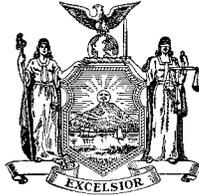


STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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PUBLIC SERVICE COMMISSION

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Acting Secretary

December 5, 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. EL03-27-002 - Niagara Mohawk Power Corporation

Dear Secretary Salas:

For filing, enclosed please find the Motion for Late Intervention, Motion to Lodge Decision and Reply Brief 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**

Niagara Mohawk Power Corporation) Docket No. EL03-27-002
 v.)
Huntley Power LLC; NRG Huntley)
Operations, Inc.; Dunkirk Power)
LLC; NRG Dunkirk Operations,)
Inc.; Oswego Harbor Power LLC; NRG)
Oswego Operations, Inc.)

**MOTION FOR LATE INTERVENTION, MOTION TO LODGE DECISION,
AND REPLY BRIEF**

Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Motion For Late Intervention, Motion To Lodge Decision, and Reply Brief 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

BACKGROUND

On November 26, 2002, Niagara Mohawk Power Corporation (Niagara Mohawk) filed a complaint against Huntley Power LLC,

NRG Huntley Operations, Inc., Dunkirk Power LLC, NRG Dunkirk Operations, Inc., Oswego Harbor Power LLC, and NRG Oswego Operations, Inc. (collectively, NRG). The utility requested that the Commission find that NRG violated the Commission's well-defined policies with respect to station power service, by refusing to pay Niagara Mohawk the amounts due under the utility's retail tariff for the sale and delivery of standby electric power to NRG's Dunkirk, Huntley and Oswego generating stations. According to Niagara Mohawk, a ruling was needed because questions about the Commission's policies were preventing its recovery of amounts due it in an action brought against NRG in a New York State court for non-payment of bills.

On March 14, 2003, the Commission issued an Order staying the complaint and holding a hearing in abeyance, to afford an opportunity for settlement. Subsequently, parties to the proceeding filed a Joint Stipulation of Facts, a Joint Statement of Issues, and a Joint Motion to Modify the Procedural Schedule. On October 17, 2003, the Commission adopted a schedule providing for the submission of a Commission Trial Staff Brief by October 31, 2003, and the reply briefs by no later than December 5, 2003. NYPSC seeks permission to reply to Trial Staff.

MOTION FOR LATE INTERVENTION

NYPSC asks that the Commission grant its Motion for Late Intervention based on the NYPSC's responsibilities in representing the public interest. NYPSC's interests are not adequately presented by any other party because it represents the interests of all New York State ratepayers.

Good cause exists to allow the intervention. NYPSC participation will not disrupt the proceeding, or prejudice the parties, because NYPSC accepts that it is bound by the Stipulation of Facts and Joint Statement of Issues. Moreover, even if NYPSC had become a party to this proceeding earlier, it could have awaited the due date for reply briefs to make a filing. As a result, allowing it to timely file a reply does not prejudice other parties.

NYPSC did not participate in this proceeding previously because it was originally instituted as a hearing process that seemed restricted to the interests of the two litigants, Niagara Mohawk and NRG. Since that time, however, it has become apparent that the issues raised have broader application.

The Joint Statement of Issues identifies potential conflicts between charges rendered under retail standby service tariffs approved by NYPSC and the requirements of the New York Independent System Operator (NYISO) station power tariff.

Moreover, after the NYISO station power tariff took effect on April 1, 2003, other wholesale generators filed complaints raising the same issue of potential conflicts between station power and standby service tariffs that Trial Staff presents in its Brief. NYPSC timely participated in the proceedings instituted upon those complaints.¹ These issues are also presented in NYPSC's Petition for Rehearing of KeySpan III, where the Commission approved the NYISO station power tariff.² The record in this proceeding would be incomplete without the arguments NYPSC has raised in similar proceedings. Accordingly, good cause exists to allow NYPSC to file a reply to Trial Staff in this proceeding.

MOTION TO LODGE DECISION

NYPSC moves to lodge its recent Order Approving Tariff Filing in NYPSC Docket No. 03-E-1016, issued November 26, 2003 (NYPSC Order Approving Tariff)(Attachment A). As discussed in greater detail below, Trial Staff maintains that Niagara Mohawk is not entitled to charge for the standby services it provides

¹ Docket No. EL03-204-000, AES Somerset LLC (complaint filed June 25, 2003; Docket No. EL03-234-000, Nine Mile Point Nuclear Station LLC (complaint filed September 26, 2003).

² KeySpan-Ravenswood, Inc., 101 FERC ¶61,230 (2002)(KeySpan III); no decision has been rendered on the Petition for Rehearing, which was filed by NYPSC on December 23, 2002.

to NRG's generation facilities under NYPSC-approved retail tariffs.

Commission precedents, however, provide that state retail charges can co-exist with Commission-jurisdictional transmission service charges. In the NYPSC Order Approving Tariff, NYPSC approved state standby retail rates that are harmonized with the NYISO's station power tariff and eliminate duplicative charges. The Commission should take administrative notice of the NYPSC Order on the record in this proceeding, adopt its reasoning, and find that Niagara Mohawk's charges to NRG, as implemented through the NYPSC Order Approving Tariff, are not superceded by the NYISO station use tariff the Commission approved.

ARGUMENT

In its October 31, 2003 Brief, Trial Staff claims Niagara Mohawk may not charge for the standby retail electric services the utility provides through its transmission facilities to NRG's generating facilities.³ Trial Staff premises its claim on the NYISO station power tariff that took effect on

³ 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.

April 1, 2003, as approved in KeySpan III after its filing in conformance with KeySpan I.⁴ According to Trial Staff, taking station power service under the NYISO tariff precludes State retail standby service charges because the NYISO tariff encompasses all the services NRG takes. All station power delivery services, says Trial Staff, are furnished through transmission-level interconnections with the NRG generators. All station power energy services, it continues, are provided through netting of the NRG facilities' energy usage against energy production, even when NRG's generators cannot produce energy because they are out-of-service.⁵

Under Trial Staff's interpretation of the NYISO station power tariff, nothing is left after April 1, 2003 for state jurisdiction.⁶ Moreover, Trial Staff would also exempt NRG from many Niagara Mohawk standby tariff charges for the period prior to April 1, 2003.

⁴ KeySpan-Ravenswood, Inc., 99 FERC ¶61,167 (2002). Rehearing was granted in part, to establish further procedures, in KeySpan-Ravenswood, Inc., 100 FERC ¶61,201 (2002)(KeySpan II).

⁵ 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.

⁶ Trial Staff also relies upon PJM Interconnection LLC, 94 FERC ¶61,251 (2001)(PJM II); PJM Interconnection LLC, 95 FERC ¶61,333 (2001)(PJM III); PJM Interconnection LLC, 95 FERC ¶61,470 (2001)(PJM 4)(collectively, the PJM Orders).

The Commission should reject Trial Staff's positions. As the Commission has found, State retail charges can co-exist with Commission-jurisdictional transmission-level services charges.⁷ To find otherwise would arbitrarily deviate from policies expressed in prior Orders, 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 delivery or retail stranded cost charges. Moreover, the station use energy a generator consumes when it is not operating is purchased at retail subject to State jurisdiction and is more properly a matter subject to state jurisdiction.

I. The Commission Should Reject Trial Staff's Interpretations of the KeySpan and PJM Orders, 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,"⁸ and State jurisdiction over delivery service includes the "authority to impose non-bypassable

⁷ PJM Interconnection, LLC, 94 FERC ¶61,251 (2001)(PJM II).

⁸ 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.

distribution or retail stranded cost charges.”⁹ Elaborating upon that principle, the Commission found in the BART Orders that,¹⁰ even where there are no identifiable local distribution facilities, states retain authority over retail delivery to end-users and so may assess separate charges for delivery service in addition to the Commission’s jurisdictional charges for transmission service. This State authority over delivery 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 Trial Staff relies upon KeySpan III and the PJM Orders as establishing that states may not tariff standby charges for transmission level customers, that reliance is misplaced.¹¹ Those Orders merely define the ambit of the station use service for wholesale generators without addressing the principles established in Order No. 888 and the BART Orders, which adhere to all retail services furnished to all

⁹ Order No. 888 at 31,781-82.

¹⁰ San Francisco Bay Area Rapid Transit District, 87 FERC ¶61,255 (1999)(BART Order) and 90 FERC ¶61,291 (2000)(BART Rehearing Order).

¹¹ In its Petition for Rehearing of KeySpan III, NYPSC seeks clarification that the Order is not intended to reverse Order No. 888 or the BART Orders.

transmission-level customers under state-jurisdictional tariffs. Consequently, the PJM and KeySpan Orders do not overrule Order No. 888 or the BART Orders, either explicitly or implicitly.

In claiming that Niagara Mohawk may not impose any state-jurisdictional charges for the standby services it provides to NRG, Trial Staff ignores Order No. 888 and the BART Orders. Since those Orders provide that states may impose delivery charges on transmission-level customers, like NRG, for retail services, like standby service, Trial Staff in effect asks that the Commission reverse its prior precedents without explanation. Because Trial Staff has not justified such a reversal, its position is flawed and should be rejected.

II. Trial Staff Has Failed To Justify Its Claim that the NYISO Station Power Tariff Supercedes All NYPSC-Approved Standby Tariff Charges.

Trial Staff argues that the charges Niagara Mohawk would impose on NRG for standby service under NYPSC-jurisdictional tariffs are superceded, because NRG takes station power service through transmission-level interconnections to the exclusion of any separate service furnished under NYPSC standby tariffs. NYISO station power and NYPSC standby charges, however, can co-exist and are not duplicative.

NYPSC adopted new standby tariffs for Niagara Mohawk after extensive proceedings in 2002.¹² Following implementation of the NYISO station use tariff on April 1, 2003, Niagara Mohawk filed standby tariff amendments, effective December 1, 2003, to harmonize its standby charges with the Commission-approved station use charges. In the NYPSC Order Approving Tariff that NYPSC moves to lodge, NYPSC found that Niagara Mohawk was successful in its efforts at harmonization. Moreover, Niagara Mohawk has agreed to refund any duplicative charges imposed under its retail standby service tariff between the April 1, 2003 effective date of the NYISO station power tariff and December 1, 2003, when its tariff amendments preventing duplication of charges took effect. NRG is not entitled to any additional remedies.

As amended, Niagara Mohawk's standby service charges are implemented properly under the Commission's AES Warrior Order.¹³ There, the Commission properly found that distribution equipment costs should not be allocated to a generator if the distribution system is not actually used to provide station

¹² 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). These tariffs unbundle energy supply from delivery, and establish a delivery-only rate.

¹³ AES Warrior Run, Inc., 104 FERC ¶61,051 (2003).

service, but noted that charging generators for stranded costs is appropriate, even if the generator takes service solely at the transmission level. The Commission also referred the resolution of disputes over allocations of costs to the relevant state jurisdiction. As discussed in the NYPSC Order Approving Tariff, Niagara Mohawk's amended standby service charges that took effect on December 1, 2003 are primarily designed to recover stranded costs, and do not include the costs of distribution delivery equipment. The amended charges are therefore proper under the AES Warrior Order.

The Commission should resolve this proceeding by finding that Niagara Mohawk, commencing April 1, 2003, may charge NRG under the NYISO station use tariff for the services provided pursuant to that tariff, and charge it under the NYPSC-jurisdictional standby services tariff for the cost of the additional services furnished under that tariff, as amended. Because Niagara Mohawk has already agreed to refund to NRG any duplicative charges made during the interim between the April 1, 2003 effective date of the NYISO station use tariff and the December 1, 2003 effective date of Niagara Mohawk's tariff amendments, this result conforms to prior precedent and to the law. Trial Staff's arguments to the contrary are not persuasive.

III. Trial Staff's Proposal to Exempt
NRG From Some Standby Service Charges
Billed Prior to April 1, 2003 is Unjust
and Unreasonable.

Besides improperly exempting NRG from all NYPSC-approved standby charges after the April 1, 2003 effective date of the NYISO station use tariff, Trial Staff would retroactively revise the standby service delivery rate for NRG in effect prior for NRG to April 1, 2003, by limiting delivery charges to those identified in Open Access Transmission Tariff (OATT) leaves that are otherwise inapplicable. Trial Staff also would allow NRG to net energy during the period prior to the April 1, 2003 date. These proposals, which would exempt NRG from paying for services it received during the period prior to April 1, 2003, are unjust and unreasonable.

Before April 1, 2003, there was no NYISO tariff in place pricing transmission delivery service to wholesale generators or providing for netting of energy service. Instead, those services were provided pursuant to Niagara Mohawk's standby service tariff approved by NYPSC. For Trial Staff to now propose that those charges are improper disregards the interests of Niagara Mohawk's other ratepayers, the financial stability of the utility, and unduly favors NRG without justification.

The Commission should not reject state charges that were properly imposed and billed to NRG prior to April 1, 2003.

If Niagara Mohawk does not recover those costs from the customers, like NRG, that impose them, it must either recover the costs from other ratepayers or absorb them itself. Either result would be unreasonable and detrimental to the public interest.

Other ratepayers should not be forced to absorb costs retroactively imposed under the Trial Staff approach. New York's ratepayers pay the just and reasonable retail rates established under state law. To shift additional costs to them, because Trial Staff would exempt NRG from paying its fair share of utility costs, would disrupt their interest in stable bills for retail service rendered in the past. Moreover, because the Commission lacks jurisdiction over retail energy and distribution, NYPSC would be responsible for addressing the costs Trial Staff would, in effect, strand.

Imposing the costs of Trial Staff's rate exemptions on the utility is equally unfair. Niagara Mohawk remains the provider of last resort to the wholesale generators, and it must arrange for the purchase and delivery of the energy from NYISO market that a wholesale generator consumes when not operating. Only a financially-healthy utility that is fully paid for incurring these burdens can be expected to reliably meet those obligations. As explained in the NYPSC Order Approving Tariff, exempting wholesale generators from stranded cost charges could

raise questions about its financial health, redounding the detriment of both the wholesale generators and all customers.

Trial Staff cannot justify its retroactive standby service rate exemptions on the theory that it is needed to remedy discrimination against NRG and in favor of utility-owned generation. Niagara Mohawk has divested all of its generation and so cannot discriminate in favor of its own generation. Arrangements Niagara Mohawk made for supplying station use at generators it owned at a time before NRG purchased its generators, before the NYISO entered operation, and before competition was introduced in New York via the NYISO are irrelevant now.¹⁴ Indeed, Trial Staff's proposal would create discrimination rather than remedying it, in that other Niagara Mohawk transmission-level customers with usage patterns similar to wholesale generators like NRG would pay more for the same service than the wholesale generators.

Trial Staff's position also amounts to impermissible retroactive ratemaking. When new law is substituted for old law that was reasonably clear, the new rules should justifiably be

¹⁴ In any event, when Niagara Mohawk's operations were integrated, it recovered the cost of station use energy in bundled retail charges; it did not suggest that its generators, when out-of-service, failed to consume energy generated elsewhere for their station use.

given prospective-only effect. Retroactive effect is appropriate only for applications of existing law.¹⁵

At most, notice that New York's standby service rates might be replaced by station power rates was given only when the Commission issued KeySpan I, on May 15, 2002, requiring the filing of the NYISO station use tariff that took effect on April 1, 2003. Trial Staff's inadequate explanation for imposing retroactive exemptions from standby service rates for NRG prior to the April 1, 2003 effective date of the NYISO station use tariff cannot overcome the prohibition against retroactive ratemaking, for bills rendered prior to the May 15, 2002 announcement in KeySpan I that the NYISO needed a station use tariff. When adequate notice is not given, the retroactive ratemaking doctrine prevents retroactive application of a rate.¹⁶

Trial Staff's proposal to exempt NRG from NYPSC-approved standby charges for services rendered to it constitutes retroactive ratemaking, violates Commission precedent, lacks a rational basis, violates established principles of cost causation, and unreasonably discriminates against other transmission-level customers. Trial Staff's arguments should be rejected.

¹⁵ Alliant Energy Corp. v. FERC, 253 F.3d 748 (D.C. Cir. 2001).

¹⁶ Consolidated Edison Company of New York, Inc. v. FERC, Docket No. 01-1503 (D.C. Cir., November 7, 2003).

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

Trial Staff maintains there is no retail sale when NRG nets current usage against prior production. As NYPSC explained in its December 23, 2002 Petition For Rehearing of KeySpan III, that contention is legally and factually unsustainable. 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;¹⁷ once that determination is made, the Commission lacks the jurisdiction to expand its authority into the arena of retail sales.

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

¹⁷ PJM II, at 61,894.

change the fact that the energy consumed is being purchased and used at retail. For the Commission to intrude upon 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.¹⁸ 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.¹⁹

Therefore, NYPSC does not lose jurisdiction over energy sales at retail that occur when out-of-service wholesale generators consume energy generated elsewhere. It may attach to those sales at retail appropriate charges for the services provided. Since Trial Staff premises its position upon the theory that no such charges may be imposed, its position lacks merit.

¹⁸ Northeast Utility Services Company, 101 FERC ¶61,327 (December 18, 2002).

¹⁹ Northeast Utility Services Company, 101 FERC at 62,363.

CONCLUSION

The Commission should reject the arguments made by Trial Staff because the relief it proposes conflicts with Commission policies and is beyond Commission jurisdiction. Instead, the Commission should find that NRG owes Niagara Mohawk all standby service charges imposed under NYPSC-approved tariffs for Niagara Mohawk prior to April 1, 2003, and the charges that would be billed under the NYPSC-approved tariff amendments subsequent to that date.

Respectfully submitted,

Dawn Jablonski Ryman
General Counsel

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

Dated: December 5, 2003
Albany, New York

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

ATTACHMENT A

At a Session of the Public Service
Commission held in the City of
Albany on November 25, 2003

COMMISSIONERS PRESENT:

CASE 03-E-1016 - Niagara Mohawk Power Corporation - Proposed
Tariff Revisions to S.C. No. 7 to Provide
Unbundled Transmission and Distribution
Rates For NYISO Station Service Customers
(filed in Case 01-E-1847).

ORDER APPROVING TARIFF FILING

(Issued and Effective November , 2003)

BY THE COMMISSION:

BACKGROUND

On July 10, 2003, Niagara Mohawk Power Corporation
(Niagara Mohawk) filed amendments to its S.C. No. 7 tariff for
the provision of standby electric service to customers that are
wholesale generators taking service at the transmission level.¹
According to the utility, the modifications it proposes are
intended to harmonize its standby service tariff with the New
York Independent System Operator's (NYISO) tariff for the

¹ 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.

provision of station power service to the transmission-level wholesale generators.

Notice of Niagara Mohawk's filing was published in the State Register on August 6, 2003, in conformance with State Administrative Procedure Act (SAPA) §202(1). The SAPA §202(1)(a)(ii) comment period expired on September 22, 2003. The Independent Power Producers of New York, Inc. (IPPNY) and Huntley Power LLC, Dunkirk Power LLC, and Oswego Harbor Power LLC, (collectively, the NRG Companies), subsidiaries of NRG Energy, Inc., timely filed comments.

POSITIONS OF THE PARTIES

Niagara Mohawk's Filing

In its filing, Niagara Mohawk explains that its charges for standby delivery service to wholesale generators should be reduced to reflect the implementation of the NYISO's station power tariff,² in conformance with Federal Energy Regulatory Commission (FERC) decisions.³ Under the station power tariff, Niagara Mohawk continues, wholesale generators may procure their station power energy needs by netting self-supply on-site, by netting self-supply from a remote location, and by purchase from a third party. A wholesale generator that self-supplies on-site nets usage when its generator is not operating against on-site production from times when it is operating, over

² 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.

³ KeySpan-Ravenswood, Inc., 99 FERC ¶61,167 (2002). Rehearing was granted in part, to establish further procedures, in KeySpan-Ravenswood, Inc., 100 FERC ¶61,201 (2002)(KeySpan II), and the NYISO tariff was approved in KeySpan-Ravenswood, Inc., 101 FERC ¶61,230 (2002)(KeySpan III).

a 30-day period.⁴ To harmonize the standby service and station power tariffs, the utility proposes to exempt generators netting their energy from the utility's requirements otherwise applicable to retail access customers taking energy from non-utility sources.⁵

The station power tariff, Niagara Mohawk notes, allows a generator to take transmission service directly from the NYISO for delivery of the energy that the generator accounts for through netting. The utility would excise the cost of that transmission delivery service from the state-jurisdictional delivery tariff, to prevent double-collection of costs.

Noting that the NYISO station power tariff took effect on April 1, 2003, Niagara Mohawk delineates the steps it would take to avoid double-billing those generators that have fulfilled the requirements of the NYISO's tariff. Bills to those customers, the utility continues, would be adjusted retroactively to the April 1 effective date, to remove any duplicative energy charges. Another retroactive adjustment, the utility posits, would be needed to extract from its bills for standby delivery services the transmission charges assessed under the station power tariff. Calculating these adjustments, the utility claims, is time-consuming, and it asks that it be permitted an extended period to make the adjustments and to retroactively credit customer bills.

⁴ These categorizations are consistent with the policies FERC established in PJM Interconnection, LLC, 94 FERC ¶61,251 (2001)(PJM II); PJM Interconnection, LLC, 95 FERC ¶61,333 (2001)(PJM III); PJM Interconnection, LLC, 95 FERC ¶61,470 (2001)(PJM IV)(collectively, the PJM Orders).

⁵ Under KeySpan III, energy supply delivered to an out-of-service generator from a third party, and any delivery of station power over local distribution facilities, remain subject to state jurisdiction and to Niagara Mohawk's existing tariffs.

IPPNY's Comment

According to IPPNY, Niagara Mohawk's tariff filing is preempted by federal law. IPPNY maintains Niagara Mohawk's efforts to charge for standby service in addition to station power service conflict with the PJM and KeySpan Orders. Moreover, IPPNY argues, the standby tariff charges to a transmission level generator must be limited, at most, to some level of customer charge and an appropriate proportion of the Competitive Transition Charge (CTC) assessed against all Niagara Mohawk customers for recovery of stranded costs. Niagara Mohawk, IPPNY asserts, insists upon charging transmission-level wholesale generators for distribution equipment costs, and the utility assesses a disproportionate level of CTC against them.

IPPNY contends Niagara Mohawk's standby charges are inconsistent with the on-site netting of energy usage against production under the station power tariff. As IPPNY describes that netting, a generating facility with positive net output over a 30 day period is deemed to have provided all of its station power requirements on-site, even if at some time during the period the facility's output is less than the station power it uses. The generator pays for this energy, IPPNY continues, by offsetting the NYISO's locational-based marginal price (LBMP) for energy the generator consumes when not operating against the LBMP paid to the generator for energy produced in excess of usage during other hours of the period.

FERC, IPPNY believes, has rejected the argument that retail delivery rates may be charged to transmission-level generators that net station power on-site. According to IPPNY, FERC ruled in PJM II that Niagara Mohawk could not charge a generator for station power when it "is in fact self-supplying

its own station power requirements."⁶ Delving further into PJM II, IPPNY sees the justification underlying promulgation of the station power tariff as the discrimination practiced by vertically-integrated utilities in allowing their own generators to net station power, while requiring independent wholesale generators to buy station power at retail rates. FERC, IPPNY maintains, found this disparity in treatment placed independent generators at a competitive disadvantage, and responded by requiring that those generators be afforded the same privilege to net station power as utilities exercised at their generators.

Arguments justifying concurrent State jurisdiction over station use service, IPPNY declares, were rejected by FERC in KeySpan III. IPPNY quotes FERC as deciding that a generator that self-supplies "does not engage in a sale at retail or any other kind of sale."⁷ The effect of that finding, IPPNY continues, was to prohibit the imposition of retail delivery charges. IPPNY maintains that the Commission, in requesting rehearing of KeySpan III, acknowledged FERC's finding that there is no retail sale in the netting of station use. To remain consistent with its position before FERC on rehearing, IPPNY asserts, the Commission must decline to approve Niagara Mohawk's tariff amendments.

IPPNY also argues Niagara Mohawk's position conflicts with the state court decision in KeySpan-Ravenswood.⁸ While conceding that the decision largely upheld the Commission's Standby Declaratory Ruling asserting jurisdiction over standby

⁶ PJM II at 61,893.

⁷ KeySpan III at ¶20.

⁸ KeySpan-Ravenswood v. Public Service Commission, Index No. 548-01 (Alb. Cty. Sup. Ct., April 2, 2002).

service to wholesale generators,⁹ IPPNY contends the court also decided that a prospective FERC decision authorizing netting within the NYISO would carry preemptive effect. Now that the NYISO station power tariff is in place, IPPNY reasons, the decision supports its position on preemption.

IPPNY criticizes the standby service rates Niagara Mohawk presents in its tariff amendments. According to IPPNY, Niagara Mohawk began by calculating the revenue reduction necessary to remove transmission charges from the retail standby service delivery rate. The utility then applied that reduction first to the as-used demand component of the standby rate, with the remainder assessed against the contract demand rate component. The utility's final step, says IPPNY, was to retain within the two charges the same CTC dollar amount that was subsumed in the charges originally.

The result, IPPNY complains, is that Niagara Mohawk's proposed rates reduce the as-used demand charge without concomitantly reducing the amount of CTC recovery accomplished through that charge, in conflict with the requirements of Opinion No. 01-4. Under that Order, IPPNY claims, stranded costs must be recovered through a uniform percentage mark-up of each standby rate component. Niagara Mohawk's approach, IPPNY protests, results in an as-used demand rate component that bears a much higher proportion of the CTC cost than the contract demand rate component.

Moreover, IPPNY believes that, under Opinion No. 01-4, CTC percentage mark-ups on the rate components charged to wholesale generators must equal the proportion of CTC mark-up in

⁹ Case 00-E-0757, Consolidated Edison Company of New York, Inc. - Petition For a Ruling, Declaratory Ruling on Jurisdiction Over Stand-By Service (issued September 29, 2000) and Order Denying Rehearing (issued February 8, 2001).

the rate components for the parent transmission-level standby service class as a whole. That mark-up, which IPPNY calculates at approximately 322.8% for both as-used and contract demand charges, is substantially less than the mark-up Niagara Mohawk achieved through retaining the existing CTC level in the as-used demand charge for wholesale generators. IPPNY claims the latter mark-up is approximately 1367%.

Niagara Mohawk's proposed standby rates, IPPNY adds, do not reflect the actual cost of serving wholesale generators. IPPNY believes the rates are based upon stale data that has the effect of improperly assessing distribution equipment costs against transmission-level wholesale generators. IPPNY contends a new cost-of-service study specifically addressing the cost of facilities actually used to serve those wholesale generators is needed to correct the errors in the existing data compilation.¹⁰

NRG Companies

The NRG Companies support IPPNY. They emphasize that FERC has found on-site self-supply through netting does not result in a sale, for end use or otherwise. As a result, the NRG Companies believe that, when a wholesale generator nets station use, there is no sale at retail that is subject to Commission jurisdiction. Consequently, they conclude, the Commission cannot approve Niagara Mohawk's proposed tariffs, and the utility's bills for standby service have been unlawful since the station use tariff went into effect on April 1, 2003.

Niagara Mohawk's Reply

As Niagara Mohawk sees it, the Public Service Law obligates it to provide service to those wholesale generators located within its service territory at non-discriminatory

¹⁰ Case 99-E-1470, Standby Rate Guidelines, Opinion No. 01-4 (issued October 26, 2001).

rates. Concomitant with that obligation, Niagara Mohawk argues, is the jurisdiction to recover the costs associated with that service, so long as it harmonizes charges assessed under the state's comprehensive jurisdiction over retail service with charges assessed under FERC's jurisdiction over transmission service. Niagara Mohawk maintains that FERC, the federal courts, and the Federal Power Act all recognize that principle.

According to Niagara Mohawk, IPPNY's legal analysis "is simply wrong."¹¹ FERC, Niagara Mohawk stresses, explicitly acknowledged State jurisdiction over local delivery service in its Order No. 888.¹² Niagara Mohawk quotes the Order as providing that:

[E]ven when our technical tests for local distribution facilities identifies no local distribution facility for a specific transaction, we believe that states have authority over the service of delivering electric energy to end users...[T]hrough their jurisdiction over retail delivery services, states have authority...to assess stranded cost charges.¹³

Niagara Mohawk interprets FERC's statement as acknowledging that states are primarily responsible for determining the amount of retail stranded costs that a utility may recover and for allocating recovery of those costs among its customers.

Citing two recent FERC decisions, the Northeast Utilities Order and the AES Warrior Order, Niagara Mohawk argues

¹¹ Niagara Mohawk Reply, p. 1.

¹² Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036, 61 Fed. Reg. 21539 (1996).

¹³ Order No. 888, 61 Fed. Reg. at 21,626.

the Order No. 888 principles apply to station power service.¹⁴ Regardless of how a station power transaction is structured, the utility maintains, there is a delivery of energy consumed by an end user that creates an element of State jurisdiction. Under that principle, Niagara Mohawk insists, states may impose stranded cost and other state-jurisdictional charges on wholesale generators taking service at the transmission level.

While conceding that FERC, in the AES Warrior Order, expressed its view that distribution equipment costs should not be allocated to a generator if the distribution system is not actually used to provide station service, Niagara Mohawk explains that FERC referred the resolution of disputes over such allocations of cost to the appropriate state jurisdiction. In any event, Niagara Mohawk contends, its charges to transmission-level wholesale generators do not include the costs of lower-voltage distribution delivery facilities, and that the charges are designed primarily to recover stranded costs. The utility concludes the charges are proper under the Northeast Utilities and AES Warrior Orders.

Declaring that its tariff amendments achieve the goal of harmonizing its standby service tariff with the NYISO station use tariff, Niagara Mohawk interprets IPPNY's argument that even harmonization conflicts with federal law as a contention that generators may take service solely under a FERC-jurisdictional transmission tariff. Exactly that argument, Niagara Mohawk contends, was rejected in Detroit Edison Co.¹⁵ There, the utility asserts, the court vacated a FERC Order that allowed a

¹⁴ Northeast Utility Services Co., 101 FERC ¶61,327 (2002)(Northeast Utilities Order); AES Warrior Run, Inc., 104 FERC ¶61,051 (2003)(AES Warrior Order).

¹⁵ Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003).

retail customer to take delivery service under a FERC tariff rather than a state retail tariff. The court, the utility contends, read Order No. 888 as specifically allowing states to impose stranded cost charges even where an unbundled retail customer could take all the delivery service it needed under FERC-jurisdictional transmission tariffs.

As Niagara Mohawk interprets it, the KeySpan-Ravenswood decision IPPNY cited upheld the Commission's jurisdiction over standby service. According to the utility, that court merely noted that state jurisdiction might be affected if FERC were to approve an NYISO tariff in conflict with the state tariff. The utility maintains that the NYISO station use tariff is not in conflict with its standby tariff amendments.

Turning to its tariff amendments, Niagara Mohawk claims its proposals will ensure that a generator taking service under the NYISO station use tariff will not pay twice for transmission delivery or energy service. Its amendments, the utility continues, separate the FERC-jurisdictional transmission service component out of current bundled charge for retail delivery service. The transmission-level generators are also exempted from paying for netted energy, other than the LMBP offset. The outcome, the utility declares, allows those generators to avail themselves of the station use tariff's full benefits.

Its stranded cost allocation, Niagara Mohawk argues, conforms to the requirements of Opinion No. 01-4. Once NYISO transmission rates are excused from the standby service tariff through the amendments, Niagara Mohawk contends, generators should continue to pay the remaining stranded cost components otherwise included in the standby delivery rate. Niagara Mohawk opposes resetting the stranded cost charge or recalculating it

after the NYISO transmission charge component is removed, because that approach would transfer stranded cost responsibility away from the generators and impose it on other customers. Its method, the utility believes, ensures that the generators continue to pay their fair share of stranded costs.

Niagara Mohawk disputes IPPNY's accusation that the tariff amendment rates are not cost based. Its standby rates were designed, Niagara Mohawk continues, to recover only those costs, at the relevant voltage levels including transmission, justified by the available cost data.

Niagara Mohawk calculates that, prior to the advent of the station use tariff, it billed wholesale generators approximately \$11.7 million per year for standby delivery service and \$8.2 million for standby energy service. Because generators availing themselves of the station power tariff will no longer purchase commodity from the utility, it notes, commodity service savings in that amount will inure to them. In addition, the utility calculates that customers taking the station power transmission service from the NYISO will save as much as \$1.4 million per year in delivery costs under the utility's amendment to its standby service tariff, another 12.2% overall rate reduction. It concludes that the tariff, as it would amend it, is structured fairly, is in compliance with federal and state law, and should be approved.

IPPNY's Reply

In a reply to Niagara Mohawk dated October 20, 2003, IPPNY asserts that the utility has overextended the decision reached in Detroit Edison Co. IPPNY interprets that decision as limited to the issue of jurisdiction over unbundled retail service furnished through local distribution facilities. That finding, IPPNY argues, cannot be expanded to include in its ambit the NYISO transmission-level station power service at

issue in this proceeding. Moreover, IPPNY believes, the NYISO station power tariff already complies with Detroit Edison Co., because, in PJM II, FERC conceded that the delivery of station power over local distribution facilities was subject to state jurisdiction.

IPPNY continues to dispute Niagara Mohawk's calculation of the amended standby service rates the utility would charge transmission-level wholesale generators. IPPNY reiterates its attacks on Niagara Mohawk's rate design, as lacking cost support and as violating the uniform percentage mark-up principle for CTC recovery stated in Opinion No. 01-4.

DISCUSSION AND CONCLUSION

Niagara Mohawk's tariff filing may take effect as filed. Contrary to the arguments made by IPPNY and the NRG Companies, FERC has not prohibited the imposition of reasonable state-jurisdictional charges for services provided under standby tariffs that are in addition to the charges for services furnished under station use tariffs. Consequently, Niagara Mohawk's standby services tariff can co-exist with the NYISO's station use tariff. Moreover, the utility's approach to CTC recovery is appropriate and its tariff charges are cost-based, as was decided in the Niagara Mohawk Standby Orders.¹⁶ The objections of IPPNY and the NRG Companies to the tariff amendments therefore lack merit.

Co-Existence of State and Federal Charges

FERC has found that states may impose charges for service to transmission customers in addition to FERC-

¹⁶ 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).

jurisdictional charges. Niagara Mohawk's amendments to its standby service tariff implement that principle.

In its Order No. 888, FERC decided that "there is an element of local distribution service in any unbundled retail transaction,"¹⁷ and state jurisdiction over delivery service includes the "authority to impose non-bypassable distribution or retail stranded cost charges."¹⁸ Elaborating upon that principle, FERC explained in the BART Orders that, even where there are no identifiable local distribution facilities, states retain authority over retail delivery to end-users and so may impose separate charges for that service in addition to the FERC jurisdictional charges for transmission service.¹⁹ This state authority over retail 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.

Nothing in the PJM or KeySpan Orders countermands Order No. 888 or the BART Orders. As a result, wholesale generators remain subject to the provisions of those Orders, so long as the state standby tariff is not in conflict with the NYISO station power tariff. As Niagara Mohawk explains, and as discussed below, there is no such conflict here.

FERC's Northeast Utilities and AES Warrior Orders buttress this interpretation of Order No. 888. In both cases, FERC allowed states to charge wholesale generators for delivery services furnished in addition to the transmission service taken under FERC-jurisdictional tariffs. The AES Warrior Order

¹⁷ Order No. 888 at 31,783.

¹⁸ Order No. 888 at 31,781-82.

¹⁹ San Francisco Bay Area Rapid Transit District, 87 FERC ¶61,255 (1999) and 90 FERC ¶61,291 (2000) (BART Rehearing Order).

provides that Order No. 888 enables a state to assign stranded costs and benefits to a transmission-level customer through a local service charge. FERC noted in that Order that state charges can co-exist with FERC-jurisdictional rates, so long as the state charges are consistent with established principles of cost causation.²⁰ Therefore, the Northeast Utilities and AES Warrior decisions reaffirm the principles that were adopted in Order No. 888.

In claiming that Niagara Mohawk may not impose any standby charges for services provided to wholesale generators, IPPNY disregards Order No. 888, the BART Orders, and the Northeast Utilities and AES Warrior Orders. Since those Orders provide that states may impose delivery charges on wholesale generators, IPPNY asks that FERC precedent be disregarded. IPPNY's position lacks merit.

IPPNY's citation to the state court decision in KeySpan-Ravenswood, as supporting its claim that the federal law preempts the standby service tariff, is unavailing.²¹ As IPPNY concedes, that decision largely upheld our jurisdiction over the provision of standby services to wholesale generators. To the extent that the decision indicates FERC would prevail under some circumstances where there is a conflict between NYISO station power tariffs FERC approves and standby service tariffs we approve, there is no such conflict here, because the Niagara Mohawk tariff amendments are in harmony with the NYISO station power tariff. As a result, IPPNY may not rely upon KeySpan-

²⁰ AES Warrior Order, pp. 14-16.

²¹ At the very least, Detroit Edison Co. demonstrates that there are restrictions on FERC's jurisdiction over retail service, undermining IPPNY's arguments to the contrary.

Ravenswood as demonstrating that Niagara Mohawk's tariff amendments are improper.

The PJM and KeySpan Orders

To the extent IPPNY relies upon FERC's PJM and KeySpan Orders as supporting its position that states may not tariff standby charges to transmission-level customers, that reliance is misplaced. Those Orders do not address, much less over-rule, application of the principles, established in Order No. 888 and its progeny, governing services furnished to customers at the transmission level. Since, in conformance with those principles, the amendments Niagara Mohawk proposes to its standby services tariff harmonize it with the station power tariff, the amendments are permissible under the PJM and KeySpan Orders.

IPPNY appears to premise its legal argument to the contrary upon statements FERC made when it required netting in the PJM and KeySpan Orders, to the effect that a retail sale is not present when a wholesale generator nets usage against prior production.²² FERC's reasoning in ordering netting, however, is irrelevant to this proceeding, because nothing in Niagara Mohawk's tariff amendments conflicts with the netting requirements that FERC imposed upon its review of the NYISO station power service. Howsoever FERC may justify its jurisdiction to impose netting,²³ Niagara Mohawk has harmonized its standby service tariff to the NYISO tariff by eliminating

²² As IPPNY points out, on December 23, 2003, we requested rehearing of the KeySpan III on precisely this issue. To date, FERC has declined to rule.

²³ IPPNY's criticism of the standby service tariff, on the grounds that Niagara Mohawk might discriminate in favor of generation units it owns, lacks merit, because the utility no longer owns generation units, having divested them well before either the standby service or station use tariffs took effect.

energy charges from the state-jurisdictional tariff for generators that net energy under the NYISO tariff. Consequently, it is not necessary to find that a retail sale has occurred to justify approval of the tariff amendments, and IPPNY's arguments do not support the relief it seeks.²⁴

The Amended Standby Service Rates

IPPNY criticizes Niagara Mohawk's calculation of the CTC applicable to wholesale generator customers. IPPNY also maintains the proposed standby service rates lack a cost basis. Both arguments lack merit.²⁵

Niagara Mohawk has accurately tariffed the CTC applicable to wholesale generators. In developing the CTC applicable to all transmission-level standby service customers, the utility met the Opinion No. 01-4 guidelines for proportional application of the CTC to the various standby service rate components. The advent of the station use tariff results in a special circumstance, whereby certain costs are removed from the otherwise-applicable retail standby service rate. The removal of those costs should not lead to distortions in CTC recovery.

Since CTC recovery was properly designed into the retail standby rate when it was developed, the amount of the CTC should remain the same after the station power costs recovered through the NYISO station power tariff, which do not include stranded cost elements, are removed from the standby tariff.

²⁴ In any event, the retail sale issue is before FERC on rehearing, and is subject to appeal to the courts after rehearing is acted upon; the presence of a retail sale would create a separate and independent basis for the approval of Niagara Mohawk's tariff amendments.

²⁵ Nothing prevents Niagara Mohawk from implementing its proposal to refund duplicative charges that may have been billed between the April 1, 2003 implementation of the NYISO station use tariff and the December 1, 2003 effective date of its standby service tariff amendments.

Otherwise, the burden of CTC recovery would be effectively transferred to other customers. Niagara Mohawk's approach avoids that discrimination and is rational.

The cost basis for Niagara Mohawk rates was addressed in the Niagara Mohawk Standby Orders. IPPNY participated extensively in the proceedings underlying those Orders, and is bound by the resolution of cost causation issues arrived at there. It has not presented reasons sufficient to warrant reopening those cost causation determinations now.²⁶

Moreover, distribution costs are not reflected in Niagara Mohawk's standby service charges to the transmission-level customer classification, which includes the transmission-level wholesale generators. As was decided in the Niagara Mohawk Standby Orders, the standby service rate charged to those customers is based on properly-allocated transmission-level costs. As a result, the tariff is in harmony with FERC's requirement that distribution charges not be assessed against transmission-level wholesale generators, and is otherwise non-discriminatory.

Under its standby service tariff, Niagara Mohawk is only recovering costs for services it furnishes to wholesale generators beyond the services furnished by the NYISO under its station power tariff. Generators netting their energy costs when their generation is not operating consume energy supplied from the NYISO markets, in order to operate their non-generation equipment or to restart their generators. While netting may be a useful approach to cost accounting for that station use

²⁶ To the extent IPPNY asks that a new cost study be performed, such studies are expensive, time-consuming, and affect all ratepayers, in that costs allocated away from some customers must be allocated towards others. Mandating performance of a new study is not appropriate under these circumstances.

energy, it does not change the fact that the energy consumed is purchased at and delivered from off-site locations.

Disregarding the provision and consumption of these delivery and energy services would have pernicious consequences. Niagara Mohawk remains the provider of last resort to the wholesale generators, and it must arrange for the purchase and delivery of the energy from NYISO markets that a wholesale generator consumes when not operating. Only a financially-healthy utility that is fully paid for incurring these burdens can be expected to reliably meet those obligations.

Niagara Mohawk's standby service rates are specifically designed to preserve its financial health and its ability to supply the delivery and energy services that wholesale generators need when their generation equipment is not operating. In particular, the CTC imposed on all customers, including wholesale generators under the standby services tariff, enabled Niagara Mohawk to avoid bankruptcy by providing for recovery of its stranded costs.²⁷ Creating an exemption from the CTC could raise questions about the utility's continued financial health, redounding to the detriment of both the wholesale generators and all other customers.

A failure to charge for services rendered to a wholesale generator when its facility is not operating would unreasonably discriminate against other transmission-level customers and would violate established principles of cost causation. Accordingly, for all the above reasons, Niagara Mohawk's amendments to its standby service tariff are approved.²⁸

²⁷ Case 94-E-0098, Niagara Mohawk Power Corporation - PowerChoice Rate Plan, Opinion No. 98-8 (issued March 20, 1998).

²⁸ One administrative modification to the tariff amendments is needed, to accommodate a numbering change to Tariff Leaf No. 106-B.

The Commission orders:

1. The tariff amendments filed by Niagara Mohawk Power Corporation, as listed in the Appendix, shall be allowed to become effective on a permanent basis on December 1, 2003, except that the company is directed to file a Tenth Revised Leaf No. 106-B, to become effective, on not less than one day's notice, on December 1, 2003.

2. The requirements of Public Service Law §66(12)(b) as to newspaper publication of the tariff amendment directed in Ordering Clause 1 is waived.

3. This proceeding is continued but shall be closed by the Secretary as soon as the compliance filing has been reviewed, unless the Secretary finds good cause to continue the proceeding further.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Acting Secretary

SUBJECT: Filing by NIAGARA MOHAWK POWER CORPORATION

Amendments to Schedule P.S.C. No. 207 - Electricity

Original Leaf No. 106-0

Seventh Revised Leaves Nos. 77-028, 106-B

Issued: July 10, 2003

Effective: October 1, 2003*

*Postponed to December 1, 2003 by S.P.O. 03-E-1016SP2

SAPA: 03-E-1016SA1 - STATE REGISTER - August 6, 2003

NEWSPAPER PUBLICATION: July 31, August 7, 14 and 21, 2003

CERTIFICATE OF SERVICE

I, Jacquelynn R. Nash, do hereby certify that I will serve on December 5, 2003 the foregoing Motion for Late Intervention, Motion to Lodge Decision and Reply Brief 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: December 5, 2003
Albany, New York

Jacquelynn R. Nash