

125 FERC ¶ 61,072
 UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
 Sudeen G. Kelly, Marc Spitzer,
 Philip D. Moeller, and Jon Wellinghoff.

California Independent System Operator Corporation	Docket Nos.	ER05-849-002
		ER05-849-003
		ER05-849-006
		ER05-849-007
		ER05-849-008

ORDER GRANTING IN PART AND DENYING IN PART REHEARING,
 ACCEPTING COMPLIANCE FILINGS, AND GRANTING CLARIFICATION

(Issued October 17, 2008)

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1. In this order, the Commission grants Constellation Generation Group, LLC and the NRG Companies’ (collectively, California Generators) joint request that we clarify that our station power orders preclude Southern California Edison Company (SCE) from imposing retail and other load-based charges on merchant generators that self-supply their station power requirements over a monthly netting period under the California Independent System Operator Corporation’s (CAISO) Station Power Protocol. We further clarify that, by staying the requirement that CAISO eliminate so-called Permitted Netting¹ from its Station Power Protocol, we did not limit netting to only Permitted Netting and did not authorize load-serving entities to impose retail and load-based charges on merchant generators that self-supply using monthly netting pursuant to the CAISO’s Station Power Protocol. We also grant in part rehearing of our June 22, 2005 order conditionally accepting in part and rejecting in part Amendment 68 to CAISO’s tariff, which contains the Station Power Protocol.² Additionally, we conditionally accept CAISO’s compliance filing in Docket No. ER05-849-003 and direct further compliance. We also accept CAISO’s compliance filing in Docket No. ER05-849-007.

¹ “Permitted Netting” refers to netting that takes place on-site at a single generation facility *when the generator is running*. Permitted Netting differs from the Commission’s definition of on-site or remote self-supply in that, in both of the latter, there is no requirement that the generator always be running throughout the specific period of time (the netting interval).

² *Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,452 (2005) (June 22 Order), *order on reh’g*, 114 FERC ¶ 61,176 (2006) (February 17 Order), *reh’g dismissed*, 115 FERC ¶ 61,038 (2006), *order granting stay*, 114 FERC ¶ 61,339 (2006) (March 31 Order).

I. Background

A. Station Power

2. The Commission defines “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.”³ As the Commission explained in its earlier station power orders, station power is procured by a generating facility in three ways: (1) on-site (or local) self-supply, where the same generator is the source of the station power it is consuming; (2) remote self-supply, where the source of the station power being consumed is another, remote generator owned by the same company; or (3) third-party supply, where the source of the station power consumed is a generator owned by a separate entity.⁴ The Commission further determined that: (1) on-site self-supply and remote self-supply did not involve sales of any type, either wholesale or retail; and (2) when remote self-supply or third-party supply involve the use of another entity’s transmission and/or distribution facilities, payment for such usage is appropriate.⁵

3. Because utilities have historically been vertically integrated, the treatment of station power was not previously an issue and utilities generally did not charge themselves, their affiliates, or even their fellow utilities, for station power.⁶ Instead, utilities traditionally treated station power consumption as “negative” generation – the energy output of a generation facility typically was its gross output less the station power consumed at the facility (that is, its output net of station power requirements, or net output).⁷ Similarly, station power consumed during periods when the generator was not operating was also treated as negative generation. If a specific facility’s station power needs could not be met by on-site generation, the facility obtained the necessary energy using its (or another’s) transmission and/or distribution facilities. Because utilities were vertically integrated, this energy typically was supplied by a utility’s other generation facilities or, if the utility was part of a centrally dispatched power pool, by the pool.

³ *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,889 (*PJM II*), *clarified and reh’g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*).

⁴ *PJM II*, 94 FERC at 61,890.

⁵ *Id.*

⁶ *Id.* at 61,882.

⁷ June 22 Order, 111 FERC ¶ 61,452 at P 16.

4. In response to the “functional unbundling” directive of Order No. 888, many vertically-integrated utilities divested themselves of their generation facilities, often selling their generation facilities to merchant generators. The treatment of station power became an issue upon the entry of merchant generators into the market, since merchant generators sought to obtain and account for station power in the manner employed by traditional utilities – by netting station power consumption against the facility’s gross output.⁸

5. In a series of orders involving PJM Interconnection, LLC (PJM),⁹ New York Independent System Operator (NYISO),¹⁰ and Midwest Independent Transmission System Operator, Inc. (MISO),¹¹ the Commission set forth its policies relating to station power procurement and delivery.¹² The Commission’s station power rulings allow a merchant generator to self-supply station power (either on site or remotely) so long as the

⁸ *PJM III*, 95 FERC at 62,189.

⁹ *PJM II*, 94 FERC at 61,251; *PJM Interconnection LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*). In an earlier order, *PJM Interconnection, LLC*, 93 FERC ¶ 61,061 (2000), the Commission acknowledged questions concerning treatment of station power, but deferred its decision, consolidating PJM’s proceeding with two complaint proceedings that raised similar issues.

¹⁰ *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,167, *order on reh’g*, 100 FERC ¶ 61,201, *order on compliance filing, KeySpan I*, 101 FERC ¶ 61,230 (2002), *reh’g denied*, 107 FERC ¶ 61,142 (*KeySpan IV*), *clarified*, 108 FERC ¶ 61,164 (2004), *aff’d sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) (*Niagara Mohawk*), *cert. denied*, 127 S. Ct. 2129 (2007); *N.Y. Power Auth. v. Consol. Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,304 (2005), *clarified and reh’g denied*, 116 FERC ¶ 61,240 (2006), *aff’d sub nom. Consol. Edison Co. of N.Y. v. FERC*, No 05-1372 (D.C. Cir. May 6, 2008) (unpublished opinion).

¹¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,073 (2004), *order on reh’g*, 110 FERC ¶ 61,383 (2005) (*MISO II*).

¹² In *Niagara Mohawk Power Corp. v. Huntley Power, LLC*, 109 FERC ¶ 61,169, at P 20-35 (2004), *reh’g denied*, 111 FERC ¶ 61,120 (2005), *aff’d, Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2129 (2007), we summarized our station power precedent to the date of issuance of that order.

merchant generator's net output over a reasonable netting interval, typically one month, is positive.¹³

6. In developing its station power policy, the Commission has on several occasions considered what length of time or interval is reasonable for the netting of station power. The Commission has approved one-month netting interval proposals made by PJM, NYISO, and the Midwest ISO.

B. History of This Proceeding

7. In September 2004, Duke Energy Moss Landing LLC filed a complaint with the Commission challenging the Permitted Netting provisions of the CAISO tariff on the grounds that they did not conform to the Commission's station power precedent. These provisions allowed the netting of station power only when the generator itself is running (Permitted Netting), rather than over a specific netting interval, and did not allow netting when a unit supplies energy to and receives energy from the transmission grid at different connections or at different times.¹⁴ In November 2004, the Commission found that the CAISO tariff did not conform to the Commission's station power policies, and directed CAISO to make a compliance filing in conformity with the Commission's policies.¹⁵ In April 2005, as amended in May 2005, CAISO submitted its compliance filing to conform to the Commission's station power precedent. This compliance filing consisted of CAISO's Station Power Protocol, designated as Amendment No. 68 to the CAISO tariff. In its Station Power Protocol, CAISO proposed to use a monthly netting interval to determine whether a participating generator had self-supplied station power and whether associated transmission service had been provided to the generator. Several entities, including SCE and the Public Utilities Commission of the State of California (CPUC), filed interventions and protests.

¹³ Netting over a period means that total station power consumption is subtracted from total gross output during a given period, known as the "netting interval." When a monthly netting interval is used, a generator's total monthly consumption of station power is subtracted from (netted against) its total monthly energy production in order to determine if it is "net positive" or "net negative" for the month. As long as a generator produces more energy over the entire month than it consumes as station power, it is "net positive," even if, during a specific hour, it consumed more station power than it generated. June 22 Order, 111 FERC ¶ 61,452 at P 16-17.

¹⁴ *Duke Energy Moss Landing LLC v. Cal. Indep. System Operator Corp.*, 109 FERC ¶ 61,170 (2004) (ISO Station Power Order), *reh'g denied*, 111 FERC ¶ 61,451 (2005).

¹⁵ *Id.*

8. On June 22, 2005, the Commission issued an order conditionally accepting in part and rejecting in part CAISO's Station Power Protocol and allowing CAISO to defer the implementation date of its station power protocol to no later than July 1, 2006.¹⁶ The June 22 Order accepted CAISO's proposal to allow monthly netting of station power.¹⁷ In addition, among other things, the June 22 Order required CAISO to remove from its Station Power Protocol provisions relating to Permitted Netting, as discussed below, and rejected CAISO's proposed change to the definition of Transmission Revenue Credit, also discussed below.¹⁸

II. Description of Filings

9. Several parties, including the CPUC, filed requests for rehearing of the June 22 Order on: (1) various legal and jurisdictional issues; (2) the requirement to remove Permitted Netting from the CAISO tariff; (3) the requirement to remove the proposed change to the Transmission Revenue Credit, and (4) the implementation date.¹⁹ On February 17, 2006, the Commission granted rehearing on the implementation date only, and required CAISO to implement the Station Power Protocol by April 1, 2006.²⁰ The Commission stated in the February 17 Order that the other issues would be addressed in a later order.²¹

10. On March 16, 2006, CAISO filed a compliance filing in response to the June 22 Order and the February 17 Order to implement its Station Power Protocol on April 1, 2006, and also filed a motion for stay of the requirement that CAISO remove Permitted Netting for non-Qualifying Facility (QF) suppliers until the Commission acts on requests for rehearing on that issue.²² On March 31, 2006, the Commission issued an order granting the stay.²³ The Commission stated that the compliance filing would be

¹⁶ June 22 Order, 111 FERC ¶ 61,452 at P 1, 62.

¹⁷ *Id.* P 6, 15-25, 37-42.

¹⁸ *Id.* P 35, 41-42.

¹⁹ The requests for rehearing of the June 22 Order were assigned Docket No. ER05-849-002.

²⁰ February 17 Order, 114 FERC ¶ 61,176 at P 10-12.

²¹ *Id.* P 1 n.2.

²² The March 16, 2006 compliance filing was assigned Docket No. ER05-849-003; the motion for stay was assigned Docket No. ER05-849-004.

²³ March 31 Order, 114 FERC ¶ 61,339 at P 22.

addressed in a later order. Also, in an order issued on April 12, 2006, the Commission dismissed a request for rehearing filed by Pacific Gas and Electric Company in Docket No. ER05-849-005.²⁴

11. On July 11, 2006, the California Generators filed a motion for clarification requesting that the Commission clarify that its station power precedent precludes SCE from imposing retail and other load-based charges on merchant generators that self-supply their station power requirements on a monthly basis, pursuant to the terms of the CAISO Station Power Protocol.²⁵ The California Generators contend that SCE seeks to impose such charges on self-supplying merchant generators via an “advice letter” filed with the CPUC (Advice Letter). The California Generators also seek clarification that, when the Commission authorized CAISO to retain Permitted Netting in its tariff until the Commission acts on the pending request for rehearing on that issue, it did not limit the authorization to generators engaging in Permitted Netting and did not authorize load-serving entities to impose retail and load-based charges on merchant generators that self-supply using monthly netting. SCE filed an answer to the California Generators’ request for clarification and the California Generators subsequently filed a response to SCE’s answer.

12. On July 21, 2006, the California Generators filed a motion to lodge. They state that, after they filed their request for clarification, San Diego Gas and Electric Company (SDG&E) and Pacific Gas and Electric Company (PG&E) filed advice letters with the CPUC that are similar to the advice letter filed by SCE.²⁶ The California Generators request that the Commission grant their motion to lodge and make these advice letters part of the record in this proceeding.

13. On October 30, 2006, CAISO submitted a compliance filing including cost support for the administrative charges in its Station Power Protocol based on actual experience, as directed in paragraph 30 of the June 22 Order.²⁷

²⁴ *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,038 (2006).

²⁵ The motion for clarification was assigned Docket No. ER05-849-006. The California Generators filed an erratum to their motion for clarification on July 13, 2006.

²⁶ SDG&E’s June 30, 2006 Advice Letter 1807-E; PG&E’s July 10, 2006 Advice Letter 2856-E.

²⁷ The October 30, 2006 compliance filing was assigned Docket No. ER05-849-007.

14. On December 21, 2007, the CPUC filed a motion to supplement its request for rehearing of the June 22 Order or, in the alternative, to supplement its response to the California Generators' motion for clarification.²⁸

III. Notice of Filings and Responsive Pleadings

15. Notice of CAISO's March 16, 2006 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 16,134 (2006), with interventions and protests due on or before April 6, 2006. Reliant Energy, Inc. submitted comments in support of CAISO's compliance filing.

16. Notice of CAISO's October 30, 2006 compliance filing was published in the *Federal Register*, 71 Fed. Reg. 65,486 (2006), with interventions and protests due on or before November 20, 2006. None were filed

17. On January 11, 2008, High Desert Power Project, LLC (High Desert)²⁹ filed a motion to intervene out-of-time in this proceeding. High Desert states that it is an indirect subsidiary of Tenaska Power Fund, L.P. (Tenaska), and that Tenaska acquired its interest in High Desert from Constellation Generation Group, LLC (CGC) on December 15, 2006. Prior to this acquisition, High Desert states it was an affiliate of CGC, an active party in this proceeding, and could look to CGC to represent High Desert's interests. Since they are no longer affiliates, High Desert asserts that no other party can represent its interests in this proceeding. High Desert contends that, because it is interconnected with transmission facilities owned by SCE and controlled by CAISO, it will be directly affected by the outcome of this proceeding, and its motion to intervene should therefore be granted. High Desert states that it failed to intervene in this proceeding when it was acquired by Tenaska, in December 2006, because the proceeding was dormant at that time. High Desert agrees to accept the record as it stands and participate solely with respect to its own rights and interests.

²⁸ The CPUC's motion to supplement was assigned Docket No. ER05-849-008.

²⁹ High Desert states that it leases and operates an approximately 830 MW natural gas-fired combined cycle generating facility in California and associated interconnecting transmission facilities. High Desert's project is interconnected with transmission facilities owned by SCE and controlled by CAISO. High Desert is an exempt wholesale generator authorized to sell electric energy, capacity, and ancillary services at market-based rates.

18. On January 14, 2008, the Western Power Trading Forum (WPTF) moved to intervene out-of time.³⁰ WPTF states that it has interests in this proceeding that cannot be adequately represented by any other party and no party will be prejudiced by its intervention. WPTF also states that it accepts the record in this proceeding as it currently exists.

19. Notice of the CPUC's December 21, 2007 motion to supplement was published in the *Federal Register*, 73 Fed. Reg. 1,331 (2008), with interventions and protests due on or before January 14, 2008.³¹ NRG Companies submitted an answer.

IV. Procedural Matters

20. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. High Desert and WPTF have met this higher burden of justifying their late interventions.³² WPTF is the only party that has pointed out the ongoing situation with respect to generators that are not paying charges or are paying into an escrow account.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept California Generators' answer in the above-captioned dockets because it has provided information that assisted us in our decision-making process.

³⁰ WPTF states that it is an organization dedicated to enhancing competition in Western electric markets in order to reduce the cost of electricity to consumers in the region while maintaining high system reliability.

³¹ See Notice of Extension of Time, Docket No. ER05-849-008 (January 10, 2008).

³² See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

22. We will grant California Generators' motion to lodge to the extent that it calls our attention to other advice letters that interpret the Commission's station power precedent.³³

V. Substantive Matters

A. Rehearing of the June 22 Order – Docket No. ER05-849-002

1. Permitted Netting

a. June 22 Order

23. In its Amendment No. 68 filing, CAISO proposed to retain an existing tariff provision that allowed Permitted Netting. Permitted Netting is netting that takes place on-site at a single generation facility only *when the generator is running*.³⁴

24. Prior to the onset of this proceeding, the CAISO tariff prohibited all other types of netting, and station power that was self-supplied through Permitted Netting did not need to be scheduled and was not subject to any transmission charges. In contrast, station power supplied by remote self-supply and third-party supply would have to be scheduled, meter data about such energy would be collected (which is also true for Permitted Netting), and such energy would be subject to all load-based charges other than the Transmission Access Charge.

25. The Cogeneration Association of California and the Energy Producers and Users Coalition³⁵ (collectively, QF Parties) and Moss Landing protested, arguing that the proposed station power provisions were confusing and inconsistent. Moss Landing argued that modifications were needed to eliminate inconsistency and confusion created

³³ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292, at P 7 (2002); *Duke/Louis Dreyfus L.L.C.*, 75 FERC ¶ 61,261, at 61,848 (1996).

³⁴ Permitted Netting differs from the Commission's definition of self-supply in that, under the Commission's station power precedent, a generator with net positive output need not always be running and generating energy throughout the netting interval. In other words, Permitted Netting is more restrictive than the type of self-supply we have authorized in other ISOs.

While the definition of Permitted Netting does not specify a netting interval during which the generator must be running in order to net, given the requirement to provide Metered Data to the ISO, the netting interval for Permitted Netting would likely never be longer than one hour and could be shorter. CAISO Tariff, Section 10.2.9.3.

³⁵ The Cogeneration Association of California and the Energy Producers and Users Coalition represent numerous Qualifying Facilities.

by the implication that monthly netting is prohibited by the metering protocols. QF Parties requested modifications to clarify that Permitted Netting would not be subject to any new charges or requirements.³⁶

26. In the June 22 Order, the Commission found that, by retaining the tariff provisions that allowed Permitted Netting, CAISO allowed for a category of station power that is inconsistent with the Commission's station power precedent; the Commission thus directed CAISO to remove Permitted Netting from its Station Power Protocol.³⁷ The Commission also stated that, on compliance, CAISO may propose a separate Station Power Protocol applying only to QFs to address their unique issues, such as their concerns that they need not qualify their portfolios and execute metering agreements.

27. In its March 16, 2006 motion for stay of the requirement to remove Permitted Netting in Docket No. ER05-849-004, CAISO claimed that, in response to a market notice it issued on February 24, 2006, it received numerous comments from generators that, if the Commission eliminates Permitted Netting in its entirety, it would place an onerous burden on generators, including costs, time to implement, availability of equipment, personnel training, internal controls, and compliance. CAISO also argued that removal of Permitted Netting would also be a sizable project for it to undertake. Several parties filed comments in support of the motion to stay, and argued for retention of Permitted Netting. As described above, the Commission granted the requested stay.

b. Rehearing Request

28. SCE filed a request for rehearing, arguing that the June 22 Order erred to the extent that it could be read to disallow Permitted Netting.³⁸ SCE contends that Permitted

³⁶ In its answer, CAISO offered several revisions to address the concerns of Moss Landing and the QF Parties. Specifically, CAISO offered to: (1) revise the definition of "On-Site Self Supply" to include energy associated with service to station power load that is netted under the existing Metering Protocol; (2) revise Station Power Protocol 1.1 to recognize that supply used to serve load that is subject to Permitted Netting is included in the definition of On-Site Self Supply; (3) revise Station Power Protocol 1.2.1 and Station Power Protocol 6.1 to exclude Permitted Netting from the new requirements, as requested by the QF Parties; and (4) revise Station Power Protocol 3.1 to remove the phrase "other than load netted in accordance with the Metering protocol....," as requested by Moss Landing. June 22 Order, 111 FERC ¶ 61,452 at P 40.

³⁷ *Id.* at P 41-42.

³⁸ Moss Landing filed an answer to SCE's request for rehearing supporting SCE's position that Permitted Netting should be allowed. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 713(d) (2007), prohibits answers to requests for rehearing. Accordingly, we will reject Moss Landing's answer.

Netting is the netting that has always been allowed by CAISO since it began operations, and is the way innumerable generators have self-supplied their station power for decades in California. SCE contends that it makes no sense to treat load served by Permitted Netting and other forms of netting the same, arguing that load served by Permitted Netting does not use the CAISO grid or any CAISO services to deliver station power to load.

c. Commission Determination

29. We will grant rehearing of the June 22 Order's requirement that CAISO remove Permitted Netting from its Station Power Protocol. Upon further consideration, we will allow CAISO to retain Permitted Netting in its tariff, given that the parties are in agreement that retaining Permitted Netting is appropriate and that CAISO has proposed to make clarifying changes to address Moss Landing's and the QF Parties' concerns. All active parties favor the retention of Permitted Netting as an option,³⁹ and we will allow those that wish to continue with Permitted Netting to do so.

30. However, while we grant rehearing to allow Permitted Netting to stay in the tariff, we also emphasize that eligible generators that wish to utilize the other forms of self-supplied station power must be allowed to do so and cannot be restricted to only Permitted Netting. In other words, the retention of Permitted Netting in the Station Power Protocol cannot operate to eliminate a generator's right to net on a monthly basis, either on-site or remotely.

31. In its original filing, CAISO attempted to incorporate the new Station Power Protocol language without changes to the long-standing practice of contemporaneous self-supply. In so doing, CAISO made certain changes to definitions and protocols that appear to have created confusion for Moss Landing and the QF Parties.⁴⁰ In response to the confusion, CAISO then filed certain clarifying revisions. Upon further consideration, we find that the tariff revisions proposed by CAISO in its original answer to the protests

³⁹ When Moss Landing and the QF Parties raised concerns about the original filing, they did not object to the retention of Permitted Netting, but rather requested certain modifications to clarify that the Station Power Protocol would be consistent with the type of self-supply used in other ISOs, that is, that the Station Power Protocol would not prohibit monthly netting and that no additional metering and scheduling requirements would be imposed on the contemporaneous self-supply of station power.

⁴⁰ For example, CAISO excluded from the definition of "On-Site Self Supply" any contemporaneous, on-site generation used to serve station power load through Permitted Netting.

should satisfy the concerns raised by Moss Landing and the QF Parties.⁴¹ We will require CAISO to include these changes in its Station Power Protocol, as discussed below.

2. Transmission Revenue Credit

a. June 22 Order

32. In its Amendment No. 68 filing, CAISO proposed to revise the definition of “Transmission Revenue Credit” in its tariff to allow participating transmission owners (PTOs) to recover any potential shortfall in their retail transmission revenues as a result of CAISO’s Station Power Protocol. Specifically, the CAISO proposed to revise the definition to add that a PTO may receive “any differences in retail transmission revenues resulting from changes in the terms of ISO service for [s]tation [p]ower between the effective date of Amendment No. 68 and the PTO’s first rate case following the filing of Amendment No. 68.”⁴² CAISO stated that this was needed to prevent the PTOs from being subject to a regulatory lag due to the potential shortfall in their retail transmission revenue collections when generators elect to participate in the Station Power Protocol.

33. Moss Landing argued that this proposed revision should be rejected, and that the proper ratemaking approach would be for PTOs to address any cost under-recovery by making new retail rate filings. Northern California Power Agency noted that the proposed credit appeared to broadly encompass any or all retail transmission revenues, and argued that the Commission should require a description and identification of what revenues are to be included in the credit.

34. In the June 22 Order, the Commission rejected CAISO’s proposal, finding that retail rates and any purported retail revenue shortfall are not issues before this Commission, and that the PTOs should seek a remedy before the appropriate state regulatory authority for any overall retail revenue shortfall.⁴³ The Commission added that it would reject proposed tariff language that would transfer any past retail revenue losses to CAISO’s Commission-jurisdictional transmission rates.

⁴¹ *Cf.* June 22 Order, 111 FERC ¶ 61,452 at P 41 (while ordering the elimination of Permitted Netting, nevertheless noting that CAISO modifications “may address some of the concerns”).

⁴² June 22 Order, 111 FERC ¶ 61,452 at P 32.

⁴³ *Id.* P 35-36.

b. Rehearing Requests and Responses

35. In its request for rehearing, SCE asserts that retail transmission in California is now subject to the Commission's jurisdiction and also notes that there was no request made to "transfer any past retail revenue losses to [CAISO's] transmission service rates." Instead, SCE states that CAISO's request was only forward-looking and involved any Commission-jurisdictional retail transmission revenue that the PTOs would lose in the future. SCE requests that the Commission clarify its jurisdiction and reconsider its ruling.

c. Commission Determination

36. In response to SCE's request for rehearing, we acknowledge that we initially misunderstood the purpose and intended operation of the proposed revision to the Transmission Revenue Credit. With our understanding of the purpose and intended operation of this revision now clarified, we nonetheless continue to believe that it should not be in the tariff and so will deny rehearing on this issue, although on different grounds. The proposed revision creates a pre-approved right or entitlement to recover any shortfall related to the addition of Amendment No. 68. That is inappropriate. Any party that believes that it can demonstrate a revenue shortfall associated with the changes in station power procurement and delivery that we have mandated in this proceeding is free to state its case for the recovery of that shortfall in a future rate filing. However, we will not approve here any language that could be read to pre-approve the recovery of a purported shortfall, or to create a right or entitlement to such recovery. While we deny rehearing, we emphasize that our finding here in no way impacts our consideration of a rate case in which a utility seeks to recover any alleged shortfall.

B. Jurisdictional Issues – Docket Nos. ER05-849-002 (Rehearing of June 22 Order) and ER05-849-006 (California Generators' Request for Clarification)

37. In both the rehearing of the June 22 Order and in the California Generators' motion for clarification, parties contend that the Commission lacks jurisdiction to determine whether a sale occurs when a self-supplying merchant generator has a net positive output over a monthly netting interval. Because similar arguments were raised in each of these proceedings, we will address them together.

1. June 22 Order

38. In the June 22 Order, the Commission, relying on its extensive station power precedent, found that netting is the accounting for station power as net, or negative, generation. Further, the Commission held that the self-supply of station power does not constitute a sale of any kind, so long as the net output over the netting interval is positive. Further, we found that netting over a reasonable period of time is an accepted means of

determining whether a generator has self-supplied rather than purchased station power, based on whether the net output over that period is negative or positive.

39. We also found that our station power precedent does not conflict with state law because no sale, retail or otherwise, takes place when a generator is self-supplying and the net output is positive, not negative, for the netting interval. We recognized, however, the limits of our authority, noting that “to the extent that a self-supplying generator has a negative net output during a netting interval, and thus a third party sale has in fact occurred, state law and the relevant retail tariff would apply.”⁴⁴ We also noted that a state may approve rates, including allowing for stranded cost recovery, when a utility sells station power at retail or uses local distribution facilities for delivery of station power. But when neither of those services is provided, state jurisdiction does not attach and the rates for those services would not apply. Instead, the charges specified in the CAISO tariff would apply to the exclusion of any retail tariff.⁴⁵

40. We also noted in the June 22 Order that the Commission has jurisdiction, in the first instance, to determine its own jurisdiction.⁴⁶ Thus, we found that “the Commission has authority to determine whether transactions involving station power (including determining whether a generator has self-supplied station power or whether the generator has instead purchased station power at retail and thus, more importantly, in turn, whether the generator has used transmission facilities or local distribution facilities to move station power to it) are subject to Commission jurisdiction pursuant to section 201(b)(1) of the [FPA].”⁴⁷

2. SCE’s Request for Rehearing – Docket No. ER05-849-002

41. In its request for rehearing, SCE argues that the Commission lacks jurisdiction to determine whether a self-supplying generator’s net capacity is positive over a monthly netting interval, and if so, to find that no “sale” has taken place. SCE maintains that any end user’s consumption of energy, whether self-supplied, remotely self-supplied, or sold by a third party, does not involve any service subject to the Commission’s jurisdiction. SCE asserts that the Commission recognized that station power self-supply is not only not a sale, but also not a wholesale sale, and the Commission therefore has no jurisdiction to determine whether self-supply constitutes a retail sale. SCE also points out that the Commission conceded that station power provided by a third-party is a retail sale outside

⁴⁴ June 22 Order, 111 FERC ¶ 61,452 at P 17.

⁴⁵ *Id.* P 22.

⁴⁶ *Id.* P 24.

⁴⁷ *Id.*

its jurisdiction. SCE argues these two findings (that self-supply is not a sale and that third-party supply is a retail sale), taken together, show that no matter how a generator obtains station power, it is outside of the Commission's jurisdiction.

42. SCE also asserts that the states, and not this Commission, have historically had the authority to adopt netting laws, tariffs and policies. Thus, SCE concludes that it is the states that have always determined whether a retail sale has occurred as a result of netting.

43. SCE also argues that the Commission erroneously reversed Order No. 888's holdings that: (1) even where there are no identifiable local distribution facilities, states have jurisdiction over the service of delivering energy to end-users; and (2) stranded cost charges can be assessed due to this state jurisdiction.⁴⁸

44. SCE further argues that the Commission erred in ruling that its orders permitting monthly netting and remote self-supply do not violate California state law and/or FPA section 212(h).

3. CPUC's Request for Rehearing – Docket No. ER05-849-002

45. The CPUC asserts that station power consumption involves no sale of wholesale energy but instead involves the delivery of energy to end-users. The CPUC contends that the Commission therefore has no jurisdiction to require the CAISO to amend its tariff provisions relating to the procurement and delivery of station power. The CPUC argues that it is the state, not the Commission, that has jurisdiction over station power.

46. The CPUC also argues that just because the Commission has found monthly netting to be reasonable in other states does not mean it is reasonable for California, where the CAISO's scheduling and settlement protocols are not consistent with monthly netting.

⁴⁸ SCE July 22, 2005 Request for Rehearing at 9 (*citing 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 31,826 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,336 (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 relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

4. California Generators' Request for Clarification and Related Filings – Docket No. ER05-849-006

a. California Generators' Request for Clarification

47. On July 11, 2006, the California Generators filed a motion for clarification of the station power orders in this proceeding. They state that clarification is needed in light of a June 1, 2006 filing by SCE with the CPUC seeking retail tariff revisions for “customers” with generating facilities that are operating under CAISO’s Station Power Protocol.⁴⁹ The California Generators state that SCE seeks CPUC authorization to assess a number of retail and load-based charges to merchant generators who do not engage in Permitted Netting. Among these charges are competitive transition charges and certain above-market generation costs, such as costs associated with Department of Water Resources’ power contracts. The California Generators claim that the tariff revisions SCE filed with the CPUC would directly contravene our station power orders and CAISO’s Station Power Protocol because the tariff revisions, if approved by the CPUC, would impose retail service charges for merchant generators who self-supply station power through monthly netting.

48. The California Generators point to paragraph 22 of our June 22 Order and focus on the phrase “the charges specified in the CAISO [t]ariff apply *to the exclusion of any retail tariff*.”⁵⁰ The California Generators contend that this phrase means that, to the extent that a generator generates more than it consumes in a calendar month (i.e., is net positive for the month), retail charges such as the recovery of stranded costs and benefits may not be levied, and any retail tariff that conflicts with the Station Power Protocol is unlawful. The California Generators explain that the proposed retail tariff provision in the Advice Letter would impair the ability of merchant generators to utilize the netting provisions of CAISO’s tariff, because the retail tariff would force them to pay charges based on fictitious energy purchases when they are, in fact, self-supplying.

49. The California Generators point out that the netting provisions of CAISO’s tariff compute the transmission load for station power by calculating, on a monthly basis, the net output injected into the transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of the retail tariff provisions proposed in the Advice Letter, creates a conflict that must be resolved by the enforcement of the federally-regulated tariff.

50. The California Generators point out that, with respect to SCE’s proposal to levy competitive transition charges on merchant generators, the Commission, in an order later

⁴⁹ SCE’s June 1, 2006 Advice Letter 2008-E.

⁵⁰ June 22 Order, 111 FERC ¶ 61,452 at P 22.

affirmed by the United States Court of Appeals for the District of Columbia Circuit (i.e., affirmed by the *Niagara Mohawk* opinion), determined that:

[u]tilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities Further, utilities are free to seek, and states are free to approve, offsetting adjustments in other rates or to request that the recovery period be extended.⁵¹

The California Generators note that the Commission further stated in the same order that:

[W]e have not reversed or changed our holdings in Order No. 888; we have only clarified that a small subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates given that they are not taking a retail service. Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.”⁵²

Therefore, the California Generators contend that SCE’s proposal to levy such charges on generators that self-supply station power is unlawful.

51. The California Generators request that the Commission clarify that its station power precedent precludes SCE from imposing retail and other load-based charges on merchant generators that self-supply their station power requirements on a monthly basis under the CAISO Station Power Protocol, and that, when the Commission authorized CAISO to engage in Permitted Netting, the Commission did not limit its authorization to generators engaging in Permitted Netting and did not authorize LSEs to impose retail and load-based charges on merchant generators that self-supply using longer-term monthly netting.

⁵¹ *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003), *reh’g denied*, 110 FERC ¶ 61,033, at P 27 (2005) (*Nine Mile Point*).

⁵² *Id.* P 44.

b. Other Filings**i. SCE Response**

52. In a response to the California Generators' motion, SCE claims that the California Generators mischaracterized the June 1, 2006 Advice Letter it filed with the CPUC. SCE argues that it does not seek CPUC authorization to assess retail and load-based charges to merchant generators who do not engage in Permitted Netting, as the California Generators claim. Rather, SCE states that it seeks CPUC authorization to *waive* charges that SCE claims would otherwise be applicable to retail customers of SCE.

53. For example, with respect to costs associated with the Department of Water Resources power contracts, SCE claims that the CPUC has the authority to assess such charges to retail customers. SCE indicates that its Advice Letter asks the CPUC to waive such charges for those "customers" who engage in Permitted Netting. SCE states that, while such "customers" may also happen to be merchant generators, its Advice Letter would not affect them because of their status as merchant generator customers, but rather because of their status as retail customers. SCE notes that some, but not all, retail customers are also merchant generators. SCE argues that, even if the Commission's station power orders prevent the CPUC from assessing charges to the merchant generators who *do not* engage in Permitted Netting, those orders do not preclude the CPUC from waiving certain charges to retail customers who *do* engage in Permitted Netting. SCE contends that the fact that some retail customers who engage in Permitted Netting are also merchant generators is irrelevant.

54. SCE also asserts that, by granting the California Generators' motion, the Commission would be partially nullifying California laws that allow charges to be assessed to wholesale generators as end-users of electricity in the absence of either a retail energy sale or the use of local distribution facilities, such as the law governing Department of Water Resources power contracts.

55. SCE also claims that its Advice Letter is not at odds with *Niagara Mohawk*. SCE states that the determinative factor is how the Commission defines a "sale." SCE states that the Commission has defined a sale as "a transaction between two parties, with one party using resources of another party for some form of consideration."⁵³ SCE claims that "giving away power in some hours in exchange for obtaining free power in other hours would constitute consideration." In such circumstances, according to SCE, the ruling in *Niagara Mohawk* does not preclude the CPUC from waiving certain charges for some retail customers (who are also merchant generators) and not others, based on whether such customers net station power on a monthly or an hourly basis.

⁵³ *Citing PJM II*, 91 FERC at 61,889.

56. SCE argues that, even if the Commission finds that the merchant generators are not taking retail service from SCE for their station power needs, state law nonetheless permits SCE to assess charges to merchant generators on the grounds that they *formerly* were retail customers. Thus, SCE argues that, were the Commission to declare that the merchant generators are not retail customers of SCE, under state law the CPUC could still require them to pay charges based on their historical status.⁵⁴

ii. CPUC Response

57. The CPUC filed a response to the California Generators' motion arguing that the Commission should deny the requested clarification. Like SCE, the CPUC points out that SCE's Advice Letter does not seek to assess charges, but rather seeks to waive charges that otherwise would apply to retail load under applicable retail tariffs. The CPUC contends that because charges would be waived, rather than imposed, the Advice Letter complies with the Commission's station power orders.

58. The CPUC argues that the Commission's station power orders addressing station power in California do not preclude SCE from applying retail and other load-based charges to merchant generators that self-supply their station power requirements on a monthly basis under the CAISO Station Power Protocol.

59. In support of its argument, the CPUC points to paragraph 22 of the June 22 Order and focuses on the phrase "or is using local distribution facilities for the delivery of station power." The CPUC contends that the California Generators have erroneously interpreted the term "local distribution facilities" as being limited to the wires that physically deliver power. The CPUC argues that the term "local distribution facilities" does not refer only to wires, but also includes such items as tariffs, rate schedules, service agreements, billing software and hardware, accounting software and hardware, meter polling software, meters, and call centers. The CPUC asserts that even if the power is not provided over SCE's wires, the merchant generators are nonetheless using other aspects of SCE's "local distribution facilities."

60. The CPUC also claims that it has regulatory authority over load-based charges on merchant generators that self-supply station power. The CPUC states that a retail sale or use of local distribution facilities is not required under California law for the state to require a utility to impose charges on certain loads. The CPUC states that the California Generators' requested clarifications, if granted, would create exemptions to California law, and the Commission does not have the jurisdiction to grant such exemptions.

⁵⁴ *Citing* Cal. Pub. Util. Code § 366.2(d)(1); *Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access*, D.03-04-030, *modified*, D.03-05-039 (2003).

iii. **California Generators' Answer to SCE's and the CPUC's Responses**

61. The California Generators filed an answer to SCE's and the CPUC's responses. The California Generators reiterate their claim that the Advice Letter is not consistent with the Commission's station power orders. The California Generators state that SCE's claim that a generator self-supplying its station power needs through monthly netting under the CAISO Station Power Protocol is effectively purchasing energy at retail is without merit. The California Generators also reject SCE's claim that state law permits it to impose retail charges on merchant generators on the basis that they were formerly retail customers. Finally, the California Generators also disagree with SCE's suggestion that the CPUC has the authority to regulate the consumption of energy by merchant generators, regardless of whether such energy is self-supplied, sold or distributed. The California Generators contend that while a state may lawfully impose energy-related taxes, that is not the basis for the retail tariff charges that SCE seeks to impose on self-supplying generators. The California Generators assert that lawful energy-related taxes are linked to energy sales or distribution services, neither of which the Commission has found to exist with respect to self-supplied station power.

iv. **SCE Supplemental Advice Letter**

62. On January 5, 2007, SCE filed a second advice letter (Supplemental Advice Letter)⁵⁵ with the CPUC. SCE's Supplemental Advice Letter repeats claims SCE made in its original Advice Letter, namely that it is not imposing charges but rather waiving charges that would otherwise be applicable to certain self-supplying merchant generators. SCE states that it intends to charge self-supplying merchant generators these "non-bypassable charges."

5. **D.C. Circuit Affirmation of the Commission's Station Power Precedent**

63. In a long series of orders, the Commission previously addressed the roles of federal and state regulators in the area of station power. In the *PJM* station power orders, the Commission ruled that merchant generators cannot be required to purchase, under state retail tariffs, their station power requirements solely from the former owners of the generating facilities. Rather, consistent with its efforts to promote the competitive supply of electricity and to eradicate unduly discriminatory practices by transmission-owning utilities, the Commission ruled that merchant generators can self-supply their own station power requirements from their own generating facilities. If merchant generators do self-supply their own station power, as measured over a reasonable period of time, then there is no sale (retail or wholesale) and thus federal and state regulation does not attach to the

⁵⁵ SCE's January 5, 2007 Advice Letter 2008-E-A.

commodity.⁵⁶ If, however, merchant generators need transmission and/or local distribution service to accommodate either remote self-supply or third party-supply of station power, then that service generally would be subject to federal and/or state regulation.⁵⁷

64. In another order, the Commission, acting on a complaint filed by a New York generator, clarified that “the fundamental questions about the appropriate treatment of station power were answered” in the *PJM* orders.⁵⁸ The Commission explained that it already had determined that self-supplying merchant generators in New York must, consistent with the *PJM* orders, be allowed to net station power against gross output “over some reasonable time period” in order to determine whether the generators are taking a service they must pay for.⁵⁹ All that was left to decide, in a subsequent compliance proceeding, was the “reasonable time period” for netting station power and to determine the precise terms of a New York tariff to implement the Commission’s earlier directives.

65. In *Niagara Mohawk*, the D.C. Circuit denied petitions for review and affirmed Commission orders that, among other things, accepted NYISO’s station power procurement and delivery provisions.⁶⁰ Among other things, the court affirmed the Commission’s approval of NYISO’s monthly netting of station power and the Commission’s finding that self-supplying merchant generators that use no transmission or local distribution facilities need not pay either retail energy or local distribution service charges.

66. Before the court of appeals, the petitioners had argued that such monthly netting encroaches upon state jurisdiction over local distribution services and retail rates in violation of the FPA, since New York generators might be taking state-jurisdictional services at some time during the one-month netting interval. Petitioners therefore

⁵⁶ *PJM II*, 94 FERC at 61,890-91.

⁵⁷ *E.g.*, *PJM III*, 95 FERC at 62,186.

⁵⁸ *KeySpan I*, 99 FERC at 61,679.

⁵⁹ *Id.* at 61,679-80.

⁶⁰ The Commission orders were: *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh’g denied*, 107 FERC ¶ 61,142, *clarified*, 108 FERC ¶ 61,164 (2004); *Nine Mile Point*, 105 FERC ¶ 61,336 (2003), *reh’g denied*, 110 FERC ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003), *reh’g denied*, 110 FERC ¶ 61,032 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 (2004), *reh’g denied*, 111 FERC ¶ 61,120 (2005).

contended that the Commission unlawfully extended federal jurisdiction to local distribution services and retail rates, because NYISO's monthly netting interval would allegedly allow generators to avoid paying retail energy or local distribution charges.

67. In rejecting these arguments, the court highlighted petitioners' acknowledgement "that an hourly netting tariff would not violate the [FPA]." ⁶¹ The court reasoned that if hourly netting is "perfectly consistent" with the FPA, as petitioners had conceded, then there was no principled reason why monthly netting violates the FPA. ⁶²

68. Furthermore, the court found nothing in Order No. 888 ⁶³ to buttress petitioners' jurisdictional objections to monthly netting. The court stated that the Commission "has made it clear that [Order No. 888's] purpose was to prevent large industrial and commercial users from avoiding their share of a utility's stranded costs." ⁶⁴ The court also found that it was reasonable for the Commission to carve out an exception from the term "end user" for wholesale merchant generators. The court held that it was reasonable that the Commission not extend the fiction that an end user takes local distribution *service* even if it does not physically use a utility's local distribution *facilities* to "the new creature in the market, the wholesale [merchant] generator." ⁶⁵

69. *Niagara Mohawk* affirmed the lawfulness of the Commission's station power policies and specifically upheld the Commission's acceptance of monthly netting as an appropriate exercise of Commission authority. ⁶⁶ The court accepted the Commission's position that no sale of any kind takes place when a merchant generator withdraws energy from the grid as station power, so long as its output is positive for the month. ⁶⁷ Our CAISO station power orders, we note, reflect this same station power policy. ⁶⁸

⁶¹ *Niagara Mohawk*, 452 F.3d at 828.

⁶² *Id.*

⁶³ Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,720.

⁶⁴ *Niagara Mohawk*, 452 F.3d at 829.

⁶⁵ *Id.*

⁶⁶ The D.C. Circuit recently reaffirmed the Commission's station power policies, as applied in another set of Commission orders. *See Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) (unpublished opinion) (affirming *N.Y. Power Auth. v. Consol. Edison Co. of N.Y.*, 116 FERC ¶ 61,240 (2006)).

⁶⁷ *Niagara Mohawk*, 452 F.3d at 830 n.9.

⁶⁸ *Id.* at 825-26.

6. Commission Determination

70. As a preliminary matter, we note that SCE's Supplemental Advice Letter continues SCE's earlier position, articulated in its request for rehearing of the June 22 Order, that it has the authority to assess "non-bypassable charges" upon generators that self-supply station power. As explained below, we will deny SCE's rehearing request and will grant California Generators' motion for clarification.

71. SCE states that its Advice Letters do not seek CPUC authorization to *assess* certain charges to merchant generators based upon whether they net on a monthly or hourly basis, but rather seek CPUC authorization to *waive* certain charges otherwise applicable to merchant generators based on whether they net on a monthly or hourly basis. SCE contends that drawing a distinction between assessing certain charges and waiving certain charges is not at odds with our station power orders. We disagree. We find this to be a hollow, semantic distinction and reject it. SCE's claim amounts to a backdoor attempt to circumvent not only our jurisdiction, but also the clear meaning and intent of our station power orders and *Niagara Mohawk*.

72. As the court recognized in *Niagara Mohawk*, our station power orders find that merchant generators need not pay transmission and local distribution charges for station power when they are neither purchasing at retail nor using local distribution facilities. Any attempt at the state level to assess (or to assess and then "waive") charges for merchant generators on the basis of whether they net station power on a monthly or hourly basis would amount to an unlawful attempt to circumvent our authority over matters that are properly within our jurisdiction.⁶⁹

73. We also repeat that netting station power does not constitute a sale, either retail or wholesale, provided that the energy a merchant generator produces meets or exceeds the station power it consumes over the netting interval specified in the Commission-jurisdictional tariff. In *KeySpan IV*, we explained why netting station power over a reasonable period of time is not a retail sale of electricity, concluding that "[s]imply because there may be momentary instances during the netting interval when a particular generating facility's output is negative does not mean that the facility's owner is buying station power at retail."⁷⁰ The *Niagara Mohawk* court affirmed this finding.⁷¹

⁶⁹ Under Section 201 of the FPA, 16 U.S.C. § 824 (2006), we have undoubted jurisdiction over transmission of electric energy in interstate commerce, and in order to determine when (and how much) jurisdictional transmission service is provided and thus when (and how much) jurisdictional transmission rates may be charged, we must also determine when station power is self-supplied (either on-site or remotely) or purchased from a third party, and when it is not. *See FPC v. So. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964).

⁷⁰ *KeySpan IV*, 107 FERC ¶ 61,142 at P 40.

Accordingly, we reject SCE's argument that the CPUC has jurisdiction over station power because a generator's station power consumption constitutes a retail sale. Further, SCE's contention that the CPUC could nonetheless find the self-supply of station power to be a retail sale under *state* law is wrong, given that we have jurisdiction and reiterate here that self-supply is not a sale.⁷² We also note that our position here is consistent with our prior station power precedent, as it has been repeatedly affirmed by the circuit courts.⁷³

74. As relevant here, this case closely parallels *Niagara Mohawk*. In *Niagara Mohawk*, New York utilities challenged the Commission's authority to accept a monthly netting interval for self-supply of station power within NYISO. The utilities sought to impose load-based charges on merchant generators engaged in self-supply notwithstanding net positive generation during a monthly netting interval. The court rejected the utilities' position, finding instead that the Commission had the authority to approve a monthly netting interval for station power self-supply. *Niagara Mohawk* turned in large part on the fact that the utilities challenging the Commission's authority to allow a *monthly* netting interval nevertheless conceded that an *hourly* netting interval was

⁷¹ *Niagara Mohawk*, 452 F.3d at 828.

⁷² Indeed, if we were to carry SCE's argument to its logical conclusion, a state could by virtue of state law define a plainly Commission-jurisdictional sale for resale to be a retail sale and thus assert its jurisdiction over the sale to the exclusion of Commission jurisdiction. This, of course, turns the federal-state relationships on their head, and is inconsistent with years of precedent to the contrary. *E.g.*, *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 371-72 (1988); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004); *Southern Co. Services, Inc.*, 123 FERC ¶ 61,204, at P 27 & n.47 (2008).

⁷³ *E.g.*, *Keyspan IV*, 107 FERC ¶ 61,142 at P 35 ("As we consistently have held since *PJM II*, the self-supply of station power is distinguishable from a retail purchase of station power. The latter, of course, involves two legally distinct entities, with a transfer of title or possession, whereas self-supply involves only one entity and no transfer of title or possession. In short, not all end use necessarily involves a sale for end use." (internal citations omitted)), *aff'd sub nom. Niagara Mohawk*, 452 F.3d at 822; *N.Y. Power Auth. v. Consol. Edison Co. of N.Y.*, 116 FERC ¶ 61,240 at P 18 (relying on *Niagara Mohawk's* recognition that "it would be a 'valid policy judgment' on the part of the Commission to determine that no retail sale occurred, and no local distribution service was provided, if a generator was net positive over a one-hour netting interval," and that there was no principled reason for disallowing monthly netting if hourly netting is acceptable), *aff'd sub nom. Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) (unpublished opinion).

acceptable and that it was within the Commission's jurisdiction to approve an hourly netting interval. The court thus concluded:

If generators must be thought of as equivalent to industrial end users, then hourly netting would be equally illegitimate [as monthly netting]; and if not, we do not see how the language of [Order No. 888] would permit netting over one hour but not one month.⁷⁴

75. Similarly, in this proceeding, SCE does not challenge the Commission's authority to allow Permitted Netting, but instead seeks to impose load-based charges on "customers" that do not engage in Permitted Netting. SCE's position effectively concedes that the Commission has the authority to allow *some* form of netting, as the utility in *Niagara Mohawk* also conceded. Given this concession, SCE's objection to other forms of netting, i.e. on-site or remote self-supply over a monthly netting interval, is untenable; it directly contravenes *Niagara Mohawk*.

76. As we noted in *AES Somerset*, a state retail tariff that "impairs the ability of merchant generators to utilize the netting provisions of [the ISO's station power protocol]... prevents [the generators] from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying."⁷⁵ The retail tariff that the CPUC seeks to impose on merchant generators has the same effect; it forces merchant generators to pay load-based charges for fictitious energy purchases. As the *Niagara Mohawk* court noted, one of the Commission's primary reasons for allowing station power netting is that "it would ensure that wholesale generators do not bear a cost that has no relationship to any service purportedly being provided by another party."⁷⁶ California Generators are not purchasing energy when they self-supply station power and are net positive over the netting interval, and load-based charges for this self-supply are costs that have no relationship to any service provided by another party.

77. SCE also argues that there are "separate issues" relating to mandatory wheeling, which is prohibited by section 212(h) of the FPA. We have addressed and rejected this argument before.⁷⁷ As we explained in *KeySpan IV*, which was affirmed by *Niagara Mohawk*, and also in the June 22 Order, a merchant generator's self-supplying station

⁷⁴ *Niagara Mohawk*, 452 F.3d at 829.

⁷⁵ *AES Somerset*, 105 FERC ¶ 61,337 at P 29.

⁷⁶ *Niagara Mohawk*, 452 F.3d at 826.

⁷⁷ June 22 Order, 111 FERC ¶ 61,452 at P 18; *Keyspan IV*, 107 FERC ¶ 61,142 at P 51.

power over a reasonable period of time does not involve a retail sale in the first place. Thus there is no retail wheeling involved, mandatory or otherwise. A Commission finding that generators may avail themselves of the optional station power provisions proposed by the CAISO does not run afoul of section 212(h). The Commission has not required transmission of electric energy directly to any generator, as an end user, which is what is prohibited by that section.

78. The CPUC relies on *Hartford Electric Light Company v. FPC*⁷⁸ to argue that so-called “paper facilities” (which it defines as tariffs, rate schedules, service agreements, billing software and hardware, and accounting software and hardware) that a utility “uses” to deliver station power to merchant generators constitute state-jurisdictional local distribution facilities, and thus establish state jurisdiction sufficient to warrant the assessment of state-jurisdictional local distribution charges. However, we previously found that the court’s decision in *Hartford* regarding such facilities was a finding specific to the FPA and cannot be extended to a public utility’s “paper facilities” under state law.⁷⁹ As we explained, the *Hartford* court considered specific language in the FPA, particularly the term “facilities” as used in section 201(b) of the FPA, as well as comparable provisions of the Natural Gas Act. The court did not address any state statutes. The *Hartford* court’s finding that Congress intended the Commission to have jurisdiction over entities owning the type of facilities at issue in *Hartford* was a finding specific to the FPA, and the Congressional mandate therein, and cannot be extended to a public utility’s non-physical, “paper facilities” under state law. While that decision did not involve California, the logic articulated by the court in *Hartford* applies equally to California.

79. Further, we confirm as correct the California Generators’ understanding that we meant the phrase “local distribution facilities” to mean wires and associated electrical equipment that is physically involved in the actual delivery of electricity, not “paper facilities.” We specifically reject SCE and the CPUC’s assertion that we meant “local distribution facilities” to include anything other than wires and associated electrical equipment used for the physical delivery of electricity (e.g., tariffs, rate schedules, service agreements, billing software and hardware, accounting software and hardware, meter polling software, meters, and call centers). This overly expansive definition – intended by SCE and the CPUC solely to create state jurisdiction where none exists – is

⁷⁸ *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

⁷⁹ *N.Y. Power Auth. v. Consol. Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,304, at P 61 (2005), *clarified and reh’g denied*, 116 FERC ¶ 61,240, at P 25-26 (2006), *aff’d sub nom. Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) (unpublished opinion); *see Hartford*, 131 F.2d at 961.

illogical, unsupported by any legal precedent, and would operate only to create confusion and unnecessary litigation.

80. The CPUC contends that the Commission lacks authority to determine when and under what circumstances a state-jurisdictional service is rendered, as CAISO's Commission-accepted monthly netting does. In *Niagara Mohawk*, the court clarified that the Commission does indeed have such authority.⁸⁰ This is consistent with the Supreme Court's finding that it is this Commission, not state commissions, which must make the factual and legal determinations to define the scope of the Commission's jurisdiction, even if those decisions also may effectively delineate the scope of state jurisdiction.⁸¹

81. We also clarify that our stay of the requirement that CAISO eliminate Permitted Netting from its Station Power Protocol (and now our decision to allow Permitting Netting to be retained in the Protocol as an option) did not limit netting over a "reasonable" time period to mean only hourly netting, and did not authorize load-serving entities to impose retail load-based charges on merchant generators that self-supply using monthly netting. As the *Niagara Mohawk* court noted, once it is conceded that netting over some period of time is justified, it can be justified regardless of the length of the netting interval.⁸²

82. We also reject SCE's argument that "giving away power in some hours in exchange for obtaining free power in other hours" (i.e., engaging in monthly netting) constitutes consideration and makes the station power self-supply a sale. This argument conflicts with *Niagara Mohawk's* explicit finding that if hourly netting is justified, then monthly netting must also be justified. SCE appears to be arguing that the generators are engaging in some kind of "energy banking" arrangement in which they exchange injected energy in some hour and withdraw energy in other hours. Even if we were to assume *arguendo* that, in monthly netting, generators are in fact "giving away" their own energy in exchange for another's free energy (which we do not), SCE's position still falls before the precedent of *Niagara Mohawk*. SCE is doing nothing more than rejecting the core

⁸⁰ *Niagara Mohawk*, 452 F.3d at 829.

⁸¹ *FPC v. So. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964) (finding that the determination of the jurisdictional status of facilities "involves a question of fact to be decided by the FPC as an original matter"); *accord W. Mass. Elec. Co.*, 61 FERC ¶ 61,182, at 61,661 (1992), *aff'd*, 165 F.3d 922, 926 (D.C. Cir. 1999); *AES Somerset*, 110 FERC ¶ 61,032 at P 35, n.41; *Nine Mile*, 110 FERC ¶ 61,033 at P 30 & n.31; *Huntley*, 111 FERC ¶ 61,120 at P 22 & n.25.

⁸² *Niagara Mohawk*, 452 F.3d at 828 ("[I]f hourly netting is perfectly consistent with the [FPA], we see no principled reason why monthly netting violates the Act.").

finding of the *Niagara Mohawk* court that: “[I]f hourly netting is perfectly consistent with the [FPA], we see no principled reason why monthly netting violates the Act.”

83. We note that, while states can assess taxes as a general matter, states cannot assess charges upon self-supplying merchant generators that are net positive over the netting interval, i.e., cannot assess charges for services that have not been rendered. Our station power orders do not seek to preempt states’ lawful imposition of taxes, but such taxes are not implicated by SCE’s advice letters. Rather, SCE seeks to impose retail charges on generators that are self-supplying consistent with a federally-approved rate schedule. The Commission’s long-standing station power precedent has found that where there is no state-jurisdictional retail sale (indeed, no sale at all), nor a use of state-jurisdictional local distribution facilities, a utility such as SCE cannot lawfully assess retail charges. In short, SCE cannot prevent a merchant generator from fully exercising its right to self-supply under the CAISO Station Power Protocol.

84. Moreover, if SCE does not object to Permitted Netting as an unlawful intrusion into state authority, then, pursuant to *Niagara Mohawk*, SCE cannot reasonably object to the monthly netting now authorized by the Station Power Protocol. Finally, to the extent that there may be a conflict between a Commission-jurisdictional tariff and a state-jurisdictional tariff, we would seek to resolve it – and we have sought to do so here – in the most narrowly-tailored and careful manner possible, consistent with our prior orders.⁸³ Our jurisdiction extends to the transmission of station power, and the use of a reasonable netting interval is designed to determine when, in fact, such transmission of station power has taken place.⁸⁴

85. We also note that we have the authority to order refunds of state charges that are improperly imposed on Commission-regulated services. In this case, that authority applies to the retail charges that are addressed in this order. In *AES Warrior Run*, for example, we directed the refund of local distribution charges that we found to be unjust and unreasonable, relying on earlier precedent that stated “the Commission must have the power to order refunds of improperly collected monies if its statutory mandate is to be given effect.”⁸⁵ Further, the court of appeals has held that the Commission has the authority to order refunds of improperly imposed state charges on Commission-regulated

⁸³ June 22 Order, 111 FERC ¶ 61,452 at P 14.

⁸⁴ *Id.*; *see supra* note 68.

⁸⁵ *AES Warrior Run, Inc.*, 108 FERC ¶ 61,316, at P 13 (2004), *order on reh’g*, 112 FERC ¶ 61,020 (2005); *accord Entergy Servs. v. FERC*, 400 F.3d 5, 7-8 (D.C. Cir. 2005) (finding that Entergy could not avoid Commission-ordered refunds after it mistakenly imposed charges on qualified facilities under state-jurisdictional retail rates).

service.⁸⁶ Accordingly, we have the authority to order refunds of any unlawful state charges imposed on merchant generators under the Advice Letters.

86. Finally, we reject SCE's argument that, even if the Commission finds that merchant generators are not taking retail service from SCE for their station power needs, state law nonetheless permits SCE to assess charges to the merchant generators on the grounds that they *formerly* were retail customers. We note that we rejected this argument in the past, and will do so again here.⁸⁷ Merchant generators are not former retail customers, and merchant generators are not converted into former retail customers simply because they now own generating units that SCE (and other California utilities) divested. As explained above, merchant generators emerged when utilities divested their ownership of generation facilities following the "functional unbundling" mandated by Order No. 888. Vertically-integrated utilities in California formerly owned, and then divested, California Generators' generation facilities, but that does not make the California Generators the "former retail customers" of the utilities.⁸⁸ Rather, this argument attempts to circumvent our clear precedent, as affirmed by *Niagara Mohawk*. *Niagara Mohawk* recognized that merchant generators are new creatures in the market post-Order No. 888, and that the Commission is not required to treat them identically to all other entities. The *Niagara Mohawk* court explicitly stated that the Commission may, in its discretion, choose not to extend Order No. 888's fiction (that an end user takes local distribution service even if it does not physically use a utility's local distribution facilities) to merchant generators.⁸⁹ The Commission has chosen not to do so.

87. In sum, as explained above, the Commission has jurisdiction to determine whether a self-supplying merchant generator's net output is positive over a reasonable, monthly netting interval, because this is critical to determining its transmission load, and, where the net output is positive, to determine that no retail sale (and, indeed, no sale at all) has taken place. Further, while states can have, and historically have had, netting laws, this does not preclude the Commission's authority to make determinations as to its undoubted jurisdiction over transmission in interstate commerce.

⁸⁶ *Pub. Util. Comm'n of Cal. v. FERC*, 143 F.3d 610, 612 (D.C. Cir. 2003).

⁸⁷ *Keyspan IV*, 107 FERC 61,142 at P 49 n.57 ("Given that the owners of divested generation did not purchase station power at retail before they purchased the units, they are not the 'retail-turned-wholesale customers' we had in mind in this passage of Order No. 888.").

⁸⁸ No party to this proceeding has offered any evidence that SCE and other utilities "paid themselves" for their own station power requirements.

⁸⁹ *Niagara Mohawk*, 452 F.3d at 829.

88. For the above reasons, we will deny SCE and the CPUC's rehearing requests and grant the California Generators' request for clarification.

C. March 16, 2006 Compliance Filing – Docket No. ER05-849-003

1. Description of Filing

89. CAISO's March 16, 2006 compliance filing consists of two sets of tariff revisions, one that includes the necessary changes to implement the Station Power Protocol other than the removal of Permitted Netting, and another that removes Permitted Netting. The filing thus includes the other changes required by the Commission, including the removal of the change to the definition of Transmission Revenue Credit and the addition of milestones under the application process.

2. Commission Determination

90. The Commission is granting rehearing and allowing CAISO to retain Permitted Netting in the Station Power Protocol, as discussed above. In addition, the compliance filing does not include several changes offered by CAISO in its May 24, 2005 answer intended to address concerns raised by Moss Landing and the QF Parties, discussed above. Accordingly, the Commission will require CAISO to file a further compliance filing to be submitted within 30 days of the date of this order.

D. October 27, 2006 Compliance Filing – Docket No. ER05-849-007

91. CAISO's October 27, 2006 compliance filing provides, in response to the Commission's directive in the June 22 Order, cost support for certain administrative charges imposed by CAISO. The Commission finds that CAISO has satisfactorily complied with the directive, and that the cost support shows that CAISO's administrative charges are reasonable. Accordingly, the Commission will accept the compliance filing.

E. CPUC Motion to Supplement – Docket No. ER05-849-008

1. CPUC Motion to Supplement

92. On December 21, 2007, the CPUC filed a motion to supplement its request for rehearing of the June 22 Order or, in the alternative, to supplement its response to the California Generators' motion for clarification. If the Commission grants the motion to supplement the CPUC's rehearing request, the CPUC requests that the Commission grant the CPUC's rehearing request. If the Commission grants its motion to supplement its response to the California Generators' motion for clarification, the CPUC asks the Commission to deny the motion for clarification and order wholesale generators that are not self-supplying on-site to pay any retail or load-based charges based on their consumption of power.

93. The CPUC argues that monthly netting is not appropriate for the CAISO market because CAISO operates a real-time market that settles sales and purchases in ten-minute intervals. The CPUC also notes that the Commission's accounting rules prohibit the netting of wholesale sales and purchases over a period greater than one hour.

94. The CPUC further asserts that a monthly netting interval in California would effectively shift the retail energy and other load-based charges required by California law away from generators at the expense of California's other ratepayers. The CPUC explains that it has recently learned that certain generators are neglecting to pay retail charges to PG&E and SCE pursuant to their CPUC tariffs, and that these generators are claiming exemption from the charges based on the Commission's station power precedent.

95. The CPUC reiterates arguments it made in its response to the motion for clarification, namely that the State of California has the authority to: (1) determine when station power self-supply constitutes a retail sale; and (2) impose load-based charges on the power consumed during station power self-supply regardless of whether there is a retail sale. The CPUC refers to Order No. 888's assurances that, after utilities opened their transmission systems to wholesale competition, states would retain the authority to collect charges associated with the use of utilities' distribution systems or retail service.⁹⁰ The CPUC argues that it relied on these assurances when it restructured California's retail electricity market. Now, the CPUC asserts, some generators that benefited from deregulation are not paying the load-based charges that every other end-user of electric energy is paying.

96. The CPUC also notes that several California statutes require the payment of specific charges by all end-use customers in California. For example, the CPUC refers to non-bypassable charges set forth in the Department of Water Resources' statutes, in statutes providing for nuclear decommissioning costs, and in statutes governing public purpose programs such as low-income electricity assistance. The CPUC argues that these charges are not necessarily contingent on the sale of power at retail. The CPUC asserts that a self-supplying generator is *providing* electric energy, and that the CPUC can regulate that provision of energy regardless of whether a sale exists.

2. Answer of Reorganized Generators

97. On January 14, 2008, the California Generators⁹¹ and High Desert⁹² (collectively, Reorganized Generators)⁹³ submitted an answer to the CPUC's motion to supplement.

⁹⁰ CPUC Motion to Supplement at 6-7 (*citing* Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,782).

⁹¹ Constellation Power Generation, Inc. is the successor in interest to Constellation Generation Group, LLC.

Reorganized Generators argue that the CPUC's motion, while framed as a supplement and a response to recent events, is actually a reiteration of its prior attacks on the Commission's established station power policies. Reorganized Generators therefore ask that the Commission deny the CPUC's motion.

98. Reorganized Generators assert that the CPUC's non-bypassable retail charges are unlawful and the Commission should act to prevent generators from facing the continuing imposition of these unlawful charges.

99. Reorganized Generators disagree with the CPUC's assertion that the Commission's station power orders infringe upon the CPUC's authority over the provision of electricity to end users. Reorganized Generators note that this argument has been repeatedly rejected by the Commission and the courts, and that the CPUC's collateral attack upon these prior orders should similarly be rejected. Reorganized Generators argue that netted station power usage does not constitute retail load and thus cannot be assessed retail load-based charges. Reorganized Generators contend that the *Niagara Mohawk* court rejected the argument that a wholesale generator self-supplying station power is indistinguishable from a large industrial customer using electric energy.⁹⁴

100. Reorganized Generators also take issue with the CPUC's assertion that monthly netting is not appropriate in California, noting that the Commission has concluded that the "monthly netting interval has evolved into the standard for determining whether station power has been self-supplied and deviating from this standard would require a strong justification."⁹⁵ Further, Reorganized Generators argue that *Niagara Mohawk* found no basis upon which the court could determine that a particular netting interval, whether an hour or a month, is unreasonable.⁹⁶

⁹² High Desert states that it became involved in this proceeding as a separate entity because it was acquired by Tenaska; its interests were represented earlier by a party to this proceeding who was then an affiliate of High Desert. High Desert's motion to intervene out-of-time in this proceeding is granted above.

⁹³ The term "Reorganized Generators" reflects the fact that High Desert intervened as a new party to this proceeding after it was acquired by Tenaska, and that Constellation Power Generation, Inc. is the successor in interest to Constellation Generation Group, LLC.

⁹⁴ Reorganized Generators Answer at 5 (*citing Niagara Mohawk*, 452 F.3d at 829).

⁹⁵ *Id.* at 6 (*citing MISO II*, 110 FERC ¶ 61,383 at P 57).

⁹⁶ *Id.* at 7 (*citing Niagara Mohawk*, 452 F.3d at 829-30).

101. Reorganized Generators assert that the CPUC's arguments regarding its authority to impose non-bypassable charges upon station power self-suppliers have already been rejected as collateral attacks on prior precedent. Further, Reorganized Generators note that the Commission has rejected station power challenges based upon Order No. 888 in the past, and they point to the Commission's prior statements that the Commission's station power policies do not reverse or change its holdings in Order No. 888, but instead clarify that merchant generators cannot be charged retail rates when they are not taking retail service.

102. Reorganized Generators conclude that, to the extent a generator generates more than it consumes as station power in a calendar month, no retail charges, including recovery of stranded costs and benefits, can be levied upon it. Accordingly, Reorganized Generators contend that the retail charges the CPUC seeks to impose are unlawful.

3. WPTF Answer

103. On January 14, 2008, WPTF filed an answer to the CPUC's motion to supplement. WPTF argues that the CPUC's motion simply reiterates arguments that CPUC previously made. WPTF urges the Commission to reject CPUC's motion.

104. WPTF argues that the CPUC has refused to take action to approve or disapprove retail tariffs proposed in the Advice Letters submitted to the CPUC, and that the CPUC may continue to require the LSEs to continue collecting load-based charges from generators even though these charges may not comport with the Commission's actions.

105. WPTF adds that those generators not paying retail charges at this time are doing so with the full knowledge and assent of the LSEs, with the understanding that their accounts will be settled later. WPTF also notes that at least one generator is paying these charges into an escrow account.

4. Commission Determination

106. We reject the CPUC's motion to supplement as an untimely attempt to enlarge upon the CPUC's request for rehearing of the June 22 Order.⁹⁷ Under section 313(a) of the FPA⁹⁸ and Rule 713 of the Commission's Rules of Practice and Procedure,⁹⁹ the

⁹⁷ We note that the CPUC attempts to style its motion as, in the alternative, a request to supplement its response to the California Generators' motion for clarification in Docket No. ER08-549-006. We are neither inclined nor obliged to accept a filing solely on the strength of its party-bestowed title. *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 n.18 (1991); *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984).

⁹⁸ 16 U.S.C. § 8251(a).

Commission lacks the authority to consider requests for rehearing filed more than thirty days after the issuance of a Commission order. Commission precedent is clear that supplements to timely filed requests for rehearing, when filed after the expiration of the statutory thirty-day period, will be rejected.¹⁰⁰

107. Even if the CPUC's motion to supplement were permissible, we would deny the motion because it raises the same arguments that the CPUC raised in response to the motion for clarification in Docket No. ER05-849-006, which we have addressed above. We have granted the motion for clarification and rejected the CPUC's arguments regarding the Commission's lack of jurisdiction to determine whether a retail sale has taken place. We expect that any monies deposited in the escrow account described by WPTF in its answer will be returned, with interest, to the generator(s).

108. The CPUC raises no new arguments that our precedent has not already addressed. We reject the CPUC's argument that a wholesale generator self-supplying station power is indistinguishable from an industrial customer using electric energy as an end user and therefore must be treated the same; the *Niagara Mohawk* court explicitly rejected this argument.¹⁰¹ Our position here also does not conflict with our findings in Order No. 888. Generators cannot be charged retail rates when they are not taking retail service. We note that in *Nine Mile Point*, which was later affirmed by *Niagara Mohawk*, we found that even if our reading of Order No. 888 could somehow be construed to impair stranded cost recovery, which we did not and still do not concede, utilities are free to seek and the state is free to approve adjustments in other rates that recover stranded costs from appropriate classes of customers, or to extend the stranded cost recovery period.¹⁰²

109. We also reject the CPUC's reliance on other California statutes to justify the assessment of load-based charges on merchant generators whose net output is positive over the netting interval. The California statutes cited by the CPUC are not relevant to this proceeding. While merchant generators consume energy for station power self-supply, they also deliver energy back to the grid, whether concurrently (Permitted Netting) or at other times during the netting interval. It is when this supply back to the

⁹⁹ 18 C.F.R. § 385.713.

¹⁰⁰ *E.g.*, *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,623; *Pub. Serv. Co. of N.H.*, 56 FERC ¶ 61,105, at 61,403 (1991).

¹⁰¹ *Niagara Mohawk*, 452 F.3d at 829 (finding that Order No. 888's recognition that an end user takes local distribution service even if it does not use local distribution facilities is a fiction, and that the Commission is not required to extend this fiction to wholesale merchant generators).

¹⁰² *Nine Mile Point*, 110 FERC ¶ 61,033 at P 44.

grid results in a net positive output over the netting interval that states are prohibited from imposing load-based charges on the generators' self-supplying station power. There is no analogous give-and-take in the context of statutes providing for nuclear decommissioning costs, of Department of Water Resources statutes, or of statutes governing public purpose programs such as low-income electricity assistance.

110. We also reject the CPUC's reliance on the fact that CAISO's real-time market settles sales and purchases in ten-minute intervals, and that the Commission's accounting rules prohibit the netting of wholesale sales and purchases over a period greater than an hour. The *Niagara Mohawk* court rejected the notion that accounting rules are determinative of whether a retail sale occurs when station power is self-supplied.¹⁰³ The *Niagara Mohawk* court stated that the Commission reasonably regarded hourly pricing, in the case of NYISO, as an accounting entry rather than an actual sale of power, and reasoned that hourly netting of power for accounting purposes in NYISO did not necessarily dictate hourly netting for determining net output and transmission load.¹⁰⁴ Moreover, as noted in the June 22 Order, we will not ignore that CAISO's proposed monthly netting interval is the same netting interval proposed for, and accepted by the Commission for PJM, the NYISO and the Midwest ISO to determine whether a generator's net output is positive for the month¹⁰⁵ and also was the result of stakeholder proceedings.

The Commission orders:

- (A) The requests for rehearing of the June 22 Order are hereby granted in part and denied in part.
- (B) The request for clarification in Docket No. ER05-849-006 is hereby granted.
- (C) CAISO's compliance filing in Docket No. ER05-849-003 is hereby conditionally accepted subject to a further compliance filing, as discussed above.
- (D) CAISO's compliance filing in Docket No. ER05-849-007 is hereby accepted.

¹⁰³ *Niagara Mohawk*, 452 F.3d at 830.

¹⁰⁴ *Id.*

¹⁰⁵ June 22 Order, 111 FERC ¶ 61,452 at P 6.

Docket No. ER05-849-002, *et al.*

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(E) The CPUC's motion to supplement in Docket No. ER05-849-008 is hereby rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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