

132 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Duke Energy Moss Landing LLC

Docket No. EL04-130-002

v.

California Independent System
Operator Corporation

California Independent System
Operator Corporation

Docket No. ER05-849-011

(Not Consolidated)

ORDER ON REMAND

(Issued August 30, 2010)

1. This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.¹ The D.C. Circuit vacated and remanded two sets of orders in which the Commission extended its station power policies, developed in other regions, to California. In the first set of orders, the Commission granted in part a complaint filed by Duke Energy Moss Landing LLC (Duke Energy) against the California Independent System Operator Corporation (CAISO), which alleged that CAISO's then-current tariff failed to conform to the Commission's station power policies.² In the second set of orders, the Commission accepted revised tariff provisions

¹ *S. Cal. Edison Co. v. FERC*, No. 05-1327 (D.C. Cir. May 4, 2010) (*Edison*).

² *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,170 (2004) (Complaint Order), *clarified and reh'g denied*, 111 FERC ¶ 61,451 (2005) (Complaint Rehearing Order).

submitted by CAISO establishing provisions for the procurement and delivery of station power as measured over a one-month netting interval.³

2. In light of the D.C. Circuit's remand order, the Commission here concludes that states need not use the same methodology the Commission uses to determine the amount of station power that is transmitted in interstate commerce to determine the amount of station power that is sold at retail.

I. Background

A. Commission Proceedings

3. In 2004, Duke Energy Moss Landing LLC (Duke Energy), a merchant generator interconnected to the transmission system controlled by CAISO, filed a complaint alleging that CAISO's tariff failed to comply with the Commission's previous station power orders.⁴ CAISO stated that it agreed and requested that the Commission order a stakeholder process to develop appropriate tariff revisions.

4. In granting the complaint, the Commission rejected Southern California Edison Company's (Edison's) contention that FERC's station power policies – which deem a generator that is net positive over a monthly netting interval to have self-supplied all of its station power needs – encroached upon state jurisdiction over retail sales.⁵ The Commission directed CAISO to file proposed tariff revisions that complied with the

³ *Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,452 (2005) (Tariff Order), *clarified and reh'g granted in part and denied in part*, 125 FERC ¶ 61,072 (2008) (Tariff Rehearing Order).

⁴ *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001); *PJM Interconnection LLC*, 95 FERC ¶ 61,470 (2001); *see also KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002), *order on reh'g*, 100 FERC ¶ 61,201 (2002); *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g denied*, 107 FERC ¶ 61,142 (2004), *clarified*, 108 FERC ¶ 61,164 (2004), *aff'd sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006); *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). *Cf. Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 (2004), *order on reh'g*, 110 FERC ¶ 61,383 (2005).

⁵ Complaint Order, 109 FERC ¶ 61,170 at P 20.

Commission's station power policies, while addressing the specific operational characteristics of the California market.⁶

5. The Commission subsequently denied Edison's request for rehearing, explaining that the Commission possesses "jurisdiction . . . over the transmission of station power. The use of a reasonable netting interval is designed to determine when, in fact, such transmission has taken place."⁷

6. In the spring of 2005, CAISO filed its station power protocols, which established a voluntary program through which eligible generators could self-supply station power and pay transmission charges based on a monthly netting interval, as specified in the protocols. The Commission conditionally accepted CAISO's station power protocols in the Tariff Order issued on June 22, 2005.⁸ The Commission explained that the station power protocols do not "conflict with state law or state tariffs relating to the rates, terms or conditions of retail sales because . . . when a generator is self-supplying, no sale has occurred."⁹ The Commission also stated that when a generator's net output is negative during a netting interval, "and thus a third party sale has in fact occurred, state law and the relevant [retail] tariff language would apply."¹⁰

7. On rehearing, the Commission again rejected challenges to its jurisdiction from Edison and others, finding that its "jurisdiction extends to the transmission of station power," and an examination of whether a generator's net output is positive or negative over a reasonable netting interval "is critical to determining its transmission load."¹¹ The Commission further clarified that its orders preclude Edison from imposing retail and stranded cost charges on merchant generators that self-supply their station power without making use of any state-jurisdictional local distribution services.¹² The Commission

⁶ *Id.* P 23.

⁷ *Id.* P 14.

⁸ Tariff Order, 111 FERC ¶ 61,451 at P 1.

⁹ *Id.* P 17.

¹⁰ *Id.*

¹¹ Tariff Order on Rehearing and Clarification, 125 FERC ¶ 61,072 at P 84, 87.

¹² *Id.* P 1.

reasoned that to permit such charges would “impair[] the ability of merchant generators to utilize the netting provisions” of CAISO’s tariff.¹³

B. The D.C. Circuit’s Decision

8. On review, the D.C. Circuit found that the Commission exceeded its statutory authority. While the D.C. Circuit recognized FERC’s “undeniable right . . . to determine how much electricity generators deliver to and take from the grid for transmission purposes,”¹⁴ it found that this authority did not “empower” FERC to “conclude that a retail sale has not taken place.”¹⁵

9. The D.C. Circuit characterized the issue as “stark:”¹⁶ whether “the netting period [the Commission] approved to calculate energy delivered to and taken from the grid by generators [in order to determine] transmission charges must also govern charges the utilities seek to impose [on] the generator’s own use of power?”¹⁷ In other words, “has [the Commission] exceeded its authority by insisting that the same method used for calculating transmission charges for station power be used to calculate retail [power sales] charges?”¹⁸ The D.C. Circuit concluded that the answer was no; they need not be the same.¹⁹ The D.C. Circuit acknowledged that different netting periods could lead to the Commission finding that no transmission of station power took place in a month in which California would recognize that retail sales of station power occurred, but found that acceptable; the “netting periods for power and transmission need not be the same.”²⁰

C. Post-Remand Pleadings

10. Motions to intervene out-of-time were filed by the following: (1) Electric Power Supply Association (EPSA); (2) Independent Energy Producers of New Jersey (IEPNJ);

¹³ *Id.*

¹⁴ *Edison*, No. 05-1327, slip op. at 3; *accord id.* at 2.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 6.

¹⁷ *Id.*; *accord id.* at 3.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 6-12.

²⁰ *Id.* at 11-12.

(3) Independent Power Producers of New York (IPPNY); (4) PPL Holtwood, LLC, *et al.* (PPL Parties); (5) Detroit Edison Company (Detroit Edison); (6) Dominion Resources, Inc. (Dominion); (7) Dogwood Energy LLC (Dogwood); and (8) RRI Energy, Inc. (RRI).

11. A Joint Motion for Expeditious Action on Remand and for Extension of Time Period for Answers (Joint Motion) was filed by EPSA, Dynegy Moss Landing, LLC (f/k/a Duke Energy Moss Landing, LLC), the Independent Energy Producers Association and the Western Power Trading Forum.

12. Answers in support of the Joint Motion were filed by IEPNJ and by IPPNY. Comments supporting the Joint Motion were filed by Calpine Corporation, Constellation Investments, Inc., and NRG Companies (together, Indicated Self-Suppliers) and by Dogwood.

13. Pacific Gas and Electric Company and Southern California Edison filed a request for an extension of time to respond to the Joint Motion. Southern California Edison then filed an answer opposing the Joint Motion.

14. 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. EPSA, IEPNJ, IPPNY, PPL Parties, Detroit Edison, Dominion, Dogwood and RRI have not met this higher burden of justifying their late interventions and their motions to intervene out-of-time are denied. *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

15. The issuance of this order on remand moots the Joint Motion and the later pleadings responding to it. We therefore need not address them here.

II. Commission Determination

16. In light of the D.C. Circuit's decision, and particularly given its determination that the Commission and the states can employ different netting periods (and thus, potentially, no transmission of station power might take place in a month in which retail sales of station power may occur), we conclude that the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and the states determine the amount of station power that is sold in state-jurisdictional retail sales. CAISO's tariff should address only Commission-jurisdictional transmission of station power and employ a Commission-approved monthly netting period to calculate

transmission load.²¹ State-jurisdictional retail sales of station power are properly the subject of state-jurisdictional tariffs, which need not be and would not be filed with the Commission.

17. We otherwise affirm our earlier orders in all other respects.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ Should CAISO or any stakeholder believe the station power protocols of the CAISO tariff require modification, they should avail themselves of the previously-approved stakeholder procedures provided for in the CAISO tariff.