

134 FERC ¶ 61,151
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. EL04-130-003

v.

California Independent System
Operator Corporation

California Independent System
Operator Corporation

Docket No. ER05-849-012

(Not Consolidated)

ORDER DENYING REHEARING

(Issued February 28, 2011)

1. In this order, we deny the requests for rehearing and clarification filed in response to the Commission's August 30, 2010 order,¹ which addressed the remand by the United States Court of Appeals for the District of Columbia Circuit.² The Commission's Order on Remand addressed the D.C. Circuit's Decision that found that the Commission had "exceeded its authority by insisting that the same method used for calculating transmission [service] charges for station power be used to calculate retail [energy] charges."³ The court vacated and remanded the case for further proceedings.⁴

¹ *Duke Energy Moss Landing LLC*, 132 FERC ¶ 61,183 (2010) (Order on Remand).

² *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) (D.C. Circuit Decision).

³ *Id.* at 997.

⁴ *Id.* at 997, 1002.

I. Background

2. Previous orders contain detailed descriptions of the background and history of the Commission's application of its station power policies, developed in other regions, to California.⁵

3. As to California, in 2004, Duke Energy Moss Landing LLC (Duke Energy), a merchant generator interconnected to the transmission system controlled by the California Independent System Operator (CAISO), filed a complaint alleging that CAISO's tariff failed to comply with the Commission's previous station power orders.

4. In granting the complaint, the Commission rejected Southern California Edison Company's (Edison's) argument that FERC's station power policies – which considered that a generator that was net positive over a monthly netting interval had self-supplied all of its station power needs – encroached upon state jurisdiction over retail sales.⁶ The Commission then directed CAISO to file proposed tariff revisions that complied with the Commission's station power policies.⁷

5. The Commission subsequently denied Edison's request for rehearing, explaining that the Commission possesses “jurisdiction . . . over the transmission of station power[,]” and that “[t]he use of a reasonable netting interval is designed to determine when, in fact, such transmission has taken place.”⁸

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 associated transmission service charges based on a monthly netting interval.⁹ In conditionally accepting the filing, 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

⁵ See, e.g., *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); *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).

⁶ Complaint Order, 109 FERC ¶ 61,170 at P 21.

⁷ *Id.* P 23.

⁸ Complaint Rehearing Order, 111 FERC ¶ 61,451 at P 14.

⁹ Tariff Order, 111 FERC ¶ 61,452 at P 1.

occurred.”¹⁰ 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.”¹¹

7. On rehearing of that order, 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.”¹²

8. On review, the D.C. Circuit found that the Commission exceeded its statutory authority. While the D.C. Circuit recognized the Commission’s “undeniable right . . . to determine how much electricity generators deliver to and take from the grid for transmission purposes,”¹³ it found that this authority did not “empower” the Commission to “conclude that a retail sale has not taken place.”¹⁴

9. The D.C. Circuit characterized the issue as “stark:”¹⁵ 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?”¹⁶ 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 [energy sales] charges?”¹⁷ The D.C. Circuit concluded that the Commission had exceeded its authority and that the methods used for these purposes need not be the same.¹⁸

¹⁰ *Id.* P 17.

¹¹ *Id.*

¹² Tariff Rehearing Order, 125 FERC ¶ 61,072 at P 84, 87.

¹³ D.C. Circuit Decision, 603 F.3d at 998; *accord id.* at 997.

¹⁴ *Id.* at 1000.

¹⁵ *Id.* at 999.

¹⁶ *Id.*; *accord id.* at 997.

¹⁷ *Id.* at 997.

¹⁸ *Id.* at 999-1002.

10. The D.C. Circuit also 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 the court found that result acceptable; the “netting periods for power and transmission need not be the same.”¹⁹

11. In response to the D.C. Circuit Decision, the Commission issued its Order on Remand and concluded that, as explained by the D.C. Circuit Decision, 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.²⁰

II. Requests for Rehearing or Clarification and Answers

12. On September 29, 2010, Dynegy Moss Landing LLC,²¹ Calpine Corporation and Constellation Investments, Inc. (collectively, the California Generators) filed a request for rehearing. The NRG Companies (NRG)²² filed a request for rehearing and clarification. The Electric Power Supply Association (EPSA), High Desert Power Project, LLC (High Desert), the Independent Energy Producers Association (IEP), the Independent Power Producers of New York, Inc. (IPPNY), the Mirant Parties,²³ the PPL Parties,²⁴ RRI Energy, Inc. (RRI) and the Western Power Trading Forum (WPTF) (collectively, Movants) filed a joint and several request for rehearing.

13. On October 14, 2010, Edison filed a request for leave to respond and response to the rehearing requests. On October 27, 2010, the California Generators filed a request for

¹⁹ *Id.* at 1002.

²⁰ Order on Remand, 132 FERC ¶ 61,183 at P 16.

²¹ Dynegy Moss Landing is the successor-in-interest to the complainant in Docket No. EL04-130.

²² The NRG Companies are NRG Power Marketing Inc., Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power LLC, and Long Beach Generation LLC.

²³ The Mirant Parties are Mirant California, LLC, Mirant Delta LLC, and Mirant Potrero LLC.

²⁴ The PPL Parties are PPL Brunner Island, LLC, PPL EnergyPlus, LLC, PPL Holtwood, LLC, PPL Maine, LLC, PPL Martins Creek, LLC, PPL Montana, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PPL University Park, LLC, PPL Wallingford Energy LLC, and Lower Mount Bethel Energy, LLC.

leave to reply and reply to Edison's response. On October 29, 2010, NRG filed an answer to Edison's response.

III. Discussion

A. Procedural Matters

14. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits an answer to a request for rehearing. Therefore, we reject Edison's response to the rehearing requests, and, as well, the California Generators' reply and NRG's answer to Edison's response.

B. Late Intervention

1. Request for Rehearing

15. Movants request rehearing of the Commission's denial of the motion of EPSA, IPPNY, PPL Parties and RRI for leave to intervene out of time. Movants argue that the Remand Order departs from nearly a decade of Commission precedent and amounts to the adoption of a new blanket rule issued without notice and comment.²⁵

2. Commission Determination

16. The Movants mischaracterize the Order on Remand. The order did not represent the adoption of a new blanket rule issued without notice and comment. Rather, the Order on Remand represents the Commission's reasonable response to what the court required of the Commission. Moreover, the D.C. Circuit Decision came after years of litigation over these issues where all sides had had opportunities to intervene and present their views.²⁶ 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.²⁷ Here, after years of litigation and

²⁵ Movants' Rehearing Request at 3, 24-28.

²⁶ The original complaint in Docket No. EL04-130-000 dates back to 2004, and the original filing in Docket No. ER05-849-000 dates back to 2005. Both filings were noticed, but EPSA, IPPNY, PPL Parties, and RRI did not seek to intervene. Subsequent compliance filings in Docket No. ER05-849 were noticed, but this subset of Movants again did not seek to intervene.

²⁷ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

multiple prior opportunities to intervene and multiple Commission orders, EPSA, IPPNY, PPL Parties, and RRI did not meet this higher burden of justifying their late intervention at this late date in this proceeding, and their rehearing request do not persuade us to the contrary. We therefore deny rehearing on this issue.

C. Unlawful Departure From Prior Policy

1. Requests for Rehearing or Clarification

17. California Generators, NRG and Movants argue that the Remand Order improperly sets aside the Commission's well-established policy governing the self-supply of station power. They argue that the Commission's action amounts to an improper departure from long-established precedent and policy without reasonable explanation.²⁸

2. Commission Determination

18. The Commission was not writing on a clean slate in its Order on Remand. While the Commission's station power policies have been the subject of vigorous litigation from the start, the D.C. Circuit has spoken regarding the extent of the Commission's jurisdiction in this matter, and the Commission has responded to the D.C. Circuit's directions. In prior orders, the Commission asserted its jurisdiction over the netting of station power sales based on its authority over interstate transmission under sections 201 and 205 of the Federal Power Act (FPA).²⁹ However, the court found that the Commission had "exceeded" its authority by:

insisting that the netting period it approved to calculate energy delivered to and taken from the grid by generators for transmission charges must also govern charges the utilities seek to impose for the generator's own use of power....³⁰

The D.C. Circuit Decision effectively required the position taken in the Order on Remand. It thus is not an unexplained departure from prior policy, but rather a change compelled by a Court of Appeals' finding on the scope of our jurisdiction. We therefore deny rehearing on this issue.

²⁸ California Generators' Rehearing Request at 4-5, 10-11, 19-23; NRG Request for Rehearing and Clarification at 1-2, 6, 19-22; Movants' Rehearing Request at 3, 24-28, 60-66.

²⁹ 16 U.S.C. §§ 824, 824(d) (2006).

³⁰ D.C. Circuit Decision, 603 F.3d at 999.

D. Wholesale Sales Jurisdiction

1. Requests for Rehearing or Clarification

19. California Generators, NRG and Movants also argue the Remand Order misinterprets the holding of the D.C. Circuit Decision as compelling the conclusions that the self-supply of station power is a retail sale and that the Commission lacks authority to determine otherwise. These entities argue that, although the court found wanting the Commission's explanation of its jurisdictional rationale, the court did not compel a specific outcome, but rather required the Commission to consider whether its station power precedent is within its plenary jurisdiction over wholesale electricity and transmission. Thus, California Generators, NRG and Movants argue that the Commission unlawfully abdicated its FPA jurisdiction over self-supplied station power.³¹

2. Commission Determination

20. For the last decade, the Commission has based its station power authority on its jurisdiction over interstate transmission service, not its authority over wholesale sales of electric energy in interstate commerce.³² However, the D.C. Circuit Decision stated that, in the context of approving the terms and conditions of the CAISO Tariff's Station Power Protocol, the Commission had effectively, and improperly, set the netting period for retail energy sales. The Commission previously has considered and rejected arguments that the third-party provision of station power "affects or relates to" wholesale services, and also has rejected the theory that the provision of station power is analogous to other wholesale

³¹ California Generators' Rehearing Request at 3, 6-7, 14-16; NRG Request for Rehearing and Clarification at 2-3, 5-6, 8-19; Movants' Rehearing Request at 4-5, 35-47.

³² See, e.g., *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).

services.³³ We will not revisit those arguments here. In fact, the court gave no indication that it would welcome such an approach.³⁴ We therefore deny rehearing on this issue.

E. New Proceedings

1. Request for Rehearing or Clarification

21. Next, argue the California Generators, the Commission had an obligation, upon the Court of Appeals' remand, to conduct "meaningful" remand proceedings, to revisit "afresh" its threshold jurisdictional authority over the self-supply of station power, and to afford Duke Energy, as the complainant, and the California Generators, as intervenors in the instant proceedings, an opportunity to amend the original complaint to address the jurisdictional issue.³⁵

2. Commission Determination

22. The record in this matter is complete. Based on all of the arguments and the record, the Commission, in its CAISO-related station power orders, asserted its authority over the CAISO's Station Power Protocol based on its interstate transmission jurisdiction. The court, however, found that, in so doing, the Commission had improperly intruded on the state's jurisdiction over retail sales. In light of this finding, we see no reason to, and are not required to, accept additional pleadings or conduct additional proceedings at this juncture.³⁶ We therefore deny rehearing on this issue.

³³ See *PJM Interconnection, LLC*, 94 FERC at 61,894-97; see also *PJM Interconnection, LLC*, 95 FERC at 62,186-87.

³⁴ D.C. Circuit Decision, 603 F.3d at 999 n.5 ("That is not to suggest that we see any stronger basis for FERC to rest on that ground [i.e., its jurisdiction over wholesale sales].").

³⁵ California Generators' Rehearing Request at 4, 7-8, 16-23.

³⁶ See *Gulf States Utilities Co.*, 67 FERC ¶ 61,035 at 61,108-09 & nn.7-8 (1994) (explaining that the Commission has discretion with respect to remands for further proceedings); see also *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities....[A]n agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing." (internal citations omitted)); accord

F. “Double Charges” or “Trapped” Costs**1. Requests for Rehearing or Clarification**

23. California Generators, NRG, and Movants argue that the Commission failed to consider that the Remand Order exposes the California Generators to unjust, unreasonable, discriminatory, and inequitable double charges or “trapped” station power costs that will result from state-authorized imposition of retail charges for past charges under the CAISO’s Station Power Protocol.³⁷ Similarly, NRG and Movants argue that as a result of the Remand Order, independent generators will be at a competitive disadvantage in the wholesale markets vis-à-vis one another and vertically integrated utilities.³⁸

2. Commission Determination

24. In the Order on Remand, consistent with the court’s findings, we determined that the Commission and the states can use different methods, with the Commission determining the amount of station power that is transmitted on the interstate transmission grid and the states determining the amount of station power that is sold in state-jurisdictional retail energy sales. Should generators face increased costs due to the application of different federal and state netting periods, any increased charges due from generators are a result of that state’s approach to estimating station power and are, simply put, not within our jurisdictional purview under the D.C. Circuit Decision. The CAISO and its members are, of course, free to propose changes to the CAISO Tariff’s Station Power Protocol, and we will review any such proposed changes if and when they are filed with us.

25. Movants argue that, given how California may define netting, if a generator is found to have used an amount of energy for self-supply of station power load each month, that amount is not available for sale at wholesale. They argue that generators thus will be unable to sell a portion of their energy at wholesale and will have that energy

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25 (1978); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992).

³⁷ California Generators’ Rehearing Request at 4, 8, 23-27; NRG Request for Rehearing and Clarification at 4, 7, 13, 22-24; Movants’ Rehearing Request at 5, 50-60.

³⁸ NRG Request for Rehearing and Clarification at 4, 6, 15-18; Movants’ Rehearing Request at 2, 4, 47-51.

“trapped” in a “regulatory no-man’s land.”³⁹ We disagree. Initially, to the extent that the Movants, by referring to “trapped” energy or costs are invoking the *Nantahala* line of federal preemption cases, we disagree that the circumstance they posit falls within the ambit of *Nantahala* and its progeny.⁴⁰ The classic application of *Nantahala* involves instances where the Commission authorizes a wholesale rate, but a state does not allow the buyer to pass that rate through in its state-jurisdictional retail rates. That is not the case here. If the netting period set by the state for retail sales (which is shorter than we set for transmission service) were to reduce the amount of energy that a generator has available to sell at wholesale, that situation would not create a *Nantahala*-like conflict raising a question of federal preemption. *Nantahala* addresses a different issue; it does not guarantee a merchant generator a right to be able to sell a specific amount of energy.

26. In support of their argument, Movants, relying on their understanding of the operation of the CAISO Tariff as a whole, provide an example of a generator that consumes one MWh per day for its station power requirements and which operates for one day during a month, generating 100 MWh of energy. Movants contend that, under the current one-month netting interval set forth in the Station Power Protocol, this generator would have a net output of 70 MWh (100 MWh minus 30 MWh (1MWh per day for 30 days)). In contrast, under the current state netting interval of one hour, they argue that this generator would have self-supplied only one MWh of station power during the one day it operated and would have been treated as purchasing 29 MWh of energy at retail over the rest of the month and thus would not have that amount of energy available to it for wholesale sales. Movants acknowledge, however, that “energy payments to the generator would be calculated based on the full 100 MW-hours,” subject to netting adjustments for other charges assessed by the CAISO during the relevant billing interval.⁴¹

27. In any event, we recognize that the net output figure derived from application of the CAISO Tariff’s Station Power Protocol is utilized to determine transmission-related charges under that Tariff, while application of a different state netting interval for retail sales could lead to a different net output calculation. But the court has already determined that a potential mismatch between energy transmission and generation via the

³⁹ Movants’ Rehearing Request at 52; NRG Request for Rehearing and Clarification at 13.

⁴⁰ See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354 (1988); see also *Entergy La., Inc. v. La. PSC*, 539 U.S. 39 (2003).

⁴¹ Movants’ Rehearing Request at 52.

application of differing federal and state netting periods does not permit us to exercise our jurisdiction in a manner that defines when a retail sale occurs.⁴²

28. We also concede that it is possible that different federal and state netting intervals might result in a situation where a generator would need to purchase station power at retail when it previously could have self-supplied its station power requirements under the current terms of the CAISO Station Power Protocol. However, given that this is a consequence of the court's determination that the netting periods for transmission and power need not be the same, we cannot act to rectify it. To the extent that the Movants believe that the court's decision results in "trapped" energy, they are seeking to relitigate the court's determination rather than our implementation of the court's determination. Further, we note that no generator is required to self-supply under the terms of the Station Power Protocol, and any generator that is currently registered for self-supply can de-register its portfolio. In addition, as suggested above, any CAISO participant can initiate stakeholder proceedings to modify the Station Power Protocol to better reconcile it with state law. Thus, we disagree with the Movants' assertion that any energy will necessarily be "trapped" and that such "trapping" requires this Commission to preempt.

G. CAISO Station Power Protocol

1. Requests for Rehearing or Clarification

29. California Generators argue the Commission erred in not directing the CAISO to make a compliance filing rationalizing and harmonizing the Station Power Protocol with the new jurisdictional regime envisioned in the Order on Remand.⁴³ Similarly, Movants argue that the Commission has failed to consider the impact of its Remand Order on the justness and reasonableness of the Station Power Protocol.⁴⁴

2. Commission Determination

30. We see no need to reevaluate the justness and reasonableness of the current CAISO Station Power Protocol at this time. The challenge in court was a jurisdictional challenge, so the Order on Remand was limited to implementation of the jurisdictional findings of the Court of Appeals. Under such circumstance, the Commission did not

⁴² See, e.g., D.C. Circuit Decision, 603 F.3d at 1002 ("It is, of course, true that under differing netting periods FERC can conclude that no transmission for station power took place in a month in which California would recognize retail sales of that power, but that is hardly a conflict.").

⁴³ California Generators' Rehearing Request at 4, 8, 27-30.

⁴⁴ Movants' Rehearing Request at 6, 66-69.

need to, and did not, re-examine the particulars of the CAISO Station Power Protocol itself. Nevertheless, we encourage interested parties to address these issues as may be necessary through the CAISO stakeholder process. We do not here mandate which particular steps CAISO may need to undertake to update its Station Power Protocol. We therefore deny rehearing on this issue.

The Commission orders:

The requests for rehearing or clarification are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.