

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

Duke Energy Moss Landing LLC)	
)	
v.)	
)	Docket No. EL04-130-002
California Independent System Operator Corp.)	
)	
California Independent System Operator Corp.)	Docket No. ER05-849-011
)	
		(Not consolidated)

**JOINT MOTION FOR EXPEDITIOUS ACTION ON REMAND
AND FOR EXTENSION OF TIME PERIOD FOR ANSWERS**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the Electric Power Supply Association (“EPSA”),² Dynegy Moss Landing, LLC (f/k/a Duke Energy Moss Landing, LLC) (“Moss Landing”),³ the Independent Energy

¹ 18 C.F.R. §§ 385.212, 385.213 (2009).

² Given the importance of the issues involved, and the potential consequences if the Commission does not adequately explain the jurisdictional bases for its station power policy, EPSA is separately filing a motion to intervene out-of-time in the above-captioned proceedings.

³ Moss Landing is the complainant in, and thus a party to, Docket No. EL04-130-000. See 18 C.F.R. § 385.102(c)(1) (2009). The Commission granted Moss Landing’s timely motion to intervene in Docket No. ER05-849-000. See *Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,452 at P 10 (2005) (“CAISO I”), *on reh’g*, 114 FERC ¶ 61,176, *on reh’g*, 115 FERC ¶ 61,038 (2006), *on reh’g*, 125 FERC ¶ 61,072 (2008) (“CAISO IV”), *clarified*, 126 FERC ¶ 61,050 (2009), *vacated & remanded sub nom. Southern Cal. Edison Co. v. FERC*, Nos. 05-1327 and 08-1384, slip op. (D.C. Cir. May 4, 2010) (“SCE”). As a party to Docket Nos. EL04-130-000 and ER05-849-000, Moss Landing “need not separately file a motion to intervene in each subsequent sub-docket to maintain its status as a party.” *Southern Co. Energy Mktg., Inc. & Southern Co. Servs., Inc.*, 109 FERC ¶ 61,275 at P 27 (2004) (“SCEM”), *on reh’g*, 111 FERC ¶ 61,144 (2005).

Producers Association (“IEP”),⁴ and the Western Power Trading Forum (“WPTF”)⁵ (collectively, “Movants”) respectfully submit this joint motion for expeditious action on remand (this “Motion”) from the decision of the U.S. Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) in *SCE*.⁶ For reasons discussed below, the Commission should act expeditiously on remand to re-affirm its longstanding station power policies and to provide a more comprehensive explanation for those policies, as requested by the D.C. Circuit. In particular, the Commission should take this opportunity to set out clearly the basis for the Commission’s jurisdiction to establish the netting interval used to determine whether a generator has self-supplied station power, and to explain in detail why state authority to regulate retail rates does not extend to regulating the practice of generators’ self-supplying station power.

The Commission’s station power policy is a matter of great importance to power markets across the Nation. It is for this reason that EPSA, the national trade association for competitive power suppliers, as well as IEP and WPTF, regional trade associations representing suppliers in the California Independent System Operating Corporation (the “CAISO”), are joining with Moss Landing, which filed the complaint that initiated these proceedings, to file this Motion. Any

⁴ The Commission granted IEP’s timely motion to intervene in Docket No. ER05-849-000. See *CAISO I* at P 10. As a party to Docket No. ER05-849-000, IEP “need not separately file a motion to intervene in each subsequent sub-docket to maintain its status as a party.” *SCEM* at P 27.

⁵ The Commission granted WPTF’s motion to intervene out-of-time in Docket Nos. ER05-849-002, *et al.* See *CAISO IV* at P 20. As a party to Docket No. ER05-849-002, WPTF “need not separately file a motion to intervene in each subsequent sub-docket to maintain its status as a party.” *SCEM* at P 27.

⁶ The D.C. Circuit’s mandate to the Commission issued on June 24, 2010, so these cases are now before the Commission.

material change in the Commission's station power policy could significantly disrupt the Nation's wholesale power markets, undermine the Commission's ongoing efforts to promote competition and prevent undue discrimination, and prevent customers from gaining access to lower cost sources of generation.

Recognizing that other parties may have an interest in responding to this submission, Movants request that the Commission extend the time period for answering from the 15 days prescribed by Rule 213(d)(1) of the Commission's Rules of Practice and Procedure⁷ to a total of 30 days. Granting this extension will ensure that all parties have an opportunity to weigh in on the important issues raised in these proceedings and allow the Commission to deny any requests for unnecessary additional briefing or hearing procedures, thus putting the Commission in the best position to take expeditious action on remand.

I. BACKGROUND

The Commission's precedent addressing station power issues extends back nearly a decade. It has been utilized to prevent undue discrimination within Commission-jurisdictional markets across the Nation and to level the competitive playing field within those markets by easing unfair disparities between merchant generators and vertically integrated utilities. The Commission's station power policies have established a straightforward test for determining, on one hand, how much of a generator's total output is being made available for transmission and wholesale sale, and, on the other hand, how much of the generator's output is being used to satisfy its own station power requirements.

⁷ 18 C.F.R. § 385.213(d)(1) (2009).

A. The Commission's Station Power Policies Generally

The Commission's precedent on station power has been applied across independent system operator ("ISO")/regional transmission organization ("RTO") markets throughout the nation. As described below, markets in which it has been applied include those administered by PJM Interconnection, L.L.C. ("PJM"); the New York Independent System Operator, Inc. (the "NYISO"); ISO New England Inc. ("ISO-NE"); the Midwest Independent Transmission System Operator, Inc. (the "Midwest ISO"); and the CAISO.

1. Station Power in PJM

In an October 25, 2000 order, the Commission accepted and suspended, subject to refund, tariff sheets submitted by PJM that were intended to clarify that generators could purchase energy needed for station power from the PJM energy market and could net such purchases against sales into that market, "thus treating the station power as 'negative generation.'"⁸ In an order issued March 14, 2001, the Commission addressed PJM's proposed tariff sheets on the merits and also acted on petitions for declaratory order regarding the Commission's jurisdiction over station power.⁹ The Commission held that "a generator may net its station power requirements against the generating facility's gross output whenever the generating facility's gross output exceeds or equals

⁸ *PJM Interconnection, L.L.C.*, 93 FERC ¶ 61,061 at 61,163 (2000) ("*PJM I*").

⁹ *See PJM Interconnection, L.L.C., et al.*, 94 FERC ¶ 61,251 ("*PJM II*"), *on reh'g*, 95 FERC ¶ 61,333 (2001) ("*PJM III*").

its station power requirements, that is, when the generator is self-supplying its station power requirements.”¹⁰

In explaining its decision, the Commission defined 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.”¹¹ Addressing the jurisdictional issues, the Commission recognized that there is a direct relationship between (i) the amount of energy produced by a generator that is available for transmission and sale at wholesale, (ii) the amount of energy produced by the generator that is deemed employed to satisfy the generators’ station power requirements, and (iii) the amount of station power that is purchased at retail from a third party. In noting PJM’s observation that “vertically-integrated utilities in the PJM control area historically have treated station power as “negative generation,”¹² the Commission stated:

[J]urisdiction over the provision of station power depends on how it is supplied. When a generator self-supplies its station power requirements, the traditional practice of netting appropriately reflects the fact that there is no sale, whether for end-use or otherwise. When a generator’s supply of station power is from a third party, then there is a sale for end-use that we do not regulate.¹³

¹⁰ *PJM II* at 61,882.

¹¹ *Id.* at 61,889.

¹² *Id.* (quoting PJM Interconnection, L.L.C., Docket No. ER00-3513-000 (filed Aug. 24, 2000)).

¹³ *Id.* at 61,891.

The Commission made a point of “emphasiz[ing] that a generator may net against its gross output as measured over a specific time period . . . , even though there may be occasions during that [time period] when gross output is less than station power requirements.”¹⁴

The Commission also justified its station power policies as necessary to prevent undue discrimination. As the Commission explained, allowing “self-supplying merchant generators to net over an appropriate time period will ensure that they do not bear a cost that has no relationship to any ‘service’ purportedly being provided by another party,” and will thus “eliminate disparities between merchant generators and vertically-integrated utilities.”¹⁵

2. Station Power in the NYISO

One New York utility’s ability to impose retail charges for station power was the subject of the petition for declaratory order addressed in *PJM II*. Broader questions of modifications to the NYISO tariff necessary to allow generators to self-supply station power were addressed through a complaint proceeding initiated by KeySpan-Ravenswood Inc. (“KeySpan”).¹⁶ Responding to the complaint, the Commission required the NYISO to modify its tariff and again determined that the netting of station power was essential “to ensure that

¹⁴ *Id.*

¹⁵ *Id.* at 61,893.

¹⁶ Complaint of KeySpan-Ravenswood, Inc. to Find Netting the Just and Reasonable Method for Accounting for Station Power, Docket No. EL01-50-000 (filed Mar. 8, 2001).

[generators] do not bear a cost that has no relationship to any 'service' purportedly being provided by another party.”¹⁷

Denying rehearing, the Commission rejected claims that netting over a reasonable time period improperly encroached upon the New York Public Service Commission’s retail rate jurisdiction. The Commission explained that “netting is simply the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output.”¹⁸ The Commission held that “deem[ing] a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting interval” was “not only impractical, and contrary to traditional utility practice and legal precedent, but . . . also . . . anti-competitive.”¹⁹

The D.C. Circuit affirmed the Commission’s orders on KeySpan’s complaint in *Niagara Mohawk*, despite finding the Commission’s jurisdictional rationale “a bit confusing.”²⁰ After observing that the Commission “does not appear to rely on its wholesale jurisdiction (although the generator's delivery of power to the grid is a wholesale sale and the deduction made for station power taken is valued at the same wholesale price),”²¹ the Court stated that the

¹⁷ *KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,167 at 61,676 (2002) (“*KeySpan I*”), *on reh’g*, 107 FERC ¶ 61,142 (“*KeySpan II*”), *aff’d sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) (“*Niagara Mohawk*”).

¹⁸ *KeySpan II* at P 38.

¹⁹ *Id.* at P 41.

²⁰ *Niagara Mohawk* at 828.

²¹ *Id.*

Commission had “not clearly articulated why that jurisdiction permits it to determine that no sale of any kind — including a retail sale — takes place when the generator takes station power from the grid.”²² Nonetheless, because petitioners conceded the need for “some practical accommodation” in regards to the setting of the netting interval, the D.C. Circuit could “see no principled reason” why the Commission’s jurisdiction should vary depending on the length of the netting interval.²³

3. Station Power in ISO-NE

In various orders, the Commission has made clear that its station power policies apply with equal force in ISO-NE,²⁴ even as it has allowed ISO-NE to employ an hourly netting interval, in contrast to the monthly netting intervals used by other ISOs/RTOs.²⁵ As the Commission stated succinctly in one such order: “Self supplying of station power is not a sale.”²⁶

4. Station Power in the Midwest ISO

More recently, in a January 2004 order, the Commission accepted tariff revisions relating to station power proposed by the Midwest ISO.²⁷ The

²² *Id.*

²³ *Id.*

²⁴ See *Northeast Utils. Serv. Co. v. NRG Energy, Inc.*, 101 FERC ¶ 61,327 at P 26 (2002) (“*NUSCO*”); *USGen New England, Inc.*, 99 FERC ¶ 61,169 at 61,684, *on reh’g*, 100 FERC ¶ 61,199 (2002); *Rumford Power Assocs., L.P., et al.*, 97 FERC ¶ 61,173 at 61,814 n.50 (2001).

²⁵ See *Rumford* at 61,814.

²⁶ *NUSCO* at P 26.

²⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,073 at P 23 (2004) (“*Midwest ISO I*”), *on reh’g*, 110 FERC ¶ 61,383 (“*Midwest ISO II*”), *on reh’g*, 112 FERC ¶ 61,211 (2005).

Commission accepted the Midwest ISO's proposal to deviate from the monthly netting interval used to determine whether a generator has self-supplied for purposes of determining charges for transmission service when a generator is self-supplying from an off-site generation source because the Midwest ISO did not yet have locational marginal pricing.²⁸ The Commission "emphasize[d] that this finding only relates to the provision of transmission service for off-site supply of station power service" and not to the determination of "whether station power has been self-supplied."²⁹

Addressing a proposed tariff provision that could have been "used to impose charges inconsistent with" the Midwest ISO's tariff, the Commission emphasized that its station power rules "do not supersede state jurisdiction."³⁰ As the Commission explained, the "Commission's station power rules . . . merely apply traditional legal boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event of a conflict between federal and state tariff provisions[,] the federal tariff provisions must control."³¹ In denying rehearing, the Commission stressed that "not all end use necessarily involves a sale for end use," and that "when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control."³²

²⁸ See *Midwest ISO I* at P 24.

²⁹ *Id.* at P 25.

³⁰ *Id.* at P 45.

³¹ *Id.*

³² *Midwest ISO II* at P 34.

B. The Commission's Previous Orders And The D.C. Circuit's Decision Remanding For Further Proceedings

Consistent with its orders addressing station power in other markets, the Commission in these proceedings required CAISO to revise its tariff provisions to comply with the Commission's station power policy.

1. Moss Landing's Complaint

On September 1, 2004, Moss Landing filed a complaint seeking revisions to the CAISO Operating Agreement and Tariff (the "CAISO Tariff") to allow it to self-supply station power in a manner consistent with established precedent in PJM, NYISO, and MISO.³³ Moss Landing noted in its complaint that "[t]he California market is well suited to the application of the Commission's station power precedent" because the "CAISO administers organized wholesale markets in which prices are established in real-time and a formal settlement process is in place to settle the market at the conclusion of the monthly period."³⁴

With the CAISO conceding that its tariff should be revised to conform with the Commission's station power policies, the Commission granted Moss Landing's complaint and ordered the CAISO to work with stakeholders to develop revised tariff language allowing generators to self-supply station power.³⁵ The Commission declined to "revisit . . . fundamental station power issues" that were

³³ Complaint of Duke Energy Moss Landing, LLC Against the California Independent System Operator Corporation, Docket No. EL04-130-000 at 3 (filed Sept. 1, 2004) ("Moss Landing Complaint").

³⁴ *Id.* at 11 (citations omitted).

³⁵ See *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,170 at P 19 (2004) ("*Moss Landing I*"), *on reh'g*, 111 FERC ¶ 61,451 (2005) ("*Moss Landing II*"), *vacated & remanded*, SCE.

“addressed in previous orders where [it] fully articulated [its] station power policies.”³⁶ On rehearing, the Commission again made clear that “netting is simply the traditional accounting for station power as net, or negative generation, that is, calculating the output of a particular generating facility net of station power requirements.”³⁷

2. The CAISO’s Tariff Filing

On April 18, 2005, following stakeholder meetings, the CAISO submitted proposed revisions to the CAISO Tariff relating to the procurement and delivery, which permitted generators to self-supply station power over a monthly netting interval.³⁸ In conditionally accepting in part and rejecting in part the CAISO’s filing, the Commission again rebuffed challenges to its jurisdiction, including the notion that “‘retail sales’ of station power may occur at some time during the one-month netting period when the generator undergoes momentary instances of negative output.”³⁹

In a subsequent order on rehearing and clarification, the Commission reaffirmed its jurisdiction to determine when a generator has self-supplied station power.⁴⁰ The Commission described the D.C. Circuit’s *Niagara Mohawk* decision as “accept[ing] 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

³⁶ *Moss Landing I* at P 21.

³⁷ *Moss Landing II* at P 15 (citing *PJM II*).

³⁸ Amendment No. 68 to the ISO Tariff, Docket No. ER05-849-000 (filed Apr. 18, 2005).

³⁹ *CAISO I* at P 15.

⁴⁰ See *CAISO IV* at PP 37-88.

long as its output is positive for” the prescribed netting interval.⁴¹ Accordingly, in light of *Niagara Mohawk*, the Commission’s orders did not include a particularly detailed explanation or lengthy justification for exercising its jurisdiction and applying its station power policies.

Nonetheless, with respect to continued efforts to impose retail charges on generators that were self-supplying station power pursuant to the CAISO Tariff, the Commission stated:

Any attempt at the state level to assert (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.⁴²

The Commission thus reaffirmed that self-supplying station power is a practice over which the Commission has jurisdiction.

3. The D.C. Circuit’s Remand Decision

In its May 4, 2010 decision in *SCE*, the D.C. Circuit vacated the Commission’s orders on Moss Landing’s complaint and the subsequent CAISO tariff filing, and remanded to the Commission for further explanation. Noting that the Commission’s “primary justification” for its orders was the earlier *Niagara Mohawk* decision, the D.C. Circuit panel opinion, authored by the same judge as *Niagara Mohawk*, indicated that the Commission had “overread[] that case.”⁴³ According to the court, *Niagara Mohawk* was a “troubling case” that “was

⁴¹ *Id.* at P 69 (citing *Niagara Mohawk* at 830 n.9).

⁴² *Id.* at P 72.

⁴³ *SCE*, slip op. at 7.

resolved based on a concession petitioners made — not made by petitioner[] here.”⁴⁴ Specifically, the D.C. Circuit explained that petitioners in *Niagara Mohawk* had conceded that the Commission had sufficient jurisdiction to “dictate an hourly netting interval for retail sales,” but not to prescribe a monthly netting interval, and the Court could see “no principled basis for distinguishing those two periods as it related to FERC’s jurisdiction.”⁴⁵

Considering the “arguments independent of *Niagara Mohawk*,”⁴⁶ the D.C. Circuit was unable to affirm the challenged orders. The D.C. Circuit recognized that the Commission “has the undeniable right to approve the netting methodology to determine how much electricity generators deliver to and take from the grid for transmission purposes.”⁴⁷ But it did not “understand why” the Commission “is empowered to conclude that a retail sale has *not* taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission.”⁴⁸ It also did not understand why the state’s attempt to set a different netting period for station power would cause a conflict with the Commission’s netting interval.⁴⁹ And it noted that the Commission has “yet to explain” why its “general concern” about undue discrimination “can be grounds to preempt the state’s authority to set the netting period for station power . . . in the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*, slip op. at 9.

⁴⁷ *Id.*, slip op. at 3.

⁴⁸ *Id.*, slip op. at 9.

⁴⁹ *Id.*, slip op. at 10–11.

retail market or to allow utilities to impose consumption charges.”⁵⁰ Accordingly, the D.C. Circuit remanded to the Commission to better explain its station power policies.⁵¹

Significantly, in remanding to the Commission, the D.C. Circuit expressed skepticism and confusion over certain issues but did not foreclose any potential justification for the Commission’s station power policies. In particular, the D.C. Circuit did not address whether the Commission’s jurisdiction over wholesale sales of electric energy would provide a “stronger basis” for asserting jurisdiction, because the Commission’s reasoning rested “only on its jurisdiction over transmission.”⁵² Similarly, the D.C. Circuit declined to address arguments by Moss Landing and other intervenors that allowing states to set the netting interval would result in an impermissible “trap[ping]” of costs, because the Commission had not relied on any such rationale in its orders.⁵³

II. MOTION FOR EXPEDITIOUS ACTION ON REMAND

The D.C. Circuit’s remand decision in *SCE* has national implications that extend far beyond the parties to this proceeding. On remand, the Commission should act expeditiously to explain and reaffirm its long-standing station power policies.

The remand provides an opportunity for the Commission to reaffirm nearly a decade’s worth of station power precedent through which the Commission has

⁵⁰ *Id.*, slip op. at 12.

⁵¹ *Id.*

⁵² *Id.*, slip op. at 7 & n.5.

⁵³ *Id.*, slip op. at 11.

adopted sound policies that have prevented undue discrimination in favor of vertically-integrated utilities and against competitive generators, including Movants and (in the case of EPSA, IEP, and WPTF) their members. A clear and detailed explanation of the Commission's policy will put an end to unfortunate and unduly discriminatory practices, and ward off unnecessary further litigation.

Unless the Commission acts decisively to provide a well-explained justification for its station power policies, the D.C. Circuit's decision foreshadows potential future appeals that could threaten to upend this important policy, thereby unsettling the Nation's energy markets and undermining the Commission's attempts to promote competition and prevent undue discrimination. In particular, if the Commission does not adequately explain its station power policies, the next court to consider a challenge to those policies might be prompted to reach the disastrous (and erroneous) conclusion that the Commission's failure to justify its policies means that it lacks jurisdiction to prevent undue discrimination against competitive generators in addressing issues concerning station power.

Fortunately, there is nothing to prevent the Commission from acting expeditiously to issue an order articulating a reasoned basis for its station power policies. The issues before the Commission on remand are purely legal and thus do not require a robust factual record. To the extent the Commission has need

to support its remand order with evidence, the extensive evidentiary records already developed in these proceedings are more than adequate.⁵⁴

The D.C. Circuit's decision in *SCE* has come as an unwelcome shock to the competitive power industry and has shaken the widely shared view that the Commission's jurisdiction over station power netting is well-settled and on solid footing. Swift action on the part of the Commission is therefore needed to provide relief to generators and to restore certainty to the Nation's electric markets.

III. THE COMMISSION POSSESSES THE NECESSARY JURISDICTION AND SHOULD EXERCISE THAT JURISDICTION TO PREVENT UNDUE DISCRIMINATION AGAINST COMPETITIVE GENERATORS WITH RESPECT TO STATION POWER.

A. The Statutory Scheme Establishes A Bright Line That Divides State and Federal Jurisdiction Over Electric Sales.

The Federal Power Act ("FPA") establishes a bright-line division of authority between federal and state regulators. As the United States Supreme Court has explained, when Congress enacted the FPA, it "meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary . . . case by case analysis."⁵⁵ Congress drew this bright jurisdictional line by making the Commission's jurisdiction "plenary and extending it to all wholesale sales in interstate commerce."⁵⁶

⁵⁴ To allow parties sufficient time to prepare and submit responses to this pleading, and to avoid the need for extended briefing or hearing procedures, Movants include a motion for extension of time for answers herein. See *infra* Part V.

⁵⁵ *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964) ("*FPC v. SCE*").

⁵⁶ *Id.* at 216.

A clear division of authority between federal and state regulators was not the only way to address the regulation of electric energy. When markets were localized and regulating electric utilities “was an almost exclusive function of local and state governments,”⁵⁷ courts “adopted a more flexible approach to state power under the Commerce Clause.”⁵⁸ Under this earlier, now-superseded line of authority, courts were “less concerned to find a point in time and space where . . . interstate commerce . . . ends and intrastate commerce begins” and instead “looked to the nature of the state regulation involved, the objective of the State, and the effect of the regulation upon the national interest in the commerce.”⁵⁹ As in other federal regulatory schemes, state regulations were not displaced as long as they avoided directly conflicting with federal regulatory authority.

When Congress enacted the FPA, however, it rejected this approach and adopted a test that “denied state power to regulate a sale ‘at wholesale to local distributing companies.’”⁶⁰ More specifically, Congress made clear that the Commission would have “plenary” authority and exclusive jurisdiction over all wholesale sales of electric energy in interstate commerce, except those sales

⁵⁷ Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice*, at 6 (3d ed. 1993).

⁵⁸ See *FPC v. SCE* at 214 (citing *Illinois Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 505 (1942)).

⁵⁹ *Id.*

⁶⁰ *Id.*

that Congress had carved out from federal regulation and made “explicitly subject to regulation by the States.”⁶¹

The FPA thus grants the Commission exclusive jurisdiction over “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.”⁶² The statute defines “sale of electric energy at wholesale” as “a sale of electric energy to any person for resale.”⁶³ It expressly contemplates that the Commission will regulate “matters relating to generation.”⁶⁴ And it makes clear that the Commission has exclusive jurisdiction over not only wholesale sales of energy and transmission but also over any “rule,” “regulation,” or “practice” that affects or pertains to wholesale rates and transmission.⁶⁵ Congress thus imposed on the Commission an affirmative obligation to ensure that all rates charged “in connection with the transmission or sale of electric energy,” as well as “***all rules and regulations affecting or pertaining to such rates or charges***,” are just and reasonable.⁶⁶

The FPA reserves to the states jurisdiction over local sales of electricity at retail.⁶⁷ But, significantly, states are not authorized to exercise jurisdiction over rules, regulations, and practices affecting or pertaining to sales at retail.⁶⁸

⁶¹ *Id.* at 216.

⁶² 16 U.S.C. § 824(b)(1) (2006).

⁶³ 16 U.S.C. § 824(d) (2006).

⁶⁴ 16 U.S.C. § 824(a) (2006).

⁶⁵ 16 U.S.C. § 824e(a) (2006).

⁶⁶ 16 U.S.C. § 824d(a) (2006) (emphasis added).

⁶⁷ 16 U.S.C. § 824(b)(1) (2006).

⁶⁸ See *Public Utils. Comm’n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (states lack authority to regulate interstate commerce); see also *New*

Accordingly, when the Commission is exercising its authority over transmission or wholesale sales, “exceptions to this primary grant of jurisdiction” must be “strictly construed” and states’ interests in regulating practices affecting retail sales must give way to federal authority.⁶⁹ Congress did not intend that the Commission’s authority would “vary from state to state, depending upon the degree of state regulation and of state opposition to federal control.”⁷⁰

Interpreting the statute and applying these settled principles, courts have long recognized that when a rule, regulation, or practice “affects or pertains to” transmission or wholesale sales of electric energy, the Commission has plenary authority to regulate, even if that same rule or regulation “affects or pertains to” retail matters subject to regulation by a state.

In *Entergy Services Inc. v. FERC*,⁷¹ for example, the Commission determined that a utility’s allocation proposal for generator imbalance service, which deemed QF output to go first to a scheduled transaction and then to serve host load, was unduly discriminatory. Under the proposed allocation scheme, any energy shortfalls were charged to the QF’s host load, which was required to obtain its needed electricity from utility at retail. Although the Commission’s orders directly affected retail sales, the D.C. Circuit affirmed that the Commission had jurisdiction to require the utility to refund retail rates collected through a state

York v. FERC, 535 U.S. 1, 3–4 (2002) (“*New York*”) (noting that the FPA “authorized federal regulation of electricity in areas beyond the reach of state power and “extended federal coverage to some areas that had previously been state regulated”).

⁶⁹ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 679 (1954) (quoting *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690–91 (1947)).

⁷⁰ *Id.* at 681.

⁷¹ 400 F.3d 5 (D.C. Cir. 2005).

approved tariff.⁷² As the D.C. Circuit explained, the utility’s allocation scheme was used “to give the appearance of a retail sale to a QF host,” but that did not change the fact that, under the Commission’s approved “host loads first” methodology, this QF output should have been “applied initially to its host load so that any deficiency would result in a wholesale sale to satisfy the QF’s schedule.”⁷³ In short, because the Commission’s “host loads first” policy was implemented in connection with a wholesale service subject to the Commission’s jurisdiction, the Commission acted within its authority to determine that there was “no retail sale,”⁷⁴ and the “ordering of refunds . . . has nothing to do with the regulation of retail rates.”⁷⁵

Similarly, in *Mississippi Industries v. FERC*,⁷⁶ the D.C. Circuit addressed Commission rules concerning the allocation of investment costs in nuclear energy among four operating companies of the Middle South Utilities. The Court held that because “[c]apacity costs are a large component of wholesale rates” and thus significantly affect wholesale prices, the Commission’s “jurisdiction under such circumstances is unquestionable.”⁷⁷ The Court further concluded that

⁷² *Id.* at 7 (the “rates at issue related to what Entergy should have considered as wholesale service provided by Entergy to QFs”).

⁷³ *Id.* at 7-8.

⁷⁴ *Entergy Services, Inc., et al.*, 103 FERC ¶ 61,125 at 61,399 P 32 (2003).

⁷⁵ *Entergy Services, Inc., et al.*, 104 FERC ¶ 61,061 at 61,213 P 18 (2003).

⁷⁶ 808 F.2d 1525 (1987) (“*Mississippi Industries*”) A unrelated portion of this decision was vacated on April 3, 1987 by order of the Court *en banc*. See *Mississippi Industries v. FERC*, 814 F.2d 773 (D.C. Cir. 1987). On June 24, 1987, the Court *en banc*, on its own motion, vacated the April 3, 1987 order and reinstated the relevant sections of the original order. See *Mississippi Indus. v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987).

⁷⁷ *Mississippi Industries* at 1543.

merely because the Commission’s “assertion of jurisdiction has some impact on state regulation does not make it unlawful.”⁷⁸ Even though parties argued that the Commission’s action “has such an extensive impact on the rate base in the state jurisdictions that it, in effect, removes regulation of retail rates and capacity construction from the hands of the state commissions,” the Court deemed these concerns “unfounded.”⁷⁹ Because the Commission was exercising its authority to regulate practices that affected wholesale rates meant that the Commission was properly exercising jurisdiction.⁸⁰

In addition to recognizing that the Commission has authority to regulate **practices** that **affect** wholesale rates or transmission, courts have also held that the Commission has authority to determine **which** regulations “affect or pertain” to wholesale sales and transmission. As the Supreme Court has noted, the jurisdictional status of facilities is “a question of fact to be decided by the [Commission] as an original matter.”⁸¹ Indeed, as the D.C. Circuit has further explained, because “there is an infinitude of practices affecting rates and service” in the energy industry, the “statutory directive must reasonably be read to require the recitation of only those practices that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally

⁷⁸ *Id.* at 1547.

⁷⁹ *Id.*

⁸⁰ *Id.*; see also *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991) (holding that section 4 of the Natural Gas Act, which includes substantially similar language to the FPA, grants the Commission “the ability to regulate other aspects of the . . . industry as necessary to make effective its primary control over interstate transportation and sales”).

⁸¹ *FPC v. SCE* at 210.

understood in any contractual arrangement as to render recitation superfluous.”⁸² The D.C. Circuit has thus concluded that “it is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive.”⁸³ As a result, the Commission may make a variety of assessments in determining its own authority, including “identifying” which facilities are used in local distribution and outside its jurisdiction, “without purporting to regulate them.”⁸⁴

The cases discussed above make clear that the Commission’s jurisdiction over practices affecting transmission and wholesale sales does not evaporate merely because those practices may also affect retail rates. To the contrary, that Commission-approved rates and charges for wholesale sales of electricity, as well as “rules and regulations affecting” such charges, may “affect” retail rates is not only permissible, but affirmatively expected.⁸⁵ As the D.C. Circuit has recognized, the FPA was specifically designed to “encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices.”⁸⁶ Accordingly, when the Commission is properly exercising its jurisdictional

⁸² *Cleveland v. FERC*, 773 F.2d 1369, 1376 (D.C. Cir. 1985).

⁸³ *Id.*

⁸⁴ *New York* at 23.

⁸⁵ The Commission has noted that case law has affirmed that it has “considerable flexibility in determining what rates are ‘for or in connection with,’ ‘affecting,’ ‘pertaining’ or ‘relating to’ jurisdiction services and, accordingly, must be filed for Commission review.” See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,987 (1993).

⁸⁶ *NAACP v. FERC*, 425 U.S. 662, 669-70 (1976); see also *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978) (the Natural Gas Act’s “fundamental purpose . . . is to assure an adequate and reliable supply of gas at reasonable prices”); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981) (decisions interpreting analogous provisions of the FPA and Natural Gas Act can be cited “interchangeably”).

authority over practices affecting wholesale rates, the possibility of “incidental effects” on retail rates “is not per se an exercise of jurisdiction.”⁸⁷

B. The Practice Of Self-Supplying Station Power, And The Rules And Regulations Concerning Station Power, Affect And Pertain To Transmission And Wholesale Sales.

The Commission has jurisdiction because the practice of self-supplying station power, as well as the rules and regulations governing that practice, directly affects and pertains to transmission and wholesale sales of electricity. The federal regulatory scheme depends on identifying how much power a generator is producing and how much of that power is available for transmission and sale on the interstate transmission grid.

1. The Commission Has Authority Under The FPA To Establish A Netting Formula For Station Power Sales.

The Commission’s policy establishes a netting formula used to determine what portion of a generator’s gross output is deemed energy transmitted for sale in interstate commerce and what portion is deemed used by the generator to meet its station power needs. Because the amount of electricity deemed used to fulfill the generator’s station power requirements reduces the amount of generator-produced energy transmitted over the grid, the netting formula directly affects the rates and conditions for the transmission and sale of electricity in

⁸⁷ *NARUC v. FERC*, 475 F.3d, 1277, 1281-82 (D.C. Cir. 2007); see also *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 696 (D.C. Cir. 2000) (the Commission’s “assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority”).

interstate commerce. The Commission's decision to set an appropriate netting interval thus falls squarely within its authority under the FPA.⁸⁸

The D.C. Circuit's *SCE* decision states that the Court did "not understand why" the Commission "is empowered to conclude that a retail sale has *not* taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission."⁸⁹ In response, the Commission should explain that, as noted above, its authority under the FPA extends beyond merely regulating wholesale sales and transmission to also include authority to regulate practices that affect wholesale sales and transmission. It should further explain that the amount of energy deemed used by the generator to satisfy its own station power requirements has a direct and straightforward mathematical relationship to the amount of generator-produced energy available for transmission and wholesale sales — every MW-hour of energy produced by a generator that is deemed used to fulfill the generator's station power requirements is one less MW-hour that is transmitted over the interstate transmission grid and, in effect, one less MW-hour available for wholesale sale.⁹⁰

⁸⁸ 16 U.S.C. § 824d(a) (2006).

⁸⁹ *SCE*, slip op. at 9.

⁹⁰ See California Independent System Operator Corporation, Station Power Program Overview at 4-6 (Version 1.1) (describing the adjustment by which CAISO accounts for self-supplied station power by applying load-based charges to load reported under a generator's "On-Site Self-Supply Load ID"), *available at* <http://www.caiso.com/17d1/17d1a7c658b70.pdf>. To be sure, some parties may have questions about how precisely the CAISO's adjustment accounts for self-supplied station power. But any such questions are irrelevant to the jurisdictional issue, and are matters to be addressed through changes to the CAISO Tariff or challenges to its application. The Commission's authority to determine whether rules and regulations affecting or pertaining to jurisdictional rates are just and reasonable obviously does not vary based on the degree of support for, or opposition to, its determinations.

The Commission should also explain that determining the amount of energy that a generator uses to satisfy its own station power requirements is necessary to fulfill the Commission's statutory obligation to promote competition and to prevent undue discrimination. The Commission should find, as it has in previous orders, that vertically integrated utilities do not require their generation assets to purchase station power at retail, and that an insufficiently lengthy netting period unduly discriminates against merchant generators competing in interstate commerce. If it is not stopped, this unfair discrimination ultimately harms consumers by denying them access to alternative, competitive sources of generation. Accordingly, holding aside the question whether a state's authority to regulate station power is displaced (an issue that is discussed in more detail below), the Commission's jurisdiction is beyond reasonable dispute.

2. The Commission Should Expressly Invoke Its Authority Over Wholesale Sales.

The D.C. Circuit's remand decision expressed confusion over whether the Commission's authority to establish station power policies is justified by its authority to regulate transmission and/or its authority to regulate wholesale sales.⁹¹ Although the Commission's statutory authority to regulate practices affecting either transmission *or* wholesale sales is a sufficient basis to justify its station power policies, to avoid any further or lingering confusion, the

turn on the existence of parties that might seek to challenge the Commission's rules and regulations.

⁹¹ SCE, slip op. at 6–7.

Commission should make clear that its station power policies are supported by its authority to regulate both services.⁹²

By invoking its jurisdiction over wholesale sales, in addition to its jurisdiction over transmission, the Commission should make clear that it is not attempting to regulate station power as a wholesale sale. The Commission is merely underscoring that the practice of self-supplying station power directly affects and pertains to the Commission's regulation of both transmission and wholesale sales because the energy not used to meet a generator's station power requirements is transmitted and sold at wholesale in interstate commerce.

Movants recognize that the Commission has previously declined to ground its station power policies in its jurisdiction over wholesale sales. But those decisions do not foreclose this rationale. Although the Commission in its earlier orders rejected the theories put before it, it never squarely addressed whether there is a nexus between wholesale sales and station power.

In the proceeding involving station power netting in PJM, for example, the Commission rejected "theories raised by parties" that it had jurisdiction over "**third-party provision** of station power because it 'affects or relates' to wholesale services or because it is comparable to other wholesale services."⁹³ In

⁹² That the Commission's station power policies are justified because generator self-supplied station power affects both transmission and wholesale sales does not contradict the fact that the Commission has "through its unbundling initiative" created "separate markets for wholesale sales, transmission, and retail sales and distribution" for pricing and selling purposes. *SCE*, slip. op. at 10. The products are treated as separate markets for administrative and regulatory ease. But, both as a practical and logical matter, that does not mean that the different products are wholly unrelated or hermetically sealed from each other for regulatory purposes.

⁹³ *PJM II* at 61,894 (emphasis added)

that proceeding, only two “general types of argument” were made to the Commission regarding its jurisdiction over station power: First, “station power to a generating facility is an integral and absolutely essential part of the interconnection and operation of a generator.”⁹⁴ Second, “station power is sufficiently analogous to restoration or blackstart service or generation interconnection, in that they all relate to jurisdictional transmission service.”⁹⁵ Although the Commission rejected both arguments, it did not close the door to a finding that its jurisdiction over wholesale sales supplies a basis for exercising authority over station power in the context of self-supply or station power netting generally. To the contrary, the Commission noted in its order that, “[w]hile we do not have jurisdiction over the provision of station power by third parties, because that is a sale for end use, the cost of station power may be a component of the cost of electric energy sold at wholesale, over which we do have jurisdiction.”⁹⁶

Building on its past precedent, the Commission should take this opportunity to explain that the practice of netting station power directly affects and pertains to the Commission’s wholesale jurisdiction, in addition to its jurisdiction over transmission, because energy not used to meet a generator’s station power requirements is transmitted and sold at wholesale in interstate commerce.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at n.76.

3. The Commission Should Respond To Objections That A Netting Formula Is A “Fiction.”

The Commission-approved netting formula is used to determine the portion of an electric generator’s gross output that is deemed energy transmitted for sale in interstate commerce, and the portion deemed to be used for the generator’s own electric needs. It is true that the formula is used to make a fictional determination of what energy is used for wholesale purposes, and what energy is used for station power. But because of the speed at which electricity moves, there is no method under existing technology (or any potential technology in the foreseeable future) to measure energy on a real-time basis, and some sort of fiction must be employed.

The Commission has recognized that, out of necessity, the energy regulatory industry must create fictional standards to effectuate regulation and administration.⁹⁷ These fictions are used in many aspects of the market. For instance, regulators have long employed the fiction that electric energy travels along a specified “contract path” for ratemaking purposes, even if the energy itself will often take a very different path from receipt point to delivery point.⁹⁸

⁹⁷ See, e.g., *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 at 62,263-64 (2001) (recognizing that because generation and load fluctuate, some reasonable period must be used to measure generator output).

⁹⁸ See *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 31,667-68 (1996) (discussing the contract path “fiction”), *on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *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*, *New York*.

In the station power context, because the movement of electricity is instantaneous, it is impractical to attempt to determine whether the electricity produced by the generator is used to meet its station power needs or if the generator is using electricity bought at retail. Accordingly, to determine how much electricity is produced to be transmitted and sold at wholesale, the Commission has done what is practicable and created a netting formula. Admittedly, any netting interval — whether it is imposed by the Commission or by state regulators — will be both over- and under-inclusive in terms of capturing the precise flows that may be occurring from moment to moment. But concerns about what netting interval best reflects the electrical reality have no bearing on the jurisdictional question, any more than the Commission's acceptance of an allegedly unjust and unreasonable rate for a given wholesale sales or transmission transaction would divest it of jurisdiction over that rate.

C. The Commission's Authority To Regulate The Practice Of Self-Supplying Station Power Preempts Inconsistent State Regulations.

Because it is clear that the Commission has authority under the FPA to regulate station power, it is also clear that the exercise of that authority displaces contradictory state regulations. If the Commission's authority were not exclusive and plenary, there could be two alternative outcomes: (1) state regulators could dictate the netting interval and the Commission could defer to the state's judgment, or (2) the Commission and state regulators could approve and enforce different netting intervals. Neither outcome is permissible under the FPA.

1. The Commission Cannot Be Required To Defer To State Practices.

The Commission has previously determined,⁹⁹ and state regulators have previously conceded,¹⁰⁰ that generators are entitled to net some of the electric energy they produce against their station power needs and, accordingly, some netting interval must be employed to determine when a generator is self-supplying station power. Both the Commission and state regulators have also recognized that when a generator is self-supplying its own station power, the generator is neither purchasing power at retail nor transmitting power over the transmission system for sale at wholesale. The question, then, is which regulator (the Commission or the state) should decide when the generator is deemed to have self-supplied station power. One option would be for the Commission to defer to whatever netting interval is applied by state regulators for purposes of determining whether a generator has self-supplied its station power requirements. But that approach would be directly at odds with the FPA.

The FPA is clear that the Commission has jurisdiction over all rules, regulations, and practices “affecting or pertaining to” wholesale rates and transmission. Deferring to the state is impermissible because it would, in effect, turn the FPA upside-down by giving states authority to displace federal authority because a given rule, regulation or practice also affects or pertains to retail sales.¹⁰¹ In particular, by deciding how much of a generators’ output is used to

⁹⁹ See *supra* Part I.A.

¹⁰⁰ See *supra* n.23.

¹⁰¹ See *Kentucky West Virginia Gas Co. v. Pa. Pub. Util. Comm’n*, 837 F.2d 600, 612 (1988) (the “thread of concern running through [cases determining states cannot

satisfy station power requirements (and how much of its station power requirements are fulfilled through third-party retail sales), the state would also be determining how much a generators' total output is available for transmission and sale at wholesale.

Equally significant, taking this approach would contravene Congress's directive that the Commission work to eliminate undue discrimination and preferences. The Commission has consistently recognized that allowing state regulators to set the netting period for station power can result in undue discrimination against competitive generators.¹⁰² Before vertically integrated utilities divested their generation resources, they did not charge themselves when they netted a generation plant's station power load against its gross output. For this reason, as the Commission has previously explained, generators who purchased facilities "to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power."¹⁰³ Allowing state regulators to dictate the applicable netting interval would thus undermine the Commission's efforts to level the competitive playing field between merchant generators and vertically integrated utilities.

Moreover, deferring to the state would open the door to undue discrimination by utilities against competitive generators in favor of their own

regulate interstate electricity matters] is the peril of state activity resulting in local economic protectionism").

¹⁰² See, e.g., *PJM II* at 61,893; see also *supra* Part I.A.

¹⁰³ *Keyspan II* at P 66.

existing generation or purchases. As a general rule, and as the Commission has previously found,¹⁰⁴ vertically integrated utilities that own generation have continued not to charge themselves for station power at retail and have deemed all of their generators' station power requirements to be self-supplied, regardless of what netting period is applied.¹⁰⁵ The upshot is that if the Commission were to allow the state to set the applicable netting interval, millions of dollars of retail charges would be imposed on competitive merchant generators that are not imposed on vertically integrated utilities with generation assets. This in turn would deprive customers of access to low cost, alternative sources of energy.

2. The Commission's Regulation Of Station Power Practices Preempts Contrary State Regulations.

If both the Commission and state regulators were permitted to regulate station power, the likely result would be that generators would be subject to two different and conflicting netting intervals — with the Commission applying one interval in determining how much energy is transmitted and available for wholesale sale; and the state applying a different interval in determining how much energy is purchased at retail. For reasons described below, that scheme of dual regulation would improperly subvert Congress's intent under the FPA and would raise serious concerns under the Constitution's Due Process and Takings

¹⁰⁴ See *KeySpan I* at 61,678 (where the Commission agrees such discrimination is unacceptable in a competitive market).

¹⁰⁵ See *id*; *PJM II* at 61,885 (summarizing the explanation that “facilities owned by a vertically-integrated utility typically take their station power needs from the utility's other generating stations or, if the utility is part of a tight power pool, from the pool's centrally-dispatched available energy supplies. In either case, station power is *never* priced at retail rates.”).

Clauses. It also would sow disorder and promote undue discrimination by subjecting the same uses of the same facilities by the same generators to different rates, terms, and conditions.

a. A Dual Regulatory Scheme Would Prevent Generators From Being Fully Compensated For The Energy They Produce.

What the D.C. Circuit failed to grasp in its *SCE* decision, and what the Commission should clearly explain on remand, is that there is a direct and necessary relationship between the amount of energy produced by a generator that is used to satisfy its station power needs, the amount of energy produced by the generator that is transmitted for wholesale sale, and the amount of energy that a generator purchases at retail to fulfill its station power needs. The more that a generator's total output is allocated to satisfying its station power needs, the less energy is deemed transmitted over the transmission grid for wholesale sale, and the less energy will need to be purchased at retail to satisfy its station power needs. Given this relationship, the Commission's affirmative determination that energy, which otherwise would be deemed transmitted and sold at wholesale, is being employed to satisfy the generator's station power requirements implies a negative judgment that energy needed to satisfy the station power requirements has not been purchased at retail.

If both the Commission and state regulators were permitted to set a netting interval for determining how much energy a generator has used to self-supply station power requirements, the dual regulatory scheme would operate to deny generators full and appropriate compensation for the energy they produce.

It is likely, for instance, that, because state regulators would seek to minimize the retail costs borne by other customer classes, including residential customers, and would not be concerned about imposing additional regulatory burdens on competitive generators, the state-approved netting interval would be shorter than the Commission-approved netting interval. The disparity in netting intervals would force generators to purchase unneeded energy at retail. It also would result in generators being unable to sell a portion of their energy at wholesale and having that energy trapped in a regulatory no-man's land — where it would not be recognized by the Commission as transmitted and available for sale at wholesale, and it also would not be available to be used to serve the generator's station power requirements.¹⁰⁶

The following hypothetical example illustrates the problem: Assume a generator subject to a Commission-approved netting interval of one month and a state-approved netting interval of one hour consumes one MW-hour per day for station power needs, and operates for one day in a 30-day month, generating 100 MW-hours of energy. Also, assume the Commission applies a monthly netting period, while the state applies an hourly netting period. For purposes of determining how much energy the generator has transmitted and sold at wholesale, applying the federal netting rule, the generator would be deemed to

¹⁰⁶ This dual, conflicting regulatory scheme would thus raise serious constitutional concerns under the Takings and Due Process Clauses of the Constitution. As the Supreme Court has recognized in a variety of contexts, a regulation that has the effect of depriving a property owner of the use of its property is a regulatory taking. See *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998); *Lingle v. Chevron U.S.A. Inc.*, 545 U.S. 528, 528-529 (2005); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 692 (1923).

have self-supplied 30 MW-hour of energy and to have had a net output for the month of 70 MW-hour (*i.e.*, 100 MW-hour minus [30 × 1 MW-hour]). For purposes of assessing retail charges, however, applying the state netting rule, the generator would be deemed to have self-supplied only one MW-hour of station power and to have purchased 29 MW-hours of energy at retail over the course of the month (*i.e.*, [30 – 1] × 1 MW-hour).

The result is that the generator is not only required to purchase 29 MW-hours of energy that it does not need, but also that 29 MW-hours of energy will not be deemed available for transmission and sale at wholesale. In effect, under the dual, conflicting regulatory scheme, 29 MW-hours of energy that the generator has produced is not accounted for and the generator receives no compensation for this energy. Although the Commission has determined that the energy is being used by the generator for purposes of fulfilling its station power requirements, the state has disregarded that determination and held in contrary fashion that the energy may not be credited against the generator's station power requirements.

b. Because A Dual Regime Would Prevent Generators From Being Fully Compensated For The Energy They Produce, State Regulations Are Preempted.

That the Commission's decision to set a netting interval for purposes of determining how much of a generator's energy is deployed to self supply station power and how much is transmitted for sale necessarily displaces conflicting

state regulations is confirmed by the logic of the Supreme Court's *Nantahala* line of cases.¹⁰⁷

In *Nantahala*, the Commission allocated low-cost power between two affiliated hydroelectric power plants connected to the power grid. In calculating rates charged to one of the plant's retail customers, the North Carolina Utilities Commission sought to impose a different allocation of power than the Commission. The state argued that, although the Commission had exclusive jurisdiction over wholesale rates, the state's *de facto* reallocation of power was "within the field of exclusive state ratemaking authority engendered by the 'bright line' between state and federal regulatory jurisdiction."¹⁰⁸ According to the state, because it had not expressly required the utility to disobey an order entered by the Commission, the state's regulation over retail rates could co-exist with the Commission's allocation of power.

The Supreme Court rejected the state's position, holding that the Commission's "exclusive jurisdiction applies not only to rates but also to power allocations that **affect** wholesale rates."¹⁰⁹ As the Supreme Court explained, a "State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved

¹⁰⁷ *Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003) ("*Entergy*"); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*Mississippi Power*"); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*").

¹⁰⁸ *Nantahala* at 961.

¹⁰⁹ *Mississippi Power* at 371 (emphasis added) (summarizing *Nantahala* at 966).

rate.”¹¹⁰ Commission-mandated “allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.”¹¹¹ Accordingly, because the Commission’s allocation of power affected wholesale rates set forth in the federal tariff, the state’s jurisdiction to set retail rates did not “give it license to ignore the limitations” that the Commission had placed on the plant’s “available sources of power.”¹¹² To the contrary, permitting the state to second-guess the Commission’s power allocation would “trap” costs that the hydroelectric plant could not fully recover because the plant could purchase power based only on the different allocation dictated by the state.¹¹³

In subsequent cases, the Supreme Court has affirmed *Nantahala* and made clear that the preemptive effect of the Commission’s exercise of jurisdiction does not depend on whether there is a direct or merely an incidental affect on retail rates. In *Entergy*, for example, the Supreme Court considered a Commission tariff that delegated discretion to regulated entities to determine the precise cost allocation and whether the Commission’s tariff pre-empted an order from a state commission adjudging those costs imprudent. Although the Supreme Court recognized that “the cost allocation between operating companies is critical to the setting of retail rates,”¹¹⁴ that fact did not color its

¹¹⁰ *Nantahala* at 966.

¹¹¹ *Mississippi Power* at 371.

¹¹² *Nantahala* at 970.

¹¹³ *Id.* at 971.

¹¹⁴ *Entergy* at 42.

preemption analysis. Instead, the Supreme Court rejected arguments that the state was allowed to determine which costs were properly incurred as part of its authority to regulate retail rates. And it reaffirmed that when the Commission has allocated costs, states cannot second guess those Commission-approved allocations, which would “trap” costs and run “directly counter” to the rationale for the Commission’s approval of cost allocations.¹¹⁵

The Supreme Court’s decisions in this area have also held that the Commission’s orders have preemptive force regardless of the explanation provided by the Commission or whether “a particular matter was actually determined” in the Commission’s proceedings.¹¹⁶ As the Supreme Court has explained, Congress has “drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates.”¹¹⁷ The Supreme Court has therefore rejected a “case-by-case analysis of the impact of state regulation upon the national interest.”¹¹⁸ Instead, it has consistently held that “States may not regulate in areas where” the Commission “has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.”¹¹⁹

¹¹⁵ *Id.* at 48.

¹¹⁶ *Mississippi Power* at 374.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The same is true here. Because the Commission is properly exercising its jurisdiction to regulate the practice of self-supplying station power, the state must defer to the Commission's netting interval and may not use its "undoubted authority over retail sales" to interfere with the Commission's determination as to how much of a generator's gross output is employed to satisfy its station power needs and how much is transmitted for wholesale sale. Instead, the Commission's allocation of power — between energy used to self-supply station power and energy transmitted for wholesale sale — is binding on the states and may not be second-guessed. As explained above, permitting states to second-guess the Commission's determination of a proper netting interval effectively "traps" energy and prevents the generator from being fully compensated for the energy it has produced.

c. Because The State's Attempt To Set A Different Netting Interval Conflicts With The Commission's Netting Interval, It Is Also Preempted Under Traditional Principles of Conflict Preemption.

Even if the logic of the Supreme Court's *Nantahala* line of cases were not controlling, a state's attempt to set a different netting interval for station power than the Commission is preempted under traditional notions of conflict preemption.¹²⁰

It is a familiar and well-established principle that the Supremacy Clause of the United States Constitution invalidates states laws that "interfere with, or are

¹²⁰ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (state regulation preempted when it presents an "obstacle" to the "accomplishment and execution" of the objectives of federal law).

contrary to,” federal law.¹²¹ State law is preempted if federal regulation is sufficiently comprehensive that no room is left for state regulation.¹²² Moreover, it is well settled that state laws can be preempted by federal regulations as well as by federal statutes.¹²³

There can be no doubt that determining the amount of a generator’s total output that is available for transmission and wholesale sale is a “peculiarly federal concern.”¹²⁴ As the Commission has previously recognized, it is charged with determining how much of a generator’s total output should be allocated as used to address the generator’s own station power requirements and how much is transmitted over the transmission grid and available for wholesale sale. Setting the correct netting interval requires making fine judgments concerning the appropriate interval needed to ensure that generators are not unduly discriminated against as compared to vertically integrated utilities that continue to deem their generators’ station power requirements to be wholly self-supplied. And it requires setting an appropriate netting interval that can be easily and appropriately administered.

Moreover, as the Commission has previously recognized, setting an appropriate netting interval does not intrude on any traditional area of state

¹²¹ *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824).

¹²² *See Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713-14 (1985) (discussing the different ways that federal law may supersede state law).

¹²³ *Id.*

¹²⁴ *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U. S. 355, 374 (1986) (when the Commission “is acting within the scope of its congressionally delegated authority” it can preempt state law); *see also* 16 U.S.C. §§ 824d(a), 824e(a) (2006) (giving the Commission exclusive authority over transmission and wholesale electricity sales).

authority. As long as a generator is producing energy that is employed to serve its own station power requirements (rather than being used to transmit for wholesale sale), it is not purchasing energy at retail and, accordingly, no retail sale occurs.¹²⁵ Regulating the practice of self-supplying station power does not involve directly regulating a retail sale or a wholesale sale or transmission, but it does affect those issues. Under the FPA, the Commission has plenary authority to regulate practices affecting transmission and wholesale sales; the states have no reserved authority to regulate practices affecting retail rates.

In this context, state regulations that seek to set a different netting interval for determining how much of a generator's total output is properly allocated to its station power requirements will inevitably conflict with the Commission's responsibility to set this somewhat delicate balance. They will also serve as an obstacle to the Commission's attempts to accomplish Congress's objectives of eliminating undue discrimination in the Nation's electricity markets. As described above, a different state-mandated netting interval would impose competitive burdens on merchant generators requiring them, unlike vertically integrated utilities, to pay for energy at expensive retail rates even though the energy is not needed to satisfy their station power requirements. It would also prevent generators from being fully compensated for the total energy that they have produced.

¹²⁵ See *PJM II* at 61,891.

IV. IF THE COMMISSION FAILS TO EXPLAIN AND REAFFIRM ITS STATION POWER POLICY, IT WOULD BE ACTING ARBITRARILY AND CAPRICIOUSLY AND CONTRARY TO LAW.

As discussed above, the Commission has repeatedly affirmed its station power policies and explained that they ensure that merchant generators “do not bear a cost that has no relationship to any ‘service’ purportedly being provided by another party,” and thus “eliminate disparities between merchant generators and vertically-integrated utilities.”¹²⁶ If the Commission were to now fail to explain its jurisdictional authority for regulating station power, it would be effectively turning its back on its established precedent by letting it be overturned. Such an unexplained departure from prior policy would be arbitrary and capricious¹²⁷

Moreover, the FPA clearly vests the Commission with authority over regulations “affecting or pertaining” to wholesale sales. Station power netting is the mechanism for determining the amount energy used to self-supply station power, and thus directly and necessarily affects the amount of energy that is available for transmission and wholesale sale. As such, station power netting falls squarely within the Commission’s jurisdiction under the FPA. The

¹²⁶ See *infra* n.15.

¹²⁷ *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for “the reasons for its departure”); *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (“[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”) (quoting *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)).

Commission may not abdicate authority to regulate matters falling within its exclusive jurisdiction.¹²⁸

V. MOTION FOR EXTENSION OF TIME FOR ANSWERS

Movants respectfully request that the Commission extend the time period for answering this Motion from the 15 days prescribed by Rule 213(d)(1) of the Commission's Rules of Practice and Procedure¹²⁹ to 30 days. Such an extension strikes a balance between the importance of the matters at issue in these proceedings, and the pressing need for the Commission to clarify the legal rationale for its jurisdiction over station power netting, and will ensure that parties who may be interested in responding to this Motion will have sufficient time to prepare substantive responses to the arguments set forth herein. The extension will ultimately facilitate more expeditious action on remand by avoiding the need for a more extensive briefing schedule or hearing procedures.¹³⁰

¹²⁸ See *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 118 (D.C. Cir. 1998) (rejecting the Commission's argument that because the petitioner's interest stemmed from downstream effect on retail rates, Commission lacked jurisdiction over wholesale allocation of costs in settlement").

¹²⁹ 18 C.F.R. § 385.213(d)(1) (2009).

¹³⁰ As the issues on remand are purely legal issues, it is difficult to see what useful purpose would be served by instituting hearing procedures in any event, but it is possible that absent a reasonable time period in which to respond to this Motion, some parties might see the need for paper hearing or some other opportunity for additional briefing.

