

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 11-1122

**CALPINE CORPORATION, ET AL.,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

JOINT BRIEF OF INTERVENORS IN SUPPORT OF PETITIONERS

**ELECTRIC POWER SUPPLY ASSOCIATION,
COGENERATION ASSOCIATION OF CALIFORNIA AND THE
ENERGY PRODUCERS AND USERS COALITION**

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INITIAL BRIEF: October 7, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Energy Regulatory Commission and in this Court are identified in the Brief of Petitioners.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Petitioners.

C. Related Cases

References to related cases appear in the Brief of Petitioners.

DATED: October 7, 2011

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rule of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the Intervenors submit the following disclosure statements:

Electric Power Supply Association (“EPSA”)

EPSA is a national trade association that represents competitive power suppliers and is incorporated under the laws of the District of Columbia. There is no parent corporation or any publicly-held corporation that owns 10 percent or more of EPSA’s stock. EPSA’s members include 17 companies, along with numerous associate and supporting members and state and regional partners that represent the competitive power industry in their respective regions. EPSA members are exempt wholesale generators that sell power exclusively at wholesale throughout the United States. EPSA members will be negatively impacted by the Commission’s orders under review. In these orders, the Commission abandoned its station power rules in wholesale markets, thereby subjecting EPSA members to different rules for the provision of station power at retail, in different states.

Cogeneration Association of California

The Cogeneration Association of California is an unincorporated ad hoc group representing the combined heat and power and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set

Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.

Energy Producers and Users Coalition

The Energy Producers and Users Coalition is an unincorporated ad hoc group representing the following companies: Aera Energy LLC, BP West Coast Products, Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Power and Gas Services Inc., Shell Oil Products US, THUMS Long Beach Company, Occidental Elk Hills, Inc., and Valero Refining Company - California.

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Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

CAISO	California Independent System Operator Corporation - The independent regional transmission operator responsible for operating the transmission grid in California and administering organized wholesale electricity markets in California.
Commission	Federal Energy Regulatory Commission
CPUC	California Public Utilities Commission
EPSA	Electric Power Supply Association
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Megawatt (MW)	A measure of real power equal to a million watts.
Megawatt Hour (MWh)	The power utilization for one hour measured in Megawatts.
<i>New York v. FERC</i>	<i>New York v. FERC</i> , 535 U.S. 1 (2002)
<i>Niagara Mohawk</i>	<i>Niagara Mohawk Power Corp. v. FERC</i> , 452 F.3d 822 (D.C. Cir. 2006), <i>cert. denied</i> 550 U.S. 119 (2007).
NYISO	New York Independent System Operator, Inc.
Order on Remand	<i>Duke Energy Moss Landing LLC, v. Cal. Indep. Sys. Operator Corp.</i> , 132 FERC ¶ 61,183 (2011).
Petitioners	Collectively, Calpine Corporation, Dynegy Moss Landing, LLC, GenOn California North, LLC, GenOn Delta, LLC, GenOn Potrero, LLC, High Desert Power Project, LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power, LLC, Long Beach Generation LLC, and NRG Power Marketing LLC.

Petitioners Br.	Brief of Petitioners
PJM	PJM Interconnection L.L.C.
Rehearing Order	<i>Duke Energy Moss Landing LLC, v. Cal. Indep. Sys. Operator Corp.</i> , 134 FERC ¶ 61,151 (2011).
RTO	Regional Transmission Organization – An entity responsible for the operation of a regional transmission network.
<i>SCE v. FERC</i>	<i>S. Cal. Edison Co. v. FERC</i> , 603 F.3d 996 (D.C. Cir. 2010).
Station Power	Energy primarily used to operate the generator’s electric production equipment, as well as provide incidental facility needs, such as lighting, heating, and air-conditioning.

STATEMENT OF THE ISSUE

The Intervenor's adopt the Statement of the Issues set forth in the Brief of Petitioners. *See* Pet. Br. 2.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum to the Brief of Petitioners.

STATEMENT OF THE CASE AND FACTS

Pursuant to Fed. R. App. P. Rule 28(i), Intervenor's adopt the Statement of the Case and Facts contained in the Brief of Petitioners. *See* Pet. Br. 3-4.

SUMMARY OF THE ARGUMENT

The Federal Energy Regulatory Commission's (the "Commission" or "FERC") introduction of competition into wholesale electricity markets has often required the courts to protect the Commission's jurisdiction against improper intrusions by state regulators. *See e.g., New York v. FERC*, 535 U.S. 1 (2002); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009). This case represents the latest chapter in that process and turns on a single issue: whether (i) the Commission has authority to determine when a generator has allocated some of the wholesale power it produces to self-supply its station power requirements through netting the generator's output against consumption on a monthly basis, or (ii) whether the Commission has no authority over this traditional

practice and instead must defer to state regulators to determine when a generator has self-supplied its station power requirements.

For the last decade, the Commission has unequivocally held that, consistent with its exclusive jurisdiction over wholesale markets, it need not defer to the states with respect to generators' self supply of station power and that it has exclusive authority to regulate the traditional practice of wholesale generators allocating a portion of their wholesale output to self-supplying their station power requirements. The Commission's "station power policy" has been an integral part of the Commission's efforts to prevent incumbent investor-owned utilities from discriminating against independent wholesale generators — against whom they compete — by imposing retail charges on those independent generators that the incumbents themselves would not pay now and did not pay previously when they owned many of the same facilities.

Through its orders under review, *Duke Energy Moss Landing LLC, v. Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,183 (2011) ("Order on Remand") (JA __) and *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,151 (2011) ("Rehearing Order") (JA __), the Commission unlawfully abandoned its station power policy based on a narrow and incorrect reading of this Court's May 4, 2010 decision in *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) ("*SCE v. FERC*"). There, the Court vacated a series

of Commission orders related to the self-supply of station power in the California Independent System Operator (“CAISO”) markets through monthly netting and remanded the proceeding back to the Commission with instructions to better articulate the jurisdictional basis for its station power policies. Rather than provide the explanation contemplated by the Court’s remand order, however, the Commission wholly abandoned its station power policies, determining that “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.” Order on Remand, 132 FERC ¶ 61,183 at P 16 (JA ____). The Commission’s decision unlawfully disregards the mandates of the Federal Power Act (“FPA”) and results in an untenable conflict between state and federal regulation that will have far-reaching and detrimental impacts on competitive wholesale markets.

The FPA directs the Commission, among other things, to: (1) exercise exclusive jurisdiction over wholesale sales, including wholesale sales in the CAISO markets; (2) exercise exclusive jurisdiction over transmission service, (3) exercise exclusive jurisdiction over “all rules and regulations affecting or pertaining to . . . rates or charges” for such sales and services; and (4) prevent undue discrimination in the wholesale markets. 16 U.S.C. §§ 824(b)(1), 824d(a)-

(b) (2006). Determining what portion of a generator's total output is properly allocated to self-supplying station power falls squarely within the Commission's statutory authority because the practice of generator self-supplied station power "affects and pertains" to wholesale sales and transportation, and because the Commission's intervention is needed to prevent undue discrimination as required by the FPA.

As Petitioners demonstrated, station power is an inextricable aspect of participating in the wholesale market and the Commission must exercise its exclusive jurisdiction to prevent a conflict between the state and federal regulatory schemes. *See* Pet. Br. 51-65. If the states, rather than FERC, are permitted to determine how much of a wholesale generator's output is used to satisfy station power requirements, the states would effectively be allowed to draw a jurisdictional line in wholesale markets between the amount of power that a generator purchases at retail rather than the amount it self-supplies. Moreover, the states would also be allowed to determine whether transmission is utilized to supply station power, thereby imposing additional charges that are within FERC's exclusive jurisdiction. FERC, not the states, must draw these lines. *See Miss. River Transmission Corp. v. FERC*, 969 F.2d 1215, 1218 (D.C. Cir. 1992) (rejecting argument that FERC could not determine interstate transportation rate when direct retail sale was involved because to accept position would be

“tantamount to conferring on private parties the power to decide whether FERC could set the rate for interstate transportation.”).

Numerous states have already taken advantage of this opportunity to the detriment of the wholesale markets. As EPSA and others explained in submissions to FERC, such state action will (i) deny generators full and appropriate compensation for the energy they produce, (ii) lead to discrimination in the wholesale markets between incumbent utilities not charged such rates and independent generators charged such rates, and (iii) unlawfully allow states to supersede the Commission’s jurisdiction. *See e.g.*, Joint and Several Request for Reh’g 51-54, Docket Nos. EL04-130-003 and ER05-849-012 (filed Sept. 29, 2010) (JA ___); Request for Reh’g and Clarification of the NRG Companies at 22-24, Docket Nos. EL04-130-003 & ER05- 849-012 (filed Sept. 29, 2010) (JA ___).

In multi-state Regional Transmission Organizations (“RTOs”), for instance, states could impose varying “retail” costs on generators impacting the competitive position of generators that are located in different states, but competing in the same regional wholesale market. This in turn would impact wholesale power prices and grid reliability by causing significant disparities in the rates paid by divested or independent generation within and among markets, which in turn would lead to undue discrimination and possible inefficiencies in the dispatching of generators. Such an outcome is anathema to the Commission’s jurisdiction and responsibilities

under the FPA. *See Jersey Cent. Power & Light v. FPC*, 319 U.S. 61, 71-72 (1943) (asserting jurisdiction over transmission line in a single state because, if “free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile.”). The Commission failed to meaningfully address these significant concerns in its orders below.

For these reasons, this Court should grant the petitions for review, reverse the Commission, and vacate the orders below with instructions for the Commission to properly explain the bases for its station power policies, consistent with its obligations under the Federal Power Act.

ARGUMENT

I. THE COMMISSION ERRED IN FAILING TO SET FORTH THE BASIS FOR ITS AUTHORITY OVER THE SELF-SUPPLY OF STATION POWER.

In issuing its Order on Remand and Rehearing Order, the Commission incorrectly interpreted the Court’s decision in *SCE v. FERC*, which remanded the issue of the Commission’s jurisdiction over the self-supply of station power by wholesale generators back to the Commission “for further proceedings.” *SCE v. FERC*, 603 F.3d at 1002. The Court did not determine that the Commission does not have jurisdiction over the self-supply of station power. Instead, the Court found the Commission “has yet to explain” the basis of its authority. *SCE v.*

FERC, 603 F.3d at 1002. The Commission has yet to meaningfully address this threshold jurisdictional question.

As discussed below, the Commission's jurisdiction is squarely grounded in the FPA. The FPA grants the Commission exclusive jurisdiction to regulate the interstate transmission grid and wholesale sales of electricity, as well as matters affecting and pertaining to transmission and wholesale sales of electric energy in interstate commerce. The Commission's jurisdictional authority extends to the self-supply of station power by wholesale generators. Accordingly, the Court should determine that the Commission's failure to meaningfully address the jurisdiction question was in error.

A. The Commission Misinterpreted the Court's Decision in *SCE v. FERC*.

Prior to the advent of competitive wholesale markets, jurisdiction over the self-supply of station power was not a disputed issue, because investor-owned utilities did not charge themselves or their affiliates retail rates for station power. *See, e.g., Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,072 at P 63 (2008) (explaining that the Commission's station power policies are part of "its efforts to promote the competitive supply of electricity and to eradicate undue discriminatory practices by transmission-owning utilities"). The power to operate the generating facility was simply a cost of producing electricity and was treated as negative generation, *i.e.*, accounting for station power use as negative production

of energy. To use the language of this case, there was never a netting period (or, if there was a netting period, it was *infinite*) and no retail charges were imposed, as incumbent utilities simply used power available on their systems to satisfy their station power requirements.

With the development of new generation facilities by independent power producers and the divesting of generation assets by utilities, those same incumbent utilities that previously did not pay for station power recognized a way to tap into a new source of revenue and place their new competitors in wholesale markets at a disadvantage by imposing retail charges on independent generation owners for station power. In response, the Commission developed its station power policies on the premise that it would be inequitable for utilities that formerly owned generating facilities to discontinue netting after they divested those facilities to new owners. *See e.g., Sunbury Generation, LLC v. PPL Elec. Utils. Corp.*, 99 FERC ¶ 61,168 at 61,681 (2002) (stating that “if a generating facility that has netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff.”). The Commission applied a limited netting period (thirty days) – unlike the “infinite” period used by incumbent utilities – to determine when a generator’s station power requirements are reasonably deemed satisfied by

a portion of the power produced by the generator. While parties will debate the ability to net, no party will challenge the reasonableness of the standard thirty (30) day netting interval established by FERC.

For over a decade, the Commission consistently applied its station power policy in the wholesale markets it regulates through a series of orders involving PJM Interconnection, LLC (“PJM”),¹ the New York Independent System Operator (“NYISO”),² Midwest Independent Transmission System Operator, Inc.,³ and the CAISO.⁴ Through these Orders, the Commission correctly recognized that because there is a direct relationship between the amount of energy produced by a generator that is available for transmission and the amount of energy used by the generator to

¹ See e.g., *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001) (“PJM II”); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (“PJM III”); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (“PJM IV”).

² See e.g., *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,167 (2002), *order on reh'g*, 100 FERC ¶ 61,201 (2002); *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g denied*, *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142 (2004), *clarified*, *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,164 (2004).

³ See e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,073 (2004), *order on reh'g*, 110 FERC ¶ 61,383 (2005).

⁴ See e.g., *Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,452 at P 10 (2005), *on reh'g*, 114 FERC ¶ 61,176 (2006), *on reh'g*, 115 FERC ¶ 61,038 (2006), *on reh'g*, 125 FERC ¶ 61,072 (2008), *clarified*, 126 FERC ¶ 61,050 (2009) (collectively, the “California Station Power Orders”).

satisfy its station power requirements, the Commission has authority to set an appropriate netting formula to determine when a generator has used its own generated energy to self-supply its station power requirements. *KeySpan-Ravenswood, Inc.*, 107 FERC ¶ 61,142 at P 41.

The Commission also held that, once it has determined what portion of a generator's total output is available for transmission and sale at wholesale and what portion is used to self-supply station power, states may not second-guess that determination by applying a different netting formula in the guise of purporting to regulate retail sales. *Id.* at P 38. More specifically, the Commission rejected "deem[ing] a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting interval," finding it "not only impractical, and contrary to traditional utility practice and legal precedent," but also "anti-competitive." *Id.* at P 41. Thus, as long as a generator is (1) using its own self-supplied energy to satisfy its station power requirements (instead of making the energy available for transmission and sale at wholesale); and (2) interconnected to the bulk transmission system (*i.e.*, not served by retail distribution facilities) it is not purchasing the energy at retail and no other retail charges may be applied consistent with the federal scheme. *PJM II*, 94 FERC at 61,890.

In *SCE v. FERC*, 603 F.3d 996, the Court vacated the California Station Power Orders and remanded the proceeding back to the Commission with instructions to the Commission to better articulate the jurisdictional basis for its station power policies. Specifically, the Court stated the Commission “has yet to explain” why it has the authority to “preempt [a] state’s authority to set the netting period for station power.” *SCE v. FERC*, 603 F.3d at 1002. The *SCE v. FERC* Court further stated:

[W]e do not understand why FERC 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. To simply declare that the state lacks jurisdiction because FERC believes no retail sale has taken place really begs the jurisdictional question. Unless a transaction falls within FERC’s wholesale or transmission authority, it doesn’t matter how FERC characterizes it.

Id. at 1000-01. In this respect, the Court remanded the case for “further proceedings” providing the Commission with an opportunity to clarify and further support the jurisdictional basis for its station power policy. *Id.* at 1002.

Rather than explain its jurisdictional rationale in its Order on Remand and Rehearing Order, the Commission wholly abandoned its station power precedent without explanation, stating that “[i]n light of the D.C. Circuit’s decision . . . we conclude that the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and the states determine the amount

of station power that is sold in state-jurisdictional retail sales.” Order on Remand, 132 FERC ¶ 61,183 at P 16 (JA ____). No other meaningful analysis was undertaken by the Commission in its Order on Remand or its subsequent Rehearing Order.

As discussed below and in the Petitioners’ Brief, it is unquestioned that the Commission has the authority under the FPA to regulate wholesale electric sales and transmission transactions and practices that affect wholesale electric sales and transmission transactions. That authority necessarily includes the authority to determine when a portion of a generator’s wholesale output is properly allocated to the self-supply of station power.

B. The Commission Has Exclusive Authority Over The Self-Supply Of Station Power.

The Commission has exclusive and plenary jurisdiction to regulate the transmission and wholesale sale of electricity in interstate commerce. *See Jersey Cent. Power & Light v. FPC*, 319 U.S. 61, 77 (1943) (“The purpose of this act [the Federal Power Act] was primarily to regulate the rates and charges of interstate energy.”). Section 201(b) of the FPA provides that the Commission’s jurisdiction includes “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b). The FPA also 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. 16 U.S.C. § 824e(a); *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 483–85 (D.C. Cir. 2009) (recognizing that the Commission has authority to regulate capacity requirements because it is a practice that affects wholesale rates); *see also Mississippi Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987) (because Commission exercised authority to regulate practices that affected wholesale rates, it did not matter that Commission’s regulation would interfere with state regulation of retail rates); *N. Natural Gas Co. v. FERC*, 929 F.2d 1261, 1272 (8th Cir. 1991) (upholding FERC review of interstate pipeline gathering charges, finding it “essential to prevent discrimination against third-party gas in interstate transportation and sales”).⁵

The practice of self-supplying station power by wholesale generators directly affects and pertains to the Commission’s regulation of both transmission and wholesale sales because (1) station power is inextricably part of the process of generating energy, and (2) the energy not used to meet a generator’s station power requirements is transmitted and sold at wholesale in interstate commerce. The federal regulatory scheme depends on the Commission’s ability to determine in precise quantities how much power a generator is producing (and when) and how

⁵ The Natural Gas Act and the Federal Power Act contain similar provisions. *See e.g., Consol. Edison Co. of N.Y. v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (“Section 205 of the Federal Power Act and Section 4 of the Natural Gas Act are identical in form and have been tested as identical in substance.”).

much of that power is available for transmission and sale on the interstate transmission grid.

As the Commission has acknowledged, station power is an input or “internal cost of the [generating] facility, just as are losses, boiler efficiencies, etc.” *See PJM II*, 94 FERC at 61,891, and *PJM III*, 95 FERC ¶ 61,333. In turn, 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. Therefore, the netting formula directly and unavoidably affects the rates and conditions for the transmission and sale of electricity at wholesale in interstate commerce. Because some netting interval has to be applied to determine how much of a generator’s output is properly allocated to satisfy its station power requirements, it is necessary for the Commission to establish the formula for making this calculation.

This Court’s decision in *Entergy Services, Inc. v. FERC*, 400 F.3d 5 (D.C. Cir. 2005) is directly applicable and instructive in the present case. In the underlying proceeding, Entergy submitted a wholesale Generator Imbalance Agreement proposing to assess generators on its transmission system a “deficient energy” charge for any shortfall between a generator’s total output and the amount of energy the generator scheduled for transmission as a wholesale sale to a third party purchaser. For qualifying cogeneration facilities (“QFs”) interconnected to

its system, however, Entergy proposed that any shortfall would be ascribed to the “host load” (e.g., an industrial customer) and instead of paying the same “deficient energy” charge, required that the energy be purchased from Entergy at retail rates.

In rejecting Entergy’s proposal, the Commission found that Entergy’s “practice of allocating all of a qualifying facility’s (QF) output to its schedule and, in the event of a shortfall in the generation of electric energy, serving the QF’s host load under retail rates is unreasonable and unduly discriminatory.” *Entergy Services, Inc.*, 103 FERC ¶ 61,125 at P 1 (2003), *order denying reh’g, Entergy Services, Inc.*, 104 FERC ¶ 61,061 (2003). The Commission determined that a QF is entitled to make up any shortfall in its schedule by paying the wholesale “deficient energy” charge instead of paying Entergy for energy at retail rates. *Id.* at P 27.

Entergy filed a petition for review by this Court, arguing that the Commission had no jurisdiction to regulate retail sales. The Court rejected that argument and affirmed the Commission’s decision finding that the Commission’s ruling had nothing to do with the regulation of retail rates. As the Court explained, “[t]he rates at issue related to what Entergy should have considered as wholesale service provided by Entergy to QFs, which is clearly within the Commission’s regulatory jurisdiction.” *Entergy Services, Inc. v. FERC*, 400 F.3d at 10.

The Court's analysis in *Entergy* applies equally to station power. As in *Entergy*, the Commission is determining the amount of wholesale sales a generator is making, which requires that it also determine how much of its output is being used to serve its "host load" — *i.e.*, the amount of energy used to satisfy its station power requirements. It is unquestionably within the Commission's sole and plenary jurisdiction to determine the amount of wholesale service a generator provides, and this determination *requires* that the Commission also determine when a generator has self-supplied its station power (its "host load") and thereby reduced the amount of power for sale in the wholesale markets. The Commission has acted within its exclusive jurisdiction, and, as with *Entergy*, the fact that the Commission's affirmative exercise of authority necessarily results in a negative determination that *no* retail sale occurs is irrelevant.

The Court's decision in *Entergy* is consistent with a long line of cases that have consistently held that the Commission may exercise its jurisdiction over wholesale markets — even if such regulation impacts state regulation. *See, e.g., Miss. Indus. v. FERC*, 808 F.2d 1525, 1547 (D.C. Cir. 1987) (upholding the Commission's jurisdiction over wholesale prices even though "assertion of [that] jurisdiction has some impact on state regulation"); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (upholding Commission regulation of installed capacity requirements notwithstanding impacts on state

spheres of regulation of generation). By contrast, states have no authority under the Federal Power Act to regulate practices that merely affect retail sales when they fall within the Commission's exclusive jurisdiction. As the Supreme Court has stated: "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988).

The Commission's policies reflect the commonsense position that when a generator allocates a portion of its total output to satisfying its station power requirements it is not purchasing energy at retail. Although the Commission's determination as to when a generator's own power is properly allocated prevents states from imposing retail charges for the same self-supplied station power, that is the result contemplated under the Federal Power Act. Indeed, any state exercise of authority over the wholesale self-supply of station power by generators would have a severe impact on the wholesale electric and transmission markets. As more fully explained below and in Petitioners' brief, permitting states to second-guess the Commission's determination of a proper netting interval (1) effectively "traps" energy and prevents the generator from being fully compensated for the energy it has produced; and (2) sanctions discrimination against wholesale generators. Accordingly, the Commission's jurisdiction over the self-supply of station power

plainly derives from the Commission's jurisdiction over wholesale sales and transmission under the FPA. This Court should find that the Commission erred in not affirming such authority in its Order on Remand.

II. FERC'S FAILURE TO EXERCISE ITS EXCLUSIVE JURISDICTION WILL RESULT IN AN IRRECONCILABLE CONFLICT BETWEEN STATE AND FEDERAL REGULATION.

As demonstrated above, the Commission has plenary and exclusive jurisdiction over wholesale sales and transmission, as well as rules, regulations and practices that "affect or pertain to" wholesale sales and transmission, including accounting for station power self-supplied by generators. With this grant of exclusive jurisdiction comes an affirmative obligation on the Commission 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 and applied in a non-discriminatory manner. *See* 16 U.S.C. § 824d(a)-(b); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 41 (2003). As this Court has recognized, "[a]s to matters within its jurisdiction, Federal Energy Regulatory Commission (FERC) has the duty — not the option — to reform rates that by virtue of changed circumstances are no longer just and reasonable." *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 337 (D.C. Cir. 1999).

FERC's authority to determine whether wholesale rates are "just and reasonable" and non-discriminatory is exclusive and may not be relinquished to the states. As the Commission has confirmed: "we have an independent obligation to ensure that we are fulfilling our responsibilities under the FPA to regulate facilities that are used in interstate commerce. We cannot delegate our jurisdiction."⁶ Thus, in responding to this Court's remand, FERC had a duty to further examine its jurisdictional boundaries and explain how its prior station power orders fell within those boundaries, or to craft a new policy which would be "just and reasonable" and within its legal authority.

In the present case, the Commission did neither, resulting in an irreconcilable conflict between state and federal regulation that must be resolved in favor of federal regulation to prevent discrimination against wholesale generators and severe impacts to the competitive wholesale markets the Commission regulates.

⁶ *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, 61 Fed. Reg. 21,539 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 1,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,345 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

A. The Commission’s Failure to Exercise its Jurisdiction Will Result in Inconsistent State and Federal Regulation.

1. A Dual Regulatory Scheme Prevents Generators from Being Fully Compensated for the Energy They Produce.

In *New York v. FERC*, the Supreme Court recognized that when the Commission and state regulators define their respective authority over the same use of the same facilities differently, conflicts should be resolved in the Commission’s favor and conflicting state retail tariffs must give way to the requirements of federal law. *New York v. FERC*, 535 U.S. 1, 22-23 (2002). In its Order on Remand, the Commission ignored this imperative, concluding that “the Commission and the states can use different methodologies when the Commission determines the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and the states determine the amount of station power that is sold in state-jurisdictional retail sales.” Order on Remand, 132 FERC ¶ 61,183 at P 16 (JA ____). Such a regime creates a clear conflict between state and federal regulation to the detriment of the wholesale markets.

Consistent measures of energy and transmission usage are required in wholesale markets. If state regulators are permitted to establish different netting intervals for determining how much energy a generator has used to self-supply station power requirements, the regulatory scheme will operate to deny non-

affiliated independent generators full and appropriate compensation for the energy they produce and potentially impose additional disparate transmission charges.

This is true because state regulators have a clear incentive to minimize the retail costs borne by the state's ratepayers by shifting additional regulatory burdens onto competitive generators and their shareholders by approving a shorter netting interval than the Commission-approved netting interval. As this Court recognized in *Miss. River Transmission*, 969 F.2d at 1218, "the primary concern of state regulators is the interests of their state citizens, who doubtless would prefer to pay less for transportation than those outside the state" or, in this case, prefer that generators' shareholders subsidize the cost of the delivery of electric energy to the state's ratepayers. This is true in CAISO, where the state netting interval is hourly and the Commission-approved netting interval is monthly, and was true in the NYISO market before this Court upheld the Commission's station power policy in *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), *cert. denied* 550 U.S. 119 (2007).

With respect to its station power policy in California, the Commission specifically recognized the motivation of the State to impose a variety of retail costs on wholesale generators that self-supply their station power requirements, including competitive transition charges and certain above-market generation costs, such as costs associated with the California Department of Water Resources'

power contracts that resulted from the California energy crisis. In fact, utility “Advice Letters” remain pending before the California Public Utility Commission, which seek to impose retail charges on generators that self-supply their station power requirements through monthly netting under the CAISO Tariff. *See* the Motion for Clarification of the Constellation Generation Group and the NRG Companies at 7-9 and Attachment A (Southern California Edison Company Advice Letter Filing), Docket No. ER05-849-004 (filed July 11, 2006) (JA ___); *see also, Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,072 at PP 47 and 87 (2008) (confirming that California utilities are not permitted to impose so-called “nonbypassable” retail and load based charges on generators that self-supply their station power needs over the monthly netting period) (JA __). The Commission’s action in its Order on Remand and Rehearing Order will allow the CPUC to act on the Advice Letters to the detriment of the wholesale markets.

In the NYISO markets, the Commission also acknowledged the conflict between state and federal tariffs and state regulators’ incentive to pass costs on to wholesale generators when it preempted a state tariff that would operate to subject a wholesale generator to significant retail charges for an 18-month period if the generator “experienced a single hour of negative net output.” *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,032 at P 30 (2005). If the Commission’s failure to assert its jurisdiction is upheld, millions of dollars of retail

charges will again likely be imposed on competitive merchant generators that are not imposed on vertically integrated utilities with generation assets.

As the example set out in Petitioners' brief shows, any disparity in netting intervals will force generators to "purchase" unneeded energy at retail. *See* Pet. Br. 57-59. It also will 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 will not be recognized by the Commission as transmitted and available for sale at wholesale and also will not be available to serve the generator's station power requirements.

In its Rehearing Order, the Commission recognized this possibility but erred in summarily concluding that, in wholesale markets, "[s]hould 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." Rehearing Order, 134 FERC ¶ 61,151 at P 24 (JA __). The Commission is plainly and simply wrong. A state's imposition of a conflicting netting interval related to the self-supply of station power would adversely and unlawfully affect the wholesale rates, an impact which is clearly subject to the Commission's exclusive jurisdiction, and which the Commission has an affirmative duty to correct.

2. The Commission's Failure to Exercise its Jurisdiction Would Result in Inconsistent State and Federal Regulation and Discrimination Against Competitive Generators, Negatively Impacting Wholesale Markets.

The Commission's station power policies were specifically designed to address the fact that, before utilities divested their generation resources, they traditionally did not charge themselves or their affiliates when they netted an electric generating plant's station power load against its gross output. *See e.g., Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,072 at P 63 (2008) (JA ___) (explaining that the Commission's station power policies are part of "its efforts to promote the competitive supply of electricity and to eradicate undue discriminatory practices by transmission-owning utilities"). For this reason, the Commission developed its station power policies on the premise that it would be undue discriminatory for a utility that formerly owned a generating facility to discontinue netting after it divested that facility to a new owner. As the Commission stated, if generators were required by states to make:

[R]etail purchases of station power whenever there was a single momentary power fluctuation during the netting period . . . [generators] would be forced to purchase their station power requirements from a single supplier, the local utility, at rates that are likely to be higher than the costs of self supply or competitive third-party supply. This would make the generator's own energy uncompetitive when compared to energy sold by the local utility, with which merchant generators compete for load, with resulting harm to ratepayers.

KeySpan-Ravenswood, Inc., 107 FERC ¶ 61,142 at P 41 (2004).

As the *SCE v. FERC* Court correctly concluded, “[t]he Commission is rather obviously concerned about the competitive position of the independent generators vis-à-vis those utilities who still maintain their own generator capacity.” *SCE v. FERC*, 603 F.3d at 1002. These concerns are well founded and compel the exercise of the Commission’s jurisdiction under the FPA.

If the Commission’s orders below are not corrected and individual states are allowed to set the applicable netting interval, two types of undue discrimination will likely occur. First, millions of dollars of retail charges will likely be imposed on competitive power generators that are not imposed on vertically integrated utilities with generation assets (or even if they would be imposed on utilities, the utilities could simply include such costs in their regulated rates, an option not available to competitive wholesale suppliers). Unlike the Commission, which has a statutory responsibility under the FPA to prevent undue discrimination in the wholesale energy markets, states are under no obligation to ensure a level-playing field or non-discriminatory treatment in *wholesale markets*. In this respect, allowing state regulators to dictate the applicable netting interval undermines the Commission’s ability to level the competitive playing field between competitive generators and vertically integrated utilities as the FPA requires. As the Supreme Court concluded in *New York v. FERC*, such discrimination should be remedied by the Commission:

Were FERC to investigate this alleged discrimination and make findings concerning undue discrimination in the retail electricity market, § 206 of the FPA would require FERC to provide a remedy for that discrimination. *See* 16 U.S.C. § 824e(a) (upon a finding of undue discrimination, ‘the Commission shall determine the just and reasonable . . . regulation, practice, or contract . . . and shall fix the same by order’).

New York v. FERC, 535 U.S. 1, 27 (2002).

Second, varying retail costs will likely be imposed in multi-state RTOs, thereby impacting the competitive position of generators located in different states but competing in the same regional wholesale market. *See Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011) (holding that the Commission may not permit a compensation scheme for reactive power that discriminates between generators competing across different pricing zones within the same RTO). This in turn would impact wholesale power prices and grid reliability by causing significant disparities in the rates paid by competitive generation within and among markets, which in turn would lead to undue discrimination and possible inefficiencies in the dispatching of generators — an economic dispatch that is based in large part upon the costs of operating the facilities.

Moreover, because of the centralized nature of competitive power markets, one state’s decision to impose retail costs on a generator self-supplying its station power requirements could impact prices for consumers in other states within the

same market as the generator attempts to recover its costs in the broader market footprint. For example, the Midwest ISO administers a centralized energy market that includes all or parts of twelve (12) states — each of which could approve a different netting interval from the monthly netting interval currently set forth in the Midwest ISO Tariff.

Ultimately, this manner of unfair discrimination gives free reign to the states to set the applicable netting intervals, ensuring that millions of dollars of retail charges will be imposed on competitive generators that are not imposed on vertically integrated utilities with generation assets. This in turn will deprive customers of access to lower cost, alternative sources of energy and lead to disparities between the treatment of generators competing in the same wholesale marketplace.

Accordingly, such discrimination directly implicates the Commission's FPA mandate to prevent undue discrimination and to ensure just and reasonable wholesale rates. *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 92 (1963) ("readjustment of purchasing patterns which such orders [of the Kansas Commission] might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states. This relationship is a

matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority”). The Commission’s decision to abandon its station power policy in its Order on Remand and Rehearing Order was arbitrary and capricious and contrary to law because the orders will result in undue discrimination by unfairly discriminating against competitive generators in favor of traditional utilities. *See* 16 U.S.C. § 824d(b) (prohibiting the making or granting of “undue preference or advantage” or the maintenance of “any undue preference or disadvantage”).

CONCLUSION

For these reasons, the Court should grant the petitions for review, reverse the Commission, and vacate the orders below with instructions for the Commission to properly explain the bases for its station power policies, consistent with its obligations under the Federal Power Act.

Dated: October 7, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Court's Order of August 8, 2011, the Joint Brief of Intervenors in Support of Petitioners does not exceed 8,750 words. Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of tables of contents and authorities, glossary, certificates of compliance and of service, and signature block, but including footnotes, headings, and quotations) contains 6414 words, as determined by the word-counting feature of the Word software program.

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ADDENDUM OF STATUTORY AND REGULATORY PROVISIONS

In accordance with Rule 28 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 28(a)(5), all applicable statutes and regulations are contained in the Brief for Petitioners.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 7th day of October, 2011, served a copy of the foregoing document on the following parties and movant-intervenors via email through the Court's CM/ECF system:

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Dated at Washington, D.C. this 7th day of October, 2011.

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