

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

TC Ravenswood, LLC

Complainant,

v.

**New York Independent System Operator, Inc.,
and New York State Reliability Council, LLC**

Respondents.

Docket No. EL12-9-000

**COMMENTS IN SUPPORT OF INDEPENDENT POWER PRODUCERS
OF NEW YORK, INC. AND ELECTRIC POWER SUPPLY ASSOCIATION**

On November 7, 2011, TC Ravenswood, LLC (“Ravenswood”) filed with the Federal Energy Regulatory Commission (“Commission” or “FERC”) a complaint under Sections 206 and 306 of the Federal Power Act (“FPA”) against the New York Independent System Operator, Inc. (“NYISO”) and the New York State Reliability Council, LLC (individually, “NYSRC,” and, with the NYISO, collectively, “Respondents”). The Complaint challenges the Respondents’ ability to rely upon an order issued by the New York Public Service Commission (“NYPSC”)¹ to direct Ravenswood to conduct an annual test on its Units 10, 20 and 30 (together, “Units”) and to continue to provide Black Start Service under the NYISO’s System Restoration Program in the face of a Commission Order expressly finding that Ravenswood had met all requirements under the NYISO’s Market Administration and Control Area Services Tariff

¹ See NYPSC Case 11-E-0423, Petition of Consolidated Edison Company of New York, Inc. for a Declaratory Ruling Concerning the Discontinuance of Blackstart Service, “Declaratory Ruling Regarding Blackstart Service” (September 28, 2011) (“NYPSC Order”).

(“Services Tariff”) to withdraw from this voluntary program.² Ravenswood requests in its Complaint that the Commission: (i) confirm that the Units are not required to provide Black Start Service under the FERC-approved System Restoration Program, (ii) hold that the NYPSC Order is preempted by the FPA to the extent that it can be interpreted to continue to require the Units to provide Black Start Service beyond September 30, 2011, and (iii) enjoin the Respondents from requiring the Units to provide Black Start Service.

Black Start Service is a voluntary, wholesale service that is provided by merchant generators pursuant to the Commission-approved System Restoration Program set forth in the NYISO’s Services Tariff and is subject to the exclusive jurisdiction of the Commission. Notwithstanding this fact, in the NYPSC Order, the NYPSC claimed jurisdiction under State law to require a wholesale generator that provides Black Start Service under the NYISO’s System Restoration Program to obtain the NYPSC’s consent before terminating its provision of Black Start Service, even in cases where the wholesale generator has terminated its provision of this service in full compliance with the FERC-approved withdrawal provisions of the System Restoration Program.

As the Complaint demonstrates, Respondents have violated the Services Tariff and the September 27 Order by attempting to require Ravenswood’s Units involuntarily to continue providing Black Start Service pursuant to the System Restoration Program. Pursuant to the Commission’s Notice of Extension of Time issued on November 25, 2011, Independent Power Producers of New York, Inc. (“IPPNY”)³ and the Electric Power Supply Association

² *TC Ravenswood, LLC*, 136 FERC ¶ 61,213 (2011) (“September 27 Order”).

³ IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. IPPNY filed a motion to intervene in this proceeding on December 5, 2011. *See* (doc-less) Motion to Intervene of Independent Power Producers of New York, Inc., Docket

(“EPSA”)⁴ hereby comment in support of the Commission granting the relief set forth in the Complaint.⁵

As demonstrated below and in the Complaint, the Respondents’ attempt to use the NYPSC Order as the basis to require Ravenswood to continue to provide Black Start Service, particularly in light of the Commission’s September 27 Order, amounts to a direct challenge to the Commission’s exclusive jurisdiction over the rates, terms and conditions of wholesale electric service. Moreover, the NYPSC’s finding in the NYPSC Order that wholesale generators must obtain the NYPSC’s consent prior to terminating the provision of Black Start Service directly conflicts with the Commission-approved System Restoration Program which establishes that Black Start Service is a wholesale, voluntary service that may be discontinued upon meeting the notice requirements set forth therein.⁶

The NYPSC Order is clearly contrary to, and, as relied upon by the NYISO and NYSRC, will directly interfere with, the Commission’s September 27 Order and the Commission-approved System Restoration Program. The Respondents’ erroneous reliance on the NYPSC Order, if permitted to stand, would set a dangerous precedent enabling states to subvert wholesale generators’ compliance with the terms of Commission-jurisdictional tariffs. Accordingly, IPPNY and EPSA respectfully request that the Commission act quickly to confirm its exclusive jurisdiction over the rates, terms and conditions of Black Start Service and

No. EL12-9-000 (filed Nov. 30, 2011).

⁴ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a motion to intervene in this proceeding on November 15, 2011. *See* (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EL12-9-000 (filed Nov. 30, 2011).

⁵ EPSA and IPPNY e-filed docless motions to intervene in this docket on November 30, 2011 and December 5, 2011, respectively.

Commission-jurisdictional tariffs in general to eliminate any uncertainty created by the NYPSC Order.

I. BACKGROUND

Ravenswood owns and/or leases the approximately 2,480 MW Ravenswood Generating Station located in Queens, New York. The Units are located at this Station. Ravenswood previously provided Black Start Service pursuant to the testing and other requirements that are set forth in the NYISO's Commission-approved System Restoration Program. On September 8, 2010, pursuant to Section 15.5.3.1 of the Services Tariff, Ravenswood provided notice to both the NYISO and Con Edison that it intended to withdraw the Units from the System Restoration Program at the conclusion of the then-extant three-year term of service (i.e., September 30, 2011).⁷ Section 15.5.3.1 of the Services Tariff provides that, to receive payment, a Black Start Service provider must commit to be available to provide the services for an initial minimum period of three years. At the end of the second year of the initial period, either the generator or Con Edison may give notice that the generator will no longer be part of the Con Edison local plan aspects of the NYISO's System Restoration Program, effective at the end of third year. The same rule applies for each successive three-year period, i.e., either the generator or Con Edison may inform the other of its election to exit the program following the first two years of each three-year period.

On August 2, 2011, Ravenswood filed a motion with the Commission for waivers of certain provisions of the System Restoration Program which, if granted, would have extended the commitment due date and associated testing requirements for a period of seven months to

⁶ As Ravenswood establishes in its Complaint, it has never had a retail tariff authorizing it to provide retail black start service nor has it ever entered into a contract or otherwise provided retail black start service to Consolidated Edison Company of New York, Inc. ("Con Edison") or any other entity. *See* TCR Complaint, Exhibit No. TCR-1, Testimony of Thomas Kender at 2.

⁷ *TC Ravenswood, LLC*, 136 FERC ¶ 61,213 (2011) at P 3 ("September 27 Order").

give the parties additional time to consider revisions to the Program’s testing requirements to allow for the Units’ design and operational limitations (the “Ravenswood Proceeding”).⁸ Ravenswood committed that “if called upon in the event of an actual blackout, [it] will operate its units to assist restoration in a manner consistent with Good Utility Practice.”⁹ In an attempt to ensure a timely resolution of the open issues concerning the testing requirements, Ravenswood also requested that the Commission convene a settlement conference to develop testing requirement revisions so that Ravenswood could continue to voluntarily participate in the System Restoration Program without putting its Units at risk.

On August 12, 2011, Con Edison moved to intervene in the Ravenswood Proceeding.¹⁰ As Ravenswood established in its Complaint, Con Edison, however, also filed a petition on the same day with the NYPSC to circumvent the Commission’s Ravenswood Proceeding.¹¹ Specifically, in its NYPSC petition, Con Edison requested that the NYPSC issue a declaratory order that, notwithstanding the express termination provisions of the System Restoration Tariff Provisions and the pendency of the Ravenswood Proceeding before the Commission in which Con Edison had intervened, wholesale generators that are Black Start Service providers under the NYISO’s System Restoration Program cannot terminate providing such service without the NYPSC’s prior consent.

⁸ As established by Ravenswood, changes to the testing protocols were necessary because the requirements of these protocols were inconsistent with the design and Ravenswood’s operational parameters for these large steam units. *See* TCR Motion at 2, 8.

⁹ TCR Motion at 3. Ravenswood further specified in its Motion that “Plant personnel continue to test, monitor and maintain the critical components of the Black Start facilities in accordance with good utility practice.” *Id.* at 6.

¹⁰ The NYPSC also intervened in the Commission’s Ravenswood Proceeding but it did not file any pleadings on the merits.

¹¹ *See also* TCR Complaint at 5.

On August 26, 2011, Ravenswood amended its motion at the Commission by withdrawing its waiver requests. The effect of the Ravenswood amendment was that Ravenswood would no longer be required to provide Black Start Service effective as of September 30, 2011 in accordance with its September 2010 Notice.

In response, the NYISO filed a motion with the Commission, *inter alia*, requesting that the Commission waive the three-year commitment period and withdrawal provisions in Section 15.5.3.1 of the Services Tariff and temporarily suspend the effective date of the withdrawal of the Ravenswood Units from the System Restoration Program until April 30, 2012. Importantly, in its motion, the NYISO conceded that “[it] and Con Edison would still be capable of restoring service to New York City in a manner that meets applicable reliability requirements [in] the absence of the Ravenswood Units.”¹²

In its September 27 Order, the Commission relied on the NYISO’s statement that the Ravenswood Units were not required to meet any applicable reliability requirements and therefore established that it was accepting the NYISO’s statement that it “is in compliance with NERC’s requirements for (both facilities and restoration time even) without the Ravenswood units.” The Commission further noted that Ravenswood had provided the required notice to terminate Black Start Service which afforded the NYISO and Con Edison ample time and opportunity¹³ to take steps, had any been found to be necessary, to ensure reliability.¹⁴

¹² NYISO Motion in Opposition to Amendment and, in the Alternative Answer; and Motion Seeking Waiver of Tariff Requirements Regarding Black Start Service at 6.

¹³ As the Commission found, “NYISO and Con Edison have had a year’s notice of Ravenswood’s intent to leave the Black Start program on September 30, 2011. This is the notice period required by NYISO’s Services Tariff, a period that should be adequate to prepare for a unit that is not part of the NYISO’s Reliability Plan to leave the Black Start Program or to negotiate an extension of that unit’s commitment.” See September 27 Order at P 43.

¹⁴ In the NYPSC Proceeding, both Con Edison and a group of New York transmission owners alleged that termination notices became effective without any review by the NYISO, FERC or the NYPSC. (See, e.g., NYPSC Case 11-E-0423, *supra*, “Comments of the Designated New York Transmission Owners” (dated September 2, 2011)

Denying the NYISO's requests, the Commission held that "NYISO has not shown good cause for . . . preventing Ravenswood's immediate withdrawal from the Black Start Program."¹⁵

Finding that Ravenswood had fully complied with all requirements of the NYISO's Services Tariff, the Commission held that Ravenswood was permitted to withdraw its Units from the System Restoration Program effective September 30, 2011.¹⁶

Ravenswood immediately filed a copy of the Commission's order with the NYPSC on the same day it was issued, September 27, 2011. Notwithstanding the issuance of, and the express determinations that were set forth in, the Commission's September 27 Order, the NYPSC issued its own order, the NYPSC Order, on the following day. The NYPSC cited to the Commission-approved System Restoration Program throughout the NYPSC Order.¹⁷ Thus, the NYPSC was obviously well aware that the Commission had occupied this area and had, in this instance, already ruled on, and confirmed, Ravenswood's withdrawal from the System Restoration Program.

at 2.) However, such arguments ignore the Commission's findings in the September 27 Order and, in fact, illustrate the inherent danger of attempting to "forum shop" -- or, more specifically, "jurisdiction shop" -- by bringing these same issues before more than one regulatory body.

¹⁵ September 27 Order at P 46.

¹⁶ *Id.*

¹⁷ The NYPSC points to the specific provisions of the System Restoration Program to argue that its proposal to compel the continued provision of Black Start Service would not constitute a confiscatory taking violative of the U.S. Constitution, stating,

Because FERC has already decided that compensation through the NYISO tariff for Blackstart Service is adequately provided for, we reject the generators' claims that compelling Blackstart Service constitutes a confiscatory taking and deprivation of property.

(*See* NYPSC Order at 24; citation omitted.) Paradoxically, however, it then ignores that the System Restoration Program also contains notice and withdrawal requirements governing the provision of Black Start Service. Nor does the NYPSC explain how the compensation provisions of the System Restoration Program could still pertain once the notice and withdrawal provisions were disregarded (*i.e.*, how exactly a wholesale generator that had provided the required notice and withdrawn from the program could still nevertheless seek compensation from the NYISO for the very service from which it had already withdrawn.)

Nonetheless, effectively ignoring the existence of, and the time afforded by, the one year notice provision that is a core part of the System Restoration Program,¹⁸ the NYPSC summarily determined that “the termination of Blackstart Service by an existing provider is likely to adversely affect the restoration of the electric system and electric service necessary for the provision of safe, adequate and reliable service after an outage.”¹⁹ Asserting that such matters “fall within our authority under [New York Public Service Law],” the NYPSC held that wholesale generators that are attached to Con Edison’s transmission system and provide Black Start Service under the NYISO’s System Restoration Program must obtain the NYPSC’s written consent before terminating such service.²⁰ The NYPSC did not, however, explain how its order conformed with the Commission’s September 27 Order or why the NYPSC had not raised any of these reliability concerns before the Commission in the Ravenswood Proceeding in which the NYPSC had intervened. Rather, the NYPSC simply asserted that it had authority under the New York Public Service Law to require Black Start Service providers to continue to provide such service until it consented to the termination of such service.

On October 11, 2011, the NYISO sent Ravenswood the October 11 Letter. Using the NYPSC Order as the basis for its actions, the NYISO (pointing to NYSRC “indications” but with

¹⁸ The NYPSC points to the one year notice provision that the Commission approved as just and reasonable but then summarily disregards it, stating, “The NYISO tariff currently provides for a one-year notice of intent to abandon Blackstart Service, although that provision adheres only to the NYISO and does not bind us.” (See NYPSC Order at n.23.)

¹⁹ See NYPSC Order at 12. To support its claims about alleged reliability concerns, the NYPSC cited to a one sentence “caution” contained in the Comments that the NYISO submitted in the NYPSC Proceeding concerning “significant reliability concerns” if the Ravenswood Units withdrew from the System Restoration Program. (See NYPSC Order at 12.) In so doing, however, the NYPSC wholly ignored the NYISO’s express statement four sentences later that “the NYISO and Con Edison would still be capable of restoring electric service to New York City in a manner that meets applicable reliability requirements”, and thus, Ravenswood’s withdrawal was actually a matter of “cost and inconvenience in New York City,” not reliability. Indeed, as established, supra, the Commission correctly relied on a similar statement that the NYISO had included in its pleading in the Ravenswood Proceeding, together with other factors, to reach its determination in the September 27 Order that Ravenswood was authorized to withdraw the Units from the System Restoration Program effective September 30, 2011.

²⁰ *Id.* at 13, 15-16.

no evidentiary support) sought to direct Ravenswood to continue providing Black Start Service under the System Restoration Program. While the NYISO was a party to the Ravenswood Proceeding and, as such, received the September 27 Order, the NYISO ignored the September 27 Order in its October 11 Letter.

II. COMMENTS

THE NYISO CANNOT RELY ON THE NYPSC ORDER TO DIRECT RAVENSWOOD TO CONTINUE TO PROVIDE BLACK START SERVICE UNDER THE SYSTEM RESTORATION PROGRAM BECAUSE THE FPA PREEMPTS THE NYPSC FROM REQUIRING WHOLESALE GENERATORS INVOLUNTARILY TO CONTINUE TO PROVIDE BLACK START SERVICE UNTIL SUCH TIME THAT THE NYPSC CONSENTS TO TERMINATION OF THAT SERVICE

In its October Letter, the NYISO asserts that its directives (and those allegedly of the NYSRC) for Ravenswood’s continued participation in the System Restoration Program are being made “[o]n the basis of the PSC’s ruling.”²¹ In its NYPSC Order, the NYPSC states: “We reject the generation owners’ arguments that our authority under [Public Service Law] Article 4 does not extend to electric corporations that lack a franchise and provide only wholesale service.”²² After laying that predicate, the NYPSC asserts that the discontinuation of Black Start Services may have reliability implications, and thus, it must exercise its claimed jurisdiction by mandating that wholesale generators that have voluntarily elected to participate in the NYISO’s Commission-approved System Restoration Program must obtain the NYPSC’s consent before terminating service thereunder. The NYPSC Order is an impermissible, direct challenge to the Commission’s exclusive jurisdiction over wholesale electric service under the FPA. Thus, the NYISO cannot rely

²¹ See TCR Complaint, Exhibit No. TCR-2.

²² NYPSC Order at 15.

upon it to direct Ravenswood to continue to provide Black Start Service under the System Restoration Program.

By operation of the Supremacy Clause of Article VI of the U.S. Constitution, federal law supersedes State or local laws in three important respects.²³ Congressional intent to preempt state or local law may be evinced (1) by express language in a federal statute, (2) implicitly, where the federal legislation is so comprehensive in scope that it fully occupies the field of its subject matter jurisdiction (field preemption), or (3) implicitly, where the state or local law actually conflicts with the federal law (conflict preemption).²⁴ Under the conflict preemption prong of the test, an actual conflict arises when either compliance with both federal and local laws is physically impossible or when the local law stands as an obstacle to the accomplishment of the full congressional purposes and objectives.²⁵ Notably, “[f]ederal regulations have no less preemptive effect than federal statutes.”²⁶

FPA Sections 201(b), 205(a) and 206 establish FERC’s exclusive jurisdiction over the rates, terms and conditions of wholesale service, and thus, by its express language, the FPA supersedes the NYPSL. Specifically, section 201(b)(1) of the FPA confers jurisdiction on the Commission over sales of electric energy at wholesale in interstate commerce. Section 205(a) of the FPA states that:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges shall be

²³ *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-713 (1985).

²⁴ *See id* at 713; *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 42-43(1998).

²⁵ *Hillsborough County*, 471 U.S. at 713; *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 39 (1996), *cert. denied*, 520 U.S. 1118 (1997).

²⁶ *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

FPA section 206 grants FERC the ability to review “any rate, charges, or classification” charged by a public utility for any transmission or sale subject to the jurisdiction of FERC, as well as “any rule, regulation, practice, or contract affecting such rate, charge, or classification....”

Moreover, the NYPSC’s jurisdiction over the rates, terms and conditions of wholesale services, including, pertinent here Black Start Service, is preempted by the FPA in two key respects. *First*, Section 202(c) of the FPA, 16 U.S.C. § 824a(c), specifically grants authority to federal officials to require generators involuntarily to generate under emergency conditions like those that would exist if Black Start Service currently being provided needed to be maintained to restore service.

[W]henever the Commission determines that an emergency exists by reason of . . . a shortage of electric energy or of facilities for the generation or transmission of electric energy . . . or other causes, the Commission shall have authority, either upon its on motion or upon complaint, with or without notice, hearing, or report, to require by order . . . such generation, delivery, interchange or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.²⁷

It is important to note that the authority that Congress granted to federal officials in this regard trumps Section 201(b)(1) of the FPA, 16 U.S.C. § 824(b)(1) (withholding jurisdiction from FERC “over facilities used for the generation of electric energy”) – the provision that the NYPSC cites as its legal rationale for exercising its jurisdiction.²⁸ FERC’s predecessor and the U.S. Secretary of Energy have invoked Section 202(c)’s authority to prevent a proposed termination of service from

²⁷ Authority under Section 202(c) was transferred to the Secretary of Energy in 1980 by the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. § 7101). *See Dist. of Columbia Pub. Serv. Cmm’n*, Docket No. EL05-145-000, Order on Petition and Complaint, at 1 fn. 2 (January 9, 2006).

²⁸ NYPSC Order at 21.

taking effect²⁹ to require generators to provide service during the California Energy Crisis³⁰ and to direct a generator to resume service where its unavailability would result in violations of applicable reliability standards.³¹ FPA Section 202(c)'s specific grant of authority to federal officials to order the continued operation of generating facilities whenever necessary to address reliability conditions, like the need for Black Start Service under certain circumstances, occupies the field leaving no room for conflicting and potentially inconsistent exercises of authority by the states in this area.³²

Second, separate and apart from the preemption resulting from FPA Section 202(c), Black Start Service, and, more importantly, the conditions under which a wholesale generator may terminate such service, are expressly governed by the NYISO's Services Tariff which is subject to the Commission's exclusive jurisdiction under FPA Sections 201(b), 205(a) and 206.³³ The NYPSC Order does not contest, nor could it, the Commission's exclusive authority over the NYISO's Services Tariff. If the NYPSC believed that the notice and withdrawal provisions that the Commission approved as a core part of the NYISO's System Restoration Program either threatened reliability or were otherwise unjust or unreasonable, it had the right, including as an intervenor in the Commission's Ravenswood proceeding, to raise these issues, and if warranted, to seek to revise these tariff provisions through the Commission's normal processes.³⁴

²⁹ *City of Cleveland v. Cleveland Elec. Illum. Co.*, 47 F.P.C. 747 (1972).

³⁰ 65 *Fed. Reg.* 82,989 (2000).

³¹ 71 *Fed. Reg.* 3279 (2006).

³² See *FPC v. Southern California Edison*, 376 U.S. 205, 215-16 (1964) (in the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.").

³³ As Ravenswood established in its Complaint, the Commission has occupied this field concerning the rates, terms and conditions of Black Start Service at wholesale since it issued Order No. 888. (*See* TCR Complaint at 7-8.)

³⁴ There was no need to entertain Con Edison's request to establish a parallel State approval process for the discontinuation of service or to provoke a jurisdictional controversy by issuing an order collaterally challenging the effect of the Commission's previously issued September 27 Order.

FERC’s jurisdiction over wholesale sales, as applied specifically here over the rates, terms and conditions of Black Start Service, preempts the NYPSC from seeking to require the involuntary provision of wholesale Black Start Service beyond the notice period provided under the System Restoration Program. “In both *Northern Natural [Gas Co. v. State Corp. Comm’n of Kansas]*, 372 U.S. 84 (1963) and *Transco[ntinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi]*, 474 U.S. 409 (1986), States crossed the dividing line so carefully drawn by Congress in [Natural Gas Act] § 1(b) and retained in the [Natural Gas Policy Act], trespassing on federal authority by imposing purchasing requirements on interstate pipelines.”³⁵ Just as States “crossed the dividing line” and “trespass[ed] on federal authority” by attempting to require FERC-jurisdictional buyers to make certain purchases in those cases, so too has the NYPSC impermissibly encroached on the Commission’s authority by issuing a declaratory ruling that FERC-jurisdictional sellers, here, wholesale generators that had elected to participate voluntarily in the System Restoration Program such as Ravenswood, cannot discontinue doing so without first obtaining the NYPSC’s consent.³⁶ Moreover, pursuant to the NYISO’s System Restoration Program, Black Start Service providers receive a pre-determined, “one size fits all” (based only on interconnection voltage level and type of facility), incremental rate for

³⁵ *Northwest Central Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 514 (1980).

³⁶ See also *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 308 (1988) (holding that the Commission’s comprehensive regulation of interstate natural gas pipelines under the provisions of the Natural Gas Act preempted State regulation even though the state regulation was intended to ensure the reliability of service for the state’s end-use consumers). The NYPSC’s order summarily dismisses reliance on Natural Gas Act cases “given the reservations of state authority that are unique to the FPA” (p. 23). Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), however, contains reservations of state authority that are quite comparable to those in Section 201 of the FPA. The NYPSC’s rationale also ignores the fact that the relevant provisions of the two acts “are in all material respects substantially identical,” *Arkansas Louisiana Gas v. Hall*, 453 U.S. 571, 577 n. 7 (1981), and that the NYPSC itself relies on Natural Gas Act cases in proceedings arising under the FPA. See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket No. RM10-23-000, Request for Clarification, or in the Alternative, Request for Rehearing of the New York State Public Service Commission (Aug. 22, 2011) at 6-7.

providing Black Start Service.³⁷ This proxy rate is a generic, black-box rate; it is not set based on the costs of any individual generator providing Black Start Service. The rate is not intended to, nor does it come close to, covering the entire cost of investing in a facility that is able to perform in the manner outlined in the System Restoration Program. Importantly, a Black Start Service provider can decide not to offer the service if it is not consistent with its facility operations, the facility is not operable or financially viable or the rate is too low to cover its respective costs of providing the service. Thus, the voluntary nature of Black Start Service is intrinsically tied to the rate, terms and conditions for providing the service that are set forth in the NYISO's Services Tariff.

Converting a voluntary service into a mandatory one as the NYISO seeks to do in its October Letter would contravene the NYISO's and the Commission's objectives by eviscerating the method that the NYISO proposed, and the Commission approved, for generators to offer Black Start Service.³⁸ It would force wholesale generators to accept a rate for an undetermined period of time that may have been just and reasonable when the service was defined as a voluntary service, but not if it was transformed into a mandatory service. Wholesale generators would be discouraged from commencing participation as Black Start Service providers if they were forced to provide the service pursuant to rates, terms and conditions that may not, in fact, allow

³⁷ Con Edison's assertion that NYPSC Section 70 approval is required to terminate Black Start Service because there is no competitive market for the service and wholesale generators are paid a cost-based rate is also wholly without basis. FERC's authority under FPA Section 205, and thereby its preemptive effect on the NYPSC, does not depend upon whether a rate is market-based or cost-based. Indeed, since the inception of ISO operated markets, FERC has issued orders approving rates based on proxy costs for specific services (e.g., voltage support service) and under specific circumstances (e.g., reliability must run capacity contracts.) *See, e.g. New York Independent System Operator, Inc.*, 115 FERC ¶ 61,005 (2006).

³⁸ It again bears note that the NYPSC's reliance on the compensation provisions that are set forth in the System Restoration Program to argue that transforming Black Start Service from a voluntary to a mandatory service would not constitute a taking is wholly without merit because it fails to account for the actual structure of, and the inter-related nature of the provisions contained in, the System Restoration Program. (*See, NYPSC Order at 24; see also* n.13, *supra.*)

them to recover their unit specific costs of providing this service or require them to operate in a manner that is not consistent with their operating protocols.

The preemptive force of the FPA as applied to the rates, terms and conditions of a merchant generator's provision of Black Start Service at wholesale is beyond dispute. Indeed, the NYPSC itself even acknowledges that Black Start Service is a wholesale service provided for the most part by exempt wholesale generators.³⁹ This wholesale service undoubtedly falls within the Commission's exclusive jurisdiction. The NYISO cannot ignore that fact as it has sought to do in its October 11 Letter.

The NYPSC argues that FPA Section 215, which provides that the State of New York "may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards," demonstrates that Congress did not intend to provide FERC with exclusive jurisdiction in regards to generation facilities, resource adequacy, and reliability.⁴⁰ Rather, the NYPSC argues, Congress sought to ensure that states retained their traditional regulatory functions. The NYPSC, argues, therefore, that it is not preempted from requiring that its consent be obtained before a supplier of Black Start Service can stop supplying that service.

Contrary to the NYPSC's argument, Section 215 of the FPA does not give the Commission authority to order wholesale generators to provide service. The NYPSC's authority under Section 215 to adopt stricter reliability rules than those approved by FERC does not mean that the NYPSC is free to impose rules that conflict with the FERC-approved NYISO Services

³⁹ NYPSC Order at 15, 18. The NYPSC makes a passing attempt to justify its claimed jurisdiction over this area by asserting that Black Start Service may not even be a wholesale service because it could be argued that Con Edison obtains it for its own use to restore service on its system. *Id.* at 24. As noted, supra, however, Ravenswood has established that it has never provided retail black start service from the Units to Con Edison or to any other entity.

⁴⁰ *Id.* at 22.

Tariff on areas over which FERC has exclusive jurisdiction.⁴¹ The savings provision states:

“Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.”⁴²

The phrase “[n]othing in this section” indicates that the reservations of authority to the states (and New York specifically) apply to the exercise of FERC jurisdiction under FPA Section 215.

It does not negate or otherwise in any way hamper FERC’s jurisdiction under other provisions of the FPA. FERC has an independent obligation under FPA Sections 201, 205, and 206 to consider whether terms and conditions affecting jurisdictional rates are just and reasonable.

Such obligation preempts the Commission from issuing orders that conflict with rates, terms and conditions of wholesale sales approved by FERC.

The Commission should rule that the Secretary of Energy has the exclusive authority to require generators to provide service to address a reliability need, and that the Commission has exclusive jurisdiction over the terms and conditions under which Black Start Service is provided and, likewise, may be terminated. As Ravenswood correctly established in its Complaint, the Commission’s orders concerning Black Start Service, including the September 27 Order, constitute the properly applied exercise of its plenary jurisdiction over “practices affecting wholesale rates,” not the direct regulation of electric generating facilities. In stark

⁴¹ The Commission’s adoption of the NYSRC’s reliability rules also does not give it authority to order Blackstart Providers to continue to provide blackstart service. There is nothing in the reliability rules that requires a wholesale generator to provide blackstart service in the first instance. Rather, if a generator elects to participate in the program and becomes a Blackstart Provider, the NYSRC rules simply establish how such service is to be rendered. Moreover, the NYISO’s Services Tariff permits wholesale generators to unilaterally terminate service as Blackstart Providers. Once a generator elects to terminate its provision of blackstart service, it ceases to be a Blackstart Provider and the NYSRC’s rules concerning blackstart service are no longer applicable to it.

⁴² 16 U.S.C. § 824o(i)(3).

contrast, the NYPSC Order constitutes an impermissible encroachment on practices affecting wholesale transactions.⁴³

If the NYPSC is allowed to take this step of encroaching into the regulation of wholesale service, and the Respondents are then permitted to rely upon it as the basis for their actions as they have attempted to do in the October 11 Letter, it will set a dangerous precedent. By usurping the Secretary of Energy's and the Commission's power in this seemingly limited instance, the NYPSC indisputably will be intruding upon the federal government's exclusive domain.⁴⁴ If the NYPSC can dictate the terms of this wholesale service under the guise that this is a matter that will affect reliability,⁴⁵ the bright line separating federally-regulated wholesale electric service and state-regulated retail electric service will be irremediably compromised.⁴⁶

⁴³ See TCR Complaint at 28-29, citing *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354 (1988); *Conn. Dep't. of Pub. Util. Control v. FERC*, 569 F.3d 477, 477, 478-79 (D.C. Cir. 2009).

⁴⁴ *Cf. California Public Utilities Commission*, 132 FERC ¶61,047 (2010) (holding that California's feed-in tariff for renewable generators is preempted in part).

⁴⁵ It bears note that the NYPSC itself intimated in the NYPSC Order that the reach of its claimed jurisdiction went well beyond simply Black Start Service and even went well beyond reliability to encompass more broadly "public interest" and "public health" issues, stating,

While we are not, in this proceeding, ordering any particular generation owner to provide Blackstart Service, we nevertheless note that PSL §66(2) provides authority to order reasonable improvements necessary to promote the public interest and preserve public health and that such improvements may include the provision of Blackstart Service.

See NYPSC Order at n.22.

⁴⁶ The NYPSC further attempts to justify its claimed jurisdiction over this area by broadly asserting that "there appear to be elements of Blackstart Service that are separate and distinct from wholesale sales of energy." (*See* NYPSC Order at 24.) However, the NYPSC's rationale, if accepted, which it cannot be, equally would apply to essentially every wholesale service - voltage support, reserves, energy, capacity, etc. Particularly in light of the NYPSC's statement in footnote 22 of its NYPSC Order as addressed, *supra*, permitting this jurisdiction encroachment to occur will produce a slippery slope where the Commission's jurisdiction, for all intents and purposes, may no longer in fact be exclusive. (*See also* TCR Complaint at 8-9.)

III. CONCLUSION

IPPNY and EPSA respectfully request that the Commission grant the Complaint and (i) confirm that the Units are not required to provide Black Start Service under the System Restoration Program, (ii) hold that the NYPSC Order is preempted by the FPA to the extent that it can be interpreted to continue to require the Units to provide Black Start Service, and (iii) enjoin the Respondents from requiring the Units to provide Black Start Service.

Respectfully submitted,

/s/

David B. Johnson
READ and LANIADO, LLP
25 Eagle Street
Albany, New York 12207
Attorneys for
Independent Power Producers of
New York, Inc.
dbj@readlaniado.com

/s/

Nancy Bagot
Vice President of Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 1230
Washington, DC 20005
(202) 628-8200
nbagot@epsa.com

Dated: December 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the foregoing document by electronic mail or first-class mail upon each person designated on the official service list compiled by the Secretary to the Commission in this proceeding.

/s/
David Johnson

Dated: December 6, 2011