

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.**

REPLY 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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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.
CAISO Station Power Protocol	A section of the California ISO's tariff that gives generators the option of voluntarily choosing to participate in the California ISO's station power program. Under the program, participating generators are permitted to self supply station power, either from on-site facilities or remote facilities owned by the same company.
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
FERC Br.	Brief of Respondent Federal Energy Regulatory Commission (December 6, 2011)
FPA	Federal Power Act
<i>New York v. FERC</i>	<i>New York v. FERC</i> , 535 U.S. 1 (2002)
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 (September 23, 2011)
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.
SCE	Southern California Edison Company
SCE Br.	Brief of Intervenor Southern California Edison Company (December 20, 2011).
<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.
Intervenor-Petitioners	Intervenors in support of Petitioners: the Electric Power Supply Association (“EPSA”), Cogeneration Association of California (“CAC”) and the Energy Producers and Users Coalition (“EPUC”).

SUMMARY OF THE ARGUMENT

In their opening brief Intervenor-Petitioners, the Electric Power Supply Association, the Cogeneration Association of California, and the Energy Producers and Users Coalition, demonstrated:

- that in *S. Cal. Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010) (“*SCE v. FERC*”) the Court remanded to the Commission to address the threshold question of the Commission’s jurisdiction over the self-supply of station power;
- that the Commission engaged in arbitrary and capricious decision-making by failing to adequately explain its decision on remand and by failing to satisfy its statutory obligation to prevent undue discrimination;
- that the self-supply of station power by wholesale generators falls squarely within the Commission’s statutory authority because the practice directly “affects and pertains” to wholesale sales and transmission; and
- that the state regulations are preempted as a matter of federal law because California’s attempt to regulate station power by setting a netting interval different from the federal netting interval necessarily conflicts with the Commission’s exclusive jurisdiction over wholesale sales and transmission.

Nothing in the briefs submitted by either the Commission or intervenor-respondent Southern California Edison Company (“SCE”) demonstrates otherwise. It is clear that the Commission’s orders should be reversed and remanded to the Commission with instructions to comply with its statutory obligations by affording full and appropriate consideration to the important issues raised in these cases.

Accordingly, to avoid duplicative briefing, Intervenor-Petitioners focus this reply on the post-hoc rationalization conjured by the Commission's lawyers in an attempt to justify the Commission's decision to abandon its decade old station power policy – a rationalization that is predicated on the false and unsupported assumption that the self-supply of station power under the CAISO Station Power Protocol through *netting energy consumption against output* does not impact the amount of energy available for wholesale. *See* FERC Br. at 44; *see also* SCE Br. at 16.

Although the Commission's brief contends that its station power policy affects only transmission charges, that contention cannot be squared with the Commission's own characterizations of self-supplied station power as “negative generation” (not “negative transmission”), the terms of the CAISO Station Power Protocol, or the nature and extent of the disputes over station power issues that have occurred over the past decade. It is simply not credible to suggest that generators, vertically integrated utilities, and the Commission itself have invested so much time and effort over the question of station power, if the only issue was the application of transmission charges to the small subset of self-supplied station power provided from remote generation. To the contrary, the reality is that the treatment of station power goes far beyond the question of transmission charges: The issue is critically important to the ability of competitive power producers to

compete on a level playing field in the wholesale markets administered by the Commission, and to receive the full and fair value of the power they produce.

The Commission's decade old station power policy at its core addresses what amount of a wholesale generator's actual output is available for sale in wholesale markets (*i.e.*, positive generation) and what amount of the generator's output is consumed to operate its generation resource (*i.e.*, negative generation), while ensuring that the generator is not required to purchase power from a third party supplier and incur associated retail charges for power that the Commission has already determined is being self-supplied by the generator. This station power accounting necessarily affects the amount of power available for sale in the wholesale markets and preempts state attempts to impose retail charges that second-guess the Commission's determination as to how much of the generator's total output is appropriately allocated to its station power requirements.

To the extent that a generator consumes a portion of the power it produces (either on site or remotely from its resource portfolio) to serve its station power load, such output is not available to sell in the wholesale market. If states are permitted to impose a netting period to determine when a generator self-supplies its station power requirements that differs from the netting period approved by the Commission (both of which measure consumption versus output), there will be an inevitable disconnect between the amount of power the Commission deems was

self-supplied by the generator and the amount determined by the state to have been self-supplied, such that the generator would be “double-charged” for station power and have less power available for sale in the wholesale market. Such a conflict between state and federal tariffs must be resolved in favor of the federal tariff to comply with the statutory scheme established by Congress, to ensure that a generator is fully compensated for the energy it produces, and to prevent undue discrimination against generators participating in the wholesale markets.

ARGUMENT

In their opening brief, Intervenor-Petitioners showed that independent generators will be denied full and fair compensation for the energy they produce if state regulators are permitted to establish different netting intervals for determining whether a generator has self-supplied its station power requirements. *See* Intervenor Br. at 24-28; *see also* Petitioners Br. at 56-60. As the Petitioners’ brief also explained:

If the inconsistent state netting rule is not preempted, some portion of the generator’s output is ‘trapped’ because the state netting rules effectively prevent the generator from receiving wholesale revenues for that portion of its total output that the Commission has determined under its own netting rules is not available for transmission and sale at wholesale (because it is being used to self-supply station power).

Petitioners Br. at 64.

In response, the Commission asserts that “[t]he [CAISO Station Power] Protocol netting procedure only assesses whether and to what extent Commission-

jurisdictional transmission is used to satisfy the generator's station power needed." FERC Br. at 44. Similarly, SCE asserts that the CAISO Station Power Protocol pertains only to the extent to which retail transmission is used to satisfy a generator's station power needs and does not "dictate how much *energy* is sold at wholesale." SCE Br. at 19. These arguments are meritless for at least three reasons.

First, by asserting that there is no impact on the amount of energy available for sale at wholesale, FERC and SCE are, in effect, claiming that there is no "netting" of energy whatsoever, even though FERC has consistently employed the concept of netting in wholesale energy markets throughout the country to determine what portion of a generator's output is available for transmission and sale at wholesale and what portion is being used to satisfy the generator's station power requirements.¹ Generators, whether independent generators or part of a vertically integrated utility, have consistently netted consumption versus output. Generators have also consistently netted the power produced and consumed in the process of either generating power or taking power from the grid when the unit

¹ Whether FERC adopts a netting period of thirty (30) days under the CAISO Station Power Protocol, or a shorter netting period, the netting is the same – the only difference is the period of netting and who sets the netting period. Significantly, in these cases, no party has pressed or preserved any argument challenging the reasonableness of the netting period set by FERC. The only issue is whether that netting period preempts inconsistent state regulations.

was not generating (*i.e.*, “negative generation”), against the total output to the grid.

As the Commission has stated:

In general, vertically-integrated utilities in the PJM control area historically have treated station power as ‘negative generation.’ ***That is, the energy output of a generation facility typically was recorded as its gross output less the power consumed at the facility.*** Station power used during periods when the generator was not operating likewise was treated as negative generation.

PJM Interconnection LLC, 94 FERC ¶ 61,251 at 61,889-61,890 (2001) (emphasis added). The fact that station power tariffs also determine if the transmission system is utilized to self-supply station power is secondary to the principal purpose of station power netting: to determine whether a generator’s power output exceeds its “negative generation” over the established netting interval.

Second, SCE and FERC’s arguments ignore the reality of how the CAISO Station Power Protocol operates — as an after the fact accounting of the station power costs incurred in relation to a generator’s output over the netting period, *i.e.*, currently 30 days. In this respect, FERC’s statement that “Calpine itself acknowledges that ‘generators are permitted to sell the energy they produce in real time at prevailing market rates’” ignores the reality that while a generator may be able to sell its energy output in real-time, when the monthly settlement takes place an adjustment is made for any such energy sold which is deemed through netting to have been used for self-supply of station power. FERC Br. at 38. The CAISO Station Power Protocol provides that:

At the end of each Netting Period, the CAISO will calculate the Net Output for each Generating Unit in the Station Power Portfolio. If the Net Output is positive, then all Station Power associated with that Generating Unit will have been served by On-Site Self-Supply. Any positive Net Output from facilities in the Station Power Portfolio will be available to provide Remote Self-Supply to any Generating Unit with negative Net Output. If the available Remote Self-Supply is less than the aggregate negative Net Output in the Station Power Portfolio, then such shortfall will be deemed to have been served by Third Party Supply. The CAISO will incorporate these determinations in its ***accounting and billing for the Netting Period*** by reassigning Station Power to unique Load identifiers for Remote Self-Supply and Third Party Supply, as required.

CAISO Station Power Protocol at Section 3.1, appended to the Petitioners' Brief (emphasis added).

The CAISO accounts for station power costs under the Station Power Protocol. The CAISO tracks how station power is sourced over the monthly netting interval by assigning "unique Load identifiers" for "On-Site Self-Supply" and "Remote Self-Supply" associated with "each Station Power meter." See CAISO Station Power Protocol, Section 6.3. In the case of remote self-supply, "positive Net Output from facilities in the Station Power Portfolio will be available to provide Remote Self-Supply to any Generating Unit with negative Net Output." CAISO Station Power Protocol, Section 3.1. Moreover, Section 3.2 of the Protocol provides that generators are to be "assessed all charges applicable to metered Demand under the CAISO Tariff," *i.e.*, all charges applicable to wholesale power taken from the transmission system to serve the station power "load." Clearly, the

CAISO Station Power Protocol is accounting for a generator's output versus consumption to determine the amount of power available for sale at wholesale, not just to determine the Transmission Access Charges that would be assessed to the generator if it remote self-supplies or to the local utility if the generator purchases station power at retail.

The accounting for transmission charges (*i.e.*, the CAISO Transmission Access Charge) is only a small component of the accounting that occurs under the Station Power Protocol. Specifically transmission charges apply if a generator either (1) remotely self-supplies its station power requirements by using the transmission system; or (2) purchases its requirements from a third-party supplier. *See* CAISO Station Power Protocol, Section 4. Importantly, if a generator has a net negative output over the monthly netting period, then that generator is subject to retail charges, including retail charges for the power consumed under a state tariff.

Consistent measures of energy and transmission usage are required in wholesale markets. Otherwise, generators may be (1) forced to "purchase" unneeded energy at retail, and (2) unable to sell a portion of their energy at wholesale, because the energy will not be recognized by the CAISO (or the Commission) as available for sale at wholesale, but at the same time, would not be recognized by the state as available to serve the generator's station power

requirements. *See generally* Petitioners Br. at 57-59. By allowing states to impose conflicting station power netting periods, FERC's orders will either subject generators to duplicative and unduly discriminatory station power charges, or require FERC to follow the states' lead and order the CAISO to adopt the netting period adopted by the state. Neither result is permitted under the Federal Power Act.

The stakes in this dispute are substantial. As Intervenor-Petitioners explained in their opening brief, if the Commission's orders below are not corrected and individual states are allowed to set the applicable netting interval, (1) 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); and (2) 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* Intervenors Br. at 24-28. Such a result conflicts with the mandate in the Federal Power Act that FERC prevent discrimination in the wholesale markets. *See* 16 U.S.C. § 824e(a).

Third, the Commission's failure to address the inevitable conflict looming between state and federal tariffs with respect to self-supply of station power is inconsistent with its own statements and applicable court precedent. In its Rehearing Order, the Commission recognized the problems that will result from its order, but summarily concluded 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 ___). This statement is inconsistent with FERC's previous statements. The Commission has long acknowledged the impact its station power policy has both on (1) the amount of energy available for sale (*i.e.*, positive versus "negative generation"); and (2) the competitiveness (*i.e.*, price) of the energy available for sale. 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) (emphasis added).

FERC's current argument that a state can employ a different netting interval to determine a generator's station power use without impacting the amount of energy available for sale in the wholesale markets ignores its previous findings. Indeed, in addressing the wholesale markets administered by the New York Independent System Operator, Inc. ("NYISO"), the Commission previously recognized that conflicting station power schemes would directly impact the wholesale market it has exclusive authority to regulate:

The netting provisions of the NYISO Services Tariff calculate the transmission load for station power *by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff)*, creates a conflict that must be resolved by the enforcement of the federally-regulated tariff.

Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation, 110 FERC ¶ 61,033 at P 25 (2005) (emphasis added). The Commission also acknowledged the potential for conflict with respect to the CAISO Station Power Protocol, noting that if the states were allowed to impose "retail and stranded cost charges on merchant generators" that self-supplied their station power requirements under the CAISO Station Power Protocol, "such charges would 'impair [] the ability of merchant generators to utilize the netting provisions' of

CAISO's tariff." *Duke Energy Moss Landing LLC, v. Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,183 at P 7 (2011) ("Order on Remand") (JA __).

FERC precedent and the actual operation of the CAISO Station Power Protocol thus clearly demonstrate that permitting a state to adopt a conflicting station power regulatory regime would affect the amount of energy available for sale in wholesale markets and impermissibly infringe on FERC's exclusive jurisdiction. In *New York v. FERC*, the Supreme Court held 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). 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.

CONCLUSION

For these reasons, Intervenor-Petitioners request that the Court 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: January 19, 2012

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 4,375 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 2895 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 19th day of January, 2012, 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 19th day of January, 2012.

/s/ Brenda Robertson

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