

MEMORANDUM

FROM: Rebecca Davis, J.D., Tam Hunt, J.D.

TO: Clean Coalition Team

DATE: July 18, 2011

RE: When Can States Assert Jurisdiction Over Interconnection Procedures?

INTRODUCTION

The interconnection of new renewable energy generation facilities to the electrical grid is a complex, generally opaque and unpredictable process in California and around the country. Much of the confusion arises from the lack of clarity regarding state and federal jurisdiction over interconnection procedures. Also, there is overwhelming anecdotal evidence that California's Investor-Owned Utilities (IOUs) frequently fail to comply with the applicable interconnection tariffs, such as deadlines and other procedures, leading to very lengthy interconnection procedures and insufficient data transparency.

To reduce confusion and increase both transparency and accountability in the interconnection process, the question of state versus federal interconnection jurisdiction should be clearly answered. This brief first discusses the sources of Federal Energy Regulatory Commission (FERC) jurisdiction over interconnection and then examines the types of interconnection procedures over which states can properly assert jurisdiction. We have identified areas where jurisdiction is readily determined and those areas that will benefit greatly from further FERC guidance.

SUMMARY

Different principles of jurisdiction apply, depending on whether the generator seeking to interconnect is a Qualifying Facility (QF) under PURPA or not. Where the generator is not classified as a QF, FERC has jurisdiction over interconnection if the generator connects to a transmission line or distribution line that is subject to an Open Access Transmission Tariff (OATT) for the purpose of selling power at wholesale. In contrast, where the generator is a QF, there is only one relevant factor: a QF that plans to sell all of its output to the host utility interconnects under state jurisdiction. If the QF plans to sell any electricity to a third party, FERC has jurisdiction, because interstate commerce is presumed.

Table 1 summarizes our conclusions.

Most importantly for the purposes of this memo, states have jurisdiction over QF sales to the local host utility and also over non-QF sales to the host utility if the distribution facility at issue is not subject to an OATT. These two categories are potentially very large categories and may allow California to reassert jurisdiction over the majority of wholesale distributed

generation (WDG, defined as wholesale generators interconnected to the distribution grid) interconnection procedures.

The key issue with respect to WDG interconnection is the applicability of an OATT to the distribution line in question, in which case a distribution line becomes a “dual-use facility” and thus subject to federal jurisdiction. There is no way to determine beforehand if this is or is not the case, as FERC has suggested, and parties seeking interconnection must query the host utility. If the party does not agree with the utility, it may seek redress from FERC. It is not clear, however, how proactive FERC will be in challenging any utility determination. We recommend that states seeking further clarity pursue a declaratory order from FERC to provide further guidance on federal jurisdiction over dual-use facilities.

In California, the investor-owned utilities have asserted that federal jurisdiction applies to all non-QF wholesale interconnection procedures, and also for some QF interconnections. This is a very aggressive interpretation of applicable law and parties seeking to challenge this interpretation should seek further FERC guidance as to whether it is supported by FERC precedent.

In this memo, “facility” can refer to both generation facilities or interconnection facilities (generally called “distribution lines” or “transmission lines”), because this is the terminology used by FERC. The context should make it clear what is being referred to and where it is not clear, we have used the term “facility/line” to make it clear.

Table 1. Summary of interconnection jurisdiction.

<i>Generator</i>	<i>Interconnection point</i>	<i>Interconnection purpose?</i>	<i>Jurisdiction</i>
Non-QF	Transmission Grid*	Wholesale	FERC
Non-QF	Dual-use facility*	Wholesale	FERC
Non-QF	Dual-use facility*	Retail	State
Non-QF	Distribution Grid	Wholesale	State
Non-QF	Distribution Grid	Retail	State
QF	Any facility	Any energy sold to third party	FERC
QF	Any facility	All energy sold to host utility	State

* Transmission and dual-use facilities are, by definition, subject to an OATT.

I. SOURCE OF FERC JURISDICTION

Congress granted FERC authority and set the limits of its jurisdiction in section 201 of the Federal Power Act.¹ In addition to the Federal Power Act (FPA), the scope of FERC's jurisdiction has been discussed in a number of FERC Orders. The most relevant Orders are discussed below. Section 201(a)² is a granting clause, giving FERC authority, while 201(b)³ provides limits to that authority. Pursuant to these provisions, FERC has jurisdiction to regulate "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," but such regulation extends "only to those matters which are not subject to regulation by the States."⁴ A "sale of electric energy at wholesale" is defined in section 201(d) of the Federal Power Act as the "sale of electric energy to any person for resale."⁵ However, the Commission "shall not have jurisdiction [...] over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."⁶

A. Order 888

In 1996, FERC issued Order No. 888 to foster competition in the electric generating industry. Order 888 requires transmission providers to grant generators equal access to transmission facilities on a comparable basis to the transmission service they provided themselves. This was accomplished by requiring transmission facilities to file Open Access Transmission Tariffs (OATTs) and to charge the same amount to itself as it does to other generators.⁷ Specifically, Order No. 888 required: "all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service."⁸

¹ Federal Power Act § 201, 16 U.S.C. § 824 (hereinafter "FPA").

² FPA § 201(a), 16 U.S.C. § 824(a).

³ FPA § 201(b), 16 U.S.C. § 824(b).

⁴ FPA § 201(a), 16 U.S.C. § 824(a).

⁵ FPA § 201(d), 16 U.S.C. § 824(d).

⁶ FPA § 201(b), 16 U.S.C. § 824(b).

⁷ *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. 21,540 (May 10, 1996), [18 CFR parts 35 and 385] FERC Stats. & Regs. ¶ 31,036 (1996), (hereinafter "Order 888"). *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS v. FERC*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); 18 C.F.R. 35, 385 [docket no. RM 95-8-000 and RM 94-7-001; order no. 888].

⁸ *Id.*

In Order No. 888, FERC also devised a seven-factor test to determine whether a facility is a local distribution facility or a transmission facility that needs to apply for an OATT. This test is not determinative as to who has jurisdiction over an interconnection, as FERC's assertion of jurisdiction over interconnections extends only to the transaction of the interconnection, and not to the facility that a generator is connecting to.⁹ Whether or not FERC has jurisdiction over the facility itself is part of a separate analysis. The seven indicators, both functional and technical, of a local distribution facility are to be applied on a case-by-case basis. They are:

1. "Local distribution facilities are normally in close proximity to retail customers.
2. Local distribution facilities are primarily radial in character.
3. Power flows into local distribution systems; it rarely, if ever, flows out.
4. When power enters a local distribution system, it is not reconsigned or transported on to some other market.
5. Power entering a local distribution system is consumed in a comparatively restricted geographical area.
6. Meters are based at the transmission/local distribution interface to measure flows into the local distribution system
7. Local distribution systems will be of reduced voltage."¹⁰

B. FERC Orders 2003 and 2006

To take advantage of the new open access procedures, generators need to be able to interconnect their generating facilities to transmission systems. "Although Order No. 888 did not address interconnection, FERC has since made clear that interconnection is an indispensable component of open access that must be offered on a nondiscriminatory basis."¹¹

FERC established standard procedures governing the interconnection of FERC-jurisdictional large generators (20 megawatts and larger) in 2003 when it issued Order No. 2003 (followed by 2003A, 2003B, and 2003C).¹² This was followed in 2005 by Order No. 2006, which established the interconnection procedures for FERC-jurisdictional small generators (smaller than 20 megawatts).¹³ In addition to laying out the rules that FERC-jurisdictional

⁹ *National Ass'n of Regulatory Utility Commissioners (NARUC) v. FERC*, 475 F.3d 1277, 1282 (D.C.C. 2007).

¹⁰ Order 888, *supra* n. 7, at ¶ 31,981.

¹¹ *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1212 (D.C.Cir. 2009) (citing *Tenn. Power Co.*, 90 F.E.R.C. ¶ 61,238, at 61,761-62 (2000)).

¹² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 F.E.R.C. ¶ 61,103 at 30,430 P 10 (2003) (hereinafter "Order 2003"), *order on reh'g*, Order No. 2003-A, 106 F.E.R.C. ¶ 61,220 (2004), *order on reh'g*, Order No. 2003-B, 109 F.E.R.C. ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 F.E.R.C. ¶ 61,401 (2005), *affirmed in National Ass'n of Regulatory Utility Commissioners (NARUC) v. FERC*, 475 F.3d 1277 (D.C.Cir. 2007).

¹³ *Standardization of Small Generator Interconnection Agreements and Procedures*, FERC Stats. & Regs. ¶ 31,180 (2005), 18 C.F.R. 35 (hereinafter "Order 2006"). Docket No. RM02-12-000; Order 2006B issued July 20, 2006.

generators must follow to connect to the grid, the Orders also clarify the scope of FERC jurisdiction over interconnections.

As part of mapping out the interconnection procedures, the Orders asserted jurisdiction over the terms of an interconnection between a generator and transmission provider, even when connecting to a facility that also engages in local distribution, but only insofar as the interconnection is “for the purpose of making sales of electric energy for resale in interstate commerce.”¹⁴ **These Orders are important to understand because they grant FERC jurisdiction over a local distribution facility in some situations, an area that previously was considered to be solely under state jurisdiction.** The key factor is the applicability of the OATT, which is itself not always entirely clear beforehand because of the lack of clarity in the seven-part test described above, and the absence of any requirement to make this information public. This is an area that would benefit from a declaratory order from FERC allowing a more “bright-line” rule than the current seven-part test.

In Order No. 2006, FERC addressed how this concept fits within the jurisdictional constraints of FPA section 201 (emphasis added):

This Final Rule does not violate the FPA section 201(b)(1) provision that the Commission does not have jurisdiction over local distribution facilities “except as specifically provided...” This is because the Final Rule applies only to interconnections of facilities that are already subject to a jurisdictional OATT at the time the interconnection request is made that will be used for purposes of jurisdictional wholesale sales. Because of the limited applicability of this Final Rule, and because the majority of small generators interconnect with facilities that are not subject to an OATT, this Final Rule will not apply to most small generator interconnections.¹⁵

II. JURISDICTION OVER NON-QF INTERCONNECTIONS

The line between federal and state jurisdiction over interconnection of non-QFs can best be understood as a spectrum. On one end of the spectrum, a generator interconnects to a local distribution facility used exclusively for retail sales, and sells all of its generated electricity to the host utility. “Retail” refers to a sale from a generator directly to the end user, and also includes a generator who uses all of the electricity generated on-site, commonly known as “behind the meter” interconnection or “net metering.” These types of interconnection are unequivocally under state jurisdiction – if the state chooses to exert jurisdiction, which is not always the case.

On the other end of the spectrum is a generator that connects to the transmission grid and intends to sell the generated electricity on the wholesale power market. This interconnection

¹⁴ Order 2003, *supra* n. 12 at 30,545-30,546 ¶ 804.

¹⁵ Order 2006, *supra*, n. 13 at ¶ 8.

would be solely under FERC’s jurisdiction. In the situations between these two extremes, the analysis becomes more complex. For example, while FERC’s jurisdiction is usually limited to interconnections to the transmission grid, it also asserts jurisdiction over distribution grid interconnections when a non-QF generator interconnects to a dual-use facility intending to sell power at wholesale. The type of facility/line (distribution or transmission) is not, however, dispositive regarding jurisdiction.

Whether a distribution line is subject to a Commission-approved OATT, “and not their nominal classification [as a transmission or distribution facility] determines eligibility for Commission-jurisdictional interconnection.”¹⁶ FERC has jurisdiction over interconnection to a facility that is covered by a public utility’s Commission-filed OATT and the interconnection is for the purpose of facilitating a wholesale sale of electricity in interstate commerce. A wholesale sale of electricity occurs when a generator sells electricity to a utility who will resell the electricity to end users.

To see how these rules apply, it is helpful to look separately at interconnection rules for transmission facilities, distribution facilities, and dual-use facilities. These details are discussed below.

A. TRANSMISSION FACILITIES

FERC has the authority to regulate the wholesale sale and transmission of electricity in interstate commerce.¹⁷ Therefore, FERC has jurisdiction over interconnection of any electric generator to the transmission grid. As discussed above, FERC Order No. 888 requires transmission facility operators to file an OATT. Keep in mind that utilities that are part of an ISO such as CAISO have transferred management of transmission facilities above a certain voltage to the ISO as part of their OATT compliance choices. Therefore, these lines are treated as transmission facilities used for interstate commerce, by definition.¹⁸

B. LOCAL DISTRIBUTION FACILITIES

States have jurisdiction over interconnection of a generator to a local distribution facility. A local distribution facility is one not used for wholesale sales in interstate commerce, and as such is not included in a public utility’s Commission-filed OATT. In other words, interconnection to a distribution facility is an exclusively state-jurisdictional interconnection except to the extent that the facility is covered by an OATT, which makes it FERC-jurisdictional.

¹⁶ FERC Order No. 2003-A, ¶ 711.

¹⁷ FPA § 201(a), 16 U.S.C. § 824(a).

¹⁸ Mike Michaud, Matrix Energy Solutions, *A White Paper On Untangling FERC & State Jurisdiction Interconnection Issues And Opportunities For Dispersed Generation* 11-12 (2007).

Even if the interconnection to a local distribution facility is for the purpose of making a wholesale sale to the host utility (i.e. for the utility to resell the energy to its own retail customers), the state retains jurisdiction, because there is no interstate commerce involved.

FERC stated in Order 2003-A that its jurisdiction “does not apply to most distributed generation, since these facilities almost always interconnect to facilities that are not subject to an OATT.”¹⁹ Generators that interconnect at the distribution level are generally facilities with a 20 MW or smaller capacity. This is the WDG category defined above.

Since the majority of small residential and commercial renewable energy systems interconnect with the distribution system, they are therefore under state jurisdiction as long as the distribution facility is not subject to an OATT.²⁰

C. DUAL-USE FACILITIES

FERC has jurisdiction over interconnection to distribution facilities/lines if: 1) the local distribution facility is subject to an OATT at the time an interconnection request is made, and 2) the generator intends the energy to be exported for wholesale.²¹

Dual-use facilities are distribution level facilities that are used both for sales subject to FERC jurisdiction and for sales subject to state jurisdiction because they transmit energy for both retail sales (state jurisdiction) and for wholesale sales in interstate commerce (federal jurisdiction).²² A dual-use facility is always subject to an OATT, and therefore, if an interconnection customer seeks to interconnect with a dual-use facility to make a wholesale sale, the interconnection is under FERC’s jurisdiction.²³ This does not apply, however, to Qualifying Facilities as discussed in Section III below.

In a dual-use scenario, where a generator plans to sell power into the wholesale market, FERC has authority over the interconnection, but not the distribution facility itself.²⁴ “[W]hile the Commission may regulate the entire transmission component (rates, terms and conditions) of the wholesale transaction – whether the facilities used to transmit are labeled ‘transmission’ or ‘local distribution’ – it may not regulate the ‘local distribution’ facility itself, which remains state jurisdictional.”²⁵

¹⁹ FERC Order 2003-A, *supra*, n. 17, at ¶ 739.

²⁰ Sari Fink, Kevin Porter & Jennifer Rogers, National Renewable Energy Laboratory, *The Relevance of Generation Interconnection Procedures to Feed-in Tariffs in the United States* 7 (October 2010).

²¹ Order 2003, *supra* n. 12 at ¶ 808; Michaud, *supra* n. 19 at 6.

²² Order 2003-C, 111 F.E.R.C. ¶ 61,401 at ¶53 (2005), *affirmed in National Ass’n of Regulatory Utility Commissioners (NARUC) v. FERC*, 475 F.3d 1277 (D.C.Cir. 2007).

²³ *Id.*

²⁴ *Id.*; Michaud, *supra* n. 19, at 6.

²⁵ Order 2003-C, *supra* n. 27, at ¶53.

D. DETERMINING WHICH LINES ARE SUBJECT TO AN OATT

Since much of the state's jurisdiction over interconnection depends on whether a particular distribution facility/line is subject to an OATT, it is important to know the status of each particular line. Unfortunately, it is difficult to determine whether or not a line falls under FERC's jurisdiction. In Order 2003-A, the National Association of Regulatory Utility Commissioners (NARUC) submitted comments asking FERC for clarification on this issue.²⁶ NARUC noted that the Transmission Owner's uniform system of accounts may not always clearly indicate whether a given distribution line is under an OATT.²⁷ Accordingly, NARUC suggested that the Commission provide a method for determining when specific distribution facilities are covered by an OATT.²⁸ The Commission's response in Order No. 2003-A was:

In most cases there will be no controversy about whether a facility is under the OATT. When there is, however, there is no simple method of deciding what facilities are under an OATT. Even if the Interconnection Customer consults the Transmission Provider's rate filings, it might be unable to determine whether a facility to which it seeks interconnection is subject to the OATT. We conclude that the only reasonable method for identifying which facilities are subject to a Transmission Provider's OATT is to rely on the Transmission Provider in the first instance to make this information available to the Interconnection Customer during the Scoping Meeting or earlier. If the Interconnection Customer disagrees with the Transmission Provider's conclusion that the facility in question lies within or outside the Transmission Provider's OATT, it should bring the issue to the attention of the Commission.²⁹

Based on this information, it is hard to know the full scope of state jurisdiction over dual-use facility interconnections without further FERC guidance. A declaratory order from FERC on this issue would be very helpful, particularly in light of increased interest in state jurisdiction over interconnection of WDG in California and other states. However, FERC stated in Order No. 2003-A that its jurisdiction "does not apply to most distributed generation, since these facilities almost always interconnect to facilities that are not subject to an OATT."³⁰ This leads us to believe that distribution lines are generally not subject to an OATT, preserving state jurisdiction over interconnections to the distribution grid in the majority of situations, whether or not the generator at issue is a QF.

²⁶ Order 2003-A, *supra* n. 17, at ¶ 709.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at ¶ 712.

³⁰ *Id.* at ¶ 739.

In California, the investor-owned utilities have argued to FERC that their entire distribution grids should be subject to FERC jurisdiction and also that even some QF interconnection procedures should be FERC-jurisdictional (see next section for more on QF interconnection). In joint testimony submitted to FERC with respect to CAISO's 2010 proposal to reform their interconnection procedures, and in response to a request from the Interstate Renewable Energy Coalition (IREC), Vote Solar and the Solar Alliance to allow states to use state interconnection procedures even when FERC jurisdiction pertains,³¹ the utilities stated: "the Joint Parties respectfully urge the Commission to clarify that it will not cede jurisdiction over distribution generator interconnections to the CPUC, and that such interconnections (with the exception of certain QF interconnections as noted above) will continue to be processed under WDAT."³²

With respect to QF interconnection, the utilities state: "PG&E, for example, believes that the interconnection of QF renewable generators not selling under PURPA, but that are nonetheless committed to selling their full output to the host utility, should fall under the FERC rules, and that to hold otherwise would substantially diminish the role and importance of the FERC interconnection rules."³³

This aggressive interpretation seems to contradict FERC precedent, but because of the rather amorphous elements of the seven-part test for federal jurisdiction in Order 888, we recommend that parties seeking to challenge the utility interpretation request a declaratory order from FERC on this issue. FERC declined to address these issues in its order conditionally accepting the CAISO interconnection reform proposal, as outside scope, but the issue is ripe for a stand-alone declaratory order.

III. JURISDICTION OVER QUALIFYING FACILITY INTERCONNECTIONS

Different principles apply to Qualifying Facilities³⁴ (QF) under PURPA.³⁵ A Qualifying Facility that interconnects to the grid (distribution or transmission) and sells all of its output to the local host utility does so under state jurisdiction.³⁶ In contrast, FERC has jurisdiction over the interconnection of a QF when the owner of a QF interconnects to the grid (distribution or

³¹ Motion to Intervene of Interstate Renewable Energy Council, et. al. under ER11-1830, Nov. 9, 2010, online at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12483039>.

³² Joint Reply of Southern California Edison Company, Pacific Gas & Electric Company, and San Diego Gas & Electric Company, Nov. 24, 2010, Docket ER11-1830, p. 6. Online at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12495445>.

³³ *Id.* at p. 3.

³⁴ QFs are defined by the Public Utility Regulatory Policies Act of 1978 (PURPA) as small power production facilities of 80 MW or less whose primary energy source is renewable (hydro, wind, or solar), biomass, waste, or geothermal resources or as cogeneration facilities of any size.

³⁵ Public Utilities Regulatory and Policy Act ("PURPA") Pub. L. No 95-617, 92 Stat. 3117 (1978); see FERC regulations at 18 C.F.R. 292.

³⁶ Fink, *supra* n. 22 at 12.

transmission) for the purpose of selling any of the output to a party other than the local host utility.³⁷

If any portion of the QF output is sold in the wholesale market to a third party, or if a future sale is planned, FERC has jurisdiction over that whole transaction, including interconnection, but only for that portion of the QF output.³⁸ Additionally, when a Power Purchase Agreement with a host utility terminates or is silent on the right of the QF to sell power to a third party, FERC will not assume third-party sales are occurring or will occur, and thus will not assert jurisdiction.³⁹

This became clear in a recent FERC Order in which Florida Power & Light (FPL) requested a reversal of Commission orders⁴⁰ concerning the scope of Commission jurisdiction over interconnection agreements between public utilities and QFs.⁴¹ Florida Power & Light argued that the orders were inconsistent with PURPA and FPA when applied to interconnection agreements that FPL was a party to.⁴² FPL was a party to certain interconnection agreements under which the QFs sold their entire output to FPL on an “as available basis,” and not through a firm contract.⁴³ FPL argued that the Commission should reverse *Niagara Mohawk*⁴⁴ as incorrectly decided and should instead make clear that “interconnection agreements with QFs do not have to be filed with the Commission so long as the host utility purchases all of the QF’s power, regardless of whether there is a firm contract in place.”⁴⁵

But FERC denied the need to reverse *Niagara Mohawk*, clarifying that its jurisdiction did not stem from the expiration of the firm contract requiring the host utility to purchase of all of the QF’s output or the absence of a contractual provision prohibiting sales to third parties, but rather it was based on a provision in the agreement that explicitly affirmed the QF’s right to sell to third parties.⁴⁶ FERC found that “where a host utility is not given notice that third-party sales of output are occurring or are planned (e.g. through a QF’s request for wheeling service or a contract providing the QF an express right to sell output to third parties), [FERC] will assume

³⁷ Order 2003, *supra* n. 12, at ¶ 813 (when a QF interconnects at the distribution level, and the utility “does not purchase all of the QF’s output and instead transmits the QF power into interstate commerce, the commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.”); *Consumers Energy Company*, 132 FERC 61,241 (Sept. 21, 2010); *Florida Power & Light Company*, 133 FERC ¶ 61,121 (Issued Nov. 3, 2010).

³⁸ Michaud, *supra* n. 19, at 3.

³⁹ *Florida Power & Light Company*, *supra* n. 39.

⁴⁰ *Niagara Mohawk Power Corp.*, 121 FERC P. 61,183 (2007), *Order denying reh’g*, 123 FERC P. 61,061 (2008).

⁴¹ *Florida Power & Light Company*, *supra* n. 39, at ¶ 1.

⁴² *Id.* at ¶ 3.

⁴³ *Id.*

⁴⁴ In *Niagara Mohawk*, the commission asserted jurisdiction over interconnection agreements at the moment of the consummation of the agreement releasing the host utility from its obligation under the associated power purchase agreement to purchase the QF’s entire output and expressly authorizing the QF to sell its output to third parties. It did not wait to be come jurisdictional until the date the utility stopped purchasing the full output of the QF. *Niagara Mohawk Power Corp.*, 121 FERC P. 61,183 (2007), *Order denying reh’g*, 123 FERC P. 61,061 (2008).

⁴⁵ *Florida Power & Light Company*, *supra* n. 39, at ¶ 4.

⁴⁶ *Id.* at ¶ 21.

that all sales of a QF's output are being made to the host utility and therefore that Commission jurisdiction will not attach."⁴⁷

CONCLUSION

Based on the above principles, states have jurisdiction over three types of interconnections: 1) interconnection of a non-QF, intended for retail sales, to a distribution facility subject to an OATT (and thus a dual-use facility), 2) interconnection of a non-QF to local distribution facilities not subject to an OATT (and thus not dual-use), and 3) interconnection of a QF to distribution or transmission lines where all of the power is sold to the host utility.

⁴⁷ *Id.* at ¶ 22.

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