

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Boston Edison Company

Docket Nos. ER06-1295-000
ER06-1295-001

ORDER REJECTING WHOLESALE DISTRIBUTION RATE SCHEDULE AND
DIRECTING REFUNDS

(Issued December 4, 2006)

1. On July 28, 2006, Boston Edison Company (Boston Edison) filed a Wholesale Distribution Rate Schedule (Rate Schedule) for service to its affiliate, MATEP LLC. This order rejects the proposed Rate Schedule for the reasons discussed below and requires refunds, without prejudice to Boston Edison demonstrating in a future filing that the proposed service to its affiliate is just and reasonable and not unduly discriminatory.

Background

2. Boston Edison, a subsidiary of NSTAR, is primarily a wires company that provides regulated transmission and distribution services and default electric service for retail customers in eastern Massachusetts. In 2004, Boston Edison restructured its electric operations by divesting its generating assets, replacing many of its former purchase power agreements with load-following purchases from various suppliers, and committing its transmission facilities to operation and control by the ISO New England Inc. (ISO-NE) Regional Transmission Organization (RTO).¹

3. MATEP LLC, also a subsidiary of NSTAR, buys power from its affiliate, Medical Area Total Energy Plant, Inc. (MATEP Plant).² It sells the power under retail contracts

¹ *ISO New England, Inc.*, 106 FERC ¶ 61,280 (2004).

² MATEP Plant owns a generator with a nameplate capacity rating of 87.8 MW in the Longwood section of Boston, Massachusetts (Longwood Generation Station).

to a number of hospitals and medical institutions³ in the Longwood section of Boston, Massachusetts (Current Users). The terms of these retail contracts extend until September 30, 2021.

4. Boston Edison states that MATEP Plant historically has self-supplied its station power requirements from the Longwood Generation Station. According to Boston Edison, with the advent of new capacity markets in New England, MATEP LLC would like to sell energy from the Longwood Generation Station to purchasers other than its Current Users and obtain its station power requirements through a new arrangement. Any excess power freed up by this new arrangement will be sold into the ISO-NE's Forward Reserves Market. Boston Edison states that the ISO-NE's Forward Reserves Market is expected to be operational by October 1, 2006.⁴ Under the proposed Rate Schedule, Boston Edison would provide wholesale distribution service for MATEP LLC's excess power over certain 13.8 kV facilities on Boston Edison's "distribution" system.

5. Under Article 4.1 of the Rate Schedule, MATEP LLC would pay a Monthly Demand Charge for the wheeling of its generation over these 13.8 kV facilities based on a cost-based formula rate.⁵ Boston Edison provides an illustration of this cost-based formula rate using historical revenue requirement data, presenting a total annual demand charge of \$918,584. While the Rate Schedule is a stand-alone agreement, the formula rate mirrors some components of ISO-NE's Open Access Transmission Tariff (OATT) formula for transmission service. For instance, it would use a rate of return on equity based on Boston Edison's Commission-approved rate of return on equity for its Local Network Service Schedule (LNS Schedule) under ISO-NE's OATT. It also would impose a Monthly Customer Charge reflecting the costs associated with billing, meter-reading, and record-keeping, as well as an allocation of administrative and general expenses from Account Nos. 920 through 935 of the Commission's Uniform System of Accounts.⁶

³ The hospital and medical institutions are: Beth Israel Deaconess Medical Center, Brigham and Women's Hospital, Children's Hospital Boston, Dana-Farber Cancer Institute, Joslin Diabetes Center, and Harvard Medical School.

⁴ MATEP LLC states that it is in the process of obtaining the necessary regulatory authorizations in order to participate in ISO-NE's Forward Reserves Market. Its application for market-based rate authority was accepted via delegated letter order on August 11, 2006 in Docket No. ER06-1143-000.

⁵ Attachment A of the Rate Schedule.

⁶ See 18 C.F.R. Part 101 (2006).

6. The Rate Schedule also would define the responsibilities of the parties for safe operation and maintenance of their respective facilities, load shedding and curtailment, billing and payment, dispute resolution, remedies, liability, indemnification, assignment and other matters. According to Boston Edison, the non-rate terms and conditions of the Rate Schedule are similar to the non-rate terms and conditions that the Commission previously accepted for Boston Edison's wholesale distribution service to the Massachusetts Port Authority (MassPort) and the Massachusetts Bay Transportation Authority (MBTE).⁷

7. On September 26, 2006, the Director, Division of Tariffs and Market Development - East, acting under delegated authority, issued a deficiency letter requesting that Boston Edison submit the following additional information: (1) explain how the Rate Schedule complies with section 35.28 of the Commission's regulations⁸ and Order No. 888;⁹ (2) identify all articles in the Rate Schedule that deviate from the ISO-NE OATT and explain why such deviations are necessary and just and reasonable; (3) explain how Article 3.1(i) of the Rate Schedule does not grant undue preference or advantage to Boston Edison's affiliate, MATEP LLC; and (4) state whether transmission service to MATEP LLC was offered over the Open-Access Same-time Information System (OASIS) system.

8. In response to the deficiency letter, Boston Edison made a supplemental filing on October 5, 2006 that removed the following provision from Article 3.1(i) from the Rate Schedule:

For the term of this Agreement, no other customer shall be served utilizing the Company's 13.8kV circuit nos. 571 174,

⁷ Boston Edison's wholesale distribution rate schedule with MassPort was accepted by the Commission under delegated authority in an unpublished letter order on October 11, 2005 in Docket No. ER05-1438-000. Boston Edison's wholesale distribution rate schedule with MBTE was accepted by the Commission under delegated authority in an unpublished letter order on January 5, 2005 in Docket No. ER05-196-000.

⁸ 18 C.F.R. § 35.28 (2006)(regulations implementing Order No. 888).

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) at 31,784, *order on reh'g*, Order No. 888-A, 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), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

404 176, and 421 123 and the associated breakers on those circuits at Brighton Station #329 [the 13.8kV facilities] without the advance written consent of the Customer.

9. Boston Edison asserts that, with the removal of this provision, the Rate Schedule conforms to the Order No. 888 *pro forma* OATT and complies with § 35.28(c) of the Commission's regulations.

10. Further, Boston Edison argues that, as for the definition of "Posted Path" in section 37.6(b)(1)(i) of the Commission's regulations, the Open Access Same-Time Information System posting requirements of Order No. 889¹⁰ do not apply to the facilities at issue here. Boston Edison states that if the Commission determines that the facilities are subject to Order No. 889, it requests waiver of that requirement until another customer requests service over the 13.8 kV lines.

11. Boston Edison requests an October 1, 2006 effective date for the Rate Schedule so that MATEP LLC will be able to participate in ISO-NE's Forward Reserves Market when that market begins on that date.

Notice and Responsive Pleadings

12. Notice of Boston Edison's original filing was published in the *Federal Register*, 71 Fed. Reg. 45,814 (2006), with interventions and protests due on or before August 18, 2006. MATEP LLC; the President and Fellows of Harvard College (collectively, Harvard); and the Medical Academic and Scientific Community Organization, Inc. (MASCO)¹¹ filed comments and protests. The New England Power Generators Association (NEPGA)¹² filed a timely motion to intervene with comments. MASCO and Harvard filed supplemental comments on August 29, 2006. On September 8,

¹⁰ *Open-Access Same-time Information System and Standards of Conduct*, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, 61 Fed. Reg. 12,484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2000 ¶ 31,049 (1997), *order on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

¹¹ MASCO represents MATEP LLC's Current Users.

¹² The current members of the NEPGA include American National Power, Boston Generating LLC, Competitive Power Ventures, Con Ed Energy, Dominion Resources, Inc., Exelon Corporation, FPL Energy, Granite Ridge Energy LLC, Lake Road Generating Company, LP, LS Power LLC, Mirant Corporation, NRG Energy, Inc., and PSEG.

September 11, and September 18, 2006, respectively, MATEP LLC, Boston Edison, Harvard and MASCO filed answers. On September 20, 2006, Boston Edison filed an answer.

13. Notice of Boston Edison's amended rate schedule was published in the *Federal Register*, 71 Fed. Reg. 61,756 (2006), with interventions and protests due on or before October 26, 2006. On October 11 and October 19, 2006, Harvard and MASCO filed protests to Boston Edison's response. On October 27, 2006, Boston Edison filed an answer.

14. MASCO states that MATEP LLC's Current Users are concerned about MATEP LLC's ability to continue to serve them under their retail contracts because: (1) the Rate Schedule may result in a decrease in the reliability of service MATEP LLC provides to its Current Users; (2) the dedication of all of the capacity on the Boston Edison tie-lines under the Rate Schedule may preclude the Current Users from receiving electric service over those lines, even though section 2(d) of their retail contracts dedicates capacity on those lines to the Current Users; and (3) the Rate Schedule's demand charge and other charges may be passed on to the Current Users.

15. MASCO filed a supplemental protest reiterating its concerns that this Rate Schedule would result in a decrease in the reliability of electric service provided to the Current Users and that the annual demand charge of \$918,584 would be passed on to the Current Users even though none of them would receive any economic benefit from MATEP LLC's use of these facilities to participate in the ISO-NE Forward Reserves Market.

16. MASCO asserts that the Rate Schedule is contrary to the rights of the Current Users under their retail contracts with MATEP LLC. The Rate Schedule would permit MATEP LLC to have exclusive capacity rights over facilities to which the Current Users have rights under retail contracts extending until 2021. MASCO states that neither Boston Edison nor MATEP LLC has confirmed that the dedication of this capacity to MATEP LLC will not supersede the rights of the Current Users under their retail contracts.

17. In addition, MASCO points out that there is no direct connection between the Longwood Generation Station and the Boston Edison distribution facilities in question. MASCO avers that instead, the Longwood Generation Plant and the facilities are connected only through electric switchgear and other equipment that is owned by, and located on the property of, each of the Current Users. MASCO contends that neither Boston Edison nor MATEP LLC has any contractual right to wheel power through the Current Users' equipment to export power to the electric power grid.

18. MASCO requests that the Commission not authorize exports over the Current Users' facilities' without their written consent, except for *de minimis* exports permitted under the existing retail contracts for the sole purpose of balancing line voltages in connection with providing electric service to the Current Users. MASCO requests that the filing be set for evidentiary hearing to allow the Current Users to determine the extent of any harm to each of them under the Rate Schedule.

19. NEPGA states that, while it does not oppose the Rate Schedule, the Commission should consider the effect it could have on New England markets as they are restructured through the ISO-NE's Forward Capacity Market.¹³

20. Harvard argues that the Rate Schedule is between affiliates and was negotiated without the involvement of affected customers. It says that neither it nor any of the medical institutions were served with notice of this highly significant new arrangement until the filing was made with the Commission.

21. Harvard argues that the Rate Schedule would breach the retail contracts because it would cause the Current Users to lose their contractual priority rights to the steam, chilled water, and electricity from the Longwood Generation Station. Harvard argues further that Boston Edison's filing appears to be an attempt to use Commission jurisdiction to violate existing retail contracts.

22. Harvard complains that Article 3.1 of the Rate Schedule gives exclusive capacity rights to MATEP LLC, which would preclude Harvard and the other Current Users from getting electric service over those lines. Harvard argues that, because it and the other Current Users anticipate expansion of their facilities, they expect increased consumption of steam, chilled water, and electricity. Harvard also argues that, under the Rate Schedule, notwithstanding the contractual obligations of the retail contracts, the Current Users would be required by Boston Edison to pay for future wires expansion, which in effect would subsidize MATEP LLC's wholesale sales.

23. Harvard asserts that Boston Edison's filing does not provide sufficient legal basis to determine the justness and reasonableness of the Rate Schedule under sections 205 or 206 of the Federal Power Act¹⁴ and sections 35.12 and 35.13 of the Commission's regulations. Harvard does not consent to the abbreviated filing treatment.¹⁵

¹³ The Commission approved ISO-NE's Forward Capacity Market settlement in *Devon Power, LLC*, 115 FERC ¶ 61, 340 (2006).

¹⁴ 16 U.S.C. § 824d (2000).

¹⁵ As specified under 18 C.F.R. § 35.13(a)(2) (2006).

24. Harvard therefore requests that the Commission reject the filing. If the Commission decides not to reject the filing, Harvard requests that the proceeding be set for evidentiary hearing, with a nominal suspension.

25. In their answers, MATEP LLC and Boston Edison argue that the late-filed protests should be rejected, given the protesters' respective Motions to Intervene which were timely filed. According to MATEP LLC and Boston Edison, the Commission's "good cause" exception in 18 C.F.R. § 385.214(d) applies only to late-filed motions to intervene, not subsequent untimely protests or other filings stating that the Commission's regulations do not provide for a party to file a motion to intervene reserving its right to file a protest late. Boston Edison argues that service of its filing was provided in accordance with the Commission's regulations, public notice was given, the protesters are not affected by the Rate Schedule, and their opposition to the Rate Schedule is gratuitous.

26. MATEP LLC and Boston Edison argue further that there are no issues to justify an evidentiary hearing in this proceeding. They state that claims of breach of a retail electric supply contract are not relevant to the justness and reasonableness of this Commission-jurisdictional agreement. MATEP LLC and Boston Edison also contend that the protesters must follow the dispute resolution provisions found in the retail contracts and that any resulting litigation should be in state court. MATEP LLC states that it has assured the Current Users that it will continue to honor its obligations under the retail contracts. It says that the Rate Schedule does not impair the rights of the Current Users under the retail contracts with regard to the tie-lines in question. In addition, MATEP LLC says that it will not pass through the charges under the Rate Schedule and that it has addressed concerns regarding the export of power over the customer-owned switchgear, as MASCO requested. Finally, MATEP LLC and Boston Edison state that Harvard has not cited a single fact to support its assertion that the rates under the Rate Schedule are unjust and unreasonable, and, therefore, Harvard's protest must be dismissed.

27. In protests filed in response to Boston Edison's response to the deficiency letter, MASCO and Harvard state that Boston Edison's response fails to address the issues raised in the deficiency letter. They state that Boston Edison has not explained how the agreement conforms with 18 C.F.R. § 35.28. MASCO and Harvard state that the Commission should require Boston Edison to indicate whether any unaffiliated customers would be eligible for similar services over these facilities.

28. MASCO and Harvard state that, notwithstanding Boston Edison's removal of the exclusivity provision, MATEP LLC has no authority to use the electric switchgear owned by the Current Users, and therefore, has no pathway to the Boston Edison system. They also state that Boston Edison's response also fails to demonstrate why it should be granted an after-the-fact waiver of OASIS requirements. Harvard argues that Boston Edison's request for waiver of the OASIS requirements in Order No. 889 fails to meet the

provisions for waiver outlined by the Commission in several hundred published orders and notices.¹⁶

Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will accept the parties' late-filed protests, given their interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Boston Edison's, MATEP LLC's, MASCO's and Harvard's answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

31. Boston Edison has not demonstrated that this Rate Schedule is just and reasonable and not unduly discriminatory or preferential. We will therefore reject the proposed Rate Schedule.¹⁷ This rejection is without prejudice to Boston Edison filing a service agreement to the OATT which complies with § 35.28 of the Commission's regulations. Further, Boston Edison must demonstrate that the proposed service complies with OASIS requirements as specified in the Commission's Order No. 889. If Boston Edison has provided service since October 1, 2006, we will require Boston Edison to refund to MATEP LLC the time value of the revenues collected under the Rate Schedule, with interest, in accordance with our precedent,¹⁸ and to file a refund report with the Commission within 15 days thereafter.

¹⁶ See, e.g., *Alcoa Power Generating Inc.* 116 FERC ¶ 61,257(2006).

¹⁷ We point out that if Boston Edison has been providing transmission service to MATEP LLC since October 1, 2006, it is doing so without Commission authorization. It should file a revised Rate Schedule as soon as possible.

¹⁸ See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

32. Boston Edison proposes to provide a transmission service over lower-voltage “distribution” facilities. Order No. 888¹⁹ required transmission owners to provide transmission service under service agreements pursuant to a non-discriminatory OATT; or, in the case of non-conforming agreements, demonstrate that such service is “consistent with the requirements of the Final Rule and . . . reasonable, generally accepted in the region and consistently adhered to by the transmission provider.”²⁰

33. The purpose of requiring transmission owners to offer transmission service under an OATT was to ensure that the industry achieves non-discriminatory open access transmission. Transmission owners are not permitted to deny access, or to offer only inferior access to other customers in favor of the transmission owner’s own generation.

34. We emphasize that we provided Boston Edison the opportunity to demonstrate that the Rate Schedule was just and reasonable, not unduly discriminatory or preferential and consistent with the *pro forma* OATT when we issued the deficiency letter. We required Boston Edison to “[i]dentify all articles in the Agreement that deviate from the ISO New England, Inc., FERC Electric Tariff No. 3, Section II- Open Access Transmission Tariff, including, but not limited to Article 3(i), and explain why such deviations are necessary and how such deviations are just and reasonable.”

35. In response, Boston Edison modified the Rate Schedule to remove Article 3.1(i), and asserted that the Agreement now conforms to the *pro forma* OATT. However, it did not explain, much less justify, any of the other deviations in its Rate Schedule, including the differences in the formula rate for services provided to MATEP LLC. For example, Boston Edison’s revenue requirement charged to MATEP LLC would inexplicably be different from the rates charged to similarly situated customers. In Boston Edison’s LNS Schedule, costs are allocated based upon load ratio share. Likewise, for curtailments, customers under the LNS Schedule are assessed a penalty of two times the kilowatts of excess transmission service for which the transmission customer fails to curtail, but in the Rate Schedule, the penalty is two times the monthly demand charge.

36. Boston Edison asserts that the Rate Schedule is similar to other bilateral agreements recently approved by the Commission which were also not filed as service agreements to a tariff, but we do not find that to be the case. The agreements that Boston Edison cites contain different rates, terms, and conditions from this agreement. Boston Edison has not explained these deviations. We note, further, that this bilateral rate schedule is between Boston Edison, as a transmission provider, and its energy affiliate, MATEP LLC, while MassPort and MassBay are third party customers. Boston Edison

¹⁹ Order No. 888 at 31,689.

²⁰ Order 888 at 31,856.

did not explain why its affiliate, MATEP LLC, was given terms and conditions different from those given to MassPort and MassBay.

37. Finally, instead of explaining why it has not conformed to the Commission's OASIS requirements, Boston Edison requests a retroactive waiver of the regulations promulgated by Order No. 889. We will deny this request. Not only is a response to the deficiency letter an inappropriate place for such a request, but Boston Edison has failed to make a showing that such waiver would be warranted,²¹ even if the request were prospective.²²

The Commission orders:

(A) Boston Edison's Rate Schedule is hereby rejected, as discussed in the body of this order, without prejudice.

(B) Boston Edison is hereby directed to refund the time value of any revenues collected under this Rate Schedule without Commission authorization, as discussed in the body of this order.

(C) Boston Edison is hereby directed to make any such time value refunds within 30 days of this order, and to file a refund report with the Commission within 15 days thereafter.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²¹ *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 at 61,941 (1996) (waiver of Order No. 889 is appropriate (1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a tight power pool).

²² *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (D.C. Cir. 2002) at 77, n.3 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000)).