

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Entergy Nuclear Operations, Inc.,
Entergy Nuclear Indian Point 2, LLC, and
Entergy Nuclear Indian Point 3, LLC

v.

Docket No. EL05-46-000

Consolidated Edison Company of New York,
Inc.

ORDER GRANTING COMPLAINT

(Issued March 23, 2005)

1. In this order, the Commission grants the complaint filed by Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (Entergy) against Consolidated Edison Company of New York, Inc. (Con Edison) regarding Con Edison's assessment of charges for unbundled deliveries of station power¹ to Entergy's Indian Point generating facilities. Entergy alleges that Con Edison has been unlawfully charging Entergy local distribution charges for deliveries of unbundled station power in instances where no Con Edison local distribution facilities are used to deliver that station power. We find that, indeed, no local distribution facilities are used to deliver station power for the transactions at issue in this complaint, and we will grant the complaint. This action benefits customers by ensuring that they pay for only those services that are actually provided.

¹ Station power is the electrical energy used for the heating, lighting, air conditioning and office equipment needs of the buildings on a generating facility site and for operating the electric equipment that is on the generating facility site. *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001).

I. Background

2. Entergy filed its complaint on December 20, 2004, asserting that Con Edison has been unlawfully charging Entergy local distribution rates for deliveries of unbundled station power to its Indian Point Energy Center Units 2 and 3 (IP2 and IP3) when no Con Edison local distribution facilities are used to deliver that station power. Entergy purchased the IP2 facility from Con Edison on September 6, 2001, and purchased IP3 from the New York Power Authority on November 21, 2000. The facilities are nuclear generating facilities within the control area of the New York Independent System Operator, Inc. (NYISO), and they are interconnected to Con Edison's Buchanan substation.²

3. Entergy states that most of the station power used at the two facilities is delivered "behind the meter" and that Con Edison has not attempted to bill Entergy either for that power or for delivery services associated with that power. However, according to Entergy, the station power that is not delivered "behind the meter" first flows into the Buchanan 138 kV substation over facilities owned by Entergy. Power is then delivered from the Buchanan 138 kV bus over 138 kV transmission lines owned by Entergy to a 138 kV bus at Indian Point which is owned by Entergy and into Indian Point.³ Entergy states that the 138 kV lines do not connect to any local distribution facilities owned by Con Edison; rather, according to Entergy, all of the facilities involved in delivery of power over those two transmission lines are transmission facilities, and all are under the control of the NYISO.⁴

4. At the time it acquired each of the Indian Point units, Entergy entered into interconnection agreements with Con Edison, provisions of which Con Edison relies on for its position that it may impose local distribution charges on Entergy. The interconnection agreements are rate schedules on file with this Commission. According to Entergy, however, the pertinent sections address unbundled deliveries of station power only when the station power is purchased from a third party, not when it is self-supplied with on-site generation as is the case here.⁵ Thus, Entergy concludes that contractual arrangements regarding deliveries of station power are not relevant when no deliveries were required in the first place.

² Complaint at 10.

³ Entergy states that a number of other lines that are local distribution facilities owned by Con Edison also deliver station power from the Buchanan substation to Indian Point. However, Entergy has paid for deliveries over those facilities, and those transactions are not at issue in this complaint.

⁴ *Id.* at 11 & n.5.

⁵ *Id.* at 24.

5. Entergy notes the NYISO-filed tariff provisions providing for transmission service for unbundled station power, which went into effect on April 1, 2003. Under these provisions, transmission service is not required for station power at a generating facility when that facility's net output for a month is positive.

6. Entergy clarifies that Con Edison is not billing it for station power itself and notes that it has paid Con Edison all local distribution charges for deliveries of unbundled station power to IP2 and IP3 when those deliveries in fact use Con Edison local distribution facilities. What is at issue in this proceeding is whether Con Edison can charge Entergy for deliveries of station power to IP2 and IP3 when no Con Edison-owned local distribution facilities are used for delivery.

7. Entergy states that it canceled a Con Edison service account under which the charges had earlier been billed as soon as NYISO's station power provisions became effective, and that since that time Entergy's units have self-supplied their station power with on-site generation; thus, there are no sales of station power subject to state jurisdiction.⁶

8. Entergy requests that the Commission find unlawful all local distribution charges billed by Con Edison since April 1, 2003; find that Entergy is not obligated to pay such charges; and prohibit Con Edison prospectively from imposing local distribution charges on Entergy when no local distribution facilities are used to deliver station power.⁷

II. Notice Of Filing And Responsive Pleadings

9. Notice of the filing was published in the *Federal Register*, 69 Fed. Reg. 67,338 (2004), with the answer, protests and interventions due on or before January 21, 2005. Con Edison filed an answer on January 21, 2005. The New York State Public Service Commission (New York Commission) filed a notice of intervention and protest. Timely motions to intervene were filed by Nine Mile Point Nuclear Station, LLC; R.E. Ginna Nuclear Power Plant, LLC; Reliant Energy, Inc. (Reliant); NYISO, Con Edison; and

⁶ In December 2004, Con Edison submitted a complaint against Entergy in New York state court, since removed to federal district court, wherein Con Edison points to several interconnection agreements between the parties as the basis for imposing the local distribution charges. Entergy claims that Con Edison's filing of the state court complaint is an attempt at an end-run around the Commission's exclusive jurisdiction and the Commission's prior holdings that such local distribution charges are unlawful.

⁷ Entergy indicates that is not seeking a refund for amounts paid prior to April 1, 2003, and because it has not paid Con Edison for disputed amounts billed since that date, it is not asking for any monetary relief. Entergy states that it has paid all local distribution charges for deliveries of station power when those deliveries actually use Con Edison local distribution facilities; those charges are not at issue in this complaint.

Indicated New York Transmission Owners (NYTOs), individually and collectively.⁸ On February 2, 2005, the New York Power Authority (NYPA) and KeySpan-Ravenswood, LLC (KeySpan) filed motions to intervene out-of-time raising no substantive issues. Also on February 2, 2005, Con Edison filed a Supplemental Answer. On February 7, 2005, Entergy responded to the Supplemental Answer, and on February 22, Con Edison filed a further reply.

A. Answer and Supplemental Answer

10. Con Edison's Answer asserts that the complaint does not involve any issues relating to the Commission's jurisdiction and argues that the Commission "lacks jurisdiction to validate Entergy's unilateral repudiation of its contractual responsibilities." According to Con Edison, Entergy contracted voluntarily to take service under Con Edison's retail access tariff and to pay state-approved rates for the service. Thus, Con Edison concludes that the complaint challenges a service and rates that are beyond the Commission's jurisdiction and that it must be dismissed. According to Con Edison, Entergy's attempt to repudiate its contractual commitment "is not cognizable before the Commission,"⁹ and Con Edison cites *Midwest Generation, LLC v. Commonwealth Edison Company*, 99 FERC ¶ 61,166 (2002) (*Midwest*), as precedent for dismissing a complaint for lack of jurisdiction where a generator challenges contracts to purchase station power from a utility. Further, Con Edison argues that entertaining the complaint would violate certain provisions of the interconnection agreements, which specify that any disputes be submitted to state or federal courts.

11. Con Edison comments that, if the Commission does not summarily dismiss the complaint, it should hold the proceeding in abeyance pending the resolution of factual issues in the court proceeding, or else set the issue for hearing in this proceeding. Specifically, whether Entergy actually self-supplied its station power after April 1, 2003, and whether Entergy was disadvantaged by having to pay local distribution charges should be examined in a trial-type evidentiary hearing, according to Con Edison.

12. In the Supplemental Answer, Con Edison disputes Entergy's claim that no local distribution facilities have been used for the deliveries of station power at issue in the complaint. Specifically, Con Edison states that certain connecting lines and feeders at the

⁸ NYTOs include Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., and Niagara Mohawk Power Corporation .

⁹ Con Edison Answer at 7.

Buchanan substation that deliver the station power at issue are local distribution facilities,¹⁰ and it asserts that a factual issue exists regarding the proper classification of the facilities used in delivering station power to Entergy.

B. Entergy's Response

13. Entergy's Response to Con Edison's Supplemental Answer disputes the assertion that there are local distribution facilities used to deliver station power. According to Entergy, the Buchanan substation and related facilities connect with the rest of NYISO's transmission system at numerous points and are "part of multiple and nested loops."¹¹ Entergy points out that these facilities have the same characteristics as those found by the Commission in another case to be transmission facilities;¹² specifically, they are high voltage, they form a loop configuration, power flows into and out of the loop configuration, and they have the capacity to transmit energy to other markets outside the geographical area. Entergy further asserts that, under the Commission's seven-factor test developed to identify local distribution facilities,¹³ its 138 kV lines and Con Edison's connecting lines are transmission facilities. Entergy offers evidence about how the facilities compare to the seven factors;¹⁴ Entergy's expert witness, Mr. Angelo Vai,

¹⁰ See Supplemental Answer, Exh. No. CE-4 (Affidavit of Benjamin Schall) at 2-3.

¹¹ Response at 8, 10.

¹² *Detroit Edison Company*, 102 FERC ¶ 61,282, *order on reh'g*, 105 FERC ¶ 61,209 (2003), *aff'd*, *DTE Energy Company and Detroit Edison Company v. FERC*, 394 F.3d 954 (D.C. Cir. 2005) (*Detroit Edison*).

¹³ See *Promoting Wholesale Competition Through Open Access Non discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (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, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁴ These indicators are: the proximity to retail customers; whether they are looped or radial; whether power flows into and out of local distribution systems; whether power entering a local distribution system is reconsigned; whether power is consumed in a restricted geographical area; whether meters are based at the transmission/local distribution interface; and the voltage level.

concludes that Entergy's 138 kV lines and Con Edison's connecting lines "are no more local distribution facilities than the 138 kV bus they are looped into."¹⁵

14. Entergy asserts that it is not attempting to repudiate the interconnection agreements, nor is it seeking abrogation of those agreements by the Commission. It adds that it has paid all local distribution charges for deliveries of unbundled station power when Con Edison has provided local distribution service to deliver that power. Entergy dismisses Con Edison's other arguments concerning the interconnection agreements, commenting that it is not attempting to enforce them or to raise any issues under them; thus, it concludes that the resolution of this complaint has no bearing on the provisions of those agreements.

15. Finally, it is Entergy's position that a hearing is not needed to resolve the factual issues flagged by Con Edison. First, Entergy states that its evidence that the facilities in question perform only a transmission function establishes that there is no material issue of fact requiring a trial-type hearing. Second, Entergy asserts that the question of whether it actually self-supplied its station power is not relevant to whether Con Edison can impose a charge to recover the costs of local distribution facilities when none are used to make unbundled deliveries of station power.¹⁶ Similarly, it argues that the question of whether it is burdened or disadvantaged by having to pay Con Edison's local distribution charges is irrelevant because answering that question is not required to have NYISO's tariff and Commission policy applied.

C. Con Edison's Reply

16. Con Edison challenges Entergy's ability to file an answer under the Commission's regulations. Con Edison counters the arguments Entergy raises in the Response, and reiterates its request that the factual issues in this case be set for hearing.

D. Intervenors' Comments

17. The New York Commission urges that the interconnection agreements should not be overturned. According to the New York Commission, Entergy chose to rely on Con Edison's retail resources, and should not be allowed to walk away from the contract binding it to its choice.

18. NYTOs state that the determination whether facilities are local distribution or not entails a functional as well as a technical analysis, and assert that the Con Edison facilities at issue in this complaint involve, at least in part, functional distribution service. Further, NYTOs aver that Entergy is asking the Commission to change the recognized

¹⁵ Entergy Response, Exh. No. A at P 28.

¹⁶ Entergy also presents evidence that its two units have had positive net output for all months since April 2003.

boundary between state and federal jurisdiction by asserting federal jurisdiction over local delivery service, an action which would impermissibly intrude on New York jurisdiction. According to NYTOs, not only is the Commission prohibited from abrogating fixed-price contracts, but the relief requested by Entergy would violate the filed rate doctrine and the rule against retroactive ratemaking because the service at issue in the complaint is subject to the retail delivery rates in NYISO's OATT, which incorporates the delivery rates of Con Edison's retail tariff by reference.

19. Reliant filed comments in support of the complaint, requesting that the Commission grant the relief requested by Entergy.

Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant NYPA's and KeySpan's motions to intervene out-of-time given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Entergy's Response and Con Edison's Reply because they have provided information that assisted us in our decision-making process.

B. Analysis

21. Initially, we note that this Commission has the authority to assess whether the facilities at issue are transmission or local distribution facilities and thus whether they are subject to our jurisdiction.¹⁷ To succeed on the merits in this proceeding, Entergy needs to prove that there are no Con Edison-owned local distribution facilities that are used to deliver station power to Entergy at IP2 and/or IP3. Con Edison's ownership of local distribution facilities that are used to deliver station power would most likely allow Con Edison to charge Entergy for usage of those facilities. This is the narrow issue to be decided in this case.

22. The only facilities that Con Edison owns whose classification is contested are those which Con Edison calls the "Connecting Lines."¹⁸ According to its expert witness, Mr. Schall, "Con Edison does use local distribution facilities [the Connecting Lines] in

¹⁷ See *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation*, 110 FERC ¶ 61,033 at P 30 & n.31 (2005).

¹⁸ See Supplemental Answer, Exh. No. CE-4 (Affidavit of Benjamin Schall).

delivering Entergy's station power from the Buchanan 138 kV bus to [Entergy's] Feeder Nos. 95331 and 95332."¹⁹

23. Entergy and Con Edison are in agreement as to the ownership and basic configuration of the lines and facilities between Con Edison's Buchanan Substation and Entergy's two units, but they disagree as to the appropriate classification of some of the facilities. The first set of facilities at issue are two 138 kV feeder lines (Feeder Nos. 95331 and 95332) between the Buchanan Substation and IP2 and IP3.²⁰ Entergy owns both these feeders. According to Entergy's expert witness, Mr. Vai, the feeders are transmission lines that connect directly to IP2 and IP3, and there are no intervening local distribution facilities that Con Edison owns.²¹

24. In response, Con Edison's Mr. Schall makes two claims. First, he alleges that Entergy's Feeder Nos. 95331 and 95332 are local distribution facilities because "they are used to supply light and power to IP2 and IP3" and are not used to transmit the generator output of IP2 or IP3 or to provide transmission service to other entities on an open access basis.²² However, Mr. Schall does not explain why it is relevant that *Entergy-owned* facilities may be local distribution.

25. The second set of contested facilities are the Connecting Lines. These are described as Con Edison-owned facilities at the bus-side terminal of disconnect switches on Feeder Nos. 95331 and 95332. Mr. Schall states:

Entergy owns Feeder Nos. 95331 and 95332, extending from its generating facility [IP] to Con Edison's facilities in the Buchanan Substation. Feeder No. 95332 terminates and interconnects with Con Edison's facilities at "the bus-side terminal of Disconnect Switch F3A." Feeder No. 95331 terminates and interconnects with Con Edison's facilities at "the bus-side terminal of Disconnect Switch BT2-6E." (Entergy Exh. E, Schedules 3.04(a)). Con Edison owns the facilities ("Connecting Lines") extending from those bus-side terminals to the 138 kV bus at the Buchanan Substation.^[23]

¹⁹ *Id.* at 2.

²⁰ The configuration of the Indian Point station is actually considerably more complex than discussed herein, but only deliveries over these two lines are at issue in this proceeding.

²¹ Complaint, Exh. No. A at P 8.

²² Supplemental Answer, Exh. No. CE-4 at P 8.

²³ *Id.* at P 6.

While Mr. Schall acknowledges that the Connecting Lines are “relatively limited in scope and operate at 138 kV,” he nonetheless maintains, based on the material quoted above, that they are local distribution facilities “based on their nature and function.”²⁴

26. Entergy’s Response explains that the Connecting Lines are transmission facilities, not local distribution facilities:

The only facilities owned by Con Edison that it identifies as local distribution facilities are two short sections – a few feet of pipe – of 138 kV, 3-phase, outdoor buswork that act as conductors in the Buchanan substation. These conductors [the Connecting Lines] connect the main section of the 138 kV bus at the Buchanan substation to 138 kV looped facilities owned by Entergy Nuclear-Northeast. Power flows both from the main 138 kV Buchanan bus into Entergy Nuclear-Northeast’s looped facilities through the Con Edison conductors and from Entergy Nuclear-Northeast’s looped facilities back into the main 138 kV Buchanan bus, also through the Con Edison conductors. Entergy Nuclear-Northeast’s looped facilities (and the Con Edison conductors) provide a parallel path for power flows in various circumstances, and energy that flows through the facilities is transmitted throughout the New York Independent System Operator (“NYISO”) market and other markets. [²⁵]

27. We find that Entergy has met its burden of proof to demonstrate that no Con Edison-owned local distribution facilities are used to deliver station power to IP2 or IP3. Thus, we will grant Entergy’s complaint, for the following reasons. Entergy’s detailed description of the facilities at issue (including the Connecting Lines, the two Entergy-owned feeder lines, and the Buchanan substation (including its 138 kV bus)), and other interconnected facilities demonstrate that the Connecting Lines and the feeder lines both function solely as transmission facilities.²⁶ In short, they are not Con Edison local distribution facilities, and, accordingly, Con Edison cannot charge a local distribution charge.

²⁴ *Id.* at P 7.

²⁵ Response at 3-4.

²⁶ Entergy notes that Con Edison’s original Answer appears to concede that no Con Edison-owned facilities were used to deliver station power to IP2 and IP3, and that Con Edison first made the assertion that some of its facilities were local distribution only in its Supplemental Answer.

28. Entergy explains that the Buchanan substation consists of a network of three transmission buses that connect with the rest of the NYISO transmission system at numerous points and that are part of multiple and nested looped facilities. Entergy also points out that what Con Edison calls the Connecting Lines are, in fact, only a few feet of 138 kV buswork that function as conductors. In contrast, Con Edison not only concedes that the Connecting Lines operate at 138 kV, which is typically a transmission rather than local distribution voltage, but submits no credible evidence that the Connecting Lines do, in fact, serve a local distribution function. And, as we previously noted, the function served by facilities that Con Edison does not own is not germane to the issues presented in this proceeding. NYTOs similarly merely assert in conclusory fashion that the Con Edison facilities at issue “involve, at least in part, functional distribution service.”²⁷ Thus, we find that Entergy has persuasively demonstrated that the facilities are transmission and not local distribution facilities.

29. Furthermore, as Entergy notes, the Commission held in *Detroit Edison Co.*, 102 FERC ¶ 61,282, *order on reh’g*, 105 FERC ¶ 61,209 (2003), that analogous facilities were transmission, not local distribution. At issue in that case was whether a disconnect switch on a 230 kV transmission lines connecting a generator to a transmission substation and a separate 230 kV line connecting the generator to the grid should be classified as transmission or distribution. The Commission held that the facilities performed only a transmission function and not a state-jurisdictional local distribution function because:

(1) the Facilities are at a high voltage level; (2) the [transmission lines] are both 230 kV lines, and along with the [generator] ring bus, form a 230 kV loop configuration; and (3) power flows into and out of the loop configuration.^[28]

On rehearing, the Commission further explained that “given the network configuration, the Facilities have the capacity to transmit energy to other markets outside the geographical area.”²⁹ The Commission further held that the facilities were not dual use facilities, even though some industrial retail loads were served from the transmission lines.³⁰ The Court of Appeals for the District of Columbia Circuit agreed with this conclusion.³¹

²⁷ NYTOs at 6.

²⁸ *Detroit Edison*, 102 FERC ¶ 61,282 at n.2.

²⁹ *Detroit Edison*, 105 FERC ¶ 61,209 at P 18.

³⁰ *Id.* at P 21.

³¹ *See supra* note 12.

30. Based on the evidence presented, we conclude with respect to the facilities in this proceeding that both Entergy's feeder lines and Con Edison's Connecting Lines are transmission facilities.³² These facilities operate at high voltage (138 kV), they are looped, and they carry power flows into and out of the Buchanan 138 kV bus.³³ Given the presence of multiple nested loops, power flowing through the facilities can flow to other markets outside the immediate geographical area and to various locations within (and beyond) the NYISO-controlled grid. Thus, the facilities have the characteristics of, and function as, transmission facilities.

31. Given our finding that the facilities at issue here are transmission facilities, it follows that the delivery of station power is transmission service, and not local distribution service. Thus, if any tariff applies to such delivery, it is the NYISO's Services Tariff, provisions of which govern netting and rates for delivery of station power over transmission facilities. The Interconnection Agreements and Con Edison's retail access tariff, are not triggered and are not at issue in this proceeding. Thus, it is not necessary to examine or interpret the Interconnection Agreements. This is not inconsistent with our decision in *Midwest* that we lacked jurisdiction over that dispute because we lacked jurisdiction over the retail delivery service covered in those agreements, as Con Edison claims. In that case, the complainant was asking the Commission to abrogate its agreements with the respondent; Entergy is not seeking that relief here, and the issues in this dispute do not require us to interpret any state-jurisdictional tariffs.

32. It is well established that the Commission may properly decline to hold an evidentiary hearing if the issues (even if they are disputed) may be adequately resolved on the written record.³⁴ In this case, where the material disputed issue does not implicate motive, intent, or credibility, and where the written record provides a sufficient basis to resolve this proceeding on the merits, there is no reason why the Commission cannot reach a decision on the merits based on the written record. Both the complainant and the respondent have filed the affidavits of qualified expert witnesses concerning the nature of the facilities at issue, and we have determined, after reviewing the record, that the

³² While we determine that Feeder Nos. 95331 and 95332 are transmission facilities, given that Entergy, not Con Edison, owns them, even our reaching the opposite conclusion would not be sufficient to justify Con Edison charging local delivery charges for the use of such facilities.

³³ Entergy explains that, under normal operating conditions, energy flows from both the main Buchanan 138 kV bus into Entergy's looped facilities and the Connecting Lines and from Entergy's looped facilities and the Connecting Lines back into the main Buchanan 138 kV bus. The looped facilities and the Connecting Lines provide a parallel path for power flows through the Buchanan substation.

³⁴ See, e.g., *Texaco, Inc. v. FERC*, 149 F.3d 1091, 1100 (D.C. Cir. 1998).

facilities can be correctly classified based on the information before us. Finally, we agree with Entergy that the other issues raised by Con Edison are not material to the resolution of this complaint and do not require a trial-type hearing. That is, for example, whether or not Entergy would be disadvantaged by having to pay Con Edison's local distribution charges does not affect the outcome of this complaint, and thus we need not reach such issues.

The Commission orders:

Entergy's complaint is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.