

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Commonwealth Edison Company

v.

Midwest Generation, L.L.C.

Docket No. EL03-127-000

ORDER FINDING COMPLAINT MOOT IN PART AND DENYING IT IN PART

(Issued July 10, 2003)

1. In this order, we find moot in part and deny in part a complaint by Commonwealth Edison Company (ComEd) against Midwest Generation, L.L.C. (Midwest). This proceeding involves the issue of whether ComEd can contractually compel Midwest to make its black start units available for system reliability testing and for use in system emergencies after ComEd's affiliate terminated the agreements that specified the rates that would be paid for these services. ComEd also asks us to compel Midwest to provide it with black start service at cost-based rates in lieu of the higher amounts in the terminated agreements.

2. Midwest states that it is willing to make the facilities available for black start service if agreement can be reached on price issues. However, as the parties have not been able to reach agreement on the price issues we will direct Midwest to file a rate schedule under Section 205 of the Federal Power Act (FPA),¹ to recover its charges for black start service within 30 days of the date of this order. This order benefits customers by ensuring that black start service is available at just and reasonable rates.

¹16 U.S.C. § 824e (2000).

BACKGROUND

3. In December 1999, Midwest acquired 9,287 MW of generating capacity from ComEd. These generating assets included three generating units with black start capabilities (i.e., the Lombard, Waukegan and Calumet peaker units).
4. In conjunction with ComEd's sale of generation to Midwest, it entered into three power purchase agreements (PPAs) with Midwest under which Midwest would sell power from the acquired facilities to ComEd at agreed upon prices until 2004.² At the same time, Midwest and ComEd also executed thirteen Facilities, Interconnection, and Easement Agreements ("Facilities Agreements"), one for each acquired generating station (including agreements covering the black start units).³ The Facilities Agreements provide for Midwest to sell black start service to ComEd and require Midwest to cooperate with ComEd's system emergency reliability testing. However, the PPAs set the price to be paid for the black start service.
5. The purchase obligations under the PPAs were assigned by ComEd to its affiliate, Exelon Generation Company (Exelon). In October 2001, Exelon exercised its option to terminate the PPAs for the Calumet, Waukegan and Lombard peaker facilities.
6. ComEd states that, in November 2001, it sought reassurances from Midwest that the black start plan for Waukegan Station remained intact even though Exelon had terminated the PPAs. ComEd states that Midwest viewed termination of the PPAs as terminating its obligation to have the Waukegan, Lombard and Calumet Stations participate in the region's plans for addressing black start situations.
7. ComEd states that, for over a year, it tried unsuccessfully to resolve its disagreements with Midwest through arbitration. On May 27, 2003, ComEd filed the complaint initiating this proceeding. ComEd argues that the Facilities Agreements and PPAs are independent and that Midwest retains its obligation to fulfill the terms of the Facilities Agreements by providing ComEd with black start service even though Exelon terminated the PPAs that set the rate for that service. It further argues that, as Midwest's black start facilities are the only such facilities in ComEd's control area, the rates for this

²The Commission accepted the PPAs for filing in a delegated letter order issued in Docket No. ER00-0907-000, et al., on March 14, 2000.

³The Commission accepted the Facilities Agreements for filing in a delegated letter order issued in Docket No. ER99-3691-000 on September 3, 1999.

service should be cost-based, rather than market-based. ComEd also argues that this matter should be given fast track treatment, because it involves reliability issues.

Notice, Intervention, and Responsive Pleading

8. Notice of ComEd's complaint was published in the Federal Register, 68 Fed. Reg. 33,484 (2003), with comments, protests or interventions due on or before June 16, 2003. Reliant Resources, Inc. (Reliant) filed a timely motion to intervene raising no substantive issues.

9. On June 16, 2003, Midwest filed an answer to the Complaint.⁴ Midwest's answer states that it will provide ComEd with black start service at the rates agreed upon in the terminated PPAs. Midwest argues that the PPAs and the Facilities Agreements are interrelated agreements, since the Facilities Agreements obligate Midwest to provide black start service, but the rates for that service were in the PPAs. Midwest states that reading the Facilities Agreements as obligating it to continue to provide black start service for free would be unreasonable. Midwest further argues that, if the Commission obligates Midwest to provide ComEd with black start service, this requirement should be subject to termination on reasonable notice. Midwest argues that, in the guise of concerns over reliability, and contrary to the parties' understanding in negotiations, ComEd is seeking to obtain the same types of services it bought from the peakers under the PPAs, but at a greatly reduced rate.

10. On July 3, 2003, ComEd filed an answer to Midwest's amended answer.

DISCUSSION

11. The timely, uncontested motion to intervene of Reliant makes it a party to this proceeding. 18 C.F.R. § 385.214 (2003). We find good cause to accept ComEd's answer despite the general prohibition against answers to an answer, because the answer contains information that will aid us in resolving the issues. 18 C.F.R. § 385.213(a)(2) (2003).

⁴On June 17, 2003, Midwest provided a supporting affidavit from Theodore F. Craver, Jr., giving its understanding of certain negotiations between Midwest and ComEd. On June 25, 2003, Midwest filed an amended answer withdrawing this affidavit, based on concerns over confidentiality. We accept Midwest's withdrawal and will not consider this affidavit.

12. ComEd argues that the Facilities Agreements and the PPAs are independent agreements and that Exelon's termination of the PPAs does not negate Midwest's obligation under the Facilities Agreements to make the black start units available for control area reliability planning and for use in emergencies. ComEd argues that its position is supported by the fact that, while the PPAs were scheduled to run through 2004, the Facilities Agreements extend beyond that date. This, ComEd argues, shows that the agreements are independent. Midwest responds that the agreements are interdependent, and that ComEd is attempting to obtain the black start services it obtained under the PPAs at a greatly reduced rate.

13. We see no need to grant the Complaint as a means to protect reliability, as Midwest is agreeable to making the black start facilities available for participation in the control area's planning and testing program for responding to system emergencies, provided that agreement can be reached on price issues. Thus, the case boils down to the proper rates to be paid for the use of the black start facilities.

14. While Midwest states that it is willing to make the facilities available for black start service if agreement can be reached on price issues, it is apparent that the parties have not been able to reach agreement on these issues. Moreover, the failure of ComEd and Midwest to specify a rate for black start service upon termination of the PPAs leaves Midwest without compensation for such service. Therefore, the Commission will direct Midwest to file a rate schedule under Section 205 of the FPA to recover its charges for black start service within 30 days of the date of this order.

15. Midwest's answer also argues that any requirement for it to provide black start service should be accompanied by a reasonable termination period so that it does not remain obligated to provide this service ad infinitum. Given this concern, Midwest may wish to propose an amendment to the Facilities Agreements adding a termination clause. In its answer, ComEd's states that it agrees with Midwest that ComEd should explore obtaining its black start service from other sources. However, to the extent that the provision of black start service by Midwest may currently be necessary for reliability purposes, the termination period should be of sufficient duration to allow ComEd to put alternatives in place. We express no view at this time on whether Midwest has a contractual right to make a unilateral filing proposing to amend the Facilities Agreements.

The Commission orders:

(A) We hereby find ComEd's complaint moot in part and deny it in part, as discussed in the body of this order.

(B) We hereby direct Midwest to file a rate schedule under Section 205 of the FPA to recover its charges for black start service from the Waukegan, Lombard and Calumet Stations within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.