

112 FERC ¶ 61,117  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

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

v.

Docket No. EL05-46-001

Consolidated Edison Company of New  
York, Inc.

ORDER DENYING REHEARING

(Issued July 25, 2005)

1. In this order, we deny rehearing of an order granting 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).<sup>1</sup> Entergy had alleged that Con Edison unlawfully charged Entergy local distribution charges for deliveries of unbundled station power to Entergy's Indian Point generating facilities in instances where no Con Edison local distribution facilities were used to deliver that station power. The Commission finds on rehearing that the March 23 Order properly granted the complaint.

**Background**

2. In its complaint, Entergy argued that Con Edison had been unlawfully charging Entergy local distribution rates for deliveries of unbundled station power to Entergy's Indian Point Energy Center Units 2 and 3 (IP2 and IP3) when no Con Edison local

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<sup>1</sup> *Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC v. Consolidated Edison Company of New York, Inc.*, 110 FERC ¶ 61,312 (2005) (March 23 Order).

distribution facilities are used to deliver that station power. IP2 and IP3 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 138 kV Buchanan substation. Entergy stated that the 138 kV transmission lines feeding into and out of its facilities do not connect to any local distribution facilities owned by Con Edison, and that all of the facilities involved in delivery of power relevant in this proceeding are transmission facilities under the control of the NYISO.

3. Entergy also explained that, at the time it acquired the Indian Point units, it entered into interconnection agreements with Con Edison. According to Entergy, the pertinent sections of the agreements addressed unbundled deliveries of station power only when the station power was purchased from a third party, not when it was self-supplied with on-site generation, as it had been doing.<sup>2</sup> Further, Entergy noted that, under provisions of NYISO's Market Administration and Control Area Tariff (Services Tariff), transmission service is not required for station power at a generating facility when that facility's net output for a month is positive. Entergy added that it canceled a Con Edison retail service account under which the local distribution charges had earlier been billed, as soon as NYISO's station power provisions became effective on April 1, 2003, and concluded that there were no sales of station power subject to state jurisdiction.<sup>3</sup>

### **March 23 Order**

4. In the March 23 Order, the Commission explained that, to succeed on the merits in this proceeding, Entergy needed to demonstrate that there were no Con Edison-owned local distribution facilities used to deliver station power to Entergy at IP2 and/or IP3. Based on the record evidence, the Commission concluded that Entergy had met its burden of proof. We cited Entergy's detailed description of the facilities at issue and found that they function solely as transmission facilities. Since they were not Con Edison local distribution facilities, the Commission stated that Con Edison could not charge a local distribution charge.

5. The Commission also considered Entergy's explanation that the Buchanan substation consisted of a network of three transmission buses that connect with the

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<sup>2</sup> See Complaint Exhibit E, Indian Point Continuing Site Agreement (IP2 Agreement) section 3.15, and Indian Point Interconnection Agreement (IP3 Agreement) section 3.14.

<sup>3</sup> Entergy indicated that it was not seeking a refund for amounts paid prior to April 1, 2003, and because it had not paid Con Edison for disputed amounts billed since that date, it was not asking for any monetary relief.

rest of the NYISO transmission system at numerous points and that are part of multiple and nested looped facilities. In contrast, Con Edison and Indicated New York Transmission Owners (NYTOs) had submitted no credible evidence that the connecting lines serve a local distribution function. The Commission cited *Detroit Edison Company*,<sup>4</sup> where it was found that analogous facilities were transmission, and not local distribution, facilities. Thus, the Commission determined that the facilities delivering power to Entergy's units have the characteristics of, and function as, transmission facilities.

6. The Commission reasoned that, since the facilities at issue in this proceeding are transmission facilities, the delivery of station power is transmission service, and not local distribution service; thus, the Commission found, the appropriate tariff governing that service is the NYISO's Services Tariff. Accordingly, the Commission held that neither the interconnection agreements nor Con Edison's retail access tariff was triggered, and those tariffs were not at issue in this proceeding. We distinguished this treatment from that in *Midwest Generation, LLC v. Commonwealth Edison Company*,<sup>5</sup> which Con Edison had cited as precedent for dismissing a complaint for lack of jurisdiction where a generator challenges contracts to purchase station power from a utility. Whereas in *Midwest* we found that we lacked jurisdiction over the dispute because we lacked jurisdiction over the retail delivery service at issue there, here we explained Entergy was not seeking abrogation of its interconnection agreements. Thus, we concluded that the issues in dispute here did not require us to interpret any state-jurisdictional tariffs (the interconnection agreements are Commission-jurisdictional rate schedules on file with this Commission).

7. Finally, we explained that the Commission may properly decline to hold an evidentiary hearing if the issues in dispute may be adequately resolved on the written record, finding that:

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 facilities can be correctly classified based on the information before us. . . . [T]he other issues raised by Con Edison are not material to the resolution of this complaint and do not require a trial-type hearing.[<sup>6</sup>]

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<sup>4</sup> 102 FERC ¶ 61,282, *order on reh'g*, 105 FERC ¶ 61,209 (2003), *aff'd*, 394 F.3d 954 (D.C. Cir. 2005) (*Detroit Edison*).

<sup>5</sup> 99 FERC ¶ 61,166 (2002) (*Midwest*).

<sup>6</sup> March 23 Order, 110 FERC ¶ 61,312 at P 32.

### **Requests For Rehearing**

8. Con Edison and NYTOs both filed requests for rehearing, challenging many aspects of the order. They assert that the Commission exceeded its jurisdiction by allegedly not recognizing that states have jurisdiction over the local delivery of energy to end-users and by asserting the authority to approve tariff provisions that determine the charges applicable to the local delivery of electricity to end-users. They also allege that the Commission reversed prior determinations that states have jurisdiction to regulate charges to end-users and failed to provide an explanation for such reversal. The New York Public Service Commission (New York Commission) also sought rehearing, focusing primarily on the March 23 Order's treatment of the interconnection agreements.

9. On May 9, 2005, Entergy filed an answer responding to the requests for rehearing. Con Edison subsequently filed a response to the answer.

### **Discussion**

#### **A. Procedural Matters**

10. Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2005), answers to requests for rehearing are not permitted. Accordingly, we will reject Entergy's May 9 answer and likewise dismiss Con Edison's response.

#### **B. Summary**

11. We will deny rehearing. Con Edison is charging Entergy for services that Entergy does not want and that Con Edison is not providing. All station power deliveries at issue in this complaint are made over transmission facilities. Hence, charges for local distribution service are not appropriate. Our action granting the complaint does not permit merchant generators such as Entergy to bypass retail stranded costs and benefits charges when such generators actually do have station power delivered over local distribution facilities. The Commission is not reversing or changing its holdings in Order No. 888 but is applying the requirements of that order to the facts in the instant complaint. The findings in our March 23 Order are the logical continuation of the analysis in our long line of station power cases.

12. Many of the allegations raised on rehearing are in fact collateral attacks on findings the Commission has made in earlier station power cases by the same parties - who were active in those earlier proceedings as they are here.<sup>7</sup> Specifically,

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<sup>7</sup> See, e.g., Con Edison rehearing at 20-24; NYTOs rehearing at 7-16.

individual Transmission Owners were active parties in *PJM Interconnection, LLC*,<sup>8</sup> while the Transmission Owners jointly were active parties in *PJM IV* and *KeySpan Ravenswood, Inc. v. New York Independent System Operator, Inc.*<sup>9</sup> Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged.<sup>10</sup>

### C. Jurisdictional Issues

13. Con Edison argues on rehearing that the Commission erred by failing to dismiss Entergy's complaint for lack of jurisdiction. According to Con Edison, Entergy's contractual commitments to Con Edison are beyond the Commission's jurisdiction, and they should be decided by New York state courts.<sup>11</sup> Con Edison reasons that, because the Commission lacks jurisdiction over the delivery service, it also lacks jurisdiction over agreements respecting the service. Con Edison asserts that, by granting the complaint, the Commission abrogated the provisions of a contract to take state-jurisdictional service, which is contrary to *Midwest* and violates certain provisions of the interconnection agreements which provide for enforcement by specified state or federal courts.

14. NYTOs similarly argue that, to the extent that parties have contractually agreed to station power service pursuant to a state-jurisdictional retail tariff, any such agreement is beyond the Commission's jurisdiction. Further, NYTOs assert that "because the rates for any such retail service are within the state's exclusive jurisdiction, any and all issues related to those retail charges can only be decided by the appropriate state commission."<sup>12</sup> NYTOs also contend that the effect of the March 23 Order is to abrogate Entergy's agreements with Con Edison, and they assert that Entergy has made no showing that the public interest requires abrogation of the

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<sup>8</sup> 94 FERC ¶ 61,251 (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (*PJM III*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

<sup>9</sup> 107 FERC ¶ 61,142 (2004) (*KeySpan IV*).

<sup>10</sup> *See KeySpan IV*, 107 FERC ¶ 61,142 at P 22 & n.25.

<sup>11</sup> The New York Commission takes the opposite position on this issue, however, as discussed below.

<sup>12</sup> NYTOs rehearing at 17.

contract at issue, which is required by the *Mobile-Sierra* doctrine.<sup>13</sup> They contend that the March 23 Order is inconsistent with the ruling in *Midwest*, where “the Commission correctly recognized that this was a state matter and not a Commission matter.”<sup>14</sup>

15. The New York Commission argues that the Commission rewrote the *Midwest* order “to restrict its ambit to distribution service, over which the Commission admittedly lacks jurisdiction.”<sup>15</sup> The New York Commission states that the principles enunciated in *Midwest* were not limited to distribution service, however, and that the principle that was established was that contracts for station power would be allowed to continue in effect, regardless of the type of facilities involved. The New York Commission concludes that the Commission deviated from those principles without explanation.

16. Con Edison’s second jurisdictional contention is that the Commission lacks jurisdiction to determine whether Con Edison performs a state-jurisdictional delivery service for Entergy and to determine whether a service is rendered under a state-jurisdictional tariff. Con Edison argues that, because the only issue posed in the complaint is whether the delivery of station power involves a service under a state-jurisdictional tariff, the Commission did not have jurisdiction to resolve the complaint and should have rejected it. Con Edison relates a decision by the New York Commission, where it determined that Con Edison’s provision of station power service is a retail service: “This State jurisdiction over delivery service permits the use of suitably developed retail rates for stand-by service, which may include non-bypassable distribution or stranded cost charges, for customers taking delivery services at either distribution or transmission levels.”<sup>16</sup>

17. Con Edison further states that, even where station power is delivered at high voltages, there exist two separate services, a local distribution service (subject to New York Commission jurisdiction) and a transmission service (subject to this Commission’s jurisdiction). Con Edison then references section 212(h) of the Federal

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<sup>13</sup> *Id.* at 18, citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

<sup>14</sup> *Id.* at 16-17.

<sup>15</sup> New York Commission rehearing at 6.

<sup>16</sup> Con Edison rehearing at 6-7, citing *Consolidated Edison Company of New York, Inc.*, New York Commission Case 00-E-0757, at 3-4 (September 29, 2000) (*NYPSC Order*).

Power Act, which prohibits the Commission from mandating delivery in certain circumstances,<sup>17</sup> and concludes that:

under the Federal Power Act, the existence of a service under Con Edison's Retail Access Tariff is a predicate for the transmission of Entergy's station power. Thus, the delivery of Entergy's station power encompasses two distinct services: a state-jurisdictional delivery service and a Commission-jurisdictional transmission service.<sup>[18]</sup>

18. NYTOs mirror this discussion, contending that the Commission exceeded its statutory authority by asserting jurisdiction over the local delivery of energy to end users, by seeking to define the nature and extent of retail service, by determining the extent to which local delivery facilities are involved, and by defining the scope of stranded costs that can be recovered in retail rates. NYTOs cite Order No. 888<sup>19</sup> and several station power orders as support for their position that the Commission has no jurisdiction to regulate the service of delivering energy to end users or ratemaking jurisdiction over facilities that perform a local distribution function.<sup>20</sup>

19. NYTOs claim that the Commission summarily rejected arguments that Con Edison's facilities at issue in this proceeding involve "dual use" facilities which provide, at least in part, functional distribution service to Entergy. According to NYTOs, the United States Court of Appeals for the District of Columbia Circuit held that bifurcation of state and federal jurisdiction (coextensive state and federal

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<sup>17</sup> 16 U.S.C. § 824k(h) (2000) (prohibiting the Commission from mandating delivery "directly to an ultimate consumer" or "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer" except in certain situations).

<sup>18</sup> *Id.* at 10.

<sup>19</sup> 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 v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>20</sup> NYTOs rehearing at 9-11.

jurisdiction) is appropriate for dual use facilities.<sup>21</sup> They conclude that the Commission's more recent station power orders improperly allow merchant generators to bypass state commission-approved local distribution charges. Con Edison also challenges the holdings of recent station power orders,<sup>22</sup> stating that in earlier orders the Commission confirmed that states have authority over the service of delivering energy to end users<sup>23</sup> and recognized that the assessment of separate charges for distribution and transmission services does not constitute a double charge.<sup>24</sup>

20. NYTOs allege further that the Commission erred by defining the nature of state-jurisdictional retail standby service, asserting that the Commission fails to recognize the nature of standby service as defined by the New York Commission. According to NYTOs, the New York Commission requires each local franchise utility to stand ready to deliver local station power, and it is up to the discretion of the New York Commission to design the rate for such service. NYTOs also state that the Commission has itself used rates that are tied to the right to service and that may be charged regardless of whether service is actually taken.

21. Finally, Con Edison contends that the Commission may not limit or prohibit its charges for state-jurisdictional delivery service unless the charges are preempted by the Federal Power Act. Con Edison proceeds to analyze federal caselaw regarding conflict preemption<sup>25</sup> and concludes that the New York Commission's determination

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<sup>21</sup> See *Detroit Edison Co. v. FERC*, 334 F.3d 48, 54 (D.C. Cir. 2003) (*Detroit Edison*).

<sup>22</sup> See Con Edison rehearing at 21-24.

<sup>23</sup> See, e.g., *Northeast Utilities Services Company v. NRG Energy, Inc.*, 101 FERC ¶ 61,327 (2002). We note that this order was subsequently reversed in pertinent part. See *AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 at P 17, *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *order on reh'g*, 112 FERC ¶ 61,020 (2005) (*Warrior Run*).

<sup>24</sup> Con Edison rehearing at 22, *citing San Francisco Bay Area Rapid Transit District v. Pacific Gas and Electric Company*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

<sup>25</sup> See Con Edison rehearing at 10-12, *citing, e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that conflict preemption arises if compliance with both federal and state law is impossible).

that Con Edison's retail access tariff is applicable to station power deliveries does not sufficiently conflict with the NYISO's Services Tariff to require the Commission-jurisdictional rate to preempt Con Edison's retail access tariff.

### **Commission Response**

22. The parties' rehearing arguments do not persuade us that we lack jurisdiction over this complaint. As an initial matter, we reject the notion that we do not have the authority to interpret the interconnection agreements. The agreements are jurisdictional rate schedules on file at this Commission as service agreements under a Commission-jurisdictional Open Access Transmission Tariff (OATT). The suggestion that we cannot interpret them because one provision refers to retail service is ludicrous. In any event, if any party wished to challenge the Commission's jurisdiction over the interconnection agreements, or over the specific provisions in question, they should have raised the issue at the time the agreements were filed. No such protest occurred.<sup>26</sup> Certainly, Con Edison cannot assert at this late date that its filing of the interconnection agreements with this Commission roughly four years ago was anything but voluntary and evidence of its view that the agreements are subject to our jurisdiction.

23. We also reject the argument that we lack the authority to make the jurisdictional determination whether Con Edison performs a state-jurisdictional or a federal-jurisdictional delivery service. We have in the first instance the authority to determine the scope of our jurisdiction and to determine, specifically, whether any jurisdictional activities are occurring.<sup>27</sup> Our authority to make this determination is not dependent on the ultimate outcome of the determination.

24. Our reading of the interconnection agreements indicates that, when Entergy is not self-supplying its station power needs, the parties agreed that Con Edison would

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<sup>26</sup> See *Consolidated Edison Company*, Docket No. ER01-478-000 (February 7, 2001) (unpublished letter order); *Consolidated Edison Company*, Docket No. ER01-3152-000 (November 2, 2001) (unpublished letter order).

<sup>27</sup> See *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033 at P 30 & n.30 (2005) (*Nine Mile II*); *New York v. FERC*, 535 U.S. 1, 22-23 (2002) (holding the Commission was within its authority to establish a seven-factor test to determine which facilities are local distribution facilities). See also *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182 at 61,661 (1992), *aff'd*, 165 F.3d 922, 926 (D.C. Cir. 1999) (concluding the Commission may examine contracts relating to transactions which may be subject to its jurisdiction prior to making its determination as to jurisdiction).

either sell bundled station power to Entergy or provide unbundled delivery service for any station power acquired from a third party supplier.<sup>28</sup> We do not interpret the interconnection agreements as expressly or implicitly prohibiting Entergy from self-supplying its station power requirements (full or partial); rather, the interconnection agreements address only the situation where Entergy cannot meet its station power requirements (full or partial) via self-supply. Because any such station power is delivered to Entergy's IP2 and IP3 units over transmission facilities and not local distribution facilities, the only tariff applicable to such delivery is the NYISO's Services Tariff, as explained in the March 23 Order. This is why the provisions of the interconnection agreements pertaining to station power are not triggered and are not at issue in this proceeding. This interpretation does not abrogate the agreements, as NYTOs and the New York Commission claim, but rather determines which rate schedule (the Services Tariff rather than the interconnection agreements) applies to the service at issue in this proceeding. Indeed, Entergy states in its complaint that it has paid Con Edison all local distribution charges for deliveries of unbundled station power to IP2 and IP3 when those deliveries use Con Edison's local distribution facilities.<sup>29</sup> Our holdings do not disturb Entergy's obligation to pay such charges.

25. We disagree with the parties' rehearing arguments that the March 23 Order is inconsistent with the rulings in *Midwest*.<sup>30</sup> Our analysis rests in part on the substance

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<sup>28</sup> The pertinent portion of section 3.14 of the IP3 Agreement provides:

Con Edison shall, at Generator's option, either (a) sell to Generator Station-Use Energy on a bundled basis or (b) provide to Generator unbundled delivery service for such Station-Use Energy if Generator purchases or otherwise obtains the energy from a person or entity other than Con Edison. Generator shall purchase either such bundled sales service or unbundled delivery service. Con Edison shall provide the bundled sales service under Con Edison's Schedule for electricity Service, P.S.C. No. 9 – Electricity, and unbundled delivery service under Con Edison's Schedule for Retail Access, P.S.C. No. 2 – Retail Access, as the same may be revised or superseded from time to time.

The IP2 Agreement contains analogous language in section 3.15.

<sup>29</sup> Complaint at 3.

<sup>30</sup> The New York Commission notes the dicta in *Midwest*, wherein the Commission reminded readers that merchant generators could not be required to purchase station power at retail, as opposed to self-supplying, but asserts that Entergy chose to rely on the retail resources of its local delivery utility. We note that when the  
(continued...)

of the interconnection agreements. As the interconnection agreements are on file here and are Commission-jurisdictional, unlike the contracts in *Midwest*, there is no need for us to disclaim jurisdiction, as discussed above. This distinguishes the instant complaint from *Midwest*. The determination whether facilities are transmission or local distribution facilities is not exclusively a state matter, whereas interpreting contracts for retail sales of energy, at issue in *Midwest*, was outside this Commission's purview. Further, because we are not being asked to abrogate, and are not in fact abrogating, any contracts (retail or otherwise), this complaint is distinguishable from that in *Midwest*.

26. As we have stated in numerous station power orders, we are not departing from our rationale in Order No. 888 by allowing merchant generators to self-supply station power via netting under a Commission-jurisdictional tariff. Nor are we prohibiting a utility from collecting charges for stranded costs and benefits through retail, local distribution rates for providing a service over local distribution facilities. Specifically:

First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which

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NYISO's station power provisions became effective, Entergy elected to take advantage of the self-supply option. As noted earlier, nothing in the interconnection agreements limits Entergy's right to self-supply station power, only its choice of retail suppliers of station power when self-supply does not fully meet its station power needs.

typically are lower voltage facilities) may not be readily identifiable as among the facilities used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation . . . where the generation has been divested to a merchant generator and the rates charged to that merchant generator for local distribution service are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.<sup>31]</sup>

27. We disagree with NYTOs that Order No. 888 recognized state jurisdiction in all circumstances over the service of delivering energy to end users. Rather, Order No. 888 determined that, if unbundled retail transmission occurred voluntarily by a public utility, this Commission has exclusive jurisdiction over the rates, terms and conditions of that transmission.<sup>32</sup> We also noted that the Federal Power Act does not limit our transmission jurisdiction over public utilities to wholesale transmission. Thus, NYTOs misrepresent the holdings of Order No. 888. Further, early station power orders no more stood for the proposition that we have no jurisdiction over delivery to end-users than did Order No. 888. We stated that *PJM II* “was not intended to, and does not, in any way, modify or reverse Order No. 888’s jurisdictional findings.”<sup>33</sup> We also explained:

While individual circumstances may vary, we agree that a generator’s so-called ‘host utility’ may be one of the *transmission providers* with whom a generator may need to make appropriate transmission and/or local distribution arrangements . . . To the extent that the host utility . . . provides unbundled retail transmission service, as we explained in *PJM II*, we would expect the service to be provided under rate schedules

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<sup>31</sup> *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 at P 45-46 (2003) (*Nine Mile I*), *reh’g denied*, 110 FERC ¶ 61,033 (*Nine Mile II*).

<sup>32</sup> See Order No. 888 at 31,781, 31,966-69.

<sup>33</sup> *PJM III*, 95 FERC ¶ 61,333 at 62,185.

on file with this Commission, including the transmission provider's [OATT], consistent with Order No. 888.<sup>[34]</sup>

28. NYTOs also claim that our recent station power decisions are contrary to our earlier holding in *USGen New England, Inc.*,<sup>35</sup> where we clarified that we did not intend to alter our findings or conclusions in Order No. 888 with respect to states' jurisdiction over the service of delivery to end users. *USGen* stated, in pertinent part: "The third-party provision of station power would be an end-use sale subject to state jurisdiction. Its delivery over the transmission delivery point may involve our jurisdiction if the applicable transmission provider has chosen to provide . . . unbundled retail transmission service."<sup>36</sup> This discussion is consistent with our treatment of the instant complaint. Thus, our holdings in the March 23 Order have not varied from our earliest pronouncements on the delivery of station power.

29. A finding that Entergy may voluntarily avail itself of the station power provisions of NYISO's Services Tariff does not run afoul of the restrictions of Federal Power Act section 212(h). As we explained in *KeySpan IV*,<sup>37</sup> since self-supply of station power does not involve a retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise. In addition, a Commission finding that merchant generators may avail themselves of the NYISO's voluntary station power provisions does not run afoul of the restrictions of section 212(h). We have not required transmission of electric energy directly to Entergy, as an end user, which is what is prohibited by that section; rather, the arrangement was voluntary.

30. Regarding *Detroit Edison*, we have previously explained how that case is distinguishable from cases involving New York utilities attempting to assess retail charges on merchant generators that choose to self-supply station power via netting pursuant to the terms of a Commission-jurisdictional tariff. In *Detroit Edison*, the jurisdictional question was:

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<sup>34</sup> *Id.*, emphasis in original.

<sup>35</sup> 100 FERC ¶ 61,199 (2002) (*US Gen*).

<sup>36</sup> *Id.* at P 6.

<sup>37</sup> See *KeySpan IV*, 107 FERC ¶ 61,142 at P 51. Cf. *Suffolk County Electrical Agency*, Opinion No. 467, 106 FERC ¶ 61,157 at P 9, *reh'g denied*, Opinion No. 467-A, 108 FERC ¶ 61,173 at P 10 (2004) (Commission may order wholesale transmission services, and determine rates, terms and conditions for such services).

. . . whether local distribution service was being provided under [Midwest] ISO's transmission tariff, which would enable unbundled retail customers to bypass retail tariffs. Here, in contrast, [the merchant generator] is not taking any state-jurisdictional, local distribution service from Niagara Mohawk. Nor, for that matter, is it taking any local distribution service from NYISO. . . . Thus, we are not allowing [the merchant generator] to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that [the merchant generator] is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. . . .<sup>38]</sup>

Hence, in no cases have we permitted improper customer bypass of state commission-approved retail, local distribution charges.

31. Although states may have jurisdiction over service to end users over dual use facilities, as Con Edison states,<sup>39</sup> we found in the March 23 Order that Con Edison's connecting lines and feeder lines are not dual use facilities. As discussed below, the requests for rehearing do not persuade us that our findings in that regard were incorrect.

32. Last, we remind NYTOs that, if a utility would not use local distribution facilities to deliver station power, then it cannot be standing ready to provide local distribution service, any more than it can provide such service in the first instance. Thus, this Commission has not attempted to define the nature of state-jurisdictional standby service, but has assessed the nature of the facilities being used to provide service in the context of this complaint, which is wholly within our authority. As we have observed in prior orders, while we cannot approve or disapprove a retail rate for standby service, it is within our purview to interpret and enforce the tariffs on file at this Commission. In any event, however, to the extent a retail tariff for standby service conflicts with NYISO's netting provision, the latter must control.<sup>40</sup>

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<sup>38</sup> *Nine Mile II*, 110 FERC ¶ 61,033 at P 32; *see also AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,032 at P 37 (2005).

<sup>39</sup> *See* Con Edison rehearing at 17. *But see Puget Sound Energy, Inc.*, 110 FERC ¶ 61,229 (2005) (stating that, to the extent local distribution facilities are used for wholesale customers, that service is exclusively under the jurisdiction of this Commission and will be provided under the utility's OATT).

<sup>40</sup> *See AES Somerset II*, 110 FERC ¶ 61,932 at 59.

**D. Conclusions of Fact**

33. Con Edison and NYTOs challenge the March 23 Order's conclusion that no Con Edison local distribution facilities deliver station power to Entergy's IP2 and IP3 units. Con Edison argues that our analysis, on which we based our finding that connecting lines and feeder lines owned by Con Edison are transmission facilities, was substantively and procedurally flawed and that we decided the issue without a complete factual record. Con Edison asserts that there is compelling evidence in the record that the connecting lines and feeder lines are local distribution facilities, and adds that they are primarily radial in nature, that the facilities do not form multiple and nested loops, and that it is not possible for power delivered over the connecting lines to flow out of New York state. Con Edison also mentions, for the first time on rehearing, other facilities purportedly used in rendering delivery of station power to Entergy, namely, meters and contracts, accounts, memoranda and other papers. NYTOs likewise claim, for the first time on rehearing, that a retail end-use meter is utilized by Con Edison as well as "the books, records and rate schedules of the local utility which represent, under clear Commission precedent, sufficient to invoke state jurisdiction."<sup>41</sup> NYTOs also claim that the Commission ignored evidence that Con Edison's facilities perform a local delivery function.

34. Con Edison also asserts that the order erred by failing to apply the seven-factor test for distinguishing between transmission and local distribution facilities. It argues that the Commission focused only on certain factors and disregarded others that favor a finding that the facilities are local distribution in nature.

35. Con Edison states that the question of whether Entergy self-supplied and netted its station power is critical because, if Entergy did not net, it must have purchased its station power from another entity. Such a transaction would have constituted a retail purchase subject to the New York Commission's jurisdiction, it maintains. Con Edison then contends that the record indicates that Entergy did not self-supply because Entergy sold the full metered output of its generators. Con Edison reasons that if Entergy had begun to self-supply after April 1, 2003, then its sales quantities would have decreased after that date. Since the quantities did not decrease, Con Edison asserts that Entergy must have continued to sell its output and to have purchased its station power at retail.

**Commission Response**

36. As we stated in the March 23 Order, Entergy had the burden of proving that there were no Con Edison-owned local distribution facilities used to deliver station

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<sup>41</sup> NYTOs rehearing at 16.

power to Entergy's generating units. We found that Entergy met this burden. There was credible evidence in the record to determine that the facilities owned by Con Edison operate at transmission-level voltage and that buses constituting the Buchanan substation are part of multiple and nested looped facilities. Con Edison, in contrast, did not submit evidence to support its position that the connecting lines and feeder lines are local distribution facilities other than claiming that they are used to supply power to Entergy's units and are not used to transmit their output or to provide transmission service to other entities, and offering the conclusory statement that the facilities serve a local distribution function. NYTOs' claim that Con Edison's facilities perform a local delivery function is similarly conclusory.<sup>42</sup> The fact that certain facilities deliver energy to an end user does not necessarily make them local distribution facilities; facilities used to provide retail transmission service (the rates, terms and conditions of which are unquestionably subject to this Commission's jurisdiction) may also deliver energy to end users.<sup>43</sup>

37. We find that Con Edison's new assertions that the connecting lines are primarily radial in nature and that the facilities are not looped facilities are not persuasive. The facilities connecting IP2 and IP3 to the transmission grid, as described in the diagrams provided by Entergy, are highly integrated and interconnect at numerous points. The system of which the Buchanan substation is a part clearly operates as a loop. Power flows in through the Indian Point 138 kV switchyard and out the main step-up transformers on its way to the three buses.<sup>44</sup> All of the wires and equipment operate at 138 kV or above, a voltage well above that considered local distribution,<sup>45</sup> and all are under the control of the NYISO, a public utility subject to this Commission's jurisdiction with tariffs on file at this Commission. Importantly, any power leaving Indian Point in the direction of upstate New York must pass

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<sup>42</sup> Parties have an obligation to support their positions with more than conclusory allegations. A moving party always has to support its own arguments. *See* 5 U.S.C. § 556(d) (2000) (providing that a proponent of a rule or order has the burden of proof); *see infra* note 61.

<sup>43</sup> *See* Order No. 888 at 31,770-85 (asserting jurisdiction over unbundled retail transmission); *accord New York v. FERC*, 535 U.S. 1, 20-24 (2002).

<sup>44</sup> *See* Complaint Exhibit B (one-line diagram).

<sup>45</sup> *See* Order No. 888, Appendix G at 31,981 & n.100 (commenting that, while there is no uniform breakpoint between transmission and distribution facilities in utilities' FERC Form Nos. 1, utilities tended to account for facilities operated at greater than 30 kV as transmission and those less than 40 kV as distribution).

through the Buchanan substation before being stepped up to 345 kV and transmitted out of the area.

38. Con Edison asserts on rehearing that the March 23 Order summarily rejected the possibility that Con Edison's facilities are dual use facilities. However, Con Edison presented no evidence in its earlier pleadings that its facilities serve a dual use. Con Edison's expert witness, Mr. Schall, nowhere testifies to that effect in his affidavit. Nor does Con Edison explain that the charges for use of the facilities have been properly allocated between transmission and local distribution uses so as to avoid double recovery of costs from customers.

39. Con Edison and NYTOs mention for the first time on rehearing the existence of a retail meter at the Buchanan substation. The contracts, accounts, memoranda and other papers purportedly comprising "facilities" likewise were never mentioned before this stage of the proceeding. Neither party suggests that this evidence could not have been offered in their earlier pleadings in this proceeding. The Commission may reject evidence proffered for the first time on rehearing.<sup>46</sup> This is because other parties are not permitted to respond to a request for rehearing.<sup>47</sup> Further, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."<sup>48</sup> Accordingly, we will deny rehearing of this issue.

40. Similarly, Con Edison never previously argued that the Commission should apply the seven factor test in its analysis, although it had the opportunity to do so. In any event, the Commission has never held that it should or must base classifications of facilities for all contexts or purposes on the seven factor test.<sup>49</sup> The seven factor

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<sup>46</sup> *Arkansas Power & Light Company*, 52 FERC ¶ 61,029 at 61,156 & n.14 (1990); *Philadelphia Electric Company*, 58 FERC ¶ 61,060 at 61,133 & n.4 (1992).

<sup>47</sup> See 18 C.F.R. § 385.713(d) (2004).

<sup>48</sup> *Californians for Renewable Energy, Inc. v. Calpine Energy Services, et al.*, 107 FERC ¶ 61,238 at P 7 (2004) (footnote omitted), citing *Tenaska Power Services Co. v. Southwest Power Pool, Inc.*, 102 FERC ¶ 61,140 at P 14 (2003); *Baltimore Gas & Electric Company, et al.*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota), et al.*, 64 FERC ¶ 61,172 at 62,522 (1993); *Cities and Villages of Albany and Hanover, Illinois, et al.*, 61 FERC ¶ 61,362 at 62,451 (1992).

<sup>49</sup> See, e.g., *Soyland Power Cooperative, Inc.*, 102 FERC ¶ 61,244, *reh'g granted on other grounds*, 104 FERC ¶ 61,288 (2003) (determining whether an OATT must be filed); *Ameren Services Company*, 103 FERC ¶ 61,121 (2003) (authorizing transfer of functional control over jurisdictional facilities).

test, as it was posited in Order No. 888,<sup>50</sup> simply does not apply in the case of facilities delivering station power to generating stations. Such facilities were never involved in the provision of bundled retail service to an end user requiring (with the advent of unbundled wholesale wheeling) a classification by a state commission<sup>51</sup> because Entergy (and any other owners of the generating stations) was never a bundled retail customer. Even if we were to strictly apply the seven factor test, however, we believe that the totality of the circumstances reflecting the facilities' appropriate classification would lead us to the same conclusion discussed above, that Con Edison's connecting lines and feeder lines are transmission facilities.

41. Regarding Con Edison's contention that the record shows Entergy did not self-supply and net its station power because its sales quantities did not decrease, we find that the issue is not relevant.<sup>52</sup> Entergy made clear in its complaint that Con Edison was not charging it for station power and that the only issue before the Commission was whether there were any Con Edison-owned local distribution facilities used to deliver station power to Entergy. If Entergy's monthly net output from IP2 and IP3 was positive, then under the terms of NYISO's station power provisions, Entergy was not responsible for acquiring station power. If Entergy's monthly net output was negative, then Entergy would be responsible for the purchase of the station power (from whom is not at issue here) and for purchasing delivery of that station power over the transmission system at the rates specified in NYISO's Services Tariff. Whether and how much station power might have been purchased by Entergy from a party other than Con Edison thus has no bearing on the outcome of this complaint.

#### **E. Other Issues**

42. On rehearing, NYTOs argue, as they did in their earlier comments, that granting Entergy's complaint violates the filed rate doctrine and the rule against retroactive ratemaking because the service at issue in the complaint is subject to the

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<sup>50</sup> Order No. 888 at 31,980-81.

<sup>51</sup> In the typical case where we would utilize the seven factor test, a state commission has previously classified the pertinent facilities as transmission or local distribution facilities. Here, we note that the New York Commission has not made any determination about the facilities serving IP2 and IP3 in a formal proceeding and has not asked this Commission for deference regarding its classification.

<sup>52</sup> Furthermore, this fact would only be relevant were Con Edison able to prove that the total output of the units remained unchanged over time, which it has not done.

retail transmission rates in Part IV of NYISO's OATT, which incorporates the delivery rates of Con Edison's retail tariff by reference.<sup>53</sup>

43. While tariffs are on file that reference rates in Con Edison's retail tariff, we have found that no retail delivery service was in fact provided. As we held in the March 23 Order, the applicable filed rate was the rate in the NYISO's Services Tariff, not the retail tariff rates incorporated by reference in Part IV of NYISO's OATT. Our holdings in this proceeding do not alter the rate in any of these tariffs; thus, no filed rate has been modified in contravention of these legal doctrines.

44. On rehearing, NYTOs raise a series of new arguments related to their contention that the NYISO Services Tariff allows the bypass of state jurisdictional charges. Specifically, NYTOs state that they relied on the Commission's jurisdictional determinations in Order No. 888 when forming the NYISO, that the NYISO station power provisions are contrary to the requirements of Part IV of the NYISO OATT which governs retail transmission service, that Part IV cannot be amended without meeting the public interest standard of FPA section 206, and that no attempt has been made to meet the public interest test necessary to abrogate underlying contractual agreements.<sup>54</sup>

45. There is no indication that these assertions could not have been made in NYTOs' original pleading. Absent a showing of good cause, the Commission discourages parties from raising on rehearing issues that should have been brought forth earlier. As we recently observed, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."<sup>55</sup> Further, much of this discussion constitutes a collateral attack on orders the Commission issued in other proceedings in which NYTOs were a party and raised those issues – and where those same positions were addressed and rejected.<sup>56</sup> Moreover, the venue in which to challenge the validity of NYISO's station power provisions was the *KeySpan* proceeding; such arguments are beyond the scope of this complaint.

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<sup>53</sup> NYTOs rehearing at 18-19.

<sup>54</sup> *Id.* at 19-30.

<sup>55</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,024 at P 6 (2004); *accord supra* note 48.

<sup>56</sup> *See, e.g., KeySpan IV*, 107 FERC ¶ 61,142 at P 48-49.

46. In any event, we disagree that we have undermined any critical assurances made in Order No. 888<sup>57</sup> or elsewhere. As we stated in *KeySpan IV*, in our station power orders, we have not interfered with nor prevented nor even significantly impaired stranded cost recovery:

Incumbent utilities may still recover stranded costs and benefits from their retail-turned wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, and nothing in our station power orders is to the contrary. We have only clarified that a small subset of merchant generators – those that neither purchase station power nor use local distribution facilities – cannot, under Order No. 888, be charged retail rates because they are not receiving a retail service. Furthermore, even if the allegation that our interpretation of Order No. 888 somehow impairs stranded costs recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the incumbent utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.<sup>[58]</sup>

47. The New York Commission asserts on rehearing that the Commission erroneously concluded that the interconnection agreements are not at issue in this proceeding; it contends that classifying Con Edison's facilities as transmission facilities does not relieve the Commission of the responsibility to examine and review the agreements. The New York Commission further argues, "Having failed to review and consider the [interconnection agreements], however, the Commission is not in a position to rule on whether it controls the pricing of station use services to Entergy's nuclear facilities. That determination could only be made after the [interconnection agreements have] been reviewed and interpreted."<sup>59</sup> The New York Commission concludes that the NYISO Services Tariff could only be applied if this Commission believes that tariff should supercede the interconnection agreements and is willing to abrogate inconsistent contractual provisions.

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<sup>57</sup> Indeed, Order No. 888 does not address the provision or delivery of station power at all.

<sup>58</sup> *KeySpan IV*, 107 FERC ¶ 61,142 at P 49 (footnotes omitted).

<sup>59</sup> New York Commission rehearing at 3-4.

48. We disagree that the NYISO's Services Tariff should only apply to service received by Entergy if we conclude that that tariff should supercede the interconnection agreements. As discussed above, it was and is within our authority to determine the type of service being provided, and to conclude that the interconnection agreements were not triggered. A finding that the NYISO's Services Tariff supercedes the interconnection agreements is not necessary to conclude that the interconnection agreement provisions simply were not triggered in the first place. In any event, this Commission did review and interpret the interconnection agreements, and that analysis was the basis for the conclusion that their provisions were not applicable to the service (i.e., transmission service) being provided to Entergy.

49. Finally, Con Edison raises on rehearing the procedural argument that the Commission improperly denied its request that certain issues be set for hearing. Specifically, Con Edison believes that the issues of (1) whether it uses local distribution facilities to deliver station power to Entergy and (2) whether Entergy self-supplied and netted its station power in accordance with the NYISO netting provisions could not be resolved adequately on the written record. Regarding the second issue, Con Edison asserts that determining whether Entergy self-supplied must be decided on an hourly basis, consistent with NYISO's administration of station power sales, and on a facility-by-facility basis; Con Edison states that only Entergy has that information.

50. The Commission has broad discretion regarding its processes. We are not obliged to conduct a trial-type, evidentiary hearing, even if there are disputed issues of material fact, if the issues can be adequately resolved on the written record.<sup>60</sup> In this case, Con Edison provided only conclusory statements about the nature of the connecting lines and feeder lines that did not refute the detailed facts laid out by Entergy; a trial-type, evidentiary hearing requires more than mere allegations on the part of a party.<sup>61</sup> Con Edison did not provide an adequate proffer of evidence that such a hearing was warranted; to the contrary, we were able to act summarily on the pleadings. As we explain above, the issue of whether Entergy actually self-supplied and netted its station power has no bearing on the outcome of this complaint. Accordingly, we will deny Con Edison's request for rehearing on this issue.

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<sup>60</sup> See *Ocean State Power II*, 69 FERC ¶ 61,146 at 61,544 & n.35 (1994).

<sup>61</sup> E.g., *San Diego Gas & Electric Company v. Century Power Corporation*, 50 FERC ¶ 61,285 at 61,916 (1990); *Houlton Water Company v. Maine Public Service Company*, 55 FERC ¶ 61,037 at 61,110 (1991).

The Commission orders:

The requests for rehearing of the March 23 Order are hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.