

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Power Authority

Docket No. EL05-123-000

v.

Consolidated Edison Company of New York, Inc.

ORDER ON COMPLAINT

(Issued September 19, 2005)

1. In this order, the Commission grants in part and denies in part the complaint filed by the New York Power Authority (NYPA)<sup>1</sup> against Consolidated Edison Company of New York, Inc. (Con Edison) regarding Con Edison's alleged interference with NYPA's desire to have certain of its New York City generating facilities utilize the station power procurement and delivery provisions of the New York Independent System Operator, Inc. (NYISO) Market Administration and Control Area Services Tariff (NYISO Services Tariff).<sup>2</sup> In so doing, we are enforcing the station power provisions of the NYISO Services Tariff, a rate schedule on file with the Commission and subject to its exclusive jurisdiction, and ensuring that NYPA may utilize the provisions of that rate schedule.

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<sup>1</sup> NYPA, a political subdivision of the State of New York, is a "municipality" within the meaning of section 3(7) of the Federal Power Act (FPA) and is an exempt public utility within the meaning of section 201(f) of the FPA. 16 U.S.C. §§ 796(7), 824(f) (2000); see *Power Authority of the State of New York*, 19 F.P.C. 186 (1958).

<sup>2</sup> The Commission accepted for filing the station power provisions (section 4.12) of the NYISO Services Tariff, effective April 1, 2003. *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g denied*, 107 FERC ¶ 61,142 (*KeySpan IV*), *clarified*, 108 FERC ¶ 61,164 (2004), *petition for review filed sub nom. Niagara Mohawk Power Corp. v. FERC*, Nos. 04-1227, *et al.* (D.C. Cir. filed July 8, 2004).

## **Background**

2. In brief, in New York, station power may be provided to a generating facility via (1) on-site self-supply (frequently referred to simply as “self-supply”); (2) remote self-supply; or (3) purchases from a third party.<sup>3</sup> NYISO’s station power program, including the registration and enrollment of eligible merchant generators, is implemented through section 4.12 of the NYISO Services Tariff and NYISO Technical Bulletins 117-122. On a monthly basis, NYISO calculates whether each enrolled generator has self-supplied its station power requirements or has made third-party purchases, and what the corresponding transmission loads are. For remote self-supply, point-to-point transmission service charges would apply under Part II of the NYISO Open Access Transmission Tariff (OATT), and any transmission and ancillary service charges for any retail transmission of station power purchased from third parties would apply under Part IV of the NYISO OATT (unless other arrangements have been made). Participation in the NYISO station power program is optional, and any generator may forgo self-supply and purchase its full station power requirements on a bundled basis under a retail tariff.

### **I. NYPA’s Complaint**

3. NYPA’s complaint involves several of its generating facilities located in New York City (New York City Plants). The New York City Plants include the Clean Power Projects and the Combined-Cycle Project.<sup>4</sup> NYPA states that it seeks a Commission order directing Con Edison to cease interfering with the enrollment and participation of its New York City Plants in NYISO’s station power program.

4. NYPA also seeks a determination that Con Edison is not authorized to assess local distribution charges for station power used at the New York City Plants, either because NYPA self-supplies the plants’ station power requirements on site or uses only NYISO-controlled transmission facilities and not local distribution facilities for remote self-supply. NYPA also seeks a refund, with interest, of charges that NYPA paid Con Edison for delivery of station power to the Clean Power Projects from April 2003, the effective date of the station power provisions of the NYISO Services Tariff, until December 2003,

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<sup>3</sup> The *KeySpan* orders cited above, *supra* note 2, discuss in detail the operation of NYISO’s station power provisions.

<sup>4</sup> NYPA’s complaint initially also included its 888 MW Poletti Plant, but in later pleadings NYPA and Con Edison indicate that they now agree on the treatment of station power for the Poletti Plant. Specifically, Con Edison will report (to NYISO) deliveries of station power to Poletti as Con Edison’s own load, rather than as NYPA retail load, and NYPA will report the in-kind return of station power to Con Edison (under the applicable operating agreement) as a bilateral transaction. Because this dispute is now resolved, we will not further address the Poletti Plant in this order.

when NYPA refused to pay additional bills (the refund period).

**A. Clean Power Projects**

5. The Clean Power Projects are ten gas turbine units each of which is, according to NYPA, connected to 138 kV transmission facilities.<sup>5</sup> NYPA states that it constructed the Clean Power Projects over a ten-month period, starting in September 2000, in response to a New York Department of Public Service request that NYPA take immediate action to assure adequate electrical supply on Con Edison's system.

6. NYPA complains that Con Edison is attempting to charge it for station power usage under what NYPA characterizes as a state-jurisdictional retail tariff. In an exhibit to its complaint, NYPA provides data that, it contends, demonstrate that during each of the 24 months from April 2003 to March 2005, nine of the ten Clean Power Projects self-supplied on site their full station power requirements. The tenth project (the Pouch Terminal) self-supplied its station power requirements on site in 23 out of 24 months. In October 2003 (which falls within the refund period), NYPA states, it remotely self-supplied the Pouch Terminal with 12 net MWh of station power.

7. NYPA states that station power arrangements for the Clean Power Projects are addressed in a bilateral contract between NYPA and Con Edison, known as the Clean Power Interconnection Agreement (Clean Power IA). Con Edison filed the Clean Power IA with the Commission as a jurisdictional rate schedule in 2002.<sup>6</sup> Section 3.14 of the Clean Power IA provides:

(a) Services. Con Edison shall provide to Generator [NYPA], and Generator shall pay for, unbundled delivery service for Station-Use Energy that Generator acquires from a third party or remotely self-provides it (*i.e.*, provides it from another generator owned by Generator by use of the Transmission System).

(b) Applicable Tariff. Con Edison shall provide the unbundled delivery service under Con Edison's Delivery Service Rate Schedule, PASNY No.

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<sup>5</sup> Both parties provide considerable detail on the electrical configurations of the Clean Power Projects, including whether transmission or local distribution facilities are used in the delivery of station power to the plants. Because we can resolve the parties' dispute without regard to the classification of these facilities, we do not summarize their respective contentions on this issue.

<sup>6</sup> The Clean Power IA is dated August 1, 2001, and was accepted for filing in a letter order issued on March 27, 2003 in Docket No. ER02-46-001.

4,<sup>7</sup>] as the same may be revised or superseded from time to time. The service shall be supplied under the applicable service classification for each intended use. Generator agrees that Station-Use Energy shall be used only to provide light and power to the Generating Facilities and, without the prior written consent of Con Edison, shall not be used in connection with any transmission or distribution service and that it shall not sell or otherwise supply such energy to any third party.

(c) Metering and Netting. The charges for Con Edison's services shall be based on the quantities that Con Edison delivers to the Generating Facilities and that are metered at the Revenue Meters.

8. NYPA explains that NYISO Technical Bulletin 117 requires that generator service bus point identifiers (PTIDs) be assigned to each generating unit enrolled in the station power program. Transmission owners, including Con Edison, are responsible for reporting to NYISO all station power withdrawn from the transmission grid at the assigned PTIDs, as well as total energy injections into the grid. NYISO uses the PTID data to determine whether, and how much, station power has been self-supplied and what the transmission loads, if any, are, so that the appropriate transmission and/or ancillary services charges can be assessed.

9. NYPA states that, to the extent that NYPA utilizes transmission facilities for remotely self-supplied station power, NYPA is or will be liable for payment for such use under NYISO's OATT. NYPA argues that Con Edison has no right to charge NYPA for the use of transmission facilities used to remotely self-supply station power, as they are to be covered under NYISO's OATT.

10. According to NYPA, NYISO has assigned the Clean Power Project plants PTIDs, but Con Edison refuses to recognize them. Rather, NYPA complains, Con Edison is reporting station power usage for the Clean Power Projects, including self-supplied station power, using the same PTID as NYPA's retail load in New York City. The effect of this, NYPA claims, is that it is being improperly charged transmission and ancillary services charges for station power that it has, in fact, self-supplied on site.

11. NYPA seeks a refund or credit for these transmission and ancillary service charges that it has provisionally paid to the NYISO since at least 2003. In addition, NYPA

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<sup>7</sup> PASNY is the acronym for Power Authority of the State of New York, an earlier name for NYPA.

requests a refund, with interest, of the approximately \$1.5 million it has paid to Con Edison for deliveries of station power to the Clean Power Projects during the refund period.

**B. Combined Cycle Project**

12. NYPA's Combined-Cycle Project consists of two combustion turbine generators and a steam turbine generator, all of which are scheduled to become operational at the end of 2005. According to NYPA, the Combined-Cycle Project will connect to 138 kV transmission facilities in Con Edison's Astoria West substation via NYPA-owned 138 kV lines. NYPA states that, when the Combined-Cycle Project is not in operation, station power would be withdrawn from Con Edison's transmission lines at 138 kV and be stepped down to 18 kV by a NYPA-owned input/output transformer (also used to deliver energy into the transmission grid) and then through auxiliary transformers which further step the energy down to 4.16 kV.

13. When the Combined-Cycle Project becomes operational, NYPA contends, it expects that the Project will self-supply all of its station power requirements either on site or through remote self-supply from other NYPA-owned units, using only transmission facilities.<sup>8</sup> Nonetheless, NYPA complains, Con Edison has proposed to bill NYPA under a state-jurisdictional retail tariff for delivery of station power to the Combined-Cycle Project.

14. While the parties did execute an interconnection agreement for the Combined-Cycle Project, which Con Edison filed on June 16, 2004, in Docket No. ER04-934-000, NYPA states that the agreement does not address station power arrangements.

**C. Notice of the Complaint and Responsive Pleadings**

15. Notice of NYPA's complaint was published in the *Federal Register*, 70 Fed. Reg. 33,741 (2005), with interventions and protests due on or before July 5, 2005. Con Edison timely filed an intervention and an answer to the complaint. The New York State Public Service Commission (New York Commission) filed a notice of intervention. 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 (collectively, Transmission Owners) timely filed a motion to intervene and protest. Subsequently, NYPA filed a reply to Con Edison's answer, Con Edison filed a response to NYPA's reply, and NYPA filed an answer to Con

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<sup>8</sup> NYPA acknowledges that it would be liable for transmission charges under the NYISO OATT for the transmission of remotely self-supplied station power to the Combined-Cycle Project.

Edison's response.

## II. Con Edison's Answer

### A. Clean Power Projects

16. In its answer, Con Edison contends that NYPA is seeking to relieve itself of its contractual responsibility under the Clean Power IA to pay for station power deliveries to the Clean Power Projects at PASNY No. 4 rates.<sup>9</sup> Con Edison states that, under PASNY No. 4 (whose rates are used for station power deliveries in the Clean Power IA), it provides an “unbundled” delivery service to NYPA, delivering NYPA-supplied energy over its (Con Edison's) transmission *and* local distribution facilities to NYPA's retail customers located in Con Edison's service territory. Con Edison further notes that, while NYPA calls PASNY No. 4 a state-jurisdictional retail rate schedule, in fact, in 1981, the Commission declared jurisdiction over PASNY No. 4 and accepted it for filing.<sup>10</sup> Citing to that 1981 order, Con Edison states that the Commission found that the service it provides under PASNY No. 4 entails transmission in interstate commerce, even though PASNY No. 4 “provides for the delivery of power directly to PASNY's customers and contains elements of activities which sometimes may be regarded as distributional.”<sup>11</sup>

17. Con Edison contends that NYPA agreed under the Clean Power IA to purchase, at the PASNY No. 4 rates, delivery service for all station power used at the Clean Power Projects. Furthermore, Con Edison argues, the amount of station power is to be determined (pursuant to section 3.14(c) of the Clean Power IA) on a metered basis, not a net output basis, as is the norm under the NYISO Services Tariff. It interprets the Clean Power IA as “disclaiming netting” and the metering provision as applying to “all station power that is delivered to and metered at” the Clean Power Projects. Thus, Con Edison

concludes, it is within its contractual rights to report the Clean Power Projects' station power needs as NYPA retail load and, furthermore, to bill NYPA for delivery of that

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<sup>9</sup> Con Edison refers to these generating facilities as the Gas Turbines, and the Clean Power IA as the Gas Turbines IA, but, for consistency's sake, we will use the terms Clean Power Projects and Clean Power IA herein.

<sup>10</sup> *Consolidated Edison Co. of New York, Inc.*, 15 FERC ¶ 61,174 (1981).

<sup>11</sup>*Id.* at 61,405. Con Edison states that, because of the strong local interest in the service, the Commission allowed the New York Public Service Commission to set rates under PASNY No. 4, absent a violation of public policy or an abuse of discretion. *Id.*

station power under the PASNY No. 4 rates.

18. Con Edison states that, during the course of the negotiations that resulted in the Clean Power IA, NYPA insisted that station power delivery services for the Clean Power Projects be provided under PASNY No. 4, even after Con Edison proposed using the less expensive provisions of the NYISO OATT. Con Edison also emphasizes that the Clean Power IA was executed on August 1, 2001, after the issuance date of the Commission's first major station power decision (June 28, 2001) as well as the filing date (March 8, 2001) of the complaint that ultimately led to the Commission's acceptance of the station power provisions of the NYISO Services Tariff.

19. Con Edison asserts that the presence or absence of local distribution facilities is "irrelevant" to its contractual authority to assess delivery charges under the Clean Power IA. This is so, it argues, because the Clean Power IA specifies that PASNY No. 4's rates are to be applied to delivery services, and those rates are premised on the 138 kV level of Con Edison's service to the Clean Power Projects.

20. In the alternative, Con Edison argues that the "distribution facilities" that it owns and uses to deliver station power to the Clean Power Projects include "the contracts between NYPA and Con Edison for the delivery of station power and the accounts, memoranda, and other papers that Con Edison uses in conjunction with its state-jurisdictional delivery service to NYPA." Con Edison maintains that such "documents are facilities sufficient to establish the Commission's jurisdiction under the Federal Power Act, and must be given equal effect with respect to state regulatory jurisdiction."<sup>12</sup>

21. Con Edison notes that NYPA relies on recent Commission orders finding that local distribution charges cannot be assessed when no local distribution facilities are used to deliver station power. It acknowledges that the pending judicial appeal of those cases will control the outcome of that issue here.

## **B. Combined-Cycle Project**

22. Con Edison concedes that station power arrangements for the Combined-Cycle Project will be governed by the NYISO Services Tariff and not by any bilateral contract it has with NYPA. However, Con Edison asserts that it will use its own local distribution

facilities to deliver remotely self-supplied or third-party purchased station power to the Combined-Cycle Project and therefore it can separately assess local distribution charges

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<sup>12</sup> Con Edison cites for support *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (*Hartford*).

under a state-jurisdictional retail tariff.

23. As was the case with the Clean Power Projects, Con Edison contends that its local distribution charges would apply even absent local distribution facilities. However, Con Edison states that, in light of recent Commission precedent, if the Commission finds that it would not use local distribution facilities to deliver station power to the Combined-Cycle Project, it will refrain from assessing such charges pending resolution of the relevant judicial appeals.

### **III. NYPA's Reply**

24. On July 20, 2005, NYPA filed a reply to Con Edison's answer. It requested that the Commission accept the pleading because its reply, together with Con Edison's answer, would substantially narrow the matters in dispute and facilitate the Commission's resolution of the issues.

#### **A. Clean Power Projects**

25. NYPA maintains that Con Edison does not deny that only transmission facilities are used to deliver station power to the Clean Power Projects (except for "paper facilities" – contracts, books, and records – that Con Edison argues constitute local distribution facilities under *Hartford*). NYPA insists that, while at one time Con Edison local distribution facilities did in fact connect to the Clean Power Projects, those facilities were removed prior to 2003, and since then, the Projects are only connected to the New York transmission system via 138 kV transmission facilities. NYPA claims that the PASNY No. 4 rates would apply only if physical local distribution facilities are used in the delivery of station power, which they are not.

26. Citing to the recent decision in *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*,<sup>13</sup> which interpreted an interconnection agreement between Con Edison and an Entergy-affiliated merchant generator, NYPA contends that the Clean Power IA directs that PASNY No. 4 rates apply to the delivery of remotely self-supplied station power or station power purchased from third parties, but *not* to station power that is self-supplied on-site. Thus, NYPA claims, the Clean Power IA does not preclude it from self-supplying the Clean Power Projects on site or registering the Clean Power Projects in the station power program.

27. Further, NYPA argues, given that the Clean Power Projects almost always self-supply their station power requirements, it can set the contract demand for PASNY No. 4 service at zero, because it has the right under the rate schedule to nominate a contract

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<sup>13</sup> 110 FERC ¶ 61,312, *reh'g denied*, 112 FERC ¶ 61,117 (2005) (*Entergy Nuclear*).

demand of zero if service has not been required for the past 12 months, which is the case for all of the Clean Power Projects.

**B. Combined-Cycle Project**

28. NYPA rejects Con Edison's contention that "paper facilities" such as contracts, books, and records warrant the assessment of local distribution charges. NYPA contends that the *Hartford* case on which Con Edison relies does not address local distribution facilities, but only addresses the Commission's FPA jurisdiction over facilities that might aid in the interstate sale for resale and transmission of electric power. It cites several Commission orders as support for its assertion that the Commission has followed the narrow holding in *Hartford* only when determining whether contracts, books, and records constitute Commission-jurisdictional facilities, not state-jurisdictional facilities.<sup>14</sup>

**IV. Con Edison's Response**

29. On August 3, 2005, Con Edison filed a response to NYPA's reply. It requested that the Commission accept the pleading because the response, together with NYPA's reply, would substantially narrow the matters in dispute and inform the record, thus facilitating the Commission's resolution of the issues.

**A. Clean Power Projects**

30. Con Edison argues that NYPA's request for a refund of the charges that NYPA paid pursuant to PASNY No. 4 for deliveries to the Clean Power Projects is barred by the terms of PASNY No. 4. Con Edison contends that the charges are in fact contract demand rates that are fixed until revised, citing to Leaf No. 10 of PASNY No. 4, which reads: "No retroactive adjustment will be made for a reduction in the Contract Demand level." Con Edison claims that because NYPA never revised the contract demand during the refund period, the requested refund is barred.

31. Con Edison also objects to NYPA's assertion that it can, under PASNY No. 4, reduce its contract demand to zero. It explains that the rate schedule defines contract demand as "the Customer's maximum potential demand," and argues that, pursuant to language on Leaf No. 10 of PASNY No. 4, NYPA can reduce its contract demand below the highest demand reached in the past 12 months only if it demonstrates, based on an engineering analysis, that electricity-consuming equipment has been removed or that permanent energy-efficiency or load-limiting equipment has been installed.

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<sup>14</sup> NYPA cites to *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 at P 33 (2003); *Western Kentucky Energy Corp.*, 83 FERC ¶ 61,336 at 62,361 (1998); *Enova Corp.*, 79 FERC ¶ 61,107 at 61,489 (1997).

32. Con Edison denies that it has interfered with NYPA's desire to enroll the Clean Power Projects in the NYISO's station power program. In fact, it contends, NYISO did not approve the units' registration until January 2004. In addition, Con Edison notes that NYISO is the forum of first resort for disputes over the qualification of generators for the station power program, and NYPA has not requested NYISO dispute resolution with respect to the Clean Power Projects.

33. Con Edison objects to NYPA's reliance on *Entergy Nuclear*. It argues that, while the issue in the *Entergy Nuclear* case was whether Con Edison could assess state-jurisdictional charges if local distribution facilities were not used in the delivery of station power, here, only charges under a Commission-jurisdictional rate schedule (*i.e.*, PASNY No. 4) are at issue. Con Edison claims that it does not propose to charge state-regulated rates for local distribution service to the Clean Power Projects, only the PASNY No. 4 rates.

34. In response to NYPA's position that the terms of the Clean Power IA limit application of the PASNY No. 4 rates to remotely self-supplied station power or station power purchased from a third party, Con Edison points to section 3.14(c), which states that charges for Con Edison's services are to be based on the metered quantity of energy that Con Edison delivers to the plants. Con Edison contends that this metering provision indicates that the Clean Power IA is a full requirements contract that would preclude on-site self-supply as defined in the NYISO Services Tariff. Its argument is premised on its belief that self-supply always involves power acquired from a third party, given that NYISO congestion management charges would apply to a generator's withdrawals and injections of energy into the New York transmission system, and the fact that a generator's output might be momentarily negative during a netting interval when its output is net positive.

## **B. Combined-Cycle Project**

35. In response to NYPA's complaint that Con Edison is interfering with NYPA's future enrollment of the Combined-Cycle Project in the station power program, Con Edison counters that NYPA has not yet registered the Combined-Cycle Project with NYISO or established the PTIDs needed for station power reporting. In fact, it complains, NYPA's failure to enroll the Combined-Cycle Project has caused it, and other load-serving entities, to bear the costs associated with providing energy used at the Combined-Cycle Project for pre-operational testing and maintenance. It accuses NYPA of avoiding paying for pre-operational station power for the Combined-Cycle Project.

36. Con Edison states that it recognizes the potential eligibility of the Combined-Cycle Project under the station power provisions of the NYISO Services Tariff. It explains that NYPA's enrollment of the Combined-Cycle Project in the station power

program will in fact benefit it by relieving it of the costs of supplying the plant's station power needs.

## **V. NYPA's Answer**

37. On August 18, 2005, NYPA filed an answer to Con Edison's response. NYPA contends that its answer will further narrow and clarify the issues and correct certain factual errors. NYPA contends that Con Edison's actions continue to foreclose the Clean Power Projects from participating in the station power program because Con Edison refuses to properly report station power usage by the Clean Power Projects under the PTIDs assigned by NYISO. NYPA also contends that the *Entergy Nuclear* decision supports its contention that only charges under the NYISO Services Tariff, not the Clean Power IA, can be assessed. NYPA argues that the Clean Power IA does not support the assessment of the PASNY No. 4 rate; Con Edison's interpretation is inconsistent with the plain language, which neither refers to PASNY No. 4 when station power is self-supplied on site nor prohibits netting.

## **VI. Comments of New York Transmission Owners**

38. In their comments, the Transmission Owners contend that NYPA effectively is urging the Commission to declare that the state has no jurisdiction either to make its own jurisdictional determination or to regulate local distribution service to NYPA's New York City Plants. The Transmission Owners argue that NYPA has its facts wrong: the remote self-supply of station power to NYPA's plants does use local distribution facilities that are subject to exclusive state jurisdiction. Finally, the Transmission Owners contend that even if no "functional" local distribution facilities were involved in the transactions at issue here, state jurisdiction nonetheless exists whenever electricity is delivered to end-users.

39. The Transmission Owners also claim that the relief requested by NYPA would violate the filed rate doctrine and the rule against retroactive ratemaking. Lastly, to the extent that the Commission finds that Con Edison's charges to NYPA for station power service are Commission-jurisdictional rates, the Transmission Owners contend that NYPA's request for such retroactive relief is barred under section 206 of the FPA.

## **Discussion**

### **I. Procedural Matters**

40. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

41. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept NYPA's reply, Con Edison's response, and NYPA's answer because these supplemental pleadings serve to narrow the matters at issue in this proceeding and provide information that facilitates our decision-making process.

## **II. Commission Determination**

### **A. Clean Power Projects**

#### **1. Clean Power IA and PASNY No. 4 Claims**

42. NYPA requests that we direct Con Edison to cease its alleged interference with NYPA's enrollment of the Clean Power Projects in the station power program. It also seeks a refund of delivery charges it paid from April 2003 to December 2003 (refund period). In addition, NYPA alleges that it was improperly assessed transmission and ancillary service charges for on-site self-supply, and seeks a refund of those charges.

43. Our first task is to determine the scope and applicability of the Clean Power IA; that is, whether, under section 3.14 of the Clean Power IA, Con Edison is entitled to collect charges based on the Clean Power Projects' full station power requirements, which would preclude on-site self-supply (as Con Edison argues), or whether the charges would apply only to deliveries associated with remote self-supply and third-party supply of station power, thereby accommodating on-site self-supply (as NYPA contends).

44. In pertinent part, section 3.14(a) of the Clean Power IA reads (emphasis added):

Con Edison shall provide to Generator [NYPA], and Generator shall pay for, unbundled delivery service for Station-Use Energy that Generator *acquires from a third-party or remotely self-provides it (i.e., provides it from another generator owned by Generator by use of the Transmission System).*

We therefore find that the Clean Power IA applies, by its express terms, only to remotely self-supplied station power and station power purchased from third parties. The Clean Power IA does not address, much less prohibit, on-site self-supply by NYPA of the full or partial station power requirements of the Clean Power Projects. In other words, the Clean Power IA is not a full requirements contract under which Con Edison supplies the

full station power requirements of the Clean Power Projects. Accordingly, NYPA is free, under the terms of the Clean Power IA, to self-supply on site the station power requirements of its Clean Power Projects (in full or part), and Con Edison cannot charge for any delivery services associated with on-site self-supply.

45. We find it compelling in this regard that the parties in section 3.14 of the Clean Power IA used concepts and language that are clearly taken from the *PJM II* decision that the Commission had issued a few months before the Clean Power IA was executed in August 2001.<sup>15</sup> Given that the Clean Power IA was negotiated against the backdrop of the *PJM II* decision, and expressly refers to two of the three types of station power procurement that the Commission outlined and discussed in *PJM II*, we find that, when the parties agreed to limit delivery charges to remote self-supply and third-party supply, they meant exactly that. We do not see in the language of section 3.14 any indication that NYPA intended to waive its right to self-supply the Clean Power Projects on site or agreed to pay any delivery charges to Con Edison when it self-supplies without using any of Con Edison's facilities, whether transmission or local distribution.

46. While NYPA is not obligated to pay delivery charges for station power that it self-supplies on site, it is obligated, however, under the express terms of the Clean Power IA to compensate Con Edison (at the rates specified in PASNY No. 4) for station power deliveries whenever it remotely self-supplies any of the Clean Power Projects and whenever Con Edison delivers station power that NYPA has purchased from a third party to these generators. (As we discuss below, this is without regard to the functional classification of the facilities used for the delivery.) Thus, we deny NYPA's request that we find that it is only obligated to compensate Con Edison under the NYISO OATT rather than the Clean Power IA.

47. Con Edison also argues that the language of the Clean Power IA's metering provision, section 3.14(c), supports its contention that the PASNY No. 4 rates apply to the Clean Power Projects' full station power requirements, thereby precluding on-site self-supply. In pertinent part, section 3.14(c) reads: "The charges for Con Edison's services shall be based on the quantities that Con Edison delivers to the Generating Facilities and that are metered at the Revenue Meters."

48. Section 3.14(c) expressly refers to charges for Con Edison's "services." Section 3.14(a) (which is labeled "Services") expressly limits those "services" to deliveries for remotely self-supplied station power and station power purchased from third parties, as

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<sup>15</sup> *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, *clarified and reh'g denied*, 95 FERC ¶ 61,133 (2001). *PJM II* not only involved proposed station power provisions for PJM, but also addressed two disputes involving station power in New York State, and several New York transmission owners (although not Con Edison) were active parties in the proceeding.

we explain above. Therefore, section 3.14(c) governs only the calculation of how much station power Con Edison delivers if and when NYPA remotely self-supplies station power or purchases station power from third parties.

49. Con Edison also argues that the Clean Power IA's metering provision applies to all deliveries of station power because, under the guise of on-site self-supply, NYPA is effectively purchasing station power from a third party since congestion management charges apply to all withdrawals and injections of energy (including station power) in and out of the transmission grid. Con Edison also claims that even when a NYPA generator's net output is positive, it may have had momentary instances when its output was in fact negative, the generator necessarily has purchased station power from a third party.

50. We have, in earlier station power orders, rejected these same arguments. In *KeySpan IV*, we explained why netting station power over a reasonable period of time does not entail retail sales of electricity and concluded that “[s]imply because there may be momentary instances during the netting interval when a particular generating facility's output is negative does not mean that the facility's owner is buying station power at retail.”<sup>16</sup> In the same proceeding, we also explained why the application of congestion management pricing<sup>17</sup> to the withdrawals and injections of energy, including station power, that a merchant generator is moving from one of its on-line generators to one of its off-line generators (as remote self-supply), is not a retail sale of energy between a buyer and a seller.<sup>18</sup> Nothing Con Edison raises in its pleadings here convinces us that our earlier findings are not applicable here.

51. We also find that the PASNY No. 4 rates are to be applied exclusively to the delivery services described in the Clean Power IA; Con Edison cannot charge any

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<sup>16</sup> *KeySpan IV*, 107 FERC ¶ 61,142 at P 40; *see Id.* P 37-41. Con Edison was a party in that proceeding, we note. *See also KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,167 at 61,677, 61,679 (2002).

<sup>17</sup> Congestion management pricing entails calculating the *differential* between the price of energy at multiple points; that variable cost would be added to fixed transmission costs. As its name indicates, congestion management creates price signals designed to relieve transmission-constrained areas by reflecting the total cost of transmitting energy to, from, or through such areas. It does not, however, entail retail sales of energy by the system operator (here, NYISO), which is only the settlement agent for the congestion management system. NYISO's congestion management system is generally described in *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062 at 61,222-24, *order on reh'g*, 87 FERC ¶ 61,135, *order on reh'g*, 88 FERC ¶ 61,138 (1999).

<sup>18</sup> *KeySpan IV*, 107 FERC ¶ 61,142 at P 29-36.

additional local distribution rates under a separate state tariff or transmission rates under an OATT. In so finding, we rely on our earlier characterization of the nature of the delivery service provided under PASNY No. 4. In our 1981 order declaring jurisdiction over PASNY No. 4, we stated:

The agreement which is the subject of the instant docket is unusual in that it provides for the delivery of power directly to PASNY's customers and contains elements of activities that sometimes may be regarded as distributional. Nonetheless, we find that the agreement between PASNY and Con Ed provides for a single transaction which constitutes the transmission of electric energy in interstate commerce.

52. Given that our earlier finding that the delivery services provided under PASNY No. 4 constitute a "single transaction," we find that no other rates, either transmission or local distribution, can properly be applied to deliveries to the Clean Power Projects.<sup>19</sup> In addition, because we find that PASNY No. 4 is the only rate schedule applicable to station power deliveries to the Clean Power Projects, we need not reach the issue of whether Con Edison uses transmission and/or local distribution facilities for deliveries of station power to the Clean Power Projects.

53. Given that we need not reach the issue of whether Con Edison uses transmission and/or local distribution facilities, we need not address the jurisdictional arguments Con Edison and the Transmission Owners raise with respect to this issue (with the exception of the new argument raised regarding the applicability of the *Hartford* decision, which we discuss below). Furthermore, because the outcome in this proceeding is subject to the decision rendered in the pending appeals of the *KeySpan* orders, in which we accepted for filing NYISO's station power rules, and the parties concede that they are making the same arguments they made earlier in that proceeding, there is no need for us to repeat our positions as articulated in those orders.

54. Based on our findings herein, we will direct Con Edison to refund to NYPA, with interest, revenues collected (under the Clean Power IA and PASNY No. 4) during the refund period for the Clean Power Projects (with the exception of the revenues associated with Con Edison's delivery of the 12 net MWh that NYPA remotely self-supplied to the Pouch Terminal in October 2003).<sup>20</sup> To the extent that either local distribution or

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<sup>19</sup> Con Edison, in its response, expressly states that it does not propose to charge state-regulated rates for state-jurisdictional local distribution services to the Clean Power Projects, only the rates specified in PASNY No. 4. It further states that, in light of the Commission's findings in *Entergy Nuclear*, it will refrain from charging state-jurisdictional charges pending resolution of pending judicial appeals.

<sup>20</sup> While Con Edison suggests that it regards as disputed the issue of whether the

transmission rates under other Con Edison tariffs, whether on file with the state or the Commission, have been collected during the refund period, we will direct Con Edison to refund those amounts with interest.<sup>21</sup>

55. Con Edison argues that our ordering a refund under PASNY No. 4 is prohibited by the terms of the contract, which, on Fourth Revised Leaf No. 10, states that “[n]o retroactive adjustment will be made for a reduction in Contract Demand.” However, that provision, located in a section entitled “Where PASNY Establishes the Contract Demand,” is a limitation on NYPA’s right to make a downward adjustment to the contract demand it nominated during the period the contract demand is in effect.<sup>22</sup> The provision is not a limitation on the Commission’s authority under section 206 of the FPA to order refunds or to enforce a rate on file.

56. Finally, the Transmission Owners claim that the relief requested by NYPA would violate the filed rate doctrine and the rule against retroactive ratemaking, and that NYPA’s request for such retroactive relief is barred under FPA section 206. We reject these claims. In fact, we are not retroactively changing a rate on file, but rather are

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Clean Power Projects self-supplied their station power requirements during the refund period, it does not in fact challenge the data that NYPA submits in its complaint indicating that each of the Clean Power Projects, except for the Pouch Terminal in October 2003, had positive net output during the refund period. Accordingly, we regard these figures as uncontroverted.

<sup>21</sup> NYPA indicates that it has provisionally paid NYISO OATT charges for station power that it actually self-supplied on site. NYPA may rely on the findings in this order in pursuing its request with NYISO for a refund or credit for such charges.

<sup>22</sup> The contract demand provision of PASNY No. 4 includes a ratchet under which the highest demand for the past 12 month period operates as a floor for the next period’s contract demand. PASNY No. 4 also contains additional limits on NYPA’s nomination of future contract demands. Given that PASNY No. 4’s rates are incorporated by reference without exception into the Clean Power IA, those limits would apply to the calculation of the contract demand for delivery service under the Clean Power IA. We will clarify, however, that for the purposes of nominating a contract demand for future station power deliveries under the Clean Power IA, NYPA can nominate a contract demand based on its projected usage of delivery services solely for remote self-supply and third-party purchases, not on its projected total injections or withdrawals of energy into the New York transmission system.

enforcing the rates, terms, and conditions of several filed rate schedules (the Clean Power IA, PASNY No. 4, the NYISO Services Tariff, and the NYISO OATT). Such action is clearly within our authority under FPA sections 205 and 206.

## 2. Interference with Enrollment and Reporting Claims

57. NYPA, in its complaint, claims that Con Edison, as part of its alleged interference with NYPA's enrollment of the Clean Power Projects in the station power program, refuses to recognize the PTIDs that NYISO assigned to the Clean Power Projects, and instead is reporting station power load for the Clean Power Projects as NYPA retail load, not Con Edison load. The consequence of such reporting, NYPA contends, is that it is assessed transmission and ancillary charges when it is actually self-supplying its own generators. Con Edison counters, first, that it has the contractual right under the Clean Power IA to report station power loads as NYPA retail load, and second, that NYISO did not notify it of the PTIDs for the Clean Power Projects until January 2004, thus precluding any alleged interference before then. Con Edison also asserts that NYPA must initially take this issue to NYISO for resolution.

58. In light of our findings that the PASNY No. 4 rates are the exclusive rates to be applied to the delivery of station power for the Clean Power Projects, and our ordering Con Edison to refund any other charges, including transmission and ancillary service charges, to NYPA, we need not resolve the factual issue of whether Con Edison should have reported station power loads as Con Edison load or NYPA retail load during the refund period or whether that dispute should have first been referred to NYISO.

59. As for future reporting requirements, we will direct Con Edison to cooperate with NYPA and NYISO in implementing our finding that NYPA can self-supply on site the station power needs of the New York City Plants, including reporting station power loads so that NYISO is able to properly determine the amount of station power that NYPA's New York City Plants self-supply on site. Such cooperation is vital not only to allow NYPA to follow a least-cost energy policy, but also will ensure that transmission owners (including Con Edison) are properly compensated for the loads that NYPA places on the New York transmission system when it is not self-supplying on site. Therefore, so that NYPA, consistent with our precedent, is not charged transmission or ancillary service charges for station power that it self-supplies on site,<sup>23</sup> we will direct Con Edison to cease reporting such self-supplied station power to NYISO as NYPA retail load.

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<sup>23</sup> See *PJM II*, 94 FERC at 61,890.

### 3. “Paper Facilities” Argument

60. Con Edison, citing to the *Hartford* case, argues that its “paper facilities” (contracts, books, and records) associated with serving NYPA constitute local distribution facilities and thus establish state jurisdiction sufficient to warrant its assessment of local distribution charges. NYPA counters that *Hartford* only addresses federal, not state, jurisdiction over facilities that might aid in the interstate sale of electricity for resale.

61. In *Hartford*, the court considered specific language in the FPA, particularly the term “facilities” as used in section 201(b) of the FPA, as well as comparable provisions of the Natural Gas Act. What the court did not do was examine any state statutes, including New York’s. The court’s decision that Congress intended the Commission to have jurisdiction over an entity owning the type of facilities at issue therein was a finding specific to the FPA and cannot be extended to Con Edison’s “paper facilities” under New York law.

#### B. Combined-Cycle Project

62. Over the course of the multiple pleadings filed in this case, the parties’ dispute over service to the Combined-Cycle Project has narrowed to whether Con Edison may charge only transmission rates or may also charge local distribution rates for the delivery of remotely self-supplied station power or station power purchased from third parties. While NYPA initially claimed that Con Edison intended to “interfere” with NYPA’s enrollment of the Combined-Cycle Project in the station power program, Con Edison now concurs with NYPA that the Project is eligible for enrollment, and indeed, seeks such enrollment so that it may collect revenues associated with its provision of transmission services. Accordingly, the only remaining dispute is whether NYPA would also use Con Edison-owned local distribution facilities.<sup>24</sup>

63. The Combined-Cycle Project is projected to enter commercial service later in 2005. Given that the parties have been successful in resolving the treatment of station power for the Poletti Plant,<sup>25</sup> as well as successful in narrowing the ongoing dispute regarding the Combined-Cycle Project, we believe that the parties should be able to

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<sup>24</sup> As noted earlier, Con Edison states that, in light of recent Commission precedent, if the Commission finds that it would not use local distribution facilities to deliver station power to the Combined-Cycle Project, it will refrain from assessing such charges pending resolution of the relevant judicial appeals.

<sup>25</sup> See *supra* note 4.

resolve this dispute concerning the Combined-Cycle Project with the assistance of a neutral facilitator. Therefore, in order to facilitate the Project's enrollment in the NYISO's station program and ensure that there is no delay in NYPA's ability to self-supply the Combined-Cycle Project's station power needs, or in NYPA's payment of applicable transmission and/or ancillary charges for deliveries of station power to the Combined-Cycle Project to Con Edison or other transmission owners, the Commission will direct the parties to make themselves available to the Commission's Dispute Resolution Service (DRS) to facilitate negotiations and to resolve this dispute consensually.<sup>26</sup> Within two weeks of the date of this order, the DRS Staff will convene the parties in this negotiation process. The parties shall submit a report on the status of any ongoing negotiations within 60 days after the convening date, unless they resolve the matter earlier. If the parties have determined that they are unable to reach a resolution of this matter after a good faith attempt, they should so inform this Commission, which, in turn, retains authority to issue a supplemental order.

The Commission orders:

(A) NYPA's complaint is hereby granted in part and denied in part, as discussed in the body of this order.

(B) Con Edison is hereby directed to make refunds, as discussed in the body of this order, with interest pursuant to 18 C.F.R. § 35.19a (2005), within 30 days of the date of this order, and to file a refund report within 30 days thereafter.

(C) Con Edison is hereby directed to cease reporting to NYISO station power that is self-supplied on site at NYPA's New York City Plants as NYPA retail load, as discussed in the body of this order.

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<sup>26</sup> The Director of the Dispute Resolution Service is Richard L. Miles, who may be reached at (202) 502-8702 or 1-877-337-2237.

(D) NYPA and Con Edison are hereby directed to make themselves available to the Commission's Dispute Resolution Service to facilitate negotiations regarding the Combined-Cycle Project in an attempt to resolve this dispute consensually and report on the progress of the negotiations, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.