

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. EL06-52-000

v.

Consolidated Edison Company  
of New York, Inc.

ORDER GRANTING COMPLAINT

(Issued April 21, 2006)

1. On February 10, 2006, the New York Power Authority (NYPA) filed a complaint against Consolidated Edison Company of New York, Inc. (Con Edison) contending that Con Edison had overcharged NYPA during the period from November 18, 1999 to December 31, 2004 for transmission service for deliveries to NYPA's customers on Long Island. In this order, the Commission grants NYPA's complaint and directs Con Edison to refund, with interest, amounts it charged to NYPA (and that NYPA paid) that are in excess of Con Edison's tariff on file.

**Background**

2. NYPA purchases wholesale transmission service from Con Edison under three separate service agreements (Agreements) to deliver power to: Brookhaven National Laboratory; the municipal development agencies of Suffolk and Nassau Counties, Long Island; and certain Economic Development Power customers on Long Island. Con Edison provides firm transmission service to NYPA under the three Agreements which are filed as Con Edison's Rate Schedule FERC No. 60, dated October 1, 1981; Con Edison's Rate Schedule FERC No. 78, dated June 26, 1985; and Con Edison's Rate Schedule FERC No. 102, dated July 25, 1991. When the New York Independent System Operator (NYISO) implemented its Open Access Transmission Tariff (OATT), the Agreements were established as grandfathered contracts under the OATT and designated as Third Party Transmission Wheeling Agreements. The rate prescribed in the three agreements is \$1.14/kW-month for this transmission service.

3. In July 2000, Con Edison informed NYPA that section 3.2 of Attachment K of the NYISO's OATT obligated it to charge NYPA a rate of \$1.20/kW-month, and that this rate needed to be made retroactive to November 18, 1999, the date the NYISO commenced operation.<sup>1</sup> NYPA states that, although it initially protested the higher rate, NYPA began paying this rate in August 2003, along with full back payment and late payment charges.

4. NYPA states that it further analyzed the \$1.20/kW-month rate in 2004, when its Economic Development Power customers questioned the legitimacy of these charges. NYPA discovered that Con Edison misapplied section 3.2 of the OATT because the Agreements are designated as Third Party Transmission Wheeling Agreements under the OATT, while section 3.2 only applies to Modified Wheeling Agreements or Transmission Facilities Agreements. Therefore, NYPA argued that it should instead pay the last rate approved by the Commission, i.e., \$1.14/kW-month. Con Edison agreed that the applicable rate under the Agreements is \$1.14/kW-month and reinstated this rate, effective January 1, 2005.

5. However, Con Edison refused to honor the \$1.14/kW-month rate for the period from November 18, 1999 through December 31, 2004, stating that it first needed to assess possible counterclaims against NYPA. NYPA, although it did provide certain data to Con Edison in the hope of receiving a settlement offer, contends that Con Edison's assertions are irrelevant to the issue of whether refunds are owed.

### **Complaint**

6. NYPA calculates that Con Edison overcharged NYPA by \$371,194 for the period November 18, 1999 through December 31, 2004. NYPA requests that the Commission find that Con Edison's collection of transmission charges in excess of the filed rate, \$1.14/kW-month, for the period November 18, 1999 through December 31, 2004 constituted a violation of the Federal Power Act and the filed rate doctrine, and direct Con Edison to pay NYPA refunds of \$371,194, plus interest, for the unauthorized collection of transmission service charges collected for the period November 18, 1999 through December 31, 2004.

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<sup>1</sup> Section 3.2 provides that each Modified Wheeling Agreement or Transmission Facilities Agreement customer "shall pay the contract rates for the Grandfathered Rights which shall be frozen at the contract rates that were in effect on the date the ISO Tariff was originally filed at FERC (January 31, 1997)."

### **Notice of Filings and Responsive Pleadings**

7. Notice of NYPA's filing was published in the *Federal Register*, 71 Fed. Reg. 8850 (2006), with protests and interventions due on or before March 2, 2006. A timely motion to intervene was filed by NYISO. Con Edison filed an answer. NYPA filed a motion for leave to file an answer to Con Edison's answer.

### **Con Edison's Answer**

8. Con Edison agrees in its answer that \$1.14/kW-month was the appropriate rate under the Agreements. However, Con Edison asserts that NYPA's refund request is inequitable because the charges resulted from a mutual mistake, and that NYPA must justify its refund request by showing that its payments to Con Edison exceeded the total compensation that Con Edison is entitled to under the Agreements, including compensation for transmission losses and for generation redispatch.

9. Con Edison explains that the Agreements were amended in 1999 to reflect the treatment of losses by NYISO, but NYPA is still obligated to reimburse Con Edison for losses to the extent that the marginal losses NYPA has paid to the NYISO are less than NYPA's contractual loss obligation under the Agreements. Con Edison contends that it is dependent upon NYPA for information related to NYPA's loss obligations. Con Edison states that, in May 2005, NYPA provided it with a summary of the marginal loss payments made to the NYISO in prior years; however, this summary was not sufficient to allow Con Edison to assess if it is owed additional compensation for transmission losses. Con Edison asserts that it needs a comparison of NYPA's marginal-loss payments, on an hourly basis, to the in-kind losses associated with scheduled service under the Agreements.

10. Con Edison also asserts that the Agreement with the Economic Development Power customers obligates NYPA to reimburse Con Edison for redispatch costs, and that neither the 1999 amendment nor the NYISO's OATT canceled this provision. Con Edison states that it requires data on the level of hourly service rendered under the contract from NYPA in order to determine the amount of redispatch costs for which NYPA is liable, but NYPA declined to provide the necessary data. Con Edison notes that NYPA's complaint states that NYPA is excused from the contractual redispatch obligation because "redispatch costs have been handled ... under the NYISO OATT's congestion

pricing provisions.”<sup>2</sup> Con Edison claims that NYPA does not appear to pay any congestion costs under the NYISO OATT.<sup>3</sup>

11. Con Edison states that it believes this dispute could be resolved through the Commission’s alternative dispute resolution process. Con Edison requests that the Commission defer ruling on NYPA’s refund request, direct NYPA to provide the information relevant to Con Edison’s claims, and allow the parties a reasonable period to informally resolve this matter.

## **Discussion**

### **Procedural Matters**

12. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), NYISO’s timely unopposed motion to intervene serves to make it a party to this proceeding.

13. 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 are not persuaded to accept NYPA’s answer and will, therefore, reject it.

### **NYPA’s Complaint**

14. NYPA argues that it is entitled to a refund, with interest, of the amounts it paid Con Edison in excess of the rate prescribed in Con Edison’s tariff. Con Edison responds by acknowledging that it did charge NYPA an incorrect rate, but asks nonetheless that it not be required to pay refunds because it is entitled to compensation from NYPA for transmission losses and generation redispatch, which may exceed the amount by which it overcharged NYPA.

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<sup>2</sup> See NYPA Complaint at 9.

<sup>3</sup> Con Edison explains that its basis for this claim is section 2.2 of Attachment K of the OATT, which allowed NYPA to retain its grandfathered contract rights or to convert the Agreements to transmission congestion customer arrangements. Under section 2.2, customers that retained grandfathered contract rights are exempt from having to pay congestion charges to the NYISO. Under section 4.3 of Attachment K, customers that converted to transmission congestion customer arrangements pay congestion charges, but receive off-setting revenues from the transmission congestion customers.

15. We find that NYPA's complaint has merit. Under the Federal Power Act and the filed rate doctrine, Con Edison can only charge the amount specified in its filed tariff. As explained by the U.S. Supreme Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981), the filed rate doctrine "forbids a regulated entity to charge rates for its service other than those properly filed with the appropriate federal regulatory authority."<sup>4</sup> Accordingly, we will grant NYPA's request for refund.

16. As to Con Edison's claims that it is entitled to compensation for transmission losses and for redispatch of generation, Rate Schedule FERC No. 78 provides that:

Con Edison will be compensated for transmission losses by adjusting the amount of energy delivered to Con Edison by [NYPA]. Losses will be determined by Con Edison and will be subject to review by [NYPA].<sup>5</sup>

17. Additionally, Rate Schedule FERC No. 102 provides that:

If Con Edison must forgo economic dispatch when delivery for [NYPA's] EDP customers under this contract requires a redispatch of Con Edison generation, [NYPA] shall reimburse Con Edison any savings that would have otherwise been realized by Con Edison from such economic dispatch. This condition may also occur when Con Edison deems it necessary for its operating security to dispatch more generation than would otherwise be required. Con Edison will calculate the actual amount chargeable to [NYPA] after the transaction.

18. Pursuant to the Agreements, it is Con Edison's responsibility determine the amount it is owed for transmission losses and for redispatch of generation. Con Edison has made no estimate of this amount and claims that it needs additional data from NYPA to calculate these costs. Moreover, as the Commission stated in *Entergy Services, Inc.*, 107 FERC ¶ 61,035 at P 18 (2004):

We reject Entergy's attempt to offset International Paper's refund amount by charges allegedly outstanding from June and July 2003. Aside from

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<sup>4</sup> *Accord, e.g., New York Independent System Operator, Inc.*, 113 FERC ¶ 61,340 at P 17 (2005); *Cargill Power Markets, LLC.*, 112 FERC ¶ 61,025 at P 27, *reh'g denied*, 113 FERC ¶ 61,233 (2005) (under the FPA and the filed rate doctrine, a jurisdictional entity must charge the rate that is on file with the Commission).

<sup>5</sup> Rate Schedule FERC Nos. 60 and 102 provide similar provisions regarding transmission losses and Con Edison's responsibility to determine such losses.

Entergy's assertion that it properly billed those charges and that International Paper failed to pay them, the parties have presented no other evidence on this issue.

19. Similarly, we find that Con Edison's arguments are essentially counterclaims that Con Edison is entitled to compensation for transmission losses and for redispatch of generation. We find that Con Edison's arguments do not have a sufficient nexus to the issue presented in NYPA's complaint to warrant allowing a reduction in the refunds owed to NYPA. Our decision here, however, does not reach the issue of whether Con Edison is entitled to separate recovery on these arguments. Thus, our decision here is without prejudice to Con Edison, if it wishes, filing a separate complaint to address these issues.

The Commission orders:

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

(B) Within 30 days of the date of issuance of this order, Con Edison is hereby directed to refund to NYPA the amount charged to NYPA (and paid by NYPA) in excess of the rate on file in Con Edison's tariff, with interest calculated pursuant to 18 C.F.R. § 35.19a (2005).

(C) Within 30 days of the date it makes refunds, Con Edison is hereby directed to file a refund report with the Commission detailing the refunds it made to NYPA.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.