

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
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April 22, 2005

Honorable Magalie R. Salas
Secretary, Federal Energy
Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. EL05-46-000 - Entergy Nuclear
Operations, Inc.

Dear Secretary Salas:

For filing, please find the Petition for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-7136.

Very truly yours,

Leonard Van Ryn
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Entergy Nuclear Operations, Inc.) Docket No. EL05-46-000
Entergy Nuclear Indian Point 2, LLC)
Entergy Nuclear Indian Point 3, LLC)

PETITION FOR REHEARING

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Petition for Rehearing in the captioned proceeding.

Copies of all documents and correspondence should be sent to:

Dawn Jablonski Ryman General Counsel Public Service Commission Of the State of New York Three Empire State Plaza Albany, New York 12223-1350	Howard Tarler, Chief, Bulk Transmission System New York State Department of Public Service Three Empire State Plaza Albany, New York 12223-1350
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In its March 23, 2005 Order Granting Complaint in this proceeding, the Commission precluded Consolidated Edison Company of New York, Inc. (Con Edison) from enforcing contracts setting charges for the station use electric services it supplies,¹ at retail, to Entergy Nuclear Operations, Inc.'s subsidiaries,

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

Entergy Nuclear Indian Point 2, LLC (ENI2) and Entergy Nuclear Indian Point 3, LLC (ENI3) (collectively, Entergy).²

Disregarding the contractual arrangement between Con Edison and Entergy, set forth in the Interconnection Agreements (IA) between the two parties, the Commission determined that the station power service was provided over transmission facilities,³ and so was subject to the Independent System Operators' (NYISO) station use tariff.⁴ Even if the facilities are properly classified as transmission, however, the act of performing the classification does not justify the Commission's decision to ignore the IA contract. Because, as Con Edison has demonstrated, that contract controls the pricing of the retail station use service Con Edison provides to Entergy, the

² ENI2 purchased the Indian Point 2 Nuclear Facility from Con Edison on September 6, 2001, and ENI3 purchased the Indian Point 3 Nuclear Facility from the New York Power Authority on November 21, 2000.

³ The NYISO's station use tariff, and the Commission's station power policies, are under judicial review in Niagara Mohawk Power Corporation v. Federal Energy Regulatory Commission, Docket No. 04-1227; New York v. Federal Energy Regulatory Commission, Docket No. 05-1033; and, Central Hudson Gas & Electric Corporation v. Federal Energy Regulatory Commission, Docket No. 05-1044 (D.C. Circuit). By this filing, NYPSC is not waiving its appeal of any jurisdictional or other station power issue in those or any other judicial or administrative proceedings.

⁴ New York Independent System Operator, Inc., 101 FERC ¶61,230 (2002).

Commission cannot replace the contractual pricing with NYISO tariff pricing unless it first abrogates the contract. This it has not done, and should not do.

SPECIFICATION OF ERROR

NYPSC requests that the Commission grant rehearing on the Order Granting Complaint, based on the following errors of fact and law:

1. The Commission erred in failing to consider and interpret the contractual arrangement between Con Edison and Entergy, and in finding that Entergy did not seek abrogation of the contractual provisions that price station power service to ENI1 and ENI2.
2. The Commission erred when it arbitrarily deviated from policies expressed in prior orders, where it decided it would not interfere with contracts setting forth charges for station use services.

ARGUMENT

- I. The IA Contract Controls the Pricing of Station Use Service to Entergy.

Entergy willingly entered into the IA contract with Con Edison that provides for the purchase from the utility of station use electric services rendered to Entergy's ENI2 and ENI3 nuclear facilities. As Con Edison has demonstrated, the IA contract establishes the pricing for those services.

The Commission erroneously concludes that the IA contract is not at issue in this proceeding. Indeed, the Commission states "it is not necessary to examine or

interpret the [contract]."⁵ Having failed to review and consider the IA contract, 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 IA contract has been reviewed and interpreted.

Instead, the Commission premises its decision on an analysis of the facilities used to serve Entergy. Over Con Edison's objections, the Commission classifies those facilities as transmission instead of distribution. The Commission presumes that categorizing the facilities as transmission automatically triggers application of the NYISO station use tariff. Even if properly performed, however, the act of classifying the facilities does not relieve the Commission of the obligation to examine and review the IA contract.

The IA contract pre-exists the NYISO tariff. Con Edison has established that the contract does in fact price station power service to Entergy's nuclear facilities. Therefore, the NYISO tariff can be applied only if the Commission believes the tariff should supercede the contract, and it is willing to abrogate any contractual provisions to the contrary.

⁵ Entergy Nuclear Operations, Inc., 110 FERC ¶61,312 (March 23, 2005), Slip Op. at 11.

Abrogation, however, would require the application of the Mobile-Sierra doctrine, and issuance of a finding that the contract does not satisfy the public interest standard under that doctrine.⁶ But the Commission cannot apply that doctrine until it first examines the contract, a step it has not yet taken. As a result, the Commission's determination is deficient and rehearing should be granted.

II. The Commission Has Failed to Properly Distinguish Prior Determinations From These Circumstances.

The Commission maintains the NYISO station use tariff controls the pricing of the station power services Entergy consumes, in effect superceding the IA contractual obligation. In the Midwest Order, however, the Commission noted that, while its station use policies precluded requiring a merchant generator to purchase station power at retail, those policies did not prevent a generator from affirmatively choosing to take station power services from retail sources.⁷ Entergy has made the same choice as that described in the Midwest Order -- to rely upon the retail resources of the local delivery utility through a contractual arrangement.

⁶ See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

⁷ Midwest Generation, LLC, 99 FERC ¶61,166 (2002)(Midwest Order).

Nonetheless, the Commission declined to apply the principles enunciated in the Midwest Order. Instead, the Commission rewrites the Midwest Order to restrict its ambit to distribution service, over which the Commission admittedly lacks jurisdiction. The scope of the Midwest Order, however, is not confined to distribution service. The principle established there was that contracts for station use service would be allowed to continue in effect. That principle was as applicable to service taken over transmission facilities as it was to service taken over distribution facilities.

The Commission here has deviated from the policies and principles established in the Midwest Order without explanation. It should grant rehearing to reverse its misinterpretation of its prior Midwest Order, and to properly apply the policies established in that order to these circumstances, by deciding that the IA contract governs the pricing of Con Edison's station use service to Entergy's nuclear facilities.

CONCLUSION

The Commission should grant rehearing of the Order Granting Complaint because it failed to examine and interpret the Interconnection Agreements, and because it failed to proffer a rational explanation for its deviation from its prior policies expressed in the Midwest Order. Upon rehearing, the Commission should defer to the Interconnection Agreements in establishing

the price of the station use service Con Edison supplies to Entergy, because ignoring or abrogating those contracts would undermine the certainty of contractual obligations to the detriment of the development of the competitive markets that the Commission seeks to promote.⁸

Respectfully submitted,

Dawn Jablonski Ryman
General Counsel

Leonard Van Ryn
Assistant Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Dated: April 22, 2005
Albany, New York

⁸ See, e.g., Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services By Public Utilities, Order No. 888, 97 FERC ¶31,781 (1997).

CERTIFICATE OF SERVICE

I, Janet Burg, do hereby certify that I will serve on April 22, 2005 the foregoing Notice of Intervention and Comments of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Date: April 22, 2005
Albany, New York

Janet Burg