

124 FERC ¶ 61,184
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

PJM Interconnection, L.L.C. Docket Nos. ER08-858-000

New York Independent System Operator, Inc. ER08-867-000

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued August 26, 2008)

1. On April 22, 2008, PJM Interconnection, L.L.C. (PJM) submitted for filing with the Commission, pursuant to Section 205 of the Federal Power Act, two executed transmission service agreements between PJM and Consolidated Edison Company of New York (Con Ed), as well as a new Schedule C to the Joint Operating Agreement (JOA Protocol) between PJM and the New York Independent System Operator, Inc. (NYISO). On April 23, 2008, the NYISO filed a copy of the JOA Protocol on an informational basis with the Commission. This order consolidates the two dockets and sets the matters at issue in both dockets for hearing, which is to be held in abeyance while the parties engage in negotiations with the assistance of a settlement judge.

I. Background

2. This proceeding has, at its base, two transmission service agreements entered into between Con Ed and Public Service Electric & Gas Company (PSE&G) in the 1970's. The first agreement, executed in 1975, provides for the transmission of 400 MW (1975 400 MW TSA) and the second agreement, executed in 1978, provides for the transmission of 600 MW (1978 600 MW TSA). As noted by PJM, these agreements pre-date the Commission's open access policies, and are now considered grandfathered agreements.

3. In 2002, Con Ed filed a complaint with this Commission in Docket No. EL02-23, alleging that PSE&G, the NYISO and PJM failed to fully honor the two agreements. The Commission set the matter for hearing,¹ after which the presiding judge ordered the

¹ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 99 FERC ¶ 61,033 (2002).

parties to negotiate an operating protocol pursuant to which the agreements could be fulfilled under the parties' open-access transmission tariffs.² The Commission adopted the initial decision.³ The parties subsequently filed an operating protocol, which the Commission approved.⁴ Con Ed, however, states that it has appealed this order.⁵ The agreements and operating protocol approved in that proceeding, however, will expire in 2012. PJM and Con Ed, therefore, have entered into replacement agreements, styled as roll-overs of the existing agreements, with an effective date in 2012.

II. The PJM and NYISO Filings

A. PJM Filing in Docket No. ER08-858-000

4. On April 22, 2008, pursuant to section 205 of the Federal Power Act, PJM filed two service agreements with the Commission: a 400 MW agreement to replace the 1975 400 MW TSA (2008 400 MW TSA) and a 600 MW agreement to replace the 1978 600 MW TSA (2008 600 MW TSA) (collectively, 2008 1000 MW TSAs), along with a new Schedule C to the JOA between PJM and the NYISO (JOA Protocol). PJM asserts that Con Ed desires to take firm point-to-point transmission service under the PJM Open-Access Transmission Tariff (OATT) and requests that the service it currently receives under the two 1000 MW TSAs be rolled over under section 2.2 of the PJM OATT. PJM states that it granted Con Ed's request because the Commission found that the two agreements are for "essentially firm service."⁶

5. PJM also states that the current 2004 Operating Protocol will no longer be in effect once the 1000 MW TSAs expire; therefore, PJM proposes a new JOA Protocol to replace the 2004 Operating Protocol. It asserts that the NYISO does not object to the filing of the JOA Protocol. PJM asserts that the JOA Protocol is essentially the same as the 2004 Operating Protocol accepted by the Commission, with seven minor changes to clarify

² *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 99 FERC ¶ 63,028 (2002).

³ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 101 FERC ¶ 61,282 (2002).

⁴ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 119 FERC ¶ 61,071 (2007).

⁵ Con Ed Comments at 1 n. 2, *citing Public Service Electric and Gas Co. v. FERC*, Docket Nos. 07-1210, *et al.* (D.C. Cir).

⁶ PJM Filing, Transmittal Letter at 4.

existing provisions and reflect the facts that service will now be taken under the PJM OATT, and the JOA Protocol will now be a schedule to the JOA between the NYISO and PJM, rather than a PJM rate schedule and attachment to the NYISO Services Tariff.

B. The NYISO Filing In Docket No. ER08-867-000

6. On April 23, 2008, the NYISO filed the JOA Protocol on an informational basis with the Commission. It incorporated by reference the PJM filing for a description of the JOA Protocol, and requested waiver of Order No. 614 and section 35.9 of the Commission's regulations so that it could file the JOA Protocol on an informational basis without adhering to the formatting requirements applicable to tariff sheets and rate schedules.

III. Notices, Interventions and Responsive Pleadings

A. Docket No. ER08-858-000

7. Notice of PJM's filing in Docket No. ER08-858-000 was published in the *Federal Register* on April 25, 2008, 73 Fed. Reg. 24,275 (2008), with interventions and protests due by May 13, 2008. Timely motions to intervene were filed by the NYISO, PSE&G, PSEG Energy Resources & Trade LLC, New Jersey Board of Public Utilities (NJBPU), Public Service Commission of the State of New York (NYPSC), New York City, and Con Ed. Motions to intervene out of time were filed by Astoria Generating Company LLC and NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC and Oswego Harbor Power LLCC (collectively, NRG).

8. PSE&G, NJBPU and NRG also filed protests. New York City and Con Ed filed comments in support of PJM's filing. PSE&G, PJM, Con Ed, NYPSC and NRG filed answers to the protests, comments and one another's answers.

1. Comments and Protests

a. PSE&G

9. PSE&G moved to reject and protested PJM's filing, arguing that the 1000 MW TSAs inappropriately attempt to perpetuate grandfathered terms and conditions that provide preferential and superior transmission service to Con Ed. According to PSE&G, the 1000 MW TSAs: (1) improperly allow Con Ed to roll over these agreements, which the Commission previously found are not firm; (2) improperly enhance their priority without considering reliability impacts; (3) improperly include discriminatory provisions instead of OATT services; (4) allow Con Ed to receive services expressly prohibited under PJM's OATT; (5) require PJM, in violation of its OATT, to provide service

utilizing the NYISO's facilities; and (6) allow Con Ed to receive service from the NYISO without entering into an agreement.

10. PSE&G maintains that the 1000 MW TSAs are not firm within the meaning of the Commission's open access transmission policies and thus are not eligible for roll-over. PSE&G states that roll-over rights are available only for contracts for firm service, the Commission has previously found that these contracts are not firm, and the 400 MW TSA is less firm than the 600 MW TSA. PSE&G states that the Commission has previously determined that the 1000 MW TSAs fell somewhere between firm and fully interruptible: "if truly firm service in all circumstances was what Con Ed really intended when the contracts were executed, Con Ed should have had the contracts drafted in a much more iron clad and less ambiguous manner than what ultimately was agreed to."⁷

11. PSE&G believes that PJM's proposal to create new non-conforming service for Con Ed's exclusive benefit violates the principles of Order Nos. 888 and 890 and is unjust, unreasonable and unduly preferential. PSE&G states that transmission service in PJM is scheduled on a contract path model, and there is no attempt to send power flows across particular transmission lines; however, service under the 1000 MW TSAs must be provided over particular lines. Further, according to PSE&G, PJM apparently would also violate its tariff because it cannot provide the service without using facilities outside of its control area and operational control. Further, PSE&G states that to the extent that Con Ed is entitled to take rollover service under the 1000 MW TSAs, it must also take appropriate service from the NYISO for power flows utilizing the NYISO's system.

12. According to PSE&G, several elements of the JOA Protocol are unjust and unreasonable and must be modified if the 1000 MW TSAs are allowed to go into effect. PSE&G believes that service for both agreements should be firmed up under the PJM OATT, in turn requiring PJM to conduct any appropriate reliability planning studies and complete any needed upgrades at Con Ed's expense. Second, PSE&G states that the new Auto Correction Factor mechanism, which requires the delivery of "keep-whole" power to compensate for periods of under-delivery, must be modified. Third, PSE&G argues that if PJM cannot count on the availability of 400 MW at Waldwick during emergency conditions, the planning criteria set forth in the JOA Protocol should be modified to reflect that fact. Finally, PSE&G asks the Commission to direct that any further substantive modifications made to the 2004 Operating Protocols must be incorporated into the JOA Protocol, since Con Ed, the NYISO and PJM are still engaged in discussions regarding ways to enhance the current protocols.

⁷ PSE&G Protest at 11, citing *Consolidated Edison Co. of New York v. Public Service Electric and Gas Co.*, 101 FERC ¶ 61,282, at P 35 (2002).

b. New York City

13. New York City filed comments in support of the filing, noting that it is a congested load pocket which relies on power imports. According to New York City, the 1000 MW TSAs represent as much as one-fifth of its power imports as well as a significant portion of its historic peak load. As such, according to New York City, any efforts to terminate the agreements would compromise reliability in New York City and would substantially increase the in-city locational capacity reserve requirement.

c. Con Ed

14. Con Ed filed comments in support of PJM's filing. Con Ed cites the record in Docket No. EL02-23 as affirming that the 1000 MW TSAs are "essentially firm service." Con Ed points to the PJM OATT as expressly allowing transmission customers to roll-over firm transmission agreements with a term of five or more years, and asserts that it unambiguously has the right to rollover the 1000 MW TSAs.

15. Con Ed claims that it made significant concessions as part of the settlement in Docket No. EL02-23. Con Ed states that, in regards to the 2008 400 MW TSA, it has agreed that if PSE&G load needs to be curtailed because of an emergency, then the desired flow under the JOA Protocol will be reduced by up to 400 MW to the extent necessary to avoid a PSE&G load curtailment if the NYISO is not also in a capacity emergency. Con Ed notes that it has also agreed to: limit its requests for Auction Revenue Rights; accept a bandwidth of +/- 100 MW of its real time desired flow; and allow redirection of power flows when congestion exists in PJM but not in New York, which thus reduces congestion costs to PJM market participants.

16. Con Ed states that the JOA Protocol is essentially the same as the 2004 Operating Protocol accepted in Docket No. EL02-23. In the interest of concluding the ongoing litigation surrounding the 1000 MW TSAs, Con Ed offers to withdraw its pending appeal and stipulate that the JOA Protocol implements the Commission's directives for an operating protocol to govern service under the 1000 MW TSAs. According to Con Ed, this is a significant concession.

d. NJBPU

17. On May 23, 2008, NJBPU filed a protest and request for settlement conference. NJBPU believes the proposed service will result in a diminution of reliability to other PJM customers and specifically, to customers in New Jersey. NJBPU also believes the proposed service will result in a misallocation of costs between Con Ed and the rest of PJM's customers, including New Jersey ratepayers. NJBPU argues that the proposed agreement violates not only the letter and the spirit of the Commission's open access policies, but also PJM's open access tariff.

18. NJBPU questions whether either of the 1000 MW TSAs is firm and asserts that Con Ed would receive firm service at a rate lower than its cost, subsidized by other customers. Although there may have been benefits to both PSE&G and Con Ed that supported the agreements when executed, NJBPU argues that this is no longer the case. Rather, NJBPU argues, the instant filing increases reliability concerns because both PJM and the NYISO would count the 400 MW of capacity as being available during peak periods, and PJM's existing facilities are insufficient to provide the service.

19. NJBPU asks the Commission to: (1) require PJM to study the cost to upgrade the facilities to meet the firm point-to-point service envisioned by the PJM/Con Ed agreement; (2) direct PJM, PSE&G, Con Ed and the NYISO to collaboratively explore other less expensive and/or beneficial alternatives; and (3) if upgrade costs or other alternatives are not economically feasible, to investigate the feasibility of continuing the wheeling service on a best efforts basis.

e. NRG

20. NRG protests the filing, asserting that the service provided under the 2008 1000 MW TSAs is superior to, and not the same service, as that in the 1970's 1000 MW TSAs. NRG urges the Commission to reject Con Ed's efforts to receive service under preferential terms and conditions once the 1970's 1000 MW TSAs expire, and require that any service Con Ed does receive following the expiration of these agreements be solely under open access provisions.

21. NRG notes that the current agreements prevent other entities from using those ties, even if they are willing to pay more for the service. NRG argues that Commission policy under Order No. 888 requires that the agreements must be allowed to expire and all customers must be able to access service over those ties on a non-discriminatory basis.

2. Answers

a. PSE&G

22. PSE&G filed two answers: on May 28, 2008, it replied to the comments filed by New York City and Con Ed, then on June 6, 2008, it replied to the answers filed by PJM, NYPSC and Con Ed.

23. In its May 28, 2008 answer, PSE&G asserts that if the roll-over arrangements are designed to excuse Con Ed from responsibility for transmission upgrade costs, such cost avoidance is contrary to the PJM OATT. PSE&G believes that transmission upgrade cost responsibility should be clarified and that Con Ed should be charged its proportionate share of any necessary upgrades. PSE&G also notes that because both PJM and New York City clearly count on the availability of 400 MW flows during emergency conditions, a study of reliability impacts must be done. PSE&G argues that if Con Ed

wishes to receive firm service after 2012 and PJM is capable of supplying such service, there should be no impediment preventing fulfillment of firm OATT arrangements.

24. On June 6, 2008, PSE&G replied to the answers filed by PJM, NYPSC, and Con Ed. PSE&G states that PJM's rationale in support of providing special operating procedures, that the proposed service cannot be provided as typical through-and-out service under its tariff without special provisions, is in direct conflict with the Commission's roll-over policies under Order Nos. 888 and 890. PSE&G maintains that when a customer under a grandfathered contract chooses to exercise rollover entitlements, it must accept the tariff's terms and conditions of service.

25. PSE&G contends that Con Ed could take point-to-point service from Waldwick to Hudson/Linden and PJM should be able to perform that service without special operating procedures. PSE&G also distinguishes the cases cited by PJM in support of special procedures as instances in which PJM apparently adapted its tariff to accommodate grandfathered agreements during the term of such agreements and not one of the agreements involves a roll-over. Also, PSE&G notes, the special terms in each case were described as a transitional mechanism prior to conversion to conventional OATT service. Finally, PSE&G contends that reliability impacts exist if the 400 MW TSA is treated as a capacity resource in both regions.

b. NYPSC

26. NYPSC opposed PSE&G's motion to reject on May 28, 2008. NYPSC states that the agreements provide critical reliability and consumer benefits throughout the entire year for New York City, which is a constrained load pocket dependent upon imports from other control areas. NYPSC contends that rejection of the agreements could jeopardize reliability because replacement of the imported power would be difficult, and could require construction of new resources. NYPSC also states that the NYISO has assumed the agreements' continued existence in forecasting available resources for the next ten years as part of its interconnection and planning studies.

c. PJM

27. PJM answered the NJBPU's protest on May 28, 2008, arguing that the JOA Protocol is necessary because unlike typical point-to-point service, the JOA Protocol establishes a mechanism for producing transmission flows over particular interfaces. PJM explains that unlike most through-and-out service, the services under both the grandfathered contracts and the proposed 2008 1000 MW TSAs originate and terminate in the NYISO control area, but the services direct power flows through PJM. PJM argues the non-conforming 2008 1000 MW TSAs and the JOA Protocol are similar to other non-conforming agreements approved by the Commission and are required to continue through-and-out service under the PJM Tariff.

28. In light of the differences between PSEG and Con Ed, and the interests of the NJBPU, NYPS&G and the City of New York which also have intervened, PJM supports requests for a settlement conference before a settlement judge and asks that the case be set for settlement judge proceedings.

d. Con Ed

29. Con Ed filed three answers: on May 29, 2008, it responded to PSE&G's protest; on June 9 2008, it answered NJBPU's protest (with a June 10, 2008 errata); and on June 23, 2008, it answered the late protest filed by NRG.

30. Con Ed answered PSE&G's protest on May 29, 2008, asserting that the 1000 MW TSAs are firm for the purpose of determining roll-over rights. It notes that the term "firm" is not expressly defined in the PJM Tariff and PSE&G's only support for its conclusion that the contracts are not firm is the Commission's observation that they could have been drafted in "a much more iron clad and less ambiguous manner"⁸ Since the Commission previously found that there are degrees of firmness, according to Con Ed, the issue is whether the service provided under the 1000 MW TSAs is classified as firm for which roll-over rights apply or interruptible with no roll-over rights. Con Ed also contends that the curtailment provisions under the 1000 MW TSAs are similar to those in a firm point-to-point contract and far more limited than those in non-firm contracts.

31. Con Ed further asserts that the non-conforming aspects of the 1000 MW TSAs do not grant it any undue preference, but simply reflect the unique circumstances of its service. According to Con Ed, these provisions do not result in a fundamentally different character of service than anything offered under the PJM Tariff and would not result in it receiving more favorable service than any other similarly-situated customer obtaining service under the PJM Tariff. Con Ed notes that the curtailment priority adopted for the JOA Protocol and the 2008 1000 MW TSAs is less favorable than PJM Tariff provisions and disputes PSE&G's assertion that that the 1000 MW TSAs and JOA Protocol would obligate PJM to provide it with power over particular lines. Con Ed objects to PSE&G's contention that the JOA Protocol creates reliability concerns, rebutting the contention on several grounds. Finally, in response to PSE&G's assertion that Con Ed must take service from the NYISO, Con Ed responds that it already takes such service.

32. On June 9, 2008, with an errata filed June 10, 2008, Con Ed answered the NJBPU's protest. Because the Commission has already determined that the 1000 MW TSAs are for essentially firm service, Con Ed asserts that it has the right to roll them over pursuant to section 2.2 of the PJM Tariff. Con Ed argues that its tariff right to roll-over

⁸ Con Ed May 29, 2008 Answer at 6-7.

the 1000 MW TSAs is not in any way conditioned on such roll-over providing PSE&G with ancillary benefits. Con Ed states that to impose such a new requirement would be a clear violation of the filed rate doctrine and would also be unduly discriminatory.

33. Con Ed also states that NJBPU ignores its prior investment in the facilities necessary to receive service under the agreements, and ignores that the agreements arose precisely to assure the reliable delivery of electricity to customers in New York City, and to increase reliability in PSE&G's northern New Jersey territory. Con Ed asserts that there has been no showing that PSE&G or any PJM customers would be harmed by the roll-over. According to Con Ed, NJBPU premises its study request upon its incorrect and unsupported assertion that PJM's existing facilities are not sufficient to provide the firm service proposed, and that the proposed service will result in reduced reliability. Rather, Con Ed states that if PJM were to lack the facilities needed to provide service under the agreements then PJM and PSE&G would be in breach of the 600 MW TSA. According to Con Ed, NJBPU failed to notice that the PJM filing reflects previous settlement efforts by the parties, including significant concessions by Con Ed.

34. On June 23, 2008, Con Ed answered NRG's protest, arguing that NRG introduces a new and unsupported allegation that approval of PJM's filing would "give Con Ed superior rights to transmit energy" and "mandate certain power flows from PJM to Con Ed that [would] materially interfere with the rights of other eligible customers to obtain and schedule service" ⁹ Con Ed responds that there is nothing preferential in its exercise of its roll-over rights, that what NRG refers to as a superior right is actually the right of all firm customers under Section 2.2 of the PJM Tariff. Therefore, Con Ed argues, its request to roll-over the agreements is not a request for unique treatment or a demand to be given some superior right. Con Ed argues that the limited non-conforming features of the service proposed in this case are reasonable, necessary and not unduly preferential under the circumstances.

35. In response to NRG's allegation that the agreements will prevent entities in New York from using the tie lines from PJM to New York, Con Ed notes that it funded the upgrades and construction needed to take service under the 1000 MW TSAs. Con Ed states that any party interested in service over particular lines, including NRG, has the right to seek such service, subject to the PJM Tariff's requirements. However, according to Con Ed, NRG should not be allowed to circumvent the tariff process for requesting new service and deny an existing firm customer its right to take service from facilities for which it has paid and upon which it has relied for well over twenty-five years.

⁹ Con Ed June 23 Answer at 1.

e. **NRG**

36. On June 30, 2008, NRG answered Con Ed's June 23, 2008 answer. NRG states that it is not attempting to pre-empt Con Ed from receiving service but seeks to promote competition by making transmission service available to all market participants under the same rates, terms and conditions. NRG argues that Con Ed's proposed service would pre-empt other market participants from using the grid and would perpetuate a power flow from PJM to New York that imposes an anticompetitive barrier to the efficient economic flow of energy between the regions.

37. NRG states that after the 1000 MW TSAs expire, Con Ed should only be pre-empted from preferential access to the grid, such that if Con Ed wants service, it must take open access service like everyone else. NRG cites the Commission's prior orders to show that these contracts involve economics more than reliability.¹⁰ Finally, NRG argues that it is favoritism to afford Con Ed transmission service at rates, terms and conditions unavailable to other market participants and that rolling-over Con Ed's entitlement blocks competition and allows it to exert monopolistic influence over the flow of power to the detriment of wholesale competition.

B. Docket No. ER08-867-000

38. Notice of NYISO's filing in Docket No. ER08-867-000 was published in the *Federal Register* on May 1, 2008, 73 Fed. Reg. 28,445 (2008), with interventions and protests due by May 14, 2008. Timely motions to intervene were filed by PSE&G, PSEG Power LLC and PSEG Energy & Trade LLC (together, PSE&G Companies), New York Transmission Owners (NYTO), Con Ed, NRG, and Astoria Generating Company LP. Con Ed filed comments in support of the filing. PSE&G Companies filed a protest and motion to consolidate, incorporating by reference its protest and motion to consolidate in Docket No. ER08-858-000. The NYISO filed an answer to PSE&G Companies, and Con Ed filed an answer to PSE&G Companies' protest on May 29, 2008, incorporating by reference its answer of the same date in Docket No. ER08-858-000.

1. Comments and Protests

Con Ed

39. Con Ed filed comments in support of the NYISO's filing, noting that it has agreed to significant concessions with the goal of bringing the parties' extensive litigation in Docket No. EL02-23, as well as the subsequent appeal, to a close. It notes that its

¹⁰ NRG Answer at 2 n. 4, citing *Consolidated Edison Co. of New York v. Public Service Electric and Gas, et. al.*, 120 FERC ¶ 61,161, at P 12 (2007).

concessions include limited requests for Auction Revenue Rights, greater curtailment provisions in the 400 MW TSA, continuation of certain provisions regarding redirection of power flows and withdrawal of its appeal pending before the U.S. Court of Appeals for the District of Columbia Circuit.

2. Answers

NYISO

40. The NYISO answers PSE&G Companies' protest to correct two statements relating to the form of financial transmission service offered by the NYISO. First, the NYISO states that PSE&G Companies' claim that Con Ed would not be able to schedule service under the JOA Protocol in New York without having a long-term transmission contract or service reservation with the NYISO is not correct. The NYISO explains that under the NYISO OATT, customers schedule transmission service by submitting transaction schedules and indicating that they are willing to pay congestion charges; there is no requirement for an express reservation of long-term point-to-point transmission rights, since such service does not exist under the NYISO OATT. Second, the NYISO states that PSE&G's references to possible limitations on Con Ed's use of Network Integration Transmission Service under the NYISO OATT are irrelevant, since no customer, including Con Ed, has requested it.

IV. Discussion

A. Procedural Issues

41. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding. We grant the motions to intervene out-of-time filed by Astoria and NRG in Docket No. ER08-858-000, as the proceeding is in an early enough stage that no party will be prejudiced by the late intervention.

42. On May 13, 2008, NJBPU filed a motion seeking an extension of time in which to file its comments. We grant the requested extension and accept NJBPU's protest. We grant the requests by the NYISO, PSE&G, PSE&G Companies, PJM, Con Ed and NRG for leave to file answers, as we find that the answers have assisted the Commission in its decision-making process.¹¹

¹¹ See, e.g., *Midwest Independent System Operator Corp.*, 121 FERC ¶ 61,132, at P 12 (2007); *Westar Energy, Inc.*, 121 FERC ¶ 61,108, at P 18 (2007).

43. We reject the NYISO's requested waiver of compliance with Order No. 614 and section 35.9 of the Commission's regulations, 18 C.F.R. § 35.9 (2008). The NYISO is required to designate and formally file, rather than submit as an informational filing, both the JOA Protocol and the JOA within thirty days of this order, with an effective date of May 22, 2007 for the JOA and an effective date of May 1, 2012 for the JOA Protocol.¹² We see no reason why the JOA should be on file as only PJM's rate schedule but not the NYISO's, since both entities have similar obligations under the agreement and the JOA is a jurisdictional agreement that should be filed.¹³

44. We grant the motions to consolidate filed by PSE&G and PSE&G Companies. Because the filings by PJM and the NYISO involve the same agreements, in order to provide administrative efficiency, we will consolidate Docket Nos. ER08-858-000 and ER08-867-000 for purposes of settlement, hearing and decision

B. Discussion

45. This filing is accepted and suspended, subject to refund, to become effective on the date requested by the parties, May 1, 2012. We find that the issues raised in the protests present issues of material fact that cannot be resolved based on the record before us and, based on our review of the record, the 1000 MW TSAs and JOA Protocol may be unjust, unreasonable, and unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we set these issues for a trial-type evidentiary hearing and settlement judge proceedings.

46. At the hearing, the presiding judge shall consider the justness and reasonableness of the 1000 MW TSAs and JOA Protocol, with particular attention to the following issues: (1) whether the 1975 400 MW TSA and 1978 600 MW TSA represent firm service for purposes of roll-over under section 2.2 of the PJM Tariff; (2) whether the 2008 600 MW TSA provides for the same level of firmness and service as the 1978 600 MW TSA; (3) whether the 2008 400 MW TSA provides for the same level of firmness and service as the 1975 400 MW TSA; (4) whether roll-over of the 1970's 1000 MW TSAs will result in Con Ed receiving unduly preferential service; and (5) whether either PJM's or the NYISO's OATT will be violated by any specific

¹² Since the effective date established by the letter order accepting PJM's September 13, 2007 filing of the JOA was May 22, 2007, and as the NYISO previously filed the JOA as an informational filing essentially contemporaneously in Docket No. ER07-1376-000, we find good cause to establish an effective date of May 22, 2007 for NYISO's filing of the JOA.

¹³ See 16 U.S.C. § 824d(c) (2006); 18 C.F.R. § 35.1-.2 (2008).

provisions of the 2008 1000 MW TSAs requiring that energy be transmitted over specific lines.

47. While we are setting these matters for hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603.¹⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge.¹⁵ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

- (A) The NYISO shall designate and file both the JOA and the JOA Protocol within thirty days of this order, as discussed in the body of this order.
- (B) The 1000 MW TSAs and JOA Protocol are set for hearing and settlement judge proceedings, as discussed in the body of this order.
- (C) Docket Nos. ER08-858-000 and ER08-867-000 are hereby consolidated for purposes of settlement, hearing and decision.
- (D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the 1000 MW TSAs and JOA Protocol. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

¹⁴ 18 C.F.R. § 385.603 (2008).

¹⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their backgrounds and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(F) Within sixty days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen days of the date of the presiding judge's designation, convene a pre-hearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.