

130 FERC ¶ 61,126  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

PJM Interconnection, L.L.C.  
New York Independent System Operator, Inc.

Docket Nos. ER08-858-000  
ER08-867-000  
EL02-23-000

ORDER ESTABLISHING ADDITIONAL PROCEDURES

(Issued February 19, 2010)

1. On February 23, 2009, PJM Interconnection, LLC (PJM) filed a Settlement on behalf of the Settling Parties to resolve issues surrounding two grandfathered service agreements between Consolidated Edison Company of New York (Con Ed) and Public Service Electric & Gas Company (PSE&G) and the proposed roll-over of the agreements under the PJM Open Access Transmission Tariff (PJM Tariff).<sup>1</sup> The filed settlement was contested and, as discussed below, we are unable to approve the Settlement under Rule 602(h) because the current state of the record does not permit us to resolve the merits of some of the contested issues.<sup>2</sup> Among other things, the record does not sufficiently address threshold issues concerning the roll-over of certain long-term contracts and whether the roll-over of such contracts would be unduly discriminatory. Because these issues must be addressed before determining whether the Settlement can be approved, the Commission will require the parties to brief these issues. In addition, the Commission reserves the right to establish additional procedures if material issues of disputed fact prevent resolution based on the briefs filed.

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<sup>1</sup> *Settlement and Offer of Settlement*, Docket Nos. ER08-858-000, ER08-867-000 and EL02-23-000 (Feb. 23, 2009) (Settlement). The Settling Parties are the New York Independent System Operator, Inc. (NYISO), Con Ed, PSE&G, PSE&G Energy Resources & Trading LLC and the New Jersey Board of Public Utilities (New Jersey Board).

<sup>2</sup> 18 C.F.R. § 385.602(h)(1)(ii) (2009).

**I. Background****A. The 1000 MW TSAs**

2. This proceeding has, at its base, two transmission service agreements entered into between Con Ed and PSE&G in the 1970s. 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, collectively 1000 MW TSAs). These agreements pre-date the Commission's open access policies and are now considered grandfathered agreements.

**B. 2002 Complaint**

3. In 2002, in Docket No. EL02-23-000, Con Ed filed a complaint alleging that PSE&G, NYISO and PJM failed to fully honor the two agreements. The matter was divided into two phases and each phase was set for hearing.<sup>3</sup> In the opinion on the initial decision for Phase I, the Commission found that although both contracts were firm, with respect to redispatch, the 1975 400 MW TSA was not as firm as the 1978 600 MW TSA.<sup>4</sup> In the opinion for Phase II, the Commission found that there should be no incremental dispatch costs for Con Ed for the 1978 600 MW TSA, but to avoid curtailment, Con Ed would have to pay the incremental redispatch costs for the 1975 400 MW TSA.<sup>5</sup> The Commission also explained that for scheduling purposes, service under the 1975 400 MW TSA has a higher priority than service to non-firm customers who agree to pay congestion costs.<sup>6</sup> The parties subsequently filed an operating protocol, which the

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<sup>3</sup> *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 99 FERC ¶ 61,033 (2002).

<sup>4</sup> *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 101 FERC ¶ 61,282, at P 36, 38 (2002).

<sup>5</sup> *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, Opinion No. 476, 108 FERC ¶ 61,120 (2004), *order on reh'g*, 119 FERC ¶ 61,071, *order on reh'g*, 120 FERC ¶ 61,161 (2007).

<sup>6</sup> Opinion No. 476, 108 FERC ¶ 61,120 at P 138.

Commission approved,<sup>7</sup> but Con Ed appealed.<sup>8</sup> These agreements and operating protocol will expire in 2012.

### **C. Roll-Over Agreements**

4. On April 22, 2008, in Docket No. ER08-858-000, 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). On April 23, 2008, in Docket No. ER08-867-000, NYISO filed a new Schedule C to the joint operating agreement between PJM and NYISO (JOA Protocol).

### **D. The August 26 Order**

5. On August 26, 2008, the Commission issued an order accepting and suspending, subject to refund, PJM's filing of the 1000 MW TSAs and JOA Protocol, and consolidating the proceedings.<sup>9</sup> It set the matter for hearing, then suspended the hearing to give the parties the opportunity to engage in settlement discussions. The Commission set the following questions for hearing: (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 PJM's Tariff or the NYISO's Open Access Transmission Tariff (OATT) will be violated by any specific provisions of the 2008 1000 MW TSAs requiring that energy be transmitted over specific lines.

## **II. The Settlement**

6. Following extensive negotiations, the parties filed the Settlement. Under the Settlement, the parties agree to make certain changes to the 1000 MW TSAs and JOA Protocol. For example, the parties agree that the service under these agreements will be rolled over under section 2.2 of PJM's Tariff, which sets forth reservation priorities for

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<sup>7</sup> *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 119 FERC ¶ 61,071 (2007).

<sup>8</sup> *Public Service Electric and Gas Co. v. FERC*, Case Nos. 07-1210, *et al.* (D.C. Cir).

<sup>9</sup> *PJM Interconnection, LLC*, 124 FERC ¶ 61,184 (2008) (August 26 Order).

existing firm customers, and acceptance of the Settlement shall mean acceptance of the 2008 1000 MW TSAs as filed on April 22, 2008. Further, Con Ed agrees to pay PJM Regional Transmission Expansion Plan (RTEP) costs during the term of its service under the 2008 1000 MW TSAs, at 90 percent of its total service reservation. In addition, the parties made several changes to the JOA Protocol. For example, the curtailment priorities for the 2008 400 MW TSA have changed: it shall be curtailed prior to PJM shedding firm load, but after PJM has taken other available actions, including emergency load response and voltage reduction. Service under the 2008 600 MW TSA, however, shall be curtailed pro rata with firm load.

**A. Comments**

**1. Initial Comments**

7. NRG Companies (NRG) filed initial comments asking the Commission to reject the proposed Settlement. First, NRG argues that the Settlement would guarantee Con Ed exclusive access to FERC-jurisdictional transmission facilities between New York City and PJM, along with future section 2.2 rollover rights that would allow Con Ed to preserve its market position in perpetuity. Indeed, NRG further alleges that the Settlement allows Con Ed to continue taking effectively the same transmission service granted by the pre-open access arrangements in direct contravention of both the Commission's open access and rollover policies.

8. Second, NRG argues that the Commission already held in the August 26 Order that it needed additional facts before it could find the 2008 1000 MW TSAs just and reasonable. Third, NRG states that the Settlement violates the Commission's rollover policies by (1) allowing for the continuation of a grandfathered service rather than replacing a grandfathered agreement with conforming OATT service,<sup>10</sup> and (2) not offering Con Ed a right of first refusal for new service under PJM's Tariff.<sup>11</sup>

9. Fourth, NRG asserts that the changes to the JOA Protocol created by the Settlement are unduly discriminatory and would carve up scarce transmission resources in perpetuity without allowing competitors open access. Citing to an affidavit by NRG's Director of Regulatory and Market Affairs, Bradley Kranz, NRG asserts that the Settlement harms market economics across the PJM-NYISO seam and may result in power flowing from higher-priced regions (PJM) into lower priced regions

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<sup>10</sup> NRG Initial Comments at 13, *citing* Order No. 888 at 31,665.

<sup>11</sup> NRG Initial Comments at 15-16, *citing Sacramento Municipal Utility District*, 105 FERC ¶ 61,358 (2003), *reh'g denied*, 107 FERC ¶ 61,237 (2004), *aff'd sub nom Sacramento Municipal Utility District v. FERC*, 428 F.3d 294 (D.C. Cir. 2005).

(Staten Island). Finally, NRG argues that the Settlement cannot be accepted under *Trailblazer*, which governs the acceptance of contested offers of settlements.<sup>12</sup>

10. Commission Trial Staff (Staff) filed comments stating that it does not support the Settlement. First, it notes that the Settlement may not be consistent with the Commission's open access transmission policy because a limited number of customers will receive unduly preferential transmission service while transmission capacity is unavailable for other customers. Second, Staff notes that transmission capacity in and out of New York City is limited, and permitting a roll-over of Con Ed's service agreements will restrict or prevent the export of in-city generation and limit in-city generators' ability to make sales. Third, Staff notes that the question of whether the agreements meet the eligibility requirements to be rolled over under section 2.2 of PJM's Tariff has not been resolved.

## 2. Reply Comments

11. PJM filed reply comments in support of the Settlement, arguing that the outcome of this consolidated proceeding will not affect how NRG or any other market participant can schedule transactions between NYISO and PJM, or the interface prices associated with such transactions. PJM further argues that the Settlement as a whole is just and reasonable and provides significant benefits, including an end to long-standing litigation. PJM argues that the Commission should approve the Settlement under third *Trailblazer* prong, finding that the benefits of the Settlement outbalance the nature of the objections given the "limited interests of the contesting party in the outcome of the case."<sup>13</sup>

12. Con Ed and New York City (NYC) filed joint reply comments urging the Commission to approve the Settlement. They assert that the Settlement meets three of the *Trailblazer* prongs for approval of a contested settlement, since it permits the roll-over of long-standing transmission service which will benefit consumers in New York and PJM; resolve all of the issues set for hearing in the August 26 Order; and resolve eight years of litigation regarding these contracts. Con Ed and NYC further argue that there is record evidence supporting the Settlement. First, they assert that the existing service provided to Con Ed is firm and, as such, the service qualifies for a section 2.2

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<sup>12</sup> NRG Initial Comments at 21, *citing Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>13</sup> PJM Reply Comments at 10, *citing Trailblazer*, 88 FERC ¶ 61,168 at 61,562 n.8.

roll-over. Further, Con Ed and NYC state that the Commission earlier stated that the agreements are “essentially for firm service.”<sup>14</sup>

13. In addition, Con Ed and NYC argue that current service under the 1975 400 MW TSA and 1978 600 MW TSA is as firm as the service to be provided under the 2008 1000 MW TSAs because the Settlement JOA Protocol is essentially identical to the existing protocol with regard to scheduling and curtailment of the 600 MW service, and is comparable in regards to scheduling and curtailment for the 400 MW service. Con Ed and NYC assert that the roll-over is not unduly preferential because Con Ed will now be an OATT customer, paying all of the rates and charges prescribed by PJM’s OATT. Thus, according to Con Ed and NYC, the non-conforming aspects of the JOA Protocol do not grant Con Ed an undue preference, but rather, simply reflect the unique circumstances of the transactions.

14. In addition, Con Ed and NYC argue that if the service is preferential, such preference is not undue because it is allowed under Order No. 681, where the Commission allowed ISOs and RTOs to grant preferences to load-serving entities.<sup>15</sup> They maintain that the Settlement should be approved under the *Trailblazer* standard for contested settlements, since the record has sufficient evidence to find that the contested issues lack merit. In addition, Con Ed and NYC assert that the overall result of the Settlement is just and reasonable because it provides an opportunity to end a long-standing dispute and the specific terms of the Settlement are just and reasonable. Finally, they argue that NRG’s interests are attenuated since its economic objections are groundless and based on a NYISO and PJM pricing practice.

15. Staff filed reply comments, asserting that the Settlement has not met the Commission’s *Trailblazer* standard for approval of a contested settlement because the Settlement is opposed and has not resolved the issues raised by the non-settling parties. First, Staff asserts that the Commission requested the creation of a factual record in setting the matter for hearing and no such record has been created. Second, Staff asserts that it cannot be demonstrated that NRG would be no worse off under the Settlement than if it were to litigate its issues, since NRG has a reasonable argument that it would be

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<sup>14</sup> Con Ed and New York City Reply Comments at 9, *citing PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,282, at P 71 (2002).

<sup>15</sup> Con Ed and New York City Reply Comments at 17, *citing Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 71 FR 43564 (Aug. 1, 2006) FERC Stats. & Regs. ¶ 31,226, *reh’g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006), *order on reh’g*, Order No. 681-B, 126 FERC ¶ 61,254 (2009).

financially harmed by the Settlement. Finally, Staff argues that NRG cannot be severed because its arguments regarding open access go to the heart of the Settlement.

16. PSE&G, NYISO, the New York Public Service Commission, and the New Jersey Board filed comments in support of the Settlement, arguing that the Settlement: (a) ends more than seven years of litigation over the 1000 MW TSAs; (b) provides certainty regarding power supplies into New York City; (c) assigns cost responsibility to Con Ed for PJM RTEP upgrades; and/or (d) helps maintain generation adequacy in northern New Jersey.

17. In its reply comments, NRG contends that the Commission should not consider reliability benefits when the Settling Parties have not put forth any evidence regarding the contracts' reliability benefits.

### **3. Answers**

18. NRG filed an answer to the reply comments filed by various parties supporting the Settlement. NRG argues that none of the parties supporting the Settlement provided any record evidence to answer the five questions set for hearing by the Commission in the April 26 Order. NRG also argues that the Settlement cannot be approved under the third *Trailblazer* prong because the Commission would have to find that its interests in open access transmission service, as an active market participant, are too attenuated.

19. Con Ed responds to NRG, stating that the Settlement settles the first three issues of whether the 1000 MW TSAs are firm such that they could be rolled over. Con Ed argues that NRG did not question the firmness of the 1000 MW TSAs, but rather focused only on the alleged lack of evidentiary support for that finding. Further, according to Con Ed, NRG did not provide any evidence that the 1000 MW TSAs are not firm.

## **III. Discussion**

### **A. Procedural Matters**

20. Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2009), we will grant the motions for leave to answer by NRG and Con Ed, and accept the April 9, 2009 NRG answer and the April 20, 2009 Con Ed answer into the record, as these pleadings have helped the Commission understand the complex matters at issue in this proceeding.

### **B. Commission Determination**

21. The parties to the Settlement have resolved certain issues set for hearing, in particular some of the factual issues regarding the equivalence of the new contracts and the expiring contracts. However, this still leaves other significant issues originally set for hearing: whether Con Ed can utilize section 2.2 of PJM's Tariff to extend the pre-open

access transmission service it received under the 1975 and 1978 TSA past their expiration date, and whether roll-over of the 1970s TSAs will result in Con Ed receive unduly preferential service, and whether either PJM's or NYISO's OATT would be violated by specific provision of the 2008 TSAs.

22. Under Rule 602(h), the Commission may decide the merits of contested settlement issues if the record contains substantial evidence upon which to base a reasoned decision. Among other things, NRG asserts that the 2008 1000 MW TSAs violate PJM's Tariff roll-over provisions by continuing in perpetuity a pre-open access transmission service, which would not otherwise be currently available under PJM's Tariff. Similarly, Staff claims that the 1000 MW TSAs may not be eligible for roll-over, and the Settlement may not be consistent with the Commission's open access transmission policy because the two contracts at issue will continue to provide an unduly preferential service to a limited number of parties while transmission capacity is unavailable for other customers. Con Ed, on the other hand, asserts that these contentions are groundless because the 1000 MW TSA will not inhibit transactions between New York and PJM.

23. The Commission finds that the record does not sufficiently address the issue of whether 1975 400 MW TSA and the 1978 600 MW TSA are firm within the meaning of Order Nos. 888<sup>16</sup> and 890<sup>17</sup> and, therefore, are eligible for rollover under section 2.2 of PJM's Tariff. In addition, the Commission finds that the record is not clear as to whether the 2008 1000 MW TSAs and the amended JOA Protocol would allow Con Ed to continue receiving a pre-open access transmission service that would otherwise not be available under PJM's Tariff and thus receive an undue preference. NRG, for example, maintains that even if the original agreements are firm and eligible for rollover, under Order No. 888, Con Ed is entitled only to standard OATT service as opposed to the non-conforming agreements contained in the Settlement. Moreover, NRG and Staff allege

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<sup>16</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>17</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

that the effect of permitting a non-conforming rollover agreement is not limited only to the settling parties, but necessarily will affect the prices and rights of other parties in the two Regional Transmission Organizations.

24. Because these issues appear to raise legal, rather than factual issues, the Commission will establish a briefing schedule to permit the parties to address these issues. Specifically, initial briefs are due within 30 days of the date of this order; reply briefs are due 20 days thereafter. The parties need to address whether these contracts are sufficiently firm to be rolled over under Order No. 888; whether, if they are eligible for rollover, Con Ed is eligible only for OATT service, or whether the circumstances here warrant a non-conforming agreement; and whether and what effect these agreements have on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA on the Locational Marginal Prices in both PJM and NYISO and the effect of these provisions on the ability of other parties to transact business.

25. Depending on the issues raised in these briefs, the Commission reserves the right to establish additional procedures including hearing procedures if necessary. The parties also may request the appointment of a Settlement Judge or the use of Alternative Dispute Resolution if they believe such discussions would be productive and may jointly request a deferral of the briefing schedule to accommodate such discussions.

The Commission orders:

The parties are to file briefs on the issues discussed in this order within 30 days of the date of this order, with reply briefs due 20 days thereafter.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.