

135 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket Nos. ER08-858-002
ER08-867-003

Consolidated Edison Co. of New York, Inc.

v.

Docket No. EL02-23-001

Public Service Electric and Gas Co., PJM
Interconnection, L.L.C. and New York
Independent System Operator, Inc.

ORDER ON REHEARING AND MOTIONS

(Issued April 8, 2011)

1. On October 18, 2010, the NRG Companies (NRG)¹ filed a request for rehearing of the Commission's September 16, 2010 order,² which, *inter alia*, approved a contested settlement (Settlement) filed by PJM Interconnection, L.L.C. (PJM) on behalf of the Settling Parties, and found the Settlement and the related transmission service agreements (TSA) and Joint Operating Agreement Protocol (JOA Protocol) to be just and reasonable.

¹ The NRG Companies include: NRG Power Marketing LLC, Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, Vienna Power LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

² *PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,221 (2010) (September 16, 2010 Order).

In this order the Commission grants, in part, and denies, in part, rehearing of the September 16, 2010 Order.

I. Background

2. This proceeding has a lengthy and complex history reaching back to agreements made between Consolidated Edison Company of New York (ConEd) and Public Service Electric and Gas Company (PSE&G) in the late 1960s and 1970s. We have recounted that history in the September 16, 2010 Order and will only briefly summarize it here.

3. In the 1970s two TSAs, a 1975 400 MW TSA and a 1978 600 MW TSA, between ConEd and PSE&G were executed to address supply problems of both northern New Jersey and New York City. The TSAs accommodated flows of energy from upstate New York sources into northern New Jersey, in exchange for the flow of the same amount of energy from PSE&G's service territory in New Jersey, east into ConEd's service territory in New York City. They featured an initial term of 40 years and thereafter, from year to year.

4. In 2002, ConEd filed a complaint with the Commission in Docket No. EL02-23 alleging that PSE&G, New York Independent System Operator, Inc. (NYISO), and PJM failed to fully honor the TSAs. The Commission divided the complaint into two phases, each of which was set for hearing.³ In the initial decision for Phase II, the presiding judge ordered the parties to negotiate an operating protocol, pursuant to which the agreements could be fulfilled under the parties' Open Access Transmission Tariffs (OATT).⁴ The parties subsequently filed an operating protocol (JOA Protocol), which the Commission approved.⁵ The TSAs and the currently-effective operating protocol will expire in 2012. PJM and ConEd, therefore, entered into replacement agreements, with an effective date in 2012. PJM subsequently filed the replacement agreements (1000 MW TSA) and the JOA Protocol, which the Commission accepted, suspended, and set for hearing.

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

⁴ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co.*, 99 FERC ¶ 63,028 (2002).

⁵ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co.*, 111 FERC ¶ 61,228 (2005).

5. Following extensive negotiations, the parties filed the Settlement at issue here, which was contested by NRG Companies (NRG). In an order issued February 19, 2010, the Commission found it was unable to approve the Settlement at that time since the record lacked evidence on certain issues. The Commission established a briefing schedule and asked the parties to brief: (1) whether the TSAs were sufficiently firm to be rolled over under Order No. 888; (2) whether, if they were eligible for roll-over, ConEd was eligible only for OATT service or whether the circumstances here warranted a non-conforming agreement; and (3) whether and what effect these agreements had on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA Protocol on the Locational Marginal Prices (LMP) in both PJM and NYISO and the effect of these provisions on the ability of other parties to transact business.⁶

II. Summary of the September 16, 2010 Order

6. In the September 16, 2010 Order, the Commission approved the Settlement, finding that it was a just and reasonable means for ConEd to obtain a continuation of its grandfathered transmission service.⁷ The Commission found that these freely-negotiated agreements provide for a continuation of pre-existing TSAs permitting ConEd to exchange power by displacement from Rockland County, New York with New York City and absent these agreements, replacement of the lost imports would likely be difficult and require a long lead time. The Commission further found that the Settlement benefitted other customers of PJM because ConEd will contribute to PJM's Regional Transmission Expansion Planning costs, thereby reducing the other parties' costs. The Commission noted that a finding on the merits that a settlement is just and reasonable satisfies the first approach articulated in *Trailblazer*,⁸ i.e., the Commission may make a decision on the merits of each contested issue.⁹ Further, the Commission found that although NRG, a third party, may more easily sell power to PJM if the Settlement is rejected, this third-party impact outweighs neither the significant benefits provided to the signatory parties and their end-use customers, nor the public benefits of continuing these agreements.¹⁰

⁶ *PJM Interconnection, L.L.C.*, 130 FERC ¶ 61,126, at P 23 (2010) (February 19, 2010 Order).

⁷ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 23.

⁸ *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345, at 62,339 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

⁹ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

¹⁰ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 24.

7. In the September 16, 2010 Order, the Commission also found the 1975 400 MW TSA and the 1978 600 MW TSA to be firm for purposes of section 2.2 roll-over. The Commission recognized that the roll-over provisions of Order Nos. 888 and 890 do not provide a right for a service other than OATT service and that, in this case, the JOA Protocol is non-conforming. However, the Commission found that a non-conforming service is needed to manage the unintended loop flow that would result from increasing power production from the generation sources north of New York City in order to serve parts of New York City. Thus, the Commission found that the Settlement, the 1000 MW TSA and the JOA Protocol are a just and reasonable means of continuing service to ConEd.

III. Request for Rehearing

8. On October 18, 2010, NRG timely filed a request for rehearing of the September 16, 2010 Order and a request for expedited action. NRG contends that the Commission erred in: (1) holding that the two non-conforming TSAs, should be allowed to roll-over and, thus, continue in perpetuity; (2) finding that the parties supporting the Settlement provided evidence sufficient to meet the *Trailblazer* standards governing contested settlements; (3) failing to address NRG's arguments that integrating the TSAs into NYISO's day-ahead markets distorts energy prices in New York and concluding the harm caused by the Settlement does not outweigh the benefits; (4) concluding that anti-competitive power flows in 12 percent of hours are not material; (5) not explaining its departure from prior precedent finding that this case was not about reliability, but about economics; (6) asserting that the JOA Protocol allows market participants to counterflow across the feeders and that other parties are free to take the same service as ConEd; and (7) rejecting the testimony of NRG consultant Kenneth Slater.

9. With respect to the roll-over policy, NRG states that the Commission erred in finding that Order No. 888¹¹ allows roll-over of pre-Order No. 888 TSAs under the same non-standard terms and conditions, in perpetuity. According to NRG, the Commission

¹¹ *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 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *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).

ignored the plain language of section 2.2 of PJM's OATT.¹² NRG states that right of first refusal was designed to ensure that customers transitioned to open access service after preferential pre-open access contracts ended and to reward customers taking open access service with a preferential right to renew that service at the end of their contract terms, if there was insufficient capacity to accommodate all requests.¹³ NRG asserts that the September 16, 2010 Order subverts both of these goals by allowing ConEd to continue taking non-standard service long after the originally bargained-for contracts terminate, without requiring ConEd to transition the service to the open access regime. NRG argues that a customer taking non-OATT service, under a grandfathered agreement, cannot use the provisions of OATT service, i.e. section 2.2, to continue taking non-OATT service under that grandfathered non-OATT agreement,¹⁴ and that section 2.2 of the *pro forma* OATT specifically states that customers rolling over service must agree "to pay the current just and reasonable rate . . . for such service." NRG also argues that Commission precedent requires that, to the extent a customer is permitted to "continue to receive transmission service," such service is only offered "so long as [the transmission customer] was willing to take service under the pertinent open access transmission tariff."¹⁵

¹² Section 2.2 of PJM's OATT conforms to section 2.2 of the *pro forma* OATT as set forth in Order No. 890. *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), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹³ NRG October 18, 2010 Filing at 7 (citing *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, at 31,665 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,197 (1997)).

¹⁴ *Id.* at 7-8 (citing *Sacramento Municipal Utility District v. Pacific Gas and Electric*, 105 FERC ¶ 61,358, at P 14, 22 (2003), *order on reh'g*, 107 FERC ¶ 61,237 (2004), *aff'd sub nom. Sacramento Municipal Utility District v. FERC*, 428 F.3d 294 (D.C. Cir. 2005) (*SMUD I*)).

¹⁵ *Id.* at 8 (citing *Northwest Natural Gas Company*, 105 FERC ¶ 61,024, at P 17-20 (2003)).

10. NRG also contends that the Commission erred in interpreting its *Trailblazer* precedent as allowing grandfathered contracts to continue unaltered.¹⁶ NRG states that the Commission's longstanding precedent is that the section 2.2 right of first refusal does not insulate transmission customers from market evolution¹⁷ and the Commission attempted to justify a departure from precedent by asserting that *SMUD I* is not dispositive in this case. NRG argues to the contrary that the Commission's differentiation between *SMUD I* and the instant case is, in part, a distinction without any appreciable legal difference and, in part, factually incorrect. NRG asserts that the California Independent System Operator (California ISO) could have continued providing the Sacramento Municipal Utility District (SMUD) the same service it had been taking previously had the California ISO agreed to incorporate the grandfathered agreement into its tariff as a non-conforming OATT service, as PJM and NYISO have agreed to do here. NRG also argues that the Commission held that because the respective PJM and NYISO tariffs are being modified to allow for the grandfathered service to continue, the service is compatible with the respective PJM and NYISO tariffs. NRG states that this argument is a tautology and not the product of reasoned decision making. In sum, according to NRG, the Commission fails to distinguish its approach in the *SMUD* proceeding from the outcome in this proceeding.

11. NRG argues that the Commission should have rejected the proposed Settlement in accordance with its *Trailblazer* precedent. NRG states that the Commission, pursuant to the first prong of *Trailblazer*, erroneously concluded that the record evidence was sufficient to allow the Commission to reach a decision on the merits of each element of the contested Settlement. NRG adds that the first prong of *Trailblazer* is not appropriate where some of the contesting party's contentions have merit. NRG states that its objections were not meritless, but the September 16, 2010 Order did not address the meritorious objections made by NRG, DTE Energy Trading, Inc., or the PJM Independent Market Monitor, and, to the contrary, the September 16, 2010 Order suggests specific proceedings in which NRG's valid concerns may be addressed at some future time.

12. NRG argues that incorporating 1000 MW of unpriced power into the day-ahead markets suppresses energy prices in New York during a substantial number of hours each

¹⁶ *Id.* at 9 (citing *New York State Electric & Gas v. New York Indep. Sys. Operator, Inc.*, 102 FERC ¶ 61,299 (2003)).

¹⁷ *Id.* at 10 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,198; also citing *Tennessee Gas Pipeline*, 71 FERC ¶ 61,207 at 61,760; *order denying reh'g*, 72 FERC ¶ 61,251 (1995)).

year and that allowing the 1000 MW TSA to continue suppressing prices in perpetuity is inconsistent with market principles and dampens the price signals upon which market participants depend. NRG contends that the Commission erred in not squarely addressing this impact. NRG states that it is unreasonable for the September 16, 2010 Order to discount the harm to NRG because it is “only” 12 - 19 percent of hours. NRG argues that depriving a generating unit of more than 10 percent of its annual revenues is a serious matter, adversely impacts its existing generating facilities, and limits its opportunity to economically repower its Arthur Kill facility.

13. NRG states that denying it relief in this proceeding based on the fact that parties may choose to address the problem in another proceeding is not reasoned decision making. Further, according to NRG, even if the Commission fixes the seams issue in another proceeding, it would only be a partial fix because ConEd will be able to continue taking service under the JOA Protocol in perpetuity.

14. NRG also disagrees with the Commission finding that the JOA Protocol is needed for reliability.¹⁸ NRG states that this finding contradicts three separate statements by the Commission that these specific agreements do not implicate system reliability.¹⁹ NRG adds that even if the Commission were to change its opinion on this matter, the evidentiary record does not support a finding that ending these agreements would harm system reliability. According to NRG, it consists exclusively of conjecture and is unsupported by engineering analysis, power studies, or other objective evidence. In addition, NRG argues that no party is suggesting that the feeders at issue here cease delivering power to New York from PJM.

15. NRG states that the Commission erred in concluding that the existing agreements permit counterflow across the A, B, C and J and K feeders and argues that the parties are prevented from flowing power, including counterflow power, across these feeders.

¹⁸ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 48, 82.

¹⁹ NRG October 18, 2010 Filing at 24 (citing *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co.*, 120 FERC ¶ 61,161, at P 12 (2007) (stating that “ConEd’s ability to depend each day on redelivery of up to 100 MW . . . is more an economic consideration than a reliability consideration”); *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co.*, 119 FERC ¶ 61,071, at P 61, 64 (2007) (stating that “[w]e find that ConEd’s concern over of reliability is less about system failure and more about reducing total costs to ConEd” and “we continue to find performance of a reliability impact consideration . . . unnecessary in this proceeding”)).

16. NRG also argues that the Commission erred in reaching a decision contrary to its prior decision when faced with the same evidence. NRG states that the Commission in its February 19, 2010 order found that there was not sufficient record evidence to reach a finding. NRG argues that no new testimonial evidence has been introduced in the intervening time and thus, the Commission cannot arbitrarily change its mind and decide that the record now contains sufficient evidence to approve the Settlement.

17. NRG further argues that the Commission's decision to reject the testimony of Mr. Kenneth Slater as untimely denied NRG the opportunity to respond to factually incorrect statements made by other parties and is arbitrary and capricious. NRG states that it filed the updated Slater testimony in response to ConEd's suggestion in its initial brief that the non-conforming agreement would enhance system efficiency and according to the Commission's established briefing schedule. NRG adds that the rejected answer was the only opportunity NRG had to respond to testimony from ConEd's witness, Mr. Robert B. Stoddard. According to NRG, Mr. Stoddard's testimony was submitted to the Commission as part of reply comments to the original contested Settlement and any response by NRG would have been an impermissible pleading. Thus, NRG concludes that there is no rational basis for the Commission's conclusion that NRG's submission of expert testimony on market harm caused by the roll-over of the JOA Protocol was untimely and should be rejected.

IV. Responsive Pleadings

18. On November 3, 2010 PSE&G filed an answer to NRG's request for rehearing. On November 4, 2010, PJM filed a motion to dismiss NRG's request for rehearing, or in the alternative, an answer to the request for rehearing. On November 5, 2010, ConEd also filed an answer and a request to dismiss as untimely NRG's request for rehearing. On November 12, 2010, NRG filed an answer to the PSE&G, ConEd, and PJM's answers.

V. Discussion

A. Procedural Issues

19. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010) prohibits an answer to a request for rehearing. Accordingly, the answers from PSE&G, PJM, and ConEd will be rejected. NRG's answer to the answers is dismissed.

20. We deny the motions requesting that we dismiss as untimely NRG's request for rehearing. On October 18, 2010, NRG timely filed a request for rehearing of the

September 16, 2010 Order.²⁰ On October 19, 2010, NRG submitted a revised version via email. In contrast to the claims in the motions, NRG did not request withdrawal of its October 18, 2010 filing, which was timely filed. The fact that NRG sought to make an amended filing does not render its timely filing null and void. We therefore will not dismiss this rehearing request as having been untimely filed.

21. We will, however, reject as a late-filed request for rehearing the October 19, 2010 submission. As the courts have repeatedly recognized, the 30-day time period within which a party may file a request for rehearing is established by section 313(a) of the Federal Power Act (FPA),²¹ and the Commission lacks discretion to extend this statutory deadline.²² Further, the Commission has long held that it lacks the authority to consider untimely requests for rehearing.²³ Thus we reject the revisions submitted out of time and will base our decision solely on the arguments advanced in the October 18, 2010 filing.²⁴ Accordingly, we deny the motions to dismiss and we dismiss NRG's answer to those motions.

²⁰ Commission eLibrary Accession Number 20101018-4015.

²¹ 16 U.S.C. § 825(k) (2006).

²² *See City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (“The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing.”); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-79 (1st Cir. 1978) (describing identical rehearing provision of the Natural Gas Act as “a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion.”).

²³ *See, e.g., Mississippi Delta Energy Agency*, 122 FERC ¶ 61,277, at P 9 (2008); *Midwest Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,202, at P 6 (2007); *New York Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,206, at P 3 (2006); *New England Power Pool*, 89 FERC ¶ 61,022, at 61,076 (1999); *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,623; *Public Service Co. of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991) (“Commission precedent is clear that supplements to timely filed requests for rehearing, when filed after the expiration of the statutory thirty-day period, will be rejected.”); *Arkansas Power & Light Co.*, 19 FERC ¶ 61,115, at 61,217-18, *reh'g denied*, 20 FERC ¶ 61,013, at 61,034 (1982).

²⁴ As a result, the additional case references and other material cited in the October 19, 2010 filing were not presented to the Commission.

B. Substantive Issues

22. We grant, in limited part, and deny, in part, NRG's request for rehearing of the Commission's September 16, 2010 Order for the reasons discussed below.

1. NRG's Position on the Roll-Over of Contracts

23. The Commission has consistently held that under the Commission's *pro forma* OATT, all firm transmission customers, upon the expiration of their contracts or at the time their contracts become subject to renewal or roll-over, have a right to continue to take transmission service from their existing transmission provider.²⁵ In the September 16, 2010 Order the Commission found that ConEd was a firm transmission customer and thus entitled to roll-over.²⁶ NRG initially argued that roll-over was not available to ConEd because the TSAs were not firm. In its request for rehearing NRG does not dispute the Commission's finding that the TSAs are for firm service.

24. NRG instead asserts section 2.2 of the PJM OATT does not apply to ConEd because a customer taking non-OATT service cannot use the provisions of OATT service. In other words, according to NRG, section 2.2 is limited to those taking prior OATT service. NRG is incorrect in this assertion. Nothing in section 2.2 requires prior OATT service for roll-over. The tariff requires only that the roll-over be limited to "existing firm service customers of any Transmission Owner." Order No. 888 provides that "all firm transmission customers, upon the expiration of their contracts or at the time their contracts become subject to renewal or roll-over, should have the right to continue to take transmission service from their existing transmission provider."²⁷ Unlike *SMUD I*, in which the California ISO did not include such a roll-over provisions in its OATT, PJM explicitly grants such a right.²⁸

²⁵ *Southwest Power Pool, Inc.* 100 FERC ¶ 61,239, at P 21 (2002) (citing *Exelon Generation Co., LLC v. Southwest Power Pool, Inc.*, 99 FERC ¶ 61,235 (2002) (citing *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); *Commonwealth Edison Co.*, 95 FERC ¶ 61,252, at 61,874, *reh'g denied*, 96 FERC ¶ 61,158, at 61,690 (2001)).

²⁶ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 37.

²⁷ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,655.

²⁸ 428 F.3d 294, at 298.

25. NRG also contends that the plain language of section 2.2 of the *pro forma* PJM OATT specifically states that customers rolling over service must agree to pay the current just and reasonable rate for that service.

26. We find that it is legitimate for PJM to permit a roll-over of this contract. We agree with NRG that section 2.2 of the *pro forma* OATT does not provide a right for a service other than OATT service, and we so stated in the September 16, 2010 Order. However, this provision does not prevent the Commission from approving non-conforming service under PJM's OATT should the Commission find it reasonable to do so. The Commission has approved non-conforming transmission service arrangements when it finds that they are just and reasonable, and that reliability concerns, novel legal issues, operational issues, or other unique factors necessitate the non-conforming provisions.²⁹

27. The service at issue here is taken under the PJM OATT, despite the fact that it contains the JOA Protocol and other non-conforming elements. ConEd will schedule the service in accordance with the PJM OATT and will pay all of the charges prescribed by the OATT for such service.³⁰ In the September 16, 2010 Order, the Commission found that the non-conforming elements were necessary. Without this agreement, PJM would need to block the otherwise uncompensated natural flow of power across its system rather than agreeing to provide transmission service to it.³¹ PJM further pointed out that it would be unable to provide service to ConEd under its existing OATT service.³² As the Commission concluded:

the JOA Protocol is needed to control the unintended loop flow that would result from increasing power production from the generation sources north of New York City in order to serve parts of New York City. Such an

²⁹ See *S. Cal. Edison Co.*, 133 FERC ¶ 61,200, at P 20 (2010); *Florida Power & Light Co.* 118 FERC ¶ 61,176, at P 11 (2007); *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,238, at P 6 (2007); *PJM Interconnection, LLC*, 111 FERC ¶ 61,098, at P 9 (2005).

³⁰ ConEd April 21, 2010 Initial Brief at 3.

³¹ PJM April 21, 2010 Initial Brief at 10.

³² September 16, 2010 Order, 132 FERC ¶ 61,221 at P 23. As an example, PJM's existing service does not provide for the adjustment of phase angle regulators in order to provide service, yet such adjustment is necessary for PJM and NYISO to provide the service to ConEd and PSE&G.

increase in production would cause increased flows into Northern New Jersey. The JOA Protocol is designed to enable PJM and NYISO to manage these flows.³³

28. In arriving at its decision in the September 16, 2010 Order, the Commission weighed the benefits of such non-conforming service against the potential harm. Specifically, the Commission found that the Settlement, the 2008 1000 MW TSAs and the JOA Protocol are necessary to manage loop flows and that the harm to pricing takes place a small percentage of the time and is generally characterized by a small differential in price.³⁴ Thus the Commission found the Settlement to be a just and reasonable means of continuing service to ConEd.

29. NRG argues that the current rates on file in NYISO and PJM permit customers to take through-and-out service under rates, terms, and conditions available to all parties on a non-discriminatory basis.³⁵ However, as discussed above, the non-conforming elements of this agreement are necessary due to the operational issues raised by the service that cannot be accommodated under standard OATT service. As a result, we find it reasonable for PJM and NYISO to enter into a mutually acceptable agreement with non-conforming elements to provide service to ConEd and PSE&G.

30. We disagree with NRG's characterization of our action as allowing for grandfathered agreements to continue unaltered. The use of a non-conforming service agreement is not the equivalent of grandfathering an existing contract, as NRG maintains. Service provided under a non-conforming agreement is still service under PJM's and NYISO's OATT. Moreover, the terms and conditions of the non-conforming contract are not the same as the original pre-Order No. 888 contracts; the terms and conditions reflect the needs of the two Regional Transmission Organizations (RTO) in order to be able to provide service to ConEd. In this context, where the utility cannot offer standard OATT service to the company eligible to roll-over its pre-OATT contract, we find that the use of a non-conforming agreement is reasonable. We previously have accepted such agreements between RTOs and other RTOs or utilities when such agreements help address loop flow issues.³⁶

³³ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 48.

³⁴ *Id.* P 48-49.

³⁵ NRG October 18, 2010 Filing at 9.

³⁶ See *PJM Interconnection, L.L.C. and Carolina Power & Light Company*, 131 FERC ¶ 61,181 (2010), *order on compliance filing*, 134 FERC ¶ 61,048 (2011)

31. NRG argues that the decision here is inconsistent with the Commission's rejection of the complaint in *SMUD I* in which the Commission determined that SMUD could not roll-over a pre-Order No. 888 contract, but must take service under the California ISO (CAISO) tariff upon contract expiration. This case, however, differs from *SMUD I* in several important respects. First, as noted above, the CAISO tariff did not contain a roll-over provision, while the PJM tariff does.³⁷ Second, the transmission owners and CAISO objected to providing non-conforming service to SMUD finding that the tariff service would be adequate. In contrast, PJM, NYISO, and both transmission owners have agreed to provide service pursuant to the protocols and agreements here due to the operational and other issues raised by these agreements.³⁸

32. Moreover, as revealed by a subsequent SMUD challenge to the termination of its contract (*SMUD II*),³⁹ there are other differences between these cases. In *SMUD II*, SMUD argued that its treatment was unduly discriminatory because CAISO and the transmission owners had negotiated a successor exchange agreement with the Western Area Power Administration (Western), but rejected SMUD's similar request. The court in *SMUD II*, however, affirmed the Commission's finding that it was not discriminatory to deny SMUD the right to roll-over its contract while permitting Western to do so, because Western owned a portion of the Intertie line in question and sought to continue that exchange agreement.⁴⁰ Similarly, in this case, the agreements at issue here are not simply agreements for the provision of transmission service. They, like the agreement permitted in *SMUD II*, are exchange agreements by which the transmission owners were able to reduce additional transmission investment.⁴¹

(accepting congestion management agreement that addresses loop flow issues between PJM and Carolina); *Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,251, *order on reh'g and clarification*, 108 FERC ¶ 61,143, *order denying reh'g*, 109 FERC ¶ 61,166 (2004) (accepting joint operating agreement).

³⁷ 428 F.3d 294, at 298.

³⁸ Unlike the case in *SMUD I*, NRG is a third party objecting to an agreement into which all the parties voluntarily have agreed.

³⁹ *Sacramento Municipal Utility District v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007).

⁴⁰ 474 F.3d 797 at 802-03.

⁴¹ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 3, 37.

2. NRG's Position on Trailblazer Precedent

33. NRG contends that our finding is contrary to *Trailblazer* and that we have misinterpreted *SMUD I*. We disagree. *Trailblazer* explains the Commission's policy on settlements as it is set forth in Commission procedural regulations and judicial and Commission precedent. In effect, it applies a framework to this precedent and has become shorthand for the varied approaches the Commission takes to the approval of settlements. Rule 602 of the Commission's Rules of Practice and Procedure provides that the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision.⁴² Likewise, the first approach outlined in *Trailblazer* provides that the Commission may render a binding merits decision on each of the contested issues. In the instant case, we reviewed the issues raised by the contesting party and found on the merits that the Settlement is just and reasonable.⁴³ This complies with Commission's responsibility under the Federal Power Act to ensure that all rates shall be just and reasonable.⁴⁴ Further, it conforms to *Trailblazer*, in that we considered the merits of each argument and found that the agreements were freely negotiated, provide benefits to other customers of PJM, and are necessary for reliability purposes.

3. NRG's Arguments with Respect to Price Distortion and Harm

34. NRG argues that the Commission did not squarely address the harm to NRG, i.e. the Settlement's impact on prices. NRG does not dispute the Commission's conclusion that the 2008 1000 MW TSA is economic in roughly 88 percent of hours; rather, NRG disagrees with the Commission's conclusion that the impact during the remaining 12 percent of the hours is outweighed by the benefits that the Settlement confers, at least until such time as the loop flow issue is comprehensively addressed in other proceedings. Despite NRG's assertion to the contrary, the Commission does not ignore the negative impact of the Settlement but evaluates it in the context of the Settlement as a whole.

35. The Commission found that improving flows in 88 percent of the hours outweighs the 12 percent of the hours in which uneconomic flows may occur. While providing for economic flows in all hours would be superior, the perfect cannot be the enemy of the

⁴² 18 C.F.R. § 385.602(h)(1)(i) (2010).

⁴³ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 23.

⁴⁴ 16 U.S.C. § 824d (2006).

good.⁴⁵ Until all loop flow issues are addressed between the RTOs, such perfect coordination is not achievable, and the agreement and the protocols provide a reasonable method of managing those loop flows. Moreover, the fact that NRG's Arthur Kill facility may suffer a reduced run time does not counteract the fact that the agreement results in substantially lower prices to customers in New York in 88 percent of the hours. In balancing the harm to one facility against the overall benefits to customers, the Commission finds the balance tips to the customer side.

4. NRG's Argument on Reliability

36. NRG contends that the September 16, 2010 Order errs because it claims that these contracts are needed to preserve reliability. It argues that the Commission ignores previous Commission findings that this case is about economics, not reliability.

37. In the first place, economics and reliability are not mutually exclusive, and these agreements provide for electricity exchange that results in the transmission of electricity into areas of New York that need it. The Commission cited to the comments made by the New York Commission and the City of New York that the agreements provide critical reliability benefits;⁴⁶ however, the Commission did not base its decision solely on reliability. The order addresses the important issues regarding the right to roll-over firm agreements, the need for the non-conforming JOA Protocol to do so, the fact that this exchange agreement reduced the need for additional transmission construction, and the lower prices produced in 88 percent of the hours. These rationales would be sufficient to permit a rollover regardless of any reliability benefits. Contrary to NRG's assertions, the primary purpose of the JOA Protocol is not to "support the reliability of the system,"⁴⁷ but rather the JOA Protocol was necessary to provide the service at issue.

38. Moreover, the case cited by NRG does not establish that there were no reliability benefits; rather, it establishes only that the Commission found that at that time the considerations were more economic than reliability related. The case to which NRG refers is the complaint proceeding in which ConEd filed a complaint against PSE&G,

⁴⁵ *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163, at P 640 (2004) ("no reason to make the perfect the enemy of the good, i.e., some centralized redispatch is better (more efficient) than none at all"), *aff'd*, *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (finding FERC's balancing of the interests in handling grandfathered agreements reasonable).

⁴⁶ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 23.

⁴⁷ NRG October 18, 2010 Filing at 23.

PJM, and NYISO alleging, *inter alia*, that PSE&G was treating service under the 1975 400 MW TSA and 1978 600 MW TSA as non-firm and was wrongfully curtailing delivery.⁴⁸ These contracts were fixed-term/fixed-rate contracts and were entered into by PSE&G and ConEd in the pre-open access era. The statements cited by NRG were made by the Commission in orders addressing ConEd's arguments on rehearing of Opinion No. 476. Specifically, ConEd contended that "reliability is not the concern *just* of PJM and NYISO,"⁴⁹ but rather, that ConEd shares reliability concerns. The Commission explained that it disagreed with ConEd on the weight to be given to reliability concerns vis-à-vis economic concerns stating that "ConEd's ability to depend each day on redelivery of up to 1000 MW, at ConEd's nomination, from the feeders under New York Bay, and always at the costs stated in the two contracts, is more an economic consideration than a reliability consideration."⁵⁰

5. NRG's Arguments with Respect to Counterflows

39. NRG states that the September 16, 2010 Order erroneously concludes that the JOA Protocol permits counterflows across the A, B, C and J and K Feeders.⁵¹ NRG further states that the September 16, 2010 Order points to nothing in the PJM OATT, the NYISO OATT, or the JOA Protocol that permits parties to schedule power across these specific facilities.

40. It is NRG itself that maintains that counterflows are an issue, claiming "counterflow is prohibited under the TSAs."⁵² NRG argues that "for over thirty years now, the grandfathered TSAs have prevented parties from flowing power, including counterflow power, across the A,B, C and J and K Feeders crossing one of the most

⁴⁸ *Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, PJM Interconnection, L.L.C., and New York Independent System Operator, Inc.*, 108 FERC ¶ 61,120, at P 13 (2004) (Opinion No. 476).

⁴⁹ *Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, PJM Interconnection, L.L.C., and New York Independent System Operator, Inc.*, 120 FERC ¶ 61,161, at P 11 (2007) (August 15, 2007 Order) (emphasis added).

⁵⁰ August 15, 2007 Order, 120 FERC ¶ 61,161 at P 12.

⁵¹ NRG October 18, 2010 Filing at 27.

⁵² NRG April 21, 2010 Initial Brief at 17.

constrained interfaces in the country.”⁵³ In the September 16, 2010 Order, the Commission merely was responding to that argument when it stated the agreement does not prohibit counterflows.⁵⁴ We agree with NRG that the JOA Protocol does not specifically address the issue of whether counterflows across the A, B, C and J and K Feeders are permitted. However, as we stated, the JOA Protocol does not state that counterflows are prohibited. Our statement that the JOA Protocol permits counterflows across the A, B, C and J and K Feeders⁵⁵ was intended to reflect the fact that nothing in the JOA Protocol (as well as the underlying documents such as the TSAs and the PJM OATT) prohibits counterflows. Indeed, PJM recognizes that “NRG and others may schedule transactions between NYISO and PJM that have counterflow effects. Such transactions will be priced using the proxy busses described above, but they are in no way precluded by the JOA Protocol.”⁵⁶ We therefore affirm our finding that PJM’s service to ConEd does not preclude NRG or other parties from scheduling counterflow transactions on the interfaces between PJM and NYISO. Although ConEd can nominate a flow into its system from the A, B and C Feeders, ConEd does not have the ability to dictate the flows over these feeders.⁵⁷ The operational control over the feeders is determined by NYISO based on: (1) ConEd’s nominated schedules; and (2) the net interchange between NYISO and PJM resulting for the scheduled transactions of other market participants.⁵⁸

41. NRG states that if the Commission based its assertion on the fact that market participants can schedule counterflow across the generic PJM-NYISO proxy bus, such a holding would contravene over ten years of precedent that energy has a locational value. NRG adds that using the fact that market participants can counterflow power in an economically untenable manner to conclude that the JOA protocol is just and reasonable is arbitrary and capricious and not the product of reasoned decision making.

42. As we stated, the Commission found only that nothing in the agreement prevents NRG from seeking to schedule a counterflow using the proxy busses maintained by PJM

⁵³ NRG October 18, 2010 Filing at 26.

⁵⁴ September 16, 2010 Order, 132 FERC ¶ 61,221 at P 72.

⁵⁵ *Id.* P 63.

⁵⁶ PJM May 11, 2010 Reply Brief at 9.

⁵⁷ ConEd and City of New York March 25, 2009 Reply Comments, Affidavit of Robert B. Stoddard at 6.

⁵⁸ *Id.*

and NYISO. Scheduling transactions based on the use of the proxy busses does not contravene the locational value of energy. Further, as we pointed out in the September 16, 2010 Order, the TSAs and the JOA Protocols are not the cause of the seams issues that result in the inefficient scheduling of power flows on the interfaces between NYISO and PJM.⁵⁹ Rather, the inefficiencies result from using single proxy busses instead of using a more comprehensive market-based pricing methodology.⁶⁰ The seams issues are being addressed in other proceedings,⁶¹ and the results of those proceedings will impact the agreements at issue here.⁶²

43. NRG requests that the Commission direct PJM and NYISO to expressly provide for counterflows across the A, B, C or J and K feeders. We deny this request. As PJM pointed out, NRG can make use of the current systems of PJM and NYISO to schedule counterflow transactions. The system operators determine how the transactions are effectuated, based on the nominated schedules of all market participants requesting interchanges between NYISO and PJM.

44. NRG also states that the Commission erred in asserting that other parties are free to take the same service as ConEd. NRG states that because the JOA Protocol is tailored to meet the specific needs of ConEd, the service is not available to other parties. As PJM has noted, no other party has requested that same service that ConEd requested.⁶³ If another party requested such service, PJM and the NYISO are obligated to evaluate such

⁵⁹ *Id.* at 3; September 16, 2010 Order, 132 FERC ¶ 61,221 at P 50 & n.9.

⁶⁰ ConEd and City of New York March 25, 2009 Reply Comments, Affidavit of Robert B. Stoddard at 7.

⁶¹ *See, e.g., New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,276 (2010). (The Commission required that NYISO re-prioritize the implementation of the four market-based initiatives it proposed on January 12, 2010 so that interface pricing reform and congestion management/market-to-market coordination will be completed by the second quarter of 2011.)

⁶² Neither the 2008 1000 MW TSAs nor the JOA Protocol would prevent PJM and NYISO from modifying their scheduling arrangements for inter-area transactions, once these seams issues are resolved. Rather, the 2008 1000 MW TSA will be subject to PJM's OATT and, if PJM and NYISO amend the scheduling practice prescribed by their OATTs, the new practice will govern service under the 2008 1000 MW TSA. *New York Indep. Sys. Operator, Inc.*, 132 FERC ¶ 61,221, at P 63 (2010).

⁶³ PJM April 21, 2010 Initial Brief at 10-11; PJM May 11, 2010 Reply Brief at 4.

requests in the same way they evaluated the ConEd request.⁶⁴ Thus, NRG's assertion that the service is not available to other parties is mistaken. Rehearing on this issue is denied.

6. NRG's Argument That Rendering a Decision Is Inconsistent with the Commission's Initial Order Setting the Matter for Hearing

45. NRG argues that the Commission erred in rejecting the testimony of NRG consultant Kenneth Slater. NRG contends that the testimony of ConEd consultant Mr. Stoddard was submitted to the Commission as part of reply comments to the original contested Settlement and any response by NRG would have been an impermissible pleading. Thus, according to NRG, it was denied the opportunity to respond to factually incorrect statements. However, NRG, in fact, did file an answer to the reply comments to the original contested Settlement, wherein NRG criticized the testimony of Mr. Stoddard as irrelevant but, also stated that Mr. Stoddard's testimony was challenged by the record established by NRG's consultant Mr. Kranz.⁶⁵

46. Nonetheless, we note that ConEd's April 21, 2010 Initial Brief does refer to the affidavit of Robert Stoddard and, upon further reflection we will accept the affidavit attached to NRG's May 11, 2010 Reply Brief. Accordingly, we grant rehearing on this limited aspect of NRG's filing. In fact, we reviewed Mr. Slater's affidavit and commented on it in the September 16, 2010 Order.⁶⁶ As we so stated, Mr. Slater's affidavit supports the conclusions of NRG's witnesses, Miles O. Bidwell and Bradley Kranz that the 2008 1000 MW TSA are inefficient in roughly 14 to 19 percent of the time studied. These figures are already part of the record, thus, the acceptance of Mr. Slater's affidavit does not change our decision with regard to the acceptance of the Settlement in this proceeding.

47. NRG argues that the Commission is acting arbitrarily in approving the settlement without hearing because, it states, the Commission initially set the matter for hearing on

⁶⁴ PJM for example has reviewed other requests from system operators for such joint agreements. *See PJM Interconnection, L.L.C. and Carolina Power & Light Company*, 131 FERC ¶ 61,181 (2010), *order on compliance filing*, 134 FERC ¶ 61,048 (2011) (accepting congestion management agreement that addresses loop flow issues between PJM and Carolina).

⁶⁵ NRG April 9, 2009 Answer to Reply Comments at 2-3.

⁶⁶ September 16, 2010 Order, 132 FERC ¶ 61,221 at n.33.

the same set of facts. NRG claims the additional record established through the briefs is insufficient to establish a sufficient record without a hearing.

48. In the February 19, 2010 Order, the Commission explained that the factual issues that led it to set the matter for hearing appeared to have been resolved by the Settlement, and that the remaining issues appeared to be legal issues that the Commission determined could be addressed through briefs as opposed to trial type proceedings.⁶⁷ All parties had sufficient opportunity to file briefs, and NRG does not raise in its pleading any specific material issues of disputed fact (other than with respect to the affidavit discussed above which we find does not change our decision) or witness credibility that require the need for a trial-type hearing.⁶⁸ We therefore affirm our determination in the September 16, 2010 Order that a trial-type proceeding to resolve these issues was unnecessary.

49. For the reasons discussed above, we deny NRG's request for rehearing, with the limited exception of our acceptance of the affidavit attached to NRG's May 11, 2010 Reply Brief.

The Commission orders:

NRG's request for rehearing of the September 16, 2010 Order is hereby granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶⁷ February 19, 2010 Order, 130 FERC ¶ 61,126 (2010).

⁶⁸ See *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (Commission "may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility"); *Union Pacific Fuels, Inc. v. FERC* 129 F.3d 157, 164 (D.C. Cir. 1997) (Commission "may resolve factual issues on a written record unless motive, intent, or credibility are at issue or there is a dispute over a past event").