

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Consolidated Edison Company
of New York, Inc.

Docket No. EL02-23-001
EL02-23-002

v.

Public Service Electric and Gas Company,

PJM Interconnection, L.L.C.

and

New York Independent System Operator

ORDER ON REQUESTS FOR REHEARING

(Issued December 23, 2003)

1. This order addresses the requests for rehearing filed by Consolidated Edison Company of New York, Inc. (ConEd) and Public Service Electric and Gas Company (PSE&G) from the Commission's order issued in this proceeding on December 9, 2002 (December 9 Order).¹ The December 9 Order affirmed in part and modified in part the Initial Decision issued in this proceeding on May 23, 2002 (Initial Decision),² regarding the responsibilities of ConEd and PSE&G under two contracts executed between them in 1975 and 1978, and a further amendment in 1978. As discussed below, we deny the rehearing requests.

¹ Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, et al., 101 FERC ¶ 61,282 (2002).

² Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, et al., 99 FERC ¶ 63,028 (2002).

Background

2. On May 22, 1975, ConEd and PSE&G entered into a contract governing the reciprocal transfer of 400 MW of power from ConEd to PSE&G's northern zone, and from PSE&G to specific delivery points in the New York City service area of ConEd (1975 contract or 400 MW contract). On May 8, 1978, the parties entered into a second contract, calling for construction of additional transmission facilities for transfer of an additional 600 MW (1978 contract or 600 MW contract). On May 9, 1978, the parties modified the 1975 contract to, among other things, extend its term to coincide with that of the 1978 contract, i.e., the end of the year 2020 (1978 amendment).³

3. This case originated when ConEd filed, on November 15, 2001, a complaint against PSE&G.⁴ The complaint primarily charged that PSE&G had violated its obligations under the contract by continually curtailing delivery of the contracted-for 1,000 MW. ConEd also named as respondents PJM Interconnection, L.L.C (PJM), the independent system operator (ISO) to which PSE&G belongs, and the New York Independent System Operator (NYISO), the ISO to which ConEd belongs.

4. The Commission set the issues for hearing⁵ and authorized the presiding judge to phase the case, in order to decide first several issues identified by ConEd as critical to service during the coming peak summer period.⁶ Two Phase I issues addressed by the Initial Decision are relevant here. First, the presiding judge considered whether PSE&G and PJM are obligated to render and whether ConEd is entitled to receive 1,000 MW of firm transmission service under the contracts, subject to curtailment only when a critical bulk power facility outage in PSE&G's northern zone impedes full service.⁷ On this point, the presiding judge found that while the subject service is not a firm service under

³ Unless otherwise indicated, the 1975 contract, 1978 contract and 1978 amendment will be referred to collectively as the "contracts."

⁴ An extensive discussion of the background, complaint and issues involved in this case is included in the December 9 Order, 101 FERC ¶ 61,282 at P 3-13.

⁵ Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, et al., 99 FERC ¶ 61,033 (2002) (Hearing Order).

⁶ This order on rehearing addresses the first phase (Phase I). The Commission's Order on Initial Decision regarding the second phase of the case (Phase II) will be issued separately in Docket No. EL02-23-003.

⁷ The other issues considered in the Initial Decision included: whether transmission service to Con Ed under the contracts should be curtailed on a non-discriminatory basis, pro rata with other firm services over PSE&G's affected transmission facilities; and whether PSE&G is obligated to provide a spare transformer and how the cost of that transformer should be allocated between PSE&G and Con Ed.

PJM's OATT, "it has a priority that prohibits its curtailment for purely economic reasons and requires PSE&G to take or pay for whatever steps are necessary (including redispatch of generation within the PJM system) to provide the service."⁸

5. Second, the presiding judge directed the parties to develop and file with the Commission a protocol under which PSE&G's obligations to ConEd pursuant to the contracts can be satisfied as nearly as possible pursuant to the open access transmission tariffs of both PJM and NYISO.⁹

6. The Commission's treatment of the foregoing aspects of the Initial Decision, and the rehearing requests are discussed by issue, below.

Discussion

A. Firmness of Service – Obligation to Redispatch

December 9 Order

7. In the December 9 Order, the Commission found that, in determining the nature of the service in question, a central issue is whether PSE&G must redispatch in order to support the service. Recognizing that each party interpreted the same contracts to marshal strong arguments on either side of the issue, the Commission stated:

[We believe] that in the ambiguous circumstances of these contracts, as they must be interpreted in the post-Order No. 888 and post-Order No. 2000 world, the most persuasive evidence of what those contracts mean is the actual operating procedures for ConEd and PSE&G . . . which have been in effect since 1984 (although PSE&G asserts ConEd unilaterally rescinded its operating procedures last year) [(1984 Operating Procedures)]. Briefly, these operating procedures provide that under normal system conditions, if PSE&G encounters off-cost conditions, it will limit the wheel to 600 MW but will operate off-cost, *i.e.*, redispatch to maintain the 600 MW wheel. The procedures provide that under abnormal system conditions, if off-cost conditions are encountered, PSE&G and ConEd will evaluate their systems to see what solution is most economical, but that, under ConEd's version of the procedures, PSE&G will operate off-cost to support the 600 MW wheel if that is most economical. Under capacity emergency conditions, the procedures provide only that PSE&G can curtail the wheel to maintain supply service to its customers. Presumably, PSE&G

⁸ Initial Decision, 99 FERC ¶ 63,028 at P 65.

⁹ Initial Decision, 99 FERC ¶ 63,028 at Ordering Paragraph D.

should operate off-cost in this situation if it is necessary and economical (compared to other options available to ConEd) to do so, although the procedures do not specifically provide for this. The gist of these procedures then, is that PSE&G will not redispatch and operate off-cost to support the 400 MW wheel, but will do so to support the 600 MW wheel if that is most economical given ConEd's other alternatives. We believe this captures the essence of the contracts as they should be interpreted given all of the circumstances of their execution and the subsequent conduct of the parties.¹⁰

8. The Commission further stated that its determination that PSE&G and PJM are required to redispatch to support only the 600 MW wheel is consistent with:

the origin of the 400 MW contract a generation exchange contract; the absence of the "plan, design, build, and operate" language in the 400 MW contract; and the payment for facilities feature of the 600 MW contract. This finding is also consistent with the fact that the 600 MW wheel, but not the 400 MW wheel, was agreed to as an alternative to ConEd building a DC tie. PSE&G would have to occasionally redispatch in order to provide service comparable to that provided by a DC tie.¹¹

9. In short, the Commission found that, although the 400 MW contract is as firm as the 600 MW contract in other respects, PSE&G and PJM need not redispatch to support the 400 MW transfer.

Rehearing Requests

10. On rehearing, PSE&G disputes the Commission's finding that PSE&G is required to redispatch up to 600 MW under the 1978 contract. PSE&G reiterates its argument that the plain language of the 1978 contract does not impose such an obligation.¹² PSE&G argues that the provision in Section III.B of the 1978 contract stating that PSE&G "will plan, design, build and operate its system so as to supply its own load, meet its obligations to PJM, and wheel 600 MW to ConEd" cannot reasonably be construed to require PSE&G to redispatch generation. PSE&G maintains that interpreting that provision in such a manner would render meaningless other language in that same section, which, according to PSE&G, defines the scope of its affirmative transfer

¹⁰ December 9 Order, 101 FERC ¶ 61,282 at P 33.

¹¹ *Id.* at ¶ 36.

¹² PSE&G also reiterates that, because ConEd receives significantly discounted service under the 1978 contract, PSE&G is not obligated to redispatch generation.

obligation from the outset.¹³ PSE&G contends that giving effect to all of the operative language in Section III.B of the 1978 contract clearly requires only that PSE&G plan, design, build and operate its system so as to permit up to 600 MW of transfers to ConEd - utilizing the specified interconnection and transmission facilities, including coordinated phase angle regulator (PAR) adjustments - during most hours of the year.

11. PSE&G also argues that, contrary to the December 9 Order, a redispatching requirement cannot be implied from the fact that the 1978 contract requires ConEd to pay for certain facilities. PSE&G maintains that ConEd's payments under the 1978 contract are associated solely with the costs of the additional interconnection facilities that PSE&G installed for ConEd's benefit, as well as carrying charges on a portion of PSE&G's existing transmission facilities to effect a sharing of the savings associated with the new facilities. PSE&G contends that any provision for the recovery of fixed costs for generating facilities or the variable costs of operating generating facilities off-cost is conspicuously absent from the 1978 contract.

12. In addition, PSE&G argues that the Commission erroneously relied upon extrinsic evidence, namely, the 1984 Operating Procedures, and further misinterpreted that evidence to contradict the express terms of the 1978 contract. PSE&G maintains that the 1984 Operating Procedures do not require PSE&G to redispatch under the 1978 contract "to the extent described in the December 9 Order."¹⁴ PSE&G maintains that while the 1984 Operating Procedures defined a course of performance adopted by the parties and did provide for PSE&G to operate off-cost in certain, narrow circumstances, PSE&G expected such an "accommodation" to be rare. PSE&G contends that the December 9 Order erroneously converted this accommodation into a firm obligation. Moreover, PSE&G maintains that the 1984 Operating Procedures confirms the parties' intent to employ PAR adjustments, not generation, to effect power transfers under the contracts.¹⁵

13. Finally, PSE&G argues that other extrinsic evidence, besides the 1984 Operating Procedures, indicates that the 1978 contract does not require redispatch of generation. PSE&G points to a 1975 joint study that refers only to the use of PARs for controlled transfers of power to ConEd; the fact (according to PSE&G) that ConEd did not characterize the 1978 contract as a transmission service agreement for purposes of grandfathering it under the NYISO OATT; and the fact (according to PSE&G) that the

¹³ PSE&G cites other language in Section III.B requiring it to "utiliz[e] the . . . interconnections, . . . the new Waldwick-Fair Lawn circuit, and other PS internal transmission facilities."

¹⁴ PSE&G rehearing request at 9.

¹⁵ PSE&G points to Section 2.2.3 of ConEd's 1984 operating procedures, which, according to PSE&G, provides that the parties' operators "will coordinate the adjustment of the phase shifters to achieve the desired magnitude of power flow."

1978 contract contains no provisions comparable to the express redispatching language in ConEd's 1991 agreement with the Power Authority of the State of New York. This last fact, according to PSE&G, shows that ConEd can be explicit about an obligation to redispatch when ConEd intends for such an obligation to exist.

14. ConEd makes analogous arguments on rehearing concerning the 1975 contract. Contrary to the December 9 Order, ConEd argues that the plain language of the 1975 contract requires PSE&G to redispatch generation and that, therefore, the Commission erred in relying upon conflicting extrinsic evidence, *i.e.*, the 1984 Operating Agreement, to find otherwise. ConEd maintains that the Commission considers documents outside of a contract only if the contract is ambiguous, and then only if the documents were executed contemporaneous with the contract at issue.¹⁶ ConEd argues that both the 1975 and 1978 contracts unambiguously obligate PSE&G to transmit energy for ConEd whenever ConEd requests service, except when outages of bulk power facilities – which, according to ConEd, include generation as well as transmission facilities – impede the service.¹⁷ Therefore, states ConEd, the contracts envision that generation facilities would be used to effectuate the service. Indeed, ConEd states that the Commission's finding in the December 9 Order that the 1975 contract is a generation exchange contract is inconsistent with its determination in the same order that the contract does not obligate PSE&G to redispatch generation. Moreover, ConEd points out that the 1984 Operating Procedures were drafted many years after the contracts were executed and that, accordingly, those procedures cannot be regarded as consistent with the intent of the parties at the time they negotiated the contracts several years earlier. ConEd maintains that the Commission's reliance upon the 1984 Operating Procedures effectively “modified” the 1975 contract, without requisite consideration, and resulted in a contract abrogation, without the requisite finding of extraordinary circumstances vitally affecting the public interest, in accordance with Mobile-Sierra.¹⁸

15. Further, ConEd argues that the absence of the “plan, design, build, and operate” language in the 1975 contract is of no import, since PSE&G's obligation to redispatch is grounded primarily on the service and curtailment provisions of the contracts, which

¹⁶ ConEd cites Golden Spread Electric Coop., Inc., 72 FERC ¶ 61,142 at 61,727 (1995); Delmarva Power & Light Co., 69 FERC ¶ 61,144 at 61,525-26 (1994) (Delmarva); and South Carolina Electric & Gas Co., 59 FERC ¶ 61,050 at 61,219 (1992).

¹⁷ ConEd cites Section 4.1 of the 1975 contract, which provides that PSE&G will transfer up to 400 MW using the specified interconnections, “except that such transfer will be curtailed when critical bulk-power facility outages in the northern portion of the [PSE&G] system would, in the opinion of [PSE&G], reduce [PSE&G's] ability to provide such transfer.

¹⁸ See United Gas Pipe Line Co. v. MobileGas Service Corp., 350 U.S. 332 (1956); Federal Power Comm'n v. Sierra Power Company, 350 U.S. 348 (1958).

ConEd states is essentially identical in both documents. ConEd posits that the “plan, design, build, and operate” provision in the 1978 contract merely emphasizes PSE&G’s service commitment in that document.

16. Also of no import, according to ConEd, are the compensation provisions of the contracts. Contrary to the Commission’s finding in the December 9 Order, ConEd states that the payment for facilities feature of the 1978 contract has no bearing upon PSE&G’s obligation to redispatch, because the contractual charges are commensurate with the use of generation under both contracts. ConEd argues that PSE&G admitted in testimony that the generation exchange in accordance with the contracts would economically benefit itself and its customers and that, therefore, it cannot now be stated that those terms were inconsistent with the redispatch of generation.

17. ConEd further maintains that the Commission erred in finding that the redispatch was an alternative to contractual transmission lines for the 400 MW contract, but not the 600 MW contract. Rather, ConEd states that PSE&G proposed both contracts as alternatives to those projects and, accordingly, both contracts require equivalent treatment with respect to redispatch issues.

Commission Determination

18. We will deny PSE&G’s and ConEd’s requests for rehearing regarding the redispatching issue. As we have previously stated, contract interpretation is often a complex process, involving close scrutiny of the contract itself, related documents, and at times, parol or extrinsic evidence.¹⁹ In this case, both parties assert, in support of divergent arguments, that the Commission erred in considering the 1984 Operating Procedures in rendering a determination regarding PSE&G’s redispatching obligations under the contracts. However, as the parties themselves recognize, this argument is based upon the presumption that the contracts are unambiguous regarding PSE&G’s obligation to redispatch generation, a premise with which we disagree. After considering the record in this case, we found in the December 9 Order that the contracts are ambiguous on this issue.²⁰

19. Indeed, this ambiguity is demonstrated by each party’s reliance on the same language as unambiguously supporting its position. Although on rehearing each party extensively reiterates its respective position and supporting arguments that the plain

¹⁹ See Delmarva, 99 FERC ¶ 61,144 at 61,525.

²⁰ December 9 Order, 101 FERC ¶ 61,282 at P 33, 35 (“[I]f truly firm service in all circumstances was what ConEd really intended when the contracts were executed, ConEd should have had the contracts drafted in a much more iron clad and less ambiguous manner than what was ultimately agreed to.”).

language of the contracts clearly must be interpreted in its favor, the Commission remains convinced that the contracts are ambiguous, *i.e.*, reasonably susceptible to different constructions or interpretations,²¹ and that, therefore, we may properly look beyond the four corners of those documents to determine PSE&G's redispatching obligations.²²

20. Each party further disputes the Commission's finding that PSE&G's obligation to redispatch is consistent with the origin of the 400 MW as a generation exchange contract; the absence of the "plan, design, build, and operate" language in the 400 MW contract; and the payment for facilities feature of the 600 MW contract.²³ We find that such arguments merely emphasize the ambiguity of the contracts on the redispatching issue and do not contradict our primary reliance on the 1984 Operating Procedures as persuasive.²⁴

21. We also disagree with ConEd's argument that the Commission's consideration of documentary extrinsic evidence is limited to documents developed contemporaneously with the contracts. In the December 9 Order, we relied upon the 1984 Operating Procedures not as a prototype or course of dealing for the contracts, in which case such timing might be relevant. Rather, we relied upon the 1984 Operating Procedures as a written memorial of the parties' actual course of performance pursuant to the contracts. Referring to those procedures, we stated in the December 9 Order that, "[i]n these circumstances, the Commission believes that the parties' course of conduct over many years has substantial weight and should be the factor most relied on by the Commission in interpreting the conflicting provisions of the contracts at issue in this case."²⁵ We routinely examine whether parties' conduct during the performance of contracts gives any indication of their understanding with respect to the meaning of disputed provisions,²⁶ and for that purpose we found the 1984 Operating Procedures to be relevant. Indeed, on rehearing, PSE&G concedes that the 1984 Operating Procedures defined the parties' course of performance under the contracts.²⁷

²¹ See *Ameren Services Co. v. FERC*, 330 F.3d 494, 499 (D.C. Cir. 2003) (describing circumstances of contract ambiguity).

²² See, *e.g.*, *Village of Jackson Center, et al. v. Dayton Power & Light Co.*, 101 FERC ¶ 61,155 at P 28 (2002).

²³ December 9 Order, 101 FERC ¶ 61,282 at P36.

²⁴ The Commission notes that we detailed the significance of the "plan, design, build, and operate" language in the Hearing Order, 99 FERC ¶ 61,033 at 61,126 (2002).

²⁵ December 9 Order, 101 FERC ¶ 61,282 at P 35.

²⁶ See, *e.g.*, *Williston Basin Interstate Pipeline Co.*, 53 FERC ¶ 61,241 (1990).

²⁷ PSE&G rehearing request at 9.

22. We further reject the parties' assertion that, in relying upon extrinsic evidence, we misinterpreted the 1984 Operating Procedures. As indicated above, the Commission conducted a thorough analysis of the meaning of the 1984 Operating Procedures. Further, despite PSE&G's assertions to the contrary, the fact that PSE&G might not have utilized the redispatching mechanism on a regular basis indicates only that its system was sufficient to support the 600 MW service without redispatch, not that the 1984 Operating Procedures do not provide for redispatch, if necessary.

23. Finally on this issue, the Commission rejects PSE&G's assertion that extrinsic evidence other than the 1984 Operating Procedures shows that the 1978 contract does not require redispatch. The gist of PSE&G's argument in this regard is that the 1978 contract is a mere facilities contract and that the only facilities to be utilized were transmission facilities, particularly the PARs to effect the wheeling service. Indeed, both contracts state that PSE&G would utilize the newly constructed facilities and other PSE&G internal transmission facilities to transfer power. It is further true that the contracts provide for certain facilities to be constructed and that the PARs were part of the facilities. However, we disagree with PSE&G's arguments that because generating resources are excluded by the language of the contracts, they may not be used to effect the service. At the time the contracts were executed, many items that were necessary to provide service were not specifically enumerated in the contracts, including generating resources used to support transmission service. Rather, these elements were understood to be inherent in bundled service. For this reason, PSE&G's argument is unfounded.

B. Protocol – Treatment of Counterflows

December 9 Order

24. In the December 9 Order, the Commission provided preliminary guidance, pending resolution of the second phase of the proceeding, to assist the parties in developing a protocol to implement the contracts.²⁸ As part of that preliminary guidance, we found that PJM should be permitted to add or subtract other circulating flows to determine whether the desired flow has occurred.²⁹ We further found it appropriate that third party tariff transactions be allowed to flow on the tielines, and inappropriate to disallow tariff transactions and any resulting counterflows on the interconnections when calculating performance under the contracts, since ConEd's revenue requirement in the NYISO transmission tariff includes the A, B, and C facilities and other flows have not been prevented from occurring on the lines.³⁰

²⁸ December 9 Order, 101 FERC ¶ 61,282 at P 64.

²⁹ Id. at P 65.

³⁰ Id. at P 66. We noted that NYISO's witness testimony that flows on the A, B,

Rehearing Requests

25. On rehearing, ConEd argues that the Commission erroneously found that third party transactions unconditionally should be allowed to flow on the A, B, and C Feeders, and that those flows should be netted against metered flows to determine the amount of PSE&G's redeliveries to ConEd. ConEd states that permitting such counterflows would violate the terms of the contracts and cause operational and reliability problems. ConEd argues that any counterflows out of New York City should be offset by other third party transactions scheduled into New York City.

Commission Determination

26. We will deny ConEd's request for rehearing regarding counterflows and third party uses of the A, B, and C feeders. As stated above, the Commission's findings in the December 9 Order relevant to these issues were preliminary,³¹ pending their further development on the record during Phase II of this proceeding. Those issues have in fact been further developed in Phase II and will be addressed in a separate order in Docket No. EL02-23-003.

C. Impairments to Deliveries Issue

December 9 Order

27. In the December 9 Order, the Commission stated that the parties must study, account for, and list and briefly describe in the protocol (referred to above) what appear to be impairments to deliveries to ConEd because of new generator interconnections on ConEd's system.³² For example, we pointed to evidence of a ConEd interconnection study showing that in year 2003 the "contractual 100 MW wheel through PSE&G system from Ramapo to New York City must be reduced to approximately 650 MW and that an additional project would reduce the wheel by another 150 MW."³³

and C lines are tightly controlled by PAR settings to only allow circulation under the contracts, but that, as PJM pointed out, flows on these lines include other flows, and PJM has never been asked to make a PAR adjustment for the purpose of preventing other flows from occurring on those lines.

³¹ Id. at P 62-69 (describing the issues and preliminary findings).

³² December 9 Order, 101 FERC ¶ 61,282 at P 70.

³³ Id.

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28. ConEd argues that the Commission erroneously determined that ConEd impaired PSE&G's performance of its contractual service obligations and that such impairment must be reflected in the protocols that are to govern PSE&G's future service to ConEd. ConEd states that the contracts allow it to request transfers of less than 1,000 MW, and if PSE&G delivers and ConEd receives the reduced amount, then PSE&G's performance has not been impaired. ConEd asserts that the finding that ConEd impaired PSE&G's performance by requesting less than 1,000 MW on certain occasions effectively converts the contracts to requirements contracts, which, ConEd asserts, they are not.

Commission Determination

29. With regard to ConEd's assertion that it has not impaired PSE&G's performance under the contracts, the Commission notes that we made no such specific finding in the December 9 Order. Nor did we imply that PSE&G could receive a reduction in its service obligations. Instead, we merely noted evidence in the record that impairments exist, and directed that such impairments be studied, listed and described in the joint protocol for implementing the contracts. Our purpose was to direct the parties to account for any operational circumstances or conditions under which the flows to ConEd might be affected when developing operating protocols going forward, not approve a permanent reduction in PSE&G's obligation.

The Commission orders:

PSE&G's and ConEd's requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.