

119 FERC ¶ 61,071
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consolidated Edison Co. of New York, Inc.

Docket No. EL02-23-003

v.

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

ORDER ON REHEARING
AND CLARIFICATION

(Issued April 20, 2007)

1. This order addresses the requests for rehearing and clarification filed by Consolidated Edison Company of New York, Inc. (ConEd) and Public Service Electric and Gas Company (PSE&G) of a Commission opinion¹ on an initial decision in Phase II of this complaint proceeding.² The proceeding concerns two 1970s era contracts that provide for PSE&G to receive up to 1,000 MW of power from ConEd at an upstate New York location and to redeliver the same amount of power to ConEd in New York City. For the reasons discussed below, we will deny rehearing, but clarify the opinion in one respect.

¹ *Consolidated Edison Co. of New York v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C., and New York Independent System Operator, Inc.*, Opinion No. 476, 108 FERC ¶ 61,120 (2004) (Phase II Opinion).

² *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C., and New York Independent System Operator, Inc.*, 103 FERC ¶ 63,047 (2003) (Phase II Initial Decision).

I. Background

2. Previous orders in these proceedings³ describe, in detail, the background to this dispute over how PSE&G, and the two regional transmission organizations (RTOs) responsible today for electric power transmission between New Jersey and New York, PJM Interconnection, L.L.C. (PJM) and the New York Independent System Operator, Inc. (NYISO), should fulfill the contracts' terms. ConEd complained to the Commission that PSE&G had curtailed transmission service and otherwise failed to fulfill its commitments to wheel the nominated power, up to 400 MW under their 1975 contract,⁴ and up to 600 MW under their 1978 contract.⁵ To enable these power transfers, ConEd and PSE&G had cooperatively built, under these contracts and predecessor contracts:⁶ the J and K Lines between ConEd's station at Ramapo, New York, and PSE&G's stations at Waldwick and New Milford, New Jersey; and three feeder lines from New Jersey to New York City, the A Feeder Line between PSE&G's station at Linden and ConEd's Goethals station on Staten Island, and the B and C Feeder Lines across Upper New York Bay, between PSE&G's station at Hudson and ConEd's Farragut station in Brooklyn.⁷ Also, ConEd had paid in part for PSE&G to construct internal lines in New Jersey. The Commission set the complaint for hearing in two phases.⁸

³ See Phase II Opinion at P 3-28; Phase II Initial Decision at P 1-17. See also the Background sections of the orders cited in notes 8, 9, and 15, *infra*.

⁴ "Interconnection Agreement between Consolidated Edison Company of New York, Inc. and Public Service Electric and Gas Company," May 22, 1975 (Exh. CE-6) (1975 contract or 400 MW contract). Because the parties executed a second contract in 1978, this 1975 agreement was subsequently amended, on May 9, 1978. "Amendment to Interconnection Agreement Dated May 22, 1975" (Exh. CE-7).

⁵ "Additional Public Service-Con Edison Interconnections-1982," May 8, 1978 (Exh. CE-9) (1978 contract or 600 MW contract).

⁶ Agreement of August 6, 1963 (Exh. CE-2) (1963 agreement); Agreement of May 10, 1968 (Exh. CE-3) (1968 agreement); Agreement of May 27, 1969 (Exh. CE-5) (1969 agreement).

⁷ See map in Appendix A.

⁸ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C. and New York Independent System Operator, Inc.*, 99 FERC ¶ 61,033 (2002) (Hearing Order).

A. Phase I

3. In Phase I, the presiding judge addressed the most pressing issues facing ConEd for summer 2002. The initial decision⁹ found that: service under the 1975 contract was the next best thing to today's firm service;¹⁰ PSE&G was obligated, under the 1978 contract, to redispatch its generation to maintain the 600 MW transfer;¹¹ PSE&G's obligation, under the two contracts, was not limited only to adjusting the taps on the phase angle regulators (PARs) under its control;¹² when PSE&G's curtailment of delivery to ConEd is justified, the curtailment must be *pro rata* with firm transmission customers under the PJM open access transmission tariff (OATT);¹³ and PSE&G was not obligated to replace a failed spare transformer for its interconnection with ConEd via the A, B, and C Feeders.¹⁴

4. The Commission affirmed in part and modified in part the Phase I Initial Decision.¹⁵ To aid in interpreting the two contracts, the Commission relied on the operating procedures that ConEd and PSE&G had adopted, in 1984, to implement the contracts (1984 Operating Procedures).¹⁶ The Commission found that both contracts

⁹ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C. and New York Independent System Operator, Inc.*, 99 FERC ¶ 63,028 (2002) (Phase I Initial Decision).

¹⁰ Phase I Initial Decision at P 49.

¹¹ *Id.* at P 51.

¹² *Id.* at P 56.

¹³ *Id.* at P 65.

¹⁴ *Id.* at P 74. Transformers are critical components at the interconnections between PSE&G and ConEd because PSE&G's transmission system is a 230 kV system while ConEd's system operates at 345 kV. *Id.* at P 66.

¹⁵ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C. and New York Independent System Operator, Inc.*, 101 FERC ¶ 61,282 (2002) (Phase I Opinion), *reh'g denied*, 105 FERC ¶ 61,343 (2003) (Phase I Rehearing Order).

¹⁶ These operating procedures are found at: "ConEdison System Operation Operating Directive No. SO-84-3," November 16, 1984 (Exh. CE-36 and Exh. PS-139); "Con Edison – PSE&G Interconnection Operation," October 4, 1984 (Exh. PS-138); "Operating Guidelines for Power transfers to Con Edison," revised, June 26, 1986 (Exh. PS-11).

were for essentially firm service; however, while PSE&G need not redispatch and operate off-cost¹⁷ to support the 400 MW wheel, it must do so to support the 600 MW wheel, if that is most economical given ConEd's other alternatives.¹⁸ The Commission suggested that ConEd could "firm up" the 400 MW wheel. It directed that the Phase II hearing focus on whether the redispatch costs for each contract should be borne by ConEd or PSE&G.¹⁹ The Commission postponed decision on whether the two contracts obligated PSE&G to replace the failed spare transformer, finding that both good utility practice and contract construction governed the matter. It directed the parties to address, in the Phase II hearing, whether a spare transformer was required and how its cost would be recovered.²⁰ Lastly, the Commission directed the parties to develop operating protocols to implement the two contracts, and gave preliminary guidance to this end.

5. The preliminary guidance pertinent to this rehearing proceeding is: (1) PJM should be permitted to add or subtract other circulating flows to determine whether the desired flow has occurred; (2) third party transactions are to be allowed to flow over the tielines covered by the contracts, *i.e.*, the J and K Lines and the A, B, C Feeders; (3) under particular circumstances, PJM and NYISO could incorporate alternatives to redispatch to support the 600 MW contract; and (4) the parties should account for what appear to be impairments to delivery of the contract service to ConEd caused by new generator interconnections on ConEd's system, and should list known and projected impairments.²¹

¹⁷ Off-cost, also called out-of-merit, generation is from generators that are more costly to operate than other available generators. Because of the off-cost generator's location in relation to a transmission constraint, its generation can relieve the constraint, unlike that from the less costly available generators.

¹⁸ Phase I Opinion at P 33, 36, 39. ConEd states that there are two principal transmission pathways into New York City – from the west, through New Jersey, with the two contracts providing 1,000 MW of capability between upstate New York and New York City, and from the north, through Westchester, where transmission facilities provide approximately 4,000 MW of capability from the New York State bulk power system via the Dunwoodie interface. ConEd Rehearing Request at 7.

¹⁹ Phase I Opinion at P 39.

²⁰ *Id.* at P 47.

²¹ *Id.* at P 65-71.

B. Phase II Initial Decision

6. The Phase II Initial Decision's findings and conclusions pertinent to this rehearing proceeding are as follows.

(1) The two contracts give PSE&G the preferential right to use all of the A Feeder's capacity.²² The two contracts do not limit use of the A Feeder only to 200 MW delivered under the 400 MW contract.²³ PJM, now assuming PSE&G's redelivery responsibility, has the option of using any or all of the feeders to redeliver power to ConEd in whatever proportion it chooses.²⁴

(2) ConEd's direct attachment of generation from its Cogen Technologies plant to its Staten Island substation, for transmission to New York City, reduced PSE&G's ability to make redeliveries over the A Feeder by about 200 MW.²⁵

(3) ConEd's internal transmission system for transmitting power from Staten Island to the rest of New York City is becoming insufficient to transmit the contract power flowing through the A Feeder plus the Cogen Technologies generation plus power generated locally on Staten Island.²⁶

(4) Service under the two contracts should be part of PJM's and NYISO's scheduled transmission services and be scheduled one day in advance.²⁷

(5) The parties' operating protocols must allow for third party use of the A, B and C Feeders.²⁸

²² Phase II Initial Decision at P 27.

²³ *Id.* at P 58.

²⁴ *Id.* at P 61.

²⁵ *Id.* at P 27.

²⁶ *Id.* at P 28.

²⁷ *Id.* at P 33, P 40, & P 53.

²⁸ *Id.* at P 38-39.

(6) Despite ConEd's objections concerning NYISO's and PJM's use of the single proxy bus convention,²⁹ NYISO's and PJM's continued use of this convention will nevertheless be left to the two RTOs' discretion and is outside this proceeding.³⁰

(7) The operating protocols must provide for comparing the costs of redispatch and the costs (and likely efficacy) of other options to provide other service under the 600 MW contract before PJM is required to redispatch to provide this service.³¹ PSE&G, not ConEd, is required to pay congestion charges applicable to provision of service under the 600 MW contract.³²

(8) Whether redispatch is warranted under either contract will be determined by use of the "Comparison-of-Alternatives" test suggested by NYISO, *i.e.*, the two RTOs will compare their internal redispatch costs relevant to the two contracts. For NYISO, this is the difference between the congestion cost at the Ramapo station and the congestion cost at either the Staten Island or the Brooklyn station, and is the same as the difference between the locational marginal prices (LMPs) at the two locations. The RTO with the lower redispatch cost will support the contract flows by redispatching its system to the point where the redispatching costs of both were the same.³³

(9) The operating protocols must provide that attachment of new generation facilities to ConEd's or PSE&G's systems requires approval from both NYISO and PJM. The parties must list in the operating protocols all known and projected impairments to the contracts.³⁴

²⁹ ConEd had objected that NYISO's and PJM's practices of using only a single proxy bus in each RTO, located in Marcy, New York, and Keystone, Pennsylvania, respectively, to price transactions between them induces third parties to flow power over the A, B and C Feeders from east to west while discouraging flows into New York City. ConEd therefore had requested that third-party flows over the feeders be conditioned with a remedy neutralizing what it called a perverse feature of the single proxy bus convention. *See* Discussion item C, "Third Party Flows on the Feeders," *infra*.

³⁰ Phase II Initial Decision at P 42-43.

³¹ *Id.* at P 47.

³² *Id.* at P 49, P 51.

³³ *Id.* at P 50.

³⁴ *Id.* at P 56.

(10) Good utility practice requires PSE&G to keep a spare transformer at Hudson, New Jersey, for use by the B and C Feeders.³⁵

C. Phase II Opinion

7. In the Phase II Opinion on the Phase II Initial Decision, the Commission affirmed most of the presiding judge's findings. The Commission's differences and clarifications pertinent to this rehearing proceeding are as follows.

(1) PSE&G does not have the preferential right to use all of the A Feeder's capacity.³⁶

(2) Concerning ConEd's objection to use of the single NYISO-PJM proxy bus convention to determine comparative costs when redispatch and congestion costs are at issue, PJM is held to its assurance that it will use the physical LMP nodes at the J and K Lines and the A, B and C Feeders.³⁷

(3) The decisions as to whether redispatch is the most economical way of providing service under the contracts, whether ConEd has more economical alternatives available to it, and whether NYISO or PJM must redispatch to support service under the two contracts are not made by PJM alone. The decision methodology must be developed in the operating protocols.³⁸ The decision as to whether NYISO or PJM must redispatch to support service under the two contracts must be made by both NYISO and PJM working together.³⁹

(4) The Commission, in the Phase I Rehearing Order, did not make a specific finding that ConEd impaired PSE&G's performance under the contracts and did not imply that PSE&G's contractual service obligations could be reduced. Rather, the record showed only that impairments had occurred. Impairments were to be identified so that the forthcoming operating protocols could remedy them.⁴⁰

³⁵ *Id.* at P B-15.

³⁶ Phase II Opinion at P 57.

³⁷ *Id.* at P 93.

³⁸ *Id.* at P 104.

³⁹ *Id.* at P 129.

⁴⁰ *Id.* at P 148.

(5) Before ConEd or PSE&G may attach new generation to its transmission system, each must obtain approval only from its respective RTO, not both RTOs. The operating protocols must provide procedures for determining possible impairments caused by these proposed new attachments and for action in response. This requirement applies only to service under the two contracts and their related tielines.⁴¹

(6) The 1978 contract requires continued provision of a spare transformer, in working condition, at Hudson, New Jersey. The 1975 contract requires that PSE&G bear the costs of a transformer as described in that contract, a 500 MVA transformer. The incremental cost of a larger transformer is to be determined by mutual agreement of the parties or by arbitration.⁴²

D. The Operating Protocol

8. ConEd, PSE&G, NYISO, and PJM complied with the Commission's directive to develop operating protocols to govern how they would wheel the contract power. On February 18, 2005, the parties jointly filed *Operating Protocol for the Implementation of Commission Opinion No. 476* (Operating Protocol) as Attachment M-1 to the NYISO Services Tariff⁴³ and Rate Schedule No. 41 to the PJM Electric Tariff.⁴⁴ The parties stated that they did not waive any rehearing or appeal right in making the filing, and that certain issues remained disputed.⁴⁵

9. The Commission accepted the Operating Protocol without modification.⁴⁶ In order to know whether the Operating Protocol is working as intended, whether adjustments seem necessary, and the parties' observations on the extent to which actual operation under the Operating Protocol complies with the contracts and the Phase II

⁴¹ *Id.* at P 149-150.

⁴² *Id.* at P 194-198.

⁴³ New York Independent System Operator Market Administration and Control Area Services Tariff, FERC Electric Tariff, Original Volume No. 2.

⁴⁴ PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1.

⁴⁵ Operating Protocol at section 1.6; transmittal letter to February 18, 2005 filing at 4.

⁴⁶ *Consolidated Edison Co. of New York v. Public Service Electric and Gas Co. , PJM Interconnection, L.L.C., and New York System Operator, Inc.*, 111 FERC ¶ 61,228 (2005) (Protocol Order).

Opinion, the Commission directed the parties to file informational reports, either jointly or individually.⁴⁷ These reports were filed on September 30, 2005, December 30, 2005, as ordered by the Commission, and additionally, at the request of the parties, on January 19, 2007. The reports cover the 18 months between July 1, 2005, when parties began operations under the Operating Protocol, through December 31, 2006. Although ConEd expresses some dissatisfaction with how contract power has been redelivered under the Operating Protocol, it states that performance has improved over time. ConEd agrees with PSE&G, NYISO, and PJM that they should be able to work out the remaining issues, and that the Operating Protocol should continue to govern how the parties arrange for the contract power to be wheeled. We discuss the reports and ConEd's related requests in a companion order issued today.⁴⁸

II. Rehearing Issues

10. ConEd submits that the Phase II Opinion errs in its implementation of the contracts by giving insufficient weight to protecting the reliability of power delivery to the New York City load pocket and by frustrating ConEd's contractual, bargained-for benefits. Specifically, ConEd alleges that the Phase II Opinion errs by: (1) failing to impose two conditions on third party use of the A, B, and C Feeders for power flows out of New York City (counterflows), first, that the net physical flow over the feeders into New York City be no less than the contract amounts, and, second, that NYISO and PJM establish additional proxy busses to eliminate the incorrect price signals that occur because of the single proxy bus in each RTO; (2) approving the NYISO method of comparing alternative supply arrangements available to ConEd to determine whether PSE&G must redispatch; (3) finding that ConEd has impaired redeliveries under the two contracts; and (4) failing to limit PSE&G's use of the A Feeder's capacity for redelivery of contract power. ConEd emphasizes that the first two errors fundamentally deprive it of the benefits for which it contracted and has paid.

11. PSE&G submits that the Phase II Opinion errs by: (1) expanding PSE&G's contractual obligations by authorizing contract power redelivery over transmission facilities other than those specified in the two contracts; (2) failing to specify a meaningful remedy for the impairments that the Commission found ConEd to have caused and that affected PSE&G's ability to redeliver contract power; (3) defining impairment too restrictively so as to exclude consideration of economic effects; (4) failing to specify that hedging opportunities available to PSE&G must be included in

⁴⁷ Protocol Order at P 34.

⁴⁸ *Consolidated Edison Co. of New York v. Public Service Electric and Gas Co., PJM Interconnection, L.L.C., and New York System Operator, Inc.*, 119 FERC ¶ 61,070 (2007).

the comparison of alternatives methodology used before redispatch is required; (5) reversing the Commission's previous position to hold now that PSE&G, instead of ConEd, must bear the costs of generation redispatch under the 600 MW contract; (6) assigning to PSE&G the costs of a replacement spare transformer at Hudson; and (7) failing to specify that, under the 400 MW contract, ConEd must decide, in the day-ahead set-up, whether it wishes to schedule service under this contract and that ConEd must state, at that time, whether it will pay for any redispatch costs to provide this service.

III. Discussion

12. We will discuss the issues raised on rehearing in the following order: (A) congestion costs under the 600 MW contract; (B) comparison of alternative supply arrangements; (C) third party flows on the feeders; (D) limitation on A Feeder capacity and distribution of flows over the three feeders; (E) use of ConEd's and PSE&G's transmission lines; (F) scheduling service under the 400 MW contract; (G) reliability of New York City's power supply; (H) impairment; and (I) spare transformer costs.

A. Congestion Costs under the 600 MW Contract

1. PSE&G's Argument

13. PSE&G argues that the Commission erred by assigning to PSE&G the congestion costs associated with wheeling power under the 600 MW contract.⁴⁹ PSE&G's first reason is that this treats ConEd better than PJM customers under other grandfathered contracts. ConEd's charges under the two contracts become substantially less than the charges for equivalent service under the PJM OATT, so that ConEd receives service superior to the service received by other PJM OATT customers. PSE&G states that, in the Phase I Opinion, the Commission concluded that redispatch costs would be assigned to ConEd unless evidence showed that doing so would treat ConEd unfairly in comparison to existing practice concerning other grandfathered contracts in PJM. The Phase II hearing demonstrated that, with two exceptions, the existing PJM practice is that customers under grandfathered contracts are subject to the congestion charge/credit provisions of the PJM OATT. Had the presiding judge used the analysis prescribed in the Phase I Opinion, he would not have departed from the Commission's conclusion there, that ConEd should pay redispatch costs under the 600 MW contract, because nothing in existing practice on the PJM system justifies the presiding judge's finding.⁵⁰

⁴⁹ Phase II Opinion at P 127-128.

⁵⁰ PSE&G Rehearing Request at 19-20.

14. PSE&G's second reason concerns efficiency. Allocating congestion costs to ConEd would give ConEd an incentive to schedule service efficiently and give effect to the Commission's principle that cost recovery should follow cost causation. Instead, ConEd receives service superior to that received by other PJM OATT customers, while PSE&G bears an onerous burden not borne by other PJM transmission owners.⁵¹

15. PSE&G's third reason addresses the presiding judge's finding that it would not be fair to require ConEd to pay for both congestion costs and a share of PSE&G's transmission facilities. The Presiding Judge stated:

[I]t does not seem just and reasonable to require Con Edison to pay congestion charges for service under the 1978 contract. Under that contract, PSE&G has an obligation to eliminate or avoid any congestion that might impede service to Con Edison. The language is very specific:

[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 [Con Edison].⁵²

If this language means anything, it means that PSE&G has agreed to take on its own shoulders the risk that there will be congestion on the transmission system that might interfere with Con Edison's wheeling service or that may increase the costs of transmission to Con Edison. PSE&G, not Con Edison, should be required to pay any congestion charges that may be applicable to the provision of service under the 1978 contract.⁵³

16. PSE&G argues that fairness requires ConEd to pay both congestion costs and facilities costs like other PJM customers with grandfathered contracts.

17. Moreover, according to PSE&G, the presiding judge misconstrued the cited section III.B of the 1978 contract when finding that PSE&G had assumed the financial risk that congestion on the transmission system might interfere with ConEd's wheeling service or increase the cost of redeliveries to ConEd and therefore that PSE&G must pay any congestion charges associated with the 600 MW wheel. PSE&G states that the presiding judge's construction would make sense only if PSE&G's obligation to "plan," as stated in section III.B, means to plan the system in such a way as never to have

⁵¹ *Id.* at 21.

⁵² Section III.B. of the 1978 contract, Exh. CE-9 at 10.

⁵³ Phase II Initial Decision at P 49 (*citing* section III.B. of the 1978 contract).

congestion, an interpretation that is inconsistent with the general meaning of the term “plan” in the energy industry.⁵⁴

18. PSE&G continues that, even if section III.B of the 1978 contract obligated PSE&G to upgrade its transmission system to eliminate all congestion, it does not follow that the contract language obligates PSE&G to bear all transmission costs. Section II.B. of the 1978 contract obligates ConEd to pay monthly charges for additions that all parties agree PSE&G must make to its system to provide service.⁵⁵ Since ConEd would be obligated to pay for any upgrades that PSE&G installs to eliminate congestion, per the contract, ConEd should be required to pay also for congestion costs that the upgrades would eliminate.⁵⁶

2. Commission Response

19. We begin with what the Commission said in the Phase I Opinion. The Commission observed, “[T]he need for efficient economic incentives and the equitable principle of cost recovery following cost causation would indicate that ConEd should pay any resulting costs of redispatch. However, this would appear to be contrary to the existing practice on PJM’s system. The Commission would like the record further developed on this issue before it makes a final decision concerning the recovery redispatch costs for both the 600 MW contract and for a ‘firmed-up’ 400 MW contract. . . . In particular, the Commission would like the record further developed concerning [certain] issues concerning grandfathered contracts.”⁵⁷ Thus, we find that the Commission did not decide, in Phase I, who pays redispatch costs. Rather, the Commission indicated the direction of its inquiry but left the final determination for Phase II. There, the presiding judge examined other grandfathered contracts. He

⁵⁴ PSE&G Rehearing Request at 22-23.

⁵⁵ Section II.B. of the 1978 contract states, “When all of the [PSE&G] facilities defined . . . above have been completed and are in commercial service, and continuing for a period of 30 years thereafter, [ConEd] will pay [PSE&G] monthly charges on the plant investment in the [PSE&G] facilities defined . . . above. This plant investment will include capital expended as of the service date, plus subsequent additions approved by both parties. . . .” Exh. CE-9 at 7.

⁵⁶ PSE&G Rehearing Request at 21-22.

⁵⁷ Phase I Initial Decision at P 39.

distinguished these contracts from ConEd's grandfathered contract and decided the question based on the terms of the 1978 contract.⁵⁸

20. We will not grant rehearing of the Commission's determination, in the Phase II Opinion, that ConEd cannot be required to pay congestion costs or redispatch costs under the 1978 contract, and that PSE&G took upon itself the risk of congestion increasing its costs to wheel the power to ConEd.⁵⁹ We find that while other grandfathered contracts are instructive, they do not determine the matter for these unique contracts. Section III.B of the 1978 contract clearly places on PSE&G the obligation to manage its transmission system so as to meet its own load, and its obligations to PJM and to ConEd.

21. In the complaint that began these proceedings, ConEd states that, as required by section II of the 1978 contract, it pays monthly carrying charges and maintenance charges (1.5 percent initially, 3.4 percent in 2001) to PSE&G for the latter's investment in facilities constructed under that contract. ConEd states that, as required by the contract, it also pays an annual 15 percent carrying charge on a capital basis of \$57,000,000 for its use of other PSE&G transmission facilities to deliver the 600 MW.⁶⁰ We find that these payments demonstrate that PSE&G has been compensated for the cost of acquiring firm transmission rights (FTRs) or taking any other steps that may be necessary to hedge the cost of congestion under the 1978 contract. It would be unfair to require ConEd to pay again for the same service. The fact that ConEd's payments under both the 1975 and the 1977 contracts may be substantially less than the charges that ConEd would have to pay for equivalent service under the PJM OATT, or that ConEd might schedule the contract wheel differently for efficiency reasons if it paid congestion costs under the 600 MW contract, is not germane to understanding what the parties agreed to when they executed these contracts. As the Supreme Court has held, "a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."⁶¹

⁵⁸ Phase II Initial Decision at P 48-49. We note, in this regard, the presiding judge's earlier finding that the two contracts are *sui generis* and that they mean what they say. Phase I Initial Decision at P 53.

⁵⁹ Phase II Opinion at P 127-128.

⁶⁰ ConEd's November 19, 2001 complaint at 12; sections II.A.-E. & G. of the 1978 contract.

⁶¹ *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

B. Comparison of Alternative Supply Arrangements

1. Background

22. In the Phase I Opinion, the Commission held that PJM must redispatch generation and operate off-cost to support service under the 600 MW contract if that is the most economical alternative compared to other options available to ConEd.⁶² The Commission stated that ConEd has the option of “firming up” service under the 400 MW contract.⁶³ However, the Commission left to Phase II the final decision on recovering redispatch costs under the 600 MW contract and a firmed-up 400 MW contract.⁶⁴

23. In the Phase II Initial Decision, the presiding judge found that the Comparison-of-Alternatives methodology proposed by NYISO was the soundest way to determine whether redispatch is warranted and to implement the Commission’s compared alternatives test. He described the methodology thus: when the RTOs find it necessary to redispatch, they compare their internal redispatch costs relevant to flows under the 1975 and 1978 contracts. This would be the difference between the LMPs at the Ramapo substation and either the Goethals or Farragut substation. The RTO with the lower redispatch cost would support the contract flows by redispatching its system to the point where the redispatch costs of both RTOs are the same.⁶⁵ The Phase II Opinion affirmed the presiding judge’s finding that PSE&G must bear these costs and also his adoption of the Comparison-of-Alternatives methodology proffered by NYISO to determine these costs.⁶⁶

2. ConEd’s Argument

24. ConEd denies the implication in the Phase II Opinion that because ConEd does not pay congestion costs or redispatch costs under the 600 MW contract, it should be indifferent to how the alternatives available to it are compared.⁶⁷ The adopted Comparison-of-Alternatives methodology means that whenever congestion costs in PJM

⁶² Phase I Opinion at P 33.

⁶³ *Id.* at P 39.

⁶⁴ *Id.* at P 33.

⁶⁵ Phase II Initial Decision at P 50.

⁶⁶ Phase II Opinion at P 126.

⁶⁷ *Id.* at P 127.

exceed those over ConEd's Westchester facilities, PSE&G and PJM will be excused from providing service under the 600 MW contract via the A, B, and C Feeders; instead, the contract power will flow over the Westchester facilities. ConEd objects to this methodology because it causes ConEd to incur incremental congestion costs, it undermines reliability, and because delegation of this decision to NYISO violates the 1978 contract and improperly places NYISO in a merchant function.⁶⁸

25. ConEd objects that the Comparison-of-Alternatives methodology conflicts with the two contracts and with the Commission's reliance, in Phase I, on the 1984 Operating Procedures⁶⁹ to interpret the 600 MW contract. It points out that the 600 MW contract does not contain a compared alternatives provision. Although ConEd disputed, in Phase I, how the Commission used the 1984 Operating Procedures to interpret the two contracts, ConEd now asks the Commission, in view of the Commission's reliance on these procedures, to give effect to all their terms and conditions. ConEd emphasizes that the 1984 Operating Procedures place two limitations on when alternatives may be compared. The first is that there must be outages in PSE&G's northern area and another outage would result in unacceptable system conditions.⁷⁰ The second is that PSE&G's obligations are waived only when abnormal conditions have arisen and ConEd and PSE&G have agreed to a non-firm power sale between them.⁷¹ ConEd emphasizes that the 1984 Operating Procedures state that ConEd shall perform the comparison of alternatives.⁷²

26. ConEd objects to substitution of NYISO's judgment concerning alternatives available to ConEd. The RTOs are not capable of performing the comparison because they do not know the nature and cost of ConEd's supply alternatives, and performing

⁶⁸ ConEd Rehearing Request at 12-13.

⁶⁹ See note 16, *supra*.

⁷⁰ ConEd Rehearing Request at 14 (*citing* Exh. No. PS-138 at 3).

⁷¹ ConEd Rehearing Request at 14 (*citing* Con Edison November 16, 1984 System Operation Operating Directive on Con Edison – Public Service Electric and Gas Co. Wheeling Procedures, Exh. No. CE-36, also Exh. No. PS-139, at section 4, “Wheel Limitations.”)

⁷² ConEd Rehearing Request at 14 (*citing* Exh. No. PS-138 at 3, “Abnormal system conditions . . . Before implementing off-cost operation by PS[E&G] after curtailment of the original 400 Mw transfer, C[on]E[ed] will evaluate means within their system to provide necessary amount of additional transfer reduction. If the CE solution is more economical than the PS solution, and a mutually agreeable power transaction can be arranged between CE and PS, then such will be implemented.”).

the comparison involves them in a merchant function at odds with their independent status. ConEd criticizes the Comparison-of Alternatives methodology as conflicting with the 600 MW contract and the 1984 Operating Procedures because the methodology would curtail service without regard to facility outages and because it ignores the 1984 Operating Procedures' limitations regarding abnormal conditions and a substitute sale arrangement.⁷³

27. ConEd continues that implementation of compared alternatives should replicate past practice under the 1984 Operating Procedures. It states that use of the Comparison-of-Alternatives methodology will increase the frequency of comparing alternatives far more often than has occurred historically. It states that PSE&G and PJM did not redispatch to fulfill the 600 MW contract in the ten years before 2004 and thus would not have employed the Comparison-of-Alternatives methodology. Additionally, given the construction of transmission and generation facilities on PSE&G's system that has occurred, the need to compare alternatives, based on the 1984 Operating Procedures, should be even less frequent in the future. ConEd objects that use of the Comparison-of-Alternatives methodology will cause resort to alternatives far more than would have been the case historically because the methodology relies on the cost of congestion, often caused by circumstances outside of PSE&G's northern zone, rather than on the effects of bulk power facility outages in that zone, as required by the contracts and the 1984 Operating Procedures.⁷⁴ The Comparison-of Alternatives methodology thus frustrates the parties' intent in entering into the contracts and deviates from their past practices under the 1984 Operating Procedures.⁷⁵

28. ConEd makes three further arguments that the Comparison-of-Alternatives methodology is unjust and unreasonable.⁷⁶ First, by decreasing deliveries over the A, B, and C Feeders and increasing flows over the Westchester facilities, the Comparison-of-Alternatives methodology undermines reliability by reducing the flexibility available to ConEd to operate its system. Additionally, it frustrates ConEd's ability to relieve congestion on the Dunwoodie Interface, a principal purpose for ConEd entering into the two contracts.

⁷³ ConEd Rehearing Request at 14.

⁷⁴ ConEd estimates that 63 percent of the time when the NYISO methodology would have required consideration of alternatives, there were no constraints on PSE&G's northern zone transmission facilities used to serve ConEd.

⁷⁵ ConEd Rehearing Request at 15.

⁷⁶ *Id.* at 16-17.

29. Second, the Comparison-of-Alternatives methodology fails to minimize the cost of service under the 600 MW contract because it compares congestion prices instead of delivered energy costs. A proper comparison of costs would go beyond comparing marginal congestion prices in PJM and New York but would also consider conditions on the two systems and the size of the loads affected by the price increase. When the New York or PJM supply curves are steep, small increases in demand can result in large increases in cost. The comparison of options available to ConEd should not permit a small difference in marginal prices to result in a disproportionate aggregate cost increase.

30. Third, by requiring ConEd to resort to other supply options, the Comparison of Alternatives methodology reduces PSE&G's cost of service and the market price in the PJM market without compensating ConEd. This benefit is analogous to the benefit provided under demand side management plans and under the Interregional Transmission Pilot Program that PJM and NYISO have undertaken to relieve congestion.⁷⁷ ConEd argues that because it funded construction of PSE&G's facilities, it must share in the savings that PSE&G and PJM realize from ConEd's reliance on alternative supply arrangements. It asks for compensation that exceeds the value loss to it caused by adoption of the Comparison-of-Alternatives methodology, and at least the 600 MW contract's already-paid \$750 million carrying charges and the approximately \$15 million yearly payment.

2. PSE&G's Argument

31. PSE&G asks us, should we affirm the Phase II Opinion's finding that PSE&G is financially responsible for congestion costs under the 600 MW contract, to clarify that the Comparison-of-Alternatives methodology takes into account the hedging opportunities available to PSE&G so that the methodology compares the total costs of dispatch in NYISO and PJM. PSE&G argues that if it accepted the risk of redispatch costs when entering into the 600 MW contract, then the correct measurement of the redispatch costs must be the level of such costs to it. Accordingly, the compared alternatives analysis must consider the FTRs or other hedging options that PSE&G receives from PJM.

⁷⁷ See *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,252 (2001) and *New York Independent System Operator, Inc.*, 97 FERC ¶ 61,308 (2001). These reciprocal pilot programs enable each RTO, under emergency conditions, to call upon generation in the other region to be redispatched.

32. PSE&G urges that it should not pay for redispatch costs unless the hedged redispatch costs in PJM exceed the unhedged redispatch costs in NYISO. Otherwise, the Comparison-of-Alternatives methodology could, unintentionally, impose higher costs rather than lower costs on the responsible party. The 1984 Operating Procedures, the source of the Comparison-of-Alternatives methodology, have as their intent to provide PSE&G with the lowest cost option. Redispatch in New York is utilized only if PSE&G and ConEd enter into a “mutually agreeable power transaction.” New York redispatch must provide the lowest cost alternative from PSE&G’s standpoint; otherwise, PSE&G would not enter into an arrangement that must be “mutually agreeable.” Comparing the total costs of dispatch in NYISO and PJM without regard to hedging opportunities leads to the absurd result that PSE&G agreed to pay for a more expensive option when a cheaper option was available to it.⁷⁸

3. Commission Response

33. We agree with ConEd that the Comparison-of-Alternatives methodology can result in redeliveries of contract power amounts over lines other than the A, B, and C Feeders, a different transmission path from that described in the two contracts.⁷⁹ We acknowledge that use of the Comparison-of-Alternatives methodology can result in higher total costs to ConEd than if the transmission paths of the two contracts were strictly adhered to. We have no reason to dispute ConEd’s recitation of the historical practice under the 1984 Operating Procedures or its description of how the Comparison-of-Alternatives methodology can benefit PSE&G and PJM.

34. However, in the Phase II hearing, as described above, the presiding judge nevertheless found that the Comparison-of-Alternatives methodology proposed by NYISO was the best way to implement the Commission’s compared alternatives requirement. Under this methodology, when the RTOs need to redispatch, they compare their internal redispatch costs relevant to flows under the 1975 and 1978 contracts; this is the difference between the LMPs at the Ramapo substation and either the Goethals or Farragut substations. The RTO with the lower redispatch cost supports the contract flows by redispatching its system until the redispatched costs of both RTOs are the same.⁸⁰ In the Phase II Opinion, the Commission affirmed the presiding judge’s

⁷⁸ PSE&G Rehearing Request at 24-25.

⁷⁹ When the two contracts were executed, ConEd and PSE&G had full responsibility for their own transmission lines. Today, PJM and NYISO have “stepped into the shoes of PSE&G and ConEd and have assumed responsibility for the contract redeliveries.” Phase II Opinion at P 59.

⁸⁰ Phase II Initial Decision at P 50.

finding that PSE&G must bear these costs and his adoption of the Comparison-of-Alternatives methodology proposed by NYISO as the best way of impartially comparing redispatch costs.⁸¹ ConEd's request for rehearing does not persuade us to change this ruling.

35. We decline to disturb the Phase II Opinion's adoption of the Comparison-of-Alternatives methodology. We find that the Commission acted correctly when, in the Phase II Opinion, it endorsed the presiding judge's adoption of NYISO's Comparison-of-Alternatives methodology.⁸²

36. We have examined Exhibit CE-139, on which ConEd relies to argue that for NYISO and PJM to compare alternatives involves the RTOs in a merchant function at odds with their independent status. The exhibit states, "Interposing the ISOs into the decision of whether, or under what financial terms, Con Edison should nominate less than its contractual maximum flows would also place the ISOs into a commercial role that is antithetical to their independent status."⁸³ Under the Comparison-of Alternatives methodology, the RTOs do not require ConEd to nominate a lesser amount than the contract total of 1,000 MW. Their role is to determine their internal redispatch costs at times when redispatch is necessary to support contract flows. The RTOs do not decide what amount ConEd should nominate.

37. We will deny the clarification requested by PSE&G, that the Comparison-of Alternatives methodology must take into account the FTRs or other hedging options that PSE&G receives from PJM. PSE&G is presenting here a new argument that it did not raise on exceptions to the Phase II Initial Decision. PSE&G referred to FTRs only when excepting to being assigned congestion costs under the 600 MW contract. It argued that if these congestion costs were not assigned to ConEd, the costs should be allocated in accordance with the rules of the PJM LMP-based energy market and recovered from participants in that market in the normal course.⁸⁴ It said that if congestion costs are assigned to it, it should be entitled to a daily allocation of FTRs equal to ConEd's day-ahead schedule to hedge its exposure to these costs.⁸⁵ PSE&G raised the subject of Comparison-of-Alternatives methodology only when opposing ConEd's exceptions to

⁸¹ Phase II Opinion at P 126.

⁸² We discuss ConEd's arguments concerning reliability of power supply to New York City in section G, "Reliability of New York City's Power Supply," *infra*.

⁸³ Rebuttal Remand Testimony of Robert B. Stoddard, Exh. CE-139, at 19.

⁸⁴ PSE&G Brief on Exceptions at 16.

⁸⁵ *Id.* at 17.

NYISO's proffered methodology. PSE&G stated that the methodology fully comports with the contracts and the 1984 Operating Procedures, and that the methodology is just and reasonable.⁸⁶

38. Under Rule 711(d)(2)-(3) of the Commission's Rules of Practice and Procedure,⁸⁷ a participant who has not objected to a part of an initial decision in a brief on exceptions has waived objections to that part of the initial decision, and may not raise such objections before the Commission on rehearing. Additionally, the Commission looks with disfavor on parties raising on rehearing issues that should have been raised earlier, and will normally not permit them. This is partly because Rule 713(d) of the Commission's Rules of Practice and Procedure⁸⁸ prohibits answers to requests for rehearing. Thus, the other parties to this proceeding are precluded from responding to PSE&G's requested clarification and offering other interpretations.⁸⁹

39. Moreover, PSE&G has not convinced us that NYISO, PJM, ConEd, the presiding judge, the Commission, or even PSE&G itself contemplated the inclusion of such hedging opportunities when considering the Comparison-of-Alternatives methodology proposed by NYISO during the Phase II hearing. The paragraphs of the Operating Protocol that discuss congestion, paragraphs 14-15 and 20-21, are similarly silent. We note that paragraph 1.5 of Appendix 1 provides for periodic review of the Operating Protocol to determine if modifications are needed. PSE&G may wish to follow this approach to change the Operating Protocol's implementation of the Comparison-of-Alternatives methodology.

⁸⁶ PSE&G Brief Opposing Exceptions at 30-36.

⁸⁷ 18 C.F.R. §§ 385.711(d)(2)-(3) (2006).

⁸⁸ 18 C.F.R. § 385.723(d) (2006).

⁸⁹ See *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270, at 61,922 & nn. 8&9 (2000); *Baltimore Gas & Electric Co.*, 92 FERC ¶ 61,043, at 61,114 (2000). See also *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,241, at P 8 & n.8 (2006); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,032, at P 6 & n.10 (2006); *Northeast Utilities Service Co. and Select Energy, Inc. v. New England, Inc. and New England Power Pool*, 109 FERC ¶ 61,204, at P 18 (2004).

C. Third Party Flows on the Feeders

1. ConEd's Argument

40. ConEd cites the Commission's finding, in the Phase II Opinion, that third-party transactions 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.⁹⁰ It objects that the Commission did not adopt two conditions pertaining to counterflow transactions flowing out of New York City over the feeders into PJM, and states that these conditions are necessary corollaries to the Commission's requirement of open access transmission service over the feeders. The first condition, pending imposition of the second, is that counterflows be offset by other third-party transactions flowing from PJM into New York City so that the net physical flows into New York City over the A, B, and C Feeders are no less than the contract amounts (minimum flow condition).

41. The second condition is that NYISO and PJM create additional proxy busses⁹¹ to price power transfers between them, beyond each RTO's existing single proxy bus. ConEd seeks to eliminate what it describes as an artificial economic barrier to transactions flowing from PJM into New York and a subsidy for counterflows.⁹² It acknowledges that this complaint proceeding is not the proceeding in which to address

⁹⁰ Phase II Opinion at P 85. *See also* Phase I Opinion at P 65 (PJM may add or subtract other circulating flows to determine whether desired flow has occurred).

⁹¹ A proxy bus is a hypothetical generator bus based on a composite of generators and used to calculate locational based marginal prices.

⁹² ConEd describes the proxy bus issue in its Rehearing Request at 10-12 thus: Currently, the RTOs price all transactions between NYISO and PJM as flowing between a single node in upstate New York, which is west of the Central East Interface, and a single node in western Pennsylvania. If the transaction sink is east of the interface, as is New York City, then NYISO assesses charges for congestion regardless of whether the power actually flows through the interface. If the transaction source is east of the interface, then NYISO extends congestion credits regardless of actual flow path. Most actual power flows between New Jersey and New York City flow over the A, B, and C Feeders, not through the interface. Thus, counterflows into New Jersey over the feeders are subsidized while otherwise economic flows into New York City over the feeders are burdened with congestion charges. Establishing additional, thoughtfully-designed proxy busses would eliminate the existing incorrect price signals so that market participants could schedule flows from PJM into New York City without incurring unwarranted congestion charges.

the proxy bus issue. It asks the Commission to adopt the minimum flow condition until the proxy bus issue is resolved.⁹³

42. ConEd continues that the B and C Feeders were constructed specifically to accommodate power flows from New Jersey into New York City and to provide the geographic diversification needed for reliability of the city's electric power system. It cites NYISO's concurrence that such diversity provides reliability benefits.⁹⁴ To the extent that counterflows offset physical deliveries into New York City, ConEd argues that they frustrate the reliability concerns that led to the alternative transmission path.⁹⁵ Because counterflows reduce the physical flow of energy into New York City, they cause increasing reliance on the already inadequate supply of in-city generation to clear contingency overload conditions.

43. ConEd cites a reliability study that used the Multi-Area Reliability Simulation (MARS) program to study congestion on the Westchester facilities caused by counterflows. This study concluded that counterflows representing less than five percent of the New York City load pocket's peak load cause a very significant decline in reliability. It cites April 18, 2002, as a day when scheduled sales from New York into PJM created large counterflows over the A, B, and C Feeders that physically offset contract deliveries into New York City and nearly caused ConEd to shed load. Thus, ConEd argues, counterflows are not only an economic issue but a reliability issue also.⁹⁶ Therefore, until the RTOs establish additional proxy busses, it asks the Commission to impose the minimum flow condition and require that net flows into New York City, over the A, B, and C Feeders, equal the contract amounts.

2. Commission Response

44. We will not require that net physical flows into New York City over the A, B, and C Feeders equal the amount nominated by ConEd each day (the minimum flow condition). To do so would remove flexibility from NYISO's and PJM's management of the contract deliveries and would reduce the RTOs' abilities to manage the totality of flows between them. We agree with PJM's statement that attempting to restrict flows on the A, B, C, J, and K lines would reduce the available transmission capacity for open access transactions between PJM and New York. We note PJM's description of the events of April 18, 2002: NYISO, with full tariff authority over the transmission

⁹³ ConEd Rehearing Request at 6.

⁹⁴ *Id.* at 8, *citing* Exh. NYISO-3 at 4.

⁹⁵ ConEd Rehearing Request at 7-8.

⁹⁶ *Id.* at 8-10.

transactions from New York to PJM that cause counterflows, curtailed or interrupted these third-party transactions to relieve the constraint; and PJM responded as soon as NYISO requested assistance.⁹⁷ We conclude that NYISO and PJM can and will uphold open access to the transmission lines under their control while still providing ConEd with the power to which the contracts entitle it and safeguarding the reliability of the New York City power supply.

45. We take note of the November 21, 2006 discussion draft Proposal for Improved PJM Proxy Bus Scheduling and Pricing prepared for the Scheduling and Pricing Working Group of NYISO's Business Issues Committee.⁹⁸ The document refers to the Operating Protocol and offers a proposed improvement in proxy bus pricing for stakeholders' consideration. We encourage the RTOs to work swiftly towards this goal which, presumably, would alleviate some of the counterflows to which ConEd objects as reducing contract redeliveries through the A, B, and C Feeders.

D. A Feeder Limitation/Distribution of Flows

1. Background

46. Under the heading, "Distribution of Service Among the A, B, and C, Feeders," the Phase II Opinion affirmed the presiding judge's conclusion that service over the A Feeder should not be limited to 200 MW, as ConEd had requested, but that redeliveries under the two contracts should be distributed over the A, B, and C Feeders so as to maximize the economic efficiency and reliable delivery of this power and of systems operations.⁹⁹ Under an earlier heading, "Impairment by ConEd," the Phase II Opinion disagreed with the presiding judge's finding that PSE&G has a preferential right to use all of the A Feeder's capacity.¹⁰⁰ Rather, the Commission concluded that the two contracts merely specified which tielines should be used for redeliveries, and did not reserve capacity over the A Feeder for as much of the transfer as PSE&G, in its sole discretion, chooses to flow. The Commission stated that it

⁹⁷ PJM's July 31, 2003 Brief Opposing Exceptions at 11, 13.

⁹⁸ This document is on NYISO's internet site.
www.nyiso.com/public/webdocs/committees/bic_spwg/meeting_materials/2006-11-21/SPWG_MSWG_PJM_Proxy_Bus_112106.pdf - Text Version

⁹⁹ Phase II Opinion at P 159.

¹⁰⁰ *Id.* at P 57.

expected PJM and NYISO to cooperate when scheduling contract service to maximize the amount of power, contract or otherwise, that can be flowed into New York City over the three feeders.¹⁰¹

2. ConEd's Argument

47. On rehearing, ConEd offers to waive its claim that, under the contracts, no more than 20 percent of the power redelivery may be delivered over the A Feeder, if the Commission clarifies that its conclusion when discussing impairment, *i.e.*, that PSE&G does not have a preferential right to the A Feeder's capacity or sole discretion regarding the portion of the contractual transfer that is delivered over the A Feeder, applies to how redelivery flows are to be distributed among the three feeders. ConEd states that its offer to waive its claim depends on a commitment by PJM to be sensitive to the needs of New York City and to work cooperatively with NYISO.¹⁰²

3. Commission Response

48. We clarify that the Commission's conclusion when discussing impairment, that PSE&G does not have a preferential right to the A Feeder's capacity for redelivery of contract power, applies also to how contract redeliveries are to be distributed among the three feeders. We note that the Operating Protocol requires:

The initial estimate of individual line flow distribution for the ABC/JK interfaces shall be based on an equal flow assumption among the lines comprising the interface. . . . Further, the ISOs shall adjust (from [Real Time Market Desired Flow]) the flow distributions for ABC (move flow from the A line to the B and C lines) upon the NYISO's request, provided that the adjustment shall not exceed 125 MW if PJM is off-cost or expected to be off-cost.¹⁰³

These provisions demonstrate both RTOs' intent to use all three feeders to redeliver contract power to New York City without reservation of the A Feeder's capacity.

¹⁰¹ *Id.* at P 58-59.

¹⁰² ConEd Rehearing Request at 21.

¹⁰³ February 18, 2005 joint filing by NYISO, PJM, and PSE&G at Appendix 7, "Distribution of Flows Associated with Implementation of Day-Ahead and Real Time Market Desired Flows," NYISO Attachment M-1 at Original Sheet No. 530, PJM Rate Schedule No. 41 at Original Sheet No. 22.

E. Use of Transmission Lines

1. Arguments

49. ConEd and PSE&G each objects, although for different reasons, to the Operating Protocol allowing NYISO and PJM to use transmission lines other than tielines specified in the two contracts or to use these tielines in other than the specified manner to satisfy the two contracts' redelivery obligations.

50. ConEd objects that the Operating Protocol's Comparison-of-Alternatives methodology, applicable to redeliveries under the 600 MW contract, transfers redeliveries from the A, B, and C Feeders to ConEd's already constrained Westchester transmission facilities. It reminds the Commission that reducing loading on its Westchester system by constructing geographically diversified transmission capacity for deliveries into New York City was the reason why it entered into the two contracts. ConEd asks the Commission to give effect to the original purpose of the two contracts and to require use of only the feeder lines for contract redeliveries.¹⁰⁴

51. PSE&G is concerned that P 64 of the Phase II Opinion¹⁰⁵ entitles ConEd to deliver power to PSE&G at points other than the J and K Lines while still obligating PSE&G to redeliver the contract power at the A, B, and C Feeders. PSE&G gives the example of ConEd claiming entitlement to schedule power to PSE&G from the service territory of American Electric Power Company, in Ohio. This, PSE&G fears, would reduce the available transmission capacity used by other entities for west-to-east flows across PJM and enable ConEd to displace other transmission customers currently receiving service without complying with PJM OATT requirements. PSE&G asks the Commission to require flows under the two contracts to use the facilities designated in the contracts.¹⁰⁶

¹⁰⁴ ConEd Rehearing Request at 3.

¹⁰⁵ Under the heading, "Scheduling Service and Desired Flow Calculations," P 64 states, in part:

We emphasize that we do not affirm the concept that the ISOs' joint obligation in transferring the contract power is necessarily limited to specific transmission lines. While all parties anticipate that the power will enter by the J and K Lines and exit by the A, B and C Feeders, the obligation that we impose on the two ISOs is simply to transfer the contract power, together with all the other power flows that they must transmit, and to maximize total transmission.

¹⁰⁶ PSE&G Rehearing Request at 5, 8-9.

2. Commission Response

52. In the Phase II Opinion, the Commission found that the RTOs are obliged to transfer contract power together with the transfer of other power flows.¹⁰⁷ This finding was based on the presiding judge's detailed analysis of the record;¹⁰⁸ he found that service under the two contracts should be part of the scheduled transmission services that PJM and NYISO now provide, and that the four parties should develop and implement a desired flow calculation.¹⁰⁹ The presiding judge also noted that both RTOs agree on transmission distribution factors to estimate how much of the flows on the line result from loop flow and third party transactions and how to calculate the resulting expected net flow. He found, and the Commission agreed in the Phase II Opinion, that the same methodology could be used here. The requests for rehearing do not persuade us to change the Commission's finding on this issue and to require use of contract tielines solely;¹¹⁰ limiting deliveries to only the A, B, and C Feeders when PSE&G and PJM must redispatch to support contract redeliveries would prevent fulfilling the contracts by the most economical alternative, the requirement imposed by the Commission in Phase I.¹¹¹

53. Were we to grant PSE&G's request, and require that only the facilities designated in the contracts be used for contract flows, this would reduce the options available to ConEd at times when PJM faces redispatch in order to fulfill the contract redeliveries. It would prevent flows over ConEd's Westchester facilities from substituting for contract redeliveries over the A, B, and C Feeders. PSE&G would have to redispatch generation under the 600 MW contract and a firm-up 400 MW contract. We find that the term "contract power," which describes power to be wheeled from upstate New York through New Jersey to New York City, could not be reasonably interpreted to include power from a source in Ohio. We clarify that ConEd is to deliver power to PSE&G for contract redelivery, under the Operating Protocol, at the interconnection designated in the two contracts.¹¹²

¹⁰⁷ Phase II Opinion at P 64.

¹⁰⁸ Phase II Initial Decision at P 33-34.

¹⁰⁹ *Id.* citing Exh. PJM-3 at 20.

¹¹⁰ *See* note 79, *supra*.

¹¹¹ *See* Phase I Opinion at P 33; *see also* Phase II Initial Decision at P 46.

¹¹² *See* section 4.1 of the 1975 contract, "PS[E&G] agrees to transfer up to 400 megawatts of power from Ramapo to Farragut"; section III.B of the 1978 contract, "PS[E&G] will transfer a maximum of 600 mw . . . from Ramapo to Farragut."

F. Scheduling Service under the 400 MW Contract

1. PSE&G's Argument

54. PSE&G refers to the Commission's affirmation, in the Phase II Opinion, of the presiding judge's recommendation that PJM create a separate category in its OATT for service under the 400 MW contract. It refers also to the Commission's determination that service under this contract has higher priority than service to non-firm customers who agree to pay congestion costs.¹¹³ It cites the Commission's denial of PJM's requested clarification, that customers with non-firm service but who nevertheless pay redispatch costs would have priority over ConEd's entitlement under the 400 MW contract. The Commission reasoned that this would reduce the firm service under the 400 MW contract to non-firm.¹¹⁴

55. PSE&G requests clarification that the Commission intends service under the 400 MW contract to have priority over customers with non-firm service who pay redispatch costs only when ConEd elects to be responsible for any redispatch costs occurring in real time and when it schedules the service in the day-ahead set-up. Alternatively, PSE&G asks the Commission to so order on rehearing.

2. Commission Response

56. We will grant the requested clarification. As a condition for higher priority, ConEd must elect to firm-up the 400 MW service. This is consistent with the Commission's statements, at P 138 of the Phase II Opinion, affirming the presiding judge's finding that for ConEd to "firm up" service under the 400 MW contract it need pay only the incremental cost of redispatch to avoid curtailment, and that PJM's requested clarification would have reduced the firm service to non-firm service. We clarify also that firmed-up service under the 400 MW contract must be scheduled in the day-ahead set-up. The presiding judge stated that all of the interested parties have supported the scheduling of service under the 1975 and 1978 contracts as part of the two RTOs' day-ahead schedules. He opined that this is a sound decision,¹¹⁵ and we concur.

¹¹³ Phase II Opinion at P 138; Phase II Initial Decision at P 52.

¹¹⁴ Phase II Opinion at P 138.

¹¹⁵ Phase II Initial Decision at P 53.

G. Reliability of New York City's Power Supply

1. ConEd's Argument

57. ConEd argues that the Commission failed to give proper weight to reliability in its decisions on future implementation of the contracts, especially the decision permitting third party flows out of New York City over the A, B, and C Feeders and the decision to adopt the Comparison-of Alternatives methodology proposed by NYISO. ConEd points out that New York City, which has a deficit of in-city generation, depends on power from outside-the-city generation. This power is delivered over two major transmission pathways – from the north, through ConEd's facilities in Westchester County, and from the west, through New Jersey. ConEd's major reason for entering into the two contracts was to reduce loading on its Westchester facilities. The 600 MW contract was an alternative to ConEd constructing a direct current (DC) transmission line from Ramapo to the New York City load pocket. The reliability of New York City's electric system is protected by reducing loading and constraint on the Westchester facilities.

58. ConEd maintains that the Phase II Opinion mistakenly found that ConEd's concern is really an economic concern rather than a reliability concern.¹¹⁶ It argues that failure to impose the minimum flow condition means that, despite NYISO's and PJM's best efforts, counterflows will continue to jeopardize reliability in New York City. The RTOs will not respond to a seams issue (the proxy bus issue) that continuously distorts the functioning of the market. ConEd faults the Commission for not requiring a reliability impact consideration, as described in the U.S.-Canada Power System Outage Task Force's report, "Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations" (Blackout Report), before making its findings.¹¹⁷

59. ConEd asks us to find that reliability is the primary purpose of the two contracts, which therefore must be interpreted in this light. Without this finding, NYISO, which has direct responsibility for reliability in New York City, will be hindered in protecting

¹¹⁶ See Phase II Opinion at P 85.

¹¹⁷ ConEd Rehearing Request at 3-4. One of the Blackout Reports' recommendations is that FERC, state regulators, and Canadian authorities "integrate a formal reliability impact consideration into their regulatory decision-making to ensure that their actions or initiatives either improve or at minimum do no harm to reliability." Blackout Report at 147. The Commission denied ConEd's motion for a reliability impact consideration in this proceeding. Phase II Opinion at P 29-30.

reliability when implementing service under the contracts because it would first have to rebut an effective presumption that there is no harm to reliability.¹¹⁸

2. Commission Response

60. We will deny ConEd's request that we determine reliability to be the primary purpose of the two contracts to which other considerations must be subordinated. We begin with understanding the reliability that is to be protected. The Energy Policy Act of 2005 defines "reliable operation" to mean "operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements."¹¹⁹

61. While reliability was one of the fundamental purposes of the two contracts, economic considerations were more important when ConEd and PSE&G executed the 600 MW Contract. ConEd and PSE&G's December 1975 joint report that compared a high-voltage DC transmission tie between Ramapo Station and New York City against an integrated PSE&G-ConEd alternating current (AC) plan concluded that ConEd's requirements could be more economically accomplished by adopting the AC plan rather than the DC plan.¹²⁰ We find that ConEd's concern over of reliability is less about system failure and more about reducing total costs to ConEd by always having an electric power delivery of 1,000 MW into New York City over the A, B, and C Feeders, leaving the available capacity of its Westchester facilities for other power deliveries.

62. As ConEd itself acknowledges, NYISO and PJM are responsible for reliability concerns.¹²¹ The Operating Protocol provides, at section 20, concerning redirection of flows when there is in-day congestion, that PJM and NYISO must verify that allowing actual aggregate interface flows to deviate from the real time market desired flows will not violate applicable PJM or NYISO reliability criteria.

¹¹⁸ ConEd Rehearing Request at 4.

¹¹⁹ Section 1211 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 941 (2005), section 215(a)(4) of the FPA, 16 U.S.C.A. § 824o(a)(4) (West Supp. 2006).

¹²⁰ "A Comparison of AC and DC Transmission Plans for Delivering Power From Ramapo to New York City in the 1980-1985 Period," December 1975 (1975 Joint Report), Exh. CE-8, at 1-2.

¹²¹ ConEd Rehearing Request at 3.

63. NYISO has primary responsibility for ensuring reliability for New York City. NYISO has not informed the Commission that the findings in the Phase II Opinion hinder its performance of its reliability obligations. Rather, NYISO has stated that its installed capacity system focuses on ensuring sufficient capacity to preserve long-term reliability in specific locations known to be vulnerable to capacity deficiencies, such as New York City. NYISO stated also that its use of an LMP-based market design provides it with accurate pricing information that enables redispatch of the system while accounting for transmission constraints.¹²² Furthermore, NYISO disputes that congestion, which it considers largely an economic issue, necessarily threatens reliability.¹²³

64. We examine last the recommendations of the Blackout Report. The Blackout Report qualifies, with the phrase “where appropriate,” its recommendation that regulators incorporate reliability impact considerations into their decision-making process. It also cautions against claims of reliability as a smokescreen.¹²⁴ We do not denigrate ConEd’s goal, that New York City have constant, assured delivery of electric power, but we also do not consider all actions or all contracts for transmission of power to the city to be governed primarily by reliability concerns. Thus, we continue to find performance of a reliability impact consideration, as discussed by the Blackout Report, unnecessary in this proceeding.

H. Impairment

1. Background

65. The impairments issue originated when PSE&G answered ConEd’s complaint that PSE&G had curtailed contract redeliveries by stating that ConEd’s own actions had impaired PSE&G’s ability to transfer power to New York City. PSE&G pointed out that ConEd received PSE&G contract redeliveries via the A Feeder at the Goethals, Staten Island, switching station for further redelivery to Farragut, in Brooklyn. It continued that ConEd was contractually obligated not to interconnect new generation or load that would impair transfer capabilities. Nevertheless, ConEd had attached power from its 600 MW Cogen Technologies generating plant to Goethals, and refused to consult with PSE&G over how the new connection would affect power transfers under the contracts. PSE&G stated further that ConEd purchased additional generation from Staten Island plants, for transmission from Goethals to Farragut, while failing to make

¹²² NYISO’s April 14, 2003 Initial Brief in Phase II at 7.

¹²³ NYISO’s July 11, 2003 Brief on Exceptions in Phase II at 8.

¹²⁴ Blackout Report at 147. *See* P 58, *supra*.

system upgrades that would increase the carrying capacity of the ConEd internal lines (Lines 25 and 26)¹²⁵ from Goethals to Farragut.¹²⁶

66. ConEd responded by saying that the 1978 contract requires PSE&G to use the B and C Feeders, not the A Feeder,¹²⁷ to redeliver up to 600 MW, and that the 1975 contract requires use of both the A and B Feeders to redeliver up to 400 MW. ConEd stated that its internal lines from Staten Island to Brooklyn are adequate to transmit correct contract redelivery amounts plus the Cogen Technologies power and additional Staten Island generation.

67. In the Phase I Opinion, the Commission stated, “[T]he parties must account for what appear to be impairments to deliveries to ConEd because of new generator interconnections on ConEd’s system.”¹²⁸ Citing a ConEd 2003 interconnection study that showed the necessity of reducing the wheel because of additional generation, the Commission stated that this and like impairments must be studied and accounted for in the operating protocols to be developed by the parties. Accordingly, the Commission directed the parties to list and describe all known and projected impairments.¹²⁹

68. On rehearing, the Commission clarified that the Phase I Opinion had not made a specific finding that ConEd had impaired PSE&G’s performance under the contracts, nor did it imply that PSE&G could reduce its service obligations. The Commission had simply noted record evidence that impairments exist and therefore directed that such impairments be studied, listed and described in the operating protocols. The purpose of this directive was to have the parties account for any operational circumstances or conditions that might affect the flows to ConEd when they developed the operating protocols, going forward, and not to approve a permanent reduction in PSE&G’s obligation.¹³⁰

¹²⁵ We accept ConEd’s correction of the Phase II Opinion’s description, at P 5, of the total capacity of Lines 25 and 26 to a book rating of 1,006 MW, which may be increased by another 30 to 60 MW by dynamic feeder rating equipment. *See*, ConEd Rehearing Request at 18 n.8.

¹²⁶ *See*, PSE&G’s January 22, 2002 Answer to Complaint at 16-19.

¹²⁷ Each of the A, B, and C Feeders has a rated capacity of approximately 500 MW.

¹²⁸ Phase I Opinion at P 70.

¹²⁹ *Id.*

¹³⁰ Phase I Rehearing Order at P 29.

69. In the Phase II Initial Decision, the presiding judge found that the two contracts give PSE&G the preferential right to use all of the A Feeder's capacity if it so chooses. Relying on this premise, the presiding judge then found that, although the combined capacity of the A, B, and C Feeders more than suffices for the maximum 1,000 MW wheel under the two contracts plus the Cogen Technologies generation, ConEd's attachment of the Cogen Technologies generation at Goethals displaced PSE&G's use of the A Feeder's capacity and is an impairment.¹³¹ The presiding judge concluded that some of PSE&G's curtailments of the contract power redeliveries were due to lack of sufficient transfer capability in the ConEd internal transmission facilities.¹³²

70. In the Phase II Opinion, the Commission reversed the presiding judge's finding that the two contracts give PSE&G the preferential right to use all the A Feeder's capacity. The Commission found instead that the two contracts specify which tielines (the J and K Lines and the A, B, and C Feeders) will be used for the power transfers.¹³³ Addressing the question of impairments, the Commission emphasized that it was concerned with the future, not with the past. The Phase I Rehearing Order had adequately addressed the impairment issue, had not made a specific finding that ConEd had impaired PSE&G's performance under the contracts, and did not imply that PSE&G's contractual service obligations could be reduced. The Commission's concern, in the Phase I Rehearing Order, was to have the parties identify impairments so that they could be remedied under the protocols and ConEd would receive the service to which the two contracts entitle it.¹³⁴ The Commission clarified, at NYISO's request, that "impairment" does not include market or other economic considerations, but is limited to the physical capability of transmission lines and to the effects of attachment on reliability criteria.¹³⁵

¹³¹ Phase II Initial Decision at P 27. The presiding judge observed that while indications are that ConEd's existing capacity on its internal tielines is adequate, a contingency that removed a tieline or reduced its capacity would leave ConEd with insufficient internal transmission capacity to handle full deliveries under the contracts. *Id.* at P 28.

¹³² *Id.* at P 30.

¹³³ Phase II Opinion at P 57.

¹³⁴ *Id.* at P 148.

¹³⁵ *Id.* at P 150.

2. ConEd's Arguments

71. On rehearing, ConEd again denies that it caused impairments. It expresses concern that the Commission will permit PSE&G to reduce the amounts nominated by ConEd for transfer because of supposed ConEd impairment or because ConEd does not always nominate the full 1,000 MW permitted by the two contracts.

72. ConEd points to conclusions in the Phase II Opinion that it considers inconsistent. It cites first the Commission's conclusion that PSE&G does not have a preferential right to use the A Feeder for redeliveries or sole discretion regarding the portion of the contract transfer that should be redelivered over the A Feeder, and that PJM may not reduce deliveries simply because the A Feeder is at capacity but must provide contract deliveries over the B and C Feeders.¹³⁶ It cites as inconsistent the Commission's earlier statement that, where PSE&G sought to use the A Feeder for redelivery of the contract power, and ConEd's use of its internal transmission lines displaced PSE&G's ability to use the A Feeder, ConEd impaired PSE&G's ability to provide service.¹³⁷

73. ConEd insists that it did not impair deliveries over the A Feeder in violation of the two contracts because the non-impairment provisions of both, section 5.3 of the 1975 Contract and section III.F of the 1978 Contract, do not apply to the A Feeder nor to ConEd's Lines 25 and 26. The non-impairment provisions, it continues, limit generator and load connections only to the B and C Feeders, between Farragut and the center of the Hudson River, and the associated terminal facilities at the Farragut Substation. The contracts impose no capacity maintenance requirement on ConEd's internal transmission facilities nor any restriction on ConEd's use of them.¹³⁸

74. ConEd maintains also that its nomination, from time to time, of a transfer level lower than 1,000 MW does not impair PSE&G's performance under the two contracts. The contracts are not "use-it-or-lose-it" contracts obligating ConEd to a particular level of service. PSE&G's continuing obligation is to transfer the quantity of energy that ConEd nominates.¹³⁹

¹³⁶ ConEd Rehearing Request at 18, *citing* Phase II Opinion at PP 57-58, 159.

¹³⁷ ConEd Rehearing Request at 18, *citing* Phase II Opinion at P 57.

¹³⁸ ConEd Rehearing Request at 19.

¹³⁹ *Id.* at 20.

3. PSE&G's Arguments

75. PSE&G states that both the Commission and the presiding judge recognized that ConEd violated contract provisions that prohibit ConEd (and PSE&G) from interconnecting new generation or load that would impair the functions of the interconnections between the two systems or cause a reduction in intra-pool or inter-pool transfer capabilities.¹⁴⁰ PSE&G objects that despite making this repeated finding, the Commission fails to specify any remedy for the harm that PSE&G has sustained and will continue to sustain.¹⁴¹ It says that the Phase II Opinion relied on two false premises. The first is that the Commission allegedly reads PSE&G's claims regarding impairment as claiming a preferential right to use all of the A Feeder's capacity. The second is the Commission's conclusion that impairments by ConEd could have been avoided had PSE&G and PJM been cooperative and routed the contract service, by PAR changes, over the B and C Feeders.¹⁴²

76. PSE&G states that ConEd's non-impairment obligation under the two contracts is a planning obligation. ConEd is obligated to plan and upgrade its system so as not to make redelivery of contract service more difficult than when the two utilities performed their 1975 Joint Report.¹⁴³ The Phase II Opinion erroneously assumes that PSE&G claims a reservation of specific capacity on the A Feeder to be withheld from other parties. The Joint Report indicated that redelivery flows would occur through use of PARs without increasing the likelihood that PSE&G would have to redispach off-cost generation.¹⁴⁴ PSE&G urges that ConEd must maintain its system today to provide the

¹⁴⁰ PSE&G cites Phase I Opinion at P 63; Phase I Initial Decision at P 27; Phase II Opinion at P 57; 1975 Contract at section 5.3; 1978 Contract at section III.F.

¹⁴¹ PSE&G Rehearing Request at 9-10.

¹⁴² *Id.* at 10-14.

¹⁴³ *See* note 120, *supra*. *See also* Phase II Opinion at P 10 & n.6.

¹⁴⁴ PSE&G cites the Joint Report (*See* note 120, *supra*) at 19-20, section D, "Phase Angle Regulator Requirements." This section discusses the degree settings required of the PARs. It states, in part:

[I]n order for the a[lternating]c[urrent] plan to deliver the 1000 MW (1980) and 1600 MW (1985) wheeling from Hudson to New York City, phase angle regulator settings of from 27 to 30 degrees (i.e. pushing towards CE) would be required on the Hudson ties under normal system conditions of PSE&G (E[xtra-]T[erritorial] G[eneration] imports) and CE (base imports). . . . Furthermore, reasonable use of the Linden-Goethals regulated tie will further reduce the Farragut PAR angle requirement.

same transfer capabilities as when the 1975 and 1978 contracts went into effect, a time when the parties contemplated that transfers would occur through the use of PARs without the need for PSE&G to dispatch off-cost generation.

77. With respect to the second premise, PSE&G states that, contrary to the presiding judge's and the Commission's findings, PSE&G and PJM could not have easily routed contract flows over the B and C Feeders because the PARs had already reached their full range. To shift power from the A Feeder, PSE&G would have had to dispatch off-cost generation or to move the PARs and create security limit violations. PSE&G states that it has complied with ConEd's requests for PAR tap changes, denying them only one tenth of one percent of the time.

78. PSE&G insists that it is entitled to have its obligation to wheel contract power reduced to the extent that ConEd's impairments make PSE&G's performance more difficult.¹⁴⁵ PSE&G reasons that if it has an obligation to generate off-cost to support the 600 MW transfer, then ConEd has a reciprocal obligation not to cause PSE&G to run more off-cost generation than the parties envisaged in their planning studies. The non-impairment provisions of the two contracts state explicitly ConEd's obligation to upgrade its system, in accord with the planning studies that addressed the effect of the 600 MW power transfer on new generation interconnections to the Staten Island facilities. ConEd's failure to comply with these provisions and to plan for adequate transmission capacity shifts ConEd's costs to PSE&G ratepayers. ConEd's failure to upgrade its system causes impairments on the ConEd system that, in turn, increase the likelihood of PSE&G having to operate off-cost to support the same level of flows that would be possible without off-cost operations were the impairments not present. PSE&G states that the Commission should not selectively enforce only certain parts of the two contracts.

79. PSE&G objects to the Commission's clarification, in the Phase II Opinion, that "impairment" is limited to the physical capability of transmission lines and the effects of attachment on reliability criteria, excluding market or economic considerations.¹⁴⁶ PSE&G states that this narrow definition will unfairly cause it to incur redispatch costs, an economic effect that the two contracts did not intend. When entering into the contracts, the parties understood the economic relationship between planning for adequate transmission capacity on the ConEd system and the need to run off-cost generation in PJM if the planning is inadequate.¹⁴⁷

¹⁴⁵ PSE&G Rehearing Request at 14-16.

¹⁴⁶ PSE&G cites Phase II Opinion at P 150.

¹⁴⁷ PSE&G Rehearing Request at 16-17.

80. PSE&G objects further that limiting the definition of impairment creates asymmetrical obligations under the 1978 contract.¹⁴⁸ ConEd is relieved of responsibility for its actions regarding performance of the transfers and can reduce the transfer capability of its system while shifting the cost of correcting those reductions to PSE&G customers. PSE&G did not agree to such a one-sided obligation when negotiating the 1978 Contract, and cites the non-impairment provisions in both contracts, section 5.3 of the 1974 Contract and section III.F of the 1978 Contract.¹⁴⁹ PSE&G continues that, in accordance with the Joint Report, interpool transfer capability should be measured under low load conditions and under peak load conditions when all generators are operating. The Commission's definition of impairment as limited to physical capability of transmission lines and effects on reliability criteria reduces the interpool transfer capability between NYISO and PJM because NYISO's methodology for determining reliability allows assumptions that particular generators will not be operating. Under this standard, ConEd can interconnect significant levels of new generation without violating reliability criteria. Yet, under the criteria of the Joint Report, interpool transfer capacity could be significantly reduced even when reliability criteria are being met.¹⁵⁰

4. Commission Response

81. We respond first to ConEd's contention that the Phase II Opinion is internally inconsistent. The Commission stated, at P 57, that where PSE&G sought to use all of the A Feeder's 500 MW capacity for delivery of the contract power, instead of dividing the delivery between the A Feeder and the two other feeders, ConEd's use of its internal lines displaced PSE&G's ability to use all of the A Feeder's capacity. The Commission found, at P 157, that the protocols may not permit PJM to reduce deliveries when the A Feeder is at capacity. There is no contradiction between PSE&G having been unable to redeliver all the contract power over the A Feeder when that line was being used for other power deliveries also, and the Commission's finding that the protocols should permit lines other than just the A Feeder redeliver the contract power.

82. Next, we assure ConEd that the Phase II Opinion does not give PSE&G the right to reduce ConEd's nomination of the amount of power to be transferred under the two contracts. We disagree with PSE&G's claim that it is entitled to have its wheeling obligation reduced, either temporarily or permanently, because ConEd uses its lines from Staten Island to Brooklyn for power other than the contract power, thus requiring

¹⁴⁸ *Id.* at 18.

¹⁴⁹ *See* P 84 and P 87, *infra*.

¹⁵⁰ PSE&G Rehearing Request at 17-18.

that a portion of the contract power flow over the B and C Feeders.

83. The Commission was not concerned, in its previous orders, with assigning fault to ConEd, PSE&G, NYISO, or PJM for the curtailments of contract power transfers that occurred in the past. While the Commission observed that ConEd's attachments of additional power impeded PSE&G's use of the A Feeder, it did not make a finding that ConEd had impaired PSE&G's contract performance. The Commission was and is more concerned with recognizing that curtailments had occurred and preventing curtailments in the future. We still see no need to attribute fault for past curtailments.

84. Nevertheless, to lay to rest further dispute about what the two contracts require concerning ConEd's attachment of generation to its Staten Island facilities and the capacity of its internal lines from Staten Island, we will examine the relevant contract provisions. Section 5.3 of the 1975 Contract states:

Con Edison and PS[E&G] may, at no charge to the other party, and after not less than six months advance written notification to the other party, connect additional load or generation to the interconnections described in Sections 1.1 and 1.2 provided that such connections will not impair the functions of said interconnections pursuant to Sections 4.1 and 4.2 or materially reduce power transfer capability between the Pennsylvania-New Jersey-Maryland Interconnection and the New York Power Pool.

85. Section 1.1 of the 1975 Contract discusses the Hudson-Farragut interconnection (the B Feeder) and section 1.2 discusses the Ramapo-New Milford interconnections (the J Line). Section 4.1 discusses the up-to-400 MW power transfer from Ramapo to Farragut, using the facilities intended to be built under the 1975 contract as well as the existing Linden-Goethals interconnection (the A Feeder) and other PSE&G and ConEd internal transmission facilities. Section 4.2 discusses ConEd's obligation to transfer up to 400 MW for PSE&G, from Linden to Hudson, using the Linden-Goethals interconnection (the A Feeder), the Hudson-Farragut interconnection (the B Feeder) and ConEd's internal transmission when PSE&G suffers bulk power outages in the northern portion of its system.

86. We conclude that the limits stated in section 5.3 apply to additional load or generation connections to the B Feeder and the J Line. The parties intended to protect the functions of the new facilities being built under the 1975 contract as well as existing facilities, and to prevent reduced power transfer capability between the two power pools.

87. Section III.F of the 1978 Contract states:

Future connections of generation and/or load may be made to the new interconnections in either New York or New Jersey provided that it is mutually agreed that such connections will not impair the functions of these

interconnections as described in Item III-B and III-I herein or cause a reduction in intra-pool or inter-pool transfer capacities.

88. Section III-B discusses PSE&G's wheel of a maximum of 600 MW, in addition to the 400 MW transfer in effect, and states that the facilities to be used are from Ramapo to Farragut, using the new and existing Ramapo-Waldwick (J and K Lines) and Hudson-Farragut (B and C Feeders) interconnections, the existing Linden-Goethals interconnection (A Feeder) and other PSE&G internal transmission facilities. Section III-I discusses costs and modifications of the wheeling plan; the facilities mentioned are either those described in the Joint Report as needed for the wheeling plan or other PSE&G facilities.

89. After examining these provisions of the 1978 Contract, we find that whether they limit ConEd's right to attach generation to the Goethals Substation for transmission to Brooklyn depends on whether the parties had intended that transfers under the two contracts could use the entire capacity of the A Feeder. The Commission has already found that in executing the contracts, ConEd and PSE&G did not intend for PSE&G to have the preferential right to use all of the A Feeder's capacity.¹⁵¹ Given the cooperative spirit of the two contracts, and their purpose of supplying New York City with power, we conclude that ConEd and PSE&G did not intend to limit ConEd's ability to attach generation to its Staten Island facilities unless that generation would interfere with contract power redeliveries or with transfers between the two existing power pools when using any or all of the three feeders.

90. Our conclusion finds support in the Joint Report's study of the feasibility of an additional contract to wheel 600 MW. Under the heading, "Description of Plans," the report states that tests simulated wheeling 1,000 MW in 1980 (and 1600 MW in 1985), primarily via the northern PSE&G system and the Ramapo-Waldwick and Hudson-New York City interconnections (the B and C Feeders), with no substantial flow placed on the Linden Goethals interconnection (the A Feeder), but with the expectation that reasonable use will continue to be made of this interconnection for day-to-day operating flexibilities.¹⁵²

91. The Phase II Opinion does not, as PSE&G alleges, characterize PSE&G's claim of a preferential right to use the entire capacity of the A Feeder as meaning that capacity would be withheld from other entities. The Commission understood then, as we understand today, that PSE&G claimed the right to use up to the feeder's full capacity for redelivery of the contract power, and that when other flows over the A Feeder or

¹⁵¹ Phase II Opinion at P 57-58.

¹⁵² Joint Report at 9-10; *see* note 120, *supra*.

ConEd's internal lines prevented it from using the A Feeder's full capacity, ConEd was impairing PSE&G's performance. As the Commission concluded, PSE&G does not have this preferential right to the A Feeder's capacity.¹⁵³

92. Even if PSE&G were correct that, when the parties executed the two contracts and conducted the studies leading to the Joint Report, they did not anticipate that frequent congestion would require PSE&G to redispatch off-cost generation to effect the transfer, the contracts nevertheless provide for PSE&G to transfer the power nominated by ConEd. Moreover, contrary to PSE&G's assertion, we are not selectively enforcing only certain parts of the contracts nor are we creating asymmetrical obligations. In any event, with the cooperation of NYISO and PJM, the transfers under the two contracts can take place consistent with the parties' agreements as reflected in the two contracts and under the 1984 Operating Procedures. We therefore will deny rehearing on this issue.

I. Spare Transformer

1. Background

93. In the Phase I Initial Decision, the presiding judge found that the two contracts did not require PSE&G to provide a spare transformer for its interconnections with ConEd to support service under the contracts.¹⁵⁴ The Commission, in the Phase I Opinion, postponed making a final determination on this issue. It directed the parties, in Phase II, to address whether a spare transformer is required and how the cost would be recovered under both contract construction and good utility practice.¹⁵⁵ In the Phase II Initial Decision, the presiding judge determined that good utility practice required a spare transformer at Hudson, and directed PSE&G to make one available.¹⁵⁶

94. In the Phase II Opinion, the Commission found that good utility practice requires a working spare transformer at Hudson to support the A, B, and C Feeders.¹⁵⁷ The Commission found that the two contracts also require provision of a spare transformer and that PSE&G must bear the costs of a spare transformer. The Commission looked to the history of the parties' execution of the 1978 contract to find that PSE&G and ConEd

¹⁵³ Phase II Opinion at 57-58.

¹⁵⁴ Phase I Initial Decision at P 74 and Ordering Paragraph (B).

¹⁵⁵ Phase I Opinion at P 47.

¹⁵⁶ Phase II Initial Decision at P B-15 and Ordering Paragraph (C).

¹⁵⁷ Phase II Opinion at P 186.

intended the facilities of the 1978 contract to function as the full equivalent of a Ramapo-New York tieline, and that the B and C Feeders were to be the principal pathway for that contract's 600 MW transfer. The Commission concluded that the 1978 contract's requirement for PSE&G to provide a spare transformer at Hudson to protect this transfer was a continuing responsibility of PSE&G, compensated for by ConEd's ongoing payments under the contract.¹⁵⁸

2. PSE&G Argument

95. On rehearing, PSE&G does not dispute that good utility practice and the two contracts require the presence of a working spare transformer. It disputes the Commission's conclusion that PSE&G must pay for a new spare transformer to replace the one that failed in 1999. It argues that neither good utility practice nor the two contracts require it to bear these costs.

3. Commission Response

96. We clarify that the Commission's conclusion rested on two related lines of reasoning. It rested first on the parties' intent, in the 1978 contract, that the B and C Feeders be the principal pathway for the contract's 600 MW transfer. The Commission found that full functional equivalent of a tieline, the purpose of the 1978 contract, means the same reliability as a tieline, which requires a working spare transformer. It observed, in addition, that the facilities-to-be-provided section of the 1978 contract, which discusses retention of a non-operating transformer to serve as a spare transformer, assigns the spare transformer to PSE&G.¹⁵⁹ We will expand this reasoning.

97. Section I.B.1.b of the 1978 contract, which provides for a spare transformer at Hudson, originated in the parties' 1969 agreement. That agreement provided for the tieline between Ramapo, New York, and New Milford, New Jersey and a new switching station at Waldwick, New Jersey.¹⁶⁰ It called for PSE&G to provide, at its expense, a

¹⁵⁸ *Id.* at P 194-195.

¹⁵⁹ Phase II Opinion at P 194-96 (*citing* the Joint Report at 8, 10, note 120, *supra*, and section I.B.1.b of the 1978 contract, which states, "PS will construct or cause to be constructed: . . . Two 345/230-kV autotransformers . . . at Hudson Generating Station, one for replacing the autotransformer in the existing Hudson-Farragut interconnection, which will be retained as a non-operating spare.").

¹⁶⁰ 1969 agreement at section I. By Public Service. Ramapo-New Milford Tie. b., note 6, *supra*. The A Feeder and associated facilities were built earlier under the 1963 agreement and the 1968 agreement. *Id.*

standby spare transformer, suitable for use at PSE&G's Waldwick and Hudson stations and ConEd's Goethals station, if power flows exceeded the normal capacity of a single transformer.¹⁶¹ This 1969 agreement was superseded by the 1975 contract, which, at section 5.2, similarly called for PSE&G to provide a standby spare transformer for use at Waldwick and Hudson, and also at Goethals when power flows increased.¹⁶² In the absence of a clear statement in the 1978 contract, we find no support for the contention that, when the parties were negotiating to increase power redeliveries from 400 MW to 1,000 MW, they changed their earlier positions requiring provision of a standby spare transformer and intended, in the 1978 contract, that PSE&G's responsibility to provide a spare transformer would end when the existing spare transformer failed.

98. The Commission based its second line of reasoning on section 6.2 of the 1975 contract, the contract under which the spare transformer was provided, stating:

To determine who should bear the costs of replacing the failed spare transformer and the replacement transformer's specifications, we look to the 1975 contract. Section 6.2(b) applies to replacements required by lawful requirement of any administrative body, such as the replacement that we require. This subsection states, "Payment for any capital improvements, betterments, replacements, reinforcements or additions to the facilities shall be determined by mutual agreement of the parties. For the purposes of this Section, the terms . . . replacements . . . shall include all capital expenditures *other than those required to substantially maintain the facilities' original capacity and operating efficiency* (emphasis added). The replacement transformer that we require is one that substantially maintains the original capacity and operating efficiency of the facilities at Hudson. Therefore, payment for it is not determined by mutual agreement of the parties.¹⁶³

99. PSE&G states that when the Commission determined that the 1975 contract obligates PSE&G to provide the spare transformer, the Commission was acting as an adjudicator of the terms of a contract. PSE&G posits that the exclusion from the mutual agreement required by section 6.2(b) covers only situations when the administrative body is acting in a regulatory action as a standards-setter, such as requiring an upgrade to comply with a safety concern. PSE&G adds that, under the Commission's interpretation of section 6.2(b), a party would be able to shift to section 6.2(b) an obligation covered by section 6.2(a) of the 1975 contract, which requires that

¹⁶¹ 1969 agreement at section III.8.

¹⁶² Section 5.2 of the 1975 contract.

¹⁶³ Phase II Opinion at P 197.

replacements considered necessary by one party be brought to the other party for its approval and that costs be determined by mutual agreement of the parties.¹⁶⁴

100. We disagree with PSE&G's interpretation of section 6.2(b) as applying only to safety upgrades and the like. Additionally, even were we to adopt PSE&G's interpretation, the Phase II Order found that a spare transformer is required as a matter of good utility practice, a standard for utilities to follow.¹⁶⁵ Thus, even under PSE&G's interpretation, section 6.2(b) would apply. Whether one party can unilaterally shift obligations covered by section 6.2(a) to section 6.2(b) is not before us in this proceeding.

101. PSE&G objects also that the Commission erroneously interprets section 6.2(b) by confusing the facilities required under the 1978 and 1975 contracts. PSE&G refers to section 6.2(b)'s exclusion of capital expenditures required to substantially maintain the facilities' *original* capacity and operating efficiency. It says that this provision is "inapposite since it is undisputed that the *original* function of the 500 MVA transformer is now being fulfilled by one of the 538 MVA transformers installed pursuant to the 1978 agreement."¹⁶⁶

102. We understand PSE&G to be arguing that section 6.2(b) does not apply because the transformer that became the spare transformer, and which began service under the 1975 contract as the transformer at Hudson but was replaced under the 1978 contract, at which time it was designated as the spare transformer, is no longer serving as a primary transformer at Hudson and is no longer performing its original function.¹⁶⁷ In short, we understand PSE&G to argue that because the transformer changed its function from primary to spare, therefore the cost of the facilities ordered by this Commission must be determined by the mutual agreement of ConEd and PSE&G under section 6.2(a).

103. We disagree. The concept we are addressing is the responsibility for continued provision of a spare transformer for use at the B and C Feeders. Once a transformer fails completely, it must be replaced. However, replacement once does not terminate

¹⁶⁴ PSE&G Rehearing Request at 27.

¹⁶⁵ Phase II Opinion at P 186. Moreover, as discussed at P 103, the Commission directed PSE&G to pay the costs of a replacement transformer having the capacity of the transformer described in the 1975 contract, leaving to it and ConEd to discuss a superior transformer and the additional cost. *See* Phase II Opinion at P 198.

¹⁶⁶ PSE&G Rehearing Request at 27.

¹⁶⁷ This transformer was called into use, in 1999, after a primary transformer at Hudson failed. Then, it too failed.

PSE&G's ongoing responsibility to provide, at its expense, a spare transformer during the life of the two contracts. The Phase II Opinion did not require PSE&G to secure a 538 MVA transformer for use as a spare, but only a 500 MVA transformer, leaving to the parties to work out whether they want a superior transformer and how to divide the incremental costs.¹⁶⁸ PSE&G's request for rehearing is denied.

The Commission orders:

(A) The requests for rehearing filed by ConEd and PSE&G in this proceeding are hereby denied, as discussed in the body of this order.

(B) The requests for clarification filed by ConEd and PSE&G in this proceeding are hereby granted or denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J Posey,
Deputy Secretary.

¹⁶⁸ Phase II Opinion at P 198.

Appendix A

