

120 FERC ¶ 61,161
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 Company of New York, Inc.
v.

Docket No. EL02-23-013

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

ORDER DENYING REHEARING

(Issued August 15, 2007)

1. Consolidated Edison Company of New York, Inc. (ConEd) has requested rehearing of two orders in this case. One order clarified and denied rehearing of the Commission's order on the initial decision in Phase II of ConEd's complaint that it was not receiving the wheeling service that it had contracted for in two 1970s-era contracts.¹ The other accepted informational reports about recent performance of the contract wheeling service under an agreed-upon Protocol.² For the reasons described below, we will deny rehearing.

¹ *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.*, 119 FERC ¶ 61,071 (2007) (Phase II Clarification/Rehearing Order).

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.*, 119 FERC ¶ 61,070 (2007) (Reports Order).

I. Background

2. Previous orders in this case describe, at length, the background to this proceeding. The case began when ConEd complained to the Commission that Public Service Electric and Gas Company (PSE&G) and the two regional transmission organizations (RTOs) responsible today for electric power transmission between New Jersey and New York, the New York Independent System Operator, Inc. (NYISO) and PJM Interconnection, L.L.C. (PJM), were failing to fully honor two contracts between ConEd and PSE&G. These contracts pre-date open access over transmission lines under the operation of the RTOs. They provide for ConEd to deliver power to PSE&G in northern New Jersey and for PSE&G to redeliver the same amount of power to ConEd in New York City. The 1975 contract provides for a wheel of 400 MW (400 MW contract) while the 1978 contract provides for a wheel of 600 MW (600 MW contract). Both contracts describe a specified transmission redelivery path from New Jersey to New York under Upper New York Bay.

3. The Commission set the complaint for hearing and divided the proceeding into two phases.³ Phase I dealt with four matters of imminent concern to ConEd. In the Phase I Initial Decision, the presiding judge directed ConEd, PSE&G, NYISO, and PJM to negotiate a Protocol under which PSE&G's contractual obligations to ConEd can be satisfied under the open access transmission tariffs (OATTs) of both RTOs.⁴ The Commission's Opinion on the Phase I Initial Decision adopted this remedy and directed the parties to develop an appropriate protocol in Phase II.⁵ The Phase I Opinion also established that economic alternatives to redispatch must be compared when PSE&G must operate off-cost (redispatch) to support the contract wheels. The Commission held that PSE&G must do so only when other alternatives available to ConEd are more

³ *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).

⁴ *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, at P 81, Ordering Paragraph (D) (2002) (Phase I Initial Decision).

⁵ *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, at P 63 (2002) (Phase I Opinion).

costly.⁶ The Commission's order on rehearing of Phase I affirmed the use of such a comparison of alternatives test.⁷

4. The Initial Decision in Phase II addressed the provisions of an appropriate protocol and ConEd's remaining issues.⁸ The presiding judge adopted NYISO's recommendations on how to compare alternatives when choosing between redispatch or power purchase to support the contracts' redeliveries, with the costs to be borne by PSE&G.⁹ The Commission's opinion on the Phase II Initial Decision affirmed this Comparison-of-Alternatives test.¹⁰ The Commission rejected ConEd's argument that concern over the reliability of electricity supply into New York City requires redeliveries of contract power over only the A, B, and C feeder lines under Upper New York Bay, rather than via the transmission lines north of New York City, in Westchester County, as would happen under the Comparison-of-Alternatives test.¹¹

5. PSE&G, PJM, and NYISO jointly filed a comprehensive operating Protocol. ConEd objected that the Protocol deviated from the Commission's directives stated in the Phase II Opinion. Nevertheless, it agreed to Protocol implementation subject to: the outcome of judicial appeal of the Commission's orders in these proceedings; NYISO and PJM exercising their discretion in a manner consistent with the two contracts and the Phase II Opinion; and a Commission requirement that the four parties file status reports setting forth the extent to which operations under the Protocol comply with the two contracts and the Phase II Opinion. The Commission accepted the Protocol, which

⁶ Phase I Opinion at P 33.

⁷ *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.*, 105 FERC ¶ 61,343, at P 18-22 (2003) (Phase I Rehearing Order).

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.*, 103 FERC ¶ 63,047 (2003) (Phase II Initial Decision).

⁹ Phase II Initial Decision at P 50.

¹⁰ *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.*, Opinion No. 476, 108 FERC ¶ 61,120, at P 106-129 (2004) (Phase II Opinion).

¹¹ Phase II Opinion at P 71-85.

became effective on July 1, 2005, and required the parties to file informational status reports.¹²

6. The parties filed three sets of informational reports. On September 30, 2005, NYISO, PJM, and PSE&G filed a joint report while ConEd filed a separate report. On December 30, 2005, NYISO and PJM filed a joint report, PSE&G filed a separate report, and ConEd filed a separate report covering the cumulative period of Protocol operation (ConEd's Second Report). On January 19, 2007, NYISO, PJM, and PSE&G filed a joint report covering Protocol operations during 2006, while ConEd filed a separate report covering the entire 18 months from Protocol implementation on July 1, 2005 through December 31, 2006 (ConEd's Third Report).

7. On April 20, 2007, the Commission accepted the three sets of informational reports, and clarified and denied rehearing of the Phase II Opinion.¹³ ConEd's May 21, 2007 request for rehearing of both orders ensued.

II. Discussion

A. Phase II Clarification/Rehearing Order

8. The Phase II Clarification/Rehearing Order clarified that PSE&G does not have a preferential right to the entire capacity of the A Feeder transmission line, between New Jersey and Staten Island, when redelivering contract power. It denied rehearing of all other matters, including ConEd's request that the Commission find that reliability was the primary purpose of the two contracts, to which other considerations must be subordinated.¹⁴

9. To address ConEd's assertion that reliability, not economics, must govern the Commission's interpretation of the two contracts, the Commission first cited the definition of reliable operation in the Energy Policy Act of 2005, "operating the elements of the bulk power system . . . so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance . . . or

¹² *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.*, 111 FERC ¶ 61,228, at P 34 (2005).

¹³ See notes 1 and 2, *supra*.

¹⁴ Phase II Rehearing Order at P 60.

unanticipated failure of system elements.”¹⁵ The Commission then examined the joint 1975 study that compared ConEd’s installation of a 600 MW high voltage direct current (DC) transmission line through New York State, from Ramapo to ConEd’s Manhattan and Brooklyn Substations, against an integrated ConEd-PSE&G alternating current (AC) plan, whereby ConEd would fund PSE&G’s construction of transmission lines through New Jersey and PSE&G would wheel the power from Ramapo to New York City.¹⁶ The Commission stated that while reliability was one of the purposes of the two contracts, economic considerations were more important, and cited the Joint Report’s statement that ConEd’s requirements can be more economically accomplished by adopting the AC plan rather than the DC plan.¹⁷

10. The Commission added that NYISO has primary responsibility for ensuring reliability for New York City, and that NYISO had not stated that the Phase II Opinion would hinder its performance of this responsibility. The Commission referred to NYISO’s statements that its installed capacity system focuses on ensuring sufficient capacity to preserve long term reliability in vulnerable locations, such as New York City; that its Locational Marginal Pricing system provides it with accurate pricing information enabling redispatch while accounting for transmission constraints; and that congestion, which is largely an economic issue, does not necessarily threaten reliability.¹⁸

11. ConEd contends that the Commission misunderstood the Joint Report’s conclusions and ConEd’s reason for entering into the two contracts, which was primarily reliability. Because of these two misunderstandings, the Phase II Rehearing Order failed to give proper weight to reliability issues and improperly relied on NYISO to provide reliability. ConEd states that, in 1975, it wanted to diversify power supply into New York City so as not to be dependent on transmission from the north. Wheeling through New Jersey would provide this alternative transmission path. It would also give PSE&G an alternative source of reliable power into northern New Jersey, where PSE&G had limited transmission, so that it could use generation in the southern part of its system

¹⁵ Phase II Rehearing Order at P 60, *citing* section 1211 of the Energy Policy Act of 2005, section 215(a) of the Federal Power Act, 16 U.S.C. § 824o(a)(4) (West Supp. 2006).

¹⁶ “A Comparison of AC and DC Transmission Plans for Delivering Power From Ramapo to New York City in the 1980-1985 Period: A Joint Report Prepared by Con Edison and PSE&G,” December 1975, at 1 (Joint Report).

¹⁷ Phase II Rehearing Order at P 61, *citing* Joint Report at 2

¹⁸ Phase II Rehearing Order at P 63, *citing* NYISO’s July 11, 2003 Brief on Exceptions in Phase II at 8.

more efficiently. ConEd insists that reliability is not the concern just of PJM and NYISO. The issue here is interpretation and enforcement of the two contracts that were prompted by reliability concerns. The fact that the Joint Report showed the AC plan to be more economical means only that the AC plan accomplished ConEd's reliability requirement at a lower price. Had the AC plan been cheaper but ineffective in meeting that requirement, ConEd would not have considered it. ConEd adds that the Commission's misunderstanding of ConEd's purposes in entering into the two contracts led to the Commission's error in adopting the Comparison-of-Alternatives test, whereby contract power is delivered over lines other than those identified in the contracts. This reduces the reliability that ConEd sought to achieve in the contracts as well as increasing ConEd's cost of power supply.

12. We do not dispute ConEd's account of its and PSE&G's motivations, combining reliability and economic considerations, when the utilities entered into the two contracts. Nor do we doubt that ConEd wanted to improve reliability by diversifying the transmission paths into New York City so that it would not be wholly dependent on transmission lines from the north or in-city generation. Where we and ConEd disagree is on the weight to be given to reliability as opposed to economic considerations in interpreting the two contracts today. ConEd's ability to depend each day on redelivery of up to 1000 MW, at ConEd's nomination, from the feeders under New York Bay, and always at the costs stated in the two contracts, is more an economic consideration than a reliability consideration. When PJM and PSE&G prefer to pay the costs of power redelivery over lines other than the A, B, and C Feeders rather than to redispatch their more expensive generation, such redelivery displaces ConEd's ability to receive power over these other lines. This is an economic event that increases ConEd's total cost of power delivered into New York City because of the transmission path used. However, as discussed above, NYISO has indicated that such redelivery does not hinder the provision of power into New York City. Thus, we will deny rehearing on the issue of whether the Commission correctly gave the proper weight to reliability considerations.

13. The issue of how to interpret the two contracts regarding how redeliveries of power are to take place, including the Commission's adoption of the Comparison-of-Alternatives test, was decided in Phase I of this proceeding. The issue is not before us in this second phase of the proceeding.

B. Reports Order

14. The Reports Order accepted the three sets of informational reports filed by the parties and concurred with their recommendation that further reports are unnecessary.¹⁹

¹⁹ Reports Order at P 41.

It referred to the workplan that the parties adopted, under which they will continue efforts to resolve outstanding issues.²⁰ It reminded the parties that the Protocol provides that it is subject to the dispute resolution procedures of the NYISO and PJM OATTs, and suggested that the parties use these procedures while they resolve issues under the workplan. The Reports Order rejected ConEd's request that the Commission institute hearing and settlement procedures, to begin in September 2007, to address ConEd's claims for refunds for contract violations.²¹

15. Lastly, the Reports Order denied ConEd's requests that the Commission require certain measures during the interim until performance under the Protocol comes into compliance with the Commission's orders and the Protocol itself.²² The Reports Order found that the RTOs had already addressed the requested interim actions concerning

²⁰ Reports Order at P 42. The workplan, designated the "600/400 MW Contract Protocols: 4 Party Joint Issues List," is Attachment A in NYISO's, PJM's, and PSE&G's 2007 Joint Report, and Attachment B in ConEd's Third Report. It lists nineteen unresolved issues for achieving improved Protocol performance that the parties anticipated pursuing in the first half of 2007. It also provides for identification of any remaining open concerns or issues. Item 19 concerns past performance and remedies.

²¹ Reports Order at P 43, P 49.

²² ConEd's requested interim measures are: (1) Direct the RTOs to complete promptly any written procedures, software modifications, and employee training necessary for proper implementation of the Protocol; (2) Direct the RTOs to respond to ConEd's requests for information about implementation of the Protocol; (3) Issue an order confirming that redirections of flows under the Protocol are not authorized where the redirection would increase costs on the receiving RTO; (4) Limit redirection of flows to 150 MW until all parties certify that refined procedures assure proper implementation of the Protocol; (5) Direct PJM to conform its congestion charge and scheduling practices regarding the 400 MW contract to the Phase II Opinion; (6) Direct PJM to credit ConEd for congestion charges that ConEd committed to pay but congestion did not occur in PJM in real time due to underdeliveries and redirections of flows from PJM to NYISO; (7) Direct the RTOs to implement the Protocol provisions in Appendix 1, section 21, which provide for redirections of flows from NYISO to PJM; (8) implement a "true-up" mechanism whereby flows over the A, B, and C Feeders are made up either by compensating changes in flows the following month or by billing adjustments, at ConEd's election; and (9) determine the amount of refunds due to ConEd for the economic consequences of Protocol violations in underdeliveries, congestion overcharges, and inappropriate and foregone redirections. ConEd's Second Report at 7-8.

procedures, software modifications, employee training, and RTO response to ConEd's informational requests.²³ The Commission found that the requests for interim actions concerning unauthorized redirection of flows when redirections increase costs on the receiving RTO and a true-up mechanism were an impermissible attempt to revise tariff sheets through a filing in a compliance proceeding.²⁴ The requests for interim actions concerning congestion charges and the 400 MW contract and redirection of flows from NYISO to PJM were really complaints that the Protocol was being violated and would have to be raised in a complaint proceeding, not in a compliance proceeding.²⁵

1. Compliance with Phase II Opinion and Protocol

16. ConEd faults the Reports Order for not requiring the Protocol parties to conform transmission service to the two contracts, as determined in the Phase II Opinion, and to the Protocol's requirements. ConEd reminds the Commission of the nine interim actions that it had recommended the Commission order the Protocol parties to perform to address the issues in ConEd's initial complaint, and states that it still has been denied full relief. It objects to the Commission's statement that the Reports Order is a compliance proceeding, and that ConEd must file a separate complaint to request the Commission to order the interim actions. ConEd supports this objection by stating that it filed a complaint about violations of the two contracts in 2001.

17. We will deny rehearing as to whether the Reports Order should have required the Protocol parties to take specific actions to address ConEd's concerns over under-deliveries and re-direction of flows. The Commission's purposes in requiring the informational reports were those stated in the Protocol Order – to learn whether the Protocol is working as the parties intended and whether adjustments seem necessary, and to get the parties' observations on the extent to which actual operation under the Protocol complies with the contracts and the Phase II Order.²⁶ This was with a view towards addressing implementation problems – actions that the parties are taking in their workplan. If, as a result, the parties conclude that the Protocol needs amendment, they may file under section 205 of the FPA.²⁷ The compliance required of the parties was to

²³ Reports Order at P 45.

²⁴ Reports Order at P 46.

²⁵ Reports Order at P 48.

²⁶ Protocol Order at P 34.

²⁷ 16 U.S.C. § 824d (2000). *See* Protocol Order at P 35 (proposed revisions of the Protocol must be filed under section 205 of the FPA).

provide information. As stated in the Reports Order, the Commission rejects efforts to use compliance proceedings as vehicles for section 206 complaints.²⁸

2. Reliability Revisited

18. ConEd criticizes the Reports Order for subordinating reliability concerns to economic considerations by using economic factors to determine transmission system deployment, the same criticism it made of the Phase II Clarification/Rehearing Order. ConEd refers to the Reports Order's acknowledgement of ConEd's concerns,²⁹ and objects to the Commission's reliance on economics to solve reliability issues associated with access to vital transmission lines. ConEd urges that because adverse reliability consequences are continuing to occur, the Commission should not have accepted the Reports without addressing the reliability issues that ConEd has consistently raised throughout these entire complaint proceedings.

19. We have already addressed ConEd's concerns over the weight to be given reliability considerations when interpreting the two contracts. As stated above, the purpose of the reports was to comply with the Commission's directive to supply information. ConEd's objections that transmission service under the Protocol is causing unintended and adverse operational and economic effects are more properly raised in a proceeding under section 206 of the FPA³⁰ or in dispute resolution procedures under the NYISO and PJM OATTs.

3. Refunds

20. In its Second Report, ConEd cited Protocol violations occurring July 1 through December 31, 2005, and asked the Commission to order refunds to make it whole for the economic consequences of the violations. ConEd stated that contract redeliveries fell short, particularly during summer months. The areas of non-compliance, which ConEd laid at the doorsteps of NYISO and PJM, included inadequate deliveries over the A, B,

²⁸ Reports Order at P 47 n.16.

²⁹ The Reports Order, at P 12, recounts ConEd's contention that under-deliveries and inappropriate directions of flow had reliability and cost consequences because of the increase in loading on the Dunwoodie, Westchester, interface and the necessity to dispatch New York City generation, and ConEd's estimate that this increased its costs by \$25 to \$35 million. At P 33, the Reports Order recounts ConEd's contention that numerous departures from Protocol requirements caused adverse operational and economic effects that the Protocol was intended to prevent.

³⁰ 16 U.S.C. § 824e (2000).

and C Feeders, inappropriate flow redirections from the PJM system to the NYISO system, delayed termination of flow redirections onto the NYISO system, inappropriate congestion billing practices, and the absence of any methodology for starting flow redirections from the NYISO system to the PJM system, as the Protocol requires.³¹

21. In its Third Report, ConEd requested \$111 million in refunds for Protocol violations. Although all four parties had committed to improve Protocol performance through the workplan, to be carried out during the first half of 2007, ConEd nevertheless asked the Commission to set ConEd's refund claims for hearing and settlement procedures, with settlement procedures to begin on September 10, 2007, following completion of the June 2007 workplan activities and the summer peak period. ConEd added that if the parties themselves could resolve Protocol performance and refund issues before that date, they would move to cancel the scheduled settlement procedures.³²

22. The Reports Order rejected ConEd's request that the Commission order hearing and settlement procedures because the request was speculative; it concerned an issue that might not even exist in September. Second, ConEd's request was procedurally infirm. The informational reports were compliance filings in which the parties reported to the Commission about the effectiveness of the Protocol in implementing the contract wheel.³³ ConEd's conditional request for hearing and settlement procedures on refunds for tariff violations exceeded the scope of the Protocol Order's report directive.³⁴

23. ConEd takes issue with the Commission's characterization of ConEd's request for hearing and settlement procedures on the issue of refunds as being beyond the scope of a compliance proceeding. ConEd points out that it filed the complaint that started this case and says that it should not have to file another one now.³⁵

³¹ ConEd's Second Informational Report at 3-4, 17-21.

³² ConEd's Third Informational Report at 3, 7-9,11.

³³ Protocol Order at Ordering Paragraph (B).

³⁴ Reports Order at P 43.

³⁵ ConEd also extends the period for which it requests refunds from the period of Protocol operations, as stated in its Second and Third Reports, to the periods during which the parties had violated the two contracts. ConEd states that because it filed the two contracts, they became filed tariffs, binding PSE&G. ConEd's Rehearing Request at 2, 4.

24. If ConEd wishes to claim refunds for violations of the Protocol, it must file a new complaint, under section 206 of the FPA, in which it can present in one filing all its requests for relief, with supporting documentation, and the answering parties will have an opportunity to address all of ConEd's requests, arguments, and statements of fact. We deny rehearing on the issue of the need to file a separate complaint for refunds for Protocol violations.

25. Concerning ConEd's request for hearing and settlement procedures to evaluate refunds for violations of the Protocol, to start on September 10, 2007, we continue to find, as stated in the Reports Order, that the request is speculative. We believe that the current circumstances do not warrant assigning the Commission's limited resources to hearing and settlement procedures until such procedures are actually needed.³⁶ Also, we decline to influence discussions that ConEd may be having with the other parties. We deny rehearing on the issue of whether the Commission should have instituted hearing and settlement procedures in the Reports Order.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.
Acting Deputy Secretary.

³⁶ See *High Island Offshore Sys., L.L.C.*, 112 FERC ¶ 61,050, at P 119 & n.109 (2005), citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (agency assesses how its resources are best spent). See also, *Arkansas Pub. Ser. Comm. v. Entergy Serv., Inc.*, 119 FERC ¶ 61,223, at P 46 & n.81 (2007) (Commission has broad discretion in deciding how to manage its proceedings).