

132 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C. New York Independent System Operator, Inc.	Docket Nos. ER08-858-000 ER08-858-001 ER08-867-000 ER08-867-002
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Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Company, PJM Interconnection, L.L.C. and New York Independent System Operator, Inc.	EL02-23-000 EL02-23-014 (not consolidated)
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ORDER APPROVING CONTESTED SETTLEMENT AND DENYING REHEARING

(Issued September 16, 2010)

1. In this order, the Commission approves a contested settlement filed by PJM Interconnection, L.L.C. (PJM) on behalf of the Settling Parties,¹ and finds that the Settlement and the related transmission service agreements (TSA) and Joint Operating Agreement Protocol (JOA Protocol) are just and reasonable. In addition, the Commission denies rehearing of its order issued in this proceeding on February 19, 2010.²

¹ *Settlement and Offer of Settlement*, Docket Nos. ER08-858-000, ER08-867-000 and EL02-23-000 (Feb. 23, 2009) (Settlement). The Settling Parties are PJM Interconnection, L.L.C., the New York Independent System Operator, Inc. (NYISO), Consolidated Edison Company of New York, Inc., Public Service Electric & Gas Company, PSE&G Energy Resources & Trading LLC and the New Jersey Board of Public Utilities (New Jersey Commission).

² *PJM Interconnection, L.L.C.*, 130 FERC ¶ 61,126 (2010) (Briefing Order).

I. Background of the 1000 MW TSAs

2. This proceeding has, at its base, two TSAs between Consolidated Edison Company of New York, Inc (ConEd) and Public Service Electric and Gas Company (PSE&G) executed in the 1970s. In the late 1960s, ConEd was planning to build a transmission line from Sprain Brook in Westchester County (east of the Hudson River and north of New York City) to New York City to provide additional transmission capacity connecting its generation sources north of New York City to its native load in New York City.³ As an alternative, PSE&G suggested that ConEd and PSE&G jointly address the supply problems of both northern New Jersey and New York City by entering into an energy exchange arrangement whereby ConEd's upstate generation sources would be used to supply PSE&G's native load customers in northern New Jersey and PSE&G's generators would be used to supply ConEd's native load customers in New York City. In May 1969, the parties entered into a letter agreement providing for construction of new facilities to accomplish their objective and effect the transfer of 400 MW by displacement.⁴ Based on the parties' May 1969 agreement, ConEd discontinued its plans to build its own transmission line from Sprain Brook to New York City. After the facilities were completed, the parties restated their agreement in more detail in an agreement executed in 1975 (1975 400 MW TSA).

3. Similarly, in the early 1970s, when ConEd was considering constructing its own high voltage DC (HVDC) cable from Ramapo in Rockland County (west of the Hudson River and generally northwest of New York City) to New York City, again to increase north-to-south transmission capability, PSE&G asked it to consider a joint development project that would achieve the same objectives as the HVDC cable. A joint study concluded that making certain additions to the PSE&G transmission system and committing excess capacity on PSE&G's existing transmission facilities in northern New Jersey would be the functional equivalent of a HVDC cable. Thus, in 1978, the parties entered into an agreement, providing for the transmission of up to 600 MW (1978 600 MW TSA). These two transmission agreements pre-date Order No. 888⁵ and are now

³ Joint Report of AC and DC Transmission Plans for Delivering Power to New York City in the 1980-1985 Period, Docket No. EL02-23, Exh. No. CE-8. *See also* Appendix A, Map of Certain Interconnection Points in New Jersey and New York.

⁴ May 27, 1969 Letter Agreement, Docket No. EL02-23, Exh. No. CE-5.

⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046

(continued...)

considered grandfathered agreements. Under both agreements, the parties' intent was to accommodate flows of energy south from Rockland County, New York to Bergen County, New Jersey, in exchange for the flow of the same amount of energy from PSE&G's service territory east into ConEd's service territory in New York City.

4. The 1975 400 MW TSA was executed on May 22, 1975, and had an initial term of 40 years, and thereafter from year to year. Specifically, this agreement provided for the construction, operation, and cost responsibilities associated with two interconnections between PSE&G's facilities in New Jersey and ConEd's facilities in New York.⁶ Under this agreement, ConEd was to supply PSE&G with 400 MW of power from the Ramapo substation for use in northern New Jersey, and PSE&G was to return the same amount of power to ConEd at its Farragut and/or Goethals substations.⁷ The transfer of power would only be curtailed when critical bulk-power facility outages in the northern portion of the PSE&G system would, in the opinion of PSE&G, reduce PSE&G's ability to provide such a transfer.⁸ Similarly, ConEd agreed that, when PSE&G had an emergency condition on its system, ConEd would transfer up to 400 MW of power for PSE&G from its switching station in Linden, New Jersey, through ConEd's system to PSE&G's Hudson switching station. This transfer of power would only be curtailed when bulk-power facility outages on the ConEd system would, in the opinion of ConEd, reduce ConEd's ability to provide such transfer.⁹

(1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁶ The Hudson Switching Station in northern New Jersey was interconnected with the Farragut Switching Station, located directly across the Hudson River in New York, and, further north, the Ramapo Station in Rockland County, New York was interconnected with the New Milford Switching Station in Bergen County, New Jersey. *See* Appendix A for a map of the relevant interconnection points.

⁷ This transaction would take place by displacement and would utilize the new Hudson-Farragut Interconnections (B and C feeders) and Ramapo Interconnections (J and K lines), the existing Linden, New Jersey-Goethals, New York Interconnection near Staten Island (A feeder), and other PSE&G and ConEd facilities. Testimony of Jed Deegan, Docket No. EL02-23-000, Exh. CE-68 at 4.

⁸ 1975 400 MW TSA, Section 4.1.

⁹ 1975 400 MW TSA, Section 4.2.

5. On May 9, 1978, the 1975 400 MW TSA was amended to, *inter alia*, change the term of the agreement so that the expiration date would coincide with the expiration date of the 1978 600 MW TSA.

6. The 1978 600 MW TSA was executed on May 8, 1978, and provided for the construction, operation and cost responsibilities for a second Hudson-Farragut Interconnection and a new interconnection between the Ramapo Substation in New York and the Waldwick Interconnection at South Mahwah in New Jersey. This agreement specified that PSE&G would transfer a maximum of 600 MW (in addition to the existing 400 MW under the 1975 TSA) when there were no major generating and/or transmission facility outages in the northern zone of the PSE&G system. This transaction would use excess transmission capacity on PSE&G's system, including the existing Linden-Goethals Interconnection, the new Hudson-Farragut Interconnection and ConEd's transmission facilities. In addition, the agreement stated that the transfer of power "can be reasonably expected to take place for most hours of the year, but will be curtailed in full or in part, as required when critical bulk-power system outages make it impossible for [PSE&G] to maintain such transfer."¹⁰ Further, the agreement stated that PSE&G would plan, design, build and operate its system so as to supply its own load, meet its obligations to PJM, and wheel 600 MW to ConEd.¹¹ The term of the agreement was 30 years from the commencement of commercial operations, or until the end of 2020, whichever occurred first.¹²

7. After the parties entered into these agreements, the Commission issued Order No. 888 providing for open access transmission service. In order to accommodate grandfathered agreements such as these, the *pro forma* open access transmission tariff (OATT) promulgated in Order No. 888 contained a provision that permitted the roll-over of firm agreements to ensure that parties under such agreements could continue their existing firm transmission service. Also, after the parties entered into the 1975 400 MW TSA and the 1978 600 MW TSA, ConEd and PSE&G respectively joined NYISO and PJM, independent system operators, and today, PJM and NYISO each operates PSE&G's and Con Ed's transmission systems. As discussed below, neither ISO took responsibility for providing service under the two grandfathered agreements, but rather, the TSAs "fell through the cracks" and led to the possible impairment of service.¹³ This led to the

¹⁰ 1978 600 MW TSA, Section III.B.

¹¹ *Id.*

¹² *Id.* at Section IV.A.

¹³ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, Opinion No. 476, 108 FERC ¶ 61,120 at P 140 (2004) (Phase II Opinion) (citing

(continued...)

complaint discussed below and the set of protocols to implement the agreements.¹⁴ On May 18, 2005, the Commission accepted the currently-effective operating protocols.¹⁵

II. Procedural Posture

A. Complaint Proceeding in EL02-23

8. In 2002, ConEd filed a complaint with this Commission in Docket No. EL02-23, alleging that PSE&G, NYISO and PJM failed to fully honor the 1975 400 MW TSA and the 1978 600 MW TSA. The Commission divided the complaint into two phases and each phase was set for hearing.¹⁶ In the order on the initial decision for Phase I, the Commission found that although both agreements were firm, the 1975 400 MW TSA, with respect to redispatch, was not as firm as the 1978 600 MW TSA.¹⁷ The Commission also directed the parties to further develop the record with respect to the costs of redispatch. In the initial decision for Phase II, the presiding judge ordered the parties to negotiate an operating protocol, pursuant to which the agreements could be fulfilled under the parties' OATTs.¹⁸ In the Phase II Opinion, the Commission adopted the initial decision, which, *inter alia*, found that there should be no incremental dispatch costs for ConEd for the 1978 600 MW TSA, but that, in order to avoid curtailment, ConEd would have to pay the incremental costs for redispatch for the 1975 400 MW TSA.¹⁹ The

Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., 103 FERC ¶ 63,047, at P 56 (2003) (Phase II Initial Decision)).

¹⁴ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 101 FERC ¶ 61,282, at P 36, 38 (2002) (Phase I Order).

¹⁵ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 111 FERC ¶ 61,228 (2005).

¹⁶ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 99 FERC ¶ 61,033 (2002) (Complaint Hearing Order).

¹⁷ Phase I Order, 101 FERC ¶ 61,282 at P 36, 38.

¹⁸ *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co.*, 99 FERC ¶ 63,028 (2002) (Phase I Initial Decision).

¹⁹ Phase II Opinion, 108 FERC ¶ 61,120 (2004), *order on reh'g*, 119 FERC 61,071 (2007) (Phase II Order on Rehearing I), *order on reh'g*, 120 FERC ¶ 61,161 (2007) (Phase II Order on Rehearing II).

Commission also explained that for scheduling purposes, service under the 1975 400 MW TSA has a higher priority than service to non-firm customers who agree to pay congestion costs.²⁰

9. The parties subsequently filed an operating protocol, which the Commission approved;²¹ ConEd subsequently appealed that order.²² The 1975 400 MW TSA and the 1978 600 MW TSA and the currently-effective operating protocol, which was approved in that proceeding will expire in 2012. PJM and ConEd, therefore, entered into replacement agreements, styled as roll-overs of the existing agreements, with an effective date in 2012. On April 22, 2008, in Docket No. ER08-858-000, pursuant to section 205 of the Federal Power Act, PJM filed two non-conforming OATT service roll-over agreements with the Commission: (1) a 400 MW agreement to replace the 1975 400 MW TSA (2008 400 MW TSA) and (2) a 600 MW agreement to replace the 1978 600 MW TSA (2008 600 MW TSA) (collectively, 2008 1000 MW TSA), along with a new Schedule C to the JOA Protocol. On April 23, 2008, in Docket No. ER08-867-000, NYISO filed the JOA Protocol on an informational basis with the Commission.

10. On August 26, 2008, the Commission issued an order accepting and suspending, subject to refund, the 2008 1000 MW TSAs and JOA Protocol.²³ It also set the matter for hearing, and then suspended the hearing to give the parties the opportunity to engage in settlement discussions before a settlement judge. The Commission set the following questions for hearing:

At the hearing, the presiding judge shall consider the justness and reasonableness of the [2008] 1000 MW TSAs and JOA Protocol, with particular attention to the following issues: (1) whether the 1975 400 MW TSA and 1978 600 MW TSA represent firm service for purposes of roll-over under section 2.2 of the PJM Tariff [OATT]; (2) whether the 2008 600 MW TSA provides for the same level of firmness and service as the 1978 600 MW TSA; (3) whether the 2008 400 MW TSA provides for the same level of firmness and

²⁰ Phase II Opinion, 108 FERC ¶ 61,120 at P 138.

²¹ Phase II Order on Rehearing I, 119 FERC ¶ 61,071.

²² *Public Service Electric and Gas Co. v. FERC*, Case Nos. 07-1210, *et al.* (D.C. Cir.). This appeal is currently being held in abeyance and will be withdrawn upon approval of the Settlement.

²³ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,184 (2008) (TSA Hearing Order).

service as the 1975 400 MW TSA; (4) whether roll-over of the 1970's 1000 MW TSAs will result in ConEd receiving unduly preferential service; and (5) whether either PJM's or the NYISO's OATT will be violated by any specific provisions of the 2008 1000 MW TSAs requiring that energy be transmitted over specific lines.²⁴

11. The order also directed NYISO to designate and formally file the 2008 JOA Protocol, which NYISO did on September 25, 2008, in Docket No. ER08-867-001.²⁵ On September 2, 2008, the Chief Administrative Law Judge designated Judge John P. Dring as settlement judge and commenced settlement judge proceedings.

B. Settlement and Order on Additional Procedures

12. Following extensive negotiations with the assistance of Judge Dring, the parties filed the Settlement. Although PSE&G and the New Jersey Commission protested the 2008 1000 MW TSAs when they were filed, they have now either signed or support the Settlement. However, NRG Companies (NRG)²⁶ and Commission Trial Staff filed comments opposing the Settlement.²⁷ Since the Settlement was contested, Judge Dring certified the Settlement to the Commission without making a determination on its merits.

²⁴ TSA Hearing Order, 124 FERC ¶ 61,184 at P 46.

²⁵ *New York Independent System Operator, Inc.*, Docket No. ER08-867-001 (Nov. 4, 2008) (unpublished letter order).

²⁶ The NRG Companies include: NRG Power Marketing LLC, Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, Vienna Power LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

²⁷ Commission Trial Staff gave four reasons for its opposition: the Settlement may not be consistent with the Commission's open access transmission policy; it fails to resolve the issue of whether the two service agreements meet the eligibility requirement to be rolled over under PJM's OATT; permitting a roll-over could have negative impacts, such as restricting or preventing export of in-City generation; and if the special operating procedures set forth in the protocols were not available to and followed by the system operators, service under the TSAs may have substantial negative effects on the reliability of the entire PJM system. Trial Staff's first three points are addressed in the filed briefs and in this order. With respect to Trial Staff's fourth point, *see infra* n 77.

13. Under the Settlement, the parties agree to make certain changes to the 1000 MW TSAs and 2008 JOA Protocol. The parties agree that service under the 2008 1000 MW TSAs will be rolled over under section 2.2 of PJM's OATT, and acceptance of the Settlement shall mean acceptance of the 2008 1000 MW TSAs as filed on April 22, 2008. Under the Settlement, ConEd also agrees to pay PJM Regional Transmission Expansion Plan (RTEP) costs under the 2008 1000 MW TSAs at its full service entitlement of 900 MW.²⁸

14. As part of the Settlement, the parties made several changes to the 2008 JOA Protocol, which was set for hearing in Docket No. ER08-867-000. While it originally specified that service under both agreements should be curtailed *pro rata* with firm load, the 2008 400 MW TSA is now to be curtailed prior to PJM shedding firm load, but after PJM has taken other available actions, including emergency load response and voltage reduction. Service under the 2008 600 MW TSA, however, remains subject to curtailment *pro rata* with firm load. The 2008 JOA Protocol is also modified (1) to eliminate a re-direction of flow mechanism, (2) to eliminate the 13 percent distribution factor in desired flow calculations,²⁹ except when PJM and NYISO's steps to control power flows on transmission lines between New Jersey and New York are unable to maintain desired flows, and (3) to state that the Auto Correction Factor shall be the only remedy for under- or over-delivery of power under the 1000 MW TSAs, unless gross negligence or intentional misconduct is involved. The parties also agree to modify the operating protocol that is currently in effect, and will remain in effect until 2012, to add the above-mentioned Auto Correction Factor. Finally, certain terms are removed from the 2008 JOA Protocol because they are no longer in use by PJM.

15. In an order issued February 19, 2010, the Commission found that it was unable to approve the Settlement at that time since the record lacked evidence on certain contested

²⁸ Energy flows over the A/B/C and J/K Feeders are controlled by Phase Angle Regulators (PAR), which cannot precisely maintain a desired flow level. ConEd further explains that, although PJM and NYISO attempt to maintain actual flows within a +/- 100 MW bandwidth of the scheduled flow, they do not adjust for flow deviations unless the deviation exceeds the bandwidth. Thus, the bandwidth effectively reduces ConEd's service entitlement to 900 MW, i.e., 90 percent of its service reservation. ConEd Reply Brief at 18.

²⁹ When proxy busses are used instead of LMP for calculating prices at the PJM-NYISO borders, assumptions have to be made with respect to flows over the interconnections. A distribution factor represents a measure of the effect of the load of each transmission zone or merchant transmission facility on the transmission constraint that requires the facility.

issues.³⁰ The Commission established a briefing schedule, which was subsequently extended, and asked the parties to brief (1) whether these [TSAs] are sufficiently firm to be rolled over under Order No. 888; (2) whether, if they are eligible for roll-over, ConEd is eligible only for OATT service, or whether the circumstances here warrant a non-conforming agreement; and (3) whether and what effect these agreements have on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA on the Locational Marginal Prices (LMP) in both PJM and NYISO and the effect of these provisions on the ability of other parties to transact business.³¹

C. Briefs and Comments

16. On April 21, 2010, six parties filed initial briefs: NYISO, PSE&G, NRG, PJM, ConEd, and the New Jersey Commission. The City of New York filed a statement in support of the Settlement and ConEd's positions. On April 22, 2010, the New Jersey Commission filed a letter clarifying its initial brief. On May 11, 2010, six parties filed reply briefs: NYISO, NRG, the New York Public Service Commission (New York Commission), PJM, ConEd, and PSE&G.³² The New York Commission states that it concurs with the positions and arguments raised in ConEd's initial brief and that it is particularly concerned that the Commission's rejection of the agreements could jeopardize reliability within New York City. The New Jersey Commission filed a letter in lieu of a reply brief.

17. On May 11, 2010, Monitoring Analytics, LLC, the Independent Market Monitor for PJM (PJM Market Monitor) filed a motion for late intervention and comments on the Settlement. On May 21, 2010, ConEd filed an answer in opposition to the motion for late intervention by the PJM Market Monitor. On May 26, 2010, PJM also filed an answer in opposition to the late intervention by the PJM Market Monitor. Also on May 26, 2010, NRG filed an answer to the reply briefs filed by ConEd, New Jersey Commission, NYISO and PJM. On June 1, 2010, ConEd filed an answer to the affidavit by Kenneth J. Slater which was filed with NRG's reply brief. On June 23, 2010, DTE Energy Trading, Inc. (DTE Energy Trading) filed a motion to intervene out of time and comments. On July 7, 2010, PJM filed an answer in opposition to DTE Energy Trading's motion and

³⁰ Briefing Order, 130 FERC ¶ 61,126, at P 23.

³¹ *Id.* P 24.

³² PSE&G states that it supports the Settlement, but, in order to preserve its rights in the event that the Settlement is not approved or if additional procedures are ordered, PSE&G references its litigation position. PSE&G Initial Brief at 1-2 (citing PSE&G's May 13, 2008 Motion to Reject and Protest; PSE&G's June 6, 2008 Reply).

comments. On July 8, 2010, ConEd filed an answer in opposition to DTE Energy Trading's motion and comments. The issues raised in these pleadings are discussed below.

D. Request for Rehearing or Clarification

18. On March 22, 2010, NRG filed a request for rehearing and clarification of the Briefing Order. NRG asks that the Commission clarify or grant rehearing on two issues. First, NRG asks the Commission to clarify that it did not "abdicate or reverse" its prior finding that this matter raises material issues of fact, which must be resolved in a hearing. According to NRG, this matter raises both legal and factual issues. NRG asserts that the record is insufficient for a finding on the Settlement, since the Settlement has not resolved any of the issues set for hearing in the TSA Hearing Order. Second, NRG asks the Commission to clarify that it did not make any factual findings on the Settlement in the Briefing Order, repeating its argument that the record is insufficient for a merits determination of the Settlement.

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the PJM Market Monitor's and DTE Energy Trading's late-filed motions to intervene given their interest in the proceeding and the absence of undue prejudice or delay.

20. NRG filed the affidavit of Mr. Slater together with its reply brief, asserting that this affidavit responds to the affidavit of Robert B. Stoddard, which ConEd filed on March 25, 2009, over a year before NRG's response was filed. Not only did NRG file Mr. Slater's affidavit in an untimely manner, but it did so in its reply brief, effectively precluding other parties from responding to that affidavit. As such, the Commission rejects Mr. Slater's affidavit as untimely.³³

³³ Although we reject Mr. Slater's affidavit, we note that even if we had allowed the affidavit into the record, it would not have changed the Commission's determinations because Mr. Slater's conclusions support the conclusions of NRG's witnesses, Miles O. Bidwell and Bradley Kranz. Mr. Slater asserts that the 2008 1000 MW TSAs are inefficient in roughly 14-19 percent of the time studied. He also notes that they restrict the ability of NRG's Arthur Kill facility from selling power roughly 10 percent of the time. Mr. Slater ends his affidavit, questioning why the parties would agree to the Settlement. As discussed in greater detail below, the Commission finds that the

(continued...)

21. Generally, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010) prohibits answers to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept NRG's May 26, 2010 answer or ConEd's June 2, 2010 answer and will, therefore, reject them.

B. Substantive Matters

22. When a settlement is contested, the Commission "must make an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates."³⁴ Rule 602(h)(1)(i) of the Commission's settlement rules provides that the Commission may decide the merits of the contested issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact.³⁵

23. Applying these standards, we will approve the Settlement and accept the 2008 1000 MW TSA and JOA Protocol finding that they are just and reasonable. These agreements were freely negotiated by all the participating parties, ConEd, PSE&G, PJM, and NYISO, to provide for a continuation of pre-existing TSAs permitting Con Ed to exchange power by displacement from Rockland County, New York with New York City. ConEd's continued ability to access such power is vital to New York City. Both the New York Commission and the City of New York have asserted that the 2008 1000 MW TSAs provide critical reliability benefits and that, if the agreements were to expire, replacement of the lost imports would be difficult and would, most likely, require a long lead time.³⁶ We find that the Settlement is a just and reasonable means for ConEd to

Settlement is economic in most hours of the day and provides needed power to New York City, thereby assuring reliability. Further, the Commission's role under section 205 of the Federal Power Act is to consider the proposal filed before us by the applicants and determine if that proposal is just and reasonable. Although Mr. Slater questions why the settling parties agreed to the Settlement, their reasoning and motivations are not germane to the Commission's analysis of whether the Settlement is just and reasonable.

³⁴ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974); *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345, at 62,339 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

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

³⁶ ConEd and City of New York Reply Comments (Mar. 25, 2009), Affidavit of Michael Forte at 4 and Affidavit of Robert B. Stoddard at 7-9; New York Commission Comments at 4-5.

obtain a continuation of its grandfathered transmission service.³⁷ Indeed, PJM states that without these agreements, it could not provide for the specific transmission service provided under these agreements.³⁸ Further, we find that the Settlement benefits other customers of PJM because ConEd will contribute to PJM's RTEP costs, thereby reducing the other parties' costs.

24. Although NRG, a third party, may more easily sell power to PJM if we reject the Settlement, we conclude that this third-party impact does not outweigh the significant benefits provided by the 2008 1000 MW TSAs to the signatory parties and, more importantly, their end-use customers, nor does such impact outweigh the public benefits of continuing these agreements. In fact, NRG itself recognizes that some agreement between PJM and NYISO would be necessary to manage this valuable transmission capacity; it argues only that a better agreement might be negotiated.³⁹ It maintains that approval of the Settlement might remove the incentive to reach such a superior agreement.⁴⁰ The PJM Market Monitor also maintains that a more comprehensive loop flow⁴¹ agreement would be superior to the TSAs. However, we will not reject this just and reasonable Settlement, which includes the 2008 1000 MW TSAs and the JOA Protocol, solely to provide an incentive for a more comprehensive agreement, particularly since the Commission already has established other proceedings to deal comprehensively

³⁷ Under the Commission's *Trailblazer* analysis, the Commission may approve a contested settlement under the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed. A finding on the merits that a settlement is just and reasonable satisfies the first approach articulated in *Trailblazer*. 85 FERC ¶ 61,345 at 62,342 (1998).

³⁸ PJM Initial Brief at 10.

³⁹ NRG May 11, 2010 Reply Brief at 25.

⁴⁰ *Id.* (“a serious problem with supporting these contracts is that since they account for a third of the total transmission flows from PJM to New York City, the perpetuation of the contracts will remove much of the incentive to fix the pricing at the congested ties”).

⁴¹ Loop flow refers to power flow along an unintended path that loops away from the most direct geographic path or contract path and therefore affects other transmission systems.

with loop flow problems in this region. Indeed, parties to the 2008 1000 MW TSAs recognize that the JOA Protocol might need to be addressed in the stakeholder processes of PJM and NYISO.⁴²

1. Firm Service for Purposes of Roll-over

25. Order No. 888, as amended by Order No. 890,⁴³ establishes the parameters for open access transmission service and sets forth a *pro forma* OATT. Section 2.2 of the *pro forma* OATT addresses the reservation priority for existing firm service customers, and states in relevant part:

Existing firm service customers (wholesale requirements and transmission-only, with a contract term of five years or more), have the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over or is renewed. This transmission reservation priority is independent of whether the existing customer continues to purchase capacity and energy from the Transmission Provider or elects to purchase capacity and energy from another supplier. If at the end of the contract term, the Transmission Provider's Transmission System cannot accommodate all of the requests for transmission service, the existing firm service customer must agree to accept a contract term at least equal to the longer of a competing request by any new Eligible Customer or five years and to pay the current just and reasonable rate, as approved by the Commission, for such service. . . . This transmission reservation priority for existing firm service customers is an ongoing right that may be exercised at the end of all firm contract terms of five years or longer.

PJM's OATT is consistent with this language.⁴⁴

⁴² ConEd Initial Brief at 32-22; PJM Reply Brief at 9.

⁴³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

⁴⁴ Fourth Revised Sheet No. 45, accepted by letter order issued on October 31, 2008, in Docket Nos. OA08-9-001 and OA08-9-002.

26. In the TSA Hearing Order, the Commission set for hearing the issue of whether the 1975 400 MW TSA and 1978 600 MW TSA represent firm service for purposes of roll-over under section 2.2 of the PJM OATT.⁴⁵ In the Briefing Order, the Commission asked the parties to further brief the issues of (1) whether the [TSAs] are sufficiently firm to be rolled over under Order No. 888 and (2) whether, if they are eligible for roll-over, ConEd is eligible only for OATT service, or whether the circumstances here warrant a non-conforming agreement.⁴⁶

a. Parties' Positions

27. ConEd submits three reasons that the grandfathered agreements are firm for purposes of section 2.2. First, ConEd states that the Commission already determined in Docket No. EL02-23-000 that the agreements were firm. Second, ConEd states that the 1975 400 MW TSA and the 1978 600 MW TSA are firm for purposes of section 2.2 based on the terms of the agreements themselves. Third, ConEd argues that the 1975 400 MW TSA and the 1978 600 MW TSA are firm for purposes of section 2.2 because they are as firm as (or more firm than) other grandfathered agreements. For example, ConEd notes that PSE&G's 1987 contract with Camden County Energy Associates (Camden) was a firm, grandfathered service. Similarly, ConEd notes that its 1979 and 1991 transmission service contracts with the New York Power Authority (NYPA) provided for firm service because the services for NYPA were subordinate to other services rendered by ConEd for the operation of ConEd's system to serve its own customers reliably and economically.⁴⁷

28. PJM states that the firmness of the service under the 1975 400 MW TSA and the 1978 600 MW TSA has already been comprehensively litigated and a thorough record

⁴⁵ The Commission also set for hearing the issues of whether the 2008 600 MW TSA provides for the same level of firmness and service as the 1978 600 MW TSA and whether the 2008 400 MW TSA provides for the same level of firmness and service as the 1975 400 MW TSA. TSA Hearing Order, 124 FERC ¶ 61,184 at P 46. We do not need to address these questions because they were raised by PSE&G, who is a party to the Settlement. We interpret PSE&G's acquiescence in the Settlement as withdrawal of its protest on these issues. Further, NRG, which contests the Settlement, did not raise concerns about the level of firmness between the 1970s contracts and the roll-over contracts. Accordingly, these two issues will not be addressed here.

⁴⁶ Briefing Order, 130 FERC ¶ 61,126 at P 24.

⁴⁷ ConEd Initial Brief at 14 (citing Exh. PS-4 at 2 and PS-5 at 3).

established, finding that the 1000 MW TSAs are “for essentially firm service.”⁴⁸ Further, PJM argues that NRG, who was a party to the prior litigation should not be allowed a “second bite at the apple” by re-litigating this issue.

29. The New York Commission agrees with ConEd’s position and also contends that the TSAs are sufficiently firm to be rolled over under section 2.2 because the Commission has already determined that the 1978 600 MW TSA is as firm as firm OATT service, and that the 1975 400 MW TSA is essentially firm and superior to all non-firm OATT service (including non-firm customers that pay congestion costs).

30. NRG states that firm service is a prerequisite for roll-over under section 2.2 of the PJM OATT and the Settling Parties have not demonstrated that the underlying agreements are for firm service. NRG states that the Commission has already ruled on this issue, finding, after vigorous briefing, that the record evidence did not support the assertion that the 400 MW TSA and the 600 MW TSA are for “firm” point-to-point transmission service.⁴⁹ Therefore, NRG notes that the Commission directed the parties to resolve five issues in a trial-type hearing. NRG argues that the evidentiary record today is effectively the same as that which existed when the Commission rendered its earlier judgment setting the firmness issue for hearing and therefore, it would be legally unsupportable for the Commission to find that it has a sufficient factual record to find that the underlying TSAs are for “firm” service.

31. NRG also notes that, as a result of the Settling Parties’ failure to submit new evidence, the state of the evidentiary record in favor of accepting the Settlement remains effectively identical to the record before the Commission when it issued the Briefing Order. It states that any decision to accept the 2008 1000 MW TSAs would be a collateral attack on the Commission’s findings in the TSA Hearing Order and the Briefing Order.

32. NRG further states that the Commission addressed the relative firmness of the TSAs at issue in the instant proceeding in Docket No. EL02-23. Specifically, NRG notes that although firmness for roll-over purposes was not at issue, the Commission addressed whether the TSAs were: (1) more or less firm than transactions necessary for PSE&G to serve its native load; and (2) required PSE&G to redispatch its own resources in order to

⁴⁸ PJM Initial Brief at 8-9 (citing Phase II Order on Rehearing I, 119 FERC ¶ 61,071 at P 4).

⁴⁹ NRG Initial Brief at 27-28 (citing TSA Hearing Order, 124 FERC ¶ 61,184 at P 46).

preserve only the 600 MW TSA, not the 400 MW TSA.⁵⁰ NRG states that the currently-effective operating protocols expressly refer to the 1975 400 MW TSA as “non-firm service” and under the currently-effective protocols, the 1975 400 MW TSA is curtailed after “non-firm” deliveries but *before* voltage reductions or calling upon active load management.⁵¹ NRG notes that the Commission found when addressing the level of service under these same agreements: “[I]f truly firm service in all circumstances was what ConEd really intended when the [TSAs] were executed, ConEd should have had the [TSAs] drafted in a much more iron clad and less ambiguous manner than what ultimately was agreed to.”⁵² Moreover, NRG notes that the Commission found that ConEd should have the right to “firm up” the 400 MW TSA. According to NRG, if ConEd has the right to “firm up,” by definition, the TSA cannot already be firm.⁵³

33. Finally, NRG takes exception to cases that ConEd proffers for the proposition that the 1000 MW TSAs at issue in this proceeding are as firm as the other grandfathered services. For example NRG states that the Camden agreement is not a transmission services contract but rather an interconnection agreement for a qualifying facility generator.⁵⁴ In addition, NRG states that the 1979 NYPA agreement specifically provides for firm service whereas the 1000 MW TSAs do not.

Commission Determination

34. As noted by NRG, the Commission addressed the relative firmness of the 1975 400 MW TSA and the 1978 600 MW TSA in Docket No. EL02-23, but the specific issue of whether the TSAs were firm for purposes of roll-over under section 2.2 of PJM’s OATT was not addressed. The TSAs pre-dated open access transmission service, and, at that time, transmission service agreements were generally not standardized. Rather, the parties negotiated terms to meet the specific circumstances of the transactions. In addition, although transmission service agreements typically were for “firm” or “non-

⁵⁰ NRG Initial Brief at 30 (citing Phase I Order, 101 FERC ¶ 61,282 at P 33).

⁵¹ *Id.* at 31 (citing Phase I Order, 101 FERC ¶ 61,282 at P 39).

⁵² *Id.* at 29 (citing Phase I Order, 101 FERC ¶ 61,282 at P 35).

⁵³ NRG Initial Brief at 31 (citing 2004 Operating Protocols, Original Sheet No. 2, n.1).

⁵⁴ NRG Reply Brief at 30-32. NRG also argued that the Commission should reject ConEd’s argument because ConEd had abused its monopoly position in the 1970s. The Commission rejects this argument because it is irrelevant.

firm” service, the specific negotiated terms of each agreement, and the lack of any *pro forma* tariff, allowed for different gradations of firm service based on such variables as *force majeure* provisions, curtailment provisions, the level of fixed charges, and obligations to plan and expand the transmission system to maintain service. Thus, for pre-Order No. 888 agreements, it is reasonable to look to the terms of the individual agreement to determine whether it is firm or non-firm transmission service.

35. The 1975 400 MW TSA requires PSE&G to “construct and make available” to ConEd portions of the Hudson-Farragut and Ramapo-New Milford interconnections.⁵⁵ The agreement further states that PSE&G would transfer up to 400 MW of power from Ramapo to Farragut, except when such transfers would be curtailed due to bulk-power facility outages.⁵⁶ The agreement also provides that ConEd will pay PSE&G annual charges for the life of the contract.⁵⁷ In addition, the 1975 400 MW TSA allows PSE&G to connect additional load or generation to the new interconnection, provided that neither the 400 MW service for ConEd nor the power transfer capability between PJM and the New York Power Pool would be impaired.⁵⁸

36. The 1978 600 MW TSA requires PSE&G to “plan, design, build, and operate its system so as to supply its own load, meets its obligations to PJM, and wheel 600 MW to [ConEd].”⁵⁹ In addition, the agreement states that the service would be “reasonably expected to take place for most hours of the year” and that curtailment would only be limited when required by “critical bulk-power system outages.”⁶⁰ The agreement also requires ConEd to pay monthly charges for capital expenses and maintenance costs associated with the facilities constructed by PSE&G for ConEd for the 30-year life of the TSA.⁶¹ Further, the agreement specifies that future connections of generation and/or load may be made to the new interconnections provided that they will not impair the functions

⁵⁵ 1975 400 MW TSA, Exh. CE-6, Sections 1.1 and 1.2.

⁵⁶ 1975 400 MW TSA, Exh. CE-6, Section 4.1.

⁵⁷ 1978 Amendment to 1975 400 MW TSA, Exh. CE-7, Section 1.

⁵⁸ 1975 400 MW TSA, Exh. CE-6, Section 5.3.

⁵⁹ 1978 600 MW TSA, Exh. CE-9, Section III. B.

⁶⁰ *Id.*

⁶¹ 1978 600 MW TSA, Exh. CE-9, Sections II. B and E.

of the interconnections as described in the agreement or cause reductions in intra-pool or inter-pool transfer capabilities.⁶²

37. We find that the agreements are firm for purposes of section 2.2 roll-over for the following reasons. Both the 1975 400 MW TSA and the 1978 600 MW TSA require PSE&G to add new facilities to its system in order to render a new service for ConEd. The two TSAs at issue require ConEd to pay a fixed monthly charge for service, regardless of whether it actually transmits any energy over its reserved transmission capacity that month.⁶³ Such fixed capacity payments are characteristic of firm transmission agreements, as opposed to non-firm transmission agreements in which payment is made only when, and if, the party actually transmits energy.⁶⁴ In addition, by their own terms, these agreements provide service superior to that of non-firm service. Both agreements specify that the service rendered is superior to that of any additional load or generation; they provide that the connection of additional load or generation to the inter-area ties would be prohibited if such connections would impair the contractual transmission service. Furthermore, both services can be curtailed only when bulk power facility outages occur and are not subject to any *pro rata* curtailment under other circumstances. The fact that the two agreements authorize curtailment for this specific operational reason does not change them into non-firm service. Moreover, in reliance on these agreements, ConEd did not build a new north-south transmission line to New York City that would have increased its system capacity to provide for reliable retail service.⁶⁵ The service provided under these agreements was therefore sufficiently firm to substitute for the construction of a transmission line within ConEd's service territory.

38. Based on these factors, we find that the two agreements are eligible for roll-over under section 2.2 of the PJM OATT because ConEd is an existing firm customer of PJM.

⁶² 1978 600 MW TSA, Exh. CE-9, Section III. F.

⁶³ 1978 Amendment to 1975 400 MW TSA, Exh. CE-7, Section 1; 1978 600 MW TSA, Exh. CE-9, Sections II. B and E.

⁶⁴ See *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at P 75-78 (2008) (linking firm, or non-firm, transmission to the payment of, or absence of, a reservation fee); see also 18 C.F.R. § 284.7 (2010) (payment of reservation charge for firm service); *Columbia Gas Transmission Corp.*, 54 FERC ¶ 61,226 (1991) (service can be firm even though subject to curtailment).

⁶⁵ May 27, 1969 Letter Agreement, Docket No. EL02-23, Exh. No. CE-5; Joint Report of AC and DC Transmission Plans for Delivering Power to New York City in the 1980-1985 Period, Docket No. EL02-23, Exh. No. CE-8.

(When PJM became an ISO, and later an RTO, it assumed the role of agreement administrator for PSE&G with regard to the two agreements).⁶⁶ In addition, the two agreements have service terms of more than five years. Further, PJM has indicated, by its April 12, 2008 filing of the TSAs, that it is able to accommodate ConEd's request for firm service,⁶⁷ and ConEd has agreed to pay PJM's OATT rates for firm transmission service.

39. We reject NRG's contention that because the evidentiary record has not changed since we issued the TSA Hearing Order, it would be legally unsupportable to find that we have a sufficient factual record to find that the 1975 400 MW TSA and the 1978 600 MW TSA are firm. We specifically requested briefs on these issues and find that the factual record developed in the evidentiary proceeding in Docket No. ER02-23 provides the basis for a decision on the Settlement.⁶⁸ NRG has failed to advance any specific factual issues that need to be resolved by hearing.⁶⁹

2. Non-Conforming TSA

40. In the briefing order, the Commission found that the record was not clear as to whether the 2008 1000 MW TSAs and the amended JOA Protocol would allow ConEd to continue receiving a pre-open access transmission service that would otherwise not be available under PJM's Tariff and thus receive an undue preference. Therefore, the Commission requested that parties brief whether ConEd is eligible only for OATT service, or whether the circumstances here warrant a non-conforming agreement.

a. Parties' Positions

41. ConEd asserts that non-conforming arrangements are necessitated by the unique circumstances under which service under the 2008 1000 MW TSAs will be rendered, i.e.,

⁶⁶ Phase II Opinion, 108 FERC ¶ 61,120 at P 59.

⁶⁷ *See also* PJM Initial Brief at 8.

⁶⁸ *Cities of Batavia, et al. v. FERC*, 672 F.2d 64, 91 (D.C. Cir. 1982) (rejecting an argument that, once having entered into hearings, the Commission must follow formal adjudicatory proceedings throughout).

⁶⁹ *Blumenthal v. FERC*, No. 09-1220, 2010 U.S. App. LEXIS 14648 (D.C. Cir. July 16, 2010) ("even when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record").

from the New York control area, through the PJM control area, and back into the New York control area. First, ConEd states that the TSAs' non-conforming terms of service are similar to other non-conforming service terms.⁷⁰ Second, ConEd states that denial of the roll-over would unduly discriminate against it vis-à-vis other customers taking transmission service pursuant to previously approved non-conforming agreements. Third, ConEd contends that the rolled-over service will not differ fundamentally from OATT service. Rather, according to ConEd the JOA Protocol simply prescribes the manner in which PJM and NYISO will coordinate the planning and provision of the transmission service which ConEd schedules. Finally, ConEd states that the roll-over of the agreements will not exacerbate the scheduling and other seams issues, which are caused, in part, by PJM and NYISO using single proxy busses⁷¹ rather than a different method, such as LMP, which could more accurately reflect economic differences across the PJM-NYISO interties.⁷²

42. PJM agrees that the circumstances warrant a non-conforming TSA. PJM states that in order to direct the power flows from NYISO, across PJM, and back into NYISO, special operating procedures are required which monitor and control the power flows across specific interfaces between NYISO and PJM. PJM states that the JOA Protocol provides these operating procedures, which enable the point-to-point, through-and-out service to occur.

43. PJM further states that if it is not permitted to provide service to ConEd using the 2008 1000 MW TSAs and the JOA Protocol, then it cannot provide point-to-point, through-and-out service to ConEd. PJM notes that its OATT, in conformance with the Commission's *pro forma* OATT, offers through-and-out service to all eligible customers. PJM states that because ConEd is an eligible customer, it is entitled to such service just as any other customer is. PJM states that due to the "unique geography" in the region, these

⁷⁰ ConEd Initial Brief at 17-19 (citing *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,228 at P 21 (2006); *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,255 at P 53 (2004); *PJM Interconnection, L.L.C.*, Docket No. ER04-892-000 (Sept. 8, 2004) (letter order); *PJM Interconnection, L.L.C.*, Docket No. ER04-893-000 (Sept. 10, 2004) (letter order); *PJM Interconnection, L.L.C.*, Docket No. ER04-891-000 (July 22, 2004) (letter order); *Cargill Power Markets, LLC*, 103 FERC ¶ 61,214 (2003)).

⁷¹ Both PJM and NYISO use a proxy bus to represent the typical generator price for the other's control area when calculating LMP at their boundaries. *See* www.nyiso.com/public/market_operations/services/customer_support/clossary/index.jsp.

⁷² Affidavit of Robert B. Stoddard at 4.

particular through-and-out flows will originate and terminate in the same control area.⁷³ Consequently, there must be a special operating arrangement to enable the scheduling and flow of power over the PJM transmission system. Without the non-conforming agreements and the JOA Protocol, PJM cannot deliver the power across its system and the service request must be denied. PJM states that this would be tantamount to a Commission determination that through-and-out service is not available under the Order No. 888 *pro forma* OATT when service originates and terminates in the same control area.

44. The New York Commission states that the Commission should recognize that the non-conforming elements of the service are necessitated by the unique circumstances under which the service will be rendered. In particular, the New York Commission states that the circumstances involving a power flow from New York into PJM and back into New York require that PJM and the NYISO utilize certain procedures to effectuate the service. Thus, the New York Commission states that the circumstances warrant a non-conforming agreement.

45. According to NRG, there are no circumstances that warrant a non-conforming TSA for ConEd. NRG states that the 2008 1000 MW TSAs change system dispatch and associated transmission flows thereby preventing least-cost dispatch on both PJM and NYISO.⁷⁴ Because this case is predominantly about economics and not reliability, NRG contends that the Commission should not deviate from the principle of economic dispatch, which NRG states is a touchstone of just and reasonable rates.⁷⁵

46. NRG also takes exception to the assertions by ConEd and PJM that the TSAs will be provided under PJM's OATT and that the JOA Protocol is necessary to provide service. NRG argues that the JOA Protocol is designed to mimic the operation of the grandfathered agreements and to convert the service into open access transmission service. NRG further contends that the circular reasoning advanced by PJM and ConEd would allow parties to continue any discriminatory grandfathered agreement in perpetuity – so long as the parties amend the OATT to incorporate the terms and conditions of the grandfathered service into the OATT.

⁷³ PJM Initial Brief at 10.

⁷⁴ NRG Initial Brief at 10 (citing Affidavit of Miles O. Bidwell at 10).

⁷⁵ NRG Initial Brief at 23-24 (citing Phase II Order on Rehearing II, 120 FERC ¶ 61,161 at P 12).

Commission Determination

47. As part of the Settlement, PJM agreed to roll-over the 1975 400 MW TSA and the 1978 600 MW TSA under section 2.2 of its OATT. Moreover, PJM will provide the service as an OATT service. OATT services can be conforming or non-conforming. In this case, the 2008 1000 MW TSAs conform to the PJM OATT's standard form of service agreement, except for the JOA Protocol which specifies: (1) the procedures for the planning, operation, control, and scheduling of energy between NYISO and PJM associated with the 2008 1000 MW TSAs; (2) how balancing market costs and congestion costs will be addressed; and (3) that ConEd's Auction Revenue Rights (ARR) requests are subject to all PJM rules for ARR allocations.

48. The roll-over provisions of Order Nos. 888 and 890 do not provide a right for a service other than OATT service. However, in this case, a non-conforming service is needed as discussed below. Specifically, the JOA Protocol is needed to control the unintended loop flow that would result from increasing power production from the generation sources north of New York City in order to serve parts of New York City. Such an increase in production would cause increased flows into Northern New Jersey.⁷⁶ The JOA Protocol is designed to enable PJM and NYISO to manage these flows. In these circumstances, we find that non-conforming OATT service agreements (i.e., ones that incorporate the terms of the JOA Protocol) are necessary to provide for a continuation of reliable service.⁷⁷

49. We find that the Settlement, the 2008 1000 MW TSAs and the JOA Protocol are a just and reasonable means of continuing service to Con Ed and do not create undue harm to pricing in the NYISO or PJM. Both the parties supporting the Settlement and NRG generally agree that the 2008 1000 MW TSAs are economic in roughly 88 percent of hours. Further, ConEd placed into evidence data that during the hours when prices are

⁷⁶ PJM Initial Brief at 10.

⁷⁷ Commission Trial Staff argued that it might cause reliability problems if the RTOs fail to abide by these protocols; however, as the New York Commission has pointed out, these agreements are necessary to help promote reliability. The two ISOs negotiated these protocols because they can abide by them. *See* NYISO April 21, 2010 Initial Brief at 2 (“The rollover would be implemented pursuant to a revised JOA Protocol that is fundamentally similar to the one that the NYISO and PJM have been successfully administering since 2005. . . . [T]he Commission should rule as soon as practicable so that . . . NYISO and PJM will be in a position to provide for the future reliable operation of their respective regional transmission systems”).

lower in NYISO than PJM, the price differential usually is not great, but, when prices in NYISO are higher than PJM, they are substantially higher.⁷⁸

50. Moreover, the Commission has established other procedures to address the loop flow issue comprehensively.⁷⁹ As ConEd notes, neither the 2008 1000 MW TSAs nor the JOA Protocol would prevent PJM and NYISO from modifying their scheduling arrangements for inter-area transactions, once these seams issues are resolved. Rather, the 2008 1000 MW TSA will be subject to PJM's OATT and, if PJM and NYISO amend the scheduling practice prescribed by their OATTs, the new practice will govern service under the 2008 1000 MW TSA.

51. The Commission further finds that no other entity has been unduly discriminated against by denial of substantially similar service on the same terms and conditions as those requested by ConEd,⁸⁰ because no entity has requested such service. Rather, the Commission finds that it would be discriminatory to deny ConEd through-and-out service when all other customers are entitled to the service, simply because ConEd sources and sinks its power in the same control area.

3. Undue Discrimination

52. In the TSA Hearing Order, the Commission set for hearing the question of "whether roll-over of the 1970's 1000 MW TSAs will result in ConEd receiving unduly preferential service."⁸¹

⁷⁸ ConEd Reply Brief at 22 (citing Affidavit of Robert B. Stoddard at Exh. RBS-3).

⁷⁹ *See, e.g., New York Independent System Operator, Inc.*, 128 FERC ¶ 61,049, at P 6 (2009). Pursuant to Commission orders in Docket No. ER08-1281, the scheduling and seams issues are being addressed. On January 12, 2010, NYISO submitted a status report on the progress of the development of (1) the buy-through congestion proposal; (2) the congestion management/market-to-market coordination proposal; (3) interface pricing revisions; and (4) enhanced interregional transaction coordination. On July 15, 2010, the Commission issued an order conditionally accepting the status report and directing the parties to provide additional information on the proposed comprehensive solutions. *New York Indep. Sys. Operator, Inc.*, 132 FERC ¶ 61,031 (2010).

⁸⁰ *California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007).

⁸¹ TSA Hearing Order, 124 FERC ¶ 61,184 at P 46.

a. Parties' Positions

53. NRG argues that the JOA Protocol created by the Settlement is unduly discriminatory because it would carve up scarce transmission resources without allowing open access to competitors and provide a level of service to ConEd which is not available to other market participants. According to NRG, the JOA Protocol prevents any other market participant from using the A/B/C and J/K feeder lines. NRG witness, Bradley Kranz, asserts that the JOA Protocol is unduly preferential to ConEd because it denies all other market participants the opportunity to be an alternative to the 1000 MW TSAs, even when such an alternative would make economic sense.⁸² He also states that ConEd's day-ahead elections in the NYISO Day-Ahead Market locks in ConEd's desired flows on the A/B/C and J/K lines, thus preventing any other market participants from using them.⁸³

54. PJM notes that no other entity, including NRG, has requested, much less been denied, the same service as ConEd, specifically through-and-out service with the source and sink both located in a single control area, such as NYISO. Further, PJM argues that it would be unduly discriminatory to deny this through-and-out service to ConEd simply because ConEd's source and sink are in the same control area. PJM also states that the service to ConEd does not preclude scheduling of counter-flow transactions on the interfaces between NYISO and PJM.⁸⁴ According to PJM, if NRG wishes to schedule such transactions, they will be priced using the NYISO-PJM proxy bus methodology and will in no way be precluded by the JOA Protocol.

55. ConEd states that it is reasonable to base its RTEP cost responsibility on 900 MW, rather than 1000 MW due to bandwidth limitations. ConEd explains that energy flows over the A/B/C and J/K Feeders are controlled by PARs, which cannot precisely maintain a desired flow level. ConEd further explains that, although PJM and NYISO attempt to maintain actual flows within a +/- 100 MW bandwidth of the scheduled flow, they do not adjust for flow deviations unless the deviation exceeds the bandwidth. Thus, the bandwidth effectively reduces ConEd's service entitlement to 900 MW.

56. ConEd argues that the roll-over will not constitute a preference, but even if it were to be construed as preferential, such preference would be justified and not undue under

⁸² NRG Initial Brief at 15 (citing Affidavit of Bradley Kranz at P 12).

⁸³ NRG Initial Brief at 14-15 (citing Affidavit of Miles O. Bidwell at 16-17).

⁸⁴ PJM Reply Brief at 9.

Order No. 681's holdings regarding long-term firm transmission rights.⁸⁵ ConEd asserts that it is a load-serving entity which has a long-term agreement under which it has paid embedded costs for PJM facilities to support load outside of PJM. ConEd also notes that the Commission has broad discretion in determining when preference is undue or permissible.⁸⁶

57. In response, NRG contends that adding a JOA Protocol designed to mimic the operation of the underlying discriminatory grandfathered agreement to the PJM OATT does not convert the service into an open access transmission service. NRG argues that the JOA Protocol repeatedly refers to ConEd by name and it does not create a right for other parties to take the same level of service as ConEd. NRG states that even ConEd concedes that the roll-over of the two TSAs would provide it with a unique level of service, not available to any other party.⁸⁷ NRG contends that the JOA Protocol is not the only means by which PJM could provide through-and-out service to ConEd, and this specific protocol includes certain discriminatory terms, including an allocation of only a portion of RTEP costs, access to the A/B/C and J/K lines, the unique congestion rights ConEd receives in PJM and specification of curtailment priorities. NRG also points to the *SMUD* decision by the U.S. Court of Appeals for the District of Columbia circuit, upholding the Commission's conclusion that an entity exercising roll-over rights must take new service governed by the OATT.⁸⁸

58. In response, PJM asserts that the through-and-out service ConEd takes under the 2008 1000 MW TSAs is available under the PJM OATT, and the only difference here is the procedures set forth in the JOA Protocol to implement the service. Further, ConEd responds that the *SMUD* case is inapposite because there, the utility providing the service refused to honor an expired contract, while here, PJM has agreed to roll over the 2008

⁸⁵ ConEd Initial Brief at 26 (citing *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, at P 325 (2006), *order on reh'g*, Order No. 681-A, 117 FERC ¶ 61,201, at P 79 (2006), *order on reh'g*, Order No. 681-B, 126 FERC ¶ 61,254 (2009)).

⁸⁶ ConEd Initial Brief at 26 (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000)).

⁸⁷ NRG Reply Brief at 18 (citing ConEd Initial Brief at 4).

⁸⁸ NRG Reply Brief at 19 (citing *Sacramento Municipal Utility District v. Pacific Gas & Elec. Co.*, 105 FERC ¶ 61,358 (2003), *order on reh'g*, 107 FERC ¶ 61,237 (2004), *aff'd sub nom. Sacramento Municipal Utility District v. FERC*, 428 F.3d 294, 297 (D.C. Cir. 2005) (*SMUD*)).

1000 MW TSAs. Also, ConEd notes, the California Independent System Operator's (CAISO) tariff did not include a roll-over provision comparable to section 2.2. ConEd also challenges the accuracy of NRG's assertion that ConEd pays for only part of the congestion costs associated with the 2008 1000 MW TSAs, citing to the Addendum to the 2008 1000 MW TSAs as proof that ConEd pays for congestion costs under both the 2008 600 MW TSA and 2008 400 MW TSA.

Commission Determination

59. The Commission finds that the Settlement, the 2008 1000 MW TSAs and the JOA Protocol are not unduly discriminatory or preferential. As PJM notes, through-and-out service that has source and sink in the same system is available under the PJM OATT although to date, no customer, other than ConEd has requested such service. PJM is willing to provide such service to any other party requesting it.⁸⁹ While the service PJM provides to ConEd differs from typical through-and-out service because the source and sink are in the same system (i.e., New York), this difference alone does not render the service unduly discriminatory or preferential. Rather, under Order No. 888, a public utility

must offer transmission services that it is reasonably capable of providing, not just those services that it is currently providing to itself or others. . . . Moreover, a public utility must offer these transmission services whether or not other utilities may be able to offer the same services and whether or not such services are generally available in the region.⁹⁰

An ISO should develop mechanisms to coordinate with neighboring control areas. An ISO will be required to coordinate power scheduling with other entities operating transmission systems. Such coordination is necessary to ensure provision of transmission services that cross system boundaries and to ensure reliability and stability of the systems. The mechanisms by which ISOs and other transmission operators coordinate can be left to those parties to determine.⁹¹

60. In short, Order No. 888 does not support NRG's claim that the service that PJM provides ConEd under the 1000 MW TSAs and the JOA is unduly discriminatory or

⁸⁹ PJM Reply Brief at 4.

⁹⁰ Order No. 888 FERC Stats. & Regs. ¶ 31,036 at 31,690.

⁹¹ Order No. 888 FERC Stats. & Regs. ¶ 31,036 at 31,732.

preferential; to the contrary, Order No. 888 supports PJM continuing to provide this service to ConEd under section 2.2 of its OATT.

61. The Commission further rejects NRG's claims that the JOA Protocol, which implements the specific kind of through-and-out service provided under the 1000 MW TSAs, is unduly discriminatory. NRG asserts that the JOA Protocol and Settlement allocate to ConEd only 90 percent, rather than 100 percent, of the costs of the 500kV facilities associated with the 1000 MW TSAs.⁹² We agree with the settling parties that this is reasonable because, due to bandwidth limitations, ConEd's firm service entitlement has been effectively reduced from 1000 MW to 900 MW.⁹³ Further, ConEd's payment of RTEP costs is a benefit of the Settlement since ConEd does not pay such costs under existing agreements.

62. NRG also argues that ConEd receives unique congestion rights in PJM, since PSE&G pays for congestion that affects the PJM portion of the wheeling arrangement under the 2008 600 MW TSA, while ConEd pays for any redispatch costs under the 2008 400 MW TSA. NRG has not explained why an arrangement to allocate redispatch costs would be unduly discriminatory. Further, ConEd challenges the accuracy of NRG's assertion, citing to the Addendum to the 2008 1000 MW TSAs as proof that ConEd pays for congestion costs under both the 600 MW and 400 MW agreements.

63. NRG asserts that the JOA Protocol, by eliminating the 13 percent distribution factor previously used to calculate Day-Ahead Market and Real-Time Market desired flows, would further reduce open access. The Commission rejects this argument because the 13 percent distribution factor will only be eliminated in unconstrained periods, when transmission capacity is available.⁹⁴ During the unconstrained hours, there are no limits on NRG's or any other party's ability to flow power in either direction across the A/B/C lines. Thus, we agree with PJM's conclusion that NRG is simply mistaken.⁹⁵ Similarly, we also reject NRG's arguments that the JOA Protocol grants unduly discriminatory and preferential access to the A/B/C and J/K lines to ConEd, preventing other market

⁹²ConEd is only entitled to 900 MW, because it has agreed that the bandwidth will not be adjusted unless the deviation exceeds 100 MW. We note that, for facilities less than 500 kV, ConEd is treated as a zone and pays based on PJM's distribution factor analyses used to determine cost responsibility assignment for such facilities.

⁹³ *See supra* P 13, and n 28.

⁹⁴ PJM Reply Brief at 10.

⁹⁵ *Id.*

participants from accessing those facilities. As PJM has stated, the service to ConEd does not preclude NRG or other parties from scheduling counter-flow transactions on the interfaces between PJM and NYISO.⁹⁶ The use of the single proxy bus pricing model for transactions between PJM and NYISO means that all transactions between the two independent system operators are priced at the proxy bus, such that whether NRG uses the A/B/C, J/K or other lines to sell its power into PJM, it will still receive the same LMP for its power.⁹⁷

64. We agree with PJM that *SMUD* is not relevant to the instant proceeding, since in that proceeding, the utility and the CAISO did not agree to extend the contract as requested by the customer. Further, it was impossible for the service to continue under the CAISO tariff. In the instant proceeding, PJM has agreed to offer the service and asserts that the service is compatible with its OATT.⁹⁸

4. Impact of the Agreements on Prices

65. In the Briefing Order, the Commission asked parties to brief “whether and what effect these agreements have on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA on the LMPs in both PJM and NYISO and the effect of these provisions on the ability of other parties to transact business.”⁹⁹

a. Parties’ Positions

66. NRG makes several arguments regarding the impact of the JOA Protocol and the 2008 1000 MW TSAs on LMPs in PJM and NYISO. NRG first asserts that the JOA Protocol affects LMP by forcing power flows into Staten Island and requiring the backing down of local generation that may be more economic. Specifically, NRG asserts that its Staten Island generators are artificially constrained by the JOA Protocol for several hours each day. NRG asserts that the statement by ConEd’s witness, Mr. Stoddard, that prices

⁹⁶ PJM Reply Brief at 9.

⁹⁷ We also reject NRG’s contentions that our approval of the Settlement will prevent the two independent system operators from resolving scheduling and other seams issues, such as the use of the single proxy bus for pricing. These issues are currently being addressed in a comprehensive manner in Docket No. ER08-1281-004, as discussed *supra* at n.63.

⁹⁸ PJM Reply Brief at 2.

⁹⁹ Briefing Order, 130 FERC ¶ 61,126 at P 24.

are higher in NYISO than PJM 88 percent of the time means prices are lower 12 percent of the time. NRG's witness, Miles O. Bidwell, supports this point by arguing that during the 12 percent of times when prices are lower in NYISO than PJM, the 2008 1000 MW TSAs contravene efficient market pricing.¹⁰⁰

67. NRG next asserts that NYISO runs its Day-Ahead Market base case with the assumption that 333 MW will flow across each of the A, B and C feeder lines.¹⁰¹ As such, NRG contends, the base case model assumes that the 2008 1000 MW TSAs provide the least-cost source of power, and resources in New York, including NRG's,¹⁰² cannot compete with that assumption. Finally, NRG claims that the agreements increase congestion pricing in PJM and can require off-price generators to run in PJM, during the hours when prices in NYISO are lower than in PJM. NRG further claims that the agreements increase costs to PJM customers because PSE&G is obligated to pay congestion costs under the 2008 600 MW TSA.

68. ConEd emphasizes that the 2008 1000 MW TSAs are economically efficient most of the time, as evidenced by Mr. Stoddard's calculation that in 2008, prices were higher in NYISO than PJM 88 percent of the time.¹⁰³ When prices are lower in NYISO, ConEd notes that the 1000 MW TSAs may help keep prices lower, such that in the absence of these agreements, NYISO prices would be even higher. ConEd emphasizes that the effects on certain limited hours are outweighed by improved economic efficiency in the vast majority of hours. ConEd argues that the price differential when prices are lower in NYISO, is greatly exceeded by the price differential when prices are higher in NYISO. According to Mr. Stoddard, during 88 percent of the hours, prices in New York City were \$13.83 to \$21.35/MWh higher than in New Jersey. In 12 percent of hours, New Jersey prices exceeded New York City prices by \$2.23 to \$6.14/MWh.¹⁰⁴ ConEd also notes that the New York City market is dominated by a limited number of generation resources, such that the 1000 MW TSAs increase competition in the market.

¹⁰⁰ NRG Initial Brief at 17-18

¹⁰¹ *Id.* at 17.

¹⁰² *Id.* at 17-18.

¹⁰³ ConEd Reply Brief at 20-21.

¹⁰⁴ ConEd Reply Brief at 22 (citing Affidavit of Robert B. Stoddard at Exh. RBS-3).

69. PJM asserts that the 2008 1000 MW TSAs will not increase prices as compared to prices existing today, as they are the same as the agreements currently in effect. In comparison to the situation which might exist if the 2008 1000 MW TSAs were rejected, PJM asserts that any congestion cost concerns are resolved by ConEd's payment for congestion and market participants are hedged against such costs through Financial Transmission Rights. In effect, according to PJM, congestion costs are no greater than those resulting from any market participant taking open access transmission service.

70. In response, NYISO states that it would never have agreed to the Settlement if it thought that the Settlement would have an impact on LMP and pricing. NYISO further states that the best evidence that the Settlement does not harm market participants in New York or New Jersey is the fact that the Settlement is supported by two state public utility commissions, the New York Commission and the New Jersey Commission, two independent system operators (NYISO and PJM) the City of New York, as well as the two original signatories to the agreements.

Commission Determination

71. We find that the 2008 1000 MW TSAs do not have a significant adverse impact on the rights of and prices paid by other parties that would preclude approval of the Settlement. As discussed earlier, both the parties supporting the Settlement and NRG, which opposes the Settlement, generally agree that the 2008 1000 MW TSAs are economic in roughly 88 percent of hours. ConEd placed into evidence data that during the hours when prices are lower in NYISO than PJM, the price differential usually is not great, but, when prices in NYISO are higher than PJM, they are substantially higher.¹⁰⁵ Further, Mr. Stoddard testified that the New York City load pocket is dominated by only a few generators such that the 2008 1000 MW TSAs increase competition. Given that the 2008 1000 MW TSAs are economic because prices are lower in PJM than NYISO in the majority of hours, the less-significant price differentials during the remaining hours, and the constrained New York City market, we find that the 2008 1000 MW TSAs do not cause impacts on pricing and LMP which would preclude us from approving the Settlement while the parties continue to negotiate a comprehensive agreement on loop flow.

72. NRG asserts that the JOA Protocol prevents economic power flows across the PJM-NYISO seam, and points to significant cost savings which could be achieved by harmonizing that seam. As discussed above, we find that any problems with the PJM-NYISO seam, including use of the single proxy bus for pricing, are beyond the scope of this proceeding. We similarly reject NRG's argument that during periods when prices are

¹⁰⁵ *Id.*

lower in PJM, its generators also may not sell into PJM because the JOA Protocol prevents counter-flows across the A/B/C and J/K feeder lines. The JOA Protocol does not prohibit counter-flows. The scheduling of flows and counter-flows and other seams issues are being addressed in Docket No. ER08-1281-004.

73. With respect to the effect of the flow changes on the ability of the parties to transact business, as we stated above,¹⁰⁶ the TSAs do not preclude NRG or any other party from flowing power in either direction during the unconstrained hours, and, during the constrained hours, parties can schedule counter-flow transactions on the interfaces between PJM and NYISO.

74. We have already addressed NRG's arguments regarding ConEd's payment of RTEP costs associated with the 2008 1000 MW TSAs, as well as the elimination of the 13 percent distribution factor during unconstrained hours, and thus, we do not address the issues again within the pricing context.

5. Tariff Issues

75. In the TSA Hearing Order, the Commission asked "whether either PJM's or the NYISO's OATT will be violated by any specific provisions of the 2008 1000 MW TSAs requiring that energy be transmitted over specific lines."¹⁰⁷

a. Parties' Positions

76. NRG contends that the Settlement violates three tariff provisions. First, NRG states that the Settlement provision that exempts ConEd from RTEP costs violates PJM's OATT. Second, NRG states that the Settlement modifies NYISO's Day-Ahead Market assumptions to include 1000 MW of forced flows and is incompatible with its pricing provisions. Third, NRG reiterates its position that the 1000 MW TSAs are not eligible for roll-over under section 2.2 of the PJM OATT because they are not open access agreements. In addition, NRG states that the Hearing Order held that additional evidence was necessary before the Commission could make a determination on whether any tariff provisions were violated. Finally, NRG contends the Settlement does not provide a sufficient evidentiary basis for the Commission to decide this issue.

77. In response, ConEd states that it would be unduly discriminated against if PJM denied it the opportunity to roll-over the 1000 MW TSAs. ConEd states that as an

¹⁰⁶ See *supra* P 63.

¹⁰⁷ TSA Hearing Order, 124 FERC ¶ 61,184 at P 46.

“eligible customer,” it is entitled to transmission service under PJM’s OATT that satisfies its needs and circumstances.¹⁰⁸ Further, ConEd states that if PJM is capable of performing a transmission service having particular attributes, it is obligated under Order No. 888 to do so under its OATT.¹⁰⁹ ConEd further notes that it has contracted with PJM for transmission service under PJM’s OATT, and it has agreed with NYISO to implement that service pursuant to the procedures prescribed by the JOA Protocol. In addition, ConEd states that under Order No. 888, PJM is authorized and obligated to enter into such service arrangements.¹¹⁰

78. As stated above, ConEd states that it is reasonable to base its RTEP cost responsibility on 900 MW, rather than 1000 MW due to bandwidth limitations.

79. NYISO states that the Settlement is consistent with its OATT. NYISO notes that it generally employs a “financial reservation” based transmission model that differs from the “physical reservation” model contemplated under the *pro forma* OATT. However, NYISO explains that in special cases, such as grandfathered transmission agreements, it applies non-financial rules. NYISO notes that the currently effective version of the JOA Protocol establishes a set of special procedures that the Commission concluded were necessary to implement ConEd’s contractual entitlement to transmission service across PJM. NYISO further notes that the currently effective JOA Protocol is an approved part of the NYISO’s Market Administration and Control Area Services Tariff. In addition, NYISO states that if the Settlement is approved, the JOA Protocol would be part of the NYISO tariffs. Finally, NYISO notes that under the JOA Protocol, it would continue to follow pricing and operational procedures for ConEd’s service that represent an appropriate exception to its standard rules, not a violation of them. NYISO asserts that under Order No. 888, the implementation of the JOA Protocol’s procedures is mandatory, not preferential.

Commission Determination

80. The Commission finds that the 2008 1000 MW TSAs do not violate any provisions of PJM’s or NYISO’s OATTs. As discussed above, we accept as reasonable

¹⁰⁸ ConEd Reply Brief at 9 (citing Order No. 888 FERC Stats. & Regs. ¶ 31,036 at 31,687).

¹⁰⁹ ConEd Reply Brief at 9-10 (citing Order No. 888 FERC Stats. & Regs. ¶ 31,036 at 31,690).

¹¹⁰ ConEd Reply Brief at 10 (citing Order No. 888 FERC Stats. & Regs. ¶ 31,036 at 31,732).

ConEd's explanation that of its contribution to RTEP costs should reflect the bandwidth limitations rather than the nominal amounts set forth in the agreements. Further, absent the Settlement, ConEd would not be contributing to PJM RTEP costs. Therefore, by approving the Settlement, we are effectively reducing RTEP costs to other parties. Furthermore, the Commission notes that the differences between financial and physical reservation models and their impact on seams issues are being addressed in Docket No. ER08-1281-004.

81. We reject NRG's claim that the Hearing Order held that additional evidence was necessary before we could make a determination on whether any tariff provisions were violated. As noted *supra*, we have the discretion to determine the nature of proceedings before us. We determined that we have a factual record in the evidentiary proceeding in Docket No. ER02-23 and that the additional briefs provide us with the legal arguments on which we can base our decision on the Settlement.¹¹¹

C. The Basis for Approval of the Settlement

82. First, the Settlement grants certainty to ConEd, New York City, PJM, PSE&G and others regarding the status of these agreements, which provide vital transmission service to New York City. The New York Commission and the City of New York have asserted that the 1000 MW TSAs provide critical reliability benefits and that, if the agreements expire, replacement of the imports lost would be difficult and would, most likely, require a long lead time.¹¹² Second, ConEd will contribute its share of PJM RTEP costs, whereas to date it has paid none of these costs.¹¹³ ConEd's contribution will reduce the contribution of others. This Settlement also ends protracted litigation over the 1000 MW TSAs. The Settlement not only resolves litigation related to the 2008 1000 MW TSAs, but also resolves the complaint originally filed by ConEd in Docket No. EL02-23, which is currently pending on appeal before the U.S. Court of Appeals for the District of

¹¹¹ *Cities of Batavia v. FERC*, 672 F.2d 64, 91 (D.C. Cir. 1982) (rejecting an argument that, once having entered into hearings, the Commission must follow formal adjudicatory proceedings throughout).

¹¹² ConEd and City of New York Reply Comments (Mar. 25, 2009), Affidavit of Michael Forte at 4 and Affidavit of Robert B. Stoddard at 7-9; New York Commission Comments at 4-5.

¹¹³ Although PSE&G also asserts that the Settlement provides reliability benefits to northern New Jersey by modifying the firmness of the 2008 400 MW TSA, we do not base any findings of benefits to the parties on this issue because none of the affidavits submitted in the comments address this issue.

Columbia Circuit.¹¹⁴ As we have previously stated, the Commission strongly favors settlements, particularly in difficult cases like the instant proceeding.

83. In addition, we find that the 2008 1000 MW TSAs, which were filed on April 22, 2008 and the JOA Protocols, as filed with the Settlement on February 23, 2009, are just and reasonable, based on our findings on the specific issues set for hearing in the TSA Hearing Order and for briefing in the Briefing Order.

D. Denial of NRG's Request for Rehearing or Clarification

84. The Commission denies NRG's requests for clarification and rehearing. NRG asks for clarification, or in the alternative, rehearing that the issues the Commission initially set for hearing procedures are still outstanding and, that nothing in the record submitted by the settling parties resolved any issues of material fact.

85. We established additional procedures in the Briefing Order to provide the parties, including NRG, the opportunity to expand the record before the Commission on the Settlement. The parties have done so and we have found that the record is adequate to approve the Settlement. Further, in this order, we have specifically addressed each of the issues raised in the TSA Hearing Order and the Briefing Order. Accordingly, we deny NRG's request for rehearing.

The Commission orders:

- (A) The Settlement is hereby approved, as discussed in the body of this order.
- (B) NRG's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹⁴ *Public Service Electric and Gas Co. v. FERC*, Case Nos. 07-1210, 07-1220, 07-1377 (D.C. Cir.).

Appendix A

Map of Certain Interconnection Points in New Jersey and New York

