ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 11-1201

NRG POWER MARKETING, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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February 23, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *PJM Interconnection, L.L.C., et al.*, 132 FERC ¶ 61,221 (Sept. 16, 2010) ("Settlement Order"), JA 1; and

2. *PJM Interconnection, L.L.C., et al.*, 135 FERC ¶ 61,018 (April 8, 2011) ("Rehearing Order"), JA 37.

C. Related Cases:

Public Service Electric and Gas Co. v. FERC, D.C. Cir. No. 07-1210, an appeal of Commission orders from the earlier litigation in this case, is currently before this Court. It is in abeyance pending the outcome of this appeal. Counsel is not aware of any other related cases.

/s/ *Samuel Soopper*
Samuel Soopper
Attorney

February 23, 2012

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GLOSSARY

Briefing Order	*PJM Interconnection, L.L.C., et al.*, 130 FERC ¶ 61,126 (2010), JA 475
Commission	Federal Energy Regulatory Commission
ConEd	Consolidated Edison Company of New York
FERC	Federal Energy Regulatory Commission
Hearing Order	*PJM Interconnection, L.L.C., et al.*, 124 FERC ¶ 61,184 (2008), JA 184
New York ISO	New York Independent System Operator, Inc.
NRG	NRG Power Marketing, LLC and its affiliated companies
PJM	PJM Interconnection, L.L.C.
PSE&G	Public Service Electric and Gas Company
Settlement Order	*PJM Interconnection, L.L.C., et al.*, 132 FERC ¶ 61,221 (2010), JA 1
Rehearing Order	*PJM Interconnection, L.L.C., et al.*, 135 FERC ¶ 61,018 (2011), JA 37

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BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably exercised its Federal Power Act section 205 authority, 16 U.S.C. § 824d, in approving a contested settlement agreement, pursuant to which PJM Interconnection, L.L.C. (PJM) amended its transmission tariff in order to accommodate particular service to Consolidated Edison Company of New York, Inc. (ConEd), when substantial evidence demonstrated that the settlement provided significant economic and reliability benefits outweighing any harm to the

contesting party.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in Addendum A to this brief.

STATEMENT OF FACTS

I. INTRODUCTION

This case arises from a Settlement Agreement filed with the Commission by PJM on February 23, 2009, intended to resolve lengthy litigation concerning certain transmission service provided by PJM to ConEd.

PJM is a Regional Transmission Organization that operates the electric transmission grid, and administers an open access transmission tariff, in certain mid-Atlantic states, including New Jersey. *See Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (describing PJM operations).

ConEd distributes energy to most of New York City and certain surrounding areas. ConEd is a member of the New York Independent System Operator, Inc. (New York ISO), which operates the electric transmission grid and provides open access transmission service for all of New York State, and is also a party to the Settlement. (The remaining settling parties – intervenors supporting the Commission on appeal – are Public Service Electric and Gas Company (PSE&G), which owns and formerly operated the PJM transmission facilities involved here,

PSE&G Energy Resources & Trading LLC, and the New Jersey Board of Public Utilities.)

Petitioners NRG Power Marketing, LLC and its affiliate companies (collectively NRG) are major energy trading and generation concerns. As relevant here, NRG owns and operates electric generation facilities on Staten Island in New York City.

In the first order on review, "Order Approving Contested Settlement and Denying Rehearing," *PJM Interconnection, L.L.C., et al.*, 132 FERC ¶ 61,221 (Sept. 16, 2010), JA 1 (Settlement Order), the Commission approved the settling parties' agreement pursuant to which PJM agreed to modify its transmission tariff and conform certain of its operations to accommodate two long-standing transmission agreements with ConEd, over the objection of NRG. In support, the Commission found, on balance, that the significant economic and reliability benefits of the Settlement outweighed any economic harm to NRG. The Commission also considered and rejected the merits of each specific objection raised by NRG.

In the second order, the agency denied NRG's request for rehearing of the Settlement Order. "Order on Rehearing and Motions," *PJM Interconnection, L.L.C., et al.*, 135 FERC ¶ 61,018 (April 8, 2011), JA 37 (Rehearing Order).

II. STATUTORY AND REGULATORY BACKGROUND

Section 201(b) of the Federal Power Act confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). Section 205 of the Act prohibits unjust and unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. §§ 824d(a)-(b), while section 206 gives the agency the power to correct any such unlawful practices. 16 U.S.C. § 824e(a).

The Federal Power Act charges the Commission to employ its authority "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). A primary purpose of the Act is "to encourage the orderly development of a plentiful supply of electricity . . . at reasonable prices." *Public Utils. Comm'n of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

This Court is well aware of the Commission's exercise of its "broad authority" under sections 205 and 206 of the Act during the last decade "to impose open access as a generic remedy for its findings of systemic anticompetitive behavior" by transmission-owning public utilities. *Transmission Access Policy*

Study Group v. FERC, 225 F.3d 667, 684 (D.C. Cir. 2000), affirmed in *New York v. FERC*.

Thus, *New York* and *Transmission Access Policy Study Group* affirmed the Commission's Order No. 888,[1] in which the Commission sought to remedy the monopoly control of vertically-integrated utilities over interstate transmission facilities by requiring such utilities to unbundle wholesale electric power services and to file open access transmission tariffs.

Order No. 888, as recently amended by Order No. 890,[2] sets out the guidelines for open access transmission service, including the terms of a *pro forma* Open Access Transmission Tariff. In Order No. 890, the Commission "concluded 'that it [was] necessary to amend the existing *pro forma* [Open Access

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[1] *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, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[2] *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).

Transmission Tariff] to require coordinated, open, and transparent transmission planning on both a local and regional level.'" *New York Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 584 (D.C. Cir. 2011) (quoting Order 890 at 12,320 (P 435)). Section 2.2 of the *pro forma* Open Access Transmission Tariff governs the reservation priority, or rollover, for existing firm service customers. (For the Court's convenience, the text of Section 2.2 is set out in Addendum B to this brief.) It is undisputed that PJM's Open Access Transmission Tariff contains language consistent with Section 2.2.

As one means of compliance with FERC's Order No. 888 open access policies, public utilities were encouraged to participate in Independent System Operators or Regional Transmission Organizations. As described by the Court, such an entity "would assume operational control – but not ownership – of the transmission facilities owned by its member utilities, thereby 'separat[ing] operation of the transmission grid and access to it from economic interests in generation.'" *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (quoting Order No. 888 at 31,654); *see also, e.g.*, *New York Regional Interconnect*, 634 F.3d at 583-584 (describing Independent System Operator administration of transmission services).

III. THE PROCEEDINGS BEFORE THE COMMISSION

A. The Earlier Transmission Agreements

The underlying situation which led up to this case is described in some detail in the Settlement Order. *See* Settlement Order PP 2-8, JA 2-6. The essential facts, which are not in dispute, are as follows.

In the 1970s, ConEd and PSE&G entered into two transmission service contracts (the Transmission Service Agreements) to address supply problems in northern New Jersey and New York City. Under both Agreements, the parties committed to engage in an energy exchange arrangement, whereby certain of PSE&G's generators in New Jersey would supply ConEd's native load customers in New York City, while ConEd's generation sources further upstate in New York would supply PSE&G's native load customers in northern New Jersey.

Under the first Transmission Service Agreement, executed in May 1975, ConEd agreed to supply 400 megawatts from its Ramapo, New York substation to PSE&G facilities in New Jersey. In exchange, PSE&G agreed to supply a like amount of power from its facilities farther south in New Jersey to ConEd's facilities in New York City. The parties also agreed to construct the necessary facilities to accomplish this objective. As a result, ConEd discontinued its plans to build its own transmission line from farther upstate in New York to New York City. (For the Court's convenience, a map of the relevant transmission facilities

and interconnections which was published as Appendix A to the Commission's decision in *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 119 FERC ¶ 61,071 at p. 61,446 (2007), is reproduced as Addendum C to this brief.)

In May 1978, the parties entered into another Transmission Service Agreement for the same purpose and employing a like energy transfer, this time for an additional 600 megawatts of energy. Under this contract, the parties agreed to the construction of additional facilities to supplement those already built. Both the 1975 and 1978 Transmission Service Agreements were scheduled to expire in 2012.

Under these Agreements, PSE&G transferred electricity from its New Jersey facilities via the A, B and C feeders east into ConEd's service territory in New York City. In exchange, ConEd transferred a like amount of energy south from its facilities in Rockland County, New York via the J and K lines to PSE&G's Bergen County, New Jersey facilities. (The energy flow on the A feeder running between Staten Island and New Jersey (indicated in green on the map at Addendum C) is of particular interest to NRG because of its Staten Island generation facilities.)

While the 1975 and 1978 Transmission Service Agreements were still operational, the Commission embarked on restructuring the electric power industry, beginning with Order No. 888's requirement of open access transmission.

Subsequently, ConEd joined the New York ISO, while PSE&G became part of PJM.

This reorganization led to a complaint filed with the Commission by ConEd in 2002, alleging that PSE&G, the New York ISO and PJM were failing to honor the 1975 and 1978 Transmission Service Agreements. The Commission divided ConEd's complaint into two phases and set each one for hearing. *See Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 99 FERC ¶ 61,033 (2002). Protracted litigation ensued. *See Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 101 FERC ¶ 61,282 (2002) (Phase I); *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, Opinion No. 476, 108 FERC ¶ 61,120 (2004), *order on reh'g*, 119 FERC ¶ 61,071 (2007), *order on reh'g*, 120 FERC ¶ 61,161 (2007) (Phase II).

During the course of this litigation, the parties agreed to, and the Commission accepted, a protocol governing the operation of the transmission facilities pursuant to the then-effective Transmission Service Agreements. *See Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 111 FERC ¶ 61,228 (2005).

B. The 2008 Administrative Proceeding

On April 22, 2008, PJM filed with the Commission, pursuant to section 205

of the Federal Power Act, two new Transmission Service Agreements which it had entered into with ConEd to supersede the expiring 1975 and 1978 Agreements. Record (R) 1, JA 58. PJM also filed a Joint Operating Protocol, an amendment to its operating agreement with the New York ISO, to replace the previously-approved protocol to manage the actual transmission of the energy subject to the new Agreements. *Id.* at 5, JA 62.

Numerous parties filed motions to intervene or protest in the proceeding, including NRG. R 18, JA 174. On August 26, 2008, the Commission issued an order in the case establishing hearing and settlement judge procedures. *PJM Interconnection, LLC*, 124 FERC ¶ 61,184 (2008), JA 184 (Hearing Order). The Commission directed that the Administrative Law Judge assigned to the case "shall consider the justness and reasonableness of the [Transmission Service Agreements] and [Joint Operating] Protocol." Hearing Order P 46, JA 195.

The Commission identified certain issues for the judge to consider. One of these was whether the 1975 and 1978 Transmission Agreements constituted firm service for purposes of rollover under section 2.2 of the PJM Open Access Transmission Tariff, Hearing Order P 46, JA 195. NRG has not pursued this issue on appeal.

Two other issues, however, remain relevant: whether rollover of the 1975 and 1978 Transmission Service Agreements would result in Con Ed receiving

unduly preferential service; and whether PJM's Open Access Transmission Tariff would be violated by any provisions of the 2008 Transmission Service Agreements requiring that energy be transmitted over the specified lines. Hearing Order PP 46-47, JA 195-196.

The parties then entered into settlement negotiations, under the supervision of the judge. On February 23, 2009, PJM, on behalf of the settling parties, filed the contested Settlement at issue on appeal. R 51, JA 199.

C. The Briefing Order

On February 19, 2010, in response to the Settlement and the comments pro and con, the Commission issued an "Order Establishing Additional Procedures," *PJM Interconnection, L.L.C.*, 130 FERC ¶ 61,126 (2010) (Briefing Order), JA 475, stating that it was "unable to approve the Settlement . . . because the current state of the record does not permit us to resolve the merits of some of the contested issues." Briefing Order P 1, JA 475 (footnote omitted).

"Because these issues appear to raise legal, rather than factual issues," the Commission set a briefing schedule "to permit the parties to address these issues." Briefing Order P 24, JA 483. As relevant on appeal, the agency required the parties to address whether "ConEd is eligible only for [Open Access Transmission Tariff] service, or whether the circumstances here warrant a non-conforming agreement," as well as "whether and what effect these agreements have on the

rights of and prices paid by other parties." *Id.* The Commission nonetheless "reserve[d] the right to establish additional procedures including hearing procedures if necessary." *Id.* P 25, JA 483.

Among the parties to submit briefs were ConEd, PJM and petitioner NRG.[3]

D. The Settlement Order

On September 16, 2010, the Commission issued the Settlement Order, the first order on review here, approving the Settlement and accepting the 2008 Transmission Service Agreements and Joint Operating Protocol, based on a finding that their terms were just and reasonable. Settlement Order P 23, JA 11.

In support of its conclusion, the Commission explained that the Settlement, "freely negotiated by all the participating parties," would provide for a continuation of the service provided by the pre-existing Transmission Service Agreements, "permitting ConEd to exchange power by displacement from Rockland County, New York with New York City." Settlement Order P 23, JA 11. ConEd's "continued ability to access such power," the Commission emphasized, "is vital to New York City." *Id.* The Commission also found that the Settlement would benefit PJM's customers, because it requires ConEd to contribute to the

[3]NRG also filed a request for rehearing and clarification of the Briefing Order, asking the Commission to confirm that the issues originally set for hearing were still outstanding and that the parties' submissions had not resolved issues of material fact. R 73.

costs of PJM's Regional Transmission Expansion Plan. *Id.*, JA 12.

The Commission acknowledged that, absent the Settlement, NRG "may more easily sell power to PJM," but nonetheless concluded that "this third-party impact" does not outweigh the "significant benefits provided by the 2008 [Transmission Service Agreements] to the signatory parties and, more importantly, their end-use customers," as well as to the general public. Settlement Order P 24, JA 12.[4]

NRG filed a timely request for rehearing of the Settlement Order. R 100, JA 790.

E. The Rehearing Order

On April 8, 2011, the Commission issued its order granting NRG's request for rehearing "in limited part," but substantially denying NRG's contentions. Rehearing Order P 22, JA 46.

The Rehearing Order considered and rejected NRG's arguments that the Commission had: (1) improperly permitted renewal or rollover of ConEd's expiring contracts pursuant to section 2.2 of PJM's Open Access Transmission

[4] The Settlement Order also denied NRG's request for rehearing and clarification of the Briefing Order. Settlement Order P 84, JA 34. The Commission explained that, in response to its prior order, the parties had sufficiently expanded the record so that it was "adequate to approve the Settlement." *Id.* P 85, JA 34.

Tariff; (2) interpreted PJM's tariff inconsistently with judicial and agency precedent (Rehearing Order PP 23-32, JA 46-49); (3) incorrectly applied its standard for the review of contested settlements (*id.* P 33, JA 50); (4) failed to adequately address the negative impact of the settlement on NRG (*id.* PP 34-35, JA 50-51); (5) placed exaggerated weight on the reliability benefits of the settlement (*id.* 36-38, JA 51-52); (6) neglected to take into account the counterflow of electricity on the feeder lines resulting from transactions under the Settlement (*id.* PP 39-43, JA 52-54); and (7) arbitrarily approved the Settlement without holding an evidentiary hearing (*id.* PP 47-48, JA 55-56).

The Commission agreed with NRG that it should have accepted the affidavit of NRG's witness Mr. Kenneth Slater into evidence, granting rehearing on this one issue. Rehearing Order PP 45-46, JA 55.

This appeal followed.

SUMMARY OF ARGUMENT

1. The Commission's approval of the Settlement was an appropriate exercise of its regulatory discretion. The Commission properly applied its regulations governing settlements by making a finding that the Settlement provides for a modification to PJM's Open Access Transmission Tariff that is just and reasonable and supported by the record. Additionally, the Commission reasonably concluded that the Settlement's significant economic and reliability benefits, accruing to the signatory parties, their customers, and the public, outweigh NRG's interest in selling power more profitably during certain hours.

2. The Commission's interpretation that PJM provides the relevant transmission service to ConEd under the terms of its Open Access Transmission Tariff is reasonable and deserves judicial deference. Contrary to NRG's position, the agency explained that section 2.2 of its Open Access Transmission Tariff, to which PJM adheres, does not prevent parties from entering into a non-conforming agreement under particular circumstances. Rather, Order No. 888 contemplates that the Commission might approve varying types of service, particularly to facilitate coordination between neighboring transmission systems.

3. The Commission's interpretation of its open-access regulations to authorize non-conforming transmission service agreements is consistent with agency and judicial precedent. Indeed, the Rehearing Order gives examples of

agency approval of such non-conforming agreements pursuant to Open Access Transmission Tariffs that NRG fails to address in its brief.

4. The Court should not reach the issue of whether the Settlement is unduly discriminatory *per se* because NRG did not properly preserve this issue for appellate review. Nonetheless, the Commission's rejection of NRG's discrimination argument in the Settlement Order was appropriate. NRG is not similarly situated to ConEd, and is not seeking the same service that PJM provides to ConEd.

5. The Commission's approval of the Settlement is supported by substantial record evidence as to both the economic and reliability benefits of the Settlement. That the operation of the transmission facilities pursuant to the Settlement is economic (*i.e.*, energy flowing from a low cost location to a high cost location) 88 percent of the time is undisputed and supported by the record. The Commission reasonably found that this benefit outweighs NRG's difficulty in scheduling sales in the remaining hours. Additionally, the Commission's finding that the Settlement provides reliability benefits to New York City was not contrary to its prior pronouncements. Moreover, this finding was firmly based on expert testimony in the record.

ARGUMENT

I. STANDARD OF REVIEW

It is well-settled that the Commission has the authority, and in fact the obligation, to consider contested settlements. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974); *Penn. Gas & Water Co. v. FPC*, 463 F.2d 1242, 1249-50 (D.C. Cir. 1972) (citing *Mich. Consol. Gas Co. v. FPC*, 283 F.2d 204, 224 (D.C. Cir. 1960)). *See* 18 C.F.R. § 385.602(h) (Commission's review of contested settlements). This Court has confirmed the Commission's significant discretion under its regulations to determine how it will evaluate the justness and reasonableness of proposed settlements that are contested. *Arctic Slope Reg. Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987) (concluding that "[t]he breadth of discretion trumpeted by [Rule 602(h)(1)(ii)(B)] is manifest"); *see also United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 208 (D.C. Cir. 1984) (observing the Commission's broad authority under its regulations to "take other action" that it deems appropriate when addressing contested settlements, and rejecting arguments that would limit the agency's options under its regulations).

The Commission may approve a contested settlement if it determines that the proposal will establish just and reasonable rates and practices. *Mobil Oil Corp.*, 417 U.S. at 312-313; *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990); *New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509, 511-12

(5th Cir. 1981). Under this standard, the Court will "affirm the Commission's orders so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Sacramento Municipal Utility District v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)).

"The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008). This judicial deference to "rate decisions" encompasses a Commission decision about any terms and conditions affecting rates. *See City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (because "there is an infinitude of practices affecting rates and service . . . , [i]t is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive").

In addition, the Court gives substantial deference to both the Commission's interpretation of its own orders, *see Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005), and FERC-jurisdictional agreements, *see Old Dominion Elec. Coop. v. FERC*, 518 F.3d 43, 48-49 (D.C. Cir. 2008).

II. THE COMMISSION'S APPROVAL OF THE SETTLEMENT WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Commission Appropriately Applied Its Settlement Regulations.

As the Commission observed below, its settlement rules provide that it may decide the merits of a contested settlement "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." Settlement Order P 22 & n.35, JA 11 (citing 18 C.F.R. § 385.602(h)(1)(i)).

In reviewing a contested settlement, the Commission is guided by the standards it set out in *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999), standards which are informed by the precedent of this Court, as well as that of the agency. Rehearing Order P 33, JA 50; Settlement Order P 22 & n.34, JA 11.

Trailblazer outlines four approaches the Commission may take with respect to a contested settlement, two of which are relevant here: "(1) the Commission may make a decision on the merits of each contested issue; [and] (2) the Commission may determine that the settlement provides an overall just and reasonable result." Settlement Order P 24 n.37, JA 12; *see Trailblazer*, 85 FERC

at 62,342-45.[5]

In this proceeding, the Commission "reviewed the issues raised by the contesting party [*i.e.*, NRG] and found on the merits that the Settlement is just and reasonable." Rehearing Order P 33 & n.43, JA 50 (citing Settlement Order P 23, JA 11-12). Thus, the agency made a merits determination on each issue raised by NRG, to satisfy "the first approach articulated in *Trailblazer*." Rehearing Order P 6, JA 39. However, the Commission took the further step of balancing the benefits of the Settlement against its impact on NRG – namely, that it "may more easily sell power to PJM if the Settlement is rejected." *Id*.

The result of this balancing was the agency's finding that the Settlement's "significant benefits" as a whole to the signatory parties and their end-use customers, as well as "the public benefits of continuing" the Transmission Service Agreements, outweigh the negative impact alleged by NRG. Rehearing Order P 6 & n.10, JA 39 (citing Settlement Order P 24, JA 12). *See also infra* pp. 34-43

[5]The remaining two approaches are: (3) the Commission approves the settlement based on a determination that the interests of the objecting parties are too attenuated, and that the benefits of the settlement to the settling parties outweigh the nature of the objections; and (4) the Commission approves the settlement as uncontested as to the settling parties, and severs the contesting parties so that they can continue to litigate the contested issues. Settlement Order P 24 n.37, JA 12.

(detailing substantial evidence in support of the economic and reliability benefits of the Settlement).

In attacking the Commission's decision to approve the Settlement here, NRG's brief repeatedly invokes this Court's decisions in *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1162 (D.C. Cir. 1998) (Pet. Br. 19, 50, 54-56), and *Tejas Power Corp.*, 908 F.2d at 1003 (Pet. Br. 28, 54). As in those cases, NRG maintains, the Commission approved this contested settlement without giving serious consideration to the objecting party's arguments.

In *NorAm* and *Tejas*, the Court rejected the Commission's approval of contested settlements where the agency had completely ignored, or given little attention to, the arguments of the objecting parties. Here, however, the Commission's orders demonstrate that the agency did not ignore a single one of NRG's arguments. To the contrary, the agency specifically followed its *Trailblazer* standards, which were promulgated at least in part to respond to the Court's concerns in those cases. *See* 85 FERC at pp. 62,340-41. Thus, in addition to weighing the interests of all the parties, the Commission specifically made "a binding merits decision on each of the contested issues." Rehearing Order P 33, JA 50. NRG's disagreement with the Commission's resolution of the issues does not support an argument that the agency did not fully consider them.

NRG also maintains that the Commission here has given the parties'

agreement to the Settlement undue weight, a practice discredited by *NorAm*. However, while *NorAm* does hold that customer support of a settlement should not be dispositive, the Court nonetheless observed that "the Commission is clearly entitled to give weight to the support of customers when deciding whether to approve a settlement offer." 148 F.3d at 1164 (quoting *Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993)).

The Commission's decision here is in complete accord with this precedent. In balancing the Settlement's overall impact, the Commission considered the near-unanimity of the affected entities as just one of a number of positive factors, which also included economic and reliability benefits to the parties and their end-use customers. *See* Settlement Order P 23, JA 11-12; Rehearing Order PP 6, 33, JA 39, 50.

B. The Commission Reasonably Concluded That The Settlement Is Consistent With Its Open Access Regulations And Policies.

In the contested orders, the Commission made two distinct findings concerning the application of its Order No. 888 open access policies to the Settlement. First, the agency determined that the 1975 and 1978 transmission agreements were eligible for reservation priority, or rollover, in accordance with section 2.2 of the PJM Open Access Transmission Tariff. Settlement Order PP 37-39, JA 18-19; Rehearing Order P 26, JA 47. Second, the Commission accepted the new Transmission Service Agreements as providing ConEd with a

reasonable "non-conforming service" pursuant to PJM's Open Access Transmission Tariff, *i.e.*, service with certain terms that vary from those contained in the standard tariff. Settlement Order P 48, JA 22; Rehearing Order PP 26-27, JA 47-48.

On the rollover issue, the Commission's main focus in the Settlement Order was establishing whether the 1975 and 1978 contracts provided for firm service, a prerequisite for rollover under section 2.2 of PJM's Open Access Transmission Tariff. Settlement Order P 38, JA 18-19. NRG, however, did not pursue this issue on rehearing. Rehearing Order P 23, JA 46.

On rehearing, the Commission considered and rejected NRG's alternative arguments. First, the agency denied NRG's claim that section 2.2 of PJM's open access tariff "does not apply to ConEd because a customer taking non-[Open Access Transmission Tariff] service cannot use" that provision. Rehearing Order P 24, JA 46. Second, the Commission determined that "[t]he service at issue here is taken under the PJM [Open Access Transmission Tariff], despite the fact that it contains the [Joint Operating] Protocol" and other elements that do not conform to the specific terms of PJM's open-access tariff. *Id*. P 27, JA 47. Rather, the agency held, an open-access tariff such as PJM's "does not prevent the Commission from approving non-conforming service" under that tariff, "should the Commission find it reasonable to do so." *Id.* P 26, JA 47.

In its brief, NRG focuses solely on its second argument, namely that the Commission could not accept the new Transmission Service Agreements and Joint Operating Protocol as modifications to PJM's open-access tariff because such non-conforming service violates Section 2.2. Pet. Br. 18, 25.[6] In NRG's view, the Commission violated its open access regulations by allowing a continuation of the old service contracts that should have been terminated under PJM's Open Access Transmission Tariff.

As the Commission explained, however, "[t]he use of a non-conforming service agreement is not the equivalent of grandfathering an existing contract." Rehearing Order P 30, JA 48. Nor, as the agency held, does its open access regulations forbid it from authorizing a non-conforming transmission agreement, once an expiring service contract is rolled over pursuant to section 2.2. *Id.*

It is common ground, as NRG describes, that "[o]pen access is the essence" of Order No. 888. Pet. Br. 23 (quoting *Transmission Access Policy Study Group*, 225 F.3d at 681-82). Nonetheless, as the Commission explained below, "under Order No. 888, a public utility 'must offer transmission services that it is

[6]NRG does not argue in its opening brief, as it did on rehearing before the agency, that Section 2.2 only applies to a customer previously taking open-access service. Thus, it has waived this argument before the Court. *See, e.g, City of Nephi, Utah v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998).

reasonably capable of providing, not just those services that it is currently providing to itself or others.'" Settlement Order P 59 & n.90, JA 26 (quoting Order No. 888 at 31,690). Order No. 888 further established, the agency observed, that "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." *Id.*

Such flexibility is of particular importance, FERC emphasized, where, like here, a Regional Transmission Organization is dealing with neighboring transmission systems. Settlement Order P 59 & n.91, JA 26 (citing Order No. 888 at 31,732). Because coordination between neighboring transmission systems (like PJM and the New York ISO in this case) "is necessary … to ensure reliability and stability of the systems . . . [t]he mechanisms by which [Independent System Operators] and other transmission operators coordinate can be left to those parties to determine." *Id.* "In short," the Commission concluded, "Order No. 888 supports PJM continuing to provide service to ConEd under section 2.2 of its [Open Access Transmission Tariff]." *Id.* P 60, JA 27.

NRG's contrary interpretation of the Commission's open access rules and policies would significantly and unacceptably limit the agency's regulatory discretion and flexibility in harmonizing its open access policies with the requirements of organized energy markets. As this Court has explained, because

such markets "present[] 'intensely practical difficulties' demanding a solution from FERC. . . [the agency] must be given the latitude to balance the competing considerations and decide on the best resolution." *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968)). Under this standard, the Court should defer here to the Commission's interpretation of its open access regulations and policies.

C. The Commission's Decision Was Fully Consistent With Precedent.

In support of its decision that the Transmission Service Agreements covered by the Settlement were consistent with its regulations, the Commission cited precedent governing post-Order No. 888 (and 890) transmission agreements. Thus, the Rehearing Order explained, FERC "has approved non-conforming transmission service arrangements when it finds that they are just and reasonable, and that reliability concerns, novel legal issues, operational issues, or other unique factors necessitate the non-conforming provisions." Rehearing Order P 26 & n.29, JA 26 (citing *S. Cal. Edison Co.*, 133 FERC ¶ 61,200 P 20 (2010); *Florida Power & Light Co.* 118 FERC ¶ 61,176 P 11 (2007); *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,238 P 6 (2007); *PJM Interconnection, LLC*, 111 FERC ¶ 61,098 P 9 (2005)).

NRG disputes the Commission's reliance on these cases, which all "involve interconnection agreements" between generators and transmission providers rather

than open access transmission tariffs. Pet. Br. 34-35. NRG is correct that these cases involved interconnection, rather than transmission service, agreements, but this factual distinction is hardly determinative. Rather, these cases support the Commission's point that it allows deviation from standard *pro forma* tariffs when peculiar facts and circumstances demonstrate that non-conforming agreements (or non-conforming elements of otherwise conforming agreements) satisfy the open access and non-discrimination policies of Order No. 888. *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,238 P 6 (explaining policy of accepting agreements that do not conform to the regulation's *pro forma* agreement due to "unique circumstances of the interconnection").

Moreover, the Commission went on to cite other cases – ignored by NRG in its brief – in which it accepted transmission agreements including terms that did not conform to the *pro forma* Open Access Transmission Tariff because of particular problems, like here, caused by the convergence of regional transmission systems and markets. *See* Rehearing Order P 30 & n.36, JA 48-49 (citing *PJM Interconnection, L.L.C. and Carolina Power & Light Co.*, 131 FERC ¶ 61,181 (2010), *order on compliance filing*, 134 FERC ¶ 61,048 (2011) (*PJM/Carolina*); *Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,251, *order on reh'g*, 108 FERC ¶ 61,143, *reh'g denied*, 109 FERC ¶ 61,166 (2004) (*Midwest/PJM*)).

In *PJM/Carolina*, the Commission accepted a Joint Operating Agreement between PJM and Carolina Power & Light Company in which provisions regarding scheduling were not fully consistent with Order Nos. 888 and 890. *See* 134 FERC ¶ 61,048 P 32. As the agency explained there, it "has recognized that [regional transmission operators], due to their real-time dispatch, may need waiver of the Order Nos. 888 and 890 requirements regarding the timing of scheduling" because "[i]n these cases, after-the-fact scheduling is deemed superior to the [Open Access Transmission Tariff] service." *Id.* (footnote omitted).

In *MidWest/PJM*, the Commission approved a joint operating agreement between two Regional Transmission Organizations under which one of them could not approve certain transmission requests without coordination with the other. *See* 109 FERC ¶ 61,166 P 22-25. The Commission rejected a protest that this allocation process violated Order No. 888's requirement that each transmission provider offer its available capacity on a first come, first serve basis. *Id.* P 25. Under the circumstances presented, where coordination between neighboring regional transmission systems was necessary to allocate "flowgate" capacity at the border of the systems, the Commission found a coordinated approach to be appropriate. *Id.*

Thus, contrary to NRG's position on appeal, the Commission's approval of variations to the *pro forma* open-access tariff is not without precedent.

NRG also claims that the Commission's orders are inconsistent with this Court's decision and the underlying agency orders reviewed in *Sacramento Municipal Utility District v. FERC*, 428 F.3d 294 (D.C. Cir. 2005) (*Sacramento I*). There, the Court affirmed the Commission's decision that Sacramento could not rollover a pre-Order No. 888 contract, but was required to take service under the California ISO's standard open access tariff upon contract expiration. In that case, however, the agency explained, "the [California] ISO tariff did not contain a roll-over provision, while the PJM tariff does." Rehearing Order P 31 & n.37, JA 49 (citing *Sacramento I*, 428 F.3d at 298). Additionally, both the California ISO and the transmission owners "objected to providing non-conforming service to [Sacramento]" because the tariff service would be adequate, while "[i]n contrast, PJM, [the New York ISO], and both transmission owners have agreed to provide service pursuant to the protocols and agreements here due to the operational and other issues raised by these agreements." *Id.*

On appeal, NRG dismisses the Commission's discussion of the factors distinguishing this case from *Sacramento I*. NRG particularly condemns FERC's reliance on the parties' agreement in this case as a distinction "without appreciable legal difference." Pet. Br. 27-28 (citing *Tejas*, 908 F.32d at 1003).

But as discussed above (*see supra* p. 21), neither *Tejas* nor any other case holds that the Commission cannot give any weight to the parties' agreement to a

settlement. More important, the fundamental rationale for the Settlement is that the transmission service provides economic and reliability benefits to all the settling parties and their customers. In *Sacramento I*, however, Sacramento was attempting to continue its pre-Order No. 888, pre-open access transmission service for its sole advantage, without the broader benefits of the type that justify the Settlement here.

NRG likewise objects to the Commission's distinction that the California ISO's tariff did not "contain a roll-over provision similar to section 2.2 of PJM's tariff" as "meaningless." Pet. Br. 29 (citing Rehearing Order P 31, JA 49). But the Court in *Sacramento I* specifically relied on the lack of such a provision in affirming the Commission's orders there. *See* 428 F.3d at 297.

Finally, NRG disputes the Commission's reliance on a subsequent case involving Sacramento and the California ISO, *Sacramento Municipal Utility District v. FERC*, 474 F.3d 797 (D.C. Cir. 2005) (*Sacramento II*). There, as the Commission explained, the Court "affirmed the Commission's finding that it was not discriminatory to deny [Sacramento] the right to roll-over its contract," while the Western Area Power Administration was permitted to continue a prior energy exchange agreement with the California ISO. Rehearing Order P 32, JA 49.

While NRG argues that ConEd's position here is analogous to Sacramento's in *Sacramento II*, Pet. Br. 31, the Commission reasonably relied on the fact that the

Transmission Service Agreements, like the Western Area Power Administration's agreement, "are exchange agreements by which the transmission owners were able to reduce additional transmission investment." Rehearing Order P 32, JA 49. *Sacramento II* is thus entirely consistent with the orders on review, as it demonstrates that the Commission is willing to accept non-conforming agreements when, in the particular circumstances presented, identified benefits (such as from energy exchanges) justify the non-conformity.

D. The Settlement Is Not Unduly Discriminatory.

In the Settlement Order, the Commission rejected NRG's contention that the Settlement was "unduly discriminatory or preferential." Settlement Order P 59, JA 26. However, because NRG never specifically raised the undue discrimination issue in its request for agency rehearing, JA 790, the Commission did not address it further.

Before the Court, NRG once again contends that the Commission's approval of the Settlement violates the Federal Power Act's section 205 prohibition against any tariff granting "any undue preference or advantage to any person" or containing "any unreasonable difference" in rates and services. Pet. Br. 42 (quoting 16 U.S.C. § 824d(a),(b)). Indeed, this argument occupies much of NRG's brief. *Id.* 42-46. However, the relevant provision of section 205 is never once cited by NRG in its request for agency rehearing.

Under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), an objection to the Commission's orders cannot be considered on judicial review unless it was first "urged before the Commission in the application for rehearing." As this Court has routinely held, the Act's rehearing requirement is a jurisdictional prerequisite. *E.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005); *City of Orville v. FERC*, 147 F.3d 979 (D.C. Cir. 1998). Thus, in this case, the Court cannot reach NRG's undue discrimination argument.[7]

In any event, NRG's discrimination claim is without merit. This Court has long recognized that the Federal Power Act does not prohibit differing treatment for customers who are not similarly situated. *See, e.g., Arkansas Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002); *see also Washington Water Power Co. v. FERC*, 201 F.3d 497, 504 (D.C. Cir. 2000) (quoting *"Complex" Consolidated Edison Co. of New York v. FERC*, 165 F.3d 992, 1013 (D.C. Cir. 1999)) ("In order to prevail on an undue discrimination claim, petitioners must demonstrate not only differential rates between two classes of customers, but also 'that the two classes of customers are similarly situated for

[7] Certain of NRG's contentions that were properly preserved on rehearing, including pricing distortion allegedly caused by the Settlement, overlap its discrimination claim. These arguments, however, were fully addressed in the Rehearing Order and are discussed elsewhere in this brief.

purposes of the rate'").

Here, NRG does not purport to seek the same service as ConEd. As the Commission explained, "PJM is willing to provide" the service it provides to ConEd "to any other party requesting it." Settlement Order P 59 & n.89, JA 26 (citing PJM Reply Brief at 4, JA 694). Indeed, PJM states in the cited passage that "[n]o other customer has requested the through-and-out service ConEd requests, *i.e.*, out of [the New York ISO] through PJM and back out to [the ISO]. If NRG or any other customer were to request such a service, PJM would follow the procedures and rules set out in the PJM [Open Access Transmission Tariff] in responding to the request." PJM Reply Brief at 4, JA 694.

In its brief to this Court, NRG also claims that PJM's "promise" of such equal treatment is "illusory" because the Joint Operating Protocol monopolizes the capacity of the feeder lines. Pet. Br. 43. However, NRG's claim of injury is not that it seeks the particular service which ConEd is getting, but rather that the Settlement reduces its access to the transmission line between Staten Island and New Jersey, resulting in a loss of energy sales. This is a completely different issue, one that the Commission addressed in discussing the effect of the Settlement on prices and transmission flow, as demonstrated below.

E. The Settlement Is Supported By Substantial Evidence.

The Commission concluded that its assessment of the Settlement with respect to the issues contested by NRG – in particular the Settlement's benefits, as measured against the harm claimed by NRG – was fully supported by the evidentiary record.

At the outset, NRG spends several pages of its brief arguing that the Commission's orders themselves somehow acknowledge the inadequacy of the record evidence in support of its approval of the Settlement. Pet. Br. 38-41. For example, NRG observes that the Commission initially set the Settlement for hearing, *see id.* 39-40 (citing Hearing Order P 45, JA 195), but failed to actually hold one. As the Commission observed, however, well-settled precedent authorizes it to decide disputed factual issues on the written record, absent questions of motive, intent or credibility (none of which NRG alleges). Rehearing Order P 48 & n.68, JA 56 (citing *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002); *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997)).

Any initial inadequacy in the record was cured by the Commission's decision to solicit briefs from the parties before acting on the Settlement. *See* 18 C.F.R. § 385.602(h)(1)(i) (Commission can act on contested settlement as long as the record contains substantial evidence upon which to base a reasoned decision).

Here, the Commission found the record sufficient to reach its decision, and its discussion of the substantive issues speaks for itself.

1. The Economic Benefits Of The Settlement

First, the Commission concluded that the Settlement provides an overall economic benefit to the settling parties, while the Transmission Service Agreements "do not have a significant adverse impact on the rights of and prices paid by other parties that would preclude approval of the Settlement." Settlement Order P 71, JA 30. An important fact on which FERC based this conclusion was that "both the parties supporting the Settlement and NRG, which opposes the Settlement, generally agree that the 2008 [Transmission Service Agreements] are economic in roughly 88 percent of hours." Settlement Order P 71, JA 30; *see also id.* P 49 (same), JA 22; Rehearing Order P 34, JA 50 ("NRG does not dispute the Commission's conclusion that the 2008 [Transmission Service Agreements are] economic in roughly 88 percent of hours.").

In this regard, the Commission relied on evidence that during the majority of hours, "when prices are lower in [the New York ISO] than PJM, the price differential usually is not great, but when prices in [the New York ISO] are higher than PJM, they are substantially higher." Settlement Order P 71, JA 30 (citing ConEd Reply Brief at 22, JA 679, and Affidavit of ConEd expert witness Robert Stoddard at Exh. RBS-3, JA 447). The Commission found that these factors – that

"prices are lower in PJM than [in New York] in the majority of hours" and that there are "less-significant price differentials during the remaining hours" – along with "the constrained" condition of the "New York City market," all supported Settlement approval. *Id.*

The Commission also found that the Settlement promoted economic efficiency by addressing the consequences of unintended energy flows on the affected transmission systems. In this regard, the agency explained, "the [Joint Operating] Protocol is needed to control the unintended loop flow [into northern New Jersey] 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." Settlement Order P 48, JA 22. More specifically, the Protocol "is designed to enable PJM and [the New York ISO] to manage these flows." *Id.*

The Commission rejected NRG's claim that the Joint Operating Protocol prevents NRG from scheduling counterflows between the New York ISO and PJM (*i.e.*, transmitting power from Staten Island into New Jersey) to reach its market. Rehearing Order P 40, JA 52-53. Rather, the agency explained, the Joint Operating Protocol is neutral on this question. *Id.*

The real basis of NRG's complaint, the Commission observed, was that the counterflows from the New York ISO into PJM would be priced based on PJM's

single proxy bus system. *See* Rehearing Order P 42, JA 54. The agency acknowledged that PJM's pricing mechanism created "inefficient scheduling of power flows on the interfaces between [the New York ISO] and PJM." *Id.* P 42 & n.59 (citing Stoddard Affidavit at 3, JA 439). FERC went on to explain that these "inefficiencies result from using single proxy busses instead of a more comprehensive market-based pricing methodology." *Id.* That issue, however, is beyond the scope of the Settlement and is being addressed in other proceedings before the agency. Settlement Order P 50 & n.79, JA 23; Rehearing Order P 42 & n.61, JA 54 (citing FERC orders issued in another docket; *see New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,276 (2010) (addressing unresolved energy flow issues at the New York ISO/PJM border)) .

On brief, NRG makes two fundamental attacks on the Commission's findings supporting the Settlement. First, NRG argues that the Commission never addressed the evidence it presented that the Settlement will "directly harm NRG's generation fleet and power marketing operations" due to the fact that the Transmission Service Agreements and Joint Operating Protocol will "cause power to flow uneconomically in approximately 12 percent of all hours in a year . . . and reduce[] the run time of NRG's Arthur Kill generating facility on Staten Island." Pet. Br. 44; *see also id.* 49 (alleging that "the Commission never addressed NRG's

arguments regarding the adverse impacts" of "price distortions over 'only' 12 percent of hours").

In fact, the Commission fully addressed this issue, specifically finding that "the fact that NRG's Arthur Kill facility may suffer a reduced run time does not counteract the fact" that the Settlement Agreement "results in substantially lower prices to customers in New York in 88 percent of the hours." Rehearing Order P 35, JA 51. That NRG does not care for the result of the Commission's balancing of the interests is not a basis for judicial disfavor. *See Public Service Commission of Wisconsin v. FERC*, 545 F.3d 1058, 1067 (D.C. Cir. 2008) (that provisions of an Independent System Operator's cost allocation plan "are not what the petitioners would have chosen does not undermine FERC's approval of it"). Rather, as the Court recently explained, it will not reject FERC's policy determination in favor of petitioner's where "FERC reflected on the competing interests at stake to explain why it struck the balance it did." *Sacramento Municipal Utility District v. FERC*, 616 F.3d 520, 541-42 (D.C. Cir. 2010). Rather, the Court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions." *Id.* at 542 (quoting *Tenn. Gas Pipeline Co. v. FERC*, 400 F.3d 23, 27 (D.C. Cir. 2005)).

Second, NRG objects to what it describes as the Commission's "evasion of responsibility" in concluding that the "price distortions caused by" the

Transmission Service Agreements and the Joint Operating Agreement Protocol "will be resolved in future proceedings." Pet. Br. 50. According to NRG, this failure runs afoul of the *NorAm* decision, where the Court rejected the Commission's assertion that the issues raised by a party contesting a settlement could be addressed in later proceedings. *Id.* 56 (citing *NorAm*, 148 F.3d at 164-65).

However, once again, because the Commission seriously considered all of NRG's arguments, *see supra* pp. 21-22, this case is unlike *NorAm*. Moreover, the Commission's decision that the Settlement is not the fundamental cause of NRG's injury rests on specific record evidence. As ConEd's witness Mr. Stoddard explained, "[t]he fact that NRG cannot directly access this capacity is because of the requirements of the single-proxy-bus model (which implicitly exports all power from a single bus north of the city), not from any use of the A feeder by [ConEd]" pursuant to the operating protocols established by the Settlement. Stoddard Affidavit at 7, JA 443.

Even if it were true that the Settlement exacerbates NRG's lack of access to the capacity in question, "an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing." *Mobil Oil*

Exploration v. United Distribution Cos., 498 U.S. 211, 231 (1991). *See supra* pp. 36-37.

2. The Reliability Benefits Of The Settlement

A second key finding by the Commission in support of the Settlement was that it "provide[s] critical reliability benefits" for New York City. Settlement Order P 23, JA 11. In this regard, according to the agency, the record demonstrated that the Settlement was important to "ConEd's continued ability to access" the power provided by the Transmission Service Agreements. *Id.* & n.36 (citing comments submitted by ConEd and the City of New York (along with supporting affidavits), and the New York Public Service Commission).

Thus, for example, the New York Public Service Commission stated that "the reliability benefits" of the Settlement "to New York City are significant and should not be overlooked," because its "wheeling arrangements fulfill a substantial portion of [the] City's in-city generation capacity requirement." Reply Comments of New York Public Service Commission at 4, JA 470. Similarly, Mr. Forte, ConEd's chief engineer, explained in some detail that "[t]he expansion of the wheeling facilities between [ConEd] and PSE&G" pursuant to the original Transmission Service Agreement following ConEd's "system-wide outage of July 1977 demonstrated [ConEd's] commitment to geographically diversify the transmission facilities into New York City." Forte Affidavit at 4, JA 434.

NRG argues that the Commission has failed to demonstrate that the Transmission System Agreements and the Joint Operating Protocol "are necessary to ensure reliability of the transmission system." Pet. Br. 50 (citations omitted); *see also* Pet. Br. 52. As the Commission explained, however, it did not approve the Settlement on the basis of the continued reliability of the New York City electric system. *See* Rehearing Order P 37, JA 51. The Commission's point was that the Settlement does provide definite reliability benefits for New York City, even if that is not its primary purpose. *Id.*

NRG also cites statements by the Commission in the course of the earlier litigation before the agency as admissions that the Transmission Service Agreements "essentially serve economic, not reliability, purposes." Pet. Br. 51 (citing *Consolidated Edison Co. of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 119 FERC ¶ 61,071 P 61 (2007), and 120 FERC ¶ 61,161 P 12 (2007)).

Neither of these orders, however, in any way repudiates the reliability benefits of the earlier Transmission Service Agreements, much less the new ones approved by the Settlement. Rather, the Commission simply explained that, in the context of ConEd's earlier complaint proceeding, "it disagreed with ConEd on the weight to be given to reliability concerns vis-à-vis economic concerns" in interpreting the contracts. Rehearing Order P 38, JA 52. However, the agency specifically recognized that the 1975 and 1978 Transmission Service Agreements

provided reliability benefits. *See Consolidated Edison Co. of New York,* 120 FERC ¶ 61,161 P 9 (indicating that "reliability was one of the purposes of the two contracts"); *Consolidated Edison Co. of New York.*, 119 FERC ¶ 61,071 P 61 ("reliability was one of the fundamental purposes of the contracts").

In any event, as the Commission explained, NRG's position ignores that "economics and reliability are not mutually exclusive, and these agreements provide for electricity exchange that results in the transmission of electricity into areas of New York that need it." Rehearing Order P 37, JA 51.

NRG responds that the Commission based its decision on testimony about reliability submitted by the settling parties, rather than contrary evidence presented by NRG. Pet. Br. 52. But when presented with "disputing expert witnesses," the Court "must defer to the informed discretion of the responsible administrative agenc[y]." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (citing cases); *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (this Court "defers to the Commission's resolution of factual disputes between expert witnesses").

NRG maintains that the Commission's findings are not entitled to deference because the agency failed to discuss the expert testimony of its witness Mr. Bidwell that the Settlement would reduce New York City's electric reliability. Pet. Br. 53 (citing Bidwell Affidavit at 17, JA 557). However, the cited page of

Mr. Bidwell's testimony merely contains his general views on how market forces influence reliability, which did not legally require a more detailed Commission response. *See also* Rehearing Order PP 45-46, JA 55 (explaining that the Commission considered the testimony of NRG witnesses, including Mr. Bidwell, concerning the economics of the Settlement).

In any event, where, as here, "the overall explanation the Commission provided" contains "reasonable responses to petitioners' objections that were neither summary nor dismissive," the Court does not require "a point-by-point rebuttal" of every piece of evidence. *Transmission Agency of Northern California v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010).

CONCLUSION

For the reasons stated, the Court should deny the petition for review and affirm the Commission's orders in all respects.

Respectfully submitted,

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February 23, 2012

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,911 words, not including the tables of contents and authorities, the certificates of counsel and the addenda.

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ADDENDUM A

STATUTES
AND
REGULATIONS

with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

[1] So in original. Section 824e of this title does not contain a subsec. (f).

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

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§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability*. This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer*. (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer*. (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service*. (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence*. (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments*. (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

ADDENDUM B

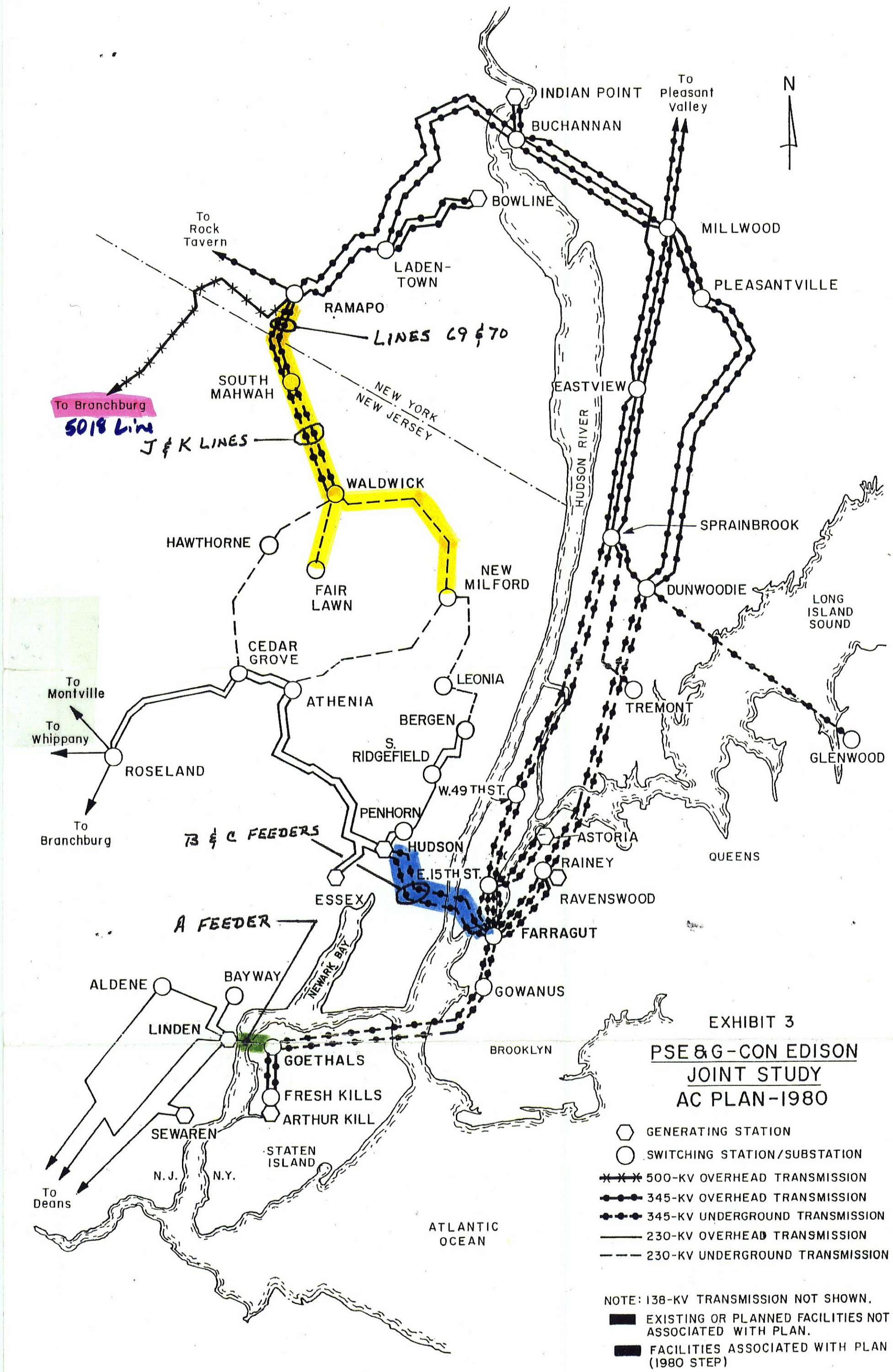
SECTION 2.2 OF THE *PROFORMA* OPEN ACCESS TRANSMISSION TARIFF

2.2 ***Reservation Priority For Existing Firm Service Customers:***

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 a competing request by any new Eligible Customer and to pay the current just and reasonable rate, as approved by the Commission, for such service; provided that, the firm service customer shall have a right of first refusal at the end of such service only if the new contract is for five years or more. The existing firm service customer must provide notice to the Transmission Provider whether it will exercise its right of first refusal no less than one year prior to the expiration date of its transmission service agreement. 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. Service agreements subject to a right of first refusal entered into prior to [the date of the Transmission Provider's filing adopting the reformed rollover language herein in compliance with Order No. 890] or associated with a transmission service request received prior to July 13, 2007, unless terminated, will become subject to the five year/one year requirement on the first rollover date after [the date of the Transmission Provider's filing adopting the reformed rollover language herein in compliance with Order No. 890]; provided that, the one-year notice requirement shall apply to such service agreements with five years or more left in their terms as of the [date of the Transmission Provider's filing adopting the reformed rollover language herein in compliance with Order No. 890].

ADDENDUM C

MAP OF TRANSMISSION FACILITIES


INDIAN POINT
To Pleasant Valley
N
BUCHANNAN
BOWLINE
To Rock Tavern
LADEN-TOWN
MILLWOOD
PLEASANTVILLE
RAMAPO
LINES 69 & 70
SOUTH MAHWAH
EASTVIEW
To Branchburg
5018 Line
J & K LINES
NEW YORK
NEW JERSEY
HUDSON
WALDWICK
SPRAINBROOK
HAWTHORNE
FAIR LAWN
NEW MILFORD
DUNWOODIE
LONG ISLAND SOUND
CEDAR GROVE
LEONIA
To Montville
ATHENIA
TREMONT
To Whippany
BERGEN
S. RIDGEFIELD
GLENWOOD
ROSELAND
W.49TH ST.
To Branchburg
PENHORN
B & C FEEDERS
ASTORIA
HUDSON
QUEENS
RAINEY
E.15TH ST.
ESSEX
RAVENSWOOD
A FEEDER
FARRAGUT
NEWARK BAY
BAYWAY
ALDENE
GOWANUS
LINDEN
BROOKLYN
GOETHALS
FRESH KILLS
ARTHUR KILL
SEWAREN
STATEN ISLAND
N.J.
N.Y.
To Deans
ATLANTIC OCEAN
EXHIBIT 3
PSE&G-CON EDISON
JOINT STUDY
AC PLAN-1980
GENERATING STATION
SWITCHING STATION/SUBSTATION
500-KV OVERHEAD TRANSMISSION
345-KV OVERHEAD TRANSMISSION
345-KV UNDERGROUND TRANSMISSION
230-KV OVERHEAD TRANSMISSION
230-KV UNDERGROUND TRANSMISSION
NOTE: 138-KV TRANSMISSION NOT SHOWN.
EXISTING OR PLANNED FACILITIES NOT ASSOCIATED WITH PLAN.
FACILITIES ASSOCIATED WITH PLAN (1980 STEP)
SCALE: 1 in = 4 mi (APROX)
EXHIBIT CE-1

NRG Power Marketing LLC, et al. **Docket No. ER08-858**
D.C. Cir. No. 11-1201

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 23rd day of February 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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