



Companies prevails on appeal, the settling parties will need to make alternative arrangements. In order to allow for a court decision well before the May 1, 2012 expiration date of the 1974 and 1976 Transmission Service Agreements between ConEd and PSEG (the “TSAs or “Grandfathered Agreements”), the NRG Companies request expedited action on rehearing.

## I. STATEMENT OF ISSUES

Pursuant to Rules 203(a)(7) and 713(c)(1), 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(1) (2010), the NRG Companies present the following identification of errors and statement of issues:

- (1) **Whether the Commission’s precedent allows rollover of pre-Order No. 888 Transmission Service Agreements, such as those at issue in this proceeding, under near identical terms and conditions.**

As explained in Sections A and B below, the Commission erred in holding that these two non-conforming TSAs, executed into the 1970s, should be allowed to continue dominating electricity flows across the PJM-New York seam in perpetuity. The Commission’s finding that Order No. 888 allows rollover of pre-Order No. 888 transmission service agreements, under the same non-standard terms and conditions, in perpetuity, contradicts black-letter open access precedent.<sup>2</sup> Precedent dictates that a transmission provider cannot rollover a non-conforming agreement –

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<sup>2</sup> *Sacramento Municipal Utility District v. Pacific Gas and Electric*, 105 FERC ¶ 61,358 (2005) (*SMUD*); 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., Regs. Preambles, ¶ 31,036 at 31,665 Order No. 888-A, FERC Stats. and Regs., Regs. Preamble ¶ 31,048, at 30,195 (1997).

even if, as here, the non-conforming agreement was accommodated, prior to its expiration, within the existing open access structure. Rather, the non-conforming TSAs terminate under their own terms, and any subsequent service must be taken under the standard terms and conditions of the relevant Open Access Transmission Tariff (“OATT”).

**(2) Whether the Commission erred in finding that the parties supporting the settlement provided evidence sufficient to meet the *Trailblazer* standards governing contested settlements.**

As discussed in Section C below, the Commission erred in finding that the evidence adduced by the Settling Parties was sufficient to allow it to accept the contested settlement under the *Trailblazer* standard. Under the first prong of the *Trailblazer* analysis, the Commission may reach a decision on the merits of each element of the contested settlement *only* if the evidentiary record “contains sufficient evidence.” The paucity of the record in this proceeding precludes the Commission from reaching the specific merits of the contested settlement. Moreover, the Commission must determine that each of the contesting party’s arguments lack merit.

Tellingly, no party filed testimony supporting the Contested Settlement after the Commission issued its February, 2010 *Order Establishing Additional Procedures*.<sup>3</sup> ConEd relied entirely on previously filed testimony that the Commission had already found unconvincing.<sup>4</sup> The New Jersey Board of Public

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<sup>3</sup> *PJM Interconnection, LLC*, 130 FERC ¶ 61,126 (2010) (“February 19 Order”).

<sup>4</sup> The *only* testimonial evidence supported in favor of the contested settlement, the testimony of Mr. Robert Stoddard and testimony of Mr. Michael Forte, was submitted *prior*

Utilities (“NJ BPU”) made statements questioning the settlement. Public Service Enterprise Group (“PSEG”) remained effectively silent.

The evidentiary record is, in fact, less favorable today than it was in February, 2010. Since then, the PJM Independent Market Monitor, Detroit Energy Trading, Inc. (DET), and NRG have filed pleadings, and in the case of NRG testimony setting forth the harm to the market that would occur if these TSAs are permitted to continue.

Having found the evidentiary record insufficient to satisfy the first *Trailblazer* approach in February, 2010, the Commission cannot now reach the opposite determination based on the same (or worse, given the views of the PJM Market Monitor and DET and the testimony of the NRG Companies) factual record. Thus, the September 16 Order’s implicit finding that evidentiary record constitutes “sufficient evidence” to issue a merits decision on the Contested Settlement is unsupported. In any event, even if evidence were sufficient in the first instance for the Commission to attempt to reach the merits of the contested settlement, the Commission erred in finding that each element was just and reasonable, as detailed by NRG below.

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to the issuance of the February 19 Order stating that the record was not sufficient to accept the Contested Settlement.

**(3) Whether the Commission adequately grappled with NRG's arguments regarding distortion in the NYISO energy markets caused by the manner in which the TSAs are integrated into the New York Day-Ahead Markets.**

As explained in Section D below, the Order did not address a key argument raised by NRG, *i.e.*, that incorporating the TSAs into the NYISO's Day-Ahead Market distorts energy prices in New York. The failure to address arguments raised by a party to a proceeding is plain error. Further, the Commission erred in (i) concluding that the harm caused to NRG and the market at large -- by reducing the output of NRG's Arthur Kill generating facility by more than 10 percent from the price suppression caused by the continuation of an out-of-market grandfathered transmission service agreement -- does not outweigh the benefits of approving the settlement,<sup>5</sup> and (ii) finding that the resulting rates are just and reasonable.

**(4) Whether FERC's conclusion that uneconomic power flows in between 12 and 19 percent of all hours, and resulting in a 10 percent reduction in power generation at NRG's Arthur Kill generating facility, is not material is just and reasonable?**

As explained in Section E below, FERC erred in concluding that anti-competitive power flows in at least 12 percent of hours are not material, particularly where NRG submitted unrefuted evidence showing that these uneconomic power flows resulted in direct harm to NRG's Arthur Kill generating facility. There is no reasoned basis for the Commission's conclusion that permitting these contracts to cause price distortions in 1,068 of the 8,760 hours in a year does not harm market participants such as NRG.

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<sup>5</sup> September 16 Order at P 24.

- (5) Whether the Commission’s finding that the reliability of the New York system would suffer if rollover is denied are adequately supported and are consistent with prior Commission statements.**

As explained in Section F below, the Commission previously found that this case was not about reliability, but about economics. The Commission did not explain its departure from this prior precedent. *See Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for “the reasons for its departure”). Further, no party provided any substantive evidence that termination of the TSAs would endanger system reliability. Making a factual finding in the absence of substantial evidence is not reasoned decisionmaking.

- (6) Whether the Commission’s finding that (i) other parties can take service under the JOA, and (ii) that the JOA allows for counterflow across the feeders into New York City, is not supported by the evidence, and thus is not the product of reasoned decisionmaking.**

As explained in Section G below, the Commission erred in asserting the JOA allows market participants to counterflow across the feeders and that other parties are free to take the same service as ConEd. This is obviously not the case, as the JOA is tailored to meet the specific needs of ConEd, and is the product of compromises by the parties.

- (7) Whether the Commission erred in rejecting responsive testimony submitted by NRG.**

As explained in Section H, below, the Order denied NRG’s substantive rights to respond to the Initial Brief submitted by ConEd in response to the Hearing Order by rejecting relevant, responsive, testimony submitted by NRG. The fact that

ConEd choose to refer exclusively to its prior testimony in this phase of the hearing should not be the basis for refusing to allow NRG to respond to the testimony. Thus, the Commission erred in rejecting the expert testimony of Mr. Slater elicited by NRG.

## II.

### REQUEST FOR REHEARING

#### A. **The Commission Erred In Ignoring The Plain Language Of Section 2.2 Of The Pro Forma OATT.**

The Commission appears to have lost sight of its precedent governing the Right of First Refusal (“ROFR”). The ROFR was designed to (i) ensure that customers transitioned to open access service after preferential pre-open access contracts ended and (ii) reward customers taking open access service with a preferential right to renew that service at the end of their contract terms, if there was insufficient capacity to accommodate all requests.<sup>6</sup> The Order subverts both of these goals by allowing ConEd to continue taking non-standard service long after the originally bargained-for contract terminate under their own terms, without requiring ConEd to transition the service to the open access regime.

The Order makes two specific errors in interpreting the ROFR. *First*, the Order purports to allow ConEd to utilize the Section 2.2 ROFR even though ConEd never transitioned to open access service. The ROFR was intended to reward to customers *taking open access service* by allowing them preferential renewal rights. A customer taking non-OATT service, under a grandfathered agreement, cannot use

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<sup>6</sup> Order No. 888 at p. 31,665; Order No. 888-A at p. 30,197.

the provisions of OATT service *i.e.*, Section 2.2, to continue taking non-OATT service under that grandfathered non-OATT agreement.<sup>7</sup> Because ConEd never elected to take open access service, it cannot be allowed to utilize one of the main benefits of open access. This was not the deal the Commission offered to existing customers in its restructuring of the natural gas and electricity markets in Order Nos. 636<sup>8</sup> and 888. The Commission thus erred in deviating from its prior precedent that rollover rights are only available to customers taking open access service in the first place.

*Second*, Commission precedent requires that, to the extent a customer is permitted to “continue to receive transmission service,” such service is only offered “so long as [the transmission customer] was willing to take service under the pertinent open access transmission tariff[.]” Section 2.2 specifically states that customers rolling over service must agree “to pay the *current* just and reasonable rate . . . for such service.”<sup>9</sup> Here, the Order purports to allow ConEd to continue taking service without requiring ConEd to take conforming OATT service.

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<sup>7</sup> *SMUD* at P 14 and P 22 (rejecting rollover when CAISO argued that right of first refusal only applies to service taken pursuant to the Order No. 888 *pro forma* Tariff and finding that the Order No. 888 right of first refusal [*i.e.* Section 2.2] does not contemplate contract extension of non-open access contracts.)

<sup>8</sup> *Northwest Natural Gas Company*, 105 FERC ¶ 61,024 at PP 17-20 (citing Order No. 636 and rejecting the ability of Part 157 to release capacity because granting the benefits of open-access, *i.e.* the ability to release capacity, while not taking open-access service, “would undermine the Commission’s goal of encouraging all pipelines to operate under Part 284.”)

<sup>9</sup> See Section 2.2 of the *pro forma* OATT.

Even the Order acknowledges that “[t]he roll-over provisions of Order Nos. 888 and 890 do not provide a right for a service other than OATT service.”<sup>10</sup> Despite this clear precedent, the Commission erroneously held that Section 2.2 allows PJM and NYISO to establish a new, non-conforming service, designed to mimic the preferential pre-open access service that ConEd currently enjoys.

There is no question that the current rates on file are the respective PJM and NYISO tariffs; which prior to the instant order, permitted customers to take through-and-out service under rates, terms and conditions available to all parties on a non-discriminatory basis. The service that ConEd receives under the grandfathered agreements is not the standard tariff service. Nor is it a close approximation of through-and-out service, modified to allow a customer to withdraw and sink power in the same control area. Instead, ConEd is taking a service that did not exist in the PJM or NYISO tariffs, except insofar as those tariffs accommodated the grandfathered service under terms and conditions unique to ConEd. Allowing a utility to simply incorporate a non-conforming, grandfathered, service agreement into its tariff when the grandfathered contract expires is wholly inconsistent with open access principles and makes a mockery of the rollover process.

**B. The Commission Erred In Interpreting Its Precedent As Allowing For Grandfathered Contracts To Continue Unaltered.**

It is impossible to reconcile the Commission’s prior precedent with the Commission’s decision to allow ConEd to continue taking a grandfathered service in

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<sup>10</sup> September 16 Order at P 48.

this proceeding.<sup>11</sup> To the contrary, the Commission’s longstanding precedent is that the Section 2.2 ROFR does not insulate transmission customers from market evolution:<sup>12</sup>

We also reject the proposition that either existing wholesale customers or transmission providers providing service to retail native load customers should be insulated from the possibility of having to pay an increased rate for transmission in the future. The fact that existing customers historically have been served under a particular rate design does not serve to "grandfather" that rate methodology in perpetuity.

Similarly, the Commission has stated that “a primary goal of Order No. 888 is to provide that in the future transmission providers and third-party transmission customers are ‘similarly situated’ in the quality of transmission service available to them.”<sup>13</sup> The decision to allow ConEd to continue taking service under the grandfathered rate methodology is directly contrary to this prohibition and is not the product of reasoned decisionmaking. The Commission has simply never before – in either its electric or gas precedent<sup>14</sup> – equated a ROFR with the ability to

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<sup>11</sup> *New York State Electric & Gas v. New York Independent System Operator Inc.*, 102 FERC ¶ 61,299 (2003) (stating that pre-existing contracts could continue but noting the Commission’s desire to move all transmission service to regional open access tariff as soon as possible.); *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 at PP 107-108 (2004) (recognizing that grandfathered contracts harm an RTOs ability to administer and operate its markets and thus are disfavored.)

<sup>12</sup> Order No. 888-A at p. 30,198

<sup>13</sup> Order No. 888-A at p. 30,212 (emphasis added).

<sup>14</sup> The Commission’s gas precedent is particularly instructive. On the gas side, conversion to open access service is a prerequisite to any continued service. See *Tennessee Gas Pipeline*, 71 FERC ¶ 61,207 at 61,760; *order denying reh’g*, 72 FERC ¶ 61,251 (1995) (the Commission will not require the conversion of a non-open access contracts but “after the contracts expire, allowing the shipper to continue the arrangement under existing [*i.e.* non-open access] terms may allow the shipper to obtain favorable treatment not available to other shippers. Thus once the parties have been afforded adequate notice and the contracts have expired, we find no reason not to regard any future transportation service as a new transaction that should be performed here under Tennessee’s open-access Part 284 rate

simply extend the rates, terms, and conditions of an existing transmission service agreement in perpetuity.<sup>15</sup> Tellingly, the Order in this proceeding does not cite one case for the proposition that two or more utilities may simply agree to extend grandfathered transmission service, via rollover rights, in perpetuity.

Moreover, the Court of Appeals agreed that transmission customers rolling over service must accept the transmission system as it exists *today*, not as it existed when the transmission customer first took the grandfathered service:<sup>16</sup>

The Commission . . . noted that any new service taken upon expiration-including service taken under the right of first refusal-would be considered “new” service and be governed by the relevant open access tariff.

The Commission’s prior interpretations of Section 2.2 constitute binding precedent, and the Commission erred in not deciding this case according to its well-established precedent governing rollover of grandfathered agreements.<sup>17</sup>

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schedules.”). The Commission has gone so far as to require open access service even without asking the customer. *Northern Border Pipeline Company*, 81 FERC ¶ 61,402 (1997) (advising shippers that a pipeline may convert Part 157 non-access service to Part 284 open access service without the customer’s consent after the contract [the Part 157 non-access contract] between them expires). The Commission would not allow a Part 157 shipper to rollover a Part 157 contract, when that contract expires, with the same Part 157 service, rather than service under Part 284. But that is effectively what the Commission allowed in this proceeding.

<sup>15</sup> See, e.g., *Consolidated Edison Co. of New York v. FERC*, 165 F.3d 992, 1008 (D.C. Cir. 1999) (“Section 205 of the Federal Power Act and Section 4 of the Natural Gas Act are identical in form and have been tested as identical in substance.”)

<sup>16</sup> “We ... are not abrogating existing requirements and transmission contracts generically... However if a customer’s existing ... transmission-only contracts expires, and the customer takes any transmission service from its former supplier, the terms and conditions of the Final Rule tariff [Order No. 888] would then apply to the transmission service that the customer receives.” (Citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,665).

In an attempt to justify this clear departure from precedent, the Commission asserts that *Sacramento Municipal Utility District v. Pacific Gas and Electric Company* (“*SMUD*”) is not dispositive in this case. *SMUD* involved an almost identical fact pattern – a grandfathered transmission customer requested that the CAISO provide rollover service that was virtually identical to service the transmission customer had been taking under the expiring grandfathered transmission service agreements. The Commission rejected *SMUD*’s request and stated that any future transmission service would be taken under the then existing CAISO tariff.

The Commission advances two unpersuasive rationales for failing to abide by the principles articulated in *SMUD*: (1) “since in that proceeding, the utility and the CAISO did not agree to extend the contract as requested by the customer”; and (2) “[i]n the instant proceeding, PJM has agreed to offer the service and asserts that the service is compatible with its OATT.”<sup>18</sup> We address each assertion in turn and explain why the *SMUD* precedent is controlling.

*First*, while it is true that the CAISO did not wish to continue providing the service to *SMUD*, that is a distinction without any appreciable legal difference. The challenged Order does not explain how ConEd and PSEG, two monopoly transmission providers, along with two RTOs, agreeing, without the consent of the

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<sup>17</sup> See *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for “the reasons for its departure”).

<sup>18</sup> Order at P 64.

NRG Companies,<sup>19</sup> to continue providing a grandfathered service is relevant to the Commission's statutory obligation to assure just and reasonable rates, to end undue discrimination, and its articulated goals of ending legacy agreements in favor of tariffs of general applicability.<sup>20</sup> This is particularly true in the contested settlement context, where the Commission's *Trailblazer* precedent forbids foreclosing a contesting parties' rights. Allowing entities to agree to continue grandfathered agreements in perpetuity, allowing the type of two-tiered access to the transmission system that the Commission banned in Order No. 888 and its progeny, should be rejected by the Commission on rehearing.

*Second*, the Commission is factually incorrect in its assertion that the CAISO was incapable of continuing the grandfathered service that *SMUD* had been taking since 1965. Had the CAISO simply agreed to incorporate the grandfathered

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<sup>19</sup> The Commission erroneously argues that these agreements "were freely negotiated by all participating parties, ConEd, PSE&G, PJM and NYISO." September 16 Order at P 23. The NRG Companies and the Commission's own Trial Staff were parties and participants to the proceeding, and the agreements were not "freely negotiated" with them.

<sup>20</sup> In any event, any such agreement is not relevant. *See, e.g., Tejas Power Corp v. FERC*, 908 F.2d 998 (D.C. Cir. 1990) In *Tejas*, the vast majority of customers agreed to a settlement, which the Commission approved. The D.C. Circuit reversed the Commission's decision, finding that agreement of customers is not a sufficient basis for approving a contested settlement. Among other things, the Court stated that the Commission may not simply assume that because parties agreed, that the contested settlement is in the interest of consumers. Further, *Tejas* requires that the "Commission in the final analysis must independently determine what is in the public interest."; *see also Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (1993) ("Even when customer support is unanimous, however, FERC retains the responsibility of making an 'independent judgment' as to whether the settlement amount constitutes a reasonable remedy.") (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C.Cir.1990)); *Kern River Gas Transmission Co.*, 126 FERC ¶ 61,034 (2009) ("[c]ourts have reversed Commission orders approving contested settlements where the court found that the Commission did not give sufficient consideration to the interests of contesting parties, even if the settlement had wide support and there were only one or very few contesting parties.").

agreement into its tariff as a non-conforming OATT service, as PJM and NYISO have agreed to do here, the CAISO could have continued providing *SMUD* the same service it had been taking previously. As the CAISO explains in its initial pleadings in that proceeding, prior to the termination and subsequent attempted rollover of the grandfathered service agreement, the CAISO provided *SMUD* with service under the grandfathered rates, terms and conditions up until the time the grandfathered agreements terminated under their own terms.<sup>21</sup> That the CAISO was physically capable of continuing to provide service was never at issue in *SMUD*, and cannot legitimately be relied upon as a rationale for the Commission to accept the grandfathered agreements in this proceeding. Certainly, had the Commission directed CAISO to change its tariff to allow for the service *SMUD* was taking at the time, it would have become “consistent” with the ISO’s tariff. Thus, one of the principle rationalizations that the Commission advanced in its attempt to avoid following *SMUD* is simply incorrect.

*Third*, the reasoning employed by the Commission that the PJM and NYISO tariffs allow for the continuation of the grandfathered transmission service agreements because PJM and NYISO are amending their tariffs to allow for the continuation of the grandfathered transmission service agreements is a tautology. The Order appears to argue that, on the one hand, the transmission service sought

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<sup>21</sup> See CAISO Answer to *SMUD*’s Complaint in ER04-3-000 at page 5 (“Accordingly, *SMUD*’s attempt to use the ROFR to seek an extension until the year 2025 of the rates terms and conditions of its pre-existing contract . . . is improper. *SMUD* cannot have it both ways: it cannot rely on a ROFR - which would mean taking service under a new agreement - to compel the extension of the terms of an about-to-expire agreement.”)

by ConEd is not currently allowed under the respective PJM and NYISO tariffs. On the other hand, the Order holds that because the respective PJM and NYISO tariffs are being modified to allow for the grandfathered service to continue, that the service is compatible with the respective PJM and the NYISO tariffs. This circular logic could be used to justify the rollover of any grandfathered agreement and seriously erodes the Commission's stated desire to put all transmission customers on an equal footing.

In sum, the Commission failed to distinguish its approach in the *SMUD* proceeding from the outcome in this proceeding. If the Commission wishes to change its prior precedent, it must explain its decision to do so, or risk reversal on appeal.<sup>22</sup>

Finally, the Commission partially justified accepting a non-conforming rate as the only way to effectuate a wheel that has its source and sink in the same control area. The reality is that ConEd, NYISO and PJM had many years to implement a mechanism to handle such scheduling under a standard tariff rate, such as utilizing the NYISO's existing scheduled line mechanism that governs

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<sup>22</sup> The courts require the Commission to fully explain any departure from established policy. See, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) (holding that the agency may not abandon its prior policy without providing a reasonable explanation for "the reasons for its departure"); *Northeast Energy Assoc. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998) (remand for failure to explain deviation from past precedent and policy); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 at 897 (D.C. Cir. 1999) ("We therefore hold that the Commission's 180 degree turn away from Kentucky Utilities was arbitrary and capricious. For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."). While the Commission is entitled to depart from previous policies, to engage in reasoned decision making, the Commission must explain the basis for any departure. *Mississippi Valley v. FERC*, 659 F.2d 488, 506-07 (5th Cir. 1981).

comparable seams with New England.<sup>23</sup> It is irrational to allow a departure from Commission precedent simply because the parties failed to proactively implement the appropriate scheduling mechanism. All parties have known that these contracts were set to expire in 2012 since the 1970s. Their failure to act should not be rewarded. It adds insult to injury to suggest that market participants, such as NRG, seeking to remedy the harm caused by the wheel should seek relief in a subsequent stakeholder process, when it should be the other way around.

**C. The Commission Should Have Rejected The Proposed Settlement In Accordance With Its *Trailblazer* Precedent.**

The standard by which the Commission will consider a contested settlement is set forth in *Trailblazer Pipeline Company* (“*Trailblazer*”).<sup>24</sup> In accordance with the standards set forth in *Trailblazer*, the Commission may take one of four actions when considering a contested settlement:

1. If the record contains sufficient evidence, the Commission may reach a decision on the merits of each contested issue.<sup>25</sup>
2. The Commission may approve the settlement based upon a finding that the overall offer of settlement is just and reasonable notwithstanding problematic aspects *if* the result of approving the settlement will not leave the contesting parties in a worse position than if the case were litigated.<sup>26</sup>
3. The Commission may conclude that the overall benefits of the offer of settlement outweigh the nature of the contesting parties’ objections and that the contesting parties’ interests are too attenuated.<sup>27</sup>

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<sup>23</sup> NYISO Services Tariff, Attachment B, Section 17.1.6.

<sup>24</sup> 85 FERC ¶ 61,345 (1998), *order on reh’g*, 87 FERC ¶ 61,110 (1999), *reh’g denied*, 88 FERC ¶ 61,168 (1999).

<sup>25</sup> *Id.* at 62,342.

<sup>26</sup> *Id.* at 62,342-43 (emphasis added).

<sup>27</sup> *Id.* at 62,343-44.

4. The Commission may sever the contesting parties to allow them to litigate the contested issues.<sup>28</sup>

*Trailblazer* requires the Commission to undertake “an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates.”<sup>29</sup>

The Commission appears to have accepted the contested settlement at issue in this proceeding pursuant to the first prong of *Trailblazer*.<sup>30</sup> For the reasons discussed below, the Commission misapplies *Trailblazer* and erroneously concluded that the record evidence adduced by the Settling Parties was sufficient to allow the Commission to even reach a decision on the merits of each element of the Contested Settlement.

*First*, the first *Trailblazer* approach “is appropriate where the issues are primarily policy issues or the parties have agreed that the record is sufficient to decide the issues on the merits,<sup>31</sup> but is not appropriate where some of the contesting party's contentions have merit.” As set forth further below, NRG’s objections were not meritless and the Order did not address the meritorious objections by the NRG Companies, DET, or the PJM Independent Market Monitor. To the contrary, the Order acknowledges that NRG’s concerns have merit and

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<sup>28</sup> *Id.* at 62,344-45.

<sup>29</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999).

<sup>30</sup> September 16 Order at n. 37. “A finding on the merits that a settlement is just and reasonable satisfies the first approach articulated in *Trailblazer*.”

<sup>31</sup> *Trailblazer Pipeline Co.*, 85 FERC at 62,342, n. 23.

suggest specific proceedings in which those valid concerns might be addressed at some future point. The Commission never defined how or when those proceedings would resolve NRG's objections. Indeed, allowing for the continuation of the two TSAs at issue here would preclude a resolution in those other proceedings. As DET put it:<sup>32</sup>

The Agreements may interfere with NYISO's and PJM's ability to establish a comprehensive interface pricing policy between the two regions because the proxy bus price afforded to the 1,000 MW wheel in the Agreements may be based on preferential access; the interface price available to the rest of the market may not be reflective of the price that would otherwise exist but for this preferential access and the unique proxy bus price afforded to the 1,000 MW wheel; and finally, the interface price for the 1,000 MW wheel is unavailable to any other transactions – all other transactions will be subject to the common interface proxy bus pricing methodology developed by PJM and the NYISO.

*Second*, accepting a contested settlement under *Trailblazer* requires the Commission to find that the parties supporting the Contested Settlement provided the Commission with the factual record necessary to justify the contested settlement. A catalogue of the testimony filed since the Commission's February 19, 2010 finding that it needed additional evidence is telling. ConEd recycled its arguments filed on March 25, 2009. The New Jersey Board of Public Utilities clarified that it "remains committed to [the] settlement and continues to advocate for its acceptance and approval, on the basis that the settlement provides appropriate and balanced resolution of the issues before the Commission and in the

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<sup>32</sup> Motion to Intervene Out of Time and Comments of DET Energy Trading Inc., *PJM Interconnection, LLC*, Docket No. ER08-858-000, et. al., filed June 23, 2010 at 6-7 (DET Motion to Intervene)

public interest,”<sup>33</sup> but it made clear that its position was “without prejudice to its right to further brief or otherwise address the issues in the event the settlement is not approved or if the Commission orders further proceedings.”<sup>34</sup> Hardly a ringing addition to the factual record.

PSEG similarly declined to supplement the factual record in support of the Contested Settlement, and simply stated that the Commission could accept the settlement – under the third prong of *Trailblazer* – because the public interest “would clearly be served by granting such approval.”<sup>35</sup> Without any record support, it argued the public interest would be served given that the settlement would resolve “long-standing disputes, would protect New Jersey customers and would enable Con Edison to plan on how to meet its future supply obligations.”<sup>36</sup>

By contrast, the evidentiary record established by opponents to the Contested Settlement is compelling. The PJM Independent Market Monitor argued that the Commission “should wind down and eliminate all legacy *preferential* transmission agreements inconsistent with that goal [efficient and large scale, organized wholesale power markets], including at the NYISO/PJM seam,”<sup>37</sup> and consistent

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<sup>33</sup> Clarification of the New Jersey Board of Public Utilities Position, *PJM Interconnection L.L.C.*, Docket No. ER08-858-000, et. al.

<sup>34</sup> Reply Brief of the New Jersey Board of Public Utilities, *PJM Interconnection L.L.C.*, Docket No. ER08-858-000, et. al. at 1-2

<sup>35</sup> Initial Brief of Public Service Electric and Gas Company, *PJM Interconnection, L.L.C.*, et. al., Docket No. ER08-858-000, et. al., filed April 21, 2010.

<sup>36</sup> *Id.*

<sup>37</sup> Motion to Intervene Out-of-Time and Comments of the Independent Market Monitor for PJM, *PJM Interconnection, LLC*, Docket No. ER08-858-000, et. al., filed May 11, 2010 at 2-3 (emphasis added)

with that view recommended that the “Commission deny indefinite renewal of Grandfathered TSAs.”<sup>38</sup>

DET, a market participant that serves load in PJM,<sup>39</sup> found the Independent Market Monitor’s position “on-point,”<sup>40</sup> adding that “is difficult to imagine how transmission service agreements established more than thirty years ago (*i.e.* prior to open access, prior to Order No. 888, and prior to the establishment of ISO and RTOs operating under security constrained dispatch using LMP) can be permitted to remain in place effectively unchanged.”<sup>41</sup>

In sum, the Commission cannot (i) lawfully acknowledge NRG’s objections as meritorious; (ii) act based on an evidentiary record it already found deficient; and (iii) proceed to approve the contested settlement.

**D. The Distortion Of The NYISO’s Day-Ahead Market Cannot Be Ignored.**

Incorporating 1,000 of unpriced power into the Day-Ahead Markets run by the NYISO suppresses energy prices in New York during a substantial number of hours each year. Allowing two grandfathered agreements – that by their own terms are supposed to end on May 1, 2012 – to continue suppressing prices in perpetuity is flatly inconsistent with market principles and dampens the price signals that market participants depend on. Effectively, the Commission proposes to allow ConEd to become the only transmission customer that does not have to flow power

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<sup>38</sup> *Id.* at 5.

<sup>39</sup> DET Motion to Intervene at 3 (emphasis added).

<sup>40</sup> *Id.* at 5

<sup>41</sup> *Id.*

in accord with prices determined at PJM/NYISO proxy bus. This enormous competition advantage cannot be allowed. As NRG discusses further in Section E below, the harm to NRG's generation fleet is substantial, eliminating 10 percent of all dispatch opportunities at its Arthur Kill facility during some months. In addition, the Order does not substantively address how a transmission contract, such as the TSAs at issue here, can be wired into day-ahead market results, and still declare those LMP prices to be just and reasonable.

Even a close reading of the agency's Order does not reveal the Commission's rationale for harmonizing this unwarranted suppression of energy price signals in New York City with its finding that adding the proposed Joint Operating Agreement to the NYISO's tariff is a just and reasonable outcome. The failure of the agency to squarely address the impact of continuing these contracts on the market is plain error and must be redressed.

**E. The JOA Protocol Creates "Undue Harm" To Pricing In NYISO And PJM, The Harm Is Material To NRG, And Cannot Lawfully Be Ignored.**

The Commission's Order appears to accept the TSAs will cause power to flow uneconomically in between 12 and 19 percent of hours,<sup>42</sup> and results in an approximately 10 percent decrease in the run hours available to NRG's Arthur Kill facility. However, the Order erroneously (and baldly) concludes that "the

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<sup>42</sup> The Commission cites the testimony of Mr. Kenneth Slater stating that power flows the wrong way between 14 and 19 percent of hours during certain months. While the Order rejected Mr. Slater's testimony (which as explained below deprives NRG of its rights and should be reversed), the Order also stated that even if true, it would not affect the Commission's determination.

Settlement, the 2008 1000 MW TSAs and the JOA Protocol . . . do not create undue harm to pricing in the NYISO or PJM.” Finding that the economic impact identified by NRG, including uneconomic power flows in a significant number of hours and a direct decrease in dispatch opportunities, does not result in “undue harm” is an arbitrary and capricious decision and does not reflect reasoned decisionmaking.

It is *per se* unreasonable (and inconsistent with precedent)<sup>43</sup> for the Order to discount the harm to NRG because power flows contrary to economics is “only” 12 – 19 percent of hours, with an hourly decrease of up to \$187/MWh. There is no reasoned basis for the Commission’s conclusion that permitting these contracts to cause price distortions in 1,068 of the 8,760 hours or finding that they do not harm market participants such as NRG. Like baseball, energy markets “are a game of inches;”<sup>44</sup> generators operate on razor thin margins. Depriving a generating unit of more than 10 percent of its annual revenues is a serious matter, and adversely impacts NRG’s existing generating facilities and limits the company’s opportunity to economically repower its Arthur Kill facility.<sup>45</sup> The Order thus deprives NRG of millions in value due to uneconomic power flows, which is inconsistent with the finding that the JOA Protocol results in just and reasonable rates.

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<sup>43</sup> *Wisvet-Connecticut, LLC v. ISO New England*, 104 FERC ¶ 61,262 at 61,850 (2003) (refusing to retroactively revise rates, even though the financial impact may be small, finding such an argument “not relevant”).

<sup>44</sup> The quote “Baseball is a game of inches” is attributed to Branch Rickey, the General Manager of, among other teams, the Brooklyn Dodgers in the 1940s and 1950s.

<sup>45</sup> See Affidavit of Mr. Kenneth Slater, at p. 4 (“[T]his economic flow...also acts as a deterrent to the building of additional generation in that area[.]”).

Further, denying relief to NRG in this proceeding, based on the fact that parties may choose to address the problem in another proceeding (such as the Lake Erie Loop Flow case Docket No. ER08-1281-004) is not reasoned decisionmaking. Assuming that the Commission fixes the seams issue in another proceeding, it would only be a partial fix because ConEd will be able to continue taking service under the JOA Protocol in perpetuity. In other words, even a successful resolution to the Lake Erie Loop Flow case will not address NRG's concerns with rolling over these specific TSAs. Moreover, this type of pointing to other forums to approve a contested settlement, without addressing its problematic elements is,<sup>46</sup> in fact, not allowed by the courts.<sup>47</sup>

**F. The Order's Findings That The JOA Protocol Is Needed For Reliability Contradicts Prior Commission Findings.**

In the challenged Order, the Commission states that it is accepting the proposed rollover because the JOA Protocol is necessary to support the reliability of the system. This finding contradicts three separate statements by the Commission that these specific agreements to not implicate system reliability and in any event were not support by the record.

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<sup>46</sup> At a minimum, the Commission should require the parties to conform the JOA Protocol to the outcome of the seams proceeding.

<sup>47</sup> See, e.g., *Noram Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1164-1165 (D.C. Cir. 1998). In *Noram* the Commission approved a contested rate settlement and in the process told a contesting party that this was "not the appropriate forum" to address its arguments concerning production area rates and market centers. The Court of Appeals reversed, stating that the Commission was required, "[g]iven that a primary goal of Order No. 636 was to create 'a regulatory environment in which no gas seller has a competitive advantage over another gas seller,' Order No. 636, it was incumbent upon the Commission, when considering the settlement offer, to give serious consideration to the alleged anticompetitive effects of Tennessee's rate system." (internal citations omitted).

The challenged Order states:

Specifically, the JOA Protocol is needed to control the unintended loop flow that would result from increasing power production from the generation sources north of New York City in order to serve parts of New York City. Such an increase in production would cause increased flows into Northern New Jersey. The JOA Protocol is designed to enable PJM and NYISO to manage these flows. In these circumstances, we find that non-conforming OATT service agreements (*i.e.*, ones that incorporate the terms of the JOA Protocol) are necessary to provide for a continuation of reliable service.<sup>48</sup>

The Order adds:

[t]he Settlement grants certainty to ConEd, New York City, PJM, PSE&G and others regarding the status of these agreements, which provide vital transmission service to New York City. The New York Commission and the City of New York have asserted that the 1000 MW TSAs provide critical reliability benefits and that, if the agreements expire, replacement of the imports lost would be difficult and would, most likely, require a long lead time.<sup>49</sup>

But the Commission's prior findings were that the TSAs at issue here were about economics, and not reliability:

ConEd's ability to depend each day on redelivery of up to 1000 MW, at ConEd's nomination, from the feeders under New York Bay, and always at the costs stated in the two contracts, *is more an economic consideration than a reliability consideration*. When PJM and PSE&G prefer to pay the costs of power redelivery over lines other than the A, B, and C Feeders rather than to redispatch their more expensive generation, such redelivery displaces ConEd's ability to receive power over these other lines. *This is an economic event that increases ConEd's total cost of power delivered into New York City because of the transmission path used.*<sup>50</sup>

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<sup>48</sup> September 16 Order at P 48.

<sup>49</sup> *Id.* P 82.

<sup>50</sup> *Consolidated Edison Company of New York, Inc. v. Public Service Electric and Gas Co.*, 120 FERC ¶ 61,161 at P 12 (2007) (emphasis added).

Elsewhere the Commission would find:

We will deny ConEd's request that we determine reliability to be the primary purpose of the two contracts to which other considerations must be subordinated. We find that ConEd's concern over of reliability is less about system failure and more about reducing total costs to ConEd . . .<sup>51</sup>

Finally the Commission would conclude:

[W]e also do not consider all actions or all contracts for transmission of power to the city to be governed primarily by reliability concerns. Thus, we continue to find performance of a reliability impact consideration, as discussed by the Blackout Report, unnecessary in this proceeding.<sup>52</sup>

The findings are not reconcilable. And it is plain error for the Commission not to explain its departure from this prior precedent, particularly given the paucity of the evidence and the lack of testimony from the parties discussed in Section C.<sup>53</sup>

Moreover, even had the Commission acknowledged that it was changing its opinion at this late date, the record evidence in favor of a reliability impact to the New York system is skimpy and incapable of supporting a finding that ending these discriminatory agreements would harm system reliability. The evidentiary record supporting a reliability impact consists exclusively of conjecture and is unsupported by engineering analysis, power studies or other objective evidence. Indeed, the Commission appears to have reached its conclusion based solely upon:

- (i) a conclusory statement by Mr. Michael Forte, employed by one of the litigants in this proceeding, that cites to the 1977 blackout as the

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<sup>51</sup> *Consolidated Edison Co. of New York, Inc. v. Public Service Electric and Gas Co., PJM Interconnection, LLC, and New York Independent System Operator, Inc.*, 119 FERC ¶ 61,071 at P 61 (2007).

<sup>52</sup> *Id.* at P 64.

<sup>53</sup> *Supra*, note 22.

reason for the creation of the facilities at issue here and thus posits a continued need for the TSAs. Mr. Forte supplied no engineering analysis to support his claims; and

- (ii) two bald assertions by regulators with strong economic incentives to preserve the status quo situation and unsupported by any analysis or testimony.

It was not reasonable for the Commission to rely on these bald assertions, utterly unsupported by engineering analysis or testimony, to dismiss NRG's legitimate market concerns on the basis of reliability, particularly when as NRG explained, no party is suggesting that the A, B and C and J and K feeders cease delivering power to New York from PJM, which would be the only cause of any reliability impact. Because the Order did not address this central argument raised by NRG, the agency's conclusions cannot be the product of reasoned decisionmaking and are not entitled to deference.

At a minimum, the Commission is required to weigh the conflicting evidence provided by Mr. Forte and Dr. Bidwell, and explain its determination in a manner that demonstrates to a reviewing court that the agency undertook a reasoned analysis. In this proceeding, the scant testimony claiming that ending these contracts would harm reliability is outweighed by the testimony provided by independent expert Dr. Miles Bidwell, who explains that proper application of economic principles would in fact increase, not decrease, reliability.<sup>54</sup> The

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<sup>54</sup> As Dr. Bidwell explains, “[w]heeling protocols such as proposed by the Settlement can only reduce the ultimate reliability enjoyed by New York City in that the Settlement limits the maximum economic power transfers that might otherwise occur due to its contractually enforced constraints which are less than the actual physical limitations of the line.”

Commission's failure to weigh the conflicting evidence is evidence of a lack of reasoned decisionmaking, and must be remedied on rehearing.

**G. The Commission Erred In Concluding That The Existing Agreements Permit Counterflow Across The A, B, C And J and K Feeders.**

For over thirty years now, the grandfathered TSAs have prevented parties from flowing power, including counterflow power, across the A, B, C and J and K Feeders crossing one of the most constrained interface in the country. The Order proposes to retain this existing grandfathered scheme in perpetuity, and to continue to prevent entities from scheduling counterflows across this facility. The Order erroneously concludes that the JOA Protocol permits counterflow across the A, B, C and J and K Feeders. That is simply not the case, and the Order points to nothing in the PJM or NYISO tariffs, or the JOA Protocol itself, permits parties to schedule power across these specific facilities.

To the extent that the Commission based its assertion on the fact that market participants can schedule counterflow across the generic PJM-NYISO proxy bus, NRG respectfully suggests that such a holding would contravene over ten years of precedent that energy has a locational value. The value of energy generated within the constrained New York City or Northern New Jersey areas is indisputably more valuable than energy generated in rural New York. Finding that the JOA Protocol is just and reasonable because it allows market participants to counterflow power in such an economically untenable manner is arbitrary and capricious, and not the product of reasoned decisionmaking. The promise of being able to export power out of the constrained New York City area into the constrained

Northern New Jersey area – and receive as payment for the energy the price in rural New York is a false hope. However, to the extent that the Commission believes the JOA Protocol allows market participants the ability to counterflow across the A, B, C or J and K facilities, NRG respectfully requests that the Commission identify the relevant provisions of the JOA, or direct PJM and NYISO to expressly provide for such service.

Finally, the Commission erred in asserting that other parties are free to take the same service as ConEd. This is obviously not the case, as the JOA is tailored to meet the specific needs of ConEd, and the contested settlement is the product of compromises by the parties.

**H. The Commission Erred In Reaching A Decision Contrary To Its Prior Decision When Faced With The Same Evidence.**

One of the most puzzling aspects of the Commission's Order is that it finds that the record contains sufficient record evidence to reach the merits of the Contested Settlement immediately after finding that there was *not* sufficient record evidence to reach such a finding in its order of February 18, 2010. Such a resolution would be logical if parties to the proceeding had submitted record evidence that was not before the Commission in February, 2010; and that when this new evidence was considered, the Commission felt that a different outcome was warranted.<sup>55</sup> However, that is not the case here. Instead, Con Ed provided no testimony in this phase of the proceeding -- the only testimonial evidence provided by parties in

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<sup>55</sup> Actually, the record is considerably worse for the Settling Parties than when the Commission originally asked for additional briefs on the Contested Settlement. *See* Section C above.

support of the Contested Settlement was word-for-word identical testimony Xeroxed by ConEd from much earlier in the proceeding. If the Commission believed that ConEd's testimony, submitted *prior* to the February 2010 order setting this matter for hearing constituted "a sufficient evidentiary record," then there would have been no reason for the parties to spend additional time and incur additional expense in amplifying the record.

Fortunately, a reviewing court will be able to rely on black-letter law that: (i) an agency cannot lawfully reach an opposite conclusion in two different instances, when faced with the same factual record. For example, the Commission's August 26, 2008 order found that PJM failed to demonstrate that its rollover proposal was just and reasonable, and set the matter for hearing and settlement judge proceedings, finding that the factual record in this proceeding was insufficient to support a finding on the merits.<sup>56</sup>

At the hearing, the presiding judge shall consider the justness and reasonableness of the 1000 MW TSAs and JOA Protocol, with particular attention to the following issues:

- (1) whether the 1975 400 MW TSA and 1978 600 MW TSA represent firm service for purposes of roll-over under section 2.2 of the PJM Tariff;
- (2) whether the 2008 600 MW TSA provides for the same level of firmness and service as the 1978 600 MW TSA;
- (3) whether the 2008 400 MW TSA provides for the same level of firmness and service as the 1975 400 MW TSA;
- (4) whether roll-over of the 1970's 1000 MW TSAs will result in Con Ed receiving unduly preferential service; and

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<sup>56</sup> *PJM Interconnection, L.L.C. and New York Independent System Operator, Inc.*, 124 FERC ¶ 61,184 at P 46 (2008) (August 26, 2008) ("Hearing Order").

- (5) whether either PJM's or the NYISO's OATT will be violated by any specific provisions of the 2008 1000 MW TSAs requiring that energy be transmitted over specific lines.

After being presented with the Contested Settlement, the Commission again stated that the factual record was insufficient and ordered briefs on the following:

The parties need to address whether these contracts are sufficiently firm to be rolled over under Order No. 888; whether, if they are eligible for rollover, Con Ed is eligible only for OATT service, or whether the circumstances here warrant a non-conforming agreement' and whether and what effect these agreements have on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA on the Locational Marginal Prices in both PJM and NYISO and the effect of these provisions on the ability of other parties to transact business.<sup>57</sup>

Then, the Commission reached a contrary decision in the September 19 Order, despite having only recycled arguments from ConEd and testimony opposing the rollover of the two TSAs.

*Trailblazer* is clear that, “[i]f the Commission finds that the record lacks substantial evidence, or finds that contesting parties or issues cannot be severed . . . the Commission [may] to establish procedures for the purpose of receiving additional evidence on the contested issues[.]” The Commission expressly determined that it did not have an adequate factual record in this proceeding when it issued its February 2010 Hearing Order. Despite requesting additional evidence, the Commission received no new testimonial evidence from PJM, ConEd, PSEG, or any of the other parties. To be clear, NRG does not bear the burden of proof in this proceeding; instead, that burden falls upon PJM and the NYISO as the entities to

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<sup>57</sup> PJM Interconnection, et. al., 130 FERC ¶ 61,126 at P 24 (2010)

whose tariffs the JOA Protocol is being appended. Without any new testimonial evidence in support of the JOA, the Commission cannot arbitrarily change its mind and decide that the record magically now contains sufficient evidence to approve the Contested Settlement.

The Commission's decision to reject the testimony of Mr. Kenneth Slater as untimely is equally puzzling, and denied NRG the opportunity to respond to factually incorrect statements made by other parties. Effectively, the Order holds that, because ConEd did not provide any testimony, that NRG somehow forfeited its opportunity to supplement, in its Reply Brief, the incorrect assertions made by ConEd in its Initial Brief. The Commission specifically directed each of the parties to "to address . . . what effect these agreements have on the rights of and prices paid by other parties, including the effect of the flow changes in the JOA on the Locational Marginal Prices in both PJM and NYISO[.]"<sup>58</sup> NRG provided expert testimony from Dr. Miles Bidwell. ConEd provided no testimony,<sup>59</sup> but did suggest that rolling over the non-conforming agreement would enhance "system efficiency".<sup>60</sup> In reply, NRG then responded with the updated economic analysis from Mr. Slater demonstrating that ConEd's supposed "efficiencies" were illusory.

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<sup>58</sup> February 19 Order at P 24.

<sup>59</sup> ConEd did submit testimony from Mr. Stoddard to the Commission as part of its March 25, 2009 reply comments to the initial settlement proposal. But any response by NRG to Mr. Stoddard's testimony at the time would have been an impermissible pleading, and any holding that NRG's only opportunity to challenge Mr. Stoddard's testimony was in the form of an impermissible answer would be arbitrary and capricious.

<sup>60</sup> Initial Brief of Consolidated Edison Company of New York on Remanded Issues, Docket No. ER08-858-000, et. al., filed April 21, 2010 at p. 33.

Further, the Order states that NRG had the opportunity to respond to Mr. Stoddard's testimony when it was filed. This is factually incorrect. Mr. Stoddard's initial testimony was submitted to the Commission as part of reply comments on March 25, 2009 to the original contested settlement. Any response by NRG to Mr. Stoddard's testimony at the time would have been an impermissible pleading, and any holding that NRG's only opportunity to challenge Mr. Stoddard's testimony was in the form of an impermissible answer would be arbitrary and capricious. There is thus zero rational basis for the Commission's conclusion that the expert testimony provided by the NRG Companies on the market harm caused by the rollover of the JOA Protocol in response to the Commission's established briefing schedule was untimely and thus should have been rejected.

### **III. CONCLUSION**

**WHEREFORE**, the Commission should grant rehearing as set forth above.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 18th day of October, 2010.

**/s/ Brenda Robertson**  
Brenda Robertson

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