

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Consolidated Edison Company
Of New York, Inc.**

Docket No. EL02-23-011

**JOINT PROTEST OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.,
PJM INTERCONNECTION L.L.C., AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY**

In compliance with the Commission’s January 13, 2006 *Notice* and January 19, 2006 *Notice of Extension of Time* in the above-captioned proceeding, and Rule 214 of its Rules of Practice and Procedure, the New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”) (together, the “ISOs”) and Public Service Electric and Gas Company (“PSE&G”) (collectively “Joint Protestors”) submit this joint protest to the *Second Report of the Consolidated Edison Company of New York, Inc. Regarding the Effectiveness of the Protocol* (“Second Report”).¹ For the reasons set forth in detail below, the Commission should not adopt any of the actions items proposed by the Second Report. The ISOs have complied with the Operating Protocol in good faith and to the best of their ability. There have been some real-time implementation challenges but this should be not surprising given the Operating Protocol’s novelty and complexity. The ISOs’ performance has been increasingly

¹ The NYISO, PJM, and PSE&G are already parties in Docket No. EL02-23-000 and therefore do not believe that they are required to intervene in this sub-docket, notwithstanding the Commission’s use of a different caption here. If the Commission concludes that interventions are necessary then the Joint Protestors respectfully submit that they have a material interest in this proceeding that cannot be adequately represented by any other party because the Second Report asks the Commission to take a number of actions against them and request permission to intervene in the above-captioned docket for all purposes.

good as they have gained experience. There is no reason to find the ISOs' performance to have been unreasonable, to have violated their tariffs, or to warrant refunds.

On the other hand, the Joint Protestors agree that it would be appropriate for the Commission to direct the parties to file a third status report ninety days after the date of this filing. The third status report(s) would provide additional information concerning the parties' performance under the Operating Protocol and include any recommendations for additional prospective improvements.

I. STATEMENT OF ISSUES

In compliance with Order No. 663,² the Joint Protestors respectfully identify the following issues that are raised in this joint protest:

1. *Have the ISOs complied with the Operating Protocol?* The Joint Protestors submit that the answer is "yes." As ConEd itself has conceded, the ISOs have worked in good faith to implement the Operating Protocol. *See* Second Report at 6 (Dec. 30, 2005). Moreover, there has been a marked increase in the ISOs' "met delivery" percentage in the months since the Operating Protocol was implemented.
2. *Has the NYISO complied with the Operating Protocol by implementing procedures that would allow it to request redirections into PJM and to review PJM requests for redirections into New York?* The Joint Protestors submit that the answer is "yes." The NYISO has always had operational processes in place to administer the Operating Protocol's redirection provisions. The NYISO has significantly improved these processes in the past month but has never been out of compliance with the Operating Protocol.
3. *Is ConEd's analysis regarding inappropriate redirections exaggerated?* The Joint Protestors submit that the answer "yes." ConEd has admitted that its analysis is based on 20/20 hindsight. *See* Second Report at 12. For example, ConEd's analysis ignores the difficult judgments that the NYISO and PJM must make under the Operating Protocol. *See, e.g.,* Operating Protocol at Appendix 1, Section 20 and Appendix 1, Section 21. Finally, ConEd's analysis may also have inflated the cost effects of redirects.

² *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 112 FERC ¶ 61,297 (2005).

4. *Have the ISOs correctly interpreted the Operating Protocol's redirection provisions?* The Joint Protestors submit that the answer is "yes." The ISOs' interpretation of the Operating Protocol's redirection provisions has always been just and reasonable. The fact that the ISOs eventually agreed to adopt an especially conservative interpretation of them in an attempt to accommodate ConEd's needs does not mean that this was the only reasonable interpretation.
5. *Are ConEd's claims regarding under-deliveries exaggerated?* The Joint Protestors submit that the answer is "yes." First, ConEd inaccurately claims that it always requests 1,000 MW of service under the Operating Protocol. This is incorrect as a factual matter. ConEd's analysis does not adjust for its actual real-time elections, which occasionally differed from its day-ahead elections, redirects, or the desired flow bandwidths. Finally, as ConEd is aware, under-deliveries may have been affected by equipment limitations impacting the NYISO's ability to use Phase Angle Regulators on the "A" feeder owned by ConEd to control flows. See PJM's Preliminary Analysis of the Second Report (attached to this Joint Protest).
6. *Is ConEd's argument that deliveries under the Operating Protocol be "equal and contemporaneous" relevant to whether it should be owed refunds?* The Joint Protestors submit that the answer is "no." ConEd is attempting to hold the ISOs to a standard that is not actually in the Commission-approved Operating Protocol, which is the exclusive source of operating procedures that they are obliged to follow. See *Consolidated Edison Company of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 111 FERC ¶ 61,288 (2005). Compliance with the Operating Protocol's requirement that actual real-time flows be within the +/- 100 MW bandwidth of the real-time market desired flow constitutes compliance with the Commission's earlier statement that deliveries under the underlying contracts were supposed to be "equal and contemporaneous."
7. *Has PJM provided ConEd with a service priority under the 400 MW contract that is consistent with the Operating Protocol?* The Joint Protestors submit that the answer is "yes." PJM has acted consistent with the terms of the Operating Protocol in providing ConEd with a credit from using excess congestion revenues that remain after congestion credits are paid to all firm PJM customers.
8. *Should the Operating Protocol be subject to a traditional filed rate doctrine refund analysis?* The Joint Protestors submit that the answer is "no." The Operating Protocol was understood to be a work-in-progress aimed at solving a novel, unusual, and complex set of operating problems associated with the implementation of grandfathered agreements in a much different operating environment. Moreover, the Operating Protocol itself recognized that it might need to be changed once the parties gained experience under it. See Operating Protocol at Appendix 1, Section 1.5.
9. *If the Commission applies a traditional filed rate doctrine refund analysis, should refunds be provided to ConEd?* The Joint Protestors answer "no" to this question. Even assuming the Commission applies a traditional refund analysis, the Joint Protestors believe that the Commission should exercise its discretion and not impose refunds in this case. See, e.g., *Towns of Concord, Norwood and Wellesley, Massachusetts v. FERC*, 955

F.2d 67, 72-73 (D.C. Cir. 1992). Given the complexity and novelty of the issues involved, and the awareness of all parties that there could be implementation issues, the Joint Protestors believe it would be inappropriate to impose refunds here. Finally, the ISOs did not benefit from any of the alleged implementation problems.

10. *May the Commission require refunds in response to ConEd's status report?* The Joint Protestors submit that the answer is "no." The Commission would have to first initiate a new Section 206 proceeding. *See* 16 U.S.C. § 824b.
11. *Can ConEd recover refunds that are prohibited by the ISOs' tariffs?* The Joint Protestors submit that the answer is "no." Both NYISO's Market and Administration and Control Area Services Tariff and PJM's Open Access Transmission Tariff specifically limit the ISOs' liability in a way that excludes consequential, indirect, punitive, special and incidental damages. *See* NYISO Services Tariff at Article 12; PJM OATT at § 10.3; PJM Operating Agreement at § 16.6. The bulk of ConEd's refund request consists of these sorts of prohibited damages.
12. *Would it be advisable to initiate a new round of administrative litigation over alleged non-compliance with the Operating Protocol?* The Joint Protestors submit that the answer is "no." It would be much more productive to focus on future improvements rather than fighting over past implementation issues.

II. THE COMMISSION SHOULD NOT INITIATE A REFUND PROCESS

ConEd alleges that the ISOs have committed a variety of Operating Protocol violations. It claims that the violations have resulted in \$57 million in total, albeit mostly indirect, "economic consequences" to New York City loads as well as other "cost issues" associated with service under the 400 MW contract.³ ConEd states that it will be a simple matter to identify violations, quantify the costs, and expeditiously compute refunds. All of these assertions are wrong.

The ISOs have worked diligently to implement the Operating Protocol and have complied with its requirements to the best of their ability. As the ISOs' December 30 status report makes clear, performance has improved substantially over time and additional improvements have either just been introduced or will soon be in place. The ISOs have also made or are developing

³ Second Report at 19.

changes specifically to address ConEd's concerns. To the extent that the ISOs' performance may not have been perfect from the outset it is a function of the novelty and complexity of the Operating Protocol as well as problems with ConEd's equipment. Ultimately, the proper remedy for any persistent problems is not to punish the ISOs but to prospectively reform the Operating Protocol.

ConEd has grossly exaggerated the extent of Operating Protocol implementation problems and the severity of their effects while using skewed data to downplay performance improvements. As is set forth in detail below, ConEd's complaints about the redirection process are unfounded. Its assertions concerning "under-deliveries" are overstated and overlook its own role in causing them. ConEd attacks the ISOs for failing to do what it alleges is required by earlier orders in this proceeding. The ISOs, however, are obliged to comply with the terms of the Commission-approved Operating Protocol, which is what translated the language of the Commission's various orders in this proceeding into instructions that the ISOs must follow. They are not subject to other requirements that ConEd might wish to impose based on its interpretation of statements in prior orders that were not incorporated into the Operating Protocol.

The Operating Protocol is a complex work in progress that was expected to evolve over time. All of the parties understood that its implementation might be imperfect in the beginning. Indeed, the Operating Protocol expressly provides for periodic reviews to consider possible modifications. Any occasions when the ISOs have been unable to fully implement the Operating Protocol should therefore not be treated as if they were traditional violations of a filed rate, but rather as potential cause to review the Operating Protocol and the associated implementation processes. If the Commission nevertheless determines that tariff violations have occurred,

which, as a matter of law, could only occur after the conclusion of a newly initiated Section 206 investigation, it should exercise its discretion and not order refunds on equitable grounds.

Refunds are not justified because the ISOs are acting in good faith, are performing as well as they can, and are not even alleged to be benefiting from any implementation problems. To the extent that the Commission decides that refunds might be warranted, it must recognize that the potential liability for compliance with the Operating Protocol is limited to ConEd's direct costs since the ISOs' tariffs include liability limitations that provide protection from consequential damages.

In short, while ConEd may, at the very most, have identified some areas where prospective enhancements to the Operating Protocol should be considered, it has not shown that the ISOs have violated their tariffs or made a valid case for refunds. Rather than sending the parties back to litigate over past problems with, at worst, relatively small, cost impacts the Commission should encourage them to focus on future performance improvements.

A. The ISOs Have Complied with the Operating Protocol

There is no question, and even ConEd concedes,⁴ that the ISOs have worked in good faith to implement the Operating Protocol. The ISOs' own status reports demonstrate that enhancements are being made, more data is being shared, and overall performance is steadily improving. In particular, the ISOs' "met delivery" rate, *i.e.*, the percentage of time that actual ABC deliveries were within the bandwidth of desired flows or resulted in over deliveries to the New York City area rose from 41.2% in July to 82.2% for the period from December 1 through December 20. The positive trend has continued since then. The final met delivery figure for December was 83.7%. For January it has been 84.9% to date. This consistent improvement

reflects the ISOs' diligence in complying with the Operating Protocol, and in detecting and fixing implementation problems. Although implementation has not been perfect, it is not realistic for ConEd to expect perfection given the ISOs' inevitable need to work through start up issues. By any measure, the ISOs have substantially complied with the Operating Protocol, have achieved a very high level of performance, and are likely to improve further in the future.

B. The ISOs Have Properly Implemented the Operating Protocol's Redirection Provisions

The ISOs have complied with and properly implemented the Operating Protocol's redirection provisions. ConEd would have the Commission believe that the NYISO has failed to meet its obligations to request redirections or to review redirection requests from PJM. It also suggests that PJM has improperly redirected flows into New York on many occasions. These contentions are false.

1. The NYISO Has Complied with the Operating Protocol's Redirection Provisions

First and foremost, the NYISO has had operational processes in place to identify conditions where redirects from New York to PJM are appropriate and to submit requests to PJM. The NYISO significantly improved on these processes earlier this month when it fully automated the identification of NYISO and PJM system conditions that warrant redirection actions, via a real-time data exchange process with PJM. The NYISO has also increased the transparency of the process by making relevant operational data available to ConEd. In essence, ConEd is receiving all the relevant PJM and NYISO operating data necessary to ensure that the protocol is correctly implemented in real-time.

⁴ See, e.g., Second Report at 6.

Prior to the introduction of these automated procedures, the NYISO had working processes in place from the time that the Operating Protocol first went into effect. It is therefore inaccurate for ConEd to say that the NYISO had not implemented the redirection provisions prior to its implementation of certain automation and transparency improvements. In fact, the NYISO has submitted six redirect requests onto the PJM system to date. Four of them were denied by PJM, as expressly permitted under the Operating Protocol, because it expected to be off-cost at the time of the NYISO requests. Two of the NYISO's redirect requests were granted.

Likewise, the NYISO has always had processes in place to ensure that redirects onto New York occur in a manner consistent with the Operating Protocol. The NYISO has reviewed all PJM requests and, as the Operating Protocol requires, has rejected them when it believed, based on expected system conditions, that they would cause New York to go off-cost. This has not been necessary very often, because New York City has experienced relatively few occurrences of congestion, but there were twenty occasions in the last three months on which the NYISO either rejected PJM requests or modified them to reduce the amount of redirection allowed.

There were two additional occasions when the NYISO was prepared to reject a PJM redirection request at a time when significant New York City area congestion was occurring but could not do so because the special New York City "Thunderstorm Alert" reliability rules mandated by the New York State Public Service Commission, and recognized by the Commission,⁵ were in effect. The specific operational conditions during these two occasions were such that cancellation of the PJM redirects would have resulted in "Thunderstorm Alert" contingency violations on the "A" and "B" lines. On these two occasions the PJM redirect could

⁵ See *New York Independent System Operator, Inc.*, 102 FERC ¶ 61,284 (2003); *Central Hudson Gas & Electric Corp, et al.*, 100 FERC ¶ 61,107 (2002).

not be cancelled even though significant New York City area congestion was occurring that could not be avoided due to the physical limitations of the A and B lines. ConEd's analysis does not account for these realities of actual system operation.⁶

While the NYISO has requested relatively few redirects compared to PJM this is because, as was noted in the ISOs' December 30 status report,⁷ there has been a great deal of congestion on the PJM system and relatively few occurrences in the New York City area. Indeed, ConEd (relying on 20/20 hindsight) was only able to identify ninety hours over a five month period in which it thought that redirects from New York should have occurred.

The NYISO implemented procedures for providing real-time New York market data needed to make informed redirection requests available to PJM from the time that the Operating Protocol was introduced. Over the past few months, PJM modified its data delivery systems to make this data available directly to the NYISO's systems. Although it is true that the NYISO's recent automation of certain aspects of its redirection procedures will make them more efficient and provide more transparency, that does not indicate that its earlier procedures were not compliant with the Operating Protocol.

⁶ It should be noted that these events are also compliant with the Operating Protocol. Section 1.3 of Operating Protocol Appendix 1 specifically authorizes the ISOs to depart from the Operating Protocol when emergency procedures, such as the New York City Thunderstorm Alert rules, dictate. Similar reliability exceptions are included in the redirection provisions themselves. *See* Protocol Appendix 1, Sections 20 and 21.

⁷ *See* ISOs' December 30 Status Report at 2-3. *See also* PSE&G's Status Report in Compliance with the Commission Order in Docket No. EL02-23-004, *et al.* at 3.

2. ConEd's Analysis is Grossly Distorted Because It Is Based on 20/20 Hindsight

ConEd's estimate of the number of inappropriate redirections is exaggerated because it relies on perfect hindsight. ConEd concedes as much in the Second Report.⁸ The same flaw existed in ConEd's September 30 Status Report and was noted in the ISOs' protest of that filing.⁹ It is easy to see why this flaw is so significant if one considers the language of the redirection provisions. Section 21 of Appendix I to the Operating Protocol states:

If the PJM is off-cost or expected to go off-cost for two or more consecutive hours in maintaining the RTMDF,¹⁰ and the NYISO is not off-cost then PJM and NYISO shall consult with each other and shall redirect up to 300 MW (in a mutually agreed upon amount and in mutually agreed upon increments) from the PJM system onto the NYISO system; provided, however, that PJM and the NYISO verify that allowing actual aggregate interface flows to deviate from the RTMDF will not result in violation of applicable PJM or NYISO reliability criteria. The process of modifying actual interface flows in incremental adjustments will continue until

- a) PJM is no longer off-cost, or
- b) The NYISO is about to go off-cost (*i.e.*, the NYISO expects that it will have to redispatch in response to transmission constraints in order to maintain the RTMDF, or
- c) 300 MW have been redirected.

Section 20 of Appendix 1 is a mirror image of Section 21 establishing identical terms for redirections from PJM into New York. Appendix 1 defines "off-cost" as an instance when "the weighted LMP of JK is less than the weighted LMP of ABC by more than \$5 and/or the weighted nodal pricing of Ramapo is less than the weighted nodal pricing of the aggregate of

⁸ See Second Report at 12 (noting that ConEd's results are based on actual, after-the-fact LMP and LBMP pricing data, not the expected or forecasted information that was actually available to NYISO and PJM operators making real-time decisions).

⁹ See ISOs' December 30 Status Report at 3.

¹⁰ RTMDF is the Operating Protocol's acronym for Real-Time Market Desired Flow.

Farragut and Goethals by more than \$5 (with a reasonable expectation of the appropriate cost-differential continuing for at least two consecutive hours).”

As the ISOs’ protest of ConEd’s September 30 report explained, ConEd’s analysis makes no allowance for the reality that the NYISO and PJM must implement the Operating Protocol, and make the difficult judgments that Sections 20 and 21 require, in real-time. The ISOs rely on the best available real-time information, expected pricing forecasts, and predictive judgments rather than after the fact prices. This is a task that involves a great deal of inherent uncertainty. There are inevitably unexpected or unforeseen events that operators are not able to anticipate when they try to predict prices two hours into the future. The ISOs’ operators acted in good faith at all times to make the best predictions they could under the circumstances. The Commission cannot expect or require perfect prognostication from the ISOs. ConEd’s insistence that all predictive judgments about future system conditions be subject to refunds is baseless and is not supported by anything in the Operating Protocol.

In addition to requiring perfect real-time decisions from the ISOs’ operators, ConEd’s analysis may also have systematically inflated the cost effects of all redirects.¹¹ ConEd’s estimate that it has incurred \$2.8 million in direct costs due to “improper” redirections appears to assume that each and every redirect that ConEd identified as inappropriate based on after-the-fact data was inappropriate in its entirety. ConEd has not, and cannot show this to be true. If and to the limited extent that there may have been imperfect redirects (where imperfect information caused the ISOs to redirect too much power from PJM to New York, for example) it

¹¹ The Joint Protestors are not able to determine based on the information provided by ConEd or Charles River Associates how their estimate of the direct costs of redirects was created.

is likely that the redirects were mostly valid and that only a small increment of the redirected MW should not have been redirected.

3. The ISOs Have Correctly Interpreted the Operating Protocol's Redirection Provisions

ConEd also claims that the ISOs violated the Operating Protocol by interpreting it to allow redirections at times when the receiving ISO/RTO was experiencing congestion costs between \$0 and \$5. While it is true that the ISOs' protest of ConEd's September 30 status report stated that the ISOs "had agreed not to authorize redirections when it appears, based on the best forecasted information available to their operators, that doing so would increase the costs of the ISO/RTO that would be required to transmit the redirected flows over its transmission facilities,"¹² the ISOs do not agree that their initial interpretation of the redirect provisions of the Operating Protocol was inappropriate, or unjust and unreasonable. Rather, the ISOs announced this more conservative interpretation of an Operating Protocol provision that was open to multiple interpretations as a good faith accommodation to ConEd, in response to ConEd's complaints about the impact of the Operating Protocol's redirection provisions. It was expressly¹³ not a concession that the ISOs had followed a different policy in the past or that it would have been a violation of the Operating Protocol if they had.

It is clear from the definition of "off-cost" quoted above that it would be reasonable to interpret the Operating Protocol as allowing redirections to continue when congestion costs were expected to be between \$0 and \$5 on the receiving system because the Operating Protocol defines "off-cost" as situations where price impacts are expected to exceed \$5. To the extent that

¹² See Limited Protest of the New York Independent System Operator, Inc., et al., Docket No. EL023-23, at 7 (Oct. 27, 2005) ("Limited Protest").

¹³ See Limited Protest at n. 6.

the ISOs' operators followed this interpretation prior to October 27, 2005 their actions were consistent with the Operating Protocol. However, ConEd's interpretation of this ambiguous provision is also reasonable, so the ISOs elected to modify their interpretation of the Operating Protocol and adopt ConEd's more conservative interpretation. The ISOs should not be punished for attempting to address ConEd's concerns.

Insofar as ConEd continues to believe that the Operating Protocol imposes excessive redirection costs on it, ConEd is free to propose prospective reforms to the parties, or to the Commission directly. ConEd has not shown, however, that there have been inappropriate redirections and should not be entitled to receive refunds simply because it uses hindsight to second-guess the ISOs' real-time operating decisions.

Finally, ConEd maintains that PJM may have used redirections of flows as a surrogate for impermissible curtailments of service.¹⁴ It is unclear exactly what ConEd means by this charge but to the extent that ConEd is contending that appropriately scheduled redirects are tantamount to curtailments its position is clearly without merit under the Operating Protocol. The Operating Protocol clearly allows for the use of redirects as long as the redirect conditions are met. Because ConEd did not provide any information concerning alleged instances when redirections did not perfectly correlate with changes to desired and actual flow levels the ISOs are not in a position to comment further on this point at this time.

C. ConEd's Claims Regarding Under-Deliveries Are Grossly Exaggerated

ConEd asserts that actual deliveries across the A/B/C feeders were less than ConEd's day-ahead elections 83% of the time between July and November. This figure is drastically overstated. For the reasons set forth below, the actual figure is at most twenty five percent.

Even this estimate creates a misleading impression, however, because it masks significant improvements in the ISOs' performance.¹⁵

As an initial matter, ConEd inaccurately claims that it always requests 1,000 MW of service under the Operating Protocol. This is true of its day-ahead elections, but ConEd sometimes opts for a lower figure in real-time. More significantly, ConEd's analysis does not account for the effects of redirects or for the existence of the +/- 100 MW desired flow bandwidths, both of which are expressly defined components of the Operating Protocol. The ISOs have calculated that these factors reduce the frequency of under deliveries to 25% of all hours for the July through November period. Furthermore, more than a third of the hours with actual under-deliveries occurred in July of 2005 (316 of 918 hours).¹⁶ July was an extremely hot month characterized by very challenging operating conditions throughout the Northeast Region and was the first month of operation under the Operating Protocol.

Similarly, ConEd alleges that deliveries across the A/B/C interface were less than 1,000 MW during 1870 hours between September 1 and November 30. Adjusting for ConEd's actual real-time elections, redirects, and the desired flow bandwidths, indicates that there were under deliveries in only 17% of the hours during this period.¹⁷

Finally, the extent to which under-deliveries during both timeframes can arguably be said to be out of compliance with the Operating Protocol is even lower because of equipment

¹⁴ Second Report at 15.

¹⁵ See ISOs' December 30 Status Report at 3.

¹⁶ See PJM's preliminary analysis of the Second Report which is attached hereto.

¹⁷ *Id.* In addition, if over-deliveries were included the total claimed level of under-deliveries would be further reduced.

limitations that restrict the NYISO's ability to use the Phase Angle Regulator ("PAR") that controls flows on the A feeder owned by ConEd. As the ISOs noted in their protest of ConEd's September 30, 2005 implementation report, ConEd has asked that no more than ten A feeder PAR moves be allowed in any given day, rather than the twenty tap changes that the Operating Protocol would ordinarily permit the ISOs to take to implement the protocol. Furthermore, as was noted in the ISOs protest of ConEd's September 30, 2005 report,¹⁸ there have been a number of occasions when all parties agreed that it would be appropriate to reduce the deliveries over the A, B, and C lines in order to address the physical equipment limitations on the A feeder PAR.

In sum, under-deliveries have been a far smaller problem than ConEd's arguments make them seem. It is not appropriate for ConEd to seek refunds for claimed under deliveries that it calculated without taking core features of the Operating Protocol and the good faith efforts by the ISOs into account. ConEd is therefore not entitled to the \$ 4 million in direct costs it attributes to under-deliveries.

D. ConEd's Argument Regarding Imbalances Cannot Justify Refunds Because It Is Not Related to the Operating Protocol

ConEd also argues that the ISOs have violated Opinion No. 476's declaration that deliveries under the Operating Protocol should be "equal and contemporaneous."¹⁹ This is irrelevant to the question of whether there should be refunds because the statement was one of many in Opinion No. 476 that does not appear in the Operating Protocol. The Operating Protocol is the sole Commission-approved mechanism for implementing Opinion No. 476. The Commission has consistently mandated that the Operating Protocol use a desired-flow

¹⁸ See Limited Protest at 6.

¹⁹ Second Report at 16-17.

methodology and explicitly allow for third party transactions over the A/B/C and J/K facilities. By definition, compliance with the Operating Protocol's requirement that actual real-time flows be within the +/- 100 MW bandwidth of the real-time market desired flow constitutes compliance with Opinion No. 476's directive that deliveries be "equal and contemporaneous." The ISOs are only responsible for implementing the Commission-approved Operating Protocol, not every word of the Commission orders that predated it. Thus, is the ISOs are only responsible for meeting the appropriate real-time market desired flow within the bandwidths prescribed by the Operating Protocol.²⁰

The ISOs also urge the Commission to consider ConEd's request that they prospectively address imbalances through more "aggressive and attentive" PAR movements in light of the operational restrictions that ConEd has asked the NYISO to adopt for PAR moves on the "A" feeder. Obviously, the ISOs' ability to make more aggressive A PAR moves is constrained by ConEd's equipment problems.

E. PJM Has Provided ConEd with a Service Priority Under the 400 MW Contract that Is Entirely Consistent with the Operating Protocol

ConEd accuses PJM of providing a level of service under the 400 MW contract that is inconsistent with Opinion No. 476.²¹ Once again, ConEd is obscuring the fact that the ISOs' performance must be judged solely against the terms of the Commission-approved Operating Protocol.²² They cannot be required to pay refunds for "violations" of Commission statements that are not reflected in the Operating Protocol's text. In this instance, the Operating Protocol

²¹ Second Report at 17-19.

²² See *Consolidated Edison Company of New York, Inc. v. Public Service Electric & Gas Co., et al.*, 111 FERC ¶ 61,288 (2005) ("*Operating Protocol Order*").

does not require PJM to make additional revisions to its OATT regarding the priority of service under the 400 MW contract. Nor has PJM violated the Operating Protocol by failing to give ConEd higher priority service than other PJM customers. Instead, PJM has done exactly as the Operating Protocol requires by giving ConEd a credit from excess PJM congestion revenues that remain after congestion credits are paid to all firm PJM customers, a credit that no other non-firm customer receives. That is the agreed upon priority service established by the Operating Protocol, and ConEd is entitled to nothing more than compliance with these provisions of the Operating Protocol.²³

It is worth reiterating that the Operating Protocol was developed through negotiations among the ConEd, the NYISO, PJM, and PSE&G and ultimately accepted by the Commission in compliance with its orders (including Opinion No. 476). ConEd's dissatisfaction with the compensation it has received may or may not be a valid reason to revisit this part of the Operating Protocol with an eye towards making prospective changes. There is, however, no justification for refunds when ConEd is not alleging a violation of the Operating Protocol.

F. Because All Parties Were on Notice that the Operating Protocol Was a Work-In-Progress It Should Not Be Subject to Traditional Filed Rate Doctrine Refund Analysis

²³ See Opinion No. 476 at P 105 (“Additionally, we believe that the parties, in developing the forthcoming operating protocols, should have the first opportunity to determine the methodology for reflecting the Commission's determination that service under the 400 MW contract is more firm than service to non-firm customers when computing the incremental costs of redispatch for ConEd to avoid curtailment under the 400 MW contract.”). That the credits ConEd has received may be less than it expected is a function of the funding of FTRs generally in PJM, not the Operating Protocol. As indicated in the ISOs' report, PJM FTRs have been underfunded generally because of several facility outages. See ISOs' December 30 Status Report at 4.

The Commission should not treat instances of non-compliance with the Operating Protocol in the same way that it would ordinarily treat tariff violations.²⁴ It is true that the Operating Protocol is on file with the Commission as an attachment to the NYISO's Services Tariff and as a PJM rate schedule. The Operating Protocol provisions are unlike other tariff provisions, however, in an important way. They were understood to be a first attempt at solving an extremely complex problem, namely, implementing two unusual wheeling agreements from the 1970s in an era with radically different characteristics, *e.g.*, the existence of ISOs and electricity markets, from what their drafters envisioned. ConEd, the NYISO, PJM, and PSE&G all recognized that the Operating Protocol might very well need to be changed as they gained experience with it. Thus, Section 1.5 of Operating Protocol Appendix 1 states:

Because the procedures in this Operating Protocol are new, the parties will review all aspects of this Operating Protocol on a periodic basis, initially monthly and, after a six-month period, annually, to determine if modifications are required to effectuate the Commission's Opinion No. 476 in Docket No. EL02-23-000 (Phase II).

The *Joint Compliance Letter* submitting the Operating Protocol to the Commission described this provision as providing for all four parties to "periodically revisit the Protocol to review whether it is working as intended and to make any necessary adjustments."²⁵ Subsequently, the Commission itself acknowledged the possibility that the Operating Protocol needed to be examined carefully and might need to be revised by requiring status reports to be filed three and six months after its introduction.²⁶

²⁵ See *Joint Compliance Filing of the New York Independent System Operator, Inc., et al.*, Filing Letter at 9.

²⁶ See *Operating Protocol Order* at P 46.

In short, it has always been clear that the Operating Protocol would be a work in progress and that implementation issues were likely to arise. The mechanism for fixing problems is to make prospective improvements, as described in Section 1.5 of Appendix 1, and as reinforced by the reporting requirements imposed by the Commission. Requiring the ISOs to pay refunds for imperfections in their performance under the Operating Protocol, as ConEd's theory would require, would be inconsistent with the Operating Protocol's complex and innovative nature.

If the Commission nevertheless concludes that it must apply the traditional filed rate doctrine in this proceeding, it should also exercise its discretion to waive refunds and allow the parties to develop prospective remedies. Courts have emphasized that the Commission is not obliged to impose refunds whenever there is a filed rate violation.²⁷ The Commission may instead use other remedies when equity requires. In this context, refunds would be inappropriate for the reasons outlined above, *i.e.*, the complexity and novelty of the Operating Protocol, as well as the reasonable expectation that there would be implementation issues, and the undesirability and complexity of imposing collections on other market participants to fund any refunds. Furthermore, the ISOs cannot be said to have benefited, financially or otherwise, from the implementation problems that have occurred. ConEd does not question that they have been acting in good faith.²⁸ Indeed, ConEd repeatedly praises PJM for its efforts to improve performance.²⁹ Given that the benefits of the Operating Protocol violations claimed by ConEd

²⁷ *See, e.g., Towns of Concord, Norwood and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (finding that nothing in the Federal Power Act requires the imposition of refunds).

²⁸ *See, e.g., Second Report* at 6.

²⁹ *See id.*

would flow to PJM customers, ConEd's concession that PJM is already doing everything in its power to correct problems³⁰ demonstrates that equity would not be served by requiring refunds.

G. The Commission Cannot Impose Refunds for Alleged Tariff Violations Without First Initiating a New Section 206 Proceeding

Even if the Commission were to conclude that refunds were appropriate it could not lawfully order them in response to the Second Report alone. All of the status reports in this proceeding are informational filings concerning the progress of Operating Protocol implementation. They are not complaints or requests for Section 206 investigations. ConEd has neither styled the Second Report as a complaint nor satisfied the procedural requirements for filing one.³¹ In order to require refunds, the Commission must either act in response to a proper Section 206 complaint or initiate an investigation of its own. The additional process would preserve due process by requiring ConEd to put forward a complete and clear case. It would also safeguard the rights of all of the Joint Protestors by giving them a full and fair opportunity to defend themselves against ConEd's claims.

H. ConEd Cannot Recover Refunds That Are Prohibited by the ISOs' Tariffs

By ConEd's own estimate, the total direct costs associated with under deliveries and supposed redirection failures for the period from July - November, 2005 period is \$ 4 million. This includes \$1.8 million attributable to alleged under deliveries at the A/B/C feeders, \$1.2 million to ostensibly "inappropriate" redirections from PJM to New York, and \$1 million to the NYISO's supposed failures to redirect. The remaining \$53 million in claimed "economic consequences" covers the secondary impacts on energy prices in New York City, stemming from the need to run higher cost New York City units to make up for shortfalls in Operating Protocol

³⁰ See *id.* at 22-23.

deliveries.³² ConEd invokes the filed rate doctrine³³ and asks the Commission to make it whole for all of the “adverse cost consequences” that flow from the ISOs’ alleged violations. ConEd argues that this is the only way to ensure that it receives the economic benefits that it believes it is due under the grandfathered agreements that were originally at issue in this proceeding.³⁴

Even if ConEd were correct that the traditional filed rate doctrine should apply to the Operating Protocol, a point which the ISOs dispute in Section II.F, above, it would not be entitled to refunds for its indirect costs. In enforcing the filed rate, the Commission would have to consider the NYISO and PJM tariffs in their entirety, not just the Operating Protocol provisions. Its analysis would have to recognize the limitation on liability provisions in Article 12 of the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”)³⁵ and in Section 10.2 of PJM’s OATT. Both documents specify that the ISOs shall not be liable for any consequential, indirect, punitive, special, incidental damages.³⁶ The ISOs’ tariffs

³¹ See 18 C.F.R. § 385.206 (2005).

³² See Second Report at 19; Charles River Associates (“CRA”) Report at 24-26.

³³ See Second Report at 20 (citing recent Commission filed rate doctrine precedent as the legal justification for refunds).

³⁴ See *id.* at 19-21.

³⁵ The NYISO’s OATT and Services Tariff contain limitation on liability provisions that differ in some respects, although none of these differences are material for purposes of this proceeding. In any event., because the Operating Protocol was filed as an attachment to the NYISO’s Services Tariff there should be no doubt that the Services Tariff provisions control here.

³⁶ Section 16.6 of the PJM Operating Agreement further provides that PJM shall not be liable to any member “for any claims, demands or costs” arising from PJM’s performance except in the case of gross negligence or willful misconduct.

therefore prohibit ConEd from obtaining refunds for the overwhelming majority of the cost consequences it claims.

In addition, for the reasons set forth above in Section II.C, ConEd's claimed \$ 4 million in direct costs is itself grossly exaggerated. ConEd would recover substantially less than that amount, if anything at all, if the Commission were to resort to a filed rate doctrine analysis. Furthermore, even if the Commission were to deem ConEd eligible to receive refunds for indirect costs, the actual amount would be much lower than \$53 million. That figure was extrapolated from ConEd's direct cost estimate and would have to be reduced along with the downward corrections to ConEd's vastly overstated direct cost estimates.³⁷

Moreover, others would have to pay the amounts that are refunded to ConEd, as the ISOs operate on a non-profit basis and any harm to ConEd from alleged mis-implementation of the Operating Protocol would have been balanced by the benefits received by other market participants. Congestion pricing is a zero sum game. To grant ConEd refunds would require the development of a mechanism to estimate the benefits that other market participants received in the hours that ConEd alleges it was harmed by imperfect implementation of the Operating Protocol. The ISOs would have to determine how the system would have operated and somehow

³⁷ While many aspects of the methodology used by CRA to conduct its analysis are not clearly described either in ConEd's pleading or in the CRA report, it appears that CRA may have assumed that every MW of alleged under delivery required uneconomic re-dispatch in Zone J. If so, CRA's analysis of alleged consequential damages to Zone J customers may have ignored available New York transmission capacity. If CRA had accounted for available New York transmission capacity in its analysis, uneconomic redispatch might not have been required. In addition, alleged under deliveries in the real-time market do not affect prices in the day-ahead market where most energy transactions occur. CRA's analysis appears to assume that an increase in real-time LBMPs would affect all Zone J deliveries (many of which were contracted for day-ahead), which exaggerates the claimed level of consequential damages.

determine market impacts, a virtually impossible task and one that for obvious reasons is nowhere addressed or contemplated by the existing Operating Protocol.

I. The Commission and the Parties Should Focus Their Attention on Prospective Improvements to the Protocol, Not Further Litigation

Notwithstanding ConEd's suggestions that a refund process would be ministerial in nature it should be apparent that its refund claims would raise a number of highly contested factual issues. The only way to resolve these issues would be through a formal hearing. In addition to addressing the threshold question of whether refunds could ever be due for ConEd's claims, a presiding administrative law judge ("ALJ") would need to explore the actual cost effects of alleged Operating Protocol violations, which the Joint Protestors submit would be far less than \$ 4 million, and could very well approach zero. The ALJ would also have to determine how to allocate any refunds between the ISOs which would only lead to further distraction and conflict. Given the years of litigation that have already taken place in this proceeding, and the relatively small dollar amounts actually at stake (once ConEd's exaggerations are corrected), the Joint Protestors respectfully submit that it would be a waste of time and resources to initiate a new round of hearings. It would be much more efficient to focus on prospective improvements, as the ISOs did in their own December 30 status report. The Commission should urge all of the Parties to take this approach.

If there were litigation, there would be numerous factual questions, including those identified in this pleading and others that would be identified following discovery, such as the extent to which ConEd has contributed to under deliveries. A hearing would be required, with the potential participation of all affected market participants. The litigation would be lengthy and expensive.

III. THERE IS NO NEED TO IMPLEMENT CONED'S OTHER PROPOSED INTERIM ACTIONS AT THIS TIME

In addition to its request that the Commission initiate a refund process, the Second Report repeats the four requests for interim relief that were set forth in its September 30 status report.³⁸ For the reasons set forth in their October 27, 2005 protest of that report, which the ISOs incorporate by reference here, the ISOs continue to believe that there is no need to take these actions at this time. In particular, ConEd's fourth interim action item, restricting redirections from 300 MW to 150 MW, would be unlawful.³⁹ As for ConEd's fourth action item, the ISOS will continue to review and respond to ConEd data requests within the bounds of data confidentiality and except to the extent that they are unduly burdensome or requesting data that is already publicly available.

The ISOs addressed ConEd's sixth interim action item, requiring PJM to "conform its and scheduling practices pertaining to the 400 MW contract" to Opinion No. 476 in Section II.E above. With respect to the seventh item, the question of possible credits to ConEd for congestion should be addressed as part of a comprehensive four-party discussion of possible Operating Protocol enhancements. The eighth proposed interim action item was addressed in Section II.B. ConEd's request for immediate action on all of these items should therefore be rejected.

Finally, the Commission should not accept ConEd's proposed ninth interim action item, which calls for the establishment of a monthly "true-up" mechanism that would compensate ConEd for any net deviation from scheduled flows (calculated separately for on-peak and off-

³⁸ See Second Report at 7, n. 5.

³⁹ See Limited Protest at 7.

peak periods.) The ISOs' own December 30 Status Report noted that persistent imbalances within the +/- 100 MW bandwidth favoring one party over another might warrant prospectively effective changes.⁴⁰ Instead of imposing ConEd's preferred solution, the Commission should allow the Parties to continue to work through the implementation issues and negotiate any appropriate enhancements.

In short, the Commission should not mandate any particular action now but should give the Joint Protestors and ConEd more time to negotiate any necessary improvements to the Operating Protocol. The ISOs propose that the Commission require the parties to file another status report in ninety days that would address performance under the Operating Protocol and include specific proposals for any necessary improvements.

⁴⁰ See ISOs' December 30 Status Report at 4.

IV. CONCLUSION

In conclusion, the Commission should reject all of ConEd’s interim action requests including its request for the initiation of a refund proceeding and direct the Joint Protestors and ConEd to focus on exploring the need for prospective improvements, not litigation.

Respectfully submitted,

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January 30, 2006

CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 30th day of January 2006.

Ted J. Murphy

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Attachment 1

PJM Summary Analysis of Consolidated Edison's Second 90-Day Status Report to FERC

This analysis has been performed in order for PJM to gain a thorough understanding of the claims made in ConEd's second 90-day status report to FERC concerning the execution of the operating protocol that governs the administration of the 600/400 MW wheeling contracts.

CRA International's Analysis of Contract Performance

The status report provided to ConEd by CRA International is the primary source of data in the claims ConEd has made about the execution of the operating protocol to date. For this reason, a preliminary analysis of CRA International's analytical approach is necessary. As stated in their report:

We calculated the **scheduled (target) deliveries** under the agreement based on reported hourly RTMDF for each interface and the definitions specified in the Protocol as follows:

$$\begin{aligned} & [(ABC \text{ desired flow}) + (JK \text{ desired flow})]/2 \\ & = [(RT \text{ Contract Schedule} + 0.13 \text{ NI}) + (RT \text{ Contract Schedule} - 0.13 \text{ NI})]/2 \\ & = RT \text{ Contract Schedule.} \end{aligned}$$

We calculated the **implied third-party flow** on each interface as follows:

$$\text{Implied third-party Flow} = (ABC \text{ Desired Flow}) - RT \text{ Contract Schedule.}$$

Based on the actual flows for each interface and the implied third-party flow, we were able to calculate **actual contractual deliveries** (which exclude third-party transactions) as:

$$\text{Actual Contractual Deliveries} = ABC \text{ Actual Flow} - \text{Implied Third-Party Flow.}$$

Finally, we calculated **the real-time shortfall** in contract deliveries as follows:

$$\text{Shortfall} = RT \text{ Contract Schedule} - \text{Actual Delivery}$$

Using the contract performance data supplied to NYISO, PSE&G, and ConEd by PJM, these calculations were used to recreate the same July 1 – November 30 result set that CRA International would have used in their analysis.

General Comments About CRA International's Analytical Approach

- The “scheduled deliveries” calculation appears to be a method to recreate the ConEd Real-Time Election from key performance data points that were supplied by PJM.
- The “implied third-party flow” calculation appears to be a method to arrive at the (NYISO Schedule * 0.13) portion of the Desired Flow calculation that is outlined in the operating protocol.
- The “actual contractual deliveries” calculation is used to remove the “implied third-party flow” from ABC Actual Flow in order to determine the schedule amount being delivered strictly for the contracts. This approach implies that third-parties will always get their

theoretical share of the ABC Actual Flow and that ConEd will be the only entity to suffer if PJM fails to deliver the full schedule amount.

ConEd's Second 90-Day Status Report

From page 3 of the status report: “Nonetheless, the contractual deliveries were less than Con Edison’s 1,000 MW nomination for 3,059 of the 3,673 hours during the period from July 1 until November 30 (i.e., 83% of the time) . . .”

This statistic has been verified using the “Actual Contractual Deliveries” calculation as referenced above; however, though it is a factually correct statement, the use of this statistic has little relevance in the context of highlighting PJM’s alleged inability to deliver 100% of ConEd’s election. Despite the bias against ConEd inherent to this calculation, this method of analysis fails, primarily, because it ignores several key aspects of the operating protocol: 1. ConEd’s real-time election, 2. the protocol-specified bandwidth, and 3. the redirect mechanism.

Page 3 of ConEd’s report states that “Without exception, from the first day of Protocol implementation on July 1, 2005 to date, 24 hours a day and seven days a week, Con Edison has nominated 1,000 MW of service without any redispatch cost limitation.” If this statement was true, then comparing ABC Actual Flow to a value of 1000 MW would be acceptable; however, the ConEd Election has been less than 1000 MW for 72 hours in the PJM Day-Ahead Market and less than 1000 MW for 278 hours in real-time. This being the case, it makes more sense to compare ABC Actual Flow to the ConEd Real Time Election, and doing so results in deliveries being less than ConEd’s election for 2939 of the 3673 hours (80%) for the time period in question.

Concerning the bandwidth, ConEd quotes the operating protocol on page 10 of their status report:

“If neither PJM nor the NYISO are off-cost, or if both are off-cost, aggregate actual ABC interface flows shall be within +/- 100 MW of the aggregate RTMDF for the ABC interface and aggregate actual JK interface flows shall be within +/- 100 MW of the aggregate RTMDF for the JK interface.”

They also state: “The Protocol does not contemplate, however, that the +/- 100 MW bandwidth flexibility can be utilized to convert Con Edison’s entitlement under both Contracts to a de facto 900 MW of firm service.” ConEd’s argument aside, PJM’s right to dispatch to a 100 MW bandwidth must still be recognized since ABC Actual Flow will never be equal to 1000 MW for any significant length of time. Accounting for a 100 MW bandwidth changes 2939 of 3673 hours of under delivery to 1918 of 3673 hours (52%) of under delivery.

Finally, the operating protocol allows the use of a redirect mechanism, which, when in effect, changes the desired flow target to which PJM dispatches; ConEd’s argument that PJM is making inappropriate use of redirects is irrelevant to this discussion. If the bandwidth is taken into account, under delivery across the ABC interface changes from 1918 of 3673 hours to 918 of

3673 hours (25%). For the time period in question, it should also be noted that 316 of these 918 hourly violations occurred in July, 2005, the first month that the operating protocols were in effect.

From page 3 of the status report: “Nonetheless, the contractual deliveries were less than . . . 800 MW for 1,309 hours (36% of the time)”

This statistic was verified using CRA's “Actual Contractual Deliveries” calculation; however, while being correct in that context, this statistic has little meaning otherwise. Specifically, the above-mentioned argument about ConEd’s election not being 1000 MW for all hours applies, and a correct statement should read “contractual deliveries were less than (the ConEd Election minus 200 MW).” In that case, with redirects taken in to account, the value of 1309 of 3673 hours changes to 294 of 3673 hours (8%).

From page 3 of the status report: “Nonetheless, the contractual deliveries were less than . . . 600 MW for 218 hours (6% of the time)”

This statistic was verified using CRA's “Actual Contractual Deliveries” calculation; however, this statistic has little meaning for the same reasons just outlined. The value of 218 of 3673 hours changes to 62 of 3673 hours (2%).

From page 4 of the status report: “Contractual deliveries exceeded 1,000 MW for 614 hours during the period.”

This statistic was verified using CRA's “Actual Contractual Deliveries” calculation; however, this statistic has little meaning since it fails to account for the actual ConEd election, the bandwidth, and redirects. When corrected, the value of 614 of 3673 hours changes to 309 of 3673 hours (8%) of over delivery.

From page 9 of the status report: “Deliveries were less than 1,000 MW during 1,870 hours, or 86% of the time, during the last 90 days from September 1 through November 30.”

This statistic was verified using CRA's “Actual Contractual Deliveries” calculation; however, this statistic has little meaning since it again fails to account for key aspects of the protocol. By replacing 1000 MW with the ConEd Election and factoring in both redirects and a bandwidth, this value changes to 381 of 2185 hours (17%).