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May 9, 2014

SENT VIA ELECTRONIC FILING  
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. ER14-972-000 - PJM Interconnection,  
L.L.C.

Dear Secretary Bose:

For filing, please find the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler  
Assistant Counsel

Attachment  
cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.            )            Docket No. ER14-972-000

REQUEST FOR REHEARING  
OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION

INTRODUCTION

On January 10, 2014, PJM Interconnection, L.L.C. (PJM) filed proposed tariff revisions to allocate approximately \$1.5 billion in system upgrade costs that were included in PJM's updated Regional Transmission Expansion Plan (RTEP) (PJM Filing). On February 10, 2014, the New York State Public Service Commission (NYPSC) submitted a Notice of Intervention and Protest to the PJM Filing because the filing sought to allocate a disproportionate and unreasonable share of the upgrades to parties interconnected with the PJM electrical grid, including Consolidated Edison Company of New York, Inc. (Con Edison).

Although PJM identified a need to remedy a local fault duty problem in Public Service Electric and Gas Company's (PSE&G) service territory as the impetus to implement various reliability upgrades (referred to as "the PSE&G upgrades"), and PSE&G was therefore the primary beneficiary of those upgrades, PJM nonetheless allocated 93% of the cost to parties interconnected with PJM (82% of which were to Con Edison), and

only 7% to PSE&G. This result, on its face, raises significant questions regarding PJM's application of its methodology for allocating costs and the justness and reasonableness of the results. The Federal Energy Regulatory Commission (FERC or Commission), however, accepted the PJM Filing on April 9, 2014, subject to a compliance filing, without determining whether the resulting allocation of costs to Con Edison was just and reasonable, as required under the Federal Power Act.<sup>1</sup>

The NYPSC hereby submits this Request for Rehearing of the April 2014 Order pursuant to Rule 713 of the Commission's Rules of Practice and Procedure.<sup>2</sup> As discussed more fully below, the Commission failed to address an unjust and unreasonable allocation of costs to Con Edison and ensure that the allocation of costs to Con Edison is roughly commensurate with the benefits. The Commission also erred in finding that PJM properly complied with its tariff, notwithstanding the facts that PJM failed to provide a preliminary determination of cost responsibility to Con Edison, or to apply an appropriate substitute proxy method to ensure a reasonable allocation of costs to Con Edison, as required under the PJM tariff. Moreover, the Commission erred in finding that the agreements

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<sup>1</sup> Docket No. ER14-972-000, PJM Interconnection, L.L.C., Order on Tariff Revisions and Cost Allocation (issued April 9, 2014) (April 2014 Order).

<sup>2</sup> 18 C.F.R. §385.713.

covering the wheeling service to Con Edison are ambiguous, and then reinterpreting them as consistent with the PJM Filing. Because of these errors, the NYPSC respectfully requests that the Commission grant rehearing in order to rectify the issues discussed herein.

#### BACKGROUND

On February 23, 2009, PJM filed a Settlement Agreement among the New York Independent System Operator, Inc. (NYISO), Con Edison, PSE&G, PSEG Energy Resources & Trade LLC, and the New Jersey Board of Public Utilities (Settling Parties), whereby the Settling Parties agreed to certain provisions that would allow Con Edison to continue taking transmission service under two grandfathered contracts between Con Edison and PSE&G.<sup>3</sup> The contracts provided for Con Edison to deliver up to 1,000 MW (i.e., a 600 MW and a 400 MW wheel) to PSE&G in northern New Jersey, and for PSE&G to redeliver the same power to Con Edison in New York City (i.e., the "wheeling service"). Under the Settlement Agreement, the contracts were allowed to be "rolled over," while Con Edison would take firm point-to-point service under the PJM tariff. The delivery points for the service were explicitly defined to include "[t]he A line, which connects

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<sup>3</sup> Docket Nos. ER08-858-000, et al., PJM, (filing dated February 23, 2009).

PSE&G's Linden switching station in New Jersey and Con Ed's Goethals Station on Staten Island, and the B and C lines which connect PSE&G's Fossil Hudson Generating Station in Jersey City and Con Ed's Farragut switching station in Brooklyn."<sup>4</sup> Based on this service, Con Edison agreed to pay rates prescribed by PJM's tariff, including costs allocated for upgrades under PJM's RTEP using the Commission's "beneficiaries pay" principle.

The NYPSC supported the Settlement Agreement, which ended the protracted litigation over the wheeling service (at least for the time being) and continued to provide reliability and consumer benefits for New York City, since New York City is a constrained load pocket that is dependent upon imports from other control areas, including PJM. Subsequent to the Commission's approval of the Settlement Agreement,<sup>5</sup> Con Edison paid allocated RTEP costs of approximately \$7 million in 2012 and \$9 million in 2013. This result was consistent with the NYPSC's understanding of the possible allocation of RTEP costs to Con Edison.

The PJM Filing, however, unilaterally changed the point of delivery prescribed under the Settlement Agreement and based on that change assigned approximately \$120 million per

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<sup>4</sup> Service Agreement, pp. 4-5 (emphasis added).

<sup>5</sup> Docket Nos. ER08-858-000, et al., PJM, Order Approving Contested Settlement and Denying Rehearing, 132 FERC ¶61,221 (issued September 16, 2010).

year (or 82% of the costs) to Con Edison for the PSE&G upgrades designed to remedy a local fault duty problem in PSE&G's service territory.<sup>6</sup> The April 2014 Order accepted the PJM Filing based on the Commission's finding that PJM provided sufficient notice to Con Edison and properly applied the allocation methodology in its tariff, including the "DFAX" formula, to compute the cost allocation to Con Edison. The April 2014 Order also found the PJM Filing was consistent with the Settlement Agreement and Service Agreement, after having found the Service Agreement was ambiguous and required reinterpretation.

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<sup>6</sup> PJM seeks to change the point of delivery via PSE&G's Fossil Hudson Generating Station in Jersey City that was specified in the Settlement Agreement, and divert the deliveries to a new substation to be constructed in Marion, New Jersey.

## REQUEST FOR REHEARING

### I. STATEMENT OF ISSUES

- A. Whether FERC Erred in Finding That the Allocation of Costs to Con Edison was Just and Reasonable and That PJM Correctly Applied its Tariff.<sup>7</sup>
- B. Whether FERC Erred in Finding that the Service Agreement Was Ambiguous and in Reinterpreting the Agreement Without a Hearing.<sup>8</sup>

### II. DISCUSSION

#### A. The Commission Erred In Accepting PJM's Proposed Allocation of Costs, Which Violated PJM's Tariff and the Federal Power Act

Pursuant to the Federal Power Act, FERC must ensure that the rates charged by utilities are "just and reasonable."<sup>9</sup>

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<sup>7</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706; see also, 16 U.S.C. §824d (requiring that all "rates or charges shall be just and reasonable" or are otherwise "unlawful"); see also, Arkansas Public Service Commission v. Entergy Corporation, 142 FERC ¶61,012 (2013), ¶27; Midwest Independent Transmission System Operator, Inc, et al., 143 FERC ¶61,149 (2013), ¶120; Docket No. ER13-90-000, PJM TOs Compliance Filing (dated July 22, 2013); Delmarva Power and Light Company, 145 FERC ¶61,055 (2013), ¶23; PPL Electric Utilities Corporation, 125 FERC ¶61,121, ¶28 (2008); Illinois Commerce Commission v. FERC, 576 F.3d 470 (7<sup>th</sup> Cir. 2009); KN Energy, Inc. V. FERC, 968 F.2d 1295 (DC Cir. 1992).

<sup>8</sup> PG&E v. FERC, 326 F.3d 243, 247 (D.C. Cir. 2003) (noting that a hearing is held to resolve difficult and complicated issues or ambiguous contractual provisions); S. Cal. Edison Co. v. FERC, 415 F.3d 17, 23 (D.C. Cir. 2005) (holding that FERC acted "arbitrarily and capriciously" in disregarding the "plain language" of the tariff); Iberdrola Renewables, Inc. v. FERC, 597 F.3d 1299, 1304 (D.C. Cir. 2010) (holding that a contract's plain language settle[d] th[e] matter).

<sup>9</sup> 16 U.S.C. §824d.

While FERC may accept a formula for determining rates, it cannot abdicate its statutory responsibility by merely relying on a utility's unsupported assertion that it properly applied its formula, such as PJM contends it has done in this case. While the formula itself may be just and reasonable, the resulting charges may not be. Therefore, FERC has held that "the transmission owner 'continues to bear the burden of demonstrating the justness and reasonableness of the rate resulting from its application of the formula,' consistent with the filed formula rate."<sup>10</sup>

"The Commission's long-standing precedent is that, under formula rates, parties have the right to challenge the inputs to or the implementation of the formula at whatever time they discover errors in the inputs to or implementation of the formula."<sup>11</sup> The April 2014 Order determined, however, that the "reasonableness of the Solution-Based DFAX methodology is beyond the scope of this proceeding."<sup>12</sup> The Commission therefore rejected arguments that the rates resulting from the application of the DFAX methodology have not been demonstrated to be just

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<sup>10</sup> Midwest Independent Transmission System Operator, Inc, et al., 143 FERC ¶61,149 (2013), P 120; Docket No. ER13-90-000, PJM TOs Compliance Filing (dated July 22, 2013); Delmarva Power and Light Company, 145 FERC ¶61,055, ¶23; PPL Electric Utilities Corporation, 125 FERC ¶61,121, ¶28 (2008).

<sup>11</sup> Arkansas Public Service Commission v. Entergy Corporation, 142 FERC ¶61,012 (2013), ¶27.

<sup>12</sup> April 2014 Order, ¶¶43-44.



and reasonable. However, by summarily concluding that the only issue is whether PJM properly applied a formula previously approved by the Commission, FERC failed to make its own assessment of the reasonableness of the costs allocated under the formula and to ensure an appropriate proxy is used where the results are unreasonable. This was in direct contravention of the Commission's previous policy,<sup>13</sup> and without reasonable explanation for why the Commission was choosing form over substance.

The justness and reasonableness of allocating approximately 82% of the costs to Con Edison for upgrades that are needed by PSE&G is dubious. It is undisputed that Con Edison did not create the need for the PSE&G upgrades and that the upgrades would be needed regardless of whether Con Edison continues to receive the wheeling service. The upgrades are clearly being driven to address local reliability needs in PSE&G's territory, and should be allocated accordingly.

Consistent with its Order No. 1000, the Commission is obligated to ensure the allocation of costs is "roughly commensurate" with the benefits, which it has failed to do. The Commission articulated in Order No. 1000 that the costs of regional facilities must be allocated "at least roughly

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<sup>13</sup> See cases cited supra note 10.

commensurate with estimated benefits."<sup>14</sup> The beneficiaries can include those that cause costs to be incurred, such as those that create a reliability need for upgrades. However, the Commission cannot impose costs on customers that derive no benefits, or benefits that are trivial in relation to the allocated costs.<sup>15</sup>

One of the Commission's principles articulated in Order No. 1000 for regional cost allocation requires that "[t]he cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility."<sup>16</sup> The PJM Filing was the first instance where PJM presented its proposed allocation of estimated costs to Con Edison. As a result, PJM failed to adhere to the principles articulated in Order No. 1000, as well as its tariff.

In particular, PJM failed to comply with its tariff provisions requiring a preliminary determination of cost

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<sup>14</sup> Order No. 1000, ¶623.

<sup>15</sup> Illinois Commerce Commission v. FERC, 576 F.3d 470 (7<sup>th</sup> Cir. 2009); KN Energy, Inc. V. FERC, 968 F.2d 1295 (DC Cir. 1992).

<sup>16</sup> Docket No. RM10-23-000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000 (issued July 21, 2011), 136 FERC ¶61,051, at ¶586.

responsibility. The PJM tariff requires PJM to "make a preliminary cost responsibility determination for each Required Transmission Enhancement...at the time such Required Transmission Enhancement is included in the Regional Transmission Plan."<sup>17</sup> However, PJM failed to do so. PJM gave no advance notice of Con Edison's cost responsibility, which was in direct violation of its tariff. Therefore, the Commission erred, in fact, when it determined that "PJM followed its tariff in making these allocations, and that, except [for a compliance filing], the documents...constituted sufficient and reasonable notice and information to Con Edison of the potential upgrades."<sup>18</sup>

PJM's failure to comply with its tariff deprived Con Edison and other stakeholders of a meaningful opportunity to participate in the planning process. Had interested parties known the potential magnitude of their cost responsibility they would have been able to utilize the planning process to test PJM's assumptions and its basis for estimated cost allocations prior to them being filed before the Commission. Moreover, interested parties would have had an opportunity to influence the project design such that Con Edison would derive a

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<sup>17</sup> PJM OATT, Schedule 12(b)(iii)(J).

<sup>18</sup> April 2014 Order, ¶51. The NYPSC also maintains that by filing to include a refund condition, the Commission is prejudging the results of the compliance filing.

meaningful benefit. Most importantly, where the potential cost allocation is unreasonable, as it is in the case of Con Edison, parties could have sought a "substitute proxy," as authorized under the PJM tariff.

The PJM tariff explicitly directs PJM to "use an appropriate substitute proxy" for the DFAX analysis where the "results of such DFAX analysis are objectively unreasonable."<sup>19</sup> This requirement is bolstered by PJM's Operating Agreement, which mandates that PJM's RTEP must "avoid the imposition of unreasonable costs on any Transmission Owner or any user of Transmission Facilities."<sup>20</sup> PJM failed to assess the reasonableness of Con Edison's cost responsibility resulting from the DFAX formula, and instead assumed it was reasonable after applying the DFAX formula. The Commission also failed in the April 2014 Order to make an independent assessment of the reasonableness of Con Edison's cost allocation under the DFAX formula, and merely relied on PJM's self-assertion that it applied the formula in accordance with its tariff. These failures are grounds for reversal of the Commission's approval of the PJM Filing.<sup>21</sup>

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<sup>19</sup> PJM OATT, Schedule 12(b)(iii)(1).

<sup>20</sup> PJM Operating Agreement, Schedule 6, §1.4(d).

<sup>21</sup> Con Edison v. FERC, 347 F.3d 964 (D.C. Cir. 2003) (remanding to FERC where the Commission erroneously determined that a tariff violation did not occur).

**B. The Commission Erred in Determining that the Settlement Agreement was Ambiguous and Required Reinterpretation, and in Failing to Provide a Hearing with Respect to Such Asserted Ambiguity**

The Commission's April 2014 Order erroneously concluded that the PJM Filing was consistent with the Service Agreement that details the 1,000 MW wheeling arrangement. The Commission's rationale was based on its incorrect conclusion that the Service Agreement was ambiguous with respect to the receipt and delivery points for the wheel, and therefore required reinterpretation.

As the Service Agreement clearly and unambiguously states, the delivery points include "...the B and C lines which connect PSE&G's Fossil Hudson Generating Station in Jersey City and Con Ed's Farragut switching station in Brooklyn."<sup>22</sup> The Commission even recognized the importance to this language by noting that it provides for "an exchange of energy at specific receipt and delivery points between Con Edison and PSE&G."<sup>23</sup>

Despite this explicit language referencing the "Hudson Generating Station in Jersey City" as the specific receipt point that the parties agreed upon, the Commission found this language was not controlling and that changing the point of receipt to another location in northern New Jersey satisfied the general intent of the Settlement Agreement. While a change in the point

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<sup>22</sup> Service Agreement, pp. 4-5 (emphasis added).

<sup>23</sup> April 2014 Order, ¶30.

of connection may still allow for deliveries to Con Edison, it is a significant change that ignores the plain language in the Service Agreement and results in a significant allocation of costs to Con Edison.<sup>24</sup> This interpretation materially changes the terms of the Service Agreement and such issues require a hearing to resolve.<sup>25</sup>

### CONCLUSION

In accordance with the discussion above, the NYPSC respectfully requests that the Commission grant the foregoing Request for Rehearing, and reject PJM's proposed cost allocation

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<sup>24</sup> S. Cal. Edison Co. v. FERC, 415 F.3d 17, 23 (D.C. Cir. 2005) (holding that FERC acted "arbitrarily and capriciously" in disregarding the "plain language" of the tariff); Iberdrola Renewables, Inc. v. FERC, 597 F.3d 1299, 1304 (D.C. Cir. 2010) (holding that a contract's plain language settle[d] th[e] matter).

<sup>25</sup> PG&E v. FERC, 326 F.3d 243, 247 (D.C. Cir. 2003) (noting that a hearing should be held to resolve difficult and complicated issues or ambiguous contractual provisions).

to Con Edison, which was procedurally deficient and represents an unjust and unreasonable allocation of costs.

Respectfully submitted,

Handwritten signature of Kimberly A. Harriman in black ink, including the initials 'SH' at the end.


Kimberly A. Harriman  
General Counsel  
Public Service Commission  
of the State of New York  
By: David G. Drexler  
Assistant Counsel  
3 Empire State Plaza  
Albany, NY 12223-1305  
(518) 473-8178

Dated: May 9, 2014  
Albany, New York

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: Albany, New York  
May 9, 2014

  
David G. Drexler  
Assistant Counsel  
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