

120 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer
Philip D. Moeller, and Jon Wellinghoff.

Hudson Transmission Partners, LLC

Docket No. EL07-70-000

v.

New York Independent System Operator, Inc.

ORDER ON COMPLAINT

(Issued August 22, 2007)

1. On June 13, 2007, Hudson Transmission Partners, LLC (HTP) filed a complaint against New York Independent System Operator, Inc. (NYISO) alleging that NYISO's interpretation and implementation of the interconnection queuing provisions of NYISO's Open Access Transmission Tariff (OATT) are unjust, unreasonable, and unduly discriminatory. For the reasons discussed below, we will grant the complaint.

I. Background

A. NYISO Interconnection Procedures

2. On August 6, 2004, in compliance with Order No. 2003¹ the Commission conditionally accepted NYISO's Standard Large Facility Interconnection Procedures

¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

(LFIP) and Large Generator Interconnection Agreement (LGIA) as Attachment X to NYISO's OATT. Prior to the Commission accepting Attachment X, the NYISO OATT did not contain interconnection procedures *per se*. Attachment S to NYISO's OATT provided procedures for allocating costs to Developers,² based on the Class Year³ in which the Developer belonged. Under Attachment S, NYISO conducts an Annual Transmission Reliability Assessment (ATRA)⁴ each year to identify the System Upgrade Facilities⁵ required for each generation and merchant transmission project that is included in a given Class Year cluster. Each project in a particular Class Year shares in the then currently available electrical capability of the transmission system and each shares in the cost of System Upgrade Facilities based on the *pro rata* impact of its project.

3. Attachment S authorizes Developers that are to be included in a given Class Year study to later decline their cost allocations as part of that Class Year and enter a subsequent Class Year. Such Developers may choose to drop down to the next Class Year, or a later one, and retain their position in the queue.

² Capitalized terms used but not defined in this order are intended to have the meaning given to such terms in Order No. 2003 and the NYISO OATT, including Attachments S and X.

³ A "Class Year" is defined in Attachment S as "the group of generation and merchant transmission projects included in any particular Annual Transmission Reliability Assessment [ATRA], in accordance with the criteria specified for including such projects in the Assessment."

⁴ ATRA is defined in Attachment S as an "assessment, conducted by the NYISO staff in cooperation with Market Participants, to determine the System Upgrade Facilities required for each generation and merchant transmission project included in the Assessment to interconnect to the New York State Transmission System in compliance with Applicable Reliability Requirements and the NYISO Minimum Interconnection Standard." To be included in the ATRA for a particular Class Year, a Developer must meet specified milestones by the time the NYISO commences the ATRA.

⁵ "System Upgrade Facilities" is defined in Attachment S as "modifications or additions to the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Minimum Interconnection Standard."

4. The Interconnection Facilities Study is performed on a Class Year basis for a group of eligible projects pursuant to the requirements of Attachment S. After the completion of this study, each Developer in a Class Year has the option of accepting its cost allocation in the study or opting out of the Class Year. Developers remaining in the Class Year must post security for the costs of their allocated share of System Upgrade Facilities or pay to other Developers the Headroom⁶ they paid for and which the new Class Year Developers will use.

5. Section 3.6 of Attachment X provides that an Interconnection Request may be withdrawn (and thus a project's Queue Position lost) at any time "by written notice of such withdrawal to the NYISO" by the Developer. NYISO's Attachment X, consistent with Order No. 2003, does not specify the type or form of notice. Section 3.6 of Attachment X further provides that if the Developer fails to adhere to all of the requirements of Attachment X, NYISO shall deem the Interconnection Request withdrawn. Section 11.2 of Attachment X provides that, unless otherwise agreed by the Parties, failure of the Interconnection Customer to execute the interconnection agreement, request NYISO to submit an unexecuted interconnection agreement, or initiate Dispute Resolution will result in the Interconnection Request being deemed withdrawn, which results in the loss of the project's Queue Position.

6. Section 4.3 of Attachment X provides that a Developer may transfer its Queue Position to another entity if that entity acquires "the specific Large Facility identified in the Interconnection Request and the Point of Interconnection does not change."

7. Section 5 of Attachment X addresses the transition of projects pending at the time Attachment X became effective. Section 5 states that interconnection agreements filed before the effective date of the LFIP were grandfathered, *i.e.*, projects that had such agreements would not be required to replace them with three-party agreements based on the LGIA. Additionally, Section 5 established rules governing how Developers with

⁶ "Headroom" is defined in Attachment S as follows: "In the case of any System Upgrade Facility that has been paid for by a Developer, the electrical capacity of a System Upgrade Facility that is in excess of the actual capacity used by the Developer's generation or merchant transmission project."

pending Interconnection Requests would proceed through any remaining steps in the interconnection study process.⁷

B. The Cross-Hudson Project

8. On May 11, 2001, prior to the issuance of Order No. 2003, PSEG Power In-City I, LLC⁸ (Cross Hudson)⁹ submitted an Interconnection Request to NYISO to interconnect its affiliate PSEG Fossil's Bergen Unit No. 2 (Bergen 2) and Bergen Unit No. 4 (Bergen 4) generating facilities to the NYISO transmission system at ConEd's West 49th Street Substation (the Project). The original Interconnection Request was for interconnection of a generating facility with a total generating capacity of approximately 1,200 MW, comprising 550 MW from Bergen 2 and 650 MW from Bergen 4. The Project was assigned NYISO Interconnection Queue Position No. 93 and initially had a Commercial Operation Date of November 24, 2004.

9. On June 20, 2002, later amended on June 28 and July 12, 2002, ConEd filed with the Commission an unexecuted interconnection agreement for the Project between ConEd and Cross Hudson, setting forth the terms and conditions under which Bergen 2 would be interconnected with ConEd at the West 49th Street Substation. Cross Hudson states that ConEd filed the unexecuted interconnection agreement upon Cross Hudson's request and that Cross Hudson sought access to a vacant bus position that ConEd initially would not give to Cross Hudson, attempting to reserve it for its own use. This unexecuted

⁷ On October 1, 2004, NYISO issued a notice to all of its market participants describing how projects would be transitioned to the new LFIP in order to provide additional clarity to the transition process.

⁸ PSEG Power In-City, LLC was a wholly owned subsidiary of PSEG Power Cross Hudson Corporation, which is a wholly owned subsidiary of PSEG Power, LLC, which is a wholly owned subsidiary of Public Service Enterprise Group, Inc. See complaint filed August 23, 2004 in Docket No. EL04-126-000.

⁹ In April 2006, PSEG Fossil, LLC (PSEG Fossil), a subsidiary of PSEG Power, LLC, entered into an agreement to sell the stock of PSEG Power Cross Hudson Corporation to CCH Holdings Group LLC. On December 1, 2006, the sale was completed. After the closing, PSEG Power Cross Hudson Corporation was re-named Cross Hudson Corporation, and its wholly-owned subsidiary was re-named In-City I, LLC. Affidavit of H. Borden at P 15. To avoid confusion, throughout this order, Cross Hudson will be used to refer to Cross Hudson Corporation and its subsidiary and its predecessor-in-interest PSEG Power Cross Hudson Corporation and its subsidiary.

interconnection agreement was filed with the Commission before Cross Hudson completed the interconnection study process. Cross Hudson protested the Project's interconnection agreement because it required Cross Hudson to pay for a new double ring bus configuration at ConEd's West 49th Street Substation. Among other things, Cross Hudson requested that the interconnection agreement be amended to provide an extension of the interconnection date for the Project beyond the November 24, 2004 date in the interconnection agreement as filed, so long as the delay did not affect other generators.

10. On August 19, 2002, Cross Hudson sent a request to NYISO for a determination that a reduction in the size of the project from 1,200 MW to 550 MW (to interconnect only Bergen 2 and not Bergen 4 as originally proposed) would not be a Material Modification resulting in the loss of its Queue Position. Bergen 2 would only be interconnected to NYISO through a radial generator lead and would not be interconnected to PJM. NYISO determined that the reduction in size was not a Material Modification. The Project entered Class Year 2002 for cost allocation purposes.

11. On November 20, 2002, the Commission issued an order accepting the interconnection agreement for filing, with modifications.¹⁰ The Commission's order required ConEd to make the open bus position at the West 49th Street Substation available to the Project, instead of requiring Cross Hudson to pay for upgrading to a double ring bus configuration. The Commission also granted, in part, Cross Hudson's request to delay its Commercial Operation Date. The Commission required ConEd to amend the interconnection agreement to provide Cross Hudson an additional 18 months to achieve operation of the Project, until May 2006, but only "if [Cross Hudson] maintains a construction schedule for the system upgrade facilities that does not adversely affect other interconnecting generators."¹¹

12. On August 23, 2004, Cross Hudson filed a complaint with the Commission (Docket No. EL04-126-000) asking to extend the interconnection date for the Project for another 18 months beyond the already extended date. The Commission again granted Cross Hudson's request to extend the interconnection date milestone until November 2007.¹² The Commission found that Cross Hudson's request for another 18-month extension was consistent with Commission precedent because Cross Hudson "remains

¹⁰ *Consolidated Edison Co. of New York, Inc.*, 101 FERC ¶ 61,185 (2002).

¹¹ *Id.* P 36.

¹² *PSEG Power In-City I, LLC v. Consolidated Edison of New York*, 109 FERC ¶ 61,189 (2004) (Order on Complaint).

committed to funding the needed system upgrades and there is no evidence that granting the extension would harm lower-queued generators.”¹³

13. On February 4, 2005, Cross Hudson issued a press release (February 4th Press Release), which stated that it would no longer pursue its project. NYISO states that, in response to the February 4th Press Release, it immediately requested clarification from Cross Hudson on whether it intended to remain in NYISO’s interconnection queue.¹⁴

14. On February 14, 2005, consistent with Attachment S, Cross Hudson sent NYISO a “non-acceptance notice” (February 14, 2005 Letter) regarding its cost allocation as part of Class Year 2002, which included an express request to be included in the following Class Year.

15. On February 24, 2005, Cross Hudson filed a letter (Discontinuance Letter) with the Commission in Docket No. EL04-126-000, stating that it had “discontinued development” of the Project and as a consequence “no longer requires access to a bus position in the West 49th Street Substation and no longer causes ConEd to require upgrades to its transmission system.” The Discontinuance Letter also explicitly stated that: “[Cross Hudson] has notified ConEd, the New York ISO and the [New York Public Service Commission] of its decision to discontinue development of [the Project].” On March 14, 2005, Cross Hudson filed a letter with the New York State Public Service Commission (New York Commission) noting that it was suspending development of its project, but not withdrawing its Article VII Certificate.¹⁵

16. In response to the Discontinuance Letter, ConEd filed with the Commission on April 6, 2005 in Docket No. EL04-126-000 a letter stating that it had received notice from Cross Hudson that it had discontinued development of its Project to connect Bergen 2 with ConEd’s West 49th Street Substation. ConEd stated that “[Cross Hudson]’s notice of discontinuance renders its prior suspension of its project permanent.” ConEd further stated that the “abandonment of the [Cross Hudson] project obviates the need for the

¹³ *Id.* P 16.

¹⁴ NYISO Answer at 13. There is nothing in the record indicating whether Cross Hudson responded to NYISO’s request for clarification.

¹⁵ An Article VII certificate is defined in Attachment S of the NYISO OATT as the certificate of environmental compatibility and public need required under Article VII of the New York State Public Service Law for the siting and construction of any new transmission facility of a size and type specified in the statute.

project's Interconnection Agreement" and for the extension of that agreement. ConEd stated that because the abandonment of the Project made the Interconnection Agreement unnecessary, Cross Hudson's complaint and the Commission's November 22, 2004 Order on Complaint¹⁶ had been rendered moot, and ConEd therefore withdrew its request for rehearing of that order. ConEd served the letter on all parties to the proceeding in Docket No. EL04-126-000, including NYISO and Cross Hudson.

17. On July 6, 2005, in Docket Nos. EL04-126-001, ER05-1210-000, and ER02-2126-000, ConEd filed a request to withdraw its compliance filing in response to the November 22, 2004 Order on Complaint and to terminate the interconnection agreement for the Project. This pleading was served on all parties in the proceeding, including NYISO and Cross Hudson, and notice of the filing was issued by the Commission on July 19, 2005. Neither Cross Hudson, NYISO, nor any other party protested or opposed the notice of cancellation of the interconnection agreement. The Commission issued a delegated letter order terminating the interconnection agreement for the Project on August 29, 2005 (August 2005 Order), which, among other things, eliminated the requirement that ConEd give up the vacant bus position at the West 49th Street Substation.

18. On August 9, 2005, NYISO sent an e-mail to Cross Hudson confirming its understanding that Cross Hudson elected to join Class Year 2006, which commenced on June 27, 2006.¹⁷

19. In April 2006, PSEG Fossil, LLC, a subsidiary of PSEG Power, LLC, entered into an agreement to sell the stock of PSEG Power Cross Hudson Corporation to CCH Holdings Group, LLC. The sale was completed on December 1, 2006. After the closing, PSEG Power Cross Hudson Corporation was re-named Cross-Hudson Corporation, and its wholly owned subsidiary was re-named In-City I, LLC.¹⁸

¹⁶ 109 FERC ¶ 61,189 (2004).

¹⁷ NYISO Answer at Attachment III.

¹⁸ Affidavit of H. Borden at P 15.

20. In June 2006, a year and a half after the Project was discontinued, Cross Hudson entered into a new Facilities Study Agreement with NYISO and ConEd,¹⁹ claiming to have revived the interconnection of the Project. The Project is described as a 345 kV alternating-current generator lead capable of transmitting approximately 600 MW, including 550 MW from Bergen 2 located in Ridgefield, New Jersey, to ConEd's West 49th Street Substation in New York City. Under the proposal, once the interconnection is completed, Bergen 2 would no longer supply power into PJM, but instead would supply power only into the NYISO market. Cross Hudson participated in the 2006 Class Year cost allocation process and study.

21. On January 29, 2007, Cross Hudson wrote a letter to the New York Commission advising of "the resumption of the development of the [Project]." Therein, Cross Hudson admits and acknowledges statements made in early 2005 that the project had been discontinued, but states that the Project still remains in the NYISO interconnection queue and is "currently included in the 2006 Class Year."

22. In a letter to NYISO dated March 14, 2007, HTP invoked the informal dispute resolution procedures pursuant to section 13 of Attachment X in an attempt to resolve whether the Project should remain in Queue Position No. 93 with an Interconnection Request date of May 11, 2001. In connection with HTP's invocation of the informal dispute resolution procedures, NYISO's representatives acknowledged that NYISO received, and that they had actual knowledge of, the Discontinuance Letter.²⁰

23. Pursuant to the procedures in Attachment S, Cross Hudson had accepted its cost allocation once, but because not all Developers accepted their cost allocations, NYISO re-ran the study, which was issued on June 26, 2007. On July 3, 2007, Cross Hudson again accepted its cost allocation, and, on or about July 12, 2007, was expected to reimburse certain Developers for Headroom costs. Upon completion of that process, Cross Hudson is expected to sign the interconnection agreement included in Attachment X without modification.²¹

¹⁹ After PSEG Power Cross Hudson Corporation and its subsidiary were renamed Cross Hudson Corporation and In-City I, LLC, *see* note 9, *supra*, the executed Facility Study Agreement was assigned to CCH Holdings Group, LLC. Affidavit of H. Borden at 15.

²⁰ Complaint at 19.

²¹ We expect that, consistent with Attachment X, the interconnection agreement will be a three-party agreement among Cross Hudson, ConEd, and NYISO.

C. Hudson Transmission Project

24. HTP is developing a 660 MW controllable²² transmission line (Hudson Transmission Project) that will connect the control areas of PJM and NYISO in order to bring electricity into New York City. The proposed 660 MW transmission line will begin in Bergen County, New Jersey, and interconnect to ConEd's West 49th Street Substation.

25. In 2005, the New York Power Authority (NYPA) held a Request for Proposals to procure new sources of energy and capacity for New York City and its governmental agencies. In November 2006, NYPA selected the Hudson Transmission Project to provide transmission capability that NYPA can use to purchase up to 660 MW of capacity and energy from generators in PJM, including 500 MW of capacity from FPL Energy, Inc. supplied by the Red Oak generating facility in Sayreville, New Jersey. NYPA will use the transmission capacity from the Hudson Transmission Project to supply NYPA's municipal customers in New York City. HTP and NYPA are in the process of negotiating an agreement for the purchase of transmission capacity on the Hudson Transmission Project, with an anticipated commencement date of late 2010. In addition to its negotiations with NYPA and working on permitting and design of the Hudson Transmission Project, HTP has been pursuing interconnection agreements with both PJM and NYISO since 2005.

26. Parallel with pursuing interconnection to the PJM grid, in December 2005, HTP submitted its Interconnection Request to NYISO in accordance with NYISO's LFIP. On December 14, 2005, NYISO assigned the Hudson Transmission Project Queue Position No. 206.

27. In addition to the System Reliability Impact Study (SRIS) for the Hudson Transmission Project, HTP requested that NYISO conduct an Optional Interconnection Study to study and design the interconnection of the Hudson Transmission Project using the assumption that the discontinued Project will not interconnect at the same substation ahead of the Hudson Transmission Project. Both studies are currently underway.

28. NYISO has preserved Cross Hudson's Queue Position No. 93, thereby allowing it access to the vacant bus position at the West 49th Street Substation. Without use of the vacant bus position, HTP would have to construct a new ring bus at the cost of approximately \$25 million in order to interconnect its Project.

²² HVDC Back-to-Back Converter with an AC cable system.

II. Notice of Filings and Responsive Pleadings

29. Notice of HTP's June 13, 2007 complaint was published in the *Federal Register*, 72 Fed. Reg. 34,238 (2007), with comments, interventions, and protests due on or before July 5, 2007. NYISO timely filed an answer to the complaint (NYISO Answer). On July 5, 2007, Cross Hudson filed a protest (Cross Hudson Protest) and ConEd filed comments in support of the complaint. On July 20, 2007, Cross Hudson filed an answer to the NYISO Answer (Cross Hudson Answer). Also on July 20, 2007, HTP filed an answer responding to both the NYISO Answer and Cross Hudson Protest. On August 6, 2007, HTP filed another answer (HTP Second Answer), this time responding to the Cross Hudson Answer of July 20, 2007. On August 14, 2007, NYISO filed another answer (NYISO Second Answer), this time responding to the HTP Second Answer of August 6, 2007. On August 17, 2007, HTP filed an answer (HTP Third Answer) responding to NYISO's Second Answer of August 14, 2007.

30. In addition, ConEd, Cross Hudson, FPL Energy Generators,²³ NRG Companies,²⁴ NYPA, the New York Commission, New York Transmission Owners,²⁵ and, jointly, Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade, LLC filed timely motions to intervene.

²³ FPL Energy Generators are FPL Energy Marcus Hook, L.P., North Jersey Energy Associates, L.P., Doswell Limited Partnership, Backbone Mountain Windpower LLC, Mill Run Windpower LLC, Somerset Windpower, LLC, Meyersdale Windpower LLC, Waymart Wind Farm, LP, and Pennsylvania Windfarms, Inc.

²⁴ NRG Companies are NRG Power Marketing Inc., Astoria Gas Turbine Power LLC, Arthur Kill Power LLC, Conemaugh Power LLC, Indian River Power LLC, Keystone Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Rockford LLC, NRG Rockford II LLC, and Vienna Power LLC.

²⁵ The New York Transmission Owners are Central Hudson Gas & Electric Corporation, LIPA, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

III. Complaint Allegations and Responses

A. Loss of Queue Position

31. HTP makes a number of arguments in support of its contention that Cross Hudson should not maintain its Queue Position. It argues that Cross Hudson should have been removed from the queue in February 2005 when it sent the Discontinuance Letter, or in August 2005, when the Commission issued an order terminating the Project's interconnection agreement, or in April 2006, when the Project's Developer changed, or finally, by the Fall of 2007 for failure to meet the November 2007 Commercial Operation Date. Each argument is explained further below.

1. Section 3.6 of Attachment X

32. HTP argues, and ConEd agrees, that NYISO reasonably should have considered the Discontinuance Letter it received as a party to Docket No. EL04-126-000 to be the written notice specified in and required by Attachment X and should have withdrawn the Project from its queue at that time.

33. NYISO claims that its practice is to require Developers to provide written notice directly to NYISO explicitly requesting that NYISO remove the project from the queue.²⁶ NYISO states that it has an established practice not to treat communications such as press releases or regulatory filings as the notice required under section 3.6 of Attachment X. When NYISO staff became aware of the press release, it requested written confirmation from Cross Hudson, which subsequently informed NYISO in writing that it was not accepting the cost allocation from Class Year 2002, but intended to enter a subsequent Class Year. While the Discontinuance Letter states that NYISO was notified of Cross Hudson's intent to discontinue the project, NYISO argues that no such notification ever occurred.²⁷

34. NYISO further claims that it had no obligation to object to the Discontinuance Letter before the Commission, either under its tariff or Commission rules, or to inform the Commission that it had not construed the Discontinuance Letter as a notice of withdrawal. NYISO asserts that having to monitor all of the public statements and

²⁶ NYISO Answer at 12.

²⁷ Cross Hudson agrees with NYISO's position that the Discontinuance Letter is irrelevant to NYISO's interconnection process. Cross Hudson states that it never provided written notice to NYISO asking it to remove the project from the queue.

Commission filings made by each of the projects that are currently in NYISO's interconnection queue would be burdensome, inefficient, and unnecessary, and would likely result in some being missed or misinterpreted, thereby promoting confusion and controversy. NYISO further argues that Attachment X does not provide, either expressly or implicitly, that NYISO is obligated to inform the Commission that a Developer made a mistake in a filing.

2. Termination of the Interconnection Agreement

35. HTP argues that the Project should have been removed from NYISO's queue in August 2005, when the Commission issued an order terminating the Project's interconnection agreement. HTP contends that, since Attachment X does not address the disposition of an interconnection request that has completed the required interconnection process, obtained an interconnection agreement and then had its interconnection agreement terminated, one must look to the Commission and its precedent for guidance. HTP claims that the weight of Commission precedent²⁸ regarding interconnection queuing argues for removal from the queue of a project that has been discontinued and has had its interconnection agreement terminated. In its comments, ConEd states that it is hard to understand why NYISO would not have deemed Cross Hudson to have withdrawn the Project from the queue.

36. NYISO argues that HTP has failed to show that the cancellation of the interconnection agreement required NYISO to remove the Project from the queue. NYISO asserts that before Attachment X, there was no direct connection between the timing of NYISO's interconnection studies and the filing of interconnection agreements - sometimes agreements were filed before studies were conducted, sometimes after. At that time, NYISO was rarely, if ever, involved in the development of interconnection agreements since they were two-party agreements between the Developer and the affected Transmission Owner.

37. Cross Hudson argues that the existence of a prior interconnection agreement is not dispositive of HTP's claims. Cross Hudson claims that because the interconnection agreement was the vehicle in which to reserve the vacant bus position at the West 49th Street Substation, it did not need the interconnection agreement. Cross Hudson insists that termination of the interconnection agreement does not mean that it abandoned its project, but that it temporarily discontinued development of the project.

²⁸ HTP cites *Arizona Public Service Co.*, 94 FERC ¶ 61,027 (2001); *Florida Power & Light Co.*, 99 FERC ¶ 61,318 (2002) (*Florida Power & Light Co.*).

3. Improper Transfer of Queue Position

38. HTP argues that the Project should have been removed from the NYISO queue in mid-2006, on the grounds that the Project's Queue Position was improperly transferred to a new Developer with a different project. HTP contends that such a transfer is not permitted by section 4.3 of Attachment X, and that NYISO should have considered the improper transfer of the Queue Position a failure to adhere to the requirements of Attachment X. HTP further argues that, under section 3.6 of Attachment X, NYISO should have deemed the Project's Interconnection Request withdrawn at the time it became aware of the improper transfer.

39. NYISO asserts that HTP has not shown that Cross Hudson's Queue Position was improperly transferred. Section 4.3 has not been violated because the Project remains materially unchanged, and because Cross Hudson's Point of Interconnection, *i.e.*, the West 49th Street Substation, is also unchanged. The NYISO's Class Year 2006 Interconnection Facilities Study examined the impacts of that interconnection and from NYISO's perspective, Cross Hudson continues to involve a generator lead line from Bergen 2. NYISO further asserts that nothing in Attachment X or Commission precedent suggests that a change in upstream ownership or a Developer's name should result in a project's removal from the queue.

40. Cross Hudson claims that the Queue Position has not been transferred, but merely involves a name change of the owner of the Project. Additionally, the characteristics of the Project remain the same as those studied in the Interconnection Facilities Study associated with the Class Year 2006 report.

4. Failure to Meet Commercial Operation Date of November 2007²⁹

41. HTP contends that Cross Hudson cannot dispute that its project will not meet its Commercial Operation Date of November 2007. According to HTP, Cross Hudson states that its project is not expected to be in service until 2009. However, Cross Hudson never

²⁹ The parties use the terms Commercial Operation Date, Commencement Date, In-Service Date and Interconnection Date interchangeably throughout their pleadings. In the case of Cross Hudson, these terms are intended to identify the date on which the transmission cable will electrically connect one or more of the Bergen generating units to ConEd's West 49th substation. In the case of HTP, the terms are intended to identify the date on which the generator cable will be connected via a HVDC Back-to-Back Converter with an AC Cable system from the Bergen 230 kV Substation in Ridgefield, New Jersey to the 345 kV transmission system at ConEd's West 49th Street Substation.

requested a Commercial Operation Date later than November 2007 before its interconnection agreement was terminated. Even if Cross Hudson's interconnection agreement had not been terminated in 2005, and even if the Project were unchanged, HTP argues that the Cross Hudson interconnection agreement would be terminated this fall because of Cross Hudson's failure to meet its November 2007 Commercial Operation Date, and the Cross Hudson Interconnection Request should be deemed withdrawn in accordance with Commission precedent.

42. NYISO asserts that HTP has not shown that Cross Hudson failed to comply with the requirements set forth in the LFIP. NYISO argues that HTP discusses several cases which are factually distinguishable and inapposite. According to NYISO, in general, the cases cited by HTP involve generators that failed to meet applicable milestones in an interconnection agreement. NYISO claims that, unlike the situation in *Florida Power & Light*, Cross Hudson has met all the applicable requirements and, consequently, NYISO has no basis for removing it from the queue. Additionally, NYISO argues, Cross Hudson has not yet reached the stage in the process where it must agree to a construction schedule under NYISO's Attachment X.

43. NYISO claims that the current in-service date for the Project is 2008, which has been reflected on the queue since March 2005, over eight months before HTP submitted its Interconnection Request. Cross Hudson has not asked NYISO to change this in-service date. NYISO asserts that the issue of whether any further extensions are available to Cross Hudson beyond 2008 is a question that may arise in the context of negotiation of Cross Hudson's interconnection agreement, which is to begin shortly. Under section 11.1 of Attachment X, NYISO and ConEd will promptly tender to Cross Hudson a draft LGIA following final settlement of Class Year 2006. After reviewing these drafts, Developers provide proposed milestones, often including updates to in-service dates. If Cross Hudson proposes a later in-service date, NYISO would determine whether the change constitutes a Material Modification of the in-service date that is currently in the queue. NYISO requests that, if the Commission issues an order before the completion of the negotiations of Cross Hudson's LGIA, the Commission indicate whether, and to what extent, it believes that Attachment X, or its own earlier rulings, limit Cross Hudson's ability to propose a Commercial Operation Date later than 2008.

B. The Appropriate Interconnection Queue Position of the Project

44. HTP argues that it does not seek to nullify the Project, but to have it placed in NYISO's queue when the project was revived, sometime in mid-2006, as determined by NYISO. HTP asserts that the Project should not have been in the queue at the time HTP tendered its Interconnection Request since, at that time, the Project was defunct and Cross Hudson had not yet started its project. ConEd supports HTP's position and adds

that, to the extent necessary, NYISO should clarify its rules so that all market participants have clear guidance as to how and when projects are removed from the queue.

45. Cross Hudson argues that taking its project out of the queue would not expunge the studies already completed, would not get HTP's project developed any faster, and would not advance HTP's position that the Base Case should be performed without inclusion of Cross Hudson's project. Cross Hudson argues that, had the Project been removed from the queue in August 2005, it would have been able to immediately file a new Interconnection Request, and would still have been ahead of HTP in the queue.

C. NYISO's Interpretation and Implementation of Its OATT and Commission Precedent

46. HTP argues that NYISO's interpretation and implementation of the queue provisions of its OATT, which kept the Project in its original Queue Position after 2005, are unjust, unreasonable, and unduly discriminatory. It contends that an ISO's rigorous policing of its queue to remove obsolete or discontinued projects would facilitate and expedite the planning, financing, and interconnection of viable projects.

47. NYISO claims that it has not engaged in undue discrimination against HTP, but has reasonably interpreted the interconnection rules in its OATT by concluding that, to date, Cross Hudson has met its requirements and, therefore, it has not removed the Project from the queue. NYISO asserts that HTP has not explained exactly how NYISO has discriminated against it or what motive NYISO could possibly have to favor Cross Hudson over it or any other competing Developer. NYISO further asserts that there are no provisions in its LFIP that would permit it to remove from the queue a cancelled project with a grandfathered interconnection agreement.

48. Cross Hudson asserts that its project is not delayed, nor is it delaying or causing delays to HTP. According to Cross Hudson, HTP has been aware of Cross Hudson's project since it filed its Interconnection Request in December 2005, with the Base Cases for HTP's Feasibility Study and SRIS including the Project. In each study, NYISO assumed that the Project was going to be built. Any action taken by the Commission to remove Cross Hudson from the interconnection process at this stage would be disruptive and extremely destabilizing for the market. Cross Hudson further asserts that HTP seeks to eliminate its competitor in order to avoid having to pay for certain costs associated with the expansion of the substation and performing studies.

49. Cross Hudson further argues that if the Commission finds an OATT violation in NYISO's administration of its interconnection queue, it would be unjust and unreasonable to impose a remedy that harms Cross Hudson, since Cross Hudson has reasonably relied on NYISO's administration of its OATT to develop its project.

IV. Discussion

A. Procedural Matters

50. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2007)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

51. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Cross Hudson's and HTP's answers filed July 20, 2007, the HTP Second Answer filed August 6, 2007, the NYISO Second Answer filed August 14, 2007, or the HTP Third Answer filed August 17, 2007.

B. Commission Determination

52. We will grant HTP's complaint on the ground that NYISO should have removed Cross Hudson's Project from the interconnection queue when it received notice consistent with the requirements of Attachment X of its tariff that Cross Hudson was withdrawing the Project. In addition, we find that the Commission's August 2005 Order terminating the Project's Interconnection Agreement is not controlling here because the February 2005 Discontinuance Letter should have resulted in the Project's removal from the queue. Similarly, we find that the Project's Queue Position could not have been transferred as part of the 2006 sale of the stock of the Project Developer because the Project should have been removed from the queue prior to the sale. We further find that Cross Hudson had no right to extend its Commercial Operation Date to November 2007 and, therefore, also direct NYISO to remove the Project from Queue Position No. 93.

1. Notice of Withdrawal

53. Section 3.6 of Attachment X to NYISO's OATT provides that an Interconnection Request may be withdrawn (and thus a project's Queue Position lost) at any time "by written notice of such withdrawal to the NYISO" by the Developer. Attachment X does not provide or prescribe a specific format or process for such written notice. NYISO's Attachment X is consistent with Order No. 2003, which also does not specify the type or form of notice.³⁰ As such, we find the requirement that a "written notice of withdrawal"

³⁰ Order No. 2003 at P 123-130.

be provided “to the NYISO by the Developer” may be satisfied in a number of ways. As described further below, the actions of Cross Hudson and NYISO satisfy the “written notice” requirements of section 3.6.

54. Cross Hudson’s Discontinuance Letter states that “[Cross Hudson] has notified ConEd, the New York ISO and the [New York Commission] of its decision to discontinue development of In-City.” The Discontinuance Letter further indicates that Cross Hudson filed the letter and served it on parties to Docket No. EL04-126-000, a proceeding to which NYISO was a party. Not only did Cross Hudson give written notice to NYISO, but “NYISO acknowledged, in a discussion with HTP about the invocation of informal dispute resolution, that it had actual knowledge of the Discontinuance Letter.”³¹ We conclude that the requirements of section 3.6 that the notice: (1) be in writing, (2) to NYISO, and (3) by the Developer are met in this instance.

55. The Commission is not persuaded by NYISO’s arguments claiming that section 3.6 of Attachment X must be narrowly read “to require Developers to provide written notice directly to NYISO staff explicitly requesting the NYISO to remove the project from the interconnection queue.”³² Neither section 3.6 nor any other provisions in Attachment X requires written notice to be directly addressed to NYISO staff or that the written notice explicitly request that NYISO remove a project from the queue. Additionally, although NYISO claims that its “established practice is to not treat other types of communications, such as press releases or regulatory filings, as notice under [section 3.6],” its own actions belie its claims. NYISO concedes that when its staff became aware of the February 4th Press Release, “it quickly requested written confirmation of Cross Hudson’s status.”³³ Cross Hudson’s written confirmation to NYISO merely stated that it did not accept cost allocation as a Class Year 2002 Developer, and, having preceded the Discontinuance Letter by over a week, did not indicate that Cross Hudson desired to remain in the queue.³⁴ NYISO fails to explain why it ignored the Discontinuance Letter, which postdates the February 14, 2005 Letter by 10 days.

³¹ Complaint at 25.

³² NYISO Answer at 12.

³³ *Id.* at 13.

³⁴ February 14, 2005 Letter.

56. NYISO states that it had communications with Cross Hudson that indicated Cross Hudson's intent to remain in the queue.³⁵ Cross Hudson may well have been sending "mixed messages" concerning the status of its Project and its intent, but the message of the Discontinuance Letter was clear. The Discontinuance Letter clearly states that the Project had been discontinued, that Cross Hudson no longer needed access to the bus position in the West 49th Street Substation, and that Cross Hudson no longer needed ConEd to upgrade its transmission system to accommodate the Project. It may be that Cross Hudson would have liked to discontinue its Project, and at the same time remain in the queue. That, however, is inconsistent with NYISO's OATT and contrary to Commission policy, as explained below. NYISO should have recognized this, rejected Cross Hudson's request to be included in the 2006 Class Year, and insisted that Cross Hudson submit a new Interconnection Request to establish a new place in the queue. It was not appropriate for NYISO to include Cross Hudson in any Class Year because Cross Hudson no longer had a project.

57. NYISO was free to develop more specific notice procedures in its Attachment X, since Order No. 2003 is silent as to the form of notice required, but it chose not to do so. While we do not require NYISO to clarify section 3.6 of Attachment X at this time, should NYISO choose to do so, it is free to propose amended tariff language consistent with what it claims are its practices. However, NYISO cannot now retroactively elevate informal "practices" into a tariff provision that allegedly was not met.

58. Because NYISO's and Cross Hudson's actions meet the requirements of section 3.6, we find that a withdrawal was in effect as of February 24, 2005 and that NYISO should have removed the Project from its Queue Position as of that date. Therefore, we direct NYISO to remove the Project from Queue Position No. 93³⁶ and to update its OASIS Queue Position posting.

59. Our order in this proceeding is based in part on our expectation that each ISO have control over the interconnection process within its footprint. While monitoring communications may be burdensome, it is the responsibility of the ISO to do so in order to effectively manage the queue. Contrary to NYISO's belief, ignoring errors in Developers' filings could lead to discontinued projects remaining in the queue, inefficient transmission planning, and unanticipated costs, all of which might decrease the likelihood of projects being developed in the most timely and cost-efficient manner.

³⁵ NYISO Answer at 12 and 13.

³⁶ We clarify that removal of the Project from Queue Position No. 93 does not mean that HTP will be placed in that Queue Position.

60. In prior cases, the Commission has encouraged the prompt removal of discontinued or extensively delayed projects from the interconnection queue and has not permitted such projects to impede the development of other viable projects by maintaining a place in the queue.³⁷ In Order No. 2003, we determined that milestones agreed upon by both the Interconnection Customer and Transmission Provider were necessary to ensure that a Transmission Provider, such as NYISO, had a planning process which only reflected “the interconnection of Generating Facilities that are making satisfactory progress toward completion.”³⁸ We also determined that it would be unfair and unreasonable to delay an interconnection project because of a higher queued interconnection project maintaining its place in the queue pending Dispute Resolution.³⁹ Later, in precedent discussing Order No. 2003, the Commission voiced its concern over the Transmission Provider and Interconnection Customer not meeting required Order No. 2003 milestones, the purpose being to “ensure that only Interconnection Customers serious about interconnecting will remain in the queue.”⁴⁰ The removal of Cross Hudson’s Project from Queue Position No. 93 is consistent with our policy of reducing uncertainty and congestion in the queue that threaten the prompt and efficient development of interconnection projects.

2. Termination of Interconnection Agreement

61. HTP argues that the Project should have been removed from the queue in August 2005, when the Commission issued an order terminating the Project’s interconnection agreement. NYISO responds that HTP failed to show that the cancellation of the interconnection agreement required it to remove the Project from the queue, and Cross Hudson argues that termination of the interconnection agreement did not mean that it had abandoned the Project, but that it had temporarily discontinued development of the Project.

³⁷ See *Southern Montana Electric Generation & Transmission Coop. v. Northwestern Corp.*, 113 FERC ¶ 61,023 at P 26 (clarifying that extensions of a project’s commercial operations date generally would be limited to 36 months, whether or not the project was grandfathered from Order No. 2003).

³⁸ Order No. 2003 at P 144.

³⁹ *Id.* at P 130.

⁴⁰ *Midwest ISO*, 109 FERC ¶ 61,085 (2004).

62. As explained above, we have determined that the February 24, 2005 Discontinuance Letter provided the notice that is required by section 3.6 of Attachment X to NYISO's OATT and that the Project should have been removed from the queue on that date. We therefore find it unnecessary to address the impact of the Commission's August 2005 Order on the already-abandoned project.

3. Improper Transfer of Queue Position

63. HTP also argues that the Project should have been removed from the queue on the grounds that the Project's Queue Position was improperly transferred to a new Developer. NYISO and Cross Hudson respond that a change in ownership or in the Developer's name should not result in the loss of Queue Position.

64. While the record is not entirely clear on the details of the corporate reorganizations, it indicates that the stock of PSEG Power Cross Hudson Corporation was sold to CCH Holdings Group, LLC on December 1, 2006, and that PSEG Power Cross Hudson Corporation was re-named Cross-Hudson Corporation. This sale took place after the issuance of the February 24, 2005 Discontinuance Letter. The Commission's decision that the Project must be removed from the queue is not based on the sale or the name change. The Queue Position could not have been transferred in 2006 because the Project should have been removed from the queue when the February 24, 2005 Discontinuance Letter was sent. PSEG Power Cross Hudson Corporation could not transfer its Queue Position because it did not have one. The sale and name change of the Project is irrelevant to our decision, and our decision that the Project is no longer in the queue would be the same even if the Project were still owned by PSEG Power Cross Hudson Corporation.

4. Failure to Meet Commercial Operation Date

65. As for HTP's arguments that Cross Hudson has lost its Queue Position because it has failed or will fail to comply with NYISO's tariff requirements that it meet its Commercial Operation Date of November 2007, we find that when the Commission accepted the withdrawal of the compliance filing and the notice of cancellation of the interconnection agreement between ConEd and Cross Hudson on August 29, 2005, Cross Hudson gave up its right to extend the interconnection date from May 2006 to November 2007 as requested in its complaint in Docket No. EL04-126-000. In addition, by virtue of the August 2005 Order and Cross Hudson's earlier filed Discontinuance Letter, Cross Hudson not only gave up its access rights to ConEd's open bus position at the West 49th Street Substation, but also gave away all access rights to the West 49th Street Substation and hence any ability to transfer them.

5. Other Issues

66. The parties also raise issues concerning the appropriate placement of the Project in the queue. We clarify that the Commission's decision requires that the Project be removed from the queue as of the date of this order, not retroactively. NYISO may then determine the Project's appropriate queue placement upon receipt of Cross Hudson's new Interconnection Request, consistent with its OATT. In addition, in response to NYISO's argument that no provision in its LFIP permits it to remove from the queue a cancelled project with a grandfathered interconnection agreement, we conclude that when Cross Hudson discontinued the project and cancelled its interconnection agreement, it forfeited the agreement's grandfathered status.

67. Finally, we reject Cross Hudson's arguments that it would be unjust and unreasonable to impose a remedy on NYISO that allegedly would impact Cross Hudson and destabilize the market. Cross Hudson knew, or should have known, that by giving notice in its Discontinuance Letter to the Commission, ConEd, NYISO, and the New York Commission, it was terminating its Queue Position. Further, the Commission's policy that discontinued or extremely delayed projects should be removed from the queue so as not to impede other viable projects does not destabilize the market, but rather reduces uncertainty and congestion in the queue and thereby promotes efficient development of interconnection projects.

The Commission orders:

(A) HTP's complaint is hereby granted, as discussed in the body of this order.

(B) NYISO is hereby directed to remove the Cross Hudson Project from its Queue Position No. 93 and update its OASIS Queue Position posting.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.