

128 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PSEG Energy Resources & Trade
PSEG Fossil, LLC

Docket No. EL08-35-001

Cross Hudson, LLC

ORDER DENYING REHEARING

(Issued August 28, 2009)

1. The New Jersey Board of Public Utilities (New Jersey Board) requests rehearing of the Commission's April 2008 Order¹ finding that the Cross Hudson Project is a merchant generator lead line rather than a merchant transmission facility. For the reasons discussed below, we deny rehearing.

I. Background

2. In January 2008, Cross Hudson, LLC (Cross Hudson) and the PSEG Entities² petitioned the Commission for a declaratory order concerning the Cross Hudson Project—a proposed eight-mile, 345 kV transmission line that, if constructed, will have an approximate continuous transfer capacity between 600 and 610 megawatts and will connect PSEG Fossil's 550 megawatt Bergen 2 generator in Ridgefield, New Jersey to Consolidated Edison's West 49th Street Substation in New York City. According to the petition, Cross Hudson will develop, own, and operate the Project and provide delivery service to PSEG Fossil, which plans to disconnect Bergen 2 from the PJM Interconnection, L.L.C. (PJM) transmission system and sell its energy and capacity

¹ *PSEG Energy Resources & Trade*, 123 FERC ¶ 61,001 (2008) (April 2008 Order).

² For the purposes of this order, the PSEG Entities consist of PSEG Energy Resources & Trade, and PSEG Fossil, LLC (PSEG Fossil).

through PSEG Energy Resources & Trade into the wholesale markets administered by the New York Independent System Operator, Inc. (NYISO).

3. In the petition for declaratory order, Cross Hudson and the PSEG Entities requested that the Commission: (1) allow Cross Hudson to charge a negotiated, non-cost-based rate for the delivery service it will provide over the new transmission line; (2) commit that it will never order the Cross Hudson Project to connect to PJM pursuant to section 202(b) of the Federal Power Act;³ and (3) declare that the Project is a dedicated generator lead line that cannot be used by any third party for firm point-to-point transmission service.

4. The Commission granted the petition in part, finding that Cross Hudson can charge a negotiated non-cost-based rate for delivery service⁴ and that, in the first instance, the Project cannot be used by any third party for firm point-to-point transmission service.⁵ The Commission declined, however, to commit to never ordering the Project to connect to PJM.⁶

5. In the course of determining whether Cross Hudson could charge a negotiated, non-cost-based rate for delivery service, the Commission found that it had to examine whether the Project is more properly characterized as a generator lead line or a merchant transmission facility.⁷ The Commission stated that the Project has characteristics of both a merchant transmission facility and a generator lead line. The Commission explained that the Project is like a merchant transmission facility in that it will be a high-voltage, alternating current facility that will provide Commission-jurisdictional delivery service to a generator engaging in wholesale sales and will be paid for, owned, and operated by a third party merchant provider, and that it is like a generator lead line in that it will not be a part of an integrated transmission grid but will instead connect two points – a generating unit and a substation – without any electrical breaks between them, and will be built to serve only a single customer – PSEG Fossil's Bergen 2. Based on analysis of these facts, the Commission concluded that the Project is properly characterized as a merchant transmission facility serving as a generator lead line—that is, as a merchant

³ 16 U.S.C. § 824a (2006).

⁴ April 2008 Order, 123 FERC ¶ 61,001 at P 21.

⁵ *Id.* P 25.

⁶ *Id.* P 23.

⁷ *Id.* P 19.

generator lead line—rather than simply as a merchant transmission facility that must conform to the Commission’s merchant transmission precedent.⁸

6. The Commission noted that its decision was confined to the specific circumstances presented in the petition, and that changed circumstances may affect the status of the Project as a merchant generator lead line.⁹ The Commission stated that in the future it is possible that Bergen 2 will be reconnected to the PJM system or interconnected to another market, and that generators other than Bergen 2 will have the opportunity to transmit power from New Jersey to New York or vice versa. Moreover, the Commission observed that the Project is expected to have a transfer capacity between 600 and 610 megawatts, while Bergen 2 is only a 550 megawatt generator. The Commission stated that if any electric energy being transmitted along the Project comes from a source other than Bergen 2, the Commission may need to reevaluate the Project’s transmission rates.¹⁰

7. Prior to their filing the petition for declaratory order, Cross Hudson and the PSEG Entities submitted the Project to the New York Power Authority in response to a request for proposals for 500 megawatts of new capacity. Following the April 2008 Order, however, the New York Power Authority selected another bid.

II. Rehearing Request

8. On rehearing, the New Jersey Board argues that the Commission relied on an insufficient record in finding that the Cross Hudson Project is a merchant generator lead line rather than a merchant transmission facility. The New Jersey Board points to the fact that the 600-610 megawatt capacity of the Project will exceed the 550 megawatt capacity of Bergen 2, and to the petitioners’ statement that they are considering the possibility of using the Project to ship additional non-Bergen 2 capacity into the NYISO market. The New Jersey Board suggests that these facts tend to show that the Project is a merchant transmission facility. The New Jersey Board also claims that the Commission expressed concern that the Project may not operate as described when it rejected the petitioners’ request for a commitment from the Commission to never require the Project to connect to PJM pursuant to section 202 of the Federal Power Act. The New Jersey Board points specifically to the Commission’s statement that if energy from non-Bergen 2 generation is delivered by the Project, and the output of these non-Bergen 2 generators is not delivered exclusively over the Project, then the Project would no longer be exclusively

⁸ *Id.* P 19-20.

⁹ *Id.* P 22.

¹⁰ *Id.*

interconnected to the New York City market and would have to be considered a merchant transmission line.

9. The New Jersey Board also points to the NRG Companies' assertion in their protest that they may want to ship energy through the Project from New Jersey to New York and vice versa. The New Jersey Board argues that while the Commission effectively rejected this argument when it stated that there is nothing in the record to indicate that the Project will transmit reactive power, the record is actually silent in this regard and a more complete record would enable the Commission to make an informed decision. Similarly, the New Jersey Board maintains that the critical issues pertaining to reliability, pricing, competition, and conflict between regional transmission organizations require a more robust factual record and closer Commission scrutiny.

10. Finally, the New Jersey Board argues that the Commission's decision to classify the Project as a merchant generator lead line may set a precedent that will impede, rather than enhance, the Commission's preference for open access transmission within and between regional transmission organizations and independent system operators. The New Jersey Board contends that the Commission's decision may unwittingly encourage additional "extension cord" projects that will be detrimental to reliability and unnecessarily increase costs.

11. The PSEG Entities submitted an answer to the rehearing request.

III. Commission Determination

A. Procedural Matters

12. Rule 713(d) of the Commission's Rules of Practice and Procedure¹¹ prohibits an answer to a request for rehearing. Accordingly, we reject PSEG Entities' answer.

B. Substantive Matters

13. It appears that that the request for rehearing may be moot, as the Project was not selected by the New York Power Authority as the winning bidder. The New Jersey Board's concerns about the completeness of the record, and the rates that may be charged, thus appear to have been overtaken by events. However, even if it is not moot, we deny rehearing and reject the New Jersey Board's claim that the Commission relied on an incomplete record in finding that the Cross Hudson Project is a merchant generator lead line rather than a merchant transmission facility. The information presented in the petition about the characteristics, construction, purpose, and possible uses of the Project was sufficient to allow the Commission to evaluate it and distinguish it from merchant

¹¹ 18 C.F.R. § 385.713(d) (2009).

transmission facilities. Thus, the Commission cited specific aspects of the Project that are typical of merchant transmission facilities and aspects typical of generator lead lines and, based on the information presented in the petition, determined that the Project is a merchant generator lead line.

14. We note, moreover, that the New Jersey Board does not identify what relevant information the Commission allegedly lacked in determining the Project's proper classification. The New Jersey Board does not allege that the Commission misconstrued the criteria it used to distinguish a merchant transmission facility and a generator lead line, relied on false or misleading facts about the Project, or overlooked critical facts about the nature of the Project. The closest the New Jersey Board comes to any such allegation is its reference to the petitioners' statement about potentially using the Project to ship non-Bergen 2 capacity into the NYISO market. But, as the New Jersey Board acknowledges, in the April 2008 Order the Commission stated that if this possibility comes to fruition, it might have to reevaluate whether the Project qualifies for non-cost-based, negotiated rates.¹² The Commission further stated that its decision in the April 2008 Order was confined to the specific circumstances presented in the petition, and that the Project's classification as a merchant generator lead line is not fixed.¹³ Since the Commission already accounted for the possibility that the Project will transmit non-Bergen 2 capacity,¹⁴ we cannot see how this possibility demonstrates that the Commission based its decision on an incomplete record.

15. Similarly, we are not persuaded by the New Jersey Board's assertion that the record is silent with respect to whether the Project will transmit reactive power; the Commission said as much in the April 2008 Order when it stated that there is nothing in the record to indicate that the Project will transmit reactive power.¹⁵ The New Jersey Board does not offer any evidence to indicate that this is a possibility. In any event, immediately after making the observation that the record is silent about reactive power, the Commission again stressed that it was relying on the facts presented in the petition. If those facts change, the Commission may have to reevaluate its conclusions.

16. Finally, we do not agree that the April 2008 Order will set a precedent that will impede, rather than enhance, the Commission's preference for open access transmission. In the April 2008 Order, the Commission made clear that its decision to grant the

¹² April 2008 Order, 123 FERC ¶ 61,001 at P 22.

¹³ *Id.*

¹⁴ *Id.* P 23.

¹⁵ *Id.* P 26.

petitioners' request for a waiver of the requirements of Order No. 888¹⁶ was based on the information presented in the petition.¹⁷ Moreover, the Commission explained that, despite the waiver, if Cross Hudson should receive a request for transmission service, it must file an open access transmission tariff with the Commission within sixty days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.¹⁸

The Commission orders:

The New Jersey Board's rehearing request is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁷ April 2008 Order, 123 FERC ¶ 61,001 at P 26.

¹⁸ *Id.*