

134 FERC ¶ 61,030  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Hudson Transmission Partners, LLC

Docket No. ER10-1281-001

ORDER DENYING REHEARING

(Issued January 20, 2011)

1. Cavallo Cross Hudson Management Company, LLC (Cross Hudson) seeks rehearing of the Commission's May 25, 2010 order issued in this proceeding.<sup>1</sup> For the reasons discussed below, we deny rehearing.

**Background**

2. On May 19, 2010, Hudson Transmission Partners, LLC (HTP) submitted a filing requesting a limited waiver of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (PJM OATT) provisions Section 212.4(c) and Attachment O, Section 6.5, as applicable to the posting of deferred security for HTP's transmission project (Hudson Transmission Project).<sup>2</sup> The Hudson Transmission Project is a 673 MW merchant transmission line intended to relieve congestion in and around the New York City area. The project is designed to run underground from northern New Jersey and

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<sup>1</sup> *Hudson Transmission Partners, LLC*, 131 FERC ¶ 61,157 (2010) (May 25 Order).

<sup>2</sup> Section 212(c) of the PJM OATT ("Deferred Security") provides in relevant part that the "Interconnection Customer may request to defer providing security [for its project] until no later than 120 days after executing the Interconnection Service Agreement, provided Interconnection Customer shall pay a deposit of at least \$200,000 or 125 percent of the estimated costs that will be incurred during the 120-day period, whichever is greater, to fund continued design work, with \$100,000 of such deposit being non-refundable." The same requirement is set forth at Schedule O, section 6.5 of the PJM OATT, which addresses the form of the Interconnection Service Agreement.

transverse the Hudson River, utilize advanced high voltage direct current (HVDC) technology, and provide control over power flows and synchronized power between PJM and the New York Independent System Operator, Inc. (New York ISO).<sup>3</sup>

3. In its filing, HTP stated that its request to interconnect its project facilities to the PJM grid had been submitted to PJM in July 2005 and that HTP has since paid over \$2 million in interconnection study costs. HTP added that, after five years and tens of millions of dollars in related investment, construction on its project was ready to commence. HTP stated that all permits had been obtained from New Jersey, where the bulk of the facilities would be located, and that all additional permits were expected to be issued in the near future. With respect to financing, HTP stated that the lead lenders for its project had been identified and that the financial community was ready to invest. HTP noted that the financial closing for its project was expected to occur soon.

4. HTP stated that, pursuant to the PJM OATT, its project would require the execution of an Interconnection Service Agreement (ISA) and an Interconnection Construction Service Agreement (ICSA).<sup>4</sup> HTP stated that, while it had signed these agreements and returned them to PJM on January 25, 2009, PJM had informed HTP, on March 9, 2010, that changes to the agreements would need to be made.<sup>5</sup> HTP stated that these revisions were not finalized and agreed to by the parties until May 6, 2010. HTP stated that, in the meantime, the 120-day cost deferral period that commenced on the date that HTP first tendered these agreements to PJM (that is, on January 25, 2009) was about to expire. HTP stated that following the expiration of this deferral period, and absent the grant of the waiver it requested, HTP would be required to pay to PJM the full amount of the deferred security (\$172 million), as required by PJM OATT, Section 212.4(c) and Attachment O, Section 6.5. Accordingly, HTP sought a limited waiver of these provisions through October 31, 2010.

5. In the May 25 Order, the Commission found that a waiver of a tariff requirement may be granted, in certain limited instances, subject to the application of a four-prong test

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<sup>3</sup> The Hudson Transmission Project was selected in November 2006 by the New York Power Authority (NYPA), through a competitive request-for-proposals process, to deliver power to NYPA's customers.

<sup>4</sup> The ISA and ICSA will be three-party agreements among HTP, PJM, and Public Service Electric and Gas Company (PSEG), the interconnection transmission owner for the project. PJM noted that a second ICSA among PJM, HTP, and Jersey Central had already been executed.

<sup>5</sup> HTP returned the agreements to PJM on January 25, 2010, not January 25, 2009, the date erroneously noted in HTP's filing.

demonstrating that: (i) the applicant has been unable to comply with the tariff provision at issue in good faith; (ii) the waiver is of limited scope; (iii) a concrete problem will be remedied by granting the requisite waiver; and (iv) the waiver does not have undesirable consequences, such as harming third parties.<sup>6</sup> The Commission found that HTP's requested waiver satisfied each of these conditions.

6. First, the Commission found that all parties to the ISA and ICSA had made good faith efforts to satisfy their respective obligations in connection with the numerous milestones applicable to the Hudson Transmission Project. Specifically, the Commission explained that, subsequent to HTP's original execution and submittal of the ISA and ICSA to PJM, entities other than HTP had proposed to make a number of material changes, including changes to the schedule of work. The Commission further noted that the terms of the three-party agreements had not been ultimately agreed upon until May 6, 2010 and that these agreements had not yet been executed. The Commission found that, under these circumstances, HTP's inability to satisfy PJM's deferred security requirement by the 120-day deadline specified in PJM's OATT did not detract from HTP's good faith effort to complete the steps necessary to interconnect its project facilities to the PJM grid.

7. The Commission added that the purpose underlying PJM's 120-day deferral period is to provide interconnecting customers with additional time and flexibility to obtain financing after the ISA has been completed. The Commission noted, however, that here HTP had represented that it could not obtain financing for its project without the additional deferral period it had requested, given the significant material changes to the ISA and ICSA proposed by third parties after HTP had already executed these agreements, and given the overall complexity of its project. The Commission found that, under these circumstances, granting the waiver requested by HTP was consistent with the fundamental purpose of the deferred security provisions of PJM's OATT.

8. The Commission also agreed that the requested waiver would be limited in scope and would remedy a concrete problem, i.e., that the grant of the requested waiver would keep the Hudson Transmission Project on schedule. Finally, the Commission found that granting the requested waiver would have no undesirable consequences, given that each of the parties to the three-way interconnection agreements supported HTP's waiver request, and given PJM's representation that it did not know of any project that would be delayed, or incur increased costs, in the event HTP's request was granted. Accordingly, the Commission granted HTP's waiver request through October 31, 2010.

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<sup>6</sup> May 25 Order, 131 FERC ¶ 61,177 at P 10. *See also ISO New England Inc. and EnerNOC, Inc.*, 122 FERC ¶ 61,297 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

### **Request for Rehearing**

9. Cross Hudson argues that the May 25 Order's grant of HTP's waiver request will operate to deprive Cross Hudson of a competitive advantage, given that Cross Hudson is HTP's direct competitor regarding the project at issue. As a threshold matter, Cross Hudson acknowledges that the Commission utilized the proper four-prong test in considering HTP's request. Cross Hudson argues, however, that none of the required showings was supported by the Commission in its order.

10. First, Cross Hudson asserts as error the Commission's finding that HTP's inability to comply with PJM's security requirement, under the timeframe allowed, was the product of actions, or omissions, undertaken by HTP in good faith. Cross Hudson argues, to the contrary, that a good faith finding cannot be supported here. Specifically, Cross Hudson argues that HTP was familiar with the PJM interconnection process and had sufficient time to make the necessary arrangements to post security as of the prescribed deadline.

11. Cross Hudson also challenges the Commission's finding that good faith was established given the significant changes made to the ISA and ICSA and the overall complexity of the project. Cross Hudson argues that these circumstances should not have prevented HTP from anticipating the need to post security. Cross Hudson adds that, even assuming that HTP had been justified in waiting until the revised ISA was complete before initiating its efforts to obtain project financing, over two weeks elapsed from the date that these revisions were completed and the date that HTP filed its waiver request. Cross Hudson further asserts that the presumed complexity of the HTP project had nothing to do with the question of why HTP chose to file for a waiver at the very last minute, as it did. Cross Hudson asserts that, regardless, HTP's project design is needlessly complex as it relies on a high cost technical design (AC/DC/AC technology rather than a Phase Angle Regulator) and a questionable commercial thesis (firm capacity versus energy only).

12. Cross Hudson also challenges the Commission's finding that HTP's waiver request was limited in scope. Cross Hudson argues that the Commission did not support this finding and that the waiver granted by the Commission is not limited in its scope because its reach and impact directly affects Cross Hudson, HTP's competitor, and other entities with a position at stake in PJM's interconnection request queue. Cross Hudson adds that the Commission's willingness to waive PJM OATT requirements will cause uncertainty for future transmission developers who must depend on the Commission's unbiased enforcement of PJM's rules.

13. Cross Hudson also asserts as error the Commission's finding that the waiver, as granted, will remedy a concrete problem, i.e., that it will keep the HTP project on schedule. Cross Hudson argues that the Commission should not have given HTP a

waiver of its security obligations just to keep the project on schedule. Finally, Cross Hudson disputes the Commission's finding that granting HTP's waiver request will have no undesirable consequences. As noted above, Cross Hudson asserts, to the contrary, that it will lose a competitive advantage if HTP's project is allowed to proceed.<sup>7</sup>

### **Discussion**

14. We deny rehearing of the May 25 Order. Cross Hudson asserts as error the Commission's findings, in the May 25 Order, that HTP's requested waiver of PJM's deferred security requirements for a limited period, through October 31, 2010, satisfied the Commission's four-prong test supporting the grant of such a waiver.<sup>8</sup> We find that each of these required findings was adequately supported in the May 25 Order.

15. First, we find that the Commission appropriately concluded that HTP's inability to post security as of the 120-day deadline specified under PJM's OATT was attributable to incidental factors arising at the conclusion of a long, largely completed process that did not draw into question HTP's good faith efforts to meet its remaining obligations, as specified under PJM's OATT. Under the PJM's interconnection request protocols, PJM is required to provide an interconnecting applicant with a final interconnection agreement.<sup>9</sup> Under Section 212.4 of PJM's OATT, the interconnecting customer is then given 120 days to provide the required collateral.<sup>10</sup> This 120-day allowance recognizes that an interconnection applicant may need a final interconnection agreement in place in order to arrange financing, and the provision provides adequate time to arrange such financing based on a final interconnection agreement. Here, moreover, it is undisputed that the interconnection agreement HTP signed and tendered to PJM, on January 25,

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<sup>7</sup> Cross Hudson notes that on May 17, 2010, it commenced an open season, offering service over the HTP line to the winning bidder. Binding sealed bids were due August 2, 2010.

<sup>8</sup> As noted above, an applicant seeking a waiver of a tariff requirement is required to demonstrate that: (i) the applicant has been unable to comply with the tariff provision at issue in good faith; (ii) the waiver is limited in scope; and (iii) a concrete problem will be remedied by granting the requisite waiver; and (iv) the waiver does not have undesirable consequences, such as harming third parties. *See supra* P 6.

<sup>9</sup> *See* PJM OATT, Section VI, Subpart B, Section 212; Order No. 2003, Appendix C *Pro Forma* Standard Large Generator Interconnection Agreement (LGIA) Section 11.2 ("the Transmission Provider shall provide to the Interconnection Customer a final LGIA.").

<sup>10</sup> *See* PJM OATT, Section VI, Subpart B, Section 212.4.

2010, turned out not to be final, given PJM's material amendments. Given these revisions, the large scale and features of HTP's project, and its consequent need to acquire financing based on a completed interconnection agreement, the Commission appropriately concluded in the May 25 Order that granting a limited waiver of PJM's deferred payment requirement was justified.

16. Cross Hudson insists, on rehearing, that HTP was familiar with the interconnection process and that, as such, its inability to meet the deferred payment deadline cannot be excused as a good faith effort to comply. Cross Hudson further argues that HTP should have anticipated the need to post security, regardless of the intervening events outlined in its request.

17. We disagree. Regardless of HTP's actual or presumed knowledge of the rules applicable to its interconnection request application, we do not find that HTP should have anticipated that PJM would make material changes to its agreement. These changes, for the reasons outlined by the Commission in the May 25 Order, were beyond HTP's control. Cross Hudson, moreover, points to no evidence suggesting that HTP could have anticipated these changes or could have obtained its project financing prior to the conclusion of the negotiated revisions. Nor does Cross Hudson cite to any credible evidence demonstrating that, in the limited time left to post its deferred payment, HTP either could have, or should have, been able to both initiate and complete the financing of its project, or that it was otherwise unreasonable to conclude that additional time might be required.

18. Nor can we agree with Cross Hudson's alternative argument that a good faith showing in this case would have required HTP to file its request two weeks earlier than it did, on or around May 6, 2010. We cannot find that delaying a waiver request to consider the implications of a change in the interconnection agreement negates good faith. Given the long lag time involved in the development and approval of a transmission project intersecting two regional transmission organizations (HTP initially filed the interconnection request here in July 2005) and given the number of parties, regulatory approvals, and multi-faceted steps involved, we are not persuaded that such a limited filing window as proposed by Cross Hudson has any bearing on our assessment of HTP's good faith efforts. To the contrary, HTP's good faith efforts must be assessed relative to its overall commitment and performance.

19. Nor do we view as relevant to this assessment Cross Hudson's assertion that HTP's project is needlessly complex and costly. These considerations, which are for the competitive market to determine, have no bearing on the issue of whether HTP has made a good faith effort to comply with its obligations, including the deferred payment obligation at issue here.

20. Cross Hudson also challenges the Commission's finding that HTP's waiver request was limited in scope. Cross Hudson claims that this finding cannot be supported because granting HTP's waiver and allowing its project to remain on schedule will prevent Cross Hudson from advancing its own alternative project in place of HTP's project. However, we find that the Commission appropriately concluded that HTP's waiver request was limited in scope, given that the OATT requirement at issue was one of many obligations that HTP had to satisfy and because it was not waived in its entirety, but simply deferred for a reasonable time, to accommodate the delay in finalizing HTP's interconnection agreements. HTP's waiver request, moreover, was consistent with the underlying intent of the deferral requirement, since it essentially provided HTP with the 120 days specified in the tariff within which to provide security.<sup>11</sup>

21. Cross Hudson disputes the Commission's finding that granting HTP's waiver request will have no undesirable consequences. It alleges that it could have been in a position to benefit had HTP failed to meet its deferred payment deadline and had HTP's project been withdrawn from the PJM interconnection request queue. The Commission, in acting on a waiver request, however, must consider the rights, obligations, and overall equities as they are presented and as they exist. We have taken into account Cross Hudson's concern that it is competitively disadvantaged by the Commission's grant of the limited waiver, but continue to find that given PJM's own conduct in making revisions to the interconnection agreement, which could not have been anticipated, and the other reasons discussed above, a waiver was justified. The interconnection process, as outlined in Order No. 2003 is predicated on all parties, including the transmission owner, complying in full with all applicable requirements.<sup>12</sup> Here, while PJM had a good faith justification for changing the interconnection agreement, such a revision warrants a corresponding change applicable to the deferred payment deadline.

22. We also reject Cross Hudson's argument that granting HTP's waiver request will promote uncertainty regarding the enforceability of PJM's rules and thus operate to

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<sup>11</sup> May 25 Order, 131 FERC ¶ 61,157 at P 13 (“[T]he purpose of PJM’s 120-day deferral period is to provide interconnecting customers with additional time and flexibility to obtain financing after having a complete ISA.”).

<sup>12</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2005), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 374 U.S. App. D.C. 406 (D.C. Cir. 2007).

impede future transmission development. The waiver at issue here was granted based on PJM's revision to the final interconnection agreement and the other circumstances involved in this case. The Commission's limited waiver, under the facts presented here, does not signal to other developers, as Cross Hudson asserts, that they cannot rely or place their faith in PJM's interconnection rules. The Commission's grant of a one-time, fixed-term waiver will not impede transmission development, but rather will allow a project, in which significant investments have already been made, to move forward.

23. Cross Hudson also disputes the Commission's finding that, because a waiver of the deferred payment obligation will keep HTP's project on schedule, HTP's waiver request will remedy a concrete problem. Cross Hudson argues that the only concrete problem at issue in this case was HTP's inability to make its deferred security payment within the 120-day period provided for under PJM's OATT. However, for the reasons discussed above, we have rejected this argument and find that a waiver in this case was justified to remedy the problem created by PJM's amendments to the interconnection agreement.

The Commission orders:

Cross Hudson's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.