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July 11, 2002

Honorable Magalie R. Salas
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: PSEG Power Cross Hudson Corporation -
Docket No. EL02-98-000

Dear Secretary Salas:

For filing please find the Protest of the Public Service Commission of New York in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 486-2652.

Very truly yours,

Saul A. Rigberg
Assistant Counsel

Enclosures

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

PSEG Power Cross Hudson Corporation)

Docket No. EL02-98-000

***PROTEST OF THE PUBLIC SERVICE COMMISSION OF
NEW YORK TO PETITION FOR A DECLARATORY ORDER***

I. INTRODUCTION AND SUMMARY

Pursuant to a Notice of Extension of Time, dated July 5, 2002, and 18 C.F.R. § 385.213 (2001), the Public Service Commission of the State of New York (NYSPC) respectfully submits this Protest to the Petition for the Declaratory Order (Petition) of PSEG Power Cross Hudson (Cross Hudson).¹ The Petition arises out of testimony filed in a NYSPC transmission siting proceeding that addresses the benefits and impacts of various transmission cables that seek to interconnect at the West 49th Street Substation in New York City.

The Petition is premature and should be rejected because Cross Hudson's alleged harm is speculative at best in that the NYSPC has not issued a decision adverse to Cross Hudson. The Petition is also substantively flawed because there is no jurisdictional conflict between the

¹ Cross Hudson describes itself as a wholly-owned subsidiary of PSEG Power, LLC. Petition at 7. PSEG Power, in turn, is a wholly-owned subsidiary of Public Service Enterprise Group, an exempt public utility holding company under the Public Utility Holding Company Act of 1935, as amended. Through its wholly-owned subsidiaries, PSEG Power owns and operates power plants totaling more than 12,000 MW in operating capacity located in the Northeast and Midwest. *Id.* In a related proceeding (Docket No. ER02-2126-000), another subsidiary of PSEG Power, PSEG Power In-City I, LLC, (In-City) is seeking an Interconnection Agreement with Consolidated Edison Company of New York, Inc. (Con Edison). In a third proceeding, Public Service Electric and Gas Company (PSE&G), also an affiliate of PSEG Power, is involved in a contract dispute with Con Edison in Docket No. EL02-23-000. In that proceeding, Con Edison alleges that PSE&G took advantage of market power by restricting power flows to New York City in a way that increased the value of the Transmission Congestion Contracts (TCCs) held by PSE&G or one of its corporate affiliates.

interconnection authority of the Federal Energy Regulatory Commission (Commission) and the NYPSC's jurisdiction over transmission siting. Indeed, federal-state interests on the issues described by Cross Hudson are complementary; namely, the fostering of workably competitive markets and the diminution of opportunities for market power while maintaining reliability.

The Commission's authority over the terms and conditions pertaining to electric transmission interconnection under Sections 202, 205 and 210 of the Federal Power Act (FPA) is assumed by the NYPSC. In fact, the NYPSC has filed comments in Docket No. RM02-1-000 (Standardization of Generator Interconnection Agreements and Procedures) supporting the Commission's interconnection initiatives to foster competition by diminishing the ability of transmission providers to exercise market power.²

Concomitantly, siting of transmission facilities is within the jurisdiction of the states. Statutes providing for the environmental review of projects, such as Article VII of the New York Public Service Law (PSL), typically require a balancing of the benefits of a project with environmental impacts³ in determining if the line would further the public interest.⁴ Such

² We share, moreover, Chairman Pat Wood's concern, which he stated at the Commission's session of June 12, 2002, that vertically integrated utilities pose a risk to the successful development of a competitive electric industry.

³ Cross Hudson refers to Article VII as "a typical state siting" process. Petition at 4.

⁴ Cross Hudson has indicated that after three years of operation, it may disconnect the cable connected to West 49th Street from the generating plant and connect the plant to the PJM system. One of the open issues raised by the Commission's Notice of Proposed Rulemaking (NOPR) in Docket No. RM02-1-000 is for how long and under what circumstances a generator may have a hold on to an interconnection without actually using it. In the NYPSC's Comments (at 9-11), we pointed out that in certain rare situations, such as regarding the W. 49th Substation, where it is not possible to physically accommodate every company that may seek to interconnect into a load pocket, it may not be in the public interest for a company to not provide energy while, at the same time, preventing other companies from doing so.

balancing requires the NYPSC (and most states) to consider the effect a proposed transmission project would have on local rates and reliability.

Such analyses certainly need not, and should not, conflict with the Commission's fulfillment of its statutory duties. Insofar as the Petition suggests the Commission may (or should) preempt the NYPSC's consideration of rate and reliability issues in the Article VII proceeding, the Petition is incorrect—and if it is to be addressed—should be rejected.

II. PROCEDURAL BACKGROUND

The New York City load pocket is often not workably competitive and is in need of new sources of energy both to maintain reliability and to avoid the successful exercise of market power. In the last quarter of 2001, six developers advised the staff of the New York Department of Public Service (NYDPS Staff) of potential filings for authorization to construct transmission lines that would each seek one or two interconnections with the West 49th Street Substation owned and operated by the Consolidated Edison of New York Company (Con Edison). Three companies eventually submitted applications pursuant to Article VII of the PSL for Certificates of Environmental Compatibility and Public Need (Certificate) to construct and operate transmission facilities.⁵ The West 49th Street Substation, however, could not physically

⁵ Cross Hudson filed its Cross Hudson Project application on October 12, 2001; Atlantic Energy filed its Neptune (Phase I) Project on January 14, 2002; and GenPower, New York filed its Hudson Energy Project on January 18, 2002. GenPower has since asked that consideration of its application be held in abeyance. Another company, TransEnergie, has completed the required studies for its proposed HUDC Harbor Cable Project to connect PJM and NYC, and has announced its intention to file an Article VII application in the Fall of 2002.

accommodate all of the potential projects, even if new interconnection positions were added.⁶

Article VII is a comprehensive statutory framework under which the NYPSC considers requests to site transmission facilities. The PSL (Section 126) requires an analysis of the need for a project and its economic impacts with its effect on the environment by requiring that before the NYPSC may grant a certificate, it must find and determine, inter alia:

- 1) the basis of the need for the facility;
- 2) the nature of the probable environmental impact;
- 3) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of any alternatives proposed;
- 4) that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving New York and interconnected utility systems, which will serve the interests of electric system economy and reliability; and,
- 5) that the facility will serve the public interest, convenience and necessity.

Upon receiving the three Article VII applications and mindful of the possibility of additional requests to connect into the West 49th Street Substation, the NYPSC adopted the Commission's established practice when confronted with mutually exclusive pipeline proposals.

⁶ As currently configured, the design of the West 49th Street Substation is a "single ring bus" consisting of various electric facilities (e.g., busses, circuit breakers, disconnect switches, cable terminations). Except for one bus position being retained by Con Edison for system expansion and reliability purposes, the existing bus positions at the West 49th Street Substation are fully utilized. However, the substation was designed with the capability of being expanded into a "double ring bus" configuration within the existing property. Upon completion of such expansion, three bus positions would be created in addition to the bus position Con Edison is seeking to retain to supply load requirements in New York City.

In such situations, the parties often raise and the Commission relies upon what is called the “Ashbacker Doctrine.”⁷

On February 6, 2002, the NYPSC issued a Notice of Opportunity to Participate In Combined Siting Proceeding in Case No. 02-M-0132 (Notice). The Notice explained that “the purpose of the combined proceeding is to coordinate and expedite the siting of major electric transmission facilities proposed to be terminated at the West 49th Street Substation so as to facilitate the construction of new transmission facilities that could be in service before the period of peak load in the Summer of 2003.” Notice at 2. The Notice explained that the joint proceeding would consider “the physical and environmental limitations of the West 49th Street Substation and environs to accommodate additional transmission facilities, the relative system benefits of such facilities, as well as the need or potential need to reserve room at the West 49th Street Substation for a new line to support local distribution facilities elsewhere in Manhattan.” Id.

A Combined Proceeding schedule was adopted with the intention of accommodating a Summer 2003 in-service date. Subsequently, Cross Hudson interrupted the proceeding with a motion, which was granted, to suspend the proceeding so it could pursue the instant Petition.

⁷ In Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), the Supreme Court required mutually exclusive proposals to be compared in the same evidentiary hearing. The purpose of the Ashbacker Doctrine is to ensure that in instances where two or more applications for a statutory license are pending that only could be granted to one, each application is afforded its statutory right to a hearing before either one of them is granted a license. Because, in such instances, the grant of a license to one of the applicants constitutes a *de facto* denial of the other’s application “the grant of one without a hearing to both deprives the loser of the opportunity [of a hearing] which Congress chose to give him.” Ashbacker, 326 U.S. at 333.

III. CROSS HUDSON'S PETITION

Cross Hudson asserts that it filed its June 12, 2002 Petition “to prevent a conflict between the Commission’s open-access policies on generator interconnections and state regulation that threatens imminently to encroach upon and conflict with those policies.” Petition at 1. Cross Hudson seeks in its Petition declarations that only the Commission can determine the terms, conditions, and charges for interconnection and transmission service to Cross Hudson,⁸ and that a state may not consider as part of its siting process whether one project would benefit development of a workably competitive regional electric market better than another project. Petition at 6-7.

Cross Hudson relies on NYDPS Staff testimony to argue that “the Commission’s core policy of non-discriminatory open access is threatened by provincial interests that would discriminate against some Eligible Customers at the expense of others, in violation of the Commission’s open-access rules.” *Id.* at 8. According to Cross Hudson, the “NYPSC’s decision to convene the combined proceeding, in itself, evidences New York’s intent to develop its own interconnection criteria in disregard of the Commission’s open access rules.” *Id.* at 9. The Petition continues:

...the Combined Proceeding’s only purpose is to develop additional, inconsistent criteria (such as the Con Edison and NYPSC staff conditions) for selecting among projects competing for space at the West 49th Street substation, and certifying only those that, in the view of the NYPSC, most greatly benefit the State’s interests. If the NYPSC succeeds with these goals, it will trump the selection process of an open-competitive market with its own provincial criteria.

Id. at 9-10.

⁸ It is actually an affiliate of Cross Hudson, In-City, that is seeking an Interconnection Agreement with Con Edison.

IV. CROSS HUDSON'S PETITION IS PREMATURE AND DOES NOT SATISFY THE STANDARD FOR A DECLARATORY ORDER

Cross Hudson cites Phillips Petroleum Co., 58 FERC ¶ 61,290 at 61,932 (1992) for the proposition that a declaratory order is appropriate “whenever the declaration is needed to terminate a controversy or remove uncertainty.” Petition at 18-19. In Phillips, the Commission actually refused to grant a request for a declaratory order, finding that “the proper circumstances which would justify a declaratory order are not present.” Phillips, 58 FERC ¶ 61,290 at 61,931.

It also explained that “the petition does not present any issues that would affect any existing disputes concerning the Commission’s regulatory responsibilities with respect to the petitioners.” Id. at ¶ 61,932. Further, “a declaratory order would likely generate controversy, not remove it.” Id. The Commission continued:

As to solving a controversy, the underlying dispute may be resolved by the tax tribunal without reaching any question within the Commission’s exclusive jurisdiction. In any event, petitioner and Alaska state that, whatever ruling the Commission would make at this point, the dispute would not end with that ruling.

Id.

The instant Petition presents a similar situation and calls for the same result. First, the issues underlying the Petition may be resolved by the parties. Second, the agency staff testimony Cross Hudson finds objectionable, which suggested various approaches to resolving potential load pocket problems, has no legal consequences unless it someday provides evidentiary support for a final agency decision.

The Commission has refused to act on requests for relief that it deems premature. Cargill-Alliant, LLC v. Midwest Independent Transmission System Operator Inc., 98 FERC ¶ 61,148 at 61,506 (2002). The Commission has also denied requests based on speculation about potential future harms and without a record to base a decision. Northwest Pipeline Corporation, ANR Pipeline Company, 71 FERC ¶ 61,202 at 61,739 (1995); Southern Indiana Gas and Electric

Company, Indiana Energy, Inc., Vectren Corporation, 89 FERC ¶ 61,288 at 61,904. Cross Hudson's allegations regarding a future decision by the NYPSC are similarly speculative and premature.

V. CONTRARY TO CROSS HUDSON'S CLAIM, A JURISDICTIONAL CONFLICT DOES NOT EXIST BETWEEN THE COMMISSION AND THE NYPSC

Cross Hudson is correct that the terms, conditions, and charges for generator interconnection, as a component of transmission service, are within the Commission's exclusive jurisdiction. Section 202(b) of the Federal Power Act (FPA) (16 USC §824b) authorized the Commission to order physical connections to sell energy. Over the years the Commission has addressed a wide gamut of interconnection issues including scope of studies, priority of requests, and cost responsibility. In New York, these issues are resolved pursuant to the Commission-approved tariffs of the NYISO.

Cross Hudson is mistaken, however, in its claim that the Combined Siting Proceeding infringes upon the Commission's interconnection jurisdiction. The Petition, indeed, appears to confuse interconnection issues with transmission siting issues, stating, for example:

Cross Hudson's proposal to interconnect Bergen 2 to Con Ed's West 49th Street Substation cannot be deemed less worthy, and given a lower priority status by the NYPSC, based on the fact that it proposes to interconnect a single generating unit to the New York market, whereas a competing project proposes a merchant transmission line that will sell Transmission Scheduling Rights to a possibly wider group of purchasers.

In Order No. 888, the Commission agreed that "Congress left to the States authority to

regulate generation and transmission siting.”⁹ The NYPSC proceeding focuses on the environmental and economic aspects of proposed transmission lines from a siting perspective (i.e., their impact on retail rates and reliability), issues that are well within the NYPSC’s jurisdiction.¹⁰ In assessing local energy benefits, in terms of reliability and rates,¹¹ NYPSC must consider whether the proposed line could exacerbate market power in such a way as to impede the reliability and rate benefits that would otherwise be available to the consumer. If such is the case, then the line’s potential economic benefits could be severely diminished and fall short in outweighing the proposed line’s environmental impact.¹²

Accordingly, the NYPSC Combined Proceeding will address economic issues, such as retail rate impacts associated with the project projects. It will not, however, attempt to dictate interconnection issues or other matters that fall within the jurisdiction of the Commission.

⁹ Order No. 888, at 31,782, n. 543. In quoting this statement, the United States Supreme Court in New York v. FERC, 122 S.Ct 1012, 1028 (2001) did not suggest in any way that it was incorrect or that it disagreed with the relevant case law.

¹⁰ Recitation of the standard does not suggest that states could impede interstate commerce by refusing to site lines needed for the provision of electricity to or from a neighboring state.

¹¹ In New York, the Supreme Court stated unequivocally that the states retain jurisdiction “of the ultimate sale of the *energy*.” 535 U.S., slip op. at 21; emphasis in original.

¹² Environmental impact statements routinely include analysis of the economic impacts projects. Environmental Defense Fund v. Tennessee Valley Authority, 371 F. Supp. 1004, 1010-11 (E.D. Tenn. 1973). While economic factors are not controlling in NEPA cases, they should not be ignored and are legitimate considerations. Conservation Law Foundation of New York v. General Services Administration, 427 F. Supp. 1369, 1376 (D.R.I. 1977). Similarly, the NYPSC’s granting of an Article VII Certificate to an applicant based on the benefit to competition has been deemed proper. CNG Transmission Corp. v. NYPSC, 185 A.D. 2d 671 (4th Dept. 1992) [pipeline would introduce competition into a monopolistic marketplace and thus lower prices to consumers and that the facility represented a minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives].

VI. CONCLUSION

For the reasons expressed above, Cross Hudson's Petition should be dismissed either on procedural grounds or on the merits.

Respectfully submitted,

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Dated: July 11, 2002
Albany, New York

CERTIFICATE OF SERVICE

I, Karen Houle, do hereby certify that I will serve on July 11, 2002, the foregoing Protest of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Karen Houle

Date: July 11, 2002
Albany, New York