

122 FERC ¶ 61,024
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. EL07-70-001

v.

New York Independent System Operator, Inc.

Order Denying Rehearing

(Issued January 17, 2008)

1. Cross Hudson Corporation (Cross Hudson) and the New York Independent System Operator, Inc. (NYISO) request rehearing of the Commission's order of August 22, 2007 (August 22 Order)¹ granting the complaint filed by Hudson Transmission Partners, LLC (HTP) seeking to remove Cross Hudson's interconnection project from its Queue Position No. 93 following Cross Hudson's written notice of withdrawal of its project to NYISO, as set out in section 3.6² of the Large Facility Interconnection Procedures (LFIP), Attachment X to NYISO's Open Access Transmission Tariff (OATT). For the reasons discussed below, the Commission denies the requests for rehearing and the requests for clarification.

I. Background

2. The Cross Hudson Project, whose history is detailed in the August 22 Order,³ is, in brief, a transmission line of up to 550 MW from a New Jersey generating facility to the NYISO transmission system at Consolidated Edison Company of New York's (ConEd's) West 49th Street Substation in New York City. The HTP Project, a competitor to the Cross Hudson Project and whose history is also detailed in the August 22 Order,⁴ is a

¹ *Hudson Transmission Partners, LLC v. New York Independent System Operator*, 120 FERC ¶ 61,179 (2007).

² Section 3.6 states, in relevant part, that "[t]he Developer may withdraw its Interconnection Request at any time by written notice of such withdrawal to the NYISO."

³ *Id.* P 8-23.

⁴ *Id.* P 24-28.

660 MW controllable transmission line that will also begin in New Jersey and interconnect to ConEd's West 49th Street Substation.

3. On June 13, 2007, HTP filed a complaint against NYISO alleging that NYISO had unjustly and unreasonably interpreted and implemented the interconnection queue provisions of its OATT and Commission precedent in failing to remove the Cross Hudson Project from Queue Position No. 93 in the NYISO interconnection queue. In particular, HTP argued that as a result of a February 24, 2005 letter (February 24, 2005 Letter) that Cross Hudson's parent company, PSEG Power LLC (PSEG), sent to the Commission and parties⁵ in Docket No. EL04-126, informing the Commission that it "discontinued development of its [] project, . . . no longer requires access to a bus position at the West 49th Street Station, and no longer causes ConEd to require upgrades to its transmission system,"⁶ the NYISO should have withdrawn the Interconnection Request of the project and removed it from the interconnection queue. In its complaint, HTP mentioned how ConEd, in response to the February 24, 2005 Letter, "filed in Docket No. EL04-126-000 a letter dated April 6, 2005, stating 'PSEG's notice of discontinuance renders its prior suspension of its project permanent'" (ConEd April 2005 Letter).⁷ ConEd's letter further stated that "[t]he abandonment of the project obviates the need for the project's Interconnection Agreement and for the extension of the agreement [to November 2007] that the November 22, 2004 order approved on a no-fault basis."⁸ HTP notes that "Consolidated Edison served the notice on all parties to the proceeding in Docket No. EL04-126-000, including the NYISO and PSEG In-City. No person filed a response, protest, or comment. . . ."⁹ HTP offered alternative arguments that Cross Hudson should have been removed from the queue 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.

4. In the August 22 Order, the Commission granted the complaint, concluding that the February 24, 2005 Letter Cross Hudson filed with the Commission constituted notice

⁵ The February 24, 2005 Letter states that PSEG "notified ConEd, the New York ISO, and the New York Public Service Commission of its decision to discontinue development of [its project]." February 24, 2005 Letter, filed in Docket No. EL04-126-000.

⁶ *Id.*

⁷ HTP Complaint at 15.

⁸ ConEd April 2005 Letter at 1.

⁹ HTP Complaint at 15.

to NYISO of withdrawal from the NYISO interconnection queue under section 3.6 of Attachment X. The Commission rejected the NYISO's interpretation that a withdrawal occurs under section 3.6 only when a developer provides written notice directly to NYISO staff explicitly requesting withdrawal of its interconnection request and removal from the interconnection queue.

5. The Commission directed NYISO to remove the Cross Hudson Project from Queue Position No. 93 and to "determine the Project's appropriate queue placement upon receipt of Cross Hudson's new Interconnection Request." Cross Hudson submitted a new Interconnection Request to NYISO on August 23, 2007. The NYISO placed that request at the end of the interconnection queue at Queue Position No. 255, where it remains today.

II. Requests for Rehearing

Cross Hudson Project's Loss of Queue Position

6. NYISO and Cross Hudson continue to argue that the August 22 Order's finding that Cross Hudson satisfied section 3.6's notice requirements is in error and must be reversed. Specifically, NYISO and Cross Hudson assert that Cross Hudson's mere service on NYISO of the February 24, 2005 Letter directed to the Commission does not constitute notice under section 3.6. Moreover, according to NYISO, the August 22 Order does not address the fact that Cross Hudson never stated, either in the February 24, 2005 Letter or elsewhere, that it was withdrawing from the queue. Rather, NYISO states, as Cross Hudson explained in its protest of HTP's complaint, it filed the February 24, 2005 Letter because it wished to inform the Commission that the development of its project was being "suspended."¹⁰ Cross Hudson asserts that its communications with NYISO before and after the February 24, 2005 Letter tell NYISO that Cross Hudson was continuing Class Year selection and preparing to enter into an Interconnection Facilities Study Agreements with NYISO and ConEd. NYISO contends that Cross Hudson could take the steps it outlined in the February 24, 2005 Letter without withdrawing from the NYISO's interconnection queue and that Cross Hudson resumed the development of its project and met the applicable LFIP milestones and requirements. NYISO further claims that the conclusion of the August 22 Order, that Cross Hudson voluntarily removed its project from the queue when it served the February 24, 2005 Letter on NYISO, expands section 3.6 beyond its reasonable scope and creates a new withdrawal mechanism that has no basis in the tariff and is contrary to the filed rate doctrine.

7. NYISO asserts that it recognizes the importance of Commission policy against allowing "discontinued or extensively delayed" projects to impede the development of

¹⁰ NYISO Rehearing Request at 6 (citing *Motion to Intervene, Protest, and Motion to Dismiss of Cross Hudson Corporation* at 16, Docket No. EL07-70-000 (July 5, 2007)).

“other viable” projects, but that such a policy is not relevant here. According to NYISO, because HTP was not in the interconnection queue when Cross Hudson filed its February 24, 2005 Letter, did not submit its own Interconnection Request until December 2005, and did not file its complaint until more than two years later, at which point, Cross Hudson had nearly reached the end of the NYISO interconnection process, it could not be said that unreasonable delays by Cross Hudson were impeding HTP.

8. NYISO claims that the August 22 Order’s decision to grant HTP’s complaint leads to harsh and inequitable results for Cross Hudson and will foster uncertainty among developers, arguments which were previously raised by Cross Hudson in its protest and other pleadings responding to HTP’s complaint. NYISO asserts that the August 22 Order appears to require Cross Hudson to start over again at the first step of the interconnection process, despite the fact that Cross Hudson had continued to meet its obligations under the LFIP for more than two and a half years following the February 24, 2005 Letter.¹¹ NYISO also contends that because developers will have reason to fear that their indirect statements, or their past actions, might unexpectedly result in their removal from the queue, developers’ plans to build viable and necessary infrastructure projects in New York and in other regions may be hindered. Similarly, NYISO asserts that investors will face greater risks if projects can reach the end of the interconnection process, after satisfying all LFIP milestones, and still be removed from the queue as a result of events years earlier.

9. Cross Hudson also repeats claims that the August 22 Order faults and penalizes Cross Hudson for relying on the NYISO’s putative misinterpretation and mis-implementation of its tariff, which is unjust and unreasonable. In reliance on the NYISO’s and ConEd’s actions and assurances that Cross Hudson was in “good standing” at Queue Position No. 93, was eligible to and did enter Class Year 2006, and entered into the July 18, 2006 Interconnection Facilities Agreements with Cross Hudson, Cross Hudson asserts that it continued to invest significantly in and develop its project. Had the NYISO and ConEd not made those assurances and instead taken steps to remove Cross Hudson from the queue in early 2005 then, as the NYISO explained in its answer to the complaint, “Cross Hudson could have filed a new interconnection request immediately . . . and still qualified for inclusion in Class Year 2006.” In support of its assertions, Cross

¹¹ Cross Hudson, in a supplemental filing, submitted an Environmental Management and Construction Plan (EMCP) to demonstrate the advanced status of the Cross Hudson project’s development and to show that the project represents the most immediate opportunity for bringing much needed power into New York City – in this case, by 2010. Cross Hudson claims that no other project to bring power to New York City that is planned or under development has submitted an EMCP to the New York State Public Service Commission and that no other project occupies the same advanced position as Cross Hudson.

Hudson submits, for the first time on rehearing, emails and drafts of unexecuted or partially executed interconnection facilities study agreements dated between August 2005 and June 2007. Cross Hudson contends that its reliance on the NYISO's interpretation and implementation was reasonable under Commission precedent,¹² and the August 22 Order's reaching back to eliminate Cross Hudson's Queue Position was unreasonable and should be reversed on rehearing.

III. Requests for Clarification and Answers

A. Scope of NYISO's Duties Under Section 3.6

10. NYISO requests that in the event the Commission does not grant rehearing, the Commission clarify the scope of the August 22 Order with respect to the section 3.6 notice requirement. NYISO asserts that section 3.6 should generally permit the NYISO to treat only direct communications from developers that clearly state an intent to withdraw as notices of withdrawal under section 3.6. To NYISO, indirect communications that are susceptible to different interpretations, such as statements contained in newspaper articles and trade publications, company press releases, regulatory filings, or other pronouncements, should not be considered sufficient notice under section 3.6. NYISO asserts that granting this clarification would establish clear, bright-line rules and would avoid the need for NYISO to make subjective determinations of developers' intentions. NYISO further requests that the Commission indicate any specific exceptions to this general approach, such as the one that would be established by the August 22 Order. According to NYISO, without such guidance, future disputes over this issue are likely.

11. HTP requests that the Commission deny NYISO's request for clarification as it raises questions that already have been answered. HTP asserts that NYISO essentially seeks a declaratory ruling from the Commission interpreting section 3.6 to require a "direct" communication from the developer that specifies an "intent to withdraw." HTP contends that the Commission did not suggest that the NYISO must review "newspaper articles and trade publications, company press releases . . . or a myriad of other pronouncements." Instead, HTP states, the August 22 Order requires that NYISO monitor filings made by developers with the Commission and read "communications" directed to the NYISO, such as letters filed in Commission proceedings regarding interconnection to which the NYISO is a party, which should not be overly burdensome for the NYISO.

¹² Cross Hudson cites *PPL EnergyPlus, LLC v. New York Indep. Sys. Operator*, 115 FERC ¶ 61,383 (2006); *New York Indep. Sys. Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216 (2007).

B. Reimbursement of Headroom Payments

12. NYISO requests that the Commission clarify how NYISO should handle the headroom¹³ payments Cross Hudson has made to other developers. According to Cross Hudson, it made a payment of \$5.52 million for headroom costs to ConEd, the New York Power Authority (NYPA) and Astoria Energy on July 10, 2007. NYISO claims that its OATT does not explicitly provide for a refund of such payments if a project is removed from the queue.

13. HTP states that, as set forth in NYISO's OATT, when a developer does not accept its upgrade cost allocation, or defaults on the security to be posted, or terminates or abandons a project, the upgrade costs to be allocated is represented to the remaining members of a class year for their acceptance. HTP continues by stating that if the remaining members agree to the revised allocation, it will govern; if they do not agree, the process continues until all the members of a class year accept their allocation. HTP asserts that, because Cross Hudson "no longer had a project" when the allocation was performed in July 2007, under the process in the OATT, the upgrade cost allocation can be represented to the remaining members of the class year. After the revised allocation has been accepted, other class year members will pick up 100 percent of the cost allocation – including the portion previously paid by Cross Hudson, and the NYISO can reimburse Cross Hudson.

14. NYISO argues that HTP incorrectly assumes that Attachment S¹⁴ would permit NYISO to revise the cost allocation for Class Year 2006 now to reflect Cross Hudson's removal from the queue, which is not the case. NYISO asserts that the cost allocation process for Class Year 2006 (which included Cross Hudson's project) was completed in July 2007, meaning that all remaining developers in that Class Year have accepted their cost allocations, posted security for System Upgrade Facilities, and made headroom payments, as required. NYISO claims that nothing in Attachment S permits the NYISO to re-open a finalized cost allocation process. NYISO asserts that HTP's proposal, by re-opening the final Class Year cost allocation, would disrupt the settled expectations of other developers that had reasonably believed, based on Attachment S requirements, that the cost allocation process for Class Year 2006 had concluded.

¹³ Attachment S to NYISO's OATT defines "headroom" as:

In the case of any System Upgrade Facility that has been paid for by a Developer, the electrical capacity of the System Upgrade Facility that is in excess of the electrical capacity actually used by the Developer's generation or merchant transmission project.

¹⁴ Attachment S to NYISO's OATT provides the procedures for allocating costs to Developers based on their class year.

15. NYISO also states that HTP errs when it states that “the NYISO can reimburse [Cross Hudson]” for headroom payments. According to NYISO, HTP fails to recognize that headroom payments made under Attachment S are made directly to developers in prior Class Years, not to the NYISO. The NYISO claims that it does not hold or collect headroom payments for developers and is therefore, not in a position to reimburse these payments. NYISO contends that Attachment S does not address how such reimbursement, under these unique circumstances, should be made.

C. Appropriate Interconnection Queue Position of the Cross Hudson Project

16. Cross Hudson argues that, should the Commission decline to grant rehearing, the Commission should clarify that NYISO possesses both the authority and discretion under the August 22 Order to reposition Cross Hudson in the NYISO interconnection queue at an appropriate point other than at the end of the interconnection queue. According to Cross Hudson, the August 22 Order appears to recognize that there are a number of earlier points in time and corresponding Queue Positions when Cross Hudson could and would have renewed its Interconnection Request had it not detrimentally relied on the NYISO’s interpretation and implementation of section 3.6 of Attachment X. Cross Hudson contends that the August 22 Order further appears to contemplate and authorize the NYISO to date the current Interconnection Request as one of those earlier points in time and assign a corresponding Queue Position. Cross Hudson states that, should the NYISO OATT not allow this result without a waiver of one or more provisions of its tariff, the Commission should clarify that it has granted the NYISO the necessary waivers.

17. Cross Hudson claims that had either NYISO or ConEd objected to the August 11, 2005 Interconnection Facilities Agreement on the ground that its project’s Interconnection Request was withdrawn and its Queue Position lost, then Cross Hudson surely would have submitted a new Interconnection Request at that time. To support its assertions, Cross Hudson submits, for the first time, emails and unexecuted or partially executed drafts of Interconnection Facilities Study Agreements dated August 9, 10, and 11, 2005. Cross Hudson argues that it should therefore be repositioned in the interconnection queue at a position corresponding to an August 11, 2005 Interconnection Request.

18. HTP argues that Cross Hudson’s request for clarification is beyond the scope of the proceeding, would effectively nullify the August 22 Order and initiate a new proceeding, and therefore, must be denied. According to HTP, because Cross Hudson’s requested clarification relates to its newly-submitted August 23, 2007 Interconnection Request, submitted after the August 22 Order, it is beyond the scope of this proceeding. HTP contends that, where parties seek relief on issues not raised in the initial pleadings and not addressed in the August 22 Order at issue, the Commission denies their requests for rehearing and clarification as beyond the scope of the proceeding.

19. HTP argues that, as Cross Hudson admits, since NYISO's OATT does not permit what Cross Hudson seeks, in order to grant the relief Cross Hudson requests, the Commission would have to grant "waivers" of the NYISO OATT that would trump the definition of Queue Position and the appropriate interconnection process contained in the OATT. HTP asserts that the Commission generally does not consider new, never-before-seen evidence introduced at the rehearing and clarification stage, such as the emails, with incomplete Facilities Study Agreements between NYISO and Cross Hudson, that supposedly support Cross Hudson's newly proposed August 2005 Interconnection Request date.¹⁵ Further, even if Cross Hudson's new materials are considered, HTP states that Cross Hudson does not explain how these emails and partially executed versions of a Facilities Study Agreement change the finding of the August 22 Order or the requirements of NYISO OATT that place Cross Hudson's project back into the queue no earlier than its Interconnection Request date of August 23, 2007.

20. HTP submits that, to the extent the Commission grants waivers of the NYISO OATT, the earliest date at which Cross Hudson's August 23, 2007 Interconnection Request could be placed in the queue would be June 2006. HTP claims that, as shown in its complaint, the June 2006 time frame is that in which Cross Hudson's project was, by its own admission and in its own words, "revived." HTP asserts that there is no evidence in the record to support any earlier date.

IV. Discussion

A. Requests for Rehearing and Answers

21. NYISO and Cross Hudson filed timely petitions for rehearing and clarification. HTP submitted an answer to the requests for clarification. NYISO subsequently submitted an answer to HTP's answer and Cross Hudson submitted a supplement to its request for rehearing and clarification on October 17, 2007.

B. Procedural Matters

22. We will accept HTP's answer to the petitions for clarification because answers to requests for clarification are not prohibited under the Commission's Rules of Practice and Procedure.¹⁶ 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 permitted by the decisional authority. We will accept NYISO's answer to HTP's answer because it has provided us with information that has assisted us in our

¹⁵ HTP cites *S. Cal. Edison Co.*, 102 FERC ¶ 61,256, at P 17 (2003); *Entergy Nuclear Operations, Inc.*, 112 FERC ¶ 61,117, at P 39 (2005).

¹⁶ Compare 18 C.F.R. § 385.213(a) (2007) with 18 C.F.R. § 385.713(d) (2007).

decision-making process,. However, the Commission does not permit supplements or amendments to requests for rehearing filed more than 30 days after the date of the order.¹⁷ Therefore, we will reject Cross Hudson's supplement to its request for rehearing and clarification.

C. Commission Determination

23. We find nothing in NYISO or Cross Hudson's requests for rehearing that warrants changing our decision to grant HTP's complaint. On rehearing, both NYISO and Cross Hudson rely principally on arguments previously rejected in our August 22 Order. Therefore, the Commission denies all requests for rehearing and the requests for clarification, as follows.

1. Requests for Rehearing

Cross Hudson Project's Loss of Queue Position

24. The Commission denies NYISO's and Cross Hudson's rehearing requests and declines to find that Cross Hudson did not withdraw from the interconnection queue because the February 24, 2005 Letter did not satisfy all of the elements of notice of withdrawal under section 3.6 of Attachment X to NYISO's OATT. Instead, the Commission affirms its original finding that the February 24, 2005 Letter satisfied the written notice requirements of section 3.6 that the notice be: (1) in writing, (2) to NYISO, and (3) by the developer and that NYISO should have removed the Cross Hudson project from its Queue Position as of February 24, 2005. We find that the case law¹⁸ that Cross Hudson relies upon to support its arguments on this issue is inapposite. The present case does not deal with indirect, constructive notice that the Commission published in a newspaper as in *Northern*, but with actual notice in the form of a letter that the NYISO received as a party to a Commission proceeding.¹⁹ In their requests for rehearing and clarification, NYISO and Cross Hudson repeat the same arguments that the Commission already addressed in the August 22 Order. We will, therefore, reject the rehearing requests.

25. Further, as we stated in our August 22 Order, Cross Hudson had no right to extend its Commercial Operation Date to November 2007. The Commission previously had

¹⁷ *Michigan Electric Transmission Co., LLC*, 116 FERC ¶ 61,164, at P 6 and n. 10 (2006) (footnotes omitted).

¹⁸ *Northern Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984) (*Northern*).

¹⁹ Complaint at 14-15.

granted Cross Hudson's complaint asking for an extension of the interconnection date for the Cross Hudson Project for 18 months – to November 2007 – beyond an already extended date of May 2006.²⁰ However, in response to the February 24, 2005 Letter, ConEd filed a request to withdraw its compliance filing to the November 22, 2004 Order, which the Commission granted in an order issued August 29, 2005.²¹ Therefore, as stated in our August 22 Order, Cross Hudson also lost its place in the interconnection queue for failure to meet its Commercial Operation Date of May 2006. Neither NYISO nor Cross Hudson dispute our finding that Cross Hudson lost its right to extend the Commercial Operation Date to November 2007 by virtue of the August 29, 2005 Order and the February 24, 2005 Letter. Additionally, Cross Hudson now claims that the project is expected to commence commercial operation in 2010²² and there is no evidence in the record of either a request for extension of the Commercial Operation Date from Cross Hudson or Commission approval of such an extension request.

26. We reject NYISO's argument that our policy against allowing discontinued or extensively delayed projects from impeding the development of other viable projects is irrelevant in this proceeding. Although NYISO claims that Cross Hudson has complied with the applicable milestones in the LFIP, it fails to refute the showing that the Cross Hudson Project not only withdrew from the queue, but failed to meet its May 2006 Commercial Operation Date, as described above. NYISO makes much of HTP not being in the queue at the time of the February 24, 2005 Letter and not filing a complaint until two years later. However, NYISO neglects to mention that HTP's filing of its complaint in June 2007 follows HTP invoking informal dispute resolution procedures under NYISO's OATT in the spring of 2007 to resolve whether the Cross Hudson Project should remain in Queue Position No. 93 and follows Cross Hudson's letter to the New York Commission in January 2007 of its "resumption of the development of the [Project]." Moreover, HTP, which also has an anticipated in-service date of late 2010, joined the queue at a time when the Cross Hudson Project had already been discontinued and before any period in which Cross Hudson claims its Project was revived. By suddenly having its Project's Queue Position lower than that of the Cross Hudson Project, which by turns was either discontinued or extensively delayed and whose status was

²⁰ *PSEG Power In-City I, LLC v. Consolidated Edison Co. of New York*, 109 FERC ¶ 61,189 (2004) (November 22, 2004 Order).

²¹ Delegated Letter Order, Docket Nos. ER05-1210-000, EL04-126-001 (August 29, 2005) (August 29, 2005 Order).

²² Cross Hudson Supplement at 3. Cross Hudson claims it is ready to begin construction in the first quarter of 2008. Cross Hudson Rehearing Request at 12.

uncertain, HTP has faced²³ and would have faced additional costs. Such additional costs would have included the funds and time needed to construct a new ring bus at ConEd's West 49th Street Substation should HTP not have been granted access to the vacant bus position which Cross Hudson had abandoned.²⁴

27. Finally, we reject Cross Hudson's argument that its reliance on the NYISO's interpretation and implementation of its tariff was reasonable and that penalizing Cross Hudson for relying on the NYISO's interpretation is unjust and unreasonable. Such a reasonable reliance argument is not relevant here for the reasons stated above in Paragraphs 25 and 26 of this order. It is Cross Hudson's action of withdrawal in accordance with section 3.6 of Attachment X of NYISO's OATT, and not NYISO's post-withdrawal assumptions about Cross Hudson's project, that is dispositive. Cross Hudson lost its queue position when it withdrew its interconnection request based on section 3.6 of Attachment X to NYISO's OATT, and not in reliance on anything that NYISO did or did not do.

2. Requests for Clarification

a. Scope of NYISO's Duties Under Section 3.6

28. We reject NYISO's request asking that the Commission clarify the scope of the August 22 Order with respect to the section 3.6 notice requirement. As we stated in our August 22 Order, NYISO "is free to propose amended tariff language consistent with what it claims are its practices."²⁵ Again, we leave to NYISO the discretion to propose revised language to section 3.6 of its LFIP to clearly state the practices it claims are appropriate.

b. Reimbursement of Headroom Payments

29. We deny NYISO's request for clarification on the issue of how to reimburse Cross Hudson for headroom payments it has made to other developers. We find that, as Cross Hudson has not made a request for such reimbursement, NYISO's request is premature and cannot be addressed at this time. We further find that, should Cross Hudson request

²³ HTP claims that it was forced to request and pay for two separate System Reliability Impact Studies – one with the discontinued Cross Hudson Project in the queue and a second study without the discontinued project.

²⁴ As stated in the August 22 Order, "[w]ithout 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." August 22 Order at P 28.

²⁵ August 22 Order at P 57.

reimbursement for the headroom payments it has made to other developers, it is the responsibility of NYISO, as the ISO, to determine the appropriate procedure that will allow Cross Hudson to be reimbursed.²⁶

c. **Appropriate Interconnection Queue Position of the Cross Hudson Project**

30. Finally, we deny Cross Hudson's request that the Commission clarify that NYISO possesses the authority and discretion under the August 22 Order to reposition the Cross Hudson Project in the NYISO interconnection queue based on an Interconnection Request date of August 11, 2005. According to section 4.1 of Attachment X, NYISO "shall assign a Queue Position based upon the date and time of receipt of the valid Interconnection Request" In this case, following the withdrawal of the Cross Hudson Project from NYISO's interconnection queue as of August 22, 2007, Cross Hudson submitted, and NYISO approved, a new Interconnection Request on August 23, 2007. We specifically stated in our August 22 Order that the Cross Hudson Project's removal from the queue was not to be retroactive, so that the placement of Cross Hudson's Project would be based on the interconnection procedures set out in NYISO's LFIP and so as not to allow for speculation as to when Cross Hudson would have resubmitted a new Interconnection Request. Further, since we deny Cross Hudson's request to have its project repositioned in the NYISO interconnection queue, we also deny its request for waiver of NYISO's tariff allowing for such a result.

31. Additionally, we agree with HTP that the Commission generally does not consider new evidence introduced at the rehearing and clarification stage, such as the emails and incomplete Facilities Study Agreements between NYISO and Cross Hudson which Cross Hudson submitted for the first time on rehearing. With the exception of one email, none of these documents were mentioned before this stage of the proceeding and Cross Hudson does not suggest that this evidence could not have been offered in its earlier pleadings in this proceeding. The Commission may reject evidence proffered for the first time on rehearing as our precedent does not permit parties to use a request for rehearing as a means to amend their original filings and provide new information.²⁷ Our policy arises from the recognition that "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final

²⁶ Additionally, it is the responsibility of parties, such as Cross Hudson, to first exhaust their administrative remedies with NYISO before bringing matters to the Commission.

²⁷ *Avista Corp.*, 89 FERC ¶ 61,136, at 61,391 (1999).

administrative decision.”²⁸ Accordingly, we will deny the request for clarification on this issue.

32. We note that this case raises issues about how to encourage the development of much needed interconnection projects²⁹ in a rapidly growing yet energy constrained area such as New York City, when the existing transmission system can only accommodate one project without the need for upgrades. Specifically, this case raises the issue of how the cost responsibility for necessary upgrades should be assigned when a lower queued interconnection project may be completed and ready to use an existing transmission system before that of a higher queued competing interconnection project. Both the HTP and Cross Hudson Projects require access to the same bus position at ConEd’s West 49th Street Substation and both are slated for completion by 2010. However, the Cross Hudson Project, which holds a lower queue position than the HTP Project, claims itself to be “the most advanced project for supplying power to New York City that is currently in the NYISO interconnection queue.”³⁰ Cross Hudson expresses concern over delays and cost increases to its project since, by being in a lower queue position than HTP, it will end up funding the construction of a new ring bus.

33. In order to minimize the delays to projects such as those of Cross Hudson and HTP, which have been recognized as projects that will help New York City meet anticipated energy reliability needs, we expect that ConEd, as the transmission owner, will use a procedure similar to the one outlined in *Virginia Electric and Power Co.*,³¹ where the issue of cost responsibility for network upgrades between two competing interconnection projects was also raised. Regardless of queue position, the interconnection project that is first completed, whether the HTP Project or the Cross Hudson Project, must be given the option to complete its interconnection using the vacant ring bus at ConEd’s West 49th Street Substation. Should the higher queued HTP Project complete its interconnection first, the HTP Project would have access to the available bus position and Cross Hudson would be required to build a new ring bus, as contemplated by

²⁸ *Entergy Nuclear Operations, Inc.*, 112 FERC ¶ 61,117, at P 39 (quoting *Californians for Renewable Energy, Inc. v. Calpine Energy Services*, 107 FERC ¶ 61,238, at P 7 (2004)).

²⁹ The issue in this case is not abandonment of interconnection projects that are placed farther down the queue since, as stated by Cross Hudson, “Removing Cross Hudson from its former queue position 93 and sending it to the end of the line at position 255 will not lessen Cross Hudson’s viability; the project is too far advanced and invested in to be abandoned.” Cross Hudson Rehearing Request at 12.

³⁰ Cross Hudson Request for Rehearing at 11.

³¹ 104 FERC ¶ 61,249, at P 18-19 (2003).

the August 22 Order. However, should the lower queued Cross Hudson project complete its interconnection first, the Cross Hudson Project would have access to the available bus position. Then, when the HTP Project is completed, Cross Hudson will have to fund a new ring bus for HTP's use. As both the HTP and Cross Hudson projects are viable and expected to be completed, such first-come-first-served interconnection should encourage the completion of both projects that will meet the energy needs of New York City in a timely manner.³²

The Commission orders:

(A) The requests for rehearing of the August 22 Order are hereby denied, as discussed in the body of this order.

(B) The requests for clarification of the August 22 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³² The Commission held a technical conference on December 11, 2007 on Interconnection Queueing Practices, Docket No. AD08-2-000. Among the issues raised in post-conference comments is whether the Commission should reconsider the policy of evaluating and interconnecting generators on a first-come-first-served basis.