

123 FERC ¶ 61,001
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.

PSEG Energy Resources & Trade
PSEG Fossil LLC

Docket No. EL08-35-000

Cross Hudson LLC

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR DECLARATORY ORDER

(Issued April 1, 2008)

1. On January 17, 2008, Cross Hudson, LLC (Cross Hudson), PSEG Energy Resources and Trade (PSEG ER&T), and PSEG Fossil, LLC (PSEG Fossil) (collectively, Petitioners), filed a Petition for Declaratory Order relating to a project that, when constructed, will interconnect a generating unit from New Jersey with the New York Independent System Operator, Inc. (NYISO) grid. For the reasons discussed below, we grant in part and deny in part the Petition.

I. Background

2. Cross Hudson will develop, own, and operate an eight-mile transmission line that will connect a new 345 kV substation¹ at PSEG Fossil's 550 MW Bergen Unit No. 2 generating plant (Bergen 2), in Ridgefield, New Jersey to the NYISO transmission system at Consolidated Edison's (ConEd's) West 49th Street Substation in New York City (NYC) following disconnection of Bergen 2 from the PJM system.² The

¹ According to the record, this substation is yet to be built.

² The request for declaratory order assumes that Bergen 2 will be disconnected from PJM. Because the disconnection of Bergen 2 is not an issue presented for Commission consideration in the request for declaratory order, this order does not address the merits of such disconnection. However, this order does not excuse PSEG Fossil from complying with any reliability or other requirements associated with disconnecting Bergen 2 from PJM.

interconnection of Bergen 2 to the West 49th Street Substation is known as the Cross Hudson Project³ (Project). Petitioners state that the Project is a high-voltage alternating current generator lead line with an approximate continuous transfer capacity of 600-610 megawatts and will be the sole path for delivery of Bergen 2 to the NYISO transmission system. Petitioners state that the Bergen 2 capacity will qualify as In-City Unforced Capacity under the NYISO rules.

3. PSEG Fossil, the owner and operator of Bergen 2, will sell the Bergen 2 output to PSEG ER&T under an existing Commission approved cost-based Power Purchase Agreement or through other Commission authorized tariffs. PSEG ER&T, in turn, will sell under its existing Commission-approved market-based tariff the energy and capacity from Bergen 2 into the markets administered by the NYISO, or to wholesale customers participating in those markets. Cross Hudson will provide delivery service to PSEG Fossil pursuant to an interconnection services scheduling rights (ISSR) agreement that Petitioners state will be filed with the Commission. Compensation to Cross Hudson for providing transmission delivery service is to be a percentage of a defined profit margin earned on PSEG ER&T's market-priced sales into the NYISO markets.

II. Petition for Declaratory Order

4. Petitioners request that the Commission: (1) allow Cross Hudson to charge PSEG Companies a negotiated, non-cost based rate for the delivery service provided over the line; (2) commit that in the future it will not order the Project to reconnect with PJM pursuant to Federal Power Act (FPA) section 202(b)⁴; 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.

5. Petitioners request Commission action to enable them to make a timely decision as to whether to bid Bergen 2 into the PJM Reliability Pricing Model Auction for Delivery Year 2011-2012, or instead sell power from Bergen 2 into the NYISO market. Additionally, Petitioners note that the Project made a bid for a NYPA issued Request for Proposal (RFP) seeking 500 MW of new capacity and associated energy that is intended to be awarded by April 2008. Petitioners state that in the event their RFP bid is successful, they will need to be prepared to make prompt commitments to NYPA.

³ The history of the Cross Hudson project is set out in the following orders: *PSEG Cross Hudson Corp.*, 100 FERC ¶ 61,162 (2002); *Consol. Edison Co. of N.Y.*, 101 FERC ¶ 61,185 (2002), *order on reh'g*, 102 FERC ¶ 61,254 (2003); *PSEG Power In-City v. Consol. Edison Co. of N.Y.*, 109 FERC ¶ 61,189 (2004); and *Hudson Transmission Partners v. New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,179 (2007), *order denying reh'g*, 122 FERC ¶ 61,024 (2008).

⁴ 16 U.S.C. § 824a (2000).

A. Negotiated, non-cost based rate

6. Petitioners contend that, while the Project is not a merchant transmission project, it satisfies five of the ten criteria for charging negotiated rates for merchant transmission as set out in *Linden*.⁵ Petitioners claim that the Project satisfies the following five criteria that they deem relevant to a generator lead line:

(1) the merchant transmission facility must assume full market risk, . . . (6) affiliate concerns should be adequately addressed, (7) the merchant transmission facility should not preclude access to essential facilities by competitors, . . . (9) physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant RTO or ISO; and (10) merchant transmission facilities should not impair pre-existing property rights to use the transmission grids of interconnected RTOs or utilities.⁶

7. Petitioners assert that in response to criteria (1) Cross Hudson will assume all the risk associated with constructing and operating the Project. In response to criteria (6), Petitioners argue that the Project has never been and will not be in the rate base of any public utility with captive customers and there is no potential for cross subsidization or other affiliate abuse. Petitioners note that PSEG ER&T's market based rate tariff is conditioned on the Commission's regulations that include affiliate provisions. Regarding criteria (7), Petitioners argue that the Project does not give Cross Hudson the ability to preclude competitors from accessing the NYC area nor will Cross Hudson rely on eminent domain authority or other powers not available to competing suppliers. Additionally, they claim, the Project does not prevent other entities from pursuing other transmission or generation projects. For criteria (9), they argue that physical energy flows on the Project will be coordinated with, and subject to, reliability requirements of NYISO. Petitioners also argue that the Project meets criteria (10) because it provides only incremental new transmission capacity, and will not impair pre-existing property rights to use the transmission grids of interconnected Regional Transmission Organizations or utilities. Petitioners indicate that if the Project becomes the successful bidder, it will be interconnected solely with the NYISO grid and that interconnection will be pursuant to the NYISO's Commission-approved procedures for interconnecting large generators to the grid.

8. Petitioners claim that the remaining criteria are not relevant to the Project because those criteria are intended to safeguard multiple transmission customers, which is not the case here. The remaining criteria include:

⁵ *Linden VFT, LLC*, 119 FERC ¶ 61,066 (2007) (*Linden*).

⁶ *Id.* P 16.

(2) the service should be provided under the open access transmission tariff (OATT) of the Independent System Operator (ISO) or Regional Transmission Organization (RTO) that operates the merchant transmission facility and that operational control be given to that ISO or RTO; (3) the merchant transmission facility should create tradeable firm secondary transmission rights; (4) an open-season process should be employed to initially allocate transmission rights; (5) the results of the open season should be posted on the Open Access Same-Time Information System (OASIS) and filed in a report to the Commission; . . . (8) the merchant transmission facilities should be subject to market monitoring for market power abuse.⁷

Petitioners assert that the ISSR agreement between Cross Hudson and PSEG Fossil is not the result of market power and that PSEG Fossil is voluntarily entering into this project with Cross Hudson. Petitioners also claim that Cross Hudson will not have the ability to erect entry barriers as neither Cross Hudson nor any of its affiliates own or control intrastate natural gas transportation, storage or distribution facilities, sites for generation capacity development, or sources of coal supplies and the transportation of coal supplies such as barges and rail cars. Petitioners further claim that although a market monitor is not needed for the Project as it is simply a generator lead line, Cross Hudson will cooperate with NYISO's market monitor.

B. No reconnection with PJM under FPA section 202(b)

9. Petitioners argue that a Commission order requiring the Project to be interconnected to PJM under FPA section 202(b)⁸ would be an undue burden and contrary to the public interest. First, Petitioners assert that any material change to the Project's interconnection status, such as reconnecting to PJM, could require modifications to Cross Hudson's interconnection request to the NYISO and result in delay and added costs – impacts that would be an undue burden. Petitioners further argue that an order from the Commission that the Project reconnect to PJM would be inconsistent with the New York Public Service Commission's (NYPSC's) order granting a Certificate of Environmental Compatibility and Public Need (Certificate),⁹ because the Project would no longer be exclusively an electric generator lead line and would no longer be exclusively interconnected to the NYC market. Finally, according to Petitioners, if the Cross Hudson Project were to be interconnected with PJM as well as NYISO, then NYISO would consider the Project to be an External Resource, subject to

⁷ *Id.*

⁸ 16 U.S.C. § 824a(b) (2000).

⁹ The Certificate requires that Bergen 2 be “exclusively interconnected” to the New York City market for at least four years.

different capacity eligibility requirements. In addition, Petitioners claim that the Project's interconnection to both PJM and NYISO would raise important operational control issues, including uncertainty over which control area would control the dispatch of the facility.

C. Exclusion of third party transmission service

10. Petitioners argue that loss of the firm use of the Project's entire capacity could significantly compromise the financial underpinnings of the Project. Petitioners assert that while the Project, as a generator lead line, would be eligible for exemption from the requirements of Order Nos. 888 and 889 under Commission precedent,¹⁰ a transmission service request would require Cross Hudson to file a *pro forma* OATT within 60 days and respond to the request. According to Petitioners, under the terms of the *pro forma* OATT, transmission providers are obligated to provide firm point-to-point transmission service to third parties unless doing so would interfere "with the Transmission Provider's ability to meet prior firm contractual commitments to others."¹¹ Petitioners claim that a third party's use of the Project would qualify as such an interference since the Project will be used as the sole delivery path for Bergen 2's capacity and energy, all of which will become a fully dedicated New York resource under certain long-term purchase power agreements (PPA). Petitioners claim that the sale of Bergen 2's capacity and energy into the NYISO markets is the only possible source of revenue for Bergen 2. Petitioners add that any excess output not needed to satisfy the PPA with NYPA would be sold into the NYISO market via the Project. Petitioners note that transmission capacity will not be withheld from the market since Bergen 2 will effectively operate within the NYC market as a base load unit with a high capacity factor. In this regard, Petitioners assert that PSE&G Power may elect to generate and load onto the Project additional generation at the Bergen site¹² provided it is concluded that there is capacity remaining on the Project after testing in accordance with NYISO rules. Petitioners state that these generation units will become a fully dedicated New York resource and that PSE&G ER&T would enter into a long term PPA with NYPA for this additional capacity and energy.¹³

¹⁰ *Black Creek Hydro, Inc.* 77 FERC ¶ 61,232 (1996) (*Black Creek*).

¹¹ Petition at 16.

¹² Petitioners do not state whether such generating units at the Bergen site, namely, Bergen 1 (a combined cycle plant) and a combustion turbine, will continue to remain electrically connected to PJM. See, <http://www.pseg.com/companies/fossil/plants/bergen.jsp> for a description of these generating units.

¹³ Petition at 17.

III. Notice of Filings and Responsive Pleadings

11. Notice of the Petitioners' request for a declaratory order was filed on January 17, 2008 and published in the Federal Register, 73 Fed. Reg. 5835 (2008), with comments, interventions, and protests due on or before February 19, 2008. On February 19, 2008, PJM filed comments. Also on February 19, 2008, NRG Companies (NRG), Hudson Transmission Partners, LLC (HTP), Exelon Corporation (Exelon), and New Jersey Division of Rate Counsel filed motions to intervene and protests. That same day New Jersey Board of Public Utilities (NJ Board) filed a notice of intervention and protest. On March 5, 2008 Petitioners filed an answer (March 5, 2008 Answer). On March 14, 2008 the NJ Board filed an answer to the Petitioners' March 5, 2008 Answer. On March 20, 2008, HTP also filed an answer to the Petitioners' March 5, 2008 Answer.

12. In addition, Dominion Resources Services, Inc., Old Dominion Electric Cooperative, New York Power Authority, Gerdau Ameristeel Corp., Designated FirstEnergy Affiliates,¹⁴ and New Jersey Large Energy Users Coalition filed timely motions to intervene.

IV. Comments and Protests

13. Several parties ask the Commission to deny the request for declaratory order, or in the alternative, to set the issues for hearing. HTP contends proposed negotiated rates for the Project are not appropriate because the Project is, in reality, a merchant transmission project and must meet the same ten criteria merchant transmission developers must meet before being given authorization to sell transmission rights at negotiated rates. HTP argues that there is simply no basis for not evaluating the Cross Hudson Project under the same rules applicable to all other merchant transmission projects.

14. NRG and the NJ Board argue that: (1) Petitioners have not provided the necessary cost support and other data to justify their request not to be made to reconnect with PJM; (2) FPA section 202(b) requires that an application be filed and a hearing held before the Commission can determine whether an undue burden would result from ordering such an interconnection; and (3) Petitioners have failed to discuss the impact that this request would have. The NJ Board states that, absent a record of all the economic projections for this project, there is no possible way to evaluate the nature of any burden. Additionally, the NJ Board asserts that Petitioners ignore the public interest of New Jersey and the PJM region.

¹⁴ The Designated FirstEnergy Affiliates are Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, and FirstEnergy Solutions Corp.

15. Several parties express concerns that removing Bergen 2 from PJM will increase energy prices in New Jersey and negatively impact reliability in the region. Exelon suggests, in the alternative, that Petitioners delist Bergen 2 rather than disconnect it to free up the capacity for sales into NYISO while avoiding potentially harmful impacts to PJM's reliability. Protestors also focus on what they claim would be unfair benefits to Petitioners. The NJ Board claims that remaining PJM generation owned at least partially by PSEG ER&T, PSEG Fossil, and PSEG Nuclear would be in a position to benefit from higher capacity prices resulting from the disconnection of Bergen 2. The NJ Board argues that, in this case, a merchant developer that does not interconnect with the PJM system, but does obtain its energy and capacity from an existing generation unit within PJM, still causes the need for local upgrades and network upgrades, but avoids any financial responsibility for those upgrades.

16. NRG complains that the Petitioners' request that the Commission permanently waive Order Nos. 888, 889 and 890 will effectively declare that Cross Hudson will not be required to provide transmission services to any eligible customer except the PSEG affiliates. NRG contends that Cross Hudson does not currently qualify for waiver from the open access requirements and in any event the Commission does not grant permanent waivers of those requirements. NRG argues that Cross Hudson is a transmission provider subject to the Commission's jurisdiction and, like other transmission providers, should be subject to the Commission's open access and pro-competition policies when providing transmission service subject to the Commission's jurisdiction.¹⁵ NRG states that it may wish to use available transmission capacity in the future to move power to and from NYC and notes that, in addition to the excess capacity from New Jersey to New York, the capacity from New York to New Jersey will be completely unutilized. NRG states that the Petitioners would possibly prohibit the Commission from exercising its authority under not only section 202(b) of the FPA, but due to the broad language in section 202(b), possibly sections 210, 211, and 212 of the FPA as well.

17. PJM requests that the Commission grant PSEG's request for a declaratory order so that PJM can perform the studies needed to evaluate the reliability impacts of the Bergen

¹⁵ NRG cites *Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006) (*Aero Energy*) (stating the Commission required that interstate transmission facilities must be made available for open access transmission service); *CED Rock Springs Inc.*, 101 FERC ¶ 61,325 (2002) (*CED Rock Springs*) (stating that an interconnection line that connected generation to the PJM grid was found to be an integral part of the PJM grid and not the type of facilities for which waiver of Order Nos. 888 and 889 are granted); and *Northeast Utilities Service Co.*, 62 FERC ¶ 61,294 (1993) (*NE Utilities*) (stating that generator lead facilities were part of the integrated transmission grid when facilities performed a transmission function by transmitting reactive power).

2 deactivation¹⁶/disconnection and the transmission system upgrades needed to alleviate those impacts. PJM requests direction from the Commission so that PJM can decide what assumptions are needed to study the reliability impacts of a Bergen 2 deactivation and the network upgrades needed to alleviate those impacts. PJM states it was notified by PSEG that deactivation of Bergen 2 would adversely affect the reliability of the PJM transmission system absent upgrades to the transmission system, thus necessitating these studies under the PJM Tariff. PJM contends that because the necessary studies are complex, 60 days is not enough time to complete them. PJM asserts that before the Commission under FPA section 202(b) decides to order an interconnection of the Project, PJM first must be allowed to study the impact of this possibility.

V. Discussion

A. Procedural Matters

18. 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. 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 a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by the Petitioners, the NJ Board, and HTP, and will, therefore, reject them.

B. Commission Determination

1. Negotiated non-cost based rates

19. The request for declaratory order asks us to consider the proper rate treatment for a merchant generator lead provider, a matter of first impression. This case of first

¹⁶ PJM states that it is treating a letter from Petitioners dated January 15, 2008 (Deactivation Letter), in which PSEG advised PJM that it intends to disconnect Bergen 2 from PJM in order to interconnect to NYSIO, as notice of "deactivation" under Part V of the PJM Tariff. Because PJM is inconsistent as to how it characterizes the Deactivation Letter, in one instance it characterizes the Deactivation Letter as a notice of deactivation and in the next the Deactivation Letter is characterized by PJM as an "advance notice of potential 'deactivation' of the Bergen 2 unit," PJM is unclear as to whether it regards the 90 day clock as having started. Part V of the PJM Tariff states (in section 11.3.2) that PJM has 90 days after a notice of deactivation to post on its website full details of the transmission upgrades necessary to alleviate the reliability impact that would result from deactivation of the generating unit.

impression specifically asks us to consider whether negotiated rates are appropriate for merchant generator lead service. Petitioners request negotiated rates for delivery service over the generator lead line. Before determining whether negotiated, non-cost based compensation is appropriate for the delivery services to be provided by Cross Hudson over the Project, we first examine whether the Project is more properly characterized as a generator lead line or a merchant transmission facility. Based on analysis of the facts presented in the record, the Commission concludes that the Project is properly characterized as a merchant generator lead line, rather than simply a merchant transmission line that must conform to the Commission's merchant transmission precedent.¹⁷

20. The Project has characteristics of both a merchant transmission project and a generator lead line. It is like a merchant transmission facility because it is a high-voltage, alternating current facility that will be built to 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. But it can also be characterized and treated as a generator lead line because it is not a part of an integrated transmission grid and will be built to serve a single customer – PSEG Fossil's Bergen 2. Typically, generator lead lines are “limited and discrete facilities”¹⁸ that “do not form an integrated transmission grid,”¹⁹ but instead connect two points – a generating unit and a substation – without any electrical breaks between the two points.²⁰ The Project, as currently proposed by the Petitioners, will consist of a new, 8-mile 345 kV line that will run from a new 345 kV substation located at PSEG Fossil's Bergen 2 to ConEd's West 49th Street substation. The 345 kV line will not be connected to any other load, generation facilities, or distribution systems. In short, the 345 kV line serves simply and solely to interconnect Bergen 2 to ConEd's West 49th Street substation, following the disconnection of Bergen 2 from PJM. Therefore, because there are no breaks between ConEd's West 49th Street substation and Bergen 2, and Petitioners claim the Project will only serve to connect NYISO with Bergen 2 and thus not form an integrated transmission grid, we find that the

¹⁷ See, e.g., *Linden*, 119 FERC ¶ 61,066; *MontanaAlberta Tie, LTD.*, 116 FERC ¶ 61,071 (2006); *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 (2005); *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, *order on reh'g*, 96 FERC ¶ 61,326 (2001); *TransÉnergie U.S. Ltd.*, 91 FERC ¶ 61,230 (2000) (each approving negotiated rates for merchant transmission projects).

¹⁸ *Black Creek*, 77 FERC ¶ 61,232 at 61,941.

¹⁹ *Id.*

²⁰ *Termoelectrica U.S., LLC*, 105 FERC ¶ 61,087, at P 10 (2003) (*Termoelectrica*).

Project is a merchant transmission facility serving as a generator lead line, or a merchant generator lead line.²¹

21. We next turn to whether delivery services to be provided by Cross Hudson over the generator lead line qualify for negotiated, non-cost based compensation. As Petitioners recognize, the Commission's criteria is "for charging negotiated rates for merchant transmission."²² Despite the Project's characterization as a merchant generator lead line, we find that it is a unique type of generator lead line that merits consideration for negotiated, non-cost based rates under criteria outlined for merchant transmission in *Linden*.²³ We accept Petitioners' support for meeting the five criteria relevant to a generator lead line. Petitioners state that Cross Hudson will assume full market risk and that the Project has no potential for cross subsidization or other affiliate abuse. Petitioners also state that the Project does not give Cross Hudson the ability to preclude competitors from access to the NYC area and does not impair pre-existing property rights to use the transmission grids of interconnected RTOs or utilities. Further, Petitioners state that the physical energy flows on the Project will be coordinated with and subject to the reliability requirements of NYISO. There is nothing in the record to suggest that these five criteria have not been met. We agree with Petitioners that the remaining criteria are not relevant here because they are intended to safeguard multiple transmission customers, which is not the case here. Therefore, we will grant Petitioners' requested rate methodology.

22. However, our decision here is confined to the specific circumstances presented in this petition. Despite our finding here, changed circumstances may affect the status of the Project as a generator lead line and its ability in the future to obtain non-cost-based, negotiated rates. Although we find in this instance that the Project is classified as a merchant generator lead line, such a classification is not fixed, but may change depending on changed conditions. In the future, it is possible that Bergen 2 will be reconnected to the PJM system or interconnected to another market and that the Project will be open to other generators to transmit power from New Jersey to New York, or, in the reverse direction, from New York to New Jersey, as NRG indicates in its protest. Additionally, with a transfer capacity of 600 to 610 MW (while Bergen 2 is a 550 MW unit), the Project may also provide delivery to other generators. Should any electric energy being

²¹ Notwithstanding the designation of the proposed line as a merchant generator lead line in the instant proceeding, the Commission notes that such a designation is not dispositive of which reliability standards under section 215 of the FPA such a line would be subject to. That determination will be made separately by the Electric Reliability Organization through its registry process subject to the Commission's review.

²² Petition at 8.

²³ 119 FERC ¶ 61,066.

transmitted along the Project come from a source other than Bergen 2, the Commission may need to reevaluate the Project's transmission rates.²⁴

2. No reconnection with PJM under FPA section 202(b)

23. The Commission denies the Petitioners' request that the Commission permanently commit to not ordering the Project to interconnect with PJM under FPA section 202(b) in the future. Under FPA section 202(b), upon application of any person engaged in the transmission or sale of electric energy, whenever the Commission,

after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons

Petitioners claim that a ruling by the Commission to commit to not ordering the Project to interconnect to PJM under FPA section 202(b) in the future is needed to avoid added delays and costs. In essence, Petitioners ask us to find that section 202(b) would never be applicable to them, and always unavailable to parties with respect to this Project, and do so permanently. The FPA does not provide the Commission with any authority to waive section 202(b) for the benefit of any public utility or project, much less to do so on a permanent basis. We reject this request as inconsistent with the FPA. Further, while the Petitioners claim that it would be contrary to the public interest to require a future interconnection with PJM, given that no party has yet filed a section 202(b) application, we cannot now adjudicate where the public interest lies; that determination must await the filing of an application and the procedures required by section 202(b). Similarly, Petitioners' argue that ordering Petitioners to reconnect to PJM would be inconsistent with NYPSC's certificate. We find this argument to be unconvincing given Petitioners' statement that any excess capacity, including energy from non-Bergen 2 generators at the Bergen site,²⁵ not needed to satisfy the NYPA PPA would be sold into the NYISO market via the Project. Should energy from non-Bergen 2 generation be delivered by the Project, and the output of these non-Bergen 2 generators not be exclusively delivered over the Project, this would suggest a level of interconnection with PJM that is also

²⁴ However, in the absence of findings pursuant to section 206 of the FPA, any change in status would not automatically abrogate any rates that are already in effect as part of a contractual agreement made while the Project was classified as a generator lead line.

²⁵ Non-Bergen 2 generation at the Bergen 2 site is currently electrically connected to PJM.

inconsistent with NYPSC's certificate because the Project would no longer be exclusively interconnected to the New York City market and as a result, the entire Project would have to be considered a merchant transmission line.

24. The Commission notes that based on the record, the disconnection of Bergen 2 from PJM is assumed to take place upon the completion of the Project. The merits or potential results of such disconnection are not among the issues presented in the Petition. Therefore, we make no findings on this matter.²⁶ We further note that according to PJM, the Petitioners have informed PJM that any necessary upgrades needed to address the impacts of the Project will be paid for by the Petitioners without regard to how such costs otherwise would be assigned under the PJM Tariff.²⁷

3. Exclusion of third party transmission service

25. Based on the status of the Project as a generator lead facility, the Commission grants Petitioners' request that in the first instance firm use of the Project's capacity for transmission of Bergen 2's output by PSEG ER&T and PSEG Fossil will not be displaced by third-party requests for firm point-to-point transmission service, in accordance with Commission waiver precedent. The Commission has regularly granted waivers of open access requirements under Order No. 888 to generator lead lines.²⁸ The Commission grants such waivers to "public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), until such time as the public utility receives a request for transmission service."²⁹

26. The merchant generator lead line at issue here, in which Petitioners claim that the Project solely delivers Bergen 2 output to NYISO, qualifies as a limited and discrete transmission facility not forming integrated transmission facilities. Unlike the generator

²⁶ We reiterate that this order does not excuse PSEG Fossil from complying with any reliability or other requirements associated with disconnecting Bergen 2 from PJM.

²⁷ PJM Comments at 4 n.2.

²⁸ See, e.g., *WFEC GENCO, LLC*, 113 FERC ¶ 61,049 (2005); *Termoelectrica*, 105 FERC ¶ 61,087; *Black Creek*, 77 FERC ¶ 61,232. Despite NRG's arguments, *Aero Energy and CED Rock Springs*, in which the Commission refused to exempt transmission lines from open access requirements, are inapposite because they deal with merchant transmission lines which were being used by multiple entities, which is not the case here. See *Aero Energy*, 115 FERC ¶ 61,128 at P 30-33; *CED Rock Springs*, 101 FERC ¶ 61,325 at P 12-13.

²⁹ *Jersey Central Power & Light Co.*, 87 FERC ¶ 61,014, at 61,042 (1999).

lead line in *NE Utilities*, to which NRG cites in support of its contention that the Project should be treated as a merchant transmission line, the Project as proposed will not perform a transmission function of transmitting reactive power “which is needed for the reliable operation of the transmission system.”³⁰ There is nothing in the record to indicate that the Project will perform the function of transmitting reactive power. Under the facts presented by Petitioners, in which there is no indication by Cross Hudson that it owns and operates any facility other than the generator lead line, we will grant the requested exemption from Order No. 888. However, despite the waiver, and as the Petitioners acknowledge, should Cross Hudson receive a transmission service request, it “must file with the Commission a *pro forma* OATT within 60 days of the date of the request, and must comply with any additional requirements that are effective on the date of the request.”³¹

27. We reject the arguments by Petitioners that the Project should not be required to provide service to third parties under section 13.5 of the *pro forma* OATT. Section 13.5 states that the third party transmission customer must compensate the transmission provider for any necessary transmission facility upgrades or expansions when the transmission provider (in this case Cross Hudson) determines that the generator lead facility is incapable of providing firm point-to-point transmission service without “interfering with the Transmission Provider’s ability to meet prior firm contractual commitments to others.”

28. Petitioners claim that PSEG ER&T’s PPA with NYPA for capacity and energy requires firm use of the total generator lead facility that would be a “prior firm contractual commitment to others” within the meaning of section 13.5 of the *pro forma* OATT. However, Petitioners fail to provide support for this assertion. Additionally, such an argument is inconsistent with other statements made by Petitioners in their filing. For example, on the one hand, Petitioners claim that exclusive use of the line is necessary to meet commitments under the PPA with NYPA. On the other hand, by their own admission Petitioners acknowledge that the Project may have excess capacity (which is likely given the 550 MW rating of Bergen 2 and the 600 to 610 MW capacity of the Project) that could be used to transmit the additional output from other generating units at the Bergen site³² that would be sold into the NYISO market so long as that excess capacity did not need to satisfy the PPA with NYPA.³³ A line is considered a dedicated line when it is to be used for a specific customer or purpose. Here, however, Petitioners

³⁰ 62 FERC ¶ 61,294 at 62,909.

³¹ *Id.*

³² *Supra* n.13.

³³ Petition at 17.

seem to be arguing that the line is both dedicated to NYPA load and yet also open to deliver output from other generators. Absent a showing that the line is in fact dedicated, we cannot conclude that third party interconnection requests would interfere with Cross Hudson's ability to meet prior firm contractual commitments to others. Additionally, even if the Project were shown to be a dedicated line, the Project would be regarded as "exclusive" and/or "dedicated" only as to the delivery of the energy from Bergen 2 under the PPA and not beyond that contractual commitment. That is to say, the limitations on third party use in section 13.5 would apply only to the Project's capacity needed to meet the PPA requirements, and not to any remaining unused capacity. Finally, in the absence of findings pursuant to FPA section 206, any contractual rights that Cross Hudson and PSEG Fossil may have would not be abrogated by a Commission order requiring third party transmission service.

29. Petitioners have not adequately demonstrated why it is necessary to make the line exclusively available for their own use or why, under the circumstances presented, such use should not be considered unduly discriminatory. As a result, we deny the Petitioners' request.

The Commission orders:

The petition for declaratory is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.