

114 FERC ¶61,265
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Bridgeport Energy, LLC

Docket No. ER05-611-003

ORDER REJECTING REHEARING

(Issued March 16, 2006)

1. In this order, the Commission rejects a request by ISO New England Inc. (ISO-NE) for rehearing of an order denying rehearing issued in this proceeding on December 22, 2005, on the grounds that rehearing does not lie.¹

Background

2. On November 15, 2004, Bridgeport Energy, LLC (Bridgeport) requested that ISO-NE provide a reliability determination for Bridgeport's 530 MW generating facility located in Southwest Connecticut. On December 15, 2004, ISO-NE notified Bridgeport that its facility "is needed for reliability under Market Rule 1."² On February 18, 2005, Bridgeport filed with the Commission a proposed RMR Agreement, in accordance with ISO-NE's Market Rule 1, between itself and ISO-NE, stating that it was experiencing

¹ *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 (2005) (December 22 Order).

² See Bridgeport's February 18, 2005, Reliability Must Run Agreement (RMR Agreement) Filing, Attachment F. ISO-NE has authority under its Market Rule 1 to enter into an RMR cost-of-service agreement with a generator that is necessary for reliability subject to Commission approval. Once a determination has been made that a generating unit is necessary for the reliable operation of the New England transmission system, if the generator is not satisfied with its current compensation alternatives, the generator is allowed to file a cost-of-service agreement for reliability services. See section 3.3.1(c) of Appendix A, Exhibit 2 of Market Rule 1.

“substantial revenue shortfall from sales at market prices.”³ On July 19, 2005, the Commission conditionally accepted the proposed RMR Agreement for filing, suspended it for a nominal period, and set it for hearing and settlement judge procedures.⁴ On August 18, 2005, Connecticut Parties⁵ and Bridgeport submitted timely requests for rehearing of the July 19 Order. ISO-NE did not seek rehearing of the July 19 Order. On December 22, 2005, the Commission denied the requests for rehearing of the July 19 Order.⁶

3. On January 11, 2006, ISO-NE filed a request for rehearing of the Commission’s December 22 Order. CT DPUC and CT OCC filed an answer to ISO-NE’s request for rehearing. Massachusetts Municipal Wholesale Electric Company (MMWEC) filed a motion to intervene out-of-time and an answer to ISO-NE’s request for rehearing. ISO-NE filed an answer to MMWEC’s and CT DPUC and CT OCC’s answers. MMWEC filed an answer to ISO-NE’s answer.

Procedural Matters

4. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), we will deny MMWEC's motion to intervene in this proceeding for failure to demonstrate good cause warranting late intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.⁷ MMWEC has not met this higher burden of justifying its late intervention.

³ Transmittal Letter at 6.

⁴ *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 (2005) (July 19 Order).

⁵ The Connecticut Department of Public Utility Control (CT DPUC), the Connecticut Office of Consumer Counsel (CT OCC), Connecticut Attorney General’s Office, and the Connecticut Municipal Electric Energy Cooperative (collectively, the Connecticut Parties).

⁶ *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 (2005) (December 22 Order).

⁷ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

5. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits answers to requests for rehearing. We are not persuaded to accept CT DPUC and CT OCC's answer nor ISO-NE's answer thereto and will, therefore, reject them.

ISO-NE's Request for Rehearing

6. ISO-NE states that there is language in the December 22 Order⁸ that can be read to mean that reliability determinations are to be filed for review under section 205 of the Federal Power Act (FPA)⁹ with the cost of service case. ISO-NE argues that its reliability determination is a procedural prerequisite in the process that provides a generator with the authority to submit a cost of service case, including a demonstration of financial need, to the Commission. It argues that to the extent Bridgeport (or any RMR candidate) provides a copy of ISO-NE's reliability determination with its filing under section 205, it is simply for the purpose of demonstrating that the Market Rule 1 prerequisite was satisfied and does not bring ISO-NE's reliability determination under a section 205 review. ISO-NE requests that the Commission clarify that ISO-NE's reliability determination is set out as a "procedural step" under ISO-NE's Commission-approved Tariff, and that while the cost of service case filed by a generator is submitted for review under section 205, reliability determinations made by ISO-NE under the Market Rule 1 cost of service prerequisite process are properly reviewed under section 206 of the FPA.¹⁰

7. ISO-NE also requests that the Commission clarify that: (1) ISO-NE's reliability determination process may be challenged by third parties only where the burden of proof and procedural safeguards of section 206 of the FPA are met; and (2) any hearing on alleged implementation flaws in ISO-NE's reliability determination should proceed only under section 206 of the FPA.

⁸ December 22 Order at P 8 ("review of the RMR Agreement, under section 205 of the FPA, included a review of the evidence presented by Bridgeport and ISO-NE that the facility is needed for reliability.").

⁹ 16 U.S.C. § 824d (2000).

¹⁰ 16 U.S.C. § 824e (2000).

Discussion

8. We will reject ISO-NE's rehearing request on the grounds that rehearing does not lie. The Commission does not allow rehearing of an order denying rehearing.¹¹ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.¹²

Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties to seek rehearing of an order denying rehearing. And, as the U.S. Court of Appeals for the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.¹³

9. Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.¹⁴ In fact, a second rehearing request is required to preserve appellate review rights in instances when the later order modifies the results of the earlier order in a significant way.¹⁵

10. Here, in the December 22 Order, the Commission denied rehearing and affirmed the findings in the July 19 Order. In these circumstances, ISO-NE's current rehearing

¹¹ See e.g., *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088 at 61,533 (1993).

¹² See, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of “infinite regress” that would “serve no useful end”).

¹³ *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)). See also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

¹⁴ *Southern*, 877 F.2d at 1073.

¹⁵ *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

request is neither required nor appropriate. The fact that, in responding to arguments challenging the Commission's acceptance of ISO-NE's reliability determination in the July 19 Order, the Commission further expounded on its rationale does not modify the results of the July 19 Order, and does not otherwise constitute a significant modification of that order. This being the case, consistent with the precedent cited above, we will reject ISO-NE's rehearing request.

11. But even if we were to consider the merits of ISO-NE's request for rehearing, we would not be persuaded by its arguments. First, Market Rule 1 is devoid of any requirement that any review or challenge to ISO-NE's reliability determination must be made under section 206. To the contrary, section 3.3.1(c)(iii) of Exhibit 2, to Appendix A to Market Rule 1, specifies that any RMR agreement be filed under section 205.¹⁶ Second, Market Rule 1 describes the process that a generator and ISO-NE are obliged to follow to negotiate a cost-of-service agreement. Market Rule 1 does not set out any specific process or method of analysis by which ISO-NE is to determine whether a generating unit is needed for reliability. Therefore, ISO-NE's reliability determination for Bridgeport's generator, or the methodology ISO-NE applied to reach its determination, was not previously approved by the Commission.

12. In any event, section 205 requires that all rates, terms, and conditions of jurisdictional service be just and reasonable. The Commission must review Bridgeport's proposed RMR agreement and its supporting documents, filed pursuant to section 205, as it reviews any other proposed rate schedule and its accompanying cost support. Just as the Commission has the obligation to review the cost support accompanying a proposed rate schedule, it has the same obligation to review the evidence, including ISO-NE's reliability determination, accompanying a proposed RMR agreement. For instance, in *Devon Power LLC*,¹⁷ the Commission stated that the filing of proposed RMR agreements under section 205 "gives market participants an opportunity to provide input and present evidence contradicting ISO-NE's determinations."¹⁸ Likewise, in *Milford Power Co.*

¹⁶ Section 3.3.1(c) states that "If the ISO has made such [a reliability] determination and the RMR Seller is not satisfied with the Reference Level or a RMR Mitigation Agreement . . . (iii) the RMR Seller shall file for cost-based rates *under Section 205* with each party free to take any position it determines appropriate regarding recovery of return on and on investment." (emphasis added).

¹⁷ 110 FERC ¶ 61,315 (2005).

¹⁸ *Id.* at P 41.

LLC,¹⁹ the Commission explained that Market Rule 1 permits ISO-NE to enter into reliability agreements “subject to Commission approval.”²⁰ Therefore, RMR applications should include evidence of ISO-NE’s reliability determination and supporting documents so that the Commission can properly determine whether there is a reliability need for that specific generator.

13. Furthermore, although the Commission grants considerable weight to ISO-NE’s reliability determinations, we always review the material supporting ISO-NE’s determinations. The Commission has never stated that ISO-NE’s reliability determination is conclusive in itself. To the contrary, the Commission has consistently held that ISO-NE’s reliability determination was subject to Commission review.²¹

The Commission orders:

ISO-NE’s request for rehearing is hereby rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁹ 112 FERC ¶ 61,154 (2005).

²⁰ *Id.* at P 15. *See also PPL Wallingford Energy, LLC v. FERC*, 419 F.3d 1194, 1196 (D.C. Cir. 2005) (While Market Rule 1 gives ISO-NE “the authority to negotiate individual RMR agreements as are required to maintain and/or improve system reliability[,]” it also requires that “such agreements are to be filed with the Commission in accordance with the Commission’s rules and regulations, and, as such, may be subject to the review of the Commission.”) (quoting *New England Power Pool*, 100 FERC ¶ 61,287 at 62,268 (2002)).

²¹ *See Milford Power Company, LLC*, 112 FERC ¶ 61,154 at P 18 (2005). *See also supra* P 12 & nn. 17-20.