

136 FERC ¶ 61,123
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northeast Utilities Service Company

Docket No. ER11-3119-001

ORDER DENYING REHEARING

(Issued August 23, 2011)

1. Conservation Resource Solutions, Inc. (CRS) seeks rehearing of the Commission's May 9, 2010 Order (May 9 Order)¹ denying Northeast Utilities Service Company's (NUSCO) request for limited waiver of a deadline prescribed in ISO New England Inc.'s (ISO-NE) Forward Capacity Market Metering and Resettlement Deadlines Calendar, as provided for in ISO-NE's Transmission, Markets and Services Tariff (Tariff). NUSCO had requested the waiver in order to allow it to resubmit interval meter data for eight demand response assets for the June 2010 obligation month. For the reasons discussed below, the Commission will deny rehearing.

I. Background

2. CRS is NUSCO's demand response meter reader. On March 16, 2011, NUSCO filed a request with the Commission seeking waiver of the 101-day deadline for submitting interval meter data, as set forth in Section III.3.1.6 of ISO-NE's Tariff (Waiver Request). In support of its Waiver Request, NUSCO stated that CRS had submitted five-minute interval meter data for eight demand response assets to ISO-NE in real-time during ISO-NE's June 2010 demand response events, using the Remote Terminal Unit (RTU) interface with ISO-NE. However, NUSCO subsequently determined through its regular validation processes that, due to technical metering issues at the assets' locations, such as malfunctioning utility pulse output boards and electrical noise from equipment installed by end-use customers, the data needed to be corrected and resubmitted to ISO-NE. NUSCO stated that, although it submitted a request to ISO-NE for a billing adjustment, asking that ISO-NE accept resubmission of validated and corrected interval meter data, ISO-NE denied the request.

¹ Northeast Utilities Service Co., 135 FERC ¶ 61,123 (2011).

3. On April 8, 2011, CRS filed an untimely motion to intervene. Although CRS stated that it “has substantial interests that may be directly affected by the outcome of this proceeding and that cannot be adequately represented by any other party[,]” CRS claimed “it did not deem participation necessary until after reviewing [ISO-NE’s Response].” CRS also noted that it disagreed with certain statements made in ISO-NE’s Response, but it did not provide any evidentiary support for its position.

4. In the May 9 Order, the Commission granted CRS’s request for untimely intervention and also found that NUSCO and CRS failed to provide evidence to support the Waiver Request. The Commission also held that the waiver was not of limited scope and would have undesirable consequences such as requiring a re-running of the market settlements and a change in the results of the third annual reconfiguration auction. Accordingly, the Commission denied the Waiver Request.²

II. Request for Rehearing

5. In its June 8, 2011 request for rehearing, which it supplemented on June 13, 2011, CRS introduces arguments and evidence not previously produced. CRS alleges that the May 9 Order “is based on an incomplete factual record, and draws erroneous conclusions based on this incomplete record.”³ Therefore, CRS now provides evidence purporting to show that it submitted the missing interval data to ISO-NE via the aforementioned requested billing adjustment. CRS further alleges that ISO-NE had requested that CRS avoid statements that would publicly raise concerns about ISO-NE’s newly implemented system of communicating with and recording the contributions of demand response resources consistent with a cooperative, collaborative approach. CRS states that, at ISO-NE’s request, CRS refrained from sharing with the Commission specific information about the likely causes of the communication failures described in the Waiver Request, its inability to verify the data submissions in the manner suggested by the ISO-NE, and the ongoing issues with ISO-NE’s communication and data retention systems.⁴

6. CRS states that it expected ISO-NE’s response to NUSCO’s Waiver Request to address these issues and/or to support the one-time request for a billing adjustment based on meetings it had had with ISO-NE.⁵ CRS states that, in a good faith effort to comply with ISO-NE in resolving the underlying errors, CRS and NUSCO did not provide the information it now attempts to introduce.⁶ CRS states that it can show that it submitted

² *Id.* P 9-12.

³ Rehearing Request at 2.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

the information using the requisite Demand Response Market User Interface.⁷ It also argues that the communication errors are most likely the result of ISO-NE's non-compliant implementation of the Simple Object Access Protocol which inhibits verification.⁸ CRS argues that ISO-NE has experienced similar failures and yet still relied on this system.⁹ CRS also argues that, under the relevant Delaware law, which, according to CRS, applies the Uniform Electronic Transactions Act, the meter corrections it submitted are deemed received on submission, even if no individual is aware of their receipt.¹⁰ CRS also alleges that ISO-NE had directed CRS not to perform the verifications that would have confirmed whether the meter data had been received.¹¹ Finally, CRS repeats arguments set forth in the underlying proceeding that the impact of correcting the errors at issue would be limited and that not doing so would cause great harm to it and NUSCO.¹²

7. On June 27, 2011, ISO New England (ISO-NE) filed a Motion for Leave to Answer and Answer.

III. Discussion

A. Procedural Matters

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2011), prohibits answers to requests for rehearing. Accordingly, we will reject ISO-NE's answer.

B. Commission Determination

9. We will deny rehearing. CRS' attempt to introduce new evidence and new claims at the rehearing stage is procedurally improper, and Commission precedent also does not allow rehearing requests to be supplemented after the statutory deadline for seeking

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.* at 15.

rehearing.¹³ This is because other parties are not permitted to respond to a request for rehearing.¹⁴ Late introduction of new evidence and claims at the rehearing stage is disruptive to the administrative process, because it has the effect of creating a moving target for parties seeking a final administrative decision and for the Commission which is seeking to issue such a decision.¹⁵

10. While the Commission can accept new evidence in a rehearing request “if based on matters not available for consideration by the Commission at the time of the final decision or order,”¹⁶ this exception does not apply here, where CRS seeks to introduce evidence bearing upon the exact issue considered in the May 9 Order, and available to it at that time.¹⁷

11. Although CRS acknowledges in its rehearing request that it had access to the evidence when the Waiver Request was filed, it fails to provide a reasonable justification for why it did not reveal this information until after issuance of the May 9 Order. Although CRS argues that it withheld this evidence when NUSCO first filed the Waiver Request based on discussions with and a desire to defer to ISO-NE, CRS could and should have provided the evidence to support the Waiver Request at that time, regardless of those discussions. The existence of such informal discussions among parties cannot

¹³*Baltimore Gas and Electric Co.*, 123 FERC ¶ 61,262, at P 10 (2008) (*BG&E I*) (“The Commission looks with disfavor on parties raising issues for the first time on rehearing.”); *accord Boralex Livermore Falls L.P.*, 123 FERC ¶ 61,279, at P 23 (2008) (*Boralex*).

Baltimore Gas and Electric Co., 130 FERC ¶ 61,210, at P 9 (2010) (“We deny the Maryland Commission's motion to revise its request for rehearing as untimely.”); *accord Texas-New Mexico Power Co.*, 107 FERC ¶ 61,316, at P 22 (2004).

¹⁴ 18 C.F.R. §385.713(d) (2011).

¹⁵ *E.g.*, *BG&E I*, 123 FERC ¶ 61,262 at P 10; *Boralex*, 123 FERC ¶ 61,279 at P 23.

¹⁶ *TransCanada Alaska Pipeline System*, 67 FERC ¶ 61,175, at 61,531(1994) (interpreting Rule 713(c)(3) and rejecting evidence offered at rehearing because it could have been raised previously).

¹⁷ *FPL Energy Marcus Hook L.P. v. PJM Interconnection L.L.C.*, 108 FERC ¶ 61,171, at P 12 (2004); *see also Westar Energy, Inc.*, 134 FERC ¶ 61,176 at P 23 (noting that, while the party seeking rehearing claimed that it did not raise any new issue, it did admit to submitting new evidence, which the Commission found should have been submitted earlier in the proceeding).

control a formal Commission proceeding, particularly given that deadlines for submitting information exist and those deadlines are designed to ensure fairness to all parties and the Commission, including both the opportunity to respond and the ability of the Commission to process its cases in an orderly manner.

The Commission orders:

CRS' request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.