

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Berkshire Power Company, LLC

Docket No. ER05-1179-004

ORDER REJECTING REHEARING

(Issued May 26, 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 February 2, 2006,¹ on the grounds that rehearing does not lie.

Background

2. On March 24, 2005, Berkshire Power Company, LLC (Berkshire) requested that ISO-NE provide a reliability determination for Berkshire's 245 MW generating facility located in Agawam, Massachusetts (Facility). On May 6, 2005, ISO-NE notified Berkshire that the Facility "is needed for system reliability" under Market Rule 1.² On June 30, 2005, as amended on July 1 and 8, 2005, Berkshire, in accordance with ISO-NE's Market Rule 1, filed with the Commission a proposed RMR Agreement between itself and ISO-NE, arguing that the RMR Agreement is necessary to permit the facility to continue providing reliability services, as Berkshire has received insufficient revenue to

¹ *Berkshire Power Co., LLC*, 114 FERC ¶ 61,099 (2006) (February 2 Order).

² Berkshire's June 30, 2005, Reliability Must Run Agreement (RMR Agreement) Filing, Attachment E. ISO-NE has authority under Market Rule 1 to enter into an RMR cost-of-service agreement with a generator that is needed 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. Section 3.3.1(c) of Appendix A, Exhibit 2 of Market Rule 1.

sustain its operation. On September 6, 2005, the Commission conditionally accepted the RMR Agreement for filing, suspended it for a nominal period, set it for hearing and settlement judge procedures, and directed Berkshire to submit a compliance filing.³ On October 6, 2005, Massachusetts Municipal Wholesale Electric Company (MMWEC) filed a request for rehearing of the September 6 Order, and Berkshire submitted a compliance filing in response to the September 6 Order. ISO-NE did not seek rehearing of the September 6 Order. On February 2, 2006, the Commission denied the request for rehearing and accepted the compliance filing.⁴

3. On March 6, 2006, ISO-NE filed a request for rehearing of the Commission's February 2 Order. The Attorney General of Massachusetts and, jointly, MMWEC, Chicopee Municipal Lighting Plant, and South Hadley Electric Light Department filed answers to ISO-NE's request for rehearing.

Procedural Matters

4. 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, and will, therefore, reject them.

ISO-NE's Request for Rehearing

5. ISO-NE notes that the February 2 Order states that "review of the RMR Agreement, under section 205 of the [Federal Power Act (FPA)]⁵, also included a review of the evidence presented by Berkshire and ISO-NE that the facility is needed for reliability."⁶ ISO-NE argues that this language means that the reliability determination was reviewable under section 205. 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 agreement to the Commission. It argues that, to the extent Berkshire (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 make ISO-NE's reliability

³ *Berkshire Power Co.*, 112 FERC ¶ 61,253 (2005) (September 6 Order).

⁴ *Berkshire Power Co., LLC*, 114 FERC ¶ 61,099 (2006).

⁵ 16 U.S.C. § 824d (2000).

⁶ February 2 Order at P 13.

determination subject to 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 agreement 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.⁷

6. ISO-NE also requests that the Commission clarify that: (1) reliability determinations are a core function of an Independent System Operator or Regional Transmission Organization and need not be submitted to the Commission for review and approval; and (2) 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.

Commission Determination

7. We will reject ISO-NE's rehearing request on the grounds that the Commission does not allow rehearing of an order denying rehearing.⁸ 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.⁹ 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.¹⁰

8. 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

⁷ 16 U.S.C. § 824e (2000).

⁸ *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).

⁹ *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").

¹⁰ *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).

objection.¹¹ 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.¹²

9. Here, in the February 2 Order, the Commission denied rehearing and affirmed the findings in the September 6 Order. In these circumstances, ISO-NE's current rehearing 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 September 6 Order, the Commission further expounded on its rationale did not modify the results of the September 6 Order, and did 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.

10. But even if we were to consider the merits of ISO-NE's request for rehearing, we would not be persuaded by its arguments. Market Rule 1 is devoid of any requirement that any review or challenge to ISO-NE's reliability determination can be made only 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 205.¹³ In addition, 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 Berkshire's generator, or the methodology ISO-NE applied to reach its determination, was not previously approved by the Commission.

11. In any event, section 205 requires that all rates, terms, and conditions of jurisdictional service be just and reasonable. The Commission must review Berkshire's proposed RMR agreement and its supporting documents, filed pursuant to section 205, as

¹¹ *Southern*, 877 F.2d at 1073.

¹² *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).

¹³ Section 3.3.1(c) states that "If the ISO has made such [a reliability] determination and the Reliability Seller is not satisfied with the Reference Level or a Reliability Mitigation Agreement, . . . (iii) the Reliability 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 of and on investment." (emphasis added).

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*,¹⁴ 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."¹⁵ Likewise, in *Milford Power Co. LLC*,¹⁶ the Commission explained that Market Rule 1 permits ISO-NE to enter into reliability agreements "subject to Commission approval."¹⁷ Therefore, filings of RMR agreements 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.

12. 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.¹⁸

¹⁴ 110 FERC ¶ 61,315 (2005).

¹⁵ *Id.* at P 41.

¹⁶ 112 FERC ¶ 61,154 (2005).

¹⁷ *Id.* at P 15. *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)).

¹⁸ *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265 at P 13 (2006); *Milford Power Co., LLC*, 112 FERC ¶ 61,154 at P 18 (2005). *See also supra* P 11 & nn.14-17.

The Commission orders:

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.