

157 FERC ¶ 61,059
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

NextEra Energy Resources, LLC
PSEG Companies

Docket No. EL16-93-001

v.

ISO New England Inc.

ORDER DISMISSING REHEARING

(Issued October 27, 2016)

I. Background

1. In an August 31, 2016 order, the Commission dismissed without prejudice a complaint filed by NextEra Energy Resources, LLC and PSEG Companies (Complaint) against ISO New England Inc. pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's regulations.² The Complaint alleged that state regulators in Massachusetts, New Hampshire, Connecticut, and Rhode Island were on the verge of implementing a manipulative scheme to artificially suppress prices in the wholesale energy and capacity markets in New England.³ The Commission found that the Complaint was not ripe for consideration because the circumstances giving rise to the claims were "in a state of flux" and, as a result, the Commission did "not have before it the concrete facts necessary to determine whether the tariff will be unjust and unreasonable."⁴

¹ 16 U.S.C. § 824e (2012).

² 18 C.F.R. § 385.206 (2016).

³ *NextEra Energy Resources, LLC*, 156 FERC ¶ 61,150 (2016) (August 31 Order).

⁴ August 31 Order, 156 FERC ¶ 61,150 at P 15.

2. On September 30, 2016, Algonquin Gas Transmission, LLC (Algonquin) timely filed a request for rehearing of the Commission's August 31 Order. In its rehearing request, Algonquin agrees with the Commission that "the concerns raised by the Complaint are indeed speculative and unsupported."⁵ Nevertheless, Algonquin urges the Commission to grant rehearing, address the merits of the Complaint, and dismiss it on the following grounds: the Commission should not intrude on state jurisdiction; the Complaint is incurably deficient; and the Complaint is "an anti-competitive use of the Commission's processes."⁶

3. On September 30, 2016, Eversource Energy Service Company (Eversource), on behalf of its public utility subsidiaries, Connecticut Light & Power Company, NSTAR Electric Company, Public Service Company of New Hampshire, and Western Electric Company, filed a motion in support of Algonquin's request for rehearing.

4. In this order, we dismiss Algonquin's request for rehearing and Eversource's motion for the reasons explained below.

II. Commission Determination

5. Section 313(a) of the FPA provides that any person "aggrieved" by a Commission order may apply for rehearing.⁷ "To be aggrieved, a party must establish a concrete injury arising from the Commission's underlying action."⁸

6. Here, the August 31 Order dismissed the Complaint, which was the end result advocated by Algonquin. And Algonquin agrees with the conclusion that led the Commission to that result – i.e., "the concerns raised by the Complaint are indeed speculative and unsupported."⁹ While Algonquin would have preferred a dismissal on

⁵ Algonquin Rehearing Request at 2.

⁶ *Id.* at 4.

⁷ 16 U.S.C. § 825l (2012).

⁸ *Confederated Salish & Kootenai Tribes Energy Keepers, Inc.*, 153 FERC ¶ 61,217, at P 7 (2015); *see also CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1292 (D.C. Cir. 1994) ("To show aggrievement, a plaintiff must allege facts sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature.") (internal quotations omitted).

⁹ Algonquin Rehearing Request at 2; *see also* August 31 Order, 156 FERC ¶ 61,150 at P 15.

the merits, rather than a procedural dismissal, mere disagreement with the Commission's rationale for a substantively favorable decision does not establish aggrievement.¹⁰

7. Algonquin contends that the Commission's procedural dismissal leaves open the possibility that NextEra and PSEG could "continue their troubling delay tactics."¹¹ But "[a]llegations of injury based on predictions regarding future legal proceedings are . . . 'too speculative'" to establish a concrete injury-in-fact.¹²

8. Moreover, the Commission is not obligated to reach the merits of a case when it can be decided on procedural grounds.¹³ Administrative economy concerns are

¹⁰ See *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995) ("Shell does not have standing to seek review of the Commission's disclaimer of [Interstate Commerce Act] jurisdiction. For 'mere disagreement with an agency's rationale for a substantively favorable decision, even where such disagreement focuses on an interpretation of law to which a party objects[,]'" is insufficient injury.) (citation omitted); *Telecomm. Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (dismissing for lack of standing petition for review by party who endorsed the end result reached by the FCC, but disagreed with the rationale employed by the Commission); see also *Grand Coulee Project Hydroelec. Auth.*, 145 FERC ¶ 61,063, at n.3 (2013) ("mere disagreement with an agency's rationale for a substantively favorable decision does not make a party aggrieved").

¹¹ Algonquin Rehearing Request at 4.

¹² *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 157 (1990)); see also *Union Elec. Co.*, 147 FERC ¶ 61,070, at 61,285 & n.4 (2014) (dismissing request for rehearing for lack of aggrievement because "some day" intentions without concrete plans do not support the requisite finding of "actual or imminent injury") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

¹³ See, e.g., *Mobil Oil Explor. & Prod. SE Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would generate more appropriate information[.]") (citations omitted); see also *Ten. Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem."); *Nadar v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload."); *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) ("It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it.").

particularly acute where, as here, the facts are in flux and the record before the Commission may be incomplete.¹⁴

9. In light of our dismissal of Algonquin's rehearing request, we also dismiss Eversource's motion in support of that request.

The Commission orders:

(A) The request for rehearing is hereby dismissed, as discussed in the body of this order.

(B) The motion in support of the rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁴ See August 31 Order, 155 FERC ¶ 61,150 at P 15 (describing factors that are in flux, including judicial decision recognizing limitation on state commission's authority and subsequent withdrawal of petitions that were pending before the state commission). See, e.g., *N. Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736, 739 (2016) (denying petition for review for lack of ripeness where there were "too many 'ifs' in the asserted causal chain linking the agency's action to the alleged hardship"); *Mich. Elec. Trans. Co., LLC*, 156 FERC ¶ 61,025, at PP15-16 (2016) (dismissing complaint as unripe without reaching the merits of the complaint); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,104, at P 10 (2010), *reh'g denied*, 149 FERC ¶ 61,245 (2014), *reh'g denied*, 153 FERC ¶ 61,304 (2015) (dismissing complaint concerning project cancellation costs as unripe because the state commission had not yet approved cancellation of the project).