

148 FERC ¶ 61,137
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

ISO New England Inc.

Docket No. ER14-1409-000

ORDER REQUIRING PRODUCTION OF PROTECTED MATERIAL
PURSUANT TO A NON-DISCLOSURE AGREEMENT

(Issued August 21, 2014)

1. On July 31, 2014, the Eastern Massachusetts Consumer-Owned Systems (EMCOS)¹ filed a motion for disclosure of certain privileged information submitted in this proceeding. We hereby grant that motion in part, and require ISO New England, Inc. (ISO-NE) to provide intervenors with a non-disclosure agreement consistent with this order no later than two business days from the date of this order, then to provide any intervenor with a copy of the requested non-public documents, subject to certain information remaining redacted, as explained more fully below, no later than one business day after the intervenor executes the non-disclosure agreement. Parties wishing to file protests or comments on the substance of the non-public documents must do so on or before September 5, 2014.

¹ EMCOS consists of Belmont Municipal Light Department, Braintree Electric Light Department, Concord Municipal Light Plant, Georgetown Municipal Light Department, Groveland Electric Light Department, Hingham Municipal Lighting Plant, Littleton Electric Light and Water Department, Merrimac Municipal Light Department, Middleton Electric Light Department, Rowley Municipal Lighting Plant, Taunton Municipal Lighting Plant and Wellesley Municipal Light Plant.

I. Background

2. On February 28, 2014, ISO-NE submitted the results of its eighth Forward Capacity Auction (FCA 8) to the Commission for acceptance under section 205 of the Federal Power Act (FPA)² (the February 28, 2014 filing).

3. Notice of the February 28, 2014 filing was published in the *Federal Register*, 79 Fed. Reg. 18,681 (2014), with interventions, comments and protests due on or before April 14, 2014. The New England Power Pool Participants Committee (NEPOOL); Dominion Resources Services, Inc. (Dominion); Exelon Corporation (Exelon); the NRG Companies (NRG); the New England States Committee on Electricity (NESCOE); the PSEG Companies (PSEG); and H.Q. Energy Services Inc. (HQ) filed timely motions to intervene. Brayton Point, NextEra Energy Resources, the New England Power Generators Association (NEPGA), the Electric Power Supply Association (EPSA), the Utility Workers Union of America Local 464 (UWUA), and the Conservation Law Foundation filed motions to intervene out-of-time.

4. EMCOS, the Attorney General for the State of Connecticut (CTAG); the Connecticut Municipal Electric Energy Cooperative and the New Hampshire Electric Cooperative, Inc. (CMEEC/NHEC); the New Hampshire Office of Consumer Advocate, the Maine Office of the Public Advocate, and the Connecticut Office of Consumer Counsel (collectively, the State Advocates); Public Citizen, Inc.; Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company d/b/a National Grid (National Grid), the Massachusetts Attorney General, the Massachusetts Department of Public Utilities (MA DPU), the Northeast Utilities Companies, and the United Illuminating Company (collectively, the Joint Parties); the Eastern Massachusetts Consumer-Owned Systems (EMCOS); and UWUA filed motions to intervene and protests.

5. On June 27, 2014, Commission staff issued a deficiency letter to ISO-NE, stating that its filing was deficient and requesting ISO-NE to provide further information. The deficiency letter stated that “[t]o the extent that some of the requested information may contain confidential material, please submit a non-public version in addition to a public version for Commission review.”³

² 16 U.S.C. § 824(d) (2012).

³ Deficiency Letter at 1.

6. On July 17, 2014, ISO-NE filed both a public and a confidential version of its response (the July 17, 2014 filing).⁴ ISO-NE sought confidential treatment pursuant to the Commission's regulations⁵ for the entirety of Attachments B, C and D, which contain detailed information about market participants' bidding behavior in FCA 8, and for certain confidential information included in the answers in Attachment A, stating that those portions of the response contained "resource-specific and market-sensitive information that is treated as confidential under the Tariff" and that is "commercially sensitive to the pertinent market participants and would be exempt from the mandatory public disclosure requirements of the Freedom of Information Act [FOIA], 5 U.S.C. § 552, pursuant to 18 C.F.R. § 388.107(d) ('Trade secrets and commercial or financial information obtained from a person and privileged or confidential')." ⁶

7. Notice of ISO-NE's July 17, 2014 filing was published in the *Federal Register*, 79 Fed. Reg. 43,463 (2014), with interventions, comments and protests due on or before July 31, 2014. Calpine Corporation, GDF SUEZ Energy North America, and Emera Energy Services filed timely motions to intervene; NEPGA filed comments; and EMCOS filed a supplemental protest and motion for disclosure of the confidential version of ISO-NE's response. The New Hampshire Electric Cooperative, Inc. filed an answer in support of EMCOS motion. ISO-NE and NEPGA filed answers opposing the motion.

II. Motion for Disclosure and Answers

8. EMCOS reiterates its concerns, submitted in its protest of the February 28, 2014 filing, regarding the possible exercise of market power in FCA 8. EMCOS further asserts that ISO-NE has not followed the procedures contained in the Commission's regulations, under which any person submitting a document to the Commission for which it is requesting privileged treatment must provide a proposed form of protective agreement with the filing.⁷

⁴ All citations to ISO-NE's July 17, 2014 filing in this order are to the public version.

⁵ 18 C.F.R. § 388.112 (2014).

⁶ ISO-NE July 17, 2014 filing at 1 (citing to Tariff, Attachment D (Information Policy)).

⁷ EMCOS Supplemental Protest and Motion for Disclosure at 4 (citing 18 C.F.R. § 388.112(b)(1) and (b)(2)(i) (2014)).

9. EMCOS asserts that the confidential information provided in the July 17, 2014 filing should not be granted confidential treatment under FOIA Exemption 4, since release of the information will not impair the government's ability to obtain necessary information in the future, or cause substantial harm to the competitive position of the person from whom the information was obtained.⁸ Furthermore, EMCOS argues the information is "stale" for commercial purposes since FCA 8 is concluded.⁹ On this basis, EMCOS requests that the Commission direct ISO-NE to disclose in full those portions of its July 17, 2014 filing that were redacted. In the alternative, EMCOS states that ISO-NE "should be directed to provide full and unredacted versions of its [July 17, 2014 filing] to intervenors in this proceeding, upon execution of an appropriate non-disclosure agreement. The Commission should thereafter re-notice this material for comments, providing adequate opportunity for its disclosure and review."¹⁰

10. ISO-NE filed a response opposing EMCOS' motion. It states that the Commission recognized in its deficiency letter that ISO-NE's response could contain confidential material, and directed ISO-NE to submit a non-public version of such material, without indicating that intervenors were to receive the non-public version. ISO-NE states that, therefore, it complied with the Commission's order.¹¹

11. ISO-NE further states that, to comply with the deficiency letter, ISO-NE provided resource-specific offer and bid information, which is classified as "Confidential Information" under the Commission-accepted ISO New England Information Policy.¹² As an example, it states that it provided the specific auction price/quantity points at which capacity was withdrawn from the auction for all resources participating in the

⁸ EMCOS Supplemental Protest and Motion for Disclosure at 5 (citing *Jurewicz v. Dept. of Agriculture*, 741 F.3d 1326, 1331 (D.C. Cir. 2014) (*Jurewicz*), quoting, *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)) (standard for whether information is confidential is whether "disclosure would be likely either ' (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'").

⁹ EMCOS Supplemental Protest and Motion for Disclosure at 6.

¹⁰ *Id.*

¹¹ ISO-NE August 11, 2014 response to motion at 1-2.

¹² ISO-NE August 11, 2014 response to motion at 2 n.3 (citing to Tariff, Attachment D ("Information Policy")).

auction, certain cost information regarding de-list bids, and resource-specific new resource offer floor prices. ISO-NE asserts that this “Meter, Bid and Offer Data” submitted by market participants “as inputs to the Market System” is considered Confidential Information pursuant to Section 3.0(f) of the Information Policy, and may not be released by the ISO because, under Section 2.1(a) of the Information Policy, it constitutes trade secrets or commercial or financial information, the disclosure of which would harm the furnishing market participant or prejudice the position of the market participant in the New England electricity markets. ISO-NE asserts that disclosure of this information could harm the entities to which the information relates, as well as the competitiveness of future capacity auctions, as the Commission has previously recognized.¹³

12. ISO-NE also notes that the Confidential Information redacted from the ISO Response is classified as “Strategic Information” under the ISO New England Information Policy,¹⁴ and such information is considered the sole and exclusive property of the market participant who furnished it, and ISO-NE has an obligation to maintain that confidentiality pursuant to its Information Policy.

13. Additionally, ISO-NE asserts that, contrary to EMCOS’s characterization, the data is not “stale” because FCA 8 is over. Rather, ISO-NE argues, the confidential information is resource-specific offer and bid price data that remains commercially sensitive beyond FCA 8, since disclosure could (a) permit other market participants to improve their positions vis-à-vis that of the furnishing market participant in future FCAs, and (b) compromise the competitiveness of future auctions by enabling parties to analyze

¹³ ISO-NE August 11, 2014 response to motion at 3, 3 n.4 (citing *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,103, at P 30 (2009) (*NYISO*) (Commission did not require information of “generator or equipment specific data, and transmission system information which is commercially valuable, necessary to participation in the marketplace, and not yet public. . . . This includes bidding strategies that have not yet been made public, generator reference prices, and generator costs.” The Commission further “recognize[d] the confidential nature of bid data and . . . concerns regarding entities that may use this information to gain competitive advantage”).

¹⁴ ISO-NE August 11, 2014 response to motion at 3 (citing Section 3.1(h) of the Information Policy, under which Strategic Information includes “*Confidential Information* supplied by Governance Participants to the extent such information would affect a Governance Participant’s bid or offer strategy such as . . . all offer prices and parameters for particular resources [and] [c]ost information regarding operation of one or more resources if and to the extent supplied to the ISO”).

confidential offer and bid information from their competitors and potentially use that information in structuring their own future bids.¹⁵

14. ISO-NE points out that, even if disclosure is limited in its distribution, the possible harm to future auctions outweighs any benefit that might derive from any disclosure of the confidential information, and that this is particularly true where, as here, the party seeking disclosure has made no showing that a grant of access to the confidential information would assist the Commission in making decisions.¹⁶ ISO-NE further notes that the Commission has previously rejected requests to make public confidential Forward Capacity Market information.¹⁷ For these reasons, ISO-NE requests that the Commission neither grant the motion nor re-notice ISO-NE's filing for comments.

15. NEPGA also filed in opposition to EMCOS' motion. NEPGA states that EMCOS fails to establish that the Confidential Information is relevant to the issue before the Commission in this proceeding, and fails to establish an interest that outweighs suppliers' interests in the confidentiality of what may be their most commercially sensitive and confidential information, namely, their offers into the FCA. NEPGA asserts that the standard for when confidential information should be provided pursuant to a protective order and non-disclosure agreement depends, in part, on whether the information is necessary to develop the record.¹⁸ NEPGA argues that the only question at issue here,

¹⁵ ISO-NE August 11, 2014 response to motion at 3-4. ISO-NE further states that, even if EMCOS (a customer group) is not in a position to use this information in such a way as to cause competitive harm, many other market participants would be able to do so. *Id.* at 4.

¹⁶ ISO-NE August 11, 2014 response to motion at 4-5 (citing *NYISO*, 129 FERC ¶ 61,103 at P 20 (Commission denied disclosure of confidential information where the New York Public Service Commission simply relied on generalized assertions concerning the benefits of disclosure)).

¹⁷ ISO-NE August 11, 2014 response to motion at 4 n.8 (citing *ISO New England Inc.*, 138 FERC ¶ 61,196, at PP 57-64 (2012) and *ISO New England Inc.*, 128 FERC ¶ 61,266, at P 79 (2009)).

¹⁸ NEPGA August 11, 2014 answer at 2 n.3 (citing *Astoria Generating Company, L.P. and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 136 FERC ¶ 61,155, at P 23 (2011) (citing *Mojave Pipeline Co., et al.*, 38 FERC ¶ 61,249 (1987))).

however, is whether ISO-NE appropriately applied its Tariff in conducting FCA 8,¹⁹ and that, since EMCOS simply makes general claims of market manipulation, it has not demonstrated that the confidential information it seeks is relevant to that question. NEPGA also notes that the Commission has historically maintained the confidentiality of information ISO-NE has provided to support an FCA results filing.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely-filed unopposed motions to intervene serve to make the entities that filed them a party to this proceeding. We will grant the late-filed motions to intervene given those parties' interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

B. Commission Determination

17. We grant EMCOS' motion for disclosure of redacted information in part, and pursuant to a non-disclosure agreement, as discussed below.

18. The Commission previously has recognized that parties have a legitimate interest in appropriately protecting the confidentiality of their data.²⁰ In order to assert this interest, ISO-NE submitted portions of its response pursuant to Section 388.112 of the Commission's regulations, which permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of FOIA. To obtain privileged treatment, the filer must (1) include a justification for requesting privileged treatment, (2) designate the document as privileged,

¹⁹ NEPGA August 11, 2014 answer at 2 (citing to its prior April 29, 2014 pleading at 2 n.7-8 ("The ISO is "obligated solely to demonstrate that it conducted the FCA pursuant to its own market rules" (*ISO New England Inc.*, 127 FERC ¶ 61,040, at P 28 (2009)) and the extent of the Commission's review is to "evaluate the filing to determine whether ISO-NE conducted the FCA in accordance with its FCM rules" (*ISO New England, Inc.*, 140 FERC ¶ 61,143, at P 23 (2012))))).

²⁰ *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 26 (2011) (*West Deptford*).

and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent.²¹

19. ISO-NE has identified the competitive harm that may occur as a result of publicly releasing the redacted information, stating that the confidential information included in the response is resource-specific offer and bid price data that remains commercially sensitive beyond FCA 8, and that disclosure of the confidential information would be harmful in the context of future Forward Capacity Auctions and to the interests of all New England market participants by potentially compromising the competitiveness of those auctions.²² We agree with ISO-NE that public release of the confidential information could result in serious adverse impacts to future Forward Capacity Auctions, and harm New England market participants and consumers. Therefore, we will not require ISO-NE to release the redacted information publicly.

20. However, we also must weigh EMCOS' interest in participating in this proceeding. The Commission previously has observed that "[f]airness requires that in a Commission adjudicatory proceeding, entities which have intervened properly in a proceeding and are parties to that proceeding be permitted to participate meaningfully in that proceeding."²³ As we have previously stated, "[t]he Commission is obligated to balance the interests of a party seeking confidential treatment for information with the interests of parties seeking access to that information."²⁴ The Commission has achieved this balance, in the past, by allowing intervenors to obtain access to confidential material through a non-disclosure agreement, which ensures that information is neither publicly disclosed nor used by parties for purposes unrelated to their participation in the proceeding.²⁵

21. In this instance, we find persuasive arguments made by ISO-NE and NEPGA that revealing resource-specific bid data would result in such harm to the Forward Capacity Market that it cannot be provided to parties, even through a non-disclosure agreement.

²¹ 18 C.F.R. § 388.112(b)(1) (2014).

²² ISO-NE August 11, 2014 response to motion at 3-4.

²³ *West Deptford*, 134 FERC ¶ 61,189 at P 25.

²⁴ *Id.* P 30.

²⁵ See, e.g., *Mojave Pipeline Co., et al.*, 38 FERC ¶ 61,249; *Dominion Cove Point LNG, LP*, 147 FERC ¶ 61,202 (2014); *Arlington Storage Co., LLC*, 145 FERC ¶ 61,025 (2013); and *Southern Co. Energy Marketing, Inc.*, 111 FERC ¶ 61,011 (2005).

Specifically, we are concerned that revealing information related to specific auction price/quantity points at which capacity was withdrawn from the auction, cost information regarding de-list bids, and resource-specific new resource offer floor prices could harm the market participants that provided such information and adversely affect the competitiveness of future capacity auctions. Contrary to the assertions made by EMCOS, this information is not “stale,” as it is predictive of resources’ bidding behavior in future auctions. Given the ongoing relevance of this information, we are concerned that market participants could use this information in order to gain a competitive advantage in future auctions.

22. Additionally, we note that, in accordance with ISO-NE’s Tariff, market participants already have access to certain information related to the auction.²⁶ In determining how much information should be provided following an auction, the Commission has carefully balanced parties’ need for transparency and market participants’ expectations that their information will remain confidential.²⁷ We note that allowing market participants to view the redacted information in its entirety would be

²⁶ For example, ISO-NE publically provides data related to de-list bids on its website (see http://www.iso-ne.com/markets/hstdata/mkt_offer_bid/fcm_bids/fifteen_day_after_auction_report.xlsm). This data reveals which resources submitted de-list bids and for how many MW, but does not reveal the de-list bid prices.

²⁷ See, e.g., *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. and Regs. ¶ 31,281, at P 432 (2008); *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,250, at PP 202-203 (2009) (Order No. 719 requires that bid and offer data be released only after a lag time has elapsed and with market participant identities masked to guard against “the ability of market participants to exercise market power” and to “avoid participant harm and the possibility of collusion”); *San Diego Gas & Elec. Co.*, 101 FERC ¶ 61,186, at P 12 (2002) (CAISO tariff “requires [the ISO] to keep confidential virtually all information relating to individual bids”); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,115, at 61,364 (2001) (“The amount particular competitors bid is generally considered confidential business information. Disclosure of such information may lead to a reduction in competition because it will allow competitors to learn what their competitors are bidding and could lead to collusion or coordination.”); *Central Hudson Gas & Elec. Co.*, 86 FERC ¶ 61,062, at 61,204 (1999) (explaining that the basis for keeping bid data confidential for six months is to prevent collusive behavior); *PJM Interconnection, L.L.C.*, 86 FERC ¶ 61,247, at 61,890 (1999).

contrary to prior findings that this type of information is too sensitive to reveal, even after an auction concludes.²⁸

23. Accordingly, we conclude that the entirety of Attachments B, C, and D cannot be protected adequately by a non-disclosure agreement, and therefore should remain redacted because of the sensitive nature of the information found in these attachments. For the same reasons, information regarding a specific market participant's name and bidding behavior included in response to Question 2 (on page 6) should remain redacted.²⁹

24. The remaining redacted portions of the July 17, 2014 filing should be released to intervenors who sign a non-disclosure agreement. We find that the use of such agreements appropriately balances the interests of filers in protecting their sensitive information against inappropriate disclosure and the right of intervenors to access information necessary to their full and meaningful participation in a contested proceeding. While ISO-NE and NEPGA have argued against any disclosure of confidential information, even through the use of a non-disclosure agreement, we believe that the remaining redacted portions of the July 17, 2014 filing do not present the same risks to the Forward Capacity Market, and therefore should be released to parties who sign an appropriately tailored non-disclosure agreement.

25. Therefore, we order ISO-NE to provide intervenors with a non-disclosure agreement consistent with ISO-NE's model non-disclosure agreement, with two additional provisions specified below, no later than two business days from the date of this order, then to provide intervenors with a copy of all of the confidential data provided to the Commission in this proceeding, excluding the portions outlined above, no later than one business day after the intervenor executes the non-disclosure agreement. ISO-NE must include in the non-disclosure agreement provisions that designate the information as highly sensitive competitive material and preclude competitive duty personnel from accessing the information.³⁰

26. We will allow parties until September 5, 2014 to file with the Commission any additional comments based upon such information. We also direct any parties filing a

²⁸ *Id.*

²⁹ ISO-NE July 17, 2014 filing, Attachment A, Answer to Question 2, Paragraph 1.

³⁰ See *West Deptford*, 134 FERC ¶ 61,189 at P 29 n.48 (citing *Illinois AG*, 119 FERC ¶ 61,107, at P 9 (2007) of the approved protective order; *AERO Energy*, 118 FERC ¶ 61,047 (2007); *Northern Border*, 113 FERC ¶ 63,041, at P 23 (2005)).

response related to the information contained in the non-public version of ISO-NE's response to file both a non-public and public version and otherwise follow the requirements of Section 388.112 of the Commission's regulations.

The Commission orders:

(A) The Commission hereby grants EMCOS motion for disclosure of redacted information in part, as discussed above.

(B) The Commission hereby directs ISO-NE to provide intervenors with a protective agreement consistent with this order no later than two business days from the date of this order.

(C) The Commission hereby directs ISO-NE to provide the portions of the privileged material discussed above to intervenors no later than one business day after intervenors' execution of non-disclosure agreements.

(D) The Commission hereby directs parties who wish to file protests or comments on the substance of ISO-NE's July 17, 2014 response to do so on or before September 5, 2014, pursuant to the requirements of Section 388.112 of the Commission's regulations, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.