

142 FERC ¶ 61,058
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

ISO New England Inc.

Docket Nos. ER13-356-000
ER13-356-001

ORDER ON TARIFF REVISIONS AND REQUEST FOR REHEARING

(Issued January 23, 2013)

1. In this order, the Commission accepts on an interim basis, to become effective on January 24, 2013 through April 30, 2013, subject to conditions, the revisions to ISO New England Inc.'s (ISO-NE) Information Policy¹ which, by order issued December 7, 2012,² the Commission had accepted and suspended for five months, subject to settlement procedures and further Commission action. We also deny rehearing of the December 2012 Order.

I. Background

2. The Information Policy establishes rules and guidelines regarding appropriate disclosure of all information received, created, and distributed among ISO-NE, stakeholders, task forces, and working groups, in connection with the operation of and participation in markets administered by ISO-NE. The Information Policy has allowed ISO-NE to, among other things, share aggregate generator output schedule information

¹ The Information Policy is Attachment D to the ISO-NE Transmission, Markets and Services Tariff. The proposed tariff revisions will be referred to here as the Information Policy Changes.

² *ISO New England Inc.*, 141 FERC ¶ 61,196 (2012) (December 2012 Order).

with the interstate natural gas pipeline companies (pipelines) serving New England,³ and it includes *pro forma* non-disclosure certification and non-disclosure agreements that ISO-NE may enter into with state commissions and academic institutions for purposes of protecting confidential market information that ISO-NE shares with those parties. In case of a breach, each agreement expressly allows the affected participant that gave ISO-NE confidential market information to seek a certain level of judicial recourse, including an injunction and return of the relevant information.

3. On November 13, 2012, ISO-NE submitted revisions to its Information Policy, which added a single paragraph allowing ISO-NE to share the forecasted schedules and real-time output of specific natural gas-fired generators with the operating personnel of the pipelines. The Information Policy Changes provide:

Notwithstanding anything to the contrary in the ISO New England Information Policy, the ISO may disclose confidential forecast and real-time output information concerning natural gas-fueled generation from resources located within the New England Control Area to the operating personnel of an interstate natural gas pipeline company that operates a pipeline that is used to serve, directly or indirectly, the resources, provided that: (a) the ISO and the interstate natural gas pipeline company have entered into a non-disclosure agreement substantially in the form attached hereto as Appendix D; and (b) the ISO will discontinue the disclosure of Confidential Information to the interstate natural gas pipeline if (i) the gas pipeline breaches or threatens to breach its obligations under the non-disclosure agreement or (ii) the ISO determines that disclosure is no longer required for reliability purposes. The generator whose Confidential Information is disclosed pursuant to this provision shall be entitled to all rights and remedies, in law or equity, with respect to any breach of the pipeline company's obligation to maintain the disclosed data in confidence consistent with all applicable FERC orders and rules, including FERC Order No. 717, and FERC-approved gas pipeline tariffs, to the same extent as if the generator had provided the information directly to the interstate natural gas pipeline company.

³ The pipelines include Portland Natural Gas Transmission System (Portland Gas), Tennessee Gas Pipeline Company, L.L.C. (Tennessee Gas), Iroquois Gas Transmission System, L.P. (Iroquois), Algonquin Gas Transmission, LLC (Algonquin), and Maritimes & Northeast Pipeline, L.L.C. (Maritimes).

4. In support of the Information Policy Changes, ISO-NE stated that it had been working with stakeholders to address emerging concerns over resource performance and New England's increasing reliance on natural gas-fired generators,⁴ and that the revisions will enhance reliability and market efficiency by facilitating communication and coordination between electric and gas network control room operators.

5. ISO-NE asserted that pipelines may already be given the relevant output information under Order No. 698,⁵ but that the Information Policy Changes would ensure that all parties have the same information at the same time so that they can openly discuss issues as they arise. For example, ISO-NE stated that, by sharing scheduled and real-time output of specific natural gas-fired generators, the pipelines could provide information on gas availability that will allow ISO-NE to better anticipate and address potential reliability problems in the event that there is insufficient fuel for all gas-fired generators to meet their schedules. ISO-NE stated that the Information Policy Changes do not expand or restrict ISO-NE's existing authority to take dispatch actions based on its assessment of potential reliability threats, and neither the generators nor the pipelines stand to benefit from the proposed information-sharing arrangement; the changes only provide ISO-NE with better information upon which it can base its decisions to take actions to protect reliability.

6. Included as Appendix D to the Information Policy Changes was a new *pro forma* Non-Disclosure Agreement (NDA) that ISO-NE intends to enter into with each pipeline. The NDA provides for a "Confidential Period" of six months, during which time ISO-NE and a pipeline may disclose confidential information, i.e., information provided pursuant

⁴ According to ISO-NE, natural gas-fired generation supplied 51 percent of New England's electricity in 2011.

⁵ *Standards for Business Practices for Interstate Natural Gas Pipelines; Standards for Business Practices for Public Utilities*, Order No. 698, FERC Stats. & Regs. ¶ 31,251 (2007), *order on clarification and reh'g*, Order No. 698-A, 121 FERC ¶ 61,264 (2007) (collectively, Order No. 698). ISO-NE states that Order No. 698 incorporated certain standards of the North American Energy Standards Board by reference, including WEQ Standard 011-1.2/WGQ Standard 0.3.12; this standard directed each power plant operator and the transportation service provider directly connected to the power plant operator's facility to establish procedures to communicate material changes in circumstances that may impact hourly flow rates, and the power plant operator to provide projected hourly flow rates accordingly.

to the Information Policy Changes, only as set forth in the NDA.⁶ The NDA further requires ISO-NE and a pipeline to give each other prompt notice of any legal obligation to disclose confidential information, such as by a court order, and ISO-NE must in turn give notice to any affected generator.⁷ The NDA also allows ISO-NE and a pipeline to request the return of confidential information; provides for the destruction of written documents discussing the confidential information; and, in case of breach, allows ISO-NE or a pipeline to seek damages and equitable relief.⁸

7. However, unlike ISO-NE's *pro forma* certification and non-disclosure agreements for state commissions and academic institutions, the NDA does not expressly provide for judicial remedies and includes a "No Third-Party Beneficiaries" clause which states: "The Parties do not confer any rights or remedies upon any person other than the Parties to this Agreement and their respective successors and permitted assigns."

8. As detailed in the December 2012 Order, the NDA, and particularly its "No Third-Party Beneficiaries" clause, represented a major point of contention between generators, who sought third-party beneficiary status so that they could enforce the NDA directly against a pipeline for improperly sharing information, and the pipelines, who refused to sign any NDA with such a provision and in fact sought the above-referenced clause specifically excluding third-party beneficiaries. In support of its decision to include the "No Third-Party Beneficiaries" clause, ISO-NE stated that providing generators with third-party beneficiary status would give generators rights in excess of those currently provided by the Commission, expose pipelines to unlimited liability, and, as a practical matter, render the Information Policy Changes infeasible because no pipeline will sign an NDA conferring third-party beneficiary status upon generators.

9. Moreover, ISO-NE asserted that the new Information Policy language (quoted above) protects generators by providing that generators shall be entitled to all rights and remedies in law or equity and maintain protection under federal law and regulations, such

⁶ In broad terms, without the express prior written consent of the disclosing party and any affected generators, ISO-NE shall not disclose confidential information of a pipeline to anyone except ISO-NE's officers and employees charged with maintaining reliability and their advisors, and a pipeline shall not disclose confidential information of ISO-NE or any affected generator except to the pipeline's transmission function employees and their advisors. NDA section 2(a).

⁷ NDA section 2(c).

⁸ NDA section 3.

as the anti-discrimination provisions of the Natural Gas Act⁹ and the Order No. 717 Standards of Conduct requirements.¹⁰ ISO-NE further noted that generators' information may not be used for any purpose other than to ensure reliability of gas and electric systems, thus prohibiting pipelines from sharing the information with pipeline personnel who sell gas or transportation services; generators must consent to any disclosure or use of the information outside of these parameters and be given notice of subpoenas and any assignment of the NDA; and the protections included in the NDA extend for six months after the disclosure of the information, which, according to ISO-NE, is universally acknowledged as a time period exceeding the commercial lifespan of the information. Nevertheless, ISO-NE noted that stakeholders approved two versions of a non-disclosure agreement: ISO-NE's proposed NDA passed with a vote of 81.72 percent in favor, and an alternative version (alternative NDA) establishing generators as third-party beneficiaries passed with a vote of 98.1 percent in favor.

10. In the December 2012 Order, the Commission accepted the Information Policy Changes, suspended them for a period of five (5) months to be effective June 14, 2013, or such shorter period as the Commission may establish in a subsequent order, subject to refund, and set them for settlement judge procedures.¹¹ The same day, the Chief Judge issued an order appointing a settlement judge and scheduling a settlement conference for December 13, 2012.¹²

⁹ Both the Federal Power Act (FPA) and the Natural Gas Act (NGA) prohibit undue discrimination or preference. *See* 16 U.S.C. § 824d(b) (2006); 15 U.S.C. § 717c (b) (2006).

¹⁰ *See Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh'g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009), *order on reh'g*, Order No. 717-C, 131 FERC ¶ 61,045 (2010), *order on reh'g*, Order No. 717-D, 135 FERC ¶ 61,017 (2011) (collectively, Order No. 717).

¹¹ *ISO New England Inc.*, 141 FERC ¶ 61,196.

¹² *ISO New England Inc.*, Docket No. ER13-356-000 (Dec. 7, 2012) (unpublished).

11. On December 13, 2012, the settlement judge recommended that the settlement be terminated, stating that, after considerable discussions, the parties were unable to reach an agreement.¹³ On December 14, 2012, the Chief Judge terminated the settlement proceedings.¹⁴

II. Request for Expedited Rehearing and Clarification

12. On December 19, 2012, ISO-NE filed a request for rehearing and clarification of the December 2012 Order, seeking expedited Commission action in order to allow ISO-NE to share information with the pipelines this winter. ISO-NE states that a number of events have heightened reliability-related concerns, including expected reduced capabilities from Northeastern liquefied natural gas (LNG) facilities due to global LNG prices and damage to LNG facilities in the Middle East.

13. ISO-NE argues that the Commission should accept the Information Policy Changes without suspension or refund, stating that the changes are just and reasonable and consistent with the Commission's policy encouraging greater gas-electric coordination. ISO-NE states that the revisions provide greater confidentiality protections than other previously-accepted Information Policy provisions and are consistent with practices of other Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs).

14. ISO-NE further states that, if rehearing is granted:

the ISO agrees to the imposition of a condition to limit the scope of its information-sharing to avoid any inadvertent disclosure of generator information. Information-sharing will occur on an "as needed" basis. In other words, the ISO will not routinely share daily generator schedules with the pipeline; instead, the ISO will discuss specific output information with the pipelines only when ISO staff, in their discretion, believe that it is necessary to protect reliability. The ISO believes that this information-sharing will be primarily, if not exclusively, oral. Finally, information about a specific generator will be shared only with the pipeline serving that generator directly, or serving the Local Distribution Company that serves that generator.

¹³ *ISO New England Inc.*, Docket No. ER13-356-000 (Dec. 13, 2012) (unpublished).

¹⁴ *ISO New England Inc.*, Docket No. ER13-356-000 (Dec. 14, 2012) (unpublished).

15. ISO-NE argues alternatively that, should the Commission decline to accept the proposed tariff revisions without suspension or condition, it should reduce the suspension from five months to one day and remove the reference to accepting the changes subject to refund, and replace it with a statement that the acceptance is subject to further Commission orders.

16. Finally, ISO-NE requests that the Commission clarify that information sharing by the pipelines under the NDA will not cause them to violate applicable laws and regulations, including section 4 of the NGA, even in circumstances where the pipeline gas controllers that receive information from ISO-NE are the same individuals who manage available capacity on the pipeline system. Noting that the pipelines had sought such clarification in previously-filed comments regarding the Information Policy Changes, ISO-NE states that not addressing this issue will result in the pipelines declining to execute the NDA and also may chill communication practices that currently are in place.

17. On December 26, 2012, the New England Power Generators Association, Inc. (NEPGA) filed a response to ISO-NE's request for rehearing and clarification. On January 2, 2013, the pipelines filed a joint answer to ISO-NE's and NEPGA's pleadings.

III. Discussion

A. Procedural Issues

18. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2012), prohibits answers to requests for rehearing. Accordingly, we will reject NEPGA's and the pipelines' answers.

B. Commission Determination

19. The Commission supports efforts to increase communication and coordination between the electricity and natural gas industries in ways that will maximize efficiencies and help ensure reliable electricity service for consumers, and NEPGA as well as the pipelines have acknowledged ISO-NE's concerns that, in order to ensure reliability in New England during emergency conditions this winter, ISO-NE may need to share and discuss certain information regarding generation resources with the pipelines.¹⁵ At the same time, we recognize NEPGA's concern that the NDA provide adequate

¹⁵ See NEPGA's November 23, 2012 Protest at 4; Pipelines' November 28, 2012 Comments at 2-3.

confidentiality of proprietary information. Thus, in light of the unique facts and circumstances before us, including ISO-NE's statements concerning current LNG supplies to New England, we will accept the Information Policy Changes on an interim basis, to become effective on January 24, 2013 through April 30, 2013, subject to the conditions discussed below. Our action here is intended to address immediate reliability-related concerns for this winter, while providing further opportunity for review of the Information Policy and the NDA accepted on a temporary basis here.

20. Consistent with ISO-NE's statements in its request for rehearing, we will require ISO-NE to submit a compliance filing with revisions reflecting additional limitations on the information sharing process. Specifically, ISO-NE should specify in the Information Policy that it will share information regarding specific generators only with the pipeline serving that generator directly, or serving the Local Distribution Company that serves that generator, and only when it is operationally necessary, as determined at ISO-NE staff's discretion, to ensure reliability. The Information Policy must also specify that ISO-NE will provide a summary of any disclosed confidential information to the affected market participant within 48 hours following disclosure.¹⁶ ISO-NE must submit its compliance filing within thirty (30) days of the date of this order, incorporating these conditions and updating the tariff to include the effective date and termination date established herein. Given our determination here, to the extent that ISO-NE seeks to have the Information Policy Changes effective indefinitely, we deny its request for rehearing.

21. We now turn to ISO-NE's request for clarification and the pipelines' comments in the original proceeding.¹⁷ There appear to be two concerns. First, clarification is requested concerning the information that the pipelines can provide to ISO-NE without violating Commission regulations, such as the Standards of Conduct.¹⁸ Second, the pipelines expressed concern over whether a pipeline gas controller receiving information from ISO-NE could be the same individual that will be contacted for available capacity on the pipeline system.

¹⁶ We note that, although we have rejected NEPGA's and the pipelines' answers to ISO-NE's rehearing request, both parties indicate that they support sharing of confidential information pursuant to the NDA on a temporary basis, subject to conditions similar to those outlined here.

¹⁷ See *ISO New England Inc.*, 141 FERC ¶ 61,196 at P 24.

¹⁸ 18 C.F.R. Part 358 (2012). While the pipelines state that they do not believe potential violation of the Standards of Conduct is a concern in this context, they indicate that Commission confirmation of their belief would be helpful.

22. The pipelines have not specified exactly what information they would provide to ISO-NE. However, we can clarify that, under the Commission's regulations, exchanges of critical information are permitted. Under Commission regulations, pipelines are required to notify "affected parties" of operational flow orders, critical periods, and other critical notices.¹⁹ Critical notices pertain to information on pipeline conditions that affect scheduling or adversely affect scheduled gas flow.²⁰ Pipelines must consider ISOs and RTOs as affected parties and therefore can provide them with direct notification of critical notices that affect scheduled gas flow to the areas served by the Balancing Authorities and Reliability Coordinators.²¹ With respect to the Standards of Conduct, we agree with the pipelines that, as discussed further below, the Standards of Conduct apply only to communications with marketing affiliates and not to communications between pipelines and ISOs or RTOs.

23. Regarding the second concern, where a pipeline gas controller receiving non-public information from ISO-NE is the same individual managing available capacity on the pipeline system, that individual must dispatch available capacity consistent with the pipeline's tariff. The pipelines are required to allocate available capacity on a not unduly discriminatory basis among the various requestors of capacity.²²

24. Regarding concerns that the information sharing would implicate or violate the Standards of Conduct, we note, as mentioned above, that the Standards of Conduct govern communications between interstate natural gas pipelines and their affiliates that engage in marketing functions, and public utilities that own or operate electric

¹⁹ 18 C.F.R. § 284.12(b)(3)(vi) (2012).

²⁰ 18 C.F.R. § 284.12(a)(iv) (incorporating by reference NAESB standards 5.2.1 and 5.4.16).

²¹ 18 C.F.R. § 284.12(a)(i) (incorporating by reference NAESB Gas Standard 0.3.14); *Standards for Business Practices of Interstate Natural Gas Pipelines*, Order No. 587-V, FERC Stats. & Regs. [Regulations Preambles] ¶ 31,322, 140 FERC ¶ 61,036, P 25 (2012) ("We interpret this standard [0.3.14] to include both Balancing Authorities and Reliability Coordinators as affected parties under the Commission regulations who are eligible to request from the pipeline and receive direct notification through email or Electronic Data Interchange of operational flow orders and other critical notices.").

²² 15 U.S.C. § 717c(b) (2006). Under Commission rules, undue discrimination occurs where the pipeline provides disparate treatment to similarly situated parties. *See, e.g., Sw. Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir 2003).

transmission facilities and their affiliates that engage in marketing functions.²³ In other words, the Standards of Conduct apply to communications only within the same organization (i.e., between the affiliated entities of a single corporate family) and do not limit communications between unaffiliated natural gas pipelines and electric transmission system operators. Moreover, under section 358.1(c) of the Commission's regulations, the Standards of Conduct do not apply to Commission-approved ISOs and RTOs.²⁴

25. We caution, however, that the general guidance provided here may not be applicable to particular facts and circumstances that may arise. Thus we reiterate that, as indicated in the December 2012 Order, there are avenues available for market participants to seek additional guidance regarding particular circumstances.²⁵ In addition, if the pipelines would like Commission guidance regarding a particular situation, they may submit a request for a no-action letter regarding specific proposed transactions, practices, or situations.²⁶

26. As emphasized in the December 2012 Order and above, the Commission appreciates the increasing importance of coordination between natural gas and electricity markets for purposes of ensuring reliability,²⁷ and, to that end, we reiterate here our desire for the parties to continue to make good faith efforts to resolve their differences with respect to the NDA and make a future filing that provides a more permanent means to promote information sharing. We note in this regard that the Commission will hold a

²³ 18 C.F.R. § 358.1(a) and (b) (2012).

²⁴ 18 C.F.R. § 358.1(c) (2012).

²⁵ *ISO New England Inc.*, 141 FERC ¶ 61,196, at P 33 (citing *Coordination Between Natural Gas and Electricity Markets*, 141 FERC ¶ 61,125, at P 9 (2012)).

²⁶ See *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157 (2008). We note that this order states that past no-action letter responses have addressed issues such as the ability of certain employees to provide non-public transmission information on a non-discriminatory basis, the use of shared employees by a transmissions providers' generation function and transmission function, and classification of service-providing affiliates under the Standards of Conduct. See *id.* P 22.

²⁷ See *Order Directing Further Conferences and Reports*, 141 FERC ¶ 61,125 (2012).

technical conference on February 13, 2013 which will address, among other things, information sharing and confidentiality issues.²⁸

The Commission orders:

(A) ISO-NE's tariff revisions are hereby accepted on an interim basis, effective January 24, 2013 through April 30, 2013, subject to conditions, as discussed in the body of this order.

(B) ISO-NE is hereby directed to make a compliance filing within thirty (30) days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁸ See Notice of Request for Comments and Technical Conference, Docket No. AD12-12-000 (Dec. 7, 2012).