

161 FERC ¶ 61,061
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

ISO New England Inc.

Docket No. ER17-2110-000

ORDER ACCEPTING FILING AND GRANTING WAIVER

(Issued October 19, 2017)

1. On July 19, 2017, pursuant to section 205 of the Federal Power Act (FPA),¹ ISO New England Inc. (ISO-NE) submitted privileged and public (i.e. redacted) versions of a filing describing the Permanent De-List Bids and Retirement De-List Bids that were submitted on or prior to the existing capacity resources' deadline for the upcoming twelfth Forward Capacity Auction (FCA) to be held in February 2018 for the 2021-22 Capacity Commitment Period. Subsequently, ISO-NE requested a waiver of the requirement of section 388.112(b) of the Commission's regulations,² which require parties seeking privileged treatment for certain filings to provide access to that privileged material to intervenors who execute a non-disclosure agreement. In this order, the Commission accepts ISO-NE's filing, effective September 18, 2017, as requested and grants ISO-NE's requested waiver.

I. Background

2. ISO-NE administers the Forward Capacity Market (FCM), in which eligible resources compete in an annual FCA conducted three years in advance of the relevant delivery year.³ In preparation for the annual FCA, ISO-NE administers a qualification process that includes the requirement that existing capacity resources that wish to exit their capacity supply obligation must submit de-list bids to ISO-NE. De-list bids specify a price below which a supplier does not wish to provide capacity from an existing

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. § 388.112(b) (2017).

³ *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006).

resource; de-list bids submitted ahead of the FCA may be in the form of either a Static De-List Bid (a one year exit from the capacity market), a Permanent De-List Bid (a permanent exit from the capacity market), or a Retirement De-List Bid (a permanent exit from all ISO-NE markets). A Dynamic De-List Bid is submitted during the auction and would result in a one year exit from the capacity market.

II. ISO-NE's Initial Filing and Deficiency Letter Response and Waiver Request

A. Initial Filing

3. On July 19, 2017, ISO-NE submitted both public and privileged versions of the instant filing describing the Permanent De-List Bids and Retirement De-List Bids that were submitted for the 2021-22 FCA, to be held in February 2018.⁴ ISO-NE states that it received one Permanent De-List Bid and 23 Retirement De-List Bids from six Lead Market Participants for the 2021-22 FCA. ISO-NE states that these bids were for resources located throughout all eight Load Zones in New England.

4. According to ISO-NE, the aggregate MWs of capacity included in the bids is 511.104 MWs. ISO-NE states that, for four of these bids, totaling 8.525 MW, ISO-NE's Internal Market Monitor (IMM) was not required to perform a review under section III.13.1.2.3.2.1 because the bids were not greater than 20 MW, and the four suppliers that submitted the bids are not affiliates of the two remaining suppliers that submitted Permanent De-List Bids or Retirement De-List Bids for the auction. ISO-NE states that 20 bids for the remaining 502.579 MWs of capacity came from two suppliers, and the IMM reviewed these bids in accordance with section III.13.1.2.3.2.1. Pursuant to tariff section III. 13.1.2.3.2.1., ISO-NE filed the determination for these 20 bids, for the Commission's review, in the privileged version of the filing.

B. Deficiency Letter Response and Waiver Request

5. On August 23, 2017, Commission staff issued a letter notifying ISO-NE that its filing was deficient because it did not include a form of non-disclosure agreement, as

⁴ ISO New England Inc. July 19, 2017 Transmittal.

required by section 388.112(b) of the Commission's regulations.⁵ Staff requested that ISO-NE submit a form of non-disclosure agreement.⁶

6. On August 25, 2017, ISO-NE submitted its response to the August 23, 2017 deficiency letter, as well as a form of non-disclosure agreement.⁷ However, as further discussed below, ISO-NE also requested a waiver of section 388.112 to the extent it requires submission of a form of nondisclosure agreement in this case.⁸

III. Notice of Filing and Responsive Pleadings

7. Notice of ISO-NE's July 19, 2017 filing was published in the Federal Register, with interventions and protests due on or before August 9, 2017.⁹ The following parties submitted timely motions to intervene: Public Citizen, Inc. (Public Citizen), National Grid, and New England Power Pool Participants Committee. The following parties submitted untimely motions to intervene: PSEG Companies, Eversource Energy Service Company, and the New England Power Generators Association Inc. The only protest was filed by Public Citizen, which challenged the lack of form of non-disclosure agreement in ISO-NE's initial filing.

8. Notice of ISO-NE's response to the deficiency letter, which included a request for waiver of section 388.112(b) of the Commission's regulations, was published in the

⁵ 18 C.F.R. § 388.112(b) (2017). Section 388.112(a) provides that any person submitting a document to the Commission may request privileged treatment for some or all of the information contained in that document. Section 388.112(b) then provides that any person who is a participant in the proceeding or has filed a motion to intervene in the proceeding may make a written request for the complete, non-public version of the document, if that request includes an executed copy of a protective agreement, and it also requires the filer to provide a proposed form of protective agreement. Section 388.112(b) further provides that any person may file an objection to such disclosure, and in that case, the privileged material will not be disclosed until so ordered by the Commission or another decisional authority.

⁶ Commission Staff August 23, 2017 Deficiency Letter.

⁷ ISO-NE August 25, 2017 Response to Deficiency Notice and Request for Waiver of Section 388.112.

⁸ *Id.*

⁹ 82 Fed. Reg. 34,518-01 (2017).

Federal Register with interventions and protests due on or before September 5, 2017.¹⁰ No interventions or protests were filed.

9. On August 25, 2017, in addition to its response to the Commission's deficiency letter, ISO-NE filed an answer to Public Citizen's protest, including its request for waiver of section 388.112 of the Commission's regulations. On August 28, 2017, Public Citizen filed a reply opposing ISO-NE's waiver request. Public Citizen also submitted a completed form of non-disclosure agreement. On September 5, 2017, ISO-NE filed a second answer and an objection to the Commission's release of the privileged version of the filing. NEPGA also filed an answer to Public Citizen's protest on August 24, 2017.

10. Through their pleadings, Public Citizen and ISO-NE dispute whether ISO-NE should be granted waiver of section 388.112(b) of the Commission's regulations. Public Citizen has asserted that "[w]ithout access to the privileged components of the . . . filing, it is impossible to determine whether the Permanent De-List Bids and Retirement De-List Bids are just and reasonable."¹¹

11. ISO-NE states in response that the privileged portions of its filing contain "highly confidential, market sensitive information" that could "provide market participants who obtain it with an unfair competitive advantage" in the next and future capacity auctions, thus negatively affecting the competitiveness of those auctions.¹² ISO-NE points to an earlier order in which, according to ISO-NE, the Commission agreed that revealing resource-specific bid data would result in such significant harm to the FCM that it could not be provided to parties even if those parties signed a non-disclosure agreement.¹³

¹⁰ 82 Fed. Reg. 41,946-01 (2017).

¹¹ Public Citizen Protest at 4.

¹² ISO-NE August 25, 2017 Answer at 3.

¹³ *Id.* at 5 (citing to *ISO New England Inc.*, 148 FERC ¶ 61,137, at P 21 (2014) (FCA 8 Order):

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.

ISO-NE asserts that the privileged material at issue in this docket is identical in substance to the material at issue in that order.¹⁴

12. Public Citizen states in response that the FCA 8 Order only addressed the request by a market participant, the Eastern Massachusetts Consumer-Owned Systems (EMCOS), to obtain privileged data, but Public Citizen states that it is not a market participant and does not participate in ISO-NE's capacity auctions. Thus, it argues, releasing privileged information to it would not raise a concern that market participants could use that information to gain a competitive advantage.¹⁵ On that point, in its September 5, 2017 Answer, ISO-NE counters to Public Citizen's arguments by stating that the FCA 8 Order made no distinction based on whether the party receiving access to privileged information was a market participant or not, and that the risk that release of this information (even inadvertently) could compromise the integrity and competitiveness of capacity auctions is too significant to justify its disclosure, even pursuant to a non-disclosure agreement.¹⁶

IV. Determination

A. Procedural Questions

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), we will grant the late-filed motions to intervene given those parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

¹⁴ ISO-NE states that the privileged information in this order includes "the [de-list] bidders' expected cash flows, expectations regarding capacity market payments, and information regarding opportunity costs. . . [and] critical aspects of suppliers' likely bidding strategies . . . [which], in conjunction with the other confidential information, reveals the prices at which supply would be withdrawn in the auction" (ISO-NE August 25, 2017 Answer at 3).

¹⁵ Public Citizen August 28, 2017 Answer at 3.

¹⁶ ISO-NE September 5, 2017 Answer at 2-3.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by ISO-NE, Public Citizen, and NEPGA because they have provided information that has assisted our decision-making process.

B. Analysis

15. The Commission accepts ISO-NE's filing, effective September 18, 2017, as requested. ISO-NE's filing complies with its Commission-approved Tariff, specifically, the requirements to submit publicly available aggregate level data and a privileged version of the filing that discusses commercially sensitive data including: (i) the IMM's determination with respect to each Permanent De-List Bid and Retirement De-List Bid, (ii) supporting documentation for each determination, (iii) the capacity that will permanently delist or retire prior to the Forward Capacity Auction, and (iv) whether capacity suppliers that submitted the bids have elected to conditionally or unconditionally retire the capacity pursuant to section III.13.1.2.4.1.¹⁷ After examining the IMM's submitted information, we find that the filing meets the requirements of section III.13.1.2.3.2.1, which provides that the IMM must determine whether the bid is consistent with: (1) the net present value of the resource's expected cash flows; (2) reasonable expectations about the resource's Capacity Performance Payments; and (3) the resource's reasonable opportunity costs.

16. We also grant ISO-NE's request for waiver. In the FCA 8 Order, the Commission ruled that ISO-NE had demonstrated that release of resource-specific privileged information was inappropriate because that information would remain commercially sensitive beyond FCA 8 and that "disclosure of the privileged information would be harmful in the context of future Forward Capacity Auctions."¹⁸ Additionally, the Commission noted that parties had access to significant publicly-available information regarding the auction.¹⁹ Therefore, the Commission did not require ISO-NE to disclose this information. We find that the same rationale applies here, and accordingly, we will grant ISO-NE's request to waive section 388.112(b) in this case.

¹⁷ ISO New England Inc. July 19, 2017 Transmittal at 1.

¹⁸ *Id.* P 19.

¹⁹ The Commission noted that ISO-NE published 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.xlsx), which reveals which resources submitted de-list bids and for how many MW, but does not reveal the de-list bid prices. FCA 8 Order, 148 FERC ¶ 61,137 at P 22 n.26.

17. Public Citizen argues that the determination in the FCA 8 Order is not applicable to its request because it is not a market participant. We disagree. When the Commission issued the FCA 8 Order, although it referred to “market participants” (since the requesting party in that case, EMCOS, was a market participant), the Commission did not find that harm could result solely from disclosure to market participants. Rather, the Commission stated that the potential for harm to the FCM and to New England customers from any disclosure of this protected information could be significant.²⁰ We additionally note, as the Commission did in the FCA 8 Order, that certain information as to resource retirements is available publicly that may assist Public Citizen in its participation in this proceeding.²¹ And finally, we note that, after the next FCA is conducted in February 2018, the results of that auction will be filed with the Commission under section 205, and parties may raise objections regarding the justness and reasonableness of those auction results at that time.

The Commission orders:

(A) ISO-NE’s submittal is hereby accepted for filing, effective September 18, 2017, as discussed in the body of this order.

²⁰ FCA 8 Order, 148 FERC ¶ 61,137 at P 19 (“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.”) and P 21 (“we find persuasive arguments . . . 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.”) (emphasis added).

²¹ ISO-NE notes that, in the month following the submission of retirement and permanent de-list bid requests, it publishes on its web site the aggregate de-list bids by load zone. It further provides information to the New England Power Pool Reliability Committee regarding the potential reliability impacts of the Retirement and Permanent De-List bids and discusses with that committee its determination regarding whether to reject or accept the bids for reliability reasons. Following this reliability review, ISO-NE updates a spreadsheet on its web site indicating the status of its reliability review for Retirement and Permanent De-List bids. ISO-NE August 25, 2017 Answer at 8.

(B) ISO-NE is hereby granted waiver of section 388.112(b) of the Commission's regulations, for purposes of this proceeding, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.