

169 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

ISO New England Inc.

Docket No. ER19-2312-000

ORDER ACCEPTING FILING AND GRANTING WAIVER

(Issued October 8, 2019)

1. On June 28, 2019, pursuant to section 205 of the Federal Power Act (FPA),¹ ISO New England Inc. (ISO-NE) filed privileged and public (i.e., redacted) versions of a filing, which describes the Permanent De-List Bids,² Retirement De-List Bids (together, De-List Bids), and substitution auction test prices (Test Prices) for the fourteenth Forward Capacity Auction (FCA 14) that ISO-NE will hold in February 2020 for the 2023 – 2024 Capacity Commitment Period (Retirement Bid Filing). Subsequently, ISO-NE requested a waiver of the requirement of section 388.112(b) of the Commission’s regulations,³ which requires parties seeking privileged treatment for certain filings to provide access to that privileged material to intervenors who execute a protective agreement. As discussed below, we accept ISO-NE’s Retirement Bid Filing, effective August 27, 2019, as requested, and grant 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

¹ 16 U.S.C. § 824d (2018).

² Capitalized terms not defined herein are used as they are defined in ISO-NE’s Transmission, Markets, and Services Tariff (Tariff). *See* Tariff, Rules of Construction; Definitions (113.0.0) § I.2.

³ 18 C.F.R. § 388.112(b) (2019).

delivery year.⁴ 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. This process also includes the requirement that existing capacity resources submit substitution auction test prices if they wish to participate in the substitution auction following the FCA.

3. De-list bids specify a price below which a supplier does not wish to provide capacity from an existing resource. De-list bids submitted ahead of the FCA may be 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 if cleared would result in a one-year exit from the capacity market.⁵

II. Filing and Deficiency Letter

A. Initial Filing

4. On June 28, 2019, in accordance with Tariff section III.13.8.1(a),⁶ ISO-NE submitted the Retirement Bid Filing, which describes the De-List Bids and Test Prices submitted for FCA 14. ISO-NE explains that the IMM must review each De-List Bid that exceeds 20 MW and is at or above the Dynamic De-List Bid threshold and each Test Price at or above 3 MW. ISO-NE adds that a market participant must submit a Test Price regardless of whether it falls below the Dynamic De-List Bid threshold and expected revenues cannot be included as a component of the resource's opportunity costs in its Test Price submission.⁷

⁴ *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006).

⁵ An existing capacity resource that seeks to participate in the substitution auction can offer a Test Price that indicates its estimate of a price at which it would not earn enough revenues to cover its going forward costs. The Internal Market Monitor (IMM) compares its calculated Test Price against the resource's offered Test Price to ensure that a participant is not bidding below its actual costs to obtain a Capacity Supply Obligation in the primary auction in order to shed the Capacity Supply Obligation in the substitution auction for a severance payment.

⁶ *See* Tariff, § III.13.8.1(a) (22.0.0).

⁷ Retirement Bid Filing at 3-4.

5. According to ISO-NE, the aggregate capacity included in the De-List Bids is 279 MW. ISO-NE states that it received 22 Permanent De-List Bids, 11 Retirement De-List Bids, and three Test Prices. ISO-NE further states that, for 31 of the Permanent or Retirement De-List bids, totaling 181 MW, the IMM was not required to perform a review because either the bids were not greater than 20 MW or the bids were below the Dynamic De-List Bid threshold.⁸ ISO-NE states that five of these Retirement Bids, totaling 157 MW, required substitution auction Test Price reviews because the resource bids were greater than 3 MW. In total, ISO-NE explains that the IMM reviewed (1) the Test Prices of five resources above 3 MW that submitted Retirement De-List Bids;⁹ (2) two Retirement De-List Bids from a single supplier totaling 98 MW of capacity;¹⁰ and (3) three Test Prices that were not associated with De-List Bids.

6. Finally, ISO-NE notes that, in Docket No. ER19-1428-000, it proposed an Inventoried Energy Program that will begin in the 2023 – 2024 Capacity Commitment Period, which could provide additional revenues for resources that participate.¹¹ ISO-NE explains that the Retirement Bid Filing includes two prices that have been provided to market participants in their conditional retirement notifications: a price under the current Tariff requirements and a price that applies if the proposed Inventoried Energy Program is approved by the Commission.¹²

B. Deficiency Letter Response and Waiver Request

7. On August 7, 2019, 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

⁸ *Id.* at 4-5.

⁹ *Id.* at 5.

¹⁰ If the sum of all De-List Bids submitted by a single participant exceeds 20 MW, the Tariff requires the IMM to review each of that participant's bids at or above the Dynamic De-List Bid threshold. *Id.* at 3; Tariff, § III.13.1.2.3.2.1 (62.0.0).

¹¹ Retirement Bid Filing at 5. *See* ISO New England Inc., Docket No. ER19-1428-000 (filed Mar. 25, 2019).

¹² Retirement Bid Filing at 5. The proposed Tariff revisions containing the Inventoried Energy Program were pending before the Commission at the time ISO-NE submitted the Retirement Bid Filing. The Inventoried Energy Program Tariff revisions went into effect by operation of law on August 6, 2019. *See* Notice of Filing Taking Effect by Operation of Law, Docket No. ER19-1428-001 (Aug. 6, 2019).

required by section 388.112(b) of the Commission's regulations (Deficiency Letter).¹³ Commission staff requested that ISO-NE submit a form of non-disclosure agreement.

8. On August 9, 2019, ISO-NE submitted its response to the Deficiency Letter and a form of non-disclosure agreement as well as a request for waiver of section 388.112(b) of the Commission's regulations (Deficiency Response).¹⁴

III. Notice of Filing and Responsive Pleadings

9. Notice of the Retirement Bid Filing was published in the Federal Register, 84 Fed. Reg. 32,452 (2019), with interventions and protests due on or before July 19, 2019. Dominion Energy Services, Inc.; Eversource Energy Service Company; Exelon Corporation; National Grid; New England Power Pool Participants Committee; New England States Committee on Electricity; NRG Power Marketing LLC; and Public Citizen Inc. (Public Citizen) filed timely motions to intervene. On July 17, 2019, Public Citizen filed a protest.

10. Notice of ISO-NE's Deficiency Response was published in the Federal Register, 84 Fed. Reg. 42,910 (2019), with interventions and protests due on or before August 23, 2019. On August 23, 2019, Public Citizen filed an objection to ISO-NE's request for waiver (Public Citizen Objection). On September 3, 2019, ISO-NE filed an answer to the Public Citizen Objection.

11. In its protest, Public Citizen asserts that, although the prices in the Retirement Bid Filing that factor in the Inventoried Energy Program would provide an opportunity to determine whether that program is just and reasonable, ISO-NE has not provided a non-disclosure agreement for stakeholders to obtain the privileged information, as the

¹³ 18 C.F.R. § 388.112(b). 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.

¹⁴ Deficiency Response at 1.

Commission's regulations require.¹⁵ Public Citizen argues that the Commission's finding in the 2017 Waiver Order¹⁶ that market data should not be disclosed was factually incorrect and does not apply to the Retirement Bid Filing, which contains data concerning the Inventoried Energy Program.¹⁷ Public Citizen states that ISO-NE must provide a non-disclosure agreement in order to allow stakeholders to review the rates calculated under the Inventoried Energy Program.

12. In its request for waiver, ISO-NE points to the 2017 Waiver Order, in which the Commission found that competitively sensitive, resource-specific information and confidential market data contained in a confidentially-filed ISO-NE FCM submission should not be disclosed, even under a non-disclosure agreement.¹⁸ ISO-NE contends that similarly the information at issue here should remain confidential to safeguard the FCA's competitiveness and prevent the exchange of sensitive commercial information among competitors. ISO-NE explains that the Retirement Bid Filing contains the IMM's evaluation of resource-specific information, including the cash flows, expected capacity payments and opportunity costs of the furnishing market participants, and ultimate determination of whether to accept or adjust a particular resource's De-List Bid or substitution auction test price, which are derived from sensitive commercial and financial information that is exempt from public disclosure.¹⁹

13. Public Citizen argues that the Commission should reject the waiver request because access to the data in this proceeding provides the last opportunity for Public Citizen and other parties to contest whether the proposed Inventoried Energy Program, in Docket No. ER19-1428-000, is just and reasonable.²⁰

¹⁵ Public Citizen Protest at 2 (citing 18 C.F.R. § 388.112(b)).

¹⁶ *ISO New England, Inc.* 161 FERC ¶ 61,061 (2017) (2017 Waiver Order).

¹⁷ Public Citizen Protest at 3.

¹⁸ Deficiency Response at 1 (citing 2017 Waiver Order, 161 FERC ¶ 61,061 at P 16; *ISO New England Inc.*, 148 FERC ¶ 61,137 (2014) (FCA 8 Order)).

¹⁹ Deficiency Response at 2-3.

²⁰ Public Citizen Objection at 2-3.

IV. Determination

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Analysis

15. We accept ISO-NE's filing, to become effective August 27, 2019, as requested. ISO-NE's filing complies with its Commission-accepted Tariff, specifically the requirements to submit publicly-available, aggregate level data and a privileged version of the filing that discusses commercially sensitive data submitted by both the capacity supplier and the IMM including: (1) the IMM's determination with respect to each De-List Bid and Test Price; (2) supporting documentation for each determination; (3) the capacity that will permanently delist or retire prior to the FCA; and (4) whether capacity suppliers that submitted the bids have elected to conditionally or unconditionally retire the capacity pursuant to Tariff Section III.13.1.2.4.1.²¹ After examining this data filed by ISO-NE, we find that the filing meets the requirements of Tariff Sections III.13.1.2.3.2.1 and III.13.2.8.3.1A, which require the IMM to determine whether the De-List Bid or Test Price 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.²²

16. We also grant ISO-NE's request for waiver. The Commission has found that the release of resource-specific privileged information, even through a non-disclosure agreement, is inappropriate when that information would remain commercially sensitive beyond the current FCA and that "disclosure of the privileged information would be harmful in the context of future [FCAs]."²³ In particular, the Commission has found

²¹ Retirement Bid Filing at 2; Tariff, § III.13.1.2.4.1 (62.0.0).

²² Tariff, §§ III.13.1.2.3.2.1, III.13.2.8.3.1A (22.0.0). In addition, a Test Price cannot include the expected revenues for a cleared substitution auction demand bid as a component of opportunity costs, and is reviewed regardless of whether it is below the Dynamic De-List Bid threshold. Tariff, § III.13.2.8.3.1A(b) (22.0.0).

²³ 2017 Waiver Order, 161 FERC ¶ 61,061 at P 16; FCA 8 Order, 148 FERC ¶ 61,137 at PP 19-21.

that the FCM's competitiveness could be harmed if "cost information regarding de-list bids" were revealed.²⁴ The Commission has therefore not required ISO-NE to disclose such information, noting that parties have access to significant publicly-available information regarding an FCA.²⁵ The resource-specific privileged information that Public Citizen seeks is the same type of information that the Commission has determined could harm the competitiveness of the FCM if revealed and therefore should not be disclosed.

17. When considering participant requests to access confidential information, the Commission has found that it is "obligated to balance the interests of a party seeking confidential treatment for information with the interests of parties seeking access to that information."²⁶ The Commission has acknowledged that parties to a proceeding must be permitted to participate meaningfully therein.²⁷ While Public Citizen claims it needs access to the confidential information submitted here to evaluate the Inventoried Energy Program, it has stated no interest in accessing this information for purposes of participating meaningfully in this proceeding. As such, based upon the record here, we find that Public Citizen's need to access this confidential information is outweighed by the need to protect it.

18. For these reasons, we grant ISO-NE's request to waive the requirement in section 388.112(b) of the Commission's regulations that ISO-NE file a form of protective agreement. We note, however, that our decision to grant ISO-NE's waiver request in this proceeding or similar requests in prior proceedings does not exempt ISO-NE from meeting the Commission's filing requirements in future proceedings. We will review future requests for waiver of the Commission's regulations on a case-by-case basis.

The Commission orders:

(A) ISO-NE's Retirement Bid Filing is hereby accepted, to become effective August 27, 2019, as requested, as discussed in the body of this order.

²⁴ See FCA 8 Order, 148 FERC ¶ 61,137 at P 21.

²⁵ See 2017 Waiver Order, 161 FERC ¶ 61,061 at P 17; FCA 8 Order, 148 FERC ¶ 61,137 at P 22.

²⁶ *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 30 (2011).

²⁷ *Id.* P 25.

(B) ISO-NE's request for waiver is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.