



July 26, 2019

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Supplemental Response and Waiver Request of ISO New England Inc. to the Commission Staff’s Request For Additional Information Regarding the Results of the Thirteenth Forward Capacity Auction (FCA 13), Docket No. ER19-1166-000

Dear Secretary Bose:

ISO New England Inc. (“ISO” or “ISO-NE”) hereby responds to the letter dated July 25, 2019 (“July 25 Letter”) from the Commission’s Office of Energy Market Regulation in the above-referenced proceeding. The July 25 Letter notes that the public version of the ISO’s prior submission on June 28, 2019 (“Deficiency Response”) in response to Commission staff’s June 6, 2019 deficiency letter contained redacted portions and a request for confidential treatment of the redacted information therein. Referring to the Commission’s regulations at 18 C.F.R. § 388.112 (2018), the July 25 Letter directs the ISO to submit a “form of a Non-Disclosure Agreement, to which any participant or intervenor can then submit to the filer in order to request a copy of the complete non-public version of the document.”¹

The ISO hereby respectfully requests that the Commission waive Section 388.112 of its regulations insofar as it provides for the submittal of a form of non-disclosure agreement in this case. Good cause for such waiver exists because the Commission previously has ruled that competitively sensitive, resource-specific information and confidential market data contained in confidentially-filed ISO submissions should not be disclosed, even under a non-disclosure agreement, to intervenors in a Commission proceeding. *See ISO New England Inc.*, 161 FERC ¶ 61,061 (2017) (granting ISO-NE’s request for a waiver of Section 388.112 to the extent it requires submission of a form of non-disclosure agreement concerning resource-specific, commercially sensitive Permanent De-List Bids and Retirement

¹ July 25 Letter at 1-2, citing 18 C.F.R. §§ 388.112(b)(2)(i) & 388.112(b)(2)(iii).

De-List Bids in a Forward Capacity Market information filing); *see also ISO New England Inc.*, 148 FERC ¶ 61,137 at P 21 (2014) (“find[ing] 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”).

Under the same reasoning, the information provided confidentially to the Commission by the ISO in its Deficiency Response includes highly confidential, non-public, proprietary business and competitively-sensitive commercial information relating to the Killingly Energy Center (“Killingly”) and FCA 13; therefore, this information should not be disclosed to participants and intervenors even under a non-disclosure agreement. New Generating Capacity Resources that submit offers in the Forward Capacity Market at prices below the relevant Offer Review Trigger Price must submit the lowest price at which the resource requests to offer capacity and supporting documentation justifying that price as competitive in light of the resource’s costs. Such commercially-sensitive resource-specific cost data are entitled to and should be afforded the same confidential protection as the commercial and financial information that comprises de-list bids. The IMM’s evaluation of this information and ultimate determination regarding whether to accept or adjust a requested offer floor price likewise contains highly sensitive commercial and financial information that is, or is derived from, the confidential business information of the furnishing market participant.

Furthermore, as noted in ISO-NE’s Deficiency Response, Tariff Section III.13.8.1(c)(vii) requires the ISO to provide in an Informational Filing prior to the relevant Forward Capacity Auction the determinations of the Internal Market Monitor (“IMM”) concerning each requested offer price from a new resource below the relevant Offer Review Trigger Price, which “shall be filed confidentially with the Commission.” This includes confidential information regarding the elements considered in the IMM’s determination (other than revenues from ISO-administered markets) and whether the offer is consistent with the resource’s long run average costs net of expected revenues other than capacity revenues (the IMM’s capacity price estimate) for the resource.² ISO-NE respectfully submits that the additional information provided to the Commission in its Deficiency Response concerning the IMM’s review of the Killingly requested offer floor price is entitled to the same confidential treatment mandated by Tariff Section III.13.8.1(c)(vii) as the information provided in the original Informational Filing.³

² *See* ISO-NE’s Deficiency Response to the Commission staff’s June 6, 2019 deficiency letter at 3 (Response to Question 2).

³ In the June 6, 2019 deficiency letter, Commission staff requested additional information relating to the review by ISO-NE’s IMM of Killingly’s requested offer floor price. Commission staff requested “[a]ll data and information upon which ISO-NE’s [IMM] relied in reviewing Killingly’s requested offer price [Question 1];” “explanations of, and reasoning for, any adjustments made by

Nevertheless, should the Commission decline to grant the requested waiver of section 388.112, the ISO also includes in this supplemental response a form of non-disclosure agreement. The ISO submits this form of agreement to comply with Commission staff's July 25 Letter, and does so without prejudice to its position that none of the confidential portions of its prior Deficiency Response should be disclosed to any participant or intervenor even under a non-disclosure agreement. The ISO respectfully advises the Commission that it will object to disclosure of any confidential portion of the Deficiency Response to any party that requests such material, and will not provide any such material to any requesting entity, unless otherwise directed by an order of the Commission.

The Commission staff's July 25 Letter instructs the ISO to submit its response through eTariff. However, the ISO's Deficiency Response was submitted through the eFiling system, rather than through eTariff, because it did not contain Tariff changes. Therefore, the ISO is submitting its supplemental response to the deficiency letter through eFiling as a "General" filing under the category of "Response to Data Request." The ISO believes that filing through eTariff would result in either the issuance of a new docket number or the rejection of the submittal.

Respectfully submitted,

By: /s/ Timothy Helwick

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cc: Katherine Scott (FERC, Office of Energy Market Regulation) (by email)

the [IMM] to the input and assumption values submitted by Killingly based on the [IMM's] determination that such values were inconsistent with prevailing market conditions, as required by the Tariff [Question 2]; and "any other data, information, or documentation that the [IMM] used to support its determination regarding Killingly's offer floor price [Question 3]." ISO-NE provided the requested information confidentially in its Deficiency Response, consistent with the Tariff requirements of a pre-auction confidential Informational Filing. *See* Tariff Section III.13.8.1(c)(vii) (which "shall be filed confidentially with the Commission").

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Holyoke, Massachusetts this 26th day of July, 2019.

/s/ Julie Horgan

Julie Horgan
eTariff Coordinator
ISO New England Inc.
One Sullivan Road
Holyoke, MA 01040
(413) 540-4683

NON-DISCLOSURE AGREEMENT

FOR DOCKET NO. ER19-1166-000

THIS NON-DISCLOSURE AGREEMENT (the “Agreement”) is made as of this ____ day of _____, 2019, by and between the undersigned individual (the “Authorized Intervenor Representative”) and ISO New England Inc., a Delaware corporation, with offices at One Sullivan Road, Holyoke, Massachusetts, 01040-2841 (the “ISO”). The Authorized Intervenor Representative and the ISO shall be referred to herein individually as a “Party,” or collectively as the “Parties.”

RECITALS

Whereas, the ISO serves as the Regional Transmission Organization for the New England Control Area, and operates and oversees wholesale markets for electricity pursuant to the requirements of the ISO Tariff, as defined below; and

Whereas, the ISO New England Information Policy requires that the ISO maintain the confidentiality of Confidential Market Information; and

Whereas, the FERC has directed the ISO in a deficiency letter dated July 25, 2019 in Docket No. ER19-1166-000 to submit a form of Non-Disclosure Agreement under which the ISO, subject to its agreement or pursuant to an order of the FERC, may provide certain Confidential Market Information to one or more Authorized Intervenor Representatives who execute this Agreement; and

Whereas, Confidential Market Information is not available to Competitive Duty Personnel; and

Whereas, this Agreement is a statement of the conditions and requirements under which the ISO may provide the Confidential Market Information to Authorized Intervenor Representatives.

NOW, THEREFORE, intending to be legally bound, the Parties hereby agree as follows:

1. Definitions. Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the ISO Tariff.

1.1 Affected Governance Participant. A Governance Participant, which as a result of its participation in the markets administered by the ISO, provided Confidential Market Information to the ISO, which Confidential Market Information is requested by an Authorized Intervenor Representative under this Agreement. Affected Governance Participant shall include Killingly Energy Center, its agents and representatives, including without limitation its developer NTE Energy.

1.2 Authorized Intervenor Representative. A natural person who: (i) is employed by an entity that the FERC has designated as an intervenor in Docket No. ER19-1166-000; (ii) is not a Competitive Duty Personnel; and (iii) has signed this Agreement.

1.3 Confidential Market Information. Shall mean the portions of ISO-NE's Response to the Request of the FERC Regarding the Results of the Thirteenth Forward Capacity Auction ("FCA 13"), which the ISO filed confidentially with the FERC in Docket No. ER19-1166-000 on June 28, 2019, in response to a June 6, 2019 deficiency letter from FERC staff, relating to the ISO's Internal Market Monitor's ("IMM") review of the Killingly Energy Center's requested New Resource Offer Floor Price in FCA 13.

1.4 Competitive Duty Personnel. Shall mean a person whose duties include (i) the marketing or sale of electric power at wholesale; (ii) the purchase or resale of electric power at wholesale; (iii) the direct supervision of any employee with duties specified in subparagraph (i) or (ii) of this paragraph; or (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale. Competitive Duty Personnel shall not have access to the Confidential Market Information provided under this Agreement.

1.5 FERC. The Federal Energy Regulatory Commission.

1.6 Governance Participant. Shall have the meaning set forth in the ISO Tariff.

1.7 ISO New England Information Policy. Shall have the meaning set forth in the ISO Tariff.

1.8 ISO Tariff. The ISO's Transmission, Markets and Services Tariff, as it may be amended from time to time.

1.9 Killingly Energy Center. Shall mean the proposed 632 MW combined cycle power plant for which its developer, NTE Energy, submitted a New Resource Offer Floor Price for review by ISO New England's IMM prior to FCA 13. The IMM reviewed the developer's submittal and issued a qualification determination notification that communicated the results of its review and mitigation process and final Offer Floor Price, which was also included in the ISO's Informational Filing for Qualification in the Forward Capacity Market dated November 6, 2018, filed confidentially with the FERC. The resource subsequently obtained a Capacity Supply Obligation in FCA 13, which cleared at \$3.80 per kW-month.

1.10 Notes of Confidential Market Information. Shall mean memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in the definition of Confidential Market Information set forth above. Notes of Confidential Market Information are subject to the same restrictions provided in this Agreement for Confidential Market Information except as specifically provided in this Agreement.

1.11 Third Party Request. Any request or demand by any entity upon the Authorized Intervenor Representative for release or disclosure of Confidential Market Information. A Third Party Request shall include, but shall not be limited to, any subpoena, discovery request, or other request for Confidential Market Information made by any: (i) federal, state, or local governmental subdivision, department, official, agency or court; or (ii) arbitration panel, business, company, entity or individual.

2. Protection of Confidentiality.

2.1 Duty to Not Disclose. The Authorized Intervenor Representative represents and warrants that: (i) s/he represents and is duly authorized by an entity that has been designated by the FERC as an intervenor in Docket No. ER19-1166-000; (ii) s/he is familiar with, and will comply with, such entity's applicable data protection procedures; and (iii) s/he is not a Competitive Duty Personnel. The Authorized Intervenor Representative hereby covenants and agrees not to disclose the Confidential Market Information, to deny any Third Party Request, and to defend against any legal process that seeks the release of Confidential Market Information in contravention of the terms of this Agreement. The Authorized Intervenor Representative further agrees at all times to store securely, and to restrict others' access to, all Confidential Market Information in the same manner as his/her employer stores and protects its trade secrets and other proprietary business information.

2.2 Defense Against Third Party Requests. The Authorized Intervenor Representative shall defend against any disclosure of Confidential Market Information pursuant to any Third Party Request through all available legal process, including, but not limited to, obtaining any necessary protective orders. In the event a protective order or other remedy is denied, the Authorized Intervenor Representative agrees to furnish only that portion of the Confidential Market Information which his/her or his/her employer's legal counsel advises the ISO (and of which the ISO shall, in turn, advise any Affected Governance Participants) in writing is legally required to be furnished, and to exercise its best efforts to obtain assurance that confidential treatment will be accorded to such Confidential Market Information.

2.3 Use and Care of Confidential Market Information.

2.3.1 Use. The Authorized Intervenor Representative shall use the Confidential Market Information only for purposes of developing and presenting his/her or his/her employer's arguments and positions in FERC Docket No. ER19-1166-000 based on the Confidential Market Information. Any pleading, affidavit, testimony, or other document that comprises or contains any reproduction of Confidential Market Information, in whole or in part, or any statements or other materials that disclose any Confidential Market Information, in whole or in part, shall be filed with FERC only in a non-public filing that follows the requirements of Section 388.112 of the FERC's regulations.

2.3.2 Control of Confidential Market Information. The Authorized Intervenor Representative shall be the custodian of any and all Confidential Market Information received pursuant to the terms of this Agreement from the ISO.

2.3.3 Competitive Duty Personnel. If the Authorized Intervenor Representative subsequently becomes Competitive Duty Personnel, s/he shall thereafter no longer have access to the Confidential Market Information and shall continue to comply with the requirements set forth in this Agreement with respect to Confidential Market Information to which s/he previously had access. He/she shall promptly notify the ISO of his/her employer's new Authorized Intervenor Representative, who shall execute this Agreement, and thereafter will take custody of all Confidential Market Information in the possession of the original Authorized Intervenor Representative. If no new Authorized Intervenor Representative of the same employer has executed this Agreement within 10 days after the original Authorized Intervenor Representative became Competitive Duty Personnel, the original Authorized Intervenor Representative, within 10 days after the end of the previously identified 10-day period, (a) shall return all Competitive Market Information to the ISO, or (b) shall destroy all Competitive Market Information, and (c) shall

deliver to the ISO an affidavit certifying that, to the best of his/her knowledge and belief, all Confidential Market Information has been returned or destroyed.

2.3.4 Notice of Disclosures. The Authorized Intervenor Representative shall promptly notify the ISO, and the ISO shall promptly notify any Affected Governance Participant, of any inadvertent or intentional release or possible release of the Confidential Market Information provided pursuant to this Agreement. The Authorized Intervenor Representative shall take all steps to minimize any further release of Confidential Market Information, and shall take reasonable steps to attempt to retrieve any Confidential Market Information that may have been released.

2.3.5 Ownership and Privilege. Nothing in this Agreement, or incident to the provision of Confidential Market Information to the Authorized Intervenor Representative, is intended, nor shall it be deemed, to be a waiver or abandonment of any legal privilege that may be asserted against, subsequent disclosure or discovery in any formal proceeding or investigation. Moreover, no transfer or creation of ownership rights in any intellectual property comprising Confidential Market Information is intended or shall be inferred by the disclosure of Confidential Market Information by the ISO, and any and all intellectual property comprising Confidential Market Information disclosed and any derivations thereof shall continue to be the exclusive intellectual property of the ISO and/or the Affected Governance Participant.

2.3.6 Duration of Obligations. At any time after the later of 1) the date an order terminating Docket No. ER19-1166 no longer is subject to judicial review, or 2) the date any other Commission proceeding relating to the Confidential Market Information is concluded and no longer subject to judicial review, the ISO may request (in writing) that the Authorized Intervenor Representative return or destroy all Confidential Market Information. The Authorized Intervenor Representative shall comply with this request within 15 days after the date the request is made. If requested, the Authorized Intervenor Representative shall also submit to the ISO an affidavit stating that, to the best of his/her knowledge and belief, the request to return or destroy the Confidential Market Information has been fully satisfied. Notwithstanding the foregoing terms of this paragraph, however, the Authorized Intervenor Representative may retain copies of filings, of official transcripts, and of exhibits in the Commission's Docket No. ER19-1166 or any related court proceeding which contain Confidential Market Information or Notes of Confidential Market Information, provided that any such copies are at all times secured in accordance with Section 2.1 of this Agreement. Regardless of any order terminating Docket No. ER19-1166 or any related court proceeding, this Agreement shall remain in effect to the extent that, and for so

long as, the Authorized Intervenor Representative retains any Confidential Market Information or Notes of Confidential Market Information.

3. Remedies.

3.1 Material Breach. The Authorized Intervenor Representative agrees that any release of Confidential Market Information to persons not authorized to receive it or any publication of any material related to or that relies upon the Confidential Market Information, including notes of Confidential Market Information, which is not redacted or summarized in such a manner that the Confidential Market Information may not be identified shall constitute a breach of this Agreement and may cause irreparable harm to the ISO and/or the Affected Governance Participant. In the event of a breach of this Agreement by the Authorized Intervenor Representative, the ISO may terminate this Agreement upon written notice to the Authorized Intervenor Representative, and all rights of the Authorized Intervenor Representative hereunder shall thereupon terminate. The Authorized Intervenor Representative hereby shall indemnify, save, hold harmless, discharge, and release the ISO and each Affected Governance Participant from and against any and all payments, liabilities, damages, losses or costs and expenses paid or directly incurred by the ISO and/or each Affected Governance Participant arising from, based upon, related to, or associated with the breach of, or failure to perform or satisfy, any obligation of the Authorized Intervenor Representative set forth in this Agreement.

3.2 Judicial Recourse. In the event of any breach of this Agreement, the ISO or the Affected Governance Participant shall have the right to seek and obtain at least the following types of relief: (a) temporary, preliminary, and/or permanent injunctive relief with respect to any breach; and (b) the immediate return of all Confidential Market Information to the ISO. The Authorized Intervenor Representative expressly agrees that in the event of a breach of this Agreement, any relief sought properly includes, but shall not be limited to, the immediate return of all Confidential Market Information (including any copies or notes thereof) to the ISO.

4. Jurisdiction. The Parties agree that jurisdiction over all other actions and requested relief with respect to the Agreement shall lie in any court of competent jurisdiction.

5. Severability and Survival. In the event any provision of this Agreement is determined to be unenforceable as a matter of law, the Parties intend that all other provisions of this Agreement remain in full force and effect in accordance with their terms.

6. Representations. The undersigned represent and warrant that they are vested with all necessary corporate, statutory and/or regulatory authority to execute and deliver this Agreement, and to perform all of the obligations and duties contained herein.

7. Third Party Beneficiaries. The Parties specifically agree and acknowledge that each Affected Governance Participant is an intended third party beneficiary of this Agreement entitled to enforce its provisions.

8. Counterparts. This Agreement may be executed in counterparts and all such counterparts together shall be deemed to constitute a single executed original.

9. Amendment. This Agreement may not be amended except by written agreement executed by authorized representatives of the Parties.

ISO NEW ENGLAND INC.

AUTHORIZED INTERVENOR REPRESENTATIVE

By: _____

Name:
Title:

Name:
Title:
Representing:
Address: