

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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ISO New England Inc)	Docket No. ER13-356
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**MOTION TO INTERVENE AND PROTEST OF THE NEW ENGLAND POWER
GENERATORS ASSOCIATION, INC.**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.211 and 214, and in accordance with the Commission’s Combined Notice of Filing #1, dated November 14, 2012, as amended on the same day, the New England Power Generators Association, Inc. (“NEPGA”)¹ hereby files this Motion to Intervene and Protest of the ISO New England, Inc. (“ISO-NE”) November 13, 2012, filing of revisions to its Information Policy (“IP”) in Docket No. ER13-356-000 (“ISO-NE Filing”), which revisions include a non-disclosure agreement between the ISO-NE and interstate natural gas pipeline companies serving New England (“Pipeline NDA”). The Pipeline NDA is unjust, unreasonable and unduly discriminatory and should be rejected by the Commission. As discussed further below, the Commission should require the ISO-NE to adopt the non-disclosure agreement overwhelmingly approved by 98.1% of the NEPOOL Participants (“NEPOOL Preferred NDA”) (collectively, with the Pipeline NDA, the “NDAs”) and require the Pipelines to enter into the NEPOOL Preferred NDA.

¹ The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

I. Motion to Intervene and Communications

NEPGA is a private, non-profit trade association advocating for the business interests of competitive electric power generators in New England. NEPGA's member companies represent approximately 27,000 megawatts of installed capacity throughout the New England region. NEPGA's mission is to promote sound energy policies which will further economic development, jobs, and balanced environmental policy.

The ISO-NE's proposed revisions to its IP would allow the ISO-NE to share confidential information concerning natural gas-fueled generator ("Affected Generator") day-ahead forecast and real-time output information with New England interstate natural gas pipeline company ("Pipeline") operating personnel. Several NEPGA member companies are Affected Generators whose confidential information the ISO-NE seeks to provide to the Pipelines. NEPGA, therefore, has a substantial interest in the outcome of the proceeding that no other party can adequately represent. NEPGA respectfully requests that the Commission grant its motion to intervene.

All correspondence and communications related to this proceeding should be addressed to the following individuals:

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II. Background

At the September 11, 2012, NEPOOL Markets Committee (“MC”) Meeting, the ISO-NE first presented its proposal to amend its IP and provide the Pipelines with Affected Generator-specific scheduled and real-time output information subject to an NDA. On October 11, 2012, the MC voted 74.35% in favor to recommend NEPOOL Participants Committee (“NPC”) support of the ISO-NE’s IP changes, subject to the ISO-NE, Pipelines, and Affected Generators continuing to seek to agree to the terms of a non-disclosure agreement prior to the November NPC meeting. On November 2, 2012, the NPC voted to defer a vote on the ISO-NE’s proposed IP changes to afford interested stakeholders additional time to reach agreement on NDA terms. On November 9, 2012, the NPC voted on the ISO-NE’s proposed revisions to its IP, including the addition of the Pipeline NDA as Appendix D to its IP. On the same day, the NPC voted on the NEPOOL Preferred NDA. The NPC approved the ISO-NE’s proposed revisions to the Information Policy and Pipeline NDA with an 81.72% vote in favor. The NPC also voted in favor of a NEPGA amendment to the Pipeline NDA with a 98.1% vote in favor creating the NEPOOL Preferred NDA.

The ISO-NE’s proposed IP changes allow the ISO-NE to share Affected Generator confidential information (“CI”) with the five Pipelines that serve the New England markets. Specifically, under its proposal the ISO-NE will be permitted to provide Pipeline operating personnel with Affected Generator day-ahead scheduled and real-time MW output on an Affected Generator-specific basis, rather than an aggregated basis, subject to the Pipeline executing the Pipeline NDA. The NEPOOL Preferred NDA does not serve to undo or contradict any aspects of the ISO-NE’s proposed revisions to the IP. Virtually every NEPOOL Participant, including the Affected Generators, therefore, agreed to the ISO-NE’s proposed IP changes. The

NEPOOL Preferred NDA, however, provides for two significant and necessary enhancements to the Pipeline NDA.

First, the Pipeline NDA provides that a Pipeline must keep the CI confidential only for six months after the Pipeline receives the information, after which the Pipeline has no obligation to maintain the confidentiality of the CI. The NEPOOL Preferred NDA would require the Pipeline to return the CI to the relevant Affected Generator at the expiration of the six month confidentiality period to ensure full protection of the Affected Generator while not unduly burdening the Pipeline. Second, the Pipeline NDA seeks to prohibit an Affected Generator who is adversely affected by a Pipeline violation of the NDA from enforcing the NDA by explicitly stating that ISO-NE and the Pipelines do not confer any rights or remedies upon any other party other than ISO-NE and the Pipelines, *i.e.*, does not create any third-party beneficiary rights in Affected Generators. The NEPOOL Preferred NDA recognizes that Affected Generators are third party beneficiaries to the NDA and, therefore, may enforce in law or equity the Pipeline obligations and Affected Generator rights in the NDA. Such third party beneficiary status is absolutely necessary for the appropriate protection of the proprietary and confidential Affected Generator information the ISO-NE proposes to provide to the Pipelines.

III. Protest

NEPGA strongly supports efforts to increase communication and coordination between the electricity and natural gas industries to maximize efficiencies and continue providing reliable electricity service for consumers in New England. NEPGA actively participated in the August 20, 2012, Commission Technical Conference in Docket No. AD12-12-000 held in Boston, and NEPGA President Dan Dolan serves as a Tri-Chair of the New England Gas-Electric Focus Group, which was recently cited by the Commission Staff as an example of a voluntary regional

effort to foster improved communication among regional stakeholders.² NEPGA supports ISO-NE's efforts to share certain CI with the Pipelines in order for the ISO-NE to better maintain reliability³

NEPGA's support of the intent of the ISO-NE's proposed IP changes, however, should not lend itself to a Commission finding that that the Pipeline NDA is just and unreasonable. It is unjust and unreasonable for the ISO-NE and Pipelines to seek to deny Affected Generators the right to enforce the confidentiality of the CI the ISO-NE intends to provide the Pipelines. It is unduly discriminatory to seek to limit Affected Generator rights to protect CI when the ISO-NE provides such rights to other non-Affected Generator New England participants under other non-disclosure agreements required under the IP. NEPGA, therefore, requests that the Commission reject the Pipeline NDA and order the ISO-NE to adopt the NEPOOL Preferred NDA into the ISO-NE IP. Further, given the Pipelines' declaration that they will not enter into an NDA that allows for third party beneficiary rights,⁴ NEPGA requests that the Commission order Pipelines to enter into the NEPOOL Preferred NDA so that the ISO-NE may improve gas/electric coordination and better anticipate and address potential reliability problems in New England.

² *Commission Staff Report on Gas-Electric Coordination Technical Conferences*, Docket No. AD12-12-000, November 15, 2012, at 22.

³ See ISO-NE Filing, *Pre-Filed Direct Testimony of John Norden*, Docket No. ER 13-356-000 ("Norden Testimony").

⁴ The ISO-NE anticipates that the Pipelines would refuse to execute the NEPOOL Preferred NDA, and therefore refuse to agree to reasonable non-disclosure agreement terms that would allow the ISO-NE to better ensure reliability, most immediately, this winter. ISO-NE Filing at 11.

A. The Pipeline Non-Disclosure Agreement is Unjust and Unreasonable

1. The Pipeline Non-Disclosure Agreement Fails to Reflect the Affected Generators Status as the Intended Beneficiary of the Agreement

The Pipeline NDA and NEPOOL Preferred NDA are governed by Massachusetts law.⁵ Under Massachusetts law, a third-party beneficiary is a party whom the contracting parties intend to benefit from the rights and obligations defined by the contract.⁶ Both the language of the contract and the circumstances giving rise to the contract are relevant to determine the intent of the parties to confer rights to a third party beneficiary.⁷ In order for a third party to recover for breach of a contractual obligation, the third party must show that it was an intended beneficiary.⁸

The language of the NDAs establishes that the ISO-NE and the Pipelines seek to enter into the NDAs solely for the benefit of Affected Generators. The NDAs are intended to ensure that the Pipelines do not disclose CI to unauthorized recipients in violation of the NDA.⁹ The NDAs define CI to include Affected Generator forecast and real-time electric output information.¹⁰ The NDAs require Pipelines to acquire the written consent of Affected Generators in order to disclose CI subject to the NDA.¹¹ Should a Pipeline incur an obligation to disclose CI, *e.g.*, by court order, it must notify ISO-NE which, in turn, must notify the Affected Generator(s).¹² The ISO-NE must then join with the Affected Generator(s) in seeking an appropriate protective or other remedy, unless the Affected Generator(s) waive compliance with the terms of the NDA.¹³ The NDAs recognize the Affected Generators' property rights in the CI,

⁵ Pipeline NDA § 7; NEPOOL Preferred NDA § 7.

⁶ *Spinner v. Nutt*, 417 Mass. 549 (1994).

⁷ *Anderson v. Fox Hill Village Homeowners Corp.*, 424 Mass. 365 (1997); Restatement (Second) of Contracts § 302.

⁸ *Ayala v. Boston Housing Authority*, 404 Mass. 689 (1989).

⁹ Pipeline NDA Recitals.

¹⁰ *Id.* § 1.

¹¹ *Id.* § 2(a).

¹² *Id.* § 2(c).

¹³ *Id.*

as applicable.¹⁴ ISO-NE is obligated to provide Affected Generators with notice of any proposed assignment of the NDA by a Pipeline.¹⁵ Taken together, these Affected Generator rights under the NDA are consistent with, and establish, that the NDA serves solely to protect Affected Generator interests in the confidentiality of the CI.

The circumstances giving rise to the NDAs also show that the only reason the ISO-NE and Pipelines must enter into an NDA is to protect Affected Generator interests in their CI. To date, the ISO-NE has provided Pipeline operators with aggregate generator output schedule information to allow Pipelines to advise the ISO-NE if scheduled outputs may not be feasible due to gas supply limits.¹⁶ According to the ISO-NE, an NDA between the ISO-NE and Pipelines is necessary when the ISO-NE provides CI to the Pipelines because Commission gas tariffs, rules and regulations do not fully protect the CI consistent with the ISO-NE's obligations under its IP.¹⁷ As the ISO-NE recognizes, Affected Generators could suffer economic losses should their CI be made available to parties unauthorized to receive the CI.¹⁸ With these Affected Generator interests in mind, the ISO-NE determined that an NDA is necessary to protect Affected Generator interests, and the interested stakeholders sought to agree to NDA terms.

The NDA language and circumstances giving rise to the NDA demonstrate that the Affected Generators are the only NEPOOL Participants who may suffer economic harm due to a breach of the NDA, and, therefore, are the only beneficiaries of the NDA's protections. To seek to deny Affected Generators the right to enforce the terms of an NDA solely benefiting Affected Generators is unjust and unreasonable.

¹⁴ *Id.* § 3(a).

¹⁵ *Id.* § 8.

¹⁶ Norden Testimony at 4.

¹⁷ ISO-NE Filing at 9.

¹⁸ *Id.* at 8.

2. The Pipeline NDA Contradicts the Information Policy Changes Proposed by the ISO-NE and Agreed to by NEPOOL Participants

Over 98% of NEPOOL Participants, including all members of the Generator Sector, voted to approve the ISO-NE's proposed changes to the IP other than the two sections of the Pipeline NDA identified above. The ISO-NE's proposed amendment to the IP adopts language consistent with anti-fraud provisions of the Natural Gas Act.¹⁹ Specifically, the ISO-NE's proposed amendment to the IP reads, in relevant part, that:

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.²⁰

The ISO-NE's proposed IP change recognizes the Affected Generators' right to enforce the confidentiality of the CI, which in the case of the NDA would be as a third-party beneficiary to the NDA. The ISO-NE concedes that an NDA between the ISO-NE and Pipelines is necessary because, absent an NDA, the CI is not afforded adequate protection consistent with the ISO-NE's obligations under its IP.²¹ Yet, the ISO-NE and Pipelines seek to limit the Affected Generators' rights and remedies in law or equity by including a provision in the Pipeline NDA seeking to extinguish third-party beneficiary rights. The NEPOOL Preferred NDA, conversely, is consistent with the ISO-NE's proposed IP changes by protecting Affected Generators' rights in law or equity to enforce the confidentiality of their CI.

¹⁹ *Id.* at 9.

²⁰ *Id.* (emphasis added).

²¹ *Id.*

B. The Non-Disclosure Agreement is Unduly Discriminatory

1. All Governance Participants Are Third Party Beneficiaries Under the ISO-NE's Other Non-Disclosure Agreements

The Pipeline NDA is unduly discriminatory because it does not afford Affected Generators with the same rights all Governance Participants²² enjoy when the ISO-NE discloses the CI of Governance Participants pursuant to the existing IP non-disclosure agreements. There is no reasoned basis for denying Affected Generators the right to enforce the Pipeline NDA when Governance Participants are entitled to enforce the non-disclosure agreements governing the release of their Confidential Information.

The ISO-NE IP provides that the ISO may provide both State Regulatory Bodies and Educational Institutions with Confidential Information of each Governance Participant, provided that the recipient executes a non-disclosure agreement with the ISO-NE.²³ Attached to the ISO-NE's IP are two NDAs; one for State Commissions and the other for Academic Institutions.²⁴ The Existing NDAs explicitly state that "each Governance Participant is an intended third party beneficiary of this Agreement entitled to enforce its provisions."²⁵ Conversely, the Pipeline NDA explicitly provides that Affected Generators are not third party beneficiaries to the Pipeline NDA.

The ISO-NE provides no rationale for seeking to deny an Affected Generator its third-party beneficiary rights when its CI is provided to a Pipeline, while explicitly granting all Governance Participants third-party beneficiary rights when their Confidential Information is

²² Governance Participants include all Individual Participants and NEPOOL Participants, including transmission owners, suppliers, utilities, demand response resources, energy efficiency resources, and all other NEPOOL participants. *See* ISO-NE Tariff Section 1, § I.2.2; NEPOOL Participants Agreement, § 1.1.

²³ IP § 3.3.

²⁴ *See* IP, Appendices A ("State Commission NDA") and C ("Academic Institution NDA") (collectively, the "Existing NDAs").

²⁵ IP Appendix A, § 9; Appendix C, § 8.

provided to State Commissions or Academic Institutions. If there should be any disparate rights afforded under the ISO-NE IP, Affected Generators should enjoy greater rights when the ISO-NE provides their CI to the Pipelines who, unlike Academic Institutions and State Commission, have economic interests in the New England energy markets. The FERC Code of Conduct, by prohibiting interstate pipeline companies from disseminating confidential information to their marketing affiliates, recognizes that generators or other market participants incur a risk of economic harm when an ISO or RTO provides their Confidential Information to interstate pipelines. Conversely, there is no inherent economic risk in providing CI to a State Commission or Academic Institution.

Yet the ISO-NE proposes to prohibit an Affected Generator from protecting its economic interests where there is the risk of economic harm, while granting all Governance Participants the right to protect their economic interests where there is no inherent risk of economic harm. Similarly, the ISO-NE seeks to deny an Affected Generator the right to protect its interests when the ISO provides CI to a Pipeline, while granting an Affected Generator such right when the exact same information is provided to a State Commission or Academic Institution.²⁶ The ISO-NE's proposal, therefore, not only unduly discriminates against Affected Generators but makes no sense.

2. The Pipeline NDA Fails to Protect Affected Generator Interests in its Confidential Information After Six Months

The Pipeline NDA provides that a Pipeline must keep the CI confidential only for six months after the Pipeline receives the information, after which the Pipeline has no obligation to

²⁶ The definition of Confidential Information for purposes of the State Commission NDA and Academic Institution NDA includes the Affected Generator CI.

maintain the confidentiality of the CI.²⁷ The NEPOOL Preferred NDA obligates the Pipeline to return the CI to the relevant Affected Generator at the expiration of the six month confidentiality period.²⁸ The ISO-NE reports that there is universal acknowledgment that six months exceeds the “commercial lifespan” of the CI.²⁹ NEPGA, however, does not accept as an absolute matter that there is no commercial value to Affected Generator-specific information after six months. In an effort to relieve the administrative burden, if any, of Pipelines, the generators agree that a relatively short CI obligation may be agreeable, but only if the Affected Generators can be sure that their CI will not be used in any future reports, analyses, or other non-confidential document. By comparison, a State Commission must return Governance Participant CI or provide certification that the State Commission has destroyed the CI, subject to state public records laws.³⁰ Similarly, Academic Institutions must return or destroy all CI they receive pursuant to their NDA.³¹

The ISO-NE offers no rationale for why State Commissions and Academic Institutions are required to return or destroy CI, and Pipelines are not. To the extent returning or destroying provisions are unduly burdensome, the IP unduly discriminates against State Commissions and Academic Institutions by subjecting them to such burdens while relieving Pipelines of the same. In any event, the Pipeline NDA unduly discriminates against Affected Generators by denying Affected Generators the right to have their CI protected by requiring Pipelines to return the CI, while granting all Governance Participants with the right of return when their CI is provided to a State Commission or Academic Institution.

²⁷ Pipeline NDA § 3(b).

²⁸ NEPOOL Preferred NDA § 3(b).

²⁹ ISO-Filing at 9.

³⁰ State Commission NDA § 2.5.5.

³¹ Academic Institution NDA § 2.3.5.

IV. Should the Pipelines Refuse to Execute the NEPOOL Preferred NDA, the Commission May Order the Pipelines to Execute the NEPOOL Preferred NDA or Provide That the ISO-NE Will Enforce the Pipeline NDA for the Benefit of Generators

According to the ISO-NE, the Pipelines have put the ISO-NE on notice that they will refuse to execute the NEPOOL Preferred NDA, thereby prohibiting the ISO-NE from sharing Affected Generator-specific information with the Pipelines under the ISO-NE IP. As discussed above, the NEPOOL Preferred NDA is a reasonable and just alternative to the unjust, unreasonable, and unduly discriminatory Pipeline NDA. The Pipelines' apparent refusal to agree to reasonable terms could interfere with the ISO-NE's ability to maintain reliable electric service this winter. To the extent one or more Pipelines would, in fact, refuse to collaborate with the ISO-NE unless the NDA includes language seeking to deprive Affected Generators of their third-party beneficiary rights, the answer is not to compromise the legitimate interests of Affected Generators in their CI, but to compel Pipelines under the Natural Gas Act to collaborate with the ISO-NE in accordance with the ISO-NE's IP, including a form of NDA that protects Affected Generators rights.³²

Alternatively, Affected Generator interests could be protected if the ISO-NE will enforce its terms for the benefit of Affected Generators. The ISO-NE, as a party to the NDAs, may, of course, seek to enforce a breach of the NDA, but there is no express provision requiring the ISO-NE to do so. If the ISO-NE were to enforce the NDA on behalf of and under the guidance of an Affected Generator, if an Affected Generator believes a Pipeline has violated the NDA with respect to that Affected Generator's CI, subject to the Affected Generator paying the expenses

³² See 15 U.S.C. § 717(a) (stating that "the business of transporting natural gas is affected with a public interest"); 15 U.S.C. § 717d(a) (authorizing the Commission to reform "any rule, regulation, [or] practice" affecting Commission-jurisdictional transportation rates); 15 U.S.C. § 717(o) (empowering the Commission "to perform any and all acts ... necessary or appropriate to carry out the provisions" of the Natural Gas Act).

related to any such action, a Generator would be in a relatively equal position as if it was were able to enforce the NDA itself.

V. Should the Commission Issue an Interim Order it Should Do So Subject to Refund and an Expedited Final Order

The ISO-NE asks that the Commission waive its notice provisions and issue an interim order making the IP changes and Pipeline NDA effective December 7, 2012.³³ The ISO-NE cites as support for its request the Commission's interim order in *New England Power Company et al.*,³⁴ where the Commission accepted tariff changes pursuant to an interim order, subject to a final order and refund.³⁵ The ISO-NE asks the Commission to "follow the model set forth in *New England Power Company et al.*"³⁶ Should the Commission issue an interim order making the Pipeline NDA effective on December 7, 2012, or some other date, NEPGA respectfully requests that the Commission grant the ISO-NE's request that it do so subject to refund and a final order issued as soon as practicable. For so long as the Pipeline NDA is effective, Affected Generators will be denied their rights to enforce the confidentiality of their CI absent a refund provision in the Commission's interim and final orders.

VI. Conclusion

Wherefore, NEPGA respectfully requests that the Commission grant its motion for leave to intervene in this proceeding and adopt NEPGA's requests herein. Specifically, the Commission should direct the ISO-NE to adopt the NEPOOL Preferred NDA into its Information Policy, direct the Pipelines to execute the NEPOOL Preferred NDA in order to give

³³ ISO-Filing at 11.

³⁴ *New England Power Company, NEES Transmission Services, Inc., Granite State Electric Company, Massachusetts Electric Company, and the Narragansett Electric Company*, 75 FERC ¶ 61,207 (1996).

³⁵ ISO-NE Filing at 11.

³⁶ *Id.*

the ISO-NE the means necessary to provide reliable electric service to New England, most immediately for the 2012/2013 winter season, and make the Pipeline NDA effective on an interim basis, if at all, subject to refund and an expedited final order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments by via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts, November 23, 2012.

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