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August 11, 2016

VIA COURIER & ELECTRONIC MAIL

Luly E. Massaro, Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

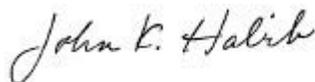
**RE: Docket 4627 – The Narragansett Electric Company d/b/a National Grid
Review of Precedent Agreement with Algonquin Gas Transmission LLC for
Capacity on the Access Northeast Project Pursuant to R.I.G.L. § 39-31 et seq.
National Grid’s Objection to NextEra Energy Resource, LLC Motion to Compel
and Memorandum of Law in Support of Objection**

Dear Ms. Massaro:

On behalf of National Grid¹, I enclose the original and three (3) copies of the Company’s Objection to NextEra Energy Resource, LLC Motion to Compel National Grid To Produce Unredacted Filings Pursuant To A Non-Disclosure Agreement. Also enclosed are the original and three (3) copies of the National Grid’s Memorandum of Law in support of its Objection.

Thank you for your attention to this transmittal. If you have any questions concerning this filing, please contact me at (617) 951-1400.

Very truly yours,



John K. Habib (RI Bar #7431)

Enclosures

cc: Docket 4627 Service List

¹ The Narragansett Electric Company d/b/a National Grid (National Grid or the Company).

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
RHODE ISLAND PUBLIC UTILITIES COMMISSION**

**Review of Precedent Agreement with
Algonquin Gas Transmission LLC for
Capacity on the Access Northeast Project
Pursuant to R.I.G.L. § 39-31 *et seq.***

Docket No. 4627

**THE NARRAGANSETT ELECTRIC COMPANY D/B/A NATIONAL GRID'S
OBJECTION TO NEXTERA ENERGY RESOURCE, LLC MOTION TO COMPEL**

Pursuant to Rule 1.15(d) of the Rhode Island Public Utilities Commission's Rules of Practice and Procedure (PUC Rules), National Grid¹ opposes the Motion To Compel National Grid To Produce Unredacted Filings Pursuant To A Non-Disclosure Agreement (Motion to Compel) filed by NextEra Energy Resource, LLC (NEER). For the reasons set forth in the accompanying memorandum of law, the Motion to Compel should be denied because: (1) the confidential information designated as highly sensitive confidential information (HSCI) or standard confidential information meets the PUC's standard for protective treatment and is appropriately protected from public dissemination pursuant to PUC's Rule 1.2(g) and the Access to Public Records Act (APRA), R.I.G.L. §38-2-2(4); (2) granting NEER's Motion to Compel would damage National Grid's and Algonquin Gas Transmission, LLC's (Algonquin) competitive position in the marketplace and cause significant financial harm to ratepayers in the New England states that are currently conducting competitive solicitations for natural gas capacity contracts; (3) NEER has failed to demonstrate that exchanging confidential information pursuant to the non-disclosure agreements proposed by National Grid would interfere with its due process rights or prevent it from competently litigating its position in this proceeding; and

¹ The Narragansett Electric Company d/b/a National Grid (National Grid or the Company).

(4) granting the Motion to Compel would undermine the process for exchanging confidential information established in National Grid's related proceeding currently pending before the Massachusetts Department of Public Utilities (MDPU)² by permitting NEER and other competitors of National Grid to obtain access to certain highly sensitive competitive information in the Rhode Island proceeding which the MDPU has determined should be withheld from the Company's competitors.

National Grid, therefore, respectfully requests that the Rhode Island Public Utilities Commission deny the Motion to Compel filed by NEER pursuant to PUC Rule 1.15(a).

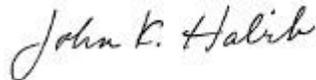
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**THE NARRAGANSETT ELECTRIC COMPANY
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Dated: August 11, 2016

² Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid, D.P.U. 16-05 (2016)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RHODE ISLAND PUBLIC UTILITIES COMMISSION

Review of Precedent Agreement with)	
Algonquin Gas Transmission LLC for)	
Capacity on the Access Northeast Project)	Docket No. 4627
Pursuant to R.I.G.L. § 39-31 <i>et seq.</i>)	

**MEMORANDUM OF LAW IN SUPPORT OF THE NARRAGANSETT
ELECTRIC COMPANY d/b/a NATIONAL GRID’S OBJECTION
TO NEXTERA ENERGY’S MOTION TO COMPEL NATIONAL GRID
TO PRODUCE UNREDACTED FILINGS
PURSUANT TO A NON-DISCLOSURE AGREEMENT**

I. INTRODUCTION

National Grid¹ submits this memorandum of law in support of its objection to the Motion To Compel National Grid To Produce Unredacted Filings Pursuant To A Non-Disclosure Agreement (Motion to Compel) filed by NextEra Energy Resources, LLC (NEER). As discussed herein, the Rhode Island Public Utilities Commission (PUC) should deny NEER’s Motion to Compel because: (1) the confidential information designated as highly sensitive confidential information (HSCI) or standard confidential information meets the PUC’s standard for protective treatment and is appropriately protected from public dissemination pursuant to PUC’s Rule 1.2(g) and the Access to Public Records Act (APRA), R.I.G.L. §38-2-2(4); (2) granting NEER’s Motion to Compel would damage National Grid’s and Algonquin Gas Transmission, LLC’s (Algonquin) competitive position in the marketplace and cause significant financial harm to ratepayers in the New England states that are currently conducting competitive

¹ The Narragansett Electric Company d/b/a National Grid (National Grid or the Company).

solicitations for natural gas capacity contracts; (3) NEER has failed to demonstrate that exchanging confidential information pursuant to the non-disclosure agreements proposed by National Grid would interfere with its due process rights or prevent it from competently litigating its position in this proceeding; and (4) granting the Motion to Compel would undermine the process for exchanging confidential information established in National Grid's related proceeding currently pending before the Massachusetts Department of Public Utilities (MDPU)² by permitting NEER and other competitors of National Grid to obtain access to certain HSCI in the Rhode Island proceeding which the MDPU has determined should be withheld from the Company's competitors.

II. PROCEDURAL BACKGROUND

On June 30, 2016, National Grid filed with the PUC its request for approval of a precedent agreement with Algonquin for capacity on the Access Northeast Energy Project (ANE Project). Separately, the Company's affiliates Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid have filed a similar request for approval of precedent agreements with Algonquin for capacity on the ANE Project with the MDPU. Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid, D.P.U. 16-05 (2016). The MDPU approved a two-tier confidential document designation to provide an added layer of protective treatment. The MDPU recognized the additional layer of protective treatment was necessary because certain intervenors granted full-party status in the Massachusetts proceeding are either bidders in the request for proposals (RFP) that resulted in the precedent agreement,

² Massachusetts Electric Company and Nantucket Electric Company each d/b/a National Grid, D.P.U. 16-05 (2016)

generators, or other entities that have competitive interests in the interstate pipeline market. Other intervenors include governmental entities that may be required to disclose bid information that they received through their intervention in the Massachusetts proceeding.

In this proceeding, the Company proposed to adopt the same two-tier approach to protect the Company's HSCI and competitive information from disclosure to its competitors. Although the PUC declined to formally adopt the two-tier method of protective treatment proposed, on July 13, 2016 the PUC issued a preliminary ruling regarding the exchange of confidential information in this proceeding that would allow the parties to utilize the two-tiered standard adopted by the MDPU in order to allow the parties to enter into appropriate confidentiality agreements for each tier. Adopting the same approach in place in the related Massachusetts proceeding also ensures consistency across New England by preventing competitors from gaming the procedures for protective treatment in one jurisdiction by doing an end-run around restrictions adopted in another jurisdiction, in order to gain access to highly sensitive information.

Notwithstanding the fact that NEER and National Grid have exchanging information for months under the two-tier process in Massachusetts, NEER has requested access to the HSCI and Confidential information submitted in this docket. National Grid provided NEER with two Non-Disclosure Agreements based on the two-tier confidential document designation used in Massachusetts described above: (1) a Non-Disclosure Agreement for Highly Sensitive Confidential Information (HSCI NDA); and (2) a Non-

Disclosure Agreement for Confidential Information (Standard NDA).³ The HSCI NDA applies to (1) bid information, including the information contained in the winning bid that was used to develop the confidential price and other terms of the Precedent Agreements with Algonquin; (2) analysis regarding bid information; and (3) proprietary models, and associated inputs and assumptions, along with information and analyses developed using that information.

In recognition of: (1) the highly sensitive nature of the information contained in the Company's initial filing and the fact that that highly sensitive information would form the basis of the Company's responses to information requests, cross examination, briefing, etc. in this proceeding; and (2) the fact that NEER and other full party intervenors who would likely seek access to the highly sensitive information are appropriately classified as bidders to RFP process conducted by National Grid, electric generators operating in Massachusetts and New England, and/or competitive market participants, the HSCI NDA restricts provision of the information to NEER's outside counsel and a mutually agreed-to third-party neutral consultant. HSCI provided pursuant to the HSCI NDA may not be disclosed to NEER's internal staff given the intervenors position as a generator and/or market participant.

Following its review of the HSCI NDA, outside counsel for NEER requested that National Grid include a provision in the HSCI NDA that would allow NEER to disclose the confidential information covered by the HSCI NDA to four identified in-house attorneys and its Director of Regulatory Affairs. National Grid declined to include such a provision as it essentially negates the reasonable dissemination parameters of the HSCI

³ The Standard NDA provided to NEER covers materials that, while confidential, do not fall into the three highly sensitive categories covered by the HSCI NDA. Pursuant to the terms of the Standard NDA, this type of confidential information may be appropriately shared with NEER's internal staff.

NDA rendering the HSCI NDA worthless.

On August 4, 2016, following its decision not to sign the HSCI NDA as proposed by National Grid, NEER filed a Motion to Compel to request that the PUC order National Grid to include its four identified in-house attorneys and Director of Regulatory Affairs in the HSCI NDA and allow these individuals access to the HSCI pursuant to the terms of the Non-Disclosure Agreement (NEER Motion to Compel at 8-9). NEER alleges that the terms of the HSCI NDA violate its due process rights and prevent it from litigating its position in this proceeding. As is demonstrated below, NEER's contentions and allegations are baseless. The PUC should deny NEER's Motion and instead find that National Grid's process for disseminating HSCI is reasonable and appropriate given its protection of both intervenors' due process rights and HSCI. Furthermore, granting NEER's Motion to Compel would cause great financial harm to ratepayers in Rhode Island and other New England States that are currently conducting competitive solicitations for long-term gas capacity.

III. LEGAL STANDARD

There is no dispute that the confidential information designated as HSCI or standard confidential information is appropriately protected from public dissemination pursuant to PUC's Rule 1.2(g) and the Access to Public Records Act (APRA), R.I.G.L. §38-2-2(4), which authorizes the PUC to protect from public disclosure: "[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature." R.I.G.L. §38-2-2(4)(B). As demonstrated in the Motion for Protective Treatment filed by the Company on June 30, 2016, the information contained in the Company's initial filing designated as confidential

clearly meets the PUC's standard for protective treatment. No intervenor, including NEER, has disputed this treatment.

National Grid has proposed the PUC adopt the two-tiered classification of confidential information authorized by the MDPU, wherein if an intervenor is a market competitor, a generator or market participants, those parties access to confidential information designated as highly sensitive will only be shared with that party's outside counsel or independent consultant. The PUC determined that the documents marked HSCI and standard should be protected from public disclosure while the parties to negotiate appropriate non-disclosure agreements to exchange this information under the two-tiered system.

IV. ARGUMENT

A. National Grid Confidential Information Dissemination Protocol Appropriately Protects NEER's Due Process Rights.

NEER alleges that its due process rights have been impinged upon by National Grid's determination to restrict access to HSCI to its outside attorney and third-party expert (NEER Motion to Compel at 7). NEER also states that NEER's request is narrowly tailored to afford only those NEER employees with a need to know of the National Grid confidential information under strict confidentiality requirements (*id.* at 8). NEER's allegations are unfounded.

NEER requests the PUC issue an order requiring National Grid include a clause in the HSCI that allows four of NEER's in-house attorneys and Director of Regulatory Affairs (also an attorney) to sign the Non-Disclosure Agreement and view the alleged HSCI (NEER Motion to Compel at 4). This type of provision would essentially negate the protection afforded by the HSCI NDA and should be denied.

A similar two-tiered protocol for sharing confidential information was proposed in both National Grid's and Eversource's petitions for approval of similar Precedent Agreements with Algonquin for additional gas capacity from the Access Northeast Project. In both proceedings, NEER challenged these protocols and sought to expand the dissemination of confidential information beyond NEER's outside counsel and independent consultant to allow NEER's internal legal counsel and regulatory staff access to confidential information. In upholding the protocols proposed by National Grid and Eversource, the MDPU found it necessary to add an additional layer of protection for specific contract terms related to Algonquin's RFP bid that are contained in the agreements (Interlocutory Order, D.P.U. 15-181, April 5, 2016, at 24, provided hereto as Attachment A). Such terms directly relate to Algonquin's successful RFP bid, and that release of such information to NEER's internal legal counsel and regulatory staff could compromise the Company's or Algonquin's future negotiations by revealing the Company's or Algonquin's negotiation or bid strategy, and detrimentally affect their competitive positions (id.). The fact that other New England states are currently or will be reviewing similar competitive solicitations for natural gas capacity resources, and that many of the full intervenors in the Massachusetts proceedings will have an interest in those solicitations and reviews of those solicitations, further compelled the MDPU to protect information related to Algonquin's RFP bid from disclosure to NEER's internal counsel and regulatory staff.

The confidential information dissemination protocol developed by the Company for this proceeding is critical to protect the integrity of the bidding process and is squarely in line with the protocol authorized by the MDPU. Pursuant to the protocol,

NEER's outside counsel and expert have full access to materials provided under the HSCI NDA. NEER has retained Keough & Sweeney, Ltd. as its outside counsel and Compass Lexecon as its third-party expert consultant. Keough & Sweeney, Ltd has extensive experience representing clients before the PUC.⁴ Compass Lexecon is a well-regarded economic consulting firm that provides valuation and financial analyses to its clients. According to its website, Compass Lexecon's energy practice has a deep knowledge of the economics and institutional structures of all segments of the energy industry and has completed numerous economic studies on issues related to competition, pricing, and the impact of regulation.⁵ "Because of our intimate knowledge of the energy industry, we ask the right questions, pursue the appropriate analyses, and develop solid conclusions and recommendations that address the challenges and opportunities facing our clients. We combine this with the ability to comprehend and synthesize often complex issues on the cutting edge of industry transition and to communicate them effectively to both clients and policymakers."⁶

Accordingly, both NEER's outside counsel and expert consultant have the requisite proficiency to review and analyze the HSCI and to assist NEER in deciding upon and supporting its claims and proposals. NEER has made no showing that review of the HSCI by NEER's internal legal counsel and Director of Regulatory Affairs, neither of whom is a neutral third party expert or outside counsel, is necessary to fully litigate its position in the proceeding.

Additionally, the Company's confidential information dissemination protocol set

⁴ <http://www.keoughsweeney.com/what-we-do>

⁵ <http://www.compasslexecon.com/practice-areas/energy/>

⁶ Id.

out in the HSCI NDA does not prevent either NEER's outside counsel or expert from consulting with NEER as to the impact of the National Grid's Petition on NEER's business interests. Under the terms of the HSCI NDA provided to NEER's outside counsel, both NEER's outside counsel and consultant are authorized to consult with NEER and are allowed to rely generally on their examination of the HSCI to provide strategic guidance to NEER regarding this proceeding, provided however, that in rendering such guidance, advice and otherwise communicating with NEER, NEER's outside counsel and consultant are prohibited from disclosing any confidential information provided pursuant to the HSCI NDA to NEER. In this manner, internal NEER attorneys and Director of Regulatory Affairs will be able to determine how the National Grid request for approval of a Precedent Agreement with Algonquin may impact their specific business and market interests.

National Grid has carefully developed its HSCI NDA consistent with the parameters authorized by the MDPU in order to ensure that HSCI is protected in a manner that does not impinge upon NEER's due process rights. In fact, the protocols used to exchange highly sensitive confidential employed in the Massachusetts proceedings noted above did not prevent NEER from developing over 383 information requests (205 to Eversource and 178 to National Grid) and hundreds of pages of direct and surrebuttal testimony in those proceedings. Based on the above, it is clear that NEER's due process rights have not been negatively impacted by the Company's use of the HSCI NDA. The Commission should reject NEER's argument that the restrictions under the HSCI NDA have a real and material negative impact on NEER's ability to participate in this proceeding because NEER's outside counsel and consultant have full

access to the HSCI (NEER Motion to Compel at 7). Based on the information provided by the Company, therefore, the PUC should reject NEER's claims of due process infringement and approve the dissemination of HSCI in this proceeding pursuant to the HSCI NDA and Standard NDA as reasonable, appropriate and consistent with PUC precedent.

B. Providing Highly Sensitive Confidential Information to NEER's Internal Staff Risks Significant Financial Harm to Ratepayers throughout New England.

NEER alleges that the restrictions on NEER's internal legal counsel and Director of Regulatory Affairs under the HSCI NDA are unreasonable and unsupported (NEER Motion to Compel at 8). On the contrary, the protections afforded HSCI in National Grid's HSCI NDA are appropriate given the proceeding, the type of information sought and the on-going competitive solicitations in other states in New England. National Grid's HSCI NDA is tailored to meet the requirements under PUC's Rule 1.2(g) and R.I.G.L. §38-2-2(4), and to ensure that Rhode Island ratepayers' interests are protected.

As noted above, the Company determined that the following confidential information is so sensitive as to require its dissemination pursuant to the HSCI NDA: (1) bid information, including the information contained in the winning bid that was used to develop the confidential price and other terms of the Precedent Agreements with Algonquin; (2) analysis regarding bid information; and (3) proprietary models, and associated inputs and assumptions. These categories extend to analyses developed by the Companies, such as the bill impacts, utilizing the original HSCI. This categorization is necessary due to the fact the New England states are seeking to address constrained gas capacity and related high wholesale electric prices regionally. This regional solution is

being pursued through competitive solicitations for natural gas capacity contracts, similar to the solicitation conducted by National Grid that resulted in its Precedent Agreements with Algonquin. Currently, Connecticut is in the process of conducting such a solicitation. Those competitive solicitations will suffer in the event that Algonquin's market competitors, generators and other market participants, such as NEER, have access to the HSCI. It is likely that knowledge of this information will have an impact on the bids provided in response to other New England competitive solicitations, creating an unequal and biased playing field. In the end, it is ratepayers, both in Rhode Island and elsewhere in New England, who will suffer.

As noted in the Motion for Protective Treatment that accompanied the Company's initial filing, if the PUC were to require the disclosure of this competitively sensitive pricing and other negotiated terms, National Grid would likely experience substantial difficulty in the future in negotiating successfully with potential contract partners; particularly if those vendors' confidential information was provided to a competitor or other market participant, thus impairing, perhaps permanently, their ability to compete in the marketplace in terms of competitive solicitations. If the PUC were to allow disclosure of pricing and other negotiated terms in this proceeding, it would have a chilling effect on the Company's ability to (1) attract contract partners who may fear that the PUC will ultimately release proprietary pricing and other negotiated terms to market competitors, and (2) secure attractive pricing from contract partners for the benefit of the Company's customers. In the end, the Company's customers, as well as other utility customers in New England, will bear the burden of higher prices. National Grid has prevented such an outcome by developing the HSCI dissemination protocol described

above.

As indicated above, there are on-going competitive solicitations for natural gas capacity occurring in New England which increase the need to ensure that all negotiated terms under the Precedent Agreements are covered under the HSCI NDA. A more general release of these terms exacerbates the Company's concern regarding detrimental impacts to its customers outlined above.

In this proceeding, NEER is seeking to protect and advance its market interests in the wholesale electricity market, and likely the substantial income generated by that market position, and to ensure the status quo is not altered or reduced by a market solution that will ease natural gas capacity constraints and subsequently lower wholesale electric prices (NEER Petition to Intervene at 3). In contrast, National Grid is seeking to benefit its customers and protect them from ever increasing wholesale electric pricing; thus National Grid initiated the competitive solicitation that resulted in its Precedent Agreements with Algonquin. NEER's concern with its own interests should not supersede customers' interests, especially when, under the HSCI NDA, NEER's expert consultants have full access to highly sensitive confidential information allowing NEER to pursue its litigation strategy in this proceeding.

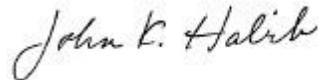
IV. CONCLUSION

WHEREFORE, the Company respectfully requests that the PUC reject the Motion To Compel National Grid To Produce Unredacted Filings Pursuant To A Non-Disclosure Agreement filed by NextEra Energy Resources, LLC for the reasons stated herein.

Respectfully submitted,
**THE NARRAGANSETT ELECTRIC
COMPANY d/b/a NATIONAL GRID**
By its attorneys,

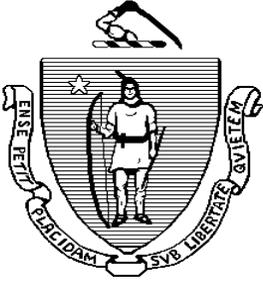


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Dated: August 11, 2016



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 15-181

April 5, 2016

Petition of NSTAR Electric Company and Western Massachusetts Electric Company, each doing business as Eversource Energy, for Approval of Firm Gas Transportation and Storage Agreements with Algonquin Gas Transmission Company, LLC, pursuant to G.L. c. 164, § 94A.

INTERLOCUTORY ORDER ON (1) NEXTERA ENERGY RESOURCES, LLC'S MOTION TO COMPEL EVERSOURCE ENERGY TO PRODUCE UNREDACTED FILINGS TO OUTSIDE COUNSEL, INDEPENDENT EXPERT, AND NEER LEGAL AND REGULATORY STAFF, AND FOR EXPEDITED BRIEFING AND HEARING, (2) ALGONQUIN GAS TRANSMISSION, LLC'S MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT, AND (3) EVERSOURCE ENERGY'S MOTION FOR CONFIDENTIAL TREATMENT

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I. INTRODUCTION AND PROCEDURAL HISTORY

On December 21, 2015, NSTAR Electric Company (“NSTAR Electric”) and Western Massachusetts Electric Company (“WMECo”), each doing business as Eversource Energy (“Eversource” or “Companies”) filed a petition with the Department of Public Utilities (“Department”) for approval pursuant to G.L. c. 164, § 94A of gas transportation and storage agreements between the Companies and Algonquin Gas Transmission Company, LLC (“Algonquin”). The Department has docketed this matter as D.P.U. 15-181.

On December 22, 2015, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention pursuant to G.L. c. 12, § 11E(a). The Department granted full intervenor status to the Department of Energy Resources, the Low-Income Weatherization and Fuel Assistance Program Network, Tennessee Gas Pipeline Company, LLC (“Tennessee”), ENGIE Gas & LIG LLC (“ENGIE”), Portland Natural Gas Transmission System (“PNGTS”), TransCanada PipeLines Limited, Conservation Law Foundation, Algonquin, the Cape Light Compact, NextEra Energy Resources, LLC (“NEER”), Direct Energy Business, LLC And Direct Energy Services, LLC, the Town of Weymouth, and Repsol Energy North America Corporation (“RENA”).¹

¹ The Department granted limited participant status to Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid, New England Power Generators Association, Inc., the Coalition for Gas Alternatives, NRG Power Marketing LLC, GenOn Energy Management, LLC, and NRG Canal LLC, the Coalition to Lower Energy Costs, The Berkshire Gas Company, The United Illuminating Company, and Exelon Generation Company, LLC.

On December 21, 2015, pursuant to G.L. c. 25, § 5D, Eversource submitted a motion for confidential treatment of portions of its petition. The Department received no responses to that motion. On March 15, 2016, NEER submitted a motion requesting that the Department (1) direct Eversource to provide a copy of the Companies' unredacted filing to NEER's outside counsel, NEER's third-party expert consultant, and NEER's internal legal and regulatory staff, subject to a non-disclosure agreement ("NDA"), and (2) extend the procedural schedule for each day beyond March 11, 2016 that NEER's outside counsel and expert consultant have been without access to unredacted copies of the filing (NEER Motion at 2). On March 22, 2016, Eversource submitted a response opposing NEER's motion.

On March 16, 2016, Algonquin submitted a motion for a protective order and confidential treatment requesting that only the Attorney General and the Department be given access to confidential information (Algonquin Motion at 2). On March 23, 2016, Tennessee and NEER each submitted a response opposing Algonquin's motion.²

Because NEER's motion and Algonquin's motion directly relate to the same point, *i.e.*, the level of access that parties should be afforded to confidential information, we will address and analyze the motions together as outlined below. Following the Department's analysis of

² On March 30, 2016, Algonquin filed a motion for leave to reply and reply to NEER's opposition to Algonquin's motion, and a motion for leave to reply and reply to Tennessee's opposition to Algonquin's motion. The Department's procedural rules provide only for the submission of motions and answers to motions. 220 C.M.R. § 1.04(5)(c). Subsequent responsive filings serve to delay any action by the Department and may cloud the issues. See Massachusetts Municipal Wholesale Electric Company, D.P.U. 96-45-D at 4 n.8 (1996). Therefore, we deny Algonquin's motion for leave to reply to NEER's and Tennessee's oppositions to Algonquin's motion, and will not consider the issues Algonquin raises in its replies.

the NEER and Algonquin motions, we will consider the Company's motion for protective treatment in Section III, below.³

II. NEER AND ALGONQUIN MOTIONS

A. Positions of the Parties

1. NEER

a. Highly Sensitive Confidential Information NDA

NEER asserts that Eversource proposed two types of NDAs to NEER. First, NEER states that Eversource proposed that the following highly sensitive confidential information ("HSCI") be disclosed only to NEER's outside counsel and outside expert consultant⁴ pursuant to a HSCI NDA: (1) bid information, (2) analysis regarding bid information, and (3) proprietary models and associated inputs and assumptions (NEER Motion at 4). Pursuant to the HSCI NDA, Eversource would not provide this confidential information to NEER internal legal and regulatory staff (NEER Motion at 4 & Exhibit A at 2). NEER explains that Eversource's second proposed NDA would restrict disclosure of confidential materials that do not fall into the highly sensitive category ("Confidential NDA") (NEER Motion at 4). Pursuant to the Confidential NDA, Eversource would release confidential information not only to NEER's outside counsel and expert consultant, but also to internal NEER staff (NEER Motion at 4 & Exhibit A at 2). NEER states that it offered to sign both NDAs with a

³ Eversource submitted subsequent motions for confidential treatment on March 18, 2016 and March 22, 2016. Those motions remain under advisement.

⁴ Foley Hoag, LLP is NEER's outside counsel, while Compass Lexecon is its expert consultant (NEER Motion at 2).

reservation of the right to raise objections to the Department if Eversource's designation of HSCI and the associated prohibition of disclosing that information to NEER internal staff would make it impracticable for NEER to develop and argue its case (NEER Motion at 4).

NEER contends that it executed the Confidential NDA, but was then advised by Eversource that all confidential information currently in the record is HSCI and, accordingly, is not subject to release under the Confidential NDA (NEER Motion at 5). NEER asserts that Eversource explained that all confidential information currently in the record, including exhibits pertaining to pricing terms from the agreements, falls into the category of bid information because that information flows from the terms of Algonquin's winning bid following Eversource's solicitation of a Request for Proposals ("RFP") for natural gas capacity (NEER Motion at 5). NEER claims that the scope of HSCI is far broader than that the Companies' original proposal (NEER Motion at 5-6). NEER argues that Eversource offered no justification for refusing to provide unredacted filings to NEER's outside consult and expert consultant while the parties resolved the issue of whether NEER internal staff would be able to access the information (NEER Motion at 6).

NEER contends that the Administrative Procedures Act affords to parties to adjudicatory proceedings the opportunity for full and fair hearing, including the rights to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence (NEER Motion at 6, citing G.L. c. 30A, §§ 10, 11(3)). NEER maintains that it must have access to the data and information supporting Eversource's petition in order for NEER to exercise its rights (NEER Motion at 6). NEER maintains that the

Department has “recognized that an attorney should be able to consult with his client or independent consultant, who, in matters before the Department, possesses the technical expertise to assist the attorney,” and that “[t]o deny access to confidential information risks denying an intervenor its due process rights and is inconsistent with G.L. c. 30A” (NEER Motion at 7, citing Eastern Edison Company, D.P.U. 96-24, Interlocutory Order on Appeal of Hearing Officer Ruling at 7 (August 1, 1997); NSTAR Electric Company, D.P.U. 07-64, Interlocutory Order on (1) Appeal of Hearing Officer Ruling; and (2) Motions to Approve Non-Disclosure Agreement at 12 (January 16, 2008)). NEER contends that Eversource’s position that NEER internal counsel and regulatory staff may not have access to unredacted versions of Eversource’s initial filing deprives NEER of its due process rights (NEER Motion at 7).⁵

NEER acknowledges that the Department has permitted parties to restrict access to commercially sensitive information to outside counsel and third-party experts in cases where others who possess the information might be in a position to use the information to a competitive advantage (NEER Motion at 10, citing D.P.U. 96-24, Interlocutory Order at 10). NEER maintains that it requests HSCI only for its outside counsel, consultant, and internal attorneys and regulatory staff who are not involved in liquefied natural gas (“LNG”) or natural gas marketing, which NEER asserts are the only matters upon which Eversource’s petition might affect NEER’s competitive interest (NEER Motion at 10). NEER argues that an NDA

⁵ Specifically, NEER states that the following NEER staff would agree to sign a non-disclosure agreement: (1) its vice president and general counsel; (2) three senior attorneys; and (3) its director of regulatory affairs (NEER Motion at 2 n.2).

would adequately protect the Companies' interest, and that it should be presumed these individuals would abide by an NDA's restrictions upon them (NEER Motion at 10).⁶

Additionally, NEER asserts that Rule 26 of the Massachusetts Rules of Civil Procedure offers guiding principles against allowing Eversource to withhold HSCI from NEER staff (NEER Motion at 10). NEER argues that Rule 26(c), which allows courts to issue protective orders regarding a trade secret or confidential information, requires courts to balance the litigants' need for discovery with the dangers posed by such discovery to the party from whom discovery is sought (NEER Motion at 11, citing Fordham v. Simmons Agency, 15 Mass. L. Rep. 291 (Mass. Super. October 10, 2002)). NEER argues that the balance weighs in favor of allowing NEER legal and regulatory staff to access HSCI (NEER Motion at 11). Similarly, NEER argues that guidance from the Massachusetts Superior Court Business Litigation Session provides that a confidential agreement that provides certain documents to "attorneys' eyes only," while sometimes appropriate for certain documents, considerably interferes with counsel's ability to confer and seek guidance from clients (NEER Motion at 11).

b. HSCI Classification

Further, NEER argues that Eversource's claim that none of the confidential information currently in the record falls under the Confidential NDA contradicts G.L. c. 25, § 5D, and is an unwarranted expansion of the Department's authority on which Eversource claims to rely (NEER Motion at 7). NEER asserts that the exemption from public disclosure outlined in

⁶ NEER notes that its regulatory staff member for whom it requests access to HSCI is a member of the bar (NEER Motion at 10).

G.L. c. 25, § 5D is subject to narrow construction (NEER Motion at 8, citing Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof; (2) Proposed Non-Disclosure Agreement; and (3) Requests for Protective Treatment at 9-10 (July 2, 1998)). NEER maintains that Eversource's claim that all redacted information is HSCI and must be withheld from NEER's staff, outside counsel, and independent consultant departs from Department policy insisting on a narrow construction of G.L. c. 25, § 5D (NEER Motion at 8).

NEER maintains that the Companies rely upon NSTAR Electric Company, D.P.U. 07-64, Interlocutory Order to support its approach to the NDAs (NEER Motion at 8). NEER argues that the Companies' reliance in D.P.U. 07-64 is misplaced because Eversource seeks to classify as HSCI the terms of the contracts for which it seeks approval, including terms other than price, while the D.P.U. 07-64 directives applied only to confidential pricing information (NEER Motion at 9). NEER contends that Eversource has not met its burden to justify such confidentiality (NEER Motion at 9). Finally, NEER argues that the Department indicated that it might revisit the protocols imposed on parties in D.P.U. 07-64 (NEER Motion at 9, citing D.P.U. 07-64, Interlocutory Order at 17).

c. Extension of Procedural Schedule

NEER asserts that Eversource has refused to provide a copy of the unredacted filing to NEER's outside counsel and its expert consultant, although both had committed to maintain the information confidentially unless the parties so agreed or hearing officer ordered (NEER Motion at 12). NEER argues that Eversource's refusal to do so has hindered NEER's ability

to review Eversource's petition and, therefore, warrants a day-for-day extension of the procedural schedule (NEER Motion at 11-12).⁷

d. NEER Response to Algonquin's Motion

NEER argues that Algonquin's motion to limit disclosure of confidential information to the Department and Attorney General is contrary to Department precedent (NEER Response to Algonquin Motion at 1). NEER contends that Algonquin's request is overbroad, and does not limit the nature of information and particular parties who might make use of it (NEER Response to Algonquin Motion at 6). NEER maintains that Algonquin incorrectly argues that providing the Attorney General access to information is sufficient, and that Algonquin ignores the substantial and specific interests of other intervenors (NEER Response to Algonquin Motion at 6). Further, NEER contends that Algonquin's blanket protective order is unnecessary because the confidential information can be adequately protected through an NDA (NEER Response to Algonquin Motion at 7). Finally, NEER asserts that Algonquin's motion is untimely, and should have been submitted within five days of Eversource's petition or, at a minimum, along with Algonquin's petition to intervene (NEER Response to Algonquin Motion at 3-4).

2. Algonquin

Algonquin requests confidential treatment of the redacted portions of Eversource's filing, and seeks a protective order that would restrict access to confidential information only

⁷ NEER asserts that the day-for-day extension should begin on March 11, 2016, and should apply at least to the date for submission of intervenor testimony (NEER Motion at 2, 12).

to the Department and Attorney General (Algonquin Motion at 1-2). Algonquin asserts that it provided confidential information to Eversource in response to the Companies' RFP with the understanding that the information would be maintained as confidential (Algonquin Motion at 3). Algonquin argues that other New England states intend to conduct solicitations for natural gas capacity contracts (Algonquin Motion at 4). Algonquin contends that release of confidential information regarding its pricing and contracting strategy as it relates to the two proposed agreements would allow competitors to adjust their pricing and contract terms to Algonquin's disadvantage (Algonquin Motion at 4). Algonquin argues that such a release would give Algonquin's competitors a distinct advantage in responding to solicitations in other states because those competitors would have access to Algonquin's response strategy, while Algonquin would have no such access (Algonquin Motion at 4).

Further, Algonquin maintains that because the Access Northeast Project ("ANE Project") is a regional solution, disclosure of confidential information could impede the ability of the ANE Project to obtain contracts in other states and, therefore, adversely impact the public interest (Algonquin Motion at 4). Algonquin argues that public disclosure of confidential information could have a chilling effect upon future solicitations because those entities that otherwise might have responded will not do so in order to avoid disclosure of confidential information, which would potentially lead to increased rates (Algonquin Motion at 4). Accordingly, Algonquin seeks a protective order restricting release of confidential information to the Department and the Attorney General (Algonquin Motion at 5).

Alternatively, if the Department determines that a broader disclosure is necessary, Algonquin requests that the Department restrict disclosure to the Department, Attorney General, and non-competitor parties, subject to signing of a confidentiality and NDA (Algonquin Motion at 5). Algonquin argues that, when determining which parties qualify as non-competitors, the Department should consider that resources other than natural gas are competing for a limited number of contracts in some states (Algonquin Motion at 5). Algonquin contends, for example, that in Connecticut, the costs and benefits of any natural gas project will be compared directly to those of small and large renewables (Algonquin Motion at 6). Further, Algonquin argues that access to confidential information should be limited to those attorneys, experts, and consultants who are not working with or representing projects competing with the ANE Project (Algonquin Motion at 7).

3. Tennessee

Tennessee opposes Algonquin's motion for a protective order and confidential treatment (Tennessee Response to Algonquin Motion at 1). Tennessee agrees with Algonquin that competitively sensitive pricing, rates, and contract terms should be protected from public disclosure and disclosure to competitors, but argues that Algonquin's motion inappropriately seeks to limit parties' access, including Tennessee's access, to non-rate and non-contract term information relating to Eversource's qualitative evaluation of the RFP bids (Tennessee Response to Algonquin Motion at 2). Tennessee disagrees that price and rate information related only to Tennessee or its Northeast Energy Direct project may only be provided to Tennessee pursuant to an NDA (Tennessee Response to Algonquin Motion at 2).

Additionally, Tennessee opposes Algonquin's motion to the extent that it would prevent disclosure to Tennessee, pursuant to an NDA, of Eversource and Sussex Economic Advisors' analysis, evaluation, and comparison of (1) Tennessee's proposal in response to Eversource's RFP for natural gas capacity, and (2) competing RFP proposals with appropriate redactions of confidential price and contract terms by competitor parties (Tennessee Response to Algonquin Motion at 2). Tennessee argues that confidential information must be disclosed more broadly than requested by Algonquin to allow Tennessee to fully participate in this proceeding and obtain Eversource's analysis of Tennessee's proposal (Tennessee Response to Algonquin Motion at 3). Tennessee asserts that alternate providers who were not awarded contracts under the RFP would be able to fully evaluate and review Eversource's selection of Algonquin, with redacted pricing or confidential contract terms (Tennessee Response to Algonquin Motion at 3).

4. Eversource
 - a. HSCI NDA

Eversource states that the Department has held that due process requires all full party intervenors in a proceeding be granted some level of access to confidential materials (Eversource Response at 4, citing D.P.U. 07-64, Interlocutory Order at 12). Eversource argues, however, that the Department has determined that it is reasonable to limit dissemination of confidential materials to a party's outside counsel, as opposed to the party itself, and a neutral third-party expert in order to address the risks of disclosure and misuse of information (Eversource Response at 4, citing D.P.U. 07-64, Interlocutory Order at 15-16).

Moreover, Eversource contends that the Department has found that the risks of disclosure and misuse of confidential information may be addressed by the parties entering an NDA that contains reasonable conditions and sets out a liability provision in the event of a breach of those conditions (Eversource Response at 4, citing D.P.U. 07-64, Interlocutory Order at 15-16).

The Companies assert that the protocol for releasing confidential information pursuant to the HSCI NDA is critical to protect the integrity of the bidding process, and is squarely in line with the procedures the Department authorized in D.P.U. 07-64 (Eversource Response at 5). Eversource states that the HSCI NDA would restrict release of information to an intervenor's outside counsel and a mutually agreed-to third party consultant (Eversource Response at 2).⁸ The Companies contend that this restriction is justified because NEER and other full intervenors likely to seek access to confidential information include bidders to Eversource's RFP process to procure natural gas capacity, generators operating in Massachusetts and New England, and/or competitor market participants (Eversource Response at 2-3).

Eversource maintains that it declined to accept NEER's request to include in the HSCI NDA a provision that would allow NEER, after reviewing the HSCI, to move to compel Eversource to disclose the information to internal NEER legal and regulatory staff (Eversource Response at 3, 5). Eversource asserts that such a provision negates the dissemination

⁸ Eversource states that, pursuant to the Confidential NDA, confidential information not subject to the three highly sensitive categories in the HSCI NDA could be shared with NEER internal staff (Eversource Response at 3).

parameters established in D.P.U. 07-64 (Eversource Response at 3). Further, Eversource argues that NEER's outside counsel and expert would have had full access to the materials released pursuant to the HSCI NDA but for NEER's insistence on expanding the terms of the HSCI NDA to include internal staff (Eversource Response at 6).

Additionally, Eversource contends that NEER's outside counsel, Foley Hoag, LLC, use a core group of attorneys who focus on the energy industry, and that NEER's expert consultant, Compass Lexecon, is a well-regarded economic consulting firm that provides valuation and financial analysis to its clients (Eversource Response at 7). Eversource argues that, based on their expertise and experience, NEER's outside counsel and expert consultant have the requisite proficiency to review and analyze the HSCI and assist NEER in deciding upon and supporting its claims (Eversource Response at 7).

Further, Eversource argues that the HSCI NDA does not prevent NEER's outside counsel or its expert consultant from consulting with NEER as to the impact of Eversource's petition on NEER's business interest (Eversource Response at 8). The Companies assert that the HSCI NDA terms do not prevent either NEER's outside counsel or its expert from consulting with NEER, and that they may rely generally on their examination of the HSCI to provide strategic advice to NEER, provided that they do not disclose the HSCI (Eversource Response at 8).

Eversource argues that it carefully developed the HSCI NDA consistent with the parameters imposed in D.P.U. 07-64 to both protect HSCI and to not impinge upon an intervenor's due process rights (Eversource Response at 10). Eversource maintains that the

Department should conclude that the HSCI NDA's dissemination protocol for confidential information pursuant is reasonable, appropriate, and consistent with Department precedent (Eversource Response at 10).

b. HSCI Classification

Eversource disputes NEER's contention that the Companies' classification of the confidential information as highly sensitive contradicts G.L. c. 25, § 5D and expands the Department's findings in D.P.U. 07-64 (Eversource Response at 9, citing NEER Motion at 7). Eversource argues that the information in the Companies' initial filing meets the Department's standard for protective treatment, and that no intervenor, including NEER, has disputed this treatment (Eversource Response at 4).

The Companies maintain that the HSCI classification is appropriate given the nature of this proceeding, the type of information sought, and the on-going competitive solicitations in other New England states (Eversource Response at 9). Eversource maintains that it has appropriately categorized the bid information, analysis of bid information, and proprietary models and associated inputs and assumptions as HSCI because other New England states are seeking to address constrained gas capacity and associated high wholesale electricity prices (Eversource Response at 10). The Companies assert that other, ongoing competitive solicitations in New England will suffer if Algonquin's market competitors, generators, and other market participants, including NEER, have access to HSCI (Eversource Response at 10). Eversource maintains that this information would likely impact bids provided in response to competitive solicitations, create an unequal playing field, and adversely affect ratepayers

(Eversource Response at 10). Further, Eversource argues that if HSCI is disclosed more broadly, the Companies and other utilities would likely experience substantial difficulty in future negotiations with potential contract partners (Eversource Response at 10-11).

c. Extension of Procedural Schedule

Finally, Eversource argues that the Department should reject NEER's request to extend the procedural schedule (Eversource Response at 13). Eversource argues that it would have provided the confidential information pursuant to the HSCI NDA as written, and that NEER is responsible for any delay in the receipt of information by seeking to expand the terms of the HSCI NDA (Eversource Response at 10, 13). Eversource asserts that while NEER had a right to challenge the HSCI NDA terms, NEER must live with the consequences of its decision (Eversource Response at 13).

B. Analysis and Findings

1. Algonquin's Motion for a Protective Order

The Administrative Procedures Act provides that all parties be afforded the opportunity for a full and fair hearing, and have a reasonable opportunity to prepare, present, and rebut evidence and argument. G.L. c. 30A, §§ 10, 11(3). The Department has previously considered whether, in light of due process requirements, confidential information may be withheld from certain intervenors in an adjudicatory proceeding. See, e.g., D.P.U. 07-64, Interlocutory Order at 10. The Department has consistently rejected parties' requests to deny an intervenor access to confidential information, even when that information is competitively sensitive. D.P.U. 07-64, Interlocutory Order at 12; D.T.E. 97-95, Interlocutory Order at 11,

12, 16. “To deny access to confidential information risks denying an intervenor its due process rights and is inconsistent with G.L. c. 30A.” D.P.U. 07-64, Interlocutory Order at 12. While acknowledging that companies have legitimate concerns about sharing commercially sensitive information with competitors, we have nevertheless determined that companies must allow intervenors to access that material through outside counsel and an expert consultant through an appropriately executed NDA. D.P.U. 07-64, Interlocutory Order at 12, 16. We affirm that conclusion here and find that Algonquin’s request to restrict release of confidential information to only the Department and Attorney General is inconsistent with G.L. c. 30A. Accordingly, we deny Algonquin’s motion for a protective order.⁹

2. HSCI NDA

We turn now to whether the HSCI NDA provision limiting access to confidential bid information, analysis of bid information, and proprietary models to external counsel and a third-party consultant is reasonably warranted and consistent with Department precedent. As discussed above, due process considerations require all intervenors to be granted some level of access to confidential materials. See D.P.U. 07-64, Interlocutory Order at 12. The Department has, however, previously limited access of confidential information to a party’s outside counsel and a third-party expert, subject to an NDA, where the party itself was a competitor to the proponent of confidentiality. D.P.U. 07-64, Interlocutory Order at 15-16; D.P.U. 96-24, Interlocutory Order at 7, 12.

⁹ We address Algonquin’s motion for confidential treatment in Section III, below.

In the instant proceeding, a number of full parties submitted unsuccessful bids in response to Eversource's request for proposals regarding interstate natural gas capacity and gas supplies,¹⁰ while other full parties are competitive generators and other natural gas market participants, including NEER. Moreover, other New England states are in the process of reviewing similar natural gas capacity contracts or will be doing so soon. See Public Service Company of New Hampshire d/b/a Eversource Energy, DE 16-241, currently pending before the New Hampshire Public Utilities Commission.¹¹

We conclude that the Department's Interlocutory Order in D.P.U. 07-64 provides a reasonable framework for releasing confidential information in a manner that affords parties, including NEER, with an opportunity to fully participate in this proceeding, while protecting release of confidential information to competitors. In light of the fact that full intervenors in this proceeding include competitive generators and natural market gas participants, and based upon the ongoing review and solicitation of natural gas capacity contracts in other New England states, we conclude that the risks of disclosure and misuse of confidential bid and associated information warrants a limitation that such information be provided to external counsel and to a third-party expert consultant, consistent with the provisions in D.P.U. 07-64,

¹⁰ These parties include Tennessee, PNGTS, GDF Suez (now known as ENGIE), and RENA.

¹¹ See also Connecticut Public Act 15-107, authorizing the Connecticut Department of Energy and Environmental Protective to conduct a solicitation for natural gas capacity contracts. To the best of the Department's knowledge, this process is currently underway in Connecticut, and will likely result in a filing for the Connecticut Public Utilities Regulatory Authority's review and approval.

Interlocutory Order at 12-17. We conclude that this provision, along with an associated liability in the event of a breach,¹² are sufficient to both provide parties with access to information but to also protect against the potential misuse of such confidential information by competitors. See D.P.U. 07-64, Interlocutory Order at 16. Contrary to NEER's assertions, such a condition does not limit the information to "attorneys' eyes only," as outside counsel can consult with its expert regarding the HSCI and, as permitted based on the HSCI NDA terms, generally rely on its review of HSCI to consult with NEER staff and develop NEER's case without disclosing the HSCI.

Additionally, NEER asserts that the internal legal and regulatory staff whom it argues should have access to confidential information are not involved in LNG or natural gas marketing, which NEER argues are the only way in which Eversource's petition might be of competitive interest (NEER Motion at 10). NEER itself, however, is a full intervenor and has competitive interests in this proceeding. As stated above, we conclude that the potential harm from disclosing confidential information and its associated misuse is sufficient to warrant providing the HSCI to NEER's outside counsel and its expert consultant, and to prevent disclosure to NEER internal staff.¹³

¹² The HSCI NDA includes a liability provision associated with breach (Eversource Response, Att. at 2). Because neither NEER nor Eversource has raised issues regarding the liability provision or any other HSCI NDA terms, we will not address other HSCI NDA provisions. To the extent that parties may disagree in the future about other HSCI NDA terms, we encourage the parties to look to the Department's directives in D.P.U. 07-64, Interlocutory Order at 15-30 to resolve those disputes.

¹³ Additionally, we disagree with NEER that it is appropriate to apply a MRCP Rule 26(c) balancing test here. We conclude that applying a balancing test that is designed to

3. HSCI Classification

We disagree with NEER that D.P.U. 07-64 is not instructive with respect to the HSCI classification issues in this matter because D.P.U. 07-64 addressed only price information, while the instant HSCI NDA applies to not just pricing terms but broader contract terms. As discussed in Section III, below, with certain exceptions, we conclude that the confidential information redacted from the initial filing and discovery responses to date falls directly within the purview of protection from public disclosure provided in G.L. c. 25, § 5D. Where the redacted information is bid information and related contract terms flowing from Algonquin's successful bid, and where disclosure of that information to competitors could affect Algonquin's competitive interest as well as the public interest due to ongoing solicitation of natural gas capacity agreements in other states, we conclude that the information properly falls within the limited disclosure procedures as outlined in D.P.U. 07-64.

4. Extension of Procedural Schedule

Finally, we reject NEER's request for a day-for-day extension in the procedural schedule for each day, as of March 11, 2016, that NEER's outside counsel and expert have not had access to an unredacted copy of Eversource's filing. We find it reasonable that Eversource did not provide NEER's outside counsel and its expert consultant a copy of the unredacted filing without NEER having executed the HSCI NDA. As discussed above, we conclude that

resolve discovery disputes is inapplicable to exhibits offered as evidence in an adjudicatory proceeding. See D.P.U. 07-64, Interlocutory Order at 16. As in D.P.U. 07-64, at 16-17, even if we applied such a balancing test, it is unclear whether NEER's need for the information to develop its arguments would outweigh Eversource's need to protect the information from disclosure.

the HSCI NDA's disclosure terms are reasonable. NEER's determined that it would not sign the HSCI NDA, but would instead challenge the HSCI NDA's disclosure terms. NEER was within its rights to do so, but its decision has led to the delay in its outside counsel and expert consultant having access to the Companies' unredacted filing. We will not extend the procedural schedule based on NEER's business decision to challenge the HSCI NDA.¹⁴

III. EVERSOURCE'S AND ALGONQUIN'S MOTIONS FOR CONFIDENTIAL TREATMENT

A. Motions

On December 21, 2015, Eversource submitted a motion for confidential treatment. Eversource claims that portions of the following exhibits contained confidential prices and other terms, and the evaluation of these prices and terms, which is competitively sensitive information that could harm the competitive business position of the Companies, contract parties, and customers: EVER-JDG-1, EVER-JGD-3; EVER-JGD-4; EVER-JMS-1; EVER-JMS-5; EVER-JMS-6; EVER-JMS-8; EVER-JMS-9; EVER-RDC-2; and EVER-RDC-2 (December 21 Motion at 1). Eversource argues that the price and terms included in these exhibits are the result of competitive solicitation of proposals pursuant to the Department's Order in D.P.U. 15-37 and subsequent negotiations (December 21 Motion at 3).

¹⁴ NEER's motion also requested that the hearing officer direct Eversource to reply to its motion within three business days, and have a hearing on the motion the following business day (NEER Motion at 2). Consistent with the requirements of 220 C.M.R. § 1.04(5)(c), the hearing officer directed that any responses to NEER's Motion be submitted no later than five business days. Moreover, because motions prior to a hearing must be in writing and the Department's procedural rules do not provide for motion hearings, we affirm the hearing officer's implicit rejection of NEER's request for expedited briefing and hearing.

The Companies contends that disclosure of this competitively sensitive information would likely cause the Companies to experience substantial difficulty in future negotiations (December 21 Motion at 3). The Companies seek confidential treatment of the information for five years following the date of the final Order in this matter (December 21 Motion at 5). On March 16, 2016, Algonquin filed a motion seeking confidential treatment of the exhibits for which Eversource seeks confidential treatment in its December 21, 2015 motion.¹⁵

B. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

[T]he [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

General Laws c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4,

¹⁵ As discussed above in Section II.A.1(d), NEER argues that Algonquin's motion for confidential treatment is untimely. Because we are addressing Eversource's motion seeking confidential treatment of the same information, NEER's argument regarding untimeliness is moot.

§ 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”). To overcome the presumption that documents in the possession of the Department are public records and to protect confidential information from public disclosure, the Department requires a party in a Department proceeding to file a written motion for a protective order in accordance with 220 C.M.R. § 1.04(5)(e).

General Laws c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, confidential, competitively sensitive or other proprietary information;” second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by “proving” the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D; 220 C.M.R. § 1.04(5)(e).

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, Hearing Officer Ruling at 4 (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party’s Limited Liability Company Agreement, notwithstanding requesting party’s assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts,

D.P.U. 96-39, Letter Order at 2 (August 30, 1996) (Department will grant exemption for electricity contract prices, but “[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer”); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

Motions for protection from public disclosure will not be allowed automatically by the Department. A party’s willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether a document, presumed to be a public record once it is received by the Department, should be protected from public disclosure. What parties may agree to share and the terms of that sharing are not dispositive of the Department’s scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

C. Analysis and Findings

NSTAR bears the burden of demonstrating that the information for which it seeks protective treatment is confidential, competitively sensitive, or proprietary information. G.L. c. 25, § 5D. While proponents seeking confidential treatment face a more difficult task of overcoming the statutory presumption against the disclosure of contract terms other than price, such as identity of a customer,¹⁶ we conclude that in this instance Eversource has, with

¹⁶ See D.P.U. 96-39, at 2.

the exceptions and conditions described below, demonstrated that the information it seeks to protect is confidential, competitively sensitive, or proprietary information. The information for which Eversource seeks protection from public disclosure is not simply the identity of a customer, but specific contract terms related to Algonquin's RFP bid that are contained in the agreements. In this instance, we conclude that Eversource has demonstrated that the information for which it seeks confidential treatment directly relates to Algonquin's successful RFP bid, and that release of such information could compromise the Companies' or Algonquin's future negotiations by revealing the Companies' or Algonquin's negotiation or bid strategy, and detrimentally affect their competitive positions. The fact that other New England states are currently or will be reviewing similar competitive solicitations for natural gas capacity resources, and that many of the full intervenors in this proceeding will have an interest in those solicitations and reviews of those solicitations, further compels us to protect information related to Algonquin's RFP bid. Accordingly, with the exceptions noted below, we grant the Company's December 18, 2015 motion for confidential treatment.

To the extent that certain information for which Eversource seeks confidential treatment is included in public testimony Eversource has submitted to the Department, we deny Eversource's request to protect that information from public disclosure. For example, Eversource's public filing includes the maximum daily total quantities available ("MDTQ") pursuant to the agreements (Exh. EVER-JGD-1, at 11, 21). Eversource has redacted the MDTQ, however, from the agreements themselves (Exh. EVER-JGD-3, at 5; EVER-JGD-4, at 5). Because Eversource has publicly disclosed the MDTQs, we deny Eversource's request

for the confidential treatment of the MDTQs in the agreements. We direct Eversource to review its filing and any other confidential information for which it seeks protection from public disclosure. In any instance in which MDTQ or other confidential information is included in public testimony but redacted from the agreements, we direct Eversource to submit updated exhibits and to amend outstanding motions for confidential treatment, as necessary. In its review, Eversource should confirm that there are no other discrepancies between what it has publicly disclosed, and what it has redacted from the public filing. If Eversource identifies any such discrepancies, we direct Eversource to submit updated exhibits and responses to information requests and to amend outstanding motions for confidential treatment, as necessary.

The Department typically grants confidential treatment to competitively sensitive information for three years. See, e.g., Bay State Gas Company, D.P.U. 07-GAF-P1, Hearing Officer Ruling on Motion for Confidential Treatment at 3 (October 26, 2007). Consistent with Department precedent, we grant confidential treatment for a three-year period from the date of the final Order in this matter. Eversource may renew its request for confidential treatment for Department consideration at that time.

Finally, we direct the Eversource to submit a report to the Department within ten business days of the issuance of this Order confirming that none of the information for which it is seeking confidential treatment, including the expected MDTQ for each phase of the project, has become available in any other jurisdiction, state or federal. The report should include a statement of the jurisdictions that Eversource has reviewed in making this determination.

Further, if any of the information for which the Department has afforded Eversource protective treatment becomes available in the public domain in any jurisdiction, federal or state, during the course of this proceeding or during the time period for which confidential treatment has been granted, we direct Eversource to advise the Department, and submit a revised filing and responses to discovery to include the information that becomes publicly available if this proceeding is ongoing. We direct Eversource to make any such revisions within ten business days of the information becoming publicly available in any other jurisdiction.

IV. ORDER

Accordingly, after opportunity for comment, and due consideration, it is

ORDERED: That NextEra Energy Resources, LLC's Motion to Compel NSTAR Electric Company and Western Massachusetts Electric Company to Produce Unredacted Filings to Outside Counsel, its Independent Expert, and NEER Legal and Regulatory Staff, and for Expedited Briefing and Hearing is DENIED;

FURTHER ORDERED: That Algonquin Gas Transmission LLC's Motion for Protective Order and Confidential Treatment is DENIED in part; and GRANTED in part; and

FURTHER ORDERED: That NSTAR Electric Company and Western Massachusetts Electric Company's December 18, 2015 Motion for Confidential Treatment is DENIED in part, and GRANTED in part; and

FURTHER ORDERED: That NSTAR Electric Company and Western Massachusetts Electric Company shall comply with all directives in this Order.

By Order of the Department,

/s/
Angela M. O'Connor, Chairman

/s/
Jollette A. Westbrook, Commissioner

/s/
Robert E. Hayden, Commissioner