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August 4, 2016

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

**Re: *The Narragansett Electric Co. d/b/a
National Grid - Docket 4627***

Dear Ms. Massaro:

Enclosed please find an original and nine copies of the following:

1. NextEra Energy Resources, LLC's Motion To Compel National Grid To Produce Unredacted Filings Pursuant To A Non-Disclosure Agreement

Please note that an electronic copy of this document has been provided to the service list.

Thank you for your attention to this matter.

Sincerely,



Joseph A. Keough, Jr.

JAK/kf

Enclosures

cc: Docket 4627 Service List (*via electronic mail*)

When National Grid filed its Request for Approval, it also filed a Request for Protective Treatment of Confidential Information for each of the following documents submitted in support of its filing:

- Joint, Initial Testimony of Timothy J. Brennan and John E. Allocca together with supporting Schedule TJB/JEA-1 containing confidential contractual terms and pricing information;
- Initial Testimony of Ann E. Leary together with supporting Schedules AEL-2 through AEL-4 containing confidential pricing information;
- Initial Testimony of Michael J. Vilbert containing confidential pricing information;
- Initial Testimony of Gary J. Wilmes from Black & Veatch together with supporting Schedules GJW-1, GJW-2, and GJW-3 containing confidential and proprietary analysis of the ANE Project;
- Initial Testimony of Richard W. Porter from Black & Veatch together with supporting Schedule RWP-3 containing confidential bid terms and pricing information regarding the Request for Proposals issued by the Company; and,
- Initial Testimony of Andrew C. Byers from Black & Veatch together with supporting Schedule ACB-2 containing confidential and proprietary analysis of the ANE Project.

National Grid also filed a Request for Confidential Treatment in conjunction with its response to the Commission's First Set of Data Requests, which sought discovery responses in a related proceeding before the Massachusetts Department of Public Utilities ("DPU"), proceeding D.P.U. 16-05.

As noted in National Grid's Requests for Confidential Treatment, the DPU approved a two-tier confidential document designation – Confidential and Highly Sensitive Confidential Information – for information provided in D.P.U. 16-05. In conjunction with this two-tier designation, National Grid developed two Non-Disclosure Agreements ("NDA"), one for Confidential Information and one for Highly Sensitive Confidential Information. The NDA for

Highly Sensitive Confidential Information does not allow anyone at NEER, including NEER's specified internal legal counsel and Director of Regulatory Affairs (also an attorney), to access the Highly Sensitive Confidential Information. The only parties who can view the Highly Sensitive Confidential Information are NEER's attorneys of record (outside counsel) and experts in D.P.U. 16-05.

NEER objected to the two-tier confidentiality designation before the DPU. As NEER explained to the DPU, prohibiting NEER access to information related to the Access Northeast proposal that National Grid unilaterally deems to be highly confidential prejudices NEER's ability to participate in the proceeding.² As the Massachusetts proceeding has progressed, NEER's concerns have been borne out. NEER's in-house attorneys have not been able to review basic information related to National Grid's proposal, such as certain contractual terms and elements of the cost-benefit analysis. NEER's attorneys have therefore been limited in their ability to work with outside counsel and experts in the proceeding, and have even been unable to view the entire testimony of its own experts because the testimony drew on material that National Grid asserted to be highly confidential.

National Grid sought a similar two-tier designation from the Commission in both of its Requests for Protective Treatment in this Docket. The Commission rejected this request, but as set forth in its July 13, 2016 Scheduling Memorandum held that "National Grid may still mark documents under the two-tier classification, but as is current practice, the parties should be

² NextEra Energy Resources, LLC's Emergency Motion to Compel, *Petition of NSTAR Electric Company and Western Massachusetts Electric Company, each d/b/a Eversource Energy, for Approval of Two Long-Term Transportation Agreements with Algonquin Gas Transmission, LLC*, D.P.U. 15-181 (Apr. 1, 2016). NEER withdrew its motion on April 7, 2016 after the Hearing Officer denied NEER's motion to compel in the related proceeding on Eversource's petition for approval of transportation agreements with Algonquin Gas Transmission.

handling the matter by entering into confidentiality agreements to address the need for two tiers of confidentiality.” Thereafter, National Grid provided NEER with two Non-Disclosure Agreements based on the two-tier confidential document designation it sought from the Commission: (1) A Non-Disclosure Agreement for Confidential Information; and (2) A Non-Disclosure Agreement for Highly Sensitive Confidential Information. Once again, the NDA for Highly Sensitive Confidential Information proposed in this Docket does not allow NEER's internal legal counsel and Director of Regulatory Affairs (also an attorney) to access the alleged Highly Sensitive Confidential Information.

NEER's undersigned local counsel raised several issues with National Grid's attorneys regarding the Non-Disclosure Agreements. After communications between NEER's local counsel and National Grid's attorneys, most of the issues were resolved, and on August 4, 2016, local counsel signed the NDAs under a reservation of rights. However, National Grid would not agree to expand the scope of the Non-Disclosure Agreement for Highly Sensitive Confidential Information to allow four of NEER's in-house attorneys – Mitchell Ross (Vice President and General Counsel), William Lavarco (Senior Attorney), Brian Murphy (Senior Attorney), and Amie Jamieson (Senior Attorney) – and Michelle Gardner, Director of Regulatory Affairs (also an attorney) to sign the Non-Disclosure Agreement and view the alleged Highly Sensitive Confidential Information.

NEER objects to this restriction and seeks to have four in-house attorneys and its Director of Regulatory Affairs designated to view Highly Sensitive Confidential Information pursuant to the restrictions of the NDAs.

III. ARGUMENT

This Commission favors “complete disclosure in exchange of information,” as set forth in

Rule 1.18 of the Commission’s Rules governing discovery:

“The Commission favors prompt and complete disclosure in exchange of information and encourages informal arrangements among the parties for this exchange. It is further the Division’s policy to encourage the timely use of discovery as a means towards effective presentations at hearing and avoidance of the use of cross-examination at hearing for discovery purposes.”

Nevertheless, the Commission’s Rules do allow that some information filed in the course of a Docket may be protected from public disclosure. Commission Rule 1.2(g)(1) provides:

“Except where the Commission directs otherwise, all pleadings, orders, communications, exhibits and other documents shall become matters of public record as of the day and time of their filing. Any claim of privilege shall be governed by the policy underlying the Access to Public Records Act, with the burden of proof resting on the party claiming the privilege.”

According to the Access to Public Records Act (“APRA”), all documents and materials submitted in connection with the transaction of official business by an agency are deemed to be a “public record,” unless the information set forth in the documents and materials falls within one of the enumerated exceptions identified in RIGL §38-2-2(4). As National Grid notes, RIGL §38-2-2(4)(i)(B) provides that the following records are not deemed to be public:

“Trade secrets and commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature.”

Commission Rule 1.2(g)(2) provides that:

“Any party submitting documents to the Commission may request a preliminary finding that some or all of the information is exempt from the mandatory public disclosure requirements of the Access to Public Records Act. A preliminary finding that some documents are privileged shall not preclude the Commission’s release of those documents pursuant to a public request in accordance with R.I.G.L. §38-2-1 et seq.”

Thus, under this procedure, the Commission typically provides preliminary protection subject a final ruling at the hearing. While the claimed confidential information is preliminarily protected from public disclosure, it is provided to the parties under the terms of a Non-Disclosure Agreement drafted by the parties. National Grid has followed this procedure in this Docket, with two wrinkles.

First, National Grid seeks the two-tiered designation of Confidential and Highly Sensitive Confidential Information, even though the Commission's Rules and the APRA do not provide for this distinction, and even though there is no Commission precedent for confidential information being withheld from a party's attorneys.

Second, even if a two-tiered confidentiality designation were consistent with the Commission's Rules and the ARPA, National Grid seeks to restrict *any* NEER employee from viewing information that it unilaterally deems Highly Sensitive Confidential Information. The type of information National Grid claims is highly sensitive includes such elementary items as terms of the proposed agreements and their supposed economic benefit to ratepayers. National Grid seeks to restrict this information even from four identified internal attorneys and the Director of Regulatory Affairs (also an attorney), who would be committed to confidentiality. These individuals are not directly involved in liquefied natural gas or natural gas marketing, the only matters upon which the petition touches in a way that might be of competitive interest. Moreover, as licensed attorneys, it should be presumed that these individuals will abide by any restrictions imposed upon them by an NDA and are all bound by ethical requirements imposed by attorney licensing authorities in various states.

Simply put, there is no basis for National Grid's proposed restrictions in the Commission's Rules of Practice and Procedure, and NEER is aware of no instance where the Commission allowed a party to unilaterally designate information to be withheld from internal counsel of a party.

Further, the Commission's Rules provide the parties the opportunity for a full and fair hearing, including the rights to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, and to submit rebuttal evidence. In order to exercise these rights, NEER and its attorneys (both internal and external) must have access to the data and information supporting National Grid's claims in its petition. NEER's experience in Massachusetts shows that the type of restriction imposed by National Grid will have a real and material negative impact on NEER's ability to participate in this proceeding. Most importantly, NEER's internal attorneys will be excluded from important discussions related to Highly Sensitive Confidential Information, cannot view all the testimony and other material National Grid relies upon in support of its application, and will not have the ability to review complete copies of NEER's own testimony. Failing to provide NEER's internal legal counsel and Director of Regulatory Affairs access to information National Grid unilaterally designates as Highly Sensitive Confidential will deprive NEER of its right to due process.

Further, it is undersigned counsel's understanding that in D.P.U. 16-05 all redacted information – including those of the terms of the proposed contracts and the maximum price in the contract that ratepayers might ultimately pay – was marked Highly Sensitive Confidential Information despite the distinction in the proposed NDAs between "Confidential" and "Highly Sensitive Confidential" information. As such, NEER's internal legal counsel and Director of

Regulatory Affairs may not review any of this information, even under a commitment of confidentiality. This restriction on NEER's internal legal counsel and Director of Regulatory Affairs – who are bound by legal and ethical professional obligations and must be presumed to honor the terms of the NDA – is unreasonable and unsupported. 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.

Finally, NEER anticipates that National Grid will point to NEER signing an NDA with similar restrictions in it in Massachusetts as evidence that NEER should be bound by the proposed restrictions in this case. That argument is unavailing. First, NEER objected to the proposed restriction in an Emergency Motion to Compel to the DPU. Only after the DPU rejected NEER's arguments in Eversource Energy's corresponding proceeding on the same proposal at issue here did NEER agree to sign the NDA.³ Second, the DPU's order relied heavily on prior Department precedent in holding the proposed restrictions to be reasonable.⁴ The Commission has no such precedent, and NEER respectfully suggests that it should not establish it in this case.

WHEREFORE, NextEra Energy Resources, LLC, requests that the Commission order National Grid to include its four identified in-house attorneys and Director of Regulatory Affairs in the Non-Disclosure Agreement for Highly Sensitive Confidential Information and allow these

³ *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, D.P.U. 15-181, Interlocutory Order on NextEra Energy Resources, LLC's Motion to Compel (Apr. 5, 2016).*

⁴ *See id.* at 17-19.

individuals access to the Highly Sensitive Confidential Information pursuant to the terms of the Non-Disclosure Agreement .

NextEra Energy Resources, LLC
By its attorney,



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Dated: August 4, 2016

CERTIFICATION

I hereby certify that on August 4, 2016, I sent a copy of the within to all parties set forth on the attached Service List by electronic mail and copies to Luly Massaro, Commission Clerk, by electronic mail and regular mail.

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