

**DEPARTMENT OF THE INTERIOR****Bureau of Ocean Energy Management**

[Docket No. BOEM-2018-0016]

**Atlantic Wind Lease Sale 4A (ATLW-4A) Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Massachusetts—Proposed Sale Notice****AGENCY:** Bureau of Ocean Energy Management, Interior.**ACTION:** Proposed Sale Notice.

**SUMMARY:** This document is the Proposed Sale Notice (PSN) for the sale of commercial wind energy leases on the Outer Continental Shelf (OCS) offshore Massachusetts, pursuant to the Bureau of Ocean Energy Management's (BOEM) regulations. BOEM proposes to offer for sale two leases: Lease OCS-A 0502 and Lease OCS-A 0503, which are the same Lease Areas (LA) that were unsold during the Atlantic Wind Lease Sale-4 (ATLW-4) on January 29, 2015. In this PSN, you will find information pertaining to the areas available for leasing, proposed lease provisions and conditions, auction details, lease form, criteria for evaluating competing bids, award procedures, appeal procedures, and lease execution. BOEM invites public comment during a 60-day comment period following publication of this notice. The issuance of the proposed leases resulting from this sale would not constitute approval of project-specific plans to develop offshore wind energy. Such plans, expected to be submitted by the auction winner(s), would be subject to subsequent environmental and technical reviews prior to a decision by BOEM to approve development.

**DATES:** Comments should be submitted electronically or postmarked no later than June 11, 2018. All comments received or postmarked during the comment period will be made available to the public and considered prior to publication of the Final Sale Notice (FSN).

Qualification materials must be postmarked no later than June 11, 2018. Please refer to the "Participation in the Proposed Lease Sale" section for additional information on entity participation and qualification.

**ADDRESSES:** Potential auction participants, Federal, state, and local government agencies, tribal governments, and other interested parties are requested to submit their written comments on the PSN in one of the following ways:

1. *Electronically:* <http://www.regulations.gov>. In the entry

entitled, "Enter Keyword or ID," enter BOEM-2018-0016 then click "search." Follow the instructions to submit public comments.

2. *Written Comments:* In written form, delivered by hand or by mail, enclosed in an envelope labeled "Comments on Massachusetts PSN" to: Office of Renewable Energy Programs, Bureau of Ocean Energy Management, 45600 Woodland Road, VAM-OREP, Sterling, Virginia 20166.

3. *Qualifications Materials:* Those submitting qualifications materials for the first time, or previously qualified bidders reaffirming their interest in bidding on a lease offshore Massachusetts, should contact Jeff Browning, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM-OREP, Sterling, Virginia 20166, (703) 787-1577, or [jeffrey.browning@boem.gov](mailto:jeffrey.browning@boem.gov). If you wish to protect the confidentiality of your comments or qualification materials, clearly mark the relevant sections and request that BOEM treat them as confidential. Please label privileged or confidential information with the caption "Contains Confidential Information" and consider submitting such information as a separate attachment. Treatment of confidential information is addressed in the section of this PSN entitled, "Protection of Privileged or Confidential Information." Information that is not labeled as privileged or confidential will be regarded by BOEM as suitable for public release.

**FOR FURTHER INFORMATION CONTACT:** Jeff Browning, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM-OREP, Sterling, Virginia 20166, (703) 787-1577 or [jeffrey.browning@boem.gov](mailto:jeffrey.browning@boem.gov).

**SUPPLEMENTARY INFORMATION:**

**Authority:** This PSN is published pursuant to subsection 8(p) of the Outer Continental Shelf (OCS) Lands Act (43 U.S.C. 1337(p)), as amended by section 388 of the Energy Policy Act of 2005 (EPA), and the implementing regulations at 30 CFR part 585, including 30 CFR 585.211 and 585.216.

**Background***Area for Proposed Leasing*

The two LAs (OCS-A 0502 and OCS-A 0503) described for leasing in this PSN are the same LAs that were unsold in ATLW-4 on January 29, 2015 (see Atlantic Wind Lease Sale 4 Final Sale Notice available at: <https://www.boem.gov/MA-FSN/>). Detailed information regarding the LAs is provided in the section entitled, "Areas Offered for Leasing."

*Environmental Reviews*

On November 2, 2012, BOEM published a Notice of Availability (NOA) for the *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf (OCS) Offshore Massachusetts Environmental Assessment* (EA) (77 FR 66185) with a 30-day public comment period. BOEM received 25 comments, which are available at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/MA/Commercial-Wind-Leasing-Offshore-Massachusetts.aspx>. Concurrently with its preparation of the EA, BOEM conducted consultation under the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and the Coastal Zone Management Act (CZMA). BOEM prepared and executed a programmatic agreement (PA) to guide its consultations under section 106 of the National Historic Preservation Act (NHPA). The PA provides for consultations to continue through BOEM's decision-making process regarding the approval, approval with modification, or disapproval of a lessee's Site Assessment Plan (SAP), and allows for phased identification and evaluation of historic properties.

Based on the public comments received in response to the EA, the conclusion of required consultations, and public outreach and information meetings, BOEM made certain revisions to the November 2012 EA. As a result of its analysis in the revised EA, BOEM issued a Finding of No Significant Impact (FONSI) on June 18, 2014 (79 FR 117). The *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf (OCS) Offshore Massachusetts Revised Environmental Assessment* and the FONSI can be found at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/MA/Commercial-Wind-Leasing-Offshore-Massachusetts.aspx>.

BOEM has evaluated the new information and changed circumstances since the FONSI was published, and has determined they would not result in significantly different environmental effects than those described in the June 2014 revised EA. The existing National Environmental Policy Act (NEPA) analyses and associated consultations adequately assess the reasonably foreseeable environmental effects of the issuance of commercial leases and associated site characterization activity in the Massachusetts Wind Energy Area (WEA), which includes the areas that

BOEM proposes to lease in this notice. It is therefore unnecessary for BOEM to perform further NEPA analysis prior to issuing two additional commercial leases within the Massachusetts WEA.

While there is no change to the EA's impact analysis for commercial and recreational fisheries, BOEM has elected to include a lease stipulation to ensure the Lessee would coordinate their activities with and communicate with commercial and recreational fishermen. Prior to the development of this lease stipulation, BOEM had been successful in using its review of survey plans and approval of SAPs to ensure that fisheries liaisons are identified and that lessees are communicating with potentially affected fishing groups. Nevertheless, BOEM included the same stipulation in the New York Lease (OCS-A 0512), and it has determined that this lease stipulation is also prudent for these proposed leases offshore Massachusetts given the importance of fishing to the economies of Southern New England states. The specific lease stipulation is as follows:

Fisheries Communications Plan (FCP) and Fisheries Liaison. The Lessee must develop a publicly available FCP that describes the strategies that the Lessee intends to use for communicating with fisheries stakeholders prior to and during activities in support of the submission of a plan. The FCP must include the contact information for an individual retained by the Lessee as its primary point of contact with fisheries stakeholders (*i.e.*, Fisheries Liaison).

BOEM will conduct additional environmental reviews upon receipt of a lessee's proposed project-specific plans, such as a SAP or Construction and Operations Plan (COP).

#### Participation in the Proposed Lease Sale

Entities wishing to participate in the proposed sale described in this notice must respond to BOEM during the 60-day comment period. Entities that qualified to participate in the first Massachusetts lease sale (ATLW-4) held on January 29, 2015, must: (1) Affirm their interest in acquiring LAs OCS-A 0502 and/or 0503; (2) notify BOEM of any adverse material changes to their financial and/or technical qualifications, including bankruptcies; and (3) provide any updates to their legal qualifications documentation on file with BOEM. Those companies are:

- Deepwater Wind New England, LLC
- EDF Renewable Development, Inc.
- Fishermen's Energy, LLC
- Green Sail Energy LLC
- Avangrid Renewables LLC (formerly IBERDROLA RENEWABLES, Inc.)

- NRG Bluewater Wind Massachusetts, LLC
- Vineyard Wind LLC (formerly Offshore MW LLC)
- RES America Developments Inc.
- Sea Breeze Energy LLC
- US Mainstream Renewable Power (Offshore) Inc.
- US Wind Inc.

Entities that have filed qualification materials with BOEM to hold a lease offshore Massachusetts since the first Massachusetts lease sale (ATLW-4) held on January 29, 2015, do not need to re-file qualification materials. Those companies are:

- Statoil Wind US LLC
- PNE WIND USA, Inc.

All other entities wishing to participate in the proposed Massachusetts lease sale that have not already been legally, financially, and technically qualified to hold a lease for commercial wind development offshore Massachusetts must submit the required qualification materials by the end of the 60-day comment period for this notice.

#### Areas of Particular Interest

Stakeholders are encouraged to comment on any matters related to this lease sale that are of interest or concern to them. However, BOEM has identified certain issues as particularly important in developing this lease sale, and we encourage commenters to address these issues specifically.

• **Multiple-Factor Auction Format:** In this PSN, BOEM proposes a lease sale based on a multiple-factor bidding auction format, and a bidding system comprised of a multiple-factor combination of nonmonetary and monetary factors. In such a lease sale, bidders can qualify for nonmonetary credits that effectively offset a percentage of their monetary bids. Bidders that can demonstrate that they have executed a Community Benefits Agreement (CBA) meeting the criteria described below would be eligible for the credit. In other lease sales, BOEM has recognized credits for bidders who could demonstrate that they had executed a Joint Development Agreement (ATLW-1) or a Power Purchase Agreement (ATLW-1, 3, 4, and 5). BOEM welcomes comments regarding whether recognition of CBAs in this lease sale is appropriate, whether BOEM should recognize one or more other nonmonetary factors in this lease sale, and if so, which ones and why. BOEM also welcomes comments on the amount of any proposed credit, including the 5% credit proposed for CBAs.

• **Cap on Nonmonetary Credits:** BOEM is considering adding a

maximum dollar amount cap on the worth of the nonmonetary credit. The cap amount would be identified in the Final Sale Notice. Such a cap would allow BOEM to limit the worth of a nonmonetary credit in BOEM's sale. Commenters are encouraged to address whether a cap is appropriate, and if so, for which type of credit and at what amount.

• **Lease Area Delineation:** In this PSN, BOEM has proposed LAs that constitute the portions of the Massachusetts WEA that went unsold in ATLW-4 in 2015. This choice reflects the fact that these areas have already undergone BOEM's rigorous environmental and spatial use analyses and been the subject of substantial public comment. Nonetheless, BOEM seeks comment on whether the division of the remaining portions of the WEA remains appropriate and, if not, what alternate divisions (potentially creating more than two LAs) would be more appropriate and why. BOEM also seeks comment on whether (and, if so, how) it should increase the number of leases offered and/or redraw boundaries between or among the leases.

• **Addition of Buffer Requirement:** One of the proposed LAs abuts another BOEM-issued renewable energy lease. Each lessee is entitled to the full enjoyment of its lease, free from unreasonable interference from other lessees' activities. BOEM is particularly concerned about the potential for interference in the form of lease "oversail" (*i.e.*, entry of wind turbine generator (WTG) blades into the airspace above an adjoining lease) or wake effects (*i.e.*, a significant reduction in the wind resource entering a lease due to the close proximity of WTGs on an adjacent lease). To ensure fair and mutual enjoyment of adjacent leases, BOEM is considering imposing buffer requirements in its leases barring WTG construction within a certain distance of an adjacent lease. BOEM welcomes comment on (a) whether such a requirement is appropriate; (b) if so, what distance from the adjacent lease is reasonable; and (c) whether such a requirement, if appropriate, is best imposed at the leasing stage or a subsequent stage (such as plan approval).

• **Deadlines and Milestones for Bidders:** This section describes the major deadlines and milestones in the auction process from publication of this PSN to execution of leases pursuant to this proposed sale. This process is organized into five stages: (1) The PSN comment period; (2) from the end of PSN comment period to publication of the PSN; (3) the FSN waiting period; (4)

conducting the auction; and (5) from the auction to Lease Execution.

*The PSN Comment Period:*

- *Submit Comments:* The public is invited to submit comments during this 60-day period, which will expire on June 11, 2018.

- *Public Seminar:* BOEM will host a public seminar to discuss the lease sale process and the auction format. The time and place of the seminar will be announced by BOEM and published on the BOEM website at <http://www.boem.gov/Massachusetts/>. No registration or RSVP is required to attend.

- *Submit Qualifications Materials:*

All qualifications materials must be received by BOEM by the end of the 60-day PSN comment period June 11, 2018. This includes materials sufficient to establish a company's legal, technical and financial qualifications pursuant to 30 CFR 585.106 and 585.107.

*End of PSN Comment Period to FSN Publication:*

- *Review Comments:* BOEM will review all comments submitted in response to the PSN during the comment period.

- *Finalize Qualifications Reviews:* Prior to the publication of the FSN, BOEM will complete any outstanding reviews of bidder qualifications materials submitted during the PSN comment period. The final list of eligible bidders will be published in the FSN.

- *Prepare the FSN:* BOEM will prepare the FSN by updating information contained in the PSN where appropriate.

- *Publish FSN:* BOEM will publish the FSN in the **Federal Register**.

*FSN Waiting Period:* During this period, qualified bidders must take several steps to remain eligible to participate in the auction.

- *Bidder's Financial Form (BFF):* BOEM must receive each qualified bidder's completed and signed BFF no later than the date listed in the FSN. Typically, this deadline is approximately 14 calendar days after publication of the FSN in the **Federal Register**. BOEM will consider extensions to this deadline only if BOEM determines that the failure to timely submit the BFF was caused by events beyond the bidder's control. Blank BFFs can be found at: <http://www.boem.gov/Massachusetts/>. Once the BFF has been processed, bidders may log into [pay.gov](http://pay.gov) and submit bid deposits (see next bullet). BOEM will only accept an originally executed paper copy of the BFF, and will not consider for this auction BFFs submitted for previous lease sales. The BFF must be

executed by an authorized representative as shown on the bidder's legal qualifications. Each bidder is required to sign the self-certification in the BFF, in accordance with 18 U.S.C. 1001 (Fraud and False Statements).

- *Bid Deposits:* Each qualified bidder must submit a bid deposit of \$450,000 no later than the date listed in the FSN. Typically, this deadline is approximately 30 calendar days after the publication of the FSN. BOEM will consider extensions to this deadline only if BOEM determines that the failure to timely submit the bid deposit was caused by events beyond the bidder's control.

- *Nonmonetary Package:* Each bidder must submit a nonmonetary package, if it is applying for a credit as described in the "Nonmonetary Auction Procedures" section of this notice. The due date for submission of the nonmonetary package is normally the same as the bid deposit deadline, approximately 30 calendar days after the publication of the FSN.

- *Mock Auction:* BOEM will hold a Mock Auction that is open only to qualified bidders who have met the requirements and deadlines for auction participation, including submission of the bid deposit. Final details of the Mock Auction will be provided in the FSN.

- *Review of Nonmonetary Packages:* Shortly before the monetary auction, the Nonmonetary Panel (the Panel) will meet to consider nonmonetary packages. The panel will send determinations of eligibility for nonmonetary credits to BOEM, which will inform each bidder by email whether or not they have been awarded a credit for use during the lease sale. BOEM will not publicly disclose which bidders, if any, were awarded nonmonetary credits until after the lease sale.

*Conducting the Auction:* BOEM, through its contractor, will hold an auction as described in the FSN. The auction will take place no sooner than 30 days following publication of the FSN in the **Federal Register**. The estimated timeframes described in this PSN assume the auction will take place approximately 45 days after publication of the FSN. Final dates will be included in the FSN.

- *Monetary Auction:* The monetary auction will be conducted on the date specified in the FSN.

- *Announce Provisional Winners:* BOEM will announce the provisional winners of the lease sale after the auction ends.

*From Auction to Lease Execution:* There are several steps between the

conclusion of the auction and execution of the lease.

- *Reconvene the Panel:* The Panel will reconvene to verify auction results.

- *Bid Deposit Refund:* BOEM will refund the bid deposit of any bidder that did not win a lease. BOEM will provide a written explanation of why the bidder did not win.

- *Department of Justice (DOJ) Review:* The DOJ has 30 days in which to conduct an antitrust review of the auction in consultation with the Federal Trade Commission, pursuant to 43 U.S.C. 1337(c).

- *Delivery of Leases:* BOEM will send three lease copies to each winner, with instructions on how to sign the leases. The first year's rent is due 45 days after the winner receives the lease copies for execution.

- *Return the Leases:* Within 10 business days of receiving the lease copies, the auction winners must post financial assurance, pay any outstanding balance of their bonus bids (*i.e.*, winning monetary bid amount minus bid deposit and any applicable nonmonetary credit), and sign and return the three signed lease copies.

- *Execution of Leases:* Once BOEM has received the signed lease copies and verified that it has received all other required materials, BOEM will execute the leases if appropriate.

*Area Offered for Leasing:* The areas described for leasing in this PSN are the same as the two unsold LAs in the ATLW-4: Lease OCS-A 0502 and Lease OCS-A 0503. Lease OCS-A 0502 consists of 248,015 acres and Lease OCS-A 0503 consists of 140,554 acres. The total area is approximately 388,569 acres. A description of the LAs can be found in Addendum "A" of the proposed leases, which BOEM has made available with this notice on its website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>.

*Map of the Area Offered for Leasing*

A map of the two proposed LAs and a table of the boundary coordinates in X, Y (eastings, northings) UTM Zone 18, NAD83 Datum and geographic X, Y (longitude, latitude), NAD83 Datum can be found at the following URL: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>.

*Delineation of the Leasing Areas*

In this notice, BOEM proposes to auction the two LAs previously offered in ATLW-4 as lease numbers OCS-A 0502 and OCS-A 0503. Prior to that sale, BOEM commissioned the Department of Energy's National

Renewable Energy Laboratory (NREL) to develop a methodology for delineation of the Massachusetts WEA into four non-overlapping LAs for BOEM, two of which were sold in that sale. The delineation report is available on BOEM's website at <http://www.nrel.gov/docs/fy14osti/60942.pdf>.

*Withdrawal of Blocks:* Interested parties should note that BOEM reserves the right to withdraw portions of the LAs prior to its execution of a lease based upon comments received in response to this PSN and other relevant information provided to the Bureau.

*Financial Terms and Conditions:* This section provides an overview of the annual payments required of a lessee that are described in the proposed leases, and the financial assurance requirements that will be associated with each lease if it is awarded.

#### Rent

The first year's rent payment of \$3 per acre for the entire LA is due within 45 days of the date the auction winner receives the lease for execution. Thereafter, annual rent payments are due on the anniversary of the Effective Date of the lease (*i.e.*, the Lease Anniversary). Once commercial operations commence, rent will be charged on the remaining part of the lease not authorized for commercial operations, *i.e.*, not generating electricity. However, instead of geographically dividing the LA into acreage that is "generating" and acreage that is "non-generating," the fraction of the lease accruing rent is based on the fraction of the total nameplate capacity of the project that is not yet in operation. That fraction is calculated as the nameplate capacity (as defined herein) that is not yet authorized for commercial operations at the time payment is due, divided by the maximum nameplate capacity after full installation of the project, as defined in the COP. This fraction is then multiplied by the amount of rent that would be due for the Lessee's entire LA at the rental rate of \$3 per acre, to obtain the annual rent due for a given year.

For example, for a lease the size of 248,015 acres (the size of the LA OCS-A 0502), the amount of rent payment would be \$744,045 per year if no portion of the leased area is authorized for commercial operations. If 500 megawatts (MW) of a project's nameplate capacity is operating (or authorized for operation), and its most recent approved COP specifies a maximum nameplate capacity of 1000 MW, the rent payment would be \$372,023. For the above example, this would be calculated as follows: 500

MW/1000 MW  $\times$  (\$3/acre  $\times$  248,015 acres) = \$372,023. BOEM requests comments on whether it would be appropriate to adjust the proposed annual rent to something other than \$3 per acre.

The Lessee also must pay rent for any project easement associated with the lease, commencing on the date that BOEM approves the COP (or COP modification) that describes the project easement. Annual rent for a project easement 200-foot wide and centered on the transmission cable is \$70.00 per statute mile. For any additional acreage required, the Lessee must also pay the greater of \$5.00 per acre per year or \$450.00 per year.

#### Operating Fee

For the purposes of calculating the initial annual proposed operating fee payment, an operating fee rate is applied to a proxy for the wholesale market value of the electricity expected to be generated from the project during its first twelve months of operations. This initial payment is prorated to reflect the period between the commencement of commercial operations and the Lease Anniversary. The initial annual operating fee payment is due within 45 days of the commencement of commercial operations. Thereafter, subsequent annual operating fee payments are due on or before each Lease Anniversary. The subsequent annual operating fee payments are calculated by multiplying an operating fee rate by the imputed wholesale market value of the projected annual electric power production. For the purposes of this calculation, the imputed market value is the product of the project's annual nameplate capacity, the total number of hours in the year (8,760), a capacity factor, and the annual average price of electricity derived from a historical regional wholesale power price index. For example, an annual operating fee for a 100 MW wind facility operating at 40% capacity with a regional wholesale power price of \$40/MWh under an operating fee rate of 0.02 (*i.e.*, 2%) would be calculated as follows: 100 MW  $\times$  8,760 hours/year  $\times$  0.4  $\times$  \$40/MWh power price  $\times$  0.02 = \$280,320.

*Operating Fee Rate:* BOEM is proposing a fixed operating fee rate of 0.02 (*i.e.*, 2%) during the project's entire life of commercial operations. BOEM requests comments on whether it would be appropriate to adjust this rate.

*Nameplate Capacity:* Nameplate capacity is the maximum rated electric output, expressed in MW that the turbines of the wind facility under commercial operations can produce at

their rated wind speed as designated by the turbine's manufacturer. The nameplate capacity at the start of each year of commercial operations on the lease will be specified in the COP. For example, if a Lessee has 20 turbines under commercial operations rated by the design manufacturer at 5 MW of output each, the nameplate capacity of the wind facility at the rated wind speed of the turbines would be 100 MW.

*Capacity Factor:* The capacity factor relates to the amount of energy delivered to the grid during a period of time compared to the amount of energy the wind facility would have produced at full capacity during that same period of time. This factor is represented as a decimal between zero and one. There are several reasons why the amount of power delivered is less than the theoretical 100% of capacity. For a wind facility, the capacity factor is mostly determined by the availability of wind. Transmission line loss and down time for maintenance or other purposes also affect the capacity factor.

The capacity factor for the year in which the Commercial Operation Date occurs, and for the first six full years of commercial operations on the lease, is set to 0.4 (*i.e.*, 40%). At the end of the sixth year, the capacity factor may be adjusted to reflect the performance over the previous five years based upon the actual metered electricity generation at the delivery point to the electrical grid. Similar adjustments to the capacity factor may be made once every five years thereafter. The maximum change in the capacity factor from one period to the next will be limited to plus or minus 10 percent of the previous period's value.

*Wholesale Power Price Index:* The wholesale power price, expressed in dollars per MW-hour, is determined at the time each annual operating fee payment is due, based on the weighted average of the inflation-adjusted peak and off-peak spot price indices for the Northeast—Massachusetts Hub power market for the most recent year of data available. The wholesale power price is adjusted for inflation from the year associated with the published spot price indices to the year in which the operating fee is to be due based on the Lease Anniversary, using annual implicit price deflators as reported by the U.S. Department of Commerce Bureau of Economic Analysis.

#### Financial Assurance

Within 10 business days after receiving the lease copies, the provisional winner must provide an initial lease-specific bond or other approved means of meeting the Lessor's

initial financial assurance requirements, in the amount of \$100,000. BOEM will determine the amount of the SAP, COP, supplemental, and decommissioning financial assurance requirements on a case-by-case basis based on estimates of cost to meet all accrued lease obligations.

The financial terms can be found in Addendum "B" of the proposed leases, which BOEM has made available with this notice on its website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>.

**Place and Time:** The auction will be held online. The time that the auction will be held will be published in the FSN. The date has not been finalized, but will be no earlier than 30 days after publication of the FSN in the **Federal Register**.

**Public Seminar:** BOEM will host a public seminar to review the auction format, explain the auction rules, and demonstrate the auction process with potential bidders and other stakeholders. BOEM will announce the time and place of the seminar and published it on the BOEM website. No registration or RSVP will be required to attend.

**Mock Auction:** BOEM will host a Mock Auction to educate qualified bidders about the procedures to be employed during the auction and to answer questions. The Mock Auction will take place between the publication of the FSN in the **Federal Register** and the date of the auction. Following publication of the FSN in the **Federal Register**, details of the Mock Auction will be distributed to those eligible to participate in the auction. All qualified bidders who intend to participate in the auction are strongly encouraged to participate in the Mock Auction. Bidders will be eligible to participate in the Mock Auction if they have been legally, technically and financially qualified to participate in the lease sale, and have submitted their bid deposit as described below.

**Bid Deposit:** A bid deposit is an advance cash deposit submitted to BOEM in order to participate in the auction. No later than the deadline provided in the FSN, each bidder must have submitted a bid deposit of \$450,000. Any bidder that fails to submit the bid deposit by the deadline described in the FSN may be disqualified from participating in the auction. Bid deposits will be accepted online via *pay.gov*. Following publication of the FSN, each bidder must fill out the BFF included in the FSN. BOEM has made a copy of the proposed BFF available with this notice

on its website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>. This form requests that each bidder designate an email address, which the bidder should use to create an account in *pay.gov*. After establishing the *pay.gov* account, bidders may use the Bid Deposit Form on the *pay.gov* website to leave a deposit.

Following the auction, BOEM will apply bid deposits against any bonus bids or other obligations owed to BOEM. If the bid deposit exceeds a bidder's total financial obligation, BOEM will refund the balance of the bid deposit to the bidder. BOEM will fully refund bid deposits to unsuccessful bidders.

**Minimum Bid:** BOEM proposes for this lease sale a minimum bid of \$2 per acre for each LA. Therefore, the minimum acceptable bid will be \$496,030 for Lease OCS-A 0502, and \$281,108 for Lease OCS-A 0503.

**Lease Terms and Conditions:** The proposed OCS commercial wind leases contain lease terms, conditions, and stipulations. BOEM reserves the right to add additional terms and conditions to any approval of a SAP and/or COP. The proposed leases, including Addendum "C," are available on BOEM's website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>. Each proposed lease includes the following seven attachments:

- Addendum "A" (Description of Leased Area and Lease Activities);
- Addendum "B" (Lease Term and Financial Schedule);
- Addendum "C" (Lease Specific Terms, Conditions, and Stipulations);
- Addendum "D" (Project Easement);
- Addendum "E" (Rent Schedule);
- Appendix A to Addendum "C": (Incident Report: Protected Species Injury or Mortality); and
- Appendix B to Addendum "C": (Required Data Elements for Protected Species Observer Reports).

Addenda "A," "B," and "C" provide detailed descriptions of lease terms and conditions. Addenda "D" and "E" will be completed at the time of COP approval.

After considering comments on the PSN and proposed leases, BOEM will publish final lease terms and conditions in the FSN.

#### *Required Plans for Potential Development of Executed Leases*

Pursuant to 30 CFR 585.601, the leaseholder must submit a SAP within 12 months of lease issuance. If the leaseholder intends to continue its commercial lease with an operations term, the leaseholder must submit a

COP at least 6 months before the end of the site assessment term.

**Qualifications—Who May Bid:** As stated above, within the 60-day comment period for this PSN, entities that were qualified to bid in the January 29, 2015, Massachusetts lease sale (ATLW-4) must affirm their interest in bidding in this lease sale (ATLW-4a), notify BOEM of any adverse material changes to their financial and/or technical qualifications, including bankruptcies, and provide any updates to your legal qualifications card. Entities that have been qualified due to submission of unsolicited lease requests in the area since ATLW-4 do not need to resubmit qualifications materials. All other entities wishing to bid in this lease sale must submit a complete set of qualifications materials by the end of the 60-day comment period of this PSN. To be eligible to participate in the auction, each potential bidder must be found by BOEM to be legally, technically and financially qualified under BOEM's regulations at 30 CFR 585.106-107 by the time the FSN for this sale is published. Please note that technical and financial qualifications are lease-specific; it is not sufficient to have been technically and financially qualified to participate in a prior lease sale.

Guidelines on BOEM's qualifications requirements can be found at: <http://www.boem.gov/Renewable-Energy-Program/Regulatory-Information/QualificationGuidelines-pdf.aspx>. You must provide any qualifications documentation in both paper and electronic formats. BOEM considers an Adobe PDF file stored on a storage media device to be an acceptable format for submitting an electronic copy.

Because it may take several weeks for BOEM to assess a potential bidder's legal, technical, and financial qualifications, BOEM advises potential bidders who plan to participate in a sale to submit their qualifications materials promptly. It is not uncommon for BOEM to request additional materials establishing qualifications following an initial review of the qualifications package. BOEM cannot determine a potential bidder to be qualified without a complete qualification package. Potential bidders whom BOEM has not qualified before publication of the FSN will not be allowed to participate in the proposed sale.

#### **Auction Procedures**

##### *Multiple-Factor Bidding*

As authorized under 30 CFR 585.220(a)(4) and 585.221(a)(6), BOEM proposes that this sale employ a

multiple-factor auction format with a multiple-factor bidding system. Each bidder may bid on only one LA at a time, and can win at most one of the two LAs offered in this sale. BOEM proposes to balance consideration of two variables in determining the outcome of this auction: (1) A cash bid, and (2) a nonmonetary credit for bidders that have entered into a CBA as described below.

#### 5% Nonmonetary Credit for Community Benefits Agreements

BOEM proposes to offer a 5% nonmonetary credit in this lease sale for bidders who have executed one or more CBAs meeting the criteria established in the FSN and proposed below. If a bidder is found to be eligible for a nonmonetary credit, the credit would be 5% of the asking price. The cash bid would make up that portion of the bid not covered by the nonmonetary credit. Summed together, these two variables comprise the "As-Bid" price. The effect of possessing a nonmonetary credit of 5% would be to receive a 5% discount on the asking price.

BOEM must receive a bidder's nonmonetary package no later than the due date listed in the FSN, containing a copy of the executed CBA and any additional explanation of the contents and purported benefits of the agreement that the bidder believes would be helpful for BOEM. The submitting bidder may designate confidential business information in its submittal pursuant to process described below.

A BOEM-designated panel will evaluate bidders' nonmonetary packages to determine whether each bidder is eligible for a nonmonetary credit applicable to the asking price in each round of the auction. It is possible that multiple or all bidders could qualify for nonmonetary credits. Bidders will be informed by email before the monetary auction whether they have been deemed eligible for a nonmonetary credit. BOEM will not disclose until after the lease sale which other bidders, if any, were determined to be eligible for a nonmonetary credit.

*Community Benefits Agreement (CBA).* In order for a nonmonetary package to qualify for a 5% credit in this auction, the BOEM-appointed panel must answer "yes" to the following questions regarding the CBA:

1. Is there a legally binding contract?
2. Is the contract between the bidder and one or more community-based organizations (CBO)?
3. Has the bidder committed to provide specified community benefits?

4. Has the CBO committed in specific ways to support the project in the governmental approval process?

A community-based organization (CBO) is defined as: A legally incorporated organization whose membership includes residents or property owners of a community within the potentially affected region, the local government of the community, or an entity created or managed by the local government(s) of the community or communities.

#### Monetary Auction Procedures

Using an online bidding system to host the auction, BOEM will start the bidding for lease OCS-A 0502 at \$496,030, and for lease OCS-A 0503 at \$281,108. BOEM will increase those prices incrementally until only one active bidder remains in the auction for each LA. BOEM proposes that no bidder in the auction be permitted to win both LAs.

The auction will be conducted in a series of rounds. At the start of each round, BOEM will state an asking price for each LA. If a bidder is willing to meet the asking price for one of the LAs, it will indicate its intent by submitting a bid equal to the asking price. A bid at the full asking price is referred to in this notice as a "live bid." To participate in the next round of the auction, a bidder must submit a live bid for one of the LAs in each previous round. As long as there are two or more live bids for at least one LA, the auction moves to the next round. BOEM will raise the asking price for each LA by an increment determined by BOEM. Asking price increments will be determined based on a number of factors, including (but not necessarily limited to) the expected time needed to conduct the auction, and the number of rounds that have already occurred. BOEM reserves the right to increase or decrease bidding increments as appropriate.

A bidder may switch its live bid from one LA to the other in the current round only if its bid from the previous round was contested—*e.g.*, a bidder cannot switch from OCS-A 0502 to OCS-A 0503 unless there was at least one other bid for OCS-A 0502 in the last round. If the bid was not contested in the previous round, the bidder cannot switch LAs, and its previous round bid will be carried forward to the next round. If another bidder places a live bid on OCS-A 0502 later in the auction, BOEM will stop automatically carrying forward the previously uncontested bid on that LA. The bidder that placed the previously carried forward bid is then free to bid on either LA in the next round at the new asking prices. A

bidder remains eligible to participate in the auction if it has submitted a live bid in the prior round, or has a previously uncontested live bid carried forward by BOEM to the current round. As discussed below, if a bidder decides to stop bidding further when its bid is contested, there are still circumstances in which the bidder could win (*e.g.*, if the winning bid is disqualified at the award stage of the auction). If this happens, the bidder may be bound by its bid and thus obligated to pay the full bid amount.

Between rounds, BOEM would disclose to all bidders who submitted bids in the first round of the auction: (1) The number of live bids for each LA in the previous round of the auction (*i.e.*, the level of demand); and (2) the asking price for each LA in the upcoming round of the auction.

A bidder is only eligible to continue bidding in the auction if it has submitted a live bid in the previous round. In any round after the first round, however, a bidder may submit an "exit bid," also known as an "intra-round bid." An exit bid is a bid that is higher than the previous round's asking price, submitted for the sale LA as the bidder's contested live bid in the previous round, but less than the current round's asking price. An exit bid is *not* a live bid, and it represents the final bid that a bidder may submit in the auction. During the auction, the exit bid can only be seen by BOEM, and not by other bidders.

A LA with only exit bids in a given round will not have its asking price raised in the next round. As soon as both LAs have one or zero live bids, the auction is over, regardless of the number of exit bids on each area.

After the bidding ends, BOEM would determine the provisionally winning bids for each LA. The provisionally winning bid for a LA would be the highest bid (live bid or exit bid) received for that LA, except that no bidder may win both LAs. Regardless of whether a provisionally winning bid is a live bid or an exit bid, BOEM would apply any nonmonetary credits in the same way. The award procedures described here could result in a tie, for example if two bidders submit identical high exit bids, or prior round live bids for the same LA. In such cases, BOEM would resolve the tie by randomized means. If the procedures described herein would result in the award of both LAs to the same bidder, BOEM would accept only the most recent bid submitted by that bidder and would award the other LA to the next highest bidder.

Provisional winners may be disqualified if they are subsequently found to have violated auction rules or otherwise engaged in conduct detrimental to the integrity of the competitive auction. If a bidder submits a bid that BOEM determines to be a provisionally winning bid, the bidder would be expected to sign the applicable lease documents, establish financial assurance, and submit the cash balance of its bid (*i.e.*, winning bid amount minus the bid deposit and any applicable nonmonetary credit) within 10 business days of receiving the lease copies, pursuant to 30 CFR 585.224. BOEM reserves the right not to issue the lease to the provisionally winning bidder if that bidder fails to timely sign and pay for the lease or otherwise comply with applicable regulations or the terms of the FSN. In that case, the bidder would forfeit its bid deposit. BOEM may consider failure of a bidder to timely pay the full amount due an indication that the bidder may no longer be financially qualified to participate in other lease sales under BOEM's regulations at 30 CFR 585.106 and 585.107.

#### *Additional Information Regarding the Auction Format*

##### **Bidder Authentication**

Prior to the auction, the Auction Manager will send several bidder authentication packages to each bidder shortly after BOEM has processed the BFFs. One package will contain tokens for each authorized individual. Tokens are digital authentication devices. The tokens will be mailed to the Primary Point of Contact indicated on the BFF. This individual is responsible for distributing the tokens to the individuals authorized to bid for that company. For bidders with authorized individuals in more than one country, tokens may be sent directly to authorized individuals rather than to the Primary Point of Contact. Bidders are to ensure that each token is returned within three business days following the auction. An addressed, stamped envelope will be provided to facilitate this process. In the event that a bidder fails to submit a BFF or a bid deposit, or does not participate in the auction, BOEM will de-activate that bidder's token and login information, and the bidder will be asked to return its tokens.

The second package will contain login credentials for authorized bidders. The login credentials will be mailed to the address provided in the BFF for each authorized individual. Bidders can confirm these addresses by calling (703) 787-1300. This package will contain

user login information and instructions for accessing the Auction System Technical Supplement and Alternative Bidding Form. The login information, along with the tokens, will be tested during the Mock Auction.

##### **Monetary Auction Times**

BOEM will provide specific information regarding when the bidders can enter the auction system and the auction start time in the FSN. Additional information will be made available in an Auction System Technical Supplement, which will be posted on BOEM's website prior to the auction.

BOEM and the auction contractors will use the auction platform messaging service to keep bidders informed on issues of interest during the auction. For example, BOEM may change the schedule at any time, including during the auction. If BOEM changes the schedule during the auction, it will use the messaging feature to notify bidders that a revision has been made and direct bidders to the relevant page. BOEM will also use the messaging system for other changes and items of particular note during the auction. The auction schedule and asking price increments are in BOEM's discretion, and are subject to change at any time before or during the auction.

During the auction, bidders may place bids at any time during the round. At the top of the bidding page, a countdown clock will show how much time remains in the round. Bidders have until the scheduled time to place bids. Bidders should place bids according to the procedures described in the Auction System Technical Supplement, and as practiced at the Mock Auction. No information about the round is available until the round has closed and results have been posted, so there should be no strategic advantage to placing bids early or late in the round.

##### **Prohibition on Communications Among Bidders During Auction**

During the auction, bidders are prohibited from communicating with each other regarding their participation in the auction. Additionally, during the auction, bidders are prohibited from communicating to the general public regarding any aspect of their participation or lack thereof in the auction, including, but not limited to, through social media, updated websites, or press releases. Federal antitrust law may impose further restrictions on communications between bidders above and beyond the restrictions described in this section.

##### **Alternate Bidding Procedures**

Alternate Bidding Procedures enable a bidder who is having difficulties accessing the internet to submit its bid via fax using an Alternate Bidding Form available on BOEM's website at: <http://www.boem.gov/Massachusetts/>.

In order to be authorized to use an Alternative Bidding Form, a bidder must call the help desk number listed in the Auction Manual *before* the end of the round. BOEM will authenticate the caller to ensure he/she is authorized to bid on behalf of the company. The bidder must explain the reasons for which he/she cannot place a bid using the online bidding platform. BOEM may, in its sole discretion, permit or refuse to accept a request for the placement of a bid using the Alternate Bidding Procedures. If bidders need to submit an Alternate Bidding Form, they are strongly encouraged to do so before the round ends.

*Rejection or Non-Acceptance of Bids:* BOEM reserves the right and authority to reject any and all bids that do not satisfy the requirements and rules of the proposed auction, the FSN, or applicable regulations and statutes.

##### **Process for Issuing the Leases**

Once all post-auction reviews have been completed to BOEM's satisfaction, BOEM will issue three unsigned copies of the lease to the provisionally winning bidder. Within 10 business days after receiving the lease copies, the provisionally winning bidder must:

1. Sign the lease on the bidder's behalf;
2. File financial assurance, as required under 30 CFR 585.515 through 585.537; and
3. Pay by electronic funds transfer (EFT) the balance (if any) of the bonus bid (winning bid less the bid deposit). BOEM requires bidders to use EFT procedures (not *pay.gov*, the website bidders used to submit bid deposits) for payment of the balance of the bonus bid, following the detailed instructions contained in the "Instructions for Making Electronic Payments" available on BOEM's website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>.

BOEM will not execute a lease until the three requirements above have been satisfied, BOEM has accepted the provisionally winning bidder's financial assurance pursuant to 30 CFR 585.515, and BOEM has processed the provisionally winning bidder's payment.

If BOEM determines the delay was caused by events beyond the provisional

winning bidder's control, BOEM may extend the ten business day deadline for executing the lease on the bidder's behalf, filing the required financial assurance, and/or paying the balance of the bonus bid.

If the provisionally winning bidder does not meet these requirements or otherwise fails to comply with applicable regulations or the terms of the FSN, BOEM reserves the right to not issue the lease to that bidder. In such a case, the provisionally winning bidder will forfeit its bid deposit.

Within 45 days of the date that the provisionally winning bidder receives copies of the lease, it must pay the first year's rent using the *pay.gov* Renewable Energy Initial Rental Payment form, available at: <https://pay.gov/paygov/formInstance.html?agencyFormId=27797604>. Subsequent annual rent payments must be made following the detailed instructions contained in the "Instructions for Making Electronic Payments," available on BOEM's website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>.

**Anti-Competitive Behavior:** In addition to the auction rules described in this notice, bidding behavior is governed by Federal antitrust laws designed to prevent anticompetitive behavior in the marketplace. Compliance with BOEM's auction procedures will not insulate a party from enforcement of antitrust laws.

Accordingly, following the auction, and before the acceptance of bids and the issuance of leases, BOEM will "allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of the lease sale." 43 U.S.C. 1337(c). If a bidder is found to have engaged in anti-competitive behavior or otherwise violated BOEM's rules in connection with its participation in the competitive bidding process, BOEM may reject the high bid.

Anti-competitive practices may include, but are not limited to:

- An agreement, either express or tacit, among bidders to not bid in an auction, or to bid a particular price;
- An agreement among bidders not to bid for a particular LA;
- An agreement among bidders not to bid against each other; and
- Other agreements among bidders that may affect the final auction price.

BOEM may decline to award a lease if, pursuant to the OCS Lands Act (43 U.S.C. 1337(c)), it is determined by the Attorney General in consultation with the Federal Trade Commission that doing so would be inconsistent with antitrust laws.

For more information on whether specific communications or agreements could constitute a violation of Federal antitrust law, please see: <http://www.justice.gov/atr/public/business-resources.html>, or consult counsel.

**Bidder's Financial Form Certification:** Each bidder is required to sign the self-certification, in accordance with 18 U.S.C. 1001 (Fraud and False Statements) in the Bidder's Financial Form, which can be found on BOEM's website at: <http://www.boem.gov/Renewable-Energy-Program/State-Activities/Massachusetts.aspx>. The form must be filled out and returned to BOEM in accordance with the "Deadlines and Milestones for Bidders" section of this notice.

**Non-Procurement Debarment and Suspension Regulations:** Pursuant to regulations at 43 CFR part 42, subpart C, an OCS renewable energy Lessee must comply with the U.S. Department of the Interior's non-procurement debarment and suspension regulations at 2 CFR parts 180 and 1400 and agree to communicate the requirement to comply with these regulations to persons with whom the Lessee does business as it relates to this lease by including this term as a condition in their contracts and other transactions.

**Final Sale Notice:** BOEM will consider comments received or postmarked during the PSN comment period in preparing a FSN that will provide the final details concerning the offering and issuance of OCS commercial wind energy leases in the Massachusetts WEA. The FSN will be published in the **Federal Register** at least 30 days before the lease sale is conducted and will provide the date and time of the auction.

**Force Majeure:** The Program Manager of BOEM's Office of Renewable Energy Programs has the discretion to change any date, time, and/or location specified in the FSN in case of a force majeure event that the Program Manager deems may interfere with a fair and proper lease sale process. Such events may include, but are not limited to, natural disasters (e.g., earthquakes, hurricanes, floods), wars, riots, acts of terrorism, fire, strikes, civil disorder, or other events of a similar nature. In case of such events, bidders should call (703) 787-1300 or access the BOEM website at: <http://www.boem.gov/Renewable-Energy-Program/index.aspx>.

**Appeals:** The appeals procedures are provided in BOEM's regulations at 30 CFR 585.225 and 585.118(c). Pursuant to 30 CFR 585.225,

- If BOEM rejects your bid, BOEM will provide a written statement of the reasons and refund any money

deposited with your bid, without interest.

- You will then be able to ask the BOEM Director for reconsideration, in writing, within 15 business days of bid rejection, under 30 CFR 585.118(c)(1). BOEM will send you a written response either affirming or reversing the rejection.

The procedures for appealing final decisions with respect to lease sales are described in 30 CFR 585.118(c).

#### Personal Identifying Information

BOEM does not consider anonymous comments: Please include your name and address as part of your submittal. You should be aware that your entire comment, including your name, address, and your personal identifying information (PII), may be made publicly available at any time. All submissions from identified individuals, businesses and organizations will be available for public viewing on *regulations.gov*.

In order for BOEM to withhold from disclosure your PII, you must identify any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequence(s) of the disclosure of information, such as embarrassment, injury or other harm.

#### Protection of Privileged or Confidential Information

BOEM will protect privileged or confidential information that is submitted as required by the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to trade secrets and commercial or financial information that is privileged or confidential. If you wish to protect the confidentiality of such information, clearly mark it and request that BOEM treat it as confidential. BOEM will not disclose such information, except as required by FOIA. Please label privileged or confidential information "Contains Confidential Information" and consider submitting such information as a separate attachment.

However, BOEM will not treat as confidential any aggregate summaries of such information or comments not containing such information. Additionally, BOEM may not treat as confidential the legal title of the commenting entity (e.g., the name of a company). Information that is not labeled as privileged or confidential will be regarded by BOEM as suitable for public release.

*Section 304 of the National Historic Preservation Act (16 U.S.C. 470w-3(a))*

BOEM is required, after consultation with the Secretary of the Department of the Interior, to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, cause a significant invasion of privacy, risk harm to the historic resources or impede the use of a traditional religious site by practitioners. Tribal entities and other interested parties should designate information that they wish to be held as confidential and provide the reasons why BOEM should do so.

Dated: April 5, 2018.

**Walter D. Cruickshank,**

*Acting Director, Bureau of Ocean Energy Management.*

[FR Doc. 2018-07379 Filed 4-10-18; 8:45 am]

**BILLING CODE 4310-MR-P**

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 337-TA-945]

**Certain Network Devices, Related Software and Components Thereof (II); Commission Determination To Modify the Remedial Orders To Suspend Enforcement as to U.S. Patent No. 7,224,668**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to modify the limited exclusion order (“LEO”) and cease and desist order (“CDO”) (collectively, “the remedial orders”) issued in the above-captioned investigation to suspend enforcement of those orders as to the claims of U.S. Patent Nos. 7,224,668 (“the ‘668 patent”) that the Commission found to be infringed. The Commission has further determined to deny Arista’s motion for stay as moot in view of the suspension of the remedial orders as to the ‘668 patent.

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E

Street, SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on January 27, 2015, based on a Complaint filed by Cisco Systems, Inc. of San Jose, California (“Cisco”). 80 FR 4313-14 (Jan. 27, 2015). The Complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, importation, and sale within the United States after importation of certain network devices, related software and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,023,853; the ‘577 patent; 7,460,492; 7,061,875; the ‘668 patent; and 8,051,211. The Complaint further alleges the existence of a domestic industry. The Commission’s Notice of Investigation named Arista Networks Inc. (“Arista”) as respondent. The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. The Commission previously terminated the investigation in part as to certain claims of the asserted patents. Order No. 38 (Oct. 27, 2015), unreviewed Notice (Nov. 18, 2015); Order No. 47 (Nov. 9, 2015), unreviewed Notice (Dec. 1, 2015).

On June 11, 2016, the Patent Trial and Appeal Board (“PTAB”) of the U.S. Patent and Trademark Office instituted separate *inter partes* review (“IPR”) proceedings concerning the ‘577 and ‘668 patents. *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00303 (regarding the ‘577 patent); *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00309 (regarding the ‘668 patent).

On May 4, 2017, the Commission found a violation of section 337 as to certain claims of the ‘577 and ‘668 patents. Notice (May 4, 2017); 82 FR 21827-29 (May 10, 2017). Specifically, the Commission issued an LEO prohibiting the unlicensed entry of network devices, related software and components thereof that infringe any of claims 1, 7, 9, 10, and 15 of the ‘577 patent; and claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the ‘668 patent, and a CDO that prohibits Arista from importing, selling, marketing,

advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of certain network devices, related software and components thereof that infringe any of claims 1, 7, 9, 10, and 15 of the ‘577 patent; and claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the ‘668 patent.

On May 25, 2017, the PTAB issued its final written decision finding claims 1, 7-10, 12-16, 18-22, 25, and 28-31 of the ‘577 patent unpatentable based on prior art not presented in the Commission investigation. On June 1, 2017, the PTAB issued its final written decision finding claims 1-10, 12, 13, 15-28, 30, 33-36, 55-64, 66, 67, and 69-72 of the ‘668 patent unpatentable based on certain combinations of prior art not presented in the Commission investigation.

On February 14, 2018, the U.S. Court of Appeals for the Federal Circuit summarily affirmed the PTAB’s decision finding the claims of the ‘668 patent unpatentable. *Cisco Systems, Inc. v. Arista Networks, Inc.*, Appeal No. 17-2384 (Feb. 14, 2018). The Court issued the mandate on March 23, 2018. *Id.*, Dkt. No. 54. The PTAB’s decision concerning the ‘577 is currently still pending before the Court.

On March 15, 2018, Arista filed a motion before the Commission to stay the Commission’s remedial orders as to the ‘668 patent. On March 26, 2018, Cisco filed its response stating that it takes no position on and, thus, does not oppose Arista’s motion. OUII did not file a response to Arista’s motion.

The Commission has determined, pursuant to 19 U.S.C. 1337(k)(1) and 19 CFR 210.76(a)(1), to modify the remedial orders to suspend enforcement of those orders with respect to the ‘668 patent pending rescission of the orders upon the cancellation of the asserted claims or pending reversal or vacatur of the Federal Circuit’s decision in *Cisco Systems, Inc. v. Arista Networks, Inc.*, Appeal No. 17-2384.

The Commission has further determined to deny Arista’s motion as moot in view of the suspension of the remedial orders as to the ‘668 patent.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.