

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ISO New England Inc.

Docket Nos. ER06-94-001
ER06-94-003

EL06-77-000

EL06-77-002

ORDER ON PAPER HEARING AND MOTION FOR CLARIFICATION

(Issued October 19, 2006)

1. On June 16, 2006,¹ as clarified on July 10, 2006,² the Commission issued a further order on rehearing in these proceedings that instituted an investigation, pursuant to section 206 of the Federal Power Act (FPA),³ concerning the justness and reasonableness of ISO New England Inc.'s (ISO-NE) external affairs and corporate communications expenses.

2. As discussed in greater detail below, the Commission finds that, based on the information provided in its original filing and a brief filed on July 17, 2006, ISO-NE's "external affairs" and "corporate communications" expenses as set forth in its 2006 administrative cost filing are just and reasonable and properly recoverable from ratepayers. The Commission also grants ISO-NE's request for clarification.

I. Background

3. On December 30, 2005, the Commission issued an order accepting for filing proposed tariff revisions submitted by ISO-NE for the collection of its administrative costs for calendar year 2006.⁴ On March 28, 2006, the Commission issued an order

¹ *ISO New England Inc.*, 115 FERC ¶ 61,332 (2006) (June 16 Order).

² *ISO New England Inc.*, 116 FERC ¶ 61,025 (2006) (July 10 Order).

³ 16 U.S.C. § 824e (2000), *amended by* Energy Policy Act of 2005, Pub L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

⁴ *ISO New England Inc.*, 113 FERC ¶ 61,341 (2005) (December 30 Order).

denying rehearing of the December 30 Order.⁵ Upon further consideration of the evidence regarding purported “lobbying”-type activities conducted by ISO-NE, and the potential for ISO-NE’s “External Affairs” and “Corporate Communications” expenses to fund such activities, on June 16, 2006, the Commission *sua sponte* granted rehearing of the December 30 and March 28 Orders with respect to the “lobbying” issue. In the June 16 Order, the Commission instituted an investigation under FPA section 206 in Docket No. EL06-77-000, concerning the justness and reasonableness of ISO-NE’s external affairs and corporate communications expenses, established a “paper hearing” on the issue, and established a refund effective date. The June 16 Order required ISO-NE to submit written statements as to:

(1) whether the costs associated with the types of activities undertaken on behalf of ISO-NE are properly recoverable as external affairs and corporate communications expenses, or whether they should be classified as lobbying activities in Account 426.4 ^[FN]; and (2) whether any amounts for these activities are included in the True-Up Amounts proposed in the October 31 Filing.

^[FN] ISO-NE should clarify the nature of each activity listed on the “lobbying reports” filed by protestors and explain how each of the activities cited by protestors is an educational, informational, or monitoring activity on the one hand, or a lobbying activity on the other. Additionally, ISO-NE should provide explanations as to whether its representatives advocated a position in their discussions with federal and state legislators, or simply provided requested information about ISO-NE’s operations.^[6]

4. In the July 10 Order, the Commission granted in part and denied in part the motion for expedited clarification and motion for shortened time to respond, or in the alternative, rehearing of the June 16 Order filed by Braintree Electric Light Department (Braintree), Reading Municipal Light Department, Taunton Municipal Lighting Plant, and Massachusetts Municipal Wholesale Electric Company (collectively, the MA Public Systems). The Commission denied the request to order the discovery sought by the MA Public Systems, finding that “[t]he types of discovery rights sought by the MA Public Systems are generally not provided for in paper hearings, but rather, are more suitable for trial-type evidentiary hearings” and “a traditional paper hearing is sufficient to establish a

⁵ *ISO New England Inc.*, 114 FERC ¶ 61,315 (2006) (March 28 Order), *pet. for review pending sub nom., Braintree Elec. Light Dept. v. FERC*, D.C. Cir. Case No. 06-1144.

⁶ June 16 Order, 115 FERC ¶ 61,332 at P 11 and n.8.

full record in this proceeding.”⁷ The Commission did, however, grant the request for clarification on the issue of how ISO-NE should justify its 2006 external affairs and corporate communications activities, requiring ISO-NE to “demonstrate that its 2006 activities to date, as well as its activities proposed for the remainder of the calendar year, have not included activities properly classified as lobbying.”⁸

II. Discussion

A. Procedural Matters

5. On July 17, 2006, as amended on July 20, 2006, ISO-NE filed its brief pursuant to the June 16 Order. Timely comments on the brief were filed by: the MA Public Systems; the Attorney General of the Commonwealth of Massachusetts (MA Attorney General); and Richard Blumenthal, Attorney General for the State of Connecticut (CT Attorney General). On August 16, 2006, ISO-NE filed reply comments. On August 31, 2006, the MA Public Systems filed a reply to ISO-NE’s reply comments. On August 30, 2006 and September 14, 2006, respectively, the Alliance to Protect Nantucket Sound (Alliance) and Cape Wind Associates, LLC (Cape Wind) submitted comments in this proceeding, but did not file a motion to intervene.

6. On July 17, 2006, ISO-NE also filed a motion for clarification or, in the alternative, request for rehearing of the June 16 Order.

7. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or another answer unless otherwise ordered by the decisional authority. We will accept the answer of the MA Public Systems because it has provided information that assisted us in our decision-making process.⁹

8. Alliance and Cape Wind submitted comments in this proceeding, but did not file motions to intervene. Rule 211(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.211(a)(2) (2006), clearly states that filing a protest does not serve to make the protestant a party, which must be accomplished through intervention

⁷ July 10 Order, 116 FERC ¶ 61,025 at P 16.

⁸ *Id.* P 18.

⁹ We note that the MA Public Systems filed a reply on July 10, 2006 and New England Conference of Public Utilities Commissioners, Inc. (NECPUC) filed an answer on July 11, 2006 in these proceedings. These pleadings relate to the motion for clarification and subsequent pleadings addressed in the July 10 Order. These pleadings were not incorporated therein because they were submitted after the issuance of the July 10 Order. Accordingly, the pleadings are moot.

under Rule 214, 18 C.F.R. § 385.214 (2006). Thus, Alliance's and Cape Wind's comments will be considered by the Commission in determining the appropriate action to be taken but will not serve to make them parties to the proceeding. Any person wishing to become a party must file a motion to intervene.

B. Paper Hearing Process

1. ISO-NE's Brief

9. ISO-NE argues that “none of the ISO’s expenditures constitute expenses included in Account 426.4 [Expenditures for certain civic, political and related activities] (even if inclusion were dispositive of rate treatment), because that account excludes any expenditures for communications with government officials – whether legislative or otherwise – regarding matters of direct operating concern.”¹⁰ ISO-NE reasserts that all of its communications, detailed for 2004, 2005, and 2006, are “designed to educate and inform public officials about the ISO’s operations, as well as the manner in which state and federal activities could affect system operations and the ISO’s mission.”¹¹

10. In its brief, ISO-NE provides information about its mission and core objectives. ISO-NE argues that its external affairs and corporate communications activities relate to these core objectives. ISO-NE argues that its unique position in the New England market mean that “legislation passed by Congress or any of the six New England states, and regulatory activities of the New England states, can significantly affect the achievement of the ISO’s mission and the degree to which its customers receive benefits from the ISO’s implementation of its Commission-approved objectives.”¹² ISO-NE also states that “an understanding of the ISO’s activities and programs can facilitate complementary action by the states that will support regional reliability and well-functioning New England energy markets.”¹³ ISO-NE maintains that external affairs efforts are critical to ISO-NE’s mission and are beneficial to its ratepayers. ISO-NE maintains that it often provides information in response to requests from public officials. ISO-NE states that its provision of information and analysis, to the extent it can facilitate state siting of system enhancements directly benefits stakeholders by increasing reliability and helping reduce congestion and locational energy prices.

11. ISO-NE maintains that most of the expenditures proposed in the \$2.3 million external affairs and corporate communications budget were not protested and do not

¹⁰ ISO-NE Brief at 5 (emphasis removed).

¹¹ *Id.*

¹² *Id.* at 9.

¹³ *Id.* at 9-10.

relate to the issues discussed in the June 16, 2006 Order. Such activities include public information activities (press releases, handling press inquiries, holding stakeholder forums, and issuing periodic and special reports), which account for a budget of \$1.1 million. ISO-NE maintains that much of the remaining \$1.2 million for Regulatory Affairs and Government Affairs activity items involves activities not implicated by the June 16 Order, including the monitoring of legislative and regulatory activities, or testifying in public meetings.¹⁴ ISO-NE also provides additional information about its external affairs staff and responsibilities of those individuals.¹⁵

12. ISO-NE states that the 2006 Revenue Requirement does not include any 2004 or 2005 external affairs expenses because True-Up amounts “represent a subtraction from what would otherwise be the 2006 Revenue Requirement.”¹⁶

¹⁴ *Id.* at 14-18.

¹⁵ As directed by the June 16 Order, ISO-NE provides a description of its external affairs activities from mid-2004 through the present. ISO-NE’s explanation details its activities, by jurisdiction, for Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, and the U.S. Congress. In support of those descriptions, ISO-NE provides the affidavits of several ISO-NE employees and/or agents. Carolyn O’Connor, Director of External Affairs for ISO-NE, provided information as to: the general purpose of ISO-NE’s external affairs activities; the activities undertaken by ISO-NE’s external affairs employees and ISO-NE’s outside consultants; the types of activities performed by ISO-NE and its consultants; and the types of training provided by ISO-NE to its outside consultants regarding FERC and IRS policy (in January 2006). Several outside consultants provided information regarding the duties undertaken on behalf of ISO-NE from mid-2004 to the present. Affidavits were provided by: Daryl J. Owen, President and Sole Principal of Daryl Owen Associates, a strategic consulting and lobbying firm; Joseph F. Burke, self-employed consultant specializing in public affairs and government relations; H. Craig Leroy, partner at Roy & Leroy, which provides Governmental Relations services in Connecticut; Kevin M. Grant, Vice President of The Karol Group, Inc., a government relations firm; Matthew A. Lopes, Jr., partner with Pannone Lopes & Devereaux LLC; Jodi Grimbilas, Director of Government Affairs with Bianco Professional Association; and William V. Ferdinand, Jr., shareholder in the law firm of Eaton Peabody.

¹⁶ ISO-NE Brief at 18. Robert C. Ludlow, Vice President and Chief Financial Officer for ISO-NE, provided information regarding budgeted amounts for external affairs activities. Mr. Ludlow also confirmed that no 2004 or 2005 expenses are being collected through the True-Ups reflected in the 2006 rates and provided relevant IRS forms and copies of the master contract executed by each of ISO-NE’s external consultants.

13. ISO-NE states that Commission precedent permits it to monitor, educate, and provide its opinion on operational issues. In defense thereof, ISO-NE cites the Commission's order accepting its proposed expenditures for these activities for the 2005 calendar year and the Commission's prior orders in this proceeding.¹⁷ ISO-NE also states that "[a]s a not-for-profit entity with no equity shareholders, [it] does not have a pecuniary interest in using ratepayer funds to subsidize political and lobbying activities unrelated to its mission and operations."¹⁸

14. ISO-NE states that, of the activities implicated in the June 16 Order, many of these activities involve the creation of presentations, state-by-state fact sheets, white papers, and reports. ISO-NE maintains that many of these documents are publicly available from ISO-NE's website.

15. ISO-NE argues that the Commission's ratemaking policies provide no categorical prohibition against recouping "lobbying" expenses, arguing that such expenditures are recoverable if they "benefit ratepayers, relate to rendering utility service, or directly relate to the ISO's mission, objectives, and operations."¹⁹ ISO-NE maintains that Order No. 276, the order implementing Account 426.4, specifically excludes from the account "any expenses incurred for '[n]ecessary appearances before or communications to Congress to legislative bodies regarding matters of direct operating concern to the utility company.'"²⁰ ISO-NE also states that the Commission's accounting principles do not necessarily dictate ratemaking policies. ISO-NE notes that, even if the Commission were to treat accounting treatment as dispositive for ratemaking purposes, the Commission should recognize that the accounts were adopted prior to the establishment of Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs).

16. ISO-NE points out that the MA Public Systems' assertion that ISO-NE's retention of outside consultants that are registered with the relevant state or federal authority as "lobbyists" is irrelevant. ISO-NE notes that the Commission has recognized that the definitions and considerations for reporting legislative activities are distinct from Commission definitions and ratemaking policy. ISO-NE argues that it must comply with IRS reporting requirements and cost limitations on "lobbying" activities that have a definitional scope that differs from Commission definitions and ratemaking policy. ISO-NE claims that their outside consultants must register with these state and federal authorities solely for the purpose of compliance with statutes that the Commission does not administer.

¹⁷ ISO-NE Brief at 27-29.

¹⁸ *Id.* at 21-22.

¹⁹ *Id.* at 22-23.

²⁰ *Id.* at 25.

17. ISO-NE argues that “if the Commission wishes to refine its policies regarding recoverability of RTO/ISO external affairs activities, it could exclude the costs of such activities extending beyond the defined mission of the RTO/ISO.” ISO-NE also argues that the Commission could “require web posting of documents used to communicate information to public officials.”²¹ ISO-NE also states that the Commission’s focus in the proceeding should be prospective, as urged by NECPUC and as discussed in the July 10 Order.²²

2. Comments

a. Whether ISO-NE’s Expenses Are for Recoverable Activities

18. Protestors argue that ISO-NE has plainly established that its external affairs activities fall under the rubric of “lobbying” and, therefore, cannot recover the costs associated with these expenses.

19. The MA Public Systems argue that the affidavits provided by the ISO-NE demonstrate “substantial efforts by or on behalf of the ISO to influence the actions of public officials with respect to significant pending matters.”²³ They maintain that “while the ISO contends repeatedly that all it does is ‘monitor’ legislation that may impact its mission, the ISO’s massive filing contains not a single document from its lobbyists to the ISO reporting on ‘monitored’ legislation. Nor, for that matter, does the filing include any communications from the ISO to its consultants or its employees outlining the ISO positions that should be conveyed to Legislative or Executive Branch officials.”²⁴

20. The MA Public Systems argue that the documents submitted by ISO-NE demonstrate that ISO-NE “seeks to persuade and direct, and not merely to provide objective, disinterested information.”²⁵ The MA Public Systems also argue that ISO-NE’s justification of its advocacy on the ground that it is “independent” is misleading because ISO-NE is not a disinterested party. “There are other economic and institutional interests besides profits from power sales that can lead an organization to act in ways that are contrary to the interests of consumers.”²⁶ The MA Public Systems argue that ISO-

²¹ *Id.* at 45.

²² *Id.* at 48-50.

²³ MA Public Systems Comments at 2.

²⁴ *Id.* at 10.

²⁵ *Id.* at 16.

²⁶ *Id.* at 2.

NE's educational and monitoring activities are advocacy-oriented and that "[i]nfluencing public officials is the intended outcome of many of ISO's activities."²⁷ The MA Public Systems argue that the affidavits submitted by ISO-NE's employees and consultants demonstrate that ISO-NE's activities extend to advocacy, lobbying, and marketing.

21. The MA Public Systems maintain that "[b]ecause communications between ISO and its consultants would further illustrate the nature of ISO's interactions with public officials, [they] renew their request for discovery regarding these materials."²⁸ The MA Public Systems note that the ISO-NE's program is even broader than described in that ISO-NE fails to mention that interactions with the Commission. The MA Public Systems are "confident – although the relevant information was omitted from ISO's filing – that ISO similarly urges this Commission through nonpublic communications to take or refrain from taking actions that would, in the ISO's view, affect its interests."²⁹

22. Similarly, the CT Attorney General maintains that "ISO-NE's filing makes clear that its proposed budget improperly sought the recovery of lobbying costs."³⁰ The CT Attorney General that ISO-NE's "educational efforts" in Connecticut are no more than the provision of "'ISO's opinion' 'for the purpose of influencing any legislative or administrative action,'" and that "[i]t is simply absurd to characterize these activities as anything other than lobbying." The CT Attorney General also argues that ISO-NE is "by no means a neutral or independent actor in New England's electricity markets."³¹

23. Likewise, the MA Attorney General argues that ISO-NE's activities in Massachusetts are lobbying activities. The MA Attorney General argues that, under MA state law, lobbyists are only required to report expenditures made as part of "direct lobbying activities" "in connection with promoting, opposing or influencing

²⁷ *Id.* at 15.

²⁸ *Id.* at 11. For example, the MA Public Systems maintain that the "submission of an unexecuted 'master' contract does not constitute probative evidence regarding the ISO's activities," noting that "[n]either ISO nor any of affiants states (a) when ISO adopted this form of the master contract, (b) whether the currently effective contracts entered into with ISO's consultants are substantively identical to the master contract . . . ; (c) when the currently effective contracts with individual consultants were executed; or (d) how the currently effective master agreement and individual contracts differ (if at all) from the prior master agreement(s) and individual contracts with ISO's affiants." *Id.* at 41.

²⁹ *Id.* at 16.

³⁰ CT Attorney General Comments at 2.

³¹ *Id.* at 4-5.

legislation.”³² Because The Karol Group made such filing based on its work for ISO-NE, “[i]n the absence of further evidence to support an allocation between the direct lobbying activities reported to the Massachusetts Secretary and ISO-NE’s ‘educational’ duties,” such activities should be deemed to be unrecoverable lobbying activities that should be removed from the cost of service.³³

b. Whether ISO-NE has demonstrated that its activities are related to core objectives or direct customer benefits

24. Protestors also raise concerns that, assuming *arguendo*, that ISO-NE is correct that activities related to its core objectives or have direct customer benefits are properly recoverable, ISO-NE has failed to demonstrate a connection between its activities and such recoverable activities.

25. The MA Public Systems argue that the ISO-NE’s arguments that “[t]here is nothing in either the ISO’s claimed core objectives or its purported ‘mission’ that mandates the development and implementation of an extensive and sophisticated multi-state effort to influence the decisions of public officials.”³⁴

26. The MA Public Systems argue that ISO-NE’s interpretation of Order No. 276 is misleading. They maintain that ISO-NE’s reliance on the phrase “direct operating concern” is misguided and inconsistent with Commission precedent. The MA Public Systems argue that ISO-NE can attempt to link virtually any activity that has a conceivable effect on bulk power trading or transmission in New England to fall within the “direct operating concern” standard. The MA Public Systems argue that the Commission has declined to allow recovery of expenses unrelated to “‘responses to requests received from legislators or regulatory groups with oversight responsibilities’ as to the utility’s actual operations and where the affected public utility ‘has not adequately demonstrated what benefits, if any, have or will accrue to ratepayers with respect to the voluntary lobbying expenditures.’”³⁵ The MA Public Systems also note that the Commission has held that “the distinction between influencing public opinion and public

³² MA Attorney General Comments at 6 (internal citations omitted).

³³ *Id.*

³⁴ MA Public Systems Comments at 11.

³⁵ *Id.* at 49 (citing *Alaskan Northwest Natural Gas Transportation Company*, 19 FERC ¶ 61,218, at 61,428 (1982)).

relations activities lies in the intended use and reason behind these payments,”³⁶ and that “the portion of expenses ‘used for lobbying activities may not, under any circumstances, be included in the utility’s cost of service.’”³⁷

27. The MA Public Systems also argue that ISO-NE’s arguments that its IRS treatment of what is/is not a lobbying expense is probative as to whether its activities should be deemed lobbying under Account 426.4 is wrong. The MA Public Systems maintain that ISO-NE’s characterization of these amounts as “de minimis,” even if correct, does not change the nature of the expenses. The MA Public Systems further argue that ISO-NE’s arguments that the 2004 and 2005 True-Up amounts represent only a subtraction is specious, maintaining that:

The affidavits and exhibits submitted in this proceeding make plain that the actual costs incurred by ISO in 2004 and 2005 included lobbying costs that should not be received from ratepayers. If those costs had not been incurred in 2004 or 2005, or had been backed out of the 2006 true-up calculation because ratepayers should not be responsible for those costs, then 2004 and 2005 revenues would have exceeded recoverable costs by a greater amount, the 2006 true-up credit would have been larger, and the revenue requirement to be recovered through 2006 rates would have been smaller.³⁸

28. The MA Public Systems maintain that ISO-NE will not be “silenced” as a result of non-recovery of costs, noting that these sorts of expenditures can “be accounted for ‘below the line as nonoperating expenses.’”³⁹ The MA Public Systems recognize, however, “that the ISO’s non-profit status and the absence of shareholders complicates its ability to engage in traditional lobbying activities without violating the Federal Power Act.”⁴⁰ The MA Public Systems propose that approval of any future budget allowance be

³⁶ *Id.* (citing *Northern Border Pipeline Company*, 23 FERC ¶ 61,213, at 61,439 (1983)).

³⁷ *Id.* at 8 (citing March 28 Order, 114 FERC ¶ 61,315, at P 13).

³⁸ *Id.* at 53-54.

³⁹ *Id.* at 54 (citing *Appalachian Power Company*, Opinion No. 698, 51 FPC 1906, 1941 (1974)).

⁴⁰ *Id.* at 59.

conditioned, among other things, to “establish a page on the ISO website for its External Affairs / Corporate Communications departments in which information on its activities can be posted and reviewed.”⁴¹

29. Similarly, the MA Attorney General maintains that even if it is appropriate for ISO-NE to engage in “educational” activities, ISO-NE has failed to demonstrate how those activities directly relate to its objectives and operations or result in direct benefits to the ratepayers. Specifically, the MA Attorney General argues that the Karol Group’s monitoring activities go beyond the scope of ISO-NE’s core objectives, and therefore, should not be deemed to be recoverable. The MA Attorney General also maintains that ISO-NE has failed to explain any direct customer benefit that resulted in ISO-NE or the Karol Group monitoring these bills.

c. **Sufficiency of the “Paper Hearing” Process**

30. Protestors raise concerns about the sufficiency of the paper hearing process. The MA Public Systems argue that ISO-NE has failed to sustain its burden of demonstrating the justness and reasonableness of the recovery of any portion of its external affairs and corporate communications expenses. The MA Public Systems asks that if the Commission chooses not to reject the inclusion of these expenditures, “the Commission must ensure that the parties have the opportunity to compile an evidentiary record that addresses the gaps in the ISO’s presentation.”⁴² The MA Public Systems maintain that additional information needs to be learned about ISO-NE’s activities, including, *inter alia*, information about contacts between ISO-NE’s representatives and the Commission and more detailed information about the “monitoring” activities of particular state legislatures.⁴³ The MA Public Systems asks that the Commission be permitted to “raise specific questions regarding ISO-NE’s initial filing during the course of this proceeding’

⁴¹ According to the MA Public Systems, the webpage should include a weekly report that would: (1) list all meetings (including those conducted by telephone) held in the past week by or on behalf of ISO-NE with any public official, including those in either the legislative or executive branches of federal or state government; (2) describe the issues addressed during the meeting, including the position(s) taken by ISO-NE and any responses from public officials; (3) identify all those present at the meeting; (4) provide documents prepared for and follow-up materials furnished after the meeting; (5) state the reason(s) for the meeting, including at whose request the meeting was held; and (6) list the out-of-pocket costs and staff salary dollars expended on each of the activities addressed in the weekly reports. *Id.* at 59-60.

⁴² *Id.* at 3.

⁴³ *Id.* at 55-58.

and permit further discovery.”⁴⁴ The CT Attorney General also states that the “paper hearing” process is insufficient to “fully expose the extent to which ISO’s [sic] has improperly included these costs in its tariff sheets.”⁴⁵

3. Reply Comments

31. In its reply comments, ISO-NE asks the Commission to reject the arguments raised by protestors. ISO-NE maintains that its July 17 brief demonstrates that its “external affairs activities are overwhelmingly factual, informational and educational by providing relevant and useful information about the New England bulk power system, and wholesale energy markets, and are always clearly within the scope of the Objectives.”⁴⁶ ISO-NE reasserts that the activities detailed in its July 17 brief are matters of “direct operating concern” and therefore, recoverable. ISO-NE states that, while such activities “could have an ‘influence’ on public officials’ decisionmaking,” such a result does not make such activities lobbying *per se* or unrecoverable.⁴⁷ In response to specific concerns about the Karol Group’s activities, ISO-NE states that the group did not attempt to influence state legislators regarding any bills, noting Mr. Grant’s affidavit to the effect that “[t]he Karol Group independently identifies the bills to be included [in the list of those to be monitored and researched for ISO-NE], and the ISO has not asked us to influence public officials one way or the other regarding these bills.”⁴⁸ ISO-NE also argues that not all of the bills listed by The Karol Group as those monitored and researched for ISO-NE are of direct operating concern, and that “[t]he Karol Group cast a wide net out of an abundance of caution, striving to provide as exhaustive a list as possible of bills it believed might affect the ISO’s business interests.”⁴⁹

32. ISO-NE notes that Braintree, one of the MA Public Systems, has recently asked ISO-NE to advocate in support of a generating project that it has proposed. ISO-NE states that the activities requested by Braintree are comparable to activities criticized by the MA Public Systems.

⁴⁴ *Id.* at 7 (citing July 10 Order, 116 FERC ¶ 61,025 at 17).

⁴⁵ CT Attorney General Comments at 6.

⁴⁶ ISO-NE Reply Comments at 4.

⁴⁷ *Id.* at 9.

⁴⁸ *Id.* at 30-31.

⁴⁹ *Id.* at n.62.

33. ISO-NE also takes exception to the protestors' assertions that its external affairs activities are marketing exercises, and states that its activities are all clearly within the scope of its objectives.

34. Further, ISO-NE argues that the MA Public Systems comments "offer an array of shifting, inconsistent and inappropriately restrictive standards obviously intended to shut down the ISO's external affairs activities as much as possible, if not altogether."⁵⁰ ISO-NE states that the MA Public Systems' proposal would prohibit it from responding to specific information requests from public officials. ISO-NE notes that while the MA Public Systems maintain that such activities are not prohibited but should be recovered from "shareholders," ISO-NE's not-for-profit status means that it has no such shareholders. ISO-NE criticizes the MA Public Systems' proposal for posting information. While ISO-NE has no objection to a requirement to post a broader array of materials, it maintains that the MA Public Systems' condition that it cannot recover payments of fees for activities that influence public officials is unworkable.

35. ISO-NE also notes a "multitude of mischaracterizations" made in the MA Public Systems' comments. For example, ISO-NE claims that the MA Public Systems have attempted to limit the Commission to only two possible courses of action – either deny recovery of ISO-NE's \$2.3 million "corporate communications" and "external affairs" budget item or find that ISO-NE's July 17 brief is insufficient in its detail. ISO-NE argues that the MA Public Systems ignore the Commission's third option; that is, to find that ISO-NE's "corporate communications" and "external affairs" expenses are not unjust or unreasonable, and to permit recovery.

36. Moreover, ISO-NE maintains that no additional discovery is necessary. It states that the July 17 brief establishes a record sufficient to permit a decision by the Commission. "To remove any conceivable doubt on the adequacy of the record," ISO-NE provides additional information including a second affidavit from Ms. O'Connor regarding certain briefings to Congress and information regarding ISO-NE's contacts with this Commission and the U.S. Department of Energy. ISO-NE also reasserts that its 2004 and 2005 True-Up amounts do not contain external affairs expenses.

37. Finally, ISO-NE reasserts its request that, to the extent the Commission believes it is necessary to provide guidance or re-direction, such direction guide future activities and the preparation of future annual budgets.

38. In response to ISO-NE's reply comments, the MA Public Systems state that "the issue in this proceeding is not so much *whether* the ISO is engaging in advocacy efforts that are funded through tariff charges but, instead, *what* should be done about it."⁵¹ The

⁵⁰ *Id.* at 22.

⁵¹ MA Public Systems Reply Comments at 4 (emphasis in the original).

MA Public Systems reassert that many of ISO-NE's activities "do cross the line from mere 'education and information' to lobbying and advocacy."⁵² In particular, the MA Public Systems defends its proposal that ISO-NE be precluded from recovering costs associated with influencing public officials and argues that ISO-NE's reply comments offer no substantiated objection to the conditions set forth by the MA Public Systems.

4. Commission Determination

39. In this proceeding, the Commission has sought to establish an adequate record of ISO-NE's "external affairs" and "corporate communications" expenses. The paper hearing established by the June 16 Order has proven to be successful. ISO-NE's July 17 brief contained affidavits and exhibits of ISO-NE employees and consultants providing detailed information about the communications between ISO-NE and public officials. The extensive detail contained in the July 17 brief and the comments thereon provided the Commission with a sufficient record to render a fully informed determination.

40. The Commission's orders regarding lobbying-type expenses provide limited guidance as to what is and is not, properly recoverable. While the Commission has generally stated that public outreach and educational expenses are properly recoverable from ratepayers⁵³ and lobbying expenses are not,⁵⁴ where the line is drawn has not been clearly delineated.

The political expenditures of utilities fall into a peculiar category. . . . The function of electric utilities and licensees under the Power Act is, in accordance with the requirements of the Act, to render public service in a business affected with a public interest; and it is fair and reasonable to require the customers to pay the expenses properly incurred by the companies in rendering this service. However, on matters which are politically controversial, differences of opinion may and frequently do exist between the companies and their

⁵² *Id.* at 2.

⁵³ *See, e.g., Northeast Utilities Service Company*, 105 FERC ¶ 61,089, at P 25 (2003), *order on reh'g*, 111 FERC ¶ 61,333 (2005) ("With respect to expenses incurred for recovery of public education and outreach expenses, we generally allow recovery in wholesale transmission rates of expenses to educate the public on matters of reliability and quality of service resulting from the construction of grid upgrades.").

⁵⁴ *See, e.g., Delmarva Power & Light Company*, 58 FERC ¶ 61,169, at 61,509, (*Delmarva I*), *order on reh'g*, 58 FERC ¶ 61,282, *further order on reh'g*, 59 FERC ¶ 61,169 (1992) (The portion of expenses "used for lobbying activities may not, under any circumstances, be included in the utility's cost of service.").

customers, between management and the rate payer. The classification generally of political expenditures to operating accounts might seem to imply that such expenditures must in due course and without further question be paid by the rate payer. Such an implication would be unwarranted and possibly unfair, in view of the fact that on politically controversial matters, the opinions of management and the ratepayer may differ decidedly. Thus [Account 426.4], while isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled without a further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises.⁵⁵

41. Most would agree that activities such as participation in Political Action Committees, candidate fundraising, entertainment expenses (*e.g.*, meals, sporting events, junkets) are clearly not recoverable lobbying activities. However, informational and educational activities as well as monitoring and communicating on issues of direct operating concern to the RTO, such as those described by ISO-NE in the present proceeding, are much harder cases.

42. In prior cases, the Commission has found that “the distinction between influencing public opinion and public relations activities lies in the intended use and reason behind these payments.”⁵⁶ For example, in our orders on Alaskan pipeline expenditures, the Commission found that “[e]xpenditures incurred to influence the opinion of the public during the selection [of applicants prior to the certification] process have little or no benefit to the ratepayers, and therefore must be borne by stockholders.”⁵⁷

43. By contrast, in *Williams Natural Gas Company*, the Administrative Law Judge found that “monitoring, reading and assessing the impact of regulatory and legislative developments in the natural gas industry ... are related to [Williams Natural Gas Company’s (WNG)] regulatory activities and thus [are] an appropriate utility-related expenditure for inclusion in WNG’s rates.” The Administrative Law Judge also found

⁵⁵ *Southwestern Electric Power Company v. FPC*, 304 F.2d 29, at 41-42, *cert. denied sub nom., Alabama Power Co. v. FPC*, 371 U.S. 924 (1962).

⁵⁶ *Northern Border Pipeline Company*, 23 FERC ¶ 61,213, at 61,439 (1983) (*Northern Border*).

⁵⁷ *Id.*

that where a utility demonstrated that “lobbying related to proposed legislation ... could benefit ... ratepayers,” that demonstration supported inclusion of the expense in the utility’s cost of service.⁵⁸

44. As indicated in the cases cited above, lobbying-type activities most often come up in the context of Account 426.4. The orders promulgating these accounting regulations provide some limited guidance on how Account 426.4 should be interpreted.⁵⁹ For example, Order No. 276 states, in relevant part:

Although the preparation of an exhaustive list of items that normally should be placed in Subaccount 426.4 or in appropriate operating expense accounts would be impractical, particularly in the absence of specific fact situations, the following table illustrates the type of expenditures that it would appear should be placed in each category:

Subaccount 426.4

Advertising in various mass communication media to influence the election or appointment of public officers or proposed legislation at Federal, state, or local levels.

Advertising in mass communication media to promote legislation exempting independent producers of natural gas from Federal regulation.

Advertising in mass communication media to influence the general public or public officials on the private v. public power question. (Such advertising even where it has no specific or express objective is calculated to affect public or official attitudes toward future legislative or administrative action.)

Letters or inserts in customers’ bills or in reports to stockholders to influence the opinion of recipients as to the

⁵⁸ *Williams Natural Gas Company*, 73 FERC ¶ 63,015, at 65,072-73 (1995), *order on initial decision*, 77 FERC ¶ 61,277 (1996), *order on reh’g*, 80 FERC ¶ 61,158 (1997) (citing *Alaskan Northwest Natural Gas Transportation Company*, 19 FERC ¶ 61,218, 61,427-28 (1982) (*Alaskan Northwest*), *aff’d in relevant part sub nom., Northern Border*, 23 FERC ¶ 61,213).

⁵⁹ *See Expenditures for Political Purposes – Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Utilities and Licensees and Natural Gas Companies – FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963), *order on reh’g*, 31 FPC 411 (1964).

election or appointment of public officers or pending legislation.

Payments for lobbying or other fees to persons or organizations including law firms, service companies or other affiliated interests, for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers.

Payments for the preparation or distribution of editorial or cartoon material intended to influence the public on political matters.

Cost to utility of time utilized by employees in a house-to-house campaign or other devices for influencing public opinion as to public power or natural gas legislation together with associated company expenses.

Membership fees in organizations engaged in lobbying on legislative matters.

Cost to utility for meals, lodging and other personal and social items of persons involved in any of the above activities.

Operating Expense Accounts

Reasonable expenditures for promotional and “good will” advertising.

Cost of appearances before the Federal Power Commission or other Federal and State regulatory agencies in various regulatory proceedings.

Costs of submitting comments on this proceeding or other regulatory proceedings.

Necessary appearances before or communications to Congress or legislative bodies regarding matters of direct operating concern to the utility company.

Appearances before zoning and tax appeal boards.

Appearances before municipal councils or other local authorities on charter of franchise regulations of direct operating concern to the utility company.

Appearances before or communication with local bodies or officials regarding ordinances such as those concerning tree-trimming and safety of equipment.

Appearances before or communication with local bodies or officials concerning permits such as those for erecting poles on public property or obtaining rights of way.⁶⁰

45. Similarly, Commission precedent provides some limited guidance as to the scope of Account 426.4. The Commission has found efforts to secure passage of legislation, including analyzing proposals and contacting members of Congress and their staffs to inform them of the impact of legislation on a project should be recorded in Account 426.4.⁶¹ The Commission has found that public relations activities involved in a campaign to develop public and legislative support for a utility's proposal should be recorded in Account 426.4.⁶² The Commission has found that the portion of industry association fees where that association undertakes lobbying activities should also be recorded in Account 426.4.⁶³ The Commission has found that dues associated with a taxpayers association that made assessments of tax proposals and then informed the

⁶⁰ *Id.* at 1542-43.

⁶¹ *Alaskan Northwest Natural Gas Transportation Company*, 13 FERC ¶ 61,213, at 61,481-82 (1980), *order on show cause order, Alaskan Northwest*, 19 FERC ¶ 61,218.

⁶² *Id.*

⁶³ In these cases, the Commission permitted the utility to obtain the necessary information from the industry association to make a proper allocation of the dues payment to the appropriate operating and non-operating expense accounts. *Union Electric Company*, 45 FERC ¶ 62,295, at 63,492 (1988), *order establishing hearing procedures*, 46 FERC ¶ 61,146 (1989), *initial decision*, 50 FERC ¶ 63,010, *order on initial decision*, Opinion No. 354, 52 FERC ¶ 62,279 (1990) (payments to "organizations that were engaged in activities to influence public opinion concerning anti-nuclear legislation" should be included in Account 426.4); *St. Joseph Light & Power Company*, 78 FERC ¶ 62,133, at 64,513 (1997) (finding that the entirety of Edison Electric Institute (EEI) dues cannot be included in an account that is fully recoverable from ratepayers); *Delmarva I*, 58 FERC at 61,509-10; *Indianapolis Power & Light Company*, 40 FERC ¶ 61,381, at 62,249 (1987), *order on accounting practices*, Opinion No. 328, 48 FERC ¶ 61,040, *order on reh'g*, 48 FERC ¶ 61,328 (1989) (same); *Eastern Edison Company*, 25 FERC ¶ 61,357, at 61,807 (1987) (portion of registered lobbyist's fees associated with lobbying activities should be accounted for in 426.4).

appropriate taxing authority of its decision “was a political activity” that should be accounted for in Account 426.4.⁶⁴ The Commission has also found that certain press-related activities belong in Account 426.4.⁶⁵

46. That being said, however, inclusion in Account 426.4 for accounting purposes is not a determination of whether an expense is recoverable.⁶⁶ Expenses properly included in Account 426.4 may be recoverable if they are “directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations” and therefore, are not considered to be unrecoverable civic, political, or related activities costs under the Commission’s accounting regulations.⁶⁷ “This accounting classification, while isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled

⁶⁴ *Ohio Edison Company*, 26 FERC ¶ 61,416, at 61,298 (1984). We note that, in *Ohio Edison Company*, the utility also charged the salary of the Manager of Governmental Affairs to operating expenses. With respect to that expense, the Commission found that “[t]he Manager of Governmental Affairs was a registered lobbyist and, *accordingly*, the cost should have been charged to Account 426.4, Expenditures for certain civic, political and related activities.” *Id.* (emphasis added). In citing *Ohio Edison Company*, we do not affirm that activities on behalf of a jurisdictional entity by a registered lobbyist should necessarily be charged to Account 426.4. As stated in our December 30 Order, the facts that one is a registered lobbyist is not dispositive of the types of activities he/she undertakes for these purposes. December 30 Order, 113 FERC ¶ 61,341 at P 16.

⁶⁵ *Northwest Alaskan Pipeline Company and Northern Border Pipeline Company*, 15 FERC ¶ 61,116, at 61,274 (1981), *order on show cause order, Northern Border*, 23 FERC ¶ 61,213 (“Expenditures of \$28,000 represent \$19,077 paid to a firm to print a booklet entitled ‘What Happens When a Pipeline Goes Through,’ and \$8,923 paid to another firm to assemble and distribute the ‘Northern Border Pipeline Press Kits.’ A review of the booklet and the press kit disclosed that they were intended and used to influence public opinion and the opinion of public officials during the selection process of the project. The Uniform System of Accounts requires that expenditures of this nature be recorded in Account 426.4, Expenditures for certain civic, political and related activities, a non-utility expense account.”).

⁶⁶ Order No. 276, 30 FPC at 1541 (“[S]uch classification does not constitute a determination that the expenditures should be excluded from a utility’s cost of service in rate proceedings.”)

⁶⁷ See *ISO New England Inc.*, 111 FERC ¶ 61,096, at P 18 (2005), *pet. for review pending sub nom., Braintree Elec. Light Dept. v. FERC*, D.C. Cir. Case No. 05-1210 (citing 18 C.F.R. Part 101, Account No. 426.4 (2004)).

without further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises.”⁶⁸

47. Our precedent has not always been clear when it comes to the classification and recovery of informational expenditures. On a number of occasions the Commission has found “lobbying” expenses of any type to be non-recoverable, while on other occasions the Commission has determined that even if the costs are related to lobbying and should be recorded in Account 426.4, they are appropriately recoverable from ratepayers, upon sufficient showing that they were undertaken for the benefit of ratepayers. In light of this, it has been difficult for utilities and others to ascertain when informational expenditures are or are not recoverable from ratepayers. Further, with the exception of a similar challenge to ISO-NE’s filing to recover budgeted administrative expenses for 2004 and 2005, in which we found the expenditures in question to be recoverable, the Commission has not considered the recoverability of informational expenses in the context of a non-profit ISO/RTO that unlike traditional investor owned utilities, has no shareholders’ interests to protect. In the absence of disparate ratepayer/shareholder interests that may exist for investor owned utilities, it is easier to see that the ISO/RTO is pursuing activities that benefit its ratepayers.

48. Based on the above-stated principles, the Commission will permit recovery of ISO-NE’s “external affairs” and “corporate communications” expenses as detailed in ISO-NE’s July 17 filing. We find that because ISO-NE has shown that its informational activities were directly related to existing or proposed core operations and undertaken to benefit its ratepayers, it may recover the costs associated with those activities.

49. After reviewing the documentation submitted by ISO-NE of its external affairs and corporate communications activities and considering the objections to specific examples cited by the protestors, the Commission finds that all of these expenditures are properly recoverable. For example, the MA Public Systems notes that ISO-NE expended funds to monitor hearings and proposed legislation dealing with ISO-NE.⁶⁹ These activities represent ISO-NE’s efforts to keep informed of all outstanding events that can affect ISO-NE and its constituents, and are directly related to maintaining the mission of an RTO. The MA Public Systems further point out that representatives from ISO-NE communicated with state and federal legislators regarding specific legislation or ideas on which there was pending legislation.⁷⁰ We find that these expenditures are properly

⁶⁸ *Southwestern Electric Power Company v. FPC*, 304 F.2d at 42.

⁶⁹ MA Public Systems Comments at 13.

⁷⁰ For example, the MA Public Systems point to: (1) discussions between an ISO-NE consultant, Joe Burke, and members of Congress in which Mr. Burke expressed ISO-NE’s concerns that “some proposed provisions of energy policy legislation, *e.g.*, native
(continued...)

recoverable as they clearly: (1) represented an educational, communicative function of ISO-NE essential to its mission of efficiently and reliably operating the New England markets; (2) supported specific legislation that ISO-NE determined was in the collective best interests of its customers/stakeholders and from which it could not reap any financial or other benefit; and (3) did not include the types of activities that would not be recoverable, such as participation in Political Action Committees, candidate fundraising, entertainment expenses (*e.g.*, meals, sporting events, junkets) and other activities not at issue here that do not directly relate to ISO-NE's operations. We recognize that, although ISO-NE's informational activities included highly controversial subject matters, such as the LICAP proposal, it is clear that, in providing information on these subjects, ISO-NE was attempting to benefit its market participants. In contrast, in the Alaskan pipeline cases cited by the MA Public Systems,⁷¹ the Commission considered activities undertaken prior to the selection of pipeline applicants and prior to the certification process, that were part of a program to convince state and local officials of the merits of a project that would significantly benefit its shareholders.⁷² Unrecoverable expenditures also related to, among other things, the passage of specific legislation and general efforts on behalf of the project before the Congress.⁷³ The Commission denied recovery for

load and transmission pricing, could impact the operation of New England's wholesale markets"; (2) Mr. Burke's statements to members of Congress of various positions of ISO-NE, including the locational installed capacity (LICAP) proposal as the least cost option in New England; and (3) Mr. Burke's meeting with a Congressman to discuss ISO-NE's views on a bill before the House that would disallow the Commission from acting on the LICAP proposal. MA Public Systems Comments at 29.

⁷¹ *See supra* notes 35-36, and 39 and accompanying text.

⁷² *Northern Border*, 23 FERC at 61,439.

⁷³ *Alaskan Northwest*, 19 FERC at 61,427.

these lobbying activities because it was clear that shareholder benefit outweighed any benefit to ratepayers.⁷⁴ Here, by contrast, there are no shareholders. It is clear that the purpose of the contested communications is the interest of market participants.

50. In other words, the Commission will allow recovery of the costs of these activities because they were directly related to existing or future operations, were undertaken in the market participants' interest and were in furtherance of legitimate RTO objectives. However, all expenditures not related to legitimate RTO objectives – such as those to support candidates or for Political Action Committees, among others, outlined above – would not be recoverable, and would not be appropriate for inclusion in ISO-NE's annual Administrative Cost Budget. The Commission will not allow recovery for any activity or expenditure undertaken for personal benefit, for the election of public officials, or any other activity that does not have a direct relationship to the operations of ISO-NE.

51. But even if these activities had been found to be unrecoverable, the Commission would have exercised its discretion not to order refunds given the circumstances of the lack of clear guidance either in our regulations or precedent as to what constitutes non-recoverable expenditures for informational activities. The FPA grants the Commission discretion in ordering refunds, and refunds would not be appropriate here.⁷⁵

52. The Commission does recognize, however, the protestors' concerns regarding the transparency level of ISO-NE's "external affairs" and "corporate communications" activities. Therefore, to provide greater transparency to ISO-NE stakeholders and allow them to achieve a clear understanding of the nature of such expenditures, the Commission

⁷⁴ In *Appalachian Power Company*, also cited by the MA Public Systems, the Commission was asked to condition the license for a hydroelectric project to require that the applicant (and its parent) refrain from interfering in and financing opposition to certain municipal bond referenda. The Commission refused to do so. The Commission found that section 10(h) of the FPA does not give the Commission "the power to inhibit political activity" and that the accounting treatment set forth in Account 426.4 has "made clear that our purpose is to stay out of the business of censorship and prior restraint. There is nothing in this records [sic] nor in the briefs to persuade us that we should not continue to stay out of that business. We neither approve of Appalachian's political activities, nor do we disapprove of them. We merely refrain from imposing a legal restraint." *Appalachian Power Company*, Opinion No. 698, 51 FPC 1906, at 1941-42, *order on reh'g on other grounds*, Opinion No. 698-A, 52 FPC 317 (1974), *order denying reconsideration*, 52 FPC 846, *aff'd sub nom., State of North Carolina v. FPC*, 533 F. 2d 702 (D.C. Cir. 1976), *vacated and remanded*, 429 U.S. 891 (1976) (internal citations omitted).

⁷⁵ Both FPA section 205(e), 16 U.S.C. § 824d(e), and FPA section 206(b), 16 U.S.C. § 824e(b), indicate the Commission "may" order refunds.

will require ISO-NE to prepare and post on its website a monthly report concerning “external affairs” and “corporate communications.” The report, among other things, should identify all meetings (including those conducted by telephone) held in the past month by or on behalf of ISO-NE with any public official, including those in the legislative or executive branches of federal or state government, as well as a description of the attendees and the issues addressed during the meetings. This will give stakeholders the opportunity to review activities that are to be classified in the “external affairs” and “corporate communications” accounts, including the topics covered and parties with whom ISO-NE employees or representatives met. To the extent that ISO-NE undertakes activities that are properly included in Account 426.4, it will be required, in future Administrative Cost Budget filings, to include support for the recovery of the costs of such activities from ratepayers.

C. Motion for Clarification

1. ISO-NE’s Motion for Clarification

53. In its Motion for Clarification, ISO-NE asks the Commission to clarify that the June 16 Order did not subject to refund any of ISO-NE’s external affairs and corporate communications expenditures incurred prior to the refund effective date. ISO-NE notes that the Commission’s July 10 Order on Motion for Clarification expressly required ISO-NE to “demonstrate that its 2006 activities to date, as well as its activities proposed for the remainder of the calendar year, have not included activities properly classified as lobbying.”⁷⁶ ISO-NE argues that the Commission has consistently held that it cannot “retroactively” suspend a previously-accepted rate schedule, and can only act prospectively under FPA section 206.⁷⁷

54. ISO-NE also asks that the Commission clarify that the June 16 Order did not set for hearing whether to provide refunds from the 2004/2005 True-Up amounts. ISO-NE argues that “such amounts were subtractive in nature,” meaning that ISO-NE is not recovering from ratepayers in 2006 expenditures incurred for any past periods, such as those at issue here. ISO-NE also argues that “any such related expenditures were

⁷⁶ ISO-NE Motion for Clarification at 5 (citing July 10 Order, 116 FERC ¶ 61,025 at P 18).

⁷⁷ *Id.* at 5 (citing 18 C.F.R. § 2.4(a) (2005); *Sierra Pacific Power Company*, 86 FERC ¶ 61,298, n.38 (1999); *Minnesota Power & Light Company*, 22 FERC ¶ 61,315 (1983)).

incurred pursuant to prior budget and rate filings that were previously accepted by the Commission and, in accordance with Commission precedent, such amounts may not be subjected to refund.”⁷⁸

55. Finally, ISO-NE asks that the Commission clarify the appropriate legal standard governing the inclusion of its proposed external affairs and corporate communications expenditures in the revenue requirement used to set ISO-NE’s jurisdictional rates. Consistent with arguments made in its July 17 brief, ISO-NE maintains that “the Commission’s accounting principles do not dictate whether costs are recoverable” and argues that “‘lobbying’ activities are not *per se* non-recoverable.”⁷⁹

2. Commission Determination

56. The Commission clarifies that our section 206 authority permits only prospective relief with regard to a previously-accepted rate schedule.⁸⁰ The Notice of Institution of Proceeding and Refund Effective Date was issued in the *Federal Register* on June 28, 2006.⁸¹ Accordingly, no refunds could be granted prior to that date. With respect to 2004/2005 True-Up amounts, the Commission sought information from that period because those expenditures could “have an impact on the activities to be funded by the 2006 Revenue Requirement . . .”⁸² However, the 2004/2005 True-Up amounts involve activities prior to the stated June 28, 2006 refund date; therefore, the 2004/2005 True-Up amounts are not subject to refund.

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 4.

⁸⁰ In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b), as amended by the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of the initiation of the Commission’s proceeding in the *Federal Register*, and no later than five months after the publication date. When the period has ended, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate. 16 U.S.C. § 824e(b).

⁸¹ 71 Fed. Reg. 36,768 (2006).

⁸² June 16 Order, 115 FERC ¶ 61,332 at P 10.

57. We believe the discussion in section III.B.4, above, addresses ISO-NE's request for clarification for the appropriate legal standard governing the inclusion of its proposed external affairs and corporate communications expenses in future administrative cost filings.

The Commission orders:

(A) ISO-NE's "external affairs" and "corporate communications" expenses as set forth in its 2006 administrative cost filing and July 17 brief in this proceeding are hereby accepted for filing, as discussed in the body of this order, effective January 1, 2006.

(B) ISO-NE is directed to post on its website information concerning its external affairs and corporate communications expenses, as discussed in the body of this order.

(C) ISO-NE's Motion for Clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.