

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. ER06-94-004
EL06-77-003

ORDER ON REHEARING AND CLARIFICATION

(Issued February 15, 2007)

1. On October 19, 2006,¹ the Commission issued an order on paper hearing and motion for clarification finding that ISO New England Inc.'s (ISO-NE) "external affairs" and "corporate communications" expenses, as set forth in its 2006 administrative cost filing are just and reasonable and properly recoverable from ratepayers. Timely requests for rehearing and motions for clarification were filed by ISO-NE and Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant and Massachusetts Wholesale Electric Company (collectively, the MA Public Systems). In this order, the Commission grants in part and denies in part the requests for rehearing and motions for clarification.

I. Background

2. 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 2006.² On March 28, 2006, the Commission issued an order denying rehearing of the December 30 Order.³ Upon further consideration of the evidence regarding purported "lobbying"-type activities conducted by ISO-NE, and the

¹ *ISO New England Inc.*, 117 FERC ¶ 61,070 (2006) (October 19 Order).

² *ISO New England Inc.*, 113 FERC ¶ 61,341 (2005) (December 30 Order).

³ *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.

potential for ISO-NE's "External Affairs" and "Corporate Communications" expenses to fund such activities, on June 16, 2006,⁴ 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 section 206 of the Federal Power Act (FPA) 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.^[5]

3. In a July 10, 2006 Order on Clarification,⁶ 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 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 full record in this proceeding."⁷ The Commission did, however, grant the request for

⁴ *ISO New England Inc.*, 115 FERC ¶ 61,332 (2006) (June 16 Order).

⁵ *Id.* P 11 and n.8.

⁶ *ISO New England Inc.*, 116 FERC ¶ 61,025 (2006) (July 10 Order).

⁷ *Id.* P 16.

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

4. On July 17, 2006, as amended on July 20, 2006, ISO-NE filed its brief pursuant to the June 16 Order (July 17 Brief). Timely comments on the brief were filed by: the MA Public Systems; the Attorney General of the Commonwealth of Massachusetts; and Richard Blumenthal, Attorney General for the State of Connecticut. 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, but did not file a motion to intervene. On July 17, 2006, ISO-NE also filed a motion for clarification or, in the alternative, request for rehearing of the June 16 Order.

5. In the October 19, 2006 Order on Paper Hearing,⁹ the Commission found that, based on the information provided in ISO-NE’s original filing and July 17 Brief, ISO-NE’s “external affairs” and “corporate communications” expenses as set forth in its administrative cost filing are just and reasonable and properly recoverable from ratepayers. The Commission found that ISO-NE’s submittals provided the Commission with a sufficient record to render a fully informed determination.

6. The Commission found that based on a review of Commission precedent regarding lobbying activities, the Commission will permit recovery of ISO-NE’s “external affairs” and “corporate communications” expenses. The Commission found 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. The Commission determined that these expenditures are properly recoverable as they:

(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

⁸ *Id.* P 18.

⁹ October 19 Order, *supra* note 1.

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.¹⁰

7. The October 19 Order permitted the 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.”¹¹ The Commission noted that:

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.

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.¹²

8. However, in order to provide “greater transparency to ISO-NE stakeholders and allow them to achieve a clear understanding of the nature of such expenditures,” the Commission directed ISO-NE to prepare and post on its website a monthly report concerning “external affairs” and “corporate communications.” The report, among other things, must:

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

¹⁰ October 19 Order, 117 FERC ¶ 61,070 at P 49.

¹¹ *Id.* P 50.

¹² *Id.* P 50-51 (internal citations omitted).

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.¹³

9. The Commission also noted that, “[t]o 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.”¹⁴

10. The October 19 Order also granted ISO-NE’s motion for clarification, confirming that our section 206 authority permits only prospective relief with regard to a previously-accepted rate schedule, and that no refunds could be granted prior to June 28, 2006, the date the Commission’s Notice of Institution of Proceeding and Refund Effective Date was issued in the *Federal Register*. The Commission also clarified that while the Commission sought information regarding the 2004/2005 True-Up amounts, 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.¹⁵

II. Discussion

A. Procedural Matters

11. On November 20, 2006, ISO-NE filed a motion for clarification. Also on November 20, 2006, the MA Public Systems filed a request for rehearing and request for clarification. On December 5, 2006, the MA Public Systems filed a response in partial opposition to ISO-NE’s motion for clarification.

12. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject the MA Public Systems’ answer.

¹³ *Id.* P 52.

¹⁴ *Id.*

¹⁵ *See Id.* P 56.

B. Whether the Commission Failed to Address the Issue Set for Paper Hearing

1. Request for Rehearing/Clarification

13. The MA Public Systems argue that the Commission failed to address the issue set for “paper hearing,” *i.e.*, whether ISO-NE’s advocacy activities are “educational and informational” in nature, rather than lobbying. The MA Public Systems maintain that the stated focus of the paper hearing was for 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.”¹⁶

14. The MA Public Systems argue that the Commission “abandoned its focus on the specific content of specific communications,”¹⁷ failing to require ISO-NE to make an evidentiary showing, “choosing instead to assume that the ISO’s advocacy efforts constitute ‘informational’ activities because the ISO is always ‘attempting to benefit its market participants’, even when ISO is advocating positions on controversial issues that are directly contrary to those taken by the same ‘market participants.’”¹⁸

15. The MA Public Systems argue that the July 20 Order “rests on the unfounded premise that, because ISO-NE has no shareholders, the interests that it advocates when it attempts to influence the decisions of state and federal executive and legislative officials are actually those of its ratepayers.”¹⁹ The MA Public Systems argue that ISO-NE and its customers are involved in numerous pending disputes, and “[t]he existence of these disputes, and indeed the pendency of this proceeding, simply belie the Commission’s

¹⁶ MA Public Systems Request for Rehearing at 11 (citing July 10 Order, 116 FERC ¶ 61,025 at P 18).

¹⁷ *Id.*

¹⁸ *Id.* at 3 (citing October 19 Order, 117 FERC ¶ 61,070 at P 49).

¹⁹ *Id.* at 7-8.

assumed community of interest between ISO-NE and its ratepayers.”²⁰ The MA Public Systems argue that this redefinition deprives the Commission’s actions of reasoned decision making.²¹

16. The MA Public Systems further argue that the Commission erred in concluding “the absence of disparate ratepayer/shareholder interests that may exist for investor owned utilities” means “that the ISO/RTO is pursuing activities that benefit its ratepayers.”²² The MA Public Systems argue that the Commission’s conclusion that there are not disparate interests as between ISO-NE and its ratepayers is irrational and unsupported by the record.

2. Commission Determination

17. We disagree with both the MA Public Systems’ characterization of the core issue of our investigation and whether we addressed the core issued in the October 19 Order. The core issue in our investigation was whether ISO-NE’s external affairs and corporate communications expenses were just and reasonable, and whether they were the types of expenditures that should be paid for by ratepayers. Our interest into whether ISO-NE had misclassified any lobbying expenses as communication expenses, rather than as Account 426.4-type lobbying expenses, also went to the issue of whether such costs were just and reasonable and should be paid for by ratepayers. The Commission thoroughly examined the explanations and support provided by ISO-NE in its July 17 Brief, as well as the information and arguments filed by the other parties in this proceeding, and based on the record, concluded that ISO-NE’s communications were either educational and informational in nature, or, in instances in which they arguably could be construed as lobbying, were directly related to ISO-NE’s existing or proposed core operations and undertaken in the collective interest of New England ratepayers. All of the communication expenditures we examined in this proceeding were consistent with ISO-NE’s responsibility to develop, oversee and fairly administer New England’s wholesale electricity marketplace and ensure reliable operation of New England’s bulk electric

²⁰ *Id.* at 13.

²¹ *Id.* at 14 (citing *Process Gas Customers Group v. FERC*, 866 F.2d 470, 476 (D.C. Cir. 1989); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2006)).

²² *Id.* at 3 (citing October 19 Order, 117 FERC ¶ 61,070 at P 47, 49).

power system.²³ As a result, the Commission concluded that all of the expenditures were recoverable from ISO-NE's ratepayers. The Commission did not attempt to identify which expenditures should have been classified as lobbying in Account 426.4, because little purpose would be served, in light of our determination that all of the expenses were properly recoverable from ratepayers. The purpose of classifying expenditures in Account 426.4 is to highlight them for scrutiny in rate proceedings and require the utility to justify their rate recovery. Since all of ISO-NE's communication expenditures were highlighted and examined in this proceeding, we did not attempt to classify any particular expenditure as informational, educational or lobbying. However, as discussed *infra*, in an attempt to mitigate future disputes about the nature of ISO-NE's communication activities, we directed ISO-NE to provide details of certain communication on its web site, and to classify any lobbying expenditures in Account 426.4.

18. With respect to the MA Public Systems' concern that ISO-NE advocated positions that were at times directly contrary to the positions taken by certain New England market participants, the Commission notes that, as system operator of New England's markets, ISO-NE is charged with the responsibility to ensure system reliability and to provide fair and competitive markets for all market participants. This necessarily has (and will) result in ISO-NE advocating positions that may be contrary to some of its individual members. Some of the disputed communication between ISO-NE and state and federal legislators and public officials involved controversial issues on which consensus among market participants in New England, each with their own financial interests, was not possible to achieve. That should not preclude ISO-NE from providing its position on issues affecting the New England electricity markets to various officials, including legislators and those in the executive branches of government, who need, and often seek out, ISO-NE as an independent informational resource. ISO-NE's direct involvement in electricity issues in New England, and its status as an independent, not-for-profit corporation make it a unique and necessary source of education and information for interested public officials.

19. In addition, it would be infeasible to exempt dissenting ratepayers from paying for ISO-NE's communications with public officials in furtherance of RTO objectives. First, the task of collecting opinions from all market participants, parsing them into categories

²³ The Commission reiterates that lobbying expenses are recoverable from ratepayers upon a sufficient showing that they are directly related to existing or future operations, are undertaken for the collective interest of market participants, are in furtherance of legitimate RTO objectives, and are not for the personal benefit of company officials or their agents. October 19 Order, 117 FERC ¶ 61,070 at P 49-50.

based on whether or not each market participant is of the same opinion as ISO-NE on a controversial issue, and then doling out charges to those market participants that consent with ISO-NE's opinion and exempting dissenting market participants would be administratively burdensome, if not impossible. ISO-NE would need to incur additional administrative costs in order to make rate calculations for each individual market participant relating to charges for "external affairs" and "corporate communications" activities.

20. Further, the accuracy of these calculations would be extremely difficult to ensure given the large number of ambivalent opinions of market participants. As is almost always the case with controversial issues, market participants may concur in part with ISO-NE's opinion. At the same time, such a market participant may be diametrically opposed to a particular part of ISO-NE's proposed solution to a controversial issue. This mixed result would make it difficult for a market participant to officially concur with or dissent from ISO-NE's opinion, making rate calculations even more arduous.

21. The MA Public Systems' argument that the Commission improperly concluded that there are similar interests between ISO-NE and its ratepayers, unlike the relationship between an investor-owned utility and its ratepayers, is also unfounded. Unlike an investor owned utility, ISO-NE is not beholden to any investors or shareholders that have an interest in the profitability of their business and obtaining a good return on their investments. ISO-NE has no interest in obtaining a profit from its operations and seeks only to provide reliable service at the lowest reasonable cost. As previously discussed, ISO-NE is an independent entity charged with the fair administration of New England's electricity markets and ensuring reliability of the electric grid in New England. It can be safely assumed that its actions are for the collective interest of its members and the ratepayers of New England. Although some individual members may not agree with some of the positions advocated by ISO-NE, no party has provided any evidence that ISO-NE has acted imprudently or contrary to its core purpose and objectives. MA Public Systems references specific instances where market participants in New England have disagreed with ISO-NE's position(s) of advocacy²⁴; however, these instances only highlight the inherent competing *financial* interests found in the New England markets and the subsequent conflict when controversial issues, such as Reliability Must-Run Contracts²⁵ and Locational Installed Capacity (LICAP),²⁶ are raised. ISO-NE has no

²⁴ MA Public Systems Request for Rehearing at 12.

²⁵ *Id.* (citing *Mystic Development LLC*, 114 FERC ¶ 61,200, *order on reh'g*, 116 FERC ¶ 61,168 (2006)).

²⁶ *Id.* at 12-13 (citing *Devon Power LLC*, 115 FERC ¶ 61,340 at P 11, 67 (2006)).

financial interests and can derive no financial benefit from specific market outcomes or market design issues, and as such, ISO-NE's "position" on controversial market issues reflects its independent assessments of costs and benefits, including reliability and market impacts, to the New England region as a whole.

C. Whether the Commission Acknowledged Evidence That ISO-NE's Activities Are Actually Lobbying Rather Than "Informational"

1. Request for Rehearing

22. The MA Public Systems also argue that the ISO-NE's evidence demonstrate that its activities are in fact lobbying, rather than "educational" or "informational" in nature. The MA Public Systems note that ISO-NE expressly stated that it spent ratepayer money on lobbying activities.²⁷ The MA Public Systems also note specific examples in the affidavit testimony submitted by ISO-NE that lobbying activities had been undertaken.

2. Commission Determination

23. We deny the MA Public Systems' request for rehearing regarding expenditures that ISO-NE classified as "lobbying" on its Form 990 Return. First, as discussed above, the designation of expenditures for tax purposes as "lobbying" expenditures does not preclude recovery of those costs from ratepayers. Second, the \$11,193.19²⁸ that ISO-NE reported on its 2006 Form 990 Return was justified in the ISO-NE's July 17 Brief, and has been accepted as just and reasonable by the Commission. ISO-NE has fully justified all expenditures in its "corporate communications" and "external affairs" accounts, including the amount classified as "lobbying" on its 2006 Form 990 Return.

24. The MA Public Systems' request for rehearing also contains multiple examples of what they consider to be "lobbying" activities, the costs of which the MA Public Systems' assert should not be recoverable from ratepayers. For example, the MA Public Systems point specifically to an ISO-NE consultant's contacts with New England Congressional delegation offices regarding ISO-NE's endorsement of LICAP as the least cost option to assure necessary levels of capacity in New England.²⁹ The MA Public

²⁷ *Id.* at 15 (citing ISO-NE July 17 Brief at 16-17).

²⁸ ISO-NE July 17 Brief at Exhibit RCL-4 (ISO-NE 2006 Form 990 Return).

²⁹ MA Public Systems Request for Rehearing at 16.

Systems point out that the LICAP issue was “highly contentious”³⁰ and that the MA Public Systems “(and many, many others) had views on this subject that were diametrically opposed to those of [ISO-NE].”³¹ However, ISO-NE’s endorsement of LICAP was consistent with its inherent obligation to pursue market mechanisms that it believed would best assure future reliability throughout New England.

25. LICAP and other specific examples highlighted by the MA Public Systems all reflect ISO-NE’s efforts to pursue positions before state and federal legislators and other public officials for the ultimate benefit of New England ratepayers. Again, it is unreasonable to expect ISO-NE’s “position” on controversial New England market issues to mirror all market participants’ viewpoints, most of which (if not all) are motivated by competing financial interests. And, as explained above, it is also unreasonable and infeasible to exempt dissenting market participants from payments for charges associated with ISO-NE’s “external affairs” and “corporate communications” activities. There is nothing in the record that would indicate that ISO-NE did not act in good faith in carrying out its responsibilities, including any of the communications about which MA Public Systems complains. The Commission will not hamstring ISO-NE’s efforts to inform public officials of its authoritative and independent opinion on controversial issues affecting the New England electricity markets by categorically excluding lobbying expenditures from rate recovery.

26. On the other hand, ISO-NE should not be immune to scrutiny of its communications to ensure that they are, in fact, consistent with legitimate RTO objectives and are just and reasonable. Our requirement for ISO-NE to post information concerning certain of its communications with public officials will provide parties with essential information that should allow them to pursue any concerns they may have with the legitimacy of ISO-NE’s communications.

D. Whether the Paper Hearing Process Was Effective

1. Request for Rehearing

27. The MA Public Systems argue that the Commission’s refusal to allow discovery prevented the compilation of a sufficient evidentiary record. The MA Public Systems maintain that the October 19 Order is “premised on characterizations of ISO-NE

³⁰ *Id.*

³¹ *Id.*

advocacy activities proffered by ISO-NE and its lobbyists, which characterizations cannot constitute substantial evidence.”³² The MA Public Systems note that “[t]hat the characterizations have now been verified under oath adds nothing of evidentiary value.”³³

28. The MA Public Systems further argue there are gaps and inconsistencies in the record, asserting that the Commission failed to address ISO-NE’s advocacy with the Commission. The MA Public Systems point to the evidence it provided to the Commission, including lobbyist disclosure reports which list the Commission as the object of ISO-NE’s lobbying activities.³⁴ The MA Public Systems also note that the affidavits provided as part of the July 17 Brief provide nearly identical paraphrasing of the scope of services from ISO-NE’s Master Service Agreement for the retention of lobbyists. The MA Public Systems maintain that these issues demonstrate “a conscious effort to shield certain highly probative information from scrutiny in this proceeding.”³⁵

2. Commission Determination

29. We disagree with the MA Public Systems’ contention that the paper hearing process was inadequate. The information provided by ISO-NE in the July 17 Brief was sufficient to supplement the record and allow us to make a decision on the merits. The information provided by ISO-NE included more than characterizations of its activities – ISO-NE submitted specific documentation of its contacts with public officials, including numerous records of meetings (as well as explanations of the nature of the meetings). Reliance on the evidentiary support supplied as affidavits was not in error.³⁶ While the

³² *Id.* at 4.

³³ *Id.* at 8.

³⁴ *Id.* at 23-24.

³⁵ *Id.* at 25.

³⁶ As previously stated in this proceeding, the Commission is required to provide a trial-type hearing only if the material facts in dispute cannot be resolved on the basis of the written submissions in the record. July 10 Order, 116 FERC ¶ 61,025 at P 16, n.23 (citing *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1199 (D.C. Cir. 2000) (in turn citing *Conoco Inc. v. FERC*, 90 F.3d 536, 543 n.15 (quoting *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993))) and *Central Maine v. FERC*, 252 F.3d 34, 46-47 (1st Cir. 2001)); see also *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1173 (9th Cir. 2001) (finding that the Commission has wide discretion to select its own procedures and that the Commission’s decision not to hold a formal evidentiary hearing

(continued)

MA Public Systems are correct that the paper hearing process did not allow for trial-type evidentiary hearings, “the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, *i.e.*, where the written submissions do not provide an adequate basis for resolving disputes about material facts.”³⁷ A record has been fully developed through the paper hearing process and that the MA Public Systems have been provided a meaningful opportunity for a hearing on these issues.

30. We also disagree with the MA Public Systems’ characterization of ISO-NE’s contacts with the Commission. ISO-NE, like any other public utility, is entitled to meet with the Commission and other regulators to pursue its legitimate interests and to recover the expenses associated with such activities.³⁸ ISO-NE’s contacts with the Commission are strictly regulatory in nature; it is appropriate for ISO-NE as a public utility to recover costs of regulatory contacts.

31. Further, we disagree with the MA Public Systems’ argument that these issues somehow demonstrate a conscious effort on the part of ISO-NE to shield certain information from scrutiny. In the July 17 Brief, ISO-NE provided specific documentation of contacts with public officials, including numerous records of meetings (as well as explanations of the nature of the meetings), that allowed the Commission to make a decision, based on such evidence, that ISO-NE’s “external affairs” and “corporate communications” activities were properly recoverable from ratepayers.

E. Whether the Findings of the October 19 Order Constitutes State Action in Contravention of the First Amendment

1. Request for Rehearing

32. The MA Public Systems argue that, notwithstanding previous orders, the October 19 Order’s specific approval of lobbying expenditures over the objection of

as to alleged license violations is a “virtually unreviewable” exercise of discretion); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982) (finding that the Commission’s decision on whether to hold an evidentiary hearing to address alleged factual allegations raised by the parties is “generally discretionary”).

³⁷ *Central Maine Power Company*, 97 FERC ¶ 61,115 at n.4 (2001); *see supra* note 36.

³⁸ *See* 18 C.F.R. Part 101, Account No. 928 (2006).

dissenting market participants constitutes state action for First Amendment purposes and therefore, contravenes the First Amendment by requiring dissenting customers of ISO-NE to provide financial support for the expression of positions with which they disagree.

2. Commission Determination

33. As stated in the June 16 Order, the Commission disagrees with the MA Public Systems that ISO-NE's proposed rates are unjust and unreasonable because dissenting market participants cannot avoid compelled subsidization of expressive activities by ISO-NE. The Commission did not revisit this issue as part of its paper hearing process. The Commission reaffirms the findings of the December 30 and March 28 Orders that the Commission's acceptance of ISO-NE's rates is not governmental action sufficient to trigger the First Amendment protections sought by the MA Public Systems.³⁹ The October 19 Order's approval of ISO-NE's activities does not constitute "state action" warranting First Amendment protection. We see nothing in the October 19 Order that would have us revisit this issue. The MA Public Systems raise no new issues that would require a different finding.

F. Posting Requirement Imposed in the October 19 Order

1. Requests for Rehearing and/or Clarification

34. ISO-NE seeks clarification regarding the scope of the posting requirement. ISO-NE states its reading of the October 19 Order as follows: "*requiring* posting of a monthly report of meetings held by the ISO (and/or its representatives) with legislators and their staffs and other public officials regarding proposed legislation" but "*not requiring* reporting of educational/informational or education/information-gathering activities such as the public issuance of periodic or special reports, interacting with the press and general public, monitoring of legislative or regulatory proceedings or participating in meetings relating solely to state or federal regulatory proceedings."⁴⁰

35. Specifically, ISO-NE argues that the Commission "could not have intended to create an impracticable reporting requirement that would cover activities whose costs are clearly recoverable from ratepayers."⁴¹ ISO-NE seeks clarification that the context of the

³⁹ See June 16 Order, 115 FERC ¶ 61,332 at P 12 (citing December 30 Order, 113 FERC ¶ 61,341 at P 18; March 28 Order, 114 FERC ¶ 61,315 at P 22-28).

⁴⁰ ISO-NE Motion for Clarification at 3-4.

⁴¹ *Id.* at 9.

October 19 Order is “squarely legislative, rather than regulatory” and none of the Commission orders in this proceeding “questioned the recoverability of costs of regulatory-related or other non-legislative activities.”⁴² ISO-NE also seeks clarification that not all of the day-to-day core activities undertaken by its employees and representatives fall within the scope of the monthly report,⁴³ arguing that such a broad reading of the requirement would be unduly burdensome. ISO-NE also argues that reading the October 19 Order to include all contacts with executive branch officials would have highly adverse impacts, including a chilling effect on ISO-NE’s ability to meet with governmental parties and “interact with such parties and/or personnel on a myriad of regulatory matters, as every regulated utility in the country is free to do.”⁴⁴

⁴² *Id.* at 10.

⁴³ ISO-NE notes several examples of activities that it deems “obviously recoverable under Commission precedent” and that it believes should not be included in the monthly report, including: (a) “pre-filing meetings with the Commission”; (b) “questions from Commission staff about uncontested ISO filings”; (c) “inquiries to or from executive branch officials about the status of regulatory proceedings or ISO activities such as system planning”; (d) “undertaking settlement discussions with executive branch parties to ongoing litigated proceedings”; (e) “providing information to state and federal, executive and legislative officials regarding the status of New England’s bulk-power system, the ISO-operated markets, and any operational forecasts”; (f) “briefing and responding to questions of governors and other executive branch officials regarding upcoming reliability concerns in their states, and related seasonal capacity outlooks”; and (g) “elucidating the likelihood of capacity deficiencies in extreme weather, the operating procedures used to manage capacity deficiencies including controlled outages that could occur as a last resort, and the importance of consumer conservation including the most effective time to request consumer conservation.” ISO-NE Motion for Clarification at 11.

⁴⁴ *Id.* at 12.

36. Finally, ISO-NE argues that applicability of “corporate communications”⁴⁵ to the monthly report is inappropriate. ISO-NE argues that the October 19 Order “makes clear that the reports are designed to disclose activities involving situations in which ISO-NE and other personnel ‘met’” and public informational activities normally do not involve meetings.⁴⁶ ISO-NE also argues that: these types of activities were not questioned in the June 16 Order or the October 19 Order, prior Commission orders have found public informational expenses to be recoverable; and the October 19 Order recognized the recoverability of costs related to monitoring functions by ISO-NE.

37. The MA Public Systems ask that the Commission clarify the posting requirement to ensure that: (a) “the obligation to post a monthly report includes the requirement that ISO post all documents prepared for, distributed, or received by ISO-NE at each meeting”; (b) “the obligation to disclose is not limited to meetings conducted by ‘external affairs’ and ‘corporate communications’ personnel; rather, the disclosure obligation is triggered by the type of communication described in P 52, regardless of which ISO department is involved”; and (c) “the disclosure obligation applies regardless of whether an ISO employee (or employees) attend a meeting or whether the meeting is attended by a consultant (including counsel) on the ISO’s behalf.”⁴⁷

2. Commission Determination

38. As we stated in the October 19 Order, the purpose of the posting requirement is to provide greater transparency to stakeholders and allow them to achieve a clear understanding of the nature of certain of ISO-NE’s “external affairs” and “corporate communications” activities. It is entirely appropriate for ISO-NE, as an independent entity entrusted to fairly represent the collective interests of its stakeholders, to disclose basic information about its contacts with certain public officials. The minimal amount of information required, *i.e.*, the identification of each meeting with public officials, along with the subject of the meeting and a description of the attendees, will not be unduly

⁴⁵ ISO-NE notes that these include, for example, “assisting in the production and dissemination of numerous periodic and special reports and updates on the New England bulk-power system and the ISO-operated markets, such as the Wholesale Markets Plan, the Reliability Report, assorted planning reports, and other white papers, the issuance of press releases and answering reporters’ questions about the ISO’s operations.” ISO-NE Motion for Clarification at 12-13.

⁴⁶ *Id.* at 13.

⁴⁷ MA Public Systems Request for Rehearing at 7, 27.

burdensome. This information will provide interested stakeholders with an indication of the nature of ISO-NE's activities, and allow them to pursue, as they deem necessary, further action or information on these activities.

39. That being said, however, the types of specific contacts for which ISO-NE seeks clarification need not be included in the monthly report. We find these types of briefings, responses to inquiries and similar activities to be an integral part of ISO-NE's regulatory or public informational responsibilities and therefore, should not be fettered by additional reporting requirements. Accordingly, we grant clarification that the following activities need not be included in the monthly report: (a) "pre-filing meetings with the Commission"; (b) "questions from Commission staff about uncontested ISO filings"; (c) "inquiries to or from executive branch officials about the status of regulatory proceedings or ISO activities such as system planning"; (d) "undertaking settlement discussions with executive branch parties to ongoing litigated proceedings"; (e) "providing information to state and federal, executive and legislative officials regarding the status of New England's bulk-power system, the ISO-operated markets, and any operational forecasts"; (f) "briefing and responding to questions of governors and other executive branch officials regarding upcoming reliability concerns in their states, and related seasonal capacity outlooks"; and (g) "elucidating the likelihood of capacity deficiencies in extreme weather, the operating procedures used to manage capacity deficiencies including controlled outages that could occur as a last resort, and the importance of consumer conservation including the most effective time to request consumer conservation."⁴⁸

40. We also agree with ISO-NE that it is not necessary to post reports or interactions with the press and general public, because that the contents of those communications are already publicly available. Moreover, we agree that ISO-NE's on-going legislative and regulatory monitoring activities that do not involve meetings with public officials need not be included.

41. We disagree with ISO-NE that the Commission should make a distinction between "corporate communications" and "external affairs" activities for the purposes of the reporting requirement. Because of the inherent overlap in the types of activities, it is appropriate that relevant activities (as clarified above) that are accounted for in either category be included in the monthly report.

42. We decline to grant the MA Public Systems' request that the Commission require ISO-NE to post all documents prepared for, distributed, or received by ISO-NE at each

⁴⁸ *Supra* note 43.

meeting. As indicated above, the intention of the reporting requirement is to provide stakeholders information regarding the nature of activities undertaken by ISO-NE and, therefore, the opportunity to seek further information from ISO-NE. We expect that, if requested, ISO-NE will provide copies of any documents that it prepared for or distributed at meetings with public officials.

43. We agree with the MA Public Systems' request for clarification that the obligation to disclose is triggered by the type of communication, regardless of which ISO-NE department is involved. We do not anticipate, however, that ISO-NE would classify these activities under accounts other than "external affairs" "corporate communications" or Account 426.4. To the extent, however, that relevant communications are undertaken by or on behalf of ISO-NE and are not classified in these accounts, we clarify that ISO-NE is still required to include that information in its monthly report.

44. Moreover, we agree with the MA Public Systems that the obligation to disclose applies regardless of whether an ISO-NE employee attends a meeting or whether the meeting is attended by a consultant (including counsel) on the ISO-NE's behalf. We note that the reporting requirement set forth in the October 19 Order was intended to "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 the parties with whom ISO-NE employees *or representatives* met."⁴⁹ Accordingly, we clarify that the reporting requirement is intended to apply to meetings where ISO-NE employees or consultants or other outside representatives acting on behalf of ISO-NE were involved.

G. Account 426.4-Related Responsibilities

1. Request for Clarification

45. ISO-NE also requests clarification of its Account 426.4-related obligations. First, ISO-NE argues that the October 19 Order only requires the inclusion of costs in Account 426.4 to the extent that costs are for activities that are reportable, but nonetheless recoverable. Second, ISO-NE states that the October 19 Order does not specifically address to what extent expenses should be included in Account 426.4 in relation to the "decisions of public officials" if they relate to "matters of direct operating concern."

⁴⁹ October 19 Order, 117 FERC ¶ 61,070 at P 52 (emphasis added).

ISO-NE states that “[b]ecause any ISO communications with public officials have involved matters of direct operating concern, the ISO has not – to date – included them in Account 426.4.”⁵⁰

2. Commission Determination

46. We agree with ISO-NE that the October 19 Order misstated, in part, the requirements as to Account 426.4. The October 19 Order erroneously stated that certain costs were unrecoverable: “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.”⁵¹ We clarify that even “civic, political, or related activities costs” can be recoverable. The designation in Account 426.4 simply means that those costs are not presumed to be recoverable, shifting the burden on the filing entity to demonstrate why such costs should be recoverable. Account 426.4 requires only that expenditures for certain civic, political and related activities be included in that account. Recoverability itself is not addressed by Account 426.4.

47. As to ISO-NE’s second request, we grant clarification that if ISO-NE is undertaking activities that “are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations” (the exception in Account 426.4) then Account 426.4 does not apply and ISO-NE is correct that it need not include them in Account 426.4.

⁵⁰ ISO-NE Motion for Clarification at 14.

⁵¹ October 19 Order, 117 FERC ¶ 61,070 at P 46 (citing *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))).

The Commission orders:

ISO-NE and the MA Public Systems' requests for rehearing and clarification are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.