

ORAL ARGUMENT SCHEDULED FOR OCTOBER 21, 2008

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 04-1335, 05-1210, 05-1212, and 06-1144

**BRAINTREE ELECTRIC LIGHT DEPARTMENT, ET AL.,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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August 22, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

Docket No. 04-1335:

1. *ISO New England, Inc.*, 106 FERC ¶ 61,294 (2004); and
2. *ISO New England, Inc.*, 108 FERC ¶ 61,346 (2004).

Docket Nos. 05-1210 and 05-1212:

1. *ISO New England, Inc.*, 109 FERC ¶ 61,383 (2004), JA 430; and
2. *ISO New England, Inc.*, 111 FERC ¶ 61,096 (2005). JA 479.

Docket No. 06-1144:

1. *ISO New England, Inc.*, 113 FERC ¶ 61,341 (2005), JA 892;
2. *ISO New England, Inc.*, 114 FERC ¶ 61,315 (2006), JA 933;
3. *ISO New England, Inc.*, 115 FERC ¶ 61,332 (2006), JA 954;

4. *ISO New England, Inc.*, 116 FERC ¶ 61,025 (2006), JA 979;
5. *ISO New England, Inc.*, 117 FERC ¶ 61,070 (2006), JA 1956;
6. *ISO New England, Inc.*, 118 FERC ¶ 61,105 (2007), JA 2028; and
7. *ISO New England, Inc.*, 120 FERC ¶ 61,122 (2007), 2081;

C. Related Cases:

This case has not previously been before this Court or any other court.

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August 22, 2008

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GLOSSARY

113 FERC	<i>ISO New England, Inc.</i> , 113 FERC ¶ 61,341 (2005)
114 FERC	<i>ISO New England, Inc.</i> , 114 FERC ¶ 61,315 (2006)
115 FERC	<i>ISO New England, Inc.</i> , 115 FERC ¶ 61,332 (2006)
116 FERC	<i>ISO New England, Inc.</i> , 116 FERC ¶ 61,025 (2006)
117 FERC	<i>ISO New England, Inc.</i> , 117 FERC ¶ 61,070 (2006)
118 FERC	<i>ISO New England, Inc.</i> , 118 FERC ¶ 61,105 (2007)
120 FERC	<i>ISO New England, Inc.</i> , 120 FERC ¶ 61,122 (2007)
2005 Filing Orders	<i>ISO New England, Inc.</i> , 109 FERC ¶ 61,383 (2004), <i>order on reh'g</i> , 111 FERC ¶ 61,096 (2005)
2006 Filing Orders	<i>ISO New England, Inc.</i> , 113 FERC ¶ 61,341 (2005), <i>order on reh'g</i> , 114 FERC ¶ 61,315, <i>further order on reh'g</i> , 115 FERC ¶ 61,332, <i>order on clarification</i> , 116 FERC ¶ 61,025, <i>order on paper hearing</i> , 117 FERC ¶ 61,070 (2006), <i>order on reh'g</i> , 118 FERC ¶ 61,105, <i>order on reh'g</i> , 120 FERC ¶ 61,122 (2007)
Commission	Federal Energy Regulatory Commission
Connecticut Consumer Counsel	Intervenor Connecticut Office of Consumer Counsel

FERC	Federal Energy Regulatory Commission
ISO	ISO New England Inc.
ISO New England	ISO New England Inc.
Municipals	Petitioners Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant
NEPOOL	New England Power Pool
RTO	Regional Transmission Organization
<i>Snohomish</i>	<i>Public Util. Dist. No. 1 of Snohomish County v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001)

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE
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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

The issues presented for review are:

1. Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) appropriately determined that ISO New England Inc.’s (“ISO New England” or “ISO”) proposed communications expenditures, all of which were directly related to ISO New England’s core operations and undertaken in the collective interest of New England ratepayers, were just and reasonable and properly recoverable from those ratepayers; and

2. Whether the Commission appropriately exercised its broad remedial discretion in establishing a monthly reporting requirement for ISO New England.

COUNTER-STATEMENT OF JURISDICTION

Docket No. 05-1210: Petitioners Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant (collectively, “Municipals”) claim that this Court has jurisdiction over their petition in D.C. Circuit Docket No. 05-1210 seeking review of *ISO New England, Inc.*, 109 FERC ¶ 61,383 (2004) (“2005 Filing Order”), JA 430, *order on reh’g*, 111 FERC ¶ 61,096 (2005) (“2005 Filing Rehearing Order”), JA 479, (collectively, “2005 Filing Orders”). Br. at 2. The 2005 Filing Orders approved ISO New England’s proposed 2005 revenue requirement. As discussed more fully in Part I of the Argument below, the Municipals do not raise any arguments regarding the 2005 Filing Orders and, therefore, their petition challenging those orders (No. 05-1210) should be dismissed.

Docket No. 05-1212: On March 31, 2008, the sole Petitioner in Docket No. 05-1212 (which sought review of the 2005 Filing Orders), Massachusetts Municipal Wholesale Electric Company, notified the Court that it “has determined not to brief the matters raised in its petition (No. 05-1212)” Notice at 3; *see also* Br. at 1 n.1 (same). Accordingly, the petition for review in that docket should be dismissed with prejudice. *Garden State Broadcasting Ltd. Partnership v. FCC*,

996 F.2d 386, 388 n.1 (D.C. Cir. 1993) (dismissal for failure to prosecute based upon failure to file brief); *Barber v. American Sec. Bank*, 841 F.2d 1159, 1161 (D.C. Cir. 1988) (same).

Docket No. 04-1335: The Municipals state that they are no longer challenging the Commission orders underlying the petition filed in Docket No. 04-1335. Br. at 1 n.2. Accordingly, the petition for review filed in that docket should be dismissed with prejudice. *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002); *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996); *Democratic Cent. Comm. v. Washington Metro Area Transit Comm'n*, 485 F.2d 786, 790 n.16 (D.C. Cir. 1973).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

INTRODUCTION

The orders underlying, Docket No. 06-1144, the only petition for review properly before the Court, address ISO New England's 2006 administrative costs filing. *ISO New England, Inc.*, 113 FERC ¶ 61,341 (2005) ("113 FERC"), JA 892, *order on reh'g*, 114 FERC ¶ 61,315 ("114 FERC"), JA 933, *further order on reh'g*, 115 FERC ¶ 61,332 ("115 FERC"), JA 954, *order on clarification*, 116 FERC ¶ 61,025 ("116 FERC"), JA 979, *order on paper hearing*, 117 FERC ¶

61,070 (2006) (“117 FERC”), JA 1956, *order on reh’g*, 118 FERC ¶ 61,105 (“118 FERC”), JA 2028, *order on reh’g*, 120 FERC ¶ 61,122 (2007) (“120 FERC”), JA 2081 (collectively, “2006 Filing Orders”).

In the 2006 Filing Orders, the Commission found ISO New England’s proposed 2006 communications expenditures, all of which were directly related to ISO New England’s core operations and undertaken in the collective interest of New England ratepayers, just and reasonable and properly recoverable from ratepayers. *See, e.g.*, 113 FERC at PP 18-19, JA 898-99; 114 FERC at PP 22-29, JA 940-43; 117 FERC at PP 40-51, JA 1969-77; 118 FERC at PP 17-30, 47, JA 2034-40, 2046; 120 FERC at P 39, JA 2094. Additionally, to ensure greater transparency regarding ISO New England’s communications expenditures in the future, the Commission exercised its broad remedial discretion and directed ISO New England to post monthly reports concerning those expenditures. *See* 117 FERC at P 52, JA 1977-78; 118 FERC at PP 38-40, JA 2043-44; 120 FERC at PP 42-43, JA 2095. The Municipals challenge both of those determinations.

STATEMENT OF FACTS

I. ISO New England’s Formation

In 1971, New England transmission and generation owners, suppliers, publicly-owned entities, and end-users formed the New England Power Pool (“NEPOOL”). NEPOOL operated the unified regional network, which coordinated

bulk power transmission and generation facilities. *See ISO New England Inc.*, 106 FERC ¶ 61,280 at P 5, *order on reh'g*, 109 FERC ¶ 61,147 (2004), *aff'd sub nom. Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006). In 1997, in response to FERC Order No. 888,¹ NEPOOL obtained FERC approval for the creation of ISO New England, Inc., a “non-profit entity to administer New England energy markets and operate the region’s bulk power transmission system.” *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007); *New England Power Pool*, 83 FERC ¶ 61,045 (1998); *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *order on reh'g*, 95 FERC ¶ 61,074 (2001).

Subsequently, in 2003, ISO New England and the New England Transmission Owners jointly requested approval to establish ISO New England as a Regional Transmission Organization (“RTO”) pursuant to Order No. 2000.² The

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC

Commission approved the RTO proposal in 2004, finding, *inter alia*, that, as a “not-for-profit entity governed by an independent, non-stakeholder board,” ISO New England satisfied Order No. 2000’s independence requirement. *ISO New England*, 106 FERC at P 51. *See also Snohomish*, 272 F.3d at 610-12 (discussing Order Nos. 888 and 2000 Rulemakings).

II. ISO New England’s 2005 Administrative Costs Filing

A. ISO New England’s Filing And Parties’ Protests

On November 1, 2004, ISO New England submitted tariff sheets setting out its 2005 revenue requirement. R.1 Item 1.³ The Municipals intervened and protested, asking, in relevant part, that the Commission “condition its acceptance of the ISO’s proposed rates upon the ISO providing greater detail and explanation regarding the budget for its ‘Legal Department’ and how the money allocated to it will be spent.” R.1 Item 7 at 21, JA 370; *see also id.* at 22, JA 371.

Intervenor Massachusetts Attorney General’s intervention and protest

Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *petitions for review dismissed*, *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (“*Snohomish*”).

³ “R.1” refers to the administrative record underlying the orders in Docket Nos. 05-1210 and 05-1212. “R.2” will be used to refer to the administrative record underlying the orders in Docket No. 06-1144.

asserted that “the Commission should reject recovery of ISO lobbying and litigation . . . costs that ISO [New England] has not shown would benefit customers.” R.1 Item 10 at 3, JA 380 (capitalization in heading altered).

Intervenor Connecticut Office of Consumer Counsel (“Connecticut Consumer Counsel”) also intervened and protested, stating that it “continues to seek further details from ISO New England about its budget, the process it used for establishing the budget and the basis for some of the line items in the budget,” and that the Commission should “suspend approval of ISO New England’s 2005 Administrative Budget pending the submission of further information by ISO New England” R.1 Item 6 at 3, JA 347.

In its answer to the protests, ISO New England further detailed the questioned line items, R.1 Item 14 at 7-9, JA 391-93, and explained that “all of the public relations expenditures advance the ISO’s mission to help create and manage efficient and reliable energy markets. This mission is clearly beneficial to its customers.” R.1 Item 14 at 11, JA 395. “Indeed,” ISO New England added, “the very implication in the Protests that the ISO uses funds in a manner ‘adverse to customers’ interests’ is perplexing, given the ISO’s independence from market interests and its accountability to the Commission. The ISO’s core mission is to develop and administer tariffs and rules that are accepted by the Commission as just and reasonable – from the perspective of the customers’ interests.” *Id.*; *see*

also id. at 13, JA 397 (“All of the ISO’s legal and public relations expenditures are intended to further its mission – in a manner consistent with Commission policy – to help create and manage efficient and reliable electricity markets.”).

Despite this additional information, the Municipals’ reply “continue[d] to urge that the Commission condition its approval . . . on a requirement that the ISO provide detailed data on the development of its estimates for the six budget items identified in [its] protest” so that customers can “decide whether to seek to decline, where principle so requires, to fund certain aspects of [ISO New England’s] operations.” R.1 Item 16 at 12-13, JA 418-19.

B. The 2005 Filing Orders

The Commission found that ISO New England had adequately explained the challenged line items, and that none constituted lobbying, or the funding of political speech and influence. 2005 Filing Rehearing Order at P 16, JA 484; *see also* 2005 Filing Order at PP 24-25, JA 437. The Commission explained that it did “not agree, for example, that monitoring state legislative activity or informing regulatory agencies about ISO activities indicates an intent to lobby.” 2005 Filing Rehearing Order at P 17, JA 484. Moreover, while “[r]ecovery of expenditures used to influence the decisions of public officials is generally not permitted, . . . expenditures ‘directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed

operations' are not considered to be civic, political, or related activities costs under the Commission's accounting regulations." 2005 Filing Rehearing Order at P 18, JA 485 (quoting 18 C.F.R. Part 101, Account No. 426.4). Furthermore, the Commission pointed out, ISO New England explained that it "does not attempt to influence public officials to take a specific action on specific legislation," but rather "interact[s] with state and federal government officials regarding [its] activities and mission," and "inform[s] interested public officials on the operation and continued development of New England's wholesale electricity markets." 2005 Filing Order at P 25, JA 437; *see also* R.1 Item 14 at 10-11, JA 394-95.

Thus, the Commission found that, because "ISO New England's communications with governmental and regulatory bodies will be strictly for the purpose of keeping all relevant regulatory agencies apprised of the ISO's activities, including system reliability, market operations, and matters pending before the Commission, while also monitoring the state legislatures and the Executive Branches of each state in New England on pending legislation and regulatory rulemakings that could impact [ISO New England]'s operations and mission," the challenged line items were recoverable. 2005 Filing Rehearing Order at P 18, JA 485.

III. ISO New England's 2006 Administrative Costs Filing

A. ISO New England's Filing And Parties' Protests

On October 31, 2005, ISO New England filed tariff sheets setting out its 2006 revenue requirement. R.2 Item 1. The filing explained, in pertinent part, that:

the mission of the ISO's Corporate Communications department is to educate and inform state and federal policymakers on the ISO's mission and operations, as well as the performance and needs of the New England bulk-power system, including emergency communications during power supply deficiencies and continuous information on the current and future needs of the power system region-wide and on a state and sub-regional basis. The ISO's Corporate Communications office facilitates regulatory community input into the process for the evolution of the transmission system and market design. The ISO staff, including outside consultants, also monitor[s] state initiatives affecting bulk-power supply and retail rate design that might impact the ISO's mission and/or operations, as well as to inform the wholesale development process.

R.2 Item 1 at 17, JA 512. An affidavit by ISO New England's Chief Financial Officer, Robert Ludlow, further explained that:

the ISO's corporate communication activities seek to answer questions from state and federal officials regarding the ISO's mission and its current tasks. The ISO also provides information that can educate officials about the reliability and market needs of the region, often at the specific request of public officials. The ISO's corporate communications expenditures advance the ISO's mission to help create and manage efficient and reliab[le] markets – a mission clearly beneficial to its customers.

Id. Exh. 3 at 30, JA 575.

The Municipals intervened and protested the filing, arguing, among other

things, that the proposed rates were unjust and unreasonable because: (1) “ISO activities impose on customers the cost of ‘expenditures for the purpose of influencing the decisions of public officials,’ in apparent contravention of the requirements of 18 C.F.R. Part 101, Account No. 426.4” (“lobbying issue”); and (2) “the ISO’s ‘corporate communications,’ lobbying and litigation activities infringe the First Amendment rights of its customers because its rate mechanisms provide no means for dissenting customers to avoid paying the cost of ideological or other activities that are not germane to the administration of New England’s wholesale bulk power markets or to the planning and operation of its bulk transmission grid” (“First Amendment issue”). R.2 Item 7 at 5-6, JA 735-36.⁴ In support of their protest, the Municipals attached several publicly-available “Lobbying Registration Forms” and “Lobbying Reports” filed by ISO New England consultants in accordance with the Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.*, R.2 Item 7 at Exhs. 1-2, JA 759-78, as well as several publicly-available state-level documents that summarized “lobbying” reports filed by ISO New England consultants in accordance with state requirements, R.2 Item 7 at Exhs 3-5, JA 779-810.

⁴ Intervenor Massachusetts Attorney General also intervened, but its protest did not raise either the lobbying or First Amendment issue. R.2 Item 9 at 3-4, JA 816-17. Intervenor Connecticut Office of Consumer Counsel did not intervene in the proceeding. *See* Certified Index To Record in 06-1144; 113 FERC at P 4, JA 893.

In its answer to the Municipals' protest, ISO New England noted that the issue before the Commission was "what is the appropriate scope of interaction by an entity such as the ISO (a non-profit independent [Regional Transmission Operator]) with regulatory and legislative officials regarding matters encompassed within the ISO's Commission-approved mission?" R.2 Item 10 at 17, JA 837. ISO New England explained that "all of the external affairs activities proposed by the ISO for 2006 [were] consistent with its Commission-approved mission" to "assure the reliability of [New England's] bulk power supply . . . and to operate non-discriminatory, competitive, unbundled wholesale energy markets." *Id.* at 17, 28, 35, JA 837, 848, 855; *see also id.* at 20-23, JA 840-43 (explaining ISO New England's external affairs activities).

Specifically, ISO New England explained, "state and federal legislative and regulatory action can affect ISO operations and the accomplishment of its reliability and market-related missions," and "[w]ithout the ISO's provision of facts, analysis and its independent regional view, public officials could take legislative or regulatory/policy actions that could unwittingly harm system reliability or market efficiency to the detriment of ISO's customers and undermine Commission objectives." *Id.* at 18-19, JA 898-39. "[R]eliable bulk-power system operations and well-functioning wholesale electricity markets in regions of the country with organized markets and independent administration depend upon the

ability of [Regional Transmission Operator]s to review, analyze and interpret data, and provide their opinions on the operation of properly-functioning competitive markets and a reliable bulk-power system in their regions.” *Id.* at 29, JA 849.

ISO New England added that it was “necessary and/or prudent for [its outside] consultants to register and engage in [lobbying] reporting because the governing statutes cover a broad array of communications, and even generalized activities could be construed as covered.” R.2 Item 10 at 21-22, JA 841-42 (footnotes omitted). Moreover, ISO New England pointed out, even if certain of its communications expenditures should be accounted for in Account No. 426.4, “classification [in that account] does not constitute a determination that the expenditures should be excluded from a utility’s cost of service in rate proceedings.” R.2 Item 10 at 24, JA 844 (quoting *Expenditures for Political Purposes*, Order No. 276, 30 FPC 1539 (1963), 1963 FPC LEXIS 337, *9 (1963)). In any event, ISO New England noted, FERC authority “provide[s] that expenses of ‘[n]ecessary appearances before or communications to Congress or legislative bodies regarding matters of direct operating concern to the utility company’ need not be placed in Account No. 426.4,” and “[a]ll of the ISO’s communications with

legislative officials involve its direct operating concerns (*i.e.*, relating to its reliable operation of New England’s bulk-power system and wholesale markets).” R.2 Item 10 at 25, JA 845 (quoting Order No. 276, 30 FPC 1539, 1963 FPC LEXIS 337 at *11-12) (ISO New England’s italicization omitted).

Finally, ISO New England pointed out, “[t]o prevail on [its First Amendment] argument, [the Municipals] must demonstrate that Commission acceptance of the ISO’s proposed rates transforms the ISO’s inclusion of corporate communications costs in its rates into state action raising Constitutional concerns, and that the ISO’s corporate communications are not germane to the ISO’s mission,” but the Municipals had “fail[ed] on both points.” R.2 Item 10 at 31, JA 851; *see also id.* at 32-37, JA 852-57.

The Municipals responded, contending that “it is unjust and unreasonable for [ISO New England] to recover from its customers the costs of its lobbying and other ‘external affairs’ and ‘corporate communications’ efforts to influence decisions by . . . state and federal officials because the imposition of such costs on [ISO New England]’s customers”: (1) “contravenes the Commission’s regulations,” R.2 Item 11 at 2 (citing 18 C.F.R. Part 101, Account No. 426.4), JA 879; and (2) “contravenes the customers’ rights under the First Amendment,” *id.* “[T]he appropriate way to protect customers’ rights against misapplication of funds extracted from them in [ISO New England] rates,” the Municipals asserted, is to

“require[e] that expenditures on [ISO New England] ‘corporate communications’ and ‘external affairs’ activities be made sufficiently transparent in a sufficiently timely manner to enable [ISO New England] customers to avoid being conscripted into supporting [ISO New England]’s expression of views that they do not support.” *Id.* at 9, JA 886.

B. The First Three 2006 Filing Orders

The Commission found the challenged expenses recoverable, as ISO New England had “adequately demonstrated that the proposed expenses will be used to fund educational and informational activities that are in furtherance of [ISO New England]’s core objectives,” 114 FERC at P 12, JA 936; *see also id.* at PP 13-15, JA 936-37; 113 FERC at PP 13-17, JA 896-98, and did not raise First Amendment concerns, 114 FERC at PP 22-29, JA 940-43; *see also* 113 FERC at PP 18-19, JA 898-99.

Upon further consideration, however, the Commission *sua sponte* ordered additional hearing procedures regarding the lobbying issue. 115 FERC at PP 1, 8, JA 954, 956. Noting that “there is no clear distinction between educational and informational activities and lobbying activities,” the Commission was unsure, based upon the evidence provided to that point in the proceeding, “whether the types of activities proposed by [ISO New England] cross[ed] that line.” *Id.* at P 9, JA 957. Accordingly, the Commission directed ISO New England to:

clarify the nature of each activity listed in 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 New England] 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 New England]’s operations.

Id. at P 11, JA 958.

C. The Additional Hearing Filings

In response, ISO New England submitted an almost 800-page filing (comprised of a brief, nine affidavits and numerous exhibits), which explained that “all ISO communications with government officials are designed to address matters of direct operating concern,” *i.e.*, “ensur[ing] a reliable bulk-power system and competitive energy markets.” R.2 Item 35 at 5, JA 993. The filing detailed ISO New England’s External Affairs and Corporate Communications activities since mid-2004, making clear that they all were “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.” *Id.*; *see also id.* at 1-50 and Attachments 1-9, JA 989-1778.

The Municipals complained that the filing “paint[ed] a clear picture of ISO New England as seeking to maintain (if not expand) its role in the design and operation of New England markets and transmission systems,” and “reveal[ed] that the ISO seeks to persuade and direct, and not merely provide objective,

disinterested information.” R.2 Item 38 at 16, JA 1796; *see also id.* at 27, JA 1807 (“It is simply an indisputable fact, set forth on the face of the ISO’s own evidence in this proceeding, that ISO engages in wide-ranging and far-reaching ‘information’ campaigns designed to influence State and Federal Legislative and Executive Branch officials to take action (or, in some cases, to refrain from taking action) in order to advance the ISO’s own institutional interests and its ‘preferred approaches . . . to what ISO perceives to be New England’s needs.”).

Moreover, the Municipals argued, ISO New England could not successfully claim that “the promulgation of its views” was for the benefit of its customers because “the Commission long ago discredited the kind of what’s-good-for-General-Motors-is-good-for-America view on which the ISO’s argument [was] premised.” *Id.* at 50, JA 1830. For its part, the Massachusetts Attorney General asserted that “Account 426.4 bars the recovery of many of the[] expenditures.” R.2 Item 39 at 5, JA 1857.

ISO New England responded that the commenters’ arguments failed to appreciate: (1) “the ISO’s unique role as [a Regional Transmission Operator];” (2) that “Commission policy clearly allows a public utility to recover from ratepayers costs incurred to communicate matters of direct operating concern, even when such communications may be influential;” and (3) that “the ISO needs to keep public officials informed about its bulk power system and market operations, including

how legislative proposals might impact the ISO's operations.” R.2 Item 41 at 4, JA 1877. Thus, “even if some of the activities described in [External Affairs] are generically thought of as ‘lobbying’ and even if the classification of utility expenses in [Account 426.4] were dispositive for ratemaking purposes (which it is not), Commission orders . . . clearly allow recovery of expenses of such activities if they constitute communications regarding a utility’s ‘direct operating concerns,’ even if they might have an influential effect.” *Id.* at 8, JA 1881. “Adopting [the Municipals]’ views,” ISO New England explained, “would have significant negative ramifications for New England ratepayers, because it would prevent the ISO from providing public officials important information to help them make informed decisions.” *Id.* at 5, JA 1878; *see also id.* at 35, JA 1908 (“it would be unfair to effectively prohibit the ISO from providing its views . . . due to the fact that the ISO has no separate shareholder equity to fund such activities.”).

Acknowledging “that this [was] not a simple problem to solve,” the Municipals responded that they were “seek[ing] to ensure that the ISO’s efforts are relatively transparent to its customers, and thereby provide interested parties with both data on the efforts of ISO’s External Affairs/Corporate Communications department, and a timely opportunity to investigate and/or respond to such efforts.” R.2 Item 44 at 4-5, JA 1952-53.

D. The Remaining 2006 Filing Orders

After “thoroughly examin[ing] the explanations and support provided by [ISO New England] in its [Additional Hearing] Brief, as well as the information and arguments filed by the other parties in this proceeding, and based on the record,” the Commission “concluded that [ISO New England]’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 New England]’s existing or proposed core operations and undertaken in the collective interest of New England ratepayers.” 118 FERC at P 17, JA 2034; *see also* 117 FERC at PP 48-50, JA 1975-77. In other words, “[a]ll of the communication expenditures [the Commission] examined in this proceeding were consistent with [ISO New England]’s responsibility to develop, oversee and fairly administer New England’s wholesale electricity marketplace and ensure reliable operation of New England’s bulk electric power system.” 118 FERC at P 17, JA 2034-35. Thus, the Commission found that ISO New England’s “‘external affairs’ and ‘corporate communications’ expenses as set forth in its 2006 administrative cost filing [were] just and reasonable and properly recoverable from ratepayers.” 117 FERC at PP 2, 48, JA 1956, 1975.

The Commission further found that, “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 [its]

regulations or precedent as to what constitutes non-recoverable expenditures for information activities.” 117 FERC at P 51, JA 1977; *see also id.* at P 47, JA 1975 (explaining that “on a number of occasions the Commission had found ‘lobbying’ expenses of any type to be non-recoverable, while on other occasions the Commission ha[d] determined that even if the costs are related to lobbying and should be recorded in Account 426.4, they [were] appropriately recoverable from ratepayers, upon sufficient showing that they were undertaken for the benefit of ratepayers.”).

“[T]o provide greater transparency to [ISO New England] stakeholders and allow them to achieve a clear understanding of the nature of [external affairs and corporate communications] expenditures,” however, the Commission directed ISO New England to post on its website a monthly report identifying the subject of, and attendees at, all meetings by or on behalf of ISO New England with public officials, except for those related to ISO New England’s day-to-day regulatory or public information responsibilities. 117 FERC at P 52, JA 1977-78; 118 FERC at PP 38-44, JA 2043-45; 120 FERC at PP 42-48, JA 2095-97.

SUMMARY OF ARGUMENT

The Municipals filed petitions for review challenging three sets of orders (the orders underlying Docket No. 04-1335; the 2005 Filing Orders (Docket No. 05-1210); and the 2006 Filing Orders (Docket No. 06-1144)), but their argument on brief challenges only the 2006 Filing Orders. As a result, the Municipals waived their right to challenge the orders underlying Docket No. 04-1335 and the 2005 Filing Orders, and their petitions for review of those orders (Docket Nos. 04-1335 and 05-1210) should be dismissed. Likewise, the petition for review in Docket No. 05-1212 should be dismissed because the petitioner in that docket did not file a brief.

Furthermore, the sole petition for review challenging the 2006 Filing Orders (Docket No. 06-1144) should be denied. The Commission's determination that ISO New England's proposed 2006 communications expenditures were just and reasonable and recoverable from ratepayers followed several rounds of explanation by ISO New England and comment by the Municipals and other parties, and was reasonable and supported by substantial evidence. As the Commission found, all the communications expenditures were directly connected to accomplishing ISO New England's core responsibilities to develop and efficiently operate competitive New England wholesale energy markets and to ensure the reliability of New England's bulk electric power system and, therefore, would be undertaken in the

collective interest of New England ratepayers.

The Commission also appropriately found that approving ISO New England's proposed revenue requirement did not constitute government action implicating the First Amendment. Supreme Court and D.C. Circuit precedent establish that the government does not become responsible for a private party's proposal simply by approving it. Moreover, the Commission reasonably determined that, even if its approval did constitute government action implicating the First Amendment, ISO New England still would be able to recover its communications expenditures from all ratepayers because those expenditures are directly related to ISO New England's core responsibilities.

Finally, the Commission appropriately exercised its broad remedial discretion by instituting a requirement that ISO New England post monthly reports regarding its potentially non-recoverable communications expenditures. As the Commission found, the monthly reports will provide greater transparency of ISO New England's communications expenditures and, therefore, will allow interested parties to pursue, as they deem necessary, further information or action regarding those communications.

ARGUMENT

I. THE PETITION FOR REVIEW OF THE 2005 FILING ORDERS SHOULD BE DISMISSED, AS THE MUNICIPALS' BRIEF DOES NOT PRESENT ANY ARGUMENT REGARDING THOSE ORDERS

Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of a petitioner's brief "contain . . . [petitioner]'s contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies" *See Terry*, 101 F.3d at 1415 (same); D.C. Circuit Handbook of Practice and Internal Procedures at IX.A.8(j) (the argument section of a brief "contains the contentions of the parties on the issues presented, with citations to authorities, statutes, and portions of the record on which the parties rely"). Thus, "where petitioners offer 'no argument whatever' in support of certain issues on appeal, [the] Court will decline to consider them[.]" *Terry*, 101 F.3d at 1415 (describing holding in *Democratic Cent. Comm.*, 485 F.2d at 790 n.16).

While the background section of the Municipals' brief discusses ISO New England's 2005 filing and the orders on that filing, Br. at 5-6, the argument section, Br. at 26-49, neither discusses nor cites to the 2005 Filing Orders or to any items in the record underlying those orders. Instead, the argument section of the Municipals' brief (like the argument section of Intervenors Massachusetts Attorney General's and Connecticut Consumer Counsel's brief) addresses only the 2006 Filing Orders and the record underlying those orders. Br. at 26-49. As the

Municipals fail to make any arguments challenging the 2005 Filing Orders, they waived their right to challenge those orders. Accordingly, the Municipals' petition for review of the 2005 Filing Orders (No. 05-1210) should be dismissed with prejudice.⁵ *Terry*, 101 F.3d at 1415; *Democratic Cent. Comm.*, 485 F.2d at 790 n.16.

II. THE COMMISSION APPROPRIATELY FOUND ISO NEW ENGLAND'S 2006 COMMUNICATIONS EXPENDITURES JUST AND REASONABLE AND PROPERLY RECOVERABLE FROM RATEPAYERS

A. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and responsive to the arguments presented. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825l(b).

The Court is "particularly deferential to the Commission's expertise in ratemaking cases, which involve complex industry analyses and difficult policy

⁵ As noted, *supra* at Counter-Statement of Jurisdiction, the other petition seeking review of the 2005 Filing Orders (Docket No. 05-1212) should be dismissed because the petitioner in that docket did not file a brief, and the petition in Docket No. 04-1335 should be dismissed because the Municipals' brief does not challenge the orders underlying that petition.

choices.” *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 821 (D.C. Cir. 2007) (quoting *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005)). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (“the breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”), quoted in *East Kentucky Power Cooperative, Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007).

Furthermore, the Court “owe[s] FERC great deference in reviewing its selection of a remedy, for ‘the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.” *Louisiana Public Service Comm’n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967), and citing *Ariz. Corp. Comm’n v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (“noting that FERC ‘wields maximum discretion’ when choosing a remedy)).

B. The Commission Reasonably Found That All 2006 ISO New England Communications Expenditures Were Recoverable From Ratepayers

The Municipals claim that the Commission erred in finding ISO New England’s communications expenditures recoverable because they purportedly “do not involve ‘[attempts] to benefit [ISO New England]’s market participants’

generally ([117 FERC] at P 49[, JA 1975]).” Br. at 38; *see also* Br. at 28-29, 32-38; Intervenor Br. at 13-14. The Commission found, however, that ISO New England’s communications expenditures did benefit all market participants as they “were either educational and informational in nature, or, in instances in which they arguably could be construed as lobbying, were directly related to [ISO New England]’s existing or proposed core operations,” *i.e.*, they were “consistent with [ISO New England]’s responsibility to develop, oversee and fairly administer New England’s wholesale electricity marketplace and ensure reliable operation of New England’s bulk electric power system.” 118 FERC at P 17, JA 2034; *see also* 117 FERC at PP 48-50, JA 1975-77. This finding is consistent with the Commission’s regulations, responsive to the parties’ arguments, and supported by substantial evidence compiled during several rounds of submissions.

1. The Commission Reasonably Concluded That ISO New England’s Communications Expenditures Were Directly Connected To Accomplishing ISO New England’s Core Responsibilities

The record -- supplemented by ISO New England’s additional submission in response to the Commission’s *sua sponte* request for more information -- supports the Commission’s finding that ISO New England’s communications expenditures were directly connected to accomplishing its core responsibilities to develop and efficiently operate competitive markets and to ensure the reliability of the New England bulk electric power system.

For example, the affidavit by ISO New England witness Daryl Owen explained that, because native load protection and participant funding amendments “could have proved disruptive to the disaggregated, competitive wholesale markets of New England, [ISO New England] advocated on behalf of provisions to exempt [its] markets from coverage of the amendments.” R.2 Item 35 at Att. 3 P 12, JA 1736. Additionally, ISO New England witness H. Craig Leroy’s affidavit explained that:

While only a small part of [its] activities, [his company] on occasion facilitated the ISO’s discussions with the Connecticut General Assembly on specific legislation. In 2006, we worked with the ISO on two items of legislation. These bills proposed to: (i) require Connecticut transmission owners to withdraw from the ISO (S.B. 353); and (ii) allow Connecticut’s retail load-serving entities to own generating plants (H.B. 5525). Both issues would have direct and significant impacts on the ISO’s ability to ensure reliability and market efficiency. In both cases, the ISO focused its efforts on informing legislators on the effects such legislation would have.

R.2 Item 35 at Att. 5 P 12, JA 1752. Furthermore, ISO New England witness Carolyn O’Connor’s affidavit explained that ISO New England discussed its Locational Installed Capacity proposal⁶ with public officials “in order to address the crucially important issue of forecasted upcoming capacity shortfalls.” R.2 Item 35 at Att. 1 P 9, JA 1044; *see also* R.2 Item 35 at Brief p. 43, JA 1031 (“Regarding

⁶ Locational installed capacity proposals are intended to ensure that there is sufficient capacity to supply system peak load under all contingencies. *Devon Power LLC*, 107 FERC ¶ 61,240 at P 1 (2004).

[Locational Installed Capacity], the ISO first and foremost tried to convey [to] members of Congress the need to address the looming capacity problems in New England”).

Thus, the Commission reasonably found that all ISO New England communications expenditures were “undertaken in the collective interest of New England ratepayers.” 118 FERC at P 17, JA 2034 (basing decision on “the explanations and support provided by [ISO New England] in its . . . Brief, as well as the information and arguments filed by the other parties in this proceeding”); *see also* 117 FERC at P 49, JA 1975-77; 118 FERC at P 25, JA 2038; 120 FERC at P 39, JA 2094. All the expenditures were directly related to developing and efficiently operating competitive New England wholesale electricity markets and ensuring the reliability of the New England bulk electric power system that serve those ratepayers. 118 FERC at P 17, JA 2034-35; 117 FERC at PP 48-50, JA 1975-77; *see also Western Area Power Admin. v. FERC*, No. 04-1090, 2008 U.S. App. LEXIS 9528, at *36 (D.C. Cir. May 2, 2008) (“regional ISOs generate significant benefits for all customers of a transmission system”) (citing similar findings in *East Kentucky*, 489 F.3d at 1306-07, and *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369-71 (D.C. Cir. 2004)).

The Municipals also contend that the Commission’s findings were premised on the belief that ISO New England seeks to provide service at the lowest

reasonable cost. Br. at 28 (citing 118 FERC at P 21, JA 2036). While one sentence in the Commission's many orders mentions that notion, it is plainly not the premise of the Commission's findings. The orders repeatedly explain that ISO New England's communications expenditures were recoverable because they were directly related to developing and efficiently operating competitive New England wholesale electricity markets and ensuring the reliability of New England's bulk electric power system. *E.g.*, 118 FERC at PP 17, 21, JA 2034-35, 2036-37; 117 FERC at PP 48-50, JA 1975-77.

There also is no merit to the Municipals' claim that communications expenditures concerning complex matters such as Locational Installed Capacity, native load recovery, participant funding, and mandatory transmission owner withdrawal from ISO New England are not recoverable because those issues were contentious. Br. at 33-38; *see also* Br. at 29. The Commission reasonably found otherwise.

While it is impossible to achieve consensus among all market participants on certain issues because each market participant has its own particular interests, ISO New England is not a market participant. 118 FERC at PP 18, 25, JA 2035, 2038; 120 FERC at P 39, JA 2094. Moreover, "[u]nlike an investor-owned utility, [ISO New England] 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.” 118 FERC at P 21, JA 2036; *see also* 117 FERC at P 49, JA 1977 (ISO New England has “no shareholders. It is clear that the purpose of the contested communications is in the interest of market participants.”).

Rather, the Commission explained, “as system operator of New England’s markets, [ISO New England] is charged with the responsibility to ensure system reliability and to provide fair and competitive markets for all participants.” 118 FERC at P 18, JA 2035. ISO New England “has no financial interests and can derive no financial benefit from specific market outcomes or market design issues, and as such, [ISO New England]’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.” 118 FERC at P 21, JA 2036-37; *see also* 120 FERC at P 39, JA 2094; 117 FERC at P 49, JA 1975-77; 118 FERC at P 24, JA 2038. “[Locational Installed Capacity] and other specific examples highlighted by [the Municipals] all reflect [ISO New England]’s efforts to pursue positions before state and federal legislators and other public officials for the ultimate benefit of New England ratepayers.” 118 FERC at P 25, JA 2038; *see also* 117 FERC at P 49 and n.70, JA 1975-77.

Given ISO New England’s unique, regional perspective, broader than that of any single market participant, the Commission reasonably determined that ISO New England should not be precluded “from providing its positions 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 New England] as an independent informational source.” 118 FERC at P 18, JA 2035. ISO New England’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.” *Id.* Accordingly, it would be inappropriate to “hamstring [ISO New England]’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.” 118 FERC at P 25, JA 2038; *see also* 120 FERC at P 39, JA 2094 (same); Municipals Comments, R.2 Item 38 at 59, JA 1839 (recognizing that the non-profit ISO New England has no shareholders and, therefore, can cover its costs only by passing them through to customers).

2. The Commission’s Regulations Do Not Preclude ISO New England From Recovering Communications Expenditures From Ratepayers

The Municipals also complain that ISO New England “fielded information requests or held briefings” in “at least six contested proceedings before the FERC,” and that “lobbyist disclosure reports” indicated that “the Commission itself is the object of [ISO New England] lobbying activities.” Br. at 36-39. In accordance with the Commission’s regulations, however, the Commission found that ISO New England, “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.” 118 FERC at P 30, JA 2040.

Thus, FERC’s accounting regulations: (1) include in a utility’s operating expense account all expenses “incurred by the utility in connection with formal cases before regulatory commissions, or other regulatory bodies, or cases in which such body is a party,” 18 C.F.R. Part 101, Account No. 928, “Regulatory commission expenses” (cited 118 FERC at P 30, JA 2040); and (2) exclude from Account 426.4 “expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations.” 118 FERC at P 47, JA 2046 (quoting 18 C.F.R. Part 101, Account No. 426.4, “Expenditures for certain civic, political and related activities”). This is consistent with the Commission’s determination in Order No.

276, 30 FPC 1539, 1963 FPC LEXIS 337 at *11, which promulgated Account 426.4, that the costs of appearances before a regulatory agency, or of submitting comments in regulatory proceedings, should be included in operating expense accounts, and not in Account 426.4. 117 FERC at P 44, JA 1971-73.

Accordingly, the Commission's determination that expenditures for communications with FERC were recoverable does not involve a substantial evidence question as the Municipals assert, Br. at 39, but, rather, involves the Commission's interpretation of its own regulations and promulgating order. As the Commission's interpretation of its regulations and order was reasonable, it should be upheld. *See, e.g., Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (reviewing Court "defer[s] to an agency interpretation of its own regulation so long as it is not plainly erroneous or inconsistent with the regulation," and "defer[s] to FERC's interpretation of its orders so long as the interpretation is reasonable.") (internal quotation omitted)).

3. The Commission's Precedent Was Unsettled

The Municipals further assert that "the FERC's policy is – or more precisely was until this case – that the portion of expenses 'used for lobbying activities may not, under any circumstances, be included in the utility's cost of service.'" Br. at 30 (quoting *Delmarva Power & Light Co.*, 58 FERC ¶ 61,169 at 61,509, *order on reh'g*, 58 FERC ¶ 61,282, *further order on reh'g*, 59 FERC ¶ 61,169 (1992)); *see*

also Int. Br. at 5-6, 12 (same). To the contrary, the Commission candidly explained that its policy was not so settled:

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.

117 FERC at P 47, JA 1975; *see also id.* at PP 40-46, 51, JA 1969-75, 1977.

“Further,” the Commission added:

with the exception of a similar challenge to [ISO New England]’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.

117 FERC at P 47, JA 1975. *See Entergy Servs. Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (an agency changing its course “must provide ‘a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored’”) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

The difficulty of applying ratemaking precedent -- which was developed in

the context of traditional, for-profit utilities -- to a regional entity (the ISO) which lacks a profit motive, understandably led the Commission to order a supplemental hearing so that it could obtain additional information from the ISO. Likewise, the Commission reasonably exercised its broad remedial discretion in finding that, in these particular circumstances, it would not have ordered refunds even if ISO New England's communications expenditures had been found to be unrecoverable. 117 FERC at P 51, JA 1977 (noting "lack of clear guidance"); *see Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043-46 (D.C. Cir. 2000) (affirming agency's decision not to provide requested relief, even upon finding a regulatory violation, when applicable authority previously was unsettled).

4. The Municipals' Procedural Objections Have No Merit

There also is no merit to the Municipals' assertion that the purpose of the supplemental hearing changed from one intended to discern the "content and circumstances" of ISO New England's communications expenditures. Br. at 31-32. ISO New England's "brief contained affidavits and exhibits of [ISO New England] employees and consultants providing detailed information about the communications between [ISO New England] and public officials." 117 FERC at P 39, JA 1969. After "thoroughly examin[ing] the explanations and support provided by [ISO New England] in its . . . Brief, as well as the information and arguments filed by the other parties in this proceeding, and based on the record,"

the Commission concluded that ISO New England’s communications expenditures were recoverable, as they “were either educational and informational in nature, or, in instances in which they arguably could be construed as lobbying, were directly related to [ISO New England]’s existing or proposed core operations and undertaken in the collective interest of New England ratepayers.” 118 FERC at P 17, JA 2034; *see also* 117 FERC at P 48, JA 1975.

Thus, the Commission reasonably concluded that it need not determine the precise accounting classification for each ISO New England communications expenditure. 118 FERC at P 17, JA 2035. As the Commission explained:

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 New England]’s communication expenditures were highlighted and examined in this proceeding, [the Commission] did not attempt to classify any particular expenditure as informational, educational or lobbying.

Id.

Next, the Municipals challenge the hearing procedures themselves, first claiming that ISO New England’s filings consisted only of characterizations rather than evidence. Br. at 38, 40-41. The Municipals are incorrect. “The information provided by [ISO New England] included more than characterizations of its activities – [ISO New England] submitted specific documentation of its contacts with public officials, including numerous records of meetings (as well as explanations of the nature of the meetings),” as well as evidentiary support in the

form of affidavits. 118 FERC at P 29, JA 2039.

Moreover, the Municipals complain that the Commission did not hold a trial-type hearing, with the opportunity for discovery or cross-examination. Br. at 40; *see also* Intervenor Br. at 7 (same). A trial-type hearing was unnecessary in this case, however, as the Commission was able to resolve all disputed material facts on the basis of the written submissions in the record. 118 FERC at P 29, JA 2039 (citing, *e.g.*, *Lomak Petroleum Inc. v. FERC*, 206 F.3d 1193, 1199-1200 (D.C. Cir. 2000) (“This court has repeatedly held that the Commission is required to hold hearings only when the disputed issues may not be resolved through examination of written submissions.”) (internal quotation omitted)); *see also* 116 FERC at P 16, JA 985; 120 FERC at P 41, JA 2094-95. “A record [was] fully developed through the paper hearing process,” and the Municipals were “provided a meaningful opportunity for a hearing on the issues.” 118 FERC at P 29, JA 2040. In fact, the Commission even granted the Municipals a waiver of its rules so that the Municipals could file an additional responsive filing (R.2 Item 44, JA 1949). 117 FERC at PP 5, 7, JA 1958.

In short, the Commission’s determination that ISO New England’s 2006 communications expenditures were just and reasonable and properly recoverable from ratepayers was reasonable, supported by the record, and involved precisely the type of “complex industry analyses and difficult policy choices” to which this

Court is “particularly deferential.” *North Baja*, 483 F.3d at 821; *see also Exxon Mobil*, 430 F.3d at 1172; *Permian Basin*, 390 U.S. at 790. Accordingly, the Commission’s determination should be upheld.

C. The Challenged Orders Do Not Raise First Amendment Concerns

The Municipals argue that approving ISO New England’s proposed revenue requirement to recover the costs of its communications expenditures constitutes government action implicating the First Amendment. Br. at 41-44. As the Commission found, precedent establishes otherwise. 113 FERC at PP 18-19, JA 898-99; 114 FERC at PP 22-29, JA 940-43.

“In cases involving extensive [government] regulation of private activity, [the Supreme Court] ha[s] consistently held that ‘the mere fact that a business is subject to [government] regulation does not by itself convert its action into that of the [government]’” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974), and citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)), all cited, *e.g.*, 114 FERC at P 26, JA 942. “The complaining party must also show that ‘there is a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself.’” *Blum*, 457 U.S. at 1004 (quoting *Jackson*, 419 U.S. at 351); *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 548, 553 n.15 (D.C. Cir.

1975).

Thus, the government “can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].” *Blum*, 457 U.S. at 1004; *see also Am. Mfrs.*, 526 U.S. at 52; *Village of Bensenville v. FAA*, 457 F.3d 52, 62, 64 (D.C. Cir. 2006). “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to hold the [government] responsible for those initiatives” *Blum*, 457 U.S. at 1004-05; *see also Am. Mfrs.*, 526 U.S. at 52; *Bensenville*, 457 F.3d at 57 (“The Supreme Court has recognized that even in instances in which the federal government plays some role, constitutional standards do not attach to conduct by third parties in which the federal government merely acquiesces.”). In the area of government regulation of private utilities:

a utility may frequently be required by the . . . regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a . . . utility Commission of such a request from a regulated utility, where the Commission has not put its own weight on one side of the proposed practice by ordering it, does not transmute a practice initiated by a utility and approved by the Commission into “[government] action.” . . . [The utility]’s exercise of the choice allowed by . . . law where the initiative comes from it and not from the [government] does not make its action in doing so “[government] action”

Jackson, 419 U.S. at 357; *see also Bensenville*, 457 F.3d at 66 (same).

In accordance with this precedent, the Commission found that its “acceptance of [ISO New England]’s rates [was] not governmental action sufficient to trigger First Amendment protection. Allowing a regulated entity to recoup from ratepayers communicative costs does not convert these expenses into the Commission’s ordering this conduct, and does not constitute compelled speech.” 113 FERC at P 18, JA 898 (citing, *e.g.*, *Jackson*, 418 U.S. at 357; *Williams Natural Gas Co.*, 77 FERC ¶ 61,277 at 62,185 (1996), *order on reh’g*, 80 FERC ¶ 61,158 (1997)); *see also* 114 FERC at PP 27-28, JA 943.

Moreover, the Commission explained, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n of California*, 475 U.S. 1 (1986), cited *Municipals’ Br.* at 43, are inapposite.

Both *Hurley* and *Pacific Gas* present cases in which the relevant state entity took affirmative actions to dictate the message that a private entity was required to say. In this case, the Commission is not dictating anything; [ISO New England] will independently make decisions about whether to speak, and if it speaks, [ISO New England] will determine the content of its speech. There is no state action under the present circumstances because the Commission is not responsible for the content of [ISO New England]’s speech.

114 FERC at P 25, JA 942.

In any event, the Commission determined, even if the Commission’s approval of ISO New England’s rate proposal did constitute government action for First Amendment purposes, ISO New England still would be allowed to recover its

communications expenditures from all of its ratepayers. 113 FERC at P 19, JA 899; 114 FERC at P 29, JA 943. “Because [ISO New England] has demonstrated that its external affairs and corporate communications activities are directly related to its mission and objectives,” the Commission explained, “[ISO New England]’s actions are germane to its valid cooperative endeavors. Therefore, even if the Commission’s actions constituted governmental imposition of group membership (which they do not), the compelled subsidy would not implicate the First Amendment protections requested by the [Municipals].” 113 FERC at P 19, JA 899 (quoting *United States and Dep’t of Agriculture v. United Foods, Inc.*, 533 U.S. 405 (2001) (internal quotation omitted); citing *Glickman v. Wileman Bros.*, 521 U.S. 457 (1997); *Keller v. State Bar of California*, 496 U.S. 1 (1990)); 114 FERC at P 29, JA 943.

III. THE COMMISSION APPROPRIATELY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ESTABLISHING ISO NEW ENGLAND’S MONTHLY REPORTING REQUIREMENT

Not only did the Commission assure that the 2006 communications expenditures before it were properly recoverable, but the Commission also assured greater transparency of ISO New England’s communications expenditures in the future by directing ISO New England to “post on its website a monthly report concerning its ‘external affairs’ and ‘corporate communications.’” 117 FERC at P 52, JA 1978. The report is to “identify all meetings (including those conducted by

telephone) held in the past month by or on behalf of [ISO New England] 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.” *Id.*

“In order to ensure that [it would] compl[y] fully and in good faith with the posting requirement,” ISO New England sought clarification to confirm its reading of the order “as *requiring* posting of a monthly report of meetings held by [ISO New England] (and/or its representatives) with legislators and their staffs and other public officials regarding proposed legislation,” and “as *not requiring* reporting of educational/informational or education/information-gathering activities” R.2 Item 48 at 3-4, JA 1984-85; *see also* 118 FERC at P 34, JA 2041. ISO New England pointed out that: (1) “[t]his reading [was] consistent with the purpose of this proceeding and its focus on expenditures that could be used to influence legislation and, therefore, *might* need to be included in Account 426.4,” R.2 Item 48 at 4, JA 1985; and (2) it did “not believe that the Commission intended . . . to set up a posting requirement of such a broad scope that would encompass regulatory-related activities that . . . are clearly recoverable under longstanding precedent,” *id.* at 9, JA 1990.

The Commission clarified its order, explaining that “the purpose of the reporting requirement is to provide a greater level of transparency to stakeholders

and allow them to understand the nature of certain of [ISO New England]’s corporate communications and external affairs activities,” and that “[t]hese ‘certain’ activities obviously do not include the day-to-day contacts” involving ISO New England, *i.e.*, its ordinary regulatory and informational responsibilities. 120 FERC at P 43, JA 2095; *see also* 118 FERC at PP 38-40, JA 2043-44. The Commission found “these types of briefings, responses to inquiries and similar activities to be an integral part of [ISO New England]’s regulatory or public informational responsibilities and therefore, should not be fettered by additional reporting requirements.” 118 FERC at P 39, JA 2044.

The Municipals challenge the Commission’s chosen remedy, first contending that the Commission “narrowed the disclosure requirement” it originally had ordered. Br. at 45-48; *see also* Int. Br. at 14-16. “That [was] simply not the case.” 120 FERC at P 42, JA 2095. Interpreting its own order, the Commission found that the reporting requirement was never intended to apply to ISO New England’s regulatory and informational activities. *Id.* at P 43, JA 2095. The Commission’s reasonable interpretation of its own order, not the Municipals’ alternative interpretation, is due deference and should be upheld. *Entergy Services*, 375 F.3d at 1209.

The Municipals’ next claim -- that the Commission’s reporting remedy “sacrifices concerns about transparency,” Br. at 48 -- fails as well. The

Commission specifically found that its remedy “will provide parties with essential information that should allow them to pursue any concerns they may have with the legitimacy of [ISO New England]’s communications.” 118 FERC at P 26, JA 2038; *see also id.* at P 38, JA 2044 (“This information will provide interested stakeholders with an indication of the nature of [ISO New England]’s activities, and allow them to pursue, as they deem necessary, further action or information on these activities.”); *id.* at P 42, JA 2045 (same).

“FERC wields maximum discretion” in selecting a remedy. *Arizona*, 397 F.3d at 956; *see also Louisiana*, 522 F.3d at 393; *Connecticut Valley*, 208 F.3d at 1044. The remedy FERC selected to increase the transparency of ISO New England’s communications expenditures was reasonable and should be upheld.

CONCLUSION

For the foregoing reasons, the petitions for review in Docket Nos. 04-1335, 05-1210, and 05-1212 should be dismissed, and the petition for review in Docket No. 06-1144 should be denied.

Respectfully submitted,

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