

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

ISO New England Inc.

Docket Nos. ER06-94-001  
EL06-77-000

FURTHER ORDER ON REHEARING, GRANTING REHEARING IN PART,  
INSTITUTING INVESTIGATION, ESTABLISHING REFUND EFFECTIVE DATE  
AND PAPER HEARING, AND CONSOLIDATING DOCKETS

(Issued June 16, 2006)

1. On December 30, 2005, the Commission issued an order accepting for filing proposed tariff revisions submitted by ISO New England Inc. (ISO-NE) for the collection of its administrative costs for calendar year 2006.<sup>1</sup> On March 28, 2006, the Commission issued an order denying rehearing of the December 30 Order.<sup>2</sup> Upon further consideration of the evidence regarding purported “lobbying”-type activities conducted by ISO-NE, and the potential for ISO-NE’s “External Affairs” and “Corporate Communications” expenses to fund such activities, the Commission believes that there are pending issues of material fact that cannot be resolved on the record before us and that these issues are more appropriately addressed in the hearing procedures ordered below. In this order, the Commission *sua sponte* grants rehearing of the December 30 and March 28 Orders with respect to the “lobbying” issue. Further, we institute an investigation under section 206 of the Federal Power Act (FPA)<sup>3</sup> in Docket No. EL06-77-000, concerning the justness and reasonableness of ISO-NE’s external affairs and corporate communications expenses, establish a refund effective date, and establish a “paper” hearing. We also consolidate Docket No. EL06-77-000 with Docket No. ER06-94-001.

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<sup>1</sup> *ISO New England Inc.*, 113 FERC ¶ 61,341 (2005) (December 30 Order).

<sup>2</sup> *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.

<sup>3</sup> 16 U.S.C. § 824e (2000).

## **Background**

2. On October 31, 2005, ISO-NE filed revised tariff sheets to collect its administrative costs for calendar year 2006 (October 31 Filing). In its October 31 Filing, ISO-NE proposed changes to section IV.A of its Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3 (Tariff) to collect its administrative costs for calendar year 2006 (2006 Revenue Requirement). In the December 30 Order, the Commission accepted ISO-NE's October 31 Filing. The Commission found that the proposed rates were just and reasonable and accepted for filing ISO-NE's proposed tariff revisions, to become effective January 1, 2006, as requested. On March 28, 2006, the Commission denied requests for rehearing of the December 30 Order.

## **Discussion**

### **A. Concerns as to "Lobbying" Funded by External Affairs and Corporate Communications Expenses**

3. In response to ISO-NE's initial filing in Docket No. ER06-94-000, protesters claimed that ISO-NE's proposed rates fund activities that are not properly chargeable to ISO-NE's customers, including lobbying. In their protest, Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, and Tauton Municipal Lighting Plant (collectively, the MA Public Systems) provided public record lobbying reports for several entities that represent ISO-NE's interests before Congress as well as state legislative and regulatory officials. The MA Public Systems asked the Commission to set this issue for a full evidentiary hearing, permitting discovery as to the nature and content of ISO-NE's past and expected future contacts with state and federal officials.

4. In its answer to protests, ISO-NE maintained that its 2006 budget for external affairs activities is just and reasonable. ISO-NE argued that, consistent with Commission policy, it may properly recover in its rates specified external affairs activities to educate and inform stakeholders, including public officials.

5. In the December 30 Order, the Commission found that the types of expenses proposed by ISO-NE as Regulatory Affairs, Public Information, and Government Affairs activities in the 2006 Revenue Requirement may be recovered from ratepayers. The December 30 Order noted that, while recovery 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.”<sup>4</sup> The December 30 Order found that because “ISO-NE’s proposed expenditures are directly related to its mission, objectives and, therefore, operations, we find that the activities described by ISO-NE – legislative monitoring and educational and informational communications – are appropriately recovered from ratepayers.”<sup>5</sup>

6. In their petition for rehearing of the December 30 Order, the MA Public Systems argued that the Commission erred in accepting ISO-NE’s unverified characterizations of the nature and scope of its prior and future lobbying activities over their proffer of evidence. The MA Public Systems maintained that, at a minimum, there are questions of fact concerning the accuracy of ISO-NE’s descriptions of its external affairs activities and therefore, whether the recovery of these costs is inconsistent with the requirements of Account 426.4.<sup>6</sup> The MA Public Systems asked the Commission to convene a full evidentiary hearing to determine the types of “lobbying” contacts undertaken on behalf of ISO-NE, and whether such activities conform to the requirements of Account 426.4.

7. In the March 28 Order, the Commission denied the request for rehearing. The Commission found that there was sufficient evidence in the record to find that ISO-NE adequately demonstrated that the proposed expenses will be used to fund educational and informational activities that are in furtherance of ISO-NE’s core objectives.

## **B. Commission Determination**

8. On further consideration, we will grant, in part, the MA Public Systems’ request for rehearing on this issue. We recognize that it is unusual for the Commission, *sua sponte*, to grant rehearing of a final order. In rare cases, however, the Commission’s statutory power to modify an order “at any time” before the record of the proceeding is

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<sup>4</sup> December 30 Order at P 14 (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))).

<sup>5</sup> *Id.* at P 15.

<sup>6</sup> In support thereof, the MA Public Systems argued that 18 C.F.R. Part 101, Account No. 426.4 does not permit “expenditures for the purpose of influencing the decisions of public officials” to be passed through to customers.

filed in a court of appeals<sup>7</sup> should be applied. Upon further reflection of the evidence filed in this proceeding, we believe this is such a case. Our further analysis on rehearing indicates that certain portions of ISO-NE's proposed tariff revisions raise issues of material fact that cannot be resolved on the record before us, and therefore are more appropriately addressed in the paper hearing ordered below.

9. As stated in the December 30 and March 28 Orders, we recognize that there is no clear distinction between educational and informational activities and lobbying activities, and, upon further consideration of the evidence provided in this proceeding, we are unsure whether the types of activities proposed by ISO-NE cross that line. On further review, we find that the additional information provided in ISO-NE's answer does not completely resolve these concerns. Accordingly, we agree with the MA Public Systems that the evidence provided in its protest raises issues of material fact as to whether ISO-NE is properly accounting for such activities.

10. In its answer to the petitions for rehearing, ISO-NE argued that the MA Public Systems fail to seek rehearing of the Commission's approval of the appropriateness of the activities proposed by ISO-NE for 2006. We find that the evidence filed by the MA Public Systems, although reflective of past periods, is relevant to the types of activities that will be undertaken under the 2006 administrative cost filing, and therefore, relevant to this proceeding. Because these types of expenditures may be included in the "True-Up" Amounts (for at least the 2004 calendar year) and have an impact on the activities to

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<sup>7</sup> Section 313(a) of the FPA provides, in relevant part:

Until the record in a proceeding shall have been filed in a court of appeals, . . . the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.

16 U.S.C. § 8251(a) (2000). *Tennessee Gas Pipeline Company v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) ("Courts have held that [section 19 of the Natural Gas Act, 15 U.S.C. § 717r (2000) and its corollary provision under the FPA, section 313] confers upon the Commission the authority 'to reconsider and correct its order until the time for judicial review has expired. [This] power to correct an order remains with the Commission until such time as the record on appeal has been filed with a court of appeals or the time for filing a petition for judicial review has expired.'"); *see also Valero Interstate Transmission Company v. FERC*, 903 F.2d 364, 368 (5th Cir. 1990).

be funded by the 2006 Revenue Requirement, the Commission cannot accept the external affairs and corporate communications expenses as filed, and sets the matter for a paper hearing.

11. Accordingly, we grant rehearing in part, finding that the recovery of costs associated with ISO-NE's external affairs and corporate communications has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will set the issue of ISO-NE's external affairs and corporate communications expenses, as outlined herein, for a paper hearing as ordered below. Among the issues to be addressed are: (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<sup>8</sup>; and (2) whether any amounts for these activities are included in the True-Up Amounts proposed in the October 31 Filing. ISO-NE should provide information regarding any other matters it considers pertinent to the issue.

12. In its protest of the October 31 Filing, the MA Public Systems also argued 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 is not revisiting this issue, and does not set for hearing the issue of whether 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 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.<sup>9</sup>

13. Upon further consideration of the pleadings in Docket Nos. ER06-94-000 and ER06-94-001, we will institute an investigation, under section 206 of the FPA, into the justness and reasonableness of ISO-NE's external affairs and corporate communications expenses and will establish a refund effective date. Because this investigation will involve issues of material fact, we will set the matter for a paper hearing.

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<sup>8</sup> 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.

<sup>9</sup> December 30 Order at P 18; March 28 Order at P 22-28.

14. We conclude that a trial-type hearing is not necessary to resolve the matter that is the subject of the proceeding that we are instituting here.<sup>10</sup> Rather, we believe that a paper hearing will allow us to determine whether ISO-NE's external affairs and corporate communications expenses are just and reasonable. The Commission requires ISO-NE to file a response to the issues set forth for paper hearing by July 17, 2006. Parties may file comments by August 1, 2006. Reply comments may be filed by August 16, 2006. Upon completion of the paper hearing, the Commission expects to issue a final order as soon as possible thereafter.

15. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA, as recently amended by section 1285 of the Energy Policy Act of 2005,<sup>11</sup> requires the Commission to establish a refund effective date that is no earlier than the date of publication of notice of its initiation of the investigation, but no later than five months subsequent to that date. Consistent with our general policy,<sup>12</sup> we will set the refund effective date as the date of publication of notice of the initiation of the investigation.

16. Section 206(b), as amended, also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision.

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<sup>10</sup> The use of a "paper" hearing rather than a trial-type evidentiary hearing has been addressed in numerous cases. *See, e.g., Public Service Company of Indiana*, 49 FERC ¶ 61,346 (1989), *order on reh'g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion 349, 51 FERC ¶ 61,367, *order on reh'g*, Opinion 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed*, *Northern Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C. Cir. 1992). As the Commission noted in Opinion No. 349, 51 FERC at 62,218-19 and n.67, while the FPA and the case law require that the Commission provide the parties with a meaningful opportunity for a hearing, 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.

<sup>11</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 580-81 (2005).

<sup>12</sup> *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by 180 days from the date of publication of this order; if no final decision is rendered by the conclusion of that 180-day period, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision.

17. Finally, because there are common issues of law and fact, we will consolidate Docket No. EL06-77-000 with Docket No. ER06-94-001.

The Commission orders:

(A) The MA Public Systems' request for rehearing is hereby granted in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), the further proceedings directed in Ordering Paragraph (C) below shall be conducted concerning the justness and reasonableness of ISO-NE's corporate communications and external affairs expenses, as discussed in the body of this order.

(C) The Commission directs ISO-NE to file a brief on the issues set for paper hearing by July 17, 2006. Parties who wish to file comments on ISO-NE's brief must do so by August 1, 2006. Parties who wish to file reply comments must do so by August 16, 2006. A party's presentation should separately state the facts and arguments advanced by the party and include any and all exhibits, affidavits, and/or prepared testimony. All materials must be verified and subscribed as set forth in 18 C.F.R. § 385.2005 (2005).

(D) The Secretary is hereby directed to publish in the *Federal Register* a notice of the Commission's initiation of the proceeding ordered in ordering paragraph (B) above, under section 206 of the Federal Power Act, in Docket No. EL06-77-000.

(E) The refund effective date in Docket No. EL06-77-000, established pursuant to section 206(b) of the Federal Power Act, shall be the date of publication of notice of the initiation of Docket No. EL06-77-000.

(F) Docket Nos. ER06-94-001 and EL06-77-000 are hereby consolidated.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.