

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. ER06-94-002
EL06-77-001

ORDER ON MOTION FOR CLARIFICATION

(Issued July 10, 2006)

1. On June 16, 2006, the Commission issued a further order on rehearing that instituted an investigation, pursuant to section 206 of the Federal Power Act (FPA),¹ concerning the justness and reasonableness of ISO New England Inc.'s (ISO-NE) external affairs and corporate communications expenses.²
2. On June 26, 2006, Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant, and Massachusetts Municipal Wholesale Electric Company (collectively, the MA Public Systems), filed a motion for expedited clarification and motion for shortened time to respond, or, in the alternative, rehearing of the June 16 Order (Motion for Clarification). In this order, the Commission grants in part and denies in part the MA Public Systems' Motion for Clarification. The Commission will not order the discovery the MA Public Systems seek, but clarifies that ISO-NE must 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.

¹ 16 U.S.C. § 824e (2000).

² *ISO New England Inc.*, 115 FERC ¶ 61,332 (2006) (June 16 Order).

I. Background

3. On December 30, 2005, the Commission issued an order accepting for filing proposed tariff revisions submitted by ISO-NE for the collection of its administrative costs for calendar year 2006.³ On March 28, 2006, the Commission issued an order denying rehearing of the December 30 Order.⁴ Upon further consideration of the evidence regarding purported “lobbying”-type activities conducted by ISO-NE, and the potential for ISO-NE’s “External Affairs” and “Corporate Communications” expenses to fund such activities, on June 16, 2006, the Commission *sua sponte* granted rehearing of the December 30 and March 28 Orders with respect to the “lobbying” issue. In the June 16 Order, the Commission instituted an investigation under FPA section 206 in Docket No. EL06-77-000, concerning the justness and reasonableness of ISO-NE’s external affairs and corporate communications expenses, established a “paper hearing” on the issue, and established a refund effective date. The June 16 Order requires 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 *ISO New England Inc.*, 113 FERC ¶ 61,341 (2005) (December 30 Order).

⁴ *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.

⁵ June 16 Order at P 11 and n.8.

II. Motions for Intervention, Notice of the Filing and Responsive Pleadings

4. On June 26, 2006, the Commission issued a Notice Shortening Answer Period for responses to the MA Public Systems' Motion for Clarification, requiring answers by July 3, 2006.

5. ISO-NE filed a timely answer in opposition to the MA Public Systems' Motion for Clarification. The New England Conference of Public Utilities Commissioners, Inc. (NECPUC) filed a motion to intervene and answer supporting the MA Public Systems' Motion for Clarification in part.⁶ Richard Blumenthal, Attorney General for the State of Connecticut (CT Attorney General) filed an answer in support of the MA Public Systems' Motion for Clarification.⁷ The Vermont Department of Public Service and the Vermont Public Service Board (collectively, the VT Entities) filed a motion to intervene and notice of intervention (respectively), and answer in support of NECPUC's answer. Motions for intervention were also filed by the Connecticut Office of Consumer Counsel (CT Consumer Counsel), Central Maine Power Company (Central Maine), and National Grid USA (National Grid). The Alliance to Protect Nantucket Sound submitted comments in this proceeding, but did not file a motion to intervene.

III. Discussion

A. Procedural Matters

6. To the extent necessary to do so, the Commission grants the motions to intervene and notice of intervention of the CT Consumer Counsel, Central Maine, National Grid, and the VT Entities, given the entities' respective interests in this proceeding.

B. Motion for Clarification

1. The MA Public Systems' Motion for Clarification

7. In their Motion for Clarification,⁸ the MA Public Systems request that the Commission clarify the June 16 Order by requiring that ISO-NE include with its initial submission in the paper hearing all documents in its possession or control (including the

⁶ NECPUC is already a party to these proceedings. December 30 Order at P 4-5.

⁷ The CT Attorney General is already a party to these proceedings. December 30 Order at P 4-5.

⁸ The MA Public Systems ask their pleading be treated as a request for rehearing if the Commission refuses to grant the requested clarification.

possession or control of its outside law firms and lobbyists) that could be relevant to the instant proceeding. These documents would include, *inter alia*: (1) documents that constitute, memorialize, or describe communications between ISO-NE (or its representatives) and public officials (such as federal or state legislators, regulators, or their staff members); (2) documents created for such purposes; (3) documents that constitute, memorialize or describe communications between ISO-NE and its representatives regarding such contacts; (4) contracts, invoices, and billing records between ISO-NE and its representatives; or (5) any summary documents. The MA Public Systems argue that for the paper hearing to provide a meaningful opportunity to address the matters at issue, ISO-NE should be directed to provide with its initial submission any such materials that would “shed light on the ‘external affairs’ and ‘corporate communications’ activities under review.”⁹ In the alternative, the MA Public Systems ask the Commission to clarify that the MA Public Systems may request production of documents from ISO-NE pursuant to Rule 406 of the Commission’s Rules of Practice and Procedure.¹⁰ Under either alternative, the MA Public Systems also seek permission to take depositions of ISO-NE representatives under Rule 404,¹¹ including the ability to compel the attendance of non-participants for deposition by subpoena pursuant to Rule 409.¹²

8. The MA Public Systems argue that the requested relief is necessary given:

(1) the lengthy procedural history of the lobbying issue to date, (2) the Commission’s recognition that there is “no clear distinction between educational and informational activities and lobbying activities,” and its related uncertainty “whether the types of activities proposed by ISO-NE cross that line” ([June 16] Order at P 9), and (3) the unique control of access to relevant information enjoyed by ISO and its agents.¹³

9. The MA Public Systems maintain that, absent discovery, the instructions in the June 16 Order “are not sufficiently prescriptive as to the materials ISO-NE is required to provide for the record to prevent a repetition of the verbal legerdemain that led the

⁹ MA Public Systems Motion for Clarification at 5.

¹⁰ 18 C.F.R. § 485.406.

¹¹ 18 C.F.R. § 385.404.

¹² 18 C.F.R. § 385.409.

¹³ MA Public Systems Motion for Clarification at 6.

Commission to issue its [June 16 Order] in the first place.”¹⁴ The MA Public Systems maintain that “substantively equivalent characterizations placed in affidavit form ... are not substantial evidence, regardless of whether or not they are verified.”¹⁵ The MA Public Systems argue that the discovery they request is reasonable because “[a]bsent compulsory disclosure and/or discovery, the factual evidence that would be developed through the parties’ written submission would not be sufficient to provide a thorough record that would enable the Commission to make a reasoned determination of factual issues it has identified.”¹⁶

10. The MA Public Systems also argue that the Commission should not limit its inquiry to whether the amounts associated with past lobbying activities were impermissibly reflected in the 2006 True-Ups for past rate periods. The MA Public Systems argue that ISO-NE should be required to demonstrate that its ratepayer-funded 2006 activities to date have not included activities properly classified as lobbying.¹⁷

2. Answers

11. The CT Attorney General supports the MA Public Systems’ Motion for Clarification in its entirety.

12. NECPUC supports the MA Public Systems’ Motion for Clarification in part. NECPUC argues that it would not be “productive or in the public interest to engage in lengthy and expensive litigation over the ISO’s pre-2006 expenditures,” but supports a “more focused inquiry that will provide guidelines for the future about permissible expenditures and determine whether the \$2.3 million in ISO-NE’s 2006 budget for external affairs and corporate communications may legitimately be recovered from ratepayers.”¹⁸ NECPUC supports the MA Public Systems’ request that the Commission order ISO-NE to disclose whether it has retained or plans to retain lobbyists or outside entities to advocate for ISO-NE before federal or state legislators or regulators for the period covered by its 2006 budget and to produce any related documentation. NECPUC

¹⁴ *Id.* at 8.

¹⁵ *Id.* (citing *City of Centralia v. FERC*, 213 F.3d 742, 749 (D.C. Cir. 2000), *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996), and *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579 (10th Cir. 1994)).

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 11-12.

¹⁸ NECPUC Answer at 5.

also asks the Commission to require ISO-NE to identify the purpose for which each entity is employed, and the amount that ISO-NE expects to spend for each purpose. NECPUC also requests that ISO-NE provide a breakdown of the \$2.3 million in external affairs costs into the following categories: state legislative, federal legislative, FERC and state regulatory commissions, along with an itemization of the type and amount of the projected expenses for those categories. The VT Entities urge adoption of NECPUC's answer.

13. ISO-NE filed an answer in opposition to the MA Public Systems' Motion for Clarification and responding to NECPUC's answer. ISO-NE maintains that the Commission has "properly specified the scope of information necessary to make what is ultimately a policy judgment, and the ISO's filing will contain even more information than is required by that order."¹⁹ ISO-NE agrees with NECPUC that a "focused inquiry" is appropriate for these circumstances. ISO-NE states that, in its submission on July 17, it plans to provide the data requested by NECPUC, and more. ISO-NE notes that it will not be able to provide categorization of its communications in the manner specifically described by NECPUC because of the overlap in the "audiences" to which ISO-NE directs such activities. ISO-NE states, however, that "the activities at issue in these proceedings involve far less than the \$2.3 million budget, as much of this budget supports unchallenged public information activities such as handling press inquiries, issuing press releases, holding stakeholder forums, issuing periodic and special reports, and similar endeavors."²⁰

14. ISO-NE states that it will file with its brief evidence including: (1) "[a]ffidavits from additional current ISO consultants – beyond the Massachusetts, Rhode Island, Connecticut and Federal consultants at issue in the lobbying reports – and from ISO personnel describing their activities, together with documents illustrating the range of written communications"; (2) "[a] copy of the master contract used with each ISO consultant"; (3) "[c]opies of IRS forms submitted by the ISO as a non-profit Section 501(c)(3) entity"; and (4) "[a]mounts paid and payable under 2006 consulting contracts."²¹

15. ISO-NE also argues that the forms of discovery sought by the MA Public Systems are inconsistent with the Commission's precedent for paper hearing processes. ISO-NE maintains that the requests in MA Public Systems' Motion for Clarification are

¹⁹ ISO-NE Answer at 4.

²⁰ *Id.* at 5.

²¹ *Id.* at 7.

overbroad, seeking “open-ended discovery (including for periods not even protested previously by [the MA Public Systems]).”²² ISO-NE also argues that the discovery sought by the MA Public Systems is not “limited” and could not be completed during the procedural schedule in the June 16 Order. Accordingly, ISO-NE asks that the Commission deny the MA Public Systems’ Motion for Clarification.

3. Commission Determination

16. We deny the MA Public Systems’ Motion for Clarification as to discovery. The 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.²³ We believe that a traditional paper hearing is sufficient to establish a full record in this proceeding.²⁴ We find that the MA Public Systems have failed to raise any persuasive due process concerns as to the paper hearing process, and accordingly, we will not require the production of a burdensome number of documents or permit the deposition of witnesses they seek.

17. We agree with NECPUC and ISO-NE that a more focused inquiry is appropriate. At this stage of the investigation, we are satisfied that the types of information that ISO-NE states it intends to provide as part of its initial filing should provide sufficient detail to allow us to make a reasoned decision on the merits of ISO-NE’s administrative costs. However, the MA Public Systems may raise specific questions regarding ISO-NE’s initial filing during the course of this proceeding. Accordingly, we find that the discovery sought by the MA Public Systems is not necessary, and deny the Motion for Clarification as to this issue.

²² *Id.* at 3.

²³ *See, e.g., Sound Energy Solutions*, 107 FERC ¶ 61,263, at P 78 (2004), *reh’g denied*, 114 FERC ¶ 61,058, at P 47 (2006); *Transcontinental Gas Pipe Line Corporation*, 84 FERC ¶ 61,160, at 61,870 (1998), *reh’g denied*, 87 FERC ¶ 61,136 (1999); *Pine Needle LNG Company, LLC*, 77 FERC ¶ 61,229, at 61,915-16 (1996), *reh’g denied*, 78 FERC ¶ 61,241 (1997).

²⁴ As the courts have repeatedly upheld, 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. *See Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1199 (D.C. Cir. 2000) (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))); *see also Central Maine v. FERC*, 252 F.3d 34, at 46-47 (1st Cir. 2001).

18. However, we grant the request for clarification on the issue of how ISO-NE should justify its 2006 external affairs and corporate communicates activities. ISO-NE should 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.

The Commission orders:

The MA Public Systems' Motion for Clarification is 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.