

122 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER08-228-000

ORDER ACCEPTING TARIFF SHEET FOR FILING

(Issued January 15, 2008)

1. On November 16, 2007, ISO New England Inc. (ISO-NE)¹ submitted for filing a revised tariff sheet² amending Schedule 5 of its Transmission, Markets, and Services Tariff (Tariff)³ to specify the rate to be collected for calendar year 2008 to fund the New England States Committee on Electricity (NESCOE), the proposed Regional State Committee (RSC) for New England. Additionally, ISO-NE included NESCOE's five-year *pro forma* budget for calendar years 2008 through 2012 in its filing. For the reasons discussed below, we accept the revised tariff sheet for filing, and accept the *pro forma* budget for informational purposes.

I. Background

2. Schedule 5 states that ISO-NE will act as NESCOE's billing and collection agent by recovering NESCOE's costs through ISO-NE's wholesale Tariff. When ISO-NE submitted Schedule 5 for filing, it presented the Commission with a Term Sheet summarizing NESCOE's key features, including its anticipated budget.⁴ This Term

¹ The New England Governors' Conference, Inc. (Governors' Conference) joined in this filing.

² ISO New England Inc., FERC Electric Tariff No. 3, Section IV.A, First Revised Sheet No. 8560.

³ *Id.*, Original Sheets Nos. 8559-60.

⁴ ISO-NE submitted Schedule 5 for filing on two occasions. The Term Sheet was included with ISO-NE's second filing on August 31, 2007. That filing was joined by the New England Power Pool Participants Committee (NEPOOL), the Governors' Conference, and the Governors of Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Sheet was the product of extensive stakeholder discussions, undertaken at the Commission's suggestion,⁵ and approved by 81.59 percent of the vote at the September 2006 NEPOOL Participants Committee meeting.

3. The Commission accepted Schedule 5 for filing, but emphasized that NESCOE's actual budget would be subject to comment when it is submitted.⁶ The Commission stated that the budget "must consist of reasonable costs, and should be transparent and indicate clearly NESCOE's anticipated future costs, identified separately from those of ISO-NE," and that it "should only contain costs that are just, reasonable, and prudently incurred."⁷

II. Description of Filing

4. ISO-NE requests that the Commission authorize a rate of \$0.00354 per kilowatt of Monthly Network Load to fund NESCOE's 2008 budget of \$914,225.⁸ Additionally, ISO-NE has submitted NESCOE's proposed *pro forma* budget through 2012. According to this budget, NESCOE's expenses will increase to \$1.4 million in year two, \$1.8 million in year three, \$1.97 million in year four, and \$2.14 million in year five. ISO-NE states that the expenses in NESCOE's 2008 budget and its five-year *pro forma* budget are consistent with the Term Sheet, and notes that, pursuant to the Term Sheet, NESCOE's proposed budgets do not exceed \$1.4 million in its first two years or \$2.2 million in its third through fifth years.

5. ISO-NE explains that NESCOE will employ an Executive Director and two senior staff members in its first year, with total salary and benefits anticipated to cost approximately \$430,000, and seven total employees in its fifth year, with salary and benefits expected to cost approximately \$1.2 million. ISO-NE states that the five-year *pro forma* budget also includes an allotment for consulting and legal services at an average cost of \$350,000 per year, and an allotment for operational expenses, such as rent, utilities, and office equipment leases, at an average cost of \$200,000 per year.

6. ISO-NE presents the testimony of David O'Brien, Commissioner of the Vermont Department of Public Service to describe NESCOE's operations. Commissioner O'Brien

⁵ See *The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 FERC ¶ 61,049, at P 41 (2005).

⁶ *ISO New England Inc.*, 121 FERC ¶ 61,105, at P 51 (2007) (October Order).

⁷ *Id.*

⁸ ISO-NE notes that this is less than the \$930,000 budget reflected in the Term Sheet.

states that NESCOE will express its views on matters of resource adequacy and system planning and expansion. With respect to resource adequacy, Commissioner O'Brien states that NESCOE will recommend policies and comment on proposed rule and tariff changes related to resource adequacy, demand response and energy efficiency. With respect to system planning and expansion, Commissioner O'Brien states that NESCOE will recommend policies designed to ensure that resources are available to provide regional electric reliability and, where feasible and cost-effective, to eliminate persistent and costly congestion over transmission lines and enable interconnection of generation resources. Commissioner O'Brien claims that the ability to fund a full-time staff of professionals will allow the New England states to be engaged "at a more granular level" with ISO-NE and other market participants, and that staffing levels will be determined by resource availability.⁹ Commissioner O'Brien further states that NESCOE's proponents recognize the "need to show a value added contribution to system planning, market development and resource adequacy" in order to maintain long term budget support from other market participants.¹⁰

7. Finally, Commissioner O'Brien states that NESCOE's budget was developed using a five step process: (1) establish priorities; (2) define activities, goals and objectives; (3) determine resource requirements; (4) develop budget estimates for various functions; and (5) review to ensure that the priorities are met in a cost-effective way.¹¹

8. ISO-NE requests that the Commission waive its 60-day prior notice requirement¹² and make the proposed rate effective January 1, 2008. ISO-NE contends that good cause exists to grant waiver because ISO-NE delayed submitting NESCOE's 2008 budget until the budget had the benefit of final consideration at NEPOOL's November 15, 2007 meeting.

⁹ ISO-NE Filing, Exhibit 3 at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*); *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

III. Notice of Filing and Responsive Pleadings

9. Notice of ISO-NE's filing was published in the *Federal Register*,¹³ with comments and interventions due on or before December 7, 2007. The Northeast Utilities Service Company¹⁴ and the PSEG Power Companies¹⁵ filed timely motions to intervene. The Vermont Department of Public Service filed a notice of intervention. NEPOOL filed a timely motion to intervene and comments supporting the filing. The Eastern Massachusetts Consumer-Owned Systems (EMCOS)¹⁶ filed a timely motion to intervene and comments protesting the filing. ISO-NE and NEPOOL filed separate answers to the protest.¹⁷

A. Comments Supporting the Filing

10. NEPOOL states that the NESCOE budget was considered at two separate meetings of the NEPOOL Budget and Finance Subcommittee, where NESCOE's organizers "considered and thoughtfully responded to the suggestions and questions by members of the . . . Subcommittee."¹⁸ NEPOOL states that ultimately the Subcommittee had no objection to NESCOE's budget, and that the NEPOOL Participants Committee voted to support the budget at their November 15, 2007 meeting.

B. Comments Opposing the Filing

11. The EMCOS object to NESCOE's proposed rate on three grounds. First, the EMCOS claim that the rate is unjust and unreasonable because it is calibrated to fund a budget that far exceeds those of RSCs "covering significantly larger geographic footprints and significantly larger and more diverse groups of regulator interests."¹⁹ The

¹³ 72 Fed. Reg. 67,926-27 (2007).

¹⁴ On behalf of the Northeast Utilities Companies: The Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire.

¹⁵ PSEG Power LLC and PSEG Energy Resources & Trade LLC.

¹⁶ EMCOS consist of: Braintree Electric Light Department, Concord Municipal Light Plant, Hingham Municipal Lighting Plant, Reading Municipal Light Department, Taunton Municipal Lighting Plant, and Wellesley Municipal Light Plant.

¹⁷ The Governors' Conference did not join ISO-NE's answer.

¹⁸ NEPOOL Comments at 4.

¹⁹ EMCOS Protest at 7.

EMCOS contend that no other RSC is “a source of comparative justification” for the initial or projected size of NESCOE’s full-time staff, or for its budgetary set asides for outside consultants and legal counsel. The EMCOS contrast NESCOE’s “shadow bureaucracy” with the “more modest operations” of other RSCs, which, according to the EMCOS, generally recover enough to fund only an Executive Director’s salary and reimbursements for state regulators’ travel, meals, and lodging.²⁰ Moreover, the EMCOS argue that ISO-NE has made no attempt to show that NESCOE’s expenses are just and reasonable, no showing that NESCOE will benefit customers, and no showing that NESCOE will not duplicate the efforts of other regulatory bodies in the New England region.²¹ Additionally, the EMCOS claim that the Commission should discount the NEPOOL vote supporting the NESCOE budget because at least two-thirds of the affirmative votes came from NEPOOL Participants who will not bear NESCOE’s costs.

12. Second, the EMCOS argue that it is inappropriate to levy a charge for NESCOE through ISO-NE’s Tariff because the activities NESCOE will carry out are unrelated to the provision of utility service. The EMCOS claim that whatever communication, consultation, or advocacy NESCOE will engage in “represent[s] a class of matters that the Commission has consistently held are not subject to cost recovery through charges applicable under wholesale transmission tariffs, and should instead be the subject of cost recovery under state-supervised retail tariffs.”²² At a minimum, the EMCOS contend that the Commission “must carefully scrutinize” NESCOE’s activities to ensure that ISO-NE customers are not unfairly burdened with inappropriate costs.²³

13. Finally, the EMCOS argue that NESCOE’s proposed rate unconstitutionally compels parties who may disagree with NESCOE’s positions—such as the EMCOS—to subsidize NESCOE’s advocacy of those positions.²⁴ The EMCOS cite *United Foods* for the proposition that the First Amendment may prevent government from compelling individuals to pay subsidies for speech they oppose.²⁵

²⁰ *Id.*

²¹ *Id.* at 8.

²² *Id.* at 9.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 10 (citing *U.S. Department of Agriculture v. United Foods*, 533 U.S. 405 (2002) (*United Foods*)).

C. Answers

14. ISO-NE contends that Commission precedent neither specifies a limit on the amount a regional transmission organization (RTO) may recover to fund an RSC, nor limits recovery of RSC costs to an Executive Director's salary and reimbursements for state regulators' travel, meals, and lodging. Moreover, ISO-NE argues that the October Order expressly accepted the New England Conference of Public Utility Commissioners' (NECPUC) claim that NESCOE was needed to permit the New England States to more fully and effectively participate in regional discussions concerning the management, improvement, and further development of New England's electric system, and that NESCOE's 2008 budget is consistent with the Term Sheet, which "formed the predicate for the Commission's determination that funding NESCOE constituted a reasonable business expense [of ISO-NE]." ²⁶

15. ISO-NE further argues that because the Commission has determined that NESCOE is a reasonable business expense of ISO-NE, the EMCOS's argument that NESCOE's rate is unrelated to the provision of utility service is an impermissible collateral attack on Commission precedent. Similarly, ISO-NE contends that the Commission previously rejected the claim that funding an RSC through a wholesale tariff unconstitutionally requires dissenting parties to subsidize the RSC's speech.

16. NEPOOL describes the EMCOS's claim that the Commission should discount the November 15, 2007 NEPOOL vote as an attempt to minimize the vote's significance. NEPOOL states that NESCOE budget received 83.88 percent support, and that the entire End Use Sector and the entire Transmission Sector, which will pay for NESCOE, voted in favor of the budget and rate. ²⁷

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, ²⁸ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, ²⁹ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will

²⁶ ISO-NE Answer at 3.

²⁷ NEPOOL answer at 2-3.

²⁸ 18 C.F.R. § 385.214 (2007).

²⁹ *Id.* § 385.213(a)(2).

accept ISO-NE's and NEPOOL's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

19. We find that NESCOE's 2008 budget is reasonable and adequately supported. Consequently, we will accept the revised tariff sheet for filing.

20. The expenses in NESCOE's 2008 budget are reasonable and well-detailed. For example, NESCOE's budget includes approximately \$280,000 for three employees' salaries: \$120,000 for an Executive Director, \$100,000 for a second employee, and \$60,000 for a third employee. To these salaries are added 35 percent for employee benefits. NESCOE's budget also sets aside \$125,250 for operating costs, such as rent, utilities, equipment leasing, service fees and travel, and \$200,000 for technical consulting and legal services.³⁰ Finally, NESCOE's budget includes an amount for working capital and contingencies to arrive at a total of \$914,225.

21. While the EMCOS have objected to NESCOE's budget, they have not presented evidence challenging any of these expenditures. Rather, they have merely asserted that NESCOE's budget must be unjust and unreasonable because it is larger than the budgets of other RSCs. We disagree. The single fact that NESCOE's budget differs from the budgets of other RSCs does not make NESCOE's budget unreasonable. After reviewing NESCOE's budget, we find that NESCOE's proposed 2008 expenses are reasonable and adequately supported.

22. Moreover, we note that NESCOE's 2008 budget is consistent with the Term Sheet, which is the product of extensive stakeholder discussion, and has broad support among NEPOOL members. NESCOE's budget was developed through a five-step process of: (1) establishing priorities; (2) defining NESCOE's activities, goals and objectives; (3) determining resource requirements; (4) developing budget estimates for various functions; and (5) reviewing the budget to ensure that the priorities are met in a cost-effective way. This process has resulted in stakeholders defining NESCOE's mission to include recommending policies and commenting on proposed rule and tariff changes related to resource adequacy, demand response and energy efficiency, and system planning and expansion, and determining that NESCOE requires a full-time staff to undertake the necessary research, analysis, communication, consultation, and advocacy to effectively engage ISO-NE and other market participants.

23. We further agree with ISO-NE that Commission precedent neither places specific limits on the amount an RTO may recover to fund an RSC that is a reasonable business expense of the RTO, nor prohibits RTOs from recovering RSC costs other than an

³⁰ \$75,000 for technical consulting and \$125,000 for legal services.

Executive Director's salary and reimbursements for state regulators' travel, meals, and lodging. Rather, with respect to NESCOE, the Commission has stated that its budget "must consist of reasonable costs, and should be transparent and indicate clearly NESCOE's anticipated future costs, identified separately from those of ISO-NE," and that it "should only contain costs that are just, reasonable, and prudently incurred."³¹ We are satisfied that NESCOE's 2008 budget meets these requirements.

24. We also agree with ISO-NE's claim that the EMCOS's other two arguments are impermissible collateral attacks on Commission precedent. Contrary to the EMCOS's claim, the Commission has never held that an RSC that is a reasonable business expense cannot be funded through a wholesale tariff. In fact, in the October Order, the Commission expressly held that because NESCOE is a reasonable business expense of ISO-NE, its costs may be "properly collected under ISO-NE's Tariff."³² Similarly, in *PJM*, the Commission rejected the argument that funding an RSC through an RTO is unconstitutional:

We find PSEG's argument that the proposed funding mechanism constitutes an unconstitutional exercise of power over free speech, is misplaced. The [Organization of PJM States, Inc] funding mechanism is a legitimate business expense of PJM to help coordinate its necessary activities with the states. The Commission's establishment of a reasonable rate for a regulated entity is not in any way equivalent to the government compulsion of association or speech. The *United Foods* case . . . is inapposite. In that case, the Court found that a government requirement that businesses fund an advertising campaign violated the first amendment by compelling a party to subsidize speech with which it did not agree. But that case involved dues paid specifically to fund speech. In this case, PJM's is providing funding to make its job of working with the states easier and more efficient. The ability of any participant to express its views will not be constrained by this proposal.³³

This same reasoning applies here. Accordingly, we reject both of these arguments as impermissible collateral attacks on Commission precedent.

³¹ October Order, 121 FERC ¶ 61,105 at P 51.

³² *Id.* P 48. See also *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292, at P 33 (2005) (*PJM*) ("With respect to the argument that wholesale purchasers of PJM transmission should not be required to pay for the cost of a RSC, we disagree. The costs PJM seeks to recover are legitimate business expenses of an RTO.").

³³ *Id.* P 40 (internal citations omitted).

25. We will also accept NESCOE's five-year *pro forma* budget for informational purposes. We remind ISO-NE and NESCOE that our order today merely accepts the rate calibrated to meet the 2008 budget. ISO-NE and NESCOE are required to annually file their budgets for Commission approval. As we stated in the October Order, each of these budgets "should only contain costs that are just, reasonable, and prudently incurred" and will be subject to challenge when filed.³⁴ Thus, we reiterate that ISO-NE and NESCOE are under a continuing obligation to ensure that future budgets meet these requirements, which includes evaluating future staffing, consulting, and other needs.

26. Finally, we agree with ISO-NE that good cause exists to grant waiver of the Commission's 60-day notice requirement.³⁵ Accordingly, we grant waiver and accept the revised tariff sheet, effective January 1, 2008.

The Commission orders:

- (A) The Commission hereby accepts the revised tariff sheet for filing.
- (B) NESCOE's *pro forma* budget is hereby accepted for informational purposes.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ October Order, 121 FERC ¶ 61,105 at P 51.

³⁵ *Central Hudson*, 60 FERC ¶ 61,106 at 61,337.