

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket Nos. ER05-134-001  
ER05-134-002  
EL05-91-000

ORDER DENYING REHEARING, GRANTING CLARIFICATION, ACCEPTING  
COMPLIANCE FILING, INSTITUTING INVESTIGATION,  
ESTABLISHING REFUND EFFECTIVE DATE AND HEARING  
PROCEDURES, AND ESTABLISHING TECHNICAL CONFERENCE

(Issued April 19, 2005)

1. On December 30, 2004, the Commission issued an order accepting for filing and suspending in part proposed tariff revisions submitted by ISO New England Inc. (ISO-NE) for the collection of its administrative costs.<sup>1</sup> In this order, the Commission denies rehearing of the December 30 Order but grants clarification that the hearing ordered in the December 30 Order was established pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), and institutes an investigation and establishes a refund effective date. We will hold the hearing in abeyance while staff conducts a technical conference. The Commission also accepts for filing a compliance filing directed in the December 30 Order. This order benefits the New England energy market by permitting ISO-NE to continue to administer energy, ancillary services and other related markets in its control area, while ensuring that filed rates are just and reasonable.

**Background**

2. On November 1, 2004, ISO-NE submitted for filing revised tariff sheets to collect its administrative costs for calendar year 2005. ISO-NE proposed an overall revenue requirement of approximately \$125.1 million. It described its tariff's three core rate schedules, Schedule 1 for Scheduling Service, Schedule 2 for Energy Administration Service, and Schedule 3 for Reliability Administration Service. ISO-NE proposed to add

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<sup>1</sup> ISO New England Inc., 109 FERC ¶ 61,383 (2004) (December 30 Order).

two new schedules, Schedule 4 for collecting FERC Annual Charges and Schedule 5 for the collection of administrative expenses of a Regional State Committee.

3. ISO-NE explained that the current rate design for its Reliability Administration Service (RAS), in Schedule 3, allocates 100 percent of revenues based on customers' Real-Time Non-Coincident Peak Load Obligation. ISO-NE stated that it believed the existing Schedule 3 rate design is just and reasonable, but in response to the concerns of a participant, it was presenting in the filing an alternate rate design for the Commission's consideration.

4. In the December 30 Order, the Commission accepted the filing, but suspended for a nominal period the proposed rate design for Schedule 3 and established hearing procedures to address the proper rate design. The Commission accepted the continuation of the existing Schedule 3 rate design, but was concerned that it contains unduly discriminatory and excessive fees that serve as barriers to market participation and that it may frustrate competition between ISO-NE and NYISO and PJM. The Commission determined that, because the case involves a possible change in rate design, any changes that might result from the hearing would be applied on a prospective basis.

5. With respect to challenges to aspects of ISO-NE's legal expense budget, the Commission found that ISO-NE provided justifications for each of the line items at issue. The Commission accepted the proposed rate design for Schedules 2 and 4, but rejected proposed Schedule 5, finding it unnecessary and premature. The Commission directed ISO-NE to submit a compliance filing removing Schedule 5 from the tariff.

6. ISO-NE, the NEPOOL Participants Committee (NEPOOL), Massachusetts Municipalities,<sup>2</sup> and jointly Black Oak Energy, LLC and SESCO Enterprises LLC (Black Oak and SESCO) filed requests for rehearing of the December 30 Order. ISO-NE filed an answer to the Massachusetts Municipalities' rehearing request. ISO-NE, NEPOOL, and Massachusetts Municipalities challenge the Commission's rejection of Schedule 5, and/or the related discussion about how the costs at issue could be recovered. The Commission will address that issue at a later time. All other issues – ISO-NE's Legal and Lobbying Expenses, the Schedule 2 rate design, and the Schedule 3 rate design – are addressed herein. On January 28, 2005, ISO-NE tendered a compliance filing removing Schedule 5.

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<sup>2</sup> Massachusetts Municipalities include: Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant.

## **Notice of Filing**

7. Notice of ISO-NE's compliance filing was published in the *Federal Register*, 70 Fed. Reg. 6856 (2005), with interventions and comments due on or before February 18, 2005. No new interventions or comments were received.

## **Discussion**

### **Procedural Matters**

8. Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2004), prohibits an answer to a request for rehearing. Accordingly, we will reject ISO-NE's answer.

### **9. Legal and Lobbying Expenses**

A. Background In response to ISO-NE's initial filing in Docket No. ER05-134-000, the Massachusetts Municipalities objected to the lack of transparency surrounding proposed costs for certain legal expenses. Specifically, they asserted that there was insufficient information about the line items for legal costs relating to Government Affairs, Public Information, Public Relations, Regulatory Affairs, and miscellaneous expenses within the legal budget (collectively, Contested Legal Costs). For example, Massachusetts Municipalities questioned how ISO-NE avoids duplication of effort in the relationship between its outside counsel and in-house staff. Massachusetts Municipalities asserted that the Commission should condition acceptance ISO-NE's proposed rates on fuller disclosure of these expenses.

10. In its answer to the Massachusetts Municipalities' protest, ISO-NE provided specific justifications for each of the categories of costs and suggested that the additional detail sought may be obtained in the course of its annual budget process. Massachusetts Municipalities replied, clarifying that the relief they seek, *i.e.*, additional information on the activities on which ISO-NE spends customer funds, "is structural and ongoing, and is therefore ill-suited for resolution through an annual stakeholder process concerning the current year's ISO budget."<sup>3</sup> Massachusetts Municipalities also charged that ISO-NE's answer left unclear whether it had expenditures that the Commission generally does not allow to be recovered from public utility customers under the Commission's Uniform System of Accounts. Massachusetts Municipalities acknowledged that the issues they

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<sup>3</sup> Massachusetts Municipalities Answer, filed 12/21/04, at 3.

raised did not present grounds for rejecting ISO-NE's tariff, and that they did not seek such relief.

11. The December 30 Order accepted ISO-NE's justifications for each of the line items, holding that ISO-NE had provided "a full list of the functions that each expense will accomplish, and adequate justification for each of the expenses."<sup>4</sup> Regarding protester's concerns that New England customers are forced to pay for ISO-NE's lobbying expenses, the Commission found the concern unfounded, noting "that the Massachusetts Municipalities offer no specific assertions that ISO-NE is engaged in impermissible activities but merely speculate as to the nature of its legal work."<sup>5</sup> The Commission concluded that "[n]othing in ISO-NE's explanation leads us to conclude that its budget includes expenditures for any type of political activity that is typically not allowed rate recovery under the Commission's regulations."<sup>6</sup>

**B. Request for Rehearing**

12. Massachusetts Municipalities request rehearing regarding the Commission's acceptance of the Contested Legal Costs, asserting that the Commission's acceptance is arbitrary and capricious, contrary to law, and unsupported by substantial evidence. They argue that the additional information about the expenses presented in ISO-NE's answer was offered too late, is unpersuasive, and should not have been relied upon as dispositive. They also seek rehearing regarding the December 30 Order's dismissal of "concerns that the New England customers are forced to pay for ISO-NE's lobbying costs" based on ISO-NE's claim that it "does not attempt to influence public officials to take a specific action on specific legislation."<sup>7</sup>

13. The Massachusetts Municipals argue that the Commission's acceptance of the Contested Legal Costs is contrary to the Commission precedent regarding the unacceptability of political expenditures as proper expenses for regulatory purposes. According to the Massachusetts Municipals, there has been no inquiry into the actual content and specific purposes of the various legal activities that ISO-NE is proposing to

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<sup>4</sup> December 30 Order, 109 FERC ¶ 61,383 at P 24.

<sup>5</sup> *Id.* at P 25.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

fund by means of the Contested Legal Costs, and it is possible that some or all of these expenditures do not belong in utility rates. Noting that the Commission required ISO-NE to produce quarterly “subcomponent” data on expenditures related to the implementation of Standard Market Design (SMD) in another proceeding,<sup>8</sup> Massachusetts Municipalities argue that the Commission has not explained why it failed to require similar levels of accountability here.

14. The Massachusetts Municipals also claim that in the December 30 Order, the Commission attempted to shift the burden of proof contained in section 205 of the Federal Power Act from ISO-NE to the protesters. The Massachusetts Municipals argue that the Commission incorrectly disregarded the protesters’ arguments because the protesters offered no specific assertions that ISO-NE was engaging in impermissible activities, and instead, the Commission should have focused on ISO-NE’s attempted justification of the proposed rates.

15. Finally, the Massachusetts Municipals claim that the December 30 Order violates the First Amendment by forcing ratepayers in ISO-NE to subsidize the political speech of ISO-NE, regardless of whether or not such ratepayers are in agreement with ISO-NE. The Massachusetts Municipals argue that, by approving the Contested Legal Costs which include lobbying expenses for political influence, New England ratepayers are obliged to subsidize ISO-NE’s political speech. They conclude that, because being a customer of ISO-NE is not a matter of choice, having to pay “charges under ISO-NE’s administrative tariff implicates ‘the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.’”<sup>9</sup> As potential objectors must be given sufficient information to gauge the propriety of assessed fees, Massachusetts Municipalities urge that they are owed more detailed disclosure than the information ISO-NE presented in the course of this proceeding regarding its lobbying expenses.<sup>10</sup>

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<sup>8</sup> See *ISO New England Inc.*, 100 FERC ¶ 61,130 at P 12 (2002).

<sup>9</sup> Massachusetts Municipalities at 15, *quoting U.S. Dept. of Agriculture v. United Foods, Inc.*, 533 U.S. 405, 410 at 413 (2001).

<sup>10</sup> *Id.* at 16, *citing Chicago Teachers Union v. Hudson*, 475 U.S. 297, 306 (1986) (holding that objectors should be given sufficient information to gauge propriety of fee).

### C. Commission Determination

16. The Commission will deny the Massachusetts Municipals request for rehearing. Although we agree with the Massachusetts Municipalities that section 205 of the Federal Power Act initially places the burden on ISO-NE to justify its proposed rates, ISO-NE has adequately supported the nature of these costs, and in the December 30 Order, we accepted ISO-NE's justification. ISO-NE clearly explained the content of the Contested Legal Costs,<sup>11</sup> and the Commission found that none of the Contested Legal Costs constitutes lobbying, or the funding of political speech and influence.

17. The Massachusetts Municipals argue that ISO-NE has not been fully forthright in explaining the content of the Contested Legal Costs. The Massachusetts Municipals state that expenditures for the purpose of influencing the decisions of public officials often occur "away from the public eye," and may take the form of "private 'briefings' or similar encounters as to which it is virtually impossible to secure evidence."<sup>12</sup> We earlier found no indication that ISO-NE's budget included expenditures for lobbying activities; nothing in Massachusetts Municipalities' request for rehearing persuades us to the contrary. We do not agree, for example, that monitoring state legislative activity or informing regulatory agencies about ISO activities indicates an intent to lobby. The Massachusetts Municipalities' unsupported assertion that ISO-NE may be conducting clandestine lobbying activities, in direct contravention of ISO-NE's submitted support for the Contested Legal Costs, is insufficient to warrant rehearing.

18. We also find it unnecessary here to require the quarterly reporting we imposed for costs related to the implementation of SMD in New England and as Massachusetts Municipalities request here. In our order on ISO-NE's SMD expenditures, we noted that the ongoing reporting requirement would be valuable for the parties to make more informed decisions as SMD implementation proceeded.<sup>13</sup> In this proceeding, the parameters for recoverability of legal costs have been established in the Commission's

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<sup>11</sup> The December 30 Order contained a detailed summary of ISO-NE's explanations for all of the Contested Legal Costs. See December 30 Order at 21-23, 25-26.

<sup>12</sup> Massachusetts Municipalities at 12.

<sup>13</sup> *ISO New England Inc.*, 100 FERC ¶ 61,130 at P 12 (2002).

accounting regulations,<sup>14</sup> as Massachusetts Municipalities clearly describe in their pleading. Recovery of expenditures used to influence the decisions of public officials is generally not permitted, an outcome consistent with the First Amendment caselaw that Massachusetts Municipalities cite. We note that 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>15</sup> ISO-NE’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-NE’s operations and mission.

19. We believe that an additional reporting requirement would not add anything to the budget process. Further, ISO-NE’s accounting for actual legal expenses is subject to audit by the Commission pursuant to Federal Power Act section 301.<sup>16</sup> In addition, ISO-NE keeps New England Power Pool (NEPOOL) Participants – a group to which the Massachusetts Municipals belong – informed on its current-year expenditures through a presentation at every NEPOOL Budget and Finance Subcommittee meeting. The Massachusetts Municipals are therefore able to track expenditures by ISO-NE, and obtain the information they seek to gauge the propriety of ISO-NE’s actual expenditures. Further reporting should not be necessary.

## **Schedule 2**

### **A. Background**

20. In its November 1 Filing, ISO-NE proposed to maintain in place the existing Schedule 2 rate design for Energy Administration Service, which had been accepted

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<sup>14</sup> See 18 C.F.R. Part 101, Account No. 426.4, Expenditures for certain civic, political and related activities. (2004).

<sup>15</sup> *Id.*

<sup>16</sup> 16 U.S.C. § 825 (2000).

earlier in the year.<sup>17</sup> The accepted rate design featured two billing determinants, Transaction Units, and Volumetric Measures; there was a three-tiered rate design for the Transaction Unit portion which distinguished between virtual activity and physical activity. The three-tiered rate design provided lower transaction fees for virtual transactions than for physical ones. The Commission found that the allocation of ISO-NE's fixed costs resulting from the rate design was reasonable, given the benefits that virtual bidding can bring to the market as a whole and that virtual traders would pay at least some of the fixed costs.

21. ISO-NE also included a report on the effect of virtual transactions on New England markets, as directed in the March 2004 Order, intended to gauge whether virtual transactions have a positive effect on the energy markets and on day-ahead to real-time price convergence. According to ISO-NE's filing, the report suggested that virtual transactions had had a generally positive effect on the market price of risk and had increased price convergence, as well as liquidity and trading options. Massachusetts Municipalities protested, asserting that the three-tiered rate design is unduly discriminatory because virtual transactions in the day-ahead market are assessed Transaction Unit charges that are almost ten times less per transaction than the charges that are assessed for physical transactions. They contended that ISO-NE's filing failed to support the imposition of such an unduly discriminatory rate design.

22. The Commission accepted the three-tiered rate design in the December 30 Order, finding that there was no reason to change it. The Commission discussed the findings in ISO-NE's report, observing that virtual trading provides generators and load-serving entities with the flexibility to manage their day-ahead commitments at the hourly level and allows entities other than generators and load-serving entities to participate in the day-ahead market. The Commission concluded that "the three-tiered allocation is just and reasonable, given the benefits that virtual trading can bring to the marketplace as a whole, and the distinct possibility that a higher per-bid charge would reduce the bidding by virtual traders, with the resultant reallocation of uncollected costs to the other market participants."<sup>18</sup>

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<sup>17</sup> See *ISO New England Inc.*, 106 FERC ¶ 61,294 (March 2004 Order), *reh'g denied*, 108 FERC ¶ 61,138 (2004).

<sup>18</sup> December 30 Order, 109 FERC ¶ 61,383 at P 35.

**B. Request for Rehearing**

23. Massachusetts Municipalities seek rehearing of the December 30 Order's acceptance of the Schedule 2 rate design. According to the Massachusetts Municipals, the December 30 Order mistakenly places the burden of proving the unreasonableness of the Schedule 2 rate design on the protestors. The Massachusetts Municipals also claim that ISO-NE failed to justify use of the three-tiered rate design found in Schedule 2, especially since virtual traders should bear their fair share of ISO-NE's fixed costs, something they do not do under the accepted Schedule 2 rate design. Because participants engaging in physical activity are charged higher transaction unit rates than participants engaging in virtual activity, the Massachusetts Municipals argue that the Schedule 2 rate design is unduly discriminatory.

24. Massachusetts Municipalities also state that the costs being allocated through the transaction units charges are fixed costs, which cannot meaningfully be said to be caused by one type of transaction or another. Therefore, the Massachusetts Municipals assert that there is no factual support for the December 30 Order's conclusion that the three-tiered allocation is just and reasonable, based on the benefits that virtual trading can bring to the marketplace as a whole, and the distinct possibility that a higher per-bid charge would reduce the activity by virtual traders. The Massachusetts Municipals argue that no causal relationship has been established among: (1) the choice of a two-tiered or three-tiered transaction unit rate design, (2) differences in the level and type of virtual trading, and (3) price convergence between the day-ahead and real-time markets or other market benefits. Further, the Massachusetts Municipals argue that even if such causal relationships existed, that would not be sufficient to justify the degree of rate discrimination imposed by the Schedule 2 rate design.

25. Massachusetts Municipalities further contend that the Commission's actions appear more arbitrary and capricious when compared to its decision to suspend and set for hearing ISO-NE's proposed Schedule 3. They observe that the order did not explain why the Commission chose not to set Schedule 2 for hearing, even though they contend that the continuation of the Schedule 2 rate design raised at least as many material issues of fact as that of Schedule 3.

**C. Commission Determination**

26. We will deny the Massachusetts Municipals' request for rehearing on this matter. As we found in the March 2004 and December 30 Orders, the Schedule 2 rate design allows greater participation in the market by virtual traders, which provides a variety of

benefits to the New England market.<sup>19</sup> We have found market-wide benefits of virtual trading in other proceedings as well.<sup>20</sup> The Commission-accepted three-tiered rate design encourages virtual trading in the New England market, and has produced measured benefits for the entire market. Indeed, the burden of proof was squarely on ISO-NE, and as described in the December 30 Order, ISO-NE successfully supported the justness and reasonableness of the Schedule 2 rate design.

27. The Commission based its decision in the December 30 Order on ISO-NE's report on virtual transactions. The December 30 Order referred to ISO-NE's conclusions in the report on virtual transactions:

The New England benchmark model, a simulation of the New England market conducted by ISO-NE, was used to simulate the day-ahead prices that would be observed with and without virtual transactions. The simulation model results suggest that virtual transactions both improve day-ahead to real-time price convergence and reduce the market price of risk.<sup>[21]</sup>

28. The ISO-NE's report on virtual transactions – a requirement of the March 2004 Commission order approving the three-tiered rate design – provides evidence of increased virtual activity, and the various market-wide benefits derived from increases in virtual transactions. The December 30 Order also required ISO-NE to continue to monitor the effect of virtual transactions on the New England market, and to file another report in its 2006 budget filing as a further verification of the benefits of virtual trading on the New England market.

29. Virtual traders have indicated that, if they had to pay the same per-transaction rates as the physical traders, it would deter, if not preclude, their participation in the markets.<sup>22</sup> Given the benefits of virtual traders' participation and the fact that their market activity does not appreciably increase costs for other participants, the disparate cost allegation inherent in Schedule 2 is just and reasonable.

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<sup>19</sup> December 30 Order at P 34.

<sup>20</sup> *See generally* March 2004 Order, 106 FERC ¶ 61,294 (2004). *See also ISO New England Inc.*, 110 FERC ¶ 61,250 at P 30 (2005).

<sup>21</sup> December 30 Order at P 33.

<sup>22</sup> *See* March 2004 Order, 106 FERC ¶ 61,294 at P 5.

30. We agree with Massachusetts Municipalities' assertion that the fixed costs of providing Energy Administration Service cannot be said to be caused solely by one type of transaction. ISO-NE has acknowledged this fact.<sup>23</sup> ISO-NE explained that, because fixed costs are not susceptible to an allocation based on cost causation principles, another type of rate design is necessary. Thus, the nature of the costs involved here does not make a case against the three-tiered rate design.

31. Finally, the Commission has broad discretion regarding its decisions to set matters for hearing; the Commission need not conduct a hearing if any disputed issues may be adequately resolved on the written record.<sup>24</sup> Here, the Commission determined that it could decide on the merits based on the evidence before it. Disagreements over the interpretation of ISO-NE's report did not constitute disputed facts sufficient to mandate a hearing. Accordingly, we will deny rehearing.

### **Schedule 3**

#### **A. Background**

32. ISO-NE stated in its filing that it believed its existing Schedule 3 rate design was just and reasonable; however, it also submitted an alternative rate design for the Commission's consideration at the request of other parties. The alternative rate design bifurcated the RAS rate into both a demand charge – based on non-coincident peak load obligation, excluding the element of load correlated with exports – and an hourly rate component based on a dollar-per-megawatt charge, that is only imposed on export activity-related load. Protesters objected to the allocation of the existing RAS costs as unjust and unreasonable and supported the adoption of the alternative design, arguing that the current fee is excessive and that it eliminates almost all arbitrage opportunities between ISO/RTO markets. Black Oak and SESCO asserted that the fee serves as a prohibitive market barrier to those participants who engage in only one or a few physical transactions each month because the current RAS fee is applied without regard to the number of trades that are made in a month. Moreover, they pointed out that the current rate design for Schedule 3 is inconsistent with the design of the equivalent tariffs in both the PJM and New York ISO systems, creating a seams issue. Protesters argued that the alternative design would fairly resolve competitive problems and eliminate existing seams caused by the current RAS rate design. They claimed that the alternative RAS rate

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<sup>23</sup> *See id.* at P 15.

<sup>24</sup> *See Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

design would both substantially reduce the Schedule 3 costs per transaction and provide transaction price certainty.

33. In their comments, Massachusetts Municipalities argued that the Commission should reject the alternative RAS rate design and maintain the current one, claiming that the alternative design is an unsupported subsidy for financial marketers. They noted that the adoption of the alternative RAS rate design would result in an approximate \$2.8 million cost shift from export activity to other non-coincident peak load activity that is not export-related. Massachusetts Municipalities further asserted that New England load would be forced to pay for export activity that provides New England load with no demonstrated benefit, and it therefore would be an inversion of cost causation principles.

34. Black Oak and SESCO acknowledged the cost shift, but claimed it would be warranted for several reasons, including that the existing RAS rate imposes roughly 14 percent of the total annual budget on export transactions even though exports represent less than 2.4 percent of total loads. Black Oak and SESCO sought Commission protection from the NEPOOL participant majority. They also claimed that the alternative rate design did not pass NEPOOL Committee process because participants that are negatively and unfairly affected by the current RAS rate design for Schedule 3 are in the minority.

35. The Commission echoed the protesters' concerns in the December 30 Order, finding that they had raised material issues of fact regarding the rate design for Schedule 3, and accepted the continuation of the existing rate design subject to suspension and hearing. The Commission ruled that any changes resulting from the hearing will be applied on a prospective basis because the case involves a possible change in rate design.

#### **B. Requests for Rehearing**

36. On rehearing, Black Oak and SESCO argue that the Commission erred in setting the rate design for hearing because all the evidence needed to resolve the issue is already in the record, or of public record. They state that, although they appreciate the Commission's recognition of their concerns, they do not believe any material issues of fact necessary to decide the matter are presented, and due to cost considerations, they will not be able to participate in the hearing.<sup>25</sup> They contend that the rates for RAS service,

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<sup>25</sup> Black Oak and SESCO state that the cost of participating in the hearing could exceed their expected revenues from export transactions for one year or more.

which are on file, clearly show that the existing rate is discriminatory and excessive, noting that a participant that engages in even one physical trade can be charged the same price as a participant that engages in hundreds of trades a month. They also object to the Commission's decision to allow the existing rate to remain in effect pending the hearing, as the existing rate design will continue to frustrate electricity exports, will continue to prevent Black Oak and SESCO from engaging in export trades, and will allow a disparity in export charges between neighboring ISO systems to remain in effect for up to one year. Finally, they suggest that, to the extent the Commission needs additional facts, we should convene a one-day technical conference among all parties who have commented on the RAS rate. Black Oak and SESCO explain that this could expedite the matter and would be a less costly process allowing all affected parties to participate.

37. ISO-NE seeks clarification, or in the alternative, rehearing, regarding the statutory burden of proof that controls the hearing proceeding. It requests the Commission to clarify that it set for expedited hearing the current rate design pursuant to FPA section 206 and not section 205. ISO-NE reasons that it has the sole authority to change its own rate design pursuant to section 205 and that, because it made no such filing, any change imposed in this proceeding would have to meet the requirements of section 206. It notes that its November 1 Filing did not attempt to revise the current Schedule 3 rate design and contends that the burden of proof rests with the challenger to the rate design (*i.e.*, Black Oak and SESCO) to demonstrate that the existing rate design is unjust and unreasonable.

### **C. Commission Determination**

38. As an initial matter, we will clarify that we intended to set Schedule 3 for hearing pursuant to FPA section 206, rather than section 205. Schedule 3 was accepted and was in effect prior to the December 30 Order. Any party attempting to change Schedule 3 bears the burden of proving that continuing the existing, filed RAS rate design is unjust and unreasonable.

39. Rather than suspending the rate schedule, the December 30 Order should have instituted an investigation under section 206 of the FPA, into the continued justness and reasonableness of ISO-NE's previously-accepted Schedule 3, and established a refund effective date. Therefore, we will do so here. As discussed below, it was appropriate to set the matter for a trial-type evidentiary hearing.

40. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the *Federal Register*, and no later than five months

subsequent to the expiration of the 60-day period. In order to give maximum protection to consumers, and consistent with our precedent,<sup>26</sup> we will establish the refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of our initiation of the proceeding in Docket No. EL05-91-000 is published in the *Federal Register*.

41. Section 206 also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it failed to do so and shall state its best estimate of when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the presiding judge, has not, by that date:

(1) certified to the Commission a statement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of an initial decision.

42. While Black Oak and SESCO raised material issues of fact regarding Schedule 3, there was not sufficient evidence in the record to decide summarily in their favor. A determination of the relative benefits and disadvantages of the alternative rate design, including whether it would result in better matching of the costs and benefits associated with the RAS service, and whether it would ameliorate asserted seams issues between ISO/RTO markets is necessary to assess whether to adopt the alternative rate design. As such material issues of fact have not been determined, it would have been inappropriate to impose protesters' alternative rate design. Accordingly, we will deny rehearing.

43. Nevertheless, because of Black Oak and SESCO's inability to participate in the hearing, we will hold the hearing in abeyance while staff convenes a technical conference, as suggested in Black Oak and SESCO's request for rehearing. A technical conference will be an informal, off-the-record conference at which the parties and the staff can explore the issues raised in this proceeding, gain an understanding of the facts, and obtain additional information regarding the positions of the parties to facilitate an expedited resolution of the issues. Following the conference, the parties will have an opportunity to file written comments that will be included in the formal record of the

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<sup>26</sup> See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Electric Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

proceeding, and from which the Commission will determine the necessity for further evidentiary proceedings.

44. Finally, we reiterate our ruling from the December 30 Order that, because this case involves a possible change in rate design, any changes that may result from the hearing will be applied on a prospective basis.<sup>27</sup> While we are establishing a refund effective date, as required by FPA section 206(b), to the extent this proceeding results in any changes to the Schedule 3 rate design, such changes will become effective at the conclusion of the technical conference or hearing, as appropriate.

#### **Compliance Filing in Docket No. ER05-134-001**

45. The December 30 Order directed ISO-NE to remove Schedule 5 from the Tariff for Transmission Dispatch and Power Administration Services. ISO-NE's January 28, 2005 Filing complies with this directive, and no party has protested it. Accordingly, we will accept the compliance filing, subject to the outcome of the pending requests for rehearing concerning Schedule 5.

#### **The Commission orders:**

(A) The requests for rehearing of the issues discussed above are hereby denied, and clarification is hereby granted in part.

(B) ISO-NE's January 28, 2005 Compliance Filing is hereby accepted for filing, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory 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), an investigation is hereby instituted, in Docket No. EL05-91-000, concerning the continued justness and reasonableness of ISO-NE's previously-accepted Schedule 3, as discussed in the body of this order.

(D) The Secretary shall promptly 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. EL05-91-000.

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<sup>27</sup> See December 30 Order, 109 FERC ¶ 61,383 at P 43.

(E) The refund effective date in Docket No. EL05-91-000, established pursuant to section 206(b) of the Federal Power Act, shall be sixty (60) days following publication in the *Federal Register* of the notice ordered in Ordering Paragraph (C) above.

(F) The ongoing hearing is hereby suspended pending the completion of a technical conference.

(G) Commission Staff is hereby directed to convene a technical conference to further explore the Schedule 3 rate design as discussed above. Staff is directed to report the results of the technical conference to the Commission within 120 days of the date of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.