

120 FERC ¶ 61,122
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 Nos. ER06-94-005
EL06-77-004

ORDER REJECTING REHEARING

(Issued August 1, 2007)

1. On February 15, 2007,¹ the Commission issued an order granting in part and denying in part requests for rehearing and motions for clarification of its October 19, 2006² Order on paper hearing finding that ISO New England Inc.'s (ISO-NE) "external affairs" and "corporate communications" expenses, as set forth in its 2006 administrative cost filing are just and reasonable and properly recoverable from ratepayers. 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 request for rehearing of the February 15 Order. In this order, the Commission rejects the request for rehearing on the grounds that rehearing does not lie.

I. Background³

2. 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 2006.⁴ On March 28, 2006, the Commission issued an order

¹ *ISO New England Inc.*, 118 FERC ¶ 61,105 (2007) (February 15 Order).

² *ISO New England Inc.*, 117 FERC ¶ 61,070 (2006) (October 19 Order).

³ A more detailed history of this proceeding is set forth in the February 15 Order. See February 15 Order, 118 FERC ¶ 61,105 at P 2-10.

⁴ *ISO New England Inc.*, 113 FERC ¶ 61,341 (2005) (December 30 Order).

denying rehearing of the December 30 Order.⁵ 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, 2006,⁶ 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, as clarified on July 10, 2006,⁷ the Commission instituted an investigation under section 206 of the Federal Power Act (FPA) 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.

3. In the October 19 Order, the Commission found that, based on the information provided in ISO-NE’s original filing and its brief filed on July 17, 2006, as amended on July 20, 2006 (July 17 Brief), ISO-NE’s “external affairs” and “corporate communications” expenses as set forth in its administrative cost filing are just and reasonable and properly recoverable from ratepayers.

4. The February 15 Order denied rehearing and granted in part and denied in part requests for clarification of the October 19 Order. The Commission found that it had thoroughly examined the explanations and support provided by ISO-NE in its July 17 Brief, as well as the information and arguments filed by the other parties in this proceeding, and based on the record, concluded that ISO-NE’s communications were either educational and informational in nature, or, in instances in which they arguably could be construed as lobbying, were directly related to ISO-NE’s existing or proposed core operations and undertaken in the collective interest of New England ratepayers. The Commission affirmed that all of the communication expenditures examined in this proceeding were consistent with ISO-NE’s responsibility to develop, oversee and fairly administer New England’s wholesale electricity marketplace and ensure reliable operation of New England’s bulk electric power system and, therefore, all of the expenditures were recoverable from ISO-NE’s ratepayers.⁸

⁵ *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.

⁶ *ISO New England Inc.*, 115 FERC ¶ 61,332 (2006) (June 16 Order).

⁷ *ISO New England Inc.*, 116 FERC ¶ 61,025 (2006) (July 10 Order).

⁸ February 15 Order, 118 FERC ¶ 61,105 at P 17.

5. The Commission also affirmed its conclusion that “there are similar interests between ISO-NE and its ratepayers, unlike the relationship between an investor-owned utility and its ratepayers” finding that ISO-NE’s activities, as an independent entity, should be in the collective interest of its members and New England ratepayers.⁹ With respect to concerns that ISO-NE advocated positions that were at times directly contrary to the positions taken by certain New England market participants, the Commission found that ISO-NE should not be precluded “from providing its position on issues affecting the New England electricity markets to various officials, including legislators and those in the executive branches of government, who need, and often seek out, ISO-NE as an independent informational resource.”¹⁰

6. The Commission also found that it would be infeasible to exempt dissenting ratepayers from paying for ISO-NE’s communications with public officials in furtherance of RTO objectives because: (1) “the task of collecting opinions from all market participants, parsing them into categories based on whether or not each market participant is of the same opinion as ISO-NE on a controversial issue, and then doling out charges to those market participants that consent with ISO-NE’s opinion and exempting dissenting market participants would be administratively burdensome, if not impossible;” and (2) “the accuracy of these calculations would be extremely difficult to ensure given the large number of ambivalent opinions of market participants.”¹¹

7. Moreover, the Commission denied requests for rehearing regarding expenditures that ISO-NE had classified as “lobbying” on its Form 990 Return, finding that: (1) the designation of expenditures for tax purposes as “lobbying” expenditures does not preclude recovery of those costs from ratepayers; and (2) ISO-NE has fully justified all expenditures in its “corporate communications” and “external affairs” accounts, including the amount classified as “lobbying” on its 2006 Form 990 Return. The Commission found that “[t]here is nothing in the record that would indicate that ISO-NE did not act in good faith in carrying out its responsibilities, including any of the communications about which MA Public Systems complains.”¹² The Commission clarified, however, that its “requirement for ISO-NE to post information concerning certain of its communications

⁹ *Id.* P 21.

¹⁰ *Id.* P 18.

¹¹ *Id.* P 19-20.

¹² *Id.* P 25.

with public officials will provide parties with essential information that should allow them to pursue any concerns they may have with the legitimacy of ISO-NE's communications."¹³

8. Further, the Commission rejected arguments that the paper hearing process was inadequate, finding that the information provided by ISO-NE in the July 17 Brief was sufficient to supplement the record and allow us to make a decision on the merits. The Commission found that a record has been fully developed through the paper hearing process and that the MA Public Systems have been provided a meaningful opportunity for a hearing on these issues.

9. The Commission also disagreed with the MA Public Systems' characterization of ISO-NE's contacts with the Commission, finding that "ISO-NE's contacts with the Commission are strictly regulatory in nature; it is appropriate for ISO-NE as a public utility to recover costs of regulatory contacts."¹⁴

10. The Commission also reiterated its findings in the June 16 Order 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.¹⁵

11. In addition, the Commission granted clarification about the posting requirement imposed in the October 19 Order. The Commission reiterated that "the purpose of the posting requirement is to provide greater transparency to stakeholders and allow them to achieve a clear understanding of the nature of certain of ISO-NE's 'external affairs' and 'corporate communications' activities."¹⁶ The Commission clarified that the types of specific contacts for which ISO-NE sought clarification¹⁷ need not be included in the

¹³ *Id.* P 26.

¹⁴ *Id.* P 30.

¹⁵ *Id.* P 33 (*citing* June 16 Order, 115 FERC ¶ 61,332 at P 12 (*citing* December 30 Order, 113 FERC ¶ 61,341 at P 18; March 28 Order, 114 FERC ¶ 61,315 at P 22-28)).

¹⁶ *Id.* P 38.

¹⁷ These types of contacts include:

(a) "pre-filing meetings with the Commission;" (b) "questions from Commission staff about uncontested [ISO-NE] filings;" (c) "inquiries to or from executive branch officials about the status of regulatory proceedings

(continued...)

monthly report because “these types of briefings, responses to inquiries and similar activities [are] an integral part of ISO-NE’s regulatory or public informational responsibilities and therefore, should not be fettered by additional reporting requirements.”¹⁸ The Commission also agreed with ISO-NE that “it is not necessary to post reports or interactions with the press and general public, because that the contents of those communications are already publicly available” and “ISO-NE’s on-going legislative and regulatory monitoring activities that do not involve meetings with public officials need not be included.”¹⁹ The Commission disagreed, however, with ISO-NE that the Commission should make a distinction between “corporate communications” and “external affairs” activities for the purposes of the reporting requirement.

12. The Commission declined to grant the MA Public Systems’ request that the Commission require ISO-NE to post all documents prepared for, distributed, or received by ISO-NE at each meeting, finding that “the intention of the reporting requirement is to provide stakeholders information regarding the nature of activities undertaken by ISO-NE and, therefore, the opportunity to seek further information from ISO-NE.”²⁰ The

or [ISO-NE] activities such as system planning;” (d) “undertaking settlement discussions with executive branch parties to ongoing litigated proceedings;” (e) “providing information to state and federal, executive and legislative officials regarding the status of New England’s bulk-power system, the [ISO-NE]-operated markets, and any operational forecasts;” (f) “briefing and responding to questions of governors and other executive branch officials regarding upcoming reliability concerns in their states, and related seasonal capacity outlooks;” and (g) “elucidating the likelihood of capacity deficiencies in extreme weather, the operating procedures used to manage capacity deficiencies including controlled outages that could occur as a last resort, and the importance of consumer conservation including the most effective time to request consumer conservation.”

Id. P 39.

¹⁸ *Id.*

¹⁹ *Id.* P 40-41.

²⁰ *Id.* P 42.

Commission also granted clarification that “[t]o the extent . . . that relevant communications are undertaken by or on behalf of ISO-NE and are not classified in these accounts, . . . ISO-NE is still required to include that information in its monthly report.”²¹

13. Finally, the Commission clarified ISO-NE’s Account 426.4-related obligations. The Commission confirmed that Account 426.4 does not address recoverability, noting that “[t]he designation in Account 426.4 simply means that those costs are not presumed to be recoverable, shifting the burden on the filing entity to demonstrate why such costs should be recoverable.”²² The Commission also granted clarification that “if ISO-NE is undertaking activities that ‘are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations’ (the exception in Account 426.4) then Account 426.4 does not apply and ISO-NE is correct that it need not include them in Account 426.4.”²³

14. On March 19, 2007, the MA Public Systems filed a request for rehearing of the February 15 Order.

II. Discussion

A. The MA Public Systems’ Request for Rehearing

15. The MA Public Systems raise several arguments in their request for rehearing. First, the MA Public Systems argue that the Commission continues to fail to meet the requirements of reasoned decision-making in the February 15 Order.

16. The MA Public Systems argue that the Commission erred in concluding that the interests advocated by ISO-NE in its non-public advocacy contacts with state and federal legislative and executive branch personnel are in line with those of ISO-NE’s customers. The MA Public Systems argue that “ISO-NE may well have no direct financial motive to obtain a profit from its operations, but that does not rule out other motives . . . for acting on behalf of its own institutional interests and adversely to the interests of its customers.”²⁴ The MA Public Systems cite the recent decision of the Court of Appeals

²¹ *Id.* P 43.

²² *Id.* P 46.

²³ *Id.* P 47.

²⁴ MA Public Systems Request for Rehearing at 6.

for the D.C. Circuit, *NStar Electric & Gas Corp. v. FERC*, for the proposition that the court “squarely rejected the notion that the Commission may rely on [ISO-NE] as a proxy representing customer interests.”²⁵

17. The MA Public Systems also argue that the Commission erred in finding that “it is infeasible to protect the rights of dissenting market participants from financial exactions to support ISO-NE positions with which they disagree.” The MA Public Systems argue that “[t]he same protections are regularly required in other regulatory contexts in which their administration involves significantly greater complexity than is present in ISO-NE’s setting, and have not been withheld in those contexts based on claims of administrative difficulty.”²⁶

18. Second, the MA Public Systems argue that the findings in the February 15 Order are unsupported by substantial evidence in the record. The MA Public Systems argue that the Commission erred in finding that ISO-NE has fully justified all expenditures in its corporate communications and external affairs accounts, arguing that “[t]he record before the Commission provides no information as to what rationale ISO-NE used to isolate a portion of its ‘corporate communication’ and ‘external affairs’ budgets as admitted lobbying expenses.”²⁷

19. The MA Public Systems also argue that the Commission’s finding that the specific examples of lobbying activities that had been identified by the MA Public Systems “all reflect ISO-NE’s efforts to pursue positions before state and federal legislators and other public officials for the ultimate benefit of ratepayers” is not supported by the record. The MA Public Systems maintain that this finding is predicated on the “unsupported and counterfactual” assumption that “ISO-NE . . . seeks only to provide reliable service at the lowest reasonable cost” and on a characterization lacking any discussion or analysis of the relevant ISO-NE communications.²⁸

²⁵ *Id.* at 7 (citing *NStar Electric & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007) (*NStar*)).

²⁶ *Id.* (citing *Penrod v. NLRB*, 203 F.3d 41, 45-48 (D.C. Cir. 2000)).

²⁷ *Id.* at 8.

²⁸ *Id.* at 9 (citing February 15 Order, 118 FERC ¶ 61,105 at P 21, 25).

20. The MA Public Systems further argue that the Commission's finding that ISO-NE's contacts with the Commission are strictly regulatory in nature is unsupported by the record.

21. Third, the MA Public Systems argue the fact finding procedures adopted in this proceeding were inadequate. The MA Public Systems argue that the Commission erred in concluding that the paper hearing process is sufficient to give the MA Public Systems a meaningful opportunity for a hearing and to develop a record of supporting recovery of ISO-NE's costs. The MA Public Systems argue that the Commission's reluctance to require ISO-NE to turn over all relevant information that is solely within its control and provide for discovery by the MA Public Systems has "fatally prejudiced the ability of [the MA Public Systems] and other parties to this proceeding to examine fully the nature and content of ISO-NE's communications with state and federal legislative and executive branch personnel."²⁹

22. Fourth, the MA Public Systems argue that the Commission abused its discretion and acted arbitrarily in limiting the posting requirement set forth in the October 19 Order. The MA Public Systems argue that the Commission erred in granting ISO-NE's motion for clarification. The MA Public Systems argue that the Commission's clarifications "effectively eviscerate" the reporting requirement established by the Commission in the October 19 Order.

23. The MA Public Systems argue that the Commission's finding that the types of activities highlighted in ISO-NE's motion for clarification to be an integral part of ISO-NE's regulatory or public informational responsibilities is unsupported. The MA Public Systems argue that this finding is in conflict with the original, broader posting requirement of the October 19 Order. The MA Public Systems argue that "given the lack of clear guidelines, it would not be reasonable to rely on [ISO-NE] to make judgment calls about how to characterize its activities and thus determine which contacts and communications would trigger narrow reporting requirements."³⁰ They also argue that "a broad reporting requirement would enable parties and the Commission to make their own informed judgments about how to characterize [ISO-NE's] activities in rates . . ."³¹ The

²⁹ *Id.* at 10.

³⁰ *Id.* at 13.

³¹ *Id.*

MA Public Systems argue that the February 15 Order assumes, without justification, “that the dividing lines are ‘clearly delineated,’ and that significant categories of communications can be excised from the scope of the obligation.”³²

24. Finally, the MA Public Systems also argue that the Commission erred in rejecting the MA Public Systems’ answer to ISO-NE’s motion for clarification as an unauthorized request for rehearing. The MA Public Systems argue that because ISO-NE’s filing was a “motion” and not a “request for rehearing,” its filing was not an unauthorized answer to a request for rehearing and, therefore, should be considered.

25. In their answer to ISO-NE’s motion for clarification, included as an attachment to their request for rehearing, the MA Public Systems argue that ISO-NE’s request for clarification “substantially narrowed” the reporting condition and is an “attempt[] to rewrite both the course of this proceeding and the scope, intent, and fundamental significance of the relief afforded ratepayers in Paragraph 52 [of the October 19 Order].”³³ The MA Public Systems maintain that the reporting condition, as set forth in the October 19 Order, was a “two-part, going-forward mechanism” focused on transparency of ISO-NE’s activities.³⁴ The MA Public Systems argue that the first part of this requirement is a disclosure by ISO-NE of all meetings with public officials, regardless of whether such actions fall within the scope of Account 426.4, arguing that “[t]he Commission saw the need for ratepayers to have more transparent access to data concerning [ISO-NE’s] activities, and addressed that need by conditioning recovery of the challenged expenses in rates through, *inter alia*, the imposition upon [ISO-NE] of a disclosure obligation.”³⁵ The MA Public Systems argue that the second part of this requirement “focuses more specifically on future rate recovery, and directs [ISO-NE] to support, in its next budget filing, those of its disclosed activities that are ‘properly included in Account 426.4.’”³⁶ The MA Public Systems contend that the plain text of the

³² *Id.*

³³ MA Public Systems December 5, 2006 Response at 2. In their pleading, the MA Public Systems do approve of one aspect of ISO-NE’s motion for clarification. The MA Public Systems agree with ISO-NE’s request that the reporting condition be clarified to ensure that ISO-NE is not required to disclose communications made in the course of litigation. *Id.* at 11-12.

³⁴ *Id.* at 3.

³⁵ *Id.* at 4-5.

³⁶ *Id.* at 5.

reporting requirement “in no way limits the reporting obligation to meetings with ‘public officials regarding proposed legislation,’ and [ISO-NE’s] Motion [for Clarification] provides no basis for so construing the language of the October 19th Order.”³⁷

26. The MA Public Systems also maintain that ISO-NE’s motion for clarification erroneously focused on ISO-NE’s communications with public officials regarding pending legislation, and argue that ISO-NE’s clarification would allow it to avoid reporting:

(a) [ISO-NE] contacts with legislators, legislative staff, or other public officials about the views they might express to this Commission; (b) [ISO-NE] contacts with legislators, legislative staff, or other public officials about potential legislation that had not yet been proposed; (c) [ISO-NE] contacts with this Commission or other public officials to obtain support for proposals [ISO-NE] has not yet filed; and (d) other contacts, not involving pending legislation, that still involve [ISO-NE’s] use of ratepayer-provided funds to advocate viewpoints that some or all ratepayers may consider to be contrary to their interests.³⁸

27. The MA Public Systems also argue that the “lobbying” communications undertaken by ISO-NE “extend[] far beyond talking to legislators and other public officials about pending bills.”³⁹ In particular, the MA Public Systems reiterate its concerns that the paper hearing process provided little information about ISO-NE’s contacts with this Commission.

28. Further, the MA Public Systems argue that ISO-NE’s motion for clarification inappropriately focuses the scope of the disclosure condition on the requirements of Account 426.4. The MA Public Systems argue that “the Paragraph 52 reporting condition goes beyond the requirement that [ISO-NE] support rate recovery of amounts included in Account 426.4” and “the exception for ‘appearances before regulatory or other governmental bodies’ clearly denotes public appearances in official proceedings and should not be extended to encompass closed-door, off-the-record meetings.”⁴⁰

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 10.

29. Finally, the MA Public Systems disagree with ISO-NE's characterization of the disclosure requirement as impracticable, arguing that "[t]he apparently pervasive nature of [ISO-NE's] interactions with public officials makes plain why compliance with the Commission's condition is important, not why it should be jettisoned" and that ISO-NE "should be directed to make all good faith efforts to comply with this obligation."⁴¹ The MA Public Systems also disagree with ISO-NE's complaint that the reporting obligation is beyond those imposed on other jurisdictional public utilities, arguing that "[i]t was precisely the *difference* between [ISO-NE] and other jurisdictional public utilities that the Commission relied upon in permitting [ISO-NE] to fund through rates activities that other public utilities' shareholders would fund."⁴²

B. Commission Determination

30. We will reject the MA Public Systems' rehearing request on the grounds that rehearing does not lie. The Commission does not allow rehearing of an order denying rehearing.⁴³ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing unless presumably that response were word-for-word identical to what the Commission earlier said.⁴⁴ Litigation before the Commission cannot be allowed to drag on indefinitely – at some point it must end – and so the Commission does not allow parties

⁴¹ *Id.* at 11.

⁴² *Id.* at 10 (emphasis in original).

⁴³ *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265, at P 8 (2006) (citing *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088 (1993)).

⁴⁴ See, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end").

to seek rehearing of an order denying rehearing. And, as the U.S. Court of Appeals for the District of Columbia Circuit has put it, even “an improved rationale” would not justify a further request for rehearing.⁴⁵

31. Rehearing of an order on rehearing only lies when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.⁴⁶ In fact, a second rehearing request is required to preserve appellate review rights in instances when the later order modifies the results of the earlier order in a significant way.⁴⁷

32. Here, in the February 15 Order, the Commission denied the MA Public Systems’ requests for rehearing and affirmed the findings in the October 19 Order (albeit with some clarifications). In these circumstances, the MA Public Systems’ current rehearing request is neither required nor appropriate. The fact that, in responding to arguments challenging the Commission’s acceptance of ISO-NE’s “external affairs” and “corporate communications” expenses, as set forth in its 2006 administrative cost filing in the October 19 Order, the Commission further expounded on its rationale does not modify the results of the October 19 Order, and does not otherwise constitute a significant modification of that order. This being the case, consistent with the precedent cited above, we will reject the MA Public Systems’ rehearing request.

33. That being said however, even if we were to consider the merits of the MA Public Systems’ request for rehearing, we would not be persuaded by its arguments.

34. First, the MA Public Systems have not raised any new issues that would cause the Commission to reassess its determination that the interests advocated by ISO-NE in its non-public advocacy contacts with state and federal legislative and executive branch personnel are those of ISO-NE’s customers.

⁴⁵ *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)); see also *Londonberry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

⁴⁶ *Southern*, 877 F.2d at 1073.

⁴⁷ *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood, Massachusetts v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990).

35. Moreover, we reject the MA Public Systems' characterization of the court's decision in *NStar*. While the MA Public Systems argue that the court "squarely rejected the notion that the Commission may rely on [ISO-NE] as a proxy representing customer interests," we disagree. The court found that the Commission had failed to adequately "explain its basis for believing that [ISO-NE's] actions satisfied the statutory requirement." That is, the court did not reject the use of ISO-NE serving as a proxy, but rather, only rejected the proxy role in the absence of a Commission determination that such a role would ensure just and reasonable rates. An order on remand is pending in that proceeding.

36. Further, the MA Public Systems argue that the Commission erred in finding infeasible the proposal to exempt dissenting ratepayers from funding those ISO-NE activities with which they disagree. However, the MA Public Systems offer in response to the Commission's concerns about feasibility a single case from a wholly unrelated regulatory context. The MA Public Systems do not respond to the implementation concerns raised in the February 15 Order.⁴⁸

37. Moreover, the MA Public Systems argue that the Commission erred in finding that ISO-NE has fully justified all of the expenditures in its corporate communications and external affairs accounts. In the February 15 Order, we concluded that ISO-NE's arguments and other information in the record sufficiently justified the expenditures.⁴⁹ The MA Public Systems have raised no new arguments that would cast any doubt on the Commission's determination in the February 15 Order.

38. The MA Public Systems continue to question ISO-NE's rationale for isolating a portion of its corporate communications and external affairs budgets as admitted lobbying expenses. Again, as pointed out in the February 15 Order, if ISO-NE classifies certain costs as "lobbying" on its IRS Form 990 Return, that does not preclude it from recovering those costs from ratepayers.⁵⁰ Further, since the Commission concluded that *all* of ISO-NE's expenditures classified as corporate communications or external affairs were properly recoverable from ratepayers, there was no need to distinguish those activities considered "lobbying" on ISO-NE's Form 990 Return.

⁴⁸ *Supra* P 6.

⁴⁹ February 15 Order, 118 FERC ¶ 61,105 at P 17.

⁵⁰ *Id.* P 23.

39. The Commission reconfirms its finding that ISO-NE's specific contacts with state and federal legislatures, regulators, and executive branches are appropriately recoverable from ratepayers. As stated in the February 15 Order, the specific examples highlighted in ISO-NE's July 17 Brief and contested by the MA Public Systems "all reflect ISO-NE's efforts to pursue positions before state and federal legislators and other public officials for the ultimate benefit of New England ratepayers."⁵¹ As pointed out in the February 15 Order, "it is unreasonable to expect ISO-NE's 'position' on controversial New England market issues to mirror all market participants' viewpoints, most of which (if not all) are motivated by competing financial interests."⁵² ISO-NE also has no financial interests and "can derive no financial benefit from specific market outcomes or market design issues, and as such, ISO-NE's 'position' on controversial market issues reflects its independent assessments of costs and benefits, including reliability and market impacts, to the New England region as a whole."⁵³ Further, there remains nothing in the record to suggest that ISO-NE is not acting in good faith in executing its duties as an independent system operator.

40. The Commission also reiterates that it will not "hamstring ISO-NE's efforts to inform public officials of its authoritative and independent opinion on controversial issues affecting the New England electricity markets by categorically excluding lobbying expenditures from rate recovery."⁵⁴ This includes ISO-NE's strictly regulatory contacts with the Commission, which the MA Public Systems continue to challenge.

41. The MA Public Systems also argue that the fact-finding procedures in this proceeding were inadequate. As stated before,⁵⁵ 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. We find the paper hearing process and fact-finding procedures adopted in this case to be sufficient. As we stated in the February 15 Order, the information provided in the July 17 Brief "included more than characterizations of its activities – ISO-NE submitted specific documentation of its contacts with public officials, including numerous records of meetings (as well as explanations of the nature of the

⁵¹ *Id.* P 25.

⁵² *Id.*

⁵³ *Id.* P 21.

⁵⁴ *Id.* P 25.

⁵⁵ *Id.* P 29, nn.36-37; July 10 Order, 116 FERC ¶ 61,025 at P 16, n.23-24.

meetings).”⁵⁶ 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.⁵⁷ ISO-NE has provided details of its corporate communications and external affairs expenses to fully develop a record and allow the MA Public Systems the opportunity for hearing on all such issues.

42. The MA Public Systems argue that the Commission erred in “limiting” the reporting requirement set forth in the October 19 Order. We disagree. The MA Public Systems have phrased their pleading in such a way as to imply that the Commission has changed the reporting requirement imposed on ISO-NE in the October 19 Order. That is simply not the case. Rather, in the February 15 Order, the Commission clarified the reporting requirement first imposed in the October 19 Order.

43. Since its genesis in the October 19 Order, the purpose of the reporting requirement is to provide a greater level of transparency to stakeholders and allow them to understand the nature of certain of ISO-NE’s corporate communications and external affairs activities. These “certain” activities obviously do not involve the day-to-day contacts described as inappropriate for inclusion in ISO-NE’s reports, as clarified by the February 15 Order.⁵⁸ The information that will be included in the reports is not “limited;” rather, the information to be included in ISO-NE’s reports is relevant to stakeholders that desire to understand the nature of certain of ISO-NE’s corporate communications and external affairs activities. Should stakeholders require additional information regarding ISO-NE’s corporate communications or external affairs activities, such parties may request that additional information from ISO-NE.

44. We also disagree with the MA Public Systems’ argument that the Commission erred in finding the types of activities highlighted in ISO-NE’s motion for clarification to be an integral part of ISO-NE’s regulatory or public informational responsibilities. Such activities as “questions from Commission staff about uncontested ISO-NE filings” and “inquiries to or from executive branch officials about the status of regulatory proceedings

⁵⁶ February 15 Order, 118 FERC ¶ 61,105 at P 29.

⁵⁷ *Id.* P 29 n.36 (citing *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1199 (D.C. Cir. 2000) (in turn 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))); *Central Maine v. FERC*, 252 F.3d 34, 46-47 (1st Cir. 2001)).

⁵⁸ *See Id.* P 39.

or ISO-NE activities such as system planning”⁵⁹ are essential to ISO-NE’s role as an independent system operator for the New England markets. Such contacts are strictly informational, and therefore are inappropriate for inclusion in the reporting requirement.

45. The MA Public Systems also argue that a “broad” reporting requirement would enable parties and the Commission to make their own informed judgment about ISO-NE’s activities and rate classifications thereof. First, the Commission disagrees with the MA Public Systems’ implicit attempt to characterize the Commission’s reporting requirement as not broad, and therefore “narrow.” That is not the case. The MA Public Systems have misinterpreted the purpose of the reporting requirement. The Commission imposed the reporting requirement to enhance transparency regarding relevant ISO-NE corporate communications and external affairs activities. By contrast, a reporting requirement that would include non-material contacts between the Commission and ISO-NE regarding an uncontested ISO-NE filing would not fit this objective, and therefore must be considered an unduly burdensome imposition on ISO-NE serving no benefit to stakeholders. The Commission will not dilute the importance and efficiency of the reporting requirement to include every possible communication between ISO-NE and public officials, no matter how inconsequential.

46. Finally, the MA Public Systems argue that the Commission erred in rejecting the MA Public Systems’ answer to ISO-NE’s motion for clarification as an unauthorized request for rehearing. The MA Public Systems are correct that, unlike answers to requests for rehearing, answers to requests for clarification are not prohibited under the Commission’s Rules of Practice and Procedure.⁶⁰ However, the Commission has revisited the MA Public Systems’ answer to ISO-NE’s motion for clarification, and we are not persuaded to change our decision not to accept it. The MA Public Systems’ answer presents similar arguments to its request for rehearing, and we have taken those up in this order, as discussed above.

47. Moreover, even if we were to address the answer on the merits, the MA Public Systems have not raised any arguments that would cast any doubt on the Commission’s determination in the February 15 Order. Had we accepted the MA Public Systems’ filing, our conclusions would have been the same.

⁵⁹ *Id.*

⁶⁰ Compare 18 C.F.R. § 385.213(a) (2007) with 18 C.F.R. § 385.713(d) (2007).

48. The Commission has already addressed, and rejected, the arguments raised by the MA Public Systems' response to ISO-NE's motion for clarification. We disagree with the MA Public Systems that the clarifications sought by ISO-NE and granted in the February 15 Order changed the reporting requirement imposed on ISO-NE in the October 19 Order. Regarding the specific items listed by the MA Public Systems, *supra* paragraph 26, we confirm that such contacts by ISO-NE need not be included in the posting requirement. For the reasons already stated in the February 15 Order and discussed above, this is consistent with the Commission's findings in the October 19 Order. Further, the Commission reaffirms its determination to exclude all appearances before regulatory and other governmental bodies from ISO-NE's disclosure requirement as reasonable and consistent with the classification requirements of Account 426.4 of our regulations.⁶¹ Finally, contrary to the MA Public Systems' assertion, we are not limiting our disclosure requirement based on its practicality; rather we are excluding from disclosure non-material contacts that would serve no purpose.

The Commission orders:

The MA Public Systems' request for rehearing is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶¹ February 15 Order, 118 FERC ¶ 61,105 at P 47.