151 FERC ¶ 61,125

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

ENE (Environment Northeast); The Greater Boston Real Estate Board; and National Consumer Law Center	Docket Nos.	EL13-33-001 EL13-33-003
v.		
Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company; New Hampshire Transmission LLC; NSTAR Electric Company; Northeast Utilities Service Company; The United Illuminating Company; Unitil Energy Systems, Inc.; Fitchburg Gas and Electric Light Company; and Vermont Transco, LLC		
Attorney General of the Commonwealth of Massachusetts; Connecticut Public Utilities Regulatory Authority; Massachusetts Municipal Wholesale Electric Company; New Hampshire Electric Cooperative, Inc.; Massachusetts Department of Public Utilities; New Hampshire Public Utilities Commission; George Jepsen, Attorney General of the State of Connecticut; Connecticut Office of Consumer Counsel; Maine Office of the Public Advocate; New Hampshire Office of the Consumer Advocate; Rhode Island Division of Public Utilities Carriers; Vermont Department of Public Service; Associated Industries of Massachusetts; The Energy Consortium; Power Options, Inc.; Western Massachusetts Industrial Group; Environment Northeast; National Consumer Law Center; Greater Boston Real Estate Board; and Industrial Energy Consumer Group		EL14-86-001
v.		
Bangor Hydro-Electric Company; Central Maine Power		

Company; New England Power Company; New Hampshire Transmission LLC; The Connecticut Light and Power Company; Western Massachusetts Electric Company; Public Service Company of New Hampshire; NSTAR Electric Company; The United Illuminating Company; Unitil Energy Systems, Inc.; Fitchburg Gas and Electric Light Company; and Vermont Transco, LLC

ORDER DENYING REHEARING

(Issued May 14, 2015)

1. On July 21, 2014, the New England Transmission Owners (New England TOs)[1] filed a request for rehearing of the Commission's June 19, 2014 order setting for hearing and settlement judge procedures a December 27, 2012 complaint filed by a group of complainants (Docket No. EL13-33 Complainants),[2] alleging that New England TOs' 11.14 percent base return on equity (ROE) is unjust and unreasonable.[3] On December 24, 2014, New England TOs filed a request for rehearing of the Commission's November 24, 2014 order setting for hearing a July 31, 2014 complaint filed by a different group of complainants (Docket No. EL14-86 Complainants),[4] also alleging that New England

[1] New England TOs are Bangor Hydro-Elec. Co.; Central Maine Power Co., New England Power Co.; New Hampshire Transmission LLC; Northeast Utilities Service Co.; NSTAR Electric Co.; United Illuminating Co.; Unitil Energy Systems, Inc.; Fitchburg Gas and Electric Light Co.; and Vermont Transco, LLC.

[2] Docket No. EL13-33 Complainants are ENE (Environment Northeast), The Greater Boston Real Estate Board, and National Consumer Law Center. Originally, the New England Power Pool (NEPOOL) Industrial Customer Coalition was also a complainant; however, on July 15, 2014, NEPOOL Industrial Customer Coalition filed a notice of withdrawal as a complainant in this proceeding, explaining that its members had disbanded the coalition.

[3] *See ENE (Environment Northeast), et al. v. Bangor Hydro-Elec. Co., et al.*, 147 FERC ¶ 61,235 (2014) (Complaint II Hearing Order).

[4] Docket No. EL14-86 Complainants are Attorney General of the Commonwealth of Massachusetts; Connecticut Public Utilities Regulatory Authority; Massachusetts Municipal Wholesale Electric Company; New Hampshire Electric Cooperative, Inc.; Massachusetts Department of Public Utilities; New Hampshire Public Utilities Commission; George Jepsen, Attorney General of the State of Connecticut; Connecticut

(continued…)

TOs' 11.14 percent base ROE is unjust and unreasonable.[5] In this order, we deny rehearing in both proceedings.

I. Background

2. On September 30, 2011, a group of complainants consisting mostly of state representatives (Docket No. EL11-66 Complainants) filed a complaint in Docket No. EL11-66-000 (Complaint I), alleging that New England TOs' 11.14 percent base ROE was unjust and unreasonable. They submitted a discounted cash flow (DCF) analysis in support of their assertion that the base ROE should not exceed 9.2 percent.[6] On May 3, 2012, the Commission set Complaint I for hearing and settlement judge procedures and established a refund effective date of October 1, 2011.[7]

3. On December 27, 2012, Docket No. EL13-33 Complainants filed a complaint (Complaint II) alleging that New England TOs' 11.14 percent base ROE was unjust and unreasonable and that Docket No. EL13-33 Complainants' DCF analysis indicates that New England TOs' base ROE should not exceed 8.7 percent.[8] Docket No. EL13-33 Complainants asserted that their complaint is not duplicative of Complaint I, contending that their DCF analysis reflected more current proxy group information and a more up-to-date zone of reasonableness than Complaint I.[9] The DCF analyses in both Complaint I and Complaint II were based on the one-step DCF methodology that the Commission

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Office of Consumer Counsel; Maine Office of the Public Advocate; New Hampshire Office of the Consumer Advocate; Rhode Island Division of Public Utilities Carriers; Vermont Department of Public Service; Associated Industries of Massachusetts; The Energy Consortium; Power Options, Inc.; Western Massachusetts Industrial Group; Environment Northeast; National Consumer Law Center; Greater Boston Real Estate Board; and Industrial Energy Consumer Group.

[5] *See Attorney Gen. of the Commonwealth of Mass. v. Bangor Hydro-Elec. Co.*, 149 FERC ¶ 61,156 (2014) (Complaint III Hearing Order).

[6] *See* Martha Coakley, Mass. Attorney General, *et al*., Complaint, Docket No. EL11-66-000 (filed Sept. 30, 2011).

[7] *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electric Co.*, 139 FERC ¶ 61,090 (2012) (Complaint I Hearing Order).

[8] *See* ENE (Environment Northeast), *et al.* Dec. 27, 2012 Complaint at 2.

[9] *See id.* at 3-5.

used in public utility cases at the time the complaints were filed.[10] The one-step DCF methodology determines high and low estimates of the cost of equity for each member of a proxy group of comparable-risk companies.[11] Those estimates are determined, for each proxy company, based on the high and low estimates of the company's average dividend yield and two estimates of short-term dividend growth.[12]

4. On May 10, 2013, the hearing on Complaint I ended, and on August 6, 2013, the presiding Administrative Law Judge certified an initial decision to the Commission.[13] On June 19, 2014, the Commission issued an order on initial decision in Docket No. EL11-66-000 (Opinion No. 531), in which the Commission changed its policy on the DCF methodology to be used in public utility ROE cases, by adopting the two-step DCF methodology that the Commission has used in natural gas pipeline and oil pipeline cases for many years.[14] Under the two-step DCF methodology, the Commission determines a single cost of equity estimate for each member of the proxy group, based on the company's average dividend yield and a growth rate that is determined by taking a weighted average of a short-term growth estimate and a long-term growth estimate.[15]

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[10] *See Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 24, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *reh'g denied*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015).

[11] *Id.* P 25.

[12] *Id.* The two growth rates used in the one-step DCF methodology are (1) security analysts' five-year forecast for the company, as published by the Institutional Brokers Estimate System (IBES); and (2) the "br+sv" sustainable growth formula, where "b" represents the percentage of earnings expected to be retained (after the payment of dividends), "r" represents the expected rate of return on book equity, "s" represents the percent of common equity expected to be issued annually as new common stock, and "v" is the equity accretion rate. *Id.* PP 17, 25.

[13] *See Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, 144 FERC ¶ 63,012 (2013).

[14] *See* Opinion No. 531, 147 FERC ¶ 61,234 at P 13.

[15] *Id.* P 17. The short-term growth estimate, which is given two-thirds weight, is based on the same IBES estimate that the Commission used in the one-step DCF methodology, and the long-term growth estimate, which is given one-third weight, is based on forecasts of long-term growth of the economy as a whole, as reflected in gross domestic product. *Id.*

5. Contemporaneously with Opinion No. 531, the Commission issued the Complaint II Hearing Order setting Complaint II for hearing and settlement judge procedures and establishing a refund effective date of December 27, 2012.[16] On July 21, 2014, New England TOs filed a request for rehearing of the Complaint II Hearing Order.

6. On July 31, 2014, Docket No. EL14-86 Complainants[17] filed a complaint (Complaint III) alleging that New England TOs' 11.14 percent base ROE was unjust and unreasonable and that Docket No. EL14-86 Complainants' DCF analysis indicates that New England TOs' base ROE should not exceed 8.84 percent.[18] Docket No. EL14-86 Complainants asserted that their complaint is not duplicative of Complaint I and Complaint II, and contended that their DCF analysis reflected more current financial information than Complaint I and Complaint II.[19] The DCF analysis in Complaint III was based on the two-step DCF methodology the Commission adopted in Opinion No. 531.[20]

7. On November 24, 2014, the Commission issued the Complaint III Hearing Order setting Complaint III for hearing, consolidating that proceeding with the Complaint II proceeding, and establishing a refund effective date for the Complaint III proceeding of July 31, 2014.[21] In the Complaint III Hearing Order, the Commission explained that, due to the establishment of two refund periods in the consolidated proceeding—the 15-month refund period associated with Complaint II and the 15-month refund period associated with Complaint III—it is appropriate for the parties to litigate a separate ROE for each refund period.[22] The Commission, therefore, explained that, for the refund period in the

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[16] *See* Complaint II Hearing Order, 147 FERC ¶ 61,235.

[17] Docket No. EL14-86 Complainants consist of the Docket No. EL13-33 Complainants and the complainants that filed Complaint I, with the exception of NEPOOL Industrial Customer Coalition.

[18] *See* Attorney Gen. of the Commonwealth of Mass., *et al.* July 31, 2014 Complaint at 20.

[19] *See id.* at 24.

[20] *Id.* at 25.

[21] Complaint III Hearing Order, 149 FERC ¶ 61,156.

[22] *Id.* P 27.

Complaint II proceeding (i.e., December 27, 2012 through March 26, 2014[23]), "the ROE for that particular 15-month refund period should be based on the most recent financial data available during that period, i.e., the last six months of that period," and, for the refund period in the Complaint III proceeding (i.e., July 31, 2014 through October 30, 2015) and for the prospective period, "the ROE should be based on the most recent financial data in the record."[24]

8. On December 24, 2014, New England TOs filed a request for rehearing of the Complaint III Hearing Order.

II. Request for Rehearing of Complaint II Hearing Order

9. New England TOs argue that the Commission erred in declining to dismiss Complaint II, stating that the complaint contained no new claims or changed circumstances, and that it circumvented the 15-month refund limitation under section 206(b) of the Federal Power Act (FPA). New England TOs argue that Complaint II is distinguishable from other electric ROE cases in which the Commission has granted a successive complaint, because Complaint II was filed when the record in the Complaint I proceeding was still open.

10. New England TOs state that in all previous electric ROE cases where the Commission allowed a second complaint, the record in the first complaint proceeding had already closed.[25] They argue that, if Docket No. EL13-33 Complainants had wanted to ensure updated information in the Complaint I proceeding, they could have intervened therein and submitted such analysis. New England TOs conclude that the purpose of Complaint II must have been "intended solely to expand the amount of refund protection beyond 15 months,"[26] otherwise there is no logical reason why Docket No. EL13-33

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[23] We note that, in the Complaint III Hearing Order, the Commission listed incorrect end dates of the refund periods associated with Complaints II and III. Those refunds periods end on March 26, 2014, and October 30, 2015, respectively—not March 27, 2014, and October 31, 2015, as stated in the Complaint III Hearing Order.

[24] *Id.*

[25] New England TOs July 21, 2014 Rehearing Request at 8 (citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W. Va. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 (*Consumer Advocate I*), *order on reh'g*, 68 FERC ¶ 61,207, at 61,998-99 (1994) (*Consumer Advocate II*); *Southern Co. Servs., Inc.*, 68 FERC ¶ 61,231 (1994) (*Southern Co. I*), *order on reh'g*, 83 FERC ¶ 61,079 (1998) *(Southern Co. II)).*

[26] *Id.* at 10-11 (citing *Southern Co.* II, 83 FERC at 61,386).

Complainants filed Complaint II instead of intervening and updating the record in the Complaint I proceeding.

11. New England TOs argue that Docket No. EL13-33 Complainants acknowledge in Complaint II that they seek additional protection from the effective rates, as they are requesting "a further fifteen-month refund period."[27] New England TOs state that the fifteen-month refund period, which Congress adopted in the Regulatory Fairness Act, cannot be extended for any reason outside of dilatory behavior by the utility, and in this case there is no such behavior or allegation thereof.[28] New England TOs allege that the Complaint II Hearing Order erred in asserting that the Commission has previously allowed successive complaints when presented with new analysis. They state that parties may have the benefit of an entirely new refund period only when a new claim is made based on materially changed circumstances. New England TOs assert that Complaint II does not meet that threshold.[29]

12. New England TOs note that, in *EPIC I*, the Commission dismissed a subsequent complaint where certain financial marketers filed back-to-back complaints without any material change in circumstances.[30] New England TOs assert that, in that case, the Commission rejected the second complaint after concluding that it sought to "re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances."[31] New England TOs state that the Commission also found that a second complaint "should respond to a material 'changed circumstance' that is distinct from the original dispute."[32] New England TOs assert that this principle also applies to ROE cases and that merely updating the market conditions through a DCF analysis does not represent new evidence or a materially changed circumstance. Moreover, New England TOs allege that the information provided in Complaint II cannot be considered "updated" because it is less current than the information in the final record of the Complaint I

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[27] *Id*. at 14 (citing Complaint II at 5-6).

[28] *Id*. at 12 (citing 16 U.S.C. § 824e(b) (2012)).

[29] *Id*. at 16.

[30] *EPIC Merch. Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (*EPIC I*), *reh'g denied*, 136 FERC ¶ 61,041, at P 14 (2011) (*EPIC II*).

[31] New England TOs July 21, 2014 Rehearing Request at 18 (citing *EPIC I*, 131 FERC ¶ 61,130 at PP 20-21).

[32] *Id*. at 19 (citing *EPIC II*, 136 FERC ¶ 61,041 at PP 14, 16).

proceeding.[33] New England TOs assert that allowing Complaint II will create "absurd results" by allowing an entity to file an updated DCF analysis at the end of each existing refund period regardless of the actual effect the purported new information has on rates or whether that information could be filed in the record of an existing proceeding.[34]

13. New England TOs also allege that Complaint II should have been dismissed because it was based on testimony from Dr. Randall Woolridge that was also the basis for Complaint I and that the Commission disregarded in Opinion No. 531. New England TOs argue that, in Opinion No. 531, the Commission found Dr. Woolridge's DCF analysis to be inconsistent with Commission precedent. Specifically, New England TOs cite the following aspects of Dr. Woolridge's DCF analysis in Complaint II that the Commission rejected in Opinion No. 531: (1) the use of *AUS Utility Reports* as a proxy group screening criterion;[35] (2) the use of a 50 percent regulated electric revenues proxy group screening criterion;[36] (3) the use of a three-year dividend payments proxy group screening criterion;[37] (4) the exclusion from the proxy group of those companies with merger and acquisition activity not significant enough to distort the DCF inputs;[38] (5) the use of the median, instead of the midpoint, as the appropriate starting point for determining an ROE for a group of electric utilities;[39] and (6) the use of *AUS Utility Reports* to calculate dividend yields.[40]

14. Based on the foregoing, New England TOs argue that Docket No. EL13-33 Complainants have failed to make a *prima facie* case that New England TOs' transmission rates are unjust and unreasonable. New England TOs aver that, because the DCF analysis in Complaint II is unreliable, there is no evidence supporting the claim that New England TOs' ROE is unjust and unreasonable. Furthermore, New England TOs assert that the Commission's directive in the Complaint II Hearing Order for the parties

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[33] *Id.* at 20.

[34] *Id.* at 21.

[35] *Id*. at 24 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 100).

[36] *Id*. at 24-25 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 101).

[37] *Id*. at 25 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 112).

[38] *Id*. at 25-26 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 114).

[39] *Id*. at 26-27 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 144).

[40] *Id*. at 28 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 76).

to "present evidence and any DCF analyses, as guided by our decision in Opinion No. 531" allows Complainants an inappropriate opportunity to improve their DCF analysis after failing to make a *prima facie* case.

15. Lastly, New England TOs also argue that the existing base ROE was within the zone of reasonableness, and therefore not unjust and unreasonable. New England TOs state that the Commission has previously found that "parties challenging the existing rate pursuant to section 206 of the FPA may not simply demonstrate that another rate is just and reasonable, or more just and reasonable than the rate being challenged."[41] Additionally, New England TOs state that in *Maine Public Utilities Commission v. FERC*, the Court explained that "there is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone."[42] New England TOs argue that, under FPA section 206, before the Commission may consider requiring a utility to charge a new rate, the rate on file must be shown to be outside the zone of reasonableness. New England TOs contend that, in *City of Winnfield*, the court held that FPA section 206 gives the utility statutory protection for existing rates, which must "be found to be entirely outside the zone of reasonableness before the agency can dictate their level or form."[43] New England TOs argue that the initial inquiry in an FPA section 206 proceeding related to a utility's ROE must be whether the existing ROE falls outside the zone of reasonableness, and, if that threshold is not met, the Commission does not have the authority to change the ROE.

16. New England TOs state that in Order No. 679 the Commission held that granting rates at or near the upper end of the zone of reasonableness is consistent with the requirement of FPA section 219(d) that incentive rates be just and reasonable.[44] New England TOs state that the Commission emphasized these findings in *Southern California Edison Co.*, holding that "pursuant to Order No. 679, *because the overall ROEs are set within the zone of reasonableness, they are consistent with the just and*

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[41] *Id*. at 30 (citing *Cal. Mun. Utils. Ass'n v. Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,315, at PP 70-73 (2009)).

[42] *Id*. at 31 (citing *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 470-71 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010)).

[43] *Id*. at 34 (citing *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984)).

[44] *Id*. at 32 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007)).

reasonable requirements . . . of the FPA."[45] New England TOs, therefore, argue that the Commission has in the past treated all ROEs within the zone of reasonableness as just and reasonable, notwithstanding the fact that a particular ROE within that zone may be considered "more just and reasonable" than another.[46]

III. Request for Rehearing of Complaint III Hearing Order

17. In their request for rehearing of the Complaint III Hearing Order, New England TOs raise many of the same issues and arguments presented in their request for rehearing of the Complaint II Hearing Order, but apply those arguments to the Complaint III Hearing Order.[47] New England TOs further argue that Complaint III should have been dismissed because the data used to establish New England TOs' ROE in the Complaint II proceeding will be more current than the data included in Complaint III, and that the more current data in the Complaint II proceeding will be used to set New England TOs' ROE in both the Complaint II proceeding and the Complaint III proceeding.[48] New England TOs assert that Congress included the 15-month refund period in the Regulatory Fairness Act to provide rate certainty during the investigation of a claim,[49] and that "[t]he statute is intended to prevent a complainant from filing successive Section 206 complaints on the same issue."[50] New England TOs argue that if the Commission allows "potentially unlimited successive complaints based on the same information . . . customers and investors will never know what a utility's ROE will be going forward."[51]

18. New England TOs argue that the Commission erred in the Complaint III Hearing Order by requiring that the ROE for the refund period associated with Complaint II—i.e., December 27, 2012 through March 26, 2014—be based only on data from the last six

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[45] *Id*. (citing *Southern California Edison Co.*, 139 FERC ¶ 61,042, at PP 47, 65 (2012) (emphasis added), *order on reh'g*, 144 FERC ¶ 61,145 (2013)).

[46] *Id.* at 32-33.

[47] *Compare* New England TOs Dec. 24, 2014 Rehearing Request at 5-6 *with* New England TOs July 21, 2014 Rehearing Request at 3-4.

[48] New England TOs Dec. 24, 2014 Rehearing Request at 8.

[49] *Id.* at 10.

[50] *Id.* at 11 (citing *Allegheny Electric Cooperative, Inc. v. Niagara Mohawk Power Corp.*, 58 FERC ¶ 61,096, at 61,349 (1992) (*Niagara Mohawk*)).

[51] *Id.*

months of that period. New England TOs assert that using data from the most recent 6 months makes sense when setting the ROE for a prospective period, because future conditions are unknown. However, New England TOs contend that the Complaint III Hearing Order provided no rationale for why data from the last 6 months of a 15-month refund period should be used when establishing an ROE for a past 15-month period.[52] New England TOs argue that the Commission's standard practice in public utility ROE cases is to use DCF data from various periods within or before the refund period to establish the ROE for that period.[53] New England TOs request that the Commission grant rehearing to allow the presiding Administrative Law Judge "the flexibility to determine the appropriate time period comprising the source data used to establish the ROE for the Complaint II refund period."[54]

IV. Discussion

A. Procedural Matters

19. On September 11, 2014, New England TOs filed a motion to admit evidence and for summary disposition, or, in the alternative, a request for consolidation of the Complaint II proceeding and the Complaint III proceeding. On September 25, 2014, Docket No. EL13-33 Complainants and a group of "intervenors"[55] jointly filed an answer

[52] *Id.* at 19.

[53] *Id.* at 19 (citing *Boston Edison Co.*, 34 FERC ¶ 63,023 (1986), 42 FERC ¶ 61,374, *reh'g denied*, 43 FERC ¶ 61,309 (1988) (*Boston Edison*), *aff'd sub nom., Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989); *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co.*, 115 FERC ¶ 63,043, at P 104 (2006), *opinion and order on initial decision*, 123 FERC ¶ 61,047, at P 192 (2008) (*Golden Spread*); *S. Cal. Edison Co.*, 86 FERC ¶ 63,014 (1999), 92 FERC ¶ 61,070 (2000) (*Southern California Edison*)).

[54] *Id.* at 19-20.

[55] These "intervenors" consist of the complainants in Docket No. EL14-86 that were not complainants in Docket No. EL13-33: Attorney General of the Commonwealth of Massachusetts; Connecticut Public Utilities Regulatory Authority; Massachusetts Municipal Wholesale Electric Co.; New Hampshire Electric Cooperative, Inc.; Massachusetts Department of Public Utilities; New Hampshire Public Utilities Commission; George Jepsen, Attorney General of the State of Connecticut; Connecticut Office of Consumer Counsel; Maine Office of the Public Advocate; New Hampshire Office of the Consumer Advocate; Rhode Island Division of Public Utilities and Carriers; Vermont Department of Public Service; Associated Industries of Massachusetts; The Energy Consortium; Power Options, Inc.; Western Massachusetts Industrial Group; and Industrial Energy Consumer Group.

to New England TOs' motion, opposing summary disposition but supporting consolidation of the two proceedings. On September 26, 2014, Commission Trial Staff filed an answer to New England TOs' motion, opposing summary disposition but supporting consolidation. On October 15, 2014, New England TOs filed an amendment to their September 11, 2014 motion in order to withdraw their request for summary disposition, while maintaining their request for consolidation.

20. On November 24, 2014, the Commission issued an order setting Complaint III for hearing and consolidating that proceeding with the Complaint II proceeding.[56] As a result, New England TOs' motion to consolidate is moot.

B. Substantive Matters

21. We deny New England TOs' requests for rehearing, as discussed below.

22. New England TOs argue that the Commission erred in setting Complaint II for hearing because Docket No. EL13-33 Complainants supported the complaint using the one-step DCF methodology rather than the two-step DCF methodology. We disagree. New England TOs overstate the Commission's findings regarding the one-step DCF methodology in Opinion No. 531. In changing the Commission's approach to determining the ROE for public utilities by adopting a two-step DCF methodology in Opinion No. 531, the Commission did not find that the one-step DCF methodology was inadequate to make a prima facie case to determine, at the outset, whether to investigate a public utility's ROE.[57] Rather, the Commission found that, given the evolution of the electric industry, it had become more appropriate to use the two-step DCF methodology to determine what ROE to set as a public utility's ROE.[58] That the two-step DCF methodology "is preferable to the one-step DCF methodology"[59] for setting a public utility's ROE does not preclude the Commission from relying on DCF studies using the one-step DCF methodology in the circumstances here, that is, where the Commission

[56] *Complaint III Hearing Order*, 149 FERC ¶ 61,156 (2014).

[57] Opinion No. 531, 147 FERC ¶ 61,234 at P 8.

[58] *Id.* P 32.

[59] *Id.* P 41.

adopted a different, two-step DCF methodology after the submission of complaints which were consistent with the Commission's ROE policy in place at the time the complaints were filed.[60]

23. Docket No. EL13-33 Complainants submitted Complaint II almost eighteen months before the Commission adopted the two-step DCF methodology in Opinion No. 531. While Docket No. EL13-33 Complainants' DCF study supporting Complaint II did not include the two-step DCF methodology, and may have other flaws, Docket No. EL13-33 Complainants provided a detailed DCF analysis that was generally consistent with the Commission's one-step DCF methodology that was in place both when New England TOs' existing 11.14 percent base ROE was established and when Complaint II was filed.[61] Thus, in setting Complaint II for hearing, the Commission properly found Docket No. EL13-33 Complainants' one-step DCF analysis, which showed a substantial decline in New England TOs' base ROE to 8.7 percent from the level previously established under the one-step DCF methodology, was adequate to establish a *prima facie* case that New England TOs' cost of equity may have declined significantly below the level of its existing 11.14 percent base ROE.[62] Thus, we conclude that the Commission properly relied upon Docket No. EL13-33 Complainants' DCF analysis in setting Complaint II for hearing.

24. New England TOs also argue that the Commission erred in setting Complaint II for hearing because the ROE that Docket No. EL13-33 Complainants seek is within the zone of reasonableness, and Commission precedent holds that ROEs within that zone are just and reasonable for purposes of FPA section 206. We disagree. As the Commission explained in the Opinion No. 531 proceeding, in response to this same argument from New England TOs, the zone of reasonableness produced by a DCF analysis does not create a zone of immunity for a utility's ROE.[63] Showing that a utility's existing ROE is unjust and unreasonable "merely requires showing that the Commission's ROE

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[60] We note that, consistent with our current policy on public utilities' ROE, we expect future ROE complaints to be supported by the Commission's two-step DCF methodology.

[61] We note that the complaint in the Opinion No. 531 proceeding was also supported by a one-step DCF methodology, not the two-step DCF methodology that the Commission ultimately adopted.

[62] *See, e.g., Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 184 (2014).

[63] Opinion No. 531, 147 FERC ¶ 61,234 at PP 50-54, *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 at PP 21-35.

methodology now produces a numerical value below the existing numerical value."[64] Therefore, the Commission appropriately concluded that Complaint II made a *prima facie* showing that New England TOs' 11.14 percent base ROE might be unjust and unreasonable.

25. New England TOs argue that the Commission erred in setting Complaint II and Complaint III for hearing because they present no new claims or changed circumstances, and in doing so the Commission contravened its own precedent and impermissibly circumvented the 15-month refund limitation in FPA section 206(b). We disagree. As discussed below, the Commission's treatment of Complaint II and Complaint III is consistent with both the FPA and long-standing Commission policy on ROE complaints.

26. FPA section 206 requires that "[w]henever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint[.]"[65] FPA section 206 also provides that

> [a]t the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force[.][66]

27. As FPA section 206 makes clear, the Commission "*shall* establish a refund effective date" for each proceeding instituted on complaint,[67] and at the conclusion of such a proceeding "the Commission *may* order refunds" for up to fifteen months after the refund effective date established for that proceeding.[68] In the instant case, Docket No. EL11-66 Complainants, Docket No. EL13-33 Complainants, and Docket No. EL14-86 Complainants filed three separate complaints, based on different facts, thereby commencing three separate proceedings. The Commission set all three proceedings for hearing and, as required by FPA section 206, established a refund effective date for each

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[64] Opinion No. 531-B, 150 FERC ¶ 61,165 at P 32.

[65] 16 U.S.C. § 824e(b) (2012).

[66] *Id.*

[67] *Id.* (emphasis added).

[68] *Id.* (emphasis added).

proceeding. Because the 15-month refund limitation in FPA section 206 is linked to the refund effective date *in each proceeding*, the 15-month refund limitation imposed by FPA section 206 separately applies to the Complaint I proceeding, the Complaint II proceeding, and the Complaint III proceeding.[69] That the Commission consolidated the Complaint II and Complaint III proceedings for purposes of hearing and decision does not affect this analysis, as the Commission's decision to consolidate the proceedings does not relieve the Commission of its statutory obligation to establish separate refund effective dates (and thus separate 15-month refund periods) for each of the proceedings.[70]

28. Congress granted the Commission its refund authority under FPA section 206 through the Regulatory Fairness Act.[71] The Commission has consistently interpreted the Regulatory Fairness Act—in the specific context of public utility ROE cases—to allow subsequent complaints in the circumstances of this case.[72] The Regulatory Fairness Act was "intended to add symmetry" between the Commission's treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases.[73] As the Commission has explained:

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[69] *See id.*

[70] *See id.*

[71] Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

[72] *Consumer Advocate I*, 67 FERC ¶ 61,288, at 62,000, *order on reh'g*, 68 FERC ¶ 61,207 (1994) (*Consumer Advocate II*); *Southern Co. I*, 68 FERC ¶ 61,231 (1994), *order on reh'g*, 83 FERC ¶ 61,079; *see also San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998) (*San Diego Gas & Elec.*), *reh'g denied*, 86 FERC ¶ 61,253 (1999), *reh'g denied*, 95 FERC ¶ 61,073 (2001). *But see EPIC I*, 131 FERC ¶ 61,130 (2010), *reh'g denied*, *EPIC II*, 136 FERC ¶ 61,041 at PP 15-18 (2011) (rejecting the "pancaked" complaint, by distinguishing it from the complaints in *Consumer Advocate I*, *Southern Co. II*, and *San Diego Gas & Elec.*).

[73] *Consumer Advocate I*, 67 FERC ¶ 61,288 at 62,000, *order on reh'g*, *Consumer Advocate II*, 68 FERC ¶ 61,207 at 61,997 (citing 133 Cong. Rec. S10925 (daily ed. July 30, 1987) (statement of Sen. Chafee) ("[u]nder the current law, . . . section 205 and section 206 filings are not treated in the same manner, and this inequality serves to favor the wholesale supplier over the wholesale customers and their residential and commercial customers"); 134 Cong. Rec. H9030 (daily ed. Oct. 27, 1987) (statement of Rep. Bruce) (the Regulatory Fairness Act, in setting a "refund effective date for consumers . . . [uses] essentially the same system used to grant rate increases"); 134 Cong. Rec. H8095 (daily ed. Sept. 23, 1988) (statement of Rep. Gejdenson) ("[t]his legislation represents an attempt to make the current regulatory process more equitable, giving electric consumers

(continued…)

> [u]tilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints.[74]

Accordingly, the Commission has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on "new, more current data," explaining that "[t]his is particularly critical given that what is at issue is return on equity[,]" which, "in contrast to other cost of service issues . . . can be particularly volatile."[75] The Commission has also explained that, in such cases, it is not "instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months, but rather [is] initiating an entirely new proceeding, based on an entirely separate factual record, that may or may not reach the same conclusions as those reached in the earlier ROE proceeding."[76]

29. In the instant proceedings, the DCF analysis in Complaint II was based on financial data that was from a different time period, and produced a different proxy group, than the DCF analysis in Complaint I. The DCF analysis in Complaint I was based on financial data from a 6-month period ending September 2011[77] and produced a proxy group of 25 companies, with a range of returns between 7.0 percent and 11.4 percent.[78] The DCF analysis in Complaint II was based on financial data from a 6-month period ending December 2012[79] and produced a proxy group of 30 companies, with a

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the same protections and considerations that supplying utilities currently receive")); *see also E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 945 n. 21 (D.C. Cir. 1988) (characterizing the Regulatory Fairness Act as "designed to overcome the disincentive facing electric utilities to speed and settle § 206 cases").

[74] *Consumer Advocate I*, 67 FERC ¶ 61,288 at 62,000.

[75] *Consumer Advocate II*, 68 FERC ¶ 61,207 at 61,998; *see also Southern Co. II*, 83 FERC ¶ 61,079 at 61,385-86.

[76] *Southern Co. II*, 83 FERC ¶ 61,079 at 61,386.

[77] Complaint I at Ex. C-1, 26.

[78] Complaint I at Ex. JRW-8, 1.

[79] Complaint II at Ex. C-1, 27.

range of returns between 5.9 percent and 12.7 percent.[80] The differences in the proxy groups produced by the two DCF analyses and the ROEs of the proxy group companies are the result of changes in, *inter alia*, the dividend yields and growth rates for each proxy group company.[81] The differences in those data constitute different factual circumstances. Thus, because Complaint II is based on newer, more current data than Complaint I, the Commission properly allowed Complaint II.[82]

30. Similarly, the DCF analysis in Complaint III was based on financial data that was from a different time period, and produced a different proxy group, than the DCF analysis in Complaint II. As mentioned above, the DCF analysis in Complaint II was based on financial data from a 6-month period ending December 2012[83] and produced a proxy group of 30 companies, with a range of returns between 5.9 percent and 12.7 percent.[84] By comparison, the DCF analysis in Complaint III was based on financial data from a 6-month period ending June 2014[85] and produced a proxy group of 32 companies, with a range of returns between 6.34 percent and 12.54 percent.[86] The differences in the proxy groups produced by the two DCF analyses and the ROEs of the proxy group companies are the result of changes in, *inter alia*, the dividend yields and growth rates for each proxy group company.[87] The differences in those data constitute different factual

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[80] Complaint II at Ex. C-111, 1.

[81] *Compare* Complaint II at Ex. C-111, 1 *with* Complaint I at Ex. JRW-8, 1.

[82] The facts in the instant case are thus distinguishable from the facts presented in *Niagara Mohawk*, 58 FERC ¶ 61,096, and *EPIC I*, 131 FERC ¶ 61,130, in both of which the Commission dismissed a second complaint against the same rate that was challenged by an earlier complaint. Here, as described above, Complaint II and Complaint III presented new factual allegations, based on different time periods. In both *Niagara Mohawk* and *EPIC I*, the second complaint was identical to the first complaint and presented no different factual or legal allegations, and so in both cases the Commission properly dismissed the second complaint. *See Consumer Advocate II*, 68 FERC ¶ 61,207 at 61,999 n.11.

[83] Complaint II at Ex. C-1, 27.

[84] Complaint II at Ex. C-111, 1.

[85] Complaint III at 24-25.

[86] *Id.* at Ex. CPL-100, 1, 5.

[87] *Compare* Complaint III at Ex. CPL-100, 5 *with* Complaint II at Ex. C-111, 1.

circumstances. Thus, because Complaint III is based on newer, more current data than Complaint II, the Commission properly allowed Complaint III.

31. We disagree with New England TOs' argument that Complaint II is not based on "updated" information because it was based on less current information (i.e., for the 6-month period ending December 2012) than the information in the final record of the Complaint I proceeding (i.e., for the 6-month period ending March 2013). Complaint II was based on data from the most recent 6-month period available to Docket No. EL13-33 Complainants at the time they filed the complaint, and it was appropriate for the Commission to analyze the claims in that complaint based on that evidence for purposes of deciding whether to set that complaint for hearing. The fact that the record in the Complaint I proceeding was still open when Docket No. EL13-33 Complainants filed Complaint II is irrelevant. As explained above, Docket No. EL13-33 Complainants, who were not parties to the Complaint I proceeding, were free to file a complaint requesting a rate decrease based on current common equity cost data as of the date of their complaint, without regard to the status of the Complaint I proceeding at that time.[88] Moreover, the Commission's final determination of New England TOs' ROE for both the Complaint II refund period and the prospective period will be based on later financial data than the Commission relied on for its ROE determinations concerning Complaint I in Opinion No. 531. As explained in the Complaint III Hearing Order, New England TOs' ROE for the Complaint II refund period will be based on data for the six months ending March 2014 (i.e., a period one year later than the study period used in Opinion No. 531), and the prospective ROE will be based on the most recent financial data in the record of the consolidated proceeding.

32. On rehearing of the Complaint III Hearing Order, New England TOs contend that Complaint III was not needed to present new financial data, and therefore serves only to extend the refund period beyond 15 months, because "even absent Complaint III, the DCF data in the Complaint II proceeding will be updated in any event."[89] However, New England TOs' assertion that Complaint III is not necessary to present new financial data is true only in cases where, as here, the timing of the issuance of the Commission's order setting the complaint for hearing makes it administratively efficient to consolidate the successive complaint proceedings. In a typical instance where two successive ROE complaints are filed, the final ROE determination in each of the two proceedings would be based on different financial data, for different time periods, submitted in separate evidentiary records. In this case, as a result of the Commission's decision to consolidate the two proceedings, the final ROE determination in each proceeding will be based on different financial data, for different time periods, submitted in a single evidentiary

[88] *See supra* P 28.

[89] New England TOs Dec. 24, 2014 Request for Rehearing at 12.

record. The only difference between these two scenarios is *how* the records are compiled. New England TOs' rationale would require the Commission to dismiss any complaint that the Commission would otherwise decide to consolidate with a similar, pending proceeding. Under such an approach, a party's rights under FPA section 206 would turn solely on whether the Commission finds it more administratively efficient to consolidate that party's complaint with a similar proceeding, without regard to the merits of the complaint. We do not read FPA section 206 to impose such a procedural limitation. Contrary to New England TOs' assertion, the Commission's policy to allow multiple ROE complaints against the same utility, or utilities, under the circumstances of this proceeding does not produce "absurd" results. Rather, it facilitates the symmetry between FPA section 205 and FPA section 206 that Congress intended in enacting the Regulatory Fairness Act.

33. In any event, New England TOs' argument that the Commission violated the 15-month refund limitation is premature. The decision to order refunds, or not order refunds, in a section 206 proceeding is made "at the conclusion of" such a proceeding.[90] Thus, whether the Commission will direct refunds as a result of the Complaint II proceeding or the Complaint III proceeding will depend on the currently unknown outcomes of those proceedings. While Congress' adopting a 15-month refund limitation in the Regulatory Fairness Act gave public utilities some rate certainty in FPA section 206 proceedings, New England TOs misinterpret the level of certainty that Congress provided. To find, as New England TOs argue, that the 15-month refund limitation in FPA section 206 requires the Commission to deny a complaint under these circumstances—*i.e.*, deny a complaint that is based on unique facts when a similar complaint is already pending before the Commission—would prohibit any party from challenging a utility's ROE as long as there is another complaint involving that utility's ROE pending before the Commission. The language of FPA section 206 does not support such a finding. Limiting refunds in a particular case to 15 months was not intended to shield a utility's rates from a later complaint, any more than the existence of one pending section 205 rate increase shields the customers of a public utility from a second, pancaked section 205 rate increase filed by that same utility later in that same year or in the next.[91] Rather, the 15-month refund limitation in FPA section 206 affects only the Commission's refund authority in a particular proceeding at the conclusion of

[90] 16 U.S.C. § 824e(b) (2012); *see also, e.g., S. Co. Servs. Inc.*, 46 FERC ¶ 61,381, at 62,191-192 (1989).

[91] *See supra* P 28. Just as Congress did not bar, in section 205, the filing of a successive rate increase while an earlier rate increase was still pending, Congress equally did not bar, in section 206, the filing of a successive complaint while an earlier complaint was still pending.

that proceeding; it does not limit either a party's right to file a new complaint under FPA section 206, the Commission's authority to set such a new complaint for hearing, or the Commission's obligation to establish a new refund effective date (and thus establish a 15-month refund period) for that new proceeding. A contrary determination would be inconsistent with the purpose of the Regulatory Fairness Act.

34. Lastly, we deny New England TOs' request that the Commission grant rehearing on the issue of whether the ROE for the 15-month refund period associated with Complaint II—i.e., December 27, 2012 through March 26, 2014—should be based on financial data from the last 6 months of that period. The Commission's decision to require parties to litigate the ROE for the Complaint II refund period based on data from the last 6 months of that period ensures that the various parties in the proceeding will submit data that is easily comparable, consistent with the Commission's requirements for DCF analyses submitted in ROE cases, and representative of the refund period at issue.

35. New England TOs cite *Boston Edison*, *Golden Spread*, and *Southern California Edison* for the proposition that the Commission's standard practice is to use DCF data from various periods within or before the refund period to determine the ROE for that refund period. However, New England TOs misinterpret those orders. While the Commission formerly used DCF study periods that exceed 6 months,[92] the Commission has long since changed its policy to use only 6-month DCF study periods. In fact, in the *Boston Edison* order to which New England TOs cite, the Commission explained that, although the parties in that case relied upon 12-month study periods, "[t]he use of six months of data has been acknowledged by the Commission as a more reasonable and appropriate time frame for determining a rate of return on equity."[93] The Commission also used 6-month study periods in both *Golden Spread* and *Southern California*

[92] *E.g.*, *New England Power Co.*, Opinion No. 158, 22 FERC ¶ 61,123, at 61,187 (1983); *Minnesota Power & Light Co.*, Opinion No. 86, 11 FERC ¶ 61,132, at 61,641 (1980). We also note that the cases cited to us (and discussed in the text above) pre-date the approach we have now adopted, in Opinion No. 531 and in later cases, to use the most recent financial data available at the hearing, and, more specifically, what data to use in individual complaint proceedings when there are successive complaint proceedings. In short, this earlier precedent has been overtaken by more recent precedent.

[93] *Boston Edison*, 42 FERC ¶ 61,374 at 62,039 (citing *Union Elec. Co.*, Opinion No. 279, 40 FERC ¶ 61,046, *order on reh'g*, Opinion No. 279-A, 41 FERC ¶ 61,343 (1987); *South Carolina Generating Co., Inc.*, Opinion No. 280, 40 FERC ¶ 61,116 (1987); *Consumer Advocate Div. of West Virginia Pub. Serv. Comm'n and the Maryland People's Counsel v. Allegheny Generating Co.*, Opinion No. 281, 40 FERC ¶ 61,117 (1987), *order on reh'g*, Opinion No. 281-A, 42 FERC ¶ 61,248 (1988)).

Edison.[94] Furthermore, none of the three Commission orders to which New England TOs cite—*Boston Edison*, *Golden Spread*, and *Southern California Edison*—involved multiple complaints and thus multiple 15-month refund periods. Rather, those orders each involved the determination of an ROE in a single proceeding. As the Commission explained in Opinion No. 531, the Commission's standard practice in cases involving one ROE complaint is to establish a single ROE to apply both during the 15-month refund period and prospectively, and to establish that ROE based on the most recent financial data available at the hearing.[95] In such cases, the 6-month study period that a party uses for the DCF analysis in the party's closing testimony is dictated by the procedural schedule that the presiding Administrative Law Judge establishes—and that procedural schedule may be unrelated to the 15-month refund period. By contrast, in the instant case, which involves multiple ROE complaints, the refund period associated with Complaint II is in the past, and the associated 6-month DCF study period can therefore coincide with the last 6 months of that refund period. Under such circumstances, it is appropriate to use data from the last 6 months of the refund period to ensure that the ROE for that refund period is based on the most recent financial data available for that period.

The Commission orders:

New England TOs' requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[94] *Golden Spread*, 123 FERC ¶ 61,047 at P 62, *aff'g, Golden Spread Elec. Coop., Inc.*, 115 FERC ¶ 63,043 at P 104; *Southern California Edison*, 92 FERC ¶ 61,070 at 61,264, *aff'g, S. Cal. Edison Co.*, 86 FERC ¶ 63,014 at 65,141.

[95] Opinion No. 531, 147 FERC ¶ 61,234 at P 64.

Document Content(s)