

122 FERC ¶ 61,038  
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.

Bangor Hydro-Electric Company

Docket Nos. ER04-157-021  
ER04-714-011  
EL05-89-001

ORDER DENYING REHEARING

(Issued January 17, 2008)

1. On August 27, 2007, the New England Transmission Owners (Transmission Owners)<sup>1</sup> requested rehearing of the Commission's July 26, 2007 order in this proceeding.<sup>2</sup> In that order, the Commission directed the Transmission Owners to make refunds to customers for the period of June 3, 2005 through September 3, 2006 using the returns on equity (ROEs) established for the ISO New England regional transmission organization (RTO) in Opinion No. 489.<sup>3</sup> For the reasons discussed below, we deny rehearing.

**Background**

2. The Transmission Owners submitted a filing under section 205 of the Federal Power Act (FPA)<sup>4</sup> requesting a base-level RTO-wide ROE of 12.8 percent for all

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<sup>1</sup> The New England Transmission Owners are: Bangor Hydro-Electric Company, Central Maine Power Company, New England Power Company, Northeast Utilities Service Company, NSTAR Electric & Gas Corporation, the United Illuminating Company, Vermont Electric Power Company, Fitchburg Gas and Electric Light Company, Florida Power & Light Company—New England Division, Unitil Energy Systems, Green Mountain Power Corporation, and Central Vermont Public Service Corporation.

<sup>2</sup> *Bangor Hydro-Electric Co.*, 120 FERC ¶ 61,093 (2007) (July 26, 2007 Order).

<sup>3</sup> *Bangor Hydro-Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006) (Opinion No. 489).

<sup>4</sup> 16 U.S.C. § 824d(a) (2000).

regional and local transmission rates within ISO New England. The Transmission Owners also requested incentive adders of 50 basis points to reward RTO participation and 100 basis points to encourage future transmission expansion. The Commission accepted the proposed base-level ROE, following suspension and subject to refund, made it effective February 1, 2005, and set it for hearing (ROE Proceeding).<sup>5</sup> The Commission also rejected the 50 and 100 basis point adders for Local Network Service (LNS), but accepted the 50 and 100 basis point adders for Regional Network Service (RNS).<sup>6</sup>

3. As the ROE Proceeding unfolded, the Maine Public Utilities Commission (Maine Commission) filed a complaint under section 206 of the FPA<sup>7</sup> alleging that the company-specific ROEs previously charged by each Transmission Owner were excessive. The Maine Commission argued that these company-specific ROEs remained effective pending the outcome of the ROE Proceeding, and that absent a section 206 complaint, the last clean rate doctrine would limit the Commission to ordering only prospective relief. The Maine Commission requested that the Commission consolidate the complaint with the then-ongoing ROE Proceeding and establish the earliest possible refund effective date. The Commission set the complaint for hearing and established a refund effective date of June 3, 2005, but held the hearing in abeyance pending the outcome of the ROE Proceeding.<sup>8</sup> Similarly, the Commission reserved judgment on whether to consolidate the two cases.

4. After an Initial Decision<sup>9</sup> and briefs on exceptions, the Commission issued an order in the ROE Proceeding. In Opinion No. 489, the Commission established a zone of reasonableness of 7.3 percent to 13.1 percent, and granted the Transmission Owners a base-level ROE of 10.2 percent with three adjustments for RNS: (1) a 50 basis point incentive for RTO participation; (2) a 100 basis point incentive for new transmission

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<sup>5</sup> *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh'g and compliance*, 109 FERC ¶ 61,147 (2004), *order on reh'g and compliance*, 110 FERC ¶ 61,111, *order on reh'g and compliance*, 110 FERC ¶ 61,335 (2005), *order on reh'g*, 111 FERC ¶ 61,344 (2005).

<sup>6</sup> The Commission accepted the 100 basis point adder for RNS following suspension and subject to refund.

<sup>7</sup> 16 U.S.C. § 824e (2000).

<sup>8</sup> *Me. Pub. Utils. Comm'n v. Cent. Me. Power Co.*, 111 FERC ¶ 61,283 (2005) (Maine Commission Order).

<sup>9</sup> *Bangor Hydro-Electric Co.*, 111 FERC ¶ 63,048 (2005) (Initial Decision).

investment; and (3) a 74 basis point adjustment reflecting updated bond data, applicable to the period beginning with the date of Opinion No. 489 (October 31, 2006). Consequently, from February 1, 2005, the rate effective date, through October 31, 2006, (the locked-in period), the Commission-approved RTO-wide ROEs were 10.2 percent for LNS, 10.7 percent for existing RNS, and 11.7 percent for qualifying new RNS.

5. The Transmission Owners submitted a compliance filing proposing to refund LNS and RNS charges assessed during the locked-in period subject to a floor dictated by the last clean rate doctrine. The Transmission Owners contended that the last clean rate doctrine permitted them to calculate refunds using either the RTO-wide ROEs approved in Opinion No. 489 or each Transmission Owner's last company-specific ROEs. Several Transmission Owners opted for calculating refunds according to the second method.

6. The Director, Division of Tariffs and Market Development – East, issued a delegated letter order accepting the Transmission Owners' compliance filing.<sup>10</sup> The New England Consumer-Owned Entities<sup>11</sup> and Public Parties<sup>12</sup> (collectively, Public Entities) requested rehearing. Public Entities argued alternatively that the Transmission Owners had waived the last clean rate doctrine, that the last clean rate doctrine did not apply, and that if the last clean rate doctrine did apply, its applicability was limited to the period before the June 3, 2005 refund effective date established in the Maine Commission Order. Public Entities also claimed that the Transmission Owners were required to calculate refunds using the RTO-wide ROEs approved in Opinion No. 489.

7. In the July 26, 2007 Order, the Commission granted rehearing in part, denied rehearing in part, and consolidated the Maine Commission's complaint with this proceeding. With respect to the Maine Commission's complaint, the Commission held, based on its analysis and findings in the ROE Proceeding, that the Transmission Owners'

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<sup>10</sup> *Bangor Hydro-Electric Co.*, Docket No. ER04-157-015 (February 7, 2007) (unpublished delegated letter order).

<sup>11</sup> New England Consumer-Owned Entities are: Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Vermont Public Power Supply Authority, New Hampshire Electric Cooperative, Inc., Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant.

<sup>12</sup> Public Parties are: Connecticut Department of Public Utility Control, Richard Blumenthal, Attorney General for the State of Connecticut, the Connecticut Office of Consumer Counsel, the Maine Public Utility Commission, the Vermont Department of Public Service, the New England Conference of Public Utility Commissioners, the Maine Office of the Public Advocate, and the Rhode Island Office of the Attorney General.

company-specific ROEs were not just and reasonable ROEs for the RNS and LNS service that had been provided since February 1, 2005.

8. With respect to Public Entities' rehearing request, the Commission held that the last clean rate doctrine applied, and therefore that the Transmission Owners could calculate refunds using their company-specific ROEs, but that its applicability was limited by the June 3, 2005 refund effective date. The Commission explained that within the locked-in period for the section 205 ROE Proceeding (February 1, 2005 through October 31, 2006) there is a separate fifteen-month refund period established by the Maine Commission's section 206 proceeding (June 3, 2005 through September 3, 2006). Consequently, the last clean rate doctrine applied before and after, but not during, the fifteen-month refund period. During the fifteen-month refund period, the Commission directed the Transmission Owners to calculate refunds using the ROEs established in Opinion No. 489.<sup>13</sup>

### **Rehearing Request**

9. On rehearing, the Transmission Owners argue that the Commission erred by ordering them to calculate refunds for the fifteen-month refund period using the ROEs established in Opinion No. 489. The Transmission Owners assert that statutory reasonableness is an abstract quality, and that there is a zone of reasonableness containing many acceptable rates rather than a single just and reasonable rate.<sup>14</sup> The Transmission Owners contend that because their company-specific ROEs were within the zone of reasonableness established in Opinion No. 489, the Commission had no basis for declaring their company-specific ROEs to be unjust and unreasonable, and thus no authority to give effect to the refund effective date established in the Maine Commission Order.<sup>15</sup>

10. We deny rehearing. The Transmission Owners' argument amounts to a claim that their company-specific ROEs are exempt from review under section 206 because they fall within the zone of reasonableness established in Opinion No. 489. In making this argument, they advance the premise that every ROE within the "zone of reasonableness" is necessarily "just and reasonable." Although clever, this premise is unacceptable and without substantive merit; its force rests exclusively on the *semantic connection* between the phrases "zone of reasonableness" and "just and reasonable," and its plausibility is

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<sup>13</sup> July 26, 2007 Order, 120 FERC ¶ 61,093 at P 20-23.

<sup>14</sup> Transmission Owners' Request for Rehearing at 6 (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota*)).

<sup>15</sup> *Id.* at 6-8.

contingent on a fundamental misunderstanding of the Commission's statutorily-prescribed function of determining the just and reasonable rate.

11. While the Transmission Owners correctly observe that statutory reasonableness represents "an area rather than a pinpoint,"<sup>16</sup> they exaggerate the significance of this fact for the purposes of calculating refund liability. When the Commission identifies a "zone of reasonableness" in a particular case, it identifies a range that reflects the "substantial spread between what is unreasonable because it is too low and what is unreasonable because it is too high."<sup>17</sup> However, not every rate within this "substantial spread" would necessarily be just and reasonable if charged. Certain rates, though within the zone, may not be just and reasonable given the circumstances of the case.

12. The Transmission Owners have made no substantive argument that every ROE in the "zone of reasonableness" is "just and reasonable" — nor can they. Such an argument would require that they show that every ROE within the zone, here from 7.3 percent to 13.1 percent, is justified under the facts. This would include explaining why, if an ROE of 7.3 percent is just and reasonable, any ROE over 7.3 percent — much less an ROE almost twice as high — would not be excessive. The Transmission Owners would also have to explain how, if an ROE of 13.1 percent is just and reasonable, and presumably necessary for the Transmission Owners to attract an adequate amount of investment, an ROE of 7.3 percent could equally suffice.

13. Similarly, the Transmission Owners' reasoning "would mean that any previously effective ROE level at or below 13.1 percent would be deemed just and reasonable, and no refunds below that level could be authorized," regardless of any factors that might prompt the Commission to specify a particular ROE as the just and reasonable rate.<sup>18</sup> This would be true even in the extreme case — if the Transmission Owners had previously charged ROEs of 13.1 percent and the Commission had set the just and reasonable ROE at 7.3 percent. Under the Transmission Owners' view, no refunds would be due in this scenario because the previously charged ROEs — although almost twice as high as the hypothetical just and reasonable ROE — would still be within the zone of reasonableness.<sup>19</sup>

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<sup>16</sup> *Montana-Dakota*, 341 U.S. at 251.

<sup>17</sup> *Id.*

<sup>18</sup> July 26, 2007 Order, 120 FERC ¶ 61,093 at P 21.

<sup>19</sup> In fact, in Opinion No. 489, we found that the proposed ROE at issue was *not* just and reasonable, and that a different, lower ROE was just and reasonable. And in the July 26, 2007 Order, we likewise found that the Transmission Owners' company-specific ROEs were *not* just and reasonable ROEs.

14. Moreover, assuming that every rate within the zone of reasonableness is equally just and reasonable in its application would leave no room for the Commission to exercise its judgment in determining the just and reasonable rate. The Transmission Owners' argument reduces the "zone of reasonableness" to little more than a declaration of optional rates,<sup>20</sup> and, when followed to its logical end, results in the conclusion that the Transmission Owners should be free to charge any ROE within the zone.<sup>21</sup> This approach would eliminate the Commission's statutorily prescribed role in resolving the "intensely practical difficulties"<sup>22</sup> inherent in "reduc[ing] the abstract concept of reasonableness to concrete dollars and cents,"<sup>23</sup> as well as nullify the Commission's mandate to ensure that rates are neither less than compensatory to the seller nor excessive to the consumer.<sup>24</sup> The phrase "zone of reasonableness" must be understood as a

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<sup>20</sup> While typically the Commission, in the exercise of its statutory authority to determine just and reasonable rates, selects a just and reasonable ROE from within a "zone of reasonableness," the Commission's doing so does not empower public utilities like the Transmission Owners to, at their option, determine that refunds of excessive rates should be calculated by reference to that zone – i.e., effectively, by reference to some other ROE within that zone that they see as more advantageous (whether it be the pre-existing ROE or some other ROE within that zone).

<sup>21</sup> Indeed, the Transmission Owners argument also necessarily leads to the conclusion that the Commission should be free to charge any rate within the zone — particularly including those at the low end — without consulting any factors specific to the case. For example, under the Transmission Owners' argument, there is no reason that the Commission should not adopt the lowest ROE as the just and reasonable ROE — here, 7.3 percent — in order to best protect customers from excessive rates.

<sup>22</sup> *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984) (*Farmers Union*) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (*Permian Basin Area Rate Cases*)).

<sup>23</sup> *Montana-Dakota*, 341 U.S. at 251.

<sup>24</sup> *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692-93 (1923) (“[a] public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties”).

shorthand way of expressing the concept that ratemaking is not an exact science,<sup>25</sup> and that the Commission “must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.”<sup>26</sup> This includes freedom to take into account all relevant public interests, both existing and foreseeable, in determining the just and reasonable rate.<sup>27</sup> Thus, it follows, when the Commission determines the just and reasonable rate, here, an ROE, that particular rate should be used to calculate refunds, rather than the zone of reasonableness, because that specific rate is the product of the Commission’s considered reflection about what is just and reasonable in that particular case.

15. Accordingly, we deny rehearing and affirm our holding that “in a case where the last clean rate doctrine applies, the specific component that the Commission authorizes or establishes, rather than the zone of reasonableness, should be used for purposes of calculating refund liability.”<sup>28</sup>

16. Finally, to the extent that the Transmission Owners’ argument challenges the Commission’s determination in Opinion No. 489 of the just and reasonable ROE, we reject it as a collateral attack on Opinion No. 489. Accordingly, we deny rehearing.

The Commission orders:

The Transmission Owners’ request for rehearing is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>25</sup> *Federal Power Comm’n v. Conway Corp.*, 426 U.S. 271, 278 (1976).

<sup>26</sup> *Permian Basin Area Rate Cases*, 390 U.S. at 767.

<sup>27</sup> *PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,173, at P 20 (2007).

<sup>28</sup> July 26, 2007 Order, 120 FERC ¶ 61,093 at P 21.