

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. ER04-157-018  
ER04-714-008  
EL05-89-000

ORDER GRANTING REHEARING IN PART,  
DENYING REHEARING IN PART,  
REJECTING COMPLIANCE FILING, AND  
DIRECTING FURTHER COMPLIANCE FILING

(Issued July 26, 2007)

1. On March 9, 2007, New England Consumer-Owned Entities<sup>1</sup> and Public Parties<sup>2</sup> (collectively, Public Entities) requested rehearing of the delegated letter order<sup>3</sup> accepting the compliance filing submitted by the New England Transmission Owners

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<sup>1</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>2</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.

<sup>3</sup> *Bangor Hydro-Electric Co.*, Docket No. ER04-157-015 (February 7, 2007) (unpublished delegated letter order).

(Transmission Owners)<sup>4</sup> in response to Opinion No. 489.<sup>5</sup> As discussed below, we grant rehearing in part, deny rehearing in part, reject the compliance filing, and direct the Transmission Owners to submit a further compliance filing consistent with this order.

## **I. Background**

### **A. RTO and ROE Requests, and Opinion No. 489**

2. On October 31, 2003, the Transmission Owners and ISO New England Inc. (ISO New England) submitted a proposal to establish ISO New England as a regional transmission organization (RTO) for the six-state New England region previously overseen by ISO New England and the New England Power Pool (NEPOOL).<sup>6</sup> On November 4, 2003, the Transmission Owners submitted a related filing requesting a single return on equity (ROE) applicable to all regional and local transmission rates within the proposed RTO.<sup>7</sup> The Transmission Owners requested a base-level ROE of 12.8 percent, with incentive adders of 50 basis points to reward RTO participation and 100 basis points to encourage future transmission expansion.

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<sup>4</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>5</sup> *Bangor Hydro Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006) (Opinion No. 489).

<sup>6</sup> 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 were not members of the original group of transmission owners seeking to establish ISO New England as an RTO. These entities subsequently joined the group.

<sup>7</sup> Green Mountain Power Corporation and Central Vermont Public Service Corporation did not join the other Transmission Owners in submitting the proposal to establish ISO New England as an RTO. They first joined with the other Transmission Owners in making this filing.

3. The Commission addressed both filings in an order issued on March 24, 2004.<sup>8</sup> In that order, the Commission accepted the proposal to establish ISO New England as an RTO, and accepted in part, following suspension and subject to refund, and rejected in part, the proposal to establish a region-wide ROE with incentive adders. Specifically, the Commission accepted the proposed base-level ROE, following suspension and subject to refund, made it effective February 1, 2005 (the Operations Date of the RTO),<sup>9</sup> and set it for hearing in Docket No. ER04-157-004, *et al.* (ROE Proceeding). With respect to the proposed incentive adders, the Commission rejected the 50 and 100 basis point adders for Local Network Service (LNS) and accepted the 50 basis point adder for Regional Network Service (RNS). The Commission also accepted the 100 basis point adder for RNS, following suspension and subject to refund.

4. The Presiding Judge issued the *Initial Decision* in the ROE Proceeding on May 27, 2005.<sup>10</sup> The parties raised exceptions, and the Commission decided the case in Opinion No. 489. In Opinion No. 489, the Commission 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 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). As a consequence, the Transmission Owners received ROEs of 10.7 percent for the locked-in period for the ROE Proceeding<sup>11</sup> and 11.4 percent for the going-forward period for the ROE Proceeding for existing transmission,<sup>12</sup> and 11.7 percent for the locked-in period and 12.4

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<sup>8</sup> *ISO New England, Inc.*, 106 FERC ¶ 61,280 (*RTO Order*), *order on reh'g and compliance*, 109 FERC ¶ 61,147 (2004) (*RTO Rehearing Order*), *order on reh'g and compliance*, 110 FERC ¶ 61,111 (*February 10, 2005 Order*), *order on reh'g and compliance*, 110 FERC ¶ 61,335 (2005) (*March 24, 2005 Order*), *order on reh'g*, 111 FERC ¶ 61,344 (2005) (*June 2, 2005 Order*).

<sup>9</sup> The Transmission Owners have correctly pointed out that paragraph 80 of Opinion No. 489 incorrectly stated that the rate effective date is March 1, 2004. *See* New England Transmission Owners Compliance Filing at n.7 (Compliance Filing).

<sup>10</sup> *Bangor Hydro-Electric Co.*, 111 FERC ¶ 63,048 (2005) (*Initial Decision*).

<sup>11</sup> The locked-in period for the ROE Proceeding runs from February 1, 2005, the date the rates became effective, following suspension and subject to refund, through October 31, 2006, the date of Opinion No. 489.

<sup>12</sup> The going forward period begins on November 1, 2006, prospectively from Opinion No. 489.

percent for the going-forward period for new transmission. The ROE for LNS was set at the 10.2 percent base-level ROE.<sup>13</sup>

**B. Order No. 489 Compliance Filing**

5. On December 21, 2006, the Transmission Owners submitted a compliance filing explaining their method for calculating the refunds due to customers in light of Opinion No. 489. In the compliance filing, the Transmission Owners proposed 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 stated that they understood the last clean rate doctrine to give them the choice to “refund to customers the difference between the as billed rates and the higher of the rates reflecting the ROEs approved by the Commission in Opinion No. 489 *or the rates reflecting the last ROE approved by the Commission for each TO* [Transmission Owner].”<sup>14</sup> The Transmission Owners opted for calculating refunds according to the second method.

6. Notice of the Transmission Owners’ compliance filing was published in the *Federal Register*,<sup>15</sup> with comments or interventions due on or before January 11, 2007. No timely comments or interventions were received. On February 6, 2007, Public Entities filed a motion to respond out-of-time to the compliance filing and submitted comments opposing the compliance filing. The Transmission Owners filed a motion for leave to answer and an answer on February 20, 2007.

7. On February 7, 2007, the Director, Division of Tariffs and Market Development – East (Director) issued a delegated letter order accepting the Transmission Owners’ compliance filing.<sup>16</sup> The delegated letter order stated that no interventions or protests had been filed, and did not address Public Entities’ late-filed motion to respond submitted the day before. Public Entities filed for rehearing.

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<sup>13</sup> The RNS and LNS rates are formula rates, with fixed ROEs that can only be changed either by a filing to the Commission seeking a change or by the Commission acting sua sponte and ordering a change.

<sup>14</sup> Compliance Filing at 5 (emphasis added).

<sup>15</sup> 72 Fed. Reg. 775 (2007).

<sup>16</sup> In accepting the compliance filing, the Director was acting pursuant to authority delegated under 18 C.F.R § 375.307 (2006).

**C. Docket No. EL05-89-000**

8. On April 4, 2005, the Maine Public Utilities Commission (Maine Commission) filed a complaint against the Transmission Owners alleging that the then-effective ROEs charged by each Transmission Owner might be excessive based on evidence presented in the then-ongoing ROE Proceeding. The Maine Commission argued that the previous base-level ROEs charged by each individual Transmission Owner remained effective pending final Commission approval of a region-wide ROE, and that, absent a complaint filed under section 206 of the Federal Power Act (FPA),<sup>17</sup> like the one filed by the Maine Commission, the last clean rate doctrine would limit the Commission to ordering only prospective relief. Accordingly, the Maine Commission requested that the Commission institute an investigation, consolidate the investigation with the then-ongoing ROE Proceeding, and establish the earliest refund effective date possible.

9. The Commission addressed the Maine Commission's complaint in an order issued on May 27, 2005.<sup>18</sup> In that order, the Commission found that the complaint raised material issues of fact that could not be resolved on the record before it, set the complaint for hearing, held the hearing in abeyance and reserved judgment on the issue of consolidation until after the Commission's review of the *Initial Decision* in the ROE Proceeding, and established June 3, 2005 as the refund effective date for the section 206 complaint proceeding.

**II. Request for Rehearing of the Delegated Letter Order**

10. In their request for rehearing of the delegated letter order, Public Entities incorporate the argument from their February 6, 2007 protest that the Transmission Owners waived their right to assert the last clean rate doctrine by failing to raise it in Opinion No. 489 or in any subsequent rehearing request.

11. Public Entities further assert that the Director erred by approving the Transmission Owners' method for calculating refunds. Specifically, as explained more fully below, Public Entities contend that the last clean rate doctrine is inapplicable under the circumstances of this case, but that, if the Commission finds that the last clean rate doctrine does apply, then the *Maine Commission Order* limits its applicability to that portion of the locked-in period before June 3, 2005, the refund effective date established in the section 206 complaint proceeding.

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<sup>17</sup> 16 U.S.C. § 824e (2000).

<sup>18</sup> *Maine Public Utilities Commission v. Central Maine Power Co.*, 111 FERC ¶ 61,283 (2005) (*Maine Commission Order*).

12. Public Entities explain that the last clean rate doctrine is inapplicable here because there is no pre-existing Commission-approved ROE comparable to the region-wide ROE that the Commission accepted in the *RTO Order* and revised in Opinion No. 489. Public Entities state that the last clean rate doctrine applies only where there is a pre-existing rate on file for the particular service at issue, that is, where there is a specific, Commission-approved schedule in place that fixes the reference rate and establishes a rate floor.<sup>19</sup> Although Public Entities acknowledge that the new region-wide provisions are successor arrangements to the previous tariffs of each individual Transmission Owner,<sup>20</sup> they maintain that since there is no pre-existing Commission-approved rate schedule establishing a single, region-wide ROE, the last clean rate doctrine cannot apply here. Consequently, Public Entities argue that the Transmission Owners should calculate refunds using, as a floor, the region-wide ROEs approved in Opinion No. 489—10.2 percent for LNS, 10.7 percent for existing RNS, and 11.7 percent for qualifying new RNS.<sup>21</sup>

13. In the alternative, Public Entities claim that the last clean rate doctrine is only applicable to that portion of the locked-in period before June 3, 2005, the refund effective date established by the Commission in the *Maine Commission Order*. Public Entities argue that the Commission's decision in Opinion No. 489 necessarily resolved the Maine Commission's complaint against the Transmission Owners in the Maine Commission's favor. Accordingly, Public Entities contend that the Commission should find that the last clean rate doctrine can only apply until June 3, 2005.

### **III. Commission Determination**

#### **A. Procedural Matters**

14. In the *Maine Commission Order*, the Commission reserved judgment on the issue of consolidation until after the Commission's review of the ROE Proceeding was complete. Having completed our review of the ROE Proceeding in Opinion No. 489, we now consolidate the Maine Commission's complaint with this proceeding.

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<sup>19</sup> Request for Rehearing of New England Consumer-Owned Entities and Public Parties at 11-12 (Public Entities' Rehearing Request).

<sup>20</sup> Public Entities acknowledge that this case involves a restructuring of service and not a new service. *Id.* at 12.

<sup>21</sup> *Id.* at 10.

## **B. Substantive Matters**

15. We grant rehearing in part and deny rehearing in part. Specifically, we find that the FPA section 205 last clean rate doctrine does apply to this case, but that its application is limited by the FPA section 206 refund effective date established in the *Maine Commission Order*, as described below.

16. At the outset, we deny Public Entities' assertion that the Transmission Owners waived their right to invoke the last clean rate doctrine. The last clean rate doctrine applies when a company has filed under section 205 of the FPA<sup>22</sup> for an increase in a previously-accepted rate (referred to as the underlying rate). If the rate increase is permitted to take effect and the Commission subsequently approves a rate lower than the underlying rate, the Commission can only order refunds equal to the difference between the increased rate and the underlying rate. This restriction prevents retroactive ratemaking and avoids penalizing a company for filing a rate increase.<sup>23</sup> As an outgrowth of the prohibition against retroactive ratemaking, the FPA section 205 last clean rate doctrine is effectively a statutory limitation on the Commission's ability to order refunds in applicable cases; parties cannot waive it by failing to raise it.

17. Next, we disagree with Public Entities' argument that the last clean rate doctrine is inapplicable here merely because there is no underlying region-wide ROE. While Public Entities correctly state that there was no region-wide ROE in New England prior to the *RTO Order*, it does not follow that the individual ROEs previously charged by each Transmission Owner are not underlying rates for purposes of the last clean rate doctrine. The fact that there is no underlying region-wide ROE does not diminish the status of the company-specific ROEs as effective, Commission-accepted ROEs for purposes of the last clean rate doctrine.

18. In this regard, even Public Entities concede that the region-wide ROE is "unmistakably" a change in rates for purposes of suspending it and making it effective subject to refund under section 205.<sup>24</sup> Similarly, Public Entities acknowledge that this case does not involve an "initial" rate, but a change in rates, *i.e.*, a restructuring of service and new rates as compared to the service that was offered under previously accepted

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<sup>22</sup> 16 U.S.C. § 824d(a) (2000).

<sup>23</sup> *Connecticut Municipal Electric Energy Cooperative v. Connecticut Light and Power Co.*, 40 FERC ¶ 61,133 at 61,389 (1987), *reh'g denied*, 40 FERC ¶ 61,402 (1987).

<sup>24</sup> Public Entities' Rehearing Request at 13.

rates.<sup>25</sup> Accordingly, under the circumstances of this case, we find that the Transmission Owners may apply the last clean rate doctrine when calculating refunds.

19. However, the application of the last clean rate doctrine is limited in the circumstances of this case. As more fully explained below, the Transmission Owners may apply the FPA section 205 last clean rate doctrine to only two portions of the locked-in period: (1) the portion prior to June 3, 2005, the FPA section 206 refund effective date established in the *Maine Commission Order*, and (2) the portion after September 3, 2006, the final day of the fifteen-month refund period under section 206.

20. In their February 20, 2007 answer, the Transmission Owners assert that there should be no limitation on applying the last clean rate doctrine because, although the Commission established a refund effective date in the *Maine Commission Order*, it has not found that the previously approved ROE levels, which all fall within the zone of reasonableness in Opinion No. 489, are unjust and unreasonable. We disagree; we find that the application of the last clean rate doctrine to reduce the refunds the Transmission Owners must pay is limited by our establishing an FPA section 206 refund effective date and a fifteen-month refund period.

21. The just and reasonable ROE levels the Commission established in Opinion No. 489 are within a zone of reasonableness of 7.3 percent to 13.1 percent based on a proxy group of transmission owning entities in the Northeast, and Opinion No. 489 authorized the Transmission Owners to include these specific ROE levels in their formula rates.<sup>26</sup> In contrast, the Transmission Owners now want to avoid using these same specific ROE levels in calculating refunds and instead limit refunds to affected customers if the last clean rates, here, ROEs, fall within the zone of reasonableness, even though all of the last clean rates, here, ROEs, exceed the specific just and reasonable ROE levels established in Opinion No. 489. We reject that approach. Applying 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. That is not consistent with Opinion No. 489's findings, which set specific ROE levels within the zone of reasonableness. We find 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. This method of calculating refunds equitably balances customer protection with the underlying goals of the last clean rate doctrine. In this regard, we note that what is at issue here are rates – and, as particularly relevant here, the ROEs – for RNS and LNS service since February 1, 2005, and that that is what was

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<sup>25</sup> *Id.* at 12.

<sup>26</sup> Opinion No. 489, 117 FERC ¶ 61,129 at P 2.

litigated in the ROE Proceeding and decided in Opinion No. 489. In light of our analysis and our findings in the ROE Proceeding establishing the just and reasonable ROEs for the Transmission Owners for RNS and LNS service that has been provided since February 1, 2005, we find that the underlying company-specific ROEs previously charged by the Transmission Owners for the services previously provided by the Transmission Owners are not just and reasonable ROEs for the RNS and LNS service that has been provided since February 1, 2005.

22. Section 206 of the FPA states that the Commission may order refunds “of any amounts paid” for the period from 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.”<sup>27</sup> The refund effective date the Commission established in the *Maine Commission Order* is June 3, 2005. Therefore, under section 206 of the FPA, the Commission may order the Transmission Owners to make refunds of any amounts paid in excess of the just and reasonable ROEs established in Opinion No. 489, from June 3, 2005 through September 3, 2006, fifteen months after the refund effective date. From February 1, 2005 through June 2, 2005, that portion of the locked-in period prior to the FPA section 206 refund effective date, and from September 4, 2006 through October 31, 2006, the remainder of the locked-in period after the expiration of the FPA section 206 fifteen-month refund period, the Transmission Owners may make refunds using their company-specific ROEs as the underlying rates.

23. In other words, the application of the FPA section 205 last clean rate doctrine in this proceeding is limited by the existence of the FPA section 206 refund effective date and fifteen-month refund period that we established in the *Maine Commission Order*. While the locked-in period for the section 205 proceeding begins on February 1, 2005 and ends on October 31, 2006, a separate fifteen-month refund period for the section 206 proceeding exists therein, namely from June 3, 2005 through September 3, 2006. The last clean rate doctrine of section 205 does not limit refunds within the fifteen-month refund period of the section 206 complaint proceeding, but does apply to the locked-in period before the Commission established the refund effective date and after the expiration of the fifteen-month refund period established by section 206, for the duration of the locked-in period.

24. Accordingly, we reject the December 21, 2006 compliance filing, and direct the Transmission Owners to submit a new compliance filing, within 30 days of the date of this order, consistent with the findings in this order.

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<sup>27</sup> 16 U.S.C. § 824e(b) (2000).

The Commission orders:

(A) Public Entities' request for rehearing of the delegated letter order is hereby granted in part and denied in part, as described in the body of this order.

(B) The Transmission Owners' December 21, 2006 compliance filing is hereby rejected.

(C) The Transmission Owners are hereby directed to submit a further compliance filing, as discussed in the body of this order, within 30 days of the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.