

150 FERC ¶ 61,081
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Delaware Division of the Public Advocate
Delaware Municipal Electric Corporation, Inc.
Delaware Public Service Commission
Maryland Office of People's Counsel
Maryland Public Service Commission
New Jersey Board of Public Utilities
New Jersey Division of Rate Counsel
Office of the People's Counsel of the District of Columbia
Public Service Commission of the District of Columbia

Docket No. EL15-27-000

v.

Baltimore Gas and Electric Company
Pepco Holdings, Inc.
Potomac Electric Power Company
Delmarva Power & Light Company
Atlantic City Electric Company

ORDER ON COMPLAINT AND ESTABLISHING HEARING PROCEDURES

(Issued February 9, 2015)

1. On December 8, 2014, pursuant to section 206 of the Federal Power Act (FPA),¹ Complainants² filed a complaint against Baltimore Gas & Electric Company (BGE), Pepco Holdings, Inc. and its operating affiliates³ (PHI) (collectively, BGE/PHI or Respondents), contending that the base return on equity (ROE) currently set at 10.8 percent (for facilities placed into service before January 1, 2006) and 11.3 percent (for facilities placed into service on and after January 1, 2006) in Respondents' formula rates for Network Integration Transmission Service under PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (OATT), is unjust and unreasonable. Complainants contend that based on current financial data and the Commission's revised Opinion No. 531⁴ discounted cash flow (DCF) methodology, the Commission should reduce Respondents' base ROE to 8.8 percent. In this order, we establish hearing procedures and set a refund effective date of December 8, 2014.

I. Background

2. BGE/PHI recover their transmission revenue requirement through formula rates for Network Integration Transmission Service under PJM's OATT. The current rates derive from a Settlement in Docket No. ER05-515-000 that the Commission accepted in 2006 (2006 Settlement).⁵

3. On February 27, 2013, Complainants filed a complaint (the February 2013 Complaint) against Respondents in Docket No. EL13-48-000, contending that due to changes in the capital markets since the 2006 Settlement, the base ROE had become unjust and unreasonable, and that as a result, ratepayers were overcompensating

¹ 16 U.S.C. § 824e (2012).

² Complainants are the Delaware Division of the Public Advocate; Delaware Municipal Electric Corporation, Inc.; Delaware Public Service Commission; Maryland Office of People's Counsel, Maryland Public Service Commission; New Jersey Board of Public Utilities; New Jersey Division of Rate Counsel; Office of the People's Counsel of the District of Columbia; and Public Service Commission of the District of Columbia.

³ Pepco Holdings, Inc.'s operating affiliates are Potomac Electric Power Company, Delmarva Power & Light Company and Atlantic City Electric Company.

⁴ *Martha Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electr. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014) (Opinion No. 531), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014).

⁵ *Baltimore Gas and Electric Co., et al.*, 115 FERC ¶ 61,066 (2006).

BGE/PHI by approximately \$35.5 million annually. Based on current financial data and their DCF analysis, Complainants requested that the Commission reduce the base ROE to 8.7 percent.

4. On August 21, 2014, the Commission set the February 2013 Complaint for hearing and settlement judge procedures, and established a February 27, 2013 refund effective date.⁶ On November 26, 2014, the Chief Administrative Law Judge terminated the settlement judge procedures and appointed an Administrative Law Judge to preside at the evidentiary hearing.

II. The Complaint

5. In the instant Complaint, Complainants contend that, based on updated financial data and the two-step DCF methodology that the Commission established in Opinion Nos. 531 and 531-A, the base ROE should be no higher than 8.8 percent, and that as a result, ratepayers are currently overcompensating BGE/PHI by approximately \$37 million annually.⁷ Complainants request that the Commission find that the existing base ROE is no longer just and reasonable, and that the Complainants' proposed 8.8 percent base ROE is just and reasonable. Alternatively, Complainants request that the Commission establish the earliest possible refund effective date, set the matter for evidentiary hearing and consolidate it with the February 2013 Complaint proceeding that is pending in Docket No. EL13-48-000, without requiring further settlement negotiations, as they have proven fruitless.⁸

6. Complainants contend, through their expert witness Kahal, that due to substantial changes in the capital markets since the Commission approved the 2006 Settlement, the market cost of capital for creditworthy utilities like Respondents has declined sharply and by some measures is at or close to an historic low. In particular, since the 2006 Settlement, long-term utility bond yields have dropped from six percent to approximately 4.5 percent, and 10-year Treasury bond yields show similar or even larger declines. In Mr. Kahal's view, these declines in capital costs stem from underlying weakness in the U.S. and global economies, very low inflation and the Federal Reserve's "quantitative easing" policy, which has pushed short-term Treasury rates close to zero. According to

⁶ *Delaware Div. of the Pub. Advocate, et al. v. Baltimore Gas and Electric Co., et al.*, 148 FERC ¶ 61,134 (2014).

⁷ Complaint at P 42.

⁸ *Id.* PP 18, 48, 50, 52.

Mr. Kahal, all of these forces have exerted downward pressure on interest rates and capital costs, including utility cost of equity.⁹

7. To facilitate reevaluation of the current ROE, Mr. Kahal updated and revised his Docket No. EL13-48-000 DCF analysis, using a national electric company proxy group of 37 companies, six months' market data from March through August 2014, and the two-stage composite growth rate that the Commission adopted in Opinion Nos. 531 and 531-A.¹⁰ He developed his national proxy group using the universe of publicly-traded companies that Value Line classifies as "electric utilities," from which he removed nine companies that he states satisfy the Commission's exclusion criteria because: (1) their Standard & Poor's or Moody's credit rating differs from the Respondents' credit ratings by more than "one notch;" or (2) they were involved in a merger during the six-month study period he used in his DCF analysis.¹¹

8. Mr. Kahal calculated the dividend yields for each proxy company for each month from March through August 2014, using monthly Standard & Poor's *Stock Guide* data. With one exception, he then used YahooFinance's late-August 2014 five-year earnings per share data for each proxy company's first-stage growth rate.¹² He used Opinion No. 531-A's long-term nominal growth rate of 4.39 percent for the second-stage growth rate,¹³ which he rounded to 4.4 percent.¹⁴ Mr. Kahal derived a 6.64-11.58 percent zone of reasonableness, an 8.79 percent median, a 9.11 percent midpoint, and recommends an 8.8 percent median ROE, consistent with Commission precedent that sets the ROE for

⁹ Kahal Test. at 6, 8, 12-16.

¹⁰ Complaint at PP 28, 30-31; Kahal Test. at 19-25.

¹¹ Complaint at P 31; Kahal Test. at 21. Mr. Kahal excluded six companies from his proxy group due to large-scale merger activity, and excluded three companies due to credit rating differences.

¹² Mr. Kahal relied on YahooFinance's late-September 2014 five-year earnings-per-share data for Portland General Electric Company, because those data corrected a calculation error in YahooFinance's late-August data for that company. Complaint at P 34; Kahal Test. at 23-25.

¹³ Opinion No. 531-A, 149 FERC ¶ 61,032, at PP 10-11.

¹⁴ Complaint at P 20; Kahal Test. at 24.

individual transmission owners at the median of the zone of reasonableness.¹⁵ Further, Mr. Kahal states that the “anomalous capital market conditions, on which the Commission in Opinion No. 531 relied to set the ROE in the top half of the zone of reasonableness, no longer exist,¹⁶ and notes that Opinion No. 531 clearly states that “[n]othing in this order precludes participants in [other] proceedings from developing a record in those cases supporting a different point in the range of reasonable returns than the midpoint of the upper half of the range.”¹⁷ Alternatively, if the Commission requires that the ROE be set in the top half of the zone of reasonableness, then Mr. Kahal recommends that the Commission set the ROE at 9.24 percent, which represents the median of the upper half of the zone of reasonableness.¹⁸

9. As a final matter, Complainants contend that the Commission should also consider the fact that because BGE and PHI recover their transmission costs through formula rates, the certainty of their cost recovery reduces Respondents’ regulatory risk.¹⁹

10. Complainants request that Commission consolidate the instant complaint with their February 2013 Complaint, given the common questions of law and fact.

III. Notice and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 79 Fed. Reg. 76,995-76,996 (2014), with comments due on December 29, 2014, later extended to January 12, 2015.

¹⁵ Kahal Test. at 8-9, 35-36; Complaint at PP 35-36, (citing *Atlantic Grid Operations A LLC, et al.*, 135 FERC ¶ 61,144, at P 91 (2011) and cases cited therein. *See also S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013); *Pacific Gas & Electric Co.*, 143 FERC ¶ 61,190 (2013); *Pub. Serv. Co. of New Mexico*, 143 FERC ¶ 61,227 (2013); *S. California Edison Co.*, 139 FERC ¶ 61,042 (2012); *Golden Spread Elec. Coop. Inc.*, 123 FERC ¶ 61,047 (2008); *Virginia Electric Power Co.*, 123 FERC ¶ 61,098 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 (2004), *aff’d in relevant part sub nom. Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005).

¹⁶ Complaint at P 38; Kahal Test. at 31-32.

¹⁷ Complaint at P 37; Kahal Test. at 33.

¹⁸ Complaint at P 39; Kahal Test. at 32.

¹⁹ Complaint at P 36; Kahal Test. at 8-9, 34-35.

12. Public Power Association of New Jersey (Public Power) and Southern Maryland Electric Cooperative, Inc. (Southern Maryland) filed timely motions to intervene. Southern Maryland's intervention includes comments supporting the Complaint and the relief it requests.

13. On January 12, 2015, Respondents submitted an answer to the Complaint.

Respondents' Answer

14. Respondents contend that the Commission should dismiss the instant Complaint for two reasons. First, Respondents assert that because Section 206(b) of the FPA limits refunds to 15 months, it therefore bars pancaked complaints that raise the same issue. Respondents emphasize that the instant Complaint relies on the same justification and requests virtually identical relief as the February 2013 Complaint, and claim that because the instant Complaint seeks a base ROE that is 10 basis points higher than the relief Complainants sought in Docket No. EL13-48-000, it definitively illustrates that Complainants' sole goal is to circumvent the 15-month statutory refund limitation and obtain consecutive 15-month refund periods. Further, Respondents claim that no purpose would be served in setting the instant Complaint for hearing, because the updated data on which it rests will be superseded by the most current data at the time of hearing in Docket No. EL13-48-000. For all of these reasons, Respondents contend that the Commission should dismiss the instant Complaint as an end-run around the FPA.²⁰

15. Second, Respondents contend that because their current base ROE falls within the Complainants' zone of reasonableness, the Complaint fails to demonstrate that it is unjust and unreasonable, and therefore the Commission should dismiss it.²¹

16. Finally, Respondents contend that if the Commission does not dismiss the instant Complaint, it should consolidate it promptly with the evidentiary hearing that is pending in Docket No. EL13-48-000. Nevertheless, Respondents ask that the Commission reinstitute Settlement Judge Procedures.²²

²⁰ Respondents' Answer at 3-5, 8-19.

²¹ *Id.* at 5-6, 19-26.

²² *Id.* at 6, 28.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

18. We find that the complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing ordered below. Accordingly, we will set the complaint for investigation and a trial-type, evidentiary hearing under section 206 of the FPA. With regard to the request for consolidation, we leave to the discretion of the Chief Administrative Law Judge whether it is appropriate to consolidate this proceeding and Docket No. EL13-48-000 for purposes of hearing and decision.²³

19. While Respondents raise various arguments as to the propriety of allowing the Complaint, the Commission has previously allowed successive complaints when presented with a new analysis.²⁴ In this case, Complainants have submitted a new DCF analysis for a new time period, with new, more current data. Respondents' assertion that the Complaint must be dismissed because it seeks a base ROE that is 10 basis points *higher* than the relief Complainants sought in Docket No. EL13-48-000 misses the point. The relief Complainants seek here is an ROE that falls well *below* the current ROE, using financial data for a later period than the DCF analysis presented in the Docket No. EL13-48-000 complaint. We likewise find unpersuasive Respondents' assertion that the Commission should dismiss the Complaint because BGE/PHI's base ROE falls within

²³ See 18 C.F.R. § 385.503(a) (2014).

²⁴ See *Consumer Advocate Div. of the Pub. Serv. Comm'n of West Virginia v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 62,000 (1994) (*Allegheny Generating*), *order on reh'g*, 68 FERC ¶ 61,207 (1994); *Southern Co. Services, Inc.*, 68 FERC ¶ 61,231 (1994) (*Southern Co.*), *reh'g denied*, 83 FERC ¶ 61,079 (1998); see also *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998) (*San Diego Gas & Elec.*), *order on reh'g*, 86 FERC ¶ 61,253 (1999), *reh'g denied*, 95 FERC ¶ 61,073 (2001). *But see EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010), *reh'g denied*, 136 FERC ¶ 61,041 (2011) (rejecting the "pancaked" complaint, by distinguishing it from the complaints in *Allegheny Generating*, *Southern Co.*, and *San Diego Gas & Elec.*).

Mr. Kahal's zone of reasonableness. The Commission has previously rejected the contention that every ROE within the zone of reasonableness is necessarily just and reasonable,²⁵ and we do so again here.

20. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,²⁶ we will set the refund effective date at the earliest date possible, i.e., December 8, 2014, as requested.

21. If the Chief Administrative Law Judge determines that it is appropriate to consolidate this proceeding with Docket No. EL13-48-000, the consolidated proceeding will involve two refund periods—the 15-month refund period in the instant proceeding, and the 15-month refund period in Docket No. EL13-48-000. In those circumstances, it would be appropriate for the parties to litigate a separate ROE for each refund period. Specifically, for the refund period covered by Docket No. EL13-48-000 (i.e., February 27, 2013 through May 27, 2014), 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.²⁷ For the refund period in the instant docket (i.e., December 8, 2014 through March 8, 2016) and for the prospective period, the ROE should be based on the most recent financial data in the record.²⁸

²⁵ See, e.g., *Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,038, at PP 10-15 (2008) and Opinion No. 531, 147 FERC ¶ 61,234 at PP 51-55, and cases cited therein.

²⁶ See, e.g., *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

²⁷ See Opinion No. 531, 147 FERC ¶ 61,234 at P 160 (addressing the use of recent financial data to determine the ROE); see also *NewYork Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176, at P 24 (2014).

²⁸ See Opinion No. 531, 147 FERC ¶ 61,234 at PP 65-67, 160 (holding that a single ROE should be established for the most recent refund period addressed at the hearing and for the prospective period based on the most recent financial data in the record); see also *NewYork Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176 at P 24.

22. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or February 29, 2016. Thus, we estimate that, absent settlement, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by December 31, 2016.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint.

(B) In the event that this proceeding is not consolidated with Docket No. EL13-48-000, a presiding judge, to be designated by the Chief Administrative Law Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date in Docket No. EL15-27-000, established pursuant to section 206(b) of the FPA, is December 8, 2014.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.