

155 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Emera Maine

Docket Nos. ER12-1650-000
ER15-1429-000

ORDER ON FORMAL CHALLENGE AND MOTION TO COMPEL, ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES, CONSOLIDATING
PROCEEDINGS, AND DIRECTING COMPLIANCE FILING

(Issued June 2, 2016)

1. On May 1, 2014, Emera Maine¹ submitted an Annual Transmission Rate Informational Filing in Docket No. ER12-1650-000 detailing the transmission charges to take effect June 1, 2014 (2014 Annual Update) for transmission service under its Open Access Transmission Tariff (OATT) for the Maine Public District (MPD OATT). On November 18, 2014, the Maine Customer Group² (Customer Group) filed a formal challenge to the 2014 Annual Update alleging that the rate for the 2014-2015 Rate Year is unjust and unreasonable with respect to six matters (Formal Challenge).
2. On May 1, 2015, Emera Maine submitted an Annual Transmission Rate Informational Filing in the same docket detailing the transmission charges to take effect June 1, 2015 (2015 Annual Update) for transmission service under the MPD OATT. On May 8, 2015, Customer Group filed in both Docket No. ER12-1650-000 and ER15-1429-

¹ Emera Maine is the successor in interest to Maine Public Service Company (Maine Public), which merged into Bangor Hydro Electric Company (Bangor Hydro) on January 1, 2014 and was renamed Emera Maine. Emera Maine provides service to two areas – the Bangor Hydro District and the Maine Public District – under two separate OATTs.

² Customer Group consists of: the Office of Maine Public Advocate, Houlton Water Company, Van Buren Light and Power District, and Eastern Maine Electric Cooperative, Inc.

000 a motion to compel revision of the 2015 Annual Update claiming that it is not based on the currently effective formula rate, but rather on a proposed formula rate (Motion to Compel Revision).

3. For the reasons discussed below, the Commission grants the Formal Challenge in part, sets the remaining issues in the Formal Challenge to the 2014 Annual Update and the 2015 Annual Update for hearing and settlement judge procedures, and consolidates the instant proceeding with the ongoing hearing and settlement judge procedures established by the Commission in Docket No. ER15-1429-000. The Commission also directs Emera Maine to submit a compliance filing within 30 days of the issuance of this order, as discussed further below.

I. Background

A. The Merger

4. On July 18, 2013, the Commission authorized Bangor Hydro and Maine Public's (203 Applicants) application under sections 203(a)(1) and 203(a)(2) of the Federal Power Act³ in which Bangor Hydro requested authorization to acquire all of the jurisdictional assets of Maine Public (Merger) (203 Application).⁴ Prior to the Merger, Maine Public and Bangor Hydro were wholly-owned subsidiaries of Emera Incorporated, a publicly-traded utility holding company headquartered in Halifax, Canada. Each subsidiary provided transmission and distribution of electric energy and related services to retail and wholesale customers in Maine.⁵ Maine Public owned 380 miles of transmission lines and provided transmission service pursuant to the Maine Public OATT, filed with the Commission.⁶ In the 203 Application, the 203 Applicants asserted that the proposed transaction would have no adverse effect on their transmission service rates, which are both determined annually pursuant to formula rates.⁷ In the Merger Order, the Commission accepted Applicants' commitment to file changes to their formula rates under section 205 of the FPA to adjust the formulas so that, after the Merger, the resulting charges would reflect, as accurately as practicable, the costs of providing

³ 16 U.S.C. § 824(a)(1)-(2) (2012).

⁴ *Bangor Hydro Electric Co.*, 144 FERC ¶ 61,030, at PP 3-4 (2013) (Merger Order).

⁵ *Id.* P 3.

⁶ *Id.* P 4.

⁷ *Id.* P 14.

service over the 203 Applicants' respective transmission systems.⁸ Furthermore, the Commission accepted Applicants' commitment to hold transmission customers harmless from transaction-related costs for a period of five years.⁹

5. After the Merger, Emera Maine, the company resulting from the Merger, began to provide transmission service for the Bangor Hydro and Maine Public Districts pursuant to the OATTs applicable to the respective service territories. As directed by the Commission, on April 1, 2015, as amended on May 1, 2015, Emera Maine submitted in Docket No. ER15-1429-000, changes to the MPD OATT, which it stated would ensure the formula rate reflects only the costs of service over the MPD Transmission System. On December 7, 2015, the Commission accepted Emera Maine's proposed revisions, effective June 1, 2015, subject to condition, and established hearing and settlement judge procedures.¹⁰

B. Maine Public's Formula Rate and Protocols

6. On August 8, 2013, the Commission approved an uncontested joint offer of settlement submitted by Maine Public that resolved all issues set for hearing in multiple proceedings and included revisions to, what was then, Maine Public's OATT Formula Rate (Formula Rate) and Formula Rate Implementation Protocols (Protocols).¹¹ The Formula Rates and Protocols currently are included in Attachment J under the MPD OATT.¹² The Formula Rate consists of a template that is used to calculate rates for Network Transmission Service and Firm and Non-Firm Point-to-Point Transmission service in Emera Maine's MPD service territory. The template is populated with information from FERC Form No. 1 each year to result in updated charges effective on June 1 of each year.

⁸ *Id.* P 19.

⁹ *Id.* P 20.

¹⁰ *Emera Maine*, 153 FERC ¶ 61,283 (2015).

¹¹ *Maine Public Service Co.*, 144 FERC ¶ 61,116 (2013).

¹² *Emera Maine Open Access Transmission Tariffs, Attachment J Rate Formula Protocols*. On January 1, 2014, Maine Public ceased to exist as a legal entity and was succeeded by Emera Maine. As such, Emera Maine revised the MPD OATT to effectuate the merger and name change. *Bangor Hydro Electric Co.*, Docket No. ER14-218-000 (Dec. 23, 2013) (delegated letter order).

7. The Protocols establish the implementation and review procedures for charges established by the Attachment J Formulas. Under the Protocols, a Rate Year is defined as the period from June 1 of each year through May 31 of the following year.¹³ No later than May 1 of each year, Emera Maine files its Annual Update as an informational filing with the Commission. The Annual Update is based on Emera Maine's FERC Form No. 1 for the previous year and is based on Commission orders, rate making policies, and accounting practices and procedures.¹⁴ The 2014 Annual Update was filed on May 1, 2014. The 2015 Annual Update was filed on May 1, 2015. The Annual Updates are subject to challenge and review in accordance with the procedures set forth in the Protocols.¹⁵

II. Summary of Formal Challenge and Responsive Pleadings

8. Pursuant to section IV.A of the Protocols under the MPD OATT, Customer Group filed the Formal Challenge to the 2014 Annual Update. Customer Group asserts that the rate resulting from the 2014 Annual Update is unjust and unreasonable because the 2014 Annual Update: (1) "omits long-term debt from [Emera Maine's] capital structure, which has resulted in an artificially inflated equity ratio (approximately 81 percent), and consequently inflated rates to the Customer Group";¹⁶ (2) erroneously includes \$11,853 related to Emera Maine's short-term revolving credit facility in the amortization of long-term debt costs; (3) makes two errors in the amounts included for post-retirement benefits other than pensions; (4) erroneously uses a 35 percent federal income tax rate instead of 34 percent; (5) errs in including the cost of the Flo's Inn transformer; and (6) errs in including the amortization of prior actuarial losses associated with pension and retiree medical benefit plans.

9. With respect to the federal income tax rate issue, Customer Group contends that Emera Maine must be viewed in isolation of its parent, Emera Incorporated, for tax treatment purposes, and that Emera Maine earned less than \$10 million in the relevant tax period. Customer Group asserts that since a federal tax rate of 34 percent applies to

¹³ Emera Maine, *Pro Forma* Open Access Transmission Tariff for Maine Public District, Attachment J Protocols (0.0.0) (Attachment J Protocols).

¹⁴ Attachment J Protocols, III - Records and Annual Review Procedures, Section B., "Each Annual Update shall be subject to the Annual Review Procedures...."

¹⁵ *Id.* III.B.2.

¹⁶ Formal Challenge at 5-6.

companies earning less than \$10 million in a tax year, a 34 percent tax rate is applicable here.¹⁷

10. Additionally, Customer Group states that Emera Maine included the cost of the Flo's Inn transformer that will not be in service until after 2014, but that Commission precedent dictates that an asset must be in service, and thus, used and useful, in the relevant test period before its costs can be recovered in rates.¹⁸

11. Moreover, Customer Group states that Emera Maine should have excluded the amortization of prior actuarial losses associated with pension and retiree medical benefit plans because: (i) the recovery of such costs in transmission rates is barred by Emera Maine's commitment to hold transmission customers harmless from transition costs arising from the Merger; (ii) the regulatory asset created by Emera Maine has not been authorized by the Commission and so violates Emera Maine's commitment to make a section 205 filing if it seeks to recover transaction-related costs in an existing formula rate; and (iii) the regulatory asset authorization from the Maine Public Utilities Commission (Maine Commission) commences July 2014, which is outside the time period relevant for rates in this filing.¹⁹

12. On December 18, 2014, pursuant to section IV.C of the Protocols, Emera Maine filed an answer to the Formal Challenge. In the answer, Emera Maine states that it does not object to recalculating its 2014-2015 charges based on a 34 percent rate, provided that this same 34 percent rate is used to calculate its accumulated deferred income taxes. However, Emera Maine disputes allegations that it erred in including the cost of the Flo's Inn transformer, stating that: (i) it fully complied with the terms of the Formula Rate; (ii) an asset need not be in service before its costs are recovered in rates; and (iii) the Flo's Inn transformer will be in service by the end of 2014.²⁰ Emera Maine further disputes allegations that it erred in including the amortization of prior actuarial losses associated with pension and retiree medical benefit plans, stating that changes in Maine Public's accounting treatment as a result of the merger had no impact on charges under the Formula Rate.²¹

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 11.

²⁰ Emera Maine Dec. 18, 2014 Answer at 9.

²¹ *Id.* at 14.

13. On January 2, 2015, Customer Group filed a response to Emera Maine's answer to the Formal Challenge. Customer Group asserts that the answer to the Formal Challenge inappropriately modifies the 2014 Annual Update, includes "untested" affidavits, and would impose unclear conditions on Emera Maine's agreement to change the federal tax rate to 34 percent.

14. On January 27, 2015, Customer Group filed a supplemental response to Emera Maine's Answer to the Formal Challenge. On February 5, 2015, Emera Maine filed an answer.

III. Summary of Motion to Compel Revision and Responsive Pleadings

15. Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2015), Customer Group filed the Motion to Compel Revision.²² Customer Group asserts that the 2015 Annual Update violates the MPD OATT because it is not based on the currently effective formula under the OATT, but rather is based on the proposed formula filed in Docket No. ER15-1429-000 on April 1, 2015, and amended on May 1, 2015. Customer Group states that the differences between the formula currently in effect and the proposed formula are substantial. Customer Group states that, if the currently effective formula were used, it would yield an annual network integration transmission service rate of \$23.61/kw-year, but that the 2015 Annual Update shows the annual rate for network integrated transmission service as \$34.56/kw-yr, a 45 percent rate overstatement.²³ Customer Group characterizes Emera Maine as proposing a "massive rate increase."²⁴ It requests that the Commission reject the 2015 Annual Update and direct the Maine Public District to recalculate the 2015 Annual Update using the formula in effect as of May 1, 2015.²⁵

16. On May 26, 2015, Emera Maine filed an answer to Customer Group's Motion to Compel Revision. Emera Maine requests that the Commission set the issues raised by Customer Group for hearing and settlement procedures. Emera Maine states that it is not

²² We note that the December 7, 2015 order dismissed the Motion to Compel in Docket No. ER15-1429-000, *Emera Maine*, 153 FERC ¶ 61,283 at P 30; however, the Motion was filed in both dockets. The motion is in essence a formal challenge which we address *infra* section IV.B.

²³ Motion to Compel Revision at 4.

²⁴ *Id.* at 6.

²⁵ *Id.* at 7.

proposing a massive rate increase, as Customer Group suggests, but rather a “not insubstantial rate decrease” of 4.2 percent.²⁶ Emera Maine states that Customer Group’s claims are based on “a false comparison that picks and chooses elements of Emera Maine’s current tariff and elements of Emera Maine’s proposed tariff.” It likens Customer Group’s claims to single-issue ratemaking.²⁷ Emera Maine explains that the current formula rate presupposes a single FERC Form No. 1 applicable to the assets subject to the MPD OATT only, but such a FERC Form No. 1 was not filed for 2014.²⁸

17. On May 27, 2015, Customer Group filed a reply explaining the process by which it arrived at the calculations in its Motion to Compel Revision. Customer Group states that its recalculated rate may not be precise, but was intended to provide an “order of magnitude” approximation to show that Emera Maine’s proposed rate changes would effect a “huge rate increase.”²⁹

IV. Discussion

A. 2014 Annual Update

1. Procedural Matters

18. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)((2) (2015), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Customer Group’s January 2, 2015 Answer filed in this proceeding because it has provided information that assisted us in our decision-making process. We are not persuaded to accept Customer Group’s January 27, 2015 Answer or Emera Maine’s February 5, 2015 Answer and will, therefore, reject them.

2. Substantive Matters

19. Except as otherwise noted below, we find that the 2014 Annual Update raises issues of material fact that cannot be resolved based on the record before us, and that are

²⁶ Emera Maine May 26, 2015 Answer at 3 (citing Motion to Compel Revision at 5).

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 5.

²⁹ Customer Group May 27, 2015 Reply at 2.

more appropriately addressed in the hearing and settlement judge procedures ordered below. In particular, we grant Customer Group's Formal Challenge pertaining to amortization of long-term debt costs, post-retirement benefits other than pensions, and the omission of long-term debt, but set the remaining issues raised by the Formal Challenge for hearing and settlement judge procedures, including the use of a 35 percent federal tax rate; costs related to the Flo's Inn Transformer; and the amortization of prior actuarial losses associated with pension and retirement plans.

a. Amortization of Long-Term Debt Costs and Post-Retirement Benefits Other Than Pensions

i. Formal Challenge

20. With respect to amortization of long-term debt costs, Customer Group asserts that Emera Maine has erroneously included \$11,853 of short-term debt costs as part of its long-term debt costs, and therefore this amount should be excluded.³⁰ With respect to post-retirement benefits other than pensions, Customer Group asserts that Emera Maine has acknowledged, in response to information requests, that it made an error in its own favor by \$43,680, and an error of \$450 in Customer Group's favor. Customer Group argues that the Commission should require that both of these errors be rectified in the 2014 Annual Update.

ii. Emera Maine's Answer

21. Emera Maine states that it does not take issue with the fundamental aspects of the foregoing issues and is willing to agree that these were inadvertent errors.³¹ It adds that it has identified another error in the Annual Update, i.e., it erroneously included non-zero values for end-of-year preferred stock issued.³² The correction of this error will increase the calculated wholesale Annual Transmission Revenue Requirement by \$186,507.³³ Emera Maine contends, however, that the errata identified herein fall squarely within the definition of the term "mistake" as used in section IV.E of the Protocols, which call for

³⁰ Formal Challenge at 8-9.

³¹ Emera Maine December 18, 2014 Answer at 16.

³² Annual Update, workpaper WP_Stmt_AV, Line 10.

³³ Emera Maine December 18, 2014 Answer at 17.

such errors to be corrected in the next Annual Update.³⁴ Thus, according to Emera Maine, Customer Group's request for corrections to Emera Maine's current charges based on these inadvertent errors is misplaced, and these issues related to inadvertent errors should be properly corrected in Emera Maine's next Annual Update.³⁵ Alternatively, Emera Maine advises that it is willing to make corrections in a compliance filing, but only if it is also permitted to correct the non-zero amount in preferred stock. Emera Maine asserts that any other outcome would be arbitrary and inequitable.³⁶

iii. Customer Group's January 2, 2015 Answer

22. Customer Group responds that the errors identified with respect to amortization of long-term debt costs and post-retirement benefits other than pensions do not fall within the meaning of "Mistake" as referenced in Emera Maine's Protocols.³⁷ Customer Group contends that a "Mistake" is defined as an arithmetic error (like a value added wrong) or an erroneous Form No. 1 reference, i.e., ministerial matters of no debate. Moreover, according to Customer Group, the concept of Mistake is intended to allow correction of such ministerial matters that are uncovered after the Annual Update has otherwise become final. Customer Group further asserts that the issues it raises are not arithmetic errors or indisputable ministerial matters, and they were identified within the time frame allowed for Formal Challenges, not after the Annual Update had become final. Thus, Customer Group states, these two issues are no different from any of the other issues identified in the Formal Challenge, and the refund remedy for their resolution can be implemented immediately.³⁸ With respect to the additional error identified by

³⁴ *Id.* Section IV.E of the Protocols states in relevant part: "Corrections of mistakes in Transmission Provider's FERC Form No. 1 and specific data applied in Attachment J Formulas, and any resulting refunds or surcharges, shall be reflected in the Annual Update for the next effective Rate Year, with interest determined in accordance with 18 C.F.R. §35.19a."

³⁵ *Id.* (citing section IV.E of the Protocols).

³⁶ *Id.* at 17.

³⁷ Customer Group January 2, 2015 Answer at 5-6.

³⁸ *Id.* at 6 (citing Attachment J Protocols, Section IV.E: "At any time following the Publication Date of the Annual Update, such Annual Update and the unit charges resulting therefrom may be changed (1) to reflect the resolution of Preliminary Challenges or Formal Challenges...").

Emera Maine, Customer Group states that Emera Maine is attempting to sweep a new issue under the heading “additional errata” and wants to substitute new values for its preferred stock. Customer Group contends that Emera Maine is limited by the filed rate doctrine to adhere to its Annual Update and it will have to wait until its next Annual Update to make this correction.

iv. Commission Determination

23. The errors Customer Group raises with respect to amortization of long-term debt costs and post-retirement benefits other than pensions were timely raised in its 2014 Formal Challenge. Emera Maine agrees that these were errors that should be corrected. However, Emera Maine believes they fall into the category of “Mistakes” as defined in the Protocols and, accordingly, should not be corrected until the Annual Update for the next Rate Year.

24. The Protocols define “Mistake” as “errors or omissions regarding the values inputted into the Attachment J Formula, such as, but not limited to, arithmetic and other inadvertent computational errors, erroneous FERC Form No. 1 references or the like.”³⁹ We find that Customer Group’s challenged errors are encompassed in the definition of “Mistake,” as that definition is not limited to arithmetic or computational errors, but only lists those types of errors as illustrative. Therefore, we believe that this provision of Emera Maine’s Protocols could require all the identified errors to be corrected in the Annual Update for the next Rate Year. However, Emera Maine’s Protocols also allow for a challenge to the formula inputs,⁴⁰ as has occurred here. When such a challenge is successful, the Protocols provide for changes to be made to the current Annual Filing to

³⁹ Attachment J Protocols, Section IV.E, Resolution of Challenges.

⁴⁰ Attachment J Protocols, Section III.B.2 provides, *inter alia*:

The Annual Update shall be subject to challenge and review in accordance with the procedures set forth in these Protocols as to:

- (i) the accuracy of the inputs in accordance with FERC Form No. 1;
- (ii) Whether the costs are based on accurate, proper and correct data and not fraudulently included in the Annual Update;
- (iii) the proper recording and accounting of costs pursuant to FERC accounting practices and procedures, generally accepted accounting principles, and the Transmission Provider’s accounting procedures;

correct the challenged inputs.⁴¹ Because Customer Group's challenges were timely raised and Emera Maine admits that the challenged inputs were erroneous inputs to its formula rate, the Commission finds that Emera Maine's formula rate should be corrected for the current 2014-2015 Rate Year. Conversely, because the non-zero preferred stock error was not a challenged input, and indeed was not discovered until well after the deadline for a formal challenge, although it also falls into the category defined in the Protocols as "Mistake," it must await correction until the Annual Update for the next Rate Year. Therefore, we direct Emera Maine to submit, within 30 days of the issuance of this order, a compliance filing in this docket that revises its 2014-2015 formula rate charges to correct the errors Customer Group raises in its Formal Challenge with respect to amortization of long-term debt costs and post-retirement benefits other than pensions.

b. Change in Capital Structure

i. Formal Challenge

25. Customer Group asserts that the omission of long-term debt from Emera Maine's capital structure results in an artificially inflated equity ratio and inflated rates that violate the Merger Order. Customer Group explains that, at the state level, the Maine Commission approved the Merger subject to refinancing of Maine Public's pre-Merger, tax-exempt debt.⁴² Customer Group states that Maine Public proposed to enter into bridge financing to pay off the tax-exempt bonds and to then issue long-term replacement debt four months later.⁴³ Customer Group notes that, despite the representations made to

⁴¹ Attachment J Protocols, Section IV.E states in relevant part "At any time following the Publication Date of an Annual Update, such Annual Update and the unit charges resulting therefrom may be changed (1) to reflect the resolution of the Preliminary Challenges or Formal Challenges by settlement, or (2) in accordance with Section IV.H."

⁴² Formal Challenge at 6. The refinancing of the tax-exempt bonds was necessitated by the Merger since, after the transaction closed, Bangor Hydro and Maine Public would be operating in more than two counties in the State of Maine and the bonds would lose their tax-exempt status. Bangor Hydro Electric Company, et al., Request for Approval of Reorganization, Maine Public Utilities Commission Docket No. 2012-00571, Exhibit 1 at 15 (filed Nov. 29, 2012) (Maine Application); *see also* 203 Application, Exhibit L (attaching Maine Application).

⁴³ Formal Challenge at 6.

the Maine Commission, Emera Maine (then Maine Public) entered into the short-term bridge financing and delayed its plans to issue the long-term replacement debt.

26. Customer Group states that Emera Maine did not include the interim bridge financing as long-term debt in its capital structure and reflected zero long-term debt for the end of year 2013. Thus, according to Customer Group, Emera Maine's capital structure was artificially inflated.⁴⁴ As a result, Customer Group asserts, the resulting capital structure for 2013, as submitted in the 2014 Annual Rate Update, of 81 percent equity and 19 percent debt artificially increases transmission rates. Customer Group argues that "pursuant to the Commission's 'hold harmless' condition, any increase in rates as a consequence of [Emera Maine's] delay of Merger-related issuance of replacement debt should not burden transmission customers."⁴⁵ Customer Group requests that the Commission impute the short-term bridge financing to Emera Maine's capital structure, resulting in the more reasonable capital structure of 67 percent equity and 33 percent debt.⁴⁶

ii. Answer to Formal Challenge

27. Emera Maine disputes Customer Group's arguments regarding the capital structure used in the 2014 Annual Update. First, Emera Maine claims that it fully complied with the terms of its formula rate because it properly booked the short-term debt used to retire the Maine Public tax-free bonds in FERC Account 231, which is not an input into the formula rate, and properly booked the retired debt at zero in FERC Account 221, which is an input to the formula rate.⁴⁷ Emera Maine asserts that, under the filed rate doctrine, it had no choice but to input such zero values.⁴⁸

28. Second, Emera Maine states that any changes to OATT charges resulting from the bond retirements are not transaction-related costs subject to its hold harmless commitment. Emera Maine explains that "[o]n information and belief, the Commission

⁴⁴ *Id.*

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 7-8 (citing *Missouri Public Service Comm'n v. FERC*, 215 F.3d 1 (D.C. Cir. 2000)).

⁴⁷ Answer to Formal Challenge at 5.

⁴⁸ *Id.* (citing *RC Cape May Holdings, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,132, at n.4 (2012)).

has never defined ‘transaction-related costs’ in the context of a hold harmless commitment to include the retirement of long term debt....”⁴⁹

29. Third, Emera Maine asserts that even if the debt retirement is viewed as a transaction-related cost, any resulting increase in charges for the 2014-2015 Rate Year will be offset by reduced charges in the coming years due to a combination of factors, including the refinancing at a lower interest rate and Emera Maine’s lower common equity ratio.⁵⁰ Emera Maine states that, absent the Merger, the tax-free bonds would not have been refinanced due to the large payment necessary to terminate certain interest rate swaps, and Maine Public’s lack of access to lower-cost, unsecured long-term debt. Emera Maine asserts that the lower interest rates on the new long-term debt will result in savings to transmission customers that more than exceed the disputed increase in transmission revenue requirement in the 2014-2015 Rate Year.⁵¹

iii. Customer Group’s January 2, 2015 Answer

30. Customer Group argues that Emera Maine does not dispute the essential facts of the capital structure issue and that Emera Maine concedes that it was obligated to refinance its long-term debt as a condition of the Merger.⁵² Customer Group reiterates that the resulting capital structure, and the resulting artificially inflated rates, were a direct consequence of the Merger and are a violation “of the Commission’s hold-harmless condition in its approval” of the Merger.⁵³

31. According to Customer Group, based on newly submitted information in an affidavit included with the Answer to Formal Challenge, Emera Maine now contends “that the costs related to the artificially-inflated capital structure are less than the savings related to [the Merger] because Emera [Maine] refinanced at a lower debt cost.”⁵⁴ Customer Group disputes Emera Maine’s claims. First, Customer Group asserts that there is no basis to assume that the increased rates due to the capital ratio were a

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 8.

⁵² Customer Group January 2, 2015 Answer at 3.

⁵³ *Id.*

⁵⁴ *Id.*

necessary consequence of the refinancing because Emera Maine could have refinanced the debt at the same, or better, rate terms without creating the equity heavy capital ratio and associated increased rates. Second, Customer Group disputes the validity of the supporting evidence submitted by Emera Maine in the Answer to Formal Challenge and asserts that the increase in rates occurs over two years, not just the 2014-2015 Rate Year.⁵⁵

iv. Commission Determination

32. The issues raised by Customer Group are complex and unique. They require the Commission to examine an increase in rates resulting from a change in capital structure due to a refinancing necessitated by a merger where the underlying order approving the merger did not take the refinancing and the resulting rate increase into account. As discussed in further detail below, we find that the rate for the 2014-2015 Rate Year has not been shown to be just and reasonable due to the effect on Emera Maine's capital structure of the refinancing of the tax-free Maine Public bonds necessitated by the Merger. Accordingly, we direct Emera Maine to impute the retired debt balance for the tax-free Maine Public bonds (\$22.6 million)⁵⁶ into the capital structure calculation for the 2014-2015 Rate Year. This remedy protects customers from the rate increase caused by the Merger, and most closely replicates the capital structure that would have existed if the Merger had not required the refinancing of the Maine Public bonds. As noted below, if Emera Maine wishes to recover the higher rate caused by the change in capital structure for the 2014-2015 Rate Year, it must submit a filing pursuant to FPA section 203(b) in Docket No. EC13-81-000 to demonstrate that the rate increase is offset by benefits due to the Merger.

33. As an initial matter, we find that the change in capital structure that precipitated the rate increase for the 2014-2015 Rate Year is due to the Merger. Emera Maine itself does not dispute that the Merger necessitated the refinancing and, in fact, concedes that the bonds would not have been refinanced absent the Merger.⁵⁷ In the 203 Application, however, the 203 Applicants represented that the Merger would have no adverse effect on rates, and the retirement of the tax-free bonds was mentioned only in copies of filings

⁵⁵ *Id.* at 3-4.

⁵⁶ *See* Answer to Formal Challenge at 4 (“On September 25, 2013, Maine Public borrowed \$25.6 million from Bank of America...and used a portion of these funds to retire \$22.6 million in outstanding tax-free bonds.”)

⁵⁷ *See id.* 7-8.

made before the Maine Commission included with the 203 Application as required by the Commission's regulations.⁵⁸ Even then, the retirement of the tax-free bonds was represented as "replacing the existing tax-free debt with lower cost long-term debt"⁵⁹ and discussed in terms of replacing the tax-free bonds with long-term debt.⁶⁰

34. As the Commission stated in the Merger Order:

our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction will have on rates, whether that effect is adverse, and whether any adverse rate effect will be offset or mitigated by benefits that are likely to result from the transaction.[] We find that the Proposed Transaction will not have an adverse effect on rates....⁶¹

35. Typically, in transactions where applicants expect an effect on rates due to a change in capital structure, applicants disclose and discuss that effect upfront in their FPA section 203 applications and, as noted above, attempt to demonstrate that the effect will not be adverse.⁶² The change in capital structure at issue here was not discussed in

⁵⁸ 203 Application, Exhibit L: Maine Application at 13 (recognizing that refinancing of the Maine Public tax-free bonds was a pre-requisite to the Merger, and that applicants would be filing a financing application to replace the debt).

⁵⁹ *Id.* at 14.

⁶⁰ Maine Application Exhibit 1 at 14-16.

⁶¹ Merger Order, 144 FERC ¶ 61,030 at P 17 (citing *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 120 (2007)).

⁶² *See, e.g.*, *ITC Holdings Corp., Joint Application for Authorization of Acquisition and Disposition of Jurisdictional Transmission Facilities, Approval of Transmission Service Formula Rate and Certain Jurisdictional Agreements, and Petition for Declaratory Order on Application of Section 305(a) of the Federal Power Act*, Docket No. EC12-145-000, at 22-33 (filed Sept. 24, 2012) (discussing rate increase resulting from change in capital structure due to proposed transaction and offsetting benefits of proposed transaction); *ALLETE, Inc., Application of ALLETE, Inc. for Authorization to Acquire Transmission Facilities*, Docket No. EC09-108-000, at 3 (filed Sept. 4, 2009) (explaining that any increase in rates paid by transmission customers resulted from

(continued...)

the 203 Application as an effect on rates. The Commission, however, relied upon the 203 Applicants' representations in the 203 Application that the Merger would not have an adverse effect on rates. Based on the 203 Applicants' representations, the Commission concluded that "no wholesale power customers will be affected by the Proposed Transaction"⁶³ and that the 203 Applicants had "provided adequate assurances that the Proposed Transaction [would] not have any adverse effect on jurisdictional transmission rates...".⁶⁴ Notwithstanding those representations, Customer Group has demonstrated, and we agree, that the refinancing necessitated by the Merger will increase transmission rates for customers.⁶⁵ Accordingly, allowing the rate increase, which is directly tied to the Merger, to stand would be inconsistent with the representations in the 203 Application and the Commission's findings in the Merger Order that the Merger would not have an adverse effect on rates.

36. We are not persuaded by Emera Maine's arguments in response to the issues raised by Customer Group. Emera Maine's primary argument is that the benefits of the refinancing required by the Merger outweigh the costs to Customer Group and that evidence provided in an affidavit supports this argument. This argument is problematic for two reasons. First, it would require the Commission to revisit or revise its finding in the Merger Order that the Merger would have no adverse effect on rates. The Commission could only make such a supplemental finding for good cause pursuant to FPA section 203(b).⁶⁶ Emera Maine, however, has not asked the Commission to reconsider its findings in the Merger Order, and we do not find that there is good cause to revisit those findings *sua sponte* based on the record in this proceeding. Second, we do not find the evidence provided by Emera Maine persuasive. Emera Maine merely compares the rate impact of the refinanced debt with the cost of the debt prior to refinancing without showing that the benefits of the Merger outweighed the rate impacts

applicant's need to collect its costs of capital and taxes associated with facilities being purchased).

⁶³ Merger Order, 144 FERC ¶ 61,030 at P 18.

⁶⁴ *Id.* P 19.

⁶⁵ In contrast, because Emera Maine failed to disclose this refinancing arrangement in its 203 application, we agree with Emera Maine that the rate increase resulting from the refinancing is not a transaction-related cost that should be subject to the hold harmless commitment the Commission accepted in the Merger Order.

⁶⁶ 16 U.S.C. § 824b (2012).

that resulted from the refinancing required by the transaction, as required by the Merger Order.

37. As noted above, the Commission may issue supplemental orders and findings under FPA section 203(b). Accordingly, if Emera Maine seeks to recover the higher rate associated with the refinancing for the 2014-2015 Rate Year, Emera Maine must submit a filing pursuant to section 203(b) of the FPA⁶⁷ requesting that the Commission revisit its findings in the Merger Order regarding the rate effects of the Merger.⁶⁸ Such a filing would need to show good cause for issuing a supplemental order and demonstrate that any increase in rates is not adverse, by, for example, demonstrating that there are offsetting benefits due to the Merger or by offering an appropriate rate protection mechanism. Until such a filing is submitted and acted on by the Commission, Emera Maine cannot recover the rate increase caused by the refinancing necessitated by the Merger.

38. We also disagree with Emera Maine's contention that the filed rate doctrine compels the use of the zero long-term equity capital structure submitted with the 2014 Annual Update. While the formula rate constitutes the filed rate, the inputs used in applying the formula rate are not part of the rate and have not been reviewed.⁶⁹ These costs may be challenged and if the costs are shown to be unjust and unreasonable, the Commission may require retroactive relief.⁷⁰

39. We direct Emera Maine, as part of the compliance filing ordered in P 24, *supra*, to impute the retired debt balance for the tax-free Maine Public bonds (\$22.6 million)⁷¹ into the capital structure calculation for the 2014-2015 Rate Year. As discussed above, this

⁶⁷ *Id.*

⁶⁸ We note that the Commission has granted requests under FPA section 203(b) to modify mitigation proposals after showing by applicants that the modifications would not have an adverse effect on competition and were consistent with the public interest. *PPL Corp.*, 153 FERC ¶ 61,257, at PP 28, 33 (2015); *MidAmerican Energy Holdings Co.*, 131 FERC ¶ 61,004, at PP 15-17 (2010).

⁶⁹ *PJM Interconnection, LLC*, 110 FERC ¶ 61,053, at P 120 & n.105 (2005).

⁷⁰ *Id.* n.105 (citing *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Company*, 72 FERC ¶ 61,142 at 61,727 n.9 (1995); *Public Service Company of New Hampshire*, 6 FERC ¶ 61,299 at 61,710 (1979)).

⁷¹ Answer to Formal Challenge at 4.

remedy protects customers from the rate increase caused by the Merger, most closely replicates the capital structure that would have existed if the Merger had not required the refinancing of the Maine Public bonds, and provides a just and reasonable rate.

B. 2015 Annual Update

1. Procedural Matters

40. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Emera Maine's May 26, 2015 Answer and Customer Group's May 27, 2015 Reply filed in this proceeding because they have provided information that assisted us in our decision-making process.

2. Substantive Matters

41. We find that the 2015 Annual Update raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

V. Hearing and Settlement Judge Procedures

42. Except for the issues discussed above, we will set the remaining issues with respect to the 2014 Annual Update and the 2015 Annual Update for hearing and settlement judge procedures. Specifically, we set for hearing and settlement judge procedures: the use of a 35 percent federal tax rate; costs related to the Flo's Inn Transformer; the amortization of prior actuarial losses associated with pension and retirement plans; and the matter of the appropriate formula rate to use for the 2015 Annual Update.

43. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. We note that Emera Maine's formula rate is at issue in Docket No. ER15-1429-000, a proceeding that was set for hearing and settlement judge procedures in the December 2015 Emera Maine order.⁷² The outcome of that proceeding is, in part, subject to the outcome of the instant proceeding.⁷³ We will consolidate the

⁷² *Emera Maine*, 153 FERC ¶ 61,283 (2015).

⁷³ *Id.* P 35.

instant proceeding with Docket No. ER15-1429-000, et al. for purposes of settlement, hearing, and decision, as such consolidation will promote administrative efficiency.

The Commission orders:

(A) Maine Customer Group's Formal Challenge is hereby granted in part, as discussed in the body of this order.

(B) We direct Emera Maine to submit, within 30 days of the issuance of this order, a compliance filing in this docket that (1) revises its 2014-2015 formula rate charges to correct the errors Customer Group raises in its Formal Challenge with respect to amortization of long-term debt costs and post-retirement benefits other than pensions, and (2) imputes the retired debt balance for the tax-free Maine Public bonds (\$22.6 million) into the capital structure calculation for the 2014-2015 Rate Year.

(C) 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 Federal Power Act, particularly, sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Emera Maine's 2014 Annual Update and its 2015 Annual Update.

(D) This proceeding is hereby consolidated with Docket No. ER15-1429-000, et al. for the purposes of settlement, hearing, and decision, as discussed in the body of this order.

(E) The settlement judge or presiding judge, as appropriate, designated in Docket No. ER15-1429-000 shall determine the procedures best suited to accommodate the consolidation ordered herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.