

156 FERC ¶ 61,198  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Belmont Municipal Light Department;  
Braintree Electric Light Department;  
Concord Municipal Light Plant;  
Georgetown Municipal Light Department;  
Groveland Electric Light Department;  
Hingham Municipal Lighting Plant;  
Littleton Electric Light & Water Department;  
Middleborough Gas & Electric Department;  
Middleton Electric Light Department;  
Reading Municipal Light Department;  
Rowley Municipal Lighting Plant;  
Taunton Municipal Lighting Plant;  
Wellesley Municipal Light Plant,

Docket No. EL16-64-000

v.

Central Maine Power Company;  
Emera Maine (formerly known as Bangor Hydro-  
Electric Company);  
Eversource Energy Service Company and its operating  
company affiliates: The Connecticut Light and Power  
Company, Western Massachusetts Electric Company,  
Public Service Company of New Hampshire, and  
NSTAR Electric Company;  
New England Power Company;  
New Hampshire Transmission LLC;  
The United Illuminating Company;  
Fitchburg Gas and Electric Light Company; and  
Vermont Transco, LLC

ORDER ON COMPLAINT, ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued September 20, 2016)

1. On April 29, 2016, the Eastern Massachusetts Consumers-Owned Systems (Complainants)<sup>1</sup> filed a complaint<sup>2</sup> against the New England Transmission Owners (Respondents or New England TOs)<sup>3</sup> (Complaint) pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>4</sup> and Rule 206 of the Commission's Rules of Practice and Procedure.<sup>5</sup> Complainants contend that the New England TOs' current 10.57 percent base return on equity (ROE) and the cap on ROE incentives of 11.74 percent used in the revenue

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<sup>1</sup> Complainants are comprised of the following entities: Belmont Municipal Light Department; Braintree Electric Light Department; Concord Municipal Light Plant; Georgetown Municipal Light Department; Groveland Electric Light Department; Hingham Municipal Lighting Plant; Littleton Electric Light & Water Department; Middleborough Gas & Electric Department; Middleton Electric Light Department; Reading Municipal Lighting Department; Rowley Municipal Lighting Plant; Taunton Municipal Lighting Plant; and Wellesley Municipal Light Plant (collectively, the Eastern Massachusetts Consumers-Owned Systems or EMCOS).

<sup>2</sup> On May 24, 2016, Complainants filed an errata reflecting revisions to: (1) certain portions of the testimony of Dr. Jonathan A. Lesser relevant to his discounted cash flow analysis (*See* Complaint, Exh. No. EMC-1); (2) related corrections to the testimony of Dr. Lon L. Peters (*See* Complaint, Exh. No. EMC-10); and (3) other exhibits or workpapers that detail the calculations presented in the testimonies of Drs. Lesser and Peters. The errata also reflects non-substantive corrections to the Complaint. Errata Notice at 1-3.

<sup>3</sup> The Respondents are comprised of the following entities: Central Maine Power Company; Emera Maine (formerly known as Bangor Hydro-Electric Company); Eversource Energy Service Company and its operating company affiliates: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and NSTAR Electric Company; New England Power Company National Grid; New Hampshire Transmission LLC NextEra; The United Illuminating Company; Fitchburg Gas and Electric Light Company; and Vermont Transco, LLC (collectively, the Respondents or New England TOs).

<sup>4</sup> 16 U.S.C. §§ 824e, 825e (2012).

<sup>5</sup> 18 C.F.R. § 385.206 (2016).

requirement formula rate for ISO New England, Inc.'s (ISO-NE) Regional Network Service (RNS) transmission, contained in ISO-NE's Open Access Transmission Tariff (OATT),<sup>6</sup> have become unjust and unreasonable and should be reduced to 8.78 percent and 11.38 percent, respectively. Alternatively, Complainants request that the Commission set the Complaint for hearing, and provide for refunds, with appropriate interest, for the difference between the current base ROE and the ROE identified as the result of such a hearing.<sup>7</sup>

2. In this order, we establish hearing and settlement judge procedures, and set a refund effective date of April 29, 2016, the date the Complaint was filed.

### **I. Background**

3. The New England TOs recover their transmission revenue requirements through formula rates included in ISO-NE's OATT. The revenue requirements for the Regional Network Service<sup>8</sup> and Local Network Service<sup>9</sup> that the New England TOs provide are calculated using a single base ROE. In 2008, the Commission determined in Opinion No. 489<sup>10</sup> that the just and reasonable base ROE for the New England TOs was 11.14 percent.

4. Beginning in September 2011, a series of complaints was filed seeking reductions in the New England TOs' base ROE. First, on September 30, 2011, a group of complainants consisting mostly of state representatives filed a complaint in Docket No. EL11-66-000 (Complaint I), alleging that the New England TOs' 11.14 percent base ROE was unjust and unreasonable. On May 3, 2012, the Commission set Complaint I for hearing and settlement

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<sup>6</sup> ISO-NE's OATT is section II of ISO-NE's Transmission, Markets, and Services Tariff (Tariff). *See* ISO-NE, Tariff, § II.

<sup>7</sup> Complaint at 3.

<sup>8</sup> Regional Network Service is the transmission service over the pool transmission facilities described in Part II.B of the OATT. ISO-NE, Tariff, § I.2 (84.0.0); *see also* ISO-NE, Tariff, § II.B Regional Network Service (0.0.0), *et seq.*

<sup>9</sup> Local Network Service is the network service provided under Schedule 21 and the Local Service Schedules of ISO-NE's OATT. ISO-NE, Tariff, § I.2 (84.0.0); *see also* ISO-NE, Tariff, Schedule 21 Local Service (1.0.0), *et seq.*

<sup>10</sup> *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008) (Opinion No. 489 Rehearing Order), *aff'd sub nom. Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010).

judge procedures and established a refund effective date of October 1, 2011.<sup>11</sup> On June 19, 2014, the Commission issued Opinion No. 531, in which the Commission changed its policy on the Discounted Cash Flow (DCF) methodology to be used in public utility ROE cases, by adopting the two-step DCF methodology that the Commission has used in natural gas pipeline and oil pipeline cases for many years.<sup>12</sup> Under the two-step DCF methodology, the Commission determines a single cost of equity estimate for each member of the proxy group, based on the company's average dividend yield and a growth rate that is determined by taking a weighted average of a short-term growth estimate and a long-term growth estimate.<sup>13</sup> On October 16, 2014, after a paper hearing to determine the long-term growth estimate, the Commission issued Opinion No. 531-A, finding that the just and reasonable base ROE for the New England TOs was 10.57 percent and their maximum ROE, including transmission incentive adders, should be capped at 11.74 percent, the top of the zone of reasonableness.<sup>14</sup> The Commission accordingly directed the New England TOs to reduce their base ROE to 10.57 percent effective October 16, 2014, and to provide refunds for the period October 1, 2011 through December 31, 2012.

5. Meanwhile, on December 27, 2012, another group of Complainants filed a complaint in Docket No. EL13-33-000 (Complaint II), alleging that New England TOs' 11.14 percent base ROE was unjust and unreasonable and that an updated DCF analysis based on more current financial information than the first complaint indicated that the New England TOs' base ROE should not exceed 8.7 percent.<sup>15</sup> The Commission set Complaint II for hearing

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<sup>11</sup> *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electric Co.*, 139 FERC ¶ 61,090 (2012) (Complaint I Hearing Order).

<sup>12</sup> *See Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electric Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 13 (2014) (Opinion No. 531).

<sup>13</sup> *Id.* P 17. The short-term growth estimate, which is given two-thirds weight, is based on the same Institutional Brokers Estimate System (IBES) estimate that the Commission used in the one-step DCF methodology, and the long-term growth estimate, which is given one-third weight, is based on forecasts of long-term growth of the economy as a whole, as reflected in gross domestic product (GDP). *Id.*

<sup>14</sup> *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electric Co.*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014).

<sup>15</sup> *See ENE (Environment Northeast), et al. December 27, 2012 Complaint at 2.*

and settlement judge procedures and established a refund effective date of December 27, 2012.<sup>16</sup>

6. On July 31, 2014, a third complaint was filed in Docket No. EL14-86-000,<sup>17</sup> alleging that New England TOs' 11.14 percent base ROE was unjust and unreasonable and that an updated DCF analysis based on more current financial information indicated that New England TOs' base ROE should not exceed 8.84 percent (Complaint III).<sup>18</sup> On November 24, 2014, the Commission set Complaint III for hearing, consolidated that proceeding with the Complaint II proceeding, and established a refund effective date for the Complaint III proceeding of July 31, 2014.<sup>19</sup> In the Complaint III Hearing Order, the Commission explained that, due to the establishment of two refund periods in the consolidated proceeding—the 15-month refund period associated with Complaint II and the 15-month refund period associated with Complaint III—it was appropriate for the parties to litigate a separate ROE for each refund period.<sup>20</sup> The Commission, therefore, explained that, for the refund period in the Complaint II proceeding (i.e., December 27, 2012 through March 26, 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,” and, for the refund period in the Complaint III proceeding (i.e., July 31, 2014 through October 30, 2015) and for the prospective period, “the ROE should be based on the most recent financial data in the record.”<sup>21</sup>

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<sup>16</sup> See *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, 147 FERC ¶ 61,235 (2014) (Complaint II Hearing Order).

<sup>17</sup> The Docket No. EL14-86-000 Complainants consist of the Docket No. EL13-33-000 complainants and the complainants that filed Complaint I, with the exception of the NEPOOL Industrial Customer Coalition.

<sup>18</sup> See Attorney Gen. of the Commonwealth of Mass., *et al.* July 31, 2014 Complaint at 20.

<sup>19</sup> *Attorney Gen. of the Commonwealth of Mass. v. Bangor Hydro-Electric Co.*, 149 FERC ¶ 61,156 (2014) (Complaint III Hearing Order).

<sup>20</sup> *Id.* P 27.

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

7. On May 15, 2015, the Commission denied the New England TOs' requests for rehearing of both the Complaint II and Complaint III Hearing Orders.<sup>22</sup> The Commission found that a public utility's ROE may be found unjust and unreasonable under FPA 206 despite the fact it may remain within the zone of reasonableness, and thus rejected the New England TOs' contention that the Commission should have denied the complaints on the ground that their existing ROE was within the zone of reasonableness. The Commission also stated that the Commission has allowed multiple complaints regarding the same ROE where the subsequent complaints have been based on new, more current data. The Commission found that Complaints II and III were based on new, more current data, and therefore they did not violate the 15-month refund limitation in FPA section 206(b).

8. On March 22, 2016, the Administrative Law Judge (ALJ) issued an initial decision in the consolidated proceeding on Complaints II and III.<sup>23</sup> The ALJ found that the just and reasonable base ROE for all relevant periods should be set at the midpoint of the upper half of the zone of reasonableness. This would result in an ROE of 9.59 percent for the December 27, 2012-March 26, 2014 Complaint II refund period, and an ROE of 10.90 percent for the July 31, 2014-October 30, 2015 Complaint III refund period and the prospective period. The ALJ also found that the top of the zone of reasonableness for the Complaint II refund period should be 11.74 percent, and for the Complaint III refund period and prospectively should be 12.19 percent, thus capping the total ROE, including transmission ROE incentive adders, at those levels.

## **II. Complaint**

9. On April 29, 2016, the Eastern Massachusetts Consumers-Owned Systems filed the instant complaint. Complainants contend that the Commission should find that the New England TOs' base ROE and incentive cap are no longer just and reasonable due to the current market cost of equity capital and should be lowered. Specifically, Complainants assert that the New England TOs' 10.57 percent base ROE established in Opinion No. 531 should be reduced to 8.78 percent, consisting of the midpoint of Complainants' two-step DCF analysis with a downward adjustment of 33 basis points to mitigate the adverse impacts on New England transmission customers of the equity-heavy capital structures maintained by certain New England TOs. Complainants further contend that the Commission should determine the incentive cap should be adjusted to 11.38 percent or lower as determined to be just and reasonable after an evidentiary hearing. Complainants

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<sup>22</sup> *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, 151 FERC ¶ 61,125 (2015).

<sup>23</sup> *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, 154 FERC ¶ 63,024 (2016).

further request a Commission order directing the New England TOs to refund—for the refund period established pursuant to section 206(b) of the FPA, and with interest as provided for in the Commission’s regulations — the difference between their RNS revenue requirement determined using their current base ROE and incentives cap, and their RNS revenue requirements determined using the base ROE and incentives cap found just and reasonable by the Commission.<sup>24</sup> Complainants request that the Commission establish the earliest possible refund effective date (April 29, 2016). In the alternative, Complainants request that the Commission set the Complaint for hearing, and provide for refunds, with appropriate interest, for the difference between the current base ROE and the ROE identified as a result of such hearing.<sup>25</sup>

10. To support their claim that the current base ROE and incentives cap are no longer just and reasonable, Complainants filed the testimony and exhibits of Doctors Jonathan A. Lesser<sup>26</sup> and Lon L. Peters.<sup>27</sup> Dr. Lesser testifies that he conducted a two-step DCF analysis covering a six-month study period ending March 31, 2016, and following the Commission’s current guidance determined that the appropriate range of implied costs of equity – or range of reasonableness – for ascertaining the just and reasonable ROE for the New England TOs extends from 6.84 percent to 11.38 percent, with a median value of 8.68 percent and a midpoint of 9.11 percent.<sup>28</sup> Furthermore, based on a review of the New England TOs’ financial and business risks, Dr. Lesser recommends that the Commission set the New England TOs’ DCF at the midpoint, i.e., 9.11 percent.<sup>29</sup>

11. Further, Dr. Lesser also examined whether any capital market conditions undercut reliance on the DCF midpoint as the just and reasonable ROE, and found neither credible evidence nor any sound theoretical basis to support such a proposition. Dr. Lesser explains that despite his findings that dismissed the notion that capital market conditions undercut reliance on the DCF midpoint, he nonetheless verified his DCF results with both *ex ante* and *ex post* capital asset pricing model (CAPM) analyses and a risk premium analysis and found

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<sup>24</sup> Complaint at 33-34.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> See Complaint, Exh. Nos. EMC-1 through EMC-9.

<sup>27</sup> See Complaint, Exh. Nos. EMC-10 through EMC-13.

<sup>28</sup> Complaint at 8 (citing Prepared Direct Testimony of Dr. Jonathan A. Lesser, Exh. No. EMC-1 at 24-25) (Lesser Test.).

<sup>29</sup> Complaint at 8 (citing Lesser Test. at 29-30, 61-84).

that both the CAPM and risk premium analyses supported his DCF findings. Dr. Lesser notes that he did not perform an expected earnings analysis relying on “the Commission’s longstanding view that ‘[a]ccounting rates of return are not reliable measures of the current market cost of capital, since they do not reflect the current market prices that are determined in competitive capital markets,’ and because ‘the expected earnings approach compounds the inaccuracies of using published accounting rates of return with uncertainties regarding forecasts of such accounting returns.’”<sup>30</sup>

12. According to Complainants, Dr. Lesser conducted his two-step DCF analysis in accordance with the Commission’s guidance in Opinion No. 531.<sup>31</sup> Dr. Lesser explains that the starting point of any rate of return analysis is the selection of a proper proxy group and that he selected his proxy group by applying the six criteria set forth in Opinion No. 531.<sup>32</sup> Dr. Lesser identified utilities that (1) are covered by the *Value Line* electric utility industry universe; (2) neither announced a merger or acquisition within the six-month analysis period nor were involved in an ongoing merger or acquisition during that period; (3) paid constant or increasing dividends for at least the past six-month dividend yield study period, have not announced forthcoming dividend cuts and did not cut their dividends during that period or thereafter; (4) are covered by generally recognized utility industry analysts and which have five-year earnings growth forecasts reported by Institutional Brokers Estimate System (IBES);<sup>33</sup> (5) do not have Standard & Poor’s (S&P) corporate credit ratings outside of BBB- to AA- and Moody’s credit ratings outside of Baa2 to A1 (i.e., credit ratings ranges from one notch above to one notch below the New England TOs’ S&P rating, and from one notch

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<sup>30</sup> Complaint at 9 (citing *Generic Determination of Rate of Return on Common Equity for Public Utilities*, Order No. 420, FERC Stats. & Regs. ¶ 30,644, at 31,367 (1985)).

<sup>31</sup> Complaint at 20 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 41 (“the DCF model remains the Commission’s preferred approach to determining allowed rate of return”)).

<sup>32</sup> Complaint at 21 (citing Lesser Test. at 17-18; Exh. No. EMC-5 Schedules).

<sup>33</sup> Complainants state that Dr. Lesser calculated a single average growth rate for each proxy group member using a weighted average of the IBES 5-year earnings growth rate for each proxy group member (given a two-thirds weight) and the long-run forecast of nominal growth in the U.S. GDP (given a one-thirds weight). Further, according to Complainants, Dr. Lesser used IBES earnings growth rates forecasts published on March 31, 2016, which is the last trading day of his six-month study period, and they also note that Dr. Lesser’s GDP growth rate is an average of the three sources the Commission relied on in Opinion No. 531. Complaint at 23.

above to one notch below their Moody's); and (6) yield DCF results that pass threshold tests of economic logic and are not outliers. Of the 44 utilities covered by *Value Line*, 12 were excluded because of major merger/acquisition activity during the study period, four were excluded for having credit ratings more than one notch above or below the range of credit ratings for the New England TO utilities, and two were excluded for failing the low-end outlier test. This resulted in a 28 utility proxy group, with a range of implied costs of equity, or range of reasonableness, extending from 6.84 percent to 11.38 percent, a midpoint value of 9.11, and a median value of 8.68 percent. According to Complainants, in keeping with the Commission's stated preference for use of the DCF midpoint to establish a just and reasonable ROE, Dr. Lesser recommends that the Commission set the New England TOs' ROE at 9.11 percent, subject to the further adjustment recommended by Dr. Peters to mitigate the adverse impacts on consumers of the equity-heavy capital structures maintained by certain New England TOs.<sup>34</sup> Complainants also recommend that the 11.38 percent upper end of Dr. Lesser's range of reasonableness establish the ceiling on the sum of base ROE and all return-based incentives for the New England TOs.<sup>35</sup>

13. Dr. Lesser also evaluated whether capital market conditions during his six-month study period could have affected the reliability of using the DCF midpoint to establish the just and reasonable ROE for the New England TOs. Based on his review of prevalent capital market conditions and arguments used to justify a base ROE above the midpoint, Dr. Lesser argues that there is neither any credible evidence nor any sound theoretical support for a deviation from the Commission's customary reliance on the DCF midpoint in this case.<sup>36</sup> Additionally, Dr. Lesser notes that the Commission's reliance on the DCF methodology was based on the fact that it is a "market-oriented analysis that accounts for all risk factors perceived by investors and is based on the concept of an efficient market."<sup>37</sup> However, he opines that the notion that investors continue to be unfamiliar with very public and well-known market conditions examined in Opinion No. 531 is at odds with the

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<sup>34</sup> As detailed below, Dr. Peters observes that the New England TOs on average carry equity-heavy capital structures (meaning capital structures composed of more than fifty percent equity) and recommends that the Commission mitigate the adverse impact on consumers of the maintenance of excessively equity-heavy capital structures by certain New England TOs with a 33-basis point downward adjustment of the base ROE determined in this case.

<sup>35</sup> Complaint at 25.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 26.

efficient market hypothesis underlying the DCF methodology.<sup>38</sup> Dr. Lesser contends that if investors failed to incorporate these market conditions into their investment behavior they would be behaving irrationally. He asserts that the lack of evidence of this behavior shows investors have incorporated any market conditions the Commission found to be anomalous in Opinion No. 531.<sup>39</sup>

14. Dr. Peters also reviewed state-regulated returns on common equity and concludes that, once properly screened, they also corroborate Dr. Lesser's DCF midpoint as a just and reasonable ROE.<sup>40</sup>

15. Complainants state that Dr. Peters also analyzed the adverse impacts on New England consumers of allowing ROEs in excess of the New England TOs' actual costs of equity capital, and the maintenance by certain of the New England TOs of excessively equity-heavy capital structures. Complainants state that both of these issues raise concerns that the Commission should take into account in its consideration of the just and reasonable base ROE and incentive cap. However, Complainants state that only the excessively equity-heavy capital structures used by some New England TOs requires specific mitigation.<sup>41</sup> With regard to the first issue, Dr. Peters states that it is possible that authorized ROEs can be so high that they violate the economic principle that the marginal costs should not exceed marginal benefits and therefore result in uneconomic and inefficient over-investment in transmission at the expense of other, more economically efficient activities.<sup>42</sup> In fact, Complainants offer that Dr. Peters observes that the data supplied by the New England TOs themselves provides some evidence that these effects are impacting New England. According to the data supplied by the New England TOs, RNS transmission charges (in nominal dollars) have increased and are forecasted to continue to increase at a simple growth rate of 15 percent per year (and a compound growth rate of almost 12.8 percent per year) since 2005.<sup>43</sup> Dr. Peters asserts that this trend will result in retail

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 29.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 29-30 (citing Prepared Direct Testimony of Dr. Lon L. Peters, Exh. EMC-10 at 8) (Peters Test.).

<sup>43</sup> *Id.* at 30 (citing Peters Test. at 10-12; Exh. EMC-11).

customers paying six times as much for RNS in 2020 as they paid in 2005.<sup>44</sup> Meanwhile, 12-coincident peak load in New England and unplanned outages on the over-200 kV portion of the New England transmission system have remained relatively constant.<sup>45</sup> Complainants state that given the possible adverse impacts on consumers of allowing returns in excess of the New England TOs' actual cost of equity, Dr. Peters recommends that the Commission refrain from enhancing the New England TOs' base ROE using generalized assumptions concerning transmission ownership, and instead carefully consider whether there is any specific empirical evidence of the nature and extent of risks facing transmission owners.<sup>46</sup>

16. Dr. Peters further observes that the New England TOs on average carry equity-heavy capital structures [defined in n. 34] and that four of the New England TOs carry capital structures currently ranging from 60 percent to over 68 percent equity, and recommends that the Commission mitigate the adverse impact on consumers of the maintenance of excessively equity-heavy capital structures by certain New England TOs with a 33-basis point downward adjustment of the base ROE determined by Dr. Lesser, which results in a base ROE of 8.78 percent.<sup>47</sup>

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<sup>44</sup> *Id.* at 30 (citing Peters Test. at 10). Dr. Peters specifically asserts that this is evidence of the “Averch-Johnson effect” at work in New England. Dr. Peters explains that the “Averch-Johnson effect” refers to the tendency for regulated firms to make uneconomic and inefficient capital intensive investments due to the ability to earn an ROE greater than their actual cost of capital. Complaint, Peters Test. at 8:16-21 (internal citations omitted); 10:10-17.

<sup>45</sup> *Id.* at 12; 30 (citing Peters Test. at 10-12).

<sup>46</sup> *Id.* at 30; Peters Test. at 23.

<sup>47</sup> *Id.* at 31. Dr. Peters asserts that the optimal capital structure is one comprised of a balance of equity and debt (50/50) and that if the New England TOs have chosen other capital structures, that choice should be reflected in an adjustment or adjustments to FERC-authorized ROEs, in order to avoid imposing an excessive overall cost of capital on consumers. Dr. Peters notes that state commissions have over time adopted a balanced capital structure, even if it means calculating the authorized ROE using a hypothetical capital structure, and that the Commission should adopt a similar approach and adjust ROE to account for the equity-heavy capital structure of the New England TOs. (Peters Test. at 19-20). Dr. Peters concludes that a 33 basis point further reduction to ISO-NE's base ROE would equate to a reduction of each New England TO's capital structure to 50/50. (Peters Test. at 23).

### **III. Notice and Responsive Pleadings**

17. Notice of the Complaint was published in the *Federal Register*, 81 Fed. Reg. 28,056 (2016), with protests and interventions due on or before May 16, 2016, which was later extended to June 6, 2016.<sup>48</sup> On June 6, 2016, New England TOs submitted an answer to the Complaint. On June 20, 2016, Complainants filed a motion for leave to answer and a proposed response to New England TOs' answer.

18. Timely motions to intervene were filed by: Associated Industries of Massachusetts, Attorney General for the State of Connecticut, Industrial Energy Consumer Group, Maine Public Advocate Office, Massachusetts Attorney General, New England Power Pool Participants Committee, Acadia Center, Public Systems,<sup>49</sup> New Hampshire Office of Consumer Advocate, Rhode Island Division of Public Utilities and Carriers, Vermont Department of Public Service, and Connecticut Consumer Counsel.

19. Timely notices of intervention were filed by: Massachusetts Department of Public Utilities, Connecticut Public Utilities Regulatory Authority, and New Hampshire Public Utilities Commission.

20. Maine Public Utilities Commission (Maine Commission) filed a timely notice of intervention and comments in support of the Complaint.

21. Joint Commenters filed comments in support of the Complaint.<sup>50</sup>

22. The Maine Commission states that while it does not endorse a specific rate, it does support Complainants' request for a downward adjustment to the New England TOs' base ROE and incentive ROE cap based on current market conditions. Specifically, the Maine

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<sup>48</sup> On May 6, 2016, the Commission issued a Notice of Extension of Time granting New England TOs' request for an 18-day extension of time to respond to the Complaint.

<sup>49</sup> "Public Systems" refers to the Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc., which filed a joint motion to intervene.

<sup>50</sup> "Joint Commenters" refer to the following: the state utility commissions of Connecticut, Massachusetts, New Hampshire, Rhode Island and Vermont; the Attorneys General of the states of Connecticut and Massachusetts, the public consumer advocates of Connecticut, Maine and New Hampshire; the Massachusetts Municipal Wholesale Electric Utility Company, New Hampshire Electric Cooperative; Associated Industries of Massachusetts, the Industrial Energy Consumer Group; and Acadia Center.

Commission states that it supports Dr. Lesser's determination that current capital market conditions do not undercut reliance on the DCF midpoint as the just and reasonable ROE under the Commission's approved DCF analysis.

23. Joint Commenters assert that Complainants have presented a more than sufficient *prima facie* basis to warrant setting this Complaint for hearing. Pointing to the studies and results provided by Dr. Lesser, in his testimony accompanying the Complaint, Joint Commenters further assert that for several reasons, the basis for making this finding is even stronger than it was in *Environment Northeast*.<sup>51</sup>

24. On August 4, 2016, the Edison Electric Institute (EEI) filed an out-of-time motion to intervene and protest. Complainants filed an answer to EEI's out-of-time intervention and protest on August 19, 2016.

#### IV. Answer

25. The New England TOs contend that this is the fourth successive ROE complaint filed since the fall of 2011 and that the continuation of repetitive complaints seeking large ROE reductions increases uncertainties and risks borne by investors and contravenes the legislative provisions of section 206 of the FPA.<sup>52</sup> Additionally, the New England TOs maintain that the evidence submitted demonstrates that the existing 10.57 percent base ROE established in Opinion No. 531 remains just and reasonable and the Commission should dismiss the Complaint.<sup>53</sup> To support this assertion, the New England TOs offer the testimony and exhibits of Adrien McKenzie. Mr. McKenzie's testimony maintains that: (1) the New England TOs cost of equity capital has not changed materially from the results of Opinion No. 531; (2) the economic factors that contributed to the Commission's decision to set the base ROE at the midpoint of the two-step DCF study in Opinion No. 531 still exist; and (3) the capital markets remain anomalous, and therefore the existing 10.57 percent base ROE established in Opinion No. 531 remains just and reasonable. Moreover, the New England TOs maintain that the existing base ROE continues to be supported by the result of the DCF analysis and that the proposed base ROE advocated by Complainants would competitively disadvantage the New England TOs when they seek to raise capital for electric transmission infrastructure investment. The New England TOs claim that the

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<sup>51</sup> Joint Commenters Comments (referencing *ENE (Environment Northeast) v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,235 (2014) (hearing order on complaint in Docket Nos. EL13-33-000 (Complaint III)).

<sup>52</sup> Answer at 2-5.

<sup>53</sup> *Id.* at 6-11.

Commission should dismiss the Complaint because the existing ROEs are within the zone of reasonableness and are therefore just and reasonable.<sup>54</sup>

26. The New England TOs allege a number of inaccuracies in Dr. Lesser's DCF analysis. First, the New England TOs contend that Dr. Lesser identified a range of S&P credit ratings attributable to the New England TOs' of BBB to A which he incorrectly determined would translate to a comparable risk band of BB- to AA-; rather, the comparable risk band under the Commission's one-notch rules should have been BBB- to A+. This, according to New England TOs, resulted in Dr. Lesser erroneously including MGE Energy in the proxy group and omitting the A+ rating in evaluating other potential proxy group members.<sup>55</sup> In addition, New England TOs contend that Dr. Lesser should not have excluded from his proxy group a utility, NextEra Energy (NextEra), that is currently engaging in M&A activity within the study period, because the pending merger is a very small transaction from NextEra's perspective (less than 6 percent of capitalization) and Dr. Lesser made no attempt to show that the transaction is distorting any DCF inputs.<sup>56</sup> New England TOs also assert that Opinion No. 531 and Commission precedent rely on actual intra-day low stock prices in each month as reported by Yahoo! Finance and that Dr. Lesser inappropriately relied on adjusted closing prices, which the New England TOs contend do not reflect actual high and low prices and therefore do not represent the range of investor sentiment.<sup>57</sup> The New England TOs also note that Dr. Lesser calculated average dividend yields during the six-month study period based on historical dividend payments rather than the method used by the Commission to derive the ROE in Opinion No. 531-- the most recent dividend declared in the six month study period. New England TOs also criticize Dr. Lesser's use of certain annualized dividends, contending that they do not accurately reflect payments made by the firms in his proxy group. According to the New England TOs, Dr. Lesser, in arriving at the dividend yield component of the DCF study, multiplied the dividend yield by 50 percent of the expected growth rate, an approach that is inconsistent with the Commission's previously confirmed approach that only the short-term (IBES) growth rate should be used in this aspect of the DCF analysis.<sup>58</sup> The New England TOs also contend that Dr. Lesser used the incorrect starting and ending points in calculating the GDP growth rate used in the DCF analysis; incorrectly treated the low end outlier test; incorrectly

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 12.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.*

included a 6.84 percent low end DCF estimate for one of the proxy companies; and misapplied the low-end test by focusing exclusively on the current cost of utility debt.<sup>59</sup> After making adjustments to Dr. Lesser's DCF study, the New England TOs' witness Mr. McKenzie attests that the appropriate range of reasonableness is from 7.10 percent to 11.45 percent, with a midpoint of the upper half of the range of 10.36 percent.

27. The New England TOs contend that Dr. Lesser's alternative benchmark studies are inconsistent with Opinion No. 531 for three reasons. First, the New England TOs contend that both of Dr. Lesser's *ex post* and *ex ante* CAPM analyses employ a methodology that is backward-looking rather than determining the expectations of investors.<sup>60</sup> Next, they contend that Dr. Lesser did not perform a valid risk premium study comparable to that approved by the Commission in Opinion No. 531, and third, that Dr. Lesser did not perform an expected earnings analysis.<sup>61</sup>

28. Notwithstanding the above, the New England TOs note that their witness, Mr. McKenzie, performed a DCF study consistent with the Commission's Opinion No. 531, except that he substituted *Value Line* earnings growth forecasts for IBES-based forecasts for the first stage growth estimates. The New England TOs urge the Commission in its decisional processes to adopt the use of *Value Line* forecasts as a benchmark or alternative since *Value Line* does its own earnings forecasts and its methods and assumptions are transparent and widely used by investors.<sup>62</sup>

29. The New England TOs also criticize Dr. Lesser's theory that efficient capital markets and the passage of time should have assimilated the anomalous market conditions relied on by the Commission in Opinion No. 531.<sup>63</sup> By contrast, the New England TOs maintain that key evidence of the anomalous conditions that the Commission was concerned with in Opinion No. 531 remain: the current 10-year Treasury bond yield of approximately 1.7 percent is more than three times lower than the average yields during the time period

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<sup>59</sup> *Id.* at 14.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> *Id.* at 17-18.

<sup>62</sup> *Id.* at 19-21.

<sup>63</sup> *Id.* at 23.

from 1968 through 2015; and similarly, 30-year bond yields are lower than they were during that period. Thus, they state, interest rates continue to be anomalously low.<sup>64</sup>

30. In addition, the New England TOs dispute Dr. Lesser's testimony regarding recent state commission-approved ROEs for integrated utilities. Specifically, according to New England TOs' witness Mr. McKenzie, recent state commission-approved ROEs strongly support moving to the high end of the DCF range of reasonableness. Mr. McKenzie criticizes Dr. Lesser's use of state commission-approved ROEs for the utilities in his proxy group that fall in a range of 9.17 percent to 10.90 percent as being inconsistent with the Commission's Opinion No. 531, wherein, according to Mr. McKenzie, the Commission established that the ROE for Commission-jurisdictional utilities should be above the level allowed by state commissions in order to attract equity capital.<sup>65</sup>

31. Further, the New England TOs contend that the Commission should reject the downward adjustment to the ROE to account for heavy transmission capital structures proposed by Complainants' witness, Dr. Peters.<sup>66</sup> The New England TOs contend that Commission precedent favors use of a utility's actual capital structure rather than an artificial capital structure for determining a rate of return, and that Dr. Peters' reduction in their base ROE to a level 33 basis points lower than the midpoint of Dr. Lesser's DCF analysis is inconsistent with Commission precedent. Additionally, the New England TOs opine that their witness, Mr. McKenzie, refutes Dr. Peters' position. Specifically, Mr. McKenzie raises four reasons to reject Dr. Peters' recommendation. First, Mr. McKenzie contends that Dr. Peters' mode of analysis is flawed based on his misunderstanding of the companies' overall investment risk.<sup>67</sup> Mr. McKenzie asserts that a comprehensive approach of reviewing the credit ratings of a proxy group accounts for the relative importance of capital structure in determining overall risk and there is no basis to focus on a single consideration – capital structure. However, he does note that the Commission occasionally analyzes whether a utility under consideration in a particular case faces risks that are unique compared to the proxy group, but this type of evaluation is based on the utility's overall risk, not one aspect of risk such as relative capital structure.<sup>68</sup> Second, Mr. McKenzie identifies Commission precedent that rejects Mr. Peters' suggestion

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<sup>64</sup> *Id.* at 24.

<sup>65</sup> *Id.* at 22.

<sup>66</sup> *Id.* at 27.

<sup>67</sup> *Id.* at 33.

<sup>68</sup> *Id.* at 29.

that the Commission should reduce New England TOs' ROE in order to counteract the claimed effect of their actual capital structures.<sup>69</sup> Third, Mr. McKenzie contends that Dr. Peters' analysis' use of Dr. Lesser's weighted average cost of capital for each Respondent creates flaws in Dr. Peters' analysis. Finally, Mr. McKenzie maintains that Dr. Peters' recommendation is based on a factually incorrect premise – that the New England TOs' equity ratios are unusually high.<sup>70</sup>

32. For all the reasons set forth in their Answer and the testimony of Mr. McKenzie, the New England TOs submit that the Complaint should be dismissed.

#### V. EEI's Out-of-Time Motion to Intervene and Protest

33. On August 4, 2016, almost two months after the June 6, 2016, intervention filing date, EEI filed an out-of-time motion to intervene and protest on behalf of its member companies (out-of-time motion and protest). According to EEI, the out-of-time motion and protest is submitted “for the limited purpose of addressing the broad industry-wide ramifications of a threshold legal and policy issue presented by this Complaint, which is the fourth successive [ROE] complaint to be filed in a five-year period against [the New England TOs].”<sup>71</sup> Specifically, EEI voices concern that the Commission's practice of permitting successive ROE complaints whenever a new DCF analysis provides a numerically different rate from the rate sought in the prior complaint will result in perpetual rate uncertainty and litigation.<sup>72</sup> EEI asserts that, at a minimum, the Commission must reassess and reform its procedures and processes for considering successive ROE complaints causing this endless litigation, and reconsider whether such complaints truly present a “different issue” based on “new data or analysis”.<sup>73</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 30.

<sup>71</sup> EEI Out-of-Time Motion to Intervene and Protest at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 27.

## **VI. Complainants' Answer to Out-of-Time Motion and Protest**

34. On August 19, 2016, Complainants filed an answer in response to EEI's late-filed motion and protest.<sup>74</sup> Complainants assert that EEI's out-of-time motion and protest should be denied for several reasons. First, as a procedural matter, Complainants maintain that EEI's out-of-time intervention fails to meet the Commission's five-factor standard for granting late interventions.<sup>75</sup> Specifically, Complainants point out that EEI fails to provide any cause for its inability to file its intervention within the prescribed time period especially in light of the 18-day extension of time granted for answers to the Complaint.<sup>76</sup> Second, Complainants note that, since EEI's out-of-time motion and protest indicates that it disavows any interest regarding the merits of the case, EEI's claim of having an interest in the matter is contradictory.<sup>77</sup> Third and finally, Complainants assert that the limited issue of concern voiced by EEI – successive ROE complaints – is already being raised by the Respondents.<sup>78</sup>

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<sup>74</sup> Complainants filed an answer to motion for leave to intervene out-of-time, motion for leave to answer protest, and proposed answer (Complainants' Answer to EEI Out-of-Time Motion to Intervene and Protest).

<sup>75</sup> Complainants Answer to Out-of-Time Motion and Protest at 3. *See* 18 C.F.R. §385.214(d)(1)(2016):

Grant of Late intervention. 1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:(i) The movant had good cause for failing to file the motion within the time prescribed; (ii) Any disruption of the proceeding might result from permitting intervention; (iii) The movant's interest is not adequately represented by other parties in the proceeding; (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (v) The motion conforms to the requirements of paragraph (b) of this section.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.*

**VII. Alternatively, if the Commission grants EEI's out-of-time motion and protest, Complainants request that the Commission accept their response to EEI's protest. In particular, Complainants request the Commission to reject EEI's challenge to the Commission's precedent of permitting successive complaints as a collateral attack on well-established Commission precedent. They also contend that the Commission has consistently rejected EEI's arguments in previous cases, and EEI raises no new arguments that would provide a basis for the Commission to reach a different conclusion on this issue.**<sup>79</sup> **Discussion**

**A. Procedural Matters**

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (d) (2016), the Commission will grant EEI's out-of-time motion to intervene and protest given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Complainants' June 20, 2016, answer to the New England TO's answer to the Complaint, and will therefore reject it. We will accept Complainants' August 19, 2016 answer to EEI's out-of-time motion and protest because it has provided information that assisted us in our decision-making process.

**B. Substantive Matters**

37. 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 and settlement judge procedures we order below. Accordingly, we will set the Complaint for trial-type evidentiary hearing and settlement judge procedures under section 206 of the FPA.

38. We find unpersuasive the assertions of New England TOs and EEI that the Commission should dismiss the Complaint because the New England TOs' base ROE continues to fall within the zone of reasonableness. The Commission has repeatedly rejected the assertion that every ROE within the zone of reasonableness must be treated as

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<sup>79</sup> *Id.* at 5 – 17.

an equally just and reasonable ROE in an FPA section 206 proceeding,<sup>80</sup> and we do so again here.

39. The New England TOs also raise various arguments as to the propriety of allowing a fourth complaint against their ROE after three previous complaints have been filed since 2011. Similarly, EEI raises the same arguments in its out-of-time motion and protest. Like the New England TOs, EEI maintains that the pancaking of complaints and endless litigation now threatens to upset any sense of regulatory certainty.<sup>81</sup> However, as the Commission explained when it denied rehearing of its decision to allow Complaints II and III to go forward,<sup>82</sup> the Commission has consistently interpreted the Regulatory Fairness Act<sup>83</sup>—in the specific context of public utility ROE cases—to allow subsequent complaints in the circumstances of this case.<sup>84</sup> The Regulatory Fairness Act was “intended to add

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<sup>80</sup> See, e.g., *Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,038, at PP 10-15 (2008); Opinion No. 531, 147 FERC ¶ 61,234 at PP 51-55; *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Electric Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165 at PP 21-33 (2013); *North Carolina Electric Membership Corporation v. Duke Energy Carolinas, LLC*, 155 FERC ¶ 61,048, at P 29 (2016).

<sup>81</sup> EEI Motion and Protest at 4. Notably, while EEI complains about the limitlessness of complaints that can be filed with the Commission pursuant to section 206, it does not offer a similar remedy with regard to a utility’s ability to file limitless section 205 filings with the Commission.

<sup>82</sup> *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, 151 FERC ¶ 61,125 at PP 25-35 (2015).

<sup>83</sup> Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

<sup>84</sup> *Consumer Advocate I*, 67 FERC ¶ 61,288, at 62,000, *order on reh’g*, 68 FERC ¶ 61,207 (1994) (*Consumer Advocate II*); *Southern Co. I*, 68 FERC ¶ 61,231 (1994), *order on reh’g*, 83 FERC ¶ 61,079 (1998) (*Southern Co. II*); see also *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998) (*San Diego Gas & Elec.*), *reh’g denied*, 86 FERC ¶ 61,253 (1999), *reh’g denied*, 95 FERC ¶ 61,073 (2001). *But see EPIC I*, 131 FERC ¶ 61,130 (2010), *reh’g denied*, *EPIC II*, 136 FERC ¶ 61,041, at PP 15-18 (2011) (rejecting the “pancaked” complaint, by distinguishing it from the complaints in *Consumer Advocate I*, *Southern Co. II*, and *San Diego Gas & Elec.*).

symmetry” between the Commission’s treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases.<sup>85</sup> As the Commission has explained:

[u]tilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints.<sup>86</sup>

40. Accordingly, the Commission has allowed successive complaints regarding the same ROE, where the subsequent complaints are based on “new, more current data,” explaining that “[t]his is particularly critical given that what is at issue is return on equity[,]” which, “in contrast to other cost of service issues . . . can be particularly volatile.”<sup>87</sup> The Commission has also explained that, in such cases, it is not “instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months, but rather [is] initiating an entirely new proceeding, based on an entirely separate factual record, that may or may not reach the same conclusions as those reached in the earlier ROE proceeding.”<sup>88</sup>

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<sup>85</sup> *Consumer Advocate I*, 67 FERC ¶ 61,288 at 62,000, *order on reh’g*, *Consumer Advocate II*, 68 FERC ¶ 61,207 at 61,997 (citing 133 Cong. Rec. S10925 (daily ed. July 30, 1987) (statement of Sen. Chafee) (“[u]nder the current law, . . . section 205 and section 206 filings are not treated in the same manner, and this inequality serves to favor the wholesale supplier over the wholesale customers and their residential and commercial customers”)); 134 Cong. Rec. H9030 (daily ed. Oct. 27, 1987) (statement of Rep. Bruce) (the Regulatory Fairness Act, in setting a “refund effective date for consumers . . . [uses] essentially the same system used to grant rate increases”); 134 Cong. Rec. H8095 (daily ed. Sept. 23, 1988) (statement of Rep. Gejdenson) (“[t]his legislation represents an attempt to make the current regulatory process more equitable, giving electric consumers the same protections and considerations that supplying utilities currently receive”)); *see also E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 945 n. 21 (D.C. Cir. 1988) (characterizing the Regulatory Fairness Act as “designed to overcome the disincentive facing electric utilities to speed and settle § 206 cases”).

<sup>86</sup> *Consumer Advocate I*, 67 FERC ¶ 61,288 at 62,000.

<sup>87</sup> *Consumer Advocate II*, 68 FERC ¶ 61,207 at 61,998; *see also Southern Co. II*, 83 FERC ¶ 61,079 at 61,385-86.

<sup>88</sup> *Southern Co. II*, 83 FERC ¶ 61,079 at 61,386.

41. Complainants filed the instant Complaint on April 29, 2016, 21 months after the July 31, 2014 filing of Complaint III, nearly nine months after the July 2, 2015 close of the Complaint III evidentiary hearing record, and six months after the end of the Complaint III refund period. The DCF analysis in this Complaint is based on financial data that is from a different time period, and produces a different proxy group, than the DCF analysis that was included in Complaint III. The DCF analysis in Complaint III was based on financial data from a six-month period ending June 2014<sup>89</sup> and produced a proxy group of 32 companies, with a range of returns between 6.34 percent and 12.54 percent.<sup>90</sup> The DCF analysis in this Complaint is based on financial data from a six-month period ending March 2016<sup>91</sup> and produces a proxy group of 28 companies, with a range of returns between 6.84 percent and 9.11 percent.<sup>92</sup> The differences in the proxy groups produced by the two DCF analyses and the ROEs of the proxy group companies are the result of changes in, *inter alia*, the dividend yields and growth rates for each proxy group company.<sup>93</sup> The differences in those data constitute different factual circumstances. Moreover, the record of the Complaint III hearing closed on July 2, 2015, and the October 2015-March 2016 financial data used in the DCF analysis in this Complaint is from a later period than any of the DCF analyses included in the Complaint III hearing record. Thus, because this Complaint is based on newer, more current data than included either in Complaint III itself or the subsequent hearing in that case, the Commission is properly setting this complaint for hearing.

42. 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. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>94</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding.<sup>95</sup> The

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<sup>89</sup> Complaint III at 24-25.

<sup>90</sup> *Id.* at Ex. CPL-100, 1, 5.

<sup>91</sup> Exh. No. EMC-1 at 17.

<sup>92</sup> *Id.* at 20.

<sup>93</sup> Compare Complaint at Exh. No. EMC-1 with Complaint III at Ex CPL-100.

<sup>94</sup> 18 C.F.R. § 385.603 (2016).

<sup>95</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The

(continued...)

Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

43. 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) then permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,<sup>96</sup> we will set the refund effective date at the earliest date possible, i.e., April 29, 2016, as requested.

44. 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 reasonable 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 approximately twelve months of the commencement of hearing procedures, or August 31, 2017. 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 June 30, 2018.

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 Federal Power Act, particularly section 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 the New England TOs' base ROE. However, the hearing shall be held in

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Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>96</sup> See, e.g., *Seminole Elec. Coop., Inc. v. Fla. 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).

abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2016), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief 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 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.

(E) The refund effective date established pursuant to section 206(b) of the FPA is April 29, 2016, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.