

139 FERC ¶ 61,090
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Martha Coakley, Massachusetts Attorney General;
Connecticut Public Utilities Regulatory Authority;
Massachusetts Department of Public Utilities; New
Hampshire Public Utilities Commission; Connecticut
Office of Consumer Counsel; Maine Office of the Public
Advocate; George Jepsen, Connecticut Attorney
General; New Hampshire Office of Consumer Advocate;
Rhode Island Division of Public Utilities and Carriers;
Vermont Department of Public Service; Massachusetts
Municipal Wholesale Electric Company; Associated
Industries of Massachusetts; The Energy Consortium;
Power Options, Inc.; and the Industrial Energy
Consumer Group,

v.

Docket No. EL11-66-000

Bangor Hydro-Electric Co.; Central Maine Power Co.;
New England Power Co. d/b/a National Grid; New
Hampshire Transmission LLC d/b/a NextEra; NSTAR
Electric and Gas Corp.; Northeast Utilities Service Co.;
The United Illuminating Co.; Unitil Energy Systems,
Inc. and Fitchburg Gas and Electric Light Co.; Vermont
Transco, LLC; and ISO New England Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued May 3, 2012)

1. On September 30, 2011, pursuant to section 206 of the Federal Power Act (FPA),¹ Complainants² filed a complaint against the New England Transmission Owners (New England TOs or Respondents),³ contending that the current 11.14 percent base return on equity (ROE) for New England TOs recovered through ISO New England Inc.'s (ISO-NE) Open Access Transmission Tariff (OATT) is unjust and unreasonable. Complainants contend that the ROE should be set to no more than 9.2 percent (a reduction of 194 basis points). In this order, we establish hearing and settlement judge procedures. Further, we set a refund effective date of October 1, 2011.

I. Background

2. The New England TOs recover their transmission revenue requirements through formula rates included in the ISO-NE OATT. The Regional Network Service (RNS) and Local Network Service (LNS) revenue requirements for all the New England TOs are calculated using a single base ROE. In the Opinion No. 489 proceeding, the going-forward base ROE was established at 11.14 percent, consisting of a base ROE of 10.4 percent with an upward adjustment of 74 basis points to account for changes in capital market conditions—specifically, the yield of 10-year U.S. Treasury bonds—that

¹ 16 U.S.C. § 824e (2006).

² Complainants include: Martha Coakley, Massachusetts Attorney General (Mass AG); Connecticut Public Utilities Regulatory Authority; Massachusetts Department of Public Utilities; New Hampshire Public Utilities Commission; Connecticut Office of Consumer Counsel; Maine Office of the Public Advocate; George Jepsen, Connecticut Attorney General; New Hampshire Office of Consumer Advocate; Rhode Island Division of Public Utilities and Carriers; Vermont Department of Public Service; Massachusetts Municipal Wholesale Electric Company; Associated Industries of Massachusetts; the Energy Consortium; Power Options, Inc.; and the Industrial Energy Consumer Group.

³ Respondents include: Bangor Hydro-Electric Co.; Central Maine Power Co.; New England Power Co. d/b/a National Grid; New Hampshire Transmission LLC d/b/a NextEra; NSTAR Electric and Gas Corp.; Northeast Utilities Service Co.; United Illuminating Co.; Unitil Energy Systems, Inc. and Fitchburg Gas and Electric Light Co.; and Vermont Transco, LLC. Because, as discussed below, we grant ISO-NE's motion for dismissal as a party to this proceeding, we do not include ISO-NE in the phrase "Respondents."

took place between issuance of the Administrative Law Judge's initial decision in the case and Opinion No. 489.⁴

II. The Complaint

3. Complainants state that, due to changes in capital market conditions occurring since October 31, 2006, when Opinion No. 489 issued, the 11.14 percent base ROE for New England TOs as currently reflected in the ISO-NE OATT formula rates is unjust and unreasonable.⁵ Further, Complainants cite the recent financial crisis as a changed economic circumstance, inclusive of the Lehman Brothers bankruptcy and the resulting "flight to quality" in the capital markets.⁶

4. Complainants state that their expert witness's discounted cash flow (DCF) analysis shows that the zone of reasonableness is now 7.0 percent to 11.4 percent, with a midpoint of 9.2 percent. Based on this analysis, Complainants argue that a just and reasonable base ROE for the New England TOs should not exceed 9.2 percent, which is 194 basis points lower than the current base ROE.

5. According to Complainants, their DCF analysis, which uses a national proxy group of 28 companies, conforms to the Commission's current precedent.⁷ Their

⁴ See *ISO-New England Inc.*, 106 FERC ¶ 61,280, at PP 232-250 (2004); *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006) (Opinion No. 489), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarification*, 124 FERC ¶ 61,136 (2008) (Opinion No. 489 Rehearing Order).

⁵ Complainants' expert witness asserts that the monthly yields on 10-year U.S. Treasury bonds have fallen from 4.98 percent to 2.88 percent, a decline of 210 basis points. Complainants state that 10-year U.S. Treasury bond yields directly correlate to the yields of utility bonds and their common stocks, and, therefore, the decline should be reflected in a downward adjustment to the ROE. Complaint, Ex. C-1 at 6-12 (Woolridge Testimony).

⁶ "Flight to quality" refers to the action of investors moving their capital away from riskier investments to the safest possible investment vehicles.

⁷ Complainants state they selected the proxy group using the following screening criteria for utilities: (1) listed as an electric or combination gas and electric company in *AUS Utility Reports*; (2) listed as an electric utility in *Value Line*; (3) has at least 50 percent regulated electric revenues; (4) has paid dividends for at least three years, with no dividend cuts; (5) is not involved in a merger or acquisition; (6) has an investment grade bond rating by Moody's or Standard & Poor's; and (7) has published analysts' earnings per share (EPS) growth rate from at least two different online financial information services (e.g., Zacks, Yahoo, or Reuters).

analysis eliminates two low-end ROE outliers (including these companies' high-end ROE values),⁸ which Complainants state is consistent with the 100 basis point utility bond yield test.⁹ Complainants' analysis also eliminates Hawaiian Electric Industries, Inc. (Hawaiian Electric),¹⁰ which Complainants contend has a high-end ROE estimate of 13.7 percent, exceeding the next highest ROE in the proxy group by 190 basis points, and should therefore be excluded as an extreme outlier.

6. Complainants argue that, even though the current base ROE of 11.14 percent falls within the top of their zone of reasonableness, the Commission should nonetheless find it to be unjust and unreasonable. Complainants posit that the Commission has found that not every point within the DCF range would necessarily result in just and reasonable rates.¹¹ Complainants assert that transmission customers are overpaying the New England TOs by \$113 million annually, which overpayment will increase to \$206 million annually by 2015 due to expansion of the New England transmission system. Complainants request that the Commission: (1) institute a paper hearing proceeding to investigate the New England TOs' base ROE; (2) establish the earliest possible refund date; and (3) direct ISO-NE to make refunds.

III. Notice and Responsive Pleadings

7. Notice of the complaint was published in the *Federal Register*, 76 Fed. Reg. 62,396-97 (2011), with interventions and protests due on or before October 20, 2011. On October 4, 2011, ISO-NE filed motions for dismissal as a party, to postpone the answer date, to request expedited action, and that any refund effective date be established as the first day of a calendar month. On October 6, 2011, Complainants responded to ISO-NE's motions.

8. The following parties filed timely motions to intervene: Public Service Electric and Gas Co.; New England Power Pool (NEPOOL) Participants Committee; and Dynegy Marketing and Trade, LLC.

⁸ Utilities eliminated due to low-end ROE outliers were Entergy Corporation (5.6 percent) and Great Plains Energy (6.2 percent).

⁹ Complaint at 22 (quoting *S. Cal. Edison*, 131 FERC ¶ 61,020, at P 55 (2010) (*SoCal Edison*) (excluding any company whose low-end ROE fails to exceed average bond yield test by about 100 basis points or more).

¹⁰ Complainants list several more reasons why Hawaiian Electric does not have comparable risks (e.g., non-jurisdictional status and banking operations).

¹¹ Complaint at 26 (citing Opinion No. 489 Rehearing Order, 124 FERC ¶ 61,136 at PP 10-16).

9. The New Jersey Board of Public Utilities submitted a notice of intervention. The Maine Public Utilities Commission (Maine Commission) submitted a notice of intervention and comments, joined by a timely motion to intervene and comments by the New England Conference of Public Utility Commissioners (NECPUC) (together, Maine Commission and NECPUC).

10. The following parties filed timely motions to intervene and comments: NEPOOL Industrial Customer Coalition (NEPOOL Industrials); New Hampshire Electric Cooperative, Inc. (New Hampshire Coop), and New England States Committee on Electricity (NESCOE).

11. On October 20, 2011, ISO-NE and Respondents each filed answers. On November 4, 2011, Complainants filed an answer to Respondents' answer. Respondents submitted a response to Complainants' answer on November 21, 2011, and Complainants filed an answer to that response on December 6, 2011.

12. ISO-NE moves for dismissal as a party to this proceeding. ISO-NE principally contends that it is not the beneficiary of any ROE and, instead, is simply the billing agent for the New England TOs. ISO-NE maintains that it has purely an administrative role and that the New England TOs are the real parties in interest. In its response to ISO-NE's October 4, 2011 motion, Complainants do not object to ISO-NE's requested October 1, 2011 effective date.

13. The Maine Commission and NECPUC agree that, because of substantial changes in the financial markets, an investigation into the reasonableness of the base ROE is appropriate. They cite Complainants' witness testimony that the average 10-year Treasury yield for the period from April to September 2011 was 2.88 percent, which they state is significantly lower than the 5.0 percent average previously relied on by the Commission to adjust the ROE. They aver that "[t]here is every reason to believe, for example, that the composition of the proxy groups, the yields, and the growth rates that comprise the inputs to the DCF calculations have changed in significant ways since the Commission last evaluated the base ROE."¹²

14. NEPOOL Industrials support Complainants' request for an investigation, arguing that there is compelling evidence that the 11.14 percent base ROE is no longer just and reasonable.

¹² Maine Commission and NECPUC Comments at 7.

15. New Hampshire Coop supports the complaint, because the data underlying the current base ROE are more than five years old and “predate the dramatic capital market changes that have occurred in recent years.”¹³

16. NESCOE agrees that the current base ROE of 11.14 percent does not meet the just and reasonable standard, because “economic conditions in New England and the rest of the United States are significantly altered from what they were [when the ROE was determined].”¹⁴ Such a change, in NESCOE’s view, justifies the initiation of an inquiry.

IV. Answer

17. In its answer, ISO-NE explains that it takes no position regarding the merits of the complaint because it is merely the billing agent for others: “the rates at issue are not the ISO’s rates.” ISO-NE states that it has no ROE and therefore, any order to change the base ROE should be directed at the New England TOs, not at ISO-NE.

18. In their October 20 answer, Respondents assert that Complainants have failed to meet the requirement under section 206 of the FPA,¹⁵ namely, to show that the existing base ROE is unjust and unreasonable, because Complainants’ DCF analysis does not conform to Commission precedent. Respondents submit witness testimony of Dr. William E. Avera with a DCF analysis that they assert shows the existing ROE is just and reasonable. Respondents state that Dr. Avera’s DCF analysis relies on the use of a national proxy group in a manner consistent with Commission policy.¹⁶ Among other things, Respondents calculated the growth rate used in the Commission’s one-step DCF methodology for electric utilities,¹⁷ excluding companies “that fail fundamental tests of reasonableness and economic logic as defined by the Commission.”¹⁸ They explain how such logic was applied to outliers. Specifically, Respondents excluded 11 low-end DCF results, ranging from 3.57 to 6.82 percent, as well as a high-end outlier of

¹³ New Hampshire COOP Comments at 3.

¹⁴ NESCOE Comments at 4.

¹⁵ 16 U.S.C. § 824e (2006).

¹⁶ Respondents October 20 Answer at 15 (citing *id.*, Attachment A at 10-29 & n.5 (Avera Testimony)).

¹⁷ Respondents October 20 Answer at 17.

¹⁸ *Id.* at 18; *see also id.* at 18 n.37.

20.15 percent.¹⁹ Respondents' DCF calculations retained the next highest cost of equity at 15.32 percent (Integrus Energy Services, Inc. (Integrus)), stating that this is well under the 17.7 percent threshold set in Opinion No. 489, and the 9.4 percent growth rate underlying this ROE estimate is significantly less than the 13.3 percent benchmark the Commission has continued to apply.²⁰

19. In support of their position that Complainants' DCF analysis is inconsistent with Commission precedent, Respondents contend that Complainants use inappropriate proxy group screening criteria. For example, Respondents point out that Complainants exclude electric utilities from the proxy group which are not listed in AUS Utility Reports, whereas Commission precedent uses listing in Value Line Investment Survey (Value Line) as the criterion. Moreover, Respondents state that Complainants exclude electric utilities that do not have at least 50 percent regulated electric revenues, which criterion is also inconsistent with Commission precedent that requires all members of the proxy group to be electric utilities, without setting minimum revenue levels.²¹ Respondents also take issue with Complainants calculation of the DCF growth rates, averring that they use the wrong sources. Respondents state that, while under Commission policy such growth rates are derived from Value Line and Institutional Broker Estimate Services (IBES), Complainants replace IBES with a composite of IBES and two other sources.

20. According to Respondents, this "combination of using the wrong proxy group and the wrong growth rates resulted in an obviously downwardly biased DCF analysis that understated the New England TOs' cost of equity."²² Respondents further contend that Complainants inappropriately excluded Hawaiian Electric, whose high-end DCF result of 13.7 percent satisfied Complainants' proxy group screening criteria. They maintain that the Commission's policy is to exclude high-end DCF results above 17.7 percent.²³ In their view, this exclusion "appears to be entirely results-oriented."²⁴

¹⁹ *Id.* at 18-19 (referring to *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,265 (2008), which found that a 17.7 percent cost of equity was extreme and should be excluded).

²⁰ *Id.* at 20.

²¹ *Id.* at 24 (referring to *SoCal Edison*, 131 FERC ¶ 61,020 (2010), *order on reh'g and clarification*, 137 FERC ¶ 61,016 (2011)).

²² *Id.* at 29.

²³ *Id.* at 30 (citing *SoCal Edison*, 131 FERC ¶ 61,020 at P 57); *see also id.* at 31 (evaluating Commission policy in case law).

²⁴ *Id.* at 32.

V. Discussion**A. Procedural Matters**

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers following ISO-NE's and Respondents' October 20, 2011 answers to the complaint and will, therefore, reject them.

23. We will grant ISO-NE's motion for dismissal as a party to this proceeding. In doing so, we note that Complainants do not protest the motion,²⁵ and, we agree with ISO-NE that, with regard to the ROE at issue, ISO-NE is the billing agent for the New England TOs, not the beneficiary. The New England TOs are the true parties in interest for purposes of this proceeding.

B. Determination

24. 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 ordered below. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

25. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute 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.²⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁷ The settlement judge

²⁵ Complainants October 6 Answer to Motion.

²⁶ 18 C.F.R. § 385.603 (2011).

²⁷ 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 Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

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.

26. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, 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. Consistent with our general policy of providing maximum protection to customers,²⁸ we will set the refund effective at the earliest date possible, i.e., October 1, 2011, as requested.

27. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by January 30, 2013. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by July 31, 2013.

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 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 this complaint. However, the hearing shall be held in 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 (2011), 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

²⁸ 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).

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.

By the Commission. Commissioner Moeller is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary

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Martha Coakley, Massachusetts Attorney General; Connecticut Public Utilities Regulatory Authority; Massachusetts Department of Public Utilities; New Hampshire Public Utilities Commission; Connecticut Office of Consumer Counsel; Maine Office of the Public Advocate; George Jepsen, Connecticut Attorney General; New Hampshire Office of Consumer Advocate; Rhode Island Division of Public Utilities and Carriers; Vermont Department of Public Service; Massachusetts Municipal Wholesale Electric Company; Associated Industries of Massachusetts; The Energy Consortium; Power Options, Inc.; and the Industrial Energy Consumer Group,

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(Issued May 3, 2012)

MOELLER, Commissioner, *dissenting*:

The majority finds that there are material issues of fact that cannot be resolved based on the record, and therefore, this matter should be set for hearing and settlement judge procedures. However, this finding is not compelling for the following reasons.

Complainants argue that the approved 11.14 percent base return on equity (ROE) in ISO-NE's tariff is unjust and unreasonable and should be reduced to no more than 9.2 percent (a reduction of 194 basis points). To support their conclusion that the base ROE should be no higher than 9.2 percent the complainants rely on a discount cash flow (DCF) analysis from an expert witness. However, the 9.2 percent ROE is based on a DCF analysis that departs from Commission precedent in several ways that are identifiable and thus able to be resolved based on the record.

Specifically, the Complainants' DCF analysis, which is the basis for the proposed ROE uses an average of growth rate data from several financial services instead of IBES alone.¹ In support, Complainants cite *Pepco Holdings*.² However, in that case, the Commission used the Value Line (br+sv)³ growth rate and IBES growth rate, consistent with its long-term DCF methodology, rather than Value Line and a composite forecast of multiple sources, including IBES. Complainants have cited no Commission precedent that uses an average of multiple investor forecasting services. In fact, the Commission has consistently used a single investor service such as IBES for the investment analysts' growth rate estimate.⁴

Complainants' DCF analysis also eliminates companies whose sales are less than 50 percent electric.⁵ For example, Complainants argue that Integrys should be eliminated from the proxy group, because Integrys derives less than 50 percent of its revenues from regulated electric utility operations. They cite several cases to support their position that the Commission regularly applies screening criteria to eliminate utilities primarily acting

¹ See *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, at PP 83-84 (2008) (rejecting the averaging of IBES with other comparable growth rate forecasts).

² See *Pepco Holdings, Inc.*, 124 FERC ¶ 61,176, at P 92 (2008); *but see id.* P 124.

³ Briefly, "br+sv" is the sustainable growth rate determined by the Value Line inputs, where "b" is the expected retention ratio, "r" is the expected earned rate of return, "s" is the percent of common equity expected to be issued annually as new common stock, and "v" is the equity accretion ratio.

⁴ See, e.g., *RITELine Ill., LLC*, 137 FERC ¶ 61,039, at P 68 (2011); *N. Pass Transmission LLC*, 134 FERC ¶ 61,095, at P 46 (2011); *S. Cal. Edison Co.*, 92 FERC ¶ 61,070, at 61,263 (2000).

⁵ See *Atlantic Grid Operations A LLC*, 135 FERC ¶ 61,144, at P 96 (2011) (reiterating policy to consider those companies as electric companies which are classified as such by independent investor services).

as natural gas companies.¹ Complainants' reliance upon these cases is misguided. The Commission eliminates companies from the proxy group that are not regarded by investors as an electric utility rather than use such revenue sources as part of its screening criteria.

Complainants DCF analysis also eliminates the high-end ROE of Hawaiian Electric (13.7 percent), as an outlier compared to the other companies in the proxy group. Complainants argue that they exclude Hawaiian Electric as a high-end outlier based on the 190 basis point "gap" between its high-end DCF result of 13.7 percent and the second highest ROE value of 11.8 percent. The Commission does not use the "gap" between the high-end DCF results in order to determine outlier values; rather, the Commission generally screens a proxy group for companies with unsustainable growth rates. Moreover, Complainants do not demonstrate that Hawaiian Electric's growth rate of 8.1 percent is unsustainable. When using its IBES growth rate of 8.60 percent, Hawaiian Electric's high-end DCF value is 14.24 percent. For similar reasons, Integrys, with a high-end DCF value of 15.32 percent, should not be excluded as a high-end outlier because Complainants do not demonstrate that its growth rate of 9.4 percent is unsustainable.

Complainants also propose in their DCF analysis to eliminate Integrys from the proxy group so as not to include companies involved in merger and acquisition (M&A) activity. Complainants have misapplied Commission precedent, which is to remove utilities from a proxy group only when the M&A activity is significant enough to distort the DCF inputs (inclusive of stock prices and estimates for earnings and growth rates).² Integrys's recent acquisition of two small companies, representing less than one-half of one percent of Integrys's asset base, is not the type of M&A activity that would distort its DCF inputs.

An existing rate is not rendered unjust and unreasonable merely by showing the possibility of a second just and reasonable rate.³ Moreover, if Complainants had adhered

¹ Complainants November 4 Answer at 6 (citing *Pepco Holdings, Inc.*, 124 FERC ¶ 61,176, at P 113 (2008); *Va. Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 61 (2008); *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at P 95 (2008)).

² See Opinion No. 489, 117 FERC ¶ 61,129 at PP 67-68.

³ See, e.g., *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007). Cf. *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 691 (D.C. Cir. 1995); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (Commission-approved proposal need not be the only just and reasonable proposal or even the most accurate).

to Commission precedent in developing their DCF analysis, the resulting zone of reasonableness, with a high-end exceeding approximately 15 percent, would have been wider than that proposed in the complaint, and the existing base ROE would have been well within the middle of that range.

Finally, Complainants generally assert that, due to changed economic circumstances, the New England transmission owners' cost of capital has declined and therefore the base ROE should be lowered. However, this assertion is not well-supported. Utility bond yields are one-half of a utility's cost of capital. The other half is a utility's cost of equity, which can only be estimated using a financial model, such as the DCF analysis. Complainants have not convincingly proven that the New England transmission owners' cost of equity has declined as much as bond yields to warrant a hearing in this case.

For all of the foregoing reasons, I would have rejected this complaint based on the record and described the areas where the Complainants' DCF analysis differs from the Commission's precedent accordingly.

Philip D. Moeller
Commissioner