

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Maine Public Utilities Commission

Docket Nos. EL05-89-000

v.

Central Maine Power Company, *et al.*

ORDER SETTING COMPLAINT FOR HEARING, ESTABLISHING HEARING
PROCEDURES AND REFUND EFFECTIVE DATE, AND HOLDING HEARING
IN ABEYANCE

(Issued May 27, 2005)

1. On April 4, 2005, the Maine Public Utilities Commission (Maine Commission) filed a complaint against Central Maine Power Company (Central Maine) and Bangor Hydro-Electric Company (Bangor Hydro) (collectively, the Maine TOs) and the New England Transmission Owners (New England TOs) stating that the currently-effective returns on equity (ROE) of the Maine TOs and New England TOs may be excessive based on evidence presented in the proceeding in Docket No. ER04-157-004, *et al.* (ROE proceeding). Specifically, the Maine Commission argues that the just and reasonable ROE determined in the ROE proceeding may be lower than the currently-effective ROEs. Therefore, the Maine Commission asks that the Commission consolidate this complaint with the ROE proceeding and that the Commission establish the earliest refund effective date possible for its complaint—sixty days from the date of filing.

2. As discussed below, we will set the currently-effective ROE for hearing, but hold the hearing in abeyance pending our review of the Initial Decision expected to be issued soon in Docket No. ER04-157-004, *et al.* This order benefits customers because it will ensure that the rates charged for transmission service are just and reasonable.

Background

3. In the ROE proceeding, the Maine TOs, and New England TOs proposed to increase their currently-effective ROEs related to transmission service. On March 24, 2004, the Commission set the proposed increase for hearing.¹

4. The Maine Commission states that the Maine TOs provide service under two-tier rate structures. Prior to February 1, 2005, the date that the Regional Transmission Organization (RTO) in New England began operations, the New England Power Pool (NEPOOL) Open Access Transmission Tariff (OATT) governed Regional Network Service (RNS) and access to Pool Transmission Facilities (PTF) and the Maine TOs' individual OATTs governed Local Network Service (LNS) and access to transmission facilities not covered by the NEPOOL OATT, that is, non-Pool Transmission Facilities (non-PTF). The Maine Commission states that each transmission owner that participated in the NEPOOL OATT had an individual ROE for its RNS assets under the NEPOOL OATT and an individual ROE for its LNS assets under its individual OATT. The Maine Commission states that Central Maine's ROE was 11 percent for its RNS and LNS transmission services and that Bangor Hydro's ROE was 11.25 percent for its RNS and LNS transmission services.

5. By order issued March 24, 2004, the Commission, *inter alia*, accepted a proposal by ISO-New England, Inc. (ISO-NE) and the New England TOs to establish an RTO for New England.² The Commission also addressed a related application filed by the New England TOs, along with Green Mountain Power Corporation and Central Vermont Public Service Corporation (collectively, ROE Filers), in which the ROE Filers proposed a single ROE applicable to all regional and local transmission rates, which would consist of a base ROE (12.8 percent), as well as incentive adders of 50 basis points to reward RTO participation and 100 basis points to reward future transmission expansions. The combined proposed ROE would be 13.3 percent for existing transmission facilities and 14.3 percent for new transmission facilities. In the March 24 Order, the Commission accepted the proposed 50 basis point adder for RNS but rejected this proposed adder as it related to LNS. The Commission also rejected the 100 basis point adder as it would relate to LNS, but set for hearing, subject to suspension and refund, the ROE Filers' proposed 100 basis point adder as it relates to RNS. In addition, the Commission set for hearing, subject to suspension and refund, the ROE Filers' proposed base level ROE.

¹ *ISO New England, Inc.*, 106 FERC ¶ 61,280 (2004) (March 24 Order).

² *Id.*.

6. The Maine Commission states that until the Commission determines the appropriate base level ROE that will apply to the New England TOs, each New England TO's current base level ROE remains effective. Hence, the Maine Commission states that Central Maine is currently charging 11 percent for RNS and LNS and Bangor-Hydro is charging 11.25 percent.³

Complaint

7. The Maine Commission states that the record in the ROE proceeding suggests that the current Maine TOs' ROEs are unjust and unreasonable and that a reduction below their current levels will be appropriate. The Maine Commission states that the "last clean rate document" provides that in the absence of a complaint filed under section 206 of the Federal Power Act (FPA),⁴ the Commission will be allowed to reduce the Maine TOs' ROEs below their current levels only prospectively, after the Commission has issued a final order finding that the Maine TOs' ROEs must be reduced.⁵ As a result, the Maine Commission has filed this complaint to request that the Commission consolidate this complaint with the ongoing ROE proceeding and to establish the earliest refund effective date possible, 60 days after filing.

8. The Maine Commission argues that section 206 of the FPA authorizes the Commission to investigate, on its own motion or upon complaint, rates and terms of service and to initiate changes to existing utility rates that are unjust, unreasonable, unduly discriminatory or preferential. The Maine Commission states that the Connecticut Department of Public Utility Control (CT DPUC) has produced evidence in the ROE proceeding which demonstrates that the just and reasonable rate for the Maine TOs (as well as other New England TOs) would be no higher than 9.26 percent.

Notice of Filing and Responsive Pleadings

9. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 19,071 (2005), with the answer, interventions, and protests due on or before April 25, 2005. On April 25, the Maine TOs filed an answer to the Maine Commission's complaint

³ Although the Maine Commission states that Central Maine is charging 11 percent for RNS and LNS and Bangor-Hydro is charging 11.25 percent, as discussed above the March 24 Order accepted proposed revised ROEs subject to hearing and subject to refund.

⁴ 16 U.S.C. § 824e (2000).

⁵ Complaint at 2, citing *Indiana & Michigan Municipal Distributors*, 61 FERC ¶ 61,351 at 62,372 n.8 (1992).

and a motion to dismiss the complaint. Also, on April 25, 2005, the Outside-Maine Transmission Owners (Outside-Maine TOs)⁶ filed an answer and a motion to dismiss. The Vermont Public Service Board filed a notice of intervention in support of the complaint. The Vermont Department of Public Service, New England Conference of Public Utilities Commissioners, and the New England Consumer-Owned Entities (NECOE) filed motions to intervene in support of the complaint. Fitchburg Gas and Electric Company and Unifil Energy Systems, Inc. filed a joint motion to intervene.

10. On May 11, 2005, both the Maine Commission and NECOE filed responses to the motions to dismiss submitted by the Maine TOs and the Outside-Maine TOs. The Maine Commission states that although the Outside-Maine TOs did not caption their answer as a motion to dismiss, the Outside-Maine TOs ask that the complaint be dismissed. However, to the extent the Commission deems the pleadings of the Maine TOs and the Outside-Maine TOs as answers, rather than requests for affirmative relief, the Maine Commission moves pursuant to Rules 212 and 213 of the Commission's regulations for leave to answer. NECOE asks that the Commission deny the Outside-Maine TOs' request to dismiss the complaint it applies to them.

11. In its answer, The Maine TOs do not dispute that the last clean rate doctrine would prevent the Commission from lowering their respective ROEs below the last ROE approved by the Commission. However, they contend that the Commission should deny the complaint or, alternatively, refrain from ruling on the complaint until it issues a decision in the ROE proceeding. The Maine TOs contend the 9.26 percent ROE relied upon by the Maine Commission is based on a flawed application of the Commission's ROE methodology that ignores the majority of the evidence and the Commission's orders in the ROE proceeding and fails to include any adders, including the 50 basis point adder already accepted by the Commission. The Maine TOs also state that the ROE proceeding has been pending for a year and a half, calling into question the urgency of the complaint. The Maine TOs argue that the Maine Commission failed to show that the existing rates, even though previously adjudged to be just and reasonable are no longer just and reasonable as a result of new facts or a significant change in circumstances.

⁶ The Outside-Maine TOs are: Northeast Utilities Service Company on behalf of the Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Power and Electric Company, Holyoke Water Power Company; and Public Service Company of New Hampshire; NSTAR Electric & Gas Corporation on behalf of its affiliates Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and Canal Electric Company; New England Power Company, The United Illuminating Company, Vermont Electric Power Company, Central Vermont Public Service Corporation, Green Mountain Power Corporation, and Florida Power & Light Company – New England Division.

12. The Outside-Maine TOs raise many of the same concerns as the Maine TOs, arguing that the complaint should be dismissed because it is based on facts that the Commission has already decided adversely to the Maine Commission. The Outside-Maine TOs also contend that the Maine Commission has not presented any new facts and instead relies on parts of the record in the ROE proceeding that have already been ruled invalid by the Commission. The Outside-Maine TOs further argue that the complaint is primarily directed at the Maine TOs; that the relief sought in the opening and closing paragraphs is directed only at the Maine TOs; and that the Maine Commission failed to make a case against the Outside-Maine TOs, even failing to identify the Outside-Maine TOs in the draft notice. If the complaint is granted, the Outside-Maine TOs state that the relief should be limited only to the Maine TOs.

13. The Outside-Maine TOs ask that the Commission not consolidate the complaint with the ROE proceeding because the evidentiary record has been closed and the matter is now pending before the presiding judge for decision. The Outside-Maine TOs state that the Maine Commission chose not to participate in the evidentiary proceedings and therefore has not presented testimony or filed a substantive brief. Further, the Outside-Maine TOs state that the Maine Commission has not stated why it requests consolidation of this complaint with the ROE proceeding or why consolidation is appropriate. The Outside-Maine TOs state that the Commission could provide the requested relief without consolidation but that it would be inappropriate and unfair for the Commission to disrupt the proceedings in the ROE proceeding. As the Maine Commission chose not to participate actively in the ROE proceeding, the Outside-Maine TOs conclude that it should not be permitted to undo the consequences of its choice by filing a late complaint.

14. In its response to the motions to reject the complaint, the Maine Commission contends that the Maine TOs' requests, that the Commission not make a ruling on the complaint until it issues a decision in the ROE proceeding and also that the Commission incorporate the entire record and briefs filed in Docket No. ER04-157-004, *et al.*, misconstrue the relief sought by the Maine Commission in the complaint. The Maine Commission states that it is asking that the Commission institute a complaint proceeding to establish the earliest refund effective date in order to give consumers the maximum protection possible, not that the Commission reach a final determination of the justness and reasonableness of the ROEs of the Maine TOs or the other New England TOs in advance of the ROE proceeding.

15. The Maine Commission states its request is consistent with the Commission's actions in *Central Montana Electric Power Cooperative, Inc. v. Montana Power Company*,⁷ wherein the utility filed a rate increase, the complainant protested the rate

⁷ 87 FERC ¶ 61,018 (1999).

changes, and the rate increases went into effect subject to refund. The Maine Commission states that as a result of information produced in the hearing process, the complainant asserted under section 206 that the rates in effect prior to the proposed change were excessive. The Maine Commission states that the Commission rejected the utility's motion to dismiss; instead the Commission instituted an investigation based on the allegations of fact made in the complaint and established the earliest refund date possible to give maximum protection to the consumer.

16. The Maine Commission states that it agrees with the Maine TOs that the ROE proceeding is the appropriate forum for the Commission to reach its determination regarding the just and reasonable rates of the Maine TOs and the New England TOs. For that reason, the Maine Commission states it requests consolidation of the complaint with the ROE proceeding and that such consolidation is appropriate because there are issues of common fact and law (the just and reasonable ROEs for the Maine TOs and the New England TOs); the principal parties are the same; consolidation will avoid unnecessary duplication; and setting the refund effective date will not disrupt the ROE proceeding.

17. Finally, the Maine Commission claims that the argument that its complaint is untimely has no merit because the Maine Commission is complaining about rates that are currently unjust and unreasonable, noting that absent this complaint, consumers are entitled only to a refund for the difference between the amount that is currently being charged subject to refund and the last clean rate which the Commission may find in the ROE proceeding to be unjust and unreasonable. The Maine Commission states that while the last clean ROE of the Maine TOs may have been unjust and unreasonable prior to the date the complaint was filed but to the extent there has been any prejudice resulting from the timing of the complaint, it has been prejudice only to ratepayer interests and has only worked to the benefit of the Maine TOs.

Discussion

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the Maine Commission's and NECOE's answers because they have provided information that assisted us in our decision-making process.

19. We find that the Maine Commission raises material issues of fact that we cannot resolve on the record before us. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.⁸ However, we will hold the hearing in abeyance pending our review of the Initial Decision expected to be issued soon in the ROE proceeding. We will also reserve judgment on the issue of consolidation until then.

20. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,⁹ we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, June 3, 2005.

21. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Given that we are holding the hearing in abeyance pending the ROE proceeding, and assuming that we conclude that we do not need to take further evidence, our best estimate of when we would expect to issue a final decision is four months following the filing of briefs on and opposing exceptions to the initial decision in the ROE proceeding, or by November 30, 2005.

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 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 this complaint, as discussed in the body of this order.

(B) The refund effective date established pursuant to section 206(b) of the Federal Power Act is June 3, 2005.

⁸ 16 U.S.C. § 824e (2000)

⁹ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(C) The hearing will be held in abeyance pending further order by the Commission.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.