166 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

East Texas Electric Cooperative, Inc. Docket No. EL18-199-000

v.

Public Service Company of Oklahoma
Southwestern Electric Power Company
AEP Oklahoma Transmission Company
AEP Southwestern Transmission Company

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued January 17, 2019)

1. On September 6, 2018, pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)[1] and Rules 206 and 212 of the Commission's Rules of Practice and Procedure,[2] East Texas Electric Cooperative, Inc. (ETEC or Complainant) filed a complaint (Complaint) against Public Service Company of Oklahoma (PSC Oklahoma), Southwestern Electric Power Company (Southwestern Electric), AEP Oklahoma Transmission Company (AEP Oklahoma) and AEP Southwestern Transmission Company (AEP Southwestern) (together, AEP West or Respondents).

2. Complainant contends that Respondents' current 10.7 percent base return on equity (ROE) is no longer just and reasonable, and that the Commission should reduce it to 8.71 percent.[3] Complainant requests that the Commission set the complaint for

[1] 16 U.S.C. §§ 824e, 825e, 825h (2012).

[2] 18 C.F.R. §§ 385.206, 385.212 (2018).

[3] Complaint at 2.

hearing and order refunds for the difference in revenue requirement that results from applying the just and reasonable base ROE determined here, and the current 10.7 percent base ROE, with interest calculated pursuant to section 35.19a of the Commission's regulations.[4] In addition, Complainant requests that the Commission set September 6, 2018, the Complaint's filing date, as the refund effective date.[5]

3. In this order, we establish hearing and settlement judge procedures, and set a refund effective date of September 6, 2018.

I. Background

4. ETEC is a not-for-profit generation and transmission corporation that owns transmission facilities, purchases transmission services and serves load within the Southwest Power Pool, Inc. (SPP) Pricing Zone 1, or AEP West pricing zone. ETEC states that its former generation and transmission cooperative members, Sam Rayburn G&T Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc., have merged into ETEC, and ETEC now serves one generation and transmission cooperative member, Northeast Texas Electric Cooperative, Inc.[6]

5. Respondents are comprised of two vertically integrated operating companies (PSC Oklahoma and Southwestern Electric) and two transmission-only operating companies, or transcos (AEP Oklahoma and AEP Southwestern), all subsidiaries of American Electric Power, Inc. Respondents state that they provide regional transmission service under the SPP Open Access Transmission Tariff, through cost-of-service formula rates that adjust annually.

6. PSC Oklahoma's and Southwestern Electric's current 10.7 percent base ROE derives from a transmission formula rate settlement agreement filed on February 23, 2009 in Docket No. ER07-1069-000.[7] AEP Oklahoma's and AEP Southwestern's

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[4] 18 C.F.R. § 35.19a (2018).

[5] Complaint at 2.

[6] Complainant explains that, as an SPP transmission owner, ETEC receives AEP West's 10.7 percent base ROE. Consistent with its position that this 10.7 percent base ROE is no longer just and reasonable, ETEC commits to implement the just and reasonable base ROE that the Commission determines here, as of the refund effective date that the Commission establishes. *Id*. at 3.

[7] The Commission approved the settlement agreement by letter order dated June 24, 2009. *Am. Elec. Power Serv. Corp.*, 127 FERC ¶ 61,292 (2009).

current 10.7 percent base ROE derives from a formula rate settlement agreement filed on September 24, 2010, in Docket No. ER10-355-000.[8]

7. On June 5, 2017, ETEC filed a complaint (the 2017 Complaint) against Respondents in Docket No. EL17-76-000, contending that, based on updated financial data (from a six-month period ending April 2017) and the two-step Discounted Cash Flow (DCF) methodology that the Commission adopted in Opinion Nos. 531, 531-A, 531-B and 551,[9] Respondents' base ROE was no longer just and reasonable and should be no higher than 8.36 percent. ETEC maintained that as a result, ratepayers were overcompensating the AEP West companies by $36.6 million annually.[10]

8. On November 16, 2017, the Commission set the 2017 Complaint for hearing and settlement judge procedures, and established a June 5, 2017 refund effective date.[11] On April 30, 2018, the Chief Administrative Law Judge terminated the settlement judge procedures and appointed an Administrative Law Judge to preside at the evidentiary hearing.

9. On October 16, 2018, six weeks after the instant Complaint was filed, the Commission issued its order responding to the decision of the United States Court of Appeals for the District of Columbia in *Emera Maine*, vacating and remanding Opinion

[8] The Commission approved the settlement agreement by letter order dated April 21, 2011. *AEP Appalachian Trans. Co., Inc.,* 135 FERC ¶ 61,066 (2011).

[9] 2017 Complaint at 7, (citing *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531, 147 FERC ¶ 61,234 (2014), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014); *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), *vacated and remanded on other grounds sub nom. Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (*Emera Maine*); *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator Inc.,* Opinion No. 551, 156 FERC ¶ 61,234 (2016)). Complainant noted that *Emera Maine* did not address the Commission's adoption of the two-step DCF model (which the Commission previously applied solely to natural gas and oil pipelines), for electric utilities, because no party challenged this aspect of Opinion No. 531.

[10] 2017 Complaint at 1, 15, citing Exhibit ETC-1 at 7 (Solomon Test.).

[11] *E. Tx. Elec. Coop., Inc. v. Pub. Serv. Co. of Okla.*, 161 FERC ¶ 61,178 (2017) (*E. Tex. Elec. Coop. I*).

No. 531.[12] In that order, the Commission outlined its proposed new approach for determining, both in future ROE cases and in those currently pending before the Commission, whether an existing ROE remains just and reasonable. In that order, the Commission proposed to change its approach to determining base ROE by giving equal weight to four financial models, instead of primarily relying on the DCF methodology. The Commission stated that evidence indicates that investors do not rely on any one model to the exclusion of others. Therefore, relying on multiple financial models makes it more likely that our decision will accurately reflect how investors make their investment decisions.

10. Specifically, the Commission proposed to rely on three financial models that produce zones of reasonableness—the DCF model, the Capital Asset Pricing Model (CAPM)[13], and the expected earnings model—to establish a composite zone of reasonableness. The zone of reasonableness produced by each model would be given equal weight and averaged to determine the composite zone of reasonableness. The Commission proposed a framework for using the composite zone of reasonableness in evaluating whether an existing base ROE remains just and reasonable.

11. For purposes of establishing a new just and reasonable base ROE when the existing base ROE has been shown to be unjust and unreasonable, the Commission proposed to rely on four financial models—the DCF model, the CAPM model, the expected earnings model, and the risk premium model—to produce four separate base ROE estimates that would then be averaged to produce a specific just and reasonable base ROE. The risk premium model produces a single numerical point rather than a range; therefore it cannot be used in establishing a composite zone of reasonableness.

12. The Commission directed all participants in the Opinion No. 531 Remand proceeding to submit briefs regarding the proposed approach, and whether there should be any adjustments to how the Commission implements it.[14] In response, on October 18, 2018, the Chief Administrative Law Judge issued an order in Docket No. EL17-76-001, holding the 2017 Complaint in abeyance, pending the outcome of the Opinion No. 531 Remand proceeding or further Commission guidance concerning ROE.

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[12] *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (*Coakley* Briefing Order).

[13] The *Coakley* Briefing Order defines CAPM as an ROE methodology that is based on the theory that the market-required rate of return for a security is equal to the risk-free rate, plus a risk premium associated with the specific security. *Id*. at Appendix.

[14] *Id*. PP 19, 32-54, 61.

13. On November 15, 2018, the Commission issued two orders providing further guidance to participants regarding how to address the Commission's proposed new ROE framework in pending cases.[15] In those orders, the Commission determined that it is not necessary to hold pending ROE proceedings in abeyance pending the outcome of the Opinion No. 531 Remand proceeding, and that it would be most efficient to address the proposed ROE framework now.[16] In addition, the Commission stated that it expects the participants to address the proposed new methodology in pending proceedings by presenting evidence concerning the merits of the proposed methodology, and whether and how to apply it to the facts of their cases.[17] The Commission stated further that it had not made any final determinations with respect to the proposed new methodology for analyzing the base ROE component of rates under section 206 of the FPA. Accordingly, the participants may present evidence concerning the justness and reasonableness of any aspect of the proposed framework, whether supporting the Commission's proposal or supporting a different or revised framework.[18]

14. On November 20, 2018, the Chief Administrative Law Judge issued an order terminating the abeyance in Docket No. EL17-76-001.

II. Complaint

15. In the instant complaint, based on updated financial data from a six-month period ending July 2018, and the Commission's two-step DCF methodology, Complainant presents its *prima facie* case that the base ROE that Respondents use in the AEP West companies' formula transmission rates is no longer just and reasonable and should be no higher than 8.71 percent. As a result, Complainant maintains that ratepayers are currently overcompensating the AEP West companies by $27.12 million annually.[19]

16. To support its claim that Respondents' 10.7 percent base ROE is no longer just and reasonable, Complainant filed the testimony and exhibits of J. Bertram Solomon.

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[15] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator Inc.*, 165 FERC ¶ 61,118 (2018) (*ABATE v. MISO II*); *Ark. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.,* 165 FERC ¶ 61,119 (2018) (*Ark. Pub. Serv. Comm'n v. Sys. Energy Resources*).

[16] *Ark. Pub. Serv. Comm'n v. Sys. Energy Resources,* 165 FERC ¶ 61,119 at PP 6-9.

[17] *Id.* P 5.

[18] *ABATE v. MISO II*, 165 FERC ¶ 61,118 at P 20.

[19] Complaint at 18.

Mr. Solomon testifies that the current AEP West base ROE rests on the Commission's former one-stage DCF methodology and data from an era in which the economic environment and capital conditions differed significantly from those that prevail today. According to Mr. Solomon, capital costs in general, and for electric utilities in particular, have substantially declined since then. For example, Mr. Solomon notes that during the six-month period that preceded the filing of the settlement in Docket No. ER10-1069-000, in which the parties negotiated the 10.7 percent base ROE, the average Moody's Baa Rated Public Utility Bond yield was 7.9 percent. By contrast, Mr. Solomon performed a two-step, constant growth DCF analysis that he states complies with Opinion Nos. 531, 531-A, 531-B and 551, using financial data from a six-month period ending July 2018, and the comparable bond yield for this period was 4.6 percent. According to Mr. Solomon, the 330-basis point drop in long-term public utility debt costs for AEP West's Moody's rating category demonstrates that capital costs have declined significantly, and that the 10.7 percent base ROE is much higher than AEP West's current cost of common equity capital. In addition, Moody's has upgraded AEP's senior unsecured rating from Baa2 to Baa1; PSC Oklahoma's long-term issuer rating from Baa1 to A3; Southwestern Electric's long-term issuer rating from Baa3 to Baa2; and Standard & Poor's (S&P) has upgraded AEP's, PSC Oklahoma's and Southwestern Electric's long-term issuer ratings from BBB to A-, all of which, Mr. Solomon testifies, show that the rating agencies perceive AEP West as less risky than when the Commission approved its current ROE. Further, Mr. Solomon notes that if state-authorized ROEs have any relevance to Commission-authorized ROEs, PSC Oklahoma and Southwestern Electric sought authorization to earn 10 percent ROEs in their recent retail proceedings, and were authorized 9.3 percent and 9.6 percent returns, respectively – both lower than the 10.7 percent ROE currently included in AEP West's transmission rates.[20]

17. To reevaluate AEP West's current ROE, Mr. Solomon stated that he employed the criteria that the Supreme Court established in *FPC v. Hope Natural Gas Co.*[21] and *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*,[22] which support an ROE that is: (1) sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital; and (2) commensurate with returns on investments in enterprises with comparable risks.[23] Further, he applied the Commission's Opinion No. 531 two-step DCF methodology to a national proxy group of electric utilities that he contends reflects, as closely as possible, the risk characteristics associated with AEP West's electric transmission service. Mr. Solomon included in his

[20] Solomon Test. at 12-15.

[21] 320 U.S. 591 (1944) (*Hope*).

[22] 262 U.S. 679 (1923) (*Bluefield*).

[23] *Hope*, 320 U.S. at 603; *Bluefield*, 262 U.S. at 692-693.

national electric utility proxy group companies that: (1) Value Line includes in its electric utility industry universe; (2) have an S&P corporate credit rating of BBB+ to A and a Moody's long-term issuer or senior unsecured credit rating of Baa2 to A3 (to encompass one credit rating notch above and below AEP's S&P rating of A- and Moody's rating of Baa1); (3) have an Institutional Brokers Estimate System published analysts' consensus "five-year" earnings per share growth rate; (4) are not engaged in major merger or acquisition (M&A) activity currently or during the six-month dividend yield analysis period ending July 31, 2018; (5) paid dividends throughout the six-month dividend yield analysis period, and did not cut dividends during that period or thereafter; and (6) yield DCF results that pass threshold tests of economic logic and are not outliers. These criteria yielded a 24-company proxy group, from which Mr. Solomon excluded five companies, four due to major M&A activity, and the fifth due to a combination of factors: insufficient historical data; no earnings growth persistence or stock price growth persistence indicators; dramatic fluctuations in earnings per share; Value Line's expectation that the company will earn extraordinarily low ROEs for a formula rate-based electric utility; a beta and share turnover ratio that falls well below those for all other electric utilities in the proxy group; and closely-held, foreign ownership and control, election of "controlled company exemption" to corporate governance rules for New York Stock Exchange-listed companies, and a Securities and Exchange Commission Form 10-K stating that the controlled company status could harm its stock price.[24]

18. Mr. Solomon's two-step, constant growth DCF analysis, national proxy group and current financial data from the six-month study period ending July 31, 2018 produce a zone of reasonableness with a range of investor-required ROEs of 5.90 percent to 10.54 percent, with a median of 8.71 percent.[25] After testing for outliers and illogical ROEs, Mr. Solomon tightened his range to 7.01 percent to 9.29 percent.[26]

19. To check the reasonableness of his results, Mr. Solomon performed a supplemental two-step DCF analysis, using all of his proxy group criteria other than the credit rating, which he altered to one notch above and below the credit rating of AEP TransCo (the immediate parent of AEP West's two transcos, AEP Oklahoma and AEP Southwestern, neither of which have individual credit ratings). He states that he did so to shed light on the lower risk and higher credit profile of AEP TransCo's stand-alone transmission business, given that the service at issue here is transmission. The plus-or-minus-one-notch rating yielded a smaller proxy group of six companies within his original proxy group; a range of 7.01 percent to 8.86 percent, and a median of 7.60

[24] Complaint at 9-13; Solomon Test. at 16-26.

[25] Complaint at 12; Solomon Test. at 28.

[26] Complaint at 12; Solomon Test. at 29-34, 39.

percent. Notwithstanding the lower median produced by Mr. Solomon's supplemental two-step DCF analysis, he recommends a base ROE of 8.71 percent, so as to be conservative, recognize that AEP owns the transmissions facilities within both its operating companies and transcos, and argue against allowing an ROE above the median, even if the Commission still has concerns about current capital market conditions.[27] For all of these reasons, Complainant urges the Commission to adopt the median value of 8.71 percent as the just and reasonable ROE for AEP West, consistent with Commission policy requiring the use of the median for a single electric utility of average risk.[28]

20. Further, Complainant contends that no basis exists upon which to raise the ROE from the median to the central tendency of the upper half of the zone of reasonableness, as the Commission did in Opinion No. 531. First, according to Complainant, the anomalous market conditions that prompted the Commission to move the ROE halfway between the midpoint and top of the zone of reasonableness are no cause for concern during the six-month study period here, given current financial conditions. Specifically, Complainant maintains that many factors demonstrate that capital market conditions are no longer anomalous: the unemployment rate has dropped substantially, the economy is expanding, the stock market is breaking historical records, the Federal Reserve has wound down its Quantitative Easing policies and begun the slow process of increasing its Federal Funds target rate, inflation is approaching the Federal Reserve Open Market Committee's 2.0 percent target, and Moody's public utility and Treasury bond yields over the 84-month period from August 2011 through July 2018 have remained low, indicating that low yields reflect a new, consistent "normal." Complainant further states that Mr. Solomon evaluated public utility and Treasury bond yields in the 84-month period from August 2011 through July 2018, and determined that yields throughout his recent study period are not unusual, and are in fact consistent with average yields over the past seven years. Complainant notes that low Treasury bond yields that have hovered around the two percent mark for the last seven years can no longer be considered anomalous and instead indicate that low yields reflect a new and consistent normal.[29]

21. Second, Complainant notes that although Opinion No. 531 also relied on state-allowed ROEs in boosting the ROE to the midpoint of the upper half of the zone of reasonableness, those ROEs have actually fallen from an average of 10.01 percent in 2012, to 9.81 percent in 2013, to 9.75 percent in 2014, to 9.60 percent in 2015 and 2016, to 9.67 for 2017, and to 9.58 percent for the first half of 2018. Further, Complainant

[27] Complaint at 12; Solomon Test. at 21, 34-40.

[28] Complaint at 2, 12-13; Solomon Test. at 39-41 (citing *So. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013)).

[29] Complaint at 13-14; Solomon Test. at 47-50.

states that because state-regulated retail service encompasses both distribution and generation, it is inherently more risky than Commission-regulated transmission service. As a result, Complainant maintains that, all other things being equal, Commission ROEs should be lower than retail ROEs – particularly where, as here, the AEP West companies recover their actual cost of providing service through formula rates that enable them to earn their authorized returns, without regulatory lag, and despite fluctuations in sales and changes in costs.[30]

22. Third, Complainant argues that the alternative benchmark methodologies on which Opinion No. 531 relied in boosting the ROE to the midpoint of the upper half of the zone of reasonableness are thoroughly discredited; that even the Commission had previously rejected them; and that the Commission only relied on them in Opinion No. 531 based on record evidence of "unusual market conditions" that are no longer anomalous and comprise the new normal. Accordingly, Complainant contends that the Commission should rely on the point of central tendency of the DCF results without adjustment.[31]

III. Notice and Responsive Pleadings

23. Notice of the Complaint was published in the *Federal Register*, 83 Fed. Reg. 46,714 (2018), with protests and interventions due on or before October 16, 2018.

24. SPP, Golden Spread Electric Cooperative, Inc., and Oklahoma Municipal Power Authority filed timely motions to intervene. Public Utility Commission of Texas filed a notice of intervention.

25. On October 16, 2018, Respondents submitted their answer to the Complaint.

26. On November 2, 2018, ETEC filed an answer to Respondents' answer.

IV. Respondents' Answer

27. In their answer, Respondents contend that the Commission should dismiss the Complaint. Respondents assert that because Complainant seeks a higher ROE here than in the pending 2017 Complaint proceeding (8.71 percent v. 8.36 percent), it is clear that ETEC pancaked the instant Complaint to evade FPA section 206(b)'s[32] 15-month

[30] Complaint at 14-15; Solomon Test. at 59-63.

[31] Complaint at 16; Solomon Test. at 63-64.

[32] 16 U.S.C. § 824e(b).

statutory refund limitation.[33] In addition, Respondents contend that the Commission should dismiss the Complaint because Complainant has failed to make a *prima facie* case that AEP West's current 10.7 percent base ROE is no longer just and reasonable. According to Respondents, the Complaint fails because the high end of Mr. Solomon's zone of reasonableness – 9.29 percent – is significantly below the base ROEs that the Commission found to be just and reasonable in Opinion Nos. 531 (10.57 percent) and 551 (10.32 percent). In support of their argument, Respondents present the testimony of Adrien M. McKenzie,[34] who testifies that Complainant's witness Solomon developed a flawed proxy group; failed to adhere to the *Hope* and *Bluefield* standards; ignored capital market conditions that distort the DCF methodology; disregarded alternate ROE benchmark methodologies and growth rates; and conducted an unreliable DCF analysis whose results deter investment in necessary transmission infrastructure.[35]

28. Mr. McKenzie claims to correct flaws he perceives in Mr. Solomon's analysis, and develops a 7.01 percent-to-11.93 percent zone of reasonableness instead. Respondents contend that because AEP West's 10.7 percent ROE falls within this zone, Complainant has failed to show that the current ROE is no longer just and reasonable, and therefore the Commission must reject the Complaint outright. Should the Commission decline to dismiss the Complaint summarily, Respondents request that the Commission establish hearing and settlement judge procedures, and set the latest permissible refund effective date.[36]

29. Respondents allege several defects in Mr. Solomon's DCF analysis. First, Respondents assert that Mr. Solomon's proxy group fails to reflect the full range of AEP West credit ratings, and therefore omits two utilities of comparable risk, contrary to the Commission's screening criteria. They also contend that Mr. Solomon incorrectly excluded comparable utilities for M&A activity during his six-month study period and speculation regarding a strategic review. In addition, Respondents claim that Mr. Solomon used the wrong tests to exclude high- and low-end outliers, and incorrectly relied on the median.[37]

30. Respondents allege three additional reasons, beyond the mechanics of Mr. Solomon's DCF analysis, why the Commission should dismiss the Complaint and let

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[33] Respondents Answer at 1-2, 6-11.

[34] Exhibit AEP-0001 (McKenzie Test.).

[35] Respondents Answer at 2, 6, 11-43; McKenzie Test. at 17-32; 36-42; 66-76.

[36] Respondents Answer at 2-3, 5-6, 46.

[37] Respondents Answer at 13-22; 41-43; McKenzie Test. at 36-66.

Respondents' current ROE stand. First, Respondents assert that Complainant incorrectly claims that the post-Opinion No. 531 persistence of low 10-year Treasury bond yields and interest rates, and shift in Federal Reserve monetary policy, show that the anomalous conditions the Commission found present in Opinion No. 531 are no cause for concern during the six-month study period here, given current financial conditions, and instead reflect a new and consistent normal. According to Respondents, current market conditions are substantially similar to those that prevailed during the time periods at issue in Opinion Nos. 531 and 551, as the Federal Reserve's massive Treasury bond and mortgage-backed securities holdings continue to exert considerable influence over capital market conditions; there is uncertainty over the future Federal Reserve policies; and yields on utility bonds remain near their lowest levels in modern history. As a result, Respondents argue that investors believe the conditions that prevailed during Opinion No. 531's study period in fact persist, should still be considered anomalous, and will not change until the Federal Reserve materially changes its monetary policy.[38]

31. In addition, Respondents dispute Mr. Solomon's testimony that state-regulated generation and distribution service is more risky than Commission-regulated transmission service, and assert that he has exaggerated the difference between the certainty of automatic full-cost recovery under Commission formula rates and the regulatory lag that can prevent utilities from earning their authorized ROEs under retail stated rate-setting mechanisms.[39]

32. Further, Respondents contend that by ignoring alternative ROE benchmarks (*i.e.*, the risk premium approach, CAPM and the expected earnings test), and relying solely on the DCF model, which Respondents claim biases results downward, Complainant has failed to ensure that the DCF is producing results consistent with *Hope* and *Bluefield*.[40] According to Respondents, the risk premium approach yields a 10.12 percent cost of equity;[41] CAPM yields a range of 8.44 percent to 13.67 percent;[42] and the expected earnings approach yields a range of 8.63 percent to 14.03 percent.[43] In Respondents'

[38] Respondents Answer at 30-34; McKenzie Test. at 20-26.

[39] Respondents Answer at 39-40; McKenzie Test. at 76-80.

[40] Respondents Answer at 34-39; McKenzie Test. at 34-35.

[41] Respondents Answer at 36-37; McKenzie Test. at 70.

[42] Respondents Answer at 38; McKenzie Test. at 73.

[43] Respondents Answer at 39; McKenzie Test. at 76.

view, these alternative benchmark methodologies fully justify Respondents' current ROE.

33. Finally, if the Commission does not dismiss the Complaint and instead sets it for hearing, Respondents argue that the Commission should delay the effectiveness of Complainant's proposed rate decrease by five months. Respondents contend that the magnitude of the reduction that Complainant seeks is plainly excessive, and that the Commission should accordingly suspend it for five months, as it does with excessive rate increase applications.[44]

V. ETEC's Answer to Respondents

34. In its answer, ETEC responds to Respondents' claims that the Commission should dismiss the Complaint because it: (1) impermissibly extends the statutory 15-month refund period under section 206 of the FPA, and (2) fails to make a *prima facie* case. ETEC states that it meets the Commission's standard for filing a successive complaint because the instant complaint is based on new, more current data; a different study period, proxy group and zone of reasonableness; and advocates a different return on equity.[45] In addition, ETEC states that Respondents have confused ETEC's ultimate burden of persuasion at the end of the proceeding with ETEC's burden to state a *prima facie* case at the beginning, and notes that the Commission has repeatedly held, in ROE complaint cases, that summary disposition is appropriate only where, unlike here, there are no genuine issues of material fact.[46] Further, ETEC states that, consistent with Commission precedent,[47] ETEC's Complaint may proceed because ETEC has offered substantial evidence, based on the Commission's two-step DCF precedent, that AEP

[44] Respondents Answer at 44-45 (citing *Ariz. Pub. Serv. Co.*, 145 FERC ¶ 61,806 (2013); *W. Tex. Utils. Co.*, 18 FERC ¶ 61,189 (1982)).

[45] ETEC Answer at 2-6 (citing *Belmont Muni. Light Dept. v. Cent. Me. Power Co.*, 162 FERC ¶ 61,035, at P 12 (2018)).

[46] ETEC Answer at 13-15 (citing *E. Tex. Elec. Coop. I,* 161 FERC ¶ 61,178 at P 29; *E. Tex. Elec. Coop., Inc., v. Sw. Elec. Power Co.*, 161 FERC ¶ 61,222, at P 30 (2017) (*E. Tex. Elec. Coop. II*); *N.C. Elec. Membership Corp. v. Duke Energy Carolinas, LLC*, 155 FERC ¶ 61,048, at P 28 (2016) (*NCEMC v. Duke*); *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 45 (2015); *Seminole Elec. Coop., Inc. v. Duke Energy Fla., Inc.*, 149 FERC ¶ 61,210, at P 29 (2014); *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,177, at P 25 (2014)).

[47] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator Inc.*, 149 FERC ¶ 61,049, at P 184 (2014), *order on reh'g*, 156 FERC ¶ 61,060 (2016).

West's current cost of equity falls well below its existing ROE,[48] and lies outside of a properly analyzed zone of reasonableness.[49]

35. Further, ETEC argues that the Commission should reject Respondents' request to delay the refund effective date for the maximum five months that the Commission may suspend a section 205 rate increase filing that is more than 10 percent excessive. They also note that Respondents' argument confuses section 205 with section 206, ignores the Commission's longstanding policy of providing maximum protection to consumers and contradicts the Commission's express holding in several recent complaint cases that found "no merit in Respondents' assertions that the Commission should delay any appropriate relief" to customers.[50]

36. Finally, ETEC notes that the Commission issued its Opinion No. 531 Remand Order more than a month after ETEC filed the instant complaint and on the same day that Respondents filed their Answer. ETEC argues that because the Opinion No. 531 Remand Order consistently refers to the Commission's new ROE approach as "proposed," it is interlocutory, subject to change, and, if applied retroactively here, would deprive ETEC of the opportunity to address the new standard, absent the Commission setting the instant Complaint for hearing.[51]

VI. Discussion

A. Procedural Matters

37. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest or answer unless otherwise

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[48] ETEC Answer at 13-14 (citing *Okla. Municipal Power Auth. v. Okla. Gas and Elec. Co.*, 163 FERC ¶ 61,114, at P 34 (2018); *E. Tex. Elec. Coop. II*, 161 FERC ¶ 61,222 at P 30).

[49] *Id*. at 17.

[50] *Id*. at 45 (citing *E. Tex.Elec. Coop. II*, 161 FERC ¶ 61,222 at P 34; *Belmont Muni. Light Dept. v. Cent. Me. Power Co.*, 156 FERC ¶ 61,198, at P 43 (2016); *NCEMC v. Duke*, 155 FERC ¶ 61,048 at PP 24, 30). *See also E. Tex. Elec. Coop. I,* 161 FERC ¶ 61,178 at P 33.

[51] ETEC Answer at 9-12.

ordered by the decisional authority. We will accept ETEC's answer because it has provided information that has assisted us in our decision-making process.

B. Substantive Matters

39. 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 a trial-type evidentiary hearing and settlement judge procedures under FPA section 206. All issues relevant to the determination of the base ROE raised in the Complaint, Respondents' Answer, and Complainants' Answer are appropriately considered.

40. The Commission issued the *Coakley* Briefing Order on the day Respondents filed their answer to the Complaint. Accordingly, the parties have not had an opportunity to address whether and how the methodology proposed in that order should apply with respect to this Complaint. The hearing established by this order will provide that opportunity. As the Commission recently clarified in *Ark. Pub. Serv. Comm'n v. Sys. Energy Resources,*[52] while the proposed new methodology is a proposal, and not yet a final policy, the "new approach reflects the Commission' proposed policy for addressing this issue in the future, including in the proceedings currently before the Commission." Therefore, we expect the participants in this proceeding to address the merits and application of the proposed methodology. Accordingly, we will set the Complaint for investigation, trial-type evidentiary hearing and settlement judge procedures under section 206 of the FPA. We will leave to the discretion of the Chief Administrative Law Judge whether it is appropriate to consolidate this proceeding and the 2017 Complaint proceeding in Docket No. EL17-76-000 for purposes of settlement, hearing and decision.[53]

41. 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.[54] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding.[55]

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[52] 165 FERC ¶ 61,119 at P 5.

[53] *See* 18 C.F.R. § 385.503(a) (2018).

[54] 18 C.F.R. § 385.603 (2018).

[55] 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 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.

42. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,[56] we will set the refund effective date at the earliest date possible, *i.e.*, September 6, 2018, as requested. We find no merit in Respondents' assertions that the Commission should delay any appropriate relief to AEP West's customers, and we expressly decline to do so here.

43. If the Chief Administrative Law Judge determines that it is appropriate to consolidate this proceeding with Docket No. EL17-76-000, the consolidated proceeding will involve two refund periods—the 15-month refund period in the instant proceeding, and the 15-month refund period in Docket No. EL17-76-000. In those circumstances, it would be appropriate for the parties to litigate a separate ROE for each refund period. Specifically, for the refund period covered by Docket No. EL17-76-000 (*i.e.*, June 5, 2017 through September 5, 2018), 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.[57] For the refund period in the instant docket (*i.e.*, September 6, 2018 through December 6, 2019) and for the prospective period, the ROE

The 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).

[56] *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, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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

should be based on the most recent financial data in the record.[58] Should the instant Complaint, the 2017 Complaint, or both, whether consolidated or not, fail to settle and instead proceed to trial, the Commission expects the participants to create an evidentiary record that addresses the Commission's proposed new ROE framework, in accordance with the Commission's latest guidance, as discussed above.

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 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 approximately twelve months of the commencement of hearing procedures, or January 31, 2020. 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 November 30, 2020.

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 AEP West's ROE. 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 (2018), 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

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

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 September 6, 2018, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.