

## MEMORANDUM

**TO:** NEPOOL Transmission Committee

**FROM:** Eric Runge and Jamie Blackburn, NEPOOL Counsel

**DATE:** May 8, 2017

**RE:** Status of FERC New England Base ROE Proceedings

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This memo provides a brief overview and summary of the four ongoing proceedings at the FERC involving the New England transmission owners' (NETOs) base return on equity (ROE). The memo includes citations to key orders and docket numbers if you wish to follow these proceedings more directly. As explained below, due to the recent decision by the D.C. Circuit Court of Appeals (described below), there is considerable uncertainty as to both the timing and resolution of these ROE proceedings.

Each of the four separate ROE proceedings was initiated by a complaint filed under Section 206 of the Federal Power Act (FPA). At their core, all four complaints allege that the NETOs base ROE in effect for the time period specified in each complaint is unjust and unreasonable and should be reduced. The first complaint was filed on September 30, 2011 (Complaint I),<sup>1</sup> the second complaint was filed on December 27, 2012 (Complaint II),<sup>2</sup> the third complaint was filed on July 31, 2014 (Complaint III),<sup>3</sup> and the fourth complaint was filed on April 29, 2016 (Complaint IV).<sup>4</sup> The filing date for each complaint triggered separate 15-month refund periods.<sup>5</sup>

On April 14, 2017, the U.S. Federal Appeals Court for the District of Columbia Circuit issued an opinion in *Emera Maine, et al v. FERC*, concerning the FERC's treatment of the first complaint filed (the "ROE I Opinion").<sup>6</sup> The ROE I Opinion vacates and remands a the FERC orders on Complaint I, which had required a reduction in the base ROE approved for NETOs from 11.14 percent to 10.57 percent.<sup>7</sup> The court held that FERC failed to find the then-existing ROE was unjust and unreasonable before setting a new base ROE, and also failed to properly

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<sup>1</sup> Docket No. EL11-66-000. Complaint I challenged the 11.14 percent base ROE.

<sup>2</sup> Docket No. EL13-33-000.

<sup>3</sup> Docket No. EL14-86-000.

<sup>4</sup> Docket No. EL16-64-000.

<sup>5</sup> See 16 U.S.C. § 824e(b) (2012).

<sup>6</sup> *Emera Maine, et al v. FERC*, No. 15-1118 (Apr. 14, 2017).

<sup>7</sup> *Coakley, Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, Docket No. EL11-66-001, 147 FERC ¶ 61,234 (2014) ("Opinion No. 531"); *order on paper hearing*, Opinion No. 531-A, Docket No. EL11-66-001, 149 FERC ¶ 61,032 (2014) ("Opinion No. 531-A"); *order on reh'g*, Opinion No. 531-B, Docket Nos. EL11-66-002 and EL11-66-003, 150 FERC ¶ 61,165 (2015) ("Opinion No. 531-B").

explain how its new base ROE was just and reasonable. Additional information on the ROE I Opinion, along with that opinion's implications for the FERC's burden in Federal Power Act section 206 proceedings can be found in a prior memo produced by NEPOOL counsel.<sup>8</sup>

What follows is a brief summary of the current status of each proceeding.

### **Complaint I (EL11-66):**

On October 31, 2006, the Commission established the base ROE at 11.14 percent.<sup>9</sup> On September 30, 2011, a complaint was filed alleging that the NETOs' 11.14 percent base ROE was unjust and unreasonable because capital market conditions had significantly changed since that base ROE was established in 2006.<sup>10</sup> In August 2013, the Presiding Administrative Law Judge (ALJ) issued an initial decision.<sup>11</sup> In June 2014 the Commission issued its Opinion No. 531 on the initial decision.<sup>12</sup> In Opinion No. 531, the Commission determined that, while the Commission historically used a one-step discounted cash flow (DCF) methodology for determining the base ROE for public utilities, it was appropriate to adopt for public utility ROE cases the two-step DCF methodology that the Commission has long-used in natural gas pipeline and oil pipeline cases.<sup>13</sup> The Commission also found it appropriate, based on the record evidence in the proceeding, to direct that the base ROE be set halfway between the midpoint of the zone of reasonableness and the top of that zone.<sup>14</sup> In a subsequent order issued on October 16, 2014,<sup>15</sup> the Commission ruled that the appropriate base ROE was 10.57 percent and that the maximum ROE including incentives was not to exceed 11.74 percent.<sup>16</sup> On November 17, 2014, as amended on April 22, 2015, ISO-NE submitted a compliance filing, on behalf of the NETOs, to comply with the Commission's directive in this proceeding. That filing was accepted by the

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<sup>8</sup> See [http://nepool.com/uploads/Lit\\_Supp\\_20170424\\_Memo\\_re\\_Base\\_ROE\\_Complaint\\_I\\_Petitions.pdf](http://nepool.com/uploads/Lit_Supp_20170424_Memo_re_Base_ROE_Complaint_I_Petitions.pdf).

<sup>9</sup> *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarification*, 124 FERC ¶ 61,136 (2008), *aff'd sub nom. Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30 (2010).

<sup>10</sup> Complaint I was filed by the Massachusetts Attorney General, CT PURA, Mass DPU, NH PUC, CT Office of Consumer Counsel, Maine Public Advocate, the Attorney General of Connecticut, NH Consumer Advocate, RI DPU, Vermont DPS, MMWEC, Associated Industries of Massachusetts, The Energy Consortium, Power Options, Inc. and the Industrial Energy Consumer Group.

<sup>11</sup> *Coakley v. Bangor Hydro-Electric Co.*, 144 FERC ¶ 63,012 (Aug. 6, 2013) available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13323769>.

<sup>12</sup> Opinion No. 531, available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13576229>.

<sup>13</sup> See Opinion No. 531 at PP 15, 17, 39.

<sup>14</sup> *Id.* P 142.

<sup>15</sup> Because the parties in the proceeding did not litigate one of the inputs to the two-step DCF methodology (i.e., the appropriate long-term growth rate to use), the Commission instituted a paper hearing and reopened the record to provide participants an opportunity to submit briefs on that issue. See *Coakley v. Bangor Hydro-Electric Co.*, Opinion No. 531-A, 149 FERC ¶ 61,032 (Oct. 16, 2014) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13660137>.

<sup>16</sup> See Opinion No. 531-A at P 11.

Commission and established the new 10.57 base ROE in the ISO-NE OATT.<sup>17</sup> Ultimately, in March 2015, the Commission issued its order denying rehearing.<sup>18</sup>

As previously stated, the D.C. Circuit's ROE I Opinion rejected FERC's reasoning in the Complaint I orders, and remanded the orders, directing the Commission to first assess whether the 11.14 percent rate is unjust and unreasonable, before choosing a new base ROE and explaining sufficiently its reasoning as to why any such new base ROE is just and reasonable. Until FERC has a quorum, however, it will not be able to issue an order on remand to resolve Complaint I. Even after the FERC has a quorum, there is no deadline for its issuance of an order on remand.

### **Complaints II and III (EL13-33 and EL14-86; consolidated):**

On December 27, 2012, while proceedings in Complaint I were ongoing, another FPA section 206 complaint was filed in Docket No. EL13-33, which also alleged that the 11.14 percent base ROE was unjust and unreasonable.<sup>19</sup> On June 19, 2014, the Commission set the Complaint II proceeding for hearing and settlement judge procedures.<sup>20</sup> Then on July 31, 2014, a third complaint was filed, also challenging the 11.14 percent base ROE.<sup>21</sup> Shortly thereafter, the Commission issued an order consolidating the Complaint II and Complaint III proceedings and establishing a trial-type, evidentiary hearing.<sup>22</sup> For the consolidated proceeding, the Commission established two separate 15-month refund periods and directed the parties to litigate a separate base ROE for each refund period.<sup>23</sup> The NETOs requested rehearing of the orders setting Complaints II and III for hearing and on May 14,

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<sup>17</sup> See generally, Docket No. ER15-414. See Letter Order Accepting ISO-NE Compliance Filing, Docket No. ER15-414-001 (July 8, 2015).

<sup>18</sup> Opinion No. 531-B, available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13792650>.

<sup>19</sup> Complaint II was filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% return on equity, and seeks a reduction of the Base ROE to 8.7%.

<sup>20</sup> *ENE (Environment Northeast), et al. v. Bangor Hydro-Elec. Company*, 147 FERC ¶ 61,235 (June 19, 2014).

<sup>21</sup> Complaint III was filed by the Massachusetts Attorney General, CT PURA, MMWEC, NH Electric Cooperative, Inc., MA DPU, NH PUC, the Connecticut Attorney General, CT Consumer Counsel, the Maine Public Advocate, NH Consumer Advocate, RIPUC, VT DPS, Associated Industries of Massachusetts, The Energy Consortium, Power Options, Inc., Western Massachusetts Industrial Group, Environment Northeast, National Consumer Law Center, the Greater Boston Real Estate Board, and the Industrial Energy Consumer Group.

<sup>22</sup> *Mass. Att'y Gen. et al. v. Bangor Hydro et al.*, 149 FERC ¶ 61,156, 61 (Nov. 24, 2014) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13692917>; *reh'g denied*, 151 FERC ¶ 61,125 (May 14, 2015).

<sup>23</sup> The refund period covered for Complaint II was December 27, 2012 through March 27, 2014, and the refund period for Complaint III was July 31, 2014 through October 31, 2015.

2015, the FERC denied rehearing of both orders.<sup>24</sup> On July 13, 2015, the NETOs appealed those orders to the D.C. Circuit Court of Appeals, and that appeal is currently being held in abeyance pending final FERC action on Complaints II and III.<sup>25</sup>

In the meantime, a hearing on Complaint II and III was held in June-July 2015, and the presiding ALJ issued an initial decision on March 22, 2016.<sup>26</sup> In the initial decision on Complaints II and III, the Presiding ALJ ruled, similar to FERC's final ruling on Complaint I, that for "each of the periods at issue, the existing base ROEs [were] unjust and unreasonable, but they [were] enclosed in anomalous capital markets."<sup>27</sup> Pleadings in response to the initial decision remain pending before the FERC, which did not issue an order on the initial decision prior to losing its quorum.

#### **Complaint IV (EL16-64):**

On April 29, 2016, a fourth FPA section 206 complaint was filed in Docket No. EL16-64 challenging the base ROE of 10.57 percent, which had been established in FERC's orders on Complaint I.<sup>28</sup> Complaint IV presents similar questions as those raised in the Complaint I, II and III proceedings, including (1) the continuing decline of the market cost of equity capital; and (2) questions surrounding the "anomalous" capital market conditions that the Commission identified in Opinion No. 531. On September 20, 2016, the FERC established hearing and settlement judge procedures for the Complaint IV proceeding.<sup>29</sup> The NETOs requested rehearing of that order, which remains pending before the Commission.

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<sup>24</sup> *Environment Northeast, et al. v. Bangor Hydro-Elec. Co., et al. and Mass. Att'y Gen. et al. v. Bangor Hydro et al.*, 151 FERC ¶ 61,125 (May 14, 2015) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13875277>.

<sup>25</sup> D.C. Cir. Case No. 15-1212. The NETOs challenge whether (1) the FERC contravened the FPA when it permitted successive section 206 complaints and (2) whether FERC contravened FPA section 206 by permitting a challenge to the base ROE where the existing base ROE was already within the zone of reasonableness.

<sup>26</sup> *ENE (Environment Northeast), et al. v. Bangor Hydro-Elec. Company*, 154 FERC ¶ 63,024 (Mar. 22, 2014) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14176871>. In mid-December 2015, the presiding ALJ reopened the record for the limited purpose of having the discounted cash flow ("DCF") calculations re-run in accordance with the FERC's preferred approach and re-submitted. A limited hearing on that supplemental information was held on February 1, 2016.

<sup>27</sup> *Id.* at P 937.

<sup>28</sup> Complaint IV complainants include: Belmont Mun. Light Dept., Braintree Elec. Light Dept., Concord Mun. Light Plant, Georgetown Mun. Light Dept., Groveland Elec. Light Dept., Hingham Mun. Lighting Plant, Littleton Elec. Light & Water Dept., Middleborough Gas & Elec. Dept., Middleton Elec. Light Dept., Reading Mun. Light Dept. ("Reading"), Rowley Mun. Lighting Plant, Taunton Mun. Lighting Plant, and Wellesley Mun. Light Plant.

<sup>29</sup> *Belmont Mun. Light Dept. et al. v. Central Me. Power Co. et al.*, 156 FERC ¶ 61,198 (Sep. 20, 2016) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14358868>. In that order, the Commission set a refund effective date of April 29, 2016. The Commission also rejected arguments as to the propriety of allowing a fourth complaint against the NETOs' ROE after three previous complaints have been filed since 2011. As it did when it allowed Complaints II and III to go forward, the

Settlement procedures for Complaint IV are ongoing.<sup>30</sup> A settlement conference had been scheduled for May 3, 2017, but in light of the ROE I Opinion remanding the FERC's orders on Complaint I, that settlement conference was cancelled. Instead, the Chief ALJ scheduled an oral argument for May 18, 2017.<sup>31</sup> At the oral argument, the participants are directed to address the question of why the Chief Judge should not recommend to the Commission that this case be dismissed.<sup>32</sup>

### **Going Forward:**

The four New England base ROE proceedings cover different time periods but otherwise involve similar issues raised in the Complaint I proceeding, including whether the existing base ROE is unjust and unreasonable and, if so, what the new base ROE should be. All four proceedings are affected by the ROE I Opinion vacating FERC's orders in the Complaint I proceeding and remanding that case back to the Commission. The Commission does not currently have a quorum, and cannot, therefore, issue an order on remand until it has a quorum to address the issues raised in the ROE I Opinion.<sup>33</sup>

When a FERC quorum is re-established, the Commission will first need to address the orders remanded by the D.C. Circuit's ROE I Opinion. We expect that for reasons of efficiency the Commission will request a voluntary remand for any other appeals pending before the D.C. Circuit related to Complaints II and III. Because the Commission has not yet issued an order on the initial decision for Complaints II and III, it will have the opportunity to issue an order on the initial decision that is consistent with however the FERC rules on Complaint I.<sup>34</sup> Ultimately, the Commission will need to revisit all four of these Complaints in order to respond consistently to the ROE I Opinion.

As always, NEPOOL counsel will continue to monitor these proceedings and provide status reports as appropriate. If you have any questions concerning these proceedings, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

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Commission found that Complaint IV was properly set for hearing as it is based on newer, more current data.

<sup>30</sup> Hearing procedures are proceeding *concurrently* with settlement judge procedures in the Complaint IV proceeding. There is an oral argument scheduled for May 18, 2017, to address questions regarding a motion to compel the production of certain data requests. Also, in light of the oral argument regarding the continuation of the Complaint IV proceeding, the procedural schedule has been pushed back.

<sup>31</sup> Order of Chief Judge Scheduling Oral Argument, Docket No. EL16-64-002 (Apr. 27, 2017) available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14573848>.

<sup>32</sup> The oral argument will be conducted "*en banc*" before the Chief Judge and the Presiding Judge.

<sup>33</sup> Furthermore, the Order Delegating Further Authority to Staff, issued just before Chairman Bay left the Commission, did not delegate any authority to FERC staff regarding responding to opinions remanded to the FERC. *See generally*, 158 FERC ¶ 61,135 (Feb. 3, 2017) available at <https://www.ferc.gov/CalendarFiles/20170203110327-AD17-10-000.pdf>.

<sup>34</sup> The Commission could, of course, again set the proceedings involving Complaints I, II and III for additional hearing and settlement judge procedures.