

165 FERC ¶ 61,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Public Service Commission
Mississippi Public Service Commission

Docket Nos. EL17-41-001

v.

System Energy Resources, Inc.

Louisiana Public Service Commission

EL18-142-000
(Consolidated)

v.

System Energy Resources, Inc.
Entergy Services, Inc.

East Texas Electric Cooperative, Inc.

Docket No. EL17-76-001

v.

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

Oklahoma Municipal Power Authority

Docket No. EL18-58-000

v.

Oklahoma Gas & Electric Company

Southwestern Electric Power Company

Docket Nos. ER18-1225-000

Minden, Louisiana

EL18-122-000
(Consolidated)

v.

Southwestern Electric Power Company

Alabama Municipal Electric Authority
Cooperative Energy

Docket No. EL18-147-000

v.

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Company Services, Inc.

ORDER PROVIDING GUIDANCE

(Issued November 15, 2018)

1. On October 16, 2018, the Commission issued an Order Directing Briefs¹ in which it proposed a new methodology for analyzing the base return on equity (ROE) component of rates under section 206 of the Federal Power Act (FPA)² and directed the participants to the applicable proceedings to submit briefs regarding the proposed new methodology. On October 17, 2018, Chief Administrative Law Judge Carmen Cintron issued an order³ in an ongoing proceeding involving a base ROE dispute under FPA section 206 that held the proceeding in abeyance until “the Commission decides the [Briefing Order] case or

¹ *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (Briefing Order).

² 16 U.S.C. § 824e (2012).

³ *Ark. Pub. Serv. Comm’n, et al. v. Sys. Energy Res., Inc.*, Docket Nos. EL17-41-001 and EL18-142-000 (Oct. 17, 2018) (Order of Chief Judge Holding Procedural Schedule in Abeyance).

issues further guidance concerning ROE.”⁴ In this order, we provide guidance regarding the effect of the Briefing Order on pending proceedings involving base ROE issues that have been set for hearing and settlement judge procedures.

I. Background

2. In *Emera Maine v. FERC*,⁵ the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded Opinion No. 531,⁶ which found that the New England Transmission Owners’ (NETOs) existing ROE was unjust and unreasonable and adopted a replacement ROE set at the midpoint of the upper half of the zone of reasonableness. The D.C. Circuit concluded in *Emera Maine* that the Commission did not adequately demonstrate in Opinion No. 531 (1) that the NETOs’ existing ROE was unjust and unreasonable and (2) that the replacement ROE was just and reasonable.

3. On October 16, 2018, the Commission issued an order on remand, directing the participants to the proceeding that was the subject of *Emera Maine*, and the participants in three other proceedings involving NETOs’ ROE that are currently pending before the Commission, to submit briefs regarding: (1) a proposed framework for determining whether an existing ROE is unjust and unreasonable under the first prong of FPA section 206 and (2) a revised methodology for determining just and reasonable ROEs.⁷ In the Briefing Order, the Commission proposed to establish a composite zone of reasonableness, giving equal weight to the discounted cash flow (DCF) model, capital asset pricing model (CAPM), and expected earnings model. The Commission proposed that, in order to find an existing ROE unjust and unreasonable under the first prong of section 206, the ROE must be outside a range of presumptively just and reasonable ROEs for a utility of its risk profile. For average risk single utilities, that range would be the quartile of the zone of reasonableness centered on the midpoint/median of the zone of reasonableness. For below or above average risk utilities, that range would be the

⁴ *Id.* P 3. A substantially similar order was issued in Docket No. EL17-76. *See E. Tex. Elec. Coop., Inc. v. Public Serv. Co. of Okla.*, Docket No. EL17-76-001 (Oct. 18, 2018) (Order of Chief Judge Holding Procedural Schedule in Abeyance and Waiving Answer Period).

⁵ 854 F.3d 9 (D.C. Cir. 2017).

⁶ *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).

⁷ *See, e.g.*, Briefing Order, 165 FERC ¶ 61,030 at PP 1, 15.

quartile of the zone of reasonableness centered on the central tendency of the lower or upper half of the zone of reasonableness, respectively.⁸ The Commission proposed to determine a replacement ROE under the second prong of FPA section 206 using the above three models, plus the risk premium model. For average risk utilities, the Commission proposed to determine the midpoint/medians of each zone of reasonableness produced by the DCF, CAPM, and expected earnings models and average those ROEs with the risk premium model ROE, giving equal weight to each of the four figures. The Commission proposed to use the midpoint/medians of the lower and upper halves of the zones of reasonableness to determine ROEs for below and above average risk utilities, respectively, and average those ROEs with the risk premium model ROE.

4. As noted above, on October 17, 2018, Chief Judge Cintron issued an order⁹ in Docket Nos. EL17-41-000 and EL18-142-000 holding the proceeding in abeyance until “the Commission decides the [Briefing Order] case or issues further guidance concerning ROE.”¹⁰ On October 18, 2018, Chief Judge Cintron issued a substantially similar order in Docket No. EL17-76-001.¹¹ On October 19, 2018, in Docket Nos. EL17-41-000 and EL18-142-000, the Arkansas Public Service Commission, Mississippi Public Service Commission, and Louisiana Public Service Commission filed a motion for clarification or reconsideration of the Chief Judge’s order holding the proceeding in abeyance, requesting that the Chief Judge withdraw paragraph 3 of the order, which holds the proceeding in abeyance indefinitely until the Commission decides the Briefing Order case or issues further guidance concerning ROE.¹² The parties argue that only a minimal stay is necessary to allow them to apply the Commission’s guidance in the Briefing Order. The parties state that they contemplated a stay of only about a week, so that the parties to the proceeding could agree on and submit a new procedural schedule, in which the filing of direct testimony would be delayed for up to six weeks so that necessary studies could be performed. The parties explain that, because it may be some time before the Commission

⁸ The 8.11 percent ROE that Opinion No. 554 awarded to PATH was based on the median of the lower half of the zone of reasonableness.

⁹ *Ark. Pub. Serv. Comm’n, et al. v. Sys. Energy Res., Inc.*, Docket Nos. EL17-41-001 and EL18-142-000 (Oct. 17, 2018) (Order of Chief Judge Holding Procedural Schedule in Abeyance).

¹⁰ *Id.* P 3.

¹¹ *E. Tex. Elec. Coop., Inc. v. Public Serv. Co. of Okla.*, Docket No. EL17-76-001 (Oct. 18, 2018) (Order of Chief Judge Holding Procedural Schedule in Abeyance and Waiving Answer Period).

¹² Motion for Clarification at 3-4.

issues a final order in the Briefing Order proceeding, holding their proceeding in abeyance indefinitely until that final order is issued would delay any decision in their proceeding far beyond the end of the refund period, which will prejudice ratepayers.¹³

II. Discussion

5. In proceedings involving base ROE issues that have been set for hearing and settlement judge procedures, including the above-captioned FPA section 206 proceedings, the Commission expects the participants to address the Briefing Order's proposed new methodology in the context of their respective proceedings. This includes presenting evidence concerning the merits of the proposed methodology and whether and how to apply the proposed new methodology to the facts of their respective proceedings. While the Briefing Order's proposed new methodology is a proposal, and not yet a final policy, the Briefing Order indicated that, in the interim, the "new approach reflects the Commission's proposed policy for addressing this issue *in the future, including in the proceedings currently pending before the Commission.*"¹⁴ Accordingly, we expect the participants to ongoing proceedings to address the merits and application of the proposed methodology in their proceedings.¹⁵

6. As a result, it is not necessary to hold currently ongoing proceedings in abeyance until the Commission issues an order after briefs are submitted in the Briefing Order proceeding. Ongoing proceedings may continue without abeyance, and the applicable Administrative Law Judge may adjust the procedural schedule in each proceeding as necessary to give participants the opportunity to address whether and how to apply the Briefing Order's proposed new methodology in the context of their proceeding.

7. We do not believe that allowing participants to address the Briefing Order's proposed new methodology in their ongoing proceedings, and continuing those proceedings without abeyance on that basis, will result in wasted time and resources because we believe that continuing with settlement discussions or hearing procedures will move those proceedings closer to resolution. In addition, these ongoing proceedings involve issues of material fact that the Commission determined would be more appropriately addressed in hearing and settlement judge procedures, and the Briefing

¹³ *Id.* at 2-3.

¹⁴ Briefing Order, 165 FERC ¶ 61,030 at P 19 (emphasis added).

¹⁵ While the Commission is providing this opportunity through a paper hearing in the Briefing Order proceeding, in those cases with ongoing proceedings that have been set for hearing and settlement judge procedures, we believe that it is most efficient to allow the participants to present this evidence as part of their ongoing proceeding.

Order's proposed new base ROE methodology does not change that determination. While the issues of material fact to be addressed are expanded with the inclusion of the three additional financial models, the most effective procedures for addressing base ROE issues continue to be the ongoing hearing and settlement proceedings.

8. More generally, section 206(b) of the FPA requires the Commission to “act as speedily as possible”¹⁶ with respect to proceedings instituted under section 206 of the FPA. Holding proceedings in abeyance until the Commission issues an order after the briefs are submitted in the Briefing Order proceeding would potentially be at odds with this requirement because the Briefing Order clarified that the proposed new ROE methodology would apply to “proceedings currently pending before the Commission”¹⁷ and acting “as speedily as possible” with respect to ongoing proceedings would therefore require ongoing proceedings to apply the proposed new ROE methodology to their proceedings, as stated in the Briefing Order.

9. For these reasons, we clarify that it is not necessary to hold currently ongoing FPA section 206 and section 205 proceedings in abeyance until the Commission issues an order after briefs are submitted in the Briefing Order proceeding. Further, we find that Administrative Law Judges may adjust the procedural schedule in each proceeding as necessary to give participants the opportunity to address and apply the Briefing Order's proposed new methodology in the context of their proceeding. We also clarify that the Commission does not intend to recall such ongoing proceedings back to the Commission, or otherwise direct that they be transferred from their ongoing hearing or settlement procedures to the Commission.¹⁸

¹⁶ 16 U.S.C. § 824e(b) (2012).

¹⁷ Briefing Order, 165 FERC ¶ 61,030 at P 19 (emphasis added).

¹⁸ The proceedings addressed by this order include only those in which the record has not been certified to the Commission by the applicable Administrative Law Judge. The Commission will consider whether to establish additional procedures in proceedings in which the record has been certified on a case-by-case basis.

The Commission orders:

The participants to ongoing proceedings and applicable Administrative Law Judges are directed to continue with their ongoing proceedings, as discussed above.

By the Commission. Commissioner McIntyre is not voting on this order.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.