

135 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Atlantic Path 15, LLC

Docket Nos. ER11-2909-000  
EL11-29-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TRANSMISSION  
REVENUE REQUIREMENT AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued April 19, 2011)

1. On February 18, 2011, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> Atlantic Path 15, LLC (Atlantic) filed tariff revisions to reflect a proposed rate reduction to its transmission revenue requirement (TRR) that it charges for transmission service over the transmission line upgrade (Path 15 Upgrade) financed by Atlantic. Atlantic requests that the proposed TRR decrease be made effective on April 19, 2011, the 60<sup>th</sup> day after filing. In this order, the Commission accepts Atlantic's proposed TRR, suspends it for a nominal period, to be effective April 20, 2011,<sup>2</sup> subject to refund, and establishes hearing and settlement judge procedures. Also, because Atlantic is proposing a TRR reduction and a further decrease may be warranted, we are instituting an

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> Absent waiver, this is the earliest date that Atlantic's proposed rate can be made effective (*i.e.*, on the 61st day after filing, after 60 days' notice). *See Utah Power & Light Co.*, 30 FERC ¶ 61,015, at 61,024 n.9 (1985) (stating that proposed changes in rates, terms, and conditions cannot become effective (absent waiver) earlier than 60 days' notice to the Commission and that the 60-day notice period required by the Commission's regulations starts to run the first day after the date of the filing); *Central Hudson Gas & Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).

investigation pursuant to section 206 of the FPA<sup>3</sup> in Docket No. EL11-29-000 to determine whether Atlantic's proposed TRR reduction is just and reasonable.

## **I. Background**

2. The Path 15 Upgrade is an 83-mile, 500 kilovolt (kV) transmission line built along the existing Path 15 corridor in California to relieve a constrained congestion point. In 2001, the Commission specifically recognized the Path 15 corridor as a significant problem area requiring incentives for investment to alleviate costly congestion.<sup>4</sup> The upgraded Path 15 transmission line went into operation on December 22, 2004, adding roughly 1,500 megawatts (MW) to the existing 5,400 MW of transmission capacity from southern to northern California, and increasing transmission capacity from north to south by about 1,100 MW.

3. On June 12, 2002, the Commission accepted a letter agreement among the Path 15 participants<sup>5</sup> that constituted the first step in a process that led to the addition of transmission capacity along California's Path 15.<sup>6</sup> The letter agreement provided for, among other things, the use of a 13.5 percent return on common equity in the calculation of a to-be-filed TRR so as to promote the timely construction of additional transmission facilities.<sup>7</sup> Later, the Commission noted that the rate principles approved in the Path 15 Order were consistent with those enunciated in the Removing Obstacles Orders, but stood independent of those orders.<sup>8</sup> The Commission stated that the rate principles approved were designed to alleviate transmission constraints along Path 15, and that Path 15 was a

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<sup>3</sup> 16 U.S.C. § 824e (2006).

<sup>4</sup> *Removing Obstacles to Increased Elec. Generation and Nat. Gas Supply in the Western United States*, 94 FERC ¶ 61,272, at 61,973, *reh'g denied*, 95 FERC ¶ 61,225, *order on requests for reh'g and clarification*, 96 FERC ¶ 61,155, *further order on requests for reh'g and clarification*, 97 FERC ¶ 61,024 (2001) (Removing Obstacles Orders). *See also Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249, at 62,190 (2004).

<sup>5</sup> The Path 15 participants included Western Area Power Administration (WAPA), Trans-Elect, and Pacific Gas & Electric Company (PG&E).

<sup>6</sup> *Western Area Power Admin.*, 99 FERC ¶ 61,306 (2002) (Path 15 Order), *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom., Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

<sup>7</sup> *Id.* at 62,277.

<sup>8</sup> *Western Area Power Admin.*, 100 FERC ¶ 61,331 (2002).

uniquely critical path with transmission limitations that had serious impacts on the ability to move power over the system.<sup>9</sup>

4. On December 2, 2004, the Commission issued an order which accepted and suspended Atlantic Path 15's initial TRR.<sup>10</sup> However, the 13.5 percent return on equity (ROE) was not part of the ordered hearing in that it was part of the previously-accepted letter agreement. The Commission stated that it accepted the letter agreement so as to give some certainty to the financial community and to enable the Path 15 participants to secure the necessary financing of this critically needed infrastructure. On November 20, 2006, the Commission found, on the record developed in the ordered hearing, that Atlantic's proposed TRR and transmission operator tariff was just and reasonable, following certain modifications.<sup>11</sup> Pursuant to a separate settlement agreement, Atlantic agreed to file rate cases not more than three years apart, starting at the end of the first three-year rate period, and agreed that it would not seek a return on equity (ROE) in excess of 13.5 percent in the first rate case.<sup>12</sup> The Commission allowed a three-year moratorium on rate filings and directed Atlantic to file a rate case at the end of the moratorium, including an updated (actual) capital structure for the company.<sup>13</sup>

5. On December 21, 2007, Atlantic filed its first triennial rate case in Docket No. ER08-374-000, proposing a decrease in its TRR and a continuation of the authorized 13.5 percent ROE (2007 Rate Case). On February 19, 2008, the Commission summarily approved Atlantic's proposed 13.5 percent ROE and set the proposed rate reduction to its TRR for hearing and settlement judge procedures.<sup>14</sup> With regard to the ROE, the Commission found that the 13.5 percent ROE was within a range of reasonable returns (7.63 percent to 13.67 percent) developed consistent with Commission policy and that Atlantic should be allowed to continue to use the 13.5 percent ROE given the need for stability and certainty in the financial community concerning recovery of investments

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<sup>9</sup> *Id.* at 62,538-62,539.

<sup>10</sup> *See* Trans-Elect NTD Path 15, LLC, 109 ¶ 61,249 (2004).

<sup>11</sup> *Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 (2006), *reh'g denied* 119 FERC ¶ 61,093 (2007). Trans-Elect NTD Path 15, LLC changed its name to Atlantic Path 15, LLC in 2006.

<sup>12</sup> Path 15 Order, 99 FERC ¶ 61,306, at 62,280.

<sup>13</sup> *Id.*

<sup>14</sup> Atlantic Path 15, LLC, 122 FERC ¶ 61,135 (2008) (February 2008 Order), *reh'g granted in part and denied in part*, 133 FERC ¶ 61,153 (2010).

made in critical infrastructure.<sup>15</sup> Subsequently, the Commission accepted an uncontested settlement resulting in a decrease in the TRR from \$34,921,034 to \$30,900,000.<sup>16</sup> As part of the settlement, Atlantic agreed not to seek an ROE in excess of the currently authorized ROE of 13.5 percent.

## II. The Filing

6. Atlantic proposes to reduce its TRR to \$30,303,018,<sup>17</sup> which would be a reduction of \$516,982 from the current rates on file with the Commission. According to Atlantic, the proposed TRR was based upon a test year consisting of the 12 months that ended on December 31, 2010, with an adjustment to the 2010 test year to reflect increased costs that Atlantic will incur from WAPA.<sup>18</sup> Atlantic states that the increased costs from WAPA result from implementation of an erosion control program that requires work to be performed along the Path 15 Upgrade beginning in 2011 and continuing through 2013.<sup>19</sup>

7. Atlantic also requests continuation of its currently approved ROE of 13.5 percent without any suspension, hearing, or refund. Atlantic contends that the 13.5 percent ROE: (1) is consistent with the Commission's traditional approach to determining a just and reasonable rate of return; (2) is consistent with the Commission's policy and precedent; (3) is appropriate in light of the Path 15 Upgrade's continuing benefits to ratepayers in California and the broader Western Interconnection transmission system; and (4) meets investor expectations and conforms with the Commission's goals of promoting new transmission investment.<sup>20</sup>

## III. Notice of Filing and Responsive Pleadings

8. Notice of Atlantic's filing was published in the *Federal Register*, 76 Fed. Reg. 10,890 (2011), with interventions and comments due on or before March 11, 2011. The California Public Utilities Commission (CPUC) filed a notice of intervention. Timely

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<sup>15</sup> February 2008 Order, 122 FERC ¶ 61,135 at P 19-21.

<sup>16</sup> *Atlantic Path 15, LLC*, 128 FERC ¶ 61,130 (2009).

<sup>17</sup> Atlantic's TRR of \$30 million is part of CAISO's Transmission Access Charge, which has a total TRR of \$855 million.

<sup>18</sup> WAPA owns and maintains the transmission line and associated land.

<sup>19</sup> Atlantic Transmittal at 6.

<sup>20</sup> *Id.* at 7-12.

motions to intervene were filed by the Northern California Power Agency, the City of Santa Clara, California and the M-S-R Public Power Agency, and the Modesto Irrigation District. Timely motions to intervene and comments or protests were filed by San Diego Gas and Electric Company (SDG&E), Southern California Edison Company (SoCal Edison), Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (collectively, Six Cities) and PG&E. On March 21, 2011, the CPUC filed a motion to accept a late filed protest and a protest. Atlantic filed an answer on March 25, 2011.<sup>21</sup>

9. Six Cities urge the Commission to reject Atlantic's proposed 13.5 percent ROE and to either summarily approve the 9.6 percent median of Atlantic's Discounted Cash Flow (DCF) results as its authorized ROE or initiate an investigation for the purpose of determining a just and reasonable ROE for inclusion in Atlantic's TRR.<sup>22</sup> Six Cities state that settlement terms make clear that investors should expect an ROE no higher than 13.5 percent, but the terms did not guarantee that the ROE level would remain at 13.5 percent beyond the three-year rate period applicable to each rate filing. Six Cities argue that the notion of investor insistence upon a fixed ROE for the life of the Path 15 Upgrade is inconsistent with the terms of the settlement.<sup>23</sup>

10. SoCal Edison and the CPUC contend that the proposed TRR is not just and reasonable and should not be approved by the Commission as filed. The CPUC states that Atlantic's proposal for a 13.5 percent ROE does not take into account current market conditions, and is based on outdated data, which goes against Commission precedent.<sup>24</sup> SoCal Edison states that the settlement for the 2007 Rate Case stipulated that Atlantic use data for the twelve month period ending December 31, 2010 to develop its proposed TRR. SoCal Edison states that Atlantic's TRR includes all of its 2010 costs, but Atlantic also adds additional costs that it anticipates incurring in 2011 through 2013.<sup>25</sup> SoCal Edison argues that including these costs violates the settlement for the 2007 Rate Case

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<sup>21</sup> On April 8, 2011, Atlantic also filed a letter from WAPA confirming that WAPA had reviewed the testimony and accompanying exhibits of Mr. Charles Wemyss that were previously filed in this proceeding. On April 12, 2011, SoCal Edison filed an answer to Atlantic's letter.

<sup>22</sup> Six Cities Protest at 1. Both Six Cities and the CPUC argue that Atlantic's DCF results for its national proxy group produce a median of 9.6 percent, which is 390 basis points below the requested 13.5 percent ROE. Six Cities Protest at 5; CPUC Protest at 3.

<sup>23</sup> Six Cities Protest at 3-4.

<sup>24</sup> CPUC Protest at 3-4.

<sup>25</sup> SoCal Edison Comments at 5.

and that Atlantic did not explain why the inclusions of these costs is consistent with its settlement commitments.

11. Moreover, SoCal Edison states that Atlantic is a single-asset company whose net book value is decreasing annually and that using historical data omits the cost decrease that will occur in calendar year 2011 associated with its declining net plant balance.<sup>26</sup> SoCal Edison therefore argues that while Atlantic justifies the inclusion of the WAPA erosion control costs on the grounds that the cost increase is known and measurable for calendar year 2011, the cost decreases associated with using a projected test year, rather than historical test year, are also known and measurable.

12. Additionally, SoCal Edison states that Atlantic includes in its cost of service a Liquidity Reserve and a Debt Service Reserve, and that Atlantic provides no workpapers or other documents to show that its lenders continue to require Atlantic to maintain these reserves.<sup>27</sup> SoCal Edison states that Atlantic's filing needs to be set for hearing in order to determine a just and reasonable TRR level.

13. PG&E asks that the Commission accept Atlantic's proposed TRR, make them effective April 19, 2011, as requested, and set the case for hearing and settlement judge procedures. PG&E states that Atlantic's use of a 2010 historical test year, and adjustments made to the 2010 data, may result in rates that are unjust and unreasonable.<sup>28</sup> PG&E states that while Atlantic's use of a 2010 test year is adequate for suspension purposes, PG&E will need to engage in discovery to determine if the use of a 2010 test year will result in an over-recovery of costs. Additionally, PG&E argues that it needs more time to examine whether the adjustments Atlantic made to the 2010 test year data result in unjust or unreasonable rates.

14. SDG&E states that it is unable to determine if Atlantic's cost of service is just and reasonable because Atlantic has not included workpapers for the majority of the filing. SDG&E requests that Atlantic's TRR be set for hearing and settlement procedures.

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<sup>26</sup> *Id.* at 6-7.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> PG&E Protest at 2.

#### **IV. Discussion**

##### **A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the Commission will accept the CPUC's out-of-time protest, given the early stage of this proceeding, the filing party's interest in the proceeding and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Atlantic's or SoCal Edison's answers and will, therefore, reject them.

##### **B. Hearing and Settlement Judge Procedures**

18. Atlantic's proposed TRR, including the requested 13.5 percent ROE, raises issues of material fact that cannot be resolved based upon the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. At the hearing, the presiding judge shall consider the justness and reasonableness of all issues arising out of Atlantic's proposed TRR reduction. Therefore, we will accept Atlantic's proposed TRR, suspend it for a nominal period, make it effective April 20, 2011, subject to refund, and set it for hearing and settlement judge procedures.<sup>29</sup>

19. In the Path 15 Order,<sup>30</sup> we granted Trans-Elect's request for a 13.5 percent ROE as an incentive for development of a much needed transmission line in a critically congested area. We stated that our acceptance of the letter agreement was to provide the participants with a way to move forward with the financing of the project upgrade. Since its inception, the Path 15 Upgrade has provided significant rate and service reliability benefits, including a substantial decrease in actual and potential congestion, along with a substantial increase in system reliability, that allowed the Commission in part to summarily approve Atlantic's proposed continuation of the 13.5 percent ROE in the 2007

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<sup>29</sup> *Atlantic Path 15, LLC*, 133 FERC ¶ 61,153 at P 20, 21 (clarifying that the Commission's decision to make up-front ROE determinations or to order an evidentiary hearing will depend on the facts and circumstances of each individual case).

<sup>30</sup> Path 15 Order, 99 FERC ¶ 61,306.

Rate Case.<sup>31</sup> Also, in the 2007 Rate Case, the Commission found that Atlantic's 13.5 percent ROE was within a range of reasonable returns developed consistent with Commission policy.<sup>32</sup> The Commission noted that the continuation of the financial incentives was appropriate in order to compensate investors for taking the risks associated with developing such infrastructure projects. The Commission also found that given the need for stability and certainty in the financial community concerning recovery of investments made in critical infrastructure, Atlantic should be allowed to continue the use of a 13.5 percent ROE in developing its TRR.<sup>33</sup>

20. In the instant proceeding, however, our preliminary analysis of Atlantic's proposed ROE indicates that the 13.5 percent ROE may no longer fall within the zone of reasonable returns. Thus, Atlantic's proposed TRR, including the 13.5 percent ROE, has not been shown to be just and reasonable, and may be unjust and unreasonable. We note that Atlantic's 13.5 percent incentive ROE was established prior to Order No. 679<sup>34</sup> and, thus, does not have specific incentive adders. Therefore, we direct the presiding judge to determine the appropriate range of reasonable returns, and in recognition of the benefits that the Path 15 Upgrade continues, and will continue, to provide, set the ROE at the upper end of this range, not to exceed the filed 13.5 percent ROE.

21. In addition, because Atlantic is proposing a rate reduction to its TRR, and a further decrease may be warranted, we are instituting a section 206 investigation in Docket No. EL11-29-000 with respect to the justness and reasonableness of Atlantic's proposed TRR reduction. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA, as amended by section 1285 of the Energy Policy Act of 2005,<sup>35</sup> requires that the Commission establish a refund effective date that is no earlier than publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date. We establish a refund effective date to be the earliest date possible in order to provide maximum protection to customers, i.e., the date the notice of the

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<sup>31</sup> February 2008 Order, 122 FERC ¶ 61,135 at P 18.

<sup>32</sup> *Id.* P 19-20.

<sup>33</sup> *Id.* P 20.

<sup>34</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>35</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

initiation of the investigation in Docket No. EL11-29-000 is published in the *Federal Register*.

22. Section 206(b) of the FPA 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 the section 206 proceeding, whichever is earlier, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding administrative law judge (judge) to provide a report to the Commission no later than 15 days in advance of the refund date in the event the judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification or a settlement or issuance of an initial decision.

23. 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.<sup>36</sup> 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.<sup>37</sup> 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.

The Commission orders:

(A) Atlantic Path 15, LLC's proposed TRR is accepted for filing and suspended for a nominal period, to become effective April 20, 2011, subject to refund, as discussed in the body of this order.

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<sup>36</sup> 18 C.F.R. § 385.603 (2010).

<sup>37</sup> 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 and a summary of their backgrounds and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(B) 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. Part I), a public hearing shall be held concerning Atlantic Path 15, LLC's proposed TRR. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is 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.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and with the Chief Judge on the status of 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.

(E) 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 Rules of Practice and Procedure.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceedings in Docket No. EL11-29-000.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.