



2. Responsive Pleadings .....88.

B. Docket No. EL12-85-000 .....92.

1. Complaint .....92.

2. Wait and Haverty Responses .....94.

3. PATH Responses .....95.

4. Newman Answer .....101.

C. Commission Determination.....102.

1. Pursuant to the terms of its 2009 Settlement<sup>1</sup> and governing provisions of the PJM Open Access Transmission Tariff (OATT or Tariff),<sup>2</sup> on June 1, 2010, in Docket No. ER09-1256-000, Potomac Appalachian Transmission Highline, L.L.C. (PATH) made an informational filing detailing its Annual Update (2010 Update) to its 2009 transmission rates based on the 2008 Settlement’s formula rate. On January 21, 2011, Ms. Keryn Newman and Ms. Alison Haverty (Challengers) filed a Formal Challenge against PATH’s 2010 Update (First Formal Challenge), pursuant to the terms under PATH’s Formula Rate Implementation Protocols (Formula Rate Protocols), disputing PATH’s 2010 Update.

2. On June 3, 2011, PATH made an informational filing detailing its Annual Update to recalculate its 2010 annual transmission revenue requirement in Docket No. ER09-1256-000 (2011 Update). On December 23, 2011, Challengers filed another Formal Challenge against PATH’s 2011 Update (Second Formal Challenge),<sup>3</sup> pursuant to the terms under PATH’s Formula Rate Protocols, disputing PATH’s 2011 Update. As discussed below, we will grant in part, and reject in part, the Formal Challenges, and set the 2010 Update and 2011 Update for hearing.

3. Challengers have also each filed individual complaints against PATH under section 206 of the Federal Power Act (FPA).<sup>4</sup> On June 27, 2012, in Docket No. EL12-79-000, Ms. Haverty filed a complaint alleging that PATH is denying her status as an

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<sup>1</sup> The Settlement was filed in 2009 and accepted in *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (2010) (*PATH Settlement Order*).

<sup>2</sup> PJM Open Access Transmission Tariff, Attachment H-19, “Annual Transmission Rates - Potomac Appalachian Transmission Highline, L.L.C.”

<sup>3</sup> The First Formal Challenge and Second Formal Challenge are referred to herein jointly as “Formal Challenges”.

<sup>4</sup> 16 U.S.C. § 824e (2006).

Interested Party in the customer review proceedings for its 2012 Update. On July 18, 2012, Ms. Newman filed a complaint in Docket No. EL12-85-000 alleging that PATH is now refusing to provide information to Ms. Newman by denying her status as an Interested Party. For the reasons discussed below, we grant Ms. Haverty's and Ms. Newman's complaints and find that they have standing.

## **I. Background**

### **A. The Parties**

4. PATH is a joint venture between American Electric Power Company, Inc. (AEP) and Allegheny Energy, Inc. (Allegheny). PATH consists, in part, of two operating companies including PATH West Virginia Transmission Company, L.L.C. (PATH WV), which is owned jointly by AEP and Allegheny, and PATH Allegheny Company, L.L.C. (PATH AYE), which is owned solely by Allegheny. These companies were organized to finance, construct, own, operate, and maintain the PATH project (Project).

5. Challengers, Ms. Haverty and Ms. Newman, are private citizens filing *pro se*. Ms. Newman resides in Sheperdstown, WV; Ms. Haverty resides in Chloe, WV; both towns receive their electric service from subsidiaries of Allegheny within the PJM region.<sup>5</sup>

### **B. The Formula Rates**

6. PATH WV and PATH AYE each have parallel Formula Rates for calculating their individual revenue requirements, which are combined to result in a single revenue requirement for the PATH transmission project as a whole. The Formula Rates are populated using data from each company's FERC Form No. 1 (Form 1) for the prior year, and projections of costs which are trued up in subsequent years.

7. PATH's transmission Formula Rates are filed with the Commission as Attachment H-19 to the PJM tariff. Attachment H-19A is the transmission formula rate. The main body of H-19A (labeled Attachment A) is the summary of the cost of service formula including rate base<sup>6</sup> allocated on the basis of wages and salaries, administrative and general expenses, operations and maintenance expenses, taxes, and return. All of these

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<sup>5</sup> Sheperdstown, WV is within the retail service area of the Potomac Edison Company; Chloe, WV is within the retail service area of Monongahela Power Company. *See* Public Service Commission of West Virginia, "Utilities by County Served," available at <http://www.psc.state.wv.us/utilities/default.htm> (2012).

<sup>6</sup> The rate base includes transmission plant in service, construction work in progress, accumulated depreciation, and cash working capital, among other things.

line items form a basic cost of service equation to produce a total annual transmission revenue requirement.

8. In order to produce the main summary in H-19A, Attachments 1 through 10 set forth the specific inputs and calculations for each aspect of the formula, the results of which flow into the main calculation. Attachment 1 calculates Revenue Credits for the year, such as revenues that the utility receives from PJM under other Schedules of the PJM Tariff.<sup>7</sup> (Attachment 2 is blank; it was removed from the currently effective version of the formula.) Attachment 3 calculates the composite depreciation rate. Attachment 4 contains the workpapers for several rate components: a monthly weighted average of all plant-in-service, monthly weighted average Construction Work In Progress (CWIP) and accumulated depreciation (including production and distribution); Land Held for Future Use; Membership dues; Regulatory Expenses; Advertising Expenses; Excluded Plant; Materials and Supplies; Regulatory Assets; Capital Structure; and Post Retirement Benefits Other than Pensions, among other things.

9. Attachment 5 calculates the Transmission Enhancement Charges (similar to a fixed charge rate) for specific high voltage transmission projects that are eligible for regional cost recovery under Schedule 12 of the PJM Tariff, as well as any transmission-related incentives (such as CWIP in rate base or ROE incentives) that were granted to these projects. Attachment 5 also includes lower voltage projects that are not eligible for regional cost recovery under Schedule 12 of the PJM Tariff. Attachment 6 is the formula for calculating the cost of borrowing on PATH's long term debt. Attachment 7 is a projection of this cost of debt after the project construction phase. Attachment 8 and 9 determine the actual and projected interest on actual and projected true-up amounts consistent with 18 C.F.R. § 35.19a. Finally, Attachment 10 contains the depreciation rates that the utilities apply to calculate accrued depreciation and the depreciation expense.

10. These Formula Rates and Formula Rate Protocols have been set for settlement and hearing proceedings twice in the approximately four years since their inception. They were first accepted and set for hearing February 29, 2008.<sup>8</sup> Two years later, the Commission approved the 2009 Settlement, and again set the ROE, as part of this

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<sup>7</sup> These utilities' Formula Rates do not contain an Attachment 2. Generally, for several other PJM Transmission Owners such as Virginia Electric & Power Company, Attachment 2 would contain a formula for taxes other than income taxes.

<sup>8</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008).

formula rate, for hearing.<sup>9</sup> PATH's settlement Formula Rates contain a non-severability clause which allowed parties to re-negotiate any terms of the settlement should the Commission revise any portion (such as the ROE) of the settlement. On October 7, 2011, in Docket No. ER08-386-000, PATH submitted an Offer of Settlement and Settlement Agreement, along with a motion for interim rate relief and expedited action, requesting that certain changes to the return on equity in the Formula Rate be effective January 1, 2011. On October 12, 2011, the Chief Administrative Law Judge granted the motion for interim rate relief and expedited action, pending Commission approval of the Settlement Agreement, noting:

In the event the Commission does not approve the Settlement, PATH has the right to reinstate its currently effective rates, terms and conditions and to apply surcharges to the impacted customers retroactive to January 1, 2011, the difference between the Interim Rates and the rates that were in effect under the Commission's Order dated November 19, 2010.<sup>10</sup>

The settlement was approved by the Commission on February 16, 2012.<sup>11</sup>

### **C. The Formula Rate Protocols**

11. The Formula Rate Protocols, set forth in the PJM tariff as Attachment H-19B, establish the legal framework for the development and review of the Formula Rates. The utility submits its initial calculations to informal review by interested parties, and then files the results with the Commission. The Commission has ruled that this annual update is "an informational filing only. ... Upon receipt, the Commission will not act on or notice the informational filing because the formula rate implementation protocols provide specific procedures for notice, review, and challenges to the Annual Updates."<sup>12</sup>

12. Two Formal Challenges were filed in this proceeding pursuant to these Formula Rate Protocols. The Formula Rate Protocols define a Formal Challenge as "a filing made

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<sup>9</sup> See *PATH Settlement Order*, 133 FERC ¶ 61,152.

<sup>10</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 137 FERC ¶ 63,003, at P 4 (2011) (citing *PATH Settlement Order*, 133 FERC ¶ 61,152).

<sup>11</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 138 FERC ¶ 61,113 (2012).

<sup>12</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, Docket No. ER09-1256-000 (February 2, 2010) (unpublished letter order).

by an Interested Party to FERC in accordance with the terms of Section VII of these Formula Rate Protocols, and which shall include the information required under 18 C.F.R. § 385.206 (b)(1), (2), (3), (4), and (7).”<sup>13</sup>

13. In both Formal Challenges, Challengers raise claims under the following subsections of Formula Rate Protocols Section VII.A.1:

(b) whether a True-up Adjustment includes only properly recorded data in accordance with Section III and IV;

(e) the proper application by PATH of the Formula Rate and the procedures in these Formula Rate Protocols;

(f) the accuracy of the data and the consistency with the Formula Rate of the charges shown in the Annual Update (including the True-up Adjustment); [and]

(h) the prudence of the actual costs and expenditures.<sup>14</sup>

14. The Formula Rate Protocols also establish the burden of proof in a Formal Challenge filed with the Commission, stating:

PATH shall bear the burden of proving that it has reasonably applied the terms of the Formula Rate, including the calculation of the True-up Adjustment and/or reasonably adopted and applied Material Accounting Changes, if any, consistent with the applicable procedures in these Protocols, in that year’s Annual Update. Nothing herein is intended to alter the burdens applied by the FERC with respect to prudence challenges.<sup>15</sup>

15. PATH’s Formula Rate Protocols state that “[a]ny modification of the Formula Rate shall be made through a Federal Power Act Section 205 or Section 206 filing, and not through ... a Formal Challenge.”<sup>16</sup> Section VII.C.2 of the Formula Rate Protocols

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<sup>13</sup> Formula Rate Protocols, § I. E.

<sup>14</sup> Formula Rate Protocols, § VII.A.1.

<sup>15</sup> Formula Rate Protocols, § VII.C.1.

<sup>16</sup> Formula Rate Protocols, § II. C.

states that nothing in the Formula Rate Protocols shall be deemed to limit the right of any party to request changes to the Formula Rate or any of its stated values pursuant to section 206.

## **II. Docket No. ER09-1256-000**

### **A. Filings and Responsive Pleadings**

16. PATH submitted its 2010 Annual Update to the Commission as an informational filing on June 1, 2010, with corrections filed on July 13, 2010 and December 28, 2010. Challengers filed their First Formal Challenge to this update on January 21, 2011. Over the next few weeks, more than 40 private individuals filed comments in support of the First Formal Challenge. These commenters are listed in the Appendix to this order. In addition numerous pleadings have been filed by PATH and Challengers.

17. PATH submitted its 2011 Annual Update on June 3, 2011.<sup>17</sup> On July 18, 2011, PATH filed a motion for issuance of a protective order to govern the discovery process. On July 20, 2011, Ms. Haverty filed an objection to PATH's motion. Ms. Newman filed a motion to compel discovery on August 17, 2011, and Ms. Haverty filed a motion to compel discovery on September 29, 2011.

18. On October 20, 2011, PATH filed a motion to dismiss the First Formal Challenge and motions to compel by Ms. Newman and Ms. Haverty. On November 3, 2011, Challengers jointly filed an answer to PATH's motion to dismiss the First Formal Challenge, and also filed two individual answers (Challengers November 2011 Joint Answer).<sup>18</sup>

19. On December 23, 2011, Challengers filed a Formal Challenge on the 2011 Annual Update (Second Formal Challenge). On January 12, 2012, PATH filed an answer to this Second Formal Challenge. In addition, numerous pleadings have been filed by PATH and Challengers,

20. Challengers argue that the Formula Rate Protocols' discovery process revealed a wide range of basic accounting errors due to PATH's poor accounting and management practices, including costs posted to more than one FERC account.

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<sup>17</sup> PATH posted a true-up on December 16, 2011 on PJM's website.

<sup>18</sup> Challengers filed these three pleadings in E-Library as a single electronic document in Accession No. 20111103-5028.

21. Challengers therefore request that the Commission reject PATH's Annual Updates as in contravention of its Formula Rate, order PATH to disclose all information requested pursuant to the terms of the Formula Rate Protocols, conduct a full evidentiary hearing into whether the Annual Updates conform to the Formula Rate and whether there has been an over-recovery of rates.

22. In addition, Challengers request the following remedies beyond the Formula Rate Protocols: (1) institute and document an education program for PATH personnel, in order to more effectively monitor PATH's expenditures,<sup>19</sup> (2) comprehensively audit PATH, (3) impose fines and penalties associated with the Commission's rules on fraud,<sup>20</sup> and (4) prohibit PATH from recovering from its ratepayers any of the fees and expenses associated with the present dockets.<sup>21</sup> Challengers further argue that PATH violated the Commission's *Prohibition of Energy Market Manipulation* rulemaking.<sup>22</sup>

23. In its answer filed on February 10, 2011 (PATH February 2011 Answer), PATH argues that the remaining comments filed are unsubstantiated, beyond the Commission's jurisdiction, or beyond the scope of the Formal Challenge. PATH states that Challengers' requests that the Commission: (1) direct a comprehensive audit of PATH's formula rate and accounting; (2) initiate a formal investigation into PATH's activities, policies and practices; and (3) impose any and all available fines, penalties and reprimands, are beyond the scope of a Formal Challenge under the Formula Rate Protocols.<sup>23</sup> In its answer filed January 12, 2012 (PATH January 2012 Answer), PATH reiterates these arguments, and also alleges that Challengers lack standing.

24. In their answer filed January 23, 2012, Challengers argue that they satisfy the requirements for standing, citing to the Commission's order in Docket No. ER12-269-000, where the Commission states that Challengers "have demonstrated that they have a

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<sup>19</sup> First Formal Challenge at 39-40.

<sup>20</sup> *Id.* at 4-5, Second Formal Challenge at 5-6.

<sup>21</sup> Second Formal Challenge at 1- 6.

<sup>22</sup> *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006).

<sup>23</sup> PATH answers that the Challengers clearly are individuals who oppose the PATH transmission line and its proposed route, stating that Challengers created the organization, "Stop PATH WV, Inc." for citizens that object to the PATH transmission line. PATH February 2011 Answer at 5 (citing [www.stoppathwv.com](http://www.stoppathwv.com)).

direct interest in the PATH Companies' rates that will be flowed through to them."<sup>24</sup> Challengers reiterate earlier concerns about advertising, lobbying, and membership costs.<sup>25</sup>

### **B. Issues outside the Scope of a Formal Challenge**

25. We reject as moot Challengers' contention that the Formula Rate itself should be rejected. Challengers state that this reference in their original filing was in error, and that the Commission should read their filing as only opposing the Annual Updates to the Formula Rate as filed.<sup>26</sup>

26. We find the allegations regarding energy market manipulation to be outside the scope permissible under the Formula Rate Protocols. The Commission's Office of Enforcement (Enforcement Staff) determines when and whether to institute an investigation relating to energy market manipulation.

27. We find the request for an audit to be outside the scope of a Formal Challenge. As discussed below, in this order, the Commission will examine the Formal Challenges and determine whether a hearing into the issues raised is warranted. Commission Enforcement Staff determines when and whether to institute an audit. There is no formal process, either under the PJM Tariff or under the Federal Power Act, by which third parties may compel an audit, nor may they compel the sanctions that may follow an audit, such as fines, programs, or independent monitoring. Commission Enforcement Staff, however, will consider credible allegations lodged by third parties, such as in this docket, in determining its audit activities.

### **C. Motion to Dismiss**

28. On October 20, 2011, PATH filed a motion to dismiss the First Formal Challenge and motions to compel filed by Ms. Newman and Ms. Haverty (Motion to Dismiss). PATH asserts that the First Formal Challenge and Motions to Compel should be dismissed because these individuals do not have standing in these Commission proceedings. PATH states that under Rule 214 of the Commission's Rules of Practice

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<sup>24</sup> Challengers' January 23, 2012 Answer at 4-5 (citing *Potomac-Appalachian Transmission Highline, LLC*, 137 FERC ¶ 61,251, at P 23 (2011); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1903 (1970)).

<sup>25</sup> *Id.* at 5-7, 10-14.

<sup>26</sup> Challengers' November 2011 Joint Answer at 2 (citing First Formal Challenge at 4).

and Procedure, to become a party in a Commission proceeding, a person must file a motion to intervene, stating the movant's interest and to show how the movant's interest may be directly affected by the outcome of the proceeding.<sup>27</sup>

29. PATH states that neither Ms. Newman nor Ms. Haverty has sought party status in these proceedings. PATH claims that Challengers would not be able to demonstrate that they should be parties to these proceedings because they do not possess an interest which may be directly affected by the outcome of these proceedings. PATH states that Ms. Haverty and Ms. Newman are not transmission customers or Responsible Customers under Schedule 12 of the PJM Tariff. PATH states that while Challengers may be retail electric customers within the PJM region, their interest as retail ratepayers falls far short of constituting a direct interest in the outcome of these proceedings.<sup>28</sup>

30. PATH also argues that the Formal Challenges should be dismissed because Challengers do not have Interested Party status under Formula Rate Protocols. PATH points out that the Formula Rate Protocols define an Interested Party as:

an entity that is or may become a customer taking transmission service under this [PJM] Tariff, a state public utility commission or state consumer advocate agency in Maryland, Pennsylvania, Virginia, West Virginia, Delaware, New Jersey or the District of Columbia, or other affected party.<sup>29</sup>

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<sup>27</sup> PATH Motion to Dismiss at 4 (citing 18 C.F.R. § 385.214(b)(ii) (2012)).

<sup>28</sup> *Id.* at 4-5 (citing *People's Elec. Coop.*, 75 FERC ¶ 63,007 (1991) (denying intervention to a retail electric customer and finding that the customer does not have an interest which may be directly affected by a Commission proceeding)).

<sup>29</sup> Formula Rate Protocols, § I.H. PATH's motion to dismiss cites to the Formula Rate Protocols § I.H effective at the time it filed its Motion to Dismiss on October 20, 2011. On October 31, 2011, PATH filed changes to this provision, contending that the phrase "other affected party" in the definition of Interest Party is intended to cover any entity that is able to demonstrate standing at the Commission in a FPA section 206 proceeding, and therefore filed to change "other affected party" to read "any entity having standing under Section 206 of the Federal Power Act." The Commission accepted this revision in *Potomac-Appalachian Transmission Highline, L.L.C.*, 137 FERC ¶ 61,251, effective January 1, 2012.

31. PATH argues that Challengers do not qualify as Interested Parties under any of the above criteria. PATH claims it elected to accommodate the participation of Challengers in the review procedures under the Formula Rate Protocols for the past two Annual Update reviews because PATH believed that it was promoting public education and awareness of the reliability benefits of the PATH Project.

32. PATH states that, having endeavored over the past two years to be responsive to Ms. Newman and Ms. Haverty, and encountering what it calls increasing hostility and abuse of the discovery process, it has now concluded that neither of these individuals qualifies as Interested Parties under the Formula Rate Protocols, nor as anyone with standing under the Federal Power Act.<sup>30</sup>

33. PATH claims that the prolonged and argumentative discovery by Challengers are costing ratepayers nearly \$100,000, through nearly 1,500 hours spent on responding to these individuals' more than 700 discovery requests, while the resulting corrections to the pending 2011 Annual Update produced only a decrease of \$15,200 to the 2010 revenue requirement included in the 2011 Annual Update and the corrections discovered as part of the prior year's 2010 Annual Update actually resulted in a slight increase to PATH's revenue requirement. PATH states that this suggests that Challengers' participation in the review procedures is counter-productive and costly to ratepayers and more the product of these individuals' opposition to PATH rather than to determine the reasonableness and accuracy of the input data.

#### 1. Answer to Motion to Dismiss

34. In their November 2011 Joint Answer, Challengers correct their earlier request that the Commission "[m]ake a determination that it will not accept PATH's Formula Rate as filed."<sup>31</sup> Challengers state that their request should have read "[m]ake a determination that [the Commission] will not accept PATH's **2010 Formula Rate Annual Update** as filed."<sup>32</sup> Challengers add that they are primarily filing this First Formal

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<sup>30</sup> *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098 at P 45 (accepting protocol provisions to provide for efforts to resolve matters directly with customers before customers resort to a section 206 complaint, so long as the process does not impact the rights of any party which has standing to bring a complaint, and directing utility to revise its tariff to expand the term "Interested Party" to include all parties having standing under section 206).

<sup>31</sup> Challengers' November 2011 Joint Answer at 2 (citing First Formal Challenge at 4).

<sup>32</sup> *Id.* at 2 (emphasis in original).

Challenge pursuant to the terms of the Formula Rate Protocols as Interested Parties and therefore, their standing in this proceeding rests entirely in the Formula Rate Protocols.<sup>33</sup>

35. Challengers argue that PATH's motion for dismissal of the First Formal Challenge should be denied because they have standing within the terms of the Formula Rate Protocols as Interested Parties. Challengers state that in *Virginia Elec. and Power Co.*, on which PATH relies, the Commission required the definition of an Interested Party to include all parties that would have standing in a section 206 proceeding.

36. Challengers argue that section 206, as implemented in the Commission's Rules of Practice and Procedure, is inclusive:

**Any person** may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

Challengers argue that they qualify under section 206, and therefore they should be considered Interested Parties.<sup>34</sup>

37. Challengers argue that PATH's motion for dismissal of the First Formal Challenge should be denied because the Commission has accepted Formal Challenges before by commenters who did not request Intervenor status and should do so here.<sup>35</sup>

38. Challengers refute PATH's allegation that their participation in the Annual Update has been unproductive and costly to ratepayers, stating that PATH's allegations are premature because the Commission has yet to rule on the First Formal Challenge and more errors may be corrected. Further, Challengers argue that PATH fails to note that, while some of the errors it corrected increase the revenue requirement in the current year, they may reduce the revenue requirement in future years.<sup>36</sup>

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<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 4-5 (citing 18 C.F.R. § 385.206(a)).

<sup>35</sup> *Id.* at 3 (citing *Southern Co. Svcs., Inc.*, 117 FERC ¶ 61,308, at P 6 (2006)).

<sup>36</sup> *Id.* at 5-6.

## 2. Commission Determination

39. PATH's 2010 Annual Update has not been formally noticed, because it is an informational filing for which "the formula rate implementation protocols provide specific procedures for notice, review, and challenges."<sup>37</sup> Rather, Challengers were required to serve a Formal Challenge "on PATH by electronic service on the date of such filing," then, "within twenty (20) days of the date of the filing a Formal Challenge, PATH shall submit its response to the Commission and certify therein that it has served by electronic service that response to the Commission and certify therein that it has served by electronic service that response on any party that has filed a Formal Challenge and on each person upon whom PATH served the Annual Update."<sup>38</sup> Challengers and PATH have complied with these particular requirements of the Protocols.

40. While Challengers have filed a Formal Challenge in Docket No. ER09-1256-000 and several other pleadings and motions, they have not filed a Rule 214 motion to intervene in this docket, nor have any of the numerous citizens who submitted comments.

41. Under Rule 211 of the Commission's Rules of Practice and Procedure, while the Commission will consider protests in determining further appropriate action, "the filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party."<sup>39</sup> Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, only those who have intervened as parties may seek rehearing of a Commission final order.<sup>40</sup>

42. The Formula Rate Protocols, however, permit interested parties to file Formal Challenges pursuant to the Formula Rate Protocols or complaints under section 206 of

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<sup>37</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, Docket No. ER09-1256-000, Delegated Letter Order (February 2, 2010).

<sup>38</sup> Formula Rate Protocols, §§ VII.B.2, VII.B.4.

<sup>39</sup> 18 C.F.R. § 385.211 (a)(2) (2012); *see also* <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>.

<sup>40</sup> 18 C.F.R. § 385.713(b) (2012). Rules 501 through 510 also restrict active involvement in any Commission hearings to "participants," which Rule 102 defines as Commission Staff and those with party status. Pursuant to Rule 504(b)(12), a person may file a motion to intervene to become a participant at the hearing before the Administrative Law Judge, who has the power to rule on motions. 18 C.F.R. § 385.102; 18 C.F.R. §§ 385.501 *et seq.* (2012).

the Federal Power Act. Further, Rule 211 permits any person, regardless of party status, to file a protest to a proceeding, and permits the Commission to consider that protest in determining whether to take further action.<sup>41</sup>

43. Accordingly, while Challengers are not parties to Docket No. ER09-1256-000, their party status is irrelevant to whether the Commission should consider their Formal Challenge under the Protocols or under our regulations relating to protests. Accordingly, we will consider the issues raised on the merits where, as discussed below, Challengers raise issues within our jurisdiction and within the scope of the Protocols.

**D. Hearing and Settlement Judge Proceedings**

**1. Issues Raised**

**a. Information Requests under Formula Rate Protocols**

**i. Challenges**

44. Pursuant to Formula Rate Protocols Section VII.A.1.e, Challengers argue that PATH misapplied its Formula Rate Protocols through restrictions on the information requests to which PATH would respond. Challengers claim that PATH provided three

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<sup>41</sup> Rule 211(a) states:

- (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.
- (2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.
- (3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.
- (4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

general reasons for denying their discovery requests. First, that the request is overbroad and unduly burdensome, seeks information that is beyond the scope of discovery and review set forth in the PATH Formula Rate Implementation Formula Rate Protocols, or is irrelevant and not reasonably calculated to lead to the discovery of relevant information.<sup>42</sup> Second, on the grounds that disclosure of this information would adversely impact the PATH Companies and/or their affiliates or persons with whom they have contractual or business relationships and thus would need a protective order. Third, that the information sought contained attorney work product or was protected by attorney-client privilege.

45. In the Second Formal Challenge, Challengers reiterate these assertions.<sup>43</sup>

**ii. PATH's Answer**

46. In PATH February 2011 Answer, PATH responds that it attempted to work cooperatively with all members of the public, even those opposed to the PATH Project, responding to approximately 90 multi-part information requests from Challengers, and provided specific narrative responses and supporting data, including invoices, purchase orders, contracts, and other documentation. Further, PATH argues that some of the material Ms. Newman requests do not exist, and Commission precedent states that a party does not have to generate material that does not currently exist to satisfy a discovery request.<sup>44</sup>

47. PATH argues that, when an objection is based on an undue burden, there is a need to balance the burden and expense of supplying the information sought against the need for the information for the full development of the record; it also explains that it did not retroactively assert privilege for information that it had previously supplied.<sup>45</sup>

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<sup>42</sup> First Formal Challenge at 44-45.

<sup>43</sup> Second Formal Challenge at 62-66.

<sup>44</sup> PATH September 1 Answer at 5 (citing *Carolina Power & Light Co.*, 53 FERC ¶ 63,005; *Kansas Gas ad Elec. Co.* 20 FERC ¶ 63,004; *Florida Gas Transmission Co.*, 59 FERC ¶ 63,006 (1992)).

<sup>45</sup> *Id.* at 5 (citing *Amoco Pipeline Co.*, 55 FERC ¶ 61,323 (1991)).

**b. Lobbying Expenditures**

48. In both Formal Challenges, Challengers argue that PATH improperly accounted for its lobbying expenses,<sup>46</sup> sought recovery for imprudently-incurred expenses, and sought recovery for items not allowed in the Formula Rate.<sup>47</sup>

49. Specifically, Challengers argue that PATH incurred several expenses associated with Access Point Public Affairs, LLC (Access Point) “to provide intelligence gathering services... to minimize opposition, and to provide general information of interest for the PATH Project in Loudoun County Virginia” and “to represent the company’s interests.”<sup>48</sup> Challengers state that PATH incurred expenses from Access Point, detailing the scope of work, among other things, as lobbying before the Virginia Legislature, but at the same time, stating that Access Point will not be lobbying before the Virginia Legislature. Challengers also claim that PATH failed to provide sufficient information or elucidate the scope of the work required to minimize opposition to the Project.

50. PATH argues that it properly included the costs of Access Point in the Annual Updates. PATH claims that none of these costs includes lobbying or other activities that would not be recoverable in the Formula Rate. PATH states that the payments to Access Point relate to public outreach and education in Loudoun County, Virginia and included conducting interviews with key state and local officials to educate them and to obtain feedback from them on the PATH Project from September 2009 through December 2009. PATH asserts that “[a]t no time did Access Point Public Affairs lobby Loudoun County officials, or any other state or local officials, or attempt to influence their opinions during a selection or approval process.”<sup>49</sup> PATH also claims that any costs it did incur from lobbying activities were removed from FERC Account 923 in the Formula Rate in its December 28, 2010 correction, and transferred to FERC Account No. 426.4.

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<sup>46</sup> Challengers also argue that PATH recorded a \$5,000 charge twice, in both FERC Account 426.4, Expenditures for Certain Civic, Political, and Related Activities, and Account 923, Outside Services Employed. First Formal Challenge at 24, Ex. E at 8, Ex. G at 1-3.

<sup>47</sup> First Formal Challenge at 24; Second Formal Challenge at 43-45.

<sup>48</sup> First Formal Challenge at 21-22, 24, Ex. P.

<sup>49</sup> PATH February 2011 Answer at 21-22 (citing *ISO New England Inc.*, 117 FERC ¶ 61,070, at P 49 (2006) (*ISO-NE*) and *Northeast Utils. Svc. Co.*, 105 FERC ¶ 61,089, at P 25 (2003)).

c. **General Advertising Expenses and Outside Services Employed**

51. Challengers argue that PATH impermissibly included over \$2 million of general advertising expenses in their Formula Rates that should be disallowed in rates. Specifically, they state that the Formula Rate at Attachment H-19-A, Line 48 requires PATH to subtract all advertising expenses charged to customers in Line 47, “except safety, education, siting and out-reach related advertising.”<sup>50</sup> Challengers argue that no General Advertising expenditures should be charged to customers. Challengers argue that PATH’s True-Up adjustment did not properly apply the formula rate when recording the general advertising expenses in its true-up adjustment by placing the entire balance of FERC Account 930.1, General Advertising Expenses, into the Safety, Education, Siting, and Outreach line<sup>51</sup> of the Formula Rates. Challengers argue that some or all of these expenses should have been put in the “Other Advertising” column of the formula rate calculation.

52. Additionally, Challengers argue that both PATH WV and PATH AYE improperly recorded data in the True-Up Adjustment by booking identical costs to different FERC accounts, and provide details of contradictory statements from PATH AYE and PATH WV regarding bills from Charles Ryan Associates.

53. Challengers also argue that PATH improperly booked Coalition and PATH Educational Awareness Team (PEAT) expenses to FERC Account 930.1, because PATH admitted that “the PEAT expenses relate to education, safety, siting, or outreach (Account 930.1).”<sup>52</sup> Challengers argue that the Uniform System of Accounts guidelines for FERC Account 930.1 do not allow education, outreach, or siting expenses to be included, and therefore, these expenses should not be in this account.

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<sup>50</sup> First Formal Challenge at 26 (quoting PJM Tariff Attachment H-19A, Note D).

<sup>51</sup> *Id.* at 29. *See also* PATH WV Attachment H-19A, Attachment 4, Line 142, Col. titled “Safety, Education, Siting & Outreach Related” of \$1,718,419; PATH AYE Attachment H-19A, Attachment 4, Line 142, Col. titled “Safety, Education, Siting & Outreach Related” of \$386,506.

<sup>52</sup> *Id.* at 28 (citing a November 18, 2010 PATH General Counsel response to information requests).

54. In their Second Formal Challenge, Challengers reiterate their concerns, and argue that PATH's advertising expenses were promotional, not educational.<sup>53</sup>

55. PATH states that it corrected any limited errors in its December 28 correction. PATH states that the corrected 2010 Annual Update reflects consistent accounting treatment between PATH-AYE and PATH-WV. PATH asserts that no vendors were overpaid or double-counted.<sup>54</sup>

56. PATH states that Commission policy allows the recovery of public education and outreach costs related to reliability and improved service from grid upgrades<sup>55</sup> PATH states that the Commission has found that such costs are related to a utility's core responsibilities, and include efforts to monitor relevant legislation, provide education and outreach to state and federal legislators and regulators, respond to media inquiries, and educate consumers on energy efficiency are recoverable, provided that the expenditures do not include certain costs that are not recoverable such as participation in Political Action Committees, candidate fundraising, entertainment expenses (such as meals, sporting events, junkets) and other activities that do not relate to electric utility operation.<sup>56</sup>

57. In its February 2011 Answer, PATH states that, contrary to Challengers' assertion, PATH only included in the Annual Update expenses for advertising that are directly related to safety, education, siting and public outreach.<sup>57</sup>

**d. Reliable Power Coalitions**

58. Challengers dispute the prudence and applicability under the Formula Rate of PATH's financial support of several "Reliable Power Coalitions" that PATH seeks to include in FERC Accounts 923 and 930.1.

59. Challengers state that two of these Reliable Power Coalitions were formed by a public relations firm contractor to develop third party support and coordinate efforts to

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<sup>53</sup> Second Formal Challenge at 14-18, 45-54.

<sup>54</sup> PATH February 2011 Answer at 24.

<sup>55</sup> *Id.* at 10 (citing *Northeast Utils. Svc. Co.*, 105 FERC ¶ 61,089, at P 25 (2003), *on reh'g*, 111 FERC ¶ 61,333 (2005)).

<sup>56</sup> *Id.* at 11 (citing *ISO-NE*, 117 FERC ¶ 61,070 at PP 43, 49).

<sup>57</sup> *Id.* at 24.

promote the PATH Project. Challengers argue that these Reliable Power Coalitions were front groups created to provide a false appearance of grass-roots activism and to hide PATH's sponsorship by professing to promote overall energy infrastructure development. Challengers argue that the PEAT program does not educate the public as PATH claims, but rather is a public relations advocacy program for the Project.

60. In their Second Formal Challenge, Challengers reiterate their arguments, arguing that these Reliable Power Coalitions are financed and managed by PATH through contracted public-relations firms, and their goal is to influence public officials and build public support for PATH.<sup>58</sup>

61. PATH argues that the expenses incurred for Reliable Power Coalitions are properly recoverable because they were incurred to educate the public about the need for renewable energy, conservation, and reliable transmission. PATH disagrees with Challengers' position that the Reliable Power Coalitions were front groups, because these organizations have web sites detailing their purpose, mission, objectives, and activities.<sup>59</sup>

62. In response to Challengers' arguments that the PEAT program is not a prudent expenditure, PATH argues that PEAT's activities are directly related to PATH's core responsibilities as a transmission-only company responsible for construction and operation of the PATH transmission line and the expenses relate to public outreach, education, safety, and siting benefits of the PATH transmission line.<sup>60</sup> PATH rejects Challengers' claim that PEAT activities are imprudent because they are too focused on the business community and not the general public. PATH claims that the PEAT website is accessible to the public at large and contains extensive information related to PATH and the PATH transmission line, as well as soliciting public participation in educating communities about the importance of PATH.<sup>61</sup> PATH acknowledges it incurred expenses to lobby public opinion prior to the approval process, but adds that PJM had already selected the PATH transmission line and costs incurred thereafter are allowable.

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<sup>58</sup> Second Formal Challenge at 18-32.

<sup>59</sup> PATH February 2011 Answer at 13-14 (citing <http://www.energizevirginia.com/>).

<sup>60</sup> *Id.* at 17 (citing *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at PP 31, 39 (2008), and the PEAT website at [www.pathawareness.com](http://www.pathawareness.com) (no longer active)).

<sup>61</sup> *Id.* at 17-18.

63. PATH states that one of these Reliable Power Coalitions, Marylanders for Reliable Power, currently has more than 140 members, and Virginians for Reliable Energy has more than 130 members. PATH claims that it is involved in these groups because the mission and corresponding activities of these coalitions are intended to educate the public in areas that are directly related to PATH's responsibilities as a transmission-only company with responsibility for a PJM-approved backbone transmission project.<sup>62</sup>

**e. Double-counting of costs between accounts**

64. Challengers argue that they uncovered numerous invoices that were posted to more than one regulatory account, artificially inflating PATH's expense and recovery.<sup>63</sup> Challengers' Exhibit N is a six page list of costs by vendor, invoice number, FERC account, and amounts they allege are over-recovered due to double-counting.

65. In response, PATH acknowledges that there are isolated incidences of inconsistent accounting journal entries that were corrected in the December 28 Correction. PATH states that Challengers also misconstrued as double-counting corrections to journal entries to move expenses from one account to another, and provides details those entries.<sup>64</sup>

66. PATH states that the December 28 Correction makes accounting for PATH-AYE and PATH WV consistent, and there were no instances where a vendor was overpaid or costs were double-counted. Therefore PATH urges the Commission to find that the corrected Annual Update complies with the requirements of the Formula Rate.

**f. Membership Dues**

67. Challengers present four arguments against PATH recovering membership dues in its Annual Updates. First, they argue that PATH misallocated membership dues, listing several instances in which memberships are credited to PATH's parent companies rather than PATH, but PATH is attempting to recover the membership dues.<sup>65</sup> Second,

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<sup>62</sup> *Id.* at 15.

<sup>63</sup> First Formal Challenge at 39-42.

<sup>64</sup> PATH February 2011 Answer at 24-25.

<sup>65</sup> Challengers cite the memberships in the WV Forestry Association, Manufacturers Association, Hardwood Alliance Zone, Municipal League, County Commissioners Association, and Coal Association, as well as several Chambers of Commerce. First Formal Challenge at 20, and Ex. D, "Memberships".

Challengers note that the membership dues are recorded in FERC Account 930.2, Miscellaneous General Expenses, and argue that the expenditures do not meet the description of FERC Account 930.2 provided in the Commission Uniform System of Accounts.<sup>66</sup> Third, Challengers argue that these costs are imprudently-incurred because several of the memberships are not germane to the business of PATH.<sup>67</sup> Fourth, Challengers argue some of these memberships equate to PATH buying a private audience in order to garner approval for the Project, because the PEAT hosts presentations at meetings of these associations.

68. In their Second Formal Challenge, Challengers reiterate their arguments.<sup>68</sup> Challengers further argue that these membership expenses were not incurred in good faith, and were more properly classified as donations or lobbying expenses and should therefore be refunded to ratepayers with interest.<sup>69</sup>

69. PATH argues that Challengers' assertions that PATH misappropriated funds by paying for memberships in organizations that were in the name of the parent company are unfounded. PATH further argues that the Formula Rate and Formula Rate Protocols allow for costs incurred by the corporate parent to be allocated to its regulated utility companies where the costs are properly recoverable by the regulatory utility and the corporate allocation methodologies are properly applied.

70. In response to Challengers' allegations regarding memberships in chambers of commerce and other such organizations, PATH explains that it already removed such lobbying-related expenses from the Formula Rates. PATH claims that the remaining costs of memberships in chambers of commerce and rotary clubs are properly included because the costs relate to corporate stewardship and outreach to business leaders, and these organizations have provided venues for PATH to educate businesses and civic leaders about the Project. PATH also argues that education and outreach to these organizations is directly related to its responsibility to obtain siting and permit approval for the Project.<sup>70</sup>

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<sup>66</sup> First Formal Challenge at 21.

<sup>67</sup> *Id.* at 20-21.

<sup>68</sup> Second Formal Challenge at 33-39.

<sup>69</sup> *Id.* at 39-40.

<sup>70</sup> PATH February 2011 Answer at 19.

**g. Shared Parent Company Costs among Affiliates**

71. Challengers argue that there are several instances where PATH's parent companies allocated identical expenses, but PATH-AYE and PATH-WV each used different FERC accounts for the same costs.<sup>71</sup>

72. PATH claims that the Formula Rate and Formula Rate Protocols allow for costs incurred by the corporate parent to be allocated to its regulated utility companies where the costs are properly recoverable by the regulated utility and the corporate allocation methodologies, which are subject to Commission audit and review, are properly applied.<sup>72</sup>

**h. Donations and Expenditures for Civic, Political, and Related Activities**

73. Challengers argue that PATH imprudently incurred costs that were recorded in FERC Account 426.1, Donations, and FERC Account 426.4. Challengers allege that "these donations are paid by ratepayers through PATH's return."<sup>73</sup> In their Second Formal Challenge, Challengers reiterate their assertions.<sup>74</sup>

74. In its February 2011 Answer, PATH states that Challengers fail to meet their burden of raising a 'serious doubt' that PATH's expenditures are imprudent, citing the legal standard that "[t]he utility does not have the burden of demonstrating that expenditures are prudent. Rather a challenger to prudence must create a 'serious doubt' as to the prudence of an expenditure."<sup>75</sup> PATH answers that it made the appropriate corrections in its December 28 Filing by transferring lobbying-related expenses to FERC Account No. 426.4, thereby removing lobbying-related costs from the rate.<sup>76</sup>

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<sup>71</sup> First Formal Challenge at 42, Ex. A at 8.

<sup>72</sup> PATH February 2011 Answer at 20 (citing Formula Rate Protocols, §§ I.I and VI.D).

<sup>73</sup> First Formal Challenge at 35-36.

<sup>74</sup> Second Formal Challenge at 54-56.

<sup>75</sup> PATH February 2011 Answer at 10 (citing *Entergy Svcs., Inc.*, 130 FERC ¶ 61,023, at P 52 (2010) (citing *Ky. Utility Co.*, 62 FERC ¶ 61,097, at 61,698 (1993))).

<sup>76</sup> *Id.* at 19.

**i. National Wild Turkey Foundation (Account 107)**

75. Pursuant to Formula Rate Protocols Section VII.A.1.b, Challengers argue that PATH improperly booked \$50,000 to FERC Account 107, Construction Work in Progress – Electric (CWIP), which represents the first part of a three-year payment of \$150,000 to the National Wild Turkey Federation. Challengers claim that this amount is booked to the wrong account and should not be included in CWIP, thus earning a return on and of equity, because it is related to PATH’s advertising and marketing plan.<sup>77</sup>

76. Pursuant to Formula Rate Protocols Section VII.A.1.h, Challengers argue that the National Wild Turkey Federation costs are not a prudent expense as defined in *Violet v. FERC*.<sup>78</sup> Challengers argue that the expenditure is imprudent because the National Wild Turkey Federation presents its Energy for Wildlife program as providing members with additional hunting areas by helping “the utility industry manage millions of miles of rights-of-way and other properties that could potentially provide ideal habitat for a number of wildlife species.”<sup>79</sup> Challengers argue that such an objective provides no benefit to consumers and is therefore imprudent.

77. In their Second Formal Challenge, Challengers reiterate concerns of proper accounting and prudence of this expense.<sup>80</sup>

78. PATH states that the National Wild Turkey Federation is a national non-profit conservation and hunting organization that, along with its volunteers, partners, and sponsors, works for the conservation of the wild turkey and preservation of that hunting heritage. PATH states that it and a number of other utilities have partnered with the National Wild Turkey Federation for several years in order to improve wildlife populations, habitat, and biodiversity in lands that utilities own or manage for their rights-of-way associated with transmission projects. PATH states that this partnership facilitates a long term sustainable and environmentally beneficial management program for the rights-of-way resulting from the Project.<sup>81</sup>

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<sup>77</sup> First Formal Challenge at 24-26.

<sup>78</sup> *Violet v. FERC*, 800 F.2d 280, 283 (1st Cir. 1986) (*Violet v. FERC*).

<sup>79</sup> First Formal Challenge at 25.

<sup>80</sup> Second Formal Challenge at 42-43.

<sup>81</sup> PATH February 2011 Answer at 23-24.

## 2. Commission Determination

79. We find that the Formal Challenges raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in an evidentiary, trial-type hearing or settlement judge proceedings. Therefore, except for the prudence of the National Wild Turkey Foundation costs (as discussed below), we will set the following issues for hearing and settlement judge procedures: lobbying costs, general advertising and outside services employed, Reliable Power Coalition's costs, double-counting of costs between FERC accounts, shared parent company costs among affiliates, membership costs, and donations and expenditures for civic, political and related activities, and the accounting for the National Wild Turkey Foundation costs. The hearing is to include allegations that the PATH's updates exceeded the scope of or misapplied the governing Protocols at Section VII.A.1, such as whether specific costs should have been included in the update at all, were accurately recorded in the correct account(s), and were prudently incurred.

80. With respect to the allegations that PATH's expenditures on the National Wild Turkey Federation were not properly accounted for and were not prudently incurred, we will set for hearing and settlement judge procedures the first issue, but not the second, which we resolve summarily. We have a concern with PATH's inclusion of these costs in a rate base account, FERC Account 107, rather than in an expense account (e.g., FERC Account 923). Costs includable in FERC Account 107 must bear a direct relationship to the project under construction. We are therefore setting that issue for hearing and settlement judge proceedings.

81. However, we find that National Wild Turkey Foundation costs were prudently incurred, and reject Challengers' claim that these costs are imprudent. We find that PATH's conservation partnership with the National Wild Turkey Federation is the sort of arrangement that a reasonable utility management under the same circumstances can be expected to have made in good faith.<sup>82</sup> Participants seeking to challenge the expenditures must first create a serious doubt as to the prudence of the expenditures before the burden shifts to the filing utility.<sup>83</sup> Other utilities have also entered into conservation

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<sup>82</sup> *Violet v. FERC*, 800 F.2d at 283.

<sup>83</sup> *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,224 at P 28 (citing *Minnesota Power and Light Co.*, Opinion No. 86, 11 FERC ¶ 61,312 at 61,644-45 & n.45, *reh'g denied*, Opinion No. 86-A, 12 FERC ¶ 61,264 (1980) (generally, the party seeking to call the prudence of an expenditure into question must do so by adducing evidence or citing to material of which the Commission may take official notice); *Indiana Municipal Power Agency v. FERC*, 56 F.3d 247, 253 (1995) (complainant urging that utility's rate is unjust must present evidence)).

partnerships with the National Wild Turkey Federation over the years to manage and improve their transmission rights-of-way in a similar manner, and the National Wild Turkey Federation's website lists multiple utilities with which they have conservation partnerships in their "Energy for Wildlife" program. According to the Federation, this program "helps the utility industry manage millions of miles of rights-of-way and other properties that could potentially provide ideal habitat for a number of wildlife species" and "works directly with utility companies to integrate wildlife management activities into their land management programs."<sup>84</sup>

82. In Order No. 414, we provided Guidelines for the Protection of Natural, Historic, Scenic, and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities.<sup>85</sup> PATH's conservation partnership with the Federation is consistent with the guidelines recommending that rights-of-way be planted for wildlife cover and feed, and to preserve the wildlife habitat to the extent practicable. State siting processes also typically require an environmental impact plan.<sup>86</sup> Given PATH's obligation to manage the environmental impact of construction, we find that its engagement with an outside organization such as the National Wild Turkey Federation, which may have a comparative advantage in providing environmental protection services, is a prudent use of funds, and that an evidentiary, trial-type hearing is not needed for us to make this determination.

83. In the absence of settlement, the Administrative Law Judge assigned to this matter will resolve all issues relating to protective orders, motions to compel, and the relevance of discovery requests<sup>87</sup> under Subpart D of the Commission's regulations.<sup>88</sup>

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<sup>84</sup> Available at [http://www.nwtf.org/conservation/energy\\_for\\_wildlife.html](http://www.nwtf.org/conservation/energy_for_wildlife.html) .

<sup>85</sup> *Protection and Enhancement of Natural Historic, and Scenic Values in the Design, Location, Construction, and Operation of Public Works*, Order No. 414, 44 FPC 1491 (1970).

<sup>86</sup> See, e.g., Maryland Code of Regulations, Public Utility Companies Article, §§ 2-121 and 7-205—7-208, Annotated Code of Maryland; Environmental Requirements: COMAR 20.79.03.02, and Maryland Environmental Policy Act - Annotated Code of Maryland, Natural Resources Title, Subtitle 3, §§ 1-301 to 1-305.

<sup>87</sup> We remind PATH and the Challengers that discovery is not a means of extending a public relations battle. *Lester C. Reed v. Georgia Power Co.*, 94 FERC ¶ 61,404, at 62,510-11 (2001) ("The Commission's task in reviewing the complaint allegations was not to conduct a fishing expedition"); *Natural Gas Pipeline Co.*, 43 FERC ¶ 63,040, at 65,424 (1988) (explaining that a protestor's "desire for a 'fishing

84. 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.<sup>89</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>90</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

85. We also address the matter of changes to the data inputs used in the 2010 and 2011 Updates that may result from the hearing and settlement judge procedures. Section VIII of the Protocols states that:

Any changes to the data inputs . . . as the result of any FERC proceeding to consider the Annual Update . . . shall be incorporated into the Formula Rate and the charges produced by the Formula Rate (with interest determined in accordance with 18 C.F.R. § 35.19a) in the Annual Update for the next effective Rate Period. This reconciliation mechanism shall apply in lieu of mid-Rate Period adjustments and any refunds or surcharges.

86. The Protocols thus specify that any changes to the data inputs at issue in the 2010 and 2011 Updates are to be reflected through incorporation into the Formula Rate, rather than through refunds or surcharges, as generally would be the case for a rate change

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expedition'" does not satisfy the standards for articulating a material factual dispute such as to invoke hearing requirements).

<sup>88</sup> 18 C.F.R. §§ 385.401-411 (2012).

<sup>89</sup> 18 C.F.R. § 385.603 (2012).

<sup>90</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 background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

application submitted under section 205 of the Federal Power Act. Therefore, any modifications to the 2010 Update or 2011 Update adopted by the Commission or agreed to in a settlement shall be undertaken according to the Protocols.

### **III. Complaints**

#### **A. Docket No. EL12-79-000**

##### **1. Complaint**

87. On June 27, 2012, in Docket No. EL12-79-000, Ms. Haverty filed a complaint alleging that PATH denied her status as an Interested Party in the customer review proceedings for its 2012 Update. In her complaint, Ms. Haverty states that she was informed on June 25, 2012 that she would not be allowed to participate in the 2012 open meeting on PATH's proposed annual update of its formula rates because her status as an Interested Party was in doubt. Ms. Haverty requests that the Commission rule on her status as an Interested Party and her right to participate in the July 18, 2012 open meeting.<sup>91</sup> Ms. Haverty requests fast track processing in time for the July 18, 2012 meeting.

##### **2. Responsive Pleadings**

88. Notice of Ms. Haverty's complaint was published in the *Federal Register*,<sup>92</sup> with comments and interventions due on or before July 5, 2012. On July 3, 2012, PATH filed a timely answer to the complaint.

89. PATH denies that it barred Ms. Haverty from participating in the July 18, 2012 meeting. It states that it merely asked Ms. Haverty to state the basis for her status as an Interested Party. PATH notes that, on July 3, 2012, PATH sent an email inviting Ms. Haverty to participate and indicating that it will provide her dial-in information for the meeting. Accordingly, PATH requests that the Commission dismiss the Complaint as moot and terminate the proceedings. If the Commission rules on the definition of an Interested Party, PATH argues that the Commission should re-notice the complaint, because it would change the scope of the complaint and raise new issues.

90. Further, PATH argues that individual end users are not Interested Parties under the Formula Rate Protocols. In support, it cites *North Star Steel*, in which the Commission dismissed a complaint because there was no privity of contract.<sup>93</sup>

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<sup>91</sup> Haverty Complaint at 3-4.

<sup>92</sup> 77 Fed. Reg. 40,032 (2012).

91. On July 5, 2012, Ms. Haverty filed an answer to the motion to dismiss, clarifying that her complaint is not moot, because PATH continues to dispute her status as an Interested Party. Also on July 5, 2012, Ms. Newman and Ms. Patience C. Wait filed separate motions to intervene and comments.<sup>94</sup> On July 9, 2012, PATH filed an answer to these comments, reiterating its earlier arguments.

**B. Docket No. EL12-85-000**

**1. Complaint**

92. On July 18, 2012, Ms. Newman filed a complaint alleging that PATH is refusing to provide information to Ms. Newman because she is not an Interested Party. Ms. Newman requests that the Commission declare that she has standing under section 206 of the Federal Power Act, and therefore qualifies as an Interested Party under the Formula Rate Protocols, and that the Commission extend the 150-day discovery period to make up for the delays caused by this dispute.

93. Ms. Newman notes that the Formula Rate Protocols' definition of Interested Party includes the phrase, "or any entity having standing under Section 206 of the Federal Power Act," and that the Commission's rules specify that "any person may file a complaint,"<sup>95</sup> under section 206.<sup>96</sup>

**2. Wait and Haverty Responses**

94. Notice of Ms. Newman's complaint was published in the *Federal Register*,<sup>97</sup> with comments and interventions due on or before August 7, 2012. On August 7, 2012, Ms.

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<sup>93</sup> PATH July 9, 2012 Answer to Comments, Docket No. EL12-79-000, at 7 (citing *North Star Steel Company, LLC v. Arizona Public Service Co.*, 116 FERC ¶ 61,022 (2006) (*North Star Steel*)).

<sup>94</sup> Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene and the notices of intervention serve to make the entities that filed them parties to this proceeding.

<sup>95</sup> 18 C.F.R. § 385.206(a) (2012).

<sup>96</sup> Newman complaint at 7 (citing *Potomac-Appalachian Transmission Highline, LLC*, 137 FERC ¶ 61,251 at P 25, and *Public Utilities Commission of Calif. v. FERC*, 254 F.3d 250, 258 (D.C. Cir. 2001)).

<sup>97</sup> 77 Fed. Reg. 43,585 (2012).

Wait and Ms. Haverty each filed comments in support of the complaint. Ms. Wait states that for several years, she has worked amicably with PATH under the Formula Rate Protocols to protect her interests as a ratepayer. However, Ms. Wait states, recently PATH has ignored its Formula Rate Protocols and the recent Commission order that, she argues, “settled the issue of consumer standing once and for all.”<sup>98</sup> Ms. Wait argues that Commission case law consistently shows that end-user customers have standing, in part because “wholesale customers cannot be assumed to have the best interests of end use consumers in mind.”<sup>99</sup> Ms. Haverty similarly argues that granting standing is appropriate and notes that, in a 2009 state proceeding, PATH itself suggested that issues related to the formula rate should be raised before FERC<sup>100</sup>

### 3. PATH Responses

95. On August 7, 2012, PATH responded that the Commission should dismiss the complaint for failure to state a claim and lack of standing. PATH states that, on June 13, 2012, Ms. Newman submitted data requests to PATH, purportedly in accordance with Section VI of the Formula Rate Protocols. PATH states that, consistent with its position in prior Formal Challenge proceedings, it sent an email to individuals, including Ms. Newman, requesting that they explain the basis for their status as an Interested Party under the Protocols. On July 9, 2012, having not received a response from Ms. Newman adequately supporting her claim as an Interested Party, PATH informed Ms. Newman that she did not satisfy the definition of Interested Party under the Protocols and as such, did not intend to respond to her data requests.<sup>101</sup>

96. PATH argues that Ms. Newman’s complaint is not proper under either section 206 or 306 of the FPA and should be dismissed. PATH argues that section 206 “applies to rate changes for public utility tariffs” and the complaint seeks no changes to the rates, terms, and conditions of the PJM Tariff. PATH argues that Ms. Newman fails to identify any violation under section 206 of the FPA, and therefore, her claim should be denied. PATH argues that Ms. Newman’s complaint should be dismissed under section 306 of the FPA as well because under section 306, “any person” may apply to the Commission

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<sup>98</sup> Wait Comments, Docket No. EL12-85-000, at 3 (citing *Potomac-Appalachian Transmission Highline, LLC*, 137 FERC ¶ 61,251).

<sup>99</sup> Wait Comments at 8 (citing *Tejas Power Corporation v. FERC*, 908 F.2d 998 (D.C. Cir. 1990)).

<sup>100</sup> Haverty Comments, Docket No. EL12-85-000, at 5.

<sup>101</sup> PATH Answer, Docket No. EL12-85-000, at 4-6.

to complain of “anything done or omitted to be done... in contravention of the provisions of [the FPA]” and PATH has “not willfully, or otherwise, done or failed to do anything in contravention of any statutory or regulatory requirements.”<sup>102</sup> PATH argues that finding against it here would impose a burden on all other public utilities that have incorporated similar language into their formula rates.<sup>103</sup>

97. PATH argues that Ms. Newman is not an Interested Party under the protocols because she lacks standing under section 206 of the FPA. PATH states that like the complainant in *North Star Steel*, Ms. Newman has not identified any transaction or contract for transmission service or the wholesale sale of electricity between her and PJM or the PATH Companies. PATH states that Ms. Newman is neither a transmission customer under the PJM Tariff nor a Responsible Customer under the Schedule 12 cost allocation provisions of the PJM Tariff.<sup>104</sup> PATH argues that it has interpreted the Formula Rate Protocols consistently on the question of standing, even when it permitted Ms. Newman to participate in prior proceedings.<sup>105</sup>

98. Further, PATH accuses Ms. Newman of falsely claiming to be an electric consumer. PATH states that it has “verified that the holder of the electric service account at [Ms. Newman’s] address is another person.”<sup>106</sup> PATH argues that, even if the Commission were to extend standing to a retail customer, the Commission cannot extend standing to someone who has no legal obligation to pay a retail electric bill.

99. PATH also argues that the Commission is the wrong venue for this dispute, which should be the state public utility commission.<sup>107</sup> PATH argues that it is unreasonable to compel PATH to respond in its Formula Rate proceedings to “all of the millions of retail customers in the PJM footprint that may be indirectly charged some portion of [PATH’s] transmission rates.”<sup>108</sup>

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<sup>102</sup> *Id.* at 8-9 (internal citations omitted).

<sup>103</sup> *Id.* at 16-17.

<sup>104</sup> *Id.* at 10-12.

<sup>105</sup> *Id.* at 15-16.

<sup>106</sup> *Id.* at 13 & n.42.

<sup>107</sup> *Id.* at 14.

<sup>108</sup> *Id.* at 15.

100. On August 22, 2012, PATH filed an answer to the comments in Docket No. EL12-85-000. PATH acknowledges that, “based on the evidence provided by Complainant in her answer to the PATH Companies’ Answer, it appears that Complainant may be a retail customer with the legal obligation to pay for electric service.”<sup>109</sup> PATH maintains, however, that based on its prior arguments, neither the complainant nor the commenters are Interested Parties, and that the comments add no new issues pertinent to this proceeding. PATH argues that the comments suffer from the same misreading of the law on standing, and introduce inapposite arguments. PATH further argues that Ms. Wait’s characterizations of the July 18, 2012 open meeting are inaccurate.

#### **4. Newman Answer**

101. On August 8, 2012, Ms. Newman filed an answer to PATH’s answer, stating that PATH made two errors. First, Ms. Newman states that PATH erred in stating that she is not a retail customer with a legal obligation to pay for electric service. Rather, she explains, Potomac Edison Company has been jointly billing her and her husband at her property address for 24 years, as evidenced by her most recent electric bill.<sup>110</sup> Second, Ms. Newman argues that PATH incorrectly asserted that the method and extent to which wholesale transmission costs are passed through in retail rates is not within FERC’s jurisdiction and that PATH’s position contradicts the position that its affiliate FirstEnergy took in a July 2012 petition before the Supreme Court.<sup>111</sup>

#### **C. Commission Determination**

102. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,<sup>112</sup> the timely, unopposed motions to intervene and the notices of intervention serve to make the entities that filed them parties to Docket Nos. EL12-79-000 and EL12-85-000. We accept Ms. Newman’s answer, since it provided material evidence that corrected the record and informed our decision-making.

103. We grant both complaints and find that Ms. Haverty and Ms. Newman qualify as Interested Parties under the Formula Rate Protocols, because they have standing under Section 206 of the Federal Power Act.

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<sup>109</sup> PATH August 22, 2012 Answer, Docket No. EL12-85-000, at 2.

<sup>110</sup> Newman Answer, Docket No. EL12-85-000, at Ex. A.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> 18 C.F.R. § 385.214 (2012).

104. Formula Rate Protocols Section I.H currently defines an Interested Party as:

an entity that is or may become a customer taking transmission service under this Tariff, a state public utility commission or state consumer advocate agency in Maryland, Pennsylvania, Virginia, West Virginia, Delaware, New Jersey or the District of Columbia, **or any entity having standing under Section 206 of the Federal Power Act.**<sup>113</sup>

Ms. Haverty and Ms. Newman argue that they each qualify as an Interested Party because each has standing under Section 206 of the FPA as a consumer, taking electrical service in the region administered by the tariff in question and that The Formula Rates of Formula Rate Protocols flow through to the bills that each pays for retail electric service.

105. We agree with their arguments. Section 206 of the Federal Power Act permits the Commission to act, “after a hearing on its motion, or upon complaint.”<sup>114</sup> Section 306 of the Federal Power Act states that “any person” may file a complaint.<sup>115</sup> Moreover, Rule 206 of the Commission’s Rules of Practice and Procedure permit “any person” to file a complaint and requires that the complainant to “set forth the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant.”<sup>116</sup> Ms. Haverty’s and Ms. Newman’s status as consumers taking service in the area in question<sup>117</sup> and subject to paying the rates charged by PATH through the Formula Rates are sufficient to qualify each individual to file a complaint and therefore qualifies each as an Interested Party under the Formula Rate Protocols.

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<sup>113</sup> As discussed in note 29 *supra*, PATH amended Formula Rate Protocols, § I.H, effective January 1, 2012. Since the complaints were filed after that effective date, we use the new tariff language.

<sup>114</sup> 16 U.S.C. §824e.

<sup>115</sup> 16 U.S.C. §825e. Person “means an individual or a corporation.” 16 U.S.C. § 796.

<sup>116</sup> 18 C.F.R. § 385.206 (a)&(b)(3) (2012).

<sup>117</sup> With regard to the evidentiary dispute over Ms. Newman’s status as a retail customer of Potomac Edison, we note that PATH presented no evidence to back its claim that she is not. Ms. Newman, by contrast, was able to respond the very next day with compelling evidence that she is a customer, namely, a Potomac Edison bill with her name on it.

106. PATH claims that “whether the end users should be permitted to intervene, is not the issue here,”<sup>118</sup> and argues that the Commission should either re-notice the proceedings or find a lack of privity of contract, as in *North Star Steel*.<sup>119</sup> We disagree. A complaint regarding a transmission rate can, under Commission rules, be filed by any person, including an end-use customer that will pay that some portion of that rate when flowed through its retail bill. As we found in *Potomac-Appalachian Transmission Highline, LLC*,<sup>120</sup> these characteristics are sufficient to satisfy our intervention requirements, and we also find them sufficient to enable an aggrieved party to file a complaint.

107. We find that the Challengers are not, as in *North Star Steel*, attempting to rely on a power pool agreement to which they are not a signatory and which expressly limits third party participation. To the contrary, the Challengers are acting in order to protect their interests pursuant to a tariff that expressly allows challenges to its Annual Updates by any person who qualifies under section 206 jurisdiction. The Commission has consistently ruled that section 206 does indeed give such “indirect customers” standing before this agency.<sup>121</sup> We see no reason to treat the Formula Rate Protocols’ reference to section 206 as producing a different result. We therefore decline PATH’s invitation to treat this

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<sup>118</sup> PATH July 9, 2012 Answer to Comments, Docket No. EL12-79-000, at 8.

<sup>119</sup> 116 FERC ¶ 61,022.

<sup>120</sup> 137 FERC ¶ 61,251 (2011).

<sup>121</sup> See *Dominion Transmission, Inc.*, 106 FERC ¶ 61,029, at P 10 (2004) (“indirect customer” has shown sufficient interest in this proceeding to warrant a grant of his motion to intervene); *United Gas Pipe Line Company*, 49 FERC ¶ 61,005, at 61,017 (1989) (indirect customers have an interest in the outcome of a proceeding); *Panhandle Eastern Pipe Line Co.*, 35 FERC ¶ 61,146, at 61,344 (1986) (intervention granted when it is in the public interest). *American Electric Power Service Corporation*, 28 FERC ¶ 61,072, at 61,140 (1984) (indirect interest is sufficient for intervention); *Texas Eastern Transmission Corporation*, 21 FERC ¶ 61,281, at 61,761 (1982) (“even an indirect interest can be sufficient to warrant intervention in the public interest where, as here, the petitioner represents consumers of natural gas”). See also *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004, 285 U.S. App. D.C. 239 (D.C. Cir. 1990) (Commission must consider the effect on ultimate consumers as indirect purchasers); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 781, 245 U.S. App. D.C. 377 (D.C. Cir. 1985) (the Commission “has not adequately attended to the agency’s prime constituency -- the consumers whom the Natural Gas Act (NGA) was designed “to protect . . . against exploitation at the hands of natural gas companies.”)

as though it were an issue of first impression and re-notice, dismiss, or expand the scope of this proceeding.

108. We find that the Challengers are Interested Parties, entitled to seek information from PATH. Challengers may participate in any public meetings,<sup>122</sup> and may participate in the informal information gathering process under the Formula Rate Protocols, subject to the Formula Rate Protocols' rules on the discovery process.<sup>123</sup>

The Commission orders:

(A) The complaints of Ms. Newman and Ms. Haverty are hereby granted, as discussed in the body of this order.

(B) The First Formal Challenge and Second Formal Challenge are dismissed in part, granted in part, and set for hearing, as discussed in the body of this order.

(C) The 2010 Update and 2011 Update are set for hearing.

(D) PATH is directed to reflect any rate corrections resulting from the hearing proceedings in the next succeeding Annual Update, consistent with Section VIII of the Formula Rate Protocols.

(E) 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., Chapter I), a public hearing shall be held concerning PATH's Annual Updates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (F) and (G) below.

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<sup>122</sup> "PATH shall provide notice on PJM's website of the time, date and location of an open meeting among Interested Parties." Formula Rate Protocols, § III.C, OATT Attachment H-19B - Potomac-Appalachian, 3.0.0.

<sup>123</sup> The Commission will not consider disputes over the information process under the Formula Rate Protocols on an interlocutory basis. An inability to resolve these issues will be considered in any Formal Challenge or other challenge to an Annual Update. To the extent the parties wish to avail themselves of an impartial intermediary, the Commission's Alternative Dispute Resolution or Settlement Judge procedures are available to assist the parties.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,<sup>124</sup> the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 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 5 days of the date of this order.

(G) Within 30 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status 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 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) 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 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.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>124</sup> 18 C.F.R. § 385.603 (2012).

## Appendix

### **Comments filed February 3, 2011**

Pamela C. and Arthur W. Dodds, Jr.

### **Comments filed February 7, 2011**

Steven Reichert

Barbara Humes

Shaun M. Amos

Theodore W. Beauvais, Jr.

Peter Yates

Michael E. Johnson

Sharon Y. Wilson

John W. Cobb, Jr.

Pamela J. Gearhart

Sortis Pappas

Richard B. Crim

Penny Fuller

### **Comments filed February 8, 2011**

Allegra White

Nancy Williams

Virginia MacColl

Melody Urbanic

Thomas and Kathy Hildebrand

Janice T. Cooper

Rosalind Welsh

Linda O'Brien

Fran Brolle

### **Comments filed February 9, 2011**

Joseph Gagnier

Charles F. Printz, Jr., and Donna F.

Printz

Gordon M. Hodgson

### **Comments filed February 10, 2011**

Dawn L. Rosenthal

Thomas D. Gunnoe

Nathaniel P. Gunnoe

Paul W. Gunnoe

Anita R. Gunnoe

Kirsten Weiblen

### **Comments filed February 11, 2011**

Casimir J. Chlebowski, Jr.

Tracey Nickola

Myra Bonhage-Hale

### **Comments filed February 14, 2011**

Barbara J. Bergman

James Male

David J. Fenstermacher

Irene and Ken Randles

Bill and Loren B. Howley

Roland Bergman

Nicholas J. Carrera and Mary Jeanne Carrara

Alfred P. Ghiorzi

Alfred T. and Irene A. Ghiorzi

Keith Lahti

Pam Corey

Susan Williams Denny

Michael Diesel Cuccherini

Thomas J. Ghiorzi

Susan C. Butler

Theresa Ghiorzi

### **Comments filed February 28, 2011**

Judith Randall

### **Comments filed March 23, 2011**

Virginia L. MacColl

### **Comments filed May 5, 2011**

Alfred T. and Irene A. Ghiorzi