

153 FERC ¶ 61,308
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

PJM Interconnection, LLC and
Potomac-Appalachian Transmission Highline, L.L.C.

Docket Nos. ER12-2708-002
ER09-1256-001
(consolidated)

ORDER DENYING REHEARING

(Issued December 17, 2015)

1. On November 30, 2012, the Commission issued an order (November 2012 Order)¹ that, among other things, denied PATH² the “continued application of the incentive return on equity (ROE) of 50 basis points for membership in PJM Interconnection, L.L.C. (PJM) effective the date of this order.”³ On December 28, 2012, PATH requested rehearing, arguing that the November 2012 Order erroneously interpreted existing Commission policy on the Regional Transmission Organization (RTO) Participation incentive, and in the alternative, that the Commission established a new policy that it should have applied only prospectively. The request for rehearing is denied for the reasons set forth below.

¹ *PJM Interconnection, LLC and Potomac-Appalachian Transmission Highline, L.L.C.*, 141 FERC ¶ 61,177 (2012).

² In this order, we use PATH to refer, collectively, to Potomac-Appalachian Transmission Highline, L.L.C. and its operating companies, PATH West Virginia Transmission Company, LLC (PATH-WV) and PATH Allegheny Transmission Company, LLC (PATH-Allegheny).

³ November 2012 Order at P 1.

I. Background

2. PATH was organized as a joint venture between American Electric Power Company, Inc. (AEP) and Allegheny Energy, Inc. (Allegheny) in 2007.⁴ PATH's operating companies, PATH-WV, owned jointly by AEP and Allegheny, and PATH-Allegheny, owned solely by Allegheny, were organized to finance, construct, own, operate, and maintain certain transmission upgrades approved by PJM (collectively, the PATH Project).

3. The PATH Project concept has antecedents in earlier, separate proposals from AEP and Allegheny. On June 27, 2007, PJM's Board of Directors approved the projects for inclusion in PJM's Regional Transmission Expansion Plan (RTEP), changing the route and scope from those originally conceived, combining portions of both AEP and Allegheny's projects into the PATH Project, with a requested completion date of June 2012.⁵ Through a series of orders, the Commission granted the PATH Project numerous incentives, including an incentive for membership in the relevant RTO, PJM, by adding 50 basis points to its ROE (RTO adder).⁶ After several reconfigurations and analyses, on August 24, 2012, PJM terminated the PATH Project and removed it from the RTEP.⁷

⁴ Allegheny merged with FirstEnergy Corp. (FirstEnergy) on February 28, 2011, and FirstEnergy became the ultimate upstream owner of Allegheny's interests in the PATH Project at that time.

⁵ See PATH, filing, Docket No. ER08-386-000, Ex. No. PTH-100 at 9-12, Ex. No. PTH-101 through Ex. No. PTH-105; PATH, filing, Docket No. ER12-2708-000, at 6. At the time the approved configuration was for a \$1.8 billion transmission line consisting of approximately 244 miles of one 765kV line starting at the Amos Substation in Putnam County, West Virginia, to the Bedington substation near Martinsburg, West Virginia, then continuing on another 46 miles as a twin circuit 500 kV line to the Kemptown substation in Frederick County, Maryland.

⁶ *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008), *order on reh'g and settlement agreement*, 133 FERC ¶ 61,152 (2010); *Potomac-Appalachian Transmission Highline, L.L.C.*, *order on reh'g*, 137 FERC ¶ 63,003 (2011); *Potomac-Appalachian Transmission Highline, L.L.C.*, *order approving settlement agreement*, 138 FERC ¶ 61,113 (2012).

⁷ PJM 2011 RTEP Report at 25, located at <http://www.pjm.com/documents/reports/rtep-documents/2011-rtep.aspx>.

4. In the November 2012 Order, the Commission found that the PATH Project was abandoned for reasons beyond PATH's control, and largely approved PATH's proposal to recover its costs, subject to conditions and the outcome of a hearing. The Commission rejected, however, PATH's proposal to continue earning the RTO adder.

5. The Commission began its analysis by quoting the order on rehearing to Order No. 679, which was the order announcing the new rule on RTO adders, as holding:

a public utility member of an RTO is eligible for the Transmission Organization incentive rate treatment as to all of its jurisdictional transmission facilities that have been turned over to the operational control of the Transmission Organization.⁸

6. The Commission noted that because of the termination of the PATH project, PATH would not be able to turn over any facilities to the operational control of PJM. The Commission reasoned that, while "the RTO participation incentive is unrelated to any particular project," if the project for which the developer is seeking recovery has been abandoned, then "the benefits from that project's inclusion in an RTO will not materialize."⁹

7. The November 2012 Order acknowledged that:

PATH contends that not requiring other utilities to remove the RTO adder from abandoned plant recovery prior to setting the abandoned plant recovery for hearing while requiring PATH to do so would amount to denying PATH the RTO adder as a result of its business structure. We disagree.¹⁰

The Commission explained that any past failure to act did not represent a policy, but rather, the Commission had never previously considered how its existing policy would apply to this precise situation. The Commission then took "this opportunity to clarify

⁸ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, at P 21 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁹ November 2012 Order at P 71.

¹⁰ *Id.*

that continued recovery of a basis point adder for RTO participation is not appropriate for recovery in an abandonment application.”¹¹

II. Request for Rehearing

8. On rehearing, PATH raises two arguments. First, PATH argues that denying continued use of the RTO adder was contrary to precedent. Second, PATH argues that even if the ruling were valid, the Commission should not have applied it retroactively.

9. PATH argues that the November 2012 Order was “contrary to the Commission’s settled practice” without “provid[ing] a reasoned analysis for its change.”¹² PATH notes that, in Order No. 679-A, the Commission held that “all utilities joining transmission organizations” were eligible for the RTO adder.¹³ PATH also argues that, in *PPL/PSEG*, the Commission declared that the RTO adder was “unrelated to any particular project.”¹⁴ PATH notes that, in the November 2012 Order, the Commission argued that the policy of denying continued use of the RTO adder had antecedents in Order No. 679-A. PATH, however, argues that the portion of Order No. 679-A that the November 2012 Order refers to actually counsels in favor of continuing PATH’s RTO adder, because Order No. 679-A held that the RTO adder “is not tied to the construction of new transmission facilities.”¹⁵ PATH also claims that the evidence presented in the proceeding does not provide a rational basis for removing the RTO adder. Accordingly, PATH argues that the November 2012 Order is arbitrary and capricious in discontinuing PATH’s RTO adder.

10. Second, PATH argues that even if the Commission upholds its new policy on RTO adders, then the “decision to apply retroactively to [PATH] its new policy ... is arbitrary and capricious.”¹⁶ PATH notes that when adopting a new policy, “the Commission has some discretion whether to apply the new policy to the matter pending before it, or to

¹¹ *Id.*

¹² Request for Rehearing at 3-4.

¹³ *Id.* at 4 (quoting Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 86).

¹⁴ *PPL Electric Utilities Corporation and Public Service Electric and Gas Co.*, 123 FERC ¶ 61,068, at P 35 (2008) (*PPL/PSEG*).

¹⁵ Request for Rehearing at 6 (quoting Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21).

¹⁶ *Id.* at 4.

apply it prospectively.”¹⁷ PATH argues that the courts have limited that discretion, however, by requiring the Commission to “consider inequities that may result from retroactively applying the new policy and whether there was sufficient notice of the impending change.”¹⁸ In this instance, PATH claims, it had no notice of the impending policy change. PATH emphasizes that just 15 days before issuing the November 2012 Order, the Commission issued a policy statement on incentive policies that did not address PATH’s issue.¹⁹ PATH also cites two orders issued just prior to the November 2012 Order in which, PATH claims, “the Commission has not revisited its prior decisions granting ROE adders for RTO participation to those utilities.”²⁰ PATH argues that, other than its status as a project-specific joint venture, there is nothing to distinguish it from those utilities that retained their RTO adders. The Commission knew of PATH’s status as a project-specific joint venture when it first granted the RTO adder, PATH argues, “and it should not take a different view now that the Project has been cancelled by the PJM Board.”²¹

III. Discussion

A. Procedural Matters

11. The Joint Consumer Advocates²² filed an answer to PATH’s request for rehearing. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure prohibits an answer

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 8 (citing *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129, at P 6 (Policy Statement) (2012)).

²⁰ *Id.* at 9 (citing *PJM Interconnection LLC and Pub. Serv. Elec. & Gas Co.*, 140 FERC ¶ 61,197 (2012) (*PJM/PSEG*); and *S. Cal. Edison Co.*, 137 FERC ¶ 61,252 (2011) (*SCE*)).

²¹ *Id.* at 10.

²² In this order, we use Joint Consumer Advocates to refer, collectively, to Pennsylvania Office of Consumer Advocate, Maryland Office of People’s Counsel, New Jersey Division of Rate Counsel, Public Service Commission of W. Virginia, Delaware Division of the Public Advocate, and Virginia Office of Attorney General.

to a request for rehearing unless otherwise ordered by the decisional authority, and we therefore reject the answer.²³

B. Commission Determination

12. We deny rehearing. While PATH claims that the Commission's ruling went against its settled practice, it does not point to any orders in which a company requested to continue its RTO adder after abandonment. In the two cases PATH cites, *PJM-PSEG* and *SCE*, neither the company nor any other parties raised the issue, and the Commission set the rates for hearing and settlement judge procedures.²⁴ Following both *PJM-PSEG* and *SCE*, the parties to the respective cases each reached a settlement that did not discuss the RTO adder.²⁵ While the Commission has approved recovery of costs of abandoned plant for several projects pursuant to Order No. 679, the Commission has repeatedly held that we would evaluate abandonment proposals on a case-by-case basis. We held that such approach would discipline investment decisions.²⁶ We further held that we required a section 205 filing for recovery of abandoned plant costs at the time the project is abandoned.²⁷

13. Furthermore, silence is not evidence of Commission policy. As the courts have held, "FERC's acceptance of a pipeline's tariff sheets does not turn every provision of the tariff into 'policy' or 'precedent,'" especially when the Commission later takes the opportunity to clarify its policy.²⁸ As the November 2012 Order explained, the PATH proceeding was the first in which:

²³ 18 C.F.R. § 385.213(a)(2) (2015).

²⁴ Request for Rehearing at 9 (citing *PJM-PSEG*, 140 FERC ¶ 61,197 and *SCE*, 137 FERC ¶ 61,252).

²⁵ *PJM Interconnection, L.L.C. and Pub. Serv. Elec. and Gas Co.*, 143 FERC ¶ 63,011 (certification of uncontested settlement) (2013); *S. Cal. Edison Co.*, 140 FERC ¶ 63,010 (certification of uncontested settlement) (2012).

²⁶ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 164.

²⁷ *Id.* P 166.

²⁸ *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (citing *Alabama Power v. FERC*, 993 F.2d 1557, 1565 n. 4 (D.C. Cir. 1993)). See also *SFPP, L.P.*, Opinion No. 522-A, 150 FERC ¶ 61,097, at P 54 (2015) (citing, *inter alia*, *Nevada Power Co.*, 113 FERC ¶ 61,007, at 61,013-14 (2005) and *Webster v. Fall*,

(continued...)

the issue of the appropriateness of [a company's] requested RTO adder for abandoned plant was specifically raised for the Commission's consideration. Accordingly, we take this opportunity to clarify that continued recovery of a basis point adder for RTO participation is not appropriate for recovery in an abandonment application.²⁹

14. While this was an issue of first impression, the Commission resolved this issue by applying existing policy, not reversing existing policy. PATH quotes Order No. 679-A out of context, as stating that "all utilities joining transmission organizations" were eligible for the RTO adder.³⁰ A more complete reading of Order No. 679-A makes clear that the Commission was considering whether to limit the incentive to new companies (such as PATH) or to open the incentive to utilities already members of an RTO. In the same paragraph the Commission stated that it understood Congress's "stated purpose," in establishing the new language in section 219 that allowed for RTO adders, as "to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power."³¹ Furthermore, later in Order No. 679-A the Commission stated that its pre-existing policy was to "condition[] its approval of incentives (including a request for recovery of costs associated with any abandonment of the project) upon the project being included in the PJM regional transmission expansion plan."³² In other words, Order No. 679-A did not, as PATH would read it, address the question of whether a project that is abandoned and removed from the RTEP would still be entitled to the RTO incentive upon abandonment.

266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."))

²⁹ November 2012 Order at P 71.

³⁰ Request for Rehearing at 4 (quoting Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 86).

³¹ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 86.

³² *Id.* P 106.

15. The original order granting the RTO adder expressly conditioned this approval not merely on PATH's membership in an RTO, but on PATH's participation in an RTO.³³ The Commission's regulations clearly define RTO participation.³⁴ For utilities such as PATH, the Commission's regulations require that to demonstrate RTO participation, applicants "must propose that operational control of the applicant's transmission system will be transferred to the Regional Transmission Organization within six months of filing the proposal."³⁵ Order No. 679 did not remove this key obligation of the Commission's regulations and in fact, upheld it:

a public utility member of an RTO is eligible for the Transmission Organization incentive rate treatment as to all of its jurisdictional transmission facilities *that have been turned over to the operational control of the Transmission Organization*. This incentive is separate from incentives related to a utility's transmission construction program. Therefore, we clarify that Transmission Organization ROE incentive is not tied to the construction of new facilities.³⁶

16. There is no "radically different policy" here as PATH asserts.³⁷ The Commission determined that PATH was not entitled to the RTO adder upon abandonment because it did not turn over operational control of facilities to PJM. In its request for rehearing, PATH attempts to argue that the Commission's finding that the eligibility for the RTO incentive is separate from the construction of new facilities negates the obligations of the first part. However, we find no inconsistency. The Commission found that the RTO incentive would apply to all facilities turned over to the RTO for operation regardless of whether they were related to new construction. In this case, since PATH turned over no

³³ *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at P 28 (2008) ("We will grant PATH's request to increase its ROE by 50-basis points conditioned upon PATH's membership application being approved by PJM *and its continued participation in PJM*, and conditioned upon the final ROE being within the zone of reasonable returns."(emphasis added)).

³⁴ 18 C.F.R. § 35.34 (2015).

³⁵ 18 C.F.R. § 35.34(g)(3)(i).

³⁶ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21 (emphasis added).

³⁷ Request for Rehearing at 6.

facilities to PJM, it is not entitled to the adder. The PATH Project, once it was abandoned, no longer met the Commission's requirement for operational control.

17. The courts have upheld the Commission policy of rejecting proposals to apply the RTO participation adder to facilities that have not been turned over to the operational control of the RTO. The court found "the purpose of the 50 basis point [RTO participation] adder was to encourage utilities to cede control of regional facilities to an independent entity responsible for providing regional transmission service under the terms and conditions of the regional tariff. By contrast, the [Transmission Owners] retained significant control of local service, which operated under individual tariffs. Hence, FERC reasonably concluded that there was nothing to reward."³⁸

18. PATH also argues that, in *PPL/PSEG*, the Commission declared that the RTO adders "are 'unrelated to any particular project,' but rather are intended as incentives for 'joining and remaining' in an RTO."³⁹ Setting aside the fact that PATH will only be remaining in an RTO in order to wind up operations, this quote misrepresents *PPL/PSEG*. The Commission was responding to a protest from parties who objected to allowing a pre-existing RTO member to collect the RTO adder without a showing that remaining in the RTO constituted a risk. The Commission stated: "As explained in Order No. 679-A, the decision to provide incentives for participation in an RTO is a policy one, aimed at promoting particular policy objectives, unrelated to any particular project."⁴⁰ The Commission, then, was merely arguing that when evaluating whether to grant the RTO adder, the particulars of the project at hand were not relevant. The Commission was not going further and arguing that an applicant could qualify for an RTO adder even if it were not going forward with a project. Indeed, in the same order, the Commission wrote:

This incentive is tied to a specific entity being a member of PJM. It is not normally tied to a specific project unless the company owns a single transmission asset, which is not the case here.⁴¹

³⁸ *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 290 (D.C. Cir. 2006).

³⁹ Request for Rehearing at 5 (quoting *PPL/PSEG*, 123 FERC ¶ 61,068 at P 35).

⁴⁰ *PPL/PSEG*, 123 FERC ¶ 61,068 at P 35.

⁴¹ *Id.* P 52.

19. Thus *PPL/PSEG* predicted that, if faced with a situation like PATH's where "the company owns a single transmission asset," the Commission would deny continued use of the incentive. Thus, PATH had no reason to be surprised that, as a single-purpose company, its continued use of the RTO adder would be denied. In fact, the November 2012 Order also responded to PATH's contention that the *PPL/PSEG* rule of treating single-purpose companies differently might be discriminatory. In the future, the Commission held, "continued recovery of a basis point adder for RTO participation is not appropriate for recovery in an abandonment application," not only for single-use companies like PATH, but also for companies with multiple transmission assets.⁴² Thus, as we explained above, the November 2012 Order followed existing statute, rule, regulation, and precedent.

20. As discussed above, then, the November 2012 Order did not diverge from precedent, and thus we reject PATH's secondary argument that, upon changing policy, the Commission should have imposed the allegedly new rule upon PATH only prospectively.

The Commission orders:

The request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴² November 2012 Order at P 71.