

138 FERC ¶ 61,005  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Atlantic Path 15, LLC

Docket Nos. ER11-2909-001  
EL11-29-001

ORDER DENYING REHEARING

(Issued January 4, 2012)

1. In this order, we deny Atlantic Path 15, LLC's (Atlantic) and Southern California Edison Company's (SoCal Edison) requests for rehearing of the Commission's April 19, 2011 order addressing Atlantic's transmission revenue requirement (TRR) for transmission service over the transmission line upgrade (Path 15 Upgrade) financed by Atlantic.<sup>1</sup>

**I. Background**

2. The Path 15 Upgrade is an 83-mile, 500 kilovolt transmission line built along the existing Path 15 corridor in California to relieve a constrained congestion point. Pursuant to settlement agreements, Atlantic agreed to file rate cases not more than three years apart for rates that it charges for transmission services over the portion of the Path 15 Upgrade financed by Atlantic. The resulting proposed TRRs, including the return on equity (ROE), are subject to the Commission's jurisdiction and review under the Federal Power Act. In the settlement agreements, Atlantic also agreed that it would not seek a ROE in excess of 13.5 percent.<sup>2</sup> In 2007, Atlantic filed its first triennial rate case, in Docket No. ER08-374-000, proposing a decrease in its overall rate and a continuation of the authorized 13.5 percent ROE. The Commission summarily approved Atlantic's proposed continuation of the 13.5 percent ROE but, to address concerns raised in protests, set the

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<sup>1</sup> *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 (2011) (April 19 Order).

<sup>2</sup> *Western Area Power Admin.*, 99 FERC ¶ 61,306, at 62,280, *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom., Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

proposed rate decrease for hearing and settlement judge procedures.<sup>3</sup> The Commission found in that order that the 13.5 percent ROE was within a range of reasonable returns and developed consistent with Commission policy.<sup>4</sup> Later, the Commission accepted an uncontested settlement resulting in a decrease in the TRR from \$34,921,034 to \$30,900,000 (2009 Settlement).<sup>5</sup> As part of the settlement, Atlantic agreed not to seek an ROE in excess of the currently-authorized ROE of 13.5 percent.

3. On February 18, 2011, Atlantic filed tariff revisions to reflect a proposed reduction of \$516,982 to its TRR (to \$30,303,018) (February 2011 Filing). The proposed TRR was based on a test year consisting of the 12 months ending on December 31, 2010, with an adjustment to reflect increased costs that Atlantic will incur from Western Area Power Administration (WAPA). Atlantic stated that the increased costs from WAPA resulted from implementation of an erosion control program that requires work to be performed along the Path 15 Upgrade beginning in 2011 and continuing through 2013.

4. Atlantic also requested continuation of its ROE of 13.5 percent. Atlantic contended that the 13.5 percent ROE (1) is consistent with the Commission's traditional approach to determining a just and reasonable rate of return; (2) is consistent with the Commission's policy and precedent; (3) is appropriate in light of the Path 15 Upgrade's continuing benefits to ratepayers in California and the broader western interconnection transmission system; and (4) meets investor expectations and conforms with the Commission's goals of promoting new transmission investment.

5. The Commission issued an order, on April 19, 2011, which stated that Atlantic's proposed TRR, including the requested 13.5 percent ROE and the inclusion of the soil erosion cost adjustment, raised issues of material fact that could not be resolved based on the record.<sup>6</sup> The April 19 Order accepted Atlantic's proposed TRR, suspended it for a nominal period, subject to refund, and established hearing and settlement judge procedures. The April 19 Order also instituted an investigation pursuant to section 206 of the Federal Power Act to determine whether Atlantic's proposed TRR reduction was just and reasonable. The parties subsequently entered into settlement negotiations, but on September 22, 2011, the Chief Administrative Law Judge issued an order terminating the settlement judge procedures, as the parties had come to an impasse.

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<sup>3</sup> *Atlantic Path 15, LLC*, 122 FERC ¶ 61,135 (2008) (February 2008 Order), *reh'g granted in part and denied in part*, 133 FERC ¶ 61,153 (2010).

<sup>4</sup> February 2008 Order, 122 FERC ¶ 61,135 at P 19-20.

<sup>5</sup> *Atlantic Path 15, LLC*, 128 FERC ¶ 61,130 (2009).

<sup>6</sup> April 19 Order, 135 FERC ¶ 61,037 at P 18.

## II. Requests for Rehearing

6. On May 11, 2011, Atlantic filed a request for rehearing, requesting that the Commission summarily affirm a continuation of Atlantic's currently-approved ROE of 13.5 percent.<sup>7</sup> Atlantic argues that the Commission's decision in the April 19 Order to not affirm the continuation of the 13.5 percent ROE ignores Commission precedent. In every previous consideration of Atlantic's 13.5 percent ROE, Atlantic argues, the Commission summarily approved a continuation of the ROE originally granted, in order to provide certainty to the financial community and enable the Path 15 participants to secure the necessary financing for the Path 15 Upgrade.<sup>8</sup>

7. Atlantic additionally argues that the Commission's decision to set the proposed 13.5 ROE for settlement procedures is arbitrary and capricious as well as unjust and unreasonable. Atlantic states that the Commission's determination that the 13.5 percent ROE may no longer fall within the zone of reasonable returns is not explained, elaborated, or justified. The Commission's determination, Atlantic argues, is therefore not the product of reasoned decision-making, in violation of legal precedent.<sup>9</sup> The Commission's preliminary calculations on the ROE are erroneous, Atlantic states, and abandon the rate-setting metrics relied on previously, as well as ignore Atlantic's evidence as to the justness and reasonableness of continuing the 13.5 percent ROE.<sup>10</sup>

8. On May 19, 2011, SoCal Edison also filed a request for rehearing. SoCal Edison states that it is seeking rehearing because the Commission failed in its April 19 Order to summarily rule that Atlantic's inclusion of the WAPA erosion control costs from 2011-2013 in its proposed TRR violates the terms of the 2009 Settlement.<sup>11</sup> SoCal Edison

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<sup>7</sup> On September 23, 2011, Atlantic filed a motion requesting expedited action on its request for rehearing.

<sup>8</sup> Atlantic May 11, 2011 Request for Rehearing at 4. *See also* Atlantic September 23, 2011 Motion Requesting Expedited Action on Request for Rehearing at 2-5.

<sup>9</sup> *Id.* at 5 (citing, *e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484 (D.C. Cir. 1995); and *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006)).

<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> SoCal Edison May 19, 2011 Petition for Rehearing at 1-2.

contends that this aspect of the April 19 Order should be reversed on rehearing, and that Atlantic should submit a compliance TRR that excludes the erosion costs.

9. SoCal Edison states that section 5.2 of the 2009 Settlement specifically states that “any filing by [Atlantic] to revise its Base TRR on or before February 18, 2011... shall be based on the twelve (12) month period beginning January 1, 2010 and ending December 31, 2010.”<sup>12</sup> SoCal Edison notes that in Atlantic’s March 25, 2011 Answer, filed in Docket No. ER11-2909-000, Atlantic had argued that the words “shall be based” in the 2009 Settlement mean that 2010 costs would merely be the “starting point” for TRR calculations.<sup>13</sup> Atlantic had further argued in its Answer that the 2009 Settlement is silent as to whether adjustments to the 2010 test year are possible, and that the Commission can therefore not infer an agreement among the parties on this matter.<sup>14</sup> SoCal Edison refutes these arguments in its rehearing request, positing that the language of the 2009 Settlement is neither ambiguous nor permissive, but rather expressly mandates that Atlantic’s filing use 2010 calendar year costs to set the current TRR.<sup>15</sup>

10. So Cal Edison asserts that Atlantic’s proposed adjustment to its TRR circumvents an express limitation contained in the 2009 Settlement. Per Atlantic’s interpretation of the 2009 Settlement terms, SoCal Edison argues, Atlantic could adjust the costs it includes in its TRR filing to include anything not expressly prohibited, thus rendering section 5.2 of the 2009 Settlement virtually meaningless.<sup>16</sup>

### **III. Discussion**

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

11. Untimely motions for intervention were filed by the Modesto Irrigation District (Modesto); the M-S-R Public Power Agency and the City of Santa Clara, California (M-S-R); Starwood Energy Group Global, L.L.C. (Starwood); the Northern California Power Agency (NCPA); and Trans Bay Cable LLC (Trans Bay). Pattern Transmission

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<sup>12</sup> *Id.* at 3 (citing Atlantic, Offer of Settlement and Stipulation, Docket Nos. ER08-374-000 and EL08-38-000, at § 5.2 (filed March 23, 2009)).

<sup>13</sup> *Id.* at 4 (citing Atlantic March 25, 2011 Answer at 16-21).

<sup>14</sup> *Id.* at 6 (citing Atlantic March 25, 2011 Answer at 18 (citation omitted)).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 5.

LP (Pattern) filed a motion to intervene out of time and request for clarification or, in the alternative, rehearing.

12. Atlantic filed a motion to strike SoCal Edison's request for rehearing as an unauthorized answer to Atlantic's March 25, 2011 Answer. SoCal Edison filed an answer to Atlantic's motion to strike. Also, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (collectively, Six Cities) filed an answer in opposition to the untimely motions to intervene.

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), we will deny the late motions to intervene in this proceeding for failure to demonstrate good cause warranting late intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>17</sup> Starwood, Pattern, and Trans Bay have not met this higher burden of justifying their late interventions. We will therefore also dismiss Six Cities' answer opposing these untimely motions as moot. We note that NCPA, M-S-R, and Modesto were already made parties to this proceeding pursuant to the April 19 Order.<sup>18</sup>

14. In light of our decision to deny Pattern's late motion to intervene, we will dismiss Pattern's request for rehearing. Because Pattern is not a party to these proceedings, it lacks standing to seek rehearing of the April 19 Order under the Federal Power Act and the Commission's regulations.<sup>19</sup>

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to rehearing requests.<sup>20</sup> Despite its styling as a motion to strike, Atlantic's motion is essentially a response to a rehearing request in this proceeding and is therefore prohibited under Rule 213(a)(2). In light of this decision, we will dismiss SoCal Edison's answer to Atlantic's motion as moot.

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<sup>17</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

<sup>18</sup> April 19 Order, 135 FERC ¶ 61,037 at P 8, 15.

<sup>19</sup> See 16 U.S.C. § 825(a) (2006); 18 C.F.R. § 385.713(b) (2011); see also *Southern Co. Services, Inc.*, 92 FERC ¶ 61,167 (2002).

<sup>20</sup> 18 C.F.R. § 385.213(a)(2) (2011).

16. With regard to SoCal Edison's rehearing request, we find that SoCal Edison references arguments included in Atlantic's March 25, 2011 Answer, which was rejected by the Commission in the April 19 Order.<sup>21</sup> We will therefore strike the portions of SoCal Edison's rehearing request that cite to Atlantic's March 25, 2011 Answer.

**B. Substantive Matters**

17. We deny Atlantic's request for rehearing regarding summary affirmation of its proposed 13.5 percent ROE. Atlantic argues that the Commission's decision to set Atlantic's proposed 13.5 percent ROE for hearing and settlement judge procedures is an unexplained, arbitrary and capricious departure from past precedent and policy. In the rehearing of the February 2008 Order, the Commission clarified that its decision to make upfront ROE determinations or to order an evidentiary hearing will depend on the facts and circumstances of each individual case.<sup>22</sup> According to the terms of the 2009 Settlement, Atlantic is required to file rate cases not more than three years apart to determine the proposed TRR. The resulting proposed TRRs, including the ROE, are subject to the Commission's jurisdiction and review under the Federal Power Act. In reviewing each triennial rate case, the Commission "retains [the] discretion to make upfront ROE determinations if the record before it is sufficient to make such a summary finding."<sup>23</sup> In Atlantic's prior rate cases, the Commission found sufficient record to summarily determine that the continuation of the 13.5 percent ROE was reasonable and it fell within the zone of reasonable returns.<sup>24</sup> However, in this particular case, our preliminary analysis indicated that, based on the most recent six-month data,<sup>25</sup> the 13.5 percent ROE "may no longer fall within the zone of reasonable returns" and therefore "may be unjust and unreasonable."<sup>26</sup> Accordingly, the Commission set the ROE for hearing and settlement judge procedures, and directed the presiding judge to determine the appropriate range of reasonable returns and to set the ROE at the upper end

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<sup>21</sup> April 19 Order, 135 FERC ¶ 61,037 at P 17.

<sup>22</sup> *Atlantic Path 15, LLC*, 133 FERC ¶ 61,153, at P 20-21 (2010).

<sup>23</sup> *Id.* P 22.

<sup>24</sup> February 2008 Order, 122 FERC ¶ 61,135 at P 18-20.

<sup>25</sup> *See, e.g., Southern California Edison Co.*, 131 FERC ¶ 61,020, at P 17-19, 21 (2010) (applying six months of data to determine ROE).

<sup>26</sup> April 19 Order, 135 FERC ¶ 61,037 at P 20.

of the zone, not to exceed 13.5 percent.<sup>27</sup> Therefore, if the hearing determines that the appropriate range of reasonable returns includes 13.5 percent, the ROE shall be set at that level. Atlantic's request for rehearing does not persuade us to reconsider our finding in the April 2011 Order.

18. We also deny SoCal Edison's request for rehearing. In the April 2011 Order, we determined that Atlantic's proposed TRR, including the erosion cost adjustment, raised issues of material fact that could not be resolved based upon the record before us.<sup>28</sup> Thus, we did not summarily determine whether certain cost adjustments should be included in Atlantic's TRR. Instead, we set the issue for hearing and settlement judge procedures. On rehearing, SoCal Edison has not raised any new arguments. We continue to find that certain terms of the 2009 Settlement may be open to different interpretation as to whether it permits Atlantic to include certain cost adjustments in the TRR based on the 2010 calendar year. Also, we find that, contrary to SoCal Edison's arguments, the 2009 Settlement does not explicitly prohibit the inclusion of any adjustments based on the 2010 test year. Thus, we continue to find that it is more appropriate to address the cost adjustment issue in the hearing procedure.

The Commission orders:

The rehearing requests of Atlantic and SoCal Edison are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>27</sup> *Id.* (noting that as Atlantic's 13.5 percent incentive ROE was established prior to Order No. 679 and therefore does not have specific incentive adders, the Commission instead directed the presiding judge to set the Atlantic's ROE at the upper end of the range of reasonable returns, not to exceed 13.5 percent).

<sup>28</sup> *Id.* P 18.