

153 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation

Docket No. ER07-1069-006

ORDER ON CERTIFICATION OF QUESTIONS

(Issued November 12, 2015)

1. On October 13, 2015, as amended on October 28, 2015, the Settlement Judge in the above-captioned proceeding certified two related questions to the Commission, pursuant to Rule 714 of the Commission's Rules of Practice and Procedure.¹ The questions certified to the Commission are:

- (1) Shouldn't section 306 of the Federal Power Act (FPA)^[2] be interpreted *in pari materia* with section 201 of the FPA? FPA section 201 gives the Commission jurisdiction over wholesale interstate rates and interstate transmission; therefore, retail ratepayers would not have the right to file complaints against wholesale rates.
- (2) Wouldn't an expansive interpretation of section 306 of the FPA (allowing retail ratepayers or end users to file complaints against interstate wholesale rates) violate the delicate balance of federalism; in other words, by giving complaint authority to retail rate customers, is the Commission interfering with states' rights by asserting jurisdiction over retail rates?³

¹ 18 C.F.R. § 385.714 (2015).

² 16 U.S.C. § 825e (2012).

³ *American Elec. Power Serv. Corp.*, 153 FERC ¶ 63,002, at P 1 (2015) (Certification Order).

As discussed below, the Commission concludes that, as courts have recognized, retail customers may file complaints⁴ and protest transmission rates and wholesale sales rates before the Commission.⁵ Moreover, allowing retail customers to challenge such rates does not violate principles of federalism or interfere with states' rights.

I. Background

2. Annually, American Electric Power Service Corporation (AEP) submits an informational filing to the Commission on behalf of its subsidiaries, including Southwestern Electric Power Company (SWEPCO), detailing the calculation of charges under the SWEPCO/AEP transmission formula rate (Annual Update) in the Southwest Power Pool, Inc. open access transmission tariff.⁶ Pursuant to the Protocols,⁷

⁴ Complaints may be filed under sections 206 and/or 306 of the FPA, 16 U.S.C. §§ 824e, 825e (2012). While section 205(e) of the FPA refers to “complaints,” 16 U.S.C. § 824d(e) (2012), the Commission commonly refers to these filings as protests. *See* 18 C.F.R. § 385.211 (2015).

⁵ *E.g., Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003-1004 (D.C. Cir. 1990) (Commission must consider and respond to the views of end-use customers) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (“The primary aim of [the NGA] was to protect consumers against exploitation at the hands of natural gas companies”). Because the relevant provisions of the FPA and Natural Gas Act “are in all material respects substantially identical,” decisions interpreting the pertinent sections of the two statutes are interchangeable. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

Accord Potomac-Appalachian Transmission Highline, LLC, 140 FERC ¶ 61,229, at P 106 (2012) (finding that a complaint “can be filed by any person, including an end-use customer that will pay . . . some portion of that rate when flowed through its retail bill.”) (*PATH*); *North Carolina Waste Awareness and Reduction Network, Inc. v. Duke Energy Carolinas, LLC and Duke Energy Progress, Inc.*, 151 FERC ¶ 61,079, at P 15 (2015) (finding that a non-profit corporation comprising individuals and families in North Carolina has standing to file a complaint where the utility does not dispute that some portion of its wholesale rates are flowed back into members' retail rates) (*NC WARN*); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,345 (1998) (recognizing that the Commission must take into account the interests of indirect customers).

⁶ On June 22, 2007, AEP filed its formula rates and Formula Rate Implementation Protocols (Protocols), on behalf of SWEPCO and Public Service Company of Oklahoma, which the Commission conditionally accepted, suspended and

(continued ...)

Martha Peine, a consumer who pays retail rates containing a pass through of the SWEPCO/AEP rates,⁸ filed formal challenges⁹ to AEP's 2013 and 2014 Annual Updates.¹⁰ On August 19, 2015, the Commission issued an order finding that

set for hearing and settlement judge procedures. *American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at PP 25-29 (2007). This 2007 filing resulted in a settlement agreement revising the formula rate and Protocols, which the Commission approved on June 24, 2009. *American Elec. Power Serv. Corp.*, 127 FERC ¶ 61,292 (2009). On September 23, 2009, in Docket No. ER09-1736, Southwest Power Pool, Inc. filed tariff revisions incorporating the formula rate and Protocols, as agreed to by the parties in the settlement. These revisions were accepted effective February 1, 2008. *Southwest Power Pool, Inc.*, Docket No. ER09-1736-000 (Dec. 2, 2009). The formula rate and Protocols are the filed rates for those companies.

⁷ The Protocols provide that the formula rate is recalculated each year to become effective for service on and after July 1 of each year through June 30 of the subsequent year. The Protocols require AEP to prepare the Annual Update on or before May 25 of each calendar year and the Annual Update is subject to review. "Interested parties" have 135 days after the Annual Update is posted to serve reasonable information requests on AEP for information and workpapers supporting the Annual Update; AEP has 15 days to respond. *American Elec. Power Serv. Corp.*, 152 FERC ¶ 61,137, at P 5 (2015) (Hearing Order).

⁸ Ms. Peine is a customer of Carroll County Electric Cooperative, which, in turn, is a member of Arkansas Electric Cooperating Corporation. Arkansas Electric Cooperative Corporation is a SWEPCO/AEP customer. AEP February 4, 2015 Response to Formal Challenges, Docket No. ER07-1069-000, at 1 & n.2.

⁹ A formal challenge is a filing to the Commission pursuant to Section III of the Protocols, which Ms. Peine asserts requires the same information as required for complaints under 18 C.F.R. § 385.206(b) (2015). See Martha Peine August 28, 2015 Motion to Intervene Out-of-Time, Docket No. ER07-1069-000, at 1 n.2. Ms. Peine asserted that she has standing to bring these formal challenges, "as an Interested Party and end use customer who pays some portion of SWEPCO's [Actual Transmission Revenue Requirement] in her Carroll County Electric Cooperative bill for service she receives" Martha Peine January 22, 2014 Formal Challenge to AEP 2013 Formula Rate Annual Update to its Annual Transmission Revenue Requirement, Docket No. ER-7-1069-000, at 4 & n.1) (citing *PATH*, 140 FERC ¶ 61,229 at P 106) (2013 Formal Challenge).

¹⁰ Certification Order, 153 FERC ¶ 63,002 at PP 3-4.

Ms. Peine's formal challenges to the Annual Updates raised issues of material fact that could not be resolved on the basis of the record before the Commission, and set the updates for trial-type evidentiary hearing and settlement judge procedures.¹¹ On August 26, 2015, Chief Administrative Law Judge Curtis L. Wagner, Jr. designated Deputy Chief Administrative Law Judge Carmen A. Cintron as the Settlement Judge in this proceeding. On August 28, 2015, Ms. Peine filed a motion for leave to intervene out-of-time, which Chief Judge Wagner granted.¹²

3. The Settlement Judge solicited the views of Commission Trial Staff (Trial Staff), Ms. Peine, and AEP on the certified questions quoted in paragraph 1 above. Trial Staff asserted that there is no conflict between any person filing a complaint pursuant to section 306 of the FPA,¹³ and the Commission's jurisdiction over the transmission of electric energy and wholesale power sales under section 201 of the FPA.¹⁴ Noting that Ms. Peine's formal challenges address the inputs to AEP's transmission rate formula, Trial Staff argued that these challenges are within the Commission's exclusive jurisdiction.¹⁵ In support of its position, Trial Staff cited *PATH*, in which the Commission concluded that "[a] complaint regarding a transmission rate can, under Commission rules, be filed by any person, including an end-use customer that will pay . . . some portion of that rate when flowed into its retail bill."¹⁶ Additionally, Trial Staff contended that its analysis is consistent with federalism because Ms. Peine's claims relate to transmission, over which the Commission has exclusive jurisdiction, and not local distribution, which falls within the purview of the states.¹⁷ Ms. Peine asserted that the issue of ratepayer standing is based on well-settled law.¹⁸

¹¹ Hearing Order, 152 FERC ¶ 61,137 at P 10.

¹² Certification Order, 153 FERC ¶ 63,002 at P 7.

¹³ 16 U.S.C. § 825e(a) (2012).

¹⁴ 16 U.S.C. § 824(b)(1) (2012); *see* Certification Order, 153 FERC ¶ 63,002 at P 8.

¹⁵ Certification Order, 153 FERC ¶ 63,002 at P 8.

¹⁶ *PATH*, 140 FERC ¶ 61,229 at P 106.

¹⁷ Certification Order, 153 FERC ¶ 63,002 at P 9.

¹⁸ *Id.* P 12.

4. AEP maintained that allowing a retail ratepayer to file a complaint in this proceeding is not in the public interest because it threatens judicial economy, creates rate uncertainty and increases other customers' rates. Noting that the company has already spent 1500 hours and \$200,000 responding to Ms. Peine's data requests, AEP asserted that its Protocols were never intended to provide interested parties with this authority, which is tantamount to an audit.¹⁹

5. On October 13, 2015, the Settlement Judge certified the two questions to the Commission quoted in paragraph 1. Disagreeing with Trial Staff and Ms. Peine, the Settlement Judge recommended the Commission answer the questions as follows: (1) "retail ratepayers are not permitted to bring an FPA section 205^[20] complaint against wholesale sellers of electricity[;]" and (2) a different interpretation (i.e., allowing such retail ratepayer complaints) "would interfere with state jurisdiction over retail rates."²¹

6. The Settlement Judge construed the FPA as follows:

Reading these provisions [sections 201, 205 and 206] together, it does not logically follow that any person may file a section 205 complaint. Though the FPA provides that any person may file a complaint, that person must implicitly possess FPA section 201 standing to file such a complaint. Retail ratepayers, by definition, do not purchase wholesale electricity – they purchase retail electricity. Thus, retail ratepayers cannot have standing to file a section 205 complaint. The FPA does not provide retail ratepayers standing to file section 205 complaints with the Commission.²²

7. The Settlement Judge acknowledged that Ms. Peine's costs "ultimately relate to the transmission of electric energy in interstate commerce."²³ The Settlement Judge emphasized, however, that Ms. Peine represents that she pays SWEPCO's *intrastate*

¹⁹ *Id.* P 13.

²⁰ 16 U.S.C. § 824d (2012).

²¹ Certification Order, 153 FERC ¶ 63,002 at P 2.

²² *Id.* P 15 (footnote omitted).

²³ *Id.* P 16.

transmission in her Carroll County Electric Cooperative bill.²⁴ Thus, the Settlement Judge reasoned that Ms. Peine's financial connection to *interstate* transmission is "remote," and "[a] remote financial connection alone cannot overcome FPA section 201's jurisdictional burden."²⁵

8. While the Settlement Judge agreed with Trial Staff that "the Commission in *PATH* said individual ratepayers could file a complaint," she nevertheless sought to distinguish this proceeding from *PATH*. First, the Settlement Judge reasoned that the Protocols in this proceeding distinguish it from *PATH*. She pointed out that, under the *PATH* formula rate protocols, the term "Interested Party" expressly included "any entity having standing under section 206 of the Federal Power Act."²⁶ Consequently, in *PATH*, the Commission determined that the individual litigants had standing under section 206 of the FPA and therefore qualified as Interested Parties under the protocols.²⁷ The Settlement Judge stated that, in contrast to the *PATH* protocols, the AEP Protocols fail to provide any definition for "interested parties." The Settlement Judge then considered the language in an earlier version of the AEP Protocols, filed in 2007, which stated as follows:

Each year, after the Posting Date and before June 25, AEP will convene a meeting ("Customer Meeting") to afford *interested parties* (e.g., *Transmission Customers and affected state and federal regulatory authorities*) an opportunity to discuss and become better informed regarding the Annual Update²⁸

The Settlement Judge characterized the AEP Protocols filed in 2007 as "intended to be narrower" than the *PATH* protocols, which expressly defined interested parties to include "entities with FPA section 206 standing."²⁹ Focusing on the examples provided

²⁴ *Id.* P 16 & n.11 (citing 2013 Formal Challenge at 4) (emphasis added).

²⁵ *Id.* P 16 (emphasis added).

²⁶ *Id.* P 19 & n.19 (citing *PATH*, 140 FERC ¶ 61,229 at P 104 (citation omitted)).

²⁷ *Id.*

²⁸ *Id.* P 19 & n.21 (citing AEP 2007 Application, Ex. AEP 101 at 8) (emphasis added).

²⁹ *Id.* P 19.

in the version of the AEP Protocols that was filed in 2007, the Settlement Judge reiterated that “Ms. Peine is not a transmission customer”³⁰ and concluded that “as an individual ratepayer she is not an interested party.”³¹

9. The Settlement Judge also pointed out that “[t]he cases the Commission cites in *PATH* address indirect customers’ standing as it relates to intervention (by individual persons or otherwise)”³² or to “other situations where the Commission notes the necessity in addressing indirect customers’ interests.”³³ The Settlement Judge stated that none of the cases the Commission cites in *PATH* involve an FPA section 205 complainant who is an individual ratepayer, and neither Trial Staff nor Ms. Peine cited any precedent for initiating an FPA section 205 proceeding based on a retail customer’s complaint.³⁴

10. Finally, the Settlement Judge reasoned that, from the standpoint of administrative economy, permitting retail ratepayers to file a section 205 complaint does not promote efficiency. Among other things, she concluded that “[s]tates are better equipped to address retail ratepayer complaints, and the FPA does not suggest otherwise.”³⁵ She added that the interests of retail ratepayers are protected in state and federal proceedings by consumer advocates, the providers of interstate energy and transmission and the state commissions. Thus, the Settlement Judge concluded that

³⁰ *Id.*

³¹ *Id.*

³² *Id.* P 18 & n.16; see *Dominion Trans. Inc.*, 106 FERC ¶ 61,029, at P 10 (2004); *United Gas Pipe Line Co.*, 49 FERC ¶ 61,005, at 61,017 (1989); *Panhandle Eastern Pipe Line Co.*, 35 FERC ¶ 61,146, at 61,344 (1986); *American Elec. Power Serv. Corp.*, 28 FERC ¶ 61,072, at 61,140 (1984); *Texas Eastern Trans. Corp.*, 21 FERC ¶ 61,281, at 61,716 (1982).

³³ Certification Order, 153 FERC ¶ 63,002 at P 18 & n.17; see *Tejas Power Corp. v. FERC*, 908 F.2d at 1004; *Md. People’s Council v. FERC*, 761 F.2d 780, 781 (D.C. Cir. 1985).

³⁴ Certification Order, 153 FERC ¶ 63,002 at P 18.

³⁵ *Id.* P 20.

“an expansive interpretation of the FPA to allow retail ratepayer[s] [sic] to file such complaints would seem to disturb the delicate balance between federal and state authorities.”³⁶

11. On October 28, 2015, the Electricity Consumers Resource Council (ELCON) and Joint Consumers³⁷ (together, Consumers) filed a motion to intervene out-of-time, or in the alternative, participate as *Amicus Curiae*, and comments (Consumers’ Motion).³⁸ Consumers oppose viewpoints expressed in the Certification Order that would restrict retail customer participation in Commission proceedings, arguing that such restriction is contrary to the FPA and established precedent. On November 2, 2015, AEP filed an answer opposing Consumers’ Motion. On November 3, 2015, as reaffirmed on November 4, 2015, Chief Judge Wagner denied Consumers’ request to intervene in this proceeding, but accepted Consumers’ comments for consideration by the Commission. On November 5, 2015, the Energy Producers and Users Coalition and California Large Energy Consumers (together, California Consumers) filed a motion for late intervention, or alternative motion for *Amicus Curiae* status, and comments (California Consumers’ Motion). California Consumers support the comments filed by Joint Consumers and explain that answering the certified questions as proposed would deprive California end-use customers of their only opportunity to litigate the propriety of transmission costs or their allocation to bundled rates.³⁹ On November 6, 2015, Chief Judge Wagner denied California Consumers’ request to intervene, but accepted their comments for consideration by the Commission.

³⁶ *Id.*

³⁷ Joint Consumers are: American Forest & Paper Association; Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Industrial Energy Consumers of America, Industrial Energy Consumer Group, Industrial Energy End Users-Ohio, Industrial Energy Users of Pennsylvania, Minnesota Large Industrial Group, PJM Industrial Customer Coalition, and Wisconsin Industrial Energy Group.

³⁸ Consumers argue that the novel viewpoint expressed in the Certification Order would reopen the Attleboro regulatory gap (*Public Utils. Comm’n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)) between federal and state jurisdiction that the FPA was designed to close, undercutting the statutory design and depriving consumers of redress. Consumers’ Motion at 22-23.

³⁹ California Consumers’ Motion at 6-7.

II. Discussion

12. As explained below, the Commission concludes that: (1) retail ratepayers may file complaints⁴⁰ and protest transmission rates and wholesale power sales rates before the Commission; and (2) allowing retail customers to challenge transmission and wholesale power sales rates does not violate principles of federalism.

13. The plain language of the FPA and the Commission's implementing regulations allow broad participation in proceedings before the Commission. Specifically, section 306 of the FPA explicitly authorizes "[a]ny person" to file a complaint with the Commission.⁴¹ The Commission's regulations are to a similar effect. For example, Rule 206(a) of the Commission's Rules of Practice and Procedures provides that "[a]ny 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."⁴²

14. This understanding is consistent with the FPA's statutory scheme. While section 201 of the FPA generally limits the Commission's jurisdiction to the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce,"⁴³ section 201 does not limit participation

⁴⁰ As noted above, *see supra* note 4, complaints may be filed under sections 206 and/or 306 of the FPA; complaints filed under section 205(e) of the FPA are more commonly referred to as protests.

⁴¹ 16 U.S.C. § 825e(a) (2012) (emphasis added).

⁴² 18 C.F.R. § 385.206(a) (2015) (emphasis added). Rule 211 of the Commission's Rules of Practice and Procedures similarly provides that "[a]ny 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." 18 C.F.R. § 385.211(a)(1) (2015) (emphasis added). Rule 214 of the Commission's Rules of Practice and Procedures also similarly refers to "[a]ny person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section [e.g., the Secretary of Energy and a state commission]," being able to file a motion to intervene, and defines the interests that may be directly affected by the outcome of the proceeding that would warrant intervention as including interests as either a consumer or a customer. 18 C.F.R. § 385.211(a)(3), (b)(2)(ii) (2015).

⁴³ 16 U.S.C. § 824(b)(1) (2012).

in Commission proceedings. Read together, section 201 grants the Commission jurisdiction over public utility transmission rates and wholesale power sales rates, and section 306 authorizes “any person” to file a complaint concerning matters that are within the Commission’s jurisdiction.⁴⁴ Thus, these sections do not conflict with each other.

15. Ms. Peine, an intervenor in this proceeding, is contesting the SWEPCO/AEP transmission formula rate inputs, and thus rates for transmission of electric energy in interstate commerce, which is within the Commission’s exclusive jurisdiction under Part II of the FPA.⁴⁵ These transmission inputs, i.e., costs, flow through to Ms. Peine’s retail electric bill. Stated another way, Ms. Peine is an “end-use customer that will pay . . . some portion of that [transmission] rate when flowed through [her] retail bill.”⁴⁶ Thus, by challenging the transmission formula rate inputs, Ms. Peine has alleged injury in fact that can only be addressed by the Commission.⁴⁷ Under these facts, Ms. Peine is permitted to file a protest or a complaint and to participate in this proceeding by intervening.

16. This outcome is consistent with federalism. Section 201 of the FPA recognizes the authority of the states over retail sales and facilities used in “local distribution.”⁴⁸ Ms. Peine’s formal challenges, however, go to the transmission formula rate inputs identified in the SWEPCO/AEP 2013 and 2014 Annual Updates. Ms. Peine’s claims, therefore, go to the transmission of electric energy in interstate commerce and not to local distribution.

⁴⁴ See, e.g., *NRG Power Mktg. v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 176 & n.5 (2010) (recognizing that complainants may include consumers, advocacy groups, state utility commissions, and elected officials acting *parens patriae*).

⁴⁵ 16 U.S.C. § 824(b)(1) (2012); *New York v. FERC*, 535 U.S. 1, 22 (2002) (stating that the FPA contains “a clear and specific” grant of jurisdiction to the Commission over interstate transmission).

⁴⁶ *PATH*, 140 FERC ¶ 61,229 at P 106.

⁴⁷ 16 U.S.C. § 824(b)(1) (2012); see also *New York v. FERC*, 535 U.S. at 22. We note that Ms. Peine’s challenge is to unbundled interstate transmission charges that are not subject to regulation by the states. *Id.* at 21.

⁴⁸ 16 U.S.C. § 824(b)(1) (2012).

17. Moreover, this issue is not a matter of first impression, as both the courts and the Commission have concluded previously that protecting consumers is one of the Commission's primary responsibilities.⁴⁹ In *PATH*, just as here, two individual retail customers filed formal challenges to the utility's informational filing detailing its Annual Update (2010 and 2011 Updates) to its 2009 and 2010 transmission rates.⁵⁰ The Commission determined that each customer qualified as an Interested Party under the *PATH* protocols and that each has standing under section 206 of the FPA, as a consumer taking electrical service in the region administered by the *PATH* tariff and because the formula rates flow through to the bills that each pays for retail electric service.⁵¹ The Commission determined that "[a] complaint regarding a transmission rate can, under Commission rules, be filed by any person, including an end-use customer that will pay . . . some portion of that rate when flowed through its retail bill."⁵² Additionally, the Commission pointed out that it "has consistently ruled that section 206 of the FPA does indeed give such indirect customers [i.e., retail customers] standing before this agency."⁵³ Notably, *PATH* is not the only proceeding in which the Commission allowed retail customers to challenge transmission rates and wholesale sales before the Commission.⁵⁴

⁴⁹ *FPC v. Hope Natural Gas Co.*, 320 U.S. at 610; accord *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (purpose of the FPA is "to protect consumers against excessive prices"); see also *Md. People's Counsel v. FERC*, 761 F.2d at 781 (concluding that the Commission "has not adequately attended to the agency's primary constituency – the consumers") *Pub. Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979) ("[T]he Federal Power Act aim[s] to protect consumers from exorbitant prices and unfair business practices.").

⁵⁰ *PATH*, 140 FERC ¶ 61,229 at P 2 & n.4.

⁵¹ *Id.* PP 103-05. In reaching its decision, the Commission reasoned that section 206 of the FPA permits the Commission to act "after a hearing on its motion, or upon a complaint." *Id.* P 105 (citation omitted). Section 306 of the FPA states that "any person" may file a complaint; similarly Rule 206 of the Commission's Rules of Practice and Procedure permits "any person" to file a complaint." *Id.* (citations omitted).

⁵² *Id.* P 106.

⁵³ *Id.* P 107 & n.121 (citations omitted).

⁵⁴ See, e.g., *NC WARN*, 151 FERC ¶ 61,079 at P 15; see also *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Op., Inc.*, 149 FERC ¶ 61,049, at

(continued ...)

18. In addition, any difference between the scope of “interested parties” under the *PATH* and SWEPCO/AEP protocols does not undercut the precedential value of *PATH*. As the Settlement Judge recognized, the current SWEPCO/AEP Protocols do not define “interested parties.”⁵⁵ The Settlement Judge pointed out that, when AEP filed the Protocols in 2007, the Protocols included the following parenthetical phrase: “interested parties (e.g., Transmission Customers and affected state and federal regulatory authorities)”⁵⁶ The Settlement Judge reasoned that the version of the SWEPCO/AEP Protocols that was filed in 2007 indicated that “the protocols at issue were intended to be narrower” than the *PATH* Protocols,⁵⁷ which expressly defined “interested party” to include “any entity having standing under [s]ection 206 of the Federal Power Act.”⁵⁸ We disagree. First, the relevant definition of “interested parties” under the SWEPCO/AEP Protocols is not the version that was filed in 2007, but rather the version that was in effect when Ms. Peine filed her formal challenges under the Protocols, and that version did not include the examples that the Settlement Judge

P 181 (2014) (finding complainants who are industrial customers within [Midcontinent Independent System Operator, Inc.] who either directly pay wholesale transmission rates or pay for transmission through bundled retail rates have standing per Rule 206); *S. Union Gas Co. v. Natural Gas Co.*, 71 FERC ¶ 61,198, at 61,717 (1995) (indirect customer of pipeline can file a complaint as long as the person is adversely impacted by the actions that are the subject of the complaint).

⁵⁵ Certification Order, 153 FERC ¶ 63,002 at P 19. The parenthetical providing examples of interested parties was removed from the SWEPCO/AEP Protocols effective February 1, 2008. *See Southwest Power Pool, Inc.*, Docket No. ER09-1736-000 (Dec. 2, 2009); Southwest Power Pool, Inc. September 23, 2009 Submission for Changes to Pricing Zone Rates, Docket No. ER09-1736-000, at 1. For the version of the Protocols in effect when Ms. Peine filed her formal challenges, which also does not define or provide examples of interested parties, *see Southwest Power Pool, Inc.* July 26, 2010 Baseline Electronic Tariff Filing, Addendum 4 to Attachment H – Part 1 (AEP Formula Rate Implementation Protocols), Docket No. ER10-1960-000; *Southwest Power Pool, Inc.*, Docket No. ER10-1960-000 (Oct. 28, 2010) (delegated letter order accepting AEP Formula Rate Implementation Protocols).

⁵⁶ Certification Order, 153 FERC ¶ 63,002 at P 19.

⁵⁷ *Id.*

⁵⁸ *PATH*, 140 FERC ¶ 61,229 at P 104 & n.113 (citation omitted).

construed as limiting the definition of interested parties to exclude Ms. Peine.⁵⁹ Moreover, we disagree with the Settlement Judge's interpretation of the parenthetical phrase in the earlier version of the SWEPCO/AEP Protocols. The parenthetical phrase "(e.g., Transmission customers and affected state and federal regulatory authorities)" provided *examples* of categories of interested parties, and should not be read as exhaustive. This parenthetical language would not preclude an end-use customer, like Ms. Peine, who will pay a portion of the transmission rate in her retail bill, from challenging the inputs to the SWEPCO/AEP transmission formula rate.

19. Additionally, the Settlement Judge contended that "the cases the Commission cites in *PATH* address indirect customers' standing as it relates to intervention (by individual persons or otherwise), or other situations where the Commission notes the necessity in addressing indirect customers' interest" and "none of the cases the Commission cites in *PATH* contain facts where an FPA section 205 proceeding's complainant is an individual ratepayer."⁶⁰ As the Commission found in *PATH*, indirect customers (e.g., retail customers) have a right to intervene and protest rates when some portion of those rates will be flowed through to their retail bill.⁶¹ Ms. Peine has, in fact, intervened in this matter and protested the SWEPCO/AEP Annual Update filings and, therefore, we see no reason to treat her participation any differently than the retail customers in *PATH* who similarly protested the formula rate updates, but did not intervene.⁶²

⁵⁹ See *supra* notes 6 and 55.

⁶⁰ Certification Order, 153 FERC ¶ 63,002 at P 18. As noted above, see *supra* notes 4 and 40, while section 205(e) refers to a "complaint" to a section 205(d) rate filing, the Commission commonly refers to such objections as protests. See 18 C.F.R. § 385.211 (2015).

⁶¹ *PATH*, 140 FERC ¶ 61,229 at P 43; see also *Potomac-Appalachian Transmission Highline, LLC*, 137 FERC ¶ 61,251, at P 23 (2011) (stating that retail customers "have demonstrated that they have a direct interest in the *PATH* companies' rates that will be flowed through to them").

⁶² *PATH*, 140 FERC ¶ 61,229 at P 43 (party status is irrelevant to whether the Commission should consider retail customers' formal challenges under the protocols or under regulations relating to protests). As the Commission stated in *PATH*, only if the person intervenes would that person have the right to seek rehearing and appeal. *Id.*

20. Lastly, as to the administrative efficiency concerns raised by the Settlement Judge and AEP,⁶³ we note that the Commission's Rules of Practice and Procedure provide appropriate measures to streamline Commission proceedings.⁶⁴

21. In sum, for the reasons explained above, the Commission concludes that: (1) retail ratepayers may file complaints and protest transmission rates and wholesale power sales rates before the Commission; and (2) allowing retail customers to challenge transmission and wholesale power sales rates does not violate principles of federalism.

The Commission orders:

The certified questions are resolved as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶³ See Certification Order, 153 FERC ¶ 63,002 at PP 13, 20.

⁶⁴ See, e.g., 18 C.F.R. § 385.504 (2015) (presiding officer has the authority to, among other things, schedule and otherwise regulate the course of the hearing); 18 C.F.R. § 385.410(c) (2015) (authorizing presiding officer to limit discovery to protect participant from undue annoyance, burden, harassment or oppression, to prevent undue delay, or to prevent unreasonably cumulative or duplicative discovery).