

135 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. ER12-269-000

ORDER ACCEPTING PROTOCOL REVISIONS

(Issued December 30, 2011)

1. On October 31, 2011, pursuant to section 205 of the Federal Power Act (FPA),¹ PJM Interconnection, LLC (PJM) filed with the Commission, on behalf of Potomac-Appalachian Transmission Highline, L.L.C. (PATH), a proposed tariff revision to PJM's Open Access Transmission Tariff (OATT). The proposed tariff revision seeks to change the definition of an "Interested Party" under PATH's Formula Rate Implementation Protocols (Protocols) for its cost of service formula rate. PATH requests that the Commission approve the change, and requests an effective date of January 1, 2012. As discussed below, we accept the tariff record changes with the requested effective date of January 1, 2012.

I. Background

2. PATH is a joint venture between American Electric Power Company, Inc. (AEP) and Allegheny Energy, Inc. (Allegheny). PATH consists, of two operating companies: PATH West Virginia Transmission Company, L.L.C., which is owned jointly by AEP and Allegheny, and PATH Allegheny Company, L.L.C., which is owned solely by Allegheny (collectively, PATH Companies). The PATH Companies were organized to finance, construct, own, operate, and maintain certain transmission upgrades approved by PJM as baseline reliability projects under the PJM Regional Transmission Expansion Plan (collectively, the PATH Project).

¹ 16 U.S.C. § 824d (2006).

3. The PATH Companies use a forward-looking formula rate to calculate their Annual Transmission Revenue Requirement for the PATH Project.² The formula rate is based on projected costs, and subsequently reconciled to actual costs in the following year using the True-Up Adjustment process set forth in PATH's Protocols (Annual Update). The PATH Companies post their Annual Update on the PJM website on or before June 1 of each year. In addition, the PATH Companies submit the Annual Update to the Commission as an informational filing.

II. Protocols

4. The Protocols describe how the PATH Companies will update the formula rate each year, what the review procedures will be, how customer challenges will be resolved, and how any changes to the Annual Update will be implemented. For example, Interested Parties have the right to serve reasonable information requests on the PATH Companies within 120 days of the publication of the Annual Update. Interested Parties also have the right to review the calculations and notify the PATH Companies in writing of any challenges within 150 days after the date the Annual Update is posted on the PJM website. If any issues cannot be resolved, Interested Parties can make a formal challenge with the Commission. The Protocols define a Formal Challenge as "a filing made 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)."³

A. Current Protocol Definition of Interested Person

5. As noted, pursuant to the terms of the Protocols, entities defined as Interested Parties have certain review, challenge, and discovery rights during the review of the Annual Update. The current PATH Protocols define Interested Party as:

An entity that is or may become a customer taking transmission service under the [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* (emphasis added).

² The Commission accepted PATH's formula rate and Protocols in *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008); *order on reh'g, Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (2010).

³ OATT Attachment H-19B "FORMULA RATE IMPLEMENTATION PROTOCOLS," Section I. E. to PJM's Intra-PJM Tariffs.

B. Description of Proposed Protocol Change

6. The PATH Companies contend 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.⁴ The PATH Companies are concerned that, without further clarification of the intent and purpose, the phrase may be broadly interpreted by some persons to apply to themselves as retail ratepayers or as individuals opposed to the PATH Project.⁵ Accordingly, the PATH Companies propose to change the definition of Interested Party to reflect the stated intent. Specifically, the PATH Companies propose to change the definition of Interested Party in the PATH Protocols to:

An entity that is or may become a customer taking transmission service under the [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 *any entity having standing under Section 206 of the Federal Power Act* (emphasis added).

7. The PATH Companies contend that the proposed change to the Protocols is consistent with changes accepted by the Commission in *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098 (2008) (VEPCO), and is in line with Commission precedence and guidance.

III. Procedural History, Notice, Interventions, and Responsive Pleadings

8. Notice of PATH’s petition was published in the *Federal Register*, 76 Fed. Reg. 69,252 (2011), with interventions and comments due on or before November 21, 2011.

9. Notice of intervention was filed by the Illinois Commerce Commission (Illinois Commission), timely motions to intervene were filed by PJM, American Municipal Power, Inc., Old Dominion Electric Cooperative (ODEC), Maryland Office of People's Counsel (Maryland OPC), Ms. Alison Haverty (Ms. Haverty), and Ms. Keryn Newman (Ms. Newman). Protests were filed by Ms. Haverty and Ms. Newman (together, Protesters). A motion to file comments out-of-time was filed by the Illinois Commission. PATH Companies filed an answer to the motion to intervene of Protesters, contending that these parties do not have an interest that could be directly affected by the proposed

⁴ 16 U.S.C. § 824e (2006).

⁵ See the PATH Companies’ Motion to Dismiss the Formal Challenge and Motions to Compel in Docket Nos. ER08-386-000 and ER09-1256-000, *et al.*

revision to the PJM Tariff. The PATH Companies also filed a motion for leave to answer the protests.

10. Protesters state that the Protocols are broad enough to include any affected party.⁶ Protesters contend that inclusiveness, rather than exclusiveness, has been the goal of the Commission when defining interested Parties in formula rate proceedings.⁷ Protesters argue that the proposed change to the Protocols is aimed at excluding individuals' participation in the formula rate review process, and contend that participants in the review process have standing under section 206 of the FPA. Protesters state, "Keryn Newman and Allison Haverty have been the only Interested Parties to properly engage PATH under the Protocols and are the only parties who have subsequently filed a Challenge to PATH's Formula Rate Annual Update."

11. The Illinois Commission objects to the PATH Companies' application to change the definition of Interested Party under its Protocols. The Illinois Commission argues that, by narrowing the definition of standing, the proposed change is contrary to Commission precedent and improperly limits the FPA section 206 rights and protections of parties to participate in the administrative process. The Maryland OPC supports the comments of the Illinois Commission, and adds that the current tariff provisions were the product of a carefully tailored compromise reached through settlement discussions.

12. In its answer, the PATH Companies request that the Commission deny the motions to intervene filed by Protesters. The PATH Companies state that it does not object to the motions to intervene filed by AMP, Illinois Commission, Maryland OPC, ODEC, and PJM, but Protesters have not demonstrated the requirements for party status under Rule 214 of the Commission's Procedural Rules.

13. The PATH Companies answer that Protesters are not customers or consumers under the PJM Tariff in question, but rather, retail electric customers in West Virginia. The PATH Companies add that while the Commission does have jurisdiction over transmission service or wholesale electric service, Protesters do not take such jurisdictional services and therefore do not have the required directly affected interests in this proceeding for party status under Rule 214 of the Commission's Procedural Rules.⁸

⁶ Ms. Haverty Comments at 4.

⁷ Ms. Newman Comments at 5.

⁸ PATH Answer at 3-4, citing 18 C.F.R. § 385.214(b)(ii) (2011), which requires a movant to demonstrate their interest in sufficient detail to show that "The movant has or represents an interest which may be *directly affected* by the outcome of the proceeding (emphasis added)."

The PATH Companies argue that the interests of retail customers in the PJM region generally are indirect, remote, and fall far short of constituting a direct interest in the outcome of this proceeding (or the review procedures under the PATH formula rates).

14. The PATH Companies state that retail customers' interests are already properly represented by the state public utility commissions and consumer advocate agencies which are Interested Parties under the PATH Protocols, and who have standing to participate in Commission proceedings involving the PATH Project.⁹

15. The PATH Companies argue that Protesters have also failed to make the required demonstration that their participation is in the public interest under Rule 214 of the Commission's Procedural Rules. In support of its request for the Commission to deny the motions, the PATH Companies cite to two proceedings where the Commission dismissed complaints and motions filed by end-users of electricity that were unable to demonstrate direct interest or represented by other parties.¹⁰

16. In response to contentions that the PATH Companies' proposed revision is inconsistent with other transmission owner's formula rate protocols' definitions of Interested Party, the PATH Companies answer that the vast majority of formula rate protocols under the PJM Tariff either define interested party consistent with the PATH Companies' proposal or those protocols contain provisions supporting the conclusion that retail rate customers are not Interested Parties under the Protocols.¹¹

17. In response to the Illinois Commission's concern with the PATH Companies use of the term "entities" as opposed to "persons or parties," the PATH Companies states this term is consistent with other Commission-accepted protocols, but will modify the provision on compliance if the Commission so directs.

18. In response to the Maryland OPC's concern that the Protocols were part of a carefully-negotiated settlement package, the PATH Companies answer that (1) the settlement does not preclude filings pursuant to section 205 or section 206 of the FPA to

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 4-6, citing *People's Elec. Cooperative*, 57 FERC ¶ 63,007 (1991) (*People's Electric*) and *North Star Steel Co., LLC v. Arizona Pub. Serv. Co. et al.*, 116 FERC ¶ 61,022, at P 11 (2006) (*North Star Steel*).

¹¹ PATH Answer at 6-7, (internal citations omitted) (referencing the protocols of Baltimore Gas and Electric Co., Old Dominion Electric Cooperative, UGI Utilities, Delmarva Power & Light Co., Atlantic City Electric Co., and Potomac Electric and Power Co.).

revise the Protocols; (2) the phrase “affected party” was in the definition of Interested Party in the original section 205 filing and not an addition to the Protocols introduced during settlement discussions; and (3) the proposed revision does not impact any of the parties in the settlement proceeding in Docket No. ER08-386-000 because these parties are either identified as Interested Parties or entities who would have standing in a section 206 proceeding.¹²

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,¹³ the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay, we accept the unopposed motion to comments out-of-time filed by the Illinois Commission.

20. Rule 213(a) of the Commission’s Rules of Practice and Procedure prohibits an answer to a protest, unless otherwise permitted by the decisional authority.¹⁴ We accept the PATH Companies’ answer to the protests because it has provided information that assisted us in our decision-making process.

21. We grant the motions to intervene of Protesters. Protesters contend that they have a direct interest in the proceeding as consumers in the region administered under the tariff in question who are ultimately responsible for the cost of the PATH Project, and individuals specifically proposed to be excluded under the proposed revised tariff provision. The PATH Companies contend that as retail consumers, Protesters do not possess “an interest which may be directly affected”¹⁵ by the filing since they do not take service directly under the PJM tariff.

22. As the PATH Companies recognize,¹⁶ under Rule 214 of the Commission’s Rules of Practice and Procedure, a person seeking intervention must show sufficient interest in

¹² PATH Answer at 9.

¹³ 18 C.F.R. § 385.214 (2011).

¹⁴ *Id.* § 385.213(a)(2) (2011).

¹⁵ PATH Answer at 3.

¹⁶ *Id.* at 3.

the proceeding: “The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a: ... Consumer or ... Customer.”¹⁷ The regulations recognize that consumers that are not direct wholesale customers may have a sufficient direct interest in proceedings that affects their retail rates. Protesters are retail consumers in an area whose rates may be affected by the rates charged under the PJM OATT. As such they have a sufficient direct interest in the proceeding under Rule 214 and their interventions are granted.¹⁸

23. PATH Companies cite to two cases in which intervention by consumers has been denied. We do not find these cases justify denying the interventions in this case. *People’s Electric* was a determination by an Administrative Law Judge ruling on an out-of-time motion to intervene in which the consumer failed to demonstrate that it “could have remained completely unaware of the nature of the issues until [its late intervention].”¹⁹ The ALJ found that such a late intervention could disrupt the proceeding and, in addition, found that the validity of late intervenor’s purchases were not at issue in the proceeding so that would not have been directly affected. In contrast, in this case, the interventions are timely and the consumers have demonstrated that they have a direct interest in the PATH Companies’ rates that will be flowed through to them.

¹⁷ 18 C.F.R. § 385.214 (b)(2)(ii).

¹⁸ 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 (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 (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”).

¹⁹ *People’s Electric*, 57 FERC at 65,031.

24. The *North Star Steel* case is equally inapposite. In that case brought as a complaint under section 206 of the FPA, the Commission neither denied intervention, nor prohibited the section 206 complaint for lack of standing. It dismissed the section 206 complaint on the merits, for a variety of reasons, including that the Commission does not have the requested remedial authority to order refunds directly to retail customers.²⁰ But that case does not establish that retail consumers have no right to intervene timely in proceedings that affect wholesale rates that will be passed through to them.

B. Proposed Protocol Change

25. As discussed below, we accept the proposed tariff revision. The tariff language as proposed is consistent with tariff language that the Commission has previously required in formula rate protocols such as the PATH Companies' Protocols.²¹ As we have in other cases, we find reasonable that the same parties with rights to file challenges to PATH's rates under section 206 should have the rights to challenge through the Protocols.²²

26. The PATH Companies contend that its existing language in the Protocols is too broad and "may be more broadly interpreted by some persons to apply to themselves as retail ratepayers or as individuals opposed to the PATH Project" and that "the Commission's exercise of its jurisdiction over the PATH Project does not directly affect these interests."²³ Other parties protest both this filing and the PATH Companies' interpretation of what the effect of the filing might be on particular interests.

27. While we accept the proposed tariff revision to the Protocol's definition of Interested Party, we find that the proposed tariff revision does not affect and we make no determination of any person's (or entity) rights under our regulations and precedents to participate in a review of formula rate filings. As we note above, our regulations recognize that consumers that are not direct wholesale customers may have a sufficient

²⁰ *North Star Steel*, 116 FERC ¶ 61,022.

²¹ *VEPCO*, 123 FERC ¶ 61,098 at P 45. *See also American Electric Power Service Corporation*, 124 FERC ¶ 61,306, at P 32-34 (2008).

²² *Public Utilities Commission of California v. FERC*, 254 F.3d 250, 258 (D.C. Cir. 2001) ("Because relief can be sought pursuant to section 206 in the event a pass through of ... costs results in unjust and unreasonable rates, the Commission's acceptance of the ISO's formula rate without additional section 205 filings does not leave the [state public utilities commission] or ratepayers without any statutory recourse.").

²³ Transmittal Letter at 3.

direct interest in proceedings that affects their retail rates, but a determination of the standing of those seeking to challenge such formula rate filings will need to be made on a case-by-case basis.²⁴

The Commission orders:

The proposed tariff revision is hereby accepted, to become effective January 1, 2012 as requested, as discussed in the body of this order.

By the Commission. Commissioner Moeller is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ *E.g.*, fn. 5, *supra*.