

133 FERC ¶ 61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Potomac-Appalachian Transmission
Highline, L.L.C.

Docket Nos. ER08-386-000
ER08-386-001

ORDER ON REHEARING AND SETTLEMENT AGREEMENT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 19, 2010)

1. This order addresses requests for rehearing filed in response to the Commission's February 29, 2008 order,¹ which granted Potomac-Appalachian Transmission Highline, L.L.C.'s (PATH) incentive rate authorizations for a transmission project (Project) under Order No. 679.² The February 29 Order also set PATH's proposed formula rate for the Project for hearing and settlement judge procedures.

2. As discussed below, we grant in part and deny in part the requests for rehearing of the February 29 Order and will set PATH's return on equity (ROE) for hearing and settlement judge proceedings. With regard to the PATH's proposed formula rate, this order approves a proposed settlement agreement between PATH and several parties.

I. Background

3. On December 28, 2007, PATH filed proposed tariff sheets with the Commission, pursuant to section 205 of the Federal Power Act (FPA)³ to be included in PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (Tariff). The tariff sheets sought to implement a transmission cost of service formula rate and incentive rate authorizations for the Project.

¹ *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008) (February 29 Order).

² *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 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

³ 16 U.S.C. § 824d (2006).

4. The proposed Project is a major backbone expansion to PJM's regional electric transmission system. The Project will significantly improve reliability in the region by adding new high-voltage transmission lines from southwestern West Virginia to central Maryland. It will include a 290-mile transmission line that begins at American Electric Power Co., Inc.'s (AEP) Amos substation near St. Albans, West Virginia, with a terminus at the Doubs substation in Kempton, Maryland. As PATH emphasized in its filing, there are numerous risks incurred with the deploying bulk transmission 765kV lines, such as specialized construction techniques, complex protection and control schemes, and advanced conductor design at 765kV.⁴ It also includes numerous upgrades to existing substations along the route, as well as new equipment and a new substation at Kempton, Maryland. The original estimated cost of the Project was \$1.8 billion.⁵

5. Based on the risks and challenges associated with the Project, PATH requested the following incentive rate authorizations under section 219 of the FPA⁶ and Order No. 679: (1) approval of a 50 basis point adder to PATH's authorized ROE for becoming a member of PJM; (2) approval of an ROE at the high end of the zone of reasonableness or, in the alternative, approval of a 150 basis point adder to be added to an ROE of 12.3 percent (along with the 50 basis point adder for RTO participation); (3) authorization to include 100 percent of construction work in progress (CWIP) in rate base; (4) permission to file for recovery of development and construction costs if the project is abandoned for reasons beyond PATH's control; (5) permission to use a hypothetical capital structure of 50 percent debt and 50 percent equity during the construction period; and (6) authorization to include in rate base an unamortized regulatory asset, consisting of deferred pre-commercial expenses not included in CWIP, and to amortize the deferred amounts during the construction period.⁷ In addition, PATH sought permission to accrue Allowance for Funds Used During Construction (AFUDC) on the regulatory asset costs until the deferred amounts are included in rate base on the requested effective date of

⁴ PATH Filing, Ex. No. PTH-100 at 34-39.

⁵ On November 10, 2008, PATH filed an update regarding the Project. According to the letter, PJM has determined that the entire length of the Project will be 765 kV, and 285 miles in length.

⁶ 16 U.S.C. § 824s (2006).

⁷ PATH did not present its request to expense and recover pre-commercial costs deferred as a regulatory asset as one of its requested transmission rate incentives pursuant to Order No. 679. However, the February 29 Order found that PATH's proposal achieved the same outcome as the Order No. 679 incentive for pre-commercial costs. Therefore, the Commission reviewed PATH's request as an incentive under Order No. 679. February 29 Order, 122 FERC ¶ 61,188 at P 49-50.

March 1, 2008, to reflect the time value associated with these expenditures. Finally, PATH requested that the Commission grant the requested incentive ROE without setting it for hearing.

6. The Commission generally granted PATH's requested incentives in the February 29 Order, and granted the requested effective date of March 1, 2008. It also granted PATH's requested ROE of 14.3 percent which included the 50 basis point adder for PJM membership and was within the high end of the zone of reasonableness based on the risks and challenges associated with the Project. While the Commission found that PATH erroneously calculated its ROE range of reasonableness, the Commission nevertheless found that the PATH's requested ROE of 14.3 percent, inclusive of the 50 basis point adder for RTO participation, was within the high end of the zone of reasonableness based on the Project's risks and challenges and fell within the range of reasonableness for the modified proxy group. Thus, the Commission resolved the ROE through summary disposition and found the 14.3 percent ROE to be just and reasonable. In addition to granting this incentive rate treatment, the February 29 Order granted PATH's request to recover CWIP in rate base, recovery of abandoned plant, hypothetical capital structure, incentive treatment for pre-commercial costs, and also set for hearing and settlement judge procedures PATH's formula rate and protocols, which are set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Tariff.

7. PATH and several parties filed a proposed settlement agreement to resolve the formula rate issues on December 10, 2008. The proposed settlement agreement attempted to resolve the issues related to PATH's formula rate and protocols, as set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Tariff. On December 31, 2008, PATH filed an errata to its December 10, 2008 filing to correct several inadvertent errors in Exhibit 1 (clean revised tariff sheets) and Exhibit 2 (redline revised tariff sheets).

II. Requests for Rehearing and Responsive Pleadings

8. On March 31, 2008, requests for rehearing were filed by Pennsylvania Public Utility Commission (Pennsylvania Commission); American Municipal Power-Ohio, Inc. (AMP-Ohio); Joint Intervenors;⁸ Public Service Commission of Maryland (Maryland Commission); and Joint Consumer Advocates.⁹ Several parties, including Pennsylvania

⁸ Joint Intervenors include: North Carolina Electric Membership Corporation, Southern Maryland Electric Cooperative, Old Dominion Electric Cooperative (ODEC), and Borough of Chambersburg, Pennsylvania.

⁹ Joint Consumer Advocates include: Pennsylvania Office of Consumer Advocate, Maryland Office of People's Counsel, Office of the Ohio Consumers' Counsel, D.C. Office of the People's Counsel, New Jersey Department of the Public Advocate Consumer Advocate Division, Public Service Commission of West Virginia, and Delaware Division of the Public Advocate.

Commission, Joint Consumer Advocates, Joint Intervenors, and Maryland Commission, filed affidavits and other evidence in support of their requests for rehearing.

9. The Virginia Division of Consumer Counsel filed a motion to intervene out of time, stating that it was authorized by PATH's counsel to represent that PATH did not oppose the late intervention so long as the Virginia Division of Consumer Counsel did not interfere with the settlement schedule. No party opposed this late motion to intervene.

10. On April 15, 2008, PATH filed a motion for leave to answer the requests for rehearing. PATH argues that the Commission has permitted such answers when a rehearing request raises a factual dispute and will assist the Commission in its decision-making. PATH notes that several parties filed affidavits in their requests for rehearing. PATH states that because these affidavits were intended to provide new information for the Commission's consideration, the Commission should allow PATH to answer the new factual assertions and arguments.

11. AMP-Ohio, Maryland Commission, and ODEC filed oppositions to PATH's motion to file an answer. In addition, ODEC filed an answer to PATH's answer. While these parties do not challenge PATH's contention that the requests for rehearing raise new factual issues, they assert that PATH's answer does not address these factual issues. PATH's answer, in their opinion, is nothing more than a reply brief that should be denied under the Commission's Rules of Practice and Procedure. However, even if factual disputes do exist, the parties assert that such factual issues should be resolved in a hearing. Finally, AMP-Ohio requests that "the Commission modify its procedural rules to prohibit the filing of a motion for leave to answer a rehearing request in the same document as the answer itself."

12. On September 16 and September 22, 2008, the Commission received late-filed comments from Ms. Kourtney Lowery and Ms. Orpha Wade, respectively. These comments raise various challenges regarding the location of the Project, the need for the Project, and its costs.

III. Discussion

A. Procedural Matters

13. 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.¹⁰ The Virginia Division of Consumer Counsel has met this higher burden of justifying its late intervention and, thus, we will grant its motion.

14. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010), provides that the Commission will not permit answers to requests for rehearing. Accordingly, we will reject PATH's answer to the requests for rehearing and ODEC's answer to PATH's answer.

15. Several parties, including Pennsylvania Commission, Joint Consumer Advocates, Joint Intervenors, and Maryland Commission, filed affidavits in support of their requests for rehearing. We will reject these affidavits as the Commission generally does not permit parties to introduce new evidence for the first time on rehearing.¹¹

16. As for AMP-Ohio's request to modify the Commission's procedural rules, we will deny that request. AMP-Ohio's request is outside the scope of this proceeding. Nor has AMP-Ohio shown good cause to require such a change.

17. Finally, we reject Ms. Lowery's and Ms. Wade's written comments. By not requesting intervenor status, neither Ms. Lowery nor Ms. Wade is a party to this proceeding and, thus, they lack standing to seek rehearing of the February 29 Order under the FPA and the Commission's regulations.¹² Moreover, their comments were filed after the statutory deadline for rehearing requests. Finally, they take issue with the siting of the PATH Project, which is outside the scope of this rate proceeding.

¹⁰ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹¹ See, e.g., *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 & n.64 (1994) (stating that "[t]he Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target.").

¹² See 16 U.S.C. § 825(a); 18 C.F.R. § 385.713(b); *Southern Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

B. Rehearing**1. Failure to Set ROE for Hearing and Other Errors Related to the PATH's Discounted Cash Flow (DCF) Analysis****a. February 29 Order**

18. In the February 29 Order, the Commission found that PATH's proposed 15-company proxy group¹³ was "a good starting point for companies in PJM to use to develop an individual proxy [group] that takes into account comparable risks."¹⁴ This proxy group, according to the order, appropriately included entities from interrelated regional transmission organization (RTO) markets operated by PJM, ISO New England, Inc. (ISO-NE) and the New York Independent System Operator, Inc. (New York ISO).¹⁵ The Commission further found that PATH's initial screening criteria were consistent with Commission policy and precedent.¹⁶ This initial screen included the elimination of: (1) those utilities that are not currently paying cash dividends; (2) utilities that have announced a merger during the six-month period used to calculate the dividend yields; (3) utilities primarily operating as natural gas companies; and (4) utilities that do not have both an IBES growth rate and Value Line data.¹⁷

19. However, the Commission also found that PATH failed to apply certain additional risk screens required by Commission policy. The Commission found that PATH failed to apply an appropriate corporate credit rating screen and, thus, included several companies that were not comparable to PATH.¹⁸ The Commission noted that PATH's parent companies had corporate credit ratings ranging from BBB- (Allegheny) to BBB (AEP), which meant that PATH should have excluded companies falling outside the range of

¹³ These companies included: American Electric Power Co.; Central Vermont Public Service Corp.; Consolidated Edison, Inc.; Constellation Energy Group, Inc.; Dominion Resources, Inc.; DPL Inc., (DPL); Exelon Corp. (Exelon); FirstEnergy Corp.; FPL Group, Inc., (FPL Group); Northeast Utilities; NSTAR; Pepco Holdings, Inc.; PPL Corporation; Public Service Enterprise Group (PSEG); and UIL Holdings Corp. (UIL Holdings).

¹⁴ February 29 Order, 122 FERC ¶ 61,188 at P 105.

¹⁵ *Id.* P 95.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* P 96.

BBB- to BBB+ or the equivalent Moody's rating.¹⁹ This required the elimination of Dominion Resources, Consolidated Edison, NSTAR, and FPL Group from PATH's proxy group.²⁰

20. In addition, the Commission found that PATH's proxy group did not sufficiently screen for unsustainable growth rates.²¹ The February 29 Order reiterated the Commission's longstanding view that companies should be excluded from a proxy group if they have unsustainable growth rates in excess of 13.3 percent.²² Based on this precedent, the Commission found that PSEG and Constellation Energy Group should have been excluded from PATH's proxy group.²³ The Commission disagreed, however, with parties claiming that PPL Corporation should have been excluded.²⁴ The Commission noted that parties miscalculated PPL Corporation's growth rate based on data from a different time period. Had they used the correct data, they would have seen that PPL Corporation's growth rate was below the 13.3 percent threshold.²⁵

21. The Commission also found that PATH erred by excluding UIL Holdings' low-end ROE from its proxy group, even though it included UIL Holdings' high-end ROE. The Commission found that, by excluding UIL Holdings' low-end ROE, PATH's method for determining when a low-end ROE was too close to the cost of debt was speculative. Therefore, the Commission determined that PATH should have included both UIL Holdings' high end ROE and its low end ROE in its proxy group.²⁶

22. Based on these findings, the Commission determined that the following companies should have been in PATH's proxy group: American Electric Power Corporation; Central Vermont Public Service Corporation; DPL Inc.; FirstEnergy Corporation; Northeast Utilities; Pepco Holdings; UIL Holdings; and PPL Corporation.²⁷ These

¹⁹ *Id.* P 98 (citing PATH Filing, Ex. No. PTH-400 at 37).

²⁰ *Id.* P 99 (citing *Southern California Edison Co.*, Opinion No. 445, 92 FERC ¶ 61,070, at 61,264 (2000)).

²¹ *Id.* P 98.

²² *Id.* P 100 (citing *ISO New England, Inc.*, 109 FERC ¶ 61,147 (2004)).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* P 102.

²⁷ *Id.* P 103.

companies established a zone of reasonable returns between 6.7 percent and 16 percent.²⁸ Since PATH's requested ROE of 14.3 percent fell within that zone, the Commission granted PATH's requested ROE.²⁹ As noted above, the ROE of 14.3 percent included the 50 basis point adder for PJM membership and was within the high end of the zone of reasonableness based on the risks and challenges associated with the Project.

b. Arguments on Rehearing

i. Failure to Set Proxy Group and ROE for Hearing

23. Parties raise various arguments regarding the Commission's failure to set PATH's requested ROE and its proxy group for hearing. They claim that due process was violated because the Commission did not require PATH to produce its underlying work papers, nor did the Commission provide them with an opportunity to submit evidence. In short, parties like AMP-Ohio claim a violation of due process because there "was no suitable opportunity through evidence and argument to challenge the result."³⁰ They assert that due process requires the Commission to submit all ROE cases to trial-type hearings so that the parties can seek discovery and challenge "the self-serving and one-sided information provided" in the application.³¹

24. AMP-Ohio claims that the Commission's decision violates well settled precedent from the Supreme Court in *Mathews v. Eldridge*, which sets forth a three-part test for determining whether due process has been satisfied.³² In this context, AMP-Ohio argues that private interests in this case are enormous because the 14.3 percent ROE will impose millions of dollars of additional costs onto consumers. It further emphasizes that the risk to those private interests has been greatly increased by the lack of process (i.e., hearing) in the proceeding. Finally, it does not believe that a hearing would have been a significant burden to the Commission or PATH.

²⁸ *Id.*

²⁹ *Id.* P 104.

³⁰ AMP-Ohio March 31, 2008 Request for Rehearing at 4 (quoting *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292 (1937)).

³¹ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 4-6.

³² AMP-Ohio March 31, 2008 Request for Rehearing at 3-7 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). AMP-Ohio states that the factors to be balanced are: (1) the private interests affected by the agency action; (2) the risk of erroneous deprivation of such interest from the procedures used; and (3) the government's interest, including the fiscal and administrative burdens required from additional procedural requirements.

25. Nor do the parties believe that the ability to file a protest, by itself, satisfies due process. They argue that a protest is merely a vehicle to raise factual disputes. Joint Intervenors state that applications of the light-most-favorable-to-protestants inference at the protest stage is reflected in 18 C.F.R. §35.8(a) governing protests to FPA section 205 rate filings, only requiring that a protest “state the basis for the objection,” not that the protest must include affidavits or other detailed evidentiary submissions to establish the existence of disputed issues of material fact.³³ They assert that “[i]nformal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting information is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate.”³⁴ According to the parties, only a trial-type hearing is sufficient to resolve factual disputes.

26. Parties also claim that the Commission violated due process by impermissibly modifying the record through *sua sponte* reformulating companies’ proffered proxy group, using data outside the record after finding the proposed proxy group to be unjust and unreasonable, and not giving parties an opportunity to offer a contrary presentation to the Commission’s modified proxy group. In support of this claim, they point to the Commission’s decision to exclude Dominion Resources, Consolidated Edison, NSTAR and FLP Group on the grounds that their corporate credit rating fell outside the BBB- to BBB+ range, even though PATH did not provide evidence of these companies corporate credit ratings.³⁵ Parties claim that they did not have a reasonable opportunity to rebut this new evidence or check its veracity.

27. Several parties, including the Joint Intervenors and the Pennsylvania Commission, argue that due process was violated by the short comment period. These parties note that intervenors only had 21 days—14 days from the Commission’s notice—to respond to PATH’s application.³⁶ They argue that such a short time period was insufficient.

28. In addition, parties claim that the Commission’s up-front determination of PATH’s proxy group, as well as its ROE, violated Rule 217 of the Commission’s Rules of Practice and Procedure,³⁷ which they argue requires the Commission to notify and afford participants with an opportunity to comment on any proposed summary

³³ Joint Intervenors at 14. Joint Intervenors contrast this with 18 C.F.R. § 602(f)(4) governing a party’s challenge to a proposed offer of settlement.

³⁴ *Id.* at 5; *see also* Joint Intervenors March 31, 2008 Request for Rehearing at 14.

³⁵ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 27-29.

³⁶ Joint Intervenors March 31, 2008 Request for Rehearing at 15; Pennsylvania PUC at March 31, 2008 Request for Rehearing 8.

³⁷ 18 C.F.R. § 385.217 (2010).

disposition.³⁸ Joint Consumer Advocates and AMP-Ohio argue that no participant moved for summary judgment, no notice was provided that there would be summary disposition, and the Commission failed to provide any reason why it should dispense with the notice and comment period.

29. Joint Consumer Advocates and Joint Intervenors state that any attempt by the Commission to construe Rule 217's opportunity to comment as permissive, rather than mandatory, would be unlawful because it is analogous to Rule 56 of the Federal Rules of Civil Procedure, where the burden of summary disposition rests on the moving party, and the evidence must be viewed in the light most favorable to the party opposing the summary judgment. In the context of section 205 rate filings, Joint Intervenors claim that a protest need only "state the basis for the objection," but does not have to include affidavits or other detailed evidentiary submissions to establish the existence of disputed issues of material fact.³⁹

30. Joint Intervenors further claim that the Commission may not summarily dispose of a case where there are issues of material fact. Joint Intervenors and the Maryland Commission note that ROE cases frequently involve "*uniquely* factual issue[s]," which cannot be summarily decided.⁴⁰

31. Parties also argue that the Commission ignored and arbitrarily departed from its precedent by not setting the proxy group and ROE for hearing.⁴¹ In particular, parties cite to several recent cases where the Commission set equity returns for hearing.⁴² They

³⁸ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 32; Joint Intervenors March 31, 2008 Request for Rehearing at 12; AMP-Ohio March 31, 2008 Request for Rehearing at 13.

³⁹ Joint Intervenors March 31, 2008 Rehearing Request at 14. Joint Intervenors contrast this with 18 C.F.R. § 602(f)(4) governing a party's challenge to a proposed offer of settlement.

⁴⁰ *Id.* at 12-13 (citing *CNG Transmission Corp.*, 67 FERC ¶ 61,030, at 61,098 (1994) (emphasis added)); Maryland PSC March 31, 2008 Rehearing Request at 11.

⁴¹ *See* Joint Consumer Advocates March 31, 2008 Rehearing Request at 36-37; Joint Intervenors March 31, 2008 Rehearing Request at 8-12; AMP-Ohio March 31, 2008 Rehearing Request at 3-7.

⁴² Joint Intervenors March 31, 2008 Rehearing Request at 9 (citing *Southern California Edison Co.*, 122 FERC ¶ 61,187, at P 27 (2008); *Commonwealth Edison Co.*, 119 FERC ¶ 61,238 (2007), *order on reh'g*, 122 FERC ¶ 61,037 (2008); *Trans-Allegheny Interstate Line Co.*, 119 FERC ¶ 61,219 (2007) (*TrAILCo.*); *Duquesne Light Co.*, 118 FERC ¶ 61,087 (2007)); Maryland PSC March 31, 2008 Rehearing Request at 11.

state that the Commission's action was particularly arbitrary in light of the fact that this case presents precisely the same evidence that was presented in another transmission incentives case, *TrAILCo.*, where the Commission set the matter for hearing.⁴³ Parties note that in both *TrAILCo.* and *PATH* the companies relied upon the same proxy group and the same methodology to support their ROEs, but the Commission set one for hearing (i.e., *TrAILCo.*) and denied a hearing in the other (i.e., *PATH*).

32. Parties argue further that the Commission failed to consider the extent to which parties relied on the Commission's old policy of setting the ROE for hearing before making a summary judgment on the ROE.⁴⁴ AMP-Ohio argues that the Commission failed to give notice of its change in policy prior to making an upfront determination in this case.⁴⁵

33. Joint Intervenors argue that the Commission's up-front ROE determination is not consistent with Order No. 679-A. Joint Intervenors argue that while Order No. 679-A indicates that a public utility may receive an up-front ROE determination concerning its proposed ROE through a petition of declaratory order, it does not obviate the need for a hearing in this case. For one thing, the Commission did not say such a petition for declaratory order would not itself be set for hearing, and this case does not involve a petition for declaratory order but rather a rate case. Further, utilities seeking such a determination are required under the nexus test to show that an up-front ROE determination "is important for the investment decision."⁴⁶

ii. Composition of Proxy Group

34. Parties challenge the companies that were included in *PATH*'s initial proxy group, as well as the companies that were included in *PATH*'s final proxy group as decided by the February 29 Order. In particular, Joint Intervenors argue that the Commission failed to justify its selection of proxy companies by "considering and examining" relevant factors, such as whether the proxy company and applicant "share common risks." Joint

⁴³ Joint Consumer Advocates March 31, 2008 Rehearing Request at 37-38; AMP-Ohio March 31, 2008 Rehearing Request at 11; Pennsylvania PUC March 31, 2008 Rehearing Request at 10; Maryland PSC March 31, 2008 Rehearing Request at 6-7; and Joint Intervenors March 31, 2008 Rehearing Request at 11.

⁴⁴ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 36; Pennsylvania PUC March 31, 2008 Request for Rehearing at 11; and Joint Intervenors March 31, 2008 Request for Rehearing at 12.

⁴⁵ AMP-Ohio March 31, 2008 Request for Rehearing at 9-12.

⁴⁶ Joint Intervenors March 31, 2008 Request for Rehearing at 10 n.46 (quoting Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 70)).

Intervenors argue that unsupported reliance on “mere geographic proximity,” for instance, is “insufficient to survive arbitrary and capricious review.”⁴⁷ Joint Intervenors and AMP-Ohio also argue that the Commission did not adequately address prior protests that PATH’s proposed formula rates allow a flow through of actual costs. This automatic flow through of costs through the formula rates virtually eliminates uncertainty on earnings, thereby eliminating risks associated with the inability to recover costs. Joint Intervenors argue this reduction in risk should be taken into account in determining PATH’s ROE.

35. Joint Consumer Advocates further argue that the Commission violated its precedent in *TrAILCo*. by accepting a proxy group of companies with limited or no connection to PJM. They note that in *TrAILCo*. the Commission specifically stated that it would “not expect such [non-PJM] companies to be included in TrAILCo’s proxy group unless there is compelling evidence to support a deviation from our general policy of requiring a proxy group to be comprised of transmission owners with a direct link to the same RTO or Independent System Operator in which the applicant is located.”⁴⁸ Joint Consumer Advocates argue that the February 29 Order failed to provide a “principled reason” or “reasoned analysis” for its departure from this precedent.⁴⁹

36. Joint Intervenors argue that the Commission’s approval of PATH’s initial proxy group was contrary to its decision in *Westar*, which was issued less than a month after the February 29 Order. Joint Intervenors point out that in *Westar* the Commission accepted a proxy group that included companies located in PJM, Southwest Power Pool, and the Midwest ISO, but did not include—like it did in the February 29 Order—companies from the New York ISO or ISO-NE. AMP-Ohio claims that the Commission failed to show that a different proxy group was not more representative, including a group with companies from the Midwest ISO.

37. Parties also challenge the Commission’s decision to exclude and include certain companies in PATH’s final proxy group. Joint Consumer Advocates argue that PATH failed to meet its burden of persuasion because the Commission rejected numerous companies in PATH’s proposed proxy group.⁵⁰ They allege that the Commission should have rejected PATH’s proxy group as a whole or set the case for full evidentiary hearing.

⁴⁷ Joint Intervenors March 31, 2008 Request for Rehearing at 17 (citing *Pacific Gas & Elec. Co.*, 306 F.3d 1112, 1120-21 (D.C. Cir. 2002)).

⁴⁸ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 38 (citing *TrAILCo.*, 119 FERC ¶ 61,129).

⁴⁹ *Id.* at 39.

⁵⁰ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 27.

38. Parties argue that UIL Holdings was erroneously included in PATH's final proxy group. Joint Intervenors raise two concerns with the Commission's retention of UIL Holdings: (1) its low ROE is only 30 basis points above the index cost of debt in contravention of Opinion No. 445, where the Commission excluded a company from a proxy group because its ROE was 36 basis points above the indexed cost of debt; and (2) the extremely wide spread between UIL Holdings' low and high ROE results (930 basis points), which allowed UIL Holdings to set both the low and high points in the range of reasonable returns.⁵¹ Similarly, the Maryland Commission questions the Commission's decision to allow UIL Holdings to set both the low-end and the high-end range of reasonable returns for PATH.⁵²

39. Joint Consumer Advocates further note that UIL Holdings experienced unusually high growth because, since 2006 it has realized overall gains from the sale of some of its non-core businesses (e.g., Bridgeport Energy, Cross Sound Cable, and Xcelecom Systems Integration). Also, in July 2007, UIL Holdings authorized a five-for-three stock split to make the company more attractive to investors. Joint Consumer Advocates argue that the Commission's policy for excluding companies in the process of merger proceedings should apply to UIL Holdings—that is, at least as it relates to UIL Holdings' implied cost of equity.⁵³

40. Joint Intervenors argue that in determining whether a growth rate was "sustainable" in the February 29 Order, the Commission merely pointed to a figure of 13.3 percent derived in another proceeding. Joint Intervenors state that while they recognize the wisdom of eliminating proposed proxy companies with unsustainable growth rates, what is "unsustainable" may change from one proxy company to another, and thus is a matter of fact that should be addressed at hearing.⁵⁴

41. The Pennsylvania Commission argues that several companies, including Central Vermont and UIL Holdings, had unsustainable growth rates and should have been excluded from PATH's proxy group. With regard to UIL Holdings, the Pennsylvania Commission notes that the company's growth rate is unusually high (10 percent) for the high dividend yield, indicating that the earnings growth was calculated from a depressed earnings base.⁵⁵

⁵¹ Joint Intervenors March 31, 2008 Request for Rehearing at 22.

⁵² Maryland PSC March 31, 2008 Request for Rehearing at 16.

⁵³ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 42.

⁵⁴ Joint Intervenors March 31, 2008 Request for Rehearing at 21.

⁵⁵ Pennsylvania PUC March 31, 2008 Request for Rehearing at 13.

42. Parties also challenge the inclusion of PPL Corporation in PATH's proxy group. Joint Intervenors argue that PPL Corporation should have been excluded based on volatility in its growth rate over the last several years. The Maryland Commission asserts that the Commission failed to address protesters' earlier concerns about the inclusion of PPL Corporation in the proxy group, reiterating that PPL Corporation's business is made up predominantly of power generation, marketing, and foreign electricity distribution in the United Kingdom and Latin America, which are completely different business risks than the domestic wholesale business of PATH. Maryland Commission further notes that PPL Corporation has 3.7 million foreign electric distribution customers, which is three times the 1.4 million distribution customers it has in the United States.⁵⁶

43. Joint Intervenors argue that a more searching risk analysis than just corporate credit ratings is necessary to determine a "risk appropriate" proxy group.⁵⁷ Joint Intervenors argue that the Commission has previously declined to place determinative weight on corporate credit ratings as the arbiter of risk comparability.⁵⁸ Joint Intervenors argue that corporate credit ratings are insufficient to determine a risk-comparable proxy group. Joint Intervenors state that if corporate credit ratings are used as the sole criterion for risk comparability, companies with BBB credit ratings that have nothing to do with electric transmission could nonetheless be considered risk comparable to PATH.

44. Several parties argue that there are disputed issues of material fact pertaining to the development of the ROE, which merit a full evidentiary hearing. For example, AMP-Ohio claims that several issues of material fact still exist: (1) whether the higher risks associated with electric demands in the Northeast impact PATH; (2) whether the Commission should re-evaluate whether regulated transmission service is less risky than other aspects of the electric utility business; (3) whether other companies in the proxy group are inherently more risky because they engage in varying amounts of unregulated energy business; and (4) whether PATH has less risk because of its parent companies.⁵⁹ Maryland Commission raises concerns regarding unresolved factual issues, saying that

⁵⁶ Maryland PSC March 31, 2008 Request for Rehearing at 13 (internal citations omitted).

⁵⁷ Joint Intervenors March 31, 2008 Request for Rehearing at 19-21.

⁵⁸ *Id.* (citing *Northwest Pipeline Corp.*, 87 FERC ¶ 61,266, at 62,068 (1999); *Transcontinental Gas Pipeline Corp.*, Opinion No. 414, 80 FERC ¶ 61,157, at 61,675 (1997)).

⁵⁹ AMP-Ohio March 31, 2008 Request for Rehearing at 17-18.

“[t]he issues raised by protesters are not the type of policy questions that the Commission should decide on its own; they are complex factual questions which must be explored further.”⁶⁰

iii. Calculation of Range of Reasonableness

45. Pennsylvania Commission argues that the growth rates for certain companies in PATH’s proxy group were excessive, in part, because PATH overstated the “r” value (i.e., the expected earned ROE component of the $g = br + sv$ growth rate formula)⁶¹ for these companies in the growth rate formula. Pennsylvania Commission also argued that PATH did not share the same risk profile with several other companies. Pennsylvania Commission also challenged PATH’s use of data from certain forecasting agencies because these agencies “tend to produce rosy earnings growth estimates that fail to materialize.”⁶²

46. Joint Intervenors likewise challenge PATH’s calculation of the “r” value.⁶³ They further assert that the Commission failed to address material facts related to PATH’s level of riskiness as compared to other companies in the proxy group. Joint Intervenors claim that PATH’s overall risk profile is greatly reduced by its transmission-only business model, but also by the transmission incentives granted by the February 29 Order.⁶⁴

47. Joint Consumer Advocates generally assert that factual disputes exist in this case. For example, they assert inputs for growth factors are factual issues that require expert witnesses to “exercise a great deal of judgment about investor expectations for future dividends when rendering an opinion on an ROE derived from the application of a DCF methodology.”⁶⁵ They note that the ROE is frequently a source of controversy. In addition, Joint Consumer Advocates argue that its expert could not reproduce many of

⁶⁰ Maryland PSC March 31, 2008 Request for Rehearing at 12.

⁶¹ The $g = br + sv$ growth rate is also referred to as the Fundamental Growth Rate or Sustainable Growth Rate.

⁶² Pennsylvania PUC March 31, 2008 Request for Rehearing at 11.

⁶³ Joint Intervenors March 31, 2008 Request for Rehearing at 37-38.

⁶⁴ *Id.* at 27.

⁶⁵ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 38-39 (citation and internal quotation marks omitted).

PATH's growth rate inputs, even though their expert also acknowledged that he may have used data from a different time period.⁶⁶

iv. Failure to Use Midpoint or Median

48. Joint Consumer Advocates state that despite PATH's reliance on establishing the midpoint of the zone of reasonableness as crucial to its ROE request, the Commission disregarded any measure of central tendency in granting an ROE of 14.3 percent, an unprecedented adder award of 245 basis points above the midpoint.⁶⁷ The Maryland Commission asserts that the rate impact of this is tremendous; a 10 basis point increase in ROE costs ratepayers \$900,000 per year, and every 100 basis point increase in ROE costs ratepayers \$9 million per year.⁶⁸

49. Parties state that the Commission should have considered the median in establishing the ROE for PATH.⁶⁹ Joint Intervenors state that under the comparable earnings test, which was used here, the point of the proxy group is to show "companies with comparable risk to that of PATH."⁷⁰ The test's next step requires determining from a range of returns, "the most refined measure of central tendency,"⁷¹ to be applied as the ROE to the applicant, subject to adjustments for possible risk differences. Thus, and contrary to the February 29 Order's reasoning, a determination of a baseline return on equity for the proxy group is required whenever the comparable earnings test is applied, not only when incentive adders are used to adjust the return.

50. Joint Intervenors argue that under Commission precedent, the baseline return for the proxy group is "calculated by using either the mean (midpoint) or the median."⁷²

⁶⁶ *Id.* at 40.

⁶⁷ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 29-31.

⁶⁸ Maryland PSC March 31, 2008 Request for Rehearing at 6 (explaining the basis for this calculation, which presumes a rate base of \$1.8 billion, and 50 percent financed by common equity).

⁶⁹ *Id.*; Joint Intervenors March 31, 2008 Request for Rehearing at 34; AMP-Ohio March 31, 2008 Request for Rehearing at 18; Maryland PSC March 31, 2008 Request for Rehearing at 17-19.

⁷⁰ Joint Intervenors March 31, 2008 Request for Rehearing at 34 (citing the February 29 Order, 122 FERC ¶ 61,188 at P 93).

⁷¹ *Id.* at 35 (internal citations omitted).

⁷² *Id.*

Joint Consumer Advocates argue that adding more companies to the proxy group creates an upward bias to the midpoint, but not the median, and therefore, the median is the best measure of central tendency.⁷³ AMP-Ohio argues that the median should be used based on the Commission's prior ruling that the midpoint is the preferable measure of central tendency only when establishing a return for a group of companies, rather than a single company, such as here.⁷⁴ The Maryland Commission states that the Commission has never justified why the median would not be appropriate for determining an ROE for single electric utilities.⁷⁵

51. The Pennsylvania Commission states that it is clear from Order No. 679 that the Commission's justification for a higher ROE is not based on a risk assessment; the risk assessment is part of a traditional DCF analysis. Given that language, the Pennsylvania Commission argues that if the Commission is going to add basis points to permit a higher than average ROE, it should at least start from the median as a base return, and not one that includes returns that are based on unreasonable growth rates or one that is a midpoint of unreasonable extremes.

v. Failure to Apply the Treasury Bond Update

52. Parties argue that the Commission failed to undertake an analysis of whether present financial and market conditions require additional or alternative modifications to the proxy group.⁷⁶ Joint Consumer Advocates argue that "while use of the latest available financial information is the Commission's stated preference" in constructing the proxy group and the respective inputs for the DCF formula, the Commission relied on stale data.⁷⁷ Specifically, Joint Consumer Advocates state that PATH's witness prepared his testimony before or on December 19, 2007, using data for the six month period May – October 2007 to calculate dividend yields. However, the 10-year Treasury bond value has decreased from 4.53 percent in October 2007 to 3.74 percent in February 2008.⁷⁸ Joint Consumer Advocates also state that Commission policy required PATH to adjust the ROE, either upward or downward, to reflect changed bond yields.

⁷³ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 45-47.

⁷⁴ AMP-Ohio March 31, 2008 Request for Rehearing at 18.

⁷⁵ Maryland PSC March 31, 2008 Request for Rehearing at 20.

⁷⁶ AMP-Ohio March 31, 2008 Request for Rehearing at 16; Joint Consumer Advocates March 31, 2008 Request for Rehearing at 48.

⁷⁷ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 48 (citing *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129, at P 79 (2006)).

⁷⁸ *Id.* at 48 (internal citations omitted).

c. Commission Determination

53. Numerous parties challenge the Commission's up-front determination policy under Order No. 679 and argue that the February 29 Order violated due process and the Commission's Rules of Practice and Procedure by applying that policy. They further argue that the Commission acted arbitrarily and capriciously by deciding PATH's ROE without a trial-type hearing. They also generally argue that there were factual disputes related to the February 29 Order. Parties generally believe that the protest process, by itself, provides them with insufficient opportunity to present evidence and argument to challenge PATH's requested incentives and ROE.

54. The Commission recently addressed similar challenges in *Pioneer Transmission LLC*.⁷⁹ In that order, the Commission rejected the claim that it must always order trial-type hearings in ROE cases. As the Commission noted in *Pioneer*, Federal courts have held that a formal trial-type hearing is unnecessary where there are no material facts in dispute.⁸⁰ The Commission further emphasized that it is not sufficient for a protesting party to merely allege an issue of disputed fact—parties “must make an adequate proffer of evidence to support them.”⁸¹ The *Pioneer* order emphasized, “The Commission is only required to provide a trial-type hearing if the material facts in dispute cannot be resolved on the basis of written submissions in the record.”⁸²

55. Based on the limited facts in this case, we will grant rehearing of our up-front determination of the ROE in the February 29 Order and set for hearing PATH's proposed proxy group and its base ROE for a full evidentiary hearing. As noted above, parties raised several issues of material fact related to the inputs used by PATH for its DCF analysis.⁸³ Because these issues could not be decided based on the written record, the ROE should have been set for hearing.

⁷⁹ 130 FERC ¶ 61,044 (2010) (*Pioneer*).

⁸⁰ *Id.* P 35 (citing *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)).

⁸¹ *Id.* (quoting *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982)).

⁸² *Id.* n.73.

⁸³ Typically, the inputs for a company's DCF analyses are based on data such as stock prices, dividend yields, and certain historical and projected earnings data from Value Line, among other things. This data is generally available to the public, as required under 18 C.F.R. § 35.13h(22) (2010). In this case, however, we cannot determine the source of PATH's data.

56. Parties raise several issues of material fact with respect to the proxy group used in the February 29 Order. Parties argue that the February 29 order should not have included UIL Holdings and Central Vermont in PATH's proxy group. Several parties also argue that these companies should have been excluded because their ROEs were approximately at or below the cost of debt. As part of the hearing and settlement proceedings discussed below, we direct parties to consider the Commission's most recent guidance in *Pioneer* regarding this issue.⁸⁴ In addition, Joint Intervenors raise the concern that PPL Corporation should have been excluded because a significant portion of the company's earning per share—at least at the time of PATH's filing in 2008—were derived from the delivery of power in foreign countries. They argue that the February 29 Order failed to address this issue and PATH failed to provide any underlying facts to support its inclusion in the proxy group.

57. To address these issues, we will set PATH's proposed proxy group and its base ROE for a full evidentiary hearing. In the hearing, PATH should be allowed to propose a new proxy group that is consistent with Commission policy and our guidance herein. Moreover, because PATH will be filing a new proxy group with updated data as part of the hearing, parties will have an opportunity to raise or re-raise issues regarding the composition of the proxy group and the risk relationship between PATH and the proxy group companies. We will not prejudge those issues here. Rather, subject to the guidance issued herein, parties will have ample opportunity to raise their factual and legal issues related to the companies in PATH's proposed proxy group.

58. In the February 29 Order, the Commission accepted PATH's proposed formula rate, including its proposed ROE, and suspended it for a nominal period. Consistent with those actions in the February 29 Order, PATH's rates are subject to refund.

59. With regard to PATH's baseline proxy group, parties raise questions regarding whether PATH should have been permitted to include certain companies based on their physical location. Joint Intervenors, for example, argue that the PATH erred by relying on "mere geographic proximity" to support its initial proxy group. Other parties, such as Joint Consumer Advocates, question how PATH could have used proxy companies with limited or no physical connection to PJM.

60. The Commission agrees with Joint Intervenors that "mere geographic proximity" is not the sole basis for inclusion of companies in a proxy group. As explained in a concurrently issued order on rehearing in *Atlantic Path 15, LLC*,⁸⁵ the Commission's

⁸⁴ *Pioneer*, 130 FERC ¶ 61,044 at P 37-39 (excluding any company whose low-end ROE failed to exceed the average bond yield by about 100 basis points or more, but took into account the extent to which the excluded low-end ROEs are outliers from the low-end ROEs of other proxy group companies).

⁸⁵ *Atlantic Path 15, LLC*, 133 FERC ¶ 61,153 (2010) (*Atlantic Path 15*).

obligation is to ensure that a filing company's proxy group consists of companies with comparable risks to those facing the applicant.⁸⁶ While geographic proximity may be a relevant factor in identifying companies with comparable risks, it is not the sole basis for inclusion of companies in a proxy group. Thus, the Commission will not mandate that a proxy group must be composed of companies in the same geographic region as the filing company.

61. Elaborating on this point, we also note in today's *Atlantic Path 15* rehearing order:

The question of which companies should be included in a proxy group is properly resolved based on the facts and circumstances of each case. In some cases, a filing company may rely solely on companies in its region to form a proxy group and to perform its DCF analysis, after demonstrating that these companies have comparable risk to the filing company. In other cases, a filing company may identify companies with comparable risk by looking beyond its geographic region. The filing company must, of course, fully support its choice of a proxy group, and intervenors are free to challenge the reasonableness of the filing company's choice.⁸⁷

62. At this point, we will not prejudge PATH's proxy group or the companies that should be included in that group. PATH has the burden of proposing a proxy group and justifying the companies in that proxy group. Parties will have the opportunity to challenge those companies in the evidentiary hearing.

63. We also provide guidance on the use of corporate credit ratings when determining PATH's ROE. Notwithstanding the arguments raised by several parties, we find that corporate credit ratings are a reasonable measure to use to screen for investment risk in incentive ROE cases. The Commission made this finding in the February 29 Order⁸⁸ and it is consistent with our established precedent.⁸⁹ While parties note that we have used

⁸⁶ *See id.* P 13.

⁸⁷ *Id.* P 14 (internal footnote omitted).

⁸⁸ *See* February 29 Order, 122 FERC ¶ 61,188 at P 97.

⁸⁹ *See Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 (2008); *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130 (2008); *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 60 (2008); *Southern California Edison Co.*, 131 FERC 61,020, at P 50-53.

other measures of risk in traditional rate cases (e.g., Value Line Safety Ranking⁹⁰), our incentive ROE cases have used corporate credit ratings as one basis for analyzing a company's financial and business risk.⁹¹ We disagree with parties that this was the sole arbiter of risk applied in the February 29 Order. Credit ratings are a key consideration in developing a proxy group that is risk-comparable. However, as we stated in the February 29 Order and reiterate herein, we considered multiple risk criteria in the final proxy group composition. We also considered the operations (business risk) and ensured that the proxy group consisted of only electric companies. We also considered the equity holders of the Project, excluded companies in the process of merger proceedings and natural gas companies, and considered proxy group companies with formula rates as representative in risk to PATH. Parties are free to consider in the hearing proceedings what companies should be included or excluded from the PATH proxy group based on corporate credit ratings.

64. In addition, as we stated in the February 29 Order and re-emphasize here, PATH's proxy group should be screened for unsustainable growth rates.⁹² The Commission found in the February 29 Order that a growth rate of 13.3 percent was unsustainable over time and, thus, did not meet the test of economic logic.⁹³ This finding is consistent with Commission precedent and was reaffirmed recently in *Southern California Edison Co.*⁹⁴ The Commission continues to find that a 13.3 percent growth rate is unsustainable and serves as a basis for excluding companies from PATH's proxy group. Parties are free to consider in the hearing proceedings what companies should be included or excluded from the PATH proxy group having growth rates below 13.3 percent.

⁹⁰ See, e.g., *Southwestern Pub. Serv. Co.*, 37 FERC ¶ 63,012, at 65,128 (1986) (stating that staff determined a company was less risky than the industry average based upon, among other criteria, the Value Line Safety Rank). See also *Kern River Gas Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034, at P 137 (2009).

⁹¹ See February 29 Order, 122 FERC ¶ 61,188 at P 97. See also Standard & Poor's General Description of Corporate and Government Ratings Credit Rating Methodology (http://www2.standardandpoors.com/spf/pdf/fixedincome/general_description_corpgovt_rating_methodology.06.26.07.pdf).

⁹² February 29 Order, 122 FERC ¶ 61,188 at P 98.

⁹³ *Id.* P 100 (citing *Bangor Hydro-Elec. Co.*, 109 FERC ¶ 61,147 at P 205). See also *Bangor Hydro-Elec. Co.*, 111 FERC ¶ 63,048, at P 62-63 (2005) (*Initial Decision*), *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129, at P 24 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarification*, 124 FERC ¶ 61,136 (2008).

⁹⁴ 131 FERC ¶ 61,020, at P 57 (2010).

65. With regard to the midpoint/median issue, we agree with parties that the median⁹⁵—rather than the midpoint⁹⁶—should be used to help determine PATH's base ROE on which to apply ROE incentive adders. While the Commission has used the midpoint for determining a base ROE for a diverse group of electric transmission owners in a RTO, we find that the median is the most accurate measure of central tendency for a single utility of average risk, such as PATH. This determination is consistent with our precedent for electric utilities where we have drawn a distinction between the use of the midpoint for RTOs and the use of the median for a single company of average risk.⁹⁷ Accordingly, we instruct the hearing judge to use the median in determining PATH's base ROE on which to apply the ROE incentive adders discussed below.⁹⁸

66. We deny Joint Consumer Advocates' request for rehearing on the Treasury Bond yield adjustment and changes in growth rates. Because we are setting the base ROE for settlement and hearing as discussed herein, Joint Consumer Advocates' concerns on the changes in growth rates and the use of stale data will be resolved as part of the hearing and settlement proceedings ordered herein.⁹⁹

67. While we are setting the base ROE for a trial-type evidentiary hearing, we encourage the participants 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

⁹⁵ The median is calculated by first averaging the low end ROE and high end ROE results for each member of the proxy group, and then sorting those averages from lowest value to highest value, and selecting the central value in the sequence. Where there is an even number of results, the median is the average of the two central numbers.

⁹⁶ The midpoint is the average of the highest and lowest data points in the range of reasonable returns.

⁹⁷ *Midwest Indep. Transmission System Operator, Inc.*, 106 FERC ¶ 61,302, at P 8-15 (2004); *Pioneer*, 130 FERC ¶ 61,044; *Southern California Edison Co.*, 131 FERC ¶ 61,020, at P 84-93 (2010).

⁹⁸ As discussed in more detail below, this order continues to find that PATH's requested ROE incentives, including a 50 basis point adder for RTO membership and a 150 basis point adder for the risks and challenges associated with the Project, are just and reasonable. The final ROE for the Project will be bounded by the range of reasonableness determined in these proceedings.

⁹⁹ See *Southern California Edison Co.*, Opinion No. 445, 92 FERC ¶ 61,070 at 61,267 (2000) (Commission found that reopening the record at hearing allowed parties to use current data in setting the company's base ROE and thus, requiring the company to update the ROE based on Treasury Bond data was unnecessary).

hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁰⁰ 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.¹⁰¹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions.

68. 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.

2. Errors Related to Transmission Incentives

a. February 29 Order

69. In the February 29 Order, the Commission granted various transmission incentives under Order No. 679 and section 219 of the FPA. These incentives included: (1) an ROE of 14.3 percent which was within the high end of the zone of reasonableness; (2) a 50 basis point adder to PATH's authorized ROE for becoming a member of PJM which was included as part of the 14.3 percent ROE; (3) 100 percent of CWIP in rate base; (4) permission to file for recovery of development and construction costs if the project is abandoned for reasons beyond PATH's control; (5) permission to use a hypothetical capital structure of 50 percent debt and 50 percent equity during the construction period; and (6) authorization to include in rate base an unamortized regulatory asset, consisting of deferred pre-commercial expenses not included in CWIP, and to amortize the deferred amounts during the construction period. In addition, the Commission authorized PATH to apply and accrue carrying charges on the regulatory asset using an AFUDC rate until the deferred amounts are included in rate base on the requested effective date of March 1, 2008, to reflect the time value associated with these expenditures.

b. Arguments on Rehearing

i. ROE Incentive

70. Parties raise various arguments related to the Commission's determination to grant PATH's requested incentives, especially the ROE of 14.3 percent. Parties state that the

¹⁰⁰ 18 C.F.R. § 385.603 (2010).

¹⁰¹ 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 – click on Office of Administrative Law Judges).

14.3 percent ROE is unjust and unreasonable because it does not adequately balance the primary aim of the “just and reasonable” standard, which is to protect consumers from excessive rates, against the need to attract capital for PATH.¹⁰² Parties state that the Commission’s determination that it may set the ROE at any point in the zone of reasonableness is contrary to Commission precedent.

71. Joint Consumer Advocates argue that the Commission reversed longstanding precedent and prior policy by expanding the ROE consideration to include the full range of reasonableness so as to make eligible for incentive ratemaking the very top of that range.¹⁰³ Joint Consumer Advocates further argue that if all points in the zone set by the Commission were reasonable, then the Commission theoretically could have granted an ROE of only 6.7 percent.¹⁰⁴ They assert that the Commission’s decision will not withstand review under the Administrative Procedures Act if the Commission were to premise a policy for the DCF methodology in “an effort to obtain the highest rate of return. . . .”¹⁰⁵

72. Nor do parties agree that risks associated with the Project are sufficient to justify an incentivized ROE of 14.3 percent. Joint Intervenors argue that the general risk criteria applied here—i.e., the need for siting approval in multiple states, the “sheer size” of the Project, the need for coordination among multiple service territories, and the aggressive timetable for completion—are generic and speculative. They do not believe that such generalized risks can be used to justify the ROE incentive. Joint Intervenors and Maryland Commission further contend that PATH’s parent companies (AEP and Allegheny) help to reduce or ameliorate any risk associated with the Project. They assert that the joint venture should reduce risk associated with siting approval and the coordination in multiple states and service territories. They assert that merely citing to sheer size of the Project is meaningless without a frame of reference to the size of the company or the parent companies.¹⁰⁶

73. Joint Intervenors argue that because Order No. 679-A states, “it may be difficult to meaningfully distinguish between an ROE that appropriately reflects a utility’s risk and

¹⁰² Joint Consumer Advocates March 31, 2008 Request for Rehearing at 4 (citations omitted); Maryland PSC March 31, 2008 Request for Rehearing at 9.

¹⁰³ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 50.

¹⁰⁴ *Id.* at 49.

¹⁰⁵ *Id.* (citing *Public Serv. Comm’n of Kentucky v. FERC*, 397 F.3d 1004, 1006 (D.C.Cir. 2005)).

¹⁰⁶ Joint Intervenors March 31, 2008 Request for Rehearing at 23; Maryland PSC March 31, 2008 Request for Rehearing at 12.

ability to attract capital and an ‘incentive’ ROE to attract new investment,” a comparative risk analysis between an incentive ROE and a traditional non-incentive ROE cannot be summarily resolved, but necessarily involves issues of material fact that compel a hearing.¹⁰⁷ Joint Intervenors also raise the question of whether there is double-counting for essentially the same risk factor expressed in different ways. Joint Intervenors argue that the Commission cited to “significant risks related to the magnitude of the financial investment required,”¹⁰⁸ but this claim is difficult to separate from the “sheer size” of the project claim, also expressed in dollar terms.¹⁰⁹

74. Joint Intervenors argue that the Commission erred in justifying PATH’s allowed ROE based on the alleged significant time period that may pass before any costs are recovered.¹¹⁰ Joint Intervenors argue that the Commission erred because PATH’s formula rates go into effect March 1, 2008, and these rates include an allowance for CWIP in rate base, which will include an estimated \$430 million during the construction period from 2008 to 2012.¹¹¹ Joint Intervenors argue that this belies the Commission’s justification that a significant time period may pass before any costs are recovered, and to the extent the Commission relied upon this justification to grant a higher ROE, that adjustment was in error and should be corrected on rehearing.¹¹²

ii. Need for a Hearing

75. Joint Intervenors argue that there are disputed issues of material fact in how PATH justified an ROE in the high end of the zone of reasonableness. Specifically, Joint Intervenors argue that the analysis under section 219 of the FPA to determine an “incentive” ROE is not distinguishable from how a traditional risk-appropriate ROE is calculated for an applicant utility. Joint Intervenors cite to Order No. 679-A, which states that “it may be difficult to meaningfully distinguish between an ROE that appropriately reflects a utility’s risk and ability to attract capital and an ‘incentive’ ROE to attract new investment.” Accordingly, Joint Intervenors argue that comparative risk analysis

¹⁰⁷ Joint Intervenors at 22-23 (citing Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 15).

¹⁰⁸ *Id.* at 25.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 38.

¹¹¹ *Id.* (internal citations omitted).

¹¹² *Id.* (internal citations omitted).

between an incentive ROE and a traditional non-incentive ROE cannot be summarily resolved, but necessarily involves issues of material fact that compel a hearing.¹¹³

76. Joint Consumer Advocates argue that although it may be difficult to measure the reductions in risk with finite detail, it is impossible to determine outside of hearing and discovery to assess whether such reductions in risk can be any more precisely measured. However, the Commission did not explain how such a measure of the “reduction in risk” should be achieved generally, and how it is achieved in the instant case, and therefore, this issue must be reheard and set for hearing.¹¹⁴

iii. Failure to Consider Overall Package of Incentives

77. Parties argue that the February 29 Order failed to adequately analyze the overall package of incentives, as required by Order Nos. 679 and 679-A. In particular, they assert that the Commission did not adequately address the reduced risk associated with the non-ROE incentives (i.e., recovery of CWIP, recovery of abandonment costs, the right to amortize pre-construction costs over a five-year period, and the right to use a hypothetical capital structure) and the higher, incentivized ROE.¹¹⁵ Parties note that the Commission highlighted numerous financial advantages and reductions in risk resulting from the numerous incentives granted to PATH: increased cash flow, reduction in interest expense, assistance with financing, improved coverage ratios used by credit rating agencies in determining credit quality, reduction in investment risk associated with approval of the abandonment incentive, and lower debt costs.¹¹⁶ All of these factors, according to parties, serve as a basis for not granting an ROE of 14.3 percent.

78. In addition, Joint Intervenors argue that the February 29 Order conflicts with Commission policy, as enunciated in *Southern California Edison Co.*¹¹⁷ In that case, Joint Intervenors note the Commission reduced the ROE adder because it granted two other transmission incentives, including recovery of CWIP and recovery of abandonment costs.¹¹⁸

¹¹³ *Id.* at 22-23.

¹¹⁴ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 52.

¹¹⁵ *Id.* at 50-52; AMP-Ohio March 31, 2008 Rehearing Request at 21-22; Maryland PSC March 31, 2008 Request for Rehearing at 21; Joint Intervenors March 31, 2008 Request for Rehearing at 32-33.

¹¹⁶ Joint Consumer Advocates March 31, 2008 Request for Rehearing at 51-52.

¹¹⁷ 121 FERC ¶ 61,168, at P 143 (2007).

¹¹⁸ Joint Intervenors March 31, 2008 Request for Rehearing at 32.

iv. Public Power Participation

79. AMP-Ohio argues that the Commission erred in denying AMP-Ohio's earlier protest that PATH should be denied the enhanced ROE because PATH rejected AMP-Ohio's offer to finance part of the Project. While AMP-Ohio understands that public power participation is not a requisite of incentive approval, it believes that its offer to finance would have reduced financing risks related to the Project. Had PATH accepted AMP-Ohio's financing, AMP-Ohio argues that PATH would have obtained financing at lower, tax-exempt rates, and financing that would have been spread among multiple investors. AMP-Ohio argues that PATH's rejection of public financing demonstrate that that PATH is not as concerned about the level of risk it claims and the incentives should be tempered to reflect this lower risk.¹¹⁹

c. Commission Determination

80. As a preliminary matter, we note that in their requests for rehearing, parties raised various arguments that generally challenge the incentivized overall ROE of 14.3 percent granted in the February 29 Order. We need not address all of those arguments here because we are not establishing an overall ROE for PATH in this order. PATH's overall ROE will depend on the outcome of the hearing and settlement proceedings, as discussed above, which will address issues related to PATH's base ROE. However, to the extent that parties' arguments relate to the incentives granted in the February 29 Order, we address those issues below.

81. As the Commission stated in *Pepco Holdings, Inc.*, "[e]ach case must be analyzed on its merits to determine if the incentives requested are justified."¹²⁰ In the February 29 Order, the Commission found that the Project is worthy of transmission incentives under Order No. 679. The Commission granted PATH an incentivized overall ROE, but did not identify what portion of that overall ROE reflected incentive ROE adders.¹²¹ We continue to believe that the Project is worthy of ROE incentives.

82. Specifically, we find here that PATH is entitled to receive a 50 basis point incentive ROE adder to its base ROE for becoming a member of PJM and a 150 basis point incentive ROE adder to its base ROE for the risks and challenges related to the Project.¹²²

¹¹⁹ AMP-Ohio March 31, 2008 Request for Rehearing at 24-26.

¹²⁰ *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130, at n.96 (2008).

¹²¹ February 29 Order, 122 FERC ¶ 61,188 at P 104, 120-121.

¹²² Other incentives that the Commission granted in the February 29 Order were not challenged on rehearing. Therefore, PATH also remains entitled to: (1) ability to recover 100 percent of CWIP in rate base; (2) ability to recover development and

83. As noted in the February 29 Order, the Project is significant in both size and scope and will relieve transmission constraints along a critical mid-Atlantic corridor.¹²³ In the February 29 Order, the Commission found that the Project faces considerable financial risks and will face many challenges due to siting a Project across multiple states and control areas. The Commission further found that these risks would increase because of the long lead time of the Project. The Project also faces risks associated with the proposed use of advanced technologies that are relevant to the Commission's nexus analysis under Order No. 679. Such technologies include advanced conductor design, fiber optic shield wires, wide-area monitoring and control, remote station equipment diagnostics and security and large static var compensator with enhanced controls, boosting line loadability from 2,700MW to 4,000MW.¹²⁴ The incentive ROE adders will be added to the median base ROE, to be established pursuant to the hearing and settlement proceedings discussed herein. In addition, the overall ROE for the Project will be bounded by the range of reasonableness determined in those proceedings.

84. We disagree with the assertion that the Commission erred in the February 29 Order by using the same "risks" for both PATH's base ROE and its incentives under Order No. 679. While there may be some "risks" that were relevant to both determinations, those risks are not the only factors that the Commission considered. For example, with regard to our determination on the ROE incentive, the Commission also examined the scope of the Project (e.g., dollar investment, increase in transfer capability, involvement of multiple entities or jurisdictions, size, effect on region) and the effect of the Project on reliability and congestion.¹²⁵ The February 29 Order was consistent with our precedent in this respect, and we will not grant rehearing.

construction costs if the Project is abandoned for reasons beyond PATH's control; (3) permission to use a hypothetical capital structure of 50 percent debt and 50 percent equity during the construction period; and (4) authorization to amortize the regulatory asset during the construction period and to include the unamortized portion of the regulatory asset costs in its rate base. Additionally, PATH may apply and accrue carrying charges on the regulatory asset using an AFUDC rate until the deferred amounts are included in rate base to reflect the time value associated with these expenditures. PATH must record the accrual of any carrying charges in Account 421, Miscellaneous Nonoperating Income, pursuant to the accounting direction in Order No. 552. *Revisions to Uniform Systems of Accounts to Account for Allowances under the Clean Air Act Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2 and 2-A*, Order No. 552, FERC Stats. & Regs. ¶ 30,967 at 30,825.

¹²³ February 29 Order, 122 FERC ¶ 61,188 at P 91.

¹²⁴ PATH December 28, 2007 Filing, Ex. PTH-100 at 22-35.

¹²⁵ *Id.* P 58 & n.61, P 91; see also *Baltimore Gas & Elec. Co.*, 120 FERC ¶ 61,084, P 52 (2007).

85. Nor do we agree with Joint Intervenors' assertion that the Commission erred by granting both CWIP and an ROE incentive. As the Commission emphasized in Order No. 679, the CWIP incentive and ROE incentive serve two separate purposes. The inclusion of CWIP in rate base enhances cash flow, reduces interest expense, and assists utilities with financing, all of which were important to PATH given the long lead time and significant outlay of capital associated with the Project. In contrast, a higher ROE encourages new transmission investment because it provides a longer term higher ROE after the project comes on line, only for that new investment, and makes that transmission project more attractive as an investment.¹²⁶ We continue to find that both incentives are just and reasonable in this case.

86. We also reject Joint Intervenors' assertion that the Commission should have set PATH's requested incentives for hearing. Contrary to Joint Intervenors' claim, the Commission's analysis of risks and challenges associated with an incentive request is not a comparative analysis. Rather, as the Commission emphasized in the February 29 Order, the Commission's risk analysis is "fact-specific and requires the Commission to review each application on a case-by-case basis."¹²⁷ It is not a comparative analysis, but instead focuses on the project requesting incentives. There was ample evidence on the record to make this determination without a hearing. We will reject Joint Intervenors' argument that we should have set the incentives for hearing.

87. Similarly, we deny AMP-Ohio's request for rehearing that the February 29 Order failed to address the reduction in risk that would have occurred if PATH accepted AMP-Ohio's offer to contribute public financing for the project. This argument is speculative. However, even if there was a reduction of risk, we nevertheless find that the risk and challenges associated with the Project, as well as the other factors that we considered (size and scope of project and its effect on reliability), justified the requested incentives.

88. Finally, we do not agree with Joint Intervenors' assertion that PATH's incentivized ROE should be reduced because PATH employs formula rates and was granted other incentives. The Commission finds that PATH's use of a formula rate does not prevent PATH from receiving an incentivized ROE or other rate incentives. While a formula rate is designed to improve cash flow by providing for the timely and administratively efficient recovery of costs, the very purpose of the incentive rates is to provide additional rate assurance in order to encourage investment in the Project.¹²⁸

¹²⁶ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 91, 115.

¹²⁷ February 29 Order, 122 FERC ¶ 61,188 at P 32 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 18).

¹²⁸ See Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 1.

89. After careful consideration of the facts in the record, we continue to find that PATH is entitled to the package of incentives discussed herein. The effect of an incentive ROE adder, the non-ROE incentives, and the formula rate are cumulative, not mutually exclusive, and together will encourage investment in the Project. Here, the Commission finds that these incentives are appropriately tailored to address the specific, demonstrable risks and challenges faced by PATH in developing the Project.¹²⁹ We find that this combination of factors merits the package of incentives requested and granted herein.

C. Settlement Agreement

1. February 29 Order

90. In the February 29 Order, the Commission set for hearing and settlement judge procedures the formula rate and protocols, which are set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Tariff.

2. Settlement Agreement

91. On December 10, 2008, PATH filed on behalf of the Settling Parties, a Settlement Agreement and accompanying materials pursuant to Rule 602 of the Commission's Rules of Practice and Procedure. PATH also filed, pursuant to Section 3.1 of the Settlement Agreement, an unopposed Motion for Interim Rates and Request for Expedited Action. The motion requested that the Settlement Agreement rates be placed in effect on an interim basis, pending Commission approval of the Settlement Agreement, on or before December 18, 2008. On December 16, 2008, the Chief Judge issued an order that placed the Settlement Agreement rates into effect on an interim basis as of December 18, 2008.

92. On December 31, 2008, PATH filed an errata to correct inadvertent clerical errors in Exhibits 1 (clean revised tariff sheets) and 2 (clean redlined revised tariff sheets) of the Settlement Agreement.

93. On January 16, 2009, the Settlement Judge certified the Settlement Agreement to the Commission as uncontested.

94. Article I of the Settlement Agreement sets forth the procedural background and scope of the Settlement. It provides that the Settlement Agreement (i) does not affect pending requests for rehearing of the Commission's February 29 Order to the extent that

¹²⁹ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21, 27; *see also* *Duquesne Light Co.*, 125 FERC ¶ 61,028, at P 57 (2008); *Duquesne Light Co.*, 118 FERC ¶ 61,087 at P 76 (2007).

those rehearing requests seek rehearing of issues not set for hearing and (ii) is conditioned on acceptance of the Settlement Agreement in its entirety, without condition or modification by the Commission.

95. Article VI outlines the standard of review for modifications. Section 6.2 states that “Nothing herein shall be construed as affecting in any way the right of any other Settling Party unilaterally to make an application of any type to the Commission to modify in prospectively, in whole or in part, the Formula Rate or Protocols under [s]ection 206 of the FPA. . ..” Article VI, Sections 6.3 and 6.4 provide, respectively, that: (i) the Settlement does not affect the Commission’s right to act *sua sponte* to modify prospectively the Formula Rate or Protocols; and (ii) the Commission shall apply the “just and reasonable” standard of review” to any modifications to the Settlement or the tariff sheets submitted as part of the Settlement. Section 6.4 also provides that “changes proposed by a non-party or by the Commission acting *sua sponte* shall also be subject to the ‘just and reasonable’ standard of review.”

3. Comments or Protest

96. Trial Staff filed comments on the Settlement Agreement, noting that the Settlement Agreement, pursuant to Section VIII of the Protocols, explicitly defers the issue of whether prior period errors, including errors in data applied in the formula rate, if any, must be corrected. Ultimately, Trial Staff believes that the various revisions to the initial filing have produced a Formula Rate and Protocols that are substantially more transparent and understandable to customers. Therefore, Trial Staff believes that the Settlement Agreement is fair and reasonable and in the public interest. Trial Staff recommends that the Settlement Agreement be approved by the Commission.

97. The Pennsylvania Commission filed brief initial comments, explaining that it does not oppose the Settlement Agreement. However, the Pennsylvania Commission requests that the Commission take notice that the Settlement Agreement does not settle or resolve ROE or incentive questions pending rehearing.

4. Commission Determination

98. The Settlement resolves all outstanding issues set for hearing in the February 29 Order. The Settlement is fair, reasonable, and in the public interest, and is hereby approved. However, the Commission’s approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

99. PATH’s formula rate will be determined using data contained in PATH Allegheny Company, L.L.C.’s (PATH-Allegheny) and PATH West Virginia Transmission

Company, L.L.C.'s (PATH-WV)¹³⁰ FERC Form No. 1 to reflect PATH's transmission revenue requirement. To build portions of the Project in Virginia and Maryland, PATH-Allegheny was required to create two new subsidiaries, PATH Allegheny Virginia Transmission Corporation (PATH-VA) and PATH Allegheny Maryland Transmission Company LLC (PATH-MD), to own portions of the Project. Therefore, PATH-Allegheny sought authorization to file a consolidated FERC Form No. 1 to include the financial information of PATH-VA and PATH-MD.¹³¹ By letter orders dated September 28, 2009, and August 5, 2010, the Chief Accountant approved¹³² PATH-Allegheny's request to file a consolidated FERC Form No. 1 to allow PATH-Allegheny to include all assets and activities in its books upon which its rates are determined.¹³³

The use of consolidated financial information contained in the FERC Form No. 1 could increase the risk that costs may be recovered more than once through PATH's formula rates. To guard against the over-recovery of costs through the formula rate and ensure transparency of PATH-Allegheny's consolidation with PATH-VA and PATH-MD, we will require that PATH-Allegheny disclose in the notes to the financial statements in its FERC Form No. 1 the accounting and control procedures employed to prevent the potential over-recovery of costs resulting from consolidation.

100. To the extent that costs are shared between affiliates, we will require that the PATH companies describe the specific cost allocation methodology used for each cost category for recording of shared costs between affiliated companies and parent, including

¹³⁰ PATH consists, in part, of two operating companies including 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. These companies (jointly, PATH Operating Companies) were organized to finance, construct, own, operate, and maintain the Project.

¹³¹ Applicants requested and the Chief Accountant approved all necessary waivers under 18 C.F.R. § 141.1, FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees, and Others; 141.2, FERC Form No. 1-F, Annual Report for Nonmajor Public Utilities and Licensees; and 141.400, FERC Form No. 3-Q, Quarterly Financial Report of Electric Utilities, Licensees, and Natural Gas Companies, to permit consolidation of financial information related to PATH-VA's and PATH-MD's activities into PATH-Allegheny's FERC Form No. 1.

¹³² *Allegheny Energy, Inc.*, Docket Nos. AC09-168-000 (September 28, 2009) and AC10-56-000 (August 5, 2010) (unpublished letter orders).

¹³³ See PATH's formula rate and implementation protocols at PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1, Original (and Revised) Sheet Nos. 314J through 314ZZ.

calculations of direct and indirect rates applied to shared services in the notes to the financial statements of their FERC Form No. 1. The representations made with respect to consolidation accounting and cost allocation are subject to audit by the Commission.

The Commission orders:

(A) The Settlement Agreement is hereby approved, as discussed in the body of this order.

(B) Rehearing and/or clarification of the February 29 Order is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(C) PATH-Allegheny is hereby directed to provide, as part of its annual FERC Form No. 1 filings, the accounting and control procedures that it used to prevent the potential over-recovery of costs resulting from consolidation.

(D) PATH Operating Companies are hereby directed to describe in their annual FERC Form No. 1 filings, the specific cost allocation method for each cost category for recording of shared costs between affiliated companies and parent, including calculations of direct and indirect rates applied to shared services.

(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 proposed base ROE. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (F) and (G) below.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (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 five (5) days of the date of this order.

(G) Within thirty (30) days of the appointment of the settlement judge, 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 sixty (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 fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such 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. Chairman Wellinghoff concurring with a separate statement attached.

Commissioner Norris concurring with a separate statement to be issued at a later date.

Commissioner Moeller is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Potomac-Appalachian Transmission
Highline, L.L.C.

Docket Nos. ER08-386-000
ER08-386-001

(Issued November 19, 2010)

WELLINGHOFF, Chairman, *concurring in part*:

I support today's decision to establish a hearing on issues related to PATH's base return on equity (ROE). I write separately to discuss the relationship between that action and statements made in my partial dissent to the underlying order in this proceeding.

In the underlying order, the majority established an overall, incentivized ROE for PATH of 14.3 percent without first establishing a base ROE. In my partial dissent to that order, I explained that by failing to establish a base ROE, the majority skipped an important step in assessing the appropriate relationship between the incentive ROE adders to be granted to an applicant and that applicant's overall ROE. To address that shortcoming, I further explained that based on the proxy group on which the majority relied to establish a zone of reasonableness and PATH's separate proposal to use the midpoint of its proposed proxy group, I would have granted PATH an overall ROE of 13.1 percent to reflect a base ROE of 11.35 percent and incentive ROE adders.

For the reasons discussed in today's order, the Commission is setting for hearing certain matters related to PATH's base ROE. I support that action, as well as the Commission's decision to grant PATH substantial incentive ROE adders. Until the hearing and settlement procedures set in today's order are complete, it is not possible to establish an overall ROE for PATH, at either the 13.1 percent level that I calculated in my prior dissent or at another level. When those procedures are complete, I will consider the enhanced record in determining the appropriate overall ROE for PATH.

Jon Wellinghoff
Chairman

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Potomac-Appalachian Transmission
Highline, L.L.C.

Docket Nos. ER08-386-000
ER08-386-001

(Issued November 29, 2010)

Attached is the separate statement by Commissioner Norris concurring to an order issued on November 19, 2010, in the above-referenced proceeding, *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (2010).

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Potomac-Appalachian Transmission
Highline, L.L.C.

Docket Nos. ER08-386-000
ER08-386-001

(Issued November 29, 2010)

NORRIS, Commissioner, *concurring*:

I support the Commission's decision in this order to grant rehearing of the up-front determination of the return on equity (ROE) for Potomac-Appalachian Transmission Highline, L.L.C. (PATH) made in the February 29 order, and to set PATH's proposed proxy group and ROE for hearing and settlement judge procedures.

I also concur in the Commission's ultimate decision to grant the transmission rate incentives requested by PATH. I write separately, however, to discuss the broader issue of the Commission's transmission rate incentive policy and how the incentive rate set in this order is representative of my concerns with Commission policy on this issue.

As I have stated previously, I strongly believe our nation needs to invest in and build out our transmission infrastructure. We are asking our transmission system to perform a number of functions, such as supporting state and federal public policy objectives, enabling vibrant wholesale power markets, and incorporating new technologies. These demands are being placed on a grid that is aging, and that nearly everyone agrees will need to be updated and expanded to help achieve our nation's energy and environmental policy goals.

It has been more than five years since Congress, in the Energy Policy Act of 2005 (EPAc 2005), directed the Commission to provide for incentive rate treatments for transmission infrastructure investment. That legislation added a new section 219 to the Federal Power Act (FPA), which required the Commission to:

establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.¹

¹ 16 U.S.C. § 824s.

In response to this direction from Congress, the Commission issued Order No. 679² in 2006, adopting regulations to guide how the Commission would review requests from public utilities for various kinds of transmission rate incentives.

Since joining the Commission, I have voted on a few occasions (mostly in orders on rehearing) to grant or affirm a previous grant of various transmission incentives for new transmission infrastructure projects.³ I have struggled, however, with applying Order No. 679 and the Commission's precedent to date under that order.

In particular, I am troubled by the lack of a limit on incentive rate amounts, and the absence of a clear analysis that articulates the balance achieved by the project's risks and rewards and its benefits to consumers. Under our policy in Order No. 679, the only limit for the final ROE for incentive rate cases is determined by the base ROE and the accompanying range of reasonableness. With no limit on incentive rate amounts, I believe the current policy will naturally lead to a ratcheting up of transmission rates over time. Furthermore, with no Commission range established for incentive rates it is difficult to determine a project's incentive award relative to its impact on consumer benefits or relationship to risks and challenges compared to other projects.

To be sure, determining the appropriate type and level of rate incentives that should be granted to a project is more art than science. To be eligible for incentive rate treatment under Order No. 679, a project need only pass the rebuttable presumption test for addressing reliability or congestion and then establish a nexus between the requested incentives and the risks and challenges faced by the project. The Commission then determines the appropriate level of incentives on a case-by-case basis. In reviewing particular requests for ROE adders and other rate incentives, the Commission exercises its considerable discretion to decide which projects need or merit enhanced rate treatment. Under the Commission's current approach to incentives, however, it has not articulated a range of potentially acceptable incentive ROE adders, and then drawn meaningful conclusions in individual cases as to why a particular level of incentive ROE adders within that range was awarded. In other words, the art of setting incentive rates is too abstract in an industry where consistency is important.

² *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (Order No. 679), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006) (Order No. 679-A), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

³ *See, e.g., Baltimore Gas & Electric*, 130 FERC ¶ 61,210 (2010); *PSE&G*, 131 FERC ¶ 61,028 (2010).

Additionally, the Commission's current approach may not appropriately balance the different types of incentives awarded to a project. Some incentives, such as the collection of rates during construction work in progress (CWIP) and the approved recovery of prudently incurred costs if the project is abandoned, serve to substantially lower risk for investors in the project. Other kinds of incentives, such as an incentive ROE adder, give investors the opportunity for greater rewards. The Commission has not articulated a sufficiently clear framework to balance requests for packages of incentives that individually seek to both limit downside risk and provide greater potential upside rewards.

The order on PATH's request for incentives exemplifies some of the difficulty I have had assessing transmission rate incentives under the Commission's current policies. In the order, we grant a total of 200 basis points of ROE adders: 50 basis points for participation in an RTO, and 150 additional basis points "for the risks and challenges related to the Project."⁴

The Commission's determination does not balance the effect of the risk reducing rate treatments granted to PATH, including CWIP and abandoned plant, against the incentive ROE adders that are also granted. We need to be able to offer consumers a clear story as to why the level and package of incentives we grant is necessary and then how it reasonably compares to other incentive award projects.

To be clear, I do believe that the PATH Project is worthy of some level of rate incentives. Without question, PATH involves a number of high risk factors such as crossing multiple state boundaries and deploying new technologies to address a critical reliability need and relieve transmission constraints along a critical mid-Atlantic corridor. My concurrence on this order should not be read to suggest that I do not believe that PATH's Project is worthwhile and important.

I am also sensitive to the fact that this order is on rehearing, and that PATH was originally granted an incentivized ROE nearly three years ago.⁵ Had this request for incentives come before me for the first time, I might have supported a different set and level of incentives. A 200 basis point incentive is a significant amount to add on top of a

⁴ *Potomac-Appalachian Transmission Highline, LLC*, 133 FERC ¶ 61,152, at P 82 (2010).

⁵ Additionally, the Commission individually granted two separate projects that ultimately become the PATH Project rate incentives over four years ago. *See Allegheny Energy Inc.*, 116 FERC ¶ 61,058 (2006), *order on reh'g*, 118 FERC ¶ 61,058 (2007); *Amer. Elec. Power Serv. Corp.*, 116 FERC ¶ 61,059 (2006), *order on reh'g*, 118 FERC ¶ 61,041 (2007).

base ROE that has been determined to be just and reasonable. According to the Maryland Commission, 200 basis points added to PATH will cost ratepayers in PJM at least \$18 million per year.⁶ As I noted earlier, had the Commission established an incentive rate range, for example zero to 200 basis points, this would have enabled the Commission to place the incentive package for PATH within that range as compared to other projects. If such a policy were in place, PATH may not have been at the high end but still higher than most projects, given the benefits to consumers it will provide.

However, I believe regulatory certainty benefits consumers by lowering the overall cost of capital for utility businesses and it is important to allow PATH and similarly situated entities to continue with their projects. For that reason, I support the ultimate outcome in today's order.⁷

Nonetheless, I am concerned that, to date, the Commission's transmission rate incentives policies have become too one-sided, approving a similar level of incentives for nearly all transmission projects that are proposed. As a result, it has become difficult for the Commission to weigh what particular level of incentives is appropriate for individual projects, and to balance the potential impacts of these incentives on consumers. While there may be periods where it makes sense to provide greater incentives across the board to help new transmission projects compete for capital, these incentives must always work to benefit consumers.

Moreover, a transmission rate incentives policy tipped too far in favor of granting similar incentives to a majority of transmission projects may well prove problematic as more transmission projects are proposed. Such a policy runs the risk that in the future the Commission will not have a good basis on which to target rate incentives to particular projects. Rate incentives can and should be a regulatory tool to address the risks and challenges of particularly difficult projects, or provide an additional possible reward for projects that have the potential to provide significant benefits to consumers. But we must clearly articulate the rationale for granting incentives to each individual project in order to mitigate increasing public opposition to new transmission infrastructure that will be vital to our nation's energy future.

In light of these concerns and the passage of time since EAct 2005 and Order No. 679, I believe the Commission should reassess its policies regarding transmission rate

⁶ Maryland PSC March 31, 2008 Request for Rehearing, Docket No. ER08-386-001, at 6 (explaining that every 100 basis point increase in ROE costs ratepayers \$9 million per year).

⁷ While regulatory certainty is an important consideration in my decision on PATH, I will evaluate incentive rates granted in rehearing orders on a case-by-case basis.

incentives, to ensure that those incentives are working to encourage the construction of transmission projects that meet identified needs and ultimately provide benefits to consumers. I hope that the thoughts and concerns that I express in this concurrence will spur more public discussion and identification of potential reforms to transmission rate incentive policies.

For the foregoing reasons, I respectfully concur.

John R. Norris, Commissioner