

145 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Delmarva Power and Light Company

Docket Nos. ER05-515-000
ER09-1158-000

ORDER GRANTING IN PART, AND DISMISSING IN PART, FORMAL
CHALLENGES, SUBJECT TO REFUND, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued October 17, 2013)

1. On May 13, 2011, pursuant to the terms of a 2006 settlement (Settlement)¹ and the governing provisions of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT), Delmarva Power & Light Company (DP&L) made an informational filing with the Commission detailing DP&L's computation of its 2011 formula transmission rate (2011 Annual Update). On December 2, 2011, the Delaware Municipal Electric Corporation, Inc. (DEMEC) filed a Formal Challenge (2011 Formal Challenge) pursuant to the Formula Rate Implementation Protocols (Protocols), disputing certain aspects of DP&L's filing. On May 14, 2012, DP&L made an informational filing with the Commission detailing DP&L's computation of its 2012 formula transmission rate (2012 Annual Update). On December 17, 2012, DEMEC filed a Formal Challenge (2012 Formal Challenge) to DP&L's 2012 Annual Update. As discussed below, we grant in part, and reject, in part, the Formal Challenges² and otherwise set the 2011 Annual Update and 2012 Annual Update for hearing and settlement judge procedures.

¹ See *Baltimore Gas and Elec. Co.*, 115 FERC ¶ 61,066 (2006).

² The 2011 Formal Challenge and 2012 Formal Challenge are referred to herein jointly as "Formal Challenges."

I. Background

A. The Formula Rate

2. On January 31, 2005, in Docket No. ER05-515-000, DP&L³ filed proposed formula rates for recovery of its transmission service revenue requirements.⁴ On April 19, 2006, the Commission approved DP&L's Formula Rate as part of an uncontested Settlement.⁵

3. The Settlement delineates the process for determining transmission rates and cost recovery within the DP&L transmission zone. Pursuant to the Settlement, DP&L utilizes a Formula Rate set forth in Attachment H-3 of the PJM OATT to calculate its Annual Transmission Revenue Requirement (ATRR). The Formula Rate consists of a template that is populated using DP&L's FERC Form No. 1 data for the most recent calendar year and other per book costs and revenues "consistent with FERC accounting policy," as explained more fully below.⁶

B. The Protocols

4. DP&L's Protocols establish the legal framework for the development and review of the Formula Rates. DP&L's Protocols were approved as part of a Settlement Agreement in *Baltimore Gas and Electric Co.*, 115 FERC 61,066 (2006).⁷ Pursuant to the Protocols, DP&L annually submits its initial calculations for informal review by interested parties, and then files the results with the Commission as an informational filing (Annual Update). Section 1 of the Protocols requires DP&L to recalculate its ATRR and produce an Annual Update on or before May 15 of each year to be effective each June 1 through May 31 of the subsequent year (Rate Year). As discussed more fully below, Section 3 of the Protocols describes the process for resolving challenges to

³ DP&L and Atlantic City Electric Company are subsidiaries of Connectiv, LLC, which is a wholly-owned subsidiary of Pepco Holdings Inc.

⁴ *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308 (2005).

⁵ *Baltimore Gas and Elec. Co.*, 115 FERC ¶ 61,066 at P 2.

⁶ See PJM OATT, Attachment H-3E, Protocols, § 1(f)(i).

⁷ Notably, DEMEC is one of the original settling parties to this Settlement where the Protocols were negotiated and approved. See Settlement Agreement and Offer of Settlement, Docket No. ER05-515-000, Ex. A at 2 (filed Mar. 20, 2006).

DP&L's Annual Updates, including Preliminary Challenges and Formal Challenges. In the event that the informal resolution procedures for Preliminary Challenges are unsuccessful, any interested party has an additional twenty-one (21) days following the period for raising Preliminary Challenges to make a Formal Challenge with the Commission.⁸

5. The Protocols state that the Annual Update “shall be subject to challenge and review only in accordance with the procedures set forth in this Attachment H-3E and only as to the appropriateness of the application of the Formula Rate according to its terms and procedures in this Attachment H-3E (including terms and procedures related to challenges concerning Material Accounting Changes).”⁹

6. The Protocols allow “[a]ny interested party” to first notify DP&L, within 150 days of the publication of the Annual Update, of “any specific challenges . . . to the application of the Formula Rate.”¹⁰ The Protocols identify these challenges as Preliminary Challenges.¹¹ Additionally, interested parties may submit information requests to DP&L “limited to what is necessary to determine whether [DP&L] has properly applied the Formula Rate and the procedures in this Attachment H-3E, and shall not otherwise be directed to ascertaining whether the Formula Rate is just and reasonable.”¹² The Protocols also provide that “such information requests shall not solicit information concerning costs or allocations where the cost or allocation method may have been determined by the Settlement or in the context of other Annual Updates, except that such information requests shall be permitted if they seek to determine if there has been a material change in circumstances.”¹³

7. The Protocols also establish the burden of proof in a Formal Challenge filed with the Commission, stating:

Except as provided in Section 2.e, . . . [DP&L] shall bear the burden of proving that it has reasonably applied the terms of

⁸ PJM OATT, Attachment H-3E, Protocols, § 3(a).

⁹ *Id.* § 1(f)(iv).

¹⁰ *Id.* § 2(a).

¹¹ *Id.*

¹² *Id.* § 2(b).

¹³ *Id.*

the Formula Rate, and the applicable procedures in these Formula Rate Implementation Protocols, in that year's Annual Update.¹⁴

8. The Protocols also establish the finality of each Annual Update:

Subject to judicial review of FERC orders, each Annual Update shall become final and no longer subject to challenge pursuant to these Annual Review Protocols or by any other means by the FERC or any other entity on the later to occur of (i) passage of the twenty-one (21) day period (or extended period, if applicable) for making a Formal Challenge if no such challenge has been made and the FERC has not initiated a proceeding to consider the Annual Update, or (ii) a final FERC order issued in response to a Formal Challenge or a proceeding initiated by the FERC to consider the Annual Update.¹⁵

II. Discussion

A. Filings and Responsive Pleadings

9. On December 2, 2011, DEMEC filed its 2011 Formal Challenge to DP&L's 2011 Annual Update. On December 12, 2011, DP&L filed a motion for an extension of time to file its response to DEMEC's 2011 Formal Challenge to January 10, 2012. On December 19, 2011, the Commission granted DP&L's motion. On January 5, 2012, Old Dominion Electric Cooperative (ODEC) filed a motion to intervene in Docket Nos. ER05-515-000 and ER09-1158-000, though ODEC is a party in Docket No. ER05-515-000 pursuant to a motion to intervene granted in *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308, at P 38 (2005). On January 10, 2011, DP&L filed an answer to DEMEC's 2011 Formal Challenge. On January 25, 2012, DEMEC filed a motion for leave to respond and response to DP&L's January 10, 2012 answer. On February 9, 2012, DP&L filed an answer and alternative reply to DEMEC's January 25, 2011 response. On February 24, 2012, DEMEC filed an answer to DP&L's February 9, 2012 answer. On March 2, 2012, DP&L filed an answer opposing DEMEC's February 24, 2012 answer.

10. On December 17, 2012, DEMEC filed its 2012 Formal Challenge to DP&L's 2012 Annual Update. On January 16, 2013, DP&L filed an answer to DEMEC's 2012 Formal Challenge. On January 31, 2013, DEMEC filed a motion for leave to respond and

¹⁴ *Id.* § 3(c).

¹⁵ *Id.* § 3(d).

response to DP&L's January 16, 2013 answer. On February 14, 2013, DP&L filed an answer to DEMEC's January 31, 2013 motion to respond and response. On March 1, 2013, Easton Utilities (Easton), ODEC, and the Public Power Association of New Jersey (PPANJ) (collectively, Joint Responders),¹⁶ sought leave to respond, and submitted a response to one portion of DP&L's February 14, 2013 answer. On March 15, 2013, DP&L filed a motion to respond to Joint Responders' response.

11. In its Formal Challenges, DEMEC explains that, despite attempts by DP&L and DEMEC to resolve the issues in the Preliminary Challenges, some issues remained unresolved, resulting in DEMEC filing the subject Formal Challenges. As further discussed in the body of this order, DEMEC argues that DP&L has included new costs that were not included in its initial Formula Rate. DEMEC also asserts that DP&L has inappropriately booked certain costs and expenses in order to allocate such costs to transmission service. Additionally, DEMEC complains that DP&L's Administrative & General (A&G) costs have escalated substantially since implementation of the Formula Rate. DEMEC protests DP&L's position that, as long as DP&L uses the Form No. 1 amounts and allocates these amounts to the transmission service using the allocators contained in the Formula Rate, no one can question the reasonableness of the expense levels and the manner by which DP&L books these amounts. DEMEC also asserts that DP&L has included costs in its ATRR associated with its non-regulated merchant activities or has otherwise failed to demonstrate that it did not include these costs.

B. Procedural Matters

12. While DP&L does not object to DEMEC's filing of the Formal Challenges, DP&L contends that, as a threshold matter, the Commission should reject DEMEC's January 31, 2013 motion to respond and response, because the Protocols do not allow for answers or motions to respond and the response is not needed to ensure a complete and accurate record.¹⁷ DP&L also characterizes DEMEC's January 31, 2013 response as raising *de novo* prudence issues and asserts that the Commission should reject the response, on the grounds that that the response constitutes a "moving target" and that the Protocols preclude a party from raising new issues in a Formal Challenge that were not addressed in the party's Preliminary Challenge. Similarly, DP&L asserts that the Commission should reject DEMEC's responses concerning the 2011 Formal Challenge, arguing that

¹⁶ Easton, ODEC, and PPANJ filed motions to intervene and protest in the original filing, Docket No. ER05-515-000, on February 22, 2005, which established the Formula Rate and Protocols of DP&L. *See* Settlement, Docket No. ER05-515-000, Ex. A (filed Mar. 20, 2006).

¹⁷ DP&L February 14, 2013 Answer at 1-2, 4, 9.

DEMEC's responses consist of arguments and testimony that were not part of, and go beyond the scope of, the Formal Challenge or otherwise fail to enhance the record.

13. DP&L also maintains that the Commission should reject Joint Responders' March 1, 2013 response, arguing that Joint Responders fail to explain how they have standing to participate in the Annual Update proceeding based on their participation in the original docket.¹⁸ DP&L contends that the Protocols include binding procedural rules and operate to preclude parties from having standing in an Annual Update proceeding unless the party participated in the 150-day Review Period, initiated a Preliminary Challenge and filed a Formal Challenge.¹⁹ Specifically, DP&L asserts that, because Joint Responders did not challenge the 2012 Annual Update pursuant to Sections 2 and 3 of the Protocols, the Commission should reject Joint Responders' motion to respond and response. DP&L also asserts the Commission should reject Joint Responders' March 1, 2013 response, because it concerns DEMEC's January 31, 2013 Answer, which DP&L argues is unsupported and not authorized by the Protocols.²⁰

Commission Determination

14. We accept DEMEC's motions for leave to respond and responses. Contrary to DP&L's suggestion, the Protocols do not prohibit a party from participating in a Commission proceeding once it is initiated. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2013), generally prohibits answers to answers unless otherwise ordered by the decisional authority. However, we will accept DEMEC's responses because they have provided information that assist us in our decision-making process.²¹

¹⁸ DP&L March 15, 2013 Answer at 1.

¹⁹ *Id.* at 1-4.

²⁰ *Id.* at 10-11.

²¹ An agency's interpretation of its own regulations is entitled to great deference. *Transcon. Gas Pipe Line Corp.*, 38 FERC ¶ 61,168, at 61,532 (1987); *see, e.g., Columbia Gas Development Corp. v. FERC*, 651 F.2d 1146 (5th Cir. 1981); *Udall v. Tallman*, 380 U.S. 1 (1965). DP&L contends that the responses should be rejected because they constitute a "moving target," and cites to Commission cases rejecting pleadings on this basis. However, these cases deal with parties submitting new evidence on rehearing, not with parties filing responses to positions during the initial consideration of the filing. *See, e.g., Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line, LLC*, 136 FERC ¶ 61,083, at P 6 (2011); *Boston Edison Co.*, 108 FERC ¶ 61,289, at P 15 (2004) (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 & n.64 (1994) (stating that "[t]he Commission

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15. We reject DP&L's argument that the Protocols prohibit parties that did not participate in the 150-day Review Period and initiate Preliminary and Formal Challenges from filing responses and that Joint Intervenors lack standing to participate. The Protocols contain no express provisions governing participation in Commission proceedings initiated by a Formal Challenge. Instead, participation in such proceedings is governed by the Commission's regulations and policies. We find that the response filed by Joint Intervenors, like those filed by DEMEC, provides information that assist us in our decision-making process, and we therefore we accept Joint Intervenors' filing.

C. Formula Rate Protocols

DEMEC and DP&L dispute what challenges are permissible under the Protocols.²² DP&L contends that permissible challenges are restricted to whether DP&L applied the formula rate appropriately according to the terms and procedures of the Protocols and argues that, if costs were booked to the correct Account, "the Formula Rate inquiry is over"²³ In addition, DP&L asserts that DEMEC is barred from raising prudence challenges because the Protocols only allow those challenges that are explicitly stated and they do not specify that prudence challenges are authorized.²⁴ DP&L claims that the majority of the arguments DEMEC raises in the Formal Challenges violate the Protocols and the Formula Rate, which prohibit challenges to "charges that are computed in accordance with the Formula Rate."²⁵ DP&L therefore concludes that DEMEC's Formal

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").

²² See DEMEC 2011 Formal Challenge at 5 (stating that "DP&L's position is that as long as it uses Form 1 amounts and allocates them to the Transmission Service using the allocators contained in its Formula Rate, no one can question the reasonableness of the levels and the manner of booking of these amounts").

²³ DP&L February 14, 2013 Answer at 4-5, 9.

²⁴ *Id.* at 6, 8; DP&L March 15, 2013 Answer at 10-11 (comparing DP&L's Protocols to those of PPL Electric Utilities Corporation, which DP&L asserts, specifically authorize prudency objections in Preliminary and Formal Challenges); see PJM OATT, Attachment H-8H, §§ V.D(e), VI.A(1)(h)-(i) (PPL Protocols).

²⁵ DP&L January 16, 2013 Answer at 7. DP&L asserts that, "[a]lthough DEMEC has the right to seek modification of the Formula Rate and the charges computed pursuant to the Formula Rate, it can only do so pursuant to an appropriately-supported complaint filed with the Commission under [s]ection 206 of the Federal Power Act." *Id.* at 5.

Challenges also violate the filed-rate and *Mobile-Sierra* doctrines and represent a collateral attack on the Settlement agreement that created the Formula Rate.²⁶

16. DEMEC contends that its Formal Challenges are consistent with the filed rate and permissible under the Protocols because the Protocols provide that DP&L bears the burden of proving that it has reasonably applied the terms of the Formula Rate.²⁷ Further, DEMEC argues, the Commission has determined that challenges to the prudence of individual items or inputs used in an Annual Update are distinguishable from challenges to the rate itself.²⁸ DEMEC asserts that, through the Formal Challenges, it seeks to ensure that the costs recovered by DP&L in the Formula Rate are just and reasonable and that DP&L has reasonably applied the terms of the Formula Rate.²⁹ In response, DP&L reiterates its argument that DEMEC is barred from raising prudence challenges because the Settlement-approved Protocols failed to specifically state that prudence challenges were allowable and, therefore, the Protocols “do not authorize prudency objections of any kind.”³⁰

Responding to DP&L’s claims, Joint Responders contend that DP&L inaccurately represents the intent of the parties to the Settlement by suggesting that the settling parties relinquished their right to assert prudence-based challenges.³¹ Joint Responders argue that, regardless of whether the Protocols specifically list imprudence among the grounds for challenging costs, the right to challenge imprudent costs is so fundamental that transmission customers retain it as a matter of law, and they did not agree to waive this

²⁶ DP&L January 16, 2013 Answer at 4-5 (citing *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165 (2010); *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist No. 1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*); *Ocean State Power II*, 69 FERC ¶ 61,146 (1994)).

²⁷ DEMEC January 31, 2013 Answer at 3 (citing *PPL Elec. Utils. Corp.*, 136 FERC ¶ 61,101 (2011)).

²⁸ *Id.*

²⁹ DP&L January 31, 2013 Answer at 3-4.

³⁰ DP&L February 14, 2013 Answer at 6, 8.

³¹ Joint Responders March 1, 2013 Answer at 4-6 (arguing that DP&L acknowledged in its filed comments to the Settlement that prudence challenges were preserved in the Settlement and citing Pepco Holdings, Inc., Reply Comments, Docket No. ER05-515-000, at 4 (filed Mar. 31, 2006)).

right in the settlement proceedings. Further, Joint Responders argue that relinquishment or waiver of so fundamental a right would require language clearly and expressly waiving this right and the Commission may not infer a waiver of that fundamental right solely from the fact that it was not included in a list in the Protocols.³² Joint Responders cite to several facts of the Settlement record to support their position. First, they state that if the Settlement intended to bar any prudence-based challenges, then Commission Trial Staff would have been obliged to inform the Commission in its settlement comments, yet Trial Staff noted that the protocols ensure that all interested parties have the opportunity to obtain information and challenge the Annual Updates before the Commission.³³ Second, Joint Responders argue that the Commission's Chief Judge's rules require identification of issues raising basic policy implications, yet the Settlement's explanatory statement did not identify the purported waiver of any prudence challenges as raising policy implications. Joint Responders state that this omission was no oversight, but rather reflects the fact that the Settlement was never intended to affect customers' rights to assert prudence-based challenges.³⁴

17. Finally, Joint Responders argue that DP&L acknowledged in its filed comments to the Settlement that prudence challenges were preserved in the Settlement; “[t]he Companies are entitled to recover their actually incurred [post-employment benefits other than pensions] costs barring a record-based finding that such costs were improperly allocated to transmission service or imprudently-incurred.”³⁵ Joint Responders argue that in DP&L observing that imprudently-incurred post-employment benefits other than pensions costs could be excluded from recovery, DP&L was simply acknowledging a fact that is true for *all costs* subject to the Formula Rate. Joint Responders state that by definition, rates that recover imprudently-incurred costs are contrary to the public interest because they shift the risk of improvident management decisions from the investors to the consumers. They assert that, had the settling parties agreed with DP&L that they would forego the assertion of prudence-based challenges, such agreement “would be akin to a

³² Joint Responders March 1, 2013 Answer at 4.

³³ *Id.* at 4-5.

³⁴ *Id.* at 5-6.

³⁵ *Id.* at 6 (citing Reply Comments of Pepco Holdings, Inc., Potomac Electric Power Co., Delmarva Power & Light Co., Atlantic City Electric Co., and Baltimore Gas & Electric Co., Docket No. ER05-515-000, at 4 (filed Mar. 31, 2006)).

contract to suppress evidence, and therefore void” because it is an agreement not to advise the Commission of the imposition of rates that offend the public interest.³⁶

18. DP&L argues that the Protocols only allow those challenges that are explicitly stated and “do not authorize challenges based on prudence.”³⁷ DP&L argues that “only through a [s]ection 206 proceeding can a party seek to amend the provisions of the Protocols to permit challenges to the prudence” of the cost inputs to the Formula Rates.³⁸ DP&L argues that the Commission may not, at the behest of one party or the other, read into contracts things which are simply not expressed.

19. DP&L argues that in any event, DEMEC has failed to make its threshold demonstration or provide evidence that any costs were imprudently-incurred and the Commission could reject the Joint Responders’ comments on those grounds.³⁹

Commission Determination

20. We disagree with DP&L’s contentions that the Protocols do not permit prudence challenges and that the Formula Rate inquiry is limited to whether costs were booked to the correct Account.⁴⁰

21. The Protocols specify that each Annual Update is subject to review and challenge “as to the appropriateness of the application of the Formula Rate according to its terms and procedures.”⁴¹ As part of the annual review procedures, the Protocols provide “[a]ny interested party” the opportunity to “review the calculations . . . and to notify [DP&L] in writing of any specific challenges, including challenges related to Material Accounting Changes, to the application of the Formula Rate.”⁴² Such challenges, if not resolved within the time period provided in the Protocols, may be raised in a Formal Challenge

³⁶ *Id.* at 6 n.14 (citing *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)).

³⁷ DP&L March 15, 2013 Answer at 7.

³⁸ *Id.* at 8-9.

³⁹ *Id.* at 10-11.

⁴⁰ DP&L February 14, 2013 Answer at 9.

⁴¹ PJM OATT, Attachment H-3E, Protocols, §1 (iv).

⁴² *Id.* § 2(a).

filed with the Commission.⁴³ The Protocols specify that, “in any proceeding initiated by the [Commission] concerning the Annual Update or in response to a Formal Challenge, [DP&L] shall bear the burden of proving that it has reasonably applied the terms of the Formula Rate, and the applicable procedures in these Formula Rate Implementation Protocols, in that year’s Annual Update.”⁴⁴

22. DP&L points to no language in the Protocols that prohibits interested parties from requesting information on and challenging costs as imprudent. Nor does it point to any evidence to support its claim that the settling parties agreed to such a concession. The Commission’s acceptance of a formula rate constitutes acceptance of the formula, but not the inputs to the formula. Parties can challenge the inputs to the formula rate in the same way as they can challenge costs in a stated rate case, including by raising prudence issues.⁴⁵ In order for formula rates to work properly, they must allow for after-the-fact corrections and updates.⁴⁶ While parties should use due diligence to ensure that correct data is used, should an error be discovered, the inputs to the formula rate must be corrected and the formula rate re-calculated to prevent parties from being overcharged or undercharged.⁴⁷ Since the Protocols do not prohibit prudence challenges, we find that such challenges are permitted as part of the challenge to the Annual Updates.⁴⁸

⁴³ *Id.* § 3(a).

⁴⁴ *Id.* § 3(c).

⁴⁵ The costs recovered through the formula rate are not part of the rate itself and have not been reviewed. These costs therefore may be challenged. *Appalachian Power Co.*, 23 FERC ¶ 61,032, at 61,088 (1983) (establishing that the Commission is not precluded from examining the reasonableness of fuel costs automatically collected under a formula rate). If the costs are shown to be unjust and unreasonable, the Commission may require retroactive relief. *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co.*, 72 FERC ¶ 61,142, at 61,727 n.9; *Pub. Serv. Co. of N.H.*, 6 FERC ¶ 61,299, at 61,710 (1979) (addressing challenged fuel adjustment costs and requiring refunds of the extra costs of spot coal).

⁴⁶ *Va. Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 46 (2008); *PPL Elec. Utils. Corp.*, 125 FERC ¶ 61,121, at P 36 (2008).

⁴⁷ *Id.*

⁴⁸ We note that, as a general matter, the ultimate burden of proof with respect to its rates is on the regulated entity. *See* 16 U.S.C. § 824d(e) (2006). However, as a matter of procedural practice, “the Commission does not require regulated entities to ‘demonstrate in their cases-in-chief that all expenditures were prudent unless the Commission’s filing

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23. We also reject DP&L's assertion that challenges to whether DP&L has reasonably applied the formula rate by including certain costs, constitute challenges to the formula rate itself, and are prohibited as violations of the formula rate and the filed rate doctrine. As DP&L acknowledges, the formula is the filed rate.⁴⁹ However, as discussed above, the inputs are not part of the rate.⁵⁰ And DP&L bears the burden of demonstrating the justness and reasonableness of the charges resulting from application of the formula.⁵¹ Commission policy has consistently found that an error in the application of a formula rate is a violation of the filed rate doctrine and, as such, is correctable irrespective of how much time has elapsed.⁵²

24. Additionally, DP&L suggests that DEMEC's Formal Challenges violate the *Mobile-Sierra* doctrine by assertedly raising matters not permitted by the Protocols. We find above that DEMEC's Formal Challenges, including prudence challenges to the costs to be recovered through the formula rate, are not barred by the Protocols.

D. Individual Challenges

25. In DEMEC's Formal Challenges, DEMEC discusses individually, and in detail, its challenges to DP&L's Annual Updates.⁵³ First, we address the issues where we find a trial-type evidentiary hearing is not needed for us to make determinations. Second, we discuss the issues we are setting for hearing.

requirements, policy, or precedent otherwise require.” *Iroquois Gas Transmission Sys., L.P.*, 87 FERC ¶ 61,295, at 62,168 (1999) (quoting *Minn. Power & Light Co.*, 11 FERC ¶ 61,312, at 61,444-61,445 (1980)). Thus, “[t]here is, in effect, a presumption of prudence which can be rebutted at hearing whenever another party ‘creates a serious doubt as to the prudence of an expenditure.’” *Id.*

⁴⁹ DP&L January 16, 2013 Answer at 5-6.

⁵⁰ *Va. Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 50.

⁵¹ *Id.* P 46 and cases cited *supra* note 45.

⁵² *Pub. Serv. Co. of N.M.*, 143 FERC ¶ 61,227 (2013).

⁵³ The 2011 Annual Update and 2012 Annual Update are referred to herein jointly as “Annual Updates.”

1. **Matters Resolved Summarily**

a. **Deferred Investment Tax Credit and Pension and Other Related Amounts**

26. In the 2011 Formal Challenge, DEMEC objects to DP&L's inclusion of approximately \$8 million of deferred income taxes in rate base: \$3,006,814 related to deferred investment tax credits and \$5,200,981 related to pensions and other employee benefits. DEMEC asserts that there is no justification for including these deferred taxes in rate base, arguing that to do so would inappropriately reduce the benefit to ratepayers of investment tax credits and allow DP&L to earn a return on pensions and other related benefits, some of which are not tax deductible. Accordingly, DEMEC asserts, no deferred taxes on these two items should be included in rate base.

27. DP&L responds that it has not included deferred taxes on investment tax credits or the non-deductible portion of pension and other employee benefits in its rate base. DP&L also asserts that including deferred taxes related to the deductible pensions and employee benefits is required by the Formula Rate as well as the Commission's accounting regulations.

Commission Determination

28. The Commission agrees that DP&L properly has handled deferred taxes associated with deferred investment tax credits and non-deductible pensions and other benefits by not including them in rate base. Therefore, the Commission finds that these objections are resolved.

29. The Commission rejects DEMEC's challenge to DP&L's inclusion of deferred taxes on deductible pension and other employee benefits in rate base. The Commission finds that recording of deferred taxes on pension and other benefits satisfies both the Commission's accounting requirements and the formula rate's criteria for inclusion in rate base. Specifically, the determination and propriety of the amounts of pensions and other benefits incurred by DP&L is not in question.⁵⁴ DP&L has paid these taxes, but cannot yet recover them in its rates. Under the Commission's regulations, DP&L is entitled to earn a rate of return on these amounts.⁵⁵ Further, DP&L's Formula Rate

⁵⁴ DP&L's pension expense is determined by independent actuaries in accordance with Statement of Financial Accounting Standards No. 87 (SFAS 87). DP&L's February 9, 2012 Answer at 18-19.

⁵⁵ See 18 C.F.R. pt. 101, General Instruction No. 18, Comprehensive Inter-period Income Tax Allocation, and Account No. 190, Accumulated Deferred Income Taxes (2013). Amounts properly recorded as electric utility-related deferred income taxes in

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specifically provides for inclusion of amounts that are properly recorded as deferred taxes in Account 190 in rate base. Accordingly, we reject this challenge.

b. Return on Equity

30. In its 2011 Formal Challenge, DEMEC challenges the Base ROE of 11.30 percent, established in 2005 and set forth in Section 3 of the Settlement, arguing that it is too high given current capital markets and there is no reason for computing the transmission rate with an ROE of 11.30 percent. DEMEC states that, since the Base ROE of 11.30 percent was established in the 2005-2006 period, capital costs have declined substantially and DEMEC's preliminary analysis reflects a median ROE of the proxy group of 9.7 percent. DEMEC raises this issue for the Commission's consideration pursuant to Section 2(e) of Attachment H3-E of the Protocols.⁵⁶ DEMEC urges the Commission to initiate an

Account 190 are additions to rate base and are allowed to earn a return because they represent amounts that the utility has paid in income taxes in excess of what it has recovered from ratepayers. Until such income taxes are recovered from ratepayers in the future, the utility is properly compensated for the cost of financing such amounts, similar to the inclusion in rate base of prepayments and unrecovered (undepreciated) utility plant costs.

⁵⁶ Section 2(e) of the Protocols provides:

Preliminary or Formal Challenges related to Material Accounting Changes shall be subject to the resolution procedures and limitations in Section 3, except that Section 3.c. shall not apply. In any proceeding initiated to address a Preliminary or Formal Challenge or *sua sponte* by the Commission, a party or parties (other than [DP&L]) seeking to modify the Formula Rate in any respect shall bear the burden of proving that the Formula Rate is no longer just and reasonable without such modification and that the proposed modification is just, reasonable and consistent with the original intent of the Formula Rate and the procedures in this Attachment H-3E; provided, however, that in any such proceeding, in determining whether the Formula Rate is no longer just and reasonable without modification to reflect a Material Accounting Change and whether the proposed modification is just and reasonable, no offsets unrelated to the applicable Material Accounting Changes may be considered.

PJM OATT, Attachment H-3E, Protocols, § 2(3).

investigation as to the justness and reasonableness of DP&L's Base ROE pursuant to section 206 of the Federal Power Act.

31. DP&L responds that, pursuant to Section 1(f)(v) of the Protocols, DEMEC cannot use the Formal Challenge process as a vehicle for amending the Formula Rate, including modification to the Bases ROE.

Commission Determination

32. We reject DEMEC's challenge to the applicable ROE as outside the scope of a Formal Challenge. Pursuant to Section 1(f)(v) of the Protocols, the Annual Update for each rate year does not open up for challenge to the Formula Rate itself, which would include challenges to the Base ROE.⁵⁷ We also decline DEMEC's request to initiate a section 206 proceeding at this time; DEMEC (along with numerous parties)⁵⁸ has filed a separate complaint pursuant to section 206 against DP&L (among others)⁵⁹ challenging the Base ROE in the respondents' formula transmission rates, and that complaint is currently pending before the Commission.⁶⁰

c. General Plant

33. In its 2012 Formal Challenge, DEMEC objects to approximately \$10.4 million of communications related plant additions being included in the Formula Rate. DEMEC argues that, because DP&L refused to provide the nature of the facilities, DEMEC is

⁵⁷ *Id.* § 1(f)(v).

⁵⁸ DEMEC is joined by the Delaware Division of the Public Advocate, the Delaware Public Service Commission, the Maryland Office of People's Counsel, the Maryland Public Service Commission, the New Jersey Board of Public Utilities, the New Jersey Division of Rate Counsel, the Office of the People's Counsel of the District of Columbia, and the Public Service Commission of the District of Columbia as filing parties in the referenced complaint.

⁵⁹ The respondents in the referenced complaint include Baltimore Gas and Electric Co. and Pepco Holdings, Inc.'s affiliates: Potomac Electric Power Co., DP&L, and Atlantic City Electric Co.

⁶⁰ Del. Div. of the Pub. Advocate, Complaint, Docket No. EL-13-48-000 (filed Feb. 27, 2013).

concerned that these facilities are related to DP&L's retail business and distribution function and are erroneously charged to transmission customers.⁶¹

34. In its January 16, 2013 answer, DP&L provides the nature of the two work orders, explaining how they relate to transmission plant and maintaining that the work orders are properly included in the Formula Rate.⁶² In its January 31, 2013 answer, DEMEC concedes this issue based on DP&L's explanation.⁶³

Commission Determination

35. Because DEMEC concedes its challenge regarding the nature of the work orders as related to transmission plant, it is no longer necessary to decide this issue. Therefore, we find that DEMEC's challenge on this issue is resolved.

2. Hearing and Settlement Judge Procedures

36. We discuss below the issues in both the 2011 Formal Challenge and 2012 Formal Challenge that we are setting for hearing and settlement judge procedures.

a. Accumulated Deferred Income Taxes

37. In its 2011 Formal Challenge, DEMEC challenges DP&L's inclusion in rate base of three deferred income items reflected in Account No. 190, Accumulated Deferred Income Taxes.⁶⁴ First, DEMEC challenges inclusion of \$728,880 related to a regulatory asset for the projected under-collection of DP&L's costs through its Formula Rate from June through December of the 2011 Formula Rate Year. DEMEC contends that this is a new item that appeared for the first time in DP&L's 2011 Update, and that DP&L does not explain how this new cost item relates to the transmission function or how it satisfies the Formula Rate's cost definitions and specific accounting criteria.

38. DP&L responds that these deferred income taxes are clearly related to transmission and is properly recorded in rate base under the terms of the Formula Rate.

⁶¹ DEMEC 2012 Formal Challenge at 6-9.

⁶² DP&L January 16, 2013 Answer at 9-13.

⁶³ DEMEC January 31, 2013 Response at 4.

⁶⁴ 18 C.F.R. pt. 101, Account No. 190- Accumulated Deferred Income Taxes (2012).

DP&L explains that that the reversal of this regulatory asset for tax purposes resulted in the \$728,800 of deferred income taxes.

39. Second, DEMEC challenges DP&L's inclusion of \$2,852 of deferred income taxes related to PJM Member Defaults. DEMEC asserts that PJM allocates a number of costs to all of its members, not all of which should be automatically included in DP&L's Formula Rate. DP&L answers that this item results from defaults by two PJM members in 2007, the charge for which is still being amortized and still has a deferred tax effect. The deferred taxes reflects the tax effect of the difference between what DP&L accrued for this obligation to PJM on an estimated basis and the timing of the actual PJM payment.⁶⁵

40. Third, DEMEC challenges DP&L's inclusion of \$546,291 of deferred income taxes related to a consolidated income tax loss. DEMEC asserts that DP&L did not show a corresponding income tax loss when computing its income tax expense, and that DP&L's treatment appears to mix actual tax computations with ratemaking tax computations. In response, DP&L states that a tax loss can and does exist side-by-side with a positive tax calculation, and that its inclusion of the \$546,291 of deferred income taxes is consistent with the Commission's accounting requirements.⁶⁶ Further, DP&L asserts this amount is based on DP&L's separate tax return, and not that of its affiliates.⁶⁷

41. DEMEC reiterates similar concerns in its 2012 Formal Challenge, challenging the addition to rate base of: (1) \$1,060,189 in deferred income taxes related to a regulatory asset that created as a result of a mismatch between DP&L's actual costs and the amount of revenues it collected under its formula rate during 2012; (2) \$2,852 of deferred taxes relating to PJM Member Defaults; and (3) \$58.8 million of deferred taxes related to DP&L's asserted tax losses in 2012.

⁶⁵ DP&L January 10, 2012 Answer, Ex. DPL-206, at 7.

⁶⁶ We note that under the Commission's "stand-alone" policy, any tax reductions realized on the consolidated tax return are taken into account when determining the amounts that are properly recognized for ratemaking purposes. *See Columbia Gulf Transmission Co. et. al.*, 23 FERC ¶ 61,396 (1983); *see also* 18 C.F.R. pt. 101, General Instructions, § 18.

⁶⁷ DP&L states that its separate tax return calculation showed a Net Operating Loss of approximately \$10 million consisting of tax deductions related to bonus depreciation, an accounting method change for repairs for T&D property, a large pension contribution, and a capitalization of the pension contribution. DP&L January 10, 2012 Answer at 14.

b. Prepayments

42. In both its 2011 and 2012 Formal Challenges, DEMEC objects to DP&L's inclusion in rate base of \$3.978 million and \$4,116,069 respectively of prepaid estimated income taxes. DEMEC argues, *inter alia*, that because DP&L collects income taxes from customers before it pays them, such tax payments should not be recognized as prepayments. Further, DEMEC asserts that such prepayments are not appropriate in light of the fact that Pepco Holdings Inc. has not paid income taxes during the years 2004-2009 (and paid only \$900,000 in 2010), DP&L received a tax refund of \$4.1 million in February 2011 but did not reduce the tax prepayment, and DP&L has not explained why it made a \$3.978 million prepayment near the end of 2010 when its taxable losses would result in very little, if any, income tax liability.

43. DP&L responds that its tax prepayments were properly included in rate base as prepayments pursuant to the provisions of the Formula Rate. DP&L asserts that DEMEC disregards the express terms of the Formula Rate, which specifically authorize the recovery of tax prepayments without regard to how or when customers may compensate it for those payments.

c. Rate Base Reductions Related to Account Nos. 924 and 926

44. In both its 2011 and 2012 Formal Challenges, DEMEC objects to the lack of a rate base reduction for amounts collected through DP&L's formula rates for Property Insurance and Employee Pensions and Benefits [that have not yet been paid]. DEMEC argues that DP&L should treat such collections as rate base reductions because they are funded by ratepayers. DEMEC requests that the Commission require DP&L to use the entire amount that DP&L collected for these expenses as a rate base reduction.

45. DP&L asserts that the Formula Rate does not provide for rate base reduction for these items, and therefore, DEMEC's challenge is prohibited by the Formula Rate.

d. Administrative and General (A&G) Expenses

46. DEMEC asserts that since the initial Formula Rate filing, the amount of Pepco Holding, Inc.'s total expenses that have been allocated to DP&L has increased significantly.⁶⁸ DEMEC protests this increase and asserts that DP&L has also allocated a number of A&G expenses to transmission customers through the prescribed wages and

⁶⁸ *Id.* at 12. DEMEC states that the A&G expenses transferred from Pepco Holdings Inc. as a percentage of DP&L's total A&G expenses have ranged from 61.7 percent in 2004 to 78.1 percent in 2007, and were 66.4 percent in 2010.

salary allocator that are not general in nature and are more appropriately assigned to the distribution function. The specific types of A&G expenses that are being challenged are discussed below.

i. Pensions and Benefits

47. In its 2011 Formal Challenge, DEMEC challenges an increase in the amount of Pepco Holding Inc.'s expenses that were allocated to DP&L for pensions and benefits. DEMEC asserts that DP&L has not justified this increase and that a reasonable increase should not be more than 10 percent. DEMEC also asserts that DP&L changed its accounting practice to allow it to recover the construction related pension and benefit costs in its current rates. In response, DP&L asserts that the increase in the overall pension and benefit expense was actually less than 10 percent,⁶⁹ and that there has been no change in accounting practice that affects the amount of pension and benefits charged to transmission customers through the formula rate.

48. In its 2012 Formal Challenge, DEMEC raises two arguments. First, DEMEC objects to DP&L including prepaid pensions in rate base and also including pensions as an expense recovered currently through its Formula Rates. Second, DEMEC raises prudence challenges on the entire balance of the pensions included in rate base.⁷⁰ DP&L counters that it has appropriately included both prepaid pensions and pension expense in the 2012 Update, and appropriately allocated that expense to the Transmission function. DP&L further asserts that its treatment complies with the Employee Retirement Income Security Act (ERISA) and the Pension Protection Act of 2006 (PPA) funding requirements, Statement of Financial Accounting Standards (SFAS) 87 accounting requirements, and the Commission's accounting requirements. DP&L also maintains that the Formula Rate requires the inclusion of prepaid pensions in the Transmission rate base. Further, DP&L argues that DEMEC's challenge must be rejected as contrary to the filed rate doctrine.⁷¹

ii. Customer Care, Power Procurement, and Delivering Electric and Gas Services

49. DEMEC asserts that DP&L included certain expenses in its Formula Rate from DP&L's parent, Pepco Holdings Inc., for Customer Care, Power Procurement, and Delivering Electric and Gas Services, that do not relate to transmission. DEMEC argues

⁶⁹ DP&L January 10, 2012 Answer at 23-24.

⁷⁰ DEMEC 2012 Formal Challenge at 18-20.

⁷¹ DP&L January 16, 2013 Answer at 21-25.

that they should not be aggregated with non-specific administrative and general (A&G) expenses and then allocated to transmission.

50. DP&L responds that it has consistently and appropriately allocated these costs to transmission to the extent they relate to transmission. DP&L further states that it has followed these procedures consistently in each annual update since the adoption of the Settlement and that DEMEC has provided no evidence to support its statement that the costs should be excluded from A&G.

iii. Regulatory Expenses and Internal Consulting

51. In both its 2011 and 2012 Formal Challenges, DEMEC protests DP&L's inclusion of expenses provided by the Service Company's Regulatory Affairs Department in Account 923⁷² in an attempt to charge regulatory costs to transmission customers. DEMEC asserts that by including regulatory expenses in Account No. 923, DP&L violated the intent of the Formula Rate and that regulatory expenses should be booked to Account No. 928, and excluded from DP&L's Formula Rate. DEMEC also challenges DP&L's allocation of any portion of Pepco Holdings, Inc.'s Internal Consulting service expenses to transmission service, asserting that these services mainly relate to DP&L's retail distribution business.

52. DP&L asserts that both the Service Company's Regulatory Affairs Department expenses and Internal Consulting services expenses are properly allocated in part to transmission through the wages and salary allocator, in accordance with the provisions of the Formula Rate.

iv. Employee Incentives

53. DEMEC challenges DP&L's inclusion of \$1,964,977 of employee incentives related to service company employees in the 2011 Formula Rate Update. DEMEC asserts that this amount is over a 171 percent increase from the previous year, and is unreasonably high. DP&L responds that employee incentives are properly included in the Formula Rate and that it has consistently included such incentives.

v. Restructuring Charges

54. In 2010 Pepco Holdings, Inc. charged DP&L \$6.8 million in restructuring charges (severances for Pepco Holdings, Inc. executives and other management employees) and related consultant costs resulting from an organizational review project related to the sale of Conective Energy and the phase-out of Pepco Energy Services' retail energy supply

⁷² 18 C.F.R. pt. 101, Account No. 923, Outside Services Employed (2012).

business. Of this amount, \$589,000 was included in DP&L's transmission rates, \$380,000 was recorded in Account No. 923 (Outside Services Employed), and \$209,000 was charged directly to transmission expense (Account No. 560). DEMEC asserts these costs stem from unregulated businesses and therefore should not be allocated to DP&L's transmission customers.

55. DP&L counters that the restructuring costs included in DP&L's transmission rate are costs associated with Pepco Holdings, Inc.'s repositioning itself in 2010 as a transmission and distribution company.⁷³ DP&L asserts that the only severance costs assigned to Delmarva related to work those former employees performed on Delmarva's behalf, and those costs were allocated consistently with the way expenses were charged prior to the employees' departure. Therefore, DP&L requests the Commission reject DEMEC's challenge.⁷⁴

e. **Account No. 242 Miscellaneous Current and Accrued Liabilities**

56. DEMEC asserts that the Formula Rate Protocols require that DP&L reduce rate base by two items in Account No. 242, Miscellaneous current and accrued liabilities. DEMEC argues that these items, Accrued Liability – General (GAL) will reduce the transmission rate base by \$258,138 and the allocation of Accrued Liability – Vacation (Vacation liability) will result in reducing the transmission rate base by \$535,203.⁷⁵ DEMEC argues that DP&L has not adequately explained why these two items should not be deducted from rate base.

57. DP&L argues that DEMEC's claims are unfounded and that DP&L has fully explained and justified why the GAL and Vacation liability items should not be deducted from its transmission rate base and that DEMEC's Formal Challenge to these two items should be rejected.

⁷³ DP&L states in connection with this repositioning, Pepco Holdings, Inc. commenced a comprehensive organization review that resulted in the adoption of a restructuring plan.

⁷⁴ DP&L points out that DEMEC has not challenged the \$209,000 direct assignment to transmission, which means the only amount in dispute is the \$380,000 A&G severance amount that was allocated to transmission through the wages and salary allocator.

⁷⁵ DEMEC 2012 Formal Challenge at 23-24.

f. Mid-Atlantic Power Pathway (MAPP) Project Costs

58. DEMEC asserts that DP&L has not supported the inclusion in the 2012 formula rate of \$34.7 million of transmission related construction costs related to the MAPP project. DEMEC argues that if actual construction of the MAPP project costs was halted in 2011, the associated costs should not be included as construction costs in the 2012 formula rate update (which is based on the actual construction costs as of December 31, 2011 plus a weighting of the monthly forecasted additions for 2012). DEMEC points out that the Commission's accounting regulations only allow plant in the process of construction to be included.

59. DP&L claims that it has included the per-book balance for this project as of year-end 2011 plus forecasted additions as of that date precisely in accordance with the provisions of the Formula Rate. Further DP&L asserts construction did not "cease" during calendar year 2011, that the "cessation" of construction occurred during calendar year 2012, and therefore if DEMEC desires to take issue with respect to the date of cessation of construction, it should do so during the 2013 Annual Update.

Commission Determination

60. We cannot find on this record that DP&L has supported the propriety of the inclusion of certain costs in DP&L's formula rate. Rather, we find that the Formal Challenges raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in a trial-type, evidentiary hearing and settlement judge procedures. Therefore, except for the issues resolved summarily above, pursuant to the Settlement, we will set the remaining issues for hearing and settlement judge procedures. As part of the arguments raised by the parties, the hearing should consider: whether DP&L has acted consistent with Commission precedent requiring utilities to use the "stand-alone" method of determining its income taxes as referenced in paragraph 42,⁷⁶ whether DP&L's accounting for prepaid income taxes, as referenced in paragraph 44, is consistent with Commission precedent in *Entergy Services, Inc.*,⁷⁷ and whether DP&L's accounting for expenses allocated from Pepco Holdings, Inc., as referenced in paragraphs 48, 53, and 56 among others, is consistent with General Instruction 14 of the Commission's Uniform System of Accounts.⁷⁸

⁷⁶ See, e.g., *Columbia Gulf Transmission Co.*, 23 FERC ¶ 61,396 (1983).

⁷⁷ *Entergy Services, Inc.*, Opinion No. 505, 130 FERC ¶ 61,023, at PP 190-194 (2010), *order on reh'g*, Opinion No. 505-A, 139 FERC ¶ 61,103 (2012).

⁷⁸ 18 C.F.R. Pt. 101, General Instruction No. 14, Transactions with Associated Companies (2013).

61. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties 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 hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁷⁹ 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.⁸⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. 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.

The Commission orders:

(A) 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 DP&L's Annual Updates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 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 5 days of the date of this order.

⁷⁹ 18 C.F.R. § 385.603 (2013).

⁸⁰ 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).

(C) Within 30 days of the date of this order, 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 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) 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 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.