

147 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

DATC Path 15, LLC

Docket No. ER14-1332-000
EL14-33-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TRANSMISSION
REVENUE REQUIREMENT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued April 17, 2014)

1. On February 18, 2014, pursuant to section 205 of the Federal Power Act (FPA),¹ DATC Path 15, LLC (DATC Path 15) filed tariff revisions to reflect a proposed rate reduction to its transmission revenue requirement (TRR) that it charges for transmission service over the transmission facility upgrade (Path 15 Upgrade) in the Path 15 transmission corridor located in California.² DATC Path 15 requests that the proposed TRR decrease be made effective on April 20, 2014. In this order, the Commission accepts DATC Path 15's proposed TRR, suspends it for a nominal period, to be effective April 20, 2014, subject to refund, and establishes hearing and settlement judge procedures. Also, because DATC Path 15 is proposing a TRR reduction and a further decrease may be warranted, we are instituting an investigation pursuant to section 206 of

¹ 16 U.S.C. § 824d (2012).

² DATC Path 15 is the successor-in-interest to 72 percent of transmission service rights associated with the Path 15 Upgrade. Since the Path 15 Upgrade's becoming commercially operable, these transmission service rights were acquired by Atlantic Power Holdings, LLC (Atlantic) from Trans-Elect NTD Path 15, LLC (Trans-Elect) on September 15, 2006 (*see Atlantic Power Holdings, LLC*, 116 FERC ¶ 62,207 (2006)) and thereafter by DATC Path 15 from affiliates of Atlantic on April 30, 2013 (*see Atlantic Path 15, LLC*, 143 FERC ¶ 62,025 (2013)).

the FPA³ in Docket No. EL14-33-000 to determine whether DATC Path 15's proposed TRR reduction is just and reasonable.

I. Background

2. The Path 15 Upgrade is an 84-mile, 500 kilovolt (kV) transmission line built along the existing Path 15 corridor in California to relieve a constrained congestion point. In 2001, the Commission specifically recognized the Path 15 corridor as a significant problem area requiring incentives for investment to alleviate costly congestion.⁴ The upgraded Path 15 transmission line went into operation on December 22, 2004, adding roughly 1,500 megawatts (MW) to the existing 5,400 MW of transmission capacity from southern to northern California, and increasing transmission capacity from north to south by about 1,100 MW.

3. On June 12, 2002, the Commission accepted a letter agreement among the Path 15 participants⁵ that constituted the first step in a process that led to the addition of transmission capacity along California's Path 15.⁶ The letter agreement provided for, among other things, the use of a 13.5 percent return on common equity (ROE) in the calculation of a to-be-filed TRR so as to promote the timely construction of additional transmission facilities.⁷ Later, the Commission noted that the rate principles approved in the Path 15 Order were consistent with those enunciated in the Removing Obstacles Orders, but stood independent of those orders.⁸ The Commission stated that the rate principles approved were designed to alleviate transmission constraints along Path 15,

³ 16 U.S.C. § 824e (2012).

⁴ *Removing Obstacles to Increased Elec. Generation and Nat. Gas Supply in the Western United States*, 94 FERC at 61,973, *reh'g denied*, 95 FERC ¶ 61,225, *order on requests for reh'g and clarification*, 96 FERC ¶ 61,155, *further order on requests for reh'g and clarification*, 97 FERC ¶ 61,024 (2001) (Removing Obstacles Orders). *See also Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249, at 62,190 (2004).

⁵ The Path 15 participants included Western Area Power Administration (WAPA), Trans-Elect, and Pacific Gas & Electric Company (PG&E).

⁶ *Western Area Power Admin.*, 99 FERC ¶ 61,306 (2002) (Path 15 Order), *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom., Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

⁷ *Id.* at 62,277.

⁸ *Western Area Power Admin.*, 100 FERC ¶ 61,331 (2002).

and that Path 15 was a uniquely critical path with transmission limitations that had serious impacts on the ability to move power over the system.⁹

4. On December 2, 2004, the Commission issued an order, which accepted and suspended Atlantic's initial TRR.¹⁰ However, the issue of the 13.5 percent ROE was not set for hearing because it was part of the previously-accepted letter agreement. The Commission stated that it accepted the letter agreement to give some certainty to the financial community and to enable the Path 15 participants to secure the necessary financing of this critically needed infrastructure. On November 20, 2006, the Commission found, on the record developed in the ordered hearing, that Atlantic's proposed TRR and transmission owner tariff were just and reasonable, following certain modifications.¹¹ Pursuant to a separate settlement agreement, Atlantic agreed to file rate cases not more than three years apart, starting at the end of the first three-year rate period, and agreed that it would not seek an ROE in excess of 13.5 percent in the first rate case.¹² The Commission allowed a three-year moratorium on rate filings and directed Atlantic to file a rate case at the end of the moratorium, including an updated (actual) capital structure for the company.¹³

A. First Triennial Rate Case

5. On December 21, 2007, Atlantic filed its first triennial rate case proposing a decrease in its TRR and a continuation of the authorized 13.5 percent ROE (2007 Rate Case). On February 19, 2008, the Commission approved Atlantic's proposed 13.5 percent ROE and set the proposed reduction to its TRR for hearing and settlement judge procedures.¹⁴ With regard to the ROE, the Commission found that the 13.5 percent ROE was within a range of reasonable returns developed consistent with Commission policy and that Atlantic should be allowed to continue to use the 13.5 percent ROE given the

⁹ *Id.* at 62,538-62,539.

¹⁰ *See Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249 (2004).

¹¹ *Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 (2006), *reh'g denied* 119 FERC ¶ 61,093 (2007). (Trans-Elect NTD Path 15, LLC changed its name to Atlantic Path 15, LLC in 2006).

¹² Path 15 Order, 99 FERC at 62,280.

¹³ *Id.*

¹⁴ *Atlantic Path 15, LLC*, 122 FERC ¶ 61,135 (2008) (February 2008 Order), *reh'g granted in part and denied in part*, 133 FERC ¶ 61,153 (2010).

need for stability and certainty in the financial community concerning recovery of investments made in critical infrastructure.¹⁵ Subsequently, the Commission accepted an uncontested settlement resulting in a decrease in the TRR from \$34,921,034 to \$30,900,000.¹⁶ As part of the 2009 Settlement, Atlantic agreed not to seek an ROE in excess of 13.5 percent.

B. Second Triennial Rate Case

6. On February 18, 2011, consistent with the terms of the 2009 Settlement, Atlantic filed its second triennial rate case (2011 Rate Case), proposing a reduction to its TRR from \$30,900,000 to \$30,303,018. Atlantic also requested a continuation of the approved 13.5 percent ROE.

7. On April 19, 2011, the Commission issued an order stating that Atlantic's proposed TRR, including the 13.5 percent ROE, raised issues of material fact that could not be resolved on the record, accepted the proposed TRR, suspended it for a nominal period subject to refund, and established hearing and settlement judge procedures.¹⁷ The Commission directed the presiding judge:

to determine the appropriate range of reasonable returns, and in recognition of the benefits that the Path 15 Upgrade continues, and will continue, to provide, set the ROE at the upper end of this range, not to exceed the filed 13.5 percent ROE.¹⁸

8. On March 8, 2011, Atlantic filed a settlement agreement (2012 Settlement) providing, among other things, for a \$28,750,000 TRR and that a revised TRR would be filed no later than February 18, 2014 with a requested April 20, 2014 effective date and a commitment to refile rate cases not more than three years apart remaining in effect. The Commission accepted the 2012 Settlement Agreement.¹⁹

¹⁵ February 2008 Order, 122 FERC ¶ 61,135 at PP 19-21.

¹⁶ *Atlantic Path 15, LLC*, 128 FERC ¶ 61,130 (2009) (2009 Settlement).

¹⁷ *See Atlantic Path 15, LLC*, 135 FERC ¶ 61,037, at P 18 (2011), *reh'g denied*, 138 FERC ¶ 61,005 (2012).

¹⁸ *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 at P 20.

¹⁹ *See Atlantic Path 15, LLC*, 139 FERC ¶ 61,148 (2012), Errata Notice (May 24, 2012).

II. The DATC Path 15 Filing

9. In its current rate filing, DATC Path 15 proposes to reduce the TRR to \$28,243,206, a reduction of \$506,794 from the current rates on file with the Commission. According to DATC Path 15, the proposed TRR was based upon a test year consisting of the 12 months that ended on December 31, 2013. DATC Path 15 states that the proposed TRR is consistent with traditional cost of service rate filings.

10. DATC Path 15 also requests continuation of its currently approved ROE of 13.5 percent. DATC Path 15 contends that the 13.5 percent ROE: (1) is consistent with the 2012 Settlement; (2) is consistent with the Commission's policy and precedent; (3) is appropriate in light of the Path 15 Upgrade's continuing benefits to ratepayers in California and the broader Western Interconnection transmission system; and (4) meets investor expectations and conforms with the Commission's goals of promoting new transmission investment.²⁰

III. Notice of Filing and Responsive Pleadings

11. Notice of DATC Path 15's filing was published in the *Federal Register*, 79 Fed. Reg. 10,792 (2014), with interventions and comments due on or before March 11, 2014. The California Public Utilities Commission (CPUC) filed a notice of intervention. Timely motions to intervene were filed by the Modesto Irrigation District, Northern California Power Agency, the City of Santa Clara, California and the M-S-R Public Power Agency, and Trans Bay Cable LLC. Timely motions to intervene and comments or protests were filed by the California Department of Water Resources State Water Project (State Water Project), the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (collectively, Six Cities), PG&E, and Southern California Edison Company (SoCal Edison). On March 18, 2014, State Water Project filed a motion to supplement and a supplement to its protest. On March 26, 2014, DATC Path 15 filed a motion for leave to answer and an answer to the protests. On March 28, 2014, State Water Project filed an answer to DATC Path 15's answer.

12. Six Cities, State Water Project, and CPUC argue that DATC Path 15's proposed TRR is unjust and unreasonable, particularly with respect to the requested ROE, the level of projected rate case costs associated with this proceeding, and the operation and maintenance (O&M) expenses reflected in the cost of service. CPUC, SoCal Edison, and PG&E also contend the DATC Path 15 filing contains other problematic rate proposals including the inclusion of Special Funds in rate base. CPUC states that further review of

²⁰ DATC Path 15 Transmittal Letter at 13 (citing *Trans Bay Cable LLC*, 145 FERC ¶ 61,151, at P 19 (2013); *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037, at PP 19-20 (2011)).

other issues in the filing is required to assure that DATC Path 15 is compliant with Commission policy. CPUC states that these additional issues include: capital structure, prepayments, normalization of accumulated deferred income taxes, and the increasing O&M and administrative and general expenses when rate base is declining. Parties request that the Commission: (1) approve the as-filed reduction in DATC Path 15's TRR effective as of April 20, 2014; (2) reject DATC Path 15's request for a 13.5 percent ROE; and (3) initiate an investigation under section 206 of the FPA, including hearing and settlement procedures, and establish the earliest permissible refund effective date, for the purpose of evaluating whether a further reduction in DATC Path 15's TRR is appropriate.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We deny State Water Project's motion to supplement its protest in that its supplement has not assisted us in clarifying the issues.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept DATC Path 15's or State Water Projects' answers and will, therefore, reject them.

B. Hearing and Settlement Judge Procedures

15. DATC Path 15's proposed TRR, including the requested 13.5 percent ROE, raises issues of material fact that cannot be resolved based upon the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. At the hearing, the presiding judge shall consider the justness and reasonableness of all issues arising out of DATC Path 15's proposed TRR reduction. Therefore, we will accept DATC Path 15's proposed TRR, suspend it for a nominal period, make it effective April 20, 2014, subject to refund, and set it for hearing and settlement judge procedures.²¹

²¹ See *Atlantic Path 15, LLC*, 133 FERC ¶ 61,153 at PP 20, 21 (clarifying that the Commission's decision to make up-front ROE determinations or to order an evidentiary hearing will depend on the facts and circumstances of each individual case).

16. In the Path 15 Order,²² we granted Trans-Elect's request for a 13.5 percent ROE as an incentive for development of a much needed transmission line in a critically congested area. We stated that our acceptance of the letter agreement was to provide the participants with a way to move forward with the financing of the project upgrade. Since its inception, the Path 15 Upgrade has provided significant rate and service reliability benefits, including a substantial decrease in actual and potential congestion, along with a substantial increase in system reliability, that allowed the Commission in part to summarily approve Atlantic's proposed continuation of the 13.5 percent ROE in the 2007 Rate Case.²³ Also, in the 2007 Rate Case, the Commission found that Atlantic's 13.5 percent ROE was within a range of reasonable returns developed consistent with Commission policy.²⁴ The Commission noted that the continuation of the financial incentives was appropriate in order to compensate investors for taking the risks associated with developing such infrastructure projects. The Commission also found that given the need for stability and certainty in the financial community concerning recovery of investments made in critical infrastructure, Atlantic should be allowed to continue the use of a 13.5 percent ROE in developing its TRR.²⁵

17. In the 2011 Rate Case, we set the TRR for hearing; nevertheless, in light of the unique nature of the Path 15 Upgrade and the benefits it provides, we directed the presiding judge to determine the appropriate range of reasonable returns, and to set the ROE at the upper end of this range, not to exceed the filed 13.5 percent ROE.²⁶ That proceeding culminated in the Commission's acceptance of the 2012 Settlement.²⁷

18. As to the current filing, our preliminary analysis of DATC Path 15's proposed ROE again indicates that the 13.5 percent ROE may no longer fall within the zone of reasonable returns. Thus, the proposed TRR, including the 13.5 percent ROE, has not been shown to be just and reasonable, and may be unjust and unreasonable. We note that

²² Path 15 Order, 99 FERC ¶ 61,306.

²³ February 2008 Order, 122 FERC ¶ 61,135 at P 18.

²⁴ *Id.* PP 19-20.

²⁵ *Id.* P 20.

²⁶ *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 at P 20.

²⁷ *See Atlantic Path 15, LLC*, 139 FERC ¶ 61,148 (2012), Errata Notice (May 24, 2012).

DATC Path 15's 13.5 percent incentive ROE was established prior to Order No. 679²⁸ and, thus, does not have specific incentive adders. Therefore, we direct the presiding judge to determine the appropriate range of reasonable returns, and in recognition of the benefits that the Path 15 Upgrade continues, and will continue, to provide, set the ROE at the upper end of this range, not to exceed the filed 13.5 percent ROE.

19. Also, because DATC Path 15 is proposing a rate reduction to its TRR, and a further decrease may be warranted, we are instituting a section 206 investigation in Docket No. EL14-33-000 with respect to the justness and reasonableness of DATC Path 15's proposed TRR reduction. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA²⁹ requires that the Commission establish a refund effective date that is no earlier than publication of the notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date. We establish a refund effective date to be the earliest date possible in order to provide maximum protection to customers, i.e., the date the notice of the initiation of the investigation in Docket No. EL14-33-000 is published in the *Federal Register*.

20. Section 206(b) of the FPA also requires that if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding administrative law judge (judge) to provide a report to the Commission no later than 15 days in advance of the 180-day period in the event the judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification or a settlement or issuance of an initial decision.

21. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute 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

²⁸ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

²⁹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

of the Commission's Rules of Practice and Procedure.³⁰ 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.³¹ 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. 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) DATC Path 15, LLC's proposed TRR is accepted for filing and suspended for a nominal period, to become effective April 20, 2014, subject to refund, as discussed in the body of this order.

(B) 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. Part I), a public hearing shall be held concerning DATC Path 15, LLC's proposed TRR. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is 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.

³⁰ 18 C.F.R. § 385.603 (2013).

³¹ 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 backgrounds and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and with the Chief Judge on the status of 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.

(E) 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 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 Rules of Practice and Procedure.

(F) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceedings in Docket No. EL14-33-000.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F) above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.