

158 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Potomac-Appalachian Transmission Highline, LLC Docket Nos. ER09-1256-002
PJM Interconnection, L.L.C. ER12-2708-003

OPINION NO. 554

ORDER ON INITIAL DECISION

(Issued January 19, 2017)

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1. This case is before the Commission on exceptions to an Initial Decision¹ issued on September 14, 2015. The Initial Decision addressed disputes relating to a project ordered and later cancelled by PJM, known as the PATH Project.² The project's developer, PATH, has filed under FPA section 205³ to recover its prudently incurred costs associated with the PATH Project's abandonment. *Pro Se* Challengers have filed formal challenges pursuant to PATH's Formula Rate Protocols for the three rate years preceding the abandonment filing. In this order, we affirm in part, and reverse in part, the determinations of the Presiding Judge on the formal challenges, prudence, return on equity, legal fees, the closing out of transactions, and the effective date, as discussed below. Accordingly, as discussed below, we direct PATH to file a compliance filing within 60 days of the date of this opinion, which includes a report estimating refunds that it will issue under the Formula Rate Protocols. We affirm the Presiding Judge's Initial Decision in all other respects.

I. Background

A. Description of the Project and PATH

2. The PJM Board of Managers identified the PATH Project as part of PJM's 2007 RTEP assessment of long-term region-wide reliability, based on 2012 conditions. In 2008, PJM adopted a reconfiguration; as reconfigured, the PATH Project was to be a 275 mile 765 kV line from Amos Substation in West Virginia through Virginia to the new Kempton Substation in Maryland. The estimated cost of the reconfigured project was \$2.1 billion.⁴

¹ *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025 (2015) (Initial Decision).

² See Appendix A of this order for a table of all acronyms and abbreviations.

³ 16 U.S.C. § 824d (2012).

⁴ Ex. PTH-1 at 7-9.

3. PJM assigned construction responsibility for the PATH Project to Allegheny Power⁵ and AEP, who formed a joint venture, PATH.⁶ PATH proceeded with the design, engineering, and procurement of the PATH Project, and filed applications for CPCN with the relevant state public utility commissions. PATH does not employ any individuals. Rather, both AEP and Allegheny/FirstEnergy provided staff to support the project.⁷

4. PATH consists of multiple operating companies, two of which are PATH-WV, owned jointly by AEP and Allegheny, and PATH-AYE, owned solely by Allegheny. To satisfy legal requirements for public utility status in Virginia and Maryland, PATH-AYE formed PATH-VA to finance, construct, own, operate and maintain the PATH Project in Virginia; and PATH-AYE and its affiliate, Potomac Edison, formed PATH-MD, and they agreed that Potomac Edison would construct, operate and maintain the PATH Project in Maryland and PATH-MD would finance and own the Project in that state.⁸ Except where the distinction is necessary, we use the term PATH throughout this order to refer to each of these entities.

B. Rates and Settlement Agreements Overview

5. PATH's cost recovery for the PATH Project has developed over several proceedings before the Commission. On December 28, 2007, in Docket No. ER08-386-000, PATH filed proposed tariff sheets pursuant to FPA section 205 to be included in PJM's OATT, and requested several transmission rate incentives for the PATH Project. In 2008, the Commission approved several transmission rate incentives pursuant to Order

⁵ Allegheny Power merged with FirstEnergy on February 25, 2011, and FirstEnergy became the ultimate upstream owner of Allegheny's interests in the PATH Project at that time.

⁶ *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at P 3 (2008) (Incentives Order), *on reh'g*, *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (granting rehearing, setting the base ROE of 12.3 percent for hearing and settlement judge procedures, and approving the 2009 Settlement Agreement filed by PATH and several parties resolving formula rate issues, as set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Tariff) (2010 Settlement Order).

⁷ Ex. JCA-48.

⁸ PATH Application, Docket No. ER12-2708-000, Ex. PTH-100 at 10. PATH-WV, PATH-AYE, PATH-VA, and PATH-MD were all organized as financing vehicles.

No. 679,⁹ including return on equity adders totaling 200 basis points and an up-front base return on equity of 12.3 percent (resulting in an overall return on equity of 14.3 percent), effective March 1, 2008, and permission to file for recovery of development and construction costs if the project were abandoned for reasons beyond PATH's control,¹⁰ and setting other issues for hearing. On rehearing of the Incentives Order, the Commission approved the 2009 Settlement Agreement. The Commission also set the base return on equity for hearing and settlement proceedings, after which the parties settled; the Commission accepted the subsequent 2011 Settlement Agreement.¹¹

6. Pursuant to the 2009 Settlement Agreement and the PJM OATT, PATH filed Annual Updates regarding their rates, first in Docket No. ER08-386-000, and later, in Docket No. ER09-1256-000. The Formula Rate Protocols filed in PJM OATT Attachment H-19B establish the legal framework for the updating and review of the Formula Rate calculations.

C. Formal Challenges and Abandonment

7. PATH's initial Annual Update under its Formula Rate Protocols, the 2009 Annual Update, went into effect unchallenged. However, each of its next three updates, the 2010, 2011, and 2012 Annual Updates, were all objected to, using the Formal Challenge procedure pursuant to the Formula Rate Protocols, which are discussed in Section III of this order. The Annual Updates for a portion of 2012 and all subsequent years are subsumed by the abandonment proceeding, which is discussed in the remainder of this order.

⁹ *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 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

¹⁰ Incentives Order, 122 FERC ¶ 61,188. PATH also received authorization to include 100 percent of CWIP in rate base, and amortize pre-commercial costs during the construction period that were not included as CWIP. Consistent with Order No. 679, we have evaluated PATH's abandonment recovery to ensure no double recovery has occurred between abandonment recovery and expensing of other costs such as pre-commercial costs.

¹¹ *Potomac-Appalachian Transmission Highline, L.L.C.*, 138 FERC ¶ 61,113 (accepting the 2011 Settlement Agreement, governing revisions to the PATH Project return on equity, among other things) (2012 Settlement Order).

8. On January 21, 2011, in Docket No. ER09-1256-000, *Pro Se* Challengers filed a formal challenge to the 2010 Annual Update (which applied to the 2009 Rate Year). On December 23, 2011, also in this docket, *Pro Se* Challengers filed a formal challenge to the 2011 Annual Update (which applied to the 2010 Rate Year). On September 20, 2012, the Commission set these two formal challenges for hearing and settlement judge procedures.¹²

9. On September 28, 2012, PATH filed in Docket No. ER12-2708-000 seeking to recover approximately \$121.5 million in abandonment costs associated with the PATH Project, for the period of January 1, 2008 through August 31, 2012. PATH proposed to amortize the \$121.5 million to expense in rates over a five year amortization period, including a return on the average unamortized balance, resulting in all costs being fully expensed at the end of five years. The major functional categories of costs that PATH proposed to amortize to expense over a five year period, and earn a return on the average unamortized balance were:

- \$39.7 million – engineering and procurement
- \$66.9 million – right of way options, land rights, and land purchases
- \$14.9 million – administrative and general costs, legal fees associated with CPCN, and permitting.¹³

10. The Commission accepted in part and rejected in part PATH's abandonment filing, denied waiver of "section 35.13 to provide full Period I and Period II data, and require[d] PATH to file cost support, including testimony, exhibits, and workpapers supporting its application, including capital structure as part of the case in chief," and set the matter for hearing.¹⁴

11. On April 1, 2013, *Pro Se* Challengers filed a third formal challenge to the 2012 Annual Update (which applied to the 2011 Rate Year). On June 5, 2013, the Commission

¹² *Potomac-Appalachian Transmission Highline, L.L.C.*, 140 FERC ¶ 61,229 (2012) (First and Second Formal Challenges Order).

¹³ PATH Application, Docket No. ER12-2708-000, at Ex. PTH-100, Ex. PTH-104.

¹⁴ *PJM Interconnection, LLC*, 141 FERC ¶ 61,177, at P 62 (2012) (Abandonment Hearing Initiation Order) (authorizing the Chief Judge to consolidate PATH's abandonment filing with *Pro Se* Challengers formal challenges docket).

issued an order setting this third formal challenge for hearing and settlement judge proceedings, consolidating it with the previously consolidated proceedings.¹⁵

12. Hearings were held March 25, 26, 30, 31, April 1-3, 14-17, 20, and 22, 2015 before the Presiding Judge. The Presiding Judge issued his Initial Decision on September 14, 2015. Trial Staff, PATH, *Pro Se* Challengers, and Joint Consumer Advocates¹⁶ each filed briefs on exceptions and briefs opposing exceptions.

II. Procedural Matters

A. EEI Filing and Responsive Pleadings

13. On October 14, 2015, EEI filed a motion to intervene out-of-time, or in the alternative, participate as *amicus curiae*, and briefs on exceptions. EEI gives three reasons for granting late intervention a month after the issuance of the Initial Decision. First, EEI argues that it was not reasonably foreseeable that the Initial Decision would have unexpectedly reached conclusions regarding the appropriate return on equity.¹⁷ Second, EEI argues that granting late intervention will not harm or prejudice existing parties' rights because it accepts the record as it stands.¹⁸ Finally, EEI argues that its interests are not adequately represented because it represents more than 70 percent of the nation's electric power industry.¹⁹

14. EEI states that the Initial Decision is inconsistent with Commission precedent and should be reversed, otherwise it would undermine the transmission development goals set by Congress and the Commission and would set a dangerous precedent that introduces significant new risks for investors and erodes the upfront certainty that the abandonment incentive was intended to provide. EEI argues that the Initial Decision's requirement for

¹⁵ *Potomac-Appalachian Transmission Highline, L.L.C.*, 143 FERC ¶ 61,208 (2013) (Third Formal Challenge Order).

¹⁶ Joint Consumer Advocates comprise Maryland Office of People's Counsel, the Pennsylvania Office of Consumer Advocate, the Virginia Office of the Attorney General's Division of Consumer Counsel, Delaware Division of Public Advocate, Maryland Public Service Commission, and the Delaware Public Service Commission.

¹⁷ EEI Amicus at 1-3.

¹⁸ EEI Amicus at 4.

¹⁹ EEI Amicus at 4-5.

an after-the-fact reassessment of the risk on an abandoned project will diminish investor confidence in new transmission infrastructure investments and is contrary to the objective of the Energy Policy Act of 2005.²⁰

15. EEI claims that the real harm to investors from a significantly reduced ROE at the abandonment stage is the loss of the ability to deploy the capital in question elsewhere and earn a higher return on that investment. It further claims that prospectively this precedent will incent investors to deploy their capital on investments other than interstate electric transmission, or will require the project developer to offer an even higher ROE to compensate them for the risk that they would lose potential earnings on their capital if the project is abandoned.²¹ EEI states that the Initial Decision erred by finding that the appropriate ROE to be applied to the prudently-incurred abandoned plant costs is “an issue of first impression.”²² EEI argues that the Commission has addressed the appropriate ROE for prudently-incurred abandoned plant costs in several prior cases holding that the utility whose transmission project was cancelled through no fault of its own should be able to earn a fair return, that is, a base ROE.²³

16. EEI states that the Initial Decision erred by not allowing the recovery of costs incurred to educate consumers, public officials, and other stakeholders regarding PATH Project. EEI states that, if affirmed, this rejection will set a precedent that will discourage efforts by transmission developers to proactively work with all affected stakeholders during the development and siting process. EEI argues that the Initial Decision fails to acknowledge the Commission statement in *ISO New England* that public outreach and education expenses are properly recovered from ratepayers.²⁴ It also argues that the Instructions to the USofA, and the limited Commission guidance on the interpretation of the accounts, do not clearly establish that consumer education and outreach expenses

²⁰ EEI Amicus at 18-19.

²¹ EEI Amicus at 23-24.

²² EEI Amicus at 25 (citing Initial Decision, 152 FERC ¶ 63,025 at P 123).

²³ EEI Amicus at 26 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,156, at P 39 (2013) (*MAPP Order*) and *Southern California Edison Co.*, 121 FERC ¶ 61,168, at P 143 (2007)).

²⁴ See *ISO New England, Inc.*, 118 FERC ¶ 61,105 (2007) (*ISO New England*).

incurred by a new entity developing a transmission project are categorically excluded from recovery in jurisdictional rates and can be read to support these types of expenses.²⁵

17. On October 19 and 29, 2015, *Pro Se* Challengers, Trial Staff, and Joint Consumer Advocates filed motions in opposition to EEI's motion to intervene out of time. *Pro Se* Challengers, Trial Staff, and Joint Consumer Advocates request the Commission deny EEI's late intervention because Commission orders, including the one cited by EEI, regularly deny motions to intervene after the Initial Decision was issued,²⁶ and EEI was on notice several years ago that its interests could have been affected.²⁷

²⁵ EEI Amicus at 33-35.

²⁶ *Pro Se* Challengers motion in opposition at 3-6 (citing *Duke Energy Carolinas LLC*, 136 FERC ¶ 61,199 (2011); *California Dep't of Water Resources & the City of Los Angeles*, 120 FERC ¶ 61,057 (2007), *reh'g denied*, 120 FERC ¶ 61,248 (2007), *aff'd*, *California Trout & Friends of the River v. FERC*, 572 F.3d 1003 (9th Cir. 2009)). Trial Staff motion in opposition (citing *NorthWestern Corp.*, 147 FERC ¶ 61,049, at P 13 (2014) (denying EEI's motion to intervene filed two months after an initial decision was issued); *Golden Spread Electric Coop., Inc.*, 123 FERC ¶ 61,047, at PP 202-208 (2008) (denying a motion to intervene filed "the day that briefs on exceptions ... were due"); *California Indep. Sys. Operator Corp.*, 103 FERC ¶ 61,114, at P 8 (2003); *Connecticut Yankee Atomic Power Co.*, 92 FERC ¶ 61,269, at 61,899 (2000); *Re Amerada Hess Pipeline Corp.*, 58 FERC ¶ 61,173, at 61,518-19 (1992)).

²⁷ Joint Consumer Advocates motion opposing at 11-13 (citing *Cent. Nebraska Pub. Power & Irrigation Dist.*, 124 FERC ¶ 61,228, at 62,191 (2008); *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189, at 61,932 (2006); *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-200 (1992) ("interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking."); *Amoco Prod. Co.*, 24 FERC ¶ 61,019, at 61,084 (1983) (a party moving to intervene out-of-time cannot show "good cause" when it had notice of the proceeding)).

18. Trial Staff does not oppose EEI's amicus participation, noting that the Commission has both allowed and disallowed such participation.²⁸ *Pro Se* Challengers and Joint Consumer Advocates oppose EEI's amicus participation. *Pro Se* Challengers and Joint Consumer Advocates also oppose EEI's comments on the merits, arguing that EEI ignores the specifics of the PATH Project litigation.

B. Commission Determination

19. In ruling on a motion to intervene out of time, the Commission applies the criteria set forth in its Rule 214(d),²⁹ and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party, but intervention near the end of a proceeding tends to be more disruptive. Therefore, the Commission is more liberal in granting late intervention at the early stages of a proceeding but is more restrictive as the proceeding nears its end.³⁰

20. EEI filed intervention and briefs after the close of the record, after the issuance of the Initial Decision, and more than three years after hearings began. Granting EEI party status would necessarily either deny participants the opportunity to rebut their position, or

²⁸ Trial Staff motion at 3-4 (comparing *United Fuel Gas Co.*, 28 FPC 347, 347 (1962) (denying intervention but finding *amicus curiae* participation “desirable” “for the limited purposes of advising ... further on the propositions raised”), and *Texas Eastern Transmission Corp.*, 35 FPC 282, 282 (1966), and *Transcontinental Gas Pipe Line Corp.*, 88 FERC ¶ 61,155, at 61,521 (1999), with *Massachusetts Municipal Wholesale Electric Co.*, 20 FERC ¶ 63,103, at 63,379 (1982) (denying *amicus curiae* participation based upon the same “rationale that militates against the grant of late intervention”), and *Bangor Hydro-Electric Company*, 95 FERC ¶ 61,149, at 61,481 (2001) (denying *amicus* participation because “[t]o do so would vitiate the Commission’s regulations and precedent ... by allowing AEI to [participate] indirectly [where] it cannot do [so] directly”).

²⁹ 18 C.F.R. § 385.214(d) (2016).

³⁰ *Maritimes & Northeast Pipeline, L.L.C.*, 154 FERC ¶ 61,182, at P 33 (2016); *Stingray Pipeline Co.*, 66 FERC ¶ 61,202, at 61,461 (1994).

else cause considerable delay by reopening the record.³¹ EEI argues that the Initial Decision reached unexpected conclusions on several issues of public policy, with potentially wide-reaching effects. The Commission has considered such arguments in other proceedings, and nevertheless ruled that parties are expected to intervene “as early as possible, whether or not they had yet decided the extent of their participation,” rather than wait until they can better articulate their interest.³² Some of the Initial Decision’s conclusions may have not been what EEI expected, but even EEI does not deny that the issues themselves were far from unexpected. Rather, the Initial Decision discussed matters that had been publicly in dispute in this proceeding since, at least, the Abandonment Hearing Initiation Order in 2012. We therefore reject EEI’s motion.

21. In the alternative, EEI requests that the Commission consider their comments in the nature of an *amicus curiae* filing. A person need not be a party to a proceeding in order to file a pleading in a Commission proceeding.³³ Nor do PATH’s Formula Rate Protocols prevent persons who have not intervened from filing a pleading.³⁴ We shall consider EEI’s comments accordingly.

III. Annual Formal Challenges

A. Formula Rate Protocols

22. At issue in this section is whether costs associated with PATH’s public relations efforts were properly booked. PATH recorded \$6,237,472.17 advertising, advocacy-building, and lobbying expenses into its rates in 2009, 2010, and 2011.³⁵ At the end of this section, we also discuss public relations costs that PATH booked to plant accounts, mainly Account 107, Construction Work In Progress-Electric, which were subsequently

³¹ See *Connecticut Yankee Atomic Power Co.*, 92 FERC at 61,899 (“To permit NU’s late intervention after the issuance of the Initial Decision, in order to challenge that decision, would result in undue burden on the active parties to the proceeding.”).

³² *Maritimes & Northeast Pipeline, L.L.C.*, 154 FERC ¶ 61,182 at P 33.

³³ See 18 C.F.R. §§ 385.202, 385.211 (2016).

³⁴ First and Second Formal Challenges Order, 140 FERC ¶ 61,229 at P 106.

³⁵ Ex. NH-1 at 67. *Pro Se* Challengers dispute \$1,536,434.99 on the Reliable Power Coalitions (Ex. NH-12); \$1,440,830.10 on PEAT (Ex. NH-31); \$140,644.74 on Memberships (Ex. NH-39); \$331,843.56 on Repass (Ex. NH-49); \$75,068.78 on Access Point (Ex. NH-52); \$93,910 on Larry Puccio (Ex. NH-55).

included in PATH's abandonment application. *Pro Se* Challengers and Trial Staff argue that these costs should have been booked to Account 426.4, Expenditures for Certain Civic, Political, and Related Activities, or Account 426.5, Other Deductions.

23. The Initial Decision found that all the expenses at issue should have been booked to Account 426.4, which was not recoverable under the agreed-to Formula Rate, and therefore required PATH to refund these amounts. The Commission affirms the Initial Decision's designation of the expenses at issue. PATH must refund the improperly booked amounts in the manner prescribed in its Formula Rate Protocols.

24. PATH's Formula Rate Protocols require PATH to bear the burden of proving that it has reasonably applied the terms of the Formula Rate, including whether data was properly recorded,³⁶ clearly identified, accurate, and supported,³⁷ in order to recover a challenged expense. Under the terms that PATH agreed to, PATH has the initiative of proposing in which accounts to book which costs, but PATH has the burden of proof for its accounting.³⁸ In this respect, the Formula Rate Protocols follow the Commission's standard policy on formula rates, which is that a utility must "illustrate how its rates were derived from FERC Accounts or the formulas used," in order to avoid giving the utility "the potential to exercise discretion in calculating the rate."³⁹

B. Amounts PATH Booked to Account 923

1. Background

25. PATH booked certain costs, detailed below, to Account 923, Outside Services Employed, which states:

A. This account shall include the fees and expenses of professional consultants and others for general services which are **not applicable to a particular operating function or to other accounts**. It shall include also the pay and expenses of

³⁶ Formula Rate Protocols, § VII.A, VII.C.1.

³⁷ Formula Rate Protocols, § III.D.

³⁸ Formula Rate Protocols, § VII.A.1.

³⁹ *Tampa Elec. Co.*, 133 FERC ¶ 61,023, at P 54 (2010).

persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered an employee of the utility.

B. This account shall be so maintained as to permit ready summarization according to the nature of service and the person furnishing the same.⁴⁰

As the above-emphasized language makes clear, Account 923 is only suitable for use when no other account is appropriate.

26. *Pro Se* Challengers and Trial Staff argue these costs should be booked to Account 426.4, Expenditures for certain civic, political and related activities, which states:

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.⁴¹

27. PATH paid Access Point \$115,089.77 to represent them before the Loudoun County, Virginia, Board of Supervisors where PATH sought an easement so that it could modify its proposed transmission line's path. PATH recorded \$75,068.78 of the Access Point expenses in Account 923, and the remainder in Account 426.4.

28. Charles Ryan provided communications and public relations services relating to the siting and construction of the PATH Project, and worked through several other organizations.⁴² PATH states that PEAT was formed to educate the public, as well as to

⁴⁰ 18 C.F.R. pt. 101, Account 923 (2016) (emphasis added).

⁴¹ 18 C.F.R. pt. 101, Account 426.4 (2016).

⁴² Ruberto Test., Ex. PTH-7 at 10.

create, promote, and collect signatures on public petitions supporting the PATH Project.⁴³ PATH recorded \$1,440,830.10 spent on PEAT between 2009 and 2011, mostly in Account 923, with small amounts in Account 930.1 or Account 107. The Reliable Power Coalitions, which were created and fully funded by PATH, were part of a public advocacy campaign to influence public opinion and public officials. The Reliable Power Coalitions incurred \$1,578,618 in expenses between 2009 and 2011.⁴⁴ PATH reimbursed its contractor, Charles Ryan, \$331,843.56 for a public opinion poll subcontracted to Repass. PATH recorded all Repass expenses in Account 923 except for three invoices, which it instead recorded in Account 107. PATH reimbursed Charles Ryan \$93,910 for subcontracted services with Larry Puccio, a West Virginia registered lobbyist whose “services would include speaking with local stakeholders.”⁴⁵

29. PATH claims:

The evidence is uncontroverted that the direct purpose of the expenditures that the PATH Companies incurred for PEAT, the Reliable Power Coalitions, [Repass, and] Larry Puccio ... was influencing *public opinion*, which is the focus of the first clause of Account No. 426.4.⁴⁶

Although PATH’s Formula Rate does not provide for recovery of Account 426.4 expenses, PATH theorizes, as discussed below, that the expenses at issue here either do not fall within the purview of Account 426.4 or are nevertheless recoverable.

⁴³ According to PATH’s exhibits, PEAT actions were specified as: (a) recruiting speakers for the West Virginia and Virginia public hearings, (b) having local members write letters to the West Virginia Public Service Commission and the Virginia State Corporation Commission, (c) having local workers sign petitions supporting the Project in all three states, and (d) having members write and send letters concerning PATH’s National Environmental Policy Act (NEPA) application review. Ex. NH-38 at 6.

⁴⁴ *Pro Se* Challengers note that P 20 of the Initial Decision states a total of \$1,520,471.03, while P 34 of the Initial Decision states a total of \$1,578,618 of refund should be refunded to ratepayers. *Pro Se* Challengers Brief on Exceptions at 22. Based on our reading of both the Initial Decision and the record, we find that the correct amount is \$1,578,618.

⁴⁵ Ex. PTH-51 at 16:11-14, 18:7-10.

⁴⁶ PATH Brief on Exceptions at 61.

2. Initial Decision

30. The Initial Decision recounted both the history of the Commission's adoption of Account 426.4,⁴⁷ and its subsequent jurisprudence. The Initial Decision noted that PATH relied on *ISO New England*, but ruled that the Commission had allowed ISO New England to recover Account 426.4 costs in part because of "the unique formula provisions and factual circumstances of that case," whereas PATH had a formula rate that made "no allowances to recover [Account 426.4] expenditures."⁴⁸ The Initial Decision found PATH's factual circumstances to be more similar to those of pipeline cases where the Commission disallowed recovery of Account 426.4 expenses.⁴⁹ Finally, the Initial Decision emphasized that most of the case law addresses utilities that are ongoing enterprises providing public service, whereas PATH was never operational or provided public service, and the "burden is on the PATH Companies to make [evidentiary] showings," to support its challenged accounting.⁵⁰

31. The Presiding Judge assigned to Account 426.4 all expenses for PEAT,⁵¹ the Reliable Power Coalitions,⁵² Repass,⁵³ Puccio,⁵⁴ and Access Point. The Initial Decision noted that PATH admitted that "Access Point contacted public officials directly."⁵⁵

⁴⁷ *Expenditures for Political Purposes – Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Util's & Licensees & Natural Gas Companies – FPC Forms Nos. 1 and 2, Order No. 276, 30 FPC 1539 (1963), order on reh'g, 31 FPC 411 (1964).*

⁴⁸ Initial Decision, 152 FERC ¶ 63,025 at P 29.

⁴⁹ Initial Decision, 152 FERC ¶ 63,025 at P 31.

⁵⁰ Initial Decision, 152 FERC ¶ 63,025 at P 32.

⁵¹ Initial Decision, 152 FERC ¶ 63,025 at P 46.

⁵² Initial Decision, 152 FERC ¶ 63,025 at P 42

⁵³ Initial Decision, 152 FERC ¶ 63,025 at PP 50-51.

⁵⁴ Initial Decision, 152 FERC ¶ 63,025 at P 60.

⁵⁵ Initial Decision, 152 FERC ¶ 63,025 at P 55.

3. PATH Brief on Exceptions

32. PATH argues that the Initial Decision erred in two fundamental aspects. First, PATH argues that the Initial Decision's ruling is contrary to the text of Account 426.4 and fails to recognize the account's distinction between expenditures with the direct purpose to influence public officials and expenditures with the direct purpose to influence public opinion. Second, PATH argues that the Initial Decision's analysis of precedent improperly conflates the licensing process for a transmission project assigned to a public utility by PJM or another regional planner with the company-led selection process for the construction of a proposed gas pipeline project.⁵⁶

33. PATH argues that the Initial Decision performs no actual textual or historical analysis of the account's description in the Commission's regulations, but rather "simply observes that Account 426.4 includes expenditures to influence public officials, and that because 'the ultimate aim of the expenditures was to influence the decisions of public officials in an effort to obtain CPCNs and other licensing approvals,' the expenditures must be recorded in Account 426.4."⁵⁷

34. PATH interprets the first clause of Account 426.4, concerning expenses to influence public opinion, as only applying to a limited number of specific subjects, such as the election or appointment of public officials, referenda legislation, and approval, modification, or revocation of franchises.⁵⁸ PATH claims that Account 426.4 does not include expenditures to influence public opinion with the ultimate goal of facilitating licensing of transmission projects.

35. PATH argues that the Initial Decision ignored and is also inconsistent with the development of Account 426.4. PATH states that the Commission established Account 426.4 as a subaccount of Account 426 in Order No. 276.⁵⁹ PATH states the Commission deleted a clause from its proposed description of Account 426.4 that would have required expenditures "having any direct or indirect relationship to political matters, including the influencing of public opinion with respect to public policy" to be recorded in that account. PATH argues that by deleting this clause, the Commission confirmed that

⁵⁶ PATH Brief on Exceptions at 59.

⁵⁷ PATH Brief on Exceptions at 59-60 (quoting Initial Decision, 152 FERC ¶ 63,025 at P 32).

⁵⁸ PATH Brief on Exceptions at 61.

⁵⁹ PATH Brief on Exceptions at 64 (citing Order No. 276, 30 FPC 1539).

indirect efforts to influence public officials on political matters or “with respect to public policy” by influencing public opinion do not need to be recorded in Account 426.4.⁶⁰

36. Separately, PATH argues that under *ISO New England*, a utility may recover amounts that, for accounting purposes, would belong in Account 426.4, so long as the utility shows that the expenditures were related to core operations and undertaken to benefit ratepayers.⁶¹ PATH argues that a total ban on recovering Account 426.4 costs would severely thwart the Commission’s efforts to foster development of a strong transmission infrastructure.⁶²

37. PATH argues that it is not necessary for it to prove that it was not its ultimate aim to influence public officials in order to defend its decision to not record public relations expenses into Account 426.4. PATH argues that its failure to provide evidence to support a contention it did not make is not material under the USofA regulation.⁶³

38. PATH argues that the unrefuted evidence is that it sought to achieve the goal of obtaining a favorable licensing decision by influencing public opinion, not by directly contacting or lobbying public officials.⁶⁴ For example, PATH states that it established PEAT as a speakers’ bureau that provided information about the PATH Project to the public and the business community, by making subject matter experts such as former regulators and representatives from the business and labor communities available to speak on behalf of the PATH Project at various public events.⁶⁵

39. PATH argues that the Repass polling was used to gauge public attitudes toward the PATH Project and to measure changes in public opinion over time and helped them to determine the degree of effort that was required to educate the public in order to counteract the opposition to the Project and to develop the best targeted outreach and advertising campaigns.⁶⁶ PATH argues that Puccio’s services were not to lobby but

⁶⁰ PATH Brief on Exceptions at 64-65.

⁶¹ PATH Brief on Exceptions at 67.

⁶² PATH Brief on Exceptions at 58.

⁶³ PATH Brief on Exceptions at 75-76.

⁶⁴ PATH Brief on Exceptions at 79-81.

⁶⁵ PATH Brief on Exceptions at 76.

⁶⁶ PATH Brief on Exceptions at 77.

rather “outreach activities to influence public opinion in West Virginia in favor of the Project.”⁶⁷

40. PATH argues that Access Point sought to educate the Loudoun County Board of Supervisors about the benefits of the proposed route, which required the modification or release of an easement that prohibited the construction of a transmission line. PATH argues that neither *Pro Se* Challengers nor Trial Staff identified a single instance in which Access Point made specific requests of the officials with whom it met. PATH argues that the evidence shows that Access Point’s role was to provide information to the members of the Board of Supervisors and their staff, not to request them to take action. However if the Board of Supervisors would agree to modify the conservation easements, PATH claims, the Project could have used a more direct route through the county, with approximately \$200 million in savings to ratepayers and decreased impact in the local area.⁶⁸ PATH argues that because Access Point conveyed the same type of information that PATH would have conveyed at a hearing on this issue, the contacts were equivalent to “appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations,” the expenditures for which are excluded from Account 426.4.⁶⁹

4. **Pro Se Challengers Briefs on and Opposing Exceptions**

41. *Pro Se* Challengers argue that PATH’s reliance on *ISO New England* is misplaced, for four reasons. First, *Pro Se* Challengers argue that the informational expenditures at issue in *ISO New England* were of a different nature than PATH’s, because PATH mischaracterized expenditures used to influence public officials as “informational” public education, outreach, and advertising costs. *Pro Se* Challengers state that in *ISO New England*, the disputed expenditures involved direct communications with regulators and legislators and were not for benefit of any specific project or utility. By contrast, they continue, PATH’s expenditures were incurred to recruit and direct third-party advocacy purposed to influence the decisions of public officials in favor of the PATH Project.⁷⁰ For example, *Pro Se* Challengers argue that PATH’s own communications reveal that the purpose of the Reliable Power Coalitions was to recruit third party speakers who would

⁶⁷ PATH Brief on Exceptions at 77.

⁶⁸ PATH Brief on Exceptions at 82-83 (citing Ex. PTH-51 at 20).

⁶⁹ PATH Brief on Exceptions at 83-84.

⁷⁰ *Pro Se* Challengers Brief on Exceptions at 14-15.

“support the critically important regulatory decisions.”⁷¹ They state that PATH attempted to pay for a grassroots efforts campaign in Project area, and recruit members to send letters to PUC in support of PATH. *Pro Se* Challengers reiterate that the focus of the Reliable Power Coalitions as well as other groups was never purely informational, but intended to build advocacy that could be deployed at strategic moments to provide supportive speakers at regulatory hearings in order to influence the decisions of public officials.⁷² *Pro Se* Challengers state that Puccio’s contracted services were described by PATH in various ways with one similarity – promoting the PATH Project and influencing stakeholders and/or government officials.⁷³

42. Second, *Pro Se* Challengers argue that *ISO New England* is a stated rate case that has little precedential value in PATH’s formula rate case, because in a stated rate design case, the utility can include costs from any account in its proposed rate, subject to Commission approval. In a formula rate design case, they argue, a utility is constrained by the accounts that are part of the Commission-approved formula. *Pro Se* Challengers note that the PATH Formula Rate does not include Account 426.4 as a recoverable cost. They also note that PATH has not made a section 205 filing with the Commission to change its formula rate to include costs in Account 426.4.⁷⁴

43. Third, *Pro Se* Challengers argue that although PATH claims the right to decide which expenses go in which account, *ISO New England* shows that the Commission does not let any utility substitute its judgment of correct accounting for the Commission’s own judgment.⁷⁵ *Pro Se* Challengers argue that PATH, knowing that it cannot change its Formula Rate to include recovery of expenditures classified to Account 426.4 without Commission approval, simply misclassified expenses to fit into recoverable accounts to circumvent the limitations on its approved Formula Rate.⁷⁶ *Pro Se* Challengers note that according to PATH’s own witnesses, PATH did not rely on *ISO New England* precedent for guidance at the time they classified expenditures and *ISO New England* only emerged as a defense during litigation. *Pro Se* Challengers state that PATH was already on notice

⁷¹ *Pro Se* Challengers Brief Opposing Exceptions at 38 (citing Ex. NH-21).

⁷² *Pro Se* Challengers Brief Opposing Exceptions at 39-40.

⁷³ *Pro Se* Challengers Brief Opposing Exceptions at 44-45.

⁷⁴ *Pro Se* Challengers Brief Opposing Exceptions at 28.

⁷⁵ *Pro Se* Challengers Brief Opposing Exceptions at 29.

⁷⁶ *Pro Se* Challengers Brief on Exceptions at 15-16.

that it did not have sufficient evidence to support its defense when one of PATH's accountants determined in 2011 that PATH was not receiving adequate invoice support from Charles Ryan to recover and support past accounting decisions.⁷⁷

44. Finally, *Pro Se* Challengers argue that it would send the wrong signal to utilities if the Commission were to expand *ISO New England* to let all utilities, regardless of their financial interest, recover lobbying expenses. *Pro Se* Challengers argue that such a lax reading would remove the need for Account 426.4 entirely, and add billions of dollars to electric bills nationwide.

5. Trial Staff Brief Opposing Exceptions

45. Trial Staff notes that, under the terms of PATH's settlement and formula rate, PATH is not entitled to recover any expenditure properly recorded in Account 426.4. Trial Staff claims that in lieu of making a Section 205 or 206⁷⁸ filing, PATH chose to argue that costs properly includable in Account 426.4 should instead be recorded in other accounts. If a utility wishes to alter some part of a formula rate, Trial Staff argues, the utility must make a filing with the Commission.⁷⁹

46. Trial Staff disagrees with PATH's reading of Order No. 276 as allowing PATH to avoid Account 426.4. Trial Staff notes that, even before Order No. 276 subdivided Account 426 into five subaccounts, the original Account 426 already covered expenditures to influence the decisions of public officers.⁸⁰

47. Trial Staff argues that "the challenged costs are clearly encompassed by the second clause of Account 426.4 ('for the purpose of influencing the decisions of public officials,')" and that regardless, the challenged costs also fall under the first clause, because PATH's narrow reading of the first clause "is flatly wrong."⁸¹ Trial Staff notes that PATH appears to be imputing the word "only" into Account 426.4; Trial Staff argues

⁷⁷ *Pro Se* Challengers Brief on Exceptions at 16-17.

⁷⁸ 16 U.S.C. § 824e (2012).

⁷⁹ Trial Staff Brief Opposing Exceptions at 27 (citing *Hampshire Gas Co.*, 6 FERC ¶ 61,249, at 61,607 (1979)).

⁸⁰ Trial Staff Brief Opposing Exceptions at 38-39.

⁸¹ Trial Staff Brief Opposing Exceptions at 40.

that the list in Account 426.4 is not an all-inclusive list, but descriptive.⁸² Trial Staff also notes that the text of Account 426.4 already provides a clearly stated exception (“appearances before regulatory or other governmental bodies...”), so there is no reason for PATH to create its own exceptions that are not in the text of the account.⁸³

6. Commission Determination on PEAT, Reliable Power Coalitions, Repass, and Larry Puccio

48. We affirm the Presiding Judge’s decision that PATH’s expenses related to PEAT, Reliable Coalitions, Repass, and Larry Puccio properly belong in Account 426.4 and therefore are not recoverable under PATH’s formula rate. PATH must refund the improperly booked amounts in the manner prescribed in its Formula Rate Protocols.

49. As a general matter, the fact that an item is included in Account 426.4 does not determine whether it is recoverable in a rate proceeding, as accounting does not drive rate treatment.⁸⁴ The PATH formula rate, however, excludes all of Account 426.4,⁸⁵ so, in this case, we need to determine the proper accounting treatment for these costs, regardless of whether the Commission permitted recovery of some of these costs in other cases. Account 426.4 states:

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other

⁸² Trial Staff Brief Opposing Exceptions at 40.

⁸³ Trial Staff Brief Opposing Exceptions at 41.

⁸⁴ See *ISO New England*, 118 FERC ¶ 61,105 at P 17.

⁸⁵ PATH Initial Brief at 10 (“Costs recorded in Account No. 426.4 are not included in the PATH Companies’ Formula Rates.”).

governmental bodies in connection with the reporting utility's existing or proposed operations.⁸⁶

50. PATH argues that Account 426.4 is best read as two separate clauses: a narrow first clause concerning expenses that influence public *opinion*, and a second clause concerning expenses that influence public *officials*. Based on that reading, PATH claims:

The evidence is uncontroverted that the direct purpose of the expenditures that the PATH Companies incurred for PEAT, the Reliable Power Coalitions, [Repass, and] Larry Puccio ... was influencing *public opinion*, which is the focus of the first clause of Account No. 426.4.⁸⁷

PATH argues that these expenditures were not designed to influence public opinion with respect to the items listed in Account 426.4.⁸⁸

51. We find this an overly narrow reading of an accounting regulation. Both clauses of Account 426.4 are focused on expenses related to public activity, either influencing public opinion with respect to a variety of public activities or directly influencing public officials.

52. As Trial Staff notes, the list in Account 426.4 is not all-inclusive, but rather provides illustrative examples. Influencing public opinion for the goals that PATH admits, such as acquiring a CPCN, are not simply general efforts to influence public opinion to be favorable to PATH, but are efforts to influence public opinion with respect to specific political actions that fall within the ambit of referenda, legislation, ordinances, the grant of franchise and the like. For example, PEAT recruited members of the public to speak at public hearings, sign petitions, and write letters to state public service commissioners.⁸⁹ The Reliable Power Coalitions used “donations from PATH” to

⁸⁶ 18 C.F.R. pt. 101, Account 426.4 (2016).

⁸⁷ PATH Brief on Exceptions at 61.

⁸⁸ These items are the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances), or approval, modification, or revocation of franchises.

⁸⁹ Ex. NH-38 at 6.

“[d]eliver messages the company and local coalitions cannot,”⁹⁰ through paid media placement, media kits, mass emails, travel budgets, and paid spokespeople.⁹¹ Repass conducted public polling, the results of which were used to develop targeted outreach and advertising campaigns.⁹² Puccio met directly with West Virginia public officials related to the PATH Project.⁹³

53. Our finding here is consistent with Commission precedent. Of particular relevance to the PATH Project, the Commission has found that Account 426.4 covers both expenditures “used to influence public opinion and the opinion of public officials during the selection process of the project.”⁹⁴ In a later case, the Commission clarified that Account 426.4 applied to any costs “incurred to influence the opinion of the public during the” period when public officials were deliberating on whether to approve a new project, regardless of whether there was an attempt to influence officials, contrasting these Account 426.4 amounts with “expenditures incurred to keep the general public informed on the progress of the project.”⁹⁵ PATH points to no case in which the Commission has maintained either: (1) a rigid separation between expenses that influence public opinion versus the opinion of public officials; or (2) a narrow reading of the first clause that would prevent the Commission from reading it expansively to cover public relations promoting electric CPCN applications. By its own admission, PATH was attempting to influence the outcome of its own state regulatory proceedings.⁹⁶ Such expenses belong in Account 426.4.

54. Additionally, none of PATH’s disputed costs fall within the narrow exception provided for in Account 426.4, as direct appearances before regulatory or other

⁹⁰ Ex. NH-32 at 1.

⁹¹ Ex. NH-32 at 2-5.

⁹² PATH Brief on Exceptions at 77.

⁹³ Ex. NH-56 at 2.

⁹⁴ *Northwest Alaskan Pipeline Co.*, 15 FERC ¶ 61,116, at 61,274 (1981).

⁹⁵ *Alaskan Northwest Natural Gas Transp. Co.*, 19 FERC ¶ 61,218, at 61,429 (1982).

⁹⁶ Ex. PTH-52 (“Presentation: Leveraging Lessons Learned”); Ex. NH-24 (“Engagement Letter Between McGuire Woods Consulting, LLC and Charles Ryan Associates”, dated May 18, 2009).

governmental bodies. All of the costs are expenditures that PATH made to influence public opinion regarding the hearings and other governmental reviews of the PATH project.⁹⁷ Although PATH points to *ISO New England*, the Commission found “external affairs” and “corporate communications” expenses were properly recorded in Account 426.4, and also properly recoverable from ratepayers.⁹⁸ Whether PATH’s expenditures would be the sort that *ISO New England* deemed to be recoverable has no bearing here since we are applying the formula rate to which PATH agreed in the settlement.

55. Finally, we need not address the merits of PATH’s argument that requiring it to book the disputed costs to Account 426.4 would hinder development of strong transmission infrastructure. PATH agreed in its settlement not to recover Account 426.4 expenses and it must adhere to the rate on file with the Commission.

7. Commission Determination on Access Point

56. We also affirm the Presiding Judge’s finding that the expenses related to Access Point involved lobbying government officials and thus fall under Account 426.4. PATH admits that “Access Point contacted public officials directly,” but PATH argues that Access Point expenses are recoverable under *ISO New England*, as lobbying expenses involving “core operations and undertaken for the benefit of their ratepayers.”⁹⁹ For the same reasons that we dismiss PATH’s reliance on *ISO New England* as discussed above, we dismiss it here. We affirm the Presiding Judge’s decision that PATH must record all Access Point expenditures in Account 426.4.

C. Amounts PATH Booked to Account 930.1

1. Background and Initial Decision

57. PATH’s formula rate generally uses the common approach for transmission-only utilities of either including or excluding a FERC Account in its entirety. Account 930.1, however, is a noteworthy exception. Account 930.1 as codified in the USofA covers

⁹⁷ For example, the Commission has held consultant expenses for “campaign polls ... [recorded] in Account 923” should instead be “recorded in Account 426.4.” *Alabama Power Co.*, Docket Nos. P-82-000, P-349-000, P-618-000, P-2146-000, P-2165-000, P-2203-000, P-2407-000, P-2408-000, P-2628-000 (Sept. 4, 1987) (letter order approving corrective action).

⁹⁸ *ISO New England Inc.*, 117 FERC ¶ 61,070, at PP 40, 49 (2006).

⁹⁹ Initial Decision, 152 FERC ¶ 63,025 at P 55.

General Advertising.¹⁰⁰ PATH's formula rate, however, limits PATH to recovering only Account 930.1 costs that are "Safety Related Advertising, Education and Out Reach [sic] Cost Support."¹⁰¹

58. PATH recorded \$2,618,740 of General Advertising into Account 930.1 in 2009 and 2010.¹⁰² Charles Ryan was the principal firm that coordinated the activities PATH classified as "general advertising" or "education and outreach."¹⁰³ In 2011, PATH represented that it spent \$102,560 in General Advertising, but recorded this amount into Account 426.4. PATH argues that this change was a management decision to reduce ratepayer controversy during the annual formula update, and PATH maintains that the expenses would have been recordable and recoverable in Account 930.1.

59. The Initial Decision found that PATH failed to prove that its general advertising expenses were not to influence public officials. The Initial Decision found inadequate documentation for the expenses, and based on a review of the brochures available in the record, found them "clearly promotional in nature and ultimately intended to influence the action of public officials."¹⁰⁴ Accordingly, the Initial Decision found PATH failed to satisfy its burden of proof for recording the costs into Account 930.1, and instead assigned them to Account 426.4.¹⁰⁵

2. Briefs on and Opposing Exceptions

60. PATH argues that advertising is recordable in Account 930.1 under PATH's Formula Rate to the extent that the advertising is related to education and outreach.¹⁰⁶ PATH further argues that the Initial Decision erred in finding PATH did not produce any

¹⁰⁰ 18 C.F.R. § 101, Account 930.1 (2016) ("This account shall include the cost of labor, materials used, and expenses incurred in advertising and related activities, the cost of which by their content and purpose are not provided for elsewhere.").

¹⁰¹ PATH Formula Rate at PATH-WV Att. 4 and PATH-Allegheny Att. 4.

¹⁰² Ex. NH-63; Ex. NH-64.

¹⁰³ Ruberto Test., Ex. PTH-7 at 10.

¹⁰⁴ Initial Decision, 152 FERC ¶ 63,025 at P 66.

¹⁰⁵ Initial Decision, 152 FERC ¶ 63,025 at P 66.

¹⁰⁶ PATH Brief on Exceptions at 84.

documentation that must be retained under the regulation, because PATH argues that the accounting regulation does not establish an evidentiary standard for cost recovery but addresses only record retention, which was not an issue for PATH. Finally, PATH argues that the Initial Decision erred in finding the provided documentation to be clearly promotional and ultimately intended to influence public officials. PATH argues, based on its textual analysis of Account 426.4, that the main purpose of its advertising was to influence public opinion on a subject matter that is not identified in the first clause of Account 426.4, and therefore, the expenses are properly recorded not in Account 426.4, but rather in Account 930.1.¹⁰⁷

61. *Pro Se* Challengers state that PATH's Formula Rate allows the inclusions of certain types of advertising such as safety, education, siting, and outreach, to be recorded in Account 930.1. They maintain, however, that PATH failed to even provide standards by which the advertising's accounting type was determined, if any, let alone provide evidence showing that the advertising had been of the sort that its Formula Rate allows. *Pro Se* Challengers assert that based on PATH's witness testimony and the text of Account 930.1, it is fair to conclude that the advertising expenses are not recoverable in PATH's formula rate.¹⁰⁸

3. Commission Determination

62. We affirm the Initial Decision for denying recovery of PATH's General Advertising expenses. The evidence shows that PATH should have booked these costs either to Account 426.4, or to the portion of Account 930.1 that PATH's formula rate excludes. While PATH asserts that it may recover any outreach expenses through Account 930.1, we find that, first, the USofA and, second, PATH's own formula rate prevent PATH from recovering its outreach expenses. The Initial Decision focuses on the filter built into the USofA, Note B of Account 930.1, which directs:

Exclude from this account and include in account 426.4, Expenditures for certain Civic, Political and Related Activities, expenses for advertising activities that are designed to solicit public support or the support of public officials in matters of a political nature.¹⁰⁹

¹⁰⁷ PATH Brief on Exceptions at 85-87.

¹⁰⁸ *Pro Se* Challengers Brief Opposing Exceptions at 48-49.

¹⁰⁹ 18 C.F.R. pt. 101, Account 930.1 (2016).

Thus, utilities may only use Account 930.1 after first confirming that the expenses are ineligible for inclusion in Account 426.4. As the Initial Decision noted, PATH did not consistently distinguish its civic, political, and related costs from its outreach costs.

63. However, PATH also cannot recover these outreach costs under Account No. 930.1 because its formula rate limits PATH to recovering only those Account 930.1 costs that are also “Safety Related Advertising, Education and Out Reach [sic] Cost Support.”¹¹⁰ In other words, even if the USofA allows PATH to record a given advertising expense to Account 930.1 and not to Account 426.4, PATH must still prove that the Account 930.1 expense is limited to the narrow subset of advertising that its formula rate allows. As PATH admits:

The PATH Companies’ formula rate explicitly allows for recovery of costs of advertising, which are recorded in Account No. 930.1, to the extent that they are related to education and outreach. Specifically, the formula rate requires the PATH Companies to deduct general advertising costs from the administrative and general expenses included in the calculation of their revenue requirements, but allows them to include “education and out-reach related advertising included in Account 930.1.”¹¹¹

64. From 2008 through 2010, PATH passed through all of its advertising costs into rates through Account 930.1 as “Safety Related Advertising, Education and Out-Reach.” These costs do not qualify for recovery under PATH’s formula. First, the evidence shows these costs should have been booked to Account No. 426.4 and, therefore, are not recoverable under Account No. 930.1. Second, PATH failed to show the costs were limited to safety related advertising, education, and outreach.¹¹²

65. *Pro Se* Challengers filed their first formal challenge with this Commission on January 21, 2011, and that same month, PATH executives admitted in internal communications that, in part because of the scrutiny and data requests from *Pro Se* Challengers, the companies needed to improve their accounting. The record shows PATH executives admitting, among several statements: “there appear to be areas of the

¹¹⁰ PATH Formula Rate at PATH-WV Att. 4 and PATH-Allegheny Att. 4, Ex. PTH-51 at 26, Ex. PTH-70 at 11, PATH Brief on Exceptions at 84.

¹¹¹ PATH Brief on Exceptions at 84 (quoting Ex. PTH-20 at 6, Note D and 11, Note D).

¹¹² Ex. NH-63 at 4.

plan that border on the classification of lobbying,” and “Advertising costs- need to be identified as to whether it is related to safety, education, siting or outreach.”¹¹³

66. An exclusion for “Safety Related Advertising, Education and Out-Reach” ordinarily would be interpreted as applying the term “safety-related” to all of the terms and to require that such costs be limited to efforts to convince the public that the transmission line or the construction is safe. Even if, as PATH suggests in its brief on exceptions, the terms “education” and “outreach” were not intended to be safety-related education and outreach, we would not find these costs recoverable as education expenses, as PATH claims. Because these terms are used as an exclusion from ordinarily recoverable advertising costs, we do not interpret the term “education” so broadly as to characterize almost all advertisements as educational, since that interpretation would essentially eliminate the exclusion.

67. Moreover, even if we were to interpret the phrase “safety related” as applicable only to advertising and not to education or outreach, PATH did not have “adequate invoice support” to establish these costs as educational.¹¹⁴ Having reviewed the advertising in the record, we find that these expenditures are for general advertising, not educational purposes.

68. Of the materials that PATH claims are outreach, none are designed to enlighten or instruct the audience; rather, they are designed to persuade the audience and are indistinguishable from most general advertising or attempts to influence the decision of public officials, which would be recorded in Account 426.4.¹¹⁵

69. Given the specific formula rate exclusions, and the lack of support provided by PATH for its characterization of these costs as educational or outreach, we find PATH has failed to meet its burden of proof.

¹¹³ Ex. NH-5 (Email chain between PATH executives and meeting minutes for how to support accounting for what is recoverable in rates).

¹¹⁴ Ex. NH-5 at 3-4, 7.

¹¹⁵ Ex. PTH-59 (“Who is the PATH Education Awareness Team”); Ex. NH-25 at 24 (PATH External Communications Committee Update October 7, 2008, “Continue outreach regarding PATH messaging by sending letters to legislators and follow up with blast e-mail.”)

D. Amounts PATH Booked to Account 930.2**1. Background and Initial Decision**

70. PATH joined and supported approximately 80 community and professional organizations. PATH claimed that the main purpose of these memberships was to reach out to the community to enhance the prospects that the PATH Project would be licensed.¹¹⁶ PATH recorded the expenses related to the memberships in Account 930.2, Miscellaneous General Expenses.

71. The Initial Decision ruled that the Commission has established clear accounting precedent requiring expenses for club membership dues and similar civic expenses to be classified to the appropriate section of Account 426.¹¹⁷ Since PATH's Formula Rate excludes all of Account 426, the Initial Decision ruled that PATH failed to show that these expenses belong in recoverable accounts. The Initial Decision did not identify a dollar figure for these costs.

2. Briefs on and Opposing Exceptions

72. PATH claims "[t]he evidence is uncontroverted that the direct purpose of the expenditures ... [for] memberships in civic organizations ... was influencing *public opinion*, which is the focus of the first clause of Account No. 426.4."¹¹⁸ As recounted in the previous section, PATH argues that the first clause of Account 426.4 applies only to expenses to influence public opinion with respect to a limited number of specific subjects, but does not include influencing public opinion regarding the licensing of transmission projects. PATH also repeats its arguments, recounted in the previous section, regarding *ISO New England*.¹¹⁹

73. Trial Staff and *Pro Se* Challengers agree with the Presiding Judge's decision. Trial Staff notes PATH recorded expenses for memberships in industry, social, and civic associations. Trial Staff disagrees with PATH's argument that their membership costs related to corporate stewardship are recoverable because they relate to the companies'

¹¹⁶ Ex. PTH-51 at 25.

¹¹⁷ Initial Decision, 152 FERC ¶ 63,025 at P 68 (citing *Pacific Power & Light Co.*, 11 FERC ¶ 61,073, at 61,104 (1980)).

¹¹⁸ PATH Brief on Exceptions at 61.

¹¹⁹ PATH Brief on Exceptions at 80-81.

core operations and were undertaken to benefit ratepayers. Trial Staff also argues, based on precedent, that membership expenditures should be recorded in the unrecoverable Account 426.5, Other Deductions.¹²⁰

74. *Pro Se* Challengers argue that, despite PATH's protestations, PATH would have no reason to influence public opinion if they did not intend for the public opinion they influenced to, in turn, influence the decisions of public officials.¹²¹ *Pro Se* Challengers claim that PATH's relationship with the Maryland Chamber of Commerce demonstrates the *quid pro quo* nature of these expenses, noting that the Maryland Chamber of Commerce intervened out-of-time in PATH's Maryland Public Service Commission licensing hearing shortly after PATH paid the Chamber an additional \$35,000 sponsorship.¹²²

3. Commission Determination

75. We affirm the Presiding Judge's decision that the expenditures related to the memberships for corporate stewardships should be recorded in the appropriate 426 Account. In particular, we concur with Trial Staff witness Miller's explanation that memberships for civic organizations should be recorded in Account 426.5, Other Deductions,¹²³ which PATH's Formula Rate excludes.

¹²⁰ Trial Staff Brief Opposing Exceptions at 44-45 (citing Ex. S-1A (National Association of Regulatory Utility Commissioners Interpretation No. 49 provides that social associations are chargeable to Account 426.5) and *Pacific Power & Light Co.*, 11 FERC at 61,104 (requiring payments to community, social, and service organizations to be recorded in 426 accounts)).

¹²¹ *Pro Se* Challengers Brief Opposing Exceptions at 21.

¹²² *Pro Se* Challengers Brief Opposing Exceptions at 45-46.

¹²³ Jean M. Miller Test., Ex. S-1 at 46. *See also* Trial Staff Brief Opposing Exceptions at 45 (citing National Association of Regulatory Utility Commissioners, Committee on Accounts, *Interpretations of Uniform System of Accounts for Electric, Gas & Water Util's*, Interpretation No. 49, issued January 1974).

E. Amounts PATH Booked as Abandoned Plant

1. Background and Initial Decision

76. PATH booked \$1,140,350 in expenses paid to Charles Ryan or its subcontractors under accounts associated with abandoned plant.¹²⁴ In particular, PATH originally recorded these costs in various plant asset accounts, namely Account 101, Electric Plant in Service; Account 105, Electric Plant Held for Future Use; and Account 107, Construction Work in Progress. When PATH filed for abandonment, PATH transferred these amounts to Account 182.2 so that it could begin recovering them from ratepayers.¹²⁵

77. PATH's agreement with Charles Ryan authorized additional subcontractors to provide outreach efforts for the PATH Project,¹²⁶ such as the Reliable Power Coalitions, PEAT, and other initiatives discussed in the above subsections. PATH provides examples of some of the materials and messaging, with advertising copy such as: "The transmission line has not impacted our tourism industry. In fact, it is the county's largest taxpayer," and "the PATH transmission line will be there to ensure dependable energy for the future. Because the real power of progress is bringing safe, reliable energy to the most important place of all: home."¹²⁷

78. The Initial Decision found, and all parties agree, that PATH's Formula Rate permits recovery of Account 107 and other plant accounts' costs, but does not include Account 426.4.¹²⁸ However, the Initial Decision did not bar recovery of these plant accounts' costs.

¹²⁴ Diana L. Gregory Test., Ex. PTH-12 at 2, Ex. JCA-11.

¹²⁵ PATH Application for Abandonment Recovery, Transmittal at 13; Ex. PTH-10 at 4. PATH had originally proposed to include the costs in Account 182.3, Other Regulatory Assets. The Abandonment Hearing Initiation Order subsequently directed PATH to transfer all abandoned plant costs to Account 182.2. Third Formal Challenge Order, 141 FERC ¶ 61,208 at P 74.

¹²⁶ Archie D. Pugh Test., Ex. PTH-51.

¹²⁷ Ruberto Test. Ex. PTH-63.

¹²⁸ See Initial Decision, 152 FERC ¶ 63,025 at P 19.

2. Briefs on and Opposing Exceptions

79. *Pro Se* Challengers argue that the Initial Decision erred by not barring recovery of expenditures for the purposes of influencing the decisions of public officials incorrectly recorded to Account 107.¹²⁹

80. In its brief opposing exceptions, PATH argues that it properly accounted for public education and outreach costs in above-the-line accounts, including Account 107. PATH repeats its argument that “Expenditures of providing information in order to influence public opinion must be included in Account 426.4 only if they relate to one of the five subjects listed in the text, which do not include siting transmission facilities.”¹³⁰ PATH argues that denying recovery of these costs in plant accounts “would undermine the Commission efforts to promote transmission expansion.”¹³¹

3. Commission Determination

81. We find that the \$1,140,350¹³² in expenses paid to Charles Ryan or its subcontractors under accounts associated with abandoned plant were booked in error. Likewise, small amounts invoiced to PEAT or Repass were also recorded to Account 107, and we rule that these invoices were also booked in error.

82. The Formula Rate Protocols and Commission regulations and policy require PATH to show that expenditures are charged to appropriate accounts. PATH failed to demonstrate that these costs were appropriately recorded in plant accounts prior to the abandonment filing. Further, the record indicates that these expenditures were also incurred to influence public opinion or officials in support of the PATH Project’s licensing process.¹³³ We direct PATH to book these costs into Account 426.4, for the same reasons that the expenses PATH claimed under Account 923 should be assigned to

¹²⁹ *Pro Se* Challengers Brief on Exceptions at 25.

¹³⁰ PATH Brief Opposing Exceptions at 61.

¹³¹ PATH Brief Opposing Exceptions at 62.

¹³² Diana L. Gregory Test., Ex. PTH-12 at 2.

¹³³ Ex. PTH-57, Ex. PTH-59 (“PEAT Information Card”); Ex. PTH-60 (“PEAT Fact Sheet”); Ex. PTH-61 (“PEAT Frequently Asked Questions”); Ex. PTH-62 (“PEAT Fact versus Fiction”); Ex. PTH-69 (“Educational Materials Presented to Organizations in Maryland”).

Account 426.4. Because PATH's Formula Rate prohibits PATH from recovering expenses booked into Account 426.4, these costs are not recoverable as abandonment costs. We see nothing in the record to distinguish these "plant" costs from the other costs we are reassigning to Account 426.4.

83. We also see no demonstration that any of these public relations expenses were directly related to the construction of physical plant or other activities that Accounts 101, 105, and 107 typically cover. The USofA defines the 100 series of accounts as "Assets and other debits," with Account 101 referring to Electric plant in service, Account 105 to Electric plant held for future use, and Account 107 to Construction work in progress. Public relations activities, regardless of whether they are political in nature, cannot simply be relabeled as physical assets. We disallow recovery of these misallocated expenditures.

F. Compliance

84. Because we affirm the Initial Decision's findings that PATH did not properly book the above expenses for the years of 2009 through the present reporting period, PATH must recalculate its recoverable cost of service.

85. PATH must file a draft revised FERC Form No. 1 (Form 1) with adjustments made to reflect the corrected accounting findings and determinations discussed above, for each year from 2009 to the present. PATH also must recalculate its recoverable cost of services for each year from 2009 through the present under its approved Formula Rate. PATH must provide the support for the recalculated cost of service for each period in spreadsheet format, including all formulas. All costs and exogenous variables used in the spreadsheet should be documented as to their source, with the required changes clearly identified. PATH must calculate estimated amounts to be refunded, in accordance with Section VIII of the PATH Formula Rate Protocols, at the FERC interest rate.¹³⁴ PATH must support these refund calculations in spreadsheet format, including all formulas.¹³⁵

¹³⁴ 18 C.F.R. § 35.19a (2016).

¹³⁵ All the spreadsheets must contain all the formulas necessary to calculate the compliance rates. If the spreadsheets use macros, functions, or other techniques to perform iterative functions, PATH should provide an explanation of the macros or functions used, where they are located, and how to initiate those functions. All macros and functions should not be set at a default state to run upon opening the spreadsheet. All formulas, variables, and results should be visible and not hidden. The spreadsheets should not use security features that prevent copying, modification, or printing – although PATH may provide separate spreadsheets that do have these features activated. The

(continued...)

86. We direct PATH to file a compliance filing with the draft revised Form 1s, Annual Updates, recalculated costs of service, and estimated refunds, within 60 days of the date of this opinion. Parties may file comments on PATH's compliance filing 30 days from the date PATH makes its compliance filing. Under PATH's Formula Rate Protocols section VIII, any "error must be corrected in the Formula Rate or Annual Update and shall be reflected in the True-up Adjustment made as part of the next succeeding Annual Update," and PATH has an obligation to correct errors not only in the current year's rates, but "occurring in a period prior to the period under review." PATH is directed to make refunds with interest when it submits its next Formula Rate Annual Update.

IV. Recovery of Legal Fees, Net Losses on Land, and Failure to Seek Earlier Termination of the Project

87. Parties contested PATH's recovery of certain attorney fees, losses incurred from selling property at lower than the purchase price, and losses occasioned by PATH failing to cease expenditures at an earlier point. These issues all involve the determination of whether PATH's conduct was prudent.

A. Prudence Standard

88. We first address the standard to be applied in determining whether costs were prudently incurred.

1. Initial Decision

89. The Initial Decision recited the Commission's well-established prudence standard, as articulated in *New England Power*:

[M]anagers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility

spreadsheets should not contain any links to sources outside of the spreadsheet document. To the extent applicable, the spreadsheets should use the format prescribed by the Commission's Instruction Manual for Electronic Filing applicable to natural gas pipeline rate case statements and schedules, located here: <http://www.ferc.gov/industries/gas/gen-info/rate-filings.asp>.

management [] would have made, in good faith, under the same circumstances, and at the relevant point in time.¹³⁶

90. The Initial Decision noted that the Commission had ruled in other orders:

that the necessary evidence to establish a serious doubt of prudence requires more than bare allegations¹³⁷ and that “[d]irect evidence” is necessary.¹³⁸ Establishing a serious doubt regarding prudence requires “reliable, probative, and substantial evidence.”¹³⁹

91. The Initial Decision grounded the rebuttable presumption of prudence in the Federal Rules of Evidence, which explains that a presumption “does not shift the burden of persuasion, which remains on the party who had it originally.”¹⁴⁰ The Initial Decision explained that PATH “cannot meet this burden by withholding or losing evidence that intervenors may require to fashion a case of imprudence.”¹⁴¹

2. Joint Consumer Advocates Brief on Exceptions

92. Joint Consumer Advocates request the Commission reverse the Initial Decision on the requirement that only “direct” evidence is sufficient to create a serious doubt on the prudence of expenditures, and “indirect” evidence is insufficient to create doubt, improperly ignoring key evidence. Joint Consumer Advocates argue that the Initial Decision disregarded its case law showing that circumstantial evidence is just as good as,

¹³⁶ Initial Decision, 152 FERC ¶ 63,025 at P 74 (quoting *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985) (*New England Power*)).

¹³⁷ *Iroquois Gas Transmission Sys., L.P.*, 87 FERC ¶ 61,295, at 62,168 (1999) (*Iroquois*).

¹³⁸ *Mid-America Pipeline Co., LLC*, 124 FERC ¶ 63,016, at P 976 (2008) (*Mid-America*), *aff'd* 130 FERC ¶ 61,123 (2010).

¹³⁹ Initial Decision, 152 FERC ¶ 63,025 at P 75 (citing *Wis. Elec. Power Co.*, 73 FERC ¶ 63,019, at 65,225 (1995), *aff'd in relevant part*, 98 FERC ¶ 61,233 (2002) (citing Section 7(c), Administrative Procedure Act, 5 U.S.C. § 556(d) (2012))).

¹⁴⁰ Initial Decision, 152 FERC ¶ 63,025 at P 85 (quoting Fed. R. Evid. 301 (emphasis added)).

¹⁴¹ Initial Decision, 152 FERC ¶ 63,025 at P 86.

if not better than, direct evidence, and that the direct evidence the Initial Decision required would rarely, if ever, be available.¹⁴² Joint Consumer Advocates argue that the Initial Decision misconstrued *Iroquois* and *Mid-America*, in finding that “[d]irect evidence” is necessary.¹⁴³ Joint Consumer Advocates note that the Supreme Court has written that “evidence, either direct or circumstantial,”¹⁴⁴ can show imprudence.

93. Similarly, Joint Consumer Advocates claim the Initial Decision’s “reasonable utility manager” test, restricts testimony on prudence to current or former utility managers.¹⁴⁵ Joint Consumer Advocates argue that the Commission has cautioned the extent of evidence necessary to trigger a utility’s obligation to establish prudence “cannot be so extensive that it in effect reverses the statutory burden of proof” especially because “the evidence regarding any expenditures is in the hands of the utility and not the parties challenging the expenditure.”¹⁴⁶ Joint Consumer Advocates argue that it is highly unlikely that a utility would voluntarily divulge evidence of ineffective, wasteful, or imprudent actions, and as such, “[c]ircumstantial evidence is not only sufficient, but may be more certain, satisfying, and persuasive than direct evidence.”¹⁴⁷ They argue that limiting evidence of imprudence to direct evidence ignores evidence of omissions, that is, actions that management should have taken but did not.

94. Joint Consumer Advocates cite to the Federal Power Commission’s determination that managers of unregulated businesses are “subject to the free interplay of competitive forces [and] have no alternative to efficiency” because if they are to remain competitive, they must constantly be on the lookout for cost economies and cost savings.” In contrast, public utility management “does not have quite the same incentive” and, accordingly, regulation “must make sure that the cost incurred in the rendition of the service requested

¹⁴² Joint Consumer Advocates Brief on Exceptions at 9-10.

¹⁴³ Joint Consumer Advocates at 14 (citing *Mid-America*, 124 FERC ¶ 63,016 at P 976 and *Iroquois*, 87 FERC at 62,168).

¹⁴⁴ Joint Consumer Advocates Brief on Exceptions at 15 (citing *West Ohio Gas Co. v. Public Util’s Comm’n of Ohio*, 294 US 63, 68 (1935) (*West Ohio*)).

¹⁴⁵ Joint Consumer Advocates Brief on Exceptions at 10-11.

¹⁴⁶ Joint Consumer Advocates Brief on Exceptions at 20-21 (citing *Iroquois*, 87 FERC at 62,168).

¹⁴⁷ Joint Consumer Advocates Brief on Exceptions at 16-17(citing *Desert Palace Inc., v. Costa*, 539 US 90, 100 (2003)).

is necessary and prudent.”¹⁴⁸ Therefore, extravagant and unnecessary costs cannot “be imposed on the ratepayers, no matter how convinced management may have been that those costs were necessary in its own interest.”¹⁴⁹

95. Joint Consumer Advocates argue that Supreme Court precedent requires officers with the authority to act to testify, yet none of the corporate officials, managers, or senior executives who made any of the decisions that Joint Consumer Advocates challenge as imprudent testified.¹⁵⁰ Joint Consumer Advocates argue that all of the employees that did testify on behalf of PATH were employees of affiliated service companies; none of the companies who employed these witnesses for PATH were regulated utilities.¹⁵¹ Joint Consumer Advocates argue that *BP Pipelines* ruled that, when a utility fails to present its managers, the Commission upheld the presiding judge’s conclusion that evidence dispelling doubt of prudence would include testimony of managers who made the allegedly imprudent decisions:

their silence likely implies that they have no such specific evidence. Failure... to call as witnesses those officers who were in the position to know... is itself persuasive that their testimony, if given, would have been unfavorable to the appellants.¹⁵²

¹⁴⁸ Joint Consumer Advocates Brief on Exceptions at 20 (citing *Midwestern Gas Transmission Co. v. FPC*, 36 FPC 61, 70 (1966), *reh’g denied*, 36 FPC 599, *aff’d*, *Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968)).

¹⁴⁹ Joint Consumer Advocates Brief on Exceptions at 20 (citing *Midwestern Gas Transmission Co. v. F.P.C.*, 36 FPC 61, 70 (1966), *reh’g denied*, 36 FPC 599, *aff’d*, *Midwestern Gas Transmission Co. v. F.P.C.*, 388 F.2d 444 (7th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968)).

¹⁵⁰ Joint Consumer Advocates Brief on Exceptions at 26-30 (citing *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1939) (“The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants.”)).

¹⁵¹ Joint Consumer Advocates Brief on Exceptions at 25.

¹⁵² Joint Consumer Advocates Brief on Exceptions at 20-21 (quoting *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (*BP Pipelines*)).

96. Finally, Joint Consumer Advocates argue that PATH should not receive the presumption of prudence because PATH did not have custody of the financial and accounting documents on which their case was premised. Joint Consumer Advocates state that PATH's parent company executives stated that PATH functioned as a financial paper company and its parent companies' respective service company affiliates performed the actual accounting for the costs at issue here. Joint Consumer Advocates argue that the Commission and courts have consistently held that a presumption of prudence should not be applied to affiliate transactions because they do not reflect the likely outcomes of competitive markets or the presumed good faith of utility management.¹⁵³

3. Trial Staff Brief Opposing Exceptions

97. Trial Staff states that contrary to Joint Consumer Advocates' claim, the Initial Decision considered circumstantial and indirect evidence. Trial Staff states that Joint Consumer Advocates' Brief on Exceptions over-reads a single phrase in the Initial Decision which states that "[d]irect evidence' is necessary." Trial Staff argues that given that Joint Consumer Advocates improperly ascribe an incorrect meaning to cited precedent and distort the application of that precedent, their exception on this matter is without merit.¹⁵⁴ Trial Staff argues that Joint Consumer Advocates misrepresent *BP Pipelines* through selective quoting,¹⁵⁵ and that they fail to show that their reading of *Iroquois* truly differs from the Presiding Judge's reading.¹⁵⁶

98. Trial Staff argues that Joint Consumer Advocates incorrectly assumed that the Initial Decision did not take into account indirect evidence in concluding that the legal

¹⁵³ Joint Consumer Advocates Brief on Exceptions at 31-32 (citing *Northeast Util's Serv. Co.* 66 FERC ¶ 61,332, at 62,089 (1994) ("The Commission has long recognized, and courts agreed, that transactions between affiliates require close scrutiny."); *Ind. & Mich. Mun. Distribs. Ass'n v. Ind. Mich. Power Co.* 62 FERC ¶ 61,189, at 62,238 (1993)).

¹⁵⁴ Trial Staff Brief Opposing Exceptions at 47-48.

¹⁵⁵ Trial Staff Brief Opposing Exceptions at 48-49.

¹⁵⁶ Trial Staff Brief Opposing Exceptions at 45-47 (citing Joint Consumer Advocates Brief on Exceptions at 13-17, Initial Decision, 152 FERC ¶ 63,025 at P 75 (citing *Mid-America*, 124 FERC ¶ 63,016 at P 976, *aff'd* 130 FERC ¶ 61,123 (2010) (regarding "direct evidence"); *Iroquois*, 87 FERC at 62,168 (regarding "bare allegations" language)).

fees were prudently incurred. Trial Staff states that contrary to Joint Consumer Advocates' position, the Initial Decision covered the variety of arguments made by Joint Consumer Advocates' expert witness, and discounted the witness on the factual merits, not on an erroneous legal theory.¹⁵⁷ Trial Staff concludes that the Initial Decision did consider all evidence, and properly assessed relevant facts and law.¹⁵⁸

4. Commission Determination

99. The Formula Rate Protocols do not “alter the burdens applied by the FERC with respect to prudence challenges,”¹⁵⁹ so we apply our longstanding prudence jurisprudence. A prudent expenditure is one “reasonable utility management [] would have made, in good faith, under the same circumstances, and at the relevant point in time.”¹⁶⁰ A prudence determination is based upon what the company knew or should have known at the time a decision was made.¹⁶¹

100. The regulated entity has the burden of proof to establish prudence. However, in order to ensure that rate cases are manageable, the Commission presumes that all expenditures are prudent so the utility need not justify in its case-in-chief the prudence of all of its costs.¹⁶² The Commission permits challenges to the prudence of individual expenditures when the Commission's filing requirements, policy, or precedent require otherwise, the Commission itself determines that the company must establish the prudence of an expenditure, or a party creates serious doubt as to the prudence of an expenditure.¹⁶³ Serious doubt must be more than a “bare allegation of imprudence,” but

¹⁵⁷ Trial Staff Brief Opposing Exceptions at 45-47 (citing Initial Decision, 152 FERC ¶ 63,025 at PP 77-79, 81).

¹⁵⁸ Trial Staff Brief Opposing Exceptions at 48.

¹⁵⁹ Formula Rate Protocols, § VII.C.1.

¹⁶⁰ *New England Power*, 31 FERC at 61,084.

¹⁶¹ *Entergy Servs., Inc.*, 130 FERC ¶ 61,023, at P 52 (2010); *Iroquois*, 87 FERC at 62,170; *New England Power*, 31 FERC at 61,084.

¹⁶² *Iroquois*, 87 FERC at 62,168.

¹⁶³ *Iroquois*, 87 FERC at 62,168. See *West Ohio Gas Co. v. Public Util's Comm'n of Ohio*, 294 US 63, 68 (1935); *BP Pipelines*, 153 FERC ¶ 61,233 at P 13 (citing *Iroquois*, 87 FERC at 62,170).

this threshold may not be so demanding that it effectively reverses the statutory burden of proof.¹⁶⁴ We find no reason to distinguish between direct and circumstantial evidence in determining whether the challenging party has raised a serious question of the prudence of an expenditure.

101. Once such serious doubt has been raised, the company has “the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.”¹⁶⁵ This showing must meet the ordinary evidentiary standard of a preponderance of the evidence on the record. Since the parties have fully litigated the prudence issues, we will base our decision on whether a preponderance of the evidence demonstrates that PATH acted prudently.¹⁶⁶

B. Legal Fees

1. Legal Fees that the Initial Decision Found Recoverable

a. Initial Decision

102. PATH spent approximately \$8.7 million from 2009 to 2011 on legal fees in establishing the PATH Project.¹⁶⁷ Of the \$8.7 million, PATH spent approximately \$4.8 million on outside counsel as PATH filed CPCN applications in Maryland, Virginia, and West Virginia. Joint Consumer Advocates recommended disallowing: \$1,141,958 in legal fees due to “cryptic” billing entries; \$219,382 of fees associated with clerical and administrative tasks; \$111,928 in fees that involved travel; and a disallowance of \$268,941 because the CPCN proceedings were unsuccessful.

103. Applying the prudence standard explained above, the Presiding Judge found that for the categories of bills that PATH provided information for, there was no reason to doubt their prudence, and thus allowed recovery.¹⁶⁸ The Presiding Judge allowed \$4.8 million of outside legal fees.

¹⁶⁴ *BP Pipelines*, 153 FERC ¶ 61,233 at P 13 (citing *Anaheim, Riverside, Banning, Colton, & Azusa, Cal. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981) (*Anaheim*)).

¹⁶⁵ *Anaheim*, 669 F.2d at 809.

¹⁶⁶ *See BP Pipelines Inc.*, 153 FERC ¶ 61,233 (conducting a detailed review of the evidence submitted and finding it did not support the investments made).

¹⁶⁷ Ex. PTH-6 (Major Functional Categories for Abandonment Costs).

¹⁶⁸ Initial Decision, 152 FERC ¶ 63,025 at PP 77-82.

b. Joint Consumer Advocates Brief on Exceptions

104. Joint Consumer Advocates claim their witness Toothman raised a “serious doubt” of prudence.¹⁶⁹ They state that Toothman applied the “prudent client” standard in reviewing the legal bills, describing a prudent client as one who would secure a fair billing agreement, examine bills as they are issued, ask questions of counsel, obtain estimates and budgets, and reject amounts viewed as improper or excessive.¹⁷⁰ Joint Consumer Advocates explains that the “prudent client” standard is comparable to the Commission’s prudence standard:

[Toothman] looked at the [FERC] definition of prudence, compared them to what [he] know[s] about legal fee standards on reasonable fees, and found them to be overlapping and very similar.¹⁷¹

105. Joint Consumer Advocates claim that PATH acted as “absent clients” in its capacity as utility management of outside counsel fees.¹⁷² Joint Consumer Advocates state that the Presiding Judge’s finding that, under the *Lodestar* method prohibiting excessive legal fees, law firms are not allowed to bill overhead charges while “no Commission rule prohibits such charges” is in error, because there is equally no Commission rule allowing overhead legal fees either.¹⁷³ Simply because a charge is not expressly prohibited by rule does not mean it is prudent or allowable, they argue.¹⁷⁴ Joint Consumer Advocates argues that the Presiding Judge should not have applied a presumption of prudence to outside legal fees billed to PATH’s affiliates because these affiliates were not parties to the proceedings, and because their general counsels failed to offer any testimony.

¹⁶⁹ Joint Consumer Advocates Brief on Exceptions at 35.

¹⁷⁰ Joint Consumer Advocates Brief on Exceptions at 35-38 (citing Ex. JCA-127 at 12).

¹⁷¹ Joint Consumer Advocates Brief on Exceptions at 39 (citing Tr. 1431:5-8).

¹⁷² Joint Consumer Advocates Brief on Exceptions at 40-41.

¹⁷³ Joint Consumer Advocates Brief on Exceptions at 38-39.

¹⁷⁴ Joint Consumer Advocates Brief on Exceptions at 53.

106. Because no one with personal knowledge of the retention of these outside law firms testified, Joint Consumer Advocates claim PATH acted as an “absent client.”¹⁷⁵ To have the opportunity to question anyone from the PATH legal team, Joint Consumer Advocates had to subpoena witnesses to the evidentiary hearings, and even then, they were not witnesses who were involved in the review of the legal fees. None of these witnesses were able to describe the review process or the standards.¹⁷⁶ Joint Consumer Advocates argue that the individual who pays the bill (here, ratepayers) should be able to determine the precise nature of the services rendered, but the Initial Decision fails to discuss whether ratepayers would be able to understand the legal bills, particularly because of the use of block billing and the use of cryptic terms (for example, one term, “tech conference” to describe over 8,000 timekeeping entries) for the legal bills associated with outside law firms’ time for CPCN proceedings.¹⁷⁷

107. Finally, Joint Consumer Advocates argue that the Initial Decision failed to address the excessive staffing levels, or clerical work billed at the attorney rate. While PATH contended without any elaboration or factual support that “[a]ttornies managing outside counsel were vigilant about not having multiple lawyers working on the same issue,” and outside firms “staffed their practices leanly and parsimoniously,” Joint Consumer Advocates argue the record shows otherwise.¹⁷⁸

c. PATH Brief Opposing Exceptions

108. PATH argues that the Initial Decision was correct in its application of the prudence standard, and the finding that Joint Consumer Advocates failed to apply the standard. PATH states that Joint Consumer Advocates’ witness found the Commission’s question of whether “they are costs which a reasonable utility management... would have [incurred]”¹⁷⁹ immaterial to his analysis. He admitted that he did not assess “prudence...

¹⁷⁵ Joint Consumer Advocates Brief on Exceptions at 35-37.

¹⁷⁶ Joint Consumer Advocates Brief on Exceptions at 43-46.

¹⁷⁷ Joint Consumer Advocates Brief on Exceptions at 49-50 (explaining that the practice of block billing make it impossible to tell how much time was spent on a task and verify that the rates were reasonable.).

¹⁷⁸ Joint Consumer Advocates Brief on Exceptions at 53-55 (citing Ex. JCA-157, Ex. JCA-166, Ex. JCA-175, Ex. JCA-184, Ex. JCA-193, Ex. PATH-49).

¹⁷⁹ PATH Brief Opposing Exceptions at 39 (citing *New England Power*, 31 FERC at 61,084)).

from the perspective of [PATH] at the time they made that decision,” as the Commission’s standard requires. Instead, he focused on the ethical obligations of PATH based on a provision of the American Bar Association’s Model Rules of Professional Conduct, according to principles courts would use after-the-fact.¹⁸⁰

109. PATH argues Joint Consumer Advocates’ standard is flawed because it is based entirely on hindsight, which is contrary to the Commission’s prudence standard: “[n]either FERC nor [a] court can properly use hindsight in evaluating the reasonableness of a decision’s effect on rates.”¹⁸¹ PATH argues that Joint Consumer Advocates’ witness focused on the adequacy of the law firms’ bills for an after-the-fact analysis, was never involved in the PATH CPCN proceedings, has never been involved in a CPCN proceeding, and has no other basis for assessing the legal effort required for those matters.¹⁸²

110. PATH argues that Joint Consumer Advocates provided no evidence that the legal fees were imprudently-incurred, and rather argued that \$1,134,007 should be disallowed because the bill entries mentioned internal communications or memoranda, while at the same time, admitting that “[s]ome internal communications may be reasonable.” PATH argues that Joint Consumer Advocates’ witness flagged for disallowance legal fees that are reasonable, such as internal consultation regarding the need for a protective order in a CPCN proceeding.¹⁸³

111. PATH argues that Joint Consumer Advocates’ witness should be given no weight because he lacks the experience and expertise necessary to provide a credible opinion about the reasonable level of legal fees for CPCN proceedings; the witness conceded that he had never participated in any proceeding before a state public utility commission.¹⁸⁴

¹⁸⁰ PATH Brief Opposing Exceptions at 38-40 (citing Tr. 1431:10-20 (Toothman Test.)).

¹⁸¹ PATH Brief Opposing Exceptions at 41 (citing *City of Orleans v. FERC*, 67 F.3d 947, 954 (D.C. Cir. 1995); *New England Power*, 31 FERC at 61,084)).

¹⁸² PATH Brief Opposing Exceptions at 41 (citing Tr. 1475:1-1479:25, 1535:1-1536:12 (Toothman Test.)).

¹⁸³ PATH Brief Opposing Exceptions at 44 (citing Ex. JCA-144 at 18 (Toothman Test. on outside legal fees)).

¹⁸⁴ PATH Brief Opposing Exceptions at 44-45 (citing Tr. 1475:1-1477:4, 1479:11-1480:20 (Toothman Test.)).

PATH argues that the testimony of Joint Consumer Advocates' witness demonstrated that he was unfamiliar with basic elements of the transmission permitting process.

112. PATH argues it presented ample evidence supporting legal expenditures, showing that the bills they received went through rigorous scrutiny through multiple levels of review, and PATH introduced an expert witness who is well-qualified to address the prosecution of CPCN proceedings.

d. Commission Determination

113. We affirm the Initial Decision on the \$4.8 million in legal fees that it allowed PATH to recover. The record does not show that PATH's attorneys charged an unusually high hourly rate, nor does it show that PATH suffered any added expense by following the dominant legal practice of paying its outside counsel by the hour.¹⁸⁵

114. Like the Presiding Judge, we do not dismiss out of hand Joint Consumer Advocates' witness testimony. However, we also agree with the Presiding Judge that "a review of these cryptic entries did not reveal any reason to have serious doubts about their prudence."¹⁸⁶ In particular, we note that Joint Consumer Advocates' witness objected to 8,000 time keeping hours associated with "tech conference." It is wholly reasonable for a company seeking CPCNs from three different states to devote much of its time to preparing for public conference with state technical staff. Even if we apply the more stringent standard that Joint Consumer Advocates seek, PATH adequately supported the prudence of these legal fees.

¹⁸⁵ Ex. JCA-28 (Detailed invoices billing to five outside law firms within the "CPCN Permitting" Major Functional Category of abandonment costs: (1) Watson and Renner; (2) Saul Ewing; (3) Vinson & Elkins; (4) Hunton & Williams; and (5) Jackson Kelley PLLC); Ex. JCA-25 through 27, 29 through 31 (detailed list of outside legal counsel costs) Ex. JCA-144. (Toothman Test., itemization of 167 legal invoices totaling approximately \$4.5 million); Ex. JCA-151 (supplement to Toothman Test.; table of non-attorney staff hourly/annual fees charged to PATH within this category, including PJM's Vice President of Planning- Steve Herling's expenses billed through the outside legal counsel) Ex. JCA-153 (PATH written response to information request, providing "the itemized bills of outside legal counsel for which PATH and/or the PATH Companies are seeking recovery for the approximately \$8.7 million of costs included in the CPCN cost category.").

¹⁸⁶ Initial Decision, 152 FERC ¶ 63,025 at P 81.

2. Legal Fees that the Initial Decision Found Cannot be Recovered

a. Initial Decision

115. The remaining \$3.9 million in legal fees not discussed in the above subsection were spent on: (1) in-house attorneys for PATH's affiliates FirstEnergy and AEP billing for services to PATH; and (2) fees from outside law firms to litigate zoning proceedings in Frederick County, Maryland for the Kemptown Substation.¹⁸⁷ Joint Consumer Advocates claim that they did not receive any of their requested data on either the Kemptown Substation,¹⁸⁸ or on the in-house attorneys.¹⁸⁹

116. The Presiding Judge ruled, “[o]f the \$3.9 million, only the portion of outside legal fees that are assigned to the Kemptown Property is ruled to be recoverable by,” PATH because while PATH was tardy in providing data on these fees, Joint Consumer Advocates “nonetheless received the information.”¹⁹⁰ “However, the portion of the \$3.9 million that represents the in-house legal services is held not recoverable,” because PATH “failed to provide the requested data timely or at all.”¹⁹¹

117. The Presiding Judge found that establishing a serious doubt regarding prudence requires “reliable, probative, and substantial evidence,” and PATH’s failure to provide “any evidence to demonstrate the prudence of these fees,” “presents a matter of first impression.”¹⁹² The Initial Decision noted that the presumption of prudence standard gives PATH extraordinary advantage, allowing PATH to defer evidence and placing the burden of presenting evidence on the intervenors to raise serious doubts as to the prudence of expenditures. The Initial Decision reasoned that this obligation on

¹⁸⁷ Initial Decision, 152 FERC ¶ 63,025 at P 72 (citing Roberto Test. Ex. PTH-6; Toothman Test., Ex. JCA-147). *See also* Joint Consumer Advocates Initial Brief at 104-105, Tr. at 1581:5-10.

¹⁸⁸ Joint Consumer Advocates Initial Brief at 104-105, Tr. at 1581:5-10.

¹⁸⁹ JCA Initial Brief at 128.

¹⁹⁰ Initial Decision, 152 FERC ¶ 63,025 at P 83.

¹⁹¹ Initial Decision, 152 FERC ¶ 63,025 at P 84.

¹⁹² Initial Decision, 152 FERC ¶ 63,025 at PP 75, 84, 85 (citing *Wis. Elec. Power Co.*, 73 FERC at 65,225, *aff'd in relevant part*, 98 FERC ¶ 61,233 (2002) (citing Section 7(c), Administrative Procedure Act, 5 U.S.C. § 556(d) (2012))).

intervenors becomes impossible to meet if PATH does not provide data that is requested, stating:

The presumption of prudence standard presupposes that all information is readily known or obtainable. This Initial Decision holds, therefore, that if the information is not provided or is lost as occurred in this case, then the PATH Companies lose the presumption of prudence and are obligated *ab initio* in its case-in-chief to show by a preponderance of the evidence that its expenditures were prudent.¹⁹³

118. The Presiding Judge explained that this disallowance should not be misconstrued as imposing a sanction for withholding information, but only a matter of burden of proof. The Initial Decision concluded that PATH met neither their burden of proof in their case-in-chief nor their burden of persuasion that these legal fees provided by affiliates were prudent.¹⁹⁴ The Presiding Judge concluded that a filing utility cannot rest on its laurels by not providing evidence requested in discovery which might establish serious doubt. If the utility has no evidence, as here, then the utility fails to meet its burden of proof and persuasion. The Presiding Judge found this holding is supported by the Federal Rules of Evidence.¹⁹⁵

b. Briefs on Exceptions

119. PATH argues that the Initial Decision erred in denying PATH's recovery of its in-house legal costs for CPCN proceedings. First, PATH argues that it provided Exhibit JCA-23, detailing all \$940,000 of its in-house legal fees.¹⁹⁶ PATH suggests that the Initial Decision's confusion comes from PATH's inability to respond to a later request from Joint Consumer Advocates, asking PATH to break down the data in Exhibit JCA-23 among individual CPCN proceedings. PATH argues that it could not provide that level of specificity, and furthermore that it did not need to, especially because these in-house

¹⁹³ Initial Decision, 152 FERC ¶ 63,025 at P 84.

¹⁹⁴ Initial Decision, 152 FERC ¶ 63,025 at P 86.

¹⁹⁵ Initial Decision, 152 FERC ¶ 63,025 at P 85 (citing Fed. R. Evid. 301).

¹⁹⁶ PATH Brief on Exceptions at 54 (citing Ex. JCA-23).

expenses were not even included in the Joint Statement of Uncontested and Contested Issues.¹⁹⁷

120. PATH and Trial Staff argue there is no support for the Initial Decision's ruling that a presumption of prudence is lost if a utility does not provide all of the information requested, including information not available from the utility's records.¹⁹⁸ PATH argues that it "provided documentary evidence of their internal legal departments' labor costs on CPCN work orders,"¹⁹⁹ and "no party sought to compel production of any additional data ... let alone rais[e] serious doubts about prudence."²⁰⁰

121. Trial Staff argues that the Initial Decision erred when it assigned the burden of persuasion on PATH, because it is clear that PATH's in-house legal fees were prudently-incurred and merit full recovery.²⁰¹ Trial Staff explains that PATH responded to data requests by identifying in house legal costs billed by each parent company (AEP and FirstEnergy) separately to PATH, broken down by company work orders, costs, descriptions of the work provided and the purpose of each of the expenditures. Where PATH could not directly respond to data requests addressing in-house legal fees, it provided an

¹⁹⁷ PATH Brief on Exceptions at 55, 54.

¹⁹⁸ PATH Brief on Exceptions at 55-56, Trial Staff Brief on Exceptions at 11.

¹⁹⁹ PATH Brief on Exceptions at 56.

²⁰⁰ PATH Brief on Exceptions at 57.

²⁰¹ Trial Staff Brief on Exceptions at 14-15 (citing *Pennsylvania Power Co.* 26 FERC ¶ 61,354 (1984) (allowing amortization of losses associated with a cancelled nuclear plant); *Southern Calif. Edison Co.*, 8 FERC ¶ 61,198 (1979) *aff'd sub nom. Cities of Anaheim v. FERC*, 669 F.2d 779, 800-801 (D.C. Cir. 1981) (disallowing costs that were not prudently incurred); *New England Power*, 31 FERC at 61,084, *aff'd sub nom Violet v. FERC* 800 F.2d 280 (1986) ("The appropriate test to be used is whether they are costs which a reasonable utility management... would have made, in good faith, under the same circumstances, and at the same relevant point in time."); *Kansas Gas and Elec. Co.*, 49 FERC ¶ 61,295, at 62,119 (1989) (When a "participant in a proceeding creates a serious doubt as to the prudence of an expenditure, the utility has the burden of dispelling the doubt and proving the prudence of the questioned expenditure."))

explanation as to why, in compliance with Rule 406(b) of the Commission's Rules of Practice and Procedure.²⁰²

122. Joint Consumer Advocates argue that it was “reversible error for the presiding judge to apply the presumption of prudence”²⁰³ to non-utility service company affiliate accounting and in-house corporate legal billings, for which PATH provided no evidence on “how the legal invoices were reviewed and how legal billings were charged to the various proceedings.”²⁰⁴ Joint Consumer Advocates argue the Commission and courts have consistently held that a presumption of prudence should not be applied to affiliate transactions because they do not reflect the likely outcomes of competitive markets on the presumed good faith of utility management.²⁰⁵

c. Briefs Opposing Exceptions

123. Joint Consumer Advocates recount the multiple discovery requests aimed at ascertaining PATH's in-house legal fees and the handful of responses from PATH in the record. Joint Consumer Advocates note the absence of evidence in the record, even though PATH's witness on legal fees admitted that it is standard practice for utilities to keep records of “where [in-house attorney time] was spent.”²⁰⁶

124. PATH agrees that the Commission has stated that “if costs are incurred through an affiliate transaction, [the Commission] cannot presume prudence” but argues that the

²⁰² Trial Staff Brief on Exceptions at 13, 17-18 (citing 18 C.F.R. § 385.406(b)(5) (2016); Tr. at 2063:1-9, 21-2064:14, Tr. at 3238:6-3240:23).

²⁰³ Joint Consumer Advocates' Brief on Exceptions at 34.

²⁰⁴ Joint Consumer Advocates' Brief on Exceptions at 27.

²⁰⁵ Joint Consumer Advocates' Brief on Exceptions at 31-32 (citing *Northeast Util's Serv. Co.* 66 FERC at 62,089 (“The Commission has long recognized, and courts agreed, that transactions between affiliates require close scrutiny.”); *Ind. & Mich. Mun. Distributions Ass'n v. Ind. Mich. Power Co.* 62 FERC at 62,238).

²⁰⁶ Joint Consumer Advocates Brief Opposing Exceptions at 64 (citing JCA Ex. 144 (Toothman Supplemental Direct) at 16:21-17:3; Tr. 2744:1-6 (Williamson Test.)).

“Commission applies the prudence presumption to [using serving companies] no differently than in the absence of such arrangements.”²⁰⁷

d. Commission Determination

125. We affirm the Initial Decision on allowing recovery of outside legal fees that are assigned to the Kempton Property, but reverse the Initial Decision for all in-house legal expenses for which it denied recovery.

126. Despite Joint Consumer Advocates’ claims, our review of the record shows PATH provided evidence, explaining the basis and justification for the in-house legal fees, consistent with Formula Rate Protocols section VII.D.²⁰⁸ The record shows that the in-house counsel numbers in Ex. JCA-23 came directly from its SAP accounting system.²⁰⁹ The in-house legal counsel would record their time spent on the PATH project by work order through the automated timekeeping system, upon which each supervisor would review and approve the time sheets to make sure they charged their time appropriately.²¹⁰ A project controls team of eight employees ensured all in-house counsel timesheets were based on proper documentation.²¹¹ Nothing in the record disputes that these charges were incurred in pursuit of PATH’s CPCN applications and other matters that required extensive legal support.

²⁰⁷ PATH Brief Opposing Exceptions at 15-16, 37-38 (citing *Canal Elec. Co.*, 57 FERC ¶ 63,016, at 65,098 (1991); *Yankee Atomic Elec. Co.*, 49 FERC ¶ 61,428, at 62,505 n.1 (1989); *BEC Energy and Commonwealth Energy System*, 88 FERC ¶ 61,002, at 61,003 (1999)).

²⁰⁸ Ex. JCA-23; Tr. 2061:11-2065:13 (for the \$940,000 reported in Ex. JCA-23, explaining how AEP and Allegheny legal staff billed their time to PATH through the automated timekeeping system, charged to the appropriate work order according to the work that was done, and explaining that at the end of each month, a project controls team would run reports reviewing labor charged by each employee to confirm that every person charged to the project was, in fact, working on the project).

²⁰⁹ Tr. 2062:4-5 (Gonder).

²¹⁰ Tr. 2063:7-13 (Gonder).

²¹¹ Tr. 2063:7-13 (Gonder).

3. Recovery of the PATH Litigation Costs

a. Initial Decision

127. At hearing, *Pro Se* Challengers argued that if “PATH must refund all or part of the amounts in the formal challenged expenditures, equity dictates that PATH should also be ordered to refund the associated litigation expenditures for its failed attempt to justify its actions.”²¹² *Pro Se* Challengers argue ratepayers have been financing PATH’s litigation expenses in this proceeding because “PATH has been recording its challenge-related litigation expenses in operating accounts as they are incurred and collecting them from ratepayers through its formula rate.”²¹³

128. The Initial Decision declined to bar recovery of litigation costs, on three grounds. First, the Initial Decision ruled it was beyond the scope of the proceedings because the Abandonment Hearing Initiation Order and other preceding orders did not set this issue for hearing. Second, the Initial Decision found that the Commission’s longstanding precedent was that regulated utilities “are entitled to recover their reasonably incurred rate litigation costs.”²¹⁴ Third, the Initial Decision found that even if PATH’s litigation position proves to be incorrect, PATH had a “legitimate basis to believe that they could [] win, as their position on the accounting issues was not *per se* frivolous.”²¹⁵ However, the Initial Decision noted that as litigation in this area becomes more mature, it might be possible in some future case to deny recovery for bad faith legal defenses.²¹⁶

b. Briefs on Exceptions

129. On exceptions, *Pro Se* Challengers argue that the Initial Decision erred in allowing PATH to recover its Formal Challenge-related litigation costs, either under a prudence argument, or else under the just and reasonable standard of the FPA.

²¹²Initial Decision, 152 FERC ¶ 63,025 at P 148 (quoting *Pro Se* Challengers Initial Brief at 39).

²¹³ Initial Decision, 152 FERC ¶ 63,025 at P 148 (quoting *Pro Se* Challengers Initial Brief at 39).

²¹⁴ Initial Decision, 152 FERC ¶ 63,025 at P 149 (citing *SFPP, L.P.*, 137 FERC ¶ 61,220, at P 39 (2011)).

²¹⁵ Initial Decision, 152 FERC ¶ 63,025 at P 150.

²¹⁶ Initial Decision, 152 FERC ¶ 63,025 at P 150.

130. As an initial matter, they argue that PATH's litigation costs were within the scope of the Presiding Judge's authority, citing to another recent Commission case in which Formal Challenge litigation costs were set for hearing.²¹⁷

131. Regarding prudence, *Pro Se* Challengers argue that allowing PATH to recover litigation costs would contravene *Iroquois v. FERC* and *Mountain States*.²¹⁸ *Pro Se* Challengers argue that in *Iroquois v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit only found litigation expenses may be recoverable because the illegal activities that caused them could have produced a cost savings for the ratepayers.²¹⁹ *Pro Se* Challengers state that in *Iroquois v. FERC*, the Court explained that the Commission should focus on:

the prospect of ratepayer benefits from the underlying *activity* rather than from the litigation. Even though it is commonly prudent (in the conventional sense of the term) to incur legal expenses in defending conduct that turns out to have been illegal, there appears no reason why ratepayers should bear the expense of defending conduct that had no *ex ante* prospect of benefiting them.²²⁰

Pro Se Challengers state that in *Mountain States*, the court found:

A course of conduct that leads to an antitrust judgment is often the result of a corporate strategy that could benefit shareholders if the management succeeds in avoiding liability, but such conduct rarely, if ever, produces any benefit for ratepayers.... Very compelling evidence would, of course, be required to justify a conclusion that ratepayers benefited

²¹⁷ *Pro Se* Challengers Brief on Exceptions at 8 (citing *American Elec. Power Serv. Corp.*, 152 FERC ¶ 61,137 at PP 8, 10 (2015)).

²¹⁸ *Pro Se* Challengers Brief on Exceptions at 10 (citing *Iroquois Gas Transmission Sys., L.P. v. FERC*, 145 F.3d 398 (D.C. Cir. 1998) (*Iroquois v. FERC*) and *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1035 (D.C. Cir. 1991) (*Mountain States*)).

²¹⁹ *Pro Se* Challengers Brief on Exceptions at 10.

²²⁰ *Iroquois v. FERC*, 145 F.3d 398 at 401, *quoted in Pro Se* Challengers Brief on Exceptions at 13.

from violations of statutes that are designed, in substantial part, to protect consumers.²²¹

Pro Se Challengers argue that PATH's ratemaking activity, much like in *Mountain States*, was not to benefit ratepayers but rather "to protect its shareholders from any financial liability," for its excessive expenditures.²²²

132. *Pro Se* Challengers also argue, "PATH's illegal actions caused an unjust and unreasonable rate,"²²³ because PATH was given a regulatory incentive through collecting unjust and unreasonable rates, on top of recovering litigation costs from the very ratepayers harmed by the unjust and unreasonable rates at issue. An investor-owned utility would be motivated to simply refuse to discuss the expenditures at issue because it has already collected the unjust and unreasonable rates, and ratepayers would bear any financial risk of litigation. Whereas the litigation in *Iroquois v. FERC* defended rate-lowering activities, *Pro Se* Challengers argue that PATH's formula rates, by allowing recovery of litigation, promote rate-hiking activities, because there are no consequences for a failed, frivolous defense.²²⁴ Thus, *Pro Se* Challengers argue, there "can be no *ex ante* prospect of benefiting ratepayers" by charging them for costs that should have not been in rates in the first instance.²²⁵

133. *Pro Se* Challengers argue that PATH's litigation effort was more about outspending and outlasting two citizen ratepayers who do not have a bottomless pool of ratepayer money to finance their pursuit of just and reasonable rates.²²⁶ *Pro Se* Challengers argue that, if a utility may pass through the cost of litigating and losing ratepayer formal challenges to the very ratepayers harmed by the unjust and unreasonable rates at issue, it diminishes any incentive the utility may otherwise have to settle issues before litigating, or even to discuss the expenditures at issue, because ratepayers would bear any financial risk of litigation. *Pro Se* Challengers note that they will never

²²¹ *Mountain States*, 939 F.2d 1035 at 1043, quoted in *Pro Se* Challengers Brief on Exceptions at 12.

²²² *Pro Se* Challengers Brief on Exceptions at 13.

²²³ *Pro Se* Challengers Brief on Exceptions at 12.

²²⁴ *Pro Se* Challengers Brief on Exceptions at 10-17.

²²⁵ *Pro Se* Challengers Brief on Exceptions at 12.

²²⁶ *Pro Se* Challengers Brief on Exceptions at 17.

personally recoup a refund beyond a handful of pennies for their efforts to rein in PATH's costs, with much more eaten away by ratepayers financing PATH's litigation against them.²²⁷ *Pro Se* Challengers conclude that equity requires the Commission to tie costs associated with defending PATH's illegal activity to the legality of the activity itself, and thus deny recovery.

c. Commission Determination

134. We find that PATH may recover through its formula rate its prudently incurred costs for litigating the proceedings in this docket. As a substantive matter, Commission policy supports PATH's recovery of litigation expenses.

135. The Commission's longstanding precedent is that regulated utilities "are entitled to recover their reasonably incurred rate litigation costs" incurred in Commission rate making proceedings as ordinary and usual business expenses.²²⁸ *Pro Se* Challengers misread *Iroquois v. FERC* and *Mountain States*. In those cases, the Commission and the courts were dealing with the prudence of allowing the specific recovery of litigation costs incurred in defending crimes. In *Iroquois v. FERC*, the Commission found imprudent litigation costs incurred because the pipeline violated Clean Water Act requirements as well as other specific requirements that the Commission had included in its certificate order. The court found that the Commission had not considered whether the pipeline's conduct, although in violation of the certificate order, may have been conduct a reasonable company nevertheless would have undertaken, because the costs saved by the illegal activity were greater than the costs of being found in violation, factored by the risk of having the violation discovered. No similar conduct occurred in this proceeding, which is an ordinary rate proceeding involving disputed accounting issues. As the Presiding Judge found, PATH's positions in this case all had a legitimate basis and were not frivolous in and of themselves, so even though *Pro Se* Challengers prevailed on certain issues elsewhere in this proceeding, we cannot find PATH's decision to litigate this proceeding to be imprudent.

²²⁷ *Pro Se* Challengers Brief on Exceptions at 19.

²²⁸ *SFPP, L.P.*, 137 FERC ¶ 61,220 at P 39; *Pac. Gas & Elec. Co.*, 16 FERC ¶ 63,004, at 65,021 (1981) (affirming Presiding Judge finding utility entitled to recover its litigation expenses as a legitimate cost of rendering public utility service); *Northwest Pipeline Corp.*, 87 FERC at 62,050 (finding legal expenses to be a reasonable ongoing cost, recoverable in rates), *aff'd*, 92 FERC ¶ 61,287, at 61,966 (2000), *aff'd on other grounds*, *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11 (D.C. Cir. 2002).

C. Land Purchases

1. Background

136. PATH proposed to recover \$66,910,180 in right of way options, land rights, land purchased outright, and associated labor and vendor costs.²²⁹ Approximately \$35.4 million is for the associated labor and vendor costs, which, except for the Charles Ryan costs we addressed earlier, parties do not challenge.²³⁰ Approximately \$3 million is for right of way options and land rights. Approximately \$29 million is for 667 acres purchased outright.²³¹

137. PATH argues prudent business judgment required them to simplify the routing of the transmission line by purchasing conservation easements,²³² or, where it was cheaper to do so, purchase the property directly.²³³ PATH reports that out of the 20 properties purchased, 12 properties have been sold to date, for a combined \$3,004,200, after having

²²⁹ Ex. PTH-6 (Major Functional Categories for Abandonment Costs). PATH states that the “Siting and ROW” cost category encompasses costs for preparation of the line route, evaluations, aerial mapping, environmental and property assessments, land surveying, title searches, substation and transmission line design, [...] open houses [...] purchase and acquisition of real estate and real estate options....”

²³⁰ “Vendors who provided significant support for those services were Contract Land Staff (CLS) - \$25 million, Louis Berger - \$2.8 million, Charles Ryan - \$2 million, and Burns & McDonnell - \$1 million. The remaining \$4.6 million represents costs from other various other vendors, legal services, and internal costs.” Ex. JCA-11 at 1.

²³¹ Ex. PTH-9; Ex. JCA-9 (Purchase and Sale Agreements for Judy Poultry Farm and Wilt Farm); Ex. JCA-10 (Response of PATH to JCA on list of properties, amount paid, amount offered for sale, address and description, along with the advertising for such properties).

²³² See Tr. at 1686:1-1699:15 (Ruberto).

²³³ See Tr. at 1699:16-1702:10 (Ruberto).

been purchased for a combined \$6,615,198.²³⁴ The list of purchases and sales is in Appendix B of this order.

138. Of the remaining eight properties, PATH plans to sell four to third parties. PATH proposes to transfer four properties to its affiliates “at a fair market value to be determined by an independent appraisal.”²³⁵ The four properties to be transferred to affiliates include the most expensive and largest properties, which were acquired in order to build a substation in Welton Spring, Hardy County, WV (Welton Springs Properties) and a substation in Kemptown, Frederick County, MD (Kemptown Property).²³⁶ At the time of purchase in 2009, PATH assessed the two Welton Springs Properties at \$5,795,600 and \$3,328,000 based on comparable sales data, commercial value (\$35,000 per acre), and farmland value (\$12,800 per acre).²³⁷ PATH paid \$6,000,000 and \$8,000,000, respectively for the two Welton Springs Properties.²³⁸ PATH assessed the Kemptown Property at \$8.7 million,²³⁹ and bought it for \$6,830,553.²⁴⁰

139. PATH-WV and PATH-AYE each formed wholly-owned subsidiaries, PATH-WV Land Acquisition Company, and PATH-Allegheny Land Acquisition Company, respectively, as single-purpose entities to acquire, hold, and/or transfer legal interests in real property acquired by eminent domain on behalf of their immediate parent for the

²³⁴ PATH Initial Brief, filed May 14, 2014, Test. of Jay A. Ruberto, Ex. PTH-7 at 14. Ex. PTH-9. Although Ex. PTH-9 reports 11 properties sold to date, Ex. JCA-35 shows the parcel at Lot 12, Rivers Edge, Loudon County, VA sold for \$409,000 in October 2014.

²³⁵ PATH Initial Brief, filed May 14, 2014, Test. of Jay A. Ruberto, Ex. PTH-7 at 14-15.

²³⁶ PATH Application, ER12-2708-000, Ex. PTH-100 at 23, Initial Brief, Ex. PTH-9.

²³⁷ Ex. PTH-116, Ex. PTH-117.

²³⁸ Ex. JCA-9.

²³⁹ Ex. PTH-116, Ex. PTH-117.

²⁴⁰ Ex. PTH-117.

purposes of developing the PATH Project. PATH does not employ any individuals. Rather, both AEP and Allegheny/FirstEnergy provided staff.²⁴¹

140. Challenges were posed to both the acquisition prices and sales prices for the approximately \$29 million of land purchased in fee simple. Challenges were also raised on the approximately \$3 million in right of way options and land leases.

2. Hearing and Initial Decision

141. Joint Consumer Advocates argued that PATH's choice of location for the Kemptown Property was imprudent. Joint Consumer Advocates note that at the time that PATH purchased the Kemptown Property, the property was zoned Agricultural,²⁴² and PATH knew it needed either a Special Exception from the Frederick County Board of Appeals, or else preemption authority from the Maryland Public Service Commission's (MPSC's) issuance of a CPCN.²⁴³ Joint Consumer Advocates claimed PATH applied for a Special Exception, but was denied.²⁴⁴

142. The Initial Decision found that Joint Consumer Advocates did not create or establish serious doubt that no "reasonable utility management" would have purchased that property "in good faith, under the same circumstances, and at the relevant point in time."²⁴⁵

143. The Initial Decision noted that PATH witness Ruberto explained that PATH decided to purchase the Kemptown Property early because substations "are necessarily one of the very first things that you need when you're doing a transmission project."²⁴⁶ He also explained the significance of the location of the Kemptown Property for the Project:

²⁴¹ Ex. JCA-48.

²⁴² Ex. JCA-62.

²⁴³ Ex. JCA-65.

²⁴⁴ Ex. JCA-66, Ex. JCA-69.

²⁴⁵ Initial Decision, 152 FERC ¶ 63,025 at P 96 (citing *New England Power*, 31 FERC at 61,084).

²⁴⁶ Initial Decision, 152 FERC ¶ 63,025 at P 97 (citing Tr. at 1666:7-20).

Kempton is located right at the point where all four 500 kV lines that would enter into Kempton are located. Any deviation from that spot would necessarily cause additional transmission line extensions to that new location. And typical for a 500 kV transmission line, you're looking at about \$5 million a mile.²⁴⁷

144. The Initial Decision credited witness Ruberto's explanation that PATH required a very large, relatively flat piece of property, with good access to transportation for the delivery of large transmission equipment to be installed at the substation.²⁴⁸ Although PATH considered other locations for the substations, all were more distant from the nearest interconnection with the rest of the PJM grid, and had other undesirable characteristics, while the Kempton Property satisfied all requirements.²⁴⁹

145. Ruberto also testified that PATH was aware that the zoning of the Kempton Property did not permit its immediate use as a transmission substation.²⁵⁰ He explained that PATH believed that this obstacle could be overcome because:

We ... knew that the state had authority over transmission facilities. We believed that if the state saw this as a transmission facility, that they would override local zoning.²⁵¹

146. The Initial Decision noted that decades earlier, the Maryland Court of Appeals (the state's highest court), had ruled that the MPSC, as part of its authority to grant CPCNs for transmission lines, could preempt county zoning ordinances.²⁵² While the MPSC had not previously exercised that authority over transmission substations, as

²⁴⁷ Initial Decision, 152 FERC ¶ 63,025 at P 97 (citing Tr. at 1667:6-12).

²⁴⁸ Initial Decision, 152 FERC ¶ 63,025 at P 98 (citing Tr. at 1667:17-1668:2).

²⁴⁹ Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing Tr. at 1759:10-1760:23 (Ruberto)).

²⁵⁰ Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing Tr. at 1753:10-17, 1761:8-12).

²⁵¹ Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing Tr. at 1761:9-12).

²⁵² Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing *Howard Cnty. v. Potomac Elec. Power Co.*, 319 Md. 511 (1990)).

distinct from transmission lines, PATH expected the MPSC would do so.²⁵³ The Initial Decision observed that PATH's prediction was correct, as in 2009 the MPSC ruled that PATH could use the MPSC's preemption authority for "substations that are integral to a proposed transmission line project that requires a CPCN."²⁵⁴

147. Based on this, the Initial Decision concluded that Joint Consumer Advocates did not raise serious doubt that the Kemptown Property purchase was imprudent. As no other issues with the land purchases were briefed, the Initial Decision found all of PATH's land purchases, including the Kemptown Property, to be prudent.

3. Joint Consumer Advocates Brief on Exceptions

148. Joint Consumer Advocates maintain that PATH should be disallowed recovery of the cost of the Kemptown Property because the expenditure was not prudent. Joint Consumer Advocates argue that the Initial Decision ignored the fact that PATH failed to assess the investment risks, and only focused on the advantages of purchasing an expensive property that was "so massive" that it could "probably fit 25 football fields."²⁵⁵ Joint Consumer Advocates argue the Initial Decision erroneously ignored this imprudent management, and instead erroneously focused on positive testimony from an engineering standpoint.²⁵⁶

149. Joint Consumer Advocates also argue the Initial Decision failed to consider filed exhibits identifying the Kemptown Property as zoned for agricultural use only, which was a substantial legal impediment to building a substation on the Kemptown Property, and the risk of which went unaddressed.²⁵⁷ Joint Consumer Advocates claim there is no

²⁵³ Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing Tr. at 1761:8-12, 1764:2-6).

²⁵⁴ Initial Decision, 152 FERC ¶ 63,025 at P 100 (citing Ex. PTH-112 (*In re Application of Potomac Edison Co.*, Order No. 82892, at 8 (Md. Pub. Serv. Comm'n 2009)).

²⁵⁵ Joint Consumer Advocates Brief on Exceptions at 60 (citing Tr. 1089:3-13 (Ruberto)).

²⁵⁶ Joint Consumer Advocates Brief on Exceptions at 60-62 (citing Initial Decision, 152 FERC ¶ 63,025 at PP 97-100).

²⁵⁷ Joint Consumer Advocates Brief on Exceptions at 58-59 (citing Ex. PTH-117 and Ex. PTH-118).

evidence PATH management did a due diligence review to determine if the legal impediment to the Kemptown Property could be removed.²⁵⁸

150. Joint Consumer Advocates also claim that before PATH purchased the Kemptown Property, the Maryland Attorney General had issued an advisory opinion construing Maryland law as reserving authority for deciding land use (including for substations) to counties, not the MPSC.²⁵⁹ Joint Consumer Advocates further argue that PATH did not have a plan as to how to use the Kemptown Property if utility plant of some kind (that is, a transmission line or a substation) could not be legally constructed on it.²⁶⁰

151. Joint Consumer Advocates argue that the Commission cannot apply a presumption of prudence to these purchases of property by a non-utility company that was not an Applicant to this proceeding, because they are intra-corporate subsidiary transactions to which prudence cannot be attached.²⁶¹ Joint Consumer Advocates cite to the list of approximately 46 property transactions²⁶² including PATH's right of way options and the land lease amounts executed by two affiliates of PATH who were not applicants to the proceeding. Further, Joint Consumer Advocates argue that PATH has no employees of

²⁵⁸ Joint Consumer Advocates Brief on Exceptions at 62-63 (citing Tr. 1761:9-12).

²⁵⁹ Joint Consumer Advocates Brief on Exceptions at 64-66 (citing Annotated Code of Maryland, Art. 66B, § 3.08, Opinion No. 89-025, 74 Md. Op. Atty. Gen. 221, 1989 WL 503626 (Md. A.G.), "Planning Commission – Zoning–'Public Building'– Planning Commission Does Not Have Authority Under Article 66B, § 3.08 To Review And Approve Project For Privately Owned Retail Business." Opinion No. 93-034, 1993 Md. AG LEXIS 40; Opinion No. 89-025, 1989 Md. AG LEXIS 21.

²⁶⁰ Joint Consumer Advocates Brief on Exceptions at 67 (citing Tr. 989:13-19 (Pugh)).

²⁶¹ Joint Consumer Advocates Brief on Exceptions at 19-30, 56-59 (citing Ex. JCA-8; *Office of Public Counsel v. Missouri Pub. Serv. Comm'n*, 409 S.W.3d 371, 373-376 (2013); *US West Communications, Inc. v. Pub. Serv. Comm'n of Utah*, 901 P.2d 270, 274 (1995) ("While the pressures of a competitive market might allow us to assume... that nonaffiliated expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction", and referencing the "probability of collusion.")).

²⁶² Ex. JCA-8. The transactions include right-of-way options and leases, along with the fee simple purchases of the Kemptown Properties and all of the Rivers Edge properties.

its own, and in fact, is staffed with employees from PATH's parent companies, AEP and FirstEnergy.

152. Joint Consumer Advocates argue that the presumption of prudence applies only to the decisions of a company's management or managers, yet the managers that made these decisions did not testify. Joint Consumer Advocates claim that the employee who did testify acknowledged that he was not part of the "team" that made evaluations of what kinds of properties to buy to site the PATH line, and made no evaluations of his own.²⁶³ Joint Consumer Advocates argue that the Kemptown property was purchased by PATH-MD, which is not a party to the proceeding, and no one employed by PATH-MD provided testimony in this case. Joint Consumer Advocates adds that the recommendation to purchase the Kemptown Property was made by a Patrick Wiltshire, who did not testify in this case.²⁶⁴ Joint Consumer Advocates argue that PATH did not make available or present testimony from any senior management responsible for the purchase of the Kemptown property or the other properties. Thus, Joint Consumer Advocates argues, the Presiding Judge erred in failing to apply an inference that "the production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."²⁶⁵

4. Trial Staff and PATH Briefs opposing Exceptions

153. Trial Staff disagrees with Joint Consumer Advocates that a presumption of prudence cannot be applied to PATH's real estate affiliates. Trial Staff argues that the two state-level cases Joint Consumer Advocates cite²⁶⁶ are distinguishable, as those cases involved affiliates selling products and services with an incentive to drive up costs to subsidize the unregulated affiliate. Trial Staff argues that here, PATH's real estate affiliates were not selling the properties to PATH, but rather functioning as a paper

²⁶³ Joint Consumer Advocates Brief on Exceptions at 26 & 67 (citing Tr. 1085:5-14 (Pugh)).

²⁶⁴ Joint Consumer Advocates Brief on Exceptions at 58.

²⁶⁵ Joint Consumer Advocates Brief on Exceptions at 30-31, 57 (citing *Interstate Circuit, Inc. v. U.S.* 306 US 208, at 226 (1939)).

²⁶⁶ Trial Staff Brief Opposing Exceptions at 50 (citing JCA Brief on Exceptions at 33, *Office of Public Counsel v. Missouri Pub. Serv. Comm'n*, 409 S.W.3d 371, 373-376 (2013); *US West Communications, Inc. v. Pub. Serv. Comm'n of Utah*, 901 P.2d 270, 274 (1995)).

financing vehicle, which assigned the purchases to PATH at cost. Trial Staff concludes that a presumption of prudence should apply to these purchases.²⁶⁷

154. PATH reiterates that Joint Consumer Advocates failed to “show that no ‘reasonable utility management’ would have purchased Kemptown Property ‘in good faith, under the same circumstances, and in the relevant point in time.’”²⁶⁸ PATH argues that Joint Consumer Advocates’ argument about the land’s agricultural zoning does not raise serious doubts, because it ignores evidence that PATH reasonably expected the MPSC to override local zoning restrictions. PATH notes that Joint Consumer Advocates also ignore PATH testimony that siting the substation at another plausible location would have raised construction costs by \$20 million.²⁶⁹ PATH claims expert testimony from Mr. Williamson proved that early acquisition of sites for substations is critical to project development and that it is common practice to acquire property for a transmission project despite zoning restrictions, and address those restrictions after purchase.²⁷⁰ PATH argues that the 2006 Maryland zoning case that Joint Consumer Advocates cites to is not relevant (as it involved interconnection of a transmission line, not a new substation), and that PATH’s assessment of MPSC law ultimately proved correct.²⁷¹

5. Commission Determination

155. We affirm the Initial Decision’s finding that the land purchases were prudent. For the 46 transactions including land purchased in fee simple, right of way options and land leases, while the Commission has warned that “it is not appropriate to recognize gains or losses on transfers of assets between affiliates because profits cannot be realized in dealings with oneself,” PATH has sufficiently shown that its real estate affiliates are merely acting as a pass-through entity for third party sellers. Under this discrete scenario – as opposed to other types of affiliate transactions – there is no opportunity or incentive to subsidize affiliates through artificial pricing schemes because unaffiliated third parties

²⁶⁷ Trial Staff Brief Opposing Exceptions at 50-52 (quoting JCA Brief on Exceptions at 33 (citing Ex. JCA-96 Ex. D, at 6-7)).

²⁶⁸ PATH Brief Opposing Exceptions at 49 (quoting Initial Decision, 152 FERC ¶ 63,025 at P 96).

²⁶⁹ PATH Brief Opposing Exceptions at 49-51 (citing Ex. PTH-81 at 17; Tr. 2482:4-24).

²⁷⁰ PATH Brief Opposing Exceptions at n.145.

²⁷¹ PATH Brief Opposing Exceptions at 52.

are the sellers. The record shows that all of the 46 properties at issue here were purchased from unaffiliated third party sellers, thereby making the unaffiliated third party sellers, not affiliates, the beneficiaries of these transactions. Even if the presumption of prudence did not apply, regarding the non-Kempton properties, we note that Joint Consumer Advocates present no credible evidence that PATH paid excessive amounts, or that rights of way could have been more cheaply and securely obtained through other methods.

156. We also reject Joint Consumer Advocates' allegations of imprudence in the purchase of the Kempton Property. It is implausible to expect a reasonable utility manager to attempt a project of PATH's scale without purchasing land for substations. The record evidence shows the Kempton property was strategically located, that PATH considered whether other locations would be sufficient given their distance from the location of the line and other undesirable characteristics, and that PATH had a reasoned position that it could acquire the zoning variance needed because the substation was integral to a transmission project.²⁷² Joint Consumer Advocates' assertion that the Kempton Property could "probably fit 25 football fields,"²⁷³ does not establish imprudence given the evidence that it was ideally suited to use as a substation as well as the absence of evidence that the Kempton Property's owner would have been willing to agree to a partial land sale at a reasonable price or that other, smaller properties would have satisfied the requirements necessary for construction of the project at a better price.

157. Joint Consumer Advocates maintain that PATH cannot establish prudence based on transactions conducted by its affiliates, but cite no cases directly on point. Joint Consumer Advocates cite cases relating to costs that should be recognized from intra-corporate transfers between affiliates, but no evidence here relates solely to the acquisition costs for the land from third-party sellers, so such a risk does not exist.²⁷⁴

158. However, as the Initial Decision recognized, PATH provided conflicting evidence as to the purchase prices for several properties. As we discuss in the compliance section,

²⁷² Contending with zoning restrictions is an integral part of any project of PATH's scope and we cannot find that merely because a zoning approval may be needed that the decision to purchase is imprudent. Furthermore, while the standard is to assess the prudence of decisions at the time that they are made, the MPSC did agree with PATH's assessment of the law, which demonstrates the reasonableness of the assessment.

²⁷³ Joint Consumer Advocates Brief on Exceptions at 60 (citing Tr. 1089:3-13 (Ruberto)).

²⁷⁴ Ex. PTH-66, PTH-116 through PTH-126.

we are providing our findings on the proven purchase and sales prices as Appendix B to this order, and requiring PATH to refund any unproven amounts that it has collected.

D. Past Land Sales

1. Initial Decision

159. The Initial Decision determined that “the land transactions at issue in this proceeding are the most egregious aspect of the record in the case given that so much land was purchased for the Project and subsequently sold at considerable losses.”²⁷⁵ The Initial Decision concluded that PATH could not recover anything for the losses on its land dealings to date.

160. The Initial Decision ruled that the presumption of prudence standard did not apply for “the land disposition process, which is triggered after a project has been abandoned,” because it was “a distinct phase that is separate from the normal operations of a utility.”²⁷⁶ Instead, the Initial Decision applied a “reasonableness” standard in which “the burden is on the utility to prove *ab initio* in its case in chief the *prima facie* elements to show that it acted in a commercially reasonable manner to sell or transfer the property at the best possible value.”²⁷⁷ The Initial Decision ruled that the Abandonment Hearing Initiation Order supported this interpretation, quoting:

Because PATH has not completed the sale and transfers of land and other assets, we cannot determine, based on the record whether self-dealing or cross-subsidization will occur as a result of these future transfers to affiliates, and whether the proposed prices for sales to third parties *are reasonable*. As part of the hearing and settlement proceedings, we therefore direct parties *to consider the reasonableness of such transfers and sales*.²⁷⁸

²⁷⁵ Initial Decision, 152 FERC ¶ 63,025 at P 87.

²⁷⁶ Initial Decision, 152 FERC ¶ 63,025 at P 103.

²⁷⁷ Initial Decision, 152 FERC ¶ 63,025 at P 103.

²⁷⁸ Initial Decision, 152 FERC ¶ 63,025 at P 103 (quoting Third Formal Challenge Order, 141 FERC ¶ 61,208 at P 68).

161. The Initial Decision found that, even though intervenors did not present evidence regarding these land sales, PATH still had a burden to make a *prima facie* showing that sales were reasonable. On review of the record, the Initial Decision found there was not “a sufficient showing by a preponderance of evidence that that past sales were reasonable.”²⁷⁹ The Initial Decision then determined that, for both past sales and future sales, “at the very minimum the record should show,” for each property:

- a. When appraisals were obtained (if any) in relation to when the property was sold;
- b. How long the property was on the market before an offer was accepted;
- c. The scope of the advertising for the property, whether it was advertised nationally or only locally to limited buyers, a factor especially pertinent to large properties; and,
- d. Any considerations that were weighed when deciding to accept various offers, especially offers that were significantly lower than the purchase price.²⁸⁰

162. On the Initial Decision’s first factor, the Presiding Judge found appraisals for only four of the 12 properties sold. On the Initial Decision’s second and third factors, the Presiding Judge found no property-specific information regarding sales and marketing efforts, so that the Presiding Judge could not determine which properties were listed through which brokers. On the Initial Decision’s fourth factor, the Presiding Judge found that PATH had no special processes in place if a property were to be sold for significantly lower than the purchase price.²⁸¹ The Initial Decision concluded that based on the record, PATH did not meet its *prima facie* burden to demonstrate that the marketing process to sell the properties was commercially reasonable, and therefore, PATH could not recover the losses incurred on the sales from ratepayers.

²⁷⁹ Initial Decision, 152 FERC ¶ 63,025 at P 105.

²⁸⁰ Initial Decision, 152 FERC ¶ 63,025 at P 105.

²⁸¹ Initial Decision, 152 FERC ¶ 63,025 at PP 104-107 (citing Tr. at 1788:18-25, 1789:1-12).

2. PATH Brief on Exceptions

163. PATH urges the Commission to reject the Initial Decision, or in the alternative, reopen the record to afford PATH due process.²⁸² PATH argues that the Initial Decision erred by requiring PATH to show “by a preponderance of evidence that past sales were reasonable.”²⁸³ PATH notes that the Initial Decision found that no intervenor introduced any “evidence or arguments”²⁸⁴ questioning the prudence of a single transaction on these land dispositions to unaffiliated purchasers, let alone raising serious doubt. PATH argues that the Initial Decision erred in establishing a new four-part test.

164. PATH also argues that the Initial Decision imposed “an unprecedented and unjustified substantive burden,” by requiring PATH to demonstrate that it obtained “the best possible value.”²⁸⁵ PATH argues that the prudence standard does not require PATH to show that it achieved the “best possible” result, since any number of decisions could be considered prudent.²⁸⁶

165. PATH states that no party presented evidence challenging PATH’s sales, and PATH met its burden in demonstrating the process used to ensure the properties were sold at fair market value, by obtaining:

brokers from the local area, real estate brokers, and they would provide comparables to help us determine... proper prices to list. The properties were listed through these brokers, and ultimately, the market value ended up being the value you could get, which was the market value at the time

²⁸² PATH Brief on Exceptions at 49 (citing *Lopez v. United States*, 201 F.3d 478, 480 (D.C. Cir. 2000)).

²⁸³ PATH Brief on Exceptions at 43 (citing Initial Decision, 152 FERC ¶ 63,025 at PP 104, 105).

²⁸⁴ PATH, Brief on Exceptions at 42-43 (citing Initial Decision, 152 FERC ¶ 63,025 at PP 104, 105).

²⁸⁵ PATH Brief on Exceptions at 46 (quoting Initial Decision, 152 FERC ¶ 63,025 at P 103).

²⁸⁶ PATH Brief on Exceptions at 47.

for the property. And that's really true for all the ones that were sold. It was through the same process.²⁸⁷

3. Joint Consumer Advocates Brief opposing Exceptions

166. Joint Consumer Advocates argue that the Initial Decision correctly recognizes that the evidence in this case regarding past land sales “shows abysmal and inexplicable losses.” Joint Consumer Advocates report that the 12 properties that have been sold thus far were purchased for a total of \$6,615,198 and have since been sold for a total of \$3,004,200: less than half the original purchase price.²⁸⁸

167. Joint Consumer Advocates argue that “reasonableness is the standard of proof to adjudicate the land sales or dispositions, and the burden of proof is on the utility to prove *ab initio* in its case-in-chief the *prima facie* elements to show that it acted in a commercially reasonable manner to sell or transfer the property at the best possible value.”²⁸⁹ Joint Consumer Advocates state the Abandonment Hearing Initiation Order acknowledged that the Commission could not at that time determine “whether the proposed prices for sales to third parties *are reasonable*” and directing parties “*to consider the reasonableness of such transfers and sales.*”²⁹⁰

168. Joint Consumer Advocates state that the fact alone that PATH sold all of these properties for less than half of their purchase price raises serious doubt regarding the reasonableness of those sales. Joint Consumer Advocates state, for example, PATH purchased three properties (Cave Road, Dillons Run Road, and Lot 4 of Blanche Fisher Tract for \$160,300, \$315,988, and \$96,000, respectively) that were either in foreclosure or at auction. Joint Consumer Advocates argue that in spite of the distressed nature of these

²⁸⁷ PATH Brief on Exceptions at 47-48 (citing Roberto Test., Ex. PTH-7 at 13:11-15:4, Ex. PTH-9, Tr. 1788:22-1789:7).

²⁸⁸ Joint Consumer Advocates Brief Opposing Exceptions at 69, n.237.

²⁸⁹ Joint Consumer Advocates Brief Opposing Exceptions at 48-49 (quoting Initial Decision, 152 FERC ¶ 63,025 at P 103).

²⁹⁰ Joint Consumer Advocates Brief Opposing Exceptions at 48-49 (quoting Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 69) (emphasis added).

purchases, after selling these properties, PATH still incurred net losses in the amount of \$10,300, \$200,988, and \$46,000, respectively.²⁹¹

4. Commission Determination

169. We reverse the Initial Decision with respect to the losses incurred on prior land sales, finding that PATH undertook reasonable business efforts to sell the properties at prevailing market prices. We find that the normal prudence standard applies to these sales. As the Commission stated in *New England Power Co.*, the prudence standard requires an inquiry into whether “they are costs which a reasonable utility management ... would have made, in good faith, under the same circumstances, and at the relevant point in time.”²⁹² Or, stated differently, if the utility’s decisions “fall within the zone of reasonableness and there is no abuse of discretion, then these decisions will not be held imprudent – even if better alternatives were available.”²⁹³

170. The Presiding Judge focused on the extent of the losses PATH experienced on these sales. When PJM directed PATH to abandon the PATH Project, PATH was obligated to mitigate its losses by selling land that had not been bought with the idea of a resale in mind: some of PATH’s land tracts are unimproved land, carved into shapes and located in places that are necessary for transmission but unattractive for non-utility uses.²⁹⁴ Others are homes which, the record shows, were not necessarily inhabitable at the time PATH resold them.²⁹⁵

171. PATH presented uncontroverted evidence that it sold the land on the open market. It further showed that all the properties sold were marketed through licensed National Association of Realtors and the Multiple Listing Service to the parties offering the best prices.²⁹⁶ These are normal methods for disposing of property, and establish that the land

²⁹¹ Joint Consumer Advocates Brief on Exceptions at 50 (citing Initial Decision, 152 FERC ¶ 63,025 at P 92 (citing Ex. PTH-9)).

²⁹² *New England Power*, 31 FERC at 61,084.

²⁹³ *Ky Util’s Co.*, 45 FERC at 65,165, *aff’d* 62 FERC ¶ 61,097.

²⁹⁴ Ex. JCA-10.

²⁹⁵ Ex. JCA-10.

²⁹⁶ Ex. JCA-10 Att. C (“All properties were listed for sale on ... MLS [Multiple Listing Service]... [and] Realtor.com.”)

was sold prudently. We disagree with the Presiding Judge that because of the large losses, a higher burden of proof should be applied after the fact. As the Presiding Judge recognized, the intervenors introduced no evidence showing that these prices were below the prevailing market prices or that PATH could have been able to obtain greater prices.²⁹⁷ We find that PATH acted as a prudent utility in effectuating the sales required by the abandonment.²⁹⁸

172. However, as the Initial Decision recognized, PATH provided conflicting evidence as to the prices for several properties. As we discuss in the compliance section below, we are providing our findings on the proven purchase and sales prices as Appendix B to this order, and requiring PATH to refund any unproven amounts that it has collected.

E. Future Land Sales and Future Land Transfers

1. Initial Decision

173. The Initial Decision found that PATH plans to transfer four properties, worth \$21,690,553, to non-utility affiliates: the Kemptown Property and a small property in Maryland to FirstEnergy Properties, and the two Welton Spring Properties in West Virginia to be jointly owned by FirstEnergy Properties and an unidentified AEP real estate property holding company.²⁹⁹ The Initial Decision found that there are “[a]t least four other properties” that PATH plans to sell on the open market.³⁰⁰

²⁹⁷ Initial Decision, 152 FERC ¶ 63,025, at P 104.

²⁹⁸ Even had the prices of the land sales been found imprudent, the parties need to consider whether the proper remedy is exclusion of all losses from such sales, since it appears that the property values of these properties would have declined from the purchase price regardless of the extent of PATH’s marketing effort. *See Off. of Consumers’ Couns. of Ohio v. FERC*, 842 F.2d 1,308, 1,311 (D.C. Cir. 1988) (affirming Commission remedy of pricing imprudently high gas sales at the price of competing fuel); *Nat’l Fuel Gas Supply Corp.*, 44 FERC ¶ 61,293, at 62,057 (1988) (remedy of reducing the reprice of imprudent off-system sales by the amount by which the costs of off-system sales exceeded benefits); *Pub. Serv. Co. of New Hampshire*, 6 FERC ¶ 61,299, at 61,715 (1979) (subtracting excess fuel charges, as adjusted for value and costs).

²⁹⁹ Initial Decision, 152 FERC ¶ 63,025 at PP 109-111.

³⁰⁰ Initial Decision, 152 FERC ¶ 63,025 at P 117.

174. The Initial Decision noted that the Commission specifically cited Order No. 707 in the Abandonment Hearing Initiation Order,³⁰¹ which “places price restrictions on affiliate transactions for all power and non-power goods and services transactions between franchised public utilities with captive customers and provides that such sales should be made at the higher of cost or market.”³⁰²

175. The Initial Decision noted that PATH argued that Order No. 707 does not control the outcome of the pending affiliate transfers because Order No. 707 only applies to “a franchised public utility,”³⁰³ which the Commission’s regulations define as “a public utility with a franchised service obligation under state law.”³⁰⁴ Joint Consumer Advocates, by contrast, argued that the spirit of Order No. 707 applies, especially since PATH already suspected that its transfers will be at “less than cost.”³⁰⁵

176. The Initial Decision did not directly rule on Order No. 707, but did hold that if and when PATH transfers property to an affiliate, “those transactions and the proposed recovery of costs must be included in a new [FPA] section 205 filing,” and PATH “will have the burden of proof as part of their *prima facie* case to demonstrate that the transfer price to its affiliates was commercially reasonable.”³⁰⁶ The Initial Decision found that merely getting an appraisal and listing the property with an agent is not enough to show a commercially reasonable sale. The Initial Decision ruled that PATH must present evidence of their total marketing efforts with respect to each individual property, and restated the test that the Initial Decision had applied to past sales.³⁰⁷

³⁰¹ Initial Decision, 152 FERC ¶ 63,025 at P 112 (citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 FR 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (2008)).

³⁰² Initial Decision, 152 FERC ¶ 63,025 at P 111 (citing Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at n.78).

³⁰³ Initial Decision, 152 FERC ¶ 63,025 at P 113 (citing PATH Reply Br. at 66 (quoting 18 C.F.R. § 35.44(b)(1)(2014) (emphasis added))).

³⁰⁴ Initial Decision, 152 FERC ¶ 63,025 at P 113 (citing 18 C.F.R. § 35.43(a)(3) (2016)).

³⁰⁵ Initial Decision, 152 FERC ¶ 63,025 at P 113 (citing Tr. at 1179:11-13).

³⁰⁶ Initial Decision, 152 FERC ¶ 63,025 at P 118.

³⁰⁷ Initial Decision, 152 FERC ¶ 63,025 at P 117.

2. PATH Briefs on and Opposing Exceptions

177. PATH argues that in the absence of any record evidence or contention that PATH's revisions to the formula rates fail to treat the proceeds of land sales in a just and reasonable manner, the Commission should reverse the Initial Decision's requirement that PATH file future affiliate transactions in a FPA section 205 filing demonstrating that the sales were commercially reasonable, and the Commission should instead allow PATH to transfer properties to affiliates "at current fair market value" subject to review in the formula rates' annual update process.³⁰⁸

178. PATH argues that the Formula Rate Annual Update process is the proper vehicle for amounts PATH receives to be credited against abandonment costs recovered from wholesale customers, and provides a forum for which any questions concerning any property transfer and sale can be raised, resolved, and presented to the Commission through formal challenges. PATH argues that no party argued or provided evidence that PATH's proposed changes to its formula rate to recover abandoned plant were inadequate, or that additional changes to the formula rate were required.³⁰⁹ PATH argues that in the absence of any evidence that PATH's revisions to the formula rates fail to treat the proceeds of land sales in a just and reasonable manner, there is no basis for a future section 205 compliance requirement justifying future land sales and the Commission must reverse the Initial Decision. PATH cites to *Cities of Bethany v. FERC*,³¹⁰ noting that a utility need only establish that its rate is just and reasonable, not that it is superior to other alternatives.

179. PATH agrees that "if costs are incurred through an affiliate transaction, [the Commission] cannot presume prudence."³¹¹ However, PATH argues that "the Commission should rule that crediting ratepayers with the fair market value of any property transferred to an affiliate is just and reasonable and ensures that ratepayers are

³⁰⁸ PATH Brief on Exceptions at 49, 52.

³⁰⁹ PATH Brief on Exceptions at 50, 54 (citing Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 68).

³¹⁰ PATH Brief on Exceptions at 51 (citing *Cities of Bethany v. FERC* 727 F.2d 1131, 1136 (D.C. Cir., 1984); accord, e.g., *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282, at P 31 (2009).

³¹¹ PATH Brief Opposing Exceptions at 15 (citing *Ind. & Mich. Mun. Distribs. Ass'n v. Ind. Mich. Power Co.* 62 FERC at 62,238).

not required to subsidize shareholders.”³¹² PATH defines “current fair market value” as the amount that PATH would receive if the property were sold to an unaffiliated purchaser in the open market, and as such, whether the property were sold to an affiliate or a third party, the value would be the same, and ratepayers would receive the same amount of money whether they are sold to an affiliate or a third party. PATH adds that affiliate transfers may reap an even higher ratepayer credit because PATH would avoid marketing costs and broker’s fees associated with a sale to an unaffiliated purchaser.³¹³

180. PATH indicates that it had planned to transfer land to affiliates because of its proximity to existing transmission lines, but the Initial Decision’s deferral on the justness and reasonableness of the future land sales to a separate section 205 filing creates uncertainty and prevents PATH from proceeding with this transfer at present.³¹⁴

3. Joint Consumer Advocates Briefs on and Opposing Exceptions

181. Joint Consumer Advocates argue that the Commission has traditionally applied a heightened level of scrutiny to transactions involving affiliates, explaining, “[t]he Commission long has recognized, and the courts have agreed, that transactions between affiliated companies require close scrutiny.”³¹⁵ Joint Consumer Advocates also cite state-level cases reaching the same result.³¹⁶

182. Joint Consumer Advocates argue that the Presiding Judge’s failure to rule on whether to apply Order No. 707’s higher of cost or market pricing to transfer of property between affiliates was in error and should be reversed. Joint Consumer Advocates argues that even though PATH is not a franchised public utility, the reasoning behind Order No. 707’s pricing restrictions apply to PATH, and the PATH affiliate transactions are a prime example of the need for pricing restrictions because the affiliate will acquire the property

³¹² PATH Brief Opposing Exceptions at 53-54.

³¹³ PATH Brief on Exceptions at 52 (citing Tr. 1705:7-10 (Ruberto)).

³¹⁴ PATH Brief on Exceptions at 51 (citing Tr. 1703:9-13, 21-23 (Ruberto)).

³¹⁵ Joint Consumer Advocates Brief on Exceptions at 31, 72 (citing *Northeast Util’s Serv. Co.*, 66 FERC ¶ 61,332, *Ind. & Mich. Mun. Distribs. Ass’n v. Ind. Mich. Power Co.* 62 FERC at 62,238).

³¹⁶ Joint Consumer Advocates Brief on Exceptions at 31-32 (citing *US W. Comm’n., Inc. v. Pub. Serv. Comm’n of Utah*, 901 P.2d 270, 274 (1995); *Boise Water Corp. v. Idaho Pub. Util’s Comm’n*, 97 Idaho 832 555 P.2d 163 (1976)).

for less than cost, and at a fraction of what captive ratepayers pay for the exact property.³¹⁷ Joint Consumer Advocates argue that it would go against the spirit of Order No. 707 to permit PATH to sidestep the important policy considerations announced in Order No. 707 because it argues here that neither it nor its affiliates can be classified as franchised public utilities.

183. In any event, Joint Consumer Advocates argue that the claim that the pricing restrictions outlined by Order No. 707 can only apply to franchised public utilities with an obligation to serve under state law appears incorrect. Joint Consumer Advocates argue Order No. 707 is clear that the “pricing rules ... do not preclude the Commission from imposing additional cross-subsidization restrictions on affiliate transactions, as appropriate, on a case-by-case basis.”³¹⁸ As such, Joint Consumer Advocates argue that applying the higher of cost or market standard would not simply be “illusory” as is asserted by PATH.

184. In the alternative, if the future transfer of real property is to be considered in a future section 205 proceeding, Joint Consumer Advocates request that the Commission set the standard in that proceeding to the higher of cost or market value.³¹⁹ Joint Consumer Advocates argue that because PATH proposes to include any unamortized balance of land losses in rate base and earn a return on that rate base until it is expensed, ratepayers will be required to pay the original purchase price of a property minus the price at which the affiliate transactions occur, meaning non-utility affiliates could acquire ownership of a property for a fraction of what ratepayers would pay for that same property while PATH’s shareholders earn a return on the losses. Joint Consumer Advocates argue that the Commission should prevent this outcome by requiring that any transfer of property between affiliates be priced at the higher of cost or market value.³²⁰

³¹⁷ Joint Consumer Advocates Brief on Exceptions at 74-75.

³¹⁸ Joint Consumer Advocates Brief on Exceptions at 52 (quoting Order No. 707, FERC Stats. & Regs. ¶ 31,264 at P 29).

³¹⁹ Joint Consumer Advocates Brief on Exceptions at 76.

³²⁰ Joint Consumer Advocates Brief Opposing Exceptions at 53-54.

4. Commission Determination

a. Future Land Sales to Non-Affiliates

185. Consistent with Commission precedent that utilities may recover actual losses, PATH may recover its losses on future land sold to non-affiliates, but only after PATH sells the property or can estimate with reasonable accuracy its losses in its compliance filing, as discussed below.

b. Future Land Transfers to Affiliates

186. We will permit PATH to transfer property to its affiliates, if it chooses to do so. At the time of such transfer, PATH should book the land to its formula rate either at original cost, or at market value if PATH provides evidence as to the value of the property determined on the open market. We find that Order No. 707 does not apply to PATH's proposed transfers. Rather, Order No. 707 only applies to "sales of any non-power goods or services by *a franchised public utility* that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities."³²¹

187. While the Commission generally requires utilities to use original cost in acquiring or transferring property, land, and land rights,³²² the Commission has recognized that in certain situations, transfers between affiliates may be reflected at market-determined prices. The Commission's *Edgar* line of cases allows the utility to make a demonstration that a market-based sale to its affiliate is reasonably priced compared to alternatives in

³²¹ 18 C.F.R. § 35.44(b)(1) (2016) (emphasis added); 18 C.F.R. § 35.44(a)(3) (2016) (emphasis in original).

³²² Cf., e.g., *Repeal of the Public Utility Holding Co. Act of 1935 & Enactment of the Public Utility Holding Co. Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197, at P 169 (2005); *Iowa Southern Utilities Co.*, 58 FERC ¶ 61,317, at 62,014, *reh'g denied*, 58 FERC ¶ 61,193 (1992); *Ohio Power Co. v. FERC*, 954 F.2d 779, 785, *cert. denied*, 113 S.Ct. 483 (1992).

the market.³²³ In such cases, the Commission requires the utility to show the benefits of such a transfer³²⁴ and that:

- (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate;
- (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and
- (3) the affiliate was selected based on some reasonable combination of price and non-price factors.³²⁵

188. In the case of these land parcels, PATH has demonstrated that some of these parcels are in close proximity to existing transmission lines and could well be of greater value if held for such use than if sold to non-utilities. However, as PATH concedes, it needs to demonstrate that the price of its transfer reflects the amount that PATH would receive if the property were sold to an unaffiliated third party purchaser in the open market. Such a showing could include a public solicitation process, independent third party appraisals of property value, or other convincing evidence of market value. Therefore, in its compliance filing, PATH must reflect either the original value of assets transferred to an affiliate or establish the asset's fair market value, as discussed above.

F. Compliance

1. Conflicting Record Evidence

189. As noted above, PATH has presented different values for the purchase and/or sales prices of several properties. Appendix B to this order identifies all the properties. Appendix B provides three lists: one list for which the record shows purchase and/or sales prices that are consistent across the whole record, one list for which the record shows purchase and/or sales prices that are reported differently in different exhibits, and one list for which PATH has not yet submitted a final sale price to the record. In addition, it is not clear how the totals on Form 1 for losses correspond to the individual properties on the record. Therefore, on compliance, PATH must provide a property-by-

³²³ *Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027 at 61,059-60 (1999); *Edgar Electric Energy Co.*, 55 FERC ¶ 61,382, at 62,167-69 (1991) (*Edgar*).

³²⁴ *Arkla Energy Resources*, 61 FERC at 61,038.

³²⁵ *Edgar*, 55 FERC at 62,168.

property breakdown of the losses that it has passed through and/or proposes to pass through for its real estate purchases and sales, separating out associated taxes, any labor or other costs, consistent with Commission regulations.³²⁶ PATH must file revised Form 1s with an explanation as to how the losses are reflected. For those properties in which PATH agrees with the prices in Appendix B, PATH may simply confirm on compliance that it used those prices in its ratemaking. However, to the extent that PATH's rates have reflected prices other than those reflected in Appendix B, and for those properties where Appendix B highlights different prices, PATH must provide evidence establishing the correct price. If PATH cannot correct these conflicting purchase and sales prices, PATH may only record in rates the lowest price of the conflicting purchase price and the highest price of the conflicting sales prices. PATH is required to support its refund calculations in spreadsheet format, including all formulas.³²⁷

2. Future Land Sales and Future Land Transfers

190. The Abandonment Hearing Initiation Order ruled, “the inclusion of abandoned cost associated with real property is conditioned on PATH expeditiously working to dispose of the property at cost or market values, by transfer or sale prior to the end of the five year amortization period.”³²⁸ PATH states that it has stopped closing out transactions altogether. As discussed above, we have provided PATH until December

³²⁶ See, e.g., 18 C.F.R. pt. 101, Electric Plant Instructions 6 and 7.

³²⁷ All the spreadsheets must contain all the formulas necessary to calculate the compliance rates. If the spreadsheets use macros, functions, or other techniques to perform iterative functions, PATH should provide an explanation of the macros or functions used, where they are located, and how to initiate those functions. All macros and functions should not be set at a default state to run upon opening the spreadsheet. All formulas, variables, and results should be visible and not hidden. The spreadsheets should not use security features that prevent copying, modification, or printing – although PATH may provide separate spreadsheets that do have these features activated. The spreadsheets should not contain any links to sources outside of the spreadsheet document. To the extent applicable, the spreadsheets should use the format prescribed by the Commission's Instruction Manual for Electronic Filing applicable to natural gas pipeline rate case statements and schedules, located here: <http://www.ferc.gov/industries/gas/gen-info/rate-filings.asp>.

³²⁸ In Order No. 679, the Commission maintained its earlier determination in Opinion No. 295 that abandoned plant costs should typically be recovered “over the life of the asset as if it had gone into service.” Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 69.

2017 to either sell the remaining property or transfer it to an affiliate at the value determined on the open market and to make the appropriate compliance filing consistent with the formula rate protocols. If PATH makes an affiliate transfer at less than original cost, it must demonstrate its market based transfer is reasonable, as described above.

191. It is our understanding that PATH has, since 2012, been amortizing the cost of the land that it has purchased, even for assets that it has not yet sold. Because PATH has already been amortizing the cost of its property, if PATH sells or transfers the property, it must reflect a credit to ratepayers for the amount received. Likewise, if PATH fails to sell or transfer a property by December 2017, it must return to ratepayers the full purchase price of the property plus the return on equity that it has received since December 2012.

3. Timing

192. We direct PATH to submit this compliance filing within 60 days of the date of this opinion. Parties may file comments on PATH's compliance filing 30 days from the date PATH makes its compliance filing. Under Formula Rate Protocols section VIII, any "error must be corrected in the Formula Rate or Annual Update and shall be reflected in the True-up Adjustment made as part of the next succeeding Annual Update," and PATH has an obligation to correct errors not only in the current year's rates, but "occurring in a period prior to the period under review." To the extent refunds are due, PATH is directed to make refunds with interest when it submits its next Formula Rate Annual Update.

G. Failure to Seek Early Termination of the Project

1. Initial Decision

193. At hearing, Joint Consumer Advocates contended that PATH imprudently failed to recommend the suspension of the PATH Project when events were evident that the Project should not continue to go forward. Joint Consumer Advocates argued that this imprudence increased the abandonment costs by \$29 million, which they argued PATH should be denied from recovering.³²⁹

194. The Initial Decision found that the evidence showed that PJM, not PATH, is authorized to decide and assess questions of whether a regional network transmission project is needed.³³⁰ The Initial Decision reasoned that PATH was not charged to know

³²⁹ JCA Initial Brief at 63; Ex. JCA-109 at 4:13-15.

³³⁰ Ex. PTH-46 at 6; Tr. at 912:12-18; PATH Initial Brief at 45-46.

the full range of information and data on which PJM relies for transmission determinations,³³¹ and additionally, PATH had a contractual obligation to construct the transmission projects as assigned to them by PJM.³³² The Initial Decision found that PATH did behave as a prudent utility by proceeding with its assigned obligations until otherwise instructed by PJM, and therefore these expenditures were recoverable.

2. Joint Consumer Advocates Brief on Exceptions

195. Joint Consumer Advocates note that the Initial Decision found they had failed to create a serious doubt that a reasonable utility manager would have recommended suspension under the circumstances of this case, and that no utility management had ever recommended suspending a transmission project under similar circumstances.³³³ Joint Consumer Advocates counter that TrAILCo, of which Allegheny Power was a part, did in fact request and receive a stay of regulatory proceedings to reconsider a large transmission project.³³⁴

196. Joint Consumer Advocates state that in December 2009, with PATH's CPCN application pending in Virginia, the Virginia State Corporation Commission (VA-SCC) Hearing Examiner requested PJM to prepare sensitivity load flow analyses, which included updating information about existing and proposed generation, updating the load forecasts, and updating information on existing and forecasted demand response and energy efficiency.³³⁵ Joint Consumer Advocates state that the results of those sensitivity studies showed that no thermal overloads were forecasted to occur before 2021 and no voltage violations were expected to occur before 2016.³³⁶ Joint Consumer Advocates state that PJM admitted that the sensitivity analyses it had performed at the behest of the VA-SCC Hearing Examiner had the potential to defer the PATH Project beyond 2014.³³⁷

³³¹ Tr. at 914:13-22.

³³² Ex. PJM-1 at 8-9.

³³³ Joint Consumer Advocates Brief on Exceptions at 84 (citing PATH Initial Brief at 38).

³³⁴ Joint Consumer Advocates Brief on Exceptions at 85.

³³⁵ Joint Consumer Advocates Brief on Exceptions at 88 (citing Ex. JCA-109 at 12).

³³⁶ Joint Consumer Advocates Brief on Exceptions at 88

³³⁷ Joint Consumer Advocates Brief on Exceptions at 89 citing Ex. JCA-109 at 5.

Joint Consumer Advocates note that on the same day that PJM produced the results of the sensitivity studies, PATH filed a motion to withdraw its CPCN application and terminate the Virginia proceedings because it no longer supported the CPCN application based on a 2014 need for the PATH Project.³³⁸ The VA-SCC granted PATH's motion on January 27, 2010.³³⁹

197. Joint Consumer Advocates state that the Initial Decision also states that PATH is not charged to know the full range of information and data on which PJM relies for transmission determinations.³⁴⁰ Joint Consumer Advocates note that Mr. Herling explained that AEP and Allegheny had the ability to conduct power flow analyses, which model all customer load in the region, all of the generating resources, and all of the transmission facilities.³⁴¹ Thus, Joint Consumer Advocates claim, PATH had the same information on which PJM was basing its decisions.³⁴²

198. Moreover, Joint Consumer Advocates contend that the rate of cost escalation was greater over portions of the life of the PATH Project than would be expected when compared with typical industry cost indices. Joint Consumer Advocates state that Mr. Lanzalotta calculated this budget increase at \$4.3 million, using the Handy Whitman Cost Trends for Electric Utility Construction.³⁴³ Joint Consumer Advocates conclude that PATH's rates should be reduced by \$4.3 million.

3. PATH Brief Opposing Exceptions

199. PATH states that Joint Consumer Advocates provide a long list of facts about the PATH Project, without noting that PJM was conducting a comprehensive reevaluation of

³³⁸ Ex. JCA-109 at 13.

³³⁹ Joint Consumer Advocates Brief on Exceptions at 89 (citing Ex. JCA-109 at 14-15).

³⁴⁰ Joint Consumer Advocates Brief on Exceptions at 93 (citing Initial Decision, 152 FERC ¶ 63,025 at P 121).

³⁴¹ Joint Consumer Advocates Brief on Exceptions at 93 (citing Tr. 2234:18-24 (Herling)).

³⁴² Joint Consumer Advocates Brief on Exceptions at 93-94.

³⁴³ Joint Consumer Advocates Brief on Exceptions at 94 (citing Ex. JCA-109 at 23-24).

the need for the PATH Project during 2010,³⁴⁴ and that nothing in the provided list suggests that PATH had information or analysis that PJM lacked.³⁴⁵

200. PATH contends that the Initial Decision correctly found that PATH is not authorized to decide and assess questions of whether a regional network transmission project is needed. PATH asserts that PJM is the entity charged with planning and managing the reliability of the transmission network, such that PATH is not charged to know the full range of information and data on which PJM relies for transmission planning determinations.

201. PATH recounts that Joint Consumer Advocates also argue that transmission owners' contractual construction responsibility is subject to permits, financing, obtaining rights of way, and other factors, and asserts that transmission owners have no responsibility to construct a project until all of these conditions are satisfied.³⁴⁶ However, PATH states that the obligation to construct subject to these conditions does not mean that a utility can avoid responsibility.³⁴⁷

202. PATH contends that PJM's comprehensive analysis led PJM to conclude in April 2010 that the PATH Project continued to be needed, although at a later in-service date, and was superior to alternatives.³⁴⁸ PATH discounts the claim that suspension of the PATH Project between early 2010 and April 2010, when PJM concluded that the PATH Project was still needed, would have saved \$29 million. Additionally, PATH states that Mr. Lanzalotta provided no basis for his conclusion that the facts he cited would have led any reasonable utility management to recommend suspension of the project to the VA-SCC and PJM.³⁴⁹

³⁴⁴ PATH Brief Opposing Exceptions at 26 (citing Ex. PJM-1 at 19-25; Ex. PJM-7, PJM-8).

³⁴⁵ PATH Brief Opposing Exceptions at 24.

³⁴⁶ PATH Brief Opposing Exceptions at 26 (citing Joint Consumer Advocates Brief on Exceptions at 92).

³⁴⁷ PATH Brief Opposing Exceptions at 27 (citing *City of Campbell v. FERC*, 770 F.2d 1180, 1189 (D.C. Cir. 1985)).

³⁴⁸ PATH Brief Opposing Exceptions at 28 (citing Tr. 2919:4 – 2921:7 (Lanzalotta)).

³⁴⁹ PATH Brief Opposing Exceptions at 28-29.

203. Additionally, with regard to Joint Consumer Advocates' argument that PATH imprudently incurred \$4.3 million of the cost of the PATH Project because it exceeded typical cost escalation over time, PATH asserts that Joint Consumer Advocates present no analysis of actual expenditures. PATH notes that Mr. Lanzalotta acknowledged that he analyzed only budgets, not spending, and although Mr. Lanzalotta took the position that spending typically follows the budget, he later testified that PATH's actual costs in 2010, the year of the most significant increase in the PATH Project's budget, did not follow the budgets;³⁵⁰ as such Mr. Lanzalotta conceded that his central premise was inapplicable and invalid.

4. Commission Determination

204. We affirm the Initial Decision's conclusion that, based on the record, PATH did behave as a prudent utility by proceeding with its assigned obligations until otherwise instructed by PJM. Transmission planning for the PATH Project was a regional undertaking. While PATH needed to keep PJM apprised of its progress, PJM determined whether the Project should continue.

205. The record shows that PATH took prudent steps to provide PJM with Project status information in the relevant timeframe. Nothing in the record suggests that PATH had information or analysis that PJM lacked, that PJM needed a recommendation from PATH to assess the available information, or that PJM would have reached a different conclusion if PATH had recommended suspension.

206. We also disagree with Joint Consumer Advocates' assertions that PATH was imprudent for not asking the VA-SCC to direct a collaborative effort to consider alternatives to the PATH Project. PJM had already undertaken an initiative for a comprehensive analysis of the need for the PATH Project, which considered alternatives.

207. Joint Consumer Advocates point out that the obligation to build facilities is subject to conditions such as obtaining necessary state approvals. But difficulty in obtaining such approvals would not justify the utility abandoning its efforts to complete a project that PJM determined is needed to maintain reliability. The entities designated to construct the projects PJM identifies must employ reasonable efforts to do so. They are only relieved of that responsibility if they *cannot* build the project. They cannot simply *choose* not to build the project, as Joint Consumer Advocates appear to suggest.

208. We find unconvincing Joint Consumer Advocates' analysis of changes in the budget for the entire project to support its claim that any spending was excessive or

³⁵⁰ PATH Brief Opposing Exceptions at 33 (citing Tr. 2916:1-3 (Lanzalotta)).

imprudent. A mere finding that costs escalated at an above-average rate (even the \$4.3 million escalation in budget that Joint Consumer Advocates claim) is not sufficient reason to find that PATH should have to cancel a project against the RTO's directive or that its failure to do so was imprudence. As such, we affirm the Initial Decision on this argument.

V. Return on Equity

209. We turn now to PATH's ROE. Before its filing in this case, PATH's Formula Rate Templates included a line item for adding "Unamortized Abandoned Plant" to rate base.³⁵¹ The Formula Rate Templates provided for PATH to earn a return on that rate base using a hypothetical capital structure of 50 percent equity and 50 percent debt,³⁵² with PATH recovering a 12.4 percent ROE on the unamortized equity portion of its rate base and an imputed debt cost of either 6.64 percent or 6.76 percent on the debt portion of the rate base.³⁵³ As explained in Note J to PATH's Rate Formula Templates, the ROE included: (1) a base ROE of 10.4 percent; (2) a 50-basis-point incentive ROE adder for becoming a member of PJM; and (3) a 150-basis-point incentive ROE adder for the risks and challenges related to the Project.

210. The 10.4 percent base ROE originated in an October 2011 Settlement in the proceeding establishing PATH's formula rate.³⁵⁴ The Commission approved the two incentive adders earlier in that proceeding. The October 2011 Settlement included a four-year moratorium on changes to PATH's ROE until January 1, 2015. However, the Settlement provided that if the PATH project was cancelled, the rate moratorium on changes to the ROE "shall have no further force or effect and, in particular, shall not limit the rights of any party to argue what the proper ROE (if any), including both the base

³⁵¹ Rate Formula Template Line Item 34.

³⁵² Rate Formula Template Line Items 114-121. PATH's actual capital structure is 100 percent equity.

³⁵³ Rate Formula Template Line Items 120 and 118 respectively.

³⁵⁴ The Commission approved the October 2011 Settlement in February 2012. 2012 Settlement Order, 138 FERC ¶ 61,113. The imputed cost of debt for PATH-WV is 6.64 percent and the imputed cost of debt for PATH-AYE is 6.76 percent. Rate Formula Template Line Item 118.

ROE and any adders, should be in calculating any abandoned plant recovery ultimately sought by PATH.”³⁵⁵

211. In its FPA section 205 filing to recover its abandoned plant costs,³⁵⁶ PATH proposed to reduce its overall 12.4 percent ROE to 10.9 percent by eliminating the 150-basis-point ROE adder for the project’s risks and challenges. PATH did not propose any modification to its existing 10.4 percent base ROE or its 50-basis point-ROE adder for RTO participation. PATH also proposed to amortize its abandoned plant costs over a five year period, rather than over the anticipated depreciable life of the project had it gone into service.

212. In the Abandonment Hearing Initiation Order, the Commission accepted and suspended, subject to refund, the non-ROE aspects of PATH’s section 205 filing, effective December 1, 2012.³⁵⁷ However, the Commission found that PATH’s proposal to reduce its ROE from 12.4 percent to 10.9 percent by eliminating the 150-basis-point ROE incentive resulted in a reduction of rates. Accordingly, the Commission accepted that proposal to be effective on the September 1, 2012 date proposed by PATH without suspension or any refund condition.³⁵⁸ In addition, the Commission invoked FPA section 206 to require PATH to remove the 50-basis-point ROE adder for RTO participation, prospectively as of the November 30, 2012 date of the Abandonment Hearing Initiation Order,³⁵⁹ that is, December 1, 2012. Finally, the Commission set all issues raised by the

³⁵⁵ Settlement Article III, ¶ 3.2(b). Consistent with this settlement provision, Note J to PATH’s Rate Formula Template stated, “No change in ROE may be made absent a Section 205 or 206 filing with FERC and no filing to change the ROE may be made by a Settling Party or a Non-Opposing Party (as defined in the Settlement Agreement filed on October 7, 2011 in Docket No. ER08-386-000, et al,) except in accordance with the provisions of Section 3.2 of the Settlement Agreement.”

³⁵⁶ PATH Abandonment Application, Docket No. ER12-2708-000, at 1, 14, App. C, App. E & App. G.

³⁵⁷ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at ordering para. (A)

³⁵⁸ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 64 & ordering para. (B).

³⁵⁹ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at PP 70-72 & ordering para. (C).

protests, including issues concerning the continuation of PATH's 10.4 percent base ROE, for hearing and settlement judge procedures.³⁶⁰

213. At the hearing, Trial Staff and Joint Consumer Advocates argued that, because PATH did not have an ROE on file for the abandonment phase of the project, PATH's filing represented a proposed rate increase under section 205 of the FPA and that, as a result, it was PATH's burden to demonstrate that its proposed ROE was just and reasonable.³⁶¹ Trial Staff and Joint Consumer Advocates further argued that the project's abandonment had significantly reduced the risks PATH faced and that the Commission should, therefore, reduce PATH's ROE accordingly, effective from the beginning of the abandonment period. Trial Staff contended that an ROE of 9.13 was just and reasonable.³⁶² Joint Consumer Advocates argued for an ROE of 8.54 percent.³⁶³

214. PATH argued that, because it already had an ROE on file—namely, the 10.4-percent ROE that the Commission had left in place following the Abandonment Hearing Initiation Order—and had not proposed any further reductions in that ROE, the Commission could reduce PATH's ROE only prospectively under section 206 of the FPA.³⁶⁴ PATH argued that no such reduction was appropriate and it should be permitted to continue receiving a 10.4 percent ROE.³⁶⁵ We address these issues in turn, beginning first with the applicable legal standard and then turning to PATH's just and reasonable ROE.

A. The Governing Legal Standard

1. Initial Decision

215. The Presiding Judge found that PATH's filing to recover its abandonment costs was a proposal for a rate increase under section 205 of the FPA. The Presiding Judge

³⁶⁰ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 60.

³⁶¹ Trial Staff Initial Brief at 49; Joint Consumer Advocates Initial Brief at 134-135.

³⁶² Trial Staff Initial Brief at 47.

³⁶³ Joint Consumer Advocates Initial Brief at 243-244.

³⁶⁴ PATH Initial Brief at 90-92.

³⁶⁵ PATH Initial Brief at 95-96.

determined that, although the Commission had previously approved a 10.4 percent base ROE for PATH, that ROE applied only to PATH's prior operational status. Accordingly, the Presiding Judge found that PATH did not have an ROE on file for the abandonment phase of the project, and, therefore, that PATH's filing to apply an ROE to its abandoned plant costs was a request for rate increase under FPA section 205.³⁶⁶ As a result, the Presiding Judge concluded that PATH bore the burden of showing that the proposed 10.4 percent ROE was just and reasonable. In addition, the Presiding Judge determined that, because the hearing was being conducted under section 205, the effective date for the new rate would be the beginning of the abandonment phase, not the date of the Commission's order on the Initial Decision.³⁶⁷

2. Briefs on Exception

216. PATH contends that the Presiding Judge erred in applying section 205 and should have instead acted under section 206. PATH states that, at the time it filed to recover its abandonment costs, it was receiving an ROE of 12.4 percent. PATH further states that that filing proposed, under section 205, to reduce its ROE to 10.9 percent because PATH recognized that the project-specific 150-basis-point adder was no longer applicable to the now-abandoned project.³⁶⁸ PATH claims that, because it already had on file an ROE at the time of hearing—namely, the 10.4 percent ROE that the Commission set in the Abandonment Cost Hearing order—the Commission could reduce PATH's ROE only under section 206 of the FPA.

217. PATH cites to several cases for the proposition that, in order to reduce a rate that a public utility has not itself proposed to reduce, the Commission must act under section 206 and that any resulting reduction can only be prospective, either from the refund effective date or the date of the order reducing the rate. In particular, PATH cites to a line of D.C. Circuit cases that, PATH contends, hold that the Commission may reduce a portion of a rate that the utility does not propose to increase only by acting under section 206 (or the analogous section 5 of the Natural Gas Act) and that any such refund must be only prospective.³⁶⁹ PATH also claims the Commission's earlier orders in this

³⁶⁶ Initial Decision, 152 FERC ¶ 63,025 at PP 126-128.

³⁶⁷ Initial Decision, 152 FERC ¶ 63,025 at P 125.

³⁶⁸ PATH Brief on Exceptions at 20-21.

³⁶⁹ PATH Brief on Exceptions at 20-22 (citing *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984); *Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993); *E. Tenn.*

(continued...)

proceeding confirm that it must proceed under section 206, not section 205. PATH observes that, in the Abandonment Hearing Initiation Order, the Commission invoked its authority under section 206 to reduce the ROE by eliminating the 50-basis-point RTO participation adder and made that reduction prospective, effective the date of that order, December 1, 2012.³⁷⁰

218. PATH contends that, because the Presiding Judge should have applied section 206 rather than section 205, the Initial Decision erred in concluding that it was PATH's burden to prove that the proposed ROE was just and reasonable.³⁷¹ In addition, PATH contends that, because the Commission must proceed under section 206 and because the Commission did not set a refund effective date in the Abandonment Hearing Initiation Order, any reduction in PATH's ROE can take effect only from the date on which the Commission issues a final decision on PATH's ROE (that is, the date of this order).

3. Briefs Opposing Exceptions

219. Trial Staff contends that the Presiding Judge correctly applied section 205 when setting PATH's ROE. Trial Staff states that, in the Abandonment Hearing Initiation Order, the Commission set all issues "raised by the parties" for hearing pursuant to section 205.³⁷² Trial Staff contends that PATH's ROE was one of the issues raised by the parties and, therefore, falls "clearly" within the scope of the issues that the Commission set for hearing under section 205.³⁷³ Trial Staff claims that the only issue that the Commission decided summarily under section 206 was whether to remove PATH's 50 basis point RTO participation adder, leaving the remaining issues, including PATH's ROE, for resolution under section 205. Accordingly, Trial Staff concludes that pursuant to section 205, the Presiding Judge correctly determined that PATH bore the burden of proof to establish the justness and reasonableness of its ROE.

Gas Pipeline Co. v. FERC, 860 F.2d 446, 454 (D.C. Cir. 1988)); PATH Brief on Exceptions at 40-41 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *City of Anaheim v. FERC*, 558 F.3d 521, 523 (D.C. Cir. 2009); *Town of Concord v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992); *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985)).

³⁷⁰ PATH Brief on Exceptions at 21-22, 41.

³⁷¹ PATH Brief on Exceptions at 17.

³⁷² Trial Staff Brief Opposing Exceptions at 19.

³⁷³ Trial Staff Brief Opposing Exceptions at 18-20.

220. Joint Consumer Advocates agree that the Presiding Judge correctly applied section 205 when setting PATH's ROE. Joint Consumer Advocates argue that PATH, by its own admission, requested to remove the project-specific ROE adder as part of a section 205 filing. In addition, Joint Consumer Advocates contend that PATH has not previously had on file an ROE for the abandonment phase, and, therefore, that any ROE award would constitute a rate increase, which PATH bears the burden of proving to be just and reasonable.³⁷⁴ Joint Consumer Advocates argue that although PATH has styled its ROE request as a request for continuation of the ROE that applied during the operational phase of the project, PATH's risk profile has changed dramatically now that it is in the abandonment phase of the project and, accordingly, the Commission should treat the ROE applicable to the abandonment phase as a new and separate ROE.³⁷⁵ Joint Consumer Advocates argue that, pursuant to a line of Commission decisions, including *Atlantic Grid*, *Pioneer Transmission*, *RITELine*, *El Paso Natural Gas*, and *Opinion No. 531*, the Commission has the authority under section 205 to award an ROE lower than that requested by the utility.³⁷⁶ Joint Consumer Advocates also contend that, because the Presiding Judge was correct to decide the issue under section 205, the Presiding Judge was also correct to determine that the ROE would apply during the entire abandonment phase, not just the time remaining after the date on which the Commission issues its opinion on the Initial Decision.

4. Commission Determination

221. For the reasons that follow, we find that the Presiding Judge erred in proceeding under section 205 of the FPA, putting the burden on PATH to show that its existing 10.4 percent ROE is just and reasonable. We agree with PATH that we must proceed under FPA section 206 to reduce PATH's base ROE. Similarly, we agree with PATH that any reduction in PATH's ROE can only be prospective, beginning on the date of this order.

222. The D.C. Circuit has consistently held that, when a public utility proposes a rate change under section 205, the Commission must proceed under section 206 in order to

³⁷⁴ Joint Consumer Advocates Brief Opposing Exceptions at 14.

³⁷⁵ Joint Consumer Advocates Brief Opposing Exceptions at 16.

³⁷⁶ Joint Consumer Advocates Brief Opposing Exceptions at 15 (citing *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 51 (2014); *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, at 181-82 (D.C. Cir. 2013); *El Paso Natural Gas Co.*, 145 FERC ¶ 61,040 (2013); *RITELine Illinois, LLC*, 137 FERC ¶ 61,039 (2011); *Atlantic Grid Operations*, 135 FERC ¶ 61,144 (2011); and *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009)).

require that the utility modify its existing rates in a way that the utility did not propose in its filing.³⁷⁷ As the Court explained in *City of Winnfield*, the purpose of this rule is, in part, to protect the filing utility by preventing the Commission from requiring it to justify components of its rates that it did not propose to change. The Court explained that requiring the filing utility to show the justness and reasonableness of the components of its rates that it did not propose to change would undermine the protections that Congress included in the FPA—most notably, the requirement in section 206 that the Commission must bear the burden of showing that an existing rate is not just and reasonable. A contrary result, in which the filing utility bore the burden of justifying unchanged components of a filed rate, would, the Court explained, upend the basic structure and purpose underlying sections 205 and 206 of the FPA.

223. Consistent with this precedent, the Commission has held that, when a utility with formula rates makes a section 205 filing to modify its rate formula, the Commission must proceed under FPA section 206 if it seeks to reduce the stated ROE in that formula to a level not proposed by the utility.³⁷⁸ For example, in *International Transmission Co.*, a utility proposed under FPA section 205 to modify its formula rate to change from a backward-looking annual adjustment to a forward-looking adjustment, thus eliminating the cost recovery lag caused by using last year's rates. Protestors contended that the utility's proposal for accelerated cost recovery would decrease its financial risk and therefore the Commission should reduce the utility's existing ROE in the formula rate. The Commission held that, since the utility had not proposed to change its ROE, any reduction in that ROE could only be made pursuant to section 206.³⁷⁹

³⁷⁷ *E.g. Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1577-79 (D.C. Cir. 1993) (noting the Court's repeated clarification of the line between Section 4 and Section 5 of the Natural Gas Act); *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d 932, 941-42 (D.C. Cir. 1988) ("Existing filed rates which the Commission finds to be unreasonable can, under § 5, be remedied only prospectively."); *City of Winnfield v. FERC*, 744 F.2d 871 (D.C. Cir. 1984) (similar under the FPA); *Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980).

³⁷⁸ *Int'l Transmission Co.*, 116 FERC ¶ 61,036, at P 35 (2006); see *Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 533 (D.C. Cir. 1996) (adopting the Commission's position that to establish a new ROE for a now-abandoned power plant, the Commission must proceed under section 206).

³⁷⁹ *Int'l Transmission Co.*, 116 FERC ¶ 61,036 at P 35.

224. The Commission has applied this same principle in the context of FPA section 205 filings to recover abandoned plant costs. In *Yankee Atomic Electric Co.*,³⁸⁰ a utility proposed to abandon its nuclear generation facility – its only major asset – and made a section 205 filing to recover its abandonment costs. In that filing, the utility proposed to continue the same ROE as in its existing formula rate. Protestors contended that the abandonment of the utility’s only generating facility reduced its risk and therefore its ROE should be reduced. The Presiding Judge found that, because Yankee Atomic had not proposed to change its existing ROE, in order to reduce the ROE, the Commission had to proceed under section 206.³⁸¹ The Commission and the court similarly analyzed the issue under section 206.³⁸²

225. The same principle applies here. As noted, the only ROE change proposed in PATH’s abandonment cost recovery filing was to reduce the existing 12.4 percent overall ROE to 10.9 percent by removing the 150-basis-point adder. Accordingly, D.C. Circuit precedent and settled Commission practice require that any further reductions to PATH’s ROE must be made under section 206, not section 205. Indeed, the Commission expressly invoked FPA section 206 in the Abandonment Hearing Initiation Order when it reduced PATH’s ROE from the 10.9 percent to 10.4 percent by requiring removal of the 50-basis-point RTO adder, and the Commission made that ROE reduction effective prospectively from the date of the Abandonment Hearing Initiation Order, as required by FPA section 206.³⁸³ Similarly, the Commission must act under FPA section 206 to reduce PATH’s base ROE here.

226. It is true that the Courts and the Commission have recognized a narrow exception to this general rule. However, the limited scope of that exception only reinforces the broad application of the FPA’s general bar against the Commission requiring retroactive

³⁸⁰ *Yankee Atomic Electric Co.*, 67 FERC ¶ 61,318, *reh’g denied*, 68 FERC ¶ 61,364 (1994).

³⁸¹ *Yankee Atomic Electric Co.*, 65 FERC ¶ 63,001, at 65,013 (1993) (citing *Pub. Serv. Comm’n of N.Y.*, 642 F.2d at 1345, and *Yankee Atomic Electric Co.*, Order No. 285, 40 FERC ¶ 61,372, at 62,206 (1987)).

³⁸² *Yankee Atomic Electric Co.*, 67 FERC at 62,120 (finding section 206 burden to reduce ROE had been satisfied), *aff’d in part*, *Town of Norwood*, 80 F.3d at 533 (citing Opinion No. 285’s holding that, when a utility proposes to continue the existing ROE in its formula rate, the Commission can lower ROE only by acting pursuant to FPA section 206).

³⁸³ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 72.

changes to unchanged rate components in a section 205 proceeding.³⁸⁴ The D.C. Circuit and the Commission have required a public utility to justify an unchanged component of a rate in a section 205 proceeding if “the unchanged component is integral to the justness and reasonableness of the proposed increase.”³⁸⁵ As the Court has explained, however, “integral to” is a high bar, one that can be met only where the “proposed changes cannot be implemented without interacting with [the] existing components so as to produce what the pipeline *should itself have recognized* as an unjust and unreasonable result.”³⁸⁶ That means that, in order to fall within this narrow exception, the relevant FPA section 205 filing must “*create* results that are unjust or unreasonable under *existing* Commission policy as it applies to the [applicant] at the time it files its proposed rate changes.”³⁸⁷ Thus, for example, the “integral to” standard might be met where “an existing provision interacts with proposed changes so as to effect double recovery of costs that under existing policy [may be] recover[ed] only once,” but not in the much more common case that existing component of a utility’s formula rate simply interacts with an updated provision to increase the total revenue recovered.³⁸⁸

227. PATH’s base ROE does not meet the “integral to” standard. That is, it cannot be described as “integral to” the justness and reasonableness of the abandonment costs that PATH proposed to include in its formula rate in its section 205 filing. As described above, PATH’s formula rate included a line item placeholder for adding abandonment costs to its rate base before its section 205 filing to recover such costs and provided for PATH’s return to be calculated by multiplying whatever costs were included in the rate base by a weighted average of the fixed ROE and the debt cost components of the

³⁸⁴ The Commission did not establish a 15-month refund period under FPA section 206(c) in this proceeding.

³⁸⁵ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) (holding that the Commission may use its authority under NGA section 4 to alter an existing component of a rate—that is, one that the applicant has not proposed to change in the section 4 filing—only where the “proposed changes cannot be implemented without interacting with [the] existing components so as to produce what the pipeline *should itself have recognized* as an unjust and unreasonable result” (emphasis in the original)); *Sw. Pub. Serv. Co.*, 152 FERC ¶ 61,126, at P 13 (2015); *Entergy Servs. Inc.*, 143 FERC ¶ 61,120, at P 51 (2013).

³⁸⁶ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d at 942.

³⁸⁷ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d at 943.

³⁸⁸ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d at 945.

formula rate set forth elsewhere in the formula rate. Therefore, PATH's instant section 205 filing to include the abandoned plant costs in rate base was permitted by its existing formula rate, while its proposal to amortize the costs over five years instead of the anticipated life of the project, simply changed one aspect of the formula rate—the amortization period—without implicating the overall ROE. Given that in *Yankee Atomic* the Commission permitted a utility to make a FPA section 205 filing to recover abandoned plant costs without requiring the utility to rejustify its existing ROE under FPA section 205 despite assertions that the abandonment of its only generation facility reduced its risk, this is not a situation where PATH “should itself have recognized” that its filing to recover abandonment costs would render its existing ROE unjust and unreasonable.³⁸⁹ Nor is there any other “existing Commission precedent”³⁹⁰ that provides that applying a base ROE to the recoverable costs of abandoned project is not just and reasonable.

228. The contentions of Joint Consumer Advocates and Trial Staff in their briefs opposing exceptions do not require a contrary conclusion. Joint Consumer Advocates suggest that the Commission should conclude that PATH does not have an ROE on file for the abandonment phase of the project and, therefore, that the Commission should interpret PATH's abandonment cost filing as a request to increase its ROE. We are not persuaded. As already discussed, PATH had an ROE on file prior to making the 205 filing to recover its abandoned plant costs and neither Joint Consumer Advocates nor Trial Staff has provided a principled basis for disregarding that rate just because PATH is now an abandoned project. In any case, as noted, their argument is foreclosed by clear D.C. Circuit precedent: As the Court of Appeals explained in *Town of Norwood*, the Commission must act pursuant to section 206 if it intends to lower PATH's ROE to reflect the reduced risk it faces as an abandoned project.³⁹¹

229. Joint Consumer Advocates also cite to several cases for the proposition that “the Commission has the authority under section 205 to award an ROE lower than that requested by the utility.”³⁹² Most of those cases involved requests for a new rate by a

³⁸⁹ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d at 942.

³⁹⁰ *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d at 943.

³⁹¹ *Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 533 (D.C. Cir. 1996) (citing the Commission's conclusion in Order No. 285, 40 FERC ¶ 61,372 at 62,206, that the Commission must act under section 206 if it is to reduce Yankee Atomic's ROE).

³⁹² See Joint Consumer Advocates Brief Opposing Exceptions at 15 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 51; *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, at 181-82 (D.C. Cir. 2013); *El Paso Natural Gas Co.*, 145 FERC ¶ 61,040; *RITELine*

(continued...)

utility that, unlike PATH, did not already have a rate on file for the project at issue.³⁹³ As a result, those cases are inapt, because they involve FPA section 205 proposals to establish a new ROE, rather than to continue an existing ROE, as here. In another of those cases, the Commission in fact acted under section 206 to reduce the utilities' existing ROE, similar to the Commission's action here.³⁹⁴ Accordingly, those cases do not undermine our earlier conclusion.

230. The Commission's decisions in *El Paso Natural Gas Co.*, cited by Joint Consumer Advocates, and *SFPP, L.P.*,³⁹⁵ relied on by the Presiding Judge, are also distinguishable from the instant case. Those cases involved a natural gas pipeline and an oil pipeline, respectively, with stated, composite rates reflecting the pipeline's entire cost of service, rather than a utility with a formula rate containing a separate, fixed ROE. In both oil and natural gas pipeline cases, the Commission has held that, when a pipeline proposes to increase its stated, composite rates based on an increase in its overall cost of service, the pipeline has the burden to support each component of its cost of service, including unchanged components such as depreciation and ROE as well as changed components.³⁹⁶ That is because each component of the cost of service contributes to the single composite rate set forth in the pipeline's tariff. Therefore, the Commission has explained, each component of the cost of service is an integral part of the pipeline's proposed overall increase in its stated, composite rate. Thus, a natural gas or oil pipeline which files to increase its stated, composite rates must itself recognize that, under existing precedent, its rate increase filing may interact with any unchanged components of its cost of service to produce unjust and unreasonable results to the extent that the pipeline has failed to reflect decreases in those cost of service components in its overall rate increase filing. By

Illinois, LLC, 137 FERC ¶ 61,039; *Atlantic Grid Operations*, 135 FERC ¶ 61,144; and *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281).

³⁹³ *RITELine Illinois*, 137 FERC ¶ 61,039 at PP 3-9; *Atlantic Grid*, 135 FERC ¶ 61,144 at PP 5-7; *Pioneer Transmission*, 126 FERC ¶ 61,281 at PP 2-11. Although Southern California Edison already had a rate on file, it proposed a new, project-specific ROE for the projects at issue in that case. As a result, that case did not involve a possible change to the company's existing ROE, as is the case here for PATH. *S. California Edison Co.*, 122 FERC ¶ 61,187, at PP 10-11 (2008).

³⁹⁴ Opinion No. 531, 147 FERC ¶ 61,234 at P 51.

³⁹⁵ 134 FERC ¶ 61,121, at P 46 (2011).

³⁹⁶ *Kern River Gas Transmission Co.*, 129 FERC ¶ 61,240, at P 156 (2009). *Northwest Pipeline Corp.*, 87 FERC ¶ 61,266, at 62,038-62,039 (1999).

contrast, as explained above, no existing Commission precedent gave PATH notice that its filing to recover its abandoned plant costs would require it to rejustify the fixed ROE in its formula rate under FPA section 205.

231. Finally, to the extent that Joint Consumer Advocates and Trial Staff contend that the Presiding Judge was correct to proceed under section 205 because PATH's ROE was within the scope of issues that the Commission set for hearing pursuant to section 205, we reject their arguments.³⁹⁷ Regardless of whether the Commission included PATH's ROE among the issues set for hearing, the Commission must proceed under section 206 to modify PATH's ROE.³⁹⁸

232. As noted, the foregoing conclusion has two important implications for the rest of this proceeding. First, the Commission may further reduce PATH's base ROE only if the Commission determines that the current 10.4 percent ROE is not just and reasonable. Second, any such reduction in PATH's ROE may take effect only prospectively, beginning on the date of this order.

233. The following sections turn to address the merits of PATH's ROE. We first discuss the DCF methodology used by the Commission to identify a zone of reasonableness. We then address the appropriate placement of PATH's ROE within that zone.

B. The DCF Methodology

234. During the hearing, PATH, Joint Consumer Advocates, and Trial Staff each supported their ROE proposals with a discounted cash flow (DCF) analysis of a proposed proxy group of companies of comparable risk, purporting to apply the two-step DCF methodology that the Commission adopted in Opinion No. 531.³⁹⁹ With simplifying

³⁹⁷ See Joint Consumer Advocates Brief Opposing Exceptions at 42; Trial Staff Brief Opposing Exceptions at 19. We reiterate that in the Abandonment Hearing Initiation Order, the Commission did not suspend PATH's ROE or make it subject to refund as the Commission did for the other aspects of PATH's section 205 filing, and no party sought rehearing of that action. Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at ordering para. (A), (B).

³⁹⁸ See *Boston Edison Co.*, 107 FERC ¶ 61,248, at P 31 (2004); *Kentucky Power Co.*, 64 FERC ¶ 61,112, at 61,922 (1993).

³⁹⁹ See Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015). In addition to studies based on the two-step DCF methodology, the

(continued...)

assumptions, the formula for the DCF model reduces to: $P = D/k-g$, where “P” is the price of the common stock, “D” is the current dividend, “k” is the discount rate (or investors’ required rate of return), and “g” is the expected growth rate in dividends. For ratemaking purposes, the Commission rearranges the DCF formula to solve for “k”, the discount rate, which represents the rate of return that investors require to invest in a company’s common stock, and then multiplies the dividend yield by the expression $(1+.5g)$ to account for the fact that dividends are paid on a quarterly basis. Multiplying the dividend yield by $(1+.5g)$ increases the dividend yield by one half of the growth rate and produces what the Commission refers to as the “adjusted dividend yield.” The resulting formula is known as the constant growth DCF model and can be expressed as follows: $k=D/P (1+.5g) + g$. Under the Commission’s two-step DCF methodology, the input for the expected dividend growth rate, “g,” is calculated using both short-term and long-term growth projections.⁴⁰⁰ Those two growth rate estimates are averaged, with the short-term growth rate estimate receiving two-thirds weighting and the long-term growth rate estimate receiving one-third weighting.⁴⁰¹

235. In their rebuttal and cross-answering testimonies, respectively, each of the participants updated their DCF analyses to reflect more recent financial data. Joint Consumer Advocates Witness Dr. J. Randall Woolridge’s and PATH Witness Dr. William E. Avera’s proxy group proposals contained 24 companies each,⁴⁰² while Trial Staff Witness Robert J. Keyton’s final proxy group proposal contained nine companies.⁴⁰³ Following the credit rating screen process set forth in Opinion No. 531, Joint Consumer Advocates and PATH utilized a proxy group that includes electric utilities with credit ratings issued by Moody’s and Standard and Poor’s that are within the “comparable risk band.”⁴⁰⁴ Specifically, Witnesses Dr. Woolridge and Dr. Avera chose utilities with investment grade credit ratings that are within one-notch above or below the

participants also submitted other evidence, including alternative cost of equity studies, in support of their proposed ROEs.

⁴⁰⁰ Opinion No. 531, 147 FERC ¶ 61,234 at PP 15-17, 36-40, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 at P 10.

⁴⁰¹ Opinion No. 531, 147 FERC ¶ 61,234 at PP 17, 39.

⁴⁰² Ex. JCA-102; Ex. PTH-99A.

⁴⁰³ Ex. S-17, Sched. No. 3.

⁴⁰⁴ Opinion No. 531, 147 FERC ¶ 61,234 at PP 106-107.

credit ratings of PATH's parents.⁴⁰⁵ Utilizing the low-end outlier test, both Witness Dr. Woolridge and Witness Dr. Avera removed FirstEnergy Corporation and Entergy Corporation from their respective proxy groups, producing final proxy groups of 22 companies for each.⁴⁰⁶

236. Trial Staff used a narrower credit rating screen than that set forth in Opinion No. 531. Witness Mr. Keyton chose to include only companies that have a credit rating that is the same as both of PATH's parent companies.⁴⁰⁷ Both Joint Consumer Advocates and PATH contend that using this narrow credit rating screen is the key reason that Witness Mr. Keyton's final proxy group contained only 9 companies and argue that Witness Keyton did not correctly apply the Commission's "comparable risk band" based on credit ratings to construct his proxy group.⁴⁰⁸ Joint Consumer Advocates further argue that by using only companies that have a credit rating that is the same as either one of the parent companies, Witness Keyton screened out a number of companies that both Joint Consumer Advocates and PATH left in their proxy groups.⁴⁰⁹ Trial Staff Witness Mr. Keyton states that while he considered using a proxy group that includes utilities that are one-notch above or below in credit rating, the comparable risk band for PATH already consists of multiple credit ratings from both S&P and Moody's.⁴¹⁰ This, Trial Staff Witness Keyton states, is because PATH has two owners, AEP and FirstEnergy, and that both have different credit ratings within the band of ratings.⁴¹¹ Therefore, Trial Staff Witness Mr. Keyton argues that using the exact credit ratings of PATH's parent

⁴⁰⁵ AEP has a Standard and Poor's (S&P) Issuer Credit Rating of BBB and a Moody's credit rating of Baa1. FirstEnergy has an S&P Issuer Credit Rating of BBB- and a Moody's credit rating of Baa3. Thus, these witnesses used an S&P credit rating band of BBB+ to BBB-, and a Moody's credit rating band of A3 to Baa3. Ex. JCA-100 at 7; Ex. JCA-140; Ex. PTH-23 at 26; Ex. PTH-99A.

⁴⁰⁶ Ex. JCA-141 at 3; Ex. PATH. PTH-97A at 5.

⁴⁰⁷ Ex. S-11 at 22. Specifically, Mr. Keyton used an S&P credit rating band of BBB to BBB- and a Moody's credit rating band of Baa1 to Baa3.

⁴⁰⁸ Joint Consumer Advocates Initial Post-Hearing Brief at 170; PATH Initial Post-Hearing Brief at 100.

⁴⁰⁹ Joint Consumer Advocates Initial Post-Hearing Brief at 170.

⁴¹⁰ Ex. S-11 at 25.

⁴¹¹ Ex. S-11 at 25.

companies leads to a sufficient size proxy group because his S&P screen consists of two different credit ratings and his Moody's screen consists of three different credit ratings.⁴¹²

237. Trial Staff's final proxy group produced cost of equity estimates that ranged from 6.49 percent to 10.85 percent with a median ROE of 9.13 percent, which is the ROE that it argued for in the hearing.⁴¹³ While Joint Consumer Advocates' and PATH's proxy group methodology produced final proxy groups with the same number of companies, their respective methodologies produced different ranges for their cost of equity estimates. Joint Consumer Advocates' final proxy group produced cost of equity estimates that ranged from 6.31 percent to 10.85 percent⁴¹⁴ with a median ROE of 8.56 percent.⁴¹⁵ PATH's final proxy group produced a cost of equity estimates that ranged from 6.53 percent to 10.97 percent⁴¹⁶ with a median ROE of 8.65 percent.⁴¹⁷ Joint Consumer Advocates contend that despite having the same proxy group, PATH has an inflated ROE because PATH Witness Dr. Avera's dividend yield methodology inappropriately calculates the estimated dividend yield based on the dividend declared at the end of the six-month period, then projected back over the prior five-month period.⁴¹⁸ Joint Consumer Advocates argue that PATH Witness Dr. Avera's dividend methodology does not follow the Commission's methodology in Opinion No. 531 and *Portland Natural Gas Transmission System*.⁴¹⁹ PATH Witness Dr. Avera states that he used the

⁴¹² Ex. S-11 at 25.

⁴¹³ Ex. S-17 at 4.

⁴¹⁴ Ex. JCA-138 at 2; Ex. JCA-139 at 1.

⁴¹⁵ We note that Joint Consumer Advocates argued in the hearing for the ROE to be set at the five year Treasury note rate, which it states was 1.70 percent on the day before its initial brief was filed, and if not accepted, alternatively proposed an ROE of 8.56 percent, which is the median of its zone of reasonableness. Joint Consumer Advocates Initial Briefs at 149. Ex. JCA-138 at 2; Ex. JCA-141 at 3.

⁴¹⁶ Ex. PTH-97 at 6; Ex. PTH-100 at 1.

⁴¹⁷ PATH argues for a 10.4 percent ROE in the hearing, which it states falls within the 8.65 percent to 10.97 percent upper end of the ROE zone of reasonableness. Ex. PTH-97A at 9. Ex. PTH-98A at 1.

⁴¹⁸ Joint Consumer Advocates Initial Post-Hearing Brief at 176.

⁴¹⁹ Joint Consumer Advocates Initial Post-Hearing Brief at 176.

used the most recent dividend declared to determine the indicated annual dividend in each month.⁴²⁰

1. Initial Decision

238. The Presiding Judge concluded that none of the proxy groups in the various DCF analyses is appropriate because the risk profiles of the proxy group companies do not correspond to the risks that PATH faces in the abandonment phase.⁴²¹ The Presiding Judge stated that each of the three proxy groups that witnesses presented were comprised of ongoing operational utilities, which, unlike PATH, harbor extremely high risks with no opportunity to recoup 100 percent of their losses. Further, the Presiding Judge found that PATH embarked on this project with the full expectation and the right to recoup all of its expenditures that were prudently incurred even if the project was abandoned before going into service and found that the proxy group members selected by the various witnesses did not receive similar protections.⁴²²

239. The Presiding Judge noted that the parties contested various issues concerning how the DCF analysis should be performed, including the proper calculation of the dividend yield and how to project growth in dividends. However, the Presiding Judge found that the evidence on these issues was not dispositive of the ROE question in this case, because none of the proxy groups in the various DCF analyses is appropriate.

2. Briefs on Exceptions

240. PATH argues that there is no evidence in the record supporting the Initial Decision's finding that, because PATH is entitled to recover its prudently incurred abandonment costs, PATH does not have risks comparable to the proxy group companies used in the DCF analysis. PATH contends that all of the financial witnesses who presented ROE analyses in this proceeding testified that the proxy groups reasonably represented PATH's investment risk and that none testified that PATH's risks were so low that the DCF analysis was inapplicable.⁴²³

⁴²⁰ *Portland Natural Gas Transmission System*, Opinion No. 510, 134 FERC ¶ 61,129, at PP 232-234 (2011), Ex. PTH-83 at 88; Ex. PTH-97 at 4.

⁴²¹ Initial Decision, 152 FERC ¶ 63,025 at P 134.

⁴²² Initial Decision, 152 FERC ¶ 63,025 at P 139.

⁴²³ PATH Brief on Exceptions at 27.

241. PATH asserts that the Initial Decision does not cite a single case in which the Commission concluded that a DCF-based analysis of proxy groups that included operating utilities was not an appropriate comparison for evaluating the ROE of a utility that is eligible to recover abandonment costs. PATH also avers that it is not aware of any such case. PATH contends that Order No. 679, which included full recovery of prudently incurred abandoned plant costs among the transmission rate incentives available to utilities, stated explicitly that it would continue to use the DCF analysis for ROE determinations of utilities that qualify for abandoned plant recovery.⁴²⁴ Further, PATH argues that Order No. 679 also rejected requests that the Commission mandate a reduction in ROE for utilities that qualify for abandoned plant recovery, stating that determinations of a just and reasonable ROE include risk evaluations made in individual rate proceedings and are based on individualized facts applicable to the utility and its proxy group.⁴²⁵

242. PATH argues that the Commission performs DCF analyses of proxy groups of operating electric utilities to establish ROEs for utilities that the Commission determined to be eligible to recover prudently incurred abandoned plant costs. PATH argues that the Commission used a DCF analysis of a proxy group of electric utilities to establish PATH's initial ROE in the same order in which it granted the abandonment recovery incentive, and followed the same practice for numerous other utilities that received the same incentive.⁴²⁶

3. Briefs Opposing Exceptions

243. Trial Staff argues that the Presiding Judge's ROE determination is consistent with precedent in that it makes factual findings regarding the subject company and the proxy group companies and, based on those factors, determines a risk-adjusted ROE. Trial Staff argues that the Presiding Judge correctly relied on the evidence of a wide risk disparity between PATH and the proxy group companies to determine that this risk-

⁴²⁴ PATH Brief on Exceptions at 32 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 92 (2006)).

⁴²⁵ PATH Brief on Exceptions at 32 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 167).

⁴²⁶ PATH Brief on Exceptions at 33 (citing *RITELine Illinois, LLC*, 137 FERC ¶ 61,039 at PP 71-73, 83; *Northeast Util's Serv. Co.*, 125 FERC ¶ 61,183, at PP 81, 93 (2008); *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130, at PP 59, 91 (2008)).

appropriate ROE is the lowest ROE in Joint Consumer Advocate's zone of reasonableness.⁴²⁷

244. Joint Consumer Advocates argue that the weight of the evidence shows: 1) that the electric company proxy groups developed by the three rate of return witnesses for purposes of the DCF and the alternative analyses do not have risks that correspond to the risks that PATH faces in its abandonment phase; 2) that PATH's going forward financial integrity is irrelevant; and 3) that PATH does not now, nor ever will, need to maintain its credit or access to capital markets for the discharge of any public duties. Joint Consumer Advocates argue that the record evidence showed that PATH is unlike the companies in the three DCF proxy groups, all of which have business, financial, and operational risk, with employees, used and useful plant, and pensions. Joint Consumer Advocates argue that it demonstrated that PATH does not have a risk profile comparable to other electric utilities and that it is, therefore, inappropriate to compare PATH to any of the electric proxy groups used in the DCF analysis or the alternative benchmark analyses.⁴²⁸

245. Joint Consumer Advocates argue that PATH's DCF analysis suffers from fatal methodological errors that do not comply with the Commission's prescribed methodologies, and must therefore, be disregarded. Joint Consumer Advocates argue that the Initial Decision correctly restated the Commission's policy on the DCF, as set forth in Opinion No. 531, which provides that although the DCF analysis is the preferred approach to determine the ROE, it is not necessarily the only acceptable approach. Joint Consumer Advocates also argue that the Initial Decision is consistent with Order No. 679, which provides that risks are not always fully reflected in a traditional DCF analysis and, therefore, another approach may be necessary to ensure that the ROE is just and reasonable.⁴²⁹

4. Commission Determination

246. We reverse the Initial Decision's finding that none of the proxy groups in the various DCF analyses is appropriate. Although we find that PATH differs in important respects from many of the proxy group companies, that finding does not require the Commission to disregard the results of a DCF analysis of a proxy group selected consistent with the criteria ordinarily used in public utility rate cases. As all parties

⁴²⁷ Trial Staff Brief Opposing Exceptions at 9-10.

⁴²⁸ Joint Consumer Advocates Brief Opposing Exceptions at 22-23.

⁴²⁹ Joint Consumer Advocates Brief Opposing Exceptions at 33-34 (citing Initial Decision, 152 FERC ¶ 63,025 at P 134).

agree, use of a proxy group represents the Commission's typical method for evaluating an ROE. Instead, as discussed further below, these differences are better accounted for by adjusting the placement of the ROE within the zone of reasonableness created by the DCF analysis.⁴³⁰ We further find that Joint Consumer Advocates' updated DCF study is generally consistent with the Commission's two-step DCF methodology.⁴³¹

247. Joint Consumer Advocates prepared their updated DCF analysis by applying the Commission's two-step DCF methodology to a proxy group of companies meeting the following criteria: a national proxy group consisting of companies that: (1) are listed as Electric Utility Central, East, or West by *Value Line Investment Survey*; (2) have an investment grade corporate credit and bond rating that falls within the comparable risk band; (3) have not cut their dividends in the past six months; (4) have not been involved in an acquisition of another utility, and are not the target of an acquisition in the past six months; and (5) have investment analysts' long-term earnings per share growth rate forecasts available from Yahoo.⁴³² Those criteria produced a group of 24 companies.⁴³³ Using the low-end outlier test, Joint Consumer Advocates eliminated FirstEnergy Corporation and Entergy Corporation from its proxy group.⁴³⁴ That methodology produced a final proxy group of 22 companies, and Joint Consumer Advocates' DCF analysis of those companies produced cost of equity estimates ranging from 6.31 percent to 10.85 percent. We find that Joint Consumer Advocates' selection of proxy companies is consistent with the standards set forth in Opinion No. 531 and its DCF analysis of those companies is consistent with the two-step DCF methodology adopted in Opinion No. 531.⁴³⁵

248. We reject Trial Staff's proxy group proposal. We agree with Joint Consumer Advocates' and PATH's contention that Trial Staff Witness Keyton did not correctly

⁴³⁰ See *Petal Gas Storage, LLC v. FERC*, 496 F.3d 695 (D.C. Cir. 2007).

⁴³¹ Ex. JCA-141 (JRW-Update-Ex. 3) is Joint Consumer Advocates' updated FERC Two-Stage DCF Analysis.

⁴³² Described in Ex. JCA-100 at 6-7 and the updated DCF model is provided in Ex. JCA-141 (JRW-Update-Ex. 3).

⁴³³ Ex. JCA-141 (JRW-Update-Ex. 3).

⁴³⁴ Ex. JCA-141 (JRW-Update-Ex. 3).

⁴³⁵ See Opinion No. 531, 147 FERC ¶ 61,234 at PP 96, 100-102, 106-108, 112, 114, 118, 122-123 and cases cited therein.

apply the Commission's "comparable risk band" based on credit ratings to construct his proxy group. We further agree with Joint Consumer Advocates and PATH that Trial Staff used a narrower credit rating screen than that set forth in Opinion No. 531, because Witness Mr. Keyton chose to include only companies that have a credit rating that is the same as either one of PATH's parent companies.⁴³⁶ Moreover, we are not persuaded by Trial Staff witness Keyton's contention that using the exact credit ratings of either one of PATH's parent companies leads to a sufficient proxy group. Instead, we agree with Joint Consumer Advocates that using only companies that have a credit rating that is the same as either one of the parent companies resulted in a proxy group that is not as representative of the risk faced by PATH than that submitted by either Joint Consumer Advocates or PATH. Therefore, we find that Trial Staff's proxy group proposal is inconsistent with the comparable risk band credit rating screen set forth in Opinion No. 531.⁴³⁷

249. While PATH proposed the same proxy group as Joint Consumer Advocates, we agree with Joint Consumer Advocates that PATH Witness Dr. Avera erred in his calculation of dividend yields. PATH Witness Dr. Avera states that he used the most recent dividend declared as of the end of the six-month period for purposes of calculating the dividend yields for each month of the six-month period. Thus, he calculated the monthly dividend yields by dividing the same most recent declared dividend as of the end of the six month period by the average stock prices in each of the six months.⁴³⁸ We agree with Joint Consumer Advocates that PATH Witness Dr. Avera inappropriately calculates the estimated dividend yield for each month based solely on the dividend declared at the end of the six-month period, rather than using the most recent declared dividend as of the end of each month during the six-month period.⁴³⁹ Therefore, we agree with Joint Consumer Advocates and Trial Staff that PATH Witness Dr. Avera's dividend methodology does not follow the Commission's methodology in Opinion No. 531 and *Portland Natural Gas Transmission System*.⁴⁴⁰ As the Commission found in *Portland Natural Gas Transmission System*, and reiterated in Opinion No. 531, using only the dividend declared in the final month results in a mismatch between the stock prices and

⁴³⁶ Ex. S-11 at 22.

⁴³⁷ Opinion No. 531, 147 FERC ¶ 61,234 at PP 106-107.

⁴³⁸ Ex. PTH-83 at 88; Ex. PTH-97 at 4.

⁴³⁹ Joint Consumer Advocates Initial Post-Hearing Brief at 176; *See also* Tr. 3308:21 – 3309:4.

⁴⁴⁰ Opinion No. 531, 147 FERC ¶ 61,234 at PP 77-78; Opinion No. 510, 134 FERC ¶ 61,129 at P 234.

the dividends used to calculate a firm's dividend yield.⁴⁴¹ Further, the Commission found that this can result in overstated dividend yields, particularly when a firm raises its dividends or distributions during the six-month study period, because earlier stock prices do not reflect the increased value of the stock resulting from the increased dividend or distribution.⁴⁴² Thus, we reject PATH's proposed DCF analysis.

C. Placement of PATH's ROE within the Zone of Reasonableness

1. Initial Decision

250. The Initial Decision concluded that, as it is now in the abandonment phase of the project, PATH faces "very low risk" and should receive an ROE that reflects its present risk profile, not the risk that it faced before the project was abandoned.⁴⁴³ The Initial Decision concluded that the record shows that PATH faces "minimal financial risk and minimal operational risk," largely on the basis that the Commission granted PATH full recovery of its prudently occurred abandonment costs.⁴⁴⁴ The Initial Decision concluded that the "closest risk analysis" to PATH was not a utility with "ongoing operation[s]," but instead a five-year U.S. Treasury bond.⁴⁴⁵ The Initial Decision reasoned that, like a bond, PATH's investors were "certain of the return of their money plus interest, or as in this case, a ROE." Accordingly, the Initial Decision determined that PATH's 10.4 percent ROE was not just and reasonable. The Presiding Judge therefore concluded that PATH failed to meet its burden under section 205 or, alternatively, that Trial Staff and Joint Consumer Advocates met their burden under section 206 to show that PATH's ROE was not just and reasonable.⁴⁴⁶

251. Although the Initial Decision found some merit in Joint Consumer Advocates' argument that the ROE should be set at the prevailing rate for a five-year U.S. Treasury

⁴⁴¹ Opinion No. 531, 147 FERC ¶ 61,234 at PP 77-78; Opinion No. 510, 134 FERC ¶ 61,129 at P 234.

⁴⁴² Opinion No. 531, 147 FERC ¶ 61,234 at PP 77-78; Opinion No. 510, 134 FERC ¶ 61,129 at P 234.

⁴⁴³ Initial Decision, 152 FERC ¶ 63,025 at P 136.

⁴⁴⁴ Initial Decision, 152 FERC ¶ 63,025 at PP 138-140.

⁴⁴⁵ Initial Decision, 152 FERC ¶ 63,025 at P 140.

⁴⁴⁶ Initial Decision, 152 FERC ¶ 63,025 at P 129.

bond, the Initial Decision concluded that the record did not contain any evidence to support that option. The Initial Decision therefore set the ROE at the lowest point for which there was evidence in the record, namely 6.27 percent, the bottom of the zone of reasonableness produced by Joint Consumer Advocates' DCF analysis, although it noted that that decision "presupposes that the appropriate ROE is much lower."⁴⁴⁷ Finally, although the Initial Decision noted that Opinion No. 531 provides that prevailing capital market conditions play a role in determining where to place the ROE within the zone of reasonableness, it ultimately did not address the state of the capital markets because the Presiding Judge concluded that the companies in the proxy group did not accurately represent the risks faced by PATH.⁴⁴⁸

2. Briefs on Exception

252. PATH contends that the 6.27 percent ROE is "confiscatory" and contrary to the evidence in the record. PATH contends that there is no evidence in the record that suggests that PATH does not face ongoing risks simply because it is in the abandonment phase of the project. Instead, PATH suggests that the testimony of all the witnesses who presented an ROE analysis suggests that PATH faced risks comparable to those of a utility with ongoing operations.⁴⁴⁹ PATH contends that the Commission has permitted utilities to recover prudently incurred investments for at least 35 years and, in at least one case, the Commission allowed a company to continue to earn its base ROE during its abandonment phase.⁴⁵⁰

253. PATH also asserts that the Presiding Judge erred in declining to use the DCF analysis, which PATH contends the Commission has used in other cases where it has determined that a utility is eligible for prudently incurred abandonment costs. In addition, PATH contends that reducing its ROE during the abandonment phase would undermine Commission policy, which PATH characterizes as supporting additional transmission investment to support wholesale market activities and changes in the generation mix.⁴⁵¹ PATH contends that reducing its ROE to 6.27—200 basis points

⁴⁴⁷ Initial Decision, 152 FERC ¶ 63,025 at P 143.

⁴⁴⁸ Initial Decision, 152 FERC ¶ 63,025 at P 133.

⁴⁴⁹ PATH Brief on Exceptions at 27.

⁴⁵⁰ PATH Brief on Exceptions at 31 (citing *MAPP Order*, 142 FERC ¶ 61,156 at P 45).

⁴⁵¹ PATH Brief on Exceptions at 33-35.

below the level supported by any witness in the record—would send a “strong negative signal” to investors, especially in regions, such as PJM, that regularly review the need for transmission projects, including ones already selected and under development.

254. PATH also contends the Initial Decision erred in determining that the 10.4 percent ROE set by the Commission in the Abandonment Cost Hearing order was not just and reasonable.⁴⁵² PATH observes that the 10.4 percent ROE is within all three of the zones of reasonableness in the record, which, PATH contends, “*validates*” the continued reasonableness of a 10.4 percent ROE.

255. PATH contends that the Initial Decision erred by not finding that unusual capital market conditions were present during the study period and adjusting the ROE accordingly. PATH states that, in Opinion No. 531, the Commission concluded that unusual capital market conditions present during the study period reduced the Commission’s confidence that the central tendency of the zone of reasonableness “accurately reflect[ed]” the equity returns necessary to satisfy *Hope* and *Bluefield*.⁴⁵³ PATH contends that the evidence in the record shows that the capital market conditions have not changed “in any meaningful respect” since the Commission issued Opinion No. 531. PATH also contends that Opinion No. 531 and Opinion No. 531-B identified depressed bond yields as the primary evidence of anomalous market conditions.⁴⁵⁴ PATH points to evidence that it claims demonstrates that bond yields continue to be depressed. PATH also points to the Federal Reserve Bank’s continued holdings of debt securities and statements by its Chair, Janet Yellen, as further evidence of unusual capital market conditions. PATH contends these anomalous market conditions should lead the Commission to consider alternative valuation methodologies, which, PATH contends, support an ROE of 10.57 percent, the midpoint of the upper half of the zone of reasonableness.

256. Although Joint Consumer Advocates and Trial Staff do not except to the Presiding Judge on this issue, they note that it appears that the Initial Decision intended to select 6.31 percent as the just and reasonable ROE, rather than 6.27 percent.⁴⁵⁵ Joint Consumer

⁴⁵² PATH Brief on Exceptions at 35-40.

⁴⁵³ PATH Brief on Exceptions at 36-38 (citing *Bluefield Water Works v. Pub. Serv. Comm’n*, 262 U.S. 679 (1923) and *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)).

⁴⁵⁴ PATH Brief on Exceptions at 38.

⁴⁵⁵ Trial Staff Brief on Exceptions at 1-2.

Advocates notes that 6.31 percent represented Dr. Woolridge's low end of the range of reasonableness based on his March 6, 2015 updated testimony.⁴⁵⁶

257. Edison Electric Institute argues⁴⁵⁷ that the Initial Decision's after-the-fact assessment of the impact of the abandonment incentives, separate and apart from the determination of a just and reasonable base ROE, is contrary to Commission precedent.⁴⁵⁸ Edison Electric Institute argues that the Supreme Court's decisions in *Hope* and *Bluefield* do not compel the Initial Decision's focus on PATH's risk during the abandonment phase and that, instead, those decisions require that the ROE be set at a level that is sufficient to attract capital.⁴⁵⁹ Edison Electric Institute also states that the Commission has consistently allowed utilities to receive a fair ROE, usually its base ROE without a significant reduction, when recovering the costs of a project that was canceled through no fault of its own.

3. Briefs Opposing Exceptions

258. Trial Staff contends that PATH's existing 10.4 percent ROE is not just and reasonable. As an initial matter, Trial Staff argues that PATH is wrong in suggesting that, just because 10.4 percent falls within the zone of reasonableness, it is therefore just and reasonable. Trial Staff points out that the Commission expressly rejected that argument in Opinion No. 531.⁴⁶⁰ Trial Staff supports an ROE in the lower half of the zone of reasonableness, although not necessarily at the bottom of the zone of reasonableness. Trial Staff agrees with the Initial Decision that, as a result of the abandonment, PATH has minimal financial risk and that a commensurate reduction in its ROE is appropriate.⁴⁶¹ Trial Staff contends that Order No. 679 expressly contemplated

⁴⁵⁶ Joint Consumer Advocates Brief Opposing Exceptions at 20.

⁴⁵⁷ As noted, *supra* PP 19-20, Edison Electric Institute sought to intervene and file briefs more than three years after we instituted the hearings in this proceeding. Consistent with our longstanding practice, we denied Edison Electric Institute's request to intervene. Nevertheless, we consider its arguments as *amicus curiae*.

⁴⁵⁸ Edison Electric Institute Brief on Exceptions at 22-23.

⁴⁵⁹ Edison Electric Institute Brief on Exceptions at 25.

⁴⁶⁰ Trial Staff Brief Opposing Exceptions at 13-14.

⁴⁶¹ Trial Staff Brief Opposing Exceptions at 7-12.

that a utility that receives abandonment incentives might be allowed a lower ROE and, therefore, reducing PATH's ROE is not inconsistent with Commission policy.

259. Trial Staff also contends that the anomalous capital market conditions identified in Opinion No. 531 cannot be "directly imported" to the facts of this case. Trial Staff contends that PATH has failed to adduce sufficient evidence to show that the data from the study period are affected by anomalous capital market conditions. Trial Staff characterizes the "main thrust" of PATH's argument as being that bond yields were low during the study period.⁴⁶² Trial Staff argues, however, that low bond yields, by themselves, do not show that the capital markets were experiencing unusual conditions. Trial Staff notes that, in Opinion No. 531, the Commission considered several additional reasons, beyond bond yields, before concluding that the capital markets were experiencing anomalous conditions, including the possibility of a double-dip recession, the looming "fiscal cliff" of spending cuts, and the financial conditions in other parts of the world.⁴⁶³ Trial Staff states that PATH failed to introduce evidence of these types of additional factors affecting the capital markets. In addition, Trial Staff contends that the statements of PATH's chief witness, Dr. Avera, predated the relevant time period for this case and are thus inapplicable.⁴⁶⁴ Trial Staff also asserts that the statements by Chair Yellen were focused on short-term interest rates, not the long-term interest rates upon which Trail Staff contends the DCF model relies.

260. Joint Consumer Advocates contend that the Initial Decision correctly determined that a 10.4 percent ROE is not just and reasonable and that setting PATH's ROE at the bottom of the zone of reasonableness is a just and reasonable result. Joint Consumer Advocates also claim that, should the Commission decline to set the ROE at the bottom of the zone, a median ROE of 8.54 percent would be a just and reasonable result.⁴⁶⁵ Joint Consumer Advocates contend the evidence in the record showed that PATH has no business or operational risk and, therefore, does not have a risk profile that is similar to the other companies in the three proxy groups in the record.⁴⁶⁶ As a result, Joint Consumer Advocates contend, PATH is not truly comparable to the electricity company proxy groups in the record and therefore was properly awarded an ROE at the bottom of

⁴⁶² Trial Staff Brief Opposing Exceptions at 14-18.

⁴⁶³ Trial Staff Brief Opposing Exceptions at 15-16.

⁴⁶⁴ Trial Staff Brief Opposing Exceptions at 16-17.

⁴⁶⁵ Joint Consumer Advocates Brief Opposing Exceptions at 28.

⁴⁶⁶ Joint Consumer Advocates Brief Opposing Exceptions at 22-23.

the zone of reasonableness. In addition, Joint Consumer Advocates contend that PATH failed to introduce evidence showing that the capital markets were experiencing unusual conditions during the study period.

261. Joint Consumer Advocates further argue that this result represents sound public policy because the PATH Project never provided benefits to consumer and because it is only logical, Joint Consumer Advocates contend, that PATH should receive a lower ROE after the Commission reduced its risk by granting PATH abandonment incentives.⁴⁶⁷ Joint Consumer Advocates also argue that PATH's citation to the Mid-Atlantic Power Pathway proceedings is inapt because, although the Commission did not originally set the ROE for hearing after that project was abandoned, the Commission subsequently granted rehearing and the case was settled before the Commission could definitively resolve this issue.⁴⁶⁸

4. Commission Determination

262. We agree with the Initial Decision that a 10.4 percent ROE for PATH is not just and reasonable. We find that, in the abandonment phase of the project, PATH's risk profile has decreased significantly as compared to the proxy companies that face ongoing business risks. As a result, it would be unjust and unreasonable to maintain the current 10.4 percent ROE, which, as noted, is well above the median of the zone of reasonableness in all three DCF analyses in the record, including Joint Consumer Advocates' DCF analysis on which we rely. PATH points to Opinion No. 531, in which the Commission described the risk facing a utility that builds electric transmission, including many of the proxy companies, including "long delays in transmission siting, ... project complexity, environmental impact proceedings, requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way, [and] liquidity risk from financing projects that are large relative to the size of a balance sheet."⁴⁶⁹ PATH contends that "the record evidence demonstrates that [PATH] faced all these risks," not to mention the changing economic conditions that ultimately lead to its abandonment, and that together these risks justify a relatively high ROE.⁴⁷⁰

⁴⁶⁷ Joint Consumer Advocates Brief Opposing Exceptions at 23-26.

⁴⁶⁸ Joint Consumer Advocates Brief Opposing Exceptions at 31-34 (citing *MAPP Order*, 142 FERC ¶ 61,156).

⁴⁶⁹ PATH Brief on Exceptions at 29 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 149).

⁴⁷⁰ PATH Brief on Exceptions at 29.

263. Even if PATH faced this risk during the operational phase of the project, PATH's risk profile has decreased in the abandonment phase. PATH is no longer an operational entity. And although PATH continues to face risk in the abandonment phase of the project, the threat to PATH's investments posed by such risk falls short of the cumulative risks facing an ongoing utility.

264. The conclusion that PATH's ROE should be reduced in its abandonment phase is also consistent with Commission and court precedent. For example, in *Town of Norwood v. FERC*,⁴⁷¹ the U.S. Court of Appeals for the District of Columbia Circuit examined a situation quite similar to this case. Following the early retirement of a nuclear power plant, the Commission granted the plant's owners full recovery of the plant's unamortized costs.⁴⁷² The Commission explained that under the then-unique circumstances of that case—"a single-asset company ... whose principal asset is no longer operating...; which has no need to attract capital; and which ... is ... guaranteed recovery of virtually all costs associated with its principal asset"—the plant's reduced risk profile required the Commission to reduce its ROE to the lower end of the zone of reasonableness.⁴⁷³ Although the Court remanded the case to the Commission to consider a new study period as part of the DCF analysis, it approved of the Commission's conclusion that, in light of the nuclear plant's significantly reduced risks as an abandoned project that has received cost-recovery, a reduced ROE was appropriate. The same conclusion applies to the substantively identical facts of this case: when an entity's only asset is abandoned, but it nevertheless receives guaranteed cost recovery, the entity's reduced risk profile merits a corresponding decrease in ROE for the period in which it recovers its abandonment costs.

265. PATH contends that the Presiding Judge's finding that it must reduce its existing ROE is contrary to the Commission's decision concerning the PHI Companies'⁴⁷⁴ recovery of costs associated with the abandonment of their Mid-Atlantic Power Pathway (MAPP) Project.⁴⁷⁵ In the *MAPP Order*, the Commission did not require any reduction in base ROE due to decreased risk resulting from the abandonment of the project.

⁴⁷¹ 80 F.3d 526 (D.C. Cir. 1996).

⁴⁷² 80 F.3d at 529 (citing *Yankee Atomic Elec. Co.*, 67 FERC at 62,113-115).

⁴⁷³ *Yankee Atomic Elec. Co.*, 67 FERC at 62,120.

⁴⁷⁴ The PHI Companies are the transmission-owning public utility affiliates of Pepco Holdings, Inc. (PHI).

⁴⁷⁵ *MAPP Order*, 142 FERC ¶ 61,156.

Instead, the Commission required the PHI Companies to “use their base ROE which is currently 10.80 percent on the unamortized portion of the MAPP Project,”⁴⁷⁶ while removing their ROE incentive adders.

266. However, the *MAPP Order* is distinguishable from the present case. Unlike PATH, the PHI Companies did not create a separate venture and separate operating companies to develop the MAPP Project.⁴⁷⁷ Instead, they developed the project themselves as an addition to their existing transmission facilities. Accordingly, when the Commission initially approved the abandonment incentive and ROE adders for the MAPP project, it did not establish a new, separate base ROE applicable solely to that project, as the Commission did for PATH. Rather, the Commission required the PHI Companies to use the same 10.80 percent base ROE for the MAPP Project as the Commission had previously approved for the PHI Companies’ existing transmission facilities.⁴⁷⁸

267. A single-asset company, such as PATH, is distinguishable from companies with significant transmission networks, such as the PHI Companies, for purposes of determining relative risk vis-à-vis the proxy group. A utility with ongoing business activities must continue to attract new capital in order to maintain those activities, while a single-asset company with guaranteed recovery of its abandoned plant costs may not need to do so. When a utility abandons a single project while continuing to operate many other assets, it is reasonable to apply the same ROE to the abandoned asset as to the rest of the utility’s assets because investors invest in a company as a whole, not particular assets of the company.⁴⁷⁹ A utility with many assets that continue in operation would not see risk to its overall business and operations reduced when one project is abandoned in

⁴⁷⁶ *MAPP Order*, 142 FERC ¶ 61,156 at P 45.

⁴⁷⁷ See *MAPP Order*, 142 FERC ¶ 61,156 at P 1; see also Section 205 Tariff Filing to Recover Abandonment Costs, Docket No. ER13-607-000, at 4 (Dec. 21, 2012) (explaining MAPP’s ownership structure).

⁴⁷⁸ *Pepco Holdings Inc.*, 125 FERC ¶ 61,130 at PP 80, 91-94.

⁴⁷⁹ See *Aera Energy LLC v. FERC*, 789 F.3d 194-95 (D.C. Cir. 2015) (citing *Kern River Gas Transmission Co.*, Opinion No. 486-E, 136 FERC ¶ 61,045, at P 205 (2011)). We also note that there may be significant benefits that companies, such as PATH’s investors, realize by using a single-purpose corporate vehicle like PATH. These include limitations on liability, tax benefits, and various efficiencies in the financing and operation of the project.

the same manner as a utility whose only asset is abandoned.⁴⁸⁰ That conclusion is fully consistent with Commission precedent.⁴⁸¹

268. While we affirm the Presiding Judge's finding that PATH faces less risk than the proxy group, we disagree with the Presiding Judge's conclusion that PATH is wholly risk-free. As a result, we conclude that, although the Order No. 679 abandonment incentive provides substantial protections for PATH's equity holders, it does not eliminate all risk facing their invested capital. Because of this risk, we reject the Initial Decision's conclusion that PATH's risk-profile is more analogous to a five-year U.S. Treasury bond than to a typical public utility and we decline to place PATH's ROE at the bottom of the zone of reasonableness.

269. We also conclude that it would be improper to set the ROE at the bottom of the zone of reasonableness for the additional reason that it would set PATH's equity returns below PATH's implied cost of debt for both of the PATH entities, which, as noted, is 6.64 percent for PATH-WV and 6.76 percent for PATH-AYE.⁴⁸² Placing the ROE below the implied cost of debt would be illogical since debt holders must, by definition, face a lower risk to their invested capital than equity investors. And although it is true, as Joint Consumer Advocates point out, that PATH has not actually issued any debt, we find that fact immaterial for the purposes of this analysis. As noted, the Commission accepted PATH's proposal for a hypothetical capital structure of 50 percent debt and 50 percent equity,⁴⁸³ and it would be inappropriate to PATH to now ignore that structure in setting its ROE. Although PATH's parent companies contributed 100 percent of PATH's capital in the form of invested equity, because of the hypothetical capital structure, they have effectively been recovering a much lower rate. That is because PATH's ROE has been applied to only half of the invested capital, with the other half generating a return of 6.64 or 6.76 percent—the PATH entities implied costs of debt, both of which are several hundred basis points lower than the Commission-allowed ROE. As such, it would be

⁴⁸⁰ This distinction is not intended to justify any other disparate treatment as between single-asset utilities and those with a significant transmission network with respect to transmission development or transmission ratemaking. Rather, we are relying on this distinction only for addressing the relative risk analysis used in determining the ROE of a single-asset entity seeking recovery of its abandonment costs.

⁴⁸¹ See *Yankee Atomic Elec. Co.*, 67 FERC at 62,120, *rev'd on other grounds*, *Town of Norwood, Mass v. FERC*, 80 F.3d 526 (D.C. Cir. 1996).

⁴⁸² Rate Formula Template Line Item 118.

⁴⁸³ Incentives Order, 122 FERC ¶ 61,188 at P 53.

inappropriate to now deprive PATH of one of the benefits of its hypothetical capital structure, namely the common-sense assumption that the cost of equity should produce a higher return than the cost of debt.

270. As we explained in Opinion No. 531, “[t]he Commission has traditionally looked to the central tendency to identify the appropriate return within the zone of reasonableness.”⁴⁸⁴ In this case, however, in light of the foregoing determinations, we conclude that the just and reasonable ROE for PATH’s abandonment phase is the median of the lower half of the zone of reasonableness, 8.11 percent,⁴⁸⁵ based on Joint Consumer Advocates’ final proxy group that produced cost of equity estimates that ranged from 6.31 percent to 10.85 percent⁴⁸⁶ and a proposed median ROE of 8.56 percent.⁴⁸⁷ In particular, we conclude that, because PATH’s risks have been significantly reduced now that it has been abandoned, an ROE at the median of the zone of reasonableness would not be just and reasonable. Although it is generally our practice to use the middle of the zone of reasonableness, “the mid[dle] does not represent a just and reasonable outcome if the midpoint does not appropriately represent the utilities’ risks.”⁴⁸⁸ That is the case here and, accordingly, we will set PATH’s ROE at the measure of central tendency of the

⁴⁸⁴ Opinion No. 531, 147 FERC ¶ 61,234 at P 151; *see Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,302, at P 10 (2004) (given a range of returns, the “most appropriate” and “most just and reasonable” single return that best considers that range is the central tendency), *aff’d in relevant part sub nom., Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004, 1010-11 (D.C. Cir. 2005).

⁴⁸⁵ As we have explained, when applying a measure of central tendency, it is the Commission’s practice to use the median when setting the ROE for a single utility and the midpoint when setting the ROE for a diverse group of utilities. *See S. Cal. Edison Co.*, 131 FERC ¶ 61,020 at PP 84-91, *remanded on other grounds sub nom., S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 186 (D.C. Cir. 2014) (concluding that the Commission adequately explained “how its different purposes determine its different approaches when setting the ROE for a single electric utility as opposed to a group of utilities with diverse risk profiles”).

⁴⁸⁶ Ex. JCA-138 at 2; Ex. JCA-139 at 1.

⁴⁸⁷ Ex. JCA-138 at 2; Ex. JCA-141 at 3.

⁴⁸⁸ Opinion No. 531, 147 FERC ¶ 61,234 at P 144; *Petal Gas*, 496 F.3d at 700 (noting that the Commission may respond to differences between the risk profiles of the proxy group companies and the subject company by moving the subject company’s ROE to a different point within the zone of reasonableness).

lower half of the zone of reasonableness, in this case the median of the lower half of the zone of reasonableness.

271. Although we have considered PATH's claims regarding the prevailing capital market conditions,⁴⁸⁹ the facts before the Commission in Opinion No. 531 are materially different from those presented here. In Opinion No. 531, the Commission explained that the unusual conditions in the capital markets made "it more difficult to determine the return necessary for public utilities to attract capital" because those conditions left us "less confiden[t] that the midpoint of the zone of reasonableness established in this proceeding accurately reflects the equity returns necessary to meet the *Hope* and *Bluefield* capital attraction standards."⁴⁹⁰ The Commission therefore concluded that its usual procedure for setting the ROE for utilities with similar risks to the proxy group—*i.e.*, setting the ROE at the midpoint or median of the zone of reasonableness—may not meet the *Hope* and *Bluefield* requirements.

272. PATH, however, does not have a risk profile that is broadly comparable to those of the proxy group companies. Instead, as noted, PATH's abandonment has significantly reduced its risk profile. Therefore our concern in Opinion No. 531 that the midpoint or median of the zone of reasonableness may not satisfy *Hope* and *Bluefield* does not extend to this case. To the contrary, the Commission can determine confidently, on the basis of PATH's unique risk profile, that an ROE at the lower median satisfies the *Hope* and *Bluefield* standards, notwithstanding the prevailing capital market conditions.⁴⁹¹

273. Based on the foregoing discussion, we approve an ROE of 8.11 percent, which is 135 and 147 basis points above PATH's two implied costs of debt. Given PATH's low level of risk as compared to the proxy group, we find that an ROE set at the lower median of the zone of reasonableness and either 135 or 147 basis points above the implied cost of debt to be just and reasonable.

274. With respect to EEI's concerns regarding how this determination might impact investor confidence in the investment of transmission infrastructure in the United States, the Commission continues to believe that its transmission incentive policy is an important

⁴⁸⁹ PATH Brief on Exceptions 35-39.

⁴⁹⁰ Opinion No. 531, 147 FERC ¶ 61,234 at P 145.

⁴⁹¹ *Cf. El Paso Natural Gas Co.*, 145 FERC at 61,299 (An "analysis attempting to demonstrate that a deviation from the median ROE is justified must present a comparison between the risk level of the subject company and the risk level of each of the proxy group companies. This is the crux of the analysis.").

tool intended to encourage the development of transmission infrastructure in this country. By granting the abandonment incentive to the PATH project, the Commission provided certainty to investors that they will be able to recover 100 percent of the prudently incurred costs for projects that are abandoned due to factors beyond the control of the developer, plus a ROE on those costs that is commensurate with the developer's risk.

D. Compliance

275. PATH shall make a compliance filing under eTariff to amend its Formula Rate, effective on the date of this order, within 60 days of the date of this opinion. As discussed above, within 60 days of the date of this opinion, PATH is also filing a report showing how it shall adjust its rates pursuant to the Formula Rate Protocols; that report must reflect the previous ROE for amounts that PATH over-collected in previous periods, and the new ROE for amounts that PATH has not yet collected.

VI. Closing out of Transactions and Effective Date of Abandonment Recovery

A. Background and Initial Decision

276. In its abandonment application,⁴⁹² PATH proposed to recover its abandoned plant costs recorded in Account 182.2 over an amortization period of five years and has been amortizing such costs since 2012. In the hearing proceedings, Joint Consumer Advocates argued for an amortization period of four years. The Initial Decision ruled that PATH met its burden to show that the proposed five-year amortization period is just and reasonable.⁴⁹³ The Initial Decision cited to a PATH exhibit supporting an amortization period of September 2012 to August 2017.⁴⁹⁴

B. Briefs on Exceptions and Opposing Exceptions

277. Joint Consumer Advocates did not take exception to the Initial Decision's rejection of their position.⁴⁹⁵ However, Joint Consumer Advocates argue that December 1, 2012 is the refund effective date.⁴⁹⁶

⁴⁹² PATH abandonment application, Docket No. ER12-2708-000, at 9-16; App. C; App. E and App. D.

⁴⁹³ Initial Decision, 152 FERC ¶ 63,025 at PP 145-147.

⁴⁹⁴ Initial Decision, 152 FERC ¶ 63,025 at P 145 (citing Ex. PTH-18 at 7 (Milorad Prokrajak Test.))

⁴⁹⁵ PATH Brief Opposing Exceptions at n.160.

C. Commission Determination

278. We affirm the Presiding Judge's decision on the amortization period, but we find it necessary to clarify the effective date, so that PATH has precise instructions on the timing of its cost recovery.

279. Joint Consumer Advocates argue that the Commission set December 1, 2012 as the effective date of the amortization period. The Initial Decision cited to a PATH exhibit supporting an amortization period of September 2012 to August 2017.⁴⁹⁷ PATH's 2013 Annual Update to its formula rates for the 2012 calendar year reflects an amortization period beginning September 1, 2012.⁴⁹⁸ That date, however, conflicts with the Hearing Initiation Order, which stated:

*PATH is proposing to amortize and recover the costs over a five-year period through the PATH Companies' formula rate, effective December 1, 2012. PATH also proposes to change the PATH Companies' existing approved ROE of 12.4 percent, using instead a 10.9 percent ROE (the 10.4 percent base ROE plus 50 basis points for RTO participation) effective September 1, 2012.*⁴⁹⁹

⁴⁹⁶ Joint Consumer Advocates Brief Opposing Exceptions at 43, n. 145 (citing PATH request for rehearing, Docket Nos. ER09-1256 and ER12-2708, at 2).

⁴⁹⁷ Initial Decision, 152 FERC ¶ 63,025 at P 145 (citing Ex. PTH-18 at 7 (Milorad Prokrajak Test.))

⁴⁹⁸ Formula rates annual update filed on June 3, 2013 in Docket No. ER09-1256-000, Transmittal at 2, "PATH LLC states that the major factor causing a change in the Actual Transmission Revenue Requirement between the Annual Update and the prior year's Annual Update is the inclusion of four (4) months of the sixty (60) month amortization of abandonment costs for the PATH Project beginning September 1, 2012".

⁴⁹⁹ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at P 8.

280. The Abandonment Hearing Initiation Order's ordering paragraphs, in line with PATH's proposal, made the proposed ROE of 10.9 percent effective September 1, 2012, but made the amortization effective December 1, 2012.⁵⁰⁰

281. PATH did not challenge these effective dates on rehearing. The delegated letter order accepting PATH's compliance filing likewise stated that the "submittal is accepted for filing, effective December 1, 2012, as directed in the" Hearing Initiation Order.⁵⁰¹ Therefore, we direct that PATH must include adjustments to the 2012 rate year and any changes necessary to subsequent years to reflect the December 1, 2012 effective date.

D. Compliance

282. We direct PATH to file, as part of the compliance filing detailed in the above sections of this order, adjustments to the 2012 rate year to reflect the December 1, 2012 effective date.⁵⁰² We direct PATH to file within 60 days of the date of this opinion. Parties may file comments on PATH's compliance filing 30 days from the date PATH makes its compliance filing.

The Commission orders:

(A) The exceptions to the Initial Decision are resolved as stated in the body of this order; to the extent an exception is not discussed, it should be considered denied.

⁵⁰⁰ Abandonment Hearing Initiation Order, 141 FERC ¶ 61,177 at PP 1, A, B.

⁵⁰¹ *PJM Interconnection, L.L.C. and Potomac-Appalachian Transmission Highline, LLC*, Docket No. ER12-2708-001 (2013) (unpublished letter order).

⁵⁰² All the spreadsheets must contain all the formulas necessary to calculate the compliance rates. If the spreadsheets use macros, functions, or other techniques to perform iterative functions, PATH should provide an explanation of the macros or functions used, where they are located, and how to initiate those functions. All macros and functions should not be set at a default state to run upon opening the spreadsheet. All formulas, variables, and results should be visible and not hidden. The spreadsheets should not use security features that prevent copying, modification, or printing – although PATH may provide separate spreadsheets that do have these features activated. The spreadsheets should not contain any links to sources outside of the spreadsheet document. To the extent applicable, the spreadsheets should use the format prescribed by the Commission's Instruction Manual for Electronic Filing applicable to natural gas pipeline rate case statements and schedules, located here: <http://www.ferc.gov/industries/gas/gen-info/rate-filings.asp>.

(B) PATH's ROE is hereby set at 8.11 percent, effective on the date of this order, as discussed in the body of this order. PATH shall make a compliance filing under eTariff to amend its Formula Rate, within 60 days of the date of this opinion.

(C) Within 60 days of the date of this opinion, PATH shall file a report correcting its Form 1 reports and other supporting necessary documentation, and proposing what its revised rates shall be in order to refund the over-collected amounts, in the manner prescribed in its Formula Rate Protocols, as discussed in the body of this order.

(D) Comments on the compliance filing to this order are due 30 days after PATH submits the compliance filing.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A
Abbreviations used in this order,
and list of previous PATH orders

Shortened Name	Full Name
2008 Settlement Agreement	Settlement agreement, filed 12/10/08, Docket No. ER08-386-000
2011 Settlement Agreement	Settlement agreement, filed 10/7/11, Docket Nos. ER08-386-001, -002 (governing revisions to the PATH Project return on equity, among other things).
2010 Update	Annual Update covering 2009 calendar year. Filed June 1, 2010, corrected July 13, 2010 and December 28, 2010
2011 Update	Annual Update covering 2010 calendar year filed June 2011
2012 Update	Annual Update filed June 2012, covering 2011 calendar year
abandonment application	September 28, 2012 filing in Docket No. ER12-2708-000 seeking to recover approximately \$121.5 million in abandonment costs associated with the PATH Project
Access Point	Access Point Public Affairs
Allegheny Power	A subsidiary of FirstEnergy, and one of the owners of PATH
AEP	America Electric Power, one of the owners of PATH
Annual Update	Updates to the Formula Rate calculations, filed each June, and covering the previous calendar year
Charles Ryan	Charles Ryan Associates
CPCN	Certificate of Public Convenience and Necessity
CWIP	Construction Work In Progress
DCF	Discounted Cash Flow
EEl	Edison Electric Institute
FirstEnergy	FirstEnergy Corporation, successor to Allegheny Power's ownership interest in PATH
Formal Challenge	Under PATH's Formula Rate Protocols, the method for challenging the Annual Updates
Formula Rate	PJM Open Access Transmission Tariff, Attachment H-19, "Annual Transmission Rates – Potomac-Appalachian Transmission Highline, L.L.C."
Formula Rate Protocols	PJM OATT Attachment H-19B – Formula Rate Implementation Protocols, 2.0.0.
Joint Consumer Advocates	Maryland Office of People's Counsel Pennsylvania Office of Consumer Advocate Virginia Office of the Attorney General's Division of

	Consumer Counsel Delaware Division of Public Advocate Maryland Public Service Commission Delaware Public Service Commission
MPSC	Maryland Public Service Commission
OATT	PJM Open Access Transmission Tariff
PATH	Collectively, PATH-AYE, PATH-WV, PATH-VA, and PATH-MD.
PATH-AYE, or PATH-Allegheny	PATH Allegheny Transmission Company, L.L.C.
PATH-MD	PATH Allegheny Maryland Transmission Company, LLC
PATH Project, or Project	Potomac-Appalachian Transmission Highline Project
PATH-VA	PATH Allegheny Virginia Transmission Corporation
PATH-WV	PATH West Virginia Transmission Company, L.L.C.
PEAT	PATH Educational Awareness Team
PJM	PJM Interconnection, L.L.C.
Potomac Edison	The Potomac Edison Co.
Presiding Judge	Presiding Administrative Law Judge Phillip C. Baten
Pro Se Challengers	Keryn Newman and Alison Haverty, jointly
Reliable Power Coalitions	West Virginians for Reliable Power, Marylanders for Reliable Power, and Virginians for Reliable Energy
R.L. Repass, or Repass	R.L. Repass & Partners, Inc., a polling firm
ROE	Return on Equity
RTEP	Regional Transmission Expansion Plan
RTO	Regional Transmission Organization
Second Formal Challenge	Formal Challenge filed on the 2011 Update
Trial Staff	Commission Trial Staff
USofA	Uniform System of Accounts, 18 C.F.R. Part 101
VA-SCC	Virginia State Corporation Commission

Short Name	Full Citation
Incentives Order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , 122 FERC ¶ 61,188 (2008)
unpublished letter order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , Docket No. ER09-1256-000 (February 2, 2010)

Incentives Rehearing Order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , 133 FERC ¶ 61,152 (2010) (partly affirming Incentives Order, approving 2008 Settlement Agreement, and ordering further settlement proceedings)
2012 Settlement Order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , 138 FERC ¶ 61,113 (2012) (accepting the 2011 Settlement Agreement).
First and Second Formal Challenges Order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , 140 FERC ¶ 61,229 (2012)
Abandonment Hearing Initiation Order	<i>PJM Interconnection, LLC</i> , 141 FERC ¶ 61,177 (2012).
Third Formal Challenge Order	<i>Potomac-Appalachian Transmission Highline, L.L.C.</i> , 143 FERC ¶ 61,208 (2013).
Initial Decision	<i>Potomac-Appalachian Transmission Highline, LLC</i> , 152 FERC ¶ 63,025 (2015).

Appendix B List of Purchases and Sales

Unless otherwise noted:

All purchase prices are from both Ex. PTH-9 and Ex. JCA-8

All dates of purchase are from Ex. JCA-8.

All sales prices and dates of sale are from Ex. PTH-9

Properties with no record discrepancy in purchase and sale price

Location	Purchase Price & date	Sale Price / Date of Sale	Loss on Sale
Rt 50 Dillons Run Rd, Capon Hampshire C'ty, WV	\$315,988 7/9/10	\$115,000 Sept. 2013	-\$200,988
Dorland Lane, Harpers Ferry, Jefferson C'ty, WV	\$64,000 3/30/09	\$13,250 April 2013	-\$50,750
142 Buck Fever Trail, Charles Town, Jefferson C'ty, WV	\$84,900 1/8/10	\$43,950 Oct. 2013	-\$40,950
Lot 3, Rivers Edge, Loudoun C'ty, VA	\$1,090,000 4/8/09	\$704,000 May 2013	-\$386,000
Lot 13, Rivers Edge, Loudoun C'ty, VA	\$1,175,000 3/10/09	\$390,000 May 2013	-\$785,000
3050 Big Woods Rd, Ijamsville, Frederick C'ty, MD	\$700,000 9/14/09	\$335,000 Oct. 2013	-\$365,000
Lot 4 of Blanche Fischer Tract, Capon, Hampshire C'ty, WV	\$96,000 1/21/11	\$50,000 Jan. 2014	-\$46,000
39710 Catocin View Lane, Lovettsville, Loudoun C'ty, VA	\$910,000 4/8/09	\$534,000 Dec. 2013	-\$376,000

Properties with a discrepancy in purchase or sale price

Location	Purchase Price & date	Sale Price / Date of Sale
1060 Old Cave Rd, Charles Town, Jefferson C'ty, WV	\$160,300⁵⁰³ or \$163,000⁵⁰⁴ 8/16/10	\$150,000 March 2013
Weller Rd, Monrovia, Frederick C'ty, MD	\$430,000 10/1/09	\$230,000⁵⁰⁵ or \$30,000⁵⁰⁶ April 2014
4420 Lynn Burke Rd, Monrovia, Frederick C'ty, MD	\$930,000 10/1/09	\$30,000⁵⁰⁷ or \$230,000⁵⁰⁸ April 2014
Lot 2, Rivers Edge, Loudoun C'ty, VA	\$418,000⁵⁰⁹ or \$300,000⁵¹⁰ 4/8/09	[Future third-party sale]
Rt 220, Moorefield, Hardy C'ty, WV (Welton Springs)	\$6,000,000⁵¹¹ 5/12/09 or \$3,941,200⁵¹² 9/9/09⁵¹³	[Future affiliate transfer]

⁵⁰³ Ex. PTH-9.

⁵⁰⁴ Ex. JCA-8.

⁵⁰⁵ Ex. PTH-9.

⁵⁰⁶ Ex. JCA-35 at 1.

⁵⁰⁷ Ex. PTH-9.

⁵⁰⁸ Ex. JCA-74.

⁵⁰⁹ Ex. PTH-9, Ex. JCA-8.

⁵¹⁰ Ex. JCA-10.

⁵¹¹ Ex. JCA-9.

⁵¹² Ex. JCA-8.

⁵¹³ Ex. JCA-8.

Rt 220, Moorefield, Hardy C'ty, WV (Welton Springs)	\$8,000,000⁵¹⁴ 5/12/09⁵¹⁵ or \$7,858,800⁵¹⁶ 9/9/09⁵¹⁷	[Future affiliate transfer]
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⁵¹⁴ Ex. JCA-9.

⁵¹⁵ Ex. JCA-9.

⁵¹⁶ Ex. JCA-8.

⁵¹⁷ Ex. JCA-8.

**Properties with no record discrepancy in purchase price,
but with no known sale price**

Location	Purchase Price & date	Sale Price / Date of Sale
Bear Run, Harpers Ferry, Jefferson C'ty, WV	\$50,000 2/19/10	[Future third-party sale]
Lot 5, Rivers Edge, Loudoun C'ty, VA	\$285,000 3/3/09	[Future third-party sale]
Lot 12, 39947 Rivers Edge Lane, Loudoun C'ty, VA	\$689,000 2/24/09	[Future third-party sale]
Lot 332 of Ashton Woods, Moorefield, Hardy C'ty, WV	\$815,000 10/16/09	[Future third-party sale]
3038 Big Woods Rd, Ijamsville, Frederick C'ty, MD	\$860,000 9/14/09	[Future affiliate transfer]
Bartholows Rd, Mt. Airy, Frederick C'ty, MD (Kemptown)	\$6,830,553 12/16/08	[Future affiliate transfer]