

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Keryn Newman and Alison Haverty		Docket No. ER08-386-000
Complainants,		Docket No. ER09-1256-000
v.		
Potomac-Appalachian Transmission Highline, LLC		
Respondent.		

**FORMAL CHALLENGE TO
POTOMAC-APPALACHIAN TRANSMISSION HIGHLINE, LLC
2010 ANNUAL TRANSMISSION REVENUE REQUIREMENT**

December 23, 2011

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I. INTRODUCTION

Keryn Newman and Alison Haverty, Interested Parties, *pro se* (the “Challengers”), dispute the recovery of \$2,437,540.94 included in the Potomac-Appalachian Transmission Highline, LLC (“PATH”) 2010 Actual Transmission Revenue Requirement (“ATRR”) and income deductions in the amount of \$443,486.00 in Accounts 426.1 and 426.4, Federal Energy Regulatory Commission (the “Commission” or “FERC”) docket numbers ER09-1256-000 and ER08-386-000.

Challengers hereby incorporate arguments presented in the Formal Challenge of PATH’s 2009 ATRR¹ (“previous Challenge”) to state:

- ⌘ The Commission has jurisdiction over PATH’s ATRR filing and authority to withhold acceptance thereof;
- ⌘ Challengers, as ratepayers and Interested Parties, have standing to bring this formal challenge;²
- ⌘ Challengers have satisfied all the terms and preconditions of bringing this formal challenge pursuant to the PATH Formula Rate Implementation Protocols (“Protocols”) of the PJM Interconnection, LLC (“PJM”) Open Access Transmission Tariff (“OATT”);³
- ⌘ Challengers have properly raised a preliminary challenge⁴ to PATH’s 2010 ATRR;

¹ Formal Challenge to the PATH LLC 2010 Formula Rate Annual Update (2009 ATRR) filed by Keryn Newman and Alison Haverty, Section I (January 21, 2011).

² See PJM OATT Attachment H-19B Section I.E and I.H for Interested Party guidelines. Also, the Commission has jurisdiction through the “filed-rate doctrine” which requires that persons challenging rates, procedurally done through a Section 206 filing or through a Formal Challenge, which is a modified Section 206 filing, must come before *this* body for adjudication. The filed-rate doctrine is based on *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); see also *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003) which held that challenges to the validity of a tariffed rate must be conducted before the agency which determined that rate to be in effect. As well, for Challengers to take the issues raised in the Challenge before any other agency would violate the Supremacy Clause of the United States Constitution. *U.S. Constitution Article VI, Paragraph 2*.

³ PJM OATT Attachment H-19B Section VII.B.

⁴ See 2010 ATRR Preliminary Challenge (November 23, 2011), available at <http://www.stoppathwv.com/documents/2010Prelim-final.pdf>

- ⤴ Challengers have submitted requests for information from PATH;
- ⤴ Challengers have made good faith, timely, persistent, thorough and clearly articulated efforts to obtain information from PATH showing that it has reasonably applied the terms of the Formula Rate concerning the necessity and factual circumstances underlying the expenses included in the ATRR; and
- ⤴ Despite Challengers' efforts, they have neither succeeded at persuading PATH to voluntarily comply with their information requests nor at obtaining responses that comply either with the stated requirements of the Protocols or with the spirit, purpose and intent of the Protocols, to provide clarity and transparency to the public as stakeholders in this process.

II. CHALLENGERS' REQUESTS

Challengers hereby respectfully request that this honorable Commission:

- 1) Make a determination that it will not accept PATH's ATRR as filed on June 3, 2011;
- 2) Begin proceedings for a comprehensive audit and investigation of PATH's regulatory accounts to determine compliance with all FERC regulations, and any additional obligations that may exist under PATH's settlement agreement;⁵
- 3) Order PATH to disclose all information requested pursuant to the terms of the Protocols;
- 4) Conduct a full evidentiary hearing in order to fully develop the record with testimony that is subject to cross examination and challenge;
- 5) Conduct an investigation of PATH's activities to determine whether the costs submitted to FERC for recovery are consistent with FERC's mandate to ensure that PATH's filed rates are prudent, just and reasonable and not unduly discriminatory or preferential and serve the public interest;

⁵ 133 FERC ¶ 61,152 November 19, 2010 Docket Nos. ER08-386-000 and ER08-386-001

- 6) Initiate a formal investigation into PATH's policies and practices to determine whether there is a pattern and/or practice of wrongfully seeking ratepayer reimbursement and over-recovery of costs;
- 7) Clarify in which regulatory account(s) promotional activities (to include public relations, advertising and governmental affairs expenses) should be placed when the activities are carried out during the state and local permitting process, prior to approval;
- 8) Determine that PATH's cost of all labor, legal fees and expenses related to examination of amounts challenged, where that challenge is ultimately found to be valid, becomes the sole financial responsibility of PATH's shareholders, not to be recovered from ratepayers through the formula rate; and
- 9) Impose any and all fines, penalties and reprimands available under the Commission's authority consistent with its findings.

III. BACKGROUND

On February 29, 2008, the Commission issued an Order Accepting and Suspending Formula Rates, Subject to Conditions, and Establishing Hearing and Settlement Procedures, Docket No. ER08-386-000. In this Order, the Commission conditionally granted PATH an incentive rate package which included a Return On Equity ("ROE") of 14.3 percent, and the right to include 100 percent of prudently incurred Construction Work in Progress ("CWIP") in the rate base. On November 19, 2010, the Commission approved a settlement agreement between PATH and several parties regarding the proposed Formula Rate, and set the 14.3 percent ROE for rehearing.⁶ On October 7, 2011, a settlement intended to resolve all issues set for hearing in the November 19, 2010 Order was filed. Parties are currently awaiting an order from the Commission

⁶ Potomac-Appalachian Transmission Highline, LLC, 133 FERC ¶ 61,152 (2010)

on this latest settlement, which reduces the ROE to 12.4 percent effective January 1, 2011, and provides for refunds to ratepayers.

Subsequent to the Commission's conditional guarantees in 2008, PATH West Virginia Transmission Company, LLC ("PATH-WV") and PATH Allegheny Transmission Company, LLC ("PATH-AYE") (collectively "PATH"), embarked upon a promotional campaign intended to influence favorable consideration of its applications for the project before the West Virginia Public Service Commission, the Virginia State Corporation Commission and the Maryland Public Service Commission. In pursuit of this goal, PATH created, directed and financed front groups, financed an advertising campaign based on advocacy instead of education, lobbied various government officials and policymakers, and made additional expenditures, at ratepayers' expense, in excess of prudent, just and reasonable expenses, with the objective of promoting PATH and positively influencing approval of its state siting applications. PATH's promotional activities have also been in pursuit of repressing and maligning the forthright, knowledgeable, escalating public opposition to its project. This opposition to PATH culminated in public and regulatory support for a faster, cheaper and less destructive alternative to the PATH Project.⁷

On January 21, 2011, Keryn Newman and Alison Haverty filed the previous Challenge with the Commission pursuant to the Protocols.⁸ The previous Challenge presented probative evidence disputing recovery of over \$3 million due to accounting errors and imprudent expenditures.

After several recalculations, repeatedly postponing PATH's original in-service date from 2012 to 2015, PJM placed the PATH Project in abeyance on February 28, 2011, when competing, alternative projects alleviated reliability issues through PJM's 15-year planning

⁷ Mount Storm Doubts Rebuild, PJM id. Dominion b1507, b1507.1, FE (APS) b1507.2 and b1507.3 <http://www.pjm.com/planning/rtep-upgrades-status/backbone-status/mount-storm-doubts.aspx>

⁸ PJM OATT, Attachment H-19B, Section VII.

horizon.⁹ As a result, PATH immediately ceased its promotional campaign, which it had improperly designated as “public education.”¹⁰

In June 2011, PATH filed its 2010 ATRR true-up showing a revenue requirement of approximately \$24.6 million, and beginning in June of 2011, Ms. Newman and Ms. Haverty, as Interested Parties, began a series of Information Requests, pursuant to Section VI. of the Protocols in order to examine PATH’s 2010 Revenue Requirement and ensure that accounting errors and recovery of imprudent expenditures identified in the previous Challenge had not persisted. During the discovery period, PATH Counsel relied on refusal of reasonable requests for information and the attempted use of confidentiality protections to persist in efforts¹¹ to suppress information. Notwithstanding this obstruction, the limited responses received by the Interested Parties continued to illuminate a pattern of inaccurate and inconsistent expense recording. The responses also led Challengers to identify over \$2 million in imprudent and improper expenditures related to PATH’s sustained promotional campaign that were recovered from ratepayers. The accounting errors, imprudent and improper expenditures, and general advertising expenses improperly recouped from ratepayers were the subject of a Preliminary Challenge served upon PATH Counsel on November 23, 2011. Per the Protocols, PATH had until December 21, 2011, to resolve the issues raised by the Interested Parties.

On December 16, 2011, PATH LLC caused to be posted on the PJM website a second revision to the 2012 PTRR reflecting a revised 2010 True-up Adjustment to reflect some of the

⁹ See *Testimony of PATH Counsel Richard D. Gary before the Virginia State Corporation Commission*, March 17, 2011, admitting that Dominion’s Mount Storm-Doubs 500kV transmission line rebuild and the new Warren, Va. gas-fired generating facility coming on line obviated any need for the PATH Project in PJM’s planning process through at least 2026. Available at: <http://www.stoppathwv.com/documents/Gary-Testimony.pdf>

¹⁰ Answer of Potomac-Appalachian Transmission Highline, LLC to Keryn Newman & Alison Haverty’s Formal Challenge, February 10, 2011 (hereinafter “Answer”), pp. 4

¹¹ Previous Challenge, Section IV.E.

errors discovered by interested parties during the Review Period of the Annual Update.¹² The adjustment addressed an insignificant fraction of the issues raised by Ms. Newman and Ms. Haverty. Interested Parties received their first and only response to their lengthy and complex Preliminary Challenge in the final days of the Resolution Period.¹³ PATH has shown a lack of interest and good faith in working with the Interested Parties, who earnestly wished to resolve the issues during the allotted time period without burdening the Commission with a Formal Challenge. Had PATH Counsel utilized the Resolution Period provided in the Protocols¹⁴ as intended, some number of issues may have been resolved, thereby making the filing of a Formal Challenge with the Commission unnecessary.

We do not embark on this filing lightly, nor do we wish to waste the Commission's resources. However, the unabated volume of uncorrected accounting errors and imprudent expenditures resulting in unjust and unreasonable rates charged to consumers leave us little choice.

IV. DISCUSSION

PATH describes itself as a joint venture between American Electric Power Company, Inc. ("AEP") and FirstEnergy Corp., ("FE")¹⁵ organized to finance, construct, own, operate and maintain certain transmission upgrades approved by PJM as baseline reliability projects under the PJM Regional Transmission Expansion Plan (RTEP), collectively known as the PATH Project.

¹² Challengers suspect that PATH's limited corrections to the 2010 ATRR were not done in accordance with guidance provided in the Protocols, Sec. VIII., which directs that errors must be corrected in the Annual Update, and shall be reflected in the True-up Adjustment made as part of the next succeeding Annual Update. PATH did not perform the required correction to the Annual Update, but only to the true-up reflected in the 2012 PTRR.

¹³ See *Letter to Challengers from PATH regarding Preliminary Challenge*, December 19, 2011 available at <http://www.stoppathwv.com/documents/Preliminary%20Challenge%20Explanations.pdf>

¹⁴ PJM OATT Attachment H-19B Section VII.B.(1)

¹⁵ Allegheny Energy merged with FirstEnergy on February 25, 2011. However, during the year 2010 when the activities described took place, and the expenses herein challenged were incurred, Allegheny Energy was the correct legal name of this PATH partner.

PATH has exceeded its authority by assuming a role that it does not possess; that of a Regional Transmission Organization (“RTO”), Independent System Operator (“ISO”) or other not-for-profit grid operator, the appropriate provider of information and education related to grid reliability to elected officials, business leaders, the media, and the public at large.

In adopting this inappropriate role, PATH created and financed reliable power coalitions,¹⁶ and employed other means to shape public opinion about topics such as: the need for new transmission infrastructure; new traditional and renewable resources; conservation; safety; energy efficiency; alleged electricity shortages; the need for additional generation; improvement of transmission capacity; economic vitality; personal well-being; the promotion of stable electricity prices; over-reliance on any one source of energy; potential disruptions to the electric supply; productivity; public health; security; public policy goals; long-term energy planning and infrastructure construction; the role electric infrastructure plays in the viability of West Virginia; the future electricity needs of West Virginia, Virginia and Maryland; and the awareness of the wise use of natural resources for future generations.¹⁷ Many of these topics are far outside PATH’s core responsibilities as a transmission-only company, and therefore the expenses associated with activities on these topics undertaken to promote the PATH Project are not appropriately classified as operating expenses and recovered from ratepayers. These topics have been inappropriately utilized in an attempt to engender an unnecessary sense of public trepidation regarding the possible degradation of society if the PATH Project is not approved. This promotion of the PATH Project has been intended to garner public, institutional, governmental, political and regulatory acceptance of AEP and FirstEnergy’s for-profit venture, and as such the associated costs must be reclassified as non-operating expenses and removed from PATH’s revenue requirement.

¹⁶ Virginians for Reliable Energy, West Virginians for Reliable Power (or Energy) and Marylanders for Reliable Power

¹⁷ Answer pp. 13-15

In order to justify recovery of its promotional, non-operating and/or imprudent expenditures associated with this presumed role, PATH attempts to equate its expenditures with those of an ISO by repeatedly citing¹⁸ the much adjudicated proceeding of the Filing of ISO New England Inc. for Recovery of its 2006 Administrative Costs, Docket No. ER06-94-000 (October 31, 2005) (“ISO-NE”), where certain contested expenses, described as “lobbying”¹⁹ by the parties were found to be recoverable. However, the expenses at issue in ISO-NE are dissimilar and do not begin to encompass the broad range of promotional activities PATH participated in, and which have been subsequently challenged.

Furthermore, it is not germane for PATH to equate its actions and stature with that of ISO-NE for the purpose of recouping expenses more appropriately placed “below the line,”²⁰ and/or not prudently recoverable. PATH, and by extension its parent companies’ stockholders, financially benefits from every expenditure it places “above the line,” or tries to recover. The PATH Project is a *for-profit* venture and, if constructed, will provide its parent companies and their stockholders with a 12.4 percent return on equity for the expected life of the plant. The PATH parent companies have a distinct pecuniary interest in owning and constructing the PATH Project. ISO-NE is a *not-for-profit* entity and, as the Commission noted, “[i]n the absence of disparate ratepayer/shareholder interests that may exist for investor owned utilities, it is easier to see that the ISO/RTO is pursuing activities that benefit its ratepayers.”²¹ PATH assumes a role as surrogate for PJM simply because PJM selected the PATH Project as the preferred alternative for solving future reliability violations

¹⁸ Answer, footnotes 17, 20, 21, 24, 40, 52, 53, 55, and 59

¹⁹ Motion to Intervene and Protest of Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant in ISO-NE Section I : Statement of Issues (November 21, 2005)

²⁰ National Association of Regulatory Utility Commissioners’ instructions for determining if an account is above or below the line:

- ▲ The “line” is “Net Utility Operating Income.”
- ▲ Accounts above this line are “above the line”, i.e. recovered from ratepayers.
- ▲ Accounts below this line are “below the line”, i.e. recovered from shareholders.

²¹ *ISO New England, Inc.*, 117 FERC ¶ 61,070 at P 47 (2006)

and, while affecting this role, PATH engaged in activities of a dubious nature that we contend would *never* be undertaken by a non-profit grid operator, such as PJM, in order to promote a transmission project. The Commission also reminds that “[e]xpenditures incurred to influence the opinion of the public during the selection [of applicants prior to the certification] process have little or no benefit to the ratepayers, and therefore must be borne by stockholders.”²²

The promotional expenses of investor-owned utilities incurred to sway public opinion as a means to attempt to influence the required certification of an entity, such as FERC, have been ruled to have little to no benefit to the ratepayers. Therefore, it is equitable to determine that the same type of promotional expenses incurred by investor-owned utilities have no value to the ratepayers if they are contracted to influence public opinion during the approval process of *any* entity, such as a[n] RTO/ISO, a state public service commission, or other regulatory body whose permits/certifications are vital to the for-profit venture’s success. It is the nature of the promotional activities in relation to role of the entity carrying them out that must be judged, while avoiding getting bogged down in the particular venue in which the activities are undertaken in order to attempt to influence outcome.

PATH’s significant promotional expenditures to market PATH, not as the preferred but as the *only* solution to projected reliability issues, have provided no discernible benefit to ratepayers in the form of lower rates, reliability, or any other quantifiable benefit. The PATH Project was accepted by PJM as the preferred alternative for solving predicted future reliability issues in 2007. However, when competing, alternative projects alleviated reliability issues through PJM’s 15-year

²² *Northern Border Pipeline Company*, 23 FERC ¶ 61,213, at 61,439 (1983) (Northern Border). Challengers understand the “selection process” prior to certification to include the Certificate of Need or Certificate of Public Convenience and Necessity process.

planning horizon,²³ the PATH Project was placed in abeyance and an alternative was approved by PJM.

Furthermore, no determination of quantifiable benefit to ratepayers flowing from construction of the PATH Project is possible due to the fact that PATH was approved by PJM without any study of the effect of PATH on congestion costs,²⁴ or a determination of PATH's impact on any cost to customers in any PJM area.²⁵

PATH's promotional activities, masquerading as education regarding grid reliability, and purported to be "broad-based public relations activities intended to sustain and support the core responsibilities of a utility to the benefit of ratepayers and the public at large,"²⁶ were not planned to continue following state siting approval,²⁷ and moreover, ceased immediately upon abeyance of the Project. Therefore, "broad-based" and "sustained" are not accurate descriptions, and "targeted efforts to influence opinions during a selection or approval process"²⁸ is a more apt characterization. There is a distinction, and PATH's actions illustrate that education about grid reliability was never the aim of the effort, only promotion of the for-profit PATH Project.

Ultimately, the public was provided with an alternative option for alleviating reliability issues that

²³ See *Testimony of PATH Counsel Richard D. Gary before the Virginia State Corporation Commission*, March 17, 2011, admitting that Dominion's Mount Storm-Doubs 500kV transmission line rebuild and new Warren County, Va. gas-fired generating facility coming on line obviated the need for the PATH Project in PJM's planning process through at least 2026. Available at: <http://www.stoppathwv.com/documents/Gary-Testimony.pdf>

²⁴ West Virginia Public Service Commission, Case 09-0770-E-CN Discovery Response Sierra-V-2, September 8, 2009, p. 3, <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=278158&NotType=%27servicelist%27&CaseServiceListID=25810>

²⁵ *Id.*, Sierra-V-12, p. 13

²⁶ Answer p. 11

²⁷ *Supplemental Direct Testimony of Milorad Pokrajak, July 8, 2010*, Public Service Commission of West Virginia Case 09-0770-E-CN, Statement A, Schedule 2, pp. 3-4, shows PATH's projected 2016 Operation and Maintenance Expenses with a zero budget for Accts. 930.1 (Advertising), 930.2 (Memberships), and Acct. 923 (Outside Services) is reduced from levels required during permitting by 50% - roughly the charges of public relations contractor Charles Ryan Associates. Statement A, Schedule 7, p.1 shows PATH's projected 2016 Other Income Deductions with a zero budget for Accts. 426.1 (Donations) and 426.4 (Lobbying). Available at: <http://www.stoppathwv.com/documents/PATH-SupplementalTestimony-WVPSC.pdf>

²⁸ Answer p.11

was cheaper, faster and less destructive than the PATH Project, and the PATH Project can no longer be justified, even by its most ardent supporters.

A. PATH’s promotional expenditures belong “below the line” in non-operating accounts unless and until sufficient showing is made that they benefit ratepayers.

In accordance with Section VII.A(1)(b) of the Protocols, we hereby challenge whether the ATRR includes only properly recorded data in accordance with Section III and IV of the Protocols.

PATH’s promotional expenditures properly belong “below the line” in non-operating accounts. Only after PATH has made a sufficient showing that these expenditures benefit ratepayers would the Commission, alone, have the authority to allow reclassification of these expenses as “above the line,” recoverable operating expenses. In its FERC Form-1 and subsequent ATRR, PATH places the promotional expenses challenged in the succeeding sections “above the line” in operating accounts in order to recover the expenditures without a further showing. This is a grievous error, and is contrary to Commission precedent and accounting guidance, and must be rectified before any subsequent determination can take place.

The Commission and the courts have long held that expenditures of the nature challenged herein must not be “presumed recoverable in all instances,”²⁹ but that only after “a further showing”³⁰ could the utility locate them “above the line” for recovery. “But the choice is solely that of the Commission.”³¹ The authority for this determination is not PATH’s, though they have incorrectly presumed it to be and taken that authority. After correction has been made and the challenged expenditures are properly placed “below the line,” the possible recovery of these

²⁹ *Braintree Elec. Light Dept. v. Fed. Energy Reg. Commn.*, 550 F. 3d 6 (D. DC 2008)

³⁰ *Id.*

³¹ *Southwestern Elec. Power Co. v. Fed. Power Commission*, 304 F.2d 29 (5th Cir. 1962)

expenditures must be addressed during a further showing of evidence that the expenditures accrue benefit to ratepayers.

We are confident that the current Commission will echo the United States Court of Appeals Fifth Circuit in their 1962 affirmation of an earlier Federal Power Commission's determination that:

"Here it may be said that these petitioners are not being denied the right to charge the cost of [these promotional activities] as operating expenses because they engage in constitutionally protected activities; they are simply being required to keep their books in such manner as to indicate that presumptively those activities are to be paid for out of their own pockets rather than passed on to the consumer."³²

B. PATH's promotional expenditures are not just and reasonable.

PATH's promotional activities, designed to influence state decision makers during the approval process through the advocacy and third-party influence of elected representatives, state and federal agencies, the business community, the media, and public opinion, rely heavily on the utilization of propaganda devices, not factual education that would allow the audience to form logical conclusions on their own after being provided with all available facts.³³

The Challengers fully appreciate the loaded nature of the word "propaganda," however we respectfully ask the Commission to set aside the inflammatory nature of the word and examine the academic study of propaganda and the probative evidence of the nature of PATH's promotional activities, which are most accurately discerned through the understanding of the social science of propaganda.

Propaganda is the manipulation of public opinion, either positively or negatively, in order to persuade through insidious, emotional manipulation and a tightly controlled rendition of only

³² *Id.*

³³ "I am aware that the word "propaganda" carries to many minds an unpleasant connotation. Yet whether, in any instance, propaganda is good or bad depends upon the merit of the cause urged, and the correctness of the information published." Bernays, Edward. *Propaganda*. New York: H. Liveright, 1928.

certain facts that support the desired conclusion. Propaganda is defined as “the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person,”³⁴ and relies on deployment of the seven common propaganda devices identified by the Institute for Propaganda Analysis in their 1938 book, *Propaganda Analysis*.³⁵

These seven devices are:

1. **Transfer:** Transfer, also known as association, is a technique of projecting positive or negative qualities (praise or blame) of a person, entity, object, or value (an individual, group, organization, nation, patriotism, etc.) to another in order to make the second more acceptable or to discredit it. It evokes an emotional response, which stimulates the target to identify with recognized authorities. Often highly visual, this technique often utilizes symbols, for example images of the American flag, to inspire feelings of patriotism to be associated with an idea or proposal.
2. **Testimonial:** This technique is used to associate a respected person or expert with a product or cause through endorsement, thereby giving it their “stamp of approval,” with the intent that the non-expert public will support the product or cause without logical contemplation.
3. **Card Stacking:** Card stacking is a technique that seeks to manipulate audience perception of an issue by emphasizing one side of an argument and repressing another. Following are some examples of the technique: Creating media events that emphasize a certain view; using one-sided testimonials; and ensuring that critics are not heard. This technique is utilized to make the best case possible for one side and the worst for the opposing viewpoint by carefully using only those facts that support the preferred side of the argument while attempting to lead the audience into accepting the facts as a conclusion. In

³⁴ Merriam-Webster, 2011

³⁵ Institute for Propaganda Analysis, *Propaganda Analysis*, (New York: Columbia University Press, 1938).

other words, the propagandist stacks the cards against the truth. Card stacking is the most difficult technique to detect because it does not provide all of the information necessary for the audience to make an informed decision.

4. **Bandwagon:** Use of this technique persuades the audience to follow the crowd. This device creates the impression of widespread support. It reinforces the human desire to be on the winning side. With the aid of all the other propaganda devices, all of the artifices of flattery are used to harness the fears and hatreds, prejudices and biases, convictions and ideals common to a group. Thus is emotion made to push and pull us as members of a group onto a “bandwagon.”
5. **Plain Folks:** A Plain Folks argument is one in which the speaker presents him or herself as an “average Joe,” a common person who can understand and empathize with a target audience's concerns. The most important part of this appeal is the speaker's portrayal of himself as someone who has had a similar experience, and knows why they may be skeptical or cautious about accepting the speaker's point of view. In this way, the speaker gives the audience a sense of trust and comfort, believing that the speaker and the audience share common goals and that the audience should therefore agree with the speaker.
6. **Glittering Generalities:** Glittering generalities are emotionally appealing words so closely associated with highly valued concepts and beliefs that they carry conviction without supporting information or reason. Such highly valued concepts attract general approval and acclaim. Their appeal is to emotions such as love of country and home, and desire for peace, security, freedom, glory, and honor. They ask for approval without examination of the reason.
7. **Name-Calling:** The name-calling technique introduces fear and arouses prejudices in the target audience with the intention that the bad names will cause the targets to construct a

negative opinion about a group or set of beliefs or ideas that the propagandist wants the targets to denounce. The method is intended to provoke conclusions about a matter apart from impartial examinations of facts. Name-calling is a substitute for a rational, fact-based argument against an idea or belief.

PATH's unbridled spending of funds on a promotional campaign was intended to influence support for its own project and disparage opposition and alternative projects during the state approval process. PATH's actions in this regard are imprudent, self-serving, and went far beyond what a prudently-run company would knowingly spend, as the promotional expenses of a company must be added to the ultimate cost of its product, and provided no benefit to the ratepayers from whom the expense was subsequently recovered. In the following sections, we will demonstrate how PATH utilized propaganda devices, and not education, to influence opinions regarding its project.

1. Challenge in accordance with Section VII.A.1.h of the Protocols: The prudence of the actual costs and expenditures

On the issue of prudence, *Violet v. FERC*³⁶ determined the standard of prudence to be, "...whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time."³⁷ "Reasonable" is defined as sound judgment performed in a fair and sensible manner. "In good faith" is defined as honesty or sincerity of intention.

To gain public and regulatory support for the approval of its project, PATH created, financed and directed front groups; funded an advocacy campaign utilizing recognized propaganda devices which was directed at private groups; and purchased memberships in Chambers of Commerce, lobbying, and industry groups in order to promote support and influence in favor of the

³⁶ *Violet v. FERC*, 800 F.2d 280 (1st Cir.) (1986)

³⁷ *Id.* at 12

PATH Project. PATH contracted with a public relations/lobbying firm to attempt to influence the decision of the Loudoun County Board of Supervisors regarding the release of a conservation easement in PATH's proposed right-of-way. PATH also contracted the services of a registered West Virginia lobbyist and Chairman of the West Virginia State Democratic Party to meet with stakeholders in order to influence support for the PATH Project and recovered these lobbying expenses from ratepayers. PATH purchased the support of a wildlife non-profit, intending to use its name as a sponsor of the project in a future marketing campaign.

PATH's lack of public acknowledgement of its financial and/or strategic responsibility for these programs infers its own internal assessment that these activities may be perceived as furtive and inherently self-serving, even dishonest. It also demonstrates PATH's understanding that public knowledge of its involvement in these activities would result in unfavorable public opinions of both parent companies and the proposed PATH Project. To carry out these programs, some of which rely on clandestine meetings and agreements with influential individuals and groups in a position to attempt to influence the decision of state public service commissions and/or public opinion using propaganda techniques, cannot be judged as fair, sensible, or honest. Therefore, the expenditures further detailed in subsections a. - g. below are not prudent and any recovery should be refunded to the ratepayers with interest.

a. Reliable Power Coalitions

Invoices totaling \$622,242.07,³⁸ designated and recovered as expense in FERC regulatory account 923, represent expenditures for PATH-created, directed and funded reliable power/energy coalitions in Maryland, Virginia and West Virginia. The three reliable power/energy coalitions being wholly financed by ratepayers through PATH's Formula Rate and managed by PATH and its contractors are: West Virginians for Reliable Power (or Energy), Marylanders for Reliable Power,

³⁸ See Exhibit-A, *Charles Ryan Assoc. Coalition Expenses for 2010 in Account 923*

and Virginians for Reliable Energy (collectively the “coalitions”). The costs of these groups are not prudent expenditures as defined in *Violet v. FERC*, and therefore should not be recovered from ratepayers under PATH’s Formula Rate.

We hereby incorporate evidence³⁹ provided regarding the reliable power coalitions in the Formal Challenge of PATH’s 2009 ATRR to state:

- ⤴ The coalitions are not legally registered, organized, independent entities with Articles of Incorporation, Bylaws, Officers or legally recognized members.
- ⤴ The coalitions are wholly financed by PATH.
- ⤴ The purpose of the coalitions is to build public advocacy for, and shape public opinion about, the PATH Project.
- ⤴ The coalitions’ goals and activities are directed and managed by PATH through contracted public relations firms, whose employees serve as coalition spokesmen and organizers. The coalitions do not exist as independent bodies, but are artificial constructs carefully orchestrated by public relations contractors to create an appearance of public support for the PATH Project. The public relations contractors recruited legitimate entities to sign up for a “membership” that requires no action or commitment on the part of the member, except to allow the use of its name as a “member” supporting the coalition’s goals.⁴⁰

³⁹ Previous Challenge, Section VI.A.1.

⁴⁰ See guidelines for coalition building - Gilbeck, Paula. Energize Weekly, Electric Utility Consultants, Inc., "Coalition Building: A Critical Step in Getting Your Project Built" Last modified April 20, 2011. Accessed December 8, 2011. http://www.euci.com/energize/4-20-11_Coalition_building.pdf?q=5951f381454Yj0205.

- ▲ The coalitions are front groups⁴¹ and/or “astroturf,”⁴² which are designated as improper conduct and malpractice under industry ethics codes.⁴³

PATH continues its absurd charade that it is merely “a member”⁴⁴ of the reliable power coalitions, when PATH’s own contracts and purchase orders⁴⁵ incontrovertibly belie this claim. The reliable power coalitions were created by public relations contractors engaged by PATH to promote the PATH Project, and have been utilized as an advocacy-building tool. Coalition management, goals and activities are directed by PATH through public relations firm contractors and subcontractors.

The Coalitions have publicly claimed that they are not connected to the PATH Project, nor advocating for PATH or any particular project, yet they receive all their financing and direction from PATH.

PATH describes the coalitions as follows:

“West Virginians for Reliable Energy understands the fundamental role electric infrastructure plays in the economic viability of our state. From energy independence and national security, to local economic development and retention of our existing businesses, access to a reliable source of power is crucial for all West Virginians. The coalition was formed to educate the West Virginia marketplace on this critical issue and to encourage electrical transmission infrastructure improvements in our region.

Marylanders for Reliable Power is a coalition of businesses, organizations and citizens who want to ensure that Maryland's future electricity needs are met through additional generation of electricity from traditional and renewable sources, improvement of transmission capacity and conservation. The coalition works to inform the public of the

⁴¹ “...an organization that purports to represent one agenda while in reality it serves some other party or interest whose sponsorship is hidden or rarely mentioned. The front group is perhaps the most easily recognized use of the third party propaganda technique.” http://www.sourcewatch.org/index.php?title=Portal:Front_groups

⁴² “Astroturf refers to apparently grassroots-based citizen groups or coalitions that are primarily conceived, created and/or funded by corporations, industry trade associations, political interests or a public relations firm.” <http://www.sourcewatch.org/index.php?title=Astroturf>

⁴³ Professional Standards Advisory PS-7 (2004; Revised October 2008) Engaging In The Use Of Deceptive Practices While Representing Front Groups - The Public Relations Society of America www.prsa.org/AboutPRSA/Ethics/ProfessionalStandardsAdvisories/PS709.pdf

⁴⁴ Answer, p. 15

⁴⁵ Previous Challenge, Exhibit-P, *Contracts and Purchase Orders*

critical need to act so that electricity is available to support the state's productivity, public health and security.

Virginians for Reliable Energy is a statewide coalition of individuals and businesses with a variety of interests in energy related issues who agree on the need for a public policy framework that will ensure sufficient supplies of reliable and affordable energy to support the quality of life and growing economy of the Commonwealth. Coalition members believe an “all of the above” multi-faceted energy policy is critical to the economic vitality of our Commonwealth and nation. This approach will enhance Virginia’s energy security, protect against potential disruptions from over-reliance on any one source, support protection of our environment and promote stable energy prices.”⁴⁶

Despite PATH’s multiple claims that “the mission and corresponding activities of these coalitions are intended to educate the public...,”⁴⁷ the coalitions were based, and their activities centered, in Charleston, West Virginia, Annapolis, Maryland, and Richmond, Virginia, far removed from the majority of the proposed location of the PATH Project and the public opposition to the project. True education would have been more effective directed at affected individuals and those opposed to the project, however, PATH centered its coalition activities in state capitals where they would be highly visible to and influential upon state legislators and the public utility commissions considering PATH’s project applications.

Through information responses, a true picture emerges of who these groups are and why they were formed. PATH maintains that coalition goals are determined, “[b]y each coalition’s steering committee which is made up of coalition members.”⁴⁸ However, PATH also admits that, “The PATH Team held bi-weekly conference calls to review/discuss activities of the Coalitions and PEAT and their spokespersons.”⁴⁹ And, “[f]or the Coalitions, Charles Ryan Associates managed the overall efforts of the PATH Education and Awareness Team, Maryland Reliable Power

⁴⁶ Information Response Newman2011-19.1(October 19, 2011)

⁴⁷ Answer, p. 15

⁴⁸ Information Response Newman2011-19.4 (October 19, 2011)

⁴⁹ Information Response Newman2011-18.2, 2.c.ii. (October 19, 2011)

Coalition, West Virginians for Reliable Power and Virginians for Reliable Energy.”⁵⁰ When asked to name the officers, directors and members of the coalition steering committees, PATH refused to answer.⁵¹ PATH has not provided one scintilla of evidence to support its claim of mere “membership” in the coalitions; that the coalitions are legal entities that actually exist; or that “[t]he expenses incurred by PATH in connection with participation in the Reliable Power coalitions benefit ratepayers, and as such, represent prudently recoverable expenses.”⁵² Furthermore, when the PATH Project was suspended by PJM on February 28, 2011, and PATH discontinued its financial support of the coalitions,⁵³ at which time “the PATH Companies [were] no longer active members of the coalitions and, therefore, [were] not involved in any ongoing activities of the coalitions,”⁵⁴ the Maryland and West Virginia coalitions ceased to exist⁵⁵ and the Virginia coalition was re-purposed to focus on the activities of “industry partner”⁵⁶ Dominion Resources and new partners Columbia Gas and Old Dominion Electric Cooperative.

It would be preposterous to accept coalition websites owned, designed, maintained and hosted by PATH public relations contractor Charles Ryan Associates as probative evidence of the legitimacy of the coalitions.⁵⁷ As well, PATH’s claim⁵⁸ that members of Marylanders for Reliable Power include the Maryland Public Service Commission, PJM, Edison Electric Institute, the

⁵⁰ Information Response Newman2011-15.1, 3. (September 21, 2011)

⁵¹ Information Response Newman2011-19.3 (October 19, 2011)

⁵² Answer, p. 16

⁵³ Information Response Newman2011-19.7 (October 19, 2011)

⁵⁴ Information Response Newman2011-19.11 (October 19, 2011)

⁵⁵ While the West Virginians for Reliable Energy’s website is still online, unlike the Marylanders for Reliable Power’s website which has ceased to exist, it should be noted that West Virginians for Reliable Power’s website has not been updated since February of 2010, despite the fact that PATH paid contractor Charles Ryan Associates over \$50,000 for the maintenance of only five websites in 2010. (Websites include one for each Coalition, one for PEAT, and the main PATH Transmission website.)

⁵⁶ Virginians for Reliable Energy membership list <http://www.energizevirginia.com/coalition/>

⁵⁷ Answer, pp. 13-16

⁵⁸ Answer, p. 16

United States Department of Energy and the North American Electric Reliability Corporation is simply false.⁵⁹

The public relations contractors behind the coalitions utilized the following propaganda devices to recruit members in order to present an appearance of widespread public support for the PATH Project, which was intended to influence state public service commission approvals:

- ⤴ Bandwagon: By creating a fictional “grassroots” coalition of businesses, legislators, former regulators and individuals, PATH attempted to convince the audience to join other knowledgeable entities already on the “bandwagon” to support the PATH Project and prevent future “blackouts and brownouts.”⁶⁰
- ⤴ Card stacking: By basing the coalitions in geographical areas far removed from the proposed location of the PATH Project (where knowledge about the project was limited) and by holding coalition events in closed groups, PATH presented only those facts that supported the conclusion that its Project was “needed to keep the lights on,”⁶¹ thereby “stacking the deck” for the target audience to join the coalition and support the project without a complete set of facts to make an informed decision.
- ⤴ Plain folks: By purporting to be a spontaneous grassroots effort to ensure a reliable electric supply, PATH attempted to gain the support of individuals who would be drawn to the efforts of other citizens just like themselves, and who would not be supportive of the efforts of an investor-owned utility to expand their operations and earnings by promoting the PATH Project.
- ⤴ Testimonial: PATH utilized a series of well-paid event speakers such as Kerry Stroup of PJM, John Mark Robinson of FERC, and Susan Eisenhower, an expert on international

⁵⁹ See Exhibit-B, *Membership list from now defunct Marylanders for Reliable Power website*, www.marylandersforreliablepower.com

⁶⁰ See Exhibit-N, *PATH Advertising Copy 2010*

⁶¹ *Id*

security and relations between Russia and the U.S and granddaughter of President Dwight Eisenhower, to provide “expert” testimonial to target audiences contending that the transmission grid must be expanded or blackouts will ensue.

- ▲ Glittering generalities: By incorporating topics such the economy, security, personal health, safety and well-being and their dependence on electricity to function into its programs, PATH equated these highly-valued concepts with the need for its project.
- ▲ Name-calling: By presenting the idea that societal chaos will ensue unless citizens support expansion of the transmission grid, PATH played on the fears of citizens to force them to an emotional and irrational conclusion that the PATH Project was necessary to maintain their quality of life.

Within the coalition expenses, PATH has improperly booked advertising and donation expenses to Account 923, Outside Services. Coalition advertising expenses in the amount of \$14,938.65, plus an additional unknown amount for the Marylanders for Reliable Power and Virginians for Reliable Energy advertising that PATH refused to divulge,⁶² should have properly been booked to General Advertising Account 930.1. Only then could the expenses be evaluated and classified as recoverable, if found to be safety, education, siting and outreach related advertising. Donations in the amount of \$950.00 should have properly been booked to Account 426.1 and not recovered through the Revenue Requirement. These third party expenses, and many others, were billed to PATH via invoices from PATH public relations contractor Charles Ryan Associates under the line item “Expenses,” and were improperly booked to Account 923 without evaluation of their nature or purpose. Also among the expenses of Charles Ryan Associates are many registrations for conferences, trade shows and other events that appear more than once and are suspected to be duplicate expenses charged to PATH multiple times in different invoices.

⁶² Information Response Newman2011-22 (November 14, 2011)

Despite PATH's claim that "review of each invoice is performed to verify that support for expense reimbursement is included,"⁶³ it appears that no real scrutiny has been given to the non-specific line item "Expenses" on Charles Ryan Associates invoices.

Payments for promotional public relations initiatives that are designed to hide the sponsorship of PATH, and are designated as improper conduct and malpractice under industry ethics codes, are not prudent expenditures. These coalition expenses, intended solely to influence public opinion and thereby state approvals for the PATH Project, cannot be considered a necessary, sensible and trustworthy component of the prudently recovered construction costs of a project such as PATH and provide no benefit to ratepayers. The financing of front groups using funds that are recovered from ratepayers should not be judged prudent, and consequently is not just and reasonable.

PATH erroneously placed the expenses of the coalitions "above the line" for inclusion in its Revenue Requirement without a sufficient showing of benefit to ratepayers. Commission precedent instructs designating promotional, non-operating expenses such as these "below the line" so that they may be objectively evaluated by *the Commission* for benefit to ratepayers, and if found to provide sufficient benefit, *the Commission* would classify them "above the line."

For expenses properly placed "above the line," the standard of prudence defined in *Violet v. FERC* requires that the company act in good faith at the time the expenditure is made. PATH has not acted in good faith regarding the coalitions. Therefore, we request that all funds used for this purpose by PATH be refunded to ratepayers, with interest.

b. PATH Education Awareness Team ("PEAT")

⁶³ Information Response Newman2011-18-2, 4.j. (October 19, 2011)

Invoices totaling \$539,810.04,⁶⁴ designated and recovered as expense in regulatory account 923, represent expenditures for PATH's PEAT program in Maryland, Virginia and West Virginia. These are not prudent expenditures as defined in *Violet v. FERC* and should not be recovered from ratepayers under PATH's Formula Rate.

We hereby incorporate evidence⁶⁵ provided regarding the PEAT Program in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ The tasks described in contracts with PEAT spokesmen are more consistent with public relations advocacy than education.
- ⤴ PEAT's alleged "public education"⁶⁶ campaign has not been carried out in public venues.
- ⤴ Contrary to claims of educating the public, PEAT declined an invitation from Sugarloaf Conservancy, Inc. to provide education at a public forum.
- ⤴ The PEAT Program is an advocacy-focused campaign targeted at private audiences, with the goal of shaping the opinion of the business community in order to influence state approvals for the PATH Project.

PATH Counsel describes the PEAT program in the following manner:

"PEAT provides services to educate the public about the PATH Project and its benefits."⁶⁷

Paid PEAT spokesmen described the PEAT program to the media differently:

"Martin said those who support the project are making a push to have their voices heard as well. 'What the PATH Awareness Team is doing is getting out the real facts,' he said."⁶⁸

⁶⁴ See Exhibit-C, *Charles Ryan Assoc. PEAT Expenses for 2010 in Account 923*

⁶⁵ Previous Challenge, Section IV.A.2.

⁶⁶ Answer, p. 16

⁶⁷ Answer, p. 16

⁶⁸ The Journal, Martinsburg, West Virginia (August 5, 2009)

“Frisby, a former chairman of the Maryland Public Service Commission, is heading PEAT. The group was formed to answer consumer concerns about the Potomac Appalachian Transmission Highline.”⁶⁹

“To help combat what they perceive as “misinformation” about PATH, Allegheny Electric and AEP have created the PATH Education and Awareness Team, or PEAT.”⁷⁰

“PEAT, an acronym for PATH Education and Awareness Team, is a joint venture financed by Allegheny Energy and America Electric Power, builders of the proposed power line, in answer to its critics.”⁷¹

“Miller, who was one of the three SCC commissioners from 1996 to 2006, is currently part of the PATH Education and Awareness Team. He is traveling the state for Allegheny Energy and American Electric Power, trying to convince civic and trade groups of the need for the line.”⁷²

It can be determined from the statements of PEAT spokesmen that the purpose of the program was to counter the release of factual information about the PATH Project that was not flattering, and to cast aspersions upon PATH opposition groups.

PATH states that the goals of PEAT were determined by “the PATH Steering Committee,”⁷³ however they refused to name the members of this committee. PATH also admits that, “[t]he PATH Team held bi-weekly conference calls to review/discuss activities of the Coalitions and PEAT and their spokespersons.”⁷⁴

When asked to describe any differences between the goals of PEAT and the Coalitions and explain the necessity for two separate, purported public education programs supporting the PATH Project and amounting to a combined expense to ratepayers of over \$1M per year, PATH counsel declined to answer.

⁶⁹ The Frederick News-Post, Frederick, Maryland (August 4, 2009)

⁷⁰ The Shepherdstown Chronicle, Shepherdstown, West Virginia (September 4, 2009)

⁷¹ The Herald-Mail, Hagerstown, Maryland (August 5, 2009)

⁷² The Winchester Star, Winchester, Virginia (February 2, 2011)

⁷³ Information Response Newman2011-19.10 (October 19, 2011)

⁷⁴ Information Response Newman2011-18.2, 2.c.ii. (October 19, 2011)

PEAT's now defunct website⁷⁵ contained a prominent invitation on every page to "Sign the Petition" to support the PATH Project. A petition supporting the project aggregated by PEAT is more characteristic of advocacy than education.

PATH asserts, in its Answer to the previous Challenge, that "PEAT is necessary, relevant and beneficial to the PATH Project."⁷⁶ However, discernible benefits to the ratepayers are not identified, let alone quantified. Also in the Answer, PATH demonstrates its misunderstanding of the differences between targeted efforts to influence the opinion of public officials during a selection or approval process and broad-based public relations activities that are directly related to a utility's core responsibilities⁷⁷ by asserting that since the PATH Project had "already been vetted and approved" by PJM, the activities of PEAT would have no influence on the ongoing state public service commission permit approval process. This is disingenuous; it is this exact approval process that PEAT was designed and implemented to influence.

The public relations contractors managing the PEAT Program utilized the following propaganda devices to discredit opposition and influence the business community to support the PATH Project, thereby presenting an appearance of widespread public support for the PATH Project which was, in turn, intended to influence state public service commission approvals:

- ⤴ Card stacking: By holding their events in private venues, PEAT ensured that only their version of "the real facts"⁷⁸ was heard by target audiences, therefore "stacking the deck" for targets to support their project.
- ⤴ Testimonial: The PEAT Program was represented by several former public service commissioners from Virginia and Maryland, who were well paid for their endorsement of the PATH Project. Other paid spokesmen included well-known local businessmen. By

⁷⁵ www.pathawareness.com

⁷⁶ Answer, p. 17

⁷⁷ *ISO-New England Inc.*, 117 FERC ¶ 61,070 (2006) ("ISO-NE") at P 49.

⁷⁸ *The Journal*, Martinsburg, West Virginia (August 5, 2009)

utilizing former regulators to endorse the PATH Project, PEAT presented the idea that the public service commission was supporting the project, and therefore the non-expert public should follow their lead.

- ⤴ Name-calling: The purpose of PEAT was to counter the public relations campaigns of grassroots citizens' opposition groups. By claiming to have not just "the facts," but "the *real facts*," PEAT vilified the opposition as uninformed, or worse yet, purposefully misleading. Instead of debating the facts and allowing the public to form a rational opinion, PATH attempted to discredit and drown out the opposition.
- ⤴ Bandwagon: Target audiences were urged to "sign the petition" to support the PATH Project and join other businesses who were supporting the project to, ostensibly, protect their business interests and increase their profitability.
- ⤴ Transfer: By utilizing former public service commissioners as spokesmen, PEAT created the assumption that, since former commissioners supported the project, current commissioners would also. PATH transferred the public's respect for the state commissions' expertise to respect for its project.
- ⤴ Glittering generalities: PEAT used glittering generalities and skewed statistics to support its contention that unless its project was constructed, the productivity and profits of businesses would be threatened by loss of electric service, i.e. "brownouts and blackouts."⁷⁹

Within the expenses of PEAT, donations in the amount of \$4,950.00 should have properly been booked to Account 426.1 and not recovered through the Revenue Requirement. These third party expenses, and many others, were billed to PATH via invoices from PATH public relations contractor Charles Ryan Associates under the line item "Expenses," and were improperly booked

⁷⁹ See Exhibit-D, *Winchester Star* article, "Power companies make case for PATH," February 2, 2011- for example of misleading "facts" about the need for the PATH Project. This article was published a mere three weeks before the PATH Project was put in abeyance by PJM. Van Meter, Val. "Power Companies make case for PATH." *Winchester Star*, February 2, 2011.

to Account 923 without evaluation of their nature or purpose. Despite PATH's claim that "review of each invoice is performed to verify that support for expense reimbursement is included,"⁸⁰ it appears that no real scrutiny has been given to the non-specific line item "Expenses" on Charles Ryan Associates invoices.

In addition to the amounts relating to coalition and PEAT expenses booked to Account 923, PATH booked expenses in the amount of \$51,242.14 to Account 921, meals, traveling and incidental expenses, for costs incurred by PATH parent company Allegheny Energy's External Affairs Department employees for their travel, meals and other expenditures associated with, "employee attendance at Chamber meetings/hearings/conferences where PATH was discussed."⁸¹ These expenses were incurred to provide support for PATH's imprudent coalition and PEAT programs and should be considered a component of these programs. When asked to elaborate on meals and other entertainment expenses reimbursed, PATH refused to answer.⁸² It is unclear whether these expenses are related to entertainment expenses which the Commission has disallowed from recovery.⁸³

An additional expenditure of \$9,000, invoiced to PATH as a third-party expense by Charles Ryan Associates and booked to regulatory account 923, was made to the law firm owned by PEAT spokesman Clarence Martin, Martin & Seibert, L.C., for "legal review of withdrawal of Virginia Application and SCC Evaluation of withdrawal request."⁸⁴ When questioned regarding Martinsburg, West Virginia-based law firm Martin & Seibert's involvement with PATH's Virginia SCC application, PATH counsel responded:

⁸⁰ Information Response Newman2011-18-2, 4.j. (October 19, 2011)

⁸¹ Information Responses Newman2011-11.2 and Newman2011-11.12 (September 6, 2011)

⁸² Information Response Newman2011-16.5 (September 15, 2011)

⁸³ *ISO-New England Inc.*, 117 FERC ¶ 61,070 (2006) ("ISO-NE") at P 49.

⁸⁴ Information Response Newman2011-15.1, Attachment G (September 21, 2011)

“Clarence Martin, a member of Martin & Seibert, L.C., was a member of PEAT. Neither he nor Martin & Seibert, L.C. provided legal services for the PATH Project. Mr. Martin reviewed the final Virginia application withdrawal documents in his role as a member of PEAT, not as an attorney representing the PATH Companies before the Virginia State Corporation Commission. Because his review was not related to the preparation of the filing, it is not properly considered CWIP or a regulatory expense.”⁸⁵

PATH also refused a request for copies of documents produced by Martin & Seibert that generated this expense.

It is unclear what purpose Martin’s review of Virginia SCC documents served that could not have been accomplished by PATH’s legal counsel of record in the Virginia case, who had been paid to produce the original documents. The supplementary expense for Martin’s legal review was not prudent and provided no benefit to the ratepayers who financed it.

The cost of PEAT, intended solely to influence the opinion of the business community and elected officials, and thereby state approvals for the PATH Project, cannot be considered a necessary and sensible component of the prudently recovered construction costs of a project such as PATH, and provides no corresponding benefit to ratepayers. The financing of targeted efforts to influence the opinion of public officials during an approval process using funds that are recovered from ratepayers should not be judged prudent, and consequently not just and reasonable.

PATH erroneously placed the PEAT expenses “above the line” for inclusion in its Revenue Requirement without a sufficient showing of benefit to ratepayers. Commission precedent instructs designating promotional, non-operating expenses such as these “below the line” so that they may be objectively evaluated by *the Commission* for benefit to ratepayers, and if found to provide sufficient benefit, *the Commission* would classify them “above the line.”

For expenses properly placed “above the line,” the standard of prudence defined in *Violet v. FERC* requires that the company act in good faith at the time the expenditure is made. PEAT was a promotional, advocacy-building tool masquerading as public education and was not undertaken in

⁸⁵ Information Response Newman2011-18.2, 9. a. (October 19, 2011)

good faith. Therefore, we request that all funds used for this purpose by PATH be refunded to ratepayers, with interest.

c. Memberships

Invoices, totaling \$56,061.33⁸⁶ designated and recovered as expense in regulatory account 930.2, represent expenditures for PATH's "memberships" in various Chambers of Commerce, Rotary Clubs, industry interest, local government and lobbying groups. These are not a prudent expense as defined in *Violet v. FERC* and should not be recovered from ratepayers under PATH's Formula Rate.

We hereby incorporate evidence⁸⁷ provided regarding PATH's memberships in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ Some of PATH's memberships in industry groups are for industries that are far outside PATH's business interests.
- ⤴ PATH's memberships for the purposes of "corporate stewardship"⁸⁸ are more properly donations and are imprudent expenditures that should not be recovered from ratepayers.
- ⤴ PATH's memberships for the purposes of "educating business leaders about PATH"⁸⁹ are expenditures directly related to purchasing access to target audiences for its imprudent coalition and PEAT programs and should be considered a component of these programs and removed from the revenue requirement.

⁸⁶ See Exhibit-E, *PATH Membership Expenses for 2010 in Account 930.2*

⁸⁷ Previous Challenge, Section IV.A.3.

⁸⁸ PATH's reasoning for recovering "corporate stewardship" memberships can best be explained by their incongruous answer to Newman2011-21.20 (November 4, 2011) "Corporate stewardship related donations are recorded to FERC account 426.1. Corporate stewardship related memberships are recorded to FERC account 930.2."

⁸⁹ Information Response Newman2011-9.1 (August 22, 2011)

The vast majority of PATH's challenged membership expenses in 2010 are "memberships related to corporate stewardship"⁹⁰ that were purchased to provide access to a target audience for PATH's coalitions and PEAT programs and allocated completely to the PATH Project, although many of these memberships are listed in the names of the PATH parent companies. This arrangement allows the parent companies the benefit of a membership that was completely funded through the PATH revenue requirement, although "membership benefits the whole corporation."⁹¹ In addition, these memberships in 501(c)6 organizations may more properly be tax deductible as business or trade expenses,⁹² instead of recovered in their entirety from ratepayers.

PATH's relationship with the Maryland Chamber of Commerce, represented by a \$20,000 "platinum sponsorship" paid in 2010, can be described as troubling at best, and collusive at worst, and epitomizes how PATH's promotional campaign intended to join the three elements of external affairs,⁹³ namely public relations, lobbying and regulatory matters, together in an attempt to unduly influence approvals of PATH's state public service commission applications.

PATH paid a \$20,000 "sponsorship" to the Maryland Chamber of Commerce in 2010. PATH stated, "The \$20,000 relates solely to sponsorship of the Chamber."⁹⁴ However, PATH also claimed "membership" in the Chamber and stated:

"...membership in the MD Chamber of Commerce provided the PATH Companies with the opportunity, outside of the regulatory process, to provide educational materials about the PATH Project to MD Chamber of Commerce participants to, and engage in personal discussions, forums and conferences about the PATH Project with, municipal, county and state elected officials, their staffs, business leaders and members of the public who register

⁹⁰ Information Response Newman2011-9.1 (August 22, 2011)

⁹¹ *Id.*

⁹² See "Tax treatment of donations - 501(c)(6) organizations," Internal Revenue Service, U.S. Department of the Treasury, <http://www.irs.gov/charities/nonprofits/article/0,,id=163437,00.html>

⁹³ The term "external affairs" was accepted by FERC and adopted by the DC Circuit Court of Appeals in the context of analyzing certain types of expenditures, namely "Government Affairs," "Public Information," and "Regulatory Affairs" (collectively "external affairs"). *Braintree Elec. Light Dept. v. Fed. Energy Reg. Comm.*, 550 F. 3d 6 (D. DC 2008).

⁹⁴ Information Response Newman2011-13.18 (September 21, 2011)

for meetings from the area where the PATH Project is proposed to be located and across the state of Maryland.”⁹⁵

When asked if the “personal discussions” were considered lobbying, PATH responded:

“The discussions held with municipal, county and state elected officials are not considered lobbying since these discussions were educational in nature and held with public officials that did not have decision-making authority with respect to the construction and siting of the PATH Project.”⁹⁶

When asked how the education of elected officials and business members at Chamber events that were not open to the general public was considered “public education,” PATH responded:

“Providing PATH Project educational materials to MACO, Maryland Municipal League and the Maryland Chamber of Commerce allows the leadership, staff and members of the respective organizations to be fully informed on the facts of the project to share with the general public in discussions and respond to inquiries on the PATH Project. Any educational materials on the PATH Project distributed to those organizations were available for sharing with the general public.”⁹⁷

When asked what additional benefits were acquired with sponsorship that justified the more than \$19,000 price difference between membership and sponsorship, PATH stated:

“Membership in the MD Chamber of Commerce at the platinum level provided the PATH Companies with the maximum advantage of full access to all events with no additional cost beyond the membership sponsorship and with references to the PATH Companies prominently displayed at Chamber events and on Chamber publications and website.”⁹⁸

and

“As a Chamber sponsor, the PATH Project received opportunities to provide educational materials along with discussions of the PATH Project and related issues above and beyond a simple membership in the Chamber. Sponsorship allowed representatives of the PATH Project to attend meetings, conferences and other organization activities without incurring additional fees that regular

⁹⁵ Information Response Newman2011-8.7 (August 22, 2011)

⁹⁶ Information Response Newman2011-13.17 (September 21, 2011)

⁹⁷ *Id.*

⁹⁸ Information Response Newman2011-8.7 (August 22, 2011)

membership would require.”⁹⁹

and

“The PATH Project considered the increased and full access to all Chamber events, including significantly increased attendance at each event, under platinum membership versus regular membership.”¹⁰⁰

However, when asked to produce a copy of their cost evaluation, PATH claimed:

“A written cost evaluation was not prepared and, therefore, no copy can be provided.”¹⁰¹

In addition, when fees paid for a Maryland Chamber of Commerce Business Policy Conference were discovered in the line item “Expenses” of an invoice from public relations contractor Charles Ryan Associates, PATH had this explanation for why “full access to all events with no additional cost” did not apply to this event:

“The fee paid was for Charles Ryan Associates representatives to attend the Business Policy Conference as a PEAT exhibitor. The sponsorship paid by PATH-Allegheny only allowed PATH-Allegheny employees to have free registration for all Chamber events.”¹⁰²

When asked if the “references to the PATH Companies prominently displayed at Chamber events and on Chamber publications and website” would be considered advertising and properly booked to Account 930.1, PATH responded:

“Displaying the PATH Project logo gives the project general exposure and an opportunity for attendees at Chamber events or visitors to the Chamber website to either inquire about the project or request educational materials on the project.”¹⁰³

and further denied that this constituted advertising.

There is also the matter of the \$51,242.14 in questionable expenses booked to account 921 for expenses incurred by PATH parent company Allegheny Energy’s External Affairs Department

⁹⁹ Information Response Newman2011-13.8 (September 21, 2011)

¹⁰⁰ Information Response Newman2011-14.8 (September 21, 2011)

¹⁰¹ Information Response Newman2011-17.26 (October 18, 2011)

¹⁰² Information Response Newman2011-18.2, 4. f. (October 19, 2011)

¹⁰³ Information Response Newman2011-14.8 (September 21, 2011)

employees for their travel, meals and other expenses associated with, “employee attendance at Chamber meetings/hearings/conferences where PATH was discussed.”¹⁰⁴ It is unclear how much of this expense was incurred at the Maryland Chamber of Commerce because PATH refused to answer discovery propounded in this area.

It was also discovered upon review of the Maryland Chamber of Commerce’s 2009 IRS Form 990¹⁰⁵ that L. Aldie Warnock, Vice President of External Affairs for Allegheny Energy, was a member of the Chamber’s Board of Directors for 2010-2011.

Perhaps most disturbing about PATH’s convoluted relationship with the Maryland Chamber of Commerce was the petition to intervene out-of-time filed by the Chamber in PATH’s Maryland Public Service Commission Case on February 11, 2011.¹⁰⁶ The petition was filed on the Chamber’s behalf by two attorneys with law firm Gordon, Feinblatt, Rothman, Hoffberger & Hollander. This firm appeared on PATH’s 2009 Account 426.4 detail¹⁰⁷ as providing lobbying services to the PATH Project. In addition, the two attorneys filing the Chamber’s petition were also registered with the State of Maryland to lobby on PATH’s behalf regarding “Certificate of Need.”¹⁰⁸

It is clear that PATH’s \$20,000 platinum sponsorship of the Maryland Chamber of Commerce provided much more than a mere member relationship and eventually led to the Chamber, assisted by PATH’s paid lobbyists, attempting to directly influence the decision of the Maryland Public Service Commission by intervening in the case to support PATH’s application. This expense, intended to directly influence state approvals for the PATH Project, cannot be

¹⁰⁴ Information Responses Newman2011-11.2 and Newman2011-11.12 (September 6, 2011)

¹⁰⁵ <http://www.guidestar.org/FinDocuments/2010/521/784/2010-521784310-0680cc73-9O.pdf>

¹⁰⁶ See Exhibit-F, *Petition of the Maryland Chamber of Commerce to Intervene Out-of-Time and Maryland Ethics Commission Lobbyist Registration forms for 2010*

¹⁰⁷ Previous Challenge, Exhibit-E, *2009 Account detail 426.4, WV-PSC Discovery Response Haverty I-2-A*, pages 8-12

¹⁰⁸ See Exhibit-F, *Petition of the Maryland Chamber of Commerce to Intervene Out-of-Time and Maryland Ethics Commission Lobbyist Registration forms for 2010*

considered a necessary and sensible component of the prudently recovered construction costs of a project such as PATH, and provides no corresponding benefit to ratepayers. The financing of targeted efforts to influence the opinion of public officials during an approval process using funds that are recovered from ratepayers is not just and reasonable and should be refunded to ratepayers.

Other certain memberships have been paid to 501(c)3 organizations and do not represent any actual “membership” and should be properly classified as donations in Account 426.1.

Still other memberships represent costs incurred through participation in lobbying groups that benefit PATH’s parent companies and should be properly classified as lobbying expenses in Account 426.4.

For example, Allegheny Energy’s membership in COMPETE, which was allocated in part to the PATH companies, was explained as a fee for having an Allegheny Energy employee sit on the COMPETE Board of Directors:

“The PATH Companies incurred \$200 (PATH-AYE) and \$202.50 (PATH-WV) of the total \$25,000 paid to COMPETE in 2010. The fees paid were for board member dues. An employee was on the board of directors and paid dues for that privilege”¹⁰⁹.

However, COMPETE’s website¹¹⁰ states that “COMPETE membership is free.” It is unclear why Allegheny Energy paid \$25,000 for a membership that is “free” and then recovered the amount from ratepayers.

A look at COMPETE’s “leadership”¹¹¹ and their 2010 IRS Form 990¹¹² shows that COMPETE is managed by individuals from lobbying firms paid to represent the coalition and that the activity of the coalition consists mainly of lobbying activities. The American Public Power Association, a nonprofit, non-partisan, service organization for the nation's more than 2,000

¹⁰⁹ Information Response Newman2011-13.6 (September 21, 2011)

¹¹⁰ <http://www.competecoalition.com/join>

¹¹¹ http://www.competecoalition.com/press_kit/leadership

¹¹² <http://www.guidestar.org/FinDocuments/2010/202/621/2010-202621493-074b54b3-90.pdf>

community-owned electric utilities, claims that COMPETE is a disingenuous industry group whose true agenda is to protect the monopoly revenues of their members:

"So, while cloaking themselves in righteous assertions of competition, Compete's real agenda is to protect the monopoly revenues received by the existing generator members of their group."¹¹³

It is highly speculative whether Allegheny Energy's privilege fees paid to COMPETE provide any tangible benefit to ratepayers. The fees are alleged to provide financial benefit to PATH's parent company by protecting Allegheny Energy's monopoly revenues through lobbying, therefore this membership should be properly classified in Account 426.4.

The memberships listed in Exhibit-E do not meet the description of expenditures properly recovered in account 930.2; only provide benefit to the PATH Companies and/or their parents; are necessary simply to further other programs not prudently recoverable under PATH's Formula Rate; and provide no benefit to ratepayers. The financing of targeted efforts to influence the opinion of public officials during an approval process using funds that are recovered from ratepayers should not be judged prudent, and consequently not just and reasonable.

PATH erroneously placed the membership expenses "above the line" for inclusion in its Revenue Requirement without a sufficient showing of benefit to ratepayers. Commission precedent instructs designating promotion-related, non-operating expenses such as these "below the line" so that they may be objectively evaluated by *the Commission* for benefit to ratepayers, and if found to provide sufficient benefit, *the Commission* would classify them "above the line."

For expenses properly placed "above the line," the standard of prudence defined in *Violet v. FERC* requires that the company act in good faith at the time the expenditure is made. The memberships were either more properly classified as donations; related to lobbying activity; or a component of PATH's imprudent PEAT and reliable power coalition programs, and were not

¹¹³ <http://www.naylornetwork.com/app-ppw/articles/index-v2.asp?aid=156097&issueID=23297>

incurred in good faith as expenditures properly placed “above the line.” Therefore, we request that all funds used for this purpose by PATH be refunded to ratepayers, with interest.

d. Access Point Public Affairs

Invoices totaling \$55,068.78¹¹⁴ designated and recovered as expense in regulatory account 923, represent expenditures for lobbying and influencing of local government by Access Point Public Affairs, LLC, as contracted by PATH under Allegheny Energy Purchase Order No. 4500239980.¹¹⁵ These are not a prudent expense as defined in *Violet v. FERC* and should not be recovered from ratepayers under PATH’s Formula Rate. Furthermore, the expense represents lobbying and should have been booked to Account 426.4.

The purchase order issued to Access Point Public Affairs, LLC, details the scope of work, which was to be paid at the flat rate of \$5,000 per month, plus expenses, as follows:

“- Strategic guidance on next steps in Loudoun County to support opportunities to influence the Board of Supervisors
-Continue outreach to key stakeholders and those who influence them in Loudoun
-General Assembly member outreach and communications
-Continued message and communications support
-Regular intelligence reporting”

A contract executed between Access Point Public Affairs, LLC, and PATH-AYE¹¹⁶ details a substantially similar, but more detailed, scope of work as follows:

- ▲ “Strategic guidance on next steps in Loudoun County to support opportunities to influence the Board of Supervisors - Access point will provide strategic guidance on steps Allegheny may take to generate community support for County negotiations related to conservation easements in the PATH Application. The focus of efforts will be on identifying, creating and pursuing opportunities to encourage the County to minimize the impact of the PATH project on the community outside the existing transmission corridors by releasing conservation easements along the proposed route. Access Point will also consider potential roles non-Board of Supervisor public officials and community leaders may play to influence the Board on the conservation easements.

¹¹⁴ See Exhibit-G, *Access Point Public Affairs Expenses for 2010 in Account 923*

¹¹⁵ See Exhibit-H, *Allegheny Energy Purchase Order #4500239980 and Contract between PATH-Allegheny Transmission Company and Access Point Public Affairs executed October 26, 2009*

¹¹⁶ *Id.*

- ▲ Continued outreach to key stakeholders and those who influence them within Loudoun - Access Point will maintain close contact with the key decision makers on the PATH project, as well as the potential influencers of those decision makers in Loudoun County. Access Point will serve as Allegheny’s primary “local” connection to these stakeholders, providing strategic guidance on how best to work with them to support the ultimate goal of encouraging the Board of Supervisors to release the conservation easements along the proposed route in Loudoun County.”

Discovery propounded under the Protocols asked:

“Were the services provided by Access Point lobbying or attempts to influence the decision of the Loudoun County Board of Supervisors regarding release of a conservation easement, or any other matter over which the BOS had decisional authority?”

PATH’s answer to this question was “No.”¹¹⁷

In the previous Challenge, Challengers identified a single invoice for this purchase order in the amount of \$5,000 that was improperly booked to Account 923. Challengers also identified three (3) other monthly invoices in the amount of \$5,000, plus expenses, which were paid to Access Point Public Affairs, LLC, and were correctly booked to Account 426.4, which are suspected to be expenses incurred under the same purchase order.¹¹⁸

These expenses are undeniably related to lobbying activity undertaken to influence the Loudoun County Board of Supervisors to release a conservation easement in PATH’s proposed route through Loudoun County. It is quite unsettling to discover that PATH planned to accomplish this by creating a more destructive alternate route around the conservation easement, and then using it to play neighbor against neighbor in order to force the desired decision by the Board of Supervisors.

¹¹⁷ Information Response Newman2011-17.23 (September 27, 2011)

¹¹⁸ Previous Challenge, Exhibit-E, *2009 Account detail 426.4, WV-PSC Discovery Response Haverty I-2-A*, page 8

Lobbying expenses are not a recoverable expense under PATH's Formula Rate and therefore cannot be deemed prudently recovered from ratepayers. These expenditures for lobbying services should be reclassified to Account 426.4 and properly refunded to ratepayers, with interest.

e. National Wild Turkey Federation

Invoices totaling \$50,000,¹¹⁹ designated as CWIP and added to the rate base in regulatory account 107, represent the second payment as part of a three-year "cooperation agreement"¹²⁰ between the National Wild Turkey Federation ("NWTF") and PATH totaling \$150,000.

We hereby incorporate evidence¹²¹ provided regarding The National Wild Turkey Federation in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ The National Wild Turkey Federation was anticipated to be utilized as an advertising partner for the PATH Project.
- ⤴ It is unclear whether any benefits accrue to ratepayers related to this expense and a cost vs. benefit analysis was not performed.

PATH erroneously placed the NWTF expenses "above the line" for inclusion in its Revenue Requirement without a sufficient showing of benefit to ratepayers. Commission precedent instructs designating promotional, non-operating expenses such as these "below the line" so that they may be objectively evaluated by *the Commission* for benefit to ratepayers, and if found to provide sufficient benefit, *the Commission* would classify them "above the line."

For expenses properly placed "above the line," the standard of prudence defined in *Violet v. FERC* requires that the company act in good faith at the time the expenditure is made. The NWTF agreement with PATH included the organization's advocacy for the Project and was of

¹¹⁹ See Exhibit-I, *National Wild Turkey Federation Expenses for 2010 in CWIP*

¹²⁰ Previous Challenge, Exhibit-F, *Letter and invoices from National Wild Turkey Federation*

¹²¹ Previous Challenge, Section IV.A.5.

questionable benefit to ratepayers, and hence was not undertaken in good faith. Therefore, we request that all funds used for this purpose by PATH be refunded to ratepayers, with interest.

f. Larry Puccio L.C.

Invoices totaling \$62,502.00¹²² designated and recovered as expense in regulatory account 923, represent expenditures invoiced to PATH by public relations contractor Charles Ryan Associates for the subcontracted cost of “Consulting Services”¹²³ provided by Larry Puccio L.C. PATH describes the services provided as:

“Various services including meeting with stakeholders, review testimony, review material, etc.”¹²⁴
and
“Larry Puccio met with project leaders, participated in conference calls, and attended association functions and team meetings.”¹²⁵

When asked to name the “stakeholders” met with, provide more details on the “testimony” and “material” reviewed and to define “etc.,” PATH refused to answer.¹²⁶

Larry Puccio served as Chief of Staff for former West Virginia Governor Joe Manchin and, according to The Charleston (WV) Gazette:

“Puccio resigned as Manchin's chief of staff on Dec. 31, 2009, and registered as a legislative lobbyist one week later, with high-profile clients including The Greenbrier resort and the Charles Town racetrack and casino.”
and
“In June [of 2010], the state Democratic Executive Committee elected Puccio as the state party chairman.”¹²⁷

¹²² See Exhibit-J, *Charles Ryan Associates Consulting Services – Larry Puccio, L.C. for 2010 in Account 923*

¹²³ Information Response Newman2011-8.3, Attachment B (August 22, 2011)

¹²⁴ Information Response Newman2011-15.1, Attachment G (September 21, 2011)

¹²⁵ Information Response Newman2011-18.2, 9. b. 7. (October 19, 2011)

¹²⁶ Information Response Newman2011-18.2, 9. b. (October 19, 2011)

¹²⁷ Kabler, Phil. "More subpoenas issued in federal investigation." *The Charleston Gazette*, October 25, 2010. <http://wvgazette.com/News/201010251079> (accessed December 13, 2011).

Larry Puccio was a lobbyist registered with the West Virginia Ethics Commission in 2010.¹²⁸ Between September 30, 2010 and the beginning of 2011, Larry Puccio was re-registered to lobby for FirstEnergy, one of the PATH partners.¹²⁹

It is likely that the services provided to the PATH Project by Larry Puccio consisted of lobbying. Lobbying expenses are not a recoverable expense under PATH's Formula Rate and therefore cannot be deemed prudently recovered from ratepayers. These expenditures for lobbying services should be reclassified to Account 426.4 and properly refunded to ratepayers, with interest.

g. R. L. Repass & Partners, Inc.

Invoices totaling \$109,518.74¹³⁰ designated and recovered as expense in regulatory account 923, represent expenditures invoiced to PATH by public relations contractor Charles Ryan Associates for the subcontracted services provided by R. L. Repass & Partners, Inc. PATH describes the services as:

“Public opinion tracking research was conducted in 2010 to gauge public awareness and opinions about the PATH Project and whether there had been any change in public opinion since the project began.”¹³¹

and in response to an inquiry regarding a description of one specific invoice for “Research,” PATH responded:

“Questionnaire revisions and programming, telephone data collection, data tabulation and analysis, and management summary report.” For the purpose of: “Focus groups/polling to gauge public awareness/impression of PATH.”¹³²

The services of R. L. Repass & Partners were clearly contracted as an element of PATH's public relations and promotional activities to assist in development of future messages and

¹²⁸ See WV Ethics Commission, Lobbyist Registration/Employer Authorization as of September 30, 2010, <http://www.ethics.wv.gov/SiteCollectionDocuments/Lobby/Lobbyists%202009-10.pdf>

¹²⁹ See WV Ethic Commission, Current Registered Lobbyists, <http://www.ethics.wv.gov/SiteCollectionDocuments/Lobby/lobbcu.pdf>

¹³⁰ See Exhibit-K, *Charles Ryan Assoc. "Research and Expenses" R. L. Repass Partners, Inc. for 2010 In Account 923*

¹³¹ Information Response Newman2011-18.2, 10. (October 19, 2011)

¹³² Information Response Newman2011-18.2, Attachment A, 4d. (October 19, 2011)

activities and should be considered another component of PATH's imprudent promotional activities intended to influence state approvals for the PATH Project. These expenditures provide no benefit to the ratepayers who funded them. The financing of targeted efforts to influence the opinion of public officials during an approval process using funds that are recovered from ratepayers should not be judged prudent, and consequently not just and reasonable.

PATH erroneously placed the R. L. Repass & Partners expenses "above the line" for inclusion in its Revenue Requirement without a sufficient showing of benefit to ratepayers. Commission precedent instructs designating promotional, non-operating expenses such as these "below the line" so that they may be objectively evaluated by *the Commission* for benefit to ratepayers, and if found to provide sufficient benefit, *the Commission* would classify them "above the line."

For expenses properly placed "above the line," the standard of prudence defined in *Violet v. FERC* requires that sound judgment be utilized. The expenses of R. L. Repass & Partners were an unnecessary, extravagant expense related to measuring public opinion of both the PATH Project and its parent companies; served no useful purpose related to any necessary regulatory process; was used solely to measure the success of PATH's coalition and PEAT promotional efforts; and produces no quantifiable benefit to ratepayers. Hence, the services of R. L. Repass & Partners were not prudently incurred using sound judgment. Therefore, we request that all funds used for this purpose by PATH be refunded to ratepayers, with interest.

2. Advertising

General Advertising expenses are improperly recorded as "Safety, Education, Siting, and Out-Reach related advertising" ("SESO")¹³³ and erroneously included in the Revenue Requirement.

¹³³ PJM OATT Attachment H-19A, Attachment 4, line 142

We hereby incorporate evidence¹³⁴ provided regarding regulatory Account 930.1 in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ The rate formula instructs a multi-step process to ensure no General Advertising monies are recovered from ratepayers;
- ⤴ It is imperative for oversight to account for these steps and the choices made by PATH at each of them;
- ⤴ Unsound accounting practices result in the initial recording of expenses in a manner inconsistent with the Commission's Uniform System of Accounts¹³⁵ ("USofA") guidelines and/or in agreement between the two PATH companies;
- ⤴ PATH omits the vital step of examining properly recorded General Advertising supporting documents which identify the specific advertising message to objectively judge whether the advertising is SESO;
- ⤴ Reliability was the central theme of PATH's 2009 General Advertising message;
- ⤴ The term "reliability" itself is not clearly defined in the electrical transmission industry;
- ⤴ FERC itself has failed to show the impact of new transmission projects on grid reliability in a court of law;¹³⁶
- ⤴ PATH improperly placed the entire General Advertising balance into the SESO column of the rate formula;

¹³⁴ Previous Challenge, Section IV.B.2.

¹³⁵ 18 C.F.R. Part 101

¹³⁶ United States Court of Appeals For the Seventh Circuit Nos. 08-1306, 08-1780, 08-2071, 08-2124, 08-2239
Illinois Commerce Commission, Et Al., Petitioners, v. Federal Energy Regulatory Commission, Et Al., Respondents. at page 5

As detailed below, General Advertising expenditures and errors shown on Attachment-L totaling \$798,260.38¹³⁷ should not be included in the revenue requirement. We request these monies be refunded to the ratepayers, with interest.

a. Challenge in accordance with Section VII.A.1.b of the Protocols: Whether a True-up Adjustment includes only properly recorded data.

PATH maintained unsound accounting practices with respect to regulatory accounts 930.1 and 923. These practices led to Charles Ryan Associates (“CRA”) invoices for identical expenses being placed in different regulatory accounts.¹³⁸ The exact same charges cannot simultaneously be advertising and outside services.¹³⁹ The two PATH companies must consistently apply the USofA to ensure that the booking of expenses is uniform.

In addition to these CRA invoice recording errors, Interested Parties found advertising recorded in Outside Services¹⁴⁰ because,

“The advertising costs were incurred by a subcontractor of Charles Ryan Associates and were therefore considered an outside service properly charged to FERC account 923. Both accounts 923 and 930.1 are recoverable through the formula rate.”¹⁴¹

Regulatory account 930.1 is for General Advertising and is not assured to be recovered through the formula rate. As such, the persistent slipshod accounting practice of treating 930.1 as automatically recoverable continues to lead to errors in the revenue requirement.

¹³⁷ See Exhibit-L, *Charles Ryan Assoc. Advertising Expenses for 2010 in Account 930.1*

¹³⁸ See Exhibit-M, *Identical Expenses Booked to Different Accounts 2010*

¹³⁹ Explanation using example invoices: CRA bills each company a share (76 percent and 24 percent, respectively) of the same expense, so these two example invoices represent different percentages of the exact same charges. Example: CRA invoice 6111-2, received by PATH-WV, and invoice 6111-1, received by PATH-AYE. PATH-WV placed the entire balance of their invoice in account 930.1 (General Advertising) and PATH-AYE placed the entire balance of their invoice in account 923 (Outside Services).

¹⁴⁰ Information Response Newman2011-15.1, 7. (September 21, 2011)

¹⁴¹ Information Response Newman2011-18.2, 7.a. (October 19, 2011)

**b. Challenge in accordance with Section VII.A.1.e of the Protocols:
The proper application by PATH of the Formula Rate and the
procedures in these Protocols.**

PATH's ongoing practice of placing the *entire* balance of regulatory account 930.1 in the recoverable SESO column of the Rate Formula Template is in error.

Challengers maintain that in the absence of guidelines, determination of advertising expenses by PATH is self-serving, subjective, open to interpretation, and not what the Commission intended. Challengers contend that PATH's self-determination of the nature of its own advertising is not based on impartial reasoning, and moreover, that this determination does not take place.

Information Responses show that neither company distinguished the SESO expenses, at the time of posting, as distinct from General Advertising.¹⁴² And when preparing the ATRR, neither company examined the expenses¹⁴³ in order to ensure only SESO was recovered. Both companies simply repeated the flawed practice of placing the entire 930.1 balance in the SESO column of the formula rate without examination of the corresponding advertisements.

As was the case with the General Advertising expenditures of 2009, the advertising produced in 2010 centered around reliability and was carefully crafted to trigger fear of sustained loss of electrical service in the target audience.

An examination of PATH's eight different advertising campaigns for 2010,¹⁴⁴ both direct and third-party under the name of the reliable power coalitions, reveals that the public relations contractors crafting the advertisements employed the seven common propaganda devices, as well as misstatements or omissions of crucial facts, in an attempt to instill trepidation and an urgent need to act in their target audiences, instead of to educate them.

¹⁴² Information Response: Haverty2011-1.4 (June 27, 2011)

¹⁴³ Information Response: Haverty2011-1.5 (June 27, 2011)

¹⁴⁴ See Exhibit-N, *PATH Advertising Copy 2010 - Supporting Documents Identifying the Specific Advertising Message* - From Information Responses Haverty2011-1.2 (June 27, 2011) and Newman2011-15.1 (September 21, 2011)

▲ PATH TV: Connected to the National Grid / :30, July 20, 2010:

This television commercial utilized the following devices to first produce fear in the audience, and then promote PATH as the solution that will secure America's future:

1. Transfer: Use of an image of the American flag in the light display that is dramatically revealed during the commercial equates support of the PATH Project with patriotism.
2. Bandwagon: Use of the words "our" and "we" convey the message that everyone else agrees that "we" need the PATH Project to solve a common problem and if the viewer does not agree, they will not only be left in the dark, but be the ostracized cause of a power failure that affects everyone else.
3. Card stacking: Factual information is very limited and presents the conclusion that transmission lines are the only alternative to solve reliability problems, which is far from the truth.
4. Glittering generalities: Use of the words "reliability," "security," "highly advanced,"¹⁴⁵ "protect," "the nation," and "our future" are highly-valued concepts that appeal to common emotions without examination of the facts.
5. Plain folks: Image of "modern family using electricity in their daily lives" is intended to convey that "people just like you" need PATH's electricity and endorse the project.
6. Name-calling: Fear of an undefined "missing link" that will cause blackouts is introduced as the demon that will be vanquished by the PATH Project.

▲ PATH TV: More Electricity / :30, July 20, 2010

This advertisement uses the same technique of introducing fear of widespread blackout and presenting the PATH Project as the only solution that must be supported through similar use of the words "our" and "we;" and emotional glittering generalities such as "need to keep

¹⁴⁵ See Potomac-Appalachian Transmission Highline, 122 FERC ¶ 61,188, FN 16, "The Commission is not viewing PATH's incentives request as an advanced technology incentive request."

going,” “highly advanced,” “nation,” “secure and reliable,” and “need.” Ordinary people (and even a dog!) engaged in activities using electricity that were ensuring their comfort and safety utilizes the plain folks device to encourage the audience to identify with the actors. This advertisement omits several key facts, such as the fact that “more appliances, gadgets and equipment” are also constantly replacing older models with new ones that use only a fraction of the electricity of their earlier counterparts. According to a September, 2011, article in Bloomberg Business Week:

“Residential power use has fallen even as the number of electronic devices has exploded because the devices themselves have gotten more efficient. In the 1970s, for example, refrigerators used 2,000 kilowatt-hours per year. Today, they use 500.”¹⁴⁶

The article also reveals that, “[u]tility executives have been aware that the rate of demand growth is slowing,” making PATH’s claims in the advertisement that much more disingenuous.

▲ PATH Radio: More Electricity, July 20, 2010:

While using many of the same emotion-inducing keywords as the other advertisements such as “our,” “we,” “growing,” “nation,” “reliable,” and “future,” this advertisement presents the absurd conclusion that the electrical grid has not been maintained or updated since the 1970s, a conclusion that ignores the efforts of government agencies, PJM, NERC and other entities who constantly monitor the grid and recommend needed upgrades to ensure reliability. The advertisement “stacks the cards” to state that demand for electricity has “dramatically increased” since the 1970s. PATH fails to mention that booming demand in earlier decades has slacked off and demand has actually been falling for several years and is not growing at previous rates.

▲ PATH “Technology” Print Ads

¹⁴⁶ Fahey, Jonathan. “Shocker: Power demand from US homes is falling.” *Bloomberg Business Week*, September 7, 2011. <http://www.businessweek.com/ap/financialnews/D9PJRV980.htm> (accessed December 13, 2011).

This series of advertisements conveys the same basic fear-inducing and PATH-promoting message as the radio ad above and utilizes similar emotional trigger key words, such as “our,” “we,” “all of us,” “growing,” “efforts,” “strengthen,” “support advancing technologies,” “much-needed,” “reliability,” “security,” “need,” and “move forward,” to lead the target audience to blanket acceptance of incorrect conclusions, instead of imparting factual knowledge that would allow the audience to form their own conclusions.

^ PATH “Technology” Internet Banner Ads

This is the Internet counterpart to the advertisement above and makes the unsupportable statement that, “40- (or 30-) year old technology cannot support today’s lifestyle.” This statement insinuates that not only has the grid not been maintained or upgraded in many years, but also that PATH is technologically advanced. The PATH Project consisted of substations and overhead lines, the same basic technology we have been using to transport electrical power from remote generation sites to load pockets for the past 100 years.

^ Virginians for Reliable Energy Internet Ads

In this four-part advertising series, PATH felt free, when hiding behind its front group, to whip up public fear of widespread blackouts, something it would never do under its own corporate name. This series provides no educational facts or solutions, after attempting to frighten the target audience, except for an invitation for the target to “sign-up” or “learn more” with the coalition, where they would unwittingly be supporting the PATH Project. With phrases such as, “It’s hard to keep the lights on when you don’t have power,” and “It’s no fun living in the dark,” PATH targeted the emotional response of fear to corral the public into its front group paddock. These advertisements utilized all seven propaganda devices in an attempt to present an evil entity (blackout), and provide a hero (the coalition) that would push the public onto PATH’s bandwagon.

^ West Virginians for Reliable Power Internet Ads

This advertisement relies on a quote from the U.S. Department of Energy's Energy Information Administration that cannot be verified,¹⁴⁷ and attempts to transfer the authority of the federal government to PATH's coalition front group. Glittering generalities are used with the words "reliable," and "future needs." The public is urged to jump on the coalition's bandwagon with use of words such as "we," and "our." The conclusion is drawn for the target audience that they must take action by joining the coalition to secure West Virginia's future energy needs. Since this advertisement relies on a quote that appears to be manufactured, there is absolutely no educational value in this advertisement.

^ Marylanders for Reliable Power Internet Ads

This three-part series of ads utilizes the bandwagon device with the phrase "let's keep it reliable" in the first advertisement, after informing the viewer that they are using electricity. This is not educational and imparts no knowledge that would not already be possessed by a target viewing the ad while using the Internet. In the second advertisement, the transfer device is used to project the public's approval for renewable power to PATH's front group coalition. The PATH Project was not planned to transport renewable power. The last advertisement in the group is designed to solicit the emotional response of fear with key-words and phrases such as "lose power," "inconvenience," "loses power," and "threat to public safety." This fear is intended to invoke glittering generalities in the mind of the viewer to draw the conclusion that some urgent action, such as joining the coalition, must be taken to prevent disaster. These ads utilize card stacking by presenting a very minimal set of facts unrelated to the PATH Project that coax the viewer to search for a solution to the manufactured problem that will lead them to the coalition, and ultimately, the PATH Project.

¹⁴⁷ Annual Energy Outlook 2010 with Projections to 2035, U.S. Energy Information Administration [http://www.eia.gov/oiaf/aeo/pdf/0383\(2010\).pdf](http://www.eia.gov/oiaf/aeo/pdf/0383(2010).pdf)

The advertisements of all three coalitions fail to mention the PATH Project, in keeping with the coalitions' facades that they are independent from the PATH Project, when the reality is that all these advertisements were completely funded by ratepayers through PATH's revenue requirement and provided no corresponding benefit to the ratepayers.

In summary, PATH's 2010 advertising relied on deployment of the seven common propaganda devices in order to create inaccurate conclusions in the minds of the target audience, instead of educating them by presenting factual knowledge and allowing the audience to think for itself.

Challengers have been unable to locate, and PATH has been unable to provide, a definition for the "safety, education, siting and outreach" advertising that is recoverable from ratepayers in PATH's Formula Rate. Had PATH exercised its due diligence it would have followed USofA General Instruction 5. *Submittal of Questions* which states:

"To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision."

Regardless, with recoverable advertising not clearly defined at the federal level, it is helpful to investigate what states have done to further define the USofA, when used as the accounting basis for state regulated recovery of utility costs. The Code of Maryland, § 20.07.04.08,¹⁴⁸ Rate Making—Revenues and Expenditures, defines four distinct types of advertising:

- "(1) "Promotional" means directed toward selling services or promoting the addition of new customers or seeking additional use of utility service.
- (2) "Informational" means directed toward informing customers of charges and conditions of service, safety precautions, energy conservation, temporary or emergency conditions, employment opportunities, rate cases, annual reports, legal and financial matters.
- (3) "Community affairs" means directed toward influencing public opinion on a controversial issue, or the result of any legislative or administrative matter that would justify the utility civic and community position.
- (4) "Institutional" means directed toward establishing a favorable image of the utility company or its employees and which serves to identify the sponsor."

¹⁴⁸ <http://www.dsd.state.md.us/comar/getfile.aspx?file=20.07.04.08.htm>

Of the four types of advertising, only “informational” advertising is recoverable without a separate showing of benefit to ratepayers:

“C. Expenditures for advertising and promotion other than that classified as informational will not be allowed for rate making purposes unless it is demonstrated to the satisfaction of the Commission in a subsequent rate proceeding that the expense is of direct benefit to the rate payer and in the public interest. Informational advertising is presumed to be in the public interest unless otherwise demonstrated in a subsequent rate proceeding.”

PATH’s 2010 advertisements do not fall under Maryland’s definition of “informational” advertising because they did not inform of charges and conditions of service, safety precautions or temporary or emergency conditions, and only touched on energy conservation as a topic worthy of note without providing any educational facts. Challengers call the Commission’s attention to the fact that the only mention of conservation in PATH’s advertising accompanied an image of a home with every light blazing, both inside and out, hardly an example of conservation. PATH’s advertising can be more accurately defined as “promotional,” or “community affairs,” and provides no benefit to ratepayers, in Maryland or elsewhere.

Advertising expenditures which PATH recovered as SESO are in fact General Advertising, and not SESO. Additionally PATH failed to perform the steps necessary to include recovery of \$798,260.38 in the revenue requirement. We request these expenses be refunded to ratepayers, with interest.

**3. Challenge in accordance with Section VII.A.1.h of the Protocols:
The prudence of the actual costs and expenditures - PATH’s use of
regulatory accounts 426.1 and 426.4**

PATH has been improperly utilizing regulatory accounts 426.1 and 426.4. While these regulatory accounts may exist within the guidelines of the USofA, that does not mean they are appropriately used in the certain way that PATH used them to promote the PATH Project. We

hereby incorporate evidence¹⁴⁹ provided regarding regulatory Accounts 426.1 and 426.4 in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ PATH's donations booked to Account 426.1 in 2009 reveal a pattern of donations to political interests; local community organizations in areas impacted by PATH; and sponsorship of community events where PATH received free advertising and other perks in exchange for its sponsorship; and constitute a pattern of buying favorable consideration for the PATH Project.
- ⤴ PATH's use of Account 426.4 in 2009 was for the purposes of lobbying elected officials to encourage them to attempt to influence the decisions of state public officials responsible for rendering approvals for the PATH project.
- ⤴ PATH's registered lobbyists in the State of Maryland listed "Certificate of Need" as a matter on which they would be lobbying in that state in 2010.
- ⤴ PATH's testimony in the West Virginia Public Service Commission case showed donations and lobbying expenses falling to zero on or before completion of the PATH Project, which indicates that pre-approval expenditures in these regulatory accounts are for the purposes of influencing the decisions of public officials.

PATH made \$65,090 in donations booked to Account 426.1 in 2010. Properly included in Account 426.1 as per definition in the USofA are "Donations: This account shall include all payments or donations for charitable, social or community welfare purposes." Donations for "charitable, social or community welfare purposes" are not a necessary construction and development cost for a project such as PATH, which should be judged upon its own merits and not charity or goodwill.

¹⁴⁹ Previous Challenge, Section IV.C.

PATH made expenditures of \$378,396 on lobbying expenses booked to Account 426.4 in

2010. Properly included in USofA regulatory account 426.4 are:

“Expenditures for certain civic, political and related activities. 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.**” (emphasis added)

The types of activities properly included in this account are not a necessary construction and development cost for a project such as PATH. PATH is to be judged only on its merits and the need for the project by the individual permitting authorities. PATH's use of this account is clearly for the purposes of lobbying to influence the decisions of public officials responsible for rendering approvals for its project. Since every aspect and action regarding the PATH Project by PATH is geared toward the approval of the PATH Project itself and includes no other goals, any allowable inclusion of these types of expenses in this account would be contrary to the definition of account 426.4. As specifically written in the definition of account 426.4, expenditures directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations are not allowed. PATH's expenditures on both federal and state lobbyists were a targeted attempt to influence the regulatory/judicial bodies reviewing its project applications.

The use of both accounts 426.1 and 426.4 for the purposes of donations and direct lobbying to influence, perchance illicitly, the ostensibly unbiased consideration of the PATH Project's applications should be examined, and possible accounting adjustments made.

C. Challenge in accordance with Section VII.A.1.f of the Protocols: The accuracy of data and the consistency with the Formula Rate of the charges shown in the Annual Update

Continued poor accounting and management practices on the part of PATH are the cause of many of the identified accounting errors discovered in PATH's 2010 ATRR. Proper and consistent application of the guidelines in the USofA when booking expenses is the very foundation of PATH's Formula Rate Revenue Requirements. When expenses are booked to incorrect accounts, this can distort the calculation of the Formula Rate and result in a revenue requirement that is erroneous, and possibly unjust and unreasonable. Due to the ongoing broad scope of accounting errors committed by PATH, Challengers question PATH's overall ability to accurately calculate its Formula Rate Transmission Revenue Requirements. The numerous corrections and adjustments to PATH's projected and actual transmission revenue requirements, filed every year since the inception of PATH's formula rate, provide credence to our skepticism of PATH's competence in calculation.

It has been made evident by continued inconsistent expense recording, and PATH's answers to information requests, that accountants for PATH do not have a consistent set of guidelines or working knowledge of account definitions specifically spelled out in the USofA. It is requested that an education program be instituted for these personnel so that future expense recording is correct and consistent. Should this be instituted, Challengers request this documentation be shared with them to facilitate citizens' future monitoring of PATH expenditures.

PATH's inconsistent application of the account definitions found in the USofA is soundly demonstrated by numerous information responses¹⁵⁰ received this year admitting that expenses

¹⁵⁰ Information Responses Newman2011-11.6, Newman2011-11.25, Newman2011-16.7, Newman2011-16.9, Newman2011-16.12, Newman2011-16.13, Newman2011-16.14, Newman2011-11.18, Newman2011-11.19, Newman2011-16.16, Newman2011-17.23, and Newman2011-17.24.

were booked to incorrect accounts, however PATH stated that if an expense is recoverable, it doesn't matter which recoverable account it is placed in. For example, "[t]he security services would be more appropriately classified in account 923, but both accounts 921 and 923 costs are recoverable through the formula rate."¹⁵¹

When questioned further about their inconsistencies, a new excuse¹⁵² arose:

"Because the general purpose of the expense was considered when determining the account that the expense would be recorded to instead of the specific purpose of the event."¹⁵³

And in explaining why charges for UPS shipping expense were inconsistently booked to both Accounts 921 and 923, PATH had this explanation:

"Because the other UPS mailing services expense were considered to be postage as described in the USofA for account 921, Item 10 and these services were classified as outside services account 923 based on general services provided by outside vendors."¹⁵⁴

PATH again failed to explain why corporate allocation of PATH-Allegheny Account 935 (Maintenance of general plant) expenses to PATH-WV were booked to Account 921 (Office supplies and expenses). Different allocations of the same costs cannot simultaneously be both "cost of individual items of office equipment used by general departments which are of small value or short life," or "[b]uilding service expenses for customer accounts, sales, and administrative and

¹⁵¹ Information Response Newman2011-11.6 (September 6, 2011) Incidentally, the "security services" in question were ultimately corrected to Acct. 426.5 and refunded to ratepayers, due to a corrected determination that they were "merger costs."

¹⁵² Information Responses Newman2011-21.9, Newman2011-21.11, Newman2011-21.12, Newman2011-21.8, Newman2011-21.17, Newman2011-21.7, and Newman 2022-21.15

¹⁵³ Information Response Newman2011-21.19 (October 17, 2011)

¹⁵⁴ Newman2011-21.16 (October 17, 2011)

general purposes.”¹⁵⁵ and “... expenses incurred in the maintenance of property, the book cost of which is includible in account 390, 391, 397 and 398.”¹⁵⁶

PATH’s explanation for this continued practice was:

“ The difference in how costs are classified is based on different accounting systems being used by Allegheny Energy and American Electric Power. Both accounts 921 and 935 costs are recoverable through the Formula Rate whether in account 921 or 935.”¹⁵⁷

One of PATH’s more egregious accounting errors in 2010 involved the failure to correct a 2009 over-accrual in Account 930.1 in the amount of \$68,642.83 for PATH-WV and \$15,192.63 for PATH-Allegheny.¹⁵⁸ When corresponding invoices for these accruals were received in January of 2010 showing such vast differences, adjustments should have been made. Instead, PATH left these amounts as credits in Account 930.1, and these credits were not exhausted until the fourth quarter of 2010, nearly a year after the unspent funds were recovered from ratepayers. While an error of this magnitude would certainly throw off cost accounting in any corporation, this error was more grievous as committed by PATH because the over-accrued amount should have been added, with interest, to the refund due ratepayers from PATH-WV in 2009, and been subtracted from the under-collection recovered from ratepayers, with interest, by PATH-Allegheny in 2009. The effect of this error is that PATH collected funds from ratepayers nearly a year in advance of the expense being incurred. PATH had several opportunities to correct this error: before filing the 2009 ATRR in June of 2010; before filing its first correction to the 2009 ATRR on July 13, 2010; and also before filing its second correction to the 2009 ATRR on December 28, 2010. Challengers request that appropriate adjustments be made now to correct this error.

¹⁵⁵ USofA Account 921 definition

¹⁵⁶ USofA Account 935 definition

¹⁵⁷ Information Response Newman2011-11.13 (September 6, 2011)

¹⁵⁸ See Exhibit-O, *2009 Over Accruals in Account 930.1 and Copies of PATH-Allegheny and PATH-WV FERC Forms No. 3Q and No. 1 for 2010*

Challengers continue to question the reasonableness of PATH parent company Allegheny Energy's inter-corporate cost allocation methodologies in 2010. Allegheny Energy's allocation of parent company expenses to the PATH Project shows an exhaustive list of small allocations for every expense imaginable, including "corporate jet"¹⁵⁹ and "funeral arrangement"¹⁶⁰ that were never sufficiently justified for recovery, or benefit to PATH's captive ratepayers, in information responses received.

When questioned as to why Allegheny Energy was allocating a portion of corporate shareholder and Board of Director expenses to the PATH Project, while PATH-parent AEP did not, PATH responded:

"The difference in the accounting policies is that American Electric Power charges only the parent company with stockholder meeting expenses, however, Allegheny Energy allocated its stockholder meeting expenses to its affiliates."¹⁶¹

If these costs are properly allocated to the PATH Project, there must be some reason AEP doesn't nickel and dime the PATH ratepayers the way Allegheny Energy does. Perhaps AEP is more properly following appropriate cost allocation and recovery guidelines.

An error was found in the cost allocation manual of PATH partner Allegheny Energy¹⁶² whereby expenses related to the merger of Allegheny Energy and FirstEnergy were allocated to PATH's revenue requirement and subsequently recovered from ratepayers in West Virginia and Maryland in contravention of merger settlement agreements with those states' public service commissions. The settlements stipulated that merger costs would not be borne by that state's ratepayers. This error resulted in merger costs appearing in PATH's 2010 ATRR and being charged

¹⁵⁹ Information Response Newman2011-1.1 (June 27, 2011)

¹⁶⁰ *Id*

¹⁶¹ Information Response Newman2011-17.4 (October 18, 2011)

¹⁶² See Exhibit-P, *Excerpts from Allegheny Energy Cost Allocation Manual* showing how merger costs were allocated to PATH's Revenue Requirement in 2010, Information Response Newman2011-14.2 (September 21, 2011)

to all load serving entities within PJM, who subsequently recovered them from their customers in states where this recovery was prohibited.

Another error in contravention of a West Virginia Public Service Commission settlement agreement regarding the approval of the TrAILCo¹⁶³ Project being committed by Allegheny Energy is the recovery of an inter-corporate allocation of relocation services expenses for Allegheny Energy employees transferred to Allegheny Energy's new transmission headquarters, and Allegheny Energy's subsequent agreement to not charge West Virginia customers of affiliates Potomac Edison and Mon Power any costs associated with TrAILCo for a certain period of time. By allocating TrAILCo settlement-stipulated relocation costs to the PATH Project, Allegheny Energy subsequently recovered a portion of these expenses from their affiliate customers in West Virginia, again in contravention of settlement agreement stipulations.¹⁶⁴

In light of other improper expense recording, the allocation of parent company Allegheny Energy's expenses to PATH should be further examined as part of a full audit to assure that allocation is not being improperly utilized to simply dilute company expenses and charge as much to the ratepayers as possible in order to lower Allegheny Energy's liabilities.

In summary, the ineptitude demonstrated by PATH in properly applying procedures, guidelines and safeguards has allowed a rash of accounting errors to occur that are in PATH's favor, and come out of the pockets of ratepayers. The Challengers would like to think that these errors are simply that, errors, and are not part of a larger scheme of purposeful overcharging of ratepayers, but our examination of PATH's expense detail leaves us with many serious doubts.

¹⁶³ WV-PSC Case 07-0508-E-CN

¹⁶⁴ See Exhibit-Q, *Questions Regarding Allocation of TrAILCo Settlement Stipulation Expenses to PATH's Revenue Requirement*, Information Responses Newman2011-16.15 (September 15, 2011) and Newman2011-21.14 (November 4, 2011)

D. Challenge in accordance with Section VII.A.1.e of the Protocols: The proper application by PATH of the Formula Rate and the procedures in these Protocols

During the Discovery Period¹⁶⁵ for the 2010 ATRR, PATH continued to rely on unreasonable requirements for Protective Agreements and objections to reasonable requests for information in order to suppress release of information which may have shown their actions in an unfavorable light.

We hereby incorporate evidence¹⁶⁶ provided regarding the Discovery Period in the Formal Challenge of PATH's 2009 ATRR to state:

- ⤴ Challengers' information requests were made pursuant to Section VI.D of the Protocols
- ⤴ The Protocols exclusively carve out Capital and O&M budgets for confidentiality protection;
- ⤴ None of the Challengers' requests pertained to Capital and O&M budgets;
- ⤴ PATH Counsel's requirement for a Protective Agreement applied to invoices, expired purchase orders and contracts, even though information similar to that requested had previously been provided without a Protective Agreement;
- ⤴ With no pre-determined venue through which to compel discovery, Challengers are at the whim of what PATH Counsel deems relevant and/or protected;¹⁶⁷

¹⁶⁵ PJM OATT Attachmnet H-19B, VI.C.

¹⁶⁶ Previous Challenge, Section IV.E.

¹⁶⁷ PATH confirms that they believe this ludicrous assumption to be true and that they alone determine the nature and scope of discovery under the Protocols, whereby they may deny requests that scrutinize or probe too deeply in areas that PATH would rather remain undiscovered. In their recent Answer to Responses to Motion to Dismiss on Docket No. ER08-386-000, PATH states that "...the Commission has recognized that the PATH formula rate protocols govern the procedures and scope of the annual review process, and motions to compel can only be proper pleadings for consideration in Docket No. ER-9-1256-000 if the PATH protocols so provide. The PATH protocols, however, do not provide for submission of discovery disputes to the Commission. Article VI of the PATH formula rate protocols governs the annual review process, including the scope of informal discovery. Nothing in Article VI, or elsewhere in the protocols, authorizes participants in the annual review process to file motions to compel with the Commission."

The lengths that PATH went to during the 2010 ATRR Discovery Period to avoid examination of their \$24.6 million Revenue Requirement far exceeded those utilized in the previous Discovery Period.

PATH began the review period with a requirement for a Protective Agreement which contained a provision for retroactive application of confidentiality, as well as blanket confidentiality for everything supplied going forward. PATH also claimed that producing some information discoverable under the Protocols was unreasonable, burdensome, harassing, annoying and oppressive.

When the Protective Agreement was refused by Interested Parties, PATH asked the Commission to issue a Protective Order for the documents in question. The Commission failed to act on PATH's Motion, however PATH never supplied the requested documents. Following Interested Parties' requests to the Commission to compel the disputed documents and information, PATH answered with outlandish arguments regarding the status of Interested Parties under the Protocols. PATH ended the discovery period by making a Section 205 filing¹⁶⁸ to change the Protocols and continue their convoluted argument that FERC is not the proper jurisdiction for the Challenge brought by Interested Parties.

PATH has every right to apply for a revision to their tariff however, unless a revision is approved by the Commission, PATH must abide by the Protocols, as crafted in lengthy settlement negotiations and so ordered by the Commission. While the Commission has yet to act on any of these disputes, PATH has made their own determination and refused all further discovery requests properly propounded under the Protocols. On November 14, 2011, PATH responded to all outstanding requests as follows:

“Newman2011-22, Newman2011-23, Newman2011-24, Newman2011-25 and Newman2011-26 (see Attachment A through Attachment E):

¹⁶⁸ FERC Docket No. ER12-269

Response:

The PATH Formula Rate Protocols state:

During the Discovery Period, Interested Parties shall have the right to serve reasonable information and document requests (“Information Requests”) on PATH relevant to the Annual Update, including the True-up Adjustment, and the Projected Transmission Revenue Requirement under review.

In Newman2011-1 through Newman2011-21, Keryn Newman submitted approximately 770 separate Information Requests. The PATH Companies have responded to each Information Request contained in Newman2011-1 through Newman2011-21. In Newman2011-22 through Newman2011-26 (see Attachments A through E), Ms. Newman has submitted approximately 152 additional separate Information Requests. The PATH Companies object to all of the Information Requests contained in Newman2011-22 through Newman2011-26 on the grounds that Ms. Newman does not have standing as an Interested Party to submit Information Requests pursuant to the Protocols for the reasons stated in the PATH Companies’ Motion to Dismiss the Formal Challenge and Motions to Compel Filed by Keryn Newman and Alison Haverty filed with the Federal Energy Regulatory Commission on October 20, 2011.

To the extent that the Commission may determine that Ms. Newman has standing as an Interested Party, the PATH Companies object to all of the Information Requests contained in Newman2011-22 through Newman2011-26 on the grounds that, when combined with the approximately 770 Information Requests in Newman2011-1 through Newman2011-21, the total of all Information Requests served by Ms. Newman in Newman2011-1 through Newman2011-26 is unreasonable and, of all Information Requests served by Ms. Newman in Newman2011-1 through Newman2011-26 is unreasonable and, therefore, beyond the scope of discovery set forth in the Protocols which limits discovery to the service of reasonable Information Requests.

To the extent that the Commission may determine that Ms. Newman has standing as an Interested Party, the PATH Companies further object to many of the Information Requests contained in Newman2011-22 through Newman2011-26 on the grounds that they are argumentative, unreasonable and overbroad, constitute an undue annoyance, burden, harassment and oppression, seek information that is beyond the scope of discovery and review set forth in the PATH Formula Rate Implementation Protocols, and are irrelevant and not reasonably calculated to lead to the discovery of relevant information.

To the extent that the Commission may determine that Ms. Newman has standing as an Interested Party, many of the requests for the production of documents contained in Newman2011-22 through Newman2011-26 seek documents containing trade secrets and/or commercially sensitive, confidential and/or proprietary information not available to the public.

The disclosure of these documents has the potential to harm the PATH Companies and/or their affiliates or persons with whom they have contractual or business relationships. Therefore, the PATH Companies will require either (1) the issuance of a Protective Order

by the Commission or an Administrative Law Judge (ALJ) and Ms. Newman's execution of a Non-Disclosure Certificate or (2) your execution of a Protective Agreement prior to the disclosure of these documents. On July 18, 2011, the PATH Companies submitted to the Commission and the Chief ALJ a Motion for Issuance of a Protective Order in Docket No. ER09-1256-000. Neither the Commission nor the Chief ALJ has acted on the motion."

As a result of PATH's actions, Interested Parties were unable to examine PATH's CWIP accounts for 2010. If errors similar to those committed in 2009 exist, it is incumbent upon other parties to reveal them to ensure the formula rate results in a rate that is just and reasonable.

Within the discovery requests that PATH did answer this year, there were a number of answers¹⁶⁹ that were proven to be untrue and subsequently revised by PATH when it realized the inaccuracy of a previous response. For example, in response to an inquiry about a corporate allocation of expenses booked to Account 921 and described as "corporate jet," PATH answered with an elaborate story that featured public service commission personnel and contractors surveying the PATH route via helicopter at the request of the regulators.¹⁷⁰ PATH later admitted that the version of events concocted as a response to Newman2011-6.2 never occurred. This lends skepticism to all of PATH's information responses this year, as they could not be verified since PATH refused to release actual documents.

PATH's attempts to frustrate discovery with the intention of preventing release of information that could lead to a Challenge of its Formula Rate Annual Update under the Protocols runs counter to the substance, and indeed the very spirit, of the Protocols.

PATH chose to seek recovery of expenses for its project from ratepayers through a formula rate. In doing so, PATH placed themselves in a position of transparency, under the watchful eyes of the ratepayers financing its project. That ratepayer Interested Parties actually utilized the

¹⁶⁹ Information Responses Newman2011-6.2, Newman2011-18.1, Newman2011-21.23, Newman2011-21.13, Newman2011-8.2; Newman2011-11.23, Newman2011-16.21, Newman2011-21.19, Newman2011-17.28, and Newman2011-17.30.

¹⁷⁰ Information Response Newman2011-6.2 (August 9, 2011)

system PATH created to properly obtain information under the Protocols may not have been what PATH envisioned, but this does not change PATH's responsibility as set forth in the Protocols. If the necessary transparency standards that are part and parcel of utilizing a formula rate to recover costs reveal actions on PATH's part which are embarrassing or unflattering, perhaps PATH should have ensured that its actions were above reproach from the start. Interested Parties respectfully ask for guidance from the Commission on the appropriate procedure and venue to compel contested discovery in the future. For, as experience demonstrates, if a method to compel discovery does not exist, then the protections set out in the Protocols to ensure just and reasonable rates, themselves, do not exist.

V. CONCLUSION

Ms. Newman and Ms. Haverty, as affected ratepayers and Interested Parties, began their series of Information Requests in June of 2011 in an effort to probe details regarding PATH's 2010 ATRR with the hope that improved procedures had been instituted by PATH over the previous year that would prevent errors previously identified from recurring. Our hopes were dashed with the first Information Responses received.

The advertising and other expenses improperly recovered through accounting error and the imprudent charges center around PATH's promotional activities, carried out in large part by public relations contractor Charles Ryan Associates. These "below the line," non-operating expenses recovered as "above the line," operating expenses amount to \$2,609,131.72, a full 33 percent, or one-third of the 2010 recovered total for Operations and Maintenance. Commission precedent determines that only after PATH has made a sufficient showing that these expenditures inure benefit to ratepayers would *the Commission* have the authority to allow reclassification of the expenses as "above the line," recoverable, operating expenses. That said, the intensity, proportion and nature of the promotional expenditures being passed on to the ratepayers of the PJM region are

not prudent or justified and provide no benefit to ratepayers across thirteen states and the District of Columbia.

We believe that the Commission never intended to give AEP and FirstEnergy a blank check signed by the 54 million ratepayers in the PJM region, to be spent as determined solely by the companies, to promote their for-profit venture and turn the state approval process into a mockery of impartial regulatory oversight, jurisprudence and democracy through PATH's inappropriate influence on due process. Nonetheless, the costs of PATH's promotional activities continue to be recovered through the revenue requirement, contrary to precedent where "...the Commission has found that public relations activities involved in a campaign to develop public and legislative support for a utility's proposal should be recorded in Account 426.4 [a "below the line" account]."¹⁷¹

A full independent audit is a vital first step toward correcting the accounting errors; however, adherence to the Protocols and the Commission's guidance regarding discovery disputes will also encourage future compliance by PATH. Challengers also respectfully request that the advertising expenses be classified correctly as General Advertising, PATH's use of accounts 426.1 and 426.4 to purchase favor and influence for its project be discontinued, and the detailed imprudent expenditures related to PATH's promotional campaign to influence state approvals be reclassified to a non-operating, "below the line" account and thereby rebated to ratepayers, with interest.

The Commission may be sympathetic to PATH's accounting difficulties, as they were when stating "...it has been difficult for utilities and others to ascertain when informational expenditures

¹⁷¹ *ISO New England, Inc.*, 117 FERC ¶ 61,070 at P 45 (2006) citing *Alaskan Northwest Natural Gas Transportation Company*, 13 FERC ¶ 61,213, at 61,481-82 (1980), *order on show cause order, Alaskan Northwest*, 19 FERC ¶ 61,218.

are or are not recoverable from ratepayers.”¹⁷² However this caveat is accompanied by the following admission and guidance that PATH ignores:

“Our precedent has not always been clear when it comes to the classification and recovery of informational expenditures.” The Commission finds “...that they are appropriately recoverable from ratepayers, **upon sufficient showing** that they were undertaken for the benefit of ratepayers.”¹⁷³ (emphasis added)

On the rare occasion that the Commission has approved contested informational expenditures for recovery, it was only *after* they examined a sufficient showing which included “...a detailed mass of... *actual* communications, in the form of speeches, correspondence, PowerPoint presentations and handouts.”¹⁷⁴ To the contrary, PATH has not supplied what could even be remotely considered as a sufficient showing of benefit to ratepayers. Furthermore, as we understand the process, following the Challengers presentation of probative evidence raising serious doubt and showing that PATH’s imprudent expenditures related to a pattern of buying influence for project approvals using funds recovered from ratepayers and a breadth of accounting errors uncorrected, the burden of justification shifts to the entity accused of the recovery of unjust and unreasonable rates.

PATH has taken full advantage of the following realities to wrongly recover expenses that resulted in rates that are unjust and unreasonable.

- ⤴ Should no parties take on the burden of contesting a filing, ratepayers must pay for all expenses that companies choose to include in their revenue requirement and rate base.
- ⤴ The actuality that the Maryland Office of People’s Counsel informed the Commission of recently:

“...consumer advocate offices (“CAOs”) and other load entities have long voiced concerns about the substitution of the formula rate process for actual rate cases.

¹⁷² *ISO New England, Inc.*, 117 FERC ¶ 61,070 at P 47 (2006)

¹⁷³ *Id.*

¹⁷⁴ *Braintree Elec. Light Dept. v. Fed. Energy Reg. Commn.*, 550 F. 3d 6 (D. DC 2008)

Because regulated utility companies generally file rate cases only once every 3 to 5 years, CAOs can target their limited staffing resources and budgets when regulated companies present a rate case. With formula rate annual updates being filed *every* year by *each* utility, however, **CAOs simply do not have the in-house technical expertise, and do not have sufficient funds for retaining outside technical expertise, to review these financially complex formula rate update documents** in anywhere near the depth that can be accomplished in occasional rate cases. **While industrial and commercial load often do have in-house expertise, as for-profit businesses they also are constrained from spending money and reassigning staff to reviews of rates whose impact on any *single* industrial or commercial customer is deemed insufficient to justify the cost.**¹⁷⁵ (emphasis added)

- ▲ It is exceedingly rare for individuals to voluntarily scrutinize complex formula rates and the hundreds of documents necessary to track expenses through the formula.

PATH has taken its knowledge of limited public resources and ample private financial constraints as a license to include charges which do not rightly deserve recovery because it assumed it would receive no scrutiny. AEP and FirstEnergy have used the PATH formula rate cost recovery mechanism to attempt to influence the regulatory approval of their for-profit endeavor in individual states, and the unjust and unreasonable charges resulting from this activity benefit only AEP and FirstEnergy, not electric consumers as ratepayers. The Commission surely did not intend this unbridled expense recovery from ratepayers when they approved PATH's Formula Rate, but now that it has been brought to light, we have confidence that the Commission will take action to ensure just and reasonable rates, and that no party receives preferential treatment.

Respectfully submitted this December 23rd, 2011,

/S/ Keryn Newman

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¹⁷⁵ Comments of Maryland Office of People's Council, FERC Docket No. ER12-269-000, December 1, 2011.

Certificate of Service

We, Keryn Newman and Alison Haverty, certify that we have served a copy of the FORMAL CHALLENGE TO POTOMAC-APPALACHIAN TRANSMISSION HIGHLINE, LLC 2010 ANNUAL TRANSMISSION REVENUE REQUIREMENT upon the parties listed below via e-mail, on December 23, 2011.

/S/ Keryn Newman

Keryn Newman

/S/ Alison Haverty

Alison Haverty

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