

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Keryn Newman and Alison Haverty		Docket No. ER08-386-000
Complainants,		Docket No. ER08-386-001
v.		Docket No. ER09-1256-000
Potomac-Appalachian Transmission Highline, LLC		
Respondent.		

**FORMAL CHALLENGE TO POTOMAC-APPALACHIAN TRANSMISSION
HIGHLINE, LLC 2010 FORMULA RATE ANNUAL UPDATE**

January 21, 2011

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I. INTRODUCTION

Keryn Newman and Alison Haverty, (the “Challengers”) *pro se*, dispute the recovery of \$3,356,415.14 included in the Potomac-Appalachian Transmission Highline, LLC (“PATH”) 2009 Actual Transmission Revenue Requirement (“ATRR”), \$32,629.32 over-recovered in the rate base Construction Work in Progress (“CWIP”) Account, and income deductions in the amount of \$367,847.64 in Accounts 426.1 and 426.4, Federal Energy Regulatory Commission (the “Commission”) docket numbers ER09-1256-000 and ER08-386-000.

Challengers hereby state:

- The Commission has jurisdiction over PATH’s Formula Rate filing and authority to withhold acceptance thereof;¹
- Challengers, as ratepayers and Interested Parties, have standing to bring this formal challenge;²
- Challengers have satisfied all the terms and preconditions to 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 challenge to the Formula Rate;
- Challengers have submitted requests for information from PATH;

¹ The 10th Circuit Court of Appeals clearly held that the time a rate becomes effective is a strict matter of black letter law, ruling out any flexibility in determining the effective date of ROI, "Under the [FPA], the rates are fixed on the date FERC accepts [the transmission developer's] compliance filings." *Pub. Svc. Comm'n of NM v. FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987).

² PJM OATT Attachment H-19B Section I.E and I.H

³ Section VII.B

- Challengers have made good faith, timely, persistent, thorough and clearly articulated efforts to obtain information from PATH concerning the necessity and factual circumstances underlying the expenses included in the Formula Rate; 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 requirement 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 Formula Rate as filed;
- 2) Begin proceedings for a comprehensive audit of PATH’s Formula Rate accounts to determine compliance with all FERC regulations, and any additional obligations that may exist under PATH’s settlement agreement, 133 FERC ¶ 61,152 November 19, 2010 Docket Nos. ER08-386-000 and ER08-386-001;
- 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;⁴
- 5) Conduct an investigation of PATH’s activities to determine whether the costs submitted to FERC are consistent with FERC’s mandate for ensuring that PATH’s Formula Rates are

⁴ PATH appears to concur with Challengers’ assertion that a full hearing with the opportunity to thoroughly present evidence and “...testimony, of course, subject to cross examination and challenge,” is an appropriate process for determining ROI. PATH presented a vigorous argument that a thorough probing of the fine details of its proposed ratemaking is a matter deserving of a full-out hearing. Potomac-Appalachian Transmission Highline, LLC Request for Rehearing, Dockets ER08-386-000 and ER08-386-001, p. 5 and fn 12. (Dec. 20, 2010). Challengers also assert that PATH’s willingness to fully probe the fine details of determining ROI indicates that the process will not pose any particular hardship.

prudent, just and reasonable and not unduly discriminatory or preferential and serve the public interest;⁵

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 reimbursements and over-recovery of costs;⁶ and

7) Impose any and all fines, penalties and reprimands available under the Commission's authority consistent with its findings.⁷

⁵ FERC Strategic Plan FY2009-FY2014 and Mission Statement: "Fulfilling this mission involves pursuing two primary goals: 1. Ensure that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential; and 2. Promote the development of safe, reliable and efficient energy infrastructure that serves the public interest. www.ferc.gov/about/strat-docs/strat-plan.asp

⁶ Challengers' request is consistent with recent FERC activity to vigorously protect the public interest in matters within its jurisdiction. In a press release on November 18, 2010, Commission Chairman Wellinghoff explained the Commission's initiation of an investigation brought under the Natural Gas Act in response to a market participant's possible "over-recovery of its cost-of-service." The Chairman stated, "After careful consideration of this information, it appears that Kinder Morgan Interstate Gas and Ozark Gas Transmission may be substantially over-recovering their cost-of-service. As a result, we are instituting section 5 proceedings to determine whether the rates charged by these pipelines are just and reasonable. The Commission understands that review of Form 2 data is not the full story, and must be considered in conjunction with other factors, such as the costs and risks of litigation, the level of infrastructure investments, and the existence of a rate moratorium or come-back provision. However, an investigation will provide the Commission with the opportunity to hear the full story, and to ensure that consumers enjoy reliable, efficient and sustainable energy services at a reasonable cost." <http://www.ferc.gov/media/statements-speeches/wellinghoff/2010/11-18-10-wellinghoff-G-3.asp>

⁷ While Challengers are aware of the narrow purpose for this formal challenge, this Commission and courts have consistently held that FERC's authority to expand a proceeding or initiate related proceedings is exceptionally broad to allow FERC to fulfill its mission. Should an examination of PATH's accounts and related evidentiary findings reveal any indication of an intent "to affect, or have acted recklessly to affect a jurisdictional transaction," as defined under the Energy Policy Act, which "bars 'any manipulative or deceptive device or contrivance' in wholesale natural gas and electricity commodity and transportation or transmission markets subject to the Commission's jurisdiction. Under the Final Rule [concerning market behavior], it is unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or natural gas or the purchase or sale of transmission or transportation services subject to Commission jurisdiction: (1) to defraud using any device, scheme or artifice; (2) to make any untrue statement of material fact or omit a material fact; or (3) to engage in any act, practice or course of business that operates or would operate as a fraud or deceit." News Release, Commission Finalizes Rule Barring Market Manipulation (January 19, 2006); see also Policy Statement on Enforcement, 113 FERC par. 61,068 (October 20, 2005). It is Challenger's contention that PATH has knowingly engaged in a pattern of conduct that takes advantage of its superior market position in order to secure the PATH project's implementation by recklessly using ratepayer funds and improperly adding to its expenses the cost of intentionally attempting to mislead the public and public officials into a false belief that the PATH project is a "done deal" and there is no

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 includes 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 their 14.3 percent ROE for rehearing⁸.

Subsequent to the Commission’s conditional guarantees, PATH West Virginia Transmission Company, LLC (“PATH-WV”) and PATH Allegheny Transmission Company, LLC (“PATH-AYE”), (collectively the “PATH Cos.”), spent over \$3 million creating and directing front groups, financing an advertising campaign based on advocacy instead of education, lobbying various government officials and policymakers, and made additional imprudent expenditures. All of this activity was in the pursuit of dampening and denigrating rising, authentic, public opposition to their project, as well as simultaneously spending to influence support of it.

In June 2010, PATH filed their 2009 ATRR true-up showing a revenue requirement of approximately \$18 million, and beginning in August of 2010, Keryn Newman and Alison Haverty, as Interested Parties, began a series of Information Requests pursuant to Section VI of the Protocols. During the discovery period, PATH Counsel relied on refusal of reasonable

competition or changed circumstances that would render the project unnecessary. Challengers also assert that this disinformation campaign intentionally underplays and fails to disclose potential hazards, public risk, public costs and consequences to property owners and conflicts with numerous longstanding and evolving public policies.

⁸ Potomac-Appalachian Transmission Highline, LLC, 133 FERC ¶ 61,152 (2010)

requests for information and the use of confidentiality protections to suppress information. Responses received by the Interested Parties illuminate a pattern of inaccurate and inconsistent expense recording. The responses led Challengers to identify over \$1.3 million in seemingly imprudent expenditures. The accounting errors, imprudent expenditures, and general advertising expenses improperly recovered from ratepayers were the subject of a Preliminary Challenge⁹ served upon PATH Counsel on November 29, 2010. Per the Protocols, PATH had until January 3, 2011, to resolve the issues raised by the Interested Parties. On December 28, 2010, PATH filed a correction to their 2009 ATRR with the Commission. The correction addressed only a fraction of the issues raised by Interested Parties. Interested Parties received their first and only direct response to their lengthy and complex Preliminary Challenge on the final day of the Resolution Period. 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 communicated with the Interested Parties, some number of issues may have been resolved, therefore 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 sheer volume of accounting errors and imprudent expenditures, amounting to 18 percent of the 2009 revenue requirement, leave us little choice.

⁹ Exhibit-A, *Preliminary Challenge to PATH's 2010 Annual Update*

IV. DISCUSSION

A. **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*¹⁰ 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.”¹¹ “Reasonable” is defined as sound judgment performed in a fair and sensible manner. “In good faith” is defined as honesty or sincerity of intention. Whether similar costs have been recovered in the past and not challenged as imprudent is irrelevant, unless these same costs were summarily challenged and found to be prudent expenditures. Lack of challenge does not imply prudence; two wrongs do not make a right.

To gain public and regulatory support for the approval of their project, the PATH Cos. financed and directed front groups; funded an advocacy campaign directed at private groups and promoted it as “public education;” and purchased memberships in Chambers of Commerce, lobbying, and industry groups in order to buy support and influence. They also contracted with a public relations firm to gather intelligence, minimize public opposition, and influence the decisions of local government. PATH also purchased the support of a wildlife non-profit, whose name may appear as a “sponsor” of the project in a future marketing campaign.

The PATH Cos.’ lack of public acknowledgement, and in some instances outright denial, of their financial and/or strategic responsibility for these programs, infers their own internal assessment that these activities may be perceived as inherently dishonest. It also demonstrates

¹⁰ *Violet v. FERC*, 800 F.2d 280 (1st Cir.) (1986)

¹¹ *Id.*, paragraph 12

their understanding that public knowledge of PATH's involvement in these activities would result in unfavorable public opinion of both their companies and the proposed PATH project. To then recover the cost of these questionable initiatives from the very ratepayers being deceived by them adds insult to injury and cannot be judged as fair, sensible, or honest. Therefore, the expenditures further detailed in subsections 1 - 5 below are not prudent and should be refunded to the ratepayers with interest.

1. Reliable Power Coalitions

Invoices totaling \$682,048.66,¹² designated and recovered as expenses in FERC regulatory accounts 923 and 930.1, represent expenditures for PATH's "reliable power/energy coalitions" in Maryland, Virginia and West Virginia. These are not prudent expenditures as defined in *Violet v. FERC*, and therefore should not be recovered from ratepayers under PATH's Formula Rate. The three "reliable power/energy coalitions" being wholly financed through PATH's Formula Rate and managed by the PATH Cos. and their contractors are: West Virginians for Reliable Power (or Energy), Marylanders for Reliable Power, and Virginians for Reliable Energy (collectively the "Coalitions"). These Coalitions are not standalone legal entities; they do not legally exist (are not registered in their respective states), therefore, all financing of their activities must come directly from the PATH Cos., as an entity not legally incorporated would have no ability to generate revenue and maintain itself financially.

The Coalitions have repeatedly claimed that they are not connected to the PATH project, nor advocating for PATH or any particular project. They purport to be independent advocacy groups of citizens, businesses, governmental officials, labor leaders, business associations,

¹² Attachment D of Exhibit-A, *Preliminary Challenge*

industry leaders and organizations with *other* goals, as evidenced by the following quotes by their spokespersons:

“We’re not talking about PATH, we’re talking about power lines in general”¹³ -West Virginians for Reliable Power’s Bryan Brown

“The coalition’s goals are to enhance Virginia’s energy security, protect against potential disruptions from the over reliance on any one source, and promote stable prices.”¹⁴ -Virginians for Reliable Energy

“Marylanders for Reliable Power is a non-profit public awareness group, founded in 2008 with a grant from Alleghany [sic] Power in Western Maryland, and with support from PEPCO. It’s [sic] mission is to raise awareness of the imminent shortage of electricity...”¹⁵ -Marylanders for Reliable Power’s Allan Gorsuch

“...[T]he effort started ‘because users know that the state doesn’t have enough electricity’ as energy use has exploded nationwide, and ‘we’re dealing with an overloaded electric grid.’”¹⁶ -Marylanders for Reliable Power’s Louise Hayman

“ ‘We are running out of electricity, quite frankly,’ said H. Russell Frisby, a spokesman for Marylanders for Reliable Power, a coalition of 32 businesses and groups pushing for various changes, including expanded generation and transmission,” and, “Marylanders for Reliable Power, which includes Allegheny Energy, favors an upgrade, but doesn’t take a position on the route, Frisby said.”¹⁷ -Marylanders for Reliable Power’s H. Russell Frisby

These statements are misleading and deceptive regarding the creation and financing of the Coalitions. Through information requests, a true picture emerges of who these groups are and why they were formed.

Two of the Coalitions (Maryland and West Virginia) were originally formed by public relations firm contractor Burson-Marsteller for use as a public relations tool during Allegheny Energy’s Trans-Allegheny Interstate Line (“TrAIL”) project. During the approval process for

¹³ The Journal, Martinsburg, West Virginia (May 5, 2010)

¹⁴ Press release about the coalition’s formation (July 1, 2009), www.energizevirginia.com

¹⁵ The Cambridge, Maryland, Rotary’s “Rotoscope” (July 27, 2009)

¹⁶ The Business Monthly, Howard & Anne Arundel counties, Maryland (Sept. 4, 2008)

¹⁷ Herald-Mail, Hagerstown, Maryland (Sept. 11, 2008)

that project, the public was unaware of the coalitions' ties to TrAIL and the true nature and ownership of these Coalitions. The PATH Cos. admitted:

“Burson-Marsteller was originally contracted to perform these services for the TrAIL Project and once the PATH Project was initiated, it was determined that since the coalitions promote energy infrastructure development in general, the PATH Project should also contribute to the coalitions. Therefore, these invoices were jointly paid by Trans-Allegheny Interstate Line Company and the PATH Companies.”¹⁸

For the PATH project, the Artemis Group was contracted in the management of Marylanders for Reliable Power by PATH-Allegheny to:

“Develop third party support and champions”
“Develop “Grasstops””
“Coalition Development and Recruitment”

and the Purchase Order also references:

“The Artemis Group, LLC[‘s] Proposal for Developing and Implementing a Public Advocacy Campaign dated December 18, 2007,”¹⁹

Charles Ryan Associates, LLC was contracted by PATH-Allegheny for the following services on behalf of Virginians for Reliable Energy:

“Description: Reliable Power Coalition in Virginia \$210,000.00”
“... for the performance of communications and public relations services relating to the siting and construction of the PATH Allegheny 500 KV transmission line.”²⁰

“Efforts in Virginia - For a total fee of up to \$100,000 plus reasonable expenses The Service Provider shall coordinate efforts and facilitate PATH West Virginia’s involvement and activity in Virginia regarding the PATH project and its promotion.”²¹

“[T]he Service Provider shall coordinate efforts to facilitate PATH Allegheny’s involvement and activity in Virginia regarding the PATH project and the management of a Reliable Power Coalition in Virginia.”²²

18 Information Response: Newman-23.d (Nov. 23, 2010)

19 Exhibit-P, *Contracts and Purchase Orders*, pp. 1-2

20 Exhibit-P, *Contracts and Purchase Orders*, pp. 3-8

21 Exhibit-P, *Contracts and Purchase Orders*, pp. 9-11

22 Exhibit-P, *Contracts and Purchase Orders*, pp. 12-13

PATH-WV's Letter of Agreement with Brown Communications, LLC, contracts Brown

to:

“... assist PATH-WV grow and promote the West Virginians for Reliable Power (WVRP) coalition in order to build support for rebuilding and expanding West Virginia and the nation's aging electric infrastructure.”

and footnotes the list of tasks to be performed as follows:

“*These tactics and activities would be timed around key dates associated with the approval process for the PATH-WV project.”²³

The PATH Cos. initially stated that they “... are members of the West Virginia and Maryland coalitions because they focus on promoting overall energy infrastructure development.”²⁴ However, they later confirmed their role as creator, manager and financier following an inquiry regarding the determination that the expenses of Marylanders for Reliable Power were properly recorded in regulatory account 923 (Outside Services):

“The determination reflects the role of the Artemis Group, an outside services provider, in managing and coordinating the efforts of the coalition under the overall guidance of Charles Ryan Associates for the PATH Project.”²⁵

The Contracts and Agreements entered into by the PATH Cos., as well as other evidence presented here, clearly show that the “reliable power/energy coalitions” are front groups and/or “astroturf”, defined by the Center for Media & Democracy as,

“...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,”²⁶

²³ Exhibit-P, *Contracts and Purchase Orders*, pp. 14-16

²⁴ Information Response: Newman-23.a (Nov. 23, 2010)

²⁵ Information Response: Newman-51.w (Nov. 18, 2010)

²⁶ http://www.sourcewatch.org/index.php?title=Portal:Front_groups

or “astroturf”, which is defined as,

“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 public relations firm.”²⁷

The Public Relations Society of America’s (“PRSA”) “Best Practices” regarding front groups makes clear the impropriety of assisting front groups.

“PRSA members should recognize that assisting front groups and individuals that represent undisclosed sponsorships and/or deceptive or misleading descriptions of goals, causes, tactics, sponsors or participants, even if such activities are lawful such as 527 organizations, constitutes improper conduct and malpractice under the PRSA Member Code of Ethics and should be avoided.”²⁸

Expenses for public relations initiatives that are designed to hide the sponsorship of the PATH Cos., and are designated as improper conduct and malpractice under industry ethics codes, are not prudent expenditures. They cannot be considered a necessary, sensible and trustworthy component of the prudently recovered construction costs of a project such as PATH. 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.

PATH’s Formula Rate was approved to recover prudently incurred construction and development costs for the project. In making the following statement in discovery, the PATH Cos. demonstrate a distorted interpretation of recoverable costs by expanding it to include costs incurred for publicly promoting other issues.

“Marylanders for Reliable Power is necessary and relevant to the PATH Project because the coalition, through its membership, understands the fundamental role electric infrastructure plays in the economic viability of the state. From energy independence and

²⁷ <http://www.sourcewatch.org/index.php?title=Astroturf>

²⁸ 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

national security, to local economic development and retention of existing businesses, access to a reliable source of power is crucial for all Marylanders. The coalition was formed to educate the Maryland business community on this critical issue and to encourage electrical transmission infrastructure improvements in the region.”²⁹

PATH’s Formula Rate is not intended to promote the economic viability of individual states, national security, energy independence or local economic development. It is intended to finance the infrastructure necessary to construct this specific transmission line.

In reality, creation and use of the Coalitions does not appear to have improved PATH’s public image or caused a groundswell of public support for the project. PATH’s public image continues to deteriorate. This is primarily due to PATH’s dubious tactics and dealings with the public, which are exemplified by their use of front groups and the subsequent exposure of these groups to the public by citizens opposed to the project. Expenditures made for the Coalitions have not produced a significant increase in favorable public support for PATH. This inability to show benefit versus harm demonstrates that these expenditures were unwise and have had the unintended, but entirely predictable, consequence of causing additional public opposition to the PATH project.

The financing of front groups using funds that are recovered from ratepayers should not be judged prudent. Therefore, we request that all funds used for this purpose by the PATH companies be refunded to ratepayers, with interest.

2. PATH Education Awareness Team (“PEAT”)

Invoices totaling \$554,405.58,³⁰ designated and recovered as expenses in regulatory accounts 923 and 930.1, represent expenditures for PATH’s PEAT program in Maryland,

²⁹ Information Response: Newman-51.w (Nov. 18, 2010)

³⁰ Attachment E of Exhibit A, *Preliminary Challenge*

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.

PATH Counsel describes the PEAT program in the following manner:

"PEAT is necessary, relevant and beneficial to the PATH Project because its participants provide education to the public regarding the facts about the PATH Project."³¹

Regarding the educational nature of this program, PATH-Allegheny's purchase order issued to Pritchard Electric Co., Inc., includes only the following tasks for PEAT spokesman Tom Bloss:

"Contractor hereby agrees to provide public relations, communications, and similar services as directed by the Owner. Contractor will provide information about the importance of additional transmission infrastructure at trade shows and through other activities."³²

Nothing in this description of services to be provided mentions educating the public, but instead provides a company-directed agenda that must be adhered to. The tasks described are more indicative of public relations advocacy than education based on this spokesman's supposed expertise in the area of electricity.

While we question the educational nature of PEAT's agenda, their events are not carried out in public venues. Problems with PEAT's "public education" agenda began immediately upon the introduction of this program. A staged media event went awry when an astute reporter asked PEAT's spokesman, Clarence Martin, if he was being compensated and by whom. Martin revealed that he was being compensated by PATH public relations contractor Charles Ryan Associates, LLC, to present "the real facts about PATH."³³ Disbelief and mistrust by the general public was immediate, and should have curtailed PATH's continued spending on this effort.

³¹ Information Response: Newman-56.b (Nov. 18, 2010)

³² Exhibit-P, *Contracts and Purchase Orders* pp.17-21

³³ The Journal, Martinsburg, West Virginia (August 5, 2009)

Instead, PEAT turned to a privatized model, presenting exclusively before Chambers of Commerce, Rotary Clubs, business associations, organizations and industry conferences.³⁴

These events are only open to members of the various groups, and not open to members of the general public. The attendees are generally uninformed about the PATH project and do not represent a true cross-section of the public.

When a citizens' PATH opposition group extended an invitation for PEAT to appear at one of their open, public education programs in August of 2009, PEAT declined³⁵ to "provide education to the public regarding the facts about the PATH Project"³⁶. Further, when PEAT made a presentation before the Friends of Frederick County organization in November 2009, educated members of several citizen opposition groups attended the event, without PEAT's prior knowledge of their presence. The event quickly got out of PEAT's control when the PEAT spokesman could not provide answers to questions from an informed public,³⁷ contrary to their stated goal. The Friends of Fredrick County fiasco resulted in an unflattering appearance of PATH's project and speaker and only reinforced to the PATH Cos. their preferred tactic of controlling their events by staging them in private environments.

PATH's PEAT website³⁸ lists no upcoming public education events and gives minimal information of an educational nature. The educational content of the website consists of cherry-picked facts. Challengers contend that none of PEAT's educational events have been advertised as open to the public, and that PEAT does not encourage the public to attend its events. PEAT can hardly be classified as a public education program if the public is unaware of its existence

³⁴ Exhibit-B, *Monthly activity listing from PEAT's website, October 2009*

³⁵ Frederick News-Post (August 23, 2009)

³⁶ Information Response: Newman-56.b (Nov. 18, 2010)

³⁷ Frederick News-Post (November 4, 2009)

³⁸ www.pathawareness.com

and programs, and indeed are intentionally excluded. Additionally, one might expect that landowners along the proposed lines, who will be most affected by PATH's immediate presence, would be individually notified of PEAT's public education events, especially if PATH believes that education would promote public support. This has not been the case.

By focusing on the business community, as opposed to the general public, the PATH Cos. continue the public relations strategies set out by their parent companies, Allegheny Energy ("AE") and American Electric Power ("AEP"). Holly Kauffman, AE Director of Transmission Projects, presented Obtaining Approval for a Multi-State Transmission Line at an Edison Electric Institute meeting on April 7, 2009. In the presentation, Ms. Kauffman illustrates the following company strategy:

"Third party validators, such as DOE, FERC, PJM, etc., can impact the business communities [sic] views. Residents listen to their local businesses and industry."³⁹

Lisa Barton, AEP Vice President of Transmission Strategy & Business Development, made similar suggestions on gaining project approval in her presentation, Transmission Siting - How Should it work, and How Do We Succeed in Today's World?? [sic]. Ms. Barton spoke of AEP's difficult 16-year approval process for one of their projects and shared their successful strategy:

"Coalition established, supporters –labor, business -were kept informed and were active. Key audiences identified"⁴⁰

These two presentations demonstrate the public relations strategy of PATH's parent companies and their planned actions to sway the opinion of business, industry and union groups,

³⁹ Exhibit-C, p. 2 - *Obtaining Approval for a Multi-State Transmission Line* p.19

⁴⁰ Exhibit-C, p.1 - *Transmission Siting - How Should it work, and How Do We Succeed in Today's World??* p.14

thereby having these groups further influence the public with a favorable opinion of PATH's project. This is not a "public education" strategy, but an advocacy-building technique. The target groups for PEAT are the same ones targeted by parent company marketing strategy.

While it should have been obvious to a reasonable utility manager that PEAT was not received by the public as an educational program right out of the box, the PATH Cos. persisted in an unwise course of action by continuing the program at ratepayer expense. In fact, the PATH Cos.' contract with Charles Ryan Associates for management of the PEAT program provides:

"The Board of Advisors shall conduct a review of PEAT every ninety (90) days to assure the program is meeting the specified objectives. If it is determined PEAT is not meeting the objectives and should be terminated, all contracts related to PEAT will be terminated within thirty (30) days upon prior written notice."⁴¹

If these reviews have indeed been carried out at indicated intervals and deemed to be meeting PEAT's objectives, then the objectives cannot be public education. The PEAT initiative is not a public education program, but an advocacy-focused campaign targeted at private audiences, with the goal of shaping public opinion in order to influence approvals for the PATH project. Alternatively, the PATH Cos. should have terminated PEAT for failure to educate the public.

Challengers would also like to draw the Commission's attention to the guidance which was reaffirmed in *Violet v. FERC* for comparing challenged costs to "...costs which a reasonable utility management [would have incurred]... at the relevant point in time."⁴² The "relevant point in time"⁴³ was, in fact, the point of emphasis, so as to not rely on hindsight in determining reasonableness. On this point, we contend that Allegheny Energy's TrAIL project did not

⁴¹ Exhibit-P, *Contracts and Purchase Orders*, pp. 9-11

⁴² *Id.*

⁴³ *Id.*

require the use of a “TrAIL Education Awareness Team,” nor was there a comparable program. The TrAIL project received necessary approvals without the use of a similar “public education” program.

The expenditures for PEAT are rendered an unnecessary and unwise expense as a program that failed to meet its goals, and therefore are not prudent as defined in *Violet v. FERC*. We request that all funds used for this purpose by the PATH companies be refunded to ratepayers, with interest.

3. Memberships

Invoices, totaling \$71,716.47,⁴⁴ 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 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.

Properly included in regulatory account 930.2 are:

Miscellaneous General Expenses.

This account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.

2. Industry association dues for company memberships.
3. Contributions for conventions and meetings of the industry.⁴⁵

The “industry” described here is clearly intended to be the industry of the company utilizing this account. It is not meant to include *any* industry, and therefore should be limited to the electric transmission industry by virtue of PATH’s own business activities. For example, PATH is claiming industry association dues for the WV Forestry Association, Manufacturers

⁴⁴ Exhibit-D, *Memberships*

⁴⁵ 18 C.F.R. Part 101

Association, Hardwood Alliance Zone, Municipal League, County Commissioners Association and Coal Association, all associations for industries not germane to the business of the PATH Cos. and therefore not a prudent expense.

In discovery, the PATH Cos. made the following statement regarding many of their memberships:

“Membership related to corporate stewardship and the education of business leaders about PATH.”⁴⁶

By paying membership dues in these organizations as a generous “steward,” the PATH Cos. have placed themselves in the role of benefactor. In fact, many of these memberships paid for by the PATH Cos. are actually credited to the parent company, Allegheny Energy, while in reality the memberships are being funded by ratepayers under PATH’s Formula Rate.⁴⁷ This may even be considered a misappropriation of funds due to the dishonesty about the source of funding. While stewardship may be an admirable goal, it loses its shine when being done with funds being recovered from ratepayers under PATH’s Formula Rate, and not with the funds of the steward claiming credit. This kind of “stewardship” is dishonest and cannot be considered “in good faith.”

The “education of business leaders about PATH”⁴⁸ mentioned by the PATH Cos. shows that the memberships in numerous Chambers of Commerce, Rotary Clubs and industry associations are intended to provide a private, target audience for their Coalitions and PEAT programs described in II.A.1 & 2 above. In fact, a review of PEAT’s monthly activity listing⁴⁹ can be used to draw a direct link between these memberships and PEAT spokesmen making

⁴⁶ Information Response: Newman-30 Attachment A & B (Nov. 9, 2010)

⁴⁷ Exhibit-D, *Memberships*

⁴⁸ Information Response: Newman-30 Attachment A & B (Nov. 9, 2010)

⁴⁹ Exhibit-B, *Monthly activity listing from PEAT’s website, October 2009*

presentations at meetings of these same organizations. The membership, therefore, should be equated to buying a private audience, and should be considered as a component of the imprudent expenditures for PEAT and the “reliable power” coalitions. These expenditures have been made exclusively to further initiatives which strive to influence public opinion in order to gain approvals for the PATH project.

In addition, many of these memberships include the benefit of organization lobbying on behalf of its members,⁵⁰ and therefore should not be included as a prudent and recoverable expense from ratepayers in account 930.2. Additionally, a few of these “memberships” appear to be more along the lines of charitable donations and not related to any actual membership or meeting of the industry of the PATH Cos.,⁵¹ and are in fact publicly credited to the parent companies and not the PATH Cos.

These memberships do not meet the description of expenditures properly recovered in account 930.2, and are not only dishonest in their crediting of funding but necessary only to benefit other programs not prudently recoverable under PATH’s Formula Rate. Therefore, these memberships should also be found to be imprudent as defined in *Violet v. FERC*. We request that all funds used for this purpose by the PATH companies be refunded to ratepayers, with interest.

4. Access Point Public Affairs

Invoices totaling \$20,000,⁵² designated and recovered as expense in regulatory account 923, represent expenditures for lobbying and influencing of local government as well as intelligence-gathering on private citizens and minimizing the opposition of private citizens to the

⁵⁰ Exhibit-D, *Memberships*

⁵¹ Exhibit-D, *Memberships*

⁵² Attachment G of Exhibit 1, *Preliminary Challenge*

PATH project. These are not a prudent expense as defined in *Violet v. FERC* and should not be recovered from ratepayers under PATH's Formula Rate.

A purchase order issued to Access Point Public Affairs, LLC details the scope of work as follows:

“...to provide intelligence gathering services to identify issues, positions, minimize opposition, and provide general information of interest for the PATH Project in Loudoun County Virginia.”⁵³

A contract between Access Point Public Affairs, LLC and PATH-Allegheny details the scope of work as follows:

“...Independent Contractor's best efforts to represent, as the company may direct, the company's interests before any and all state, regional and local government agencies in Virginia; and to assist the company in any other consulting matters as company may direct.”⁵⁴

In an effort to determine if services provided by the contractor were or were not lobbying, a series of information requests were submitted to the PATH Cos. They responded that the requests were overbroad, unduly burdensome, covered by the attorney work product privilege, beyond the scope of discovery, and irrelevant.⁵⁵

Lobbying would actually be preferable to the possible reality created by the scope of work stated on the purchase order, which equates to spying on private citizens and minimizing their actions in opposition to the PATH project, and is the more likely of the two conflicting scopes of work to have actually occurred. A corporate entity intending to be granted public utility status with its attendant power of eminent domain, should not rightfully be entitled to violate the privacy of citizens by “gathering intelligence” on them and/or their activities and

⁵³ Exhibit-P, *Contracts and Purchase Orders*, pp. 22-23

⁵⁴ Exhibit-P, *Contracts and Purchase Orders*, ps. 24-30

⁵⁵ Information Response: Newman-37 (Nov. 12, 2010) & Newman-38 (Nov. 12, 2010)

consequently interfering with their actions in an attempt to “minimize” them. The exact actions covered by the verb “minimize” used in this scope of work need to be elucidated but when information requests of that nature were propounded, the PATH Cos. refused to answer them, as stated above. The PATH Cos. recovered these dubious costs from these very same citizens of Loudoun County, as ratepayers under PATH’s Formula Rate, adding insult to injury. Until and unless the scope of work resulting in these expenses is more fully explored, and demonstrated to not include unethical, possibly illegal actions, they absolutely cannot be considered a reasonable, prudent expense performed in good faith as defined in *Violet v. FERC*, and therefore should be refunded with interest. Conversely, if the actual work performed was lobbying, which is not permitted to be recovered from ratepayers under PATH’s Formula Rate, these expenditures should still be removed from the Revenue Requirement.

A separate purchase order issued to Access Point Public Affairs, LLC, details the scope of work 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”⁵⁶

A contract executed between Access Point Public Affairs, LLC, and PATH-AYE⁵⁷ details a substantially similar, but more detailed, scope of work and also adds lobbying before the Virginia Legislature to the list of tasks. However, this same contract also contradicts itself by stating that the contractor will **not** be lobbying before the Legislature.

⁵⁶ Exhibit-P, *Contracts and Purchase Orders*, pp. 31-33

⁵⁷ Exhibit-P, *Contracts and Purchase Orders*, pp. 34-35

In an effort to determine if the services provided by the contractor were or were not lobbying, a series of information requests were submitted. The response of the PATH Cos. to these requests were:

“The PATH Companies object to subparts b. through j. of this data request to the extent that the [sic] seek information related to lobbying services to be provided by contractors on the grounds that they are overbroad and unduly burdensome, the requests 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.”⁵⁸

The PATH Cos. allude to the services of this contractor being lobbying in their response, and the scope of work describes lobbying, therefore it must be lobbying. Lobbying expenses are not a recoverable expense under PATH’s Formula Rate and therefore cannot be deemed prudently recovered from ratepayers. In fact, the single invoice for this purchase order recorded in Account 923 also appears to be recorded in Account 426.4, Certain Civic and Political Activities,⁵⁹ which would have resulted in the PATH Cos. both recovering the expense from ratepayers and also using it as a deduction to income in the amount of \$5,000. Challengers suspect that the recording of this invoice in Account 923 was an error but when notified of this error in the Preliminary Challenge, PATH chose to defend it, rather than correct it. This expenditure for lobbying expenses should now be properly refunded to ratepayers, with interest.

5. National Wild Turkey Federation

Invoices totaling \$50,000,⁶⁰ designated as CWIP and added to the rate base in regulatory account 107, represent an initial payment as part of a three-year “cooperation agreement” between the National Wild Turkey Federation (“NWTF”) and the PATH Cos. totaling \$150,000.

⁵⁸ Information Response: Newman-43.b through j (Nov. 17, 2010)

⁵⁹ Exhibit-E, p.8, *Account detail 426.4, WV-PSC discovery response Haverty I-2-A*

⁶⁰ Exhibit-F, *Letter and invoices from National Wild Turkey Federation*

This not a prudent expense as defined in *Violet v. FERC* and should not be recovered from ratepayers under PATH's Formula Rate.

Lisa Barton, AEP Vice President of Transmission Strategy & Business Development, demonstrated how use of the NWTF as an advertising partner facilitated public acceptance of their project to gain project approvals in her presentation, Transmission Siting - How Should it work, and How Do We Succeed in Today's World?? [sic]:

“Advertising –Consistent and frequent use of print/television partners included Wild Turkey Federation, Nature Conservancy, local industry, homeowners”⁶¹

Based on parent company marketing strategy, the “cooperation agreement” is clearly a part of the PATH Cos.’ advertising and marketing plan for their project and are not properly included in CWIP, which earns a return and is subject to depreciation.

On its website, NWTF presents its Energy for Wildlife program, which “helps the utility industry manage millions of miles of rights-of-way and other properties that could potentially provide ideal habitat for a number of wildlife species.” The Energy for Wildlife program benefits NWTF members by providing them with additional hunting areas. It is unclear what benefits are conferred to the ratepayers by this program. An evaluation of cost versus benefit in the public interest needs to be undertaken before this program becomes a prudent construction cost for a transmission line project. However, neither the PATH Cos. nor their parent companies are listed as Energy for Wildlife members.

In the similar TrAIL project, NWTF was not used as an advertising partner in print/television, showing that another reasonable utility management did not find this expenditure necessary “at the relevant point in time.” The PATH Cos.’ “cooperation

⁶¹ Exhibit-C, p.3 - *Transmission Siting - How Should it work, and How Do We Succeed in Today's World??* p.15

agreement”⁶² with NWTf is a marketing tool used to advocate for the project and not a necessary component of prudent construction and development costs for the PATH project. This expenditure for the PATH project is not a necessary, reasonable and prudent expense as defined in *Violet v. FERC*. We request that all funds used for this purpose by the PATH companies be refunded to ratepayers, with interest.

B. Advertising

Attachment H-19A of PJM’s OATT contains the Rate Formula Template for each of the PATH Cos. These Rate Formula Templates provide for dealing with advertising expenses in the following manner: On page 4 and page 8, for PATH-WV & PATH-AYE respectively, the revenue requirement collected by PJM is calculated. Administrative and General Expenses (“A&G”) are allocated to the revenue requirement on a dollar-for-dollar basis. On line 48 the balance from regulatory account 930.1, “except safety, education, siting and out-reach related advertising,”⁶³ is subtracted from the A&G total.⁶⁴ The Safety, Education, Siting and Out-Reach Related Advertising (“SESO”) total is found on H-19A, Attachment 4, line 142, under this column heading. This figuring is a multi-step process to ensure no General Advertising monies are recovered from ratepayers, and it is imperative for oversight to account for these steps and the choices made by the PATH Cos. at each of them. To this end, the first Information Request⁶⁵ asked the question:

“In the Supporting Calculations and Notes - Note D references ‘safety, education, siting and out-reach related advertising included in Account 930.1’. What are the definitions/guidelines of these individual advertising categories. Where are these definitions found?”

⁶² Exhibit F - *Letter and invoices from National Wild Turkey Federation*

⁶³ H-19A Supporting Calculations and Notes (p.6 & 11): Note D - ...all Regulatory Commission Expenses itemized at 351.h, except safety, education, siting and out-reach related advertising included in Account 930.1.

⁶⁴ *Id.*

⁶⁵ Haverty-1 (Aug. 13, 2010)

to which PATH Counsel responded:

“The definitions and guidelines for Account 930.1 are found in 18 C.F.R. Part 101 which contains the Federal Energy Regulatory Commission Uniform System of Accounts.”

This is true, though not a response to the Information Request at hand. Counsel for PATH acknowledged during an email exchange, “Other than the definitions and guidelines for general advertising expenses contained in 18 C.F.R. Part 101 for account 930.1, the Commission has not issued definitions or guidelines for safety, education, siting or outreach advertising.”⁶⁶ As detailed below, General Advertising expenditures and errors totaling \$2,104,925⁶⁷ should not be included in the revenue requirement. We request these funds be refunded to the ratepayers, with interest.

1. Challenge in accordance with Section VII.A.1.b of the Protocols:

Whether a True-up Adjustment includes only properly recorded data.

The initial recording of expenses listed on Exhibit-H was not done in agreement with the Commission’s Uniform System of Accounts (“USofA”) guidelines and/or in agreement between the two PATH Cos. Invoices for identical expenses were placed in different regulatory accounts. To simplify an explanation, let us consider as an example⁶⁸ Charles Ryan Associates, LLC (“CRA”) invoice 3497-2, received by PATH-WV, and invoice 3497-1, received by PATH-AYE. CRA bills each company a share (76 percent and 24 percent, respectively) of the same expense, so these two invoices represent different percentages of the exact same service charges. PATH-WV Project Manager Ron Poff placed the entire balance of their invoice in account 930.1

⁶⁶ Exhibit-G, *E-mail exchange between Ms. Haverty and PATH counsel, Sept. 2, 2010*

⁶⁷ Total included in 2009 ATRR

⁶⁸ Exhibit-I, *CRA Example Invoices*

“...because they had been determined to be advertising related.”⁶⁹ PATH-AYE accountants placed only the PATH Production-001 total in acct 930.1 and placed the remaining balance (PATH Strategy-000 and PATH Strategy-003) in account 923 (Outside Services) because they “...were for consulting services not advertising.”⁷⁰ The exact same charges cannot simultaneously be advertising and consulting services. These two companies, if they are to be responsible for a \$2.1 billion project, should ensure that the booking of expenses is consistent.

When expense recording errors were pointed out, PATH stated:

“These costs should have been booked to account 923 instead of account 930.1, however, this error had no material impact on PATH’s revenue requirement.”⁷¹

The placement of expenses in the proper regulatory account is the foundation on which all subsequent decisions are based, so to state there is no “material impact” is erroneous.

In addition to these CRA invoice recording errors, Interested Parties found Coalition and PEAT expenses improperly recorded in 930.1.⁷² When questioned about the involvement of the PEAT spokespeople in the production of the advertising campaigns, PATH admitted, “PEAT spokespeople were not involved in the advertising campaigns.”⁷³ In an explanation for their inclusions in the General Advertising regulatory account, PATH Counsel stated “... the PEAT expenses relate to education, safety, siting, or outreach (Account 930.1)”⁷⁴ Regulatory account 930.1 is for General Advertising, not education, safety, siting or outreach expenses generally, per the guidelines in the USofA. The USofA guidelines for account 930.1 do not include these terms nor allude to them in any fashion. Therefore, the PEAT expenses are not properly posted to

⁶⁹ Information Response: Haverty-18 (Nov. 3, 2010)

⁷⁰ Information Response: Haverty-19.a (Nov. 3, 2010)

⁷¹ Information Response: Haverty-26.d (Nov. 17, 2010)

⁷² Exhibit-H, *Expenses Improperly Recorded in Account 930.1*

⁷³ Information Response: Haverty-26.b (Nov. 17, 2010)

⁷⁴ Information Response: Newman-56.c (Nov. 18, 2010)

Account 930.1. PEAT and Coalition expenses are improperly recorded and need correction, in addition to the arguments pertaining to them in II.A.1&2 above.

2. 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 placement of the *entire* balance of regulatory account 930.1 in the SESO column of the Rate Formula Template was in error. PATH states that "...the category these expenses fall under is education."⁷⁵ The USofA does not contain a definition or guidelines for what constitutes educational advertising. PJM's OATT does not contain a definition or guidelines. PATH has no written definition or guidelines for their accountants to refer to at the time expenses are posted, nor in the preparation of the ATRR. PATH Counsel states:

"Written guidelines are not necessary to make a decision that a service constitutes educational advertising and, consequently, such written guidelines do not exist."⁷⁶

Challengers maintain that in the absence of guidelines, determination of advertising expenses as "education" is subjective and open to interpretation. Challengers contend that PATH's determination of the nature of advertising is not based on impartial reasoning, and moreover, that this determination did not take place.

Information Responses show that neither company uses sub-accounts to designate the SESO expenses at the time of posting as distinct from General Advertising.⁷⁷ Both companies posted "advertising"⁷⁸ and other incorrect expenses in 930.1 as described above. A

⁷⁵ Information Response: Haverty-3 (Aug. 31, 2010)

⁷⁶ Information Response: Newman-21 (Nov. 1, 2010)

⁷⁷ Information Response: Haverty-9 (Sept. 21, 2010) PATH-WV and PATH-Allegheny do not use sub-accounts for FERC account 930.1.

⁷⁸ Exhibit-J, *Advertising invoices*

determination to classify advertising expenses as “education related” did not occur during the ATRR preparation, which would have been the proper time to make a determination. An *objective* determination, as opposed to the current *subjective* determination, is properly made at this step in the process, when copy of advertising and invoices in General Advertising would be examined by accountants. And based on a written set of guidelines, expenses would either be placed in the SESO column of the ATRR and thus recoverable, or placed in the Other Advertising column and not recoverable. This step must take place to ensure no General Advertising monies are recovered from ratepayers. This step, the current subjective determination, or a proper objective determination, did *not* take place, as evidenced by Information Response Haverty-10.2:

“There were no data requests or deficiency letters received during the preparation of the FERC tariff filing of the Potomac-Appalachian Transmission Highline, LLC 2009 Formula Rate Annual Update under ER09-1256.”

Had PATH taken the necessary step to examine the advertising which they classified as educational, as previously stated, it would have been a subjective determination. Interested Parties asked questions to ascertain, in an empirical fashion, if the advertising was indeed educational. As education must be based on a foundation of truth and knowledge, the intent of the questions was to verify the factual nature of statements made in the ads, and examine the credentials of the statement makers.

In response to every one of these questions the PATH Cos.’ reply was the same:

“The PATH Companies object to this data request on the grounds that the request is overbroad and unduly burdensome, the request seeks information that is beyond the scope of discovery and review set forth in the PATH Formula Rate Implementation Protocols, and is irrelevant and not reasonably calculated to lead to the discovery of relevant information.”⁷⁹

⁷⁹ Information Responses: Haverty-22 (Nov. 12, 2010) & Newman-26 (Nov. 1, 2010)

It is, of course, entirely relevant to determine if the advertising campaigns are, in fact, educational and therefore properly included in the Education Related Advertising column of the ATRR. However, because of the “unduly burdensome” nature of the requests, according to PATH’s counsel, and with no venue in which to compel this relevant information, Challengers are constrained by what is publicly known of the advertising campaigns and why they should not be considered educational in nature.

The “PATH Benefits” 60-second TV spot presents alleged “benefits” of PATH. The voiceover begins by stating:

“The new PATH transmission line is not just a bright idea for our region but for communities and neighborhoods along the way. From West Virginia to Virginia and Maryland...it’s one PATH but it leads everywhere... bringing safe, reliable power to our communities... making sure industry has a dependable source of energy to count on... and giving our local schools, hospitals and offices the energy it takes to stay up and running.”⁸⁰

The physical nature of the PATH Transmission Line “...consists of a 765-kilovolt (kV) transmission line extending approximately 275 miles from the Amos Substation in Putnam County, W.Va., to the proposed Kemptown Substation, southeast of New Market, Md. The project also includes a new Welton Springs substation along the proposed route in northwest Hardy County, W.Va.”⁸¹ It is a transmission line, unbroken and uninterrupted, save for the one substation, and it is not part of the distribution system for “local schools, hospitals, and offices.” “Communities and neighborhoods along the way” will not be brought electricity via PATH. PATH also neglected to “educate” about the differences between the transmission versus

⁸⁰ Information Response: Haverty-3 Attachment 3 (August 31, 2010)

⁸¹ PATH Fact Sheet <http://www.pathtransmission.com/docs/PATHFAQ-v2010.pdf>

distribution systems, insinuating that the transmission and distribution systems are the same.

Therefore, the presentation cannot be considered “education.”

The voiceover continues with the statement:

“Best of all, the PATH transmission line will be there to ensure dependable energy for the future. Not only reinforcing our power grid...but ready and able to support new energy sources, including renewables.”

This statement, regarding inclusion of “renewables” and the video showing wind turbines, neglects to mention that PATH is first and foremost a part of “Project Mountaineer,” a plan announced in 2005 by Western PJM Interconnection’s then-President Karl Pfirrmann. Pfirrmann described Project Mountaineer as a plan to move coal-fired electricity from the western part of the PJM region to load zones in the eastern section of PJM. On May 13, 2005, FERC held a conference in Charleston, WV, titled, “Promoting Regional Transmission Planning to Facilitate Fuel Diversity Including Expanded Uses of Coal-Fired Resources.” Speakers at this conference repeatedly expressed support for Pfirrmann’s Project Mountaineer.

At the FERC conference, AEP CEO Mike Morris stated, “[W]hat do power plant owners think about regional planning and how can regional planning bodies help us out? Let me group those two bullets together and say that we think that regional planning is an excellent idea without question. I think ... the notion of taking a look at these things through an RTO lens, taking a look at these things through the regional state compacts that we’ve tried to put together makes a tremendous amount of sense because it lends credibility to what you’re trying to do.”⁸² AEP is one of the partners in the PATH project. Mr. Morris clearly stated his intention to use PJM’s reliability planning process, to provide “credibility” to the Project Mountaineer plan to

⁸² “Promoting Regional Transmission Planning and Expansion to Facilitate Fuel Diversity Including Expanded Use of Coal-Fired Resources,” FERC Docket AD05-3-000, p. 186

expand markets for AEP's coal-fired electricity. There was little discussion of green energy at this 2005 conference. Speakers included officials from coal mining and trading companies. Based on the misleading nature of the assertions in the advertisement, it cannot be determined "educational."

Another ad campaign of 2009 was the "Business Leaders" radio spots and newspaper ads featuring businessmen:

- Media broadcaster Nick Fantasia, Fairmont, WV
- West Virginia Business Roundtable President Paul Arbogast
- Charleston Area Medical Center CEO David Ramsey, Charleston, WV
- Grant County Commissioner Jim Wilson, Grant Co., WV
- Essroc Cement Plant Manager Paul Biel, Martinsburg, WV

The campaign consisted of these men making statements about "reliable power,"⁸³ but they are not experts in the field of electric reliability, nor do they hold credentials or possess particular qualifications as the result of formal education to address the specific issues of electric reliability and the economy. They are not qualified to expound on this, attempting to "educate" the public via the airwaves and print media on the ever-evolving topic of transmission grid reliability. The term "reliability" itself is not even clearly defined in the electrical transmission industry. While there are technical standards of various kinds, there is no consensus about the connection between system reliability and transmission capacity. In his study for the Congressional Research Service in April 2004, "Electric Power Transmission: Background and Policy Issues,"⁸⁴ Stan Mark Kaplan described how little data exists in the U.S. to measure the connection between reliability and transmission. Kaplan concluded: "In summary, depending on the case, building new transmission lines is not the only or best approach to enhancing power system reliability."

⁸³ Information Response: Haverty-3 Attachment 3 (Aug. 31, 2010)

⁸⁴ http://assets.opencrs.com/rpts/R40511_20090414.pdf

Judge Richard Posner appeared to agree with Kaplan’s conclusion in an opinion he entered on August 6, 2009 in the federal Seventh Circuit Court of Appeals remanding FERC’s cost recovery system for large-scale transmission projects back to FERC.⁸⁵ In his opinion, Judge Posner stated that FERC itself had failed to show the impact of new transmission projects on grid reliability: “No particulars are presented concerning the contribution that very high-voltage facilities are likely to make to the reliability of PJM’s network. Not even the roughest estimate of likely benefits... is presented.”⁸⁶ If FERC can’t define reliability in a court of law, then the untrained spokesmen in question certainly can’t be relied upon to do so. Therefore, the advertisement should not be determined educational.

Of the three advertising campaigns produced and distributed in 2009, though, the “Landowner” spots are the most subjective. PATH Manager Ron Poff states that these spots are meant “...to ease some concerns and give examples of our cooperation with landowners affected by transmission line projects such as PATH.”⁸⁷ Two landowners appear in these ads, out of the 164 owners affected by the transmission line project he is referring to,⁸⁸ with no mention of whether their positive views are shared by the other 162.

Specific to the PATH project, the docket of the West Virginia Public Service Commission (“WV PSC”)⁸⁹ contains numerous complaints about land agent behavior, as well as over 80 people withdrawing previously granted permission or denying to PATH representatives access to property. The WV PSC docket also has a formal complaint⁹⁰ regarding the right of

⁸⁵ 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.*

⁸⁶ *Id.* at page 5

⁸⁷ Information Response: Haverty-6.2 (Sept. 24, 2010)

⁸⁸ AEP Jackson’s Ferry/Wyoming Line

⁸⁹ WV PSC case no: 09-0770-E-CN

⁹⁰ WV PSC case no: 09-1758-E-C

way (“ROW”) clearing of PATH parent company Allegheny Energy’s TrAIL line. The PATH landowner complaints⁹¹ detail numerous breaches in “PATH’s Code of Conduct for Right of Way Agents and Subcontractor Employees.” These filings paint a much less rosy picture of “cooperation” than Mr. Poff does. The owners of the “...1,139 parcels identified as requiring a ROW for PATH in West Virginia”⁹² deserve better than to have this advertising funded through PATH’s Revenue Requirement which they, as electric customers, are forced to pay. This simply cannot be what FERC had in mind as “education related advertising.” Funding these campaigns is in opposition to FERC’s own Strategic Plan to “ensure that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential.”⁹³

Advertising expenditures which PATH recovered as SESO are in fact General Advertising, and not “education related.” PATH failed to perform the steps needed to include recovery of \$2.1 million in the revenue requirement, a figure which exceeds 11% of the total revenue requirement. A better process is warranted to ensure that the calculation of the revenue requirement does not come down to the subjective opinions of the recipients. We request these expenses be refunded to ratepayers, with interest.

C. 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

The PATH Cos. have 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 for a project such as PATH.

⁹¹ WV PSC case no: 07-0508-E-CN

⁹² Discovery Response: WVStaff-III-10, Twelfth Supplement WVPSC case no: 09-0770-E-CN (Jan. 4, 2011)

⁹³ <http://www.ferc.gov/about/strat-docs/strat-plan.asp>

Properly included in Account 426.1 are “Donations. This account shall include all payments or donations for charitable, social or community welfare purposes.”⁹⁴ 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. Because these donations are made in the name of the PATH Cos. and used as an income deduction on their Form No. 1, the recipients are under the mistaken impression that this is a goodwill gesture on the part of the companies, when in fact the funds for these donations are paid by the ratepayers through PATH’s return. While charity is an admirable pursuit, it quickly loses its luster when performed with money that comes out of the pocket of someone else.

A review of PATH’s 2009 Account 426.1 detail⁹⁵ reveals a pattern of donations to political interests; local community organizations in areas impacted by PATH; sponsorship of community events where PATH received free advertising and other perks in exchange for their sponsorship; and contributions made to Allegheny Energy’s own Dollar Energy Fund, for which the corporation takes credit.

The larger donations and sponsorships in PATH’s account detail are given solely to influence public opinion toward acceptance of their project in affected communities. In many cases, these sponsorships have value added in the form of event advertising and public relations opportunities and therefore are not true charitable contributions given without expecting a return. For example, the PATH Cos.’ “donation” to Top of Virginia Regional Chamber sponsored a golf tournament where sponsors received “...prominent name recognition prior to, during and following the event. Don’t miss this opportunity to place your name in front of over 150 area

⁹⁴ 18 C.F.R. Part 101

⁹⁵ Exhibit-E, pp. 1-7, *Account detail 426.1, WV-PSC discovery response Haverty I-2-A*

business people the day of the event. Your business name will also appear in Chamber publications before and after the event which are distributed to over 900 chamber member businesses.”⁹⁶

By their “donation of a sponsorship,” the PATH Cos. received valuable public relations exposure used to influence public opinion to favor approval of their project based on their generosity to the Chamber, and not on the actual need for PATH.

Properly included in 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.**”⁹⁷ (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 their project. Expenses listed in this account in 2009⁹⁸ are clearly buying influence for approval of their project. Since every aspect and action regarding the PATH project by the PATH Cos. is geared toward the approval of the PATH project itself and includes no other goals, any allowable inclusion of expenses in this account would be contrary to the definition of account 426.4.

⁹⁶ Exhibit-K, *Top of Virginia Regional Chamber Newsletter, excerpts April & June, 2009*

⁹⁷ 18 C.F.R. Part 101

⁹⁸ Exhibit-E, pp. 8-12, *Account detail 426.4, WV-PSC discovery response Haverty I-2-A*

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. Challengers contend that lobbying for approval of the PATH project before various governmental bodies is still considered directed at the approving body, even if done through a third party, and should be strictly prohibited by definition in the USofA. PATH spent \$314,793.80 in 2009 alone on both federal and state lobbyists in an attempt to influence the regulatory/judicial bodies reviewing their project's applications. As an example, see Exhibit-L, which is a copy of two State of Maryland Lobbyist Registrations (2009 and 2010)⁹⁹ for one of PATH-Allegheny's paid lobbyists. The registration lists matters on which the lobbyist will be acting or employing someone to act during the registration period. First on the list is "Certificate of Need." This shows intent on the part of PATH, through their paid lobbyists, to attempt to influence the Maryland Public Service Commission, which is tasked with reviewing PATH's application in that state and either issuing or denying a Certificate of Need. Since the Maryland PSC has sole jurisdiction on the issuance of a Certificate of Need, any lobbying on this issue would be moot if it did not attempt to influence their decision. This is a blatant example of "expenditures directly related to appearances before a regulatory commission in connection with a proposed operation," which is prohibited in the account 426.4 definition.

Another example which clearly shows PATH's utilization of both 426 accounts to favorably influence approvals for their project is Tab 12, Supplemental Direct Testimony of Milorad Pokrajac, PATH's application to the West Virginia Public Service Commission,

⁹⁹ Exhibit-L, *Lobbyist Registration, Daniel Paul Tompkins, Nov. 1, 2009 - Oct. 31, 2010 and Nov. 1, 2010 - Oct. 31, 2011*

Statement A of Schedule 7 (July 8, 2010).¹⁰⁰ Mr. Pokrajak's testimony presents a hypothetical PATH project revenue requirement for the year ended June 30, 2016, which would be PATH's proposed first year of operation. The schedule shows a total projected expenditure of zero for both accounts 426.1 and 426.4 during PATH's expected first year of operation. In 2009, PATH's expenditures for both 426 accounts was \$367,847. By noting PATH's abrupt abandonment of any charitable, civic or political activities after project approval, a clear inference can be made that PATH's current use of these two accounts is for the express purpose of buying favorable influence to facilitate approvals for their project.

The use of both accounts 426.1 and 426.4 should be disallowed by the PATH companies and appropriate accounting adjustments made.

D. 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

As Challengers commenced receiving information from the PATH Cos. through the discovery process, a wide range of basic accounting errors began to present themselves. Poor accounting and management practices on the part of the PATH Cos. are the cause of many of these errors. Because of the broad scope of accounting errors committed by the PATH Cos., Challengers question PATH's overall ability to accurately calculate their Formula Rate. This also lends skepticism to the previous calculation of pre-construction costs currently being amortized over the 5-year construction period and the calculation of the 2008 Actual Transmission Revenue Requirement.

¹⁰⁰ Exhibit-M, *Supplemental Direct Testimony of Milorad Pokrajak, July 8, 2010*, WV-PSC Case 09-0770-E-CN

Perhaps most egregious of the accounting errors is the copious number of invoices that have been posted to more than one regulatory account, artificially inflating the PATH Cos.' expense and recovery.¹⁰¹ The PATH Cos. cannot recover more than they have paid for services. This double-posting of expenses has even spread to the CWIP account, where it grievously inflates the rate base (where the expense will reside for years until fully depreciated) and subsequent return to the PATH Cos. Whether it is caused by simple carelessness on the part of accounts payable when originally posting expenses, or by journal entries created to move expenses around the general ledger at a later date that are not properly balanced, the cause needs to be investigated, corrected and necessary procedures instituted to safeguard against future occurrence of this frequent accounting error.

It was made evident by a large volume of inconsistent expense recording that accountants for the PATH Cos., as well as project managers assigning accounts on invoices, 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.

According to the PATH Cos., the ATRR is never fully audited by an outside party, therefore the errors discovered by Challengers were never examined. The audit submitted to the Commission, as part of PATH's FERC Form 1 filing, as claimed by the PATH Cos., covered only certain pages of FERC Form 1 (pages 110 - 123):

¹⁰¹ Exhibit-N, *Over-recovered expense posted to more than one regulatory account*

“The independent auditor does not review PATH’s ATRR prior to submission. However, the independent auditor audits the financial information contained in FERC Form 1 that is used as inputs to the formula to compute the ATRR.”¹⁰²

“No separate audit was performed, or is required, solely with respect to any individual financial statement line items. The Deloitte audit included examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.”¹⁰³

The PATH Cos. should voluntarily subject themselves to full audit at regular intervals to ensure the integrity of their Formula Rate filings in the future, particularly in light of Challengers finding a plethora of accounting errors.

The PATH Cos. have made numerous expense recording errors caused by lack of purchase orders being issued, or a purchase order from another project (TrAIL) being utilized for PATH expenses. Common accounting procedure notes that lack of proper purchasing documents often results in improper accounts payable expense recording and is suspected by Interested Parties to be a contributor to the PATH Cos.’ inconsistent and improper expense recording in this instance.

The PATH Cos.’ allocation of parent company expenses to the PATH project shows an inconsistent and bizarre pattern of unrelated expenses on behalf of partner Allegheny Energy. In an attempt to understand their processes, several information requests were submitted. Although the company cost allocation manuals received in response¹⁰⁴ were straightforward, the allocation of identical expenses to different regulatory accounts for PATH-Allegheny and PATH-WV was never properly explained:

¹⁰² Information Response: Newman-17 (Oct. 25, 2010)

¹⁰³ Information Response: Newman-48, c (Nov. 18, 2010)

¹⁰⁴ Information Response: Newman-36, A & B (Nov. 12, 2010)

“Allegheny Energy utilizes a simplified FERC derivation process in billing PATH-WV. The majority of the costs are classified as accounts 920, 921, or 923. Therefore, a portion of some expenses is charged to PATH-Allegheny’s account 935 and a separate portion of the same expenses is charged to PATH-WV’s account 921.”¹⁰⁵

Specifically regarding allocation of Sirva Relocation expenses for Allegheny Energy executives, including employees at the CFO level in Greensburg, Pennsylvania,¹⁰⁶ PATH had this explanation:

“Sirva Relocation costs are related to the relocation of the work location of Allegheny Energy transmission employees to the new Allegheny Energy transmission headquarters building. The PATH Project receives an allocation of a portion of these transmission employee related costs.”¹⁰⁷

The new transmission headquarters referenced is located in West Virginia, not Greensburg, Pennsylvania.

In light of other improper expense recording, the allocation of parent company expenses by the PATH Cos. 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 the PATH Cos. 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 the PATH Cos. expense detail leaves us with many serious doubts.

¹⁰⁵ Information Response: Newman-28, b. (Nov. 3, 2010)

¹⁰⁶ Information Response: Newman-7B (Oct. 1, 2010)

¹⁰⁷ Information Response: Newman-25 (Nov. 1, 2010)

E. 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

Per the Protocols, Challengers' information requests were made to determine per Section VI.D:

- (a) that the input data [was] properly recorded;
- (b) that PATH [had] properly applied the Formula Rate and the procedures in these Protocols;
- (c) the accuracy of data and the consistency with the Formula Rate of the charges shown in the Annual Update (including the True-up Adjustment);
- (d) the extent and effect(s) of Material Accounting Changes;
- (e) the prudence of the costs and expenditures included for recovery in the Annual Update; and
- (g) the reasonableness of any cost allocation methodologies, including inter-corporate cost allocation methodologies that differ from those utilized in the prior Annual Update.

Through the data requests PATH chose to answer, it was discovered that expenses had not been properly recorded on FERC Form 1, and that there were imprudent costs that had been included for recovery in the Formula Rate.

In the beginning of the process, our data requests were answered in a transparent, thorough manner, and included requested copies of invoices, expired contracts and purchase orders without the requirement of confidentiality or protective agreements. These requested documents do not fall within the only mention of confidentiality in the Protocols. Section VI.D.g states, "Interested Parties may obtain and review the Capital and O&M budgets ("Budgets") for PATH-WV and PATH-Allegheny, subject to confidentiality protections," so it was not appropriate to require protections for the aforementioned documents per the Protocols.

As Interested Parties made additional requests for information and documents, increasingly came the response:

“Your timely execution of a satisfactory protective agreement will be required prior to disclosure of these documents.”¹⁰⁸

PATH Counsel’s requirement for a Protective Agreement became quite frequent, even though information similar to that requested had previously been provided without a Protective Agreement. While the Protective Agreement may have first become an issue for legitimate reason, when the Challengers found themselves unable to sign it due to PATH Counsel’s accidental release of parts of the covered information without benefit of an Agreement in an earlier response, Counsel began a relentless quest¹⁰⁹ to get Challengers to sign a generalized Protective Agreement. The Counsel was fully aware of the reasons why Challengers could not sign such an agreement. The confidentiality of documents was tainted early in the discovery process by PATH Counsel’s own errors, and it is not incumbent upon Challengers to sign Protective Agreements retroactively in order to rectify Counsel’s blunders.

This pattern of noncompliance with the protocols, following an initial period of adherence, continued to the end of the Discovery Period. Another response we received with increasing frequency was:

“The PATH Companies object to this data request on the grounds that the request is overbroad and unduly burdensome, the request seeks information that is beyond the scope of discovery and review set forth in the PATH Formula Rate Implementation Protocols, and is irrelevant and not reasonably calculated to lead to the discovery of relevant information.”¹¹⁰

The scope of discovery per the Section VI.C of the Protocols states:

¹⁰⁸ Information Response: Newman-6, Sept. 14, 2010

¹⁰⁹ Newman-6, Newman-18, Newman-19, Newman-35, Newman-46, Haverty-23, Haverty-24

¹¹⁰ Newman-13, Newman-14, Newman-18, Newman-21, Newman-26, Newman-29, Newman-32, Newman-37, Newman-38, Newman-39, Newman-41, Newman-42, Newman-43, Newman-1, supplemental, Newman-45-2, Newman-48, Newman-49, Newman-50, Newman-51, Newman-52, Newman-53, Newman-54, Newman, 55, Haverty-20, Haverty-22, Haverty-23, Haverty-26, Haverty-29, Haverty-32, Haverty-35, Haverty-36

“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.”

With no venue through which to compel discovery, Challengers were at the whim of what PATH’s Counsel deemed relevant and/or protected.

As Challengers found what were believed to be recording errors and expenses improperly passed to ratepayers, questions were required to ascertain if we were correct in our assessment. They were not meant to be overbroad; in fact, most were overly specific. They were not beyond the scope of the Protocols and were calculated to lead directly to relevant information. Even simple questions that did not require the production of documents¹¹¹ were denied as time progressed toward the end of the discovery period.

Use of Protective Agreements and refusing reasonable requests for information were relied on by the PATH Cos. to suppress information which may have shown their actions in an unfavorable light. Because PATH chose to seek recovery of expenses for their project from ratepayers (and even constructed their own set of Protocols, H-19B), they placed themselves in a position of transparency, under the watchful eyes of the ratepayers financing their project. That ratepayer Challengers actually utilized the system PATH created to properly obtain information under 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 using public money reveal actions on their part which are embarrassing or unflattering, perhaps they should have ensured that their actions were above reproach from the start.

¹¹¹ Information Request: Newman-39 (Oct. 28, 2010)

III. CONCLUSION

Ms. Newman and Ms. Haverty, as affected ratepayers and Interested Parties, began their series of Information Requests in August of 2010 in an effort to gain knowledge regarding PATH's Formula Rate.

The Information Responses revealed a distinct pattern of buying influence for project approvals using funds recovered from ratepayers and a breadth of accounting errors not originally anticipated. A full independent audit is a vital first step to correcting the accounting errors; however, adherence to the public oversight protections in the protocols also will insure future compliance. Challengers also request that any resulting audit be made public.

Challengers also respectfully request that the advertising expenses be classified correctly as General Advertising, the PATH Cos. use of accounts 426.1 and 426.4 be discontinued, and the detailed imprudent expenditures be rebated to ratepayers, with interest.

The advertising, lobbying, and imprudent expenditures are all the more glaring when compared with the similar TrAIL project expenses.¹¹² Many of the same contractors and one of the same parent companies were involved in the TrAIL project. For the challenge related regulatory accounts 923, 930.1, 930.2, 426.1 and 426.4, the balances for PATH are more than double that of TrAIL "at relevant points in time."¹¹³ TrAIL may be a somewhat smaller project than PATH, but it also is a multi-state project in many of the same media markets and crosses much of the same terrain. Most of these same objectionable strategies began during the TrAIL project, under the management of one of PATH's parent companies, Allegheny Energy. Challengers have no intent to hold the Trans-Allegheny Interstate Line Company ("TrAILCo.")

¹¹² Exhibit-O, *Comparison of TrAIL and PATH Expenditures*

¹¹³ *Id. at 12*

up as exemplary in these matters; however, a comparison helps to illustrate the manner in which this company has transgressed.

PATH Counsel reminded Challengers in the response to the Preliminary Challenge that “...the Commission generally does not require utilities seeking recovery of costs through their rates demonstrate initially that all expenditures for which they seek recovery are prudent.” The burden is on the parties alleging the expenses as imprudent to take the first step. Should no parties take on this burden, ratepayers must pay for all expenses the companies choose to include in their revenue requirement and rate base. There is no incentive to self-regulate, as evidenced by the lesson learned by one of PATH’s parent companies in TrAIL, which was that there is no one “...adducing evidence or citing material of which the Commission may take notice.”¹¹⁴ That an interested party never challenged TrAILCo.’s Formula Rate is due entirely to ignorance of the available processes by the average ratepayer. It is not due, in any way, to the prudence of the TrAIL expenditures. In fact, we now suspect that if this same process were to be embarked upon concerning TrAILCo.’s Formula Rate, substantially similar errors and imprudent expenditures would quickly make themselves evident. We would urge the Commission to require a thorough review of all of Allegheny Energy’s rate recovery processes, as the party in common on both projects.

The Challengers’ inability to compel evidence through PATH’s Formula Rate Implementation Protocols only makes matters worse in light of the Challenge the Commission now has before it, and a better system is warranted. The Commission surely did not intend these consequences when they approved PATH’s Formula Rate, but they are now a reality, and the

¹¹⁴ PATH Counsel’s Response to Preliminary Challenge (Jan. 3, 2011)

Challengers have put forth a great deal of effort so that “the Commission may take notice,” in response to PATH Counsel’s observation.

A. FERC is obligated to incorporate Public Policy considerations in its decision making on whether or not to accept PATH’s filing

PATH’S tariff filing is rife with expenditures designated for the purposes of public education, educating public entities and promoting its operations. The Challengers have failed to obtain cooperation on disclosure of the details of its reasoning behind these large-scale expenditures. Exactly what must the public and its representatives be educated about? PATH has taken the position that it is somehow the surrogate for PJM and FERC and, in some ways, the sole enforcer of FERC’s incentive-based transmission development goals. The clear messages being disseminated throughout PATH’s proposed service territory are: Without the PATH project, the lights will go out; PATH is a done deal so the public may as well get used to it; and the presumptuous proposition that PATH has been “ordered” or “directed” to be built by PJM – as directed by FERC - as the representative of the critical national interest in modernizing the electric grid, thus PATH is the agent that is pursuing the design of the United States’ goal of better transmission for a greener and more secure future. The Challengers contend that the unchecked quantity of expenditures on “external affairs” activities¹¹⁵ promoting these ideas is reckless, intentionally misleading and far outside the boundaries within which a prudently run business would venture.¹¹⁶

¹¹⁵ The term “external affairs” was accepted by FERC and adopted by the DC Circuit Court of Appeals in the context of analyzing identical types of expenditures, namely. “Government Affairs,” “Public Information,” and “Regulatory Affairs” (collectively, “external affairs”). *ISO-NE, 109 FERC ¶ 61,383 at p. 18 (2004)*; *ISO-NE, 113 FERC ¶ 61,341 at p. 10 (2005) and*; *Braintree Elec. Light Dept. v. Fed. Energy Reg. Commn., 550 F. 3d 6 (D. DC 2008)*.

¹¹⁶ Challengers contend that it is manifestly imprudent for a company to engage in activities that violate consumer protection laws in several of the states where PATH proposes to do business. An example of the ‘path’ such expenditures could potentially follow is eerily similar to the predicament of PG&E in California, where utility

FERC was established as a regulator for the benefit of consumers who rely on its ability to ensure just and reasonable rates. FERC’s precedential model for this duty was established by the Supreme Court in *NAACP v. FPC*.¹¹⁷ The Supreme Court defined the authority of the Federal Power Commission (FERC’s predecessor) regarding its jurisdiction over matters such as unfair labor practices that are not specifically stated to be under the Commission’s original jurisdiction. Although the Commission’s regulatory authority is strictly limited to that defined by statute, the Supreme Court adopted the Court of Appeals’ reasoning that although “the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare,” the Court also agreed that the words take their meaning from the purposes of the regulatory legislation.¹¹⁸ The primary purpose of the statute creating the Federal Power Commission is “the *legislative command* to the Commission under the Power and Gas Acts to ‘establish just and reasonable rates for the transmission and sale of electric energy’ ...”¹¹⁹ (emphasis added). The Supreme Court analyzed the question of the Commission’s authority thus: Because employment discrimination is an unfair labor practice that is strongly contrary to the public interest, it results in duplicative labor costs (by way of backpay awards; costs of losing valuable government contracts; costs of legal proceedings; costs of strikes, demonstrations and

shareholders were forced to fund a defense against state Unfair Practices Act allegations by the state Attorney General. The 9th Circuit Court of Appeals determined that regardless of the regular asset distribution rules in bankruptcy court, activities that potentially violate consumer protection laws could be concurrently litigated to benefit the public via restitution and/or injunctive relief directing legal fees and potentially distributable assets away from shareholders. *City and C’ty of San Francisco v. PG&E*, 433 F.3d 1115, 1119 (9th Cir. 2006). Challengers assert that there is no valid business purpose for engaging in a blatant campaign of disinformation that harms consumers and conflicts with public policy goals while simultaneously placing its corporate reputation and legal risk position in jeopardy. Public goodwill is a corporate asset that PATH is foolish to squander. For a company that relies on public perception of its honesty and legally required transparency of its operations to support its financing structure, the imprudence and impudence of PATH’s external affairs activities is an astonishingly arrogant abuse of its market position as an incumbent transmission owner.

¹¹⁷ *Nat’l Assoc. for the Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662 (1976).

¹¹⁸ *Id.* at 669.

¹¹⁹ *Id.* at 666. (internal citations omitted)

boycotts; and numerous other unquantifiable expenses that are contrary to the interests of the consumer because they are unnecessary and unfair, and therefore “directly related to the Commission’s establishment of just and reasonable rates in the public interest.”¹²⁰

Just as NAACP analyzed the Commission’s responsibility to limit unnecessary costs to the consumer by regulating wrongful policies and practices, the case *Scenic Hudson Preservation Conference v. Fed. Power Comm’n* charged the Commission with the “public policy” duty to consider alternative electric transmission projects that would better preserve the scenic beauty of the Hudson River and protect other public interests such as land value, fisheries, conservation of resources, tax revenues, long range community planning, and effects on the daily lives of the people.¹²¹ The Court of Appeals adopted the words of the FPC dissenting Commissioner who stated, “I do feel that the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The thread running through this case has been that the applicant is entitled to a license upon making a prima facie case... This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it.”¹²²

Hudson was under the direct authority of the FPC to grant a CPN to the project. Although in the case of PATH, the CPN authority lies with the states at this stage, FERC’s authority is broad. Due to the controversial nature of the PATH project, the Commission has a duty to ensure that activities that are paid for by ratepayers do not act to foreclose the opportunity for the public to keep its options open for better and more appropriate projects. The

¹²⁰ *Id.* at 671.

¹²¹ *Scenic Hudson Preservation Conference v. Fed. Power Comm’n*, 354 F.2d 608 (2nd Cir. 1965).

¹²² *Id.* at 620.

Challengers request that this Commission exercise its duty to protect the public's right to determine its own interests by denying PATH the opportunity to wage an all-out "external affairs" war with no purpose but to abolish any chance for alternative transmission plans. This duty to protect the public right to transparency and open decision-making is even more critical now than when a specialized power commission was established because of the rapid pace of technological development and changing environmental and security needs. Challengers remind the Commission that PATH is entirely within the Chesapeake Bay watershed, it stands to deflect resources from the development of off-shore Atlantic renewable energy, and it surrounds the geographic epicenter of the nation's homeland security interests. It is not a proper abdication of this Commission's authority to allow PATH to dictate, with unlimited expenditures, what the public's needs are.

Challengers have questioned PATH on its motivations and the circumstances that "require" such expenditures, to no avail. Meanwhile, public anger and the vehement determination of consumers to shape their own policy needs is growing increasingly expensive and reaching a critical mass that will result not in advanced power transmission, but in endless litigation. It is incumbent upon FERC to enforce PATH's disclosure obligations to reveal the reason it finds it necessary to engage in a multi-million dollar advertising, marketing, lobbying and influence campaign and how this benefits the consumers' bottom line -- just and reasonable rates -- and how it advances this Commission's duty to protect the public interest.

Respectfully submitted this January 21st, 2011

/S/ Keryn Newman

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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 FORMULA RATE ANNUAL UPDATE upon the parties listed below by e-mail, on January 21, 2011.

/s/ Keryn Newman

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/s/ Alison Haverty

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