



March 31, 2011

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington DC 20426
Via Electronic Filing

Re: *Potomac-Appalachian Transmission Highline, LLC*
Docket No. ER08-386-000

Dear Secretary Bose:

I write on behalf of the Sierra Club and Earthjustice regarding the March 7, 2011 letter submitted by Potomac-Appalachian Transmission Highline, LLC (“PATH”). Contrary to PATH’s assertions, we respectfully submit that PATH is not entitled to continue recovering funds from the ratepayers for its activities subsequent to PJM’s suspension of the project. To allow recovery under these circumstances would conflict with the Commission’s obligation to assure that rates are just and reasonable.¹ It would also create a perverse incentive for companies to spend ratepayer money on potentially unnecessary transmission lines.

The Sierra Club is among the oldest environmental organizations in the United States and is dedicated to the protection of the natural and human environment. Sierra Club has over 620,000 members, including more than 95,000 members who live within the PJM service territory.² Many Sierra Club members are ratepayers who will face higher electricity bills as a

¹ Federal Power Act §205(a), codified at 16 U.S.C.A. § 824d(a) (“All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”).

² This figure is based on membership numbers for Ohio, Pennsylvania, New Jersey, Delaware, Washington, D.C., Maryland, Virginia, and West Virginia only. Sierra Club also has 36,979 members in Michigan, North Carolina, and Kentucky, the other states partially covered by the PJM service territory.

result of PATH's recovery of its ongoing expenditures. Sierra Club members are also concerned about the environmental impacts of the PATH line. In addition to the line's direct impacts, expert testimony has shown that dangerous emissions from old coal-fired power plants will increase as a result of the line.³

PATH's continued collection under its Formula Rate would be unjust, and therefore unlawful, given the project's current "suspended" status. Granting PATH incentives to build a project whose need is in serious doubt would also encourage other ill-conceived projects to move forward.

I. Congress and the Commission Intended Incentive Rate Packages to Encourage the Construction of Transmission Lines that Would Serve the Public Interest.

To address concerns about underinvestment in transmission, Congress enacted Section 219 of the Federal Power Act through the Energy Policy Act of 2005, requiring the Commissioner to make rules establishing "incentive-based rate treatments" for transmission projects. The incentives are to "benefit[] consumers by ensuring reliability and reducing the cost of transmitted power by reducing transmission congestion." Pub. L. 109-58 §1241(a). Federal Power Act Section 219(d) provides that all incentive rates remain "subject to the requirements of [FPA] sections 205 and 206" and must be "just and reasonable and not unduly discriminatory or preferential." 16 U.S.C.A. 824s(d).

FERC Order No. 679 established the Commission's incentive program. The Commission requires that an applicant for rate incentives "must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that the total package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable." 18 C.F.R. § 35.35(d).

³ See Direct Testimony of Christopher A. James on Behalf of the Sierra Club, *In Re: Path Allegheny Virginia Transmission Corporation: Application for Approval of Electric Facilities Under the Utility Facilities Act*, Virginia State Corporation Commission, Docket No. PUE-2009-00043 (filed Oct. 14, 2009), pp. 8-10, 12-13, 17-20; Direct Testimony of George C. Loehr, *In Re: Path Allegheny Virginia Transmission Corporation: Application for Approval of Electric Facilities Under the Utility Facilities Act*, Virginia State Corporation Commission, Docket No. PUE-2009-00043 (filed Oct. 23, 2009) (hereinafter "Loehr Testimony"), pp. 8, 29, 31-33, 40-41. Both documents are available at <http://www.earthjustice.org/news/press/2009/experts-raise-concerns-about-new-transmission-line-from-coal-country-to-eastern-grid>.

Pursuant to these standards, PATH received its incentive rate package on February 29, 2008. In its February 29 Order, the Commission cited two key factors supporting its decision: that PJM had included the PATH line in its 2007 Regional Transmission Plan, and that there was “substantial evidence that the Project ensures reliability by substantially reducing overloads on the current system and reduces the cost of delivered power by reducing congestion on 12 major 500 kV transmission routes in the region.” *Order Accepting and Suspending Formula Rates, Subject To Conditions, and Establishing Hearing and Settlement Procedures*, 122 FERC ¶ 61,188 at ¶3 (Feb. 29, 2008).

Thus, the Energy Policy Act, FERC Order No. 679, and the Order on PATH’s incentives all contemplate incentives for lines that are actively recommended by the regional grid operator to ensure reliability and reduce congestion, which are actually moving forward, and which result in just and reasonable rates. In the event that a project is “abandoned” for reasons beyond the utility’s control, Order 679 and the February 29, 2008 Order authorize recovery of project expenditures up until abandonment. But neither Congress nor the Commission intended to provide ratepayer-funded incentives to continue work on lines whose necessity is up in the air indefinitely; each of the authorities discussed above is silent on the effect of a “suspension” of a project. As discussed below, the PATH project is currently suspended and may be permanently off the table. Neither Congress nor FERC has authorized incentive rates in such a situation. Thus, the Commission should not allow PATH to continue recovery per its Formula Rate without further review of whether the company is still entitled to do so.

II. PATH is Not Currently Included in PJM’s Long-Term Transmission Expansion Plan, and May Never Be.

The circumstances surrounding the PATH project have fundamentally changed since the Commission first granted PATH its incentive rate package in February 2008, and even since the Commission’s Order on Rehearing (133 FERC ¶61,152, Nov. 19, 2010). On February 28, 2011, PJM ordered PATH to “suspend efforts on the PATH project.”⁴ PJM decided not to include the project in its 2010 Regional Transmission Expansion Plan issued earlier this month. This is the first year since the project’s inception that PJM has removed the project from its annual transmission expansion plan. PATH has since sought to withdraw its applications for state approval in all three states where applications were pending. Although PJM continues to study PATH, there is no assurance that it will ever recommend that it be built. Moreover,

⁴ *PJM Directs Delay in PATH Transmission Line*, PJM News Release, February 28, 2011, at <http://pjm.com/~media/about-pjm/newsroom/2011-releases/20110228-RTEP-announcement.ashx>.

PJM's analysis thus far as shown that the projected reliability violations originally driving the project have moved *more than a decade into the future*. PATH's attorney recently presented PJM's analysis before the Virginia State Corporation Commission. He concluded:

[A]s you can see, the base case alone [taking into account a revised load forecast] moves out the thermal violations into the next decade. And when the two fairly certain sensitivities that were considered by PJM, the Mt. Storm-Doubs [transmission line] rebuild and the construction of the Warren County [Virginia power plant] facility, *the thermal violations virtually disappear from the planning horizon*.

Transcript of Hearing on Motion to Withdraw before Alexander Skirpan, Senior Hearing Examiner, Virginia State Corporation Commission, March 17, 2011 (Statement of Richard D. Gary, Counsel for PATH), attached hereto.⁵

PATH does not concede the obvious significance of these changes. Its counsel has stated that “[s]ome non-development activities and non-capital cost expenditures will necessarily continue in order to maintain the Project in its current state during this period of suspension. Thus, the PATH Formula Rate and Protocols will continue to apply during the Project’s suspension.” March 7, 2011 letter from PATH’s Counsel, Docket No. ER08-386-000. The assumption that the formula rate continues to apply is wholly unsupported. PATH has created for itself a new category somewhere between project development and abandonment, which it calls “suspension”. None of the authorities under which PATH received its incentives contemplate such an in-between category, in which the fate of the line is uncertain.

III. The Changed Circumstances Warrant Further Review of PATH's Assumption that it Can Proceed with Formula Rate Recovery.

The Commission should review whether, given the fundamentally changed circumstances of the line, the incentives granted to PATH must expire. Allowing recovery for “activities necessary to maintain the Project in its current state” when the line’s need is in such serious doubt that it is no longer part of PJM’s long-term planning document, nor even pending before state public utility commissions, would violate the requirement that all rates be “just and reasonable.” *See* Federal Power Act §§ 205, 206, 219(d). By PATH’s own admission, the current 15-year planning horizon shows no

⁵ Mr. Gary also stated that the upgrade of the Mt. Storm-Doubs line “will move out the thermal violations shown in the base case well into the decade of the 2020’s.” Tr. at 418:2-8.

apparent need for the line. Although PATH has yet to determine the cost of these “activities necessary to maintain the project”, the principle is the same regardless of the amount. Ratepayers should not be subsidizing an uncertain line for an indefinite period.

The Commission should also consider whether allowing recovery for activities following the suspension makes good transmission policy. Sierra Club submits that it does not. A far better course would be to require a new application for an incentive package *when and if* PJM determines that the line is needed. Transmission investment should not be an end in itself. It is inherent in the Commission’s duty to ensure just rates to consider whether the cost to ratepayers of such investment is in proportion to the public benefits of the line.

Thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Saxonhouse', written in a cursive style.

Elena Saxonhouse
Staff Attorney
Sierra Club

Abigail Dillen
Staff Attorney
Earthjustice

ATTACHMENT

Transcript of Hearing on Motion to Withdraw before Alexander
Skirpan, Senior Hearing Examiner
Virginia State Corporation Commission
March 17, 2011
Statement of Richard D. Gary, Counsel for PATH

1 HEARING EXAMINER: Okay. Is that all
2 the folks on the phone?

3 (No response)

4 Okay, good.

5 I know currently we have a number of,
6 number of Motions that have been filed,
7 Responses that have been made, and so what, what
8 I'm -- I guess, Mr. Gary, since you're -- you
9 probably have the most Motions outstanding, I'll
10 let -- you-all will go first.

11 Assume that I've already read all of
12 the Motions, pleadings and Responses, so rather
13 than starting off as if it was the -- you know,
14 just with the Motion, if as you go through, you
15 want to address any of the comments or
16 Responses, we can do that and get more into the
17 substance as we go.

18 MR. GARY: Your Honor, may I use the
19 podium?

20 HEARING EXAMINER: Sure.

21 MR. GARY: Good afternoon, Your Honor.

22 The -- of course, the Motion to
23 withdraw the application is the primary Motion
24 we're addressing this afternoon, and as well as
25 the Motion in which we asked and you agreed to

1 suspend further studies being submitted to the
2 Commission pending this oral argument. Those
3 are the two essential Motions I'll be addressing
4 and some Responses that we've received to those.

5 And on February 28, 2011, PATH-VA
6 filed a Motion to withdraw the application for
7 the Commission's approval in the certification
8 of the PATH Project. The reason for the
9 Withdrawal Motion is that PJM has suspended
10 current development of the PATH line because the
11 updated load forecast and current transmission
12 topology indicate that the projected appearance
13 of NERC Reliability Standard violations have
14 advanced several years into the future.

15 I want to use a slide here that was
16 from the PJM Transmission Expansion Advisory
17 Committee -- the TEAC -- meeting of March 10,
18 2011. And this is the information that was
19 before the PJM Board when it decided to suspend
20 PATH on February 28, 2011.

21 Now, Your Honor, what this slide shows
22 is the results of the base case and several
23 sensitivity analyses for the thermal violations.
24 Your Honor will recall that you requested in
25 your Ruling of January 19, 2011, that an updated

1 base case be run to include essentially four
2 things: One is the most up-to-date 2011 load
3 forecast; two, the updated generation in the PJM
4 queue; three, the 2010 RPM results including
5 demand response; and four, the updated PJM
6 transmission projects.

7 As we discussed in the January 10 pre-
8 hearing conference -- January 6 pre-hearing
9 conference, the 2011 load forecast is projected
10 to be 2.2 percent lower in 2011, 2.7 percent
11 lower in 2014, and 3.4 percent lower in 2016.
12 This slide shows the results of that base case.
13 And in this first column -- if I can point to it
14 here -- the base case shows that the first
15 thermal violation based on the base case with
16 the updated load forecast and the other updates
17 I mentioned moves out to 2021. And that is on
18 the eastern portion of the Mt. Storm-Doubs line,
19 as designated as the T157 Tap to Doubs line.

20 Now, as you requested, the base case
21 does not include the approved -- the PJM-
22 approved update -- upgrade and rebuild of the
23 Mt. Storm-Doubs line, which is shown on, on this
24 chart as the first two lines on this slide. So,
25 the Mt. Storm to T157 Tap is the western side of

1 the line, and the T157 Tap to Doubs is the
2 eastern side of the line. When the upgrade is
3 completed, the Mt. Storm-Doubs line, the first
4 two lines on this slide, the carrying capacity
5 of that line will be increased about 66 percent.
6 And so, that will move out the thermal
7 violations shown in the base case well into the
8 decade of the 2020's.

9 The Pruntytown-Mt. Storm is the next
10 closest violation, and even in the base case
11 does not occur until 2024. We now know that the
12 Dominion's Warren County 1400-megawatt gas-fired
13 generation project will unload that Pruntytown-
14 Mt. Storm line, because it is east of the, of
15 the source of the Pruntytown line, so it will --
16 the generation from the Warren County project is
17 most likely to go east. When you include that
18 in the second column, the Warren County line,
19 you see that the Warren County facility, the
20 overload on the Pruntytown-Mt. Storm line moves
21 out way into the next decade of 2020's. We
22 understand that the Warren County project is
23 well under development and has an interim
24 Interconnection Service Agreement, with the
25 final ISA to be filed to -- or tendered to PJM

1 likely within the next month.

2 So, as you can see, the base case
3 alone moves out the thermal violations into the
4 next decade. And when the two fairly certain
5 sensitivities that were considered by PJM, the
6 Mt. Storm-Doubs rebuild and the construction of
7 the Warren County facility, the thermal
8 violations virtually disappear from the planning
9 horizon. And this is why the other studies that
10 PJM was going to complete, as you requested in
11 your January 19, 2011 Ruling, were obviously
12 unnecessary, for PJM to take the action it has
13 now taken to suspend the construction activities
14 on the PATH line.

15 The solution of the base case can
16 certainly be submitted to the parties as text
17 files, which is the established way that PJM has
18 provided the power flow solutions in previous
19 cases. We really see no reason to submit the
20 results of the further sensitivity studies, as
21 the submission of these additional studies will
22 involve a substantial amount of data, all of
23 which becomes aged fairly quickly. And most
24 importantly, there certainly is no reason for
25 PJM to perform any more sensitivity studies,

1 given the results of the base case and the
2 several sensitivities already run, in that those
3 studies were sufficient to have caused PJM to
4 suspend construction activities on the PATH
5 line.

6 So, we believe that withdrawal of the
7 application is warranted, and indeed required,
8 given the base case, and specifically the 2011
9 lower load forecast. There should be no concern
10 about FERC jurisdiction being invoked, since a
11 voluntary withdrawal will give no grounds for
12 PATH to seek a FERC approval of the line. The
13 data you're looking at here certainly would not
14 support such a filing, and PATH commits not to
15 make such a filing. And moreover, the 9th
16 Circuit ruling that was previously handed down
17 remanded the designation of the National
18 Corridors back to the DOE, and that puts the
19 validity of the Mid-Atlantic National Interest
20 Corridors certainly in question.

21 Now, also, as we stated in the Motion
22 to Withdraw, a similar Motion as filed in
23 Virginia was also filed in West Virginia on
24 February 28th, and was promptly granted by the
25 West Virginia Public Service Commission on March

1 1st. And I have a copy of that for Your Honor
2 if you'd like a copy for the record.

3 In Maryland, the Public Service
4 Commission's regulations support that only a
5 notice is required to withdraw an application.
6 Now, that notice has been given, but there is
7 some opposition to that process.

8 So, all these points show the
9 appropriateness of withdrawing the PATH
10 application in this Virginia proceeding. And I
11 want to thank you, and I'll be happy to answer
12 additional questions now or after comments from
13 the other participants.

14 HEARING EXAMINER: The -- do I take it
15 from this that they also ran the Mt. Storm-Doubs
16 rebuild as a sensitivity analysis in this?

17 MR. GARY: As I understand it, they
18 didn't run any studies. They've looked at this,
19 and they know that the upgrade is substantial --
20 and, again, 66 percent increase in the carrying
21 capacity of the Mt. Storm-Doubs line. And it
22 clearly moves it out beyond the planning
23 horizon, as I understand it.

24 Mr. Herling is on the line. He can
25 correct me. There was no specific sensitivity

1 run for that one, as there were for Base Case +
2 Warren, for example.

3 HEARING EXAMINER: Okay.

4 MR. GARY: Now, the RPS studies, the
5 RPS to Existing Forecast and RPS At Risk, those
6 also did not involve new runs as much as they
7 involved looking at the requirements in the
8 states that have mandatory RPS, as Mr. McGlynn
9 had explained in his pre-filed testimony in this
10 case. And so, they looked at the megawatt-hours
11 that would be needed to move west to east and
12 loaded the lines up with those megawatt-hours.
13 And in the column marked At Risk is when they
14 took out relatively small coal units that were
15 more than 40 years old.

16 And just to complete the thing -- the
17 sheet here, the base case -- and Global Insight
18 is a much more aggressive load forecast, that
19 is, a higher load forecast than the Moody's
20 forecast that PJM generally uses, and that moves
21 it out again -- or moves it back closer in time.
22 But, again, when you add the upgrade to the Mt.
23 Storm-Doubs line to 2017, again will move
24 further out, several years out beyond that.

25 HEARING EXAMINER: Okay. We'll hear

1 from everyone else and see where we go.

2 MS. DILLEN: Your Honor, Abigail
3 Dillen, for the Sierra Club.

4 HEARING EXAMINER: Okay. And just --
5 I'm sorry, just before you start -- I would
6 assume, Mr. Gary, that you don't have any
7 problems filing what we just looked at?

8 MR. GARY: Filing this?

9 HEARING EXAMINER: Yes.

10 MR. GARY: Oh, not at all, Your Honor.

11 HEARING EXAMINER: Okay. All right.

12 MS. DILLEN: Your Honor, we certainly
13 agree that withdrawal of the application is
14 appropriate in light of the data that Mr. Gary
15 has presented.

16 We have two additional modest requests
17 that I think are eminently reasonable in light
18 of the history of these proceedings. One, we'd
19 like not only the base case to be provided to
20 the parties, but also the analyses themselves
21 that are the basis for the Motion to Withdraw.
22 I'm not exactly clear on what Mr. Gary was
23 representing he'd be willing to present to the
24 parties, so it might be worthwhile just getting
25 clarity on that.

1 But I, I took you to be saying, Mr.
2 Gary, that you'd be willing to provide the
3 solved base case, but not the, the results of
4 the load flow analyses that you have done -- or
5 that PJM has done?

6 MR. GARY: Well, we think it's
7 unnecessary. We'd be -- you know, I don't think
8 any of this is necessary -- but to the extent
9 we, we -- the Hearing Examiner would like, we
10 would file the base case, as we normally file
11 load flow solutions, but not file the other
12 couple of cases that are on here, the Base Case
13 Warren, Base Case Global. It's just a lot of
14 paper, and it's a lot of -- we have them, but we
15 don't see the need to do it. It just shows the
16 need for the line even further out than even the
17 base case shows it, which seems to us to be
18 enough to spin from.

19 MS. DILLEN: Well, respectfully, we
20 would like to see those. We've, we've been
21 through this situation before, and if at some
22 point this project does become -- come before
23 the Commission again -- and, of course, that
24 possibility is, is one that PJM and PATH-VA are
25 expressly contemplating -- at that point, it

1 will become necessary to figure out what has
2 changed to warrant a new application and to, to
3 gain that understanding. We want to fully
4 understand what's driving PJM's determination
5 now. So, we think it makes sense to, to file
6 all of those analyses. And, and I think that
7 closes the loop on Your Honor's Order as well.

8 In any event, we think it's absolutely
9 crucial that PATH-VA and PJM be required to
10 preserve all these materials so that they're
11 discoverable in the event we find ourselves here
12 once again litigating over the PATH Project.

13 The second request we have, Your
14 Honor, is just that it -- in case we are
15 encountering a new application, that we be
16 allowed to retain the confidential materials
17 that we have now. We would, of course, abide by
18 the protective order. And we ask that that be -
19 - that continue for a period of two years. We
20 were thinking that was reasonable. It may make
21 sense just to key it to the length of the
22 suspension. So long as the project is out there
23 and there's the potential for it to be revived,
24 we may as well not give back or destroy a lot of
25 materials that, that we may just have to ask for

1 and then get produced once again. I'm not sure
2 what the Company's position on that is, but I
3 think we, we could eliminate a lot of hassle for
4 all the parties if we were to have such a
5 provision.

6 HEARING EXAMINER: So you're asking
7 for two years?

8 MS. DILLEN: Well, I, I -- our Motion
9 asked for at least two years. And it occurred
10 to me, Your Honor, that it might be more
11 efficient for everyone just to key it to the
12 length of the, of the suspension. So, for so
13 long as the project is held in abeyance and not
14 formally cancelled by PJM, the, the Order would
15 remain in place. But if that seems too open-
16 ended, two years is, is probably a good number
17 as well.

18 MR. GARY: You know what, Your Honor,
19 I guess I could short-circuit this. We have
20 different people asking for different things,
21 but, you know, we look back at the conditions
22 you put on the withdrawal last year, and we have
23 no problem with the same conditions this year,
24 updated obviously, but we have no problem with
25 the confidential information being retained for

1 two years.

2 HEARING EXAMINER: Okay.

3 MR. GARY: Now, the, the question
4 about retaining the files on the existing
5 sensitivity studies, it's fairly fluid -- and
6 Steve Herling, you may want to comment on that -
7 - but I don't think they retain base cases in
8 that sense. We have the hard copies though.
9 I'm not sure electronically we retain them.

10 MR. HERLING: Yeah, this is Steve.

11 There, there is the starting point
12 base case, and then we, we could provide the
13 tables of adjustments that are made to get to
14 those sensitivities, but there is not a discrete
15 case for those two columns labeled RPS to
16 Existing and RPS to At Risk.

17 MS. DILLEN: Well, to the extent that
18 there is documentation of those analyses,
19 including correspondence, those are things that
20 we might be interested in discovering later.
21 So, you know, I think we could address this
22 simply with a requirement that all materials
23 pertaining to these analyses referenced in PJM's
24 public announcement and in your filings are
25 preserved for purposes of discovery later.

1 MR. GARY: I think we could retain the
2 paperwork, absolutely.

3 HEARING EXAMINER: Okay.

4 MR. GARY: Steve -- I'm making --
5 Steve, is that right?

6 MR. HERLING: Yeah, we would certainly
7 retain everything related to the project. You
8 know, it sounds like we're discussing two layers
9 here. One is what we would produce now, and one
10 is what we would retain for, for potential
11 discovery later.

12 HEARING EXAMINER: Correct.

13 MR. HERLING: That would present no
14 problem.

15 MS. DILLEN: Thank you, Your Honor.

16 MR. MARMET: Thank you, Your Honor.
17 Robert Marmet, with Piedmont Environmental
18 Council.

19 I wish to initially join with the
20 Sierra Club's Motion. I think they are asking a
21 relatively modest amount from the Applicant.

22 I find myself a little bit at a loss,
23 because I read the January 19th -- or, excuse me
24 -- the, the filing of March 8th a little bit
25 differently, and it now appears that the

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by transmission through the Commission's eLibrary system.

Dated at San Francisco, CA this 31st day of March, 2011.



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