

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

DATC Path 15, LLC

Docket Nos. ER20-1006-000
EL20-43-000

ORDER ACCEPTING PROPOSED TRANSMISSION REVENUE REQUIREMENT,
INSTITUTING SECTION 206 PROCEEDING, ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES, AND ESTABLISHING REFUND
EFFECTIVE DATE

(Issued May 21, 2020)

1. On February 14, 2020 (February 14 Filing), DATC Path 15, LLC (DATC Path 15) submitted, under section 205 of the Federal Power Act (FPA),¹ a revised Appendix I to its Transmission Owner Tariff (Path 15 Tariff) reflecting a proposed rate reduction to its Transmission Revenue Requirement (TRR) from \$25,571,090 to \$21,724,075.² DATC Path 15 also proposes, and the reduced TRR reflects, continuation of its previously granted incentive return on common equity (ROE) of 13.5%, not to exceed the upper end of the zone of reasonableness.³ As discussed below, we accept DATC Path 15's filing, effective June 13, 2020, as requested. In addition, because DATC Path 15 is proposing a rate decrease and a further decrease may be warranted, we institute an FPA section 206 investigation proceeding in Docket No. EL20-43-000 to allow customers to recover refunds associated with any further reduction in DATC Path 15's TRR, and establish hearing and settlement judge procedures.

I. Background

2. The Path 15 Upgrade is an 84-mile, 500 kilovolt (kV) transmission line along the existing Path 15 corridor in California, built to relieve a constrained congestion point. In 2001, the Commission specifically recognized the Path 15 corridor as a significant

¹ 16 U.S.C. § 824d (2018).

² DATC Path 15 Transmittal Letter at 1.

³ *Id.* at 3.

problem area that would require incentives to encourage investment in infrastructure to alleviate costly congestion.⁴ The Path 15 Upgrade transmission line went into operation on December 22, 2004, adding approximately 1,500 megawatts (MW) to the existing 5,400 MW of capacity from southern to northern California, and increasing the capacity from northern to southern California to approximately 1,100 MW.

3. On June 12, 2002, the Commission accepted a letter agreement among the Path 15 participants, constituting the first step in a process that led to the addition of transmission capacity along Path 15.⁵ The letter agreement provided for the use of an incentive ROE of 13.5% in the calculation of a to-be-filed TRR, to promote the timely construction of additional transmission facilities. Pursuant to settlement agreements resulting from hearing and settlement judge procedures regarding the initially filed TRR, DATC Path 15's predecessor agreed to file rate cases not more than three years apart for rates that it charges for transmission service over the portion of the Path 15 Upgrade it financed.⁶

4. Between 2007 and 2014, DATC Path 15 or its predecessor filed three triennial rate cases. In the second and third of these proceedings, the Commission directed the presiding judge to determine the reasonable range of returns and to set the ROE at the upper end of the range, not to exceed 13.5%. In both filings, the presiding judge determined the 13.5% incentive ROE was still applicable. In the fourth triennial case in 2017, DATC Path 15 proposed a reduction of its TRR and a continuation of its previously accepted 13.5% incentive ROE, or the upper end of the zone of reasonableness.⁷ The Commission subsequently instituted a section 206 proceeding to determine whether the proposed TRR reduction was just and reasonable and established hearing and settlement judge procedures.⁸ Settlement proceedings were unsuccessful and a hearing was held,

⁴ *Removing Obstacles to Increased Elec. Generation and Nat. Gas Supply in the Western United States*, 94 FERC ¶ 61,272, at 61,973, *reh'g denied*, 95 FERC ¶ 61,225, *order on requests for reh'g and clarification*, 96 FERC ¶ 61,155, *further order on requests for reh'g and clarification*, 97 FERC ¶ 61,024 (2001). *See also Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249, at 62,190 (2004).

⁵ *Western Area Power Admin.*, 99 FERC ¶ 61,306, *reh'g denied*, 100 FERC ¶ 61,331 (2002), *aff'd sub nom., Pub. Util. Comm'n. of Cal. v. FERC*, 367 F.3d 925 (D.C. Cir. 2004).

⁶ *Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 (2006), *reh'g denied*, 119 FERC ¶ 61,093 (2007).

⁷ DATC Path 15 Transmittal Letter at 11-24.

⁸ *DATC Path 15, LLC*, 161 FERC ¶ 61,063, at P 2 (2017).

resulting in the issuance of the presiding Administrative Law Judge's initial decision in 2019.⁹ The initial decision is currently pending.

II. February 14 Filing

5. DATC Path 15 proposes to reduce its TRR to \$21,724,075, a reduction of \$3,847,015 from the rate currently on file. The proposed TRR is developed through a traditional cost-of-service methodology based upon the 12-month period ending December 31, 2019. DATC Path 15 requests to continue its previously approved 13.5% incentive ROE, capped at the upper end of the zone of reasonableness, although DATC Path 15's own analysis currently supporting an upper end of the zone of reasonableness of 12.87%. DATC Path 15 states if the matter is set for hearing it will update the ROE, as necessary. Thus, DATC Path 15 does not limit its requested ROE to 12.87% that its own analysis can support, but rather provides notice that it seeks a 13.5% ROE, unless the upper end of the zone of reasonableness is lower at the time the rate is determined, in which case DATC Path 15 asserts that the upper end would set the ROE.¹⁰ However, DATC Path 15 states that if the matter is not set for hearing, DATC Path 15 would submit a compliance filing to adjust its TRR to reflect the 12.87% ROE supported by its own analysis. DATC Path 15 requests that the Commission accept its proposed TRR for filing, without amendment, modification, or suspension, effective June 13, 2020.

6. DATC Path 15 argues it is entitled to continue receiving an incentive ROE of 13.5%, unless the upper end of the zone of reasonableness is lower. To support this argument, DATC Path 15 states that: (i) it is a single asset entity and was one of the first non-traditional transmission projects; (ii) the investment in that single asset was extremely risky; (iii) the risky investment was of critical national importance, relieving congestion that played a significant role in the California energy crisis; and (iv) the Path 15 Upgrade continues to provide the same rate and reliability benefits today as it did upon the upgrade's inception.¹¹

7. In support of its proposed 13.5% ROE, DATC emphasizes the financial community's reliance on the Commission's acceptance of certain rate making principles concerning the rate of return for the Path 15 Upgrade and the importance of honoring past incentives to attract future investments. DATC Path 15 states the Commission implemented the 13.5% incentive ROE to give certainty and assurance to the financial

⁹ *DATC Path 15, LLC*, 169 FERC ¶ 63,021 (2019) (Initial Decision).

¹⁰ DATC Path 15 Transmittal Letter at 11.

¹¹ *Id.* at 2.

community and without that regulatory certainty, there would have been no Path 15 Upgrade.¹²

8. Finally, DATC Path 15 explains that as in past decisions the Commission determined the 13.5% incentive ROE remained appropriate “given the need for stability and certainty in the financial community concerning the recovery of investments made in critical infrastructure,”¹³ and asserts its need for stability and certainty remains because the initial investment of Path 15 is not yet fully depreciated and the recovery of investments is not finished.

III. Notice and Responsive Pleadings

9. Notice of DATC Path 15’s filing was published in the *Federal Register*, 85 Fed. Reg. 11,066 (Feb. 26, 2020), with interventions and comments due on or before March 6, 2020. Timely motions to intervene were filed by Southern California Edison Company; the California Department of Water Resources State Water Project; the City of Santa Clara, California; and the Transmission Agency of Northern California. Timely motions to intervene and protests were filed by the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) and the California Public Utilities Commission (CPUC). On March 23, 2020, DATC Path 15 filed answers to the protests.

A. Protests

10. Six Cities and CPUC protest the filing. Both protests request that the Commission institute an FPA section 206 investigation subject to refund. Six Cities contends that: (1) DATC Path 15’s placeholder ROE of 13.5% had artificially inflated its TRR of \$21,724,075;¹⁴ (2) the alternative ROE of 12.87% was incorrectly calculated;¹⁵ and (3) DATC Path 15’s rate case expenses of \$3.1 million are excessive for one TRR proceeding of no particular complexity.¹⁶ CPUC argues in its filing that: (1) DATC Path 15’s requested ROE of 13.5% should be rejected;¹⁷ and (2) there are numerous

¹² *Id.* at 12.

¹³ *Id.* at 13 (citing *Atlantic Path 15, LLC*, 122 FERC ¶ 61,135 at P 21 (2008)).

¹⁴ Six Cities Protest at 3-6, 13.

¹⁵ *Id.* at 7-10.

¹⁶ *Id.* at 12.

¹⁷ CPUC Protest at 3-4.

discrepancies in the supporting exhibits for the cost of service that result in substantial increases in the TRR.¹⁸

11. Both Six Cities and CPUC assert that the 13.5% placeholder ROE falls outside the zone of reasonableness that was calculated by DATC Path 15's own witness and is not supported by any testimony or analysis in the record.¹⁹ Six Cities and CPUC also argue that the 12.87% ROE is unjust and unreasonable because it is contrary to the methodology described in Opinion No. 569,²⁰ which adopted an approach that establishes a composite zone of reasonableness based on the equal weighting of the two-step discounted cash flow (DCF) model and capital-asset pricing model (CAPM) analyses.²¹ Instead, they note that DATC Path 15 relies on the results of the constant growth form of the DCF, the enhanced capital-asset pricing model (ECAPM), and the Expected Earnings approach, and that the Commission has rejected the ECAPM methodology and declined to rely on the Expected Earnings methodology.²² And they both argue that DATC Path 15's alternative benchmark methodologies should similarly be disregarded as being incompatible to Opinion No. 569's CAPM and DCF analyses.²³ CPUC also complains that DATC Path 15's witness and supporting exhibits distort the methodology further by using growth estimates and proxy groups not recommended or permitted in Opinion No. 569, and lowering DATC Path 15's credit rating by two notches with an alternate reading of the Moody's credit rating.²⁴

12. CPUC also asserts that DATC Path 15 has not shown that it is entitled to a 13.5% ROE indefinitely, and that incentives are not even necessarily needed.²⁵ CPUC argues that in DATC Path 15's previous triennial cases, the Commission did not grant it a 13.5% ROE without considering current policies and without reference to the zone of

¹⁸ *Id.* at 11.

¹⁹ Six Cities Protest at 3, 4; CPUC Protest at 8.

²⁰ *Ass'n of Bus. Advocating Tariff Equity Coal. of MISO Transmission Customers v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019).

²¹ Six Cities Protest at 7; CPUC Protest at 5.

²² Six Cities Protest at 8-9; CPUC Protest at 5.

²³ Six Cities Protest at 10-12; CPUC Protest at 4-7.

²⁴ CPUC Protest at 6-7

²⁵ *Id.* at 7-8.

reasonableness.²⁶ CPUC also notes that DATC Path 15's own models demonstrate that 13.5% is too high for the ROE, and that the upper end of reasonableness in the revised tariff should be 12.87%.²⁷

B. DATC Path 15's Answer

13. DATC Path 15 responds that any hearing on the ROE should limit the scope to determining the upper end of reasonable returns and whether a 13.5% incentive ROE falls within that range, consistent with prior cases related to the Path 15 Upgrade.²⁸ DATC Path 15 also argues that it is still a turbulent investment market and that there are benefits to an incentive ROE.²⁹ DATC Path 15 also states that only its own precedent is applicable to it, not any other orders.³⁰ DATC Path 15 next asserts that the Commission historically has stated that DATC Path 15 is entitled to a 13.5% ROE so long as that ROE is just and reasonable.³¹ Further, DATC Path 15 argues that Opinion No. 569 does not apply here because it does not address all-in incentive ROEs like DATC Path 15's, but rather base ROEs.³² Finally, DATC Path 15 argues that CPUC and Six Cities make several vague allegations about rate case expenses and other elements to the cost of service model which are unsupported and do not make a case for hearing.³³

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding.

²⁶ *Id.* at 8.

²⁷ *Id.* at 10.

²⁸ Answer at 3.

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 6-7.

³¹ *Id.* at 9.

³² *Id.* at 11.

³³ *Id.*

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept DATC Path 15's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

16. Our preliminary analysis indicates that DATC Path 15's proposed TRR, including the requested 13.5% ROE, has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. DATC Path 15's proposed TRR raises issues of material fact that cannot be resolved based upon the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

17. While DATC Path 15 is proposing a rate decrease, our preliminary review indicates that a further decrease may be warranted. Accordingly, we accept DATC Path 15's proposed TRR, to become effective June 13, 2020. In addition, we will institute an FPA section 206 investigation in Docket No. EL20-43-000, with respect to the justness and reasonableness of DATC Path 15's proposed rate decrease and set all issues for hearing and settlement judge procedures.

18. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months after the publication date.³⁴ Consistent with our general policy of providing maximum protection to customers,³⁵ we will establish a refund effective at the earliest date possible, i.e., the date notice of the initiation of the investigation in Docket No. EL20-43-000 is published in the *Federal Register*.

19. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within 12 months of the commencement of hearing

³⁴ 16 U.S.C. § 824e(b).

³⁵ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

procedures, or, if the case were to go to hearing immediately, by May 31, 2020. Thus, we estimate that, if the case were to go to hearing immediately and the Presiding Judge issued an initial decision within 12 months, we would be able to issue our decision within approximately 10 months of the filing of briefs on and opposing exceptions, or by May 31, 2022.

20. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁶ If parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.³⁷ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) DATC Path 15's proposed TRR is hereby accepted for filing, to become effective on June 13, 2020, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL20-43-000 concerning the justness and reasonableness of DATC Path 15's proposed TRR, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

³⁶ 18 C.F.R. § 385.603 (2019).

³⁷ If parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience. (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 60 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or telephonically, as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) Given that the circumstances caused by the COVID-19 pandemic may disrupt, complicate, or otherwise change the ability of participants to engage in normal hearing procedures, the Chief Judge is hereby authorized to set or change the dates for the commencement of the hearing and the issuance of the initial decision as may be appropriate.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the section 206 proceeding in Docket No. EL20-43-000.

(H) The refund effective date established in Docket No. EL20-43-000, established pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.