

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

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

Potomac-Appalachian Transmission Highline, LLC	Docket Nos. ER09-1256-003
	ER09-1256-005
PJM Interconnection, L.L.C.	ER12-2708-004
	ER12-2708-005
	ER12-2708-007

OPINION NO. 554-A

ORDER ON REHEARING, DIRECTING BRIEFS, AND ACCEPTING IN PART AND  
REJECTING IN PART COMPLIANCE FILINGS

(Issued January 24, 2020)

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1. On January 19, 2017, the Commission issued Opinion No. 554<sup>1</sup> addressing an Initial Decision ruling on disputes relating to a project that was ordered and later cancelled by PJM Interconnection, L.L.C. (PJM), known as the Potomac-Appalachian Transmission Highline Project (PATH Project). In this order, we address both a request for rehearing of Opinion No. 554 that was filed by the PATH Project's developer, PATH, and several filings by PATH to comply with Opinion No. 554.
2. The Parent Companies created PATH for the sole purpose of building and operating the PATH Project. PATH applied for and was granted Order No. 679 incentives, including recovery of all prudently incurred costs if the project was abandoned.<sup>2</sup> When PJM cancelled the PATH Project, PATH filed under section 205 of the Federal Power Act (FPA)<sup>3</sup> to recover its prudently incurred costs associated with the PATH Project's abandonment. That section 205 proceeding was consolidated with proceedings involving formal challenges to certain PATH formula rate annual updates and a hearing was commenced, after which the Initial Decision issued, followed by Opinion No. 554.
3. On February 21, 2017, PATH requested rehearing of Opinion No. 554. PATH contends that the Commission erred in (1) reducing its return on equity (ROE) pursuant to FPA section 206 and (2) denying recovery of PATH's expenditures in order to, among other things, increase support for the licensing of the PATH Project.
4. With respect to ROE, PATH argues that Opinion No. 554 erroneously found that abandonment of the PATH Project decreases PATH's risk profile as compared to the proxy group companies, that PATH's existing 10.4 percent base ROE was unjust and unreasonable, and that a base ROE of 8.11 percent was a just and reasonable base ROE for PATH in the abandonment phase. As discussed below, we deny PATH's request for rehearing of the Commission's determination regarding PATH's risk profile. However, we do not at this time address the merits of PATH's requests for rehearing of the Commission's determinations that PATH's 10.4 percent base ROE was unjust and unreasonable and that a base ROE of 8.11 percent is a just and reasonable base ROE for PATH in the abandonment phase.

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<sup>1</sup> *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017).

<sup>2</sup> *See Potomac-Appalachian Transmission Highline, LLC*, 122 FERC ¶ 61,188 (2008), *order on reh'g*, 133 FERC ¶ 61,152 (2010).

<sup>3</sup> 16 U.S.C. § 824d (2018).

5. After issuance of Opinion No. 554, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued *Emera Maine*,<sup>4</sup> vacating and remanding the Commission's decision in Opinion No. 531 concerning the base ROE of the New England Transmission Owners (NETOs).<sup>5</sup> The D.C. Circuit found (1) that the approach that the Commission had used in Opinion No. 531 to determine if an existing base ROE is unjust and unreasonable under the first prong of section 206 of the FPA did not satisfy the requirements of FPA section 206; and (2) that the Commission had not justified the new ROE that it established under the second prong of section 206.<sup>6</sup> On remand, the Commission proposed a new methodology for determining whether an existing base ROE is unjust and unreasonable under the first prong of section 206 and for determining a new just and reasonable base ROE under the second prong of section 206 when an existing base ROE has been found to be unjust and unreasonable, and the Commission directed briefing on how the methodology should apply to the NETOs' base ROE at issue in *Emera Maine*.<sup>7</sup> Subsequently, in two proceedings involving the base ROE of Midcontinent Independent System Operator, Inc. (MISO) transmission owners (MISO TOs)<sup>8</sup> and other cases involving disputed ROEs,<sup>9</sup> the Commission directed the participants to address, or stated that it expects participants to address, whether and how the Commission's ROE methodology proposed in the *Coakley* Briefing Order should apply to the facts of specific proceedings. On November 21, 2019, the Commission issued Opinion No. 569<sup>10</sup> in the two proceedings involving the MISO TOs' base ROE and requests for rehearing of Opinion No. 569 currently are pending.

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<sup>4</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (*Emera Maine*).

<sup>5</sup> *Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (Opinion No. 531), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015).

<sup>6</sup> *See Emera Maine*, 854 F.3d at 27.

<sup>7</sup> *See Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (*Coakley* Briefing Order).

<sup>8</sup> *See Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) (MISO Briefing Order).

<sup>9</sup> *See Ark. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 165 FERC ¶ 61,119 (2018).

<sup>10</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019), *reh'g pending*.

6. Consistent with the Commission's approach in the *Coakley* Briefing Order and MISO Briefing Order,<sup>11</sup> we establish a paper hearing in this proceeding and direct the participants to submit briefs regarding the Commission's methodology proposed in the *Coakley* Briefing Order and MISO Briefing Order for determining whether an existing ROE is unjust and unreasonable and for determining a new just and reasonable ROE when an existing ROE has been found to be unjust and unreasonable, and whether and how that revised methodology should apply to the facts of these proceedings. The Commission's proposed revised base ROE methodology, and the additional briefing in this proceeding addressing it, may affect the determinations as to whether PATH's 10.4 percent base ROE is unjust and unreasonable and, if so, what is a just and reasonable ROE for PATH. Therefore, we will not address PATH's request for rehearing at this time on those issues.

7. We also accept, subject to the outcome of the paper hearing ordered herein, a compliance filing submitted by PATH in compliance with the Commission's findings and directives in Opinion No. 554 concerning PATH's ROE and long term debt rate.

8. In its request for rehearing, PATH also argues that the Commission erroneously denied recovery of amounts that PATH expended to inform the public about the benefits and licensing of the PATH Project. For the reasons discussed below, we grant PATH's request for rehearing on this issue, and direct further compliance.

## **I. Background**

9. The PATH Project was to be a 275 mile 765 kV line from Amos Substation in West Virginia through Virginia to a new Kemptown Substation in Maryland. Before abandonment, PATH filed applications for certificates of public convenience and

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<sup>11</sup> See, e.g., *Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 61 n.17 (citing *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (holding that the Commission may apply a new policy "retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard"); *Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 535 (D.C. Cir. 1996) (holding that, "the Commission takes account of changes that occur between the ALJ's decision and the Commission's review of that decision . . . the Commission may not depart from the zone of reasonableness on the basis of the change without giving parties an opportunity to reopen the record") (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1201-04 (D.C. Cir. 1989)); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (*en banc*) (discussing factors that the D.C. Circuit considers when determining whether it would be inappropriate to apply new policy retrospectively)).

necessity in Maryland, Virginia, and West Virginia.<sup>12</sup> To support these applications, PATH contracted with various companies to conduct advocacy activities to influence public officials, trade groups, and other entities in support of PATH's licensing process. As explained below, PATH also engaged firms to execute a public outreach plan that "[p]roactively communicate[d] project benefits . . . , [s]olicit[ed] third party endorsements . . . , [m]itigate[d] opposition by community officials,"<sup>13</sup> and assisted with "Government Relations."<sup>14</sup>

10. PATH collects amounts from PJM members under two transmission formula rates (Formula Rates) that were developed and later revised through settlement negotiations.<sup>15</sup> PATH uses this equation to update its transmission revenue requirements for a given rate year on a rolling basis, as explained in its Formula Rate Protocols.<sup>16</sup> PATH's initial annual update under its Protocols, the 2009 annual update, went into effect unchallenged. However, each of its next three updates, the 2010, 2011, and 2012 annual updates for the 2009, 2010, and 2011 rate years, respectively, were all objected to on the basis of accounting and what the Formula Rates allowed, using the formal challenge procedures pursuant to the Protocols.<sup>17</sup>

11. On September 28, 2012, PATH filed in Docket No. ER12-2708-000 seeking to recover its abandonment costs associated with the PATH Project. The Commission accepted in part and rejected in part PATH's abandonment filing,<sup>18</sup> and authorized PATH to recover its abandonment costs, but found that the specific amount of abandoned plant

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<sup>12</sup> See, e.g., Opinion No. 554, 158 FERC ¶ 61,050 at PP 2-3, 102; PATH Rehearing Request at 10-13.

<sup>13</sup> Ex. S-2 at 19.

<sup>14</sup> *Id.* at 20-21.

<sup>15</sup> See *Potomac-Appalachian Transmission Highline, LLC*, 122 FERC ¶ 61,188, P 3 (2008), *on reh'g*, *Potomac-Appalachian Transmission Highline, LLC*, 133 FERC ¶ 61,152 (2010) (granting rehearing, setting the base ROE of 12.3 percent for hearing and settlement judge procedures, and approving the 2009 settlement agreement filed by PATH and several parties resolving formula rate issues, as set forth in Attachments H-19, H-19-A, and H-19-B of the PJM Open Access Transmission Tariff).

<sup>16</sup> PJM Open Access Transmission Tariff, Attachment H-19 – Potomac-Appalachian Transmission Highline, LLC, 2.0.0 (Protocols).

<sup>17</sup> See Opinion No. 554, 158 FERC ¶ 61,050 at P 7.

<sup>18</sup> See *PJM Interconnection, LLC*, 141 FERC ¶ 61,177 (2012).

costs that PATH proposed to recover raised issues of material fact and established hearing and settlement judge procedures with respect to those costs.<sup>19</sup> The Commission also authorized the Chief Judge to consolidate PATH's abandonment filing with proceedings for the challenges to PATH's 2010 and 2011 annual updates.<sup>20</sup> The Commission later set the formal challenge to PATH's 2012 annual update for hearing and settlement judge proceedings and consolidated it with the previously consolidated abandonment filing proceeding and other annual update proceedings.<sup>21</sup>

12. As relevant here, Opinion No. 554 found that the Commission must proceed under FPA section 206 in order to reduce PATH's existing 10.4 percent base ROE.<sup>22</sup> Opinion No. 554 found that PATH's risks had been significantly reduced because the PATH Project had been abandoned and, as a result, a base ROE at the median of the zone of reasonableness would not be just and reasonable. Accordingly, Opinion No. 554 concluded that PATH's 10.4 percent base ROE was unjust and unreasonable and that the just and reasonable ROE for PATH's abandonment phase was the median of the lower half of the zone of reasonableness, or 8.11 percent.<sup>23</sup>

13. Opinion No. 554 also found that PATH's Formula Rates, which PATH agreed to in a settlement, did not permit recovery of expenditures for the purpose of influencing public opinion that are properly recorded in Account 426.4 (Expenditures for Certain Civic, Political and Related Activities).<sup>24</sup> Opinion No. 554 then found that PATH improperly shifted such expenditures to accounts that were in PATH's Formula Rates, namely, Account 107 (Construction Work in Progress), Account 923 (Outside Services Employed), Account 930.1 (General Advertising Expenses), and Account 930.2 (Miscellaneous General Expenses).<sup>25</sup> Further, Opinion No. 554 ruled that PATH's Formula Rates limit PATH's recovery of Account 930.1 (General Advertising)

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<sup>19</sup> *Id.* PP 59-60.

<sup>20</sup> *Id.* P 60.

<sup>21</sup> *Potomac-Appalachian Transmission Highline, LLC*, 143 FERC ¶ 61,208 (2013).

<sup>22</sup> *See* Opinion No. 554, 158 FERC ¶ 61,050 at PP 221, 231.

<sup>23</sup> *See id.* PP 262-63, 270.

<sup>24</sup> *See id.* PP 48-49, 54-55.

<sup>25</sup> *See, e.g., id.* PP 62, 75, 81-83.

costs to only those that are “Safety Related Advertising, Education and Out Reach [sic] Cost Support.”<sup>26</sup>

14. On rehearing, PATH primarily argues that the Commission erroneously found that (1) abandonment of the PATH Project decreases PATH’s risk profile as compared to the proxy group companies, (2) PATH’s 10.4 percent base ROE was unjust and unreasonable, (3) an 8.11 percent ROE was a just and reasonable ROE for PATH, and (4) PATH should be denied recovery of amounts expended to inform the public about the PATH Project, as discussed below.<sup>27</sup>

## II. Procedural Matters

15. On February 21, 2017, Edison Electric Institute (EEI) filed a motion requesting that the Commission grant reconsideration of two substantive issues in Opinion No. 554, namely the Commission’s finding that PATH’s ROE should be reduced because abandonment of the PATH Project has decreased PATH’s risk profile<sup>28</sup> and its decision to deny recovery of certain education and outreach expenses incurred by PATH.<sup>29</sup> As noted above, PATH is also seeking rehearing of these same Commission determinations. On March 8, 2017, the Joint Consumer Advocates<sup>30</sup> filed an objection to EEI’s request for reconsideration, asking the Commission to reject the request.

16. EEI correctly “recognizes that it does not have the right, as a non-party, to submit a request for rehearing.”<sup>31</sup> In Opinion No. 554, the Commission rejected EEI’s motion to intervene out-of-time.<sup>32</sup> EEI does not seek rehearing of that determination. Accordingly,

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<sup>26</sup> *Id.* P 63 (citing PATH Formula Rates at PATH-WV Att. 4 and PATH-AYE Attachment 4).

<sup>27</sup> *See* PATH Rehearing Request at 2-3.

<sup>28</sup> *See* EEI Request for Reconsideration at 1-2.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> For purposes of this filing, the Joint Consumer Advocates consist of the Maryland Office of People’s Counsel, Pennsylvania Office of Consumer Advocate, Virginia Office of the Attorney General’s Division of Consumer Counsel, Delaware Division of Public Advocate, Maryland Public Service Commission, and Delaware Public Service Commission.

<sup>31</sup> EEI Request for Reconsideration at 1 n.2.

<sup>32</sup> *See* Opinion No. 554, 158 FERC ¶ 61,050 at P 20.

EEI is not a party to this proceeding. However, EEI seeks to invoke Rule 212 of the Commission's Rules of Practice and Procedure, on motions, in order to request reconsideration.<sup>33</sup> Rule 212(a)(2) only permits motions "[b]y a participant<sup>34</sup> or a person who has filed a timely motion to intervene which has not been denied."<sup>35</sup> As noted above, EEI's motion to intervene was denied and it does not otherwise qualify as a participant; therefore we reject EEI's request for reconsideration. EEI also provides a statement of issues in compliance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,<sup>36</sup> even though it again acknowledges that "as a non-party it does not have the right to submit a formal request for rehearing."<sup>37</sup> We also will not consider EEI's filing as a request for rehearing pursuant to Rule 713 because that rule provides that a request for rehearing may be filed "by a party"<sup>38</sup> and EEI is not a party.

17. In Opinion No. 554, the Commission stated that it would consider EEI's comments in the nature of an *amicus curiae* filing, despite its rejection of EEI's motion to intervene out-of-time.<sup>39</sup> EEI notes this<sup>40</sup> and requests that the Commission similarly consider its request for reconsideration submission in the nature of an *amicus curiae* filing.<sup>41</sup> As noted above, rule 212(a)(2) only permits motions "[b]y a participant or a person who has filed a timely motion to intervene which has not been denied"<sup>42</sup> and EEI's motion to intervene was denied, therefore we will not consider EEI's filing as an *amicus curiae* motion. Moreover, regardless of the previous denial of EEI's motion to intervene, we would not be persuaded to consider EEI's request for reconsideration in the

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<sup>33</sup> 18 C.F.R. § 385.212 (2019).

<sup>34</sup> Rule 102(b) defines "participant" as either someone who has been granted party status, or the Commission Staff. 18 C.F.R. § 385.102(b) (2019).

<sup>35</sup> 18 C.F.R. § 385.212(a)(2).

<sup>36</sup> 18 C.F.R. § 385.713(c)(2) (2019).

<sup>37</sup> EEI Request for Reconsideration at 5.

<sup>38</sup> 18 C.F.R. § 385.713(b) (emphasis added).

<sup>39</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 21.

<sup>40</sup> EEI Request for Reconsideration at 1.

<sup>41</sup> *Id.* at 15.

<sup>42</sup> 18 C.F.R. § 385.212(a)(2).



nature of an *amicus curiae* filing given the similarity of the arguments raised by EEI and by PATH in its request for rehearing.<sup>43</sup>

### III. ROE Determinations

18. As discussed below, we do not address the merits of PATH's request for rehearing of the Commission's determinations in Opinion No. 554 that PATH's 10.4 percent base ROE was unjust and unreasonable and that an 8.11 percent ROE is a just and reasonable ROE for PATH because the Commission has proposed a revised methodology for analyzing existing base ROEs under section 206 of the FPA and we are directing additional briefs from the participants on this revised methodology, both of which may affect these determinations. However, we deny PATH's request for rehearing of the Commission's determination in Opinion No. 554 that abandonment of the PATH Project decreases PATH's risk profile as compared to the proxy group companies, as discussed below.

#### A. Standard for Showing that PATH's Existing ROE was Unjust and Unreasonable, *Emera Maine*, and ROE Briefing

##### 1. Opinion No. 554

19. In Opinion No. 554, the Commission found that it must proceed under FPA section 206 in order to reduce PATH's base ROE.<sup>44</sup> Accordingly, the Commission explained that it could reduce PATH's base ROE only if the Commission determined that PATH's then-existing 10.4 percent base ROE is not just and reasonable.<sup>45</sup> The Commission found that the Joint Consumer Advocates' selection of proxy companies was consistent with the standards set forth in Opinion No. 531 and its discounted cash flow (DCF) analysis of those companies was consistent with the two-step DCF methodology adopted in Opinion No. 531. That DCF analysis produced a zone of reasonableness of 6.31 percent to 10.85 percent, with a median of 8.56 percent.<sup>46</sup> The

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<sup>43</sup> See, e.g., *Mass. Mun. Wholesale Elec. Co., v. Power Auth. of N.Y.*, 20 FERC ¶ 63,103, at 63,379 (1982) (denying *amicus curiae* participation and noting that "the representation of the petitioners' point of view by parties already in the proceeding, compel rejection of further arguments by [petitioners].") Given our decision to reject EEI's request for reconsideration, we find it unnecessary to rule on Joint Consumer Advocates' objection to EEI's request for reconsideration.

<sup>44</sup> See Opinion No. 554, 158 FERC ¶ 61,050 at PP 221, 231.

<sup>45</sup> *Id.* P 232.

<sup>46</sup> *Id.* PP 247, 270.

Commission then found that PATH's 10.4 percent ROE was not just and reasonable.<sup>47</sup> The Commission explained that, in the abandonment phase of the PATH Project, PATH's risk profile had decreased significantly as compared to the proxy group companies that face ongoing business risks.<sup>48</sup> The Commission stated that, as a result, it would be unjust and unreasonable to maintain PATH's 10.4 percent ROE, which the Commission explained was well above the median of the zone of reasonableness in all three DCF analyses in the record, including the DCF analysis on which the Commission relied.<sup>49</sup>

## 2. Rehearing Request

20. PATH argues that the Commission exceeded its statutory authority under FPA section 206 by reducing PATH's 10.4 percent base ROE without determining that this existing ROE was "entirely outside the zone of reasonableness."<sup>50</sup> PATH asserts that its existing ROE was within the zone of reasonableness upon which the Commission relied in Opinion No. 554 and within every other zone of reasonableness supported by a witness in this proceeding, and thus, there was no basis for the Commission to reduce PATH's ROE.<sup>51</sup>

21. In particular, PATH contends that, under *City of Winnfield*, in order to find existing rates unjust and unreasonable under section 206 of the FPA, the Commission must find the existing rates "entirely outside the zone of reasonableness before the agency can dictate their level or form."<sup>52</sup> PATH argues that the Commission itself has recognized that its analysis of ROEs "can result in a range of returns . . . any of which falling within the range are just and reasonable."<sup>53</sup> PATH argues that, therefore, in order to reduce PATH's existing ROE in this proceeding, Joint Consumer Advocates and Commission Trial Staff (Trial Staff) were required to prove, and the Commission is required to find, that the ROE of 10.4 percent was entirely outside the zone of

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<sup>47</sup> *Id.* P 262.

<sup>48</sup> *Id.* PP 262-67.

<sup>49</sup> *Id.* P 262.

<sup>50</sup> See PATH Rehearing Request at 3, 8 (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984) (*City of Winnfield*)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 22 (citing *City of Winnfield*, 744 F.2d at 875).

<sup>53</sup> *Id.* (citing *Promoting Transmission Inv. Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 92 (2006) (emphasis added)).

reasonableness. However, PATH asserts, the Commission did not undertake this inquiry and the record evidence would not support such a finding.<sup>54</sup>

22. PATH acknowledges that the Commission held in Opinion No. 531 that, notwithstanding *City of Winnfield* and the other authorities cited by PATH, the Commission may act under section 206 to reduce an ROE that is within the zone of reasonableness if the ROE exceeds the just and reasonable level identified in the second step of its ROE analysis. In Opinion No. 531, the Commission held that the NETOs' existing ROE was unjust and unreasonable under the first prong of FPA section 206, and the Commission established a new ROE for the NETOs under the second prong of FPA section 206. As PATH notes, at the time it filed its request for rehearing, Opinion No. 531 was on review in the D.C. Circuit. PATH argues that Opinion No. 531 presents no basis for the Commission to use its authority under section 206 to disturb a rate that is within the zone of reasonableness, as it did in Opinion No. 554.

### 3. Commission Determination

23. We deny PATH's request for rehearing on the specific point that it raises concerning the standard for finding an existing ROE unjust and unreasonable under the first prong of FPA section 206. However, in light of developments since the issuance of Opinion No. 554, we request additional briefs on certain of the ROE issues in this proceeding.

24. As PATH notes, at the time it filed its request for rehearing, the Commission's decision in Opinion No. 531 was on review in the D.C. Circuit,<sup>55</sup> but the D.C. Circuit has since issued its decision.<sup>56</sup> In that decision, the court found that FPA section 206 does not require the Commission to find that an existing rate is "entirely outside the zone of reasonableness" before it can exercise its authority under FPA section 206 to change that rate.<sup>57</sup> However, the court vacated and remanded Opinion No. 531, finding that the Commission did not adequately demonstrate either (1) that the NETOs' existing ROE was unjust and unreasonable under the first prong of FPA section 206 or (2) that the new ROE that the Commission set was just and reasonable under the second prong of section 206.<sup>58</sup> The D.C. Circuit explained that the FPA's statutory "zone of

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<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 23.

<sup>56</sup> *Emera Maine*, 854 F.3d 9.

<sup>57</sup> *See id.* at 22-23.

<sup>58</sup> *See id.* at 27.

reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE” and that whether a particular ROE is unjust and unreasonable depends on the “particular circumstances of the case.”<sup>59</sup> Thus, the fact that NETOs’ existing ROE did not equal the just and reasonable ROE that the Commission would have set using the current DCF analysis inputs did not necessarily indicate that NETOs’ existing ROE fell outside the statutory zone of reasonableness and was unjust and unreasonable under the first prong of section 206.<sup>60</sup> The D.C. Circuit also concluded that the Commission had not explained why setting the NETOs’ ROE at the upper midpoint in that case was just and reasonable.<sup>61</sup> The D.C. Circuit noted, in particular, that the Commission relied on three alternative models (the capital asset pricing model (CAPM), expected earnings (Expected Earnings) model, and risk premium (Risk Premium) model) and state-regulated ROEs to support a base ROE *above* the midpoint, but that it did not rely on that evidence to support an ROE *at* the upper midpoint.<sup>62</sup>

25. On October 16, 2018, the Commission issued the *Coakley* Briefing Order on remand in response to the D.C. Circuit decision.<sup>63</sup> The Commission directed the participants in the proceeding that was the subject of *Emera Maine*, and the participants in three other proceedings involving NETOs’ ROE that are currently pending before the Commission, to submit briefs regarding (1) a proposed framework for determining whether an existing ROE is unjust and unreasonable under the first prong of FPA section 206; and (2) a revised methodology for determining just and reasonable ROEs under the second prong of FPA section 206.<sup>64</sup> The Commission proposed to establish a composite zone of reasonableness, giving equal weight to the DCF, CAPM, and Expected Earnings models.<sup>65</sup> The Commission proposed that, in order to find an existing ROE unjust and unreasonable under the first prong of section 206, that ROE must be outside a range of presumptively just and reasonable ROEs for a utility of its risk profile, absent

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<sup>59</sup> *Id.* at 23, 26.

<sup>60</sup> *Id.* at 27 (“To satisfy its dual burden under section 206, FERC was required to do more than show that its single ROE analysis generated a new just and reasonable ROE and conclusively declare that, consequently, the existing ROE was per se unjust and unreasonable.”)

<sup>61</sup> *Id.* (quoting *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

<sup>62</sup> *Id.* at 29.

<sup>63</sup> *Coakley* Briefing Order, 165 FERC ¶ 61,030.

<sup>64</sup> *Id.* PP 1, 15.

<sup>65</sup> *Id.* P 30.

additional evidence to the contrary. For an average risk single utility, that range would be the quartile of the composite zone of reasonableness centered on the median of the zone of reasonableness. For a below or above average single utility, that range would be the quartile of the zone of reasonableness centered on the central tendency of the lower or upper half of the zone of reasonableness, respectively. The Commission proposed to determine a replacement ROE under the second prong of FPA section 206 using the above three models, plus the Risk Premium model.<sup>66</sup> For an average risk single utility, the Commission proposed to determine the median of each zone of reasonableness produced by the DCF, CAPM, and Expected Earnings models and average those ROEs with the Risk Premium ROE, giving equal weight to each of the four figures. The Commission proposed to use the medians of the lower and upper halves of the zones of reasonableness to determine ROEs for single utilities of below and above average risk, respectively.<sup>67</sup>

26. Finally, the Commission proposed generally to use the same proxy group screening criteria as outlined in Opinion No. 531.<sup>68</sup> However, the Commission proposed to apply a high-end outlier test to the results of the CAPM, Expected Earnings and DCF analyses, noting, among other things, that neither the CAPM nor Expected Earnings analyses include a long-term growth projection based on GDP that would normalize the ROEs produced by the model.<sup>69</sup> The Commission proposed to treat as high-end outliers any proxy company whose cost of equity estimated with a given model is more than 150 percent of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a “natural break” analysis similar to the approach the Commission uses for low-end DCF analysis results.<sup>70</sup> The Commission subsequently issued the MISO Briefing Order in which it explained that, in that order, and the order involving the NETOs’ ROE proceedings, the “scope of the paper hearing . . . includes all aspects of [the] proposed methodology.”<sup>71</sup> On

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<sup>66</sup> *Id.* P 17.

<sup>67</sup> *Id.* P 17 and n.62.

<sup>68</sup> *Id.* P 49.

<sup>69</sup> *Id.* P 52.

<sup>70</sup> *Id.* P 53.

<sup>71</sup> MISO Briefing Order, 165 FERC ¶ 61,118 at P 20 (“In this order, as in the *Coakley* Briefing Order, we do not make any final determinations with respect to the proposed new methodology for analyzing the base ROE component of rates under section 206 of the FPA. The scope of the paper hearing established in this order includes all aspects of this order's proposed methodology.”).

November 21, 2019, the Commission issued Opinion No. 569 in which it applied a revised methodology for analyzing existing base ROEs under section 206 of the FPA. The revised methodology applied in Opinion No. 569 used the DCF model and CAPM in the Commission's analysis under the first prong and second prong of section 206, instead of the four models as was proposed in the MISO Briefing Order.<sup>72</sup> Requests for rehearing of Opinion No. 569 currently are pending before the Commission. Because the instant proceedings involve requests for rehearing of a Commission determination that an existing ROE is unjust and unreasonable and the Commission's selection of a new just and reasonable replacement ROE, we direct the participants to these proceedings to submit briefs regarding the Commission's revised ROE methodology proposed in the *Coakley* Briefing Order and MISO Briefing Order and whether and how to apply it to the facts of this proceeding. Therefore, we establish a paper hearing proceeding to provide the participants the opportunity to submit additional evidence and argument concerning the limited issue of whether and how to apply the revised ROE methodology proposed in the *Coakley* Briefing Order and MISO Briefing Order to determine PATH's ROE. The participants may supplement the record with additional written evidence as necessary to support the arguments advanced in their briefs.<sup>73</sup> However, to the extent that participants submit additional financial data or evidence concerning economic conditions in this proceeding it must relate to periods between the date on which PATH filed seeking to recover abandonment costs associated with the PATH Project and the conclusion of the hearing in this proceeding. Any additional evidence shall be submitted in the form of affidavits accompanying the relevant brief(s). Initial briefs shall be due sixty (60) days from the date of this order. Responses to those initial briefs shall be due thirty (30) days later. No answers or additional briefs will be permitted.

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<sup>72</sup> See, e.g., Opinion No. 569, 169 FERC ¶ 61,129 at PP 37, 276.

<sup>73</sup> See *Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d at 323 (holding that the Commission may apply a new policy "retroactively to the parties in an ongoing adjudication, so long as the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard"); *Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 535 (D.C. Cir. 1996) (*Norwood*) (holding that, "the Commission takes account of changes that occur between the Administrative Law Judge's decision and the Commission's review of that decision . . . the Commission may not depart from the zone of reasonableness on the basis of the change without giving parties an opportunity to reopen the record" (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1201-04 (D.C. Cir. 1989))); see also *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d at 1081 (discussing factors that the D.C. Circuit considers when determining whether it would be inappropriate to apply new policy retrospectively).

27. While we are directing additional briefing in this order regarding the revised ROE methodology that the Commission proposed after the *Emera Maine* decision, the court in *Emera Maine* settled the issue of whether the Commission must find that an existing rate is “entirely outside the zone of reasonableness” in order to find it unjust and unreasonable, finding that the Commission is not required to do so under section 206.<sup>74</sup> Accordingly, we deny PATH’s request for rehearing on this point, as noted above. The petitioners in *Emera Maine* raised the same argument that PATH raises here, and the court rejected it. Specifically, the petitioners in that case, “relying on dictum from *City of Winnfield*”<sup>75</sup>—as PATH does here—“argue[d] that FERC must show that an existing rate is ‘entirely outside the zone of reasonableness’ before it can exercise its section 206 authority to change that rate.”<sup>76</sup> The court explained that “[t]he crux of [petitioners’] argument appears to be that in a section 206 proceeding, the established zone of reasonableness is ‘coextensive’ with the statutory just-and-reasonableness standard, and therefore, FERC must accept as just and reasonable all ROEs within the discounted cash flow zone of reasonableness.”<sup>77</sup> The court found that “FERC rejected that argument and so do we.”<sup>78</sup> The court, in “clarifying what *is not* required of FERC”<sup>79</sup> found that “[n]either the language of the FPA nor our precedents compel FERC to accept all rates within the discounted cash flow zone of reasonableness as just and reasonable in a section 206 proceeding.”<sup>80</sup>

28. The court further clarified that “[w]hether a particular rate within the zone is the just and reasonable rate for the utility at issue depends on a number of factors”<sup>81</sup> and “[t]hus, the fact that a rate falls within the zone of reasonableness does not establish that the rate is *the* just and reasonable rate for the utility at issue.”<sup>82</sup> Accordingly, the court found that “while showing that the existing rate is entirely outside the zone of

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<sup>74</sup> See *Emera Maine*, 854 F.3d at 22-24.

<sup>75</sup> *Id.* at 22.

<sup>76</sup> *Id.* at 22-23.

<sup>77</sup> *Id.* at 23.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 22 (emphasis in original).

<sup>80</sup> *Id.* at 23-24.

<sup>81</sup> *Id.* at 23 (internal citations omitted).

<sup>82</sup> *Id.* (emphasis in original).

reasonableness may illustrate that the existing rate is unlawful . . . that is not the *only* way in which FERC can satisfy its burden under section 206.”<sup>83</sup> On the contrary, the court found that “[w]hether a rate, even one within the zone of reasonableness, is unlawful depends on the particular circumstances of the case.”<sup>84</sup>

29. Accordingly, we disagree with PATH’s argument that section 206 of the FPA requires the Commission to find that an existing rate is “entirely outside the zone of reasonableness” in order to find that such rate is unjust and unreasonable under section 206.

### **B. Finding that Abandonment Reduced PATH’s Risk Profile**

30. As noted above, PATH requests rehearing of the Commission’s determinations in Opinion No. 554 that PATH’s 10.4 percent base ROE was unjust and unreasonable and that an 8.11 percent ROE is a just and reasonable ROE for PATH.<sup>85</sup> We will not address the merits of PATH’s request for rehearing on these issues at this time because the Commission’s proposed revised base ROE methodology, and the additional briefing directed herein addressing that methodology, may affect the determinations of whether PATH’s 10.4 percent base ROE is unjust and unreasonable and, if so, what a just and reasonable ROE is for PATH. Accordingly, we will address PATH’s request for rehearing on those issues after the participants have had the opportunity to submit briefs addressing the proposed revised ROE methodology in the context of these proceedings.

31. However, we will address PATH’s request for rehearing of the Commission’s determination in Opinion No. 554 that abandonment of the PATH Project decreases PATH’s risk profile as compared to the proxy group companies. Under both the approach that the Commission applied in Opinion No. 554 and the Commission’s revised base ROE methodology,<sup>86</sup> determining a utility’s relative risk profile is a significant factor in determining if an existing ROE is unjust and unreasonable and in selecting a just and reasonable replacement ROE when an existing ROE has been shown to be unjust and unreasonable. Accordingly, PATH’s relative risk profile will remain relevant despite the Commission’s proposed revised ROE methodology and the additional briefing directed

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<sup>83</sup> *Id.* at 24 (internal citations omitted) (emphasis in original).

<sup>84</sup> *Id.* at 23.

<sup>85</sup> *See, e.g.*, PATH Rehearing Request at 3-5, 24-26, 34-39.

<sup>86</sup> *See, e.g.*, *Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 24 (“we conclude that a utility’s relative risk profile should be the most critical consideration when identifying the ‘broad range of potentially lawful ROEs’ that *Emera Maine* contemplates within the overall zone of reasonableness.”).



herein. Moreover, the participants already had a full opportunity at the hearing before the Administrative Law Judge in this case to develop a full record on the issue of PATH's risk vis-a-vis the proxy group. As a result, we will address PATH's request for rehearing on this issue in this order.

**1. Opinion No. 554**

32. In Opinion No. 554, the Commission found that “in the abandonment phase of the project, PATH's risk profile has decreased significantly as compared to the proxy companies that face ongoing business risks” and “[a]s a result, it would be unjust and unreasonable to maintain the current 10.4 percent ROE.”<sup>87</sup>

33. As the Commission noted, PATH pointed to the risks facing a utility that builds electric transmission that were described in Opinion No. 531, including “long delays in transmission siting . . . project complexity, environmental impact proceedings, requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way, [and] liquidity risk from financing projects that are large relative to the size of a balance sheet.”<sup>88</sup> The Commission found that

Even if PATH faced this risk during the operational phase of the project, PATH's risk profile has decreased in the abandonment phase. PATH is no longer an operational entity. And although PATH continues to face risk in the abandonment phase of the project, the threat to PATH's investments posed by such risk falls short of the cumulative risks facing an ongoing utility.<sup>89</sup>

34. The Commission stated that its conclusion that PATH's risk profile had decreased in its abandonment phase was also consistent with Commission and court precedent. The Commission explained that, for example, in *Norwood*<sup>90</sup> the D.C. Circuit examined a Commission order which reduced the ROE of an entity to the lower end of the zone of reasonableness because of its reduced risk profile. In that order, the Commission explained that under the circumstances of the case—where there was “a single-asset company . . . whose principal asset is no longer operating . . . which has no need to attract capital; and which . . . is . . . guaranteed recovery of virtually all costs associated with its

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<sup>87</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 262.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* P 263.

<sup>90</sup> 80 F.3d 526.

principal asset”<sup>91</sup>—the entity’s reduced risk profile required the Commission to reduce its ROE to the lower end of the zone of reasonableness. In Opinion No. 554, the Commission explained that, while the D.C. Circuit in *Norwood* remanded the case to the Commission to consider a new study period as part of the DCF analysis, it approved of the Commission’s conclusion that, in light of the plant’s significantly reduced risks as an abandoned project that has received cost-recovery, a reduced ROE was appropriate.<sup>92</sup> The Commission then stated that the “same conclusion applies to the substantively identical facts of this case: when an entity’s only asset is abandoned, but it nevertheless receives guaranteed cost recovery, the entity’s reduced risk profile merits a corresponding decrease in ROE for the period in which it recovers its abandonment costs.”<sup>93</sup>

35. The Commission’s reasoning in Opinion No. 554 then turned to PATH’s argument on exceptions that the finding in the Initial Decision that PATH’s risk profile had decreased was contrary to a prior order in which the Commission required no reduction in a multi-asset utility’s ROE after it abandoned a transmission project when PJM determined that it was no longer needed.<sup>94</sup> The Commission explained that in the *MAPP Order*, the Commission did not require any reduction in base ROE due to decreased risk resulting from the abandonment of the project, but that the *MAPP Order* is distinguishable from PATH’s case because, unlike PATH, the developing companies did not create a separate venture and separate operating companies to develop the project. The Commission then noted that the developing companies had instead developed the project themselves as an addition to their existing transmission facilities and thus, when the Commission initially approved the abandonment incentive and ROE adders for the project at issue in the *MAPP Order*, it did not establish a new, separate base ROE applicable solely to that project, as the Commission did for PATH. The Commission explained that it required the developing companies to use the same base ROE for the project as the Commission had previously approved for their existing transmission facilities.<sup>95</sup>

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<sup>91</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 264 (citing *Yankee Atomic Electric Co.*, 67 FERC ¶ 61,318, at 62,120, *reh’g denied*, 68 FERC ¶ 61,364 (1994)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* PP 265-66 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,156 (2013) (*MAPP Order*)).

<sup>95</sup> *Id.*

36. The Commission stated that a single-asset company like PATH is distinguishable from companies with significant transmission networks, such as the developing companies in the *MAPP Order* proceeding, for purposes of determining relative risk vis-à-vis the proxy group because a utility with ongoing business activities must continue to attract new capital in order to maintain those activities, while a single-asset company with guaranteed recovery of its abandoned plant costs may not need to do so. The Commission explained that, when a utility abandons a single project while continuing to operate many other assets, it is reasonable to apply the same ROE to the abandoned asset as to the rest of the utility's assets because investors invest in a company as a whole, not in particular assets of the company. The Commission noted that a utility with many assets that continue in operation would not see risk to its overall business and operations reduced when one project is abandoned in the same manner as a utility whose only asset is abandoned.<sup>96</sup>

37. The Commission therefore affirmed the findings in the Initial Decision that PATH does not have a risk profile that is broadly comparable to those of the proxy group companies because the abandonment of the PATH Project has significantly reduced PATH's risk profile.<sup>97</sup>

## 2. Rehearing Request

38. PATH contends that the Commission's finding that the abandonment of the PATH Project reduced PATH's risk profile relative to the proxy group companies is not the product of reasoned decision-making and is not supported by substantial evidence. PATH asserts that its equity investors faced all of the risks associated with the development of major transmission projects and that reducing PATH's ROE once those risks were realized—i.e., once the PATH Project had been terminated by PJM—would deny them a compensatory return on their investment.<sup>98</sup>

39. In addition, PATH argues that the Commission's reliance on *Norwood* to support its finding that the abandonment of the PATH Project reduces PATH's risk profile does not justify the Commission's finding.<sup>99</sup> PATH further contends that the Commission's ruling here is not distinguishable from the *MAPP Order* in which the Commission

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<sup>96</sup> *Id.* P 267.

<sup>97</sup> *See id.* PP 262-63, 272.

<sup>98</sup> PATH Rehearing Request at 3-4.

<sup>99</sup> *Id.* at 4, 31-32.

required no reduction in a multi-asset utility's ROE after it abandoned a transmission project when PJM determined that it was no longer needed.<sup>100</sup>

40. In particular, PATH notes that the Commission found that, after the PATH Project had been abandoned, the remaining risks faced by PATH ““fall[] short of the cumulative risks facing an ongoing utility.””<sup>101</sup> PATH contends that this statement “represents the entirety of the Commission’s analysis” and that the Commission did not explain how PATH’s risks declined after the PATH Project was abandoned relative to the risks any other utility faces. Specifically, PATH argues that the Commission did not identify the additional risks that proxy group companies face relative to the risks PATH faces or explain how it compared those risks to the risks that PATH continues to face after abandonment. In addition, PATH argues that the Commission did not consider the opportunities for returns on alternative investments that investors gave up when they committed the capital necessary to build the PATH Project.<sup>102</sup>

41. PATH further contends that utilities in the proxy group have the same right to recover their prudently incurred investments as PATH, so PATH cannot be distinguished from those utilities on the basis that it exercises that right. PATH also argues that the record evidence establishes that a public utility that abandons a transmission project still faces the regulatory risks associated with implementing a previously established “right” to recover prudently incurred costs and a fair return on investment. In addition, PATH asserts that evidence also establishes that investors have recognized that a utility’s regulatory environment and, in particular, its exposure to after-the-fact prudence review, present significant risk exposure, which is not diminished by abandonment of a project. PATH also argues that this proceeding itself demonstrates that the investors in PATH still faced and continue to face significant regulatory risks. In addition, PATH contends that the Commission identifies no transmission project that has faced unsupported claims of imprudence and other objections to cost recovery comparable to those presented in this proceeding.<sup>103</sup>

42. PATH also argues that the Commission’s determination that PATH’s risk profile has decreased will contradict its policy initiatives to promote the development of critically needed transmission infrastructure. PATH contends that reducing its ROE on the ground that abandonment has reduced PATH’s risk deprives it of the ability to recover its prudent investment and undermines the abandonment recovery incentive that

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<sup>100</sup> *Id.* at 4, 32-33 (citing *MAPP Order*, 142 FERC ¶ 61,156).

<sup>101</sup> *Id.* at 26-27 (quoting Opinion No. 554, 158 FERC ¶ 61,050 at P 263).

<sup>102</sup> *Id.* at 27.

<sup>103</sup> *Id.* at 28-29.

the Commission granted. PATH asserts that the Commission's ruling will make every transmission project more risky and thus more costly, and that investors will take notice.<sup>104</sup>

43. PATH states that the Commission cited the *Norwood* decision to support its finding that the abandonment of the PATH Project reduces PATH's risk profile, but contends that the Commission reads too much into the *Norwood* decision. PATH argues that the court's relevant holding was its reversal of the Commission's reliance on a zone of reasonableness that was established seven years earlier to place bounds around the ROE result. PATH explains that the court remanded to the Commission to develop a new zone of reasonableness in light of the Commission's finding that the utility's risk was reduced by the retirement of its generating plant. PATH asserts that the court's reference to the Commission's finding that the utility's risk was reduced is *dicta* and does not constitute a precedential holding that the ROE must be reduced for any utility that prematurely retires an operating project.<sup>105</sup>

44. In addition, PATH argues that the Commission failed to follow its precedent in the *MAPP Order*. PATH states that the Commission distinguished that order on the grounds that the utilities pursuing the project that was abandoned in that case did not do so through separate operating companies, but as part of the utilities' existing transmission systems. PATH contends that this distinction is invalid. PATH asserts that the risks associated with developing a transmission project and with recovering prudently incurred investment after a project is prudently abandoned are the same, regardless of whether or not the developing company also owns other transmission facilities. PATH further argues that the need of a multi-asset utility to attract capital for its ongoing operations does not support a different result for such a utility as opposed to a single asset utility like PATH.<sup>106</sup>

45. PATH also asserts that the Commission failed to consider how its risk profile decision in Opinion No. 554 will impede the development of transmission infrastructure by making it more risky and costly to use single-asset companies as vehicles for project development. PATH argues that by finding that single-asset companies have decreased risk when their single asset is abandoned, the Commission's decision in Opinion No. 554 makes single-asset development structures more risky and costly and will discourage the

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<sup>104</sup> *Id.* at 29-31.

<sup>105</sup> *Id.* at 31-32.

<sup>106</sup> *Id.* at 32-33.

use of such structures and thereby reduce the options available for transmission development.<sup>107</sup>

### 3. Commission Determination

46. We affirm the Commission's finding in Opinion No. 554 that PATH's risk profile has decreased due to abandonment of the PATH Project. Accordingly, we reject PATH's request for rehearing on this point.

47. PATH asserts that the Commission took note of evidence that PATH introduced showing that investors in PATH faced financial and business risks,<sup>108</sup> but that the Commission discounted these risks on the ground that PATH no longer bears them to the same extent after abandonment of the PATH Project, at which point its remaining risks "fall[] short of the cumulative risks facing an ongoing utility."<sup>109</sup> PATH argues that this quoted statement "represents the entirety of the Commission's analysis" and "is too terse and opaque to satisfy the Commission's obligation to demonstrate that it engaged in reasoned decisionmaking."<sup>110</sup>

48. As an initial matter, the quoted statement does not represent the entirety of the Commission's analysis. On the contrary, the Commission acknowledged that "PATH continues to face risk in the abandonment phase of the project," but explained that "PATH's risk profile has decreased in the abandonment phase" partly because "PATH is no longer an operational entity."<sup>111</sup> The Commission's analysis continued, explaining that under "the facts of this case: when an entity's only asset is abandoned, but it nevertheless receives guaranteed cost recovery, the entity's reduced risk profile merits a corresponding decrease in ROE for the period in which it recovers its abandonment costs."<sup>112</sup> The Commission also distinguished between the risks facing a company in PATH's circumstances and the risks facing a utility with ongoing operations, explaining that "[a] utility with ongoing business activities must continue to attract new capital in order to maintain those activities, while a single-asset company with guaranteed recovery

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<sup>107</sup> *Id.* at 33-34.

<sup>108</sup> *Id.* at 26 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 262).

<sup>109</sup> *Id.* at 27 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 263).

<sup>110</sup> *Id.*

<sup>111</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 263.

<sup>112</sup> *Id.* P 264.

of its abandoned plant costs may not need to do so.”<sup>113</sup> In addition, the Commission explained that “[a] utility with many assets that continue in operation would not see risk to its overall business and operations reduced when one project is abandoned in the same manner as a utility whose only asset is abandoned.”<sup>114</sup> Accordingly, we disagree with PATH’s assertion that “the entirety of the Commission’s analysis”<sup>115</sup> consisted of its statement that PATH’s post-abandonment risks “fall[] short of the cumulative risks facing an ongoing utility.”<sup>116</sup>

49. We agree, as the Commission found in Opinion No. 554, that PATH is not “wholly risk-free” in the abandonment phase of the PATH Project.<sup>117</sup> In Opinion No. 554, the Commission explained that “although the Order No. 679 abandonment incentive provides substantial protections for PATH’s equity holders, it does not eliminate all risk facing their invested capital.”<sup>118</sup> Accordingly, nothing in Opinion No. 554 is inconsistent with PATH’s arguments that it continues to face regulatory risks such as those associated with implementing a previously established right to recover prudently incurred costs and facing after-the-fact prudence reviews. We acknowledge, as the Commission did in Opinion No. 554, that PATH continues to face some risk during the abandonment phase of the PATH Project.

50. However, the fact that PATH continues to face some risk does not mean that abandonment of the PATH Project has not decreased PATH’s risk profile at all. On the contrary, record evidence supports a finding that PATH’s risk profile has decreased as compared to the proxy companies facing ongoing business risks. For example, Trial Staff Witness Robert J. Keyton, when asked a question about the type of risks facing PATH, testified that “I don’t think it would be operating risk since it’s no longer in operation.”<sup>119</sup> Mr. Keyton’s testimony supports the conclusion that an entity that owns completed and operational transmission facilities faces greater risk than an entity that does not own operational transmission facilities, and thus does not face the risks and costs associated with maintaining transmission facilities or the risks and costs associated

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<sup>113</sup> *Id.* P 267.

<sup>114</sup> *Id.*

<sup>115</sup> PATH Rehearing Request at 27.

<sup>116</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 263.

<sup>117</sup> *See id.* P 268.

<sup>118</sup> *See id.*

<sup>119</sup> Tr. 3365:20-21 (Keyton).

with employing or contracting with individuals or entities that are needed to maintain those facilities. Mr. Keyton also testified that, after abandonment of the PATH Project, PATH faced minimal financial risk. In particular, he testified that “[a] general definition of financial risk is defaulting on [an entity’s] debt. In this proceeding, PATH did not issue any debt. . . So the financial risk to PATH should be minimal.”<sup>120</sup> While this may be one “general definition of financial risk,” it nonetheless serves as further evidence of another risk that PATH does not face—the risk of defaulting on its debt.

51. A significant way in which PATH’s risks have been reduced as compared to the risks faced by the proxy group companies, which have ongoing operations, is that PATH no longer has the same degree of need to maintain its credit and attract capital. A primary focus of the *Hope*<sup>121</sup> and *Bluefield*<sup>122</sup> capital attraction standards is ensuring that an ROE is sufficient to maintain a utility’s credit and thereby enable it to access capital to discharge its public duties.<sup>123</sup> However, after abandonment of the PATH Project, which was PATH’s sole asset, PATH has a significantly reduced need to maintain its credit or continue to access capital markets to discharge its public duties or otherwise meet the public’s needs. PATH will not have ongoing costs associated with owning and maintaining an operational transmission facility nor will it face the same risks that an owner of an operational transmission facility would, such as the potential for damages to the facility and associated property resulting from events such as severe weather and technical or operational problems.<sup>124</sup>

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<sup>120</sup> Tr. 3365:8-11 (Keyton).

<sup>121</sup> *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (*Hope*).

<sup>122</sup> *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm’n of W.V.*, 262 U.S. 679 (1923) (*Bluefield*).

<sup>123</sup> *See Hope*, 320 U.S. at 603 (“the return to the equity owner . . . should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”); *Bluefield*, 262 U.S. at 693 (“[a] return . . . should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.”); *Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, & Zelienople, Pa. v. FERC*, 731 F.2d 959, 967 (D.C. Cir. 1984) (“The Commission is required to set a rate of return commensurate with other enterprises of comparable risk and sufficient to assure that enough capital is attracted to the utility to enable it to meet the public’s needs.”).

<sup>124</sup> Moreover, owners of operational transmission facilities face the additional risk that regulatory bodies may not allow full recovery of costs associated with such damages. *See, e.g., Application of San Diego Gas & Elec. Co. (U902E) for Authorization to*



52. On the other hand, the companies in the DCF proxy group that the Commission relied on all have existing net plant<sup>125</sup> which requires cash flow to maintain and operate, and operating revenues<sup>126</sup> that are subject to change, which means that they could, and in all likelihood will, require continued access to capital markets and therefore be required to maintain their credit, in order to continue with their ongoing business and meet the needs of the public that rely on their transmission facilities and other plant. Accordingly, in the abandonment phase, PATH has a reduced need to attract capital and maintain its credit as compared to the proxy group companies; thus PATH's risk profile in the abandonment phase does not need to be as high as those for the proxy group companies in order to satisfy the *Hope* and *Bluefield* capital attraction standards.

53. PATH points to the Commission taking note of risks facing a utility that builds electric transmission such as “long delays in transmission siting . . . project complexity, environmental impact proceedings, [and] requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way.”<sup>127</sup> PATH asserts that “[t]he Commission did not deny that investors in [PATH] bore all these risks.”<sup>128</sup> However, while the Commission did not explicitly find that PATH had *never* faced such risks, it explicitly found that “[e]ven if PATH faced this risk during the operational phase of the project, PATH's risk profile has decreased in the abandonment phase.”<sup>129</sup> Now that the PATH Project has been abandoned, PATH is in the process of dissolution, and PATH will neither construct nor own any operational transmission facility, the risks posed to PATH from the factors cited by PATH such as delays in transmission siting, environmental impact proceedings, and obtaining necessary regulatory approvals are significantly reduced. In particular, the abandonment of the PATH Project reduces the extent of transmission siting that PATH must complete, the extent of environmental impact proceedings which PATH must resolve, and the extent of the regulatory approvals

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*Recover Costs Related to the 2007 S. Cal. Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA)*, Order Denying Rehearing of Decision (D.) 17-11-033, Application 15-09-010, 2018 WL 3753814, at \*2-3 (Cal. Pub. Utils. Comm'n July 12, 2018) (denying rehearing of decision denying utility's request to pass wildfire costs on to its ratepayers).

<sup>125</sup> See, e.g., Ex. JCA-140 (showing net plant values for proxy group companies).

<sup>126</sup> See, e.g., *id.* (showing operating revenue values for proxy group companies).

<sup>127</sup> PATH Rehearing Request at 26 (citing Opinion No. 554, 158 FERC ¶ 61,050 at P 262).

<sup>128</sup> *Id.*

<sup>129</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 263.

that PATH must obtain, as compared to a scenario in which PATH had to fully complete construction of the PATH Project and own an operational transmission facility on a going forward basis. It is logical that if a project only progresses a fraction of the way toward completion before abandonment and never begins operating, then the entity developing the project has faced fewer risks associated with siting, permits, and related environmental and other regulatory proceedings than if the entity had to fully construct the project and maintain it on a going forward basis.

54. In addition, PATH argues that, when the Commission decided that abandonment of the PATH Project had decreased PATH's risk profile, it did not consider the opportunities for returns on alternative investments that investors gave up when they committed the capital necessary to build the PATH Project.<sup>130</sup> We find this argument unavailing. The Commission's determination regarding PATH's risk profile involved an evaluation of PATH's risk as compared to the risk of the proxy group companies, which represent potential alternative investments. In other words, the Commission considered the opportunities for returns on alternative investments by looking at the proxy group companies that represented comparable alternative investments, including the returns that they offered, then assessing their risk profile relative to PATH's, and reaching a determination that PATH had a decreased risk profile as compared to the risk profile of that portfolio of alternative investments. Indeed, a consideration of the opportunities for returns on alternative investments is inherent when the Commission analyzes ROEs, which *Hope* requires to be "commensurate with *returns on investments in other enterprises* having corresponding risks."<sup>131</sup>

55. PATH apparently takes issue with the fact that the Commission considered the returns offered by alternative investments of comparable risk after abandonment of the PATH Project and not the returns offered by alternative investments of comparable risk at the time that PATH's investors initially committed capital to PATH. However, PATH's ROE "should be commensurate with returns on investments in other enterprises having corresponding risks,"<sup>132</sup> and when PATH's risk changed, then the ROE that was set at the time that its investors initially committed their capital may no longer "be commensurate with returns on investments in other enterprises having corresponding risks." In other words, when PATH's risk changed, then the "enterprises having corresponding risks" also changed. When determining risk profiles and ROEs, we consider the current risks faced by the utility, not the risks that were faced by the utility when its investors initially committed capital or when its ROE was last accepted. This is consistent with the Commission's past practice of conducting its ROE analysis based on

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<sup>130</sup> PATH Rehearing Request at 27.

<sup>131</sup> *Hope*, 320 U.S. at 603 (emphasis added).

<sup>132</sup> *Id.*

current circumstances, rather than past circumstances.<sup>133</sup> Accordingly, PATH's argument on this point does not persuade us that the Commission was in error in determining that PATH's risk profile decreased based on PATH's circumstances after abandonment of PATH Project.

56. PATH also argues that the Commission failed to consider how its risk profile decision affects its policy initiatives to promote the development of needed transmission infrastructure. PATH contends that, if the Commission finds that single-asset entities have decreased risk in the abandonment phase of their single asset, it will deprive such entities of the ability to recover their investment and undermine the abandonment recovery incentive that the Commission granted. PATH asserts that this ruling will make transmission projects more risky and hence more costly.<sup>134</sup> We are not persuaded that the Commission's determination that PATH has a reduced risk profile in the abandonment phase of the PATH Project is at odds with the Commission's policy regarding the development of transmission infrastructure. As the Commission explained in Opinion No. 554:

By granting the abandonment incentive to the PATH [P]roject, the Commission provided certainty to investors that they will be able to recover 100 percent of the prudently incurred costs for projects that are abandoned due to factors beyond the control of the developer, plus a ROE on those costs that is commensurate with the developer's risk.<sup>135</sup>

PATH's abandonment incentive guaranteed that its investors would be able to recover their prudently incurred costs, even if the PATH Project was eventually abandoned, and the incentive further guaranteed that PATH's investors would also receive a return on

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<sup>133</sup> See, e.g., *Norwood*, 80 F.3d at 535 ("Faced with Yankee's changed circumstances due to the shutdown of the plant, the Commission should have developed a new zone of reasonableness."); *Consumer Advocate Div. of the Pub. Serv. Comm'n of W. Va. v. Allegheny Generating Co.*, 68 FERC ¶ 61,207, at 61,998 (1994) ("return on equity can be particularly volatile. It will change both as an individual public utility's risks change over time and as capital market conditions change over time. . . a return on equity found to be reasonable at one time may be unreasonable at a later time."); *S. Co. Services, Inc.*, 83 FERC ¶ 61,079, at 61,385-86 (1998) ("the Commission reiterated the need to consider current data in assessing the reasonableness of a claimed ROE . . . we will decide whether Southern's current ROE is reasonable based on current data, rather than data compiled in the first ROE proceeding.").

<sup>134</sup> PATH Rehearing Request at 29-31.

<sup>135</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 274.

those costs. We do not believe that reducing the return that PATH's investors receive on those costs to reflect the fact that they face reduced risks after abandonment of the PATH Project is inconsistent with the Commission's policies encouraging transmission development. Guaranteeing 100 percent recovery of costs, plus a return commensurate with the developer's risks, encourages development by reducing the risks associated with investing a project that may be abandoned. The fact that the level of return may be changed when the level of risk changes merely ensures that the level of return can continue to be commensurate with the developer's risk. The D.C. Circuit has explained that "[i]f the Commission contemplates increasing rates for the purpose of encouraging exploration and development . . . it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose."<sup>136</sup> Decreasing PATH's ROE because the actual risks faced by its investors have decreased does not conflict with policy initiatives to promote the development of needed transmission infrastructure, but merely ensures that abandonment incentive does not provide PATH with a return that is "more than is needed" based on the risks it faces.

57. In addition, PATH asserts that the Commission's determination that PATH faces decreased risk in the abandonment phase will make it more risky and costly to use those single-asset companies as vehicles for project development and thereby reduce the options available for transmission development, which will increase the costs of needed projects.<sup>137</sup> We are not persuaded that the Commission's factual determination that PATH faces decreased risk in the abandonment phase will necessarily increase the costs of transmission projects or otherwise impede transmission development. PATH provides no factual evidence in support of its position. In addition, as the Commission noted in Opinion No. 554,<sup>138</sup> single-asset corporate vehicles and limited liability companies may offer other benefits that outweigh the potential risk of having a reduced risk profile and potentially a reduced ROE after the abandonment of the project that the single-asset limited liability company owns. The Commission explained that these could include limitations on liability, tax benefits, and various efficiencies in the financing and operation of the project.<sup>139</sup> PATH similarly notes that such single-asset limited liability companies could make it "easier or less costly to attract financing."<sup>140</sup> Accordingly, we are not persuaded that the Commission's decision regarding PATH's risk profile will

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<sup>136</sup> *City of Detroit, Mich. v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955), *cert. denied sub nom. Panhandle E. Pipe Line Co. v. City of Detroit, Mich.* 352 U.S. 829 (1956).

<sup>137</sup> PATH Rehearing Request at 33-34.

<sup>138</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 267 n.479.

<sup>139</sup> *Id.*

<sup>140</sup> PATH Rehearing Request at 33.

necessarily reduce the use of single-asset limited liability companies or increase the cost of transmission projects.

58. PATH further argues that the *Norwood* decision does not support the Commission's determination that PATH faces decreased risk in the abandonment phase of the PATH Project. We disagree. PATH asserts that the court's relevant holding in *Norwood* was its reversal of the Commission's reliance on a zone of reasonableness established seven years earlier in another case, to place bounds around the ROE result, and that the court's reference to the Commission's finding that the utility's risk was reduced was *dicta*.<sup>141</sup> While PATH is correct that the court reversed the Commission's conclusion that it was bound by a previously established zone of reasonableness, the court explained, "*Because Yankee's circumstances have changed drastically since Opinion No. 285, the Commission's continued adherence to the zone of reasonableness established there is arbitrary and capricious.*"<sup>142</sup> As the court later noted, those "changed circumstances [were] due to the shutdown of the plant."<sup>143</sup> Accordingly, the court's reasoning that supported its holding regarding the zone of reasonableness was that a shutdown of its plant had drastically changed the owner's circumstances. That is consistent with the Commission's finding in Opinion No. 554 that the abandonment of the PATH Project had changed PATH's circumstances, including the level of risk facing it.

59. Moreover, the court did not merely note the Commission's finding that the plant owner's risks had decreased, but specifically remanded "to the Commission to develop a new zone of reasonableness *that takes account of Yankee's reduced risk.*"<sup>144</sup> The court specifically directed the Commission to develop a new zone of reasonableness that took account of that reduced risk. This supports the Commission's conclusion in Opinion No. 554 that PATH, the owner of an abandoned project that was its only asset like the plant owner in *Norwood*, also had reduced risk after abandonment. PATH also argues that reliance on *Norwood* cannot take the place of evidence in this record. *Norwood* represents a similar situation in which abandonment was found to reduce a utility's risk, and is not a substitute for record evidence. As discussed herein, various record evidence, including witness testimony and exhibits in the record—in addition to court and Commission precedent—support our conclusion that abandonment of the PATH Project has changed PATH's circumstances as compared to the proxy group companies and, in

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<sup>141</sup> *Id.* at 31-32.

<sup>142</sup> *Norwood*, 80 F.3d at 535 (emphasis added).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

particular, reduced the risks that PATH now faces as a business in the process of unwinding its operations.

60. We are also not persuaded by PATH's argument that the *MAPP Order* is not distinguishable from PATH's case. PATH contends that the need of a multi-asset utility to attract capital for its ongoing operations does not support reaching a different conclusion for a single-asset utility. We disagree. We reaffirm the reasoning in Opinion No. 554 that "[a] utility with ongoing business activities must continue to attract new capital in order to maintain those activities, while a single-asset company with guaranteed recovery of its abandoned plant costs may not need to do so."<sup>145</sup> PATH's only asset has now been abandoned; therefore, it will have minimal need to continue to attract new capital. However, a multi-asset utility like those at issue in the *MAPP Order* with ongoing operations will need to continue to attract new capital in order to maintain those operations. PATH asserts that the *MAPP Order* is also not distinguishable because the risks associated with developing a transmission project and with recovering prudently incurred investment after a project is abandoned are the same, regardless of whether or not the developing company also owns other transmission facilities. While this may be true with respect to a project, the distinction is with respect to the risks facing the owner of the project. Where that owner also has other transmission facilities, the overall risks faced by the owner are determined by all of the owner's transmission facilities, including the project that has been abandoned. As Opinion No. 554 noted, investors invest in a company as a whole, not particular assets.<sup>146</sup> Therefore, a company's ROE should reflect the risks posed by all of its transmission facilities and operations. The abandonment of one project within a company's fleet of assets may not significantly reduce the overall risks facing the company. However, where a company owns only a single asset like PATH and that asset is abandoned, the overall risks facing the company are significantly reduced.

61. For the reasons discussed above, we affirm the Commission's finding in Opinion No. 554 that PATH's risk profile has decreased because of the abandonment of the PATH Project. Accordingly, we deny PATH's request for rehearing on this issue.

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<sup>145</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 267.

<sup>146</sup> *Id.*

### C. ROE Compliance Filing

62. On March 20, 2017, PATH submitted a filing in compliance with Opinion No. 554 to address all of the Commission's findings and directives in Opinion No. 554 with the exception of those concerning PATH's ROE.<sup>147</sup> The March 20, 2017 Compliance Filing contained the proposed Form 1 adjustments, Formula Rate revisions, and estimated refund report.<sup>148</sup> Also on March 20, 2017, in Docket No. ER12-2708-005, PATH submitted a separate compliance filing in compliance with the Commission's findings and directives in Opinion No. 554 concerning ROE, which included tariff sheet changes to amend the ROE component of PATH's Formula Rates.<sup>149</sup>

63. In Opinion No. 554, the Commission set PATH's ROE at 8.11 percent, effective on the date of Opinion No. 554, January 19, 2017.<sup>150</sup> In the ROE Compliance Filing, PATH states that it complies with Opinion No. 554's requirement for PATH to address how the revised ROE of 8.11 percent will affect rates in its compliance filing. PATH further states that its compliance filing reflects the previous ROE of 10.4 percent for the amounts over-collected in previous periods when the 10.4 percent was effective and the new ROE of 8.11 percent for amounts that PATH has not yet collected.<sup>151</sup> Specifically, PATH's ROE Compliance Filing proposes to amend Attachment H-19A of the PATH Formula Rates in compliance with the Commission's findings and directives in Opinion No. 554. Additionally, PATH proposes to amend Attachment H-19A of the PATH Formula Rates, as required under the Stipulation Agreement between PATH and Trial Staff and Opinion No. 554, to incorporate a hypothetical long term debt rate of 4.70 percent for both PATH-WV and PATH-AYE, effective December 1, 2012, the

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<sup>147</sup> See Potomac-Appalachian Transmission Highline, LLC, Compliance Filing, Docket Nos. ER09-1256-004, et al., at 1 (filed March 20, 2017) (March 20, 2017 Compliance Filing).

<sup>148</sup> The March 20, 2017 Compliance Filing was addressed by the Commission in a separate order. See *Potomac-Appalachian Transmission Highline, LLC*, 166 FERC ¶ 61,035 at P 11 (January 2019 Compliance Order).

<sup>149</sup> See Potomac-Appalachian Transmission Highline, LLC, Compliance Filing, Docket No. ER12-2708-005, at 1-2 (filed March 20, 2017) (ROE Compliance Filing).

<sup>150</sup> See Opinion No. 554, 158 FERC ¶ 61,050 at Ordering Paragraph (B).

<sup>151</sup> See ROE Compliance Filing at 6.

commencement date of PATH's amortization period that the Commission approved in Opinion No. 554.<sup>152</sup>

64. We find that PATH has complied with the Commission's findings and directives in Opinion No. 554 concerning ROE and therefore, we accept PATH's ROE Compliance Filing, subject to the outcome of the paper hearing ordered herein which may require additional filings to comply with the final ROE determinations in these proceedings.

#### **IV. Civic, Political, and Related Expenditures**

65. PATH's request for rehearing of Opinion No. 554's accounting determinations rests upon four arguments discussed below. First, PATH argues that the Commission's interpretation of Account 426.4 (Expenditures for Certain Civic, Political and Related Activities) "is inconsistent with the explicit text of the regulation describing the account"<sup>153</sup> and violates "several canons of construction."<sup>154</sup> Second, PATH argues that the regulatory history of Account 426.4 demonstrates that it does not include expenditures to influence public opinion in support of licensing a transmission project.<sup>155</sup> Third, PATH claims that precedent does not support the Commission's accounting interpretation of Account 426.4.<sup>156</sup> Finally, PATH argues that the Commission erred in disregarding the likelihood that its accounting action adversely impacts the development of transmission infrastructure.<sup>157</sup> As discussed more fully below, we grant PATH's request for rehearing of the Commission's determinations in Opinion No. 554 that denied PATH's recovery of amounts expended to inform the public about the PATH Project.

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<sup>152</sup> *Id.*

<sup>153</sup> PATH Rehearing Request at 47.

<sup>154</sup> *Id.* at 46-51.

<sup>155</sup> *Id.* at 54-55.

<sup>156</sup> *Id.* at 51-55.

<sup>157</sup> *Id.* at 41-46.



**A. Opinion No. 554**

66. PATH's Formula Rates are derived and populated based on the Commission's Uniform System of Accounts (USofA) balances from PATH's FERC Form No. 1.<sup>158</sup> PATH's Formula Rates specify the accounts under which it is permitted to recover costs and, as described below, in some cases the Formula Rates do not permit recovery of costs recorded in certain accounts.<sup>159</sup>

67. Because PATH's Formula Rates do not allow recovery of certain accounts, the Commission in Opinion No. 554 reviewed whether PATH had properly recorded amounts to the correct USofA account.<sup>160</sup> Opinion No. 554 found that PATH had improperly accounted for certain expenditures in Account 923 (Outside Services Employed)<sup>161</sup> and other accounts,<sup>162</sup> and such expenditures properly belonged in Account 426.4 (Expenditures for Certain Civic, Political, and Related Activities). The order found that, because PATH's Formula Rates did not include Account 426.4, these expenditures were not recoverable—even though some of these costs may have been recoverable if PATH had requested a rate change,<sup>163</sup> consistent with Commission ratemaking precedent.<sup>164</sup>

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<sup>158</sup> The FERC Form No. 1 is an annual financial report of a public utility providing detailed accounting information used primarily to support the development of rates and is prepared in conformance with the Commission's USofA in 18 C.F.R. Part 101.

<sup>159</sup> January 2019 Compliance Order, 166 FERC ¶ 61,035 at PP 8-9.

<sup>160</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 82.

<sup>161</sup> *Id.* PP 25-56.

<sup>162</sup> *Id.* PP 76-86 (finding that payments to Charles Ryan and its subcontractors Reliable Power Coalitions and PATH Education Awareness Team should not have been recorded in Account 101 (Electric Plant in Service); Account 105 (Electric Plant Held for Future Use); and Account 107 (Construction Work in Progress – Electric), and that the amounts should have been recorded to Account 426.4 (Expenditures for Certain Civic, Political, and Related Activities)).

<sup>163</sup> 18 C.F.R. § 35.13 (2019).

<sup>164</sup> Opinion No. 554, 158 FERC ¶ 61,050 at PP 48-56, 81-83.

68. As relevant here, the disputed expenditures consist of: (1) payments to Charles Ryan Associates to organize and manage Reliable Power Coalitions in the states which the PATH Project required permits to inform the public about the need for energy infrastructure; (2) expenditures to support the PATH Education Awareness Team (PEAT); and (3) expenditures for polling by R.L. Repass.<sup>165</sup> The activities of the first and second groups, Reliable Power Coalitions<sup>166</sup> and PEAT, respectively, consisted of “[e]lected official/media outreach” and public relations<sup>167</sup> to, among other things, “help create a public climate that allows the regulatory review to proceed.”<sup>168</sup> These coalition activities included the identification and recruitment of new members and spokespersons to counter activities of opposition groups,<sup>169</sup> distributing fact sheets to state legislators,<sup>170</sup> events,<sup>171</sup> and promoting the coalition through news releases and media tours.<sup>172</sup> The activities of the third group, R.L. Repass, consisted of opinion polling.<sup>173</sup>

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<sup>165</sup> See PATH Rehearing Request at 13, n.27.

<sup>166</sup> The Reliable Power Coalitions included Marylanders for Reliable Power, Virginians for Reliable Energy, and West Virginians for Reliable Power.

<sup>167</sup> See, e.g., Ex. NH-25 at 31-56 (PATH External Communications Committee Updates describing Reliable Power Coalition activities, including meetings with Virginia legislatures and the Virginia Governor). See also Opinion No. 554, 158 FERC ¶ 61,050 at P 28.

<sup>168</sup> Ex. NH-9 at 1. See also Ex. NH-21 at 1-5 (emails between PATH executives and Charles Ryan staff on what the objectives were for the Reliable Power Coalitions and PEAT).

<sup>169</sup> Ex. NH-57 at 38-41.

<sup>170</sup> Ex. NH-25 at 58.

<sup>171</sup> Ex. NH-21 at 1-5.

<sup>172</sup> Ex. PTH-7 at 11:2-7.

<sup>173</sup> Ex. NH-50 (R.L. Repass Partners, Inc.’s (R.L. Repass) contractual agreement with PATH, defining “Scope of Work—Multi-Method Opinion Research” (dated April 30, 2010)).

69. As noted above, PATH recorded these expenditures to a variety of accounts, primarily in Account 923 (Outside Services Employed) in its 2009, 2010, and 2011 Rate Years.<sup>174</sup> In addition to the above-discussed expenditures, PATH also recorded expenses paid to Charles Ryan or its subcontractors under several plant in service accounts from 2008 through 2012,<sup>175</sup> \$1,140,350 of which PATH later transferred to its abandoned plant account in 2012.<sup>176</sup>

70. The Commission determined that the Formula Rate Protocols, Commission regulations, and policy required PATH to show that expenditures are charged to appropriate accounts.<sup>177</sup> The Commission found the expenditures at issue were incurred to influence public opinion or officials in support of the PATH Project's licensing

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<sup>174</sup> Account 923 states:

A. This account shall include the fees and expenses of professional consultants and others for general services which are not applicable to a particular operating function or to other accounts. It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered an employee of the utility.

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

Opinion No. 554, 158 FERC ¶ 61,050 at P 25 (quoting 18 C.F.R. pt. 101, Account 923).

<sup>175</sup> *Id.* PP 76-83. PATH recorded these expenditures to Account 101 ("Electric plant in service"), Account 105 ("Electric plant held for future use"), and Account 107 ("Construction work in progress-Electric").

<sup>176</sup> *Id.* P 76.

<sup>177</sup> *Id.* P 82.

process as well as other approvals, and directed PATH to book these costs to Account 426.4.<sup>178</sup> As a result, the Commission determined that the costs are not recoverable.<sup>179</sup>

71. In response to PATH's argument that the costs were not appropriately booked to Account 426.4 because they were unrelated to the specific items listed in the first clause of the account description,<sup>180</sup> the Commission held that the list in Account 426.4 is not all-inclusive, but rather provides illustrative examples of the types of expenditures to influence public opinion that should be included in Account 426.4. Rather, the Commission found that PATH's expenditures were for "efforts to influence public opinion with respect to specific political actions that fall within the ambit of referenda, legislation, ordinances, the grant of franchise, and the like."<sup>181</sup> The Commission reviewed the record evidence, including the participants' arguments regarding Order

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<sup>178</sup> 18 C.F.R. pt. 101, Account 426.4 (2019). Account 426.4 states:

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

<sup>179</sup> Opinion No. 554, 158 FERC ¶ 61,050 at PP 82-83 (finding that "[p]ublic relations activities, regardless of whether they are political in nature, cannot simply be relabeled as physical assets").

<sup>180</sup> *Id.* P 51.

<sup>181</sup> *Id.* P 52.

No. 276,<sup>182</sup> and found that PATH's activities fell into both clauses of Account 426.4.<sup>183</sup> Thus the Commission concluded that PATH's accounting of public relations costs "is inconsistent with the explicit text of the regulation describing the account."<sup>184</sup>

72. PATH separately argued that, under *ISO New England*,<sup>185</sup> a utility may recover amounts that, for accounting purposes, would belong in Account 426.4, so long as the utility shows that the expenditures were related to core operations and undertaken to benefit ratepayers. PATH also argued that disallowance of Account 426.4 costs would severely thwart the Commission's efforts to foster development of a strong transmission infrastructure.<sup>186</sup> Opinion No. 554 rejected both arguments, finding that "PATH agreed in its settlement not to recover Account 426.4 expenses and it must adhere to the rate on file with the Commission."<sup>187</sup>

73. The Commission rejected PATH's reliance on *ISO New England*, stating that PATH, unlike ISO New England, had Formula Rates that did not permit the recovery of amounts in Account 426.4. Finally, the Commission dismissed PATH's general argument about national infrastructure policy, noting that the recoverability of the costs is not an issue of Commission policy, but rather is a result of PATH's Formula Rates.

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<sup>182</sup> *Expenditures for Political Purposes — Amendment of Account 426, Other Income Deductions, Unif. Sys. of Accounts, and Report Forms Prescribed for Electric Util's and Licensees and Nat. Gas Companies — FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963) (Order No. 276), *order on reh'g*, Order No. 279-A, 31 FPC 411 (1964).

<sup>183</sup> Opinion No. 554, 158 FERC ¶ 61,050 at PP 30, 35, 46-47, 52; *id.* P 54 ("[N]one of PATH's disputed costs fall within the narrow exception provided for in Account 426.4, as direct appearances before regulatory or other governmental bodies.").

<sup>184</sup> *Id.* P 47.

<sup>185</sup> *ISO New England, Inc.*, 117 FERC ¶ 61,070 (2006) (*ISO New England*), *order on reh'g*, 118 FERC ¶ 61,105 (2007), *order rejecting reh'g*, 120 FERC ¶ 61,122, *aff'd sub nom., Braintree Elec. Light Dept. v. FERC*, 550 F.3d 6 (2008).

<sup>186</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 36.

<sup>187</sup> *Id.* PP 49, 55.

**B. Costs Recorded in Account 923****1. Rehearing Request**

74. PATH argues that it correctly assigned costs to Account 923 and that, in any case, the Commission erred in disallowing recovery of Account 426.4 expenditures. PATH asserts that these expenditures were useful to the project and thus public policy supports cost recovery. PATH claims “[t]here is no dispute that the” costs in question were made “to influence public opinion in favor of the [PATH] Project and enhancing the likelihood of successful licensing,”<sup>188</sup> and “did not involve activities aimed at directly influencing decisions of public officials.”<sup>189</sup>

75. PATH disputes the Commission’s interpretation that the payments PATH recorded as consultants’ expenses and advertising properly should have been recorded to Account 426.4. PATH argues that Account 426.4 contains two clauses, which PATH numbers for purposes of reference:

This account shall include expenditures [1] 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 [2] 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.<sup>190</sup>

76. PATH argues that the first clause does not apply to its actions. PATH also argues that it did not trigger “any of the subjects listed in that [second] clause.”<sup>191</sup> PATH argues that the Commission’s interpretation is contrary to the plain language of the regulation

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<sup>188</sup> PATH Rehearing Request at 48.

<sup>189</sup> *Id.* at 46-47.

<sup>190</sup> *Id.* at 46 (citing 18 C.F.R. pt. 101, Account 426.4).

<sup>191</sup> *Id.* at 47.

and violates “canons of construction.”<sup>192</sup> Specifically, PATH argues that the Commission’s interpretation that the subjects listed in Account 426.4 are illustrative rather than all-inclusive violates a canon of construction known as *expressio unius est exclusio alterius*, because “[a] statute listing the things it does cover exempts, by omission, the things it does not list.”<sup>193</sup> PATH claims that, “[t]he permitting of a transmission project like the PATH Project is not ‘the election or appointment of public officials, referenda, legislation, or ordinances . . . or approval, modification, or revocation of franchises.’”<sup>194</sup> PATH argues that Account 426.4 would need to have explicit language stating that it applies to any and all political actions, such as the phrase “such as” in order to apply to things that are not listed. By failing to include such a phrase, PATH argues, the subjects listed in Account 426.4 must be understood “as the only subjects for which expenditures . . . must be recorded.”<sup>195</sup>

77. As such, PATH argues that the Commission erred in finding that influencing public opinion to help secure a certificate of public convenience and necessity for a transmission project is a “specific political action[]” that “fall[s] within the ambit of referenda, legislation, ordinances, the grant of franchise and the like.”<sup>196</sup>

78. PATH also argues that the Commission erred in rejecting any distinction between the breadth of the expenditures covered by the first clause of Account 426.4 and those covered by the second. PATH asserts that by treating the two clauses as if they covered the same expenditures and ignoring the limitations on the coverage of the first clause, the Commission treated the different phrasing of the two clauses as meaningless.<sup>197</sup> PATH argues that the Commission’s interpretation effectively treats “the limitations on the coverage of the first clause . . . as ‘surplusage,’” because if all political actions were to be covered, then listing certain examples “would be meaningless.”<sup>198</sup>

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<sup>192</sup> *Id.* at 46-51.

<sup>193</sup> *Id.* (citing *Original Honey Baked Ham Co. of Ga., Inc. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999)).

<sup>194</sup> *Id.* at 49 (quoting 18 C.F.R. pt. 101, Account 426.4).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 47 (quoting Opinion No. 554, 158 FERC ¶ 61,050 at P 52).

<sup>197</sup> *Id.* at 49-50.

<sup>198</sup> *Id.* at 50.

## 2. Commission Determination

79. Upon further consideration, we grant rehearing and reverse the Administrative Law Judge's treatment of these expenditures. As discussed below, PATH incurred costs to directly influence public opinion on matters not contemplated in the text to Account 426.4. PATH also incurred costs to indirectly influence public officials, which is also not contemplated in the text to Account 426.4. On reconsideration, we find it appropriate for PATH to have recorded these consultant costs in Account 923, rather than Account 426.4. As the Commission has stated, "where the line [between public outreach and educational expenses and lobbying expenses] is drawn has not been clearly delineated."<sup>199</sup> We continue to affirm the Administrative Law Judge's finding that, "the 'intended use' and the 'reason behind' the payment dictates its accounting assignment."<sup>200</sup>

80. We first examine PATH's claim that it properly recorded these costs to Account 923. Account 923 covers "the fees and expenses of professional consultants and others for general services." The representative list of items covered by this regulation include general corporate services, such as "accountants and auditors, actuaries, appraisers, attorneys, engineering consultants, management consultants, negotiators, public relations counsel, tax consultants, etc."<sup>201</sup> Account 923 further states that amounts should only be included in this account if those amounts are "not applicable to a particular operating function or to other accounts."

81. The Administrative Law Judge found that Charles Ryan and the Reliable Power Coalitions were not providing these sort of services, stating "this account is generally reserved for the costs of accountants, lawyers, and other professional services to support

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<sup>199</sup> *ISO New England*, 117 FERC ¶ 61,070 at P 40 (finding "activities such as participation in Political Action Committees, candidate fundraising, entertainment expenses (e.g., meals, sporting events, junkets) are clearly not recoverable lobbying activities").

<sup>200</sup> *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025, at PP 30, 40 (Initial Decision) (citing *ISO New England*, 117 FERC ¶ 61,070 at P 42) (noting "the distinction between influencing public opinion and public relations activities lies in the intended use and reason behind these payments"). For example, reasonable expenditures for promotional and "goodwill" advertising may be considered an operating expense.

<sup>201</sup> 18 C.F.R. pt. 101, Account 923, Item 1.



operations.”<sup>202</sup> Instead, Charles Ryan was hired to execute a public outreach plan that “[p]roactively communicate[d] project benefits. . . , [s]olicit[ed] third party endorsements . . . , [m]itigate[d] opposition by community officials,”<sup>203</sup> and assisted with “Government Relations.”<sup>204</sup> However, as we discuss below, the fact that these costs were part of an approved public outreach plan for an approved project does not necessarily require PATH to record these amounts in Account 426.4.

82. We find that PATH appropriately recorded these amounts in Account 923. Account 923 includes “expenses of professional consultants” that “are not applicable to a particular operating function,” such as “public relations counsel.”<sup>205</sup> The expenses incurred by PATH were paid to such consultants.

83. The Administrative Law Judge also concluded that these costs should not be included in Account 923 because Account 923 states that it is not applicable to expenses properly included in other accounts. The Administrative Law Judge found these accounts were includable in Account 426.4.

84. Based on the information provided in PATH’s rehearing request, we find that these costs are not required to be included in Account 426.4. Account 426.4 deals with “expenditures for certain civic, political, and related activities.” Account 426.4 has two clauses. The first clause states: “[T]his 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.”<sup>206</sup> The Administrative Law Judge found that all of PATH’s expenditures were directed at obtaining a public convenience and necessity determination. Upon reconsideration, we conclude that PATH’s efforts to obtain a public convenience and necessity finding do not “fall within the ambit of referenda, legislation, ordinances, the grant of franchise and the like,”<sup>207</sup> because PATH’s efforts were in service of an RTO-

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<sup>202</sup> Initial Decision, 152 FERC ¶ 63,025 at P 39. *See also* 18 C.F.R. pt. 101, Account 923, Item 1.

<sup>203</sup> Ex. S-2 at 19.

<sup>204</sup> *Id.* at 20-21.

<sup>205</sup> 18 C.F.R. pt. 101, Account 923 (A) & Account 923, Item 1.

<sup>206</sup> 18 C.F.R. pt. 101, Account 426.4.

<sup>207</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 52.

approved project. We find that general promotional efforts on behalf of an already-approved project to obtain a finding of a public convenience and necessity are not the type of political activity included in the first clause of the regulation.

85. The second clause of Account 426.4 applies to expenditures “for the purpose of influencing the decisions of public officials.”<sup>208</sup> We reverse the determination in Opinion No. 554 that such expenditures include all efforts to promote a project that may influence indirectly public officials regarding an already approved project.<sup>209</sup> We do not find that this clause applies to otherwise legitimate promotional expenditures for an RTO-approved project simply because such costs have an indirect effect of influencing the decisions of public officials. As the Commission stated in *Northeast Utilities Service Co.*: “With respect to expenses incurred for recovery of public education and outreach expenses, we generally allow recovery in wholesale transmission rates of expenses to educate the public on matters of reliability and quality of service resulting from the construction of grid upgrades.”<sup>210</sup> These types of public outreach costs generally allowable in wholesale transmission rates are not the type of costs provided for in Account 426.4, even if there is an indirect effect of influencing the decisions of public officials. Instead, PATH may record the costs of expenditures needed to promote an approved project and obtain a public convenience and necessity determination as an operating expense.

86. We note that when the Commission established Account 426.4, it recognized the difficulty in where to draw the line between “political” and operating expenses. The Commission noted that it would be impractical to prepare an exhaustive list of items that normally should be placed in Account 426.4 or in an operating expense account, particularly in the absence of specific fact situations.<sup>211</sup> As discussed above, we have reexamined the Commission’s interpretation of Account 426.4, and find that PATH’s costs of promotional and public outreach on behalf of its approved project are not contemplated in Account 426.4, despite the fact that the activities may have the effects of influencing government officials indirectly. These amounts can be recorded in other appropriate accounts.

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<sup>208</sup> 18 C.F.R. pt. 101, Account 426.4.

<sup>209</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 26.

<sup>210</sup> 105 FERC ¶ 61,089, at P 25 (2003), *order on reh’g*, 111 FERC ¶ 61,333 (2005).

<sup>211</sup> Order No. 276, 30 FPC at 1542.

## C. Costs Recorded as Abandoned Plant

### 1. Rehearing Request

87. PATH argues that the Commission erroneously denied recovery of Charles Ryan expenditures recorded in certain plant accounts. PATH argues that these public relations expenditures are necessary to successful licensing, and that “these activities are as much legitimate costs of project development as permitting, engineering, and construction activities and should be accounted for in the same manner.”<sup>212</sup> PATH states that it originally recorded these expenditures to various plant asset accounts, namely, Account 101 (Electric Plant in Service), Account 105 (Electric Plant Held for Future Use), and Account 107 (Construction Work in Progress). PATH explains when it filed for abandonment recovery, it transferred these Charles Ryan expenditures to Account 182.2 so that it could begin expensing them through rates.<sup>213</sup> PATH argues that the USofA Electric Plant Instruction No. 3 directs public utilities to include a range of costs that are not themselves physical assets in plant accounts together with the cost of plant itself.<sup>214</sup> PATH further contends that there is no basis for the Commission’s statement in Opinion No. 554 that including the costs of such activities in plant accounts is equivalent to relabeling them as physical assets.

### 2. Commission Determination

88. In Opinion No. 554, we found that PATH improperly recorded these Charles Ryan promotional expenditures to plant costs, concluding they should have been recorded in Account 426.4. For the reasons discussed above, we grant rehearing of the determination that these promotional costs should have been recorded in Account 426.4. While we maintain the Commission’s finding that the Charles Ryan promotional expenditures should not be recorded to plant accounts, after reexamining the interpretation of Account 426.4, we also find that costs such as the Charles Ryan promotional expenditures to promote or perform public outreach on behalf of an approved project

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<sup>212</sup> PATH Rehearing Request at 62-63.

<sup>213</sup> *Id.* at 62 n.171 (“PATH had originally proposed to include costs in Account 182.3, Other Regulatory Assets. The [Commission] subsequently directed PATH to transfer all abandoned plant costs to Account 182.2.”) (citing Potomac-Appalachian Transmission Highline, LLC, Application for Abandonment Recovery, Docket No. ER12-2708-000, at 13 (filed Sept. 28, 2012); Ex. PTH-10 at 4).

<sup>214</sup> *Id.* at 63 (citing 18 C.F.R. pt. 101 Electric Plant Instruction 3, *Components of construction cost* (PATH asserts that “construction cost includes items such as protection, injuries, and damages, privileges and permits, rents, engineering and supervision, general administration, insurance, law expenditures, training costs, and studies.”)).

are not required to be recorded to Account 426.4. We therefore grant rehearing and will permit PATH to recover these costs by booking them to Account 923.

**D. Advertising**

**1. Opinion No. 554**

89. Opinion No. 554, affirming the Initial Decision, found that PATH had improperly recovered advertising expenses, in part because some expenses should have been recorded in Account 426.4 instead of to the General Advertising Account 930.1. USofA Account 930.1 states:

This account shall include the cost of labor, materials used, and expenses incurred in advertising and related activities, the cost of which by their content and purpose are not provided for elsewhere.<sup>215</sup>

90. Opinion No. 554 also found that PATH's Formula Rates limit PATH to recovering only Account 930.1 costs that are "Safety Related Advertising, Education and Out Reach [sic] Cost Support." Opinion No. 554 affirmed the Initial Decision's finding that PATH did not consistently distinguish between these Account 930.1 costs that its Formula Rates include, and "most general advertising,"<sup>216</sup> which its Formula Rates exclude. Opinion No. 554 explained:

PATH's formula rate generally uses the common approach for transmission-only utilities of either including or excluding a FERC Account in its entirety. Account 930.1, however, is a noteworthy exception. Account 930.1 as codified in the USofA covers General Advertising. PATH's formula rate, however, limits PATH to recovering only Account 930.1 costs that are "Safety Related Advertising, Education and Out Reach [sic] Cost Support."<sup>217</sup>

91. The Commission noted PATH's failure to provide evidence showing how the term "safety related" was applied.<sup>218</sup> The Commission also rejected PATH's effort to

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<sup>215</sup> 18 C.F.R. pt. 101, Account 930.1.

<sup>216</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 68.

<sup>217</sup> *Id.* P 57 (quoting PATH Formula Rates at PATH-WV Attachment 4 and PATH-Allegheny Attachment 4).

<sup>218</sup> *Id.* P 66.

“interpret the term ‘education’ so broadly as to characterize almost all advertisements as educational.”<sup>219</sup> Absent a clear ability to delineate its Account 930.1 costs, the Commission found that PATH should exclude any remaining costs recorded in Account 930.1 from PATH’s Formula Rates.<sup>220</sup> Opinion No. 554 affirmed the Initial Decision’s finding that PATH did not consistently distinguish its civic, political, and related costs from its safety-related advertising, education and outreach costs. Accordingly, the Commission held that PATH should have recorded these costs to Account 426.4 or, if the costs were recorded in Account 930.1, excluded them from PATH’s Formula Rates.<sup>221</sup>

## 2. Rehearing Request

92. Regarding Opinion No. 554’s directive that some Account 930.1 costs should have been recorded in Account 426.4, PATH states that its arguments addressed above regarding Accounts 426.4 and 923 apply equally here.<sup>222</sup> Regarding Opinion No. 554’s directive that any remaining Account 930.1 costs were not shown to qualify under PATH’s Formula Rates, PATH raises a three-part argument, detailed below.

93. First, PATH rejects the implication that its Formula Rates limit Account 930.1 recovery to safety-related advertising. Opinion No. 554 stated,

An exclusion for “Safety Related Advertising, Education and Out-Reach” ordinarily would be interpreted as applying the term “safety-related” to all of the terms and to require that such costs be limited to efforts to convince the public that the transmission line or the construction is safe.<sup>223</sup>

94. PATH argues that the Commission needed to offer record support in order to interpret the tariff, and that the Commission failed to do so.<sup>224</sup> PATH further argues that a “no less straightforward” reading of the Account 930.1 limitation would be that the limiting term “safety related” applies only to advertising, and does not apply to education

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* PP 65-69.

<sup>221</sup> *Id.* P 62. On compliance, the Commission also provided PATH with the option to “specifically justify each item,” as recoverable under the included portion of Account 930.1. January 2019 Compliance Order, 166 FERC ¶ 61,035 at P 33.

<sup>222</sup> PATH Rehearing Request at 56.

<sup>223</sup> Opinion No. 554, 158 FERC ¶ 61,050 at P 66.

<sup>224</sup> PATH Rehearing Request at 56.

or outreach. PATH notes that elsewhere in its Formula Rates, the column heading corresponding to the same category instead reads as “Safety, Education, Siting & Outreach Related.”<sup>225</sup> PATH argues that this column heading unambiguously supports PATH’s reading of the ambiguous title, and therefore “[t]he Commission simply failed to consider all portions of the rate schedule describing the entry.”<sup>226</sup>

95. Second, PATH maintains that, despite the Commission’s findings, PATH’s advertising was indeed educational, and that the Commission’s definition of education is too narrow. PATH claims that the Commission’s conclusions were arbitrary and capricious, because its conclusion that PATH’s expenses are not recoverable does not follow from the premise that allowing recovery would involve reading ‘education’ so broadly as to encompass almost all advertisements.<sup>227</sup>

96. PATH asserts that ads are not educational if they are intended “to persuade consumers to select a product over a competitor’s alternative, to use more of a product, or to use the product in a different manner,” but ads are indeed educational if they are “intended to educate the public about the need for and benefits of the PATH project.”<sup>228</sup> PATH claims that “the former [ads attempt] to increase corporate sales and profits,” whereas PATH’s advertising “is to enhance the prospects for licensing.”<sup>229</sup>

97. Third, PATH contends that it need not provide invoices to support the dollar amount and the nature of its advertising expenditures. PATH notes that the relevant question is not what type of evidence PATH submitted, but whether it was sufficient to inform the Commission. PATH states that witness testimony satisfied its evidentiary burden sufficiently for the Commission to rule that the nature and the dollar amount of advertising was properly accounted for and passed through in rates. PATH argues that its evidence must have been sufficient, because “the Initial Decision was able to rule on the nature of the advertising and apparently, based on its ruling, so was the Commission.”<sup>230</sup>

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<sup>225</sup> *Id.* at 57 (citing Ex. PATH-20 at 25, 33).

<sup>226</sup> *Id.* at 57-58 (citing *Newmont Nevada Energy Inv. LLC v. Sierra Pac. Power Co.*, 147 FERC ¶ 61,030, P 38 (2014) (“A fundamental tenet of contract interpretation is that a contract provision should be interpreted, where possible, as consistent with the contract as a whole and that the contract must be interpreted as a whole.”)).

<sup>227</sup> *Id.* at 58.

<sup>228</sup> *Id.* at 59.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 60.

The Commission, PATH alleges, is trying to “have it both ways . . . [by] simultaneously conclud[ing] that the” evidence points to PATH misclassifying its costs, and also that PATH did not provide enough evidence to support PATH’s own classification of its costs.<sup>231</sup> PATH also notes that the Commission, in reaching this conclusion, cites no evidence. PATH cites the testimony of its own witness, Mr. Williamson, who compares “the PATH Companies educating” “the public with factual information about . . . the reliability benefits” of the project to a professor “providing [] information in order to persuade students that the theory of evolution is correct.”<sup>232</sup> PATH concludes that the Opinion No. 554 otherwise is contrary to the record.

### 3. Commission Determination

98. We grant rehearing. Opinion No. 554 found three independent grounds for denying recovery of advertising costs, so we discuss them separately below.

99. First, the Commission’s principal argument in denying recovery of these advertising costs is that they should have been recorded in Account 426.4. As the Administrative Law Judge and the Commission in Opinion No. 554 found, the USofA, at Note B of Account 930.1, specifically requires that utilities “[e]xclude from this account and include in Account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for advertising activities that are designed to solicit public support or the support of public officials in matters of a political nature.”<sup>233</sup> On reconsideration we find that the advertising costs were public outreach activities, rather than the activities of a political nature described in Note B of Account 930.1. Accordingly, we reverse the decision that these costs should properly be recorded in Account 426.4, and allow PATH to record them in Account 930.1.

100. Second, the Commission erroneously interpreted PATH’s Formula Rates as limiting PATH to only recovering Account 930.1 advertising that is also “safety related.” The Commission interpreted a heading in PATH’s Formula Rates stating “Safety Related Advertising, Education and Out Reach Cost Support” as limiting recovery only to safety related matters. On rehearing, PATH contends the limiting term “safety related” applies only to advertising, and does not apply to education or outreach, citing the relevant column heading (“Safety, Education, Siting & Outreach Related”). That is, PATH may recover Account 930.1 expenditures, even if they are not safety-related, so long as they are either educational, or siting-related, or outreach. On reconsideration, we find that the

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 61 (citing Ex. PTH 79 at 19:2-13).

<sup>233</sup> 18 C.F.R. pt. 101, Account 930.1.

more specific statement in the column heading controls over an interpretation of the ambiguous language used elsewhere.

101. Third, Opinion No. 554 affirmed the Administrative Law Judge's finding that the advertisements were not educational, but instead were promotional efforts. Opinion No. 554 agreed that the advertisements were not educational but "clearly promotional in nature and ultimately intended to influence the action of public officials."<sup>234</sup> As we found above, PATH's Formula Rates permits it to recover its expenditures if the advertising is either safety, education, siting, or outreach. Given this interpretation, we need not determine whether the expenses were educational, as the costs qualify as outreach and are therefore recoverable.

#### **E. Civic, Political, and Related Expenditures Compliance Requirements**

102. Our findings regarding both civic, political, and related expenditures and advertising will require PATH to recalculate its total revenue requirement and account for refunds paid during the interim between Opinion No. 554 and the instant order. Accordingly, we deem all PATH's post-Opinion No. 554 accounting compliance filings moot, and direct PATH to submit a new accounting compliance filing and refund report, within sixty (60) days of the date of this order. PATH's resubmissions should include the remaining Opinion No. 554 compliance obligations not covered in this order: such as land transactions,<sup>235</sup> PATH's plan for ending operations, timeline for cancelling formula rates, and final notice to the Commission within ten (10) days of when the closing out of business is complete.<sup>236</sup>

#### **The Commission orders:**

(A) PATH's request for rehearing is hereby denied in part and granted in part, as discussed in the body of this order.

(B) The participants are directed to submit supplemental briefs and additional written evidence regarding the application of the Commission's proposed revised ROE methodology to these proceedings, with initial briefs due sixty (60) days from the date of this order and responses to those initial briefs due thirty (30) days later, as discussed in the body of this order.

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<sup>234</sup> Initial Decision, 152 FERC ¶ 63,025 at PP 65, 66.

<sup>235</sup> Opinion No. 554, 158 FERC ¶ 61,050 at PP 170-172, 187-189, 192; January 2019 Compliance Order, 166 FERC ¶ 61,035 at PP 44-46.

<sup>236</sup> January 2019 Compliance Order, 166 FERC ¶ 61,035 at P 49.



(C) PATH's ROE Compliance Filing is hereby accepted, effective as requested, subject to the outcome of the paper hearing ordered herein.

(D) PATH shall file a compliance filing with revised accounting records and a refund report in compliance with this order within sixty (60) days of the date of this order.

(E) PATH's compliance filings filed in Docket Nos. ER09-1256-005 and ER12-2708-007 and refund report submitted in Docket No. ER12-2708-005 are rejected as moot.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.