

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 24<sup>th</sup> day of November 2009.

CASE NO. 09-0770-E-CN

PATH WEST VIRGINIA TRANSMISSION COMPANY, LLC;  
PATH ALLEGHENY TRANSMISSION COMPANY, LLC;  
PATH-WV LAND ACQUISITION COMPANY; AND  
PATH-ALLEGHENY LAND ACQUISITION COMPANY

Joint application for Certificate of Convenience and Necessity for the construction and operation of the West Virginia segments of a 765kV electric transmission line and related facilities in Putnam, Kanawha, Roane, Calhoun, Braxton, Lewis, Upshur, Barbour, Tucker, Preston, Grant, Hardy, Hampshire, and Jefferson Counties, including modifications to the Amos Substation in Putnam County and a new substation in Hardy County, and for related relief.

**COMMISSION ORDER**

This order (i) denies the motions to dismiss, (ii) tolls the statutory due date, and (iii) establishes a procedural schedule.

**BACKGROUND**

On May 15, 2009, the PATH West Virginia Transmission Company, LLC (“PATH-WV”), PATH Allegheny Transmission Company, LLC (“PATH-Allegheny”), the PATH-WV Land Acquisition Company, and the PATH-Allegheny Land Acquisition Company (all four, collectively, “Applicants”) filed a joint application for certificates of public convenience and necessity and for related relief (“Joint Application”) pursuant to W.Va. Code §§24-2-11 and 24-2-11a. The PATH Project is approximately 225 miles of 765 kV electric transmission line and related facilities in the fourteen counties of Putnam, Kanawha, Roane, Calhoun, Braxton, Lewis, Upshur, Barbour, Tucker, Preston, Grant, Hardy, Hampshire, and Jefferson. The Applicants also seek a certificate of public convenience and necessity (i) to jointly construct, own, operate, and maintain the new Welton Spring Substation, as another part of the PATH Project in West Virginia to be constructed two miles north of Old Fields in Hardy County, and (ii) to construct, own, operate, and maintain certain modifications to the Amos Substation owned by Appalachian Power Company and Ohio Power Company.

On November 10, 2009, the Commission issued an Order (i) staying the current procedural schedule, (ii) granting the parties additional time to file recommendations regarding the Commission Staff motion to dismiss, and (iii) granting the request of two parties to withdraw from the case.

Additional procedural information will be addressed as necessary in the Discussion section of this Order.

## **DISCUSSION**

### *Motions To Dismiss*

On October 28, 2009, Staff filed a Motion to Dismiss the Filing as Insufficient or in the Alternative, Require Path to Request a Tolling and Implement Further Case Processing Procedures. Staff argued that (i) the failure to re-file the dismissed Maryland proceeding renders this project incomplete, (ii) the application should be supported by current economic and PJM load forecast information to determine the need for the PATH Project and that the updated information in the 2010 Regional Transmission Expansion Plan (“RTEP”) was not included in updates to the 2009 RTEP but is potentially crucial in determining the need for the PATH Project, and (iii) Staff and Intervenors will be prejudiced by expending limited resources to review an incomplete project and stale need-related information, and then analyze updated information as it becomes available.

Staff asked that the Commission (i) dismiss this case without prejudice, (ii) permit the Applicants to re-file concurrent with the filing of a proper certificate application before the Maryland Public Service Commission (“Maryland PSC”), and (iii) require the Applicants to support the re-filed West Virginia application with the updated PJM annual load forecast and February 2010 RTEP. In the alternative Staff recommended proceeding with the pending application if the Applicants request to toll the statutory due date subject to certain other conditions.

On November 4, 2009, the Applicants filed a response to the Staff motion to dismiss. In opposition to the Staff motion the Applicants stated that (i) the Staff bases to dismiss or toll this case are not warranted; (ii) the absence of a pending application for certification of the PATH Project in Maryland does not support any delay in the West Virginia portion of the proceeding; and (iii) feasibility of further study cannot be asserted as a justification for postponing the evidentiary hearing because there is always more up-to-date analysis that can be performed. In support of an alternate tolling of the statutory deadline Applicants conceded that delayed consideration and certification of the Maryland segments of the project provide an opportunity for this Commission and its sister commission in Virginia to base their decisions on updated evidence of electrical need. The Applicants proposed tolling the statutory decision due date in West Virginia if a satisfactory extension of the current procedural schedule were put into place.

On November 10, 2009, Staff filed a reply to the Applicants' response. Staff stated that (i) the Applicants' offer to toll the statutory deadline contingent on a specific procedural schedule was not acceptable, (ii) the Commission should not hold two hearings to address need and non-need testimony, and (iii) the parties should be given more time to file testimony on non-need issues.

Numerous parties filed in support of the Staff motion to dismiss. Several of those supportive filings made further recommendations that the Commission extend or stay the procedural deadline pending a decision on the Applicants offer to toll.

On November 10, 2009, the Commission issued an order (i) suspending the procedural schedule in this case and (ii) granting the parties until November 17, 2009 to file a final response to the Staff motion to dismiss and offer to toll tendered by the Applicants.

Several intervenors filed responses as permitted by the November 10, 2009 order. In addition to those described below, the majority of the comments opposed splitting the testimony and hearing between need and non-need issues as proposed by the Applicants.

On November 16, 2009, Intervenors Eric Burleyson and Kirsten Weiblen filed a Motion to Dismiss the Filing as Insufficient arguing that the Commission should (i) dismiss the case without prejudice; (ii) allow re-filing concurrently with the filing of a proper certificate application before the Maryland PSC and before the Virginia State Corporation Commission; and (iii) require any re-filed application to be supported with the forthcoming PJM annual load forecast and the updated RTEP. The Intervenors also described a scenario under which the Applicants might file for approval of the proposed line before the Federal Energy Regulatory Commission ("FERC") under the "backstop" provision of Section 216 of the Federal Power Act ("FPA").

On November 17, 2009, (i) the Sierra Club, Inc., and the West Virginia Highlands Conservancy, (ii) the Jefferson County Intervenor Group and the Tucker County Landowners, and (iii) the Consumer Advocate Division, each filed separate responses to the Staff motion to dismiss. While recommending the Commission grant the motion to dismiss, each also provided the Commission with a proposed procedural schedule for use in this case in the event the Commission decided not to dismiss. All of the parties were opposed to splitting the testimony and hearing between the need and non-need issues.

On November 17, 2009, the Applicants filed a Revised Proposal to Toll Statutory Decision Due Date and Extend Procedural Schedule. The Applicants (i) stated that the Potomac Edison Company plans to re-file an application seeking certification of those portions of the PATH Project in Maryland, including a terminus at the Kemptown Substation, (ii) proposed tolling the statutory due date until February 24, 2011, and (iii) submitted a revised procedural schedule that did not require multiple hearings and testimony filings to address need and non-need issues.

*Commission Decision Regarding the Motions to Dismiss*

The motions to dismiss and filings in support thereof cited the (i) need for updated information on the question of need, and (ii) dismissal of the Maryland application, as sufficient reason to dismiss this case.

The benefit of updated information is not unique to this case. In addressing the need for updated information, we will begin by stating the obvious: If no one used electricity, there would be no need to build transmission lines. It follows that the amount of electricity required and the need for this particular line is a critical question underlying this proceeding. The task of defining and measuring that need creates the illusion that better and more accurate information is just beyond the horizon and that the Commission cannot issue a fair decision unless it first considers that future information. This belief manifests more frequently during a turbulent economy but is present in almost all cases that rely on projections of future demand. Nevertheless, the adjudicatory process requires that the Commission select a deadline for the submission of new information, and then make a decision based on the evidence.

The Maryland PSC dismissal of the PATH proceeding potentially exacerbates the problem described in the above paragraph. For instance, if the Commission moved forward in this case, but PATH does not re-file the application to build the transmission line in Maryland, the parties in this State would have expended time and resources for naught. Even a significant delay in a Maryland refiling could create the need to reopen the proceedings in this State based on unanticipated routing or other changes dictated by the Maryland PSC. All things considered, it is beneficial to have the proceedings before the utility commissions of Virginia and Maryland moving forward at a pace at least roughly parallel to our own.

The proposed grounds to dismiss suggest that the Commission make a determination that either of the above reasons is sufficient as a matter of law to dismiss this case; i.e., the Commission should dismiss because the Applicants would be unable to support the need for a certificate unless (i) they were able to present updated information or (ii) the application had been re-filed in Maryland. Subsequent filings, however, have diluted the persuasiveness of the reasons to dismiss. First, the revised proposal to toll will assure the availability of updated information. Specifically, tolling the running of the statutory deadline will assure that the PJM February 2010 RTEP will be filed in this case and the parties, as well as the Commission, will have sufficient time to evaluate the issues presented by that updated study. Second, the assurance that the PATH Project will be re-filed in Maryland avoids proceeding in West Virginia without parallel filings in other affected jurisdictions.

The Commission will deny the motions to dismiss.

*Procedural Schedule*

Several parties submitted procedural schedules. The schedules were substantially similar. The Commission will adopt the schedule submitted by the Applicants and endorsed by Staff. There are several advantages afforded by the Applicants schedule: (i) the extended discovery period following issuance of the February 2010 RTEP and (ii) a submission date for the Applicants testimony to allow inclusion of the May 2010 RPM capacity auction. The Commission will adopt the following schedule for use in this case.

<b>Event</b>	<b>Date</b>
Discovery reopens on issues of electrical need.	Monday, February 1, 2010
Applicants file supplemental testimony on issue of electrical need and any other issues requiring supplementation.	Noon, Tuesday, June 29, 2010
Deadline for propounding discovery on supplemental testimony due June 29, 2010.	Noon, Tuesday, July 13, 2010
Staff's and Intervenors' prepared direct testimony and rebuttal to the direct testimony of Applicants.	Noon, Tuesday, August 31, 2010
Deadline for propounding discovery in response to testimony due August 31, 2010.	Noon, Tuesday, September 7, 2010
Applicants' rebuttal testimony to the direct testimony for Staff and Intervenors, and Staff and Intervenor rebuttal testimony to the direct testimony of one another.	Noon, Tuesday, September 28, 2010
Deadline for propounding discovery in response to the rebuttal testimony due September 28, 2010.	Noon, Tuesday, October 5, 2010
Written opening statements.	Noon, Thursday, October 14, 2010
Evidentiary hearing begins.	Monday, October 18, 2010
Evidentiary hearing ends.	Tuesday, November 2, 2010
Initial briefs and proposed orders.	Noon, Tuesday, November 30, 2010
Reply briefs.	Noon, Thursday, December 16, 2010
Deadline for Commission decision.	Thursday, February 24, 2011

The parties should note that the discovery period beginning February 1, 2010 and ending July 13, 2010 is limited to (i) the issue of need, and (ii) any issues supplemented by the June 29, 2010 testimony filed by the Applicants. Additionally, the “party responsibilities” outlined in the Commission August 4, 2009 order, and the specific rules regarding service and filings of documents and discovery described in the August 21, 2009 order remain in effect.

*The “Backstop” Provision*

The Energy Policy Act of 2005 added Section 216(b) to the FPA giving the FERC “backstop” transmission siting authority under certain conditions. The language in Section 216(b)(1)(C)(i) allows FERC to permit the siting and construction of new transmission lines when the state authority has withheld approval for more than one year after the filing of an application seeking approval. The Commission does not have authority to modify the one year triggering period in the FPA. The Commission interprets the Applicants proposal to toll this proceeding as an indication that the Applicants will not avail themselves of the backstop provision pending resolution of the current proceeding. The Applicants should immediately notify the Commission if this interpretation is not correct.

**FINDINGS OF FACT**

1. The motions to dismiss primarily focus on updating information on the question of need and the current state of the PATH Project filing before the Maryland PSC.
2. The Applicants submitted a revised proposal to toll, a revised procedural schedule endorsed by Staff, and an assertion that the PATH Project will be re-filed in Maryland by the end of this year.
3. The procedural schedule submitted by the Applicants and endorsed by Staff will provide (i) an extended discovery period on the question of need and (ii) revised testimony on need including the February 2010 RTEP and the May 2010 RPM capacity auction.

**CONCLUSIONS OF LAW**

1. The revised proposal to toll supported by the Applicant and assertion regarding re-filing of the PATH Project in Maryland renders it unnecessary for the Commission to deliberate further on the motions to dismiss.
2. It is reasonable to deny the motions to dismiss.
3. It is reasonable to grant the Applicants revised proposal to toll the running of the statutory deadline in this proceeding for 247 days, which shall establish a new deadline of February 24, 2011 for a Commission decision.

4. The procedural schedule proposed by the Applicants and endorsed by Staff is reasonable and will be adopted by the Commission in this case. The “party responsibilities” outlined in the Commission August 4, 2009 order, and the specific rules regarding service and filings of documents and discovery described in the August 21, 2009 order remain in effect.

5. It is reasonable to interpret the Applicants proposal to toll the running of the statutory deadline in this proceeding as an indication that the Applicants will not avail themselves of the right to seek a permit from the Federal Energy Regulations Commission pursuant to §216(b) of the Federal Power Act a provision pending resolution of the current proceeding.

### **ORDER**

IT IS THEREFORE ORDERED that the Staff and the Burleyson/Weiblen motions to dismiss this proceeding are denied.

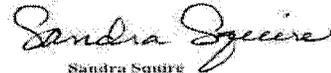
IT IS FURTHER ORDERED that the Applicants revised proposal to toll is hereby granted. The statutory due date in this matter is tolled until Thursday, February 24, 2011.

IT IS FURTHER ORDERED that the procedural schedule established herein, including the hearing beginning October 18, 2010, is adopted for use in this proceeding.

IT IS FURTHER ORDERED that the Applicants must notify the Commission within five days of the date of this Order if they disagree that their proposal to delay a decision in this case by tolling the West Virginia statutory suspension period is also an agreement by the Applicants that they will not avail themselves of the Federal permitting process pursuant to §216(b) of the Federal Power Act of 2005.

IT IS FURTHER ORDERED that the Commission Executive Secretary serve a copy of this Order on all parties of record via electronic mail or United States First Class Mail as appropriate, and on Commission Staff by hand delivery.

A True Copy, Teste:

  
Sandra Squire  
Executive Secretary

JJW/slc  
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