

IN THE MATTER OF THE : BEFORE THE PUBLIC SERVICE
APPLICATION OF THE POTOMAC : COMMISSION OF MARYLAND
EDISON COMPANY D/B/A :
ALLEGHENY POWER FOR A : Case No. 9223
CERTIFICATE OF PUBLIC :
CONVENIENCE AND NECESSITY :
TO CONSTRUCT THE :
MARYLAND SEGMENTS OF A 765 KV :
ELECTRIC TRANSMISSION LINE AND :
A SUBSTATION IN FREDERICK :
COUNTY, MARYLAND :

**REPLY BRIEF
TO PRELIMINARY ISSUES
RAISED BY THE PUBLIC SERVICE COMMISSION**

**FILED ON BEHALF OF
SUGARLOAF CONSERVANCY, INC.**

April 29, 2010

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SUGARLOAF CONSERVANCY, INC.**

Sugarloaf Conservancy, Inc., by its counsel, James L. Thompson, Amy C. H. Grasso, and Miller, Miller & Canby, Chtd., files this reply brief pursuant to the Public Service Commission’s (“the Commission”) Notice Initiating Proceeding and Setting A Procedural Schedule, dated March 10, 2010, and in support states:

OVERVIEW

Potomac Edison filed its original application in case No. 9198 *on behalf of* PATH-Allegheny, which was rejected as improper. Now, Potomac Edison attempts to achieve the same result—obtain a Certificate for Public Convenience and Necessity (“CPCN”) on behalf of a non-electric company—but does so by designing a corporate structure that, on its face, appears to comply with the relevant statute. Indeed, Potomac Edison claims that it must only satisfy two prerequisites to apply for a CPCN: it must be an “electric company” by statute, and it must “construct” the transmission lines. Such a narrow reading, however, is incompatible with the purpose of the statute and provides for an absurd result—one in which a non-electric company will own and operate the highest voltage line in Maryland without oversight by the Commission.

To start, the statute is not clear regarding whether a CPCN may be awarded for construction of a line that a non-electric company will own and operate. But, a review of the

Public Utility Companies (“PUC”) Article demonstrates that it is implied that only an electric company will own and operate a transmission line such as the PATH Project. Indeed, § 7-207 of that Article assumes as much. And, although Potomac Edison claims it will “operate” the transmission lines in question, the evidence supporting its application suggest that it will neither *own* nor *operate* the lines; instead, PATH-MD will be responsible for ownership and operation. Further, in spite of the new corporate structure, PATH-MD cannot constitute an “electric company,” by virtue of Potomac Edison’s meager 5% ownership interest therein. The result of this is two-fold. First, Potomac Edison should be precluded from seeking a CPCN when it is intended that PATH-MD—not a statutory “electric company”—will own and operate the transmission lines in question. Second, the Commission will not have regulatory jurisdiction over PATH-MD, which has several public policy implications, safety being among the forefront.

Even if the Commission is to be comforted by the 5% ownership interest that Potomac Edison presently maintains in PATH-MD, there is no guarantee that this 5% ownership interest will endure, as—although the Commission may place conditions on Potomac Edison’s actions in constructing the line—it cannot condition the ownership of PATH-MD, who is not an applicant. Indeed, restrictions on the alienability of stock are disfavored, and enforcing any such restriction would be problematic.

But, ignoring the foregoing, and even accepting Potomac Edison’s argument that the statute needs to be strictly interpreted to only require “electric company,” and “construction,” the application is still improper because Potomac Edison’s ability to carry out the acts identified by § 7-207 is still controlled by PATH-MD (and accordingly, PATH-Allegheny¹). Specifically, under the PATH-MD Operating Agreement, all construction-related activities carried out by Potomac

¹ Path Allegheny Transmission Company, LLC.

Edison are subject to approval of the PATH-MD Board (which is 95% comprised of PATH-Allegheny). And, any rights of way or interests acquired by Potomac Edison through condemnation are required to be transferred to PATH-MD. Most importantly, however, there is not even any assurance that PATH-Allegheny will continue to control Potomac Edison's actions in this regard. PATH-Allegheny is entitled to assign its interests under the Operating agreement at any time, meaning that a stranger assignee may step in and exercise complete control over Potomac Edison's actions under any CPCN awarded. Thus, even if Potomac Edison satisfies the minimum statutory requirements, the obligations carried out pursuant to those statutory requirements are controlled by PATH-Allegheny (or potentially a stranger), and the application is still improper.

Finally, Sugarloaf Conservancy encourages the Commission to make its decision on these preliminary issues based solely upon the applicable law and the facts and not under the threat of federal proceedings. To do otherwise would be improper. Because the application is improperly made, and in spite of the new corporate structures effectively seeks the same result sought in the previously-rejected application, the Sugarloaf Conservancy asks this Court to reject the application as improperly filed.

DISCUSSION

- I. **The PUC Article Must be Read to Require that an *Electric Company* Must Not Only "Construct" an Overhead Transmission Line in Excess of 69,000 Volts, but Also Own and Operate It; Because Potomac Edison will Not Own and Operate the PATH Project, its Application Should be Rejected as Improper.**
 - A. **The only reasonable way to read the PUC Article is to require that the Electric Company applying for the CPCN also own and operate the transmission line.**

It can hardly be denied that the legislature, when crafting the language relating to obtaining a CPCN, did not contemplate the various scenarios recently offered by Potomac

Edison. The quite bare language of the Article does not address—as the parties dealt with in Case No. 9198—the instance in which an electric company applies for a CPCN *on behalf of* a non-electric company. It also does not address the present instance, in which an electric company applies for a CPCN to construct a transmission line that it will not own and operate, and of which its miniscule interest may be depleted at any time.

But, just because this specific scenario was not addressed by the legislature does not mean that the scenario is proper or that Potomac Edison and Path Allegheny should be permitted to circumvent the prior Order of the Commission by manipulating corporate structures. Potomac Edison argues that it simply must (1) be an electric company; and (2) seek to *construct* a transmission line. Pot. Ed. Brief at 2. This narrow reading, however, is incompatible with common sense and does not answer the questions raised by this application. There is no statutory language to suggest that the existence of an electric company is *only* necessary for purposes of *construction*. Indeed, taking Potomac Edison's argument to its extreme would provide for a scenario which an electric company could simply apply for a CPCN, *begin* construction, and then transfer the CPCN and construction obligations to a non-electric company one day later. This extreme transfer or assignment gambit was discussed at the hearing before the PSC in the prior case and went nowhere for good reason.

This interpretation would lead to an absurd result and cannot effectuate the intention of the legislature. Instead, the reference to “electric company” in § 2-207 for purposes of beginning construction *assumes* that the owner and operator of that transmission line will also be an electric company. This is evidenced by a review of the PUC Article, which suggests that an electric company is intended to be the owner and operator of a transmission line as well, not just the

constructor thereof. A sample of some of the statutory language to provide context to this requirement follows:

- § 1-101 (“‘Public service company’ means a common carrier company, **electric company**, gas company, sewage disposal company, telegraph company, telephone company, water company, or any combination of public service companies.”)
- § 2-112 (“the Commission has jurisdiction over each **public service company**² that engages in or *operates* a utility business in the State . . .”)
- § 2-113 provides that the Commission must supervise and regulate the **public service companies** to ensure their operation and interest of the public and promote adequate, economical, and efficient delivery of utility services in the State. § 2-113(a)(1)(i). This includes enforcing compliance with the requirements of law by public service companies. § 2-113(a)(1)(ii).
- § 7-204 (“a **public service company** shall provide . . . written notice . . . of intent to run a line or similar transmission device over, on, or under the land.)
- § 7-301 (b)(1) (“each . . . **electric company** shall maintain suitable equipment, approved by the commission, for testing the accuracy of a[n] . . . electric meter furnished by the company for use by its customers. . .”)
- § 7-305 (a)(“[an] . . . **electric company** may bill its customers for gas, electricity, or any other service it renders . . .”)
- § 7-306 (a)(5) (“Net energy metering’ means measurement of the difference between the electricity that is supplied by an **electric company**. . .”)
- § 7-307 (“A **public service company** may not terminate electric . . . service . . .”)
- § 7-506 (“The **electric company** . . . shall provide and be responsible for distribution services . . .”)
- COMAR § 20.50.02.01 (The electric plant of the [**electric company**]³ shall be constructed, installed, maintained, and operated in accordance with accepted good engineering practice in the electric industry to assure, as far as reasonably possible, continuity of service, uniformity in the quality of service furnished, and the safety of persons and property.

The Commission’s first step in this analysis is to recognize that the statute’s meaning is unclear. *See Diaz v. State*, 129 Md. App. 51, 80 (1999). There is simply no language in § 7-207 to suggest that a transmission line to a CPCN may be owned and operated by a non-electric company. In fact, Potomac Edison and PATH-MD must recognize the absence of clarity on the

² Because a public service company includes “electric company” and not person or non-electric company, for purposes of this discussion, “public service company” is used interchangeably with “electric company.”

³ The regulation itself refers to a “utility,” however, a “utility” is therein defined as an “electric company” pursuant to § 1-101 of the Public Utility Companies Article. For simplicity and consistency, only the term “electric company” is used herein.

topic, as PATH-MD was intentionally structured with a 5% “electric company” ownership interest in an apparent attempt to preempt any such concerns.

The second step in the Commission’s determination, in light of the absence of specific language to address the present scenario, is to analyze the statute. Its “goal in analyzing a statute is a ‘commonsensical’” approach, avoiding “giving the statute a *strained* interpretation or one that reaches an *absurd* result.” *Id.* (citing *Richmond v. State*, 326 Md. 257, 262 (1992)) (emphasis added). The analysis should end here, as the suggestion that an electric company *construct* but not *own and operate* a transmission line exceeding 69,000 volts, as Potomac Edison advances, would give the PUC Article exactly that—a strained interpretation and an absurd result.

Instead—in light of the repeated language employing the words “electric company” or “public service company” with respect to ownership and operation of a transmission line—the Commission should “interpret[] [the] statutory language, assum[ing] that the words of the statute have their ordinary and natural meaning, absent some indication to the contrary.” *See, e.g., Briggs v. State*, 348 Md. 470, 477; *Atkinson v. State*, 331 Md. 199, 215 (1993); *Richmond*, 326 Md. at 262. In doing so, the Commission should interpret the language that is “clear and consistent with the statute’s apparent purpose” and give the it “meaning and effect in light of the *setting, the objectives and purpose of the enactment.*” *Diaz*, 129 Md. App. at 81 (emphasis added; citations omitted). The objectives and purpose of the enactment are clear—safe and efficient delivery of electricity. Such safety and efficiency can only be promoted by requiring the ownership and operation of a transmission line be held to the same standard as the construction of such a line. Otherwise, what is at risk is that the highest voltage line in Maryland

will be owned and operated by a non-electric company with no oversight by the Public Service Commission.

And, it makes no difference that, in some circumstances, this same statutory language may be unambiguous; the present scenario is unique, by Potomac Edison's own doing. "That a term may be free from ambiguity when used in one context but of doubtful application in another context is well settled." *Id.* (citations omitted). The Commission may be confronted with many situations in which the statute is unambiguous when applied with respect to a straightforward application of common or standard facts. But when the Commission is faced with a unique or distinct factual circumstance—such as the present one in which Potomac Edison is again seeking to obtain a CPCN on behalf of a non-electric entity—"the picture [may] become[] obfuscated," *Id.* (citations omitted). When the picture does become so obfuscated, and it is necessary for the Commission to look further to determine how to apply the statute, it should consider public policy and avoid an absurd result.

The public policy underlying the PUC Article is not in question; it is to *supervise and regulate the public service* companies to ensure their operation and interest of the public (§ 2-113). From a review of the preceding language from the PUC Article, and in consideration of the underlying public policy two relevant conclusions emerge. First, an "electric company" is meant to *own and operate* transmission lines such as the PATH Project. Indeed, this is evidenced in the Commission's own decision in Case No. 9198, wherein it refers to "constructing, owning, and operating." See Order No. 82892, p. 5.

Second, it becomes undeniable that in the present case, Potomac Edison—though technically an "electric company"—will not be doing any of the acts that are required to be done by "electric companies" pursuant to the Article. Instead, PATH-MD—a non-electric company—

will be the entity responsible for both *owning and operating* the transmission lines, as is discussed below.

B. PATH-MD, not Potomac Edison, will own and operate the Path Project.

Although Potomac Edison casually states that it will “construct, operate, and maintain the PATH Project” (App. p. 4), the evidence suggests that Potomac Edison will construct, but neither own nor operate the PATH Project. This is evidenced by Potomac Edison’s own application and exhibits.

1. Joenson testimony⁴

Dr. Joenson states that Potomac Edison will be responsible for the following:

- Design of PATH facilities;
- Construction, installation, and commissioning of all such facilities;
- Ensuring that construction complies with all applicable laws and regulatory requirements;
- Condemnation of any rights-of-way;
- Procurement of equipment and materials;
- Development and maintenance of plans for performance of operation and maintenance.

See Joenson testimony at p. 9. Nowhere in this list, however, is it suggested that Potomac Edison will be responsible in any way for “operating” the PATH project. Instead, all of the listed tasks relate solely to construction or maintenance of the project. As Dr. Joenson further elaborates, the owning and operating will be carried out by subsidiaries of PATH LLC (here, PATH-MD). *Id.* at p. 10. In that regard, Dr. Joenson makes no attempt to hide the fact that Potomac Edison has only been involved in this application to achieve superficial compliance with § 2-207. *Id.* at p. 9-10. Superficial compliance, however, does not serve to protect the public interest.

⁴ Exhibit 12 to Potomac Edison Application for CPCN in this matter.

2. Poff testimony⁵

Mr. Poff confirms that Potomac Edison's sole responsibility will be construction of the PATH Project in Maryland. Poff Testimony at p. 8. The remainder of his testimony discusses the details of construction. There is no indication that Potomac Edison will carry out any duties relating to *operation* of the PATH Project.

3. Service Agreement

The Service Agreement, provided in conjunction with the direct testimony of Dr. Joenson⁶, is entered into between (1) Allegheny Energy Service Corporation and (2) PATH-MD. The Service Agreement and its Exhibit A, outline particular services that will be provided *on behalf of PATH-MD*. These include, corporate services (accounting, cash management, financial management, risk management, investor relations, and audit services); "strategic planning (management of regulatory and marketing developments); administration (information services, human resources, procurement, system security); corporate communications; external affairs; legal services (provides legal services, investigates claims, maintains corporate records); **distribution business functions** (providing all services to Allegheny customers); **transmission business functions** (ensures service of POLR load and wholesale transmission); generation business functions (operates and maintains all generation units); and "other business ventures (analyzes, designs, engineers, **constructs, and maintains communication facilities** and on-site power alternatives).

⁵ Exhibit 7 to Potomac Edison Application for CPCN in this matter.

⁶ Because this Service Agreement has already been included as an exhibit to the Application (see Ex. 12) and to multiple filings, for the sake of efficiency, it is not provided again here.

In light of this list of services that will be provided on behalf of PATH-MD, it begs the question, in what capacity will Potomac Edison have any involvement in “operating” the PATH project? There is none to be found.

4. PATH-MD Operating Agreement

The Limited Liability Company Agreement of PATH Allegheny Maryland Transmission Company, LLC (“PATH-MD Operating Agreement”) defines the tasks for which Potomac Edison will be responsible. These include facility design, construction, condemnation, and procurement. *See* Oper. Agr., attached hereto as Ex. 1, §§ 4.1-4.4. Those four categories are not related to operation of the PATH project. Additionally, a section titled “Operation and Maintenance” provides as follows:

Subject to the Board’s approval, rights pursuant to Section 8.6 Potomac Edison shall be responsible for developing . . . a coordinated plan for performance of operation and maintenance activities on the Maryland Transmission Facilities, including the **procurement and storage of replacement parts**. Potomac Edison shall **operate and perform all maintenance** on the Maryland Transmission Facilities in accordance with Good Utility Practices and the applicable O&M Plan.

This section is telling. First, most significantly, any “operating” role is subject to the Board’s approval, and the Board’s decision-making authority is controlled by PATH-Allegheny (*see* Section 8.1(c))—PATH-Allegheny possesses 95% voting rights on any Board decision). More worrisome, Path-Allegheny may dispose of “all or any portion of its Interests at any time.” § 9.1(a). And, “[u]pon any such assignment, the assignee shall succeed to the rights and obligations of PATH-[Allegheny] in respect of its Interests so transferred.” *Id.* There is not even any guarantee that PATH-Allegheny will continue to control Potomac Edison’s activities relating to construction, condemnation, or operation. This means that (1) there is no decision-making role that Potomac Edison would have regarding operation of the facility—it is all subject to the control of Path-Allegheny; and (2) at any time, any decision made by Potomac Edison regarding

construction or operation may be subject to the control a complete stranger (a successor to PATH-Allegheny).

Second, although the word “operate” is employed, it apparently refers to *operation of maintenance* on the “Maryland Transmission Facilities,” not operating the facilities *per se*. Further, the carefully-selected language demonstrates that the reference to “operation and maintenance” translates into (1) developing a plan and (2) procuring and storing replacement parts. This maintenance-related role, which is nonetheless subject to the control PATH-Allegheny is insufficient to satisfy any role as operator of the PATH Project. At the very least, Potomac Edison should be required to proffer some proof that it will be engaged in operating the PATH Project, as opposed to just constructing it. Finally, even if Potomac Edison is—by virtue of the PATH-MD Operating Agreement—assigned some role in operation of the facility, the fact that Potomac Edison’s interest in PATH-MD may be conveyed⁷, negates any significance attributed to this provision.

C. PATH-MD is not an Electric Company in spite of the corporate structure; Potomac Edison should, therefore, be precluded from seeking a CPCN when it is intended that PATH-MD own and operate the PATH Project.

As is made clear by the Joenson testimony and the diagrams included therein, PATH-MD is 95% owned by PATH Allegheny Transmission Company, LLC, a subsidiary of Potomac-Appalachian Transmission Highline, LLC, and only 5% owned by Potomac Edison. Potomac Edison’s mere 5% ownership is insufficient to qualify PATH-MD as an “electric company,” so as to satisfy the statutory requirements, described above.

To start, Potomac Edison is not vested with any decision-making, or even persuasive, authority. The entity is managed by a Board, which is comprised of one Potomac Edison

⁷ See Section D, below.

representative and two representatives of PATH Allegheny Transmission Company, LLC. Oper. Agr. § 8.1 (c). More significantly, Potomac Edison's votes with respect to management and governance of PATH-MD only comprise 5% of the total vote, Path-Allegheny's votes comprise 95%. *Id.* § 8.1(b). Indeed, there is no instance in which a decision supported by PATH-Allegheny⁸ could be blocked or even persuaded by Potomac Edison. And, the PATH-MD Operating agreement clearly provides that it has an identity separate and distinct from Potomac Edison. *Id.* § 2.12. Further, there is no guarantee that Potomac Edison will even retain its 5% ownership interest; it may be bought out by Path-Allegheny or any other willing buyer at any time.⁹ *See id.* § 8.6.

As a matter of public policy, the 5% ownership interest of Potomac Edison in PATH-MD cannot convert PATH-MD into an "electric company." This would defeat the purpose of the statutory requirements that an electric company construct, own, and operate the type of project in question here. This public policy perspective finds support by analogy in the example of the Minority Business Enterprise ("MBE") certification in Maryland. In those cases, one cannot simply give itself the title "minority business" to qualify for the MBE benefits. Instead, a business must be at least 51% owned and controlled by one or more minority persons in order to constitute a MBE.¹⁰ And, a minority applicant for the program must have the authority to make day-to-day and long-term business decisions for the firm.¹¹ Using the same standard, PATH-MD cannot qualify as an electric company with a mere 5% electric company ownership, and where

⁸ Path-Allegheny has already conceded that it is not an "electric company" for purposes of the statute.

⁹ See Section D, below.

¹⁰ <http://www.mva.maryland.gov/AboutMVA/procure/MBE.htm>

¹¹ http://www.mdot.state.md.us/MBE_Program/overview

the electric company—Potomac Edison—has no authority to make day-to-day decisions for PATH-MD.

Indeed, PATH-MD—a Delaware limited liability company—is not even subject to the laws of Maryland. Md. Code Ann., Corps. & Assn's § 4A-1001. Indeed, the parties to the Operating Agreement chose to have the agreement governed by the laws of Delaware. See § 13.4. And, upon search of the Maryland State Department of Assessments and Taxation records, it appears that PATH-MD is not even registered in Maryland, precluding it from doing business in Maryland, making it incapable of filing suit in Maryland, and subjecting it to a possible misdemeanor conviction. *Id.*, §§ 4A-1002; 4A-1007.

D. The Commission cannot regulate ownership of the PATH Project, which is owned by PATH-MD.

As discussed above, the question of whether Potomac Edison may convey its 5% interest to a willing buyer at any time is a red herring because the Commission obtains no jurisdictional advantage over PATH-MD by virtue of Potomac's meager 5% interest therein. But, even assuming *arguendo* that the 5% ownership is relevant to the Commission's determination, it is necessary to briefly address the arguments of Staff on this point. First, the fact that Potomac Edison has stated in discovery that it would seek the approval of the Commission prior to selling its interest is irrelevant—this is something that could have been written into the Operating Agreement but was excluded. The agreement—§ 9.1—only refers to the consent of the PATH-MD Members before disposition of its interests. Indeed, restrictions on transfer of stock are disfavored in Maryland and elsewhere¹²; and, where Potomac Edison may be precluded from transferring its stock *at all*, such a clause would likely be unenforceable.

¹² Restraints on the alienability of stock have long been suspect. See, *Victor G. Bloede Co. v. Bloede*, 84 Md. 129,34 A. 1127, 1129 (1896) (“[U]nreasonable and palpable restraint upon the alienation of stock invalid”); 17 Williston on

Second, reference to § 7-208(e) is inapposite. That section allows the Commission to place conditions on the *applicant* relating to the CPCN issued for purposes of construction. And, it may very well be that the Commission can place restrictions on Potomac Edison's ability to transfer ownership of *The Potomac Edison Company* to another entity.¹³ But it cannot place restrictions on PATH-MD, a non-applicant who is not subject to the jurisdiction of the Commission. By placing conditions on Potomac Edison's ability to convey its stock in PATH-MD, however, it would effectively be placing conditions on the stock, and impacting the Operating Agreement, of *PATH-MD*, which it cannot do. Thus, although it may condition Potomac Edison's CPCN on certain Actions of Potomac Edison, it cannot place conditions that would modify the Agreement between Potomac Edison and PATH-MD.¹⁴ Finally, even if PATH-MD were to concede to the restrictions proposed by Staff, this would still not serve to subject PATH-MD to the jurisdiction of the Commission, as the Commission's jurisdiction cannot be expanded by agreement between the parties.¹⁵

Contracts § 51:69 (4th ed. 2009). As common law has evolved, only certain restraints that are reasonable or tailored to a valuable corporate purpose have been enforced. See, *B&H Warehouse v. Atlas Van Lines*, 490 F.2d 818,826 (5th Cir. 1974). In this case, however, there is not just a proposed restriction (i.e., existing shareholders have a right to purchase stock for fair market value), but an absolute preclusion (in that, Potomac Edison may be unable to sell its stock altogether).

¹³ Sugarloaf was unable to access Commission Order No. 82309 cited by Staff, but notes that the section cited at p. 9 in Staff's brief demonstrates that the cases are distinguished. There, the Commission discussed the ownership and control of the facility. Apparently, CPV owned and controlled the facility. Here, PATH-MD owns and controls the facility and any interest of Potomac Edison is once removed. An analogy may exist if the Commission precluded PATH-MD from transferring ownership or control of the transmission lines. But, as discussed herein, this cannot be done because the Commission does not have jurisdiction over PATH-MD.

¹⁴ For example, imagine an instance in the future in which Potomac Edison defaults in its agreement with PATH-MD and PATH-MD and PATH-Allegheny seek to exercise their rights under the agreement or by statute. A court would not restrict PATH-MD and PATH-Allegheny's rights under the Operating agreement simply because Potomac Edison had separately agreed to the conditions of the Commission.

¹⁵ Sugarloaf incorporates the legal authority relied upon by The Office of the People's Counsel in its Initial Brief, fn. 28.

II. Even if the Commission Reads the Statute as Strictly as Potomac Edison Argues it Should, Potomac Edison is *Still* Not a Qualified Applicant. Its actions are controlled by PATH-Allegheny under the PATH-MD Operating Agreement; and, they May be Controlled by a Stranger Entity or Person in the Future, as PATH-Allegheny is Entitled to Assign its Interests Under the PATH-MD Operating Agreement.

Perhaps the most astonishing aspect of Potomac Edison's application is that, even if this Commission should disagree with the foregoing, and find that Potomac Edison need only carry out acts relating construction and condemnation, its application is still inadequate. This is because Potomac Edison's authority for *construction and condemnation* is nonetheless subject to the *control* of PATH-Allegheny by virtue of the PATH-MD Operating Agreement. Indeed, we are "back to square one" as the same concerns prevalent in the prior application exist here.

At a bare minimum, as is suggested by Potomac Edison, § 7-207 requires that an electric company applying for a CPCN be an "electric company" and be charged with *construction* and the exercise of the rights of *condemnation*. But the PATH-MD Operating Agreement gives PATH-MD (and therefore, PATH-Allegheny) control over the design, construction, and condemnation by Potomac Edison. To start, the facility design and construction must be approved by the Board (whose vote is 95% PATH-Allegheny). The agreement provides:

Section 4.1 Facility Design. **Subject to the Board's approval** rights pursuant to Section 8.6, Potomac Edison shall be responsible for developing the design . . .

Section 4.2 Construction. Potomac Edison shall: (a) be responsible for the construction and installation of the Maryland Transmission Facilities **in accordance with the design approved by the Board;**

Likewise, although § 7-207 contemplates the *electric company* exercising rights of condemnation, § 4.3 of the PATH-MD Operating Agreement provides that "Potomac Edison shall acquire such rights-of-way and interests and **the Board shall cause PATH-MD to acquire such rights-of-way** and interests from Potomac Edison . . . [and] . . . **Potomac Edison shall**

transfer the rights-of-way and interests to PATH-MD at their acquisition cost. (emphasis added).

Most significantly, as discussed above, *there is not even a guarantee that PATH-Allegheny will continue to control the decisions of Potomac Edison*, as PATH-Allegheny may dispose of its interests at any time and the assignee of those interests would then have complete control over the decisions of Potomac Edison. *See Oper. Agr. § 9.1(a)*.

It cannot be the intent of the legislature to require an *electric company* to apply for a CPCN—which was the holding of this Commission in Case No. 9198—yet to allow that electric company’s obligations with respect to the CPCN to be controlled by a non-electric company. Thus, although Potomac Edison may technically comply with the language of the statute, it would defeat the purpose of the statute if PATH-MD, a non-electric company, could exercise control over the construction and condemnation by Potomac Edison. When is an electric company not an electric company for purposes of obtaining a CPCN? The answer is clear in this case and the PSC can not permit the statute to be circumvented in this manner.

III. The Commission Will Not have Jurisdiction over PATH-MD, a Non-Electric Company.

As discussed above, Potomac Edison’s 5% ownership interest in PATH-MD does not magically attribute to PATH-MD status as a statutory electric company. The recurring underlying policy theme is regulatory jurisdiction and safety. The Commission does not have the unfettered ability to carry out regulatory, policing, and enforcement powers over non-electric companies. As § 2-112 provides, the Commission’s jurisdiction is limited to public service companies (which includes electric companies), and its powers are only those specifically conferred by law or implied and incidental ones needed to carry out its functions under the Public Utilities Companies Article.

The regulatory, policing, and enforcement powers, as is evident under subsequent sections of the Article, as well as the Code of Maryland Regulations (“COMAR”) regulations adopted to carry them out, almost uniformly apply only to the regulation of “public service companies,” but not non-public service companies. Public service companies include: common carrier companies, **electric companies**, gas companies, sewage disposal companies, telegraph companies, telephone companies, water companies, or any combination of public service companies. PATH-MD, falls into *none* of the preceding categories. Thus, with what authority would the Commission purport to have any jurisdiction to Regulate PATH-MD, and absent that jurisdiction, how would the PSC enforce its orders or exercise meaningful oversight? Lacking that authority, then to what safety risks would the public be exposed?

The enforcement powers granted to the Commission are encapsulated both in the statutory scheme and the regulatory scheme. These provisions provide the type of regulatory, police, and enforcement powers to which electric companies are subject. These are the same powers to which PATH-MD, not constituting a public service company, will not be subject.

To start, §2-113 provides that the Commission must supervise and regulate the **public service companies** to ensure their operation and interest of the public and promote adequate, economical, and efficient delivery of utility services in the State. § 2-113(a)(1)(i). This includes enforcing compliance with the requirements of law by public service companies. § 2-113(a)(1)(ii). Specifically, in supervising and regulating public service companies, the Commission must consider the public safety of the State. § 2-113(a)(2).

Similarly, the Commission is granted specific authority to conduct investigations, including examining the records of a public service company, compelling records of a public service company by subpoena, and requiring that verified copies of records be filed with the

Commission. § 2-115. The Commission does not have the authority to examine or compel the records of a non-public service company, like PATH-MD. And, as the PATH-MD Operating Agreement makes clear, its books, records, and accounts are maintained separate from those of Potomac Edison. See Oper. Agr. § 2.12(a)(i). Likewise, the Commission may inspect the plants of a public service company, including any electric company. It does not have the right to inspect the plants of a non-public service company, like PATH-MD.

Further, the Commission is granted specific authority to prosecute any violation of the Public Service Commission Article, against a public service company, but not a non-public service company. § 2-117. If it believes that a public service company subject to its jurisdiction is violating or will violate the statutory regulations it has a duty to bring an action for injunction or other appropriate remedy. *Id.* No such enforcement powers are provided with respect to non-public utility companies.

Similar regulations exist within the context of the COMAR, which are applicable specifically to electric companies. For example, COMAR 20.50.02.01 provides standards for the construction, installation, maintenance, and operation of an electric company.¹⁶ Those standards are set to assure, among other things, “safety of persons and property.” The COMAR regulations provide the standards of practice applicable to an electric company and the requirements for generating capacity. § 20-50.02.02-.03. The regulations similarly require procedures to be in place for operation and maintenance procedures for electric companies. 20.50.02.04. These procedures are required to oversee the need for replacement and repair, and also require that the electric company keep ample records to evidence its compliance with operation and procedures. *Id.* Specific standards are set for the operation and maintenance

¹⁶ The regulation itself refers to a “utility,” however, a utility is therein defined as an “electric company” pursuant to § 1-101 of the Public Utility Companies Article. For simplicity and consistency, only the term “electric company” is used herein.

programs for any electric company serving over 40,000 customers. *Id.* It also requires an electric company to follow the requirements of the National Electrical Safety Code, including the vertical clearances that are set by the that Code. 20.50.02.05.

Sections 20.50.03.01, *et seq.*, establish compliance requirements for electric service companies. These include the requirement that certain records be available for inspection; that copies of the electric companies' tariffs be filed with the Commission; and that specific information be filed with the Commission, including special contracts, installation rules, bill forms, system maps, contact information, fatal accident notices, accident notices, annual capital expenditures, monthly reports, line support identification, and records' locations. Pursuant to the applicable regulations, an electric company is also required to investigate any complaint concerning its charges, practices, facilities, or service, and keep records of those complaints. 20.05.04.10-11.

Most importantly, the regulations provide standards of care with respect to hazards to which employees, customers, and the general public may be subjected. See 20.50.08.01. They require an electric company to adopt safety programs, use safe tools and equipment, promote safe work methods, and instruct employees regarding the hazard of electrical shock. 20.50.08.03. This includes, as well, using applicable provisions of the National Electrical Safety Code and National Electrical Code for grounding secondary circuits, and a variety of testing procedures. 20.50.08.03.

In sum, the regulatory, policing, and enforcement powers permit the Commission to regulate public service companies and, in particular, electric companies. They are not, however, available to the Commission for regulating, policing, and carrying out enforcement measures against non-public service companies or non-electric companies such as PATH-MD. And,

PATH-MD cannot not agree to expand the Commission's jurisdiction to include this even if it chose to make the offer.

IV. In Ruling on Preliminary Issues, it Would be Improper for the Commission to Consider the Issue of Federal Jurisdiction.

Staff urges that, "in determining whether Potomac Edison is an appropriate applicant . . . the Commission should consider the impact of its ruling upon any potential federal jurisdiction over the siting of transmission lines within Maryland." Staff Brief at 13. Sugarloaf Conservancy respectfully disagrees. Instead, it would be entirely improper for the Commission's legal analysis—which should include only an interpretation of the law and application of it to the facts—to be influenced by attempts to intimidate it with the threat of federal jurisdiction.¹⁷

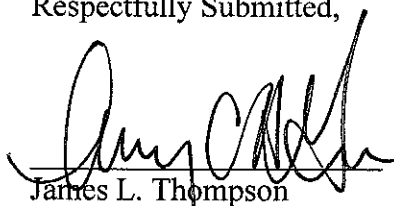
CONCLUSION

WHEREFORE, for the foregoing reasons, Sugarloaf Conservancy, Inc., asks this Commission to find that:

- (1) Potomac Edison may not apply for a CPCN where the PATH Project will be owned and operated by PATH-MD, a non-electric company;
- (2) Potomac Edison may not file for a CPCN where its obligations with respect to the CPCN are controlled by PATH-MD and PATH-Allegheny, who owns 95% interest in PATH-MD, a non-electric company;
- (3) The application of Potomac Edison, as filed, is defective and should be dismissed.

¹⁷ Nonetheless, a brief review of this statutory language suggests that none of these scenarios are applicable. First, with respect to 16 U.S.C.A. § 824-(b) (1) (A), the Commission *does* have the authority to approve of the siting of the transmission lines; it must just be done upon a proper application filed by a proper applicant. And, 16 U.S.C.A. § 824-(b) (1) (B) would also likely be inapplicable. Here, it is requested that the application of Potomac Edison be rejected as improper because Potomac Edison, though it will apparently construct and maintain the line, will not own and operate the line. The applicant—*Potomac Edison*, not PATH-MD or PATH-Allegheny—would not be rejected due to its "failure to serve end-use customers in Maryland," but because the premise of the application itself is improper. It is also not clear whether Potomac Edison would qualify as a transmitting utility under the federal definition. See 16 U.S.C.A. § 796. Finally, 16 U.S.C.A. § 824-(b) (1) (C) also does not apply; by order of the Commission, no application has yet been accepted for filing; therefore, the one-year deadline has not yet begun to run.

Respectfully Submitted,



James L. Thompson

Amy C. H. Grasso

Miller, Miller & Canby, Chtd.

200-B Monroe Street

Rockville, Maryland 20850

301-762-5212

Fax: 301-762-6044

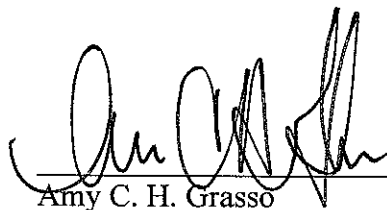
jlthompson@mmcanby.com

acgrasso@mmcanby.com

Attorneys to Sugarloaf Conservancy, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2010, I served this Motion by first-class mail, postage prepaid to all known parties of record to this proceeding.



Amy C. H. Grasso

EXHIBIT 1

**LIMITED LIABILITY COMPANY AGREEMENT
OF
PATH ALLEGHENY MARYLAND TRANSMISSION COMPANY, LLC**

This Limited Liability Company Agreement (the "*Agreement*") of PATH ALLEGHENY MARYLAND TRANSMISSION COMPANY, LLC ("*PATH-MD*"), dated as of December 15, 2009, is adopted, executed and agreed to by and among THE POTOMAC EDISON COMPANY, a Virginia and Maryland corporation ("*POTOMAC EDISON*") and PATH ALLEGHENY TRANSMISSION COMPANY, LLC, a Delaware limited liability company ("*PATH-AYE*").

RECITALS

WHEREAS, PATH-AYE and Potomac Edison desire to form PATH-MD to develop and own certain transmission facilities to be located in the State of Maryland (such facilities, as described in more detail below, the "*Maryland Transmission Facilities*"); and

WHEREAS, Potomac Edison is in the business of transmitting and distributing electricity to retail electric customers in the State of Maryland; and

WHEREAS, the Members desire to adopt this Agreement to set forth the rights and obligations of the Members with respect to PATH-MD.

NOW, THEREFORE, in consideration of the promises and the covenants and provisions of this Agreement, the Members hereby adopt the following:

**ARTICLE I
DEFINITIONS AND INTERPRETATION**

Section 1.1 *Definitions*. As used in this Agreement, the following capitalized terms have the respective meanings set forth below or set forth in the Sections or other provisions referred to below:

Act: The Delaware Limited Liability Company Act.

Affiliate: With respect to any Person: (a) each entity that such Person Controls; (b) each Person that Controls such Person; and (c) each entity that is under common Control with such Person; *provided, however*, PATH-MD shall not be deemed to be an Affiliate of any Member.

Agreement: The preamble to this Agreement.

Available Cash: With respect to any Quarter shall mean: (a) the sum of all cash and cash equivalents received by PATH-MD; less (b) the sum of (i) all costs and expenses of PATH-MD and (ii) the amount of any cash reserves necessary or appropriate, in the reasonable discretion of the Board, to provide for the proper conduct of the business of PATH-MD (including reserves for obligations under any existing service agreements of PATH-MD, future capital expenditures and anticipated future credit needs)

and to comply with applicable Laws or any agreement or obligation to which PATH-MD is a party or by which it is bound or its assets are subject.

Bankruptcy or Bankrupt: With respect to any Person: (a) a general assignment for the benefit of creditors occurs; (b) the filing by such Person of a voluntary bankruptcy petition; (c) such Person (i) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceedings, (ii) files a petition, answer or other pleading seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any Law, (iii) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against such Person in a proceeding of the type described in clause (a), (d), (e) or (f) of this definition; (d) such Person seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator over such Person or over all or any substantial part of such Person's assets or properties; (e) the commencement of a proceeding seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any Law against such Person and, within sixty (60) Days of such commencement, such proceeding has not been dismissed or the relief requested therein has not otherwise been denied; or (f) the appointment, without such Person's consent or acquiescence, of a trustee, receiver or liquidator over such Person or all or any substantial part of such Person's assets or properties, which appointment (A) has not been vacated, stayed or terminated within sixty (60) Days or (B) continues for a period of more than sixty (60) Days after the date of expiration of a stay, if the appointment has not previously been vacated or terminated.

Board: Section 8.1(a).

Budget Forecast: Section 5.2.

Business Day: Any day other than a Saturday, a Sunday or a holiday on which national banking associations in the State of New York are closed.

Claim: Any and all judgments, claims, causes of action, demands, lawsuits, suits, proceedings, governmental investigations or audits, losses, assessments, fines, penalties, administrative orders, obligations, costs, expenses, liabilities and damages (whether actual, consequential or punitive), including interest, penalties, reasonable attorneys' fees, disbursements and costs of investigations, deficiencies, levies, duties, imposts, remediation and cleanup costs, and natural resources damages, in each case to the extent not reimbursed or paid for by insurance.

Class A Manager: Section 8.1(c).

Class B Manager: Section 8.1(c).

Code: The Internal Revenue Code of 1986, as amended.

Company: The preamble to this Agreement.

Confidential Information: Trade secret or confidential information that is provided by a Disclosing Party to a Recipient pursuant to this Agreement or any other agreement, including any of the following kinds of information if confidential: business information, operational information, customer information, technology information, risk management information, personnel, benefits and human resource information, information systems information, intellectual property information, legal information, supplier or vendor information and plans, information concerning sources or terms of financing or credit, supply chain information and processes, tax information, financial information, market analysis information, technical information, process information, product information, service information, pricing information, formulae, formulations, technical and product specifications, equipment descriptions, plans, layouts, drawings and computer programs, assembly, quality control, installation and operating procedures, operating and/or maintenance manuals, instructions and other user documentation, technical and marketing information, designs and data; *provided, however,* that Confidential Information shall include the terms and conditions of this Agreement; *and provided further,* that Confidential Information shall not include, and all obligations regarding Confidential Information shall not apply to, information that the Recipient can prove:

- (a) was already known by (as established by dated documentation) the Recipient at the time of receipt of the information by the Recipient from the Disclosing Party;
- (b) is or becomes available to the industry without confidentiality restrictions (e.g., in technical literature, databases or the like that are available with or without subscription) or is in, or subsequently enters, the public domain other than as a result of a disclosure by the Recipient in breach of this Agreement;
- (c) was received by the Recipient from a third party if such third party was not, or the Recipient reasonably believed such third party was not, subject to any confidentiality obligation to the Disclosing Party or disclosing information that the third party knew at the time of such disclosure was obtained from the Disclosing Party by improper means;
- (d) was independently developed by a Person without access to information provided by the Disclosing Party;
- (e) was or is furnished by the Disclosing Party to a third party without confidentiality restrictions; or
- (f) is approved for release by written authorization of the Disclosing Party.

Control: The possession, directly or indirectly, through one or more intermediaries, of the following: (a) in the case of a corporation, the power or authority to vote or dispose of more than fifty percent (50%) of the outstanding voting securities entitled to elect directors or individuals who perform similar management functions

thereof; (b) in the case of a limited liability company, partnership, limited partnership or other entity, the right to more than fifty percent (50%) of the distributions therefrom or economic interests therein; or (c) in the case of any entity, the power or authority, through ownership of voting securities, by contract or otherwise, to elect or appoint a majority of general partners, directors, managers, managing members, trustees or such other Persons that perform similar management functions, or otherwise exercise predominant control over the management of the entity.

Day: A calendar day; *provided, however*, that if any period of Days referred to in this Agreement shall end on a Day that is not a Business Day, then the expiration of such period shall be automatically extended until the end of the first succeeding Business Day.

Disclosing Party: A Member or any of such Member's Affiliates that discloses Confidential Information to a Recipient.

Dispose, Disposing or Disposition: With respect to any asset (including all or any portion of the Interests), a sale, assignment, transfer, conveyance, gift, exchange or other disposition of such asset, whether such disposition be voluntary, involuntary or by operation of Law, including the following: (a) in the case of an asset owned by a natural person, a transfer of such asset upon the death of its owner, whether by will, intestate succession or otherwise; (b) in the case of an asset owned by a Person other than a natural person, (i) a merger or consolidation of such entity (other than where such entity is the survivor thereof), and (ii) a distribution of such asset, including in connection with the dissolution, liquidation, winding-up or termination of such entity (unless, in the case of dissolution, such entity's business is continued without the commencement of liquidation or winding-up); and (c) a disposition in connection with, or in lieu of, a foreclosure of an Encumbrance, *provided, however*, that neither the creation of an Encumbrance nor the conversion of an entity into another type of entity shall constitute a Disposition.

Encumbrance: A security interest, lien, pledge, mortgage or other encumbrance, whether such encumbrance be voluntary, involuntary or by operation of Law.

FERC: The Federal Energy Regulatory Commission or any Governmental Authority succeeding to the powers of such commission.

Financing Arrangements: Section 5.4.

FPA: The Federal Power Act, 16 U.S.C. §§ 824 *et seq.*

GAAP: Generally accepted accounting principles for financial reporting as in effect from time to time in the United States, applied on a consistent basis.

Good Utility Practices: Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not

intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather is intended to include acceptable practices, methods or acts generally accepted in the region.

Governmental Approvals: Licenses, certificates, permits, franchises, orders, approvals, determinations and authorizations from Governmental Authorities having valid jurisdiction.

Governmental Authority: Any federal, state, commonwealth, foreign, tribal, territorial, local, county, parish, district or municipal governmental body; any governmental, regulatory or administrative agency, commission, body, instrumentality or other authority exercising or entitled to exercise any executive, judicial, legislative, administrative, regulatory or taxing authority or power, including any court or other judicial body, FERC, the MPSC or any other any state utility regulatory commission with jurisdiction; and any officer, official or other representative of any of the foregoing.

Indemnified Party: Section 12.1(b).

Interest: With respect to any Member: (a) such Member's status as a Member of PATH-MD; (b) such Member's share of the income, gain, loss, deduction and credits of, and the right to receive distributions from, PATH-MD; (c) all other rights, benefits and privileges enjoyed by such Member (under the Act, this Agreement or otherwise) in its capacity as a Member of PATH-MD, including that Member's rights, if any, to vote, designate any Manager(s), consent and approve and otherwise to participate in the management of PATH-MD; and (d) all obligations, duties and liabilities imposed on such Member (under the Act, this Agreement or otherwise) in its capacity as a Member of PATH-MD, including any obligations to make certain capital contributions to PATH-MD.

Kempton Substation: A new 765/500 kV substation to be located approximately three miles southeast of New Market in Frederick County, Maryland.

Law: Any constitution, statute, act, code (including the Code), law, ordinance, executive order, rule, or regulation (including a regulation that has been formally promulgated in a rule making proceeding but, pending final adoption, is in proposed or temporary form having the force of law); any guideline or notice having the force of law; and any Governmental Approval, judgment, decree, writ, ruling, proclamation, injunction, resolution, decision, declaration or interpretative or advisory opinion or letter of a Governmental Authority having jurisdiction.

Manager: Section 8.1(a).

Maryland Transmission Facilities: The Kempton Substation and all of the structures, foundations, grillages, conductor, insulators and other equipment, material, installations and facilities comprising the portion of the PATH Transmission Project that runs from the border between Virginia and Maryland to the Kempton Substation.

Member: Any: (a) Person identified as a Member on Schedule 2.5; (b) any assignee that acquires all or any portion of Interests and is admitted as a Member in accordance with the terms of this Agreement; and (c) successors in interest to any such Person(s).

Member Indemnified Party: Section 12.1(a).

MPSC: The Maryland Public Service Commission or any Governmental Authority succeeding to the powers of such commission.

O&M Plan: Section 4.5.

Operating and Capital Budget: Section 5.1.

Ownership Percentage: With respect to each Member, the Ownership Percentage set forth opposite such Member's name on Schedule 2.05, as such Ownership Percentage may be changed as a result of a Disposition of Interests; *provided, however*, the total Ownership Percentages for all Members shall always equal one hundred percent (100%).

PATH-AYE: Preamble to this Agreement.

PATH-AYE Series: The series of PATH LLC that is exclusively entitled to the benefits, and exclusively responsible for the liabilities, of PATH-AYE and its subsidiaries.

PATH LLC: Potomac-Appalachian Transmission Highline, LLC, a Delaware series limited liability company.

PATH-MD: Preamble to this Agreement.

PATH-MD Certificate: Section 2.1.

PATH-MD Indemnified Party: Section 12.1(b).

PATH Transmission Project: The 765 kV transmission line running from the John Amos Substation owned by Appalachian Power and located near St. Albans, West Virginia to and including the Kempton Substation, and all facilities appurtenant thereto.

Person: The meaning assigned that term in Section 18-101(11) of the Act, including a Governmental Authority and any other entity.

PJM: PJM Interconnection, L.L.C.

PJM Agreements: The: (a) Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., dated as of June 2, 1997; (b) PJM Owner Agreement; and (c) PJM Tariff.

PJM Owner Agreement: The Consolidated Transmission Owner Agreement dated as of December 15, 2005.

PJM Tariff: The PJM Open Access Transmission Tariff on file with FERC.

Potomac Edison: Preamble of this Agreement.

Project Cost Estimate: Section 5.3.

Quarter: Unless the context requires otherwise, a fiscal quarter of PATH-MD.

Recipient: A Person that receives Confidential Information.

Service Agreement: The Service Agreement dated December 15, 2009, by and between PATH-MD and Allegheny Energy Service Corporation.

Tax Allocation Agreement: The Tax Allocation Agreement dated July 31, 2003 as amended through December 15, 2009, by and among Allegheny Energy, Inc. and its consolidated subsidiaries, including PATH-MD.

Term: Section 2.6.

Section 1.2 **Interpretation.** Unless the context requires otherwise:

- (a) the gender of all words used in this Agreement includes the masculine, feminine and neuter;
- (b) all pronouns used in this Agreement shall be deemed to refer to the singular and plural;
- (c) references to Articles and Sections refer to Articles and Sections of this Agreement;
- (d) the section headings of this Agreement are for convenience of reference only, do not form a part of this Agreement, and do not in any manner modify, interpret or construe the intent or agreement of the Members;
- (e) references to Schedules refer to Schedules attached to this Agreement, each of which is made a part hereof for all purposes;
- (f) references to Laws refer to such Laws as they may be amended from time to time, and references to particular provisions of a Law include any corresponding provisions of any succeeding Law;
- (g) references to money are to the legal currency of the United States of America;
- (h) the terms "hereof", "herein", "hereto", "hereunder" and words of similar or like import refer to this entire Agreement and not any particular Section or other subdivision of this Agreement;

- (i) the words "include", "includes" and "including" shall be deemed to be followed by "without limitation" or "but not limited to"; and
- (j) references to agreements shall be deemed to refer to such agreement as it may be amended, supplemented, revised or modified from time to time in accordance with its terms.

**ARTICLE II
ORGANIZATIONAL AND OTHER MATTERS**

Section 2.1 **Formation.** PATH-MD has been organized as a Delaware limited liability company by the filing of a certificate of formation dated December 14, 2009 (the "**PATH-MD Certificate**") with the Secretary of State of Delaware.

Section 2.2 **Name.** The full name of PATH-MD is "PATH Allegheny Maryland Transmission Company, LLC." All business of PATH-MD shall be conducted in the name of PATH Allegheny Maryland Transmission Company, LLC or such other names as may be authorized from time to time by the Board.

Section 2.3 **Limited Liability.** Except as otherwise provided by the Act, the debts, obligations and liabilities of PATH-MD, whether arising in contract, tort or otherwise, shall be the debts, obligations and liabilities solely of PATH-MD, and the Members shall not be obligated personally for any of such debts, obligations or liabilities solely by reason of being a member of PATH-MD.

Section 2.4 **Registered Office; Registered Agent; Principal Office.**

- (a) The registered office of PATH-MD required by the Act to be maintained in the State of Delaware shall be the office of the initial registered agent named in the PATH-MD Certificate or such other office (which need not be a place of business of PATH-MD) as the Board may designate in the manner provided by applicable Law. The registered agent of PATH-MD in the State of Delaware shall be the initial registered agent named in the PATH-MD Certificate or such other Person or Persons as the Board may designate in the manner provided by applicable Law.
- (b) The principal office of PATH-MD shall be at such place as the Board may designate from time to time, which need not be in the State of Delaware, and PATH-MD shall maintain records at such principal office or such other place(s) as the Board shall designate. PATH-MD may have such other offices as the Board may determine.

Section 2.5 **Members.** Each of the Persons listed in Schedule 2.5 is a Member of PATH-MD as of the date of this Agreement. The name and business address for each Member is also set forth in Schedule 2.5.

Section 2.6 **Term.** The period of existence of PATH-MD (the "**Term**") commenced on the date that the PATH-MD Certificate was filed with the Office of the

Delaware Secretary of State. The existence of PATH-MD shall end at such time as a certificate of cancellation of PATH-MD is filed with the Secretary of State of Delaware in accordance with Section 11.2.

Section 2.7 *Foreign Qualification.* Prior to PATH-MD conducting business in any jurisdiction other than the State of Delaware, the Board shall, if required by applicable Laws, cause PATH-MD to comply with all requirements necessary to qualify PATH-MD to do business in such jurisdictions.

Section 2.8 *Regulatory Matters.* Each of the Members acknowledges that PATH-MD will be a "public utility" as defined in Section 201 of the FPA. The Board shall cause PATH-MD to file all applications for Governmental Approvals required to be obtained by PATH-MD; (b) diligently prosecute applications to obtain such approvals; and (c) exercise all commercially reasonable efforts to obtain such Governmental Approvals.

Section 2.9 *Segregated Funds.* No PATH-MD funds shall be commingled with funds of any other Person, including any Member, PATH LLC or any member of PATH LLC or any of their Affiliates.

Section 2.10 *Tax Matters.* The Board shall prepare and timely file, or cause to be prepared and timely filed, (on behalf of PATH-MD) state and local tax returns, if any, required to be filed by PATH-MD. PATH-MD will not be treated as a corporation for federal income tax purposes.

Section 2.11 *Compliance with Law.* The Board shall cause PATH-MD to comply with the PJM Agreements and all applicable Laws pertaining to PATH-MD and the Maryland Transmission Facilities, including FERC standards and codes of conduct.

Section 2.12 *Separate Existence.*

- (a) The Board shall cause PATH-MD to conduct its business and operations separate and apart from that of any other Person, including causing PATH-MD to:
- (i) maintain its books, records and accounts separate from those of any other Person;
 - (ii) not commingle or pool its funds or other assets with those of any other Person;
 - (iii) conduct its business in its own name, not identify itself as a division of any other entity, hold itself out as a separate entity, correct any known misunderstanding regarding its separate identity, conduct its dealings with third parties on an arm's length, fair and reasonable basis, and observe all limited liability company procedures and organizational formalities, including those required by the this Agreement and the Act;

- (iv) pay its obligations and liabilities out of its own funds; and
 - (v) not pay, guarantee, become obligated for, hold out its credit as being available to satisfy, or pledge its assets to secure, the obligations or liabilities of any other Person.
- (b) Notwithstanding anything to the contrary in this Agreement, the failure by PATH-MD to comply with any of the obligations set forth in this Section 2.12 shall not affect the status of PATH-MD as a separate legal entity.

Section 2.13 *Service Agreement.* PATH-MD is authorized to enter into the Service Agreement and the officers of PATH-MD are, and each of them is, hereby authorized and directed to execute and deliver, and to cause PATH-MD to perform its obligations under, the Service Agreement.

Section 2.14 *Tax Allocation Agreement.* PATH-MD is authorized to enter into the Tax Allocation Agreement and the officers of PATH-MD are, and each of them is, hereby authorized and directed to execute and deliver, and to cause PATH-MD to perform its obligations under, the Tax Allocation Agreement.

ARTICLE III PURPOSE AND POWERS

Section 3.1 *Purposes.* The purposes of PATH-MD are to: (a) design, engineer, site, acquire rights-of-way for, procure, permit, construct, commission, finance, own, operate and maintain the Maryland Transmission Facilities; and (b) engage in any activities directly or indirectly relating thereto.

Section 3.2 *Powers.* PATH-MD shall have the power to do any and all acts reasonably necessary, appropriate, proper, advisable, incidental or convenient to or for the furtherance of the purposes and businesses described in this Agreement and for the protection and benefit of PATH-MD.

ARTICLE IV DEVELOPMENT AND OPERATION

Section 4.1 *Facility Design.* Subject to the Board's approval rights pursuant to Section 8.6, Potomac Edison shall be responsible for developing the design of the Maryland Transmission Facilities, including developing specifications of all materials and equipment to be incorporated therein.

Section 4.2 *Construction.* Potomac Edison shall: (a) be responsible for the construction and installation of the Maryland Transmission Facilities in accordance with the design approved by the Board; (b) be responsible for the inspection, testing and commissioning of the Maryland Transmission Facilities; and (c) perform the construction, installation, inspection, testing and commissioning of the Maryland Transmission Facilities in accordance with Good Utility Practices and all applicable

Laws, including Laws regarding protection of the environment and archaeological and cultural resources.

Section 4.3 **Condemnation of Right-of-Way.** If any rights-of-way or other interests in real property required in connection with the Maryland Transmission Facilities must be acquired by exercise of the right of eminent domain, Potomac Edison shall acquire such rights-of-way and interests and the Board shall cause PATH-MD to acquire such rights-of-way and interests from Potomac Edison pursuant to an agreement that provides that Potomac Edison shall transfer the rights-of-way and interests to PATH-MD at their acquisition cost. Potomac Edison hereby agrees to sell and convey any such rights-of-way and other interests in real property to PATH-MD at their acquisition cost.

Section 4.4 **Procurement.** Potomac Edison shall cause all major equipment and materials comprising the Maryland Transmission Facilities to be procured by PATH-MD pursuant to PATH-MD purchase orders or agreements.

Section 4.5 **Operation and Maintenance.** Subject to the Board's approval rights pursuant to Section 8.6, Potomac Edison shall be responsible for developing, and modifying as necessary from time to time, a coordinated plan (the "**O&M Plan**") for performance of operation and maintenance activities on the Maryland Transmission Facilities, including the procurement and storage of replacement parts. Potomac Edison shall operate and perform all maintenance on the Maryland Transmission Facilities in accordance with Good Utility Practices and the applicable O&M Plan.

Section 4.6 **Standard of Performance.** Potomac Edison shall perform its responsibilities set forth in this Article IV in a professional, competent and diligent manner in accordance with Good Utility Practices and all applicable Laws, including standards of the appropriate engineering and construction codes.

ARTICLE V COST REIMBURSEMENT

Section 5.1 **Operating and Capital Budgets.** No later than each December 1, the Class B Members shall cause to be prepared and delivered to each Member proposed budgets identifying, to the extent applicable, all operating costs and capital expenditures anticipated to be incurred by or on behalf of PATH-MD during the subsequent calendar year. Each such proposed budget shall, at a minimum, set forth in reasonable detail, and in a form reasonably acceptable to the Members, all costs anticipated to be incurred or accrued by PATH-MD in connection with the Maryland Transmission Facilities, including development costs, construction costs, procurement costs, right-of-way acquisition costs. Each such proposed budget shall be subject to the approval of the Board, and once approved shall constitute (until an amendment or replacement thereof is approved) the "**Operating and Capital Budget**" for such calendar year. A Manager may, from time to time, submit to the Board proposed amendments to any Operating and Capital Budget and any such proposed amendments shall be subject to the approval of the Board.

Section 5.2 *Budget Forecasts.* No later than each December 1, the Class B Managers shall cause to be prepared and delivered to the Members a proposed forecast identifying all costs and expenses anticipated to be incurred during the following five (5) year period by or on behalf of PATH-MD in connection with the Maryland Transmission Facilities. Each such proposed forecast shall set forth in reasonable detail, and in a form reasonably acceptable to the Board, all such costs and expenses, including development costs, construction costs, procurement costs and right-of-way acquisition costs. Each such proposed forecast shall be subject to the approval of the Board, and once approved shall constitute (until an amendment or replacement thereof is approved) the "*Budget Forecast.*" A Manager may, from time to time, submit to the Board proposed amendments to any Budget Forecast and any such proposed amendments shall be subject to the approval of the Board.

Section 5.3 *Project Cost Estimate.* Promptly after the date that the MPSC has issued a final order approving this Agreement, the Class B Managers shall cause to be prepared and delivered to the Board a proposed estimate of all costs and expenses anticipated to be incurred by or on behalf of PATH-MD in connection with the design, engineering, siting, acquisition of rights-of-way for, procurement, permitting, construction, commissioning, financing, ownership, operation and maintenance of the Maryland Transmission Facilities through the term of the useful life of such facilities (such proposed estimate, once approved by the Board, the "*Project Cost Estimate.*"). A Manager may, from time to time, submit to the Board proposed revisions to the Project Cost Estimate and any such proposed revisions shall be subject to the approval of the Board.

Section 5.4 *Financing.* Subject to the Board's approval rights pursuant to Section 8.6, PATH-AYE shall be responsible for attempting to obtain third-party financing for PATH-MD to develop and construct the Maryland Transmission Facilities ("*Financing Arrangements.*"); *provided, however,* a condition to any such third-party financing shall be an acknowledgement by the lenders that they have no claim against PATH LLC or any subsidiary or series thereof.

ARTICLE VI BUSINESS OPPORTUNITIES

Section 6.1 *Release.* To the maximum extent permitted by applicable Laws, PATH-MD hereby releases and forever discharges each Manager of PATH-MD from all liabilities that such Manager might owe, under the Act or otherwise, to PATH-MD or the other Managers of PATH-MD on the ground that any decision of a Manager to grant or withhold any vote, consent or approval constituted a breach or violation of any standard of care or duty applicable to such Manager.

Section 6.2 *Business Opportunities.* To the maximum extent permitted by applicable Laws, PATH-MD hereby:

- (i) renounces in advance each and every interest or expectancy it might be considered to have under the Act, at common law or in

equity in any business opportunity, any opportunity to participate in any business opportunity, or any business or industry in which any Member or any of its Affiliates now or in the future engages, which is presented to such Member or any of its Affiliates or to any present or future partner, member, director, officer, manager, supervisor, employee, agent or representative of such Member or any of its Affiliates, including those serving on the Board; and

- (ii) waives and consents to the elimination of any fiduciary or other duty, including any duty of loyalty, which any Member or any Affiliates of any Member might be considered to owe to PATH-MD under the Act, at common law or in equity by reason of such Member's ownership structure or its membership in PATH-MD to offer to PATH-MD any business opportunity or any opportunity to participate in any business opportunity.

Section 6.3 *Effect on Fiduciary Duties.* THE PROVISIONS OF THIS ARTICLE VI CONSTITUTE AN AGREEMENT TO MODIFY OR ELIMINATE FIDUCIARY DUTIES PURSUANT TO THE PROVISIONS OF SECTION 18-1101 OF THE ACT.

ARTICLE VII CAPITAL CONTRIBUTIONS AND DISTRIBUTIONS

Section 7.1 *Capital Contributions.* Without creating any rights in favor of any third party, each of the Members shall be obligated to make capital contributions from time to time to PATH-MD to fund all costs and expenses of PATH-MD in accordance with each Member's respective Ownership Percentage.

Section 7.2 *Distributions.* No later than thirty (30) Days following the end of each Quarter, the Managers shall, subject to Section 18-607 of the Act, cause PATH-MD to distribute the amount of the Available Cash to each Member in accordance with such Member's Ownership Percentage.

ARTICLE VIII MANAGEMENT OF THE COMPANY

Section 8.1 *Management by the Board.*

- (a) Each of the Members authorizes the formation of a board (the "*Board*") to manage and govern PATH-MD. The Board initially shall comprise three (3) individuals (each, a "*Manager*"). Except as set forth in Section 7.6 and Section 7.7, decisions and actions of the Board shall be subject to a vote of a majority of the voting rights of the Managers. The management of PATH-MD is fully reserved to the Board.
- (b) The voting rights of the Managers shall be determined as of the time that a vote is taken in the following manner: (i) the Class A Managers shall hold

an aggregate percentage of votes equal to the Ownership Percentage held by Potomac Edison; and (ii) the Class B Managers shall hold an aggregate percentage of votes equal to the Ownership Percentage held by PATH-AYE.

- (c) The Managers shall be appointed as follows: (i) one (1) Manager (each a "Class A Manager") shall be appointed by Potomac Edison and (ii) two (2) Managers (each, a "Class B Manager") shall be appointed by PATH-AYE.
- (d) Each Member may remove and replace, for any reason or no reason, a Manager appointed by it upon written notice. Each Member may designate a different Manager for any meeting of the Board by notifying the other Managers at least three (3) Business Days prior to the scheduled date for such meeting; *provided, however*, if giving such advance notice is not feasible, any new Manager(s) shall present written evidence of authority at the commencement of such meeting.
- (e) Decisions or actions taken by the Board in accordance with the provisions of this Agreement shall constitute decisions or actions by PATH-MD, unless and to the extent such decision is altered or revised by the Members. The participation by the Managers holding a majority of the voting rights shall be required for the Board to conduct business.
- (f) No Manager shall be entitled to compensation from PATH-MD for his or her service as a Manager.
- (g) The initial Managers and their respective notice addresses are set forth in Schedule 8.1.

Section 8.2 *Officers and Committees.*

- (a) The Board may appoint such officers or other designees as it deems necessary and appropriate. Any officers so designated shall serve for terms not to exceed one (1) year in length and shall have such titles and, subject to the other provisions of this Agreement, shall have such authority and perform such duties as the Board may delegate to such officers. Any officers so designated shall serve at the pleasure of the Board and shall report to the Board. Any appointment of an officer by the Board may be rescinded by the Board, in its sole and absolute discretion.
- (b) The Board may create such committees, and delegate to such committees such authority and responsibility, and rescind any such delegations, as it deems appropriate.
- (c) The initial Officers to hold office from and after the date of this Agreement until their removal pursuant to this Agreement or until their

respective successors are appointed and qualified pursuant to this Agreement, are as follows:

Paul J. Evanson	Chief Executive Officer
Rodney L. Dickens	President
Kirk R. Oliver	Vice President
James R. Hancy	Vice President
Bruce M. Sedlock	Vice President
David M. Feinberg	Vice President & Secretary
William F. Wahl III	Vice President, Controller & Chief Accounting Officer
Barry E. Pakenham	Treasurer
Steven R. Staub	Assistant Treasurer
James A. Arcuri	Assistant Secretary
Daniel M. Dunlap	Assistant Secretary
Ruth R. Tolbert	Assistant Secretary

Section 8.3 *Meetings.*

- (a) The Board shall meet quarterly, subject to more or less frequent meetings upon approval of the Board or as provided below. Notice of, and an agenda for, the Board meetings shall be circulated to the Managers at least five (5) Days prior to the date of each meeting, together with proposed minutes of the previous Board meeting (if such minutes have not been previously ratified); *provided, however*, a failure to provide proposed minutes will not render such a notice ineffective.
- (b) Special meetings of the Board may be called at such times, and in such manner, as any Manager with voting rights deems necessary. Any such Manager calling for any such special meeting shall notify the other Managers of the proposed date, location and agenda for such meeting at least five (5) Days prior to the date of such meeting, which five (5) Day period may be waived: (i) by attendance in the manner described in Section 8.3(d); or (ii) in writing by all of the Managers.
- (c) All meetings of the Board shall be held at a mutually agreeable location; *provided, however*, that if the Board is unable to agree on a mutually agreeable location, such meeting shall be held in Baltimore, Maryland.
- (d) Attendance by a Manager at a meeting of the Board shall constitute a waiver of notice of such meeting, except where such attendance is for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

- (e) The Board may adopt whatever rules and procedures relating to its activities as it may deem appropriate; *provided, however*, such rules and procedures shall not be inconsistent with or violate the provisions of this Agreement or the Act.
- (f) Any action required or permitted to be taken at a meeting of the Board may be taken without a meeting and/or without a vote, but with prior notice, if a consent or consents in writing, setting forth the action so taken, is signed by all the Managers holding a majority of the voting rights that could have been exercised at such a meeting of the Board.
- (g) The Board may participate in and hold such meeting by means of conference telephone, videoconference or similar communications equipment by means of which all participants in such meeting can effectively communicate with each other. Participation in such a meeting shall constitute presence in person at such meeting, except where a Manager participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Section 8.4 *Limitation of Duties and Liabilities.* The only fiduciary or other duties or obligations that any Manager owes in his/her capacity as a Manager shall be: (a) an implied covenant of good faith and fair dealing; and (b) the duty of care. No Manager shall, under this Agreement, the Act or otherwise, owe, in his or her capacity as a Manager, or be personally liable for monetary damages for any breach of, any fiduciary or other duties or obligations, other than any non-waivable covenant of good faith and fair dealing imposed by applicable Law.

Section 8.5 *Voting.* With respect to any matter submitted to the Board for a vote, consent or approval, except as otherwise provided by Section 18-1101 of the Act, the Managers then entitled to vote, as applicable, may grant or withhold that vote, consent or approval: (a) in their sole and absolute discretion; (b) with or without reasonable cause; (c) subject to such conditions as they may deem appropriate; and/or (d) without taking into account the interests of, and without incurring any liability to, PATH-MD or any other Manager.

Section 8.6 *Matters Requiring Unanimous Approval of the Board.* Notwithstanding anything to the contrary set forth in this Agreement, the following actions shall require a unanimous vote of the Board:

- (a) dissolution or liquidation of PATH-MD;
- (b) filing a petition seeking protection for PATH-MD under any Bankruptcy Law or filing an admission by PATH-MD of Bankruptcy before any Governmental Authority;
- (c) a Disposition of substantially all of the operating assets of PATH-MD;

- (d) amending the organizational documents of PATH-MD;
- (e) guaranteeing an obligation of any Person;
- (f) repurchasing or redeeming any membership interests of PATH-MD;
- (g) entering into a new business, changing the scope or nature of the business of PATH-MD or creating any subsidiaries other than a wholly-owned subsidiary to acquire real property interests on which the Maryland Transmission Facilities are to be located;
- (h) hiring any employees;
- (i) incurring any indebtedness or otherwise encumbering any of the Maryland Transmission Facilities, including entering into any Financing Arrangements;
- (j) approval of the design of the Maryland Transmission Facilities;
- (k) approval of each O&M Plan;
- (l) approval of each Operating and Capital Budget;
- (m) approval of each Budget Forecast; and
- (n) approval of each Project Cost Estimate.

Section 8.7 *Costs and Expenses.* The Managers shall exercise all commercially reasonable efforts to assure that all costs and expenses incurred by or on behalf of PATH-MD are prudent.

**ARTICLE IX
DISPOSITION OF MEMBERSHIP INTERESTS; ADMISSION OF NEW
MEMBERS**

Section 9.1 *Disposition of Membership Interests.*

- (a) Subject to applicable limitations thereon in this Agreement, PATH-AYE may make a Disposition of all or any portion of its Interests at any time. Upon any such assignment, the assignee shall succeed to the rights and obligations of PATH-AYE in respect of its Interests so transferred.
- (b) Potomac Edison may not make a Disposition of all or any portion of its Interests without the unanimous written consent of the other Members.
- (c) Notwithstanding anything to the contrary in this Agreement, no Disposition by a Member of all or any portion of its respective Interests shall operate to dissolve PATH-MD.

Section 9.2 *Admission of New Members.* PATH-MD shall not admit any Person as a member of PATH-MD without the unanimous written consent of all of the Members.

**ARTICLE X
ACCOUNTING; AUDIT RIGHTS**

Section 10.1 *Accounting.* The books of account of PATH-MD shall be: (i) maintained on the basis of a fiscal year that is the calendar year; (ii) maintained in accordance with GAAP; and (iii) unless the Board decides otherwise, audited by certified public accountants at the end of each calendar year.

Section 10.2 *Reports.* The Board shall cause to be prepared and delivered to each Member: (a) periodic statements describing operations and cash flows of PATH-MD; (b) no later than thirty (30) Days after the end of each Quarter, unaudited quarterly balance sheets and income statements; and (c) no later than ninety (90) Days after the end of each calendar year, financial statements for PATH-MD for the preceding calendar year, audited by the certified public accountants.

Section 10.3 *Records.* The Board shall cause complete and accurate books and records of PATH-MD, including all documentation of transactions with respect to the conduct of PATH-MD's business, minutes of the proceedings of the Board and any other books and records that are required to be maintained by applicable Law, to be maintained at the principal office of PATH-MD.

Section 10.4 *Audits.*

- (a) A Member shall have the right, upon reasonable notice, and at all reasonable times during normal business hours, to cause to be performed internal audits of PATH-MD, including audits of PATH-MD's books and records, financial information, systems, policies and procedures. The Member shall be entitled to receive any information that they may request concerning PATH-MD; *provided, however,* the Board shall not be obligated to create any information that does not already exist at the time of such request, except as otherwise required. The Members shall also have the right, upon reasonable notice, and at all reasonable times during normal business hours to inspect the properties of PATH-MD and to audit, examine and make copies of the books of account and other records of PATH-MD.
- (b) The rights described in this Section 10.4 may be exercised through any agent, employee or consultant of a Member that is designated in writing by such Member, including accountants, engineers and attorneys. A Member making a request pursuant to this Section 10.4 shall bear all costs and expenses incurred in any inspection, examination or audit made on such Member's behalf.

**ARTICLE XI
DISSOLUTION**

Section 11.1 *Dissolution.* PATH-MD shall dissolve and its affairs shall be wound up at such time, if any, as the Members may, by unanimous vote, elect. No other event (including an event described in Section 18-801(4) of the Act) shall cause PATH-MD to dissolve.

Section 11.2 *Certificate of Cancellation.* Upon dissolution and completion of winding up of PATH-MD, PATH-AYE (or such Person or Persons as the Act may require or permit) shall file a certificate of cancellation with the Secretary of State of Delaware, cancel any other filings made on behalf of PATH-MD, as applicable, and take such other actions as may be necessary to terminate the existence of PATH-MD. Upon the filing of such certificate of cancellation, the existence of PATH-MD shall terminate except as may be otherwise provided by the Act or other applicable Laws.

**ARTICLE XII
INDEMNIFICATION**

Section 12.1 *Indemnification Obligations.*

- (a) PATH-MD shall indemnify, defend and hold harmless each of the Members and their respective Affiliates, Representatives, Administrators, directors, officers, trustees, employees and agents (each a "*Member Indemnified Party*") from and against any Claims related to the ownership or operation of the properties owned or operated by PATH-MD or related to or arising out of any indebtedness or other obligation of PATH-MD, except to the extent of any such Claims arising out of, or caused by, the gross negligence or willful misconduct of the Indemnified Party or any of its Affiliates.
- (b) PATH-MD shall indemnify, defend and hold harmless each Manager, officer and employee of PATH-MD (each a "*PATH-MD Indemnified Party*") and together with each of the Member Indemnified Parties each an "*Indemnified Party*") from and against any Claims related to PATH-MD or the Maryland Transmission Facilities, except to the extent of any such Claims arising out of, or caused by, the gross negligence or willful misconduct of the Indemnified Party.
- (c) Notwithstanding any other provision of this Agreement, a Person shall not be indemnified from and against the portion of any Claim resulting from such Person's failure to exercise commercially reasonable efforts to mitigate damages.

Section 12.2 *Procedures.*

- (a) Within a reasonable time after receipt by any Indemnified Party of any Claim as to which the indemnity provided for in Section 12.1 may apply,

such Indemnified Party shall notify the Indemnifying Party in writing of such fact; *provided, however*, delay in notifying the Indemnifying Party shall not relieve the Indemnifying Party of its indemnification obligations except to the extent that it is materially prejudiced by such delay.

- (b) The Indemnifying Party shall diligently, competently and in good faith control and conduct the defense of any Claim as to which the indemnity provided for in Article 12 applies; *provided, however*, the Indemnifying Party may not settle or compromise any such Claim without the Indemnified Party's consent unless the terms of such settlement or compromise unconditionally release the Indemnified Party from any and all liability with respect thereto and do not impose any obligations on any Indemnified Party.
- (c) An Indemnified Party shall have the right, but not the obligation, to be represented at its own expense by advisory counsel of its own selection in order to monitor the progress and handling of an indemnified Claim.
- (d) An Indemnified Party shall have the right, but not the obligation, to retain counsel of its choice (at the Indemnifying Party's expense) and to assume the defense of any indemnified Claim (including settling or compromising any such Claim) if: (i) the Indemnifying Party fails to acknowledge, in writing, its responsibility to assume the defense of such Claim; (ii) the Indemnifying Party fails to diligently, competently and in good faith control and conduct the defense of such Claim; (iii) there is an apparent conflict of interest between the Indemnifying Party and the Indemnified Party with respect to such Claim; or (iv) such Indemnified Party shall have reasonably concluded that there are legal defenses available to it that are different from, additional to or inconsistent with those available to the Indemnifying Party; *provided, however*, in any such case the Indemnified Party shall defend such Claim diligently, competently and in good faith; *and provided further*, an Indemnified Party may not settle or compromise any such Claim if the Indemnifying Party has unequivocally acknowledged, in writing, its responsibility to indemnify the Indemnified Party in accordance with Section 12.1.
- (e) The Indemnifying Party's obligations to indemnify, defend and hold each Indemnified Party harmless shall not be reduced or limited by reason of any limitation on the amount or type of damages, compensation or benefits payable by or for the Indemnifying Party or any of its subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.
- (f) Assumption of the defense of any matter by an Indemnifying Party shall not constitute a waiver by such Indemnifying Party of its right to claim at a later date that such third party claim for which the defense was assumed is not a proper matter for indemnification pursuant to Section 12.1;

provided, however, if an Indemnifying Party at any time determines that a Claim is not a proper matter for indemnification pursuant to Section 12.1, such Indemnifying Party shall: (i) immediately notify the Indemnified Party; (ii) turn over defense of the indemnified Claim and all relevant documents and information to the Indemnified Party; and (iii) reasonably cooperate in the transition of such defense to the Indemnified Party, in each case if so requested by the Indemnified Party.

Section 12.3 *Subrogation.* In the event that an Indemnifying Party pays all or any portion of a Claim, the Indemnifying Party shall be subrogated to any and all defenses, claims, or other matters which the Indemnified Party asserted or could have asserted against the Person making such Claim, and all related cross-claims that the Indemnified Party asserted or could have asserted against other Persons. The Indemnified Party shall execute and deliver to the Indemnifying Party (at the Indemnifying Party's expense) such documents as may be reasonably necessary to establish, by way of subrogation, the ability of the Indemnifying Party to assert such defenses, claims, cross-claims or other matters.

ARTICLE XIII GENERAL PROVISIONS

Section 13.1 *Confidentiality.*

- (a) Except as permitted by Section 13.1(b): (i) each Recipient shall keep, and shall cause its Affiliates to keep, confidential all Confidential Information and shall not disclose any Confidential Information to any Person; and (ii) each Recipient shall use the Confidential Information only in connection with the Project.
- (b) Subject to the other provisions of Section 13.1, the following disclosures and uses of Confidential Information are permitted:
 - (i) disclosures to a Member in connection with the PATH Transmission Project;
 - (ii) disclosures that may be required from time to time to obtain required Governmental Approvals (subject to the provisions of Section 13.1(b)(vii));
 - (iii) disclosures that are reasonably necessary in connection with obtaining financing, provided that each Person to whom such Confidential Information is disclosed has been informed of the confidential nature of the information disclosed to such Person;
 - (iv) disclosures to an Affiliate if such Affiliate has a "need to know" such Confidential Information in connection with the PATH Transmission Project;

- (v) disclosures to a potential transferee of a Member's Interests if such potential purchaser agrees in writing to abide by the terms of this Section 13.1;
- (vi) disclosures required by Governmental Authorities, including disclosures required pursuant to: (i) the Securities Act of 1933 and the rules and regulations promulgated thereunder; (ii) the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder, (iii) any state securities Laws, or (iv) any national securities exchange or automated quotation system; and
- (vii) disclosures that a Recipient is legally compelled to make by deposition, interrogatory, request for documents, subpoena, civil investigative demand, order of a court of competent jurisdiction or similar process, or otherwise by Law; *provided, however*, that the Recipient shall disclose only that portion of Confidential Information that, in the opinion of its legal counsel, is legally required to be disclosed; *and provided further*, that prior to any such disclosure, a Recipient shall, to the extent legally permissible:
 - (1) provide the Disclosing Party with notice of such requirements so that the Disclosing Party may seek a protective order or other appropriate remedy;
 - (2) consult with the Disclosing Party on the advisability of taking steps to resist or narrow any compelled disclosures; and
 - (3) reasonably cooperate with the Disclosing Party if it attempts to obtain a protective order or other appropriate remedy or assurance that confidential treatment will be afforded the Confidential Information.
- (c) Each Recipient shall take reasonable measures to require that all Persons to whom the Recipient discloses Confidential Information, including their respective directors, officers, employees, agents and contractors, comply with the requirements of this Section 13.1.
- (d) The Members agree that no adequate remedy at law exists for a breach or threatened breach of any of the provisions of this Section 13.1, the continuation of which, if not remedied, would cause a Disclosing Party to suffer irreparable harm. Accordingly, the Members agree that a Disclosing Party shall be entitled, in addition to other remedies that may be available, to immediate injunctive relief from any breach of any of the provisions of this Section 13.1 and to specific performance of their rights hereunder, as well as to any other remedies available at law or in equity.

- (c) The obligations of the Members under this Section 13.1 shall terminate two (2) years after the end of the Term.

Section 13.2 **Amendment.** This Agreement may be amended or modified only by a written instrument executed by all of the Members.

Section 13.3 **Severability.** In the event of a direct conflict between the provisions of this Agreement and any mandatory, non-waivable provision of the Act, such provision of the Act shall control. If any provision of the Act provides that it may be varied or superseded in a limited liability company agreement (or otherwise by agreement of the members or managers of a limited liability company), such provision shall be deemed superseded and waived in its entirety if this Agreement contains a provision addressing the same issue or subject matter. If any provision of this Agreement is held invalid or unenforceable to any extent the remainder of this Agreement shall not be affected thereby.


Section 13.4 **Governing Law.** This Agreement shall be governed by and shall be construed in accordance with the Laws of the State of Delaware, excluding any conflict-of-laws rules or principles that might refer the governance or the construction of this Agreement to the Laws of another jurisdiction.

Section 13.5 **No Third Part Beneficiaries.** Any agreement contained, expressed or implied herein is only for the benefit of the Members and their respective successors and permitted assigns, and shall not inure to the benefit of any other Person whomsoever or whatsoever, except for Indemnified Parties.


Signature Page Follows

IN WITNESS WHEREOF, the undersigned has entered into this Agreement as of the date first written above.

**PATH-ALLEGHENY TRANSMISSION
COMPANY, LLC**

By: 
James R. Hancy
Vice President

THE POTOMAC EDISON COMPANY

By: 
Rodney L. Dickens
President

Schedule 2.5
Members; Ownership Percentages

Members	Ownership Percentage
The Potomac Edison Company	5%
PATH-Allegheny Transmission Company, LLC	95%

Schedule 8.1
Initial Managers

Class A Managers	Class B Managers
Rodney L. Dickens	James R. Haney
	Mark A. Joensen