

ORDER NO. 83469

IN THE MATTER OF THE APPLICATION OF THE POTOMAC EDISON COMPANY D/B/A ALLEGHENY POWER FOR A 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	* * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND _____ CASE NO. 9223 _____
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In this Order, the Public Service Commission (“Commission”) finds that Potomac Edison Company d/b/a Allegheny Power (“Potomac Edison” or the “Company”) is a proper applicant for a Certificate of Public Convenience and Necessity (“CPCN”) to construct a 765 kV electric transmission line and substation in Frederick County, Maryland.¹ We base this ruling on the plain language of Maryland Code Ann., Public Utility Companies (“PUC”) Article § 7-207(b)(3), which requires an “electric company” to obtain a CPCN before it may “begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts or exercise a right of condemnation with the construction.” Potomac Edison indisputably qualifies as an “electric company,” as that term is defined by PUC § 101(h), because it “physically transmits or distributes electricity in the State to ...retail customer[s]”. Although Potomac Edison will own only a 5% interest in the subject transmission line, PUC § 7-

¹ Commissioner Brenner joins in the result that Potomac Edison is a proper applicant for a CPCN to construct an overhead electric transmission line in Maryland. However, consistent with his opinion dissenting in part in predecessor Case No. 9198, Order No. 82892 (Sep. 9, 2009), he disagrees respectfully with views in the instant Order that state or imply that Potomac Edison was not a proper party to apply for a CPCN for the subject transmission line on behalf of its affiliate PATH-Allegheny.

207(b)(3) does not require that the electric company seeking a CPCN own the line, and we will not create an ownership requirement where the statute does not.

Unlike the application we considered in Order No. 82892, Case No. 9198, Potomac Edison has not filed the pending application “on behalf of” its non-electric-company affiliate, PATH Allegheny Transmission Company, LLC (“PATH-Allegheny”). Instead, Potomac Edison requests the CPCN in its own right, and intends to construct and operate the transmission line and substation should we accept and ultimately approve its Application for CPCN filed on December 21, 2009 (“Second Application”). We find no basis on which we can require Potomac Edison to do more. From here, we will await Potomac Edison’s further filings before determining whether and when the Second Application has become complete and when any time clocks would begin to run.

I. Background

Potomac Edison is a wholly-owned subsidiary of Allegheny Energy, Inc. (“Allegheny”).² Allegheny is an investor-owned public utility holding company headquartered in Greensburg, Pennsylvania whose subsidiaries own and operate generating, transmission and distribution facilities in Maryland, Pennsylvania, and West Virginia as well as transmission facilities in Virginia.³

On June 22, 2007, the PJM Board of Managers approved the 2007 Regional Transmission Expansion Plan (“RTEP”) that, among other things, directed the construction of a 765 kV transmission line connecting the existing Amos Substation in West Virginia with a new substation in Mt. Airy, Maryland to address projected

² Second Application at 4.

³ *Id.* Subsequent to the Company’s filing the Second Application, the Virginia State Corporation Commission approved Allegheny’s sale of its Virginia distribution assets to Rappahannock and Shenandoah Valley Electric Cooperatives:

http://www.electricenergyonline.com/?page=show_news&id=133938

violations of NERC Reliability Standards (“PATH Project”).⁴ Approximately 20 miles of the 276 mile-long transmission line will be constructed in Maryland. The entire line will pass through the PJM Transmission Zones of Potomac Edison as well as American Electric Power Company (“AEP”).⁵ Based upon the Transmission Zones implicated by the project, the PJM Operating Agreement designated Potomac Edison and AEP as the transmission owners responsible for assuring construction of the project.⁶

Allegheny and AEP created the Potomac Appalachian Transmission Highline, LLC (“PATH-LLC”) to construct, finance, own, maintain and operate the PATH Project in order to: (1) facilitate a single FERC tariff for the jointly-owned, multi-jurisdictional project, (2) separate ownership of the PATH assets from other Allegheny and AEP assets to acquire better financing, and (3) allow business services to be provided efficiently to the PATH project by Allegheny, AEP and third-party vendors.⁷

PATH LLC is a series limited liability company organized under the laws of Delaware. As a series LLC, PATH LLC has separate series – one for West Virginia, Ohio and AYE⁸, respectively, – with each series governed and accounted for separately.⁹ PATH LLC owns three operating companies: (1) PATH WV, controlled by the West Virginia series, (2) PATH Ohio, controlled by the Ohio series, and (3) PATH-Allegheny, controlled by the AYE series. AEP and Allegheny, through two subsidiaries, each owns

⁴ *Id.* at 9. NERC is the North American Electric Reliability Corporation. PJM plans and operates in accordance with NERC Reliability Standards which FERC approves.

⁵ *Id.* at 4.

⁶ *Id.* at 10.

⁷ *See* Prepared Written Testimony of Dr. Mark A. Joensen (“Joensen Direct”) at 6-7.

⁸ AYE is the New York Stock Exchange symbol for Allegheny.

⁹ *Id.* at 7.

50% of the West Virginia and Ohio series, while Allegheny owns 100% of the AYE series and therefore controls 100% of PATH-Allegheny.¹⁰

Case No. 9198

With this corporate structure in place, on May 19, 2009, Potomac Edison filed a motion for an expedited decision as well as an application for a CPCN “on behalf” of PATH-Allegheny (“First Application”). On June 19, 2009, we ordered all interested parties to submit legal memoranda addressing, *inter alia*, whether PUC § 7-207(b)(3) authorizes the Commission to issue a CPCN to PATH-Allegheny, which is not an electric company as defined by Maryland law.¹¹ In the First Application, Potomac Edison submitted that “PATH-Allegheny is the legal entity that will finance, construct, own, operate and maintain the Maryland Segments and Kemptown Substation of the PATH Project.”¹² Following oral argument, we concluded that we lacked the authority to expand the plain language of § 7-207 to include affiliates of an electric company, and we asked Potomac Edison to advise whether they intended to submit a revised application consistent with our decision.¹³

Case No. 9223

In response to our Order, Potomac Edison and PATH-Allegheny formed PATH Allegheny Maryland Transmission Company, LLC (“PATH-MD”), of which Potomac Edison owns a 5% interest and PATH-Allegheny owns the remaining 95% interest. The Limited Liability Company Agreement (“LLC Agreement”) between PATH-MD and

¹⁰ *Id.* at 8, including a diagram of the current corporate inter-relationships.

¹¹ Order 82729, in Case No. 9198 (June 19, 2009).

¹² First Application at 5.

¹³ Order No. 82892, in Case No. 9198 at 6, 13-14 (September 9, 2009). Commissioner Brenner dissented from this portion of our Order.

Potomac Edison allocates the specific rights and responsibilities between the parties, including the following which are relevant to our analysis:

PATH-MD

- Will finance and own the transmission line and Kemptown Substation (§ 5.4);
- Will be a “Public Utility” for purposes of the Federal Power Act (§ 2.8);
- Will maintain segregated funds from any other entity, including its members (§ 2.9);
- Will comply with PJM Agreements and all applicable laws pertaining to PATH-MD and the Maryland Transmission Facilities, including FERC standards and codes of conduct (§ 2.11);
- Will pay its obligations and liabilities out of its own funds (§ 2.12(iv)).

Potomac Edison

- Subject to the Board’s approval rights, will design the Maryland Transmission Facilities (§ 4.1);
- Will construct and install the Maryland Transmission Facilities in accordance with the Board-approved design (§ 4.2);
- Will perform the construction, installation, inspection, testing and commissioning of the Maryland Transmission Facilities in accordance with Good Utility Practices and all applicable laws (§ 4.2);
- Will acquire all necessary rights-of-way in connection with the Maryland Transmission Facilities (§ 4.3);
- Subject to the Board’s approval rights, will develop and modify an “Operation and Maintenance Plan” (“O&M Plan”) for the operation and maintenance of the Maryland Transmission Facilities (§ 4.5).

The Board of PATH-MD consists of one Class-A manager appointed by Potomac Edison and two Class-B managers appointed by PATH-Allegheny, with each class of managers possessing the aggregate ownership interests of Potomac Edison and PATH-Allegheny respectively.¹⁴ The LLC Agreement further provides that certain matters require the unanimous approval of the Board, including:

- Amendments to the organizational documents of PATH-MD;
- Repurchase or redemption of any membership interests of PATH-MD;
- Approval of the design of the Maryland Transmission Facilities;

¹⁴ LLC Agreement at § 8.1(a)-(c).

- Approval of each O&M Plan;
- Approval of each Operating and Capital Budget, budget forecast and Project Cost Estimate.¹⁵

On December 21, 2009, Potomac Electric submitted the Second Application to this Commission, seeking a CPCN for the Maryland portion of the PATH Project on its own behalf as the entity that will construct, operate and maintain the transmission line and substation, but not the entity that will finance or own any portion of the PATH Project. We again solicited memoranda and, on June 3, 2010, held a hearing, attended by counsel for all parties, to determine whether PUC § 7-207(b)(3) authorizes us to grant a CPCN to Potomac Edison even though the Company will not own the transmission line that is the subject of the CPCN.

II. Discussion

PUC § 7-207(b)(3) provides as follows:

Unless a certificate of public convenience and necessity for the construction is first obtained from the Commission, an electric company may not begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts or exercise a right of condemnation with the construction.

We have held previously that this provision authorizes us to issue a CPCN for a qualifying overhead transmission line only to an electric company, and that we may not grant a CPCN to an electric company “on behalf of” a non-electric electric company.¹⁶ It follows from that holding and from the plain language of the statute that only an electric company may begin construction of such a transmission line. The statute defines “construction” as:

¹⁵ *Id.* at § 8.6.

¹⁶ Order 82892 at 1.

- (i) any physical change at a site, including fabrication, erection, installation, or demolition; or
- (ii) the entry into a binding agreement or contractual obligation to purchase equipment exclusively for use in construction in the State or to undertake a program of actual construction in the State which cannot be canceled or modified without substantial loss to the owner or operator of the proposed generating station.¹⁷

Potomac Edison contends that the statute requires only that the electric company apply for the CPCN and begin construction of the transmission line, and does not require the electric company to own it.¹⁸ Additionally, Potomac Edison argues that it could sell the project at any time to any party after it put the first spade in the ground¹⁹ (although they concede,²⁰ and we agree, that they would first need to seek and obtain approval from this Commission for any such transfer).²¹

The Commission's Technical Staff ("Staff") agrees with Potomac Edison that under the corporate structure set forth in the Second Application, Potomac Edison is a proper applicant for a CPCN under § 7-207(b)(3), and that allowing Potomac Edison to proceed would be consistent with our decision in Case No. 9198.²² Three parties – the Office of People's Counsel ("OPC"), Citizens Against the Kemptown Electric Substation ("CAKES") and Sugarloaf Conservancy, Inc. ("Sugarloaf") – disagree, contending that by requiring that only an electric company may apply for a CPCN and begin

¹⁷ PUC § 7-207(a)(1).

¹⁸ Tr. 9-10 (June 3, 2010). All references to the hearing transcript refer to the June 3, 2010 hearing.

¹⁹ Tr. 26.

²⁰ *Id.*

²¹ We can, and routinely do, include among the various conditions of approval of a CPCN a requirement that the Commission must approve any transfer of the approved project. *See, e.g., In re CPV Md., LLC*, 99 Md. PSC 183, 213-214 (2008) (requiring CPCN holder to obtain Commission approval prior to transferring ownership or control of the subject facility); *Request of Clipper Windpower, Inc. for Consent to Transfer of the Criterion Wind Energy Project*, Case No. 8938 (2007), Proposed Order of Hearing Examiner, App. B at 72 (2003) (adopted by the Commission in Order No. 78354) (restricting applicant's ability to transfer ownership or control of the project without the written consent of the Commission).

²² Staff Initial Brief at 6.

construction, the General Assembly meant logically to imply that an electric company must own the line as well.²³

As an initial matter, under the LLC Agreement, Potomac Edison, an electric company, will design all PATH facilities in Maryland, subject to PATH-MD Board approval; construct and install those facilities; perform the construction, installation, inspection, testing and commissioning of those facilities in accordance with Good Utility Practices and all applicable laws; acquire all necessary rights-of-way in connection with those facilities; and develop and modify an O&M Plan for the operation and maintenance of those facilities, subject to PATH-MD Board approval rights. Thus, the LLC Agreement contemplates that Potomac Edison's responsibilities will extend far beyond simply commencing construction.²⁴

The plain language of the statute does not, however, require that an electric company own the transmission line and substation, and we shall not impose such a requirement in this Order. Even if we were inclined to do so, we note that PUC § 1-101(t) defines "own" to include "own, operate, lease to or from, manage or control." In

²³ Sugarloaf Reply Brief at 3-11; OPC Initial Brief at 5-12; Tr. 57-9. In this regard, we observe the degree to which Potomac Edison's Second Application appears to have dampened certain parties' loyalty to strict statutory construction. *Compare*, Case No. 9198, Sugarloaf Reply Brief at 3-4 (contending that this Commission "may not surmise a legislative intention contrary to the plain language of a statute")(citation omitted) *and* OPC Initial Brief at 5 (claiming this Commission is bound by "the plain wording of this provision") *with* Case No. 9223 Sugarloaf Reply Brief at 4, 7 (criticizing Potomac Edison's "narrow reading" of the statute and urging this Commission "to look further [i.e. at public policy] to determine how to apply the statute") *and* OPC Initial Brief at 9-10 (warning against "viewing the governing statute in an unduly circumscribed manner").

²⁴ Of course, a CPCN encompasses far more than the right to start digging. It defines the scope and parameters of the project we have approved for construction, authorizes the exercise of eminent domain, and defines the conditions under which the project must operate after construction is completed. The holder of a CPCN must comply with those conditions, which we have continuing jurisdiction to enforce, and must obtain our approval to make modifications to the project during or following construction. *See* PUC §§ 2-112 & 2-113; *Howard County v. Potomac Elec. Power Co.*, 319 Md. 511, 524 (1990) (describing the General Assembly's intent to confer broad powers upon this Commission to provide adequate electrical service Statewide). Counsel for Potomac Edison conceded our authority to re-open this case subsequent to the issuance of a CPCN should we determine that additional conditions become necessary. Tr. 53-54.

our view, the LLC Agreement likely confers sufficient responsibilities upon Potomac Edison to satisfy that definition.

Our holding here is limited to a determination that, under the circumstances set forth in the Second Application, Potomac Edison is a proper applicant for a CPCN. As we observed in the Notice initiating this proceeding, we will not consider the Company to have filed a complete Second Application “until such time as it files the evidence on which it intends to rely to prove ‘the need for the project in meeting demands for service.’” If and when the Company has filed a complete Second Application, we will address in later proceedings the merits of the Second Application.

IT IS THEREFORE, this 13th day of July, in the Year Two Thousand Ten by the Public Service Commission of Maryland,

ORDERED: (1) That, for the reasons set forth above, Potomac Edison is a proper applicant for a CPCN to construct a 765 kV electric transmission line and substation in Frederick County, Maryland.

/s/ Chairman Douglas R.M. Nazarian

/s/ Commissioner Harold D. Williams

/s/ Commissioner Susanne Brogan

/s/ Commissioner Therese M. Goldsmith
Commissioners