TO: The Honorable Philip C. Baten  
Presiding Administrative Law Judge

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure,¹ PJM Interconnection, L.L.C. (“PJM”), submits this answer to the “Motion of Keryn Newman and Alison Haverty To Strike Portions of the Cross-Answering Testimony of Steven R. Herling” (“Motion to Strike”).² For the reasons discussed below, the Motion to Strike certain portions of the cross-answering testimony sponsored by Mr. Herling should be denied.

I. Background

On January 8, 2015, Mr. Steven R. Herling filed cross-answering testimony on behalf of PJM in the captioned dockets.³ In his testimony, Mr. Herling addressed, among other issues, assertions made by Ms. Newman⁴ and Ms. Haverty⁵ in their direct and answering testimony to

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the effect that the Potomac-Appalachian Transmission Highline transmission project (“PATH” or “PATH Line” or “PATH Project”) either was not undertaken to provide benefits to “[c]ommunities and neighborhoods along the PATH Line” or was a for-profit project.6

In their Motion to Strike, Ms. Newman and Ms. Haverty seek to strike the following lines from Mr. Herling’s testimony:

(i) Page 3, Lines 5-10 stating that the purpose of Mr. Herling’s testimony is to provide information to certain statements by Ms. Newman and Ms. Haverty to the effect that PATH was not undertaken to provide benefits to transmission customers;

(ii) Page 3, Lines 15-17 stating that his testimony addresses the formal challenges that are the subject of Ms. Newman’s and Ms. Haverty’s testimony; and

(iii) Page 11, Lines 13-16 the question: “Ms. Newman has testified that the purpose of the PATH Project was to provide profits for the PATH Companies, not to benefit customers. Is this contention consistent with the PJM transmission planning process [Mr. Herling] has described?”

As described below, the Motion to Strike incorrectly contends that these portions of Mr. Herling’s testimony are procedurally deficient and should be denied.9

II. Argument

The admissibility of evidence in Commission proceedings is governed by Rule 509, which provides that “[t]he presiding officer shall exclude from evidence any irrelevant,  

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8 The referenced question is not testimony. Consequently, it is unclear why the parties seek to strike the question and not the answer. Additionally, given that the question is not testimony the request to strike the question should be denied on its face.

9 See Motion to Strike at 2.
immaterial, or unduly repetitious material,” or material that “is [not] of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.”

This broad permissive standard reflects the Commission’s determination that “[i]t would not be in the public interest to eliminate relevant testimony from the evidentiary record, thus depriving the Commission of a full and complete record on which to rule, rather than maintaining a focus on the weight to be accorded the testimony.” The Commission therefore disfavors motions to strike and seeks to avoid debates about the admissibility of evidence. A motion to strike will not be granted unless it meets one of the narrow criteria of the three-part test set forth in Power Mining, Inc., which holds that a motion to strike will be denied “unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.” Those seeking to exclude testimony from Commission consideration thus bear a “heavy burden.”

Ms. Newman and Ms. Haverty have failed to acknowledge, much less carry, the “heavy burden” required for their motion to succeed. First, Ms. Newman and Ms. Haverty attempt to

11 ANR Pipeline Co., 123 FERC ¶ 61,137, at P 9 (2008); see also Energy Services, Inc., 134 FERC ¶ 63,008 at P 5 (2011) (“[A] complete record upon which the Commission can base its decision’ is the preferred approach in administrative proceedings.”) (footnote omitted).
12 See, e.g., Energy Services, Inc., 134 FERC ¶ 63,008 at P 4; San Diego Gas & Elec. Co., 114 FERC ¶ 61,070 at P 20 (2006); Power Mining, Inc., 45 FERC ¶ 61,311 at 61,972, n. 1 (1988); see also Pacific Gas & Elec. Co., 12 FERC ¶ 61,226 at 61,554 (1980) (As a general rule, evidence is to be received liberally in administrative proceedings without regard to the technical concepts of the common law which were developed for jury trials”) and 61,554, n. 1 (“[W]e cannot let this matter pass without stating our concern about the inordinate expenditure of time and other resources on debate about the admissibility of evidence. This is most regrettable. It need not have occurred.”).
13 Power Mining, Inc., 45 FERC ¶ 61,311.
show that Mr. Herling’s testimony has “no possible relationship” in this Formal Challenge proceeding by asserting that Mr. Herling introduces a new issue regarding the need for and/or benefits of the PATH Project. In support of this argument, Ms. Newman and Ms. Haverty state that the issues set for hearing in the Formal Challenges include, by way of example, lobbying costs, general advertising and outside services employed, not “whether the PATH [P]roject was advanced solely for the profit of the PATH Companies, or whether it was a project identified to resolve future violations of reliability criteria.”

It is difficult to understand how Ms. Newman and Ms. Haverty can assert that Mr. Herling’s testimony attempts to confuse the issues by introducing matters that have no relationship to the controversy when in fact Ms. Newman and Ms. Haverty introduced the idea that the PATH Project is a for profit proposal in its April 1 Formal Challenge stating: “PATH’s voluntary promotional expenditures were in the pursuit of one goal: To favorably influence public officials with the authority to approve PATH’s for-profit proposal,” which concept, as acknowledged by Ms. Newman in the Motion to Strike, was brought forward in her testimony in her use of the words “for-profit” to describe the PATH Project.

Additionally, Ms. Haverty clearly introduced the issue of benefits arguing that the advertising was directed to those who would not receive any benefits from the line. She stated:

It was a transmission line, unbroken and uninterrupted, save for the one substation, and it was part of the distribution system for local schools, hospitals and offices. Not one single watt of electricity

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17 Motion to Strike at 4, 5.

18 April 1 Formal Challenge at 13.

19 Motion to Strike at 4.

traveling the PATH Line would have made it to the homes of the people PATH was advertising to. Communities and neighborhoods along the PATH Line would not have been brought electricity via PATH.\(^\text{21}\)

In support of Ms. Haverty’s argument that the advertisements were not education-related, she supported her argument as to the absence of benefits quoting Judge Posner: "[n]ot even the roughest estimate of likely benefits . . . is presented."\(^\text{22}\)

While Mr. Herling does not take issue with or proffer a position on whether or not the advertising expenditures were recovered consistent with the Uniform System of Accounts or were education-related, his testimony addressed assertions made by Ms. Newman and Ms. Haverty, either stated or implied, related to: (i) the need for the project, \(i.e.,\) whether or not the purpose of the project was for profit or for reliability; and (ii) the project benefits, which only PJM could testify to as the transmission provider responsible for planning the transmission system by identifying reliability needs and system conditions anddesignating the construction and ownership and/or financing of the PATH Project consistent with the PJM Tariff.

Contrary to Ms. Newman and Ms. Haverty’s assertions in their Motion to Strike, Mr. Herling has not raised any new issues. He has simply clarified for the record the need for the project and the fact that the 2009 RTEP identified benefits to customers in the Alleghany Power transmission zone, as well as other benefits such as reduction in total system annual congestion costs to customers. Such testimony is certainly useful in providing the Commission with a full and complete record upon which to rule.

Second, Ms. Newman and Ms. Haverty fail to demonstrate that admission of Mr. Herling’s testimony “may confuse the issues” in this proceeding. In the Motion to Strike, Ms.

\(^{21}\) Haverty Testimony at 5:21-6:3.

\(^{22}\) Haverty Testimony at 9:13-16.
Newman and Ms. Haverty argue that Mr. Herling’s testimony “serves simply to confuse the issue” because his testimony clarifies the need for the project and he does not take a position with respect to the public relations advocacy activities or whether or not the PATH Project would provide profit to the PATH Companies. As stated above, PJM takes no position and proffers no testimony whether or not PATH properly recovered the advertising expenditures or whether such expenditures were education-related; however, whether or not there was a legitimate need for the project justifying advertising expenditures if they were recovered in accordance with the Uniform System of Accounts and identifying the beneficiaries of the project are issues PJM may properly address in this matter. The resolution of this matter should be based on a correct understanding of the PATH Project in the first instance. Mr. Herling’s reading of Ms. Newman’s and Ms. Haverty’s testimony was that it presented the PATH Project in a less than accurate fashion. The purpose for his testimony was to ensure that the PATH Project was understood in the correct context so that the Transmission Owners, who are designated construction and ownership responsibility by PJM, have a reasonable chance to recover prudently incurred project costs. In order for that to happen, the record must portray the project accurately.

Third, any claim of undue prejudice from the admission of Mr. Herling’s testimony is simply not plausible, particularly in view of the experience and sophistication of the parties to this matter. Nor have Ms. Newman or Ms. Haverty cited to any procedural rule prohibiting Mr. Herling’s testimony at this juncture. Certainly, they will have ample opportunity on cross examination to discredit any of Mr. Herling’s statements.

While Ms. Newman and Ms. Haverty seek to imply some wrongdoing by Mr. Herling for not intervening in the Challenges dockets and now filing cross-answering testimony, they fail to
acknowledge the hours of time spent by PJM in responding to discovery requests requiring the production of hundreds of emails by PJM.

Given the foregoing, there is no evidence to satisfy a claim of undue prejudice. Simply put, Ms. Newman and Ms. Haverty have “failed to meet the applicable standard of proof in order to prevail in a motion to strike.”

III. Conclusion

Given that Ms. Newman and Ms. Haverty have failed to satisfy the three-part test set forth in *Power Mining, Inc.*, PJM respectfully requests that the Presiding Administrative Law Judge deny the Motion to Strike.

Respectfully submitted,

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24 *Power Mining, Inc.*, 45 FERC ¶ 61,311.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in Docket Nos. ER12-2708-003 and ER09-1256-002.

Dated at Audubon, PA this 23\textsuperscript{rd} day of February, 2015.

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