

Public Service Commission  
Of West Virginia

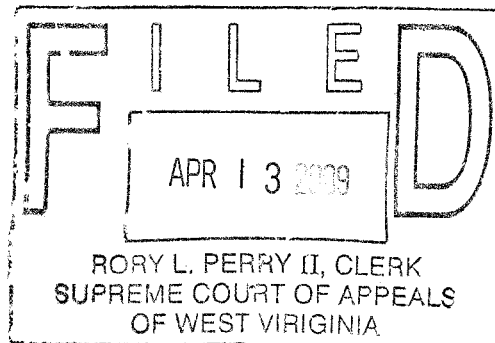
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April 13, 2009

Rory L. Perry, II, Clerk  
West Virginia Supreme Court  
of Appeals  
State Capitol Building, East Wing  
Charleston, West Virginia 25305



Re: Sierra Club, Inc. and Thomas M. Hildebrand v.  
Public Service Commission of West Virginia  
and Trans-Allegheny Interstate Line Company  
Supreme Court Docket Nos. 090379 and 090382  
Commission Case No. 07-0508-E-CN

Dear Mr. Perry:

Enclosed for filing please find the original and nine (9) copies of the "Statement of the Respondent, Public Service Commission of West Virginia, of its Reasons for the Entry of its Orders of August 1, 2008 and February 13, 2009 in Case No. 07-0508-E-CN".

Copies have today been mailed to all parties of record in this proceeding.

Sincerely,

*Caryn Watson Short*

On Behalf of the Public Service  
Commission of West Virginia

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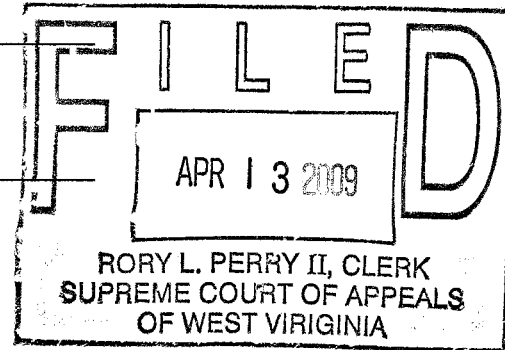
WVA PUBLIC SERVICE  
COMMISSION  
SECRETARY'S OFFICE

CWS/s  
cc: Sandra Squire, Executive Secretary  
Enclosures

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IN THE SUPREME COURT OF WEST VIRGINIA  
CHARLESTON

Docket Nos. 090379 and 090382



SIERRA CLUB, INC.

and

THOMAS M. HILDEBRAND,

Petitioners,

v.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA and TRANS-ALLEGHENY  
INTERSTATE LINE COMPANY,

Respondents.

---

STATEMENT OF THE RESPONDENT, PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA, OF ITS REASONS FOR THE ENTRY OF ITS  
ORDERS OF AUGUST 1, 2008 and FEBRUARY 13, 2009  
IN CASE NO. 07-0508-E-CN

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W VA PUBLIC SERVICE  
COMMISSION  
SECRETARY'S OFFICE

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ON BEHALF OF THE PUBLIC SERVICE  
COMMISSION

APRIL 13, 2009

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STATEMENT OF THE RESPONDENT, PUBLIC  
SERVICE COMMISSION OF WEST VIRGINIA, OF  
ITS REASONS FOR THE ENTRY OF ITS ORDERS  
OF AUGUST 1, 2008 and FEBRUARY 13, 2009, IN  
CASE NO. 07-0508-E-CN

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:

The Respondent, Public Service Commission of West Virginia (hereinafter "Commission"), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Orders of August 1, 2008<sup>1</sup> and February 13, 2009<sup>2</sup>, in Case Nos. 07-0508-E-CN.

**STATEMENT OF THE CASE**

On March 30, 2007, Trans-Allegheny Interstate Line Company ("TrAILCo" or "Applicant")<sup>3</sup> filed an application with the Commission seeking a certificate of public convenience and necessity pursuant to W.Va. Code §24-2-11a and Rule 9 of the Commission's *Rules and Regulations for the Government of Electric Utilities*, 150 C.S.R. 150-3-9 (*Electric Rules*), authorizing the construction and operation of the West Virginia segments of a 500 kilovolt ("kV") electric transmission line, including its towers, conductors and the terminal equipment and related facilities, known as "TrAIL". As proposed and described by TrAILCo, the West Virginia segments of TrAIL were to

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<sup>1</sup>This Commission Order may be referenced herein by its date of entry or described as the "Certificate Order".

<sup>2</sup>This Commission Order may be referenced herein by its date of entry or described as the "Reconsideration Order".

<sup>3</sup>TrAILCo is a Maryland and Virginia corporation wholly owned by Allegheny Energy Transmission, LLC, which in turn is wholly owned by Allegheny Energy, Inc. (Certificate Order, p. 4, footnote 2.)

consist of approximately 114 miles of 500 kV transmission line and related facilities in Monongalia, Preston, Tucker, Grant, Hampshire, and Hardy Counties, entering West Virginia from Pennsylvania approximately 0.9 miles north west of Bowlby in Monongalia County, and exiting West Virginia into Virginia approximately 2.5 miles east of Capon Springs in Hampshire County. The entire TrAILCo project extends from a proposed Prexy Substation in Washington County, Pennsylvania, to the proposed 502 Junction Substation in Greene County, Pennsylvania, crosses into West Virginia and continues to Dominion Virginia Power's existing Mt. Storm Substation, continues eastward in West Virginia and then crosses the state line into Virginia and continues to Allegheny Power's existing Meadow Brook Substation in Frederick County, Virginia. From the Meadow Brook Substation, TrAIL will continue east to a point at which Dominion Virginia Power will continue construction of the 500 kV line to its Loudoun Substation in Loudoun County, Virginia. (Certificate Order p. 4 and p. 91, Finding of Fact No. 2.)

TrAILCo estimated in the Application that the total cost of TrAIL will be \$820 million, of which the West Virginia Segments were then estimated at \$437 million. (TrAILCo Exhibits 1 at Application, p. 16 and JRB-D at p. 23.) As of January 2008, the total cost estimate was unchanged, but the West Virginia segments are now estimated at \$380 million, based on a refined engineering and design analysis of the project. (Certificate Order p. 92, Finding of Fact No. 6; Tr. January 17, 2008 at 14-15, 61-62, 84-86 (Mr. Bodenschatz).)

TrAILCo intends to finance, construct, own, operate, and maintain TrAIL to conduct, among other activities, the business of transmitting electric power and energy through portions of West Virginia as a public utility under Chapter 24 of the West Virginia Code. TrAILCo indicated in its Application that it also may finance, construct, own, operate, and maintain other transmission



projects assigned by PJM Interconnection L.L.C. (“PJM”), to TrAILCo or Allegheny Power, an affiliate of TrAILCo. (Certificate Order p. 92, Finding of Fact No. 7; TrAILCO Exhibit 1 at Application, p. 3.)

The costs associated with this project are recovered by methodologies and rates established by the Federal Energy Regulatory Commission (“FERC”) pursuant to federal law. (Certificate Order p. 53; Tr. January 11, 2008, p. 261; Tr. January 12, p. 51.) On April 19, 2007, FERC ruled that for facilities at 500 kV, or above, the costs are to be distributed on a “postage-stamp basis,” whereby all transmission customers, including West Virginia customers, within the PJM region will share in the cost of the 500 kV, or above, facilities. (Certificate Order p. 53; Tr. January 12, 2008, pp. 51-51.) The total annual revenue, which will be established by FERC, is estimated to be between \$153 and \$191 million, depending on assumptions included in the calculation. (Certificate Order p. 54; TrAILCo Ex. 8; Revised MAM-1; and Tr. January 11, 2008, pp. 266-268.) TrAILCo represented that the annual revenue requirement for Allegheny Power utility affiliates will be \$9.6 million for both Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“P.E.”)<sup>4</sup>; while the annual revenue requirement for Appalachian Power Company (“APCo”) and Wheeling Power Company (“WPCo”)<sup>5</sup> will be \$4.7 million. The anticipated increase for Mon Power and P.E. residential customers is approximately \$0.90 per month and approximately \$0.35 per month for APCo and WPCo residential customers.<sup>6</sup>

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<sup>4</sup>These are the Utility affiliates of Allegheny Power that supply retail electric service to approximately half of the West Virginia electric customers located in north and central West Virginia.

<sup>5</sup>These are the Utility affiliates of American Electric Power that supply retail electric service to approximately half of the West Virginia electric customers located in the southern half of West Virginia.

<sup>6</sup>Commission Order entered June 11, 2007 on publication, Appendix A, p. 2.

The record in this case is voluminous. Beyond the Applicant, the Staff, the Consumer Advocate Division (“CAD”), the West Virginia Energy Users Group (“WVEUG”), formal parties to the proceeding include Sierra Club, Inc. (“Sierra Club” or “Petitioner”) and other community interested environmental groups, as well as many affected landowners and concerned citizens, including Thomas M. Hildebrand (Mr. Hildebrand or “Petitioner”), and developer, CPV Warren LLC (“CPV”).<sup>7</sup> In rendering a decision the Commission (i) reviewed pre-hearing documents including the TrAILCo Application, thousands of pages of prefiled direct and rebuttal testimony and exhibits including expert opinions and analysis, the opinions and interests of businesses, consumer and community representatives, and the concerns of affected and interested West Virginians;<sup>8</sup> (ii) presided over ten days of testimony and another day of hearing during which stipulation witnesses were presented and cross-examined; and (iii) reviewed extensive and comprehensive post-hearing initial and reply briefs, proposed orders, filed statements, motions, petitions and stipulations of parties. Three stipulations were presented to the Commission during this proceeding: (i) a Partial Joint Stipulation and Agreement for Settlement filed January 7, 2008 between TrAILCo and the CAD (“CAD Stipulation,” Appendix A of the Certificate Order); (ii) a Partial Joint Stipulation and Agreement for Settlement filed April 8, 2008 between TrAILCo and *pro se* Intervenors Laurence and Angela Williams (“Williams Stipulation,” Appendix B of the Certificate Order); and (iii) a Joint Stipulation and Agreement for Settlement filed April 15, 2008 among TrAILCo, Staff, CAD and WVEUG (“Joint Stipulation,” Appendix C of the Certificate Order). The stipulations will be described in greater detail herein.

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<sup>7</sup>See, Certificate Order pp.4-5 for a list of all intervenors.

<sup>8</sup>See, Transcripts from public comment hearings held in Monongalia, Taylor, Tucker, Hardy and Preston Counties listed in Certificate Order p. 5.

By Order entered August 1, 2008, the Commission granted a certificate of public convenience and necessity to TrAILCo: (i) authorizing construction and installation of the West Virginia segments of a 500 kV electric transmission line, including its towers, conductors and the terminal equipment and related facilities, and (ii) approving the West Virginia location for the transmission line, described as the Preferred Route in Appendix D to the Application, as modified by the Grafton Area Route. Approval of the certificate was granted subject to certain conditions.

After the Commission issued its Certificate Order, Sierra Club, TrAILCo, *pro se* Intervenor Thomas M. Hildebrand, *pro se* Intervenor Paula Stahl, and H-P Energy Resources, LLC (“H-P”) (an entity that had not previously sought to intervene in this matter), filed separate petitions for reconsideration.

On February 13, 2009, the Commission issued its Reconsideration Order that: (i) denied the petitions for reconsideration filed by the Sierra Club and Mr. Hildebrand, and Ms. Stahl, (ii) granted the petition for reconsideration filed by TrAILCo, (iii) denied the petitions to intervene and for reconsideration filed by H-P, (iv) rescinded the decision in the Certificate Order to require a compliance hearing, and (v) addressed various other filings.

### **PROCEDURAL HISTORY**

The procedural history of the case is thoroughly set forth in the Commission’s numerous procedural orders<sup>9</sup>. The Commission’s original statutory clock pursuant to W.Va. Code §§24-2-11a

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<sup>9</sup> The Commission entered the following procedural orders directing the processes in this case: June 11, 2007 - Order addressed publication of proceeding, Applicant relief requests and petitions to intervene; August 21, 2007 - Order set hearing on status of case; August 31, 2007 - Order required publication of Grafton Area Route; September 27, 2007 - Order addressed motions for admissions *pro hac vice*, discovery rules, Applicants relief requests, intervention, motions by Intervenors and set a procedural schedule; October 3, 2007 - Order set public comment hearings in Morgantown, Grafton, Canaan Valley/Davis, Moorefield and in Charleston; October 24, 2007 - Order required public comment hearing in Preston County; October 30, 2007 - Order set public comment hearing in Kingwood; November 8, 2007 - Order addressed motion for

and 24-2-11(f) would have expired on May 3, 2008, however upon the filing of the Joint Stipulation the Applicant requested, and the Commission granted, a tolling of the statutory due date until 12:01 a.m., August 2, 2008.

The issues raised and contested by Sierra Club, Inc. and Thomas M. Hildebrand, Petitioners, before this Court arise from the Commission's Certificate Order, granting a certificate of convenience and necessity to TrAILCo (entered August 1, 2008), and Reconsideration Order, addressing the petitions for reconsideration (entered February 13, 2009).

The Commission files this Statement of Reasons for the entry of its August 1, 2008 and February 13, 2009 Orders in Case No. 07-0508-E-CN in compliance with the Supreme Court's Orders of March 16, 2009.

### **ASSIGNMENTS OF ERROR**

The assignments of error by the Sierra Club, Inc., and Thomas M. Hildebrand are set forth in their respective petitions.

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protective treatment and motion to compel; November 26, 2007 - Order addressed motion to compel, modified procedural schedule and required publication of revised procedural schedule; December 4, 2007 - Order granted petition to intervene, addressed motions to compel discussed disputed protective treatment between Applicant and Intervenor CPV; December 18, 2007 - Order addressed motion to compel, granted petition to intervene, granted waivers to *pro se* intervenors and required all parties to file written opening statements; December 21, 2007 - Order denied Applicant renewed motion to revoke CPV's intervenor status; January 4, 2008 - Order addressed Intervenor Hildebrand's motion to amend his direct testimony, TrAILCo's objections, Intervenor CPV's motions for admission *pro hac vice* and set a schedule for appearance of witnesses at evidentiary hearing; January 7, 2008 - Order revised witness schedule and ruled on Applicant motion for protective treatment; January 25, 2008 Order- set briefing schedule; February 1, 2008 - Order granted Intervenor CPV motion of substitution of party and admonished CPV for failing to serve notice on all parties; April 17, 2008 - Order described need for Applicant to revise its motion to toll from 30 days to 90 days; April 24, 2008 - Order granted revised motion to toll and set procedural schedule for addressing the April 15, 2008, joint stipulation; May 1, 2008 - Order addressed intervenors motion for clarification and modified procedural schedule as requested by CAD; May 23, 2008 - Order denied Intervenor CPV motion to compel, denied interventions and granted Staff motion to quash the subpoena requiring Staff Witness Ellars to testify.

## SUMMARY OF ARGUMENT

The Commission properly granted a certificate to TrAILCo to construct a 500kV transmission line in accordance with the legal standards provided in W.Va. Code § 24-2-11a; and therefore the Commission respectfully requests this Court not disturb its decision. The Commission conducted a comprehensive review of the evidence and determined there exists a present and anticipated need for reliable electric power for the customers of the Applicant and to address reliability in the region. The evidence in the record clearly supports a finding of need for transmission facilities. Specifically the Commission analyzed the evidence presented and determined that TrAIL meets the criteria of W.Va. Code §24-2-11a (d)(1). Finally the Commission determined that TrAIL will result in an acceptable balance between reasonable power needs and reasonable environmental factors in compliance with W.Va. Code §24-2-11a(d)(1). For all of these reasons the Commission contends that TrAILCo satisfied the requirements of W.Va. Code § 24-2-11a and that the evidence supports the Commission's issuance of a certificate.

The Petitioners make an unsubstantiated claim that the economic commitments in the Joint Stipulation offered by the Applicant influenced the Commission regarding the need for TrAIL. This contention is not supported by a review of the Commission's Orders, including its thorough and complete findings of fact and conclusions of law, which demonstrate the Commission based its decision on the evidence. Further, the Petitioners attempt to create confusion about the Commission's determination with regard for the timing of the need for TrAIL. The Commission unequivocally held the evidence presented supports a finding of need and a granting of the certificate at this time.

The Commission approval of the Company proposed route, as modified by the Grafton area route, satisfies the required legal standard. The Commission gave reasoned consideration to the

routing concerns that were expressed in this proceeding, including, (i) the over-arching question of which route TrAIL should take through the State, (ii) whether to use the Grafton Area Route, and (iii) the concerns of individual landowners and tenants as the line passes over and/or near their lands.

The Commission's determination of TrAILCo to be a public utility was proper under W.Va. Code §24-1-2 and §24-2-1(a). TrAILCo is a public utility and will have customers using and relying upon its transmission facilities and services.

Further, in an attempt to obscure the thorough review performed by the Commission, the Petitioners make unfounded and disingenuous claims related to parties' participation in the proceedings. These claims should be ignored by this Court.

Finally, the Commission properly denied the Petitioners' multiple requests for granting a reopening, requiring further hearing or requiring prudence reviews, because sufficient grounds for such requests were not presented to the Commission. The Commission properly exercised its discretion in permitting the Applicant to implement phased compliance filings and in establishing a complaint-based compliance plan.

In conclusion, the Commission acted within its statutory jurisdiction and powers when issuing its Certificate and Reconsideration Orders. The Commission appropriately weighed the facts involved and made findings, supported by adequate evidence, on how the conflicting facts were to be resolved. Accordingly, the Commission urges this Honorable Court to deny the petitions for appeal.

## STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in W. Va. Code §24-5-1, which provides in part:

Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order.

In the process of reviewing a Commission Order, this Court is guided by the well established principle that the Order will not be disturbed upon appeal unless such findings are arbitrary, unjust, contrary to the evidence or without evidence to support them, Baltimore & Ohio Railroad v. Public Service Commission, 99 W.Va. 670, 130 S.E. 131 (1925), or unless the decision is based upon a mistake of law or misapplies legal principles. Preston County Light & Power Co. v. Public Service Commission, 297 F. Supp. 759 (S.D. W.Va. 1969); United Fuel Gas Company v. Public Service Commission, 143 W.Va. 33, 99 S.E.2d 1 (1957); Wilhite v. Public Service Commission, 150 W.Va. 747, 149 S.E.2d 273 (1966); Virginia Electric & Power Co., v. Public Service Commission, 161 W.Va. 423, 242 S.E.2d 698 (1978). As the District Court explained:

[R]eview by the Supreme Court of Appeals, while not calling for an independent judgment as to both law and facts, does provide a review in regard to the evidentiary support for the findings of the Commission as well as the correctness of the legal principles applied and conclusions reached by that body.

Preston County Light & Power Co., 297 F. Supp. at 766.

Several years ago this Court reconsidered the standard of review to be applied in Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981). In Monongahela Power, this Court adopted the comprehensive standard of review applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

After discussing the merits of the more comprehensive standard of review in Permian Basin, this Court adopted the Permian Basin three-pronged analysis as follows:

The first is a rather broad inquiry centering on whether the Commission abused or exceeded its statutory jurisdiction and powers. The second step relates to an analysis of the Commission's methodology and a determination of whether there is adequate evidence to support the Commission's findings. The third analysis looks to the substantive result of the Commission's order to see if it has arrived at a proper determination.

Monongahela Power Company, 166 W. Va. at 429, 276 S.E.2d at 183. It should be noted that although the Court reviewed a Commission rate case decision in Monongahela Power Company case, the same standard of review would apply to the Commission's ruling in a certificate case.

Similarly, in C & P Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), the West Virginia Supreme Court of Appeals began by reiterating the three-pronged standard of review established in the Monongahela Power case, supra, and went on to hold generally that: "The Court's responsibility is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." C & P Telephone, 300 S.E.2d at 611. Furthermore, the C&P case affirmed the Supreme Court's holding "that this Court will not substitute our judgment for that of the Commission on controverted evidence." Id. at p. 611.

In Braxton County Citizens for a Better Environment v. The Public Service Commission of West Virginia, 189 W. Va. 249, 429 S.E.2d 899 (1993) and in Harrison Rural Electrification Association, Inc. v. The Public Service Commission of West Virginia, 190 W.Va. 439, 438 S.E.2d 782 (December 9, 1993), this Court reaffirmed the use of the standard of review set forth in the Monongahela Power case.



## STATEMENT OF REASONS AND NOTE OF ARGUMENT

### **I. THE COMMISSION PROPERLY GRANTED A CERTIFICATE TO TRAILCO TO CONSTRUCT A 500kV TRANSMISSION LINE IN ACCORDANCE WITH ITS STATUTORY MANDATES**

This Court should reject both Sierra Club and Mr. Hildebrand's broad claims that the certificate of convenience and necessity was improperly granted by the Commission to TrAILCo. The Petitioners claims are unfounded. The Commission's decision is based soundly on the evidence in the record and proper application of the appropriate legal standard.

W.Va. Code §24-2-11a requires a utility, person, or corporation to obtain a certificate of public convenience and necessity from the Commission approving the construction and proposed location of high voltage transmission lines of 200 kV or above. The criteria for whether the Commission may grant the applied-for certificate is described in W.Va. Code §24-2-11a(d):

[T]he commission may approve the application if it shall find and determine that the proposed transmission line:

(1) Will economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power of the customers served by the applicant [Provision A] or is necessary and desirable for present and anticipated reliability of service for electric power for its service area or region [Provision B]; and

(2) Will result in an acceptable balance between reasonable power needs and reasonable environmental factors.

(Emphasis added. Additionally, the reader should note that "Provision A" and "Provision B" do not appear in the Code but have been added as a convenient reference.)

The following sections of this brief will give this Court an overview of the extensive review conducted by the Commission in reaching its decision. The Commission in Part I of its Certificate Order first considered need for the project. A specific discussion of the statute will occur in Part B

of this brief, below.

**A. The Commission Reviewed the Evidence and Determined That a Need Exists**

Part I of the Certificate Order recognized that (i) W.Va. Code §24-2-11a implicitly requires that a present and anticipated need exists for the proposed project, and (ii) Provision B allows the Commission to consider the needs of customers within the borders of the State of West Virginia and the region beyond. Thus, the Commission determined that the State statute allows it to consider present and anticipated requirements for electric power and reliability to the Applicant's customers or reliability needs to the region. (Certificate Order pp. 1 and 10.)

In determining the need on a regional basis, the Commission properly acknowledged the existing federal authority over transmission at the regional level. Regional Transmission Organizations ("RTO")<sup>10</sup> are regulated by the Federal Energy Regulatory Commission and are responsible, pursuant to federal law, for the coordinated operation of interconnected transmission systems owned by private utilities. The State of West Virginia lies within the PJM Regional Transmission Organization ("PJM") which stretches from the Atlantic Ocean to the Midwest and from Pennsylvania to Virginia<sup>11</sup>. Among other electric transmission owners, the extensive

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<sup>10</sup>Regional Transmission Organizations are provided for by Federal law and regulated by the Federal Energy Regulatory Commission. In very general terms, their purpose is to place the operations control of interstate electric transmission lines, owned by private utilities, under the control of an independent entity that will assume nondiscriminatory access to transmission lines by both generators and purchasers. (Certificate Order p. 10, fnt. 4.)

<sup>11</sup>The PJM Region includes all or substantially all of Delaware, District of Columbia, Maryland, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia and portions of Illinois, Indiana, Kentucky, Michigan, North Carolina and Tennessee. The electric transmission service area of PJM includes approximately 51 million people in all or parts of 13 states. (Certificate Order p. 93 Finding of Fact No. 17.) The PJM Region and its transmission zones are shown in Attachment J to the PJM OATT, FERC Electric Tariff, Sixth Revised Volume N. 1. See [www.pjm.com/documents/downloads/agreements/tariff.pdf](http://www.pjm.com/documents/downloads/agreements/tariff.pdf). (TrAILCo Exhibits 1 at Application, p. 4 and SRH-D at pp.4-5.)

transmission networks of the Allegheny Power System (and its subsidiaries Mon Power and P.E.) and the American Electric Power System (and its subsidiaries APCo and WPCo) fall within the confines of PJM. (Certificate Order p. 10.)

PJM is authorized under federal law, in its role as a RTO charged with maintaining the reliability of the bulk transmission system, to direct the construction of transmission facilities. As a result of PJM's Regional Transmission Expansion Plan ("RTEP") process, PJM determined that numerous transmission system reliability violations will arise within PJM if no action is taken. (Certificate Order p. 95 Finding of Fact No. 23.)

The RTEP process incorporates transmission planning on five-year and fifteen-year planning horizons. PJM performs a five-year baseline analysis to assess compliance with reliability criteria and identifies transmission upgrades needed to meet near-term demand growth for customers' electricity needs. The process considers not only existing generation, but also new resources that arise from interconnection requests by developers seeking to construct new generating plants and merchant transmission facilities. (Certificate Order p. 14 and p. 95 Finding of Fact No. 24; TrAILCo Exhibit SRH-D at 13-15.) Planning on a fifteen-year horizon, which first was used in the RTEP prepared in 2006, permits the consideration of long-lead-time transmission options and enables PJM to address both the reliability and economic performance of the transmission grid based on the impacts of long-term load growth and a wide range of market factors. (Certificate Order p. 14 and pp. 95-96 Finding of Fact No. 27.)<sup>12</sup>

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<sup>12</sup>The comprehensive list of factors that are examined include: (i) forecasted load growth, demand-side-response efforts and distributed generation additions; (ii) interconnection requests by developers of new generating resources and merchant transmission facilities; (iii) solutions to mitigate persistent congestion and forward-looking economic constraints and to ensure adequate allocation and funding of long-term transmission rights; (iv) assessments of the potential risk of aging infrastructure; (v) long-term firm transmission service requests; (vi) generation retirements and other deactivations; (vii) transmission owner-

The Commission reviewed the processes and procedures used by PJM in PJM's determination that TrAIL was necessary. The Commission review was extensive and encompassed, among other things, the following:

1. The Energy Policy Act of 2005 ("EPAAct 2005") created a mandatory compliance and enforcement regime for reliability standards under the oversight of the FERC. Pursuant to EPAAct 2005, the FERC designated North American Electric Reliability Council ("NERC")<sup>13</sup> as the "Electric Reliability Organization" for the United States. NERC has proposed various reliability standards for adoption by the FERC for enforcement as FERC rules. (TrAILCo Exhibit SRH-D at 10.) The FERC has since adopted many of the NERC standards, making them mandatory for RTOs and transmission owners. See Order No. 693, *Mandatory Reliability Standards for the Bulk-Power System*, Docket No. RM06-16-000, 118 FERC ¶61,218 (March 16, 2007) (FERC approval of 83 of 107 proposed reliability standards, including all "TPL" series transmission planning standards relevant here). (Certificate Order p. 12 and p. 94 Finding of Fact No. 19.)
2. PJM is required to apply NERC reliability criteria in its planning process. (Certificate Order p. 12 and p. 94 Finding of Fact No. 20.)
3. The RTEP process permits PJM members and stakeholders, including generation developers such as CPV, to participate in the process through PJM committees, including the identification of alternative solutions to transmission system reliability problems. The activity of PJM's Transmission Expansion Advisory Committee ("TEAC"), which operates under specific provisions of the PJM Operating Agreement, provides the primary forum for the exchange of ideas, the discussion of issues, and the presentation of planning findings. TEAC participation is open to (i) all transmission customers, (ii) entities proposing to provide transmission facilities to be integrated into the PJM region, (iii) all PJM members, (iv) representatives of state commissions (including this Commission), (v) state consumer advocates of states in the PJM region, and (vi) other interested parties. Other PJM committees, including the Members Committee and Planning Committee, provide additional opportunities for stakeholders to provide input. (TrAILCo Exhibits SRH-D at 18-20; LAH-R at 25.) (Certificate Order p. 15 and p. 96 Finding of Fact No. 28.)
4. Although PJM makes the ultimate decision on the resolution of reliability violations, the transmission owners' involvement in PJM planning groups is a component of the RTEP's development and gives PJM first-hand insight into the operating systems. (TrAILCo Exhibit

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initiated improvements; and (viii) load-serving entity capacity plans. (Commission Order p. 14, footnote 6)

<sup>13</sup> The North American Electric Reliability Corporation is the successor to the North American Electric Reliability Council.

SRH-D at 8-9.) (Certificate Order p. 15 and p. 96 Finding of Fact No. 29.)

5. PJM's application of the NERC reliability criteria, through the use of PJM's own system-stressing procedures as well as those designed by transmission owners, is at the center of the PJM RTEP process and produces consistent, reliable results. (Certificate Order p. 15 and p. 97 Finding of Fact No. 32.)
6. PJM's use and application of these tests to apply the NERC reliability criteria is both reasonable and required. (Certificate Ordering p. 16 and p. 122 Conclusion of Law No. 11.)
7. Any planning process to demonstrate compliance with NERC criteria would unavoidably require PJM to make assumptions on load forecasts, the development or retirement of generation and demand response resources, and electricity transfer levels between portions of the grid. Forecasting future events requires PJM to make assumptions about those events, but the need to make assumptions does not impair the validity of the planning process or the results it produces. (Certificate Order p. 19, pp. 98-99 Finding of Fact No. 41 and p. 122 Conclusion of Law No. 13.)
8. TrAILCo submitted evidence that PJM's load forecasting methodology conservatively accounts for the impact of Demand Side Management ("DSM") and conservation efforts. (Certificate Order p. 20.)
9. PJM's load forecasting methodology was reasonable and reliable, and it properly incorporated the impact of existing or announced DSM initiatives in other states. PJM has a reasoned process for the forecasting of load growth that has been independently evaluated and is under continuous evaluation and refinement by PJM. (TrAILCo Exhibits JMR-R at 3-6 and JMR-1.) (Certificate Order p. 99 Finding of Fact No. 44 and p. 122-123 Conclusion of Law No. 15.)
10. PJM uses a bright-line test to determine what proposed generators it will include in the RTEP process, and those that are too indefinite to be considered as available to resolve reliability violations are excluded. (Certificate Order p. 25. p. 99 Finding of Fact Nos. 45 and 46 and p. 123 Conclusion of Law No. 17.)

Ultimately, the Commission concluded that the PJM RTEP process was reasonable and reliable in the identification of projected violations of NERC reliability criteria. (Certificate Order p. 123 Conclusion of Law No. 16.) In other words the Commission determined that the process used by PJM in testing for potential problems in the electrical transmission grid is trustworthy.

The Commission next examined whether PJM properly applied its own process in identifying

the twelve electric reliability problems specified in the 2006 and 2007 RTEP. Here the Commission determined:

1. Peak demand growth in the mid-Atlantic and northern Virginia areas is the primary factor causing the electrical need for TrAIL and that “load pockets” in these areas have too little local generation of electricity relative to their load. Consequently, these load pockets must import much of their electricity via transmission lines, thereby creating the potential for electrical reliability problems on those transmission lines. (Certificate Order p. 25, p. 100 Finding of Fact No. 50; TrAILCo Exhibit SWG-D at 8-9; Tr. January 10, 2008 at 99-100 (Mr. Gass).)
2. Although peak demand in these load pockets can cause electric reliability problems, the effect of that peak demand can be manifested as an electric reliability problem in areas quite remote from the load pockets themselves. (TrAILCo Exhibit SWG-D at 9.) Reliability problems can bring about adverse consequences for electric customers in the form of transmission facility overloads<sup>14</sup> and voltage drops or voltage collapses at substations.<sup>15</sup> (Certificate Order p. 25-26 and p. 100 Finding of Fact No. 52.)
3. PJM’s 2006 RTEP process identified twelve violations of NERC reliability criteria. (Chart A of Mr. Gass’s Exhibit SWG-1.) There was no competent evidence presented that PJM incorrectly applied the NERC reliability criteria or misidentified violations of those criteria. (Certificate Order pp. 27-29, pp. 101-102 Finding of Fact Nos. 55, 56, 57, 58 and 59.)
4. PJM’s test for including generators for the purpose of resolving reliability problems in the RTEP process was consistently and properly applied and there was no evidence that PJM excluded any proposed generator that, under this process, should have been included, or that the construction of any proposed generators identified in this proceeding would delay or defer the need for TrAIL, including CPV’s proposed facilities – CPV Warren and CPV Maryland. (Tr. January 16, 2008 at 89 (Ms. Segner).) (Certificate Order pp. 27-29.)

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<sup>14</sup> In the “overload” situation, the conductor, the conductor clamps, and the line terminal equipment begin to overheat. Overheating the conductor may cause the line to sag enough to bring it into contact with whatever is beneath it. Under these conditions, the metal in the conductor may become brittle, rendering the line useless. In addition, the line may break and fall to the ground. Overheating of the conductor clamps and line terminal equipment may cause similar results. Overloading transmission lines may permanently damage transmission infrastructure. (TrAILCo Exhibit SWG-D at 12-13.) (Certificate Order p. 26 ftnt. 11.)

<sup>15</sup> Voltage drops can occur when large loads are turned on and when faults or short circuits occur on the system. The severity of the consequences depends on the severity of the voltage drop at the substation. Voltage drops of less than 3% are usually not significant. However, when the voltage drop at a substation exceeds 3%, the consequences can range from annoying dimming of lights in homes and businesses to a voltage collapse. A voltage collapse occurs when the voltage on the system drops to a critically low level and the system is unable to support power transfers across the system and customer load connected to the system. (TrAILCo Exhibit SWG-D at 13-14.) (Certificate Order p. 26 ftnt. 12.)

5. Staff witness Dr. Ileo presented an alternative load growth projection based on demographic information from Census Bureau reports. Dr. Ileo's alternative projection, however, was not as reasonable as the load forecasting methodology PJM used (and with which Dr. Ileo expressed no disagreement). (Certificate Order p. 31-32, p. 103 Finding of Fact No. 64.)
6. TrAILCo showed that the correct summer emergency rating on the Mt. Storm-Doubs 500 kV line is 2,598 megavolt ampere ("MVA") – the same figure on which both the 2006 and 2007 RTEPs were based. (Certificate Order p. 32-35, p. 104 Finding of Fact No. 71 and p. 124 Conclusion of Law No. 23.)
7. West Virginia electric customers will be adversely affected if TrAIL is not constructed because customers in the Eastern Panhandle of West Virginia will be at risk of "load shedding." The possibility of actual harm to West Virginia customers enhanced the Commission's determination that need for a solution exists. (Certificate Order pp. 36-38, p. 106 Finding of Fact No. 75 and p. 124 Conclusion of Law No. 25.)

The substantial and compelling expert testimony supporting the PJM processes persuaded the Commission that a present and anticipated need exists for electric power and reliability of both (i) the regional transmission system, of which all of West Virginia's high-voltage transmission facilities are an integrated part, and (ii) the customers of West Virginia electric utilities. (Certificate Order p. 120 Conclusion of Law No. 2 and p. 124 Conclusions of Law Nos. 25 and 26.) The Commission respectfully requests the Court not disturb its findings on the underlying issue of need.

**B. The Evidence Presented Supports a Finding of Need for TrAILCo**

Following the conclusion that there exists a present and anticipated need for reliable electric power for the customers of the Applicant and to address reliability in the region, the Commission next considered the central question in the case: Did TrAILCo, in presenting TrAIL as a vehicle for addressing the existing electrical need and regional reliability, meet the requirements of W.Va. Code §24-2-11a. The Commission stated: "Irrespective of PJM's directive, this Commission must find a need for the proposed transmission line under State law." (Certificate Order p. 10) It is as simple as this – TrAILCo seeks a certificate from the State of West Virginia – therefore it must satisfy the State

of West Virginia's legal requirements to be granted a certificate.

**1. The Commission Determined That TrAIL Met the Criteria of W.Va. Code §24-2-11a(1)**

After determining that a need exists, Part II of the Commission Order addressed the TrAIL project and whether it met the criteria required by W.Va Code §24-2-11a(1).

W.Va. Code §24-2-11a(d)(1) states that the Commission may approve the application if it shall find and determine that the proposed transmission line:

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|---|----|--|
| (1) Will economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power of the customers served by the applicant [Provision A] | or | is necessary and desirable for present and anticipated reliability of service for electric power for its service area or region [Provision B]; |
|---|----|--|

Because subsection 11a(1) is written in the disjunctive, it was sufficient for the Commission to find that either one of the two provisions had been met. In fact, the Commission determined that Subsection (d)(1) had been met as to both Provision A and Provision B.

Starting with Provision A, the Commission found that TrAIL will economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power for customers of the applicant. (Certificate Order p. 109 Finding of Fact No. 92.) In particular the record demonstrated that TrAIL will address the reliability problems identified in the 2006 RTEP in a timely and effective way. TrAIL will resolve the reliability problems, and from an engineering, design and cost perspective, TrAIL is a competent solution. In fact no witnesses contested the testimony of TrAILCo witnesses that from an electrical and transfer capacity perspective, TrAIL will achieve its purpose. (Certificate Order p. 109 Finding of Fact No. 92.) The Commission viewed the economic contribution as encompassing both the economic cost of the proposed project itself, and as compared



to other available, reasonable alternatives. Specifically the Commission found that TrAIL (i) will economically benefit the State, with a total forecasted impact of \$678.9 million, and an additional employment impact of \$210.3 million associated with 3,400 job years (TrAILCo Exhibits TSW-D at pp. 2-9, TSW-2.); (ii) will not adversely impact property owners, with the only competent evidence indicating that the effects, if any, of TrAIL on the value of nearby real estate values will be confined to property within 200 feet of TrAIL, and would be relatively minor; and (iii) because of the postage-stamp rate approach instituted by FERC, TrAIL is economically feasible from a rate recovery standpoint.<sup>16</sup> (Certificate Order p. 110 Finding of Fact No. 95 and p. 126 Conclusion of Law No. 37.) Based on the record, the Commission found that if no effective solution to the electric reliability problems is implemented, electric customers in northeastern West Virginia, and particularly those of P.E. in Berkeley, Jefferson, Morgan, and Hampshire Counties, are at risk for service interruptions in the form of controlled load shedding. (Certificate Order p. 124 Conclusion of Law No. 25.)

Furthermore the Commission determined that other transmission based alternatives did not meet the present and anticipated requirements for electric power of the customers served by the Applicant. Each of the alternatives suffered from deficiencies rendering them unacceptable substitutes for TrAIL. None of the alternatives – including (i) a second Mt. Storm-Doubs line, (ii) a new Mt. Storm-Loudoun line, (iii) Allegheny Power’s initial TrAIL proposal (from Wylie Ridge Substation to Kemptown Substation), (iv) reconductoring the Mt. Storm-Doubs line, increasing ground clearance of the line, or (v) installation of a static VAR compensator – will economically, adequately or reliably contribute to meeting the present and anticipated requirements for electric

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<sup>16</sup>FERC’s decision to allocate costs based on the postage-stamp methodology results in the costs of TrAIL being recovered from all PJM transmission customers and not just West Virginia customers. West Virginia’s customer share is approximately 5% of the total annual revenue requirement.

power of the customers served by the Applicant.

Turning to Provision B, no party contested the efficacy of TrAIL in resolving the reliability problems, and neither did any party present viable alternatives to TrAIL. The Commission determined based on the evidence that TrAIL will make the electric grid more reliable. (Certificate Order p. 109 Finding of Fact No. 94.) The Commission determined that the West Virginia segments of TrAIL are necessary and desirable for the continued reliability of electric service in West Virginia and the region.

In short, the Commission determined that TrAILCo satisfied both Provision A and Provision B of W.Va. Code §24-2-11a(d)(1) in meeting power needs. (Certificate Order p. 126 Conclusion of Law No. 39.)

**2. The Economic Commitments in the Joint Stipulation Did Not Influence the Commission Regarding the Need for TrAIL**

It is critical for the Court to note that the Commission rendered its decision to grant the certificate based on the evidence in the record, and without regard to the economic commitments submitted by the Company as part of the Joint Stipulation. Pursuant to the Joint Stipulation, TrAILCo agreed to provide multi-faceted and comprehensive benefits captured by certain financial, economic, construction and operational conditions. The financial commitments in the aggregate total \$42 million and encompass rate mitigation to West Virginia customers of Mon Power and P.E. in the form of transmission credits on their monthly billings, contributions totaling \$2.5 million for energy conservation and \$500,000 for low income energy assistance. The economic commitments include the construction of a \$50 million facility for a new transmission operation headquarters with the annual payroll and benefits associated with jobs at the facility expected to be \$12 million. The

construction and operational conditions are broad and designed to benefit and protect landowners along the route as TrAIL is designed, sited, constructed and placed in operation. Granted, these commitments enhanced the Commission's decision to grant the certificate by adding greater weight to both the economic contribution and the desirability of the project, but the Commission's analysis and decision was based solely on the evidentiary record, and did not rely on the incentives presented in the Joint Stipulation.

Moreover the Petitioners unfairly and incorrectly assess the Staff position by claiming Staff changed its position based on the financial commitments. The testimony of Staff on this position stands in stark contrast to the Petitioners' claims. The Staff recognized that the need for TrAIL does exist, albeit on a further horizon than TrAILCo presented. The Staff position on timing of need is discussed in detail below.

**3. The Commission Determined That TrAIL Will Result in an Acceptable Balance Between Reasonable Power Needs and Reasonable Environmental Factors**

W.Va. Code §24-2-11a(d)(2) requires that the Commission determine whether the proposed transmission line results in an acceptable balance between reasonable power needs and reasonable environmental factors. In Part III of the Order the Commission reviewed the impact of TrAIL (i) on habitats and types of wildlife, and on human and domestic animal life; (ii) on right-of-way clearing and vegetation management, and in particular the use of herbicide impact on human health and drinking water supplies; (iii) on soil erosion and sedimentation control; (iv) regarding electric and magnetic fields including audible and radio noise; (v) on wetlands and hydro logic resources; (vi) on wildlife resources, including rare, threatened, and endangered species; (vii) on cultural and historical resources; (viii) on the continued development of coal and natural gas reserves and the operation of

gas wells and pipelines; and (ix) on the appearance of TrAIL and how its visual aspects might detrimentally affect the enjoyment of their property or community. (Certificate Order pp. 111-115, Findings of Fact Nos. 102-123.)

Upon review, the Commission concluded that TrAIL achieves an acceptable balance between reasonable power needs and reasonable environmental factors as required by W.Va. Code §24-2-11a(d)(2). (Certificate Order pp. 127-129, Conclusions of Law Nos. 42-51.)

**C. The Commission Satisfied the Requirements of W.Va. Code §24-2-11a Through an Extensive Review of All Available Evidence**

The Petitioners make the broad assertion that the Commission did not have sufficient evidence to grant the requested certificate. They are incorrect. The above overview of the Commission's Order provides only a small taste of the expanse of the Commission's review of the evidence that unequivocally supports the conclusion that a need exists, and that the TrAIL project not only meets the statutory requirements but is necessary to meet the real demand for electric service that will face our region of the country in the near future. A review of the full Commission Order will give the reader a thorough understanding of the breadth and depth of the evidence that the Commission considered in deciding this case.

The next section of this brief will address specifically the arguments raised by the Petitioners.

**II. THE EVIDENCE PRESENTED SUPPORTS A GRANTING OF THE CERTIFICATE AT THIS TIME**

The Petitioners argue that the Commission must make a finding of need for TrAIL in 2011 in order to grant a certificate to TrAILCo at this time. This contention is inaccurate and short-sighted. The Petitioners attempt to bolster their position by claiming that Commission approval of

the certificate was fatally flawed in that the Commission acknowledged that the critical need for TrAIL *may* not manifest until the year 2014 or 2015. (Reconsideration Order at p. 3.) The Petitioners' analysis on this point is incorrect.

The Commission's decision to grant a certificate to TrAILCo at this time was based upon a thorough review of all the evidence presented, well-reasoned and based upon its regulatory experience with projects of this complexity and magnitude.<sup>17</sup>

The record reflects that the RTEP process incorporates transmission planning on five-year and fifteen-year planning horizons. PJM performs a five-year baseline analysis to assess compliance with reliability criteria and identifies transmission upgrades needed to meet near-term demand growth for customers' electricity needs. The process considers not only existing generation, but also new resources that arise from interconnection requests by developers seeking to construct new generating plants and merchant transmission facilities. (Certificate Order p. 14; TrAILCo Exhibit SRH-D at 13-15.) Planning on a fifteen-year horizon, which first was used in the RTEP prepared in 2006, permits the consideration of long-lead-time transmission options and enables PJM to address both the reliability and economic performance of the transmission grid based on the impacts of long-term load growth and a wide range of market factors. (Certificate Order p. 14)<sup>18</sup> This short-term and longer

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<sup>17</sup>A review of the Commission's own records reveals that the last high voltage transmission line project commenced with filings before the Commission in 1991, *Ettelson v. Appalachian Power Company*, Case No. 91-579-E-C (Commission Order October 1, 1991) and *Appalachian Power Company*, Case No. 91-448-E-P (Commission Order October 15, 1991 Petition of Appalachian Power Company for an order relating to certain matters in advance of its filing of an application for a certificate of public convenience and necessity under the provisions of W.Va. Code §24-2-11a.) *Appalachian Power Company*, Case No. 93-0123-E-CN (Commission Order May 10, 1993 Dismissed certificate application.) *Appalachian Power Company*, Case No. 97-1329-E-CN (Commission Order May 27, 1998). The line was placed in service in May of 2006. See [www.aep.com](http://www.aep.com) News Release May 2006.

<sup>18</sup>The comprehensive list of factors that are examined include: (i) forecasted load growth, demand-side-response efforts and distributed generation additions; (ii) interconnection requests by developers of new generating resources and merchant transmission facilities; (iii) solutions to mitigate persistent congestion

term planning information presented by the Applicant supports the Commission's decision to grant the certificate for TrAIL now.

In accordance with W.Va. Code §24-1-1(2) the Commission has a duty to ensure that utilities provide adequate, economical and reliable utility services throughout the state. In order to fulfill its obligation to maintain reliable electric service in West Virginia, the Commission considered when to grant the certificate to TrAILCo. In order to fulfill its mandate of adequate electric service, the Commission determined it must grant a certificate in time for the transmission infrastructure to be built and placed in-service to coincide with the needs of West Virginia and regional customers.

During the course of the May 30, 2008 hearing, Earl E. Melton, P.E.<sup>19</sup> Director of the Commission's Engineering Division, testified regarding the Staff position of need for TrAIL and in support of the Joint Stipulation. (Certificate Order at pp. 38-39.) Mr. Melton described his oversight of the testimony of the Staff expert witnesses during the January 2008 hearings. He noted that at Staff's direction the consultants had been directed to have "an aggressive mind set . . . really testing the application . . . And with that aggressive mind set, all they could do is delay the ultimate need for the line until 2014/2015." Based on Mr. Melton's experience and expertise he did not believe that was a significant timing difference to warrant a denial or delay in the granting of the certificate. In fact Mr. Melton ultimately described the need for TrAIL as "imminent." The Commission found that

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and forward-looking economic constraints and to ensure adequate allocation and funding of long-term transmission rights; (iv) assessments of the potential risk of aging infrastructure; (v) long-term firm transmission service requests; (vi) generation retirements and other deactivations; (vii) transmission owner-initiated improvements; and (viii) load-serving entity capacity plans. (Commission Order p. 14, footnote 6)

<sup>19</sup>Mr. Melton has been employed with the Commission since 1983. He is a registered Professional Engineer and holds a Master of Science in Engineering Management. He was the Project Manager over the Staff Consultant work in *Appalachian Power Company*, Case No. 97-1329-E-CN. He has been the Director of Engineering since 2000. Tr. May 30, 2008 at pp. 189-191, Stipulation Hearing.

the need for TrAIL exists and agreed with Mr. Melton's expert opinion that the certificate should be granted now in order for the project to proceed timely so that the West Virginia customers and the service region would continue to experience uninterrupted, reliable electric service.

### **III. EVIDENCE CONCERNING INDIRECT ENVIRONMENTAL IMPACTS OF CARBON TAXES AND GREEN HOUSE GASES WAS PROPERLY CONSIDERED BY THE COMMISSION**

The Sierra Club claims the Commission failed in the balancing analysis required by W.Va. Code §24-2-11a(d)(2) because it did not give appropriate weight to the likelihood of anticipated federal regulation of carbon production by coal-fired electrical generators. The Sierra Club requested the Commission deny certification of TrAIL because if constructed TrAIL will facilitate continued or additional electric generation through the combustion of coal, as opposed to other means of generation, such as wind turbines, that the Sierra Club believes to be more environmentally benign or, in the long run, less costly. Other than making assumptions, arguments and assertions to block TrAILCo, or any related transmission facilities, the Sierra Club offers not one shred of evidence to support its position.

The Commission determined that the pollution associated with existing or potential future coal-fired generating plants is not before the Commission in this proceeding. TrAIL's transmission capacity will not discriminate against electrons based on the source or type of generation resources located within the PJM area; that is, TrAIL will provide both a direct pathway and an alternative pathway, in case of outages of other transmission lines, capable of carrying electricity from coal, oil natural gas, wind, hydro, biomass, methane or any other generation source. (Reconsideration Order p. 5 and Certificate Order p. 63.) The evidence in the record demonstrates that TrAIL's anticipated indirect effects on the environment through the facilitation of coal-fired generation of electricity,

when combined with the other environmental factors discussed in its orders, results in an acceptable balance between reasonable power needs and reasonable environmental factors. (Reconsideration Order p. 5 and Certificate Order p. 63.)

The issue is not whether green house gases are detrimental to the environment, or whether a carbon tax will increase the cost of electricity created from coal. The issue is whether, given the need for reliable electric power, TrAIL meets the criteria of W.Va. Code §24-2-11a. This Court should not allow the Petitioners to obfuscate the issue by introducing unquantified and outside-the-record scenarios that do not impact the need for TrAIL, as objectively determined by the Commission's review of the evidence in this case.

**IV. THE COMMISSION APPROVAL OF THE COMPANY PROPOSED ROUTE, AS MODIFIED BY THE GRAFTON AREA ROUTE, SATISFIES THE REQUIRED LEGAL STANDARD**

In its Petition Sierra Club contests the Commission's approval of the Applicant's Preferred Route (Route H), as modified by the Grafton Area Route, in granting a certificate to TrAILCo. Sierra Club argues that (i) because the Commission did not select the shortest route possible for the West Virginia Segments of TrAIL the Commission was arbitrary in rendering its decision, (ii) a numeric count of environmental impacts along each of the various proposed routes for TrAIL points to the Maryland Route as the superior choice, because it contains fewer environmental impacts than the Preferred Route, and (iii) the segment of the Preferred Route replaced by the Grafton Area Route created less detrimental impacts than the Grafton Area Route. (Reconsideration Order p. 5.)

The siting of electric transmission lines is invariably controversial. Applicants are often focused on getting from point A to point B (i.e. 502 Junction to Mt. Storm Substation), but property owners and other residents are understandably concerned when their community is the one selected.



Regardless of the route selected, there will be opposition from the affected property owners.

The Commission considered the numeric criteria cited by Sierra Club and non-numeric criteria, including regional needs and the need to avoid a provincial approach to routing the line. (Reconsideration Order pp. 5-6.) The numeric factors cited by the Sierra Club were not, and could not be, the sole criteria in the routing decision. Relying on a single numeric evaluation in making a determination as variable and complex as routing would be imprudent. The Commission reviewed numerous factors in making its routing decision. For example, the evidence showed that the Grafton Area Route was superior to the segment of the Preferred Route it replaced because (i) it paralleled existing transmission rights-of-way, (ii) it minimized green field rights-of-way, (iii) the necessary green field rights-of-way required for the Grafton Area Route generally do not cross pristine or undisturbed areas, (iv) the existing residences and buildings crossed by TrAIL can be addressed by minor route deviations or site-specific solutions, and (v) the Grafton Area Route avoided the properties of several intervenors in this case. (Reconsideration Order pp. 5-6; *See*, Certificate Order at page 69 and 70, and Section IV generally.) Throughout its deliberations the Commission was mindful that the Preferred Route must satisfy the mandate under W.Va. Code §24-2-11a(d)(2) requiring that the Commission find that the project will result in an acceptable balance between reasonable power needs and reasonable environmental factors. In other words it was not sufficient to approach this issue from the perspective of individual property owners who, for the most part, oppose any high-voltage transmission line in proximity to their property.<sup>20</sup>

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<sup>20</sup>The Supreme Court has recognized that eminent domain proceedings in state court will resolve private property owner concerns. The West Virginia Supreme Court of Appeals recently recognized the inherent difficulty with the Commission considering private property owner interest in the context of an exempt wholesale generator siting certificate application under W.Va. Code §24-2-11c:

The Commission also considered in its balancing of interests our recent decision in *Burch*

The Commission thoroughly addressed routing in Part IV of the Certificate Order pp. 65-75. The Commission gave reasoned consideration to the routing concerns that were expressed in this proceeding, including, (i) the over-arching question of which route TrAIL should take through the state, (ii) whether to use the Grafton Area Route, and (iii) the concerns of individual landowners and tenants as the line passes over and/or near their lands. (Certificate Order pp. 65-67; pp. 116-118 Findings of Fact Nos. 131-139 and pp. 130 Conclusions of Law Nos. 57, 58 and 59.)

The routing criteria propounded by the Sierra Club is overly simplistic in light of the multi-variable complexity involved in routing. The Court should reject the Sierra Club's claim on this point.

#### **V. THE COMMISSION PROPERLY DECLARED TRAILCO TO BE A PUBLIC UTILITY**

Both State law and the evidence in this case support the Commission's decision that TrAILCo is a public utility. Mr. Hildebrand argues TrAILCo is not a public utility because it has "no defined service region or service district" and it has no customers. Mr. Hildebrand is incorrect both as to the law and the facts on this issue.

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*v. Nedpower Mount Storm*, 220 W.Va. 443, 453, 647 S.E.2d 879, 889 (2007), wherein we stated: "Notably absent in this balancing of interests are the interests of nearby landowners whose use and enjoyment of their properties may be substantially interfered with by the operation of an electric generating facility. Because the rights of nearby landowners are not a primary consideration in the PSC's siting determinations, we believe it is necessary to preserve the traditional rights of these landowners to seek appropriate remedies in the circuit courts." The Commission found that many of the negatives associated with the project related to the private interests of local landowners rather than the interests of the public as a whole, such as the viewshed, noise, and property value arguments presented for the Commission's consideration. The Commission then concluded that its decision was consistent with this Court's determination in *Burch* that the rights of local landowners are not the primary consideration in the balancing of interests. Mountain Communities for Responsible Energy v. Public Service Commission, 665 S.E.2d 315 (2008).

**A. TrAILCo is a Public Utility As Defined By West Virginia Law**

W.Va. Code §24-1-2 defines a public utility as “any person or persons, or associations of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service.”

TrAILCo will be engaged in the “transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through a distributing utility,” an activity explicitly described as a “public service” by W.Va. Code §24-2-1(a). Transmission of electricity over the certificated line will benefit the public, not only in this State, but in other States as well. By engaging in this statutorily defined activity TrAILCo is by law a public utility. This is true even in the absence of such an express finding by the Commission, because the Commission’s jurisdiction extends to every entity in the State providing a public service set forth in W.Va. Code §24-2-1(a), irrespective of whether a specific Commission designation as such has been made, or a certificate issued. Boggs v. Public Service Comm’n, 154 W. Va. 146, 174 S.E.2d 331 (1970).

This Court rendered an opinion on a similar matter involving generation related to the construction and operation of a gas-burning electric generating facility known as Big Sandy Peaker.<sup>21</sup> The Commission had determined that Big Sandy Peaker, an electric generating facility that was planned to be constructed and operated to provide generation intended solely for the wholesale market was not a public utility. The Court disagreed and held that the operation of Big Sandy Peaker was included in the public service described by W.Va. Code §24-2-1 and held the facility to be a utility.

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<sup>21</sup>The Affiliated Construction Trades Foundation, a Division of the West Virginia State Building and Construction Trades Council v. the Public Service Commission of West Virginia and Big Sandy Peaker Plant, LLC, 211 W. Va. 315; 565 S.E.2d 778; 2002 W. Va. LEXIS 10 (February 22, 2002)

The Court stated its determination was based on the fact that the electricity produced would ultimately be sold to the public, even if that public will be located outside of the State.<sup>22</sup> The Commission contends that the statutory framework the Court relied upon to determine that Big Sandy Peaker was a public utility applies in the same fashion to TrAILCo.

**B. TrAILCo Will Have Customers**

Further, Mr. Hildebrand is mistaken on a factual basis: TrAIL will have customers. The service area or region of TrAILCo will encompass the service area of West Virginia and the service area of PJM. The infrastructure of TrAIL will provide transmission service in the entire PJM region, including the PJM zones of Allegheny Power and American Electric Power serving West Virginia. The direct customers of TrAIL are the PJM companies (including Mon Power, P.E., APCo and WPCo) taking transmission service from PJM. Finally, and similar to the holding in Big Sandy, retail customers are ultimately, although indirectly, the final consumers of the transmission services provided by TrAIL.

**VI. NO PARTY TO THE PROCEEDING HAD ANY *EX PARTE* COMMUNICATIONS WITH THE DECISIONMAKERS**

Both Mr. Hildebrand and the Sierra Club present scurrilous and unfounded accusations that range from (i) fundamental misunderstanding of the separate roles of the Commission and Staff, to (ii) what can only be categorized as a willful attempt to throw mud on the these proceedings in the hopes that this Court will lose sight of the fact that the Commission rendered a decision consistent with the law and evidence. A prime example is the Petitioners' strained and twisted argument that as a result of *ex parte* communications the Commission ignored the evidence and granted the

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<sup>22</sup>Id. at p. 322.

certificate based on the economic commitments contained in the Joint Stipulation. That incorrect and unsustainable argument was refuted in Part I of this brief. This section of the brief will focus on another incorrect and disturbing accusation, that the Staff participation in settlement negotiations with the Applicant, CAD and WVEUG constitutes an *ex parte* communication.

As the Commission stated in its Certificate Order pp. 9-10, Mr. Hildebrand misunderstands the separate roles of Commission and Staff. The Commission is charged with (i) ensuring fair and prompt regulation of public utilities in the interest of the using and consuming public, (ii) providing for the availability of adequate, economical and reliable utility services throughout the state, (iii) encouraging the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state's energy resources, such as coal, and (iv) appraising and balancing the interests of current and future utility service customers, the general interests of the state's economy, and the interests of the utilities subject to Commission jurisdiction in its deliberations and decisions.<sup>23</sup> Furthermore, the Commission has specific legislative guidance pertaining to this filing. *See W.Va. Code §24-2-11 a.* The Commission must adjudicate the various issues presented by the parties and issue a decision based on the record.

As a party before the Commission in a proceeding, Staff performs as an advocate: it independently reviews, investigates and analyzes the Application, and develops and aggressively pursues the position that it believes is in the best interest of the State of West Virginia, the utility customers, and the utilities in this state. In accomplishing these tasks, it makes use of the same tools available to the other parties in a case before the Commission, specifically, Staff may make motions, file pleadings, file and respond to discovery, engage in negotiations with other parties, appear at

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<sup>23</sup>*See, W.Va. Code §24-1-1(a) and (b).*

hearing, present witnesses and cross-examine the witnesses of other parties. Staff does not violate its duties by adopting a position counter to any particular party by modifying its position, or by later settling all or part of its issues.<sup>24</sup> (Reconsideration Order pp. 9-10.)

In this proceeding Staff entered into settlement negotiations that resulted in the Joint Stipulation, described above. At the Commission's direction (i) the proceedings were delayed by ninety days to allow all parties the opportunity to review the Joint Stipulation, and (ii) an additional day of hearing was convened to afford all parties the opportunity to comment and presentation evidence and testimony on the Joint Stipulation.<sup>25</sup> These were reasonable processes in light of the Commission's recognition that very few of the parties were signatories to the Joint Stipulation.

At that point in the proceedings the Sierra Club filed approximately three thousand pages of data obtained from the Commission, the CAD, and the Office of the Governor of the State of West Virginia, pursuant to the Freedom of Information Act (FOIA), requesting all documents mentioning, and associated with, the Joint Stipulation. During the May 31, 2008 hearing the Sierra Club attempted to move this information into evidence. (Tr. May 30, 2008 Hearing p. 25.) The Commission denied this broad motion because neither the Sierra Club nor any other party was able to show that the approximately three thousand pages was material or relevant as evidence in this case. However the Commission noted that if the Sierra Club had a particular document from these materials that it wanted to sponsor that opportunity remained open. (Tr. May 30, 2008 Hearing p. 25.) Nevertheless, the massive amount of information remained available for wide-spread public review

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<sup>24</sup>The fact that Mr. Hildebrand and the Staff's positions were overlapping or aligned in part are coincidence because the Staff does not have an obligation to Mr. Hildebrand or any other intervenor. In fact if the Staff were to take up the charge of a particular party it would be in peril of abandoning its obligations to represent the broad public interest.

<sup>25</sup>Commission Order, April 24, 2008

through the Commission's Internet site.

In a desperate attempt to bolster his unsubstantiated claims of *ex parte* communications, Mr. Hildebrand tries to use this three thousand pages (of what, in the final analysis, amounts to scrap paper), to randomly cast aspersions upon the character of other Commission employees, including, the Chairman, the Director of the CAD and even the Governor. Mr. Hildebrand's efforts in this area are baseless and should be ignored by this Court. Quite simply neither of the Commissioners nor the Commission Law Clerk assigned to this case held any discussions on the merits of this proceeding with any party outside of the presentations made in the course of the evidentiary hearing. Furthermore, the Staff performed properly and within the prescribed role of advocating on behalf of broad public interests. There is absolutely no evidence to the contrary.

In fact, even after several months of open public access to the thousands of pages of supposedly damning information, Mr. Hildebrand's only claim to the existence of a "smoking gun" is what he claims to be the existence of inappropriate communication between the Chairman, who had recused himself from this case, and the Governor. Mr. Hildebrand's incorrect claim can be put to rest by identifying the context of the few pages out of the thousands that mention the recused Chairman. The first instance encompasses an email sent on August 27, 2007 by Don Corwin, a member of Intervenor Halleck-Triune Community, to various Senators and Delegates, which: (i) asked the lawmakers to take his concerns regarding opposition to TrAIL and complaints about treatment of landowners to the Commission and the Governor, (ii) noted that the Commission had yet to hold hearings, and (iii) memorialized Mr. Corwin's version of issues discussed with the Governor on July 28. That email was forwarded by Senator Jon Hunter to the Governor's Office. Thereafter a representative of the Governor's Office, Peggy Ong, forwarded the message to the

recused Chairman. As the statutory administrative head of the Agency, the Chairman responded to the Governor's inquiry with regard to the ongoing proceeding that: (a) he had personally instructed a representative of Allegheny not to make any such statements that the project is a "done deal" to landowners, (b) that issues including alternate routing, cost or need for the line will all be considered at public hearings and decided by the Commission on the record, (c) that public hearings would be conducted at regional locations where the line is currently proposed to be located and full evidentiary hearings will be conducted in Charleston where the issues identified in Senator Hunter's e-mail would be fully considered, and (d) members of the public will be given the opportunity to make their views known to the Commission at the hearings.

It is disingenuous for Mr. Hildebrand to use this communication to allege improprieties. The Chairman, as the statutory administrative head of the Commission, had properly and appropriately responded to the Governor's inquiry with information that was publicly known (e.g., the proceeding was currently pending before the Commission and therefore it was inappropriate for TrAILCo to make representations to the contrary, and that all issues would be addressed by the Commission through the hearing process), about a matter before the Commission -- nothing more.

The only other email connected to the Chairman of the Commission is a single instance of the Chairman emailing a copy of the Joint Stipulation (which was also publicly available on the Commission's website) to the Office of the Governor as a courtesy.

What the thousands pages of email communications and notes associated with the Joint Stipulation more accurately reveal is that the Applicant made the first offer of settlement and thereafter intense discussions ensued among the Applicant, Staff, CAD and WVEUG representatives. Each of these Parties sought concessions from the Applicant that were aligned with their respective



clients' particular interests. Each of these Parties reached an independent decision to settle; and for the Staff, the settled position was endorsed by the engineering, financial and legal representatives.

Mr. Hildebrand's and the Sierra Club's claims of *ex parte* communications are, as noted above, simply an attempt to divert this Court's attention. There was no *ex parte* communication.

Further insinuations by Mr. Hildebrand and the Sierra Club that the Staff engaged in inappropriate behavior, e.g., that the Director Ranson of the Utilities Division's absence from the May 31, 2008 hearing on the Joint Stipulation was part of a nefarious plot, are offensive. The Commission points out in its Reconsideration Order p. 11 that: (i) the Staff offered to sponsor the Deputy Director of the Utilities Division and make him available for cross-examination on any financial issues in the Joint Stipulation, (ii) Mr. Hildebrand did not object at the hearing to Staff not calling Director Ranson and should not be permitted to do so after the close of the evidentiary record, and (iii) the testimony of Director Melton was comprehensive and that in fact no questions of the parties were left unanswered by Director Melton.

## **VII. SUFFICIENT GROUNDS FOR GRANTING A REOPENING, REQUIRING FURTHER HEARING OR REQUIRING PRUDENCE REVIEWS, WERE NOT PRESENTED TO THE COMMISSION**

In addition to their respective petitions for reconsideration of the Certificate Order, Petitioners Hildebrand and Sierra Club also filed motions to reopen the record for further hearing and for continuing prudence reviews.<sup>26</sup> All of the filings were given due consideration by the Commission

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<sup>26</sup> Filed by Mr. Hildebrand: (i) Motion to Reopen the Record to Accept Results of PJM Study Requested by the Maryland Public Service Commission and Motion to Take Judicial Notice of Testimony to MD PSC (June 16, 2008); (ii) Petition for Reconsideration (August 11, 2008); (iii) Petition for Further Hearing, (November 21, 2008); Petition for Further Hearing (Corrected), (November 26, 2008); (iv) Addendum to Motion for Additional Hearing, (December 4, 2008); (v) Addendum No. 2 to Motion for Additional Hearing, (December 15, 2008); and (vi) Addendum No. 3 to Motion for Additional Hearing, (January 20, 2009).

in its Certificate and Reconsideration Orders. The Commission properly denied those motions.

**A. Mr. Hildebrand's Request to Reopen**

In support of his June 11, 2009 request to reopen the evidentiary record Mr. Hildebrand attached a PJM study requested by the Maryland Public Service Commission. The Commission determined that information submitted by Mr. Hildebrand represented little more than loosely supported conflicting scenarios without corresponding bases to weigh one scenario against the next. The Commission properly concluded that it could not proceed on the unsupported and incomplete conjecture submitted by Mr. Hildebrand on June 11, 2008. (Certificate Order p. 88 and Reconsideration Order p. 8.)

**B. Mr. Hildebrand's Request for Further Hearing**

In assessing Mr. Hildebrand's November 21, 2008 Petition for Further Hearing (and associated addendas), the Commission considered whether there exists a reason for the Commission to reopen the evidentiary record. Rule 19.2 of the Commission's *Rules of Practice and Procedure*, 150 C.S.R. 1, permits a new hearing for matters that have arisen since the hearing, or to hear facts that were not known by the party at the time of the hearing.

The information submitted in support of Mr. Hildebrand's Petition for Further Hearing does not constitute information related to the need for TrAIL. Instead Mr. Hildebrand submitted a press release relating to a separate transmission line project, PATH, along with general information regarding trends in electricity demand, and suggested that the Commission should reopen the evidentiary proceeding so TrAILCo and PJM can address the application of this information to TrAIL.

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Filed by the Sierra Club: (i) Petition for Reconsideration of the August 1, 2008 Order (August 6, 2008); (ii) Petition for Continuing Prudence Review and Supplemental Memorandum in Support of Petition for Reconsideration (November 24, 2008); and (iii) Reply of the Sierra Club, Inc., to Applicant's Opposition to Petition for Continuing Prudence Review (December 2, 2008).

The information submitted by Mr. Hildebrand does not refer to TrAIL or demonstrate that TrAIL is no longer needed. (Reconsideration Order p. 18.) The Commission determined that the information submitted by Mr. Hildebrand was not relevant to TrAIL and did not warrant reopening the evidentiary record.

**C. Sierra Club's Request for a Continuing Prudence Review**

The Commission correctly determined that Sierra Club's Petition for Continuing Prudence Review should not be granted. W.Va. Code §24-2-11b(a) states that when granting a certificate of convenience and necessity for the construction of a transmission line, with a completion date of more than one year from the date of the order granting the certificate, the Commission may require that such project be subject to a continuing prudence review.

On its own motion, and concurrent with the request of TrAILCo and the other parties, the Certificate Order included numerous pre-construction conditions and other contingencies. The idea of a continuing prudence review was not among those conditions proposed by any party during the long procedural history of this case and was raised for the first time in the Sierra Club's motion. The Commission held that a prudence review is not warranted in this case because (i) the prudence review process, as described by W.Va. Code §24-2-11b(c), is more appropriate for use in cases where rate-making issues are central to the question of whether to grant a particular certificate, (unlike the present case where FERC and not the Commission has jurisdiction over rates), and (ii) the question of whether it is prudent to move forward with TrAIL was decided in the affirmative in the Certificate Order. It would be inappropriate and unnecessary to reopen this question through a prudence review proceeding. (Reconsideration Order pp. 17-18.)

**VIII. PHASED COMPLIANCE AND CONSTRUCTION WILL ENHANCE THE COMPLAINT-BASED COMPLIANCE PLAN ADOPTED BY THE COMMISSION.**

The Certificate Order required that TrAILCo present all evidence of compliance with pre-construction conditions for the West Virginia Segments of TrAIL through a single compliance hearing. The Commission directed TrAILCo not to commence construction until the Commission review of compliance was completed. The Petitioners allege that the Commission's change from a single compliance hearing to a multi-phased complaint-based compliance process presented an unacceptable risk to the customers.

In its Petition for Reconsideration, TrAILCo argued that (i) obtaining permits and completing the pre-construction conditions for the entire West Virginia length of TrAIL all at one time imperiled the timely and economic completion of the project, particularly in consideration of the numerous regulatory approvals required for this project<sup>27</sup>; (ii) review of pre-construction conditions for each West Virginia segment of TrAIL under a phased schedule would be more manageable and efficient because the Commission could focus on geographically discrete portions of the project; (iii) agreements with engineering firms, suppliers, contractors, and lenders are structured around a phased construction schedule; (iv) there is no evidence in the record to suggest that TrAIL will ultimately fail for lack of any pre-construction condition; and (v) concern regarding stranded investment (Certificate Order p. 82.) under a phased schedule was misplaced, because permits for

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<sup>27</sup>Regulatory approvals include permission from the West Virginia Department of Environmental Protection (an NPDES permit); the West Virginia Division of Culture and History (cultural and historical resource studies); the West Virginia Division of Natural Resources ("WVDNR") (studies of endangered plants and stream activity application); the United States Fish and Wildlife Service (studies of threatened and endangered species); the Pennsylvania Fish and Boat Commission, and both the U.S. Army Corps of Engineers and the WVDNR (water resource inventory studies)

national and state environmental laws will address how and where, but not whether, TrAIL will be constructed and operated. *See*, Fleissner affidavit, paragraph 9. TrAILCo requested that the Commission modify the Certificate Order accordingly.

The Commission determined that the question of phased construction is tied to another aspect of the Certificate Order, namely, the compliance hearing. On its own initiative the Commission reconsidered the need for a compliance hearing in this matter. In the interest of avoiding undue delay in addressing all compliance-related concerns, and mindful of the experience of *Beech Ridge Energy, LLC*, Case No. 05-1590-E-CS, (a siting certificate for a wholesale electric generating facility) and *NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN (a wind power project), the Commission removed the compliance hearing requirement in this case. Instead, the Commission required TrAILCo to file a verification that it had met the pre-construction conditions<sup>28</sup> including supporting detail demonstrating compliance. The Reconsideration Order further held that failure to meet these preconditions may be brought to the attention of the Commission through the formal complaint process.

The Commission recognized that moving from a single compliance hearing to a complaint-based approach would achieve even greater efficiencies if combined with a multi-phased approach to compliance-verification and construction. Specifically, by using a phased approach, TrAILCo and the parties/complainants will have the opportunity to learn from any issues that arise in earlier phases of the project and use that knowledge to avoid similar problems in later phases of the project, thus allowing the more orderly and timely construction of the project.

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<sup>28</sup> The following are the pre-construction conditions of the Certificate Order: Sections V.C.3.u, V.C.3.v, and V.D.

In conclusion the Commission believes that a complaint-based, multi-phased approach to compliance and construction will balance appropriately (i) the timely and efficient construction of the projects with (ii) the need to assure that all aspects of the Commission's decision are fulfilled.


**CONCLUSION**

WHEREFORE, acting within the scope of its authority established by the Legislature, the Public Service Commission in its Orders of August 1, 2008 and February 13, 2009, has properly granted a certificate of convenience and necessity to TrAILCo. The evidence in this matter supports the Commission decision and the substantive result is proper. Therefore, in the interest of the public, it is respectfully requested that this Court deny the petitions for appeal filed by Sierra Club and Mr. Hildebrand.

Respectfully submitted this 13<sup>th</sup> day of April, 2009.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA

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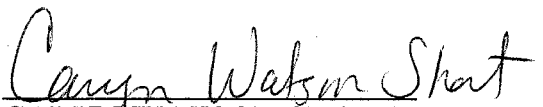
CERTIFICATE OF SERVICE

I, CARYN WATSON SHORT, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Orders of August 1, 2008 and February 13, 2009 in Case No. 07-0508-E-CN" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 13th day of APRIL, 2009.

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