PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
AT CHARLESTON

CASE NO. 07-0508-E-CN

TRANS ALLEGHENY INTERSTATE LINE COMPANY

POST HEARING BRIEF OF SIERRA CLUB, INC.

The Sierra Club sincerely appreciates the many courtesies this Commission has extended to it, and its Counsel, throughout this proceeding, in particular the patient indulgence of an advocacy not deeply schooled in the rules and customs of practice before this Commission. As a modest thank you for these courtesies, the Sierra Club will forgo the opportunity of filing a later "Reply Brief" and is filing this post-hearing brief prior to its scheduled filing date, in order to give all parties an opportunity to reply to it at the earliest opportunity, and possibly thereby forgo further briefing themselves.

The Sierra Club accepts as accurate Commissioner's McKinney's observation that, as a result of prior filings and its participation in the hearing held on May 30, 2008, the Commission understands the Sierra Club's position in this litigation. For the reasons stated in the Sierra Club's briefs, the Sierra Club believes the case for need has not been made, and that the environmental impact of increased CO_2 emissions would, in any event, offset any electrical benefit. As it relates to the most recent Joint Stipulation, the Sierra Club believes, for the reasons stated in its May 29, 2008 reply brief, that the Joint Stipulation makes the "balance" between electric needs and environmental impacts worse, not better – although the route itself plainly is not, as TrAILCo's counsel correctly points out, the primary ground for the Sierra Club's opposition.

Accordingly, we will not rehash the merits of this application here, beyond the summary statement above. Instead, we prefer to file what we intend to be a memorandum intended to assist this Commission in the decision before it. In short, we do not approach the remaining discussion from the point of view of trying to persuade the Commission, in one last effort, to adopt the Sierra Club's position on global warming or any other issue. Specifically, we want to take the opportunity to discuss the options before the Commission, because we believe those options extend well beyond simply saying "yes" or "no" to TrAILCo.

What the meaning of "imminent" is.

Earl Melton, among the last witnesses to testify before the Commission, testified that because no significant transmission construction had been undertaken by Allegheny Energy in the last 40 years, the Utilities Division of the PSC felt it incumbent to engage experts to assist their analysis. He further testified that, based upon his experts analysis, he believed that TrAILCo's case for need had been made – in 2014. Mr. Melton candidly acknowledged, however, that the projections of experts – both his and those of others – were not so precise as to make distinctions between outcomes projected for June 2011 and June 2014 particularly meaningful, certainly not when those projections are made in June 2008.

Thus, Mr. Melton concluded that TrAILCo had made a showing of a need for some transmission response to electrical congestion in the Allegheny region of PJM sometime between June 2001 and June 2014, and to the extent that such a showing was made, the need for transmission could be called "imminent."

Webster's 1913 online dictionary defines "imminent" as "threatening to occur immediately; near at hand; impending; - said especially of misfortune or peril." The Merriam Webster online dictionary defines it similarly as "ready to take place; *especially* **:** hanging threateningly over one's head, was in *imminent* danger of being run over." The Merriam Webster etymology of the term, however, offers a slight, but discernible, difference in the temporal character of an event described as imminent, as follows: "Etymology: Latin *imminent-, imminens,* present participle of *imminēre* to project, threaten, from *in-* + *-minēre.*

The fact that imminent may be used to indicate that something is "projected" is, in our judgment, a more accurate description of the use of imminent by Mr. Melton than is the "threatening to occur immediately" definition put on the term by Webster's. At the very least, it is safe to assert that something projected to occur in June 2001 is not "immediate" in June 2008.

Why is that important? The Sierra Club believes that this Commission has more time to consider the issues before it than the statutory deadline, and that the Commission would be well served to use the additional time. Mr. Melton pointed out that one timing matter was the statutory requirement for a decision within the 400-days following the March 30, 2007 filing. That deadline has already been waived once, initially at TrAILCo's request, and again, for a longer period, at the Commission urging.

Why should the Commission now seek additional time for a decision? And if so, how?

West Virginia Cannot Be A "Friend of Coal" and Remain "Open for Business"

First, the "why." The case for "imminence" on action to avoid global warming is, in the view of some, critical right now. In the view of others, the prospect of global warming is something sufficiently far off in the future that we can deal with it later. Although, the Sierra Club plainly favors an earlier rather than a later response to *that* perceived threat, a realist must acknowledge that projections about what will happen in the year 2050 -- as a result of the accumulation of invisible CO_2 in the seemingly remote atmosphere -- commands a significantly smaller audience than, say, the Preakness, coming up this Saturday, or even something months away, like this year's presidential election. The year 2050, when global warming will be upon us in full force, is for most "way off" in the future, at least as an atmospheric reality for the world.

But "global warming" is not remote for the state of West Virginia or the coal industry. Nor is it merely "projected" in the sense that it is uncertain. It is both certain and, under anyone's usage, "imminent." In fact, one can state the date and hour of the arrival of global warming for West Virginia and the coal industry with great precision: it will begin at High Noon on January 20, 2009 – the hour of inauguration of the next president – for the simple reason that all three remaining major candidates for the presidency have unambiguously committed themselves to some form of carbon tax, whether "cap and trade" or direct.

The exact formulation of the Congressional response to global warming is not set in stone. But its outline is clear – in some fashion the perceived cost of CO_2 emissions will be taxed to reward low carbon fuels and penalize high carbon fuels. The Lieberman-Warner bill introduced in the US Senate will be the beginning point for the discussion, but some conclusion to that discussion will occur – soon – certainly as measured against the 2050 due date for global warming. And soon too even as measured by the date for a showing of need for TrAILCo's line sometime between June 2011 and June 2014.

In short, long before sea levels rise 80 feet to put Manhattan below water and generate a massive population dislocation – and long before the first right-of-way is condemned to make way for TrAILCo's line – the cost of coal-fired electricity will have risen dramatically in comparison to the cost of electricity generated from almost any source. Nor can West Virginia take solace from any illusion that "we are all in this together." To be sure, there will be winners and losers in the global warming sweepstakes, and West Virginia is scheduled to be an early loser.

The reasons for this turn of events are based in our state's overwhelming dependence on coal for generation of electricity. Allegheny Energy's December 2007 "Global Climate Change Report," admitted into evidence in the course of the testimony of Mr. Flitman, TrAILCo's President, states plainly that Allegheny is dependent on coal for 95% of its electric generation. [1] Mr. Flitman testified that a carbon tax of $10 per ton

[1] Public sources of information depict an even greater dependence – 97% -- for AEP, Allegheny's electric supply counterpart in the southern part of West Virginia, which also happens to be a partner of Allegheny in the PATH transmission line proceeding which will be filed at or near year-end, and criss-cross the 114-

on Allegheny's annual 45 million tons of CO_2 emissions, will represent a material financial event for that company. It will either pass the cost on to customers – all $450 million dollars, year in and year out for the life-time of all persons who attended the hearings in this case; or Allegheny will become insolvent. As it develops, the Manager's Substitute for Lieberman-Warner, introduced on June 2, 2008, places the initial cost per ton of carbon emission licenses at $22 to $30 per ton,[2] two to three times the $10 figure Mr. Flitman acknowledged was "material."

The nation-wide dependence on coal, however, is at worst 55-45. In short, other regions of the country will be far better situated than West Virginia to absorb the electric cost increases associated with cap and trade because they will simply side step it, by use of natural gas, or nuclear, or other alternatives to high carbon content coal.

Allegheny Energy explicitly acknowledged the potential catastrophe facing it, and its customer in the "Global Climate Change Report" discussed by Mr. Flitman. As explained in AE's report: "Regardless of the eventual mechanism, for Allegheny Energy this quickly becomes a major challenge. Most notable will be the potential impact on customer bills and disproportionate increases in energy cost in areas which have built their energy and industrial infrastructure over the past century based on coal-fired electric generation."[3]

In plain English, very, very shortly – and way before the rest of the country -- West Virginia consumers and businesses will start paying the price of global warming -- not in superficial life-style changes -- but rather in cold, hard cash. The bottom line is simple; West Virginia cannot remain a "Friend of Coal" and, simultaneously, pretend to be "Open for Business."

Committing West Virginia businesses to fund billions of dollars of construction costs, as a means of moving coal from west to east, at a time when those billions could be spent diversifying the fuel source, will leave West Virginia businesses at a significant, long term, competitive disadvantage with their counterparts across the nation.

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mile northwest to southeast route of TrAILCo, by running from southwest to northeast for some 165 miles in West Virginia – which will as a result acquire an unofficial state tattoo, a great big "X".

[2] http://www.vnf.com/news-alerts-264.html

[3] Allegheny Energy's anxiety is not isolated. AEP, its partner in PATH, and other major coal-fired electric utilities, recently formed the "Americans for Affordable Climate Change" a coalition of seven major coal-fired generators that seek to insure that emissions regulation doesn't have too great an impact on their customers' rates.. AACG has engaged a DC firm to lobby on its behalf in connection with the imminent global warming legislation. See the May 27, 2008 entry in the Legal Times blog for Lobbying at http://legaltimes.typepad.com/influence/2008/05/index.html.

Yes, We Can Just Say "NO" !

Mr. Melton testified that the timing pressure on West Virginia to make a decision on the TrAILCo application was, in part, a result of the fact that "we," that is, West Virginia, can't control the decisions of others, i.e., we can't force others to adopt conservation efforts that would potentially obviate the need for TrAILCo's line (or the PATH line to be proposed later this year).

However, passive acquiescence in the decisions of other jurisdictions does not appear to have guided the Virginia State Corporation Commission. That commission, by its decision, recently reaffirmed, turning down AEP's application for a certificate to build the Mason County, West Virginia IGCC plant (which depended on Virginia consumers to share construction costs), effectively overruled this Commission's decision last December approving the AEP application. That IGCC plant will not be built. Period.

The additional effect of the Virginia SCC decision is to place a very large question mark on the four IGCC plants which Dr. Tom Witt pointed to as providing fully 80% of the economic justification of TrAILCo's proposed line. Those four IGCC plants, at a cost of a billion dollars each, were supposed to make the economic decision to go forward with TrAIL a slam dunk; who could be against a total of $5 Billion in construction in West Virginia? Lots of folks, it turns out, at least when they are asked to share the cost – both environmental and financial -- of construction for additional coal-fired electric plants.[4]

The corollary to this has got to be more power for West Virginia to affect others. Mr. Melton's statement that West Virginia cannot order the jurisdictions in northern Virginia, DC or Maryland – whose increased electric usage has created the projected electric congestion along Mt. Storm-Doubs in 2001 –at least seems open to question. Why can't this Commission effectively dictate conservation for those jurisdictions by simply declining to authorize construction of increased transmission capacity to perpetuate energy inefficiency? At the risk of appearing topical, this Commission might

[4] The Virginia SCC is not alone in signaling a regulatory resistance to additional coal-fired electric generation plants. Proposals for new coal fired electric plants have been cancelled by utilities or rejected by regulators in jurisdictions across the country. On October 18, 2007, Kansas rejected a new coal-fired electric generation plant. See http://www.kdheks.gov/news/web_archives/2007/10182007a.htm. In Jerome County, Idaho, Sempra Energy's proposal to build a large plant to burn pulverized coal was rejected and a two-year statewide moratorium on such plants was adopted instead. Most dramatically, Kohlberg Kravis Roberts & Co. and Texas Pacific Group Capital, as part of a leveraged buyout of Texas utility TXU Corp. cancelled TXU's plans to build eight 850-MW coal plants. And Tampa Electric cited uncertainty related to CO2 regulations in October, 2007 when it indefinitely postponed its $2-billion plan to build a 632-MW integrated gasification combined-cycle (IGCC) plant in Polk County. In November, a joint venture of Southern Power and the Orlando Utilities Commission cited similar concern when it scrapped the coal-gasification part of a 285-MW IGCC plant whose construction was about to begin at OUC's Stanton station in Orlando, Fla., replacing it with a conventional gas turbine with combined cycle. See http://enr.construction.com/features/powerIndus/archives/080227-1.asp

adopt a new attitude: "YES WE CAN." Or in the spirit of bi-partisanship, "YES, WE CAN JUST SAY 'NO' !"

At the very least, this Commission has incentives to extend the time frame for decision. Why commit West Virginia customers to the 4.2%[5] share of the costs of TrAILCo's line, and make virtually inevitable West Virginia's absorption of a share of PATH's multi-billion dollar construction costs, at a time when the viability of the project to "*move large amounts of coal from west to east*" is clearly suspect.

In particular, why approve a Joint Stipulation that commits the state to a significant portion of construction costs at a time when that Joint Stipulation, by inadvertent omission or otherwise, does not require TrAILCo to waive constitutional arguments against West Virginia's collection of the Governor's tax.

And why rush to a decision on TrAILCo's proposal, when the issue of transmission congestion and purported reliability issues will be before this Commission again by the end of this year – at the latest – when PATH files its application. If Allegheny Energy is committing in its Joint Stipulation to complete studies of re-conductoring and double-circuiting as part of the PATH filing (and it claims it is), why can't those studies be viewed at the time when the Commission assessed the pending TrAILCo application, even if it means delaying a decision on TrAILCo. And why, given the delays that have already occurred, should the Commission now rush to a decision based upon a 2006 RTEP, which has already been superceded by a 2007 RTEP for PATH, and possible a 2008 RTEP.

Granting the TrAILCo application at this point serves the interests of one party and one party only -- Allegheny Energy stockholders. All other interested parties – including this Commission – will be better served by having an updated RTEP, a full understanding of the form of carbon taxation legislation in 2009, and a full appreciation of the changes in the market for coal-fired electricity, all of which will be forthcoming shortly. The fact that Allegheny Energy may be ready for a decision is no reason to commit West Virginia taxpayers, consumers and businesses, when the matters affecting their pocket book to the tune of billions of dollars are all up for grabs.

The "how" part of the delay decision is straightforward. The most obvious way to do it is simply to request that TrAILCo itself waive the 400-day statute again. With the evidentiary record before this Commission, what possible ground could TrAILCo have for saying no. Certainly any claim that they need to start construction now to meet a June

[5] Governor Manchin's contemplated tax on the TrAILCo line was intended to effectively reverse the imposition of 4.2% of TrAILCo's costs on the state of West Virginia. Governor Manchin advocated a "beneficiary pays" formula under which the jurisdictions receiving the additional electric supply, i.e., the electricity supply beneficiaries, paid the entire costs. Implicit in Governor Manchin's tax and his "beneficiary pays" argument is a complete rejection of the purported "reliability" justification for TrAILCo's line, since that justification would, of course, make West Virginia a beneficiary from whom contribution may be justly expected. Clearly, the Governor recognizes that the TrAILCo line is built to move coal from west to east, and nothing else.

2011 delivery date is thin at best. And the risk they take of saying "no" to a Commission request, is that the Commission itself will say "no" to their application.

Alternatively, the Commission could grant the application but condition going forward with any right of way acquisition or construction until after completion of, and Commission consideration of, the reconductoring and double circuiting studies that will – by the terms of the Joint Stipulation – accompany the partially Allegheny owned PATH application in November of this year. Effectively, this would merge the two cases. Any party to this proceeding could, incident to its participation in PATH, move to reopen the TrAILCo decision based upon the results of the studies promised for PATH.

Or the Commission could deny the TrAILCo application without prejudice to resubmission in concert with the PATH application at year-end. Again, what possible ground would exist for refusal to go forward on terms that allow the Commission to assess all of the factors relating to the need for additional transmission capacity.

Meeting a deadline created by PJM's questionable computer model -- and which the Commission's own expertise describes as somewhere between June 2011 and June 2014 -- should take a back seat to a realistic assessment of all of the matters that will be before this Commission, both in November/December 2008 as a part of PATH, and in January 2009 and following as the US Congress addresses carbon emissions as a legislative matter.

The overriding need at this moment – the matter which is truly "imminent" – is for the Commission to exercise its power, *all* of its power, to protect the interests of the citizens of West Virginia.

Respectfully submitted,

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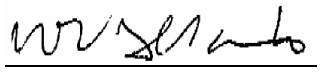

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