Case No.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SIERRA CLUB, INC.

PETITION FOR SUSPENSION AND REVIEW OF FINAL ORDERS OF THE PUBLIC SERVICE COMMISSION IN CASE NO. 07-0508-E-CN

DATED AUGUST 1, 2008 granting Trans Allegheny Interstate Line Company a certificate of public convenience and necessity for the construction of a high voltage interstate electric transmission line, not later than June 30, 2011, pursuant to PJM 2006 projections of increased electric demand,

AND FEBRUARY 13, 2009 denying the Sierra Club's motion for reconsideration and request for continuing prudence review of the August 1, 2008 Order, based upon the projected decline in future electric consumption acknowledged by PJM in October, 2008 Order.

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Filed: March 13, 2009

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I. Preliminary Statement

The Sierra Club, Inc., an intervenor at the Public Service Commission (Commission) below, respectfully requests that this Court enter an order vacating the Commission's August 1, 2008 and February 13, 2009 orders, issued under authority of W. Va. Code § 24-2-11a, granting a certificate of necessity and convenience to Trans Allegheny Interstate Line Co. (TrAILCo), a wholly-owned subsidiary of Allegheny Energy, Inc. The August 1, 2008 order would permit TrAILCo to construct – by the critical date of June 30, 2011 – a high voltage (500kV) electric transmission line from southwest Pennsylvania, across West Virginia, to a termination point in western Virginia.

TrAILCo's March 30, 2007 application, and the Commission's August 1, 2008 initial order granting the certificate, were both expressly predicated on a five-year projection of increased electric transmission needs by June 30, 2011, referred to as the "2006 RTEP" (Regional Transmission Expansion Program). The 2006 RTEP was prepared by PJM, the non-governmental, regional transmission organization that operates the electric grid in a thirteen-state area.

In the 2006 RTEP, PJM projected increased demand – by June 30, 2011 – for electricity in the Washington, DC market during the August peak load period associated with high air-conditioning use. Because PJM's computer model projected that the Washington, DC area does not have adequate electric generation capacity nearby, PJM in 2006 ordered Allegheny Energy to construct a line – by June 30, 2011 – to transmit electricity from its available generation capacity to the west (95% of which is coal-fired). In 2007, on the basis of the same computer-modeled process, PJM ordered Allegheny Energy and American Electric Power (AEP) to construct PATH, a second transmission line (which would also cross West Virginia en route to New Jersey) to serve projected increases in demand for electricity in the PJM mid-Atlantic market area.

However, following the historic crash of financial markets in September, 2008, PJM concluded that its computer-modeled forecasts for increased electricity had to be revised downward. In October, 2008, PJM issued an order to Allegheny Energy and AEP, joint venturers in PATH, extending until June 30, 2013, an earlier June 30, 2012 deadline for delivery of PATH's electric transmission line. The PJM order extending PATH's delivery date brought into question the continuing validity of PJM's earlier projections which had been the basis for the PJM's order to Allegheny to build the TrAILCo proposed line which is the subject of this proceeding.

As a result, on November 23, 2008, the Sierra Club filed a petition to make the August 1, 2008 order granting TrAILCo's application subject to a continuing prudence review, under W. Va. Code 24-2-11b. On February 13, 2009, the Commission issued an order rejecting the Sierra Club's petition for continuing prudence review, along with an August 6, 2011 motion for reconsideration of the August 1, 2008 order granting TrAILCo's application.

In its February 13, 2009 review of the Sierra Club's argument that TrAILCo had not sustained its burden of proof to show the need for the electric transmission line by June 30, 2011, the Commission stated explicitly that "The Sierra Club is correct with regard to timing…" However, the Commission nonetheless reaffirmed the August 1, 2008 order's grant of a certificate of convenience and necessity to TrAILCo, reasoning that merely because "the critical need for TrAIL may not manifest until the year 2014 or 2015 does not contradict the evidence that there is a need for TrAIL."

PJM has made no finding of need predicated on any date other than June 30, 2011, and TrAILCo has not filed an application for certificate of necessity and convenience based on any showing of need other than the now obsolete 2006 RTEP's June 30, 2011 deadline. Additionally, the February 13, 2009 decision's grant of a certificate of necessity on the basis of the equally obsolete 2007 studies by Commission Staff's expert witnesses cannot sustain the issuance of a certificate.

Because the 165-mile transmission line will cost in excess of $1 billion dollars, all of which will be passed through to electricity consumers, the certificate of convenience and necessity, issued without an adequate showing of need, must be rescinded.

Moreover, the Commission's August 1, 2008 order failed to consider the impact of proposed carbon taxation on the customers of Allegheny – which generates 95% of its electricity from coal and emits 45 million tons of CO2 annually – and will pass any direct carbon tax (or indirect cap and trade costs) through to its electric customers, whom Allegheny acknowledges are disproportionately dependent on high-carbon, and soon to be high-cost, fuel.

Further, the Commission's failure to address – at all – the environmental impact of the increased utilization of old, highly inefficient coal-fired electric generation capacity to supply electricity to the Washington DC market, unjustifiably disregards the mandate of W. Va. Code §24-2-11a that the Commission predicate a certificate on a finding of a balance between electric needs and environmental harm.

No finding of balance can be sustained where the single most important environment impact is not even addressed in the Commission's 183-page decision, where TrAILCo concedes it never assessed the impact of increased CO_2 emissions, and where PJM's Planning Chief acknowledged, under oath at the evidentiary hearing in this proceeding, that PJM gave no consideration whatsoever to environmental impact in its 2006 (or any other) RTEP.

Finally, the Commission's willingness to require the citizens of this state to absorb nearly three-quarters of the route impact (120 miles out of a total of 165 miles) – while all of the electricity transmitted across the line will be delivered to satisfy the air-conditioning needs of Washington, DC – is an arbitrary allocation of regulatory burdens and cannot be sustained as a balancing of electrical and environmental burdens. This is particularly the case where West Virginia has absolutely no need for additional electric supplies itself, having for years exported fully 2/3 of the 90 million megawatt hours of electricity it produces annually, and consuming less than 30 million megawatt hours itself, a number which is declining.

The fact that the August 1, 2008 decision granting TrAILCo's application for a certificate was based on an extended *ex parte* communication with the Commission Staff – which caused the Commission Staff to withdraw its prior aggressive opposition to TrAILCo's application in exchange for a $41.4 million dollar payment to state agencies and industrial energy users – removes any basis for the deference that this Court might ordinarily extend to the August 1, 2008 or February 13, 2009 decisions, in an area as technically complex as electric transmission, and argues strongly for very vigorous judicial scrutiny.

II. Timeliness of Appeal

Appeals from the Public Service Commission (Commission) to the Supreme Court of Appeals are governed by W. Va. Code § 24-5-1, entitled "Review of final orders of commission, which provides in pertinent part that "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." Under the Commission's Rules of Practice and Procedure at W. Va. CSR § 150-1 et seq., a decision of the Commission is not final until the Commission rules upon any pending motions for reconsideration filed within ten (10) days of a Commission order. See 150 CSR 19.3.

On August 1, 2008, the Commission issued an order granting the application of Trans Allegheny Interstate Line Company (TrAILCo), a wholly owned subsidiary of Allegheny Energy, Inc. (Allegheny Energy), for a certificate of necessity and convenience to construct an interstate electric transmission line, commonly referred to as TRAIL. Five days later, on August 6, 2008, the Sierra Club filed a Petition for Reconsideration of the August 1, 2008 decision. On November 23, 2008, the Sierra Club filed a motion for continuing prudence review under W. Va. Code § 24-2-11b.

On February 13, 2009, the Commission issued a final order granting TrAILCo's petition for reconsideration in its entirety, and denying in their entirety the motion for reconsideration and continuing prudence review of the Sierra Club.

This Petition for Suspension is filed on March 13, 2009, within the thirty-day period for appeal of the February 13, 2009 order provided by W. Va. Code § 24-5-1.

II. Course of Proceedings Below

On March 30, 2007, TrAILCo filed an application for a certificate of necessity and convenience under W. Va. Code § 24-2-11a to construct "TRAIL," originally a high-voltage (500 kV) electric transmission line from a point beginning in southwest Pennsylvania, crossing the northeast portion of West Virginia, and terminating near Warren, Virginia, in the western portion of the state. The electric transmission line was originally proposed to be 215 total miles in length. Some 1.2 miles of line have been approved in Pennsylvania, and 36 miles in Virginia. Originally 114 miles, crossing parts of Monongalia, Preston, Tucker, Grant, Hardy and Hampshire counties, was proposed to be built in West Virginia. As a result of the subsequent adoption of the so-called Grafton Area route, an additional 6 miles was added to the original 114 mile proposal. Thus, as approved by the Commission, 120 miles of the proposed 215 mile line, or 56% of the initially proposed line, would be located in West Virginia. If the Pennsylvania portion of the line is limited to the presently approved 1.2 miles, and the remaining 53 miles of line proposed in Pennsylvania are not approved, the 120 miles located in West Virginia will constitute 74 % of the resulting 162 total miles.

No electricity transmitted on the TRAIL line is proposed to be sold to retail customers in West Virginia. The state is already a very large net exporter of more than 60 million megawatt hours – more than two-thirds of the total 90+ million megawatt hours of electricity generated annually in the state. The state's own consumption of electricity is approximately 30 million megawatt hours per year, and is declining, not increasing. All of the electricity transported by the TRIAL line will be generated in Pennsylvania and delivered to the PJM's mid-Atlantic region, specifically, the Virginia and Maryland suburbs of Washington, DC.

TrAILCo's March 30, 2007 application was expressly, and exclusively, based on the issuance of an order to Allegheny Energy to complete construction of increased transmission capacity – not later than June 30, 2011 – by PJM, a Regional Transportation Organization (RTO) which operates the electric grid for an area encompassing all of West Virginia, Pennsylvania and Virginia and ten other states. The need for TRAIL was asserted in PJM's 2006 Regional Transmission Expansion Program (RTEP), an annual review of transmission capacity which PJM conducts. The 2006 RTEP purportedly identified 12 "reliability" issues in West Virginia which justified the $1 billion construction project.

The increased transmission capacity was justified, according to PJM and TrAILCo, by the need to accommodate the projected increases – by June 30, 2011 – in the demand for air-conditioning, during the latter weeks of August which are the peak load periods in Washington, DC and its environs. Because the June 30, 2011 increased air-conditioning demand would, in the absence of increased local generation capacity, place increased loads on transmission lines supplying the electricity from the West, PJM concluded in its 2006 RTEP, and TrAILCo argues on the basis of the RTEP, that there is an unacceptable future risk of "blackouts" which will place at risk the electricity supplies of tens of thousands of West Virginians – even though West

Virginia, a very large net exporter of electricity, obviously has no need for the increased transmission capacity to satisfy their own electric needs. PJM, which operates the electric grid for its member companies, has authority to order members to build additional electric transmission capacity; PJM has no authority to order construction of electric generation capacity.

On August 30, 2007, TrAILCo amended its application to accommodate changes in the cost pass through provisions of an order of the Federal Energy Regulatory Commission (FERC) which had jurisdiction over the rates TrAILCo, an interstate marketer of electricity, could charge. On the same date, TrAILCo filed an analysis of the Grafton Area alternative route.

Numerous parties intervened in the Commission proceeding below, including CPV Warren, LLC, the developer of a natural gas fired electric generation plant located very near the Warren, Virginia termination of TRAIL, and a competitor of the lower cost, coal-fired electric suppliers, including TrAILCo's parent corporation, Allegheny Energy, whose electricity would be transmitted by TRAIL into the mid-Atlantic market. Interveners included the West Virginia Energy Users Group (WVEUG), some of the largest industrial users of electricity in West Virginia, and the Consumer Advocate Division (CAD) of the Commission

Additional interventions were filed by numerous individuals and by community associations, , both pros se and by counsel, whose homes and small businesses were located in the proposed route of TRAIL. The Bahavana Society, a monastery of Buddhist Monks which had located in the mountains of West Virginia to minimize contact with the industrialized world, intervened. And the Sierra Club intervened primarily because of the impact of increased emissions of green house gases that would necessarily result substantial increased utilization of old, inefficient, coal-fired electric generation plants to satisfy Washington, DC's projected demand – <u>in June 30, 2011</u> – for air conditioning. Allegheny Energy depends upon coal for 95% of its electric generation, and emits annually approximately 45 million tons of carbon dioxide (CO_2) – the green house gas primarily responsible for global warming.

On January 7, 2008, two days before the evidentiary hearing commenced, TrAILCo and CAD announced that they had entered into a partial stipulation relating to TrAILCo's application, pursuant to which CAD agreed not to oppose TrAILCo's application, and TrAILCo agreed, *inter alia*, to provide "free" electricity to individual land owners whose property TRAIL crossed.

After extended discovery, and public meetings at a number of locations across West Virginia, the Commission conducted an evidentiary hearing in Charleston between January 9 and January 19, 2008 generating a transcript in excess of three thousand pages, the longest in the Commisssion's history. In the course of the ten-day evidentiary hearing all parties presented extensive expert testimony and introduced numerous exhibits, all on the record and subject to the procedures that have come to be associated with administrative due process, including cross examination of witnesses.

In the course of the evidentiary proceeding the Commission Staff presented testimony, from its various division personnel and outside experts, in opposition to TrAILCo's application.

Staff presentations at the evidentiary hearing included (1) staff expert testimony that the alternative route of the line directly across Maryland – many miles shorter than the proposed 215 mile line – would have a substantially reduced environmental impact on the citizens of all affected states, and (2) outside expert testimony that the purported June 30, 2011 deadline for delivery of the expanded transmission capacity represented by TRAIL had not been demonstrated. The Commission Staff also filed an extensive post-hearing brief on February 29, 2008, outlining in detail its position that, under settled criteria, TrAILCo had failed to sustain its burden of proof in the evidentiary hearing before the Commission.

Notwithstanding its prior vigorous opposition to TrAILCo's application, on April 15, 2008, the Commission Staff announced that it had entered into a Joint Stipulation with TrAILCo, in which CAD and the WVEUG had joined, pursuant to which the Commission Staff agreed to withdraw its prior opposition to TRAIL and, instead, to actively support the application. In exchange for the withdrawal of the Commission Staff's opposition, TrAILCo agreed to make financial payments to various state agencies totaling approximately $41.4 million dollars, to abate the pass through to West Virginia industrial customers of certain costs and to locate an operations center for the TRAIL line in West Virginia. TrAILCo also modified the route of the transmission line to select a so-called Grafton Area route. The revised route by-passed the majority of the individual land owners in the Morgantown area who had intervened in opposition to TRAIL.

At a hearing on May 30, 2008 to receive comments on the April 15, 2008 Joint Stipulation, the Commission denied the Sierra Club's motion to introduce into evidence approximately 3,000 pages of materials obtained pursuant to the Freedom of Information Act (FOIA) documenting extensive ex-parte communications between TRAIL representatives, representatives of the Commission Staff and CAD, and the office of the Governor, leading up to the signing of the April 15, 2008 Joint Stipulation in which the Commission Staff withdrew its opposition to the TRAIL application. Additionally, the Commission granted the Commission Staff's motion to quash the appearance of James Ellars, the Commission Staff employee who had personally flown by helicopter over every mile of the many routes considered by TrAILCo, including the shortest route through Maryland which, he had testified previously, had by far the least environmental impact of all alternative routes.

At the May 30, 2008 hearing, the Commission Staff's witness, Earl Melton, Director of the Engineering Division of the Commission, acknowledged that he relied in part on *ex-parte* presentations by TrAILCo representatives as a basis for his decision to concur in the April 15, 2008 Joint Stipulation which withdrew opposition to the application to build the TRAIL line by June 30, 2011. Mr. Melton also acknowledged his continuing belief, despite the April 15, 2008 Joint Stipulation, that the need for the TRAIL line had not been demonstrated for any time period in advance of 2014, three years past the 2011 delivery date commanded by PJM. Mr. Melton testified that he was prepared to waive the requirement for a showing of need for the line on June 30, 2011 because of TrAILCo's willingness to locate an operations center for TRAIL in West Virginia.

On August 1, 2008, the Commission, accepted the arguments of TrAILCo and the arguments of the Commission Staff (following the receipt of the April 15, 2008 Joint Stipulation), that TrAILCo had demonstrated its need for the certificate of convenience and necessity in order to meet the PJM dictated deadline – June 30, 2011 – for increased transmission capacity to handle the projected increased demand for air-conditioning in Washington, DC.

In the course of the TrAILCo proceeding at the Commission, TrAILCo and PJM witnesses referred to PATH, a second proposed high voltage electric transmission line to be built by a partnership consisting of Allegheny Energy and American Electric Power. The PATH line was proposed to originate at the John Amos plant in Winfield, West Virginia and extend across the state, intersecting en route with TrAILCo's proposed line, and terminate in New Jersey. In the TrAILCo proceedings at the Commission, PJM witnesses testified that the increased energy demands necessitating TRAIL, also necessitated PATH. The August 1, 2008 decision referred to the 2006 and 2007 RTEP's, jointly, as supporting the finding of need for increased transmission – by June 30, 2011. August 1, 2008 Decision at p. 25.

On October 31, 2008 Potomac-Appalachian Transmission Highline, LLC (PATH), the joint venture of Allegheny Energy and American Electric Power formed to construct the PATH line, announced that PJM had extended, from June 2012 to June 2013, the in-service date for delivery of PATH. The basis for PJM's October 31, 2008 change of in-service date for PATH was, Allegheny Energy and AEP announced, the "result of an ongoing, dynamic process by PJM that considers the projected growth in electricity demand, the planned construction and retirement of power plants, the effect of demand-response initiatives and other factors."

More succinctly, Michael Morris, Chief Executive of AEP (Allegheny Energy's partner in PATH), was quoted an article titled "Surprise Drop In Power Use Delivers Jolt To Utilities," published in the November 21, 2008, *Wall Street Journal*, as stating that:

> "The message is: be cautious about what you build because you many not have the demand" to justify the expense.

Exhibit B to November 23 Motion for Continuing Prudence Review.

On November 21, 2008, Mr. Hilldebrand filed a motion for reconsideration of the August 1, 2008 decision, based upon the dramatic decreases in projected demand for electricity. And on November 23, 2008, the Sierra Club, citing the same evidence, filed a motion for continuing prudence review under W. Va. Code § 24-2-11b, which provides that a certificate of convenience and necessity for an interstate electric transmission line may be subjected to a continuing prudence review and may be rescinded if the certificate is found not to be warranted, after review, if the lines construction takes more than one year; TrAILCo had previously announced a two and one-half year construction schedule.

Both of the November motions were clearly and unambiguously predicated on the widely reported, dramatic decrease in projected demand for electricity which had been the basis for PJM's October 31, 2008 decision to extend the delivery date from June 2012 to June 2013 for delivery of PATH. PATH is the interstate transmission line justified by PJM's 2007 RTEP (PJM's annual review of electric transmission expansion capacity for the year 2012), which was issued one year after PJM's 2006 RTEP, which resulted in the order to build TRAIL.

On February 13, 2009 the Commission issued an order granting TRAILCO's motion for reconsideration and denying the motions for reconsideration and continuing prudence review of the Sierra Club and intervenor Thomas Hilldebrand. The Commission sustained the August 1, 2008 order. Regarding the argument that TrAILCo did not establish the need for the TrAIL project by June 30, 2011 – the PJM-mandated delivery date for the TRAIL line – the February 13, 2009 order stated that "The fact that the critical need for TrAIL may not manifest until the year 2014 or 2015 does not contradict the evidence that there is a need for trail. Feb 13, 2009 Decision at p. 3.

However, notwithstanding PJM's issuance of the order to Allegheny Energy, on the basis of the 2006 RTEP's projected increase in electric demand by June 30, 2011 – and notwithstanding TrAILCo's insistence throughout the ten-day hearing that the certificate of need could not be delayed a moment longer, if they were to meet the critical June 30, 2011 deadline -- the February 13, 2009 order, with a dead-pan that would have made Jack Benny jealous, casually acknowledged that: "The Sierra Club is correct regarding timing..."

IV. Statement of Facts

A. The Nature of Judicial Review in a Proceeding with a 3084-Page Transcript.

The 3084-page transcript of the evidentiary hearing from January 9 through January 19, 2008, and the 183-page August 1, 2008 decision granting TrAILCo's application for a certificate of convenience and necessity, defy easy summation. The physical management of the record below is itself a burden which, by sheer virtue of its size, makes meaningful judicial review a challenge.

In the following section of this Petition, the Sierra Club lays out a summary of the evidence on the controlling issues of need and environmental impact. Plainly, any effort to summarize the 10-day hearing below, or the two lengthy Commission opinions, is susceptible to challenge as incomplete. But the Sierra Club suggests that this Court recognize that the August 1, 2008 decision itself disregarded substantial portions of the evidence in the proceeding. In plain terms, this Court is in no way disadvantaged by the fact that it does not wade, page-by-page, through the entire 3084-page transcript, or even the 183-page August 1, 2008 opinion.

Nor should this Court be in any way deterred from aggressive judicial review merely because it may not be able to facilely differentiate between a "static VAR compensator" and an "MVAR capacitor." A superficial acquaintance with the concept of substantial evidence, and passing familiarity with the requirements of due process, are the primary tools needed to guide this Court's review.

Finally, this Court will be greatly assisted -- ***very*** greatly assisted -- in its review of the August 1, 2008 and February 13, 2009 orders, by a reading the uncompromisingly blunt assessment of the evidence in the Commission Staff's February 29, 2008 Proposed Order, to which the Sierra Club makes frequent reference below.

B. The Purported Electrical Need

Neither TrAILCo nor PJM ever contended that the proposed interstate transmission line was necessary for any electrical *supply* need in West Virginia. And for obvious good reason. Dr. Ron Klein, a retired professor of electrical engineering at West Virginia University, testified on behalf of interveners Lauren Run Community Watershed Association and Halleck-Triune Community, that West Virginia was a very large net exporter of electricity:

> Based on 2005 statistics, West Virginia generated 93,626,286 megawatt-hours (Mwh), and West Virginia retail sales consumed 30,152,069 MWh, yielding a margin

> of 63,474,2 17 MWh of excess generation. West Virginia exports more than twice the amount of electric energy than it consumes.

December 5, 2008 direct testimony of Ronald Klein.

PJM's 2006 RTEP concluded that projected increases – by June 30, 2011 – in the Washington, DC area's demand for air-conditioning during the August peak load period, would siphon enough electricity from the western transmission lines to create a risk of blackouts in West Virginia. These so-called "reliability" violations appeared from computer-modeled demonstrations of the June 30, 2011 electric grid. These reliability violations – claimed to be 12 in number, but in fact 4 -- were all predicated on data entered into PJM's computer-model relating to available generation, transmission capacity, and likely decreases from conservation measures between 2006 and 2011, among other things, in short, the load forecast.

The violations are best understood if discussed in reverse chronological order. Violations 10 through 12 were all associated with purported inadequacies along the Mt. Storm to Prunytown line in Pennsylvania. It was undisputed that these problems could be corrected by the installation of a static VAR compensator at the relatively inexpensive cost of $50 million. No one asserted at the January 2008 evidentiary hearings that violations 10 to 12 alone would justify the $1 billion dollar construction cost of TRAIL.

Additionally, violation number 9 was acknowledged from the beginning of the January 2008 hearings to be a violation that would only occur in 2014 and was – ***for that reason alone*** – summarily dropped from the discussion of need by all parties, including TrAILCo. Of course, the silence with respect to need to correct violation number 9 in 2014 is now telling, given the Commission's concession in its February 13, 2009 decision that the Sierra Club was correct with regard to the timing of the need for the TrAILCo line, and the Commission's assertion that it would be needed someday, in 2014 or perhaps 2015.

Critically, no one argued -- or even conceived of arguing -- at the January 2008 evidentiary proceeding that the other 11 "reliability" violations would not generate a need for TrAILCo's line would until June 30, 2014, for the obvious reason that such an argument would have summarily ended the proceeding with a Commission order denying the application.

Instead, at the January 2008 evidentiary hearing, TrAILCo argued that the remaining violations, 1 through 8, along the Mt. Storm to Doubs line (the now existing electric transmission line running from the eastern panhandle of West Virginia into western Virginia) were the overriding justification for the TRAIL line. As explained at the hearings, increased demand from the Washington, DC market -- by June 30, 2011 -- would stress the transmission capacity in the west to the point of an unacceptable risk of a "violation," i.e., an electrical short fall that might cause a "blackout."

Violations 1 through 8 were acknowledged to be duplicative. That is, violations 1 to 4 were generated by stressing Mt. Storms to Doubs line, in the computer-modeled grid, under the

operating criteria or "tests" applied by PJM. Violations 5 through 8 were generated, by stressing the identical stretch of transmission line, under the slightly different standards applied by Dominion Resources, the owner of the portion of the TRAIL line to be constructed in Virginia. However, both sets of violations involved the same problems at the same electric facilities – the possibility of electrical failures that threatened blackouts.

The January 9 to 19, 2008 hearings focused to a significant degree on the validity of the assumptions that went into PJM's computer model – how much additional generation capacity was likely to come on stream by June 30, 2011, what opportunities existed to reduce demand in the DC area by adoption of conservation programs (commonly referred to as DSM – or "demand side management"), what alternatives, if any, to the construction of TRAIL, existed to fix the projected transmission inadequacy, at potentially lower economic costs or environmental impact.

These issues are reviewed here solely to demonstrate that the evidentiary record, as it existed on January 19, 2008, clearly compelled a rejection of TrAILCo's application. This is necessary – despite the Commission's February 13, 2009 concession that no showing of need by June 30, 2011 has been made – to demonstrate how the justification for TrAILCo's application has now shifted, from a purportedly clear and present need for the immediate commencement of construction on the line, to the now insupportable assertion that it may be needed in 2014 or 2015. To be sure the 2014 to 2105 time frame encompasses a degree of foresight well beyond even PJM's crystal ball, whose computer models only go out five years into the future. In other words, even PJM has not yet projected needs in 2014, let alone suggested that such needs warrant issuance of a certificate of need to TrAILCo to spend $1billion dollars today to meet those as yet unforeseen needs.

So what was the evidence of need -- by June 30, 2011 -- at the end of the January 19, 2008 hearing?

C. Multiple Evidentiary Deficiencies in TrAILCo's Application

Following the close of the ten-day hearing in January 2008, numerous interveners and the Commission Staff filed briefs requesting that the Commission deny TrAILCo's application for a number of reasons related to both the failure to show need, and the failure to show a balance between electric benefits and environmental impact. A review of the principal failings follows.

1. Generation.

The Commission Staff (who will defend the August 1, 2008 and February 13, 2009 orders before this Court) proposed that the Commission find that PJM erroneously omitted from its calculation of the electricity available in the load pocket associated with the Washington, DC metropolitan area 2500 MW of electric generation capacity in the eastern region of PJM, which had signed so-called ISA's (Interconnection Supply Agreements) with Dominion prior to the

time Dominion joined PJM, but which did not yet have ISA's with PJM itself. The Commission Staff argued that the Commission should deem PJM's rejection of the 2500 MW, solely because it did not have signed ISA's with PJM, to be "***truly insignificant***" because that excluded eastern generation could supply the demand for electricity in the Washington, DC "load pocket" and thereby eliminate the computer-modeled "violations" in the western PJM region, to which PJM looked exclusively to "find" electric supplies to satisfy the air-conditioning needs of Washington, DC. See Commission Staff Proposed Order dated February 29, 2008 at page 7.

2. Line Rating.

There is a single electric transmission line running from Mt. Storm in West Virginia to the Doubs substation in western Virginia. No evidence was ever introduced that the portion of the line in West Virginia was constructed of any different materials, or pursuant to any different design capacity than the portion of the line in Virginia. Indeed, no evidence was introduced that the lines were not constructed at the same time by the same contractor pursuant to a single construction project. See Commission Staff Proposed Order dated February 29, 2008 at page 8.

The line rating for the portion of the line located in West Virginia is 3300 MVA, a line rating which shows ***no*** risk of electrical failure when subjected to the PJM computer modeled stresses for presumed demands for electricity in June 30, 2011. However, PJM and TrAILCo argued at the January 9 to 19, 2008 hearing that the line rating, on the portion of the Mt. Storm to Doubs line owned by Dominion Resources, was 2598 MVA, a line rating which risked failure when placed under the PJM computer-modeled stress.

This lower rating was a function of ground clearance, which could be corrected by either raising the height of the towers supporting conductors on the line, or removing dirt below the conductor to increase the ground clearance. Or the line, which was of substantial age, could be re-tensioned to eliminate "sag." See Commission Staff Proposed Order dated February 29, 2008 at page 8-9.

Additionally, the Commission staff suggested that the line rating of the Dominion owned portion of the Mt. Storm to Doubs line could be "reconductored," i.e., the old conductors be replaced with newer, more efficient models. Importantly, the evidentiary dispute at the January 9 to 19, 2008 hearing was over the time required to reconductor, with TrAILCo witnesses claiming it would require five years – a time frame beyond the PJM-ordered delivery date of June 30, 2011 – or three years, which might have meant the June 30, 2011 delivery date for increased transmission capacity (albeit via re-conductoring rather than a new line) could be met. See Commission Staff Proposed Order dated February 29, 2008 at page 8-9.

Of course, given the February 13, 2009 finding that "the Sierra Club is correct" with regard to timing, and the need arises until 2014 or 2015, the 3-year vs. 5-year debate is meaningless. In short, so long as they start sometime this year (2009), TrAILCo's five year re-conductoring plan would still meet the Commission's newly forecast need date.

3. Black Out Misrepresentation.

The Commission Staff further proposed on February 29, 2008 that the Commission reject evidence TrAILCo had introduced of a Location Deliverability Area (LDA) study conducted by PJM that purportedly supported its claims that 77,000 West Virginians along the Mt. Storm – Doubs line would face a risk of black outs, and another 66,000 West Virginians would be placed at risk who depended on the Meadow Brook Substation. The LDA study, which TrAILCo's witness represented to the Commission as supporting TrAILCo's "blackout" analysis along the Mt. Storm-Doubs line was, in fact, rejected by PJM. See Transcript, January 11 at pp. 22-23. The claim of blackouts was, the Commission Staff concluded, an "illusion." See Commission Staff Proposed Order dated February 29, 2008 at page 10. And TrAILCo's own witnesses conceded that the Meadow Brook line issues (so-called reliability "violations" 10 through 12) could be fixed by a static VAR compensator (SVC) at a cost of $50 million dollars (a $950 million dollar savings over the cost of TRAIL).

4. "Find a Way To Move Large Amounts of Coal"

In the course of day one of the evidentiary proceeding, Stephen J. Herling, Planning Chief for PJM, stated that Allegheny had initially "proposed a line for another purpose." Transcript, January 9, 2008 at p. 57 and 150. That reason, the PJM Planning Chief freely acknowledged, was in response to a directive, verbalized as a question by a FERC official at a 2005 conference in Charleston, West Virginia. The directive-question was straight forward: "what would it take to move…large amounts of coal." Mr. Herling personally attended the conference at which this query was posed, and the later RFP denominated "Project Mountaineer" was PJM's response. The initial Allegheny proposal to build TRAIL was submitted in response to this RFP. See Transcript, January 9, 2008 at pp. 52, 157.

Based on this evidence, the Commission staff on February 29, 2008 proposed that the Commission find that the 2006 RTEP's discovery, a short time later, of 12 purported "reliability" violations, particularly in the absence of ***any*** violations in the preceding year's 2005 RTEP, made the "assertion that TRAIL is proposed to serve electrical need rather than money making purposes is at the very least suspicious." See Commission Staff Proposed Order dated February 29, 2008 at page 11.

5. PJM Load/Energy Forecasting Model Flaws.

At the January 11, 2008 evidentiary hearing, the Commission Staff observed that TrAILCo did not file with its March 30, 2007 application any information or data related to PJM's load forecasting process or model, and objected to the introduction of rebuttal testimony from a PJM witness submitted later, in rebuttal of criticisms of the model from the Commission Staff's witness, Dr. Ileo and Halleck-Triune/Laurel Run witness, Dr. Klein. See Transcript, January 11, 2008 at pp. 94.

Also at the third day of the January evidentiary proceeding, the PJM witness who had authored a white paper on their computer model that forecast future loads, explained the manner in which the model worked. Among other things the witness, John M. Reynolds, testified on cross examination by Mr. Gregg, counsel for CAD, as follows:

> Q. I went through your entire white paper, as well as your 2006 forecast, load forecast. Would I be correct in making the observation that I did not see the words demand-side management --- or the phrase demand-side management or the word conservation mentioned at all?
>
> A. I'm sure you are correct. You saw neither of those terms in that white paper.
>
> Q. Given that and given the fact that, yes, that it's not an explicit factor that goes into your forecast, how does PJM account for demand-side management activities and conservation activities in its different states and its different zones?

Transcript, January 11, 2008 at pp. 104 – 105 (emphasis added).

In response to Mr. Reynolds distinguished between demand management programs that PJM controlled and those, such as government mandated conservation programs, that PJM did not control. Again, the PJM witness, in a colloquy with Mr. Gregg, testified as follows:

> Q. However, once again, the impact on your forecast would only be on an after-the-fact basis, after it's already --- the savings have already occurred?
>
> A. Correct.
>
> Q. In other words, you wouldn't be forecasting those savings?
>
> A. Correct. The philosophy there is that before that has occurred, we don't know it would occur. So in the planning perspective, we need to plan to serve that purpose, because you don't know whether or not it's going to be off in the system.
>
> Q. And your load forecast, is the basis of the stress tests on the transmission system that resulted in showing the need for this line?

> A. Could you repeat that, please?
>
> Q. In your load forecast, is the basis of the, I'm going to call it a stress test, the load 1 deliverability test and the generator deliverability test, that showed the need for this line?
>
> A. It would have been what I referred to as our forecast of the unrestricted load, then decrement it by the amount of load management that would be important. So they take the full load and then decrement the anticipated load management.
>
> Q. As we said, that's only for those that you actively control?
>
> A. Correct, only if they're under the PJM system.

Transcript, January 11, 2008 at pp. 112 – 114 (emphasis added).

On cross examination by the Sierra Club, Mr. Reynolds testified as follows:

> Q. All right. Let me ask you about something that is sort of outside the realm of government, somewhat highly visible, at least among some of us. Wal-Mart adopted a very broadly based, aggressive program to sophistically substitute fluorescent bulbs for the incandescent ones, at least on a bulb by bulb basis; very significant energy savings. Does your model, or do any of the PJM models that you're aware of, make any attempt to incorporate long-term impacts of those kinds of consumer decisions in the model to either increase or decrease load?
>
> A. It does not. It does not list the long-term issues, but to the extent over time electrical equipment used in homes and business and offices has tended to get more efficient. There is essentially embedded in the forecast a continuation of increased efficiency.
>
> Q. I understand. But those are, if you will, updates to the model that occur as a result of historical data year in and year out.
>
> A. Correct.

Transcript, January 11, 2008 at pp. 121-122 (emphasis added)

> Q. Have you incorporated into any of your models any adjustments, upward or downward, of projected energy uses to accommodate anticipated changes in the consumer, commercial or industrial behavior as a result of adjustments to global warming or any policies that might be adopted to deal with global warming issues such as habitat?
>
> A. At this point we have not done that.

Transcript, January 11, 2008 at p. 122(emphasis added) .

Asked again later on day three of the evidentiary proceeding if the load forecast model took into account any decreases in the load that were project to result from government policies or changes in consumer behavior, before the historical data was available, the PJM witness denied that his forecast model made any attempt to project the impact from such changes:

> Q. In other words, you have to find out whatever the change is going to be in 2011, your model won't reflect those changes until 2011 data is available; is that right?
>
> A. I would say that our forecast does not make adjustments for any of those types of developments.

Transcript, January 11, 2008 at p. 122.

Based on the foregoing evidence, the Commission Staff proposed that the Commission specifically find that the PJM forecast was flawed. See Commission Staff Proposed Order dated February 29, 2008 at page 15 Additionally, the Commission Staff proposed that the Commission reject the PJM load forecast model because it was not susceptible to cross examination or explanation with the following finding of fact:

> Mr. Reynolds acknowledged on cross examination that neither the PJM Load/Energy Forecasting Model White Paper nor his direct testimony contains the data necessary for another expert witness to analyze and/or recalculate the results provided by Mr. Reynolds.

Commission Staff Proposed Decision at p. 14.

6. The need for profits vs. the need for transmission capacity.

The Commission Staff recommended that the Commission find that TrAILCo's and PJM's failure to consider alternatives to the $1 billion dollar construction of TRAIL "***leaves little doubt that reliability purposes were not the driving factor behind this line, especially when considering that the line will show great returns to a Company trying to bet back on its feet after bankruptcy.***" Commission Staff February 29, 2008 Proposed Order at p. 15(emphasis added) .

D. Demand Side Management Alternatives.

DSM encompasses direct actions by PJM (such as the ordering of a generator to increase generation, or ordering a large scale user to reduce consumption) plus a much broader array of conservation activities in general, from state imposed limits on usage to changes in consumer needs based upon the "better mouse trap" principle, such as the use of more efficient, compact fluorescent bulbs instead of less efficient, incandescent light bulbs. The August 1, 2008 decision rejected DSM as a means of fixing the reliability violations projected to occur by June 30, 2011 because of the extended time required to implement such programs.

> TrAILCo witness Dr. Jay Zarnkau, president of Frontier Associates, LLC, testified as to the practical limitations of implementing DSM programs, including (i) the lead time necessary to build up such programs, (ii) uncertainties inherent in relying on customer behavior, and (iii) required market research, planning, regulatory approval, and start-up activities. Sierra Club witness Mr. Powell acknowledged these complications at hearing. DSM programs are an important contributor to reducing overall energy demand, and to the extent these programs enjoy some level of effectiveness, their results will likely be incorporated into PJM's load forecasts on a going-forward basis. <u>But to assert that such reductions will be available to resolve reliability problems arising in just three years would subject customers who depend on a reliable transmission system to unreasonable uncertainty</u>.

See August 1, 2008 decision at p. 22 (emphasis added).

The Commission's February 13, 2009 decision – which acknowledge that the Sierra Club was correct in its contention that TrAILCo had not shown a need for the new line by June 30, 2011 – referenced only general observations about DSM on page 20-21 of its August 1, 2008 order, which refer to the possibility that some day in the future PJM's forecast model will incorporate DSM savings. Disregarded entirely in the February 18, 2003 order was the post September 2008 consumer behavior that was, in fact, now a part of the historic record, regardless

of the limitations of PJM's model. Nor did the February 19, 2009 order reconcile its summary dismissal of DSM as time consuming, with its finding that we in fact have more time, lots of it according to the Commission, because the need for TRAIL has only been speculated on as arriving sometime in 2014 or 2015, based upon the Commission's own prognosis, arrived at without assistance from an up-to-date five-year planning tool, such as the as yet unpublished 2009 RTEP.

E. Speculative Economic Benefits And Ignored Costs.

The Commission Staff, in its proposed order filed on February 29, 2008 readily conceded that the Commission could legitimately consider the economic benefits of the proposed TRAIL line under the mandate of W. Va. Code §24-2-1 (b), which charges the Commission with "the responsibility for appraising and balancing the interest of current and future utility service customers, the general interest of the state's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions."

However, the Commission Staff also concluded that, under the test of W. Va. 24-2-1 (b), TrAILCo failed to sustain its burden of showing any real economic benefit. Commission Staff Proposed Decision at p.24. Specifically, the Commission Staff proposed that the Commission find that Dr. Tom Witt's economic testimony on behalf of TrAILCo was totally speculative because it simply assumed that four coal-fired, IGCC electric generating plants, with a total capacity of 2700 MW would be constructed, even though no decision had been made to locate those facilities in West Virginia, and no applications for certificates of necessity and convenience relating to the facilities had been filed with the Commission. Transcript, January 12, 2008 at pp. 21-22. TrAILCo President Flitman was, if anything, less definite than Dr. Witt on the likelihood of the construction of four new IGCC plants that would justify claims of economic benefits:

> Q. In fact, [do] you contemplate or anticipate those --- that additional generation capacity would come on stream sometime over the near term?
>
> A. I have no idea.

Transcript, January 12, 2008 at p. 224.

In response to cross examination by the Sierra Club, Dr. Witt acknowledged that he had not conducted any analysis to compare the costs of adding MW to the system by building four new IGCC generation plants (at a cost of $4 billion), with the cost of acquiring additional MW by conservation programs. Transcript, January 12, 2008 at pp. 29-30. And TrAILCo's economic expert witness acknowledged that he had made no calculation of the economic impact on West Virginia consumers of a "cap and trade" carbon tax on coal:

> Q. … did you make any assumptions about the impact of a cap and trade system imposed on coal fired plants, how that would affect the rate structure that would be posed on the

> users --- excuse me, which would be passed through to the consumers of electricity from those plants?
>
> A. We did not consider that.

Transcript, January 12, 2008 at p. 33.

But Dr. Witt conceded, albeit hesitantly, that the impact on a population disproportionately dependent on coal fired electricity would be adverse under a cap and trade system that increased the cost of coal fired electricity:

> Q. ...Would you agree that areas which have energy and industrial infrastructure built disproportionately on coal fire electric generation are going to receive disproportionate impacts of any cap and trade system that's done?
>
> A. That's a fairly general statement I'm not sure that I can offer an opinion on that.
>
> Q. Well, if you were disproportionately dependent on a system that required recovery of $4 billion in costs, you would have a greater impact on your electric rate system dependent on a $2 billion system; correct?
>
> A. Everything else being equal.

Transcript, January 12, 2008 at pp. 33-34.

TrAILCO witnesses also acknowledged that the impact of cap and trade carbon taxation on Allegheny and its customers was material and had not been considered -- at all -- by TrAILCo:

> Q. Would a cap and trade tax of $10 a ton have a material impact on the financials on Allegheny Energy? Assume 45 million tons there's a $10 per ton cap and trade tax effectively or fee, however it's characterized, what would 450 million dollars do to the competitiveness of your organization?
>
> A. It's a significant amount of money.
>
> Q. It would --- <u>if you're writing a management representation letter to your outside accountants this would fall under the heading "material"; correct</u>?

A. I believe it would (emphasis added).

Transcript, January 12, 2008 at p. 230

> Q. …if a cap and trade tax were imposed, you would have to pass through all of them in one fashion or another to your own end users; correct, or not recover, one or the other?
>
> A. I think that would be correct.
>
> Q. And to the extent that West Virginia's consumers' dependence on coal mirrors Allegheny Energy's, that is a gross disproportionate dependence on electricity generated by coal, they're going to incur whatever increase in cost is associated with a cap and trade program; is that correct?
>
> A. They would incur a proportionate amount, yes.

Transcript, January 12, 2008 at p. 231 (emphasis added).

TrAILCo's principal rate officer, Mr. Mark Mader, confirmed the pass through to West Virginia consumers of any cap and trade carbon taxation on coal:

> Q …the purchasing consumer or residential or commercial or industrial would all be absorbing the impact of necessity of whether it's passed through by market forces or passed through by other regulatory entities, they would all be absorbing the impact of the cap and trade tax; is that correct?
>
> A. At the end of the day the end user would pay the tax.

Transcript, January 12, 2008 at p. 106 (emphasis added).

Although Mr. Mader claimed to have read industry-wide statistical studies on cap and trade legislation, he conceded that he had not seen any economic analysis, and he acknowledged that TrAILCo had made no analysis of its ability to pass through cap and trade costs to West Virginia consumers, or the impact of such costs on them:

> Q. …internally you're not aware of any study by Allegheny relating [to] the impact of a cap and trade system on any aspect of this operation?
>
> A. I've seen nothing.

Transcript, January 12, 2008 at p. 107 (emphasis added).

F. Route Analysis.

In direct testimony filed with the Commission on December 5, 2007, James W. Ellars, P.E., was highly critical of the selection of the route for TrAILCo's transmission line on a number of grounds. Mr. Ellars, a Registered Engineer and employed at the Commission for 16 years at the time of his December 2007 testimony, is a member of the National Association of Regulatory Utility Commissioners Subcommittee on Electric Reliability, and served on the North American Electric Reliability Council's Compliance and Certification Committee from 2002 to 2004. Since 1999 he was either the engineer responsible for, or assigned to review, electric utility certificate filings and generator siting cases at the Commission.

As part of his assessment of the alternate routes proposed for TrAILCo's interstate transmission line, Mr. Ellars testified that he personally conducted an aerial reconnaissance of: (1) "Route H," TrAILCo's preferred route in its entirety, (2) the so-called "Grafton Area" route (which was recommended by the April 15, 2008 Joint Stipulation and adopted by the August 1, 2008 decision), and (3) the route designated as "Route A" in the course of the proceeding, which ran from the 502 Junction in Pennsylvania to Mt. Storm in West Virginia, via a path intersecting a portion of Maryland. Video tapes of his aerial reconnaissance attached to his testimony were admitted as part of the record before the Commission as Exhibit JWE-6 and are available for viewing by this Court.

As a threshold matter, Mr. Ellars testified that "there appears to be little correlation between the quantitative data provided by TrAILCo's own analysis and the qualitative conclusions reached regarding the selection of Route H as the preferred route between the 502 Junction and Mt. Storm. Ellars December 5, 2007 Direct Testimony at p. 9. Exhibit JWE-2, attached to Mr. Ellars testimony and admitted into evidence on January 18, 2009 (Transcript, January 18, 2009 at p. 103), demonstrated "that Route A is a better choice in almost every evaluation category except for cultural resource proximity," a category for which TrAILCo had not completed its evaluation. Ellars December 5, 2007 Direct Testimony at p. 11.

According to TrAILCo's own data, Mr. Ellars testified:

> Alternate Route A contains 27 residences within 500 feet while TrAILCo's preferred route, Route H, contains 78 residences within 500 feet of the centerline. In other words, TrAILCo's selected route, Route H, contains almost three times the number of residences within 500 feet of the centerline than does Route A, a route which happens to pass through Maryland.

Ellars December 5, 2007 Direct Testimony at p. 12 (emphasis added).

Moreover, based upon his personal aerial reconnaissance of Route A between 502 Junction and Mt. Storm, Mr. Ellars testified that he

> [W]itnessed no extenuating conditions which might eliminate that route as a viable alternative. On the contrary, overall the route seemed much less dense in terms of development that TrAILCo's selected route.

Ellars December 5, 2007 Direct testimony at p. 12-13 (emphasis added).

On pages 18 and 19 of his direct testimony, Mr. Ellars testified that where an "unchosen route might have a lesser impact on the environment and its citizens," it was unacceptable to shift "the massive burden of siting the TrAILCo project upon the citizens of West Virginia," particularly, Mr. Ellars emphasized, where the Commission Staff expert witnesses Lewis and Ileo had concluded that the "project will not provide any substantive, permanent benefits to West Virginia." Mr. Ellars further testified that he understood that Maryland's state environmental requirements were "more difficult to satisfy than West Virginia's requirements." Ellars December 5, 2007 Direct testimony at p. 18-9 (emphasis added).

TrAILCo's counsel at the evidentiary proceeding on January 18, 2009, asked Mr. Ellars, why on pages 18 and 19 he had emphasized the burden of siting the TrAILCo project on the citizens of West Virginia. Mr. Ellars responded:

> … It impacts over twice as many residences, it has more structures, it crosses more steep terrain, it affects more forest. Route A parallels 83,000 feet of existing line. The selected route parallels none. And the conclusion that I came to, and I think the Rebuttal testimony confirmed it, is that you, in fact, did weight your evaluation criteria. And what you weighted the most was the regulatory difficulties that you have in filing with another state, which you would choose the path of least regulatory resistance. And for that reason you chose a longer more circuitous low-impact route in West Virginia.

Transcript, January 18, 2008 at p. 137 (emphasis added).

G. Green House Gas Emissions - CO_2

David Flitman, President of TrAILCo and Allegheny Power, authenticated Exhibit SCX-4, a copy of Allegheny Energy's "Global Climate Change Report" for 2007 in his testimony on January 12, 2098, and it was admitted into evidence. Transcript, January 12, 2008 at p. 233.

Referring to the 2007 "Global Climate Change Report," Mr. Flitman concurred in its statement that Allegheny Energy currently emitted 45 million tons of CO_2 and acknowledged his company's very heavy dependence on coal-fired electricity:

> Q. And would you agree that Allegheny Energy, which is 95 percent dependent upon coal, is certainly among the entities described in this last sentence that is. And West Virginia area itself is, that is areas which have built their energy and industrial infrastructure over the past century based on coal fired electric generation? Would you agree with that?
>
> A. I'm not sure I can speak on behalf of the State. I can certainly speak to this as true of our company.

Transcript, January 12, 2008 at p. 228-229.

And Mr. Flitman conceded that nothing in the construction or location of the TrAILCo line would alter its dependence on coal-fired electricity.

> Q. Okay. You're investing on the order of a billion dollars in the TrAIL line; correct?
>
> A. More than 800 million dollars, yes.
>
> Q. Okay. It does nothing to alter the mix of fuel on the line, on any of the operations Allegheny Energy; is that correct?
>
> A. Correct.

Transcript, January 12, 2008 at p. 228 (emphasis added).

PJM's Planning Chief acknowledged on the first day of the evidentiary hearing that PJM accorded no weight whatsoever to any environmental factors in its determinations to order the construction of transmission capacity:

> Q. In the course of your assessing whether a violation occurred or what a proper solution is of that violation, is it fair to say that the only criteria that really apply, as PJM applies, is will the proper either generation or transmission of electricity solve the gap or the imbalance, whatever the character of the violation is? And no environmental cost, whether it's stated broadly or other instances that are more specific, like CO2 emissions. None of those are factored into your determination that a proper solution is appropriate; is that correct?
>
> A. First the generation mix that we use in identifying whether or not a particular solution, transmission solution will be satisfactory is the existing generation mix plus any generators that have executed in connection service agreements. With respect to citing issues associated with the transmission line, that is not considered in the identification of the solution, but in the identification of the route and the implementation of the solution.
>
> Q. All right. Let's set aside those issues for a moment and talk about the fuel source. If I understand your testimony, it is that if you can solve a problem at a given point in time in a given location by getting the electricity there, the fact that the electricity was generated by natural gas, coal or wind or any other source is not relevant to that determination; is that correct?
>
> A. That's correct, we don't make any judgments about what generation will ultimately serve the load.
>
> Q. And if this commission were required as it is by law to weigh those environmental impacts or costs, certainly they cannot rely upon PTM as a surrogate for having made that kind of a balance, because you accord no weight to those costs; correct?
>
> A. We have not identified those costs.

Transcript, January 9, 2009 at p. 153-155(emphasis added) .

Additionally, the TrAILCo employees detailed to study the environmental and other impacts of the siting of the transmission line, acknowledged that they undertook no inquiry into any aspect of possibly increased green house gas emissions:

> Q. Because this was a site evaluation only, nobody asked you to conduct and you did not conduct any analysis of the --- some of the downstream activity that might occur, for instance, the construction of four IGC plants? No one asked you to analyze the ---?
>
> MR. HALPERN: It wasn't relevant to our study.
>
> ATTORNEY DEPAULO: Right. No one asked you to quantify nor analyze the impacts of whatever CO2 emissions might come out of that ---?
>
> MR. HALPERON: That's not relevant to our study, right.

Transcript, January 15, 2009 at p. 19-20 (emphasis added).

Sierra Club expert witness Dr. James W. Kotcon, a professor of biology at West Virginia University, filed direct testimony on December 5, 2008 directly addressing the environmental impacts from the increased utilization of coal-fired electricity to fuel Washington, DC's increased August air-conditioning use. Dr. Kotcon's teaching responsibilities at West Virginia University since 1985 have included teaching a course in the preparation of Environmental Impact Statement, and he has served on numerous committees with the West Virginia Department of Environmental Protection and other state agencies for the purpose of drafting legislation affecting environmental issues in the state.

Dr. Kotcon testified that increased emissions of greenhouse gases for the 30-50 year life of the transmission line would be among the primary environmental impacts of the construction of TRAIL. As detailed later, Dr. Kotcon testified that the impact of increased emission of greenhouse gases cannot be quantified for climate on a scale as small as a single county, or even several counties, but could be measured on regions which include West Virginia.

V. Issues Presented

A. Did substantial evidence support the Commission's August 1, 2008 decision to grant an application for necessity and convenience predicated exclusively on the purported need for expanded electric transmission capacity by June 30, 2011:

- where the Commission itself concluded in February 2009 that the applicant had not shown the need for the electric line at any time in advance of 2014 or 2015, and

- where the Commission's finding of need in 2014 or 2015 was based on equally obsolete 2007 studies by expert witnesses for the Staff Commission.

B. Did TrAILCo sustain its evidentiary burden of showing that the proposed electric transmission line was economically viable:

- where Congress is about to impose a regulatory scheme for carbon management which will directly (or indirectly via a cap and trade system) impose a $20 to $50 dollar per ton tax on the carbon content of Allegheny Energy's coal fired electricity, and

- where TrAILCo had not conducted any analysis of the economic impact on Allegheny Energy which was 95% dependent on coal-fired electric generation, or on the small businesses and consumers of West Virginia who are at risk vicariously as a result of Allegheny Energy's grossly disproportionate dependence on coal-fired electricity.

C. May the Commission disregard – totally – the environmental impact of increased green house gases, and speciously conclude that the TRAIL line is "electron neutral:"

- where TrAILCo's parent corporation is 95% dependent on old, inefficient, coal-fired electric generation,

- where TrAILCo explicitly cited the proposed future construction of four additional coal generation plants at a cost of $4 billion, as part of the economic justification of TRAIL, and

- where PJM's Planning Chief acknowledged under oath at the Commission's first day of evidentiary hearings that the historic basis for TrAIL was a 2002 directive from a Washington politician to "find a way to move large amounts of coal from west to east."

D. Did the Commission exercise its discretion arbitrarily by rejecting the shortest route directly through Maryland:

- where the shorter, direct Maryland route had a substantially smaller environmental impact on the citizens of all states,

- where TrAILCo bypassed Maryland in its entirety solely to avoid Maryland's heightened environmental standards,

- where 100% of the electricity transmitted by the TRAIL line will be sold to Maryland and Virginia suburbs of Washington, DC to accommodate presumed increases in air-conditioning use in the peak load period of August each year, and

- where the environmental impact on West Virginia, of locating 75% of the transmission line in its borders, is grossly disproportionate to any economic, electric or other benefit.

E. May an applicant for a certificate of convenience and necessity purchase an "**ADMINISTRATIVE PASS,**" relieving it of its evidentiary burden of demonstrating a balance between the electric need for the project and its environmental impact, in exchange for the applicant's agreement to make financial payments to state agencies and customers, of nearly $41.4 million dollars, all memorialized in an April 15, 2008 "Joint Stipulation," the product of sustained, *ex parte* communications with the Commission Staff?

VI. Points and Authorities

Cases

Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416 (1993) 31

Interstate Commerce Commission v. Louisville & Nashville Railroad, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913). 43

Kanawha Valley Transp. Co. v. Public Serv. Comm'n, 159 W. Va. 88 (1975) 42

Massachusetts v. EPA, 549 U.S. 497, *127 S. Ct. 1438, 167 L. Ed. 2d 248,* (2007) 40

MCRE v. PSC of W.Va., 665 S.E.2d 315 (2008) 32

Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981) 30, 31

Order Granting Certificates of Need Subject to Conditions, Minnesota Public Utilities Commission, Docket No. E-002/CN-01-1958 (March 11, 2003) 36

San Diego Gas & Electric Company for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, Case No. 06-08-010 (October 31, 2008) 39

U.S. v. Abilene & Southern Railway Co., 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924) 43

Statutes

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W. Va. Code § 24-2-11b 3, 7

W. Va. Code § 24-5-1 3

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Other Authorities

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Dirty Air, Dirty Power: Mortality and Health Damage Due to Air Pollution from Power Plants. Ledford, 2003 38

Surprise Drop In Power Use Delivers Jolt To Utilities, Wall Street Journal, November 21, 2008, ... 7

Regulations

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VII. Argument

A. The standard for judicial review.

W. Va. Code 24-2-11a provides that the Commission may approve an application for a certificate of necessity and convenience to construct an electric transmission line if it determines 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
>
> or
>
> is necessary and desirable for present and anticipated reliability of service for electric power for its service area or region;
>
> and
>
> (2) will result in an acceptable balance between reasonable power needs and reasonable environmental factors.

W. Va. Code § 24-2-11a.

The consistent judicial test for review of decisions under § 24-2-11a has been the familiar "substantial evidence" test of administrative law generally. This Court summarized and reaffirmed this broad standard in *MCRE v. PSC of W.Va.*, 665 S.E.2d 315 (W. Va. 2008), as follows:

> We set forth the standard of review of an order of the Commission in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), wherein we held:
>
> In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority.

We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence.

Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.

The court's responsibility is not to supplant the Commission's balance of these 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.

We summarized our standard set forth in Monongahela Power Co. in Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993), where we held:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows:

(1) whether the Commission exceeded its statutory jurisdiction and powers;

(2) whether there is adequate evidence to support the Commission's findings; and,

(3) whether the substantive result of the Commission's order is proper.

Furthermore, we explained that: '[A]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.

MCRE v. PSC of W.Va., 665 S.E.2d 315 (2008).

This appeal presents no challenge to this widely adopted statement of the law; it is its application alone that is at issue.

B. The Commission's February 13, 2009 Decisions concedes that the PJM 2006 studies projecting a need for expanded transmission capacity by June 30, 2011 were obsolesced by the September 2008 economic recession, and the December 2007 studies relied upon for the Commission's finding of need in 2014 or 2015 are equally obsolete.

In the August 1, 2008 order granting TrAILCo's application, the Commission made all of the required findings necessary, on its face, to sustain the issuance of a certificate of necessity and convenience. Specifically, the Commission's August 1, 2008 order held that

> TrAILCo established that numerous transmission system reliability violations will arise within PJM if no action is taken. In both 2006 and 2007, PJM's Regional Transmission Expansion Plan ("RTEP) process demonstrated that these violations will exist and must be addressed.

August 1, 2008 Decision at 10 (emphasis added).

Again, expressly referencing the June 2011 delivery date for expanded transmission capacity, the Commission in its August 1, 2008 decision made findings necessary, and adequate on their face at the time, to sustain its issuance of a certificate of need:

> [I]f TrAIL is not implemented by June 2011 and the reliability issues identified in the 2006 RTEP are not addressed, customers in the Eastern Panhandle of West Virginia will be at risk of "load shedding."

August 1, 2008 decision at p. 36 (emphasis added).

Citing TrAILCo and PJM's numerous witnesses and their forecasts of doom, the Commission concluded that failure to approval TrAILCo would place citizens of the state in peril:

> For the reasons stated above the Commission concludes that a present and anticipated need exists. More specifically, PJM's RTEP process reliably identified the existence of NERC reliability criteria violations, that those

> violations are significant, and that failure to resolve them in a timely way will place the interconnected system, including customers in the PJM Region as well as in West Virginia, at risk.

August 1, 2008 Decision at 39 (emphasis added).

The issue presented in this proceeding arises because the Commission itself has now determined that the factual predicate underlying its August 1, 2008 finding of need has now dissolved.

Specifically, the Commission in its February 13, 2009 decision readily concedes the "Sierra Club is correct" in its contention – based upon subsequent market events presented to the Commission in submissions after issuance of its August 1, 2008 order – that TrAILCo's showing of need for expanded electric transmission by June 30, 2011 (the date specified in TrAILCo's application) is no longer sustainable.

As noted in the Sierra Club's November 23, 2008 request that the Commission either reconsider the August 1, 2008 decision, or at least make it subject to a continuing prudence review, dramatic decreases in the demand for electricity following the financial collapse of September 2008 caused PJM itself, the non-governmental organization that issued the order to Allegheny Energy (TrAILCo's parent) to build expanded transmission capacity, to publicly express its own second thoughts.

On October 31, 2008 Potomac-Appalachian Transmission Highline, LLC (PATH), a partnership consisting of Allegheny Energy and American Electric Power, announced that PJM had extended from June 2012 to June 2013 the in-service date for PATH to deliver a second high voltage electric transmission line, ordered on the basis of a 2007 RTEP – concluded only one year after the 2006 RTEP that had been the basis for the order to build TrAILCo's new transmission line.

As a matter of law, under W. Va. Code § 24-2-11a, an applicant must demonstrate necessity on the ground identified in its application and subsequent submissions. Once the Commission determined that TrAILCo's application – at least by February 13, 2009 – was no longer supported by substantial evidence, it had to reconsider the August 1, 2008 order -- or at least make it subject to a continuing prudence review under W. Va. Code 24-2-11b – and the refusal to do so was arbitrary and erroneous as a matter of law.

To be sure, the Commission's assertion that the TRAIL line may be necessary some day in 2014 or 2015 – in the circumstances of this case – is not an adequate substitute for the legal finding of necessity for the transmission line on the date specified in the application, i.e., June 30, 2011.

Specifically, the Commission can no more rely on now-outdated 2007 studies of the Commission Staff's experts – placing the possible need date for TrAILCo's proposed line in 2014 or 2015 – than it can rely on the PJM's even more antiquated 2006 projection of need in 2011.

In this case, this Court need not examine in detail the multiple grounds on which the Commission Staff and its experts, and other witnesses, in the course of the January 2008 evidentiary proceeding, attacked the 2006 RTEP, because it ignored state-compelled reduction in consumption, or because it ignored forecasted declines in consumer demand until they were past history.

Nor does this Court need to assess the wisdom of the 2006 RTEP's exclusion from its computer-modeled load forecast of fully 2,500 MW of electric generation in the eastern portion of PJM's region, on the specious ground that the generators had not signed ISA's with PJM – even though they had signed ISA's with Dominion Resources shortly before Dominion joined PJM and were located literally next door to the Washington, DC market.

And this Court need not sort out the motivation for as a FERC directive to find a way to "move large amounts of coal" from west to east. All of those substantial issues are effectively mooted by the Commission's unambiguous concession that the temporal basis for the TrAILCo application has simply ceased to exist.

However, the evaporation of TrAILCo's case for need, cannot be salvaged by a last minute invocation of need, predicated on studies concluded nearly a year and a half in advance of the September 2008 events that obsolesced TrAILCo and PJM's own analysis of need, and equally obsolete as the 2006 RTEP's for projecting need in 2011 or any time thereafter.

The core requirement of substantial evidence cannot be satisfied by the simple expedient of substituting one inadequate, obsolesced study for another, and the very broad discretion recognized in *MCRE v. PSC of W.Va,* cannot be drawn down on to fill the evidentiary hole in the showing of need for the proposed TrAILCo electric transmission line. This is particularly the case where, as noted below, the obstacles to the viability of TrAILCo's line have increased, not decreased as time moves on.

C. The Commission totally disregarded TrAILCo's concession below that it had not assessed the disproportionate impact on West Virginia customers of substantial carbon taxes virtually certain to be imposed as a result of Allegheny's 95% dependence on coal-fired electricity.

David Flitman, President of both TrAILCo and Allegheny Power, readily conceded that Allegheny Energy had not conducted any analysis – none whatsoever – of the economic impact of a carbon tax on Allegheny Energy, or the small businesses and consumers of West Virginia who share their grossly disproportionate dependence on coal-fired electricity. And, as noted,

Allegheny Energy is 95% dependent on coal-fired electricity. Moreover, TrAILCo explicitly cited the proposed future construction of four additional coal generation plants at a cost of $4 billion, as part of the economic justification of TRAIL. Further Mr. Flitman's conceded that the construction of TrAILCo would do nothing to alter the fuel source of its electricity.

As discussed below, the Commission summarily dismissed the Sierra Club's argument against issuance of a certificate to TrAILCo because of increased CO_2 impacts, based upon the Commission's totally specious assertion that the proposed transmission line is "election neutral." This raw exercise of bureaucratic power may bluff its way past environmental concerns, but it does not alone provide substantial evidence that the TrAILCo project will be immune to carbon based taxes.

There is, in short, no serious basis for any assumption that Allegheny Energy and its transmission line subsidiary will not be impacted, very adversely, by carbon tax (or cap and trade) legislation. As Mr. Flitman acknowledged, Allegheny Energy's "Climate Change Plan" explicitly recites that the impact of carbon taxation would be potentially devastating for companies like Allegheny Energy – and its customers – which are "disproportionately dependent" on a coal-fired electric infrastructure.

Mr. Flitman acknowledged that even at $10 per ton – the very low end of the range of carbon taxes under consideration – the 45 million tons of carbon currently emitted by Allegheny Energy would cause an increased cost of $450 million dollars annually -- a "material" increase in cost for Allegheny Energy under accounting standards applicable to contingencies. It is legally irrelevant that Allegheny may pass these costs through to customers. To the contrary, that factor weighs heavily in favor of finding the August 1, 2008 fatally deficient, not blindly proceeding as though no problem exists.

Although the nation as a whole is only 50% dependent on a coal-fired electric infrastructure, this state's dependence on coal mirrors that of its principal electric suppliers, Allegheny Energy and AEP, whose dependence on coal is, if anything, greater than Allegheny's. Surely the impact on West Virginia consumers of expanded

Surely, the studies conducted by the Commission Staff's experts, well in advance of the January 2008 evidentiary proceeding at which they were presented, cannot provide a basis for going forward with a $1 billion dollar project – 100% of the cost of which will be passed through to West Virginia consumers – when the proposed transmission line now faces current legislative proposals that TrAICO has not assessed.

The Commission's August 2008 decision simply ignored the increased costs of coal-fired electricity that will result from the very highly probable bipartisan adoption of some proposal for a carbon tax. It is not recognized as an issue. The Commission's order is at pains to state that it can consider the *positive* economic impact of an activity proposed in a certificate of necessity and convenience, a proposition with which the Sierra Club agrees. However, the right to consider positive economic impacts imposes a concomitant duty to recognize potential *negative* impacts. That did not happen in the August 1, 2008 or February 13, 2009 orders.

This Court should recognize this bureaucratic phenomenon for what it is: a classic example of a boondoggle, commenced by the off-hand comment of a FERC political operative, nurtured and sustained by the economic needs of a company just out of bankruptcy presented with the opportunity to receive a 14% guaranteed return on the equity portion of its $800,000,000 investment, and still breathing after last fall's financial collapse solely as a result of bureaucratic inertia – in short, a "bridge to nowhere." Unfortunately for the electric consumers of this state who will foot the bill, the tab on this "bridge" is many multiples of its now famous Alaskan counterpart. No amount of bureaucratic caprice will spare the rate payers of this state from the carbon taxes now virtually certain to come – but not once analyzed by TrAILCo or the Commission.

The Sierra Club wishes to underscore that it is not against environmentally responsible projects that, in addition to everything else, provide jobs for the citizens of West Virginia. The Sierra Club notes that at least one public utility commission has conditioned the approval of a proposed electric transmission line on the applicant's demonstration that it would transmit low-carbon-content, renewable energy across the line. *Order Granting Certificates of Need Subject to Conditions,* Minnesota Public Utilities Commission, Docket No. E-002/CN-01-1958 (March 11, 2003). The Sierra Club has publicly offered to withdraw its opposition to TRAIL (and its follow on project, PATH) in exchange for an enforceable commitment by the utilities to cancel plans for four new IGCC coal-fired plants and to construct instead a commensurate electric generation capacity to fill the new lines with renewable fuel sources. TrAILCo and AEP presumably are still considering the offer, as no replies have been received.

D. The Commission arbitrarily disregarded – in total – the environmental impact of increased green house gases, including CO_2.

Allegheny Energy, TrAILCo's parent corporation, is 95% dependent on old, inefficient, coal-fired electric generation, and TrAILCo explicitly cited the proposed future construction of four additional coal generation plants at a cost of $4 billion, as part of the economic justification of TRAIL.

The Commission's entire discussion of CO_2 and other pollutants in the August 1, 2008 order was the assertion – mind numbing on this record -- that the Sierra Club "appears to concede that the pollution associated with existing or potential future coal-fired generating plants is not an issue before the Commission in this proceeding," citing the second page of an exhibit to the testimony of Dr. Kotcon. August 1, 2008 decision at 63.

To be sure, the Commission's assertion that the Sierra Club concedes that pollution from coal-fired electric generating plants is not an issue, based upon the statements of James Kotcon in Exhibit JK-1, is incomprehensible. Dr. Kotcon's January 6, 2008 rebuttal testimony in JK-2 unambiguously criticizes the increased utilization of coal-fired electricity, but does so in the

context of assessing the adequacy of CAD's recitation of environmental issues. Dr. Kotcon commented in JK-2 is as follows:

> CAD has failed to address what is certainly the defining issue of our generation, global warming. An increase in generation means an increase in carbon dioxide emissions from plants that are already amount the largest emitters in America.

JK-2 at p. 2 (emphasis added).

The Commission's assertion that Dr. Kotcon did not object to the increased utilization of coal-fired electric generation plants is not assisted by the fact that the balance of this particular piece of Dr. Kotcon's testimony focused on the economic impact of a carbon tax, or cap and trade legislation. Dr. Kotcon's December 5, 2008 Direct Testimony, submitted one month earlier, did specifically address in detail the environmental impact of increased utilization of coal-fired electric generation plants. Dr. Kotcon testified that:

> EPA has made assessments of the impacts likely to occur regionally for the areas including West Virginia. These include a higher frequency of heat waves with increased incidence of heat-related mortality, increased concentrations of ground level ozone with commensurate adverse effects of this pollutant, an increase in incidence of certain infectious diseases, and an increased frequency of extreme weather events such as droughts, floods, and severe storms. The will have direct annual costs to local residents and businesses…

December 5, 2007 Direct testimony of James W. Kotcon at p. 3.

Additionally, Dr. Kotcon's testimony detailed the impacts from increased emissions of sulfur dioxide and nitrogen oxides, ozone, mercury and particulate pollution, likely to result from increased generation of electricity from inefficient, coal-fired power plants, as follows:

> As pollution emissions increase, more people die. A study by Abt Associates ("Power Plant Emissions: Particulate Matter-Related Health Damages and the Benefits of Alternative Emission Reduction Scenarios" (June 2004), available at http://www.cleartheair.org /dirtypower/docs/abt_powerplant_whitepaper.pdf)[1] documents the adverse health impacts from power plant pollution. Using these estimates, the effect of this pollution were estimated for individual states (Dirty Air, Dirty

[1] Now available at http://www.abtassociates.com/reports/Final_Power_Plant_Emissions_June_2004.pdf

> Power: Mortality and Health Damage Due to Air Pollution from Power Plants. Ledford, 2003, available at: http://www.cleartheair.org/dirtypower/docs/dirtyAir.pdf)[2] The report show that West Virginia leads the nation in per capita deaths from power plant pollution. The study calculates that 399 West Virginians die from power plant pollution each year. Under pollution reductions trigger by the EPA's Clear Skies proposal, mortality would be reduced by about 40%. It is not possible to calculate precisely how large the impacts will be because TrAILCo has not estimated the increased capacity factors induced by construction of the line (TrAILCo's Response to Sierra Clubs' Fourth Discovery Request). But if emissions increase due to increased plant operations, those mortality rates will inevitably head back up. More people will die.

James W. Kotcon, Dec. 5, 2007 Direct Testimony at p. 5(emphasis added)

Any fair-minded review of the foregoing testimony reveals the utter absence of any basis for the Commission's assertion that Sierra Club witness conceded that increased pollution from coal-fire electric plants was not an issue in this proceeding.

Still later, following the May 30, 2008 hearing on the April 15, 2008 Joint Stipulation, the Sierra Club submitted a post-hearing brief in which it argued as follows:

> 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

[2] Now available at http://www.environmentamerica.org/home/reports/report-archives/clean-air/clean-air/dirty-air-dirty-power---mortality-and-health-damage-due-to-air-pollution-from-power-plants.

> 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.

June 3, 2008 Brief of Sierra Club.

As with Dr. Kotcon's testimony, there is no mistaking the fact that the Sierra Club raised the issue of increased emissions from both existing and new coal plants, loudly and clearly, from the beginning of the proceeding to the very end. The Commission's contrary holding is simply incomprehensible. Clearly, it lacks substantial evidence.

Assuming, preposterously, that the Sierra Club had completely dropped the ball on global warming, how would that failure excuse the Commission from its responsibility under §24-2-11a? The controlling statute requires the Commission to find a balance between the electrical needs and environmental impact, before issuing a certificate of need. The Commission's inartful attempt to side-step global warming, as Dr. Kotcon correctly describe it, the overriding environmental issue of our generation, should be summarily reversed by this Court.

This Court should compare the Commission's avoidance of global warming with a recent decision of the California Public Utility Commission which directly addressed the topic and rejected the application for an electric transmission line precisely because of the high probability that it would transmit electricity generated in substantial part by coal-fired generators.

In Application of San Diego Gas & Electric Company for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, Case No. 06-08-010 (October 31, 2008) (http://docs.cpuc.ca.gov/efile/PD/93071.pdf), the California Public Utility Commission considered the application for a certificate to construct an electric transmission line, like TRAIL, justified by claims of reliability, and like TRAIL, substantially dependent on coal-fired generators for throughput. Also, California's statute, like West Virginia's, required an assessment of the environmental impacts of the line along side a consideration of the case for need. And, stretching statistical probabilities, the proposal before the California PUC also provided some degree of additional "reliability" for the applicant's service area -- but not until 2014.

In a lengthy analysis, including computer modeling of the green house gas emissions from the proposed transmission line's likely sources of electric generation (both increases from coal and reductions from use of renewals), and including the 100,000 tons of CO_2 likely to be generated by construction, the CPUC compared the result with green house gas emissions from alternatives to the proposed transmission line.

Ultimately, the CPUC rejected the proposed transmission line, for numerous reasons, but included among them was the green house gas analysis which the applicant had provided:

> We reject SDG&E's attempts to quantify the GHG emission impacts of the Sunrise alternatives. SDG&E gives no basis for its contentions that the cases analyzed by CAISO are in any way comparable to those defined in the Draft EIR/EIS. CAISO's Part 2 testimony (which SDG&E cites as the source of its estimated emissions levels) does not address GHG emissions, nor does it provide updated GridView modeling. In addition, SDG&E provides no record of conducting the updated production cost modeling that would be necessary to derive WECC-wide estimates of GHG emissions related to Sunrise alternatives.

CPUC October 31, 2008 decision at 181.

It is no response to the California PUC's analysis to point toward mandatory green house gas savings as compelling the decision under state law, or that its procedures employ full environmental impact statements. W. Va. Code § 24-2-11a provides all the legal authority necessary to require – indeed it mandates – a comprehensive analysis of environmental impact.

The U.S. Supreme Court's rejected the Bush Administration EPA's not-so-strict-constructionist argument that EPA was not required to regulate green house gases, merely because federal legislation required it to regulate matters affecting "climate." Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248, (2007). Of course, the Bush Administration's position in EPA -- like the FERC directive to PJM in 2005 -- reflected the political will of the day. This Court should recognize, as the Supreme Court did in *Massachusetts v. EPA*, that all that is required to defeat political obstructionism is a simple willingness to follow the broad statutory dictate of W. Va. Code § 24-2-11a by compelling the Commission to analyze comprehensively and honestly the impact of increased CO_2 emissions, before reaching any conclusion that electric benefits offset environmental impacts.

Additionally, this Court should hold that the requirement of W. Va. Code § 24-2-11a (b)[3] -- that an applicant file the statement of environmental impact requirement for a "statement of

[3] W.Va. Code § 24-2-11a (b) (3) provides that an application for a certificate to construct an electric transmission line shall contain "A statement of the environmental impact of such line facilities."

the environmental impact" of the electric transmission facilities—is inadequate if it fails to address the impact of the proposed electric transmission line on global warming.

E. The Commission arbitrarily rejected the shortest route, directly through Maryland, which had by far the least environmental impact.

The Maryland route was by far the least environmentally damaging route. Table 2-3, an exhibit submitted by TrAILCo on August 10, 2007 as part of the amended Line Route Evaluation and Environmental Report, evaluates the desirability of the alternative routes based upon the criteria identified by TrAILCo. "Route A" is the Maryland route which Mr. James Ellars of the PSC Staff testified on January 18, 2008 was the shortest route and the route which had the least environmental impact. "Route H "was TrAILCo's initial proposed route, with respect to which testimony was elicited during the January 9 to 19, 2008 evidentiary hearing.

Table 2-3, also submitted with the August 10, 2007 amendment, makes patent the facts testified to in Mr. Ellars testimony. Based upon the unweighted assessment of TrAILCo's own criteria, the Maryland Route has fewer environmental impacts than the TrAILCo preferred route by a factor of 124 to 169, where fewer impacts is, obviously, a "better" score. The intervening routes B through G have scores varying from 140 to 190. For purposes of the current analysis, however, only Route A (the shorter Maryland route) and Route H (TrAILCo's initial proposed route) are germane.

The analysis of TrAILCo's route selection in Commission Staff's February 29, 2008 Proposed decision could not have been more harsh, or more clearly supported by the evidence in the record at the close of the evidentiary proceeding on January 19, 2008. Without regard to state boundaries, the Commission Staff noted in its Proposed Decision, filed on February 29, 2008, that:

> Route A, across Maryland, is 6 miles shorter overall, and is significantly shorter in West Virginia. Route A is 40 miles in West Virginia and the Preferred Route is 66 miles. It is also the shortest route of all the alternatives studied. It crosses 10 less streams. It travers about half as many steep soils. It parallels an existing line for 25% of its length, as opposed to 0% for the Preferred Route. It has fewer houses with 250 fee and substantially fewer houses with 500 feet (27 to 78). Route A effects the lowest number of houses and buildings of all the routes….Route A also crosses fewer transmission lines.

Commission Staff Proposed Order at 30.

The Commission Staff posed the appropriate question: "Why did the Company choose such a tortured route that just barely misses the state of Maryland?" And the Commission Staff suggested the obvious answer:

> The answer that comes to mind on first glance is that the Company purposely tried to avoid Maryland. Once the evidence is examined, it becomes clear, the Company chose the path of least regulatory involvement. It decided that since it had to cross West Virginia no matter what, it would be easier to avoid substantial impact in any other state to make the certification process simpler and easier for the Company. While that provincial decision on the part of the company may have been an appropriate choice for the Company, it is not the right choice for this Commission. The Commission is charged with balancing the need of this line verses the environmental impact of the line. It is inconceivable the Commission should find the balancing favors the granting approval of the Preferred Route when the route selected by the Company is not the route with the lowest potential for impacts in terms of overall impacts across all of the affected states and in terms of impacts to West Virginia citizens.

Commission Staff Proposed Order at 32 (emphasis added).

The Sierra Club concurs fully with the Commission Staff's February 29, 2008 characterization of a Commission finding of "balance" – on these facts – inconceivable.

F. The Commission's ratification of the *ex parte* communications between the Commission Staff and TrAILCo constitutes an abdication of its statutory responsibility to condition the issuance of a certificate on a finding of a balance between the electric need for the project and its environmental impact.

This Court has long made clear the principle that decisions of the Commission must be based upon matters of record, subject to notice, an opportunity to be heard, cross examination and the other procedures, all falling under the broad heading of administrative due process. Thus, in Kanawha Valley Transp. Co. v. Public Serv. Comm'n, 159 W. Va. 88 (1975), the Court held that:

> The Public Service Commission is not limited to strict rules with regard to admissibility of evidence when acting in a quasi-judicial capacity, Code, 24A-5-5(a), as amended, but, with few exceptions, evidence acted on by the Commission in the revocation proceeding must be contained in the record and commissioners cannot act upon their own information. The parties must be fully informed of the evidence submitted or to be considered and must be given an opportunity to cross-examine witnesses, to inspect documents and offer evidence in rebuttal. Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937); U.S. v. Abilene & Southern Railway Co., 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1924); Interstate Commerce Commission v. Louisville & Nashville Railroad, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913).

159 W. Va. 88 (emphasis added).

As noted previously, at the May 30, 2008 hearing, the Commission granted the Commission Staff's motion to quash a subpoena for the appearance of its own witness, James W. Ellars, the only witness who had personally flown over all routes covered by the August 1, 2008 order, and who had announced via email that he learned of the Joint Stipulation entered into on April 15, 2008 from newspaper reports. See Exhibit to Sierra Club Brief of May 16, 2008.

Also at May 30, 2008 hearing, the Commission denied the Sierra Club's motion to introduce into evidence the nearly 3,000 pages of FOIA documents it had obtained pertaining to communications between TrAILCo, the Commission Staff, CAD and the Governor's Office. The Sierra Club argued that either the testimony of Cheryl Ranson, the head of the Utilities Division who was principally responsible for negotiating the April 15, 2008 settlement, or the FOIA documents, should be in the record in order to facilitate a reviewing Court's consideration of the record. Since Ms. Ranson called in "sick" on May 30, 2008, the FOIA documents were the only vehicle for assuring transparency. Transcript, May 30, 2008 at pp. 22-23.

Because Commission Staff had initially opposed the proposed transmission line, as unnecessary until 2014, Commission witness Earl Melton was asked at the May 30, 2008 hearing, following publication of the April 15, 2008 Joint Stipulation, what changed his mind:

> Q. What was the tipping point for you, Mr. Melton?
>
> A. It was probably when they offered to bring the transmission operations unit from Pennsylvania into north central West Virginia.
>
> ***

Q. … there would be 100 to 150 professional jobs?

A. Yes.

Q. And do you agree that the amount of the estimated payroll will be $12 million annually?

A. Yes.

Transcript, May 30, 2008 at p. 198-199 (emphasis added)

However, Mr. Melton conceded on cross examination that the economic benefits associated with the location of transmission operations fro Pennsylvania to West Virginia did not alter the electrical analysis:

> Q. … If I understood your testimony, it was that the outside consultants who you engaged back and I understood that the testimony wasn't --- their analysis was that it was basically a question of time and they could see that the couldn't see it in [2011]; is that a fair summary?
>
> A. Yes.
>
> ***
>
> Q. …as you describe the trade offs, if you will, between what you may have preferred and what you ended up with from TrAILCo, that doesn't reflect an altered view of the evidence so much as it reflects --- so that what you were able to get as a result of the bargaining process if I understand your testimony; is that correct?
>
> A. I believe that's fair.
>
> ***
>
> Q. Can you think of any reason based upon the evidence in the record why the Commission shouldn't go ahead and either deny the application …?
>
> A. Well if you believe the need is in 2011 I doubt if you're going to be able to get it done by then with the refilling and the two states that are new filing.
>
> Q. I understand that. And that's what I preface my question was based on the matters in evidence which includes your consultant's testimony that the need doesn't exist until 2014; correct?

A. They can use that if they want.

(Tr. May 30, 2008 at p. 208-209 (Mr. Melton).)

Mr. Melton also conceded in the course of the May 30, 2008 hearing that his decision to accept the TrAILCo settlement was in part based upon what he deemed more effective presentations by TrAILCo on the merits of the issues which had been the subject of the evidentiary hearings.

> Q. Ms. Short's question was that –-- question to you was whether or not the Staff recommendation was based on the evidence in the record and I understood your answer to be, but correct me if I'm wrong, your answer was no. That you had taken in consideration new information and, in fact, did take into consideration material not in the record in this proceeding, specifically that you considered material submitted in the Virginia proceeding relating to the Mount Storm-Doubs matter and you also took into consideration the additional matter not in the proceeding, but apparently filed in other proceedings either in Virginia or Pennsylvania relating to retention?

After Ms. Short objected to the form of the question, it was rephrased as follows:

> Q. Okay. With the exception of the word "no," you did state that you took --- that you were not limited to the matters in the record that you took into consideration of other matters including the matters in the Virginia and the Pennsylvania proceedings; is that correct?
>
> A. That's a fair representation.
>
> Q. Thank you.

Transcript, May 30, 2008, at 253 (emphasis added).

It is not possible in this case to find independent grounds for sustaining the August 1, 2008 decision, because the February 13, 2009 follow on decision was itself based on the equally out of date projections of need in 2014 which Mr. Melton referred to, projections based on data available to Commission Staff's experts in 2007, not the critical period following the collapse of financial markets in September 2008.

Moreover, it cannot be convincingly argued that the August 1, 2008 Decision ignored the product of the *ex parte* communications, i.e., the Joint Stipulation itself. To be sure, the

Commission formalized Engineer Melton's "tipping point" calculus in the bargaining with TrAILCo with a finding that the payments from TrAILCo to the state may be, in the Commission's all too candid terms, "***loosely***" categorized as Directly Rate-Related Economic Benefits (e.g., rate reductions) and Non-Directly Rate-Related Economic Benefits (e.g., construction of the technology center). August 1, 2008 Decision at 50.

This Court should recognize the *ex parte* communications -- which commenced immediately following the close of the January 2008 evidentiary proceedings -- for what they were. This whole course of communications, following the close of the evidence on the record, can only be viewed as a tacit admission by TrAILCo that it was fully, if painfully, aware that it had failed in its evidentiary burden on the administrative record.

This Court should not now sustain the administrative agency's formalization of the deal struck behind doors which was clearly aimed at reversing the outcome dictated by the evidence. TrAILCo's conduct effectively concedes its evidentiary failure; the Commission Staff's compelling February 29, 2008 briefing against the issuance of a certificate to TrAILCo makes any assertion that they simply "saw the light" as a result of further briefing by TrAILCo incredible.

VIII. Conclusion And Request For Relief

For the reasons set forth above, the Sierra Club respectfully requests that this Court issue an order vacating the August 1, 2008 decision of the Commission issuing a certificate of convenience and necessity to TrAILCo for the construction of a high voltage, electric transmission line.

Respectfully submitted,

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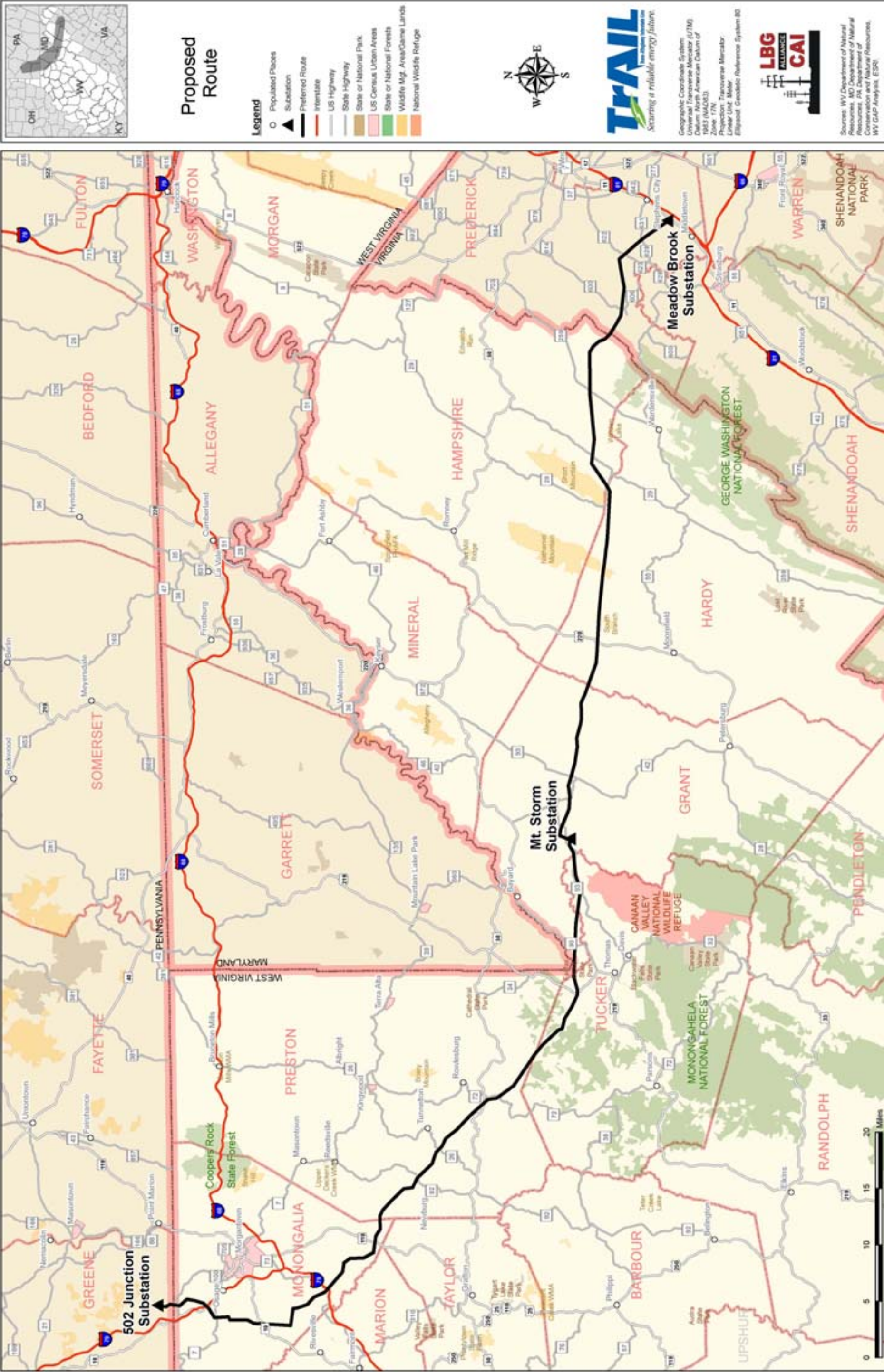
IX. Addendum



X. Certificate Of Service

I hereby certify that I mailed a copy of this Petition for Suspension and Review, by email or certified mail, postage pre-paid, this 13th day of March 2009, to the following:

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