IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

THE SIERRA CLUB, INC.,
Petitioner,

v.

No. 090379
(Appealed from Case No. 07-0508-E-CN,
Public Service Commission of West Virginia)

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
and TRANS-ALLEGHENY INTERSTATE LINE COMPANY
Respondents.

THOMAS M. HILDEBRAND,
Petitioner,

v.

No. 090382
(Appealed from Case No. 07-0508-E-CN,
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RESPONSE OF TRANS-ALLEGHENY INTERSTATE LINE COMPANY TO THE PETITIONS FOR APPEAL OF THE SIERRA CLUB AND THOMAS M. HILDEBRAND

John Philip Melick (WVSB #2522)
Christopher L. Callas (WVSB #5991)
James Robert Alsop (WVSB #9179)
James M. Davis (WVSB #10820)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322-0553
(304) 340-1000

Randall B. Palmer
Allegheny Energy, Inc.
800 Cabin Hill Drive
Greensburg, PA 15601-1689

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The Sierra Club, Inc., and Thomas M. Hildebrand are seeking appellate review of the determination of the Public Service Commission of West Virginia ("Commission") to approve the application of Trans-Allegheny Interstate Line Company ("TrAILCo") by certifying the West Virginia segments of a 500 kilovolt electric transmission line and related facilities, the Trans-Allegheny Interstate Line ("TrAIL") pursuant to W. Va. Code § 24-2-11a ("Section 11a"). The Commission Order entered on August 1, 2008 ("August Order") granted TrAILCo's application

for a certificate of public convenience and necessity to construct and operate TrAIL. The Commission Order entered on February 13, 2009 ("February Order") adjudicated several petitions for reconsideration filed by the parties and disposed of certain other outstanding motions, including several filed by the Sierra Club and Mr. Hildebrand.

This Court, in its March 16, 2009 orders, designated both the Commission and TrAILCo as respondents. TrAILCo submits this consolidated response to the Petitions for Suspension and Review of the Sierra Club, Inc. ("SC Petition"), and the Petition for Appeal of Thomas M. Hildebrand ("Hildebrand Petition"). TrAILCo appreciates the opportunity to be heard in these proceedings, and respectfully urges this Court to refuse both petitions.

After telling the Court that it need not "wade, page by page," through the very Commission Orders as to which it seeks review (SC Petition at 9), the Sierra Club, as its statement of facts for this Court, proceeds simply to paraphrase the Staff's witnesses and Staff's ***proposed*** order as filed with the Commission on February 29, 2008. *Id.* at 11-13, 16-17, 21-22. Mr. Hildebrand likewise "does not attempt to rehash all the technical information presented" (Hildebrand Petition at 17), limiting his summary to positions the Staff later abandoned. *Id.* at 6, 18, 24-28. One reading the petitions would scarcely discern what anyone but Staff had to say in Case No. 07-0508-E-CN, or how the Commission itself resolved the issues.

The Sierra Club and Mr. Hildebrand have good reason for wanting not to "rehash" the evidence, and for encouraging this Court not to "wade, page-by-page," through the Commission Orders. They both know that those orders and the evidence cited therein eviscerate their assertions and, yes, those of the Staff that were submitted to the Commission while Staff was still a litigant opposing TrAIL's certification.

TrAILCo respectfully suggests that this Court can and should take the time to read both the August and February Orders for itself before considering either the Sierra Club's or Mr. Hildebrand's petitions.

I. PROCEDURAL HISTORY

TrAILCo concurs in the procedural history set forth in the "Background" section of the August Order (pages 4-9), and elaborates here only to emphasize the extensive participation of the Sierra Club and Mr. Hildebrand. The Commission afforded the Sierra Club, Mr. Hildebrand, and everyone else numerous opportunities to fairly present all of their concerns, evidence, and arguments. Over 490 days, the Commission received written comment, conducted public comment hearings, heard the evidence, and accepted numerous briefs and statements of position from all parties. Only then did the Commission issue its 183-page, single-spaced August Order, in which it summarized thoroughly everything that had been presented for its consideration and explained its resolution of the issues.

A. Initial Case Filing and Case Development

On March 30, 2007, TrAILCo filed its application for a certificate of public convenience and necessity to construct and operate the West Virginia segments of TrAIL ("Application"). August Order at 4. Although it was not required to do so at that time, TrAILCo submitted with its Application its pre-filed direct testimony.[1]

Multiple parties were granted intervenor status: 28 appeared *pro se*, including Mr. Hildebrand; and 10 were represented by counsel, including the Sierra Club.[2] August Order at 4-

[1] Under the Commission's Rules of Practice and Procedure, parties are generally required to pre-file prepared written testimony and exhibits for any witness who will testify at a hearing. (See Rules of Practice and Procedure, W.V. C.S.R. § 150-1-13.3.). This usually occurs after an application is filed.

[2] When Mr. Hildebrand intervened, his only particular assertion was that TrAIL would reduce the value of his land. *See* Hildebrand intervention petition (July 20, 2007). The Sierra Club raised the

5. The Commission gave these parties 250 days to respond to the Application and TrAILCo's direct testimony.

Both Mr. Hildebrand and the Sierra Club were active opponents of TrAIL. TrAILCo responded to 90 data requests from the Sierra Club and 27 data requests from Mr. Hildebrand. The Sierra Club sponsored testimony from three witnesses. Mr. Hildebrand sponsored his own written testimony, with 161 pages of exhibits.

B. The Evidentiary Hearing and Subsequent Briefing

Over ten days of hearings, the Commission heard from 42 witnesses, whose pre-filed evidence and oral testimony comprises 3,084 pages of transcript. The Sierra Club's counsel and Mr. Hildebrand attended most, if not all, of the evidentiary hearings, and each actively cross-examined many witnesses. Each also accepted the Commission's invitation to file initial briefs and/or proposed orders, and each also filed a reply brief.

C. The Stipulations and the August Order

On January 7, 2008, TrAILCo and the Consumer Advocate Division ("CAD") filed a Partial Joint Stipulation and Agreement for Settlement (the "CAD Stipulation"), which addressed (i) transmission credits (free electricity) for certain property owners affected by TrAIL; (ii) right-of-way clearing and maintenance; and (iii) certain agreements by CAD regarding its further participation in the proceedings, relating to CAD's agreement not to oppose the need for TrAIL and its agreement that TrAILCo would become a public utility upon TrAIL's certification. While the Commission had the fully briefed case under consideration, another settlement was reached among TrAILCo, the Staff, the CAD, and the West Virginia Energy Users Group

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specters of rate increases and adverse environmental consequences, related both to the mining of coal and its combustion for the generation of electricity. *See* Sierra Club intervention petition (June 28, 2007). TrAILCo did not oppose the intervention of either the Sierra Club or Mr. Hildebrand.

("WVEUG") and filed for the Commission's consideration on April 15, 2008 ("Joint Stipulation"). In the Joint Stipulation, TrAILCo agreed to additional conditions, including: (1) using a partial alternative route, known as the Grafton Area Route, that the CAD had advocated, (2) providing significant rate relief and economic benefits to West Virginia, and (3) agreeing to a number of safety and environmental provisions. Despite the earlier opposition by the Staff and the WVEUG to TrAILCo's demonstration of need for TrAIL, each of them, as well as the CAD, agreed in the Joint Stipulation to support the need for TrAIL.

Because the Joint Stipulation was entered into three weeks before the May 3, 2008 deadline for the Commission to decide the case, TrAILCo agreed to extend the 400-day statutory decision deadline for another 90 days. The Commission opened an additional comment period, scheduled another hearing, and thereafter ordered briefing. Both Mr. Hildebrand and the Sierra Club took advantage of these opportunities. Mr. Hildebrand served more data requests on both TrAILCo and Staff, and filed comments in opposition to the Joint Stipulation. The Sierra Club was also active in response to the Joint Stipulation, although not through traditional discovery processes; it pursued the extraordinary step of filing Freedom of Information Act ("FOIA")[3] requests on the Staff of the Commission, the CAD, and the Governor's Office. The Sierra Club also filed comments. Both participated in the May 30, 2008 hearing at which the Commission took additional evidence on the Joint Stipulation, and each filed briefs thereafter.

On August 1, 2008, the Commission issued the August Order, granting TrAILCo a certificate. The Commission also approved, with certain modifications, the Joint and CAD Stipulations, as well as other stipulations or agreements between TrAILCo and landowners as to the final route for TrAIL.

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[3] *See* W. Va. Code §§ 29B-1-1, *et seq.*

D. Post-Hearing Motions and the February Order

Mr. Hildebrand, the Sierra Club, and TrAILCo petitioned the Commission for reconsideration and modification of the August Order. While those petitions were pending, Mr. Hildebrand filed a petition for further hearing, to which he later submitted three addenda. The Sierra Club also filed a motion for a continuing prudence review for TrAIL.

On February 13, 2009, the Commission issued its February Order. The Commission denied the various petitions and motions filed by the Sierra Club and Mr. Hildebrand. The Commission granted several aspects of TrAILCo's petition for reconsideration, and modified the processes that had been established in the August Order to ensure TrAILCo's satisfaction of the conditions the Commission had imposed in the August Order.

II. STATEMENT OF FACTS

The August Order, in its detailed recital of the evidence presented both in support of and opposition to TrAIL's certification, offers the Court a useful statement of the relevant facts. The August Order is divided into distinct components of the Commission's decision to certify the West Virginia segments of TrAIL, taking into account the statutory test for certification of high-voltage transmission lines in Section 11a. An overview of these components appears in the August Order's introduction (pages 1-3).

In Part I of the August Order, the Commission painstakingly demonstrated TrAILCo's satisfaction of the first component of the Section 11a test: that a present and anticipated need for TrAIL exists. Part I focuses on West Virginia's participation in an interconnected regional transmission system, the overlay of national policies on transmission system reliability, and the role of PJM, as a "regional transmission organization" ("RTO"), in planning transmission

expansion within its control area. The Commission's validation of PJM's identification of reliability violations in 2011 formed the basis for its determination of need.

The Commission first described the regional nature of transmission planning. The West Virginia Legislature's specific incorporation of regional concerns in the disjunctive test in Section 11a "requires the Commission to view the question of 'need' to encompass regions outside of West Virginia and outside of the service territories of our jurisdictional utilities," directing it to consider not only the reliability needs of West Virginia electric customers, but also the needs of the "interconnected transmission system of which all of West Virginia's high-voltage transmission facilities are an integrated part." August Order at 11. Citing several recent Commission decisions, the Commission reiterated West Virginia's role in this system and acknowledged the Legislature's intent, expressed in W. Va. Code § 24-2-1e,[4] to promote the export of electricity generated in West Virginia. Electric transmission facilities, the Commission reasoned, are central to promoting this effort. *Id.*

The Commission next framed its siting responsibilities under Section 11a within the context of national policy intended to ensure the reliability of the interstate electric transmission system.

> Congress and federal agencies have identified the continued reliability of the Nation's bulk electric transmission system as a national imperative, and have mandated processes for identifying threats to that reliability, defining solutions, and compelling reinforcements to electric transmission infrastructure. The role of PJM, as a federally-designated RTO, in this process is a critical one. PJM's responsibilities and authority to identify transmission system reliability problems over a wide area and affecting multiple electric utility service areas and to participate in the regional planning for the construction of transmission facilities to resolve them, are at the core of this proceeding.

[4] West Virginia Code § 24-2-1e provides for accelerated rate recovery for the construction of electric transmission facilities that increase the capacity to transmit electric power to areas outside the utility's service territory.

Id. at 12. The Commission observed that neither this regulatory framework nor any of its particulars were disputed at the hearing. (They remain undisputed in the SC and Hildebrand Petitions.)

As an RTO, PJM must comply with transmission reliability standards of the North American Electric Reliability Corporation ("NERC"), many of which (including those at issue in this case) have been adopted by the Federal Energy Regulatory Commission ("FERC"), making them mandatory for PJM and transmission owners such as Allegheny Power. In its planning process, PJM must apply the NERC reliability standards; when it identifies violations of those criteria, it must develop a plan to mitigate them. If PJM determines that new transmission facilities are required to stave off violations of NERC standards, then it must designate a transmission owner (in this case, Allegheny Power) to construct the facilities. Under PJM's governing documents, Allegheny Power was "not at liberty to ignore this obligation or PJM's directive to cause the construction of TrAIL." August Order at 12-13.

PJM ensures transmission system reliability through its annual "Regional Transmission Expansion Plan," or "RTEP," process. "Conducting the RTEP process is one of PJM's primary and ongoing responsibilities as an RTO." *Id.* at 14. The RTEP process incorporates both five- and fifteen-year planning horizons and considers a range of factors relevant to transmission system reliability, including forecasted load growth, demand response efforts and distributed generation, requests by developers of generating facilities and "merchant" transmission facilities to interconnect with the PJM transmission system, economic congestion on the system, potential risk to existing infrastructure, and generation retirements and other deactivations. *Id.* at 14 n.6. The RTEP process benefits from stakeholder involvement, including PJM's Transmission

Expansion Advisory Committee ("TEAC"), which is open to a wide range of market participants and regulators. *Id.* at 15.

The Commission found that the RTEP process is a "reasonable and valid mechanism by which to ascertain the existence of violations of NERC reliability criteria and to identify solutions," concluding that no TrAIL opponent showed that the RTEP process "is flawed when applied in accordance with PJM's documented protocols or leads to unreliable or unreasonable results." *Id.* at 16. The Commission validated PJM's application of the NERC reliability criteria (*id.* at 16-18, Part I.D.1), endorsed PJM's use of assumptions and projections in the process (*id.* at 19, Part I.D.2), approved PJM's consideration of the impact of demand side management ("DSM") efforts on load forecasts (*id.* at 19-21, Part I.D.3), concluded that PJM's load forecasting methodology was reasonable and reliable (*id.* at 21-22, Part I.D.4), and supported PJM's "bright-line" tests on which generators should be modeled as available to resolve transmission reliability problems (*id.* at 22-25, Part I.D.5).[5]

Having validated the RTEP process itself, the Commission next considered various challenges to PJM's application of the process and its resulting determination that a number of violations of NERC reliability criteria would occur beginning in June 2011. Part I.E of the August Order summarizes the Commission's findings:

- The Commission concurred in PJM's identification of peak demand growth in the mid-Atlantic and northern Virginia areas as the primary factor causing the need for TrAIL, and acknowledged that the underlying reliability problems could manifest both as transmission line overloads and voltage drops at substations, which if serious enough can lead to a "blackout" or "brownout" situation. "The projected onset of these problems is a clear indicator of a transmission system that is in need of reinforcement." (*Id.* at 25-26, Part I.E.1.)

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[5] *See also id.* at 97-100 and 122-123 for the Commission's relevant findings of fact and conclusions of law on these points.

- The Commission found that PJM's 2006 RTEP process correctly identified 12 violations of NERC reliability criteria, including eight violations on the Mt. Storm–Doubs 500 kV line, which "is almost entirely within West Virginia and is critical to service reliability in much of the Eastern Panhandle of West Virginia as well as the mid-Atlantic region." Eleven of these violations were projected to occur beginning in 2011, with the twelfth violation, an overload on the Pruntytown-Mt. Storm 500 kV line, projected to occur in 2014. The Commission rejected arguments that PJM had misapplied a NERC reliability standard in the identification of voltage problems around the Meadow Brook substation and that the Pruntytown–Mt. Storm violation should not be considered because it was not scheduled to occur until 2014. (*Id.* at 26-28, Part I.E.2.)

- The Commission rejected claims that PJM excluded proposed generators that should have been included in PJM's system modeling, concluding that PJM's standards on this point, and particularly its practice of excluding planned generation projects that do not hold an executed Interconnection Services Agreement ("ISA") with PJM, was reasonable and valid. (*Id.* at 28-31, Part I.E.3.)

- The Commission determined that the projections of load growth incorporated into the 2006 RTEP were reasonable, explicitly rejecting an alternative load growth projection presented by a witness retained by the Staff. (*Id.* at 31-32, Part I.E.4.)

- The Commission agreed with TrAILCo's showing that the correct summer emergency "rating" on the Mt. Storm–Doubs 500 kV line, rejecting intervenor "speculation" that PJM's rating of 2,598 megavolt ampere was in error and, consequently, that the line could accept higher peak loadings before the projected NERC violations would occur. (*Id.* at 32-36, Part I.E.5.)

The Commission made distinct findings of fact and conclusions of law on each of these points. *Id.* at 100-104 (Findings of Fact 50-71) and 123-124 (Conclusions of Law 19-24).

In addition to its demonstration of NERC reliability violations, the Commission also found that West Virginia electric customers in the Eastern Panhandle would be at risk of "load shedding" if TrAIL were not implemented by June 2011, enhancing its determination that a need for TrAIL exists. The Commission rejected both (i) the Staff witness's contention that TrAILCo's load flow studies were appropriate to determine the location and extent of potential load shedding and (ii) the Sierra Club's effort to undermine TrAILCo's use of distribution factor, or "DFAX," calculations for this purpose. (*Id.* at 37-39, Part I.F.) Importantly, because the bulk

transmission system is presently operated at or near its limits, the Commission found that "from an operational perspective, many of the transmission reliability issues that PJM projects to occur as early as 2011" are actually present ***today***.

> The need to apply emergency procedures [to address at-limits loadings on the Mt. Storm–Doubs line] is not a sign of a healthy transmission system. Operational control of the power flow on the Mt. Storm–Doubs line every month of the year is an indication that system capability is inadequate; consequently, system operators lack the level of operational control they need.

Id. at 38; *see also id.* at 106 (Findings of Fact 77-78).

The Staff's abandonment of its initial opposition to TrAILCo's showing of need in 2011, and its later concession that TrAILCo is indeed needed, underpin much of the SC and Hildebrand Petitions. Yet in its August and February Orders, the Commission showed that its determination that a "present and anticipated need" for TrAIL exists was little affected by the Staff's earlier litigation position. In Part I.G of the August Order, the Commission recounted the testimony of a Staff witness that even though he questioned PJM's identification of a June 2011 in-service date for TrAIL, reliance on other alternatives would only likely defer the time that TrAIL is needed, ***not*** eliminate that need entirely. *Id.* at 38 (*quoting* direct testimony of Staff witness Lewis). At the May 30, 2008 hearing on the Joint Stipulation in which Staff joined in recommending that the Commission find a need for TrAIL, the director of the Commission's Engineering Division advised that even though "[n]obody knows for sure what the exact date is," the need for TrAIL is imminent and justifies action now. *Id.* at 39 (*quoting* testimony of Mr. Melton). Based on this testimony, the Commission accepted the Staff's modified position that TrAIL is needed. The Commission concluded, then, that a "present and anticipated need" exists:

> More specifically, PJM's RTEP process reliably identified the existence of NERC reliability criteria violations, that these violations are significant, and that failure to resolve them in a timely way will place the interconnected transmission system, including customers in the PJM Region as well as in West Virginia, at risk.

Id. at 39.

Having determined the existence of need, the Commission turned in Part II of the August Order to the question of whether PJM considered all reasonable alternatives within its authority to address the identified reliability violations. The Commission discussed at some length the limitations on PJM's and Allegheny Power's respective abilities to resolve reliability problems within a national regulatory construct designed to encourage competition and market-driven decisions in the energy and capacity markets. *Id.* at 43-44. The Commission rejected claims that TrAILCo should have been required to present a range of market-based solutions (including strategically-placed new generation and DSM) as alternatives to TrAIL, including claims by a Staff witness that TrAILCo's case was deficient because it did not incorporate a least-cost "integrated resource plan." *Id.* at 44; *see also id.* at 107 (Findings of Fact 80-82) and 125 (Conclusions of Law 29-30). The Commission also endorsed TrAILCo's evidence that other transmission-based alternatives – including "reconductoring" the Mt. Storm–Doubs line and adding ground clearance below that line to permit more line sag and thus increase its carrying capacity – were not feasible. *Id.* at 45-47; *see also id.* at 107-109 (Findings of Fact 83-89) and 125 (Conclusions of Law 31-33). Citing the concessions of a Staff witness on the competence of TrAIL from an engineering and design perspective, the Commission found that "if certified and constructed, TrAIL will address the reliability problems identified in the 2006 RTEP in a timely and effective way." *Id.* at 48; *see also id.* at 109 (Finding of Fact 92) and 126 (Conclusion of Law 36).

The Commission next addressed the financial commitments embodied in the CAD and Joint Stipulations, and how those benefits enhanced TrAIL's economic contributions under Section 11a. *Id.* at 50-53; *see also id.* at 110 (Findings of Fact 98-99) and 127 (Conclusion of

Law 40). The Commission at this point in the August Order also explained how recovery of TrAIL's costs was accomplished through ratemaking at the FERC, noting that this ratemaking approach contributed to TrAIL's financial feasibility. *Id.* at 53-55; *see also id.* at 111 (Findings of Fact 100-101) and 127 (Conclusion of Law 41).

The Commission then turned to the second part of the Section 11a test, determining that TrAIL will acceptably balance reasonable power needs and reasonable environmental factors. *Id.* at 56-64; *see also id.* at 111-116 (Findings of Fact 102-130) and 127-129 (Conclusions of Law 42-55). The Commission augmented this discussion with a separate portion of the August Order focused on the routing of TrAIL, an inherently controversial topic. *Id.* at 65-75; *see also id.* at 116-118 (Findings of Fact 131-140) and 130 (Conclusions of Law 57-61). Finally, the Commission addressed the evidence in the context of its review of the various conditions to which TrAILCo had agreed in the CAD and Joint Stipulations, and set forth how it would ensure TrAILCo's compliance with those conditions. *Id.* at 76-85; *see also id.* at 118 (Finding of Fact 141) and 130-131 (Conclusions of Law 62-64).

III. STANDARD OF REVIEW

The standard of review that this Court applies to a challenged Commission order is well known, but bears repeating. The Court has insisted that the Commission must act within its statutory authority and must base its decisions upon the evidence, but has otherwise deferred to the Commission's judgment within the sphere of its regulatory expertise:

> 4. "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." Syl. Pt. 2, *Monongahela Power Co. v. Public Service Comm'n,* 166 W.Va. 423, 276 S.E.2d 179 (1981).

> 5. "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." Syl. Pt. 1, *Central West Virginia Refuse, Inc. v. Public Service Commission,* 190 W.Va. 416, 438 S.E.2d 596 (1993).
>
> 6. " ' " '[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.' *United Fuel Gas Company v. The Public Service Commission,* 143 W.Va. 33, 99 S.E.2d 1 (1957)." Syllabus Point 5, in part, *Boggs v. Public Service Comm'n,* 154 W.Va. 146, 174 S.E.2d 331 (1970).' Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission,* 180 W.Va. 387, 376 S.E.2d 593 (1988)." Syl. Pt. 1, *Sexton v. Public Service Commission,* 188 W.Va. 305, 423 S.E.2d 914 (1992).

State *ex rel.* Public Service Comm'n of West Virginia v. Town of Fayetteville, Mun. Water Works, Syl. Pts. 4-6, 212 W.Va. 427, 573 S.E.2d 338 (2002). *See also, e.g.*, Affiliated Constr. Trades Found. v. Public Serv. Comm'n, Syl. Pt. 1, 211 W. Va. 315, 565 S.E.2d 778 (2002); Virginia Elec. Power Co. v. Public Serv. Comm'n, 162 W. Va. 202, 242 S.E.2d 698 (1978). "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." Affiliated Constr. Trades, Syl. Pt. 2.

TrAILCo respectfully suggests that the certification of EHV transmission lines is a matter squarely within the Commission's particular expertise. This Court should accord substantial

deference to the findings of the Commission (even though ignored by the Sierra Club and Mr. Hildebrand) where these specialized matters are concerned.

IV. ARGUMENT

A. The Commission Correctly Determined in the August Order that a Need for TrAIL Exists in 2011.

Both the Sierra Club and Mr. Hildebrand urge this Court to conclude that the Commission, on the basis of their petitions for reconsideration and other post-order motions, reversed its finding of a need for TrAIL in 2011 that the Commission had so assiduously documented in the August Order. Much of their remaining argument turns on this conclusion. But no fair reading of the February Order suggests such a radical departure from the Commission's earlier findings; to support their position, the petitioners have resorted to a tortured construction of what admittedly is some confusing language in the February Order.

1. Nothing in the February Order Reversed the Commission's Earlier Determination of the Existence of a Need for TrAIL in 2011.

The February Order denied the Sierra Club petition for reconsideration in its entirety, devoting six full pages to addressing each argument that the Sierra Club had advanced. The Commission described one of these arguments as an assertion that TrAILCo "did not support the contention that TrAIL was needed by 2011." February Order at 3. Reference to the relevant portion of the Sierra Club's petition for reconsideration (filed August 6, 2008) shows that the Sierra Club urged the Commission to reconsider the August Order because it allegedly was "not supported by substantial evidence," and specifically that the Staff's Engineering Director, Earl Melton, testified at the May 30, 2008 hearing on the Joint Stipulation that, "in his considered judgment, TrAILCo had not established [the need for] that additional electric transmission capacity as requested by TrAILCo in June 2011 vs. 2014 . . ." Sierra Club Petition for

Reconsideration at 7. The Sierra Club went on to quote Mr. Melton's hearing testimony at length, in which he acknowledged that while the Staff's retained experts had found TrAIL would be needed in 2014, Staff's modified view was to support a determination of need in 2011.[6] In summary, the Sierra Club urged the Commission to find that because the Staff experts had testified that they believed a need for TrAIL would arise in 2014, not 2011, the Commission's determination of a need in 2011 was "not supported by substantial evidence" and should be reconsidered.

The Commission rejected this argument in the February Order:

> *(ii) Need for TrAIL by 2011.* The Sierra Club also argued that TrAILCo did not establish the need for the TrAIL project by the year 2011.
>
> The ***Sierra Club is correct regarding timing*** but incorrect on the question of the ultimate need for TrAIL. Section I of the [August 1, 2008] Order contains an extensive analysis showing the need for TrAIL. ***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.*** *See*, Final Order at pages 7 and 10-39; Transcript May 30, 2008 at pages 195-196.

February Order at 3 (emphases added). Both the Sierra Club and Mr. Hildebrand seize upon the emphasized language, and ask the Court to draw conclusions from it that the balance of the Commission Orders simply does not support.

The petitioners insist that the Commission, in stating that the "Sierra Club is correct regarding timing," effectively found that TrAILCo had not shown a need for TrAIL in 2011. Examples of this interpretation litter the petitions.[7] The Sierra Club's preliminary statement advises this Court that

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6 *Id.* at 7-8, *quoting* transcript of May 30, 2008 hearing at 207-209. Interestingly, the Sierra Club's quotation candidly included Mr. Melton's assessment that "if you're talking about 2014 versus 2011, it is not that big of a difference really."

7 *See, e.g.*, SC Petition at 10 (characterizing the "Commission's concession" in the February Order that "the Sierra Club was correct with regard to the timing of the need for the TrAILCo line, and the

> [i]n 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 . . ."

SC Petition at 2 (emphasis in original). More pointedly, the Sierra Club argues that the two paragraphs in the February Order quoted above constituted the Commission's determination to reverse its finding of need in the August Order:

> 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 conceded the "Sierra Club is correct" in its conclusion – 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 (that date specified in TrAILCo's application) is no longer sustainable.

Id. at 32 (emphasis in original). The Commission's reversal on this issue, the Sierra Club now contends, constituted a determination that TrAILCo's Application, and specifically its assertion of the need for TrAIL in 2011, "was no longer supported by substantial evidence," and therefore that the Commission's failure to reconsider it was legally erroneous. *Id.* Moreover, the Commission's purported reversal of position means, in the Sierra Club's view, that the Court need not sort out other substantive issues raised in the SC Petition: "All of those substantive

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Commission's assertion that it would be needed someday, in 2014 or perhaps 2015"); at 11 (February Order constitutes the Commission's "concession that no showing of need by June 30, 2011 has been made"); at 12 (assertion that Commission's finding in February Order that "the Sierra Club is correct" means that the Mt. Storm–Doubs line can be reconductored by 2014); at 17 (February Order "acknowledge[s] that the Sierra Club was correct in its contention that TrAILCo had not shown a need for the new line by June 30, 2011"); and at 26 (asserting that "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").

Mr. Hildebrand also focuses on the same language in the February Order to support his claim that the Commission misapplied Section 11a. *See* Hildebrand Petition at 19 (asserting that the Commission's statement that the "Sierra Club is correct regarding timing" equates to a Commission determination that the line is not needed in 2011).

issues are effectively mooted by the Commission's unambiguous concession that the temporal basis for the TrAILCo application has simply ceased to exist." *Id.* at 33.

For all the bombast and repetition the Sierra Club brings to this argument, a careful review of the February Order shows how spurious and self-serving it is. First, the Commission's holding quoted above necessarily addressed the portion of the Sierra Club petition for reconsideration to which it related – a request that the Commission find that, because a Staff witness believed that no need for TrAIL would arise until 2014, the Commission's finding of need in 2011 in the August Order was "not supported by substantial evidence" and thus should be reconsidered. The Commission declined to grant this request; this denial cannot reasonably be interpreted, as both petitioners now urge, as an explicit Commission determination that TrAIL is ***not*** needed in 2011. Had the Commission agreed with the Sierra Club that the Staff witness's position was determinative of the question, and thus resulted in a lack of "substantial evidence" that TrAIL is needed in 2011, it would have granted this aspect of the Sierra Club petition, not denied it.

Second, had the Commission intended to reverse its earlier determination in the August Order that a need in 2011 had been effectively demonstrated, it would have devoted more than two slim paragraphs to explaining why. Instead, the Commission made careful and supportive reference to its earlier findings: "Section I of the [August] Order contains an extensive analysis showing the need for TrAIL." Two sentences later, it cited to pages 7 and 10-39 of the August Order – the very same discussion that approved the PJM approach, validated PJM's application of it to identify reliability violations ***in 2011***, and rejected each and every Staff and intervenor challenge to that result. (See Section II.A above.) The Commission also expressly found that

the Sierra Club petition for reconsideration raised issues that had been "fully addressed" in the August Order. February Order at 19 (Finding of Fact 1).

Third, the Sierra Club now insists that the Commission, by its finding that the "Sierra Club is correct regarding timing," meant to overturn its August 2008 finding of need in 2011 because it was convinced by later Sierra Club and Hildebrand arguments, advanced only in November 2008, that "subsequent market events" had undercut its earlier need determination. SC Petition at 32. There is, of course, absolutely no support for this view in the February Order. The Commission's disposition of the Sierra Club's challenge to need in 2011 made ***no reference*** to any of the material supplied in support of the Hildebrand Petition for Further Hearing (filed on November 21, 2008) or the Sierra Club Petition for Continuing Prudence Review (filed on November 24, 2008). To the contrary, the Commission denied these motions in separate sections of the February Order. *Id.* at 15-18. In effect, the Sierra Club has attempted to bootstrap the Commission's emphatic denial of two later motions as the factual predicate for its assertion that the Commission, in denying its petition for reconsideration, really meant to reverse its earlier determination of need in 2011. The Sierra Club's disregard for the totality of the Commission's decisions and its lack of candor with the Court are stunning.

The Commission, in its Statement of Reasons, will have an opportunity to speak to the significance of the discussion at page 3 of its February Order. TrAILCo suggests, however, that a simpler interpretation is more reasonable and more consistent with the Commission's denial of all aspects of the various requests the Sierra Club and Mr. Hildebrand filed after the August Order:

- In observing that the Sierra Club "is correct regarding timing but incorrect on the question of the ultimate need for TrAIL," the Commission merely acknowledged that the Sierra Club correctly distinguished the Commission's endorsement of PJM's determination of need in 2011 from the Staff witness's belief that the need

for TrAIL might not arise until 2014. This distinction is, after all, the only point the Sierra Club made in the relevant portion of its petition for reconsideration. Sierra Club Petition for Reconsideration at 7-8.

- The Commission's statement that "[t]he 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" signified the Commission's view that ***even if*** PJM had not effectively identified a need for TrAIL in 2011, the Staff's concession that a need arising in 2014 or 2015 would still justify the Commission's certification of the line.

This interpretation of the Commission's language is not only contextually correct – it is the only one that can be reconciled with its emphatic validation in the August Order of PJM's identification of NERC reliability violations projected to occur beginning in 2011, none of which the Commission withdrew in the February Order.

2. The Commission's Determination That TrAIL is Needed in 2011 Was Proper and Supported by Overwhelming Evidence, and the Petitioners' Challenges to that Determination Were Entirely Without Evidentiary Support.

Perhaps betraying a lack of confidence in their primary argument that the Commission had actually reversed its position on need in 2011, both the Sierra Club and Mr. Hildebrand present a variety of challenges to the Commission's need determination.[8] But they fail to confront the Commission's reasoned rejection of each of these challenges in the August Order, when they had been presented in the Sierra Club's and Mr. Hildebrand's petitions for reconsideration. Aside from their assertion that the Commission Staff had earlier advanced some of these challenges, the petitioners offer no basis to conclude that the Commission's decision to reject them was in error.

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[8] The Sierra Club characterizes these as "evidentiary deficiencies," enumerating them in Sections IV.C and IV.D of its petition. SC Petition at 11-18. Interestingly, they do not appear prominently in Sections V ("Issues Presented") or VII ("Argument"), so it is difficult to appreciate their relevance to the Sierra Club's assignments of error. Mr. Hildebrand's approach is even more oblique; rather than asserting that they constitute error, he instead contends that the Staff was not free to abandon them in its earlier objections to TrAILCo's demonstration of need. Hildebrand Petition at 23-28.

Availability of Generation to Resolve Reliability Violations. To complete its RTEP analyses, PJM must determine what generation resources can reasonably be expected to be available to cause or resolve reliability violations.[9] Relying on a position advanced by Staff at hearing, the Sierra Club assails the Commission's rejection of the assertion that PJM should have included approximately 2,500 MW of generation that did not have executed Interconnection Services Agreements with PJM. SC Petition at 11-12; *see also* Hildebrand Petition at 24. The Sierra Club offers no explanation, other than the Staff's proposed order urging a different approach, for why this is so. The Commission found no evidentiary basis that any of these generators was available to delay or defer the need for TrAIL, and otherwise endorsed PJM's bright-line tests for including and excluding generators. August Order at 29, 99-100 (Findings of Fact 45-49), 102 (Finding of Fact 59), and 123-23 (Conclusions of Law 17, 19-22).

Determination of Line Rating of the Mt. Storm-Doubs Line. The Sierra Club asserts that the Commission incorrectly determined the "line rating," or carrying capacity, of the Mt. Storm-Doubs line, and that this line could be effectively "reconductored," or alternatively that additional ground clearance could be added, prior to TrAIL's in-service date of June 2011, thus staving off reliability violations by increasing the line's carrying capacity. SC Petition at 12; *see also* Hildebrand Petition at 25. The Commission specifically concurred in TrAILCo's demonstration of the correct line rating (August Order at 32-36, 103-104 (Findings of Fact 64-71), and 124 (Conclusion of Law 24)) and rejected the notion that Mt. Storm–Doubs could be

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[9] In simplistic terms, a generator in one location might tend to increase loadings on a particular portion of the transmission system, while the same generator, if located in another location, might operate to relieve those loadings and eliminate or defer the appearance of a reliability violation. Thus, determining which existing and potential generators are assumed to be available, and which are assumed to be unavailable, is quite significant in PJM's identification of the location and timing of NERC reliability criteria violations.

effectively remediated prior to June 2011 (*id.* at 45-47, 107-109 (Findings of Fact 83-91), and 125 (Conclusions of Law 32-33)).

Risk to West Virginia Customers. Under the heading "Black Out Misrepresentation," the Sierra Club assails TrAILCo's showing that customers in Berkeley, Jefferson, Morgan, and Hampshire Counties will be at risk for load shedding in the absence of TrAIL, contending that TrAILCo's basis for this assertion was limited to a "Locational Deliverability Area" proposal advanced and then rejected by PJM. SC Petition at 13; *see also* Hildebrand Petition at 25-26. The Commission specifically approved TrAILCo's demonstrations on this point, and found that nothing in the Sierra Club's cross-examination of TrAILCo's witness undermined this analysis. August Order at 36-38, 104-106 (Findings of Fact 72-78), and 124 (Conclusions of Law 25-26).

Fabrication of Reliability Concerns to Justify TrAIL. Both the Sierra Club and Mr. Hildebrand argued, in their petitions to this Court and to the Commission, that the reliability violations constituting the need for TrAIL were a pretext fabricated by PJM and Allegheny Power to "move large amounts of coal" to eastern electricity markets, and thereby to generate revenues for Allegheny Power. SC Petition at 13; Hildebrand Petition at 26. There was absolutely no evidence of this alleged shadowy conspiracy in the record and the Commission, making reference to the entirety of its need findings in the August Order, summarily dismissed this claim. February Order at 4.

PJM's Load Forecasting Methodology. The Sierra Club contended that PJM's load forecasting methodology failed to account for speculative long-term impacts associated with DSM initiatives, changes in usage "as a result of adjustments to global warming," and changes in government policies. It also argued, again based on the Staff's litigation position, that TrAILCo had not presented enough information to allow a meaningful evaluation of PJM's load

forecasting methodology. SC Petition at 13-16; *see also* Hildebrand Petition at 27. The Commission found no evidence that PJM's load forecasting methodology is unreasonable or unreliable, or that it failed properly to incorporate the impact of existing or announced DSM initiatives, as the Staff had earlier contended. It also validated PJM's determination to include only mandatory "active" load management obligations in its load forecasts. August Order at 21-22, 99 (Findings of Fact 43-44), and 122-123 (Conclusions of Law 15-16).

3. The Commission Never Found, and the Evidence Does Not Support, That Only Reliability Violations Within a Five-Year Window Can Justify PJM's Determination of Need for TrAIL.

The Sierra Club's and Mr. Hildebrand's insistence that the Commission disavowed its finding of need in 2011 extends to another false interpretation of the evidence – that only if TrAILCo was able to show the existence of need in 2011 could the Commission properly certify TrAIL.[10] This incorrect premise finds multiple expressions in the petitions. Mr. Hildebrand repeatedly asserts that PJM has a five-year "direction window" (an odd term that, to TrAILCo's knowledge, does not appear anywhere in the record) beyond which PJM allegedly does not study the transmission system for reliability violations, and that unspecified "PJM rules" forbid it to direct transmission upgrades where the reliability need arises beyond that timeframe. Hildebrand Petition at 1, 14, 21. The Sierra Club contends that PJM's "crystal ball" does not forecast the transmission system beyond five years, because its "computer models only go out five years into the future" (SC Petition at 11) and, incongruously, that the one NERC reliability violation that

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[10] We have already seen the Sierra Club's insistence in the SC Petition that the Application was exclusively predicated on a showing of need in 2011, and to the extent the project is shown to be needed at any later time, certification of the line is impossible. SC Petition at 4, 32 (assertion that Commission's purported assertion that TrAIL is needed later than 2011 is "not an adequate substitute" for the legal determination of need by the date specified in the Application, June 2011). Of course, nothing in Section 11a is so restrictive of the Commission's authority, nor does the Commission's order interpret either the statute or the Application in that way.

PJM ***did*** project to occur in June 2014 (electrical occurrence 9, an overload of the Pruntytown–Mt. Storm 500 kV line in north-central West Virginia) was "summarily dropped from the discussion" for the sole reason that its projected occurrence beyond five years doomed it to irrelevance due to supposed limitations on PJM's authority (*id.* at 10).

These contentions are flatly contradicted by testimony submitted with the Application and recounted in the August Order. The Commission observed that PJM's RTEP process incorporates transmission planning "on five-year and fifteen-year planning horizons," and that the fifteen-year horizon "permits the consideration of long-lead-time transmission options and enables PJM to address both the reliability and economic performance of the transmission grid based on the impacts of long-term load growth and a wide range of market factors." August Order at 14-15. The simple reason that NERC reliability violations beyond the near-term five-year analysis for 2011 in the 2006 RTEP were not explored in detail (beyond the previously-mentioned 2014 overload on Pruntytown-Mt. Storm, that is) is because eleven of the twelve violations ***were*** projected to occur in 2011; thus, the question of whether violations in year six or later years would have been sufficient simply was not relevant, and therefore was never specifically adjudicated. Although petitioners now encourage this Court to leap to the convenient conclusion that violations of NERC reliability standards beyond five years cannot support PJM's direction of a reliability-based transmission upgrade, this conclusion is flat wrong, and there is utterly no basis for it in the record or under Section 11a. Nor is there any suggestion in the Commission Orders that the Commission interpreted PJM's analysis capabilities, or its authority as an RTO, to be restricted in this way. Indeed, the Commission's observation in the February Order that even if reliability violations had not been effectively shown in 2011, TrAIL would still be needed, completely undercuts the petitioners' position. Although the

Commission's conclusive finding of need in 2011 moots petitioners' argument on this point, the Court should understand the purported five-year window on PJM's authority to direct reliability-based transmission upgrades has no basis in fact or the evidentiary record.

4. The Economic Recession Has Not "Obsolesced" the Commission's Finding of Need, and the Commission Was Within Its Discretion Not to Reopen the Evidentiary Record on the Need for TrAIL.

For all of these reasons, the Commission was not required, notwithstanding the economic slowdown and uncertainties of late 2008 and early 2009, to reopen the evidentiary record to reconsider its ruling or, as the Sierra Club requested, to conduct a "continuing prudence review" to re-evaluate the need for TrAIL. *See* SC Petition at 1; Hildebrand Petition at 36-40.[11] Even setting aside the extensive evidentiary record, the extended period over which the Commission considered the Application (nearly two years from its filing to the Commission's resolution of post-order submissions in February 2009), and the manifold opportunities accorded to the Sierra Club and Mr. Hildebrand to challenge the Commission's findings of need, there are compelling reasons why the Commission was within its sound discretion not to reopen the proceeding.

First, despite the petitioners' absolute certitude that that the economic recession, including downward forecasts of growth in energy demand, has eviscerated the need for TrAIL, the Commission knows – and its orders reflect – that there are many factors in addition to load growth forecasts that bear on the existence and timing of NERC reliability violations: generation additions and retirements, the status of interconnection requests, and other aspects of

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[11] It should be noted that Mr. Hildebrand's views on the Commission's ability to consider post-hearing developments have changed considerably. In comments on the Joint Stipulation that he filed with the Commission on May 19, 2008, Mr. Hildebrand repeatedly asserted that only the Joint Stipulation was to be considered at the May 30, 2008 hearing, and that the evidentiary record on the need for TrAIL must "remain closed." Of course, this insistence was premised on his view that the evidentiary record had already proved the non-existence of need, and that the Joint Stipulation should not admit additional evidence on need because the need question had, in Mr. Hildebrand's estimation then, already been demonstrated to TrAILCo's disadvantage.

transmission system topology are also relevant. Second, there is no reason to suppose that even if the need for TrAIL had been determined to slip to 2012 in subsequent PJM RTEP studies, then the Commission would have been unwilling to certify its construction; the Commission's discussion in the February Order suggests just the opposite is true. Finally, the Commission correctly concluded that changes in the projected in-service date for another transmission line (the "PATH" line) were not directly relevant to when the reliability violations underlying TrAIL would occur. In fact, TrAILCo showed that PJM's revisions to its 2007 RTEP, which revised the PATH in-service date, were premised on a transmission system topology that continued to assume that TrAIL will be placed in service by June 1, 2011.[12] The Commission was justified in concluding, then, that Mr. Hildebrand's information "does not refer to TrAIL or demonstrate that TrAIL is no longer needed" (February Order at 18, 20 (Finding of Fact 13)) and thus was insufficient "to warrant a decision to hold an additional hearing after the close of the evidentiary record" (*id.* at 21 (Conclusion of Law 11)). The Commission was well within its discretion not to reopen the evidentiary record to re-evaluate the need for TrAIL, especially when it had so emphatically approved the need for it. TrAIL is still needed, and the Commission is not required to continually review its certification of a multi-state transmission project, over and over again, until it is too late to complete construction by the PJM-directed in-service date.

[12] *See* TrAILCo's Response to Hildebrand Petition to Reopen and Sierra Club Petition for Continuing Prudence Review and Supplemental Memorandum in Support of Petition for Reconsideration, dated November 26, 2008, at n.6 and accompanying text. To this day, PJM's planning studies, including the report on PJM's 2008 RTEP report issued February 27, 2009, continue to show an in-service date for TrAIL of June 1, 2011. *See* 2008 RTEP Report at 6, available at http://www2.pjm.com/planning/downloads/rtep-2008/2008-rtep-report.pdf.

B. The Commission Did Not Err By Approving the Joint Stipulation and Thus Rejecting the Findings Initially (But Not Ultimately) Urged by the Commission Staff.

1. The Commission is the Decision-Maker; the Commission Staff is a Litigant.

Instead of focusing on the Discussion, Findings of Fact, and Conclusions of Law rendered by Commission in the August and February Orders, the Hildebrand and SC Petitions focus squarely on the initial litigation position taken by the Staff in this proceeding relating to need. The Hildebrand and SC Petitions insist that the Staff, unlike other parties, has a direct role in advising the Commission, and that the Commission erred in not giving special deference to – indeed, in not adopting entirely – the Staff's initial argument that TrAIL was not needed.

The Staff, however, is not involved in the Commission's decision-making process. Instead, the Staff is (and was in Case No. 07-0508-E-CN) a party that presents evidence it believes is necessary for the Commission to decide a case; in addition, the Staff typically advocates for a particular outcome. For over 20 years, the Commission has created lines of separation between itself, as a decision-maker, and the Staff. *See generally* General Order No. 195.10 (Commission Order dated November 13, 1986). The Division of Administrative Law Judges, law clerks, auditors, and support staff, including the Executive Secretary's office, constitute the adjudicatory (*i.e.*, decision-making) section of the Commission. *Id.* at 2. The Legal Division, the Utilities Division, and the Transportation Division, commonly referred to as the "Staff," are outside of the Commission's adjudicatory section, and instead are parties who may present evidence and "advocate" certain positions before the Commission. *Id.* Thus, the Commission has concluded that the "Offices of the Commissioners and the Division of Administrative Law Judges, Auditors assigned thereto, Law Clerks, and necessary support staff shall exist independently of the other divisions of the

Commission." *Id.* In short, the Commission Staff is like any other party to a proceeding, except for the fact that it is not required to seek the Commission's leave to intervene in a case, as other parties are required to do. W. V. C.S.R. § 150-1-5.3. Moreover, the Staff is responsible for developing its own case, presenting its own evidence, and deciding which positions to advocate. Beech Ridge Energy, LLC, Case No. 05-1590 (Commission Order dated May 5, 2006) ("[E]ach party to a siting certificate has the responsibility to present his or her own position. Staff's role in a proceeding is to thoroughly analyze the evidence, balance all of the interests and provide the Commission with an unbiased recommendation."); *see also* AES Laurel Mountain, LLC, Case No. 08-0109 (Commission Order dated May 22, 2008) (same).

In the TrAIL proceeding, Staff participated as a party litigant, a fact which could not have been lost on the Sierra Club or Mr. Hildebrand. Staff counsel filed and opposed motions, cross-examined witnesses, made and opposed objections, and played a role indistinguishable from that of the other lawyers and *pro se* parties over the course of more than a year and throughout two weeks of evidentiary hearings. The Commission ruled in favor of or against Staff in the same manner as it ruled for or against other parties.

Mr. Hildebrand and the Sierra Club also misapprehend the Commission's adjudicatory role when they suggest that the Commission erred by not giving special credence to the Staff's initial position on need. It is well established that Staff's litigation positions receive no special deference, but are to be evaluated by the Commission on their merits. The Commission must weigh all of the admissible evidence presented to it in light of the statutory requirements, regardless of the party submitting it.[13] The Commission is under no obligation to provide any

13 These statutory duties lie with the Commissioners, and not with the Staff. AES Laurel Mountain, LLC, Case No. 08-0109 (Commission Order dated May 22, 2008) ("The Association is incorrect . . . to

special deference to the litigation positions taken by the Staff (or, for that matter, any party) concerning how to weigh the evidence presented or how to resolve a case. Beech Ridge Energy, LLC, Case No. 05-1590 (Commission Order dated January 11, 2007) ("Staff's recommendation is not entitled to any more weight than other evidence received . . . . Staff's position is one of several that the Commission weighs, and Staff's opinion has equal weight with other parties."). The Commission is free to reject positions advocated by the Staff, and often does so.[14]

2. The Commission Staff, TrAILCo, the CAD, and WVEUG Did Not Act Inappropriately in Negotiating or Filing the Joint Stipulation.

Both the Sierra Club and Mr. Hildebrand assert that there were inappropriate *ex parte* communications between the Commission Staff and TrAILCo relating to the Joint Stipulation.[15] Once again, this argument fails to appreciate, or at least to acknowledge, the critically important distinction between the Commission and its Staff.

Ex parte rules generally prohibit tribunals from initiating, permitting, or considering *ex parte* communications, other than for administrative purposes. *See, e.g.*, Canon 3 of the West

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suggest that the statute imposes an obligation on Commission *Staff*. The Public Service Commission statutes speak to obligations of the *Commissioners*; those statutory responsibilities do not devolve to Commission *staff*." (emphases in original)).

[14] *See, e.g.*, West Virginia-American Water Company, Case No. 08-0900 (Commission Order dated March 26, 2009). In this recent order, the Commission rejected Staff's positions on a variety of issues ranging from return on equity, labor expenses, and operation and maintenance expenses.

[15] Mr. Hildebrand also suggests that there were inappropriate communications between the Governor's office and the Chairman of the Commission, who had been recused from Case No. 07-0508-E-CN, and that they may have had something "to do with the final decision." *See* Hildebrand Petition at 34. TrAILCo has reviewed the 1,000+ pages of documents produced to the Sierra Club pursuant to FOIA, and alluded to by Mr. Hildebrand. TrAILCo believes there to be only two documented communications involving the Commission's Chairman. On September 2007, the Chairman responded to an inquiry of a State Senator forwarded by the Governor's Office concerning Commission jurisdiction over utilities' right-of-way acquisition practices. On April 22, 2008, the Chairman forwarded to the Governor's counsel a copy of the so-called "Financial Agreement," stating simply that "[a]ttached is a copy of the Joint Stipulation and Agreement for Settlement filed on April 15, 2008, in the TrAILCo case." Respectfully, Mr. Hildebrand should have been more forthcoming in his petition about the utterly unremarkable nature of these communications.

Virginia Code of Judicial Conduct. For purposes of *ex parte* rules, the Commission Staff is not the tribunal or its advisor. As noted above, the Staff is a party, independent of the Commission and its decision making processes. For this reason, the Commission has mandated that the "Commission Staff from the Legal Division, the Utilities Division, and the Transportation Division assigned to a given case shall be precluded from *ex parte* communications with Commissioners or the assigned Administrative Law Judge regarding that case." *Id.* Consistent with Canon 3, those parties that fulfill the adjudicatory role of the Commission are prohibited from engaging in *ex parte* communications with the Staff. Thus, the Staff was not prohibited from entering into discussions with any party to the case. TrAILCo was free to discuss any aspect of this proceeding with Staff, privately or otherwise, just as the Staff was free to have private discussions with the Sierra Club, Mr. Hildebrand, the CAD, or the WVEUG. There was nothing inappropriate about TrAILCo discussing the case, or any aspect of it, with the Staff.

To the contrary, the Commission favors discussions that lead to the submission of settlements and stipulations, including settlements involving the Staff. The purpose of a joint stipulation is to recommend an overall or partial resolution, without binding the stipulating parties on the same issue in future cases. Stipulations can be partial or full, in terms of issues covered and participating parties. Stipulations frequently play a key role in the Commission's resolution of cases, and the Commission appreciates them. The Commission recently endorsed the use of even non-unanimous stipulations in another controversial proceeding.[16]

In addition to the *ex parte* allegations, the Sierra Club and Mr. Hildebrand allege that the Staff acted inappropriately by entering into the Joint Stipulation, given its initial litigation

[16] *See* West Virginia-American Water Company, Case No. 07-0998-W-42T (Commission Order dated March 18, 2008) at 7 (Conclusion of Law 1) ("The Commission values stipulations in rate and other proceedings because they resolve many cases in a prompt, fair, reasonable and expedited fashion based on the arms-length negotiations of the parties and can reduce litigation costs.").

position on need. The Staff, however, is not obligated to any one position. It takes litigation positions in which it seeks to achieve a specific outcome. Moreover, like any litigant, it can change its litigation position, even dramatically, based on its assessment of the strength of its position or what the decision-maker may do. It can participate in stipulated settlements and yield on previously-held litigation positions. Any settlement involves such give and take.

The SC and Hildebrand Petitions are also based on the self-serving presumptions that TrAILCo had made no effective showing of need for TrAIL and that the Staff's commitment to the Joint Stipulation was based solely on TrAILCo's financial commitments, not any weaknesses Staff may have perceived in its "need" case. The record does not bear this contention out. Witnesses sponsored by TrAILCo, including PJM representatives, established a strong need for TrAIL. Indeed, the CAD never challenged the need for TrAIL. Given this evidence and the Joint Stipulation, it is unreasonable to assert that the Staff could not come to believe that TrAIL was needed, or at least to concede that a compelling showing of need – one that might very well have convinced the Commission – had been made. To the contrary, it is reasonable to assume that the Staff was neither inalterably wedded to its initial position that TrAIL is not needed, nor sufficiently convinced that the quality of its evidence on this point would carry the day. Moreover, the Staff had other concerns beyond need – throughout the hearings, Staff was consistently concerned with economic benefits and the effects of TrAIL on property owners in West Virginia, both of which concerns were a substantial aspect of the so-called "Financial Agreement."

Given the evidence of need presented during the hearing, the Staff was presented with a choice: it could maintain its position and risk that the Commission would find a need for TrAIL and grant the certificate without conditions that Staff believed were necessary; or it could

leverage its litigation position to secure concessions from TrAILCo, thus increasing the likelihood that the conditions Staff wanted would be in place if the Commission found a need for TrAIL. For its part, TrAILCo, confident in its case but understanding the benefit of Staff support, made a number of important concessions primarily related to easing rate impact, just as it had done earlier with the CAD Stipulation. A review of the facts bears this out.

Staff had questioned the economic benefit of the TrAIL line, asserting in its initial briefs an insufficiency of benefits in this area. Economic benefits – primarily in the form of an abatement of TrAIL-related rate impacts for an extended period – were exactly what the parties to the Joint Stipulation negotiated:

1. Rate Mitigation. Mon Power and Potomac Edison (TrAILCo affiliates and subsidiaries of Allegheny Energy) agreed:

   A. Not to seek recovery in West Virginia of transmission charges billed by PJM to Mon Power and Potomac Edison for TrAIL for the period beginning January 1, 2007 through the latest to occur of (i) December 31, 2013, (ii) the last day of the thirtieth month following the month during which the in-service date for the West Virginia Segments of TrAIL occurs, or (iii) the last day of the month during which the in-service date occurs of the Allegheny Facility, discussed below. Mon Power and Potomac Edison estimated that the aggregate amount of these transmission charges over this period is approximately $31.2 million.

   B. To include a credit in the amount of $0.00065/kWh on the monthly bills of all ratepayers served under Rate Schedules K, P, and PP for the period beginning January 1, 2010, and concluding on December 31, 2011. This action was estimated to provide cost savings to the affected customers of approximately $5,750,000 for that period.

2. Energy Conservation. TrAILCo agreed to contribute $500,000 to the Governor's Office of Economic Opportunity for an expansion of the current energy efficiency program in the counties traversed by TrAIL in West Virginia. TrAILCo agreed to continue this level of funding for five years (inclusive of the first year), with each annual contribution to be in addition to Allegheny Power's current annual program.

3. Low Income Energy Assistance. TrAILCo agreed to contribute $500,000 to the State designated to fund low income energy assistance programs in the State, and to continue this level of funding for five years (inclusive of the first year).

4. Allegheny Facility. Mon Power, Potomac Edison, and TrAILCo agreed that on or before April 21, 2008, they would publicly announce their intention to locate 100 to 150 additional managerial, professional, technical, and administrative jobs in north-central West Virginia not later than the in-service date of the West Virginia Segments of TrAIL, projected to be June 1, 2011.

5. Free Electricity. Mon Power, Potomac Edison, and TrAILCo, agreed to provide "property owners" with a Transmission Credit pursuant to which a single residence on a "subject property" would received free electricity up to 12,000 kWh during any year.[17]

6. Property Owner Purchase Option. TrAILCo agreed to purchase any property containing residences that are within 400 feet of the centerline if the owner desires to sell their property. The provision contained a dispute resolution mechanism if the property owner desired to sell but a price could not be agreed upon.

Although the Commission emphatically found the existence of a need for TrAIL independent of these commitments, the Commission approved them as well. They certainly factored into the support the CAD, the Staff, and the WVEUG expressed in the Joint Stipulation.

The Sierra Club and Mr. Hildebrand also assert that the Staff's entry into the Joint Stipulation without the knowledge and involvement of all parties was improper. However, neither the Sierra Club, Mr. Hildebrand, nor anyone else was entitled to knowledge of the Staff's litigation or settlement positions. Staff can negotiate with, or refuse to negotiate with, any other party or group of parties. It has no obligation to share its litigation position, or its settlement position, with any other party. That is not to say that the Sierra Club and Mr. Hildebrand were not entitled to due process concerning the Joint Stipulation. They were, and, as explained below,

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[17] This portion of the Joint Stipulation was initially part of the CAD Stipulation.

the Commission provided ample opportunity for all parties to comment on and contest the Joint Stipulation.

3. The Commission Acted Appropriately in Approving the Joint Stipulation.

TrAILCo filed its Application on March 30, 2007, and the Commission was obligated to decide the case within 400 days (by May 3, 2008). The Joint Stipulation was filed on April 15, 2008, leaving the Commission with less than three weeks to review it under the statutory deadline. The Commission believed that it was necessary to have additional time for other parties to comment and present evidence on the Joint Stipulation, and it informed TrAILCo that it would not consider the Joint Stipulation unless TrAILCo agreed to extend the decisional deadline for 90 days to August 2, 2008. TrAILCo agreed.

With this additional time, the Commission could and did give the parties ample opportunity to review and comment on the Joint Stipulation, explain and justify their support or opposition, and present and cross-examine witnesses in another evidentiary hearing. As documented in the SC Petition, the parties extensively cross-examined Earl Melton, Director of the Engineering Division, on the Staff's position on need and its support for the Joint Stipulation. And, after the evidentiary hearing, the parties were presented with an opportunity to file initial and reply briefs. There can be no serious claim that the Sierra Club or Mr. Hildebrand did not have an opportunity to argue that the Commission should reject the Joint Stipulation, or to develop evidence to inform that position.

Mr. Hildebrand's argument that the Joint Stipulation constituted a "Financial Agreement" that the ***Commission*** entered into is without merit. Hildebrand Petition at 31-36 ("The Commission accepted (entered into) a contract in which it agreed to accept payment from TrAILCo....."). Stipulations present a recommended resolution of a case or contested issue, and

the Commission is free to accept, reject, or modify them. It could have approved TrAIL with an entirely different set of conditions, or no conditions at all.

Moreover, it is common in Commission proceedings for the Staff and CAD to seek, for the Commission to approve or insist upon, and for the utility to cede to, rate concessions, in the form of stay-outs, rate reductions, shareholder financial commitments, or otherwise, as a condition of approvals to rate increases or transaction approvals and in order to positively affect the "balancing of interests" the Commission is frequently required to undertake. This case was no different: TrAILCo offered financial commitments to enhance this aspect of the Commission's consideration of the Application.[18]

C. The Commission Appropriately Found That TrAILCo Will Be a Public Utility by Virtue of Its Ownership and Operation of TrAIL.

Mr. Hildebrand asserts that "it is very difficult to see how TrAILCo could meet the statutory test" of Section 11a to become a public utility, citing TrAILCo's lack of retail customers in West Virginia. To support this position, Mr. Hildebrand also asserts that TrAILCo "is not believed to have even owned any transmission equipment" – a perplexing claim given that TrAILCo, like any other applicant not previously authorized as a public utility, must obtain certification under Section 11a before it can lawfully operate any "transmission equipment." *See* Hildebrand Petition at 20. He goes onto quote a portion of the statute, emphasizing certain words and phrases while ignoring others. But there he stops, refusing to address the Commission Orders on this issue.

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[18] Not all of TrAILCo's commitments in the Joint Stipulation were financial in nature, however. Others included TrAILCo's endorsement of the CAD's proposed Grafton Area Route as well as its agreements to consider double-circuiting in limited instances, to establish a phone number for comments or concerns, to ground all buildings within 50 feet of the right-of-way, to restrict herbicides used for maintenance, and to limit construction activity.

The Commission explained in considerable detail why and how the need for electric transmission lines is considered on a regional basis under Section 11a (*see* August Order at 11-13, 93-95 (Findings of Fact 17-22), 120-122 (Conclusions of Law 3-10)) and why TrAILCo, as an entity engaged in the "transmission of electrical energy . . . for service to the public, whether directly or through a distributing utility," is a "public utility" under W. Va. Code §§ 24-1-2, 24-2-1(a), and 54-1-2(a)(2) (*see id.* at 78-79, 92 (Finding of Fact 7), 132-133 (Ordering Paragraph 3).

TrAILCo respectfully urges the Court to review these and all other portions of the Commission Orders. But Mr. Hildebrand's argument is plainly incorrect on the face of Section 11a. The Legislature authorized the Commission to certify TrAIL, and thereby make TrAILCo a public utility, "if it shall find and determine that the proposed transmission line:

> (1) Will economically, adequately and reliably contribute to meeting the present and anticipated requirements for electric power of the customers served by the applicant ***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(d) (emphases added). The "need" component of the governing statute is disjunctive, and thus does not require an applicant to have any end user customers, in West Virginia or elsewhere.

Mr. Hildebrand's argument that "TrAILCo had no customers, they had no defined service region or service district as intended by statute and therefore the Commission erred when it granted TrAILCo status as a West Virginia public utility" is based on a willful disregard of the law and the Commission's correct application of it.

D. The Commission Appropriately Rejected Sierra Club Predictions About "Carbon Taxes" and TrAIL's Indirect Environmental Effects.

The Commission rejected the Sierra Club's argument that TrAIL should not have been certified because of "the very highly probable bipartisan adoption of some proposal for a carbon tax." *See* SC Petition at 33-35. Although its position remains murky, it appears that the Sierra Club believes that such legislation will result in the demise of coal-fired electricity, thus leaving TrAIL "'a bridge to nowhere.'" SC Petition at 35. Lost in the Sierra Club's argument, however, is any reasoned recognition that TrAIL will be equally available to transmit wind energy and other renewable forms of generation.

The Sierra Club is passionate to the point of vituperation, but it fails to demonstrate how its assertions could have justified the Commission's denial of TrAILCo's Application.[19] TrAIL is not one of the coal-fired generation plants for which the Sierra Club harbors such contempt – it is a 500 kV ***line*** that will ***transmit*** electricity across several states, irrespective of the location the generating facility or whether the electricity is generated by the burning of West Virginia coal, the turning of turbines by the wind, or other means of generation.

> 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. (See Sierra Club Exhibit JK-2 at second page.) Moreover, TrAIL's transmission capacity will not discriminate against electrons

[19] This portion of the Sierra Club's petition is not only nasty in tone, but remarkably reckless. The assertion that "100% of the cost of [TrAIL] will be passed through to West Virginia consumers" (page 34) is 100% wrong. The evidence was undisputed that TrAIL's costs will be assigned by the FERC to transmission customers throughout PJM. *See* August Order at 53-55, 111 (Findings of Fact 100-101), and 127 (Conclusion of Law 41).

The representation that TrAILCo or any other Allegheny Energy entity was or is "just out of bankruptcy" (page 35) is false, too. The Staff's proposed order filed February 29, 2008 (which both the Sierra Club and Mr. Hildebrand present as unassailable throughout their petitions) contained the same assertion, to which TrAILCo replied as follows: "Although Allegheny Energy's financial distress in the early 2000s is known to this Commission, neither it nor its utility subsidiaries sought bankruptcy protection at any time during those difficulties, a fact the Staff might reasonably be expected to know. Moreover, Allegheny Energy's debt obligations have returned to investment grade." *See* TrAILCo Reply Brief, page 8 n. 6 (March 21, 2008).

> based on the source or type of generation resources which will be located within the PJM area. TrAIL will provide both a direct pathway, and an alternative pathway in case of outages of other transmission lines, that will be able to carry electricity from coal, oil, natural gas, wind, hydro, biomass, methane, or any other generation source. Even if the Commission were to consider indirect environmental impacts, the evidence in the record regarding TrAIL's anticipated indirect effects on the environmental through the facilitation of coal-fired generation of electricity, when combined with the other environmental factors discussed in this order, results in an acceptable balance between reasonable power needs and reasonable environmental factors.

August Order at 63; *see also id.* at 115 (Findings of Fact 126-127), 129 (Conclusion of Law 53).

The Sierra Club's next, related argument is that TrAIL's certification should have been denied because TrAIL will facilitate the continued generation of electricity through the combustion of coal, thereby increasing levels of carbon dioxide and other "greenhouse gases" in the environment. *See* SC Petition at 35-40. The Sierra Club is outraged over the Commission's observation in the discussion quoted above that the Sierra Club's witness, Dr. Kotcon, had appeared 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." But nothing in the cited portion of Dr. Kotcon's rebuttal testimony suggested that the Commission could or should attempt to regulate those emissions as such. Rather, he testified that there is inadequate environmental regulation of coal, but that the Commission could arrogate the role of environmental regulator by linking TrAIL to those emissions, and taking them into account as "indirect environmental impacts," thus depriving coal-fired plants of an outlet for their generation. *See* Sierra Club Exhibit JK-2 at second page.[20]

The Sierra Club cites (incorrectly) only one case for its novel interpretation of Section 11a(d)(2). In San Diego Gas & Electric Company, Docket 06-08-010, the California Public

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[20] The Sierra Club at page 35 of its petition describes this as "the second page of an exhibit to the testimony of Dr. Kotcon." It was, in fact, Dr. Kotcon's written testimony that he prepared in advance of the hearing, authorized the Sierra Club to file, and formally sponsored at the hearing.

Utilities Commission ("CPUC") considered the certification of an electric transmission line, and was required by California law to evaluate the project's effects on the level of greenhouse gases. *See* SC Petition at 38-39 (candidly acknowledging that West Virginia has no such greenhouse gas policy). The Sierra Club asserts that "[u]ltimately, 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." *See* SC Petition at 39 (citing "CPUC October 31, 2008 decision at 181"). In fact, the CPUC's final decision dated December 18, 2008 ***granted*** the application.[21]

Anyone can seek the introduction of a bill to subject Section 11a to a statutory greenhouse gas policy, but our Legislature has not enacted, and the Governor has not signed into law, any legislation that supports the Sierra Club's apparent position on what Section 11a ***should*** say. Nevertheless, the CPUC's discussion of the issue suggests that the Sierra Club, even under such a statute, would have to do much more to demonstrate a link between TrAIL and greenhouse gases than it did in Case No. 07-0508-E-CN:

> We, therefore, do not think it reasonable to impose the "Minnesota approach" offered by Conservation Groups as a solution, at least not on the basis of the CAISO analysis, given the speculative nature of the problem this solution purports to solve. As our discussion of the CAISO's modeling has shown, the determinant of whether operational GHG emissions reductions will be realized is not how Sunrise is used but whether or not the 33% RPS is met.
>
> We remain fully committed to meeting and exceeding California's already ambitious renewable energy and climate change related policies and goals. While we decline to mandate specific requirements about what types of energy Sunrise should carry, we believe it is appropriate to adopt measures aimed at ensuring that the investment in Sunrise supports achievement of the RPS and the AB32 GHG reduction targets. The record before us clearly demonstrates that one of the main goals of Sunrise is to access renewable resources - much of which are base load

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[21] The October 31, 2008 document cited by the Sierra Club was a proposed decision filed by an Administrative Law Judge that the CPUC chose not to adopt. The docket also shows that the Sierra Club is a party to the proceeding, and filed on January 23, 2009 a request for rehearing. *See* http://docs.cpuc.ca.gov/published/proceedings/A0608010.htm.

> geothermal resources - that otherwise would not be available without transmission upgrades. We want to be certain that construction of Sunrise will facilitate the development of renewable resources in the Imperial Valley.

San Diego Gas & Electric, "Decision Granting a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project," December 18, 2008 at 171-172 (footnotes omitted).

Dr. Kotcon's testimony was likewise based on the unsubstantiated premise that TrAIL would only transmit electricity generated through the combustion of coal, as opposed to wind energy or other sources. In any event, this Court should decline the Sierra Club's invitation to rewrite Section 11a by subjecting it to California's greenhouse gas policy, and reject its implication that TrAIL will be unavailable to transmit – and, by extension, to foster the continued development of – wind energy and other renewable energy resources.

E. The Commission Was Correct in Its Approval of TrAIL's Route.

The Sierra Club asserts that the Commission "arbitrarily rejected the shortest route, directly through Maryland, which had by far the least environmental impact." *See* SC Petition at 40-41. Once again, the Sierra Club in its discussion of this issue has adopted the Staff's evidence and ***proposed*** order, and ignored all of the other evidence and the Commission's discussion of it.

The Commission thoroughly examined the evidence and the parties' various positions on line routing, including the 138-page routing study (Appendix D to the Application) that addressed environmental impacts in much greater depth than comparing the raw lengths of the routes considered. *See* August Order at 65-75, 116-118 (Findings of Fact 131-139). More importantly for purposes of this Court's consideration of the SC Petition, the Commission concluded that Section 11a(d)(2) does not require an applicant to prove that it has selected the

best route to the exclusion of all others, but to demonstrate that the route selected and other aspects of a proposed line "[w]ill result in an acceptable balance between reasonable power needs and reasonable environmental factors" in the general interest of the public.

> 57. In determining whether the proposed route is in the public interest, the Commission must consider the interest of the general public. *Mountain Communities for Responsible Energy v. Public Service Commission*, slip op., at 28-29, June 23, 2008.
>
> 58. The Commission concluded that the line, which necessarily includes a route, reaches a reasonable balance between power needs and reasonable environmental factors. The Commission can not find that the proposed route presents any environmental impacts from the perspective of the general public that would be eliminated by utilizing an alternative route. The applicant has submitted a study of alternate routes and has stated adequate justification for the route selected.

See August Order at 130 (Conclusions of Law 57-61).

The Sierra Club fails to address the Commission's policy that, under Section 11a and the Commission's Rules, an applicant must propose a single, particular route, not alternatives, for Commission consideration. Appalachian Power Company, Case No. 97-1329-E-CN (Commission Order dated April 8, 1998); *see also id.* at Commission Order dated April 29, 1998 (denying applicant's petition for reconsideration). It would be folly to expect any applicant for a project like TrAIL to pick out the one, "best" route. While the Sierra Club might be particularly sensitive to effects on wildlife or native plants, a property owner like Mr. Hildebrand might care much more about TrAIL's visibility from his dining room window.

It should come as no surprise that there is substantial authority for the principle that if a proposed route is based on sufficient analysis and is neither arbitrary nor capricious, approval should not be withheld on the ground that another route might have been selected. Laird v. Pennsylvania Public Utility Com'n, 19 P.U.R.3d 387, 133 A.2d 579, 581 (Pa. 1957). In Pennsylvania, if a utility considers economic, topographic, environmental, regulatory, social, and

service factors in selecting among a reasonable number of alternatives, then the proponent of an alternative route must compile and present the evidence necessary to show that the utility's choice is unreasonable. Paxtowne v. Pennsylvania Public Utility Com'n, 398 A.2d 254 (Pa. 1979). Similarly, in Arkansas:

> It is not the function of a public utility regulatory agency to substitute or superimpose its judgment for that of the utility as to the location of the proposed new transmission facilities. If the route selected by the utility is not unreasonable and appears to have been chosen after consideration of the [appropriate] factors . . . then in the absence of special or very unusual circumstances the governmental regulatory body reviewing the application for a certificate of public convenience and necessity should confine itself to only ordering minor deviations in the route.

Harness v. Arkansas Public Service Comm'n, 962 S.W.2d 374, 379 (Ark. Ct. App. 1998), *affirming* Arkansas Power & Light Co., Docket No. 95-580-U, Order 4 (June 26, 1996), and *quoting* In re Southwestern Electric Power Co., Docket No. 94-003-U, 155 P.U.R.4th 316 (1994)); *see also* In re Carroll Electric Cooperative Corporation, Case No. 01208U, 2002 WL 32883492 (Ark. Pub. Serv. Comm'n January 24, 2002). Likewise, in Kentucky, "[t]he burden on each utility coming before us seeking a transmission line CPCN is to establish that it has thoroughly analyzed alternative routes for the line, including routes that use existing utility corridors or other suitable rights-of-way, and to establish that its route selection was reasonable." In re Louisville Gas and Electric Co., Docket No. 05-00467 (Ky. Pub. Serv. Comm'n May 26, 2006).

None of these authorities is cited in the Commission Orders, but they all were briefed by TrAILCo in Case No. 07-0508-E-CN and unrefuted by the Sierra Club or anyone else.[22]

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[22] Similarly, the Sierra Club ignores the analogous principles of condemnation law that TrAILCo briefed for the Commission. In condemnation "it is unnecessary for the petitioner to allege that it cannot obtain without condemnation other or equally suitable property; what particular land is necessary for the purposes of petitioner and for the public use to which it is to be devoted is generally a matter within the discretion of the petitioner." W. Va. & Md. Power Co. v. Raccoon Valley Coal Co., Syl. Pt. 5, 93 W. Va.

Respectfully, at this point the Sierra Club should at least acknowledge the regulatory principles at issue if it wishes to have its petition granted by this Court.[23]

F. The Commission Orders Provide an Appropriate Means to Ensure TrAILCo's Compliance with the Conditions Attached to the Certificate.

In its petition for reconsideration of the August Order, TrAILCo asked the Commission to geographically segment the hearing on compliance with the conditions attached to TrAIL's certificate. Instead, the Commission in the February Order replaced the compliance hearing envisioned in the August Order with (i) phased certification of compliance and (ii) ongoing enforcement of the conditions of TrAIL's certificate through discrete complaint or other focused proceedings.

Mr. Hildebrand asserts that this Commission decision was "arbitrary and capricious." *See* Hildebrand Petition at 40-43. Mr. Hildebrand bases his argument on suspicion, questioning the motives of both TrAILCo and the Commission:

> It is logical to believe TrAILCo will not be able to meet or does not plan to meet a portion of its pre-construction requirements. TrAILCo would not have asked for such relief and made it a condition of the Financial Agreement if this were not the case. To meet the terms of the Financial Agreement, the

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505, 117 S.E. 891 (1923). *See also*, Annot., *Eminent Domain: Review of Electric Company's Location of Transmission Line for Which Condemnation Is Sought*, 19 A.L.R.4th 1026, §§2[a], 3 (1983, 2007):

> [A] condemning authority enjoys broad discretion in determining the particular route, line, or location ... and ... the courts will not interfere with such determination in the absence of abuse of discretion, arbitrariness, or other unreasonable conduct on the part of the condemnor ... in reviewing the selection of the location of transmission lines by electric power companies seeking to condemn property for such facilities.

[23] The Sierra Club has also ignored the obvious need for comity in the siting of any interstate infrastructure. The route embraced by the Sierra Club would have required Maryland not only to address its design and location in that State, but also to coordinate two border crossings with West Virginia (and *vice versa*). That route also would have required Pennsylvania to certify seven times as long a line in that Commonwealth (14 miles, as opposed to less than two miles of TrAIL from 502 Junction due south to the West Virginia border). Even Mr. Ellars, the Staff witness whose testimony is embraced by the Sierra Club, conceded that people in different states "possibly" would see these issues differently. (Tr. 9 at 138 (Mr. Ellars).)

Commission appears motivated to move the project forward at lightning speed without due consideration to any negative ramifications.

Hildebrand Petition at 40.[24]

The Commission explained in the February Order why it decided to change its approach to compliance, given the geographic breadth and complexity of the TrAIL project. The Commission specifically cited its experiences in prior cases, and how it had come to appreciate the superiority of a phased approach and complaint proceedings that can be instituted by Mr. Hildebrand or anyone else, whether or not a party to Case No. 07-0508-E-CN, at any time. *See* February Order at 12-14, 20 (Findings of Fact 7-10), 21 (Conclusions of Law 6-7). Mr. Hildebrand ignores all of this explanation of the Commission's reasoning, and simply asserts – without any supporting evidence, law, or anything else – that another approach, in his view, is preferable.

It is both apparent and regrettable that Mr. Hildebrand has come to see every action or utterance of TrAILCo or the Commission as evidence of bad faith. No statute or rule prescribes whether or how the Commission must condition a certificate for a facility such as TrAIL, much less how it is to monitor and enforce those conditions that it determines to attach. This is an instance in which deference should be accorded to the Commission's judgment as to how it can best fulfill its statutory responsibilities.

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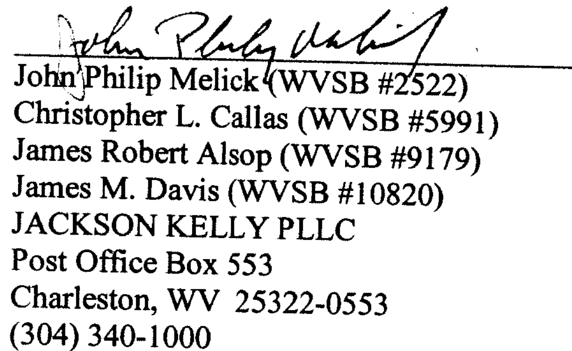
[24] Mr. Hildebrand fails to note the "lightning speed" with which the Commission resolved his and the Sierra Club's petitions for reconsideration. Those petitions were filed in August 2008, and were pending before the Commission for six months before their rejection in the February Order.

V. CONCLUSION

The Commission's certification of the West Virginia segments of TrAIL was the product of an exhaustively litigated proceeding over nearly two years. The Commission's chief conclusions – that serious transmission system reliability issues will arise beginning in 2011 if TrAIL is not constructed, and that the route selected for the West Virginia segments was appropriate – were thoroughly and professionally considered, and supported by ample evidence. Neither the Sierra Club nor Mr. Hildebrand has shown that the Commission exceeded its statutory jurisdiction and powers, or that the certification of TrAIL was without adequate evidentiary support or otherwise improper. TrAILCo respectfully requests that this Honorable Court deny the Sierra Club and Hildebrand petitions.

Respectfully submitted this 13th day of April, 2009.

TRANS-ALLEGHENY INTERSTATE LINE COMPANY
By Counsel



John Philip Melick (WVSB #2522)
Christopher L. Callas (WVSB #5991)
James Robert Alsop (WVSB #9179)
James M. Davis (WVSB #10820)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, WV 25322-0553
(304) 340-1000

Randall B. Palmer
Allegheny Energy, Inc.
800 Cabin Hill Drive
Greensburg, PA 15601-1689
(724) 838-6000

CERTIFICATE OF SERVICE

I certify service of RESPONSE OF TRANS-ALLEGHENY INTERSTATE LINE COMPANY TO PETITIONS FOR APPEAL OF THE SIERRA CLUB AND THOMAS M. HILDEBRAND by United States mail on April 13, 2009 addressed:

Thomas M. Hildebrand
7336 Sheraton Drive
Manassas, VA 20112

William V. DePaulo, Esq.
179 Summers Street, Suite 232
Charleston, WV 25301-2163
Counsel to Sierra Club, Inc.

Richard E. Hitt, Esq.
General Counsel
Public Service Commission of West Virginia
Post Office Box 812
Charleston, WV 25322

John Philip Melick