PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 07-0508-E-CN

TRANS-ALLEGHENY INTERSTATE
LINE COMPANY

Application of Trans-Allegheny Interstate Line Company for a certificate of public convenience and necessity under W. Va. Code § 24-2-11a authorizing the construction and operation of the West Virginia segments of a 500 kV electric transmission line and related facilities in Monongalia, Preston, Tucker, Grant, Hardy, and Hampshire Counties, and for related relief

APPLICANT'S RESPONSE TO HILDEBRAND PETITION TO REOPEN AND SIERRA CLUB PETITION FOR CONTINUING PRUDENCE REVIEW AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION

Trans-Allegheny Interstate Line Company ("TrAILCo") opposes the latest attempts by Thomas Hildebrand and the Sierra Club to reopen the evidentiary record and undermine the finality of the August 1, 2008 Commission Final Order in this matter ("August 1, 2008 Order").[1] Mr. Hildebrand in his November 21, 2008 petition has "request[ed that] the Commission require the applicant and/or PJM to provide a complete set of updated modeling forecasts to include all underlying data and assumptions for TrAIL." In a petition filed November 24, 2008, the Sierra Club similarly requested that the Commission require TrAILCo to file a PJM study upon which the decision to revise the in-service date of the Potomac-Allegheny Transmission Highline

[1] On June 12, 2008, Mr. Hildebrand moved to reopen the evidentiary record and to request that the Commission take judicial notice of testimony before the Maryland Public Service Commission. The Commission firmly denied that motion in its August 1, 2008 Commission Order (*see* pages 87-88, 131, 134). Oddly, neither Mr. Hildebrand nor the Sierra Club makes any mention of this in their new petitions.

("PATH") was based. The Sierra Club also requested that the Commission conduct a W.Va. Code § 24-2-11b continuing prudence review with respect to TrAIL.[2]

TrAILCo respectfully submits that the Commission developed an extensive record on the need for TrAIL, and appropriately certified its construction in accordance with W. Va. Code § 24-2-11a. The Commission should recognize and reject the recent filings of Mr. Hildebrand and the Sierra Club for what they are: collateral attacks on the August 1, 2008 Order that add nothing of any evidentiary substance.

The need for TrAIL predominated in the ten days of evidentiary hearings in January. In its orders leading up to the May 30 hearing, the Commission warned that it would not entertain any additional evidence on this question or any other contested issue in the case:

> This case was submitted for decision upon the close of the January 2008 hearings and subsequent submission of the initial and reply briefs. The upcoming hearing is for the sole purpose of addressing the Joint Stipulation. The Commission will not permit the parties to reopen or re-litigate any aspects of this case that were previously submitted.

Commission Order dated May 1, 2008 at 3; see also p. 4 at Finding of Fact 3 and Conclusions of Law 3 and 4.[3] No party, including Mr. Hildebrand or the Sierra Club, objected to this directive. Indeed, many parties to this case, including Mr. Hildebrand and the Sierra Club, argued that the evidentiary record developed at the January hearing proved the ***non-existence*** of need,[4] and opposed the Joint Stipulation on the premise that the need question had ***already*** been determined

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[2] Additionally, the Sierra Club requests that the Commission treat its November 24, 2008 submission as a Supplemental Memorandum in Support of its prior Petition for Reconsideration of the August 1, 2008 Order.

[3] *See also* Commission Order dated May 23, 2008 at 4 (May 30, 2008 hearing not for the purpose of submitting additional evidence beyond that addressed during the January 2008 hearing) and 5 (issues raised during the January 2008 hearing will not be reopened during the May 30 hearing).

[4] *See, e.g.*, Sierra Club Initial Brief dated February 27, 2008 at 3-26.

to TrAILCo's disadvantage.[5] It is contrary to their earlier positions as to both the January hearing and the May 30 hearing to now insist that additional evidentiary development is necessary on the same issue.

"Attachment 1" submitted by Mr. Hildebrand concerns not TrAIL, but PATH. In his remaining material, "Attachment 2," neither TrAIL, PATH, nor any other transmission line is even mentioned – not once. Nor has Mr. Hildebrand correlated these data to any rigorous demonstration that TrAIL is no longer needed. Just as he did in his motion back in June, Mr. Hildebrand has presented to the Commission "little more than loosely supported scenarios describing conflicting realities without a corresponding basis to weigh one scenario against the next." And just as it said in the August 1, 2008 Order (page 88), "the Commission can not proceed on the unsupported conjecture of the type submitted by Mr. Hildebrand."

The Sierra Club's request that the Commission require TrAILCo to submit the PJM study on which the decision to push back PATH's in-service date was based should also be denied. PJM's Regional Transmission Expansion Program ("RTEP") for the 2008–2022 Period presumed that TrAIL will be operational on PATH's in-service date.[6] Indeed, the Sierra Club's own cross-examination of Mr. Hozempa brought out that basic assumption.[7] A later decision to push back PATH's in-service date says nothing about the continuing need for TrAIL, and does not justify reopening the evidentiary record with respect to TrAIL's certification.

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5 *See, e.g.*, Halleck-Triune Community's Initial Comments on Joint Stipulation dated May 19, 2008 at 3-4; Sierra Club Initial Brief in Opposition to Joint Stipulation dated May 16, 2008 at 3-4.

6 *See* http://www.pjm.com/planning/rtep-baseline-reports/downloads/2007-rtep-baseline-assessment.pdf, the Regional Transmission Expansion Plan for the 2008–2022 Period (issued March 2008) at Appendix C, upgrade IDs b0328.1-.4 and b0347.1-.4, stating that TrAIL's in-service date is June 1, 2011. The same report lists PATH's projected in-service date as June 2012. *Id.* at 15.

7 *See* Hearing Transcript, Case No. 07-0508-E-CN, examination of Mr. Hozempa by Mr. DePaulo at 27–31 (January 11, 2008).

The Sierra Club has also asked – for the first time in a case pending 20 months – that the Commission condition certification of TrAIL with a W. Va. Code § 24-2-11b[8] prudence review. One might wonder why the Sierra Club has only now raised this argument, if not to wait as long as possible before playing its last card. But irrespective of whether the Sierra Club has been holding back, or just discovered the statute, the Commission has often stated that an opponent who requests that the Commission reassess a certificate must present "compelling"[9] information that is not "substantially similar"[10] to evidence that has already been considered by the Commission. The recycled testimony and recent *Wall Street Journal* article presented by the Sierra Club fail to satisfy this test.[11] The Sierra Club had ample opportunity throughout this

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[8] Section 24-2-11b of the West Virginia Code (1990) states:

> (a) If, in granting a certificate of convenience and necessity for the construction of an electric utility generating plant, a facility to comply with the federal Clean Air Act, as amended, or transmission line, the commission determines that the completion date for such plant or line is more than one year from the date of the order granting the certificate, the commission may require that such construction project or projects be subject to a continuing prudence review pursuant to this section.
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> (b) If the commission determines that continuation of a certificate subject to a continuing prudence review is not warranted or that the certificate should be amended, it may rescind or modify its authorization for construction.
>
> (c) The commission shall promulgate such rules and regulations as it determines are necessary for the administration of this section. The commission shall specify, either by rule or for a specific certificated project, the frequency of each prudence review, the rate-making treatment to be afforded partially completed projects, and such other terms and conditions as it determines are reasonable.

[9] *See, e.g.*, Citizens for Responsible Wind Power, Case No. 04-1685-E-PC at 6 (Commission Order dated January 25, 2005).

[10] *See, e.g.*, Citizens for Responsible Windpower, Case No. 04-1685-E-PC at 6 (Commission Order dated March 29, 2005).

[11] In Citizens for Responsible Windpower, Case No. 04-1685-E-PC (Commission Order dated March 29, 2005), the Commission found that derogatory newspaper articles about wind turbines which were "substantially similar" to information previously submitted by an opponent of a wind farm were not sufficient to grant a moratorium on the construction of wind power projects. *Id.* at 6.

matter to present its arguments about PJM's demand studies. The Commission considered these arguments at length,[12] and found them lacking.[13] The *Wall Street Journal* article merely rehashes the same failed arguments, albeit in a much weaker form.[14]

As the Commission stated in Gwinn v. Crab Orchard-MacArthur Public Service District, Case No. 86-217-S-C, *et. al.* (Commission Order Denying Petition to Reopen dated October 18, 1989), "an agency decision becomes a property interest to the participating parties and its finality is a fundamental element of that interest." *Id.* at 4 (citing Traux-Traer Coal Company v. Compensation Commissioner, 213 W.Va. 621, 17 S.E.2d 330 (1941)). The Commission also recognized the importance of finality in Monongahela Power Company, Case No. 9665 (Commission Order dated May 25, 1982):

> Generally, this Commission is of the opinion that it is inappropriate to second guess our decisions or to apply "20/20 hindsight" to one of our decisions, since to do so deprives them of finality, and we take the position that, under normal circumstances, a Commission order should not be revised retroactively, to reflect new knowledge or information presented to the Commission, which was not before us during our deliberations on the case in the first instance.

Id. at 6.

There simply must be finality to proceedings such as this if controversial projects subject to the Commission's jurisdiction are ever to be built on a timely basis. The evidentiary record

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[12] *See, e.g.*, August 1, 2008 Order at 20-31. The Sierra Club argued that a 14% reduction in peak electricity demand in the PJM region is conceivable over a ten-year period, and that such a reduction would obviate the need for TrAIL. The Sierra Club argued that extensive demand side management ("DSM") could make such a reduction possible.

[13] *Id.* at Conclusion of Law 17. The Commission rejected the Sierra Club's argument, finding PJM's load forecasting analysis both reasonable and reliable.

[14] The article states that while a recent unexpected drop in U.S. electricity consumption may be a trend, "[t]he data are early and incomplete," and in any case, "electricity use fluctuates with the economy and population trends."

was more than sufficient to permit the Commission's certification of the West Virginia Segments of TrAIL, as amply reflected in the August 1, 2008 Order.

TrAILCo acknowledges that the Sierra Club and Mr. Hildebrand are sincerely committed to stopping TrAIL. The continuing fervor of their efforts has been remarkable. However, the Sierra Club and Mr. Hildebrand have failed to "fully set forth" evidence that would warrant reopening of the evidentiary record, as required by Rule 19, to present compelling new information that would justify a reassessment of the August 1, 2008 Order, or that would warrant the institution of a prudence review. Their petitions should therefore be denied.

Dated this 26th day of November, 2008.

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