

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGES HOYER AND NEMEC
ON THE APPLICATION OF TRAILCO
August 2008
EXCERPTED CONTENT

On August 15, 2008, a Recommended Decision on the Application of Trans-Allegheny Interstate Line Company (TrAILCo) was issued, in preparation for a decision by the Pennsylvania Public Utilities Commission later this year. The Administrative Law Judges (ALJs) who reviewed the record concluded that the applicant failed to satisfy its burden of proof with regard to need for the proposed facilities, or that the project would avoid creating an unreasonable risk of danger to public health and safety, and also failed to demonstrate compliance with applicable statutes on protection of natural resources, that it would create a minimum adverse environmental impact, or is in compliance with siting regulations.¹

Excerpts from this Recommended Decision are provided below.

On the planning methods and motivations of TrAILCo and PJM

Synopsis: The ALJs conclude that (a) the decision to build new transmission originated from an intent to move coal-fired power into eastern markets, (b) the reason for this objective was driven by financial gain, not reliability, (c) the reliability justifications were concocted after the fact, (d) the methods used to project future reliability problems relied upon biased methods and that (e) less costly alternatives and non-transmission alternatives were not considered seriously.

- "Economics, not reliability, is the impetus for both the original request for transmission proposals from PJM and the TrAIL proposal itself" [p. 112]
- "The original TrAIL project was proposed before any reliability criteria infractions were identified" [p. 113]
- "Project Mountaineer's goal was to transmit 5000 megawatts of new coal-fired generation from western to eastern PJM" and "According to Mr. Pfirrmann [PJM management in a presentation to FERC], at least two extra high-voltage transmission lines were required to support the delivery of this much electricity." [p. 113]
- "PJM does not look for non-transmission solutions to potential electric reliability problems." [p. 115]
- "The RTEP modeling process used by PJM is an overly conservative, belt and suspenders approach to transmission planning" [p.115]
- [on the biases of the modeling process used by PJM] "In PJM's modeling, once generation has a signed facilities agreement, it is included in modeling for the purpose of contributing to problems but not for the purpose of providing solutions." [p.115]
- "We conclude that the RTEP process is designed to yield transmission solutions." [p.115]
- In its concluding comments, the Judges indicated that the proposed projects are, in the one case "a grandiose answer to a minor or even non-existent problem" and, in the other case, "granting approval ... at this juncture rewards a lack of foresight and proper maintenance, and has policy implications for the location of future generation that should be carefully considered before any further action is taken." [p.234]

¹ Certain of the conclusions have implications for the Mid-Atlantic National Interest Electric Transmission Corridor as well, as they find that the modeling information used by the regional transmission organization, PJM, were flawed. These same methods were used in the analysis of regional congestion in DOE's 2006 Congestion Study.

- “Non-transmission alternatives were not considered. PJM and TrAILCo settled on a global transmission solution because, as we have discussed, the true impetus for the 502-Loudan segment is to transport cheaper coal-fired generation from western PJM to eastern PJM.” [p. 234]
- “We question the modeling that was done to support the alleged need.” [p. 234]

Conclusion: “We do not believe that the present proposal is necessary or proper for the accommodation of the public, and we do not believe that the present proposal has a minimal environmental impact.” [p.118] And “As a result of our review of the record, we conclude the TrAILCo has not carried its burden of proof.”

On Route Evaluation and Siting

Synopsis: The ALJs found that TrAILCo did not come close to meeting the requirements for line siting in Pennsylvania, but instead the route selection process was “arbitrary” and “unreasonable”.

- “The Commission requires an analysis of the following elements for each HV line: 1) a general description of each alternative route, 2) a description of the methodology for developing the alternative routes, 3) a comparison of the relative merits of each route, and 4) a statement of the reasons underlying the selection of the preferred route” [p. 157]
- “The very best that can be said for the TrAILCo siting process that is detailed in this record is that it is incomplete. It does not meet the requirements of this Commission’s siting regulations and cannot support a finding that it is a reasonable route for the proposed project. The failure to incorporate, or at the very least, respond to the concerns expressed during the public input and siting hearings is fatal.” [p. 169]

Several additional pages of discussion detail concerns about applicant inattentiveness to issues of mitigating impacts on cultural and historic sites, viewsheds and airspace safety concerns, the adequacy of the public input process, inaccuracies in information disseminated to property owners, due process rights of affected property owners, and the decades-old, possibly abandoned, right of way easements and the poor level of documentation of where these easements are situated. [pp 170-176]

Conclusion: “Even if this Commission should conclude that TrAILCo should be granted a certificate of public convenience, and that it has established a need for some or all of the proposed power lines and substations, we recommend that it find that the record for the routing is insufficient to support a finding that the chosen routing complies with this Commission’s requirements. Our conclusion is the route selection process was arbitrary, incomplete and, as a result, unreasonable.”

and:

“Perhaps the greatest failure of TrAILCo on this record was to comply with the last recommendation of the National Commission ‘focusing the siting approval process on the question of whether a specific infrastructure proposal at a particular place is acceptable. Applicants should provide information demonstrating not only environmental impacts, but also the process used to identify and consider other sites, as well as project configuration and technology choices that satisfy similar needs ... The siting of electricity transmission infrastructure, in particular, should include a comprehensive system-wide of alternatives’ ... We are unaware of any comprehensive system-wide review of alternatives that was presented on this record.” [p. 237]

On Environmental Impacts

Synopsis: The Pennsylvania Code details the evidence to be considered by the Commission when assessing environmental impacts. These include the impacts of proposed projects on:

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| (i) Land use. | (vii) Archeologic areas. |
| (ii) Soil and sedimentation. | (viii) Geologic areas. |
| (iii) Plant and wildlife habitats. | (ix) Historic areas. |
| (iv) Terrain. | (x) Scenic areas. |
| (v) Hydrology. | (xi) Wilderness areas. |
| (vi) Landscape. | (xii) Scenic rivers. |

The ALJs found that the information provided by TrAILCo was insufficient and did not meet the statutory requirements of Pennsylvania law. The Judges relied heavily on the positions presented by the Office of Trial Staff (OTS) which included the following:

- “The OTS contends that such a perplexing viewpoint seems to completely misconstrue the proposed impacts of the project on the natural, cultural, and environmental resources set forth in Section 57.75(e) and completely ignores the requirement that the Commission must make an affirmative finding, based upon the competent, reliable and substantial evidence that the proposed project will be in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth, and that the project will have minimal adverse environmental impacts. Without a full, complete record of the environmental and cultural phenomena encountered along the line corridor, and an accompanying evaluation of the impact of the proposed project on those phenomena, the Commission cannot make such an affirmative ruling.” [p.187]
- The OTS concludes that taken together, the facts in this case seem to indicate a certain level of indifference towards producing a record that tends to show that reasonable efforts to reduce environmental incursion were employed.” [p.188]

In the ALJ’s own words:

- “It is abundantly clear that the Commission does require an affirmative and complete environmental impact ... While the level of this requirement may vary depending upon the proposed project, it only stands to reason that a project of the magnitude proposed by TrAILCo in this proceeding would require a more in-depth analysis and review. Merely providing a listing of natural, cultural, and environmental phenomena encountered along a preferred transmission line route, albeit, an incomplete cataloging apparently, clearly cannot be constituted as a “reasonable effort” to “affirmatively and completely” address environmental impacts.” [p.189]
- TrAILCo is asking this Commission to trust it to do all the right things after approving what is basically a concept of a project rather than one that is fully developed. We suggest that this Commission would be shirking its oversight review duty were it to do so. [p.190]
- “One glaring area neglected by TrAILCo in this proceeding is the impact on surface and subsurface water. ... Approvals needed from other regulatory agencies have not been obtained, or even, to the best of our knowledge, applied for by TrAILCo. We conclude that TrAILCo’s presentation on the environmental impact of its projects is inadequate.” [p. 235]

Conclusion: “We conclude that TrAILCo has failed to carry its burden of proof to show that it has acted responsibly and reasonably to mitigate the environmental impacts of its proposed project.” [p.190]

On the use of eminent domain

Synopsis: The judges note that in order for the Commission to grant the use of eminent domain it must first be determined that it “ is necessary or proper for the service, accommodation, convenience or safety of the public” and that the party involved must have certification as a public utility. [p. 203]

Further in this discussion, they note:

- “The applicant, Trans-Allegheny Interstate Line Company, has not met its burden of proving that the Application for a Certificate of Public Convenience and authority to exercise the power of eminent domain ... is necessary or proper for the service, accommodation, convenience or safety of the public.” [p.231]
- “The affected property owners are entitled to nothing less than a clear and definitive notice of the specific portions of their property to be burdened with the proposed project. “ [p.206]

Conclusion: “We recommend that authority to exercise the power of eminent domain not be granted, but if and when this project is approved, TrAILCo should be required to file a separate application for each property.”

On Exemption from Local Zoning Regulation

Synopsis: TrAILCo requested that the Commission grant it an exemption from local zoning regulation for substations and related buildings and facilities. The Judges found the argument of the applicant to be nonsensical.

- “On January 11, 2001, the Commission adopted a final policy statement order intending to further the State’s goal of making State agency actions consistent with sound land use planning by considering the impact of its decisions upon local comprehensive plans and zoning ordinances. ... The policy statement provides that the Commission will consider the impacts of its decisions upon local comprehensive plans and zoning ordinances when reviewing applications” [p.209]
- “TrAILCo is under the mistaken impression that it can request and obtain a blanket exemption from any and all unidentified local zoning regulations and then plan the development of each substation site and obtain necessary permits. This is not so. “ [p.210]
- “Such an interpretation, in addition to being contrary to the clear language of Section 619 of MPC, also runs contrary to the Commission’s policy statement regarding local land use plans and ordinances.” [p.214]
- “TrAILCo’s interpretation of Section 619 of MPC does not make sense. Under its interpretation, the local governing bodies’ authority to regulate site development and construction would be taken away by the Commission and there would be no oversight whatsoever.” [p. 214]
- “This record lacks important information that would be needed to decide whether to grant the exemption and whether certain conditions on the grant of an exemption should be imposed.” [p. 236]

Conclusion: “Accordingly, the undersigned recommend that the request for exemption from local zoning regulation contained in the Application be denied because there is no need for the substations and because TrAILCo’s request is deficient.” [p.215]