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November 8, 2005

VIA HAND DELIVERY

Mr. Kevin Kolevar, Director
Office of Electricity and Energy Reliability
US Department of Energy
Forrestal Building
1000 Independence Avenue, SW
Washington, DC 20585

RE: Emergency Petition and Complaint of the District of Columbia Public Service Commission (OE Docket EO-05-01)

Dear Mr. Kolevar:

Enclosed please find the Response of the District of Columbia Public Service Commission ("DCPSC") to submissions made in this proceeding by Robert G. Burnley, Director of the Commonwealth of Virginia Department of Environmental Quality and the City of Alexandria.

This filing is being served upon all persons who received the DCPSC's Emergency Petition and Complaint filed in this proceeding on August 24, 2005 (identified in the DCPSC's August 30, 2005 letter to you) and to all parties on the official service list compiled by the Federal Energy Regulatory Commission in Docket No. EL05-145-000. For your convenience, both lists are attached to this filing at Exhibit 2. Please contact me with any questions.

Very truly yours,

Sheila Slocum Hollis

cc: Rachel Beitler
Richard Beverly
Kenneth S. Hughes
Sebrina M. Greene
Grace Hu

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Emergency Petition and Complaint of District of Columbia Public Service Commission	)))	**Case No. EO-05-01**

RESPONSE OF THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION

Pursuant to 10 C.F.R. §§ 205.370-205.379, the District of Columbia Public Service Commission ("DCPSC") hereby responds to the submissions made in this case by Robert G. Burnley, Director of the Commonwealth of Virginia Department of Environmental Quality ("VDEQ")[1] and the City of Alexandria ("Alexandria").[2] Both the VDEQ and Alexandria oppose the relief sought in the Emergency Petition and Complaint of the District of Columbia Public Service Commission ("DCPSC Complaint") filed in this case. Among other things, the DCPSC Complaint requested the Secretary of Energy ("Secretary") to use his emergency authority under

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[1] *See* Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality to Deny the District of Columbia Public Service Commission's Petition on the Grounds that the Commission May Not Lawfully Grant the Requested Relief; or, in the Alternative, to Defer Action Pending Further Analysis of Environmental Impacts of Requested Relief, Docket No. EL05-145-000 (October 11, 2005)("VDEQ Motion"). A copy of the VDEQ Motion filed at the Federal Energy Regulatory Commission ("FERC" or "Commission") in Docket No. EL05-145-000 on October 11, 2005, was submitted by the VDEQ in this proceeding, apparently without modification, on October 12, 2005.

[2] Motion to Intervene and Comments of the City of Alexandria, Virginia, Docket No. EL05-145-000 (August 29, 2005)("Alexandria Motion"). A copy of the Alexandria Motion filed at the FERC in Docket No. EL05-145-000 on August 29, 2005, was submitted by Alexandria in this proceeding, apparently without modification, on October 7, 2005.

Section 202(c) of the Federal Power Act ("FPA"), 16 U.S.C. § 824a(c), to restore electric service from the Potomac River Power Plant, which is operated by Mirant Potomac River, LLC ("Mirant")[3] and is located in Alexandria, Virginia ("Mirant Plant" or "Potomac River Plant"). The DCPSC provides the instant Response to correct the misstatements made by the VDEQ and Alexandria in their submissions and renew its call for immediate action in this case.

Despite the passing of more than two months since the filing of the DCPSC Complaint, the concerns that animated the DCPSC's request for emergency relief have not been alleviated in any meaningful way. On the contrary, the proceedings initiated and conducted by the Department of Energy ("DOE") and the FERC in response to the DCPSC Complaint have laid bare the far-reaching, dangerous impacts of the Potomac River Plant's shutdown on the reliability of electric service in our Nation's capital. While the DCPSC cannot discuss in this pleading the specific critical energy infrastructure information ("CEII") submitted by other parties, suffice it to say that the provided data amply vindicates the DCPSC's decision to seek emergency relief from the Secretary and the FERC. Importantly, immediate action by these federal authorities continues to be needed to restore the Potomac River Plant's operations to a level that would ensure full compliance with the established reliability requirements.

Although the blackouts and power shortages that have occurred across the country over the past several months, including those caused by Hurricane Katrina, have so far spared the Washington, D.C. area, they dramatically highlight the danger inherent in underestimating the adverse reliability consequences that may follow from the abrupt shutdown of a major generating facility, such as the Potomac River Plant. This danger is particularly unacceptable in the instant

[3] Mirant Potomac River, LLC, is a wholly owned subsidiary of Mirant Corporation, which is currently subject to bankruptcy proceedings in the U.S. Bankruptcy Court for the Northern District of Texas.

case, since a blackout or power shortage in the area is likely to directly and adversely affect not only thousands of consumers and businesses located in the capital but also the very ability of the federal government and its agencies and departments to function normally and meet their daily challenges.

For these reasons, the DCPSC believes that the continued inability of the Potomac River Plant to operate at a level sufficient to ensure reliable service in the District represents an "emergency" within the meaning of Section 202(c) of the FPA and the DOE's implementing regulations. The DOE has the authority to address this emergency and it is the DCPSC's firm conviction, which is apparently shared by other parties that are directly responsible for ensuring reliability of electric service in the area, that this action should be taken promptly to prevent any further deterioration of the electric reliability situation in the area. Nothing that the VDEQ and Alexandria have said in their filings alters this conclusion. Accordingly, the DOE should use its emergency authority under Section 202(c) and grant the relief requested by the DCPSC, as discussed herein.

I. BACKGROUND

On August 24, 2005, the DCPSC initiated this case by filing its Emergency Petition and Complaint. In its filing, the DCPSC requested emergency relief from the Secretary under Section 202(c) of the FPA and from the Commission under Sections 207 and 309 of the FPA[4] in connection with the then impending shutdown of the Mirant Plant. Mirant shut down the facility later on August 24, 2005, in response to a letter from the VDEQ, dated August 19, 2005.[5] In that

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[4] As noted above, the DCPSC Complaint was filed in Docket No. EL05-145-000 at the FERC.

[5] Letter from R.G. Burnley, Director, VDEQ, to L.D. Johnson, Mirant (August 19, 2005) ("VDEQ Letter"). The VDEQ Letter is Exhibit A to the VDEQ Motion.

letter, the VDEQ expressed concerns about the results of a modeling analysis of the downwash emissions from the Potomac River Plant of SO_2, NO_2, and PM_{10}. Recognizing the potential adverse impact of the shutdown on the reliability and safety of electric supply in the District of Columbia and the surrounding area, the DCPSC requested emergency relief from the Secretary and the FERC, asking that Mirant be ordered to continue the operation of the facility.

Immediately upon receipt of the DCPSC Complaint, the DOE and the FERC issued a series of information requests to Mirant, PEPCO Holdings, Inc. ("PHI"), the corporate parent of Potomac Electric Power Company ("PEPCO"), which is the local distribution company responsible for supplying electricity to consumers, businesses and government entities in the District of Columbia and Maryland whose facilities connect with the Mirant Plant, and PJM Interconnection, Inc. ("PJM"), the entity responsible for the administration of the bulk power grid and energy markets in the region. In their requests, the DOE and the FERC sought detailed information from these entities regarding the effect of the Mirant Plant's shutdown on the reliability and stability of power supply in the region. On August 26, 2005, Mirant, PHI and PJM provided the requested information in response to the Commission's August 25, 2005 requests. The submitted data contained CEII and was placed in a non-public file in accordance with 18 C.F.R. § 388.112 (2005). On September 6, 2005, the FERC issued an additional request, seeking further information from these entities. That information, which also included CEII, was duly provided on September 9, 2005. A follow-on request was issued to PHI and PJM on September 22, 2005, which responded with additional CEII data on September 27, 2005. It is the DCPSC's understanding that copies of all Mirant, PHI and PJM responses to the FERC's data requests were provided to the DOE. In addition, the DOE separately sought additional information from PHI and PJM, which was provided on September 23, 2005.

On September 9, 2005, PEPCO filed an answer to the comments and protests submitted in the FERC proceeding.[6] In its Answer, while recognizing that an ideal solution would be the full restoration of the Mirant Plant's operations, PEPCO proposed an interim solution to address the untenable situation created by the shutdown. PEPCO described the specific elements of this interim solution as follows:

> First, as [PJM] has determined, when the load served by the Potomac River substation exceeds approximately 475 MW, *i.e.*, during peak periods in the summer, at least one generator must be kept running so that the loss of one of the two 230kV transmission circuits will not cause an overload or voltage collapse on any remaining transmission facilities.
>
> Second, if maintenance must be scheduled on one of the 230 kV transmission circuits, the generation at the [Mirant] Plant, as required by PJM, must match and "follow" the load in real time. Therefore, during any maintenance outage, depending on the load level, up to 5 generators must be running at least at partial output. Of course, these generators need only be running during the duration of the maintenance, which will be limited.
>
> Third, if one of the 230 kV transmission circuits into the Potomac River substation trips unexpectedly, all five generators will be required to run on an emergency basis. In this instance, because a line trip cannot be forecast and substitute generation cannot be scheduled to run in advance, all five generators at the [Mirant] Plant must also be available to start within 11 hours.
>
> Fourth, although Pepco and PJM do not operate to a double contingency, if both 230 kV transmission circuits into the Potomac River substation were to trip unexpectedly (as has happened on two occasions in the past), all load served by the Potomac River substation will be lost, *i.e.*, there will be a blackout in the District of Columbia. For a rapid restoration of this load, all generators at the Potomac River station must be available to start within 11 hours.[7]

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6 Potomac Electric Power Company's Motion for Leave to Answer and Answer to Comments and Protests, Docket No. EL05-145-000 (September 9, 2005).

7 *Id.* at 4-5.

PEPCO noted that its proposed solution "should satisfy the parties' concerns with regard to emissions from the [Mirant] Plant."[8]

On September 20, 2005, Mirant filed a letter with the VDEQ, announcing that it would reactivate Unit 1, one out of the five generating units at the Mirant Plant, as of September 21, 2005. According to Mirant, additional air emission modeling of that unit indicated that emission levels meet the National Ambient Air Quality Standards ("NAAQS") for the contaminants at issue. Mirant proposed to operate Unit 1 up to sixteen hours per day, including approximately eight hours at maximum load (88 MW) and approximately eight hours at minimum load (35 MW), with eight hours of shutdown. On the morning of September 21, 2005, Mirant voluntarily reactivated Unit 1.

On September 21, 2005, PEPCO filed Supplemental Comments in the FERC proceeding to advise the Commission of the effects on electric reliability of Mirant's reactivation of Unit 1.[9] Specifically, PEPCO explained that the reactivation of Unit 1 did not resolve the reliability concerns raised by the Mirant Plant's shutdown.[10] PEPCO then renewed its request that the Commission adopt the operating solution proposed in its September 9, 2005 Answer.

On October 11, 2005, the VDEQ filed its Motion, asking the Commission to deny the DCPSC Complaint. The VDEQ argued that the Commission does not have the authority to issue the immediate relief requested by the DCPSC and that any such relief would conflict with federal

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8 *Id.* at 5.

9 Supplemental Comments of Potomac Electric Power Company, Docket No. EL05-145-000 (September 21, 2005).

10 The DCPSC has recently learned that Unit 1 has been out of service since October 28, 2005, and is projected to go back on line as of November 9, 2005. As a result, the District's electrical systems are currently operating without even the meager and inadequate safety net that Unit 1 provided.

and state environmental laws. In the alternative, VDEQ sought to defer action pending further analysis of the environmental impacts associated with the relief sought in the DCPSC Complaint. Finally, the VDEQ contended that the authority to provide immediate relief in response to the DCPSC Complaint should reside with the DOE under its emergency powers, and not with the FERC pursuant to sections 207 and 309 of the FPA.

On October 13, 2005, PEPCO and PJM filed a joint answer to the VDEQ Motion, asking the Commission to deny the relief sought by the VDEQ.[11] The DCPSC answered the VDEQ Motion on October 26, 2005.[12] The DCPSC Answer is attached hereto at Exhibit 1 and the DCPSC requests that it be incorporated herein. The DCPSC Answer and the joint PEPCO/PJM Answer have comprehensively addressed and refuted the VDEQ arguments that the relief requested by the DCPSC is inconsistent with the Clean Air Act, Virginia environmental statutes and regulations and the National Environmental Policy Act of 1969 ("NEPA"). Accordingly, these arguments are incorporated herein and will not be repeated. Instead, the instant Response focuses on the DOE's authority to provide immediate relief and the continued and unabated need for this action.

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[11] Answer of Potomac Electric Power Company and PJM Interconnection, L.L.C. to Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality, Docket No. EL05-145-000 (October 13, 2005).

[12] Answer of the District of Columbia Public Service Commission to Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality, Docket No. EL05-145-000 (October 26, 2005)("DCPSC Answer").

II. ANSWER

A. The Secretary Has The Authority To Act On The DCPSC Complaint Under Section 202(c) Of The FPA.

Under Section 202(c) of the FPA, whenever the Secretary "determines that an emergency exists by reason of a sudden increase in the demand for electric energy or a shortage of electric energy or of facilities for the generation or transmission of electric energy or of fuel or water for generating facilities, or other causes, the [Secretary] shall have authority, either upon [his] own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in his judgment will best meet the emergency and serve the public interest."[13] The DOE implementation regulations state that this authority extends to "any 'entity' which owns or operates electric power generation, transmission or distribution facilities."[14] Mirant owns and operates the Potomac River Plant and is clearly an "entity" subject to the Secretary's Section 202(c) orders.

The DOE regulations further explain that an "emergency" within the meaning of Section 202(c) is defined as "an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power."[15] Importantly, the regulations state that an emergency also can result from "a

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13 16 U.S.C. § 824a(c). This emergency authority originally resided with the Federal Power Commission, the FERC predecessor agency, but was transferred to the Secretary pursuant to the Department of Energy Organization Act of 1978.

14 10 C.F.R. § 205.370 (2005).

15 10 C.F.R. § 205.371 (2005).

regulatory action which prohibits the use of certain electric power supply facilities."[16] In this case, the shutdown of the Potomac River Plant was precipitated by the VDEQ's regulatory action and it appears that it would not have occurred absent such action by the VDEQ. As further discussed below, the shutdown presents "an unexpected inadequate supply of electric energy" in the area, a shortage that results from the outage of the Mirant Plant.

Significantly, the VDEQ does not contest that the Secretary has the authority to act on the DCPSC Complaint. On the contrary, the VDEQ Motion states that action on the DCPSC Complaint "would more properly be taken by the Secretary of Energy under his § 202(c) emergency authority."[17] Despite Alexandria's arguments to the contrary,[18] the Secretary has used his Section 202(c) authority to provide emergency relief to address the consequences of various structural problems affecting the ability of electric utilities and generating companies to provide reliable electric supplies. Both in California and Northeast, the Secretary has used his emergency authority with great success to immediately address reliability challenges while allowing the FERC to arrive at a more permanent solution.[19] The same paradigm could be followed here.

Finally, the fact that the Commission is examining the shutdown in a Section 207 proceeding does not warrant any delay in this case, as the DOE has independent authority to

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16 *Id.*

17 *See* VDEQ Motion at 16.

18 *See* Alexandria Motion at 7.

19 *See, e.g.*, "Order pursuant to Section 202(c) of the Federal Power Act" (December 14, 2000); "Order pursuant to Section 202(c) of the Federal Power Act" (January 11, 2001); Order No. 202-02-01 (August 16, 2002); Order No. 202-03-1 (August 14, 2003); Order No. 202-03-02 (August 28, 2003).

order temporary restoration of service at the Mirant Plant. The DCPSC believes that the interim solution proposed in PEPCO's September 9, 2005 Answer provides a reasonable blueprint for such an action. As noted above, the DOE and the FERC have often acted in tandem to address emergencies and the same approach can be utilized here.[20] Both agencies have the authority to act on the DCPSC Complaint and this step needs to be taken expeditiously to prevent further deterioration of the power supply situation in the region.

B. The Facts Established In This Proceeding And The Related FERC Proceeding Require Immediate Action.

The facts established in this case and the parallel FERC proceeding unambiguously confirm that continued failure to resume the operation of the Mirant Plant at full capacity creates a dangerous reliability and security problem in the region. Both PJM and PEPCO, the two parties who have the direct responsibility over the provision of reliable electric service in the region, are in agreement that the continued non-operation of Units 2, 3, 4 and 5 of the Mirant Plant poses a serious reliability and safety problem that must be promptly addressed.

In its filing at the FERC, PJM states that "the loss of all units at the Potomac River Plant for an extended period, coupled with the potential for loss of critical transmission lines, creates a significantly increased risk of losing a large block of load (in the order of approximately 400-500

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[20] For example, the 2000-2001 California crisis was simultaneously addressed by both the Secretary under his Section 202(c) authority and the Commission under its Section 206 authority. *See* "Order pursuant to Section 202(c) of the Federal Power Act" (December 14, 2000); "Order pursuant to Section 202(c) of the Federal Power Act" (January 11, 2001); San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Docket No. EL00-95-000, *et al.*; Investigation of Practices of the California Independent System Operator and the California Power Exchange, Docket No. EL00-98-000, *et al.*

MW) in a major metropolitan area."[21] As of the date of this filing, the Mirant Plant has been out of operation for more than 2 months and the severe risk of strain on the regional power grid caused by this loss continues unabated. As PJM warns, "the potential for load loss in the nation's capital until remedial alternatives can be put in place (*i.e.*, new generation or transmission system upgrades) presents an unacceptable risk profile to the system operator."[22] In fact, outages or unavailability of the Mirant Plant and its connecting transmission lines already led to load loss in the District on at least two occasions in the 1990s.[23] This historical precedent should not be taken lightly and the permanent unavailability of the Mirant Plant might lead to even more serious consequences than in the past. The reality of such consequences is plain to see in light of more recent events, such as the blackout of 2003 and the latest blackouts in major cities around the country. Given the data that has been filed in this proceeding, the DCPSC strongly believes that the immediate risks to national security and local and regional security and safety compel continued operation of the Mirant Plant.

This view is supported by PJM's responses to the DOE data requests. These responses highlight significant national security implications of the continued shutdown, which clearly warrant DOE action under Section 202(c). As explained by PJM:

> [I]t should be pointed out that the situation involving a potential forced shutdown of a generating station such as Potomac River needed to maintain reliability in a major metropolitan area with significant homeland security implications is not at all typical of the kind of contingencies faced around the nation. For one, the reliability exposure caused by the shutdown of the Potomac River unit is extensive. *Moreover, although there are other examples of close-in generators needed to serve major metropolitan*

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21 Motion to Intervene and Comments of PJM Interconnection, L.L.C., Docket No. EL05-145-000, at 5 (August 26, 2005).

22 *Id.* at 5-6.

23 *Id.* n.8.

> *areas, the distinguishing feature of this case is the potential for an order immediately shutting down all five units with no flexibility available to the system operators to call upon some or all of the units even to meet emergency circumstances when reliability is threatened. This is far different from the normal operating risk that is considered in the design and operation of a power system.* In normal circumstances, the probability of all five units of a generating station needed to serve local reliability all becoming unavailable at once and without sufficient notice to put in place alternatives is extremely remote. In this case, the single event of shutting down the unit actually represents a significant number of simultaneous contingencies, all occurring at once and all significantly impacting reliability. In short, the plant shutdown actually represents five contingencies (one for each unit) all being triggered at once.[24]

Based on this analysis, PJM believes that the simultaneous loss of the Mirant Plant's generating units is "a highly unusual event."[25] PJM concludes that "[w]hen coupled with the nature of the load served and its impact on homeland security and effective operation of the United States government, . . . the Secretary's immediate use of his authority in this instance is most appropriate."[26] The DCPSC has no reason to doubt this assessment and actually believes that the "highly unusual event" referred to in PJM's response is in effect an emergency within the meaning of Section 202(c), which requires swift and decisive action by the Secretary.

Furthermore, PJM and the DCPSC are not alone in arriving at this conclusion. In fact, PJM's apprehensions are shared by PHI and PEPCO. Thus, in his letter to Secretary Bodman, PHI's Chairman of the Board, President and CEO, Mr. Dennis R. Wraase, states that "[u]ntil the [Mirant] plant resumes operations, the ability to maintain reliable service to the Nation's Capital will remain significantly compromised."[27] PEPCO's multiple filings at the FERC also make it

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24 Letter from Mr. Craig A. Glazer to Mr. Lawrence Mansueti, Case No. EO-05-01, at 2-3 (September 23, 2005)(redacted version)(emphasis added).

25 *Id.* at 3.

26 *Id.*

27 Letter from Dennis R. Wraase to The Honorable Samuel W. Bodman, Case No. EO-05-01, at 2 (August 26, 2005).

clear that the shutdown is having an adverse effect on consumers, businesses and agencies of the government. According to PEPCO, the Mirant Plant is "an important aspect of existing policies and procedures designed to ensure reliable electric service to the Potomac River area of PEPCO's load within the District of Columbia."[28] PEPCO also confirms that the area that may be impacted includes the central business district of Washington, D.C., with its great many federal agencies and institutions, Georgetown and other parts of Northwest Washington.[29] The continued failure to restore power production at the Mirant Plant "eliminates a vital component of the system that helps maintain the reliability of electric service" in the area.[30] Furthermore, the shutdown has put additional stress on PEPCO's transmission facilities by adversely affecting their maintenance.[31] In its filings, PEPCO warns that if for some reason both of the lines that connect to the Mirant Plant go out of service, "all connected load would be dropped"[32] and concludes that "the loss of the [Mirant Plant] for an extended period, coupled with the risks of a potential loss of critical transmission lines, creates a significant risk of losing large portions of Pepco's load in the District of Columbia."[33] In addition, PEPCO explains that Mirant's partial restoration of Unit 1 did not resolve this fundamental reliability problem,[34] and,

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28 Potomac Electric Power Company's Motion to Intervene and Comment in Support of Emergency Petition and Complaint, Docket No. EL05-145-000, at 4 (August 29, 2005).

29 *Id.*

30 *Id.* at 8.

31 *Id.*

32 *Id.*

33 *Id.*

34 *See* Supplemental Comments of Potomac Electric Power Company, Docket No. EL05-145-000 (September 21, 2005).

as noted above, Unit 1 has been out of operation again since October 28, 2005. The filed non-public CEII that the DCPSC has been able to review amply supports PJM's and PEPCO's concerns and validates the DCPSC's decision to bring this matter to the DOE's and Commission's attention.

Finally, the DCPSC would like to note the potential for serious environmental consequences that could be felt throughout the area (including the City of Alexandria) due to even a single blackout occasioned by the Mirant Plant's shutdown. In its comments in this proceeding, the District of Columbia Water and Sewer Authority explains that its Blue Plains Advanced Wastewater Treatment Plant ("Blue Plains Plant") depends on reliable electric service for proper operation.[35] In fact, the Blue Plains Plant is located across the Potomac River from the Mirant Plant and is served by the two underwater 69 kV cables from the Mirant Plant.[36] A disruption of operations at the Blue Plains Plant due to a loss of power supply will have "environmental consequences of its own that would not be limited to the District."[37] To be more specific, it is DCPSC's understanding that within 24 hours of any such loss of electric supply, the Blue Plains Plant will have no choice but to release raw sewage directly into the Potomac River.[38] The damaging environmental consequences to the area and to the Chesapeake Bay that may result from any such release are not difficult to imagine.

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35 Motion for Leave to Intervene and Comments of the District of Columbia Water and Sewer Authority, Docket No. EL05-145-000, at 3 (August 29, 2005).

36 *Id.*

37 *Id.* at 4.

38 *See also* Potomac Electric Power Company's Motion for Leave to Answer and Answer to Comments and Protests, Docket No. EL05-145-000, at 3 (September 9, 2005).

In sum, there are no legitimate reasons for the dismissal or delay of the relief requested by the DCPSC. The uncontroverted evidence submitted in this proceeding and the parties' comments demonstrate the seriousness of the problem and a genuine need for speedy resolution. While the full restoration of service from the Mirant Plant is clearly an ideal solution to the long-term reliability issues identified in this proceeding, the DCPSC believes that the proposal set forth in the PEPCO's September 9, 2005 Answer may present an acceptable basis for an interim solution. Accordingly, the DOE and the Commission should act now and fulfill their respective statutory responsibilities.

C. The Relief Requested By The DCPSC Does Not Conflict With Any Applicable Environmental Or Other Laws.

In the attached Answer to the VDEQ Motion filed in the FERC proceeding, the DCPSC addresses and refutes the VDEQ claims that the relief requested by the DCPSC conflicts with various environmental state and federal laws. The DCPSC incorporates these arguments in the instant Response. The DCPSC further observes that, even if the VDEQ's claims are assumed, *arguendo*, as true, they are irrelevant for the purposes of this case. Section 202(c) is a grant of emergency power and was drafted to override other inconsistent state or federal regulatory action. Indeed, the DOE regulations clearly state that the Secretary can exercise his Section 202(c) responsibilities even where the emergency in question arose out of another agency's regulatory action.[39] Accordingly, there are no conflicts with other legislation and the Secretary may act now to relieve the emergency created by the Mirant Plant's shutdown.

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[39] *See* 10 C.F.R. § 205.371 (2005).

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the DCPSC requests that the Secretary grant the relief requested in the DCPSC Complaint, as supplemented by this Response.

Respectfully Submitted,

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ATTORNEYS FOR THE PUBLIC
SERVICE COMMISSION OF THE
DISTRICT OF COLUMBIA

DATED: November 8, 2005

WSH\146978.2

EXHIBIT 1

October 26, 2005 Answer of the District of Columbia Public Service Commission to Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality

FERC Docket EL05-145-000

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Emergency Petition and Complaint of District of Columbia Public Service Commission	)))	**Docket No. EL05-145-000**

ANSWER OF THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION TO MOTION OF ROBERT G. BURNLEY, DIRECTOR THE COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.213 (2005), the District of Columbia Public Service Commission ("DCPSC") hereby submits this Answer in response to "Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality to Deny the District of Columbia Public Service Commission's Petition on the Grounds that the Commission May Not Lawfully Grant the Requested Relief; or, in the Alternative, to Defer Action Pending Further Analysis of Environmental Impacts of Requested Relief" ("VDEQ Motion") filed in the above-captioned proceeding on October 11, 2005.[1]

The DCPSC requests this Commission to reject the VDEQ Motion, as it has no basis in either law or fact and is procedurally defective. Instead, the FERC should grant the relief

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[1] The VDEQ Motion was initially filed on October 6, 2005, but was legally deficient under the Commission's rules in that it failed to include a Statement of Issues required pursuant to *Revision of Rules of Practice and Procedure Regarding Issue Identification,* Order No. 663, 70 Fed. Reg. 55,723 (September 23, 2005)("Order No. 663"). The Virginia Department of Environmental Quality ("VDEQ") then withdrew its filing and resubmitted a revised version thereof on October 11, 2005.

requested in the Emergency Petition and Complaint of the District of Columbia Public Service Commission ("DCPSC Complaint") that initiated this proceeding, as further supplemented by this Answer.

I. STATEMENT OF ISSUES

Pursuant to Order No. 663, the following Statement of Issues is provided:

1. Is the VDEQ Motion an impermissible late protest and should it be rejected as such?

The DCPSC believes that the Commission should reject the VDEQ Motion as an untimely supplementary protest. The VDEQ has provided no explanation for the delay and no good cause exists to grant its late filing.

2. Does the Commission have the authority to act under sections 207 and 309 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824f and 825h, in this proceeding and should it issue an immediate decision granting the DCPSC Complaint?

The DCPSC's position is that the Commission has the requisite authority to act and should immediately grant the relief requested in the DCPSC Complaint, as supplemented by this Answer.

3. Does the relief requested by the DCPSC conflict with any applicable environmental or other laws?

No such conflict exists. Accordingly, granting the relief requested herein would not result in a violation of any applicable environmental or other laws.

4. Does the relief requested in the DCPSC Complaint interfere with the VDEQ Director's duties under Virginia law?

The Commission's action in this proceeding would not interfere with the VDEQ Director's ability to perform his legitimate duties, as there is no conflict between the relief requested by the DCPSC and any state law or regulation. In addition, the FERC's action would be in the exercise of its exclusive responsibility over the interstate power grid, pursuant to the explicit language of section 207 of the FPA. To the extent there is a genuine conflict between any state law or regulation and section 207 of the FPA, any such state law or regulation would be preempted.

5. Is the Commission required to take any action under the National Environmental Policy Act of 1969 ("NEPA") before ordering the restoration of service at the Mirant Plant?

The Commission is not required to take any action under NEPA prior to granting the relief requested in the DCPSC Complaint because the relief requested is not subject to NEPA. NEPA does not apply to continuing operation of completed facilities that have been in operation for many years. In addition, NEPA is not applicable here due to the emergency nature of the relief requested.

II. BACKGROUND

On August 25, 2005, the DCPSC initiated this proceeding by filing an Emergency Petition and Complaint in the above-captioned docket.[2] In its filing, the DCPSC requested emergency relief from the Commission under sections 207 and 309 of the FPA and from the Secretary of Energy ("Secretary") under section 202(c) of the FPA[3] in connection with the

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[2] The DCPSC Complaint was actually submitted on August 24, 2005, after the Commission's normal operating hours.

[3] The Department of Energy ("DOE") has docketed the DCPSC Complaint in Case No. EO-05-01.

impending shutdown by Mirant Potomac River, LLC ("Mirant")[4] of its Potomac River Power Plant located in Alexandria, Virginia ("Mirant Plant" or 'Plant"). Mirant voluntarily decided to shut down its facility on August 24, 2005, after receiving a letter from the VDEQ, dated August 19, 2005.[5] In that letter, the VDEQ expressed concerns about the results of a modeling analysis of the downwash emissions from the Plant of SO_2, NO_2, and PM_{10}. Concerned with the potential adverse impact of the Mirant Plant's shutdown on the reliability and safety of electric supply in the District of Columbia and the surrounding area, the DCPSC requested emergency relief from the Commission and the Secretary, asking that Mirant be ordered to continue the operation of the facility.

The Commission officially noticed the DCPSC Complaint on August 25, 2005, establishing August 29, 2005, as the deadline for all interested parties to file interventions, protests and comments. Numerous parties, including the VDEQ, intervened and submitted their protests and comments by the deadline established by the Commission.

Immediately upon receipt of the DCPSC Complaint, the Commission initiated a hearing and issued a series of information requests to Mirant, PEPCO Holdings, Inc. ("PHI"), the corporate parent of Potomac Electric Power Company ("PEPCO"), which is the local distribution company responsible for supplying electricity to consumers, businesses and government entities in the District of Columbia and Maryland whose facilities connect with the Mirant Plant, and PJM Interconnection, Inc. ("PJM"), the entity responsible for the administration of the bulk

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[4] Mirant Potomac River, LLC, is a wholly owned subsidiary of Mirant Corporation, which is currently subject to bankruptcy proceedings in the U.S. Bankruptcy Court for the Northern District of Texas.

[5] Letter from R.G. Burnley, Director, VDEQ, to L.D. Johnson, Mirant (August 19, 2005) ("VDEQ Letter"). The VDEQ Letter is Exhibit A to the VDEQ Motion.

power grid and energy markets in the region. In its requests, the Commission sought detailed information from these entities regarding the effect of the Mirant Plant's shutdown on the reliability and stability of power supply in the region. On August 26, 2005, Mirant, PHI and PJM provided the requested information. This data contained critical energy infrastructure information ("CEII") and was placed in a non-public file in accordance with 18 C.F.R. § 388.112 (2005). On September 6, 2005, the Commission issued an additional request, seeking further information from these entities. That information, which also included CEII, was duly provided on September 9, 2005. A follow-on request was issued to PHI and PJM on September 22, 2005, which responded with additional CEII data on September 27, 2005. [6]

On September 9, 2005, PEPCO filed an answer to the comments and protests submitted in the proceedings.[7] In its Answer, while recognizing that an ideal solution would be the full restoration of the Mirant Plant's operations, PEPCO proposed an interim solution to address the untenable situation created by the shutdown. PEPCO described the specific elements of this interim solution as follows:

> First, as [PJM] has determined, when the load served by the Potomac River substation exceeds approximately 475 MW, *i.e.*, during peak periods in the summer, at least one generator must be kept running so that the loss of one of the two 230kV transmission circuits will not cause an overload or voltage collapse on any remaining transmission facilities.
>
> Second, if maintenance must be scheduled on one of the 230kV transmission circuits, the generation at the [Mirant] Plant, as required by PJM, must match and "follow" the load in real time. Therefore, during any maintenance outage, depending on the load level, up to 5 generators must be running at least at partial output. Of course,

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[6] The DOE separately sought additional information from PHI and PJM, which was provided to the DOE on September 23, 2005. A copy of the joint PHI/PJM response to the DOE request was filed in this docket on September 23, 2005.

[7] Potomac Electric Power Company's Motion for Leave to Answer and Answer to Comments and Protests, Docket No. EL05-145-000 (September 9, 2005).

these generators need only be running during the duration of the maintenance, which will be limited.

Third, if one of the 230kV transmission circuits into the Potomac River substation trips unexpectedly, all five generators will be required to run on an emergency basis. In this instance, because a line trip cannot be forecast and substitute generation cannot be scheduled to run in advance, all five generators at the [Mirant] Plant must also be available to start within 11 hours.

Fourth, although Pepco and PJM do not operate to a double contingency, if both 230kV transmission circuits into the Potomac River substation were to trip unexpectedly (as has happened on two occasions in the past), all load served by the Potomac River substation will be lost, *i.e.*, there will be a blackout in the District of Columbia. For a rapid restoration of this load, all generators at the Potomac River station must be available to start within 11 hours.[8]

PEPCO noted that its proposed solution "should satisfy the parties' concerns with regard to emissions from the [Mirant] Plant."[9]

In the meantime, Mirant filed a letter with the VDEQ on September 20, 2005, announcing that it would reactivate Unit 1, one out the five generating units at the Mirant Plant, as of September 21, 2005. According to Mirant, additional air emission modeling of that unit indicated that emission levels met the National Ambient Air Quality Standards ("NAAQS") for the contaminants at issue. Mirant proposed to operate Unit 1 up to sixteen hours per day, including approximately eight hours at maximum load (88 MW) and approximately eight hours at minimum load (35 MW), with eight hours of shutdown. On the morning of September 21, 2005, Mirant voluntarily reactivated Unit 1.

On September 21, 2005, PEPCO filed Supplemental Comments to advise the Commission of the effects on electric reliability of Mirant's reactivation of Unit 1.[10]

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8 *Id.* at 4-5.

9 *Id.* at 5.

Specifically, PEPCO explained that the reactivation of Unit 1 did not resolve the reliability concerns raised by the Mirant Plant's shutdown. PEPCO then renewed its request that the Commission adopt the operating solution proposed in its September 9, 2005 Answer.

On October 11, 2005, the VDEQ filed its Motion, asking the Commission to deny the DCPSC Complaint. The VDEQ argued that the Commission does not have the authority to issue the immediate relief requested by the DCPSC and that any such relief would conflict with federal and state environmental laws. In the alternative, VDEQ seeks to defer action pending further analysis of the environmental impacts associated with the relief sought in the DCPSC Complaint. Finally, the VDEQ contends that the authority to provide immediate relief on the DCPSC Complaint properly resides with the DOE under its emergency powers, and not with the Commission pursuant to sections 207 and 309 of the FPA. On October 13, 2005, PEPCO and PJM filed a joint answer to the VDEQ Motion, asking the Commission to deny the relief sought by the VDEQ.[11]

III. ANSWER

In this Answer, the DCPSC refutes the VDEQ's contentions and renews its request for immediate relief in this proceeding. Despite the reactivation of Unit 1, the DCPSC's profound concerns regarding the stability and reliability impact of the Mirant Plant's shutdown have not been allayed in any manner. The safety, health and economic well-being of the District of Columbia, and its residents, government agencies and businesses, are in jeopardy as a result of

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[10] Supplemental Comments of Potomac Electric Power Company, Docket No. EL05-145-000 (September 21, 2005).

[11] Answer of Potomac Electric Power Company and PJM Interconnection, L.L.C. to Motion of Robert G. Burnley, Director the Commonwealth of Virginia Department of Environmental Quality, Docket No. EL05-145-000 (October 13, 2005).

the shutdown. While the full restoration of service from the Mirant Plant is clearly an ideal solution to the long-term reliability issues identified in this proceeding, the DCPSC believes that the proposal set forth in PEPCO's September 9, 2005 Answer may present an acceptable basis for an interim solution. Regardless of what course the Commission ultimately decides to take, it is critical to act now to prevent any further deterioration of the reliability situation in the region.

A. The VDEQ Motion Is An Impermissible Late Protest And Should Be Rejected.

While the VDEQ calls its filing a motion, it is, in fact, an impermissible supplementary protest that seeks to inject new issues and re-write the legal arguments the VDEQ previously made in this proceeding. Because the Commission's rules do not permit such supplementary submissions,[12] the VDEQ Motion should be rejected.

In this emergency proceeding, the Commission issued a public notice and established August 29, 2005, as the deadline for all interested parties to file interventions, comments and protests.[13] The VDEQ was fully aware of the deadline and, indeed, filed a timely intervention and protest on that date.[14] Although the VDEQ argued in its initial filing that it had "a need to access, review and assess the information filed by PJM and PEPCO,"[15] none of the arguments made in the VDEQ Motion are predicated on this information. Instead, the VDEQ confines itself to strictly legal arguments pertaining to the Commission's authority (or claimed lack thereof) to

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12 *See, e.g., Delmarva Power & Light Co.*, 88 FERC ¶ 61,247, at 61,786 (1999)(untimely supplementary protest rejected).

13 *See* Notice of Filing, Docket No. EL05-145-000 (August 25, 2005).

14 *See* Motion to Intervene and Protest of Robert G. Burnley, Director, the Commonwealth of Virginia Department of Environmental Quality, Docket No. EL05-145-000 (August 29, 2005)("VDEQ Protest").

15 *Id.* at 5.

act on the DCPSC Complaint and the alleged conflict of any such action with federal and state environmental statutes. Nothing prevented the VDEQ from making any and all of these legal arguments at the time its Protest was due. Despite that, the VDEQ failed to present a timely argument and no explanation is given for the resulting 43-day delay.[16]

Due to the urgency of the reliability issues raised in this proceeding, the Commission's speedy action is paramount. The VDEQ should not be allowed to inject new legal issues or reargue or expand its previous submission, thereby delaying the Commission's resolution of this case. Accordingly, the VDEQ Motion should be rejected as a late supplementary protest.[17]

B. The Commission Has The Authority To Act Under Sections 207 And 309 Of The FPA And Should Issue An Immediate Decision Granting The DCPSC Complaint.

It is important to note at the outset that the VDEQ Motion does not really dispute that the Commission has the authority to act on the DCPSC Complaint under sections 207 and 309 of the FPA.[18] Nor does the VDEQ dispute that the DCPSC has raised serious reliability issues arising out of the Mirant Plant's closure that need to be addressed. Instead, the VDEQ seeks refuge in the procedural requirements of section 207, as amplified by the VDEQ's badly misplaced claim that granting the relief requested by the DCPSC would conflict with federal and state environmental laws. While the latter claim will be addressed and refuted in the subsequent

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[16] The DCPSC notes that the VDEQ Motion includes no request for leave to file a late protest and contains no argument that good cause exists to grant its late submission.

[17] In the event the Commission decides to accept the VDEQ Motion as a protest, the DCPSC respectfully requests leave to file this Answer in response.

[18] *See* VDEQ Motion at 16 ("The Director does not dispute the Commission's authority to order the furnishing of adequate and sufficient service under FPA § 207 'after opportunity for hearing.' Nor does the Director dispute the Commission's authority under FPA § 309 to act in a manner 'necessary or appropriate to carry out the provisions of [the FPA]' to the extent such actions are properly within the jurisdiction of the Commission.").

sections of this pleading, the argument that the Commission cannot or should not act immediately under its FPA §§ 207 and 309 authority has no support in the plain language of these provisions and increasingly rings hollow in light of the developments that have occurred in this proceeding since the filing of the DCPSC Complaint.

1. The Commission Has The Authority To Act

The VDEQ arguments regarding the scope of the Commission's authority under FPA §§ 207 and 309 distort the DCPSC's position and lack support in the plain language of the statute. The VDEQ makes the following two points. First, noting that section 207 requires a hearing, the VDEQ accuses the DCPSC of "attempting to circumvent the statutory requirement for a hearing prior to the Commission taking action under FPA § 207" by invoking the Commission's authority under FPA sections 207 and 309.[19] Second, apparently conceding that some action, in fact, may be required prior to an opportunity for hearing, the VDEQ incongruously contends that "such action would more properly be taken by the Secretary of Energy under his [FPA] § 202(c) emergency authority."[20] A close analysis of the statutory language and case law indicates, however, that neither of these arguments has any merit. The Commission may and should act now to ensure that no adverse impact on the reliability of power supply occurs in the region.

As an initial matter, the DCPSC wants to make it clear that it does not dispute the self-evident fact that section 207 requires a hearing. Contrary to the VDEQ argument, however, asking the Commission to use its considerable enforcement powers under FPA § 309 to ensure that this very hearing can take place in an orderly environment and the reliability situation in the

19 *Id.*

20 *Id.*

region does not deteriorate before action is taken does not equate to an attempt "to circumvent the statutory requirement for a hearing." The courts have long held that it is precisely the purpose of section 309 to avert the unacceptable outcomes like the one suggested by the VDEQ, and the Commission is empowered to take the necessary action on an interim basis under this provision prior to completion of the hearing.[21] To interpret section 309 otherwise would be to undercut the Commission's ability to enforce the substantive provisions of the FPA, including those requiring emergency action, such as section 207.

That said, the DCPSC submits that the VDEQ argument is now moot in any event, regardless of how far the Commission's enforcement powers under section 309 might extend. The inescapable reality is that the Commission in fact has been conducting the hearing mandated by FPA section 207 since it published a notice of the DCPSC Complaint in the Federal Register on August 25, 2005. Pursuant to that notice, the Commission established a deadline for all interested parties to file interventions, protests and comments, which were duly submitted and which now form an integral part of the record developed in this proceeding. In addition, the

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[21] *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) ("While such 'necessary or appropriate' provisions [of section 309] do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."); *Northern States Power Co. v. FPC*, 118 F.2d 141, 143 (7th Cir. 1941)("If the Commission is intelligently to exercise its extensive regulatory and supervisory power, it must have been intended that it shall have power to do everything essential to the execution of its clearly granted powers and the achievement of the purposes of the legislation."); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968)(applying NGA section 16, the counterpart of FPA section 309, the Supreme Court held that "the Commission's broad responsibilities . . . demand a generous construction of its statutory authority."); *see also San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,202 n.170 (2001)("FPA section 309, 16 U.S.C. § 825h (1994), gives the Commission the necessary flexibility to take unusual remedial action in appropriate circumstances.").

Commission issued a series of data requests to Mirant, PHI and PJM in order to obtain the necessary factual data from these entities. As far as the DCPSC is able to determine, all of these entities have punctually complied with the Commission's data requests, and there is no argument to the contrary in the VDEQ Motion. The Commission thus has successfully conducted a "paper hearing," as required by section 207 of the FPA.

While the VDEQ Motion does not explicitly request the Commission to establish an evidentiary, trial-type hearing, it appears that the VDEQ is under the impression that it is required in this proceeding. To the extent the VDEQ seeks to make any such argument, the DCPSC submits that an evidentiary hearing before an administrative law judge is unnecessary under the circumstances. A trial-type proceeding would result in a considerable waste of Commission resources while, at the same time, delaying resolution of the critical issues raised in the DCPSC Complaint. It is well established that the Commission is not required to conduct trial-type proceedings to comply with the hearing requirements of the FPA and that it may instead give an opportunity to interested parties to participate through written evidentiary submissions.[22] Even where material issues of fact are raised, the Commission still may opt for a "paper hearing" if they can be resolved through written submissions.[23] In the instant proceeding, the requisite factual record has been created through the parties' written submissions and through

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[22] *See, e.g., Colton Power, L.P. v. Southern California Edison,* 101 FERC ¶ 61,150, at 61,618 (2002)("The Commission is only required to provide a trial-type hearing if the material facts in dispute cannot be resolved on the basis of written submissions in the record."); *see also Friends of the Cowlitz v. FERC*, 2001 U.S. App. LEXIS 28368, at *35 (9th Cir. 2001)(citing *Wisconsin v. FERC*, 104 F.3d 462, 467-68 (D.C. Cir. 1997)"(holding that neither the APA nor the FERC regulations in 18 C.F.R. §§ 385.501 et seq. create an independent right to an evidentiary hearing, and that FERC 'is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions')."

[23] *Id.*

detailed responses to the Commission's data requests by the entities that are in possession of the critical system and infrastructure information. There is no allegation in the VDEQ Motion that the submitted data is inaccurate or that, to the extent there are any factual disputes, they cannot be resolved on the written record.[24] Furthermore, an analysis and review of the non-public CEII instrumental to reaching a decision in this case could not be efficiently performed in a trial-type setting. Accordingly, no such hearing is necessary.

Finally, the VDEQ argument that the Commission should refrain from action because the DCPSC also filed a petition with the DOE under section 202(c) is baseless. There is nothing in the FPA, or any other statute or rule, that would so circumscribe the Commission's authority. On the contrary, many of the recent interventions by the Secretary under his emergency authority pursuant to section 202(c) arose out of the events that were simultaneously subject to pending Commission proceedings.[25] Under the FPA, the Commission has the primary authority over the transmission of energy and wholesale sales in interstate commerce,[26] and to argue that this fundamental authority is somehow implicitly constrained by the Secretary's emergency powers

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[24] As previously noted, the VDEQ's arguments center on various legal theories that do not require an evidentiary hearing.

[25] For example, the 2000-2001 California crisis was simultaneously addressed by both the Secretary under his section 202(c) authority and the Commission under its section 206 authority. *See* "Order pursuant to Section 202(c) of the Federal Power Act," (December 14, 2000); Order pursuant to Section 202(c) of the Federal Power Act," (January 11, 2001); San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Docket No. EL00-95-000, *et al.*; Investigation of Practices of the California Independent System Operator and the California Power Exchange, Docket No. EL00-98-000, *et al.*

[26] *See* 16 U.S.C. § 824.

under section 202(c) is inconsistent with the FPA's intent and purpose.[27] In light of the seriousness of the reliability issues raised in this proceeding, any such unwarranted deferral of action on the part of the Commission would be tantamount to an abdication of responsibility over one of the most critical elements of its jurisdictional portfolio.

In short, the DCPSC Complaint complies with the threshold requirements of section 207 of the FPA. To date, there has been no valid argument to the contrary and the VDEQ Motion makes none. Furthermore, the Commission has met its hearing obligations by conducting a paper hearing in this proceeding. As a result, nothing prevents it from issuing its ruling on the DCPSC Complaint.

2. The Facts Established In This Proceeding Confirm That The Commission Should Immediately Grant The Relief Requested By The DCPSC To Prevent Further Deterioration Of The Reliability Situation In The Region.

The facts established in the paper hearing conducted by the Commission unambiguously confirm that continued failure to resume operation of the Mirant Plant at full capacity creates a dangerous reliability and security problem in the region. These facts demonstrate that, unless the Commission acts now, the nation's capital area may become precariously exposed to security threatening blackouts and environmental catastrophes that would have a direct adverse impact on the lives of hundreds of thousands of citizens in the area and may jeopardize the ability of the governments to function properly.[28] While the DCPSC is not at liberty to discuss the non-public critical energy infrastructure information submitted in this proceeding by PHI, PJM and Mirant,

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[27] This intent and purpose were made all the more clear by the passage of the Energy Policy Act of 2005, which vested in the Commission significant additional powers in the area of electric reliability.

[28] As further explained below, one specific and extreme environmental impact would be the potential shutdown of the Blue Plains Advanced Wastewater Treatment Plant.

the DCPSC's review of that information, as well as publicly available data and the parties' submissions in this docket, paint a highly disturbing picture that warrants immediate action by the Commission.

First, both PJM and PEPCO, the two parties in these proceedings who have the direct responsibility for the provision of reliable electric service in the region, are in agreement that the continued non-operation of Units 2, 3, 4 and 5 of the Mirant Plant poses a serious reliability and safety problem that must be promptly addressed. Thus, PJM states in its comments that "the loss of all units at the Potomac River Plant for an extended period, coupled with the potential for loss of critical transmission lines, creates a significantly increased risk of losing a large block of load (in the order of approximately 400-500 MW) in a major metropolitan area."[29] As of the date of this filing, the bulk of the Mirant Plant has been out of operation for more than 2 months and the severe risk of strain on the regional power grid caused by this loss continues unabated. PJM warns that, in its independent judgment, "the potential for load loss in the nation's capital until remedial alternatives can be put in place (*i.e.*, new generation or transmission system upgrades) presents an unacceptable risk profile to the system operator."[30] In fact, outages or unavailability of the Mirant Plant and its connecting transmission lines already led to load loss in the District on at least two occasions in the 1990s.[31] This historical precedent should not be taken lightly and the permanent unavailability of the Mirant Plant might lead to even more serious consequences than in the past. The reality of such consequences is particularly obvious in light of more recent

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29 Motion to Intervene and Comments of PJM Interconnection, L.L.C., Docket No. EL05-145-000, at 5 (August 26, 2005).

30 *Id.* at 5-6.

31 *Id.* n.8.

events, such as the blackout of 2003 and the latest blackouts in major cities around the country. Given the data that has been filed in this proceeding, the DCPSC strongly believes that the immediate risks to national security and local and regional security and safety compel the continued operation of the Mirant Plant.

Similar to PJM, PEPCO is gravely concerned with the loss of the Mirant Plant and believes that the shutdown is having an adverse effect on consumers, businesses and agencies of the government. According to PEPCO, the Mirant Plant is "an important aspect of existing policies and procedures designed to ensure reliable electric service to the Potomac River area of PEPCO's load within the District of Columbia."[32] The area that may be impacted includes the central business district of Washington, D.C., with its great many federal agencies and institutions, Georgetown and other parts of Northwest Washington.[33] The continued failure to restore power production at the Mirant Plant "eliminates a vital component of the system that helps maintain the reliability of electric service" in the area.[34] Furthermore, the shutdown has put additional stress on PEPCO's transmission facilities by adversely affecting their maintenance.[35] In its comments, PEPCO warns that if for some reason both of the lines that connect to the Mirant Plant go out of service, "*all connected load would be dropped.*"[36] Echoing PJM, PEPCO concludes that "*the loss of the [Mirant Plant] for an extended period, coupled with*

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32 Potomac Electric Power Company's Motion to Intervene and Comment in Support of Emergency Petition and Complaint, Docket No. EL05-145-000, at 4 (August 29, 2005).

33 *Id.*

34 *Id.* at 8.

35 *Id.*

36 *Id.* (emphasis added).

the risks of a potential loss of critical transmission lines, creates a significant risk of losing large portions of Pepco's load in the District of Columbia."[37] A subsequent PEPCO filing confirmed that Mirant's partial restoration of Unit 1 did not resolve this fundamental reliability problem.[38]

Second, the filed non-public CEII that the DCPSC has been able to review amply supports the concerns expressed by PJM and PEPCO and validates the DCPSC's decision to bring this matter to the Commission's attention. While the DCPSC will not discuss the specifics of this information due to its protected status, the DCPSC assumes that the same data also was made available to the VDEQ. Nevertheless, the VDEQ has not provided any information challenging this data or the basic fact it established; namely, that the shutdown of the Mirant Plant poses a serious thereat to the region. The uncontroverted facts established in this proceeding unambiguously demonstrate that Mirant's interstate service in the area is inadequate and insufficient to the level of threatening regional reliability, a problem that the Commission has clear authority to remedy by ordering the restoration of service from the Mirant Plant under section 207 of the FPA.

Third, despite its professed concern with the quality of the environment, the VDEQ appears to be strangely indifferent to the serious environmental consequences that could be felt throughout the area (including the City of Alexandria) due to even a single blackout occasioned by the Mirant Plant's shutdown. In its comments in this proceeding, the District of Columbia Water and Sewer Authority ("WASA") explains that its Blue Plains Advanced Wastewater

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37 *Id.* (emphasis added).

38 *See* Supplemental Comments of Potomac Electric Power Company, Docket No. EL05-145-000 (September 21, 2005).

Treatment Plant ("Blue Plains Plant") depends on reliable electric service for proper operation.[39] In fact, the Blue Plains Plant is located across the Potomac River from the Mirant Plant and is served by the two underwater 69 kV cables from the Mirant Plant.[40] A disruption of operations at the Blue Plains Plant due to a loss of power supply will have "environmental consequences of its own that would not be limited to the District."[41] To be more specific, it is DCPSC's understanding that within 24 hours of any such loss of electric supply, the Blue Plains Plant will have no choice but to release raw sewage directly into the Potomac River.[42] The damaging environmental consequences to the area and to the Chesapeake Bay that may result from any such release are not difficult to imagine.

There are no legitimate reasons for dismissal or delay of the relief requested by the DCPSC. The uncontroverted evidence submitted in this proceeding and the parties' comments demonstrate the seriousness of the problem and a genuine need for speedy resolution. The Commission should fulfill its statutory responsibilities under section 207 of the FPA and restore service from the Mirant Plant.

C. The Relief Requested By The DCPSC Does Not Conflict With Any Applicable Environmental Or Other Laws.

Perhaps one of the most disturbing allegations made in the VDEQ Motion is the suggestion that the DCPSC is asking this Commission to act in contravention of federal

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39 Motion for Leave to Intervene and Comments of the District of Columbia Water and Sewer Authority, Docket No. EL05-145-000, at 3 (August 29, 2005).

40 *Id.*

41 *Id.* at 4.

42 *See also* Potomac Electric Power Company's Motion for Leave to Answer and Answer to Comments and Protests, Docket No. EL05-145-000, at 3 (September 9, 2005).

environmental laws. The DCPSC fully appreciates the paramount need for all regulatory agencies to observe and comply with the letter and spirit of environmental laws passed by Congress. Indeed, the DCPSC's action in this docket is dictated, in no small measure, by concerns over the serious environmental harm that may occur as a result of a power supply interruption due to the Mirant Plant's shutdown.

What the DCPSC does object to, however, is the apparent attempt to present inconclusive studies as actual violations of the Clean Air Act ("CAA"). As a matter of fact, there are no actual, monitored violations of the SO_2, NO_2 and PM_{10} NAAQS at the ambient air monitors closest to the Mirant Plant, and there is no allegation that Mirant has violated any of the emission limits for those pollutants that VDEQ set for the Mirant Plant as part of Virginia's state implementation plan ("SIP"). As a result, granting the relief requested by the DCPSC in this proceeding entails no conflict with any applicable laws.

The VDEQ argument that the Commission cannot issue an order requiring the Mirant Plant to continue operations because such an order would result in violations of the NAAQS for SO_2, NO_2 and PM_{10} is not supported. Under the CAA, Virginia implements NAAQS through its SIP.[43] As part of its SIP, Virginia also establishes limitations for the emissions of SO_2, NO_2 and PM_{10} from specific stationary sources, including the Mirant Plant.[44] These specific emission limits contained in Virginia's SIP govern the Mirant Plant. There is no allegation in this proceeding that the Mirant Plant cannot operate in compliance with the specific SO_2, NO_2 and PM_{10} emission limits contained in the SIP. Further, the VDEQ has not done anything to revise

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[43] *See* 9 Va. Admin. Code §§ 5-30-10 through 5-30-80 (national ambient air quality standards); 40 C.F.R. § 52.2420(c) (listing EPA-approved regulations contained in Virginia's SIP, including Virginia's NAAQS regulations); CAA § 110, 42 U.S.C. § 7410.

[44] *See* 40 C.F.R. § 52.2420(d).

or to revoke these SO_2, NO_2 and PM_{10} emission limits for the Mirant Plant. As a result, any suggestion that an order by the Commission to restore operation of the Mirant Plant would violate the Virginia SIP is erroneous.

Although air quality modeling may constitute a basis for the VDEQ to consider whether to revise the emission limits for the Mirant Plant to protect against NAAQS violations, Virginia's air pollution episode prevention regulations make it clear that the VDEQ cannot base any emergency orders on a modeling analysis. Instead, such orders must be based on actual monitored data.[45] In addition, Virginia's regulations recognize the importance of electric reliability. Under these regulations, coal-fired electric power generating facilities, such as the Mirant Plant, generally are not required to shut down, even when an air pollution emergency exists.[46]

The VDEQ's basis for contending that the Mirant Plant may be violating the NAAQS for SO_2, NO_2 and PM_{10} is a computer modeling analysis that used admittedly unrealistic assumptions to evaluate a hypothetical worst-case scenario[47] and does not reflect the actual

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[45] *See* 9 Va. Admin. Code § 5-70-40(B)(2), (3), (4) (setting forth the pollutant levels that much be reached at a *monitoring site* before an episode may be declared).

[46] The provision cited by VDEQ in the August 19, 2005 VDEQ Letter does not appear to apply to the situation at issue here. That provision, 9 Va. Admin. Code § 5-20-180(I), applies to situations where a facility's pollution control equipment malfunctions. The DCPSC is not aware of any allegation that pollution control equipment at the Mirant Plant is malfunctioning. Further, even in a situation where pollution control equipment malfunctions, VDEQ may order a shut down only under "worst case conditions" after finding "there is no other method of operation to avoid a violation of the primary ambient air quality standard." *Id.*

[47] *See A Dispersion Modeling Analysis of Downwash from Mirant's Potomac River Plant*, ENSR Corporation, at 5-3 (August 2005) ("Modeling Analysis") ("The analysis incorporated several conservative assumptions to ensure that the absolute maximum pollutant concentrations are predicted. Actual maximum pollutant concentrations due to the power plant are likely much lower than the maximum predicted concentrations presented in this report."); *id.* at 6-1 ("Worst-case modeling results indicat[ing] . . . exceedances of the NAAQS . . . assum[e] that the facility (continued...)

situation surrounding the Mirant Plant. Instead, the Modeling Analysis calculates the background level of ambient concentrations of the criteria air pollutants using monitors closest to the Mirant Plant, a consideration that must be taken into account. The Modeling Analysis on its face acknowledges that this results in "double counting" of the Mirant Plant's air quality impacts.[48] In fact, this modeling approach appears to be at odds with EPA modeling guidelines that require the use of a monitor not impacted by the source being modeled to estimate background levels.[49]

In addition, according to Mirant, the computer-estimated "impact of the Potomac River Plant's emissions on 'ambient air'" that it submitted to the VDEQ assumed that "the plant operated 100% of the time, [and] emitted at its maximum allowable emission rates."[50] The Modeling Analysis also assumed the Mirant Plant uses fuel with a sulfur content at the maximum allowable level. It appears, however, that the Mirant Plant uses fuel with a sulfur content well below the allowable level. As a result, the computer-predicted exceedances do not reflect actual ambient concentrations. A more refined modeling analysis with more realistic assumptions (*e.g.*, actual operating hours, lower fuel sulfur content, and elimination of double-counting) is likely to result in predicted ambient air pollutant concentrations that are much lower. These same shortcomings plague Mirant's subsequent analysis performed for Unit 1.

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operates at maximum possible load for the entire year and emits pollutants at the maximum allowable rates and highest impacts.").

48 Modeling Analysis at 4-1, 6-1.

49 *See* 40 C.F.R. pt. 51, App. W, section 9.2.2(b).

50 Letter from D. Bolton, Mirant, to M. Salas, Commission, Docket No. EL05-145-000, at 2 (August 26, 2005).

The conflict with environmental laws alleged by the DCPSC is thus purely hypothetical. The Commission is free to exercise its responsibilities under the FPA, and the CAA, when properly construed, presents no obstacle to the Commission's action in this docket.

D. The Relief Requested By The DCPSC Will Not Interfere With The VDEQ Director's Duties Under Virginia Law.

The VDEQ Motion contends that granting the relief requested in the DCPSC Complaint "would have the effect of preventing the [VDEQ] Director from performing his obligation . . . under the Air Pollution Control Law."[51] This implausible claim is based on the erroneous presumption that the Commission's exercise of its FPA section 207 authority in this proceeding would necessarily conflict with the CAA and other environmental statutes. As discussed above, however, no such conflict exists and the Director's ability to perform his duties under Virginia law remains undisturbed.

Further, under section 207 of the FPA, the Commission has the duty to "determine the proper, adequate, or sufficient service to be furnished" whenever it finds that "any interstate service of any public utility is inadequate or insufficient."[52] This duty is pursuant to the Commission's exclusive authority over the transmission of electric energy and wholesale sales of energy in interstate commerce. While the DCPSC believes that there is absolutely no conflict between the Commission's ability to grant the relief requested in this proceeding and any Virginia statute or regulation, it is well established law that a state statute or regulation conflicting with the FPA is preempted under the Supremacy Clause.[53] Again, the DCPSC wants

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51 VDEQ Motion at 12.

52 16 U.S.C. § 824f.

53 As the Supreme Court explained in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992), "[i]n determining whether 'state law stands as an obstacle' to the full (continued...)

to emphasize that it does not believe that the preemption doctrine is triggered here, as there is an absence of any conflict; however, the Commission should not shy away from exercising its core responsibilities over the interstate power grid in accordance with a long-standing regulatory scheme established by Congress.

E. No Action Under NEPA Is Required To Grant The Relief Requested By DCPSC.

The VDEQ claims that the relief requested by the DCPSC would constitute a "major Federal action[] significantly affecting the quality of the human environment," triggering obligations under NEPA.[54] Contrary to this argument, requiring Mirant to continue operations at the Mirant Plant is not a "major federal action" within the meaning of NEPA. The DCPSC is not asking the FERC or the DOE to expand the Mirant Plant, as any such relief is precluded by the express terms of section 207 of the FPA. Nor is the DCPSC asking the FERC or the DOE to order the Mirant Plant to be operated any differently from the manner in which it has always operated and has been permitted to operate, or to operate the Mirant Plant in a manner inconsistent with the CAA or the Virginia SIP. As a result, the relief requested by the DCPSC of continuing the Mirant Plant's operations would not constitute an action within the intended scope of NEPA, much less a major federal action.

The courts have consistently held that NEPA does not apply to the continuing operations of completed facilities[55] or where the facility at issue continues to be operated in the manner

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implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal.'" (Citations omitted.)

54 VDEQ Motion at 13.

55 *See County of Trinity v. Andrus,* 438 F. Supp. 1368, 1388 (E.D. Cal. 1977).

intended.[56] Similarly, the Commission's granting of the relief requested in this proceeding would result in the continuing operation of the Mirant Plant in the same manner it previously operated for years prior to August 21, 2005. There is no proposal for the extension of the Mirant Plant or service as compared with the pre-shutdown levels. Accordingly, if the Commission or the Secretary were to order Mirant to continue operations at the Plant in order to ensure electric reliability for the District of Columbia, this would not constitute an action within the meaning of NEPA.

Further, the emergency nature of the relief sought in this case permits the Commission to act without conducting a NEPA analysis, even if it were required. The Supreme Court has recognized that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[57] Courts have upheld actions by agencies in emergency situations -- particularly in the energy context -- to avoid NEPA analysis.[58] In this case, the Commission cannot comply with its responsibilities under the FPA to ensure the reliability of the electric system and conduct an analysis under NEPA. In particular, section 207 of the FPA directs the Commission to order a public utility to furnish "proper, adequate, or sufficient service" whenever the Commission finds that "any interstate service of any public utility is inadequate or insufficient."[59] It is impossible for the Commission to issue an order to avert an electric supply emergency in a timely fashion

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56 *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990).

57 *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976).

58 *See, e.g., Cities of Lakeland & Tallahassee v. FERC*, 702 F.2d 1302 (11th Cir. 1983); *Louisiana Power & Light Co. v. FPC*, 557 F.2d 1122 (5th Cir. 1977); *American Smelting & Refining Co. v. FPC*, 494 F.2d 925 (D.C. Cir. 1974); *Atlanta Gas Light Co. v. FERC*, 476 F.2d 142 (5th Cir. 1973); *Gulf Oil Corp. v. Simon*, 502 F.2d 1154 (Temp. Emer. Ct. App. 1974).

59 16 U.S.C. § 824f.

under section 207 and conduct a NEPA analysis. Because the Commission cannot adequately deal with emergency situations such as the one presented here and comply with NEPA, "NEPA must give way."[60]

For all these reasons, the relief requested by the DCPSC in the Emergency Petition is outside the scope of NEPA, and the Commission can order Mirant to continue operations of the Potomac River Plant. Any such order would not be subject to NEPA or its requirements.

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[60] *Flint Ridge*, 426 U.S. at 788. Moreover, VDEQ has argued that the reason the relief requested by the DCPSC should be deemed "significant" for NEPA purposes is that granting the relief would result in violations of the NAAQS for SO_2, NO_2 and PM_{10}. As discussed in Section III.C, *supra*, that assertion is simply not true. In addition, VDEQ's argument fails because the relief requested by the DCPSC does not represent any change in circumstances. It is well established that when a federal action maintains the status quo, an agency does not have to prepare an EIS. *Fund for Animals v. Thomas*, 127 F.3d 80, 84 (D.C. Cir. 1997) ("Because the new national policy maintained the substantive *status quo*, it cannot be characterized as a 'major federal action' under NEPA."); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo."); *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979) ("In general, however, if there is no proposal to change the status quo, there is in our view no 'proposal for legislation' or 'other major Federal action' to trigger the duty under NEPA to prepare an EIS.").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the DCPSC requests that the Commission reject the VDEQ Motion and grant the relief requested in the DCPSC Complaint, as supplemented by this Answer.

Respectfully Submitted,

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DATED: October 26, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned proceedings.

Dated at Washington, DC this 26th day of October, 2005.

/s/ Sheila S. Hollis
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EXHIBIT 2

Emergency Petition and Complaint of the District of Columbia Public Service Commission

DOE Docket EO-05-01

FERC Docket EL05-145-000

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