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PUBLIC VERSION
CRITICAL ENERGY
INFRASTRUCTURE INFORMATION
REMOVED

Honorable Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: *District of Columbia Public Service Commission, Docket No. EL05-145-000*

Dear Ms Salas:

Please find enclosed the Answer of Potomac Electric Power Company ("Pepco") and PJM Interconnection, L.L.C. ("PJM") to the October 6, 2005 motion filed by the Virginia Department of Environmental Quality in the above-captioned proceeding.

Request for Critical Energy Infrastructure Information ("CEII") Treatment:
Pursuant to 18 C.F.R. §§ 388.112 and 388.113 (2005), Pepco and PJM respectfully request privileged treatment of Appendix A to this Answer. Appendix A contains CEII, which relates to the production, generation, transportation, or distribution of energy and could be useful to a person planning an attack on critical infrastructure. Accordingly, Pepco and PJM are providing, under seal, an original and two copies of the confidential version of this filing, including the CEII, and an original and the requisite number of copies of the public version of this Answer, with the CEII removed.

Pepco and PJM designate the following as contact persons for the purposes of this request for CEII treatment.

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**HUNTON
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Honorable Magalie R. Salas
October 13, 2005
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Please do not hesitate to contact the undersigned should you have any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "Patrick J. McCormick, III". The signature is written in a cursive style with a large initial "P" and "M".

Patrick J. McCormick, III

Counsel for
Potomac Electric Power Company

PUBLIC -- CEII REMOVED

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**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**

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, Potomac Electric Power Company ("Pepco") and PJM Interconnection, L.L.C. ("PJM") hereby answer the 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").¹ For the reasons detailed in this Answer, Pepco and PJM request that the Commission deny the Virginia Department of Environmental Quality's ("VDEQ") motion.

¹ The VDEQ Motion was originally filed on October 6, 2005, but VDEQ withdrew and refiled it with minor revisions on October 11, 2005.

EXECUTIVE SUMMARY AND STATEMENT OF ISSUES

In accordance with the Commission’s recently issued rule in Docket No. RM05-33-000,² Pepco and PJM hereby provide the Commission with a statement of the issues presented:

1. Whether the VDEQ Motion is out of time, and therefore an impermissible supplemental protest.³

2. Whether the Commission can grant the relief requested by the District of Columbia Public Service Commission’s (“DC PSC”) emergency petition and complaint (“Emergency Petition”) without conflicting with existing federal, state, or local laws, including the laws governing the national ambient air quality standards (“NAAQS”) for sulfur dioxide (“SO₂”), nitrogen dioxide (“NO₂”), and particulate matter less than 10 microns in diameter (“PM₁₀”) and the Clean Air Act’s (“CAA”) general conformity requirements.⁴

3. Whether the Commission can grant the relief requested in the DC PSC’s Emergency Petition without affecting the ability of the Director of VDEQ to meet his duties under Virginia law.⁵

² *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 70 Fed. Reg. 55723 (September 23, 2005).

³ See *Emergency Petition and Complaint of District of Columbia Public Service Commission, Notice of Filing*, Docket No. EL05-140-000 (August 25, 2005) (establishing deadline to intervene and protest).

⁴ CAA § 110, 42 U.S.C. § 7410; CAA § 176(c)(5), 42 U.S.C. § 7506(c)(5); 40 C.F.R. § 52.2420(c), (d); 40 C.F.R. § 81.347; 9 Va. Admin. Code §§ 5-30-10 through 5-30-80; 9 Va. Admin. Code § 5, Chapter 70.

⁵ CAA § 110, 42 U.S.C. § 7410; 40 C.F.R. § 81.347.

4. Whether the Commission can grant the relief requested in the DC PSC's Emergency Petition without undertaking an analysis under the National Environmental Policy Act ("NEPA").⁶

5. Whether the Commission has authority under the Federal Power Act to grant the relief requested in the Emergency Petition.⁷

In sum, the Commission should deny VDEQ's motion and should not delay in granting the relief requested in the DC PSC's Emergency Petition. As detailed in numerous submissions to the Commission, the electric reliability concerns posed by not operating the Potomac River Generating Station power plant ("Potomac River Plant" or "Plant") pose significant threats to public health, safety, and security for the national capital area, including indirect impacts to Virginia and Maryland. The Commission should act quickly to ensure electric reliability. Moreover, the Commission should deny the VDEQ Motion for the following reasons:

1. The VDEQ Motion is an impermissible supplemental protest because it was filed past the Commission's August 29, 2005 deadline.

2. Because there is no allegation that the Plant does not comply with the SO₂, NO₂, and PM₁₀ emission limits contained in its operating permit and incorporated in Virginia's SIP, an order by the Commission directing the Plant to continue operating at a level sufficient to ensure electric reliability does not conflict with the CAA or Virginia's SIP. Granting the relief requested in the DC PSC's Emergency Petition would not result in a violation of any federal,

⁶ *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Fund for Animals v. Thomas*, 127 F.3d 80 (D.C. Cir. 1997); *Upper Snake River v. Hodel*, 921 F.2d 232 (9th Cir. 1990); *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977); *Milford Power Company, LLC*, 110 FERC ¶ 61,299 (2005).

⁷ Federal Power Act § 207, 16 U.S.C. § 824f; Federal Power Act § 309, 16 U.S.C. § 825h; *Southern California Edison Co., et al.*, 70 FERC ¶ 61,087 (1995).

state, or local laws, including the laws governing NAAQS and the Clean Air Act's general conformity requirements. The ambient air monitors closest to the Potomac River Plant have not shown *any* actual monitored violations of the NAAQS for SO₂, NO₂, and PM₁₀. No one, including VDEQ, has alleged violations of the emission limits for SO₂, NO₂, and PM₁₀ that VDEQ set for the Plant. Those emission limits are part of Virginia's state implementation plan ("SIP") adopted to ensure attainment and maintenance of the NAAQS and are the CAA laws governing the Plant. Although air quality modeling may constitute a basis for VDEQ to consider revisions to its SIP, Virginia's air quality regulations do not permit modeling analyses to be used to require an electric power generating station to shut down. Further, the CAA's requirement to make a general conformity determination does not apply here. General conformity obligations apply only in areas that do not meet (or did not meet in the past) the NAAQS for the pollutant at issue. The Northern Virginia area where the Plant is located is (and always has been) in attainment for the SO₂, NO₂, and PM₁₀ NAAQS.

3. Granting the relief requested in the Emergency Petition would not impair the VDEQ Director's ability to perform his duties. The Emergency Petition does not ask the Commission to engage in state environmental regulation, and ordering the Potomac River Plant to continue operation would not result in a violation of any applicable laws. VDEQ bases its allegations on uncertain modeling results. No one, including VDEQ, has alleged that the Plant's actual emissions of SO₂, NO₂, and PM₁₀ do not comply with the emission limits contained in the *Plant's operating permit and Virginia's SIP*.

4. The Commission does not have to conduct an environmental assessment under NEPA before it can grant the relief requested in the Emergency Petition because the relief requested is outside the scope of NEPA. NEPA does not apply to continuing operation of

completed facilities. The relief requested in the Emergency Petition does not ask that anything new or more extensive be done at the Plant, nor is it requesting that the Plant be expanded. Thus, NEPA does not apply. NEPA also does not apply here because of the emergency situation at hand. It is impossible for the Commission to meet its responsibilities under the Federal Power Act to ensure electric reliability on the one hand and respond to this emergency situation and conduct a NEPA analysis on the other.

5. The Commission has authority under sections 207 and 309 of the Federal Power Act to act on the DC PSC's Emergency Petition. The fact that the Department of Energy ("DOE" or "Secretary") has authority section 202(c) of the Federal Power Act to issue an emergency order does not preclude the Commission from making a determination under section 207 and issuing an order with regard to the Plant under that provision.

BACKGROUND

This proceeding involves a voluntary decision by Mirant⁸ to shut down the Potomac River Plant located in Alexandria, Virginia, on August 24, 2005, after receiving an August 19, 2005 letter from VDEQ.⁹ In that letter, VDEQ expressed concerns about the results of a modeling analysis of the downwash emissions from the Plant of SO₂, NO₂, and PM₁₀. On the same day that Mirant shut down the Plant, the DC PSC filed the Emergency Petition before the Commission and the Secretary requesting that Mirant be ordered to "continue the operation of the Potomac River Plant" and "take immediate action preventing Mirant from ceasing operations

⁸ "Mirant" means Mirant Corporation and its public utility subsidiaries, including Mirant Potomac River, LLC, a wholly owned subsidiary of Mirant Corporation that owns and operates the Potomac River Plant.

⁹ 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.

at the Potomac River Plant to ensure that electric reliability in the area is not adversely affected.”¹⁰ After conducting additional modeling analysis, Mirant voluntarily resumed operations at the Potomac River Plant at a reduced level on September 21, 2005.

On October 6, 2005, VDEQ filed the VDEQ Motion, asking the Commission to deny the DC PSC’s Emergency Petition, arguing that the relief requested by the DC PSC cannot lawfully be granted. In the alternative, VDEQ seeks to defer action pending further analysis of the environmental impacts associated with the relief sought in the Emergency Petition. For the reasons detailed in this Answer, the relief requested by the DC PSC in the Emergency Petition is necessary and can be lawfully granted. Moreover, any delay in granting that relief continues to jeopardize the electric reliability of the District of Columbia, raising serious issues of public health and safety, and national security.

DISCUSSION

I. BECAUSE THE VDEQ MOTION IS PROCEDURALLY DEFICIENT, THE COMMISSION SHOULD REJECT IT.

VDEQ styles its pleading as a “Motion...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.” Despite the exclusion of the word “protest” from its “motion,” VDEQ has effectively submitted an impermissible supplemental protest that the Commission should not consider.

On August 25, 2005, the Commission issued a public notice of the Emergency Petition that stated that motions and protests had to be filed no later than 5:00 pm Eastern Time on

¹⁰ Emergency Petition at 2.

August 29, 2005. VDEQ, in fact, submitted a motion to intervene and protest by the deadline. That pleading, of course, is part of the record in this proceeding. Now, VDEQ wants a “second bite at the apple” by filing, more than a month after the deadline established by the Notice, a pleading that supplements its August 29 protest. The Commission should not permit VDEQ to introduce, at this stage, arguments it should have made at the time all other parties to this proceeding were required to submit comments. Pepco and PJM also note that VDEQ made no motion for leave to supplement its original protest. The VDEQ Motion states no new facts and does not attempt to provide any justification for its late filing. For these reasons, the Commission should reject the VDEQ Motion as an impermissible supplemental protest.¹¹

II. THE RELIABILITY ISSUES RAISED BY THE DC PSC IN THE EMERGENCY PETITION ARE SUBSTANTIAL AND IMPLICATE SERIOUS RISKS TO PUBLIC HEALTH, SAFETY, AND SECURITY.

VDEQ minimizes the electric reliability concerns raised by the DC PSC as a “theoretical possibility.”¹² In fact, as numerous filings before the Commission show, the electric reliability concerns have been identified by several parties to this proceeding and pose significant threats to public health, safety, and security.¹³ Appendix A to this Answer, filed as Confidential Critical

¹¹ To the extent the Commission considers the VDEQ Motion a protest rather than a motion, Pepco and PJM respectfully request the Commission to grant them leave to file this Answer in response. See Rule 213 of the rules of Practice and Procedure of the FERC, 18 C.F.R. § 385.213.

¹² VDEQ Motion at 3.

¹³ See, e.g., Motion for Leave To Intervene and Comments of the District of Columbia Water and Sewer Authority (“WASA”), at 4 (“In balancing the environmental and power security interests, it is important for the Commission and interested parties to keep in mind that the concern with air quality is not the only environmental interest at stake. . . . [T]he loss of electricity to Blue Plains [WASA’s wastewater treatment facility] has environmental consequences that would not be limited to the District.”) (emphasis in original); Notice of Intervention of the Pennsylvania Public Utility Commission and Comments in Support of Petition, at 4 (“[I]t would appear incontrovertible that the immediate and compelling public interest lies with the protection of life
(continued...)”) (continued...)

Energy Infrastructure Information, provides additional detail in support of the District of Columbia and Pennsylvania Commissions.

As can be seen, operation of the Potomac River Plant at a level greater than that at which is has been operating since September 21, 2005, is necessary to ensure electric reliability to the national capital area. The Commission or the Secretary should act immediately to ensure that the Potomac River Plant continues operating at a level necessary to address these electric reliability concerns.¹⁴

III. THE RELIEF REQUESTED BY THE DC PSC IN THE EMERGENCY PETITION DOES NOT CONFLICT WITH ANY APPLICABLE FEDERAL OR STATE LAWS.

VDEQ argues in its motion that the Commission cannot grant the relief sought by the DC PSC in the Emergency Petition because that relief would conflict with federal and state law, namely the federal CAA and Virginia's implementation of the CAA through its SIP. In fact, there can be no conflict because there are no *actual monitored* violations of the SO₂, NO₂, and PM₁₀ NAAQS at the ambient air monitors closest to the Plant, and no one has alleged that the Plant has violated any of the emission limits for those pollutants that VDEQ set for the Plant as part of Virginia's SIP. For this reason and those reasons discussed below, granting the relief requested is entirely consistent with the Commission's authority and responsibility under the Federal Power Act and does *not* conflict with *any* applicable laws.

and property threatened by the plant shutdown."); Emergency Petition at 4 ("Virginia has legitimate interest in the environmental impacts of the Potomac River Plant. . . . Yet, there is no escaping the fact that the Potomac River Plant is for now and the foreseeable future, an essential element in the provision of electric service to the District of Columbia. Without the power generated by it, catastrophe could be very near.").

¹⁴ The Secretary of Energy also has authority to order the Potomac River Plant to operate, and he should do so.

A. Granting the Relief Requested in the Emergency Petition Would Not Result in Any Violations of the NAAQS for SO₂, NO₂, and PM₁₀.

VDEQ argues that the Commission cannot issue an order requiring the Potomac River Plant to continue operations because such an order would result in violations of the NAAQS for SO₂, NO₂, and PM₁₀. This is simply not the case.

Under the CAA, Virginia implements NAAQS through its SIP.¹⁵ As part of its SIP, Virginia also establishes limitations for the emissions of SO₂, NO₂, and PM₁₀ from specific stationary sources, including the Potomac River Plant.¹⁶ These specific emission limits contained in Virginia's SIP govern the Potomac River Plant. Neither VDEQ -- nor anyone else for that matter -- alleges that the Potomac River Plant cannot operate in compliance with the specific SO₂, NO₂, and PM₁₀ emission limits for the Plant contained in the SIP. VDEQ has not done anything to revise or to revoke these SO₂, NO₂, and PM₁₀ emission limits for the Plant. Any suggestion that an order by the Commission to operate would violate the Virginia SIP is erroneous. In fact, the Plant would be in full compliance with the SIP.

Furthermore, although air quality modeling may constitute a basis for VDEQ to consider whether to revise the emission limits for the Plant to protect against NAAQS violations, Virginia's air pollution episode prevention regulations make clear that VDEQ cannot base any emergency orders on a modeling analysis. Such orders must be based on actual monitored data.¹⁷ In addition, Virginia's regulations recognize the importance of electric reliability. Even

¹⁵ 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.

¹⁶ See 40 C.F.R. § 52.2420(d).

¹⁷ 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). In addition, Virginia's

(continued...)

in the event of an air pollution emergency -- the worst type of air pollution episode -- owners of coal-fired electric power generating facilities such as the Potomac River Plant are not required to shut down.¹⁸ In such emergency situations, the electric generating facilities are asked to reduce operations to the greatest extent possible by diverting electric power generation to facilities outside the emergency area.¹⁹ In contrast, other industrial facilities must shut down in an air pollution emergency.²⁰

It should also be noted that the Northern Virginia area where the Plant is located -- indeed, the entire Commonwealth of Virginia -- is in attainment with (i.e., meets) the NAAQS for all three criteria pollutants at issue here.²¹ In addition, VDEQ's basis for contending that the Potomac River Plant *may* be violating the NAAQS for these pollutants is a computer modeling analysis that used admittedly unrealistic assumptions to evaluate a hypothetical worst-case scenario.²² In other words, the Modeling Analysis does not reflect the actual situation

regulations state that the air pollution episode prevention regulations apply only in nonattainment areas. *Id.* § 5-70-10. The Northern Virginia area where the Plant is located is an attainment area for SO₂, PM₁₀, and NO₂. 40 C.F.R. § 81.347; *see also* <http://www.epa.gov/oar/oaqps/greenbk>.

¹⁸ Indeed, the provision cited by VDEQ in the August 19, 2005 VDEQ Letter does not 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. No one has alleged that pollution control equipment at the Plant is malfunctioning. 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." 9 Va. Admin. Code § 5-20-180(I).

¹⁹ 9 Va. Admin. Code § 5, Chapter 70, Table VII-C(II)(A).

²⁰ *Id.*, Table VII-C(I)(C).

²¹ *See* 40 C.F.R. § 81.347; *see also* <http://www.epa.gov/oar/oaqps/greenbk>.

²² *See A Dispersion Modeling Analysis of Downwash from Mirant's Potomac River Plant*, ENSR Corporation, at 5-3 (Aug. 2005) ("Modeling Analysis") ("The analysis incorporated several conservative assumptions to ensure that the absolute maximum pollutant concentrations are

(continued...)

surrounding the Plant. In fact, the U.S. Environmental Protection Agency's ("EPA") Monitor Values Report for the years 2000-2005 for the three criteria pollutants for the monitors located closest to the Plant do not show any NAAQS violations.²³

The Modeling Analysis calculates the background level of ambient concentrations of the criteria air pollutants using monitors closest to the Plant, a consideration that must be taken into account. The Modeling Analysis on its face acknowledges that this results in "double counting" of the Plant's air quality impacts.²⁴ In fact, this modeling approach is at odds with EPA modeling guidelines that require the use of a monitor not impacted by the source being modeled to estimate background levels.²⁵

In addition, according to Mirant, the computer-estimated "impact of the Potomac River Plant's emissions on 'ambient air'" that it submitted to VDEQ assumed that "the plant operated 100% of the time, [and] emitted at its maximum allowable emission rates."²⁶ The Modeling Analysis also assumed the Plant uses fuel with a sulfur content at the maximum allowable level.

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

²³ See Monitor Values Report, available at <http://www.epa.gov/air/data/index.html> (attached hereto as Exhibit 1). The closest EPA ambient air monitor for SO₂ and NO₂ is located at 517 N. St. Asaph Street in Alexandria, only 1 kilometer southwest of the Plant. Modeling Analysis at 4-1. The closest EPA ambient air monitors for PM₁₀ are located at 2675 Sherwood Hall Lane and at the Cub Run site on Lee Road in Fairfax County. *Id.* These are the monitors used in the Modeling Analysis to estimate background levels. *Id.*

²⁴ Modeling Analysis at 4-1, 6-1.

²⁵ See 40 C.F.R. pt. 51, App. W, section 9.2.2(b).

²⁶ Letter from D. Bolton, Mirant, to M. Salas, Commission, at 2 (August 26, 2005).

In fact, Pepco and PJM understand that the 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. This conclusion is borne out by the fact that there is *no actual monitored violation* of the NAAQS for the pollutants anywhere in the vicinity of the Plant.²⁷ A more refined modeling analysis with more realistic assumptions (e.g., actual operating hours, lower fuel sulfur content, and elimination of double-counting) would result in predicted ambient air pollutant concentrations that are much lower.

Mirant performed additional modeling analysis for just Unit 1 at the Plant on September 20, 2005.²⁸ As a result of this second modeling analysis, Mirant began operating Unit 1 at the Plant on September 21, 2005, subject to self-imposed restrictions, including hours of operation. The reduced level at which the Plant is operating, however, does not eliminate electric reliability concerns.

The second modeling analysis suffers from many of the same flaws contained in the first Modeling Analysis, including double-counting in the calculation of background levels and a higher fuel sulfur content than the Plant has historically used.²⁹ As a result, the second modeling analysis, like the first Modeling Analysis, does not reflect reality.

Unlike the modeling analyses, the electric reliability concerns associated with the Plant's reduced operation level are real, as the filings in this proceeding amply demonstrate. Given the

²⁷ See Monitor Values Report, available at <http://www.epa.gov/air/data/index.html> (attached hereto as Exhibit 1).

²⁸ *Update 1 to: A Dispersion Modeling Analysis of Downwash from Mirant's Potomac River Power Plant: Modeling Unit 1 Emissions in a Cycling Mode*, ENSR Corporation (September 20, 2005).

²⁹ See *id.* at 2-1 to 2-2; *id.* at Table 3-3.

threat to public health, safety, and security that currently exists as a result of the Plant's reduced operating level, the Commission should not delay in acting on the Emergency Petition.

B. The Commission Does Not Need To Make a General Conformity Determination Before It Can Order the Relief Requested in the Emergency Petition.

VDEQ also argues that the Commission cannot order the relief requested unless it determines that the action would conform with Virginia's SIP.³⁰ VDEQ misses a fundamental point. The general conformity provisions of the CAA, CAA § 176(c)(1), 42 U.S.C. § 7506(c)(1), apply only in nonattainment areas and only to pollutants for which the area is designated nonattainment. Section 176(c)(5) of the CAA provides that:

This subsection shall apply only with respect to -- (A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and (B) an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area³¹

As discussed above, the Northern Virginia area is in attainment for all three criteria pollutants at issue.³² Moreover, the Northern Virginia area is not a maintenance area (an area that was once designated as nonattainment but was later redesignated to attainment).³³ Thus, general conformity obligations do not apply here.

For all these reasons, the relief requested in the Emergency Petition can be granted without violating any applicable federal or state air quality laws.

³⁰ VDEQ Motion at 5-8.

³¹ 42 U.S.C. § 7506(c)(5).

³² 40 C.F.R. § 81.347; *see also* <http://www.epa.gov/oar/oaqps/greenbk>.

³³ *Id.*

IV. THE RELIEF REQUESTED BY THE DC PSC IN THE EMERGENCY PETITION DOES NOT IMPAIR THE ABILITY OF THE DIRECTOR OF VDEQ TO MEET HIS DUTIES.

VDEQ states that granting the relief requested in the Emergency Petition “would impermissibly strip the [VDEQ] Director of his ability to meet his duties under Virginia law.”

As discussed in section III above, nothing requested in the DC PSC’s Emergency Petition results in a conflict with the Director’s duties to ensure that Virginia achieves and maintains NAAQS.

Contrary to VDEQ’s argument, the Emergency Petition does not request that the Commission engage in state environmental regulation and that is not what would occur if the Commission granted the relief requested. Rather, the Commission would be ordering the Potomac River Plant to operate consistent with state environmental regulation, including the emission limits set out for the Plant in Virginia’s SIP. An order under section 207 of the Federal Power Act simply would not extend the Commission’s jurisdictional reach beyond its current authority under the Federal Power Act.

V. GRANTING THE RELIEF SOUGHT IN THE EMERGENCY PETITION DOES NOT REQUIRE THE COMMISSION TO CONDUCT THE REQUESTED NEPA REVIEW BECAUSE THE RELIEF SOUGHT IS OUTSIDE THE SCOPE OF NEPA.

In its motion, VDEQ claims that the relief requested by the DC PSC to order Mirant to continue operations at the Potomac River Plant would constitute a “major federal action[] significantly affecting the quality of the human environment,” triggering obligations under NEPA.³⁴ In fact, requiring Mirant to continue operations at the completed Potomac River Plant is not a “major federal action” within the meaning of NEPA. The DC PSC is not asking FERC to expand the Potomac River Plant; nor is the DC PSC asking FERC to order the Plant to be

³⁴ NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

operated any differently from the manner in which it has always operated and has been permitted to operate, or to operate the Plant in a manner inconsistent with the CAA or the Virginia SIP. For this reason, the relief requested by the DC PSC of continuing the Plant's operations would not constitute an action within the intended scope of NEPA, much less a major federal action.

In *County of Trinity v. Andrus*,³⁵ the U.S. District Court for the Eastern District of California held that NEPA did not apply to a decision by the Bureau of Reclamation to lower the level of a reservoir during a drought because of potential damage to the fish population in the reservoir. The court explained that “[t]he issue here is not whether the actions are of a sufficient magnitude to require the preparation of an [environmental impact statement (“EIS”)], but rather *whether NEPA was intended to apply at all to the continuing operations of completed facilities.*”³⁶ The court found that the Bureau’s project was not a case where “a project takes place in incremental stages of major proportions” or “a revision or expansion of the original facilities.”³⁷ Instead, the court held that NEPA did not apply to the Bureau’s action of lowering the reservoir level because “[t]he Bureau has neither enlarged its capacity to divert water from the Trinity River nor revised its procedures or standards for releases into the Trinity River and the drawdown of reservoirs. It is simply operating the Division within the range originally available pursuant to the authorizing statute, in response to changing environmental conditions.”³⁸

³⁵ 438 F. Supp. 1368 (E.D. Cal. 1977).

³⁶ *Id.* at 1388 (emphasis added).

³⁷ *Id.*

³⁸ *Id.* at 1388-89.

Other courts have adopted the *Trinity* court's reasoning. In *Upper Snake River Chapter of Trout Unlimited v. Hodel*,³⁹ the Ninth Circuit found that NEPA did not apply to the Bureau of Reclamation's decision to reduce river flow as part of its operation of a dam and reservoir.⁴⁰ The court found that the Bureau was "simply operating the facility in the manner intended. . . . [T]hey are doing nothing new, nor more extensive, nor other than that contemplated when the project was first operational. Its operation is and has been carried on and the consequences have been no different than those in years past."⁴¹

In this proceeding, the DC PSC is asking only that Mirant be ordered to continue operation of the Potomac River Plant as the Plant has operated for years. The DC PSC is neither asking that anything new or more extensive be done at the Potomac River Plant, nor is it requesting that operations at the Plant be revised or expanded. If the Commission or the Secretary were to order Mirant to continue operations at the Potomac River Plant to ensure electric reliability for the District of Columbia, this would not constitute an action within the meaning of NEPA.

Indeed, the Commission and the Secretary have historically not undergone NEPA analysis in ordering electric generating units to continue operations. To address reliability concerns, the Commission approves reliability must-run contracts between an independent system operator and a unit that must operate to ensure maintenance of system reliability and does

³⁹ 921 F.2d 232 (9th Cir. 1990).

⁴⁰ *Id.* at 234.

⁴¹ *Id.* at 235; *see also Raymond Proffitt Found. v. Corps of Engineers*, 175 F. Supp. 2d 755, 772 (E.D. Pa. 2001) (NEPA does not apply to Corps of Engineers' policy decisions with regard to releases of water from the Walter Dam into the Lehigh River because those decision are "part of its ordinary operation of the dam."); *accord Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

not engage in NEPA analysis in making these orders.⁴² The Secretary also has not engaged in NEPA analysis when it has issued emergency orders requiring generators to operate units to ensure electric reliability.⁴³ Because these orders merely require a unit to continue operating, NEPA does not apply.

The fact that Mirant voluntarily shut down the Potomac River Plant for a period of time does not change the analysis. In *Upper Snake River*, plaintiffs argued that reduction of the river's flow below 1,000 cubic feet per second was "not a routine managerial action" because the flow had only rarely been lowered below that level. The court rejected this reasoning stating that "a particular flow rate will vary over time as changing weather conditions dictate. . . . What does not change is the Bureau's monitoring and control of the flow rate. . . ."⁴⁴ Electric power companies routinely shut down electric generating units for a period of time for a myriad of reasons. The fact that a unit has been shut down for a period of time⁴⁵ does not change the fact that the Commission has authority to order a unit to continue operating to ensure electric system reliability.

If the Commission grants the DC PSC's Emergency Petition and orders Mirant to operate the Potomac River Plant to ensure electric reliability, such an order would not constitute an

⁴² See, e.g., *Milford Power Company, LLC*, 110 FERC ¶ 61,299 (2005).

⁴³ 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. 202-03-1 (August 14, 2003).

⁴⁴ *Upper Snake River*, 921 F.2d at 237.

⁴⁵ This situation differs from the one in *NRDC v. Vaughn*, 566 F. Supp. 1472 (D.D.C. 1983), where DOE sought to restart a nuclear reactor that had been shut down for 15 years. In that case, NEPA review was required because the unit could not be considered to be in continuous operation given the 15-year lapse.

action within the meaning of NEPA because such an order would involve only the continued operation of an existing facility.

Beyond these reasons, the emergency nature of the relief sought in this case permits the Commission to act without conducting a NEPA analysis. The Supreme Court has recognized that “where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.”⁴⁶ In *Flint River*, the Court found that the Department of Housing and Urban Development could not comply with a requirement of the Interstate Land Sales Full Disclosure Act to allow statements of record to go into effect within 30 days of filing and simultaneously comply with NEPA. Thus, the Court found that NEPA did not apply.⁴⁷

Courts have upheld actions by agencies in emergency situations -- particularly in the energy context -- to avoid NEPA analysis. Courts have upheld orders by the Commission implementing interim curtailment plans under the Natural Gas Act to avoid gas shortages without undergoing NEPA analysis because it was not possible for the Commission to meet its requirements under the Natural Gas Act and comply with NEPA.⁴⁸ Similarly, the Federal Energy Office was not required to conduct a NEPA analysis before allocating crude oil under the Emergency Petroleum Allocation Act of 1973 because “[t]he short period Congress allowed for the formulation and effectuation of a nationwide scheme of oil allocation would have sufficed for no more than the preliminary stages of development of an environmental impact statement. In these circumstances, Congress must have intended that the President proceed forthwith to

⁴⁶ *Flint Ridge Development Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 788 (1976).

⁴⁷ *Id.* at 791.

⁴⁸ *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 and 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).

allocate oil supplies without the elaborate formal determination of environmental impact for which the National Environmental Policy Act provides.”⁴⁹

Here, the Commission cannot comply with its responsibilities under the Federal Power Act to ensure the reliability of the electric system and conduct an analysis under NEPA. In particular, section 207 of the Federal Power Act 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.”⁵⁰ It is impossible for the Commission to issue an order to avert an electric supply emergency in a timely fashion under section 207 and conduct a NEPA Analysis.⁵¹ Because the Commission cannot adequately deal with emergency situations such as the one presented here and comply with NEPA, “NEPA must give way.”⁵²

⁴⁹ *Gulf Oil Corp. v. Simon*, 502 F.2d 1154, 1157 (Temp. Emer. Ct. App. 1974).

⁵⁰ 16 U.S.C. § 824f.

⁵¹ *See Dry Color Mfrs. Ass’n v. Department of Labor*, 486 F.2d 98, 107-08 (3d Cir. 1973) (“The process by which NEPA statements are produced and circulated is a lengthy one. To require its completion before the promulgation of an emergency temporary standard would impair the purpose . . . to provide speedy protection from grave dangers. . .”). Similarly, it would be impossible for the Secretary to meet his obligations under section 202(c) of the Federal Power Act and conduct a NEPA analysis. Section 202(c) states that in the event “an emergency exists by reason of a . . . shortage of electric energy or of facilities for the generation or transmission of electric energy,” the Secretary “shall have authority, . . . with or without notice, hearing, or report, to require by order such temporary connection of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.” 16 U.S.C. § 824a(c).

⁵² *Flint Ridge*, 426 U.S. at 788. Moreover, VDEQ has argued that the reason the relief requested by the DC PSC should be deemed “significant” for NEPA purposes is that granting the relief would result in violations of the NAAQS for SO₂, NO₂, and PM₁₀. As discussed in Section III, that assertion is simply not true. Thus, under VDEQ’s reasoning, granting the relief cannot be considered “significant” as a factual matter because there are no demonstrated violations of those NAAQS. In addition, VDEQ’s argument fails as a matter of law because the relief requested by the DC PSC -- namely that Mirant continue to operate the Potomac River Plant -- does not

(continued...)

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

VI. THE COMMISSION HAS AUTHORITY TO ACT ON THE DC PSC'S EMERGENCY PETITION.

In its Motion, VDEQ asserts that the DC PSC's request is not properly before the Commission.⁵³ According to VDEQ, only the Secretary of Energy is empowered to hear this case pursuant to the Department of Energy Organization Act, 42 U.S.C. §§ 7101, et seq.⁵⁴ This claim is without merit. The Commission does, in fact, have authority to consider and rule on the DC PSC's Emergency Petition.

The Federal Power Act provides the Commission with the requisite statutory authority to act on the Emergency Petition, notwithstanding VDEQ's claims to the contrary, in two provisions.⁵⁵ First, section 207 provides:

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.").

⁵³ VDEQ Motion at 14.

⁵⁴ *Id.* at 3.

⁵⁵ Contrary to VDEQ's assertion, the Commission has authority under sections 205 and 206 of the FPA to grant the relief sought in the Emergency Petition. See VDEQ Motion at 5 n.1. As Pepco referenced in its Motion for Leave to Answer filed in this proceeding on September 9, (continued...)

[W]henever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall *find that any interstate service of any public utility is inadequate or insufficient*, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation. . . .”⁵⁶

This provision, particularly the emphasized terms, establishes that the Commission has authority to issue an order directing a public utility to furnish “proper, adequate, or sufficient service,” whenever the Commission makes a determination that interstate service “is inadequate or insufficient.” Section 207 not only authorizes the Commission to issue orders of the type requested in the Emergency Petition, but *requires* the Commission to issue such an order to remedy the situation once the Commission makes a determination of inadequacy or insufficiency.

Not only does the Commission have authority to grant the relief requested in the Emergency Petition, but it must grant that relief.⁵⁷ The evidence in this case demonstrates that *inadequate and insufficient service exists if the Potomac River Plant is not operated at a load level greater than its current operation level*. Once the Commission finds that inadequate and insufficient service exists, it must “determine the proper, adequate, or sufficient service to be

2005, the Commission has authority to enforce the terms and conditions of jurisdictional agreements under sections 205 and 206. *See* Pepco Answer, at 7 n.9. Under the Local Area Support Agreement (“LASA”), which was accepted for filing by FERC, Mirant agreed to operate the Plant in a manner that protected electric reliability in the D.C. region. *See In re Potomac Elec. Power Co.*, 93 FERC ¶ 61,240 (2000). In particular, various sections of the LASA require that Mirant operate the Plant to achieve this goal. *See, e.g.*, LASA sec. 3.2(a), 4.2, 8.2. As a result, in addition to its authority under sections 207 and 309 of the FPA, the Commission has authority under sections 205 and 206 of the FPA to direct Mirant to operate the Plant.

⁵⁶ 16 U.S.C. § 824f (emphasis added).

⁵⁷ Section 207’s requirement that the Commission cannot compel the enlargement of generating facilities or compel the public utility to sell or exchange energy if it would impair its ability to serve its customers, is not implicated in this case.

furnished” and must “fix the same by its order, rule, or regulation.”⁵⁸ Nothing in section 207 limits the Commission’s authority or directs the Commission to defer to the Secretary. In fact, section 207 expressly provides the authority for the *Commission* to act, *not* any other governmental body. Therefore, VDEQ’s suggestion that the Petition is not properly before the Commission is meritless.⁵⁹

Second, section 309 of the Federal Power Act, which governs the Commission’s administrative powers is also relevant to this case. When used in conjunction with section 207, section 309 buttresses the fact that the DC PSC’s Emergency Petition is appropriately before the Commission. Section 309, in pertinent part, provides that the Commission “shall have the power to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.”⁶⁰ Because section 309 provides that the Commission may issue orders to enforce other provisions of the statute, including section 207, it provides additional assurance that the Commission has authority to hear and grant the relief requested in the Emergency Petition.

The upshot of VDEQ’s argument is that this matter should be before the Secretary of Energy and not the Commission. Pepco and PJM note that their primary concern is to resolve this issue expeditiously before an appropriate administrative forum. Indeed, the DC PSC filed

⁵⁸ Federal Power Act § 207, 16 U.S.C. § 824f.

⁵⁹ VDEQ states that the DC PSC took the “unusual step” of requesting Commission action under section 207. The mere fact that section 207 is not regularly used does not mean that section 207 is a dead letter. Congress has had many opportunities to repeal the provision, most recently in its consideration of the Energy Policy Act of 2005, Pub. L. No. 109-58. That it did not do so indicates that section 207 remains an integral part of the Federal Power Act, even if rarely called upon.

⁶⁰ Federal Power Act § 309, 16 U.S.C. § 825h.

the Emergency Petition before both agencies. It is important to observe, however, that just because the Secretary has authority under section 202(c) of the Federal Power Act to issue an emergency order, the Commission is not therefore precluded from acting under section 207 to issue an order.

Nothing in the statutory language of either section 202(c) or section 207 (or, for that matter, in the entire statute) indicates that a party bringing an issue before the Secretary under section 202(c) is barred from requesting relief from the Commission under section 207. The same is true of the converse. If a state appropriately requests action from the Commission under section 207, nothing prevents the state from asking the Secretary to act under section 202(c). Moreover, the Department of Energy Organization Act, pursuant to which the Commission's authorities under section 202(c) were transferred to the Secretary, does not contain any language that would restrict either the Secretary's or the Commission's respective authorities under either section 202(c) or section 207.

In addition, the fact that the Commission may act on the Emergency Petition under section 207 is further supported by the recently enacted Energy Policy Act of 2005, Pub. L. No. 109-58. Section 1211 of that Act expressly provides the Commission with regulatory authority to ensure reliability of the nation's power grid by giving the Commission the authority to approve and to oversee mandatory reliability standards. As discussed in Section II above, the Potomac River Plant is integral to electric system reliability for the District of Columbia. Although section 1211 of the Energy Policy Act of 2005 does not specifically bear on the issues presented in the Emergency Petition, it provides further support that Congress intends for the Commission to ensure electric system reliability. Commission action under section 207 is consistent with the Commission's new and express authority to ensure reliability.

Finally, VDEQ states that the DC PSC's Emergency Petition invokes section 207 and section 309 in an attempt to evade section 207's hearing requirement.⁶¹ It should be noted, however, that the DC PSC's Petition specifically requests a hearing.⁶² It is therefore unclear what VDEQ's concern is in this regard.

Indeed, because the Commission already has before it a significant record of material information, including the Emergency Petition, pleadings from numerous entities (including several from VDEQ) in response to the Emergency Petition, responses by Pepco and PJM to Commission information requests, and other materials, the Commission should consider whether further hearing procedures are even warranted. At this point in the proceeding, interested parties have had an opportunity to intervene in this docket and present arguments either supporting or opposing the Emergency Petition.

Pepco and PJM urge the Commission to consider use of "paper" hearing procedures, rather than establish a trial-type hearing. The Commission has, in many instances, determined that a paper hearing would be more appropriate than a trial-type hearing. For example, the Commission has stated that:

[W]hile the [Federal Power Act] and the case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, i.e., where the written submissions do not provide an adequate basis for resolving disputes about material facts.⁶³

⁶¹ VDEQ Motion at 14.

⁶² Emergency Petition at 2.

⁶³ *Southern California Edison Co., et al.*, 70 FERC ¶ 61,087 at n.43 (1995).

A paper hearing (i.e., a review of the written record as it has been developed) is appropriate in this proceeding for a number of reasons. First, all factual issues can be easily demonstrated through written submissions without the need for oral testimony. Second, because this is a very time-sensitive situation, with system reliability and, in the event of an electric service interruption, significant environmental harm at stake, it is important that the issues surrounding this proceeding be resolved in a timely fashion, without unnecessary delay. Proceeding to an order on the written record would conserve Commission resources and be far more efficient than a trial-type hearing.

In sum, the Commission has authority under sections 207 and 309 of the Federal Power Act to make a determination on the Emergency Petition and to grant the relief requested by the DC PSC, and it should do so.

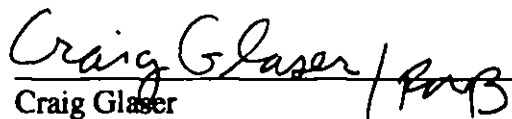
CONCLUSION

For the foregoing reasons and for the reasons set forth in Pepco's Motion To Intervene and Comment in Support of Emergency Petition and Complaint, Pepco's Motion for Leave To Answer and Answer to Comments and Protests, and PJM's Motion To Intervene and Comments, Pepco and PJM respectfully request that the Commission deny the VDEQ Motion. Because of electric reliability concerns, Pepco and PJM further request that the Commission deny VDEQ's alternative request to defer action pending further analysis of environmental impacts and instead move expeditiously to grant the relief the DC PSC has requested.

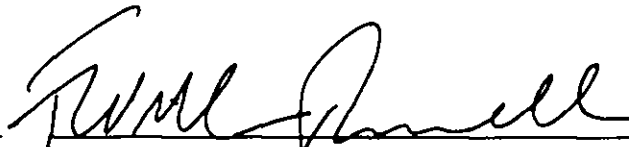
Respectfully submitted,

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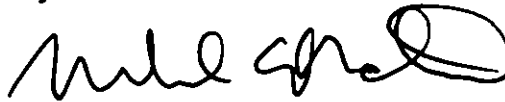
APPENDIX A

CRITICAL ENERGY INFRASTRUCTURE INFORMATION REMOVED

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document on the official service list compiled by the Secretary in Docket No. EL05-145-000 in accordance with the requirements of 18 C.F.R. § 385.2010 (2005).

Dated at Washington, DC this 13th day of October 2005.



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