

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

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

**MOTION TO INTERVENE AND COMMENTS
OF THE CITY OF ALEXANDRIA, VIRGINIA**

Pursuant to Section 214 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.214, and the Notice of Filing issued in this proceeding on August 25, 2005, the City of Alexandria, Virginia (“Alexandria”) moves to intervene and provides the following comments in this proceeding.

I. MOTION TO INTERVENE

1. Alexandria, a municipality, is an independent city in the Commonwealth of Virginia, and derives its governing authority from a charter granted by the Virginia General Assembly. The Potomac River Generating Station (“Potomac River Plant”), owned and operated by Mirant Potomac River, LLC, and Mirant Mid-Atlantic, LLC, respectively (collectively (“Mirant”), is located within the municipal limits of Alexandria.

2. At approximately midnight on August 24, 2005, Mirant shut down the five electric power generators at the Potomac River Plant. This was a wholly unilateral action by Mirant and taken without adequate notice to the relevant operating and governing authorities – the District of Columbia Public Service Commission (“DCPSC”), the Potomac Electric Power Company (“PEPCO”) and PJM Interconnection, LLC (“PJM”) – involved in the generation, transmission and oversight of electric power. It is unclear what specifically motivated Mirant’s

action. No government agency ordered such a shutdown. Alexandria has a strong interest in participating in this proceeding before the Commission to ensure a review of Mirant's corporate motives and agenda in what appears to be an attempt by Mirant to escape from its contractual obligations and relinquish its duty to the public.

3. The DCPSC submitted its Emergency Petition and Complaint allegedly to avert the impending shutdown, requesting the Commission and the Department of Energy ("DOE") to exercise jurisdiction pursuant to Sections 202(c), 207 and 309 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824a(c), 824 and 825h, and order Mirant to maintain production availability at its Potomac River Plant. Alexandria also has an interest in this proceeding to determine the reasonableness of the DCPSC's, PEPCO's and PJM's reliance on the nearly 60-year-old plant for transmission reliability, a plant that even Mirant characterizes as obsolete. Put differently, the knowledge that the plant was recognized – years ago – as unreliable and with a limited life has not been incorporated into the reliable planning of any of these entities. That circumstance, alone, warrants an inquiry by the Commission.

4. Finally, Alexandria has a strong interest in the operation of the Potomac River Plant in full compliance with all environmental laws. It has obligations under its police powers to protect the health, safety and welfare of its residents. On August 19, 2005, Mirant received the results of an air quality analysis ("downwash study") of the operations of the plant conducted by its own contractor, ENSR Corporation. The downwash study reveals that emissions from the Potomac River Plant cause or substantially contribute to serious violations of the primary national ambient air quality standards ("NAAQS") with significant adverse public health impacts. These emissions put at serious risk the health and welfare of the residents of Alexandria, a situation that probably has existed for many years. In response to the ENSR study,

the Virginia Department of Environmental Quality (“VDEQ”) requested Mirant to submit a plan of action necessary to ensure the protection of human health and the environment, particularly in communities nearby and adjacent to the Potomac River Plant. As of the date of this motion, Mirant has not responded to VDEQ’s request.

5. As the municipality where the Potomac River Plant is located, and where the plant’s environmental violations hit hardest, Alexandria is uniquely placed to represent the interests of its residents who are directly and adversely affected by the plant’s emissions. These interests are discrete and unique to the residents of Alexandria. In addition, any activity involving the operation of the plant, in particular capital improvements related to pollution control or production capacity modifications to the plant, implicate Alexandria’s zoning ordinances. Consequently, for all the above reasons, Alexandria should be allowed to participate in this proceeding.

II. BACKGROUND

6. In September 2004, the United States of America and the State of Maryland filed a civil action against Mirant under the Air Pollution Prevention and Control Act (“Clean Air Act”), 42 U.S.C. § 7401 et seq., for violations of the Potomac River Plant’s State Operating Permit and the federally enforceable Virginia State Implementation Plan, which is intended to ensure that federal air quality standards are followed in Virginia. The Commonwealth of Virginia, through the Director of VDEQ, intervened as a plaintiff in the case.

7. The Potomac River Plant is a coal fired power plant and has operated in Alexandria for nearly 50 years. It is located in a densely populated urban area, adjacent to the Potomac River and surrounded by and in close proximity to residential communities. In 2003,

the Potomac River Plant emitted twice the level of nitrogen oxides (“NO_x”) allowed by its State Operating Permit, precipitating the Clean Air Act lawsuit action against Mirant by the United States, Maryland and Virginia.

8. Concurrent with the filing of the Clean Air Act complaint, the parties lodged with the Court a proposed Consent Decree. Mirant failed, however, to disclose material facts in the negotiations, a situation that the government agencies did not learn until after the Consent Decree was lodged with the Court. Consequently, the parties have been renegotiating the Consent Decree for the past year.

9. On August 19, 2005, Mirant submitted to the VDEQ the results of ENSR Corporation’s downwash study. This air quality analysis revealed that emissions from the Potomac River Plant result in, cause or substantially contribute to serious violations of the NAAQS for sulfur dioxide (“SO₂”), nitrogen dioxide (“NO₂”) and particulate matter (“PM₁₀”). The NAAQS are established by the United States Environmental Protection Agency at concentrations necessary to protect human health with an adequate margin of safety.

10. Due to the serious violations of these health based standards, the VDEQ requested, pursuant to Virginia’s Air Pollution Control Regulations, 9 VAC 5-20-180(1), that Mirant undertake such actions as necessary to ensure the protection of human health and the environment. VDEQ also requested that Mirant provide a summary of such proposed actions no later than 2 p.m., August 24, 2005. Mirant did not submit a summary of its proposed actions; rather it shut down the Potomac River Plant at midnight on that day.

11. The City of Alexandria conducted its own air quality analysis which it released publicly on August 26, 2005. Although the levels of exceedances are slightly higher than those in the Mirant/ENSR downwash study, the emission trends and behavior at the Potomac River

Plant are similar in both reports. The Alexandria report confirms the findings of the Mirant/ENSR report – emissions from the Potomac Power Plant are significantly and adversely impacting air quality in Alexandria and jeopardizing the health of its residents. In addition to the pollutant violations identified in the Mirant/ENSR report, the Alexandria report identified serious violations of the NAAQS for fine particulate matter (“PM_{2.5}”) and violations of the VDEQ toxics guidelines for hydrogen chloride and hydrogen fluoride.¹ (See “Ambient Air Quality Analysis, Potomac River Generating Station, Alexandria, Virginia”, prepared by AERO Engineering Services, attached hereto as Exhibit 1.)

12. On August 23, 2005, the DCPSC issued an order in Case No. 1023, directing the Potomac Electric Power Company (“PEPCO”) to review the implications of the shutdown of the Potomac River Plant and advise the DCPSC, in writing, of the impact on the local system and the District of Columbia consumers. The DCPSC provided PEPCO five (5) days within which to respond to the Order. Prior to receiving any such response from PEPCO, the DCPSC filed its Petition invoking this Commission’s emergency jurisdiction.

III. COMMENTS

13. Alexandria opposes as premature the emergency request made by the DCPSC. The DCPSC provides no evidence of any imminent emergency to warrant the exercise of extraordinary authority on the part of the Commission and the DOE. To reiterate, Mirant’s action to shut down the Potomac River Plant was unilateral; neither the Commonwealth of Virginia nor Alexandria mandated Mirant’s action. Although Alexandria welcomes Mirant’s

¹ Alexandria retained its own experts to evaluate the emissions levels at the Potomac River Plant and the impacts of such emissions on the public health. These include Maureen Barrett, P.E., AERO Engineering Services, and Dr. Rebecca Bascom, M.D., M.P.H., Professor of Medicine, Penn State College of Medicine, Division of Pulmonary, Allergy and Critical Care Medicine.

action as appropriate in light of serious environmental issues, Alexandria requests that this Commission undertake an inquiry (or have Mirant submit to an independent investigation) of Mirant's corporate motives and agenda influencing its precise action at this particular time. It appears that this may be a wholly manufactured scenario by Mirant to allow it to diminish its public and contractual obligations.

14. In documents submitted to the Virginia State Corporation Commission, Mirant identified its Potomac River Plant as "functionally obsolete." It stated that, because of deterioration to the plant, "The remaining useful life [of this facility] as of January 1, 2002, is estimated at 5 years." (See excerpts, Amended Petition for Review and Correction, Application of Mirant Potomac River, LLC before the Commonwealth of Virginia State Corporation Commission, attached hereto as Exhibit 2.) Such a position by Mirant warrants an additional investigation into the continued reliance by PEPCO and PJM on the Potomac River Plant for transmission reliability for District of Columbia customers. In light of the anticipated end of the plant's useful life in 2007, the reliability infrastructure issues should have already been addressed. The environmental issues and any alleged action by the VDEQ did not cause the functional obsolescence of the plant.²

15. With respect to environmental issues, the federal and state regulatory agencies identified clear violations in 2003 of the Potomac River Plant's emissions of nitrogen oxides ("NO_x") – approximately 1,109 tons in excess of the plant's emissions limit – resulting in the filing of a Clean Air Act lawsuit. In addition to the violations set out in the lawsuit, the recent

² Furthermore, any capital modification of the plant to alleviate environmental violations and prolong the life of the plant would contravene the spirit, if not the letter, of the Clean Air Act as well as Alexandria's Zoning Ordinance. The Clean Air Act intended to grandfather existing power plants, such as the Potomac River Plant, from certain requirements of the Act. "[T]he provisions concerning [New Source Review] modifications indicate that this is not to constitute perpetual immunity from all standards under the [permit] program." State of New York v. U.S. Env't'l Protection Agency, 413 F.3d 3, 63-64 (D.C. Cir. 2005).

downwash analyses by Mirant and Alexandria unequivocally show that emissions at the Potomac River Plant are adversely affecting air quality in Alexandria. The science is clear – the analyses demonstrate that the Potomac River Plant’s emissions are violating several NAAQS that are designed to be protective of human health. In many cases, the exceedances are several times the NAAQS. Both the Mirant and Alexandria analyses show that areas of noncompliance are widespread and severe, and violations of NAAQS are frequent. These are not theoretical, worst-case violations. Rather they are based on actual emissions data submitted by Mirant to VDEQ and reflect actual, operating conditions. It is Alexandria and its residents who bear the public health and environmental costs caused by the excess emissions from the Potomac River Plant.³

16. For the above reasons, Alexandria opposes the DCPSC’s emergency request for the Commission to order Mirant to resume operation of the Potomac River Plant without addressing the environmental issues related to the operation of the plant. In light of the severe and adverse impacts of the plant’s emissions on public health, doing so would not be in the public interest, as required by Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c).⁴ Furthermore, the Potomac River Plant shutdown does not warrant emergency action by the Commission, particularly in light of possible ulterior motives by Mirant. The emergency powers granted to the Commission were intended to be for “temporary” emergencies epitomized by wartime disturbances. . . ,” not ongoing problems. Richmond Power & Light v. Federal Energy Regulatory Comm’n, 574 F.2d 610, 615(D.C. Cir. 1978). Rather, after a thorough review of Mirant’s action, the Commission should coordinate a response that is beneficial to both the

³ Worst case data and averages far exceed the NAAQS making any discussion about the inapplicability of these analyses moot. For example, SO₂ 24-hour impacts are 14 times the safe standard and exceed the NAAQS for one of every six to seven days. See AERO Engineering Ambient Air Quality Analysis, pg. 3-3.

⁴ The Commission also has the duty under the Federal Power Act to give due consideration to the public health, safety and welfare before issuing an order in this proceeding, 16 U.S.C. § 824a(g)(3)(A). Furthermore, a Commission order to Mirant to resume its polluting activities likely would require a review of impacts and alternatives under the Natural Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*

public health of the impacted communities and the reliability objectives for the region, including transmission system reinforcements that will address the consequences of a permanent deactivation of the Potomac River Plant.

IV. CORRESPONDENCE AND COMMUNICATIONS

Correspondence and communications with respect to this filing should be sent to, and Alexandria requests the Commission to include on the official service list, the following:

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CONCLUSION

For the reasons stated above, Alexandria's intervention in this proceeding is in the public interest. The Commission should grant Alexandria's motion to intervene and consider the relief requested herein.

Respectfully submitted,



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