COMMONWEALTH of VIRGINIA

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October 12, 2005

Via Electronic and First-class Mail

Mr. Lawrence Mansueti
Office of Electricity Delivery and
Energy Reliability
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Docket No. EO-05-01

Dear Mr. Mansueti:

Enclosed please find a motion filed yesterday in Federal Energy Regulatory Commission Docket No. EL05-145 by Robert G. Burnley, Director of the Commonwealth of Virginia's Department of Environmental Quality. The Director's motion specifically references and otherwise relates to Department of Energy Docket No. EO-05-01.

Yours truly,

D. Mathias Roussy, Jr.
Assistant Attorney General

Enclosure

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**

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

Pursuant to Rules 203 and 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.203 and 385.212, Robert G. Burnley, Director of the Commonwealth of Virginia's Department of Environmental Quality (the "Director") hereby files this Motion in response to the Emergency Petition And Complaint ("Petition") filed by the Public Service Commission of the District of Columbia ("DC PSC" or "PSC") in the above-referenced proceeding before the Commission.

While mindful of the important considerations raised by the DC PSC in its Petition with regard to reliability, as discussed therein, any relief granted by the Commission in this proceeding must comply with applicable requirements of federal and state environmental laws in order to ensure that any resumption of operations at the Potomac River Generation Station Power Plant (the "Potomac River Plant") adequately protects human health and the

environment. The Director specifically requests that the Commission deny the relief requested by the DC PSC on the grounds that the Commission may not lawfully undertake the action sought in a manner that complies with the Clean Air Act, Virginia's Air Pollution Control Act, and the National Environmental Policy Act, or that is otherwise consistent with federal and state law. In the alternative, the Director asks the Commission to defer any substantive action pending further analysis of the environmental impacts of the requested relief.

I. STATEMENT OF FACTS

Recent modeling results demonstrate that the Potomac River Plant's operation can expose citizens of Virginia to sulfur dioxide ("SO_2"), nitrogen dioxide ("NO_2"), and particulate matter ("PM-10") substantially in excess of the respective federal health-based National Ambient Air Quality Standards ("NAAQS") for these dangerous pollutants. Accordingly, on August 24, 2005 Mirant shut down the Potomac River Plant in Alexandria, Virginia in response to a letter from the Director (on behalf of the State Air Pollution Control Board) requesting that Mirant take immediate action necessary to ensure protection of human health and environment in the vicinity of the Potomac River Plant. (See Exhibit A attached hereto.) In response, and on the same date as the shutdown, the DC PSC filed an emergency petition requesting the Commission to direct Mirant to continue operations. On September 20, 2005, Mirant advised the Director that it would be resuming operations at a reduced level and that based on its projections under a revised modeling analysis, it would meet the required ambient air quality standards. On September 21, 2005, Mirant resumed operation of the Potomac River Plant at a reduced level.

The Virginia Department of Environmental Quality ("Virginia DEQ") is currently reviewing the revised modeling submitted by Mirant, but as yet has made no determination whether the emissions projected thereunder adequately protect human health and the environment.

II. STATEMENT OF ISSUES

1. Whether the Commission has the authority to order Mirant to operate the Potomac River Plant in a manner inconsistent with the Federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* *See, e.g.*, 5 U.S.C. § 706(2)(A); *Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451 (D.C. Cir. 1996); *Unitek Envtl. Servs. v. Hawaiian Cement*, 1997 U.S. Dist. LEXIS 19261 (D. Haw. 1997).

2. Whether the Commission has the authority to order Mirant to operate the Potomac River Plant in a manner inconsistent with the Commonwealth of Virginia's State Implementation Plan. *See, e.g.*, 42 U.S.C. § 7506(c)(1); *DOT v. Public Citizen*, 541 U.S. 752 (2004); *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (9th Cir. 1989); *Unitek Envtl. Servs. v. Hawaiian Cement*, 1997 U.S. Dist. LEXIS 19261 (D. Haw. 1997).

3. Whether the Commission has the authority to order Mirant to operate the Potomac River Plant without determining whether such action would conform with the Commonwealth of Virginia's State Implementation Plan. *See, e.g.*, 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 51.853(b); *DOT v. Public Citizen*, 541 U.S. 752 (2004).

4. Whether the Commission has the authority to order Mirant to operate the Potomac River Plant if such order would prevent the Director of the Virginia Department of Environmental Quality from administering and enforcing the Commonwealth's Air Pollution Control Law, Code of Virginia § 10.1-1300 *et seq.*, and federally-approved implementing regulations to achieve and maintain the federally established health-based National Ambient Air Quality Standards ("NAAQS"). *See, e.g.,* 16 U.S.C. § 824(a).

5. Whether the Commission has the authority to order Mirant to operate the Potomac River Plant without first satisfying the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. *See, e.g., Arizona Public Service Co. v. FPC,* 483 F.2d 1275 (D.C. Cir. 1973); *Sierra Club v. U.S. Forest Service, et al.*, 843 F.2d 1190 (9th Cir. 1988).

6. Whether it is within the Commission's jurisdiction to grant the immediate relief requested by the DC PSC under FPA §§ 207 and 309 to address an alleged emergency without providing an opportunity for hearing. *See, e.g.,* 42 U.S.C. § 7151(b); 42 U.S.C. § 7172.

III. DISCUSSION

A. THE RELIEF REQUESTED BY THE DC PSC IS IMPERMISSIBLE BECAUSE IT WOULD CONTRIBUTE TO SIGNIFICANT EXCEEDANCES OF THE AIR QUALITY STANDARDS.

In its Petition, the DC PSC has requested that the Commission issue an order, pursuant to FPA § 207, 16 U.S.C. § 824f, and/or FPA § 309, 16 U.S.C. § 825h, requiring Mirant to continue operations at the Potomac River Plant without regard to whether those operations comply with the Federal Clean Air Act ("CAA"), 42 USC §§ 7401 *et seq.*[1] Furthermore, the DC PSC requests that the Commission take this unusual step without complying with the statutory requirement of a hearing prior to Commission action under FPA § 207.[2] However, in seeking this extraordinary relief, the DC PSC makes no argument and cites to no authority that would confer upon the Commission the extraordinary power of supplanting the well-established requirements of the CAA designed to protect human health and safety from the adverse effects of dangerous air pollutants emitted by the Potomac River Plant, or of abandoning the Commission's normal procedures for considering whether to grant the relief requested by the DC PSC. Instead, the DC PSC merely asserts that such relief is warranted due to a theoretical possibility of a "major load shedding event triggered by the shutdown of a major generating facility combined with extreme weather or other events on the grid. . . ." Petition at 3.

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1 In its Motion For Leave To Answer, the Potomac Electric Power Company ("PEPCO"), asserts that the Commission also has the authority under Sections 205 and 206 of the FPA to direct Mirant to operate the plant. However, these sections merely apply to rate setting and grant to the Commission no additional powers to compel generation in contravention of federal and state law.

2 The Director notes that the DC PSC also "requests a waiver of all DOE and FERC filings and other regulations that may be otherwise applicable to this submission including the regulations set forth at 10 C.F.R. § 205.370, et seq." Petition at 9.

Notwithstanding the DC PSC's request for emergency relief and the important issues raised by the DC PSC regarding the need to ensure reliable service, the Commission is not without constraints that require it to consider and comply with any applicable statutory requirements. Indeed, it is well-recognized and a fundamental precept that no federal agency may issue any order that is contrary to law. *See* Federal Administrative Procedures Act § 10(e), 5 U.S.C. § 706(2)(A) (requiring agency actions to be in accordance with law). Therefore, absent any legislative enactment to the contrary conferring extraordinary powers on the Commission to override other requirements of law, the Commission is necessarily bound in fashioning any remedy pursuant to the FPA to conform its action to any applicable requirements of federal law – including the CAA. Inasmuch as there is no express authority granted to the Commission pursuant to FPA §§ 207 or 309 – or for that matter any other section of the FPA – to issue an order that would contravene the CAA, the Commission has no discretion to issue any order with respect to the generation of electrical power at the Potomac River Plant unless that order complies with the CAA.[3]

As demonstrated by Mirant's own modeling analysis, operation of the Potomac River Plant at the levels of electrical output previously operated (*i.e.*, before the recent shutdown and resumption of operations at a lower output level) resulted in emissions that caused exceedences of the NAAQS for SO_2, NO_2, and PM-10 substantially above federally mandated

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[3] Because the relief requested would require Mirant to operate in violation of the CAA, any such order by the Commission would constitute an impermissible indirect violation of the CAA. *See Richmond Power & Light v. F.E.R.C.*, 574 F.2d 610, 620 (D.C. Cir. 1978) ("What the Commission is prohibited from doing directly it may not achieve by indirection."). *See also* 40 C.F.R. §§ 51.852, 51.853 and 51.858 (requiring conformity with State Implementation Plan for any "indirect" emissions caused by federal agency action that "may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable. . ."). (*See* discussion of requirement of conformity with State Implementation Plan *infra*).

levels. Thus, any relief granted by the Commission requiring Mirant to resume operations at the previous levels would be contrary to federal law, as it would result in a violation of the federally mandated NAAQS for these constituents.[4]

Prior to issuing any form of relief requiring the resumption of operations at the Potomac River Plant, the Commission also is required pursuant to Section 176(c)(1) of the CAA to determine whether its action conforms with the relevant state's State Implementation Plan ("SIP"). *See* 42 U.S.C. § 7506(c)(1) (requiring agency actions to conform with state SIP) and 40 C.F.R. § 51.853(b)[5]; *see also DOT v. Public Citizen*, 541 U.S. 752, 771 (2004) (stating that unless a facility's emissions fall below the *de minimis* thresholds set forth in 40 CFR § 93.153(b), a Federal agency must "undertake a conformity determination with respect to a proposed action to ensure the action is consistent with [42 U.S.C.] § 7506(c)(1)"). Section 176(c)(1) of the CAA provides, in pertinent part, that:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 or this title.
>
> * * *
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> Conformity to an implementation plan means –
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> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

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4 The NAAQS for SO_2, NO_2 and PM-10 were promulgated by EPA pursuant to § 109 of the CAA, 42 U.S.C. § 7409, and are set forth at 40 C.F.R. Part 50 and incorporated at 9 VAC 5 Chapter 30. Section 109(b)(1) of the CAA directs EPA to promulgate NAAQS at concentrations necessary to protect public health with an adequate margin of safety.

5 Pursuant to 40 C.F.R. §51.853, the Environmental Protection Agency established *de minimis* thresholds below which the conformity requirement does not apply. In the present case, the total emissions resulting from the resumption of operations at the Potomac River Plant at the previous levels far exceed the lowest applicable thresholds of 100 tons per year for SO_2, NO_2 and PM-10.

(B) that such activities will not –

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

If it is determined that the action would not be in conformity with the SIP, Section 176(c)(1) precludes the agency from taking the action. *DOT*, 541 U.S. at 758 (stating that Congress added Section 176(c)(1) to the CAA to "prohibit the Federal Government and its agencies from engaging in, supporting in any way ... any activity which does not conform to a state implementation plan") (punctuation omitted). Under the present circumstances, there is every reason to believe that any substantive action by the Commission requiring the resumption of operations of the Potomac River Plant at the previous levels, and possibly at any reduced levels, would not be in conformance with Virginia's SIP.

First, resumption of the Potomac River Plant's operations at the previous levels would not be in conformity with the Virginia SIP's purpose of eliminating or reducing the severity and number of exceedences of the NAAQS for SO_2, NO_2 and PM-10, as this would result in emissions of all three constituents at a rate that clearly would result in exceedences of NAAQS. Indeed, these exceedences unquestionably would be contrary to the overriding and most central purpose of the SIP, which is precisely to prevent such exceedences from occurring in the first instance. *See* 42 U.S.C. §7410(a)(1); *see also Environmental Defense Fund, Inc. v. E.P.A.*, 82 F.3d 451, 454 (D.C. Cir. 1996) (stating that the purpose of a SIP is to "'provide[] for

implementation, maintenance, and enforcement' of 'national ambient air quality standards'") (punctuation omitted).

That the resumption of operations at the Potomac River Plant at the previous output levels would not be in conformity with Virginia's SIP is further evidenced by the fact that such action would conflict with legally binding SIP-authorized requirements set forth in the Director's August 19, 2005 letter (the "August 19th Letter") to Mirant.[6] In this letter, the Director asked Mirant to "*immediately* undertake such action as is necessary to ensure protection of human health and the environment, in the area surrounding the Potomac River Plant, including the potential reduction of levels of operation, or potential shut down of the facility." This letter was issued pursuant to, and specifically referenced, the Virginia State Air Pollution Control Board's (the "Board") authority to make such a request under 9 Virginia Administrative Code ("VAC") 5-20-180(I), which is incorporated into the SIP as one of the Virginia DEQ's enforcement mechanisms for assuring compliance with the NAAQS.[7] While Mirant voluntarily chose to shut down the Potomac River Plant's operations in response to the Director's request, any relief granted by the Commission requiring the Potomac River Plant to resume operations at previous levels, or any other level that would not be protective of human health or the environment,[8] clearly would conflict with Mirant's regulatory obligation to comply with the

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6 Attached hereto as Exhibit A.

7 As quoted in the August 19th Letter, 9 VAC 5-20-180(I) specifically provides that, "[r]egardless of any other provision of this section, the owner of any facility subject to the Regulations for the Control and Abatement of Air Pollution ***shall***, upon request of the Board, reduce the level of operation at the facility if the Board determines that this is necessary to prevent a violation of any primary ambient air quality standard." (Emphasis added.) The Director is authorized to enforce Virginia's air pollution control laws and regulations and act on behalf of the Board. *See, e.g.* Code of Virginia §§ 10.1-1186(10) and 10.1-1307.3 and Virginia Administrative Code §§ 9 VAC 5-170-120 and 9 VAC 5-170-180.

8 In its Motion to Intervene, PEPCO has requested that the Commission issue an order requiring the Potomac River Plant to operate at a lower output level than the

Director's request under 9 VAC 5-20-180(I), and therefore would not be in conformity with the SIP.[9]

Even if the Commission is not required to conform its actions with the requirements of Virginia's SIP, it is still precluded from issuing the relief requested by the DC PSC to the extent that such relief conflicts with Virginia's requirements and directives adopted pursuant to the CAA, as any such requirements are also a matter of federal law, which the Commission is bound to follow. Irrespective of whether the particular law or regulation was adopted by the Commonwealth of Virginia (the "Commonwealth"), to the extent that it was adopted pursuant to the scheme of federal regulation of interstate air pollution, it is inherently a federal legal requirement. Indeed, it is well-settled that the regulation of interstate air pollution is ultimately a matter of federal, not state, law. *See, e.g., Unitek Envtl. Servs. v. Hawaiian Cement*, 1997 U.S. Dist. LEXIS 19261, *18-19 (D. Haw. 1997) (holding that once a SIP is approved by the Environmental Protection Agency, its requirements become federal law and are fully enforceable in federal court); *Her Majesty the Queen v. City of Detroit*, 874 F.2d 335 (9th Cir. 1989) (same).

It is also clear from the statutory structure of the CAA that Virginia's NAAQS regulations are also part of a scheme of federal law. Pursuant to Section 110(a)(1) of the CAA, 42 U.S.C. §7410(a)(1), the CAA requires that each state submit a SIP to the United States

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level at which the plant previously operated. However, as PEPCO has acknowledged in its motion, while this lower level of output would reduce the severity of NAAQS exceedences for SO_2, it would nonetheless still result in a violation of the NAAQS. *See* Potomac Electric Power Company's Motion for Leave to Answer and Answer to Comments and Protests, at 5-6 (Sept. 9, 2005).

[9] EPA's conformity regulations also make it clear that a conflict with 9 VAC 5-20-180(I) would necessarily lead to a finding of nonconformity under Section 176(c)(1) of the CAA. Pursuant to 40 C.F.R. §51.858(c), "an action ... may not be determined to conform to the applicable SIP unless the total of direct and

Environmental Protection Agency ("EPA") providing for "implementation, maintenance, and enforcement" of the NAAQS within each state. If a state fails to make a required submission or makes an incomplete submission or if the state's SIP submittal is disapproved, EPA has a mandatory duty to promulgate a federal implementation plan. 42 U.S.C. §7410(c). Furthermore, EPA is required to enforce any non-compliance with the SIP adopted by the state. 42 U.S.C. § 7413.

Finally, examination of the enabling statutes for the Board reveals that the Virginia General Assembly recognizes that the regulation of interstate air pollution is not merely a matter of state law. The Virginia General Assembly defines the duties of the Board as including promulgating regulations to achieve and maintain the NAAQS "established by the United States Environmental Protection Agency, under the federal Clean Air Act." Code of Virginia § 10.1-1322.3.

B. THE RELIEF REQUESTED BY THE DC PSC WOULD IMPERMISSIBLY STRIP THE DIRECTOR OF HIS ABILITY TO MEET HIS DUTIES UNDER VIRGINIA LAW.

It is the obligation of the Commonwealth "to protect [the Commonwealth's] atmosphere...from pollution, impairment, or destruction" so that "the people have clean air." Virginia Const. art. XI, § 1. The Director is charged with the responsibility to administer and enforce the provisions of the Commonwealth's Air Pollution Control Law, Code of Virginia § 10.1-1300 et seq., and the regulations and orders of the Board. Code of Virginia § 10.1-1307.3. Board regulations implement, as a matter of federally-approved State law, plans and programs to achieve and maintain the federally established health-based National Ambient Air Quality

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indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the SIP... ." (emphasis added).

Standards ("NAAQS"). *See, e.g.,* Virginia Administrative Code 9 VAC 5 Chapters 10, 20, 30, 40, 50, 80, and 91.

If the Commission grants the relief requested by the DC PSC, it would have the effect of preventing the Director from performing his obligation under Virginia law to protect human health and the environment pursuant to his responsibility under the Air Pollution Control Law. However, the Commission is granted no such authority to override state law. For example, FPA § 201(a), 16 U.S.C. § 824(a), provides that absent specific language to the contrary, the Commission's power to regulate the sale and transmission of electric energy does not encroach upon those areas subject to State regulation. Specifically, FPA § 201(a) provides:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*

Id. (emphasis added).

Nothing in the FPA suggests that the Commission's authority under Section 207 or 309 may be exercised in a manner that would override any duly enacted and/or promulgated state law or regulation pertaining to the control of emissions that may cause or contribute to a violation of a NAAQS. For this reason too, the Commission should not issue the relief requested by the DC PSC.

C. IT IS PREMATURE FOR THE COMMISSION TO TAKE ACTION WITHOUT FIRST SATISFYING THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, prior to taking any substantive action in response to the DC PSC's petition, the Commission is required to perform an analysis of the environmental impacts that its action may have on the environment. The Virginia DEQ therefore respectfully requests that the Commission defer any further action on the DC PSC's petition until such time that it has performed the required NEPA analysis.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires all federal agencies, prior to taking any "major Federal actions significantly affecting the quality of the human environment," to issue a detailed statement that, among other things, describes the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided by the action, and alternatives to the proposed action. Regulations adopted by the Council on Environmental Quality provide that a federal action will be deemed "significant" based on various factors, including the action's effects on public health and safety and whether the action threatens a violation of a federal, state or local environment law. 40 C.F.R. § 1508.27. In view of the existing modeling data demonstrating that operation of the Potomac River Plant at its previous level of output would necessarily result in a violation of the NAAQS for SO_2, NO_2 and PM-10, there can be no doubt that the action requested by the DC PSC will have a significant impact on the environment, and that the action will have a "major" – as opposed to insignificant or minor – impact on the environment. Therefore, NEPA requires that the Commission perform an analysis of the impacts that its action will have on the environment, including any potential violations of federal or state environmental laws. *See Sierra Club v. U.S.*

Forest Service, et al., 843 F.2d 1190 (9th Cir. 1988) (holding that the United States Forest Service's failure to assess impact of timber sales on California's water quality standards was in violation of NEPA and directing trial court to enter order immediately halting sales).[10] In any event, the Commission cannot act on the Petition until, at the very least, it determines whether a NEPA analysis is required and provides a written statement of its determination. *See Arizona Public Service Co. v. FPC,* 483 F.2d 1275, 1282 (D.C. Cir. 1973) ("The [FPC] may not be permitted to skirt [its NEPA] responsibility, particularly where it may be in the interest of the parties for purposes of expedition or otherwise to overlook these considerations. The minimum requirement for compliance with the 'action-forcing' provisions of NEPA is for the agency to supply a statement of reasons why it believes an impact statement is unnecessary.").

In the event the Commission determines that it legally is not required to prepare a detailed statement of the environmental impact of the requested relief pursuant to NEPA or to determine whether its action is in conformity with Virginia's SIP pursuant to Section 176(c)(1) of the CAA, the Director respectfully requests that the Commission nonetheless defer any further action in this matter pending further analysis. In this regard, the Commission should exercise its discretion over the conduct of the proceedings and take no substantive action until such time as it has fully assessed any negative impacts that the requested relief will have on the human health and the environment of the citizens of the Commonwealth and upon the Director's ability to discharge his duty to safeguard the public. In view of the potential for adverse effects that

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10 In addition to assessing any violations of environmental laws, the Commission would be required to assess the effect of its action on a range of environmental values, including the quality of the natural environment, urban environment and aesthetic effects. *See, e.g.*, NEPA § 101(a), 42 U.S.C. § 4331(a)(declaring NEPA policy as recognizing "the profound impact of man's activity on . . . the natural environment"); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972), *cert. denied* 409 U.S. 990 (1971) (effects on urban environment); *Maryland-National Capital Park & Planning Comm'n v. USPS*, 487 F.2d 1029, 1038 (D.C. Cir. 1973) (aesthetic effects).

continued operation of the Potomac River Plant at previous output levels and/or modified output levels could have, especially on the health and safety of the residents of Alexandria, the Commission must fully understand and weigh heavily any such impacts before issuing any directive that would require the facility to resume operations at any particular level of output.

D. THE FACTS ALLEGED AND THE RELIEF REQUESTED IN THE DC PSC'S EMERGENCY PETITION APPEAR TO BE MORE PROPERLY CONSIDERED WITHIN THE JURISDICTION OF THE DEPARTMENT OF ENERGY.

Based on the Director's understanding of the Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq.*, the Secretary of Energy has authority under Federal Power Act ("FPA") § 202(c), 16 U.S.C. § 824a(c), to address emergency situations.[11] *See* 42 U.S.C. § 7151(b)(transferring all of the Federal Power Commission's authority to the Secretary of Energy, except as otherwise provided); 42 U.S.C. § 7172 (transferring certain of the Federal Power Commission's functions to the Federal Energy Regulatory Commission, not including the Federal Power Commission's § 202(c) authority); *See also* 42 U.S.C. § 7172(a)(1)(B) (expressly stating that the Federal Energy Regulatory Commission shall not have authority over "emergency interconnection"). The Secretary of Energy's ("Secretary") prior delegation of this authority appears consistent with this statutory interpretation. *See* DOE Delegation Order No. 0204-4, 42 Fed. Reg. 60726 (Nov. 29, 1977)(delegating the Secretary's § 202(c) authority to the Administrator of the Economic Regulatory Administration); DOE Delegation Order No. 0204-126 (Feb. 7, 1989), *available at* http://www.directives.doe.gov/pdfs/sdoa/0204126.pdf (revoking

[11] The DC PSC's Petition also appears to recognize the Secretary's authority under FPA § 202(c). See Petition at 7-8.

Delegation Order No. 0204-04). The Director's understanding of FPA § 202(c) is also supported by the Secretary's prior use of this authority. *See* Petition at 7, n.7.

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. *See* 42 U.S.C. § 7172(a)(2)(A)(The Commission may exercise its FPA § 309 authority to the extent it "determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission."). By invoking the Commission's authority under FPA §§ 207 and 309, however, the DC PSC is attempting to circumvent the statutory requirement for a hearing prior to the Commission taking action under FPA § 207. If action is required prior to an opportunity for hearing, the Director believes such action would more properly be taken by the Secretary of Energy under his § 202(c) emergency authority. Put another way, the DC PSC is attempting to obtain emergency relief from the Commission when such relief is properly within the jurisdiction of the Department of Energy. Indeed, the Department of Energy has docketed a proceeding to consider whether the facts warrant exercising its FPA § 202(c) authority. *See Emergency Petition and Complaint of the District of Columbia Public Service Commission Under Section 202(c) of the Federal Power Act*, Department of Energy Docket No. EO-05-01.

IV. CONCLUSION

For all the reasons discussed herein, the Director respectfully moves that the Commission deny the relief requested by the DC PSC on the grounds that the Commission may not lawfully undertake the action sought in a manner that complies with the Clean Air Act, Virginia's Air Pollution Control Act, and the National Environmental Policy Act, or that is otherwise consistent with federal and state law. In the alternative, the Director asks the Commission to defer any substantive action pending further analysis of the environmental impacts of the requested relief.

Respectfully submitted,

ROBERT G. BURNLEY, DIRECTOR
COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY

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Counsel for Robert G. Burnley, Director
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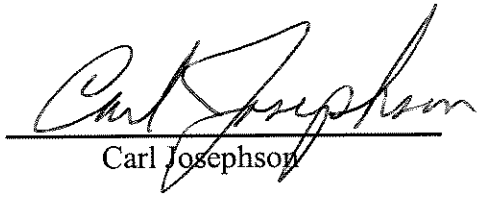
Department of Environmental Quality

Dated: October 11, 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 in this proceeding in accordance with the provisions of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Richmond, Virginia, this 11th day of October, 2005.



Carl Josephson

EXHIBIT A

COMMONWEALTH of VIRGINIA

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August 19, 2005

Lisa D. Johnson, President
Mirant Potomac River, LLC
8711 Westphalia Road
Upper Marlboro, Maryland 20774

Dear Ms. Johnson:

DEQ is in receipt of the results of Mirant's "downwash" modeling provided by Mirant to DEQ pursuant to the consent special order between the State Air Pollution Control Board and Mirant Potomac River, LLC.

A cursory review of the modeling reveals that emissions from the Potomac River Generating Station result in, cause or substantially contribute to *serious* violations of the primary national ambient air quality standards or "NAAQS" for sulfur dioxide (SO_2), nitrogen dioxide (NO_2) and PM_{10}. NAAQS are established by the U. S. Environmental Protection Agency at concentrations necessary to protect human health with an adequate margin of safety.

The Virginia Air Pollution Control Regulations at 9 VAC 5-20-180(I) provides as follows: *Regardless of any other provision of this section, the owner of any facility subject to the Regulations for the Control and Abatement of Air Pollution shall,* ***upon request of the Board, reduce the level of operation at the facility if the Board determines that this is necessary to prevent a violation of any primary ambient air quality standard. Under worst case conditions, the Board may order that the owner shut down the facility, if there is no other method of operation to avoid a violation of the primary ambient air quality standard.*** *The Board reserves the right to prescribe the method of determining if a facility will cause such a violation. In such cases, the facility shall not be returned to operation until it and the associated air pollution control equipment are able to operate without violation of any primary ambient air quality standard.* (Emphasis added).

Because of the serious violations of the human health-based NAAQS, and as provided in 9 VAC 5-20-180(I), I am writing on behalf of the Board to request that Mirant *immediately* undertake such action as is necessary to ensure protection of human health and the environment, in the area surrounding the Potomac River Generating Station, including the potential reduction of levels of operation, or potential shut down of the facility. A summary of the actions being taken and their progress toward eliminating NAAQS violations is to be provided to DEQ no later than 2 pm, Wednesday, August 24, 2005.

Failure to comply with this request will result in DEQ taking appropriate and immediate enforcement action pursuant to § 10.1-1309 of the Air Pollution Control Law.

Sincerely,

Robert G. Burnley

C: W. Tayloe Murphy, Jr.
Secretary of Natural Resources

Carl Josephson – Office of the Attorney General

Michael G. Dowd – DEQ
Ken McBee – DEQ
Jeffery Steers - DEQ

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