



COMMONWEALTH of VIRGINIA

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January 19, 2006

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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:

For filing in the above-referenced proceeding, enclosed please find the Request for Rehearing and Clarification of David K. Paylor, Director of the Commonwealth of Virginia's Department of Environmental Quality.

Yours truly,

A handwritten signature in black ink, appearing to read "Mathias Roussy, Jr.", written over a horizontal line.

D. Mathias Roussy, Jr.
Assistant Attorney General

Enclosure

cc: Service List

In addition to rehearing, Director Paylor requests a clarification of this Order, for the interim period prior to the rehearing, in the form of a supplemental order pursuant to FPA § 202(c). Director Paylor seeks interim clarification that Order No. 202-05-3 does not allow transmission line maintenance that is not necessary to abate emergency reliability conditions. Director Paylor further seeks interim clarification providing sufficient oversight to ensure that the Potomac Electric Power Company (“PEPCO”) schedules and conducts its transmission line outages in a manner that minimizes the environmental effects of air pollution from the Plant as required by Order 202-05-3.

II. STATEMENT OF ISSUES

1. Does the FPA empower the Secretary to preempt the Clean Air Act and related state laws?
2. Does the Secretary’s emergency authority under FPA § 202(c) allow him to authorize a party to perform maintenance activities on transmission lines that are not necessary to abate or prevent emergency conditions and result in violations of federal and state environmental laws?
3. Does the Secretary’s emergency authority under FPA § 202(c) allow him to authorize a public utility to take action that will result in the violation of federal and state environmental laws by a power plant owned and operated by another, unrelated public utility, limited only by the Secretary’s request that the first utility determine for itself how to minimize the environmental effects caused by the operation of the second utility’s power plant?

III. REQUEST FOR REHEARING⁵

A. The Secretary Has Erred by Preempting the Clean Air Act and Related State Laws.

Order No. 202-05-3 provides, in part, that:

During any period in which one or both of the 230kV lines serving the Central D.C. area is out of service, whether planned or unplanned, Mirant will operate the [Plant] to produce the amount of power (up to its full capacity) needed to meet demand in the Central D.C. area as specified by PJM for the duration of the outage.

...

When producing electricity pursuant to this paragraph, Mirant shall utilize pollution control equipment and measures to the maximum extent possible to minimize the magnitude and duration of any exceedance of the NAAQS.⁶

Order No. 202-05-3 thus allows violations of the health-based NAAQS mandated under the Clean Air Act when one of the two 230 kV transmission lines serving the Central D.C. area is out of service.

The Secretary, however, may not use his authority under the FPA to “preempt” the Clean Air Act because the preemption doctrine (and the Supremacy Clause of the Constitution) applies only where state law conflicts with federal law requirements – not to federal laws *inter se*. See, e.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663

⁵ In support of his Request for Rehearing and in addition to the arguments included herein, Director Paylor also reasserts and incorporates by reference the relevant facts and arguments included in the Motion for Leave to File a Consolidated Answer filed in this proceeding by his predecessor Robert Burnley on November 14, 2005. The principal argument of the November 14, 2005 Motion is that the Secretary lacks the statutory authority to compel the Plant to operate in a manner that would cause modeled exceedances of the health-based National Ambient Air Quality Standards (“NAAQS”) mandated under the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, and which would interfere with the Director’s performance of his statutory duty to protect the health and environment of the citizens of the Commonwealth of Virginia. Order No. 202-05-3 impermissibly allows both of these unacceptable results.

⁶ Ordering ¶ A.

(1993). In addition, the FPA expressly provides that it does not apply to any area in which the states have regulated, including electric generation. *See, e.g.*, 16 U.S.C. § 824.

The Secretary similarly may not preempt the Director's authority to require the Plant to reduce its level of operation to prevent localized NAAQS exceedances because the Director's authority under Virginia law (9 Virginia Administrative Code 5-20-180(I)) is incorporated into Virginia's federally approved State Implementation Plan ("SIP"). It is well-recognized that any obligation arising under a SIP is a matter not only of state law but also federal law under the Clean Air Act. *See, e.g., Her Majesty the Queen v. City of Detroit*, 874 F.2d 332 (9th Cir. 1989)(holding that once a SIP is approved by the EPA, its requirements become federal law and are fully enforceable in federal court); *Unitek Envtl. Servs. v. Hawaiian Cement*, 1997 U.S. Dist. LEXIS 19261, *19-20 (D.Haw. 1997) (same). The Secretary, therefore, exceeded his authority by issuing Order No. 202-05-3, which results both in operation of the Plant in violation of the Clean Air Act and preemption of the Director's authority to regulate emissions from the Plant to protect the public health and environment.

B. The Secretary Has Exceeded the Scope of His Emergency Authority Under FPA § 202(c) By Allowing PEPCO to Perform Maintenance That is Not Necessary to Abate or Prevent Emergency Reliability Conditions.

The Secretary's Order exceeds the scope of his emergency authority under FPA § 202(c) in so far as the Order allows maintenance work on the transmission lines to address non-emergency conditions. It is simply counterintuitive that an agency official acting under *emergency* authority can allow a party to take action that is not necessary to address the emergency identified by that official. Activity, directed or permitted by the

Order, particularly where human health and safety are at risk, must be strictly limited to that which is absolutely necessary to mitigate the emergency condition and no more.

Order No. 202-05-3 requires 1) sufficient advance notice of planned outages of either of the two 230 kV lines and 2) “that only those planned outages needed to maintain or enhance the reliability of the 230 kV lines (or to install new lines) are scheduled and that such outages are scheduled to minimize the environmental effects of the operation of the Plant.”⁷ Although this is one of the several provisions in the Order that appears to balance reliability and environmental interests, the Order’s lack of specificity has resulted in an interpretation by PEPCO and PJM that tips any such balance unnecessarily in favor of reliability interests, at the expense of the health and environment of the citizens of Virginia.

For example, PEPCO is currently performing maintenance on one of the two 230 kV lines after providing advance notice. It is our understanding that this maintenance, which was supposed to commence on January 9, 2006 did not, in fact, commence until on or about January 12, despite PEPCO and PJM’s insistence that the Plant resume full operations on January 9. The Director is concerned that, based on PEPCO’s unilateral decision, the Plant may have operated needlessly for several days in violation of Order No. 202-05-03 while potentially endangering the health and environment of the surrounding citizens.

Further, as demonstrated by the attached affidavit of Seth W. Brown, P.E., a Principal and Manager of Transmission Services with engineering firm GDS Associates, Inc., PEPCO’s planned maintenance outage is being used not only to conduct

⁷ Ordering ¶ C.

maintenance to address imminent emergency conditions found by the Secretary, but also to perform additional routine maintenance that could be delayed until after Mirant has taken measures to decrease emissions at the Plant to a legally acceptable level, without jeopardizing reliability.⁸ Assuming, without conceding, that FPA § 202(c) allows the Secretary to preempt the Clean Air Act and related state laws, it does so only to the extent necessary to mitigate the emergency. Any other interpretation of the Secretary's emergency power would result in violations of other federal law and be contrary to important principals of federalism.

C. The Secretary Erred By Failing to Establish a Mechanism to Ensure That Transmission Line Outages Will Be Scheduled in a Manner That Minimizes the Environmental Effects of Operation of the Potomac River Power Plant.

Order No. 202-05-3 requires PEPCO to “ensure that ... planned ... outages are scheduled to minimize the environmental effects of the operation of the Plant.”⁹ Yet, the Order does not require any showing — or other accountability mechanism — that outages of PEPCO's 230 kV lines are planned and conducted in a manner that does, in fact, minimize health and safety impacts. The absence of such a mechanism permits outages to proceed with only “advance notice” to DEQ and EPA, without any assurance that environmental impacts will be minimized. Assuming FPA § 202(c) allows the Secretary to preempt the Clean Air Act and related state laws under certain conditions, which the Director maintains it does not, Order No. 202-05-3 does not provide sufficient detail to protect Virginia citizens from environmental harm. The Order authorizes a public utility (PEPCO) to take action that will necessarily result in the violation of federal and state

⁸ See the attached Affidavit of Seth W. Brown.

⁹ Ordering ¶ C.

laws by a power plant owned and operated by another, unrelated, public utility (Mirant) based merely on the unilateral determination of the first utility concerning the environmental effects of operating that power plant. Order No. 202-05-3 permits the utilities to ignore expert judgments of DEQ and EPA, the state and federal agencies responsible for monitoring the environmental effects of the Plant under various environmental laws, and to disregard the potential for harm implicit in its decisions.

IV. REQUEST FOR INTERIM CLARIFICATION

A. Director Paylor Seeks Interim Clarification That Only Maintenance Necessary to Address or Prevent Imminent Emergency Conditions May Be Performed.

The Secretary entered Order No. 202-05-3 pursuant to his authority under FPA § 202(c), which expressly provides that “[i]f the parties affected by [an order under FPA § 202(c)] fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect may prescribe by supplemental order such terms as it finds to be just and reasonable”¹⁰ It appears that at least two parties affected by this Order, Director Paylor and PEPCO, disagree on the extent of PEPCO’s authority under the Order to perform maintenance on the two 230 kV lines that deliver power into the Central D.C. area. Director Paylor’s position is that any maintenance performed on the two 230 kV lines must be narrowly tailored to address emergency conditions. PEPCO, on the other hand, based on its supplemental notices, other filings, and actions, appears to interpret the Order to allow it to perform *any* maintenance tasks — including those not immediately

¹⁰ 16 U.S.C. § 824a(c).

necessary – so long as the outage was noticed and scheduled to perform necessary maintenance.¹¹ Such an interpretation will result in readily-preventable violations of federal and state law and a substantial risk of harm to Virginia citizens. It is fundamentally inconsistent with the Order’s requirement that PEPCO “ensure that only those planned outages needed to maintain or enhance the reliability of the 230 kV lines (or to install new lines) are scheduled to minimize the environmental effects of the operation of the Plant.”¹²

Director Paylor, therefore, requests clarification prior to rehearing, in the form of a timely supplemental order pursuant to FPA § 202 (c), that Order No. 202-05-3 limits PEPCO’s authority to perform maintenance on the two 230 kV lines to only that maintenance necessary to address emergency conditions. The operation of the Plant without sufficient pollution controls will cause localized exceedances of the health-based NAAQS in contravention of federal and state laws. Thus, a supplemental order under FPA § 202 (c) would be “just and reasonable” given the potential for damage to the health and safety of Virginia citizens caused by operating the Plant prior to the installation of sufficient pollution control systems.

Given Mirant’s planned installation of pollution controls, the Secretary could also reasonably limit the duration of the requirement. Mirant’s pollution control installation schedule provides that Trona systems will be operational on all five units at the Plant no later than March 20, 2006. To allow perform of maintenance activities that are not absolutely necessary to address emergency conditions, prior to installation of the Trona systems that are projected to be completed in approximately two months, simply cannot

¹¹ See the attached Affidavit of Seth W. Brown.

¹² Ordering ¶ C.

be reconciled with the requirement that PEPCO act in a way that will minimize the environmental effects of the Plant's operation. Director Paylor, therefore, seeks clarification on this issue in the form of a supplemental Order for the interim period prior to rehearing.

B. Director Paylor Seeks Interim Clarification That the Secretary Will Establish a Mechanism For Ensuring That Planned Transmission Line Outages Will Be Scheduled in a Manner That Minimizes the Environmental Effects of Operating the Potomac River Power Plant.

Order No. 202-05-3 requires PEPCO to “ensure that only those planned outages needed to maintain or enhance the reliability of the 230 kV lines (or to install new lines) are scheduled to minimize the environmental effects of the operation of the Plant.”¹³ The implementation of this requirement, however, allows too much discretion. Lacking a mechanism for determining what steps must be taken to minimize the environmental effects of resumed operation of the Plant and whether sufficient steps have, in fact, been taken, it is, and will continue to be, unclear whether PEPCO has complied with this requirement of the Order. Although minimizing the environmental effects of operating the Plant can best be achieved by coordination with Mirant, the Director is not aware that any steps have been taken to achieve this necessary coordination. Indeed, it appears that, in the case of the outage planned to begin on January 9, PEPCO even failed to inform Mirant when the transmission line outage was postponed for several days. In light of PEPCO's apparent disregard for the clear language of Order No. 202-05-3, Director Paylor seeks clarification for the interim period prior to the rehearing of the steps PEPCO

¹³ *Id.*

must take to ensure that it schedules transmission line outages in a manner that minimizes the environmental effects of operating the Plant.

V. CONCLUSION

For the reasons stated above, David K. Paylor, Director of the Virginia Department of Environmental Quality, requests rehearing and interim clarification of the Secretary of Energy's Order No. 202-05-3.

Respectfully submitted,
DAVID K. PAYLOR, DIRECTOR
VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY



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UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

District of Columbia Public Service Commission)

Docket No. EO-05-01

Order No. 202-05-3

AFFIDAVIT OF SETH W. BROWN, P.E.

State of Georgia)
) ss:
County of Cobb)

Seth W. Brown, P.E., being first duly sworn, deposes and says:

Qualifications

1. I am employed by GDS Associates, Inc., ("GDS" or "GDS Associates") as Principal and Manager of Transmission Services in the Transmission Regulatory and Rates consulting area.
2. I graduated from the Georgia Institute of Technology with a Bachelor of Electrical Engineering in March 1985. I am a registered Professional Engineer in the State of Georgia.
3. I have been employed by Florida Power & Light Company, Southern Engineering Company, and Georgia Transmission Corporation. While employed at Florida Power & Light and Southern Engineering, I performed various duties in the area of substation engineering and operations. While employed at Georgia Transmission Corporation, a transmission-owning cooperative, I held various positions including Manger of Engineering and Technical Services, Manager of Operations and Maintenance, and Manager of Tariff Services.

4. At GDS Associates, I perform consulting services in a wide range of areas for transmission and distribution cooperatives and municipal electric systems. This includes consulting on transmission and substation operations and maintenance issues, transmission contracts for services, analysis of system impact studies, transmission queue issues and developing policies on complex issues such as transmission congestion management, financial transmission rights, locational marginal pricing, ancillary services and generator operations. In addition, I represent clients in the Regional Transmission Organization stakeholder process for MISO, SPP, and PJM.
5. The purpose of my affidavit is respond to certain representations made in the January 6, 2006 letter ("January 6 Letter") from Kirk J. Emge, General Counsel for Potomac Electric Power Company ("Pepco") to Secretary Bodman of the Department of Energy. In that letter, Mr. Emge describes the planned outages to two 230 kV transmission lines (identified as 23106 and 23107) which terminate at the Pepco Palmers Corner Substation.
6. Mr. Emge states that "during the outages, Pepco plans to perform critical maintenance on the two 230 kV transmission lines that is needed to ensure the reliability of the electric supply to the national capital region will not be compromised"¹. Mr. Emge goes on to discuss that the first outage is needed to repair hotspots detected on the 230 kV line-side and bus-side disconnect switches on line 23106.

¹ January 6 letter, page 2

According to Mr. Emge, these hotspots must be repaired in order for Pepco to be able to take line 23107 out of service to repair a faulty circuit breaker operating mechanism.

7. Mr. Emge then states that in order to reduce any environmental impact on the area surrounding the Potomac River Generating station, Pepco has added several additional activities to be performed on line 23106 "to prevent the need for additional planned outages and to avoid forced outages"². These additional activities include:

- (1) Refurbish 23106 bus disconnect
- (2) Refurbish 23106 line disconnect
- (3) Test, inspect, and repair oil circuit breaker
- (4) Relocate fiber optic relay control cable
- (5) Perform oil sampling and testing of underground cable
- (6) Perform routine inspection and testing of 230 kV reactor
- (7) Perform relay inspection and testing
- (8) Test and repair microwave radio system
- (9) Inspect and test 230 kV transformers
- (10) Inspect and test 230 kV breakers at Potomac River Substation
- (11) Perform various communication control testing

The total scheduled outage time for line 23106 is eight days.³

8. I have not been provided thermographic or other test data for the line 23106 230 kV disconnect switches, but assuming that they are

² January 6 letter, page 3

³ Ibid.

operating at a temperature enough above ambient to cause Pepco concern, Pepco should perform this needed corrective maintenance and remove the switches from service for cleaning and regreasing the contact surfaces and terminal pads. It also follows that if Pepco has the opportunity to repair or replace switch components that are identified as needing such during the outage, they should do so. These activities appear to be covered in items 1 and 2 listed above and in the January 6 Letter. With proper maintenance staff and equipment on-hand, an outage consisting of a single, extended work day (ten hours) is typically sufficient to de-energize and ground each switch, remove the jumpers, replace any damaged contacts, and clean and regrease the remaining contacts and terminal pads on all three phases. If the switches are motor-operated, the operating mechanisms can be serviced at the same time. Therefore, two extended work days should suffice to complete any necessary switch repair.

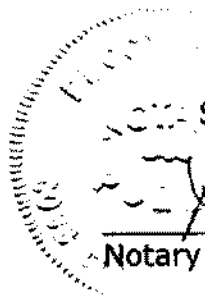
9. The remaining items 3 - 11 appear to be preventative or routine maintenance. Mr. Emge offers no reason why those preventative maintenance activities must be performed **at this time**. As is prudent utility practice in normal situations, maintenance personnel typically try to perform as many maintenance activities as possible when taking a critical 230 kV facility out of service. Given the nature of this proceeding, however, the scheduling of this maintenance is not occurring under normal circumstances.

10. In summary, items 3 – 11 appear to be preventative or routine rather than corrective in nature and may be able to be deferred for some period without any additional risk to the transmission system. This opinion is offered with no more information than what is contained in the January 6 Letter. If Pepco can offer additional data as to why items 2 -11 must be performed at this time, the need can be better determined.
11. This completes my Affidavit.

[Next Page is Signature Page]

Seth W. Brown
Seth W. Brown

Subscribed and sworn to before me this 18th day of January, 2006.



Peggy Hich
Notary Public

Notary Public, Cobb County, Georgia
My Commission Expires Jan. 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was on this day served by electronic mail on the persons listed below.

Dated at Richmond, Virginia, this 19th day of January, 2006.



D. Mathias Roussy, Jr.

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