UNITED STATES DEPARTMENT OF ENERGY

PJM Interconnection, L.L.C. Request for Emergency Order Pursuant to Section 202(c) of the Federal Power Act	)))))	Order No. 202-17-2

SIERRA CLUB'S MOTION TO INTERVENE AND PETITION FOR REHEARING

I. Statement of Issues

On June 16, 2017, the Secretary of Energy, on behalf of the Department of Energy (the "Department"), issued Order No. 202-17-2 (the "Order"), determining that an emergency exists in the Commonwealth of Virginia, and ordering Dominion Energy Virginia ("Dominion") to operate Units 1 and 2 of the Yorktown Power Station. Sierra Club hereby moves to intervene and petitions for rehearing of that Order, pursuant to section 313 of the Federal Power Act, 16 U.S.C. § 825l.

Sierra Club seeks to intervene in order to protect its interests in reducing the pollution authorized by Order No. 202-17-2, as well as the consequent costs to consumers. We request rehearing on the following grounds:

- The Department has not demonstrated that an emergency exists sufficient to justify issuance of Order No. 202-17-2. The circumstances described by the Order are neither unexpected nor unusual; and section 202(c) does not permit the Department to enforce reliability standards issued under section 215 of the Federal Power Act, 16 U.S.C. § 824o, under the circumstances presented here. *Richmond Power and Light v. Federal Energy Reg'y Comm.*, 574 F.2d 610, 615 (D.C. Cir. 1978); *Otter Tail Power Co. v. Fed. Power Comm.*, 429 F.2d 232, 233-34 (1970); *California Independent System Operator Corp. v. FERC,* 372 F.3d 395, 401-2 (D.C. Cir. 2004).

- The Department has not provided measures to limit the operations of the Yorktown Power Station to the hours necessary to meet the claimed emergency, nor imposed restrictions sufficient to provide the maximum practicable compliance with applicable environmental laws. The Order merely instructs PJM Interconnection, L.L.C. ("PJM") and Dominion to devise such measures, violating section 202(c)'s express

requirement that the Order itself provide them. 16 U.S.C. § 824a(c)(2); *Perot v. Federal Election Com'n*, 97 F.3d 553, 559-60 (D.C. Cir. 1996); *Orion Power N.Y. Gp II, Inc.*, 104 FERC ¶ 62118, 64300 (Aug. 13, 2003).

- The Department has not assessed the environmental consequences of the Order—a major federal action significantly affecting the human environment—as required under the National Environmental Policy Act. 42 U.S.C. § 4321; *et seq.* 40 C.F.R. § 1502.3; 40 C.F.R. § 1506.11. Because the Order compels operations that violate Clean Air Act emissions standards, it may not be categorically excluded as a power-management activity in which operations remain within normal operating limits. 40 C.F.R. Part 1021 Subpart D App. B 4.4.

II. Background

PJM Interconnection, L.L.C. submitted a request for an emergency order pursuant to section 202(c) of the Federal Power Act, 16 U.S.C. § 825a(c), on June 13, 2017. Letter to Honorable James Richard Perry from Steven Pincus dated June 13, 2017 ("Request"). The Request claimed that an emergency existed under two scenarios: first, if total load levels exceeded certain levels, *id.* at 6-7; and, second, during construction of a planned, PJM-ordered transmission project, *id.* at 7-8. In both cases, PJM asserted that absent the units' operation, reliability would be threatened within certain areas of Virginia "[u]pon loss of certain [other] facilities." *Id.* at 8-9 & n.17. In support, PJM provided results of an analysis taken to assess compliance with a federal reliability standard issued by the National Electric Reliability Council ("NERC"), pursuant to section 215 of the Federal Power Act, 16 U.S.C. § 825o. *Id.* at 24-25 (noting that "planning performance requirements were not met" for "NERC Reliability Standard TPL-001-4").

On June 16, 2017, without notice or further proceedings, the Department issued Order No. 202-17-2 (the "Order"). The Order noted that the second scenario—construction of the PJM-ordered transmission project—was "not applicable," as Dominion had not yet obtained "permitting approval" for that project. *Id.* at 1. The Department stated that "[e]lectric system reliability is at risk during the next ninety days absent the availability of Yorktown Units 1 and 2 during peak load conditions and contingency events detailed in the application." *Id.* at 2. In support, it noted that "several" of the North American Electric Reliability Corporation's mandatory reliability standards would be "implicated" if Yorktown Units 1 and 2 were unavailable, including Reliability Standard TPL-001-4. *Id.*

Because the Order conflicts with the Clean Air Act—specifically, the air toxics standards governing coal-fired power plants, 40 C.F.R. part 63 subpart UUUUU—the Department recognized that it was required to include conditions to "minimize any adverse environmental impacts." Order at 2. Those air-toxics standards—the Mercury and Air Toxics Standards (or "Standards")—were proposed in 2011, and finalized in 2012. 77 Fed. Reg. 9,304 (Feb. 16, 2012). The Standards require decreases in coal-fired power plants' emissions of mercury, acid gases, and hazardous metals. EPA promulgated the Standards more than three full years before the compliance deadline. 40 C.F.R. § 63.9984. Virginia provided a one-year extension of that deadline for the Yorktown facility; pursuant to that extension, Dominion was to provide regular progress reports as to its steps to address reliability-related concerns associated with Dominion's plan to retire the Yorktown units. Request Att. B. At the expiration of that extension EPA and Dominion entered a one-year administrative consent order, because the plant had still not reduced its emissions to meet the Standards. Request Att. C. According to that consent order, the Yorktown units were to achieve full compliance with the Standards by April 16, 2017. *Id.* at 9. The consent order terminated on that date. *Id.* at 12.

To minimize its environmental impacts, the Department's Order authorizes continued operation of the Yorktown units "only when called upon by PJM for reliability purposes," and under the "operational limits described" in the EPA administrative consent order previously governing the plant. Order at 2. On that basis, the Department ordered Dominion to operate Yorktown Units 1 and 2 "as directed by PJM," from June 16 to September 14, 2017. The Department directed PJM and Dominion to "develop and implement a dispatch methodology" to ensure that the units are operated "only when called upon to address reliability needs," and to provide that methodology to the Department, along with reports of the days of the units' operation and their air and water emissions. *Id.* The Department further invited PJM and Dominion to submit a "renewal request," should Dominion "obtain[] permitting approvals for the [transmission] upgrade and identif[y] the date on which construction would begin." *Id.* On June 27, 2017, PJM sent the Department the methodology by which it intends to regulate operations at the Yorktown plant. Letter from Steven Pincus & Craig Glazer to Honorable James Richard Perry dated June 27, 2017 ("PJM Methodology").

III. Basis for Intervention

Sierra Club and its members have an interest in the Order. Sierra Club members are affected by the pollution that will be produced by operations required by the Order. Over 20,200 Club members reside in Virginia; approximately 265 of those members reside in the general vicinity of the

Yorktown plant. Sierra Club members also fish in lakes and rivers that will be affected by pollution (including mercury pollution) from the plant. Sierra Club members are, furthermore, ratepayers who may be subject to increased costs as a result of the Department's Order.

The Sierra Club has a demonstrated organizational commitment to the above-described interests. The Sierra Club's Beyond Coal Campaign seeks to reduce the pollution currently being produced by coal-fired power plants such as the Yorktown plant. To that end, Sierra Club has participated in regulatory proceedings relating to the Yorktown plant. Sierra Club has also devoted substantial resources to supporting the air toxics standards that the Order allows the Yorktown plant to violate. Sierra Club has a further organizational interest in demand-side management and other non-polluting alternatives to operation of the Yorktown facility. Sierra Club has advocated for such alternatives as part of its efforts to reduce pollution from the Yorktown plant. *See* Post-Hearing Brief of Environmental Respondents, Application of Virginia Electric and Power Co., Case No. PUE-2012-00029 (Virginia Corp. Com'n, May 23, 2013) (attached as Ex. A); Comments of Environmental Respondents to the Report of Senior Hearing Examiner, Application of Virginia Electric and Power Co., Case No. PUE-2012-00029 (Virginia Corp. Com'n, August 30, 2013) (attached as Ex. B).

The Department has not published notice of its Order in the Federal Register, nor offered any opportunity for public comment or participation. This motion is, therefore, sufficiently timely to reasonably permit Sierra Club's participation.

IV. Request for Reconsideration

A. *The Circumstances Noted by the Order Do Not Demonstrate an "Emergency" Within the Meaning of the Federal Power Act*

The Department's Order makes the following findings to support its determination that an "emergency" exists, sufficient to justify the exercise of the Department's powers under section 202(c), 16 U.S.C. § 824a(c): that the Department anticipates "heightened electricity demand or peak load conditions associated with hot summer weather"; that during such "peak load conditions and contingency events," "several" of NERC's mandatory reliability standards "are implicated," absent availability of the Yorktown units, "including Reliability Standard TPL-001-4 (Transmission System Planning Performance Requirements)"; and that "PJM load flow studies" suggest that generation from the Yorktown units will be required to "prevent the possibility of uncontrolled power disruptions and shedding of critical loads in the North Hampton Roads" area of Virginia. Order 1-2. PJM's

Application indicates that these "load flow studies" are those required to demonstrate compliance with NERC Standard TPL-001-4, under scenarios involving the "loss of certain [other generating] facilities." Request at 9 n.17, 24. Those findings—in essence, that one of NERC's mandatory reliability-planning standards has not been fully satisfied—are not sufficient to demonstrate an "emergency" within the meaning of the section 202(c) of the Federal Power Act.[1]

1. Section 202(c) Confines Emergencies to Unexpected Events, Beyond the Control of Local Authorities

Section 202(c) of the Federal Power Act provides the Department with authority over "the generation of electric energy" only "[d]uring the continuance of any war in which the United States is engaged," or if "the [Department] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes." 16 U.S.C. § 824a(c)(1). The statute does not define "emergency"; according to the dictionary, the word primarily demands "an *unforeseen* combination of circumstances or the resulting state that calls for immediate action." Merriam Webster's Dictionary 407 (11th ed. 2009) (emphasis added). An emergency, by definition, is not an anticipated or regular occurrence; it is, rather, an unexpected and unusual event.

The surrounding context emphasizes the exigency of the circumstances described by section 202(c)'s reference to an "emergency": the authority granted by section 202(c) is, primarily, a war-time power. 16 U.S.C. § 824a(c) (authorizing orders during "continuance of any war in which the United States is engaged"). *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that statutory terms should be interpreted in context of nearby parallel terms "in order to avoid the giving of unintended breadth to the Acts of Congress"). An "emergency" under the statute is limited to circumstances that are similarly unusual and unforeseeable: "a *sudden* increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for

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[1] The Department has generally taken the position that judicial review of emergency orders issued under section 202(c) of the Federal Power Act must be secured through section 313 of that Act, 16 U.S.C. § 825l. *See, e.g.*, Order No. 202-05-3, District of Columbia Public Service Commission, Docket No. EO-05-01 (December 20, 2005) at 11-12. Sierra Club does not, by filing this petition, concede that section 313 provides the exclusive means of judicial review of the Order.

generating facilities." 16 U.S.C. § 824a(c) (emphasis added). *See Richmond Power and Light v. Federal Energy Reg'y Comm.*, 574 F.2d 610, 615 (D.C. Cir. 1978) (holding that section 202(c) "speaks of 'temporary' emergencies, epitomized by wartime disturbances" and that statute is reasonably understood to exclude circumstances such as "dependence of imported oil").

Congress underlined the limited scope of section 202(c) when enacting the provision. "This is a temporary power designed to avoid a repetition of the conditions during the last war, when a serious power shortage arose. Drought and other natural emergencies have created similar crises in certain sections of the country; such conditions should find a federal agency ready to do all that can be done in order to prevent a break-down in electric supply." S. Rep. No. 74-621 at 49 (1935).[2]

The Department's regulations confirm those limitations. They define an "emergency" as "an *unexpected* inadequate supply of electric energy" resulting from "the *unexpected* outage or breakdown of facilities," which may result from "weather conditions, acts of God, or *unforeseen occurrences not reasonably within the power of the affected 'entity' to prevent.*" 10 C.F.R. § 205.370 (emphases added). The regulations also include "a *sudden* increase in customer demand," emphasis added, or a "regulatory action which *prohibits* the use of certain electric power supply facilities." *Id.* (emphases added).[3] Those examples reflect the limited nature of the emergencies encompassed by section 202(c): unusual, unforeseen, and unexpected events, with immediate and substantial consequences.

The regulations suggest that "*[e]xtended* periods of insufficient power supply," resulting from "inadequate planning or the failure to construct necessary facilities" may create an unexpected crisis that qualifies as an emergency. *Id.* (emphasis added).[4] But the regulation does not suggest that a

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[2] While Congress amended section 202(c) in 2015, it did not alter the Department's basic grant of emergency authority; it only addressed occasions on which a Department order might produce a conflict with other laws. *See* H.R. Rep. No. 114-357 (2015).

[3] EPA's Mercury and Air Toxics Standards do not prohibit the plant's operation. They require it to reduce its pollution. 40 C.F.R. § 63.10000 Furthermore, the rule provided ample time for the plant to achieve those reductions. 40 C.F.R. § 63.10005.

[4] To the extent that the Department's regulations are inconsistent with the statute—and "inadequate planning," under most circumstances, could not fit the definition of an emergency—the regulations are not valid.

potential shortage, which may occur only within a brief, seasonal period, could be an emergency, or that the Department's emergency powers could be used as a substitute for ordinary planning. Moreover, an emergency does not exist merely due to—as is the case here—circumstances of which the regional authorities (as well as the generator) have long been aware. Nor is the Department's preference for a different plan over that that pursued by local authorities an emergency. And the regulations make clear that even where a genuine emergency results from inadequate planning, the affected entity must "make firm arrangements to resolve the problem," so that no continuing order is required. *Id.*

2. The Structure of the Act Further Confirms That the Authority Conferred by Section 202(b) Is Limited to Unusual, Unexpected Circumstances

Other portions of the statute, outside section 202(c) itself, reinforce that section's tightly limited scope. Section 202(b) confirms the constrained nature of the Department's emergency powers under section 202(c). That section provides cabined authority (exercised by the Federal Energy Regulatory Commission, rather than the Department) to "direct a public utility ... to establish physical connection[,] ... sell energy, or exchange energy" with other persons, under normal, non-emergency conditions. 16 U.S.C. § 824a(b). The statute establishes specific standards and procedural requirements for such non-emergency orders. *Id.* Section 202(c) removes many of those requirements—but does so only during war-time or similarly extreme circumstances. 16 U.S.C. § 824a(c). *See Otter Tail Power Co. v. Fed. Power Comm.*, 429 F.2d 232, 233-34 (1970) (holding that section 202(c) "enables the Commission to react to a war or national disaster," while section 202(b) "applies to a crisis which is likely to develop in the foreseeable future"). That structure establishes a clear divide between quotidian energy-system management (even where necessary to avert a future crisis), governed by section 202(b), and unusual, unforeseeable 'emergencies,' governed by section 202(c). Read within that structure, section 202(c) cannot apply to routine planning matters; such application would render section 202(b) unnecessary, and eviscerate its procedural and substantive requirements.

Section 215 of the Federal Power Act, added in 2005, suggests additional boundaries on the Department's powers under section 202(c). Section 215 provides a detailed enforcement mechanism, with specified procedures, remedies, and timeframes, for federal reliability standards. *See generally* 16 U.S.C. § 825o. As the D.C. Circuit has recognized, the portion of the Federal Power Act that predates that section—which includes section 202(c)—did not provide the federal government with the power to enforce reliability standards. *Alcoa, Inc. v. FERC,* 564 F.3d 1342, 1344 (D.C. Cir. 2009) (noting

that prior to the Energy Policy Act of 2005, "the reliability of the nation's bulk-power system depended on participants' voluntary compliance with industry standards"). Consequently, a bare violation of a federal reliability standard cannot suffice to provide the Department with "emergency" power to enforce that standard under section 202(c). Reading section 202(c) to permit direct enforcement of reliability standards through emergency orders would bypass the limits and procedures that Congress enacted in section 215 to constrain such enforcement. *See California Independent System Operator Corp. v. FERC,* 372 F.3d 395, 401-2 (D.C. Cir. 2004) ("Congress's specific and limited enumeration of [agency] power over [particular matter] in [one section of Federal Power Act] is strong evidence that [separate section] confers no such authority on [agency].").

3. The Order Does Not Demonstrate Events Sufficient to Provide the Department with Emergency Authority Under Section 202(c)

Under those statutory standards, the circumstances noted by the Order do not demonstrate an "emergency" under section 202(c). First, the basic events making up the claimed emergency—"hot summer weather," Order 1—are hardly unforeseeable, unexpected, or even unusual. Allowing normal seasonal temperatures to trigger the Department's emergency powers would remove any meaningful boundaries upon the use of those powers; every summer is hot, as every winter is cold. *See United States v. Gov't of Virgin Islands,* 363 F.3d 276, 289 n.10 (3d Cir. 2004) (conditions that are "hardly 'unexpected'" are not an emergency sufficient to invoke emergency powers); *United States v. Southern Pac. Co.,* 209 F. 562, 566 (8th Cir. 1913) (the "usual causes of delay incident in the operation of trains, standing alone," are not an "emergency").

Neither are the requirements of the Mercury and Air Toxics Standards in any way unforeseeable. Both PJM and Dominion have been aware of those requirements since 2012. The Standards provided three years for plants to make preparations necessary for compliance, with an additional fourth year available if necessary to address localized reliability concerns. *See* 77 Fed. Reg. 9,304, 9,407-10 (Feb. 16, 2012) (noting that rule provides opportunity for "utilities and other entities with responsibility for maintaining electric reliability" to "take actions to mitigate" reliability-related issues); Resource Adequacy Implications of Forthcoming U.S. Air Quality Regulations (U.S. Department of Energy December 2011) (concluding that E.P.A. regulations, in total, do not threaten reliability). Virginia provided that fourth-year extension for the Yorktown plant before the Standards would apply, and Dominion entered into an administrative consent order which permitted the plant to operate for an additional, fifth year, without reducing its emissions to meet the Standards. Those five years preclude any inference that

compliance with the standards might be sudden or unexpected. The Standards are, in other words, part of the usual, anticipated regulatory environment (and they do not prohibit the plant's operations, 10 C.F.R. § 205.370); they are not the sort of unforeseen, drastic event that could reasonably be described as an emergency. *See also* Order, Application of Virginia Electric & Power Co. d/b/a Dominion Virginia Power, Case No. PUE-2012-0029 (Nov. 26, 2013) (discussing compliance plans for Dominion) (attached as Ex. C).

Furthermore, the sole reason that the Order posits for designating the circumstances surrounding the Yorktown Plant an emergency is a potential violation of the National Electric Reliability Council's reliability standards, issued under section 215 of the Federal Power Act. Order at 2; Request at 10. Section 215 prescribes specific remedies for such a failure, none of which have been deployed here. 16 U.S.C. § 825o(e); 18 C.F.R. § 39.7. The likelihood that reliability standards may not be met has been recognized by Dominion, and local planning authorities, since at least 2012. *See* Exs. A-B. The Order thus seeks to substitute section 202(c)'s emergency powers for the limited, defined enforcement mechanism prescribed by section 215. The Federal Power Act does not allow the Department to undertake that end-around. *California Independent System Operator Corp.,* 372 F.3d at 401-2.

That is especially so here, for two reasons. First, the reliability standards at issue are second- and third-order standards; that is, they represent conditions under which the supply of electricity may be threatened only if additional contingencies occur, such as a loss of an additional source of generation or transmission capacity. *See* Request 26 (noting that electricity shortfalls occur only under various contingencies). At most, violation of such a standard makes an electricity-supply related emergency more likely; it does not, of itself, create an emergency. Second, the remedies provided by section 215 are not demonstrably inadequate to cure the violation of the section 215 standards described by the Order. Indeed, no effort has been made to employ those remedies. At a minimum, failure to meet the section 215 standards at issue here is not an "emergency" under section 202(c), until the remedies provided by that section have been shown to be insufficient.[5]

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[5] The second scenario described by PJM's request—which the Order does not address—falls even further short of circumstance that could be squared with the statutory, or common-sense, understanding of an emergency.

B. *The Department's Order Does Not Ensure the Maximum Practicable Consistency with Applicable Environmental Laws, and Does Not Show that the Prescribed Measures Are in the Public Interest*

Even if the Order did demonstrate that an emergency exists sufficient to invoke the Department's emergency powers, the Department has failed to meet section 202(c)'s additional criteria: that the Order "require generation ... only during hours necessary to meet the emergency," 16 U.S.C. § 824a(c)(2); that the Order be "to the maximum extent practicable ... consistent with any applicable Federal, State, or local environmental law or regulation and minimize[] any adverse environmental impacts," *id.*; and that it "serve the public interest," 16 U.S.C. § 824a(c)(1).

The only measures included in the Order to restrict the Yorktown plant's operation are: that "Dominion Energy Virginia ... operate Yorktown Units 1 and 2 of the Yorktown Power Station as directed by PJM only as needed to address reliability issues"; and that "PJM and Dominion develop and implement a dispatch methodology" designed to operate the Yorktown units "only when called upon to address reliability needs." Order at 2.[6] That methodology will, according to the Order, be submitted to the Department "upon implementation." *See* PJM Methodology (submitted to Department on June 27, 2017). PJM and Dominion are also required to report dates and estimated emissions associated with the units' operation, but not until the Order expires or submittal of a renewal request.

The Department has thereby failed to assess, let alone impose, limitations that might ensure that the Yorktown plant operate only "during hours necessary to meet" the purported emergency, or to ensure the maximum practicable consistency with applicable environmental laws. It has instead passed an undefined obligation on to PJM and Dominion, with no standards governing that obligation, and no clear method to review or cure any deficiencies or violations. *See Cobell v.* Norton, 392 F.3d 461, 469 (D.C. Cir. 2014) (observing that "plan to make a plan" does not satisfy agency's duty (citation omitted)). The Department has thereby failed to comply with the statute's demand that the "order" *itself* provide these conditions, and ensure compliance. 16 U.S.C. § 824a(c)(2) (the Department "shall ensure that *such order* requires generation ... only during hours necessary to meet the

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[6] The Order also adopts the terms of the administrative consent order between Dominion and the U.S. Environmental Protection Agency; but that administrative consent order merely states, much like the Department's Order, that Dominion "implement a dispatch methodology with PJM." Request Att. C at 8-9.

emergency and serve the public interest and, to the maximum extent practicable, is consistent with" environmental laws and regulations (emphasis added)).[7] The statute does not permit—nor could it permit—the Department to delegate its statutory obligations to private, non-governmental actors in the fashion that the Order delegates the Department's section 202(c) responsibilities. *Perot v. Federal Election Com'n,* 97 F.3d 553, 559-60 (D.C. Cir. 1996) (noting that "when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor"). *See also Wellness Intern. Network v. Sharif,* 135 S. Ct. 1932, 1957-8 (2015) (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions").

Even if it could substitute for the conditions required by the statute, the methodology submitted by PJM does not limit operation to the emergency identified in the Order. PJM's methodology asserts that "PJM may dispatch Yorktown units to help mitigate ... [r]eliability issues associated with scheduled ... transmission outages directly related to the Skiffes Creek [transmission] project," and proposes operation of the units during that transmission project. PJM Methodology at 1-3. But the Order does not authorize such operations (much less justify them). The Department's Order declines to address the need for operation of the Yorktown units "during transmission outages to support construction of system upgrades," finding PJM's request for such operations to be "not applicable until Dominion Energy Virginia obtains permitting approval for the" upgrades, and requiring "a renewal request" should those conditions change. Order at 1-2.

The Order, furthermore, fails to include any measures that might reduce the duration of the conditions which, according to the Department, create an emergency. The Department's regulations recognize the need for such measures, expressly stating that where an emergency results from "inadequate planning," the statute's requirement for maximum practicable compliance with environmental laws demands "firm arrangements to resolve the problem." 10 C.F.R. § 205.370. The Order does not include any such "firm

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[7] The Order could, for example, condition the Yorktown units' operation on occurrence of the transmission or generation failures, and/or load conditions, which PJM's load-flow studies found might produce power shortfalls, or utilize some conditions that would trigger the "remedial action scheme" noted in PJM's application. *See* Request 8. *Cf.* PJM Methodology at 1-2 (suggesting dispatch under terms related to remedial action scheme, but extending beyond operations authorized by Order).

arrangements," or any other conditions to limit the duration of the reliability-related concerns to which the Order claims to respond (and neither does PJM's dispatch methodology).

Finally, the Order does not include any discussion of alternative means of ensuring reliability within Virginia, or of the comparative costs of continued operation of the Yorktown units as against such alternatives. The Federal Energy Regulatory Commission has generally recognized that consideration of "benefits and costs," as well as of "reasonable alternatives," is necessary to support "an informed decision on the public interest." *Orion Power N.Y. Gp II, Inc.,* 104 FERC ¶ 62118, 64300 (Aug. 13, 2003). FERC also requires regional transmission organization and independent system operators like PJM to consider, as part of regional transmission planning, non-transmission alternatives such as demand-side management, distributed generation, or energy storage. FERC, Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (July 21, 2011). The Order does not assess the viability of any non-transmission alternatives to continued operation of Yorktown, though such alternatives would reduce or eliminate any conflict with federal environmental laws. Development of a portfolio of alternatives that could mitigate the need to operate the Yorktown units more quickly than development of a transmission solution should be part of the "firm arrangements" contained in the Order.

C. The Department Has Not Complied With the National Environmental Policy Act

The Order is a major federal action, requiring compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). *See* 40 C.F.R. § 1508.3 & 1508.9 *New York v. Nuclear Reg'y Com'n,* 681 F.3d 471, 476-77 (D.C. Cir. 2012). The Order will have significant environmental impacts; the Yorktown plant produces substantial air and water pollution. *See, e.g.,* Request Att. F. That the Order addresses a purported emergency does not excuse the Department from the need to comply with NEPA. The Council on Environmental Quality's implementing regulations provide that "[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal Agency taking the action should consult with the Council about alternative arrangements." 40 C.F.R. § 1506.11. The Council has stated that such "[a]lternative arrangements do not waive the requirement to comply with NEPA, but establish an alternative means of NEPA compliance." Memorandum for Heads of Federal Departments & Agencies from Nancy H. Sutley (May 12, 2010) (attached as Ex. D).

Here, there has been no showing that the circumstances surrounding the order prevent compliance with normal NEPA requirements; as set forth above, those circumstances have long been known. But even if full compliance were impracticable, the Department has not undertaken appropriate alternative arrangements, as described by the Council on Environmental Quality. *See, e.g.,* Special Environmental Analysis for Actions Taken Under U.S. Department of Energy Emergency Orders Regarding Operation of the Potomac Generating Station in Alexandria, Virginia (U.S. Dep't of Energy Nov. 2006).[8] At a minimum, the Department should undertake the consultation with the Council on Environmental Quality required by 40 C.F.R. § 1506.11, especially prior to granting any request for extension or renewal of the Order.

The Department has indicated that it believes that its action falls under a categorical exclusion governing "power management activities" where "the operations of generating projects would remain within normal operating limits." Records of Categorical Exclusion Determination, Order No. 202-17-2 (June 16, 2017) ("Categorical Exclusion Determination") at 2. But by its terms, the Order compels operations which violate the Clean Air Act's air toxics standards. 40 C.F.R. Part 63, Subpart UUUUU. The required operations are therefore not within "normal" operating limits. The Department's categorical exclusion determination states that EPA's prior administrative consent order allows it to ignore that violation. *Id.* at 2. But while the consent order addressed a transgression of the Clean Air Act, it did not command that the plant abide by the governing limits. Request Att. C at 6 (Yorktown units "will not be able to comply" with Standards). Moreover, the consent order has expired (and could not be extended). *Id.* at 12. That the Department's Order mimics the administrative consent order's requirement of a PJM-devised dispatch methodology does not transform an ongoing violation of Clean Air Act limits into compliance with those limits. The Department cannot, therefore, categorically exclude the Order under NEPA. *See West v. Dept. of Transp.*, 206 F.3d 920, 928 (9th Cir. 2000).[9]

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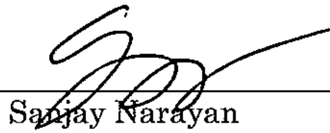
[8] https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/SEA-04-2006.pdf

[9] The Department's categorical-exclusion determination also states that "EPA's ACO has previously been determined" to be exempt from NEPA, because it is an "action taken under the Clean Air Act." Categorical Exclusion Determination at 2. But the Order is not an action taken under the Clean Air Act; 15 U.S.C. § 793(c)(1) does not apply to it.

V. Conclusion

Sierra Club recognizes the vital importance of maintaining the reliability of the electric power system. However, for the reasons described above, Sierra Club respectfully requests that the Department reconsider the means by which it has addressed those concerns here, especially in light of alternative means of securing safe, reliable, inexpensive and clean electric generation in the future.

Respectfully submitted on July 13th, 2017 by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served via U.S. Mail on this 13th day of July, 2017 on:

Hon. Rick Perry Secretary of Energy U.S. Department of Energy 1000 Independence Ave., S.W. Washington D.C. 20585	Catherine Jereza Deputy Assistant Secretary Office of Electricity Delivery and Energy Reliability U.S. Department of Energy 1000 Independence Ave., S.W. Washington D.C. 20585
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