UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Virginia Electric and Power Company (Dominion Energy Virginia)	))	Order No. 202-17-4

MOTION FOR LEAVE TO ANSWER AND ANSWER OF VIRGINIA ELECTRIC AND POWER COMPANY AND PJM INTERCONNECTION LLC

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" and "Commission Rules"), 18 C.F.R. §§ 385.212, 385.713(c)(3)[1], the Virginia Electric and Power Company ("Dominion Energy Virginia") and PJM Interconnection LLC ("PJM") respectfully submits to the Secretary for the Department of Energy ("Secretary" and "Department") this Motion for Leave to Answer ("Motion") and Answer ("Answer") to the Sierra Club's Petition for Rehearing ("Petition") of the Secretary's Order No. 202-17-4 (the "Renewal Order") submitted on October 5, 2017.

I. Point of Order

As an initial point of order, while the Renewal Order does not explicitly identify the parties to this proceeding, Dominion Energy Virginia seeks to clarify that it is a party of right. Commission Rule 102, 18 C.F.R. §385.102(c)(1) states that a "party" means "any respondent to a proceeding" and subsection (f)(1) states that a respondent means any person "to whom an order

[1] The Department has previously indicated that its regulations pertaining to Federal Power Act § 202(c) emergency authority at 10 C.F.R. § 205.370 *et seq.* do not contain a rehearing section, but that parties should look to guidance on rehearing procedures from the Commission Rules. E-mail from Lot Cooke, Dep't of Energy Office of Gen. Counsel, to Linda Alle-Murphy, Assoc., Schnader Harrison Segal & Lewis L.L.P. (December 28, 2005 9:05 AM) *available at:* https://energy.gov/oe/downloads/question-and-answer-procedural-questions-application-rehearing-order-no-202-05-02 ("The DOE regulations on emergency orders, 10 CFR section 205.370, et seq., do not a have specific rehearing section, but a party seeking rehearing can look for procedural guidance to FERC's Rules of Practice and Procedure, 18 CFR Part 385."). Therefore, to the extent possible, this Motion and Answer is stylized under the Commission Rules. However, in doing so, Dominion Energy Virginia does not necessarily concede that the Commission Rules govern this proceeding.

. . . is issued by the Commission." The Renewal Order issued by the Secretary is explicitly directed at Dominion Energy Virginia: Dominion Energy Virginia "shall" operate Units 1 and/or 2 of the Yorktown Power Station ("Yorktown") as directed by PJM; Dominion Energy Virginia "shall continue to comply with the dispatch methodology submitted by PJM; Dominion Energy Virginia "shall" report all dates on which Yorktown Units 1 and/or 2 are operated as well as the estimated emissions and water usage data associated with their operation.[2] Because Dominion Energy Virginia is a person to whom the Renewal Order is issued, it is a respondent and, therefore, a party of right to this proceeding.[3]

II. Motion for Leave to Answer

Dominion Energy Virginia and PJM respectfully move for leave to answer the Petition. While Commission Rules discourage answers to rehearing requests, a party may answer a rehearing request if permitted by the decisional authority (here the Secretary or his designee).[4] For its part, the Commission has permitted a party to answer a request for rehearing when those answers help to clarify complex issues, provide additional information, or are otherwise helpful in the Commission's decision-making process.[5] Likewise, the Department has permitted "submission" of any additional comments, information, or analysis on the operation of and/or effects of an order under FPA § 202(c) as such operation and/or effects may be relevant to a

[2] Renewal Order at 2.

[3] Dominion Energy Virginia's position as a party of right to this proceeding is explicitly evident from the face of the Renewal Order. However, out of an abundance of caution, and to preserve our rights, should the Secretary deem Dominion Energy Virginia not to be a party to this proceeding, then, pursuant Commission Rule 214, 18 C.F.R. § 385.214, Dominion Energy Virginia respectfully moves to intervene in this proceeding. Dominion Energy Virginia's interest in this proceeding is clear by the number of actions ordered of it under the Renewal Order.

[4] 18 C.F.R. § 385.213.

[5] *See Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 at P 14 (2008) (accepting answer to rehearing request because the Commission determined that it has "assisted us in our decision-making process."); *FPL Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289 at P 12 (2008) (accepting "PJM's and FPL's answers [to rehearing requests], because they have provided information that assisted us in our decision-making process.").

decision on the request for rehearing.[6] As demonstrated below, all of these criteria are met by the Answer. Therefore, Dominion Energy Virginia and PJM respectfully request that the Secretary grant this Motion because the Answer will help clarify the record and contribute to an understanding of the operation and/or effects of the Renewal Order.

III. Answer

Sierra Club raises two issues in its Petition: (1) whether the Department satisfied the National Environmental Policy Act in issuing the Renewal Order by invoking a categorical exclusion; and (2) whether the Department, in issuing the Renewal Order demonstrated that it mandates environmental compliance to the maximum extent practicable or limits the hours of operation to the those necessary to meet the emergency or serve the public interest. For the reasons set forth below, the answer to both questions is yes. The Sierra Club's arguments are without merit.

A. The Department Properly Categorically Excluded the Renewal Order from Review under the National Environmental Policy Act.

Sierra Club asserts that the Department improperly applied a "categorical exclusion" in determining that the Renewal Order was not subject to further review pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). As it did in its first Petition submitted on July 13, 2017, Sierra Club first suggests that the Department did not comply with the statute and asks the Secretary to do more review than NEPA requires.

The Department fulfilled its NEPA obligations by analyzing the effects of the Renewal Order and determining that activities were categorically excluded from NEPA's requirement to prepare either an environmental assessment or an environmental impact statement. Further,

[6] *Response to Requests for Rehearing of DOE Dec. 20, 2005 DOE Order No. 202-05-3*, Order No. 202-06-1, Docket No. EO-05-01, Feb. 17, 2006.

Sierra Club fails to recognize authority granted by Congress in the FPA regarding applicability and enforceability of environmental law while the Renewal Order is in effect. The Department appropriately determined that issuing the Renewal Order is an action that is categorically excluded from further NEPA analysis.

1. NEPA Allows for Categorical Exclusions

NEPA is a procedural statute that requires a federal agency to assess the environmental effects of a proposed action prior to making a decision on the action. An agency assesses a major federal action significantly affecting the human environment in a detailed statement known as an "environmental impact statement" ("EIS").[7] If the agency determines from the outset that the action does not require preparation of an EIS, or determines that analysis is required to determine whether to prepare an EIS, the agency is authorized by regulation to prepare an "environmental assessment" ("EA").[8] An agency may also determine that certain categories of actions do not individually or cumulatively have a significant effect on the human environment and, therefore, neither an EA nor an EIS is required. These categories of actions are known as "categorical exclusions."[9]

Categorical exclusions are individually determined by federal agencies using agency-specific procedures.[10] The Department establishes categorical exclusions pursuant to a rulemaking for defined classes of actions that the Department determines are supported by a record showing that they normally will not have significant environmental impacts, individually or cumulatively.[11] This record is based on the Department's experience, the experience of other

[7] 42 U.S.C. § 4332(c).

[8] 40 C.F.R. § 1501.4(a)-(c).

[9] *Id.* at § 1508.4.

[10] *Id.* at §1501.4(a)(2).

[11] 76 Fed Reg. 63,765 (Oct. 13, 2011).

agencies, completed environmental reviews, professional and expert opinion, and scientific analyses.[12] The Department also considers public comment received during the rulemaking.[13]

Categorical exclusions are not exemptions or waivers of NEPA review, "they are simply one type of NEPA review."[14] Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs.[15] The use of categorical exclusions can reduce paperwork and delay, so that EAs or EISs are targeted toward proposed actions that truly have the potential to cause significant environmental effects.[16]

2. The Renewal Order fits within the Power Management Categorical Exclusion

The Department's categorical exclusions include activities related to power marketing services applied in the Renewal Order.[17] These activities include, but are not limited to, storage, load shaping and balancing, seasonal exchanges, and other similar activities, provided that the operations of generating projects would remain within normal operating limits.[18]

As part of its environmental review responsibilities under NEPA, a Department NEPA Compliance Officer was required to examine the proposed Renewal Order to determine whether it qualified for a categorical exclusion. The Department's process is consistent with that described in the Council on Environmental Quality's ("CEQ") Categorical Exclusion Guidance: "When determining whether to use a categorical exclusion for a proposed activity, a Federal agency must carefully review the description of the proposed action to ensure that it fits within

[12] *Id*.

[13] *Id*.

[14] 75 Fed. Reg. 75,631.

[15] *Id*.

[16] *Id*.

[17] 10 C.F.R. Pt. 1021, Subpt. D, App. B, B4.4.

[18] *Id*.

the category of actions described in the categorical exclusion. Next, the agency must consider the specific circumstances associated with the proposed activity, to rule out any extraordinary circumstances that might give rise to significant environmental effects requiring further analysis and documentation" in an EA or EIS.[19] The Department's record of this process is known as a "Record of Categorical Exclusion Determination."

As described in the Record of Categorical Exclusion Determination accompanying the Renewal Order and included in the docket for the Renewal Order[20], the Department applied a single categorical exclusion that applies to power marketing services and activities. In the first Application for Order submitted on June 13, 2017 and incorporated by reference in the Renewal Application, PJM requested authorization to order Dominion Energy Virginia to operate the Yorktown Units 1 and 2 when total demand for electricity "exceeds certain levels to avoid impacting electric reliability and potential violations of Reliability Standards developed by the North American Electric Reliability Corporation ("NERC") in the North Hampton Roads area."[21] This type of activity fits squarely within the power marketing services and activities exclusion, which includes load balancing "that helps ensure system reliability by managing energy resources to be equal with load."[22] The Record of Categorical Exclusion also stated that "DOE has determined that the proposed action identified above will not have a significant effect on the human environment."[23]

[19] 75 Fed. Reg. at 75,631.

[20] Findings of Fact at 9.; Records Of Categorical Exclusion Determination Order No. 202-17-4 (Sept. 11, 2017)

[21] Application at 2.

[22] 76 Fed. Reg. 63,777 (Oct. 13, 2011).

[23] Records of Categorical Exclusion at 3.

3. Sierra Club's NEPA arguments are meritless.

Sierra Club argues that "the operations required by the Department's Order do not comply with the Clean Air Act standards and therefore are not within normal limits."[24] The Department properly applied the power marketing and services categorical exclusion because the operations of Yorktown Units 1 and/or 2 will remain within normal operating limits.[25] The term "normal operating limits" means the capacity of generating units. As stated in the Records of Categorical Exclusion, "[t]he expected combined operation of Yorktown Units 1 and 2 reacting to electricity reliability emergencies under DOE Order No. 202-17-4 will be well below normal operating capacities and limits of Yorktown Units 1 and 2."[26]

As described in the Application and in the Renewal Order, Dominion Energy Virginia had been operating the subject units under authorization from the Environmental Protection Agency ("EPA") under an Administrative Compliance Order on Consent ("ACO") that includes further operational limitations restricting the capacity of the generating units. In the Summary of Findings accompanying its Renewal Order, the Department noted that it had consulted with the EPA and reviewed estimated emissions and water usage data, and that the Renewal Order "continues the operational limitations" in the EPA's ACO.[27] These limits, approved by a federal agency with jurisdiction, can only be considered "normal" or, truly, more restrictive than "normal" operating limits associated with generating capacity. Indeed, the on-going normalcy of these limits is confirmed every two weeks when Dominion Energy Virginia's reports to the

[24] Sierra Club Petition at 1.

[25] The Department should not be misled by the Sierra Club's suggestion in subheading IV.A. of the Petition that the Department "should assess the impacts of its action under the National Environmental Policy Act." The analysis that led to application of a categorical exclusion is, in itself, an assessment of the impacts under NEPA. That Sierra Club wishes the Department had done more than required by law is of no consequence to whether the Department fully complied with NEPA.

[26] Records of Categorical Exclusion at 3.

[27] Summary of Findings at 9.

Department all dates on which Yorktown Units 1 and/or 2 have operated and the associated air emissions and water usage for those dates.

Sierra Club's argument that the Renewal Order compels violations of EPA's Mercury and Air Toxics Standards under the Clean Air Act, which consequently cannot be considered "normal operations,"[28] is a red herring. Congress carefully crafted FPA § 202(c) to take into account potential violations of federal environmental laws that may result from the issuance of an emergency order. That compliance with such an order "results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation."[29] Thus, any emissions resulting from compliance with the Renewal Order that may not comply with regulations promulgated under the Clean Air Act are not violations, much less emissions that are not "normal." Because FPA § 202(c) provides this exemption, application of the powering marketing services and power management activities categorical exclusion to issue the Renewal Order would not result in violations of the Clean Air Act and was consequently appropriate.

B. Sierra Club Misconstrues FPA Requirements where an Order Conflicts with Environmental Regulations.

According to FPA § 202(c)(2), where, as in this proceeding, an order conflicts with a Federal environmental law, the Department "shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable, is consistent

[28] *Id.* at 14.

[29] FPA § 202 (c)(3).

with any applicable Federal, State, or local environmental law or regulation and minimizes any adverse environmental impacts." The Renewal Order itself describes in detail the manner in which the Department has fulfilled these requirements. Sierra Club, however, challenges the Department's consultation with the EPA regarding short-term emissions limitations and misconstrues the actual extent of Yorktown Units 1 and/or 2's operations in an effort to expand measures the Department may require to limit emissions.

1. The Department Properly Consulted with the EPA.

Sierra Club alleges that the Department's consultation with the EPA was deficient because Sierra Club thinks the record does not contain sufficient information.[30] FPA § 202 (c)(4)(B) requires consultation with the primary Federal agency with expertise in the environmental interest (here, the EPA) but does not proscribe how the agencies should consult or what records should be included in the public docket beyond any conditions the EPA determines are necessary to minimize adverse impacts to the extent practicable. As noted in the Summary of Findings, after consulting with EPA, and consistent with that consultation, the Department found that the only appropriate short-term emissions limitation on Yorktown Units 1 and 2 would be to curtail operating hours to the maximum extent practicable for reliability purposes. By consulting with the EPA, the Department met its statutory obligation. Even if, in its discretion, the Department considered doing more, the fact is that the limited use – on an emergency basis – of Yorktown Units 1 and/or 2 would be reason enough to not consult any more than the Department did. Sierra Club's desire that the Department had done more is simply not supported by law or the instant facts.

[30] Petition at 9.

2. The Limitations on Operations Are Appropriate.

Sierra Club misconstrues the extent to which Yorktown Units 1 and/or 2 will operate pursuant to the Renewal Order. While conceding that curtailing operating hours is the only practicable means of limiting emissions, Sierra Club implies that the Units will be operating full-time for 18-20 months. This is simply not the case. The Renewal Order, in fact, only authorizes operation of Yorktown Units 1 and/or 2 "in the event generation … is needed to maintain grid reliability." History and future projections show that the need is far less than full time and, in total, may only amount to 81 days over the entire 18-20 month period.[31] Therefore, given the relatively low use of the Units, there is simply no need for the Department to require Dominion Virginia Energy to limit operations any more than the Renewal Order already does.

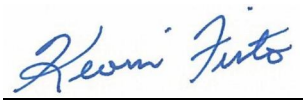
Finally, Sierra Club suggests that demand side management or distributive generation would reduce the number of hours of operation of Yorktown 1 and 2. The Renewal Order specifically requires PJM and Dominion to exhaust all reasonably available resources including demand side management and behind the meter generation sources prior to operating Yorktown Unit 1 or Yorktown Unit 2.[32] Sierra Club provides comments by Ariel Horowitz suggesting that alternatives for distributive generation or demand side management might be available to solve the problem. Horowitz, however, admits that he does not know the load levels or deficiencies that need to be addressed. [33] Moreover, far more robust solutions were carefully considered in the Corps permit process and failed to prove practicable. Such a demonstration for demand side management or distributive generation is made more difficult by the fact that Skiffes Creek Project is the chosen and authorized solution and any other alternative would have only a temporary benefit.

[31] *See* Renewal Application dated August 24, 2017, at page 3.
[32] Renewal Order at 2; Findings of Fact at 9, 10.
[33] Horowitz comments at 19.

IV. Conclusion

Dominion Energy Virginia respectfully requests that the Secretary grant its Motion and take into consideration this Answer.

Respectfully submitted,



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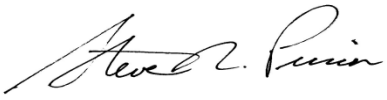

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Dated: October 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon:

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Dated at Richmond, VA this 20th day of October, 2017.

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