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November 23, 2005

VIA ELECTRONIC MAIL

Mr. Kevin Kolevar, Director
Office of Electricity Delivery and Energy Reliability
U.S. Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Docket No. EO-05-01

Dear Mr. Kolevar:

During the course of participating in the above-captioned Department of Energy (“DOE”) docket, Robert G. Burnley, Director of the Virginia Department of Environmental Quality (“Director”), has filed two pleadings regarding the District of Columbia Public Service Commission’s (“DC PSC”) Emergency Petition.¹ After initial uncertainty regarding the agency that would decide this matter and the applicable procedural rules,² you indicated in a November 15, 2005 letter to FERC Chairman Joseph T. Kelliher that the DOE intends to rule on this matter “in the near future.” Rather than burden the DOE with another pleading, the Director files this letter, by undersigned counsel, to briefly summarize the Director’s legal position for the

¹ The Director’s October 12, 2005 filing attached an October 11 Motion filed by the Director with FERC. The Director’s November 14, 2005 filing attached a November 10 Answer filed by the Director with FERC.

² The Emergency Petition sought relief from the DOE, the Federal Energy Regulatory Commission (“FERC”), and/or the Department of Homeland Security.

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convenience of the DOE. To the extent recent filings by other parties have caused confusion, this letter will also serve to clarify the Director's position.³

Under Virginia law, the Director has the responsibility to protect human health and the environment. Among his obligations is the implementation of the health-based National Ambient Air Quality Standards ("NAAQS"), including the prevention of localized NAAQS exceedences.⁴ Prior to its August 24, 2005 shutdown, the Director determined that continued operation of Mirant's Potomac River Generation Station Power Plant ("Plant") at then-current levels would result in localized NAAQS exceedences. As a result of this determination, the Director requested, by letter dated August 19, 2005, that Mirant "immediately undertake such action as is necessary to ensure protection of human health and the environment . . . including the potential reduction of levels of operation, or potential shut down of the facility." A requirement that the Plant operate at pre-August 24, 2005 levels will result in localized NAAQS exceedences and prevent the Director from discharging his obligation to protect human health.⁵

Although the Commonwealth is fully cognizant of the important reliability concerns raised in the DC PSC's Emergency Petition, Congress has not given the Federal Power Act primacy over the Clean Air Act. Nowhere in the Federal Power Act -- § 202(c) or elsewhere -- is there language providing that reliability concerns take precedence over federal and state environmental laws. Further, § 201(a) of the Federal Power Act expressly preserves state jurisdiction over electric generation. The Federal Power Act also does not preempt Virginia law or the Director's authority pursuant to Virginia law, because obligations arising under the federally approved State Implementation Plan are a matter of both state and federal law.⁶

Relief should not be granted in this matter absent compliance with the National Environmental Policy Act. Careful consideration must be given to the impacts on the human health and the environment of the citizens of the Commonwealth.⁷ Given the passage of time since the Emergency Petition was filed, such a review, even if not legally required, is both prudent and possible.

Action on the Emergency Petition requires the consideration of significant issues of first impression regarding the intersection of the Federal Power Act and state and federal environmental laws. In making its decision, the DOE must consider how its action will impact

³ Namely, the Response of the District of Columbia Public Service Commission filed on November 8, 2005 with the DOE and the Motion for Leave to Answer and Answer of Potomac Electric Power Company filed on November 15, 2005 with FERC.

⁴ See the Director's October 11 Motion at 5-11; November 10 Answer at 9-19.

⁵ See the Director's October 11 Motion at 11-12; November 10 Answer 9-19.

⁶ See the Director's October 11 Motion at 10-11; November 10 Answer at 20-22.

⁷ See the Director's October 11 Motion at 13-14; November 10 Answer at 23-25.

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the States' abilities to effectively implement state and federal laws designed to protect the health and safety of their respective citizens.

Yours Truly,

A handwritten signature in black ink that reads "Ira Kasdan". The signature is written in a cursive style with a large, sweeping initial "I".

Ira T. Kasdan
Steven L. Humphreys
Counsel to the Commonwealth of Virginia
Department of Environmental Quality

Enclosure

cc: Director Robert G. Burnley
Attorney General Judith Williams Jagdmann