

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Emergency Petition and Complaint of) Docket No. EL05-145-000
District of Columbia Public Service)
Commission)

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF
POTOMAC ELECTRIC POWER COMPANY**

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213, Potomac Electric Power Company (“Pepco”) hereby moves for leave to answer and answers the Motion for Leave to File Consolidated Answer and Consolidated Answer of Robert G. Burnley, Director of the Commonwealth of Virginia Department of Environmental Quality filed on November 10, 2005 (“VDEQ Answer”). For the reasons detailed below, Pepco requests that the Commission reject VDEQ’s Answer, or in the alternative, if the Commission accepts the VDEQ Answer, the Commission should also accept Pepco’s answer to correct inaccuracies in the VDEQ Answer, and to clarify the record.

The VDEQ Answer contains 25 pages of legal argument that, as discussed below, does not support its argument that the Commission is precluded from directing Mirant¹ to continue operating the Potomac River Generating Station power plant (“Potomac River Plant” or “Plant”). Pepco provides this brief response to show that VDEQ’s arguments do not preclude the Commission from acting expeditiously in this proceeding. As set forth earlier pleadings filed by Pepco and others, this proceeding involves significant reliability issues for the

¹ “Mirant” means Mirant Corporation and its public utility subsidiaries, including Mirant Potomac River, LLC, a wholly owned subsidiary of Mirant Corporation that owns and operates the Potomac River Plant.

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nation's capital. Pepco is eager to have this matter resolved and is pleased to know the matter is on the Commission's agenda for its November 17, 2005 meeting.

I. STATEMENT OF ISSUES

1. Whether the Commission should accept the VDEQ Answer and, if so, whether the Commission should also accept Pepco's answer.

Pursuant to the Commission's rules, answers to answers are generally not permitted unless good cause is demonstrated. 18 C.F.R. § 385.213(a)(2) (2005).

2. Whether the Commission may issue an order directing Mirant to continue operations at the Plant to maintain reliability of electricity service without conflicting with any order or directive of VDEQ.

Action by the Commission directing the Potomac River Plant to continue operations in compliance with its existing operating permits does not conflict with any VDEQ order or directive.

II. DISCUSSION

1. **The Commission Should Reject the VDEQ Answer.**

Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a), answers to answers are generally not permitted unless good cause is demonstrated.² The Commission has denied answers to answers when they add nothing to the record.³ In this case, VDEQ has not shown the requisite good cause and its answer should not

² See 18 C.F.R. § 385.213(a)(2) (2005) ("An answer may not be made to...an answer...unless otherwise ordered by the decisional authority."); see also *Southern California Edison Co.*, Docket No. ER88-83-000, "Order Denying Motion" (Jan. 10, 1992) (J. Nacy) (unreported) ("Answers to answers are barred by Rule 213(a)(2), absent an authorizing order, and for good reason. There is an ancient and trite (but true) observation to the effect that all litigation must have an end.").

³ See, e.g., *Duke Electric Transmission*, 113 FERC ¶ 61,139 (2005); *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,409 at P 36 (2005) (rejecting answers to answers, citing Rule 213(a)).

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be considered by the Commission. VDEQ has already taken advantage of numerous opportunities to provide the Commission with its views, as have all parties. In its most recent pleading, VDEQ provides no new facts and, instead, argues legal issues that were raised or should have been raised earlier. Moreover, contrary to VDEQ's claims, the record in this proceeding is substantial and all parties have been afforded an adequate hearing. Therefore, VDEQ has not demonstrated that good cause exists for filing yet another pleading in this proceeding.

In the event that the Commission accepts VDEQ's impermissible answer, Pepco respectfully requests that the Commission grant it leave to respond to VDEQ's latest pleading. In its efforts to raise more arguments via this new pleading, VDEQ mischaracterizes the record and arguments set forth by Pepco and PJM. It would therefore be equitable to permit Pepco to respond if the Commission accepts VDEQ's pleading.

2. A Commission Order Directing Mirant To Continue Operations at the Potomac River Plant Would Not Conflict With Any Order or Directive of VDEQ.

Action by the Commission on the District of Columbia Public Service Commission's ("DC PSC") emergency petition to order the Potomac River Plant to continue operations will not conflict with any order or action by VDEQ. The bottom line in this case is that VDEQ, as it now admits "did not order the Plant to shut down."⁴ As a result, action by the Commission directing the Potomac River Plant to continue operations in compliance with its existing operating permit does not conflict with any VDEQ order and does not necessitate a violation of any rule or law, contrary to VDEQ's assertions.

⁴ VDEQ Answer, at 14 n.9.

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The VDEQ Answer purports to respond to points that Pepco and PJM Interconnection, L.L.C. (“PJM”) in fact did not make, and highlights that there is in fact little disagreement on the salient issues. Indeed, the VDEQ Answer shows that there is *no* disagreement on the key points that support prompt resolution of this matter by the Commission.

First, Pepco and PJM did not argue that 9 VAC 5-20-180(I) does “not authorize[] . . . shutdown . . . or, presumably, . . . any other type of action,”⁵ or that “the Director had no authority”⁶ under this provision. Rather, Pepco and PJM said that this provision authorizes shutdown only under the narrow circumstances prescribed in the provision, and then only *as a matter of last resort*.⁷ In any event, this point is now moot. As VDEQ now concedes, “the Director did not order the plant to shut down, but rather requested pursuant to 9 VAC 5-20-180(I) that it take whatever steps were necessary, including reduction in level of operation, to prevent the [national ambient air quality standards (“NAAQS”)] exceedances” suggested by conservative air quality modeling.⁸

Second, Pepco and PJM did not argue that the VDEQ August 19, 2005 letter⁹ was “[r]eviewable by the Commission.”¹⁰ As VDEQ admits, the August 19, 2005 letter is not a shutdown order. That letter merely directs Mirant to provide VDEQ with “[a] summary of the

⁵ *Id.* at 9.

⁶ *Id.* at 10.

⁷ Pepco/PJM Answer, at 10 n.18 (“VDEQ may order a shut down only under ‘worst case conditions’ after finding ‘there is no other method of operation to avoid a violation.’”).

⁸ VDEQ Answer, at 14 n.9.

⁹ Letter from R.G. Burnley, Director, VDEQ, to L.D. Johnson, Mirant (August 19, 2005) (“VDEQ August 19, 2005 Letter”).

¹⁰ VDEQ Answer, at 16.

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actions being taken” to address modeled exceedances.¹¹ In the VDEQ Answer, VDEQ acknowledges that it has not ordered the Plant to shut down, but rather has ordered Mirant to develop a schedule for addressing modeled exceedances “on a timely basis.”¹² As VDEQ explains, “[p]ursuant to an administrative Order on Consent . . ., Mirant agreed to perform the downwash modeling study . . . [and] to then submit and comply with a schedule for eliminating and preventing the [modeled] exceedances [sic] on a timely basis.”¹³ As a result, VDEQ and the U.S. Environmental Protection Agency (“EPA”) are “actively working to determine the appropriate level of operation by the Plant.”¹⁴ This point, too, is moot. Action by the Commission on the DC PSC’s emergency petition directing the Plant to continue operations does not prevent any of these things from occurring. Nor would action by the Commission necessarily contradict any findings made by either VDEQ or EPA.

Third, Pepco and PJM have not argued that “unless the Plant has violated a specific emissions limitation under its operating permits, it cannot be found to be in violation of the Virginia Air Act or the [Clean Air Act (“CAA”).”¹⁵ Rather, Pepco and PJM observed that the Plant does *not* violate any emission limitation for the pollutants at issue that VDEQ has established to protect the NAAQS and that are contained in Virginia’s state implementation plan (“SIP”). If VDEQ believes that the modeling study suggests a need to establish different or additional emission limitations, it has authority to undertake a proceeding to do so. Action

¹¹ VDEQ August 19, 2005 Letter, at 2.

¹² VDEQ Answer, at 17.

¹³ *Id.* at 16-17.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 19.

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on the part of the Commission to order the Plant to continue operations does not impede that authority. In fact, VDEQ now concedes that its emergency regulations do not apply here because no monitored exceedances of the NAAQS have occurred.¹⁶

Fourth, as Pepco and PJM observed, the National Environmental Policy Act (“NEPA”) does not apply to the continued operation of an existing facility.¹⁷ Similarly, obligations under the general conformity provisions of the CAA do not apply to the continued operation of an existing facility.¹⁸ As a result, an order by the Commission to continue operation of the Potomac River Plant as it has always operated or at some reduced level of operation that will maintain reliability does not constitute a federal action that triggers obligations under NEPA or the general conformity provisions of the CAA.

Finally, VDEQ now “recognizes that the Commission has FPA § 207 jurisdiction to order the furnishing of adequate and sufficient service under certain circumstances,” *i.e.*, after a hearing and consideration of health and safety impacts (including reliability impacts).¹⁹ The VDEQ Answer demonstrates that it has not ordered the Plant to shut down. Instead, VDEQ

¹⁶ *Id.* at 16 (“[A]s PEPCO/PJM point out, 9 VAC 5, ch. 70, Table VII-C(II)(A) applies only in situations where there is an actual monitored exceedance [sic] at a monitoring site.”).

¹⁷ Pepco/PJM Answer, at 14-18.

¹⁸ CAA § 176(c)(1), 42 U.S.C. § 7506(c)(1). There is a disagreement between Pepco and PJM on one hand, and VDEQ on the other, as to whether general conformity would apply to the pollutants at issue here. *Compare* Pepco/PJM Answer, at 13, *with* VDEQ Answer at 22-23. This issue is now moot given that VDEQ has admitted that it has not ordered the Potomac River Plant to shut down, because ordering the Plant to continue operations does not constitute federal action that triggers the general conformity requirements. CAA § 176(c)(1), 42 U.S.C. § 7506(c)(1). Moreover, an order requiring Mirant to continue operations at the Plant in compliance with its operating permits by definition conforms to Virginia’s SIP because the terms of the permits are part of the SIP. *See* 40 C.F.R. § 52.2420(d).

¹⁹ VDEQ Answer, at 9.

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has directed Mirant develop a schedule to address the modeled exceedances. Nothing requested in the DC PSC emergency petition conflicts with VDEQ's action here. Nor is the Commission required to substitute its judgment for that of VDEQ or another agency as to matters unrelated to reliability concerns.²⁰ The Commission therefore should immediately take action to order Mirant to continue operations of the Potomac River Plant to maintain reliability of electricity service in the Washington, D.C. region, in compliance with the operating permits issued by VDEQ and the Virginia SIP.

III. COMMUNICATIONS

Please add the following individuals to the service list in this proceeding:

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²⁰ See *id.* at 16.

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IV. CONCLUSION

For the foregoing reasons, the Commission should issue an order on an expedited basis directing Mirant to continue operating its plant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served on the official service list designated by the Secretary in this proceeding on this 15th day of November 2005.

/s/

Linda L. Walsh

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