UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Virginia Electric and Power Company	)	Order No. 202-17-2
(Dominion Energy Virginia)	)	

MOTION OF VIRGINIA ELECTRIC AND POWER COMPANY TO STRIKE THE PROCEDURALLY DEFICIENT PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO ANSWER AND ANSWER OF VIRGINIA ELECTRIC AND POWER COMPANY

Pursuant to Rules 212 and 713(c)(3) 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), the Virginia Electric and Power Company ("Dominion Energy Virginia") hereby moves that the Secretary for the Department of Energy ("Secretary" and "Department") strike the putative petition for rehearing of the Secretary's Order No. 202-17-2 ("Order") submitted by the Sierra Club on July 13, 2017 ("Petition for Rehearing").[1] As explained below, Dominion Energy Virginia requests that the Secretary strike the Petition for Rehearing because it fails to set forth the matters relied upon by the party requesting rehearing. Specifically, Sierra Club does not, as required by § 313(b) of the Federal Power Act ("FPA"), assert that it is aggrieved by the Order. In the alternative, pursuant to Commission Rules 212 and 213, 18 C.F.R. §§ 385.212, 385.213, Dominion Energy Virginia respectfully submits to the

[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.

Secretary this Motion for Leave to Answer ("Motion") and Answer ("Answer") to the Petition for Rehearing.

I. Point of Order

As an initial point of order, while the 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 . . . is issued by the Commission." The Order issued by the Secretary is explicitly directed at Dominion Energy Virginia: Dominion Energy Virginia is "order[ed]" to operate Units 1 and 2 of the Yorktown Power Station ("Yorktown") as directed by PJM Interconnection, L.L.C. ("PJM"); Dominion Energy Virginia and PJM are "direct[ed]"to develop and implement a dispatch methodology to operate Yorktown Units 1 and 2 only when called upon to address reliability need, provide the Department with that methodology, and "report" all dates on which Yorktown Units 1 and 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 Order is issued, it is a respondent and, therefore, a party of right to this proceeding.[3]

II. Motion to Strike

The Petition for Rehearing fails to satisfy statutory procedural requirements for an application for rehearing. Specifically, FPA § 313(a) states that "[a]ny person . . . <u>aggrieved</u> by an order issued by the [Department] in a proceeding under this Act to which such person . . . is a

[2] 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 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 Order.

party may apply for rehearing within thirty days after the issuance of such order."[4] However, Sierra Club does not explicitly identify itself as a party aggrieved by the Order.

The Petition for Rehearing includes a motion to intervene supported by a section entitled "Basis for Intervention" which states that "Sierra Club and its members have an interest in the Order."[5] Even assuming this statement of interest sufficiently "state[s] the movant's interest in sufficient factual detail" to support a motion to intervene under the Commission Rule 214(b)(2), that would only make Sierra Club a party to this proceeding. However, an application for rehearing under FPA § 313(a) can only come from an aggrieved party to this proceeding. The "Basis for Intervention" section states that Sierra Club will be "affected" by the Order.[6] However, nowhere in that section, the subsequent section entitled "Request for Reconsideration," nor anywhere else in the Petition for Rehearing does Sierra Club affirmatively state that it is a party aggrieved by the Order, nor does it state facts that would amount to it being an aggrieved party.

While Sierra Club goes out of its way to explicitly support its motion to intervene under the Commission Rules through a statement of interest, it does not do the same to meet the procedural requirements set forth in FPA § 313(a) for an application for rehearing.[7] Procedural regulations cannot supplant statute, and adherence to the Commission Rules alone does not suffice under FPA § 313(a).

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[4] Emphasis added.

[5] Petition for Rehearing at 3-4.

[6] *Id.*

[7] *See Sierra Club v. Morton*, 405 U.S. 727 (1972) (finding that Sierra Club's "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" did not support its standing under the Administrative Procedures Act as a person "aggrieved" by a U.S. Forrest Service decision to allow development of the Mineral King Valley.).

The Petition for Rehearing does not state that Sierra Club is an aggrieved party. It therefore fails to meet the basic requirements under FPA § 313(a) of an application for rehearing of the Order.[8] The Petition for Rehearing should be deemed procedurally deficient and stricken from this proceeding.[9]

III. Motion for Leave to Answer

Assuming that the Department determines that the Petition for Rehearing meets the procedural requirements of an application for rehearing under FPA § 313(a), then Dominion Energy Virginia respectfully moves for leave to answer the Petition for Rehearing. 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).[10] 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.[11] 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 decision on the request for rehearing.[12] As demonstrated below, all of these criteria are met by

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[8] *C.f. Notice Rejecting Request for Rehearing and Dismissing Request for Stay*, 148 FERC ¶ 61,073, Jul. 29, 2014 (Commission notice rejecting and rendering moot a Sierra Club request for rehearing of Commission order because the petition was filed 25 seconds late, in violation of Commission Rule 2001.).

[9] The Order was issued on June 16, 2017. The thirty-day period set forth in FPA § 313(a) to apply for rehearing of the Order closed on July 16, 2017. As such, an application for rehearing of this Order can no longer be filed, and Sierra Club may not cure the deficiency of its Petition for Rehearing.

[10] 18 C.F.R. § 385.213.

[11] *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.").

[12] *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.

the Answer. Therefore, Dominion Energy Virginia respectfully requests that the Secretary grant its Motion because the Answer will help clarify the record and contribute to an understanding of the operation and/or effects of the Order.

IV. Answer

A. The Order Addresses an Emergency Under FPA 202(c).

This Answer incorporates by reference the information provided by PJM in its Motion for Leave to Answer and Answer ("PJM Answer"). The PJM Answer, as well as PJM's original application for the Order ("Application"),[13] provides ample, detailed information as to the emergency conditions created by the deactivation of Yorktown Units 1 and 2 in April 2017.

Put in simple terms, Yorktown Units 1 and 2 are like an emergency room for the electric grid. An emergency room responds to inevitable but not-yet-specifically-identified emergencies. It does not cease to be an emergency room during times of unuse, nor does it cease to be an emergency room because it treats probable but often unexpected injuries or illnesses. In that same way, Yorktown Units 1 and 2 are needed to respond to possible but not-yet-specifically-known conditions that are formed by a combination of electricity load (affected by weather and other parameters) and inadequate availability of generation and transmission capacity. That the units remain unused and in reserve for conditions that are conceptually foreseeable (hot days, natural disasters impacting equipment, equipment failures, or even physical or cyber acts of vandalism) but unpredictable in fact or time does not change the fact that the current circumstances presents an emergency. An emergency is "an urgent need for assistance or

[13] Letter from Steven R. Pincus, Assoc. Gen. Counsel, PJM, to Hon. James Richard Perry, Secretary, June 13, 2017.

relief."[14] PJM's direction that Dominion Energy Virginia provide urgent assistance to the grid by running Yorktown Units 1 and 2 in July demonstrates that emergency.[15]

Sierra Club strains to cloud the concept of "emergency," attempting to break the word down into independent components upon which it can throw various legal arguments.[16] However, for our customers, the issue is simpler. They flip a switch and expect power to be available – for water treatment plants or military facilities, to keep hospitals from running on reduced emergency power, or for other public safety operations. If that power is not available, they will not care whether the word "emergency" should be broadly or narrowly construed. There will be no doubt in their minds that an emergency exists. It is common sense.

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 with any applicable Federal, State, or local environmental law or regulation and minimizes any adverse environmental impacts." The PJM Answer describes in detail the manner in which the Department has fulfilled these requirements in the Order. Sierra Club, however, reads additional

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[14] "Emergency" *Merriam Webster's Dictionary*, https://www.merriam-webster.com/dictionary/emergency.

[15] As directed by the Order, or as otherwise necessary, Dominion Energy Virginia and PJM will provide details on the Yorktown operation and estimated emissions since the Order's issuance.

[16] For example, Sierra Club notes that Merriam-Webster's Dictionary defines an emergency as an "unforeseen combination of circumstances . . . that calls for immediate action." Petition for Rehearing at 5. Sierra Club thus alleges that the Order does not address an emergency because the pending retirement of Yorktown Units 1 & 2 due to the Mercury and Air Toxics Standards has been known for years. *Id.* However, this does not change the need for urgent assistance that would exist should these generating units be unavailable to meet peak load. Notably, Sierra Club fails to mention that Merriam Webster's second definition for "emergency" is not predicated on foreseeability at all. Rather an emergency is simply "an urgent need for assistance or relief." "Emergency" *Merriam Webster's Dictionary*, https://www.merriam-webster.com/dictionary/emergency.

stringent requirements into FPA § 202(c)(2) that reflect neither the statute nor Congressional intent.

1. The Statue Requires a Proper Order but not a Specific Outcome.

Sierra Club alleges that the Department was statutorily obligated to craft the Order to include specific "limitations" that have a "clear method to review or cure any deficiencies or violations" to "ensure" that PJM and Dominion Energy Virginia meet the requirements of FPA § 202(c)(2) in operating the Yorktown units.[17] Sierra Club further alleges that these statutory obligations were so singularly vested in the Department that the Order's requirement that PJM and Dominion Virginia Energy create an implementation methodology violates the U.S. Constitution under the nondelegation doctrine.[18]

At its heart, Sierra Club's basic assertion is that FPA § 202(c)(2) requires the Department, and only the Department, to ensure the outcome of an FPA § 202(c) order. However, the statutory language, particularly when viewed in light of its legislative history, only requires that the Department ensure the content of an FPA § 202(c) order. Further, the Department is provided substantial flexibility in doing so.

Looking first to the statute itself, while FPA § 202(c)(2) imparts upon the Department a duty to "ensure," even Sierra Club recognizes that such obligation extends only to an FPA § 202(c) order "itself."[19] Specifically, under FPA § 202(c)(2), the Department "shall ensure" that "such order requires" operation only to meet the emergency, that "such order . . . is consistent" with environmental laws, and that "such order . . . minimizes" adverse environmental impacts to the maximum extent practicable. If Congress wanted to use FPA § 202(c)(2) to impose

[17] Petition for Rehearing at 10.

[18] *Id.* at 10-11.

[19] *Id.* at 10.

substantive obligations on the Department to ensure an outcome, it would have subjected these requirements on an outcome, not the order itself. In other words, it would have required the Department to ensure that <u>such generation, delivery, interchange, or transmission of electric energy ordered by the Department</u> be required only to meet the emergency, be consistent with environmental laws, and minimizes adverse environmental impacts to the maximum extent practicable. Congress did not write FPA § 202(c)(2) in this manner because it did not intend to impose upon the Department a requirement to craft exhaustive implementation procedures in the face of responding to a reliability emergency.

2. Legislative History is Contrary to Sierra Club's Position.

Legislative history confirms this understanding. Subparagraphs (2) – (5), pertaining to environmental liabilities, were added to FPA § 202(c) by the 114th Congress in late 2015 through H.R. 22, the "Fixing America's Surface Transportation Act" ("FAST Act"). The Conference Report for the FAST Act makes no mention of complex implementation requirements. Rather, that Conference Report states that Congress amended FPA § 202(c) "[t]o <u>ensure</u> that EGUs and other facilities critical to electric reliability are available for service as needed . . . ."[20]

Earlier legislative history is even clearer that Congress did not intend to impose complex procedural requirements on an FPA § 202(c) order. The precise language of FPA § 202(c)(2) was first introduced during the 112th Congress in the version of H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012," that was reported to the House of Representative by the Committee on Energy and Commerce. The Committee Report for H.R. 4273, in a section entitled "Balancing environmental considerations," explains the intention of those who drafted that language:

[20] H.R. REP. NO. 114-357 at 542 (emphasis added).

> A legislative solution to the conflict described herein should balance reliability considerations with environmental interests. Such an approach is consistent with what DOE has expressly sought to do in the past when utilizing its section 202(c) emergency authority. For example, in the 2005 DOE Order . . . ordered Mirant to "operate in a manner that provides reasonable electric reliability, but that also minimizes any adverse environmental consequences from operation of the Plant." Accordingly, in issuing a section 202(c) order that may result in a conflict with an environmental law, H.R. 4273 requires DOE, to the maximum extent practicable, to ensure the order is consistent with all applicable environmental laws and regulations and minimizes adverse environmental impacts that may occur as a result of the emergency directive.[21]

Thus, in drafting FPA § 202(c)(2), Congress intended that future FPA § 202(c) orders be similar to the Department's 2005 order to the District of Columbia Public Service Commission requiring the Mirant Corporation to operate the Potomac River Generating Station ("2005 DOE Order").[22] In the discussion section of the 2005 DOE Order, the Secretary stated, "In this order, I have <u>sought</u> to harmonize [reliability and environmental] interests to the extent reasonable and feasible by ordering Mirant to operate <u>in a manner</u> that provides reasonable electric reliability, but that also minimizes any adverse environmental consequences from operation of the Plant."[23] Notably, the 2005 DOE Order did not require complex implementation measures, nor did it explicitly order that any adverse environmental consequences by minimized. Rather the 2005 DOE Order, upon which Congress based FPA § 202(c)(2), contained ordering paragraphs with requirements intended to accomplish that objective. Indeed, these provisions are strikingly similar to this Order, such as limiting operation to only those hours when needed as specified by PJM and directing Mirant Corporation to submit an implementation plan.[24]

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[21] H.R. Rep. No. 112- at 7.

[22] Order No. 202-05-3, Docket No. EO-05-01, Dec. 20, 2005.

[23] 2005 DOE Order at 12-13 (emphasis added).

[24] *Id.* at 10-11.

Therefore, FPA § 202(c)(2) only outlines what the Department must include in an FPA § 202(c) order, and provides the Department substantial flexibility in how those requirements are fulfilled. For this reason, Sierra Club's nondelegation arguments also fail. Indeed, like the Order, the template 2005 DOE Order upon which FPA § 202(c)(2) is based directed a private company to develop an implementation plan.[25]

3. Sierra Club's Regulatory Arguments are Misplaced.

Sierra Club further asserts that the Order is inconsistent with the Department's own regulations by not requiring "firm arrangements" to comply with environmental laws,[26] and not engaging in a public interest analysis of "reasonable alternatives" that could act as such firm arrangements.[27] However, Sierra Club outright misrepresents the Department's regulations and illogically misreads FPA § 202(c)(2) to invent in it a broad public interest standard that does not exist.

According to Sierra Club, "[FPA § 202(c)(2)'s] requirement for maximum practicable compliance with environmental laws demands 'firm arrangements to resolve the problem.'"[28] This is simply not true. The Department's regulations implementing FPA § 202(c) state that such "firm arrangements" are merely "expected" and only to resolve the "problem" causing the

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[25] Nor do the cases cited by Sierra Club provide support for this argument. *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir 2014) pertains to agency obligations under an injunction order issued by an exasperated court in a long drawn-out case, not flexibly written statutory language. Likewise, *Perot v. Federal Election Com'n*, 97 F.3d 553(D.C. Cir 1996), actually comes to the opposite conclusion to that for which it is proffered by Sierra Club. *See* F.3d at 560 ("The contention that the regulation delegates authority to [a private organization] because it does not spell out precisely what the phrase 'objective criteria' means goes far beyond the normal usage of the term 'delegation.'").

[26] Petition for Rehearing at 11-12.

[27] *Id.* at 12.

[28] *Id.* at 11-12 (incorrectly citing to 10 C.F.R. § 205.370, the proper citation is to § 205.371).

emergency.[29] This language does not apply to FPA § 202(c)(2)'s requirement to minimize adverse environmental impact. Nor is there any reasonable way to argue that these regulations, which were promulgated in 1981,[30] contemplated the language in FPA § 202(c)(2) that was passed over three decades later in the 2015 FAST Act.

4. Public Interest Review is Narrow.

Finally, the Department is not, as Sierra Club claims, required to conduct a broad public interest analysis of "firm arrangements" or "reasonable alternatives" when issuing an FPA § 202(c) order.[31] Rather, FPA § 202(c)(2) requires a far more narrow analysis of public interest, the Department "shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to . . . serve the public interest." Thus, the Department's public interest analysis when issuing an FPA § 202(c) order need go no further than the question of whether enough electricity is being generated, delivered, interchanged, or transmitted to serve the public.[32] The Order meets this requirement.

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

Sierra Club asserts that the Department has not complied with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), because the Department has not shown that an emergency exists to prevent immediate compliance with NEPA and because issuing the Order cannot be categorically excluded from preparing an environmental impact

[29] 10 C.F.R. § 205.371. In any case, Dominion Energy Virginia has made "firm arrangements" to address the emergency prompting the Order, through seeking to build new transmission infrastructure. However, organizations including the Sierra Club have worked to delay action on those firm arrangements.

[30] 46 Fed. Reg. 39,987 (Aug. 6, 1981).

[31] Petition for Rehearing at 12.

[32] As such, Sierra Club's citation to Commission cases like *Orion Power N.Y. Gp II, Inc.*, 104 ¶ 612,118 (Aug. 13, 2002), is inapplicable. *Orion* pertains to a hydropower license sought under FPA § 15(2), which requires the Commission to examine whether a proposal is "best adapted to serve the public interest." This is a far broader public interest standard than the very narrow analysis called for by FPA § 202(c)(2).

statement or environmental assessment under NEPA.[33] Sierra Club misinterprets the Department's NEPA analysis and subsequent categorical exclusion determination. The Department did not rely on the emergency nature of the Order to ignore or circumvent its NEPA requirements. Further, Sierra Club fails to recognize authority granted by Congress in the FPA regarding applicability and enforceability of environmental law while the Order is in effect. The Department appropriately determined that issuing the 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").[34] 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").[35] 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."[36]

Categorical exclusions are individually determined by federal agencies using agency-specific procedures.[37] The Department establishes categorical exclusions pursuant to a

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[33] Petition for Rehearing at 13-14.

[34] 42 U.S.C. § 4332(c).

[35] 40 C.F.R. § 1501.4(a)-(c).

[36] *Id.* at § 1508.4.

[37] *Id.* at §1501.4(a)(2).

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.[38] This record is based on the Department's experience, the experience of other agencies, completed environmental reviews, professional and expert opinion, and scientific analyses.[39] The Department also considers public comment received during the rulemaking.[40]

Categorical exclusions are not exemptions or waivers of NEPA review, "they are simply one type of NEPA review."[41] 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.[42] 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.[43]

2. The Order fits within the Power Management Categorical Exclusion

The Department's categorical exclusions include the exclusion applied in issuing the Order, for activities related to power marketing services and power management activities.[44] 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.[45]

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[38] 76 Fed Reg. 63,765 (Oct. 13, 2011).

[39] *Id*.

[40] *Id*.

[41] 75 Fed. Reg. 75,631.

[42] *Id*.

[43] *Id*.

[44] 10 C.F.R. Pt. 1021, Subpt. D, App. B, B4.4.

[45] *Id*.

As part of its environmental review responsibilities under NEPA, a Department NEPA Compliance Officer was required to examine the proposed 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 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.[46] 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 Order, the Department applied a single categorical exclusion that applies to power marketing and services and activities. In the 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."[47] This type of activity fits squarely within the power marketing and services exclusion, which includes load balancing "that helps ensure system reliability by managing energy resources to be equal with load."[48]

[46] 75 Fed. Reg. at 75,631.

[47] Application at 2.

[48] 76 Fed. Reg. 63,777 (Oct. 13, 2011).

3. Sierra Club's NEPA arguments are meritless.

Sierra Club first argues that the Department is not "excused" from complying with NEPA because of an emergency.[49] Dominion Energy Virginia agrees. In fact, however, the Department did comply with NEPA through the application of a categorical exclusion. As described above and by the CEQ, application of a categorical exclusion is "one type of NEPA review." The Department did not look over or set aside its NEPA responsibilities; it complied by thoroughly analyzing the proposed action and determining that the action fits within the activities described in the categorical exclusion. This analysis is documented in the Record of Categorical Exclusion Determination accompanying the Order.

The Department properly applied the power marketing and services categorical exclusion because the operations of the generating projects would remain within normal operating limits. As described in the Application and in the 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 operational limitations, thus defining "normal operating limits." In its Order, the Department noted that it had consulted with the EPA and reviewed estimated emissions and water usage data, and that the Order "continues the operational limitations" in the EPA's ACO.[50] These limits, approved by a federal agency with jurisdiction, can only be considered "normal."

Finally, Sierra Club's argument that the Order compels violations of EPA's Mercury and Air Toxics Standards under the Clean Air Act, which consequently cannot be considered "normal operations,"[51] is a red herring. Congress carefully crafted FPA § 202(c) to take into

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[49] Petition for Rehearing at 13-14.

[50] Order at 2.

[51] *Id.* at 14.

account potential violations of federal environmental laws that may result from the issuance of an emergency Order. When issuing an FPA § 202(c) order, 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 with any applicable Federal, State, or local environmental law or regulation and minimizes any adverse environmental impacts."[52] As noted herein and in the PJM Answer, the Order fully complies with these requirements by limiting "operation of the units only when called upon by PJM for reliability purposes,"[53] which will minimize adverse environmental impacts and also remain consistent with the approach taken by the EPA. In the event, however, that compliance with the 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."[54] Thus, any emissions resulting from compliance with the 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 Order would not result in violations of the Clean Air Act and was consequently appropriate.

[52] FPA § 202(c)(2).

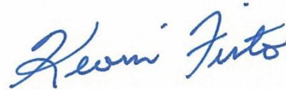
[53] Order at 2.

[54] FPA § 202 (c)(3).

V. Conclusion

Dominion Energy Virginia moves that the Secretary strike the Petition for Rehearing. If the Secretary determines that the Petition for Rehearing meets the procedural requirements set forth in FPA § 313(a), then Dominion Energy Virginia respectfully requests that the Secretary grant Dominion Energy Virginia's Motion and take into consideration this Answer.

Respectfully submitted,



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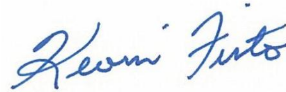
Dated: August 1, 2017

CERTIFICATE OF SERVICE

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

Pat Hoffman, U.S. Department of Energy
Katherine Konieczny, Department of Energy
Catherine Jereza, U.S. Department of Energy
Rakesh Batra, U.S. Department of Energy
Steven R. Pincus, PJM Interconnection, L.L.C.
Craig Glazer, PJM Interconnection, L.L.C.
Sanjay Narayan, Sierra Club

Dated at Richmond, VA this 1st Day of August, 2017.



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