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Hearing on Resolving Environmental and Grid Reliability Conflicts Act
Subcommittee on Energy and Power
Committee on Energy and Commerce
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Chairman Whitfield, Ranking Member Rush, and members of the Committee, I appreciate the opportunity to testify before you today on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." Although the Administration does not yet have a position on this proposed legislation, I would like to make several basic points that I hope will assist the Committee in its consideration of the bill. Based on past experience, EPA believes that the Executive Branch already has sufficient tools to address issues that may arise. Orders under Section 202(c) of the Federal Power Act have been very rare, and the EPA is aware of no instance in which compliance with such an order required any necessary conflict with environmental laws or regulations. Moreover, EPA does not believe that its recently promulgated power sector regulations -- including the mercury and air toxics standards (MATS) rule – change the situation. Further, the bill could have the unintended consequence of creating problems that would not otherwise exist. It could actually increase the likelihood of conflict between electric reliability and compliance with environmental laws, by removing important incentives to take timely actions necessary to avoid or minimize such conflicts. Finally, the bill also could unnecessarily endanger public health.

Section 202(c) of the Federal Power Act provides that, if the Secretary of Energy determines that "an emergency exists," by reason of a sudden increase in demand for electricity or a shortage of electricity or facilities for the generation or transmission of electricity, he can order "such generation, delivery, interchange, or transmission of electric energy as in [the Secretary's] judgment will best meet the emergency and serve the public interest." The Secretary can exercise this authority either upon his own motion or upon complaint by any person, with or without notice or hearing. DOE regulations provide that an "emergency" for these purposes can result, among other things, from "a regulatory action which prohibits the use

of certain electric power supply facilities" or "[e]xtended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities."[1i]

H.R. 4273 would make two key changes to Section 202(c). First, the bill would provide a blanket shield to any liability for violation of any Federal, State or local environmental law resulting from any action or omission necessary to comply with a Section 202(c) order. Second, it provides that a Section 202(c) order *should* "require generation, delivery, interchange or transmission of energy only during times necessary to meet the emergency and serve the public interest and, to the extent reasonable, be consistent with any other applicable Federal law, including any environmental law or regulation, and endeavor to minimize any adverse environmental impacts." This, however, is not a mandatory requirement, but a hortatory statement.

The history of section 202(c) orders does not demonstrate a need for legislation to override environmental requirements. Section 202(c) has been invoked only six times by the Department of Energy. To the EPA's knowledge, the only such order with regard to which it has been claimed that compliance resulted in a conflict with environmental requirements is the 2005 order concerning the Mirant Potomac River Generating Station ("Mirant Potomac")[2] I wish to emphasize two points here.

First, DOE, the EPA and the Virginia Department of Environmental Quality (VADEQ) worked cooperatively with one another and with Mirant to ensure that the Section 202(c) order minimized the risk of non-compliance with applicable environmental requirements. DOE's order was structured so as to minimize the likelihood of any violation of environmental requirement. The EPA, for its part, after close consultation with DOE, issued an administrative

[1] 10 C.F.R § 205.371

[2] GenOn Energy Inc. (formerly known as Mirant) has made recent statements concerning a citizen suit brought against Mirant in 2001 in connection with its Potrero Power Plant in the San Francisco area. This plant received an administrative order from the EPA to operate above the hours allowed in its operating permit, following a determination from the California Independent System Operator that such operation was necessary to assure electricity reliability in the San Francisco area. DOE did not, however, issue a Section 202 (c) order with respect to the plant that covered the same time period as the EPA's order. The Section 202 (c) order that DOE issued with respect to the 1999-2001 California electricity crisis had expired approximately two months before the EPA order was signed.

order prescribing conditions that allowed continued operation of the plant as required by the DOE order, but that minimized the adverse environmental consequences. Second, it is the EPA's understanding that DOE's order did not require any violation of environmental laws or requirements. Some have drawn attention to the fact that the Virginia Department of Environmental Quality (VADEQ) later fined Mirant approximately $30,000 for environmental violations while operating the plant pursuant to the DOE order.[3] It is the EPA's understanding, however, that VADEQ imposed this fine based on Mirant's failure to implement appropriate operating and maintenance procedures, not because of any violation that was compelled by DOE's order. That is, VADEQ's investigation found that Mirant could have operated the plant in a manner that was in compliance with the DOE and EPA orders, but failed to do so.

A Section 202(c) order is a tool of last resort. The need for such an order arises only when all of the many tools available to avoid a reliability problem have failed and the generation owner is unable or unwilling to undertake an action needed to correct that problem. It should not be surprising that this provision has rarely been invoked and that it has virtually never implicated any conflict with environmental compliance because generation owners, grid planners and operators, and state and federal regulators together have a very strong record of identifying and addressing potential reliability issues before any such conflict arises.

The EPA does not believe that its recently promulgated power sector regulations – including the Mercury and Air Toxics Standards (MATS) rule – change the situation or create any new rationale for amending Section 202(c). The EPA paid close attention to comments raised by stakeholders regarding the time available to achieve compliance with MATS and its other rules, as well its impacts on electric reliability. Before MATS was finalized, the EPA and the Department of Energy (DOE) conducted several analyses of its effects on electric generation resources.[4] The EPA's and DOE's analyses demonstrate that the vast majority, if not all, sources

[3] It is the EPA's understanding that the VADEQ and Mirant settled the violation in a consent order, which assessed a total penalty of $52,000; however, approximately $21,000 of the penalty was attributable to a separate and independent 2008 violation of a federal consent decree that required Mirant take undertake specific environmental projects to protect local residents from fugitive dust.

[4] Environmental Protection Agency (2011). "Resource Adequacy and Reliability in the IPM Projections for the MATS Rule" http://www.epa.gov/ttn/atw/utility/revised_resource_adequacy_tsd.pdf
Department of Energy (2011). "Resource Adequacy Implications of Forthcoming EPA Air Quality Regulations" http://energy.gov/sites/prod/files/2011%20Air%20Quality%20Regulations%20Report_A_120911.pdf

will be able to meet the MATS requirements within the time frames provided under the Clean Air Act.

The EPA's resource adequacy analysis for the MATS rule and the Cross State Air Pollution Rule projected that only a modest amount of generating capacity would become uneconomic to operate under the MATS standards, and removal of this capacity will not adversely affect capacity reserve margins in any region of the country. This retiring generation capacity is an average of more than fifty years old, relatively inefficient, and does not have modern pollution controls installed. In addition, new capacity will be added between now and 2015. It should be noted that over the last few years low natural gas prices and an aging coal generation fleet have been pushing the industry towards less reliance on coal and greater reliance on natural gas.

David Sandalow, DOE Assistant Secretary for Policy and International Affairs, summarized the DOE analysis as "demonstrat[ing] that new EPA rules – which will provide extensive public health protections from an array of harmful pollutants – should not create resource adequacy issues."[5] In addition, a recent Congressional Research Service report (January 2012)[6] reviewed industry data on planning reserve margins and potential retirement of units that do not currently meet the standards and concluded, based on these data "that, although the rule may lead to the retirement or derating of some facilities, almost all of the capacity reductions will occur in areas that have substantial reserve margins."

The EPA took steps in the final MATS rule to address stakeholder concerns that compliance with MATS could not be achieved within the maximum three-year compliance date authorized under the statute. In the final rule, the EPA described in detail the wide range of situations where we believe an additional year for compliance could be granted by permitting authorities. This fourth year – in addition to the three years provided to all sources – is provided by the Clean Air Act as needed to complete installation of control technologies.

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[5] http://energy.gov/articles/energy-department-releases-study-electricity-system-ahead-proposed-epa-air-quality
[6] James E. McCarthy, January 9, 2012. "EPA's Utility MACT: Will the Lights Go Out?" http://www.eenews.net/assets/2012/01/19/document_gw_03.pdf

The EPA is encouraging permitting authorities to make this fourth year broadly available to sources that require it to complete their compliance activities, including installing pollution control equipment, constructing on- or off-site replacement power, and upgrading transmission. The EPA is also encouraging that the fourth year be made available as needed to units that continue to operate for reliability purposes while other units are installing pollution controls.

The EPA is engaging in outreach to states and permitting authorities to help ensure that the fourth year for compliance is broadly available and that the process for sources to request and states to grant the extensions is clear and straightforward. States have used this provision before and they are very familiar with it. As a result, the EPA estimates that sources generally will have until spring of 2016 to comply – one year longer than our analysis indicates is necessary for most sources.

Although the EPA's analysis indicates that most, if not all, sources can comply within three years, and that the fourth year should be available in the broad range of situations described above, the EPA is also providing a clear pathway for units that are shown to be critical for electric reliability to obtain a schedule to achieve compliance within up to an additional year beyond the four years mentioned above. This pathway is set forth in a policy memorandum from the EPA's Office of Enforcement and Compliance Assurance.[7] As stated above, the EPA believes there will be few, if any, situations in which this pathway will be needed. In addition, in the unlikely event that there are situations where sources cannot come into compliance on a timely basis that do not fall into any of these categories, the EPA will address them on a case-by-case basis, at the appropriate time, to determine the appropriate response and resolution. This is consistent with its longstanding historical practice under the Clean Air Act.

As part of the Administration's commitment to maximize flexibilities under the law, MATS was accompanied by a Presidential Memorandum that directs the EPA to take a number of steps to ensure continued electric reliability. These steps include: 1) working with State and local permitting authorities to make the additional year for compliance with MATS provided

[7] EPA Memorandum December 16, 2011. "The Environmental Protection Agency's Enforcement Response Policy For Use of Clean Air Act Section 113(a) Administrative Orders in Relation To Electric Reliability and the Mercury and Air Toxics Standard" http://www.epa.gov/compliance/resources/policies/civil/erp/mats-erp.pdf

under section 112(i)(3)(B) of the Clean Air Act broadly available to sources; 2) working with the Department of Energy, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations, the North American Electric Reliability Corporation and regional electric reliability organizations, other grid planning authorities, electric utilities, and other stakeholders, as appropriate to promote early, coordinated, and orderly planning; and 3) making available to the public, including relevant stakeholders, information that describes the process for identifying circumstances where electric reliability concerns might justify allowing additional time to comply. The EPA is in the process of taking a number of steps to implement the directives in this memo.

The EPA is actively engaging power plants and other entities that will be involved in getting power plants retrofitted while maintaining the reliability of the electric grid. The EPA has held, and will continue to hold, a series of discussions with the Department of Energy, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations and other planning authorities, the North American Electric Reliability Corporation, regional electric reliability organizations, and generation owners and operators to promote early compliance planning, to support orderly implementation of the MATS standards, and to ensure that any potential, localized reliability concerns are identified and addressed. The EPA has started and will continue discussions with power plant owners and operators to help them understand their responsibilities under the standards and their role in early, coordinated, and orderly planning. The EPA is conducting specific outreach to stakeholders with unique concerns such as rural electric cooperatives, public power facilities, and investor-owned utilities. In addition, the EPA will also engage in outreach to states and permitting authorities to help ensure that the fourth year for compliance is broadly available and that the process for sources to request and states to grant the extensions is clear and straightforward.

More important, the Agency is concerned that, if enacted, this legislation would have the unintended consequence of creating problems that would not otherwise exist. It could actually increase the likelihood of conflicts between reliability and compliance with environmental laws and regulations. The bill would shield a generation owner from any liability for violations of environmental laws or regulations resulting from operation to comply with a Section 202(c)

order, without any regard to whether the owner could have taken or did take any actions to timely comply with the relevant environmental requirements and/or to mitigate the relevant reliability concern. In so doing, the bill would eliminate important incentives for owners to take expeditious actions to comply with environmental requirements and avoid conflicts of this nature. In addition, if a plant were subject to a 202(c) order, the bill would do little to ensure that the generation owner would have appropriate incentives to take expeditious action to eliminate the need for the order to continue – again, either by bringing the source into compliance with environmental regulations or by taking other actions necessary to mitigate the reliability issue. Advance planning and timely action are key to the successful implementation of EPA's power sector rules, and this bill could undercut power plants' incentives to plan and act in a timely fashion.

This bill could also unnecessarily endanger public health. To the extent that this bill results in 202(c) orders that would otherwise be unnecessary under current law, it increases the likelihood that facilities will operate in violation of environmental regulations, with resulting excess emissions of mercury and other air toxics, as well as pollutants that cause smog or fine particle pollution. Additionally, the hortatory statement that DOE should minimize conflicts with environmental laws is inadequate. As compared to current law, the bill decreases the incentives for input from the EPA and State and local environmental officials by authorizing DOE to issue an order absolving a generation owner from liability for running in violation of Federal, State, or local environmental laws, without requiring any consultation with or assent from the EPA or relevant State or local officials. The views of such entities, of course, are highly relevant to determining how best to minimize conflicts with environmental laws and adverse environmental effects.

The Nation's power grid is strong and resilient because numerous agencies and organizations fulfill their obligations to maintain the Nation's electric reliability. Over the 40-year history of the Clean Air Act, these stakeholders – working together with State and Federal regulators – have had an outstanding track record of substantially reducing pollution while maintaining reliability. We remain confident that, together, we have the tools to address any challenges that may arise in connection with the implementation of our power sector rules. In

light of this situation, we encourage the Committee to consider carefully the potential unintended consequences of the bill discussed above.