

**Statement of
Debra L. Raggio
Vice President and Assistant General Counsel
GenOn Energy, Inc.
Before the Subcommittee on Energy and Power
Committee on Energy and Commerce
U.S. House of Representatives**

May 9, 2012

SUMMARY OF TESTIMONY

As one of the largest competitive generators of wholesale electricity in the United States, GenOn, Inc. (“GenOn”), has focused our core mission on creating value for our owners through the generation and marketing of electricity in a safe, reliable, and environmentally responsible manner. And yet, in emergency situations where reliability must be preserved to provide power to preserve the safety of communities, the current state of Federal emergency authority—encompassed in Section 202(c) of the Federal Power Act (“FPA”)—conflicts with this mission by forcing companies to choose whether to comply with an emergency run order or violate environmental obligations.

GenOn’s predecessor company, Mirant Corporation (“Mirant”), faced this exact situation during the California energy crisis in 2001 and again in 2005. In each case, the company acted in compliance with a directive to run for reliability to keep the light on, and in each case this compliance led to liability for the company. This liability risk creates uncertainty for generators during emergencies when communities are at risk and stability is most needed.

H.R. 4273 resolves this conflict by amending the FPA to clarify that when a company is under an emergency directive to operate pursuant to Section 202(c) of the FPA by DOE, it will not be deemed in violation of environmental laws or subject to civil or criminal liability or citizen suit as a result of actions to comply with such emergency order. GenOn urges the subcommittee to support this legislation and I would be pleased to answer any questions you might have.

I. INTRODUCTION

Chairman Whitfield, Ranking Member Rush, and members of the Subcommittee, I appreciate the opportunity to testify before you today as you consider H.R. 4273, the Resolving Environmental and Grid Reliability Act of 2012. My name is Debra Raggio and I am testifying on behalf of GenOn Energy, Inc. (“GenOn”), one of the largest competitive generators of wholesale electricity in the United States. I have worked for GenOn, and its predecessor company Mirant Corporation (“Mirant”), for over ten years and have the position of Vice President for Government and Regulatory Affairs and Assistant General Counsel. Headquartered in Houston, Texas, GenOn has close to 3,100 employees and a generation portfolio of approximately 23,700 megawatts with facilities located across the country.

As a company, our core mission is to create value for our owners through the generation and marketing of electricity in a safe, reliable, and environmentally responsible manner. It is these very tenets—safety, electric reliability, and environmental stewardship—that are at issue before the subcommittee today. The tension between reliability needs and environmental regulations has long existed, but the potential for conflict has recently been highlighted by increasingly stringent environmental restrictions and cybersecurity initiatives. The value or virtue of these recent actions is neither the subject of this legislation nor the topic of this hearing; however, it is undeniable that members of both parties and all sides of the issue have discussed the use of existing emergency authorities as a way to resolve concerns about electric reliability. If situations do arise that implicate these authorities, H.R. 4273 will serve a vital role in ensuring that companies have a clear understanding of the legal issues at hand.

As a general matter, there may be ways to resolve the conflict between environmental regulations and emergency authorities in situations where there is sufficient advance notice. For

example, in some cases, a generator may be able to work with the U.S. Environmental Protection Agency (“EPA”) and other environmental authorities to adjust permit restrictions so that units known to be needed for reliability can continue operating, or to obtain a consent decree so that the generator operating to preserve reliability is relieved from liability for violations of such restrictions. Any such solution must have a solid legal basis, and there must be adequate time to allow for the process to work. In a true emergency, however, there may not be enough time for a generator to go through the procedural and other steps required to obtain adequate assurances that it will not be subject to significant penalties and liability if it violates environmental restrictions in the course of operating to maintain reliability. Such uncertainty could impede a company’s ability or willingness to operate at the time when reliability is most threatened.

Some have argued that conflicts between reliability needs and environmental rules could ultimately be addressed through Section 202(c) of the Federal Power Act (the “FPA”), which gives the Department of Energy (“DOE”) authority to direct the operation of electric generation plants in order to maintain the reliability of the bulk power system during an emergency. These parties claim that Section 202(c) allows DOE to “override Clean Air Act [(the “CAA”)] control requirements in limited emergency circumstances where there is a finding that an electric emergency exists.”¹ Unfortunately, neither DOE nor any of the relevant environmental

¹ *Impacts of EPA Regulations on Electric System Reliability: Hearing Before the U.S. House of Representatives Comm. on Energy and Commerce, Subcomm. on Energy and Power* (Sept. 14, 2011) (Testimony of Susan F. Tierney, Ph.D., Managing Principal, Analysis Group, Boston at 30), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/091411/Tierney.pdf>. See also Paul J. Miller, Northeast States for Coordinated Air Use Management, *A Primer on Pending Environmental Regulations and Their Potential Impacts on Electric System Reliability* at 22 (Sept. 19, 2011) (claiming that DOE “can override [CAA] requirements under section 202(c) of the [FPA] in limited emergency circumstances”), available at <http://www.nescaum.org/documents/primer-on-epa-reg-impacts-20110919-update.pdf>; Letter from John R. Norris, Commissioner, Federal Energy Regulatory Commission to Lisa A. Murkowski, United States Senate at 3 (Oct. 7, 2011) (asserting that DOE’s Section 202(c) authority will allow it “to order a plant to continue operating in the unlikely event of a reliability emergency precipitated by compliance with

authorities has taken the position that authority under Section 202(c) of the FPA trumps environmental law. Nor is there any express statutory language in the FPA, the CAA or other environmental laws, or judicial precedent, supporting such a position. Indeed, as explained below, two cases – both involving the predecessor to GenOn, Mirant – demonstrate the difficulties that a generator may face when operating to maintain reliability in a true emergency when such operation conflicts with applicable environmental restrictions.

II. STATUTORY BACKGROUND

Section 202(c) of the FPA gives DOE authority to order the operation of generation facilities for reliability reasons. Specifically, Section 202(c) currently provides:

During the continuance of any war in which the United States is engaged, or *whenever the Commission determines that an emergency exists* by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, *the Commission shall have authority*, either upon its own motion or upon complaint, with or without notice, hearing, or report, *to require by order* such temporary connections of facilities and *such generation*, delivery, interchange, or transmission *of electric energy as in its judgment will best meet the emergency and serve the public interest*. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.²

environmental rules”), *available at*
http://energy.senate.gov/public/_files/100711CommissionerNorrisResponse.pdf.

² 16 U.S.C. § 824a(c) (2006) (emphasis added). Although the text of Section 202(c) refers to “the Commission,” authority under that provision resides with the Secretary of Energy, rather than the Federal Energy Regulatory Commission (“FERC”). Under Section 301(d) of the Department of Energy Organization Act (the “DOE Act”), 42 U.S.C. § 7151(b) (2006), the powers previously vested in the Federal Power Commission under the FPA (and other statutes) and not expressly reserved to FERC were transferred to, and vested in, the Secretary of Energy. Although the DOE Act reserved to FERC powers to require interconnection of electric facilities under Section 202(b) of the FPA and DOE has since delegated certain other powers, including those provided by Section 202(a), to FERC, Section 202(c) authority remains with the Secretary of Energy.

At the same time, various environmental laws impose limitations on a generation facility's operations. For example, Section 109 of the CAA directs EPA to promulgate National Ambient Air Quality Standards ("NAAQS") to protect the public health and welfare.³ Section 110 of the CAA, in turn, requires each state to adopt a State Implementation Plan ("SIP") to achieve the NAAQS within such state.⁴ Upon EPA's approval of a SIP, "its requirements become federal law and are fully enforceable in federal court."⁵ EPA is authorized to enforce its NAAQS through administrative, civil, or criminal actions.⁶ In addition, a state "may enforce its regulations through state proceedings,"⁷ and a citizen has the authority to bring a civil action against any person in violation of emissions standards or limitations.⁸

FERC could potentially order relief similar to that available under Section 202(c) of the FPA by exercising some combination of its authority under Sections 207 and 309 of the FPA. Section 207 provides that, if FERC determines, "upon complaint of a State commission," that "any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation" 16 U.S.C. § 824f (2006). Section 309 authorizes FERC "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the FPA]." 16 U.S.C. § 825h (2006). To date, orders compelling generation in emergencies have been issued under Section 202(c), not Sections 207 and 309. *Cf. DC Pub. Serv. Comm'n*, 114 FERC ¶ 61,017 at P 2 (2006) (the "FERC Potomac River Order") (order issued under Section 207 of the FPA requiring long-term plan to maintain adequate reliability where DOE had already ordered a facility to operate).

³ See 42 U.S.C. § 7409 (2006).

⁴ See 42 U.S.C. § 7410 (2006).

⁵ *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989). See also, e.g., *Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975).

⁶ See 42 U.S.C. § 7413 (2006).

⁷ *Union Elec.*, 515 F.2d at 211. See also, e.g., *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007) ("States were obliged to implement and enforce" NAAQS).

⁸ 42 U.S.C. § 7604 (2006).

III. EXAMPLES OF CONFLICTS

As mentioned above, GenOn, via its predecessor company Mirant, has experienced two instances where the conflict at the heart of today's hearing resulted in legal consequences for the company. These two situations are described briefly below.

- **Potrero Power Plant (2001)**

In 2001, beginning at the height of the California energy crisis, Mirant's Potrero Power Plant in the San Francisco area was dispatched by the California Independent System Operator (the "CAISO") at a relatively high rate to maintain reliability.⁹ Because the Potrero Power Plant had a relatively low annual operating limit of 877 hours, Mirant became concerned that it would be unable to operate as needed by the CAISO while remaining within its operating limit. In order to ensure that the plant could operate as needed to preserve reliability, Mirant worked to obtain written approvals from local and federal regulators – the Bay Area Air Quality Management District ("BAAQMD") and EPA, respectively – allowing the plant to operate for more than 877 hours.¹⁰ Nonetheless, Mirant was subjected to a citizen lawsuit by the City of San Francisco and environmental groups for exceedance of the 877 hour operating limit,¹¹ and was forced to settle the lawsuit at significant expense.

⁹ DOE exercised its authority under Section 202(c) of the FPA to compel operation of generation facilities during the California energy crisis, ordering certain generators to make energy available to the CAISO for a period of approximately two months. *See Notice of Issuance of Emergency Orders Under Section 202(c) of the Federal Power Act*, 65 Fed. Reg. 82,989 (Dec. 29, 2000).

¹⁰ *See* Compliance and Mitigation Agreement between Mirant Potrero, LLC and the Bay Area Air Quality Management District at § 2.1 (Mar. 29, 2001); *Mirant Potrero LLC*, R9-2001-04, Administrative Order on Consent at § IV.4 (Apr. 6, 2001), available at <http://www.epa.gov/region9/energy/generators/r9200104mirant.pdf>.

¹¹ *See* Rachel Gordon, *Potrero Hill power plant operator sued/S.F., groups seek pollution controls*, San Francisco Chronicle (June 19, 2001), available at http://articles.sfgate.com/2001-06-19/news/17605126_1_mirant-corporation-pollution-clean-air-act; First Amended Complaint for Injunctive and Other Relief and Demand for Jury Trial, *City & County of San Francisco v. Mirant*

- **Potomac River Generating Station (2005)**

On August 24, 2005, Mirant’s Potomac River Generating Station (the “Potomac River Plant”) was shut down to comply with orders of the Virginia Department of Environmental Quality (the “Virginia DEQ”) in response to modeled, localized NAAQS exceedances. On that same day, the District of Columbia Public Service Commission (the “DC PSC”) filed petitions with DOE under Section 202(c) of the FPA and with FERC under Sections 207 and 309 of the FPA requesting that Mirant be compelled to operate the Potomac River Plant to maintain reliability.

In response, the Virginia DEQ argued to FERC that because “there is no express authority granted to the Commission pursuant to FPA §§ 207 or 309 – or for that matter any other section of the FPA – to issue an order that would contravene the CAA,” the Commission had “no discretion to issue any order with respect to generation of electrical power at the Potomac River Plant unless that order complies with the CAA.”¹² Similarly, the Virginia DEQ objected before DOE that:

Congress has not given the [FPA] primacy over the [CAA]. Nowhere in the [FPA] – § 202(c) or elsewhere – is there language providing that reliability concerns take precedence over federal and state environmental laws. Further, § 201(a) of the [FPA] expressly preserves state jurisdiction over electric generation. The [FPA] also does not preempt Virginia law or the Director’s authority pursuant to Virginia law, because obligations arising under the federally approved [SIP] are a matter of both state and federal law.¹³

Potrero, LLC, No. C-01-2356 PJH (N.D. Cal. Aug. 20, 2001); First Amended Complaint, Bayview Hunters Point Community Advocates v. Mirant Potrero, LLC, No. C-01-02348-PJH (N.D. Cal. Aug. 20, 2001).

¹² Motion of Robert G. Burnley, Director, The Commonwealth of Virginia Department of Environmental Quality to Deny the District of Columbia Public Service Commission’s Petition on the Grounds that the Commission May Not Grant the Requested Relief; or, in the Alternative, to Defer Action Pending Further Analysis of Environmental Impacts of Requested Relief at 6, Docket No. EL05-145-000 (filed Oct. 11, 2005).

¹³ Letter from Commonwealth of Virginia Department of Environmental Quality to Kevin Kolevar, Director, Office of Electricity Delivery and Energy Reliability, U.S. Dept. of Energy at 2, Docket No.

On December 20, 2005, DOE ordered Mirant to resume operating the Potomac River Plant under Section 202(c) in order to maintain the electric supply to Washington, D.C.¹⁴ The 2005 DOE Order stated that “[o]rdering action that may result in even local exceedances of the NAAQS is not a step to be taken lightly. . . .”¹⁵ DOE did not, however, provide any assurance to Mirant that compliance with the order would not subject it to liability for those exceedances. Instead, the order said only that DOE had “sought to harmonize those interests to the extent reasonable and feasible by ordering Mirant to operate in a manner that provides reasonable electric reliability, but that also minimizes any adverse environmental consequences from operation of the Plant.”¹⁶

After the Potomac River Plant resumed operating in compliance with the DOE order, the EPA issued an Administrative Compliance Order by Consent, which set forth certain operating standards “taking into account the seriousness of the modeled NAAQS exceedances and the concerns of DOE regarding electric reliability in the Central D.C. area,”¹⁷ and required Mirant to operate the Potomac River Plant “as specified by PJM and in accordance with the [2005] DOE

EO-05-01 (Nov. 23, 2005) (citation omitted), *available at* <http://www.gc.doe.gov/oe/downloads/letter-clarifying-position-director-virginia-department-environmental-quality-regarding>.

¹⁴ See *DC Pub. Serv. Comm’n*, DOE Order No. 202-05-3 (Dec. 20, 2005) (the “2005 DOE Order”), *available at* <http://www.gc.doe.gov/oe/downloads/department-energy-order-no-202-05-3>. Orders extending the 2005 DOE Order, as well as other documents relating to the DC PSC’s petition before DOE are available at the DOE website. See <http://www.gc.doe.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/emergency>. See also FERC Potomac River Order, 114 FERC ¶ 61,017 at P 28 (2006) (addressing the DC PSC’s petition under Section 207 of the FPA “in light of the immediate nature and short-term relief granted to the DC [PSC] by the Secretary of Energy”).

¹⁵ 2005 DOE Order at 8.

¹⁶ *Id.* at 8-9. See also *id.* at 5 (“In response to the environmental concerns raised, this order seeks to minimize, to the extent reasonable, any adverse environmental impacts. Should EPA issue a compliance order directed to operation of the Plant, DOE will consider whether and how this order should [be] conformed to such order.”).

¹⁷ See *Mirant Potomac River LLC*, Administrative Compliance Order by Consent at 4, Docket No. CAA-03-2006-0163DA (June 1, 2006).

Order.”¹⁸ During its operations as directed by DOE, the Potomac River Plant was forced to exceed its 3-hour NAAQS limit on February 23, 2007. Accordingly, in 2007, the Virginia DEQ issued a Notice of Violation¹⁹ and subsequently fined Mirant for actions that were a result of Mirant’s compliance with the DOE order to run for reliability. Had the Potomac River Plant been required to operate such that it would have violated a plant-specific environmental permit limit, Mirant would have faced significant additional penalties, including claims from citizen lawsuits under the CAA.

IV. H.R. 4273: A RESPONSIBLE PATHWAY FORWARD

The examples cited here are by no means confined to GenOn and can easily recur as more environmental regulations are promulgated and reliability challenges become increasingly likely. Some have suggested that, given enough time, EPA could enter into a court-approved consent agreement that would ensure that a generator required for reliability is protected from liability for any CAA (or other environmental law) violations that may result. There is debate as to whether such an order would protect a generator from potential citizen lawsuit liability. But with enough time it may be possible to thread the needle so that a generator needed for reliability is not subject to environmental penalties or liability.

In an emergency, however, electricity generators are unfairly forced to weigh the risks and costs of violating environmental permits against the risks and costs of non-compliance with a DOE emergency order to run, creating uncertainty at a time when stability and prompt action is most

¹⁸ *Id.* at 14.

¹⁹ *See* Letter from Jeffery A. Steers, Regional Director, Commonwealth of Virginia, Department of Environmental Quality to Michael Stumpf, Group Leader – Plant Operations, Mirant Potomac River Generating Station, Notice of Violation Re: Mirant Potomac River Generating Station, Facility Registration No. 70228 (Mar. 23, 2007). *See also* Letter from Michael Stumpf, Mirant Potomac River, LLC to Jeffrey A. Steers, Regional Director, Department of Environmental Quality, Northern Virginia Regional Office, Re: Response to March 23, 2007 Notice of Violation (May 11, 2007).

needed. It is imperative that there be clear authority within the federal government to direct actions that can balance an emergency reliability need with binding environmental regulations.

H.R. 4273 offers a clear way to conclusively ensure that the tools needed to maintain the reliability of the grid are available in the face of conflicting environmental requirements. The bill amends the FPA to clarify that when a company is under an emergency directive to operate pursuant to Section 202(c) of the FPA by DOE, it will not be deemed in violation of environmental laws or subject to civil or criminal liability or citizen suit as a result of actions to comply with such emergency order. Specifically, the bill inserts the following language into Section 202(c) of the FPA:

“To the extent any omission or action taken by a party, which is necessary to comply with an order issued under [section 202(c)], including any omission or action taken to voluntarily comply with such 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.”

This language ensures that in an emergency situation, without adequate time and even with full cooperation of reliability and environmental regulators, the reliability of the grid will not be compromised in critical emergency situations as a result of even relatively minor environmental exceedances. GenOn urges the Subcommittee to support H.E. 4273 as a responsible step toward resolving this issue. To be clear, this legislation need not – and, indeed, should not – be allowed to delay environmental or cybersecurity initiatives. Rather, reform of Section 202(c) of the FPA should be pursued on a parallel track that ensures that the potential conflict between reliability and environmental concerns is resolved before the next emergency requiring DOE to exercise its authority under this provision.