

IN THE MATTER OF THE APPLICATION OF \*  
CATOCTIN POWER, LLC FOR A CERTIFI- \*  
CATE OF PUBLIC CONVENIENCE AND \*  
NECESSITY TO CONSTRUCT A NOMINAL \*  
600 MW GENERATING FACILITY IN \*  
FREDERICK COUNTY, MARYLAND. \*

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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CASE NO. 8997

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**PROPOSED ORDER OF HEARING EXAMINER**

**Appearances:**

James R. Barrett, George D. Cannon, Jr., Stephanie S. Lim, and Rebecca N. Brandt, for Catoctin Power, LLC.

M. Brent Hare and Ransom E. Davis, for the Maryland Department of Natural Resources, Power Plant Research Program.

Jeral A. Milton, for Eastalco Aluminum Company.

Robert A. Ganton and Carl J. Lorenz, for the U.S. Army Corps of Engineers, Baltimore District-Washington Aqueduct Division.

John S. Mathias and Richard J. McCain, for Board of County Commissioners of Frederick County, Maryland.

Margaret W. Tindall, Jill M. Dennis, and Stuart A. Raphael, for the Fairfax County Water Authority.

Joel A. Kramer, for Washington Suburban Sanitary Commission.

Cynthia Green-Warren and Donald F. Rogers, for the Office of People's Counsel.

M. Catherine Dowling, Annette B. Garofalo, and Lloyd J. Spivak, for the Staff of the Public Service Commission of Maryland.

Rolan O. Clark, *pro se*.

Thomas Mangold, *pro se*.

Donald L. James, *pro se*.

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## I. INTRODUCTION

On February 25, 2004, Catoctin Power, LLC ("Catoctin", Applicant" or "Company") filed an application with the Commission for a Certificate of Public Convenience and Necessity ("CPCN") to construct and operate a nominal 600 megawatt ("MW") combined-cycle natural gas-fired electric power generating facility at the Eastalco industrial site located in Frederick County, Maryland. The application notes that Catoctin is a wholly owned subsidiary of Sempra Energy Resources and was formed to develop the project. The application was filed pursuant to §§ 7-207 and 7-208 of the Public Utility Companies Article, *Md. Ann. Code*, and includes substantial supporting information. Also, the application requests a waiver of the two-year notice requirement of § 7-208(b) to allow construction to commence in spring 2005.

Following delegation of this matter to the Hearing Examiner Division, a pre-hearing conference was held on April 14, 2004, in Baltimore, Maryland, notice of which was published in a newspaper of general circulation throughout the County. At the pre-hearing conference, a procedural schedule was developed and interventions of parties were granted. In addition to the Applicant, parties granted intervention included the following: Eastalco Aluminum Company ("Eastalco"); U.S. Army Corps of Engineers, Baltimore District-Washington Aqueduct Division ("Washington Aqueduct Division"); Board of County Commissioners of Frederick County, Maryland ("Frederick County"); Power Plant Research Program

of the Department of Natural Resources, representing various State Agencies ("PPRP" or "State Agencies"); the Fairfax County Water Authority ("Fairfax County"); the Washington Suburban Sanitary Commission ("WSSC"); the Office of People's Counsel ("OPC"); the Commission Staff ("Staff"); and *pro se* intervenors Rolan O. Clark, Thomas Mangold, and Donald L. James.

A status conference in this matter was held on June 25, 2004, and evidentiary hearings in this matter were conducted on July 19, 2004, July 20, 2004, July 22, 2004, October 14, 2004, December 9, 2004, and January 12, 2005. In addition to the evidentiary hearings, all of which were conducted in Frederick, Maryland, an evening hearing for the purpose of receiving public comment was also held on January 12, 2005 at Tuscarora High School located near the proposed project, notice of which was advertised to the community through newspaper publication.

**A. Summary of Witnesses**

The witnesses who appeared during the course of the evidentiary hearings on behalf of the Applicant included the following consultants: Brent B. Waters, Senior Hydrogeologist with Golder Associates, Inc., who testified with respect to water supply and quality, as well as impacts on the Potomac River; Gregory M. Powell, Senior Engineer with Golder Associates, who testified with respect to Potomac River water flow and low flow augmentation proposals; Richard Zwolak, Director of Environmental Planning for Golder Associates, who testified with respect to project effects on

land use, socioeconomic impacts, aesthetics, landmarks, compatibility with the Adamstown land use plans, project buffers, and water supply and pipeline proposals; and Karl Bullock, Staff Ecologist with Golder Associates, who presented ecological analysis and impacts testimony. In addition, other witnesses for the Applicant included Kennard F. Kosky, Environmental Engineer, Project Director and Project Manager for the Air Permitting and Environmental Impact Assessments; and Robert C. McCann, Manager-Air Resources Group at Golder Associates, who presented testimony regarding air quality impacts and noise impacts. In addition, the following witnesses employed by Sempra Energy Resources ("Sempra") also testified on behalf of the application: Gordon Chirdon, the Project Development Director for the project, who testified on various overall aspects of the project including its benefits; and Keith Latham, the Permitting Manager, who testified with respect to air plans, water and discharge plans, and permitting matters.

Witnesses for intervening parties in this proceeding included the following: Dr. Roland Steiner, Regional Water and Wastewater Manager for WSSC; and Erik Hagen, Director of Cooperative Water Supply Operations at the Interstate Commission on the Potomac River Basin, who testified as a panel on behalf of water suppliers who utilize the Potomac River (which includes WSSC, Fairfax County, and the Washington Aqueduct Division). Craig Taborsky, Transmission/Generation Engineer for the Commission Staff, testified with respect to project interconnection and reliability concerns, including proposed conditions. Intervenor

Donald L. James, a nearby resident, testified and expressed general opposition to the project, but noted certain proposed conditions in the event the project is granted, including additional air monitoring near the facility.

Intervenor Frederick County presented three witnesses in this proceeding: Michael Marschner, Director of Frederick County Division of Utilities and Solid Waste Management; Betsy Smith, Chief of the Department of Development Review and Engineering for Frederick County Division of Permitting and Development Review; and Mr. Gary Hessong, the Director of the Division of Permitting and Development Review, which witnesses presented the recommendations of the Frederick County Board of Commissioners including various proposed conditions in the event that a CPCN is granted by the Commission.<sup>1</sup>

PPRP, which coordinated an extensive review of the project on behalf of various State Agencies,<sup>2</sup> presented numerous witnesses in this proceeding, including Diane H. Brown, PPRP Project Manager for review of the application, who presented overview testimony of the State Agencies review as well as the

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<sup>1</sup> Frederick County proposed conditions include a proposal that the Applicant seek to obtain a permanent agricultural preservation easement for 250 acres of land currently owned by the Eastalco Aluminum plant as a further buffer area between the project and neighboring property sites, or obtain alternative parcels in consultation with the Carrollton Manor Land Trust. Other County proposed conditions involve site plan, air quality, and water use, in addition to land preservation.

<sup>2</sup> The State Agencies review coordinated by PPRP includes the Department of Natural Resources (of which PPRP is a part), as well as the State Departments of Agriculture, Business and Economic Development, Environment, Planning and Transportation, and also the Maryland Energy Administration ("MEA").

environmental review document prepared on their behalf. Also, PPRP presented an air quality panel of Julia B. Ross, Senior Air Quality Professional and partner with Environmental Resources Management, Inc.; William V. Paul, Combustion and Metallurgical Division Chief with the Air and Radiation Management Administration ("ARMA"), Maryland Department of the Environment ("MDE"); and Mark E. Garrison, Air Quality Meteorologist with Environmental Resources Management, which panel on air quality presented testimony regarding air quality emissions and impacts of the project. The PPRP water panel included John Grace, Chief of the Source Protection and Appropriations Division of the Maryland Department of the Environment, Water Management Administration; Robert W. Keating, Hydrogeologist with Environmental Resources Management; Gary L. Walters, Environmental Engineer and Manager of the Engineering Group with Environmental Resources Management; and Dr. Stephen Schreiner, Senior Scientist and Program Manager with Versar, Inc., a consultant to PPRP in this matter, which panel testified on the project's water use alternative proposals and effects on surface water resources. Richard M. Letty, Senior Consultant with KM Chng Environmental, Inc., presented testimony with respect to noise impacts, and Dr. Peter D. Hall, President of Metametrics, a consulting economist to PPRP, presented testimony regarding a socioeconomic impact analysis of the project.

At the evening hearing held in this matter on January 12, 2005, numerous interested persons residing near the vicinity of the project commented. The comments from the members

of the public noted concerns regarding potential loss of value of residential properties in the area, concerns regarding effects on water availability, concerns regarding emissions from the area, truck traffic concerns, and specific concerns regarding crossings of water pipes over park service land. In addition, several written comments were filed by nearby citizens, further expressing opposition and concerns with the project, including the need for such a project and alleged detriments that will result to the area, with one commentator indicating the area already suffers from higher risks of health detriments from pre-existing nearby industry affecting the environment.

#### **B. Settlement Agreements**

Importantly, during the course of this proceeding, the Applicant has engaged in two settlement agreements with specific parties regarding important issues in this proceeding. Specifically, the water suppliers (Fairfax County, WSSC, and the U.S. Army Corps of Engineers-Washington Aqueduct Division), reached an agreement with the Applicant in October 2004 which has been filed in the record of this case (Catoctin Exhibit No. 17, Docket Entry No. 57, filed November 24, 2004), concerning protection of the Potomac River water supply. This agreement contains a "trigger mechanism" which would require Catoctin to either release additional water from secured sources to augment low flows in the Potomac River, or to reduce the consumptive water use if the specified conditions for such flow augmentation or use restriction

occur.<sup>3</sup> The purpose of the agreement and augmentation/restriction provisions are to ensure that the project will not consume water during drought emergency periods, and that the facility will have no adverse effect on the adequacy of the existing reservoir system to meet water suppliers' needs. Pursuant to the agreement, the water suppliers request that certain proposed conditions of the settlement governing the low flow augmentation and water use reduction be included in the CPCN. These conditions are agreed by the Applicant, and are reiterated in the water suppliers February 4, 2005 final letter-brief.

In addition, the Applicant and PPRP have reached an Agreement of Stipulation and Settlement by which these parties recommend issuance of the CPCN subject to 110 conditions. The parties indicate that with these conditions, the project would meet or exceed requirements of all currently applicable environmental laws and regulations, including those relating to noise abatement and control of air and water pollution. The Settlement includes provisions regarding air quality requirements, including specific standards that require Catoctin to employ the Best Available Control Technology ("BACT") to control emissions of particulate matter, carbon monoxide ("CO"), sulfur dioxide ("SO<sub>2</sub>"), and nitrogen oxide ("NO<sub>x</sub>") from the combustion turbines and associated duct burners and heat recovery steam generators. The Agreement specifies

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<sup>3</sup> Catoctin has obtained two possible supply sources of water that can be released to bolster the water supply of the Potomac River when necessary. The second alternative is to decrease consumption at certain times.

emission limits for such pollutants with specified limits that may not be exceeded, as well as separate emission limits for such pollutants for the emergency diesel generator at the plant. The Agreement further states specific Lowest Achievable Emission Rate ("LAER") standards for NO<sub>x</sub> emissions and Volatile Organic Compound emissions ("VOC") (which emissions affect ozone), and annual limits for the emissions are also specified as well as average hourly limits. Also, Catoctin must obtain emission reduction offsets for NO<sub>x</sub> and VOC at a minimum ratio of 1.3 to 1, so that this project will actually reduce the level of NO<sub>x</sub> and VOC by such offsets, thereby improving air quality with respect to ozone.

The PPRP Agreement also contains provisions regarding the water supply used for cooling purposes, addressing both proposed alternative water supply options for which the Applicant seeks authorization in this proceeding. In this regard, Catoctin proposes use of Frederick County wastewater as one cooling supply option, while an alternative option of utilizing Potomac River water is included, and conditions applicable to both options are included in the Agreement. The conditions also include specified provisions that Catoctin shall maintain the minimum amount of low flow augmentation storage of 468 million gallons at two quarries in Jefferson County, West Virginia, and the CPCN is specifically noted as not constituting an authorization to discharge waste water to waters of the State, for which Catoctin must obtain a discharge permit from the Maryland Department of the Environment.

Other aspects of the comprehensive agreement require Catoctin to conduct archeological surveys of selected pipeline corridors in accordance with the Maryland Historical Trust standards. Further, Catoctin shall develop a detailed visual impact mitigation and landscaping plan for above-ground facilities associated with water supply and discharge pipelines (including specific steps to mitigate visual impact on the C & O Canal national historical park and on the Potomac River), and Catoctin shall work with PPRP to prepare a forest planting plan to mitigate for incremental nitrogen deposition from the facility and mitigate forest losses associated with construction of linear facilities. Finally, provisions regarding cultural resources, traffic, other impact mitigation (including a lighting distribution plan to mitigate intrusive night lighting), security procedures, noise control, and land use (including designing the facility in substantial conformance with the site plan drawings reviewed by Frederick County) are included in the Agreement.

### **C. Close of Record**

Following the hearings, parties have submitted briefs and reply briefs in this matter, which briefs contained the final recommendations and arguments of the parties. The briefs also contain the final recommendations of the State Agencies through the PPRP brief, although PPRP notes that it has engaged in discussions with the Federal Environmental Protection Agency regarding the

final air quality conditions relating to the project.<sup>4</sup> However, as no further recommendations have been submitted subsequent to the final briefs, the decision will be based on the final record including the reply briefs of all parties.<sup>5</sup>

All of the evidence and testimony on the record, as well as the comments of the public and arguments of the parties on brief, have been carefully reviewed and given appropriate consideration in reaching a decision on this matter.

## II. DISCUSSION AND ANALYSIS

As noted above, this proceeding involves an application for a Certificate of Public Convenience and Necessity to construct a gas-fired generating plant on an industrial-zoned site located in Frederick County, Maryland, near the town of Adamstown. The application has been filed pursuant to Sections 7-207 and 7-208 of the Public Utility Companies Article, *Md. Ann. Code*. Pursuant to the statute, the Commission shall take final action on the application only after due consideration of the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station is proposed

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<sup>4</sup> Pursuant to Section 7-207(d)(4) of the Public Utility Companies Article, the Commission shall allow State Agencies 15 days after the conclusion of the hearing to modify their initial recommendations.

<sup>5</sup> Mr. James' reply brief and OPC's letter in lieu of a final brief are admitted as their final replies although the Commission docket does not indicate their filing with the Executive Secretary's office by the February 18, 2005 date for reply briefs, as it appears that such documents were timely provided to other parties.

to be located, as well as due consideration of the effect of the generating station on the stability and reliability of the electric system, economics, aesthetics, historic sites, aviation safety, air and water pollution (when applicable), and the availability of means for required timely disposal of wastes produced by the generating station.<sup>6</sup>

**A. Preliminary Issue - Post-Hearing Recommendations and Conditions**

A preliminary issue prior to determination of the merits of the application concerns Catoctin's arguments on brief that certain conditions proposed by other parties in their respective briefs, such as Frederick County and OPC, are inappropriate extra record proposals that should be rejected as the evidentiary record in this proceeding has closed. Specifically, Catoctin contends that certain conditions proposed by parties on brief reflect new information that properly should have been introduced while the evidentiary record was open to allow full cross-examination of such proposals. Catoctin contends proposed conditions presented in the briefing stage deny other parties an opportunity to fully and fairly test such proposed conditions through cross-examination and discovery in violation of procedural due process. Catoctin therefore contends that the County's post-hearing slate of proposed CPCN conditions should be excluded from consideration, and similarly argues against a proposed OPC reporting requirement of the Company

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<sup>6</sup> Section 7-207(e).

raised in OPC's post-hearing comments. However, while not waiving its rights, Catoctin has submitted substantive argument on such proposed conditions while also maintaining an objection as noted.

In considering Catoctin's apparent objections to the County's (and OPC's) proposed conditions as a violation of due process, it is noted that this case has been litigated over many months with substantial pre-filing of testimony, and several hearings for cross-examination of parties' witnesses and positions. During the course of the testimony and hearings, numerous conditions have been produced upon the record, which have in fact been included in testimony and subject to examination by all other parties as noted by Catoctin. However, while most conditions have been proposed through the testimonial process and undergone opportunity for cross-examination by all parties, this does not necessarily mean that conditions or other proposals advocated subsequent to the hearing process should be excluded as a violation of due process. The evidentiary record in this matter consists of the testimony and other material evidence, such as exhibits, that have been admitted during the course of the hearings in this matter, and the evidentiary record is in fact concluded at the close of the evidentiary hearings, unless specific reservation has been made for future admission by holding the record open on a specific matter.

However, while Catoctin is correct that the evidentiary record may have concluded at such time, this does not necessarily preclude a party from advocating a position subsequent to the hearings held in this matter, but such later proposals do not

constitute evidence in this matter but are accepted as part of a party's arguments on brief which are also part of the record, although not of an evidentiary weight. Ideally, a party's final positions as expressed in brief should be supported by the evidentiary record, but the final positions of a party and their final recommendations may in fact differ from earlier positions taken through their witnesses based upon the entire record that has been produced in a Commission proceeding. The parties are free to adjust their final positions on brief, including proposals for new recommendations in their final position, although the post-hearing recommendations would not constitute evidence in the case unless they have in fact been admitted as such during the hearing process. Accordingly, Catoctin's objections to final recommendations, including newly proposed conditions, made by other parties on brief are denied to the extent Catoctin seeks to preclude such consideration of conditions or other final proposals made on brief that were not included in the evidentiary portion of this case, but such denial is predicated on the understanding that certain final proposals constitute final arguments of the parties and do not elevate any such proposals into evidence in this case.

**B. Primary Issue - Issuance of CPCN**

The fundamental issue in this proceeding concerns whether the Commission should issue a Certificate of Public Convenience and Necessity for the Applicant, Catoctin Power, LLC, to construct a nominal 600 MW generating facility in Frederick

County. The record reflects that Catoctin filed its application on February 25, 2004, seeking to construct the generating station at the Eastalco industrial site located in Frederick County, which Eastalco complex is a large parcel zoned for industrial use and includes an aluminum smelting facility operating since 1970. Catoctin, which is a wholly owned indirect subsidiary of Sempra Energy Resources, was formed by Sempra to develop, own and operate the project, as Sempra is a company which specializes in development and operation of power generating facilities and has more than 6,000 MW of generating capacity in operation or active development. Sempra's power plants include state-of-the-art combined-cycle power generation technology that use clean-burning natural gas to generate electricity for the wholesale power market, and this project continues that line of business as a proposed natural gas-fired electric power generating facility that would use two combustion turbines with electric generators, associated heat recovery steam generators, and a steam turbine. The proposed project site will be leased on an approximately 20 acre tract of land near the middle of the total 2,200 acre Eastalco complex, and is located approximately one and a quarter miles from Adamstown, Maryland, and approximately eight miles south of Frederick, Maryland. The Company proposes in the application to begin construction in the spring of 2005 and conclude in the summer of 2007, and has therefore requested a waiver of the provisions of Section 7-208(b) of the Public Utility Companies Article to allow commencement of construction earlier than two years from the date of application.

The Applicant contends the project is in the public interest as it will enhance system reliability and foster transition to a workable competitive energy market by increasing supply reliability in the State, noting in part that other recent proposals for new generation have in fact been canceled. Furthermore, Catoctin notes the project will be developed on an existing industrial parcel and therefore avoids concerns associated with developing a generation station on other "greenfield" locations, and the project will be developed without need to construct off-site transmission lines. Catoctin considers the location of the proposed site to be one of the most desirable locations in Maryland to develop a new power plant from both an environmental and energy infrastructure perspective, and the project will be a very "clean" plant with extremely low emissions that will help to facilitate transition to more efficient cleaner burning power generation technologies. In addition, the Applicant will offset its NO<sub>x</sub> and VOC emissions by retiring emissions from one or more nearby sources, thereby assuring that area-wide emissions are actually reduced by the project commencing operations for these pollutants. The Applicant also considers other environmental effects of the project to be fully within applicable regulatory standards relating to air quality, noise levels, water quality, and land use.

During the course of this proceeding, the Applicant has presented extensive testimony regarding the alleged benefits of the project, including witnesses, testimony, and exhibits regarding each of the specified factors to be considered by the Commission in

determining a CPCN application. In addition, the Power Plant Research Program has made a comprehensive review and analysis of the proposal, and also presented witnesses regarding the statutory factors. As noted above, PPRP and Catoctin have reached an agreement in which PPRP notes its position in support of the project with the numerous conditions attached, which conditions have taken into account all relevant factors and considerations and also considered the information contained in the parties' environmental review and supporting testimony. In the agreement, PPRP has stipulated that the construction and operation of the project in accordance with the agreed final 110 conditions would meet or exceed requirements of all currently applicable environmental laws and regulations, including those relating to noise abatement and control of air and water pollution.<sup>7</sup>

The intervening water supplier parties, Washington Aqueduct Division of the U.S. Army Corps of Engineers, Fairfax County Water Authority, and WSSC, have also reached an agreement with the Applicant as such water suppliers recommend that the CPCN include certain additional conditions as agreed by these parties which would protect the water resources of the Potomac River basin, especially during times of low flow and drought. These conditions generally require Catoctin to augment water flow or curtail consumptive use of the Potomac River water during specified low flow conditions, and the water suppliers note that no party opposes such

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<sup>7</sup> Catoctin-PPRP Agreement of Stipulation and Settlement, p. 3 ¶ 1 (PPRP Exh. No. 15), docketed January 13, 2005 (Docket Entry No. 68).

conditions which will ensure that the proposed facility will have no adverse effect on the adequacy of the existing reservoir system to meet water suppliers' needs.

As to positions of other parties, intervenor Donald L. James has expressed opposition to the grant of the application. As basis for his opposition, Mr. James notes a concern that the operational power plant will contribute to a decrease in property values in the immediate area, citing negative connotations of power plants as well as the height of the structures. Mr. James also emphasizes concerns regarding the local air quality resulting from the project, noting that while the State Agencies and other expert parties in this proceeding indicate that applicable guidelines will be satisfied, unless local air monitoring occurs, no parties can state what is the actual air quality near the plant. He therefore proposes that if the CPCN application is approved, it should be contingent on quarterly air testing at a minimum of three locations surrounding the plant, including Carroll Manor Elementary School, to be conducted by an independent third party and funded by Catoctin. The testing should continue for two years and be continued if necessary, and should include monitoring of CO, NO<sub>x</sub>, VOCs, SO<sub>2</sub>, fluorides, PM10, and PM2.5.<sup>8</sup> In this regard, he contends such monitoring will indicate the exact quality of air and how it will be affected after the plant is in operation, and provide a level of both safety and comfort to the nearby residents

with respect to air quality. He therefore opposes any exemptions from ambient air monitoring requirements sought by the Company, and requests his monitoring proposal be a specified condition if the application for a CPCN is granted.

Intervenor Rolan Clark, who is also a nearby resident in the area, has participated in the hearings in this matter and appears to have concerns with the project.<sup>9</sup> Other residents of the area have also expressed concerns or opposition to the project at the evening hearing for receipt of public comment or in written comments submitted by the residents. These concerns and opposition generally involve feared impacts of the project on property values, air emissions, and water resources. Several nearby residents clearly expressed opposition as they believe the site is not appropriate for a power plant as they fear deleterious effects on the community if the plant is built.

Frederick County has fully participated in this proceeding during the hearings and on brief, and in its final position indicates that if a CPCN is granted by the Commission, certain proposed conditions of the County should be included in the Certificate supplementary to those conditions agreed by the Applicant with the State Agencies (as represented in the agreement with PPRP) and with the water suppliers. Among Frederick County's

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<sup>8</sup> PM10 and PM2.5 refer to Particulate Matter emissions of certain sizes (fine particulate matter with diameter smaller than 10 microns or 2.5 microns).

<sup>9</sup> Proposed testimony of an economic consultant initially sponsored by Mr. Clark was not admitted into the record.

proposed conditions are site plan conditions requiring the plant be constructed in accordance with the project site plan, and the applicant shall obtain permits from the County prior to beginning site work at the project. The County also proposes additional ambient air quality conditions including obtaining NO<sub>x</sub> and VOC offsets from Frederick County sources, if available, or from the geographically closest available sources, as well as compliance with all local PM<sub>2.5</sub> ambient air quality standards in effect and which might be required in the future. The more controversial proposed County conditions involve water-related conditions if the project uses the County effluent as a cooling source, and a land preservation condition which would require Catoclin to place approximately 250 acres of land located in the vicinity of the plant into permanent agricultural preservation.<sup>10</sup> In its final position, the County appears to neither support nor oppose the threshold issue of granting the CPCN, but emphasizes its position that if such Certificate is granted, then the County's proposed conditions should be included.

Eastalco did not present any witnesses in this proceeding, but has filed briefs indicating opposition to Frederick County's proposed land-use condition that would require Catoclin to work with Eastalco to place large parcels of land in the vicinity

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<sup>10</sup> The County's contested water-use conditions and land preservation condition are discussed in greater detail below in this Order. The proposed 250 acre land preservation condition is intended to serve as a buffer between the plant and community (specifically the St. Matthew's Church) and to offset negative impacts of the plant on the residents' quality of life, according to the County.

of the plant into permanent agricultural preservation. Eastalco contends that Frederick's proposed agricultural preservation condition is unsupported by evidence, is outside the scope of the Commission's jurisdiction, and would be unconstitutional.

The final party that has sponsored a position in this matter is the Commission Staff. Staff has sponsored a witness and filed briefs in which it concentrates on the stability and reliability of the electric system. Staff concludes that the record indicates that, should Catoctin comply with PJM's requirements pertaining to direct connection and network upgrades, operation of the proposed plant should not negatively affect the reliability of the electric system in Maryland. Staff states the record indicates the plant will require a single circuit 230 kV line between the plant and an Eastalco substation, and two 230 kV metering packages on the line between the Doubs Substation and Eastalco. Staff further states that the plant will benefit Maryland's electric system through increasing generation adequacy and thereby lessening the State's dependence on foreign electricity, providing reactive and voltage support at Doubs, alleviating congestion costs associated with power flows through Doubs, and offering potential to alleviate excessive loading of a transmission line feeding Doubs. Staff supports the CPCN provided that several conditions regarding interconnection with the PJM are included. These conditions include certification by Catoctin that transmission system improvements have been completed and interconnection requirements have been met, as well as filing a copy of its interconnection service agreement

with the Commission prior to putting the project into service. Finally, Staff considers such certifications to be conditions precedent to operation of the proposed plant that must be performed prior to the plant being put into service, and Staff recommends the application be denied if such proposed conditions (that is, the certifications requested by Staff) are not provided prior to the plant being placed into service.

The Office of People's Counsel has indicated in post-hearing comments that it supports Staff's proposed conditions with respect to certifications regarding the stability and reliability of the electric system, while further recommending a clarification that reports should be submitted at least 30 days prior to operation of the proposed facility so that sufficient time is available for review of filings related to transmission and interconnection.<sup>11</sup>

#### **1. Economic Concerns**

The opponents of the plant noted areas of concern with regard to economic effects on the general area, as well as concerns with air emissions and the affect on water sources. With respect to the economic effects, there is simply no credible testimony that the plant will in fact reduce property values as feared by certain

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<sup>11</sup> An exception to this prior reporting concerns the interconnection service agreement which can be filed after the project is put into service, as specified in Staff's proposed conditions, according to OPC.

neighboring residents. Furthermore, the fact that the plant is to be constructed on less than 20 acres of a much larger industrial site with an existing major industrial facility that is nearly as prominent in height as the proposed plant belies the fears of the residents that the addition of a clean gas-fired power plant will change the character of the area and adversely impact property values. The Company has produced testimony regarding certain positive economic benefits that will result from the plant construction and workers employed there, including revenues and taxes that will benefit the economy and government, and the record contains a paucity of evidence indicating that land values will reduce from the plant as feared, especially in this situation where it is located next to an existing large industrial facility. The Company has further agreed to numerous conditions regarding mitigation of aesthetic effects, such as planting and screening, although the Company objects to the condition proposed by Frederick County with respect to placing large amounts of nearby acreage in agricultural preservation, which proposed condition will be discussed in greater detail below.

## **2. Emission Concerns**

Another area of major concern by opponents of the application concerns the emissions of the project, specifically the effects on local air quality. The Applicant's witnesses, such as Mr. McCann, one of the air quality consultants presented by the Company, have indicated that project emissions are too low to

adversely impact air quality as they are in fact less than the federal level of significant impact for any pollutants. This conclusion is also supported by PPRP witnesses Garrison and Paul. However, the Applicant's witnesses (Kosky and McCann) acknowledge that Maryland is considered a severe nonattainment area for ozone, which is formed by emissions from NO<sub>x</sub> and VOC.<sup>12</sup> Furthermore, the Company must obtain offsets in the ratio of 1.3 pounds for every 1.0 pound emitted for NO<sub>x</sub> and VOC, which offsets must be approved by the Department of the Environment. The Applicant further concludes that due to the regional offsets, as well as satisfying Lowest Achievable Emission Rate ("LAER") requirements, this project will not worsen the ozone levels in the vicinity as in fact the project's emissions are approximately 1/40th of other power plant emissions. Furthermore, the Applicants' witnesses indicate that both Frederick County and the Adamstown area, as well as the entire region, actually will experience improved air quality as they will benefit from the offsets which will result in a reduction of pollutants forming ozone. Mr. McCann notes that the air quality in the Adamstown area is in fact very good, and the plant will have monitors on emissions at the plant site although there is no air monitor in the Adamstown area off the plant site. Mr. McCann also states that the air quality in Frederick County for ozone was actually improving, but other areas in the region have been

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<sup>12</sup> Ozone is a result of a chemical reaction in the atmosphere, rather than an emission from the project, and the nonattainment area is region-wide, not limited to the specific location of the plant. Therefore, the local air quality for ozone may be affected by emissions from far away sources.

deteriorating so that Frederick County was designated a severe nonattainment area for ozone several months prior to the hearing in this matter.

While no other pollutants have been indicated to be a nonattainment area with respect to Frederick County, witness McCann confirmed that the Environmental Protection Agency ("EPA") is currently reviewing particulate matter and proposed Frederick County be classified nonattainment for fine particulate matter (PM2.5). However, this designation has been contested, and it has not been finalized.<sup>13</sup>

Mr. McCann also notes that the project is subject to Prevention of Significant Deterioration ("PSD") review requirements for the following fine pollutants: sulfur dioxide, total suspended particulates, particulate matter 10 (PM10), nitrogen oxides, and carbon monoxide. However, he states significant impact threshold levels for all the criteria pollutants have not been exceeded by the project, as the projects maximum impacts are predicted to be three percent or less of the national ambient air quality standards ("NAAQS"), and therefore the maximum impacts are well below the levels designed to protect human health and welfare. Mr. McCann states that the projects maximum impacts are therefore 30 times lower than the levels that affect human health. Due to such low

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<sup>13</sup> According to the record, fine particulate matter may affect children and elderly by contributing to problems with lungs and asthma. Ozone may also affect respiratory problems and contributes to acid rain.

level of impacts, pre-construction ambient air monitoring data for the pollutants is not required, according to the applicants' witnesses. They conclude that the project's potential impacts on air quality in nearby communities are expected to be minimal and far below the ambient air quality standards that are desired to protect the health and welfare.

The State Agencies have also provided testimony by witnesses Paul, Ross and Garrison with respect to the potential emissions and effect on air quality. Mr. Paul has testified that PPRP and ARMA have concluded that the new facility should be considered a separate source for PSD purposes from the existing Eastalco plant, which is an existing major source of emissions. He further states that emissions of other regulated pollutants, including lead, total fluorides, total reduced sulfur, reduced sulfur compounds, hydrogen sulfide, mercury, beryllium, arsenic, asbestos, vital chloride, chlorocarbons, halons, and radionuclides, will be zero or negligible.

Mr. Paul also testified that the proposed project has potential emissions of NO<sub>2</sub>, CO, SO<sub>2</sub>, and PM<sub>10</sub> that are subject to PSD review, and potential emissions of NO<sub>x</sub> and VOCs will be above applicable thresholds and so trigger nonattainment new source review requirements. Mr. Paul states he has reviewed the Company's proposed operations for achieving Best Available Control Technology ("BACT") for emissions of NO<sub>x</sub>, CO, SO<sub>2</sub>, and PM, and he concurs with Catoctin's conclusions for achieving BACT. He further reviewed impact assessments of the Company's air quality dispersion models

and concurs that the maximum impacts for all pollutants of concern and all relevant averaging periods are less than the applicable significant impact levels, which conclusion is also confirmed by Mr. Garrison, the air quality consultant retained by the State Agencies.<sup>14</sup> Therefore, because the maximum impacts are less than the significant impact levels for all pollutants, no additional steps need be taken to demonstrate compliance with PSD increments and NAAQS for any regulated pollutant, according to Mr. Paul. He also confirms, however, that NO<sub>x</sub> and VOCs are subject to LAER review in this case, and he has concurred with the Applicant's LAER proposals for these emissions. He notes that Catoctin will be required to secure the emissions offsets for NO<sub>x</sub> and VOC in the ratio of 1.3 to 1, with projected potential NO<sub>x</sub> emissions from the Catoctin Power project of 191.7 tons per year and projected potential VOC emissions constituting 30 tons per year. Therefore, Catoctin must obtain offsets for NO<sub>x</sub> of 249 tons, and offsets for VOC of 39 tons. He states that under Maryland regulations the offsets may be obtained from sources within the ozone nonattainment area in which the proposed facility will be located, or from another ozone nonattainment area, if the area has an equal or higher nonattainment classification than the area in which the source is located. He further states that the Maryland Department of the Environment prefers in-State sources of offsets; however, offsets may come from other emissions sources outside of Maryland

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<sup>14</sup> Paul Direct Testimony, PPRP Exhibit No. 5, at p. 13 (filed November 24, 2004, Docket Entry No. 58).

that are the same or higher ozone nonattainment classification area and that are located in the broad vicinity of the proposed new source. These offsets must be demonstrated to ARMA's satisfaction from an acceptable source prior to issuance of air quality approvals.

As noted above, the State Agencies and Catoctin have reached a Stipulation and Settlement Agreement with numerous agreed conditions, which conditions include specified limits on emissions as well as other enumerated conditions affecting air quality issues. The State Agencies support the grant of the application with the proposed conditions, as they have concluded the site for the proposed Catoctin facility is suitable, provided that the State's recommended conditions are incorporated into the CPCN. Furthermore, the State Agencies state the project will meet State and federal environmental requirements with an adequate margin of safety to protect the public's health and safety, and the State Agencies conclude that the project will meet all requirements of the Clean Air Act by observing the recommended conditions, provided the offsets are obtained and approved by the Air and Radiation Management Administration ("ARMA") of the Maryland Department of the Environment prior to construction. The State Agencies, through PPRP, further argue in their final comments on brief that the State already has an extensive and reliable monitoring network, and therefore PPRP does not consider additional monitoring stations proposed by intervenor Donald L. James to be necessary in this matter, which issue will be discussed further below.

Upon consideration of the record, I find the Applicant and State Agencies have presented substantial testimony in full support of the project's satisfying applicable air quality standards which testimony has not been contradicted, although the issue of additional monitoring stations will be discussed further below.

### **3. Water Concerns**

The final major area of concern with respect to project effects concerns water usage, as large quantities of water are needed by the facility for cooling purposes. The record reflects the plant's total average daily water use is estimated to be 2.58 million gallons per day ("MGD"), of which 2.43 MGD will be needed as cooling tower water while 0.14 MGD will be County-supplied potable water used for other purposes. This project is unique in that the Applicant proposes authorization for two alternative water supplies, one utilizing Frederick County waste water as a prime cooling source in the event that Catoctin and Frederick County reach agreement for such use of County effluent, while the alternative water supply involves obtaining water directly from the Potomac River as the source.

As of the close of record in this case, Frederick County has not provided approval for Catoctin to use the County's waste water as the water cooling source, although Frederick County has proposed various conditions in the event that such a water option is effectuated. This option appears to be the preferred option of the Applicant, as well as the State Agencies, as PPRP notes the use

of reclaimed water would avoid certain impacts associated with construction of water supply lines, including impacts to the Chesapeake and Ohio ("C&O") Canal national historical park, as well as avoiding impacts associated with withdrawal of water from the Potomac River.

Residents commenting at the public hearing and in written comments also reveal concerns with the use of water supply and the affect on the Potomac River, but the Applicant has reached agreement with the water suppliers and has proposed to meet consumptive use regulations (COMAR 26.17.07) by providing upstream storage to augment river flow during low flow conditions or by reducing consumptive use to less than 1 MGD during low flow periods. The Company has also identified two potential facilities, a Millville quarry owned and operated by Aggregate Industries and the "Old Standard Quarry," which is an abandoned flooded quarry. The State Agencies have concluded that either quarry has sufficient capacity to provide the necessary storage, and the volume of water should be adequate to support the number and frequency of potential releases that may be required based on the recent and long-term history of river flow.

The record reflects that Catoctin and the water suppliers have entered into an agreement and defined the terms under which Catoctin will store water and make releases from the storage which agreement includes conditions to be incorporated into the CPCN. The State Agencies appear to accept the agreement with the addition of certain further conditions noted in the State

Agencies-Catoctin agreement. The State Agencies have also proposed a number of additional conditions in the event that Catoctin elects to use the effluent County water as the source of cooling water for the facility to ensure that reclaimed water is managed safely and does not pose any risk to human health and the environment. These conditions include monitoring of the reclaimed water to ensure that any pathogens that may remain in the effluent are destroyed prior to being used in the cooling system. The State Agencies also note that a condition (Condition No.51) provides for review of the water appropriations at a minimum of every three years, and therefore the State will be able to require whatever adjustments are necessary to meet the changes in environmental flow-by requirements.<sup>15</sup>

Upon review of the record with respect to the water use options, the evidence indicates that with the conditions agreed by Catoctin with the water suppliers and PPRP, the Applicant has proposed a sufficient source of water by either of the two alternatives that would have minimal effects upon the river and will fully protect the other users through the augmentation and restriction proposals. Accordingly, I find the record indicates that concerns of commentators with respect to the effects on water supply are

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<sup>15</sup> Such a condition will address a concern addressed at the public evening hearing to allow future adjustments in flow-by requirements. Another concern expressed at the evidentiary hearing was to require complete resolution of the water supply source prior to commencement of any construction of the project. In its brief, PPRP does not consider such a condition necessary as the site location adjacent to an industrial facility confines the impact of commencement of construction, and the Applicant is not likely to commence significant construction if a viable water supply is not arranged. Accordingly, no such condition will be adopted, although the plant may not operate until the water supply is finalized.

adequately addressed by the Company's proposal and conditions of the PPRP and water suppliers, while the additional water supply conditions with respect to use of effluent of Frederick County will be discussed below.

#### **4. Other Impacts**

The record further contains evidence by witnesses for both Catoclin and the State Agencies on other aspects of the proposal indicating the project will have minimal other impacts, especially as it is located on an industrial site as noted above. For example, the record reflects minimal cultural impacts as no known archaeological sites in or around the proposed project area have been identified in the approximately 20 acres affected by the facility, and visual impacts will also be mitigated by additional screening. Also, the property is located next to a large existing industrial plant of nearly the same height which would mitigate the marginal visual impact of the facility on existing neighboring properties. The record further indicates minimal noise impacts as the facility will operate in compliance with applicable State and local noise regulations provided that major construction activities are limited to certain hours.

#### **5. Conclusion-Grant of CPCN**

Upon consideration of the record in this proceeding, including the evidence on the record and arguments of the parties, as well as the comments submitted by the public with respect to the

application, I find that the application of Catoctin Power, LLC for a Certificate of Public Convenience and Necessity to construct a nominal 600 MW generating facility in Frederick should be granted as being in accordance with the public convenience and necessity and in the public interest. A review of the record shows that Catoctin has presented evidence on all required factors which indicate that the plant will be in the public interest and have relatively minimal effects on the area when operational, as the impact of the plant will be mitigated by the extensive conditions accepted in this proceeding. In this respect, the agreement and extensive conditions proposed by the State Agencies through the Power Plant Research Program will reduce any deleterious effects of the project and are hereby accepted, as is the agreement reached by the Applicant and the water suppliers which protect the water supply of the Potomac River. The water suppliers' agreement provides for conditions for augmenting the Potomac River or reducing consumptive use by Catoctin under certain circumstances, which conditions also address the concerns expressed by public commentators at the public hearing concerning the effect of the project on water resources, and are hereby accepted.

In sum, the record reflects the plant will be a new, clean generation source utilizing natural gas that will be located on a large industrial site next to an existing industrial plant, the Eastalco Aluminum facility. The expert testimony submitted by the Company, which is confirmed by the expert testimony submitted on behalf of the State Agencies, shows the plant will meet all

applicable standards and have a large number of protections through these accepted conditions so that it will not cause significant adverse impacts, and therefore the Certificate will be granted as being in the public interest.

In conclusion, I find the record reflects that the proposed project is located in a very appropriate site for construction of a gas-fired generating facility, and with the extensive conditions agreed by the Applicant with both the State Agencies and water suppliers, the application should be granted as being in the public interest.

### **C. Disputed Conditions**

While I find that the application shall be granted with the conditions noted by the State Agencies and water suppliers, several parties in this proceeding have proposed further conditions that they request be included in the Certificate if the application is granted. As noted above, Mr. James, Frederick County, and the Commission Staff (supported by OPC with a slight modification) have each proposed additional conditions that they desire be included in the grant of a CPCN. These further proposed conditions, many of which are contested, will now be discussed.

## 1. Donald L. James' Proposed Air Monitoring Condition

Mr. James, who has provided diligent participation throughout the entire proceeding, has proposed a condition<sup>16</sup> that would require a minimum of three air quality testing monitors in residential areas near the plant, one of which would be placed at Carroll Manor Elementary School. Mr. James proposes that air quality testing be conducted by an independent third party, and funded by Catoctin, until the plant has been in full operation for two years, and longer if there is a measurable difference in the actual pollutant levels which contradict the modeling and expert assertions. In support of his proposed air quality testing condition, Mr. James has emphasized throughout the course of this proceeding that he believes there is insufficient evidence of actual testing of air quality in the residential areas that can specify the actual values of criteria pollutants in the vicinity. He further states that the residents in the Adamstown area have a great deal of uncertainty regarding the air quality which would not be alleviated by the modeling techniques used by the State, and that a valid sampling of the actual air quality in the area is necessary for assurance to the community of the safety of the actual air quality experienced by the residents. He acknowledges that while exemptions from ambient air monitoring requirements can be requested if air quality impacts are projected to be less than

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<sup>16</sup> During the course of the proceeding, Mr. James also proposed a condition with respect to use of effluent from Frederick County as the water source, but has withdrawn this proposed condition in his final position on brief.

*de minimis* levels, he requests the Commission not grant an exemption from ambient air monitoring requirements and require monitoring of the actual quality for the health and comfort level of the Adamstown residents.

In addition, on brief Mr. James asserts that the Eastalco plant has filed an application with MDE which will allow Eastalco to increase its production, which would also result in an increase in emissions. He contends that such increase provides further support for air monitoring as proposed in his condition.

Both Catoctin and PPRP oppose Mr. James' proposed condition for additional monitoring of local air quality. These parties do not consider such an air monitoring requirement to be necessary, noting that the Catoctin project's low emissions will result in air quality impacts that would not exceed significant impact thresholds so that such additional monitoring is not necessary for this project.

Catoctin also objects to the proffered information regarding an apparent recent application by Eastalco to increase production as such information was not offered during the evidentiary record in this case. However, Catoctin notes that to the extent Eastalco has filed a PSD application with the Maryland Department of the Environment, Eastalco will be required to satisfy all applicable regulatory requirements associated with the PSD permitting process, including a demonstration that any associated emissions do not cause any violation of applicable air quality standards in and around the community. Catoctin further reiterates

that its obligation to secure emissions offsets will in fact result in an overall decrease in pollutants that contribute to ozone problems in the region. Also, should MDE determine an air quality monitoring station in Adamstown is warranted, then MDE has the ability and authority to establish such a monitoring station.

The State Agencies have also been a vociferous critic of Mr. James' proposed monitoring condition. While acknowledging Mr. James' responsible participation in the hearing process, the State Agencies consider his testing proposal to be unnecessary and not supported by regulatory or technical rationale. They consider it to be an unnecessary expense subject to legal challenge. The State Agencies further dispute Mr. James' assertion that the actual air quality of Adamstown is unknown, stating it can be determined based upon modeling data collected from the rigorously designed and implemented nationwide monitoring network operated over a period of years. The closest monitoring station is located in Frederick, and using EPA-approved methodologies, MDE establishes background ambient pollutant concentrations for every locale in the State with a high degree of statistical confidence, according to PPRP. The monitoring network allows the State and U.S. Environmental Protection Agency to determine which areas of the country are attaining National Ambient Air Quality Standards ("NAAQS"), and which areas are not in compliance. Furthermore, the citizens of Adamstown are in no different situation than citizens in any other community located near industrial facilities or power plants, and Catoctin is already being required to install millions of dollars

of pollution control equipment at the facility as well as purchase offsets in order to meet the stringent PSD and Nonattainment New Source Review requirements. Therefore, to impose additional unnecessary expenses for further monitoring will not make the citizens of Adamstown more safe, according to PPRP.

In further explanation, the State Agencies contend that models are designed to establish the maximum impact that might occur from a new facility and estimate concentrations throughout the local area by using a detailed receptor grid, which can estimate the impact of source emissions at maximum allowable levels whereas air monitors may only reflect the actual emissions. Also, once the generating facility is in operation, it will be subjected to monitoring and inspections to assure that emissions limits are being satisfied, and the modeling performed by both the Applicant and State for this project indicate that the impacts are quite small and do not exceed the monitoring *de minimis* levels or significant impact levels for any pollutant modeled. The State Agencies contend that there is no regulatory or factual basis to recommend imposition of additional monitoring in Adamstown as a further condition, especially since MDE operates an ozone monitoring station at the Frederick Municipal Airport located approximately 7.5 miles from the Catoctin Power site as well as 100 pollutant monitoring stations for various criteria pollutants within 60 miles of the proposed project. Catoctin's emissions will be monitored at the stack source, which records will be submitted to MDE and EPA to ensure compliance with facility emission limits,

and PPRP concludes that the monitoring program meets the in-depth program requirements established by the EPA for pollutant monitoring networks. Therefore, as the project emissions will have no significant impacts, there is no need for further ambient air monitoring in the area, according to PPRP.

A review of the record on this issue indicates an apparent dichotomy between the residential neighbors of the project and the expert witnesses who testified on behalf of Catoctin and PPRP. While the Applicant and State Agencies do not believe actual air quality testing is necessary in the vicinity, Intervenor James, as well as comments from nearby residential neighbors of the project, express concerns regarding the emissions from the project and effect on air quality to the neighboring community, specifically Adamstown. A review of the evidence shows that the affected area is classified as a severe nonattainment area for ozone, and Frederick County has a monitor for ozone located approximately 7.5 miles away at the airport. Also, Mr. Paul, the State witness from MDE, stated that the Frederick County monitor has not registered a violation since 1999, which violation was for just one day, with regard to ozone. Also, the record reflects there is some question and recent dispute as to local air quality with respect to fine particulate matter, PM<sub>2.5</sub> (fine particulate matter with a diameter smaller than 2.5 microns).

A review of the evidence further reveals that Catoctin will purchase offsets of at least 1.3 times the project's maximum NO<sub>x</sub> and/or VOC emissions, so that, as noted above, the project will

actually provide some benefit to ozone air quality throughout the larger region by purchase of such emission offsets which will improve air quality throughout the region as a whole. In addition, the record reflects that the Applicant has agreed to conditions to endeavor to obtain such offsets from Frederick County sources, if reasonably commercially available, or from the geographically closest reasonably commercially available sources. However, as noted by the record in this case, procurement of local offsets may provide economic advantages to Frederick County, but from air quality perspectives, local offsets may not produce the same local air quality results as offsets from other areas.<sup>17</sup>

Mr. James has proposed his air monitoring condition for the stated purpose of measuring the actual air quality in the residential vicinity and to provide assurance to nearby residents of the actual air quality irrespective of what predictive models used by regulatory agencies may estimate. In this regard, there appears to be a clear fear of the air emissions from the project and distrust of how the modeling relied upon by State Agencies will translate into actual air quality of the nearby locale. In considering all of the evidence on the record and arguments of the parties with regard to this dispute, I find the record supports requiring one air monitoring station in the Adamstown area to determine actual air quality in the region that will result after

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<sup>17</sup> The air quality in any specific area may in fact be affected by emissions from far away sources, especially for ozone, so that local offsets may not necessarily have the intended benefit to nearby ozone air quality as more remote sources would have.

the project is placed in operation, but no support for three monitoring stations as proposed by Mr. James.

In reaching such decision, I agree with the Applicant and PPRP that the record indicates that the project does in fact satisfy all applicable standards for issuance of a CPCN as the emissions are within acceptable levels that will not constitute a significant impact to the area. Furthermore, the State Agencies particularly believe that the existing air monitoring system is sufficient without need of additional monitors, as they believe their modeling methodology can determine air quality throughout the State. While recognizing such record evidence, I find that there are certain unique aspects to this project so that an additional monitor for the Adamstown area is a reasonable condition for such project which is a new source of emissions in the area. Specifically, the evidence indicates that Frederick County, as well as all of Maryland, is in a federally designated severe nonattainment area for ozone, and while ozone is a pollutant formed by emissions of specific compounds (NO<sub>x</sub> and VOC) that is formed over large areas, the fact remains that the location is part of a severe nonattainment area so that scrutiny should be given to requests for exemptions of air monitoring requests for these pollutants.<sup>18</sup> In addition, there is apparently a pending proposal

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<sup>18</sup> According to PPRP witness Garrison, sources subject to PSD review must conduct ambient impact analyses using measured air quality data in the vicinity of the project, but can obtain an exemption if the source's impact is shown, through modeling, to be less than the *de minimis* concentration levels defined in PSD regulations. (PPRP Exh. No. 7, Garrison Direct Testimony at pp. 8-11, filed October 1, 2004, Docket Entry No. 48.)

to find Frederick County as a nonattainment area for particulate matter. The record further reflects that both ozone and particulate matter can impact local health, including affecting respiratory problems and asthma. In light of the record indicating potential health effects for these pollutants, and the clear concerns of the neighboring area which is in a designated nonattainment area, the request by an affected community for local air monitoring of these pollutants as a condition for a new power plant must be given serious consideration.

In addition, the record is also clear that the proposed power plant will be located in an industrial-zoned area near existing major emission sources. While I note earlier the site constitutes a reasonable site for placement of the power plant, these facts raise other factors that must be considered, specifically that a large industrial facility is already operating on the site. In this regard, while Catoclin is correct that future plans for the Eastalco facility potentially increasing emissions have not been adequately presented on the record and therefore cannot be considered,<sup>19</sup> the fact remains that Eastalco is an existing industrial plant with emissions that affect the area, and operation of the proposed Catoclin power plant in the vicinity cannot be judged in total isolation. Furthermore, there are other power plants located several miles from the proposed Catoclin site,

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<sup>19</sup> As noted by the Applicant, State Agencies will review any such increased emissions in their review of any such Eastalco proposal.

specifically major power plant operations at Dickerson, located nearby in Montgomery County.

The air monitoring systems in place are largely based upon modeling which takes into account all aspects of emissions that may affect the residents of Maryland, and include monitors placed upon the emissions of each emitting source to ensure that such facilities are within their limits for each specific emission. While modeling methodology is intended to include cumulative effects and determine air quality in any locale, the confluence of the three major sources (Eastalco, Dickerson, and the Catoctin plant) within a fairly close geographic area further support the conclusion that it is reasonable to require an additional air monitoring station in the Adamstown vicinity to provide actual testing results of the air quality that will be experienced in that locale. Accordingly, the recommendation to require Catoctin to fund an air monitoring station in Adamstown for a two-year period as a condition of the CPCN will be accepted, as I find that such a condition is a reasonable request for one community air monitoring station (rather than three as proposed by Mr. James), which shall measure those pollutants for which the area is in nonattainment or potential nonattainment. Accordingly, Mr. James' condition will be accepted, but for one air monitor in Adamston, which shall measure air quality of ozone, NO<sub>x</sub>, VOC and PM on a quarterly basis for a two-year period at the expense of the Applicant, Catoctin Power. Other pollutants requested to be monitored by Mr. James will not be required as the project emissions are below significant impact

levels and the location is not designated a nonattainment area for these other pollutants. The condition is also modified to require monitoring for a two-year period at which time it may cease, unless the State of Maryland Department of the Environment believes such monitoring should then be continued based upon the results of the testing.<sup>20</sup>

## **2. Frederick County Proposed Conditions – Site Plan, Air Quality, Water Use, Land Preservation**

As noted above, Frederick County has proposed various conditions in this matter in the event that the CPCN is granted. Specifically, Frederick County has proposed 15 enumerated conditions regarding issues of site plan, air quality, water use, and land preservation. Of these conditions, Catoctin has accepted many of the enumerated conditions, although with certain modifications or clarifications which do not appear to be contested and will therefore be accepted as no longer in dispute. Specifically, Catoctin appears to agree with Frederick site plan conditions Nos. 2, 3, 4, 5, and 6, which are hereby accepted, while indicating

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<sup>20</sup> The record indicates the cost of air monitoring for a two-year period to be fairly modest. Mr. McCann, who testified for Catoctin in rebuttal to Mr. James' proposal, gave a rough cost estimate of up to \$100,000/year for an air monitor. (T. 1131-1137). The State Agencies also provided a cost estimate on brief indicating similar costs, but disavow the estimate in their reply brief.

While the cost estimates on this record are not very precise, it appears that the costs of a two-year monitor at a single location would be fairly modest and would benefit the community by providing actual air quality results to the Adamstown community to ensure the safety of the air.

it believes its agreement to PPRP-proposed condition No. 101<sup>21</sup> satisfies the substance of Frederick County site plan condition No. 1 and is preferable to Frederick County's "vague and ambiguous" condition No. 1. Catoctin also accepts the ambient air quality proposed conditions of Frederick with certain clarifications which would require Catoctin to endeavor to obtain NO<sub>x</sub> and/or VOC offsets from Frederick County sources if reasonably commercially available. Accordingly, conditions No. 7 and 8, as modified by Catoctin, are also accepted.

Frederick County conditions No. 9 through 14 concern water issues, with Catoctin accepting conditions No. 9 and 10, which are interpreted to clarify that the CPCN does not require Frederick County to supply treated waste water or potable water to Catoctin Power or require Frederick County to allow Catoctin Power to discharge waste water through the County's discharge system. Catoctin also agrees to condition No. 13, providing that Catoctin shall obtain a separate NPDES User Discharge Permit prior to discharging wastewater into or through the County's effluent outfall system. As agreed by the parties, these conditions will also be accepted.

Frederick County conditions No. 11, 12 and 14 concern matters regarding supply of effluent to Catoctin Power (or

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<sup>21</sup> PPRP Condition No. 101: "Catoctin Power shall design the facility in substantial conformance with the Site Plan drawings reviewed by the Frederick County Planning Commission ..."

discharge of Catoctin wastewater into the County's wastewater discharge system -- No. 12), which conditions are opposed by Catoctin as vague and ambiguous. Also, Catoctin opposes such conditions claiming they are commercial in nature and should more appropriately be accomplished through negotiation of any agreement between the County and Catoctin Power in their effluent negotiations.

With respect to these disputed water conditions, as noted earlier, the record reflects that Catoctin proposes two alternative options for obtaining the water supply for cooling purposes. The first option would use effluent from Frederick County that would require a contract with the County, while the second alternative would utilize the Potomac River as an alternative source with low flow augmentation provisions as noted earlier in this order. While Frederick County proposes certain specific terms with regard to possible effluent use for cooling purposes, Catoctin opposes the CPCN containing certain terms and conditions as the use of County effluent is contingent upon Catoctin and the County reaching agreement. Accordingly, Catoctin notes that terms regarding the County effluent option should be based upon negotiation between the parties rather than dictated by the Commission in the CPCN for such an option.

A review of the disputed conditions indicates that such provisions appear to be matters which the Board of County Commissioners have full power to negotiate with Catoctin Power in the event the parties reach agreement on use of County effluent as

the water cooling source, and therefore there is no need to address these conditions which appear to be matters subject to the parties' negotiation. No such agreement to use County effluent has occurred as of this date, but any such agreement should incorporate the provisions mutually agreeable to both parties if agreement is reached.

Frederick County's final proposed condition provides for a land preservation condition that Catoctin Power shall work with Eastalco Aluminum to place approximately 250 acres of land located in the general vicinity of the plant into permanent agricultural preservation. The County states the purpose of such land preservation is to offset negative impacts of the plant on the quality of life of the citizens of the area, and to serve as a further buffer between the plant and community including, but not limited to, St. Matthew's Lutheran Church. Furthermore, if such land preservation does not occur for this specific site, an alternative similar site would be acceptable, or Catoctin Power shall work with the Carrollton Manor Land Trust to identify and locate land to achieve the same result, with certain parcels of land identified in the proposed Frederick County condition.

The County's proposed land preservation condition is opposed by Catoctin, and also by Eastalco as noted above. Eastalco, which did not sponsor any witnesses but opposed the proposed condition on brief, contends the proposal is unsupported by evidence, outside the scope of the Commission's jurisdiction, and would be unconstitutional. Eastalco notes the proposed gener-

ating site is on property currently zoned for industry and adjacent to an existing industrial facility, and the location is consistent with Frederick County's comprehensive plan. Furthermore, Eastalco contends the record does not support any claims of significant adverse impacts from the project, noting the evidence of the expert witnesses does not indicate any significant impacts on traffic, noise levels, or property values. Only minor effects on demand for fire and rescue services have been demonstrated, for which Catoclin has agreed in a condition to conduct an assessment and provide adequate services or reimbursement if necessary, and truck traffic transporting aqueous ammonia will use designated truck routes that would not pass by schools or housing developments. Also, Eastalco contends that the evidence shows project air emissions will not adversely impact air quality and will comply with all applicable air standards, regulations, and requirements under federal and state law. Therefore, Eastalco claims the record, including the numerous conditions regarding air quality and testing by the Applicant and DNR, refute any allegations of increased pollutants requiring a large buffer area for offsetting alleged negative impacts of the plant on the quality of life of Frederick County citizens.

In addition to the lack of record support for such a land preservation condition, Eastalco contends the proposed condition seeking to place Eastalco property into agricultural preservation is beyond the jurisdiction of the Commission and is in effect an attempt to accomplish rezoning of Eastalco property. Eastalco

contends the Commission does not have jurisdiction over zoning such that it can require placement of unrelated property into permanent agricultural preservation, nor does it have jurisdiction over Eastalco that can require Eastalco to do so. Finally, Eastalco contends the request is unconstitutional as it would impose a constructive taking of portions of Eastalco's property as a condition in the CPCN, the grant of which would be arbitrary and capricious and offend due process.

Catoctin also opposes the proposed land use condition disputing the County's rationale that the agricultural set-aside would provide needed additional buffering benefits. Catoctin notes that the record reflects over 97 percent of the two proposed parcels provide no buffer at all between the church and the Catoctin facility, and the project was in fact purposely sited in the center of an industrial-zoned parcel with significant amounts of adjacent industrial property to provide physical buffer to the community. The project incorporates additional buffering and screening recommendations of the County and the public, including tree plantings which would buffer and screen the facility from the church property. Furthermore, the proposed parcels which the County proposes be placed by Catoctin in permanent agricultural preservation are not owned by Catoctin, but are Eastalco property that are currently zoned for agricultural use. Therefore, it is within the County's control to allow or not allow industrial use on such property in the future.

As to a possible purpose of placing further land into agricultural preservation as an offset to the project, Catoctin opposes such request in this instance as the project is proposed for an industrial-zoned site rather than "green field" property. Catoctin contends the CPCN process should not be used to circumvent land use planning regulations or dictate a land use concession from Catoctin simply because the project will be located on property owned by a landowner with whom the County has previously engaged in land use discussions. Catoctin further disputes the rationale of needing the property for preservation of "quality of life" conditions in the County noting it has agreed to many such quality of life conditions, and the site was selected to avoid such issues.

A review of the record with respect to the proposed land use condition of Frederick County shows that Frederick County desires the Applicant arrange the placement of a very large parcel of land in the vicinity of the plant into agricultural preservation. The land is not currently owned by the Applicant and has little relation to the project other than being in a nearby vicinity. The County seeks such a condition for the purpose of addressing impacts of the proposed plant on the quality of life of Frederick County citizens and to serve as a buffer between the plant and the community, with its evidentiary presentation indicating desire for an additional buffer for the St. Matthew's Lutheran Church located north of the project site.

In reviewing the record on this issue, of the 250 acres sought by the County to be placed in agricultural preservation, the

evidence reveals that approximately only eight acres may serve as additional buffer between the church site and the Catoctin project site, while the remainder of the proposed agricultural property is basically to the east and west of the St. Matthew's Church and would in fact provide no buffer between the church and Catoctin's facility. The record further reveals that the Catoctin plant will be located in the zoned Eastalco industrial site in close proximity to the existing Eastalco plant, and Catoctin has included tree planting buffering along the industrial site borders with the road in the area to buffer neighboring communities. Furthermore, Catoctin would be willing to engage in additional tree planting buffering of the area along the same path, and I find that the tree planting buffer area along the area of the industrial site near the roadway should provide adequate buffering for neighboring communities from the Catoctin facility.

The County further argues that the agricultural preservation condition is requested for quality of life purposes, but the record in this instance further indicates that the proposed plant will have minimal effects on the quality of life in the area. The record indicates the project will satisfy all regulatory requirements with the conditions designed to mitigate the environmental and other effects, and there will also be little effect on the character of the area, which is currently a zoned industrial area with an existing large industrial plant.

The County request is essentially a proposal to seek permanent placement of large parcels of land in permanent agricul-

tural preservation, which land is currently used for agricultural purposes but may not continue so in the future. There is no requirement that power plants seek to "offset" power plant sites with protection of comparable properties, but if any such offsets would be considered as an appropriate "trade off" for power plant construction, the request for 250 acres or more in agricultural preservation would totally dwarf the less than 20 acres utilized by the Catoctin plant in this instance. This would be an arbitrary and capricious demand imposed upon generating projects absent some type of legislative direction requiring such a proposal.

Therefore, based upon the record, I find that the County's proposed condition to require a large parcel of neighboring property be placed in agricultural preservation is not reasonable in this instance as a condition to be placed upon the Applicant, and it will therefore not be accepted as a condition of the Certificate. Such decision, however, does not speak in any respect to any attempts the County may wish to engage in with the owner of the property in question, Eastalco, as to maintaining such property in agricultural preservation if the County believes that is the proper designation for the parcels in question. However, the record in this case does not support the reasonableness of requiring such a condition in the Catoctin CPCN, especially for this project which will constitute less than 20 acres on an already zoned industrial parcel.

### **3. Staff Proposed Conditions – Electric System Stability and Reliability**

During the course of this proceeding, Staff has proposed three conditions regarding the effect of the proposed plant on stability and reliability of the electric system. Specifically, Staff recommends that prior to putting any portion of the project in service, the Applicant shall file with the Commission a listing of transmission system improvements required by PJM and certification that the improvements have been completed. Also, the Applicant shall file with the Commission a listing of interconnection requirements and certification that the requirements have been met, and within 30 days after putting the project into service, Catoctin shall file a copy of its interconnection service agreement with the Commission.

The Applicant has indicated agreement with such conditions, although issues have arisen regarding the timing of such certifications and the parties' implementation language with respect to such conditions. In this regard, OPC has also indicated in its final comments supplied in letter form in this proceeding that such reporting by the Company of transmission system improvements and interconnection requirements should be done at least 30 days prior to operation of the proposed facility (except for the interconnection service agreement which may be filed after the project is put into service). OPC claims a sufficient time is needed for review by the Commission of filings related to transmission and interconnection.

Catoctin reiterates an objection to the consideration of the OPC proposed modification, which Catoctin considers to be untimely as it was raised in OPC's final letter submitted subsequent to the hearings. However, Catoctin also indicates if the OPC's request is not rejected as out of time, Catoctin would accept such conditions with the modification that certifications of improvements may not always be available 30 days prior to operation with regard to minor modifications required by PJM or the transmission provider. Catoctin therefore proposes that it will file with the Commission a list of transmission improvements and interconnection requirements not less than 30 days prior to putting any portion of the project in service, but certifications that the improvements and interconnection requirements have been met will be filed prior to putting the project in service.

In considering this dispute, while it may have been preferable for all parties to have advanced their positions at an earlier stage in the proceeding, I find that the proposed modification by Catoctin in its final brief appears to be a reasonable resolution of this issue that apparently satisfies concerns of all parties with respect to this subject. Accordingly, the modified Staff conditions No. 1 and 2 of the Catoctin reply brief<sup>22</sup> will be accepted, as will the original Staff condition No. 3, which does not appear to be contested.

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<sup>22</sup> February 18, 2005, Catoctin Reply Brief, p. 11.(Docket Entry No. 84)

### III. CONCLUSION

In conclusion, upon consideration of all the evidence, testimony and comment on the record, as well as the arguments of the parties, I find and conclude that the application of Catoctin Power, LLC for a Certificate of Public Convenience and Necessity, for construction and operation of a nominal 600 MW combined-cycle gas-fired electric power generating facility, should be granted in accordance with the findings of this Order. In this regard, the Settlement Agreement of the Applicant with PPRP and the Settlement Agreement of the Applicant with the water suppliers are both accepted as uncontested and in the public interest, and the CPCN conditions accepted in both agreements shall be adopted as conditions of the CPCN. In addition, the condition of Intervenor Donald James, as herein modified to provide for one air monitoring station in Adamstown of certain pollutants at the expense of the Applicant for a two-year period, is also adopted in accordance with this Order. Various conditions of Frederick County and Staff as modified and accepted herein are also included as conditions of the Certificate.<sup>23</sup> In this regard, three proposed conditions of Frederick County regarding wastewater effluent matters are not

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<sup>23</sup> Attachment I (consisting of Appendices A, B and C), incorporated herein by reference, contains the conditions accepted as part of the CPCN. Attachment I, Appendix A contains the PPRP conditions, Appendix B contains the water supplier conditions, and Appendix C contains the accepted conditions of Frederick County, Staff, and Mr. James.

accepted, and the Frederick County proposed land preservation condition is also not accepted as discussed above.

In sum, I find the record reveals that the proposed new power plant, to be powered by natural gas, will be a source of additional power that will be located in an industrial-zoned property near another large industrial plant, with minimal effects on the surrounding area. It will operate, with the extensive conditions accepted herein, without exceeding significant impact thresholds upon the environment, and will in fact benefit overall ozone air quality by the required offsets for certain emissions (NO<sub>x</sub> and VOC). The power plant will operate to the overall benefit of the public by providing a new source of clean electric power within acceptable parameters when considering the relevant factors, and satisfies the public interest.

Finally, as the CPCN with the accepted conditions is granted as being in the public interest, the request of the Applicant for waiver of the two-year period from filing of the application to commencement of construction shall be granted. The record does not indicate any valid purpose to unnecessarily delay the project for nearly another year, and therefore the waiver is granted to allow construction to commence prior to February 2006. Also, as the site is already industrially zoned, no harm to the community would occur from earlier commencement of construction once the CPCN has been issued.

IT IS, THEREFORE, this 24th day of March, in the year Two Thousand Five,

ORDERED: (1) That the application of Catoctin Power, LLC for a Certificate of Public Convenience and Necessity to construct and operate a nominal 600 MW combined-cycle natural gas-fired electric power generating facility in Frederick County, Maryland is hereby granted in accordance with the findings of this Order.

(2) That the Agreement of Stipulation and Settlement of Catoctin Power, LLC and the Power Plant Research Program of the Department of Natural Resources is hereby accepted, including the conditions contained therein (noted in Attachment I, Appendix A).

(3) That the Settlement Agreement of Catoctin Power, LLC and the water suppliers (Fairfax County Water Authority, Washington Suburban Sanitary Commission, and Washington Aqueduct Division) dated October 21, 2004 is hereby accepted, including the conditions contained therein (noted in Attachment I, Appendix B).

(4) That the additional conditions accepted herein and noted in Attachment I, Appendix C are accepted as part of the CPCN.

(5) That the request for waiver of the provisions of § 7-208(b) of the Public Utility Companies Article to allow commencement of construction prior to two years from the filing of the application is granted.

(5) That this Proposed Order will become a final order of the Commission on April 26, 2005, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in Section 3-113(d)(2) of The Public Utility

Companies Article, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in Section 3-114(c)(2) of The Public Utility Companies Article.

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Joel M. Bright  
Hearing Examiner  
Public Service Commission of Maryland