STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF INDIANA MICHIGAN POWER COMPANY (I&M), AN INDIANA CORPORATION, FOR APPROVAL OF A CLEAN ENERGY PROJECT AND QUALIFIED POLLUTION CONTROL PROPERTY AND FOR ISSUANCE OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR USE OF CLEAN COAL TECHNOLOGY; FOR ONGOING REVIEW; FOR APPROVAL OF ACCOUNTING AND RATEMAKING, INCLUDING THE TIMELY RECOVERY OF COSTS INCURRED DURING CONSTRUCTION AND OPERATION OF SUCH PROJECT THROUGH I&M'S CLEAN COAL TECHNOLOGY RIDER; FOR APPROVAL OF DEPRECIATION PROPOSAL FOR SUCH PROJECT; AND FOR AUTHORITY TO DEFER COSTS INCURRED DURING CONSTRUCTION AND OPERATION, INCLUDING CARRYING COSTS, DEPRECIATION, TAXES, OPERATION AND MAINTENANCE AND ALLOCATED COSTS, UNTIL SUCH COSTS ARE REFLECTED IN THE CLEAN COAL TECHNOLOGY RIDER OR OTHERWISE REFLECTED IN I&M'S BASIC RATES AND CHARGES.	FILED July 21, 2017 INDIANA UTILITY REGULATORY COMMISSION **CAUSE NO. 44871**

INDIANA MICHIGAN POWER COMPANY'S SUBMISSION OF ADDITIONAL INFORMATION CONCERNING ROCKPORT UNIT 2 LEASE

Indiana Michigan Power Company ("I&M" or the "Company") has committed to updating the Commission and stakeholders concerning the Company's ongoing evaluation of options for the Rockport Unit 2 lease. *See* Pet. Ex. 1 at 11, Pet. Ex. 1R at 5. To that end, I&M makes this filing to inform the Commission and stakeholders that I&M and several of its affiliates (collectively, "AEP") today filed the attached motion in the United States District Court for the Southern District of New York seeking (1) to modify several aspects of the Consent Decree that governs the Rockport Plant and other AEP generating units, including proposed

modifications to eliminate the requirements to install Selective Catalytic Reduction ("SCR") and high-efficiency Flue Gas Desulphurization (FGD) systems on Rockport Unit 2, and (2) to toll the deadline to install SCR technology on Rockport Unit 2 during the pendency of the motion. *See* Attachment 1.

Below is a brief summary of the motion and a description of the implications for this proceeding and future proceedings.

1. The Request to Modify the Consent Decree

Today, I&M and several of its AEP affiliates (collectively, "AEP") have filed a motion in the United States District Court for the Southern District of Ohio to modify the Consent Decree. As described in the motion, the district court retains broad discretion under Federal Rule of Civil Procedure 60(B)(5) to modify the Consent Decree if "applying it prospectively is no longer equitable." *See* Attachment 1, at 12 (citing case law). Here, AEP argues that enforcement of the current terms of the modified Consent Decree is no longer equitable because "the Sixth Circuit's decision has undermined basic assumptions underlying the modified Consent Decree with respect to AEP's rights under the Lease." *Id.* at 15. The motion explains:

> At the time of the Third Joint Modification, the parties assumed that AEP was able, consistent with its authority under the Lease, to agree to install a high-efficiency FGD at Rockport Unit 2 as late as 2028, past the end of AEP's initial lease term in 2022. The Sixth Circuit's decision has called into question whether AEP was permitted to make this agreement under the "Permitted Lien" and "no lien" provisions of the Lease. The parties never anticipated that what they were agreeing to in the modified Consent Decree was potentially inconsistent with AEP's rights under the Lease, particularly after hearing no objections from the Lessors.

Id. at 15 (footnotes omitted). As a result, the motion argues, enforcement of the current terms of the modified Consent Decree would "potentially expose [I&M and AEP] to significant liability based on the court's interpretation of the Lease in a way that calls into question AEP's authority

to agree to certain of its terms." *Id.* at 16. That result has caused AEP to "lo[se] the benefit of its bargain in the Third Joint Modification" and is profoundly inequitable. *Id.* at 15.

As a remedy, the motion proposes several modifications to the Consent Decree that are "suitably tailored to the changed circumstance" and designed "to ensure that the environmental benefits the parties previously bargained for are maintained or enhanced." *Id.* at 16 (citation omitted). Specifically, the motion proposes five modifications, summarized as follows:

(1) "[R]emove the requirements for additional control installations at Rockport Unit 2 (the SCR and the high-efficiency FGD)."
(2) "[M]emorialize AEP's commitment to seek any appropriate state regulatory approvals to replace Rockport Unit 2's capacity and energy, including but not limited to actions related to the Rockport Unit 2 Lease."
(3) "[I]f AEP owns or otherwise controls only one Rockport Unit by the end of 2026, AEP will commit to retire one Rockport Unit by the end of 2028; alternatively, if AEP owns or otherwise controls two Rockport Units by the end of 2026, AEP will commit to retire one Unit by the end of 2028 and retrofit, retire, repower, or refuel the other Unit by the end of 2028."
(4) "[C]ommit to retire Conesville Units 5 and 6 at the end of 2022 to partially offset the SCR/FGD obligations at Rockport Unit 2."[1]
(5) "[P]rovide for other off-setting reductions in the AEP system-wide caps."

Id. at 18-19. The modifications "remove[] the cloud of uncertainty created by the Sixth Circuit's decision, and provide[] alternatives with respect to Rockport Unit 2 while ensuring that system-wide benefits are maintained." *Id.* at 25-26.

2. Action Seeking to Toll the Deadline to Install SCR Technology on Unit 2

In addition to requesting to modify the Consent Decree as described above, AEP has sought an extension of the deadline to install SCR technology on Rockport Unit 2 while the request to modify the Consent Decree is pending. AEP's motion to amend the consent decree expressly requests that the current December 31, 2019 deadline to install an SCR on Rockport Unit 2 be tolled while the motion is considered. As the motion explains, I&M "faces the

[1] Conesville is a coal-fired generating plant in Ohio that is owned by AEP Generation Resources, Inc.

immediate prospect of entering into major contracts and other obligations that ultimately represent more than a third of the total project cost, while at the same time seeking approval to eliminate the requirement to install those controls and substitute other actions to achieve equivalent environmental benefits." Attachment 1, at 23. Accordingly, the motion proposes that the deadline to install the SCR should be tolled because it "is beneficial to all parties" and will "allow for careful consideration of the instant motion and time for continued negotiations with the Lessors." *Id.* at 25.

3. Implications for This Proceeding and Future Proceedings

a. Obligation to Install an SCR

The motion filed today represents the latest step in I&M's ongoing attempt to find a resolution of the Rockport Unit 2 lease that is in the best interests of both the Company and its customers. The motion is I&M's and AEP's response to the uncertainty caused by the Sixth Circuit's decision and, if successful, would resolve or substantially narrow the issues in that case and provide a clearer path forward for the Rockport Plant.

However, if the motion is not granted (or only partially granted), I&M may still be required to install an SCR on Rockport Unit 2. I&M has worked to defer necessary expenditures on the Unit 2 SCR, including, as described above, requesting that the district court toll the Unit 2 SCR deadline during the pendency of I&M's motion. But if I&M's effort to toll the SCR deadline is unsuccessful, or the motion to modify the Consent Decree is denied, I&M will face an imminent need to commence construction of the SCR in order to comply with the Consent Decree. For that reason, I&M respectfully requests that the Commission proceed to issue an order that grants the Certificate of Public Convenience and Necessity (CPCN) so that I&M may continue towards the construction of the SCR in the event it is required to do so. I&M

expressly clarifies that if Commission grants the CPCN now, I&M will work to avoid or lessen expenditures on the SCR so long as the deadline to install the SCR is being tolled. Further, in the event that I&M's motion is granted and the Consent Decree is modified to remove I&M's obligation to install the SCR on Rockport Unit 2, I&M will not go forward with the SCR installation.

b. Prospects for a Lease Renewal

As the record in this Cause indicates, I&M has been discussing a lease renewal with Lessors. *See, e.g.*, Tr. A-27, A-66 to -67. But as noted in the motion, "given the ongoing dispute with the Lessors concerning the terms of the Lease, AEP does not currently plan on extending the term of the Lease, which will terminate in 2022." Attachment 1, at 17.

Critically, however, I&M's evidence in this proceeding established that installing an SCR was the reasonable least cost option in all scenarios considered, including "Option 1B" in which the lease was not renewed in 2022. *See* Pet. Ex. 4, Attachments SCW-4-1, 4-2 and 4A-E; IMPO at 27-28 (citing Pet. Ex. 4R at 20-23). Accordingly, the fact that lease renewal is now unlikely does not alter or diminish the reasons in favor of granting the CPCN.

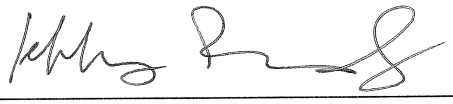
c. Commission Approvals of Energy and Capacity Needed to Serve Customers.

As Dr. Chodak explained in his testimony, I&M previously committed to seeking approval from this Commission for any extension of the Rockport Unit 2 Lease. *See, e.g.*, Tr. A-22 to -24. Now that I&M has determined that it is currently unlikely to extend the Lease, I&M is further clarifying that it will seek appropriate approval for additions of energy and capacity in anticipation of the expiration of the Lease and for replacing Rockport energy and capacity in the event of the Rockport Unit closure commitments I&M is proposing. This commitment, moreover, is expressly stated in the attached motion. *See* Attachment 1, at 18-19.

4. Conclusion

I&M remains committed to informing the Commission and stakeholders of developments in this matter, including the disposition of the motion once it is considered by the court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following via electronic email, hand delivery or First Class, United States Mail, postage prepaid this 21st day of April, 2017 to:

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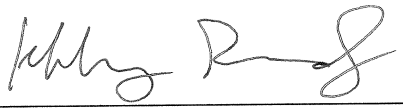

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, and STATE OF NEW YORK, ET AL., Plaintiff-Intervenors, v. AMERICAN ELECTRIC POWER SERVICE CORP., ET AL., Defendants.	Consolidated Cases: Civil Action No. C2-99-1182 Civil Action No. C2-99-1250 JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Terence P. Kemp
OHIO CITIZEN ACTION, ET AL., Plaintiffs, v. AMERICAN ELECTRIC POWER SERVICE CORP., ET AL., Defendants.	
UNITED STATES OF AMERICA Plaintiff, v. AMERICAN ELECTRIC POWER SERVICE CORP., ET AL., Defendants.	JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Norah McCann King Civil Action No. C2-05-360 Civil Action No. C2-04-1098

DEFENDANTS' MOTION FOR FIFTH MODIFICATION OF CONSENT DECREE

TABLE OF CONTENTS AND SUMMARY OF ARGUMENT

This Court has the inherent equitable power to modify its consent decrees as appropriate. Because consent decrees have attributes of a contract, contract principles, including the doctrine of mistake, are relevant to the Court's analysis. The Supreme Court in *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992) set forth a flexible two-part standard for modifying consent decrees based upon changed circumstances. Under the first prong, the party seeking modification bears the burden of establishing that a significant change in circumstances warrants modification. If the first prong is met, the Court should then consider whether the modification is suitably tailored to the changed circumstance.

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DEFENDANTS' MOTION FOR FIFTH MODIFICATION OF CONSENT DECREE

I. INTRODUCTION

Now come the AEP Defendants, American Electric Power Service Corp., AEP Generation Resources Inc. (successor to Ohio Power Company and Columbus Southern Power Company), Appalachian Power Company, Cardinal Operating Company, Indiana Michigan Power Company, and Kentucky Power Company (collectively, "AEP"), and hereby respectfully request this Court to modify the Consent Decree in this action.

Following the entry of the modified Consent Decree in 2013 (the "Third Joint Modification") AEP was unexpectedly sued in federal court for alleged breaches of the agreements related to the sale-leaseback (collectively referred to herein as the "Lease") of a unit at a power plant in Rockport, Indiana, known as Rockport Unit 2. Despite being provided advance notice and having voiced no objections to the modified Consent Decree, the plaintiffs in that litigation (referred to herein as the "Lessors") have alleged that AEP lacked the authority to consent to certain provisions of the Third Joint Modification under the terms of the Lease. This Court dismissed those claims, finding that AEP's actions were authorized by the unambiguous language of the Lease.[1] The Sixth Circuit recently issued an opinion reversing in part, affirming in part, and remanding that case to this Court for further proceedings consistent with that opinion.[2]

Although AEP continues to believe that it will prevail on the merits in the lease litigation, the Sixth Circuit's decision will require protracted and costly litigation. AEP is now in an entirely unanticipated and untenable position—facing extended litigation that could potentially

[1] *Wilmington Trust Co. v. AEP Generating Company*, Case No. 2:13-cv-1213, Opinion and Order, 2016 WL 1259567 (March 28, 2016) (hereinafter "Wilmington II").
[2] *Wilmington Trust Co. v. AEP Generating Co.*, 859 F.3d 365 (6th Cir. 2017).

result in severe and unforeseen negative consequences for the company under the Lease.[3] At the same time, if AEP fails to take timely action to install controls at Rockport Unit 2, it could potentially be found liable for a violation of the modified Consent Decree. Indeed, AEP is currently pursuing the regulatory approvals from the Indiana Utility Regulatory Commission ("IURC") necessary to commence construction of a selective catalytic reduction system ("SCR") at Rockport Unit 2.[4]

Situations such as this one are the very reason this Court maintains the inherent equitable power to modify its consent decrees as the circumstances warrant. Accordingly, AEP proposes removing from the Consent Decree the future control equipment installation obligations at Rockport Unit 2, while revising AEP's obligations in other respects to preserve—and actually exceed—the environmental benefits the Consent Decree was designed to achieve. In addition, AEP seeks to toll the existing deadline for installation of the nitrogen oxide ("NOx") controls at Rockport Unit 2, pending resolution of this motion.

II. SUMMARY OF BASIS FOR MODIFICATION

At the time of the Third Joint Modification, the parties were engaged in a dispute about whether a particular type of flue gas desulfurization ("FGD") equipment designed to reduce sulfur dioxide ("SO_2") emissions, commonly referred to as a dry sorbent injection ("DSI") system, was sufficient to satisfy the requirement to install FGD on two units of a power plant in Rockport Indiana, referred to as Rockport Units 1 and 2. After fully briefing the issue and

[3] Based on the Sixth Circuit's interpretation of the Lease, if the facts alleged in the Lessors' complaint are proven, AEP could be found to have breached the Lease by attempting to preserve and comply with the terms of the Consent Decree. AEP strongly denies several facts alleged in the Lessors' complaint, including facts critical to the Sixth Circuit's decision allowing the Lessors' claims to go forward in that litigation. For example, contrary to the allegations in the complaint relied on by the Sixth Circuit, it was in fact the EPA that made allegations and threats about enforcement proceedings against Rockport generally and Rockport 2 specifically, and pursued AEP to include specific control installations. Nothing in the current motion should be construed as an admission by AEP that it breached the Lease.

[4] *Verified Petition of Indiana Michigan Power Co.*, Cause No. 44871 (IURC 2016) (hereinafter "IURC Petition").

preparing for a hearing before this Court, the parties reached an agreement to install DSI on both Units by an earlier date than was otherwise required by the Consent Decree. However, Plaintiffs insisted on including an obligation to install more efficient FGD controls at the Rockport Units or take other actions to further reduce SO_2 emissions from those Units at a substantially later date, in addition to imposing a declining facility-wide cap on SO_2 emissions from the Rockport Plant. AEP also agreed to take action at other Units in the AEP Eastern fleet, which substantially reduced the fleet-wide AEP Eastern System cap for SO_2 emissions.

AEP and the other Consent Decree parties took steps to avoid any disputes regarding AEP's authority to enter into the Third Joint Modification. The Lessors were provided with direct notice of the proposed modification and its terms by AEP. Through public notice in the *Federal Register* the Lessors were given the opportunity to file public comments.[5] At no time did Lessors raise any objections to the parties to the Consent Decree or to this Court.

The Sixth Circuit's decision calls into question the extent of AEP's authority to make future commitments regarding pollution controls for Rockport Unit 2 under the Lease, and will now require protracted and costly litigation. AEP has not yet answered the Lessors' First Amended Complaint,[6] and the parties recently agreed to stay further proceedings in that case for a limited time to explore the possibility of settlement.[7] The prospect of continuing litigation creates uncertainty for Lessors and all of the parties to the Consent Decree. AEP now seeks to

[5] *Notice of Lodging of Proposed Consent Decree under the CAA,* 80 Fed. Reg. 15740 (Mar. 12, 2013).
[6] AEP intends to deny allegations critical to the Lessors' complaint for breach of the Lease, and assert numerous affirmative defenses in its answer. Furthermore, AEP intends to seek a declaratory judgment that the DSI system is a "Severable Modification" under Section 8 of the Facility Lease, requiring the Lessors to pay AEP to use or benefit from those controls after expiration of the Lease. AEP anticipates, based on the arguments asserted by Lessors in the current litigation, that Lessors will similarly dispute their obligation to pay for the SCR after expiration of the Lease, which would lead to further extensive litigation. However, modification of the Consent Decree as requested herein will assure that the environmental benefits associated with implementation of the Consent Decree can be achieved through actions that have already been undertaken and through future actions only at Units that AEP owns and controls.
[7] *Wilmington Trust Co. v. AEP Generating Co.,* Case No. 2:13-cv-1213, Order of MJ Vascura (July 6, 2017).

modify the remaining commitments related to pollution controls at Rockport Unit 2 as a means to resolve or substantially narrow the issues in that case, and is contemporaneously providing Lessors with a copy of this filing.

As the situation currently stands, essential elements of the modified Consent Decree have been called into question, and may not be fully or timely implemented. No party is advantaged by this continued uncertainty, when further modification can preserve and enhance the environmental benefits provided in the modified Consent Decree. Accordingly, as set forth more fully below, the Court should modify the Consent Decree to avoid triggering future control equipment installations at Rockport Unit 2 while preserving the Consent Decree's environmental benefits, and should toll the deadline for completion of the SCR controls at Rockport Unit 2 pending resolution of this motion.

III. FACTUAL BACKGROUND

A. The Enforcement Litigation

In 1999, the Environmental Protection Agency ("EPA"), Department of Justice ("DOJ"), and various states and citizen groups (collectively, the "Environmental Plaintiffs") filed suits alleging violation of the New Source Review provisions of the Clean Air Act against American Electric Power Service Corporation and five operating company subsidiaries in the AEP System. The complaints alleged violations at a number of units in AEP's system, but did not allege any violations at either of AEP's two units in Rockport, Indiana, Rockport Units 1 and 2.

Over the course of the litigation, the Environmental Plaintiffs refined and expanded their claims, eliminating some and adding others, and the litigation ultimately culminated in a trial held in 2005. However, the parties elected to attempt to negotiate a settlement before any determination was made as to liability. By late 2007, the parties' settlement efforts began to bear

fruit and the parties were able to file a proposed Consent Decree with the Court in October, 2007.

B. The Rockport Unit 2 Lease

An AEP company, Indiana Michigan Power Company ("I&M"), constructed and operates Rockport Unit 2, but AEP does not own this Unit. Rather, in 1989, AEP Generating Company and I&M (also collectively referred to hereafter as "AEP") entered into a sale-leaseback transaction, pursuant to which AEP sold Rockport Unit 2 to a group of Lessors, who then leased it back to AEP for an initial term of 33 years extending through 2022. The Lease contains options under which AEP may choose to extend the Lease beyond 2022.

At the time of the Lease negotiations, Congress was in the process of debating what would become the Clean Air Act Amendments of 1990. Pub. Law 101-549. The centerpiece of the Amendments was a new market-based emissions trading program whose goal was to reduce SO_2 emissions from fossil-fueled steam electric generating facilities by more than ten million tons over a ten-year period, commonly referred to as the "Acid Rain Program." 42 U.S.C. §7651(b). The most efficient control devices for SO_2 at that time were FGD systems. The Lease included specific terms that addressed the ownership of, and financial responsibility for, any future installations of FGD systems or other pollution control equipment of comparable expense at Rockport Unit 2. If those improvements are required by "Applicable Law," as defined in the Lease, and the Lessors do not finance those improvements, AEP retains ownership and Lessors must compensate AEP for the use and benefit of those controls at the time the Lease expires.[8]

[8] *Wilmington Trust Co. v. AEP Generating Co.,* Case No. 2:13-cv-1213, Opinion and Order, 2015 WL 12967769 *11 (S.D. Ohio Jan. 13, 2015) (hereinafter "Wilmington I") (quoting the Facility Lease, Section 8(c), (d), and (e)).

C. The Original Consent Decree

The Consent Decree encompassed all Units at the nine power plants named in the complaints, along with all Units at seven additional plants in the AEP Eastern System, including Rockport. The Consent Decree set forth system-wide emission caps on SO_2 and NOx for the entire AEP Eastern System and specified that AEP was required to install, upgrade, and operate pollution controls on certain individual Units. System-wide emission caps provide greater flexibility than Unit-specific emission rates or control efficiencies, while maintaining the same total environmental benefits to the region.

Certain obligations were effective on the date of entry of the Consent Decree, and others were implemented over the period from the date of entry on December 10, 2007, to December 31, 2019. The last control installations were scheduled to occur at Rockport Unit 2 in December, 2019.

The Lessors made no objections to the Consent Decree. The parties issued press releases regarding their settlement and AEP representatives discussed the Consent Decree with representatives of the Lessors in October 2007. Notice of the Consent Decree was published by the DOJ in the Federal Register for purposes of seeking public comment, and a copy was posted on the DOJ's website. *See* 72 *Fed. Reg.* 58887 (October 17, 2007). The Lessors submitted no comments and raised no objections at any time before they filed the lease litigation in July 2013.

D. Modifications to the Consent Decree

The Consent Decree has been modified four times to date. The first and second modifications were entered on April 5, 2010, and December 28, 2010, respectively and altered the installation dates for FGD systems at a different AEP plant by a few months in order to accommodate outage-planning schedules.

The Third Joint Modification was more significant. The original Consent Decree required AEP to install FGD systems on Rockport Units 1 and 2 by the end of 2017 and the end of 2019, respectively. To comply with these obligations, AEP intended to install a DSI system. However, a dispute arose amongst the parties as to whether a DSI system satisfied the Consent Decree's definition of a FGD system. Accordingly, AEP filed a motion in this Court requesting a determination of that issue.

Before the Court made any such determination, the parties again reached a resolution in the Third Joint Modification. The Third Joint Modification replaced the original Consent Decree's obligation to install FGD systems at Rockport Units 1 and 2 in 2017 and 2019 respectively with an obligation to install DSI systems on both units by April 16, 2015. The parties also agreed AEP would install a high-efficiency FGD system on one Rockport Unit in 2025 and on the other Rockport Unit in 2028, or would repower, refuel or retire the Units at those times.

The Third Joint Modification also imposed a new declining Plant-Wide Annual SO_2 Tonnage Limitation at Rockport, and reductions in the annual SO_2 tonnage limitations for the entire AEP Eastern System, which are currently being implemented. AEP also agreed to shutdown, refuel or install pollution controls on Big Sandy Unit 2, shutdown or refuel Muskingum River Unit 5 and Tanners Creek Unit 4, install 200 MW of renewable energy in Indiana or Michigan, and provide additional mitigation funding for the states and citizen plaintiffs; all of these commitments have already been fulfilled.

As it did before the original Consent Decree was entered, AEP took steps to advise the Lessors of Rockport 2 regarding the proposed modification. AEP provided them a copy of the text of the proposed Third Joint Modification filed with the Court. (*See* 2/22/13 letter, attached

hereto as Exhibit A.) The Third Joint Modification was also the subject of public notice and comment. *See Fed. Reg.* 15740 (March 12, 2013). The Lessors did not file any comments or raise any objections to AEP.

This Court approved and entered the Third Joint Modification on May 14, 2013. The Consent Decree was later modified for the fourth time on January 23, 2017, in order to allow for the sale of particular units to a third party buyer, who became a party to the Consent Decree.

E. The Rockport Lease Litigation

Despite their lack of objection to the terms of the Third Joint Modification, and without any prior notice to AEP, on July 26, 2013, the Lessors filed suit in the Southern District of New York against AEP Generating Company and I&M, alleging breach of the sale-leaseback agreements. The case was subsequently transferred to this Court. AEP moved to dismiss the complaint in October 2013. This Court issued an Opinion and Order granting in part and denying in part that motion.[9] Additional motions were filed by both parties, and on March 28, 2016, the Court granted AEP's motion for partial judgment on the pleadings and AEP's second motion to dismiss, denied the Lessors' motion for partial summary judgment, and denied the remaining motions as moot.[10] The Lessors voluntarily dismissed their remaining claims and pursued an appeal to the Sixth Circuit. The Sixth Circuit affirmed in part, reversed in part, and remanded the case to this Court for further proceedings.[11] The Sixth Circuit determined that, assuming the allegations in the filed complaint were true, AEP could not voluntarily agree to install additional pollution controls at Rockport Unit 2 after the expiration of the Lease where – according to Lessors' allegations - the EPA had not asserted any Clean Air Act violations at that

[9] *Id.*
[10] *Wilmington II.*
[11] *Wilmington Trust Co. v. AEP Generating Co.*, 859 F.3d 365 (6th Cir. 2017).

particular facility. The Sixth Circuit recognized that given the early stages of the proceedings before this Court, there had not been an adequate opportunity to develop all of the relevant facts and remanded the claims at issue for further proceedings consistent with its opinion.[12]

F. Implementation of the Consent Decree

Since its inception, AEP has faithfully implemented the Consent Decree. Annually since 2009, AEP has filed reports detailing its progress in fulfilling its obligations. Each year, AEP has reduced emissions to a greater extent than required. In total, the Units in the AEP Eastern System have achieved over 782,000 tons of excess SO_2 emission reductions and over 152,000 tons of excess NO_x emission reductions through 2016.

Moreover, AEP has maintained compliance with the Consent Decree in the face of competing obligations imposed by other Clean Air Act programs and additional environmental requirements affecting operation of the Units covered by the Consent Decree. For example, since the time the original Consent Decree was entered, the ambient air quality standard for ozone has been reduced twice;[13] new one-hour standards for nitrogen dioxide and sulfur dioxide were adopted;[14] a more stringent standard for fine particulate matter was adopted;[15] a new regional transport rule was adopted and then revised to be more stringent;[16] and new hazardous air pollutant emission standards were adopted and became effective.[17] All of these requirements

[12] *See id.* at p. 10.
[13] *National Ambient Air Quality Standard for Ozone*, Final Rule, 73 Fed. Reg. 16436 (March 27, 2008); *National Ambient Air Quality Standard for Ozone*, Final Rule, 80 Fed. Reg. 65292 (Oct. 26, 2015).
[14] *Primary National Ambient Air Quality Standard for Sulfur Dioxide*, Final Rule, 75 Fed. Reg. 35520 (June 22, 2010); *Primary National Ambient Air Quality Standards for Nitrogen Dioxide*, Final Rule, 75 Fed. Reg. 6474 (Feb. 9, 2010).
[15] *National Ambient Air Quality Standards for Particulate Matter,* Final Rule, 78 Fed. Reg. 3086 (Jan. 15, 2013).
[16] *Cross-State Air Pollution Rule*, Final Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011); *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, Final Rule, 81 Fed. Reg. 74504 (Oct. 26, 2016).
[17] *National Emission Standards for hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial- Commercial-Institutional Steam Generating Units*, Final Rule, 77 Fed. Reg. 9304 (Feb. 16, 2012).

placed additional demands on the AEP Eastern System Units. Nonetheless, AEP has adhered to the Consent Decree.

G. Current Status of Compliance Efforts

Consistent with its past adherence to the Consent Decree, by the time the Sixth Circuit issued its opinion in April, 2017, AEP was in the process of seeking approval for installation of a SCR system at Rockport Unit 2 from the IURC, scheduled to be in operation before the end of 2019.[18] AEP has advised the Commission of the Sixth Circuit's decision allowing the Lessors' suit against AEP to proceed, and will notify it of the filing of the motion in this case. No decision has been issued by the Commission, and none of the major equipment orders or other significant contracts have been executed pending that decision. While expenditures on the SCR have been limited up to this point, by the end of this year AEP would be required to make commitments for nearly $100 million of the total $274 million cost of the SCR by entering into binding agreements with equipment vendors and outside contractors in order to maintain the project schedule and complete the control installation by December 31, 2019.

The high-efficiency FGD and the SCR systems currently required by the modified Consent Decree could cost up to $1.7 billion, an amount equal to the original cost of Rockport Unit 2. AEP's understanding of the Lease terms at the time of the Third Joint Modification is reflected in this Court's prior decisions, and was reasonably relied upon by all of the parties. If certain environmental improvements installed by AEP are required by "Applicable Law," AEP retains title to that equipment and the Lessors must pay AEP at the end of the lease term to use or benefit from that equipment. The Lessors have argued, among other things, that the Consent Decree does not meet the definition of "Applicable Law" under the Lease, and that if AEP

[18] *IURC Petition.*

installs this equipment at its sole cost, the Lessors can receive free use of those improvements when the Lease terminates.[19] The initial term of the Lease ends on December 7, 2022, only three years after the SCR must be in operation under the Consent Decree.

AEP disagrees with the Lessors, and maintains, as it believed when it entered into the Consent Decree, that the Consent Decree is "Applicable Law" with respect to Rockport Unit 2, and that the air pollution controls constitute "Severable Modifications" under the Lease. Given the existing controversy over key elements of the Lease, AEP does not currently believe that extending the term of the Lease is advisable, and AEP will be seeking other options to supply the capacity and energy needs of its customers. In any event, AEP strenuously objects to the notion that it could be required to invest in $1.7 billion of improvements at a Unit that likely will not be serving its customers after 2022, without any assurance that AEP can maintain any rights to or be entitled to compensation for those improvements.

These events and the resulting uncertainty were entirely unexpected at the time of the Third Joint Modification, and threaten to destroy the mutually beneficial agreement the parties believed they were striking. AEP therefore requests elimination of all future obligations to install pollution controls at Rockport Unit 2 (high-efficiency FGD and SCR), and proposes a set of modifications to the other remaining obligations in the Consent Decree designed to preserve the environmental benefits for which the parties bargained.

[19] *Wilmington Trust Co. v. AEP Generating Co.,* Case No 2:13-cv-1213, Lessors' First Amended Complaint, p. 37 (Prayer for Relief).

IV. LAW AND ARGUMENT

A. The Court has inherent authority to modify its consent decree as the circumstances warrant.

"A consent decree has 'attributes of both a contract and a judicial act' and is 'essentially a settlement agreement subject to continued judicial policing.'" *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992), *cert. denied*, *Lorain Bd. of Educ. v. Ohio Dep't of Educ.*, 509 U.S. 905 (1993) (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). "[O]nce approved, the prospective provisions of the consent decree operate as an injunction." *Williams*, 720 F.2d at 920.

Accordingly, consent decrees are "subject to the rules generally applicable to other judgments and decrees," including Fed. R. Civ. P. 60(B). *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). Rule 60(B)(5) allows for relief from the terms of a consent decree where "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(B)(5). "Whether prospective enforcement is no longer equitable … is a fact-intensive inquiry within the broad equitable powers of a district court." *Brown v. Tenn. Dep't of Fin. & Admin.*, No. 07-6163, 2009 U.S. App. LEXIS 4847, at *9-11 (6th Cir. Mar. 9, 2009). In fact, Courts have the "inherent equitable power to modify a consent decree," regardless of whether, and if so, how, the decree itself provides for modification. *Waste Mgmt. v. City of Dayton*, 132 F.3d 1142, 1145-1146 (6th Cir. 1997) (citation omitted). *See also Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737, 741 (6th Cir. 2012) ("[A] district court is not merely an instrument of a consent decree or of the parties' stipulations with respect to it…."); *Lorain*, 979 F.2d at 1148 (Courts "are *not bound under all circumstances by the terms contained within the four corners of the parties' agreement*") (emphasis in original).

Because consent decrees are also contracts negotiated by the parties, state law claims such as "mutual mistake, fraud, misrepresentation, etc." may also serve as a basis for modification. *See Waste Mgmt.*, 132 F.3d at 1146 n.4 (6th Cir. 1997). *See also Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991) (mutual mistake of fact may warrant relief from consent decree); *Doe v. Briley*, 511 F. Supp. 2d 904, 925 n.8 (M.D. Tenn. 2007) (mutual mistake of law grounds for modification of consent decree); *Haudenschield v. Lotz*, No. 6-91-27, 1992 Ohio App. LEXIS 4103, at *10 (Ohio Ct. App. Aug. 10, 1992) ("Consent to a decree does not remove an underlying mistake.").

In exercising their equitable powers, courts "have a duty to … modify … their consent decrees as required by circumstance." *Lorain*, 979 F.2d at 1148. The Supreme Court in *Rufo v. Inmates of Suffolk Cty. Jail* set forth a "flexible standard" for evaluating a proposed modification to a consent decree based on changed circumstances, consisting of a two-part analysis. 502 U.S. at 383, 393. First, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* Second, "if the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* In the Sixth Circuit, these questions are to be determined after a complete hearing and findings of fact. *See Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2017 U.S. Dist. LEXIS 65029, at *11 (S.D. Ohio Apr. 28, 2017).

B. The parties agreed to modify the Consent Decree under materially different circumstances, relating to the basic assumptions of the parties, causing an unanticipated and inequitable burden to fall upon AEP.

The Sixth Circuit's recent decision in *Wilmington Trust Company v. AEP Generating Company et al.* creates a materially different set of circumstances than those under which the

parties agreed to modify the Consent Decree. Whether the precise label for the legal theory justifying the modification is best described as a change or clarification in decisional law, or a mistake of fact or law, the analysis hinges on equity and whether the changed circumstances have frustrated the parties' original intent. As it currently stands, AEP's fundamental authority to enter into the modified Consent Decree consistent with AEP's rights under the Lease has been called into question by the recent Sixth Circuit decision. Moreover, AEP's ability to fully implement the modified Consent Decree by treating the required air pollution controls at Rockport Unit 2 as "Severable Modifications" is also in dispute. Given these circumstances, further modification is equitable, and is necessary to preserve the bargain negotiated by the parties.

A party that seeks to modify a consent decree "may meet its initial burden by showing a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384. A change in law sufficient to support modification may either alter the state of the law or clarify pre-existing law, and may be based on subsequent statutory or decisional law. *See Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Doe*, 511 F. Supp. 2d at 925 n.8 (rejecting proposed distinction between change in law and "clarification of law about which the parties were mistaken," stating "these are merely two avenues that lead to the same place").

Although a decision clarifying the law will not "in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo*, 502 U.S. at 390. *See also United States v. Rohm & Haas Co.*, No. 1:CV-92-1295, 1997 U.S. Dist. LEXIS 22828, at *6-8 (M.D. Pa. Aug. 1, 1997) (modification may be appropriate where "changes in statutory or decisional law alter the legal premises underlying the decree" or

"undermine[] the parties' basic assumptions") (citing *Rufo*, 502 U.S. at 388, 390); *United States v. Krilich*, 303 F.3d 784, 790-791 (7th Cir. 2002) ("*Rufo* specifically identifies the parties' misunderstanding of law, as clarified by another decision, as a circumstance where modification might be warranted."). Moreover, traditional contract principles dictate that in order to support modification, a legal misunderstanding or mistake typically must be mutual. *See Waste Mgmt.*, 132 F.3d at 1146 n.4; *Rohm*, 1997 U.S. Dist. LEXIS at *7-8.

Here, modification is needed because the Sixth Circuit's decision has undermined basic assumptions underlying the modified Consent Decree with respect to AEP's rights under the Lease. As a result, AEP now finds itself in an unintended and inequitable position. At the time of the Third Joint Modification, the parties assumed that AEP was able, consistent with its authority under the Lease, to agree to install a high-efficiency FGD at Rockport Unit 2 as late as 2028, past the end of AEP's initial lease term in 2022. The Sixth Circuit's decision has called into question whether AEP was authorized to make this agreement under the "Permitted Lien" and "no lien" provisions of the Lease.[20] The parties never anticipated that what they were agreeing to in the modified Consent Decree was potentially inconsistent with AEP's rights under the Lease, particularly after hearing no objections from the Lessors.[21]

AEP has also lost the benefit of its bargain in the Third Joint Modification. AEP has already installed the DSI on Rockport Unit 2, earlier than any FGD system was required by the terms of the Consent Decree. In exchange for changing the dates to install high-efficiency FGDs

[20] Section 7 of the Lease provides that "The Lessee shall not directly or indirectly create, incur, or suffer to exist any Lien on or with respect to" Unit 2, except "Permitted Liens."
[21] As stated previously, AEP continues to believe that its actions were consistent with all of its rights under the Lease and that it will ultimately prevail in that litigation.

at the Rockport Units[22], AEP also assumed numerous and significant obligations with respect to certain other Units and the entire AEP Eastern System as a whole. Most of those obligations have already been fulfilled. The parties anticipated that the Third Joint Modification would be a mutually beneficial agreement—not that a subsequent court decision would potentially expose one party to significant liability based on the court's interpretation of the Lease in a way that calls into question AEP's authority to agree to certain of its terms.

Accordingly, the Court should exercise its equitable powers to modify the Consent Decree as set forth below.

C. AEP's proposed Modification is suitably tailored to the changed circumstances.

AEP's proposed modification is narrowly drawn to address the state of affairs that has resulted from the Sixth Circuit's decision. AEP seeks no more than is necessary to remove the uncertainty surrounding its rights with respect to Rockport Unit 2, and is willing to comply with even more stringent system-wide restrictions than were previously agreed upon in order to ensure that the environmental benefits the parties previously bargained for are maintained or enhanced. AEP is not seeking to change the overall fundamental environmental goals of the Consent Decree, as modified; it is simply seeking the ability to take a different path to reach those goals.

Modifications to consent decrees based upon changed circumstances must be "suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391. Here, AEP's proposed

[22] AEP continues to believe that DSI satisfies the obligation to install FGD at Rockport set forth in the original Consent Decree. It agreed, however, to settle this claim, providing additional environmental benefits in exchange for a later date to install high-efficiency FGDs. AEP believed at the time, and continues to believe, that under a proper interpretation of the Lease, the Third Joint Modification was consistent with prudent utility practice and benefitted Lessors, and AEP's customers, by minimizing current expenditures on pollution controls and providing multiple options to achieve further reductions at a future date.

modification is just that. In recognition of the potential limitations on AEP's ability to make commitments for future control installations at Rockport Unit 2, as are set forth in Sixth Circuit's ruling, the proposed modification removes those obligations and commits AEP to pursue one of two courses of action in the future with respect to the Rockport Units. As noted, given the ongoing dispute with the Lessors concerning the terms of the Lease, AEP does not currently plan on extending the term of the Lease, which will terminate in 2022. Although AEP is required to operate Rockport Unit 2 after the Lease expires unless removed by Lessors, Lessors are entitled to the power generated by the Unit, and AEP will schedule the delivery of that power. After termination of the Lease, significant capital expenditures like those associated with the SCR and FGD require unanimous consent of Lessors.[23] AEP is committed to seeking any appropriate state regulatory approvals to replace the energy and capacity provided by Rockport Unit 2, including any action with respect to the Rockport Unit 2 lease. For so long as Rockport Unit 2 continues to be operated by AEP, it would be treated as a part of the AEP Eastern System, subject to the Consent Decree obligations, including both the AEP Eastern System-Wide Tonnage Limitations and the Rockport Plant-Wide Tonnage Limitations for SO_2. If AEP ceases operating Rockport Unit 2, certain Rockport Unit 2-specific requirements will survive as part of the facility's Title V operating permit, and the AEP Eastern System caps would be reduced to offset the tonnages of SO_2 and NOx attributable to Rockport Unit 2.

Alternatively, the parties to the lease litigation currently are exploring settlement, and AEP and Lessors could reach agreement on an arrangement under which AEP would own or otherwise control Rockport Unit 2 in the future, including the clear right to make decisions with

[23] Rockport Unit 2 Operating Agreement, Section 5.

respect to future capital expenditures and the ultimate retirement of the Unit.[24] Under those circumstances, AEP would be able to take additional action at Rockport Unit 2 pursuant to the terms of the Consent Decree. Under either scenario, substantially equivalent results would be achieved.

To the extent AEP proposes other modifications to the Consent Decree, their purpose is to maintain the environmental benefits previously bargained for under the modified Consent Decree. As a practical matter, most of the benefits the Plaintiffs sought in the Consent Decree have already been delivered, so there is much about the Consent Decree that cannot now be "undone." However, the Court can modify the remaining terms to ensure the Plaintiffs still receive the full extent of environmental benefits they previously sought.

In summary, AEP proposes modifying the Consent Decree as follows: (1) remove the requirements for additional control installations at Rockport Unit 2 (the SCR and the high-efficiency FGD); (2) memorialize AEP's commitment to seek any appropriate state regulatory approvals to replace Rockport Unit 2's capacity and energy, including but not limited to actions related to the Rockport Unit 2 Lease ; (3) if AEP owns or otherwise controls only one Rockport Unit by the end of 2026, AEP will commit to retire one Rockport Unit by the end of 2028; alternatively, if AEP owns or otherwise controls two Rockport Units by the end of 2026, AEP will commit to retire one Unit by the end of 2028 and retrofit, retire, repower, or refuel the other Unit by the end of 2028; (4) commit to retire Conesville Units 5 and 6 at the end of 2022 to partially offset the SCR/FGD obligations at Rockport Unit 2; and (5) provide for other off-setting

[24] All references in this motion or in the proposed modification to AEP potentially "controlling" Rockport Unit 2 after the Lease expires are intended to signify that AEP would have the legal right to make independent decisions regarding future capital expenditures and the future retirement of the Unit.

reductions in the AEP system-wide caps. Specifically, AEP proposes the following modifications to individual paragraphs of the Consent Decree:

1. Modify Paragraph 67 to reduce the AEP Eastern System-Wide Annual Tonnage Limitation for NOx to 67,750 tons per year beginning in 2018 and to 63,500 tons per year in 2020 (to reflect reductions resulting from the installation of SCR at Rockport Unit 1, and to offset the reductions that would have resulted from installing SCR at Rockport Unit 2), and include an additional reduction to 56,750 tons per year in 2023 (to reflect the retirement of Conesville Units 5 and 6 by December 31, 2022), and to 49,000 tons per year in 2029 and thereafter;

2. Modify Paragraph 68 to insert an obligation to retire Conesville Units 5 and 6 by December 31, 2022; delete the obligation to install and continuously operate SCR on Rockport Unit 2 by December 31, 2019; and insert alternative obligations with respect to Rockport Units 1 and 2, to be met by December 31, 2028. If AEP owns or otherwise controls only one Rockport Unit by 2026, AEP will retire one Rockport Unit by the end of 2028; alternatively, if AEP owns or otherwise controls two Rockport Units by 2026, AEP will retire one Rockport Unit and Retrofit, Retire, Repower, or Refuel the second Rockport Unit by December 31, 2028;

3. Modify Paragraph 86 to reduce the AEP Eastern System-Wide Annual Tonnage Limitation for SO_2 to 106,500 tons per year for the period from 2023-2025 and to 98,500 tons per year for the period from 2026-2028 (to reflect the retirement of Conesville Units 5 and 6), and maintain the final cap of 94,000 tons per year for the period 2029 and thereafter;

4. Modify Paragraph 87 to reflect an obligation to retire Conesville Units 5 and 6 by December 31, 2022, install and continuously operate DSI on Rockport Units 1 and 2 by April 16, 2015, and insert alternative obligations with respect to Rockport Units 1 and 2 to be met by December 31, 2028. If AEP owns or otherwise controls only one Rockport Unit by 2026, AEP will retire one Rockport Unit by the end of 2028; alternatively, if AEP owns or otherwise controls two Rockport Units by 2026, AEP will retire one Rockport Unit and Retrofit, Retire, Repower, or Refuel the second Rockport Unit by December 31, 2028;

5. Modify the introductory language before the table in Paragraph 89A to clarify that AEP will seek any appropriate state regulatory approvals to replace the capacity and energy from Rockport Unit 2, including but not limited to actions related to the Rockport Unit 2 Lease, and state that for so long as AEP continues to serve as the operator of Rockport Unit 2, AEP shall limit the total annual SO_2 emissions from Rockport Units 1 and 2 to the existing Plant-Wide Annual Tonnage Limitations for SO_2 shown in the remainder of Paragraph 89A;

6. Insert a new Paragraph 89B to provide that if, at any time after the initial term of the Rockport Unit 2 Lease, AEP no longer serves as the operator of Rockport Unit 2, so long

as the provisions of the Consent Decree specifically applicable to Rockport Unit 2 have been incorporated into a Title V permit, enforcement of the Consent Decree requirements for Rockport Unit 2 shall thereafter be enforceable only through the Title V permit.

The particular language AEP proposes to achieve the above modifications is set forth in the Proposed Fifth Joint Modification Mark-Up of Specific Paragraphs of Current Consent Decree, attached hereto as Exhibit B. The chart below compares the current terms of the modified Consent Decree with the proposed terms outlined above:

Term	Current Decree	Proposed Modification
¶ 67. AEP Eastern System-Wide Annual Tonnage Limitation for NOx	2016 and thereafter – 72,000 tpy	2016-2017 72,000 tpy 2018-2019 67,750 tpy 2020-2022 63,500 tpy 2023-2028 56,750 tpy 2029 and thereafter 49,000 tpy unless AEP no longer operates Rockport Unit 2, at which time cap will be further reduced by 8,500 tpy.
¶68. NOx Emission Limitations and Control Requirements	Rockport Unit 1 – SCR by December 31, 2017 Rockport Unit 2 – SCR by December 31, 2019 Conesville Units 5 & 6 – NA Rockport Units 1 & 2 - NA	No change Delete this requirement Conesville Units 5 & 6 – Retire by December 31, 2022 Rockport Units 1 & 2 - if AEP owns or otherwise controls only one Rockport Unit by 2026, retire one Rockport Unit by December 31, 2028; if AEP owns or otherwise controls two Rockport Units by 2026, retire one Rockport Unit and Retrofit, Retire, Repower, or Refuel the second Rockport Unit by December 31, 2028.
¶86. AEP Eastern System-Wide Annual Tonnage Limitation for SO_2	2018 145,000 tpy 2019-2021 113,000 tpy 2022 110,000 tpy	No change No change No Change

Term	Current Decree	Proposed Modification
	2022-2025 110,000 tpy 2026-2028 102,000 tpy 2029 and thereafter 94,000 tpy	2023-2025 106,500 tpy 2026-2028 98,500 tpy No change unless AEP no longer operates Rockport Unit 2, at which time cap will be further reduced by 10,000 tpy.
¶87. SO_2 Emission Limitations and Control Requirements	Rockport Unit 1 – DSI by April 16, 2015 Rockport Unit 2 – DSI by April 16, 2015 First Rockport Unit – Retrofit, Repower, Refuel or Retire by December 31, 2025 Second Rockport Unit - Retrofit, Repower, Refuel or Retire by December 31, 2028 Rockport Units 1 and 2 – NA Conesville Units 5 & 6 – NA	No change No change Delete this requirement Delete this requirement Rockport Units 1 & 2 - if AEP owns or otherwise controls only one Rockport Unit by 2026 retire one Rockport Unit by December 31, 2028; if AEP owns or otherwise controls two Rockport Units by 2026, retire one Rockport Unit and Retrofit, Retire, Repower, or Refuel the second Rockport Unit by December 31, 2028. Conesville Units 5 & 6 – Retire by December 31, 2022
¶89A. Plant-Wide Annual Tonnage Limitations for SO_2 at Rockport	Reduced to 28,000 tpy in 2016 with declining caps to 10,000 tpy in 2029 and thereafter	No change in table, but commit that so long as AEP continues to operate the unit the plant-wide SO_2 emissions will comply with the caps. If AEP ceases operating Rockport Unit 2, so long as the provisions of the Consent Decree specifically applicable

Term	Current Decree	Proposed Modification
		to Rockport Unit 2 have been incorporated into a Title V permit, enforcement of the Consent Decree requirements shall be exclusively through the title V permit.

The net environmental impact of the modifications is more beneficial than implementation of the modified Consent Decree as written today. Further NOx reductions will be achieved beginning in 2018 if the modification is issued promptly. In total, these modifications will provide 125,500 tons of additional NOx reductions over the period from 2018 through 2028 and 21,000 tons of additional SO_2 reductions over the period from 2023 through 2028. Even if AEP does not acquire ownership or control of Rockport Unit 2, the Consent Decree obligations specific to Rockport Unit 2 (continuous operation of the DSI system and operations consistent with the Annual Tonnage Limitation for SO_2 at Rockport) will continue to apply to operations at Rockport Unit 2 for so long as AEP remains the operator of that Unit, and will be enforceable through the Title V permit thereafter. Rockport Unit 2 will also be included in calculating compliance with the AEP Eastern System caps on SO_2 and NOx emissions so long as AEP operates Rockport Unit 2. If AEP acquires ownership or control of Rockport Unit 2, both Units will remain subject to the requirements outlined above, and provide equivalent environmental benefits.

Even if AEP's relationship to Rockport Unit 2 ends, emissions from Rockport Unit 2 must remain well controlled due to other provisions of the Clean Air Act. For instance, continuous operation of the DSI system already installed at Rockport Unit 2 can achieve the plant-wide tonnage limitations for SO_2 at Rockport and is necessary to support compliance with the Unit's MATS obligations. By 2018, the Cross-State Air Pollution Rule currently in effect

allocates only 7,722 annual NO_x allowances and 11,517 annual SO_2 allowances to Rockport Unit 2. Even with trading options available, maintaining compliance with these allocations and the assurance provisions included in the rule will require Rockport Unit 2 to operate and maintain the DSI system and combustion controls already installed. The Mercury and Air Toxics Standards impose unit-specific obligations to control acid-gases and/or SO_2 emissions to low levels, and require units to undertake burner tuning and other work practices to assure efficient combustion. Additional incentives to control emissions may arise from implementation of the 2015 ozone standard, and other future ambient air quality standards. Thus, Rockport Unit 2 will be required to operate consistent with these current and future Clean Air Act requirements, independent of any requirements imposed by the Consent Decree, and regardless of who operates the unit.

The original Consent Decree was negotiated to ensure regional environmental benefits across the entire AEP Eastern System. Consistent with that goal, the proposed modification removes the cloud of uncertainty created by the Sixth Circuit's decision, and provides alternatives with respect to Rockport Unit 2 while ensuring that system-wide benefits are maintained. Accordingly, it is narrowly tailored, and the Court should adopt AEP's proposed modification.

D. Tolling the SCR installation date is a reasonable exercise of the Court's equitable powers.

AEP has been diligent in planning for the SCR installation at Rockport Unit 2, but now faces the immediate prospect of entering into major contracts and other obligations that ultimately represent more than a third of the total project cost, while at the same time seeking approval to eliminate the requirement to install those controls and substitute other actions to achieve equivalent environmental benefits. The Consent Decree explicitly provides that this

Court "shall retain jurisdiction after the Date of Entry … to take any action necessary or appropriate for its interpretation, construction, execution, modification, or adjudication of disputes."[25] Any party to the Consent Decree may apply to the Court for any relief necessary to effectuate the decree.[26] AEP therefore respectfully requests that the Court exercise its discretion and enter an order tolling the deadline for installation of the SCR on an expedited basis, while consideration of the remainder of the relief requested in this motion proceeds on a lengthier schedule.

Given the complexity of the Rockport Unit 2 Lease, the Consent Decree, and the AEP Eastern System, consideration of the facts necessary to resolve this motion may take an extended period of time. Although AEP is committed to dedicating all necessary resources in an attempt to achieve resolution of this motion, those discussions will involve multiple parties located in many different places, and will be difficult to coordinate. If the Court proceeds with consideration of the instant motion, it could involve preparation for and conduct of a formal hearing, which could easily extend beyond the 90-day stay issued in the lease litigation.

In the meantime, AEP has not yet received approval from the IURC, and faces the prospect of making commitments over the next few months for nearly $100 million of the total $274 million cost of the SCR by entering into binding agreements with equipment vendors and outside contractors in order to maintain the project schedule and complete the control installation by December 31, 2019. One such commitment, involving contracts for fabrication of the SCR equipment itself, would need to be made by the end of August. It is unreasonable to expect that these proceedings could be concluded within such a limited period of time, and the equities favor tolling of the deadline pending resolution of this motion.

[25] Consent Decree, Paragraph 198.
[26] *Id.*

If AEP's requested relief is granted by the end of this year, reductions in NOx emissions will start to be achieved sooner than would otherwise be achieved through the installation of those controls. Tolling the deadline for installation of the SCR to allow for careful consideration of the instant motion and time for continued negotiations with the Lessors is beneficial to all parties.

Even if AEP's motion is denied, and installation of SCR controls at Rockport Unit 2 is ultimately required, there would be a limited delay in achieving the NOx reductions at Unit 2. But the length and impacts of any such delay are not easily estimated at this time. Rockport Unit 2 is already a low NOx emitting unit due to the quality of its fuel and the combustion controls employed at that Unit. In addition, AEP already has made substantial additional reductions in NOx on the balance of the AEP Eastern System, beyond those required by the AEP Eastern System caps, and may achieve additional reductions this year as well. To the extent that sufficient offsetting reductions have not already been made, this Court retains the ability to order further relief.

AEP should not be required to either proceed with making potentially unnecessary investments, or risk incurring liability for stipulated penalties or other relief, while the parties and this Court consider the alternative presented herein. Accordingly, AEP requests that the Court toll the current deadline for installation of the SCR at Rockport Unit 2 pending a decision on this motion, and that a decision awarding such relief be effective at the earliest possible date.

V. CONCLUSION

The Sixth Circuit's recent opinion has unexpectedly undermined the parties' basic assumptions in entering and modifying the Consent Decree. What the parties once thought would be a mutually beneficial agreement that was clearly authorized under AEP's Lease is now

plagued with uncertainty and could be severely punitive to AEP. Accordingly, the Court should exercise its equitable powers to modify the Consent Decree in recognition of the Sixth Circuit's opinion and order to maintain and enhance the environmental benefits the Consent Decree was designed to achieve.

Respectfully submitted,

/s/ James B. Hadden
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Counsel for Defendants American Electric Power Service Corp., AEP Generation Resources Inc. (successor to Ohio Power Company and Columbus Southern Power Company), Appalachian Power Company, Cardinal Operating Company, Indiana Michigan Power Company, and Kentucky Power Company

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ James B. Hadden
James B. Hadden

EXHIBIT A

AEP
AMERICAN ELECTRIC POWER

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AEP.com

February 22, 2013

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Mr. Michael Stephenson
Citigroup Global Markets Inc.
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Ms. Cindy Fitzgerald
GE Energy Financial Services
800 Long Ridge Rd
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Dear Owner Participants:

RE: Rockport Unit #2 Lease Discussions

Please find attached a copy of a filing made by Indiana Michigan Power Company, several of its affiliates and other interested parties, with the United States District Court for the Southern District of Ohio (the "Court") outlining a proposed settlement among the parties that would modify the Consent Decree entered by the Court on December 13, 2007. We would be happy to discuss this with you if you have any questions.

Respectfully,

Paul Chodak
President and Chief Operating Officer
Indiana Michigan Power Company

Julia A. Sloat
Senior Vice President and Treasurer
American Electric Power Company
Indiana Michigan Power Company

PROPOSED FIFTH JOINT MODIFICATION
MARK-UP OF SPECIFIC PARAGRAPHS OF CURRENT
CONSENT DECREE

67. Notwithstanding any other provisions of this Consent Decree, except Section XIV (Force Majeure), during each calendar year specified in the table below, all Units in the AEP Eastern System, collectively, shall not emit NO_x in excess of the following Eastern System-Wide Annual Tonnage Limitations:

Calendar Year	**Eastern System-Wide Annual Tonnage Limitations for NO_x**
2009	96,000 tons
2010	92,500 tons
2011	92,500 tons
2012	85,000 tons
2013	85,000 tons
2014	85,000 tons
2015	75,000 tons
2016-2017~~, and each year thereafter~~	72,000 tons per year
2018-2019	67,750 tons per year
2020-2022	63,500 tons per year
2023-2028	56,750 tons per year
2029 and each year thereafter	49,000 tons per year

If AEP ceases to operate Rockport Unit 2, emissions from Rockport Unit 2 will no longer be included in calculating compliance with this Paragraph, and the AEP Eastern System-Wide Annual Tonnage Limitation for NOx will be reduced by 8,500 tons per year beginning with the calendar year during which AEP ceases operating the Unit.

68. No later than the dates set forth in the table below, Defendants shall install and Continuously Operate SCR on each Unit identified therein, or, if indicated in the table, Retire, Retrofit, Refuel, or Re-power such Unit:

Unit	**NO_x Pollution Control**	**Date**
Amos Unit 1	SCR	January 1, 2008
Amos Unit 2	SCR	January 1, 2009
Amos Unit 3	SCR	January 1, 2008
Big Sandy Unit 2	SCR	January 1, 2009
Cardinal Unit 1	SCR	January 1, 2009
Cardinal Unit 2	SCR	January 1, 2009
Cardinal Unit 3	SCR	January 1, 2009
Conesville Unit 1	Retire, Retrofit, or Re-power	Date of Entry of this Consent Decree
Conesville Unit 2	Retire, Retrofit, or Re-power	Date of Entry of this Consent Decree
Conesville Unit 3	Retire, Retrofit, or Re-power	December 31, 2012
Conesville Unit 4	SCR	December 31, 2010
Conesville Unit 5	Retire	December 31, 2022
Conesville Unit 6	Retire	December 31, 2022
Gavin Unit 1	SCR	January 1, 2009
Gavin Unit 2	SCR	January 1, 2009
Mitchell Unit 1	SCR	January 1, 2009
Mitchell Unit 2	SCR	January 1, 2009
Mountaineer Unit 1	SCR	January 1, 2008

Unit	**NO_x Pollution Control**	**Date**
Muskingum River Units 1-4	Retire, Retrofit, or Re-power	December 31, 2015
Muskingum River Unit 5	SCR	January 1, 2008
Rockport Unit 1	SCR	December 31, 2017
~~Rockport Unit 2~~ Rockport Units 1 and 2	~~SCR~~ If AEP owns or otherwise controls only one Rockport Unit by 2026, AEP will retire one Rockport Unit If AEP owns or otherwise controls two Rockport Units by 2026, AEP will Retire one Rockport Unit and Retrofit, Retire, Refuel or Re-Power the second Rockport Unit	~~December 31, 2019~~ December 31, 2028 December 31, 2028
Sporn Unit 5	Retire, Retrofit, or Re-power	December 31, 2013
A total of at least 600 MW from the following list of Units: Sporn Units 1-4, Clinch River Units 1-3, Tanners Creek Units 1-3, and/or Kammer Units 1-3	Retire, Retrofit, or Re-power	December 31, 2018

86. Notwithstanding any other provisions of this Consent Decree, except Section XIV (Force Majeure), during each calendar year specified in the table below, all Units in the AEP Eastern System, collectively, shall not emit SO_2 in excess of the following Eastern System-Wide Annual Tonnage Limitations:

Calendar Year	**Eastern System-Wide Annual Tonnage Limitations for SO_2**
2010	450,000 tons
2011	450,000 tons
2012	420,000 tons
2013	350,000 tons
2014	340,000 tons
2015	275,000 tons
2016	145,000 tons
2017	145,000 tons
2018	145,000 tons
2019-2021	113,000 tons per year
2022~~-2025~~	110,000 tons per year
2023-2025	106,500 tons per year
2026-2028	~~102,000~~98,500 tons per year
2029, and each year thereafter	94,000 tons per year

If AEP ceases to operate Rockport Unit 2, emissions from Rockport Unit 2 will no longer be included in calculating compliance with this Paragraph, and the AEP Eastern System-Wide Annual Tonnage Limitation for SO_2 will be reduced by 10,000 tons per year beginning with the calendar year during which AEP ceases operating the Unit.

87. No later than the dates set forth in the table below, Defendants shall install and Continuously Operate an FGD on each Unit identified therein, or, if indicated in the table, Retire, Retrofit, Refuel, or Re-power such Unit:

Unit	**SO_2 Pollution Control**	**Date**
Amos Unit 3	FGD	December 31, 2009
Amos Unit 1	FGD	February 15, 2011
Amos Unit 2	FGD	April 2, 2010
Big Sandy Unit 2	Retrofit, Retire, Re-Power, or Refuel	December 31, 2015
Cardinal Units 1 and 2	FGD	December 31, 2008
Cardinal Unit 3	FGD	December 31, 2012
Conesville Units 1 and 2	Retire, Retrofit, or Re-power	Date of Entry
Conesville Unit 3	Retire, Retrofit, or Re-power	December 31, 2012
Conesville Unit 4	FGD	December 31, 2010
Conesville Unit 5	Upgrade existing FGD and meet a 95% 30-day Rolling Average Removal Efficiency, and Retire	December 31, 2009 December 31, 2022
Conesville Unit 6	Upgrade existing FGD and meet a 95% 30-day Rolling Average Removal Efficiency, and Retire	December 31, 2009 December 31, 2022
Gavin Units 1 and 2	FGD	Date of Entry
Mitchell Units 1 and 2	FGD	December 31, 2007

Unit	**SO_2 Pollution Control**	**Date**
Mountaineer Unit 1	FGD	December 31, 2007
Muskingum River Units 1-4	Retire, Retrofit, or Re-power	December 31, 2015
Muskingum River Unit 5	Cease Burning Coal and Retire Or Cease Burning Coal and Refuel	December 15, 2015 December 31, 2015, unless the Refueling project is not completed in which case the Unit will be taken out of service no later than December 31, 2015, and will not restart until the Refueling project is completed. The Refueling project must be completed by June 30, 2017.
~~First~~ Rockport Units 1 and 2	Dry Sorbent Injection, and If AEP owns or otherwise controls only one Rockport Unit by 2026, AEP will retire one Rockport Unit If AEP owns or otherwise controls two Rockport Units by 2026, AEP will Retire one Rockport Unit and Retrofit, Retire, Refuel or Re-Power the second Rockport Unit ~~Retrofit, Retire, Re-Power or Refuel~~	April 16, 2015 December 31, 2028~~5~~
~~Second Rockport Unit~~	~~Dry Sorbent Injection,~~ ~~and~~ ~~Retrofit, Retire, Re-power, or Refuel~~	~~April 16, 2015~~ ~~December 31, 2028~~

Unit	SO_2 Pollution Control	Date
Sporn Unit 5	Retire, Retrofit, or Re-power	December 31, 2013
Tanners Creek Unit 4	Retire or Refuel	June 1, 2015
A total of at least 600 MW from the following list of Units: Sporn Units 1-4, Clinch River Units 1-3, Tanners Creek Units 1-3, and/or Kammer Units 1-3	Retire, Retrofit, or Re-power	December 31, 2018

89A. Plant-Wide Annual Tonnage Limitations for SO_2 at Rockport. AEP currently leases Rockport Unit 2, and the initial lease term expires effective December 7, 2022. AEP will seek appropriate state regulatory approvals of any arrangement to replace the capacity and energy provided from Rockport Unit 2, including any action with respect to the current Rockport Unit 2 lease. For so long as any AEP Defendant serves as the operator of Rockport Unit 2, in each of the calendar years set forth in the table below, AEP Defendants shall limit their total annual SO_2 emissions from Rockport Units 1 and 2 to Plant-Wide Annual Tonnage Limitations for SO_2 as follows:

Calendar Years	Plant-Wide Annual Tonnage Limitation for SO_2
2016-2017	28,000 tons per year
2018-2019	26,000 tons per year
2020-2025	22,000 tons per year
2026-2028	18,000 tons per year
2029, and each year thereafter	10,000 tons per year

89B. If, at any time after termination of the Rockport Unit 2 lease, AEP no longer serves as the operator of Rockport Unit 2, so long as the obligation to install and Continuously Operate DSI applicable to Rockport Unit 2, and the Plant-Wide annual Tonnage Limitations for SO_2 at Rockport have been incorporated into a Title V permit for Rockport Unit 2, the Consent Decree requirements for Rockport Unit 2 shall thereafter be enforceable only through the Title V permit.