**STATE OF INDIANA**

**INDIANA UTILITY REGULATORY COMMISSION**

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| **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.** | ) | **CAUSE NO. 44871** |

## JOINT INTERVENORS' VERIFIED PETITION FOR RECONSIDERATION AND REHEARING

Come now Citizens Action Coalition of Indiana, Sierra Club, and Valley Watch (collectively, "Joint Intervenors") and, pursuant to 170 I.A.C. 1-1.1-22(e), respectfully petition the Indiana Utility Regulatory Commission ("IURC" or "Commission") for reconsideration, rehearing, and reversal of certain findings of fact and conclusions of law in its Order in this Cause issued March 26, 2018. In particular, the Commission's approval of Indiana Michigan Power Company's ("I&M") recovery from its customers of the cost of installing selective catalytic reduction ("SCR") on Rockport Unit 2 conflicts with the prohibition of Indiana regulated utilities using their captive customers to cross-subsidize out-of-state, unregulated affiliates. Such cross-subsidization became clear as a matter of law when, after the close of the hearing in this proceeding, the U.S. Court of Appeals for the Sixth

Circuit held that Indiana Michigan Power Company's ("I&M") parent company, American Electric Power ("AEP"), agreed to install SCR controls on Rockport 2 solely to avoid the need to install pollution controls on other AEP generating units as part of settling a federal Clean Air Act enforcement action that alleged violations at numerous other AEP generating units but not at Rockport Unit 2. As such, cost recovery for the installation of SCR on Rockport Unit 2 constitutes exactly the type of cross-subsidization of non-jurisdictional utility interests that the Commission has long rejected as unjust, unreasonable, and contrary to law.

## I. Rate Recovery for the Rockport Unit 2 SCR Project Will Allow Unlawful Cross-Subsidization of I&M's Parent Company and Unregulated Affiliates.

1. I&M sought cost recovery for the Indiana jurisdictional portion of I&M's ownership share of the Rockport Unit 2 SCR Project under Ind. Code § 8-1-8.8-11. Order at 4. The Commission order states that "[a]s part of the Federal Clean Air Act and related consent decree . . . I&M must retrofit Rockport Unit 2 with selective catalytic reductions ("SCR") technology." Order at 3. The Commission approved cost recovery for the SCR. The basis for the Commission's approval of I&M's cost recovery request was as follows:

> We find that I&M's proposed accounting and ratemaking treatment for the Rockport Unit 2 SCR is in conformity with applicable rules and statutes. Further, the allocation of costs in the CCTR is supported by the testimony of Mr. Phillips and Mr. Williamson. Substantial record evidence demonstrates, and we find, that I&M's proposed accounting and ratemaking treatment, including a ten-year depreciation period and allocation of fixed costs using a 6 CP method, is reasonable and should be approved.

Order at 32. After a thorough review of the evidentiary record and Commission's findings on this issue, Joint Intervenors respectfully state: (a) the Sixth Circuit's ruling in *Wilmington Trust Co. v. AEP Generating Co.*, 859 F.3d 365, 369 (6th Cir. Apr. 14, 2017), which was issued after the close of the hearing and briefing, demonstrates that AEP, the parent company of I&M, encumbered Rockport Unit 2 with the obligation to install SCR and flue gas desulfurization ("FGD" or "scrubber")

technology so that it could get more favorable settlement terms for out-of-state, unregulated affiliates in a lawsuit that involved no claims against the Rockport plant; (b) allowing I&M any cost recovery for the SCR would constitute cross-subsidization of its affiliates, which received favorable settlement terms by offering up Rockport Unit 2, and would lead to unfair and unreasonable rates for I&M ratepayers; and (c) allowing I&M cost recovery that would cross-subsidize its affiliates is in conflict with Commission decisions. Since the *Wilmington Trust* decision was issued after the close of hearing, the Commission should reopen the proceeding to take further evidence on this issue.

*A.* *The Commission Should Reopen the Proceeding to Take Further Evidence that Became Clear as a Matter of Law after the Close of the Hearing in this Case that Unquestionably Demonstrates that "the consent decree required AEP to modify both Rockport units notwithstanding the lack of alleged violations at these facilities" because "AEP traded away Rockport 2's long-term value in exchange for a more favorable settlement of claims against their other interests."*

2. "Beginning in 1999, the United States Environmental Protection Agency ("EPA"), many states, and private environmental organizations commenced enforcement actions against AEP and several of its affiliates, including I&M. These lawsuits, consolidated in the Southern District of Ohio, alleged AEP and its affiliates modified thirteen power plants across the country without installing certain pollution controls in violation of the Clean Air Act." *Wilmington Trust*, 859 F.3d at 369, attached to I&M's Submission of Additional Information Concerning Rockport Unit 2 Lease filed on April 20, 2017. As the Sixth Circuit found in that proceeding, "there was no allegation of misfeasance at Rockport" in the underlying Clean Air Act enforcement action that led to AEP's commitment to install an FGD and SCR on Rockport Unit 2. *Id.*

3. These suits sought injunctions prohibiting AEP from operating any of the plants at issue except in accordance with the Clean Air Act,[1] along with civil penalties exceeding $100 million. *See*, e.g. Third Am. Compl. of State of New York, et al. at pg. 85, attached hereto. Again,

[1] The lawsuit alleged Clean Air Act violations against nine plants, only one of which was in Indiana: Tanners Creek (IN), Cardinal (OH), Conesville (OH), Muskingum River (OH), Clinch River (VA), Mitchell (WV), Sporn (WV), Amos (WV), and Kammer (WV).

none of these lawsuits alleged any violations at Rockport 2 (or Rockport 1); they solely concerned other plants in AEP's system. *Wilmington Trust Co.*, 859 F.3d at 369.

4. "The parties to these lawsuits resolved the claims by way of a consent decree approved by the district court in 2007. Of import, the consent decree required AEP to modify both Rockport [units] (notwithstanding the lack of alleged violations at these facilities)." *Id.* Most notably, the consent decree required that I&M install and Continuously Operate SCRs and FGDs at Rockport 1 and Rockport 2 no later than December 31, 2017 and December 31, 2019, respectively. *See* Attachment JCH-1 to Petitioner Ex. 2 at PDF pages 46-47 and 56. In 2013, AEP entered into a Third Modification to the consent decree, which extended the scrubber installation dates until December 31, 2025 and December 31, 2028. *See* Chodak Dir. Test at pg. 9.

5. Rockport Unit 2 is owned by a financial conglomerate of non-utility investors (the "Lessors") with whom I&M and affiliate AEP have signed a long-term lease. *Id.* at pg. 7-8. I&M's lease expires at the end of 2022. *Id.* at 8. I&M told the Lessors that it reserved the right not to install a scrubber and return Rockport 2 to the Lessors without any obligation to pay for the scrubber. *See* Second Am. Compl. of Wilmington Trust. at pg. 5, attached hereto. The Lessors brought a lawsuit against I&M for, among other claims, failure to comply with the Rockport Lease and Participation Agreement. The Lessors are seeking an injunction requiring I&M to install the scrubber at Rockport 2, which will cost approximately $1.4 billion. *See id.* at pg. 31; *see also Wilmington Trust Co.*, 859 F.3d at 369.

6. The Lessors brought a lawsuit against AEP that alleged three causes of action: "(1) breach of the Facility Lease by imposing an impermissible Lien; (2) breach of Section 6.01(j) of the Participation Agreement by taking an action that materially adversely affected the economic useful life of Rockport 2; and (3) breach of the covenant of good faith and fair dealing by curtailing Rockport 2's economic useful life." *Wilmington Trust Co.*, 859 F.3d at 369.

7. "On January 13, 2015, the district court dismissed the Facility Lease claim, holding that the consent decree's requirements, as modified, constituted a Permitted Lien under Section 7. On March 28, 2016, the district court dismissed the Participation Agreement claim, reasoning the Permitted Lien's specific authorization governed over the Participation Agreement's more generalized prohibition, and concurrently denied the owners' motion for partial summary judgment. It also dismissed the good faith and fair dealing claim as duplicative of the express breach of contract claims…[t]he district court entered judgment in favor of defendants." *Wilmington Trust Co.*, 859 F.3d at 370. This was the governing standard when I&M filed its application in this proceeding.

8. On October 21, 2016, I&M filed its petition in the present proceeding, requesting a certificate of public convenience and necessity ("CPCN") to install and operate an SCR at Rockport Unit 2 and for cost recovery for the Indiana jurisdictional portion of I&M's ownership share of the Rockport SCR Project. Order at 3-4. The Company's application evaluated four alternatives, but I&M's preferred alternative is to install the SCR and renew or extend the lease beyond its current expiration date. The Company argued "that even if the Lease terminates at the end of its initial term in 2022, it makes economic sense for I&M and its customers to install and operate SCR technology for the remaining time that I&M and its customers would benefit from the output of the unit." Chodak Direct Test. at pg. 10, lines 20-23. The Commission convened an evidentiary hearing, which took place on March 1 and 2, 2017. Following the hearing, the parties filed post-hearing proposed orders and briefs.

9. After the close of the hearing and briefing in this matter, on April 20, 2017, I&M submitted additional information to the Commission concerning the Sixth Circuit's ruling in the *Wilmington Trust* litigation and attached a copy of that decision. In *Wilmington Trust*, the Sixth Circuit found that AEP's commitment to install an FGD on Rockport Unit 2 after the expiration of I&M's lease of that unit constituted a prohibited Lien and that, therefore, I&M and AEP had breached

Section 7 of the Facility Lease. *See Wilmington Trust Co.,* 859 F.3d at 365.[2] The Sixth Circuit vacated the district court's order partially granting summary judgment to I&M regarding Section 6.02(j) of the Participation Agreement. The Sixth Circuit found that I&M had created an unpermitted lien because "AEP traded away Rockport 2's long-term value in exchange for a more favorable settlement of claims against their other interests." *Id.* at 372. This was because neither the EPA nor any of the other plaintiffs had brought an action for alleged violations of the Clean Air Act with regard to Rockport 2; instead, the claims were against other plants owned by AEP and its subsidiaries. *Id.* This was an unpermitted lien because EPA gained the ability to establish requirements for Rockport 2 not because of violations at that unit but, instead, only by virtue of a Consent Decree settling claims targeting other units.

10. At the time that I&M filed its petition and through the close of the hearing in this matter, the governing law was that I&M had not violated the Rockport Lease and Participation Agreement by entering into the Consent Decree. Given this controlling case law, it would have been inappropriate for Joint Intervenors to have raised the issue during the hearing or post-hearing briefs. Moreover, it was not anticipated at the time of the hearing and briefing that the Sixth Circuit would issue an expansive decision that held that "AEP traded away Rockport 2's long-term value in exchange for a more favorable settlement of claims against their other interests." *Wilmington Trust Co.,* 859 F.3d at 372.

11. This Sixth Circuit decision represents a major change in the relevant law and facts as it unquestionably establishes that AEP encumbered Rockport Unit 2 with significant compliance obligations "notwithstanding the lack of alleged violations at [Rockport]" so that it could get more favorable settlement terms for its other affiliates. The Sixth Circuit stated:

[2] On June 8, 2017, the Sixth Circuit issued an amended opinion, which maintained the substantive holdings of its previous decision. On June 27, 2017, I&M filed another Informational Filing updating the Commission about the amended opinion.

> "[W]e look to what rights the EPA (as a Governmental Authority) had to condemn, appropriate, control, or regulate Rockport 2 when the parties finalized the sale and leaseback arrangement. At that time, the EPA had the general power to commence proceedings to enforce the Clean Air Act and to settle such proceedings through a consent decree. 42 U.S.C. § 7413(b), (g). And it exercised this power by initiating and ultimately settling enforcement litigation against various AEP affiliates for alleged Clean Air Act violations at other coal-burning power plants. But it did not do so with respect to Rockport 2. Rather, having made no allegations regarding the owners' plant, the EPA gained the ability to impose the scrubber requirement only by virtue of the consent decree agreed to by its lessees—one whereby AEP traded away Rockport 2's long-term value in exchange for a more favorable settlement of claims against their other interests."

*Wilmington Trust Co.*, 859 F.3d at 372. The Commission should thus reopen the proceeding to take further evidence on this issue as approval of recovery from I&M ratepayers of the cost of installing the SCR on Rockport Unit 2 conflicts with the prohibition, discussed below, of Indiana regulated utilities using their captive customers to cross-subsidize out-of-state, unregulated affiliates. The evidence regarding this matter came to light only after the record closed in this matter and is not cumulative.

### B. *Allowing I&M Cost Recovery for the SCR Would Constitute a Cross-Subsidization of I&M's Unregulated Parent Company and Unregulated Affiliates that Would Lead to Unfair and Unreasonable Rates for I&M Ratepayers.*

12. Pursuant to Indiana statute, Indiana case law, and Commission decisions, unjust and unreasonable rates are unlawful and illegal.[3] If the Commission finds any rates or charges to be unjust, unreasonable, insufficient, discriminatory, or otherwise in violation of statute, the Commission may determine, and by order fix, just and reasonable rates or charges, to be imposed in the future in lieu of those found to be improper. Ind. Code § 8-1-2-68. The Company's proposal seeks to have I&M ratepayers pay Rockport Unit 2 consent decree compliance costs when the only reason that those obligations exist is because, as the Sixth Circuit's decision has now established, "AEP traded away Rockport" to get better settlement terms for its other affiliates. This dynamic is a

[3] *Pub. Serv. Comm'n of Ind. v. Indiana Bell Tel. Co.,* 235 Ind. 1, 130 N.E.2d 467 (1955); *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.*, 440 N.E.2d 14 (Ind. Ct. App. 3d Dist. 1982); *L. S. Ayres & Co. v. Indianapolis Power & Light Co.,* 169 Ind. App. 652, 351 N.E.2d 814 (2d Dist. 1976).

textbook example of improper cross-subsidization; namely, a regulated utility seeking to charge its captive Indiana customers to benefit non-regulated affiliates located in other states.

13. Indiana tribunals have continuously held that it is improper for a regulated utility to charge its customers in order to cross-subsidize its unregulated affiliate. *See, e.g.*, *In re Tell City Municipal Electric Utility*, Commission Cause No. 37388, 1984 Ind. PUC LEXIS 127, *32 (Ind. Util. Reg. Comm'n Oct. 31, 1984) ("There is no accepted reason to allow one of Petitioner's utilities to subsidize the operations of its other utilities."); *Petition of Indiana-American Water Co.*, Commission Cause No. 42029, 2002 Ind. PUC LEXIS 432 (Ind. Util. Reg. Comm'n Nov. 6, 2002) (Commission would not allow subsidization when a utility proposed to subsidize certain rates by allocating a substantial amount of the revenue requirements sought for the sewer operations to the water group); *In re New Paris Telephone, Inc.*, Commission Cause No. 38779, 1989 Ind. PUC LEXIS 395, *21-23 (Ind. Util. Reg. Comm'n Nov. 22, 1989) ("As the Public points out, it is quite natural to expect that unregulated entities would seek to enhance their competitive advantage through subsidization by captive monopoly customers. . . . The current subsidization of Petitioner's unregulated enterprises by its regulated telephone customers does not support a finding that lessened regulation for Petitioner is in the public interest."); *In Re N. Indiana Pub. Serv. Co.*, Commission Cause No. 44081, 2012 WL 3711345 (Ind. Util. Reg. Comm'n Mar. 15, 2012) (the settlement agreement would ensure that cost allocation follows cost causation and there was no cross-subsidization); *In re: Appeal of the Consumer Affairs Divisions Decision of the Complaint of Michael Brenston Against N. Indiana Pub. Serv. Co.*, Commission Cause No. 43708, 2010 WL 2095672, at *5 (Ind. Util. Reg. Comm'n May 19, 2010) ("Such cross-subsidization should be avoided at all costs"); *In Re New Paris Tel., Inc.*, Commission Cause No. 38779, 1991 WL 497166 (Ind. Util. Reg. Comm'n Sept. 4, 1991) ("If the unregulated subsidiaries were in need of unavailable investment funds Petitioner could bolster sagging profits in the unregulated companies by shifting costs to the regulated utility then implementing a rate increase

to satisfy these costs"); *Verified Petition of Duke Energy Indiana, Inc. for Approval of A Premier Power Serv. Rider No. 25 & Approval of Alternative Regulatory Plan (ARP) & Declination of Jurisdiction to the Extent Required Pursuant to Ind. Code § 8-1-2.5-1, et seq.*, Commission Cause No. 44452, 2014 WL 1896299, at *5 (Ind. Util. Reg. Comm'n May 7, 2014) ("The proposed Premier Power Service program insulates non-participants from bearing the capital investment costs and operating costs of this completely below-the-line ARP program, preventing cross-subsidization"); *Application of Northern Ind. Fuel & Light Co.*, Commission Cause No. 38431, 2004 Ind. PUC LEXIS 353, *21 (Ind. Util. Reg. Comm'n Nov. 18, 2004) ("The Utility shall not subsidize Affiliates or non-regulated activities."); *In re New Paris Telephone, Inc.*, 1991 Ind. PUC LEXIS 316 (Ind. Util. Reg. Comm'n Sept. 4, 1991). "[C]ross-subsidization can result in intracorporate transfers that artificially inflate or deflate a utility's financials, resulting in rates that 'do not accurately reflect the cost to or gain by the utilities, the affiliates, or their common owners.'" *See In Re L.M.H. Utilities Corp.*, Commission Cause No. 43022, 2007 WL 2826620 (Ind. Util. Reg. Comm'n Mar. 22, 2007) *citing GTE Northwest Inc., v. Pub. Util. Comm'n of Ore.*, 852 P.2d 918, 920 (Ore. Ct. App. 1993); *accord, State ex rel. Atmos Energy Corp. v. Pub. Sew. Comm'n*, 103 S.W.3d 753, 763-64 (Mo. 2003). "The Commission disapproves of such cross-subsidization." *See In Re L.M.H. Utilities Corp.*, Commission Cause No. 43022, 2007 WL 2826620 (Ind. Util. Reg. Comm'n Mar. 22, 2007); *see also, Re: White River Valley Water Corp.*, Commission Cause No. 40719, 1998 Ind. PUC LEXIS 1, at *45 (Ind. Util. Reg. Comm'n Jan. 7, 1998).

14. The Commission has continually operated to ensure that there is no cross-subsidization. For instance, when AEP proposed to merge with Central and South West Corporation ("CSW"), the Commission on its own motion initiated an investigation regarding the proposed merger. *See In re: Investigation on the Commissions Own Motion into Any & All Matters Relating to the Merger of Am. Elec. Power, Inc. & Cent. & S. W. Corp.*, Commission Cause 41210, 1999 WL 35217138, at *10 (Ind. Util. Reg. Comm'n Apr. 26, 1999). The Commission approved a Stipulation

and Settlement Agreement that had specific provisions to prevent cross subsidization in the Affiliate Standards section that stated:

> The following affiliate standards shall apply from the date of closing of the merger until new affiliate standards imposed by state legislation or State Commission action become effective.
>
> A. The financial policies and guidelines for transactions between an AEP operating company and its affiliates shall reflect the following principles:
>
> 1. An AEP operating company's retail customers shall not subsidize the activities of the operating company's non-utility affiliates or its utility affiliates.
>
> 2. An AEP operating company's costs for jurisdictional rate purposes shall reflect only those costs attributable to its jurisdictional customers.

*Id.*, at * 18-19; *see also In Re Psi Energy, Inc.*, Commission Cause No. 42873, 2006 WL 1465924 (Ind. Util. Reg. Comm'n Mar. 15, 2006) ("The financial policies and guidelines for transactions between PSI and its Affiliates shall reflect the following principles: (1.) PSI's retail customers shall not subsidize the activities of PSI's Non-Utility Affiliates or its Utility Affiliates . . . (3.) PSI's costs for jurisdictional rate purposes shall reflect only those costs attributable to its jurisdictional customers."); *In Re Psi Energy, Inc.*, Commission Cause No. 39897, 1994 WL 186452 (Ind. Util. Reg. Comm'n Mar. 29, 1994) ("The Cross-Subsidization Principles set forth in the Affiliate Guidelines are intended to assure that the utility rates for jurisdictional customers of PSI only reflect those costs attributable to such jurisdictional customers. The Cross-Subsidization Principles are also intended to prevent the subsidization of non-utility activities by jurisdictional customers and the subsidization of PSI's public utility activities by affiliates.")

15. Cost allocation must follow cost causation to prevent cross-subsidization. *In Re N. Indiana Pub. Serv. Co.*, Commission Cause No. 44081, 2012 WL 3711345 (Ind. Util. Reg. Comm'n Mar. 15, 2012); *see also In Re PSI Energy, Inc.*, Commission Cause No. 42873 (Ind. Util. Reg. Comm'n Mar. 15, 2006); *In Re PSI Energy, Inc.*, Commission Cause No. 39897, 1994 WL 186452 (Ind. Util.

Reg. Comm'n Mar. 29, 1994). That is why Indiana regulated utilities are prohibited from using their captive customers to cross-subsidize unregulated affiliates.

16. In *In re Tell City Municipal Electric Utility*, Commission Cause No. 37388, 1984 Ind. PUC LEXIS 127, *32 (Ind. Util. Reg. Comm'n Oct. 31, 1984), a utility sought to charge its electric customers rates which would require electric customers to pay for improvements to the utility's separate water and sewage operations. The Commission found such proposal contrary to the regulatory goal of basing utility rates on the actual costs of providing utility service. The Commission held:

> [T]his Commission believes that Petitioner's rates and charges for electric service could not be found to be "reasonable and just" if the expenses and capital costs of other municipal services were included in Petitioner's revenue requirement for ratemaking purposes. Even in situations where municipal utility rates are not subject to approval by a state regulatory commission, municipal utility rates must bear a reasonable relationship to the service provided and must not merely be the exaction of tax, disguised as utility rates, to finance other municipal projects. If Petitioner's rates for electric service are swollen by recovery of expenses and capital costs associated with providing water or sewage service, then what is to prevent Petitioner's electric rates and charges from being designed so that sufficient revenue is generated to finance any other municipal project or enterprise?

*Id.* at *34 (internal citations omitted).

17. Here, much like the utility in *Tell City Municipal Electric Utility*, AEP is attempting to impose a charge on I&M ratepayers, disguised as a utility rate increase, to finance the compliance costs it faced at other power plants. The consent decree compliance costs were not caused by Rockport or its operation. *Wilmington Trust Co.*, 859 F.3d at 369. The Clean Air Act lawsuit against AEP and its affiliates involved other power plants; "[t]here was no allegation of misfeasance at Rockport." *Id.* "AEP traded away Rockport" "in exchange for a more favorable settlement of claims against their other interests." *Id.* at 372. Since the Rockport plant was not the cause of the litigation or consent decree, to force the ratepayers for this plant to pay the compliance costs would lead to cross-subsidization of unregulated affiliates.

18. "The burden is on the utility to justify inclusion of affiliate-based costs in its rate base." *See e.g., In Re L.M.H. Utilities Corp.*, Commission Cause No. 43022, 2007 WL 2826620 (Ind. Util. Reg. Comm'n Mar. 22, 2007) *citing Midland Cogeneration Venture Ltd. P'ship v. Mich. Pub. Sew. Comm'n,* 199 Mich.App. 286, 324, 501 N.W.2d 573, 591 (Mich. Ct. App. 1993); cf. *City of Ft. Wayne, Ind. v. Util. Ctr., Inc.*, 840 N.E.2d 836, 842 (Ind. App. 2006) (onus is on utility to provide evidence that the affiliate contracts are in the public interest.) AEP has not produced any evidence about why I&M ratepayers should pay for Rockport Unit 2 consent decree compliance costs even though there were no alleged violations at this unit and the Sixth Circuit explicitly held that AEP "traded away Rockport" for "more favorable settlement of claims against their other interests." Since passing these costs to I&M ratepayers would constitute the inclusion of affiliate-based costs that were caused by actions of those unregulated affiliates, AEP has the burden to justify the inclusion of such costs. It has not, and cannot do so.

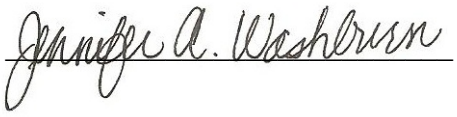
19. Accordingly, Joint Intervenors respectfully request the Commission reopen the proceeding to take further evidence on the cross-subsidization issue that came to light after the hearing and briefing in this case closed and reconsider its approval of cost recovery for the Indiana jurisdictional portion of I&M's ownership share of the Rockport 2 SCR project as such cross-subsidization would be an abuse of the authority granted to the utility, would result in unjust and unreasonable rates, and would, therefore, be illegal under Indiana law.

## II. Conclusion

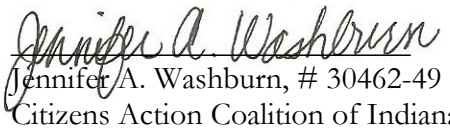
Joint Intervenors respectfully request that the Commission: (1) reopen the proceeding to take further evidence regarding whether the Rockport Unit 2 consent decree compliance costs were caused by other AEP affiliates and not by Rockport or its operation; (2) reopen the proceeding to determine whether allowing I&M any cost recovery for the SCR would constitute a cross-subsidization of I&M's parent company and unregulated affiliates that would lead to unfair and

unreasonable rates for I&M ratepayers, and (3) reverse its finding approving cost recovery for the Rockport 2 SCR project.

I, Jennifer A. Washburn, affirm under penalties for perjury that the foregoing representations are true to the best of my knowledge, information, and belief.

Signed  (Representative of the Ratepayers/Petitioners)

Respectfully submitted,



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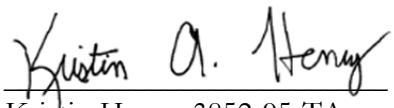

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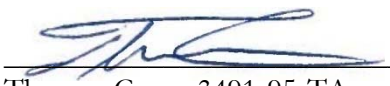

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronic mail or U.S. Mail, first class postage prepaid, this 16th day of April, 2018, to the following:

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Jennifer A. Washburn
Citizens Action Coalition

# Attachment 1

# Third Amended Complaint of the State of New York

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

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>v.<br><br>AMERICAN ELECTRIC POWER SERVICE CORPORATION, OHIO POWER COMPANY d/b/a AMERICAN ELECTRIC POWER, APPALACHIAN POWER COMPANY d/b/a AMERICAN ELECTRIC POWER, INDIANA MICHIGAN POWER COMPANY d/b/a AMERICAN ELECTRIC POWER, COLUMBUS SOUTHERN POWER COMPANY, d/b/a AMERICAN ELECTRIC POWER, and CARDINAL OPERATING COMPANY,<br><br>Defendants. | : | Civil Action No. C2-99-1182<br>District Judge: SARGUS, J.<br>Magistrate Judge: KEMP, J. |
| STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF MARYLAND, STATE OF RHODE ISLAND and COMMONWEALTH OF MASSACHUSETTS<br><br>Plaintiff-Intervenors<br><br>v.<br><br>AMERICA ELECTRIC POWER SERVICE CORP., et. al.,<br><br>Defendants | : | |
| OHIO CITIZEN ACTION, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>AMERICAN ELECTRIC POWER SERVICE CORP., et al.,<br><br>Defendants. | : | Consolidated with<br>Civil Action No. C2-99-1250<br>District Judge: SARGUS, J.<br>Magistrate Judge: KEMP, J. |

# THIRD AMENDED INTERVENOR COMPLAINT

The States of New York, Connecticut, New Jersey, Vermont, New Hampshire, Maryland, Rhode Island, and the Commonwealth of Massachusetts (the "Plaintiff States"), each represented by, and by authority of, its respective Attorney General, allege:

## NATURE OF THE ACTION

1. The Plaintiff States commence this civil action against defendants American Electric Power Service Corporation ("AEP Service"), Ohio Power Company d/b/a American Electric Power ("OPC"), Appalachian Power Company d/b/a American Electric Power ("APC"), Indiana Michigan Power Company d/b/a American Electric Power ("IMPC"), Columbus Southern Power Company d/b/a American Electric Power ("CSPC"), all of which are wholly-owned subsidiaries of American Electric Power Company, Inc. ("AEPCo"), and against Cardinal Operating Company ("Cardinal Operating"), a company co-owned by OPC and Buckeye Power Co. (AEPCo, AEP Service, OPC, APC, IMPC, CSPC, and Cardinal Operating are collectively referred to herein as "AEP"), pursuant to 42 U.S.C. § 7604(a), based on their construction and operation of modified major emitting facilities without the permits required by Part C of Title I of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7470-7479, the Prevention of Significant Deterioration ("PSD") provisions, and nonattainment new source review ("NSR") requirements of 42 U.S.C. §§ 7502-03.

2. Through its subsidiaries, including defendants AEP Service, OPC, APC, IMPC, CSPC, and Cardinal Operating, AEPCo owns and operates numerous coal-fired power plants in several southern, midwestern and eastern states. At several of these plants ("the Facilities"), AEP has undertaken capital projects that have had the effect of increasing the plants' generation

of electricity and emissions. AEP undertook many of these construction projects in order to extend the operational lives of the Facilities' electricity generating units at a time when the units at issue were nearing the end of their normal operational lives.

3. At no time did the defendants apply for or obtain the preconstruction permits required under the PSD and/or NSR provisions and their implementing regulations or any equivalent state program. To date, defendants operate all the Facilities without applying best available control technology ("BACT") or meeting the lowest achievable emission rate ("LAER") for both $SO_2$ and $NO_x$, and without obtaining emission offsets at the Facilities as required by, respectively, the PSD and NSR requirements.

4. Emissions of nitrogen oxides ("$NO_x$") and sulfur dioxide ("$SO_2$") from coal-fired power plants contribute extensively to damages to public health and the environment. The $NO_x$ emissions from these sources contribute to the formation and transport of ozone ("$O_3$") pollution. In the presence of sunlight, $NO_x$ reacts with volatile organic compounds ("VOCs") in a complicated reaction that leads to the creation of ozone, a major component of urban smog. The $NO_x$ and $SO_2$ emissions lead to significant levels of nitric and sulfuric acid deposition and nitrate and sulfate fine particulate deposition in the Plaintiff States.

5. Ozone contributes to many respiratory health problems, including chest pains, shortness of breath, coughing, nausea, throat irritation and increased susceptibility to respiratory infections such as asthma. Elevated ozone levels jeopardize the health of residents of each of the Plaintiff States, especially children, those suffering from respiratory illnesses, and people who work or exercise outdoors. The adverse health effects of ozone pollution are particularly severe in New York, Connecticut, New Jersey, and other northeastern urban areas, where thousands of

children suffer the debilitating effects of asthma.

6. The release of ozone-creating pollutants in Ohio, West Virginia, Indiana, and Virginia contributes to the formation of ozone in the Plaintiff States. AEP's Ohio, West Virginia, Indiana and Virginia power plants, described below, all release ozone-creating pollutants in those states that contribute significantly to the formation of ozone in the Plaintiff States. Because the prevailing winds are from the west, particularly in the summertime, they bring to the Plaintiff States the $NO_x$ emitted from dozens of utilities and other industrial operations in the Midwest, and the resultant ozone pollution. This effect is exacerbated by the fact that many power plants utilize extremely high stacks, which only serve to increase the long range mobility of the emissions. In recognition of this phenomenon, Congress singled out the migration of ozone and its precursors for special emphasis in the 1990 amendments:

> The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels. Senate Report No. 101-228, reprinted in *1990 U.S. Code Cong. and Admin. News at 3389, 3399.*

7. Each of the Plaintiff States suffers from the results of ozone transport, which directly contribute to continued difficulty of most of the Plaintiff States in attaining and maintaining the National Ambient Air Quality Standards (hereinafter "NAAQS") for ozone. Air quality modeling demonstrates that much of the ozone in the northeastern states is attributable to transport from power plants in upwind states. For example, ozone levels in Rhode Island, Connecticut, New Jersey, Maryland and New Hampshire would exceed the ozone NAAQS even if all manmade, or anthropogenic, emission sources in those states were eliminated.

8. $NO_x$ and $SO_2$ emissions also contribute to the formation of acid deposition, which has

caused the acidification of hundreds of lakes and ponds in the Plaintiff States. For example, the percentage of lakes in New York's Adirondack Park that are chronically acidic (i.e., corresponding to a pH of 5.28 or lower, a level at which many species of fish can no longer survive) now approaches 20%. This percentage is expected to increase in years to come, unless upwind power plants significantly reduce their emissions of $NO_x$ and $SO_2$. Many lakes, particularly those in the western Adirondacks, that were favored destinations of anglers just two generations ago, are now devoid of fish.

9. Similarly, New Hampshire's lakes and ponds are highly vulnerable to the effects of acid deposition due to their low buffering capacity, and will continue to deteriorate unless upwind emissions are reduced. Nearly half of New Hampshire's lakes have been acidified and some lakes have already been acidified to the point where they do not support many, if not most, species of naturally reproducing fish populations.

10. Vermont has suffered and continues to suffer similar extensive damage from acid deposition. In Vermont, which has undertaken a long-range monitoring effort, over 20% of the State's lakes have been designated as sensitive or critically sensitive to acid deposition toxification. At least two apparently crystal clear lakes have a pH level so acidic that they cannot support aquatic life. Like much of the Northeast, more than 50% of Vermont's bedrock is granite or other non-calcareous rock that provides low buffering capacity for neutralizing acid and thus is able to do little to counteract the acid loading of Vermont's lakes and rivers from atmospheric deposition.

11. In 1991, as part of its implementation of the PSD provisions of the Act, see 42 U.S.C. § 7475(d), the Forest Service reported that chemistry data from lakes and streams in and

adjacent to Lye Brook Wilderness in Vermont showed that these waters were acidic and very sensitive to further acidification by atmospheric deposition. In the same document, the Forest Service determined that aquatic organisms in Lye Brook were already experiencing stress and damage as a result of sulfur and nitrogen deposition and that additional deposition would cause additional damage. Only a substantial reduction in sulfur and nitrogen deposition would return the area to a situation where adverse impacts would not be occurring.

12. During the winter, acid deposition falls in New York, Vermont, New Hampshire and other Plaintiff States in the form of snow, sleet and rain. Vermont's and New Hampshire's large annual snowfall locks up large amounts of pollutants in the snow covering fields and forests. Spring runoff from snow melt creates an annual pulse of acidified water which enters lakes and streams in huge volumes, creating a phenomenon known as acid shock. Acid shock can be particularly harmful to aquatic communities because it occurs during spawning or the early life stages of many aquatic animals. Some naturally occurring levels of nutrients, such as calcium, become less available to aquatic life because they are chemically bound up buffering the effects of the incoming acids. A decrease in calcium concentrations can be detrimental to the shell development of crustaceans and mollusks as well as to the ability of fish to respond to changes in water temperature and alkalinity.

13. New Hampshire's higher elevations experience roughly twice the deposition rate measured in lower elevations due to the acidic "fog" containing sulfur and nitrogen compounds that envelope the higher elevations. As a result, New Hampshire's high elevation forests have suffered and continue to suffer significant crown damage and death.

14. The health of northeastern high altitude forests in the Plaintiff States is deteriorating

as a result of the weakening effect of acid deposition on trees. Acid deposition mobilizes and washes away calcium in the soil that is necessary to the survival and growth of trees. Levels of calcium in the soil have been measurably dropping over the years, with a concomitant drop in tree growth rates and decreased resistance to stress and disease. The northern forests face a serious threat to survival in the face of frequent assaults by the high acid levels in snow, rain, and sleet in a climate already disposed to destroy the weak.

15. The high acidity of acid deposition also leaches harmful metals such as mercury (most of which also comes from electric power plants) out of the soils and into lakes and streams, where its presence results in human health advisory warnings to avoid eating mercury-laden fish. Acid precipitation also washes aluminum otherwise harmlessly present in soils into water bodies, where it is highly toxic to fish. Acidified water may also cause lead to leach out of residential water pipes, leading to increased exposure to lead in drinking water.

16. $NO_x$ emissions also cause eutrophication of coastal waters including Maryland's Chesapeake Bay, the Long Island Sound and others in New York, Connecticut, New Jersey, Massachusetts, Maryland and elsewhere, and contribute to nutrient loading in other waters including those in Rhode Island, reducing the diversity of fish and other life in these essential waters.

17. Emissions of $NO_x$ and $SO_2$ also lead to the creation of fine nitrate and sulfate particles, which, like ozone, are emitted in southern and midwestern states but are transported by prevailing winds to the Plaintiff States. Inhalation of fine particulate matter causes respiratory distress, cardiovascular disease and premature mortality. Fine nitrate and sulfate particles are also toxic to aquatic life and vegetation.

18. As set forth in more detail below, the Clean Air Act affords special protection to areas classified as federal "Class I" such as certain national parks and wilderness areas. See, e.g., 42 U.S.C. §§ 7473(b)(1) and 7475(d). The federal land manager for New Hampshire's and Vermont's Class I areas, the U.S. Forest Service, has determined that air quality related values, such as vegetation, wildlife, water and scenic beauty, have been seriously impacted by acid, sulfur and nitrogen deposition. The National Park Service has conducted vegetation damage surveys in New Jersey's Class I area, the Edwin B. Forsythe National Wildlife Refuge. These surveys have revealed ozone injury to a wide variety of species.

19. Sulfates resulting from power plant emissions contribute to impaired visibility, negatively impacting Class I areas including, but not limited to, the following Class I areas located in Plaintiff States:

- Edwin B. Forsythe National Wildlife Refuge (New Jersey)
- Great Gulf and Presidential Range - Dry River Wilderness Areas (New Hampshire) (almost 33,000 acres of scenic mountains that reach elevations of up to 5,807 feet above sea level)
- Lye Brook Wilderness (Vermont)

Congress has declared visibility impairment prevention a national goal in federal Class I areas. See, e.g., 42 U.S.C. §§ 7491 and 7492.

20. In light of the extensive environmental harm attributable to the emissions from the Facilities, the Plaintiff States seek, *inter alia*, (a) an injunction prohibiting further operation of the Facilities until defendants implement BACT and/or LAER, and obtain required emission offsets, as required, and otherwise comply with the Act and the laws and regulations promulgated thereunder; (b) civil penalties for defendants' past and ongoing violations of the Act; and (c)

mitigation of the harm caused by the defendants' illegal emissions.

JURISDICTION AND VENUE

21. This Court has jurisdiction of the subject matter of this action pursuant to 42 U.S.C. §§ 7604(a) and 7477, and pursuant to 28 U.S.C. §§ 1331 and 1355.

22. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c), and § 1395(a), because AEPCo and one or more of its subsidiaries, including defendants OPC, APC, IMPC, CSPC, and AEP Service, may be found in this District and a substantial part of the events or omissions giving rise to the claims asserted herein arose in this District.

ALLEGATIONS COMMON TO ALL CLAIMS

The Defendants

23. American Electric Power Service Corporation ("AEP Service") is a corporation organized under the laws of the State of New York, with a principal place of business located at 1 Riverside Plaza, Columbus, Ohio. AEP Service is a wholly-owned subsidiary of AEPCo, providing, upon information and belief, management and professional services to, among others, the electric utility subsidiaries of AEPCo, including accounting, administrative, information systems, environmental, engineering, financial, legal, maintenance and other services. Upon information and belief, most of the directors and officers of AEPCo and each of the electric utility subsidiaries are employees of AEP Service. AEP Service is an operator of the Facilities that are the subject of this action.

24. Ohio Power Company d/b/a American Electric Power ("OPC") is a corporation organized under the laws of the State of Ohio, with a principal place of business located at 301 Cleveland Avenue, S.W., Canton, Ohio. OPC, a wholly-owned electric utility subsidiary of

AEPCo doing business as American Electric Power, is engaged in the generation, sale, purchase, transmission and distribution of electric power to customers in several regions of Ohio. OPC owns and operates the following coal-fired electric power generation plants: Muskingum River plant ("Muskingum River facility") located in Beverly, Ohio; Unit 1 of the Cardinal plant ("Cardinal facility") located in Brilliant, Ohio; the Kammer plant ("Kammer facility") located in Captina, West Virginia; the Mitchell plant ("Mitchell facility") located in Captina, West Virginia; 2/3 of Unit 3 of the John E. Amos plant ("Amos facility"); and Units 2, 4 & 5 of the Philip Sporn plant ("Sporn facility") located in New Haven, West Virginia. It also operates the Muskingum River, Kammer and Mitchell facilities.

25. Appalachian Power Company d/b/a American Electric Power ("APC") is a corporation organized under the laws of the State of Virginia, with a principal place of business located at 40 Franklin Road, S.W., Roanoke, Virginia. APC, a wholly-owned electric utility subsidiary of AEPCo doing business as American Electric Power, is engaged in the generation, sale, purchase, transmission and distribution of electric power to customers in Virginia and West Virginia. APC owns and operates the following coal-fired electric power generation plants: Units 1 & 2 of the Amos facility, located in St. Albans, West Virginia; Unit 3 of the Amos facility (as part owner and operator); and the Clinch River plant ("Clinch River facility") in Carbo, Virginia.

26. Indiana Michigan Power Company d/b/a American Electric Power ("IMPC") is a corporation organized under the laws of the State of Indiana, with a principal place of business located at One Summit Square, P.O. Box 60, Fort Wayne, Indiana. IMPC, a wholly-owned electric utility subsidiary of AEPCo, doing business as American Electric Power, is engaged in

the generation, sale, purchase, transmission and distribution of electric power to customers in Indiana and Michigan. IMPC owns and operates the Tanners Creek coal-fired electric power generation plant ("Tanners Creek") located in Lawrenceburg, Indiana.

27. Columbus Southern Power Company d/b/a American Electric Power ("CSPC") is a corporation organized under the laws of the State of Ohio, with a principal place of business located at 1 Riverside Plaza, Columbus, Ohio. CSPC, a wholly-owned electric utility subsidiary of AEPCo doing business as American Electric Power, is engaged in the generation, sale, purchase, transmission and distribution of electric power to customers in several regions of Ohio. CSPC owns and operates Units 1, 2, 3, 5, and 6 of the Conesville coal-fired electric power generation plant ("Conesville") located in Coshocton County, Ohio, and owns a portion of and operates Unit 4 of the Conesville facility.

28. Cardinal Operating is, upon information and belief, a corporation organized under the laws of the State of Ohio, and is operator of the Cardinal facility.

29. American Electric Power Company, Inc. ("AEPCo") is a corporation organized under the laws of the State of New York, with a principal place of business located at 1 Riverside Plaza, Columbus, Ohio. AEPCo is a public utility holding company that owns all outstanding common stock of its domestic electric utility subsidiaries, including OPC, APC, CSPC, and IMPC, as well as its service company, AEP Service. AEPCo and its subsidiaries own and/or operate the Facilities that are the subject of this action.

30. AEP Service, OPC, APC, IMPC, CSPC, and Cardinal Operating are each a "person" within the meaning of 42 U.S.C. § 7602(e).

The "AEP System"

31. Although each of the electric utility subsidiaries is separately incorporated, they operate as one entity -- American Electric Power. AEP documents establish that they are all physically interconnected, their operations are coordinated as a single electric utility system, and they are centrally controlled, managed and directed out of the Columbus, Ohio offices of AEPCo and AEP Service.

32. Upon information and belief, these AEP-owned companies operate all of their generating plants as a single interconnected and coordinated electric utility system known as the "AEP System Power Pool." Pursuant to an Interconnection Agreement to which these subsidiaries are parties, they share costs and benefits associated with the System's generating plants. This "sharing" is based upon a monthly calculation of each company's maximum peak demand in relation to the sum of the maximum peak demand of all five of the subsidiaries in the preceding twelve months.

33. Upon information and belief, the AEP electric utility subsidiaries also operate their transmission lines as a single intercoordinated system known as the "AEP System Transmission Pool." Pursuant to the Transmission Agreement to which these companies are parties, they share costs associated with their relative ownership of the extra-high-voltage transmission system and certain facilities operated at lower voltages. The agreement combines these companies' investments in transmission facilities and shares the costs of ownership in proportion to the companies' respective peak demands.

34. Upon information and belief, the AEP electric utility subsidiaries are also parties to the AEP System Allowance Agreement, pursuant to which they transfer among themselves allowances for emissions of $SO_2$ associated with transactions under the Interconnection

Agreement.

35. Upon information and belief, the members of the AEP System Power Pool also share marketing and trading transactions involving, *inter alia*, purchase and sale of electricity under physical forward contracts at fixed and variable prices and the trading of electricity contracts including exchange traded futures and options and O-T-C options and swaps. The AEP System Power Pool also sells electric power on a wholesale basis to non-affiliated electric utilities and power marketers, and allocates the sales among the subsidiaries.

36. Upon information and belief, at the time this action was commenced, virtually all of the directors and officers of AEPCo were directors and/or officers of each of the electric utility subsidiaries and AEP Service. For example, E. Linn Draper was Chairman of the Board of Directors and the Chief Executive Officer of AEPCo, AEP Service, OPC, APC and IMPC. He was also President of AEPCo and AEP Service, and Vice President of OPC, APC and IMPC.

37. At the time this action was commenced, Henry W. Fayne was a Vice President of AEPCo, OPC, APC and IMPC, and Executive Vice President, Financial Services of AEP Service. He was also a director of OPC, APC and IMPC.

38. At the time this action was commenced, William J. Lhota was President, Chief Operating Officer, and a director of OPC, APC and IMPC. He was also Executive Vice President for AEP Service.

39. At the time this action was commenced, James J. Markowsky was Vice President and a director of OPC, APC and IMPC. He was also an Executive Vice President, Power Generation, for AEP Service.

40. At the time this action was commenced, J.H. Vipperman was a Vice President and a

director of APC and IMPC, a director of OPC, and an Executive Vice President, Corporate Services, for AEP Service.

41. At the time this action was commenced, Armando A. Pena was Treasurer of AEPCo, AEP Service, OPC, APC and IMPC. He was also Chief Financial Officer for AEP Service, OPC, APC and IMPC, a Senior Vice President, Finance, for AEP Service, and a Vice President for OPC, APC and IMPC.

42. Upon information and belief, AEPCo and AEP Service exercise complete dominion and control over, and manage and direct the environmental policy of, OPC, APC, IMPC, CSPC, and Cardinal Operating with respect to the operation of their power plants. Upon information and belief, AEPCo and AEP Service communicate directly with state and federal regulators with respect to environmental and other issues involving OPC, APC, IMPC, CSPC, and Cardinal Operating.

43. As set forth above, AEPCo and its subsidiaries are essentially one enterprise entity, consisting of several interdependent corporations wholly owned, controlled, operated and managed by a superior corporate entity -- AEPCo -- with the goal of accomplishing one general business purpose.

44. Upon information and belief, AEPCo and AEP Service have been aware of the requirements of the environmental statutes and regulations more particularly described below, and have been aware of the impact upon downwind locations, like the Plaintiff States, of the emissions from the electric utility power generation plants owned and/or operated by AEPCo and its subsidiaries.

45. Upon information and belief, AEPCo and AEP Service, through their control over

and manipulation of OPC, APC, IMPC, CSPC, and Cardinal Operating, have illegally and unjustly increased emissions from the electric utility power generation plants owned and/or operated by these subsidiaries without complying with relevant environmental statutes and regulations, and with full awareness of the impacts such increased emissions would have, and the injuries such increased emissions would cause, upon downwind states including the Plaintiff States.

STATUTORY AND REGULATORY BACKGROUND

46. The Clean Air Act established a regulatory scheme designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b)(1).

47. Pursuant to 42 U.S.C. § 7409, the Administrator of the United States Environmental Protection Agency ("EPA") has promulgated regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for certain criteria air pollutants, including ozone and $SO_2$. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

48. Pursuant to 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan ("SIP") that provides for the attainment and maintenance of the NAAQS.

49. Under 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or

where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area; one that does not is termed a "non-attainment" area.

Prevention of Significant Deterioration

50. Part C of subchapter 1 of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration ("PSD") of air quality in those areas designated as attaining the NAAQS standards. These PSD program requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process.

51. Congress intended the PSD program to ensure that emissions from sources in one State will not interfere with efforts to prevent significant deterioration of air quality in another State. 42 U.S.C. § 7470(4). To effectuate these goals, the PSD provisions of the Act provide that any decision to allow increased air pollution in any area be made only after careful evaluation of all consequences of such a decision, including the interstate effects, and after adequate procedural opportunities for informed public participation in the decision-making process. 42 U.S.C. § 7470(5).

52. The PSD program is also intended "to preserve, protect and enhance the air quality in national parks, national wilderness areas ... and other areas of special national or regional natural, recreational, scenic or historic value." 42 U.S.C. § 7470(2). Certain procedures must be followed with regard to potential impact on Class I areas from a proposed source or modification.

Under 42 U.S.C. §§ 7475(d)(2)(A)-(C), EPA must provide notice of the PSD permit application to the federal official charged with responsibility for management of any lands within a Class I area that may be affected by emissions from the proposed facility. The notification must include an analysis of the proposed source's anticipated impacts on visibility in the Class I area.

53. The federal land manager must then make a determination whether the proposed project will adversely impact air quality related values (including visibility) of any lands within the Class I area. In any case where the federal land manager files a notice alleging that emissions from a proposed project may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations that exceed the maximum allowable increases for a Class I area.

54. 42 U.S.C. § 7475(a) prohibits the construction of a major emitting facility in an area designated as attainment unless a PSD permit has been issued. 42 U.S.C. § 7479(1) defines "major emitting facility" as including, *inter alia*, any fossil-fuel fired steam electric plant with a heat input of more than 250 million British thermal units per hour (250mm Btu/hr) that emit or have the potential to emit 100 tons per year (tpy) or more of any air pollutant or any other source with the potential to emit 250 tpy or more of any air pollutant.

55. In accordance with 42 U.S.C. § 7471, each state implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under the regulations promulgated pursuant to these provisions, to prevent significant deterioration of air quality in attainment areas.

56. A state may comply with 42 U.S.C. § 7471 either by being delegated by EPA the authority to enforce the federal PSD regulations set forth at 40 C.F.R. § 52.21, or by having its own PSD regulations, that must be at least as stringent as those set forth at 40 C.F.R. § 51.166, approved as part of its SIP by EPA.

57. EPA has duly promulgated regulations at 40 C.F.R. § 52.21 to implement the PSD program. As set forth at 40 C.F.R. § 52.21(k), the PSD program generally requires a person who wishes to construct or modify a major emitting facility in an attainment area to demonstrate, before construction commences, that construction of the facility will not cause or contribute to air pollution in violation of any ambient air quality standard or any specified incremental amount.

58. The provisions of 40 C.F.R. § 52.21(i) prohibit the construction or major modification of a major stationary source in any area that has attained the NAAQS unless a PSD permit has been issued that meets the requirements of 40 C.F.R. §§ 52.21(j)-(r). The term "major stationary source" is defined at 40 C.F.R. § 52.21(b)(1)(i) to include, *inter alia*, any fossil-fuel fired steam electric plant of more than 250 million Btu/hr that emits or has the potential to emit 100 tpy or more of any air pollutant subject to regulation under the Act or any other facility that emits, or has the potential to emit, 250 tpy or more of any air pollutant subject to regulation under the Act, or any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source, if the changes would constitute a major stationary source by itself.

59. As set forth at 40 C.F.R. § 52.21(i), any major emitting source that intends to construct a major modification must first obtain a PSD permit. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2) as meaning any physical change in or change in the method of

operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act. "Significant" is defined at 40 C.F.R. § 52.21(b)(23)(i), in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, as a rate of emissions that would equal or exceed any of the following: for ozone, 40 tpy of VOCs or $NO_x$; for $SO_2$, 40 tpy; for particulate matter, 25 tpy.

60. As set forth at 40 C.F.R. § 52.21(j), a new major stationary source or a major modification shall apply best available control technology ("BACT") for each pollutant subject to regulation under the Act that it would have the potential to emit in significant quantities. BACT is the maximum degree of emission reduction achievable for each pollutant regulated under the Clean Air Act, taking into consideration energy, environmental and economic impacts of the emission reductions. 40 C.F.R. § 52.21(b)(12).

61. Pursuant to 40 C.F.R. § 52.21(k), the owner or operator of the facility to be modified must demonstrate that the modified source would not contribute to violation of (a) a NAAQS in any air quality control region (including regions located downwind of the source); or (b) any allowable pollution increments.

62. Pursuant to 40 C.F.R. § 52.21(p), notification of any permit application for a proposed major source or modification, the emissions from which may affect a Class I area, must be provided to the Federal Land Manager for that area. The notification must include an analysis of the proposed source's anticipated impacts on visibility in the Class I area. A permit may not be issued if certain impacts, including impacts on allowable increments and air quality related values (including visibility) for the Class I area, would occur.

Nonattainment New Source Review

63. The New Source Review ("NSR") preconstruction requirements of 42 U.S.C. §§ 7502-03 apply in those areas designated as nonattainment with the NAAQS standards. Congress designed these NSR requirements to protect public health and welfare and to ensure that any new construction activity in nonattainment areas, including modification of existing facilities, results in improvements in air quality.

64. In accordance with 42 U.S.C. § 7502(c)(5), all SIPs shall include plan provisions that require permits, in accordance with 42 U.S.C. § 7503, for the construction and operation of new or modified stationary sources in nonattainment areas.

65. Pursuant to 42 U.S.C. § 7503(a), NSR preconstruction permits are issued only if the following conditions, among others, are met: (a) by the time it has commenced operation, the source has obtained offsetting emissions in an amount such that the total emissions from all sources within the region are reduced in an amount to represent reasonable further progress (as defined in 42 U.S.C. § 7501); (b) the proposed source will comply with the lowest achievable emission rate (LAER); and (c) the owner or operator of the proposed new or modified source has demonstrated that all sources it owns in that State are subject to, and in compliance with, emission limitations and standards applicable under the Act.

66. A state may comply with 42 U.S.C. §§ 7502-03 either by being delegated by EPA the authority to enforce the federal NSR regulations set forth at 40 C.F.R. § 52.24, or by having its own NSR regulations approved as part of its SIP by EPA.

67. The provisions of 40 C.F.R. § 52.24(a) and (b) prohibit the construction or major modification of a major stationary source in any area that is nonattainment with the NAAQS unless an NSR permit has been issued pursuant to a SIP that meets the requirements of 40 C.F.R.

§§ 52.24. The term "major stationary source" is defined at 40 C.F.R. § 52.24(f)(4) to include, *inter alia*, any fossil-fuel fired steam electric plant of more than 250 million Btu/hr that emits or has the potential to emit 100 tpy or more of any air pollutant subject to regulation under the Act or any other facility that emits, or has the potential to emit, 250 tpy or more of any air pollutant subject to regulation under the Act, or any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source, if the change would constitute a major stationary source by itself.

68. "Major modification" is defined at 40 C.F.R. § 52.24(f)(5) as meaning any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act. "Significant" is defined at 40 C.F.R. § 52.24(f)(10), in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, as a rate of emissions that would equal or exceed any of the following: for ozone, 40 tpy of VOCs or $NO_x$; for $SO_2$, 40 tpy.

State Regulatory Provisions

A. Ohio

69. On August 7, 1980, EPA disapproved Ohio's proposed PSD program. 45 Fed. Reg. 52676, 52741 (August 7, 1980). Accordingly, the EPA promulgated the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Ohio SIP at 40 C.F.R. § 52.1884, and delegated to Ohio the authority to implement the federal PSD program incorporated into the Ohio SIP. 46 Fed. Reg. 9580 (Jan. 29, 1981). Prior to August 7, 1980, the EPA administered the PSD program in Ohio, applying the regulations at 40 C.F.R. § 52.21, originally promulgated on December 5, 1974 and as amended thereafter. The regulations appearing at 40 C.F.R. § 52.21 were incorporated

and made a part of Ohio's SIP. 40 C.F.R. § 52.1884 (1998). Ohio submitted a request to the EPA for approval of Ohio Administrative Code section 3745-31-01 through 3745-31-20 into the Ohio SIP on March 1, 1996 as its construction program. Ohio subsequently submitted to the EPA additional revisions to the Ohio SIP. On October 10, 2001, Ohio's PSD program was conditionally approved by the EPA. 66 Fed. Reg. 51570 (Oct. 10,2001). Further revisions to Ohio Administrative Code Chapter 3745-31 were submitted by Ohio on July 18, 2002. On January 22, 2003, the EPA approved Ohio's PSD SIP provisions, 3745-31-01 through 3745-31-20, which became effective on March 10, 2003. 68 Fed. Reg. 2909 (Jan. 22, 2003).

70. On April 15, 1974, EPA approved revisions to Ohio's SIP that required NSR preconstruction permits for new or modified sources ("the 1974 permit requirements"). 39 Fed. Reg. 13539 (April 15, 1974). In October of 1980, U.S. EPA conditionally approved revisions of Ohio's nonattainment NSR SIP rules, which were codified at Ohio Administrative Code ("Ohio Adm. Code") 3745-31-01 through 3745-31-08. 45 Fed. Reg. 72119, 72122 (Oct. 31, 1980). On September 8, 1993, U.S. EPA approved certain revisions to Ohio's nonattainment NSR SIP Rules. 58 Fed. Reg. 47211 (Sept. 8, 1993); see 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999). These nonattainment NSR SIP rules were promulgated pursuant to: the nonattainment NSR requirements of Part D of Title I of the CAA Amendments of 1977, 42 U.S.C. §§ 7501-08 and, following the 1990 Amendments, 42 U.S.C. §§ 7501-15. The SIP Rules, as further amended in 2001 and 2003, are now codified at Ohio Adm. Code 3745-31-01 through 3745-31-29. 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999).

71. Under the CAA and Ohio's approved nonattainment NSR SIP Rules, no person may undertake a major modification of an existing major stationary source in a nonattainment area

without first obtaining a nonattainment NSR permit to install, or under the 1974 permit requirements, a permit to construct or modify, from the Ohio Environmental Protection Agency ("OEPA"). 42 U.S.C. §§ 7501-7515; Ohio Adm. Code 3745-31-02(A).

72. Under the nonattainment NSR program, incorporated by reference into the Ohio SIP, a "major stationary source" is defined as any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. See 40 C.F.R. Part 51, App. S, II.A.4(i); Ohio Adm. Code 3745-31-01(WW)(1).

73. "Major modification" is defined under the nonattainment NSR program, incorporated by reference into the Ohio SIP, as any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any pollutant subject to regulation under the Act. See 40 C.F.R. Part 51, App. S, II.A.5(i); Ohio Adm. Code 3745-31-01(VV). "Net emissions increase" means the amount by which the sum of the following exceeds zero: (1) Any increase in "actual emissions" (as defined by the nonattainment NSR Rules, 40 C.F.R., Part 51, App. S.; Ohio Adm. Code 3745-31-01(C)) from a particular physical change or change in method of operation at a stationary source; and (b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable. 40 C.F.R. Part 51, App. S.II.A.6; Ohio Adm. Code 3745-31-01(DDD). "Significant" means a rate of emissions that would equal or exceed any of the following rates for the following pollutants: $NO_x$, 40 tons per year and $SO_2$, 40 tons per year. 40 C.F.R. Part 51, App. S, II.A.10(i); Ohio Adm. Code 3745-31-01(WWW).

74. "Contemporaneous" is defined as the period from five years prior to the change up to the date that the unit undergoing the physical change or change in the method of operation

becomes operational again and begins to emit the pollutants. Ohio Adm. Code 3745-31-01(DDD)(3)(a). "Creditable" decreases in the contemporaneous five year period are those decreases that are "federally enforceable." Ohio Adm. Code 3745-31-01(DDD)(3)(e)(ii).

75. 42 U.S.C. § 7503 and the Ohio SIP, Ohio Adm. Code 3745-31-01 through 3745-31-29, require that in order to obtain a nonattainment NSR permit, the owner or operator of a source undertaking a major modification must, among other things: (a) comply with the lowest achievable emission rate as defined in Section 171(3) of the Act, 42 U.S.C. § 7501(3)(a); (b) obtain federally enforceable emission offsets at least as great as the new or modified source's emissions; (c) certify that all other major sources that it owns or operates within Ohio are in compliance with the CAA; and (d) demonstrate that the benefits of the proposed source or modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification.

B. Indiana

76. On August 7, 1980, EPA disapproved Indiana's proposed PSD program and incorporated by reference the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Indiana SIP at 40 C.F.R. § 52.793. Accordingly, the EPA promulgated the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Indiana SIP at 40 C.F.R. § 52.793, and delegated to Indiana the authority to implement the federal PSD program incorporated into the Indiana SIP. 46 Fed. Reg. 9580 (Jan. 29, 1981). The regulations appearing at 40 C.F.R. § 52.21 were incorporated and made a part of Indiana's SIP. On March 3, 2003, EPA conditionally approved Indiana's PSD SIP provisions, which became effective on April 2, 2003. 68 Fed. Reg. 9892 (March 3, 2003).

C. Virginia

77. On August 7, 1980, the EPA disapproved Virginia's proposed PSD program. 45 Fed. Reg. 52676, 52741 (August 7, 1980). Accordingly, the EPA promulgated the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Virginia SIP at 40 C.F.R. § 52.2451, and delegated to Virginia the authority to implement the federal PSD program incorporated into the Virginia SIP. Id. The State of Virginia has adopted, and EPA approved, effective April 22, 1998, State regulations for the implementation of a State PSD program at 9 Virginia Administrative Code ("VAC") § 5-80-1700 et seq. 63 Fed. Reg. 13795, 13797 (March 23, 1998).

78. Pursuant to VAC § 5-80-1790, the construction or major modification of a major stationary source in any area of Virginia that has attained the NAAQS is prohibited unless a PSD permit has been obtained by the source and the source complies with the requirements of VAC § 5-80-1800 through § 5-80-1880, including the implementation of best available control technology ("BACT"), as defined in VAC § 5-80-1710.

79. The term "major stationary source" is defined at VAC § 5-80-1710 to include fossil fuel fired steam electric plants greater than 250 million Btu/hour heat input that emit or have the potential to emit more than 100 tpy of a pollutant subject to regulation under the Act, and any other facilities that emit, or have the potential to emit, 250 tons per year tpy or more of a pollutant subject to regulation under the Act.

80. The term "major modification" is defined at VAC § 5-80-1710 to mean any physical change or change in the method of operation of a major stationary source that would result in a "significant," as defined in VAC § 5-80-1710, "net emissions increase," as defined at VAC § 5-80-1710, of any pollutant subject to regulation under the Act.

81. Pursuant to VAC § 5-80-1710, a "significant net emissions increase" of $NO_x$ and $SO_2$ is an increase of at least 40 tpy.

D. West Virginia

82. The State of West Virginia has adopted, and EPA has approved, effective May 12, 1986, State regulations for the implementation of a State PSD program at Code of State Regulations ("CSR") Title 45, Series 14, CSR §§ 45-14-1 through 45-14-20. 51 Fed. Reg. 12517 (April 11, 1986).

83. Pursuant to CSR § 45-14-6, the construction or major modification of a major stationary source in any area of West Virginia that has attained the NAAQS is prohibited unless a PSD permit has been obtained by the source and the source complies with the requirements of CSR § 45-14-7 through CSR § 45-14-12, including the implementation of best available control technology ("BACT"), as defined in CSR § 45-14-2.9.

84. The term "major stationary source" is defined at CSR § 45-14-2.30 to include fossil fuel fired steam electric plants greater than 250 million Btu/hour heat input that emit or have the potential to emit more than 100 tpy of a "regulated pollutant," as defined in CSR § 45-14-2.41, and any other facilities that emit, or have the potential to emit, 250 tpy or more of a regulated air pollutant.

85. The term "major modification" is defined at CSR § 45-14-2.27 to mean a physical change or change in the method of operation of a major stationary source that results in a "significant," as defined in CSR § 45-14-2.46, "net emissions increase," as defined in CSR § 45-14-2.34, of any "regulated pollutant."

86. Pursuant to CSR § 45-14-2.46, a "significant" net emissions increase of the regulated

pollutants $NO_x$ and $SO_2$ is an increase of at least 40 tpy.

Enforcement Provisions

87. Pursuant to 42 U.S.C. § 7604(a)(3), any person may commence, in the United States District Courts, a suit against any person who constructs a modified major emitting facility without a PSD or NSR permit, whichever is required. No notice must be provided before the commencement of a suit under 42 U.S.C. § 7604(a)(3).

88. 42 U.S.C. § 7602(e) defines a "person" to include corporations and States. The States of New York, Connecticut, New Jersey, Vermont, New Hampshire, Maryland, and Rhode Island, and the Commonwealth of Massachusetts, are each a "person" within the meaning of 42 U.S.C. § 7602(e).

89. 42 U.S.C. § 7413(b) authorizes both injunctive relief and civil penalties of up to $32,500 per day for each violation.

NOTICES

90. Notwithstanding the fact that notice is not a prerequisite for suits brought under 42 U.S.C. § 7604(a)(3), the States of New York and Connecticut provided notice of many of their claims to the owners of the Facilities.

91. On September 15, 1999, on behalf of the State of New York, Eliot Spitzer, Attorney General of the State of New York, sent, by certified mail, to defendants AEPCo, AEP Service, OPC, APC and IMPC five notices of intent to sue. New York sent a notice by certified mail to AEP, EPA and the State of West Virginia regarding the Amos facility in West Virginia. New York sent a notice by certified mail to AEP, EPA and the State of Virginia regarding the Clinch River facility in Virginia. New York sent a notice by certified mail to AEP, EPA and the State of

West Virginia regarding the Kammer, Sporn and Mitchell facilities in West Virginia. New York sent a notice by certified mail to AEP, EPA and the State of Ohio regarding the Muskingum River and Cardinal plants in Ohio. New York sent a notice by certified mail to AEP, EPA and the State of Indiana regarding the Tanners Creek plant in Indiana.

92. On November 3, 1999, on behalf of the State of Connecticut, Richard Blumenthal, Attorney General of the State of Connecticut, sent, by certified mail, to defendants AEPCo, AEP Service, OPC, APC and IMPC five notices of intent to sue. Connecticut sent a notice by certified mail to AEP, EPA and the State of West Virginia regarding the Amos facility in West Virginia. Connecticut sent a notice by certified mail to AEP, EPA and the State of Virginia regarding the Clinch River facility in Virginia. Connecticut sent a notice by certified mail to AEP, EPA and the State of West Virginia regarding the Kammer, Sporn and Mitchell facilities in West Virginia. Connecticut sent a notice by certified mail to AEP, EPA and the State of Ohio regarding the Muskingum River and Cardinal plants in Ohio. Connecticut sent a notice by certified mail to AEP, EPA and the State of Indiana regarding the Tanners Creek plant in Indiana.

93. Each notice was served by certified mail on the EPA Administrator, the EPA Regional Administrator for the EPA Region in which the plants identified in the notice are located, the State in which the plants identified in the notice are located, AEPCo, AEP Service and the subsidiary that owned the plants identified in the notice. Each notice provided sufficient information to permit the recipients to identify the activity alleged to be in violation, the persons or persons responsible for the alleged violation (i.e. AEPCo and its subsidiaries), the location of the alleged violations, the date of the violations and the full names and address of the person giving the notice.

94. Sixty days have elapsed since the notices were sent by the State of New York and Connecticut.

FIRST CLAIM FOR RELIEF

(PSD violations -- Amos Unit 1)

95. The Amos facility includes three (3) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1971. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 1 had a Maximum Generator Nameplate Rating of 816 MW. Unit 2 was placed in service in 1972. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 2 had a Maximum Generator Nameplate Rating of 816 MW. Unit 3 was placed in service in 1973. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 3 had a Maximum Generator Nameplate Rating of 1300 MW.

96. In 1998, the Amos facility emitted 47,551 tons of $NO_X$ and 97,988 tons of $SO_2$.

97. At the time AEP constructed the Amos facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_X$ and 250 tpy of $SO_2$.

98. The Amos facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and CSR § 45-14-2.30, for $NO_X$ and $SO_2$.

99. The Amos facility is located in an area that, during the time periods relevant to the

claims in this complaint, was attainment for $SO_2$, and attainment or unclassifiable for $NO_x$. With respect to ozone, the Amos facility is located in an area that was nonattainment from 1978 to December 9, 1981, attainment from December 9, 1981 to November 15, 1990, nonattainment from November 15, 1990 to September 6, 1994, and attainment from September 6, 1994 to June 1, 2004.

100. AEP modified Unit 1 of the Amos facility when it (a) retubed the main condenser in 1989 (CI # 12130); and (b) installed additional economizer surface and support system in 1989 (CI # 12012).

101. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

102. Upon information and belief, the aforesaid modifications constitute major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $NO_x$ and/or $SO_2$.

103. AEP has not applied for a PSD permit for the modifications of the Amos facility identified in this claim for relief.

104. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

105. AEP has not implemented, or operated in accordance with, BACT for control of

$NO_x$ or $SO_2$ emissions from Unit 1 of the Amos facility.

106. Therefore, since 1989 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

107. AEP has not obtained PSD permits for the Amos facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from the Amos facility, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12.

108. Unless restrained by an order of this Court, these violations of the Act will continue.

109. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SECOND CLAIM FOR RELIEF

(PSD violations – Amos Unit 3)

110. Paragraphs 95 through 99, regarding the Amos facility, are realleged and incorporated by reference.

111. AEP modified Unit 3 of the Amos facility when it retubed the main condenser in 1995 (CI # 12473, CI # 72778).

112. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net

increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

113. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.24(f)(5) and CSR § 45-19-2.22, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

114. AEP has not applied for a PSD permit for the modification of the Amos facility identified in this claim for relief.

115. Prior to constructing the aforesaid modification, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and CSR Title 45, Series 19.

116. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from the Amos facility.

117. Since 1995 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, CSR Title 45, Series 19.

118. AEP has not obtained PSD permits for the Amos facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from the Amos facility, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and CSR Title 45, Series 19.

119. Unless restrained by an order of this Court, these violations of the Act will continue.

120. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15,

2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

THIRD CLAIM FOR RELIEF

(PSD violations – Cardinal Unit 1)

121. Units 1 and 2 of the Cardinal facility were each placed in service in 1967. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Cardinal Units 1 and 2 each had a Maximum Generator Nameplate Rating of 615 MW. Defendant Cardinal Operating operates Units 1, 2 and 3 of the Cardinal facility.

122. In 1998, the Cardinal facility emitted 45,944 tons of $NO_x$ and 152,220 tons of $SO_2$.

123. At the time the Cardinal facility was constructed, and at the time the PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $SO_2$ and $NO_x$.

124. The Cardinal facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. §§ 52.21(b)(1)(i)(b), for $NO_x$ .

125. The Cardinal facility is located in an area that was in attainment for ozone under 42 U.S.C. § 7407(d) for the period between 1980 and 2004. Since 2004, the Cardinal facility has been located in an area that is nonattainment for ozone. The Cardinal facility is located in an area that was nonattainment for $SO_2$ for the period between 1980 and 1999. The Cardinal facility is located in an area that has been attainment for $SO_2$ since 1999. The Cardinal facility is located in an area that has been attainment for $NO_x$ between 1980 and the present.

126. AEP modified Unit 1 of the Cardinal facility when it: (a) replaced five pulverizers

in 1978-1979, installed ten additional burners in 1979-1980, and removed the primary superheater, added wingwalls, and replaced the horizontal reheater in 1979-1980 (CI # 71448, CI #71516); (b) removed five 700 HP primary air fan motors and installed five 900 HP primary air fan motors in 1988 (CI # 72201); and (c) replaced all of the primary lower furnace tubing during two outages in 1990-1991 (CI # 72373).

127. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

128. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

129. AEP has not applied for PSD permits for the modifications of the Cardinal facility identified in this claim for relief.

130. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

131. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1 of the Cardinal facility.

132. Since 1978 or earlier, AEP has been in violation of 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, and the Ohio SIP.

133. AEP has not obtained PSD permits for the Cardinal facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r).

134. Unless restrained by an order of this Court, these violations of the Act will continue.

135. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

FOURTH CLAIM FOR RELIEF

(NSR violations -- Cardinal Unit 1)

136. Paragraphs 121 through 125, regarding the Cardinal facility, are realleged and incorporated by reference.

137. At the time the Cardinal facility was constructed, and at the time that NSR regulations became effective, the facility had the potential to emit in excess of 250 tpy of $SO_2$.

138. The Cardinal facility is, and was at the time AEP made the modifications identified in this claim for relief, a "major stationary source," within the meaning of 42 U.S.C. §7602(j) and 40 C.F.R. §52.24(f)(4) and Ohio Adm. Code Chapter 3745-31, for $SO_2$ .

139. AEP modified Unit 1 of the Cardinal facility when it: (a) replaced five pulverizers in 1978-1979, installed ten additional burners in 1979-1980, and removed the primary superheater, added wingwalls, and replaced the horizontal reheater in 1979-1980 (CI # 71448, CI

#71516); (b) removed five 700 HP primary air fan motors and installed five 900 HP primary air fan motors in 1988 (CI # 72201); and (c) replaced all of the primary lower furnace tubing during two outages in 1990-1991 (CI # 72373).

140. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that each of the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

141. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

142. AEP has not applied for NSR permits for the modifications of the Cardinal facility identified in this claim for relief.

143. Prior to constructing the aforesaid modifications, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

144. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 1 of the Cardinal facility.

145. Since 1978 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, or Ohio Adm. Code Chapter 3745-31.

146. AEP has not obtained NSR permits for the Cardinal facility, nor has it installed LAER for control of $SO_2$ emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

147. Unless restrained by an order of this Court, these violations of the Act will continue.

148. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

FIFTH CLAIM FOR RELIEF

(PSD violations -- Cardinal Unit 2)

149. Paragraphs 121 through 125, regarding the Cardinal facility, are realleged and incorporated by reference.

150. AEP modified Unit 2 of the Cardinal facility when it: (a) replaced four pulverizers in 1978-1979, installed ten additional burners in 1980, and removed the primary superheater, added wingwalls, and replaced the horizontal reheater in 1980 (CI # 71449, CI # 71517); (b) removed four 700 HP primary air fan motors and installed four 900 HP primary air fan motors in 1988 (CI # 98066); and (c) replaced all of the primary lower furnace tubing in 1991-1992 (CI # 98085).

151. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

152. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained

prior to the commencement of construction.

153. AEP has not applied for PSD permits for the modifications of the Cardinal facility identified in this claim for relief.

154. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

155. AEP has not implemented, or operated in accordance with, BACT for control of , $SO_2$ or $NO_x$ emissions from Unit 2 of the Cardinal facility, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r).

156. Since 1978 or earlier, AEP has been in violation of 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, and the Ohio SIP.

157. Unless restrained by an order of this Court, these violations of the Act will continue.

158. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SIXTH CLAIM FOR RELIEF

(NSR violations -- Cardinal Unit 2)

159. Paragraphs 121 through 125, and paragraphs 137 through 138, regarding the Cardinal facility, are realleged and incorporated by reference.

160. AEP modified Unit 2 of the Cardinal facility when it: (a) replaced four pulverizers in 1978-1979, installed ten additional burners in 1980, and removed the primary superheater, added wingwalls, and replaced the horizontal reheater in 1980 (CI # 71449, CI # 71517); (b) removed four 700 HP primary air fan motors and installed four 900 HP primary air fan motors in 1988 (CI # 98066); and (c) replaced the No. 7E and No. 7W high pressure feedwater heaters in 1989 (CI # 98057).

161. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

162. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

163. AEP has not applied for NSR permits for the modifications of the Cardinal facility identified in this claim for relief.

164. Prior to constructing the aforesaid modifications, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

165. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 2 of the Cardinal facility, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-

31.

166. Since 1978 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

167. Unless restrained by an order of this Court, these violations of the Act will continue.

168. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SEVENTH CLAIM FOR RELIEF

(PSD violations -- Clinch River Unit 1)

169. The Clinch River facility includes three (3) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1958. and has a nameplate capacity of 237 MW. Unit 2 was placed in service in 1958. Unit 3 was placed in service in 1961. At all times relevant to this complaint, APC reported to the Federal Energy Regulatory Commission that Clinch River Units 1, 2 and 3 each had a Maximum Generator Nameplate Rating of 237.5 MW.

170. In 1998, the Clinch River facility emitted 31,546 tons of $NO_x$ and 28,676 tons of $SO_2$.

171. At the time AEP constructed the Clinch River facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of

250 tpy of $NO_x$ and 250 tpy of $SO_2$.

172. The Clinch River facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and VAC § 5-80-1710, for $NO_x$ and $SO_2$.

173. The Clinch River facility is located in an area that has attained the NAAQS for ozone, $NO_x$ and $SO_2$ under 42 U.S.C. § 7407(d).

174. AEP modified Unit 1 of the Clinch River facility when it replaced the primary, secondary and reheat superheater banks and associated casing and insulation in 1995 (CI # 12502).

175. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

176. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and VAC § 5-80-1710, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

177. AEP has not applied for a PSD permit for the aforesaid modification.

178. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and VAC § 5-80-1800 through § 5-80-1860, including consideration of impacts on Federal Class I areas.

179. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from the Clinch River facility.

180. Therefore, since 1995 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the Virginia SIP and, since March 23, 1998, VAC § 5-80-1790.

181. AEP has not obtained PSD permits for the Clinch River facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), or VAC §§ 5-80-1800 through 5-80-1860.

182. Unless restrained by an order of this Court, these violations of the Act will continue.

183. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

EIGHTH CLAIM FOR RELIEF

(PSD violations -- Clinch River Unit 2)

184. Paragraphs 169 through 173, regarding the Clinch River facility, are realleged and incorporated by reference.

185. AEP modified Unit 2 of the Clinch River facility when it when it replaced the primary, secondary and reheat superheater banks and associated casing and insulation in 1997 (CI # 12502). .

186. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

187. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and VAC § 5-80-1710, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

188. AEP has not applied for a PSD permit for the aforesaid modification.

189. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and VAC § 5-80-1800 through § 5-80-1860, including consideration of impacts on Federal Class I areas.

190. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 2 of the Clinch River facility.

191. Therefore, since 1997 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the Virginia SIP and, since March 28, 1998, VAC § 5-80-1790.

192. AEP has not obtained PSD permits for the Clinch River facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 2, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), or VAC §§ 5-80-1800 through 5-80-1860.

193. Unless restrained by an order of this Court, these violations of the Act will continue.

194. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above

subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

NINTH CLAIM FOR RELIEF

(PSD violations -- Clinch River Unit 3)

195. Paragraphs 169 through 173, regarding the Clinch River facility, are realleged and incorporated by reference.

196. AEP modified Unit 3 of the Clinch River facility when it replaced the primary, secondary and reheat superheater banks and headers and associated casing and insulation in 1996 (CI # 12502).

197. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

198. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and VAC § 5-80-1710, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

199. AEP has not applied for a PSD permit for the aforesaid modification.

200. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. §

7475, 40 C.F.R. § 52.21(j) through (r) and VAC § 5-80-1800 through § 5-80-1860, including consideration of impacts on Federal Class I areas.

201. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3 of the Clinch River facility.

202. Therefore, since 1996 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the Virginia SIP and, since March 23, 1998, VAC § 5-80-1790.

203. AEP has not obtained PSD permits for the Clinch River facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), or VAC §§ 5-80-1800 through 5-80-1860.

204. Unless restrained by an order of this Court, these violations of the Act will continue.

205. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## TENTH CLAIM FOR RELIEF

(PSD violations -- Conesville Units 1, 2, and 3)

206. The Conesville facility includes six (6) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1959. Unit 2 was placed in

service in 1957. Unit 3 was placed in service in 1962. Unit 4 was placed in service in 1973. Unit 5 was placed in service in 1976. Unit 6 was placed in service in 1978. At all times relevant to the claims in this complaint, CSPC has reported to the Federal Energy Regulatory Commission that Unit 1 has a Maximum Generator Nameplate Rating of 118 MW, that Unit 2 has a Maximum Generator Nameplate Rating of 147 MW, that Unit 3 has a Maximum Generator Nameplate Rating of 147 MW, that Unit 4 has a Maximum Generator Nameplate Rating of 841.5 MW, that Unit 5 has a Maximum Generator Nameplate Rating of 444 MW, and that Unit 6 has a Maximum Generator Nameplate Rating of 444 MW.

207. In 1998, the Conesville facility emitted 25,893 tons of $NO_x$ and 150,773 tons of $SO_2$.

208. At the time the Conesville facility was constructed, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_x$ and $SO_2$.

209. The Conesville facility is located in an area that has attained the NAAQS for ozone and $NO_x$ under 42 U.S.C. § 7407(d). The Conesville facility is located in an area that was nonattainment for $SO_2$ for the period 1979-2000, and attainment from 2000 to the present.

210. The Conesville facility is, and was at the time AEP and Columbus Southern Power Co. (CSPC) made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b), for $NO_x$ and $SO_2$.

211. AEP modified the Conesville facility when it (a) replaced four cyclones, re-entrant throats and primary burners at Unit 1 in 1987 (CI # 75140); (b) replaced four cyclones, re-entrant

throats and primary burners at Unit 2 in 1987 (CI # 75246); (c) replaced furnace floor tubing at Unit 2 in 1989 (CI # 75312); and (d) replaced economizer bank at Unit 3 in 1988 (CI #75285).

212. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

213. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $NO_x$ and/or $SO_2$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

214. Neither AEP nor CSPC has applied for a PSD permit for the modifications of the Conesville facility identified in this claim for relief.

215. Prior to constructing the aforesaid modifications, AEP and CSPC did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 40 C.F.R. § 52.21(j) through (r).

216. AEP has not implemented, or operated in accordance with, BACT for control of $NO_x$ and $SO_2$ emissions from Units 1, 2, and 3 of the Conesville facility.

217. Therefore, since 1987 or earlier, AEP and CSPC have been in violation of 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, and the Ohio SIP.

218. Some of the major modifications identified in this claim for relief occurred during time periods when the Conesville Plant was located in a nonattainment area for $SO_2$. These major modifications resulted in significant net emission increases, as defined by the CAA and the Ohio SIP, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51, App. S, as incorporated into the Ohio

SIP at OAC Chapter 3745-31, of $SO_2$.

219. AEP and CSPC violated and continue to violate the Nonattainment NSR provisions of the CAA and the Ohio SIP by, among other things, undertaking such major modifications and operating the facility after the modifications without obtaining a Nonattainment NSR permit as required by OAC Chapter 3745-31. In addition, as required by the CAA, 42 U.S.C.§ 7501-7515, and OAC Chapter 3745-31, AEP and CSPC have not (1) installed and operated LAER for control of $SO_2$, (2) obtained and operated with federally enforceable emission offsets at least as great as the modified source's emissions, (3) certified that all other major sources that they own or operate within Ohio are in compliance with the CAA, and (4) demonstrated that the benefits of the modifications significantly outweigh the environmental and social costs imposed as a result of the modifications.

220. Based upon the foregoing, AEP and CSPC have violated and continue to violate the Nonattainment NSR provisions of Part D of Title 1 of the CAA, 42 U.S.C. §§ 7501-7515, and OAC Chapter 3745-31.

221. Unless restrained by an order of this Court, the violations of the Act alleged in this claim for relief will continue.

222. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

ELEVENTH CLAIM FOR RELIEF

(PSD violations --Kammer Unit 1)

223. The Kammer facility includes three (3) electricity generating units, each consisting of one boiler and one steam turbine. Units 1 and 2 were placed in service in 1958. Unit 3 was placed in service in 1959. At all times relevant to the claims in this complaint, OPC has reported to the Federal Energy Regulatory Commission that Kammer Units 1, 2 and 3 each has a Maximum Generator Nameplate Rating of 237.5 MW.

224. In 1998, the Kammer facility emitted 23,840 tons of $NO_x$ and 108,618 tons of $SO_2$.

225. At the time AEP constructed the Kammer facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_x$ and 250 tpy of $SO_2$.

226. The Kammer facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and CSR § 45-14-2.30, for $NO_x$ and $SO_2$.

227. The Kammer facility is located in an area that has attained the NAAQS for ozone and $SO_2$ under 42 U.S.C. § 7407(d). The Kammer facility is located in an area that is attainment or unclassifiable for $NO_x$.

228. AEP modified Unit 1 of the Kammer facility when it replaced the furnace floor tubing in 1991-1993 (CI # 72442).

229. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net

increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

230. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

231. AEP has not applied for a PSD permit for the modification of the Kammer facility identified in this claim for relief.

232. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

233. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1 of the Kammer facility.

234. Therefore, since 1991 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

235. AEP has not obtained PSD permits for the Kammer facility, nor has it installed BACT for control of $SO_2$ or $NO_x$. emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR § 45-14-7 through 45-14-12.

236. Unless restrained by an order of this Court, these violations of the Act will continue.

237. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of

the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWELFTH CLAIM FOR RELIEF

(PSD violations --Kammer Unit 2)

238. Paragraphs 223 through 227, regarding the Kammer facility, are realleged and incorporated by reference.

239. AEP modified Unit 2 of the Kammer facility when it replaced the secondary superheater outlet bank and headers, the reheater intermediate and outlet banks and headers, and the penthouse casing and insulation in 1998 (CI # 72863, CI # 72864, CI # 72908).

240. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

241. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

242. AEP has not applied for a PSD permit for the modification of the Kammer facility identified in this claim for relief.

243. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. §

7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

244. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 2 of the Kammer facility.

245. Therefore, since 1998 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

246. AEP has not obtained PSD permits for the Kammer facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 2, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

247. Unless restrained by an order of this Court, these violations of the Act will continue.

248. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## THIRTEENTH CLAIM FOR RELIEF

(PSD violations -- Mitchell Unit 1)

249. The Mitchell facility includes two (2) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1970, and Unit 2 was placed in

service in 1971. At all times relevant to the claims in this complaint, OPC has reported to the Federal Energy Regulatory Commission that Mitchell Units 1 and 2 each has a Maximum Generator Nameplate Rating of 816 MW.

250. In 1998, the Mitchell facility emitted 25,551 tons of $NO_X$ and 59,330 tons of $SO_2$.

251. At the time AEP constructed the Mitchell facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_X$ and 250 tpy of $SO_2$.

252. The Mitchell facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and CSR § 45-14-2.30, for $NO_X$ and $SO_2$.

253. The Mitchell facility is located in an area that has, at times relevant to the claims is this complaint, been attainment for $SO_2$, and attainment or unclassifiable for $NO_x$ and ozone.

254. AEP modified Unit 1 of the Mitchell facility when it (a) converted the No. 15 MBF pulverizer to an MPS-89 pulverizer in 1990 (CI # 72462); and (b) replaced the low pressure reheat outlet bank, low pressure reheat outlet header, heat recovery area rear wall and penetration seals in 1993 (CI # 72721).

255. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that each of the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

256. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit

should have been obtained prior to the commencement of construction.

257. AEP has not applied for a PSD permit for the modifications of the Mitchell facility identified in this claim for relief.

258. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

259. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 1 of the Mitchell facility.

260. Therefore, since 1990 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

261. AEP has not obtained PSD permits for the Mitchell facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

262. Unless restrained by an order of this Court, these violations of the Act will continue.

263. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461

and 31 U.S.C. § 3701.

FOURTEENTH CLAIM FOR RELIEF

(PSD violations -- Mitchell Unit 2)

264. Paragraphs 249 through 253, regarding the Mitchell facility, are realleged and incorporated by reference.

265. AEP modified Unit 2 of the Mitchell facility (a) installed additional economizer surface and support system in 1987-1988 (CI # 72206); and (b) when it replaced the low pressure reheat outlet bank, low pressure reheat outlet header, heat recovery area rear wall and penetration seals in 1994 (CI # 72722).

266. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that each of the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or NOx.

267. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

268. AEP has not applied for a PSD permit for the modifications of the Mitchell facility identified in this claim for relief.

269. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

270. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 2 of the Mitchell facility.

271. Therefore, since 1987 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

272. AEP has not obtained PSD permits for the Mitchell facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 2, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

273. Unless restrained by an order of this Court, these violations of the Act will continue.

274. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

FIFTEENTH CLAIM FOR RELIEF

(PSD violations – Muskingum River Unit 1)

275. The Muskingum River facility includes five (5) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1953. Unit 2 was placed in service in 1954. Unit 3 was placed in service in 1957. Unit 4 was placed in service in 1958. Unit 5 was placed in service in 1968. At all times relevant to the claims in this complaint, OPC has reported to the Federal Energy Regulatory Commission that Unit 1 has a Maximum

Generator Nameplate Rating of 220 MW, that Unit 2 has a Maximum Generator Nameplate Rating of 220 MW, that Units 3 and 4 each has a Maximum Generator Nameplate Rating of 237.5 MW, and that Unit 5 has a Maximum Generator Nameplate Rating of 615 MW.

276. In 1998, the Muskingum River facility emitted 31,868 tons of $NO_x$ and 167,624 tons of $SO_2$.

277. At the time AEP constructed the Muskingum River facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_x$ and 250 tpy of $SO_2$.

278. The Muskingum River facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b), for $NO_x$ and $SO_2$.

279. The Muskingum River facility is located in an area that was nonattainment for $SO_2$ from 1978 until October 21, 1994, and has been in attainment for $SO_2$ since that time. The Muskingum River facility is located in an area that was in attainment for ozone for the period 1978 to 2004, and which has been nonattainment for ozone since 2004. The Muskingum River facility is located in an area that was in attainment or was unclassifiable for $NO_x$ between 1978 and 2004.

280. AEP modified Unit 1 of the Muskingum River facility when it replaced the entire inlet and outlet tube assemblies for the secondary superheater in 1988 (CI #72172).

281. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net

increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

282. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

283. AEP has not applied for a PSD permit for the modifications of the Muskingum River facility identified in this claim for relief.

284. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

285. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1 of the Muskingum River facility.

286. Therefore, since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, and the Ohio SIP.

287. Unless restrained by an order of this Court, these violations of the Act will continue.

288. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SIXTEENTH CLAIM FOR RELIEF

(NSR violations -- Muskingum River Unit 1 )

289. Paragraphs 275 through 279, regarding the Muskingum River facility, are realleged and incorporated by reference.

290. At the time the Muskingum facility was constructed, and at the time that NSR regulations became effective, the facility had the potential to emit in excess of 250 tpy of $SO_2$.

291. The Muskingum facility is, and was at the time AEP made the modifications identified in this claim for relief, a "major stationary source," within the meaning of 42 U.S.C. §7602(j) and 40 C.F.R. §52.24(f)(4) and Ohio Adm. Code Chap. 3745-31, for $SO_2$ .

292. AEP modified Unit 1 of the Muskingum River facility when it replaced the entire inlet and outlet tube assemblies for the secondary superheater in 1988 (CI #72172).

293. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that each of the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

294. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

295. AEP has not applied for NSR permits for the modifications of the Muskingum River facility identified in this claim for relief.

296. Prior to constructing the aforesaid modifications, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

297. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 1 of the Muskingum River facility.

298. Since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31. Unless restrained by an order of this Court, these violations of the Act will continue.

299. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SEVENTEENTH CLAIM FOR RELIEF

(PSD violations -- Muskingum River Unit 2)

300. Paragraphs 275 through 279 regarding the Muskingum River facility are realleged and incorporated by reference.

301. AEP modified Unit 2 of the Muskingum River facility when it replaced the entire inlet and outlet tube assemblies for the secondary superheater in 1988 (CI #72173).

302. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

303. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained

prior to the commencement of construction.

304. AEP has not applied for a PSD permit for the modifications of the Muskingum River facility identified in this claim for relief.

305. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

306. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 2 of the Muskingum River facility.

307. Therefore, since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, and the Ohio SIP.

308. Unless restrained by an order of this Court, these violations of the Act will continue.

309. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

EIGHTEENTH CLAIM FOR RELIEF

(NSR violations -- Muskingum River Unit 2)

310. Paragraphs 275 through 279, and paragraphs 290 through 291, regarding the

Muskingum River facility, are realleged and incorporated by reference.

311. AEP modified the Unit 2 of the Muskingum River facility when it replaced the entire inlet and outlet tube assemblies for the secondary superheater in 1988 (CI #72173).

312. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

313. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

314. AEP has not applied for NSR permits for the modification of the Muskingum River facility identified in this claim for relief.

315. Prior to constructing the aforesaid modification, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

316. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 2 of the Muskingum River facility.

317. Since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31. Unless restrained by an order of this Court, these violations of the Act will continue.

318. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January

30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

NINETEETH CLAIM FOR RELIEF

(PSD violations – Muskingum River Unit 3)

319. Paragraphs 275 through 279, regarding the Muskingum River facility are realleged and incorporated by reference.

320. AEP modified Unit 3 of the Muskingum River facility when it replaced five cyclone furnaces, primary burners and related equipment, and replaced furnace floor tubing in 1988 (CI # 72162, CI # 72254, CI # 72258).

321. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

322. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$ and each required that a PSD permit be obtained prior to the commencement of construction.

323. AEP has not applied for a PSD permit for the modifications of the Muskingum River facility identified in this claim for relief.

324. Prior to making the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I

areas.

325. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3 of the Muskingum River facility.

326. Therefore, since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, and the Ohio SIP.

327. AEP has not obtained PSD permits for the Muskingum River facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r).

328. Unless restrained by an order of this Court, these violations of the Act will continue.

329. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## TWENTIETH CLAIM FOR RELIEF

(NSR violations -- Muskingum River Unit 3)

330. Paragraphs 275 through 279, and paragraphs 290 through 291, regarding the Muskingum River facility, are realleged and incorporated by reference.

331. AEP modified Unit 3 of the Muskingum River facility when it replaced five cyclone furnaces, primary burners and related equipment, and replaced furnace floor tubing in 1988 (CI # 72162, CI # 72254, CI # 72258).

332. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

333. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

334. AEP has not applied for NSR permits for the modification of the Muskingum River facility identified in this claim for relief.

335. Prior to constructing the aforesaid modification, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. § § 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

336. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 3 of the Muskingum River facility.

337. Since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, Ohio Adm. Code Chapter 3745-31.

338. AEP has not obtained NSR permits for the Muskingum River facility, nor has it installed LAER for control of $SO_2$ emissions from Unit 3, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24.

339. Unless restrained by an order of this Court, these violations of the Act will continue.

340. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January

30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-FIRST CLAIM FOR RELIEF

(PSD violations -- Muskingum River Unit 4)

341. Paragraphs 275 through 279 regarding the Muskingum River facility are realleged and incorporated by reference.

342. AEP modified Unit 4 of the Muskingum River facility when it (a) replaced 5 cyclone furnaces, primary burners and related equipment, and replaced furnace floor tubing in 1987-1989 (CI # 72163, CI # 72255, CI # 72259); (b) replaced secondary superheater outlet headers in 1989 (CI #72398); (c) replaced the furnace rear wall, rear arch and side walls in 1997 (CI # 72882); and (d) replaced the reheat outlet header and leg tubes, and replaced the reheat intermediate headers and intermediate outlet banks in 2001 (CI # 72850, CI # 72875).

343. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that each of the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

344. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$ and required that a PSD permit be obtained prior to the commencement of construction.

345. AEP has not applied for a PSD permit for the modifications of the Muskingum River facility identified in this claim for relief.

346. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the

emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

347. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 4 of the Muskingum River facility.

348. Therefore, since 1987 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), and 40 C.F.R. § 52.21, and the Ohio SIP.

349. AEP has not obtained PSD permits for the Muskingum River facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 4, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21.

350. Unless restrained by an order of this Court, these violations of the Act will continue.

351. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## TWENTY-SECOND CLAIM FOR RELIEF

(NSR violations -- Muskingum River Unit 4)

352. Paragraphs 275 through 279, and paragraphs 290 through 291, regarding the Muskingum River facility, are realleged and incorporated by reference.

353. AEP modified the Muskingum River facility when it (a) replaced 5 cyclone furnaces, primary burners and related equipment, and replaced furnace floor tubing in 1987-1989 (CI # 72163, CI # 72255, CI # 72259); and (b) replaced secondary superheater outlet headers in 1989 (CI #72398).

354. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

355. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

356. AEP has not applied for NSR permits for the modifications of the Muskingum River facility identified in this claim for relief.

357. Prior to constructing the aforesaid modifications, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

358. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 4 of the Muskingum River facility.

359. Since 1987 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

360. AEP has not obtained NSR permits for the Muskingum River facility, nor has it installed LAER for control of $SO_2$ emissions from Unit 4, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, or Ohio Adm. Code Chapter 3745-31.

361. Unless restrained by an order of this Court, these violations of the Act will continue.

362. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-THIRD CLAIM FOR RELIEF

(PSD violations -- Muskingum River Unit 5)

363. Paragraphs 275 through 279 regarding the Muskingum River facility are realleged and incorporated by reference.

364. AEP modified Unit 5 of the Muskingum River facility when it (a) replaced the original primary superheater with furnace wingwalls, replaced the original horizontal reheater by a larger reheater, increasing side and vertical tube spacing, replaced the existing pulverizers with pulverizers of a different design, added ten coal burners, and replaced the furnace hopper slope tubes in 1978-1980 (CI # 71505, CI # 71450, CI # 71665); (b) replaced and upgraded the economizer in 1985 (CI # 71966); (c) replaced five 700 HP primary air fan motors with five 900 HP primary air fan motors in 1988 (CI # 72202); (d) replaced lower furnace tubes in 1990-1992 (CI # 72372); and (e) replaced the first reheat superheater outlet bank in 1992 (CI # 72632).

365. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$, and/or 25 tpy of particulate matter.

366. The aforesaid modifications constitute a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$, $NO_x$ and/or particulate matter. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

367. AEP has not applied for a PSD permit for the modifications of the Muskingum River facility identified in this claim for relief.

368. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

369. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$, $NO_x$ or particulate matter emissions from Unit 5 of the Muskingum River facility.

370. Therefore, since 1978 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, and the Ohio SIP.

371. AEP has not obtained PSD permits for the Muskingum River facility, nor has it installed BACT for control of $SO_2$, $NO_x$ or particulate matter emissions from Unit 5, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r).

372. Unless restrained by an order of this Court, these violations of the Act will continue.

373. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January

30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-FOURTH CLAIM FOR RELIEF

(NSR violations -- Muskingum River Unit 5)

374. Paragraphs 275 through 279, and paragraphs 290 through 291, regarding the Muskingum River facility, are realleged and incorporated by reference.

375. AEP modified the Muskingum River facility when it (a) replaced the original primary superheater with furnace wingwalls, replaced the original horizontal reheater by a larger reheater, increasing side and vertical tube spacing, replaced the existing pulverizers with pulverizers of a different design, added ten coal burners, and replaced the furnace hopper slope tubes, in 1978-1980 (CI # 71505, CI # 71450, CI # 71665); (b) replaced and upgraded the economizer in 1985 (CI # 71966); (c) replaced five 700 HP primary air fan motors with five 900 HP primary air fan motors in 1988 (CI # 72202); (d) replaced lower furnace tubes in 1990-1992 (CI # 72372); and (e) replaced the first reheat superheater outlet bank in 1992 (CI # 72632).

376. Had AEP complied with the NSR preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$.

377. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.24(f)(5) and Ohio Adm. Code Chapter 3745-31, for $SO_2$. Therefore, a NSR permit should have been obtained prior to the commencement of construction.

378. AEP has not applied for NSR permits for the modifications of the Muskingum

River facility identified in this claim for relief.

379. Prior to constructing the aforesaid modifications, AEP did not obtain emission offsets or comply with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24 and Ohio Adm. Code Chapter 3745-31.

380. AEP has not implemented, or operated in accordance with, LAER for control of $SO_2$ emissions from Unit 5 of the Muskingum River facility.

381. Since 1978 or earlier, AEP has been in violation of 42 U.S.C. §§ 7502-03, and 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

382. AEP has not obtained NSR permits for the Muskingum River facility, nor has it installed LAER for control of $SO_2$ emissions from Unit 5, or complied with any other substantive requirements of 42 U.S.C. §§ 7502-03, 40 C.F.R. § 52.24, and Ohio Adm. Code Chapter 3745-31.

383. Unless restrained by an order of this Court, these violations of the Act will continue.

384. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## TWENTY-FIFTH CLAIM FOR RELIEF

(PSD violations – Sporn Unit 1)

385. The Sporn facility includes five (5) electricity generating units, each consisting of

one boiler and one steam turbine. Unit 1 was placed in service in 1949. Unit 2 was placed in service in 1950. Unit 3 was placed in service in 1951. Unit 4 was placed in service in 1952. Unit 5 was placed in service in 1960. At all times relevant to the claims in this complaint, OPC has reported to the Federal Energy Regulatory Commission that Units 1-4 each has a Maximum Generator Nameplate Rating of 152.5 MW. At all times relevant to the claims in this complaint, OPC has reported to the Federal Energy Regulatory Commission that Unit 5 has a Maximum Generator Nameplate Rating of 499.55 MW.

386. In 1998, the Sporn facility emitted 29,165 tons of $NO_X$ and 76,714 tons of $SO_2$.

387. At the time AEP constructed the Sporn facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_X$ and 250 tpy of $SO_2$.

388. The Sporn facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and CSR § 45-14-2.30, for $NO_X$ and $SO_2$.

389. The Sporn facility is located in an area that has attained the NAAQS for ozone, $NO_x$ and $SO_2$ under 42 U.S.C. § 7407(d).

390. AEP modified Unit 1 of the Sporn facility when it replaced the lower furnace headers and rear and side walls and replaced the seal trough, seal skirt and drip screen in 1990 (CI # 12147, CI # 12166).

391. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net

increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

392. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

393. AEP has not applied for a PSD permit for the modifications of the Sporn facility identified in this claim for relief.

394. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r), and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

395. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1 of the Sporn facility.

396. Therefore, since 1990 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

397. AEP has not obtained PSD permits for the Sporn facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 1, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

398. Unless restrained by an order of this Court, these violations of the Act will continue.

399. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of

the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-SIXTH CLAIM FOR RELIEF

(PSD violations -- Sporn Unit 2)

400. Paragraphs 385 through 389, regarding the Sporn facility, are realleged and incorporated by reference.

401. AEP modified Unit 2 of the Sporn facility when it (a) replaced the lower furnace headers and rear and side walls and replaced the seal trough, seal skirt and drip screen in 1990-1991 (CI # 72421, CI # 72446); and (b) retubed the main condenser in 1990-1991 (CI # 72464).

402. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

403. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

404. AEP has not applied for a PSD permit for the modifications of the Sporn facility identified in this claim for relief.

405. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. §

7475, 40 C.F.R § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

406. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 2 of the Sporn facility.

407. Therefore, since 1990 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

408. AEP has not obtained PSD permits for the Sporn facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 2, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

409. Unless restrained by an order of this Court, these violations of the Act will continue.

410. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

## TWENTY-SEVENTH CLAIM FOR RELIEF

(PSD violations -- Sporn Unit 3)

411. Paragraphs 385 through 389, regarding the Sporn facility, are realleged and incorporated by reference.

412. AEP modified Unit 3 of the Sporn facility when it replaced the lower furnace headers and rear and side walls and replaced the seal trough, seal skirt and drip screen in 1991-1992 (CI # 12148).

413. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

414. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

415. AEP has not applied for a PSD permit for the modification of the Sporn facility identified in this claim for relief.

416. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

417. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 4 of the Sporn facility.

418. Therefore, since 1991 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

419. AEP has not obtained PSD permits for the Sporn facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 3, or complied with any other substantive

requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

420. Unless restrained by an order of this Court, these violations of the Act will continue.

421. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-EIGHTH CLAIM FOR RELIEF

(PSD violations – Sporn Unit 4)

422. Paragraphs 385 through 389, regarding the Sporn facility, are realleged and incorporated by reference.

423. AEP modified Unit 4 of the Sporn facility when it replaced the lower furnace headers and rear and side walls and replaced the seal trough, seal skirt and drip screen in 1989-1990 (CI # 72429).

424. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

425. The aforesaid modification is a major modification within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

426. AEP has not applied for a PSD permit for the modification of the Sporn facility identified in this claim for relief.

427. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

428. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 4 of the Sporn facility.

429. Therefore, since 1989 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

430. AEP has not obtained PSD permits for the Sporn facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 4, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

431. Unless restrained by an order of this Court, these violations of the Act will continue.

432. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

TWENTY-NINTH CLAIM FOR RELIEF

(PSD violations – Sporn Unit 5)

433. Paragraphs 385 through 389, regarding the Sporn facility, are realleged and incorporated by reference.

434. AEP modified Unit 5 of the Sporn facility when it (a) replaced the upper three banks of the first reheater and first reheater inlet header in 1990 (CI # 72477); (b) replaced the main stop valve and bypass valve in 1992 (CI # 72311); (c) replaced the lower furnace tubes in 1992 (CI # 72393); and (d) retubed the low pressure, high pressure and auxiliary condensers in 1992 (CI # 72637).

435. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$.

436. The aforesaid modifications are major modifications within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for $SO_2$ and/or $NO_X$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

437. AEP has not applied for a PSD permit for the modifications of the Sporn facility identified in this claim for relief.

438. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

439. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_X$ emissions from Unit 5 of the Sporn facility.

440. Therefore, since 1990 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

441. AEP has not obtained PSD permits for the Sporn facility, nor has it installed BACT for control of $SO_2$ or $NO_X$ emissions from Unit 5, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r), and CSR §§ 45-14-7 through 45-14-12.

442. Unless restrained by an order of this Court, these violations of the Act will continue.

443. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

THIRTIETH CLAIM FOR RELIEF

(PSD violations --Tanners Creek Unit 3)

444. The Tanners Creek facility includes four (4) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1951. Unit 2 was placed in service in 1952. Unit 3 was placed in service in 1954. Unit 4 was placed in service in 1964. At all times relevant to the claims in this complaint, IMPC has reported to the Federal Energy Regulatory Commission that Unit 3 has a Maximum Generator Nameplate Rating of 215

MW, and that Unit 4 has a Maximum Generator Nameplate Rating of 580 MW.

445. In 1998, the Tanners Creek facility emitted 29,140 tons of $NO_x$ and 46,672 tons of $SO_2$.

446. At the time AEP constructed the Tanners Creek facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of $NO_x$ and 250 tpy of $SO_2$.

447. The Tanners Creek facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b), for $NO_x$ and $SO_2$.

448. The Tanners Creek facility is located in an area that has attained the NAAQS for ozone, $NO_x$, and $SO_2$ under 42 U.S.C. § 7407(d).

449. AEP modified the Tanners Creek facility when it replaced reheat outlet banks and outlet headers and vestibule in 1988 (CI # 31236).

450. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modification identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

451. The aforesaid modification is a major modification, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$ and required that a PSD permit be obtained prior to the commencement of construction.

452. AEP has not applied for a PSD permit for the modification of the Tanners Creek facility identified in this claim for relief.

453. Prior to constructing the aforesaid modification, AEP did not demonstrate that the emission increases resulting from the modification would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

454. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3 of the Tanners Creek facility.

455. Therefore, since 1988 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, and the Indiana SIP.

456. AEP has not obtained PSD permits for the Tanners Creek facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 3, or complied with any other substantive requirements of 42 U.S.C. § 7475 and 40 C.F.R. § 52.21(j) through (r).

457. Unless restrained by an order of this Court, these violations of the Act will continue.

458. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

THIRTY-FIRST CLAIM FOR RELIEF

(PSD violations --Tanners Creek Unit 4)

459. Paragraphs 444 through 448 regarding the Tanners Creek facility, are realleged and

incorporated by reference.

460. AEP modified Unit 4 of the Tanners Creek facility when it (a) replaced eleven cyclone furnaces in 1987 (CI # 31140); (b) replaced the primary furnace arch and floor tubes in 1989 (CI # 31378); (c) replaced the secondary superheater intermediate and outlet bank and headers in 1998 (CI # 31737); and (d) replaced the front wall third pass tubes in 1998 (CI# 31739).

461. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of $SO_2$ and/or $NO_x$

462. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for $SO_2$ and/or $NO_x$. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

463. AEP has not applied for a PSD permit for the modifications of the Tanners Creek facility identified in this claim for relief.

464. Prior to constructing the aforesaid modifications, AEP did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R § 52.21(j) through (r), including consideration of impacts on Federal Class I areas.

465. AEP has not implemented, or operated in accordance with, BACT for control of $SO_2$ or $NO_x$ emissions from Unit 4 of the Tanners Creek facility.

466. Therefore, since 1988, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d),

40 C.F.R. § 52.21, and the Indiana SIP.

467. AEP has not obtained PSD permits for the Tanner's Creek facility, nor has it installed BACT for control of $SO_2$ or $NO_x$ emissions from Unit 4, or complied with any other substantive requirements of 42 U.S.C. § 7475 and C.F.R. § 52.21(j) through (r). .

468. Unless restrained by an order of this Court, these violations of the Act will continue.

469. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to $25,000 per day for each violation of the Act prior to January 30, 1997, and $27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff States request that this Honorable Court:

1. Permanently enjoin defendants from, inter alia, operating the Amos, Cardinal, Clinch River, Conesville, Kammer, Mitchell, Muskingum River, Philip Sporn, and Tanners Creek facilities except in accordance with the Clean Air Act, the PSD regulations, the NSR regulations and the state SIP regulations;

2. Order defendants to remedy their past violations;

3. Order Defendants to take other appropriate actions to remedy, mitigate, or offset the harm to public health and the environment caused by the violations of the Act alleged above;

4. Assess a civil penalty against defendants of up to $25,000 per day for each violation of the Act, the PSD and NSR regulations, and the state SIP regulations prior to January 30, 1997,

$27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and $32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

5. Award the Plaintiff States their costs of this action and attorneys fees; and

6. Grant such other relief as the Court deems just and proper.

Dated: September 17, 2004

Respectfully Submitted,

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# Attachment 2

# Second Amended Complaint of Wilmington Trust

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

| | | |
|---|---|---|
| WILMINGTON TRUST COMPANY, et al., | : | |
| | : | |
| Plaintiffs, | : | Case No. 2:13-cv-01213 |
| | : | |
| v. | : | Judge Sargus |
| | : | |
| AEP GENERATING COMPANY, et al., | : | Magistrate Judge Kemp |
| | : | |
| Defendants. | : | |

# FIRST AMENDED COMPLAINT

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Dated: October 2, 2015

Plaintiffs hereby file this First Amended Complaint as of right pursuant to Fed. R. Civ. P. 15(a)(2), based on Defendants' consent through counsel set forth in writing in Doc. 106 at 20 n.4 (which was reiterated orally at a Status Conference before the Magistrate Judge on September 21, 2015). The Amendment adds subparagraph 37(c) to the Complaint, along with a parallel addition of paragraph 1(e) to the Prayer for Relief herein. It makes no other changes in the Complaint as originally filed, except to integrate the Supplemental Complaint into the Complaint. For convenience and simplicity, and in order to preserve, without waiver, contentions made in the original Complaint, Plaintiffs have not altered or edited their original allegations even though some have been dismissed (some with prejudice and some without prejudice) by Court Order on January 13, 2015. The non-removal of these allegations from the Complaint does not represent an intention to reargue them now, but instead to preserve them without waiver.

COME NOW THE PLAINTIFFS, WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of AEGCO Trust 1, and not in its individual capacity; WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of AEGCO Trust 2, and not in its individual capacity; WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of AEGCO Trust 5, and not in its individual capacity; WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of I&M Trust 1, and not in its individual capacity; WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of I&M Trust 2, and not in its individual capacity; and WILMINGTON TRUST COMPANY, a Delaware corporation, acting in its capacity as Owner Trustee of I&M Trust 5,

and not in its individual capacity (the foregoing collectively the "Trusts"), and for their Complaint, allege as follows against each Defendant:

## NATURE OF THE ACTION

1. This case arises in connection with "Rockport 2," a large, coal-fired electric power generating unit in Indiana. The Defendants lease Rockport 2 (also called the "Facility") from the Plaintiffs, and operate the Facility. The Defendants breached the lease and a related agreement by agreeing to the imposition on the Facility of severe, binding operating restrictions, in the form of a Consent Decree whose terms will bind the owner—indeed, any future operator—in perpetuity. The impact of these restrictions will be most onerous after the end of the lease term, yet the Defendants openly assert a right to return the Facility to the Plaintiffs at the end of the lease term with these restrictions unaddressed. Defendants' actions have injured the Plaintiffs' ownership interests dramatically. Here, in summary, is what has happened:

- The two affiliated Defendants built Rockport 2, completing it in 1989.
- That year, Defendants sold Rockport 2—which was conservatively estimated to have an economic useful life of 45-60 years—to the Plaintiffs.
- Simultaneously, the Plaintiffs leased the Facility back to the Defendants for 33 years.
- This arrangement intentionally made Plaintiffs' continuing ownership of the Facility after the end of the Defendants' lease very valuable to the Plaintiffs. The Plaintiffs were to capture the residual value of their Facility ownership after the end of the lease either by operating Rockport 2 for their own account, leasing the Facility to a third party, or leasing the

Facility to Defendants pursuant to certain options conferred upon the Defendants.

- One Defendant (Indiana Michigan Power Company, or "I&M") is the government-licensed "Operator" of the Facility. I&M will continue to serve as Operator throughout the term of the lease. To protect the value of the Plaintiffs' residual ownership interest, I&M will continue to act as Operator even after the end of the lease (on a cost-reimbursement basis) until licensing authorities have approved transfer of its Operator's license to a successor.
- This sale/leaseback transaction involved a host of contracts, which were negotiated and executed at the offices of Defendants' lawyers and bankers in Manhattan, near the offices of the Plaintiffs' lawyers, bankers and business representatives. The contracts at issue are expressly governed by New York law (with minor exceptions inapplicable to this action) under choice of law clauses in the contracts.
- Approximately 20 years into the lease term, I&M and certain of its affiliates were sued in a series of actions alleging serious violations of environmental law (the "Environmental Actions"). I&M and its affiliates settled the Environmental Actions by voluntarily agreeing to a Consent Decree, which was entered in 2007 and modified significantly in 2013.
- **The Environmental Action allegations had nothing to do with Rockport 2. Instead, they concerned *other* facilities the Defendants and/or their affiliates own and operate.** Nevertheless, I&M and

Defendants' affiliates (the "Environmental Action Defendants") voluntarily included in the Consent Decree provisions that will require the Facility to shut down shortly after the end of the lease term (but well before the end of its economic useful life) unless approximately $1.4 billion in pollution control "scrubbers" have been installed by that time.

- The Consent Decree also imposed a variety of emissions limits directly and indirectly on Rockport 2. These limits are more rigorous than the law otherwise requires, and become progressively more restrictive over time.
- All of these restrictions included in the Consent Decree will bind the Facility in perpetuity because the Consent Decree expressly binds I&M as the licensed "Operator," and obligates I&M to bind any transferee of its Operator's license to the same restrictions.
- Not only are the Consent Decree restrictions effectively perpetual, the impact of these restrictions will arise primarily and most onerously ***after*** the end of the lease term, and they therefore burden the Plaintiffs' interests dramatically.
- The Environmental Action Defendants gratuitously agreed to saddle Rockport 2 with these restrictions on its future operation to serve interests of their own, by allowing them to settle claims that they had broken the law elsewhere in their extensive system.

Thus, the Environmental Action Defendants traded away the value of the Plaintiffs' future operating rights and freedoms in order to settle unrelated allegations against themselves and their affiliates. By taking these actions and failing to protect the Plaintiffs' interests thereafter,

Defendants breached express promises made in the lease and in a related agreement to protect Plaintiffs' residual interests in the Facility—and not to encumber Rockport 2 with unsatisfied future obligations—as well as similar promises implied into those contracts by New York law.

2. The Environmental Action Defendants' acquiescence in the Consent Decree took place in stages:

- The Environmental Actions were filed between 1999 and 2005, and settled through a Consent Decree in 2007.
- The original Consent Decree required installation of scrubbers at the Facility by 2019—three years before the end of the lease term (and therefore at Defendants' expense, under the terms of the lease).
- In 2013, the Environmental Action Defendants negotiated for a modification of the Consent Decree, by which they voluntarily agreed to shut Rockport 2 down either at the end of 2025, or at the end of 2028 (three or six years **after** the end of the lease term, but in either case well before the end of the Facility's useful life) unless the scrubbers have been installed by that date.
- The Environmental Action Defendants also voluntarily agreed in 2007 to subject Rockport 2 to various direct and indirect future limits not otherwise required by law on its emission of various pollutants, and made these limits substantially more stringent in the 2013 modification.
- In 2013, the Defendants made it clear that they reserve the right not to install scrubbers, and to return the Facility to the Plaintiffs subject to an unsatisfied obligation to do so in order to operate in the future.

Thus, after voluntarily burdening Rockport 2 with the obligations of the 2007 Consent Decree, the Defendants orchestrated a deferral of the deadline for compliance. They did so to seek the option to impose on the Plaintiffs the operational impact of, and/or financial responsibility for, compliance with the obligations that the Defendants themselves had voluntarily created.

3. The Plaintiffs had specifically guarded in their contracts with the Defendants against just such abuse of the Defendants' long-term leasehold possession and operational control of Rockport 2. Among other things, the Defendants promised in the lease, and in the "Participation Agreement" by which the general terms of the entire sale/leaseback transaction were established, to protect Rockport 2 by covenanting:

- not to take any action that would materially adversely affect either the economic useful life of Rockport 2 or Plaintiffs' interest in the Facility after the end of the lease term; and
- not to allow encumbrances on the operating capability of Rockport 2, on their own interests or title, or on the interests or title of the Plaintiffs—and to take action promptly to discharge any such encumbrances that might arise.

In addition to these express contractual covenants to protect the Plaintiffs' residual interests, Defendants also implicitly promised (as in any contract) to deal fairly and in good faith, so as not to deprive the Plaintiffs of the expected fruits of the contract.

4. The Defendants' maneuvers to create the overhanging $1.4 billion financial obligation they have imposed on Rockport 2 breached each of these promises, and subjected the Plaintiffs to uncertainty they expressly bargained to avoid. This overhanging burden has imposed severe and continuing injury on the Plaintiffs.

5. Plaintiffs do not challenge entry of the Consent Decree, and no aspect of any relief sought here requires or contemplates any disturbance of any provision of that order. Instead, Plaintiffs seek in this action a judgment requiring the Defendants to act (consistently with the terms of the Consent Decree) to comply with the contractual promises they made to the Plaintiffs—and not to allow the encumbrance and other restrictions they have created for the Facility to impair the value of the Plaintiffs' ownership interests in Rockport 2. The injury to Plaintiffs should be redressed through:

- a judgment for Plaintiffs declaring that Defendants breached the lease and the Participation Agreement, and that Defendants must satisfy (at their own sole expense) the restrictive operating conditions they voluntarily arranged to impose on Rockport 2;
- a declaration that Defendants must hold Plaintiffs harmless from any financial impact of the restrictive operating conditions to which Defendants agreed in the Consent Decree;
- an injunctive order mandating Defendants' specific performance of their contractual obligation to the Plaintiffs to satisfy the restrictive operating conditions and retaining jurisdiction to award damages if they fail to do so successfully; and
- a further award of damages in this action to compensate Plaintiffs for quantifiable injury already suffered.

## FACTS

Plaintiffs provide immediately below brief structural background concerning the sale/leaseback transaction, in order to promote clarity in the identification of parties and discussion of jurisdiction and venue that follows immediately thereafter.

*The Rockport 2 Plant And The Sale/Leaseback*

6. Defendants Indiana Michigan Power Company ("I&M") and its affiliate AEP Generating Company ("AEG") operate in the electric power industry. AEG sells electric power at wholesale and I&M transmits and distributes electric power to retail customers. I&M and AEG (collectively, the "Defendants") are affiliated, and (together with other affiliated utilities) act in concert to manage a fleet of power plants and transmission facilities in pursuit of their business. In the 1980s, the Defendants developed two large coal-fired electric generating units near Rockport, Indiana—on the "Rockport Plant Site." These units are known as Rockport Unit 1 ("Rockport 1"), which was completed and placed into service in 1984; and Rockport Unit 2 ("Rockport 2"), which was completed and placed into service in 1989. I&M and AEG own Rockport 1. Immediately before the sale/leaseback of the Facility, each Defendant also owned a 50% undivided interest in Rockport 2 and the underlying land (the "Rockport 2 Site").

7. Rockport 1 and Rockport 2 are electric generating units with outputs of just over 1,300 megawatts each, giving the Rockport Plant a total generating capacity of 2,600 megawatts. Rockport 1 and Rockport 2 share certain structures, systems and related equipment on or near their respective sites (the "Common Facilities") that are used in the operation of both units. Each unit is operated by I&M as the governmentally licensed "Operator." Rockport 1 and Rockport 2 are among the largest coal-fired units in the country, are efficient and low-cost performers for I&M, and are relatively young for coal-fired electric generating units.

8. In order to refinance their cost of building Rockport 2, the Defendants decided to pursue a sale and leaseback arrangement, by which Defendants would sell undivided interests in Rockport 2 (the "Undivided Interests") to equity investors, and simultaneously lease such Undivided Interests back from the respective purchasers. The leases are for a period of 33 years, with certain renewal options exercisable by Defendants. To implement the transaction, each equity investor formed a pair of common law trusts of which it was beneficial owner: one to buy an Undivided Interest from I&M; and the other to buy an Undivided Interest from AEG. Each trust entered into substantively identical agreements with each Defendant respecting a percentage of that Defendant's original plant ownership interest—such that each equity investor, or "Owner Participant" had one trust buy half of its total Undivided Interest in the Facility from I&M, and the other trust buy the other half of its total Undivided Interest in the Facility from AEG. Such a sale/leaseback arrangement has, during various periods over the course of the last several decades, been a commercially attractive way for developers of large infrastructure projects, like the Defendants, to spread the cost of development over time and to unburden their balance sheets of the substantial asset and corresponding liability that such projects represent. Of course, the equity investors, as owners of these facilities, require and expect to receive a return on investment in exchange for their substantial financial commitment and risk.

9. Accordingly, as Rockport 2 neared completion, the Defendants and their investment bankers marketed the sale/leaseback of Rockport 2 to various institutional equity investors. Through meetings and negotiation sessions held in Manhattan at the offices of the Defendants' bankers and lawyers, Defendants reached agreement with several institutions to enter into the sale/leaseback transaction. In March 1989, each of these investors executed a Participation Agreement with the Defendants and others by which they agreed to the basic terms

of the sale/leaseback. The Owner Participants agreed: (a) to contribute equity capital to trusts they would establish to buy their Undivided Interests, (b) to cause the trusts to borrow to help finance the investment, and (c) to cause these trusts to enter the sale/leaseback arrangement by executing a series of related "Transaction Documents." The parties, including the Owner Participants and the common law trusts on whose behalf the Trustee is suing herein (the "Trusts"), accordingly entered into these Transaction Documents at the same time they executed the Participation Agreements.

10. Each sale/leaseback of each Trust's Undivided Interest in Rockport 2 involved more than a dozen significant contracts with one of the Defendants, as well as scores of certificates, corporate documents, opinions of counsel, side letters and other instruments. Hundreds of separate documents implementing the transaction as a whole were delivered at a closing in the Manhattan offices of the Defendants' counsel, on or about December 7, 1989. Some of the original Owner Participants have since sold their interests to third party purchasers. Some of the Trusts for whom the instant suit is brought are beneficially owned by original Owner Participants, while others are beneficially owned by subsequent purchasers.

*The Parties, Jurisdiction And Venue*

11. Plaintiff Wilmington Trust Company is a Delaware corporation with its principal place of business in Wilmington, Delaware, and is acting herein solely in its capacity as the "Owner Trustee" of each of the following Trusts, and not in its individual capacity.

a. AEGCO Trust 1 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with AEG on behalf of Philip Morris Credit Corporation (now Philip Morris Capital Corporation, or "PMCC") as Owner Participant. PMCC is a corporation organized under the laws of

Delaware with its principal place of business in Stamford, Connecticut. AEGCO Trust 1 owns approximately 50% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by AEG.

b. I&M Trust 1 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with I&M on behalf of PMCC as Owner Participant. I&M Trust 1 owns approximately 50% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by I&M.

c. AEGCO Trust 2 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with AEG on behalf of NYNEX Credit Company (now known as Verizon Capital Corp., or "VCC") as Owner Participant. VCC is organized under the laws of Delaware, with its principal place of business in New York, New York. AEGCO Trust 2 owns approximately 23.53% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by AEG.

d. I&M Trust 2 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with I&M on behalf of VCC as Owner Participant. I&M Trust 2 owns approximately 23.53% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by I&M.

e. AEGCO Trust 5 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with AEG on behalf of SNET Credit Inc. ("SNET") as Owner Participant. Aircraft Services Corporation ("ASC") succeeded to all of SNET's rights, titles and interests as Owner Participant of AEGCO Trust 5 by purchase of those rights, titles and interests on January

17, 2008. ASC is a corporation organized under the laws of Nevada, with its principal place of business in Stamford, Connecticut. AEGCO Trust 5 owns approximately 5.88% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by AEG.

f. I&M Trust 5 is a common law trust organized under the laws of the State of Delaware, for the purpose of entering into the Transaction Documents with I&M on behalf of SNET as Owner Participant. ASC succeeded to all of SNET's rights, titles and interests as Owner Participant of I&M 5 by purchase of those rights, titles and interests on January 17, 2008. I&M Trust 5 owns approximately 5.88% of the Undivided Interests in the 50% of Rockport 2 conveyed in the sale/leaseback by I&M.

g. As owners of Undivided Interests in Rockport 2, each of the trusts is permitted to act independently of the other trusts. The Plaintiff Trusts therefore have full right and authority to bring this action even though other trusts, owning approximately 20.59% of the Undivided Interests, are not Plaintiffs in this action. (None of these other trusts or their beneficial owners are organized in, or have their principal place of business in, either Indiana or Ohio.)

12. Defendant Indiana Michigan Power Company ("I&M") is a corporation organized under the laws of Indiana with its principal place of business in Columbus, Ohio. I&M engages in the generation, transmission and distribution of electric power.

13. Defendant AEP Generating Company ("AEG") is a corporation organized under the laws of Ohio, with its principal place of business in Columbus, Ohio. AEG engages in the business of selling power at wholesale to affiliates including I&M.

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 (diversity jurisdiction), because the amount in controversy between each Trust represented herein, and each Defendant sued herein, exceeds $75,000 exclusive of interest and costs, and there is complete diversity of citizenship between the Plaintiffs and the Defendants.

15. This Court has personal jurisdiction over I&M and AEG pursuant to N.Y. C.P.L.R. § 302(a)(1) because, among other things, I&M and AEG marketed and negotiated the contracts whose breach is alleged herein, as well as a number of related transactions, within this judicial district, and because each Defendant executed and delivered each of these contracts and related transaction documents in this judicial district.

16. Venue lies in this District under 28 U.S.C. § 1391(b)(1) and (2), because each Defendant is subject to personal jurisdiction in this judicial district with respect to this action and therefore resides in this judicial district, and because a substantial part of the events or omissions giving rise to the claims herein occurred in this District.

*The Transaction Documents*

17. Because each Trust purchased a percentage Undivided Interest in Rockport 2 from each of the Defendants, each Trust entered into a substantively identical set of Transaction Documents with each of the two Defendants. These Transaction Documents are substantively identical from Trust to Trust, and from Defendant to Defendant, for purposes of this action. This Complaint therefore refers to each type of Transaction Document in the singular for ease of reference. Thus, for example, the six substantively identical Facility Leases between the parties to this action are collectively referred to in the singular as the "Facility Lease," and so on.

18. While there are numerous other Transaction Documents which together constituted a voluminous closing binder with respect to each Undivided Interest purchased from,

and leased back to, each of the Defendants, Plaintiffs describe those of principal importance to this action below. In these instruments, Defendants expressly covenanted: (a) not to take any action to impair any aspect of the Trusts' Undivided Interests in Rockport 2; (b) not to encumber Rockport 2 with limitations on its use or on transfers of interest by either the Trusts or the Defendants; and (c) to satisfy and terminate any such encumbrance that arose.

a. *The Participation Agreement.* As indicated above, this agreement established the overall framework for the sale/leaseback transaction. Among other things, it required Defendants to protect the value of the Trusts' residual interests in the Facility by doing nothing to impair the economic useful life of the Facility. The Participation Agreement contains an express choice of law clause providing that the law of New York governs the contract. A correct copy of the Participation Agreement between one of the Defendants and one of the Trusts (highlighted to aid the Court in referring to specific provisions cited below) is attached hereto as Exhibit 1.

b. *The Bill of Sale.* Each Trust purchased its Undivided Interest from each Defendant pursuant to a Bill of Sale. These Bills of Sale conveyed only Rockport 2 and the fixtures at the Rockport 2 Site; each of the Defendants retained its 50% undivided interest in the underlying Rockport 2 Site.

c. *The Ground Lease.* Each Defendant leased an undivided interest in the Rockport 2 Site (the "Rockport 2 Site Interest") to each Trust pursuant to a Ground Lease and Easement Agreement (the "Ground Lease"). The percentages each Trust leased from each Defendant matched the percentages of such Trust's Undivided Interest purchases of Rockport 2. The Ground Lease has a term of 44 years, 4 months, and may be extended to the end of Rockport 2's economic useful life (as determined by an appraisal in 2022), at

each Trust's option. In the Ground Lease, the Defendants conveyed to the Trusts an easement to use the adjacent Rockport 1 site, the Defendants' personal property on the Rockport 2 Site, and the Common Facilities to operate and maintain Rockport 2 for the duration of that Ground Lease.

d. *The Facility Lease*. Through a "Facility Lease," each Trust leased its Undivided Interest in Rockport 2 and subleased its Rockport 2 Site Interest to each of the two Defendants (*i.e.*, the Undivided Interest it had acquired from I&M back to I&M, and the Undivided Interest it had acquired from AEG back to AEG) for a Basic Lease Term of 33 years, from December 7, 1989 through December 7, 2022. As Lessee, each Defendant has the option (but not the obligation) to extend its Facility Lease under two alternative term and pricing formulas into one or more Renewal Terms (depending upon the form of its option exercise, if any). Neither Defendant has acted to extend the Basic Lease Term by exercise of any option for a renewal term, and the Defendants do not have to decide whether to exercise that right until June 2021. A correct copy of the Facility Lease between one of the Defendants and one of the Trusts (highlighted to aid the Court in referring to specific provisions cited below) is attached hereto as Exhibit 2.

e. *The Operating Agreement.* The Trusts, the Owner Participants and their predecessors were and are financing parties without direct operational capability in electric power generation. Moreover, unlike the Defendants, the Trusts and Owner Participants have never maintained any regular physical presence at Rockport 2. The Trusts and their beneficiaries therefore required some assurance that I&M would make its services as Operator available to them after the end of the Facility Lease in order to protect the value of the Trusts' residual interest. Accordingly, each Trust entered into the

Unit 2 "Operating Agreement" with the Defendants. (Unlike the other Transaction Documents, there is only one Operating Agreement and it is signed by each of the Defendants and the Trusts.) The Operating Agreement provides, among other things, that after the Facility Lease ends, I&M will continue to operate Rockport 2 on a cost-reimbursement basis for the benefit of the respective Trusts, and that at that time I&M will transmit electric energy to the market so the Trusts can sell the Facility's capacity and output to third parties. As Operator, I&M is under a number of obligations to operate and maintain Rockport 2 in accordance with good commercial practice after the Facility Lease ends. However, the Operating Agreement itself does **not** obligate I&M to pay for any major capital improvements needed to continue operations at Rockport 2 after the end of the Facility Lease. Finally, I&M is not permitted to resign as Operator (except under very narrow conditions). (Even in the event of I&M's removal or resignation as the licensed Operator, it is obligated to cooperate in and use reasonable efforts to achieve the transfer of its Operator's license to its successor.)

*Key Purposes And Provisions Of The Facility Leases And The Sale/Leaseback*

19. The commercial attractiveness of the sale/leaseback arrangement to the Owner Participants arose from several sources, including the rent payments during the Basic Lease Term, certain tax benefits related to the ownership of the leased property, accounting treatment accorded such leases, and the residual value of Rockport 2 during the period after the end of the Basic Lease Term. Realization of this residual value required that Rockport 2 have a significant economic useful life and value at the end of the Basic Lease Term. Indeed, the tax rules applicable to leases *mandate* that expected remaining useful life and residual value after the end

of the lease term represent at least 20% of the total economic useful life and fair market value, respectively, of the leased property.

20. In light of their non-operating ownership, the lengthy duration of the Basic Lease Term, and their need to protect the value of their residual and other interests throughout the Lease Term and beyond, the Trusts obtained a number of protections through covenants made by the Defendants as Lessees in the Facility Lease. In general, these protections obligated the Defendants to pay on time without excuse, to operate on a commercially efficient basis, to protect Rockport 2's economically useful life by appropriate operations and maintenance, to fund all physical improvements and other actions necessary to comply with all applicable law, and not to burden Rockport 2 with actual or contingent future obligations that might hinder or restrict operation of the Facility in the future. In particular:

a. The Defendants agreed, in the Participation Agreement (whose terms are incorporated by reference in the Facility Lease), "not to take any action (or omit to take any action) . . . the taking or omission of which will materially adversely affect the operation, safety, capacity, economic useful life or any other aspect of [Rockport 2] (including the Undivided Interest)." Facility Lease § 20 (incorporating Section 6.01(j) of the Participation Agreement by reference). Thus, the Defendants promised broadly not to take any action to materially adversely affect the economic interests of the Trusts in their Undivided Interests in Rockport 2 including, *inter alia*, their total generating capability and their residual interests.

b. The Defendants agreed to maintain and preserve Rockport 2's operating efficiency in accordance with applicable law, warranty conditions, insurance covenants and electric power industry standards, and in connection with that obligation to ensure

that Rockport 2 has the capacity and functional ability to perform normal commercial operation on a continuing basis (ordinary wear and tear excepted). Facility Lease § 8(a).

c. The Defendants agreed to make no voluntary modifications to Rockport 2 that would shorten its economic useful life. Facility Lease § 8(c).

d. The Defendants agreed to pay the costs of operations, maintenance and modifications to Rockport 2 (whether made voluntarily or under compulsion of law) during the Lease Term. *Id.*

e. The Defendants agreed they would "not directly or indirectly create, incur or suffer to exist any Lien on or with respect to the Undivided Interest . . ., the Lessor's title thereto or interest therein, . . . or any title or interest of the Lessee therein, except Permitted Liens." Facility Lease § 7. "Liens" include "any . . . encumbrance . . ., easement . . . or charge of any kind" on the applicable interest. Facility Lease App. A (Definitions) at p. 10. Thus, the Facility Lease requires that the Defendants do nothing during the term of their leaseholds: (i) to incur or create a specially applicable legal constraint on the Trusts' right, or the Defendants' own right, to operate Rockport 2 or use the Rockport 2 Site Interest; or (ii) to incur or create a legal cloud on either (A) the Trusts' title to Rockport 2, or their freedom to transfer that title fully and without operating constraint on the new owner, or (B) the Defendants' own title to the Rockport 2 Site. While certain government actions are exempt from this proscription because they are defined as Permitted Liens, these include only actions that the government takes unilaterally to "control or regulate" the Facility, without any need for collaboration or consent of the Defendants. *Id.,* at p. 13.

f. The Defendants further promised to "take such action as may be necessary duly to discharge promptly any such Lien as might arise." Facility Lease § 7.

g. The Facility Lease included a provision expressly allowing the Trusts to forbear from asserting or enforcing rights arising from any breach by Defendants without concern that any "express or implied waiver" of any right be deemed to arise from such "failure or delay" by the Trusts to exercise any such right. Facility Lease § 16(c).

h. The Defendants agreed that (unless one or both of them purchased Rockport 2) they would turn Rockport 2 over to the Trusts in compliance with the requirements described above at the end of the Lease Term. Facility Lease § 5.

i. Finally, both the Facility Lease and the Participation Agreement expressly chose New York law to the maximum extent permissible under general common law principles. Specifically, the Participation Agreement expressly provides that it is to be "governed by and construed in accordance with the law of . . . the State of New York." Participation Agreement § 11.07. The Facility Lease provides that it "shall be governed by and construed in accordance with the law of the State of New York, except as to matters relating to the creation of the leasehold and subleasehold estates hereunder and the exercise of rights and remedies with respect to such leasehold and subleasehold estates, which shall be governed by and construed in accordance with the law of the State of Indiana." Facility Lease § 21(f). Thus, the Facility Lease applies Indiana law only with respect to rights to own and occupy real property in that state (just as the common law would likely do even were this exception not expressly included in the Facility Lease), and otherwise applies New York law to govern the scope and enforcement of the parties' covenants—which is what this Complaint concerns.

21. One of the key principles embedded in these provisions was the Defendants' duty to protect the value of the Trusts' residual interests from the adverse economic effects of either (i) a limitation or restriction on use, or (ii) an obligation to make capital improvements that might arise from the Defendants' own actions during the term of the leasehold but apply only after the Defendants had turned economic responsibility for Rockport 2 back to the Trusts. The economic value of the Trusts' residual interests after the end of the Facility Lease term was thereby to be protected from the economic effects of obligations or limitations the Defendants incurred by operation of Rockport 2 for their benefit, but whose impact affected the Facility only after Defendants' lease term ended.

22. The Participation Agreement also contains a "General Indemnity" in favor of each of the Trusts, by which the Defendants agree (among other things) to reimburse the Trusts and the Owner Participants for any and all "Expenses," including (a) liabilities and obligations incurred by action of the Defendants, and (b) legal fees and related expenses incurred by the necessity to protect the Trusts' and/or the Owner Participants' interests in Rockport 2. Participation Agreement § 7.01.

23. The parties fully understood and intended that the Owner Participants' beneficial interests in their respective Trusts were to be, in essence, financial instruments that are freely transferable to qualified investors. Defendants' continuous compliance with their obligations as Lessees was expected to afford the Owner Participants the opportunity to sell their interests as and when their financial strategies and general market conditions made a sale attractive to them.

*The Environmental Action Defendants Are Sued In A Series of Enforcement Actions Relating To Other Facilities*

24. In 1999, 2004 and 2005, I&M and a number of affiliates of both Defendants were sued in the Environmental Actions by the United States Environmental Protection Agency

("EPA"), several States, and some private environmental organizations (collectively the "Environmental Action Plaintiffs"), for noncompliance with (*inter alia*) the Clean Air Act. The Environmental Action Plaintiffs alleged that the Environmental Action Defendants had made "major modifications" at certain power plants in their system without obtaining and installing pollution controls.

25. None of the complaints in any of the Environmental Actions alleged violations at Rockport 2, either by Defendants or anyone else. I&M was an Environmental Action Defendant based on its ownership and operation of another facility more than 100 miles from Rockport 2. Neither the Trusts nor the Owner Participants were ever party to any proceedings in the Environmental Actions.

26. The Environmental Action complaints sought injunctions to shut down all thirteen units that were the subject of the complaints immediately, until the requisite emission controls were installed, and civil penalties of more than $100 million against the Environmental Action Defendants.

27. The Environmental Actions were consolidated before the United States District Court for the Southern District of Ohio (Eastern Division). The Environmental Action Defendants settled all of these actions before any decision could be rendered, by agreeing to a Consent Decree. A correct copy of the Consent Decree as entered in 2007 is attached hereto as Exhibit 3. The Consent Decree expressly provided that it could be modified only by a subsequent written agreement signed by all of the parties to it, and could be modified materially only upon court approval. Consent Decree ¶ 199.

*The Environmental Action Defendants Settle Claims Against Other Facilities By Agreeing To Impose Restrictive Conditions on Rockport 2*

28. In the Consent Decree, the Environmental Action Defendants agreed to a number of remedies including payment of money to the Environmental Action Plaintiffs. Defendant I&M also voluntarily agreed, as part of the consideration for resolution of the specific claims made with respect to other plants in the Environmental Actions, to make certain expensive modifications at, and impose operating limits on, Rockport 2. Specifically, the Environmental Action Defendants voluntarily undertook to include the following obligations relating to Rockport 2 in the Consent Decree:

a. The Consent Decree required the Defendants to install Selective Catalytic Reduction pollution control devices for reduction of nitrogen oxide ("$NO_x$") emissions at Rockport 2 on or before December 31, 2019. Consent Decree ¶ 68.

b. The Consent Decree required Defendants to install Flue Gas Desulfurization ("FGD") system pollution control devices (also called scrubbers) for the reduction of sulfur dioxide ("$SO_2$") emissions at Rockport 2 by that same date (the "Scrubber Mandate"). FGD scrubbers are time-consuming and expensive to field. Consent Decree ¶ 87. Industry experience shows that it can take more than four years to plan, design, permit, construct and install such systems, and the cost of fielding FGD scrubbers at Rockport 2 is estimated at approximately $1.4 billion.

c. The Consent Decree imposed limits on the collective emissions of $NO_x$, and the collective emissions of $SO_2$, by Rockport 2 and 45 other generating units owned and operated by the Environmental Action Defendants or their affiliates (which it called the "AEP Eastern System"). These system limits (the "AEP System Emissions Caps") were stricter than those otherwise required by law, and may curtail the future operations

and value of Rockport 2 (based in part on inefficiencies at other plants which the Trusts cannot control). Consent Decree ¶ 86.

d. The Consent Decree obligated the Environmental Action Defendants (and their successors/assignees) collectively to surrender certain "$NO_x$ Allowances" and "$SO_2$ Allowances" (*i.e.*, valuable, tradable pollution credits) in the future, under circumstances in which they would otherwise have no obligation to do so. Consent Decree ¶¶ 74, 76, 77, 79, 93. This "Allowance Surrender Obligation" will deprive the Trusts of value otherwise available from Rockport 2's output after reversion of the Facility to them following the Basic Lease Term.

29. Upon unanimous joint motion by the Environmental Action Plaintiffs and Defendants, the United States District Court for the Southern District of Ohio entered the Consent Decree in the form proposed by the parties on December 10, 2007.

30. The requirements of the Consent Decree will bind Rockport 2 to these requirements in perpetuity.

a. The Consent Decree specifically requires Defendant I&M to comply with all of its terms, unless and until I&M transfers its operational interests in the Facility pursuant to procedures specified by the Consent Decree itself. Consent Decree ¶¶ 178 (providing for enforcement of Consent Decree against I&M and other parties until termination of enforcement rights against them) and 215-16 (permitting termination of enforcement rights against I&M and other Environmental Action Defendants only after compliance and/or inclusion of requirements in operating permits that bind the Facility, among other conditions). EPA and the other Environmental Action Plaintiffs are in a position to enforce I&M's compliance obligation, because as owner of the land and

operator of the Common Facilities necessary to operate Rockport 2 (not to mention associated transmission facilities), I&M is in a position to prevent physically the generation of power at Rockport 2 and/or the transmission of electricity generated there for sale.

b. The Consent Decree also specifically prohibits each of the Defendants from transferring any operational or ownership interest in Rockport 2 to any third party unless and until that third party executes a Consent Decree modification expressly subjecting itself to all requirements of the Consent Decree as a party. Consent Decree ¶¶ 191-92. Thus, neither Defendant is permitted under the Consent Decree to transfer either its title to the Rockport 2 Site, or its leasehold interest in Rockport 2, to any third party without obtaining that third party's binding legal commitment to comply with all Rockport 2-related requirements of the Consent Decree by signing that instrument as a party.

c. Similarly, I&M cannot transfer its interests as Operator of Rockport 2—including its contractual responsibility to conduct operations, and its Title V Operating Permit issued by EPA—without first obtaining the transferee's written commitment to be bound by the terms of the Consent Decree as a party. *Id.*

31. Plaintiffs neither asserted nor sought to enforce any right under any of the Transaction Documents in the wake of the Environmental Action Defendants' agreement to the Consent Decree in 2007. *Inter alia*, it appeared that the Defendants were committed to compliance with the terms of the Consent Decree within the term of the Facility Lease, and that they would in fact comply. Moreover, the Trusts were protected from any assertion of "waiver by silence" by the express provisions of the Facility Lease, which states that no "express or

implied waiver" is to arise from any Trust's "failure or delay . . . in exercising any right" under the Facility Lease arising from any breach of any covenant by the Defendants. Facility Lease § 16(c).

*The Defendants Orchestrate A Change In The Consent Decree*

32. In 2012, seven years before their deadline under the 2007 Consent Decree to install scrubbers at Rockport 2, the Defendants took steps to alter that commitment they had voluntarily made. Along with the other Environmental Action Defendants, I&M moved for court permission to install substantially less expensive pollution control technology at Rockport 1 and Rockport 2 to satisfy the Scrubber Mandate. But their attempt to install this technology instead of scrubbers met opposition. So they negotiated a different form of relief that benefited them, at the Trusts' expense.

33. Unable to alter the commitment they had voluntarily undertaken to install FGD scrubbers, Defendant I&M and the other Environmental Action Defendants negotiated a Consent Decree modification deferring the deadline for compliance from December 31, 2019 to December 31, 2025—taking the effective date of the FGD scrubber installation requirement outside the term of the Facility Lease. As a part of that arrangement, I&M agreed to shut down, or "retire," Rockport 2 on that date—three years after the end of the Facility Lease Term—unless FGD scrubbers are installed by then. (Under certain unlikely circumstances, Defendants may elect to defer this requirement for three years, to December 31, 2028—but only at the expense of either spending $1.4 billion on Rockport 1 or shuttering that Facility (which it owns) by the December 31, 2025 deadline. Whatever choice Defendants make, this requirement will affect Rockport 2 long before the end of its design life.) I&M also agreed to accept an $SO_2$ emissions cap applicable to Rockport 1 and Rockport 2 (collectively) both before and after the installation

of such scrubbers, thereby creating a highly burdensome restriction on the otherwise lawful operation of Rockport 2 after 2025. Specifically:

a. On October 31, 2012, I&M and the other Environmental Action Defendants filed an "Application for Judicial Interpretation of Consent Decree" in the Environmental Actions, asking the Ohio federal court to state explicitly that installation of a dry sorbent injection ("DSI") system at Rockport 2 would comply with the 2007 Consent Decree requirement to install an FGD system. The Environmental Action Plaintiffs vigorously opposed the request, arguing that the Application was a thinly-disguised request for relaxation of the Scrubber Mandate. The Environmental Action Defendants took the opportunity presented by the debate over their Application to agree voluntarily with the Government on a variety of new requirements through comprehensive amendment of the Consent Decree.

b. This amendment involved changes to a variety of emissions limit requirements and plant modification requirements from those originally set forth in the Consent Decree. These new requirements were reflected in a Consent Decree "Modification" agreed to by the Environmental Action Defendants and the other parties to the Environmental Actions. A correct copy of the Modification, as entered, is attached hereto as Exhibit 4.

c. In the Modification, I&M: (i) agreed to require installation of the substantially less expensive and less effective DSI system at Rockport 2 by April 2015, and (ii) agreed that imposition of the requirement to install FGD scrubbers at Rockport 2 would be deferred to 2025—but that the Facility would be shut down if this improvement is not made by that date. This "Operating Restriction" became a fully binding term of the

Consent Decree after the Environmental Action Defendants obtained the Modification. Third Joint Modification to Consent Decree ¶ 9, modifying Consent Decree ¶ 87. (The Modification identifies two permitted alternatives to installation of FGD scrubbers as a condition of continued operations past December 31, 2025, but each greatly impairs the value of the Facility because they are likely to be economically inferior to retrofitting Rockport 2 with FGD scrubbers. These are "refueling" or "repowering" the Facility. *Id.*) By conditionally prohibiting operation of Rockport 2 as a power plant from 2026 (or 2029) through the end of its current projected economic useful life approximately 20 – 25 years later, the Operating Restriction threatens the viability of Rockport 2 for fully the last third of its economic useful life, and in any event substantially impairs the pre-existing residual value of the Facility by requiring very substantial financial investment by Plaintiffs to realize it.

d. In the Modification, the Environmental Action Defendants also agreed to impose emission limits on Rockport 2 that are stricter than those otherwise imposed by law. The Environmental Action Defendants agreed that: (i) Rockport 2 would meet 30-day rolling average $NO_x$ and $SO_2$ emissions limits (the "Rockport 2 Emissions Limits") (*id.* ¶ 7 (modifying Consent Decree ¶ 56), ¶ 9 (modifying Consent Decree ¶ 87); and (ii) Rockport 1 and Rockport 2, together, would emit no more than 28,000 tons per year of $SO_2$ in 2016-17, with that limit to decline periodically until it reaches 22,000 tons per year at the end of the Basic Lease Term, and reaches 10,000 tons per year on January 1, 2029 (the "Rockport Plant Emissions Cap") (*id.* ¶ 10, adding ¶ 89A to the Consent Decree). The Rockport 2 Emissions Limits and the Rockport Plant Emissions Cap constrain the otherwise lawful operation of Rockport 2 both before and after the end of

the Basic Lease Term. The Rockport Plant Emissions Cap also subjects Rockport 2 to emissions limits in combination with Rockport 1—such that Rockport 2's operating capacity might be adversely affected by Rockport 1's operations.

e. The Modification also cut the AEP System Emissions Cap for $SO_2$ (which indirectly limits permissible emissions from the Facility) almost in half, to 110,000 tons per year by the end of the Basic Lease Term, falling to 94,000 tons per year by 2029. *Id.* ¶ 8, modifying Consent Decree ¶ 86.

f. The Defendants notified the Trusts (through the Owner Participants) of their intention to modify the Consent Decree only after the fact. Defendants indicated in a February 22, 2013 notice letter that the Environmental Action Defendants and the other parties to the Environmental Actions had already negotiated and executed the Modification, and had already moved (together with the Environmental Action Plaintiffs) for its approval by the Ohio federal court. The Modification itself provided that all parties would continue to support it unless and until the United States Government withdrew its support for entry of the order modifying the Consent Decree. Defendants never notified the Trusts or the Owner Participants (nor publicly disclosed) that they were interested in obtaining the Modification until after the ink was already dry on their commitment to do so.

g. The Ohio court entered the Modification "for the reasons set forth within . . . [the parties'] motion," and in precisely the form they had proposed, on May 14, 2013. *Id.*, at p. 2.

h. The Defendants have made it clear they will do nothing in the next several years to arrange for compliance with the Operating Restriction—and that they will

reserve the right not to do so at all. Nor have the Defendants undertaken to protect the Trusts against any financial impact arising from curtailment of operations, remedial measures necessary to avoid curtailment, and/or fines, penalties or losses arising from noncompliance with the Rockport 2 Emissions Limits, the Rockport Plant Emissions Cap or the AEP System Emissions Caps (collectively, the "CD Emissions Caps").

*The Breaches*

34. The Trusts' Complaint arises solely from private contractual promises the Defendants made not to encumber the Facility, not to shorten the economic useful life of the Facility, and to deal fairly and in good faith to protect the Trusts' economic interests as owners of the leased Facility. Accordingly, and as set forth below, the Complaint does not seek to disturb or modify the Consent Decree or the Modification; instead, Plaintiffs seek to require the Defendants to perform their preexisting contractual promises to Plaintiffs, consistently with the terms of the Consent Decree.

35. The Operating Restriction constitutes an encumbrance and a restrictive covenant/negative easement—and therefore a Lien—on Rockport 2 under Section 7 of the Facility Lease because the Operating Restriction: (a) restricts otherwise lawful use (i) of the Rockport 2 Site by the Defendants as its owner, and of Rockport 2 by the Defendants as Lessees who participate in its operation, and (ii) of the Rockport 2 Site Interest by the Trusts as ground lessees and as owner of Rockport 2—in each case unless they comply with extraordinary conditions on the way in which they can use Rockport 2; and (b) constitutes a binding constraint and limit on the conveyance of title to the Rockport 2 Site, or of a leasehold interest in Rockport 2, by Defendants. I&M breached Section 7 of the Facility Lease by creating and/or incurring this

prohibited Lien. Each Defendant has also breached Section 7 of the Facility Lease by suffering this Lien to exist, and by failing to discharge the Lien or satisfy the conditions for its discharge.

36. The Operating Restriction is not a "Permitted Lien" within the meaning of Section 7 of the Facility Lease because, *inter alia*, it does not arise from the exercise by any Governmental authority of reserved or vested power to impose the Operating Restriction or any Emissions Cap affecting Rockport 2 on Defendants. Instead, these encumbrances and limitations were effected through Defendants' own active collaboration and consent.

37. Defendants' actions create—but do not satisfy—a binding legal obligation to make and fund substantial Modifications to Rockport 2 or to shut the plant down substantially before the end of the economic useful life it would otherwise enjoy. Defendants' actions also create a functional limit on Rockport 2's operations beyond the Lease Term. The Defendants' actions accordingly violate:

a. each Defendant's covenant under Section 6.01(j) of the Participation Agreement (and therefore Section 20 of the Facility Lease): (i) to take no action that would materially adversely affect the economic interests of the Trusts as holders of the Undivided Interests; and (ii) to take such action as might be necessary to avoid such consequences;

b. each Defendant's implied covenant under the Facility Lease to deal fairly and in good faith with the Trusts as Lessors and not to exercise their discretion to act in a manner that undermines the value of the Trusts' residual interests; and

c. Each Defendant's covenant under Sections 8(a), (c) and (h) of the Facility Lease, by *inter alia* failing to comply with (and disavowing any intent to comply with) the obligations of Applicable Law or Governmental Actions with respect to Rockport 2 in

the 2007 Consent Decree affecting Rockport 2, and instead impermissibly and voluntarily creating, through the 2013 Modification, a "substantial danger of . . . the extension of the ultimate imposition of such Applicable Law beyond the end of the last day of the Lease Term."

38. Defendants' actions also create a future liability, cost and/or obligation affecting the Trusts with respect to Rockport 2 by reason of the CD Emissions Caps and the Allowance Surrender Obligation of the Consent Decree.

39. Through each of these breaches of covenants they made under the Facility Lease and/or the Participation Agreement, each Defendant has injured each of the Trusts in amounts greatly exceeding, in each case, $75,000. These injuries arise from the incurrence of approximately $1.4 billion worth of unfunded future obligations that must be satisfied in order to avoid premature retirement of Rockport 2; the incurrence of other potential operating constraints, obligations and/or liabilities arising from the CD Emissions Caps and the Allowance Surrender Obligation; and a corresponding present diminution in the value of each Trust's Undivided Interest in Rockport 2.

40. The harm Defendants' foregoing actions have caused and will cause to the Trusts is irreparable, because it affects Rockport 2 in ways that constrain and limit future operation of the Facility, with far-reaching consequences that cannot be fully compensated by an award of damages.

## CLAIMS FOR RELIEF BY EACH PLAINTIFF AGAINST EACH DEFENDANT

### COUNT I
### Breach Of Contract (Facility Lease)

41. The Trusts repeat and re-allege the allegations of paragraphs 1-40, above, as if fully set forth herein.

42. Each Facility Lease is a valid and binding contract to which a Trust on the one hand, and a Defendant on the other hand, are party.

43. Each of the Defendants has breached the Facility Lease with each of the Trusts by the above-described actions of the Defendants.

44. Each Trust has at all times complied with any and all obligations of performance it must meet in order to enforce the promises set forth by each Defendant in the Facility Lease.

45. As a direct, proximate and foreseeable result of each Defendant's breach of each Facility Lease, each Trust has suffered and will suffer irreparable harm, which is not fully compensable by remedies at law, and injury and damages greatly exceeding $75,000.

**COUNT II**
**Breach of Contract (Participation Agreement)**

46. The Trusts repeat and re-allege the allegations of paragraphs 1-45, above, as if fully set forth herein.

47. Each Participation Agreement is a valid and binding contract to which a Trust on the one hand, and a Defendant on the other hand, are party.

48. Each of the Defendants has breached the Participation Agreement with each of the Trusts by the above-described actions of the Defendants.

49. Each Trust has at all times complied with any and all obligations of performance it must meet in order to enforce the promises set forth by each Defendant in the Participation Agreement.

50. As a direct, proximate and foreseeable result of each Defendant's breach of the Participation Agreement, each Trust has suffered and will suffer irreparable harm, which is not fully compensable by remedies at law, and injury and damages greatly exceeding $75,000.

**COUNT III**

**Breach Of The Covenant Of Good Faith And Fair Dealing**

51. The Trusts repeat and re-allege the allegations of paragraphs 1-50, above, as if fully set forth herein.

52. Under New York law, a covenant of good faith and fair dealing is implied by law in every contract (including the Facility Lease and the Participation Agreement), to protect the reasonable expectations of the parties and to protect them against their counterparty's evasion of the spirit and purpose of the agreement.

53. Each of the Defendants has breached the covenant of good faith and fair dealing under the Facility Lease and the Participation Agreement against each of the Trusts by their above-described actions.

54. Each Defendant's above-described actions defeat the reasonable expectations for which each Trust bargained in the Transaction Documents, and evades the spirit and purpose of the Facility Lease and the Participation Agreement.

55. As a direct, proximate and foreseeable result of each Defendant's breach of the covenant of good faith and fair dealing in each of the Facility Lease and the Participation Agreement, each Trust has suffered and will suffer irreparable harm, which is not fully compensable by remedies at law, and injury and damages greatly exceeding $75,000.

**COUNT IV**
**Indemnification**

56. The Trusts repeat and re-allege the allegations of paragraphs 1-55, above, as if fully set forth herein.

57. Under the Participation Agreement, each Defendant agreed to indemnify each Trust (among others) against obligations and liabilities arising from actions of the Defendants that create them with respect to Rockport 2. The foregoing actions of Defendants expose each

Trust to the prospect of a future liability for, or obligation with respect to: (a) surrender of $NO_x$ and $SO_2$ Allowances they would otherwise be entitled to keep but for the Allowance Surrender Obligation, and/or to pay substantial fines and/or penalties for failure to do so; and (b) potential penalties, fines or incurrence of expenses to avoid one or more of the CD Emissions Caps.

58. Defendants have refused and/or failed to acknowledge any obligation to indemnify the Trusts for such "Expenses" (within the meaning of the Participation Agreement) in connection with these prospective obligations and liabilities.

59. As a direct, proximate and foreseeable result of each Defendant's actions, each Trust has suffered and will suffer irreparable harm, which is not fully compensable for remedies at law, and injury and damages greatly exceeding $75,000.

**COUNT V**
**Breach of Contract (Facility Lease Section 8(b))**

60. Plaintiffs incorporate by reference each and every allegation of their Complaint, filed on July 26, 2013, as though set forth fully herein.

61. The Facility Lease entitles Plaintiffs (as Lessors) to obtain substantial information, by way of document inspection as well as interviews, from Defendants (as Lessees). The parties made this arrangement in light of Defendants' many long-term obligations with respect to Rockport 2 itself—obligations Defendants took on when Plaintiffs and other trusts bought the Facility and leased it back to them. Set forth in Section 8(b) of the Facility Lease (Ex. 2 to the original Complaint), Plaintiffs' rights include:

a. the right "to inspect the books and records of the Lessee[s] relating to [Rockport 2] and the Common Facilities and to make copies of and extracts therefrom," and to do so upon five business days' notice and to do so acting through their authorized representatives, upon five business days' notice; and

b. the right, on the same terms, to "discuss the Lessee[s'] affairs, finances and accounts with its executive officers …."

These rights are expressly exercisable "at such times and as often as may be reasonably requested."

62. These robust inspection and interview rights are unsurprising given the terms of the sale/leaseback transaction, by which Plaintiffs entrusted Defendants with the operation of Plaintiffs' extremely expensive investment for decades. The Transaction Documents therefore provide Plaintiffs with substantial rights to inspect Rockport 2's books and records and to interview the executives in charge of Rockport 2's operation about its affairs.

63. On May 29, 2014, Plaintiffs notified Defendants of their exercise of their rights under that Section 8(b) of the Facility Lease to inspect and copy certain categories of documents, and to question relevant executives of Defendants in furtherance of their effort to obtain that information, also as provided in Section 8(b). Plaintiffs made these requests through their beneficial owners, the Owner Participants, who enjoy identical rights under Section 8(b) of the Facility Lease for their own benefit and for the benefit of the Trusts. Plaintiffs' requested materials and discussions concerned, among other things: (a) notices or other communications related to potential, alleged or actual non-compliance with environmental laws; (b) Defendants' operation of Rockport 2; (c) the circumstances surrounding Defendants' agreement to the Consent Decree and the Modification, which impaired Plaintiffs' residual interests in Rockport 2; (d) Defendants' planning and analysis concerning how they will satisfy their obligations under the Facility Lease to comply with specified requirements of Applicable Law in accordance with that instrument; and (e) economic evaluations of Rockport 2 and the obligations required under

the Consent Decree and Modification. *See* Plaintiffs' Facility Lease Requests, attached hereto as Exhibit 5.

64. These requests were all related to Plaintiffs' rights to comprehend how Defendants have approached, and in the future plan to approach, their environmental and contractual compliance obligations and strategies in their operation of Plaintiffs' billion-plus-dollar asset. The requests were motivated in part by Plaintiffs' natural concern about Defendants' stewardship of Rockport 2 in light of Defendants' prior and ongoing contractual breaches.

65. On June 5, 2014, Defendants unequivocally refused to comply with any aspect of the Plaintiffs' requests.

66. Defendants' refusal to honor their obligations under Section 8(b) of the Facility Lease constitutes a breach of their obligations thereunder.

67. As a direct, proximate and foreseeable result of each Defendants' breach of each Facility Lease, each Trustee has suffered and will suffer irreparable harm, which is not fully compensable by remedies at law.

68. The rights to be appropriately informed, as embodied in the Facility Lease, are unique and Plaintiffs have no adequate remedy of law for their ongoing inability to exercise those rights as promised. They are accordingly entitled to the injunctive relief sought.

**PRAYER FOR RELIEF**

WHEREFORE, each of the Trusts requests the following relief:

1. Entry of judgment in favor of the Trustee of each of the Trusts and against each of the Defendants, declaring:

a. that each Defendant's actions complained of herein constitute a breach of the Facility Lease, the Participation Agreement, and the covenant of good faith and fair dealing implied into both of these contracts, by each Defendant against each Plaintiff herein;

b. that each Defendant's agreement or assent to the Scrubber Mandate and the Operating Restriction, by such Defendant's agreement or assent to the Consent Decree and to the Modification including such provisions, constituted the creation and incurrence by such Defendant of a prohibited Lien under Section 7 of each Facility Lease;

c. that each Defendant's failure to discharge the prohibited Lien by proceeding, at its own sole expense, to install FGD scrubbers at Rockport 2 (or otherwise) is a breach of Section 7 of the Facility Lease;

d. that each Defendant's actions as set forth above breach their covenants not to curtail the economic useful life and/or the total generating capability of Rockport 2 and thereby damage the Undivided Interest of each Trust in Rockport 2;

e. that each Defendant's actions as set forth above breach their covenants to comply with Applicable Law and Governmental Actions in Section 8 of the Facility Lease;

f. that each Defendant's actions as set forth above breach the reasonable expectations of each Trust with respect to each Defendant's management and operation of Rockport 2 as Lessee; and

g. that each Trust is entitled to be held harmless from each Defendant's breaches by each Defendant, jointly and severally, such that each Trust is entitled to

(i) Defendants' satisfaction of the Operating Restriction to protect the residual value of the Facility by installation of FGD scrubbers (or otherwise) at Defendants' sole expense;

(ii) full compensation from Defendants (jointly and severally) to the Trusts for any future loss of profits from, or costs incurred to avoid, curtailment of operations at Rockport 2 caused by any CD Emissions Cap and/or the Allowance Surrender Requirement, as well as any fines, penalties or other liabilities arising from any of the foregoing; and/or

(iii) damages compensating each of the Plaintiffs for any loss incurred by reason of either Defendant's failure to satisfy any of the foregoing obligations;

2. An order enjoining the Defendants to render specific performance of these foregoing contract obligations by using all best efforts to discharge the Operating Restriction by installing FGD scrubbers that comply with the Operating Restriction of the Consent Decree (or otherwise), and retaining jurisdiction to award damages against the Defendants (jointly and severally) for any failure by the Defendants to complete such efforts successfully;

3. An award of compensatory damages in favor of each of the Trusts against each of the Defendants in an amount greater than $75,000 to be proved at trial, which will include without limitation the Trusts' attorney's fees and costs incurred in connection with this action; and

4. A declaration that Plaintiffs are entitled to review and inspect the requested materials, and to question officers and/or employees of Defendants about that subject matter, without delay, and that Defendants' refusal to afford such relief constitutes a breach of the Facility Lease;

5. Permanent injunctive relief mandating that Defendants provide copies of the requested materials, or access to them for review and copying, and promptly produce

knowledgeable officers and/or employees (in each case, as previously requested by Plaintiffs) for purposes of obtaining the requested information;

6. An award of attorneys' fees and costs incurred in connection with this Supplemental Complaint; and

7. Such other further relief as the Court deems just and proper.

Dated: October 2, 2015

Respectfully submitted,

/s/ Stephen E. Chappelear

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