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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

NATURAL RESOURCES DEFENSE COUNCIL, INC.; RESPIRATORY HEALTH ASSOCIATION; and SIERRA CLUB, INC., Plaintiffs, v. ILLINOIS POWER RESOURCES GENERATING, LLC, Defendant.	Case No. 13-cv-01181 United States District Judge Joe Billy McDade Magistrate Judge Thomas P. Schanzle-Haskins III

PLAINTIFFS' OPENING MEMORANDUM
IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON REMEDY

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INTRODUCTION

In August 2016, this Court found Illinois Power Resources Generating, LLC (IPRG) liable for more than six thousand Clean Air Act violations, based on unexcused exceedances of applicable opacity and particulate matter pollution standards at the E.D. Edwards Plant during the liability period that began in April 2008 and ended in June 2014. Since then, IPRG has violated the Clean Air Act at least two thousand more times. In March, the Court will hold a trial to determine what civil-penalty award and injunctive relief are warranted to bring IPRG into compliance with the Clean Air Act, deter future violations by IPRG and others, and remedy the violations that have already occurred.

Many of the factors this Court must weigh before deciding the appropriate remedy for IPRG's decade of violations will require the Court to apply its equitable discretion to expert opinion and other evidence best presented at trial. But there are several matters the Court can resolve now, to help focus and lay the groundwork for trial. Plaintiffs request a declaration on each of the following points:

1. The Clean Air Act provides for IPRG to pay $44,965,000 in civil penalties for its violations during the liability period.

2. No one has paid any penalties for IPRG's violations.

3. The Court must account for the full liability period when applying the penalty factors that concern economic benefit, compliance history, good faith, duration, and seriousness.

4. To promote the Clean Air Act's deterrence goals, the Court will order IPRG to pay penalties that exceed the economic benefit of noncompliance.

5. To qualify for any penalty reduction based on economic impact, IPRG must prove that higher penalties would be ruinous or disabling.

6. The finances of IPRG's corporate parents are relevant to the Court's assessment of

whether IPRG qualifies for any penalty reduction based on economic impact.

7. IPRG does not qualify for any penalty reduction based on economic impact.

8. In determining injunctive relief, the Court must account for IPRG's Clean Air Act violations at Edwards since the end of the liability period.

9. IPRG has violated the Clean Air Act at Edwards at least 2,211 times since the end of the liability period, including at least 132 times in the first half of 2018.

UNDISPUTED MATERIAL FACTS

IPRG's Clean Air Act Violations at the Edwards Plant

1. IPRG has owned and operated the E.D. Edwards Plant in Bartonville, Illinois (Edwards, or Plant) since December 2, 2013. Mar. 9, 2016 IPRG Resp. to Pl. Mot. for Summ. J. and Mem. in Supp. of Cross-Mot. for Summ. J. (IPRG Liability Summ. J. Br.), ECF No. 109, at 2-3 ¶¶ 3-4.

2. The air pollution the Plant releases from its smokestacks is subject to a provision of Illinois's State Implementation Plan for the Clean Air Act (Illinois SIP), codified at 35 Illinois Administrative Code § 212.123, which states: "No person shall cause or allow the emission of smoke or other particulate matter, with an opacity greater than 30 percent, into the atmosphere from any emission unit . . ." 35 Ill. Admin. Code § 212.123(a); Aug. 23, 2016 Op. & Order on Summ. J. (Liability Order), ECF No. 124, at 3.

3. 35 Illinois Administrative Code § 212.123 contains a subsection known as the "8-minute exemption." Liability Order, ECF No. 124, at 2-3, 4 n.8; *see also* IPRG Liability Summ. J. Br., ECF No. 109, at 3 ¶¶ 5, 7. The 8-minute exemption states:

> The emission of smoke or other particulate matter from any such emission unit may have an opacity greater than 30 percent but not greater than 60 percent for a period or periods aggregating 8 minutes in any 60 minute period provided that such opaque emissions permitted during any 60 minute period shall occur from only one such emission unit located within a 305 m (1000 ft) radius from the center point of any other such emission unit owned or operated by such person,

> and provided further that such opaque emissions permitted from each such emission unit shall be limited to 3 times in any 24 hour period.

35 Ill. Admin. Code § 212.123(b).

4. The Plant has two smokestacks. Liability Order, ECF No. 124, at 3.

5. The Plant's Common Stack 1 serves Unit 2, and when Unit 1 was operating also served Unit 1. IPRG Liability Summ. J. Br., ECF No. 109, at 2 ¶ 2.

6. Unit 1 was retired on January 1, 2016. Nov. 30, 2017 Lindenbusch Dep., Ex. AB, 82:12-21.

7. The Plant's Unit 3 stack serves Unit 3. IPRG Liability Summ. J. Br., ECF No. 109, at 2 ¶ 2.

8. The center points of the Plant's Common Stack 1 and Unit 3 stack are located within 305 meters (1,000 feet) of each other. IPRG Liability Summ. J. Br., ECF No. 109, at 2 ¶ 2.

9. Condition 4a of the Plant's operating permit (Permit) states:

> The Permittee shall submit a quarterly excess emission report of emissions in excess of those allowed by Title 35 Subtitle B for each boiler as indicated in 35 Ill. Adm. Code 201.405. This report shall be postmarked within forty-five days after the end of each calendar quarter and shall be based on data from the Continuous Emissions Monitor System (CEMS).
>
> i. Excess emission and monitor performance reporting shall include the following:
>
> A. The starting date and time of the excess emissions;
>
> B. The duration of the excess emissions;
>
> C. The magnitude of the excess emissions
>
> D. The cause of the excess emissions, if known;
>
> E. Corrective actions taken to lessen the emissions; and
>
> F. The operating status of the monitoring system including the dates and times of any periods during which it was inoperative.

Permit, ECF No. 104-8, ¶ 4a.

10. Permit Condition 5a states that "[o]peration in excess of applicable opacity [and] particulate matter . . . standards, [sic] is allowed during periods of startup, malfunction, and breakdown." Permit, ECF No. 104-8, ¶ 5a; IPRG Liability Summ. J. Br., ECF No. 109, at 3 ¶¶ 5, 9.

11. Permit Condition 5c states that "[t]he Permittee shall notify the Illinois EPA's Regional Office by telephone as soon as possible during working normal hours upon the occurrence of excess emissions due to malfunctions or breakdowns." Permit, ECF No. 104-8, ¶ 5c; IPRG Liability Summ. J. Br., ECF No. 109, at 3 ¶ 10.

12. Permit Condition 5d states:

> The Permittee shall maintain records of excess emissions during malfunctions and breakdowns. As a minimum, these records shall include:
> . . .
> v. The steps taken to prevent similar malfunctions or breakdowns and/or to reduce their frequency and severity.

Permit, ECF No. 104-8, ¶ 5d; IPRG Liability Summ. J. Br., ECF No. 109, at 3-4 ¶ 11.

13. IPRG has testified that the majority of the information the Plant keeps pursuant to Condition 5d is contained in the internal excess emissions reports the Plant prepares for opacity exceedances. Dec. 21, 2017 IPRG Dep., Ex. AE, 270:24–271:6.

14. The Plant keeps its records pursuant to Condition 5d(v) in the section of its internal excess emissions reports titled "Future Preventative Measures (if needed)." Dec. 21, 2017 IPRG Dep., Ex. AE, 270:24–271:6; Ex. AR (compiling reports that correspond to exceedances reported as malfunctions or breakdowns).

15. The liability period in this case began April 18, 2008 and ended June 30, 2014. Liability Order, ECF No. 124, at 4.

16. In support of partial summary judgment on liability, Plaintiffs submitted spreadsheets

identifying the liability-period opacity exceedances that were not excused by the 8-minute exemption, because one or more of the following criteria applied: the opacity level was above 60%, the exceedances lasted more than eight minutes within the same one-hour period, four or more exceedances had occurred within the same 24-hour period, or exceedances occurred at both of Edwards' smokestacks within a one-hour period. Pl. Jan 13, 2016 Mem. in Supp. of Mot. for Partial Summ. J. (Pl. Liability Summ. J. Br.), ECF No. 104-1, at 15 ¶ 25 and p. 28; Ex. 2 to Pl. Mot. for Partial Summ. J. on Liability, ECF No. 104-4 ("Basis for Non-Exemption" col.).

17. IPRG never disputed Plaintiffs' application of the 8-minute exemption. IPRG Liability Summ. J. Br., ECF No. 109, at 5 ¶ 25.

18. The Court adopted Plaintiffs' application of the 8-minute exemption in its August 2016 summary judgment ruling on liability. Liability Order, ECF No. 124, at 4 n.8.

19. On August 23, 2016, this Court found IPRG liable for 2,632 unexcused opacity events during the liability period. Liability Order, ECF No. 124, at 49-50; Aug. 31, 2018 Decl. of Ian Fisher in Supp. of Pl. Mot. Partial Summ. J. on Remedy (Fisher Decl.) ¶ 6.

20. The 2,632 unexcused opacity events correspond to 3,600 six-minute intervals during which the opacity measured at one of the Plant's smokestacks exceeded 30%. Fisher Decl. ¶ 6.

21. On August 23, 2016, this Court found IPRG liable for 2,276 unexcused particulate matter events (continuous periods of six minutes or more during which the Plant was deemed to have violated the applicable particulate matter limit for a stack as a matter of law) during the liability period. Liability Order, ECF No. 124, at 49-50; Fisher Decl. ¶ 13.

22. The 2,276 unexcused particulate matter events correspond to 3,037 six-minute intervals during which the opacity measured at one of the Plant's smokestacks exceeded 30%, and as to which the Court determined that IPRG had not established the sole defense available to

particulate matter violations. Fisher Decl. ¶¶ 12-13; Liability Order, ECF No. 124, at 38-39 (citing 35 Ill. Admin. Code § 212.124(d)(2)).

23. On August 2, 2018, Plaintiff Natural Resources Defense Council sent a Freedom of Information Act (FOIA) request to the Illinois Environmental Protection Agency (Illinois EPA) that sought any records of payment of penalties for the Clean Air Act violations this Court found in its August 2016 summary judgment order. Ex. Y (FOIA request); Fisher Decl. ¶ 78.

24. On August 7, 2018, Illinois EPA responded that there are no such records. Ex. Z (FOIA response); Fisher Decl. ¶ 79.

25. IPRG has not paid any penalties for the violations this Court found IPRG liable for in its August 2016 summary judgment order.

26. No one has paid any penalties for the violations this Court found IPRG liable for in its August 2016 summary judgment order.

27. IPRG's quarterly excess emissions reports to Illinois EPA show that Edwards exceeded its 30% opacity limit during 2,678 events between June 1, 2014 (the end of the liability period) and June 30, 2018 (the most recent date included in a filed quarterly report). Exs. B-F (reports), and R (list); Fisher Decl. ¶¶ 47-49 & 49 n.1.

28. Those events correspond to 3,925 six-minute intervals during which the Plant exceeded its 30% opacity limit. Exs. B-F (reports), and R (list); Fisher Decl. ¶ 49.

29. Six-minute average opacity data from Edwards's continuous opacity monitoring systems (COMS) shows that Edwards exceeded its 30% opacity limit at least 194 times (on a six-minute average basis) between July 1 and August 21, 2018. Ex. V; Fisher Decl. ¶¶ 70-71.

30. Edwards notified Illinois EPA of exceedances attributable to malfunctions or breakdown for 681 exceedance events between July 1, 2014 and June 30, 2018. Ex. T; Fisher Decl. ¶¶ 51-52.

31. The 681 exceedance events identified in Exhibit T constitute the only exceedance events between July 1, 2014 and June 30, 2018 for which the Plant provided a notification to Illinois EPA pursuant to Permit condition 5c.

IPRG's Corporate Family and Finances

32. From the start of the liability period in April 2008 through December 2, 2013, Ameren Energy Resources Generating Company (AERG) owned and operated Edwards. Liability Order, ECF No. 124, at 2 n.3; IPRG Liability Summ. J. Br., ECF No. 109, at 2 ¶ 3.

33. Plaintiffs first notified AERG and Ameren Energy Resources Company (AER) in writing that they planned to sue to enforce the Clean Air Act at Edwards in July 2012. IPRG Liability Summ. J. Br., ECF No. 109, at 5 ¶ 22.

34. Plaintiffs filed this lawsuit against AERG and AER in April 2013. Pl. Apr. 18, 2013 Compl., ECF No. 1.

35. As part of the merger and acquisition process that led to its ownership and operation of Edwards, IPRG assumed the liabilities associated with Edwards, including those alleged against AERG in this lawsuit. May 23, 2014 Stip. of Facts, ECF No. 44, ¶¶ 1-9; *see also* Liability Order, ECF No. 124, at 2 n.3 (AERG "owned and operated the Plant from the start of the relevant time period until December 2, 2013," and "IPRG . . . assumed AERG's liabilities following a merger"); IPRG Liability Summ. J. Br., ECF No. 109, at 2-3 ¶ 4 ("AERG's liabilities associated with the instant litigation have been assumed by IPRG. Accordingly, IPRG is the current owner and operator of the Plant, and holds AERG's liabilities as alleged in the Complaint." (citation omitted)).

36. In June 2014, IPRG and Illinois Power Resources, LLC (IPR) were substituted as defendants for AERG and AER.[1] June 3, 2014 Text Only Order; Pl. May 23, 2014 Unopposed Mot. to Substitute, ECF No. 45, ¶¶ 1-4.

37. IPRG is wholly owned by IPR, which in turn is a wholly-owned subsidiary of Illinois Power Holdings, LLC (IPH), which in turn is a wholly-owned subsidiary of Illinois Power Holdings II, LLC (IPH II), which in turn is a wholly-owned subsidiary of Dynegy Inc. IPRG June 9, 2017 Supp. Objs. & Answers to Pl. Interrogs., Ex. AM, at 4.

38. On August 29, 2018, IPRG confirmed that the information in the preceding paragraph "remains accurate." Fisher Decl. ¶ 30.

39. From the time IPRG became owner of Edwards until at least December 2017, IPRG and Dynegy Inc. (Dynegy) were parties to a "Service Agreement," sometimes called a "Shared Services Agreement," that provides for Dynegy and some of its subsidiaries to provide services to IPRG. Dec. 13, 2017 Robinson Dep., Ex. AD, 28:22–29:18; ex. R198 to Dec. 13, 2017 Robinson Dep., Ex. AJ.

40. IPRG joined and became a Recipient under the Service Agreement on December 2, 2013. Service Agreement, ex. R198 to Dec. 13, 2017 Robinson Dep., Ex. AJ, at IPR-IPRG-399944, 399948, 399984. IPRG's joinder identifies Dynegy as Primary Provider and IPH as Primary Recipient under the Service Agreement. *Id*. at IPR-IPRG-399984 (Joinder page).

41. A "Summary of Services Agreement" Dynegy included in an October 2016 U.S. Securities and Exchange Commission (SEC) filing states that "Dynegy and certain of its subsidiaries (collectively, the 'Providers') provide certain services (the 'Services') to IPH, and

[1] Plaintiffs have stipulated to the dismissal of their claims against IPR. Mar. 16, 2017 Stip. of Voluntary Dismissal, ECF No. 135, ¶ 1.

certain of its subsidiaries (collectively, the 'Recipients')"; identifies IPRG as one of the "Recipients"; and lists the following "Services":

> Strategic Planning and Business Development: Administer and manage all strategic planning and business development matters
>
> Government Approvals and Proceedings: Maintain the existence and good standing and ensure the compliance with all laws and orders of Governmental Entities, including as may be necessary to obtain, modify, comply, extend or renew any required government approvals
>
> Commercial: Manage and market the electric power generation, capacity and ancillary services of the Business; manage the final requirements of the Business; and manage the emissions allowances of the Business
>
> . . .
>
> Legal, Compliance, and Ethics: Administer and manage all legal, compliance, NERC compliance, and ethics matters
>
> Human Resources: Administer and manage all human resources policy matters, including any matters related to employee and labor matters
>
> Business Services: Administer and manage all business services, including providing office space for employees not located at a generation facility, processing of accounts payable, procurement of supplies and services from third parties and preparation of budgets and reports
>
> Tax and Accounting Services: Provide accounting, audit/planning services for customary taxes and all contractual arrangements with consultant(s)
>
> Operation and Maintenance Support Services: Manage all operation and maintenance support services, including project technical services, engineering support, environmental, health and safety matters, bulk purchasing, management reporting, planning for operating expenses and capital expenses and regulatory compliance
>
> Insurance, Risk: Administer and manage all insurance matters related to the Business, including the procurement, renewal and cancellation of insurance policies, and the submission, negotiation and pursuit of insurance claims
>
> Information Technology: Provide or cause its subcontractors to provide the information technology services set forth in the agreement
>
> Records: Maintenance of books and records, accounting records, pay bills and collecting receivables, provide management and budgeting reports, handle

> customary transactional matters with third parties, and administer and manage all finance and treasury matters
>
> Public relations: Administer and manage all community, investor and public relations
>
> Management: Supplying officers, directors, and managers

Oct. 3, 2016 Dynegy Form 8-K Report, ex. 99.3, Ex. I, at 27 of 35 (page headed "Summary of Services Agreement," section marked "Services").

42. The Service Agreement provides for Dynegy and others in the "Provider Group" to provide services in the same categories included in the "Summary of Services" quoted in paragraph 41 above to IPRG. Service Agreement, ex. R198 to Dec. 13, 2017 Robinson Dep., Ex. AJ, at IPR-IPRG-399954-399956.

43. From February 2, 2017, until at least December 2017, IPRG was party to a Power Supply Agreement with Illinois Power Marketing Company (IPM). Second Amdt. to the Amd. and Restated Power Supply Agreement Between Ameren Energy Marketing Company (AEMC) and AERG, ex. R197 to Dec. 13, 2017 Robinson Dep., Ex. AI, at IPR-IPRG-399941-43; Dec. 13, 2017 Robinson Dep., Ex. AD, 8:13–9:25.

44. The Power Supply Agreement provides for IPRG to sell power generated at Edwards to IPM, which resells the power to the midcontinent independent electrical system operator (MISO).[2] Amd. and Restated Power Supply Agreement Between AEMC and AERG, ex. R195 to Dec. 13, 2017 Robinson Dep., Ex. AH, at IPR-IPRG-399925 (para 3.1) (providing for Seller to sell and Buyer to purchase "all of the capacity from" Seller's generation fleet); Second Amdt. to the Amd. and Restated Power Supply Agreement Between AEMC and AERG, ex. R197 to Dec. 13, 2017 Robinson Dep., Ex. AI, at IPR-IPRG-399941 (identifying IPRG as Seller and IPM

[2] MISO operates the electric transmission system in parts of 15 states, including Illinois. Ex. G.

as Buyer); Dec. 13, 2017 Robinson Dep., Ex. AD, 8:13–10:16.

45. Dynegy's annual report for calendar year 2017, filed with the SEC in February, identifies IPM as one of "our power marketing entities." Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at 12 (first para. under "Other").

46. Some amendments to the Service Agreement and Power Supply Agreement state that IPRG was "formerly known as [AERG]." *See, e.g.*, Second Amdt. to Service Agreement, Ex. AK, at IPR-IPRG-400072 (first para.); Second Amdt. to the Amd. and Restated Power Supply Agreement Between AEMC and AERG, ex. R197 to Dec. 13, 2017 Robinson Dep., Ex. AI, at IPR-IPRG-399941 (first para.); *see also* Dec. 13, 2017 Robinson Dep., Ex. AD, 9:9-12 (IPRG is "the current name" of AERG).

47. IPRG is also subject to a Delegation of Authority Policy, sometimes referred to as a "Delegation of Authority manual," approved by Dynegy's Executive Management Team (EMT). Exhibit R203 to Dec. 13, 2017 IPRG Dep., Ex. AS, at 1 (approval), 8 (EMT definition); Dec. 13, 2017 IPRG Dep., Ex. AC, 127:21–128:15.

48. The Delegation of Authority Policy provides for Dynegy's Board of Directors to approve annual capital and operating budgets for IPRG-owned facilities, and for Dynegy's Executive Management Team to receive monthly reports on capital and operating spending. Exhibit R203 to Dec. 13, 2017 IPRG Dep., Ex. AS, at 2 ("Annual Operating Plan (AOP)" and "Monitoring & Reporting of Annual Operating Plan (AOP)" headings), 7 (defining "Annual Operating Plan" and "Board of Directors (BOD)").

49. The Delegation of Authority Policy also provides for Dynegy's Board of Directors to approve IPRG spending above certain thresholds and to approve all "legal settlements" exceeding $25 million. Exhibit R203 to Dec. 13, 2017 IPRG Dep., Ex. AS, at 3, 9 & n.7.

50. Dynegy's 2017 annual report states:

> We are a holding company and conduct substantially all of our business operations through our subsidiaries. Our primary business is the production and sale of electric energy, capacity and ancillary services from our fleet of 43 power plants in 12 states totaling approximately 28,000 MW of generating capacity.

Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at 2.

51. Dynegy's 2017 annual report identifies Edwards as one of the power plants in "Our Power Generation Portfolio." Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at 4 (table headed "Our Power Generation Portfolio," "Edwards" row).

52. Beginning in late 2016, Dynegy allowed IPRG to access Dynegy's revolving credit facility whenever IPRG needed cash. Nov. 16, 2017 IPRG Dep., Ex. AA, 138:9–139:1; 133:17–135:22.

53. Before Dynegy granted IPRG access to its revolving-credit facility, IPRG was party to and borrowed money under a loan agreement that allowed Dynegy to transfer money to IPRG when IPRG projected a short-term cash deficit. Nov. 16, 2017 IPRG Dep., Ex. AA, 133:7–135:14.

54. From time to time during the years 2014-2016, IPRG borrowed amounts from and repaid amounts to IPR under a $25 million revolving note agreement. IPRG Aug. 11, 2017 Fourth Supp. Objs. & Answers to Pl. Interrogs., Ex. AN, at 2.

55. During the first half of 2017 (the most recent period for which IPRG has provided such information in response to Plaintiffs' remedy-phase interrogatories), a net of $8 million was transferred from IPRG's account to Dynegy's account. IPRG Aug. 11, 2017 Fourth Supp. Objs. & Answers to Pl. Interrogs., Ex. AN, at 2.

56. In at least calendar years 2014, 2015, 2016, and the first half of 2017 (the most recent period for which IPRG has responded to Plaintiffs' interrogatory on this issue), IPRG transferred

some of its revenues to Dynegy and its subsidiaries. IPRG Aug. 11, 2017 Fourth Supp. Objs. & Answers to Pl. Interrogs., Ex. AN, at 2.

57. IPRG transferred more than $1 million in revenue to Dynegy and its subsidiaries in the first half of 2017. IPRG Aug. 11, 2017 Fourth Supp. Objs. & Answers to Pl. Interrogs., Ex. AN, at 2 & Attach. A.

58. The revenue IPRG transferred to Dynegy and its subsidiaries in the first half of 2017 represented 5.02% of IPRG's revenue for that period. IPRG Aug. 11, 2017 Fourth Supp. Objs. & Answers to Pl. Interrogs., Ex. AN, at 2 & Attach. A (final row).

59. IPRG's revenues in the first half of 2017 were more than $26 million. Fisher Decl. ¶ 33 (calculation).

60. In December 2017, Dynegy's Board of Directors approved a final 2018 capital budget and 2019-2022 capital forecast for Edwards (2018-2022 capital budget and forecast). Dec. 21, 2017 IPRG Dep., Ex. AE, 194:13–195:7; 2018-2022 capital budget and forecast, ex. R216 to Dec. 21, 2017 IPRG Dep., Ex. AF.

61. Edwards' final 2018 annual capital budget and 2019-2022 capital forecast provides for more than $70 million in capital spending in the years 2018-2022. 2018-2022 capital budget and forecast, ex. R216 to Dec. 21, 2017 IPRG Dep., Ex. AF (sum of entries in "AllProjectType" row, cols. marked 2018, 2019, 2020, 2021, and 2022 at top).

62. Edwards' final 2018 annual capital budget and 2019-2022 capital forecast provides for spending on projects classified as "involving environmental compliance, our environmental improvements." Dec. 21, 2017 IPRG Dep., Ex. AE, 196:5-10 (discussing the "Capital Environmental" category in deposition exhibit R216).

63. In December 2017, Dynegy's Board of Directors approved a final 2018 annual operations and maintenance budget and 2019-2022 operations and maintenance plan for Edwards. Fisher Decl. ¶ 23; Ex. AG ("Edwards - 2018 BOD Approved 5-Year Plan" department summary tab).

64. Edwards' final 2018 annual operations and maintenance budget and 2019-2022 operations and maintenance plan provides for more than $152 million in operations and maintenance spending in the years 2018-2022. Fisher Decl. ¶ 23; Ex. AG.

65. Dynegy reported $4.842 billion in revenues and $76 million in net income in 2017 and $11.771 billion in assets as of December 31, 2017. Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at 36.

66. Dynegy's 2017 annual report states:

> As of December 31, 2017, we had a $3.563 billion credit agreement, as amended, that consisted of (i) a $2.018 billion seven -year senior secured term loan facility (the "Term Loan") and (ii) $1.545 billion in senior secured revolving credit facilities (the "Revolving Facility," and collectively with the Term Loan, the "Credit Agreement").

Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at F-33 (Notes to Consolidated Financial Statements, first line under Credit Agreement heading).

67. Dynegy's 2017 annual report states:

> ***Edwards CAA Citizen Suit.*** In April 2013, environmental groups filed a CAA citizen suit in the U.S. District Court for the Central District of Illinois alleging violations of opacity and particulate matter limits at our MISO segment's Edwards facility. In August 2016, the District Court granted the plaintiffs' motion for summary judgment on certain liability issues. We filed a motion seeking interlocutory appeal of the court's summary judgment ruling. In February 2017, the appellate court denied our motion for interlocutory appeal. The District Court has scheduled the remedy phase trial for March 2019. We dispute the allegations and will defend the case vigorously.
>
> Ultimate resolution of any of these CAA matters could have a material adverse impact on our future financial condition, results of operations, and cash flows. A resolution could result in increased capital expenditures for the installation of pollution control equipment, increased operations and maintenance expenses, and penalties. At this time we are unable to make a reasonable estimate of the possible

costs, or range of costs, that might be incurred to resolve these matters.

Feb. 22, 2018 Dynegy Form 10-K Report, Ex. J, at 16.

68. Dynegy has merged with and into Vistra Energy Corporation (Vistra). The merger closed on April 9, 2018. Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at ii, 5, 55.

69. Vistra has a 100% ownership interest in Edwards. Aug. 6, 2018 Vistra "Second Quarter 2018 Results" investor presentation, Ex. N, at 33 (slide headed "Asset Fleet Details," row marked Edwards, entry in "Ownership Interest" col.).

70. An August 2018 Vistra presentation to investors, posted on Vistra's website, mentions Vistra's ownership interest in Edwards without mentioning IPRG. Aug. 6, 2018 Vistra "Second Quarter 2018 Results" investor presentation, Ex. N.

71. Following its merger with Dynegy, Vistra has "assumed the obligations under Dynegy's . . . $1.545 billion senior secured revolving credit facility." Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 20.

72. Vistra's website identifies "Dynegy" as "a subsidiary" and links to the dynegy.com website "for additional information, including site locations." Vistra website, "About Dynegy" page, Ex. K.

73. Dynegy's website includes a chart that identifies Edwards as among Dynegy's "Illinois Generating Facilities" without mentioning IPRG. "Dynegy in Illinois" chart (rev. 6/18), Ex. O, at 1-2 & n.2.

74. Dynegy's website lists Edwards among its "generating assets" and notes a "100%" ownership interest in Edwards. "Dynegy Generating Assets" chart, Ex. P.

75. Vistra is on the Fortune 500 list for 2018. Ex. Q. The ranking is based on its total revenues for fiscal 2017, relative to other companies that are incorporated and operate in the U.S. and file financial statements with a public agency. Ex. Q.

76. Vistra's quarterly report for the second quarter of 2018, filed with the SEC on August 6, states:

> Vistra Energy is a holding company operating an integrated retail and generation business in markets throughout the U.S. Through our subsidiaries, we are engaged in competitive electricity market activities including power generation, wholesale energy sales and purchases, commodity risk management and retail sales of electricity to end users.

Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 5.

77. Vistra's quarterly report for the second quarter of 2018 includes the following statement about this lawsuit:

> *Edwards CAA Citizen Suit* — In April 2013, environmental groups filed a CAA citizen suit in the U.S. District Court for the Central District of Illinois alleging violations of opacity and particulate matter limits at our MISO segment's Edwards facility. In August 2016, the District Court granted the plaintiffs' motion for summary judgment on certain liability issues. We filed a motion seeking interlocutory appeal of the court's summary judgment ruling. In February 2017, the appellate court denied our motion for interlocutory appeal. The District Court has scheduled the remedy phase trial for March 2019. We dispute the allegations and will defend the case vigorously.

Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 26.

78. Vistra's quarterly report for the second quarter of 2018 states, with reference to this lawsuit and others, that

> Ultimate resolution of any of these CAA matters could have a material adverse impact on our future financial condition, results of operations, and cash flows. A resolution could result in increased capital expenditures for the installation of pollution control equipment, increased operations and maintenance expenses, and penalties, or could result in an order or a decision to retire these plants. While we cannot predict the outcome of these legal proceedings, or estimate a range of costs, they could have a material impact on our results of operations, liquidity or financial condition.

Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 26.

79. Vistra reported $2.574 billion in operating revenue and $105 million in net income for the second quarter of 2018. Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 58 (Consolidated Financial Results, three months ending June 30, 2018).

80. $257 million of Vistra's reported operating revenue and $31 million of Vistra's reported net income for the second quarter of 2018 came from its MISO segment, which includes Edwards. Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 58 (Section labeled "Three Months Ended June 30, 2018," Column headed "MISO," rows marked "Operating revenues" and "Net income (loss)").

81. Vistra reported total assets of $26.470 billion and "total available liquidity" of $1.822 billion, including $757 million in "Cash and cash equivalents," as of June 30, 2018. Aug. 6, 2018 Vistra Form 10-Q Report, Ex. K, at 3 ("Condensed Consolidated Balance Sheets" table, "Assets" col.), 76 ("Available Liquidity" table).

ARGUMENT

Plaintiffs request a declaration on each point stated in a Roman numeral heading below. Each concerns an issue as to which there is no genuine dispute of material fact, and on which Plaintiffs are entitled to judgment as a matter of law. 28 U.S.C. §§ 2201(a) and 2202 (authorizing Court to grant declaratory relief); Fed. R. Civ. P. 56; *McMahan v. Deutsche Bank AG*, 892 F.3d 926, 933 (7th Cir. 2018) (summary judgment standard).

I. The Clean Air Act provides for IPRG to pay $44,965,000 in civil penalties for its violations during the liability period

The Clean Air Act empowers this Court to award "any appropriate civil penalties" for IPRG's violations, 42 U.S.C. § 7604(a), after accounting for the statutory maximum penalty, *see id.* § 7413(b), and the other factors Congress specified this Court "shall take into

consideration," *id*. § 7413(e)(1); *see also* July 18, 2017 Order & Op., ECF No. 144, at 2-3 (discussing the civil-penalty language in 42 U.S.C. §§ 7604(a) and 7413(e)(1)).[3] Congress has mandated and the federal Environmental Protection Agency (EPA) has implemented inflation-adjusted maximum penalties of $32,500 for violations that occurred through January 12, 2009, and $37,500 for violations that occurred between January 13, 2009, and June 30, 2014 (the end of the liability period in this case). 40 C.F.R. § 19.4 (Table 1, row marked "42 U.S.C. 7413(b)" and "Clean Air Act (CAA)," three rightmost columns); Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 2(b), 104 Stat. 890 (providing for regular inflation adjustment of civil penalties to maintain the penalties' deterrent effects and promote compliance); Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, title VII, § 701, 129 Stat. 584, 599-601 (requiring agencies to adjust civil penalties within their jurisdiction for inflation each year).

The Clean Air Act provides for IPRG to pay $44,965,000 in penalties for the violations this Court found IPRG liable for in its August 2016 summary judgment order. To calculate this figure, Plaintiffs first totaled the calendar days during which the Court ruled that there was at least one opacity violation at Edwards and multiplied those totals by the relevant maximum penalty figures specified for each date range in 40 C.F.R. § 19.4. Fisher Decl. ¶¶ 6-10; *see also* Statement of Undisputed Facts (Facts) ¶¶ 19-20 (citing Liability Order, ECF No. 124). Next,

[3] The Clean Air Act states that "[i]n determining the amount of any penalty to be assessed under . . . section 7604(a) of this title . . . the court . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation." 42 U.S.C. § 7413(e)(1); July 18, 2017 Order & Op., ECF No. 144, at 2.

Plaintiffs totaled the calendar days during which the Court found that there was at least one particulate matter violation at Edwards and multiplied that total by the relevant maximum penalty figures for each date range. Fisher Decl. ¶¶ 12-14; *see also* Facts ¶¶ 21-22. Plaintiffs then added the opacity and particulate figures to arrive at a total of $44,965,000. Fisher Decl. ¶ 15.

This approach to calculating civil penalties is generous to IPRG. It ascribes no additional penalties to the calendar days during which Edwards repeatedly violated its opacity limits, its particulate limits, or both.[4] When a defendant violates the same standard more than once in a calendar day, a separate penalty may be assessed for each violation. *See* 42 U.S.C. § 7413(b) (referring to this Courts' authority to "assess . . . a civil penalty of not more than $25,000 per day *for each violation*" (emphasis added)); *United States v. Midwest Suspension & Brake*, 824 F. Supp. 713, 734 n.28 (E.D. Mich. 1993) ("civil penalties against defendant for each violation, even if the violations occur on the same day, is warranted under § 7413(b)"), *aff'd*, 49 F.3d 1197 (6th Cir. 1995); *see also Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. CV H-10-4969, 2017 WL 2331679, at *15-*16 (S.D. Tex. Apr. 26, 2017) (for purposes of the penalty count, "to the extent [that] multiple violations by the same pollutant occur on the same calendar day, those violations are counted as separate violations").[5] Plaintiffs' count also ascribes no

[4] For example, this Court found IPRG liable for 27 unexcused opacity exceedance events (consisting of 56 six-minute opacity violations) and 6 unexcused particulate matter events (consisting of 6 six-minute intervals) at the Plant's Common Stack 1 (which connects to Units 1 and 2), and an additional 3 unexcused opacity exceedance events (consisting of 6 six-minute opacity violations) and 3 unexcused particulate matter events (consisting of 6 six-minute intervals) at Edwards' Unit 3 stack, on April 19, 2008. Fisher Decl. ¶ 16. Plaintiffs' maximum-civil-penalty calculation conservatively assumed a single penalty of $32,500 for all violations of the opacity standard that day, and another single penalty of $32,500 for the particulate violations that day, for a total maximum of $65,000. *Id*.

[5] Courts have reached the same conclusion in the Clean Water Act context. *See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 817-18 (9th Cir. 2001) (construing Clean Water Act to authorize separate maximum penalties for each violation within a calendar day, and noting that this reading furthers the Act's purpose by encouraging defendants to bring

additional penalties to calendar days during which violations occurred at both of Edwards' smokestacks, even though separate penalties may be assessed for those violations. *See Hawai'i Wildlife Fund v. Cty. of Maui*, No. CIV. 12-00198 SOM, 2015 WL 3903918, at *8 (D. Haw. June 25, 2015) ("If the County discharged effluent from all four wells in a day, it is liable for four violations. . . . No governing law suggests that, when four wells are involved, the same single violation is in issue. Indeed, counting multiple acts as a single violation could invite increased pollution.").

Plaintiffs request a declaration that the Clean Air Act provides for IPRG to pay $44,965,000 in civil penalties for its violations during the liability period.

II. No one has paid any penalties for IPRG's violations

There is no evidence that IPRG or anyone else has ever been assessed, let alone paid, any penalties for IPRG's Clean Air Act violations at Edwards. Facts ¶¶ 23-26. Plaintiffs accordingly request that the Court grant them partial summary judgment on the factor that calls for the Court to consider "payment by the violator of penalties previously assessed for the same violation," 42 U.S.C. § 7413(e)(1), and declare that no one has paid any penalties for IPRG's violations. In the alternative, Plaintiffs request a declaration that IPRG has the burden of proof on this factor.

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illegal pollution under control more quickly); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1138 (11th Cir. 1990) ("This language, ["$25,000 per day for each violation," in Clean Water Act,] is, we find, capable of only a single reasonable interpretation: the daily maximum penalty applies separately to each violation of an express limitation."). As this Court has recognized, the Clean Air Act's and Clean Water Act's penalty provisions are "virtually identical," so the Clean Water Act civil-penalty cases are instructive. *See* July 18, 2017 Order & Op., ECF No. 144, at 4 n.2; *see also id*. at 5 n.3.

III. The Court must account for the full liability period when applying the penalty factors that concern the economic benefit of noncompliance, compliance history, good faith, duration, and seriousness

To ensure that the final penalty award in this case appropriately reflects and remedies all of the violations this Court found IPRG liable for on summary judgment, the Court must account for the full liability period when applying the factors that provide for it to consider "the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), . . . the economic benefit of noncompliance, and the seriousness of the violation." 42 U.S.C. § 7413(e)(1). A declaration on this point will help clarify the scope of the March 2019 remedy trial, because IPRG's expert disclosures show it is preparing to argue that the Court should ignore relevant evidence that predates its ownership of Edwards.[6]

In particular, the Court must account for the full liability period when applying the "economic benefit of noncompliance" penalty factor. When IPRG became owner and operator of Edwards in December 2013, IPRG expressly assumed its predecessor AERG's liabilities and potential liabilities for the Plant, including those associated with this lawsuit. Facts ¶ 35 (quoting May 2014 stipulation and IPRG's summary judgment brief on liability). That is why the Court substituted IPRG as a defendant, and in August 2016 found IPRG liable for Edwards' Clean Air Act violations throughout the liability period that began in April 2008—years before IPRG bought the Plant. Facts ¶¶ 15, 19-22, 36. Any approach that accounted for less than the full period would violate the Act's requirement that this Court set "appropriate civil penalties" for IPRG's adjudicated violations, *id.* § 7604(a), by omitting application of a mandatory civil-

[6] For example, one of IPRG's experts predicated her opinions about the economic benefit of noncompliance on the assumption that benefit should be calculated as though it "start[ed] from December 2, 2013." Mar. 21, 2018 Report of Anne E. Smith, Ex. AL, at 58.

penalty factor to many of those violations (all that occurred before December 3, 2013). *See id.* § 7413(e)(1) (courts "shall take into consideration" economic benefit and the other enumerated factors in determining penalty amounts under 42 U.S.C. § 7604(a), the Act's citizen-suit provision); July 18, 2017 Order & Op., ECF No. 144, at 2 (emphasizing the "shall take into consideration" language in 42 U.S.C. § 7413(e)(1)).

Ignoring the economic benefit that accrued before IPRG owned the Plant would also undermine the Act's goals and set a terrible precedent. As explained at Part IV below, civil penalties should help deter future violations of the Act by ensuring that the public recoups at least the economic gains associated with proven past violations. If a facility sale were enough to erase or reduce potential civil-penalty liability for pre-sale violations, companies would be far less motivated to avoid illegal pollution. *Cf. San Francisco Baykeeper v. Tosco Corp.*, 309 F.3d 1153, 1155, 1160 (9th Cir. 2002) (applying similar deterrence rationale to reject a predecessor owner's effort to evade Clean Water Act penalties); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486-87 (8th Cir. 1992) (observing that given CERCLA's goals of promoting swift, polluter-financed cleanups, "Congress could not have intended that [responsible] corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities"). By the same token, it would be harder to ensure that the final civil-penalty amount assessed against the new owner was high enough to deter future violations by that company and others.[7]

For the same reasons it must do so when assessing the "economic benefit of

[7] These problems could be particularly acute in IPRG's own industry, where ownership changes are frequent. As one of IPRG's designated experts on remedy put it at his deposition this spring, "the industry constantly shifts companies that they own. So I can't even keep track of the names of them anymore because this plant has had five names." Keeler Dep., Ex. AQ 84:23–85:3.

noncompliance," this Court must consider relevant evidence from the full liability period when assessing "the violator's full compliance history and good faith efforts to comply, the duration of the violation . . . and the seriousness of the violation." 42 U.S.C. § 7413(e)(1). The Court cannot faithfully apply these mandatory factors and set an "appropriate" penalty for IPRG's adjudicated violations of the Clean Air Act, *id.* § 7604(a), without accounting for the full timeframe during which those violations occurred.

Plaintiffs accordingly request a declaration that the Court must account for the full liability period when applying the penalty factors that concern the economic benefit of noncompliance, compliance history, good faith, duration, and seriousness.

IV. To promote the Clean Air Act's deterrence goals, the Court should declare that it will order IPRG to pay penalties that exceed the economic benefit of noncompliance

A major purpose of civil penalties under the Clean Air Act and analogous federal environmental laws is to deter future violations of applicable pollution standards, by both the defendant and others who may find it cheaper to violate than to comply. *See* S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3756 ("The assessment of civil penalties for violations of the [Clean Air] Act is necessary for deterrence, restitution and retribution."); *Tull v. United States*, 481 U.S. 412, 422 (1987) ("The legislative history of the [Clean Water] Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties."); *see also* July 18, 2017 Order & Op., ECF No. 144, at 5 n.4 ("Congress intended for the CAA's penalty assessment to operate in a similar manner as to the Clean Water Act."). "Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully [] deter violations." *Atl. States Legal Found.*, 897 F.2d at 1141 (discussing Clean Water Act's analogous penalty provisions).

To further the Clean Air Act's deterrence goals, the civil-penalty amount this Court orders IPRG to pay following trial should—at minimum—exceed the economic benefit that IPRG and AERG enjoyed by failing to prevent the violations that occurred at Edwards during the liability period.[8] *Cf. United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 266 (3d Cir. 1998) (observing that "[a] violator who chooses to continue to violate its permit while experimenting with less costly remedies necessarily subjects itself to the surrender via penalty of any economic benefit it acquired"). A penalty that does not exceed the economic benefit of noncompliance "is no deterrent at all because the violator would be no worse off than if it had complied in the first place." *Riverkeeper, Inc. v. Brooklyn Ready Mix Concrete, LLC*, No. 14-CV-1055, 2016 WL 4384716, at *9 (E.D.N.Y. Aug. 16, 2016).

Treating economic benefit as the floor for the final penalty amount is also consistent with EPA's guidelines for calculating civil penalties in its own enforcement work under 42 U.S.C. § 7413(e)(1). EPA's guidelines recognize that "[i]f, after a penalty is paid, a violator still profits by violating the law, there is little incentive to comply." EPA, Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68 (June 2012), Ex. W, at 7-8 (providing for EPA to calculate penalties by first determining the economic benefit and then considering what to add to that amount based on consideration of other penalty factors).[9]

Plaintiffs accordingly ask the Court to declare that it will order IPRG to pay penalties that

[8] As discussed at Part III, IPRG assumed AERG's liabilities when it bought the Plant. *See also* Facts ¶ 35.

[9] *See also* EPA Supplemental Environmental Projects Policy (2015 Update), Ex. X, at 21 ("Settlements that include a [Supplemental Environmental Project] must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s)."), 22 § B.1 ("Minimum Penalty Requirements" formulas that require the penalty to exceed the economic benefit).

exceed the economic benefit of noncompliance.

V. To qualify for any penalty reduction based on economic impact, IPRG must prove that higher penalties would be ruinous or disabling

Courts charged with enforcing the Clean Air Act "generally presume that the maximum penalty should be imposed." *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994). One of the factors the Act directs this Court to consider before setting the final penalty amount is "the economic impact of the penalty on the business." 42 U.S.C. § 7413(e)(1). IPRG bears the burden of proof on any argument that penalties should be reduced to protect it from an undue economic impact. *See, e.g.*, *In re Oil Spill*, 148 F. Supp. 3d 563, 575 (E.D. La. 2015); *United States v. Mountain State Carbon, LLC*, No. 5:12-cv-19, 2014 WL 3548662, at *35 (N.D. W. Va. July 17, 2014) ("The burden of showing that a civil penalty would have a detrimental effect on the violator's business rests with the violator.") *United States v. Smith*, No. 96-2450, 1998 WL 325954, at *3 (4th Cir. 1998) (defendant bears the burden to show an inability to pay the penalty). To qualify for a reduction, IPRG must show that the penalties would otherwise be ruinous or disabling. *In re Oil Spill*, 148 F. Supp. 3d at 575; *see also United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 868 (S.D. Miss. 1998); *Riverkeeper*, 2016 WL 4384716, at *9.

Plaintiffs accordingly request a declaration that to qualify for any penalty reduction based on economic impact, IPRG must prove that higher penalties would be ruinous or disabling.

VI. The finances of IPRG's corporate parents are relevant to this Court's assessment of whether IPRG qualifies for any penalty reduction based on economic impact

Both IPRG's finances and those of its corporate parents are relevant to the question of whether IPRG qualifies for any penalty reduction based on economic impact. Courts often account for corporate parents' finances when applying the economic impact factor. *See, e.g.*, *Mun. Auth. of Union Twp.*, 150 F.3d at 268 (holding that the trial court properly accounted for a parent's finances in assessing defendant's ability to pay, and noting that other courts "have

looked to the assets and finances of the violator's parent in evaluating the economic impact of the penalty on a violator"); *Idaho Conservation League v. Atlanta Gold Corp*., 879 F. Supp. 2d 1148, 1170 (D. Idaho 2012) ("Cases uniformly make clear that so long as the penalties are not actually imposed on the parent, consideration of a parent's assets is one factor, among many, that is appropriate . . . .").

Parent-company finances are particularly relevant to this Court's assessment of economic impact and ability to pay, because IPRG is so intertwined with its parents and its parents have such substantial wealth. The ultimate owner of the Edwards Plant is Vistra Energy Corporation (Vistra), a Fortune 500 company with more than $26 billion in assets. Facts ¶¶ 37, 67-70, 72-75, 81. Vistra became a 100% owner of Edwards when it merged with the Plant's former ultimate owner, Dynegy Inc., in April of this year. Facts ¶¶ 67-70. Dynegy is now a Vistra subsidiary, but the last annual report it filed as an independent public company showed it had more than $11 billion in assets as of the end of 2017. Facts ¶¶ 65, 72.

The undisputed facts show that IPRG's finances and operations are intertwined with Dynegy's and Vistra's in several important ways.

First, Dynegy's Board of Directors has approved final capital and operating budgets for IPRG's generating facilities, including Edwards' 2018 capital and operations and maintenance budgets and 2019-2022 forecasts. Facts ¶¶ 48, 60, 62. Dynegy's Board has also been responsible for approving IPRG spending and legal settlements above certain thresholds. Facts ¶ 49. IPRG's monthly capital and operating spending are also subject to review, by Dynegy's Executive Management Team. Facts ¶ 48.

Second, IPRG has traditionally relied on Dynegy and other Dynegy subsidiaries for a wide array of corporate services including management and marketing of electric power

generation; tax, accounting, legal, and compliance support; human resources; insurance; information technology; and public relations. Facts ¶¶ 39-42.

Third, IPRG has traditionally sold much of the power Edwards generates not directly onto the market, but to another Dynegy subsidiary. Facts ¶¶ 43-45.

Fourth, over the past several years, IPRG has repeatedly transferred revenues and other money to and borrowed money from Dynegy, including as needed to cover its short-term cash needs. Facts ¶¶ 52-57. Dynegy has also given IPRG access to a revolving-credit facility whose obligations Vistra assumed with the merger. *Id*. ¶¶ 52, 71.

Fifth, Vistra and Dynegy's public websites advertise their full "ownership" interest in Edwards—without referring to IPRG. Facts ¶¶ 70, 74.

Last, both Vistra and Dynegy recently told their shareholders and government regulators that this lawsuit could affect their finances and "result in increased capital expenditures for the installation of pollution control equipment, increased operations and maintenance expenses, and penalties"—without mentioning IPRG. Facts ¶¶ 67, 78. Vistra's last quarterly report, filed with the SEC earlier this month, describes this lawsuit as concerning "*our* MISO segment's Edwards Facility." *Id*. ¶ 77 (emphasis added). So does Dynegy's 2017 annual report. *Id*. ¶ 67.

Any one of these features of IPRG's close relationship with its parents would suffice to make the parents' finances germane to this Court's economic-impact assessment. *See, e.g.*, *Mun. Auth. of Union Twp.*, 150 F.3d at 268-69 (emphasizing parent's involvement in and control over defendant's evaluation of pollution-control options at the violating plant, as well as revenue transfer from defendant to parent, in determining that trial court properly considered parent company's financial statement as evidence of defendant's ability to pay); *Idaho Conservation League*, 879 F. Supp. 2d at 1170 (discussing annual reports that failed to distinguish parent from

defendant, a wholly owned subsidiary, as well as intercompany loans parent made in response to defendant's "cash calls"). Taken together, they show that any fair appraisal of IPRG's ability to pay must account for its corporate parents' finances.

Plaintiffs accordingly request a declaration that the finances of IPRG's corporate parents are relevant to this Court's assessment of whether IPRG qualifies for any penalty reduction based on economic impact. *See* July 18, 2017 Order & Op., ECF No. 144, at 7-8 (The Clean Air Act provides "for this Court to not only determine the *amount* of civil penalties, but also to determine the *relevant facts* it is required to consider under [42 U.S.C.] § 7413(e)(1).").

VII. IPRG does not qualify for any penalty reduction based on economic impact

The undisputed facts show that IPRG can afford to pay $44.965 million in penalties for its violations during the liability period. This is considerably less money, for example, than Dynegy's Board of Directors approved and forecast for capital, operations, and maintenance spending at Edwards between 2018 and 2022. Facts ¶¶ 60-61, 63-64 ($70 million for capital and $152 million for operations and maintenance). $44.965 million is less than one percent of Dynegy's annual revenues for 2017. Facts ¶ 65; Fisher Decl. ¶ 36 (calculation). It is less than two percent of Vistra's revenues, and less than half of Vistra's net income, for the most recent calendar quarter. Facts ¶ 79 ($2.574 billion in revenues and $105 million in net income for the three months ending June 30, 2018); Fisher Decl. ¶ 39. It is less than three percent of Vistra's total liquidity, and *two-thousandths* of the value of Vistra's assets, as of June 30. Facts ¶ 81 ($1.822 billion in total liquidity and $26.470 billion in assets as of June 30, 2018); Fisher Decl. ¶ 38.

Both Vistra and Dynegy have also told their investors and regulators that they may be called upon to contribute to the cost of a remedy, including penalties, in this case. *Supra* VI.

Given these facts, there is no genuine dispute that IPRG will be able to pay the full

$44.965 million in penalties Plaintiffs seek here. *See, e.g.*, *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996) (imposing $4 million penalty and reasoning that a fine of this magnitude could be easily absorbed by corporate parent with approximately $215 million in net assets), *aff'd*, 150 F.3d 259 (3d Cir. 1998); *Idaho Conservation League*, 879 F. Supp. 2d at 1170 (referring to parent and defendant subsidiary's $41 million in combined assets as evidence that defendant had the ability to pay a $2 million penalty).

Plaintiffs request a declaration that IPRG does not qualify for any penalty reduction based on economic impact.

VIII. In determining injunctive relief, the Court must account for IPRG's Clean Air Act violations at Edwards since the end of the liability period

A primary purpose of Clean Air Act injunctions is to secure and promote compliance with the law. 42 U.S.C. § 7604(a) (empowering courts adjudicating citizen suits "to enforce" emissions standards or limitations); *see also id.* § 7413(b) (empowering courts adjudicating federal enforcement suits to "restrain" violations and "require compliance"). Evidence that a defendant who has already been found liable for violating the Act continues to violate the Act in similar ways is central to a court's assessment of what injunctive relief is needed to bring the defendant into compliance and deter further violations. Plaintiffs accordingly request a declaration that in determining injunctive relief, the Court must account for IPRG's Clean Air Act violations at Edwards since the end of the liability period.

IX. IPRG has violated the Clean Air Act at Edwards at least 2,211 times since the end of the liability period, including at least 132 times in the first half of 2018

IPRG reported 3,925 exceedances of the Edwards Plant's opacity limit between July 1, 2014 (the end of the liability period) and June 30, 2018, the most recent date represented in the quarterly emissions reports IPRG files with Illinois EPA under Permit Condition 4a. Facts ¶ 27. As explained below, there is no genuine dispute that, after accounting for the exemptions

provided in the Illinois SIP and the Permit, at least 2,211 of these post-liability exceedances represent additional Clean Air Act violations.

To determine which of IPRG's reported exceedances since the end of the liability period fall within the Illinois SIP's 8-minute exemption, Plaintiffs compiled the relevant information from IPRG's quarterly excess emissions reports, then applied the following rules. Fisher Decl. ¶¶ 47-50, 64; Ex. U (Compiled violations from July 1, 2014 through June 30, 2018).

First, exceedances for which IPRG reported a 6-minute average opacity value of greater than 60 were classified as non-exempt because they exceeded 60% opacity. Fisher Decl. ¶ 50a. Second, when two or more 6-minute exceedances occurred within an hour at the same smokestack, those exceedances were classified as non-exempt because they represented times the Plant exceeded the opacity limit for a stack for more than 8 minutes within an hour. *Id*. ¶ 50b. Third, when four or more 6-minute exceedances occurred at the same smokestack within a 24-hour period, all exceedances at that smokestack during the 24-hour period were classified as non-exempt, because the 8-minute exemption "does not apply . . . if the heightened emissions occur more than three times in 24 hours." *Id*. ¶ 50c (quoting Liability Order, ECF No. 124, at 4 n.8). Finally, when at least one exceedance occurred at each of Edwards' two smokestacks during the same one-hour period, all exceedances during that period were classified as non-exempt, because the 8-minute exemption "does not apply if heightened emissions occur from both of Edwards' stacks during [a] sixty-minute period." *Id*. ¶ 50d (quoting Liability Order, ECF No. 124, at 4 n.8).

Plaintiffs also made some additional assumptions to conservatively account for the startup, malfunction, and breakdown language in Permit Condition 5a, even though IPRG bears the burden of proof on application of this language to excuse exceedances that would otherwise

constitute Clean Air Act violations.[10] *See* Liability Order, ECF No. 124, at 24 ("If IPRG cannot produce evidence that would allow it to prove an affirmative defense for these exceedances, summary judgment for Plaintiffs is appropriate."), 39-46 (applying Permit language).

To apply the Permit language to IPRG's reported exceedances through the end of 2017, Plaintiffs began with the exceedances that were not excused by the 8-minute exemption and conservatively excluded those that IPRG's designated expert on post-liability-period violation counts, Mr. Keeler, has characterized as occurring during startup.[11] Fisher Decl. ¶¶ 58-59. Plaintiffs also excluded the exceedances Mr. Keeler characterized as attributable to malfunction or breakdown, provided there was also some evidence that IPRG complied with Permit Condition 5c, which requires IPRG to "notify the Illinois EPA's Regional Office by telephone as soon as possible during normal working hours upon the occurrence of excess emissions due to malfunctions or breakdowns."[12] Permit, ECF No. 104-8, ¶ 5c; Fisher Decl. ¶¶ 60-61; *see also*

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[10] At trial, Plaintiffs will present expert testimony and other evidence that many of the post-liability exceedances IPRG has attributed to malfunction or breakdown (and that Plaintiffs have conservatively excluded from their post-liability violation count for purposes of this partial summary judgment motion) were not legitimately classified as such, and constitute additional Clean Air Act violations.

[11] IPRG's quarterly excess emissions reports, which must specify "[t]he cause of the excess emissions, if known," do not show that all of these exceedances occurred during startup. Facts ¶ 9; Fisher Decl. ¶ 59. Plaintiffs nonetheless conservatively excluded all of them from the post-liability violation count, for summary judgment purposes. Fisher Decl. ¶ 59.

[12] For summary judgment purposes, Plaintiffs conservatively excluded such exceedances even where there was no evidence that IPRG complied with companion Condition 5d, which says IPRG "shall maintain records of excess emissions during malfunctions and breakdowns," including, for each exceedance, records concerning "[t]he steps taken to prevent similar malfunctions or breakdowns and/or to reduce their frequency and severity." Facts ¶ 12; *see also* Liability Order, ECF No. 124 at 39-40 & 40 n.13 (discussing Condition 5d).

IPRG tracks most 5d information on the Plant's internal excess emissions report forms. Facts ¶ 13. Those forms include a section titled "Future Preventative Measures (if needed)," which corresponds to the language in Permit Condition 5d(v). Facts ¶¶ 12-14. The section is blank in all but 76 of the 664 internal excess emissions report forms Plaintiffs have found for exceedances they classified for summary judgment purposes as reported pursuant to Condition

Liability Order, ECF No. 124 at 39-46 (discussing and applying Condition 5c). This generated a violation count of 2,079 (corresponding to 1,358 opacity events) for the period July 1, 2014 through December 31, 2017. Fisher Decl. ¶ 61.

Plaintiffs used a different method to apply the Permit language to exceedances for the first half of 2018, which IPRG's expert (Mr. Keeler) did not address in his report. Fisher Decl. ¶ 63. Plaintiffs began with the exceedances that were not excused by the 8-minute exemption, and excluded those which IPRG had associated with the following codes in its quarterly excess emissions reports to EPA: "Startup/Shutdown" (unless accompanied by the action code "Shutdown in Progress"), and "Startup in Progress." *Id.* ¶¶ 64-66. Plaintiffs also excluded all exceedances for which there is some evidence that the Plant complied with Permit Condition 5c. *Id.* ¶¶ 67-68. This generated a violation count of 132 (corresponding to 83 opacity events) for the period January 1, 2018 through June 30, 2018. *Id*. ¶ 69 & n.5; Ex. U.

Plaintiffs accordingly request a declaration that IPRG has violated the Clean Air Act at Edwards at least 2,211 times between the end of the liability period and the end of the second quarter of 2018—at least 2,079 times from July 1, 2014 to December 31, 2017 and at least 132 more times in the first half of 2018—for the exceedances listed in Exhibit U.

* * * *

The illegal air pollution this Court has been called on to remedy stretches back to 2008. Since then, the E.D. Edwards Plant has changed hands, the Court has found IPRG liable for violating the Clean Air Act, and IPRG's original multi-billion-dollar parent company has merged

5c (and thus excluded from the post-liability violation count). Fisher Decl. ¶ 75; Ex. AR. In 65 of the 76 instances where text appears in the section, the text reads simply "N/A." Fisher Decl. ¶ 75; Ex. AR.

with another multi-billion-dollar company. But the problem persists: As each year passes, IPRG violates the Clean Air Act hundreds more times.

This spring, the Court will decide what IPRG must do to finally bring itself into compliance with the Act and mitigate some of the harm it has done to the people of Peoria. The Court will also decide what penalty amount best reflects the gravity of IPRG's violations; the money IPRG and others have saved by letting those violations continue for a decade; and IPRG's true ability to pay. A declaration on each point presented above will narrow the issues for trial and help the Court finish its important work.

CONCLUSION

Plaintiffs respectfully request partial summary judgment.

Respectfully submitted August 31, 2018,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing **PLAINTIFFS' OPENING MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON REMEDY** complies with the type volume limitation set forth in Local Rule 7.1(D)(5). The Argument section contains a total of 5,489 words.

s/ Selena Kyle
Selena Kyle

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I caused the following to be served on all parties' counsel via the Court's CM/ECF system:

PLAINTIFFS' OPENING MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON REMEDY

EXHIBITS A THROUGH AS
(EXHIBITS AA THROUGH AS BEING FILED UNDER SEAL)

MOTION FOR LEAVE TO FILE UNDER SEAL

DECLARATION OF IAN FISHER

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMEDY AND ORAL ARGUMENT REQUEST

[PROPOSED] ORDER GRANTING PARTIAL SUMMARY JUDGMENT ON REMEDY

s/ Selena Kyle
Selena Kyle