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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' REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON REMEDY

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INTRODUCTION

Summary judgment promotes finality and conserves resources by limiting trials to issues that cannot be resolved earlier. No genuine dispute precludes declaratory relief on each issue Plaintiffs moved on. The few true errors or inconsistencies IPRG identified in Plaintiffs' submissions do not affect the proposed maximum penalty for IPRG's violations during the liability period, and barely affect the post-liability violation count on which Plaintiffs seek summary judgment. IPRG "disputes" other factual points only by mischaracterizing, attempting to recant, or simply ignoring its own witnesses' testimony, its discovery responses to Plaintiffs, and statements its corporate parents have made on their public websites and to the SEC. The parties' only legal disagreement concerns interpretation of the Illinois SIP's 8-minute rule. IPRG's interpretation contravenes the rule's text and the Clean Air Act's purposes, and even if credited would show that IPRG has violated the Act well over a thousand times in the post-liability period. The Court should grant Plaintiffs' requested declarations, which will help streamline its determination of the appropriate remedies for IPRG's persistent violations.

RESPONSE TO IPRG'S ADDITIONAL MATERIAL FACTS

1. Under the Clean Air Act "[i]n determining the amount of any penalty to be assessed . . . the Administrator or the court, as appropriate, 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)

Response: Material and undisputed.

2. During the period of April 18, 2008 and June 30, 2014 opacity exceedances, including exceedances that were dismissed by the Plaintiffs as occurring during Startup or malfunction, occurred during only 0.29% of the Edwards units' operating time. (Ex. 4 at ¶ 13.)

Response: Immaterial and disputed.

The percent of Edwards' operating time consumed by exceedances is immaterial to the declarations that Plaintiffs' partial summary judgment motion requests.

Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." The only support cited for IPRG's statement is a conclusory paragraph in Mr. Keeler's declaration, which references a chart attached as Exhibit B. Sealed Ex. 4, ECF No. 201, ¶ 13. Exhibit B includes no supporting evidence or explanation. *Id*. Ex. B.

To the extent Plaintiffs can respond without more information on how Mr. Keeler derived the 0.29 percent figure, the statement is false. Exhibit B appears to match an exhibit in Mr. Keeler's March 2018 expert report. *Compare id*., *with* March 21, 2018 Report of Mr. Thomas Keeler (Keeler Report), Ex. HA, at 36. For that report, Mr. Keeler considered only the exceedances IPRG included in its quarterly reports to Illinois EPA, and within that group, only those Plaintiffs had not classified as excused by the 8-minute exemption in 35 Illinois Administrative Code § 212.123(b). *Id.* at 31. Mr. Keeler also mistakenly categorized as offline some exceedances that occurred when the units were in fact operating, *see* June 26, 2018 Keeler Dep., Ex. HB, at 262:7–277:18; these mistakes affect the percentage Mr. Keeler purports was the proportion of operating time consumed by exceedances.

3. Before the Court's August 23, 2016 order, IEPA had informed Edwards that it wanted to be notified under Permit Condition 5(c) only for malfunction/breakdown opacity exceedances lasting longer than five six-minute periods and the plant operated in accordance with the IEPA's instruction until this Court's August 23, 2016 Order and Opinion. (Doc. 109 at 42-3.)

Response: Immaterial and disputed.

This statement about a possible alternative notification requirement, that deviates from the text of Condition 5c and this Court's liability ruling, has no bearing on IPRG's violation counts or any of the other issues on which Plaintiffs' motion seeks declarations. This Court has considered and rejected IPRG's argument, concluding that "[s]uch an agreement [between Edwards personnel and Illinois EPA] – if it existed – could not be reconciled with the text of the currently operative Permit." Aug. 23, 2016 Op. & Order (Liability Order), ECF No. 124, at 41; *see also id*. at 42 (IPRG cannot "rewrite the text of the Permit through informal agreement").

The statement is also unsubstantiated and an improper attempt to relitigate decided issues. IPRG's citation to the argument section of its liability-phase summary judgment brief is improper and should be disregarded.[1] The argument section also asserts that it is "at least an open question" whether Illinois EPA informed Edwards personnel that it wanted to be notified under condition 5(c) only for malfunction/breakdown opacity exceedances lasting longer than five six-minute periods. Def. Resp. to Pl. Mot. for Partial Summ. J. (Def. Liability Summ. J. Opp.), ECF No. 109, at 42-43. The argument section references an internal email that predates

[1] *See United States v. Fed. Res. Corp.*, 30 F. Supp. 3d 979, 992 n.3 (D. Idaho 2014) ("It is incumbent upon the parties to provide specific citation to the record in support of record-based arguments. The failure to do so may properly result in rejection of the argument." (citation omitted)), *aff'd in part*, 691 F. App'x 441 (9th Cir. 2017).

IPRG's current operating permit and an internal operating procedure, neither of which support IPRG's statement. *Compare id.* at 43 (citing April 2000 internal email, ECF No. 104-46, and Ameren Operations Procedure, ECF No. 104-18), *with* Permit, ECF No. 180-2, at 1 (issued July 1, 2004).

4. The new proposed Title v. air operating permit for Edwards, which is currently undergoing public comment, changes the trigger for reporting of malfunctions or breakdowns to events that last for more than 42 minutes. (IPRG's Motion for Summary Judgment, Doc. 180-3 at 96.)

Response: Immaterial and undisputed.

The procedures in IPRG's draft Title V permit are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

5. In its August 23, 2016 Order and Opinion, the Court held that Defendant could not make use of the malfunction and breakdown defense provided under Condition 5.a of the Edwards Permit and 35 ILL. ADMIN. CODE § 212.124(a) for an opacity event unless the event was reported under Condition 5.c of the Edwards Permit. (Doc. 124.)

Response: Material and undisputed.

6. As of September 2016, IPRG changed its procedure for reporting opacity exceedances at Edwards to be consistent with the Court's Order. Edwards personnel now notify IEPA by telephone and email of every event they determine, based on available information, are malfunctions or breakdowns. (Ex. 6 at 247-257.)

Response: Immaterial and disputed.

This statement is immaterial to Plaintiffs' motion, which excludes from the post-liability violation count on which Plaintiffs seek summary judgment all exceedances for which IPRG or Illinois EPA produced a record of a telephone notification. Pl. Br., ECF No. 184-1, Facts at 6-7 (¶¶ 27-31) & Arg. § IX at 29-33 (describing violations identified in IPRG's reports and expert's testimony, compiled in supporting Exhibit U); Ex. U to Pl. Br., ECF No. 184-30 (violation compilation). Plaintiffs attached those records as Exhibit T to their motion. With the exception of one exceedance event IPRG mislabeled in the notification email included in Exhibit T, and which Plaintiffs have now removed from the post-liability violation count on which they seek summary judgment, *see infra* Resp. to Facts ¶ 38, IPRG has not identified any 5(c) notifications Plaintiffs failed to account for. Opp., ECF No. 200, Resp. to Facts at 12-13 (¶¶ 30-31).

Plaintiffs do not dispute that IPRG changed its procedure, but dispute whether IPRG has applied the procedure's definition for malfunction or breakdown ("Any sudden, infrequent and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner."). *See* Pl. Opp. to Def. Mot. for Summ. J. Concerning Injunctive Relief (Opp. to IPRG Summ. J. Mot.), ECF No. 198, Resp. to Facts at 28 (¶ 24).

7. Defendant's expert, Thomas Keeler, analyzed each of the opacity events for which there was a finding of liability to determine whether they fell within the malfunction or breakdown exemption, had the Court considered that exemption. Mr. Keeler determined 2,273 of those opacity events from the liability period were caused by a malfunction or breakdown. (Ex. 4 at ¶¶ 12, 14.) An additional 250 or so opacity events for which there was a finding of liability occurred when a unit was offline. (*Id.* at ¶ 14.)

Response: Immaterial and disputed.

Mr. Keeler's claims about which violations in the liability period are attributable to malfunction or breakdown, and which violations in the liability period occurred while Edwards was offline, are immaterial to Plaintiffs' motion and to remedy proceedings generally. The Court has already adjudicated IPRG's liability-period violations, Liability Order, ECF No. 124, at 38-39, 46, 48-49, and the penalty award Plaintiffs' motion concerns will be based on those adjudicated violations.

When Plaintiffs moved for summary judgment on liability, IPRG argued that 224 opacity exceedances on which Plaintiffs moved occurred when the unit was offline and that the opacity and particulate matter limits do not apply to those exceedances. IPRG Reply in Supp. of Summ J., ECF No. 116, at 8 & n.20. Plaintiffs did not contend that Edwards' particulate matter limits apply during offline periods, Pl. Opp. to Def. Cross-Mot. for Partial Summ J. (Pl. Liability Summ. J. Opp.), ECF No. 114, at 32-33, but the Court agreed with Plaintiffs that the opacity limits apply when the respective emission unit is offline. Liability Order, ECF No. 124, at 46-49. Plaintiffs have removed from their list of particulate matter violations the specific additional events IPRG contended occurred when the relevant unit was offline. Fisher Decl. to Pl. Br., ECF No. 184-2, ¶ 12. It is too late for IPRG to relitigate whether opacity limits apply when a unit is offline or argue that additional liability-period exceedances it never identified as such during liability briefing should also be classified as offline.

Plaintiffs also dispute Mr. Keeler's new claims about the causes of opacity exceedances, and about which of those exceedances occurred during offline periods. Some of Mr. Keeler's new claims about the causes of opacity exceedances also depart from the testimony he gave at deposition. At deposition, Mr. Keeler testified that exceedances categorized in TRK code "6" were exceedances for which he and the people who assisted him with his report could not

determine the cause, and thus they were unable to conclude those exceedances were exempt pursuant to the malfunction/breakdown affirmative defense. Keeler Dep., Ex. HB, at 118:9-22; *see also id.* at 74:5-20; 124:7–126:11. Mr. Keeler's new declaration claims that exceedances categorized under TRK code "6" are ones he "determined were due to malfunction/breakdown." *See* Sealed Ex. 4, ECF No. 201, ¶ 20. IPRG cannot avoid summary judgment and seek to alter Mr. Keeler's testimony with a declaration filed after Plaintiffs moved on Mr. Keeler's original testimony. *See Ineichen v. Ameritech*, 410 F.3d 956, 963 (7th Cir. 2005). The reference to TRK code "6" in paragraphs 12 and 14 of Mr. Keeler's new declaration should be disregarded or stricken. *See Rowe Intern. Corp. v. Ecast, Inc.*, 586 F. Supp. 2d 924, 933-36 (N.D. Ill. 2008) (striking portions of an expert declaration defendant filed with its summary judgment opposition as new for purposes of rule 26(a) and prejudicial to Plaintiffs).

It is also unclear what definition of malfunction or breakdown Mr. Keeler used, in his report and in his new declaration. *See* Sealed Ex. 4, ECF No. 201, ¶¶ 12-15 (no definition); Keeler Dep., Ex. HB, at 220:6-10, 221:21–225:8, 229:16–230:8 (explaining initial categorization of events as malfunction, followed by determination that all such events were sudden, infrequent, and not reasonably preventable). To the extent that the offline exceedance count in this statement is based on the count Mr. Keeler included in his report, he has conceded that he misclassified some events as offline. Keeler Dep., Ex. HB, at 262:7–277:18.

Based on the Court's liability summary judgment decision and the stipulated list of exceedances the parties submitted to the Court following that decision, Plaintiffs presented a liability-period violation list, count, and proposed maximum penalty. *See* Pl. Br., ECF No. 184-1, Facts at 5-6 (¶¶ 19-22) & Arg. § I, at 17-20; Ex. A to Pl. Br., ECF No. 184-4. In response to IPRG's challenge to the double listing of five of these liability-period violations (three opacity

and two particulate matter events), IPRG Opp., ECF No. 200, Resp. to Facts at 11-12 (¶19), 18-21 (¶¶ 20-22), Plaintiffs have revised the list of liability violations to remove the following inadvertently duplicated events: Common Stack 1 at 17:18 on November 3, 2010 for opacity and particulate matter, 13:48 on January 16, 2011 for opacity, and 12:30 on January 27, 2014 for opacity and particulate matter. *See* Revised Ex. A, at 34, 36, 61, 97, 122. This double listing is a relic of the fact that those violations were included twice on the stipulated list of exceedances the parties submitted to the Court following its summary judgment ruling on liability. *See* ECF No. 135-1, at 16, 57 (November 3, 2010 opacity violation at 17:18); *id.* at 14 (January 16, 2011 opacity violation at 13:48); *id.* at 1, 49 (January 27, 2014 opacity violation at 12:30); ECF No. 135-2, at 16, 57 (November 3, 2010 particulate matter violation at 17:18); *id.* at 1, 49 (January 27, 2014 particulate matter violation at 12:30). Plaintiffs have revised the counts of opacity and particulate matter violations and violating events on page 1 of Revised Exhibit A. The mistake did not affect the calculated maximum civil-penalty figure on which Plaintiffs seek summary judgment, because Plaintiffs—in a significant concession to IPRG—disregarded multiple violations of the same emission limit within a calendar day when calculating the maximum. *See* Revised Ex. A, at 1 (penalty still $44,965,000); Pl. Br., ECF No. 184-1, at 18-20 (explaining Plaintiffs' counting method).

8. Opacity readings are not meaningful when a unit is offline, because they do not indicate elevated particulate matter level emissions, and do not cause harm to human health or the environment. (Ex. 4 at ¶ 16; Ex. 8 at 251:21-255:7.) Plaintiffs' experts do not rebut to these opinions. (Sahu Dep. at 263:18-264:11, relevant excerpts attached herein as Ex. 13.)

Response: Immaterial and disputed.

This characterization of offline emissions is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

IPRG's statement is also unsubstantiated, and its citations are incomplete and misleading. IPRG's citation includes Plaintiffs' engineering expert, Dr. Sahu, saying "I know that there are" $PM_{2.5}$ emissions when a unit is offline, but "I just didn't estimate them, given the calculation method that I used." June 21, 2018 Sahu Dep. Ex. HC, at 263:18-23. In testimony IPRG does not cite, Dr. Sahu went on to explain:

> Opacity is limited to 100 percent. PM emissions are not bounded, so you know as you get higher in opacity, at some point opacity will saturate. It will be 100 percent. You cannot be more than 100 percent opacity by definition. Whereas, there is no such grounds for expecting an upper bound on all of the dust that might be reentrained and come out of the stack during an offline period, at least the first few hours of an offline period.
>
> So because of that there is no mass relationship, like we have been to establish in all of these correlations. They are only valid for a normal operating period, if you will, not these offline periods.

Id. at 265:17–266:7. Dr. Sahu's reports also explain that high opacity readings during offline periods correspond to high particulate matter emission levels. Dec. 18, 2015 Liability Report of Dr. Ranajit Sahu (Sahu Liability Report), Ex. HD, at 17-20; Feb. 4, 2016 Liability Rebuttal Report of Dr. Ranajit Sahu (Sahu Liability Rebuttal), Ex. HE, at 15.

It is undisputed that additional harmful particulate matter is emitted when the relevant Edwards unit is offline and the opacity at the corresponding smokestack exceeds 30%. Sahu Liability Report, Ex. HD, at 5, 17-20, 52, 56-57; Sahu Liability Rebuttal, Ex. HE, at 14-16; Dec. 17, 2015 Liability Report of IPRG expert Richard McRanie, ECF No. 113-1, at 10-11 (testifying

that volume of particulate matter emitted during offline exceedances is very small, but not zero); June 15, 2018 Dep. of IPRG expert Ralph Roberson, Ex. GA, at 254:21–255:7 (same).

9. Just 51 of the opacity events for which there was a finding of liability were not malfunctions or breakdowns, or occur offline. This constitutes less than 1/100th of a percent of the operating time of the Edwards units during the liability period of April 18, 2008 – to June 30, 2014. Those 51 opacity events were due to operations and maintenance activities, testing, lingering issues from start up, and boiler cooldown. (Ex. 4 at ¶ 51.)

Response: Immaterial and disputed.

IPRG's post hoc claims about which exceedances during the liability period occurred during malfunctions or breakdowns and/or in offline conditions are immaterial to Plaintiffs' motion and to remedy proceedings in general. The Court has already adjudicated and determined IPRG's liability-period violations, Liability Order, ECF No. 124, at 38-39, 46, 48-49, and the penalty award Plaintiffs' motion concerns will be based on those violations.

For the reasons explained in the response to statement 7, *supra*, it is too late for IPRG to relitigate whether opacity limits apply when a unit is offline or argue that additional liability-period exceedances it never identified as such during liability briefing should also be classified as offline.

Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." The only support IPRG cites for this statement is a paragraph that does not appear in the cited exhibit, Mr. Keeler's declaration. *See* Sealed Ex. 4, ECF No. 201 (does not have a paragraph 51). To the extent IPRG meant to cite to paragraph 15 of that declaration, that paragraph is conclusory and unsupported.

Sealed Ex. 4, ECF No. 201, ¶ 15. It does not identify the evidence Mr. Keeler relied on or explain what calculations he did to arrive at the figures IPRG cites. *Id. See supra* Resp. to Facts ¶ 7, for additional reasons Plaintiffs dispute IPRG's new claims about what caused certain opacity exceedances during the liability period and which of those exceedances occurred during offline periods.

10. Opacity is not a pollutant and does not cause harm to human health or the environment. *See, e.g., Sierra Club v. Tennessee Valley Auth.*, 592 F. Supp. 2d 1357, 1362 (N.D. Ala. 2009) ("TVA") ("Opacity is not a pollutant, but instead is a measure of the lightblocking property of a plaint's emissions. . . . Opacity serves as a surrogate for determining continuous compliance with particulate matter standards."); Doc. 124 at 48 ("opacity is most often used as a proxy for particulate matter").

Response: Immaterial and disputed.

This claim about the nature of opacity is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

IPRG's characterization of opacity as a non-pollutant does not alter the fact that IPRG is subject to opacity limits enforceable through the Clean Air Act and has exceeded those limits thousands of times. Liability Order, ECF No. 124, at 3-4; Permit, ECF No. 180-2, Condition 3; 35 Ill. Admin. Code § 212.123; *see also* Opp. to IPRG Summ. J. Mot., ECF No. 198, Resp. to Facts at 26-28 (¶ 23).

Plaintiffs also dispute IPRG's characterization of opacity, which IPRG's citations do not substantiate. As Plaintiffs explained in their September 21, 2018 opposition to IPRG's motion

for summary judgment concerning injunctive relief, it is undisputed that IPRG's opacity violations have caused and continue to cause harm to human health and the environment, and that increases in opacity obscure the natural clarity of the air and impair air quality in and of themselves. *See* Opp. to IPRG Summ. J. Mot., ECF No. 198, Add'l Facts at 41-43 (¶¶ 1-16) and Resp. to Facts at 8-9 (¶ 45b), 11-12 (¶ 47), 13-14 (¶ 10), 25-28 (¶¶ 16, 23).

11. During the liability phase, this Court did not hear evidence, and did not consider, whether opacity exceedances fell within any of the exemptions in the Edwards permit. Nor did the Court hear evidence, or consider, whether any of the opacity events caused any actual violation of the particulate matter limitation in Edwards' permit. (Doc. 124.)

Response: Immaterial and disputed.

This statement about the evidence presented to and considered by the Court during the liability phase is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to setting a penalty for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

This statement also contradicts the Liability Order, ECF No. 124. The Court did hear evidence and did consider whether opacity exceedances fell within any of the Permit's exemptions. Def. Liability Summ. J. Opp., ECF No. 109, at 41-48; Pl. Liability Summ. J. Opp., ECF No. 114, at 24-33. The Court also heard evidence and considered whether opacity exceedances caused violations of the particulate matter limitations in Edwards' permit. Def. Liability Summ. J. Opp., ECF No. 109, at 34-41; Pl. Liability Summ. J. Opp., ECF No. 114, at 33-38.

12. The finding of particulate matter violations by this Court was a finding as a matter of law based on a presumption in the Illinois Regulations. (Doc. 124 at 5) (noting that Plaintiffs "rely upon the opacity exceedances established in the first two claims in order to establish a derivative violation of the particulate matter standards").

Response: Immaterial and disputed.

The bases for the Court's ruling on IPRG's liability-period particulate matter violations is immaterial to Plaintiffs' motion, which concerns the statutory maximum, floor, and scope of financial information relevant to a penalty for IPRG's adjudicated violations during the liability period, as well the number of uncontested violations that have occurred since the liability period.

Plaintiffs dispute this statement to the extent it mischaracterizes the Court's liability ruling. In the ruling, the Court explained that Plaintiffs "rely upon the opacity exceedances established in the first two claims in order to establish a derivative violation of the particulate matter standards. *See* 35 Ill. Admin. Code § 212.124(d)(2)(A) (explaining that for certain power plants, opacity exceedances may also be deemed particulate matter exceedances)." Liability Order, ECF No. 124, at 5. The Court found § 212.124(d)(2) applied to the Plant during the relevant time period. *Id*. at 27-33.

13. Edwards did not actually violate the particulate matter limitation in its permit at any time pertinent to this proceeding, even during the events that were held to be derivative particulate matter violations. (Ex. 8 at 43:12-44:9, 46:24-47:5, 131:7-132:20; Ex. 13 at 114:2-13.)

Response: Immaterial and disputed.

This statement about IPRG's liability-period violations of its particulate matter emission limits is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of

financial information relevant to setting a penalty for IPRG's adjudicated opacity and particulate violations during the liability period, as well the number of opacity violations the undisputed facts show have occurred since the liability period. It also contradicts and is an improper bid to relitigate issues this Court resolved in its liability ruling, which found IPRG liable for numerous violations of its particulate limits during the liability period. Liability Order, ECF No. 124, at 38-39, 49.

The statement is also unsubstantiated. Mr. Roberson's testimony (excerpted in IPRG's Exhibit 8) undermines, rather than supports, IPRG's claim that Edwards has never exceeded its numeric limits on particulate matter emissions. It is undisputed that Mr. Roberson's own correlations of opacity to particulate matter emissions at Edwards show exceedances of the particulate matter limits at certain opacity values above 30% that are represented in Edwards' opacity monitoring data. March 21, 2018 Report of Mr. Ralph Roberson, Sealed Ex. EF, ECF No. 199, at 7; May 7, 2018 Remedy Rebuttal Report of Dr. Ranajit Sahu (Sahu Rebuttal), Ex. HF, at 46-48.[2]

IPRG's citations to Dr. Sahu's June 21, 2018 testimony (excerpted in IPRG's Exhibit 13) are incomplete and misleading because one omits the context of the question and the other is irrelevant to the statement. *See* June 21, 2018 Sahu Dep., Ex. HC, at 112:23–114:13 (question stating "[w]e'll return to" Mr. Roberson's correlation and focusing question on Opinions 2 and 3 of Dr. Sahu's initial remedy report), 297:14–298:20 (correcting description of opacity data used for certain time period to estimate particulate matter emissions).

[2] Dr. Sahu explained that Mr. Roberson's correlation for Unit 3 predicts particulate matter emissions above Unit 3's limit whenever opacity is 36% or higher and that one of the September 2017 Unit 3 test runs that Roberson based his correlation on resulted in a particulate matter emission rate of 0.103 lb/mmBtu when the opacity was 33.6%. Sahu Rebuttal, Ex. HF, at 46-47.

It is also undisputed that the results of multiple stack tests conducted at Edwards (including some overseen by Mr. Roberson) show that Edwards has emitted particulate matter in excess of its numeric particulate limits. *See* Sealed Ex. 7c, ECF No. 182, at IPR-IPRG-013915 (showing test run with emissions rate of 0.203 lb/mmBtu at Common Stack 1 serving Units 1 and 2); Sealed Ex. 7n, ECF No. 182, at 4 (showing test run with emissions rate of 0.102 lb/mmBtu at Unit 3);[3] Sahu Rebuttal, Ex. HF, at 46.

Other record evidence also contradicts IPRG's statement. *See* Opp. to IPRG Summ. J. Mot., ECF No. 198, Resp. to Facts at 29-30 (¶ 28), 31-34 (¶¶ 30-32, 34).

14. There has been no harm to human health or the environment from the opacity exceedances. (IPRG's Motion for Summary Judgment, Doc. 180 at 13-4.)

Response: Immaterial and disputed.

The existence and extent of harm attributable to IPRG's Clean Air Act violations is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to setting a penalty for IPRG's adjudicated opacity and particulate violations during the liability period, as well as the number of violations the undisputed facts show have occurred since the liability period.

IPRG's statement is also unsubstantiated. Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." The only support IPRG cites is the argument section of its remedy-phase opening

[3] This exceedance occurred over a 71-minute period with an average opacity of 33.6%. Sealed Ex. 7n, ECF No. 182, at 75-76. It is undisputed that Edwards' emissions have exceeded and continue to exceed 33.6% opacity. Edwards 2018 Quarterly Opacity Excess Emissions Reports, Ex. B to Pl. Br., ECF No. 184-5, at 47 (examples of recent reported opacity exceedances over 33.6%).

summary judgment brief. IPRG Summ. J. Mot., ECF No. 180, at 13-14. That argument section references various statements, which Plaintiffs have disputed. Opp. to IPRG Summ. J. Mot., ECF No. 198, Resp. to Facts 3-12 (¶¶ 40-41, 43, 45-47) 201-21 (¶ 39), 26-28 (¶¶ 23-24), 34-35 (¶¶ 42, 44); *id.* Add'l Facts at 41-43 (¶¶ 1-16).

As explained in Plaintiffs' Statement 10 response, *supra*, the undisputed evidence shows that IPRG's opacity violations have caused and continue to cause harm to human health and the environment.

15. IPRG has never received notice of, or been found liable for, violations of the Clean Air Act, including of applicable opacity or PM limitations, in any context outside of this lawsuit. (Ex. 7 at ¶ 10.)

Response: Immaterial and disputed.

Whether IPRG has been found liable for Clean Air Act violations other than those at issue in this case is immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.[4]

Plaintiffs also dispute the statement to the extent that IPRG's only citation is to a declaration from Edwards' current Managing Director, who joined the plant in December 2013. *See* Sealed Ex. 7, ECF No. 201, ¶ 1. IPRG cites no evidence for the proposition that it has not been notified of, or found liable for, any Clean Air Act violations in earlier periods of Edwards'

[4] IPRG does not dispute that no one has paid any penalties for its adjudicated violations, for purposes of the civil-penalty factor that concerns past penalty payments. Opp., ECF No. 200, Resp. to Facts at 5 (¶¶ 25-26); *see also* Pl. Br., ECF No. 184-1, at 20.

operating history for which Mr. Lindenbusch lacks foundation, or at any of IPRG's other facilities.

16. Edwards operates and maintains its units consistent with good industry standards and practices, including operation of its electrostatic precipitators ("ESP") and flue gas conditioning systems at each unit to control opacity. (Ex. 4 at ¶ 21.) Edwards also engages in procedures for preventing and responding to opacity exceedances that are consistent with good, industry standard practices. (*Id.*)

Response: Immaterial and disputed.

IPRG's operations and maintenance practices are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

IPRG's statement is unsubstantiated. Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." The only support cited for this statement is a conclusory paragraph in a declaration by Mr. Keeler. Sealed Ex. 4, ECF No. 201, ¶ 21. The paragraph includes no supporting evidence. *Id*.

Other evidence in the record, including some of IPRG's own documents and testimony, contradicts the statement. Dr. Sahu has explained, based on a review of documents in the record, including inspection reports and depositions of Plant staff, that the ESPs at Edwards have not been properly maintained. Sahu Liability Report, Ex. HD, at 3, 26-44; Sahu Liability Rebuttal, Ex. HE, at 10-14, Jan. 17, 2018 Remedy Report of Dr. Ranajit Sahu (Sahu Report), Ex. HG, at

29-38. The documents in the record show that IPRG and its predecessors have not always followed its third-party contractors' recommendations about ways to improve Edwards' opacity performance. *See, e.g.*, Sahu Liability Report, Ex. HD, at 38-43 (comparing recommendations from different third-party inspection reports over time); November 22, 2014 Unit 3 Electrostatic Precipitator Inspection Report for Dynegy Edwards Generating Station by Southern Environmental, Ex. HH, IPR-IPRG-087269, at IPR-IPRG-087272 (collecting plates "are approximately 40 years old and appeared to be thin and near the end of their service life. These should be replaced as soon as practicable in conjunction with any future precipitator upgrades. Additionally, after this inspection was performed, review of prior inspection reports of this unit indicates that there have been issues with the collecting plates as far back as 2003."); July 20, 2005 ESP Assessments by GE Energy, Ex. HI, IPR-IPRG-087461, at IPR-IPRG-087464 (for Unit 1, "ESP performance and condition are marginal. Planning for rebuilding or replacing should begin."), IPR-IPRG-087668 (for Unit 3, "While some usefulness may be regained by installing properly designed mechanical straighteners, the design and overall condition of the collecting plates are such that replacement may be the most cost-effective long-term solution.").

It is also undisputed that IPRG is not controlling particulate matter enough to avoid continued violations of the Clean Air Act. *See* Opp. to IPRG Summ. J. Mot., ECF No. 198, Add'l Facts at 43 (¶ 15); *see also infra* Resp. to Facts ¶¶ 21, 32, 37-38.

17. Since approximately 2008, Defendant has invested more than $60 million on capital projects to control opacity and particulate matter. (Ex. 7 at ¶ 6, attaching list of capital projects and cost as Exhibit B.)

Response: Immaterial and disputed.

IPRG's spending on pollution control is immaterial to Plaintiffs' motion, which concerns

the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

IPRG's claim that the projects its statements referenced were "to control opacity and particulate matter" is contrary to the evidence in the record. As Dr. Sahu has explained, IPRG's list of projects includes many with a tenuous connection to opacity and particulate matter that affect opacity and particulate matter only indirectly, if at all. Sahu Report, Ex. HG, at 34. Mr. Cichanowicz, IPRG's expert, has described some of the projects as being done to improve overall plant operation and efficiency (or for other reasons in addition to opacity and particulate control). March 21, 2018 Report of Mr. J. Edward Cichanowicz, Ex. HJ, at 2; *see, e.g.*, Sealed Ex. 7, ECF No. 201, Ex. B ("Partial DCS system upgrade," "Replace low NOx burners, overfire air system," "Overhaul of Unit 2 Turbine," "Installed water cannons," "Replace low NOx burners, overfire air system," "Overhaul of turbine and generator"). IPRG also misleadingly includes in its "investment" figure over $5 million for Unit 1, for which it was reimbursed by MISO under the System Support Resource Service agreement. March 21, 2018 Report of Dr. Anne Smith, Ex. HK, at 55-56; April to May 2014 Email Chain, Ex. HL, IPR-IPRG-362485, at IPR-IPRG-362487 (projects expected to be offset by revenue included in MISO payments).

It is also undisputed that IPRG is not controlling particulate matter enough to avoid continued violations of the Clean Air Act. *See supra* Resp. to Facts ¶ 16.

18. Since January 1, 2014, Defendant has implemented more than 50 projects or steps to minimize opacity excursions and further control particulate matter at Edwards. (Ex. 7 at ¶ 5, attaching interrogatory responses with list of projects as Exhibit A.)

Response: Immaterial and disputed.

See supra Resp. to Facts ¶ 17.

19. In addition to the $60 million in projects described above, Defendant has and continues to perform regular inspections, maintenance, and repairs, of the ESPs and other equipment to address opacity and particulate matter performance at Edwards. (Ex. 7 at ¶ 7, attaching list of maintenance, inspection, and repair work orders as Exhibit C.) Inspection, maintenance and repair activities of the ESPs at Edwards include regular weekly and monthly preventative maintenance activities, inspections of the ESPs, and a work order system to complete repairs as needed on an ongoing basis. (Ackerman 30(b)(6) Dep. at 49:1-52:11, 85:23-88:9, 92:7-97:23, relevant excerpts attached herein as Ex. 14; Ex. 7 at ¶ 7, Ex. C.)

Response: Immaterial and disputed.

See supra Resp. to Facts ¶¶ 16 and 17.

20. Defendant has, on an ongoing basis, engaged third party contractors to assess and make recommendations on management and operation of opacity control equipment, including possible improvements to that equipment, and has regularly implemented those recommendations. (Ex. 14 at 66:1-78:21, 66:15-78:21; Ex. 7 at ¶ 8.)

Response: Immaterial and disputed.

IPRG's engagement of third-party contractors and responsiveness (or lack thereof) to their recommendations are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

Plaintiffs do not dispute that IPRG has engaged third party contractors to assess and make recommendations on management and operation of opacity control equipment, including

possible improvements to that equipment. Plaintiffs dispute that IPRG "has regularly implemented those" recommendations. The record shows that IPRG and its predecessor have ignored recommendations from third party contractors about possible improvements. *See supra* Resp. to Facts ¶ 16.

21. Defendant has additional activities planned that would have the impact of improving opacity performance at Edwards, including work to improve the performance of its ESPs. (Ex. 7 at ¶ 5; Defendant's Aug. 27, 2018 Supplemental Objections and Answers to Plaintiffs' Interrogatories, attached herein as Ex. 15.)

Response: Immaterial and disputed.

IPRG's planned activities are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

IPRG's statement that there are "additional activities planned that would have the impact of improving opacity performance" is also unsubstantiated by the short list of future projects it identifies, which concern just one of Edwards' two unretired units (Unit 3), and some of which are described as "preliminary" in scope. *See* Sealed Ex. 7, ECF No. 201, ¶ 5 & Ex. A-3, at 2; IPRG Ex. 15, ECF No. 200-11, at 2 (same information).

The undisputed evidence shows that Edwards continues to violate its opacity limits at both units. *See* Opp. to IPRG Summ. J. Mot., ECF No. 198, Add'l Facts at 43 (¶ 15); *see also infra* Resp. to Facts ¶¶ 16, 32, 37, 38. As Dr. Sahu has explained, activities like those IPRG's statement identifies—even if pursued at Unit 3—will be inadequate to overcome that Unit's ESP's limitations (which include that it is severely undersized) and end further violations at that

Unit. Sahu Report, Ex. HG, at 10-15, 37-38. Similar activities performed on the ESP for Edwards' Unit 2 in 2017 have not resulted in any improvement in that Unit's opacity performance. *Id.*; Sahu Rebuttal, Ex. HF, at 8-11, 27-35.

22. As a result of these efforts, the average monthly opacity readings for the common stack, decreased from just above 20% in 2008 to below 10% in 2017. For the Unit 3 stack, average monthly opacity decreased from just under 15% in 2008 to just above 11% in 2017. (Ex. 4 at ¶ 22.) Consequently, overall particulate matter emissions (which have never exceeded the limit in Edwards' permit) have decreased from the level that existed during the liability phase of this case. (Ex. 4 at ¶ 22; Ex. 8 at 24:4-25:24, 43:12-20; 44:21-47:5.)

Response: Immaterial and disputed.

Edwards' average monthly opacity levels and trends in those levels are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

The first sentence of IPRG's statement is misleading and does not support IPRG's conclusion, in the second sentence of the statement, that "overall particulate matter emissions . . . have decreased from the level that existed during the liability phase of this case." Edwards' opacity limit is measured as a six-minute average, and its particulate matter limits are measured on a one-hour average. Permit, ECF No. 180-2, at 1-2; 35 Ill. Admin. Code § 201.405(c). As Dr. Sahu has explained in the context of opacity, monthly average figures obscure the many shorter-term exceedances and spikes that occurred in the years 2008 through 2017 (and continued into 2018) at Edwards. Sahu Rebuttal, Ex. HF, at 10-11. IPRG's citations to the monthly averages for Edwards' Common Stack 1 are particularly misleading because they obscure important facts

about what units were operating and feeding into that stack in the timeframes IPRG focuses on. IPRG's statement also does not account for either stack's opacity performance in 2018. *Id.* at 11.

Plaintiffs also dispute IPRG's claim, in the second sentence, that "overall particulate matter emissions . . . have never exceeded the limit in Edwards' permit," for the reasons included in Plaintiffs' September 21, 2018 response to IPRG's motion for summary judgment concerning injunctive relief. *See* Opp. to IPRG Summ. J. Mot., ECF No. 198, Resp. to Facts at 29-30 (¶ 28), 31-34 (¶¶ 30-32, 34).

23. Personnel at Edwards undergo training with respect to environmental obligations and, with respect to opacity are trained and instructed to:

a. Operate the units at Edwards with a running opacity of less than 20%. If opacity exceeds 20%, the plant reduces load (i.e. production) until opacity is below 20% and the unit is de-rated to that lower load;

b. Monitor the 1-minute opacity average at the units. If the 1-minute reading spikes to greater than 30%, operators receive an alarm and immediately take actions such as reducing load, suspending sootblowing, determining the cause and taking corrective actions;

c. Monitor operational data corresponding to the ESPs and take immediate action to respond to any alarms indicating issues with the equipment;

d. Monitor operations of the rappers, which are a component of the ESPs, to ensure proper operation;

e. Pull flyash from the hoppers, another component of the ESPs, twice per shift to minimize re-entrainment of flyash;

f. Reduce load while conducting power off rapping;

g. Conduct regularly scheduled inspection and preventative maintenance on power supplies, rappers, and other ESP components;

h. Condition flyash from both units to improve resistivity of the ash and, therefore, effectiveness of collection by the ESP;

i. Maintain excess air in the combustion process as low as possible to minimize air flow through the boiler and ESP;

j. Monitor air-inleakage to the units and make repairs as needed to prevent such inleakage; and

k. Monitor of other plant operational conditions that could impact opacity levels, such as load and activated carbon injection, and take actions as needed to control those conditions to minimize opacity; and

l. Prepare work orders for and conduct maintenance or repairs determined to be needed on equipment as a result of inspection or monitoring activities.

(Ex. 7 at ¶ 9.)

Response: Immaterial and disputed.

The kinds of training and instructions IPRG's statement describes are immaterial to Plaintiffs' motion, which concerns the maximum, floor, and scope of financial information relevant to penalties for IPRG's adjudicated violations during the liability period, as well as the number of violations the undisputed evidence shows have occurred since the liability period.

The only support IPRG cites for this statement is a declaration from Edwards Managing Director, Mr. Lindenbusch, who joined the Plant late in the liability period. *See* Sealed Ex. 7, ECF No. 201, ¶ 1. Mr. Lindenbusch does not describe what timeframe his testimony about "train[ing] and instruct[ions]" covers, *id*. ¶ 9, and says he relies on others for "[d]ay-to-day management . . . including with respect to environmental compliance." *See id*. ¶ 3. To the extent that part a) of the statement suggests that Edwards personnel have been consistently trained and instructed to operate the ESPs to maintain opacity at or below 20% since the start of the liability period, there is contrary evidence. *See, e.g.*, Envtl. Compliance & Emission Excursions Presentation, Ex. HM, IPR-IPRG-061470, at IPR-IPRG-061478 (listing response actions to take, as appropriate, "[i]f the % opacity is approaching the operational limit (28%)"); Apr. 2008 shift turnover report, Ex. HN, IPR-IPRG-054939 ("We are sitting at a duct opacity average of 28-29% on unit 2, which has resulted in 1 out so far, and a couple of very very close ones. Marketing has been informed of our struggles and said he 'wishes us the best of luck.'"); Sept. 2009 shift turnover report, Ex. HO, IPR-IPRG-008208 ("Achieved 318mw net with opacity of 21% before

marketing has [sic] us drop load due to economics"); email from Mark Davis, Edwards Manager of Environmental and Chemistry, to Bob LaPlaca, Consulting Environmental Scientist, Ameren Corp., Ex. HP, IPR-IPRG-352641 (inquiring about operating practices that would allow Edwards to run its electrostatic precipitators "at a reduced level" and "result in higher opacity, but would still allow us to remain in compliance with our opacity permit limit").

24. Illinois Power Resources Generating, LLC is the owner and operator of Edwards. (Doc. 184-1 at 2, ¶ 1; Ex. 1 at ¶ 8.)

Response: Material and undisputed.

25. Dynegy, Inc. has never owned or operated Edwards. (Doc. 184-1 at 2, ¶ 1; Ex. 1 at ¶ 8.)

Response: Material and disputed.

Plaintiffs dispute this statement as to both ownership and operation.

With respect to ownership, Dynegy was Edwards' ultimate owner from December 2, 2013, when IPRG's immediate ownership of the Plant began, *see* Pl. Br., ECF No. 184-1, Facts at 7 (¶ 32), 8 (¶¶ 37-38), 12 (¶¶ 50-51), 15 (¶¶ 73-74), until at least its merger with Vistra in April 2018, when Dynegy was merged with and into Vistra, Edwards' current ultimate owner, *see id.* at 15 (¶¶ 68-69). During this period, IPRG was wholly owned by Illinois Power Resources, LLC (IPR), which was a wholly-owned subsidiary of Illinois Power Holdings, LLC (IPH), which was a wholly-owned subsidiary of Illinois Power Holdings II, LLC (IPH II), which was a wholly-owned subsidiary of Dynegy Inc. *Id.* at 8 (¶¶ 37-38); IPRG Opp., ECF No. 200, Resp. to Facts at 6 (¶ 37), 41 (¶ 38).

With respect to operations and finance, Dynegy was responsible for approving all budgets at Edwards, including operation and maintenance budgets and capital expenditure

budgets. Pl. Br., ECF No. 184-1, Facts at 11 (¶¶ 47, 48). Dynegy's Executive Management Team also received monthly reports on capital and operating spending. *Id.* Under a Delegation of Authority Policy approved by Dynegy's Executive Management Team, Dynegy's Board of Directors was responsible for approving IPRG spending above certain thresholds, and all "legal settlements" exceeding $25 million. *Id.* at 11 (¶ 49). IPRG and Dynegy were parties to a Shared Services Agreement that provided the following services: Strategic Planning and Business Development; Government Approvals and Proceedings; Commercial; Legal, Compliance, and Ethics; Human Resources; Business Services; Tax and Accounting Services; Operation and Maintenance Support Services; Insurance, Risk; Information Technology; Records; Public Relations; and Management. *See* Opp., ECF No. 200, Resp. to Facts at 41-44 (¶¶ 39-42). They were also parties to a loan agreement followed by a revolving credit facility, both of which allowed Dynegy to transfer money to IPRG when IPRG projected a short-term cash deficit. Pl. Br., ECF No. 184-1, Facts at 12 (¶¶ 52-53).

As Plaintiffs noted in their opening brief, and substantiated with a document downloaded from the website, Dynegy's website lists Edwards among its "generating assets" and notes a "100%" ownership interest in Edwards. Pl. Br., ECF No. 184-1, Fact at 15 (¶ 74); Ex. P to Pl. Br., ECF No. 184-26, at 1 ("Dynegy Generating Assets" chart from Dynegy's website, row marked "Edwards" on the left). IPRG's authenticity objection to this statement is baseless, for the reasons as Plaintiffs explain at pages 12-14 of their opposition to IPRG's September 21, 2018 motion to strike, ECF No. 207. IPRG's only other stated basis for disputing the statement is that

"as of April 2017 [sic], Dynegy, Inc. does not exist."[5] Opp., ECF No. 200, Resp. to Facts at 15 (¶ 74).

Plaintiffs also note that IPRG objected to many of their remedy-phase discovery requests for information on the finances of and/or relationships between IPRG, IPRG parents including Dynegy, Dynegy subsidiaries other than IPRG, and any Dynegy successor by asserting that this kind of information was "not relevant" and that "there [was] no basis for discovery" about entities other than IPRG itself. *See, e.g.*, Def. Resp. to Pl. First Req. for Prod. of Docs. Relating to Remedy, Ex. DI to Opp. to IPRG Summ. J. Mot., ECF No. 198-10, at 13-20 (document requests 28-33 and 35-39, and 39); Def. Supp. Resp. to Pl. First Set of Interrogs. Concerning Remedy, Sealed Ex. AM, ECF No. 199, 1-4 (interrogatories 1(c) and 13); *see also* Pl. First Req. for Prod. of Docs. Relating to Remedy, Ex. DH to Opp. to IPRG Summ. J. Mot., ECF No. 198-9, at 2 ¶ 4 (definitions) and Pl. First Set of Interrogs. Relating to Remedy, Ex. GG, at 2 ¶ 4 (same).

26. Vistra Energy Corporation ("Vistra") is a corporation, organized under the laws of the State of Delaware. (Ex. 1 at ¶ 4.) Vistra complies with the corporate formalities required under the laws of the State of Delaware. (*Id.*) It maintains its own books, records, and bank accounts, and its books records and bank accounts are separate from those of its subsidiaries. (*Id.*) Vistra has never owned or operated Edwards. (Doc. 184-1 at 2, ¶ 1; Ex. 1 at ¶ 8.)

Response: Immaterial and disputed as to the second through fourth sentences.[6]

[5] Plaintiffs assume, given IPRG's citation and other evidence, that IPRG meant to write that "Dynegy does not exist as of April 2018." *See* Opp., ECF No. 200, Resp. to Facts at 15 (¶ 74) (citing IPRG Ex. 1, ¶ 6); IPRG Ex. 1, ECF No. 200-1, ¶¶ 5-6 ("On April 9, 2018, Vistra merged with Dynegy, Inc. As a result of that merger, Dynegy, Inc. ceased to exist.").

[6] Plaintiffs do not dispute that Vistra is organized under Delaware law.

First, Vistra's observance of (or lack thereof) of corporate formalities is not relevant to the question of whether this Court may consider Vistra's finances to help assess the economic impact of a penalty award on IPRG, for the reasons explained in Argument V, below.

Second, the second and third sentences of IPRG's statement express legal conclusions (or at the very least, conclusions that require the application of corporate law principles to facts) about Vistra's compliance with corporate formalities and accounting practices. For support, IPRG cites only two paragraphs in a fact declaration that itself includes no supporting evidence or explanation. *See* IPRG Ex. 1, ECF No. 200-1, ¶¶ 4, 8. *See also supra* Resp. to Facts ¶ 25 (noting IPRG's objections to discovery about entities other than IPRG).

IPRG's own statements disprove its claim, in the fourth sentence of its statement, that "Vistra has never owned or operated Edwards." *See* Pl. Br., ECF No. 184-1, Facts at 15 (¶¶ 69-70); IPRG Opp., ECF No. 200, Resp. to Facts at 14-15 (¶¶ 69-70).

With respect to ownership, Vistra has a 100% ownership interest in Edwards. Aug. 6, 2018 Vistra "Second Quarter 2018 Results" investor presentation, Ex. N to Pl. Br., ECF No. 184-24, at 33 (slide headed "Asset Fleet Details," row marked Edwards, entry in "Ownership Interest" column). IPRG's dispute with this statement over authenticity is baseless, as Plaintiffs explain at pages 12-14 of their opposition to IPRG's September 21, 2018 motion to strike, ECF No. 207. The remainder of IPRG's response states simply that "IPRG owns Edwards" and that "Vistra is the ultimate parent company of IPRG." Opp., ECF No. 200, Resp. to Facts at 14 (¶ 69). These statements disprove IPRG's claim that "Vistra has never owned Edwards."

With respect to operation, IPRG has confirmed that Vistra assumed Dynegy's obligations under the Shared Services Agreement described in Plaintiff's opening brief and in response paragraph 25 above. Opp., ECF No. 200, Resp. to Facts at 41-44 (¶¶ 39-42); *id.* Add'l Facts at 53

(¶ 30). Vistra has also assumed Dynegy's obligations with respect to the revolving credit agreement with IPRG. Pl. Br., ECF No. 184-1, Facts at 15 (¶ 71); IPRG Opp., ECF No. 200, Resp. to Facts 31-32 (¶ 71).

27. Day-to-day management of environmental compliance at Edwards is done at the plant level, by IPRG employees and lead by Plant Manager, Dennis Theodore Lindenbusch. Mr. Lindenbusch has decision-making authority regarding responding to environmental matters, development of budgets, directing and approving maintenance and repair activities, engineering issues, and supervision of employees. Day-to-day management of Edwards, including with respect to environmental compliance, is done at the plant level by IPRG employees under the Plant Manager's supervision. (Ex. 7 at ¶ 3.)

Response: Disputed.

Plaintiffs dispute this characterization of how Edwards' environmental compliance is managed. IPRG did not dispute that Vistra provides, or that Dynegy and certain of its subsidiaries before the merger with Vistra provided, the following list of services to IPRG: Strategic Planning and Business Development; Government Approvals and Proceedings; Commercial; Legal, Compliance, and Ethics; Human Resources; Business Services; Tax and Accounting Services; Operation and Maintenance Support Services; Insurance, Risk; Information Technology; Records; Public Relations; and Management. *See supra* Resp. to Facts ¶¶ 25-26. IPRG also does not dispute that Vistra has assumed Dynegy's obligations under a revolving credit facility against which IPRG can borrow to meet certain short-term cash needs. *See supra* Resp. to Facts ¶¶ 25-26.

IPRG also concedes that IPRG's "capital budget, which could require additional capital contribution by IPRG's owners, ultimately went to the Dynegy Board of Directors for approval,

and will go to the Vistra board in the future for approval," Opp., ECF No. 200, at 72, and that the Dynegy-board-approved 2018 final capital budget and the 2019-2022 capital forecast for Edwards provides for spending on projects classified as "involving environmental compliance, our environmental improvements." *Id.* Resp. to Facts at 13 (¶ 61). After moving for summary judgment concerning injunctive relief, IPRG filed a declaration from a Vistra Senior Vice President and Chief Fossil Officer that asserts an order directing the installation of new pollution-control equipment at Edwards will "trigger a decision by Vistra's senior management, and ultimately Vistra's Board of Directors, to move forward with the closure of the Edwards plant." Decl. of Barry T. Boswell, ECF No. 189, ¶ 7.

Mark Davis, Edwards' Manager of Environmental and Chemistry, testified that he submits drafts of environmental reports including Edwards' quarterly excess emissions reports for opacity exceedances to an environmental support group based outside of the plant, and that this group is responsible for submitting the final reports to Illinois EPA. Nov. 10, 2017 Davis Dep., Ex. GB, at 9:15-17, 10:24–11:21, 18:2-9, 21:5-24, 320:24–322:5. Edwards' Opacity Exceedance Due to Malfunction or Breakdown Notification Procedure bears a Dynegy logo, states that it "applies to all of Dynegy's coal-fired power stations in Illinois," and was approved by Cynthia Vodopivec. *See* IPRG Summ. J. Mot., ECF No. 180, at 3 (¶ 9) (identifying Procedure); Sealed Ex. 2, ECF No. 182, at IPR-IPRG-400413 (copy of Procedure). Ms. Vodopivec is now the Vice President, Environmental Health and Safety at Vistra Energy, and before that was the Vice President, Safety & Environmental at Dynegy. *See* Ex. GC (Ms. Vodopivec's LinkedIn page).

The shift turnover reports IPRG has produced in discovery also show that plant-based personnel have consistently communicated with and received direction from Houston, where

Dynegy's corporate offices were located, about operating and maintenance decisions, including those that affect Edwards' electrostatic precipitators (ESPs) and control of opacity and particulate matter. *See, e.g.*, Aug. 2014 shift turnover report, Ex. HQ, IPR-IPRG-011333 ("Discussed with Houston the desire to take unit 3 off line this weekend to repair the precipitator sections that are causing opacity concerns."); July 2018 shift turnover report, Ex. HR, IPR-IPRG-406557 (noting in "Communications with Houston Dispatch" section "Sent derate request for U2 precip cleaning"); Ex. J to Pl. Br., ECF No. 184-19 (identifying Dynegy's corporate office location as Houston).

See also supra Resp. to Facts ¶ 25 (noting IPRG's objections to discovery about entities other than IPRG).

28. Payments made by IPRG to Dynegy, Inc. or its subsidiaries were payments that were either made pursuant to a Shared Services Agreement for services provided or loan repayments. (Ex. 10 at 47:9-13, 88:19-89:8, 106:8-108:15.)

Response: Disputed.

Local Rule 7.1(D)(2)(b)(5) required IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted" and to support "each additional fact . . . by evidentiary documentation referenced by specific page." IPRG's Exhibit 10 does not include the pages IPRG's statement references, *see* ECF No. 200-8, and the included pages do not support IPRG's statement.

See also supra Resp. to Facts ¶ 25 (noting IPRG's objections to discovery about entities other than IPRG).

29. Payments under the Shared Services Agreement were based on fair market rates for such services. (Ex. 11 at ¶ 5.)

Response: Disputed.

Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." The citation in this statement is to a declaration stating that prior to entering the Shared Services Agreement in December 2013, IPH obtained a third-party opinion that the terms were market terms. IPRG Ex. 11, ECF No. 200-9, ¶ 5. The declaration provides no further support for that proposition, and IPRG has not submitted a copy of the "third party opinion" the declarant describes. *Id.* This statement is also vague as to at what time period it is asserting payments "were based on fair market rates."

See also supra Resp. to Facts ¶ 25 (noting IPRG's objections to discovery about entities other than IPRG).

30. As a general matter, Vistra does not receive IPRG's profits. Currently, the only transfers of money that Vistra receives from IPRG are payments pursuant to a Shared Services Agreement. The Shared Services Agreement was formerly between Dynegy, Inc. and IPRG. Vistra assumed Dynegy's obligations under the Shared Services Agreement as a result of the merger. (Ex. 1 at ¶ 9.)

Response: Disputed as to the first two sentences.

The first sentence is vague, but the qualifier "as a general matter" strongly suggests that, assuming the statement is true, there are some instances in which Vistra *does* receive IPRG's profits. The second sentence is vague to the meaning of "currently," and that qualifier similarly suggests that Vistra may receive transfers of money *other* than payments pursuant to the Shared Services Agreement at other points in time. The only support IPRG provides for these sentences

is a conclusory paragraph in a new fact declaration that does not attach or reference documentation. IPRG Ex. 1, ECF No. 200-1, ¶ 9.

See also supra Resp. to Facts ¶ 25 (noting IPRG's objections to discovery about entities other than IPRG).

31. Plaintiffs' expert Jonathan Shefftz opines that IPRG's economic benefit of non-compliance ranges from $43 million (if the Court determines IPRG should have installed two new ESPs) to $102 million (if the Court determines IPRG should have installed two new baghouses). (*See* Rebuttal Expert Opinion on Economic Benefit and Economic Impact of Jonathan S. Shefftz, at 25, attached hereto as Ex. 16.)

Response: Disputed in part. Plaintiffs provide the following clarification.

IPRG seems to have attached the wrong exhibit: its Exhibit 16 contains the rebuttal report of Plaintiff's public-health expert, Dr. Schwartz. *See* IPRG Ex. 16, ECF No. 200-12. Plaintiffs have attached relevant excerpts from Mr. Shefftz's Rebuttal Report in which Mr. Shefftz explained, after incorporating some assumptions Dr. Smith used in order to minimize disputes, that the economic benefit attributable to IPRG's noncompliance as of May 7, 2018 (the date of his Rebuttal) would be roughly $102 million as to baghouses and $43 million as to new ESPs. May 7, 2018 Rebuttal Report of Mr. Jonathan Shefftz (Shefftz Rebuttal), Ex. GD, at 4-13, 22. Mr. Shefftz also explained that the economic benefit will continue to grow unless and until IPRG disgorges it in the form of a civil penalty. *Id*. at 2.

32. IPRG vigorously disputes Dr. Shefftz's economic benefit calculations because Dr. Shefftz is incorrect that two baghouses or two new ESPs are or would have been necessary to bring the Edwards Plant into compliance with its Permit and applicable regulations. (Cichanowicz Dep. at 117:5-118:14 (noting that a baghouse would not eliminate opacity

exceedances), 108:5-110:19 (explaining that an option provided by Defendant's expert Mr. Cichanowicz would all but eliminate opacity excursions), relevant excerpts attached herein as Ex. 17.; Decl. of T. Keeler at ¶ 23.)

Response: Immaterial and disputed.

With respect to immateriality and to clarify, Mr. Shefftz, Plaintiffs' economic expert, did not opine on what new pollution controls are or would have been necessary to bring IPRG into compliance with the Clean Air Act at Edwards. Shefftz Rebuttal, Ex. GD, at 13. Dr. Sahu concluded that Edwards would continue to violate its opacity limit with its current equipment and that it needed baghouses to avoid, and new ESPs to substantially reduce, its violating exceedances. Sahu Report, Ex. HG, at 5, 39-42; Sahu Rebuttal, Ex. HF, at 7, 24-43. IPRG's disagreement with Dr. Sahu's conclusions is immaterial to Plaintiffs' motion. Plaintiffs have not asked this Court to declare, on summary judgment, either what new pollution controls should be ordered at Edwards or the economic benefit attributable to IPRG's violations.

Plaintiffs also dispute the statement's underlying premise that the new pollution controls Dr. Sahu identified are not "necessary to bring the Edwards Plant into compliance with its Permit and applicable regulations." IPRG's experts did not disagree that Edwards will continue to violate its opacity limits if it continues relying on its current pollution-control equipment for opacity and particulate matter. Opp. to IPRG Summ. J. Mot., ECF No. 198, Add'l Facts at 44 (¶ 20); *id.* Resp. to Facts at 4-5 (¶ 41a). Nor did they identify any equipment that they claim would allow Edwards to eliminate further violating opacity exceedances. *See id.* Add'l Facts at 44 (¶ 21); *id.* Resp. to Facts at 4-5 (¶ 41a). Although IPRG's experts questioned whether baghouses would eliminate all opacity violations, they agreed that baghouses would improve the Plant's opacity performance. *Id.* Add'l Facts at 45 (¶ 22); *id.* Resp. to Facts at 4-5 (¶ 41a). The

only possible dispute is whether baghouses or new ESPs would eliminate opacity violations at Edwards.

Furthermore, IPRG's citations do not support its statement. The first citation is to an assertion by Mr. Cichanowicz that a baghouse would not eliminate opacity *excursions* (as opposed to opacity exceedances, or violating opacity exceedances). Cichanowicz Dep., Ex. GE, at 117:5-118:14. It ignores that when discussing opacity excursions in the context of baghouses, Mr. Cichanowicz conceded that he actually meant "an increase above a baseline value," and not necessarily an increase above 30% on a 6-minute average. *Id.* at 122:5–123:9, 142:23–144:21, 146:2–147:16, 150:2-20. The second citation is to an assertion that a "hardened ESP" option identified by Mr. Cichanowicz (and that Dr. Sahu has testified would not meaningfully reduce IPRG's opacity violations, *see* Sahu Rebuttal, Ex. HF, at 41-43) should "all but eliminate" opacity exceedances generally. Cichanowicz Dep., Ex. GE, at 108:19–109:16. "[A]ll but eliminat[ing]" opacity exceedances at Edwards is not the same thing as ending opacity violations at Edwards. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 764 (7th Cir. 2004) (noting in the Clean Water Act context that "[c]ompliance means an *end* to violations, not merely a reduction in the number or size of them"). The third and last citation is to a conclusory sentence in a new declaration from Mr. Keeler that does not explain the basis for Mr. Keeler's opinion or provide any supporting evidence. Sealed Ex. 4, ECF No. 201, ¶ 23; *see also* CDIL-LR 7.1(D)(2)(b)(5). Mr. Keeler also still has not identified any pollution-control equipment that would allow Edwards to eliminate further violating opacity exceedances.

33. IPRG's expert Dr. Anne Smith also has criticized Dr. Shefftz's methodology for calculating economic benefit of noncompliance and has opined Dr. Shefftz's calculations are incorrect even if one assumes two new ESPs or two baghouses are necessary to achieve

compliance at Edwards. (Smith Dep. at 204:5-209:15, 214:2-218:5, 237:8-239:4, 268:6-270:12, relevant excerpts attached herein as Ex. 18)

Response: Immaterial and disputed.

IPRG's (or its expert's) disagreement with aspects of Mr. Shefftz's testimony on the economic benefit attributable to IPRG's Clean Air Act violations is immaterial to Plaintiffs' motion, which does not ask this Court to declare, on summary judgment, the economic benefit.

IPRG's statement does not explain what the referenced criticisms are, nor do its citations. Mr. Shefftz's Rebuttal Report responded to and addressed the points Dr. Smith made about his initial remedy report. Shefftz Rebuttal, Ex. GD, at 4-13.

34. Many of the 2,211 6-minute opacity events Plaintiffs claim are violations in the post-liability period meet the definition of malfunction or breakdown, a defense provided for in the Edwards Permit Condition 5.a and 35 ILL ADMIN. CODE § 212.124(a). (Ex. 4 at ¶ 20.)

Response: Disputed.

This statement is a legal contention about many facts, not a statement of fact. IPRG's statement that "many" meet the definition of malfunction or breakdown is also vague. IPRG does not specify how "many" of the 2,211 events it contends "meet the definition of malfunction or breakdown," or otherwise provide Plaintiffs enough information to fully respond.

Local Rule 7.1(D)(2)(b)(5) provides that "each additional fact must be supported by evidentiary documentation referenced by specific page" and requires IPRG to "[i]nclude as exhibits all relevant documentary evidence not already submitted." IPRG cites a paragraph in a September 21, 2018 declaration from Mr. Keeler, which in turn references a table attached as Exhibit F. *See* Sealed Ex. 4, ECF No. 201, ¶ 20. Exhibit F does not explain Mr. Keeler's

purported determinations concerning which of the 2,211 events Plaintiffs identified were "due to malfunction or breakdown," *see id*. ¶ 20 & Ex. F.

Some of Mr. Keeler's new claims about the causes of opacity exceedances also depart from the testimony he gave at deposition and must be disregarded or stricken, for the reasons noted in Plaintiffs' response to statement 7, *supra*.

It is also unclear what definition of malfunction or breakdown Mr. Keeler used, either in his report or in his new declaration. *See* Sealed Ex. 4, ECF No. 201, ¶¶ 12-15 (no definition); Keeler Dep., Ex. HB, at 218:15-219:7, 220:6-10, 221:21–225:8, 229:16–230:8 (describing an initial categorization of events as malfunctions followed by a finding that all those events met the Plant's definition). To the extent that the offline exceedance count in paragraph 14 of Mr. Keeler's new declaration is based on the count he included in his report, he has conceded that he misclassified some events as offline when he prepared that count. Keeler Dep., Ex. HB, at 262:7–277:18.

35. At least 1,721 six-minute opacity events during the post-liability period are exempt under a proper application of the 8-minute rule. (35 ILL. ADMIN. CODE § 212.123(b); Ex. 4 at ¶ 18.) This is 1,178 more six-minute events than were excluded by Plaintiffs' application of the 8-minute rule. (*Id.* at ¶ 19.)

Response: Disputed.

The first sentence of the statement reflects an application of IPRG's legal interpretation of the 8-minute rule to many facts and is not a pure statement of fact. The second sentence depends on the first.

The statement is also unsubstantiated. IPRG cites to Mr. Keeler's new declaration, but Mr. Keeler has testified that his application of the 8-minute rule (at least for purposes of the

opinions he expressed in his report and at deposition) was based on the direction of IPRG counsel, not his own interpretation. Keeler Dep., Ex. HB, at 44:17–45:14.

IPRG's (or Mr. Keeler's) interpretation of what constitutes a "proper application of the 8-minute rule" is also wrong. First, it incorrectly assumes that "any 60 minute period," 35 Ill. Admin. Code § 212.123(b), refers only to hours beginning and ending on the clock hour, and not to any other 60-minute periods. Sealed Ex. 4, ECF No. 201, ¶ 17a. Second, it incorrectly assumes "any 24 hour period," 35 Ill. Admin. Code § 212.123(b), refers only to calendar days beginning and ending at midnight, and not to any other 24-hour periods. Sealed Ex. 4, ECF No. 201, ¶ 17b.

Third, IPRG's interpretation does not exclude the first eight minutes or even the eight minutes with the highest opacity value (within the 30-60 percent range specified in the exemption's text, 35 Ill. Admin. Code § 212.123(b)) in an hour, but rather selectively identifies and removes the highest one-minute average values between 30 and 60% that fall *within periods* where the measured opacity on a six-minute average basis was over 30.5% (and thus, before the exclusions, would constitute exceedances of the opacity limit). Sealed Ex. 4, ECF No. 201, ¶ 17a ("exclude periods totaling up to 8-minutes [sic] (with opacity above 30% but not above 60%) within opacity excursions"). This distorts the exceedance record and (depending on the values within the data) can have the effect of lowering the violation count. Here is an illustration, using the monitoring data IPRG collected from Common Stack 1 on August 8, 2017 between 11 pm and midnight (in one-minute average values) and produced as IPR-IPRG-401598:

	Original results		Results after removing first 8 one-minute average opacity values between 30 and 60%		Results after removing 8 highest one-minute average opacity values between 30 and 60%		Results after using IPRG's method (selectively removing values within 6-minute periods that exceeded the 30% limit)	
	1 min average opacity	6 min average opacity	1 min average opacity	6 min average opacity	1 min average opacity	6 min average opacity	1 min average opacity	6 min average opacity
08/08/2017 23:00	35.3	33.7	[omitted]	16.5	35.3	31.5	35.3	27.5
08/08/2017 23:01	30.6		[omitted]		30.6		30.6	

08/08/2017 23:02	37.4		[omitted]		37.4		[omitted]	
08/08/2017 23:03	44.8		[omitted]		[omitted]		[omitted]	
08/08/2017 23:04	37.6		[omitted]		37.6		[omitted]	
08/08/2017 23:05	16.5		16.5		16.5		16.5	
08/08/2017 23:06	7.4	28.9	7.4	6.0	7.4	23.5	7.4	28.9
08/08/2017 23:07	5.5		5.5		5.5		5.5	
08/08/2017 23:08	5.0		5.0		5.0		5.0	
08/08/2017 23:09	38.4		[omitted]		38.4		38.4	
08/08/2017 23:10	55.8		[omitted]		[omitted]		55.8	
08/08/2017 23:11	61.3		[omitted]		61.3		61.3	
08/08/2017 23:12	65.8	29.8	65.8	29.8	65.8	24.7	65.8	29.8
08/08/2017 23:13	55.6		55.6		[omitted]		55.6	
08/08/2017 23:14	33.3		33.3		33.3		33.3	
08/08/2017 23:15	11.7		11.7		11.7		11.7	
08/08/2017 23:16	6.9		6.9		6.9		6.9	
08/08/2017 23:17	5.7		5.7		5.7		5.7	
08/08/2017 23:18	35.7	31.5	35.7	31.5	35.7	29.2	[omitted]	22.7
08/08/2017 23:19	43.1		43.1		[omitted]		[omitted]	
08/08/2017 23:20	42.2		42.2		42.2		[omitted]	
08/08/2017 23:21	35.4		35.4		35.4		35.4	
08/08/2017 23:22	22.3		22.3		22.3		22.3	
08/08/2017 23:23	10.5		10.5		10.5		10.5	
08/08/2017 23:24	12.5	35.8	12.5	35.8	12.5	25.3	12.5	25.3
08/08/2017 23:25	56.2		56.2		[omitted]		[omitted]	
08/08/2017 23:26	63.2		63.2		63.2		63.2	
08/08/2017 23:27	57.4		57.4		[omitted]		[omitted]	
08/08/2017 23:28	17.9		17.9		17.9		17.9	
08/08/2017 23:29	7.7		7.7		7.7		7.7	
08/08/2017 23:30	6.3	29.9	6.3	29.9	6.3	23.2	6.3	29.9
08/08/2017 23:31	34.7		34.7		34.7		34.7	
08/08/2017 23:32	43.9		43.9		[omitted]		43.9	
08/08/2017 23:33	42.5		42.5		[omitted]		42.5	
08/08/2017 23:34	36.8		36.8		36.8		36.8	
08/08/2017 23:35	15.1		15.1		15.1		15.1	
08/08/2017 23:36	9.0	4.0	9.0	4.0	9.0	4.0	9.0	4.0
08/08/2017 23:37	5.1		5.1		5.1		5.1	
08/08/2017 23:38	3.8		3.8		3.8		3.8	
08/08/2017 23:39	2.6		2.6		2.6		2.6	
08/08/2017 23:40	2.1		2.1		2.1		2.1	
08/08/2017 23:41	1.6		1.6		1.6		1.6	
08/08/2017 23:42	1.4	1.2	1.4	1.2	1.4	1.2	1.4	1.2

08/08/2017 23:43	1.3		1.3		1.3		1.3	
08/08/2017 23:44	1.2		1.2		1.2		1.2	
08/08/2017 23:45	1.3		1.3		1.3		1.3	
08/08/2017 23:46	1.1		1.1		1.1		1.1	
08/08/2017 23:47	1.1		1.1		1.1		1.1	
08/08/2017 23:48	1.0	1.4	1.0	1.4	1.0	1.4	1.0	1.4
08/08/2017 23:49	1.7		1.7		1.7		1.7	
08/08/2017 23:50	2.0		2.0		2.0		2.0	
08/08/2017 23:51	1.2		1.2		1.2		1.2	
08/08/2017 23:52	1.1		1.1		1.1		1.1	
08/08/2017 23:53	1.3		1.3		1.3		1.3	
08/08/2017 23:54	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
08/08/2017 23:55	1.4		1.4		1.4		1.4	
08/08/2017 23:56	1.2		1.2		1.2		1.2	
08/08/2017 23:57	1.1		1.1		1.1		1.1	
08/08/2017 23:58	1.0		1.0		1.0		1.0	
08/08/2017 23:59	1.0		1.0		1.0		1.0	

IPRG's method leaves in minutes with opacities of 55.8% and 55.6%, and instead exempts minutes with lower opacity values (of 35.7% and 37.6%). This lowers the number of six-minute average periods within the hour that exceed 30% opacity.

Fourth, IPRG's interpretation incorrectly assumes that "3 times in any 24 hour period," 35 Ill. Admin. Code § 212.123(b), means that IPRG can exempt many more than three exceedances in 24 hours. Sealed Ex. 4, ECF No. 201, ¶ 17c. IPRG has relied on its interpretation of the 8-minute rule to exempt up to *eleven* six-minute exceedances within a day. *See* Sealed Ex. 4 to IPRG Opp., ECF No. 201, Ex. F, at 322-25 (showing 11 Unit 3 exceedances coded "FALSE" in column marked "Opacity Event After 8 Minute Rule," on 8/13/2016).

Dynegy staff who have provided environmental compliance advice to Edwards staff and Mr. Keeler himself (at points during his deposition) have acknowledged that this is not a natural or plausible reading of the provision. Email Chain from Feb. 26, 2014 and Dec. 2, 2013, IPR-IPRG-023008, Ex. GF, at IPR-IPRG-023009 to -023010 (email from Timothy Kelley, Senior

Environmental Professional, Environmental Compliance, Dynegy Operating Company, as agent for Dynegy Midwest Generation, LLC, describing the exemption as "one per hour and three per day that are less that [sic] 60% opacity . . . as allowed by Illinois code"); Keeler Report, Ex. HA, at 65 and Keeler Dep., Ex. HB, at 162:17–164:22, 170:17–172:3 (explaining understanding of § 212.123(b) as exempting up to 3 exceedances per day).

IPRG's claim that approximately 1,178 more opacity exceedances are excluded based on IPRG's interpretation of the 8-minute rule as violations in Plaintiffs' Exhibit U is misleading. Sealed Ex. 4 to IPRG Opp., ECF No. 201, ¶ 19. In Exhibit HS, Plaintiffs have provided an alternative count of violations using the 8-minute rule exemptions IPRG presented in its opposition, Sealed Ex. 4 to IPRG Opp., ECF No. 201, ¶¶ 18-19, Exs. F & G.

For the July 2014 to December 2017 exceedances (the first part of Plaintiffs' Exhibit HS), Plaintiffs added a "Reported as Malfunction" column on the right, highlighted in gray, to Mr. Keeler's Exhibit F to mark which exceedances are represented in their Exhibit T (the compilation of 5c notification emails).[7] Mr. Keeler's Exhibit G included a similar "Reported as Malfunction" column for January to June 2018 exceedances (the second part of Plaintiffs' Exhibit HS). That column fails to mark as "Reported as Malfunction" 18 exceedances represented in Plaintiffs' Exhibit T. Plaintiffs accounted for those.[8]

Just as they did for their Exhibit U, Plaintiffs removed from Exhibit HS all exceedances that could potentially be excused under the Permit's startup, malfunction, and breakdown

[7] Plaintiffs also added the timeframe (7/1/14-12/31/17) to the header.

[8] The 2018 exceedances Mr. Keeler missed are as follows: January 1 on Unit 3 at 3:06, 3:12, 3:42, 10:30, and 10:48; March 8 on Unit 3 at 22:42; March 19 on Common Stack 1 at 20:30; April 3 on Common Stack 1 at 3:48; April 10 on Unit 3 at 20:24 and 21:06; April 11 on Unit 3 at 1:06; April 18 on Unit 3 at 12:00; April 24 on Unit 3 at 18:00; May 25 on Common Stack 1 at 12:42; June 20 on Common Stack 1 at 3:48 and 3:54; June 25 on Common Stack 1 at 7:00 and 15:24.

language in the same manner as they did with Exhibit U. *See* Pl. Br., ECF No. 184-1, at 30-32. Plaintiffs removed exceedances Mr. Keeler characterize as occurring during startup or (for 2018 exceedances) were reported as associated with startup. *See id.* at 31-32. Plaintiffs also removed from Exhibit HS all exceedances Mr. Keeler characterized as attributable to malfunction or breakdown, provided there was also some evidence that IPRG notified Illinois EPA pursuant to Permit Condition 5c or (for 2018 exceedances) all exceedances where there was some evidence that IPRG notified Illinois EPA pursuant to Permit Condition 5c. *See id.*

Exhibit HS shows that even using IPRG's 8-minute rule interpretation, IPRG has violated the Clean Air Act at least 1,355 times, including 119 times in the first half of 2018.

36. In his declaration, Plaintiffs' counsel Ian Fisher included in his violation count 70 six-minute events that took place during the time Defendant's expert Ralph Roberson oversaw Method 5 PM stack tests at artificially elevated opacity levels to determine whether Edwards meets particulate matter limits even at opacity levels above 30%. (Doc. 184-4; Doc. 182, Ex. 7m-n; Ex. 8 at 13:17-14:6, 122:18-24.)

Response: Immaterial and disputed.

The coincidence of opacity violations and testing periods (in this case, during the post-liability period) is immaterial to Plaintiffs' motion. IPRG identifies no legal theory that would provide a basis for exempting exceedances that would otherwise constitute violations from the post-liability count simply because they occurred during testing. It is undisputed that IPRG did not request or obtain permission from Illinois EPA to exceed the Plant's opacity limits for the purposes of the September 2017 stack tests IPRG's statement references. Roberson Dep., Ex. GA, at 138:12–139:14. Mr. Roberson testified that "[w]e accepted the fact that we were exceeding the permitted PM -- I'm sorry, the opacity limit." *Id*. at 139:12-14. It is also

undisputed that during one of the test runs on Unit 3, the Plant exceeded its particulate limit of .10 lb/mmBtu. Sealed Ex. 7n, ECF No. 182, at 4; Permit, ECF No. 180-2, at IPR-IPRG-078442. That IPRG has deliberately exceeded its emissions limits in some instances does not excuse the resulting violations. To the contrary, it shows how little regard IPRG has for its environmental and Clean Air Act compliance obligations.

Plaintiffs also dispute IPRG's claim that 70 of the post-liability violations Plaintiffs identified occurred during stack tests. Only 38 six-minute exceedances overlap at all, even by 1 minute, with the stack tests. *Compare* Sealed Ex. 7n, ECF No. 182, at 5 (showing Unit 2 test runs on September 20, 2017 at 8:40-10:14, 11:30-12:52, 13:55-15:18, 16:10-17:28), at 8 (showing Unit 3 test runs on September 27, 2017 at 6:20-7:33, 9:25-10:35, 11:50-13:00, 13:35-14:49, 15:15-16:25), *with* Pl. Ex. U to Pl. Br., ECF No. 184-30, at 22-23 (showing Plaintiffs' violation count for Unit 2 on September 20, 2017), 53-54 (showing Plaintiffs' violation count for Unit 3 on September 27, 2017).

37. Mr. Fisher made mistakes, and improperly applied his own methodology, in purporting to compute six minute opacity violations during the post liability period. For example, though Mr. Fisher purported to exclude all exceedances which IPRG's expert Mr. Keeler indicated were attributable to startup using the "TRK Code" 1 (*see* Doc. 184-2 at ¶ 58) all such events were not excluded from Plaintiffs' list of post-liability "violations." (*See*, *e.g.*, Doc. 186-15 at 14) (listing event occurring at Edwards Stack 1 at 5:24 on May 18, 2016 with "TRK Code" 1) and (Doc. 184-30 at 14) (including that same startup event in list of post-liability violations). Additionally, whereas Ian Fisher purported to exclude all exceedances which Mr. Keeler indicated were attributable to malfunction or breakdown using the "TRK Codes" 2, 4.1, 4.2, 4.3, 4.4, & 4.5 and for which a Permit condition 5.c notice was provided to IEPA (see Doc. 184-2 at ¶

60) all such events were not excluded from Plaintiffs' post-liability "violations." (*See*, *e.g.*, Doc. 186-15 at 24 (listing three events occurring at Edwards Stack 1 at 7:48, 7:54, and 8:00 on July 19, 2017 with "TRK Code" 2); Doc.192-2 at 100 (notice provided to IEPA including those three events); Doc. 184-30 at 22 (listing those same events as "violations").)

Response: Disputed.

IPRG's statement is vague as to "all such," and identifies only four exceedance events it contends were mistakenly labeled as post-liability violations, out of the more than 2,200 on which Plaintiffs moved. *See* Pl. Ex. U to Pl. Br., ECF No. 184-30. Plaintiffs have revised the list of post-liability violations on which they seek summary judgment to remove each of the events listed above: Common Stack 1 at 5:24 on May 18, 2016 and at 7:48, 7:54, and 8:00 on July 19, 2017.

Plaintiffs have also revised the list of post-liability violations on which they seek summary judgment in response to note 11 in the argument section of IPRG's opposition brief, *see* ECF No. 200, at 77, to remove the event occurring at Stack 3 at 6:24 on June 12, 2017.

See Revised Ex. U (filed with this brief) (omitting the exceedances referenced in this response).

38. In addition, though Mr. Fisher purported to exclude "all of the 2018 exceedances for which there is some record of a notification pursuant to Permit Condition 5c" (*see* Doc. 184-2 at ¶ 67), and purported to include all available notifications at Exhibit T (*id*. at ¶¶ 51-52), all such events were not excluded from Plaintiffs' post-liability "violations" and all notifications were not included in Exhibit T. (*See, e.g.,* Ex. 7 at ¶ 13, Ex. D (notice provided to IEPA of event occurring at Edwards Stack 3 at 1:00 on June 30, 2018, but not included in Plaintiffs' Exhibit T); Doc. 184-30 at 65 (listing same event as "violation").)

Response: Disputed.

Plaintiffs dispute IPRG's characterization. IPRG's statement identifies a single exceedance event that IPRG contends it reported under Condition 5c and that Plaintiffs did not exclude from the list of post-liability exceedances on which they moved for summary judgment: Stack 3 at 1:00 on June 30, 2018. Plaintiffs' Exhibit T includes a notification email from IPRG describing the event, but the email mislabels the event with the wrong start time. *See* Ex. T, ECF No. 192-4, at NRDC IF06839. Because of the mislabeling, Plaintiffs could not match the exceedance described in the email to any of the exceedances in IPRG's quarterly reports.

In response to this statement (which is based on an internal record IPRG never produced to Plaintiffs, despite its agreement to produce all records it could reasonably locate of post-liability 5(c) notifications, *see* Fisher Decl. to Pl. Br., ECF No. 184-2, ¶ 51), and to eliminate unnecessary factual disputes, Plaintiffs have revised the post-liability violation list on which they seek summary judgment to exclude the exceedance IPRG identifies. *See* Revised Ex. U at 65 (filed with this brief) (omitting Stack 3 at 1:00 on June 30, 2018).

Plaintiffs' Revised Exhibit U removes from the post-liability violation list on which Plaintiffs seek summary judgment each exceedance event IPRG's response identified as mistakenly classified. *See also infra* Resp. to Facts ¶ 37 (discussing the other exceedances Plaintiffs removed).

Revised Exhibit U shows a total of 2,205 post-liability violations between July 1, 2014 and June 30, 2018, including 131 violations in the first half of 2018.

39. Additionally, Plaintiffs include many other events in the 2,211 6-minute opacity events Plaintiffs claim are violations that Mr. Keeler has concluded were malfunctions and for which a Permit condition 5.c notice was provided to IEPA. (*See, e.g.*, Ex. 4 at ¶¶ 12, 20

(explaining that events with the TRK code "6" are malfunctions); Ex. 4 at Ex. F (listing three events occurring at Edwards Stack 3 at 15:42, 16:36, and 19:12 on April 20, 2017 with TRK Code "6"); Doc. 192-1 at 117 (notice provided to IEPA for same three events); Doc. 184-30 at 51 (listing the same three malfunctions as "violations").)

Response: Disputed in part.

This statement is vague as to "many," and depends in part on new testimony by Mr. Keeler that should be disregarded or stricken for the reasons noted in Plaintiffs' Statement 7 response, *supra*. Plaintiffs do not dispute that the portion of their corrected Exhibit T includes emails concerning 5(c) notifications for exceedances occurring at Edwards Stack 3 at 15:42, 16:36, and 19:12 on April 20, 2017. Pl. Revised Ex. T, ECF No. 192-1, at IPR-IPRG-400545.

ARGUMENT

I. The facts IPRG has not genuinely disputed are admitted

IPRG either did not dispute or did not genuinely dispute, with contrary evidence, most of Plaintiffs' fact statements. *See* Opp., Resp. to Facts ¶¶ 3-11, 13, 15, 16, 23-26, 29, 32-36, 38-45, 53-60, 62, 63, 65-81. These are admitted pursuant to Local Rule 7.1(D)(2)(b)(6).

II. The Clean Air Act provides for IPRG to pay up to $44,965,000 in penalties

IPRG has not genuinely disputed nor provided any alternative to the $44,965,000 figure Plaintiffs proposed this Court treat as the maximum potential penalty for IPRG's violations during the liability period. The handful of duplicate entries IPRG identifies do not affect Plaintiffs' calculated maximum, because Plaintiffs included just one penalty per violation type (opacity or particulate) per calendar day. *Supra* ¶ 7 & Revised Ex. A. Ascribing separate penalties to IPRG's opacity and particulate matter violations is not "double-assess[ing]" because the opacity and particulate limits are independent and separately enforceable. ECF No. 124, at 3-4. IPRG's other arguments concern how this Court should decide what departure (if any) from the maximum is warranted, Opp. 57-60, not what the maximum should be.

III. Penalties must account for the full liability period and exceed economic benefit

IPRG agrees the Court "has discretion in determining how to apply" the economic benefit, compliance history, good faith, duration, and seriousness factors, and does not argue the Court can ignore evidence from any part of the liability period. Opp. 66.

IPRG also does not refute the reasons Plaintiffs gave for this Court to declare it will set a penalty that exceeds the economic benefit of noncompliance, and does not explain why this Court must first determine the benefit and consider unspecified other factors, *see* Opp. 63.[9] The

[9] This Court cannot "infer[]" from EPA's failure to sue, *id*. 64, that EPA believes IPRG did not benefit (or cause harm) by violating the Clean Air Act. The inference is unsubstantiated,

possibility that the adjudicated economic benefit associated with IPRG's liability-period violations will exceed Plaintiffs' proposed maximum penalty, *id*. 64-65, exists only because Plaintiffs' calculation approach is so generous to IPRG. *Supra* ¶ 7; Pl. Br., ECF No. 184-1, at 19-20. If the Court determines that the economic benefit exceeds the statutory maximum, Plaintiffs would not oppose a penalty reduction to the maximum.

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

IPRG suggests that the "ruinous or disabling" test applies only when a court elects a top-down penalty analysis, Opp. 67, but none of the decisions it cites says so.[10] Applying the test in a bottom-up analysis also would not require the Court to ignore most penalty factors, Opp. 68. The Court could consider each factor and decide whether it supports an increase above the amount this Court sets as the floor. *See, e.g.*, *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2003 WL 25265873, at *7, 11 (D. Colo. Feb. 10, 2003) (bottom-up analysis applying "ruinous or disabling" test), *rev'd on other grounds*, 421 F.3d 1133 (10th Cir. 2005).

V. IPRG's corporate parents' finances are relevant to economic impact, and IPRG is not entitled to a penalty reduction based on economic impact

IPRG presents no new facts to carry its burden of proof on whether it qualifies for any penalty reduction, *compare* Opp. 72-73 *with* Pl. Br., ECF No. 184-1, at 25, 28-29, & ¶¶ 60-61, 63-65, 79, 81. It just improperly "disputes" its own discovery responses and its parents' public statements. *Supra* ¶¶ 24-27 & Arg. § I; Pl. Opp. to Mot. to Strike, ECF No. 207, at 12-14.

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implausible, and contrary to the Act, which gives citizens "very broad opportunities to participate in the effort to prevent and abate air pollution." *Pound v. Airosol Co.*, 498 F.3d 1089, 1097 (10th Cir. 2007), and empowers them to enforce the same limits and penalty provisions as EPA. 42 U.S.C. § 7604(a). That citizens sued IPRG is irrelevant to the remedy determination.

[10] *See In re Oil Spill*, 148 F. Supp. 3d 563, 575, 579, 585 (E.D. La. 2015) (applying test without referring to choice to conduct a top-down analysis); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 868 (S.D. Miss. 1998) (same); *Riverkeeper, Inc. v. Brooklyn Ready Mix Concrete, LLC*, No. 14-CV-1055, 2016 WL 4384716, at *9 (E.D.N.Y. Aug. 16, 2016) (same).

IPRG asserts that its parents' assets are "not relevant" to whether it qualifies for a penalty reduction based on economic impact, Opp. 70-72, but does not genuinely dispute the facts sufficient to show that this Court can and should consider its parents.[11] *Supra* ¶¶ 24-27 & Arg. § I; Pl. Br., ECF No. 184-1, at 25-28. IPRG cannot deny that—like the parent whose finances were considered in *Union Township*—its current and former ultimate parents, Vistra and Dynegy, have played a role in its illegal pollution and "actions that could have resolved it." 150 F.3d at 269. IPRG has filed a declaration claiming that an order to install new pollution controls at Edwards will "trigger a decision by Vistra's senior management, and ultimately Vistra's Board of Directors, to move forward with [closure]." *Supra* ¶ 27. According to IPRG, Vistra has the final say over how long to continue operating and whether to invest in new controls at Edwards.

Because IPRG's parents' existence and resources bear on the economic implications of ordering IPRG to pay penalties, the Court should consider them. *See also, e.g.*, *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166 (D.N.J. 1989) (rejecting defendant's claim that it was in a "relatively poor economic position," in part, because its ultimate parent was a publicly

[11] IPRG cites *Bestfoods* but does not argue that this Court needs to pierce any corporate veils to consider its parents' resources in an economic-impact assessment. "[C]onsideration of a parent's financial condition in assessing a penalty on a subsidiary is a far cry from piercing the corporate veil and holding the parent liable for the actions of its subsidiary." *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 268 (3d. Cir. 1998). EPA's Environmental Appeals Board has similarly recognized that it is unnecessary to include corporate relatives as liable parties in order to consider their assets when determining a defendant's ability to pay. *In re Carroll Oil Co.*, 10 E.A.D. 635, 2002 WL 1773052, at *27 (EAB 2002).

None of the decisions IPRG cites holds that a parent finances are relevant only if the parent could be held liable. One addresses the issue in a footnote that acknowledges other courts have considered parent finances without veil piercing. *United States v. Dico*, 4 F. Supp. 3d 1047, 1065 n.43 (S.D. Iowa 2014). The others, from district courts in the Third Circuit, concern punitive damages for fraud, contract breach, and negligence. To the extent they have any bearing on penalty determinations under strict-liability laws, they do not square with *Union Township*. *See St. Croix Renaissance Grp. v. St. Croix Alumina, LLC*, Civ. No. 04-67, 2010 WL 4723897, at *2 (D.V.I. Nov. 18, 2010); *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1276 (D.V.I. 1974).

traded corporation), *rev'd in part on other grounds*, 913 F.2d 64 (3d Cir. 1990). Considering parents' resources when assessing the impacts of penalizing liable subsidiaries ensures that the public is not deprived of the normal penalties unless those prove truly impossible to fund. It also helps deter future violations, by encouraging parents to ensure that present and prospective future subsidiaries are not cutting corners on environmental compliance.

VI. IPRG has violated the Clean Air Act at least 2,205 times in the post-liability period[12]

A. IPRG's interpretation of the 8-minute rule contravenes its text and purpose, and even IPRG's interpretation shows 1,355 post-liability violations

IPRG's objection to Plaintiffs' use of rolling hours and days, Opp. 76, contravenes the plain text of the 8-minute rule, which refers to "*any* 60 minute period" and "*any* 24 hour period." 35 Ill. Admin. Code § 212.123(b) (emphasis added); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 673 n.2 (7th Cir. 2008) (the rule "allow[s] emissions for greater than 30 percent for 8 minutes in any 60-minute period, provided that this occurs no more than three times in any 24-hour period"). IPRG's reading of the rule to exclude many more than three exceedances per day, *supra* ¶ 35, does not square with its text or IPRG's own expert's and staff's interpretations. This reading and the others IPRG urges would convert the rule into a license to pollute, contrary to the Clean Air Act's purposes. *See* Opp. 75-76; 42 U.S.C. § 7401(b)(1).[13]

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[12] IPRG's most recent violations are not the only ones that matter to injunctive relief, *contra* Opp. 73. The full history is evidence of the inadequacy of Edwards' pollution controls, and of harm that injunctive relief may help mitigate. *See* Opp. to IPRG Summ. J. Mot., ECF. No. 198, at 41-45, 48-52, 56 n.9, 62.

[13] For example, if plant owners knew the first minutes in any hour or first three six-minute exceedances in a day would be excused no matter how much longer their opacity stayed above 30%, Opp. 76, they would be less motivated to get opacity back under 30% threshold immediately, and more likely to treat the earliest exceedances as inconsequential.

With respect to IPRG's complaint that Plaintiffs "allow no more than 6 minutes in a 60-minute period to be excluded" under the rule's reference to "a period or periods aggregating 8 minutes," Opp. 75, IPRG's opacity limit is stated as a 6-minute average, Liability Order, ECF No. 124, at 4, and IPRG's quarterly excess emissions reports to Illinois EPA present 6-minute average opacity data. *See* Ex. B to Pl. Br., ECF No. 184-5 (sample reports). IPRG's

Even under IPRG's erroneous interpretation of the 8-minute rule, it has violated the Clean Air Act least 1,355 times in the post-liability period. *Supra* ¶ 35 & Ex. HS.

B. The violation count properly includes so-called "malfunction" exceedances IPRG did not report and its expert did not attribute to malfunctions

IPRG's assertion that many of the post-liability violations Plaintiffs moved for summary judgment on "meet the definitions of malfunction or breakdown," Opp. 73, ignores that Plaintiffs already omitted all exceedances IPRG's expert identified as attributable to malfunction or breakdown and for which there is evidence that IPRG made a 5c notification. *Supra* ¶ 38. IPRG cannot change its expert's testimony after the dispositive-motion deadline to try to exclude yet more exceedances. *Supra* ¶¶ 7, 38 (citing *Ameritech*, 410 F.3d at 963, and *Rowe,* 586 F. Supp. 2d at 933-36). IPRG's claim that "malfunction or breakdown" events should be excluded "regardless of whether they were reported" under 5c contravenes the liability order, *see* ECF No. 124, at 46, and if credited would encourage others to do what IPRG is trying to do here: erase violations by recharacterizing as "malfunctions" exceedances never timely reported as such.

C. Plaintiffs based their count on the methods they described, and have adjusted it to resolve the few errors and inconsistencies IPRG found

Plaintiffs have revised the post-liability violation list on which they seek summary judgment to address the few true errors and inconsistencies IPRG identified. *See supra* ¶¶ 37-38 & Pl. Revised Ex. U. They request a declaration that IPRG has violated the Clean Air Act at least 2,205 times since the liability period, including at least 131 times this year. *Supra* ¶¶ 37-38.

Respectfully submitted October 5, 2018,

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interpretation requires reference to one-minute average opacity data IPRG does not report, *id*., and if credited would undermine the principle that violations should be identifiable based on polluters' public monitoring reports. *See* 40 C.F.R. § 51.211 (state implementation plans must "provide for legally enforceable procedures requiring [source and operators to] periodically report (a) Information on the amount and nature of emissions; and (b) Other information as may be necessary to enable the State to determine whether the sources are in compliance.").

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I caused the following to be served on all parties' counsel via the Court's CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT ON REMEDY

EXHIBITS GA THROUGH GG
(EXHIBITS HA THROUGH HS BEING FILED UNDER SEAL)

MOTION FOR LEAVE TO FILE UNDER SEAL

DECLARATION OF IAN FISHER

s/ Selena Kyle
Selena Kyle