

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION

UNITED STATES OF AMERICA )  
 )  
 Plaintiff, )  
 )  
 and )  
 )  
 COMMONWEALTH OF KENTUCKY )  
 ENVIRONMENTAL AND PUBLIC )  
 PROTECTION CABINET )  
 v. )  
 )  
 EAST KENTUCKY POWER )  
 COOPERATIVE, INC., )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil Action No. 06-cv-00211-JMH

CONSENT DECREE

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WHEREAS, the United States of America (“the United States”), on behalf of the United States Environmental Protection Agency (“EPA”), filed a Complaint on June 30, 2006, against East Kentucky Power Cooperative, Inc. (“EKPC”) pursuant to Sections 113(b) and 414 of the Clean Air Act (“Act”), 42 U.S.C. §§ 7413(b) and 7651m, for injunctive relief and civil penalties for alleged violations of the Acid Rain provisions of the Act, 42 U.S.C. §§ 7651 through 7651o (Title IV-A); Section 502(a) of the Act, 52 U.S.C. § 7661a(a) (Title V); and the provisions governing Nitrogen Oxide (“NO<sub>x</sub>”) Requirements for Large Utility and Industrial Boilers of the State Implementation Plan (401 KAR 51:160);

WHEREAS, the Commonwealth of Kentucky, by and through the Environmental and Public Protection Cabinet (hereinafter the “Cabinet”), filed a Complaint in intervention on June 30, 2006, against EKPC pursuant to KRS 224.99-010, 224.99-020 for injunctive relief and civil penalties for alleged violations of the regulations promulgated under KRS 224.10-100(5), including the Kentucky Title V operating permit program (401 KAR 52:020 and all relevant prior versions) and the provisions governing Nitrogen Oxide (“NO<sub>x</sub>”) Requirements for Large Utility and Industrial Boilers of the State Implementation Plan (401 KAR 51:160);

WHEREAS, in their Complaints, the United States and the Cabinet (collectively “Plaintiffs”) allege, *inter alia*, that in 1998, EKPC replaced two existing 22 megawatt (“MW”) generators at its Dale Plant in Ford, Clark County, Kentucky, with larger 27 MW generators without participating in mandatory emissions reduction programs, which include the Acid Rain Program (for sulfur dioxide (“SO<sub>2</sub>”) and NO<sub>x</sub>) and the Kentucky NO<sub>x</sub> SIP Call program (for ozone season NO<sub>x</sub>), for units that serve a generator with a nameplate capacity of greater than 25 MW;

WHEREAS, in their Complaints, Plaintiffs further allege, *inter alia*, that Dale Unit 1 and

Dale Unit 2 are “affected units” and that the Dale Plant is an “affected source,” within the meaning of Title IV-A of the Act; that the Dale Plant was a “major source” within the meaning of Title V of the Act and the Kentucky Title V program regulations; and that Dale Unit 1 and Dale Unit 2 are “electric generating units” or, alternatively, “industrial boilers” under the Kentucky NO<sub>x</sub> SIP Call program;

WHEREAS, EPA provided EKPC and the Cabinet with notices of violations (“NOVs”) pertaining to EKPC’s alleged violations, in accordance with Section 113(a)(1) and (b) of the Act, 42 U.S.C. § 7413(a)(1) and (b);

WHEREAS, the Complaints allege claims upon which relief can be granted against EKPC under Sections 113 and 414 of the Act, 42 U.S.C. §§ 7413 and 7651m, and 28 U.S.C. § 1355, and under KRS 224.99-010 and 224.99-020;

WHEREAS, EKPC, a rural electric cooperative based in Winchester, Kentucky, has answered the Complaints filed by the United States and the Cabinet;

WHEREAS, EKPC has denied and continues to deny the violations alleged in the NOVs and the Complaints; maintains that it has been and remains in compliance with the Act and is not liable for civil penalties or injunctive relief; and states that it is agreeing to the obligations imposed by this Decree solely to avoid the costs and uncertainties of litigation;

WHEREAS, EKPC has demonstrated a limited ability to pay the civil penalties associated with the alleged violations; and

WHEREAS, the Parties have agreed, and the Court by entering this Consent Decree finds: that this Consent Decree has been negotiated in good faith and at arms length; that this settlement is fair, reasonable, consistent with the goals of the Act, in the best interest of the

Parties and in the public interest; and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, without any admission of fact or law, and without any admission of the violations alleged in the Complaints, notices of violations and otherwise, and with the consent of the Parties; it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over this action, the subject matter herein, and the Parties consenting hereto, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 113 and 414 of the Act, 42 U.S.C. §§ 7413, 7651m. Venue is proper under Section 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b) and (c), and 1395(a) because the violations are alleged to have occurred and to be occurring in this district and the facilities at issue are operated by EKPC in this district. Solely for the purposes of this Consent Decree, or any action to enforce this Decree, EKPC waives all objections and defenses that it may have to the Court's jurisdiction over this action, to the Court's jurisdiction over EKPC, and to venue in this District. EKPC shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. For purposes of the Complaints filed and resolved by the Consent Decree, and for purposes of entry and enforcement of this Consent Decree, EKPC waives any defense or objection based on standing. For purposes of this Consent Decree, EKPC further agrees that the Complaints state claims upon which relief may be granted.

### **II. APPLICABILITY**

2. Upon entry, the provisions of this Consent Decree apply to and are binding upon Plaintiffs and EKPC, its successors and assigns, and EKPC's officers, employees and agents, solely in their capacities as such.

3. EKPC shall provide a copy of this Consent Decree to all officers, employees and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any vendors, suppliers, consultants, contractors, agents and any other company or other organization retained to perform any of the work required by this Consent Decree. EKPC shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

4. Notwithstanding any retention of contractors, subcontractors, or agents to perform any work required under this Consent Decree, EKPC shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Decree. In any action to enforce this Consent Decree, EKPC shall not assert as a defense the failure of its officers, directors, employees, agents, or contractors to take actions necessary to comply with this Consent Decree, unless EKPC establishes that such failure resulted from a Force Majeure Event, as defined in Paragraph 42 of this Consent Decree.

### **III. OBJECTIVES**

5. All obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing EKPC to achieve and maintain full compliance with the Acid Rain provisions of the Clean Air Act and the regulations promulgated thereunder, the Kentucky NO<sub>x</sub> SIP Call regulations, and the terms and conditions of EKPC's current operating permits.

#### IV. DEFINITIONS

6. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

“Affected Source” shall have the same definition as that provided in Section 402(1) of the Act, 42 U.S.C. 7651a(1);

“Affected Unit” shall have the same definition as that provided in Section 402(2) of the Act, 42 U.S.C. 7651a(2);

“Annual Average Emission Rate” shall mean 0.46 lbs/mmBtu of NO<sub>x</sub> for each calendar year beginning January 1, 2008.

“Audited Net Margin” means, for any fiscal year, an amount constituting the actual net margins of EKPC and its subsidiaries, determined without duplication on a consolidated basis in accordance with Generally Accepted Accounting Principles (“GAAP”) and Rural Utilities Service (“RUS”) accounting requirements set forth in 7 C.F.R. Part 1767, and reported by EKPC on RUS Form 12a.

“Cabinet” shall mean the Commonwealth of Kentucky Environmental and Public Protection Cabinet.

“CEMS” or “Continuous Emission Monitoring System” means, for obligations involving NO<sub>x</sub> and SO<sub>2</sub> under this Consent Decree, the devices defined in 40 C.F.R. § 72.2 and installed, operated, and maintained as required by 40 C.F.R. Part 75.

“Clean Air Act” or “Act” means the federal Clean Air Act, 42 U.S.C. §§7401-7671q, and

its implementing regulations.

“Commonwealth” shall mean the Commonwealth of Kentucky.

“Complaints” shall mean the complaints filed by the United States and the Cabinet in this action.

“Consent Decree” or “Decree” means this Consent Decree and any appendices attached hereto.

“Cooper Plant” means the John Sherman Cooper Power Station located near Somerset, KY, consisting of the following coal-fired Units: Unit 1 (124 MW) (“Cooper Unit 1”) and Unit 2 (240 MW) (“Cooper Unit 2”).

“Dale Plant” means the William C. Dale Power Station, located near Winchester, Kentucky.

“Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business the next business day.

“Debt Service Coverage Ratio” and “DSC Ratio” shall mean the ratio determined as follows: for each calendar year the total of (I) Net Margins of EKPC, (ii) Interest on Long-Term Debt of EKPC provided, however, that in computing Interest on Long-Term Debt, there shall be added to the extent not otherwise included, an amount equal to 33-1/3% of the rentals of Restricted Property under Long-Term Leases paid by EKPC, in excess of 2% of the net of EKPC’s Total Margins and Equities less Regulatory Assets, and (iii) Depreciation and Amortization Expense of EKPC, and dividing the total so obtained by an amount equal to the sum of all payments of principal and interest required to be made on account of Total Long-Term

Debt during such calendar year; provided, however, that in computing this sum, there shall be added to interest expenses, to the extent not otherwise included, an amount equal to 33-1/3% of the rentals of Restricted Property under Long-Term Leases paid by EKPC, in excess of 2% of the net of EKPC's Total Margins and Equities less Regulatory Assets. Principal repayments on EKPC's \$650 million unsecured revolving credit agreement, presently scheduled through 2010, and any such modified or replacement credit facility, shall not be used for purposes of calculation of the DSC Ratio.

"Depreciation and Amortization Expense" means an amount constituting the depreciation and Amortization expense of EKPC and its subsidiaries, determined without duplication on a consolidated basis in accordance with GAAP and RUS accounting requirements.

"Effective Date" shall have the definition provided in Section XVI of this Consent Decree.

"EKPC" shall mean East Kentucky Power Cooperative, Inc.

"Emission Rate" means the number of pounds of pollutant emitted per million Btu of heat input ("lbs/mmBtu") measured in accordance with this Consent Decree.

"EPA" means the United States Environmental Protection Agency and any of its successor departments or agencies.

"Fiscal Year" means EKPC's fiscal year, which is the twelve-month period beginning on January 1 and ending on December 31 of each calendar year.

"Generally Accepted Accounting Principles" or "GAAP" means the common set of accounting principles, standards and procedures that define accepted accounting practice used by companies in the United States to compile audited financial statements.

"Generator" shall have the same definition as that provided in Section 402(9) of the Act,

42 U.S.C. 7651a(9).

“Interest Expense” shall mean an amount constituting the interest expense of EKPC determined in accordance with RUS accounting requirements and reported by EKPC on RUS Form 12a.

“Interest on Long-Term Debt” shall mean an amount constituting the Interest Expense on Long-Term Debt.

“lb/mmBtu” means one pound of a pollutant per million British thermal units of heat input.

“Long-Term Leases” means leases having unexpired terms (taking into account terms of renewal at the option of the lessor, whether or not such leases have been renewed) of more than 12 months.

“Low NO<sub>x</sub> Burner” and “Low NO<sub>x</sub> Burner Technology” shall have the same definition as that provided in 40 C.F.R. § 76.2.

“MW” means a megawatt or one million Watts.

“Net Margin” shall mean, for any period, an amount constituting the net margins of EKPC and its subsidiaries, determined without duplication, on a consolidated basis in accordance with GAAP and RUS accounting requirements.

“NO<sub>x</sub>” means oxides of nitrogen, measured in accordance with the provisions of this Consent Decree.

“NO<sub>x</sub> Allowance” shall mean an authorization allocated to an affected unit by the Administrator under the NO<sub>x</sub> Budget Trading Program to emit, during or after a specified calendar year, one ton of nitrogen oxides.

“Ownership Interest” means all or part of EKPC’s legal or equitable interest in Dale Unit

1 or 2.

“Paragraph” shall mean a portion of this Decree identified by an arabic numeral.

“Parties” means the United States, the Cabinet, and EKPC, and “Party” means any one of the named “Parties.”

“Plaintiffs” mean the United States of America and Commonwealth of Kentucky.

“Regulatory Assets” means the sum of any amounts properly recordable as unrecovered plant and regulatory study costs or as other regulatory assets determined in accordance with Kentucky Public Service Commission authorization and accounting requirements and reported by EKPC on RUS Form 12a.

“Restricted Property” means all properties of EKPC other than automobiles, trucks, trailers, tractors, other vehicles (including, without limitation, aircraft, railcars, towboats, tugboats, barges, vessels, and ships), office, garage and warehouse space and office equipment (including, without limitation, computers).

“Rural Utilities Service” or “RUS” means an agency of the U.S. Department of Agriculture.

“Section” shall mean a portion of this Decree identified by a roman numeral.

“SO<sub>2</sub>” means sulfur dioxide, measured in accordance with the provisions of this Consent Decree.

“SO<sub>2</sub> Allowance” shall mean an authorization allocated to an affected unit by the Administrator under Title IV-A of the Act to emit, during or after a specified calendar year, one ton of sulfur dioxide.

“Times Interest Earned Ratio” and “TIER” shall mean the ratio determined as follows: for each calendar year the total of (I) Net Margins of EKPC, and (ii) Interest on Long-Term Debt of

EKPC, divided by the total so obtained by Interest on Long-Term Debt of EKPC; provided, however, that in computing Interest on Long-Term Debt, there shall be added to the extent not otherwise included, an amount equal to 33-1/3% of the rentals of Restricted Property under Long-Term Leases paid by EKPC, in excess of 2% of the net of EKPC's Total Margins and Equities less Regulatory Assets.

“Title V Permit” means the permit required of EKPC's Dale Plant under Subchapter V of the Act, 42 U.S.C. §§ 7661-7661e.

“Total Long-Term Debt” means an amount constituting the total long-term debt of EKPC determined in accordance with accounting requirements and reported by EKPC on RUS Form 12a.

“Total Margins and Equities” means an amount constituting the total margins and equities of EKPC determined in accordance with RUS and GAAP accounting requirements and reported by EKPC on RUS Form 12a.

“Unit” means, solely for the purposes of this Consent Decree, collectively, the coal pulverizer, stationary equipment that feeds coal to the boiler, the boiler that produces steam for the steam turbine, the steam turbine, the generator, the equipment necessary to operate the generator, steam turbine and boiler, and all ancillary equipment, including pollution control equipment and systems necessary for the production of electricity.

“United States” shall mean the United States of America, acting on behalf of EPA.

## V. CIVIL PENALTY

7. **Fixed Penalty Payment.** EKPC shall make six annual payments of \$1,900,000.00 (“Fixed Penalty Payment”), totaling \$11,400,000.00, as follows:

- a. Within 30 Days of the Effective Date of this Consent Decree, EKPC shall pay as a civil penalty the sum of \$1,900,000.00 to the United States.
- b. Beginning one year from the date on which EKPC is required to make the payment in the preceding subparagraph (a), and annually thereafter, EKPC shall make five additional Fixed Penalty Payments of \$1,900,000.00 each to the United States.

8. **Contingent Penalty Payment.** In addition to the Fixed Penalty Payments described in Paragraph 7, and subject to the limits set forth in this Paragraph, EKPC shall pay an additional sum to the United States as a civil penalty, for a period of five years, based on audited financial statements for the years 2008 through 2012 (each a “Contingent Penalty Payment”). The amount of these Contingent Penalty Payments shall be the sum of the Level A and Level B Penalty Payments, and shall be calculated as follows:

- a. **Level A Penalty Payment.** In each year that EKPC achieves a TIER exceeding 1.10, EKPC shall pay to the United States, in addition to the Fixed Penalty Payment, 14.0 percent of the difference between the actual Audited Net Margin, or the Net Margin required to achieve a TIER of 1.20, whichever is less, and the Net Margin required to achieve a 1.10 TIER.
- b. **Level B Penalty Payment.** In each year that EKPC achieves a TIER exceeding 1.20, EKPC shall pay to the United States, in addition to the

Fixed Penalty Payment and the Level A Payment, 20.0 percent of the difference between the actual Audited Net Margin and the Net Margin required to achieve a 1.20 TIER.

- c. **Contingent Penalty Due Dates.** Contingent Penalty Payments shall be made on or before April 15 of each year, beginning April 15, 2009, and continuing until April 15, 2013.

A sample calculation of the Contingent Penalty Payment using the formula above is provided in Appendix A. In the event that in any given Fiscal Year EKPC does not achieve a TIER exceeding 1.10 or if its DSC is below 1.00, EKPC will have no Contingent Penalty Payment obligation for that year, but will remain obligated to pay the Fixed Penalty described above in Paragraph 7. If payment of a Contingent Penalty Payment in a given year would cause EKPC's DSC Ratio to fall below 1.00, the Contingent Penalty Payment calculated in accordance with this Paragraph shall be reduced by the amount necessary to allow EKPC to achieve a DSC Ratio of 1.00. Any such Contingent Penalty Payment reduction in a year required to obtain a DSC Ratio of 1.00 shall not reduce, eliminate or affect, in any way, either the Fixed Penalty Payment in Paragraph 7, or the Contingent Penalty Payment obligation in any other year. EKPC shall not schedule the retirement of Long-Term Debt or take any other action predominantly for the purpose of achieving a DSC Ratio below 1.00 to avoid a Contingent Penalty Payment in a given year.

9. The total Contingent Penalty Payment annually or cumulatively is not limited in any manner, and EKPC agrees that the forbearance evidenced in this agreement is adequate consideration for this commitment. Any net accounting expense associated with the Fixed Penalty Payment described above in Paragraph 7 shall not be taken into account for purposes of

calculating the first or any subsequent Contingent Penalty Payment under Paragraph 8. Specifically, any payment or payment obligation associated with the Fixed Penalty Payment in Paragraph 7 shall not reduce the actual Net Margin used for purposes of calculating the Contingent Penalty Payment in Paragraph 8. If the audited financial statement includes a reduction to the Net Margin for the Fixed Penalty Payment, then that reduction must be added back to the actual Net Margin for the Contingent Penalty Payment calculation.

10. EKPC shall annually submit to the Plaintiffs by April 15 of each year (or as soon as possible thereafter if not available by April 15) copies of its audited financial statements and all documentation supporting the proposed calculation of the Contingent Penalty Payment required by this Paragraph. Failure of the United States to object to any proposed calculation shall not prejudice the rights of the United States to challenge the amount calculated by EKPC and to seek additional payment. Upon request, EKPC shall provide additional financial information to allow the United States to verify the propriety of any penalty calculation.

11. All civil penalty payments shall be paid by Electronic Funds Transfer (“EFT”) to the United States Department of Justice, in accordance with current EFT procedures, referencing USAO File Number \_\_\_\_\_ and DOJ Case Number 90-5-2-1-08835 and the civil action case name and case number of this action. The costs of such EFT shall be EKPC’s responsibility. Payment shall be made in accordance with instructions provided to EKPC by the Financial Litigation Unit of the U.S. Attorney’s Office for the Eastern District of Kentucky, Lexington Division. Any funds received after 2:00 p.m. EDT shall be credited on the next business day. At the time of payment, EKPC shall provide notice of payment, referencing the USAO File Number, the DOJ Case Number, and the civil action case name and case number, to DOJ and to EPA in accordance with Section XIV (Notices) of this Consent Decree.

12. Failure to timely pay the civil penalty shall subject EKPC to interest accruing from the date payment is due until the date payment is made at the rate prescribed by 28 U.S.C. § 1961, and shall render EKPC liable for all charges, costs, fees, and penalties established by law for the benefit of a creditor or of the United States in securing payment.

13. EKPC shall not deduct any penalties paid under this Decree pursuant to this Section or to Section VIII (Stipulated Penalties) in calculating any tax owed to the federal, state, or local governments.

## VI. COMPLIANCE REQUIREMENTS

14. EKPC shall, with respect to Dale Units 1 and 2, comply with the requirements of program participation set forth in Title IV-A of the Act, 42 U.S.C. §§ 7651 through 7651o; Section 502(a) of the Act, 52 U.S.C. § 7661a(a); the Nitrogen Oxide (“NO<sub>x</sub>”) Requirements for Large Utility and Industrial Boilers of the State Implementation Plan (401 KAR 51:160) adopted by the Commonwealth of Kentucky and approved by EPA pursuant to Sections 502 and 110 of the Act, 42 U.S.C. §§ 7661a, 7410; and all regulations promulgated thereunder. In addition, EKPC shall comply with each of the following requirements set forth in this Section.

15. **Installation and Operation of Low NO<sub>x</sub> Burner Technology.** No later than October 31, 2007, EKPC shall install Low NO<sub>x</sub> Burners on Dale Units 1 and 2. Upon installation, EKPC shall operate the Low NO<sub>x</sub> Burner Technology whenever Dale Units 1 and 2 are in operation.

16. **NO<sub>x</sub> Emission Limitations.** No later than January 1, 2008, EKPC shall achieve and thereafter maintain at Dale Units 1 and 2 an Annual Average Emission Rate of 0.46 lbs/mmBtu of NO<sub>x</sub>, as required by 40 C.F.R. § 76.7. EKPC must meet this performance standard to the number of significant digits in which the standard is expressed. EKPC shall round the

third significant digit to the nearest second significant digit. For example, if an actual Emission Rate is 0.464, that shall be reported as 0.46, and shall be in compliance with an Emission Rate of 0.46, and if an actual Emission Rate is 0.465, that shall be reported as 0.47, and shall not be in compliance with an Emission Rate of 0.46.

17. **Acid Rain NO<sub>x</sub> Excess Emissions Mitigation.** As mitigation for EKPC's excess emissions of NO<sub>x</sub> during the period that it operated Dale Units 1 and 2 without Low NO<sub>x</sub> Burner Technology, EKPC shall, within thirty (30) Days of the Effective Date of this Consent Decree, surrender to EPA 1,000 NO<sub>x</sub> Allowances. EKPC shall submit a NO<sub>x</sub> Allowance transfer request form to EPA directing the transfer of such NO<sub>x</sub> Allowances to the EPA NO<sub>x</sub> Budget Program Enforcement Account Number OTC000000306, or to any other EPA account that EPA may direct in writing. In its transfer request, EKPC shall irrevocably authorize the transfer of the NO<sub>x</sub> Allowances and identify – by name of account and any applicable serial or other identification numbers or station names – the source and location of the NO<sub>x</sub> Allowances being surrendered. For purposes of this Paragraph, “surrender of allowances” means permanently surrendering allowances from the accounts administered by EPA for all of EKPC's Units, so that such allowances can never be used to meet any compliance requirement under the Clean Air Act or the Kentucky NO<sub>x</sub> Budget Trading Program (401 KAR 51:160).

18. **Surrender of NO<sub>x</sub> Allowances In Satisfaction of NO<sub>x</sub> SIP Call Obligations.** Within thirty (30) Days of the Effective Date of this Consent Decree, EKPC shall surrender to EPA 3,107 NO<sub>x</sub> Allowances in satisfaction of its obligations under 401 KAR 51:160. EKPC shall submit a NO<sub>x</sub> Allowance transfer request form to EPA directing the transfer of such NO<sub>x</sub> Allowances to the EPA NO<sub>x</sub> Budget Program Enforcement Account Number OTC000000306, or to any other EPA account that EPA may direct in writing. In its transfer request, EKPC shall

irrevocably authorize the transfer of the NO<sub>x</sub> Allowances and identify – by name of account and any applicable serial or other identification numbers or station names – the source and location of the NO<sub>x</sub> Allowances being surrendered. For purposes of this Paragraph, “surrender of allowances” means permanently surrendering allowances from the accounts administered by EPA for all of EKPC’s Units, so that such allowances can never be used to meet any compliance requirement under the Clean Air Act or the Kentucky NO<sub>x</sub> Budget Trading Program (401 KAR 51:160).

19. **Surrender of SO<sub>2</sub> Allowances.** Within thirty (30) Days of the Effective Date of this Consent Decree, EKPC shall surrender to EPA 15,311 SO<sub>2</sub> Allowances. EKPC shall submit an SO<sub>2</sub> Allowance transfer request form to EPA directing the transfer of such SO<sub>2</sub> Allowances to the EPA Enforcement Surrender Account Number 000000000043, or to any other EPA account that EPA may direct in writing. In its transfer request, EKPC shall irrevocably authorize the transfer of the SO<sub>2</sub> Allowances and identify – by name of account and any applicable serial or other identification numbers or station names – the source and location of the SO<sub>2</sub> Allowances being surrendered. For purposes of this Section, the “surrender of allowances” means permanently surrendering allowances from the accounts administered by EPA for all of EKPC’s Units, so that such allowances can never be used to meet any compliance requirement under the Clean Air Act.

20. Within one-hundred and eighty (180) Days of the Effective Date of this Consent Decree, EKPC shall apply for amendments of its Title V permit for Dale Units 1 and 2 to include a schedule for all Unit-specific performance, operational, maintenance, and control technology requirements established by this Consent Decree including, but not limited to, Emission Rates, the requirement in Paragraphs 17 and 18 pertaining to the surrender of NO<sub>x</sub> Allowances and the

requirement in Paragraph 18 pertaining to the surrender of SO<sub>2</sub> Allowances.

21. EKPC has applied for an Acid Rain permit in accordance with 40 C.F.R. Parts 72 and 76, and a NO<sub>x</sub> Budget Trading Program permit under the Kentucky SIP. EKPC shall comply at all times with any permits issued by EPA and the Cabinet pursuant to such regulations.

22. Where any compliance obligation under this Section requires EKPC to obtain a federal, state, or local permit or approval, EKPC shall submit timely and complete applications and take all other actions necessary to obtain all such permits and approvals. EKPC may seek relief under the provisions of Section IX of this Consent Decree (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, only if EKPC has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

23. Notwithstanding the reference to Title V or other federally enforceable permits in this Consent Decree, the enforcement of such permits shall be in accordance with their own terms and the Act. The Title V or other federally enforceable permits shall not be enforceable under this Consent Decree, although any term or limit established by or under this Consent Decree shall be enforceable under this Consent Decree regardless of whether such term has or will become part of a Title V or other federally enforceable permit, subject to the terms of Section XIX (Termination) of this Consent Decree.

24. EKPC shall provide a copy of any permit proposed as a result of any permit application identified in this Consent Decree pursuant to the requirements of Section XIV (Notices).

25. **Monitoring, Recordkeeping and Reporting Requirements.** EKPC has

installed and has completed certification of CEMS at Dale Units 1 and 2. As of the Effective Date of this Consent Decree, EKPC shall continuously operate such CEMS at Dale Units 1 and 2 whenever such Units are in operation. Operation and maintenance of such CEMS, and the recording and reporting of data generated by such CEMS, shall be in accordance with 40 C.F.R. Part 75.

## **VII. REPORTING OBLIGATIONS**

26. EKPC shall submit the following reports:

a. On or before April 15 of each year after lodging of this Consent Decree, until termination of this Consent Decree pursuant to Section XIX, EKPC shall submit a report for the preceding year that shall include all information necessary to determine compliance with this Consent Decree, including but not limited to information regarding payment of civil penalties pursuant to Section V of this Consent Decree (Civil Penalty); the status of EKPC's execution of its obligations under Section VI of this Consent Decree (Compliance Requirements); any problems encountered or anticipated, together with implemented or proposed solutions; any information indicating that the installation and commencement of operation of a pollution control device may be delayed, including the nature and cause of the delay, and any steps taken by EKPC to mitigate such delay; the status of permit applications; and the operation and maintenance of Low NO<sub>x</sub> Burners and CEMS at Dale Units 1 and 2.

b. EKPC shall provide a written report to EPA of any non-compliance with the requirements of this Consent Decree, including exceedances of the Annual Average Emission Rate within ten (10) Days of when EKPC knew or should have known of any such violation. EKPC shall explain the likely cause or causes of the violation and all measures taken or to be taken by EKPC to prevent or minimize such violations in the future. If the violation can not be

fully explained at the time the report is due, EKPC shall so state in the report. EKPC shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) Days of the date EKPC becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves EKPC of its obligation to provide the notice required by Section IX of this Consent Decree (Force Majeure).

27. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).

28. Each report shall be signed by EKPC's Environmental Manager, or, in his or her absence, the Vice President for Generation and Transmission Operations, or higher ranking official, and shall contain the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluate the information submitted. Based on my evaluation or direction and my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

29. The reporting requirements of this Consent Decree do not relieve EKPC of any reporting obligations required by the Act, the Kentucky SIP, or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

30. Any information provided pursuant to this Consent Decree may be used by the United States and the Commonwealth in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

31. In any report submitted pursuant to this Section, EKPC may incorporate by

reference information previously submitted under its Title V permitting requirements, provided that EKPC attaches the Title V permit report and provides a specific reference to the provisions of the Title V permit report that are responsive to the information required in the report submitted pursuant to this Section.

**VIII. STIPULATED PENALTIES**

32. EKPC shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure), and subject to the provisions of Section X (Dispute Resolution). A violation includes failing to perform any obligation of this Consent Decree according to all applicable requirements of this Consent Decree and within the specified time schedules established by or approved under this Consent Decree. EKPC shall pay, within thirty (30) Days after receipt of written demand by the United States, the following stipulated penalties to the United States:

<b>Consent Decree Violation</b>	<b>Stipulated Penalty (Per day per violation, unless otherwise specified)</b>
a. Failure to pay the civil penalty as specified in Section V (Civil Penalty) of this Consent Decree	\$10,000
b. Failure to comply with the applicable Annual Average Emission Rate for NO <sub>x</sub> , where the violation is less than 5% in excess of the limit set forth in this Consent Decree	\$10,000 per calendar year
c. Failure to comply with the applicable Annual Average Emission Rate for NO <sub>x</sub> , where the violation is equal to or greater than 5% but less than 10% in excess of the limit set forth in this Consent Decree	\$50,000 per calendar year
d. Failure to comply with the applicable Annual Average Emission Rate for NO <sub>x</sub> , where the violation is equal to or greater than 10% in excess of the limit set forth in this Consent Decree	\$250,000 per calendar year
e. Failure to install or commence operation of NO <sub>x</sub> pollution control devices on Dale Unit 1 or 2.	\$1,000 during the first 30 Days, \$5,000 thereafter

f. Failure to continue operation of NO <sub>x</sub> pollution control devices on Dale Unit 1 or 2.	\$1,000
g. Failure to take any action necessary to obtain a permit under 40 C.F.R. Part 72, Part 76, or the Kentucky NO <sub>x</sub> Budget Trading Program.	\$1,000
h. Failure to operate or maintain CEMS as required in Paragraph 25	\$500 for the first 5 Days in a calendar year, \$1,000 thereafter
i. Failure to timely submit, modify, or implement, as approved, any report, plan, study, analysis, protocol, or other submittal required by this Consent Decree	\$750 for the first 10 Days, \$1,000 thereafter
j. Failure to surrender NO <sub>x</sub> Allowances as required by Paragraphs 17 and 18	(a) \$32,500 plus (b) \$1,000 per NO <sub>x</sub> Allowance
k. Failure to surrender SO <sub>2</sub> Allowances as required by Paragraph 19	(a) \$32,500 plus (b) \$1,000 per SO <sub>2</sub> Allowance
l. Any other violation of this Consent Decree	\$1,000

33. All stipulated penalties shall begin to accrue on the Day after the performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases.

34. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

35. EKPC shall pay any stipulated penalty to the United States within thirty (30) Days of receipt of written demand to EKPC from the United States, and shall continue to make such payments every thirty (30) Days thereafter until the violation(s) no longer continues, unless EKPC elects within twenty (20) Days of receipt of written demand to EKPC from the United States to dispute the accrual of stipulated penalties in accordance with the provisions in Section X (Dispute Resolution) of this Consent Decree.

36. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree. In deciding whether to reduce or waive stipulated penalties, the United States may take into consideration, among other factors, the length of time EPA takes to decide any claim of Force Majeure made by EKPC.

37. Stipulated penalties shall continue to accrue as provided in accordance with Paragraph 33 during any Dispute Resolution, with interest on accrued stipulated penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement, or by a decision of EPA pursuant to Section X (Dispute Resolution) of this Consent Decree that is not appealed to the Court, EKPC shall pay accrued stipulated penalties agreed or determined to be owing, together with accrued interest, to the United States within thirty (30) Days of the effective date of the agreement or of the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and Plaintiffs prevail in whole or in part, EKPC shall pay all accrued stipulated penalties determined by the Court to be owing, together with accrued interest, within sixty (60) Days of receipt of the Court's decision or order, except as provided in Subparagraph c, below;

c. If any party appeals the District Court's decision, EKPC shall pay all accrued stipulated penalties determined to be owing, together with accrued interest, within fifteen (15) Days of receipt of the final appellate court decision.

38. EKPC shall pay stipulated penalties owing to the United States in the manner set

forth and with the confirmation notices required by Paragraph 11, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violations the penalties are being paid.

39. Should EKPC fail to pay stipulated penalties in compliance with the terms of this Consent Decree, EKPC shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for EKPC's failure to pay any stipulated penalties.

40. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for EKPC's violation of this Consent Decree or applicable law, except that the United States may not seek a penalty for a violation of the Consent Decree that, when combined with a stipulated penalty paid for the same violation, exceeds the maximum penalty provided under Section 113(b) of the Act, 42 U.S.C. § 7413(b), as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

41. Notwithstanding the provisions of this Section and Paragraph 12 of this Consent Decree, EKPC shall not be liable for a stipulated penalty for a failure to make all or part of a Contingent Penalty Payment required by Section V of this Consent Decree (Civil Penalty) if EKPC can demonstrate that its failure to pay was due to an error in the calculation of the Contingent Penalty Payment, and that its error was made in good faith, or that EKPC in good

faith disagrees with the United States' position regarding the calculation of a Contingent Penalty Payment. In that event, EKPC shall be liable solely for interest on the unpaid amount of the Contingent Penalty Payment, at a fixed rate of 8% per annum, accruing as of the date the Contingent Penalty Payment became due.

## **IX. FORCE MAJEURE**

42. For purposes of this Consent Decree, a "Force Majeure Event" shall mean an event arising from causes beyond the control of EKPC, of any entity controlled by EKPC, or of EKPC's contractors, that delays or prevents the performance of any obligation under this Consent Decree, or otherwise causes a violation of any provision of this Consent Decree, despite EKPC's best efforts to fulfill the obligation. The requirement that EKPC exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure Event and to address the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. EKPC's financial inability to perform any obligation under this Consent Decree shall not constitute a Force Majeure Event. Unanticipated or increased costs or expenses associated with the performance of EKPC's obligations under this Consent Decree shall not constitute a Force Majeure Event.

43. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure Event, EKPC shall notify the United States orally or by electronic or facsimile transmission to the Director of the Air Enforcement Division, U.S. Environmental Protection Agency and the Director of the Division of Air Quality, Kentucky Environment and Public Protection Cabinet, as quickly as possible, and within ten (10) Days of when EKPC first knew that the event might cause a delay.

Within seven (7) Days thereafter, EKPC shall provide in writing to EPA and the Cabinet an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay or the effect of the delay, and EKPC's rationale for attributing such delay to a Force Majeure Event if it intends to assert such a claim. EKPC shall include with any notice all available documentation supporting the claim that the delay was attributable to a Force Majeure Event. Failure to comply with the above requirements shall preclude EKPC from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. EKPC shall be deemed to know of any circumstance which EKPC, any entity controlled by EKPC, or EKPC's contractors knew or should have known.

44. If EPA agrees that the delay or anticipated delay is attributable to a Force Majeure Event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure Event will be extended by EPA for such time as is necessary to complete those obligations. An extension of time for performance of the obligations affected by the Force Majeure Event shall not, of itself, extend the time for performance of any other obligation. EPA will notify EKPC in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure Event..

45. If EPA does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure Event, EPA will notify EKPC in writing of its decision.

46. If EKPC elects to invoke Dispute Resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 Days after receipt of EPA's notice. In any

such proceeding, EKPC shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure Event. EKPC shall also bear the burden of proving that EKPC gave the notice required by this Section and the burden of proving the anticipated duration and extent of any delay(s) attributable to a Force Majeure Event. If EKPC carries this burden, the delay at issue shall be deemed not to be a violation of this Consent Decree.

## **X. DISPUTE RESOLUTION**

47. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures in this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. EKPC's failure to seek resolution of a dispute under this Section shall preclude EKPC from raising any such issue as a defense to an action by the United States to enforce any obligation of EKPC arising under this Consent Decree.

48. **Informal Dispute Resolution.** Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when EKPC sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not extend beyond thirty (30) Days from the date of the first meeting or conference call among the Parties, unless that period is modified by written agreement. If the Parties can not resolve a dispute by informal negotiation, then the position advanced by the United States shall be considered binding unless, within forty-five (45) Days after the conclusion of the 30-Day informal negotiation period, EKPC invokes formal dispute resolution procedures as set forth below. During the informal negotiations period, the disputing Parties may also submit their

dispute to a mutually-agreed-upon alternative dispute resolution (ADR) forum if the Parties agree that the ADR activities can be completed within the 30-Day informal negotiation period (or such longer period as the Parties may agree to in writing).

49. **Formal Dispute Resolution.** EKPC shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting EKPC's position and any supporting documentation relied upon by EKPC.

50. The United States shall serve its Statement of Position within forty-five (45) Days of receipt of the EKPC's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on EKPC, unless EKPC files a motion for judicial review of the dispute in accordance with the following Paragraph.

51. EKPC may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of EKPC's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly

implementation of the Consent Decree.

52. The United States shall respond to EKPC's motion within the time period allowed by the Local Rules of this Court. EKPC may file a reply memorandum, to the extent permitted by Local Rule.

53. This Court shall not draw any inferences nor establish any presumptions adverse to any Party as a result of EKPC's invocation of this Section or the Parties' inability to reach agreement.

54. **Standard of Review.** Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 51, EKPC shall bear the burden of demonstrating with clear and convincing evidence that its position complies with this Consent Decree and that it is entitled to relief under applicable principles of law. The United States reserves the right to argue that its position is reviewable only on an administrative record of the disputed issue assembled by EPA, and must be upheld unless arbitrary and capricious or otherwise not in accordance with law. The Parties agree that, in any dispute involving the calculation or payment of a Contingent Penalty Payment pursuant to Section V of this Consent Decree (Civil Penalty), the United States shall not argue that review must be on an administrative record, or that its position must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

55. Invocation of the Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of EKPC under this Consent Decree, unless and until final resolution of the dispute so provides. Except as otherwise provided in this Consent Decree, stipulated penalties with respect to the disputed matter shall continue to accrue

from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 37. If EKPC does not prevail on a disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

56. If EKPC prevails on a disputed issue, the Parties may agree, or this Court may order an extension or modification of the schedule for completion of the activities required under this Consent Decree to account for the delay that occurred as a result of dispute resolution. In that event, EKPC shall be liable for stipulated penalties for its failure thereafter to complete the work in accordance with the extended or modified schedule, provided that EKPC shall not be precluded from asserting that a Force Majeure Event has caused or may cause a delay in complying with the extended or modified schedule.

## **XI. INFORMATION COLLECTION AND RETENTION**

57. The United States, the Commonwealth, and their representatives, including their attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, including EKPC's administrative offices, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States or the Commonwealth in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by EKPC or its representatives, contractors, or consultants;

- d. obtain documentary evidence, including photographs and similar data; and
- e. assess EKPC's compliance with this Consent Decree.

58. Upon request, EKPC shall provide EPA and the Cabinet or their authorized representatives splits of any samples taken by EKPC. Upon request, EPA and the Cabinet shall provide EKPC splits of any samples taken by EPA or the Cabinet.

59. Until five (5) years after the termination of this Consent Decree, EKPC shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records or other information (including documents, records or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to EKPC's performance of its obligations under this Consent Decree. This information retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information retention period, upon request by the United States or the Commonwealth, EKPC shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

60. At the conclusion of the information retention period provided in the preceding Paragraph, EKPC shall notify the United States and the Cabinet at least ninety (90) Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States or the Cabinet, EKPC shall deliver any such documents, records, or other information to EPA or the Cabinet.

61. EKPC may assert that certain documents, records, or other information is

privileged under the attorney-client privilege or any other privilege recognized by federal law. If EKPC asserts such a privilege, it shall provide the following: (1) the title of the document, record, or other information; (2) the date of the document, record, or other information; (3) the name and title of each author of the document, record, or other information; (4) the name and title of each addressee and recipient; (5) a description of the subject matter of the document, record or other information; and (6) the privilege asserted by EKPC. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

62. EKPC may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that EKPC seeks to protect as CBI, EKPC shall follow the procedures set forth in 40 C.F.R. Part 2.

63. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or the Commonwealth pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of EKPC to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

## **XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

64. This Consent Decree resolves only the civil claims of the United States and the Commonwealth for the violations alleged in the Complaints filed in this action through the date of lodging.

65. The United States and the Commonwealth reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 64. This Consent Decree shall not be construed to limit the rights of the United States or the Commonwealth to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations or permit conditions, except as expressly specified in Paragraph 64.

66. In any subsequent administrative or judicial proceeding initiated by the United States or the Commonwealth for injunctive relief, civil penalties, other appropriate relief relating to Dale Units 1 and 2, EKPC shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the Commonwealth in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 64 of this Section.

67. This Consent Decree is not a permit, or a modification of a permit, under any federal, state, or local laws or regulations. EKPC is responsible for achieving and maintaining complete compliance with all applicable federal, state and local laws, regulations and permits; and EKPC's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. In addition, the obligation in this Consent Decree to achieve and maintain a certain Emission Rate does not relieve EKPC from any obligation to comply with other state and federal requirements under Act, including any obligation to satisfy any state modeling requirements set forth in the Kentucky SIP.

The United States and the Commonwealth do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that EKPC's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, or with any other provisions of federal, state, or local laws, regulations, or permits.

68. This Consent Decree does not limit or affect the rights of the Parties against any third party, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against EKPC, except as otherwise provided by law.

69. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not a party to this Consent Decree.

### **XIII. COSTS**

70. The Parties shall bear their own costs of this action, including attorneys' fees. The United States and the Commonwealth shall not be precluded from seeking their costs (including attorneys' fees) in any action necessary to enforce this Consent Decree.

### **XIV. NOTICES**

71. Unless otherwise provided herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

As to the United States of America:

Chief, Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611  
DJ# 90-5-2-1-08085

and

Director, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
Ariel Rios Building [2242A]  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

and

Director, Air, Pesticides and Toxics  
Management Division  
U.S. EPA Region IV  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

As to the Commonwealth:

Director, Division for Air Quality  
803 Schenkel Lane

Frankfort, Kentucky 40601

As to EKPC:

Environmental Manager

East Kentucky Power Cooperative

4775 Lexington Road

PO Box 707

Winchester, KY 40392-0707

and

General Counsel

East Kentucky Power Cooperative

4775 Lexington Road

PO Box 707

Winchester, KY 40392-0707

72. All notifications, communications or submissions made pursuant to this Section shall be sent either by: (a) overnight mail or delivery service; (b) certified or registered mail, return receipt requested; or (c) electronic transmission, unless the recipient is not able to review the transmission in electronic form. All notifications, communications and transmissions (a) sent by overnight, certified or registered mail shall be deemed submitted on the date they are postmarked, or (b) sent by overnight delivery service shall be deemed submitted on the date they are delivered to the delivery service. All notifications, communications, and submissions made

by electronic means shall be electronically signed and certified, and shall be deemed submitted on the date that EKPC receives written acknowledgment of receipt of such transmission.

73. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address.

#### **XV. SALES OR TRANSFERS OF OWNERSHIP INTERESTS**

74. No sale or transfer of an Ownership Interest to an entity unrelated to EKPC (“Third Party Purchaser”), whether in compliance with the procedures of this Paragraph or otherwise, shall relieve EKPC of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to any such transfer, EKPC shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to Region 4 of EPA, the United States Attorney for the Eastern District of Kentucky, and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any attempt to sell or transfer an Ownership Interest without complying with this Paragraph is a violation of this Decree.

75. No sale or transfer of an Ownership Interest shall take place before the Third Party Purchaser and Plaintiffs have executed, and the Court has approved, a modification pursuant to Section XVIII (Modification) of this Consent Decree making the Third Party Purchaser a party defendant to this Consent Decree and jointly and severally liable with EKPC for all the requirements of this Decree that may be applicable to the transferred or purchased Ownership Interests, except as provided in Paragraph 76 below.

76. This Consent Decree shall not be construed to impede the transfer of any Ownership Interests between EKPC and any Third Party Purchaser as long the requirements of this Consent Decree are met. This Consent Decree shall not be construed to prohibit a contractual allocation – as between EKPC and any Third Party Purchaser – of the burdens of compliance with this Consent Decree, provided that both EKPC and such Third Party Purchaser shall remain jointly and severally liable to the United States and the Commonwealth for the obligations of the Consent Decree applicable to the transferred or purchased Ownership Interests, except as provided in Paragraph 77 below.

77. If Plaintiffs agree, EPA, EKPC, and the Third Party Purchaser that has become a party defendant to this Consent Decree pursuant to Paragraph 75, may execute a modification that relieves EKPC of its liability under this Consent Decree for, and makes the Third Party Purchaser liable for, all obligations and liabilities applicable to the purchased or transferred Ownership Interests. Notwithstanding the foregoing, however, EKPC may not assign, and may not be released from, any obligation under this Consent Decree that is not specific to the purchased or transferred Ownership Interests, including the obligations set forth in Section V (Civil Penalty). EKPC may propose and the United States may agree to restrict the scope of joint and several liability of any purchaser or transferee for any obligations of this Consent Decree that are not specific to the transferred or purchased Ownership Interests, to the extent such obligations may be adequately separated in an enforceable manner.

## **XVI. EFFECTIVE DATE**

78. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter is granted, whichever occurs first, as

recorded on the Court's docket.

### **XVII. RETENTION OF JURISDICTION**

79. The Court shall retain jurisdiction of this case until termination of this Consent Decree, for the purpose of resolving disputes arising under the Decree or entering orders modifying this Decree, pursuant to Sections X (Dispute Resolution) and XVIII (Modification), or effectuating and enforcing compliance with the terms of the Decree.

### **XVIII. MODIFICATION**

80. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by both Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court.

### **XIX. TERMINATION**

81. After the EKPC has completed the requirements of Section VI (Compliance Requirements) of this Decree, and has thereafter maintained satisfactory compliance with this Consent Decree for a period of one (1) year, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, EKPC may serve upon the United States and the Commonwealth a Request for Termination, stating that EKPC has satisfied those requirements, together with all necessary supporting documentation.

82. Following receipt by the United States and the Commonwealth of EKPC's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether EKPC has satisfactorily complied with the

requirements for termination of this Consent Decree. If the United States, after consultation with the Commonwealth, agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

83. If the United States, after consultation with the Commonwealth, does not agree that the Decree may be terminated, EKPC may invoke Dispute Resolution under Section X of this Decree. However, EKPC shall not seek Dispute Resolution of any dispute regarding termination, under Paragraph 49 of Section X, until ninety (90) Days after service of its Request for Termination.

## **XX. PUBLIC PARTICIPATION**

84. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper or inadequate. EKPC consents to the entry of the Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by this Court or to challenge any provision of the Decree, unless the United States has notified EKPC, in writing, that it no longer supports entry of the Consent Decree.

## **XXI. SIGNATORIES AND SERVICE**

85. Each undersigned representative of the Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind to this document the Party he or she represents.

86. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

87. Each Party hereby agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

## **XXII. INTEGRATION**

88. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supercedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## **XXIII. FINAL JUDGMENT**

89. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the Commonwealth, and EKPC. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Rules 54 and 58 of the Federal Rules of Civil Procedure.

SO ORDERED, THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2007.

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THE HONORABLE JOSEPH. M. HOOD  
UNITED STATES DISTRICT COURT CHIEF JUDGE

Signature Page for Consent Decree in:

*United States of America and  
Commonwealth of Kentucky Environmental and Public Protection Cabinet*

v.

*East Kentucky Power Cooperative, No. 06-cv-00211-JMH (E.D. Ky.)*

**FOR THE UNITED STATES OF AMERICA:**

---

RONALD J. TENPAS  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

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PHILLIP A. BROOKS  
Counsel to the Chief  
PATRICIA L. HURST  
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ANDREW SPARKS  
Assistant United States Attorney  
Eastern District of Kentucky  
United States Department of Justice

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GRANTA Y. NAKAYAMA  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

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ADAM M. KUSHNER  
Director, Air Enforcement Division  
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---

ROBIN B. THOMERSON  
RANDALL S. ROYER  
Commonwealth of Kentucky  
Environmental and Public Protection Cabinet  
Office of Legal Services  
5th Floor, Capital Plaza Tower  
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**FOR DEFENDANT EAST KENTUCKY POWER  
COOPERATIVE:**

---

ROBERT MARSHALL  
President & CEO  
East Kentucky Power Cooperative  
4775 Lexington Road  
PO Box 707  
Winchester, KY 40392-0707

## APPENDIX A

### Sample Calculation of Contingent Penalty Payment

#### Example (1)

Audited Net Margin = \$5.0 million

Annual Interest Expense = \$100.0 million

Achieved TIER =  $(\$5 \text{ million} + \$100 \text{ million})/\$100 \text{ million}$   
= 1.05 x

Contingent Penalty Payment = \$0 (TIER does not exceed 1.10.)

#### Example (2)

Audited Net Margin = \$25.0 million

Annual Interest Expense = \$100.0 million

Achieved TIER =  $(\$25 \text{ million} + \$100 \text{ million})/\$100 \text{ million}$   
= 1.25 x

Net Margin @ TIER of 1.10 x = 10.0% x \$100 million = \$10 million

Net Margin @ TIER of 1.20 x = 20.0% x \$100 million = \$20 million

Level A Penalty = 14.0% x (\$20 million - \$10 million) = \$1.40 million

Level B Penalty = 20.0% x (\$25 million - \$20 million) = \$1.00 million

Total Contingent Penalty = A + B = \$1.40 million + \$1.0 million  
= \$2.4 million