

Arkansas Public Service Commission
Docket Summary Cover Sheet
(For all dockets other than Rate Cases, "TD", "C" and "TF" Dockets)
Must be filed with each new docket filed at the Commission

STYLE OF DOCKET: (Style may be changed by Secretary of Commission) **Docket Number:**

IN THE MATTER OF AN APPLICATION BY THE OFFICE OF
 ARKANSAS ATTORNEY GENERAL LESLIE RUTLEDGE FOR AN
 INVESTIGATION INTO WHETHER ENTERGY ARKANSAS, LLC'S
 DECISION TO ENTER INTO A VOLUNTARY SETTLEMENT
 AGREEMENT AFFECTING ELECTRIC GENERATING PLANTS IS
 PRUDENT AND SERVES THE PUBLIC INTEREST, AND FOR
 ORDERS TO PROTECT RATEPAYERS

18-079-U

DOCKET DESIGNATOR: ☒ U ☐ A ☐ R ☐ P
☐ SD

RELATED DOCKETS:

Nature of Action: (See second sheet)

PETITIONER/INITIATING PARTY*

Arkansas Attorney General Leslie Rutledge

ATTORNEYS' NAME, ADDRESS, PHONE, FAX AND E-MAIL

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*If the initiating party is not a jurisdictional utility in Arkansas, please provide mailing address, phone, fax and e-mail for the company

Pursuant to Rule 3.04 of the Commission's Rules of Practice and Procedure, please provide name, address, phone, fax, e-mail of at least one, but not more than two names to appear on the Service List for this docket

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Write a brief statement, limited to the space provided herein describing the case that you are filing.

Please provide enough information to assure that the nature of your docket is clear.

The Attorney General submits this Application to request that the Commission establish this docket as an investigative inquiry and regulatory docket on behalf of all interested parties, to examine the Settlement Agreement, its economic and legal effects, and whether EAL's actions, the Settlement Agreement, and the specific obligations included in it, are prudent and in the public interest.

Form completed by: MS Date: 12/13/18

Representing: AG

NATURE OF ACTION: Please choose at least one, but no more than three docket types

<input type="checkbox"/> Accounting	<input type="checkbox"/> Lifeline/link up
<input type="checkbox"/> Acquisition/Sales	<input type="checkbox"/> Market Power
<input type="checkbox"/> Act 310 of 1981 (Surcharge)	<input type="checkbox"/> Merger/Transfer
<input type="checkbox"/> Act 821 of 1987 (Cooperatives Rate Change)	<input type="checkbox"/> Municipal Franchise Tax
<input type="checkbox"/> Administrative Procedures	<input type="checkbox"/> Net Metering
<input type="checkbox"/> Affiliate Rules	<input type="checkbox"/> Nuclear Decommissioning
<input type="checkbox"/> Annual Reports/Assessment	<input type="checkbox"/> One Call
<input type="checkbox"/> Ar Energy Conservation Act (Efficiency Programs)	<input type="checkbox"/> Out-of-State Plant Construction
<input type="checkbox"/> Arbitration	<input type="checkbox"/> Pipeline Safety
<input type="checkbox"/> Arkansas High Cost Fund	<input type="checkbox"/> Pole attachment issues
<input type="checkbox"/> Arkansas Intralata Toll Pool	<input type="checkbox"/> Protective Order
<input type="checkbox"/> Arkansas Universal Service Fund	<input type="checkbox"/> Public Utility Holding Company Act
<input type="checkbox"/> ARSI Arkansas Relay Service, Inc.	<input type="checkbox"/> Public Utility Regulatory Policy Act
<input type="checkbox"/> Auto Adjustment	<input type="checkbox"/> Purchase Power
<input type="checkbox"/> Avoided Cost	<input type="checkbox"/> Railroad
<input type="checkbox"/> CCN Cancellation	<input type="checkbox"/> Rates
<input type="checkbox"/> CCN Facility	<input type="checkbox"/> Refund
<input type="checkbox"/> CCN License	<input type="checkbox"/> Reports
<input type="checkbox"/> CECPN	<input type="checkbox"/> Resource Plan
<input type="checkbox"/> Cost of Gas/Energy seasonal/unscheduled	<input type="checkbox"/> Restructuring
<input type="checkbox"/> Customer release/Abandonment	<input type="checkbox"/> Retail
<input checked="" type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> River Crossing
<input type="checkbox"/> Depreciation	<input type="checkbox"/> Regional Transmission Organization
<input type="checkbox"/> Dialing/Numbering	<input type="checkbox"/> Rulemaking
<input type="checkbox"/> Disabilities Act of 1990	<input type="checkbox"/> Self-Direct Certification
<input type="checkbox"/> Earnings Review	<input type="checkbox"/> Service Quality
<input type="checkbox"/> Eligible Telecommunications Carrier Designation	<input type="checkbox"/> Shielded Outdoor Lighting
<input type="checkbox"/> Energy Policy Act	<input type="checkbox"/> Show Cause
<input type="checkbox"/> Energy/Fuel Purchasing Practices	<input type="checkbox"/> Stranded Costs
<input type="checkbox"/> EWG Exempt Wholesale Generator	<input type="checkbox"/> Sustainable Energy Resources
<input type="checkbox"/> Extended Area Service	<input type="checkbox"/> Terms and Conditions
<input type="checkbox"/> Extension of Telecommunications Facilities Fund	<input type="checkbox"/> Territory/release/unallocated territory
<input type="checkbox"/> Extraordinary Property Loss	<input type="checkbox"/> Transition costs
<input type="checkbox"/> FCC	<input type="checkbox"/> Transportation Network Company Services
<input type="checkbox"/> Finance (Bonds/issue & sell; stock; prom note)	<input type="checkbox"/> Unbundling
<input type="checkbox"/> Grand Gulf	<input type="checkbox"/> USOA (Uniform System of Accounts)
<input type="checkbox"/> Integrated Resource Planning	<input type="checkbox"/> Waiver/Exemption
<input type="checkbox"/> Interconnection Agreements	<input type="checkbox"/> Weather
<input type="checkbox"/> Interest/Customer Deposit	<input type="checkbox"/> Wholesale
<input checked="" type="checkbox"/> Investigation/Inquiry	<input type="checkbox"/> Wholesale Rate Adjustment

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN APPLICATION BY)
 THE OFFICE OF ARKANSAS ATTORNEY)
 GENERAL LESLIE RUTLEDGE FOR AN)
 INVESTIGATION INTO WHETHER ENTERGY)
 ARKANSAS, LLC'S DECISION TO ENTER INTO) DOCKET NO. 18-079-U
 A VOLUNTARY SETTLEMENT AGREEMENT)
 AFFECTING ELECTRIC GENERATING)
 PLANTS IS PRUDENT AND SERVES THE)
 PUBLIC INTEREST, AND FOR ORDERS TO)
 PROTECT RATEPAYERS)

APPLICATION

COMES NOW the Office of Arkansas Attorney General Leslie Rutledge ("AG"), and for its Application states:

I. INTRODUCTION

1. This Application requests that the Arkansas Public Service Commission ("APSC" or "the Commission") open an investigatory docket seeking information and contemplating action regarding a pending Settlement Agreement¹ between Entergy Arkansas, LLC² ("EAL" or "Company"), the Sierra Club ("Sierra"), and the National Parks Conservation Association ("NPCA") ("the Settlement Agreement"); and requests Commission action to address, review, and evaluate the

¹ The Settlement Agreement is attached to a Notice of Lodging of Settlement Agreement filed in *Sierra Club and National Parks Conservation Association v. Entergy Arkansas, Inc., Entergy Power, Inc., Entergy Power, LLC, and Entergy Mississippi, Inc.*, 4:18-CV-00854-KGB (E.D. Ark. 2018) (hereinafter *Sierra Club v. Entergy*).

² Entergy Arkansas, LLC has transitioned or is transitioning to become the independently owned electric utility that serves the majority of Arkansas ratepayers, having previously been Entergy Arkansas, Inc. The transition was approved by the Commission in APSC Docket No. 17-052-U, in which EAL agreed to submit to the jurisdiction of the APSC. The Complaint initiating *Sierra Club v. Entergy* was filed prior to the transition and, therefore, names Entergy Arkansas, Inc. as a Defendant.

public interest, prudence, and regulatory and jurisdictional appropriateness of EAL's actions, making all orders and holdings necessary to protect ratepayers and other stakeholders from any negative consequences resulting from EAL's actions.³

2. This matter is of urgent import to the Arkansas ratepayers represented by the Attorney General, and possibly to other stakeholders and the Commission.⁴ As further detailed in this Application and the supporting testimony filed contemporaneously therewith, EAL has stated to the AG that the entry of a court order approving the Settlement Agreement will guarantee EAL recovery of certain substantial costs in rates for the actions contemplated therein, insofar as such an order will constitute a binding federal mandate interpreting federal law. Thus, these circumstances compel the AG to act immediately on behalf of Arkansas ratepayers, and the AG urges the Commission to heed its request for prompt attention to this matter.

3. Arkansas law empowers the Office of Arkansas Attorney General Leslie Rutledge in Ark. Code Ann. §§ 23-4-301 through 307 to represent Arkansas utility ratepayers in matters before the Commission. Those statutes obligate the Consumer Utilities Rate Advocacy Division ("CURAD") to "provide effective and aggressive representation for the people of Arkansas in hearings before the

³ See Application Exhibit 1 (which includes a copy of the Complaint filed by Plaintiffs and the Notice of Lodging of Settlement Agreement, both of which were filed in the U.S. District Court on November 16, 2018).

⁴ As explained in paragraph 4, the Settlement Agreement relates to electric generating units owned by EAL and by certain other electric cooperatives and municipalities. As a result, the vast majority of Arkansas's electric utility ratepayers will be affected by EAL's action: over 700,000 EAL customers, over 500,000 electric cooperative customers, and tens of thousands of municipal electric customers.

Arkansas Public Service Commission and other state and federal courts or agencies concerning utility-related matters.”⁵ Further, the statutes require CURAD to “advocate the holding of utility rates to the lowest reasonable level.”⁶

4. EAL is a business entity organized and operating under the laws of the State of Texas, and is a public utility as that term is defined by Ark. Code Ann. §§ 23-1-101, *et seq.* As such, EAL is subject to the jurisdiction and regulation of the Commission. EAL is a partial owner⁷ and operator of the White Bluff Steam Electric Station (“White Bluff”), located in Jefferson County, Arkansas. EAL is also a partial owner⁸ and operator of the Independence Steam Electric Station (“Independence”), located in Independence County, Arkansas. White Bluff and Independence are coal-fired electricity generation facilities. EAL is also the sole owner and operator of the gas-fired Lake Catherine Steam Electric Station (“Lake Catherine”).

5. The Complaint filed in *Sierra Club v. Entergy* alleges violations of the federal Clean Air Act (“CAA”)⁹ at Independence and White Bluff.¹⁰ The Complaint seeks injunctive and declaratory relief and civil penalties against Entergy.^{11,12}

⁵ Ark. Code Ann. § 23-4-305(a).

⁶ Ark. Code Ann. § 23-4-305(b).

⁷ EAL co-owns White Bluff with several other entities, including Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, Conway Corporation, and City of West Memphis. Contractually, EAL is the sole operator of White Bluff.

⁸ EAL co-owns Independence with several other entities, including Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, East Texas Electric Cooperative, Osceola Municipal Light & Power, Conway Corporation, and City of West Memphis. Contractually, EAL is the sole operator of Independence.

⁹ 42 U.S.C. §§ 7401-7671q.

¹⁰ Application Exhibit 1, Complaint, p. 2, ¶ 1.

6. In the Settlement Agreement, EAL commits to a number of different actions which would impact plant operations at White Bluff, Independence, and Lake Catherine.

7. With regard to White Bluff, the Settlement Agreement would:

- a. require EAL to permanently cease the combustion of coal at White Bluff no later than December 31, 2028;¹³ and
- b. require strict emission standards for the remaining coal combustion period at White Bluff.¹⁴

8. With regard to Independence, the Settlement Agreement would:

- a. require EAL to permanently cease the combustion of coal at Independence no later than December 31, 2030;¹⁵ and
- b. require strict emission standards for the remaining coal combustion period at Independence.¹⁶

9. With regard to Lake Catherine, the Settlement Agreement would require EAL to permanently cease all existing unit operations at Lake Catherine no later than December 31, 2027.¹⁷

¹¹ *Id.* at ¶ 2.

¹² The remedies sought in the Complaint are pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 7413, 7604(a) of the CAA.

¹³ Application Exhibit 1, Settlement Agreement, p. 9, ¶ 9.

¹⁴ *Id.* at 9-10, ¶ 10-11.

¹⁵ *Id.* at 10, ¶ 12.

¹⁶ *Id.* at ¶ 13-14.

¹⁷ *Id.* at ¶ 15.

10. The Settlement Agreement also commits EAL, its co-defendants, and non-party co-owners to present and seek approval of 800 MW of renewable energy generation facilities on or before December 31, 2027.^{18,19}

11. The Settlement Agreement purports to fully resolve the allegations averred in the Complaint.²⁰ According to the Settlement Agreement, the Environmental Protection Agency (“EPA”) and the Department of Justice (“DOJ”) have 45 days from the date of filing to review and comment upon the Settlement Agreement.²¹ By filing of the Notice with the federal district court where the civil action is pending, the parties to the Settlement Agreement state that the deadline for EPA and DOJ to review and comment is January 10, 2019.²² After the review period has elapsed, the Settlement Agreement may be approved by the Court.

12. The AG submits the Direct Testimony of Christina Baker in support of its Application. AG witness Baker’s testimony will address the need for this Application and the relief sought therein, including a discussion of the Settlement Agreement, the Plant Specific Obligations, as well as a discussion of related environmental litigation currently pending regarding Arkansas’s State

¹⁸ *Id.* at 11, ¶ 16.

¹⁹ For purposes of this pleading, the AG shall hereinafter refer to the Settlement Agreement’s requirements for Lake Catherine, White Bluff, Independence and renewable energy as the “Plant Specific Obligations.”

²⁰ Application Exhibit 1, Settlement Agreement, p. 17, ¶ 26.

²¹ *Id.* at 23, ¶ 47.

²² *See Sierra Club v. Entergy*, Docket Entry No. 16.

Implementation Plan for regional haze, and other pertinent matters supporting this Application.

13. The AG seeks a preliminary order from the Commission requiring EAL to provide information, analysis and supporting testimony through an investigative inquiry designed to determine whether EAL's decision to enter into the Settlement Agreement and the Plant Specific Obligations serves the public interest, whether EAL's actions are necessary, lawful, and prudent, and making orders and/or holdings necessary to protect Arkansas ratepayers and other stakeholders. The inquiry may also contemplate whether EAL's Plant Specific Obligations, if approved, will result in just and reasonable rates. The information that the AG seeks in this inquiry includes (without limitation) any relevant cost-benefit analysis comparing ratepayer costs and benefits resulting from implementing the proposed Settlement Agreement to alternative scenarios without the agreement, litigation risk analyses, cost projections, rate impact analyses, and any other relevant information necessary for adequate regulatory oversight and ratepayer protection. The cost-benefit analysis ordered by the Commission should consider uncertainty in key input assumptions, including future load growth, commodity prices and environmental regulations, at least consistent with the analytical approach applied in EAL's 2018 integrated resource planning analysis.

14. The AG brings this Application under Rule 3.09(a)–(b) of the Commission's Rules of Practice and Procedure ("RPPs"). The AG seeks declaratory orders from this Commission "to terminate a controversy" over the prudence and

public interest underlying EAL's actions pursuant to the Commission's broad statutory authority to regulate EAL,²³ including the Commission's Resource Planning Guidelines for Electric Utilities for the Establishment of Integrated Resource Planning ("IRP").²⁴ Since EAL has sought judicial approval of actions which are subject to the jurisdiction of this Commission, without the Commission's prior approval, the AG anticipates that action should be taken now to preserve future prudence objections, ratepayer protections, and Commission jurisdiction,²⁵ as explained herein.

15. The AG requests the following individuals be included on the Official Service List for this Docket pursuant to RPP 3.04:

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II. JURISDICTION

16. The Commission has jurisdiction over this matter pursuant to, *inter alia*, Ark. Code Ann. § 23-2-301, which empowers, and makes it the *duty* of, the Commission to

²³ See, e.g., Ark. Code Ann. §23-2-301; §23-2-302; §23-2-304; §23-2-310; §23-4-101; and §23-4-103.

²⁴ See APSC Docket No. 07-016-U.

²⁵ *North Little Rock Water Co. v. Waterworks Comm'n of City of Little Rock*, 199 Ark. 773, 136 S.W.2d 194 (1940) ("[T]hat it is settled beyond excuse for extensive citation of authority that a public utility may not abandon any part of its property devoted to public service without the consent of the State, or transfer its property to someone else and be rid of its duty to serve the public.").

supervise and regulate every public utility defined in § 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.²⁶

Further, Ark. Code Ann. § 23-2-302 dictates that the Commission has jurisdiction over “[a]ll matters pertaining to the regulation and operation of...[e]lectric lighting companies and other companies furnishing gas or electricity for light, heat, or power purposes.”²⁷

17. Arkansas law authorizes this Commission to conduct an inquiry into the actions by EAL pursuant to Ark. Code Ann. § 23-2-310(a)(1), which states: “[t]he commission, whenever it may be necessary in the performance of its duties, may investigate and examine the condition and operation of public utilities or any particular utility.”²⁸ The proposed Settlement Agreement includes provisions that require significant operating restrictions, including mandated retirement and/or fuel switching that would directly impact 1,552 MW of existing generating capacity owned by EAL and designated for EAL’s customers; therefore, the obligations created by the Settlement Agreement substantially impact the operations and costs of the EAL system and clearly merit a thorough investigation by the Commission. Further, actions required to implement the terms of the Settlement Agreement may include, but may not be limited to, the abandonment of transmission lines,

²⁶ Ark. Code Ann. § 23-2-301 (emphasis added).

²⁷ Ark. Code Ann. § 23-2-302(a)(1)(A)(xiv).

²⁸ Ark. Code Ann. § 23-2-310(a)(1).

substations and other facilities which connect these generation substations to EAL's transmission and distribution grid and the reformation or termination of EAL's contracts for coal or rail services.

18. Importantly, the impact goes even further than EAL and its customers; the customers of the plants' co-owners will experience commensurate negative impacts. Overall, the Settlement Agreement affects 3,300 MW of generating capacity. In fact, the generation mix used to serve the customers of the co-owners could be affected to an even greater extent than EAL's customers because they will have the need to seek a higher proportion of replacement baseload generation.

19. Federal case law recognizes certain public interest duties imposed upon a public utility, and the utility property utilized for the furnishing of utility service, which may warrant the Commission to exercise a public policy review of EAL's decision to seek judicial approval of the Settlement Agreement without prior approval of this Commission.²⁹

20. EAL's actions regarding the Settlement Agreement undermine its responsibility to its ratepayers. Arkansas law prohibits EAL from agreeing to the Plant Specific Obligations without prior Commission approval. "A public utility may not abandon any part of its property devoted to public use without consent of the state..."³⁰ "[T]he utility holds and must manage its property in the nature of a

²⁹ See *Munn v. Illinois*, 94 U.S. 113, 126, 24 L.Ed. 77 (1876) ("When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.").

³⁰ *North Little Rock Water Co. v. Waterworks Comm'n of City of Little Rock*, 199 Ark. 773, 136 S.W.2d 194, 198 (1940).

trusteeship.”³¹ “The utility must use all its receipts as though they were a public trust.”³² “[T]he Company bears a trust relationship to its customers and must conduct its operations on that basis and not as if it were engaged in a private business with no restrictions as to the income it could earn.”³³

21. Further, EAL has previously recognized the importance of seeking prior Commission approval regarding matters of this import. For example, its predecessor stated the following in a similar matter:

[The Company submits] this Petition consistent with public policy and prior Commission orders favoring Commission review of major projects and investments that may have a substantial effect on the rates and service of Arkansas retail ratepayers *before such initiatives are finalized*.³⁴

Recognizing that the Plant Specific Obligations will require replacement of the retired facilities with other “major projects and investments,” EAL should have, as it has done in the past, sought prior Commission approval.

22. Arkansas law further authorizes the Commission to conduct an examination into whether EAL’s actions pursuant to the Settlement Agreement and

³¹ *Acme Brick Co. v. Ark. Pub. Serv. Comm’n.*, 227 Ark. 436, 441, 299 S.W.2d 208, 211 (1957).

³² *Id.* (citing *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 85, 247 S.W.2d 474, 483 (1952)).

³³ *City of El Dorado v. Arkansas Public Service Commission*, 362 S.W.2d 680, 235 Ark. 812 (Ark., 1962).

³⁴ APSC Docket No. 09-024-U, IN THE MATTER OF ENTERGY ARKANSAS, INC.’S REQUEST FOR A DECLARATORY ORDER APPROVING THE ADDITION OF THE ENVIRONMENTAL CONTROLS PROJECT AT THE WHITE BLUFF STEAM ELECTRIC STATION NEAR REDFIELD, ARKANSAS, Petition for a Declaratory Order, p. 12.

the Plant Specific Obligations comply with Ark. Code Ann. § 23-3-113, which states that:

Every public utility shall furnish, provide, and maintain such adequate and efficient service, instrumentalities, equipment, and *facilities as shall promote* the safety, health, comfort, requirements, and convenience of its patrons, employees, and the public.³⁵

23. Further, Arkansas law authorizes the Commission to:

[a]dopt rules and regulations under which electric utilities *shall* seek commission review and approval of the processes, actions, and plans by which the utilities: (1) Engage in comprehensive resource planning; (2) Acquire electric energy, capacity, and generation assets; or (3) Utilize alternative methods to meet their obligations to serve Arkansas retail electric customers.³⁶

The Commission's Resource Planning Guidelines for Electric Utilities establish the rules under which a utility must make informational filings regarding its IRP. However, the Resource Planning Guidelines in no way diminish a utility's obligation to seek Commission review and approval of its actions as they relate to resource planning pursuant to the statute, nor do they diminish the Commission's role in reviewing and approving such action.

24. Arkansas law further dictates that the Commission may make whatever "preliminary" investigation, with or without notice, it deems necessary into EAL's action, and order whatever "formal" investigations are necessary in that

³⁵ Ark. Code Ann. § 23-3-113(a) (emphasis added).

³⁶ Ark. Code Ann. § 23-18-106(a) (emphasis added).

course.³⁷ The Commission may enter whatever preliminary orders as may be necessary pursuant to this authority, including those sought by the AG herein.

25. Ark. Code Ann. § 23-3-119 recognizes the Commission's authority to preside over, and an individual or entity's right to file, a complaint seeking relief for a "violation, or claimed violation, of any order, law, or regulation which the commission has jurisdiction to administer."³⁸ At this time, the AG is unable to ascertain whether an action or omission by EAL may warrant such relief, because such information is in the sole possession of EAL, and has not been provided to the AG at this time. Nevertheless, the Commission is authorized and has jurisdiction to facilitate pre-complaint discovery as would be similarly available to litigants in a civil proceeding on a pre-suit basis.³⁹

26. The Commission has utilized its authority pursuant to Ark. Code Ann. § 23-3-305 to promulgate RPPs to establish practices and procedures before the Commission, including the ability for the AG to file this Application for requested relief pursuant to RPP 3.09(a)–(b). No other current regulatory docket before the Commission specifically encompasses the scope and nature of this inquiry, or provides a centralized location for tracking and identifying these issues for the foreseeable future. The AG, therefore, consistent with such similar past practices,

³⁷ Ark. Code Ann. § 23-3-118(a)–(b).

³⁸ Ark. Code Ann. § 23-3-119(a)(1).

³⁹ *See e.g.* Fed. R. Civ. P. 27(a).

brings this Application petitioning the Commission for appropriate regulatory action and relief.⁴⁰

III. REQUESTED ISSUES TO INVESTIGATE

27. The AG requests that the Commission establish this docket as an investigative inquiry and regulatory docket, to examine the Settlement Agreement, its economic and legal effects, and whether EAL's actions, the Settlement Agreement, and Plant Specific Obligations are necessary, reasonable, prudent and serve the public interest. To this end, the issues sought to be addressed, and the information sought by the AG which would allow the AG and the Commission to assess these issues, are listed in this Application's accompanying testimony.

IV. REQUESTED RELIEF SOUGHT

28. The AG requests a preliminary Order from the APSC establishing an investigatory docket for the purposes stated herein. Further, for the protection of the State of Arkansas and its ratepayers, the AG requests the following additional relief:

- a. Holding that EAL's actions in seeking federal judicial approval of the Settlement Agreement and the Plant Specific Obligations, which are likely to have very significant and long-term impacts on EAL's operations and costs to ratepayers, without providing analysis

⁴⁰ See e.g. APSC Docket No. 90-036-U (an investigation in the overall gas purchasing practices of Arkla, Inc. including the Arkla-Arkoma transactions); APSC Docket No. 04-023-U (an investigation into EAI's participation in the Entergy System Agreement and the future protection of ratepayers); APSC Docket No. 10-011-U (a show cause order directed to EAI regarding its system agreement membership).

supporting the Settlement or providing an adequate opportunity for review by the Commission, does not constitute a prudent utility action, and therefore may subject EAL to cost disallowances, and other remedies in future proceedings;

- b. Holding that EAL's actions in entering into the Settlement Agreement without seeking Commission approval of the agreement were unilateral and discretionary and therefore EAL's shareholders alone should bear any risks of future cost disallowances related to the Settlement Agreement, including possible disallowed rate recovery because of imprudence;
- c. Holding that EAL's deliberate, intentional, and chosen actions cannot be construed as a federal mandate (for purposes of rate recovery) requiring any Commission action due to the voluntary nature of its participation in the Settlement Agreement;
- d. In establishing this docket as a regulatory investigative forum, provide affected parties, intervenors, and the Commission the opportunity to engage in discovery and inquiry regarding EAL's actions, the Settlement Agreement, and the Plant Specific Obligations;
- e. Establishing a reasonable procedural schedule for an inquiry into whatever issues and scope of investigation the Commission determines to be proper;

- f. Finding that EAL should provide the Commission, through public filings, with documentary evidence to address any substantive or procedural issues pertaining to the Settlement Agreement and Plant Specific Obligations that the Commission deems proper;
- g. Invite relevant stakeholder participation following public notice, and provide public comment opportunities; and
- h. Require that EAL modify its current IRP to include an analysis of the ratepayer cost and other impacts of the proposed Settlement Agreement in comparison to costs of reasonable alternatives to the agreement.

29. The AG requests that the Commission, after reasonable notice and full and complete hearing, make whatever relevant legal, prudence-related, and public interest findings are warranted, and further implement whatever regulatory action is needed to protect ratepayers and the State of Arkansas.

30. The AG requests the Commission make any and all necessary additional orders and actions pursuant to its authority and duties as necessary in this docket and in *Sierra Club v. Entergy*. Since the Settlement Agreement may be approved by a federal judge any time after January 10, 2019, the AG requests that the Commission issue appropriate preliminary findings and orders accordingly.

WHEREFORE, the above premises considered, the AG respectfully requests that this Commission grant all recommended actions and all other relief to which the AG is entitled.

Respectfully submitted,

By: /s/ Michael Sappington

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COUNSEL FOR THE ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Michael Sappington, certify that on this 13th day of December, 2018, I filed a copy of the foregoing utilizing the Commission's Electronic Filing System, which caused a copy to be served upon all parties of record via electronic mail, with additional copies sent via email and 1st class mail to:

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/s/ Michael Sappington
Michael Sappington

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN APPLICATION)	
BY THE OFFICE OF ARKANSAS ATTORNEY)	
GENERAL LESLIE RUTLEDGE FOR AN)	
INVESTIGATION INTO THE PRUDENCY)	
AND PUBLIC INTEREST OF ENTERGY)	
ARKANSAS, LLC'S DECISION TO ENTER)	Docket No. 18-079-U
INTO A SETTLEMENT AGREEMENT)	
WITH SIERRA CLUB AND NATIONAL PARKS)	
CONSERVATION ASSOCIATION AFFECTING)	
ELECTRIC GENERATING PLANTS AND)	
FOR ORDERS TO PROTECT RATEPAYERS)	

APPLICATION EXHIBIT 1

December 13, 2018

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FILED
 U.S. DISTRICT COURT
 EASTERN DISTRICT ARKANSAS

NOV 16 2018

JAMES W. McCORMACK, CLERK
 By: _____
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IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF ARKANSAS

<p>SIERRA CLUB and NATIONAL PARKS CONSERVATION ASSOCIATION,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>ENTERGY ARKANSAS, INC., ENTERGY POWER, LLC., and ENTERGY MISSISSIPPI, INC.</p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No.</p> <p>COMPLAINT AND DEMAND FOR JURY TRIAL</p>
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4:18-cv-854-BRW

This case assigned to District Judge Wilson
 and to Magistrate Judge Kearney

INTRODUCTION

1. This Complaint commences a civil action against Entergy Arkansas, Inc., Entergy Power, LLC, and Entergy Mississippi, Inc. for violations of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §§ 7401–7671q, at the Independence Steam Electric Station (“the Independence plant”) located in Newark, Arkansas and the White Bluff Steam Electric Station (“the White Bluff plant”) located in Redfield, Arkansas.

JURISDICTION AND VENUE

2. This court has subject matter over the claims set forth in this complaint pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of the Clean Air Act) and 28 U.S.C. § 1331 (federal question statute). This action seeks injunctive and declaratory relief and civil penalties and is authorized pursuant to 28 U.S.C. §§ 2201 and 2202 (declaratory judgment) and 42 U.S.C. §§ 7413, 7604(a) (Clean Air Act).

3. Plaintiffs demand a trial by jury on all issues so triable.

4. To the extent required by 42 U.S.C. § 7604(b), Plaintiffs sent notices of intent to sue for violations of the Clean Air Act set forth in this Complaint on January 10, 2018 and February 8, 2018 to Defendants and all government officers required to receive such notice by 42 U.S.C. § 7604(b) and 40 C.F.R. § 54.2.

5. Venue is properly vested in this Court pursuant to 42 U.S.C. § 7604(c), because the Independence and White Bluff plants are located in the Eastern District of Arkansas.

PARTIES

6. Plaintiff Sierra Club is an environmental organization with a long history of service to the residents and communities of Arkansas. Sierra Club's national headquarters are located at 2101 Webster St., Suite 1300, Oakland, CA 94612.

7. Sierra Club has been working to protect communities, wild places, and the planet since 1892. With more than 775,800 members throughout the United States, including 3,080 members in Arkansas, Sierra Club is the nation's largest, grassroots environmental organization. Sierra Club is dedicated to the protection and preservation of the natural and human environment.

8. Plaintiff National Parks Conservation Association ("NPCA") is a national not-for-profit corporation headquartered at 777 6th Street, NW, Suite 700, Washington, D.C. 20001. NPCA has over 397,633 members nationwide, including 2,164 in Arkansas. NPCA's mission is to protect and enhance America's national parks for the use and enjoyment of present and future generations.

9. Since NPCA was established in 1919, it has advocated for protection of the natural environment (including air quality) in and around the national parks,

and it has educated decision makers and the public about the importance of preserving the parks. NPCA works to convince officials in the Executive Branch and members of Congress to uphold the laws that protect the public's use and enjoyment of the parks and to support new legislation to address threats to the parks. NPCA also litigates to uphold these laws. Furthermore, NPCA assesses the health of the parks and the adequacy of park management to better inform the public and advocate for the parks.

10. Entergy Arkansas, Inc. is a domestic, for-profit corporation, incorporated in Arkansas, and located at 425 West Capitol Avenue, Little Rock, AR 72201. At all times relevant to this Complaint, Entergy Arkansas, Inc. was and is an owner or operator of the Independence and White Bluff plants.

11. Entergy Arkansas, Inc. is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C § 7602(e).

12. Entergy Power, LLC is a domestic, for-profit corporation, incorporated in Delaware, and located at 425 West Capitol Avenue, Little Rock, AR 72201. At all times relevant to this Complaint, Entergy Power, LLC was and is an owner or operator of the Independence plant.

13. Entergy Power, LLC is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C § 7602(e).

14. Entergy Mississippi, Inc. is a domestic, for-profit corporation, incorporated in Mississippi, and located at 308 East Pearl Street, Jackson, MS 39201. At all times relevant to this Complaint, Entergy Mississippi, Inc. was and is an owner or operator of the Independence plant.

15. Entergy Mississippi, Inc. is a “person,” as that term is defined in Section 302(e) of the Act, 42 U.S.C § 7602(e).

PLAINTIFFS’ INJURIES

16. The Independence plant is a stationary electric utility generating station located in Independence County, Arkansas.

17. The White Bluff plant is a stationary electric utility generating station located in Jefferson County, Arkansas.

18. Each plant consists of two coal-fired electrical generating units and associated equipment, and each plant has a nameplate capacity of 1700 megawatts.

19. As a result of their coal combustion, both plants release into the atmosphere significant amounts of air pollution, including sulfur dioxide (“SO₂”), nitrogen oxides (“NO_x”), carbon dioxide (“CO₂”), carbon monoxide (“CO”), mercury (“Hg”), and particulate matter (“PM”). Under Clean Air Act regulations, fossil fuel-fired steam electric plants such as the Independence and White Bluff plants are considered “major stationary sources” if they have the potential to emit more than 100 tons per year of any air pollutants. 40 C.F.R. § 52.21(b)(1)(i). In

2017, the Independence plant emitted 19,487 tons of sulfur dioxide (“SO₂”) and 8,695 tons of nitrogen oxides (“NO_x”). In 2017, the White Bluff plant emitted 23,212 tons of SO₂ and 11,418 tons of NO_x.

20. Individually and collectively these pollutants contribute to acid rain, regional haze, formation of ground level ozone or smog, formation of fine particulate matter, and pollution of surface waters.

21. SO₂ pollution is “a medically recognized threat to human health.” *Ohio Power Co. v. U. S. Entvl. Prot. Agency*, 729 F.2d 1096, 1097–98 (6th Cir. 1984). It forms sulfates, sulfuric acid mist, and other chemical derivatives that aggravate respiratory illness, contribute to acid deposition, fall to earth as acid rain, and impair visibility.

22. NO_x contributes to acid rain, diminishes water quality, impairs visibility, and causes ground-level ozone, or smog, which triggers serious respiratory problems. NO_x emissions also contribute to nitrogen dioxide (NO₂) concentrations, and elevated NO₂ concentrations can worsen asthma symptoms. Further, NO_x emissions exacerbate atmospheric ozone depletion, and cause eutrophication of water bodies.

23. As shown, in part, by declarations attached to this Complaint as Exhibit A, Plaintiffs’ members, staff, and volunteers live, work, recreate, own property, and fish in the areas most affected by the Independence and White Bluff

plants. Illegal air pollution from these plants injures Plaintiffs' members, staff, and volunteers' aesthetic, recreational, environmental, spiritual, economic, educational, and health interests in these areas. Poor air quality injures human health, fish and wildlife, vegetation, visibility, water quality, cultural resources, including national parks and wilderness areas, and property in areas used by Plaintiffs' members.

Unless the relief requested herein is granted, the violations of the Clean Air Act by these plants will continue to injure human health, fish and wildlife, vegetation, visibility, water quality, cultural resources, and property in areas used by Plaintiffs' members.

24. As shown, in part, by declarations attached to this Complaint as Exhibit A, Plaintiffs' members, volunteers and staff are aware of the health and environmental impacts associated with the air pollution from the Independence and White Bluff plants and are concerned about harm to their health and the surrounding environment, including the public lands and natural resources they own, use, and enjoy.

25. As shown, in part, by declarations attached to this Complaint as Exhibit A, the illegal and excessive discharges of pollution from the Independence and White Bluff plants injure Plaintiffs' members' diverse interests. These interests include, but are not limited to: 1) breathing air free from the plants' excessive pollutant emissions, 2) enjoying the natural ecology of the region free

from air pollution-related impacts, including hiking, viewing and photographing plants and wildlife at places including the Buffalo National River, 3) viewing scenery at Clean Air Act designated Class I areas including the Upper Buffalo Wilderness and the Caney Creek Wilderness, 40 C.F.R. § 81.404, that are unimpaired by pollution from the plants, or by the smog, haze, and other aesthetic damage caused (in whole or in part) by the plants' emissions, 4) preventing excessive health care costs and other economic damages caused by or contributed to by the plants' pollutant discharges, 5) enjoying the region's cultural and spiritual resources that are susceptible to air pollution-related impacts, and 6) benefiting from economic resources that Plaintiffs' members reasonably fear will be adversely impacted by pollution from the plants. Plaintiffs' members' interests have been and, unless the relief requested herein is granted, will continue to be, adversely affected by Defendants' violations of the CAA.

LEGAL BACKGROUND

26. The Clean Air Act is designed to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

The National Ambient Air Quality Standards

27. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) to promulgate regulations establishing primary and secondary national ambient air quality standards (“NAAQS” or “air quality standards”) for those air pollutants (“criteria pollutants”) for which air quality criteria have been issued pursuant to Section 108 of the Act, 42 U.S.C. § 7408. The primary air quality standards are requisite to protect the public health with an adequate margin of safety, and the secondary air quality standards are requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air. 42 U.S.C. § 7409(b).

28. Pursuant to Sections 108 and 109, 42 U.S.C. §§ 7408 and 7409, U.S. EPA has identified SO₂ and NO₂ as criteria pollutants and has promulgated air quality standards for these pollutants. 40 C.F.R. §§ 50.4, 50.5, 50.11, and 50.17.

29. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the air quality standards for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the air quality standard for a particular pollutant is termed an “attainment” area with respect to such pollutant. *Id.* at § 7407(d)(1)(A)(ii). An area that does not meet the

air quality standard for a particular pollutant is termed a “nonattainment” area with respect to that pollutant. *Id.* at § 7407(d)(1)(A)(i). An area that cannot be classified as either “attainment” or “nonattainment” with respect to a particular pollutant due to insufficient data is termed “unclassifiable” with respect to that pollutant and, under the Clean Air Act, is viewed the same as an attainment area. *Id.* at § 7407(d)(1)(A)(iii).

30. The Independence plant is located in Independence County, Arkansas. At the times relevant to this complaint, Independence County has been classified as either unclassifiable/attainment or unclassifiable for SO₂ and unclassifiable/attainment for NO₂. 40 C.F.R. § 81.304.

31. The White Bluff plant is located in Jefferson County, Arkansas. At the times relevant to this complaint, Jefferson County has been classified as unclassifiable/attainment for SO₂ and NO₂. 40 C.F.R. § 81.304.

Prevention of Significant Deterioration

32. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the air quality standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to

permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. 42 U.S.C. § 7470. These provisions are referred to herein as the “PSD program.”

33. As part of the PSD program, Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the “construction” of a “major emitting facility” in an area designated as attainment or unclassifiable unless a permit has been issued that comports with the requirements of Section 165, and the facility employs the “Best Available Control Technology” (“BACT”) for each pollutant subject to regulation under the Act that is emitted from the facility.

34. Section 169(2)(c) of the Act, 42 U.S.C. § 7479(2)(c), defines “construction” as including “modification” (as defined in CAA Section 111(a)). “Modification” is defined in CAA Section 111(a)(4), 42 U.S.C. § 7411(a)(4), to be “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”

35. Section 169(1) of the Act, 42 U.S.C. § 7479(1), designates fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input that emit or have the potential to emit 100 tons per year or more of any air pollutant to be “major emitting facilities.”

36. Section 169(3) of the Act, 42 U.S.C. § 7479(3) defines BACT, in pertinent part, as

[A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility In no event shall application of “best available control technology” result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 ... of this title.

37. CAA Section 165(a)(3), 42 U.S.C. § 7475(a)(3), allows issuance of a PSD permit only if “the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility” will not compromise compliance with applicable air quality standards.

38. Pursuant to CAA Section 110, 42 U.S.C. § 7410, each State must adopt and submit to the U.S. EPA for approval a State Implementation Plan (“SIP”) that includes, among other things, regulations to prevent the significant deterioration of air quality under CAA Sections 161-165, 42 U.S.C. §§ 7471-7475. Section 161 of the Act, 42 U.S.C. § 7471, requires that each applicable SIP contain a PSD program.

39. Pursuant to CAA Section 302(q), 42 U.S.C. § 7602(q), an applicable implementation plan is the implementation plan, or most recent revision thereof,

which has been approved by U.S. EPA pursuant to CAA Section 110, 42 U.S.C. § 7410, or promulgated by U.S. EPA pursuant to CAA Section 110(c), 42 U.S.C. § 7410(c), and which implements the relevant requirements of the Act. Upon U.S. EPA approval, SIP requirements are federally enforceable under Section 113 of the Act, 42 U.S.C. § 7413, and 40 C.F.R. § 52.23.

40. A state may comply with CAA Section 161, 42 U.S.C. § 7471, by having its own PSD regulations approved by U.S. EPA as part of its SIP, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166. If a state does not have a PSD program that has been approved by U.S. EPA and incorporated into the SIP, then the U.S. EPA federal PSD regulations set forth at 40 C.F.R. § 52.21 shall be incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).

The Title V Operating Permit Program

41. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources” and any source required to have a PSD permit. 42 U.S.C. § 7661a(a). A “major source” for purposes of Title V is defined, among other things, as a source with a potential to emit greater than 100 tons per year of any criteria pollutant. 42 U.S.C. § 7661(2)(B); *id.* § 7602(j).

42. Pursuant to Section 502(b) of the Act, 42 U.S.C. § 7661a(b), on July 21, 1992, the U.S. EPA promulgated regulations implementing the requirements of

Title V and establishing the minimum elements of a major source operating permit program to be administered by any air pollution control agency. 57 Fed. Reg. 32,250 (July 21, 1992). These regulations are codified at 40 C.F.R. Part 70.

The State of Arkansas' PSD and Title V Programs

43. The State of Arkansas' State Implementation Plan contains elements that make up its PSD program, including Regulation 19, Chapter 9, and Regulation 26. See 72 Fed. Reg. 18,394 (Apr. 12, 2007), 66 Fed. Reg. 51,312 (Oct. 9, 2001), and 80 Fed. Reg. 11,573 (Mar. 4, 2015).

44. The State of Arkansas' Part 70 Operating Permit program, which implements Title V of the Clean Air Act, contains elements included in its State Implementation plan in Regulation 26. See 66 Fed. Reg. 51,312 (Oct. 9, 2001).

45. The Arkansas PSD program, as codified in the SIP, incorporates by reference U.S. EPA's definition of "major source." Reg. 19.903(D). Major sources of air pollution include fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input that have the potential to emit 100 tons per year or more of any air pollutant. 40 C.F.R. § 52.21(b)(1).

46. The Arkansas PSD program, as codified in the SIP, incorporates by reference U.S. EPA's definition of "major modification." Reg. 19.903(D). A "major modification" is "any physical change in, or change in the method of operation of, a major stationary source that would result in a significant emissions

increase and a significant net emissions increase of a regulated NSR pollutant from the major stationary source.” 40 C.F.R. § 52.21(b)(2).

47. The Arkansas PSD program, as codified in the SIP, in part at Regulation 19.904(A), incorporates by reference the following applicability procedures to determine if a project is a major modification. Projects at existing emission units require a pre-project comparison between “projected actual emissions” and “baseline actual emissions” to determine if the project would result in a “significant emissions increase.” 40 C.F.R. §§ 52.21(a)(2)(iv)(b) and (c). If a project would result in a “significant emissions increase” and the project would also result in a “significant net emissions increase” considering all contemporaneous emission increases and decreases at the plant, then the project is considered a “major modification.” 40 C.F.R. §§ 52.21(a)(2)(iv)(a), (b)(2), (b)(3), (b)(23). The regulations further provide that “[r]egardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.” 40 C.F.R. § 52.21(a)(2)(iv)(b).

48. The Arkansas PSD program, as codified in the SIP at Regulation 19.903(D), incorporates by reference the following definition from 40 C.F.R. § 52.21(b)(23): “Significant” means “in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emission that

would equal or exceed any of the following rates: ... Nitrogen oxides: 40 [tons per year]; Sulfur dioxide: 40 [tons per year].”

49. The Arkansas PSD program, as codified in the SIP at Regulation 19.904(A), incorporates by reference the following requirements from 40 C.F.R. § 52.21(j)-(p): BACT “shall apply” to the air pollutants triggering PSD review as “major modifications.” In addition, each application for a permit for construction or major modification must include, among other things, consultation with implicated federal land managers and an analysis of ambient air quality and the impact of the construction or major modification on air quality, visibility, soils and vegetation.

50. Under the Arkansas State Implementation Plan, the requirement to obtain a Part 70 permit applies to all major sources. Reg. 26.302(A).

51. A major source for the purposes of Part 70 includes any “major stationary source” as defined in 42 U.S.C. § 7602. 40 C.F.R. § 70.2; 42 U.S.C. § 7661(2)(B).

52. 42 U.S.C. § 7602(j) defines major stationary source to include: “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”

53. Furthermore, under the Arkansas State Implementation Plan, “No part 70 source shall begin construction of a new emissions unit or begin modifications

to an existing emissions unit prior to obtaining a modified part 70 permit.” Reg. 26.301(C).

54. Moreover, under the Arkansas State Implementation Plan, “No part 70 source may operate unless it is operating in compliance with a part 70 permit.” *Id.* at 26.301(A).

Enforcement Provisions

55. The Clean Air Act provides a cause of action for “any person” to file suit against any other person who is alleged to have violated or be in violation of an emission standard or limitation under the CAA. 42 U.S.C. § 7604(a)(1).

56. Additionally, the Act provides a separate cause of action by any person against any other person who constructs any new or modifies any existing major facility without the required permits. 42 U.S.C. § 7604(a)(3).

57. The Plaintiffs and Defendants in this case are all “persons” within the meaning of the Clean Air Act. 42 U.S.C. § 7602(e).

58. An “emission standard or limitation,” within the meaning of 42 U.S.C. § 7604(a)(1), is defined in 42 U.S.C. § 7604(f)(4).

59. An “emission standard or limitation” includes “any . . . standard . . . under any applicable [s]tate implementation plan” and “any requirement to obtain a permit as a condition of operations.” 42 U.S.C. § 7604(f)(4).

60. The Court is authorized to order injunctive relief as well as civil penalties in amounts up to \$37,500 per day per violation for violations occurring after January 12, 2009 until November 2, 2015, up to \$44,539 per day per violation for violations occurring after November 2, 2015 until January 15, 2017, and up to \$45,268 per day per violation for violations occurring after January 15, 2017. 28 U.S.C. § 2461; 31 U.S.C. § 3701; 40 C.F.R. Part 19.

61. Penalties are paid to the United States Treasury, except that the Court may authorize that penalties up to \$100,000 be paid into a beneficial mitigation project fund used to enhance the public health or environment. 42 U.S.C. § 7604(g)(2).

FACTUAL BACKGROUND

62. The Independence plant is a “fossil fuel-fired steam electric plant of more than 250 million British thermal units per hour heat input” with a potential to emit more than 100 tons per year of SO₂ and NO_x. Therefore, the plant constitutes a “major stationary source” within the meaning of Reg. 19.903(D) and 40 C.F.R. § 52.21(b)(1)(i)(a) and is a “major emitting facility” within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1).

63. The White Bluff plant is a “[f]ossil fuel-fired steam electric plant[] of more than 250 million British thermal units per hour heat input” with a potential to emit more than 100 tons per year of SO₂ and NO_x. Therefore, the plant constitutes

a “major stationary source” within the meaning of Reg. 19.903(D) and 40 C.F.R. § 52.21(b)(1)(i)(a) and is a “major emitting facility” within the meaning of Section 169(1) of the Act, 42 U.S.C. § 7479(1).

64. The Independence plant is a “major source” under 42 U.S.C. § 7602 because it emits or has the potential to emit more than 100 tons per year of SO₂ and NO_x, and therefore it is a major source under Arkansas’ Part 70 program. *See* 40 C.F.R. § 70.2; 42 U.S.C. § 7661(2).

65. The White Bluff plant is a “major source” under 42 U.S.C. § 7602 because it emits or has the potential to emit more than 100 tons per year of SO₂ and NO_x, and therefore it is a major source under Arkansas’ Part 70 program. *See* 40 C.F.R. § 70.2; 42 U.S.C. § 7661(2).

66. From on or about February 28, 2009 to April 17, 2009 (“2009 Independence Unit 1 Outage”), Defendants undertook a planned outage at Unit 1 at the Independence plant.

67. During the 2009 Independence Unit 1 Outage, Defendants made a number of physical changes and/or changes in the method of operation at Independence Unit 1 including, but not limited to, replacement of the economizer in the boiler.

68. The physical changes and/or changes in the method of operation at Unit 1 during the 2009 Independence Unit 1 Outage caused emissions of SO₂ for at

least one 12-month period beginning on or after April 2010 that exceeded baseline actual emissions for any consecutive 24-month period within the 5-year period immediately preceding commencement of the 2009 Independence Unit 1 Outage by an amount greater than the applicable PSD significance level.

69. Because the physical changes and changes in the method of operation at Unit 1 during the 2009 Independence Unit 1 Outage resulted in post-project significant emissions increases and significant net emissions increases for SO₂, a major modification occurred for that pollutant. Defendants did not obtain a PSD permit for that major modification and they are operating the Independence plant without completing a permit application for such permit, without the permit itself, and without complying with the conditions that would be imposed by such permit, including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements.

70. Moreover, Defendants did not obtain a modified Part 70 permit prior to commencing work on the modification described in the previous paragraph, yet they are operating the Independence plant without that modified Part 70 permit, which would have incorporated terms and conditions from a PSD permit, including emission limitations that would be imposed by a PSD permit pursuant to BACT requirements.

71. From on or about September 14, 2008 to November 4, 2008 (“2008 Independence Unit 2 Outage”), Defendants undertook a planned outage at Unit 2 at the Independence plant.

72. During the 2008 Independence Unit 2 Outage, Defendants made a number of physical changes and/or changes in the method of operation at Independence Unit 2 including, but not limited to, replacement of the economizer in the boiler.

73. The physical changes and/or changes in the method of operation at Unit 2 during the 2008 Independence Unit 2 Outage caused emissions of SO₂ for at least one 12-month period beginning on or after June 2009 that exceeded baseline actual emissions for any consecutive 24-month period within the 5-year period immediately preceding commencement of the 2008 Independence Unit 2 Outage by an amount greater than the applicable PSD significance level.

74. Because the physical changes and changes in the method of operation at Unit 2 during the 2008 Independence Unit 2 Outage resulted in post-project significant emissions increases and significant net emissions increases for SO₂, a major modification occurred for that pollutant. Defendants did not obtain a PSD permit for that major modification and they are operating the Independence plant without completing a permit application for such permit, without the permit itself, and without complying with the conditions that would be imposed by such permit,

including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements.

75. Moreover, Defendants did not obtain a modified Part 70 permit prior to commencing work on the modification described in the previous paragraph, yet they are operating the Independence plant without that modified Part 70 permit, which would have incorporated terms and conditions from a PSD permit, including emission limitations that would be imposed by a PSD permit pursuant to BACT requirements.

76. From on or about September 14, 2007 to November 18, 2007 (“2007 White Bluff Unit 2 Outage”), Defendant Entergy Arkansas undertook a planned outage at Unit 2 at the White Bluff plant.

77. During the 2007 White Bluff Unit 2 Outage, Defendant Entergy Arkansas made a number of physical changes and/or changes in the method of operation at White Bluff Unit 2 including, but not limited to, replacement of the economizer in the boiler.

78. The physical changes and/or changes in the method of operation at Unit 2 during the 2007 White Bluff Unit 2 Outage caused emissions of NO_x for at least one 12-month period beginning on or after April 2009 that exceeded baseline actual emissions for any consecutive 24-month period within the 5-year period

immediately preceding commencement of the 2007 White Bluff Unit 2 Outage by an amount greater than the applicable PSD significance level.

79. Because the physical changes and changes in the method of operation at Unit 2 during the 2007 White Bluff Unit 2 Outage resulted in post-project significant emissions increases and significant net emissions increases for NO_x, a major modification occurred for that pollutant. Defendant Entergy Arkansas did not obtain a PSD permit for that major modification and they are operating the White Bluff plant without completing a permit application for such permit, without the permit itself, and without complying with the conditions that would be imposed by such permit, including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements.

80. Moreover, Defendant Entergy Arkansas did not obtain a modified Part 70 permit prior to commencing work on the modification described in the previous paragraph, yet they are operating the plant without that modified Part 70 permit, which would have incorporated terms and conditions from a PSD permit, including emission limitations that would be imposed by a PSD permit pursuant to BACT requirements.

CLAIMS FOR RELIEF

Plaintiffs' First Claim for Relief

Modifying and Operating the Independence Plant Without Obtaining a PSD Permit for a Major Modification at Unit 1

81. Plaintiffs reallege all preceding paragraphs as if set forth herein.
82. Defendants made a major modification at Independence Unit 1 for SO₂, described in Paragraphs 66 and 67 that caused the significant emissions increase and significant net emission increase described in Paragraph 68.
83. For the major modifications described in the preceding paragraph, Defendants constructed and are operating the Independence plant without completing a permit application for a PSD permit, without such PSD permit, and without complying with the conditions that would be imposed by such permit, including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements, thereby violating the Regulation 19 of the Arkansas SIP and Clean Air Act.
84. Unless restrained and penalized by an order of this Court, these and similar violations of the PSD provisions of the Act and Arkansas SIP will remain ongoing.

Plaintiffs' Second Claim for Relief

**Modifying and Operating the Independence Plant Without
Obtaining a Modified Part 70 Permit**

85. Plaintiffs reallege all preceding paragraphs as if set forth herein.

86. Defendants made a major modification at Unit 1 for SO₂ discussed above in the First Claim for Relief.

87. With respect to SO₂, Defendants violated Regulation 26.301(A) and (C) of the Arkansas SIP by operating Independence without a Part 70 permit modified to address the major modification discussed above in the First Claim for Relief.

88. Unless restrained and penalized by an order of this Court, these and similar violations of Regulation 26.301(A) and (C) of the Arkansas SIP will remain ongoing.

Plaintiffs' Third Claim for Relief

**Modifying and Operating the Independence Plant Without
Obtaining a PSD Permit for a Major Modification at Unit 2**

89. Plaintiffs reallege all preceding paragraphs as if set forth herein.

90. Defendants made a major modification at Independence Unit 2 for SO₂, described in Paragraphs 71 and 72 that caused the significant emissions increase and significant net emission increase described in Paragraph 73.

91. For the major modifications described in the preceding paragraph, Defendants constructed and are operating the Independence plant without completing a permit application for a PSD permit, without such PSD permit, and without complying with the conditions that would be imposed by such permit, including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements, thereby violating Regulation 19 of the Arkansas SIP and Clean Air Act.

92. Unless restrained and penalized by an order of this Court, these and similar violations of the PSD provisions of the Act and Arkansas SIP will remain ongoing.

Plaintiffs' Fourth Claim for Relief

**Modifying and Operating the Independence Plant Without
Obtaining a Modified Part 70 Permit**

93. Plaintiffs reallege all preceding paragraphs as if set forth herein.

94. Defendants made a major modification at Unit 2 for SO₂ discussed above in the Third Claim for Relief.

95. With respect to SO₂, Defendants violated Regulation 26.301(A) and (C) of the Arkansas SIP by operating Independence without a Part 70 permit modified to address the major modification discussed above in the Third Claim for Relief.

96. Unless restrained and penalized by an order of this Court, these and similar violations of Regulation 26.301(A) and (C) of the Arkansas SIP will remain ongoing.

Plaintiffs' Fifth Claim for Relief

**Modifying and Operating the White Bluff Plant Without
Obtaining a PSD Permit for a Major Modification at Unit 2**

97. Plaintiffs reallege all preceding paragraphs as if set forth herein.

98. Defendant Entergy Arkansas made a major modification at White Bluff Unit 2 for NO_x, described in Paragraphs 76 and 77 that caused the significant emissions increase and significant net emission increase described in Paragraph 78.

99. For the major modifications described in the preceding paragraph, Defendant Entergy Arkansas constructed and is operating the White Bluff plant without completing a permit application for a PSD permit, without such PSD permit, and without complying with the conditions that would be imposed by such permit, including but not limited to emission limitations that would be imposed by that permit pursuant to BACT requirements, thereby violating Regulation 19 of the Arkansas SIP and the Clean Air Act.

100. Unless restrained and penalized by an order of this Court, these and similar violations of the PSD provisions of the Act and Arkansas SIP will remain ongoing.

Plaintiffs' Sixth Claim for Relief

**Modifying and Operating the White Bluff Plant Without
Obtaining a Modified Title V Permit**

101. Plaintiffs reallege all preceding paragraphs as if set forth herein.

102. Defendant Entergy Arkansas made a major modification at Unit 2 for NO_x discussed above in the Fifth Claim for Relief.

103. For the major modifications described in the preceding paragraph, Defendant Entergy Arkansas violated Regulation 26.301(A) and (C) of the Arkansas SIP by operating White Bluff without a Part 70 permit modified to address the major modification discussed above in the Fifth Claim for Relief.

104. Unless restrained and penalized by an order of this Court, these and similar violations of Regulation 26.301(A) and (C) of the Arkansas SIP will remain ongoing.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

105. Declare that Defendants violated and are violating the Clean Air Act;

106. Permanently enjoin Defendants from operating the Independence and White Bluff plants except in accordance with the Clean Air Act, and the Arkansas SIP;

107. Order Defendants to submit required permit applications, obtain required permits, comply with the requirements of any permits obtained, and submit correct compliance certifications;

108. Order Defendants to remediate the environmental damage and ongoing impacts (including the injuries to Plaintiffs' members as set forth above) resulting from its violations;

109. Assess civil penalties against Defendants in the amount of \$37,500 per day per violation for violations occurring after November 12, 2009 until November 2, 2015, of \$44,539 per day per violation for violations occurring after November 2, 2015 until January 15, 2017, of \$45,268 per day per violation for violations occurring after January 15, 2017, pursuant to 42 U.S.C. § 7413 and 40 C.F.R. § 19.4;

110. Order that, pursuant to 42 U.S.C. § 7604(g)(2), \$100,000.00 of the civil penalties assessed against Defendants be used in beneficial mitigation projects to enhance public health and the environment (including enhanced air quality monitoring) in the areas where Plaintiffs' members live, work and recreate and that are adversely impacted by Defendants' illegal emissions;

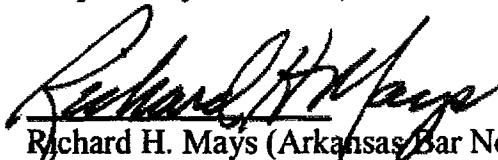
111. Retain jurisdiction of this action to ensure compliance with the Court's Order;

112. Award Plaintiffs their costs of litigation, including reasonable attorney fees, pursuant to 42 U.S.C. § 7604(d); and

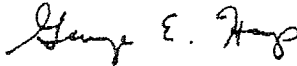
113. Grant such other relief as the Court deems just and proper.

Dated this 16th day of November, 2018

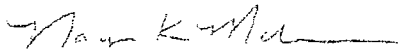
Respectfully submitted,



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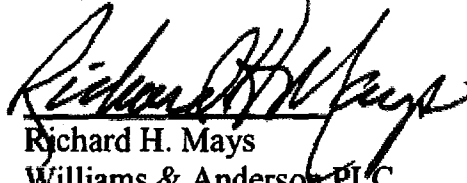
*Counsel for Plaintiffs Sierra Club and
National Parks Conservation Association*

DEMAND FOR JURY TRIAL

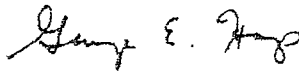
Plaintiffs demand a jury trial for all issues so triable.

Dated this 16th day of November, 2018

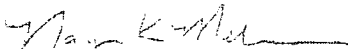
Respectfully submitted,



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*Counsel for Plaintiffs Sierra Club and
National Parks Conservation Association*

Exhibit A

DECLARATION OF JACK STEWART

I, Jack Stewart, hereby declare:

1. I am over eighteen (18) years old, am competent to testify and have personal knowledge of the matters set forth herein.
2. I am a retired teacher in the International School Education system and have lived near Jasper, Arkansas next to the Buffalo National River for the past 20 years.
3. I am currently an active volunteer member of the National Parks Conservation Association ("NPCA") and have been a member off and on for the past 20 years. NPCA has the same interest in preserving the unique Buffalo National River and surrounding Park and wilderness areas as I do. I also hold volunteer leadership positions in one other national nonprofit environmental organization, and two local nonprofit groups dedicated towards protection of the Buffalo National River area.
4. My property abuts the Buffalo National River Park boundary on three sides. I bought my property 20 years ago after repeated visits to the area because it borders the National Park and has good areas to hike within walking distance of my property. I visit the Buffalo National River Park to go walking in nearly every day of the year because it is adjacent to my

property, and I will continue visiting the Park nearly every day for as long as I live here.

5. Jasper, AR is located approximately 102 miles from the Independence coal-fired power plant. I am concerned about the air pollution coming from that and other coal-fired power plants in the area. I've noticed decreased visibility from my property looking out at mountain ridges in the distance over the years. I've also noticed decreased visibility when I go walking or for longer hikes into the Buffalo National River Park in the Eastern direction of the Independence plant. The views of the river and mountains in the distance, such as when I am looking at the bluffs above the river, have become less clear, and the hazy conditions are worsening. I notice this especially during bird migration events when the wind conditions are favorable, and the birds gather along the ridges of the bluffs above the river. Then it is particularly noticeable that the visibility is impaired. I am concerned because my ability to view the natural scenery in the park and from my property has been diminished because of air pollution that reduces visibility and air quality.

6. I have read news reports online and in newspapers about the bad air pollution in the area for several years. I am concerned about the effect of the pollution on my property and in the Buffalo National River area where I

go walking nearly every day. I am concerned about the air quality and visibility at my home, and that pollution may be impairing my family's ability to breath clean air. I worry about decreased value in my property having to regularly clean off a small layer of dark dust that collects on top of my solar panels that I believe comes from coal-fired power plants in the area. I am also concerned about potential harm to local wildlife along the Buffalo National River and in the region.

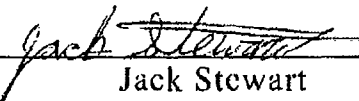
7. I have read warnings about eating local fish due to possible contamination from pollution online. I've seen a sign warning of mercury contamination to not eat the fish at Johnson Hole near Clinton, which is approximately 52 miles away from where I live and 58 miles from the Independence power plant. I also understand that there is a mercury warning at Gray's Lake, which is approximately 32 miles from the White Bluff power plant. Because of mercury in fish warnings, I am much more careful about the source of the fish that I eat, and have reduced my consumption of local fish as a result. Fried local fish is popular here. Being nearby the Southern United States, a lot of people eat it and serve it regularly around my town and surrounding areas. But I've definitely cut back eating the local fish since learning about the mercury warnings. I've learned that pollution from coal-fired power plants in the area can contribute

towards mercury contamination in the fish. If the local fish are contaminated, I am also concerned for the health of larger mammals in the area, and for the health of myself and my family.

8. Reducing air pollution from the Independence and White Bluff coal-fired power plants will have a positive impact on my ability to view the natural scenery in the Buffalo National River area and will improve views of nearby mountain ridges at my property. My aesthetic and recreational interests would be improved at the park, while I would have less apprehension for my property and health interests at home, including lessening my concern about eating local contaminated fish.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Jasper, Arkansas, on DATE: November 4, 2018



Jack Stewart

DECLARATION OF ROBERT ALLEN

I, Robert Allen, hereby declare:

1. I am over eighteen (18) years old, am competent to testify and have personal knowledge of the matters set forth herein.

2. I live in Dover, Arkansas, approximately 87 miles from the White Bluff coal-fired power plant and 98 miles from the Independence coal-fired power plant. I have lived in Arkansas since 1980.

3. I am a retired chemist and professor of chemistry. I have taught organic chemistry, environmental chemistry, and toxicology at Arkansas Tech University in Russellville, Arkansas in the past. I am an active member of Sierra Club, and have been a member for the past 20 years. I am also on the Executive Committee of Sierra Club's Arkansas Chapter and have served in that capacity since 2010. I became a member of Sierra Club because I support and believe in its activist stance on environmental issues. I am proud that Sierra Club takes action to improve the environment in Arkansas and around the country. I am also a member of a few other environmental non-profit organizations.

4. One of my favorite things about living in Arkansas is the many opportunities for outdoor activity that we have here. Part of the reason I moved to Arkansas was to be near the Buffalo National River and to spend

more time outdoors. I visit the Buffalo National River area at least six times per year where I enjoy camping, hiking, and canoeing, among other activities. In 2007 I went on a 10-day camping trip up and down the Buffalo National River, and I go canoeing there regularly to get away from the rest of the world. The last time I was there was a little over a month ago in order to conduct an informal algae survey studying nutrient problems in the water.

5. When I visit the Buffalo National River area I have seen hazy conditions and worsening visibility up and down the river. From just about anywhere along the bluffs beside the river, such as at Big Bluff, Jim Bluff, Red Bluff, and other lookout points, I have seen haze at some point. I am very concerned about the impacts of haze pollution on the Buffalo National River area. This haze and reduced visibility lessens my enjoyment and causes me to have concern about air pollution in the area. To stand on the bluffs above the river and to admire the magnificent views of the meandering river below is an important and unique part of my experience when I visit the Buffalo National River area. I find it disturbing that haze in the area decreases visibility and my ability to take in the scenic views from the nearby bluffs, lessening my enjoyment of the area. Despite the haze, I plan to continue to visit the Buffalo National River and to engage in outdoor

activities there. However, if haze pollution persists and visibility continues to worsen, I will be less likely to visit and enjoy this area as often in the future.

6. I also visit Hot Springs National Park regularly, about 2 times per year. There, I enjoy the natural hot springs of the park and hiking to nice lookout points on the trails above the urban area. I have noticed that the views from these outlook spots were clearer in the past. I have observed hazy conditions in this area, obscuring panoramic views that I can't see as well as I used to be able to. This decreased visibility lessens my enjoyment of Hot Springs National Park. However, I plan to continue to visit the park in the future, but with perhaps fewer hikes to enjoy the scenic views as long as visibility continues to worsen.

7. I understand that air pollution causes or contributes to haze that diminishes visibility in the Buffalo National River and Hot Springs National Park. I share Sierra Club's strong interest in protecting these parks and other natural areas in Arkansas from haze pollution.

8. As a retired chemistry professor, and through many years of volunteering with the Sierra Club, I know that the same pollutants that cause visibility impairment, such as sulfur dioxide, nitrogen dioxide, and particulate matter, are also harmful to public health. I know that sulfur

dioxide and nitrogen oxide pollution from fossil fuel burning power plants also react in the atmosphere to form particulate matter, which can penetrate deep into the lungs and cause respiratory and cardiovascular problems. Nitrogen oxide pollution from power plants also contributes to the formation of smog and ground-level ozone pollution, which causes a number of adverse impacts to human health and the environment. As a result, I am often concerned about the impacts of pollution from Arkansas power plants on my own health, and the health of my family and friends in the area. I have a few friends that have asthma who live in Dover or nearby, and I am concerned about the impact of air pollution upon their health. Because of my public health concerns, I avoid prolonged exposure in areas adjacent to power plants in Arkansas.

9. I am also concerned about the impact on local fish populations from coal-fired power plants in Arkansas, and am concerned for those who eat contaminated fish. I have learned that burning coal can contribute towards mercury contamination in fish. I am aware that there are mercury warnings to not eat the fish at Johnson Hole, Gray's Lake, and Lake Ouachita, which are within 70 miles of the Independence or White Bluff coal-fired power plants. I enjoy fishing a few times during the summer at various local spots and in wilderness areas, but avoid fishing at locations with mercury in fish

warnings. Even though I go fishing a few times during the summers, I don't eat many local fish, preferring to catch and release. The possibility of mercury contamination is always in the back of my mind whenever I go fishing or consider eating local fish.

10. Reducing air pollution from coal-fired power plants in the area will benefit me and other Sierra Club members who use and enjoy the Buffalo National River and Hot Springs National Park by improving the views, and by helping to protect human health from air pollution and fish contamination. Hiking, camping, canoeing, fishing and other outdoor activities in the parks and other wilderness places in the area would be more enjoyable for me with no haze pollution from these plants. Because I am concerned about the impacts of air pollution on my health, on local fish populations, and on my aesthetic and recreational enjoyment of these protected parks, I support Sierra Club's efforts to require reductions in pollution from the Independence and White Bluff power plants.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Dover, Arkansas, on DATE: Oct 29, 2018


Robert Allen

DECLARATION OF DON CASTLEBERRY

I, Don Castleberry, hereby declare:

1. I am over eighteen (18) years old, am competent to testify and have personal knowledge of the matters set forth herein.
2. I live in Maumelle, Arkansas, adjacent to and Northwest of Little Rock, Arkansas and have lived in the Little Rock area for the past 25 years. My house in Maumelle is located approximately 80 miles from the Independence coal-fired power plant and 32 miles from the White Bluff coal-fired power plant.
3. I am a member of the National Parks Conservation Association ("NPCA"). I joined in 1996 because I was very impressed with the work NPCA does to protect national parks. I retired from the National Park Service after 32 years of serving in such roles as Superintendent, Regional Director, and Associate Director of Operations. I transitioned from government work to become a Board member for NPCA from 1994 until 2001. Today, I continue to work closely with NPCA's Southeast Regional Office, particularly on issues involving my home State of Arkansas. NPCA represents my interest in restoring the clear views and clean air in our country's national parks and wilderness areas. I have been personally involved in the protection of this region since the late 1960's.

4. I am also a member of Sierra Club because I support and believe in its environmental work. The Sierra Club represents my interest in taking action to improve the environment in Arkansas and around the country. My interest in protecting the environment relates to my former work as a National Park Service employee.

5. As a retired National Park Service employee, I still regularly visit both the Buffalo National River and Hot Springs National Park to visit friends and former co-workers to give informal advice. I visit the Buffalo National River approximately three times per year. The last time I was there was about 6 months ago when I spoke with the Superintendent and Assistant Superintendent for the park. I enjoy a combination of informal park discussions with outdoor activities such as hiking, canoeing, floating down the river, and conducting casual photography while I am up there.

6. When I visit the Buffalo National River area I frequently see hazy conditions when viewing vista points such as at Buffalo Point and other high points along the river. I am aware that some of this haze is caused by air pollution from human-made sources—specifically from Independence, and other coal-fired power plants in the area. This haze causes me to have concern for the state and well-being of the park's natural environment and lessens my enjoyment of the park. However, I intend to

continue to visit the Buffalo National River to hike, canoe, take pictures, and visit informally with friends and Park Service employees for as long as I live in Arkansas.

7. I visit the Hot Springs National Park more frequently -- approximately every six to eight weeks. My last visit there was 2 months ago. I visit with friends, former coworkers and the Park Superintendent for informal park discussions at Hot Springs National Park, along with enjoying recreational activities at the Park. I visit the unique natural hot springs, and I take my boat to go boating in the park's lakes. I see hazy conditions at Hot Springs National Park as well, and while not present all of the time, some parts of the year it is obvious, such as when viewing from the observation tower at the high point of the park. The park has two mountains with a meandering drive up to a popular observation tower with dramatic views. From this point hazy conditions and pollution are readily visible. The visible haze lessens my enjoyment at Hot Springs National Park. However, I intend to continue visiting Hot Springs National Park to boat, to enjoy the hot springs and to visit with friends and Park Service employees into the future on a regular basis for as long as I am physically able.

8. I have an academic and professional science background in geology

and hold a Master's degree in Environmental Management from Indiana University, where I've served as an adjunct lecturer for classes made up of elected public officials. I understand the general composition of air pollution and how pollution impacts entire ecosystems. I have read, specifically, how it can be detrimental to water and wildlife. I am concerned by the hazy conditions and reduced visibility that I have seen at both Buffalo National River and Hot Springs National Park. I am concerned about the impacts of haze pollution in the Parks and for my own aesthetic and recreational enjoyment of those parks.

9. I am also concerned about the pollution in Maumelle, Arkansas where I live. Haze and reduced visibility is especially apparent when at the Interstate 430 bridge connecting Maumelle to Little Rock. At this vista point I can see visible air pollution over Little Rock and Maumelle and up the river looking West to Pinnacle Mountain State Park. I notice when Pinnacle Mountain is clear or obscured from hazy conditions. As a result, I can sometimes see the pollution here in my town, only 32 miles from the White Bluff coal plant. For 10 years, from approximately 1998 to 2008, I served on the Pulaski County Planning Commission that includes planning for Maumelle, Little Rock, and other towns in the county. I became alarmed during meetings of the County Board when the Mayor of Little Rock

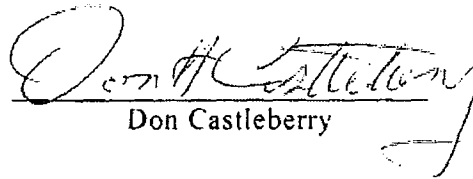
announced that local pollution limits were exceeded. This happened at least 5 times while I was there in the room.

10. Given that I have heard direct warnings about the level of pollution where I live, I have public health concerns for myself, my family and friends who all live in the area. I understand that haze-causing pollution from power plants, such as sulfur dioxide, nitrogen oxides, and particulate matter, are harmful to human health. I know that sulfur dioxide and nitrogen oxides can increase asthma and can form particulate matter that further aggravates respiratory and heart diseases and can even cause premature death. I am especially concerned for my daughter and granddaughter who both live nearby in Maumelle, and who have worsening allergies. I believe that the pollution in the area that they breathe everyday does play a role in their overall health. I am concerned about the air quality in Maumelle because of its proximity to the Independence, White Bluff, and other coal-fired power plants in the area. I am concerned that the pollution from the plants may be impairing my family's ability to breathe clean air.

11. Improving the air quality in the region that I live in will have a positive impact on my family's health, my recreational interests and informal work in the Buffalo National River and Hot Springs National Park, and my ability to view the scenic vistas and landscapes at those parks.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that
the foregoing is true and correct.

Executed in Maumelle, Arkansas, on DATE: 10-27-2018


Don Castleberry

DECLARATION OF JANET NYE

I, Janet Nye, hereby declare:

1. I am over eighteen (18) years old, I am competent to testify, and have personal knowledge of the matters in this declaration.

2. I was raised in Little Rock, Arkansas. I graduated from Hall High School in 1975, and I have lived in Maumelle since 1987. I also own a second home in Gilbert, Arkansas, located less than a quarter of a mile from the Buffalo National River ("BNR"). My second home in Gilbert is located approximately 76 miles from the Independence power plant.

3. I am a member of the National Parks Conservation Association ("NPCA"). I joined NPCA in 1990 because I am passionate about the National Parks and realized that NPCA is a strong advocate in protecting those parks. These natural environments are what fill my soul. I go to National Parks to renew my spirit, enjoy creation, and satisfy my curiosity about the natural world. I depend on these parks for their beauty, and to immerse in their ecosystems, inspire my creativity, and connect with other visitors.

4. Twenty years after joining NPCA, I enhanced my support and became a Trustee for the Parks because I wanted to make a stronger impact for NPCA's ongoing work regionally to protect the air quality, wildlife, and

water within the Parks and surrounding areas. The mission of NPCA is to protect and enhance America's national parks for the use and enjoyment of present and future generations. Since NPCA was established in 1919, it has advocated for protection of the natural environment, including air quality, in and around the national parks and other federal lands. NPCA is a nationally recognized not-for-profit Section 501(c)(3) and (c)(4) membership-based public interest organization, and represents my interest in restoring the vistas and clean air in Arkansas' National Parks and wilderness areas.

5. Because my second home in Gilbert is only a quarter mile from the boundary of the BNR, I regularly visit the river at least one to two times per month to hike, paddleboard, canoe, birdwatch, and identify wildflowers in the Spring. I intend to continue visiting the river for the rest of my life.

6. One of the things I love to do is hike the Buffalo River Trail. It is designed to maximize views from the tops of bluffs above the river. What is special about the bluff lines is the panoramic views they afford of the river valley below. The river doesn't travel straight through the valley; it meanders, and the overlooks allow you to appreciate the variety of the BNR with its mix of sightlines, wildlife, recreation, and history.

7. Unfortunately, sometimes my enjoyment of these vistas is diminished by hazy conditions. In areas where the view is particularly

expansive, the haze makes the visibility poor. It really bothers me when I hike up to an overlook only to find the vista obscured by haze. It concerns me what effect these polluted conditions are having on the flora and fauna.

8. I am aware that some of this haze is caused by air pollution from human-made sources. I am concerned about the effect of this pollution on the wildlife and ecosystem of the BNR. I want to be able to look out from the cliffs and see clearly expansive views looking up and down the river. I want clear views, and to ensure that the flora and fauna, and the water and soil, have a healthy environment needed to sustain this area for generations to come.

9. I plan to live in Arkansas permanently and improving the air quality in the BNR region will have a positive impact on the ability of myself and my family to enjoy the natural environment and scenic views of the BNR.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Maumelle, Arkansas, on DATE: 11-1-18



Janet Nye



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FILED
 U.S. DISTRICT COURT
 EASTERN DISTRICT ARKANSAS

NOV 16 2018

JAMES W. McCORMACK, CLERK
 By: _____ DEP CLERK

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Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF ARKANSAS

<p>SIERRA CLUB and NATIONAL PARKS CONSERVATION ASSOCIATION,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>ENTERGY ARKANSAS, INC., ENTERGY POWER, INC., ENTERGY POWER, LLC, and ENTERGY MISSISSIPPI, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>Civil Action No.</p> <p>NOTICE OF LODGING OF SETTLEMENT AGREEMENT</p>
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4:18-cv-854- BRW

Plaintiffs hereby provide notice to the Court of the lodging of the attached Settlement Agreement for the Court's review and approval. The relief set forth in this Settlement Agreement represents a full resolution of this Clean Air Act citizen suit.

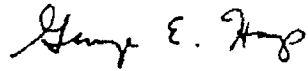
This Settlement Agreement is not to be entered as an Order of the Court, however, until the completion of a forty-five (45) day review period provided to the United States Department of Justice and the Environmental Protection Agency by the Clean Air Act, 42 U.S.C. § 7604 (c)(3), and described in paragraph 47 of the Settlement Agreement. Following the conclusion of the forty-five day notice period, the Parties intend to review and take into account any comments submitted by the federal government, and thereafter move the Court to enter this Settlement Agreement.

Dated this 16th day of November, 2018

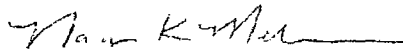
Respectfully submitted,



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*Counsel for Plaintiffs Sierra Club and
National Parks Conservation Association*

SETTLEMENT AGREEMENT AND CONSENT JUDGMENT

Date entered by Court: _____

WHEREAS, Sierra Club and National Parks Conservation Association (“Plaintiffs”) brought this action against Entergy Arkansas, Inc., Entergy Power, LLC, and Entergy Mississippi, Inc. (each a “Defendant” and collectively “Defendants”) pursuant to Section 304 of the Clean Air Act (the “Act”), 42 U.S.C. § 7604, for declaratory and injunctive relief and assessment of civil penalties for certain alleged violations of the Act and its implementing regulations at the Independence and White Bluff Steam Electric Stations;

WHEREAS, Defendants deny Plaintiffs’ allegations and maintain that they have been and remain in compliance with the Act and are not liable for civil penalties or injunctive relief, and nothing herein shall constitute an admission of any fact, conclusion of law, or liability;

WHEREAS, on September 27, 2016, the U.S. Environmental Protection Agency (“EPA”) published a federal implementation plan (“FIP”) for Arkansas titled “Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan,” 81 Fed. Reg. 66,332 (Sept. 27, 2016), replacing the previously disapproved portions of Arkansas’ state implementation plan under the Clean Air Act, 42 U.S.C. § 7491, and Regional Haze Rule, 40 C.F.R. § 51.301 *et seq.*;

WHEREAS, the FIP imposes requirements on the Independence, White Bluff, and Lake Catherine Steam Electric Stations;

WHEREAS, the Parties each petitioned for review of the FIP in the United States Court of Appeals for the Eighth Circuit in separate actions consolidated under Case No. 16-4270;

WHEREAS, the Parties desire to settle all matters and claims by execution and entry of this Agreement and avoid the costs, delay, and uncertainty of litigation;

WHEREAS, the Parties agree that the settlement of this action through this Agreement without further litigation is in the public interest, and is a fair, reasonable, and appropriate means of resolving the matter;

WHEREAS, the Parties anticipate that this Agreement will achieve significant reductions of air emissions over time and thereby significantly improve air quality;

WHEREAS, pursuant to 42 U.S.C. § 7604(c)(3) of the Act, this Agreement is being forwarded to the United States Department of Justice and to the EPA for the statutorily-mandated forty-five (45) day review period; and

WHEREAS, the Parties consent to the entry of this Agreement without trial of any issues;

NOW, THEREFORE, it is hereby ORDERED AND DECREED as follows:

JURISDICTION, VENUE, AND APPLICABILITY

1. This Court has jurisdiction over the Parties to and the subject matter of this action under Section 304(a) of the Act, 42 U.S.C. § 7604(a), and under 28 U.S.C. §§ 1331 and 1355(a). For the purposes of entering this Agreement, the underlying Complaint, and enforcing this Agreement, Defendants waive all objections and defenses

that they may have to the Court's jurisdiction over this action, entry or enforcement of the Agreement, or venue in this judicial district.

2. Venue is proper in this Judicial District under Section 304(c) of the Act, 42 U.S.C. § 7604(c), and under 28 U.S.C. §§ 1391 and 1395.

3. The Parties consent to entry of this Agreement without further notice.

4. Upon the Date of Entry, the provisions of this Agreement shall apply to, be binding upon, and inure to the benefit of the Parties, as well as to each individual Party's successors and assigns.

5. If any Defendant proposes to sell or transfer an operational or ownership interest in any of the Three Plants, as defined below, to an entity unrelated to Defendants ("Third Party"), the Defendants shall advise the Third Party in writing of the existence of this Agreement prior to such sale or transfer and shall send a copy of such written notification to the Plaintiffs at least sixty (60) days before such proposed sale or transfer.

6. Except as provided below, no sale or transfer of an operational or ownership interest in any of the Three Plants by any Defendant to a Third Party shall take place before the Third Party and Plaintiffs have executed, and the Court has approved, a modification pursuant to this Agreement making the Third Party a party to this Agreement and jointly and severally liable with Defendants for all the requirements of this Agreement that are applicable to the transferred or purchased interests. This Paragraph does not apply to the sale or transfer of an operational or ownership interest

in one or more of the Three Plants from a Third Party to any Defendant or to any Affiliate of any one of the Defendants, as defined below. Furthermore, this Paragraph does not apply to the amendment of any agreement(s) between any Defendant and any Co-owners, as defined below, concerning operation of any of the Three Plants, so long as the amendment would not prevent Defendants from complying fully with this Agreement.

DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in the Clean Air Act, 42 U.S.C. §§ 7401-7671q, or regulations implementing the Clean Air Act, shall have the meaning set forth in the Clean Air Act or those regulations.

8. Whenever the terms set forth below are used in this Agreement, the following definitions shall apply for the purposes of this Agreement:

- a. "ADEQ" means the Arkansas Department of Environmental Quality.
- b. "Affiliate" means, when used in connection with any Defendant, a legal entity directly or indirectly owned by Entergy Corporation, and, when used in connection with any Co-owner, a legal entity under common ownership or control.
- c. "APC&EC" means the Arkansas Pollution Control and Ecology Commission.
- d. "APSC" means the Arkansas Public Service Commission.

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- e. "Best efforts to fulfill the obligation" include using best efforts to anticipate any potential Force Majeure Event and to address the effects of any such event both as it is occurring and after it has occurred, such that the delay and/or violation are minimized to the greatest extent possible.
- f. "Challenge" means, for purposes of Paragraphs 17, 18, 21, 22, and 23, the filing or funding of comments or administrative or judicial proceedings.
- g. "Clean Air Act," "CAA," or "Act" means the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q, and its implementing regulations.
- h. "Coal" means all forms of coal, including but not limited to bituminous coal, sub-bituminous coal, and lignite, and petroleum coke.
- i. "Co-owners" means, with respect to Independence, Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, East Texas Electric Cooperative, Osceola Municipal Light & Power, Conway Corporation, and City of West Memphis, and, with respect to White Bluff, Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, Conway Corporation, and City of West Memphis.
- j. "Date of Entry" means the date this Agreement is approved or signed by the United States District Court Judge.
- k. "Date of Lodging" means the date the notice of lodging of this Agreement is filed with the Clerk of the Court for the United States District Court for the Eastern District of Arkansas.

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- l. "Effective Date" means the date the Agreement is entered by the district court judge or, if the approved Agreement is appealed and upheld, the date of the mandate from the court of appeals.
- m. "Entergy Arkansas" means Entergy Arkansas, Inc.
- n. "EMI" means Entergy Mississippi, Inc.
- o. "EPLLC" means Entergy Power, LLC, including its predecessor Entergy Power, Inc.
- p. "EPA" means the United States Environmental Protection Agency.
- q. "FLMs" mean the Federal Land Managers.
- r. "FOIA" means the federal Freedom of Information Act.
- s. "Force Majeure Event" means an event that has been or will be caused by circumstances beyond the control of Defendants, one or more of their contractors, or any entity controlled by one or more Defendants or Affiliates, that delays or prevents the performance of any obligation related to this Agreement or otherwise causes a violation of Paragraphs 9 through 16 of this Agreement despite Defendants' best efforts to fulfill the obligation. Unanticipated or increased costs or expenses associated with the performance of Defendants' obligations under this Agreement shall not constitute a Force Majeure Event. A Force Majeure Event includes, but is not limited to, construction, labor or equipment delays; acts of God; or acts of war; terrorism; or failure of a permitting authority to issue any

necessary permit, order, or other approval with sufficient time for that Defendant to achieve compliance with any requirement of this Agreement if the failure of the permitting authority to act is beyond the control of the Defendant and the Defendant has taken all reasonable steps available to it to obtain the necessary permit, order, or other approval.

- t. "Independence" means the Independence Steam Electric Station, which consists of two coal-fired electric utility steam generating units (Units 1 and 2) with nameplate capacity of approximately 900 megawatts each, located in Independence County, Arkansas.
- u. "Lake Catherine" means the Lake Catherine Steam Electric Station, which consists of one operating fossil-fuel fired electric utility steam generating unit (Unit 4) primarily fired with natural gas of approximate nameplate capacity of 528 megawatts located in Hot Spring County, Arkansas.
- v. "lbs/MMBtu" means pounds per million British thermal units.
- w. "LNB/SOFA" means low NO_x burners and separated over-fire air.
- x. "MW" means megawatts.
- y. "NO_x" means nitrogen oxides.
- z. "NPCA" means National Parks Conservation Association.
- aa. "Parties" means Sierra Club, NPCA, Entergy Arkansas, EMI, and EPLLC, and "Party" means one of the Parties.
- bb. "RE" means renewable energy.

cc. "Regional Haze Plan" refers to any proposed or final: (i) revised Regional Haze federal implementation plan; (ii) ADEQ replacement Regional Haze state implementation plan (iii) Regional Haze-related administrative order(s) between any Defendant and ADEQ; (iv) EPA Regional Haze state implementation plan approval(s); or (v) EPA Regional Haze FIP withdrawal entered into or promulgated by EPA or ADEQ to address regional haze requirements, including but not limited to best available control technology and reasonable progress under the Clean Air Act, 42 U.S.C. § 7491 and 40 C.F.R. § 51.308, or any successor thereto.

dd. "SO₂" means sulfur dioxide.

ee. "Three Plants" mean White Bluff, Independence, and Lake Catherine.

ff. "White Bluff" means the White Bluff Steam Electric Station, which currently consists of two coal-fired electric utility steam generating units (Units 1 and 2) with nameplate capacity of approximately 900 megawatts each, located in Jefferson County, Arkansas.

PLANT SPECIFIC OBLIGATIONS

9. No later than December 31, 2028, Entergy Arkansas shall permanently cease the combustion of coal at White Bluff.

10. No later than June 30, 2021, Entergy Arkansas shall ensure that the emissions of SO₂ at each White Bluff Units 1 and 2 shall not exceed 0.6 lbs/MMBtu based on a 30-boiler-operating-day rolling average.

11. With respect to emissions of NO_x at White Bluff Units 1 and 2, Entergy Arkansas shall continue to operate the LNB/SOFA, comply with all provisions specified in 40 C.F.R. § 63.10021(e), or any successor thereto, and prepare and submit to Plaintiffs annual reports consistent with and meeting the requirements of 40 C.F.R. § 63.10021(e)(8), or any successor thereto, by March 31 for the previous calendar year.

12. No later than December 31, 2030, Entergy Arkansas shall permanently cease the combustion of coal at Independence.

13. No later than June 30, 2021, Entergy Arkansas shall ensure that the emissions of SO₂ at Independence Units 1 and 2 shall not exceed 0.6 lbs/MMBtu based on a 30-boiler-operating-day rolling average.

14. With respect to emissions of NO_x at Independence Units 1 and 2, Entergy Arkansas shall continue to operate the LNB/SOFA, comply with all provisions specified in 40 C.F.R. § 63.10021(e), or any successor thereto, and prepare and submit to Plaintiffs annual reports consistent with and meeting the requirements of 40 C.F.R. § 63.10021(e)(8), or any successor thereto, by March 31 for the previous calendar year.

15. No later than December 31, 2027, Entergy Arkansas shall permanently cease all operations of existing units (Units 1-3, which are currently retired, and Unit 4, which is currently operating) at Lake Catherine. This Paragraph does not prohibit Entergy Arkansas from using the site and its infrastructure for purposes other than operating the existing units.

16. Defendants shall commence development of and/or present recommendations to the appropriate regulatory agencies, if any, for the development of RE projects, as described below, in a total amount of 800 MW (with at least half (400 MW or more) on or before December 31, 2022, and the remainder (400 MW or less) on or before December 31, 2027). Each Defendant will seek the appropriate regulatory approvals, if any, for any RE projects that it may determine to develop in its sole discretion. For purposes of satisfying Defendants' RE obligation under this Paragraph 16, the RE projects may include wind, solar, geothermal, and run of the river hydro, including both commercial and residential (e.g., rooftop solar) scale projects and energy storage technologies. Further, for purposes of satisfying Defendants' RE obligation under this Paragraph 16, the methodology for accounting for RE projects shall be based upon the nameplate rating of the RE projects being developed or otherwise presented to the appropriate regulatory agencies pursuant to this Paragraph by Defendants or by Co-owners (including the Co-owners' respective Affiliates) including, but not limited to, the nameplate rating of all RE projects that (i) are to be owned, constructed, or built by Defendants or Co-owners; (ii) are to be acquired, purchased, or leased by Defendants or Co-owners; (iii) otherwise are to be procured by Defendants or Co-owners, for example, through Defendant- or Co-owner-sponsored offerings or tariffs incentivizing or allowing customers to pursue distributed renewable generation; and (iv) are to be placed into service, or made available through an arrangement such as a purchase power agreement. The foregoing RE projects explicitly shall include purchase power

agreements with deliveries commencing January 1, 2018, and thereafter, and purchase power agreements that Entergy Arkansas already has presented to and received approval from the Arkansas Public Service Commission ("APSC") in APSC Docket No. 15-014-U (Stuttgart Solar) and in APSC Docket No. 17-041-U (Chicot Solar), which resources shall count toward satisfying Defendants' RE obligation under this Paragraph.

ADDITIONAL OBLIGATIONS OF THE PARTIES

17. The Parties shall not Challenge the provisions of any Regional Haze Plan related to this Settlement Agreement regarding White Bluff, Independence or Lake Catherine. Each Party retains the right to Challenge any provision of a Regional Haze Plan that is not included in, is inconsistent with, or is beyond the scope of this Settlement Agreement.

18. If a court reverses or remands any Regional Haze Plan after the entry of this Agreement, Plaintiffs shall not file or fund Regional Haze Plan comments, or file or fund any Regional Haze Plan Challenge, that are inconsistent with the provisions of this Agreement regarding the cessation of coal combustion at White Bluff and Independence and the cessation of currently operating generation at Lake Catherine in Paragraphs 9, 12, and 15 or the emission limitations, compliance obligations, and compliance dates in Paragraphs 10-11 and 13-14. Plaintiffs shall not seek additional emission controls for any of the Three Plants beyond those specifically required by this Agreement. Plaintiffs retain the right to file comments or Challenge any provision of any Regional

Haze Plan that is not included in, or is inconsistent with, or is beyond the scope of this Agreement, and Defendants retain the right to oppose any such comments or Challenge.

19. Within 65 days of the Effective Date, Plaintiffs shall file a stipulation of dismissal pursuant to Fed. R. App. P. 42(b) dismissing their petition to review in *National Parks Conservation Association v. EPA*, No. 16-4309 (8th Cir. filed Nov. 28, 2016), with each party to bear its own costs and attorney fees.

20. Within 65 days of the Effective Date, Sierra Club shall withdraw all pending FOIA requests to EPA related in whole or in part to White Bluff, Independence, and Lake Catherine. The Parties agree to confer and jointly file an appropriate status or other report or motion with the U.S. District Court for the Eastern District of Louisiana in *Entergy Louisiana, L.L.C. and Entergy Arkansas, Inc. v. EPA*, No. 14-1827, to keep the litigation in abeyance consistent with the timeline in this Paragraph. Plaintiffs agree not to submit new FOIA requests seeking the same or similar information sought in the to-be-withdrawn requests nor to submit any new FOIA requests concerning matters subject to the release of claims herein.

21. Plaintiffs shall not Challenge any ADEQ or APC&EC approvals, including permits and variances, necessary for compliance with this Agreement, any Regional Haze Plan, as well as any new source review permit or Title V renewals, modifications, or other permits, variances, or administrative orders for White Bluff, Independence, or Lake Catherine; however, this provision does not apply if Defendants propose a

significant increase in emissions, as defined in 40 C.F.R. § 52.21(b)(23), or any successor thereto, of any regulated pollutant except as it relates to pollution control equipment modifications at the plant and/or changes in plant operations necessary to meet the requirements of this Agreement, including but not limited to increases in carbon monoxide emissions associated with optimization of the LNB/SOFA at White Bluff and Independence. Within 65 days of the Effective Date, Sierra Club shall voluntarily dismiss *In the Matter of Revisions to the Arkansas State Implementation Plan, Regional Haze SIP Provisions for 2008-2018 Planning Period*, APC&EC Docket No. 18-002-MISC (filed Sept. 6, 2018), with prejudice pursuant to APC&EC Regulation 8 and the Arkansas Rules of Civil Procedure, with each party to bear its own costs and attorney fees.

22. Plaintiffs shall not Challenge Defendants or their Co-owners seeking any approvals that are necessary to implement the terms of this Agreement. Plaintiffs shall not oppose Defendants or their Co-owners in regulatory proceedings regarding the recovery of costs or other treatment related to or occasioned by the obligations in this Agreement, including but not limited to costs to install and operate LNB/SOFA at Independence or White Bluff, meeting the SO₂ emissions limitations, and/or any alteration of depreciation schedules, and/or recovery of undepreciated capital costs remaining at the time of end of coal use, as a result of this Agreement.

Notwithstanding the forgoing, Plaintiffs reserve the right to oppose Defendants or their Co-owners as they seek any approvals related exclusively to replacement generation capacity for the Three Plants, and Defendants reserve their rights to oppose Plaintiffs,

except however, Plaintiffs shall not object to the need for replacement generation in any appropriate and relevant proceeding relating to the need for replacement generation before the appropriate regulatory body to the extent such proceeding relates to or is occasioned by the requirements of this Agreement; however, Plaintiffs expressly retain the right to contest the amounts by fuel type or siting of replacement generation, and Defendants reserve their rights to oppose Plaintiffs.

23. Plaintiffs shall not Challenge any determinations or approvals by any government agency, including but not limited to ADEQ, FLMs, APC&EC and EPA, as the case may be, that no additional air pollution controls or emission limitations are necessary or required for White Bluff, Lake Catherine or Independence for the Regional Haze program beyond the controls and emission limitations set out in this Agreement.

24. The Parties shall not circumvent their obligations in this Agreement by funding any third party taking any action that the Parties themselves are prohibited from taking.

NOTIFICATIONS AND RECORDKEEPING

25. All notifications related to this Agreement shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing and shall be copied to all Parties by email.

For Sierra Club:

Director of Environmental Law Program
Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94162
(415) 977-5709
kristin.henry@sierraclub.org

For NPCA

National Parks Conservation Association
777 Walnut Street
Suite 200
Knoxville, TN 37902
Attention: Stephanie Kodish, Senior Director, Clean Air Program
(800) 628-7275
skodish@npca.org

For Defendants:

William B. Glew, Jr.
Associate General Counsel
Entergy Services, LLC
639 Loyola Avenue, 22nd Floor
New Orleans, Louisiana 70113
504-576-3958
wglew@entergy.com

and

Kimberly Bennett
Assistant General Counsel - Regulatory Legal Services
Entergy Services, LLC
425 W. Capitol Avenue
Little Rock, AR 72201
(501) 377-5715
kbenne3@entergy.com

EFFECT OF SETTLEMENT

26. This Agreement represents full and final settlement between the Parties. Plaintiffs release and waive any and all claims, including continuing claims, that could have first accrued prior to the Date of Lodging that they may have against (a) Defendants and their employees, agents, officers, directors, and Affiliates and (b) their Co-owners and their employees, agents, officers, directors, and Affiliates concerning White Bluff, Independence, and Lake Catherine, based on any federal environmental statute or regulation, including under the Clean Air Act, Clean Water Act ("CWA"), the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, or any similar environmental state statute or regulation, or any common law tort. This release will also include all claims, if any, that accrue on or after the Date of Lodging related to coal combustion residuals at Independence and White Bluff pursuant to the CWA, RCRA, EPA's coal combustion residuals regulations, or similar state authority. The release of the Co-owners provided by this Paragraph will be void with respect to any individual Co-owner if such Co-owner or its Affiliates take action either to oppose entry of this Agreement by the Court or to block Defendants from complying with Paragraphs 9, 12, or 15 of this Agreement.

27. The Parties acknowledge and agree that specific performance and injunction are the only appropriate remedies for any violation of this Agreement, and under no circumstances shall monetary damages be allowed for any breach of this

Agreement. In addition, no motion for specific performance or injunction shall be brought or maintained until the Dispute Resolution process has been completed.

28. The failure of a Party to comply with any requirement contained in this Agreement will not excuse the obligation to comply with other requirements contained herein.

DISPUTE RESOLUTION

29. The dispute resolution procedure provided by this Section shall be available to resolve all disputes arising under this Agreement, provided that nothing shall preclude the Parties from resolving disputes without invoking this Section.

30. The dispute resolution procedure required herein shall be invoked by one Party ("Noticing Party") giving written notice to the other Parties ("Receiving Parties") advising of a dispute pursuant to this Section. The notice shall describe the nature of the dispute and shall state the Noticing Party's position with regard to such dispute. The Receiving Parties shall acknowledge receipt of the notice, and the Parties shall expeditiously schedule a meeting to commence informal negotiations not later than fourteen (14) days following receipt of such notice.

31. Disputes submitted to dispute resolution under this Section shall, in the first instance, be the subject of informal negotiations among the Parties. Such period of informal negotiations shall not extend beyond thirty (30) days from the date of the first meeting among the Parties' representatives unless they agree in writing to shorten or extend this period.

32. If the Parties are unable to reach agreement during the informal negotiation period, the Noticing Party shall provide Receiving Parties with a written summary of its position regarding the dispute. The written position provided by Noticing Party shall be considered binding unless, within forty-five (45) days thereafter, the Receiving Parties seek judicial resolution of the dispute by filing a petition with this Court. The Noticing Party may respond to the petition within forty-five (45) days of filing. The time periods set out in this Section may be shortened or lengthened upon motion to the Court of one of the Parties to the dispute, explaining the Party's basis for seeking such a scheduling modification.

33. The Court shall not draw any inferences or establish any presumptions adverse to any Party as a result of invocation of this Section or the Parties' inability to reach agreement.

34. As part of the resolution of any dispute under this Section, in appropriate circumstances the Parties may agree, or this Court may order, an extension or modification of the schedule for the completion of the activities required under this Agreement to account for the delay that occurred as a result of dispute resolution. Defendants 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.

35. The Court shall decide all disputes pursuant to applicable principles of law for resolving such disputes. In their initial filings with the Court under this

Section, the Parties shall state their respective positions as to the applicable standard of law for resolving the particular dispute.

FORCE MAJEURE

36. The Parties agree that Defendants' obligations pursuant to this Agreement shall be subject to the following Force Majeure provisions.

37. **Notice of Force Majeure Events.** If any event occurs or has occurred that may delay or prevent compliance with or otherwise cause a violation of any Defendant's obligations under this Agreement as to which such Defendant intends to assert a claim of Force Majeure, that Defendant shall notify Plaintiffs in writing as soon as practicable, but in no event later than fourteen (14) business days following the date that Defendant first knew, or by the exercise of due diligence should have known, that the event caused or may cause such delay or violation. In this notice, the Defendant shall reference this Section and describe the anticipated length of time that the delay or violation may persist, the cause or causes of the Force Majeure Event, all measures taken or to be taken by the Defendant to prevent or minimize the delay or violation, the schedule by which the Defendant proposes to implement those measures, and the Defendant's rationale for attributing the failure, delay, or violation to a Force Majeure Event. The Defendant shall adopt all reasonable measures to avoid or minimize such failures, delays, or violations. The Defendant shall be deemed to know of any circumstance which it, its contractors, or any entity controlled by the Defendant, knew or should have known.

38. **Failure to Give Notice.** If a Defendant fails to comply with the notice requirements of this Section, the Plaintiffs may seek to void such claim for Force Majeure as to the specific event for which a Defendant failed to comply with such notice requirement.

39. **Sierra Club and NPCA Response.** Plaintiffs shall notify Defendants in writing of their response regarding any claim of Force Majeure as soon as reasonably practicable. If Plaintiffs agree that a delay in performance has been or will be caused by a Force Majeure Event, the Parties shall stipulate to an extension of deadline(s) for performance of the affected compliance requirement(s) by a period equal to the agreed delay actually caused by the event, in which case the delay at issue shall be deemed not to be a violation of the affected requirement(s) of this Agreement. In such circumstances, an appropriate modification shall be made pursuant to Paragraph 43 (Modification) of this Agreement.

40. **Disagreement.** If Plaintiffs do not agree with any Defendant's claim of Force Majeure, or if the Parties cannot agree on the length of the delay actually caused by the Force Majeure Event, the matter shall be resolved in accordance with Paragraphs 29-35 of the Agreement (Dispute Resolution).

41. **Burden of Proof.** In any dispute regarding Force Majeure, Defendants shall bear the burden of proving by a preponderance of the evidence that any delay in performance, or any other violation of any requirement of this Agreement, was caused by or will be caused by a Force Majeure Event. Defendants shall also bear the burden of

proving by a preponderance of the evidence that they gave the notice required by this Section and that the anticipated duration and extent of any failure, delay, or violation(s) were or will be attributable to a Force Majeure Event. An extension of one compliance date may, but will not necessarily, result in an extension of a subsequent compliance date.

COSTS OF LITIGATION

42. Defendants agree that, pursuant to 42 U.S.C. § 7604(d), Plaintiffs are entitled to seek recovery of their costs of litigation in this action, including reasonable attorney and expert witness fees. The Parties also agree that Plaintiffs, by accepting certain litigation costs and fees for work performed prior to the Date of Entry, are not precluded from requesting and being awarded litigation costs and fees pursuant to 42 U.S.C. § 7604(d) for work performed after the Date of Entry.

MODIFICATION

43. Material modifications of this Agreement must be in writing, signed by the Parties, and approved by this Court. No Party may petition this Court for a modification without having first made a good-faith effort to reach agreement with the other Parties on the terms of such modification. Non-material modifications to this Agreement may be made only upon written agreement of the Parties that shall be filed with the Court.

RETENTION OF JURISDICTION

44. Until termination of this Agreement, this Court shall retain jurisdiction over both the subject matter of this Agreement and the Parties to enforce the terms and conditions of this Agreement. Following termination, the Court shall retain jurisdiction to enforce the provisions and obligations set forth herein that are permanent.

TERMINATION

45. Either Plaintiffs or Defendants may move the Court to terminate this Agreement once Defendants have complied with all requirements contained in Paragraphs 9 - 16 of the Agreement. Defendants must demonstrate such compliance prior to, or upon, moving the Court to terminate this Agreement.

LODGING AND ENTRY

46. The Parties agree to cooperate in good faith in order to obtain the Court's review and entry of this Agreement.

47. Pursuant to 42 U.S.C. § 7604(c)(3), this Agreement will be lodged with the Court and simultaneously presented to the United States Attorney General ("DOJ") and Administrator of EPA for review and comment for a period of 45 days. In the event that DOJ or EPA comments upon the terms of this Agreement, the Parties agree to discuss such comments and any revisions of the Agreement as may be appropriate. After the review period has elapsed, the Agreement may be entered by the Court. If

the Agreement is not entered by the Court, the Parties shall retain all rights they had in this litigation before the Date of Lodging.

SIGNATORIES

48. Each undersigned representative of a Party to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind such Party to this Agreement.

49. The Parties hereby agree not to oppose entry of this Agreement by this Court or challenge any provision of this Agreement.

COUNTERPARTS

50. This Agreement may be signed in counterparts.

THE UNDERSIGNED Parties enter into this Agreement and submit it to this Court for approval and entry.

SO ORDERED THIS __ DAY OF _____, 2018:

UNITED STATES DISTRICT JUDGE

Signature Page for Agreement in *Sierra Club, et al. v. Entergy Arkansas, Inc., et al.* (E.D. Ark)

For Plaintiff Sierra Club:

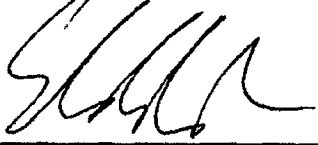
Kristin A. Henry
[Signature]

Date: November 13, 2018

Kristin A. Henry, Managing Attorney
[Name and Title]

Signature Page for Agreement in *Sierra Club, et al. v. Entergy Arkansas, Inc., et al.* (E.D. Ark)

For Plaintiff National Parks Conservation Association:



Date: 11.13.18

[Signature]

Stephanie Katish, Senior Director + Counsel

[Name and Title]

Signature Page for Agreement in *Sierra Club, et al. v. Entergy Arkansas, Inc., et al.* (E.D. Ark)

For Defendant Entergy Power, LLC:

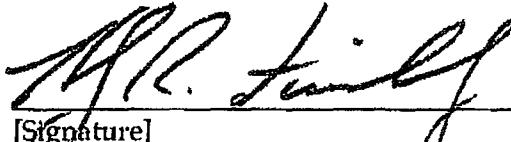

[Signature]

Date: 11/15/2018

GERALD A. SANCHEZ - VICE PRESIDENT
[Name and Title]

Signature Page for Agreement in *Sierra Club, et al. v. Entergy Arkansas, Inc., et al.* (E.D. Ark)

For Defendant Entergy Mississippi, Inc.:


[Signature] Date: 11/15/18
Haley R. Fisackerly, President & CEO
[Name and Title]

Signature Page for Agreement in *Sierra Club, et al. v. Entergy Arkansas, Inc., et al.* (E.D. Ark)

For Defendant Entergy Arkansas, Inc.:

Laura Landreux Date: 11/15/2018
[Signature]

Laura Landreux, President & CEO
[Name and Title]

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN APPLICATION)
BY THE OFFICE OF ARKANSAS ATTORNEY)
GENERAL LESLIE RUTLEDGE FOR AN)
INVESTIGATION INTO WHETHER ENTERGY)
ARKANSAS, LLC'S DECISION TO ENTER) Docket No. 18-079-U
INTO A VOLUNTARY SETTLEMENT)
AGREEMENT AFFECTING ELECTRIC)
GENERATING PLANTS IS PRUDENT AND)
SERVES THE PUBLIC INTEREST, AND)
FOR ORDERS TO PROTECT RATEPAYERS)

DIRECT TESTIMONY OF CHRISTINA L. BAKER, PE, JD

on behalf of

THE OFFICE OF ARKANSAS ATTORNEY GENERAL LESLIE RUTLEDGE

December 13, 2018

1 **DIRECT TESTIMONY OF CHRISTINA L. BAKER**

2 **Introduction**

3 **Q. Please state your name, position, and business address.**

4 A. I am Christina L. Baker. I am an Assistant Attorney General in the
5 Consumer Utilities Rate Advocacy Division (“CURAD”) for the Office of
6 Arkansas Attorney General Leslie Rutledge (“the Attorney General”). My
7 business address is 323 Center Street, Suite 200, Little Rock, Arkansas
8 72201.

9 **Q. Please describe your background and qualifications.**

10 A. I began my employment with the Attorney General in November 2017. As
11 part of CURAD, I represent ratepayers as it relates to public utilities.

12 I received a Bachelor of Science degree from what is now known as
13 Missouri University of Science & Technology in 1992. My major field of
14 study was Chemical Engineering. In 2006, I received a Juris Doctorate
15 degree from Saint Louis University School of Law. I also received a LLM
16 in Dispute Resolution from the University of Missouri – Columbia School
17 of Law. I am an attorney licensed to practice in the States of Arkansas
18 and Missouri. I am also a Professional Engineer licensed by the States of
19 Arkansas, Missouri and Illinois. I am a member of the American Bar
20 Association, Arkansas Bar Association, the Missouri Bar Association, and
21 the National Society of Professional Engineers.

1 From January 2016 until November 2017, I worked as a Staff
2 Attorney with the General Staff of the Arkansas Public Service
3 Commission. In this position I handled several utility proceedings before
4 the Arkansas Public Service Commission, balancing both the interests of
5 Arkansas utility customers, as well as the interests of Arkansas public
6 utilities.

7 From August 2006 until November 2015, I worked for the Missouri
8 Office of the Public Counsel representing the interests of Missouri utility
9 customers in proceedings before the Missouri Public Service Commission.
10 Prior to gaining my Juris Doctorate, I worked from 1993 until 2006 as an
11 Environmental Engineer with the State of Missouri in its Department of
12 Natural Resources. I have also worked as an Environmental Engineer in
13 private consulting.

14 I am currently a member of MISO's Advisory Committee. I
15 previously served as a member of the EPA National Drinking Water
16 Advisory Council, Lead and Copper Working Group and on the Water
17 Research Foundation's Public Council on Drinking Water Research. I am
18 also a member of the NASUCA Gas Committee and Water Committee. I
19 have been a speaker and panelist on various regulatory issues at various
20 conferences and educational programs.

21 **Q. On whose behalf are you appearing?**

1 **A.** I am appearing on behalf of the Office of Arkansas Attorney General
2 Leslie Rutledge. I will present testimony supporting the need for a
3 Commission investigative docket seeking information regarding a pending
4 Settlement Agreement between Entergy Arkansas, LLC¹ (“EAL”), Sierra
5 Club (“Sierra”) and National Parks Conservation Association (“NPCA”);²
6 and request for Commission action to address, review, and evaluate the
7 public interest, prudence, and regulatory and jurisdictional
8 appropriateness of EAL’s actions, making all orders and holdings
9 necessary to protect ratepayers and others from any negative impacts of
10 EAL’s actions.³

11 **Q.** **What is the role of the Attorney General in these proceedings?**

12 **A.** The Attorney General, through the CURAD, is charged by statute with
13 representing the interests of Arkansas ratepayers in utility-related

¹ Entergy Arkansas, LLC has transitioned or is transitioning to become the jurisdictional independently owned utility that serves Arkansas ratepayers, having previously been Entergy Arkansas, Inc. (“EAI”). The transition was approved by the Commission in APSC Docket No. 17-052-U. The Complaint was lodged prior to the transition and names Entergy Arkansas, Inc. as a Defendant.

² The Settlement Agreement is attached to a Notice of Lodging of Settlement Agreement filed in *Sierra Club and National Parks Conservation Association v. Entergy Arkansas, Inc., Entergy Power, Inc., Entergy Power, LLC, and Entergy Mississippi, Inc.*, 4:18-CV-00854-KGB (E.D. Ark. 2018) (hereinafter *Sierra Club v. Entergy*).

³ See Application Exhibit 1 (which includes a copy of the Complaint filed by Plaintiffs and the Notice of Lodging of Settlement Agreement, both of which were filed in the U.S. District Court on November 16, 2018).

1 matters⁴ in an effort to try and ensure a result that keeps utility rates to
2 the lowest reasonable level.⁵

3 **Q. What issues does the Attorney General's Application request be**
4 **addressed by the Commission?**

5 A. The Attorney General requests that the Commission establish this docket
6 as an investigative inquiry and regulatory docket on behalf of all
7 interested parties, to examine the Settlement Agreement, its economic
8 and legal effects, and whether EAL's actions, the Settlement Agreement,
9 and the specific obligations included in it, are prudent and in the public
10 interest.

11 **Q. What relief is the Attorney General seeking?**

12 A. The Attorney General brings this Application pursuant to Rule 3.09(a)–(b)
13 of the Commission's Rules of Practice and Procedure ("RPPs") to seek
14 declaratory orders from this Commission to terminate controversy over
15 the prudence and public interest of EAL's actions pursuant to the
16 Commission's broad statutory authority to regulate EAL. Because EAL
17 has sought federal approval of actions which are subject to the jurisdiction
18 of this Commission, without prior approval, the Attorney General believes
19 that action should be taken now to preserve future prudency objections,
20 ratepayer protections, and Commission jurisdiction.

⁴ Ark. Code Ann. § 23-4-301, *et seq.*

⁵ Ark. Code Ann. § 23-4-305(3).

Background

Q. What is the background of the proposed Settlement Agreement?

A. On November 16, 2018, Sierra and NPCA filed a Complaint and Demand for Jury Trial (“Complaint”) and a Notice of Lodging of Settlement Agreement (“Settlement Agreement”) between themselves and EAL, Entergy Power, LLC, and Entergy Mississippi, Inc. (collectively referred to as “Entergy”) with the United States District Court for the Eastern District of Arkansas.^{6,7} The proposed Settlement Agreement between Sierra, NPCA, and Entergy purports to resolve a number of claims between the parties, which are the subject of the Complaint.

Q. What does the Complaint allege?

A. The Complaint alleges violation of the Clean Air Act (“CAA”)⁸ at the Independence Steam Electric Station⁹ (“Independence”) located in Newark, Arkansas and the White Bluff Steam Electric Station¹⁰ (“White Bluff”) located in Redfield, Arkansas.¹¹ The Complaint seeks injunctive

⁶ See *Sierra v. Entergy*, 4:18-CV-00854-KGB (E.D. Ark. 2018).

⁷ A copy of the Complaint, Notice of Lodging, and Settlement Agreement are attached to the Attorney General’s Application as Exhibit 1.

⁸ 42 U.S.C. §§ 7401-7671q.

⁹ EAL co-owns White Bluff with several other entities including Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, Conway Corporation, and City of West Memphis. Contractually, EAL is the sole operator of White Bluff.

¹⁰ EAL co-owns Independence with several other entities including Arkansas Electric Cooperative Corporation, City Water & Light of Jonesboro, East Texas Electric Cooperative, Osceola Municipal Light & Power, Conway Corporation, and City of West Memphis. Contractually, EAL is the sole operator of Independence.

¹¹ Application Exhibit 1, Complaint, p. 2, ¶ 1.

1 and declaratory relief and civil penalties pursuant to 28 U.S.C. §§ 2201
2 and 2202 and 42 U.S.C. §§ 7413, 7604(a) of the CAA.

3 **Q. What obligations does the Settlement Agreement include?**

4 A. The Lodging Notice indicates that the Settlement Agreement between
5 Sierra, NPCA, and Entergy represents a full resolution of the
6 Complaint.¹² Among other items, the Settlement Agreement includes
7 certain Plant Specific Obligations:

- 8 • Agreement that EAL will permanently cease the combustion of coal at
9 White Bluff no later than December 31, 2028;¹³
- 10 • Agreement that EAL will permanently cease the combustion of coal at
11 Independence no later than December 31, 2030;¹⁴
- 12 • Agreement that strict emission standards will be met for the
13 remaining coal combustion period at White Bluff and Independence;¹⁵
14 and
- 15 • Agreement that EAL will commence development of, and present and
16 seek approval for, 800 MW of Renewable Energy on or before
17 December 31, 2027.¹⁶

¹² *Id.*, Notice of Lodging, p. 2.

¹³ *Id.*, Settlement Agreement, p. 9, ¶ 9.

¹⁴ *Id.*, pp. 9-10, ¶¶ 10 & 11.

¹⁵ *Id.*, ¶¶ 10, 11, 13 & 14.

¹⁶ *Id.*, p. 11, ¶ 16.

1 **Q. Does the Settlement Agreement contain Plant Specific**
2 **Obligations for plants not specified in the Complaint?**

3 A. Yes. The Settlement Agreement states that EAL will permanently cease
4 all existing unit operations at the gas-fired Lake Catherine Steam Electric
5 Station (“Lake Catherine”) no later than December 31, 2027.¹⁷ EAL is the
6 sole owner and operator of Lake Catherine. Lake Catherine was not
7 mentioned in the Complaint, so it is unclear how this Plant Specific
8 Obligation acts to resolve the Complaint.

9 **Q. What environmental concerns does the Complaint raise?**

10 A. The Complaint alleges that Entergy failed to obtain a number of required
11 permits for Independence, Units 1 and 2, and for White Bluff, Unit 2 and
12 operated the units without the required permits, thereby violating the
13 CAA. The Complaint lists specific claims for relief under the Prevention of
14 Significant Deterioration (“PSD”) of the National Ambient Air Quality
15 Standards (“NAAQS”),¹⁸ and the Title V Operating Permit Program (“Title
16 V”).¹⁹ Sierra and NPCA allege that certain plant modifications should
17 have undergone new source review (“NSR”) and that the violations
18 occurred in the 2007-2009 time period.²⁰

¹⁷ *Id.*, p. 10, ¶ 15.

¹⁸ Application Exhibit 1, Complaint, p. 24, ¶¶ 81-84; pp. 25-26, ¶¶ 89-92; p. 27, ¶¶ 97-100.

¹⁹ *Id.*, p. 25, ¶¶ 85-88; p. 26, ¶¶ 93-96; p. 28, ¶¶ 101-104.

²⁰ It should be noted that the alleged violations are outside the applicable statute of limitations.

1 **Q. What environmental concerns does the Settlement Agreement**
2 **seek to address?**

3 A. The obligations in the Settlement Agreement seem to only address
4 possible obligations under Regional Haze requirements.²¹ The Settlement
5 Agreement does not mention NSR and Title V. In fact, the release
6 language only states that Sierra and NPCA will not challenge any
7 Arkansas Department of Environmental Quality (“ADEQ”) or Arkansas
8 Pollution Control and Ecology Commission (“APC&EC”) approvals under
9 those environmental regulations necessary for White Bluff, Independence
10 or Lake Catherine.²² The Settlement Agreement contains no specific
11 obligations regarding NSR or Title V.

12 **Q. Is Regional Haze an environmental concern noted in the**
13 **Complaint?**

14 A. No. The Complaint lists no specific claims for relief under Regional Haze
15 requirements. As a result, it is unclear how the Settlement Agreement
16 addresses the claims for relief alleged in the Complaint.

17 **Q. Why should this be a concern for the Commission?**

18 A. The proposed Settlement Agreement between Sierra, NPCA, and Entergy
19 purports to resolve a number of claims between the parties, which are the
20 subject of the Complaint. However, on closer inspection, the resolution in

²¹ Application Exhibit 1, Settlement Agreement, p. 2; p. 9, ¶ 8(cc); p. 12, ¶ 18; p. 14, ¶ 21.

²² *Id.*, p. 13, ¶ 21.

1 the Settlement Agreement does not align with the allegations of the
2 Complaint. Yet, EAL and the other parties have agreed that the
3 Settlement Agreement represents a full resolution of the CAA citizen suit
4 represented in the Complaint.²³ The Attorney General is concerned that
5 this Complaint is a manufactured controversy to obtain a pre-arranged
6 resolution through a federal court. The Commission should be troubled
7 that this is merely a “sue-and-settle”²⁴ lawsuit with only one stakeholder
8 and without appropriate oversight; the costs of which will be borne
9 directly by ratepayers.

10 **Q. Is it possible that other citizens of Arkansas will be affected, not**
11 **just EAL’s ratepayers?**

12 A. Yes. Overall, the Settlement Agreement affects 3,300 MW of generating
13 capacity. It should be noted that the Settlement Agreement relates to
14 electric generation units owned by EAL and by certain electric
15 cooperatives and municipalities. As a result, the impact goes even further
16 than EAL and its customers; the customers of the plants’ co-owners will
17 experience commensurate negative impacts.

²³ *Id.*, Notice of Lodging, p. 2.

²⁴ “‘Sue and Settle’ refers to when a federal agency agrees to a settlement agreement, in a lawsuit from special interest groups, to create priorities and rules outside of the normal rulemaking process. The agency intentionally relinquishes statutory discretion by committing to timelines and priorities that often realign agency duties. These settlement agreements are negotiated behind closed doors with no participation from the public or affected parties.” *Sue and Settle: Regulating Behind Closed Doors*, U.S. Chamber of Commerce, <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

1 In fact, the generation mix used to serve the customers of the co-
2 owners could be affected to an even greater extent than EAL's customers
3 because they will have the need to seek a higher proportion of
4 replacement baseload generation. The vast majority of Arkansas's electric
5 utility ratepayers will be affected by EAL's actions: over 700,000 EAL
6 customers, over 500,000 electric cooperative customers, and tens of
7 thousands of municipal electric customers.

8 **Q. Has the Settlement Agreement been approved by the District**
9 **Court?**

10 A. Not yet; however, it may be in the very near future. According to the
11 Settlement Agreement, the Environmental Protection Agency ("EPA") and
12 the Department of Justice ("DOJ") have 45 days from the date of filing to
13 review and comment upon the Settlement Agreement. Because notice was
14 not received until November 26, 2018, the opportunity to comment ends
15 on January 10, 2019.²⁵ After the review period has elapsed, the
16 Settlement Agreement may be entered by the Court.

17 **Q. Was the Attorney General involved in the preparation of either**
18 **the Complaint or the Settlement Agreement?**

19 A. No. The Attorney General was informed of both the Complaint and the
20 Settlement Agreement at its filing and has quickly moved to preserve the
21 rights of Arkansas ratepayers through both the filing of this Application

²⁵ See *Sierra v. Entergy*, 4:18-CV-00854-KGB (E.D. Ark. 2018), Docket Entry No. 16.

1 and by filing an intervention before the District Court mere weeks after
2 the initial filing of the Settlement Agreement. In her capacity as
3 ratepayer advocate, the Attorney General is seeking intervention in the
4 District Court (a) to correct misrepresentations present in the proposed
5 Settlement Agreement; (b) to inform the District Court how and why the
6 Settlement Agreement usurps state regulatory authority over EAL,
7 including its assets, and its rates; and (c) to protect Arkansas utility
8 ratepayers from the adverse effects of the Settlement Agreement.

9 **Q. Could EAL and the other parties have included ratepayer**
10 **protections in the Settlement Agreement?**

11 A. Yes. There are a myriad number of ways in which EAL and the other
12 parties could have ensured ratepayer protections were included in the
13 Settlement Agreement. For example, EAL could have insisted on a
14 provision that the Settlement Agreement be contingent based on
15 Commission determination that the actions contemplated were in the
16 public interest.

17 **Need for Urgency**

18 **Q. Why does the Attorney General seek urgent action from the**
19 **Commission?**

20 A. After announcement of the Settlement Agreement, EAL conducted
21 informal discussions with the Attorney General. During one such
22 discussion EAL was asked about potential Commission review and

1 approval for the actions contemplated in the Settlement Agreement. EAL
2 implied its confidence in future rate recovery due to the fact that it would
3 be acting pursuant to a federal court order.

4 Given this viewpoint and the impending deadline of January 10,
5 2019, the Attorney General is concerned that EAL will attempt to shield
6 its deliberate, intentional, and voluntary actions with a federal court
7 order. Whether EAL seeks rate recovery through riders, base rates, or in
8 an Act 310 proceeding, it appears that it will seek to bypass a public
9 interest finding for its actions in the Settlement Agreement. The Attorney
10 General seeks any and all appropriate orders from the Commission to put
11 EAL on notice that it will not be able to shield its voluntary actions under
12 the guise of a federal mandate.

13 **Prudency and Public Interest**

14 **Q. Has the Attorney General been able to determine if the actions of**
15 **EAL and the Settlement Agreement are prudent and in the public**
16 **interest?**

17 **A.** No. As stated earlier, the Attorney General was only informed of both the
18 Complaint and the Settlement Agreement at its filing. The Attorney
19 General believes the act of entering into a Settlement Agreement, without
20 any consultation with the Attorney General, the General Staff, or any
21 other affected stakeholders as to the terms of the agreement, shows that
22 EAL has no desire to protect the interests of ratepayers.

1 **Q. What preliminary concerns do you have with the Settlement**
2 **Agreement?**

3 A. At this time, the Attorney General has the following questions and
4 concerns regarding the Settlement Agreement which require further
5 inquiry, investigation and evaluation:

- 6 a. Why EAL believes the Settlement Agreement and Plant Specific
7 Obligations are not within the supervisory and regulatory oversight
8 of the Arkansas Public Service Commission and the State of
9 Arkansas, and do not require Commission approval;
- 10 b. Whether the proposed Settlement Agreement usurps the State's
11 regulatory authority over EAL, including its assets and rates;
- 12 c. Whether the Settlement Agreement and Plant Specific Obligations
13 are consistent with all of EAL's obligations made pursuant to the
14 various regulatory dockets regarding these plants, including but not
15 limited to those governing the construction and operation approvals
16 for Independence and White Bluff, any and all Transmission assets
17 connected to Independence or White Bluff, obligations to not engage
18 in System Agreement or affiliate joint planning, and the recent EAI
19 restructuring approval;²⁶

²⁶ See *North Little Rock Water Co. v. Waterworks Comm'n of City of Little Rock*, 199 Ark. 773, 136 S.W.2d 194 (1940) ("[T]hat is settled beyond excuse for extensive citation of authority that a public utility may not abandon any part of its property devoted to public service without the consent of the State, or transfer its property to someone else and be rid of its duty to serve the public.").

- 1 d. Whether EAL has properly considered all interests of Arkansas
2 ratepayers that may be affected by the Settlement Agreement,
3 including its fundamental duties owed to the ratepayers;²⁷
- 4 e. Whether the Settlement Agreement serves the interest of EAL and
5 its various corporate shareholders to the detriment of ratepayers
6 and the State of Arkansas;
- 7 f. Whether the Settlement Agreement improperly shifts the cost-
8 burden of any imprudence by EAL in the environmental risks
9 associated with coal generation (e.g., permitting, environmental
10 controls, designs, and operations) away from the shareholders,
11 Entergy affiliates, and other corporate entities, and places those
12 cost-burdens onto the ratepayers;
- 13 g. What cost-benefit analysis, if any, EAL engaged in to determine the
14 prudence of its actions and the terms of the Settlement Agreement;

²⁷ See *Acme Brick Co. v. Ark. Pub. Serv. Comm'n.*, 227 Ark. 436, 299 S.W.2d 208 (1957) (“if a public utility has the right [or if the Public Service Commission has the power to give it the right] to dispose of one segment of its assets without any kind of an accounting, then there is reason to fear it might some day be urged that it would have the same right to dispose of another segment or all of its assets in a like manner. This could, of course, lead not only to breach of trust but could defeat the very purpose for which utilities are organized *to serve the public*.” (emphasis added)); See *The City of El Dorado v. Ark. Pub. Serv. Comm’n*, 362 S.W.2d 680, 235 Ark. 812 (1962) (holding that “It is the duty of the Company to operate in such manner as to give to the consumers the most favorable rate reasonably possible. This stems from the fact that the State has given the Company the exclusive right to sell and distribute gas to its customers. Consequently *the Company bears a trust relationship to its customers* and must conduct its operations on that basis and not as if it were engaged in a private business with no restrictions as to the income it could earn.”(emphasis added)).

- 1 h. What the scope of any cost-benefit analysis was, including whether
2 the cost-benefit analysis only applied to EAL, and if not, from
3 whose perspective was such cost-benefit analysis conducted;
- 4 i. What economic factors EAL considered before agreeing to propose
5 the Settlement Agreement and Plant Specific Obligations, including
6 what economic effects the proposed Settlement Agreement and
7 Plant Specific Obligations would have on the State of Arkansas,
8 including the citizens of Independence and Jefferson counties;
- 9 j. What EAL's proposed rate-making treatment is for the issues
10 addressed in the Settlement Agreement and Plant Specific
11 Obligations, including adjustments for plant depreciation and
12 intergenerational fairness and subsidization considerations;
- 13 k. Whether EAL has done any analysis to determine if the Settlement
14 Agreement and Plant Specific Obligations could affect the
15 reliability and safety of the entire Arkansas electric grid, existing
16 transmission and distribution assets, and future transmission and
17 distribution assets and needs;
- 18 l. Whether EAL has done any analysis to determine if the Settlement
19 Agreement and the Plant Specific Obligations could affect the
20 rights, obligations, economic interests, and safety and reliability of
21 other Arkansas utilities, public utility membership cooperatives,

1 trade and industry groups, municipalities, or other members of the
2 public;

3 m. Whether EAL has done adequate analysis on the overall and
4 auxiliary costs that the Settlement Agreement and Plant Specific
5 Obligations could impose on ratepayers as sunk costs, including but
6 not limited to abandoned assets and property, contract breaches,
7 employee benefit costs, etc.;

8 n. Whether EAL has, as a member of Midcontinent Independent
9 System Operator (“MISO”), ensured that the Settlement Agreement
10 and the Plant Specific Obligations are consistent with its
11 obligations to MISO;

12 o. Whether EAL has analyzed the transmission planning, regulatory,
13 legal, and environmental effects the Settlement Agreement and
14 Plant Specific Obligations will create, which includes the
15 regulatory, legal, economic, and environmental costs for
16 replacement plants and power;

17 p. How EAL’s actions will impact existing infrastructure including the
18 abandonment of transmission lines, substations and other facilities
19 which connect these generation substations to EAL’s transmission
20 and distribution grid;

21 q. How EAL’s actions will impact the reformation or termination of
22 EAL’s contracts for coal or rail services;

- 1 r. If the Settlement Agreement and Plant Specific Obligations are
2 consistent with Ark. Code Ann. § 23-3-113(a), and specifically as to
3 how EAL believes they will promote the safety, health, comfort,
4 requirements, and convenience of its patrons, employees, and the
5 public;
- 6 s. If the Settlement Agreement and Plant Specific Obligations are
7 consistent with Ark. Code Ann. § 23-3-113(b), and specifically how
8 EAL believes they do not give any unjust discrimination or
9 preference to EAL, its affiliates, Entergy Corporation, Sierra Club
10 members, National Parks Conservation Association members, and
11 others;
- 12 t. Consistent with EAL's ratepayer trustee obligations, what
13 ratepayer protections has EAL sought with the Settlement
14 Agreement and Plant Specific Obligations, if any;
- 15 u. How EAL's decisions regarding the Settlement Agreement and
16 Plant Specific Obligations are consistent with the current
17 Integrated Resource Plan ("IRP");
- 18 v. How EAL will replace or address the 1,552 MW of existing
19 generating capacity that will be retired; and
- 20 w. How EAL's actions will impact the plants' co-owners and
21 ratepayers.

22 **Q. Could there be other concerns with the Settlement Agreement?**

1 A. Yes. As I noted, the Attorney General was not notified of the Complaint
2 and Settlement Agreement until their filing. As a result, the Attorney
3 General is still in the process of reviewing the Complaint and Settlement
4 Agreement in an effort to determine their effect on ratepayers.

5 **Q. Does the Attorney General believe that time is of the essence in**
6 **initiating an investigation?**

7 A. Yes. As discussed above, the Attorney General believes this matter is of
8 urgent import to Arkansas ratepayers, other stakeholders, and the
9 Commission.

10 **Conclusion**

11 **Q. What is your recommendation?**

12 A. I recommend that the Commission, after reasonable notice, and full and
13 complete hearing, make whatever relevant legal, prudence, and public
14 interest findings are warranted, and further implementing whatever
15 regulatory action is needed to protect ratepayers and the State of
16 Arkansas. I also recommend that the Commission make any all necessary
17 additional orders and actions pursuant to its authority and duties as
18 necessary in this docket and in *Sierra Club v. Entergy*.

19 **Q. What specific relief is being sought by the Attorney General?**

20 A. The AG requests a preliminary Order from the APSC establishing an
21 investigatory docket for the purposes state herein. Further, for the

1 protection of the State of Arkansas and its ratepayers, the AG requests
2 the following additional relief:

3 a. Holding that the EAL's actions in seeking approval of the
4 Settlement Agreement and the Plant Specific Obligations which are
5 likely to have very significant and long-term impacts on EAL's
6 operations and costs to ratepayers, without providing analysis
7 supporting the Settlement or providing an adequate opportunity for
8 review by the Commission, does not constitute a prudent utility
9 action, and therefore may subject EAL to cost disallowances, and
10 other remedies in future proceedings;

11 b. Holding that EAL's actions in entering into the Settlement
12 Agreement without seeking Commission approval of the agreement
13 were unilateral and discretionary and therefore EAL's shareholders
14 alone should bear any risks of future cost disallowances related to
15 the Settlement Agreement connected with these actions, including
16 possible disallowed rate recovery because of imprudence;

17 c. Holding that EAL's deliberate, intentional, and chosen actions
18 cannot be construed as a federal mandate requiring any action due
19 to the voluntary nature of its participation in the Settlement
20 Agreement;

21 d. In establishing this docket as a regulatory investigative forum,
22 provide affected parties, intervenors, and the Commission the

1 opportunity to engage in discovery and inquiry regarding EAL's
2 actions, the Settlement Agreement, and the Plant Specific
3 Obligations;

4 e. Establishing a reasonable procedural schedule for an inquiry into
5 whatever issues and scope of investigation the Commission
6 determines to be proper;

7 f. Finding that EAL should provide the Commission, through public
8 filings, with documentary evidence to address any substantive or
9 procedural issues pertaining to the Settlement Agreement and
10 Plant Specific Obligations that the Commission deems proper;

11 g. Invite relevant stakeholder participation, public notice, and public
12 comment opportunities; and

13 h. Require that EAL modify its current IRP to include an analysis of
14 the ratepayer cost and other impacts of the proposed Settlement
15 Agreement in comparison to costs of reasonable alternatives to the
16 agreement.

17 **Q. Does this conclude your testimony?**

18 A. Yes. Thank you.

CERTIFICATE OF SERVICE

I, Michael Sappington, certify that on this 13th day of December, 2018, I filed a copy of the foregoing utilizing the Commission's Electronic Filing System, which caused a copy to be served upon all parties of record via electronic mail.

/s/ Michael Sappington
Michael Sappington