BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

DAYTON POWER & LIGHT COMPANY	:	**Case No. ERAC 574950**
Appellant.	:	
v.	:	
CHRISTOPHER JONES, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
Appellee.	:	**Issued: August 21, 2003**
FIRSTENERGY CORPORATION	:	
Intervener.	:	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER

Issued By:

ENVIRONMENTAL REVIEW APPEALS COMMISSION

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This matter comes before the Ohio Environmental Review Appeals Commission ("ERAC" or "the Commission") upon a Notice of Appeal filed on June 14, 2001, by Appellant Dayton Power & Light Company ("DP&L") from Appellee Director of the Ohio Environmental Protection Agency's ("Director," "OEPA," "the Agency") May 16, 2001 issuance of a Title V permit for Appellant's J. M. Stuart Generating Station. On July 16, 2001, First Energy Corporation ("FirstEnergy") filed a Motion to Intervene. On September 9, 2001, the Commission granted First Energy's Motion over the objection of Appellee Director. Although Counsel for Intervener FirstEnergy were present for the de novo hearing, they did not actively participate.

On August 20, 2001, Appellant DP&L filed a Motion to Summarily Vacate, claiming the Director's issuance of the instant Title V permit was void as a matter of law due to his failure to provide DP&L with an opportunity to request an adjudication hearing as required by Ohio Revised Code ("R.C.") 119.06 and General Motors v. McAvoy (1980), 63 Ohio St. 2d 232, and Occidental Chemical Corp. v. Tyler, EBR Case No. 331480, issued December 11, 1986. The Commission convened an evidentiary hearing regarding Appellant's Motion on September 25, 2001. After considering the testimony and evidence offered at the evidentiary hearing, as well as the briefs and arguments of counsel, the Commission, ruled to deny Appellant's Motion. Although the Commission previously issued a dispositive ruling relative to this issue, for the sake of clarity of the record, the Commission will set forth the reason for its earlier denial of Appellant's Motion to Summarily Vacate in the instant opinion.

A de novo hearing on the merits of the case was held before the full Commission November 4 through November 6, 2002. At the hearing, counsel for Appellant DP&L indicated that he would be presenting testimony and evidence regarding two of the issues raised in the Notice of Appeal, while relying on arguments contained in Appellant's briefs for the remaining two issues.

Appellant DP&L was represented by Mr. Louis E. Tosi, Esq., Mr. Michael E. Born, Esq., and Mr. Michael A. Snyder, Esq., Shumaker, Loop & Kendrick, Columbus, Ohio, as well as Mr. Athan Vinolus, Esq., Of Counsel. Intervener FirstEnergy Corporation was represented by Mr. Robert L. Brubaker, Esq. and Ms. Katerina M. Eftimoff, Esq., Porter, Wright, Morris & Arthur, LLP, Columbus, Ohio. Appellee Director was represented by Mr. Bryan F. Zima, Esq., Mr. J. Randall Engwert, Esq., and Ms. Yanna Robson-Higgins, Esq., Assistant Attorneys General, State of Ohio.

Based upon the evidence and testimony adduced at the de novo hearing, the Joint Stipulation of Facts and Joint Stipulation of Documents filed by the parties, and the Certified Record which was jointly moved into evidence, the Commission hereby makes the following Findings of Fact, Conclusions of Law and Final Order affirming in part and vacating in part, the Director's issuance of a Title V permit to Appellant DP&L.

FINDINGS OF FACT

1. In 1990, Congress enacted amendments to the federal Clean Air Act ("CAA") which included authorization for a federal operating permit program, commonly referred to as the "Title V" program. Title V "operating permit programs are intended to consolidate into a single federally enforceable document all requirements of the [Clean Air Act] that apply to individual sources [of air pollution]." 66 F.R. 63180; Lafleur v. Whitman, 2002 U.S. App. LEXIS 15337 (2d Cir. July 31, 2002). (Joint Stipulation of Facts ["Joint Stip."] Nos. 1, 2; 42 U.S.C. 7661-7661f.)

2. On May10, 1991, the United States Environmental Protection Agency ("U.S. EPA") proposed, and on July 21, 1992, it promulgated, final rules for the Title V permit program which are codified at 40 CFR Part 70. (Joint Stip. No. 3.)

3. The U.S. EPA summarized the purpose and workings of Title V permits as follows:

> The purpose of title V permits is to reduce violations of air pollution laws and improve enforcement of those laws. Title V permits do this by:
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> 1. recording in one document all of the air pollution control requirements that apply to the source. This gives members of the public, regulators, and the source a clear picture of what the facility is required to do to keep its air pollution under the legal limits.
> 2. requiring the source to make regular reports on how it is tracking its emission of pollution and the controls it is using to limit its emissions. These reports are public information, and you can get them from the permitting authority.
> 3. adding monitoring, testing, or record keeping requirements, where needed to assure that the source complies with its emission limits or other pollution control requirements.
> 4. requiring the source to certify each year whether or not it has met the air pollution requirements in its title V permit. These certifications are public information.
> 5. making the terms of the title V permit federally enforceable. This means that EPA and the public can enforce the terms of the permit, along with the State. (Http://www.epa.gov/oar/oaqps/permits/)

4. On October 29, 1993, Ohio Revised Code ("R.C.") Section 3704.036, entitled "Title V permit program," was enacted to grant the Director the authority to create a federally approvable Title V program for the state. Specifically, this statute provides, in part:

> (A) The director of environmental protection shall develop and administer a federally approvable Title V permit program and shall take all necessary and appropriate action to implement, through the issuance of Title V permits, applicable requirements of the federal Clean Air Act. . . .
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> (B) The director shall adopt, and may amend, suspend, and rescind, rules to facilitate the implementation, supervision, administration, and operation of the Title V permit program that are consistent with, and no more stringent than, the requirements of Title V of the federal Clean Air Act and 40 C.F.R. part 70. . . .(Emphasis added.)

5. On April 20, 1994, pursuant to R.C. 3704.036, the Director of the OEPA adopted Ohio Administrative Code ("OAC") Chapter 3745-77, which contains the administrative rules governing Ohio's Title V program. (Joint Stip. No. 4.)

6. Ohio's Title V program was fully approved by the U.S. EPA on August 15, 1995, with an

effective date of October 1, 1995. (Joint Stip. 5.)

7. In Ohio, a Title V permit consists of three main parts: "Part I" sets out the general terms and conditions applicable to the facility; "Part II" sets out the specific facility terms and conditions; and, "Part III" sets out the terms and conditions for each noninsignificant[1] emissions unit within the facility. There is a separate "Part III" section for each emissions unit that is covered by the Title V permit. (Testimony, James Orlemann ["Orlemann"])

8. Appellant herein, the Dayton Power & Light Company owns and operates the J.M. Stuart Generating Station ("Stuart") in Aberdeen, Brown County, Ohio. Stuart is a coal-fired electricity generating facility which is subject to the provisions of Title V of the CAA. Stuart generates electricity from steam-powered turbines of up to 600 megawatts in capacity. Four coal-fired boilers (i.e., Boiler Units Nos. 1 through 4), each with a maximum heat input of 5,649 million Btu/hour, generate the steam for the turbines. (Certified Record ["CR"] Item 1, 2; Testimony Amy Wright; Appellant's Ex. 1.)

9. On August 18, 1996, pursuant to the provisions of OAC 3745-77-04, Appellant DP& L submitted an application for a Title V operating permit to the Director of the OEPA for its Stuart facility. (CR Item 2; Joint Stip. 6; Appellant's Exhibit 4.)

10. Appellant's application listed, inter alia, OAC 3745-17-07(A) ("Visible particulate emission limitations for stack emissions") and OAC 3745-17-10(C)(1) ("Restrictions on particulate emissions from fuel burning equipment" - "Emission limitations") as applicable emissions limits or control requirements for all four boiler units. Further, Appellant's application indicated that Method 9 ("visible determination of the opacity of emissions from stationary sources") was the applicable method for determining compliance with the visible

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[1] "Insignificant activities and emissions levels" is defined in OAC 3745-77-01(U).

particulate emission limitations, and that Method 5 ("stack testing for particulate") was the method for determining compliance with the particulate matter emission standards for all four boiler units. (CR Item 2, Appellant's Exhibit 4.)

11. Method 9 (i.e., visible particulate emission readings by qualified observers), is the only compliance method listed in OAC 3745-17-03 for demonstrating compliance with OAC 3745-17-07(A) (visible particulate emission limitations for stack emissions)[2]. (Joint Stip. 14.)

12. Methods 1 through 5 (i.e., stack tests), are the compliance methods referenced in OAC 3745-17-03, for demonstrating compliance with OAC 3745-17-10 (mass particulate emissions limit). (Joint Stip. 13.)

13. Prior to the issuance of the first Title V permits, the regulated community, including representatives from Appellant DP& L, engaged in discussions with the OEPA to develop examples of appropriate terms and conditions that might be included in the forthcoming Title V permits. On November 18, 1996, OEPA's first draft of model Title V permit terms and conditions for a coal fired steam electric generating boiler was forwarded to the Environmental Committee of the Ohio Electric Utility Institute ("OEUI"), of which Appellant DP& L is a member. On December 13, 1996, the Committee sent comments on the draft model permit to Bruce Weinberg, a manager with the OEPA's Division of Air Pollution Control ("DAPC"). Of particular relevance to the instant proceeding were the following comments:

> [Re: Applicable Emissions Limitations and/or Control Requirements]
> . . . Ohio EPA has listed O.A.C. Section 3745-17-07 as an applicable requirement. The Utilities believe that opacity limits supplemental to mass emission limits are

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[2] In Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000)., the court, citing a passage in Credible Evidence Revisions, 62 Fed. Reg. 8319 (1997), explained Method 9 readings as follows: "Method 9 requires that a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume" to determine the opacity of the plume released.

> not Applicable Requirements because they are not relevant to the particulate NAAQS attainment demonstration and are not predicated upon the technology driven requirements of the Clean Air Act.
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> [Re: Operational Restrictions]
> The Utilities find this provision unacceptable. Ohio EPA has no authority to order the operation of the electrostatic precipitators (ESPs)[3] or any other control equipment. The regulated unit has an emission limit to meet. Ohio EPA has regulatory authority to require a source to demonstrate compliance with that limit, as outlined in the rules. How, or by what method, a source chooses to meet its emissions limit is not a matter of regulatory authority. Ohio EPA should delete this subsection entirely. The Title V permit must consist of applicable requirements only.
>
> [Re: Monitoring and/or Record Keeping Requirements]
> U.S. EPA (and consequently, Ohio EPA, too) cannot implement these kinds of additional monitoring requirements under its current authority in the SIPs. Further, . . . the Title V rules do not mandate such monitoring. O.A.C. 3745-77-07(A)(3) authorizes the creation of a new monitoring system only when the applicable requirement does not provide one. All of the applicable requirements in the draft dictate a specific monitoring method. U.S. EPA is limited to the monitoring requirements approved in its rules and the Ohio SIP, which are clearly defined in the rule and outlined in subsection V. (Appellant's Exhibit 5, emphasis in original.)

14. In addition to the utilities concerns expressed in the comments regarding the model Title V permit set out above, they also engaged in discussions with the OEPA in an effort to arrive at acceptable language regarding the use of continuous opacity monitors ("COMs")[4] for demonstrating compliance with visible particulate emission limitations. The compromise language which was agreed to (hereinafter the "Conesville/Kyger Creek" language) provided as follows:

> The continuous opacity monitoring data shall be used to demonstrate compliance

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[3] An electrostatic precipitator, or "ESP" is an air pollution control device designed to remove particulate matter from furnace gases and, thus, to reduce the emissions of particulate matter into the air.

[4] "A continuous opacity monitor employs 'a calibrated light source that provides for accurate and precise measurement of opacity at all times.'" Appalachian Power Co., supra, citing Credible Evidence Revisions, supra.

with the requirements of OAC rule 3745-17-07(A)(1). The permittee shall be deemed in compliance with OAC rule 3745-17-07(A)(1) if less than 1.5 percent of the nonexempt 6 minute average opacity values during a calendar quarter exceed 20 percent opacity. (Testimony, Wright; Appellant's Demonstrative Exhibit D-9.)

15. Mr. James Orlemann, Manager of the Engineering Section and Enforcement Coordinator for the DAPC at the OEPA, testified that, in developing the 1.5 percent compliance factor contained in the Conesville/Kyger Creek language, the Agency relied upon a historical database of continuous opacity monitoring ("COM") data from coal-fired sources, as well as a 1987 study conducted by Pacific Environmental Services ("PES"). Further, Ms. Amy Wright, Director of Environmental Management for DP&L, testified that the results of the PES study indicated that using COMs alone, 90 percent of boilers more than 250 million Btus could comply with the opacity standard only 98 percent of the time. She also testified relative to using COMs without a compliance factor that, "There isn't a coal-fired plant in this country that can continuously comply with opacity requirements using a COM. . . . It would be a miracle. It's not possible. They can't do it." (Testimony Orlemann, Amy Wright ["Wright"]; Joint Stip. Nos. 11, 12.)

16. In October of 1997, the Director issued a "pre-draft" version of a Title V permit to Appellant DP&L. Bruce Weinberg, a manager with the DAPC, testified that "pre-draft" versions of permits are not recognized or required by OAC Chapter 3745-77, however, the pre-draft version of the Title V permit herein was sent to Appellant for review and comment as a "courtesy copy of the terms that we had initially prepared." Mister Weinberg further explained that this pre-draft version was given to Appellant for comment in light of the extensive discussions the Agency had been having with the electric utility industry regarding the terms of Title V permits. (CR Item 3; OAC 3745-77-01; Testimony, Weinberg Volume II, p.150; Joint Stip. 7.)

17. Relative to particulate emission testing, the Pre-draft Title V permit provided for all four boiler units, in part, as follows:

> The permittee shall conduct, or have conducted, particulate emission testing for this emissions unit to demonstrate compliance with the allowable mass emission rate of 0.10 lb/mmBtu actual heat input in accordance with the following requirements:
>
> The particulate emission testing shall be conducted 6 months prior to permit renewal.
>
> Compliance with the allowable mass emission rate for particulates shall be determined in accordance with 40 CFR Part 60, Appendix A, Methods 1 through 5 and the procedures in OAC 3745-17-03(B)(9).... (CR Item 3.)

18. Relative to visible particulate emission limitations, Appellant's pre-draft Title V permit contained the "Conesville/Kyger Creek" language in the "Testing Requirements" section for all four boiler units. Specifically, this provision provided in its entirety:

> The continuous opacity monitoring data shall be used to demonstrate compliance with the requirements of OAC rule 3745-17-07(A)(1). The permittee shall be deemed in compliance with OAC 3745-17-07(A)(1) if less than 1.5 percent of the nonexempt* 6-minute average opacity values during the calendar quarter exceed 20 percent opacity. (Historical continuous opacity monitoring data for coal-fired boilers equipped with electrostatic precipitators or baghouses indicate that an excess emissions level of 1.5 percent (nonexempt emissions) is representative of good operation and maintenance of the emissions unit and the associated control equipment.) Compliance with the visible emission limitations in OAC rule 3745-17-07(A)(1) may also be determined in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures in OAC rule 3745-17-03(B)(1). In the event of a discrepancy between the continuous opacity monitoring data and the observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 during the same time period, the Method 9 data will take precedence for that time period.
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> *exempt emissions are defined in OAC rule 3745-17-07. (CR Item 3.)

19. On October 30, 1997, Appellant DP&L filed comments on the "pre-draft" version of the permit. Mr. Weinberg testified that the Agency considered Appellant's comments prior to issuing the draft version of the permit. (Joint Stip. 8, 9; Testimony, Weinberg.)

20. On December 4, 1997, Thomas G. Rigo, Manager of the Field Operations and Permit Section, DAPC, OEPA, forwarded a copy of the Stuart Station draft Title V permit to Mr. Cliff H. Waits of DP&L. In his cover correspondence, Mr. Rigo indicated that, "[t]he purpose of this draft is to solicit public comments." Mr. Rigo further advised Mr. Waits:

> A decision on processing the Title V permit will be made after consideration of written public comments and oral testimony (if a public hearing is conducted). After the comment period, you will be provided with a Preliminary Proposed Title V Permit and an opportunity to comment prior to the Proposed Title V permit submittal to USEPA. (CR Item 4.)

21. Notably, consistent with the pre-draft version of the permit, the draft Title V permit proposed using Methods 1 through 5 and the procedures in OAC 3745-17-03(B)(9) for determining compliance with the allowable mass emission rate and using of COM data with the 1.5% compliance factor (the Conesville/Kyger Creek language), or Method 9 and the procedures in OAC 3745-17-03(B)(1) for demonstrating compliance with the visible particulate emission limits[5]. (CR Item 4.)

22. According to Mr. Weinberg, no public hearing was requested, and the Agency did not receive any comments from the public at large, regarding Appellant's draft Title V permit. However, on January 14, 1998, Mr. Michael E. Born, Counsel for Appellant DP&L, did file comments concerning the permit with the Agency. Of particular relevance to the instant proceeding, were Mr. Born's comments regarding, "The Proper Role of O.A.C. Section 3745-17-07(A)." Specifically, Mr. Born asserted, in part, as follows:

> As with previous utility permits (and commented upon by OEUI[6]), DP&L still

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[5] Once again, the permit provided that in the event of a discrepancy between the COM data and observations performed in accordance with Method 9, the Method 9 data would take precedence. (CR Item 4.)

[6] See, for example, the December 13, 1996 letter, discussed in Findings of Fact paragraph number 13, above.

> questions and objects to the use of opacity as an independently enforceable provision for all units at the Stuart Station. The questionable enforceability of O.A.C. Section 3745-17-07 as a "stand alone" provision of the Ohio State Implementation Plan ("SIP") or as a part of the state or federal Clean Air Act Amendments of 1990 (the "Act") raises an issue as to that rule's appropriateness for inclusion in a Title V permit as an applicable requirement, especially as a "stand alone," independently enforceable one. O.A.C. Section 3745-17-07 may appear to meet the definition of an "applicable requirement" as outlined in the Title V program. [Footnote omitted] However, since courts have ruled that the standard by itself is not independently enforceable, inclusion in a Title V permit as a separate requirement could create a new burden for complying with the opacity limit as a permit term that, before now, did not exist as a part of the SIP. The following reviews the basis for courts' limitation of enforcement of the opacity limit, the possible problems with its inclusion in a Title V permit, and the Utilities' proposal for including opacity limits in the permit. . . .
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> (Testimony, Weinberg; Joint Stip. No. 16; C.R. Item 5.)

23. Mr. Born continued by stating:

> The new Title V permitting program requires the permittee to comply with all applicable requirements contained within the permit. Ohio Admin. Code Section 3745-77-07(A)(3). As discussed above, O.A.C. 3745-17-07 may meet the definition of applicable requirement. This raises a concern that in the event a Title V permit includes the 20% opacity limit from O.A.C. Section 3745-17-07(A) as a term of the permit, exceedance of that opacity limit would constitute a violation of the permit and, therefore, the Act (Ohio Admin. Code Section 3745-77-07(A)(7)(a)) even though case law has determined that prior to Title V such an excession of the opacity limit by itself would not otherwise constitute a violation of the SIP or the Act.
>
> Clearly, the regulated community cannot accept, nor does the statute authorize the Title V permit to increase the regulatory burden. The Utilities have proposed a compromise for addressing this issue that would include opacity limits in Title V permits but would not change their enforcement role. (CR Item 5.)

24. On behalf of DP&L, Mr. Born proposed that the following language would be acceptable for determining compliance with OAC 3745-17-07(A)(1):

> Compliance with the visible emission limitations in O.A.C. Section 3745-17-07(A)(1) shall be determined in accordance with 40 C.F.R. Part 60, Appendix A, Method 9 and the procedures in O.A.C. Section 3745-17-03(B)(1). O.A.C. 3745-17-07 is not independently enforceable. For the purpose of compliance with the permit and the requirements of 3745-17-07, continuous opacity monitoring data and results of tests pursuant to 40 C.F.R. Part 60, Appendix A, Method 9, shall be

used as indicator monitoring only, and as the basis for an inquiry to determine the cause and appropriate responsive action, if any, provided that the opacity readings exceeding 20% opacity (or such other equivalent level) on a six minute average represent more than 5% of unit's operating time (less any exempted averaging periods pursuant to O.A.C. Sections 3745-17-07(A)(1)(b) and 3745-17-07(A)(3)) in the appropriate calendar quarter.

In recognition of long standing policy and practice, and to account for normal and expected variability from a well-controlled and well-operated source, the permittee shall be deemed in compliance with O.A.C. Section 3745-17-07(A) if, apart from and without limitation upon any other applicable exemption, less than 5% of the six-minute average opacity readings during a calendar quarter exceed 20% opacity (excluding the six-minute average exemption for each sixty minute period, as provided in O.A.C. Section 3745-17-07(A)(1)(b)). (CR Item 5.)

25. Finally, Mr. Born summarized:

> This revision would put opacity in its proper role: as an indicator for mass particulate emissions. It would also preserve Oho EPA's current enforcement policy for 95%[7] of compliance. To include opacity limits any other way would dramatically alter (sic.) impact of O.A.C. Section 3745-17-07(A). (CR Item 5.)

26. On March 17, 1998, Mr. Weinberg responded to DP&L's comments on its draft Title V permit on behalf of the OEPA. Relative to the "Proper Role of OAC rule 3745-17-07(A)," Mr. Weinberg stated:

> The U.S. EPA has determined and stated in a letter dated February 3, 1997[8] to the Ohio EPA, that OAC rule 3745-17-07 is part of Ohio's approved State Implementation Plan and, therefore, the visible particulate emission limitations are applicable requirements. The DAPC believes that the independently enforceable issue, as described in your letter, has been addressed through the incorporation of equivalent visible emission limitations in OAC Chapter 3745-17.

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[7] In testimony regarding the 1.5 percent compliance factor used by the Agency in enforcing the opacity limits, Mr. Orlemann stated that, in practice, the Agency, "probably wouldn't pursue enforcement unless it went over five percent . . ." (Testimony, Orlemann.)

[8] The specific statement to which Mr. Weinberg was referring was contained in correspondence from Cheryl Newton of Region 5 of the U.S. EPA, and provided, "Opacity limits are not meant as a backup for mass emission limits; like emission limits, they are individually enforceable." (Appellee Director's Exhibit 8.)

> The DAPC does not agree with your proposed changes to the compliance language for the visible particulate emission limitations in Section V.2. (Joint Stip. No. 17; CR Item 6.)

27. Mr. Weinberg testified that, again, the Agency considered the comments received on DP&L's draft Title V permit prior to issuing a preliminary proposed Title V permit to DP&L on March 19, 1998. In the cover letter from Mr. Rigo at the OEPA to Mr. Waits at DP&L which accompanied this permit, Mr. Rigo stated in part:

> Enclosed is the Ohio EPA Preliminary Proposed Title V permit that was issued in draft form on 12/04/97. The comment period has ended. We are now ready to submit this permit to USEPA for approval.
>
> We are submitting this for your review and comment. If you do not agree with the Preliminary Proposed Title V permit as written or with agreed-upon changes, then you have the opportunity to schedule a meeting with us to discuss your concerns. (Joint Stip. No. 18; CR Item 7; Appellant's Ex. 8.)

28. Once again, Appellant's Preliminary Proposed Title V permit contained language indicating that Appellant was to conduct particulate emission testing to demonstrate compliance with the allowable mass emission rate through the use of Methods 1 through 5 and the procedures in OAC 3745-17-03(B)(9). The Preliminary Proposed Title V permit also contained the "Conesville/Kyger Creek" language relating to the use of COMs that had been in the pre-draft and draft versions of the permit. (CR Item 7.)

29. Pursuant to O.A.C. 3745-77-08(A)(3), DP&L requested an informal conference with the Director regarding its Preliminary Proposed Title V permit. On April 30, 1998, Bruce Weinberg, as representative for the Director, conducted the informal conference, which was attended by Ms. Amy Wright, Director of Environmental Management for DP&L and Mr. Michael Born, DP&L's legal counsel. (Joint Stip. Nos. 19; 20; Testimony, Weinberg.)

30. There was an extensive delay between the issuance of Appellant's preliminary proposed Title V permit on March 19, 1998 and the issuance of a revised version of the permit, referred to

by the Agency as a "pre-proposed" version, on February 20, 2001. In this intervening period, two matters of significance to the instant action occurred. First, discussions continued to be held between Agency personnel and the utility group, Agency personnel and the U.S. EPA and internally within the Agency, regarding various Title V permit issues and their resolution. Second, on June 3, 1998, correspondence was received by Mr. Robert Hodanbosi, Chief of the DAPC at the OEPA, from Ms. Cheryl Newton, Chief of the Permits and Grants Section for Region 5 of the U.S. EPA regarding periodic monitoring requirements in the Title V permits for four other utilities (Conesville Power Plant, Ohio Valley Electric, DP&L Killen Generating Station and Department of Public Utilities in the City of Orrville, Ohio). Ms. Newton's letter provided, in relevant part:

> Section 70.6(a)(3)(B) requires each Title V permit to contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, if the underlying applicable requirements do not otherwise specify such monitoring. In order to meet this "gap-filling"provision, the periodic monitoring terms for each emission unit in the permit must include not only the appropriate method for monitoring, but also the minimum frequency at which the monitoring must be done in order to yield sufficient data to represent the source's compliance with the permit. If a Title V permit's monitoring requirements do not specify a frequency, the monitoring methods they institute cannot be considered periodic.
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> The four Title V permits require Part 60 Method 9 testing for many of the emission units, but they do not specify the frequency at which Method 9 must be performed. The Ohio Environmental Protection Agency (OEPA) has argued that the frequency does not need to be specified because the emission units either have 1) continuous opacity monitoring systems (COMS) which will provide monitoring data for direct compliance with opacity limits, or 2) inherently clean emissions and infrequent periods of operation. In accordance with our November 10, 1997 letter to you, the United States Environmental Protection Agency (USEPA) believes that such explanations belong in a statement of basis for each permit. We understand that OEPA is working on including statements of basis in future Title V permits. USEPA also believes that, regardless of operating history, the emission units for which COMS data is not required must have a frequency for Method 9 testing specified in the permits in order to meet the gap-filling requirement . . .
>
> The four permits allow the sources to be deemed in compliance if less than 1.5%

> of their nonexempt 6-minute average opacity values during a calendar quarter exceed the 20% opacity limit. USEPA has commented that this appears to be an unnecessary limit on enforcement authority. OEPA has argued that the 1.5% leeway is considered necessary based on experience in enforcing the 20% standard and on the Pacific Environmental Services study of continuous emission data, and that the COMS data will still be used for direct compliance. USEPA understands the need to practice enforcement discretion, but opposes putting such discretion in writing in any air pollution permit. USEPA will object to the incorporation of enforcement discretion in the federally enforceable section of proposed Title V permits, and requests that the Conesville and Kyger Creek permits be administratively amended to correct this problem as soon as possible. (CR Item 15; Emphasis added.)

31. The position expressed in Ms. Newton's June 3, 1998 correspondence regarding COMs was expanded upon in a September 27, 2000 letter from Pamela Blakley, Chief of the Permits and Grants Section of the U.S. EPA to Mr. Hodanbosi, in which Ms. Blakley addressed the concerns expressed by some OEPA staff members that "requiring continuous opacity monitors (COMs) for compliance purposes would be inconsistent with the State Implementation Plan (SIP) which specifies Method 9 as the compliance method." In her letter, Ms. Blakley stated, "I would like to take this opportunity to restate USEPA's position that the Ohio Environmental Protection Agency (OEPA), as an enforcement authority, and the subject source, in certifying compliance, must consider COM data in determining compliance with the SIP opacity limit." Ms. Blakely's letter continued by explaining U.S. EPA's position, in relevant part, as follows:

> As you are aware, a Title V permit must include all applicable requirements. 40 C.F.R. Section 70.2 defines an applicable requirement to include "any standard or requirement of the acid rain program under Title IV of the Act or the regulations promulgated thereunder." Under this definition, which your Title V permit program should reflect, the requirements of 40 C.F.R. Part 75, including the requirement that utilities install, maintain and operate COMs, are applicable requirements for Title V purposes. . . .
>
> We understand from staff discussions that OEPA agrees with most of our position laid out above, but does not agree that the Title V permits can require the COMs for compliance purposes. OEPA staff have indicated an understanding that the permit must instead reference only the compliance method required by the SIP, Method 9 in this case. However, 40 C.F.R. Section 70.6(a)(3)(A) provides that a

> permitting authority may specify a streamlined set of monitoring or testing provisions provided that the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing requirement not included in the permit as the result of the streamlining. Clearly the use of COM data assures that the source is adequately monitoring for compliance with the SIP opacity limitations, and, therefore, you should be able to streamline these monitoring requirements in utility permits.
>
> Despite our belief that COMs should be specified, we would not formally object to Method 9 being referenced as a compliance method in the permit. You should be aware, however, that even if the permit refers to Method 9 as the method for demonstrating compliance with the SIP opacity limitation, based upon our reasoning above, USEPA would review and use the data gathered by the Part 75 COMs. We further would expect that the permittee would consider COM data in submitting compliance certifications. For this reason, we believe the permit would be more straightforward and clear if the COMs were clearly stated as a compliance method for the SIP opacity limitations. However, if OEPA still chooses to require the use of COMs only in the general terms and conditions of the Title V permit (which generally references the acid rain permit and the credible evidence rule) then you must clearly inform the permittee that it must consider COM data in addition to the Method 9 testing results when completing the compliance certification for the SIP opacity limit. (Appellant's Ex. 14; Emphasis added.)

32. During this same time frame, i.e., between the issuance of Appellant's preliminary proposed Title V permit and its pre-proposed Title V permit, three stack tests were conducted on Boiler Unit No. 1 at Stuart Station. Specifically, at a stack test conducted by Appellant's consultant, Mostardi-Platt, on February 25, 1999, the continuous opacity monitoring data recorded during the test showed that the six-minute average opacity levels were below 20 percent, the legal maximum for opacity levels, however, the unit exceeded the particulate mass emission limitation set forth in OAC 3745-17-10(C)(1).[9] As a result of this exceedance, on March 20, 1999, DP&L shut down Boiler Unit No. 1 and repaired broken discharge electrodes in the ESP. The unit was returned to service on March 23, 1999. On April 8, 1999, an additional stack test

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[9] Amy Wright testified that she reviewed prior stack test results contained in the business records of DP&L dating to 1978 and determined that this was the first stack test which had been failed. (Testimony, Wright.)

was conducted on Boiler Unit No. 1 which demonstrated that it was in compliance with the applicable mass particulate emission limit. During this stack test, no secondary voltage measurements were taken, as there was no equipment installed or operable for measuring secondary voltage in the electrostatic precipitator ("ESP") at Boiler Unit No. 1. (Appellant's Ex. 27; Testimony, Wright.)

33. As a result of the particulate emission limit exceedance during the February 25, 1999 stack test, the Director issued Final Findings and Orders ("DFFOs") to DP&L on July 18, 2000. The DFFOs required DP&L to conduct another particulate emission test on Boiler Unit No. 1 within 60 days after the effective date of the DFFOs, and to pay a $28,000 fine. The DFFOs also indicated that if the ordered stack test indicated compliance, then the Agency would "accept the results of that particulate emission test in lieu of the first particulate emission test for B001 required by the Facility's forthcoming Title V permit." Finally, the DFFOs provided:

> . . . Nothing contained herein prevents the Ohio EPA from exercising its lawful authority to require DP&L to perform additional activities at the facility pursuant to R.C. Chapter 3704 or any other applicable law in the future, except for those actions or alleged violations specifically referenced in these Orders or the March NOV [issued by Portsmouth local air agency]. (Joint Stip. 21-24; Appellant's Ex. 27.)

34. An additional stack test conducted on Boiler Unit No.1 on November 20, 2000, once again, demonstrated that it was in compliance with the relevant mass particulate emission limit. During this test, DP&L's consultant appeared to record readings from secondary voltage gauges, however, the gauges were not connected to secondary voltage meters. Thus, the readings were not readings of secondary voltage and, if anything, measured stray voltage. These readings were submitted to the Portsmouth local air agency in a report of the stack test and that report identified the readings as readings of secondary voltage. (Joint Stip. 26.)

35. On February 20, 2001, Bruce Weinberg of the OEPA forwarded a copy of what the

Agency referred to as the "pre-proposed" Title V permit revisions to Amy Wright at DP&L. Mr. Weinberg's cover sheet provided, in part:

> Enclosed is a copy of the proposed permit for DP&L's Stuart Generating Station. Please review the permit terms and conditions and submit any comments you may have by February 28, 2001. We are providing this additional review and comment period in light of the changes that were made since the issuance of the preliminary proposed permit. The changes were made, in part, to readdress the approach used to ensure ongoing compliance with the particulate mass emission limitation for emissions unit B001. As you are aware, the approach needed to be revised since it was not able to detect the exceedance of the particulate mass emission limitation documented by U.S. EPA reference methods. . . . (CR Item 8; Appellant's Exhibit 17.)

36. There were two significant changes, to which Appellant vehemently objected, which appeared for the first time in the February 20, 2001 pre-proposed version of Appellant's Title V permit:

> 1) The Conesville/Kyger Creek language was deleted from the "Testing Requirements" section of the permit, and a requirement that Appellant "operate and maintain existing equipment to continuously monitor and record the opacity of the particulate emissions" was inserted into the "Monitoring and/or Record Keeping Requirements" section of the permit; and
>
> 2) Annual stack tests were required for Boiler Unit No. 1 (stack tests for Boiler Units 2 through 4 were only required every 2.5 years), and, in addition, an operational restriction and related parametric monitoring requirements were imposed on the ESP for Boiler Unit No. 1. (CR Item 8; Appellant's Ex. 18; Testimony, Wright.)

37. Specifically, the operational restriction at issue provided:

> The average total combined power input (in kilowatts) to all fields of the ESP, for any 3-hour block of time when the emissions unit is in operation, shall be no less than 90 percent of the total combined power input, as a 3-hour average, during the most recent emissions test that demonstrated the emissions unit was in compliance with the particulate emission limitation.
>
> The permittee shall operate the ESP during any operation of this emissions unit, except the ESP may not be operated during periods of start-up until the exhaust gases have achieved a temperature of 250 degrees Fahrenheit at the inlet of the ESP or during periods of shutdown when the temperature of the exhaust gases has dropped below 250 degrees Fahrenheit at the inlet of the ESP. (CR Item 8.)

38. The associated parametric monitoring requirement stated:

> The permittee shall monitor and record the following on an hourly basis during any operation of the ESP:
>
> a. the secondary voltage, in kilovolts, and the secondary current in amps, for each transformer rectifier (TR) set in the ESP;
> b. The power input (in kilowatts) of each TR set for each hour (calculated by multiplying the secondary voltage (in kilovolts) by the secondary current (in amps) for each TR set); and
> c. the total power input to the ESP for each hour (add together the power inputs for the TR sets operating during the hour).
>
> The permittee shall record the following information:
> a. all 3-hour blocks of time during which the average total combined power to the ESP, when the emissions unit was in operation, was less than 90 percent of the total combined power input, as a 3-hour average, during the most recent emissions test that demonstrated the emissions unit was in compliance with the particulate emission limitation; and
> b. the duration of any downtime for the ESP monitoring equipment for secondary voltage and current specified above, the ESP sections that are out of service, and the duration of the downtime for each section, when the associated emissions unit was in operation.

39. At the hearing in this matter, Mr. Orlemann testified regarding these two substantial changes which first appeared in the pre-proposed revisions to Appellant's Title V permit. First, Mr. Orlemann indicated his assessment of the ability of a facility such as Stuart Station being able to comply with its visible particulate emission limitations through the use of COMs without a compliance factor, as follows:

> . . .I think the point was made that with COMs, there's no way the entity could comply. And in particular, in submitting their annual certification, we don't agree with that.
>
> First of all, we think there are probably situations where individual units could go a whole year without any nonexempt emissions during the year. We think that's a distinct possibility. I couldn't give you names and specific emissions units right now, but I believe that exists throughout the State for certain emissions units.
>
> But in addition to that, we believe that if - - if an entity has a level of nonexempt excess emissions that's within this exemption level of 1.5 percent, or the rule revision that we're proposing proposes a 1.1 percent, if the entity is within that level of nonexempt excess emissions, we believe they have the ability to still

> indicate that they have either continuous or intermittent compliance based on that data. Because we - - we believe that level still reflects good operation and maintenance, it still reflects compliance with the opacity rule. And since the COMs data is not the compliance method that's specified in the permit, they have the ability to make that argument in their annual certification. (Testimony, Orlemann.)

40. Regarding the operational restriction and parametric monitoring requirement, Mr. Orlemann testified that these provisions were placed in the permit as a result of the failed stack test recorded on February 25, 1999, since that test "undermined the assumption that's used for the other three units that opacity can be used as an indicator of compliance with the mass level." Mr. Orlemann explained that this operational restriction and parametric monitoring requirement was originally developed for an ESP located at a Ford automobile manufacturing plant that was significantly smaller than the ESP at Stuart. He further testified that the Agency was initially unsure of the "proper approach" to be used relative to Boiler Unit No. 1, so they engaged in discussions with U.S. EPA and, as explained by Mr. Orlemann, "U.S. EPA finally gave us the guidance that we relied on in choosing power input." (Testimony, Orlemann.)

41. As testified to by Ms. Wright, the operational restriction requires Appellant to measure secondary voltage and use secondary voltage readings to calculate the ESP's total power input. However, as Ms. Wright explained, the ESP at Boiler Unit 1 is not outfitted with the equipment necessary to measure secondary voltage. Ms. Wright further testified that when the units were installed in 1971, Appellant did purchase the equipment to read secondary voltage, but it continually malfunctioned and was disconnected. (Testimony, Wright.)

42. Testimony further revealed that the Agency did not become aware of the fact that the Stuart Station facility was not equipped with secondary voltage meters until after the issuance of Appellant's final Title V permit. In discussing this lack of knowledge on behalf of the Agency, Mr. Orlemann testified, "If we had known that before the permit was issued, it would have

definitely prompted further discussions with the company. We didn't . . . we didn't know about it. There were opportunities for us to know that and we just weren't told." (Testimony, Orlemann, Vol. II, p.43.)

43. Each party offered extensive testimony and evidence by an expert witness regarding what, if any, relationship exists between the operational restriction placed on Appellant's Boiler Unit 1 and the ability to predict or ensure compliance with the unit's particulate emission limitation through the use of the restriction. Specifically, Appellant offered the testimony of Mr. Richard McRanie, a Principal at RMB Consulting & Research, Inc., while the Director offered the testimony of Dr. Leslie E. Sparks, a Senior Chemical Engineer with the U.S. EPA. Stated briefly, Mr. McRanie concluded that restricting total power input to an ESP does not have a direct correlation to the unit's ability to comply with its particulate mass emission limitation. Conversely, Dr. Sparks indicated that he felt the operational restriction was reasonable because it is likely to ensure compliance with the particulate mass emission limitation for Boiler Unit No. 1.

44. Relative to this issue, Appellant also introduced an excerpt from a document entitled "Ohio EPA's Operation and Maintenance (O & M) Guidelines for Air Pollution Control Equipment," dated February 1993. Specifically, the document contained the following discussion regarding the relationship between power input to an ESP and the ESP's performance:

> The power input to the ESP can be a useful parameter in monitoring ESP performance. The value of power input for each field and for the total ESP indicates how much work is being done to collect the particulate. In most situations, the use of power input as a monitoring parameter can help in the evaluation of ESP performance, but some caution must be exercised . . .
>
> Acceptable ranges may be established for various parameters (by use of baseline test data) that require further data analysis or perhaps some other action if the values fall outside a given range.

> . . . As a general rule, performance improves as the total power input increases. This is normally the case when resistivity is normal to moderately high, assuming most other factors are 'normal' and components are in a state of good repair. One should not rely solely on power input, however. The pattern or trends in power input throughout the ESP are important in a performance evaluation. Also, in some cases, although the apparent power input is high, the performance is poor. For example, when dust resistivity is low or very high or when spark rates are very high, corrective measures will usually lower power input, but will also substantially improve performance. (Appellant's Exhibit 26; Emphasis added.)

45. On March 5, 2001, Amy Wright responded to Mr. Weinberg regarding the revisions to Appellant's Title V permit that the Agency had forwarded to DP&L on February 20, 2001, in part, as follows:

> . . . Due to the substantive changes proposed by the Ohio EPA, DP&L is unable to complete its review of the changes and provide comment by February 28, 2001. DP&L intends to submit comments to your office the week of March 12, 2001. (CR Item 9; Appellant's Ex. 18.)

46. On March 14, 2001, Michael Born submitted a letter on behalf of DP&L regarding the OEPA's February 20, 2001 draft of the Stuart Station Title V permit. Of significance for purposes of the instant appeal, Mr. Born made the following comments and observations in this correspondence:

> - Ohio Administrative Code 3745-77-08 requires Ohio EPA to provide for public comment on Title V permits. Whole sections of the current draft bear no resemblance to the previous draft. The Draft Permit should be noticed for additional public comment on the significant and substantial revisions now proposed by the Agency. Otherwise, the permit as written will not have been subject to public review as required by Ohio Administrative Code 3745-77-08.
>
> - . . . the proposed revisions have no basis in law or fact, and Ohio EPA has no legal authority to include them in the draft permit. The excessive monitoring and testing requirements proposed are not required to demonstrate compliance with the SIP or any federally applicable requirement. The monitoring proposed is not a part of the SIP, the Ohio rules, or any applicable requirement as defined by Ohio Administrative Code 3745-77-01(H). In short, there is no legal basis for these revisions.
>
> - . . . the Agency's purported basis for the changes, the Stuart Stations's stack test of February 25, 1999, provides no legal basis for the changes to the permit. DP&L

and Ohio EPA entered into Findings and Orders related to that stack test in July, 2000. These Findings and Orders conclusively settled all matters related to the stack test of February 25, 1999 and Ohio EPA has waived its rights to seek further actions related to it. . . .

- The draft permit references and requires compliance with Engineering Guide No. 64. The Engineering Guide is not an applicable requirement. Further, Ohio law prohibits state agencies from regulating by any means other than formal rulemaking. Ohio Nurses Association, Inc., et al. v. State Board of Nursing Education and Nurse Registration, 1989, 44 Ohio St. ed 73, 450 N.E. 2d 1354. Ohio EPA's reference is illegal, per se.[10] (CR Item 10; Appellant's Ex. 19.)

47. On March 28, 2001, Mr. Weinberg responded to Mr. Born's comments in pertinent part, as follows:

As we indicated when we offered Dayton Power & Light this additional opportunity to comment on the Title V permit terms, the revisions to the Preliminary Proposed Title V permit were made, in part, to readdress the approach used to ensure ongoing compliance with the particulate mass emission limitation for emissions unit B001. The approach needed to be revised since it was not able to detect the exceedance of the particulate mass emission limitation documented by U.S. EPA reference methods. . . .

We do not believe that the revisions to the Proposed Title V permit violate the public notice and comment requirements specified in OAC rule 3745-77-08. While the monitoring approach used to ensure ongoing compliance with the applicable requirements has been revised based upon new information, the applicable requirements have not changed.

The original approach used to ensure ongoing compliance with the particulate mass emission limitation for emissions unit B001 in the Draft Title V permit and the revised approach as specified in the Proposed Title V permit were established pursuant to OAC rule 3745-77-07(A)(3)(a)(ii).

The Director's Findings and Orders, issued to Dayton Power & Light for the violation of the particulate mass emission limitation for emissions unit B001, stand

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[10] The specific provision to which Appellant objects states as follows:

This facility is subject to the applicable requirements specified in OAC Chapter 3745-25. In accordance with Ohio EPA Engineering Guide #64, the emission control action programs, as specified in OAC rule 3745-25-03, shall be developed and submitted within 60 days after receiving notification from the Ohio EPA.

> on their own and constitute a separately enforceable document. However, the violation did indicate that our originally proposed monitoring approach may not satisfy the requirements of OAC rule 3745-77-07(A)(3)(a)(ii), and as such, we would have been remiss for not correcting this deficiency prior to submitting this permit to the U.S. EPA for review. . . .
>
> The Engineering Guide referenced in Section A.1 of Part I I of the permit simply clarifies how and when the permittee will comply with this applicable requirement. . . . (CR Item 11; Appellant's Ex. 20.)

48. On March 30, 2001, Thomas Rigo of the OEPA, forwarded the Proposed Title V permit for Appellant's Stuart Station to the USEPA for review. Mr. Rigo's accompanying cover letter to Ms. Genevieve Damico of the U.S. EPA, Region V, indicated, "[t]his proposed permit will be processed for issuance as a final action after forty-five (45) days from USEPA's receipt of this certified letter if USEPA does not object to the proposed permit." The permit sent to the USEPA contained the provisions, discussed above, to which Appellant's counsel had earlier set out his objections. Additionally, the "Statement of Basis for Title V Permit"which accompanied the permit, contained the following comments regarding Boiler Unit No. 1:

Re: the visible particulate emission limitation:

> ESP parametric monitoring and the continuous opacity monitoring system will be used to ensure ongoing compliance with particulate emission limitation. (Please note that this monitoring approach, used to ensure ongoing compliance with the applicable requirement, has been revised since the original approach, proposed with the Draft Title V permit, was not able to detect an exceedance of the particulate mass emission limitation for this emissions unit documented by U.S. EPA reference methods.) Method 9 observations will be performed as necessary based upon the ESP and continuous opacity monitoring system data.

Re : the mass particulate emission limitation:

> ESP parametric monitoring and the continuous opacity monitoring system will be used to ensure ongoing compliance with particulate emission limitation. (Please note that this monitoring approach, used to ensure ongoing compliance with the applicable requirement, has been revised since the original approach, proposed with the Draft Title V permit, was not able to detect an exceedance of the particulate mass emission limitation for this emissions unit documented by U.S. EPA reference methods.) If the ESP and/or continuous opacity monitoring system

data indicates ESP and/or opacity values in excess of the parametric or emission limitations, respectively, we would presume a potential compliance problem with the particulate emission limitation and would take appropriate actions as necessary. (Joint Stip. No. 30; CR Item 12; Appellant's Ex. 21.)

49. In the absence of any objection from the U.S. EPA, the Director issued a Final Title V Permit to Appellant for its Stuart Station facility on May 16, 2001. (CR Item 1.)

50. On June 14, 2001, Appellant timely filed an appeal of the Director's issuance of its Title V permit with the Commission. In its Notice of Appeal, Appellant set forth the following Assignments of Error:

I. The Director acted unlawfully and unreasonably in failing to provide Appellant with a formal notice and comment period, and failing to allow Appellant to request an adjudication hearing pursuant to R.C. 119.06, after his issuance of Appellant's proposed Title V permit on February 20, 2001, since the February 20, 2001 draft permit contained substantial revisions to the permit as it had existed at the close of the original comment period in January of 1998.

II. The Director acted unlawfully and unreasonably in requiring that COMs be used to demonstrate compliance with Ohio Administrative Code Chapter 3745-17, as COMs are not authorized by Ohio rule or law, they are not a part of the Ohio State Implementation Plan ("SIP"), and they are not authorized by the state or federal Title V program, in direct violation of OAC 3745-77-07(A)(3)(a)(i) and the United States Court of Appeals for the District of Columbia's decision in Appalachian Power Co. v. EPA, 208 F. 3d 1015 (D.C. Cir. 2000).[11]

III. The Director acted unlawfully and unreasonably in imposing parametric monitoring and operational restrictions for Boiler Unit No. 001 when such monitoring and restrictions are not authorized by Ohio rule or law, they are not a part of the state SIP, and they are not authorized by the state or federal Title V program, in direct violation of OAC 3745-77-07(A)(3)(a)(i) and the United States

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[11] It is interesting to note that the Agency continues to negotiate with the USEPA relative to the adoption of a compliance factor for use with COMS. As an example, in May of 2002, the Director proposed revisions to OAC 3745-17-03 for public comment. Specifically, that amendment would have designate COMs, with a .75% compliance factor, as a direct method for determining compliance with OAC 3745-17-07(A)(1). Mr. Orlemann testified that a subsequent version of this amendment, which the Agency was planning to submit at the time of hearing, would have included a 1.1% compliance factor. Mr. Orlemann also indicated that the input the Agency had received regarding this proposed amendment from the utility industry had been favorable. (Joint Stip. 33, 34; Appellant's Exhibit 28; Testimony, Orlemann.)

Court of Appeals for the District of Columbia's decision in Appalachian Power Co. v. EPA, 208 F. 3d 1015 (D.C. Cir. 2000).

IV. The Director acted unlawfully and unreasonably in including OAC 3745-17-07(A) [visible particulate emission, i.e., opacity, limitations] as an independently enforceable applicable requirement in contradiction of Ohio law and as set out in Dayton-Walther Corp. v. Williams (March 20, 1980), Franklin App. No. 79AP-356, unreported and U.S. V. New Boston Coke Corporation (Aug. 16, 1985), N.D.

V. The Director acted unlawfully and unreasonably in including terms and conditions in the permit that require compliance with an Ohio EPA policy [i.e., "Ohio EPA Engineering Guide #64"] in contradiction of Ohio law, and discussed in Ohio Nurses Association, Inc. v. State Board of Nursing Education and Nurse Registration (1989), 44 Ohio St. 3d 73." (Case File Item A.)

51. A de novo hearing before the full Commission was held in this matter on November 4 - 6, 2002.

CONCLUSIONS OF LAW

1. Pursuant to R.C. 3745.05, the statutory duty of review imposed upon the Commission herein is a determination of whether the May 16, 2001 action of the Director in issuing a final Title V permit to Appellant DP&L was unlawful or unreasonable.

2. "Unlawful" means that the action taken by the Director was not in accordance with the relevant, applicable law. "Unreasonable" means that the action was not in accordance with reason, or that it had no valid factual foundation. It is only in those cases where the Commission can find from the evidence that there was no valid factual foundation for the Director's action, or that the action was not in accordance with the relevant law, that the action under appeal can be found to be unreasonable or unlawful. (Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 [1977].)

3. Conversely, where the evidence before the Commission demonstrates that the action taken by the Director was lawful and reasonable, the Commission must affirm the action of the Director. In such an instance, the Commission may not substitute its judgment for that of the

Director. (Citizens Committee to Preserve Lake Logan v. Williams, supra.)

4. Further, it is well accepted that the Commission must grant deference to the Agency's interpretation of the regulations which it is authorized and empowered to enforce. (Jones Metal Products Co. v. Walker, 29 Ohio St. 2d 173 [1972]; Rings v. Nichols, 13 Ohio App. 3d 257 [1983].)

5. In the instant action, Appellant sets forth five discrete challenges to the Director's issuance of the Stuart Station Title V permit. The Commission will deal with each of these challenges separately, beginning with a discussion of the rationale underlying its earlier ruling denying Appellant's Motion to Summarily Vacate the instant permit due to the Director's failure to provide Appellant with the opportunity to request an adjudication hearing pursuant to R.C. 119.06.

I. Failure to Afford Appellant the Opportunity for an Adjudication Hearing Prior to Issuance of the Permit

6. Revised Code Section 119.06 provides, in relevant part, as follows:

> No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

7. Although "adjudication order" is not specifically defined, "adjudication" is defined in R.C. 119.01(D) as ". . . the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature."

8. Appellant points out that, in the instant action, it was placed in immediate noncompliance with its Title V permit when the permit imposed parametric monitoring and operational

restrictions on Boiler Unit No. 1, because the Stuart Station plant is not equipped with secondary voltage meters and voltage dividers which are necessary to monitor secondary voltage and, thus, comply with the operational restriction. Appellant further contends that the Director's issuance of the permit under these circumstances constituted the issuance of an adjudication order as defined in R.C. 119.01, and therefore, pursuant to R.C. 119.06 and the Ohio Supreme Court's decision in General Motors v. McAvoy (1980), 63 Ohio St. 3d 232, the Director was required to offer Appellant the opportunity to request an adjudication hearing prior to the permit's issuance.[12] For the following reasons, we disagree with Appellant's contention.

9. To resolve this Assignment of Error, we turn first to OAC 3745-77-08, which sets out the procedures the Director is required to follow in processing a Title V application. Specifically, OAC 3745-77-08 provides in relevant part as follows:

> (A) Action on application.
>
> (1) . . .
>
> (2) Following review of a Title V application submitted in accordance with this chapter, the director shall issue a draft permit or denial . . . for public comment, in accordance with paragraph (G) of this rule. . . .
>
> (3) Following the completion of the public comment period on the draft permit, the director shall send the applicant a preliminary proposed permit that incorporates all changes the director proposes to make to the draft permit and the director's responses to comments received on the draft permit. Within fourteen days after receipt of a preliminary proposed permit, the applicant may request an informal conference with the director. In the event of such request from the applicant, the director shall hold a conference with the applicant on the preliminary proposed

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[12] In its Motion to Summarily Vacate, Appellant also cited the case of Occidental Chemical Corp. v. Tyler, EBR Case No. 331480, issued December 11, 1986, as supporting its position on this issue. In fact, the Commission (then "Board") summarily vacated the Director's action in that case based on General Motors v. McAvoy, supra, without additional explanation. Further, although the case was appealed to the Franklin County Court of Appeals, the action was dismissed prior to hearing. Accordingly, there was no discussion by either the Board or the court of appeals which was instructive on this issue.

> permit prior to the submission of a proposed permit to the administrator pursuant to paragraph (A)(4) of this rule.
>
> (4) Following completion of the public comment period and review of the preliminary proposed permit as provided in paragraphs (A)(2) and (A)(3) of this rule, the director shall prepare and submit to the administrator a proposed Title V permit, . . .
>
> (5) The following actions shall occur after review by the administrator:
>
> (a) Upon receipt of notice that the administrator will not object to a proposed Title V permit, . . . that has been submitted for the administrator's review pursuant to this rule, the director shall issue the Title V permit . . . forthwith and in any event no later than the tenth day following receipt of the notice from the administrator.
>
> (b) Upon the passage of forty-five days after submission of a Title V permit, . . . for the administrator's review, and if the administrator has not notified the director of an objection to the proposed permit, the director shall issue the permit, . . . forthwith and in no event later than the fifty-fifth day following submission for review by the administrator. . . .

10. In the instant action, the Director issued a draft Title V permit, a preliminary proposed Title V permit and a proposed Title V permit as specifically required by OAC 3745-77-08. In addition, the Director issued a courtesy "pre-draft" permit and "pre-proposed" permit revisions to Appellant for its review and comment. In keeping with the provisions of OAC 3745-77-08, the Director also held the requisite public comment period on Appellant's draft Title V permit and conducted an informal conference with Appellant's representatives relative to the preliminary proposed permit. Thus, it is clear that the Director adhered to, and even exceeded, the mandates contained in OAC 3745-77-08. However, the question remains whether R.C. 119.06 and General Motors v. McAvoy, supra, required that the Director do more in light of the specific facts of this case.

11. There have been several instances where the Ohio Supreme Court has specifically addressed the relevance of R.C. 119.06 to permits. First, General Motors v. McAvoy, supra, involved the Director of the Ohio EPA's denial of a permit to operate. The denial was issued as a

final action, without a prior adjudication hearing being offered to Appellant pursuant to R.C. Chapter 119. Appellant General Motors appealed this denial to the Environmental Board of Review (the Commission's predecessor) and the Board ruled that Appellant was entitled to a hearing under R.C. 119.06, and remanded the action to the Director. On appeal by the Director, the Franklin County Court of Appeals reversed the Board, finding that no right to an adjudication hearing existed. Subsequently, the Ohio Supreme Court reversed the Court of Appeals, holding in a relevant portion as follows:

> Thus, we conclude that neither R.C. 3745.05 nor 3745.07 abrogates the opportunity for a prior hearing by R.C. 119.06. Unless a contradictory statutory provision is involved, the Director of Environmental Protection must issue his actions in conformance with R.C. 119.06 whenever possible and practical . . .

However, in a footnote, the Court further stated:

> The hearing requirement of R.C. 119.06 would not necessarily attach where a permit or license is granted to an applicant because no "adjudication" as that term is defined in R.C. 119.01(D), takes place when no question is raised with respect to the application.

12. Two years later, the Court again addressed the hearing requirement of R.C. 119.06 and discussed its earlier ruling in General Motors, supra, in the case of Boys Town v. Brown, (1982) 69 Ohio St. 2d 1, as follows:

> In the recent case of General Motors v. McAvoy (1980), 63 Ohio St. 2d 232, where we held that the Director of Environmental Protection had a statutory duty under R.C. Chapter 119 to provide for an adjudication hearing prior to denial of the permit sought, this Court construed R.C. 119.06 and the exceptions to a pre-adjudication hearing contained therein.

After a discussion of the specific provisions of R.C. 119.06, as well as the exceptions contained in that section, the Court concluded by stating:

> In summary, the hearing rights of applicants for licenses and permits are fixed by R.C. Chapter 119. Upon review of a permit application, the Attorney General [the denying agency in Boys Town] can either decide to issue the permit or deny it. If a permit is issued, no opportunity for a prior hearing is required since no material facts are in contest and because the issuance of the permit is not an 'adjudication'

> as defined by R. C. 119.01(D). If, however, a permit is denied, the applicant must be afforded an opportunity for a prior hearing under R.C. 119.06 unless the application is void on its face, does not present enough information to allow its issuance, or denial is not contested by the applicant. (Emphasis added.)

13. Thus, it appears to the Commission that a key factor in whether or not an applicant for a permit is entitled to an adjudication hearing pursuant to R.C. 119.06 rests with the ultimate disposition of the application. That is, if the permit is denied a hearing must be offered, while if the permit is issued, no opportunity for a hearing is required.

14. In light of these two pronouncements by the Ohio Supreme Court regarding this issue, we are not persuaded by Appellant's reliance upon one sentence in the 1984 opinion of this Commission in Dayton Power & Light Company v. Maynard, Case No. EBR 571050, 1984 Ohio ENV LEXIS 27 (Dec. 13, 1984), which provided:

> We take it as axiomatic, for instance, that a permit imposing impossible conditions on a source is as much a denial of a permit to operate . . . as an outright refusal to issue [a] permit.

15. As discussed in more detail below, there was conflicting testimony offered regarding Appellant's ability to demonstrate compliance with the visible particulate emission limitations contained in the permit through the use of COMs and, therefore, the Commission is unable to find that this condition met the definition of "impossible" as set out in Dayton Power and Light Company v. Maynard, supra. As will be addressed more fully below, the operational restriction and parametric monitoring requirement imposed on Boiler Unit 1 requires the calculation of total power input through the measurement and recording of ESP secondary voltage, which requires equipment that Appellant's facility does not have installed. Therefore, it is, in a sense "impossible" for Appellant to comply with the permit as written. Significantly, however, at the point when the Title V permit herein was issued, neither the Director nor his staff had been apprized of the fact that Appellant did not possess the requisite equipment and, therefore, they

were unaware that an "impossible" condition may have existed. For that reason, we find Dayton Power and Light Company v. Maynard to be distinguishable from the factual situation presented today.

16. Accordingly, in the instant action, the Commission finds that coupling the Director's adherence to the explicit mandates of OAC 3745-77-08 relating to the processing of Title V applications, with the only explicit pronouncements of the Ohio Supreme Court analyzing the applicability of R.C. 119.06 to permit application proceedings, leads to the conclusion that the Director was not required to offer Appellant an opportunity for an adjudication hearing prior to the issuance of the instant permit.

17 In a similar vein, Appellant also contends in its Notice of Appeal that the Director acted unreasonably and unlawfully in not providing DP&L with adequate notice of the substantial revisions to the permit contained in the "pre-proposed" version of the permit, for not providing for formal notice and comment on the record regarding this version of the permit, and for issuing the permit without conducting a meaningful review of the comments submitted by DP&L. As explained below, the Commission finds no merit in any of these contentions.

18. As previously discussed, OAC 3745-77-08 sets out the general procedure the Director must follow in processing a Title V application, and subsection (A)(4)(b) of this regulation specifically describes when a change to a permit is of such a nature that a new or extended public comment period must be held. Ohio Administrative Code Section 3745-77-08(A)(4)(b) provides:

> If new applicable requirements are promulgated or otherwise become newly applicable to the source following submission of the proposed permit to the administrator, but before issuance of the final permit, the director shall extend or reopen the public comment period to solicit comment on additional permit provisions to implement the new applicable requirements.

19. The plain wording of OAC 3745-77-08(A)(4)(b) evinces limited circumstances under

which a new or extended public comment period must be offered, i.e., if "new applicable requirements are promulgated or otherwise become applicable to the source" after the proposed permit is submitted to the administrator, but before issuance of the final permit. In the instant action, there are no new applicable requirements at issue, rather, with the release of the "pre-proposed" permit revisions and the issuance of the final Title V permit, the Director simply revised the terms of the permit to address the applicable requirements that had been identified by Appellant in its Title V application. While Appellant was understandably disappointed in the manner the Director chose to require compliance with certain applicable requirements, the applicable requirements themselves had not changed.

20. Finally, while the Commission recognizes the importance of the Director's adherence to the procedures and mandates set out in OAC 3745-77-08, it is also sensitive to the fact that the processing of Title V permits cannot be a procedure without end. As stated above, the Director clearly complied with the mandates of OAC 3745-77-08 and the Commission is unpersuaded by Appellant's arguments that, under the facts presented, it was entitled to an additional notice and comment period, or a more comprehensive or intense review of the comments which had been submitted.

21. Accordingly, the Commission hereby reaffirms its earlier ruling that Appellant was not entitled to an adjudication hearing pursuant to R.C. 119.06 prior to the issuance of the instant Title V permit. Furthermore, those Assignments of Error challenging the Director's failure to provide Appellant with an additional formal notice and comment period, as well as his alleged failure to conduct a meaningful review of the comments submitted by Appellant, are overruled.

II. Continuous Opacity Monitoring (COM) Requirement

22. In its next Assignment of Error Appellant contends that, "[t]he Director acted unlawfully

and unreasonably when he included the monitoring requirements [COMs] on pages 12, 18, 23 and 28 of the permit for compliance with Chapter 3745-17 of the Ohio Administrative Code[13] . . . that are not authorized by Ohio rule or law, not a part of the Ohio State Implementation Plan . . . , and not authorized by the state or federal Title V program, in direct violation of OAC 3745-77-07(A)(3)(a)(i) and Appalachian Power Company v. EPA, 208 F. 3d 1015 (D.C. Cir. 2000)."

23. By way of review, the "Testing Requirements" section in the pre-draft, draft and preliminary proposed versions of Appellant's Title V permit all specified the use of the negotiated Conesville/Kyger Creek language (COMs with the 1.5% compliance factor), in addition to Method 9, for demonstrating compliance with the visible particulate emission limitations. However, the Conesville/Kyger Creek language was removed from the pre-proposed version of the permit as a result of OEPA's receipt of correspondence from U.S. EPA, Region 5, which specifically referenced the Conesville/Kyger Creek language and indicated that U.S. EPA would object to the incorporation of any such terms in proposed Title V permits. As a result, the pre-proposed, proposed and, most important, the final version of Appellant's Title V permit

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[13] This Assignment of Error, as well as several of the pleadings of counsel, seem broad enough to suggest that Appellant is objecting to the use of COMs not only as they relate to opacity monitoring, but also as they relate to the monitoring of mass particulate emissions. In addition, the "Statement of Basis for Title V" which accompanied Appellant's permit broadly indicated that the continuous opacity monitoring system would "be used to ensure ongoing compliance with particulate emission limitation." However, all parties appear to be in agreement that continuous opacity monitoring, as signified by its name, monitors opacity, and opacity is merely one indicator that an entity may be exceeding its particulate mass emission limitations. Further, and most significantly, in Joint Stipulation No. 35, the parties indicated, "In alleging in its notice of appeal that the Director acted unlawfully and unreasonably when he included the monitoring requirements on pages 12, 18, 23 and 28 of the permit, DP&L is referring only to the monitoring requirements of the paragraph numbered '1' on those pages." Specifically, Paragraph number 1 provides that COMs shall be operated and maintained to "continuously monitor and record the opacity of the particulate emissions from this emissions unit." Accordingly, the Commission will confine its analysis to the lawfulness and reasonableness of the Director's insertion of COMs solely for monitoring visible particulate emissions..

deleted any reference to COMS in the "Testing Requirements" section of the permit, but contained a requirement in the "Monitoring and/or Record Keeping Requirements" section of the final permit that COMs, with no associated compliance factor, be used to continuously monitor and record opacity. Notably, the "Testing Requirements" section of Appellant's final Title V permit provides that "[c]ompliance with the visible particulate emission limitation shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures specified in OAC rule 3745-17-03(B)(1)."

24. The specific provision in the "Monitoring and/or Record Keeping Requirements" section to which Appellant objects provides:

> The permittee shall operate and maintain existing equipment to continuously monitor and record the opacity of the particulate emissions from this emissions unit. Such continuous monitoring and recording equipment shall comply with the requirements specified in 40 CFR Part 60.13.
>
> Each continuous emission monitoring system consists of all the equipment used to acquire data and includes the sample extraction and transport hardware, sample conditioning hardware, analyzers, and data recording/processing hardware and software.
>
> The permittee shall maintain a certification letter from the Ohio EPA documenting that the continuous opacity monitoring system has been certified in accordance with the requirements of 40 CFR Part 60, Appendix B, Performance Specification 1. The letter of certification shall be made available to the Director upon request.
>
> The permittee shall maintain records of the following data obtained by the continuous opacity monitoring system: percent opacity on a 6-minute block average basis.

25. Ohio Administrative Code Section 3745-77-07, which enumerates the items to be included in a Title V permit, provides, relative to monitoring and recordkeeping, in part, as follows:

> (A) Standard permit requirements. Each Title V permit shall include the following elements:
>
> (1) . . .

> (3) Monitoring and related recordkeeping and reporting requirements.
> (a) Each permit shall contain the following requirements with respect to monitoring:
> (i) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 114(a)(3) or 504(b) of the Act; . . . (Emphasis added.)

26. The term "applicable requirements" is defined in OAC Section 3745-77-01(H) as follows:

> (H) 'Applicable requirement' means all of the following federal requirements as they apply to emissions units in a Title V source subject to this chapter, including requirements that have been promulgated or approved by the administrator through rulemaking at the time of issuance but have future-effective compliance dates:
>
> (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the administrator through rulemaking under Title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in 40 C.F.R. Part 52. . . .

27. Ohio Administrative Code Section 3745-17-07(A), which sets out visible particulate emission limitations for stack emissions, is an approved part of Ohio's SIP and, thus, falls within the definition of "applicable requirement" contained in OAC 3745-77-01(H)(1).[14]

28. Ohio Administrative Code Section 3745-17-03(B)(1) sets out the test method to be used for determining compliance with visible particulate emissions limitations as follows:

> (B) Emissions test methods and procedures for all new and existing sources.
> (1) For the purpose of determining compliance with paragraph (A)(1) of rule 3745-17-07 of the Administrative Code, visible particulate emissions shall be determined according to test method nine as set forth in the "Appendix on Test Methods" in 40 CFR, Part 60 "Standards of Performance for New Stationary Sources" as such appendix existed on July 1, 1996. (Emphasis added.)

29. Appellant DP&L contends that, pursuant to the above-cited regulatory provisions, and the court's pronouncement in Appalachian Power Co. v. EPA, supra, the only method which the Director could specify in its Title V permit for demonstrating compliance with OAC 3745-17-

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[14] Specifically, OAC 3745-07-17(A) provides that, with certain exceptions set out in the rule, "visible particulate emissions from any stack shall not exceed twenty per cent opacity, as a six-minute average."

07(A) was Method 9 (visual observation by trained observer) and, therefore, the Director's inclusion of a requirement in the monitoring section of its permit that COMs[15] be operated and maintained to continuously monitor and record opacity was unreasonable and unlawful.[16] Appellant further argues that since continuous opacity monitoring is a more stringent methodology for measuring visible particulate emissions than Method 9, by requiring the use of COMs, the Director has imposed a new and more rigorous set of operating conditions not authorized by rule or law.

30. Conversely, the Director argues that because neither Method 9, nor the underlying applicable requirement, has a frequency specified for the conducting of the testing, the so-called "gap-filling" provision set out in OAC 3745-77-07(A)(3)(a)(ii) justifies the insertion of the COM requirement.[17] That section provides:

> (A) Standard permit requirements. Each Title V permit shall include the following elements:
>
> (3) Monitoring and related recordkeeping and reporting requirements.
>
> (a) Each permit shall contain the following requirements with respect to monitoring:
>
> (i) . . .

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[15] Appellant has been conducting continuous opacity monitoring at Stuart Station since 1994 in order to comply with the Acid Rain program and, therefore, as testified to by Amy Wright, does not object to the use of COMs, per se.

[16] There is a procedure set out in R.C. 3704.036(K) and OAC 3745-77-07(A)(1)(c) whereby an applicant may request the inclusion of an alternative emission limit or means of compliance in its Title V permit, however, there was no such request made herein by Appellant and these provisions are not relevant to the instant discussion.

[17] In the "Statement of Basis for Title V Permit," the Director specifically indicated that the continuous opacity monitoring system (and for Boiler Unit No. 1, the parametric monitoring) "will be used to ensure ongoing compliance with the particulate emission limitation" and that "Method 9 observations will be performed as necessary . . ." (Emphasis added.)

> (ii) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (A)(3)(c) of this rule. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. . . . (Emphasis added.)

31. More specifically, the Director contends that OAC 3745-77-07(A)(3), when read in its entirety, contemplates the following inquiry relative to the facts at issue herein: First, one must look to OAC 3745-17-03(B)(1), which specifies Method 9 as the method for determining compliance with visible particulate emission limitations. However, the regulations do not specify a frequency at which the Method 9 readings should be taken. Further, as testified to by Mr. Orlemann, the Agency felt it would have been unreasonable to require Method 9 testing with the frequency necessary for it to constitute an appropriate monitoring approach.[18] Accordingly, the Director relied upon the "gap filling" clause set out in OAC 3745-77-07(A)(3)(a)(ii) to insert a provision in the "Monitoring and/or Testing Requirements" section of Appellant's permit that COMs be used to "continuously monitor and record the opacity of the particulate emissions" for all four boiler units. According to the Director, the addition of the COM requirement provided the "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance" with the visible particulate emission limitations contained in the permit.

32. In order to resolve this Assignment of Error, the Commission turns first to an analysis of Appalachian Power Co. v. EPA, supra, which Appellant contends is dispositive of this issue.

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[18] In her testimony, Ms. Wright also acknowledged the inherent limitations in Method 9 readings; e.g., the inability to conduct such testing at night and on cloudy days, the physically taxing nature of frequently performing such tests, etc.. (Testimony, Wright.)

Appalachian Power involved an action filed by a number of parties challenging the validity of portions of a document issued in September of 1998 by the U.S. EPA entitled "Periodic Monitoring Guidance for Title V Operating Permit Programs" ("Guidance"). Included in the Guidance was the U.S. EPA's interpretation of the periodic monitoring rule contained in 40 C.F.R. Section 70.6(a)(3), a rule which is virtually identical to OAC 3745-77-07(A)(3).[19] Specifically, the Guidance stated that, "periodic monitoring is required . . . when the applicable requirement does not require . . . monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Therefore, pursuant to the Guidance, regardless of whether an emission standard contained an associated periodic testing or monitoring requirement, additional monitoring "may be necessary" if the monitoring in the standard "does not provide the necessary assurance of compliance." The

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[19] 40 C.F.R. Section 70.6(a)(3) provides:

> (3) Monitoring and related record-keeping and reporting requirements.
> (i) Each permit shall contain the following requirements with respect to monitoring:
> (A) All monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements, including part 64 of this chapter and any other procedures and methods that may be promulgated pursuant to sections 114(a)(3) or 504 (b) of the Act. If more than one monitoring or testing requirement applies, the permit may specify a streamlined set of monitoring or testing provisions provided the specified monitoring or testing is adequate to assure compliance at least to the same extent as the monitoring or testing applicable requirements that are not included in the permit as a result of such streamlining;
> (B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; . . .

Petitioners contended that the Guidance would require that states conduct a review of all state and federal monitoring requirements to assess their sufficiency, even if the applicable requirement already required some form of periodic testing or monitoring. Therefore, according to the Petitioners, either the Guidance issued by the U.S. EPA amended and significantly expanded the scope of the periodic monitoring rule, which was only intended to apply when the applicable requirement contained no monitoring requirement, a one-time startup test, or provided no frequency for monitoring, or, if the Guidance represented a valid interpretation of the rule, then the rule itself was invalid because "Congress did not authorize EPA to require States, in issuing Title V permits, to make revisions to monitoring requirements in existing federal emission standards."

33. The Commission finds several excerpts from the Appalachian Power decision to be instructive relative to the issue before us today. First, the Court indicated:

> On one thing the parties are in agreement. If an applicable State emission standard contains no monitoring requirement to ensure compliance, EPA's regulation requires the State permitting agency to impose on the stationary source some sort of 'periodic monitoring' as a condition in the permit or specify a reasonable frequency for any data collection mandate already specified in the applicable requirement.

34. Next, the Court discussed the provisions of 40 C.F.R. Section 70.6(a)(3)(i)(B), as follows:

> Section 70.6(a)(3)(i)(B) tells us that 'periodic monitoring must be made part of the permit when the applicable State or federal standard does not provide for 'periodic testing or instrumental or noninstrumental monitoring.' * If 'periodic' has its usual meaning, ** this signifies that any State or federal standard requiring testing from time to time – that is yearly, monthly, weekly, daily, hourly – would be satisfactory. The supplementing authority in Section 70.6(a)(3)(i)(B) therefore would not be triggered; instead, the emission standard would simply be incorporated in the permit, as EPA acknowledged in the rule's preamble, see supra note 8. [Note 8 provides: "In support of their view, petitioners point to the Title V rule's preamble which states: 'If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing . . . , the permit must simply incorporate this provision under Section 70.6(a)(3)(i)(A).' 57 *Fed. Reg.* 32,278 (1992)."] On the other hand, if the State or federal standard contained merely a

> one-time startup test, specified no frequency for monitoring or provided no compliance method at all, Section 70.6(a)(3)(i)(B) would require the State authorities to specify that some testing be performed at regular intervals to give assurance that the company is complying with emission limitations.
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> * EPA identified the source of its authority for Section 70.6(A)(3) as 42 U.S.C. Section 7661c(b). This provides that EPA 'may by rule' set forth methods and procedures 'for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance.'
>
> ** Although EPA defined many terms in its regulations governing permits, 40 C.F.R. Section 70.2, it provided no definition of 'periodic' or of 'monitoring.' (Emphasis added.)

35. Finally, in setting aside the Guidance being challenged in its entirety, the Court stated:

> State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 C.F.R. Section 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test. (Emphasis added.)

36. Applying the court's discussion in Appalachian Power to the instant facts, we find that the Ohio Administrative Code specifies that Method 9 is the appropriate method for determining compliance with visible particulate emission limitations.[20] However, the Code does not specify a frequency at which the Method 9 readings must be conducted. Accordingly, we agree with the Director that the plain language of the gap-filling provision (OAC 3745-77-07(A)(3)(a)(ii)), coupled with the analysis contained in Appalachian Power, supra, required the Director to either specify a frequency for the conducting of Method 9 testing, or to insert into the permit some other

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[20] Indeed, Appellant's permit specifically references that "[c]ompliance with the visible particulate emission limitation shall be determined through visible emissions observations performed in accordance with 40 CFR Part 60, Appendix A, Method 9 and the procedures specified in OAC rule 3745-17-03(B)(1)."

periodic monitoring "sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Thus, having determined that OAC 3745-77-07(A)(3)(a)(ii) and Appalachian Power required the Director to insert some periodic monitoring into Appellant's permit, and deferring to the Director's determination that simply specifying a frequency for the conducting of Method 9 testing would not be reasonable, we now address the Director's specific choice of COMs.

37. At the hearing in this matter, there was conflicting testimony offered regarding the ability, or inability, of any boiler unit of the size at issue herein being able to continually comply with its opacity limits through the use of COMs without a compliance factor. Ms. Wright, on behalf of DP&L, testified unequivocally that it would be impossible for Appellant to comply with its visible particulate emission limits under these circumstances, while Mr. Orlemann testified on redirect examination that the Agency thinks there is a "distinct possibility" that individual units could go a whole year without any nonexempt excess emissions during the year. The overall testimony and evidence, however, left the impression that it could be difficult for Appellant to certify continuing compliance through the use of COMs without an associated compliance factor. However, while we are sensitive to the potential drawbacks inherent in the use of COMs, for the following reasons, the Commission does not find that the Director's selection of COMs as a monitoring method for visible particulate emissions was unreasonable.[21]

38. First, we find it significant that all references to the use of COMs have been removed from the "Testing Requirements" sections of Appellant's permit, making it clear that direct compliance with the visible particulate emission limitations shall be determined through the use of Method 9

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[21] This is not to say that our decision would be the same if the Director had required the use of COMs, without an associated compliance factor, for directly establishing compliance with the visible particulate emission limitations contained in Appellant's permit.

readings. Second, we are reassured by the testimony of Mr. Orlemann in which he indicated that he felt that an entity could indicate that it was in either continuous or intermittent compliance if it had a level of nonexempt excess emissions within the 1.5 percent (or the proposed 1.1 percent) exemption level since, in the Agency's view, that level "still reflects good operation and maintenance." Third, we find that the September 27, 2000, letter from Pamela Blakely indicating that the U.S. EPA "would not formally object to Method 9 being referenced as a compliance method in the [Title V] permit," however, the permittee would still need to consider COM data "when completing the compliance certification for the SIP opacity limit" appears to suggest that COM data, when not used for direct compliance purposes, may not have the dire consequences claimed by Appellant. Finally, it appears to the Commission that the 1990 Amendments to Title V were meant not only to define all obligations of the CAA in one single document, but they were also intended to devise a mechanism for ensuring that the underlying applicable requirements were complied with on a continuous, or near continuous basis.[22] Thus, while the relative stringency of monitoring through the use of COMs may be troublesome to Appellant, that does not alter the fact that the 1990 Amendments to the CAA were enacted, in part, to increase industry accountability and compliance. As succinctly stated in the following excerpt summarizing the genesis and goals of the 1990 Amendments:

> During the legislative debates preceding the passage of the CAA Amendments of 1990, Congress confronted the problem most facilities, state regulators, and concerned citizens had with the then existing state air quality permitting programs. The myriad of both federal and state requirements, including emission standards, monitoring standards, record keeping, and reporting requirements were difficult to reconcile, properly apply, and difficult to enforce. Congress looked to the existing

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[22] This seems to be a recognition of the fact that many of the reference test methods (e.g., stack tests, Method 9 readings, etc.), although definitive at the moment they are taken, are not conducted frequently enough to ensure that the underlying applicable requirement is being complied with during those, often lengthy, intervals between the performance of the tests.

> federal permitting program authorized under the Clean Water Act ("CWA") when crafting a solution, but added several fundamental changes. First, the permit would be a stand-alone comprehensive document to which all parties could look to determine a facility's CAA obligations. Second, the permit would be designed with compliance as its primary goal. To that end, Congress included sufficient authority to empower state agencies to include monitoring and record keeping sufficient to determine compliance with the emission standards. Finally, the program would require Title V permit holders to certify compliance with the terms and conditions of the permit so that their legal exposure would be sufficiently severe to motivate compliance with their requirements. Enforcement provisions were added to the Act to achieve this goal. ("Compliance Under Title V: Yes, No, or I Don't Know?" 21 Va. Envtl. L.J. 1 (2002); Emphasis added; citations omitted.)

It appears to the Commission that the Director's inclusion of COMs for monitoring visible particulate emissions satisfies one of the primary goals of the 1990 Amendments to the CAA, i.e., assuring compliance with the terms and conditions of the Title V permit.

39. Accordingly, the Commission finds that the Director acted lawfully, pursuant to the gap-filling provision found in OAC 3745-77-07(A)(3)(a)(ii), in imposing "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit," and further finds that the Director's selection of COMs to satisfy this provision was reasonable.[23]

III. Operational Restriction and Parametric Monitoring Requirements for Boiler Unit No. 1

40. In its next two related Assignments of Error, Appellant contends:

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[23] As an aside, the Commission notes its recognition of the difficult situation into which the Agency was placed as a result of the U.S. EPA's pronouncement that it would object to any permit containing COMs with a compliance factor. It is clear that the Agency and the regulated community had reached a reasonable and workable solution regarding the use of COMs with an associated compliance factor, for determining compliance with visible particulate emission limitations and we applaud the Director's continuing attempts to secure U.S. EPA's acquiescence regarding the adoption of an acceptable compliance factor for COMs. The Commission is hopeful that the U.S. EPA will approve the use of COMs, with an associated compliance factor, in the near future, thus resolving the matter in a fashion which, it appears all parties would agree, is equitable.

1) "The Director acted unlawfully and unreasonably when he included the parametric monitoring and operational restrictions on pages 11 and 13 of the permit for compliance with Chapter 3745-17 of the Ohio Administrative Code ("OAC") [the mass particulate emission limitation] that are not authorized by Ohio rule or law, not a part of the Ohio State Implementation Plan ("SIP") and not authorized by the state or federal Title V program, in direct violation of OAC 3745-77-07(A)(3)(a)(i) and Appalachian Power Co. V. EPA, 208 F. 3d 1015 (D.C. Cir. 2000)."; and,

> 2) "The Director acted unlawfully and unreasonably when he required immediate compliance with the [parametric] monitoring terms . . . when the equipment and materials necessary to conduct such monitoring is not in place or available and cannot be installed in time to prevent immediate noncompliance with the permit."

41. Simply stated, the provisions to which Appellant objects are: 1) A requirement that Appellant operate its ESP at Boiler Unit No. 1 at no less than 90 percent of the total combined power input, as a three hour average, as measured during the most recent stack test at which compliance with its particulate emissions limitation was achieved; and 2) Related requirements that Appellant monitor and record specified data relating to the ESP's operation.

42. Specifically, Appellant argues that the operational restrictions and parametric monitoring requirements are unlawful and unreasonable for the following reasons:

> 1) They constitute new substantive requirements which are prohibited by R.C. 3704.036(K)[24]

2) The Ohio SIP, OAC 3745-17-03 and the court's decision in Appalachian Power Co., supra, require that Method 5 stack tests be used to determine compliance with OAC 3745-17-10 [mass particulate emissions limit];

3) They contravene the express terms of the Director's Findings and Orders which emanated from the February 25, 1999 failed stack test and provided that, "satisfaction of [the] orders shall be in full accord and satisfaction for DP & L's alleged liability for the alleged violations cited herein";

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[24] The Director's counsel contends in his Post Hearing Reply Brief that Appellant brings up "for the first time" in its Post Hearing Brief the argument that the parametric monitoring and operational restrictions imposed on Boiler Unit No. 1 violate the prohibition in R.C. 3704.036(K) against imposing new substantive requirements. In fact, this argument was extensively dealt with in Appellant's Prehearing Brief.

4) The operational restriction requires the calculation of total power input through the measurement and recording of ESP secondary voltage, however, the Stuart plant is not equipped with the voltage meters and dividers that are necessary to measure secondary voltage and, therefore, it is impossible for Appellant to comply with these provisions;

5) Similarly, because total combined power input was not recorded at "the most recent emissions test that demonstrated the emissions unit was in compliance with the particulate emission limitation," it would be impossible to comply with 90 percent of something that was not measured; and

6) The testimony presented by both parties' expert witnesses indicates that the restriction will not accurately and reasonably predict or ensure compliance with the particulate emission limitation associated with Boiler Unit No. 1.

43. Conversely, Appellee Director contends that the insertion of these provisions was both reasonable and lawful based on the following:

1) The Director was permitted to impose the operational restriction pursuant to OAC 3745-77-07(A)(1), which authorizes the Director to impose operational restrictions necessary to assure compliance with an applicable requirement, i.e., the mass particulate emission limitation;

2) Neither OAC 3745-77-07(A)(3)(a)(i), nor the decision in Appalachian Power, supra, preclude the insertion of such an operational restriction, since OAC 3745-77-07(A)(3)(a)(i) deals with monitoring, not operational restrictions;

3) Testimony by the parties' expert witnesses supports a finding that there is a correlation between the operational restriction and compliance with the particulate mass emission limitation contained in the permit; and,

4) Despite the fact that DP & L does not currently have secondary voltage meters connected and operable, DP & L did not demonstrate that it could not install such equipment.[25]

44. As Mr. Orlemann explained at the hearing in this matter, the operational restriction and parametric monitoring requirements were placed into Appellant's permit based upon the results of a failed stack test on February 25, 1999. Specifically, the results of that test revealed that Boiler

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[25] Ms. Wright testified that when the boiler units were first installed in 1971, DP &L did purchase voltage dividers so that secondary voltage could be read, however, the voltage dividers kept causing outages and had to be disconnected. An additional attempt to install secondary voltage dividers in 1996, as part of an Arc Snubbing system, also failed.

Unit No. 1 had exceeded its mass particulate emission limitation, despite having met its opacity limit. Thus, the Agency indicated that it was placing the operational restriction and parametric monitoring requirements into the permit to ensure compliance with the particulate emission limitation for Boiler Unit No. 1.

45. The evidence also established that the February 25, 1999 failed stack test was the first stack test which Boiler Unit No.1 had failed and, further, that since this failed stack test and the resulting repair of broken discharge electrodes in the ESP, the unit has passed at least three stack tests at 60 percent or less of the particulate mass emission limit.[26] (Testimony, Wright.)

46. In order to address these assignments of error, the Commission initially turns to an analysis of those regulations upon which the Director relied in placing the mass particulate emission limitation into Appellant's permit, as well as the provision relied upon in inserting the operational restriction and parametric monitoring requirement into the permit relative to Boiler Unit No. 1.

47 First, OAC 3745-17-10 sets out restrictions on particulate emissions from fuel burning equipment, including the relevant emission limitations. This regulation is an approved part of Ohio's SIP and, therefore, constitutes an "applicable requirement" as that term is defined in OAC 3745-77-01(H)(1) (see above).

48. More specifically, OAC 3745-17-10(C) provides, in part:

> . . . any owner or operator of fuel burning equipment which is located within the following counties shall operate said equipment so that the particulate emissions do not exceed the allowable emission rate specified by 'Curve P-1' of 'Figure 1': . .

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[26] On March 10, 2003, Appellant DP&L filed a Motion to Supplement Hearing Record *Instanter*, to supplement the record by adding the results of an additional stack test conducted on Boiler Unit No.1 after the conclusion of the de novo hearing. After a review of Appellant's Motion, and Director's Memorandum in Opposition, the Commission rules to deny Appellant's Motion.

. Brown . . .

49. The particulate emissions rate specified by Curve P-1 is 0.10 lb/mmBtu. Therefore, since the Stuart Station facility is located in Brown County, the relevant allowable emission rate included in Appellant's permit is 0.10lb/mmBtu.

50. Ohio Administrative Code section 3745-17-03 references that compliance with the particulate emission limits set out in OAC 3745-17-10 shall be determined in accordance with Methods 1 through 5. [27]

51. In fact, Appellant's permit does specify that compliance with OAC 3745-17-10 shall be determined in accordance with Methods 1 through 5, and, as stated above, further provides that such particulate emission testing shall be conducted at Boiler Unit No. 1 "on an annual basis during the term of this permit."[28] The Director argues, however, that in light of the February 25, 1999 failed stack test, it was necessary to not only require more frequent testing at this unit, but also to impose an operational restriction to assure compliance with the relevant mass particulate emission limit. The Director contends that such operational restrictions are expressly authorized by OAC 3745-77-07(A)(1). He further asserts that the associated parametric monitoring requirement is contemplated by OAC 3745-77-07(A)(3)(a)(ii).

52. Ohio Administrative Code Section 3745-77-07(A)(1) states:

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[27] Ohio Administrative Code Section 3745-17-03(B)(9) provides that the amount of particulate emissions shall be determined by test methods specified in OAC 3745-17-01(B)(11), which, in turn, directs one to the test methods specified in "Appendix A" of 40 CFR, Part 60 "Standards of Performance for New Stationary Sources," as such appendix existed on July 1, 1996.

[28] It is interesting to note that particulate emission testing for Boiler Unit No. 1 must be conducted on an annual basis, while such testing for Boiler Unit Nos. 2 through 4, which are identical to Boiler Unit No. 1, is only required once between years 2 and 3 and once during the last year of the permit. Thus, as a result of one failed stack test, the Director not only imposed the operational restriction and parametric monitoring requirements for Boiler Unit No. 1, but also required that stack tests be conducted for this unit on a much more frequent basis.

> (A) Standard permit requirements. Each Title V permit shall include the following elements:
> (1) Emission limitations and standards. The permit shall include emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of issuance.

53. Additionally, OAC 3745-77-07(A)(3)(a)(ii), the provision setting out the monitoring and related recordkeeping and reporting requirements for Title V permits, provides, in part, that "[s]uch monitoring requirements may apply to operating parameters . . ."

54. The Commission agrees with the Director's assertion that the plain meaning of OAC 3745-77-07(A)(1) generally authorizes the imposition of operational restrictions such as those at issue and, further, that OAC 3745-77-07(A)(3)(a)(ii) supports the insertion of related monitoring requirements. Indeed, in the absence of such a reading these sections would be rendered meaningless. Further, while it is clear that the operational restriction and associated monitoring provisions are "new" in the sense that they first appeared in Appellant's pre-proposed permit, we do not find that these provisions fall within the definition of "new substantive" requirements which are prohibited by R.C 3704.036(K).[29] Rather, we agree with the Director that these provisions were inserted into Appellant's permit to ensure compliance with the underlying applicable requirement; i.e., mass particulate emission limitation for Boiler Unit No. 1. However, our determination that the operational restriction and parametric monitoring requirements were lawful pursuant to OAC 3745-77-07(A)(1) and (A)(3)(a)(ii) does not end our inquiry.

55. Implicit in OAC 3745-77-07(A)(1) is the principle that any operational restriction imposed pursuant to its provisions must actually be designed to assure compliance with the underlying

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[29] For a discussion regarding an example of provisions which would constitute "substantive requirements" for purposes of Title V, see, for example, Appalachian Power Co. v. EPA, supra, in which the court opined that "Test methods and the frequency of testing for compliance with emission limitations are surely 'substantive' requirements; they impose duties and obligations on those who are regulated."

applicable requirement in order to be reasonable. That is, there must be a clear and demonstrable correlation between the restriction being imposed and the ability of the unit to comply with the applicable requirement.

56. Applying this analysis to the specific facts before us today, we find a fatal flaw in the operational restriction imposed by the Director on Boiler Unit No. 1. Specifically, we find that the testimony and evidence, taken as a whole, did not establish that there is a clear or direct correlation between restricting power input to the ESP and the ultimate achievement of the mass particulate emission limitation for Boiler Unit No. 1. Rather, the testimony and evidence which were offered seemed to demonstrate that restricting power input to the ESP is only one of many factors which will have an effect on the operation of an ESP; i.e., there is no apparent, definable relationship between solely restricting power input to the ESP at Boiler Unit No. 1 and Appellant's ability to achieve the mass particulate emission limitation contained in its permit for that unit.

57. Additionally, the Commission is disturbed by the fact that, as written, it is impossible for Appellant to comply with the operational restriction at issue since, as discussed above, total combined power input was not, and, indeed, could not, have been measured during the last stack test at which Boiler Unit No. 1 achieved its mass particulate emission limitation. Specifically, despite an incorrect indication to the contrary, Stuart Station does not currently have the equipment necessary to measure secondary voltage, which is required in order for Appellant to calculate total power input.

58. Clearly, in retrospect, it would have been preferable for Appellant to bring this factual misconception to the attention of Agency personnel prior to the issuance of its final Title V permit so that the issue could have been addressed at that time. This is especially true in light of

Mr. Orlemann's testimony that "it would have definitely prompted further discussions with the company" if the Agency had been aware of the fact that the Stuart Station facility was not equipped with secondary voltage meters. However, regardless of the reason for this misperception, the fact remains that prior to the permit's issuance, the Agency was not aware that total combined power input was not, and could not, have been measured at Boiler Unit No. 1 during the most recent stack test at which compliance with its mass particulate emissions limitation was achieved. Therefore, the operational restriction was included in Appellant's permit based on an invalid factual foundation, thus rendering its inclusion unreasonable.

59. Accordingly, for the reasons discussed above, the Commission finds that the Director's insertion of an operational restriction and an associated parametric monitoring requirement relative to Appellant's Boiler Unit No. 1 was unreasonable.[30]

IV. Opacity as an Independently Enforceable Emission Limit

60. In its next Assignment of Error, Appellant contends that the Director acted unlawfully and unreasonably in including OAC 3745-17-07(A) [opacity] as an independently enforceable applicable requirement since the requirement creates new obligations and is a new substantive requirement prohibited by R.C. 3704.036(K).[31] According to Appellant, opacity limits are simply a method or tool for indicating whether a unit is in compliance with its particulate emissions

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[30] Appellant also contends that these provisions contravene the express terms of the DFFOs issued as a result of the February 25, 1999 failed stack test. We disagree and find that in the "Reservation of Rights" section of the DFFOs, the Director specifically retained the right to "require DP &L to perform additional activities at the facility, except for those actions or alleged violations specifically referenced in these Orders . . . " We construe the operational restriction and parametric monitoring requirement at issue herein to be such an "additional activity", which is discrete from "those actions or alleged violations referenced in" the DFFOs.

[31] The Director's determination that visible particulate emissions are independently enforceable is in keeping with the February 3, 1997 correspondence from Cheryl Newton of the U.S. EPA to Robert Hodanbosi, Chief of the DAPC at the OEPA. (See footnote # 7; Appellee Director's Ex. 8.)

limit; i.e., they are not independent standards which are enforceable in the absence of proof of a violation of the particulate emissions limit.

61. In support of its position, Appellant primarily relies upon several cases, including Dayton Walther Corp. v. Williams (March 20, 1980), Franklin App. No. 79-356, unreported, and U.S. v. New Boston Coke Corp., No. C-1-84-1427 (S.D. Ohio Aug. 16, 1985).

62. In Dayton Walther Corp. v. Williams, supra, the Franklin County Court of Appeals addressed the proper role of opacity limitations as follows:

> The third and most important issue presented by this appeal is whether OAC 3745-17-07 stands independently of the specific regulations for the emission of hydrocarbons and particulates, and whether an applicant who is in compliance with those specific regulations can be in violation of OAC 3745-17-07 as a matter of law. . . .
>
> The only reasonable interpretation of OAC 3745-17-07, as demonstrated by the record before us, is that it is not a regulation that may be applied to an applicant independently of the hydrocarbon and particulate ambient air quality standards, but rather, . . . is to be used only as a supplement to those standards.
>
> Ohio opacity standards, as applied to a particular applicant, may be used only as a means of determining, in the first instance, whether a pollution source appears to be violating a mass emission standard. It may not be used as the primary test where other reliable data is available to indicate compliance with emission standards. . . .

63. The next case cited by Appellant, U.S. v. New Boston Coke Corp., supra, involved an action brought by the U.S. EPA in which it sought an order declaring New Boston Coke Corporation ("NBCC") to be in violation of the Clean Air Act and AP-3-07, an opacity standard contained in the state's SIP, which was the precursor to OAC 3745-17-07[32]. In this action,

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[32] Specifically, AP -3-07 provided in relevant part:

> Control of Visible Air Contaminants from Stationary Sources
> A. Emission Limitation
> (1) No person shall discharge into the atmosphere from any single source of emission whatsoever any air contaminant of a shade or density equal to or

Defendant NBCC contended that AP-3-07, "is designed to supplement and facilitate enforcement of mass emission standards and it is therefore not independently enforceable." Conversely, Plaintiff U.S. EPA contended that "AP-3-07 is part of a duly promulgated and federally approved State Implementation Plan, and is therefore independently enforceable." The Court copiously reviewed the relevant case law and reached a decision on this issue as follows:

> Having weighed the arguments of counsel and consulted pertinent authority, we conclude that the question of the independent enforceability of AP-3-07 is in reality two questions. The first is whether AP3-07 is a sufficient basis for the issuance of an NOV and commencement of an enforcement action. The second question is whether proof of a violation of AP-3-07 is sufficient proof of a violation of Ohio's SIP and, therefore, of the Clean Air Act to support judgment for the plaintiff in an enforcement action. We conclude that the answer to the first question is yes and the answer to the second question is no.
>
> The Dayton-Walther and Portland Cement I [Portland Cement Association v. Ruckelshaus, 486 F. 2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).] cases raise serous questions about the significance of a violation of AP-3-07. First, Dayton-Walther indicates that a source may comply with mass emission standards but violate opacity standards. As indicated by the uncombined water exception and by the adjustment provision contained in 40 C.F.R. 60.11(e)(2), an opacity standard does not seek to prohibit opacity per se but only seeks to prohibit opacity insofar as it represents a violation of mass emission standards.
>
> We are unconvinced by plaintiff's contention that Portland Cement II [Portland Cement Association v. Train, 513 F. 2d 506 (D. C. Cir. 1975), cert. denied, 423 U.S. 1025 (1975), reh'g denied, 423 U.S. 1092 (1976).] and Cleveland Electric and Illuminating Company [City of Cleveland v. Cleveland Electric Illuminating Co., 4 Ohio St. 3d 184, 448 N.E. 130 (1983).] require a different result. First, we find the thoughtful opinion of Judge Leventhal in Portland Cement I persuasive notwithstanding the subsequent decision in Portland Cement II. We note that Judge Leventhal did not participate in Portland Cement II opinion, and the opinion

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darker than that designated as No. 1 on the Ringelmann Chart or 20% opacity, except as set forth in Subsection (A)(2) and Section (B) of this regulation.

(2) No person may discharge into the atmosphere from any single source of emission for a period or periods aggregating not more than three minutes in any sixty minutes or for a period of time deemed necessary by the Board, air contaminants of a shade or density not darker than No. 3 on the Ringelmann Chart of 60% opacity. . . .

> contains little discussion of the concerns voiced by Judge Leventhal in Portland Cement I. Second, we find no indication in the Cleveland Electric Illuminating case that the independent enforceability issue was expressly raised. Therefore, we cannot agree that the Ohio Supreme Court has ruled that the Cleveland Municipal Code's equivalent of AP-3-07 is independently enforceable.
>
> Instead, we conclude that a violation of AP-3-07 is independently enforceable insofar as it will support issuance of an NOV and initiation of an enforcement proceeding. However, in light of the problems encountered with applying AP 3-07 to a coke battery which are discussed below, we are not willing to accept proof of a violation of AP-3-07 alone as sufficient proof to establish a violation of Ohio's State Implementation Plan and, therefore, a violation of the Clean Air Act. Plaintiff argues that such an approach requires the EPA to first prove a mass emission standard violation in order to prove an opacity violation and thereby renders the opacity standard superfluous. We disagree. The opacity standard is some evidence of a mass emission standard violation, which, in combination with other evidence, may establish a mass emission standard violation. We think that, in this particular case, this is the proper role for the opacity standard in light of the regulations and case authority discussed above. . . .

64. Appellant contends that the above-cited decisions dictate a finding that OAC 3745-17-07 is not independently enforceable and, as such, the Director acted unlawfully in including this provision in its Title V permit as an independently enforceable provision.

65. Appellee Director counters Appellant's arguments by asserting that the plain meaning of the relevant regulations, read in conjunction with the pertinent case law, leads to a conclusion that OAC 3745-17-07 is an independently enforceable provision. First, Appellee Director points out that OAC 3745-17-07(A) became an approved part of Ohio's SIP on May 27, 1994.[33] (40 C.F.R. 52.1870 (c)(97)(i)(E).) As part of Ohio's SIP, OAC 3745-17-07 falls within the definition of "applicable requirement" contained in OAC 3745-77-01(H) (see above). Next, OAC 3745-77-07, ["Permit content."] makes it clear that the visible particulate emission limitations set out in OAC 3745-17-07 must be included in every Title V permit. Specifically, this section provides in part:

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[33] See 59 Fed. Reg. 27464, May 27, 1994.

> (A) Standard permit requirements. Each Title V permit shall include the following elements:
> (1) Emission limitations and standards. The permit shall include emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of issuance

66. The fact that these limitations must be included in the permit is also made clear in OAC 3745-77-08(A)(1)(d), which requires that the permit contain, "conditions . . . [that] provide for compliance with all applicable requirements." Thus, while it is plain that visible particulate emissions limitations must be included in all Title V permits, we must now determine whether these limitations are independently enforceable.

67. As pointed out by the Director, the wording of OAC 3745-17-07(A)(1) is clearly mandatory in nature (i.e., visible particulate emissions limitations for stack emissions "shall not exceed" 20 percent opacity except for up to six consecutive minutes per hour, in which case those emissions "shall not exceed" 60 percent opacity). Further, there is nothing in this regulation to indicate that finding a violation of the visible particulate emissions limitation is in any way related to, or predicated upon, the finding of a violation of the mass particulate emissions limitation. As such, it appears to this Commission that the plain meaning of OAC 3745-17-07 indicates an intent that its provisions be independently enforceable.

68. Furthermore, we do not find that the cases relied upon by Appellant lead to a different conclusion. First, we find the court's discussion in New Boston Coke Corp., supra, to imply a very narrow holding on this issue, confined to the specific facts presented to the court in that particular case. Specifically, we note, once again, the following passage in that court's decision:

> . . . , we conclude that a violation of AP-3-07 is independently enforceable insofar as it will support issuance of an NOV and initiation of an enforcement proceeding. However, in light of the problems encountered with applying AP-3-07 to a coke battery, which are discussed below, we are not willing to accept proof of a violation of AP-3-07 alone as sufficient proof to establish a violation of Ohio's State Implementation Plan and, therefore, a violation of the Clean Air Act.

(Emphasis added.)

69. Next, we agree that the court's discourse in Dayton-Walther Corp. v. Williams, supra, relative to the independent enforceability of OAC 3745-17-07 appears to support a finding that visible particulate emissions limitations are not independently enforceable, however, the Commission finds it significant that subsequent to the issuance of the Dayton Walther decision, the Ohio General Assembly amended R.C. 3704.03 to provide that the Director could adopt:

> . . . rules prescribing shade, density or opacity limitations and standards for emissions, provided that with regard to air contaminant sources for which there are particulate matter emission standards in addition to a shade, density, or opacity rule, upon demonstration by such a source of compliance with those other standards, the shade, density, or opacity rule shall provide for establishment of a shade, density, or opacity limitation for that source that does not require the source to reduce emissions below the level specified by those other standards; . . .

70. In response to this amendment, the Director adopted OAC 3745-17-07(C), entitled "Equivalent visible particulate emission limitations," commonly referred to as an "EVEL." Pursuant to this section, any owner or operator of an air contaminant source subject to the requirements of OAC 3745-17-07(A)(1) may submit a written request to the Director for the establishment of an EVEL for the source. This provision allows the Director to specify an opacity standard different from that specified in OAC 3745-17-07(A)(1), upon a demonstration by the permit holder that it is in compliance with all other applicable emissions limitations, but it fails to comply with the standard in OAC 3745-17-07(A)(1).

71. It is the Director's argument, and this Commission agrees, that there would be no need for a regulatory mechanism whereby a permittee could request an alternative visible emissions limitation if visible emissions limitations were not independently enforceable and were merely an indicator of a possible violation of a permittee's mass particulate emissions limitations.

72. In light of the above, it is the opinion of the Commission that the Director acted reasonably

and lawfully in including OAC 3745-17-07(A) as an independently enforceable applicable requirement in Appellant's Title V permit. Accordingly, Appellant's fourth Assignment of Error is overruled.

V. Engineering Guide #64

73. Appellant provides that its Title V permit requires compliance with Engineering Guide #64, which Appellant claims constitutes an OEPA policy with the force and effect of law, which has not been formally and appropriately promulgated as an administrative rule. Appellant further contends that by requiring it to comply with this guidance document, the OEPA has created new substantive requirements in prohibition of R.C. 3704.036(K), set forth above. We disagree with Appellant's characterization of Engineering Guide #64.

74. Engineering Guide #64 sets out how Title V applicants should address the requirements contained in OAC 3745-25-03, dealing with emergency action plans. Ohio Administrative Code Section 3745-25-03 provides in relevant part:

> (A) Any person responsible for the operation of a source of air contaminants which emits 0.25 tons per day or more of air contaminants for which air quality standards have been adopted shall prepare emission control action programs, consistent with good industrial practice and safe operating procedures, for reducing the emission of air contaminants into the ambient air during periods of an air pollution "Alert," air pollution "Warning," and air pollution "Emergency." . . .
>
> (C) Emission control action programs shall be filed with the director at the following times:
>
> (1) Existing sources - shall file not later than six months after adoption of these rules. . . .
>
> (E) Emission control action programs as required by paragraph (A) of this rule shall be submitted to the director upon request within thirty days of the receipt of such request; such emission control action programs shall be subject to review and approval by the director. . . .

75. In answering the question, "[m]ust a Title V permit applicant submit an Emergency Action

Plan (EAP) to the Ohio EPA in accordance with OAC rule 3745-25-03?", Engineering Guide #64 provides in part:

> Since the mid-1970's Ohio has not experienced air quality levels that would trigger the mandatory use of EAPs, and Ohio EPA has not required industries to file or update these plans since the early 1980's.
>
> Therefore, it is the Ohio EPA's position that we continue to exercise discretion by not expecting the development and submission of an EAP. If, in the future, an EAP would be necessary as a result of a new or revised air quality standard or a degradation in air quality, then the Ohio EPA will notify facilities that EAPs must be developed and submitted within a reasonable time frame, not to exceed sixty days. . . .
>
> This Guide has been discussed with U.S. EPA Region V staff, and they concurred that Ohio was taking a reasonable approach with this State Implementation Plan requirement . . . (Appellee's Exhibit No. 4.)

76. Thus, Engineering Guide #64 simply explains that, with the concurrence of the U.S. EPA, the OEPA is relaxing a requirement currently contained in regulation; i.e., Engineering Guide #64 is not, as Appellant contends, creating a new substantive requirement, it is relaxing the enforcement of an existing regulatory requirement.[34]

77. Accordingly, the Commission finds no merit in Appellant's fifth Assignment of Error, which is hereby overruled.

FINAL ORDER

The Commission finds that the imposition of an operational restriction and associated parametric monitoring requirement on Appellant's Boiler Unit No. 1 was unreasonable, and hereby ORDERS the instant action REMANDED to Appellee Director for further proceedings consistent with this finding.

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[34] Finally, the Commission notes that it is somewhat perplexed by Appellant's objection to the inclusion of this provision in its final permit, since Appellant addressed the requirements of OAC 3745-25-03 in its Title V permit application by stating, "[n]ot applicable at this time in accordance with Engineering Guide #64."

The Commission, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code Section 3746-13-01, informs the parties that:

> Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

Julianna F. Bull, Chair

Toni E. Mulrane, Vice-Chair

Entered in the Journal of the Commission this 21st day of August, 2003.

Mary J. Oxley, Executive Secretary

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