

FILED

JAN 22 2016

U. S. DEPARTMENT OF JUSTICE



William J. Ihlenfeld, II
United States Attorney
Northern District of West Virginia

U.S. DISTRICT COURT-WVND
CLARKSBURG, WV 26301

United States Courthouse
1125 Chapline Street Phone: (304) 234-0100
P.O. Box 591 Fax: (304) 234-0111
Wheeling, WV 26003
December 21, 2015

William Powell, Esq.
Jackson Kelly, PLLC
310 W. Burke St.,
Martinsburg, WV 25402

J. Evans Rice, III, Esq.
Hogan Lovells, US LLP
Columbia Square
555 13th Street
Washington, DC 20004

Re: United States v. AES Laurel Mountain, LLC (pre-indictment)

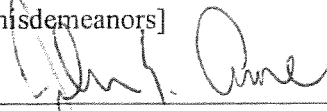
Dear Mr. Powell:

This will confirm conversations with you concerning your client, AES Laurel Mountain, LLC (hereinafter referred to as "defendant").

All references to the "Guidelines" refer to the guidelines established by the United States Sentencing Commission, effective November 1, 1987, as amended.

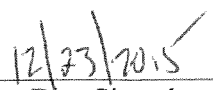
It is agreed between the United States and your client as follows:

- The defendant will plead guilty to Count One and Count Two of the Information filed in this District charging it with Unlawful Take of Migratory Birds, in violation of the Migratory Bird Treaty Act [MBTA], Title 16, United States Code, Sections 703 and 707(a). [Class B misdemeanors]

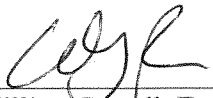


AES Laurel Mountain, LLC, Defendant

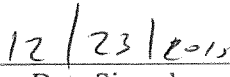
By: John E. Arose
Title: Vice President



Date Signed



William Powell, Esq.
Counsel for AES Laurel Mountain, LLC



Date Signed

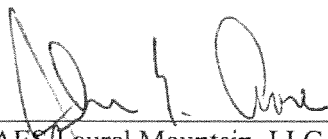
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2. The maximum penalty per count to which the defendant will be exposed by virtue of its plea of guilty, as stated in paragraph 1 above, is: imprisonment for a period of not more than (6) six months, a fine of not more than \$15,000.00 or twice the gross pecuniary gain or loss resulting from the conduct, a period of probation of not more than (5) five years, and a special mandatory assessment of \$50.00 [18 U.S.C. Section 3013(a)(1)(B)(ii)] per Count which must be paid before the date of sentencing by money order or certified check, made payable to the United States District Court. The parties agree that the provisions of Chapter 8 of the U.S. Sentencing Guidelines pertaining to the calculations of fines for specific violations (§§8C2.2 - 2.9) do not apply to environmental crimes or to Class B misdemeanors. [U.S.S.G. §§ 8A1.1, Application Note 2, 8C2.1, 8C2.10] Fines for environmental crimes are to be calculated pursuant to the general statutory provisions governing sentencing in 18 U.S.C. §§ 3553 and 3572. [U.S.S.G. § 8C2.10]

3. The defendant agrees to cooperate fully with the Office of the United States Attorney and other law enforcement agencies in the Northern District of West Virginia by meeting with them, if requested, and divulging to them information about its activities and the activities of others, to the best of its knowledge, regarding site lighting procedures, policy, and design. In providing such information, the defendant will be completely forthright and truthful.

4. Nothing contained in any information provided by the defendant pursuant to paragraph 3 will be used against it as the basis for any subsequent prosecution. It is understood that any information obtained from the defendant in compliance with this cooperation agreement will be made known to the sentencing Court; however, pursuant to Guideline section 1B1.8, such information may not be used by the Court in determining the defendant's applicable guideline range.


5. At final disposition, the United States may advise the Court of the defendant's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give the same such weight as the Court deems appropriate.



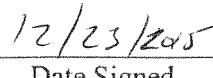
AES Laurel Mountain, LLC, Defendant
By: John E. Arose
Title: Vice President



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Counsel for AES Laurel Mountain, LLC



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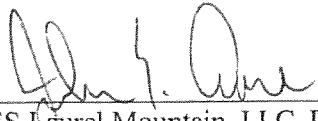
6. This Plea Agreement contains a binding agreement between the United States and the defendant regarding the ultimate sentence to be imposed upon the defendant. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the parties have agreed that the sentence to be imposed upon the defendant should and shall be a fine of \$15,000 for each Count [\$30,000.00, total] and the special mandatory assessments of \$50.00 per Count [\$100.00, total]. This Agreement does not include any stipulation as to whether or not a period of probation should also be imposed. The United States agrees not to argue for a period of probation of more than (1) one year.

7. In exchange for and contingent upon the defendant's guilty plea to Count One and Count Two of the Information, and for its compliance with the other terms and conditions of this written Plea Agreement, the United States agrees not to pursue any additional charges arising from the death of an Indiana bat in July, 2012 on AES Laurel Mountain property.

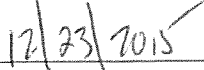
8. The defendant also agrees to perform community service by making a payment of \$48,300.00 to the West Virginia Land Trust, a non-profit organization dedicated to wildlife preservation. The money so paid will be used to conserve avian wildlife in the same geographic area affected by the defendant's conduct.

9. The defendant understands that the offer memorialized in this Plea Agreement will expire on December 24, 2015 if the defendant has not executed the Plea Agreement and returned a signed copy by 5:00 P.M. on that day.

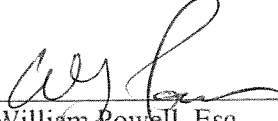
10. If in the opinion of the United States, the defendant either engages in conduct defined under the Application Notes 4(a) through (k) of Guideline 3C1.1, fails to cooperate as promised, fails to pay the special assessment prior to the sentencing hearing, or violates any other provision of this Plea Agreement, then the United States will not be bound to make the foregoing recommendations, and the defendant will not have the right to withdraw the plea.



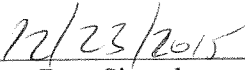
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William Powell, Esq.
Counsel for AES Laurel Mountain, LLC



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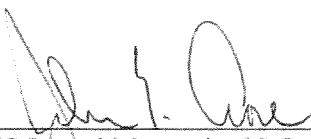
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11. The parties recognize that the “binding” nature of the Plea Agreement renders largely immaterial the Relevant Conduct Stipulation commonly featured in federal plea agreements. [U.S.S.G. 6B1.4 and 1B1.3].

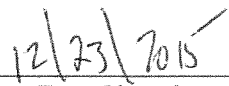
This having been noted, for the benefit of the Court, the parties agree that the defendant, by and through its employees and contractors working at its direction and under its supervision, did, without authorization, take migratory birds on October 2, 2015 and October 3, 2015 at its Battery Energy Storage System complex.

Although a Guidelines calculation is rendered similarly immaterial by the “binding” nature of the plea, the parties concur in their belief that agree that, had the Agreement *not* been binding, the defendant’s Base Offense Level would have been determined pursuant to U.S.S.G. § 2Q2.1. The United States further indicates that, had this plea not been binding in nature, it would have expected to recommend at sentencing that the defendant receive any and all available levels of reduction for Acceptance of Responsibility for the purposes of a Guidelines calculation. [U.S.S.G. 3E1.1(a), (b)].

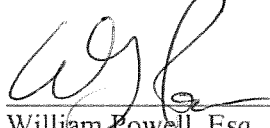
12. The United States reserves the right to provide to the Court and the United States Probation Office, in connection with any pre-sentence investigation that may be ordered pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, or in connection with the imposition of sentence should the Court, pursuant to Rule 32(c)(1), not order a pre-sentence investigation, relevant information including the defendant’s background, criminal record, offense charged in the information and other pertinent data appearing at Rule 32(c)(2) of the Federal Rules of Criminal Procedure as will enable the Court to exercise its sentencing discretion. The United States also retains the right to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the anticipated pre-sentence report to be prepared by the Probation Office of this Court, and to respond to any written or oral statements made by the Court, by the defendant or its counsel.



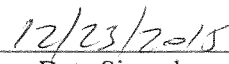
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Counsel for AES Laurel Mountain, LLC



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13. The defendant is aware that Title 18, United States Code, Section 3742 affords it the right to appeal the sentence imposed. Acknowledging all this, and in exchange for the concessions made by the United States in this Plea Agreement, the defendant waives the right: (1) to appeal any order, the conviction and any sentence that is within the maximum provided in the statute of conviction or the manner in which that sentence was determined on any ground whatsoever, including those grounds set forth in Title 18, United States Code, Section 3742; and (2) to challenge the conviction or the sentence or the manner in which it was determined in any post-conviction proceeding under Title 28, United States Code, Section 2255. Nothing in this paragraph, however, will act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.

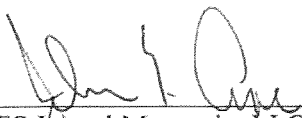
14. If the defendant's plea is not accepted by the Court or is later set aside, or if the defendant breaches any part of this Plea Agreement, then the Office of the United States Attorney will have the right to void this Plea Agreement.

Very truly yours,

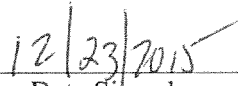
WILLIAM J. IHLENFELD, II,
United States Attorney

By: 


David J. Perri
Assistant United States Attorney



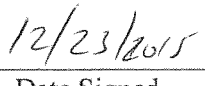
AES Laurel Mountain, LLC, Defendant
By: John E. Arose
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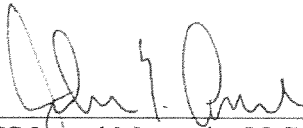


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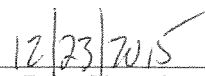
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15. The above (14) fourteen paragraphs constitute the entire agreement between AES Laurel Mountain, LLC and the United States of America in this matter. There are no agreements, understandings or promises between the parties other than those contained in this Plea Agreement.


As evidenced by my signature at the bottom of the (6) six pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.



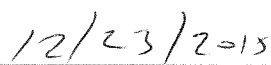
AES Laurel Mountain, LLC, Defendant
By: John E. Arose
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Date Signed



William Powell, Esq.
Counsel for AES Laurel Mountain, LLC



Date Signed

DJP:djp
cc: Agent Bryce Findley, U.S. F.W.S.