

IN THE  
UNITED STATES DISTRICT COURT,  
DISTRICT OF KANSAS

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SUNFLOWER ELECTRIC POWER CORPORATION, )

Plaintiff, )

v. )

Case No. 08-2575-EFM  
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KATHLEEN SEBELIUS, in her official capacity as )  
Governor of the State of Kansas, )

MARK PARKINSON, in his official capacity as )  
Lt. Governor of the State of Kansas, and )

RODERICK L. BREMBY, in his official capacity as )  
Secretary of the Kansas Department of Health )  
and Environment, )

Defendants. )

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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Plaintiff, Sunflower Electric Power Corporation (“Sunflower”), for its cause of action against Defendants, Kathleen Sebelius (the “Governor”), in her official capacity as Governor of the State of Kansas; Mark Parkinson (the “Lt. Governor”), in his official capacity as Lt. Governor of the State of Kansas; and Roderick L. Bremby (the “Secretary”), in his official capacity as Secretary of The Kansas Department of Health and Environment (“KDHE”), states:

**INTRODUCTION**

By this action, Sunflower seeks (a) the Court’s declaration that the Governor, the Lt. Governor, and the Secretary have violated Sunflower’s rights under the United States Constitution to the equal protection of the law and to be free from laws that violate the Constitution’s dormant Commerce Clause; (b) the Court’s order enjoining the Defendants from continuing to do so; and (c) the Court’s order vacating Defendants’ denial of Sunflower’s

application for an air quality permit required for construction of new coal-fired electricity generating units. Defendants claim to have acted on the grounds that carbon dioxide (“CO<sub>2</sub>”) emissions from the new units would contribute to global warming. In reality, Defendants’ purported basis for denying Sunflower a permit is nothing more than pretext. Defendants have never denied an air quality permit to any other CO<sub>2</sub> emitter on the basis of potential or actual CO<sub>2</sub> emissions. Indeed, since Defendants denied Sunflower a permit, they have granted hundreds of permits to other CO<sub>2</sub> emitters and continue to allow preexisting similarly situated CO<sub>2</sub> emitters to operate freely. Defendants’ denial of Sunflower’s permit was motivated by the improper purposes of (a) advancing each Defendant’s personal political aspirations, and (b) prohibiting the exportation of electric energy outside the State of Kansas. Defendants’ conduct thus violates Sunflower’s rights under the United States Constitution and should be immediately enjoined.

### **PARTIES**

1. Plaintiff Sunflower is a not-for-profit corporation with its principal place of business at 301 W. 13th St., Hays, Kansas 67601. Sunflower’s principal business is the generation and transmission of electricity.

2. Defendant Governor is and was at all times relevant hereto Governor of the State of Kansas. The Governor’s mailing address is: State Capitol, Suite 212S, 300 SW 10th Avenue, Topeka, Kansas 66612-1590.

3. Defendant Lt. Governor is and was at all times relevant hereto Lt. Governor of the State of Kansas. The Lt. Governor’s mailing address is: State Capitol, Room 231-North, 300 SW 10th Avenue, Topeka, Kansas 66612-1590.

4. Defendant Secretary is and was at all times relevant hereto the Secretary of KDHE, an agency of the State of Kansas. He is a political appointee (as opposed to a civil

service employee) who serves at the pleasure of the Governor. The Secretary's mailing address is: Curtis State Office Building, Suite 540, 1000 SW Jackson, Topeka, Kansas 66612-1368.

### **JURISDICTION AND VENUE**

5. Sunflower brings this action under 42 U.S.C. § 1983 to obtain declaratory and injunctive relief against Defendants with respect to their past and continuing denials of Sunflower's right to Equal Protection under the Fourteenth Amendment to the United States Constitution and their unlawful interference with Sunflower's right to carry out interstate commerce under Article I, Section 8 of the United States Constitution.

6. This Court has jurisdiction over this action under (a) 28 U.S.C. § 1331, in that this matter arises under the United States Constitution; (b) 28 U.S.C. § 1343(a)(3)–(4), in that this matter redresses the deprivation of constitutional rights; and (c) 28 U.S.C. § 2201(a), in that Sunflower seeks declaratory relief concerning an actual controversy within the Court's jurisdiction.

7. Venue is proper in this court under 28 U.S.C. § 1391(b), because the events giving rise to Sunflower's claims asserted against the Defendants herein occurred in the District of Kansas and all Defendants reside in the District of Kansas.

### **GENERAL ALLEGATIONS**

8. Sunflower is wholly owned by six Kansas not-for-profit rural electric distribution cooperatives (the "Member Co-ops") that purchase electricity from Sunflower for transmission and delivery to their members. Sunflower's electric generating capacity is primarily operated by Sunflower to serve the retail customers of its Member Co-ops.

9. The Member Co-ops also are the owners of, directly or through a subsidiary, Mid-Kansas Electric Company, LLC ("Mid-Kansas"), which acquired the resources and customers of the Kansas Network of Aquila, Inc. on April 1, 2007. Sunflower is under contract to

Mid-Kansas to operate the Mid-Kansas generation and transmission equipment and to manage power purchase agreements with other generators for the benefit of the Member Co-ops.

10. The Member Co-ops, in their individual capacities and acting through Mid-Kansas, provide electricity to approximately 400,000 individual consumers, nearly 48,000 of whom have annual incomes considered by the United States federal government to be at or below the poverty level.

11. Because Sunflower has limited low cost coal-fired generation capacity in its portfolio, and because the cost of generating and transmitting electricity to the Member Co-ops must be borne by relatively few consumers, the average cost per kilowatt hour (“kWh”) to Member Co-op consumers is approximately \$0.135 per kWh. In contrast, the average cost per kWh to consumers located in the Kansas City metropolitan statistical area (which includes Kansas City, Kansas; Johnson County, Kansas; and Kansas City, Missouri) is approximately \$0.075 per kWh.

12. Sunflower is a member of the regional electric reliability organization known as the Southwest Power Pool (“SPP”), one of eight National Electric Reliability Council (“NERC”) Regional Entities. NERC is a self-regulating organization, subject to oversight by the United States Federal Energy Regulatory Commission, to ensure the reliability of the bulk power system in North America through the development and enforcement of reliability standards. Sunflower and Mid-Kansas are subject to SPP requirements as to what reserve electric generating capacity must be maintained by Sunflower as part of the SPP regional plan for the prevention of regional electric blackouts. Based upon the reasonably anticipated growth in the power requirements of the Member Co-ops, the combined Sunflower and Mid-Kansas system will require additional capacity as soon as 2011 to satisfy the SPP planning criteria.

13. Sunflower is obligated by contracts to provide its Member Co-ops with all of their electric power needs. Under its agreements with Mid-Kansas, Sunflower also is obligated to provide sufficient energy to meet the wholesale energy needs of Mid-Kansas from other sources if the Mid-Kansas assets are not sufficient to do so. Based upon the reasonably anticipated growth in the power requirements of its Member Co-ops, taking into account the approaching expiration of a power purchase agreement with the owner of the Jeffrey Energy Center in Pottawatomie County, Kansas, Sunflower will need substantial additional electricity generating capacity beginning as soon as 2014.

14. The most cost-effective and practically feasible method of satisfying its obligations to the Member Co-ops and SPP involves constructing new pulverized coal-fired units at Sunflower's Holcomb Station. Accordingly, in February 2006, Sunflower submitted to KDHE its application (the "Application") for authority to construct three new coal-fired electricity generating units (the "Power Plants") denominated as Holcomb 2, Holcomb 3, and Holcomb 4. This development is commonly referred to as the Holcomb Expansion Project (the "Project").

15. In order to limit the increased costs to the Member Co-ops and their consumers that will result from constructing new electricity units with sufficient generating capacity to satisfy Sunflower's future obligations, it is necessary for the scope of the Project to be sufficient to generate a substantial amount of electricity that can be sold to purchasers other than the Member Co-ops, because the incremental cost of generation and transmission per kilowatt hour diminishes as the capacity of the new units increases. In addition, without the development fees received by Sunflower in connection with the Project, Sunflower likely would not be able to finance the construction of new electricity-generating units. Further, by locating multiple

generating units in a single location, the Project will result in lower unit fuel costs and fuel transportation costs and lower total operating costs due to the use of common service facilities.

16. Consequently, Sunflower has entered into agreements with Tri-State Generation and Transmission Association, Inc. (“Tri-State”), a not-for-profit cooperative; Golden Spread Electric Co-operative (“Golden Spread”), a not-for-profit cooperative; Midwest Energy, Inc. (“Midwest”), a not-for-profit electric cooperative, and the Kansas Municipal Energy Agency (“KMEA”), acting on behalf of nine small cities located in central Kansas, pursuant to which Sunflower will receive significant development fees and ongoing operating revenues in exchange for sharing ownership of or power produced by the proposed new units. Under these agreements, Tri-State is entitled to ownership of the first unit constructed and Golden Spread is entitled to approximately half of the power that will be generated by the second unit. Sunflower, Mid-Kansas, Midwest, and KMEA are entitled to smaller participation in the Project.

17. The permit sought by Sunflower is denominated a “PSD construction permit” because the federal and state regulations that establish the requirements for the issuance of such a permit and the terms and conditions that must be contained in such permit are part of the “prevention of significant deterioration” provisions of the federal Clean Air Act (“CAA”), 42 U.S.C. §§ 7401, et seq. In accordance with the applicable provision of the CAA, the United States Environmental Protection Agency (“EPA”) has delegated to Kansas the authority to administer this program in the State through KDHE pursuant to the Kansas Air Quality Act (“KAQA”), its implementing regulations, and the other applicable provisions of the Kansas State Implementation Plan for attaining and maintaining compliance with the National Ambient Air Quality Standards for certain air pollutants and other provisions of the CAA. See 42 U.S.C. § 7410. Under the CAA, these and the other applicable air quality standards must be set at levels

that ensure the protection of human health and are periodically reviewed (and, if necessary, revised) by EPA. See 42 U.S.C. § 7409.

18. The KAQA is set forth at K.S.A. §§ 65-3001, et seq. The process for permitting new sources of regulated air pollutants located in Kansas is established and governed by K.S.A. §§ 65-3008, 65-3008a, and 65-3008b and the regulations promulgated thereunder, i.e., K.A.R. 28-19-300 et seq. and 40 C.F.R. 52.21 (as incorporated by reference at K.A.R. 28-19-350) (collectively, the “Permitting Rules”).

19. Sunflower fully complied with all applicable Permitting Rules in connection with its Application.

20. On September 21, 2006, the Secretary made his initial decision under K.A.R. 28-19-350 that Sunflower’s Application should be approved and drafted a proposed permit for possible issuance to Sunflower (the “Draft Permit”).

21. On September 21, 2006, KDHE published a public notice in the Kansas Register of (a) the proposed issuance of the Draft Permit; (b) the public’s right to comment on this action, both by the submission of written comments and the opportunity to provide oral and written comments at a public hearing; and (c) public hearings on this action in Garden City and Topeka, Kansas.

22. On November 2, 2006, KDHE published an additional public notice in the Kansas Register of (a) the issuance of the Draft Permit; (b) the public’s right to comment on this action, both by the submission of written comments and the opportunity to provide oral and written comments at a public hearing; and (c) a public hearing on this action in Lawrence, Kansas.

23. Pursuant to these notices, KDHE conducted public hearings in Garden City, Topeka, and Lawrence, Kansas, at which members of the public were afforded the opportunity to comment on the agency's initial decision to approve Sunflower's Application.

24. During the public comment period provided for in these notices, KDHE received several hundred written comments regarding the proposed agency action, including comments submitted by EPA and other federal and state agencies.

25. Several hundred written comments by members of the public regarding the proposed agency action also were submitted to the Governor during this time period.

26. The comments received by KDHE included numerous statements of concern regarding global warming generally, the possible effect of global warming on Kansas, and assertions that CO<sub>2</sub> emissions from the proposed Power Plants would contribute to global warming.

27. On June 15, 2007, Sunflower withdrew its request for authorization to construct Holcomb 4. Its request for authorization to construct Holcomb 2 and Holcomb 3 was unaffected by this withdrawal.

28. On or about July 24, 2007, based on the complete agency record developed in conjunction with the Application, including the comments received and Sunflower's responses to those comments, KDHE's technical permitting staff (the "Staff") concluded that Sunflower's application should be approved and that a final PSD construction permit (the "Final Permit"), with certain significant differences from the terms of the Draft Permit, should be issued to Sunflower authorizing the construction of Holcomb 2 and Holcomb 3. The Staff then recommended to KDHE management that the Final Permit should be issued to Sunflower in the form drafted by the Staff.

29. Upon information and belief, Ronald Hammerschmidt, Director of the KDHE Bureau of the Environment, concurred in the Staff recommendation and forwarded this matter to the Secretary with a recommendation that the Application be approved and that Sunflower be issued the Final Permit.

30. The Permitting Rules do not contain any restrictions on or other regulations addressing the emission of CO<sub>2</sub>.

31. In July and August 2007, KDHE unequivocally asserted in certain administrative and judicial review proceedings that it would not consider CO<sub>2</sub> in connection with Sunflower's Application and that, in light of the national character of the issue, the adoption of CO<sub>2</sub> standards required national and international input and public comment. KDHE further stated that the rule-making process for greenhouse gases will likely take years to complete, once initiated.

32. To date, there is no federal or Kansas statute, rule, or regulation of general application that establishes any restriction or any other provision for the management of CO<sub>2</sub> emissions from either mobile or stationary sources of such emissions located in Kansas.

33. K.S.A. § 65-3012 ("Section 65-3012") provides the Secretary with certain emergency powers when the emission by an existing source of an air contaminant or contaminants of such quality and nature as to constitute air pollution presents a substantial endangerment to the health of persons or to the environment or where there is an imminent or actual violation of the KAQA.

34. On or about August 31, 2007, the Governor indicated that she opposed the permitting of the Power Plants, declaring: "I mean, I think, I think it's, um, it's not acceptable or appropriate that we build these plants, these 'merchant' plants, to sell energy to other folks and impose those risks on Kansans."

35. On or about September 1, 2007, the Secretary (acting in his official capacity) requested an opinion from the Attorney General of the State of Kansas, Paul J. Morrison (the “Attorney General”), as to “whether, in the absence of federal or state regulations setting limitations for a specific pollutant, K.S.A. § 65-3012 authorizes the Secretary to deny or modify an air quality permit, or place a stay on issuance of an air quality permit until state or federal regulations are enacted to address the pollutant.”

36. On or about September 24, 2007, the Attorney General issued his opinion (the “AG Opinion”) in response to the Secretary’s request stating in part that “K.S.A. § 65-3012 authorizes the Secretary to take actions as necessary to protect the health of persons or the environment. Such actions may include denying an air quality permit application on the basis of the anticipated emissions of a particular pollutant or modifying a proposed permit to address such pollutant.” The AG Opinion also noted that any action to deny an air quality permit would trigger due process protections and that staying the issuance of a permit pending the adoption of standards to regulate a particular pollutant would likely not withstand a due process challenge.

37. Also on or about September 24, 2007, the Governor issued a public statement declaring that she believes there to be a “moral duty to be good stewards of the land” and that “those considerations have convinced me that massive new coal plants in Kansas are not in the best interest of our citizens.”

38. On or about September 28, 2007, KDHE issued a press release in which the Secretary confirmed that the guidance received from the Attorney General, including consideration of Section 65-3012, “will now be analyzed and deliberated throughout the remainder of the decision-making process.”

39. By a letter to Sunflower dated October 18, 2007 (the “Denial Order”), the Secretary denied Sunflower’s Application.

40. Shortly thereafter, the Governor issued a public statement in which she declared: “[O]nly 15 percent of the energy produced . . . in the two plants would be used in Kansas; the remaining 85 percent would be sold to Colorado and Texas. So Kansas would have 15 percent of the energy and 100 percent of the pollution and environmental impact of 11 million new tons of CO<sub>2</sub> each year.”

41. In the Denial Order, the Secretary stated in relevant part that he has “authority under K.S.A. § 65-3012 as interpreted by the Attorney General of the state of Kansas to take such action as is necessary to protect the health of persons or the environment, notwithstanding a permit applicant’s compliance with all other existing provisions of the Kansas air quality act, upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of person [sic] or the environment”; that he had received “information” that in his opinion provided “support for the position that emission of air pollution from the proposed coal fired plant, specifically carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment”; and that “[b]ased on this information, the permit is denied.”

42. The Secretary’s statements in the Denial Order are the only information in the administrative record relating to Sunflower’s Application (the “Administrative Record”) that purports to set forth the basis for the Secretary’s issuance of the Denial Order.

43. There is no information in the Administrative Record or any other information available to KDHE upon which the Secretary could make a rational, factually-supported

determination that potential CO<sub>2</sub> emissions from the Power Plants constitute “air pollution” that “presents a substantial endangerment to the health of persons or to the environment.”

44. There is no rational or reasonable basis to distinguish the possible adverse effect on human health or the environment attributable to potential CO<sub>2</sub> emissions from the Power Plants from any effects resulting from the continued generation of CO<sub>2</sub> emissions from existing power plants in Kansas or other mobile or stationary sources of CO<sub>2</sub> emissions currently existing in Kansas.

45. Therefore, the “substantial endangerment” finding made by the Secretary with respect to potential CO<sub>2</sub> emissions from the Power Plants has serious negative implications for all existing and future sources of such emissions located in Kansas.

46. On or about October 22, 2007, a KDHE spokesman stated that the Secretary’s decision to deny Sunflower’s Application on the basis of Section 65-3012 was the Secretary’s alone, i.e., made without consultation with the KDHE technical staff.

47. On November 6, 2007, the Secretary testified to a Kansas Legislature committee that (a) the amount of CO<sub>2</sub> emissions predicted to be emitted annually from the Power Plants was simply too much, but that (b) he had no plans to regulate CO<sub>2</sub> emissions from other industries, instead planning only to initiate an industry-government discussion regarding voluntary ways to increase energy efficiency and otherwise reduce CO<sub>2</sub> emissions. When asked to state “how much is too much” with respect to CO<sub>2</sub> emissions and why he felt he could deny Sunflower’s Application on the basis of unregulated emissions, the Secretary responded only by stating: “CO<sub>2</sub> contributes to climate change, which contributes to global warming, which is harmful to all human beings.” Upon information and belief, these public statements by the Secretary constitute his only alleged analysis supporting his purported determination that potential CO<sub>2</sub> emissions

from the Power Plants constitute a “substantial endangerment” to the health of humans or the environment in Kansas.

48. No Kansas statute or regulation defines the term “substantial endangerment to the health of persons or to the environment” for purposes of Section 65-3012 or otherwise establishes any criteria that must be satisfied for the Secretary to make a “substantial endangerment” finding under Section 65-3012; nor does any Kansas statute or regulation establish any procedure by which the Secretary may make a “substantial endangerment” finding under Section 65-3012.

49. At no time prior to issuance of the Denial Order did the Secretary notify Sunflower of his intent to consider Section 65-3012 in any way in connection with Sunflower’s Application.

50. At no time did the Secretary afford Sunflower an opportunity to be heard in connection with the Secretary’s consideration of Section 65-3012 as part of his consideration of Sunflower’s Application.

51. At no time did the Secretary notify Sunflower or otherwise identify or articulate any process by which he intended to conduct his inquiry into the issue of whether potential CO<sub>2</sub> emissions from the Power Plants would pose a “substantial endangerment to the health of persons or to the environment” in Kansas.

52. At no time did the Secretary notify Sunflower or otherwise identify or articulate any substantive criteria or standard to be used in connection with his inquiry as to whether or not potential CO<sub>2</sub> emissions from the Power Plants would constitute air pollution that poses a “substantial endangerment to the health of persons or to the environment” in Kansas.

53. At no time did KDHE require Sunflower to perform any analysis or evaluation of the possible effects of potential CO<sub>2</sub> emissions from the Power Plants on Kansas or any other region.

54. The Denial Order does not articulate any basis for the Secretary's purported "finding" that potential CO<sub>2</sub> emissions from the Power Plants would pose a "substantial endangerment to the health of persons or to the environment" in Kansas, and there is no information in the Administrative Record that could serve as a rational basis for any such "finding."

55. Upon information and belief, Section 65-3012 had never been considered by KDHE in connection with an application for a PSD construction permit prior to September 2007.

56. Prior to October 18, 2007, no application for a PSD construction permit had ever been denied by KDHE pursuant to Section 65-3012.

57. Upon information and belief, Section 65-3012 has never been considered by KDHE in evaluating an application for a PSD construction permit submitted by emitters of pollutants other than CO<sub>2</sub>.

58. The Governor's comments made before and after the Secretary's issuance of the Denial Order indicate that she expressly and willfully participated in the Secretary's issuance of the Denial Order and that the Secretary acted in accordance with her direction in issuing the Denial Order.

59. Following the Secretary's issuance of the Denial Order, the Governor, the Lt. Governor, and the Secretary have repeatedly stated that they have no intention of blocking the construction of any other new source of CO<sub>2</sub> emissions in Kansas or regulating any existing source of such emissions.

60. Upon information and belief, KDHE has approved at least one application for a PSD construction permit other than Sunflower's since October 18, 2007, without undertaking any analysis of the potential effect on human health or the environment in Kansas of potential CO<sub>2</sub> emissions from the source to be constructed.

61. On three separate occasions during its 2008 session, the Kansas Legislature passed bills that, among other things, would have required the Secretary to reconsider the Denial Order and to evaluate Sunflower's Application without taking into account in any way the potential CO<sub>2</sub> emissions from the Power Plants.

62. All three such bills were vetoed by the Governor.

63. Efforts to override the Governor's vetoes of the first two such bills narrowly failed; consequently, no effort to override the Governor's veto of the third such bill was attempted.

64. During the course of the legislative effort to overturn the Denial Order as a practical matter, the Governor, through her staff, engaged in negotiations with Sunflower regarding Sunflower's efforts to secure KDHE approval to construct the Power Plants. During the course of these negotiations, the Governor publicly stated that she had advised Sunflower that she would agree to KDHE's issuance of a permit for the construction of one of the two proposed Power Plants, but not both, on the grounds that one new unit would be sufficient to meet the electricity needs of Sunflower's members and their consumers.

65. The comments made by the Lt. Governor during the course of the legislative effort to overturn the Denial Order indicate that he also had participated and was continuing to participate in the Sebelius-Parkinson Administration's decisions regarding the handling of

Sunflower's Application and that he shared the same improper motivations as the Secretary and the Governor.

66. During the course of the legislative effort to overturn the Denial Order, the Lt. Governor also made a number of public statements indicating that the Sebelius-Parkinson Administration would agree to KDHE's issuance of a permit to Sunflower authorizing the construction of a single new unit of sufficient generating capacity to meet the projected demands of Sunflower's Kansas consumers for electricity, but that the amount of CO<sub>2</sub> emissions that would be generated by the two proposed Power Plants was "just too much."

67. During the course of the legislative effort to overturn the Denial Order, the Lt. Governor also indicated in his public comments that, even if the Kansas Legislature were to override the Governor's vetoes, the Sebelius-Parkinson Administration has the intention and means to block the construction of the proposed Power Plants.

68. During the course of the legislative effort to overturn the Denial Order, the Secretary received an inquiry from a company considering the possibility of locating in Kansas a new refinery that would generate a greater amount of CO<sub>2</sub> emissions per year than the Power Plants would. The Secretary advised that company that he did not perceive any impediment to it being issued a permit by KDHE authorizing construction of its proposed new refinery.

69. Subsequently, the Secretary's response to the inquiry regarding KDHE's position regarding the proposed new refinery became the subject of discussion during the course of the legislative effort to overturn the Denial Order. Stating that he was troubled by an assertion by a legislator that he had told the inquiring company that it would not receive a permit from KDHE, the Secretary stated that "if the company's permit application mirrored the permit application it had filed in South Dakota and adhered to the company's public commitment to the environment,

a permit would most likely be issued” and went on to state that “[s]ince January 2003, the agency has issued more than 3,000 air-quality permits”; that “[u]nder this administration, the only air-quality permit denied has been the Sunflower permit”; and that “[s]ince the denial of the Sunflower Electric Power Corp. permit for a proposed coal-fired plant near Holcomb, KDHE has issued more than 300 air-quality construction and operating permits.”

70. The Governor’s comments made after the Secretary’s issuance of the Denial Order indicate that Defendants’ purpose in denying the Application was to prevent the exportation outside the State of Kansas of electricity that would be generated by the Power Plants.

71. The Secretary’s issuance of the Denial Order contravened the normal KDHE permitting process, was made without reference to any established standards and in the absence of any rational factual basis for his so-called “substantial endangerment finding,” and was arbitrary and capricious in all respects.

72. Thus, upon information and belief, the Secretary’s issuance of the Denial Order and the ongoing efforts by the Governor, the Lt. Governor, and the Secretary to deny Sunflower authority to construct the proposed new Power Plants has been, and continues to be, motivated by Defendants’ desires to further their individual political fortunes by catering to the environmental lobby that opposes the Holcomb Expansion Project and to increase their chances of being elected or appointed to some state or national office, all at the expense of Sunflower’s constitutional rights and the rule of law in Kansas.

73. As a result of the Secretary’s issuance of the Denial Order and Defendants’ ongoing efforts to block the construction of the Power Plants sought by Sunflower’s Application, the costs of constructing the Power Plants will be substantially greater than would have been the

case had the Secretary approved Sunflower's Application and issued a construction permit within the time period allowed by Kansas law, *i.e.*, within 18 months after KDHE's receipt of a complete application. Sunflower would have been able to enter into contracts at that time to lock in the cost of the Power Plants and protect Kansas consumers from higher electricity costs.

74. In the last two years, the reasonably projected costs of constructing the Project have increased by more than 60% and are reasonably expected to continue to rapidly escalate. If Sunflower does not obtain the permit necessary to authorize construction of the Power Plants in the very near future, the cost of construction may well increase to the point that the Project cannot be financed at all.

75. As a consequence, the ultimate cost to the consumers who must obtain their electricity from Sunflower's Member Co-ops will be significantly higher than would have been the case had the Secretary timely issued a permit authorizing construction of the Power Plants.

76. Additionally, the cost to Sunflower of providing electric power likely will rise to a level that will constitute a disincentive to any other new development in Central and Western Kansas.

77. Sunflower has incurred substantial consultants' fees, attorneys' fees and other third-party costs and expenses in connection with the preparation and prosecution of its Application.

78. Sunflower has incurred substantial attorneys' fees and expenses in prosecuting administrative and judicial appeals of the Denial Order.

#### **COUNT I – Denial of Equal Protection of the Laws**

79. Sunflower hereby incorporates by reference as if fully set forth herein, all of the allegations contained in paragraphs 1 through 78, inclusive.

80. By their acts as set forth above, Defendants have denied Sunflower, as a member of the class of applicants for permits to construct sources of CO<sub>2</sub> emissions located in Kansas, its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution in that Defendants have, without any articulated standard and without rational or reasonable basis, refused to apply to Sunflower and other such applicants the same types of processes and determination standards that they have applied in evaluating all applications for PSD construction permits submitted by applicants for permits to construct sources of air pollutant emissions other than CO<sub>2</sub>.

81. By their acts as set forth above, Defendants have further denied Sunflower, as a class of one, its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, in that the Denial Order and Defendants' subsequent conduct prohibits the potential emissions of CO<sub>2</sub> from the Power Plants when Defendants have authorized other persons to construct and operate similarly situated proposed and existing sources of CO<sub>2</sub> emissions in Kansas.

82. Defendants' discriminatory action against Sunflower is irrational, arbitrary, deliberate, intentional, made in bad faith, and improperly motivated by a desire to prevent the export of electricity out of the State of Kansas and to further Defendants' personal political aspirations.

83. Defendants' conduct, as set forth above, is not supported by any legitimate government interest.

84. Defendants' conduct, as set forth above, is not rationally related to any legitimate government purpose.

85. Defendants acted under color of the laws of the State of Kansas.

86. Defendants' conduct, as set forth above, constitutes a violation of 42 U.S.C. § 1983.

87. An actual controversy exists between the parties regarding whether Defendants have denied and continue to deny Sunflower its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

88. Sunflower has suffered and will continue to suffer tremendous injury from Defendants' conduct.

89. Therefore, Sunflower is entitled to a declaratory judgment by this Court finding that the Denial Order and Defendants' ongoing actions to deny Sunflower authorization to construct the Power Plants based upon the potential CO<sub>2</sub> emissions that would be generated have denied Sunflower its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and continue to do so.

90. Sunflower has suffered irreparable harm due to Defendants' violations of its constitutional right to equal protection of the laws and will suffer further irreparable harm for which it has no remedy at law to make it whole unless Defendants are restrained from their continuing violations of Sunflower's rights in this regard.

91. The harm to Sunflower if an injunction is not granted substantially outweighs any harm that the Defendants might suffer if an injunction is granted.

92. Enjoining the Defendants from violating Sunflower's constitutional right to equal protection of the laws serves the public interest.

93. For these reasons, Sunflower is entitled to a preliminary injunction and a permanent injunction enjoining Defendants from taking into account Section 65-3012 or otherwise taking into account the potential CO<sub>2</sub> emissions from the Power Plants in connection

with any future proceedings relating to Sunflower's Application and an award of costs, expenses, and attorneys' fees under 42 U.S.C. § 1988.

94. Because Defendants have unequivocally stated their intention to take whatever steps are necessary to continue blocking Sunflower's efforts to obtain a permit authorizing construction of the Power Plants, this Court should expressly assert its continuing jurisdiction over the matters that are the subject of this action so as to most effectively ensure Defendants' compliance with the Court's orders and thereby preclude Defendants from further violating Sunflower's constitutional right to equal protection of the laws.

### **COUNT II - Violation Of Commerce Clause**

95. Sunflower hereby incorporates by reference as if fully set forth herein, all of the allegations contained in paragraphs 1 through 94, inclusive.

96. By their conduct, as set forth above, Defendants have violated Sunflower's right to conduct interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8, in that (a) the Denial Order and Defendants' ongoing efforts to deny Sunflower authorization to construct the proposed new Power Plants sought by Sunflower's Application are motivated by the fact that some of the electricity to be generated by the proposed new Power Plants would be sold to one or more customers not located in Kansas and used by consumers who do not reside in Kansas, and (b) the burden on interstate commerce is substantial and excessive in relation to any putative benefit to Kansas.

97. Defendants' conduct, as set forth above, is not supported by any legitimate government interest.

98. The burden imposed on interstate commerce by Defendants' conduct is clearly excessive in relation to any putative local benefit.

99. Defendants acted under color of the laws of the State of Kansas.

100. Defendants' conduct, as set forth above, constitutes a violation of 42 U.S.C. § 1983.

101. An actual controversy exists between the parties regarding whether Defendants have violated Sunflower's right to conduct interstate commerce under the Commerce Clause of the United States Constitution.

102. Therefore, Sunflower is entitled to a declaratory judgment by this Court, finding that the Denial Order and Defendants' ongoing efforts to deny Sunflower authorization to construct the proposed new Power Plants sought by Sunflower's Application have violated Sunflower's right to conduct interstate commerce under the Commerce Clause of the United States Constitution and continue to do so.

103. Sunflower has suffered irreparable harm as a result of Defendants' interference with Sunflower's right to conduct interstate commerce in violation of the Commerce Clause of the United States Constitution and will suffer further irreparable harm for which it has no remedy at law to make it whole unless Defendants are restrained from their continuing violation of Sunflower's right in this regard.

104. The harm to Sunflower if an injunction is not granted substantially outweighs any harm that Defendants might suffer if an injunction is granted.

105. Enjoining Defendants from violating Sunflower's constitutional right to conduct interstate commerce serves the public interest.

106. For these reasons, Sunflower is entitled to a preliminary injunction and a permanent injunction enjoining Defendants from taking into account in connection with any further proceedings relating to Sunflower's Application the possibility that some of the electricity to be generated by the Power Plants would be sold to one or more customers not

located in Kansas and used by consumers who do not reside in Kansas and an award of costs, expenses, and attorneys' fees under 42 U.S.C. § 1988.

107. Because Defendants have unequivocally stated their intention to take whatever steps are necessary to continue blocking Sunflower's efforts to obtain a permit authorizing construction of the Power Plants, this Court should expressly assert its continuing jurisdiction over the matters that are the subject of this action so as to most effectively ensure Defendants' compliance with the Court's orders and thereby preclude Defendants from further violating Sunflower's constitutional right to be free from unlawful discrimination in its exercise of its right to engage in interstate commerce.

#### **REQUEST FOR RELIEF**

For the reasons stated above, Plaintiff Sunflower respectfully requests this Court to render judgment in its favor and to grant it the following relief:

A. a declaration that the Denial Order and Defendants' past and ongoing actions to deny Sunflower authorization to construct the Power Plants as sought by Sunflower's Application based upon the potential CO<sub>2</sub> emissions that would be generated by the Power Plants violate Sunflower's right to equal protection of the laws under the Fourteenth Amendment to the United State Constitution;

B. a declaration that Defendants have violated and continue to violate Sunflower's right to conduct interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8;

C. an order vacating the Denial Order;

D. the issuance of a preliminary injunction and a permanent injunction enjoining Defendants from taking into account Section 65-3012 or otherwise taking into account the

potential CO<sub>2</sub> emissions from Sunflower's proposed new Power Plants in connection with any future proceedings relating to Sunflower's Application;

E. the issuance of a preliminary injunction and a permanent injunction enjoining Defendants from taking into account in connection with any further proceedings relating to Sunflower's Application the possibility that some of the electricity to be generated by the proposed new Power Plants would be sold to one or more customers not located in Kansas and used by consumers who do not reside in Kansas;

F. the retention of jurisdiction over the matters that are the subject of this action through all further proceedings relating to Sunflower's Application;

G. an award of costs, expenses, and attorney's fees incurred in prosecuting this action, the amounts of which are to be determined herein, under 42 U.S.C. § 1988; and

H. all further appropriate relief.

Dated: November 17, 2008

Respectfully submitted,

/s/W.C. Blanton

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