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UNITED STATES TAX COURT

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CROSS REFINED COAL LLC,  
USA REFINED COAL LLC,  
TAX MATTERS PARTNER,

Petitioner,

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent.

19502-17

Docket No.

**PETITION FOR READJUSTMENT OF PARTNERSHIP ITEMS**  
**UNDER CODE SECTION 6226**

USA Refined Coal LLC ("Petitioner"), in its capacity as the tax matters partner of Cross Refined Coal LLC ("Cross"), hereby petitions for a redetermination of adjustments for the tax years ending December 31, 2011 ("2011 Tax Year") and December 31, 2012 ("2012 Tax Year") set forth by the Commissioner of Internal Revenue ("Commissioner") in a Notice of Final Partnership Administrative Adjustment dated June 20, 2017 (the "FPAA"), and as the basis for this proceeding, alleges the following:

1. **Petitioner.** Petitioner is a Delaware limited liability company with a **Address Used By Court** mailing address of 200 Seaport Boulevard, Mail Zone ZW9B, Boston, MA 02210.

2. **Partnership.** Cross is a Delaware limited liability company that maintained its principal place of business in South Carolina during the taxable years at issue. As of January 1, 2010, Cross was classified as a partnership for federal tax purposes, but terminated as a partnership under section 708(b)(1)(A)<sup>1</sup> on November 13, 2013.

2.a. Cross timely filed its Form 1065 for the 2011 Tax Year (the “2011 Form 1065”) and the 2012 Tax Year (the “2012 Form 1065”) with the Internal Revenue Service Center in Ogden, Utah.

2.b. During the taxable years at issue, three entities held interests in Cross: (1) Petitioner held a 51 percent interest; (2) AJG Coal, Inc. (“AJGC”), a Delaware corporation and wholly owned subsidiary of Arthur J. Gallagher & Co., held a 24 percent interest; and (3) Schneider Electric Investments 2, Inc. (“Schneider”), a Delaware corporation and wholly owned, indirect subsidiary of Schneider Electric S.E., held a 25 percent interest.

2.c. During the taxable years at issue, Petitioner was classified as a partnership for federal tax purposes, and two entities held interests in Petitioner during those periods: (1) Feedstock Investments V, LLC (“Feedstock”), a Delaware limited liability company and wholly owned, disregarded entity of FMR LLC (“FMR”), held a 99 percent interest; and (2) AJGC held a 1 percent interest.

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<sup>1</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

2.d. AJGC, Petitioner (including FMR), and Schneider are the “Partners” for purposes of this Petition.

3. **Tax Matters Partner.** Petitioner is the tax matters partner of Cross, as defined in section 6231(a)(7), having been designated as a successor tax matters partner pursuant to Treasury Regulation § 301.6231(a)(7)-1(d) on or about May 16, 2017.

4. **Notice of Final Partnership Administrative Adjustment.** The FPAA adjusted certain Cross partnership items for its 2011 Tax Year and 2012 Tax Year. The Nashville, Tennessee, office of the Internal Revenue Service issued the FPAA. A copy of the FPAA, including accompanying statements and schedules, is attached hereto and is marked as “Exhibit A.”

5. **Amounts in Dispute.**

5.a. **2011 Tax Year.** The Commissioner determined the following adjustments to Cross’s partnership items for its 2011 Tax Year:

5.a.1. The Commissioner reduced Cross’s: (1) gross receipts or sales by \$200,141,122; (2) cost of goods sold by \$206,063,239; (3) taxes and licenses by \$250; (4) depreciation by \$1,626,430; (5) other deductions by \$6,699,259; (6) portfolio interest by \$465; (7) section 754 depreciation by \$214,937; (8) investment income included in portfolio income by \$465; (9) section



45(e)(8) refined coal production tax credits by \$13,822,682; and (10) adjusted tax preference items depreciation by \$323,367.

5.a.2. The Commissioner reduced: (1) Schneider's claimed section 45(e)(8) refined coal production tax credits by \$3,455,670 and (2) Petitioner's claimed section 45(e)(8) refined coal production tax credits by \$7,049,568.

5.a.3. The Commissioner disallowed Cross's claimed losses in the amount of \$14,248,056.

5.b. 2012 Tax Year. The Commissioner determined the following adjustments to Cross's partnership items for its 2012 Tax Year:

5.b.1. The Commissioner reduced Cross's: (1) gross receipts or sales by \$172,909,200; (2) cost of goods sold by \$177,746,252; (3) taxes and licenses by \$457; (4) depreciation by \$1,163,780; (5) other deductions by \$5,508,086; (6) portfolio interest by \$3,157; (7) section 754 depreciation by \$153,501; (8) investment income included in portfolio income by \$3,157; (9) section 45(e)(8) refined coal production tax credits by \$12,003,303; and (10) adjusted tax preference items depreciation by \$138,675.

5.b.2. The Commissioner reduced: (1) Schneider's claimed section 45(e)(8) refined coal production tax credits by \$3,000,826 and



(2) Petitioner's claimed section 45(e)(8) refined coal production tax credits by \$6,121,684.

5.b.3. The Commissioner disallowed Cross's claimed losses in the amount of \$11,509,375.

5.c. Petitioner disputes all determinations made by the Commissioner in the FPAA.

**6. Assignments of Error.** The Commissioner's determinations set forth in the FPAA are based on the following errors:

6.a. The Commissioner erred in determining that Cross and its Partners did not "establish[] the existence of Cross as a partnership as a matter of fact."

6.b. The Commissioner erred in determining that the formation of Cross among Petitioner, AJGC, and Schneider "was not in substance a partnership for federal income tax purposes because it was not formed to carry on a business or for the sharing of profits and losses from the production or sale of refined coal."

6.c. The Commissioner erred in determining that Cross was created to facilitate a prohibited sale of tax credits.

6.d. The Commissioner erred in determining that Cross is not entitled to deduct an ordinary loss because "Cross has not established that it or its

[Partners] incurred ordinary or necessary or credible expenses in connection with a trade or business or other activity engaged in for profit.”

6.e. The Commissioner erred in failing to reallocate any items of income, gain, deduction, loss or credit to the Partner or other Partners entitled to such items.

6.f. The Commissioner erred in failing to permit the Partners to deduct all or any portion of the capital contributions that each Partner made to Cross.

7. **Supporting Facts.** The facts on which Petitioner relies as the basis for its case are as follows:

7.a. Overview.

7.a.1. Congress enacted section 45 renewable energy production tax credits as an incentive to encourage investment in renewable energy production activities. Congress later extended the credits to refined coal producers whose refined coal met certain pollution reduction requirements when burned to generate electricity. The section 45 refined coal production credits incentivized investment in these businesses, which needed financial incentives to be economically feasible.<sup>2</sup>

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<sup>2</sup> Refined coal production tax credits, when referenced in this Petition, refer to the credits for refined coal under section 45(e)(8).

7.a.2. In 2010, the Partners pooled their capital and their investment and technical know-how to establish three partnerships—Cross, Winyah Refined Coal LLC (“Winyah”) and Jefferies Refined Coal LLC (“Jefferies”)—that would produce and sell refined coal to three coal-fired power plants owned by South Carolina Public Service Authority (“Santee Cooper”), an electric utility. Cross, Winyah, and Jefferies are the “Refined Coal Production Partnerships” for purposes of this Petition. The Refined Coal Production Partnerships were among the first businesses to produce refined coal on a commercial scale using a new coal refining technology (the “Technology”) developed by Chem-Mod LLC (“Chem-Mod”).

7.a.3. Before the Partners agreed to pool their resources, they conducted due diligence to assess the risks (the downside) and rewards (the upside) of their potential investments. The Partners identified various business risks, including problems that could affect refined coal production output. The businesses’ financial returns would vary with and depend on the amount of refined coal that the Refined Coal Production Partnerships were able to produce and sell. Even though they took steps to mitigate risks, all three Refined Coal Production Partnerships (including Cross) experienced significant business interruptions that resulted in reduced refined coal production, which negatively affected the partnerships’ financial performance.



7.a.4. The Partners worked closely together to manage these businesses and address the various issues that caused business interruptions.

7.a.5. The Partners had economic incentives to identify and correct issues that could affect or even fully interrupt their production activities. When the Refined Coal Production Partnerships produced and sold refined coal, they would receive revenues and tax credits. Both revenues and credits were necessary for the economic feasibility of these refined coal businesses because sales revenues alone would be less than operating costs. The Partners also anticipated other potential economic benefits gained from the experience of establishing and managing refined coal businesses that used the new Technology.

7.a.6. In addition, the Partners agreed to contribute their pro rata share of the refined coal production businesses' working capital needs to fund partnership operations. There was no upper limit on the potential amount of each Partner's capital contribution obligation.

7.a.7. Even when the refined coal production facilities were idle or producing less refined coal than projected, the Partners were still required to make additional capital contributions to the Refined Coal Production Partnerships (including Cross) to maintain the production capabilities.

7.a.8. Although the Refined Coal Production Partnerships produced millions of tons of refined coal using the Technology, frequent and often

lengthy business interruptions prevented the partnerships from producing close to the amount of refined coal that the Partners had originally projected. These interruptions negatively affected the financial performance of these businesses. For instance, the business interruptions Jefferies experienced were so severe that its operations resulted in a financial loss on an after-tax basis.

7.b. Legislative Efforts to Incentivize Refined Coal Production.

7.b.1. Congress enacted the Energy Policy Act of 1992 (“Energy Policy Act”) to encourage the development and use of renewable energy sources. The Energy Policy Act provided for energy production tax credits in section 45. The section 45 tax credits were intended to enhance the development of renewable energy source technology and promote competition between renewable energy sources and conventional energy sources.

7.b.2. In 2004, Congress amended and expanded section 45 to include tax credits for the production and sale of refined coal. Congress enacted section 45(e)(8) to incentivize refined coal production. Without these refined coal production tax credits, it would be very difficult or impossible for businesses producing refined coal to earn a profit.

7.b.3. As originally enacted in 2004, section 45(c)(7) required that refined coal (1) meet certain emission reduction thresholds and (2) increase the market value of the refined coal, as compared to the value of the feedstock coal

(i.e., raw coal) used to produce the refined coal, by at least 50 percent. In 2008, Congress removed the value-enhancement requirement and adopted more stringent emissions-reduction requirements, but only for facilities first placed in service after December 31, 2008.

7.c. Development of the Refined Coal Production Partnerships.

7.c.1. In 2004, AJGC made an investment in Chem-Mod, which planned to develop the Technology. Between 2005 and 2008, testing was performed for Chem-Mod at the University of North Dakota's Energy & Environmental Research Center ("EERC") that demonstrated refined coal produced using the Technology would meet the section 45 emissions reduction qualifications. However, it was not until late 2009 that the Technology was deployed in actual commercial-scale electricity production.

7.c.2. Beginning in or around 2008, AJGC set out to build refined coal production facilities at utility sites, including the facilities that ultimately were owned by the Refined Coal Production Partnerships (including Cross). On April 29, 2008, Chem-Mod licensed to AJGC the right to use the Technology, as well as any improvements that Chem-Mod might develop, in exchange for a royalty payment. In addition, AJGC identified electric utilities that would be interested in using refined coal to generate electricity, engaged



companies to construct refined coal production facilities, and identified potential partners.

7.c.3. Electric utilities were hesitant to use refined coal to generate electricity. Utilities believed that burning refined coal to generate electricity presented potential risks, including damage to their boilers that could outweigh any possible financial benefits.

7.c.4. AJGC eventually identified Santee Cooper as a utility willing to use refined coal for energy generation. AJGC and Santee Cooper identified the Cross, Winyah, and Jefferies generating stations located in Pineville, Georgetown, and Moncks Corner, South Carolina, as sites where refined coal production facilities could be constructed and operated.

7.c.5. In June 2009, AJGC approached FMR to discuss a potential opportunity to become a partner in the refined coal production business. FMR had energy industry experience, including participating in the development and management of other energy businesses. In addition, FMR was in a financial position to invest in partnerships that would produce refined coal. Thus, AJGC viewed FMR as an attractive partner that would be engaged in the Refined Coal Production Partnerships' businesses.

7.c.6. In or around January 2009, AJGC approached Schneider to discuss a potential opportunity to become a partner in a refined coal production

business. As a global manufacturer of electrical safety and control products, Schneider had experience with energy investments. In addition, Schneider was in a financial position to invest in partnerships that would produce refined coal. Thus, AJGC viewed Schneider as an attractive partner that would be engaged in the Refined Coal Production Partnerships' businesses.

7.c.7. During 2009, although FMR and Schneider had not yet entered the refined coal production business, AJGC negotiated contractual terms for the construction and operation of refined coal production facilities at Santee Cooper's Cross, Winyah, and Jefferies generating stations. Specifically, AJGC directly negotiated terms of various agreements with, among others, Santee Cooper and the potential manager and operator of the refined coal facilities. Despite not being Partners at the time, FMR and Schneider generally participated in these negotiations by reviewing draft agreements, providing comments, and giving input on various issues.

7.c.8. The Partners also negotiated with Taggart Global, LLC ("Taggart Global"), an engineering, project management, and contract operations company, to construct the refined coal production facilities. While they were negotiating the agreements, AJGC also hired Taggart Global to visit the Santee Cooper generating stations to survey and perform other preliminary work and to estimate the scope of the construction projects. In August 2009, AJGC contracted

with Taggart Global to construct the refined coal production facilities at the Cross, Winyah, and Jefferies generating sites. By December 19, 2009, Taggart Global completed construction of the refined coal production facilities at those sites.

7.c.9. On December 15, 2009, a special trade contractor and operations company related to Taggart Global, Taggart Global Operations, LLC (“Taggart Operations”) executed contracts with the Refined Coal Production Partnerships to manage and operate the refined coal production facilities.

7.c.10. The Partners negotiated with LandGas Coal Management LLC (“LandGas”) to serve as the manager of Petitioner and the three Refined Coal Production Partnerships. In 2012, the Partners selected Pitt Clean Energy Management, Inc. (“Pitt”) to replace LandGas as manager. The Partners required that the manager prepare and maintain books of account, records, and partnership reports. In addition, the Partners directed the manager to retain an independent accounting firm to audit the Refined Coal Production Partnerships’ books of account and records.

7.d. Formation of the Refined Coal Production Partnerships.

7.d.1. In December 2009, AJGC formed Cross, Winyah, Jefferies, and Petitioner as single-member Delaware limited liability companies. On December 21, 2009, AJGC made a series of transfers in return for membership interests. AJGC transferred 49 percent of the interests in the Cross, Winyah, and



Jefferies refined coal production facilities to their corresponding Refined Coal Production Partnerships in exchange for 49 percent interests in each Refined Coal Production Partnership. It also transferred its remaining 51 percent interests in the refined coal production facilities to Petitioner, which in turn transferred those interests to the Refined Coal Production Partnerships in return for 51 percent membership interests in each Refined Coal Production Partnership.

7.d.2. On December 21, 2009, AJGC sublicensed the Technology to each Refined Coal Production Partnership (the "Sublicense") in return for royalties.

7.d.3. On January 1, 2010, FMR (through Feedstock) acquired a 99 percent interest in Petitioner from AJGC (which retained a 1 percent interest in Petitioner) for \$9.5 million. That amount was designed to reflect FMR's share of the approximate construction costs of the Cross, Winyah, and Jefferies refined coal production facilities. Of the \$9.5 million, approximately \$4 million was allocable to Cross. On that same date, Petitioner and the Refined Coal Production Partnerships became classified as partnerships for federal tax purposes.

7.d.4. On March 1, 2010, Schneider acquired a 25 percent interest in each Refined Coal Production Partnership from AJGC for \$4.25 million. That amount was designed to reflect Schneider's share of the approximate construction costs of the Cross, Winyah, and Jefferies refined coal production

facilities. Of the \$4.25 million, approximately \$1.8 million was allocable to Cross.

Schneider also agreed to pay AJGC an amount equal to 5 percent of every production tax credit allocated to it.

7.d.5. The Partners agreed to share items of income, gain, deduction, loss, and credit in proportion to their partnership interests. For the Refined Coal Production Partnerships, Petitioner's share was 51 percent, Schneider's share was 25 percent, and AJGC's share was 24 percent. For Petitioner, Feedstock's share was 99 percent and AJGC's share was 1 percent.

7.d.6. The Partners also contributed capital to the Refined Coal Production Partnerships for the purpose of establishing (and thereafter maintaining) a working capital account for Taggart Operations to use in its operation of the refined coal production facilities. As part of its agreement with Taggart Operations, Cross had to establish a working capital account of about \$2.26 million when its refined coal facility became fully operational. Of that initial amount, Petitioner contributed approximately \$1.15 million and AJGC contributed approximately \$1.11 million. Schneider subsequently reimbursed AJGC for its approximate share of the working capital contributions when it became a member of Cross.

7.e. Due Diligence Performed by the Partners.

7.e.1. Before acquiring their interests in the Refined Coal Production Partnerships, the Partners evaluated the potential risks and a range of expected financial results associated with the partnerships.

7.e.2. As AJGC continued to develop the refined coal production businesses, pilot-scale testing was performed at EERC to measure the amount of emissions reductions expected to result from the combustion of refined coal in commercial boilers used at utilities. The test results indicated that the Technology was capable of reducing emissions to levels that would meet the requirements of section 45.

7.e.3. AJGC also undertook other analyses related to the development of the refined coal production businesses, including evaluating the potential effects of the Technology on the environment, examining potential intellectual property issues, and reviewing potential supply chain issues, such as the availability of the chemicals needed to produce refined coal using the Technology.

7.e.4. AJGC provided FMR and Schneider with, among other things, information on the Technology, Santee Cooper, and the power-generating stations. The information included data on anticipated utility coal usage, chemicals needed at the three Santee Cooper sites, operator budget estimates, equipment



costs, financial projections, and technical descriptions of the Technology and the underlying intellectual property.

7.e.5. Over a period of approximately six months, FMR investigated various structural, environmental, regulatory, real estate, and tax issues related to the refined coal operations. For example, in September and October 2009, FMR performed site visits that included meeting with Santee Cooper personnel.

7.e.6. FMR also engaged John T. Boyd Company ("Boyd"), an independent consulting firm, to: (1) identify any environmentally hazardous materials used in the coal refining process; (2) identify environmental permits required for refined coal operations; (3) opine on appropriate control measures established to prevent environmental contamination; and (4) review the environmental risk and compliance history of the Cross, Winyah, and Jefferies generating stations and opine on known material environmental liabilities and risks that might exist.

7.e.7. FMR also engaged Boyd to perform an operational review of the refined coal production facilities, including an analysis of the Technology, the design of each facility, and the processing that each facility would perform. Boyd also assessed whether the facilities were placed in service on or before December 31, 2009.

7.e.8. Boyd conducted site visits and set forth its findings and conclusions in detailed reports.

7.e.9. Schneider also conducted due diligence, including investigation of various operational, environmental, regulatory, real estate, and tax issues related to the refined coal operations. For example, Schneider shared the cost of Boyd's services with FMR and also reviewed Boyd's report regarding environmental risks at the refined coal manufacturing sites at the Santee Cooper's Cross, Winyah, and Jefferies generating stations.

7.e.10. As part of their due diligence, the Partners also evaluated the potential financial performance of the Refined Coal Production Partnerships.

7.e.11. FMR analyzed the operating costs of and economic benefits from operating the refined coal production facilities. FMR projected that through its interests in the Refined Coal Production Partnerships, it would produce annually between 3.5 million and 5.3 million tons of coal, entitling it to significant sales revenue and between \$22 million and \$33 million of tax credits.

7.e.12. The Partners also considered the long-term viability of the refined coal operations, from which they would gain valuable experience and knowledge. The Partners believed that the mercury-reducing benefits of the

Technology could be in greater demand in the future as emission reduction requirements became standardized in the energy market.

7.f. Anticipated and Other Potential Risks of the Refined Coal Operations.

7.f.1. The Partners anticipated that their proposed refined coal operations presented a number of potential risks that, if encountered, could affect their financial returns.

7.f.2. Refined coal produced using the Technology could potentially cause issues with or damage to the utility's boilers and ancillary equipment. As of 2009, the extent of the potential damage was uncertain because no utilities were using refined coal produced using the Technology to generate electricity. Santee Cooper negotiated for the unilateral right to suspend its refined coal purchases if the refined coal produced by the Refined Coal Production Partnerships failed to meet certain quality standards.

7.f.3. Regulatory and environmental disruption and liability concerns existed for the Refined Coal Production Partnerships' businesses. Regulatory and environmental requirements were also subject to future changes, which could lead to additional business disruptions.

7.f.4. The Refined Coal Production Partnerships were required to obtain and maintain appropriate permits. Santee Cooper also was required to



ensure that it had appropriate permits to burn refined coal in its generating stations. The permitting processes for building and maintaining a refined coal production facility and burning refined coal in a generating station can present a significant level of uncertainty, involve costly hurdles, and result in regulators completely shutting down a facility until they issue appropriate permits. It is also not uncommon for regulators to use the permitting process to impose additional requirements on applicants, including changes to previously established requirements that are unrelated to the production or use of refined coal. Such an imposition could make using refined coal an unattractive option to a utility because it creates risks of having to comply with additional, potentially more onerous and costly regulatory requirements.

7.f.5. Future changes in the energy markets presented separate risks to the Refined Coal Production Partnerships. The Refined Coal Production Partnerships' businesses depended on Santee Cooper's demand for refined coal and Santee Cooper's customers' electricity usage. Demand for electricity produced from coal could have changed over time due to, among other things, technology advances in energy-efficient products and generating equipment, climate changes, and economic challenges. During due diligence, fluctuations in demand were observed at the Jefferies and Winyah electricity generating stations as some coal-fired units had been shut down for several months.

7.f.6. The Refined Coal Production Partnerships' use of the Technology to produce refined coal exposed them to intellectual property risks. AJGC and each of the Refined Coal Production Partnerships (as well as a number of other entities that produced and sold refined coal) were named as defendants in litigation filed in the United States District Court for the Northern District of Illinois (docket number 14-2510). The District Court dismissed the plaintiff's complaint with prejudice, holding that the plaintiff had not established that the Technology "directly infringe[d]" on the plaintiff's patent. The plaintiff has appealed the decision. The appeal is currently pending with the United States Court of Appeals for the Federal Circuit at docket number 17-1036.

7.f.7. The Partners also recognized that there were other risks inherent in starting new refined coal production businesses that could not be identified through due diligence. These potential issues could delay or suspend operations and require additional capital to resolve. For example, mechanical problems with equipment could prevent the partnerships from producing significant amounts of refined coal. Similarly, supply chain issues, including procuring the necessary chemical additives to use with the Technology, could also pose potential challenges and risks.

7.g. Efforts to Manage Risks.

7.g.1. The Partners took certain measures to manage their exposure to some risks they identified. Not only did these features not eliminate risk, ultimately several identified risks arose that negatively affected the Refined Coal Production Partnerships' operations and returns.

7.g.2. Liquidated Damages Payment. In connection with the acquisition of Feedstock's 99 percent interest in Petitioner, FMR negotiated for the right to sell any or all of Petitioner's interests in the Refined Coal Production Partnerships to AJGC if certain events occurred, including extended periods of non-operation. If FMR exercised this right, AJGC would be required to make a "liquidated damages" payment to Feedstock. This payment was equal to the unamortized portion of Feedstock's purchase price. This payment did not allow Feedstock to recover its pro rata share of the working capital cash payments it was required to make to the Refined Coal Production Partnerships or any other out-of-pocket expenses that it had invested. The agreements executed by Schneider did not contain a similar liquidated damages provision that would permit Schneider to recover a portion of its investment in Cross.

7.g.3. Private Letter Ruling Process.

7.g.3.A. The ability to produce and sell refined coal that satisfied the emissions reduction standards set forth in section 45 was critical to the



economic feasibility of the Refined Coal Production Partnerships. Until December 2009, just weeks before Feedstock acquired its interest in Petitioner, the IRS had not provided any guidance to inform taxpayers as to how the certification of the requisite emission reductions was to be performed. The guidance provided in Notice 2009-90, 2009-51 I.R.B. 859, did not fully address all relevant questions. Notice 2010-54, 2010-40 I.R.B. 403, provided additional clarity, but was not published until after both Feedstock and Schneider had invested in the Refined Coal Production Partnerships.

7.g.3.B. During the due diligence process, the Partners agreed that they would seek private letter rulings (“PLRs”) from the IRS that would confirm their refined coal met the emission-reduction requirements in section 45.

7.g.3.C. In their requests for the PLRs, the Refined Coal Production Partnerships disclosed the structure and underlying economics of the transactions to the IRS. For example, in February 2010, Cross submitted to the IRS a summary of the partnership operations and its ownership structure and provided relevant transactional documents as exhibits.

7.g.3.D. On October 25, 2010, the IRS issued PLRs to the Refined Coal Production Partnerships. The PLRs stated that, “[e]ach ton of refined coal sold to [Santee Cooper] . . . will be sold for a price that is seventy-five

cents (\$0.75) per ton less than the price paid by [Cross] for the feedstock coal . . . . This subsidy in the price is designed to compensate [Santee Cooper] for the risk to its boilers and its generation process in general from the use of refined coal rather than its traditional feedstock coal and to induce it to use the [refined coal].” The PLRs’ conclusions were limited to confirming (1) the Refined Coal Production Partnerships produced refined coal that constitutes “refined coal” within the meaning of section 45(c)(7), provided that it satisfies the qualified emission reduction test; (2) the Refined Coal Production Partnerships could rely on pilot scale testing to satisfy the qualified emission reduction test; and (3) the Refined Coal Production Partnerships could satisfy technical requirements by laboratory analyses.

7.g.3.E. The PLRs provided the Refined Coal Production Partnerships guidance on how to demonstrate to the IRS that their coal met the “qualified emission reduction” criteria in section 45. The partnerships would still need to produce refined coal that satisfied the “qualified emission reduction” criteria and accurately perform testing or laboratory analyses described in the PLRs in order to receive any refined coal production tax credits.

7.h. The Refined Coal Production Partnerships' Operations and the Partners' Involvement in Partnership Activities.

7.h.1. Santee Cooper sold feedstock coal to the Refined Coal Production Partnerships, which it delivered to the refined coal production facilities using conveyor belts. The Refined Coal Production Partnerships used that feedstock coal to produce refined coal. Following production, the Refined Coal Production Partnerships sold the refined coal to the Santee Cooper generating stations for use in generating electricity.

7.h.2. Taggart Operations operated the Refined Coal Production Partnerships' facilities, monitored inventory and chemical supplies, and managed the workforce that Taggart Operations provided.

7.h.3. The Partners were actively involved in the management of the Refined Coal Production Partnerships. The Partners maintained control over major decisions of the Refined Coal Production Partnerships, including budget approvals and the replacement of operators and managers. The Partners also were actively involved in overseeing the refined coal production activities and each participated in addressing the operational and technical concerns that arose during the course of the partnerships. The Partners frequently evaluated those problems and took steps to ensure that corrective actions would be taken.



7.h.4. LandGas (later Pitt) and Taggart Operations regularly communicated with the Partners on production and testing strategies.

7.h.5. The Partners generally received frequent reports from the manager that provided detail about the refined coal production of each Refined Coal Production Partnership. The Partners also received monthly reports that explained vendor payments and any additional capital contributions the Partners were required to make. The Partners reviewed these reports and frequently discussed their contents among themselves and with the manager and operator. The Partners also reviewed EERC testing reports to evaluate production trends and to monitor the use of additive levels in the refining processes.

7.h.6. The Partners also addressed certain labor matters with the manager and operator, such as workforce retention during idle periods and payments to compensate Taggart Operations for insurance benefits it provided to its employees it laid off during certain facility shutdowns.

7.h.7. The Partners also regularly evaluated the performance and financial status of both the manager and operator and, in certain circumstances, considered their replacements.

7.h.8. The Partners participated in annual partnership meetings every November. At these meetings, the Partners evaluated numerous business matters, including operational, environmental, supply chain, and testing issues. The

Partners also addressed maintenance needs and potential changes, safety and human resource concerns, and considered partnership financials, and business strategies. As part of these discussions, the Partners reviewed operating budgets for the following year and formally approved the budgets following the meetings.

7.i. The Economics of the Refined Coal Production Partnerships.

7.i.1. Refined coal production was critical to the economic viability of the Refined Coal Production Partnerships. The success or failure of the partnerships depended on the amount of qualifying refined coal produced and sold. All Partners had a stake in the Refined Coal Production Partnerships' successful production of refined coal; no Partner had a guaranteed return, but instead the return to each varied directly with the amount of coal actually produced.

7.i.2. The Refined Coal Production Partnerships incurred substantial operating expenses, including for the labor provided by Taggart Operations, insurance, chemical costs, pre-tax losses incurred on the purchase and sale of coal, and quarterly royalties.

7.i.3. The Refined Coal Production Partnerships sold refined coal to Santee Cooper at a price that was \$0.75 per ton less than the Refined Coal Production Partnerships paid to purchase the feedstock coal used to produce the refined coal. Santee Cooper negotiated for this economic benefit in exchange for

taking on the risks associated with using refined coal (as opposed to feedstock coal) to generate electricity.

7.i.4. Under the Sublicense, the Refined Coal Production Partnerships paid AJGC a royalty only if they produced refined coal.

7.i.5. The Refined Coal Production Partnerships would incur certain non-royalty operating expenses (e.g., labor costs, management costs, and maintenance fees) even when the refined coal facilities were idle. In particular, the Refined Coal Production Partnerships were required to make certain payments to keep Taggart Operations retained during idle periods in order to monitor, maintain, and be prepared to operate the refined coal production operations when production was back on-line. The amount of personnel needed during any idle period varied depending on the cause and potential length of the interruption. For some interruptions, the Refined Coal Production Partnerships needed to remain prepared to produce refined coal on short notice. During these idle periods, the Refined Coal Production Partnerships typically would operate at a loss on an after-tax basis.

7.i.6. During periods of operation, the Refined Coal Production Partnerships were among the first businesses to produce refined coal successfully on a commercial scale using the Technology. However, although the Refined Coal Production Partnerships generated revenues from the sale of refined coal, these revenues did not cover all their expenses. As a result, the Partners agreed to make



monthly working capital contributions in amounts equal to their pro rata share of the expenses (including the losses from the sale of coal and royalties due under the Sublicense) that exceeded operating revenues. Nonetheless, the section 45 refined coal production tax credit provided an economic incentive to encourage investment in the refined coal production operations, thereby allowing the Refined Coal Production Partnerships to be economically viable businesses.

7.j. Refined Coal Production Partnerships' Operating Results.

7.j.1. The Refined Coal Production Partnerships had material production shortfalls, resulting in the partnerships failing to meet operational expectations. Specifically, the Refined Coal Production Partnerships experienced reduced production due to environmental, permitting, equipment, and other issues that interrupted the businesses' operations.

7.j.2. Cross suspended refined coal production from November 2010 to August 2011, and from May 2012 until after November 2013. The initial suspension was primarily due to delays in securing the necessary permits. This was largely the result of the South Carolina Department of Health and Environmental Control's decision to undertake a detailed environmental impact analysis of the Santee Cooper power stations' burning refined coal produced by the Refined Coal Production Partnerships. The later suspension was in response to Santee Cooper's request that Cross shut down because Cross's coal

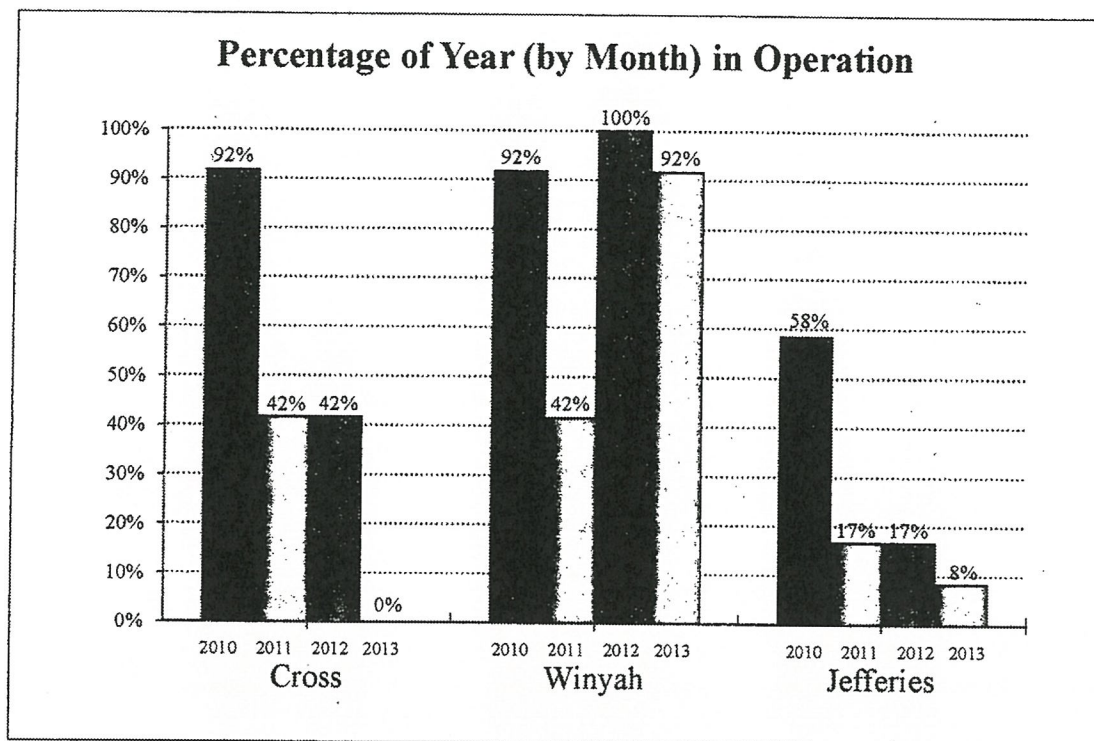
refining process was allegedly contributing to increased bromine levels in nearby water sources.

7.j.3. Winyah production declined in late 2010, ceasing from January through July 2011, and then was sporadic thereafter, largely due to permitting issues and a decline in consumer demand for electricity produced from the Winyah generating station.

7.j.4. Santee Cooper's low demand for refined coal, permitting issues, and environmental issues caused significantly reduced production at Jefferies. In 2012, Santee Cooper announced that it would be converting the Jefferies generating station from coal to natural gas. The Partners relocated the refined coal production facility from South Carolina to Muscatine, Iowa, in 2013. To fund this move, the Partners (except for Schneider, which had previously sold its interest to AJGC) were required to make additional capital contributions of \$3.65 million.

7.j.5. Cross was idle for 14 of the 24 months during 2011 and 2012 and for the entirety of 2013. Similarly, Winyah was idle for 8 months and Jefferies was idle for 31 months during those periods.

7.j.6. The following chart sets forth the approximate percentage of time (by month) that the Refined Coal Production Partnerships' facilities were in operation per year.



7.j.7. During idle periods, the Partners made capital contributions to maintain the refined coal production facilities even though they were not operating, meaning there were no sales of refined coal and no accrual of refined coal production tax credits.

7.j.8. The Refined Coal Production Partnerships' production of refined coal, and therefore the Partners' returns, was highly volatile and not fixed. The partnerships experienced idle periods and general production fluctuations (from quarter-to-quarter and even month-to-month). For example, Cross experienced inconsistent production and returns in four consecutive months in 2010. In September of that year, it produced 428,220 tons of refined coal, in



October, 239,332 tons, in November, 121,038 tons, and in December it produced no refined coal.

7.j.9. The actual aggregate operating performance of each Refined Coal Production Partnership was significantly worse than their pre-transaction production projections. The Refined Coal Production Partnerships even failed to meet their most conservative production projections. Jefferies, for example, operated at an after-tax loss of \$2.9 million.

7.k. Termination of the Cross Refined Coal Production Partnership.

7.k.1. On March 1, 2013, Schneider sold its membership interests in the Refined Coal Production Partnerships, including Cross, and a fourth refined coal production partnership to AJGC for \$25,000 and forgiveness of a note. Because Schneider's agreements did not contain a "liquidated damages" provision, Schneider and AJGC had to negotiate the sale price at that time.

7.k.2. On November 13, 2013, Feedstock exercised its liquidated damages right—which had been triggered because of a prolonged period of idleness—with respect to Cross. As a result, AJGC paid Feedstock about \$2.45 million, an amount equal to approximately 60 percent of Feedstock's initial investment in Cross (not including the approximately \$1.15 million that Feedstock had contributed for purposes of the initial funding of the working capital account). Petitioner then distributed its interest in Cross to AJGC. Because AJGC owned 100

percent of the membership interests in Cross, Cross terminated as a partnership under section 708(b)(1)(A).

7.k.3. While the Refined Coal Production Partnerships were operating, the Partners successfully commercialized refined coal production using the Technology. However, the partnerships' operational and financial performances did not come close to the projections the Partners used when evaluating whether to enter into the partnerships.

7.k.4. Nonetheless, the Partners were able to bring a new technology on-line with the economic support that the refined coal production tax credits provided. This resulted in the production and use of millions of tons of an environment-friendly fuel source, as intended by Congress.

WHEREFORE, Petitioner prays that this Court will hear this case and determine that:

1. Cross was a bona fide partnership for federal income tax purposes during the 2011 Tax Year and the 2012 Tax Year, and that each of Petitioner, AJGC, and Schneider was a bona fide partner in Cross throughout such periods;
2. The Commissioner's adjustments of Cross's partnership items for the 2011 Tax Year and 2012 Tax Year set forth in the FPAA are erroneous;
3. No adjustment should be made to the ordinary income reported on the 2011 Form 1065 and the 2012 Form 1065;
4. No adjustment should be made to the portfolio interest income, or the investment income included in portfolio income, reported on the 2011 Form 1065 and the 2012 Form 1065;
5. No adjustment should be made to the other deductions reported on the 2011 Form 1065 and the 2012 Form 1065;
6. No adjustment should be made to the section 45(e)(8) refined coal production tax credits reported on the 2011 Form 1065 and the 2012 Form 1065;



7. No adjustment should be made to the adjusted tax preference items depreciation reported on the 2011 Form 1065 and the 2012 Form 1065;
8. Each Partner is entitled to claim the amount of section 45(e)(8) refined coal production tax credits allocated to it, as reported on the 2011 Form 1065 and the 2012 Form 1065;
9. No adjustment should be made to the ordinary losses Cross reported on the 2011 Form 1065 and the 2012 Form 1065 because Cross incurred those expenses in the trade or business of producing and selling refined coal;
10. If Petitioner and/or Schneider is not entitled to any portion of the items of income, deduction, loss or credit allocated to it, as reported on the 2011 Form 1065 and the 2012 Form 1065, the portion of any such items disallowed to Petitioner and/or Schneider be reallocated among the other Partners;
11. If Cross is not a partnership for federal income tax purposes and neither Petitioner nor Schneider should have been allocated any production tax credits, the credits that were allocated to Petitioner and Schneider in the years at issue should be reallocated to AJGC;

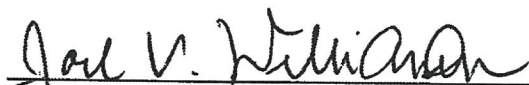
12. If the Partners are not entitled to deduct the ordinary losses reported on the 2011 Form 1065 and the 2012 Form 1065, allow the Partners to deduct the amount of capital contributions that each made to Cross; and

13. Petitioner and each Partner is entitled to further relief as the Court, in its discretion, deems just and proper.

Date: 9/14/2017

Counsel for Petitioner,

ADMITTED



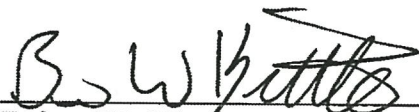
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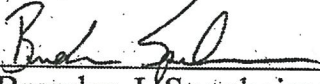
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**Department of the Treasury**  
**Internal Revenue Service**  
**Small Business and Self-Employed**  
 Technical Services Group 25  
 801 Broadway, MDP 12  
 Nashville, TN 37203

Date:  
 June 20, 2017  
 Person to contact:  
 Name: Chris Cusson  
 Employee ID: 1000342143  
 Phone: 615-250-5219  
 Hours: Mon - Fri, 8:00 am - 4:30 pm CST  
 Partnership ID number:

Tax year ended:  
 201112, 201212

USA REFINED COAL, LLC  
 Tax Matters Partner of  
 CROSS REFINED COAL, LLC  
 C/O FEEDSTOCK INVESTMENTS V, LLC; ATTN ERIC C. GREEN  
 200 SEAPORT BOULEVARD, MAIL ZONE ZW9B  
 BOSTON, MA 02210

**TMP Notice Of Final Partnership Administrative Adjustment**

Dear Tax Matters Partner:

The law requires us to send a Notice of Final Partnership Administrative Adjustment (FPAA) to the partnership named above, for the tax year listed above, and to each partner who is entitled to receive this letter.

We determined that adjustments are necessary to certain partnership items for the partnership and tax year listed above. You are receiving this letter because you were identified as the Tax Matters Partner (TMP) for this tax year. Because we made adjustments to these items on the partnership return, these adjustments will flow to the partners' returns as well. The enclosed schedule of adjustments outlines the changes. We will provide a similar letter to those partners entitled to receive it.

The adjustments to the partnership items on the partnership return may include partnership level determinations on penalties and additions to tax that relate to adjustments to partnership items. Form 870-PT, *Agreement for Partnership Items and Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts*, contains the adjustments to the partnership return.

**What you need to do**

**If you agree with the adjustments and want to bind the non-notice partners**

As the TMP, you can enter into an agreement that binds yourself and non-notice partners to the treatment of the partnership items as shown on the enclosed schedule of adjustments. We will also send you a separate letter as a partner (if you are entitled to one), which you can sign if you only want to agree to your share of the adjustments and not bind the non-notice partners. For this purpose, a non-notice partner is a direct partner with less than a one percent interest in a partnership having more than 100 direct partners. You must add the following statement above the signature blocks on the Form 870-PT:

*The undersigned tax matters partner is signing this offer on behalf of himself (herself or itself) and all other partners whom he (she or it) has the authority to bind; a final agreement resulting from the co-signature of the Commissioner of Internal Revenue will be binding on all such other partners.*

If you want to bind yourself and the non-notice partners to the partnership item adjustments, add the language above and sign and return the enclosed Form 870-PT within 150 days of the date of this letter.

We will send you a separate letter as a partner (if you are entitled to one), which you can sign if you only want to agree to your share of the adjustments and not bind the non-notice partners.

When you sign Form 870-PT to bind the non-notice partners, you are:

- Agreeing to the partnership item adjustments
- Agreeing that the non-notice partners are subject to any partnership level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items
- Agreeing that the non-notice partners are subject to additional tax and interest resulting from their share of the adjustments to the partnership return
- Waiving the rights of the non-notice partners to participate in any administrative or judicial proceedings affecting the adjustment of partnership items or partnership level determinations as to penalties, additions to tax, and additional amounts for the tax year in question.

This agreement is binding only if you sign and return Form 870-PT, and we sign on behalf of the Commissioner of the Internal Revenue Service. When we sign the agreement form, the one-year extension of the period of limitations on assessments will begin under Internal Revenue Code Section 6229(f).

Within one year of that agreement date, all impacted non-notice partners will receive a final report as to what adjustments we made to their individual, partnership, or corporate returns with a total due or refund amount, including penalties and interest (if applicable).

Once both parties sign the agreement, non-notice partners can't file a claim to:

- Change the items in question
- Claim a refund or credit based on a readjustment

However, they can file a claim to raise:

- Math errors
- Partner level defenses to partnership level determinations of penalties

**If you don't agree with the adjustments**

As the partnership TMP, if you want to contest the adjustments in court, you must file a petition within 90 days from the date of this letter. During this 90-day period, no other partner can file a petition for judicial review.

You can file your petition for readjustment of partnership items with one of the following courts:

- United States Tax Court
- United States Court of Federal Claims
- District Court of the United States, in the district of the partnership's principal place of business



A petition the TMP files in the first 90 days precludes all other actions and covers all partners still in the proceeding. If the TMP doesn't file a petition by the 90th day from the date we mailed the FPAA, any partner entitled to receive this letter, or any 5 percent group, can petition one of these courts. A "5 percent group" includes any group of partners who together have an interest of five percent or more in profits of the partnership. Five percent groups must file the petition after the 90th day, but on or before the 150th day from the date we mailed the FPAA to the TMP. If more than one petition is filed in Tax Court, the first petition filed will go forward. All other petitions (even those filed earlier in one of the other courts) will be dismissed. If no one files a petition in Tax Court, the first petition filed in one of the other courts will go forward and subsequent petitions will be dismissed. All partners still subject to the partnership proceeding will be parties to the petition that is not dismissed. Petitions filed with the United States Tax Court must be mailed to:

United States Tax Court  
400 Second Street, NW  
Washington, DC 20217

When you mail the petition, you must attach a copy of this letter to the petition. The timeframe for filing a petition with the court is fixed by law, and the court can't consider your case if your petition is late.

**If you do nothing**

If neither you, as the TMP, nor any partner file a petition for readjustment in any of the courts listed in this letter, the FPAA becomes final, and we will bill all partners for any additional tax plus interest they may owe under the FPAA. Once final, the treatment of the partnership items of the partnership under the FPAA can't be contested in any refund claim or suit.

You may want to contact a tax advisor to discuss this matter.

If you have questions, you can contact the person listed at the top of this letter. If you write, enclose a copy of this letter and include your telephone number and the most convenient time for us to call if we need additional information.

Thank you for your cooperation.

Sincerely,

*Sheila B. Korth*

John A. Koskinen  
Commissioner

By  
Sheila B. Korth  
Acting Territory Manager, Western Technical Services

Enclosures:  
Schedule of Adjustments  
Form 870-PT

cc: ARMANDO GOMEZ  
NATHAN P. WACKER

Form **870-PT**

(Rev. 4-2012)

For partnership  
taxable years ending  
after August 5, 1997

Department of the Treasury — Internal Revenue Service

**Agreement for Partnership Items and Partnership Level  
Determinations as to Penalties, Additions to Tax, and  
Additional Amounts**IN REPLY  
REFER TO:

Chris Cusson

Taxpayer(s) name(s), address and zip code:

USA REFINED COAL, LLC

Tax Matters Partner of

CROSS REFINED COAL, LLC

C/O FEEDSTOCK INVESTMENTS V, LLC; ATTN ERIC C. GREEN

200 SEAPORT BOULEVARD, MAIL ZONE ZW9B

BOSTON, MA 02210

TIN:

Name of Partnership:

CROSS REFINED COAL, LLC

Tax Year(s) Ended:

201112, 201212

EIN: [REDACTED]

Name of Tax Matters Partner:

USA REFINED COAL, LLC

**Offer of Agreement to Partnership Items and Partnership Level Determinations as to  
Penalties, Additions to Tax, and Additional Amounts & Waiver of Restrictions on Assessment for  
Partnership Items, Penalties, Additions to Tax, and Additional Amounts**

Under the provisions of sections 6224(c) and 7121 of the Internal Revenue Code (IRC), the Commissioner of the Internal Revenue Service and the undersigned taxpayer(s) agree to the determination of partnership items and partnership level determinations as to penalties, additions to tax, and additional amounts that relate to adjustments to partnership items as shown on the attached Schedule of Adjustments.

The undersigned taxpayer(s), in accordance with IRC sections 6224(b) and 6213(d), also waive(s) the restrictions provided by IRC sections 6225(a) and 6213(a) and consent(s) to the assessment and collection of any deficiency attributable to partnership items, penalties, additions to tax, and additional amounts that relate to partnership items, as set forth in the attached Schedule of Adjustments (plus any interest provided by law). IRC Section 6651 late filing penalty applies to any late filed (or non-filed) returns that are required to report the partnership item adjustments.

This agreement is conditional and will not become effective or final until this agreement form is returned to the Commissioner and is signed on his or her behalf. The one-year extension of the period of limitations on assessments under IRC section 6229(f) will not begin to run until the date the Commissioner's representative signs this form on the Commissioner's behalf. If this is a partial agreement, the period of limitations for assessing any tax attributable to the settled items shall be determined as if this agreement had not been entered into.

If this part of this agreement form is signed for the Commissioner, the treatment of partnership items and partnership level determinations as to penalties, additions to tax and additional amounts that relate to adjustments to partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact. In addition, no claim for an adjustment of partnership items, refund or credit based on any change in the treatment of partnership items or partnership level determinations as to penalties, additions to tax, and additional amounts may be filed or prosecuted.

Once the taxpayer signs such a waiver and it is countersigned by the Commissioner, the taxpayer cannot file an Administrative Adjustment Request (AAR) on any partnership items for the related TEFRA entity. This includes partnership items not specifically addressed on the attached Schedule of Adjustments.

Signature of Taxpayer

Date Signed

Phone Number

Signature of Taxpayer

Date Signed

Phone Number

By (Signature and Title)

Date Signed

Phone Number

FOR  
INTERNAL  
REVENUE  
USE ONLY

Date accepted for Commissioner

Signature

Office

Title



## INSTRUCTIONS FOR SIGNING FORM 870-PT

1. Sign the agreement if you wish to agree to the partnership items and partnership level determinations as to penalties, additions to tax, and additional amounts, as shown on the attached Schedule of Adjustments. The execution and filing of this offer will expedite the adjustment of tax liability.
2. If a JOINT RETURN OF A HUSBAND AND WIFE was filed and both spouses intend to agree, both spouses should sign Form 870-PT. One spouse may sign as agent for the other if acting under a power of attorney, which, if not previously filed, must accompany this form. The IRS may accept the signature of only one spouse at its discretion. However, the agreement will only be binding on the signing spouse.
3. If the taxpayer is a corporation, the agreement should be signed with the corporate name followed by the signature and title of the officer authorized to sign Form 870-PT.
4. Your attorney or agent may sign for you if this action is specifically authorized by a power of attorney, which if not previously filed, must accompany this form.
5. If this offer is signed by a trust, the agreement must be signed with the trust name, followed by the signature and title of the person authorized to sign on behalf of the trust. If the trustee is signing this agreement on behalf of the trust and all beneficiaries, a Form 56 must be signed by the trustee. If an individual beneficiary is signing the agreement to bind themselves to the agreement, no Form 56 is needed.
6. If the partner is an LLC, the agreement should be signed by the manager of the LLC or other authority as authorized by State law. The signature line should show: [Name of LLC], by [Name of Manager], Followed by the title [Manager].
7. For a partner who is a subsidiary corporation in a consolidated group:
  - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning before June 28, 2002, the agreement should be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The common parent corporation signs the agreement in its own name. The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should be displayed in the signature block. See Treas. Reg. § 1.1502-77A(a).
  - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning on or after June 28, 2002, then a currently authorized officer of the subsidiary corporation should sign the agreement and should do so in the name of the subsidiary corporation. See Treas. Reg. § 1.1502-77(a)(6)(iii). The signature and title of a current officer of the subsidiary corporation, who is authorized to bind the corporation, should be displayed in the signature block. The agreement should also be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should also be displayed in the signature block.
8. For a partner who is the common parent corporation of a consolidated group, a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for such consolidated return year(s) should sign the agreement in the name of the common parent corporation. See Treas. Reg. § 1.1502-77(a).
9. If the Tax Matters Partner signs this offer, please include the title with the signature.
10. If the Tax Matters Partner is a subsidiary corporation in a consolidated group:
  - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning before June 28, 2002, then a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for such consolidated return year should sign the agreement on behalf of the Tax Matters Partner. The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should be displayed in the signature block. See Treas. Reg. § 1.1502-77A(a). An authorized officer for the subsidiary corporation should also sign if it, as the Tax Matters Partner, is binding non-notice partners under the agreement. The signature and title of a current officer of the subsidiary corporation, who is authorized to bind the corporation, should be displayed in the signature block.
  - If the agreement is for a partnership year(s) ending on or before the last day of a consolidated return year beginning on or after June 28, 2002, then a currently authorized officer of the subsidiary corporation should sign the agreement in the name of the subsidiary corporation. See Treas. Reg. § 1.1502-77(a)(3)(v). The agreement should also be signed by a currently authorized officer of the corporation who was the common parent corporation of the consolidated group for the relevant consolidated return year(s). The signature and title of a current officer of the common parent corporation, who is authorized to bind the common parent corporation, should also be displayed in the signature block.

**NOTE:** The submission of this offer by you and the acceptance of the offer for the Commissioner may result in an additional tax liability to you plus interest as provided by law. If the result is a decrease in tax, the amount of the decrease will be sent to you with interest as provided by law.



**Agreement for Partnership Items and Partnership Level  
Determinations as to Penalties, Additions to Tax, and  
Additional Amounts**

**SCHEDULE OF ADJUSTMENTS**

NAME OF PARTNERSHIP CROSS REFINED COAL, LLC	TAX YEAR(S) ENDED		
	12/31/2011	12/31/2012	
EIN <span style="background-color: black; color: black;">XXXXXXXXXX</span>			
DETAIL OF ADJUSTMENTS TO ORDINARY INCOME			
a. Gross receipts or sales	(200,141,122.00)	(172,909,200.00)	
b. Cost of Goods sold	206,063,239.00	177,746,252.00	
c. Taxes & Licenses	250.00	457.00	
d. Depreciation	1,626,430.00	1,163,780.00	
e. Other Deductions	6,699,259.00	5,508,086.00	
TOTAL ADJUSTMENTS TO ORDINARY INCOME	14,248,056.00	11,509,375.00	
OTHER ADJUSTMENTS			
A. Portfolio income (loss) interest			
(1) ADJUSTMENT	(465.00)	(3,157.00)	
(2) AS REPORTED	465.00	3,157.00	
(3) CORRECTED	0.00	0.00	
B. Other deductions			
(1) ADJUSTMENT			
(2) AS REPORTED	214,937.00	153,501.00	
(3) CORRECTED	0.00	0.00	
REMARKS			

## Form 870-PT, Other Adjustments (Continued)

Page 2 of 2

NAME OF PARTNERSHIP CROSS REFINED COAL, LLC  EIN [REDACTED]	TAX YEAR(S) ENDED	
	12/31/2011	12/31/2012
<b>C. Investments income included in portfolio income</b>		
(1) ADJUSTMENT	(465.00)	(3,157.00)
(2) AS REPORTED	465.00	3,157.00
(3) CORRECTED	0.00	0.00
<b>D. Other credits (not related to rental activities)</b>		
(1) ADJUSTMENT	13,822,682.00	12,003,303.00
(2) AS REPORTED	13,822,682.00	12,003,303.00
(3) CORRECTED	0.00	0.00
<b>E. Adj./tax pref. items depreciation in serv. after 1986</b>		
(1) ADJUSTMENT	323,367.00	138,675.00
(2) AS REPORTED	323,367.00	138,675.00
(3) CORRECTED	0.00	0.00
<b>F.</b>		
(1) ADJUSTMENT		
(2) AS REPORTED		
(3) CORRECTED		
<b>G.</b>		
(1) ADJUSTMENT		
(2) AS REPORTED		
(3) CORRECTED		
<b>H.</b>		
(1) ADJUSTMENT		
(2) AS REPORTED		
(3) CORRECTED		
<b>I.</b>		
(1) ADJUSTMENT		
(2) AS REPORTED		
(3) CORRECTED		



**EXPLANATION OF ITEMS Cross Refined Coal, LLC [REDACTED]  
FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENT  
TAX YEARS ENDING DECEMBER 31, 2011 AND DECEMBER 31, 2012**

It is determined that neither Cross Refined Coal, LLC ("Cross") nor its purported partners have established the existence of Cross as a partnership as a matter of fact. Accordingly, all items of income, deductions, and credits are disallowed as specifically indicated in the charts below.

It is determined that the formation of Cross among AJG Coal, Inc. ("AJG"), USA Refined Coal, LLC ("USA"), and Schneider Electric Investments 2, Inc. ("Schneider") was not in substance a partnership for federal income tax purposes because it was not formed to carry on a business or for the sharing of profits and losses from the production or sale of refined coal by its purported members/partners, but rather was created to facilitate the prohibited transaction of monetizing "refined coal" tax credits. Accordingly, all items of income, deductions, and credits are disallowed as specifically indicated in the charts below.

The following items of income reported for taxable years ended December 31, 2011, and December 31, 2012, are adjusted to zero:

Items of Income	Tax Year	As Reported	As Corrected
Gross Receipts or Sales	2011	\$200,141,122	\$ -0-
Gross Receipts or Sales	2012	\$172,909,200	\$ -0-
Interest Income	2011	\$ 465	\$ -0-
Interest Income	2012	\$ 3,157	\$ -0-

The following deduction items claimed for taxable years ended December 31, 2011, and December 31, 2012, are adjusted to zero:

Deduction Items	Tax Year	As Reported	As Corrected
Cost of Goods Sold	2011	(\$206,063,239)	\$ -0-
Cost of Goods Sold	2012	(\$177,746,252)	\$ -0-
Taxes and Licenses	2011	(\$ 250)	\$ -0-
Taxes and Licenses	2012	(\$ 457)	\$ -0-
Depreciation	2011	(\$ 1,626,430)	\$ -0-
Depreciation	2012	(\$ 1,163,780)	\$ -0-
Other Deductions	2011	(\$ 6,699,259)	\$ -0-
Other Deductions	2012	(\$ 5,508,086)	\$ -0-
§754 Depreciation	2011	(\$ 214,937)	\$ -0-
§754 Depreciation	2012	(\$ 153,501)	\$ -0-



The following "refined coal" tax credits under I.R.C. §45(e)(8) claimed for the taxable years ended December 31, 2011, and December 31, 2012, are adjusted to zero:

Credit Item	Tax Year	As reported	As Corrected
Coal Credit	2011	\$13,822,682	\$ -0-
Coal Credit	2012	\$12,003,303	\$ -0-

It is further determined that USA and Schneider are not entitled to the "refined coal" tax credits under I.R.C. § 45(e)(8) allocated from Cross because USA and Schneider entered into the transaction with Cross solely to purchase refined coal tax credits and other tax benefits from AJG. Accordingly, the amount of "refined coal" tax credits claimed by USA and Schneider are disallowed in the following amounts.

Taxable year ending	Schneider	USA
December 31, 2011	\$3,455,670	\$7,049,568
December 31, 2012	\$3,000,826	\$6,121,684

It is further determined that, in any event, Cross is not entitled to deduct an ordinary loss in the amounts \$14,248,056 and \$11,509,375 for taxable years ended December 31, 2011, and December 31, 2012, respectively, because Cross has not established that it or its purported members incurred ordinary or necessary or credible expenses in connection with a trade or business or other activity engaged in for profit. Accordingly all claimed losses are disallowed as follows:

Taxable year ending	As reported	As Corrected
December 31, 2011	(\$14,248,056)	\$ -0-
December 31, 2012	(\$11,509,375)	\$ -0-

#### Affected Items

Upon the completion of the partnership proceeding or the execution of a Form 870-PT, a partner may be sent an examination report and /or a statutory notice of deficiency asserting affected items.