

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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IN THE MATTER OF:

THE APPEAL BY SOUTHERN MONTANA ELECTRIC REGARDING  
ITS AIR QUALITY PERMIT NO. 3423-00  
FOR THE HIGHWOOD GENERATION STATION

NO. BER 2007-06-AQ  
NO. BER 2007-07-AQ

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HEARING ON PREHEARING MOTIONS  
TRANSCRIPT OF THE PROCEEDINGS

Heard at Montana Department of Environmental Quality  
1520 East Sixth Avenue, Room 111

Helena, Montana

January 11, 2008

9:06 a.m.

REPORTED BY: CHERYL ROMSA  
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A P P E A R A N C E S

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209 South Willson Avenue  
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ALSO PRESENT:

ANNE HEDGES, MEIC (By telephone)  
MATT BROWN, Associated Press (By telephone)

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BOARD MEMBERS PRESENT:

JOE RUSSELL, Chair (By telephone)  
 GAYLE SKUNKCAP (By telephone)  
 HEIDI KAISER (By telephone)  
 LARRY MIRES (By telephone)  
 BILL ROSSBACH (By telephone)  
 DON MARBLE (By telephone)  
 ROBIN SHROPSHIRE

KATHERINE ORR, Board Counsel  
 TOM LIVERS, Deputy Director, DEQ  
 KRIS BREWER, Board Secretary

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1           WHEREUPON, the following proceedings were had:

2           CHAIRMAN RUSSELL: Just a few things before we  
3 get started. I am very concerned about having this type  
4 of meeting on a teleconference, although I'm grateful I  
5 didn't have to drive down to Helena. I'm also a little  
6 concerned. So, board members and others, please identify  
7 yourself before you speak.

8           With that, I'll -- I'll get started here. Katherine,  
9 you're there, I'm sure.

10           MS. ORR: Yes.

11           MR. LIVERS: And we'll go ahead and call the  
12 meeting to order formally, Mr. Chair.

13           CHAIRMAN RUSSELL: I've got it's 9:07, and I call  
14 this meeting of the Board of Environmental Review to order  
15 and continue the prehearing actions the Board has  
16 undertaken.

17           Katherine.

18           MS. ORR: Yes.

19           CHAIRMAN RUSSELL: Where are we?

20           MS. ORR: Today, we are the juncture of hearing  
21 presentation by the parties on the first issue addressed  
22 in the cross-motions for summary judgment, which is  
23 whether, in the permitting process, the Department was  
24 obligated to consider CO2 emissions, especially in its  
25 BACT analysis. And the parties have submitted

1 supplemental materials that the board members should have,  
2 all of the parties have done that. And then also at  
3 today's meeting, we could consider whether the parties  
4 want to make oral argument on the motion to strike the  
5 testimony of Expert Witness McCutchen.

6 As a final matter, after the presentations, I would  
7 suggest that we discuss a prehearing conference and  
8 exhibits and that sort of thing for the hearing that's set  
9 for the 23rd of January on the issue of the --

10 What is it?

11 MS. SHROPSHIRE: 22nd.

12 MS. ORR: Well, the 22nd is the main meeting.  
13 When is the meeting on -- I'm going to ask Tom to clarify  
14 that.

15 MR. LIVERS: Mr. Chairman, just a real quick  
16 aside. And I apologize to Katherine that we didn't have  
17 any time this week to connect, but my understanding is we  
18 were, at one point, considering starting the regular board  
19 meeting the afternoon of the 22nd and the hearing on the  
20 morning of the 23rd, but we abandoned -- In discussions  
21 with the Chair, we went back to the original plan of  
22 having the board meeting start the morning of the 22nd,  
23 which is Tuesday, and then on adjournment, with a break,  
24 most likely early afternoon, we would move into the  
25 beginning of the hearing. So that would be the afternoon

1 of the 22nd. I think that was the --

2 Mr. Chair, is that still your understanding?

3 CHAIRMAN RUSSELL: That is my understanding.

4 MS. ORR: Okay. And I apologize for that  
5 unclarity. I will probably issue a supplemental notice  
6 concerning when that -- when the contested case hearing  
7 starts on the issue of PM-2.5 as it relates particularly  
8 to a BACT analysis with this permit.

9 So that's where we are. And I guess I recommend that  
10 we take the same order that we did before, which would be  
11 MEIC, then the Department, and then SME.

12 CHAIRMAN RUSSELL: That would be great. So are  
13 you ready? Is counsel for MEIC ready?

14 MR. LIVERS: Mr. Chairman, DEQ counsel,  
15 David Rusoff, has a question.

16 CHAIRMAN RUSSELL: All right.

17 MR. RUSOFF: This is David Rusoff, for the  
18 record, attorney for the Montana Department of  
19 Environmental Quality. I guess I've got a clarification  
20 question. I'm not sure exactly what the Board is  
21 expecting from the attorneys for the parties today. We  
22 presented oral argument at the last board meeting on  
23 the -- the pending motions for summary judgment, and the  
24 Board denied all parties' motions on the PM-2.5 BACT  
25 claim, and then I understood that it was putting off its

1 deliberations or further deliberations on the petitioners'  
2 CO2 BACT claim until today, and additionally, Mr. Rossbach  
3 requested that the parties submit some supplemental  
4 authorities, which the parties have done.

5 So I guess when counsel for the Board asks the parties  
6 this morning if they're prepared to go ahead and present  
7 oral argument, I think at least it would be helpful to the  
8 Department to know whether the Board is asking -- I'm  
9 assuming the Board is not asking the attorneys to repeat  
10 the oral argument that they presented before, so I think  
11 some guidance would be helpful.

12 Thank you.

13 CHAIRMAN RUSSELL: David, that's good. I think  
14 that, you know, in the absence of anything that was  
15 requested, I would just ask for a motion and deliberation,  
16 but I think that there is -- since a board member has  
17 asked and all of the parties have been briefed, for no  
18 other term that I can think of right now, I would really  
19 like to hold any additional discussion relating to those  
20 matters.

21 MR. LIVERS: So, Mr. Chairman -- this is  
22 Tom Livers -- when you say "hold discussion," do you  
23 envision that you would nonetheless like some sort of  
24 summary statements from counsel prior to board  
25 deliberation with that -- with that focus as you

1 indicated, or would you prefer to move directly into  
2 motions and board deliberation?

3 CHAIRMAN RUSSELL: Well, I would prefer to get a  
4 motion and go, but I don't know how the rest of the  
5 Board -- Did someone say something?

6 MR. LIVERS: Yeah, Gayle is on.

7 CHAIRMAN RUSSELL: Gayle.

8 MR. SKUNKCAP: Mr. Chairman, this is Gayle.

9 CHAIRMAN RUSSELL: Yes.

10 MR. SKUNKCAP: We asked for -- or you asked for  
11 an overview from Katherine. Would it be possible to get  
12 an overview, a brief overview from all three parties  
13 before we go into any motion?

14 CHAIRMAN RUSSELL: I -- I guess I don't have any  
15 objection to that except for time. If I threw out a  
16 ten-minute -- you have ten minutes to recap your  
17 position --

18 MR. LIVERS: Mr. Chairman, this is Tom Livers.  
19 Katherine has a suggestion, I think.

20 MS. ORR: Mr. Chairman, members of the Board,  
21 what might be expeditious here is if any party or each  
22 party has a statement to make about the supplemental  
23 materials that they've submitted, it might be appropriate  
24 for them to address anything they see of significance in  
25 the supplemental materials. And then upon request from



1 the board members, each party, all three or one of them,  
2 depending on what the Board wants, could provide a summary  
3 statement of their -- of the thrust of their motion.

4 CHAIRMAN RUSSELL: I think that's appropriate.

5 So with that, MEIC, are you ready to address your  
6 supplemental material?

7 MS. DILLEN: Sure, Mr. Chairman.

8 For the record, this is Abigail Dillen, counsel for  
9 petitioners, Montana Environmental Information Center and  
10 Citizens for Clean Energy.

11 We have a very simple argument in this case, which is  
12 that all pollutants, quote/unquote, "subject to regulation  
13 under the Clean Air Act" are also subject to the Clean Air  
14 Act's best available control technology requirements. And  
15 so the question for you today is whether CO2 is subject to  
16 regulation under the Clean Air Act. And there's an easy  
17 answer. CO2 has been subject to monitoring, reporting,  
18 and recordkeeping requirements since 1990.

19 As our supplemental materials make clear, those  
20 regulations are quite extensive, and a failure to comply  
21 with them constitutes a violation of the Act. Citizens  
22 can sue facilities over a failure to comply with these  
23 monitoring and reporting requirements, and facilities can  
24 be subject to civil fines. The essence of regulation is  
25 being required to do something by the Government for which

1 you can be punished if you do not comply, and that's the  
2 situation we have here. So referring the Board to the  
3 materials that we've provided, they contain all of the  
4 current regulatory requirements that are applicable to CO2  
5 and also cover the consequences for failing to comply with  
6 those requirements.

7 In addition, we have argued that CO2 is inherently  
8 subject to regulation under the Clean Air Act because the  
9 Supreme Court has recently recognized that CO2 is, indeed,  
10 a pollutant. There has been confusion about that issue  
11 over the years, but that confusion is now dispersed and we  
12 should go forward immediately in regulating CO2, forcing  
13 some of the greatest CO2 emitters to reduce their CO2  
14 pollution simply by installing the best available control  
15 technology that's out there.

16 We have also received from Mr. Rossbach a question  
17 regarding whether we had raised these issues previously to  
18 the Department, and I wanted to clarify for Mr. Rossbach  
19 that, indeed, we had. The first point of the comments  
20 submitted by petitioners was, quote/unquote, "The draft  
21 air quality permit does not address carbon dioxide and  
22 other greenhouse gas emissions." And within that section  
23 even more specifically is the statement on page 2 that --  
24 excuse me -- we believe that the EPA and the State of  
25 Montana have a legal obligation to regulate CO2 and other

1 greenhouse gases as pollutants under the Clean Air Act and  
2 the Montana Clean Air Act. Going on through several of  
3 the pages of the comments was the specific suggestion that  
4 IGCC technology, which is more amenable to capturing CO2,  
5 be considered as an alternative specifically for purposes  
6 of controlling CO2 emissions. So there's no question that  
7 the Department was on notice that this was an issue, and  
8 an issue that petitioners had emphasized quite strongly in  
9 their comments.

10 With that, unless the Board has further questions, I'm  
11 happy to answer specifics, but that's the general recap of  
12 our argument that I think is most important for your  
13 consideration today.

14 CHAIRMAN RUSSELL: All right, thank you.

15 Board, do you have any questions?

16 MR. ROSSBACH: This is Bill.

17 CHAIRMAN RUSSELL: Bill.

18 MR. ROSSBACH: Abigail, I appreciate the  
19 clarification.

20 When you -- when you made the comment to the DEQ to  
21 consider CO2 as a part of their regulatory process on this  
22 particular permit, did you -- did you provide to them --  
23 other than giving them the alternative of IGCC, did you  
24 provide any specific control technologies that were  
25 economically feasible that could have been put into place

1 to capture or to otherwise reduce the emission of CO2?  
2 Did you give them anything concrete for them to consider  
3 one way or the other?

4 MS. DILLEN: Mr. Rossbach, the emphasis was on  
5 IGCC. And at this point in the comments, I think it's  
6 important to remember, these were prepared by staff, and  
7 in some cases volunteer staff, at my clients'  
8 organizations. Their -- their ask was for DEQ and SME to  
9 take a look at this issue in the first instance. This is  
10 a new area of the technology and one that requires  
11 consideration by an expert agency. So the short answer is  
12 other than IGCC, no, they did not present other  
13 alternatives, but their -- their first-line concern was  
14 that this issue even be considered, given that the  
15 agency's position was that they did not need to consider  
16 it at all.

17 MR. ROSSBACH: And the agency's response to you  
18 was that they did not need to consider it?

19 MS. DILLEN: Yes. Their response was that CO2 is  
20 not a pollutant regulated under the Act, and so it did not  
21 need to be considered for purposes of BACT.

22 MR. ROSSBACH: Okay. Let me ask you, then, do  
23 you have any authority -- My understanding, in reading the  
24 materials that we've had, that an agency, starting with  
25 the EPA or one of its delegated agencies, such as the

1 Department of Environmental Quality in Montana, that  
2 top-down BACT does not mean that the agency considering  
3 the application can force the applicant to completely  
4 change the total, I guess essence of the project. In  
5 other words, you can't make them change from a fluidized  
6 bed type technology to IGCC. You might be able to get  
7 them to do the best fluidized bed in the world and use,  
8 you know, all the technologies, methods, processes -- you  
9 know, coal washing in the mercury case or otherwise -- to  
10 make the fluidized bed the best fluidized bed, but that  
11 you don't have the authority to make them change from a  
12 fluidized bed to an IGCC.

13 Do you have any authority that says that we -- well,  
14 or that DEQ could force them to go to IGCC?

15 MS. DILLEN: Yes. The EPA has recently  
16 acknowledged that states do retain the authority to  
17 require analysis of IGCC in a BACT process. And this  
18 comports with clear congressional intent that's reflected  
19 in the legislative history of the Clean Air Act's 1990  
20 amendments. There, key members of Congress had specified  
21 that they felt that alternative techniques, including  
22 gasification, should be part of the BACT analysis  
23 consideration. Also, and this may be the most important  
24 authority, this board, in the Roundup case, which I'm sure  
25 many of you recall, concluded specifically that IGCC

1 should be considered in the BACT process. And that was  
2 with regard to a plant that was -- if I'm remembering  
3 correctly, was a PC plant.

4 CHAIRMAN RUSSELL: Abigail, would you restate  
5 that? Because I was the only one on the Roundup hearing  
6 that's still on the board, so I need you to say that  
7 again.

8 MS. DILLEN: Okay. In the Roundup decision, one  
9 of the Board's conclusions was that it is appropriate and  
10 necessary for BACT -- excuse me, it is appropriate to  
11 consider IGCC in the BACT process. And this -- this case  
12 involved a plant that was using a conventional pulverized  
13 coal boiler. So the argument was out there that IGCC  
14 would constitute a redesign of the plant, but the Board  
15 rejected that argument and found that, indeed, the  
16 Department should consider IGCC in the BACT process.

17 CHAIRMAN RUSSELL: I don't -- I don't believe  
18 that that's how the Board reached its conclusion.

19 David, you were there. If you want to --

20 The motion was that although top-down BACT was  
21 available to the Department, and fully utilized top-down  
22 BACT requires combustion sources to be all types of  
23 source, or all types of generating units to be considered,  
24 that since the Board -- since the Department did not, by  
25 regulation, have to use top-down BACT, that they jumped

1 into the process later than the combustion type.

2 MR. ROSSBACH: Well, let me -- Joe, if you don't  
3 mind --

4 CHAIRMAN RUSSELL: No.

5 MR. ROSSBACH: Well, it's confusing to me.  
6 Because I just read through the -- several hundred pages  
7 of materials on the Deseret case, and as of December of  
8 2007, the EPA was taking the position in that case that  
9 top-down BACT that they were required to do under the  
10 Clean Air Act did not allow them, under the North Country  
11 case or one of those other cases -- I'm not sure as I sit  
12 here which one it was, but basically, the EPA was saying  
13 in Deseret that top-down BACT does not -- under BACT does  
14 not allow them to change the nature of the project sort of  
15 at its essence; that in other parts of the Clean Air Act,  
16 they can consider whether IGCC should have been used as an  
17 alternative, but not under BACT. That's the way I read  
18 that.

19 CHAIRMAN RUSSELL: Not under BACT, but under  
20 top-down BACT. That was the argument of the Roundup case.

21 MR. ROSSBACH: Well, that's what they were  
22 saying -- I mean, I'm sorry, maybe -- You know, I wasn't  
23 at Roundup, Joe.

24 CHAIRMAN RUSSELL: Well, I just want to make  
25 clear that there is a big issue between BACT analysis for

1 emission controls and a top-down BACT analysis for  
2 permitting an EGU.

3 MS. DILLEN: Mr. Rossbach and Mr. Russell, if I  
4 may, this is Abigail Dillen, I'm just pulling up the  
5 IGCC opinion -- excuse me, the Roundup opinion now so that  
6 I can read you the relevant language that we've relied on  
7 in the decision. And perhaps, Mr. Russell, you could  
8 clarify actually what the process was that led up to it  
9 and if we have any misunderstanding on this matter.

10 In the meantime, I did want to respond to  
11 Mr. Rossbach's reading of the Deseret permitting analysis.  
12 And there is a difference between EPA's position and what  
13 states have the authority to do above and beyond what EPA  
14 is choosing to do. And EPA had -- had provided guidance  
15 to the states that they should not consider IGCC as part  
16 of their BACT analyses. There was a lawsuit in the DC  
17 circuit over that issue, and EPA has not backed off its  
18 own policy but has clarified that states still have  
19 discretion, when they are permitting under their own  
20 delegated programs, to require BACT analyses. And, in  
21 fact, some states do that now, and New Mexico is one of  
22 them; and, to my knowledge, Michigan is currently in a  
23 rulemaking process to provide that IGCC will be considered  
24 during the BACT process, as well.

25 MR. ROSSBACH: Okay. Well, that tells me that --



1 I mean, here's what I'm reading. I guess it comes in the  
2 Deseret case in the supplemental SME materials around  
3 page 680. I can't find it exactly, but basically, that's  
4 what they said, is that -- And they were using the term  
5 "top-down BACT," and that's why I was -- You know, not  
6 having been at Roundup, I was reading what the EPA  
7 considered to be top-down BACT, and the EPA considered  
8 top-down BACT to start at the particular technology that  
9 the applicant had decided to use, that top-down BACT did  
10 not allow the EPA to go one step earlier than that.

11 But, you know, that's fine, we have a dispute about  
12 that. Let me go on to some other questions, if I might,  
13 Joe.

14 CHAIRMAN RUSSELL: Oh. Go for it, Bill.

15 MR. ROSSBACH: Okay. I guess my question is, in  
16 your comment, and maybe you can comment to us today, if --  
17 other than IGCC, if we're assuming that IGCC is -- let's  
18 just take that off the table right now. Can you tell us  
19 how a BACT analysis would have been different and would  
20 have produced a different plant or a different air quality  
21 permit in analyzing these technologies if they had  
22 considered CO2? I mean, what would have been the  
23 difference? What technology could you have commented to  
24 them, other than IGCC, that would have said to the  
25 Department or to SME this is how you should have taken it

1       into consideration, this is the technology that should  
2       have been considered? Or if it was considered in the  
3       BACT -- I mean, I'm sure the BACT did consider different  
4       technologies -- how would the CO2 result have been  
5       different if you'd have looked at it in the BACTs that  
6       were done?

7                   MS. DILLEN: Sure.

8           Well, let me start by saying that neither I nor my  
9       clients are qualified to step into the shoes of the agency  
10      and specify what BACT should have been in this instance  
11      where there's no analysis even to start from. And that  
12      really highlights the importance of putting this back to  
13      the agency and the permittee to go out and look at the  
14      possible options and do a BACT analysis in the first  
15      instance. Arguing about it here, where everyone is less  
16      than well informed, is not an ideal process and not one  
17      that's calculated to get a result that really reflects  
18      what the Clean Air Act intends.

19           That said, however, in the context of this dispute, we  
20      have looked into the question whether there are options to  
21      be considered. And what we found out by -- by consulting  
22      with some of the most knowledgeable people in the field is  
23      that there are a number of options that are being  
24      developed and which are, in fact, commercially available  
25      in addition to IGCC. There are off-the-shelf solutions,

1       excuse me, for chilling -- it's called chilling ammonia.  
2       And you're catching me a little off guard, but there's  
3       another process called oxy-fuel. These all facilitate the  
4       capture of CO2. There are also ways of sequestering CO2  
5       in conjunction with enhanced oil and gas recovery. These  
6       are all issues which we believe should be considered in  
7       the context of a BACT analysis. I think they're worth  
8       mentioning today just to allay any concerns that a BACT  
9       analysis would essentially be a futile enterprise.

10       And in that regard, I would like to mention a question  
11       that you raised to the parties, which is, what is SME  
12       doing at the moment to honor its promises to the public  
13       that it's considering ways to capture and store its CO2?  
14       That's the kind of investigation that should have been  
15       done with the agency's oversight and in the context of a  
16       permitting process, not as simply a voluntary enterprise  
17       that may never yield material results.

18       So I can't give you an answer of what BACT would  
19       actually be, but I can say there are alternatives to  
20       capture CO2 from the CFB plant as it's proposed today at  
21       the Highwood site. You could also consider more efficient  
22       boilers, such as the super-ultra-critical boiler -- I said  
23       that wrong, an ultra-critical -- forgive me. It's an  
24       ultra-supercritical boiler.

25       So there are a variety of issues that could be

1 considered and then put through the filters of costs and  
2 energy and environmental consequences. And at that point,  
3 you would come up with a determination of what BACT is.  
4 What that is, I can't say, but I think it's absolutely  
5 crucial that the agency and the permittee undertake that  
6 analysis in the first instance, and then we could all come  
7 back and have an informed record to decide whether they  
8 undertook that analysis in a reasoned fashion.

9 MR. ROSSBACH: But you didn't submit any of that  
10 as a part of your comments to them to give them something  
11 to digest and consider and comment on as a part of the  
12 public comment process. Is it correct that you did not  
13 talk to them or submit to them comments about the chilled  
14 ammonia or any of the other available technologies  
15 specifically other than IGCC?

16 MS. DILLEN: It is correct that we focused on  
17 IGCC.

18 And one note: I agree, in an ideal process, it would  
19 be terrific to have identified every option for the  
20 agency. However, this is a very quick process, as you  
21 know, and -- I would say that there is no exhaustion  
22 requirement, of course, under the Montana air permitting  
23 rules, so while this may be a non-ideal process, it's not  
24 one that has consequences for the legal merits of -- of my  
25 clients' claims.

1 MR. ROSSBACH: Thank you.

2 CHAIRMAN RUSSELL: Any further questions?

3 (No response.)

4 CHAIRMAN RUSSELL: Abigail, I have one. You  
5 mentioned -- And I'm not as familiar with air monitoring  
6 on stationary sources as I am with monitoring of a public  
7 water supply, but you mentioned the fact that you can be  
8 in violation by not doing monitoring and reporting.

9 MS. DILLEN: Right.

10 CHAIRMAN RUSSELL: But is that the same as  
11 violating a standard?

12 MS. DILLEN: Yes, it is. And the way that you  
13 can understand that result, and it's one that I questioned  
14 as well, if you go to the definition of standards and  
15 limitations in the Clean Air Act, and that is -- that  
16 definition is among the materials that I provided to the  
17 Board, but it clearly states that it's beyond the  
18 standards as we usually think of them and extends to any  
19 requirements.

20 CHAIRMAN RUSSELL: I understand that it's a  
21 violation just like a violation of the standards. That's  
22 what you meant, right?

23 MS. DILLEN: Yes.

24 CHAIRMAN RUSSELL: But is there a standard for  
25 CO2?

1 MS. DILLEN: Is there a standard? No. It has  
2 not been designated a criteria pollutant, so there's no  
3 national ambient air quality standard.

4 CHAIRMAN RUSSELL: I mean, the Supreme Court has  
5 identified it as a pollutant.

6 MS. DILLEN: Yes.

7 CHAIRMAN RUSSELL: But it hasn't been put into  
8 the CFR as a criteria pollutant yet.

9 MS. DILLEN: That's right. But I would direct  
10 you to the -- to the specific language of the BACT  
11 requirements, which specifies that they apply to any  
12 pollutant subject to regulation. Now, of course, Congress  
13 could have said "subject to a standard," "subject to  
14 control requirements," but it used a much broader term,  
15 and that is "regulation." And to my knowledge, and I  
16 certainly haven't heard one in the context of these  
17 proceedings, there's no reason why onerous monitoring and  
18 reporting requirements do not qualify as regulation under  
19 any plain understanding of that word.

20 CHAIRMAN RUSSELL: And I agree with that.

21 Anything else for Abigail?

22 MS. DILLEN: I do want to find you --

23 CHAIRMAN RUSSELL: Go ahead.

24 MS. DILLEN: I do want to find you, Mr. Russell,  
25 the Roundup decision, but it just might take me a moment,

1 because I've been too busy answering your questions. If  
2 we can come back to that, that would be great.

3 CHAIRMAN RUSSELL: That would be fine.

4 I believe -- Does the Department wish to add anything  
5 on their supplemental?

6 MR. LIVERS: Mr. Chairman, this is Tom.  
7 David Rusoff will be responding.

8 CHAIRMAN RUSSELL: Okay, great.

9 MR. RUSOFF: For the record, again, this is  
10 David Rusoff, attorney for the Montana Department of  
11 Environmental Quality. I'd like to just make a few brief  
12 comments regarding the supplemental authorities that have  
13 been filed, and I'd like to also have the opportunity to  
14 respond to some of the questions posed by board members  
15 and Ms. Dillen's responses.

16 I guess first of all, I guess I'd like to emphasize  
17 that the issue before the Board this morning is a fairly  
18 narrow issue, which is whether or not CO2 is a regulated  
19 pollutant such that it's subject to the BACT requirement  
20 such that the Department had authority to impose a BACT  
21 determination on the Highwood Generating Station in this  
22 case. And nothing that petitioners have filed either  
23 previously or as part of their supplemental authorities,  
24 or in response to questions today, would support a finding  
25 that CO2 is a regulated pollutant. In the face of the CO2

1 monitoring requirements the petitioners continuously refer  
2 to -- which, by the way, that argument was not made in  
3 MEIC's comments on the draft permit. That was apparently  
4 an argument that they developed later. And granted, the  
5 comments were submitted by MEIC and not by an attorney.

6 But getting back to what I was saying, in the face of  
7 those CO2 monitoring requirements which have been in  
8 existence since the Federal Clean Air Act Amendments of  
9 1990, no court, no administrative board, and no permitting  
10 authority in this country has found that those monitoring  
11 requirements constitute regulation of greenhouse gases or  
12 CO2 specifically such that a BACT determination is  
13 authorized or required. And as the Board knows from the  
14 submissions, no permitting authority in this country has  
15 made a BACT determination for CO2, because it's simply not  
16 a regulated pollutant.

17 You know, there was a lot of discussion, in response  
18 to comments concerning IGCC, you know, that -- that's not  
19 at issue in this case. I'll be glad to address it if the  
20 Board wants to. Going back to the Roundup Power decision,  
21 what that decision says, and I don't have it in front of  
22 me, the ultimate conclusion of law that the Board came to  
23 was that the Department was required to consider  
24 innovative fuel combustion techniques. And, frankly,  
25 that -- that phrase is right out of the definition of



1 BACT, and we've never disputed that. But there is a clear  
2 line of authority by EPA and -- and there's a  
3 Tenth Circuit decision that came out since the Roundup  
4 Power case, in the matter of the Prairie -- I believe it's  
5 the Prairie Generating Station, where the Tenth Circuit  
6 definitely draws a distinction between control  
7 technologies that are applicable to the proposed project  
8 and alternatives to the proposed project. And that's what  
9 IGCC would constitute in the present case. SME has not  
10 proposed an IGCC combustion process, and turning the  
11 Highwood Generating Station into an IGCC plant would  
12 constitute redefinition of the project, and the  
13 Tenth Circuit ruled in the Prairie Generating Station case  
14 that that is not contemplated within -- within the BACT  
15 requirement.

16 And in response to Ms. Dillen's statement that EPA has  
17 recognized that the states may use the BACT requirement to  
18 require consideration of IGCC, again, you know, that's  
19 nothing new; the New Source Review Manual has stated that  
20 since 1990. And states are certainly free to have more  
21 stringent statutes and rules than EPA does. But EPA has  
22 consistently said and, you know, continues to say, with  
23 the permits that it's issued recently, that it does not  
24 view the BACT requirement as a means to require  
25 redefinition of the proposed project. And that's what

1 IGCC would require in this case. Again, it's not an issue  
2 in this case.

3 Going back to the Roundup case, just to finish my --  
4 my somewhat fractured line of thinking here, the Board  
5 did -- Ms. Dillen is correct that the Board did rule in  
6 that case, and with all due respect, mistakenly, that the  
7 Department should have required IGCC. But if you go back  
8 and look at that decision, there's really no factual basis  
9 in the Board's decision. And I think that was actually a  
10 finding of fact, not a conclusion of law. And, you know,  
11 the Board cited testimony that IGCC would require  
12 redefinition of the Roundup Power project, which was a  
13 proposed pulverized coal-fired combustion generating  
14 station.

15 I'm not sure how -- You know, MEIC's own witness in  
16 that case acknowledged that IGCC would require  
17 redefinition of the project, there wasn't any dispute  
18 about that. There was testimony that if -- if the  
19 Department were to require IGCC, that Bull Mountain  
20 Development Company would have had to go back and redesign  
21 its plant and its application and submit a new  
22 application, thus beginning the whole process over again  
23 in what one might argue could potentially be a  
24 never-ending process. But, again, the conclusion of law  
25 in that case was that the Department is required to

1 consider innovative fuel combustion techniques.

2 First of all, IGCC is not an innovative fuel  
3 combustion technique. That's not in dispute. IGCC is a  
4 very old technology. It's an older technology than CFB.  
5 There's deposition testimony regarding that in this case,  
6 I believe. And, again, it's not a fuel combustion  
7 technique that's applicable to a CF boiler generating  
8 station.

9 I believe Ms. Dillen referenced -- I believe she  
10 referenced it in her comments today, legislative comments  
11 on when the BACT requirement was instituted in the Federal  
12 Clean Air Act. If she didn't today, they have attached it  
13 to their -- they attached it to their comments to the  
14 Department on the draft permit and have referred to it  
15 before. And what that -- what Mr. Huddleston's testimony,  
16 legislative testimony was, was he was concerned that  
17 permit applicants would not be able -- would be precluded  
18 from proposing innovative fuel combustion techniques, and  
19 he wanted to make clear that the BACT requirement would  
20 not be thus interpreted. In looking at his comments,  
21 which MEIC quoted in its comments to the draft permit, he  
22 said it's the purpose of this amendment to leave no doubt  
23 that in determining best available control technology, all  
24 actions taken by the fuel user are to be taken into  
25 account. And, again, he just wanted to make sure that

1 permit applicants could propose a project that included  
2 coal gasification if appropriate.

3 One final comment on IGCC. Although I keep saying  
4 it's not an issue, it seems to be a concern to some of the  
5 board members. Finally, IGCC is not a CO2 control  
6 technology in any way. There's no evidence in the record  
7 of this case, and I submit that there can be no evidence  
8 in this case, that IGCC controls carbon dioxide emissions.  
9 It's simply an alternative combustion process that, as I  
10 understand it, lends itself to CO2 control, add-on control  
11 more easily than other alternative combustion processes.

12 Just one moment, please, while I review my notes.

13 I guess I've gone pretty long there. I just want to  
14 point out a couple of other things. Since Mr. Rossbach  
15 raised the issue of MEIC's comments on the draft permit,  
16 what MEIC actually said in its comments urging the  
17 Department to consider a CO2 limitation, it pointed out  
18 the pending challenge in the Massachusetts v. EPA case.  
19 And what MEIC said in its comments was, we believe that  
20 the EPA and the State of Montana have a legal obligation  
21 to regulate CO2 and other greenhouse gases as pollutants  
22 under the Clean Air Act and the Montana Clean Air Act.  
23 Well, that's fine. They then cite, for the authority for  
24 that, the fact that certain states had challenged EPA's  
25 decision to deny a petition to regulate CO2 under the

1 mobile source provisions of the Federal Clean Air Act.  
2 And what MEIC says is if -- again, if the federal court  
3 agrees that greenhouse gases such as CO2 must be regulated  
4 under the Clean Air Act, such a decision would also  
5 require the establishment of CO2 emission limits in this  
6 permit for the Highwood Generating Station.

7 Well, as we all know, the federal court did not agree  
8 that greenhouse gases such as CO2 must be regulated. The  
9 Supreme Court ruled only that CO2 does constitute an air  
10 pollutant and that EPA would have the authority, that is,  
11 it could regulate CO2 under the mobile source provisions  
12 of the Clean Air Act if it made certain endangerment  
13 findings and didn't otherwise come up with a rationale not  
14 to regulate CO2 under those provisions of the Clean Air  
15 Act. So MEIC's comment that the Department was required  
16 to consider CO2 is based upon a premise that turned out  
17 not to be -- not to happen. The court did not agree that  
18 CO2 must be regulated.

19 And I guess I would just finish by saying -- And I'll  
20 let Mr. Reich summarize the supplemental authorities that  
21 he's submitted on behalf of the Department and SME, but I  
22 would just summarize, all the authorities that I think  
23 he'll refer to, and even that MEIC included in its  
24 supplement, which was the 1978 Federal Register by EPA,  
25 all of those authorities consistently state EPA's

1 position. Since the Clean Air Act Amendments of 1977,  
2 which added the phrase "subject to regulation under this  
3 Act" into the definition of BACT, all of those Federal  
4 Registers and other authorities support the Department's  
5 position, not MEIC's, and demonstrate very clearly that  
6 EPA's consistent interpretation has been that that  
7 subject-to-regulation language means that the pollutant in  
8 question isn't actually restricted under an ambient air  
9 quality standard, a new source performance standard, an  
10 ozone depleting standard, or some other actual restriction  
11 that controls or otherwise limits emissions of the  
12 particular pollutant. And, again, that's found even in  
13 MEIC's supplemental authority, the 1978 Federal Register  
14 Notice. And the Board has that, so I won't read it.

15 I'll be glad to answer any questions, and I will  
16 assume that Mr. Reich will summarize the authorities  
17 that -- that he's filed.

18 Thank you.

19 CHAIRMAN RUSSELL: Thanks, David.

20 Any questions for the Department?

21 MS. SHROPSHIRE: Joe, this is Robin.

22 CHAIRMAN RUSSELL: Robin.

23 MS. SHROPSHIRE: I have some questions.

24 In terms of how I'm approaching -- It seems like  
25 there's a lot of shoul da, coulda, woulda. But one of the

1 things that will help me is if we could look at the -- And  
2 I talked about this a little bit at the last meeting, but  
3 if we could look at the timeline of events, I think that  
4 would be helpful for me. And so I don't know if you have  
5 this information at hand, but I suspect you do.

6 The initial application for this plant was -- when was  
7 that submitted?

8 MR. RUSOFF: The application -- And I don't  
9 actually have a timeline other than a mental timeline in  
10 front of me, so I'll have to answer from that. I do know  
11 that the application --

12 MS. SHROPSHIRE: Sorry, let me go back. You  
13 know, when the application process began and when it was  
14 submitted and when the permit was granted, that would  
15 be -- those sorts of dates would be helpful for me.

16 MR. RUSOFF: Sure.

17 The application would have been developed prior to  
18 November 2005 and was submitted to the Department in  
19 November of 2005. The Department issued a preliminary  
20 determination or draft permit, I believe, in approximately  
21 March of 2006 and issued a supplemental preliminary  
22 determination, I believe, in about June -- and these are  
23 approximations, but I think they're accurate -- in about June of  
24 2006 based upon some additional information that it  
25 received from the company. I don't think it relates to

1 the issues in this case. But the Department felt that it  
2 should issue a supplemental draft permit for public  
3 comment based on that new information. And then the  
4 Department issued its final decision, I believe, on  
5 May 30th of 2007.

6 MS. SHROPSHIRE: Okay, great. Thank you.

7 MR. RUSOFF: You're welcome.

8 MS. SHROPSHIRE: I have a few other questions.

9 In terms of the shoulda, woulda, coulda in the BACT,  
10 one of the things that I'm confused about are the  
11 arguments that a BACT for CO2 should have been conducted  
12 and whether it could have been conducted. I'm curious in  
13 terms of -- I think I understand that you don't think that  
14 it had to be. And is it also your opinion that it  
15 couldn't be conducted?

16 MR. RUSOFF: I guess I'll answer that two ways.  
17 With all due respect, I guess my initial response is  
18 that -- there's no delicate way to say this, I guess, is I  
19 don't think that's relevant. And I think you recognize in  
20 your question that it's not relevant to the issue before  
21 the Board on summary judgment, which is whether the  
22 Department had authority to impose a BACT requirement.

23 MS. SHROPSHIRE: And part of this is, I think, in  
24 my mind, a factual question, if there's a factual dispute.  
25 And I'm not sure I even want to go there, but I'm agreeing



1 so far with what you're saying.

2 MR. RUSOFF: Okay. And then the second part of  
3 my response, given the first part, is that we didn't  
4 receive a BACT analysis from the company for CO2 because  
5 we didn't ask for one because neither SME nor the  
6 Department believed, based on the existing law and the  
7 status of BACT determinations throughout the country, that  
8 a BACT analysis was required for CO2. So we didn't  
9 receive a BACT analysis. We've never reviewed a BACT  
10 analysis because, as far as I know, one has never been  
11 done, and consequently we didn't make a BACT  
12 determination. So I'm going to have to leave it to expert  
13 witnesses as to how a BACT analysis could or could not  
14 be -- be done.

15 You know, our position simply is that we didn't think  
16 it was required, we didn't do it, and we're not going to  
17 speculate on what the outcome of that BACT determination  
18 might be. I just -- I can't do that. Anything I said  
19 would be -- there wouldn't be any foundation based on our  
20 record or my personal knowledge.

21 MS. SHROPSHIRE: And, again, I appreciate that  
22 the focus is narrow, so even though some of my questions  
23 are broader, bear with me.

24 And this may be a generic, hypothetical question, but  
25 in the review process, if a plant is granted a permit,

1 that -- and it's a major source, that has to be reviewed  
2 every five years; is that correct?

3 MR. RUSOFF: The preconstruction permit is not  
4 reviewed, and that's the permit involved. There are two  
5 types of permits, air quality permits for stationary  
6 sources. And this is very confusing to a lot of people.  
7 The permit at hand in this case is a preconstruction  
8 permit or a Montana air quality permit.

9 The permit that you're referring to is a Title V air  
10 quality operating permit, and there is a five-year renewal  
11 period for those permits. And those permits do not  
12 authorize preconstruction. They just take all of the  
13 applicable requirements to a facility and put it all in  
14 one permit; that is, there are requirements outside of a  
15 preconstruction permit that a facility has to comply with  
16 to demonstrate compliance with the limits in the permit to  
17 certain recordkeeping and reporting requirements that may  
18 not be in a preconstruction permit.

19 And so, no, the only requirement for a Montana air  
20 quality permit or for any kind of preconstruction permit  
21 that I'm familiar with is that, you know, there's a  
22 timeline in the permit to commence construction and  
23 proceed with due diligence. And if the facility does  
24 that, then the permit continues indefinitely until there  
25 is some sort of a -- under the Montana rules. If there

1 were a change in our rules such that the permit would --  
2 the facility wouldn't be operating lawfully under new  
3 rules that the Board adopted, then we would have to open  
4 up the permit for that purpose. But otherwise, it would  
5 remain in effect indefinitely. And I should qualify that:  
6 If a facility proposes any kind of modification that  
7 requires essentially a new permit --

8 MS. SHROPSHIRE: Like new source review.

9 MR. RUSOFF: -- then they would have to apply for  
10 a permit modification, which is essentially a new permit;  
11 although it wouldn't open up the entire permit, it would  
12 just open up the section related to modification.

13 MS. SHROPSHIRE: This whole discussion of  
14 regulation and subject to regulation has got me thinking  
15 about this. And I'm just curious, can you think of a  
16 pollutant that's not subject to regulation?

17 MR. RUSOFF: I think there are probably hundreds  
18 of pollutants that aren't subject to regulation. I can't  
19 tell you what they are, but I know that, you know, that  
20 neither the Federal Clean Air Act nor state acts attempt  
21 to regulate every pollutant. I guess we'd need a chemist  
22 probably to tell you what all the air pollutants are.  
23 But, for example, I can tell you -- I can't give you an  
24 example, but I can tell you the Federal Clean Air Act  
25 contains a list of approximately 180 hazardous air

1 pollutants, and those are considered to be regulated under  
2 Section 112 of the Federal Clean Air Act, but it does not  
3 attempt to list every -- every hazardous air pollutant.

4 MS. SHROPSHIRE: And I'm not trying to put you on  
5 the spot. It's just -- in my mind, I was trying to come  
6 up with one in terms of approaching that question of  
7 pollutant and subject to regulation.

8 MR. RUSOFF: So I think the answer is, yes, there  
9 are other pollutants, but I can't identify one or more  
10 than one for you. But I'm fairly confident that they  
11 exist. I guess one that -- You know, I think the last  
12 time we were here, I think I was asked a similar question  
13 and I referred to O2, which it seems odd to say that  
14 that's a pollutant. But the monitoring requirements that  
15 the petitioners have -- have relied on in this case, or  
16 one of the sets of monitoring requirements through the  
17 acid rain regulations does require monitoring of either O2  
18 or CO2 for purposes of determining the NOx emission rate.  
19 And I think I told you, based on information I had, that  
20 O2 is not regulated anywhere under the -- under any clean  
21 air act as far as I'm aware.

22 And I guess the petitioners would say, well, it is  
23 regulated because there's a monitoring requirement, but  
24 they haven't asserted that we should do a BACT  
25 determination for O2.

1 MS. SHROPSHIRE: Right.

2 CHAIRMAN RUSSELL: Anything else?

3 MR. ROSSBACH: Yeah. This is Bill. I was just  
4 waiting to make sure Robin was through.

5 MS. SHROPSHIRE: I do have one last question.

6 CHAIRMAN RUSSELL: Go ahead, Robin.

7 MS. SHROPSHIRE: As the State moves forward, do  
8 you see a technical question about in the future and  
9 ability to control CO2 down the road with this type of  
10 plant? I don't know if you can comment on that, but if  
11 you can, I'd appreciate it.

12 MR. RUSOFF: I apologize, I can't. I don't have  
13 that information. You know, I think information related  
14 to that is probably available. You know, anything -- I  
15 could go on about the status of CO2 control and  
16 sequestration, but I'm not an expert on that, and it  
17 really would be unfair for everyone for me to just tell  
18 you what my understanding is.

19 MS. SHROPSHIRE: You know, the question relates  
20 to the -- It seems that everybody is in agreement that --  
21 Whether or not we agree that CO2 is subject to regulation  
22 now or whether it is regulated now, there seems to be  
23 agreement that down the road, it will be regulated. And I  
24 may be overstating that, but that's what I've -- it seems  
25 to me that I've been hearing from all the parties. And so

1 that's how -- You know, basically with that thought, how  
2 this plant fits into that is of -- is of importance to me.  
3 But I understand that you aren't going to necessarily  
4 answer that question or aren't --

5 MR. RUSOFF: Well, I guess my short response,  
6 I'll try to make this short, would be that's obviously the  
7 question on everybody's mind nationwide and throughout  
8 the world, is how to control CO2. But, you know,  
9 whether -- And I think everybody assumes there is going to  
10 be some sort of regulatory scheme. It will be regulated  
11 at some point in the future in some manner. That doesn't  
12 mean it will be through a BACT determination. It may be  
13 through something else that just ends up requiring  
14 facilities to purchase CO2 credits or to conduct their  
15 process in some manner that it mitigates CO2 emissions  
16 somehow.

17 But I think what EPA has said, and I think this is  
18 probably in the documents that are before the Board, or  
19 maybe the Massachusetts -- or at least in response to the  
20 Massachusetts case. And maybe they're not before the  
21 Board, but I don't think it's any big surprise to anybody,  
22 is, you know, it's proceeding pretty slowly right now in  
23 response to the Massachusetts v. EPA case, just to try to  
24 make sure that however it proceeds in regard to CO2, that  
25 permitting authorities and facilities will be able to

1       comply.  And the assumption on most people's part,  
2       certainly on EPA's part, is that if CO2 -- does regulate  
3       CO2 from motor vehicles pursuant to the Massachusetts v.  
4       EPA case, that that would trigger the BACT requirement as  
5       it's written now.  Because it clearly would be subject to  
6       regulation.

7             Some people, I guess, dispute whether that would  
8       constitute subject to regulation, but I think most people  
9       in EPA believe that it would and that immediately the BACT  
10      requirement would apply, because that would be an actual  
11      control, assuming that it actually limits CO2 emissions.  
12      And so I think that's why EPA is proceeding carefully, to  
13      decide whether and how to regulate CO2 from motor  
14      vehicles, to make sure that the appropriate regulatory  
15      scheme for CO2 for stationary sources comes into place and  
16      that it doesn't immediately trigger some kind of a process  
17      that doesn't make sense.

18            MS. SHROPSHIRE:  I lied, I have one last  
19      question.  And it's maybe a generic question, again, but  
20      under the -- The State of Montana has a state implement --  
21      a SIP, I'll just say, rather than try to mess up the word  
22      "implementation," under the Clean Air Act.  Am I  
23      understanding that correctly?

24            MR. RUSOFF:  Yes.  States are required to have  
25      implementation plans, and I think the original purpose was

1 to provide control plans for non-attainment areas. But I  
2 think SIPs now include other things, as well. And the  
3 states have a certain amount of leeway as to what they  
4 submit into a SIP, and EPA has rules on what's required to  
5 be in a SIP, I guess. We do have one. And I want to  
6 clarify, it's not a document. Some people think the SIP  
7 is a document, it sounds like it would be; it's the state  
8 implementation plan, I ought to be able to find that  
9 somewhere and read it. And it's not. It's just all of  
10 the state requirements and control plans for an area like  
11 Libby or Great Falls or whatever. The state rules, state  
12 statutes, and things like that are all of the part of the  
13 SIP.

14 MS. SHROPSHIRE: If everybody agreed that  
15 carbon -- CO2 was subject to regulation, would it fall  
16 under that SIP?

17 MR. RUSOFF: Well, I'm not sure -- I mean --

18 MS. SHROPSHIRE: And I'm not sure if I'm --

19 MR. RUSOFF: Correct me if I'm not answering your  
20 question correctly.

21 I believe that our BACT requirements are part of the  
22 SIP now, even though it's not related to non-attainment  
23 areas. I believe that our BACT rule, which is very  
24 similar to the federal rule -- We actually have two of  
25 them, as you know, our general rule, which is a little



1 different, and then our PSD definition of BACT, which is  
2 essentially the same as the federal definition. And those  
3 rules determine whether -- you know, what the BACT  
4 requirements are in the state of Montana. They are in the  
5 SIP.

6 But I think what you may be asking is how would a  
7 decision that a BACT determination for CO2 for the  
8 Highwood Generating Station affect our state  
9 implementation plan and any other facilities in the state.  
10 And I guess that's something we've thought about. I mean,  
11 essentially, I guess you would be ruling that every air  
12 quality permit issued in the state of Montana and probably  
13 throughout the country is illegal and it would have to be  
14 looked at. But it wouldn't, I don't think it would  
15 require -- If that was your ruling, if that was your  
16 interpretation, the SIP wouldn't change; the  
17 interpretation of the SIP would change. You know, the  
18 interpretation of the rules in the SIP would be different  
19 than the way they've been interpreted in the past.

20 MS. SHROPSHIRE: Thanks, David.

21 MR. RUSOFF: Thank you.

22 CHAIRMAN RUSSELL: Bill.

23 MR. ROSSBACH: Let me try to stay a little  
24 focused here.

25 MR. RUSOFF: I'll try to focus also.

1           MR. ROSSBACH: Okay. The Massachusetts case --  
2 the Massachusetts case basically was an appeal of the  
3 EPA's decision not to do rulemaking on CO2 for mobile  
4 sources, correct?

5           MR. RUSOFF: That's correct. I believe a dozen  
6 states --

7           MR. ROSSBACH: Okay, it's correct.

8           You know, David, I don't have to hear the whole thing,  
9 okay. I'm sorry, I'm trying to stay focused so we can all  
10 be on the same page.

11          MR. RUSOFF: Okay. I won't read the whole  
12 decision to you.

13          MR. ROSSBACH: Okay. And the decision was that  
14 the Clean Air Act authorizes the EPA to regulate  
15 greenhouse gas emissions from new motor vehicles in the  
16 event that it formed an endangerment judgment that such  
17 emissions contribute to the climate change; isn't that  
18 true?

19          MR. RUSOFF: That's essentially -- there may have  
20 been an additional -- I don't remember exactly. It seems  
21 like, you know, there may have been some additional  
22 criteria, but I think that's the fundamental criterion.

23          MR. ROSSBACH: Right. And it did authorize the  
24 EPA -- in other words, it said to the EPA you were wrong  
25 in denying the petition to start rulemaking; in other

1 words, you can start rulemaking on CO2, you can't just  
2 deny it because you don't have authority. Isn't that what  
3 it was saying?

4 MR. RUSOFF: That's correct. EPA, as I recall,  
5 Mr. Rossbach, had asserted two reasons for not initiating  
6 rulemaking, and one was that it lacked authority, and then  
7 the other, as I recall, was some sort of a policy  
8 rationale, and I think the court found that that really  
9 wasn't based upon the statutory criteria.

10 MR. ROSSBACH: Right. Right.

11 And then if I look at the Deseret case, which is after  
12 the Massachusetts case, and this is the EPA doing its  
13 comments -- And I'm looking specifically in the  
14 supplemental materials submitted by you and SME, and  
15 particularly in the area of about page 681 to about 685.  
16 And I think specifically at 682, the EPA -- And this is  
17 taking into consideration what the EPA had essentially  
18 been directed to do by the Supreme Court or directed to --  
19 that it did have authority. The EPA is saying, and I'll  
20 see if you agree with this, that it is best to initiate  
21 notice-and-comment rulemaking so that there can be a  
22 transparent process based upon the best available science.

23 Do you agree with that? This is a quote from the  
24 EPA --

25 MR. RUSOFF: Yeah, I'll try to answer your

1 question. I mean, I'm not sure that I'm the best  
2 person -- I'm just answering -- I guess the only answer I  
3 can give you is my personal opinion, and I guess my  
4 personal opinion is that based upon the longstanding  
5 interpretation throughout the country that CO2 is not  
6 subject to regulation, not subject to the BACT  
7 requirement, that, at least practically, what makes the  
8 most sense is a rulemaking -- and I think that's what EPA  
9 is trying to go through in regard to motor vehicles, a  
10 rulemaking that takes into consideration the best science  
11 and provides for input from all of the affected parties.  
12 So that makes sense to me, but, again, you know, that's  
13 just my personal opinion.

14 MR. ROSSBACH: But from a legal point of view as  
15 the attorney for the DEQ, do you agree that the EPA -- the  
16 Massachusetts v. EPA decision gives the EPA authority to  
17 regulate CO2?

18 MR. RUSOFF: It gives EPA the authority to  
19 promulgate federal regulations that restrict CO2, yes.

20 MR. ROSSBACH: And as the delegated agency in  
21 Montana, do you agree that if there is a science-based  
22 rulemaking process, through typical notice and comments,  
23 that it would also be within the authority of the DEQ, or  
24 through the authority of the BER working through this to  
25 also adopt rulemaking, that it would come within our

1 delegated authority under the Clean Air Act?

2 MR. RUSOFF: Yeah, it would. I mean, I think the  
3 petitioners would argue that -- or are arguing that you  
4 already have that authority.

5 MR. ROSSBACH: I understand. I'm not asking what  
6 the petitioners -- I'm asking you. I mean, if we take  
7 your position in this, Dave, you would agree, though, that  
8 if EPA has authority under the Massachusetts case to  
9 initiate rulemaking on CO2 and make a determination -- I  
10 mean, that doesn't mean when you initiate rulemaking that  
11 you're going to end up adopting rules, it's just starting  
12 the process -- do you agree that we have authority to  
13 start a process also here in Montana?

14 MR. RUSOFF: Yes, you do. And I think there's a  
15 couple things you can do that I've thought about, and one  
16 is -- and I'm not saying this is a good idea, I don't  
17 think it is -- you know, the Board could change the  
18 definition of BACT if, through rulemaking, the Board found  
19 that that was appropriate and that it should apply to a  
20 wider range of air pollutants than just those that are  
21 currently subject to regulation. But it would seem to me  
22 the more straightforward approach would be to regulate it.  
23 But, again, if EPA regulates it first, then I think the  
24 Board -- or the Department will be required to make BACT  
25 determinations for CO2, unless -- unless this board

1 changes its BACT requirements such that CO2 is regulated  
2 in some other manner. You know, we'd still have to be  
3 consistent with the federal BACT requirements, but there  
4 are certainly other things the Board can probably do.

5 MR. ROSSBACH: Okay. That's all I wanted to  
6 know. Thank you.

7 MR. RUSOFF: Thank you.

8 CHAIRMAN RUSSELL: Anything else from the Board  
9 to the Department -- for the Department?

10 (No response.)

11 CHAIRMAN RUSSELL: All right, we'll move along to  
12 counsel for SME.

13 MR. REICH: Yes. Thank you, Mr. Russell and  
14 members of the Board. Can everybody hear me all right?

15 CHAIRMAN RUSSELL: Better than most.

16 MR. REICH: Okay. SME's position, and it is  
17 supported by the State, is that MEIC's petition,  
18 particularly on the CO2 issue, really is an attempt to  
19 stretch the boundaries of the law beyond where they are  
20 now and, we submit, beyond a reasonable interpretation of  
21 that law.

22 As we've argued -- And we have submitted two  
23 supplemental authorities to the Board. One is a set of  
24 authorities that were referred to in either the Deseret  
25 permit or in our own briefs, and those were seven

1 regulatory cites for -- and as well as some case law cites  
2 for the Board's information; and the other was a set of  
3 two permit decisions that, like Deseret, took place after  
4 the decision in Massachusetts v. EPA in which two  
5 different jurisdictions, Kentucky and Georgia,  
6 specifically found that CO2 was not a regulated pollutant  
7 for purposes of BACT, and they declined to require a BACT  
8 analysis or to set a CO2 limit.

9 So in response to Mr. Rossbach's question from the  
10 last hearing whether any states that had made decisions  
11 with respect to a CO2 BACT analysis following the decision  
12 of Massachusetts v. EPA, we have found at least two state  
13 cases that have, and, of course, there's also the Deseret  
14 permit.

15 Now, the subject-to-regulation issue, as we talked  
16 last time, you know, like a lot of the Clean Air Act, you  
17 can't just take the words in isolation and look them up in  
18 the dictionary and say, okay, this is what it means. You  
19 really have to, particularly in this complex area, look at  
20 what the agency then is charged with -- with enforcing and  
21 interpreting these laws had said. And consistently, since  
22 1978 on, right through the Deseret permit issuance in  
23 2007, EPA has been consistent that "subject to regulation"  
24 means -- and I'm going to quote a part of the first item  
25 in my and DEQ's Notice of Filing of Supplemental

1 Authorities, which is a 1977 Clean Air Act Amendment final  
2 rule. It's 43 Federal Register 26388, June 19th, 1978.

3 And for the record, this is Kenneth Reich,  
4 representing Southern Montana. I should have said that  
5 initially.

6 In that 1978 regulation, I'll just read a pertinent  
7 part of it, which is at page 2 of my brief, it says:

8 "Some questions have been raised regarding what," quote,  
9 "'subject to regulation under this Act,'" unquote, "means  
10 relative to BACT determinations." And I'll just skip a  
11 couple of lines. "'Subject to regulation under the Act,'"  
12 in quotes, "means any pollutant regulated in Subchapter C  
13 of Title 40 of the Code Federal Regulations for any source  
14 type." But then it goes to say, "This then includes all  
15 criteria pollutants subject to NAAQS review" -- that is,  
16 these are the pollutants for which there are ambient  
17 standards -- "pollutants regulated under the Standards of  
18 Performance for New Stationary Sources ... pollutants  
19 regulated under the National Emission Standards for  
20 Hazardous Air Pollutants (NESHAP), and all pollutants  
21 regulated under Title II of the Act regarding emission  
22 standards for mobile sources."

23 Now, nowhere in that regulation is there any reference  
24 to pollutants that are regulated by simply being  
25 monitored. In fact, you know, EPA has been consistent on



1 that with that same definition all the way -- right  
2 through the Deseret permit decision. And the reason  
3 that monitoring only does not constitute regulation for  
4 BACT purposes, although it may constitute regulation for  
5 purposes of penalties and so forth, is that the new source  
6 review program as it's been administered in every state in  
7 the country and by EPA has jurisdiction over a very  
8 limited set of pollutants, pollutants for which there are  
9 standards and limits and for which it is possible to do a  
10 meaningful BACT analysis. And that -- that concept, as I  
11 said, began in '78 and has gone right through.

12 In 2002, because of the need to continue to clarify  
13 this interpretation, EPA came out with a amended  
14 regulation that defined, quote, "NSR regulated  
15 pollutants," unquote. And it's notable that in 2002 -- If  
16 petitioners are right that CO2 was already regulated  
17 because sources had to monitor it, in 2002 EPA did not  
18 list CO2 as a -- as a, quote/unquote, "regulated  
19 pollutant." In fact, there's no mention of that  
20 monitoring requirement anywhere. And, again, the -- you  
21 know the same definition applies. There has to be a  
22 pollutant for which there is some standard or limit. And  
23 the rationale is how do you set emission limits, how do  
24 you set BACT when there are no standards out there, you  
25 know, when there's no context to make that kind of

1 determination?

2 I've already mentioned that two decisions after  
3 Massachusetts vs. EPA have held -- two state decisions  
4 have held that CO2 is not a pollutant subject to  
5 regulation in Deseret, and those sources and quotes are in  
6 our materials.

7 Basically, "subject to regulation" doesn't mean, as  
8 petitioners seem to want it to mean, "could be regulated."  
9 Because otherwise, Congress could simply have said, when  
10 they -- when they defined BACT, they could have said any  
11 pollutant, you know, shall be the subject of a BACT  
12 analysis. So there has to be some meaning to "subject to  
13 regulation," and we submit it has to mean that it's a  
14 pollutant for which there is some emission limit, some  
15 standard.

16 Now, you know, the other point of that -- and I don't  
17 want to rehash the argument we made last time, but just  
18 very briefly, Mass. vs. EPA spent many, many, many pages  
19 trying to figure out whether CO2 was a pollutant, and in a  
20 5-4 decision they held that it was a pollutant that EPA  
21 had the authority to regulate if it made the appropriate  
22 determinations. So it didn't say it's a pollutant that is  
23 already regulated, it said it's a pollutant. And it's  
24 notable that there's no mention anywhere in that -- in  
25 that long opinion of these monitoring requirements that

1 petitioners are relying on.

2 We submit that MEIC is leading the BER down an  
3 erroneous path of basically ruling after the fact for a  
4 permit that has already been issued and that was issued  
5 validly. And, as we said last time, and as Mr. Rusoff  
6 indicated in some of the questions from board members,  
7 yes, the BER does have authority to -- to regulate CO2 if  
8 it chooses to, and it can do that through rulemaking which  
9 would be comprehensive and across the board and would be  
10 fair to all sources, including SME. And in that case,  
11 if the BER chose to do so, permits could be opened up and  
12 so forth so that everybody would be on the same footing.  
13 What we're simply saying is that you can't and shouldn't  
14 require the DEQ to go back and do a BACT analysis for a  
15 pollutant that was not even considered a pollutant  
16 officially by the Supreme Court until, you know, less than  
17 a month prior to the time that EPA -- or, sorry, that DEQ  
18 issued its final decision.

19 Now, before I conclude, I wanted to just address a few  
20 of the questions that were addressed to Ms. Dillen as well  
21 as other questions. Ms. Dillen indicated that, you know,  
22 the Board should perhaps consider, or on a BACT analysis  
23 there should be a consideration of IGCC. I would point  
24 out that there's -- this has never been part of their  
25 claim in this case. It's not referenced, as it has been

1 in other cases, that -- that the DEQ should have done a  
2 BACT analysis including IGCC. That wasn't raised in their  
3 affidavit, so we don't think it's an issue in the case.

4 But even if it were an issue in the case, you know,  
5 let's be clear. IGCC does not mean integrated  
6 gasification carbon capture. There is no IGCC plant  
7 today, to my knowledge, that is capturing IGCC at the  
8 levels that would be needed to capture it as a pollutant.  
9 And we submit -- And I -- and I suppose there is a  
10 question of fact on this issue. We submit that there is  
11 no commercially available technology today to capture CO2.  
12 Indeed, Ms. Dillen referred to one of the technologies  
13 that her people are looking at, the ammonia system, and  
14 it's ironic, but our very boilermaker is investigating  
15 that, you know, that technology to try to determine if  
16 it's feasible, and we are participating with our  
17 boilermaker -- This is in response to a question that was  
18 addressed to the parties. We are participating with our  
19 boilermaker in an effort to get a DOE grant to establish a  
20 pilot project to see if CO2 can be captured feasibly and  
21 economically.

22 At this time, there is no -- in our expert's opinion,  
23 there is no indication that CO2 could be captured  
24 economically and feasibly. And, in fact, just a month ago  
25 or so, the DOE issued a very large grant to build a

1 super-gen, a so-called super-gen project to attempt to  
2 capture CO2. So there's a lot of money being poured into  
3 this, but there's nothing on the ground that anybody can  
4 point to, and certainly not that the utility can point to,  
5 that says it's commercially available; certainly nothing  
6 off the shelf, as she said. And even if there are pieces  
7 that are out there, you know, they haven't been put  
8 together at the kind of capture levels that would be  
9 necessary to capture CO2. So if that's a question of  
10 fact, as to whether there's capture technology that's  
11 available, we certainly say there isn't. And if the Board  
12 thinks that that's relevant to the BACT analysis, and I  
13 don't think it is, to the BACT issue before this Board,  
14 then we should have a hearing on that issue.

15 Now, I did want -- to the extent I haven't fully  
16 addressed SME's plans, I'll just address those briefly.  
17 And if the Board intends to rely on what I'm about to say  
18 in its decision making, we're certainly prepared to put in  
19 an affidavit or even have a representative of SME testify  
20 under oath as to what their plans are, but they've been  
21 public about it. SME is exploring options for carbon  
22 capture and sequestration. What they've found is that  
23 it's expensive, it's not currently available or feasible  
24 or proven for coal-fired plants at a full-scale capture  
25 level. They are working with Alstom Power, which is their

1 boilermaker, an international boilermaker, to apply for a  
2 DOE pilot grant, as I indicated. A, there is no guarantee  
3 that SME will be able to obtain that pilot grant; and B,  
4 of course, there's no guarantee that the pilot program  
5 will work. But we are exploring that. We're exploring  
6 sequestration options, as well. And the public commitment  
7 that SME made and that has been quoted often is that it  
8 will attempt to apply a carbon capture and sequestration  
9 program to the CO2 -- or the portion of the CO2 that comes  
10 out of its stack if it's technically and economically  
11 feasible. Now, of course, if the EPA or State of Montana  
12 issues regulations or legislation that requires it for SME  
13 and all other sources, then, of course, we'll have to do  
14 it as a matter of law. Right now, we're exploring it  
15 voluntarily.

16 So returning to one of the questions that was raised,  
17 Ms. Shropshire, I believe, was looking at the timeline and  
18 I can fill in a couple of the dates that David didn't  
19 have. The final permit was actually issued on May 11th of  
20 2007, not May 30th. Mass. vs. EPA was decided April 2nd,  
21 '07. And so the permitting process had been in -- in  
22 process for, you know, at least a year and a half  
23 before -- before the final decision was made. And, as I  
24 said, the final decision was made just about a month after  
25 Mass. vs. EPA. I think that timing indicates that

1 certainly, the State could not have -- could not have  
2 anticipated the decision in Mass. v. EPA. And it  
3 certainly would run havoc with the system if a decision  
4 comes down just before you're about to issue a final  
5 permit and you've gone through the whole draft stage and  
6 all of the BACT analysis to have the decision, you know,  
7 totally reverse everything you've done. But bottom line  
8 is Mass. v. EPA did not say that CO2 is regulated.

9 So bottom line, as we said last time, if this board  
10 believes that CO2 should be regulated, the proper way to  
11 do that is through a full-blown hearing, just like you did  
12 with mercury, and go through that process. MEIC has the  
13 burden of proof to show that "subject to regulation" means  
14 what they say it does. Their position is contradicted by  
15 almost 20 years, 30 years of -- of EPA rulemaking and  
16 interpretation as well as every state in the country, and  
17 their burden is to show that DEQ erred. We submit that  
18 there's no credible or legal basis for their position,  
19 and, as we said the last time, we urge the Board to deny  
20 their motion.

21 So I'm certainly willing to entertain questions if you  
22 have any.

23 CHAIRMAN RUSSELL: Thank you.

24 Are there any questions?

25 MR. LIVERS: Mr. Chairman, this is Tom Livers. I

1 don't want to break any momentum here, so I suspect,  
2 depending on the amount of deliberation, you may want to  
3 consider a break after this round of questioning, but  
4 maybe just in deference to our court reporter, if we could  
5 just take 30 seconds or even a minute just in place to  
6 take just a breather, I think that would help.

7 CHAIRMAN RUSSELL: All right. Well, that's fine.

8 (Off the record briefly.)

9 MR. LIVERS: Okay, Mr. Chairman, I think we're  
10 ready to go. Thank you.

11 CHAIRMAN RUSSELL: Are there any questions of the  
12 Board?

13 MR. ROSSBACH: This is Bill.

14 CHAIRMAN RUSSELL: Bill.

15 MR. ROSSBACH: I'm willing to wait my turn,  
16 unless somebody else --

17 CHAIRMAN RUSSELL: Well, I think B goes before R.  
18 Go ahead.

19 MR. ROSSBACH: B goes before R?

20 CHAIRMAN RUSSELL: Alphabetically.

21 MS. SHROPSHIRE: He's making fun of me.

22 CHAIRMAN RUSSELL: Oh, I'm not.

23 MR. ROSSBACH: Oh. I'm also R, so I wasn't sure  
24 who you were referring to as B.

25 CHAIRMAN RUSSELL: Well R goes before S. Point



1 of order.

2 MR. ROSSBACH: Well, I didn't know who was lining  
3 up over there. All right.

4 Mr. Reich, I really appreciate your comments. I  
5 have -- The first thing that I'd like to address, and I  
6 appreciate your offer of submitting either sworn testimony  
7 or an affidavit. Could you tell me when or how you could  
8 do that? I'm very interested in the specifics as much as  
9 I can.

10 And I understand that you're the lawyer, and I'm not  
11 going to ask you to be put on the stand to testify as some  
12 kind of quasi-expert on what SME is doing. You know, I  
13 appreciate the comments being made by SME about their  
14 efforts, but I would like to see it in some more formal  
15 fashion. But I don't want to belabor this hearing here  
16 today on the topic of, you know, bringing up -- having you  
17 have an expert testify here today. But I would like to  
18 take you up on the offer on having an affidavit from an  
19 engineer or Mr. Gregori to tell us exactly what they are  
20 doing, who is responsible for the work, what budget they  
21 have to do it, and what kind of commitment they are making  
22 to us and the Governor and to the citizens of Montana  
23 about their efforts.

24 MR. REICH: Well, Mr. Gregori, of course, is in  
25 the room, but I'm going to forbid him to testify without

1 being prepped first by me, so I don't think you'll get  
2 your testimony today, but we're certainly going to --

3 MR. ROSSBACH: As an attorney myself, I am  
4 completely in sympathy with that. I don't want to do  
5 that. And that's all I'm asking, is your --

6 MR. REICH: We would be happy to provide either  
7 an affidavit or, you know, testimony from the appropriate  
8 person or persons as the Board wishes if you think it's  
9 necessary to the decision. I would say, however, I don't  
10 think it's necessary to your decision as to whether --

11 MR. ROSSBACH: I understand.

12 MR. REICH: -- SME has plans to --

13 MR. ROSSBACH: You know, and I'm not contesting  
14 that.

15 MR. REICH: But if the Board believes it wants to  
16 have that testimony or affidavit, we're certainly prepared  
17 to do so.

18 MR. ROSSBACH: I would like -- You don't have to  
19 have testimony. I mean, I understand how an affidavit is  
20 done. But if you have a thorough and detailed affidavit  
21 addressing these issues, it would be most gratefully  
22 appreciated by, I know, myself and I presume other members  
23 of the Board.

24 MR. REICH: And when you say "these issues" --

25 MR. ROSSBACH: Well, just what you said. I mean,

1     what is SME doing to control -- As I remember the quote,  
2     SME is doing things to control CO2.  What are those  
3     things?  What are you looking at?  Who is responsible for  
4     the work?  You know, the same things that you told us here  
5     today, fill in the blanks for us from somebody in  
6     authority to make those statements.  If you would, it  
7     would be really helpful to me.

8             MR. REICH:  We can certainly do that.  And I  
9     suppose I'll wait for directions from the Board as to how  
10    you'd like me to proceed, but we can do that, you know, I  
11    mean, in fairly short order.  And I'll wait for directions  
12    from the Board.

13            MR. ROSSBACH:  Thank you.

14            And, again, you are saying here today that you believe  
15    that a -- that we, as the delegated air quality authority  
16    for the state of Montana, that it would come within our  
17    authority pursuant to the EPA/Massachusetts decision to  
18    initiate a process.  Whether the process ends up with a  
19    rule or not, that's not the issue.  The issue is, could we  
20    initiate a process from a legal point of view, and it's  
21    your --

22            MR. REICH:  I believe you could legally.  The one  
23    caveat I would like to throw in is, as you're well aware,  
24    your clean air statute does require you to make a specific  
25    finding that -- you know, as to health effects and

1 environmental effects and so forth if you decide to adopt  
2 a rule that is more stringent than what the EPA has  
3 adopted.

4 MR. ROSSBACH: I understand. You know, and I  
5 understand the legal constraints on --

6 MR. REICH: Yes. But as I said last time, you  
7 certainly have the legal authority to convene a rulemaking  
8 with respect to -- with respect to CO2 regulation, as you  
9 did mercury.

10 MR. ROSSBACH: Thank you very much.

11 I have no further questions.

12 CHAIRMAN RUSSELL: Thanks, Bill.

13 Anyone else?

14 (No response.)

15 CHAIRMAN RUSSELL: All right. Hearing none --

16 MS. DILLEN: Mr. Chairman, this is  
17 Abigail Dillen.

18 CHAIRMAN RUSSELL: Yes.

19 MS. DILLEN: As petitioners in this matter, we do  
20 have the burden of proof, and there were just a few things  
21 that were said over the past hour that I was hoping to  
22 respond to. I understand that we are becoming pressed for  
23 time, but if I might just make a few points, I'd be very  
24 grateful.

25 CHAIRMAN RUSSELL: That would be fine.

1 MS. DILLEN: Thank you.

2 I do want to address the issue that Mr. Rossbach has  
3 raised with regard to the Board's authority to undertake  
4 rulemaking. Of course, the Board has that authority. But  
5 I think it brings up an interesting point about EPA's  
6 position. They are saying that a rulemaking should be  
7 required in order to get BACT requirements in place. But,  
8 of course, if the EPA were to come up with emissions --  
9 vehicle emission standards tomorrow, the automatic BACT  
10 requirements would be in place, there would be no rule for  
11 them. And, you know, regardless of what EPA says is the  
12 appropriate way to go about this, a rulemaking is not  
13 required or in any way necessary to trigger the  
14 requirements of BACT. And that's the whole point of BACT,  
15 is to respond to problems as they come up as quickly as  
16 possible. If we are stuck waiting for EPA or Congress to  
17 come up with a new rule in a process where they are  
18 demonstrating quite a bit of foot-dragging, it may be  
19 years before we require facilities to start installing  
20 pollution controls for CO2.

21 And I think this gets us back to some of the questions  
22 that Ms. Shropshire was asking earlier, is there another  
23 chance, say, at the operating permit renewal stage to go  
24 back and reopen this permitting process and create  
25 controls for CO2? And that's not the case. BACT is only

1 applicable when a facility is first constructing or later  
2 when it undertakes a very major modification. This is the  
3 chance that the Board has to ensure that we're doing the  
4 very best to limit emissions of CO2. And we're not  
5 talking about insignificant emissions. This is  
6 2.8 million tons of CO2 a year that will go uncontrolled  
7 for many years to come if the plant's design and controls  
8 aren't considered now.

9 And I think that points out the importance of taking  
10 into account all of the legal requirements that come to  
11 the agency's attention before the permitting process is  
12 over. It may well be that there was some confusion about  
13 permission to regulate CO2 up until April of this year.  
14 But the permit was not final at that time. And when it  
15 comes to an issue that's as important as global warming,  
16 it's just unacceptable to say, well, we can just slip this  
17 last plant under the wire and look at this later. The  
18 permit was not final, and until it's final the legal  
19 requirements that are applicable do need to be considered.

20 With respect to the issue whether CO2 is subject to  
21 regulation, Mr. Reich has gone through EPA's position in  
22 this regard, but what he failed to mention is that the  
23 2002 regulations, which he principally relies upon,  
24 specifically provide that all pollutants are -- excuse me,  
25 that pollutants subject to regulation include not only

1 pollutants that are subject to national ambient air  
2 quality standards and so forth, but also pollutants that  
3 are otherwise subject to regulation. And I've never heard  
4 any explanation as to why this wouldn't include the  
5 monitoring requirements of Section 821.

6 Now, I think it's important to note that in the  
7 supplemental materials that have been provided to you, the  
8 argument whether Section 821 and its monitoring  
9 requirements subjects CO2 -- excuse me, subjects CO2  
10 regulation -- excuse me. The question whether Section 821  
11 subjects CO2 to regulation has not been addressed, either  
12 by the states or by EPA, even in the Deseret permitting  
13 analysis that's been highlighted in these proceedings. So  
14 this is an argument that the Board is looking at for the  
15 first time.

16 I don't think it's surprising that it was not  
17 mentioned in the Supreme Court's decision in Massachusetts  
18 v. EPA. The question there wasn't whether CO2 was  
19 regulated under any provision of the Act. The question  
20 was, rather, whether EPA, under Title II, which governs  
21 emissions of motor vehicles, had -- had the authority to  
22 regulate CO2. And in that specific regard, they were  
23 suggesting that there were other regulations, for  
24 instance, a fuel efficiency, that had preempted their  
25 authority. So this issue was simply not before the

1 Supreme Court, and it should not influence your decision  
2 in any way.

3 And finally, I want to get back to this point about  
4 what has been provided to the Board so far and what a BACT  
5 analysis could and should look like for CO2. I've said  
6 this before, but I do want to leave the Board with this  
7 point: All we are asking today is to reverse the  
8 preliminary determination that DEQ made that it's not  
9 required to even look at CO2 in the first instance. The  
10 precedent that we would like you to set today going  
11 forward is that facilities do need to consider their CO2  
12 emissions and consider the way to control them. There's  
13 no more important issue that could be before you with  
14 respect to coal-fired power plants.

15 Finally, I do want to clear up any confusion about  
16 what the Roundup decision provided, just for the Board's  
17 reference. On page 18 of the final decision, at  
18 subsection 6, the decision specifically provides: Because  
19 the Department used the NSR Manual, it should have  
20 included IGCC and CFB and Step 1 as control technologies.  
21 So the Board has determined that it is proper and, indeed,  
22 necessary to include analysis of alternative designs when  
23 first evaluating control -- excuse me, control  
24 technologies in a BACT analysis.

25 I do want to keep my comments brief, but to the extent



1       there are further questions, I would be happy to entertain  
2       them.

3               CHAIRMAN RUSSELL:  Abigail, once again, I don't  
4       disagree with what the record states, but I just wonder  
5       if -- if there's something else on either side of that  
6       that speaks to the reason why we -- you know, we didn't  
7       decide in favor of MEIC in the Roundup case.

8               MS. DILLEN:  Well, there's an easy answer to  
9       that.  The next sentence says:  Nevertheless, in reviewing  
10      the BACT analysis for the project, the Department gave  
11      substantial consideration to IGCC and CFB combustion  
12      technologies.  The record supports the determination that  
13      these technologies are not BACT.

14              So my reading of that language, while I was not in the  
15      room, is that while the Board felt that -- that IGCC  
16      should be part of the BACT analysis, that in this case,  
17      the failure to include it in a formal fashion was  
18      essentially a harmless error because, in fact, the  
19      Department had given a close look to IGCC and CFB  
20      combustion technologies as alternatives.

21              CHAIRMAN RUSSELL:  Okay, I'm certainly not going  
22      to add to that comment, but -- because a lot of people  
23      know my position.

24              Based on Abigail's comments, is there any other board  
25      comments before we take a break?

1 (No response.)

2 CHAIRMAN RUSSELL: Tom, do you want us to just  
3 leave these lines open, I'm guessing, right, if we take a  
4 five-minute break?

5 MR. LIVERS: Mr. Chairman, yeah, I think that  
6 makes sense.

7 CHAIRMAN RUSSELL: Okay. Let's take a 10-minute  
8 break, and by no later than 11, let's get started again.

9 (A brief recess was taken.)

10 CHAIRMAN RUSSELL: Okay. Well, let's go ahead  
11 and move into -- I'm guessing that the best way to move  
12 forward -- Because I think we're done with any official  
13 information and any briefing on that. Could I have a  
14 motion -- We're taking up the CO2 BACT issue right now.  
15 Is there a motion of any sort that anyone would like to  
16 make to start the discussion? Or if they're not willing  
17 to make a motion, is there any comment that a board member  
18 would like to make or...

19 MR. MARBLE: This is Don Marble. Can you hear  
20 me?

21 CHAIRMAN RUSSELL: Barely.

22 MR. LIVERS: Yes.

23 MR. MARBLE: Okay. Well, after listening to the  
24 legal arguments and after hearing about the Roundup  
25 decision and the representations of SME to come in and

1 present information on their CO2 issues and concerns, I  
2 think it would be more appropriate to have all of this  
3 considered at the hearing instead of trying to just  
4 summarily cut it off on summary judgment. So I move that  
5 we deny the motions for summary judgment on the CO2 issue.

6 CHAIRMAN RUSSELL: Is there a second?

7 (No response.)

8 CHAIRMAN RUSSELL: Even a second for discussion?

9 MS. SHROPSHIRE: I'll second it for discussion.

10 CHAIRMAN RUSSELL: All right, discussion. Board  
11 members.

12 MS. SHROPSHIRE: Don, can you elaborate on your  
13 motion, please?

14 MR. MARBLE: My motion is to not have the issue  
15 of CO2 just decided here today by a motion for summary  
16 judgment and just have the issue settled. It seems to me,  
17 after hearing -- And I've read the law, and I understand  
18 the law is, you know, pretty tough. But on the other  
19 hand, we've heard discussion here today that the Board, in  
20 one previous case, required a BACT, even though maybe it  
21 was beyond what was required, and that SME is apparently  
22 going to present to the Board some information about what  
23 their intentions are as far as CO2. And I think it's fair  
24 to the public to -- to have this type of stuff presented  
25 at the hearing to be held at the end of January. And so

1 if you decide on summary judgment now, I mean, the CO2  
2 issue is done for, really. They can present what they  
3 want.

4 But I just think it's -- I think the Board would be  
5 remiss in its duty on the CO2 issue to not have a full  
6 hearing at the end of the month on the CO2 issue. And I'm  
7 interested -- I think there's some factual issues, too,  
8 about how do you control CO2, what's the technology  
9 available, you know, and so on, and what are their  
10 intentions. So anyway, that's the reason I think we  
11 shouldn't let the CO2 issue be decided by summary  
12 judgment. It's unfortunate that Gayle had an emergency  
13 and had to leave, too.

14 So those are the reasons that I think we should just  
15 have the CO2 issue go to hearing and let's hear testimony  
16 from people that want to come in; SME, I suppose, mainly,  
17 and maybe MEIC would have somebody. So I guess that's  
18 about the best thing I can say about why I think we should  
19 let the thing go to hearing.

20 MS. SHROPSHIRE: Joe, this is Robin.

21 CHAIRMAN RUSSELL: Robin.

22 MS. SHROPSHIRE: I agree that -- I think there  
23 may be some factual dispute with regard to whether or not  
24 a BACT could have been done and also with regards to  
25 control of CO2, but I'm -- I'm still uncertain of whether

1 or not that's relevant.

2 CHAIRMAN RUSSELL: Robin, when you said "a BACT  
3 could have been done," a BACT could have been done on  
4 carbon dioxide.

5 MS. SHROPSHIRE: Correct.

6 And I guess where I'm uncertain is whether or not  
7 that's relevant.

8 CHAIRMAN RUSSELL: And I guess we've been hearing  
9 arguments if a BACT was even required for carbon dioxide.

10 MR. MIRES: Joe, this is Larry.

11 CHAIRMAN RUSSELL: Larry.

12 MR. MIRES: After all of my reading and listening  
13 to all of this, I really -- in my own interpretations, I  
14 do not think that the Department erred by not requiring a  
15 BACT, nor do I think they erred in issuing the permit. I  
16 think if there's an error, the error has to come in the  
17 fact that we didn't have a requirement or a standard set  
18 in place that -- that would require such a thing. And,  
19 you know, if we're going to have a hearing on CO<sub>2</sub>, then  
20 we're going to go into rulemaking, as I understand it, and  
21 I'm not sure you can -- well, I know it's not even fair  
22 and equitable to be making a rule and then making it  
23 retroactive prior to the application being permitted. You  
24 know, that's -- I wonder if there isn't some other  
25 mitigation way to address it.

1           Not that I don't disagree that there is a real issue  
2           dealing with CO2 here, but under the current statutes and  
3           rules and regulations, it appears to me, from what I'm  
4           reading here, that, yeah, maybe the Department could have  
5           gone beyond where they went, but they didn't, they stayed  
6           within the guidelines of where they were established, and  
7           I can't say that I can fault them on that aspect of it.  
8           Yeah, we all wish that everybody would be one step beyond  
9           where they're supposed to be, but under the current rules  
10          that existed at the time -- and you've got to go at the  
11          time -- I can't see where they made an error, and neither  
12          did SME on their application as it was initially  
13          presented.

14          I think the error is -- if there's an error, it would  
15          probably be us by not having a standard and a rule set in  
16          place prior to. And with that issue comes up the other  
17          topic, is, I realize that we have statutes to set  
18          rulemaking, but that's been one of the biggest complaints  
19          out of the Legislature against DEQ and against a lot of  
20          agencies, is that we do some rulemaking that are  
21          stretching what should be legislatively done, and that  
22          opens up a whole other discussion, I think. But, anyway,  
23          there's my two bits of comments in there.

24                   CHAIRMAN RUSSELL: Thanks, Larry.

25                   Anyone else?

1           MR. MARBLE: Joe, this is Don Marble, I have one  
2 little comment. I think we need to start CO2 rulemaking  
3 also, so I'm not saying I'm not for that. So, anyway,  
4 that's it.

5           MS. SHROPSHIRE: This is Robin.

6           So, Don, are you suggesting that we have an  
7 evidentiary hearing, is that what you're suggesting, on  
8 factual disputes?

9           MR. MARBLE: That's what I'm suggesting. We  
10 should have an evidentiary hearing here about what SME's  
11 intentions are, what are the control strategies available  
12 for CO2. You know, I know next to nothing about all that  
13 stuff, and I'd feel more comfortable making a decision  
14 knowing what's available. And if a BACT isn't possible,  
15 won't work, can't work, I'd like to know that. I'd like  
16 to hear some sworn testimony as to that instead of just  
17 the lawyers talking.

18          CHAIRMAN RUSSELL: Anyone else have any comments?

19          MS. KAISER: This is Heidi. Can you hear me?

20          CHAIRMAN RUSSELL: Yes.

21          MS. KAISER: I think what Don is asking for is a  
22 great idea, but -- I don't know, maybe I'm wrong, but I  
23 feel like it's out of the scope of what we're trying to  
24 decide here. It seems like we're trying to determine, you  
25 know, whether DEQ had the authority to require a BACT

1 analysis for CO2 emissions for the Highwood generating  
2 permit. And as far as going down the road of regulating  
3 CO2, I couldn't agree more, I think it needs to be done,  
4 but I think that should be held in the future. And I  
5 guess I'd like to see this issue decided today.

6 CHAIRMAN RUSSELL: I'm sure it will be, Heidi.  
7 Thank you.

8 Anyone else?

9 MR. MIRES: Joe, this is Larry again.

10 CHAIRMAN RUSSELL: Larry.

11 MR. MIRES: The only thing that I would like is  
12 clarification on Don's motion. If -- if maybe Katherine  
13 could explain to me, a yea vote would mean what and a nay  
14 vote would mean what. Does it make any sense what I just  
15 asked?

16 CHAIRMAN RUSSELL: Well, Katherine, I probably  
17 could --

18 I mean, what he's asked is to dismiss all motions for  
19 summary judgment and hear the case, which is specifically  
20 if the Department should have done a BACT analysis or a  
21 top-down BACT analysis on carbon dioxide.

22 MR. MIRES: Okay.

23 CHAIRMAN RUSSELL: Is that how you see it,  
24 Katherine?

25 MS. ORR: Mr. Chairman, members of the Board, I



1 think what would happen if Don's motion passed would be  
2 that the Board would continue to analyze the legal  
3 question and also factor in the fact questions of what has  
4 been done with BACT or what could be done, those kinds of  
5 things. The Board has to decide today whether this case  
6 can be -- this issue can be disposed of as a matter of  
7 law. And if the Board determines that CO2 is not required  
8 in a BACT analysis, then it obviates the need for an  
9 evidentiary hearing, I think.

10 MR. MARBLE: This is Don. I thought my motion  
11 was to deny the motion for summary judgment and let it go  
12 to an evidentiary hearing. Is that -- at the end of the  
13 month. Am I confused?

14 CHAIRMAN RUSSELL: Well, Don, no, you're not  
15 confused. That's what your motion was. But I guess what  
16 Larry has asked and what Katherine has tried to explain is  
17 what that would actually mean as it relates to a hearing.

18 MR. MARBLE: Oh, at the end of the month. Okay.  
19 Well, I'd just like to hear some more -- have some  
20 more information on what's going to be done to control CO2  
21 and should they look at some other strategies in view of  
22 the fact that BER created precedent in the Roundup case  
23 that, despite what the law is, they had the authority to  
24 require that. So that's where I'm at.

25 MR. ROSSBACH: Joe, what is your comment about

1 Roundup? I'm totally confused about Roundup now.

2 MR. MARBLE: Is that a comment to me?

3 MR. ROSSBACH: No, I'm asking for Joe -- this is  
4 Bill speaking. Let me go back.

5 Joe, I'm totally confused about the Roundup issue now.  
6 Could you clarify what you understand?

7 CHAIRMAN RUSSELL: You know, and it has to be  
8 taken more than just a few lines. The whole concept  
9 that -- that the Department utilized top-down BACT to  
10 review the Roundup case was somewhat in question because  
11 of -- and this is the MEIC's point, was that they didn't  
12 look at the -- identify all control technologies relating  
13 to electrical generating units. And it was specific that  
14 it was a pulverized coal process and that you should take  
15 up the emissions relating to pulverized coal. And there  
16 was this issue about the first two steps in BACT, in the  
17 top-down BACT that says you need to identify all control  
18 technologies associated with the industry. And that  
19 was -- at least my personal vote on Roundup, that's the  
20 issue. And I made the statement if top-down BACT was a  
21 codified regulation in Montana, I think the Department  
22 would have had to look at a larger sweep of emission  
23 control technologies relating to the industry.

24 MR. ROSSBACH: Meaning they would have had to  
25 look at other alternatives to pulverized coal, for

1 example.

2 CHAIRMAN RUSSELL: Well, that was a big argument  
3 in Roundup.

4 MR. ROSSBACH: Right. So the bottom line for me  
5 is, what did you understand you were voting for, that the  
6 Department did or hadn't done that?

7 CHAIRMAN RUSSELL: That the Department did not  
8 need to do a top-down BACT analysis.

9 MR. ROSSBACH: Under Montana law.

10 CHAIRMAN RUSSELL: Under Montana rule and law.

11 MR. ROSSBACH: That's what I thought you said.  
12 Okay.

13 CHAIRMAN RUSSELL: Although they continue to use  
14 the guidance, they may not -- you know --

15 MR. ROSSBACH: That's fine.

16 CHAIRMAN RUSSELL: -- they may not be using it to  
17 the full extent it could be.

18 MR. ROSSBACH: Okay.

19 CHAIRMAN RUSSELL: And I -- Just to go on record,  
20 myself and your colleague on the Missoula City-County  
21 Board of Health actually tried to initiate rulemaking for  
22 top-down BACT after the Roundup case, and it was dismissed  
23 by the rest of the Board.

24 MR. ROSSBACH: I understand.

25 Well, I don't know whether this is the time to say

1 this exactly, but with all due respect to Don -- And, you  
2 know, there's no one on this board that I respect more  
3 than Don. I have exactly the same sentiment as you, and  
4 that's why I asked Mr. Reich to submit the materials that  
5 he did. And I'm very interested in the quotes that  
6 Mr. Gregori made in the context of the recent article that  
7 was submitted to us. But I'm afraid this is a -- I've  
8 come to conclude that this is a fairly narrow legal issue  
9 that we need to decide on that basis. And so with all due  
10 respect to Don, I'm not going to support his motion.

11 CHAIRMAN RUSSELL: Any other further board  
12 comments before we call for --

13 MR. MIRES: Joe, this is Larry.

14 CHAIRMAN RUSSELL: Larry.

15 MR. MIRES: I 100 percent concur with what Bill  
16 just said. Don, I fully want to go further with that  
17 concept, but the narrow scope of what we're dealing with  
18 today, I think we have to -- I think as a board we have to  
19 go like Bill indicated, and then I think we have to bring  
20 this topic up to get the answers that Don says that he  
21 needs to have. And I concur, we need to get those  
22 answers. But this is not the route that we can do it on  
23 today.

24 CHAIRMAN RUSSELL: Any further comments?

25 MR. MARBLE: This is Don. Could I say one more

1 little thing here?

2 CHAIRMAN RUSSELL: Don.

3 MR. MARBLE: I appreciate what Larry and Bill  
4 said, and I might be a little out of line on this, but I  
5 think, you know, this is -- We're talking about permitting  
6 a coal plant that's going to run for 40, 50 years up in  
7 Great Falls, and I hate to see an issue as big as CO2  
8 decided by summary judgment. I just think that as long  
9 there's any issues that need to be -- or new information  
10 or whatever, I think it should go to the full evidentiary  
11 hearing. And maybe nothing new will come in. That's very  
12 possible. But I just hate to see the CO2 issue decided by  
13 summary judgment. It's just the big issue now all over  
14 the world, and I just think that it's not appropriate, in  
15 my mind, for summary judgment. But I respect -- I've read  
16 the law and I know the law is pretty tough on this. But I  
17 think if there's any way we can justify giving it a full,  
18 complete hearing on the issue of CO2, that we should do  
19 that.

20 Anyway, I doubt that my motion is going to pass, but I  
21 just thought I'd get that point in there.

22 MS. SHROPSHIRE: Joe, this is Robin.

23 CHAIRMAN RUSSELL: Robin.

24 MS. SHROPSHIRE: And I'm still on the fence a  
25 little bit, but some of the areas where I do see factual

1     dispute and I guess where I'm on the fence is whether or  
2     not it's relevant. But what control technologies exist  
3     for carbon dioxide, whether or not BACT requires a  
4     standard in order to be implemented, I think there may be  
5     factual dispute in that regard. And I don't know if this  
6     is a factual dispute, but it's a question in my mind, is  
7     that throughout the permit process, the permit was amended  
8     I think at least once, and I -- and my biggest concern is  
9     that I would like to see certainty in the regulatory  
10    process. And I think, you know, changing the rules a  
11    month before is not fair, and -- but I -- And I asked for  
12    information to help me in this regard. But where I'm  
13    still uncertain is, with the information that was provided  
14    in the Supreme Court case, should they have taken another  
15    look at CO2. And I -- I've got a lot of heartburn because  
16    I see that this process has been in play for a couple  
17    years, but at the same time, it's probably the biggest  
18    issue that our society faces today. And so I have mixed  
19    feelings in terms of how we go forward with this.

20           CHAIRMAN RUSSELL: Okay.

21           Katherine, you know, can you -- just so we're clear,  
22    when a party is awarded summary judgment, what -- or  
23    Bill -- what is the basis of that decision?

24           MR. ROSSBACH: I'll let Katherine decide that.  
25    I'm not going to play lawyer.

1           CHAIRMAN RUSSELL: Gosh, Bill, I asked you, too.

2           No, that's fine.

3           Katherine.

4           MR. ROSSBACH: This is Katherine's job. And if I  
5           don't agree with her, I can -- I can say.

6           CHAIRMAN RUSSELL: Okay, that would be great.

7           MS. ORR: I think the answer is very easy. The  
8           question is whether the case can be disposed of as a  
9           matter of interpretation of law and whether there are no  
10          disputed facts.

11          MR. ROSSBACH: Well, I disagree.

12          MS. ORR: There you go.

13          CHAIRMAN RUSSELL: All right. Bill.

14          MR. ROSSBACH: It doesn't matter whether there's  
15          facts in dispute or not. It's whether the facts make any  
16          difference in terms of the law. If there are no disputed  
17          facts that pertain to the law, if the law doesn't need any  
18          facts upon which to make the decision, then the facts are  
19          irrelevant, I guess is what I'm saying. We clearly have  
20          plenty of facts in dispute here between the parties as to  
21          available control technologies, what BACT would have done  
22          or not done. But is that relevant to the decision of  
23          whether the law requires them to do it in this context or  
24          not?

25          I'm sorry, Katherine.

1 MS. ORR: No, that's true. And the rule does say  
2 material facts.

3 MR. ROSSBACH: Right, whether the facts are  
4 material to the decision on the law.

5 MS. ORR: Right.

6 MR. ROSSBACH: And material essentially means  
7 relevant.

8 CHAIRMAN RUSSELL: And that material, for the  
9 sake of argument, could be something as basic as CO2 is a  
10 pollutant.

11 MR. ROSSBACH: Maybe. I don't -- That's a legal  
12 decision because the Supreme Court has already decided it  
13 is.

14 CHAIRMAN RUSSELL: But it's somewhat up to --  
15 Just because something is deemed a pollutant doesn't mean  
16 it's a regulated pollutant, does it?

17 MR. ROSSBACH: No. No, that's a different  
18 question. That's a legal question.

19 CHAIRMAN RUSSELL: That's a legal question.

20 MR. ROSSBACH: Right. I mean, that's what the  
21 Supreme Court decided, was that it was a pollutant and,  
22 therefore, was something that the EPA had authority to  
23 regulate under rulemaking, not under a BACT analysis or  
24 not under a contested case.

25 CHAIRMAN RUSSELL: All right.



1           MR. MIRES: But EPA didn't make a rule on it; is  
2 that correct?

3           MR. ROSSBACH: They haven't yet. What EPA said  
4 in Massachusetts was, we don't have authority to do it,  
5 we're not even going to start rulemaking. And the  
6 Supreme Court said, yes, you have authority to do it, and  
7 you can't just arbitrarily deny rulemaking without making  
8 further determinations.

9           MR. MIRES: And in this case, the rule did not  
10 exist at the time that the permit was issued.

11          MR. ROSSBACH: Right. There is no rule.

12          MR. MIRES: Correct.

13          CHAIRMAN RUSSELL: You know, I would go out on a  
14 limb and reiterate how -- I mean, this is a big decision.  
15 Don, I'm with you on a lot of this. You know, we're going  
16 to possibly allow -- Although we are going to take up the  
17 hearing on the particulate matter, we're going to possibly  
18 allow a coal-fired plant to come into existence without  
19 possibly having to change any emissions or emission  
20 controls for 20 to 30 years. I think we all -- that  
21 weighs on us all.

22          But I keep coming back to the fact that we have  
23 something in front of us that we have to decide on. And  
24 it really falls back down to the basis of can we grant  
25 summary judgment to a party in this case? And I've looked

1 up definitions of summary judgment, and I'm just not smart  
2 enough to know the whole -- you know, the ins and outs of  
3 it, but, I mean, basically, you're granting the judgment  
4 because there's no facts in dispute that make the law  
5 difficult to interpret.

6 Bill, is that -- I mean, that's just kind of a --

7 MR. ROSSBACH: That's --

8 CHAIRMAN RUSSELL: -- layman's way of looking at.

9 All right. Board, let's -- Any further discussion?

10 (No response.)

11 CHAIRMAN RUSSELL: We do have a motion. And Kris  
12 or Tom, I think we could just -- we can do a roll call or  
13 we can just vote. I don't know how -- Being the way we're  
14 set up today, it might be best to do a roll call.

15 MR. LIVERS: That's what I'm thinking,  
16 Mr. Chairman. This is Tom.

17 CHAIRMAN RUSSELL: I'm going to call for the  
18 question. Would you or Kris go through the board members  
19 present.

20 And the motion on the floor is to deny all three  
21 parties' requests for summary judgment, and it's been  
22 seconded at least for discussion purposes by Robin, and I  
23 haven't heard anyone want to take the motion off the  
24 floor. So we can vote on it and then look to where we  
25 need to go from there.

1 MR. MARBLE: Joe, this is Don.

2 CHAIRMAN RUSSELL: Don.

3 MR. MARBLE: The motion is just as far as CO2 is  
4 concerned.

5 CHAIRMAN RUSSELL: Correct. The other matter has  
6 been decided.

7 MR. MARBLE: Yeah.

8 MR. LIVERS: Okay, Mr. Chairman, this is Tom.  
9 I'll go ahead and run through the roll at this point. Is  
10 everyone ready?

11 (No response.)

12 MR. LIVERS: Gayle did have to leave on an  
13 emergency, so he will not be present for the vote.

14 Don.

15 MR. MARBLE: I vote yes for the motion.

16 MR. LIVERS: Larry.

17 MR. MIRES: I vote no.

18 MR. LIVERS: Robin.

19 MS. SHROPSHIRE: Yes.

20 MR. LIVERS: Heidi.

21 MS. KAISER: No.

22 MR. LIVERS: Bill.

23 MR. ROSSBACH: No.

24 MR. LIVERS: Mr. Chairman.

25 CHAIRMAN RUSSELL: No.

1 MR. LIVERS: Okay, motion fails.

2 CHAIRMAN RUSSELL: All right. Is there another  
3 motion?

4 MR. MIRES: I'm not sure how to make the motion.

5 CHAIRMAN RUSSELL: Well, first of all, since --  
6 you can -- Don't group summary judgments between any  
7 parties. You need to look at summary judgment from a  
8 single party if you're going to grant it.

9 MR. MIRES: Well, I guess I would move that  
10 summary judgment be granted to DEQ or the Department.

11 CHAIRMAN RUSSELL: Is there a second?

12 MS. KAISER: I'll second. This is Heidi.

13 CHAIRMAN RUSSELL: All right. Discussion.

14 MR. ROSSBACH: Well, here's my position. I guess  
15 I've somewhat made it clear already, or at least  
16 telegraphed what I'm thinking. First of all, I'm going to  
17 say that I do not believe -- and I agree 100 percent with  
18 Ms. Dillen -- that there is no more important topic than  
19 dealing with global warming, and particularly since  
20 coal-fired generating plants appear to be the major  
21 component worldwide for this, that this is something that  
22 is absolutely critical and of the highest importance for  
23 any of us who are in the position that we are to deal  
24 with.

25 And secondly, I want to point out the position that is

1 at least reported in the Billings Gazette recently that  
2 the administration policy, through statements from, I'm  
3 not sure who, is that we're not going to have any more  
4 coal-fired plants unless they capture or sequester or  
5 otherwise deal with CO2 emissions. And I would want to  
6 hear more from the Government, and particularly  
7 Mr. Barrett, and others, and the Governor and presumably  
8 Mr. Opper, what is the future and how are we going to move  
9 forward on this.

10 And I guess I'm going to ask Larry and Heidi and  
11 everyone else, when the time comes, that we support some  
12 kind of resolution to request that we move forward in some  
13 form of fact-finding on this and that we require that SME  
14 come forward with an affidavit that will lay out for us  
15 what they're planning to do. And then let's start moving  
16 forward in whatever fashion that we can on looking at how  
17 we're going to deal with this and how we can deal with  
18 this. And I don't have an awful lot of confidence of how  
19 quickly the EPA is going to be moving in this area.

20 But when I look at the law -- And let me go back,  
21 then. I'm a lawyer, and what I see here is that one way  
22 or the other, this thing is going to be under scrutiny  
23 from a court, and I've got to look at this -- and this is  
24 the way I've looked at everything that we've done that's  
25 been controversial -- is do we have the facts and the law

1 to support our decision? How are we going to stand up in  
2 front of a court of law for the decision that we make?  
3 And when I look at that and look as -- And I totally  
4 appreciate the interesting and I believe novel approach  
5 that is being suggested by MEIC to use "otherwise  
6 regulated" and refer to the monitoring of CO2 under the  
7 Clean Air Act Amendments as a basis for bootstrapping us  
8 into that.

9 But the reality is, I've looked at it from a lawyer  
10 and understanding statutory construction and regulatory  
11 construction and looking at how a court is going to look  
12 at this, is that I start, first of all, with the  
13 Massachusetts decision and say what exactly did the  
14 Massachusetts decision say? And all that Massachusetts  
15 said is that there is authority to regulate. And clearly,  
16 as -- clearly, up until that point, no one, the EPA or  
17 anyone else, had ever taken that authority or decided that  
18 we did have that authority. So it is a very important  
19 decision. It says we have the authority. And I'm going  
20 to hold Mr. Reich and Mr. Rusoff to what they said to us,  
21 is that we do have authority to regulate. And that's what  
22 Massachusetts vs. EPA tells us. But it doesn't tell us  
23 that we had -- I just don't see how it bootstraps us from  
24 an authority to regulate if we didn't have -- If the  
25 question was did we have authority, certainly, then we

1 can't bootstrap, it seems to me, to the idea that it was  
2 regulated under otherwise-regulated language that MEIC is  
3 pointing us to.

4       So with that in mind, then I go back and say, well,  
5 what authority is there? And I start with the 1978  
6 Federal Register rule, and, again, you have to read that  
7 register rule in context and you can't just take one  
8 sentence out of it, you have to read the whole regulation.  
9 And the regulation says "subject to regulation" under the  
10 Act means any pollutant regulated in Subchapter C. Well,  
11 CO2 may be under Subchapter C, but the next sentence  
12 narrowly defines that by saying this, then, includes all  
13 criteria pollutants under NAAQS, NSPS, NESHAP, et cetera.  
14 In other words, the interpretation contemporaneous at the  
15 time that they said this in 1978 was that that  
16 terminology, "otherwise regulated," is -- or "subject to  
17 regulation" is very narrowly defined to those that have  
18 emission standards or controls, not just monitoring.

19       Now, certainly, there was no monitoring, because the  
20 Clean Air Act Amendments came later in which the  
21 monitoring of greenhouse gases -- or not greenhouse gases,  
22 but the monitoring requirement came as a part of the 1991  
23 amendments. But at that time, and this is a matter of  
24 statutory construction, if the Congress or if the EPA had  
25 thought that this somehow or another changed the 1978

1 interpretation, they could have done something about it  
2 then. They could have said in the Clean Air Act  
3 Amendments or they could have said in subsequent  
4 regulations that our determination in 1978 before CO2 came  
5 into effect under the monitoring rules is changed because  
6 of this. But they didn't. And so now, we have 30 years  
7 since this 1978 regulation -- Federal Register Notice was  
8 put out, we've got the Clean Air Act Amendments, and we've  
9 had two subsequent Federal Register Notices about this  
10 topic, and not once has CO2 been considered a regulated  
11 pollutant.

12 On that basis, and on the basis that we have to give  
13 deference to the EPA's interpretation of it, particularly  
14 a 30-year longstanding interpretation, I'm going to have  
15 to vote, when the time comes, that this is not subject to  
16 regulation under the Clean Air Act at this present time.  
17 And it gives me great pain to do that, I'm afraid.

18 CHAIRMAN RUSSELL: Well, spoken, Bill.

19 MS. SHROPSHIRE: Joe, this is Robin.

20 CHAIRMAN RUSSELL: Robin.

21 MS. SHROPSHIRE: With all due respect to  
22 Mr. Rossbach, I just want to give my interpretation, which  
23 is a little different. My interpretation is that, as the  
24 Supreme Court said, carbon dioxide is a pollutant, and I  
25 do believe that it is subject to regulation. I'm unclear



1 on whether or not we are currently regulating it at this  
2 time, but I do think that it is subject to regulation as a  
3 pollutant. I also think that there are factual disputes,  
4 but I -- I'm making my decision based on the timing of  
5 this and when this process started. I do think that DEQ  
6 may have required a BACT analysis, but I don't think that  
7 they had to. And I wish they had. I think it may have  
8 been easier, but I don't think that they erred in that  
9 regard. I don't think that they had to.

10 I think that we're all burying our heads in the sand  
11 if we don't think that CO2 is going to be regulated in the  
12 future, but I'm basing my decision on I think we need a  
13 certain -- we need certainty in the regulatory process  
14 and -- You know, I guess I'll just stop with that.

15 CHAIRMAN RUSSELL: Thanks, Robin.

16 Anything further?

17 MS. KAISER: This is Heidi.

18 CHAIRMAN RUSSELL: Heidi.

19 MS. KAISER: I just want to thank Bill for his  
20 overview of kind of the CO2 regulatory history or  
21 whatever. And, you know, I can appreciate Robin's  
22 concerns also. And I don't think anybody is burying their  
23 head in the sand, because I do think we all acknowledge  
24 that regulating CO2 is in the near future. Anyway, that's  
25 my thoughts.

1 MS. SHROPSHIRE: Thanks, Heidi. This is Robin  
2 again. I just want to say I'm not saying that we are. I  
3 just think that we need to go into the future with our  
4 eyes open realizing that this is coming down the pipes,  
5 and in building a new plant and with the idea of having  
6 regulatory certainty, I think it would be prudent to take  
7 that into consideration as the plant is being designed --  
8 well, or built.

9 CHAIRMAN RUSSELL: Thanks.

10 You know, the one thing that comes to mind for me is  
11 certainly that CO2 is going to be a regulated criteria  
12 pollutant soon and we'll have a regulation and Montana  
13 will do what they've done in the past and have been  
14 hopefully in the forefront of some regulations regarding  
15 pollutants, whether they be air or water. And, you know,  
16 it's ironic to me that once it's regulated, I'll bet you  
17 there's going to be some great technologies in the next  
18 ten years and we're not going to be able to go back and  
19 demand even SME to put those on unless they do some  
20 substantial remodel of what they're doing. And, you know,  
21 that's too bad. Because I look at SME as vital to  
22 Montanans, and I know that there's other plants that  
23 operate in Montana that aren't as much and aren't doing  
24 anything. And that bothers me a tremendous amount. We  
25 continue to -- You know, the prize of the day is SME,

1       which is providing a substantial amount of energy to  
2       Montana, and we have others that are shipping it out and  
3       doing a lot worse.

4             Pardon me for my editorial that isn't even on the map  
5       here, but -- but it does bother me.

6             MR. MIRES:   Joe, this is Larry.

7             CHAIRMAN RUSSELL:   Yes.

8             Go ahead, Larry.

9             MR. MIRES:   I would like to commend Bill and, as  
10       well, Robin for the comments that they've put in there.  
11       And I share both of those comments and those concerns.  I  
12       think they parallel all of our thoughts and feelings.  And  
13       I would reiterate Bill's comment that I hope all of us  
14       will not drop the ball and that we will continue to press  
15       this issue forward, because CO2 is an issue, global  
16       warming is an issue.  We all realize that, and I don't  
17       think anybody is more concerned about it than the members  
18       of this board.

19             With that, my motion was based upon all of those  
20       concepts, and I thought Bill did a good job of expressing  
21       it, and Heidi and Robin for following up with additional  
22       comments.  And I'm done.

23             CHAIRMAN RUSSELL:   All right.  Thanks, Larry.

24             The only other comment I'd make -- and not, this is  
25       not a derogatory comment to the Department, but I would

1       rather have seen us -- I mean, I would rather rule in  
2       summary judgment for SME than the Department. I think  
3       they're the most aggrieved party.

4               MR. ROSSBACH: I mean, Larry, we could amend the  
5       motion with a -- you know, they both could -- I mean,  
6       essentially, they're taking the same position. You could  
7       amend the motion to grant it for both, if that's what you  
8       want to do, from a Roberts Rules of Order --

9               MR. MIRES: And I would be so inclined to do  
10       that.

11              CHAIRMAN RUSSELL: Thanks, Bill.  
12       Larry.

13              MR. MIRES: I would approve of that, immensely.

14              CHAIRMAN RUSSELL: Who made the -- Heidi, would  
15       you agree with that amendment --

16              MS. KAISER: Yes, I would.

17              CHAIRMAN RUSSELL: -- friendly amendment?

18              MS. KAISER: Yes, I would. This is Heidi.

19              CHAIRMAN RUSSELL: All right. Any further  
20       discussion?

21              (No response.)

22              CHAIRMAN RUSSELL: Tom, I'm guessing you're ready  
23       for a roll call again?

24              MR. LIVERS: Yeah. As soon as you're ready. If  
25       you're ready now, Mr. Chairman, we can go ahead with that.

1           CHAIRMAN RUSSELL: I'll call for the question if  
2 there isn't any further comment.

3           (No response.)

4           CHAIRMAN RUSSELL: Seeing none, let's go.

5           MR. LIVERS: Again, Gayle is not present. Is  
6 that the still the case, Gayle?

7           (No response.)

8           MR. LIVERS: He had to leave on an emergency.  
9 Don.

10          MR. MARBLE: I vote no.

11          MR. LIVERS: Larry.

12          MR. MIRES: Yes.

13          MR. LIVERS: Robin.

14          MS. SHROPSHIRE: Yes.

15          MR. LIVERS: Heidi.

16          MS. KAISER: Yes.

17          MR. LIVERS: Bill.

18          MR. ROSSBACH: Yes.

19          MR. LIVERS: Mr. Chairman.

20          CHAIRMAN RUSSELL: Yes.

21          MR. LIVERS: The motion passes 5-1.

22          CHAIRMAN RUSSELL: All right. Katherine.

23          MS. ORR: Yes.

24          CHAIRMAN RUSSELL: Do we still have another  
25 matter?

1           MR. ROSSBACH: Could I -- Maybe it's off the  
2 agenda, but I'd like to have some -- whether we need to  
3 have a sense of the Board or resolution or whatever to  
4 take Mr. Reich up on his offer to provide some sort of  
5 affidavit or declaration from appropriate authorities as  
6 to what their control technology plans are, what they're  
7 looking at, what work they're doing, how they're going  
8 about it, who is doing it, et cetera. And I don't know  
9 what the process would be to get that done.

10           CHAIRMAN RUSSELL: Mr. Reich, I think all of us  
11 are real grieved about what you could do to reduce carbon  
12 dioxide emissions.

13           MR. REICH: Yes. And, certainly, that's what  
14 we've been looking at very hard with our boilermaker, who  
15 has a very keen interest in trying to prove a technology  
16 that will do so. So we would be happy, Mr. Chair -- And  
17 Mr. Gregori is in the room, so I really don't want to  
18 speak for him, but I believe we would be happy to present  
19 the Board with whatever type of information they wish, and  
20 if they wish it under oath, regarding our current plans,  
21 what we've done, what avenues we've explored, and what  
22 we're looking to do going forward.

23           MR. LIVERS: Mr. Chairman, SME Counsel  
24 Mike McCarter also is in the room and is prepared to  
25 speak.

1 MR. REICH: Thank you.

2 CHAIRMAN RUSSELL: Okay.

3 MR. McCARTER: Mr. Chairman, members of the  
4 Board, I have discussed this with Mr. Gregori. We will be  
5 happy to provide you with an affidavit. It will take us a  
6 little bit of time to get that --

7 MR. GREGORI: I could make comments even now.

8 MR. McCARTER: I think probably it's going to be  
9 better to do it by way of affidavit. And we could put  
10 that together -- That way, we can make sure that we cover  
11 everything adequately.

12 CHAIRMAN RUSSELL: I'm just -- I'm baffled to the  
13 amount of time your response would take. Weeks? Months?  
14 Days?

15 MR. GREGORI: Days.

16 MR. McCARTER: Days.

17 CHAIRMAN RUSSELL: Since this matter has been  
18 concluded, I wonder if that's -- Even though it's been  
19 concluded, you know, I'd kind of like to hear it in person  
20 at the next board meeting, but I don't know if anyone is  
21 cringing to that thought. Since we're all going to be in  
22 person and --

23 MR. McCARTER: Mr. Gregori has indicated that if  
24 the Board wishes, he would give a report right now, if  
25 that's the pleasure of the Board.

1           CHAIRMAN RUSSELL: No. I think -- I think  
2 because of where we are right now, if it's possible at the  
3 board meeting on the 22nd. Unless the parties, you know,  
4 have second thoughts or the Board doesn't like that route,  
5 I'd like to hear it at the regular board meeting.

6           MR. ROSSBACH: Could I make a proposal?

7           CHAIRMAN RUSSELL: Yes.

8           MR. ROSSBACH: I would like to see an affidavit  
9 that we can have and digest in advance and then be  
10 available for questions. I think that would be the most  
11 efficient way to do it, rather than have to have some sort  
12 of under-oath testimony and go through all of that at the  
13 time of the hearing when we've got other matters. I would  
14 like to just see a declaration, which is effectively the  
15 same as testimony, or affidavit, and then have somebody  
16 available to answer questions about it if we have  
17 questions after we've had a chance to look at it.

18          CHAIRMAN RUSSELL: Okay.

19          MR. McCARTER: This is Mike McCarter. We're  
20 certainly agreeable to doing that.

21          MR. LIVERS: Mr. Chairman, this is Tom Livers. I  
22 don't sense any concern with that approach at all by any  
23 of the parties in the room, any of the counsel, so I think  
24 that's certainly an acceptable way to go for the meeting  
25 on the 22nd and for action prior to that.



1           CHAIRMAN RUSSELL: Well, that's great, then.

2           So, Bill, you're good now with that?

3           MR. ROSSBACH: Yes.

4           CHAIRMAN RUSSELL: Okay, great.

5           Katherine.

6           MS. ORR: Yes.

7           CHAIRMAN RUSSELL: Do we have another matter we  
8           need to take up?

9           MS. ORR: Well, there is the pending motion to  
10          strike the expert testimony of Mr. Gary McCutchen, and the  
11          Board could defer that until the hearing on the 22nd or  
12          hear it now. It's been noticed for now, but my  
13          understanding of the presentation on December 21st was,  
14          from Mr. Reich, that that could be postponed.

15          As a matter of clarification, Mr. McCutchen's expert  
16          witness disclosure does address PM-2.5, so it may be  
17          something that you would want to take up before that  
18          fact-finding hearing.

19          CHAIRMAN RUSSELL: Okay. How does the Department  
20          feel about this --

21          MR. ROSSBACH: Can I make a suggestion?

22          CHAIRMAN RUSSELL: Or how does the rest of the  
23          Board feel about this?

24          MR. ROSSBACH: Can I make a suggestion?

25          CHAIRMAN RUSSELL: Bill.

1           MR. ROSSBACH: In my view, in experiencing --  
2       This is in effect a motion in limine, which means to try  
3       to limit the nature of the testimony being elicited at a  
4       trial or a hearing. And sometimes it's a little hard to  
5       grant or deny a motion like that because you don't  
6       really -- you haven't had a chance to hear what he's  
7       actually going to say in context. I mean, I think with  
8       sort of the warning to Mr. Reich that we're not going to  
9       listen to having a witness tell us what the law is, but,  
10      rather, limit his testimony to facts and be subject to  
11      objections at the time of the hearing to be ruled by the  
12      Chair or, you know, with the advice of counsel, I think it  
13      would be -- You know, it's a little hard to make a motion,  
14      but, you know, I think it's a little hard to grant or deny  
15      a motion without hearing what exactly he is going to say.

16           MS. SHROPSHIRE: This is Robin. My understanding  
17      was that it was the material that was written prior to  
18      this, but am I confused? From the -- well, that things  
19      that occurred in writing prior to that that represented  
20      opinion about the law would -- would be struck?

21           MS. ORR: Mr. Chairman, that, then, would involve  
22      the question of whether the Board wants to hear comment  
23      from counsel on this, essentially whether you want to hear  
24      discussion on this question now or wait until before the  
25      hearing.

1           MR. ROSSBACH: We've already heard argument on  
2 this, haven't we?

3           MS. ORR: Yes.

4           And Robin is raising the question of do we know  
5 exactly what that expert will say. One -- one position to  
6 take is, yes, you have the expert witness disclosure.  
7 Now, any time you get into a live hearing and you have an  
8 expert, there's going to be cross-examination, so, in  
9 essence, you don't know everything that that witness is  
10 going to say. But an alternative to addressing the motion  
11 is like Bill says, is to render a caveat to what the Board  
12 will allow the witness to say at the hearing, which should  
13 be limited to questions of fact, not law.

14           MR. MARBLE: I agree with what Bill and Katherine  
15 are saying, and do we need a motion to have that happen?

16           CHAIRMAN RUSSELL: I need a clarification of what  
17 the motion would be.

18           MR. ROSSBACH: Well, let me propose -- I mean, we  
19 can make a motion and say that we're not going to allow  
20 the witness to testify on law, but what that means when  
21 the witness starts getting on the stand and starts, you  
22 know, saying what he's going to say, whether that's law or  
23 fact has to be decided at the time. I mean, I think it's  
24 generally accepted that -- I mean, I don't agree with what  
25 Mr. Reich said at the last hearing, that some of the

1 things that Mr. McCutchen is going to say are not law. I  
2 just -- I don't agree with that. But, again, it's in the  
3 details what exactly he's going to say and how it's going  
4 to come out in the context of what other things that are  
5 being discussed that make it a decision whether that's law  
6 or fact. In some ways, you can't decide that until you  
7 put it into context.

8 I mean, I don't think anybody disagrees that experts  
9 can't testify about law. I think Mr. Reich conceded that.  
10 The question is, what is it that he's going to be  
11 testifying to, and is that law or fact? And we don't know  
12 that until we actually hear how it's going to come out,  
13 the words that he uses and how he describes, you know, his  
14 opinions.

15 CHAIRMAN RUSSELL: But with that in mind, do  
16 we -- do we need a motion? We just go and hear and listen  
17 to objections and rule on those and move forward, right?

18 MR. ROSSBACH: That's what I would think.

19 CHAIRMAN RUSSELL: So I guess I would say that  
20 we -- we can take up a motion -- Although, Don, you have a  
21 motion on the floor. Do you want to remove it or do you  
22 want a second for further discussion?

23 MR. MARBLE: Did you address that to me?

24 CHAIRMAN RUSSELL: Yeah. Don, you kind of made a  
25 motion. Do you want to --

1 MR. MARBLE: I asked what kind of motion we need.  
2 But I agree with what you're saying and Bill says.

3 CHAIRMAN RUSSELL: So with that, we actually want  
4 a motion not to exclude his testimony.

5 MR. ROSSBACH: No. I don't think so.

6 CHAIRMAN RUSSELL: Bill, what do we need?

7 MR. ROSSBACH: I don't believe we need anything.

8 CHAIRMAN RUSSELL: Well, what do we do on the --  
9 on the prehearing motion; do we just ignore it?

10 MR. ROSSBACH: We just don't grant it one way or  
11 the other. We don't have to take it up, I don't think.  
12 But maybe Katherine has a different opinion about that.  
13 I've had plenty of judges say we'll just take it under  
14 advisement and as it goes along we'll rule on specific  
15 evidentiary issues as they come up.

16 CHAIRMAN RUSSELL: Okay. Katherine, do you  
17 concur?

18 MS. ORR: Yes. I don't think the Board has to  
19 rule on this motion.

20 CHAIRMAN RUSSELL: All right. Well, then, I  
21 guess we don't -- Don, do you want to rescind your motion?  
22 Do we need to?

23 MR. ROSSBACH: I mean, I think -- I mean, I agree  
24 100 percent with the arguments made by Ms. Dillen, that  
25 much of Mr. McCutchen's testimony was -- was legal

1 opinion. But when he starts talking about how decisions  
2 are made and where -- you know, and how a PM-2.5 versus  
3 how a PM-10, et cetera, et cetera, that becomes a little  
4 mixed fact and law, and we have to sort of see how it's  
5 coming out. I mean, I agree 100 percent that he can't say  
6 the law is this or this is how the EPA would rule. I  
7 don't think that's a matter of expert testimony. But if  
8 he should start talking about how PM-2.5 BACT analysis  
9 would be done or how a PM-10 BACT analysis or how it  
10 serves as a surrogate, these are all factual matters.

11 MR. LIVERS: Mr. Chairman, this is Tom Livers. I  
12 might be wrong, but I'm not sure there is a motion on the  
13 floor. The sense I got was that Don was asking for what  
14 kind of motion might be appropriate, but did not actually  
15 make one. And if I'm wrong, Don or someone else could  
16 correct me, but I don't think we've got a motion on the  
17 table.

18 CHAIRMAN RUSSELL: Well, if we don't have a  
19 motion on the table, then I would -- unless there's some  
20 further objection, I would say that our meeting regarding  
21 the prehearing motions is over and we only have one other  
22 item to take up before we adjourn. Anyone see it  
23 differently?

24 MR. MIRES: Larry concurs.

25 MR. REICH: Mr. Chair, this is Mr. Reich. I

1 apologize for speaking up, but Ms. Orr, at the beginning,  
2 raised a couple of issues about the PM-2.5 hearing,  
3 namely, you know, listing of exhibits, the timing on that,  
4 and the prehearing conference. And I just -- I wanted to  
5 know if the Board needs to take that up or will Ms. Orr  
6 take that up separately with us.

7 CHAIRMAN RUSSELL: I think Katherine will be  
8 taking that up separately.

9 MS. ORR: Mr. Chairman, if that's the Board's  
10 pleasure, I'd be glad to do that.

11 And one of the issues is -- It's my instinct to have  
12 the Board know as much before this hearing as is possible.  
13 And the parties, I think, are going to have developed a  
14 list of exhibits and a prehearing memorandum and then the  
15 exhibits themselves. And what I would suggest is that I  
16 have a prehearing conference to get a sense of the timing  
17 in which those can be submitted, and all with the  
18 objective that the Board try to get as many of those as  
19 possible before them before the actual hearing. Does that  
20 sound appropriate?

21 CHAIRMAN RUSSELL: Very appropriate.

22 MS. ORR: Okay. And so we will try to do that.  
23 I can't -- I can't give you a projection of what's doable  
24 yet from the parties, but I'll sound them out and try to  
25 express the goal that there should be as much in front of

1 the Board ahead of time as is possible.

2 CHAIRMAN RUSSELL: That would be good.

3 And then I have a question for the Department,  
4 specifically Tom and Kris. Will you try to get that data  
5 to us on a JumpDrive or that information on a JumpDrive?  
6 We're just running out of time here. I mean, this is  
7 two weeks out.

8 MR. LIVERS: Yeah. Mr. Chairman, this is  
9 Tom Livers. We'll try to get that to you on a JumpDrive,  
10 I think that's the most workable solution. Some of these  
11 bigger files tend to clog down when you try to pull them  
12 off the Web, but we will try to do that if that's the  
13 preference of the Board.

14 CHAIRMAN RUSSELL: Yeah. The only exception is  
15 graphical representations need to -- we just need to make  
16 sure that the file sizes don't get so large that -- I had  
17 a crash this morning. I think Tom had the same problem,  
18 but I had a crash on my JumpDrive. My PDF reader memory  
19 was full and my laptop crashed.

20 MR. LIVERS: Yeah, Mr. Chairman, when I was  
21 trying to access them remotely this week, I had some  
22 trouble. So we will work on the technical side of this.  
23 I know we don't have much time on this, but I think there  
24 are probably some things we can do to maybe parse these  
25 out into smaller documents or something. There may be



1 some way to get around that.

2 CHAIRMAN RUSSELL: Okay, thank you.

3 MR. MARBLE: This is Don. I've got to leave the  
4 meeting, so I'll see you folks in a few weeks.

5 CHAIRMAN RUSSELL: All right. Thanks, Don.

6 MS. SHROPSHIRE: Do we anticipate that meeting  
7 going into the evening, that hearing, do you think?

8 CHAIRMAN RUSSELL: Well, Tom, correct me if I'm  
9 wrong, but right now, we will have a regular board meeting  
10 on the morning of the 22nd; we will start the hearing  
11 sometime in the afternoon after a break, I think that's  
12 what -- and then we will continue at 8 o'clock on the  
13 23rd. And I think -- I don't know how anyone else feels,  
14 but, you know, after about eight hours of this, I'm pretty  
15 much checked out. I don't want to -- Not that I want to  
16 be away from my home and family that long, but I don't  
17 want to also not give the parties their due. So I think  
18 we'll stick to a regular work schedule and not work into  
19 the evenings.

20 MR. LIVERS: Mr. Chairman, this is Tom Livers.  
21 That's certainly your call, and I would agree with you. I  
22 think maybe just for the sake of planning for folks, once  
23 we have nailed down the agenda for the regular board  
24 meeting, we'll try to take a look at any potential  
25 elective items on briefing items that could potentially

1       come in or go out and try to limit that meeting to more or  
2       less the morning. That will -- that will allow a lunch  
3       break, and then the hearing would start up early afternoon  
4       on the 22nd, on Tuesday.

5           I would suggest, as you've lined out, that we not plan  
6       to go into the evening. We'll find some logical breaking  
7       point, you know, in the 5 o'clock range and start up again  
8       probably 8 the next morning, Wednesday morning. And then  
9       the Board can kind of make logistical decisions as it goes  
10      along at that point in terms of the progress and what the  
11      rest of the week holds, if that makes sense.

12           CHAIRMAN RUSSELL: Makes sense to me.

13           MS. ORR: Mr. Chairman.

14           CHAIRMAN RUSSELL: Katherine.

15           MS. ORR: While the parties are all on the line  
16      or here in person, I think it would be worthwhile to ask  
17      how long they anticipate the hearing will be, given the  
18      number of witnesses and the exhibits, as a rough  
19      projection.

20           CHAIRMAN RUSSELL: That's fine.

21           How about start with the easier one, the Department.

22           MR. RUSOFF: This is David Rusoff, for the  
23      record. I'll be glad to be the easier the one. And I  
24      think I am. I think our case will be relatively brief. I  
25      anticipate the Department calling two witnesses. And my

1 take on the case at this point, based upon the Board's  
2 rulings this morning, is that the parties ought to be able  
3 to complete the entire case within normal working hours.  
4 I would even hope that we'd be done before the end of the  
5 week, but a lot of that depends on unforeseen things, like  
6 the number of questions the board members might have,  
7 whether the Board chooses to deliberate at the end of the  
8 evidentiary hearing, you know, breaks, and evidentiary  
9 objections and rulings on those, those sorts of things.  
10 But I think we should be in pretty good shape to -- to  
11 conclude the hearing at least within normal working hours  
12 by the end of the week, if not a half a day or so before  
13 that.

14 CHAIRMAN RUSSELL: Okay, thanks.

15 Abigail.

16 MS. DILLEN: Mr. Chair, members of the Board, I  
17 concur with Mr. Rusoff's assessment. We are planning to  
18 call only one witness, and given the discussions that  
19 we've had over the past couple of weeks in preparation for  
20 the hearing, I believe that we may be even able to finish  
21 early.

22 CHAIRMAN RUSSELL: Yeah, thanks.

23 Mr. Reich.

24 MR. REICH: I would concur. We plan to call  
25 two to three witnesses, one of whom is an expert, possibly

1 another person that helped prepare the application. So  
2 two to three witnesses. And we'll stipulate to the  
3 exhibits beforehand and expect that there probably won't  
4 be any contested exhibits or there will be very few. So I  
5 would hope we could finish before the end of the week.  
6 That would be our intent certainly.

7 CHAIRMAN RUSSELL: Okay, great. I'm certainly  
8 hoping that we finish up sometime Thursday afternoon.  
9 But, I mean, that would just be my hope.

10 Do we need any more information, then?

11 MS. ORR: I don't think so, Mr. Chairman. Not at  
12 this time.

13 CHAIRMAN RUSSELL: Okay. With that, I guess we  
14 will conclude that portion of our meeting. And as is  
15 necessary, I would invite any members of the public that  
16 are participating at this meeting, if they have anything  
17 that they would like to discuss with the Board that is not  
18 associated with what we have just been doing, to speak  
19 right now.

20 MR. LIVERS: Mr. Chairman, this is Tom Livers. I  
21 don't see any movement in that direction.

22 CHAIRMAN RUSSELL: Okay. With none, I will  
23 entertain a motion to adjourn. Is there a motion?

24 MR. MIRES: So move. Larry.

25 CHAIRMAN RUSSELL: Larry.

1 Is there a second?

2 MS. SHROPSHIRE: I'll second. This is Robin.

3 CHAIRMAN RUSSELL: Robin.

4 Any further discussion?

5 (No response.)

6 CHAIRMAN RUSSELL: All right. Hearing none, all  
7 those in favor signify by saying "aye."

8 (Vote.)

9 CHAIRMAN RUSSELL: All right. I will see you all  
10 Tuesday morning.

11 MR. LIVERS: 9 o'clock Tuesday morning.

12 CHAIRMAN RUSSELL: 9 o'clock Tuesday morning.

13 (The proceedings were concluded at 12:10 p.m.)

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COURT REPORTER'S CERTIFICATE

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COUNTY OF LEWIS AND CLARK )

I, CHERYL ROMSA, Court Reporter, Notary Public in  
and for the County of Lewis and Clark, State of Montana,  
do hereby certify:

That the foregoing proceedings were reported by  
me in shorthand and later transcribed into typewriting;  
and that the -109- pages contain a true record of the  
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IN WITNESS WHEREOF, I have hereunto set my hand  
and affixed my notarial seal this 18th day of January  
2008.

CHERYL A. ROMSA  
Court Reporter - Notary Public  
My Commission Expires 8/4/2011