

1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

3
4
5 IN THE MATTER OF:)CASE BER 2007-07-AQ
6 SOUTHERN MONTANA ELECTRIC)
7 GENERATION AND TRANSMISSION)
8 COOPERATIVE - HIGHWOOD)
9 GENERATING STATION)
10 AIR QUALITY PERMIT NO. 3423-00)

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12 TRANSCRIPT OF PROCEEDINGS
13 BOARD DELIBERATIONS

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16 Heard at Room 111 of the Metcalf Building
17 1520 East Sixth Avenue
18 Helena, Montana
19 February 8, 2008
20 10:10 a.m.

21 BEFORE CHAIRMAN JOSEPH RUSSELL,
22 BOARD MEMBERS LARRY MIRES, HEIDI KAISER, GAYLE
23 SKUNKCAP, DON MARBLE, BILL ROSSBACH

24 (all by telephone);
25 and ROBIN SHROPSHIRE.

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1 Whereupon, the following proceedings were
2 had:

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4 CHAIRMAN RUSSELL: It's ten after ten,
5 and I'll call the Board of Environmental Review to
6 order. I'm sure the Board members have all
7 received the closing arguments and have read them.
8 And basically at this point, we won't hear from
9 any of the parties, but we will enter into Board
10 discussion regarding settlement of the particulate
11 matter issue. Anyone want to kick it off?

12 (No response)

13 CHAIRMAN RUSSELL: Anyone want to make a
14 motion? I'd rather have a little discussion
15 before we move toward --

16 MR. LIVERS: Just for the record, I
17 think we know everybody's voice, but to make it a
18 little easier on the Court Reporter, if we could
19 just identify ourselves prior to talking, that
20 would help. Thanks. This is Tom.

21 MS. SHROPSHIRE: I'm not exactly sure
22 where to start, except maybe just to start with
23 whether or not DEQ erred in using a surrogate
24 analysis for using PM10 as a surrogate for PM2.5,
25 as a first -- take a stab at that.

1 I guess it's my opinion that they did,
2 for the reason that I believe that guidance for
3 that was misapplied. I'm sure that it may be true
4 that for some particulate matter, that it may be
5 reasonable to use PM10 as a surrogate; but I don't
6 think they demonstrated that for the control
7 technologies. And I guess I would add that I
8 think the record demonstrates that for those
9 control technologies that were evaluated, that in
10 some instances, PM10 in fact is a terrible
11 surrogate for PM2.5. And I don't think that EPA's
12 guidance necessarily directly applies to the
13 conditions for all of these control technologies.

14 So I guess that's one of the first
15 comments I want to make, is that when it comes to
16 something like PM2.5 -- which I think we have
17 heard on the record from all sides is one of the
18 most dangerous pollutants from a coal fired power
19 plant, and in fact a pollutant that we find in
20 Montana that is something that can be attributed
21 to asthma and death in humans. We need to make
22 sure that we're looking at appropriate control
23 technologies that offer the highest standard of
24 control, and I don't think that that was done.

25 I'm just going to read a couple things

1 from the record that I think demonstrate this.
2 One of these is an email. It says, "After our
3 discussions about PM10 filterable emission rates
4 --" this is to Ray Walters from Joe Lierow. And I
5 don't remember the -- it says here Deposition
6 Exhibit No. 68, but I'm not sure exactly what it
7 is in our records.

8 But it says, "After our discussion about
9 PM10 filterable emission rights of 0.012 pounds
10 per --" whatever that is -- "Btu's, I have done
11 some investigations." And it's cut off, but --
12 "Plants that have tested at a limit of 0.012 or
13 below, my initial investigation found one facility
14 in Florida. The facility started commercial
15 operations a year or two ago, and has completed
16 their compliance testing. The results of the
17 tests were published in the internet, and met the
18 limits with ease."

19 And so this actually ties in not so much
20 to whether the surrogate was appropriately used,
21 but whether or not a proper BACT analysis was
22 done. And another comment that I want to make is
23 that I don't believe that a proper BACT analysis
24 was conducted on multiple levels.

25 One of the most disturbing things that I

1 heard in testimony was that a vendor was contacted
2 to determine what an appropriate emission -- or
3 what was the emission rate that they would
4 guarantee; and from the testimony I heard, it
5 appeared, and I believe, that the emission rate
6 was determined, and then it was worked backwards
7 into the BACT analysis. The BACT analysis does
8 not say, "Go to the vendor and find out what
9 they're willing to guarantee." That's not what a
10 BACT analysis suggests. And from the evidence
11 that I heard in the record, I believe that that's
12 what the Applicants did, and I don't think that
13 that is a proper BACT analysis.

14 Whether or not the emission rate was
15 appropriate, I think that there is lots of
16 evidence that plants across the United States have
17 lower emission rates than this plant, with coals
18 that are burning higher sulphur, and I don't think
19 that necessarily it was demonstrated that they
20 have higher sulphur. But from the expert for SME,
21 he suggested that the coal that those plants were
22 burning were likely eastern coals that had higher
23 Btu's, but also have higher sulphur; and those
24 plants had lower sulphuric acid emission rates
25 than this plant. And I think that without

1 question, the emission rates that this plant could
2 produce could have been lower than what the permit
3 has.

4 I think we have to maintain the
5 integrity of the BACT process. I still have some
6 questions about how that was conducted. And there
7 are some questions that I wish I could ask now,
8 but I feel pretty strongly that this should be
9 remanded back to DEQ.

10 MS. KAISER: This is Heidi. Can I make
11 a comment?

12 CHAIRMAN RUSSELL: Go ahead.

13 MS. KAISER: Robin, what you said about
14 the BACT analysis and the fact that they
15 calculated the limit based on a rate that was
16 given to them by the manufacturer of the boiler,
17 you didn't think that was a proper BACT analysis,
18 but I think in fact the BACT analysis has got to
19 address what's achievable. So I believe that the
20 manufacturer gave them the limit that was
21 achievable. So I guess that's my comment, is part
22 of the analysis is what can be achieved, not just
23 how low can you go. That's my comment on that
24 issue.

25 MS. SHROPSHIRE: I'll just finish off by

1 saying that when it comes to the public health of
2 Montana, I think we can do better. I know we can
3 do better. And for something as dangerous as
4 PM2.5, I think that in terms of a proper BACT
5 analysis, from the testimony I heard, I don't
6 think that a combination of technologies was
7 considered to the extent that it should have been
8 in providing control for either PM10, or PM2.5, or
9 the condensibles; and I think if that were to be
10 reevaluated by looking at combined controls, I
11 think that we would have seen higher levels of
12 control. And I guess I'll stop there for now.

13 CHAIRMAN RUSSELL: Further comments?

14 MR. ROSSBACH: This is Bill. I don't
15 know where to start. But let me just say first of
16 all, I agree wholeheartedly with much of what
17 Robin says. And I don't want to be seen as -- I
18 guess it can be seen as -- (inaudible) -- of SME.

19 But my concern is this. SME has been
20 before us many times regarding mercury, regarding
21 other issues, and we have been consistently
22 assured by representatives of SME that this is
23 going to be state of the art, that this was a
24 Montana project, that this was a project that they
25 were going to demonstrate to the industry and to

1 the people of Montana that they could do the best
2 state of the art facility, and do it economically.

3 And unfortunately, as I look at the
4 record here, particularly some of the email
5 traffic, some of the testimony from Mr. Lierow,
6 Mr. Merchant, suggests to me that they didn't,
7 that there were numerous times when they could
8 have asked harder questions of the vendor.

9 Clearly they did get information from the vendor
10 when they wanted it; but when they didn't want to
11 get any additional information, a little bit of a
12 "See no evil, hear no evil." There is an email
13 that says, "We're in the middle of negotiations.
14 We don't want to ask any more information from
15 them. We don't want to jeopardize the
16 negotiations."

17 Eric Merchant said at some point
18 somebody asked whether we could get 2.5
19 information from the vendor. It was never gotten.
20 Yet the vendor did provide with them with other
21 information when they were asked for it.

22 So I just feel a little bit like Robin,
23 in the sense that I'm frustrated that we could
24 have done a lot better here.

25 At the same time, I feel a little bit

1 like I don't have enough information from the
2 other side either to really feel comfortable
3 making a decision on something of this magnitude,
4 when I really don't know where or how many times
5 coal plants have used membrane technology, how
6 much it costs, whether it's been found to be cost
7 effective.

8 And on a legal basis, I have real
9 trouble understanding sort of -- The one thing
10 that is on the federal register page -- and I'm
11 not sure of the date. It's 2007 -- 54114, where
12 it says that agencies can have discretion, and can
13 continue to use the surrogate analysis. So does
14 that mean that if they do use a surrogate
15 analysis, they get a pass? I don't know. I don't
16 feel like I've had an answer to that question.

17 And on some levels, I think it's a
18 little bit of a problem with the way this came
19 forward, in that we asked for closing arguments in
20 writing, and we really don't have a response to
21 each other's closing arguments, so it makes --
22 Normally you would have a little bit of a
23 responsiveness back and forth.

24 So my problem is this: I don't feel
25 like I'm prepared to vote. I feel like I have a

1 lot more questions that I would like to have
2 answered. I would like to have some different
3 legal issues addressed more directly and responded
4 to.

5 And this is as big a decision as we're
6 being called upon to make. We're talking about a
7 plant that has a 30 to 50 year life expectancy.
8 We're talking about a very dangerous product -- a
9 very dangerous pollutant rather; very, very small
10 increments of improvement, as Mr. Taylor
11 testified. Small tenths of a percentage
12 improvement means literally tons and tons of
13 PM2.5; meaning billions and billions of small
14 particles could potentially be trapped.

15 And on that basis, if I were asked, I
16 would -- this is what I guess I will do right now.
17 I don't intend to -- If somebody else has some
18 other comments about it. But my intention is to
19 move to table it.

20 CHAIRMAN RUSSELL: Is that a motion,
21 Bill?

22 MR. ROSSBACH: Yes, I will make the
23 motion to table.

24 CHAIRMAN RUSSELL: Is there a second?

25 MS. KAISER: I'll second it. This is

1 Heidi.

2 MR. LIVERS: Mr. Chairman, this is Tom.
3 I think maybe the better motion in this case, to
4 accomplish what Mr. Rossbach is looking for, would
5 be a motion to postpone, to postpone to a definite
6 time. There is some sense that it's out of order
7 to actually table at a special meeting that's been
8 called for the matter that's being tabled. So
9 it's a minor point, but you may want to consider a
10 friendly amendment; rather than to table, to
11 postpone.

12 CHAIRMAN RUSSELL: I concur. I think
13 tabling it kind of makes the discussion not up for
14 discussion further until it's brought back off the
15 table. So Bill?

16 MR. ROSSBACH: Well, that's fine. I did
17 intend to get into discussion. That's fine. I'll
18 move to suspend to a definite time. I don't have
19 a definite time at this point.

20 CHAIRMAN RUSSELL: That's fine. Heidi,
21 are you okay with that?

22 MS. KAISER: Yes. I actually seconded
23 so we could discuss it further. So that's fine.

24 MR. ROSSBACH: That's fine.

25 CHAIRMAN RUSSELL: I certainly hope we

1 have a little bit more discussion before --

2 MR. MARBLE: This is Don Marble. I'm
3 troubled by the fact that in view of our
4 Constitution that we're supposed to work for a
5 clean environment, and not cause further pollution
6 and all that, and that this is supposed to be a
7 model plant, kind of like we've been told; that
8 when it comes to PM2.5, we're relying on this -- I
9 consider -- kind of old EPA theory of using a
10 surrogate. And it was proposed in 1997. Then we
11 hear in the evidence that they're working on it,
12 and they're getting very close to it, they're
13 going to have a specific PM2.5 standard, and yet
14 it isn't here yet, but it might be here tomorrow,
15 or next week, or something. We don't know.

16 It seems to me like from what I've read
17 -- and I agree with what some other people have
18 said -- that the surrogate -- there is questions
19 about the surrogate method, and how appropriate it
20 is, and is it really doing what it's supposed to
21 do. It looks to me that a good argument can be
22 made that it doesn't.

23 And so it bothers me, like Bill said,
24 that we're asked to approve an air permit for a
25 plant that's going to go into Great Falls and be

1 there for 40 or 50 years, and there is no
2 provision to upgrade the permit if new technology
3 comes out that I'm aware -- I haven't heard
4 anybody talk about that. And it just seems that
5 -- and another --

6 That's one of my concerns, is this
7 surrogate method, and I don't know why the
8 Department couldn't have done just a BACT PM2.5
9 without using the surrogate thing, just to see
10 what -- show us what can be done, and what can't
11 be done. I think that would be informational. So
12 that bothers me, and it seems like -- I don't know
13 why.

14 Maybe it's getting to be time here to
15 have some rulemaking on PM2.5, and forget about
16 the surrogate method if we can. Let's take
17 testimony as to what can be done. And it's
18 probably not timely here, but that's a question I
19 have. So anyway, those are some thoughts I have.

20 CHAIRMAN RUSSELL: Thanks, Don. Further
21 comments? I have a few, and I'd hold them if
22 someone has a burning desire to --

23 MR. ROSSBACH: I have one additional
24 comment. And I'm not trying to get in between
25 Heidi and Robin here on this one. But it was

1 interesting to me -- and I was surprised by what
2 Robin said, because in my view, the fact that on
3 some issues SME did go to the manufacturer, and
4 ask for specific information, and get specific
5 information that was specific to that particular
6 boiler or emission control technology, that they
7 could have done it more if they would have wanted
8 to.

9 And in that regard, I agree with Heidi
10 that getting specific emission information is, as
11 I understood it from Eric, the best way to do a
12 BACT, is instead of relying on some sort of
13 generic emission factors, that if you could get
14 specific emission information for a particular
15 boiler, or a particular control technology,
16 membrane, or teflon, or whatever, that you're
17 getting a much better and more accurate BACT, and
18 that you're more likely to get a better and more
19 accurate ultimate emission limit that is
20 justifiable and supportable.

21 And so on that level, to me, the fact
22 that they could have gotten, or did get in some
23 instances information from the vendors is, in my
24 mind, evidence of why we should be asking them to
25 ask more questions.

1 of bothering me, and it's back to the same thing
2 that Bill said the last time, the issue here is:
3 Did they violate the law? And from my limited
4 knowledge of law and understanding, from
5 everything that I have heard and seen, I cannot
6 say that DEQ violated the law. I just don't think
7 they went the distance they should have gone.

8 But to go down that path, are we in fact
9 at that point in time initiating rulemaking on an
10 application that has been started and run? I
11 guess that's a question I have. I don't know. By
12 denying the permit, are we creating a rulemaking
13 policy process here? If so, I think we're doing
14 it backwards. We need to be doing this on the
15 front end of it, instead of on the back end of a
16 project, so that everybody knows exactly where
17 they're going.

18 And that's where I'm having the biggest
19 amount of angst on this whole issue in this case,
20 is it appears that we are into rulemaking, and
21 kind of circumventing what probably should be
22 done, and we're back to the "should have, could
23 have, would have" deal.

24 I'm not sure where I would go at this
25 point, so I'm kind of back with Bill on the idea

1 of postponing with this more information. But if
2 it's strictly a legal matter that -- did they
3 violate the law, from what everything I've seen
4 and heard, from my position, I don't think DEQ did
5 violate the law.

6 But I'm really disappointed that because
7 we're propagating the state of the art issue, we
8 didn't go the extra miles to show everybody that
9 you really are wanting to do the state of the art
10 issue. And I guess I'll end my comments at that
11 point.

12 CHAIRMAN RUSSELL: Thanks, Larry. I
13 certainly don't want to feel like the anchor here,
14 but I, too, I've been in Montana a long, long
15 time, and I grew up in the Great Falls area, and
16 this decision weighs on me very heavily, certainly
17 from a public health perspective. We are in a
18 transition time, and that's why the surrogate was
19 called for. We have been challenged to look at a
20 finer particulate as it relates to morbidity and
21 mortality, and I think that we are doing that.

22 I quite frankly think the EPA has not
23 upheld their side of the matter. It's been a long
24 time -- ten years is a long time -- waiting for
25 the ability to use a PM10 analysis -- or a PM2.5

1 analysis instead of a surrogate PM10.

2 I also understand that Montanans need
3 energy, and we are resource rich, and we're not
4 using that resource, but we're also not using our
5 resource to develop a plant that can control
6 emissions greater. And I think that evidence
7 shows that there are plants operating with lower
8 particulate emissions than this plant. And I
9 think we have been told through testimony that
10 there are -- even for a baghouse, there are higher
11 emission control devices that can be used in a
12 baghouse than are being used at SME.

13 Robin, the whole concept that Best
14 Available Control Technology -- I started to very
15 much disagree with your comment about going to the
16 manufacturer and getting that -- but the
17 definition is not Best Available Control
18 Technology for that boiler, it is Best Available
19 Control Technology for that process. So you can
20 apply a standard that says you can do better if
21 there are plants that are doing better than you
22 propose.

23 I don't want the Board to be the body
24 that holds this up. I hope that by this decision
25 -- and maybe I'm being way more presumptuous than

1 I should be -- that maybe there is something that
2 the parties can do in the interim to move this
3 along, and not just wait for us to finally make a
4 decision so this can be appealed to another court.

5 Montana needs this energy. SME has been
6 at these meetings because they need to move this
7 plant forward. The ratepayers, the people that
8 are buying this energy from these co-ops, are
9 going to be paying dearly. The difference between
10 what Butte pays for electricity and what Kalispell
11 pays is 50 percent. Is this where we're going as
12 Montanans? Are we going to allow our resources
13 not to be -- (inaudible) -- but are we going to
14 protect the public's health?

15 I'm going to get off my soap box now.
16 But I think that we could do better. I think that
17 the Department has already demonstrated a
18 willingness to protect the public's health by
19 requiring BACT on mercury. And I have no strong
20 desire to move a decision forward today when maybe
21 this outcome, with not making the decision, maybe
22 we can move this thing forward faster.

23 MR. MIREs: This is Larry, and I have a
24 question. Maybe somebody can give me an answer on
25 it. And it goes along with your comment there,

1 Joe.

2 Can the Department and SME make some
3 kind of an amendment or adjustment to show that
4 they are going to the extra mile to do this
5 without a long hassle process here? Is there any
6 way to amend something in that direction, or is
7 that totally out of the question?

8 CHAIRMAN RUSSELL: I think anything can
9 happen during a process of settling a case.

10 MR. MIRES: I think everybody has pretty
11 much expressed their disappointment, and from my
12 perspective again, I don't think they violated the
13 law, and so I don't think they're unlawful, but I
14 just don't think they went the route that they
15 should have gone, everything known about the
16 issues at hand. I think they're way short of
17 where they should be.

18 MR. LIVERS: Mr. Chairman, this is Tom
19 Livers, if I could weigh in at this point. I
20 understand the interest behind the comment. I
21 don't think we have a very good idea of what that
22 would look like in terms of what would be going
23 the extra mile, short of saying that the PM10
24 surrogate doesn't suffice -- well, maybe not
25 saying that -- but directing us to do a specific

1 PM2.5 BACT analysis. That seems to be the only
2 other place to land on that. I think we tried to
3 maintain in our presentation why we believe that
4 the regulatory framework, the information is not
5 in place to enable us to do that.

6 But without getting into the substance
7 of our case, I guess the short answer to the
8 comment is: I don't think we see another place to
9 land, other than if you're telling us we need to
10 do a PM2.5 specific BACT analysis, that's it.

11 CHAIRMAN RUSSELL: Tom, I don't think
12 that the only way I think the Board at this point
13 -- because we don't direct the Department to do
14 work. I think the only thing we could do is
15 actually a decision in this case. And once again,
16 I think that there is folks that are on the Board
17 that feel like a decision can only make this delay
18 more.

19 I think that certainly at least one
20 party could look at doing a BACT for condensibles
21 or PM2.5, but that's something that would come
22 from the parties, not from -- The Board would have
23 to make -- I feel the Board would have to make a
24 decision for that to occur from a Board direction.
25 And I keep hearing that that may not be where we

1 want to be today.

2 MR. MIRES: This is Larry. If we were
3 to say that they had to do a 2.5, is that in fact
4 doing rulemaking?

5 CHAIRMAN RUSSELL: No, I don't believe
6 so. You know, Larry, I understand your concept.
7 Our decision can set precedent, but it certainly
8 doesn't lay out a rule that says how -- it doesn't
9 lay out the road map on how to get there. It's no
10 more than a Court order basically creating the
11 precedent that a rule needs to be clearly defined.

12 So correct me if I'm wrong, if anyone on
13 the Board disagrees, but I think the only way we
14 can demand a BACT analysis for PM fine fraction is
15 to actually decide the case. I think that SME
16 could voluntarily submit a BACT on 2.5, and it
17 could be reviewed by the Department, and that
18 could be part of a settlement offering.

19 MR. MIRES: Is that possible?

20 MR. ROSSBACH: That would be up to them,
21 not us.

22 CHAIRMAN RUSSELL: Correct. We're being
23 a little coercive right now, but --

24 MS. SHROPSHIRE: This is Robin. I just
25 want to clarify my comments. I do believe

1 absolutely that going to a vendor and requesting
2 emission rates is an important part of the BACT
3 process, but I think that that was done out of
4 order in this situation. And so I don't think
5 that that should be the first step in the BACT
6 process, it should be further down on the list.
7 The first step is to identify all control
8 technologies, and I think that it was done out of
9 order, and I just want to clarify.

10 CHAIRMAN RUSSELL: And I agree with you.
11 What my point was is it's not, "Clarify control
12 strategies by vendor," it's by process.

13 MR. SKUNKCAP: Mr. Chairman. This is
14 Gayle. Is that by the Department? To make this
15 decision, the Board will have to make the
16 decision, because it wasn't done by order?

17 All those comments are good comments --
18 Larry's, Bill's, Robin's, Don's. And Larry's
19 comment about reaching an agreement if they can,
20 it didn't sound like they could, or nobody at the
21 Department didn't want to, or what.

22 You're calling it, Mr. Chairman, about
23 the energy, Montana needs this energy, and the
24 jobs, and economics, and all that. I agree with
25 all those comments, and with Bill's wanting to

1 hear more stuff, but he didn't want to end
2 discussion on it. I think we do need to hear
3 more, but I think we are going backwards on that.
4 My main concern is public health, you know, what
5 Bill said, too. This plant has a life expectancy
6 of 20, 30 years, and we need to think about public
7 health.

8 We've seen what industry can do on the
9 Zortman Landusky deal, and that's my concern,
10 after seeing what happened to the Fort Belknap
11 tribe. This is more -- Fort Belknap may be
12 affected by that again. They're downwind of that,
13 too. But again, my main concern is public health
14 on this issue because I've seen what industry did
15 on that deal.

16 But as far as making an agreement or
17 things being done out of order, is that the
18 Department doing, and then we have to go ahead and
19 make a decision on that?

20 CHAIRMAN RUSSELL: To some extent,
21 Gayle. I think that's exactly right. I keep
22 hearing Larry, and I agree with Larry. I think
23 that the Department didn't do anything illegal.
24 And I'm a regulator twenty plus years, and I think
25 that the Department utilized clearly what was in

1 front of them to analyze the BACT analysis that
2 was submitted by the consultant. But we're in a
3 transition time, and I think there has been facts
4 brought to us that say that yes, you can look at a
5 PM fine fraction, and do, and look at that or a
6 BACT analysis.

7 MR. SKUNKCAP: Mr. Chairman, this is
8 Gayle again. We have a motion on the table. Is
9 there another motion that is out there that can be
10 put out there? The motion on the table now is to
11 suspend it or table it until further evidence; is
12 that right? Is there another motion out there?

13 CHAIRMAN RUSSELL: I don't think there
14 needs to be until we act on this motion. And I
15 guess I would clarify the last part of your
16 comment. I don't believe we're asking for
17 additional evidence. And Bill, correct me if I'm
18 wrong. I don't believe we're asking for
19 additional evidence. We're asking for -- other
20 than we're asking for a little more time to make
21 our decision. I don't know what we're looking
22 for, Bill.

23 MR. ROSSBACH: I think I would like to
24 ask for some responses to specific questions, not
25 necessarily evidence, more from a legal point of

1 view.

2 MS. SHROPSHIRE: This is Robin again. I
3 wouldn't have said this except Joe brought it up.
4 But Montana's exporting 50 percent of our
5 electricity right now, and so the notion that we
6 need more energy in Montana, to me, when we're
7 exporting as much electricity as we are, is not a
8 valid argument. I do think, yes, we need jobs,
9 good paying jobs, we need good industry; but I
10 don't think the argument that we need more energy
11 is a valid one at this point.

12 CHAIRMAN RUSSELL: Where are these
13 people in Central and Southern Montana going to
14 get their electricity, Robin?

15 MS. SHROPSHIRE: Well, if we are
16 exporting 50 percent of it, maybe --

17 CHAIRMAN RUSSELL: And we can't control
18 that.

19 MS. SHROPSHIRE: I guess I'll comment on
20 another thing. These co-ops had a sweetheart deal
21 with Bonneville Power. That sweetheart deal is
22 going to expire. But whether we build a coal
23 fired plant, or whether we get that energy from
24 wind power, or any other source, that sweetheart
25 deal is gone. And I think the cost of power, if

1 we look at it in a realistic way, is going to go
2 up, no matter what.

3 CHAIRMAN RUSSELL: So Montanans should
4 bear the burden of that?

5 MS. SHROPSHIRE: I guess what I'm saying
6 is that even if we build a coal fired power plant
7 in Great Falls, the price of power is going to
8 probably double. The deal that the co-ops had
9 with Bonneville Power is going to go away, and
10 they're never going to get a deal like that ever
11 again.

12 CHAIRMAN RUSSELL: Now they're going to
13 be self-sustaining, though.

14 MS. SHROPSHIRE: What do you mean?

15 CHAIRMAN RUSSELL: They're not going to
16 be out on the market buying their power. So then
17 the cost just becomes a matter of what the
18 technology costs them to produce it.

19 MS. SHROPSHIRE: Market price for power
20 is probably double than the contract that they've
21 had with BPA. None of this stuff is on the
22 record, and I don't know if it's relevant, but I
23 don't think it's a valid argument.

24 CHAIRMAN RUSSELL: That's your point.

25 MS. KAISER: I think it's a valid

1 argument.

2 MR. SKUNKCAP: This is Gayle. What the
3 decision would be -- Like you said, you feel the
4 decision has to be made to make this move on. And
5 with Bill's motion on the table, what is the other
6 choice we have? If there is no alternative to
7 that, and the Department and them can't work that
8 out, what's going to happen, or where are we going
9 to go? Again, I stress public health and safety
10 20, 30 years down the road. That can happen.

11 If we have no alternative for the public
12 that are downwind, I'll refrain myself from
13 voting, too, because I don't want to be a part of
14 that.

15 MS. SHROPSHIRE: This is Robin. And
16 I'll say in terms of asking more questions, if we
17 are going to ask more questions, I'd like to get
18 SME on the stand, and say on the record that
19 they're going to offer power at \$20 a megawatt
20 hour.

21 CHAIRMAN RUSSELL: That's not on the
22 table, Robin.

23 MS. SHROPSHIRE: No, I know. I'm just
24 saying it shouldn't be part of our decision
25 making.

1 CHAIRMAN RUSSELL: My point was SME has
2 been at every meeting because they have a specific
3 population that they provide electrical power to.
4 This is important for that cooperative and
5 primarily for Montanans. You're right. If this
6 coal plant doesn't get built, they'll go out and
7 find power somewhere. Will it be double? It may
8 be higher than double.

9 MS. KAISER: Bill, this is Heidi. I
10 grew up near Great Falls, and I still have family
11 that live there, and they're most likely most of
12 the time down gradient of that proposed power
13 plant. And I agree with you. I don't want my
14 brother having to go out and get a second job so
15 he can turn the lights on in a few years.

16 It does concern me that if this power
17 plant is permitted with these limits, and new
18 technology comes along, that there isn't some
19 mechanism that would work to have them review, if
20 they do a permit review every five years, to see
21 if they're achieving limits that are currently
22 achievable.

23 And I suspect language like that in the
24 permit might be a deal killer, because I'm sure it
25 would be a very expensive thing to do down the

1 years to retrofit with different control
2 technologies. But I guess that's one of my
3 concerns, and Gayle brought it up. The power
4 plant is going to be there for 40 years. It would
5 be great if it could be state of the art, and that
6 we don't have to be concerned about it in the
7 future.

8 So I don't know, from a regulatory
9 standpoint, if there is some sort of review that
10 could be put in the permit. And maybe there is
11 that kind of a review there.

12 CHAIRMAN RUSSELL: Well, I think we have
13 something similar to that in the mercury rule.

14 MS. KAISER: That's what was in the back
15 of my mind.

16 CHAIRMAN RUSSELL: But we would have to
17 commence rulemaking soon, and it's something that
18 I think everyone knows that I'd like to see
19 pursued for many reasons. I won't mention the
20 term. But I think there is a way for that to
21 happen.

22 But I guess if I were -- and I try to do
23 this, and from a regulatory standpoint, maybe this
24 sounds odd, but I like to put myself in someone
25 else's shoes, and understand the ramifications of

1 my decision. My decision, not our decision,
2 because I don't presume to know how that's going
3 to go.

4 But let's say we do create a rule like
5 that, that based on the technology that they've
6 put forward, if we put in a rule that required
7 that -- Let's just say their boiler technology
8 didn't set up for good emissions on any specific
9 -- I think people are following me. I don't need
10 to get any more specific -- that maybe their
11 boiler technology isn't adequate, and get that
12 reduction that a rule would create. Either you
13 grandfather them, or they wrap it and start again,
14 depending on how they develop the rule.

15 I still look back and think you've got
16 to go into this with your eyes wide open, and
17 understand that if you did look at a BACT analysis
18 for condensibles or PM2.5, at least you'd have a
19 better idea, and have better standing than you
20 would if you didn't.

21 MR. SKUNKCAP: Mr. Chairman, this is
22 Gayle. What's the difference between
23 grandfathering and rulemaking? That kind of
24 sounds like rulemaking plus grandfathering.

25 CHAIRMAN RUSSELL: I think

1 grandfathering is what we have down in Colstrip,
2 basically have old technology that continues to
3 run, and as long as nothing changes down there,
4 and no permit modification is required, they don't
5 really have to do anything.

6 MR. SKUNKCAP: Mr. Chairman, this is
7 Gayle. The way it sounds now is like Larry and
8 Heidi kind of defined a little more about the
9 Department and industry working something out. We
10 don't really want to go into rulemaking, but
11 leaning more toward grandfathering, and I don't
12 think it's fair to industry, too, to keep them
13 holding off. We've heard a lot of stuff, and
14 we're still looking for the best technology out
15 there.

16 And like I said, is there something that
17 can be put in there? Because yes, those people do
18 need the power, but again, public health, that's
19 my weighing factor. But a decision, is there a
20 way that -- Again, is there a way that the
21 Department and industry can work that out?

22 And with your comment of we have to make
23 a decision, I don't feel that's fair to all of the
24 parties to have them wait this long after we heard
25 just about almost all that testimony.

1 CHAIRMAN RUSSELL: The only reason I
2 bring up -- There is nothing that we can do to
3 direct the Department to do anything unless we
4 make a decision. If we don't make a decision,
5 then it's up to the parties to move this forward
6 to try to get some resolution. If we make a
7 decision now, most likely our decision will be
8 appealed to -- or switched -- I don't think
9 expedites anything.

10 MS. ORR: Mr. Chairman, this is
11 Katherine Orr. I think the Board has to make a
12 decision on this contested case. You have before
13 you a request to postpone it and to hear further
14 argument on what the legal issues are, but I don't
15 think it's an alternative to not rule on these
16 contested matters.

17 And I'll even go out on a limb even
18 more, because no one is asking me specifically,
19 but I think the Board's opinion here will provide
20 guidance to the Department, whichever way it
21 determines it will go. And I think the
22 fundamental question here is whether the rules
23 concerning BACT and the top down BACT technology
24 was followed. So I just throw that in.

25 MR. SKUNKCAP: This is Gayle. If we do

1 have to make a decision, the motion that's on the
2 table that's tabled now, or to table it, we can't
3 make our decision on that until we reconvene
4 again; is that correct or not?

5 CHAIRMAN RUSSELL: That would be
6 correct.

7 MR. MIRES: This is Larry. If that were
8 the case, what time frame are we looking at
9 getting together to make a decision?

10 CHAIRMAN RUSSELL: I think an attorney
11 for one of the parties is not going to be
12 available for several weeks, so I guess it would
13 be up to the parties. It would be up to Katherine
14 to try to schedule something with the parties and
15 the Board. I'm guessing that we're not going to
16 just get on the phone again and ramble around.

17 MS. ORR: Mr. Chairman, this is
18 Katherine. I'd be glad to help focus this a
19 little bit, if you would like.

20 CHAIRMAN RUSSELL: That would be great.

21 MS. ORR: There are two issues here:
22 The timing, if there is going to be further oral
23 argument, and question and answer session
24 concerning the questions that were raised by the
25 closing argument; the timing of that; and then

1 what exactly would transpire.

2 And maybe the thing to do would be to
3 discuss among yourselves when would be a good time
4 for an interim meeting before the April 4th
5 meeting, or if you wanted to set it for the April
6 4th meeting, you could. And then there would be
7 deliberations and direction to me to draft
8 whatever your decision is, and then a final
9 decision on that language.

10 So that is sort of setting out the
11 process, and the question is: Do you want to
12 compress it? Do you want to have a meeting before
13 April 4th to ask your questions of Counsel or not?
14 And then if you even wanted to set forth a list of
15 legal questions in advance for Counsel, or factual
16 questions, that could be done, and then they can
17 answer those in the hearing, whenever that is
18 scheduled.

19 MR. ROSSBACH: This is Bill. The intent
20 of my motion is something along the lines that
21 Katherine is proposing, that we have her somehow
22 or other put a focused set of questions and issues
23 addressed in follow-up, and they're legal I think,
24 so that the parties can be prepared to address
25 them at our regular meeting, and with some

1 face-to-face questioning and answering. Merely
2 legal. That would be sort of along the lines that
3 I was anticipating.

4 MR. LIVERS: Mr. Chairman, this is Tom.
5 This is going back to maybe some comments that
6 were made a little bit earlier, just to provide a
7 little more perspective from the Department.

8 I know one of the big concerns I'm
9 hearing is allowing something to be built that's
10 going to be around for a long time, and this is
11 essentially your last crack at it. And maybe just
12 a quick reminder. At a minimum, there would be a
13 BACT analysis, new BACT analysis required on major
14 renovation; and our experience or typical
15 experience with the coal plants is that there
16 tends to be renovations within the first few years
17 as things are shaking out.

18 So I guess I do want to provide that
19 knowledge, or that likelihood that there could
20 well be opportunity for additional BACT analysis
21 in the near future. And I don't know all of the
22 grounds on this, but there is in some
23 circumstances some ability to condition permits
24 for BACT analysis.

25 And then also as was discussed earlier,

1 the case with mercury, that in a rulemaking,
2 that's also something that could be looked at in
3 terms of time frames for phase-in on new
4 technology.

5 MS. SHROPSHIRE: This is Robin. And I
6 appreciate that comment, but I don't think
7 personally that addresses the concerns that I
8 have, in that I think if a plant is built, to go
9 back and try to retrofit it is not really what
10 we're looking for.

11 I do, along with Bill's suggestion, have
12 many questions that I would still like to ask, and
13 so some of those may be legal, some of those may
14 not be legal questions, but I still have
15 unanswered questions in my head.

16 MR. MARBLE: This is Don Marble. I had
17 a question for Tom. Could the parties agree to
18 something like in the mercury rule, that they
19 would -- rather than just a major retrofit on some
20 time basis, they would go back and review their
21 operation, and the level, degrees of emission
22 control; and if there is new technology out there
23 that would improve that, could they agree to go
24 through that review, somewhat like we did down in
25 the mercury rule? Put that in the permit, I guess

1 is what I'm saying.

2 MR. LIVERS: Mr. Chairman, Mr. Marble, I
3 think if there were a voluntary agreement, the
4 permit could be conditional on that way.

5 MR. MARBLE: That's what I'm saying.

6 MR. LIVERS: I'm not sure under what
7 conditions we might be able to require it, but I
8 think --

9 MR. MARBLE: I'm saying voluntary.

10 MR. LIVERS: If there were a voluntary
11 agreement, I think that's a consideration that
12 could be built into the permit.

13 MR. MARBLE: I guess another thing is I
14 expect that possibly we'll start some rulemaking
15 on PM2.5 here in the near future, but the terms,
16 like in mercury, and would have to meet those new
17 rules. I'm just speculating. So anyway that was
18 just some more thoughts I had.

19 CHAIRMAN RUSSELL: Katherine, I agree
20 with you that the decision -- Let's double back.
21 If the decision were to be to postpone the
22 decision of the Board to a later date, at this
23 time not known, and we wanted some discussion
24 regarding some clearly defined matters, how would
25 we do that?

1 MS. ORR: Mr. Chairman, members of the
2 Board. I guess what I would suggest is: This
3 would be similar to a Judge asking for additional
4 briefing before making a decision on select
5 issues, and I think it's within the Board's
6 purview to ask for additional information, either
7 oral or written, concerning those questions. And
8 you might want to have me coordinate those. If
9 the Board wants to send me those questions, and
10 then I can disseminate those to the parties, and
11 the parties themselves can determine whether to
12 answer those orally or in writing before, say, the
13 April 4th meeting. That would be my suggestion.

14 CHAIRMAN RUSSELL: So you opened up the
15 fact that maybe we would send you our questions
16 that we wanted further development of answers to
17 via email?

18 MS. ORR: You could do that. And I
19 don't think you want to open this up to another
20 factual hearing. That's what I'm hearing today.
21 And it seems like maybe the issues could be
22 confined to legal issues, or the Board may want to
23 open this up to another fact finding hearing.
24 That's your decision, but it --

25 CHAIRMAN RUSSELL: Well, I would be

1 concerned with that.

2 MS. SHROPSHIRE: Can I ask a question
3 here? One of the questions in my mind is whether
4 or not the PM10 as a surrogate guidance was
5 applied properly to certain technologies, i.e., if
6 that guidance was misapplied in this case. And I
7 think it was. But is that a legal question, or a
8 factual question? Because I think that's a big
9 issue.

10 CHAIRMAN RUSSELL: Katherine, can you
11 answer that?

12 MS. ORR: Well, it sounds like a factual
13 issue that you're asserting doesn't exist in the
14 record. The support for the answer to that isn't
15 in the record yet, is what you're saying.

16 MS. SHROPSHIRE: For example, if a
17 cyclone was the control technology, that clearly
18 might control PM10, but I think anyone would argue
19 that that wouldn't control PM2.5, for example; or
20 a baghouse, I think on the record was stated would
21 control particulates, but not condensibles. And
22 so was that guidance misapplied to technologies
23 that it was not intended for?

24 MS. ORR: That sounds to me like both a
25 factual and a legal question. So the Board has

1 before it the question of whether they want to
2 have another fact finding hearing, and also attach
3 to it a portion of it where there would be further
4 submission on legal questions from the parties.

5 MS. SHROPSHIRE: I know that this
6 probably causes everybody a great deal of angst,
7 but when you think about 50 years, and that all of
8 us are going to be dead then, that this is a big
9 deal, and I think we need to take it seriously.
10 So my recommendation would be to go along with
11 Bill's suggestion.

12 CHAIRMAN RUSSELL: I guess the only
13 concern I have is that there is a considerable
14 amount of evidence that's been put before the
15 Board, and to just restart, I think, about four
16 hours into the next meeting, I'm going to see a
17 lot of eye rolling going, "We've already heard all
18 this before." And so my concern would be that --

19 I like the idea of allowing Katherine to
20 focus the issues that the Board has, because if we
21 start it up again, we're going to be hearing the
22 same thing over, and the Board is going to be
23 perturbed.

24 MR. MARBLE: This is Don. My feeling is
25 I'd like to see some reply briefs for the April

1 meeting, and then postpone it until then, and then
2 I think if we want to open up the evidence, we
3 could just specify the areas that we want to hear
4 evidence in, but we don't have to go over and over
5 all the same stuff. I'm not in a position right
6 now to say what those areas might be, but I think
7 that's something we all need more time to think
8 about.

9 And so anyway, I would like to see us --
10 I think Bill suggested some reply briefs -- I
11 think that would be in order -- from the parties
12 due in April, before the April meeting, and then
13 take this matter up again at that point.

14 MR. SKUNKCAP: Mr. Chairman, this is
15 Gayle. Katherine, and the Department, and the
16 parties work on a decision, they agree to come up
17 with more then, and on a call again, or before
18 April, or -- Like you said, if we go back into
19 another session, and we're going to hear the same
20 things over and over, I think what we just want to
21 hear is what Larry first stated, is if they can
22 just work on amending it or working something out.
23 And again like Bill and Robin's comments tabling
24 it, I guess.

25 And I disagree with Robin's last comment

1 of in 50 years we're all going to be dead. I'm
2 still going to be alive, because I'm going to live
3 to 100.

4 CHAIRMAN RUSSELL: I'm going to be
5 really close to 100, but I'm going to be alive,
6 too.

7 MR. MARBLE: This is Don. It seems to
8 me by postponing the decision, any further
9 decision making process until April 4th, and get
10 some reply briefs, I would imagine the parties --
11 I don't know why they wouldn't want to sit down
12 and maybe see if they can work some things out
13 between them. And we can't force them to, but I
14 would imagine normally that would be what people
15 would think, is "Well, is there some way we can
16 figure this out, and make some decisions?" And if
17 they could, it would be nice, and present it to
18 the Board. But we have to get those three parties
19 involved.

20 But it's a real big decision, and it's
21 going to affect Great Falls people for years and
22 years to come. And there is so many issues that
23 are unresolved out there, like reviews, and what
24 happens if there is new technology, and etc. And
25 I just think we've got to put this off, like Bill

1 suggests, and do the very best we can for the
2 people of Great Falls, and for the co-op members,
3 too. We've got to consider them.

4 But anyway, I'm ready to vote on
5 postponing further discussions until the April 4th
6 meeting. And then let's hope the parties maybe
7 see fit to do something, and maybe somebody will
8 get some bright ideas in between.

9 MS. KAISER: This is Heidi. I guess I
10 need some clarification. I guess we haven't voted
11 on anything, we haven't decided anything. And
12 Don's comment kind of prompted me to ask a
13 question. Don doesn't want to have any further
14 discussion until April 4th, but what about getting
15 focused questions to Katherine from the Board
16 prior to then? Is that something that we can
17 incorporate?

18 CHAIRMAN RUSSELL: Katherine?

19 MS. ORR: Mr. Chairman, members of the
20 Board, I think you could, and it would be in the
21 nature of asking for further response from the
22 parties. I do sort of see a separation between
23 legal questions and fact questions, because there
24 are certain Rules of Evidence and so forth that
25 apply to the introduction of factual information

1 into the record, which would have to then apply on
2 the April 4th meeting.

3 But if the Board wanted to have a little
4 bit more time to figure out, each one of them,
5 what further legal questions they might have, then
6 I could pass those on to the parties, and give the
7 parties an opportunity to answer those for the
8 April 4th meeting, in addition to, say, filing a
9 reply brief. So that would be an option, if
10 that's responsive to your question, Heidi.

11 MS. KAISER: Yes, it is. But as far as
12 like some of the factual questions that Robin may
13 have or other people on the Board might have, they
14 wouldn't really be open for that kind of, I guess,
15 resolution before April 4th.

16 MS. ORR: That's correct. There is a
17 right of cross-examination, for example,
18 concerning the introduction of any piece of
19 evidence in a contested case, so you would have to
20 have that format available to the parties.

21 MS. KAISER: Okay.

22 MR. MARBLE: This is Don again. It
23 seems to me that we need to reserve the right at
24 the April 4th meeting to make a decision whether
25 or not we might open up the factual record on some

1 particular issues. And so I agree with what
2 Katherine is saying about how you have certain
3 rules you have to let the factual evidence in.
4 But I think we need to wait until April 4th to see
5 if we feel like we should open up some areas. And
6 who knows? Maybe EPA is going to make a decision
7 by April 4th.

8 MS. KAISER: This is Heidi. I guess
9 this goes back to Larry's comment about: Did the
10 DEQ do their job? Did they lawfully do their job
11 during this permitting process?

12 I agree 100 percent with Larry. I
13 believe they did. Could they have done something
14 more? Yes, they might have been able to do things
15 differently. So I guess if we're waiting for
16 something to change before we make a decision on
17 this, I think that's the wrong attitude.

18 MR. MARBLE: This is Don. I think you
19 could argue they did the minimum. They used just
20 the straight surrogate EPA policy, which doesn't
21 inspire me very much in the face of the EPA. I
22 don't think it's shown that it's the great
23 defender of the states' health concerns at times.

24 But it seems to me that the Department
25 could have went ahead, and they've done it before

1 in cases, and they did it in this case actually.
2 They required more than the -- required by just
3 the bare minimum by law. But I think they could
4 have done some more things. I'm not saying they
5 didn't --

6 MS. KAISER: I agree they might have
7 been able to do some more, but I do think they
8 were within the regulation.

9 MR. MARBLE: Well, but our Constitution
10 says that the state and the rules, and
11 regulations, and Court decisions say that the
12 rules and regulations have to live up to the
13 standard of our Constitution; and just following
14 along with the EPA's surrogate policy, I don't
15 think that lives up to our constitutional
16 requirements, and then the Supreme Court decisions
17 that followed.

18 And it's not the EPA. The surrogate
19 thing is not a rule that's been approved by the
20 feds or by the state. It is just something, I
21 guess seems to me, something they threw out and
22 said, "Why don't we kind of do this for awhile."
23 And doesn't impress me as really living up to our
24 constitutional requirements of protecting a clean
25 environment, and so that's a real big concern I

1 have, is this whole surrogate thing. It's not a
2 rule that's been adopted by the State or anybody.

3 CHAIRMAN RUSSELL: Don, I think it has.
4 That's exactly what it does. The issue of law
5 here, from my perspective, is -- and you've heard
6 me, and I agree with Larry and Heidi -- that I
7 don't believe legally the Department did anything
8 wrong. I don't believe that they went above the
9 rule or the law in applying what they did, but --
10 I want to use "the fact of the matter," but I
11 don't want to use that. I don't think they did
12 anything illegal.

13 MR. MARBLE: I don't either, of course.

14 CHAIRMAN RUSSELL: Because basically
15 they were told to continue to use the PM10 BACT
16 for addressing particulate matter from a coal
17 fired plant. They did exactly what they were
18 supposed to do. Did they do more, and did they
19 have to do more is the question.

20 MR. MARBLE: Well, this is Don again.
21 I'm not saying they did anything illegal. Of
22 course they didn't. But what bothers me, I guess,
23 in the final analysis is that we've got a known
24 pollutant out there, PM2.5. This plant would put
25 out a lot of it. And we don't have any rule on

1 it, and so we're trying to -- Even though we deny
2 we're doing it, I guess we're trying to figure out
3 what would be a good rule in this other process,
4 appeal process. And so it's a dilemma. I don't
5 have an answer to it.

6 But it bothers me a great deal that
7 we're using this old surrogate thing that EPA put
8 out ten years ago, and for a plant that's going to
9 be on line for 50 years, and without any updates
10 or review, and that really concerns me. But I
11 think we ought to vote on it, and do what
12 Katherine suggested, is postpone the further
13 decision making until April 4th, and get some
14 reply briefs in, and maybe if people have
15 concerns, areas of concern other than we've
16 already expressed here today -- I've pretty well
17 expressed my concerns -- and I think at least give
18 this some process by which we'll proceed towards
19 making a decision, and I think we've done all we
20 can do today.

21 MR. MIRES: Mr. Chairman, this is Larry.
22 I guess I'm always intrigued by the legal
23 questions that Bill comes up with, and so if there
24 is something out there of a legal nature that Bill
25 has found that needs more discussion, I'm really

1 more in favor of listening to some more discussion
2 pertaining to something that may change my mind as
3 far as whether they did it legally or illegally,
4 or violated a rule or something. But I guess
5 under that aspect, I'm curious as to the questions
6 that Bill would like to further pursue from the
7 legal aspects of it. So with that concept, I
8 would be most willing to postpone until April 4th,
9 but I certainly hope we don't postpone this beyond
10 a realistic aspect of time.

11 MR. SKUNKCAP: Mr. Chairman, this is
12 Gayle.

13 CHAIRMAN RUSSELL: Go ahead.

14 (Mr. Skunkcap not present)

15 MS. SHROPSHIRE: This is Robin until
16 Gayle comes back. This is a question for
17 Katherine.

18 If on the record there is evidence that
19 some of the information that -- I guess that maybe
20 DEQ misinterpreted, or that SME provided
21 information to DEQ that DEQ assumed was the proper
22 BACT, but after hearing some of the testimony,
23 basically not that DEQ erred, but that SME erred,
24 is that reason to question this permit? Does that
25 question make sense?

1 MS. ORR: I'll take a stab at that, but
2 maybe that's a good legal question to be further
3 fleshed out by the parties. To me, what this
4 comes down to is: What is required under the BACT
5 rule, and what is required under the top down BACT
6 analysis. And one of the elements of the top down
7 BACT analysis is identify all control options.
8 Okay. Was that done? And is it appropriate for
9 the Department to rely on SME to derive that
10 information, or should the Department itself
11 conduct a further analysis and come to its own
12 conclusions?

13 That's part of the question of whether
14 you've properly identified all of the control
15 options, and that's partly a fact question and
16 partly a legal question.

17 Another one is: Did the Department
18 adequately eliminate the technically infeasible
19 options? Does the record show that as to all of
20 the options, did the Department systematically go
21 through each one of those, and say appropriately
22 what was feasible and what was infeasible? That's
23 the kind of analysis that I think the Board
24 members have to go through vis-a-vis the evidence
25 in the record to determine whether the permitting

1 process was legal.

2 MR. SKUNKCAP: Mr. Chairman, this is
3 Gayle. I'm sorry. I lost volume there. The
4 Board members, a couple of them stated earlier
5 that the Department didn't do anything illegal,
6 they did everything they can. But with the
7 technology and the stuff we found out now, I still
8 believe there is something we can do. I didn't
9 agree with the carbon monoxide deal, or the
10 mercury. The mercury is out there, too, and we
11 can't even discuss that. You've got to have a
12 limit on some for public safety.

13 And again, like I said, the technology,
14 you know, we know a lot more. Look at the last
15 smoke stack they had there. They sold those
16 bricks, and people thought it was cool to buy
17 those bricks. And what are some of the fallout
18 from that?

19 And I guess this is just more of a
20 comment. I guess I've heard -- I think I'm done
21 making my comments and statements. But just those
22 other two issues I don't agree with, and I think
23 the Department can come up with something, or else
24 look more for public safety, I guess.

25 CHAIRMAN RUSSELL: Further comments?

1 (No response)

2 CHAIRMAN RUSSELL: Katherine, you bring
3 up the -- I don't even want to go here. But you
4 mentioned the fact that the Department believes
5 that they were -- (inaudible) -- a top down BACT
6 analysis to review by SME. This was once again:
7 Did they go above what the rule or the law
8 requires, and did they have to? This is just like
9 deja vu all over again for me. I don't believe
10 they had to apply top down BACT in the first
11 place. It's not a rule. So were they legally
12 obligated to analyze a top down BACT analysis for
13 completeness?

14 MS. ORR: Mr. Chairman, I think that's
15 one of these big legal issues that should be
16 addressed. My understanding of the MEIC versus
17 Bull Mountain decision is that if the Department
18 decides to apply top down BACT analysis, then it
19 has to do so correctly, and it decided to do a top
20 down BACT analysis here, and so presumably it
21 would have to do that correctly. But you might
22 want to invite the parties to brief that.

23 CHAIRMAN RUSSELL: I think that
24 basically that is one of the biggest points that I
25 see that hasn't been resolved.

1 The other thing is the whole -- and this
2 is where we open the door if we don't really
3 narrowly look at this. This is part of the top
4 down BACT analysis. But are there specific
5 baghouse technologies that were not looked at in
6 the BACT analysis?

7 MS. ORR: That falls squarely under Step
8 No. 1 in the top down BACT analysis: "Were all
9 available control options identified?" To me,
10 that's a legal issue in this case.

11 CHAIRMAN RUSSELL: There are two that I
12 just brought up, one big one, and a little subset.
13 Board, do we want to give Katherine a little bit
14 more help before we cut this thing loose?

15 MS. SHROPSHIRE: I can throw out a few
16 questions I have. One important question for me
17 is whether or not the guidance for PM10 was
18 applied appropriately to specific equipment. Can
19 we demonstrate that that guidance was intended for
20 everything?

21 CHAIRMAN RUSSELL: Robin, a point of
22 clarification. The MEIC's Complaint was that they
23 should have done a 2.5 analysis. Do we even care
24 if they did a proper PM10 analysis?

25 MR. MARBLE: This is Don. I think we

1 do. We care about both issues.

2 CHAIRMAN RUSSELL: Is it within the
3 scope of the Complaint?

4 MS. SHROPSHIRE: I think a lot of the
5 arguments that we heard were that, "Well, we just
6 followed guidance. The reason we did what we did
7 was because we followed EPA guidance." So I
8 appreciate your questions. So I guess I'm not
9 entirely sure. But if the guidance was
10 misapplied, I think that that's -- I don't know if
11 that's relevant or not.

12 CHAIRMAN RUSSELL: Katherine, you know
13 the Complaint. The Complaint was that we should
14 have applied a PM2.5 BACT; is that correct?

15 MS. ORR: That's correct.

16 CHAIRMAN RUSSELL: Do we want to be
17 briefed on the accuracy of a PM10 BACT?

18 MS. ORR: Mr. Chairman, members of the
19 Board, I think you do.

20 CHAIRMAN RUSSELL: Okay.

21 MS. ORR: The parties addressed that
22 fairly exhaustively as a factual matter in their
23 cases.

24 MS. SHROPSHIRE: So a separate question
25 that I have is: For each pollutant, my

1 understanding is that for each individual
2 pollutant, if we look at sulphuric acid, if we
3 look at each one that's listed, and PM10 or PM2.5
4 are identified as individual pollutants separate
5 from the other ones, is my understanding, was an
6 individual BACT analysis done on each of those
7 individually? That's the other question I have.

8 From looking at the record, I can't see
9 the steps for each pollutant clearly spelled out,
10 and so my concern is that a BACT analysis was not
11 -- or I guess my belief is from looking at the
12 record, a BACT analysis was not done for each
13 pollutant.

14 CHAIRMAN RUSSELL: Was not done for
15 what?

16 MS. SHROPSHIRE: For each individual
17 pollutant.

18 CHAIRMAN RUSSELL: Katherine.

19 MS. ORR: Mr. Chairman, members of the
20 Board, I think the Counsel for SME is arguing that
21 in fact it was, and they're arguing that, and the
22 Department as a matter of the record, and that
23 that was adequate.

24 MS. SHROPSHIRE: I can clarify in an
25 email specifically what I'm looking for, rather

1 than going into a bunch of detail right now, but
2 in terms of what I see in the record, and where I
3 think information for me is missing.

4 Mr. Merchant, when he was testifying,
5 said that there is a whole lot of information that
6 exists that necessarily isn't here, and that may
7 help answer some of my questions. But from the
8 information that I have in front of me, I don't
9 feel like that I can tell that a complete BACT was
10 done for each individual pollutant separately.

11 MS. ORR: Mr. Chairman, members of the
12 Board, I would caution you. I think this process
13 ought to apply to legal questions, not fact
14 questions. And I've had experience as a Hearing
15 Examiner where unfortunately a fact question has
16 not been answered for me. And you have to decide
17 as a decision maker what do you do in that case,
18 and that might inform the question of whether the
19 BACT analysis was done appropriately. If you
20 don't see evidence in the record of that, then you
21 can't make a finding, so --

22 MS. SHROPSHIRE: That it was done
23 correctly.

24 MS. ORR: Right. So I caution you. I
25 can't focus the parties on lingering fact

1 questions. I think that I can convey questions of
2 law that the Board might have.

3 But just to ramble on a little bit, I
4 think part of the reason that this is so difficult
5 is basically we just got the record, and it's
6 going to be important for the Board members to go
7 through the transcript. And I know I went through
8 it, and I went through the closing arguments, and
9 I felt almost unprepared for this meeting, even
10 though I've spent quite a lot of time on it,
11 because there is a lot of information to absorb.
12 So I'd just make that comment.

13 CHAIRMAN RUSSELL: I don't know if we
14 want to make any more comments after that one.

15 MR. MARBLE: This is Don, and I'll make
16 one. I'd like to see more legal discussion on
17 whether the use of the EPA rule is appropriate in
18 Montana in view of our Constitution, and the Court
19 decisions, like Seven UP Pete, and any other Court
20 decisions.

21 MS. ORR: So Mr. Chairman, maybe the
22 idea would be to have the Board members, if they
23 have a legal question like that, they can email
24 that to me, and then I would email it to the
25 parties, and they can brief that or not as they

1 choose for the April 4th meeting, and then there
2 could be an exchange of oral argument and
3 questions of the Board for the parties at the
4 April 4th meeting. That's one suggestion.

5 CHAIRMAN RUSSELL: I think it's a great
6 suggestion. Anyone have objections to that
7 suggestion?

8 MR. MARBLE: I need to know her email
9 address and the time period in which we have to
10 get our comments in, I guess.

11 CHAIRMAN RUSSELL: Katherine, would you
12 mind maybe sending your email to the Board
13 members.

14 MS. ORR: I'd be glad to. And as far as
15 the timing, Mr. Chairman and Mr. Marble, I think
16 we have to think about the preparation time for
17 the parties here. And some of these questions are
18 very meaty. So I guess I'd recommend that the
19 Board members get in their questions in ten days
20 from now to me, and then I can transmit those to
21 the parties.

22 CHAIRMAN RUSSELL: Maybe that would be a
23 good thing to do in an email to the Board
24 hopefully maybe today, that lays out your schedule
25 for the Board, if it's possible.

1 I'm wondering what the first week in
2 April is going to look like now. Based on the
3 fact that we may need to hear these arguments
4 orally, or we will hear these arguments orally, do
5 you want to just make a place holder for the third
6 and the fourth on your calendar?

7 MR. MARBLE: Sounds good to me.

8 MR. MIRES: -- (inaudible) -- from
9 Larry.

10 CHAIRMAN RUSSELL: So we've been
11 discussing a motion, and with all of that, do we
12 have any further discussion?

13 (No response)

14 CHAIRMAN RUSSELL: Hearing none, we have
15 motion to postpone the Board's decision to a later
16 date, possibly the 3rd or 4th of April. All those
17 in favor, signify by saying aye.

18 (Response)

19 CHAIRMAN RUSSELL: Opposed.

20 (No response)

21 CHAIRMAN RUSSELL: So that is done. Any
22 further comments, Board, without going back
23 through what we've already discussed?

24 (No response)

25 MS. ORR: Mr. Chairman, do you want to

1 invite reply briefs?

2 CHAIRMAN RUSSELL: Yes. Katherine,
3 certainly you have the latitude to make this
4 better for us.

5 MS. ORR: Okay.

6 CHAIRMAN RUSSELL: Before I forgot,
7 since the Board is in an open meeting, is there
8 anyone that's on the line or in the audience at
9 the Department, that would like to discuss any
10 matters of importance and within the scope of the
11 Board's ability to act on at this time?

12 I'm really starting to narrow this down,
13 aren't I?

14 MR. REICH: Mr. Chair, this is Kenneth
15 Reich, if I might.

16 CHAIRMAN RUSSELL: How are you?

17 MR. REICH: Well, disappointed that
18 you're not ruling today, but I understand you have
19 a number of questions, so we'll certainly try to
20 answer them, I'm sure, on all sides.

21 The question I had is: Am I right that
22 there will not be an evidentiary hearing on the
23 4th? Because if you were going to keep that open,
24 we would all have to have our witnesses available,
25 so I just want to make sure that we're not talking

1 about an evidentiary hearing on the 4th of April.

2 CHAIRMAN RUSSELL: Katherine, how do you
3 feel about that?

4 MS. ORR: Mr. Chairman, I'm sensing from
5 the Board members that there would not be an
6 evidentiary hearing on the 4th, but at the time of
7 the hearing on the 4th, you could decide whether
8 you have some fact questions, and maybe open it up
9 again for a limited fact finding hearing.

10 CHAIRMAN RUSSELL: I think we have some
11 of these that are right on the edge of fact versus
12 law, and I certainly wouldn't make a bold
13 statement right now that there possibly wouldn't
14 be some need for witnesses, evidence, new evidence
15 to be submitted.

16 MR. ROSSBACH: This is Bill. It seems
17 to me that we are all going to start a process of
18 communicating with Katherine, and I think I would
19 like to leave it to Katherine, as she evaluates
20 these questions, to help sort of focus them as
21 legal or factual; and if there is something that
22 is clearly going to require some very limited
23 factual opening of the record to resolve, in her
24 judgment, then she should communicate that to the
25 parties.

1 CHAIRMAN RUSSELL: I agree.

2 MR. ROSSBACH: I have full confidence in
3 Katherine being able to sort out fact and law, and
4 if she feels that there is a -- That's why we're
5 doing this within ten days, so that she can then
6 communicate to the parties, and if there is a need
7 to have additional testimony or evidence, then she
8 can communicate that to them in a timely fashion.

9 CHAIRMAN RUSSELL: Sounds good to me.

10 MR. MARBLE: This is Don. I agree with
11 what Bill is saying, but at the same time, I think
12 at the April 4th meeting, if the Board feels there
13 is another area that needs some limited testimony,
14 then I think we need to reserve that possibility.

15 CHAIRMAN RUSSELL: Any further comment?

16 (No response)

17 CHAIRMAN RUSSELL:

18 MR. MARBLE: I move we adjourn.

19 CHAIRMAN RUSSELL: Is there a second?

20 MR. ROSSBACH: Second.

21 CHAIRMAN RUSSELL: It's been seconded by
22 Bill, moved by Don. Last chance.

23 (No response)

24 CHAIRMAN RUSSELL: All those in favor,
25 signify by saying aye.

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(Response)

CHAIRMAN RUSSELL: Thank you very much.

(The proceedings were concluded

at 11:46 a.m.)

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C E R T I F I C A T E

STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -65- pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this day of , 2008.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2008.