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November 16, 2007

VIA HAND DELIVERY

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: *Deseret Power Electric Cooperative*, PSD Appeal Number 07-03

Dear Clerk of the Board:

Enclosed please find an original and six copies of Deseret Power Electric Cooperative's Motion to Participate and Request for Oral Argument. Please return a file-marked copy of each document to the awaiting courier.

Please do not hesitate to contact me at (202) 282-5000 if you have any questions or concerns.

Sincerely,

Luke W. Goodrich

Via Federal Express with enclosures
David Bookbinder
Brian Doster

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Deseret Power Electric Cooperative	)	**PSD Appeal No. 07-03**

MOTION TO PARTICIPATE AND REQUEST FOR ORAL ARGUMENT

Permittee, Deseret Power Electric Cooperative, asks to participate in the above-captioned proceeding by filing the attached Memorandum and presenting oral argument.

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Deseret Power Electric Cooperative	)	**PSD Appeal No. 07-03**

MEMORANDUM IN SUPPORT OF PERMITTEE'S MOTION TO PARTICIPATE

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INTRODUCTION

The Board should deny Sierra Club's petition for review because Sierra Club has failed to demonstrate clear error in EPA's issuance of a Prevention of Significant Deterioration ("PSD") permit to Permittee Deseret Power Electric Cooperative ("Deseret"). Sierra Club first argues that EPA should have conducted a Best Available Control Technology ("BACT") analysis for carbon dioxide because certain miscellaneous provisions of law requiring the monitoring and reporting of carbon dioxide emissions render carbon dioxide a "pollutant subject to regulation under the [Clean Air Act]." 42 U.S.C. § 7475(a)(4) (CAA § 165(a)(4)). Under the plain language and longstanding interpretation of the Act, however, a pollutant is "subject to regulation" only if a law or regulation requires *actual control of the pollutant's emissions*. Because the monitoring and reporting requirements on which Sierra Club relies impose no control on carbon dioxide emissions, they do not "subject" carbon dioxide to "regulation" and therefore do not trigger a BACT analysis. Moreover, even assuming that the monitoring and reporting provisions *did* subject carbon dioxide to some form of regulation in the broadest possible sense, the requirement to establish a monitoring program was not part of the Clean Air Act. Such provisions therefore do not constitute "regulation *under the [Clean Air Act]*," and a BACT emissions limit on carbon dioxide is not required.

Sierra Club next argues that EPA's consideration of alternatives was deficient because it was "inconsistent" with comments EPA made on a draft environmental impact statement for a different project in a different region. This argument, however, was not preserved for review because Sierra Club failed, during the public comment period, to raise any concerns about the purported alternatives now identified for the first time in its brief to the Board. Moreover, even if the issue were not waived, Sierra Club has failed to demonstrate any "clear error" in EPA's decision, which reasonably considered and addressed each alternative Sierra Club did raise. PSD

permitting decisions depend heavily on site-specific, case-by-case analysis, and Sierra Club offers no basis for concluding that EPA's comments—offered under a different statutory scheme and considering a different project—were inconsistent with its permitting decision here. Review should therefore be denied.

FACTUAL BACKGROUND

The challenged permit authorizes Deseret to build a waste-coal-fired generating unit at its existing power plant near Bonanza, Utah. Because the plant will be located on an Indian reservation, EPA Region VIII is the permitting authority. The new 110-megawatt unit will fire waste coal obtained from Deseret's nearby mine (a significant energy resource that would otherwise be wasted), and will supply much-needed electricity to several Utah municipalities.

Region VIII issued the draft permit on June 22, 2006, and received public comments until July 29, 2006. Seven Utah municipalities submitted comments supporting the project, highlighting the significant need for increased generating capacity. Sierra Club and a coalition of other environmental organizations submitted the only comments opposing the project. After considering the public comments over the course of a year, Region VIII issued the final permit on August 30, 2007, imposing a number of stringent emissions limitations on the new unit. Sierra Club now challenges the permit on the ground that EPA failed to impose a BACT emissions limit on carbon dioxide and failed to consider certain alternatives to the new project.

STANDARD OF REVIEW

The Board "exercises its authority to review [PSD] permits sparingly," *In re Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 304 (EAB 2002), recognizing that "EPA policy favors final adjudication of most permits at the regional level." *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. __, slip op. at 10 (EAB 2006) (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The Board will grant review of a permitting decision

only if it involves a "finding of fact or conclusion of law which is clearly erroneous," or an "exercise of discretion or an important policy consideration which the [Board] should, in its discretion, review." 40 C.F.R. § 124.19(a)(1)-(2). The petitioner bears the burden of demonstrating that review is warranted. *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. __, slip op. at 10 (EAB 2006).

Moreover, the petitioner may raise an issue on appeal only if it was either "raised during the comment period" or "not reasonably ascertainable" before the close of the public comment period. *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 705 (EAB 2002); 40 C.F.R. §§ 124.13 & 124.19(a). Otherwise, the issue is waived. For those issues that have been properly preserved, "the petitioner must then explain with sufficient specificity why a permit issuer's previous responses to those objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review." *In re Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. __, slip op. at 10 (EAB 2006).

ARGUMENT

I. EPA Correctly Declined to Impose a BACT Emissions Limit on Carbon Dioxide Because Carbon Dioxide Is Not a "Pollutant Subject to Regulation Under the Clean Air Act."

EPA correctly rejected Sierra Club's request to impose a BACT emissions limit on carbon dioxide. A BACT limit is appropriate only if carbon dioxide is a "pollutant subject to regulation under [the Clean Air Act]." 42 U.S.C. § 7475(a)(4) (CAA § 165(a)(4)). Although all parties agree that, in the wake of *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), carbon dioxide is a "pollutant," carbon dioxide is not "subject to regulation" under the Act because no provision of the Act requires control of carbon dioxide emissions. Moreover, even if the monitoring and reporting requirements cited by the Sierra Club were sufficient to "subject" carbon dioxide to "regulation" in the broadest possible sense, those requirements were not adopted as part of the

Clean Air Act and are not, therefore, regulations "*under the Clean Air Act.*" Sierra Club's petition for review should, therefore, be denied.

A. Carbon Dioxide Is Not "Subject to Regulation" Because No Law or Regulation Controls Carbon Dioxide Emissions.

EPA Region VIII correctly interpreted the term "subject to regulation" as requiring actual control of emissions. The plain language of the Clean Air Act, longstanding EPA practice, decisions of the Board and D.C. Circuit, and important policy considerations all support this interpretation of the Act.

1. The plain meaning of the phrase "subject to regulation" requires actual control of emissions.

Sierra Club argues that carbon dioxide is "subject to regulation" by virtue of section 821 of Public Law 101-549 ("section 821"),[1] which required EPA to "promulgate regulations . . . to require that all affected sources subject to Title V of the Clean Air Act shall also monitor carbon dioxide emissions . . . [and to] require that such data be reported to the Administrator." 42 U.S.C. § 7651k note. According to Sierra Club, because "Congress ordered EPA 'to promulgate regulations'" for the monitoring and reporting of carbon dioxide emissions, carbon dioxide is "subject to regulation" under the Clean Air Act. Sierra Club Petition ("Pet.") at 5.

Mere monitoring and reporting provisions, however, do not "subject" carbon dioxide to "regulation" because the plain meaning of those terms requires actual *control* of carbon dioxide emissions. *Black's Law Dictionary* defines "regulation" as "[t]he act or process of *controlling* by rule or restriction." *Id.* at 1311 (8th ed. 1999) (emphasis added); *see also Webster's II New College Dictionary* 934 (1995) (defining "regulation" as "[a] principle, rule, or law designed for *controlling* or governing behavior") (emphasis added). Even the dictionary apparently relied

[1] "Section 821" refers to section 821 of Public Law 101-549, enacted in 1990. As explained in detail below, Congress did not direct nor intend that this section be incorporated into the Clean Air Act.

upon (but not cited) by Sierra Club (at 6) lists as its *first* definition of "regulation" "the act of regulating," and defines the verb "regulate" as "to *govern* or *direct* according to rule" or "to bring under the *control* of law or constituted authority." *Merriam-Webster's Collegiate Dictionary* 1049 (11th ed. 2005) (emphasis added). Petitioner's reliance on the secondary definition of "regulation" does not change the result. The plain meaning of the term "regulation" requires control over what is regulated, and because monitoring and reporting procedures do not control carbon dioxide emissions, they do not subject carbon dioxide to "regulation" for purposes of BACT.

The context and operation of section 165 confirm this understanding. Section 165(a)(4) does not purport to define which pollutants must be subject to regulatory control, let alone bring *new* pollutants under control. It merely establishes one means of reducing emissions (i.e., "best available control technology") for pollutants already "subject to regulation" under the Act. Viewed in this context, the plain and ordinary meaning of the term "regulation" contemplates, as a pre-requisite, a clear legislative expression of intent elsewhere in the Act to *control* emissions of the pollutant in question. Otherwise, section 165(a)(4) would lead to an absurd result: it would require the use of "*best available control technology*" for carbon dioxide emissions even though there exists no mandate, either by law or by regulation, to control those emissions through any technology or other means at all. Indeed, Sierra Club's interpretation of section 165(a)(4) would make the narrow PSD permitting context the *only* context in which control of carbon dioxide emissions was required. All other sources in all other contexts would be free to emit as much carbon dioxide as they please. Nothing in section 165 suggests that Congress intended this strange result.

Moreover, even if Sierra Club were correct, and the plain meaning of the term "regulation" simply means any "rule or order" (Pet. 6) without any form of "control," Sierra Club completely ignores the additional statutory requirement that a pollutant be "subject to" regulation. The plain meaning of the word "subject" also requires control. Webster's defines "subject" as "[b]eing under the authority, *control*, or power of another <*subject* to the law>." *Webster's II New College Dictionary* 1097 (1995) (emphasis added); *see also, e.g.*, *Random House Webster's Unabridged Dictionary* 1893 (2d ed. 2001) (defining "subject" as "being under domination, control, or influence (often fol. by *to*)"). A pollutant is not "subject to" a regulation, then, unless the regulation "controls" the pollutant. In the case of monitoring and reporting conditions, the only thing under control is the facility that is required to monitor and report. Thus, even accepting Sierra Club's definition of "regulation," it is the emitting *facility*, not carbon dioxide, that is "subject to" regulation.[2]

This analysis comports with everyday usage. For example, if EPA required power plants to monitor and report the number of hours they operated each year, but did nothing to limit those hours, one would not say that a power plant's *hours of operation* were "subject to regulation." One might say that the *power plants* themselves were subject to regulation, but one would only say that the *hours of operation* were "subject to regulation" if EPA actually limited those hours. In the same way, facilities that must monitor and report their carbon dioxide emissions may

[2] In line with this analysis, the Act takes care to distinguish whether it is referring to a "*pollutant* subject to regulation" or a particular "*source*" or "*activity* subject to regulation." *See, e.g.*, 42 U.S.C. § 7412(a)(2) ("*vehicles* subject to regulation"); *id.* at § 7412(b)(2) ("*releases* subject to regulation"; "*substance, practice, process or activity* . . . subject to regulation"); *id.* at § 7412(c)(3) ("*sources* . . . subject to regulation"); *id.* at § 7412(f)(1)(A) ("*sources* subject to regulation"); *id.* at § 7412(j)(5) ("*hazardous air pollutants* subject to regulation"); *id.* at § 7412(r)(3) ("*substance, practice, process, or activity* . . . subject to regulations"); *id.* at § 7412(r)(7)(F) ("*source* . . . subject to regulations"); *id.* at § 7475(e)(1) ("*pollutant* subject to regulation"); *id.* at § 7479(3) ("*pollutant* subject to regulation"); *id.* at § 7511b(f)(4) ("*tank vessels* subject to regulation"); *id.* at § 7543(e)(1) ("*nonroad engines or nonroad vehicles* subject to regulation"). Sierra Club's approach would have the Board ignore whether monitoring and reporting requirements actually subject "carbon dioxide" to regulation, or instead subject the emitting "source" to regulation. As explained above, the plain meaning of the statutory terms indicates that if anything is subject to regulation, it is the source, not carbon dioxide.

themselves be "subject to regulation," but their emissions of *carbon dioxide*—which can be unlimited—are not.

For the same reason, Sierra Club is wrong when it argues that EPA's interpretation gives a different meaning to the term "regulation" in different parts of the statute. Pet. 7. Section 821 calls for rules controlling the monitoring and reporting actions of emitting *facilities*, whereas section 165 applies only when there is a rule controlling the emissions of a specified *pollutant* (i.e., when a "pollutant" is "subject to" regulation). This is not a difference in the use or meaning of the term "regulation"; it is a distinction in what is being affected by each rule or regulation.[3]

Sierra Club emphasizes that "the Act contains numerous other examples of Congress requiring regulations for many reasons aside from 'actual control of emissions.'" Pet. 7. But this simply underscores our point: not every regulatory pronouncement "subjects" a "pollutant" to "regulation" as envisioned in section 165. *See* n. 1, *supra*. Sierra Club's argument would eliminate any distinction between regulations that actually control emissions and administrative regulatory requirements that impose a wide variety of programs, procedures, or practices having nothing to do with limiting or controlling emissions. Congress maintained this distinction throughout the Act, and it is written into the plain language of section 165. *Id.*

Next, Sierra Club argues that if Congress wanted to require actual control of emissions in section 165, it could have used the defined term "emissions limitation" or "emissions standard" instead of the term "regulation." Pet. 8. According to Sierra Club, this would have made clear that Congress intended to require actual control of emissions.

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[3] While EPA is correct that it has discretion to interpret the same terms differently where the context so permits, EPA Br. at 14-15 (citing *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1432 (2007)), that argument is not necessary here. The plain language of section 165 ("pollutant subject to") requires control of emissions regardless of whether one adopts the plain meaning of "regulation" throughout the statute, or adopts Sierra Club's own interpretation of that term.

This argument, however, ignores the fact that a provision for controlling emissions can be something other than an "emissions limitation" or "emissions standard." For example, under the Act, EPA can control emissions through "standard[s] of performance," CAA § 165(a)(3), "design standards," *id.* § 112(h), "equipment standards," *id.*, "work practice standards," *id.*, or "operational standards." *Id.*[4] Of course, Congress *could* have included a long list of every type of measure for controlling emissions and every corresponding section of the Act (although it still might have needed to list provisions in state implementation plans that control emissions but are not specifically spelled out in the Act). Using the term "subject to regulation," however, is a much simpler means of depicting the various methods for *controlling* emissions of a given pollutant under the Act. And lest there be any doubt that the regulation must control emissions, Congress expressly stated that the pollutant must be "subject to" the regulation—not merely "addressed" or "mentioned" in a regulation. This is a perfectly reasonable approach, and Sierra Club fails to explain why EPA's well established and long-recognized interpretation is inconsistent with Congress' use of the word "regulation."

2. EPA's longstanding interpretation of the Act is entitled to deference and is not "clearly erroneous."

Not only does the plain language of the Act indicate that "subject to regulation" requires actual control of emissions, but this has also been EPA's consistent interpretation of the Act for almost thirty years. EPA Br. at 12. In the preamble to the very first PSD regulations promulgated in 1978, EPA explained that the term "subject to regulation . . . includes all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance

[4] There are also provisions of the Act allowing EPA, in limited circumstances, to adopt "other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances)." CAA § 302(y). It is beyond the scope of this action to determine whether, for purposes of section 165(a)(4), a scheme such as economic incentives or auctioned carbon dioxide allowances, if adopted, would necessarily trigger BACT for carbon dioxide. Nevertheless, these provisions further demonstrate that the defined terms "emissions limitation" or "emissions standard" are far narrower than the interpretation of "regulation" that has been adopted and followed by EPA.

for new Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources." 43 Fed. Reg. at 26,397 (June 19, 1978). All of these provisions involve actual control of emissions.

Furthermore, in PSD rules proposed in 1996, and in final rules promulgated in 2002, EPA listed every pollutant that it considered "currently regulated under the Act." 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002). Every pollutant on the list was subject to a statutory or regulatory provision requiring actual control of emissions, and carbon dioxide was not on the list—again confirming that "subject to regulation" requires actual control of emissions. *Id.*; EPA Br. at 8-9. Had carbon dioxide been included as a proposed "pollutant currently regulated under the Act," Deseret and others similarly situated would have had opportunity for comment during the rulemaking. Deseret and others, however, never had such an opportunity, because the proposed rule said just the opposite—carbon dioxide was *not* included as a regulated pollutant.

In 1993, shortly after EPA promulgated regulations implementing section 821 of Public Law 101-549, the Office of Air and Radiation issued an interpretation specifically considering whether the carbon dioxide monitoring program instituted under section 821 rendered carbon dioxide "subject to regulation" under the Act. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993). The Wegman memo concluded that carbon dioxide was not a "pollutant subject to regulation" *both* because it was not a "pollutant," *and* because section 821 "involve[d] actions such as reporting and study, *not actual control of emissions*." *Id.* at 5 (emphasis added). Although the Court in *Massachusetts* refused to accept EPA's analysis on the first point, 127 S.Ct. at 1460, it left the second point—and the ultimate conclusion—undisturbed.

More importantly, even when EPA changed course in 1998 and decided that carbon dioxide was, in fact, a "pollutant," it still maintained that carbon dioxide was not "subject to regulation" under the Act. As EPA's General Counsel explained:

> EPA's regulatory authority under the Clean Air Act extends to air pollutants . . . includ[ing] SO_2, NO_x, ***CO_2***, and mercury emitted into the ambient air. EPA has in fact already regulated each of these substances under the Act, *with the exception of CO_2*. While CO_2 emissions are within the scope of EPA's authority to regulate [as an air pollutant], the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act.

Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998) (emphasis added). In short, even as EPA's interpretation of "pollutant" changed—sometimes including carbon dioxide, sometimes not—its interpretation of "subject to regulation" has remained consistent for almost thirty years, never requiring anything less than actual control of emissions. Again, the *Massachusetts* decision only confirmed the status of carbon dioxide as a *pollutant,* and left it to EPA whether, when, and how to exercise discretion to regulate emissions from mobile sources. It did not by itself cause carbon dioxide to become *regulated* under the Clean Air Act.

This longstanding, consistent interpretation by the Agency is entitled to significant weight. Although the Board does not give *Chevron* deference to the statutory interpretation of "any individual component of the EPA" because "the Board serves as the final decisionmaker for EPA," *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 n. 55 (EAB 1997), the Board *does* give "deference to a position when it is supported by Agency rulings, statements, and opinions *that have been consistent over time*." *In re Howmet Corp.*, 13 E.A.D. __, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007) (emphasis added); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 719 (EAB 2001) (noting that "the Board has previously deferred to [EPA's] long-established PSD

polic[ies]"); *In re AES Puerto Rico L.P.*, PSD Appeal Nos. 98-29 through 98-31, slip op. at 21 (EAB, May 27, 1999), 8 E.A.D. 324 (deferring to EPA's "established policy" relating to PSD permits). The rationale for this deference is the same as that underlying *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)—namely, that an interpretation's "consistency with earlier and later pronouncements" gives it the "power to persuade," even if it lacks the formal "power to control."' *See also Howmet*, 13 E.A.D. __, slip op. at 35 (quoting *Skidmore*). Moreover, the Board has explained that deference is especially appropriate where "the prior EPA interpretations cited by the parties directly address[] [Petitioner's] creative argument" about the disputed statutory term. *Id.* at 35.

Here, not only has EPA's interpretation of "subject to regulation" been "consistent over time," *id.*, it has remained unchanged even when the Agency took new positions on closely related terms—such as whether carbon dioxide falls within the definition of "pollutant." Moreover, the 1993 Wegman memo "directly addresses" the specific argument that Petitioner raises here. *Id.* Deference to EPA's longstanding interpretation is therefore appropriate.

Finally, even if EPA's interpretation was not required by the plain language of the statute and supported by longstanding practice, Sierra Club has failed to show that EPA's interpretation is "clearly erroneous." *See* 40 C.F.R. § 124.19(a)(1) (stating that EAB review is appropriate only if the Region's decision was based on a "finding of fact or *conclusion of law which is clearly erroneous*"). At most, Sierra Club has offered an alternative interpretation of the Act that might be permissible. This, however, is insufficient to demonstrate that EPA's legal conclusion is "clearly erroneous." Review should therefore be denied. *In re National Pollutant Discharge Elimination System Permit For: Collier Carbon and Chemical Corporation*, 1 E.A.D. 267 (EAB 1976) (denying review because EPA's statutory interpretation was not "clearly erroneous").

3. Decisions of the EAB and D.C. Circuit support EPA's interpretation.

EPA's interpretation is also consistent with decisions of the EAB and D.C. Circuit. In *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 151 (EAB 1994), shortly after EPA promulgated regulations implementing section 821, the petitioner argued that the permitting authority should have imposed a BACT emissions limit on carbon dioxide and hydrogen chloride. The EAB, however, rejected this argument, explaining that "[b]oth carbon dioxide and hydrogen chloride are . . . *unregulated* pollutants. In such circumstances, the Region was not required to examine control technologies aimed at controlling these pollutants." *Id.* (emphasis added). Importantly, the Board did not rest its decision on the conclusion that carbon dioxide was not a pollutant, but on the fact that it was "unregulated."

Even more tellingly, in *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997), the EAB again rejected a petitioner's argument that a PSD permit should have included controls for carbon dioxide. As the Board explained, the permitting authority did not err in concluding that "[c]arbon dioxide is not considered a regulated air pollutant for permitting purposes" because "at this time *there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases*." *Id.* (emphasis added). Again, the decision rested not on the fact that carbon dioxide was not a pollutant, but on the fact that there were no "regulations . . . controlling the emissions of greenhouse gases." *Id.* The Board thus affirmed the same interpretation that EPA advances here.

Finally, as EPA's brief explains, the holding in *Alabama Power v. Costle*, 636 F.2d 323, 405-06 (D.C. Cir. 1979), is entirely consistent with EPA's longstanding interpretation of which pollutants are "subject to regulation." EPA Br. at 15-16. There, industry groups argued that newly enacted PSD provisions covered only the two pollutants for which Congress had previously established PSD increments (sulfur dioxide and particulate matter), even though other

pollutants, such as those for which National Ambient Air Quality Standards were promulgated, were also expressly controlled under the language of the Act. *Id.*

In rejecting this argument, the court explained that "[t]he statutory language leaves no room for limiting the phrase 'each pollutant subject to regulation' *to sulfur dioxide and particulates*" because "the Act does not limit the applicability of PSD only *to one or several* of the pollutants *regulated* under the Act." *Id.* at 406, 404 (emphasis added). Importantly, the industry groups in *Alabama Power* did not dispute that emissions of the pollutants at issue would be controlled *at some point* under the Act. They argued only that EPA had not yet completed the studies necessary to develop appropriate standards.[5] Thus, while the opinion supports the position that *all* pollutants subject to rules requiring actual control of emissions under the Act are "subject to regulation," it says nothing about whether non-regulated pollutants—i.e., pollutants not subject to rules requiring actual control of emissions under the Act—are also "subject to regulation." *Alabama Power*, then, offers no support to Sierra Club's argument.

4. Policy considerations support EPA's interpretation

A wide variety of policy considerations also support EPA's interpretation. First, as EPA has already pointed out, a ruling in Sierra Club's favor would preempt the Administrator's opportunity to benefit from notice and comment rulemaking before promulgating regulations, and would render the very act of gathering information on a pollutant a trigger for comprehensive BACT controls. EPA Br. at 19. Moreover, imposing BACT requirements before

[5] *Alabama Power* highlights the true intent expressed by Congress in enacting section 165(a)(4). Even though NAAQS had not yet been promulgated for all of the regulated pollutants, Congress created the "best available control technology" standard to be applied as an additional, independent control on emissions of regulated pollutants from new sources under the Act. If, through implementation of BACT, emissions at any given source could be controlled at a level *lower* than that required to attain the NAAQS for a regulated pollutant, then section 165(a)(4) required that level of control, regardless of what NAAQS had been adopted. Likewise, as technology improves and becomes commercially and economically viable, BACT becomes more stringent independently of the NAAQS. That is why, as the court decided in *Alabama Power*, there was no need to wait for promulgation of the NAAQS to begin requiring BACT for pollutants as to which Congress had expressed its intent to control their emissions.

EPA has an opportunity to promulgate a de minimis emissions level would mean that any source emitting more than 250 tons per year would be a "major" source subject to PSD permit requirements. *See* 40 C.F.R. § 52.21(b)(1)(i)(b). This low threshold could trigger the PSD permitting process for all sorts of fixed installations with a boiler or furnace—such as hospitals, small factories, small industrial plants, large office buildings, schools, or shopping malls, to name a few.[6] Natural gas-fired and other combustion-based installations would be equally susceptible to BACT for their units, including retrofitting with BACT for any major modifications to existing units. EPA should have an opportunity to consider these potentially sweeping changes through notice and comment rulemaking, fully involving the public, before they are imposed haphazardly and individually through litigation. Deseret and the regulated community should be given notice and opportunity to be heard before such a change is implemented.

Sierra Club's interpretation, if accepted, could also have the strange consequence of rendering oxygen and water vapor subject to PSD permitting requirements and BACT analysis. Under the Supreme Court's broad interpretation of "pollutant" in *Massachusetts*, "all airborne compounds of whatever stripe" are pollutants, as long as they are "physical and chemical substances which are emitted into the ambient air." 127 S.Ct. at 1460 (alterations omitted). Oxygen and water vapor, of course, fit this definition. *Id.* at 1476 n.2. Indeed, water vapor is a more significant greenhouse gas than carbon dioxide. USEPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2005* at 1-3 (Apr. 15, 2007) ("Overall, the most abundant and

[6] As an illustration, according to EPA's web-based "personal emissions calculator," a "significance" level of 250 tons per year, would be triggered by any source which burned at least 4,147 decatherms of natural gas annually, or about $4,780 per month (at typical U.S. utility rates for residential customers). For larger consumers, at current market prices of $7 per decatherm for wholesale supply, that equates to only $29,029 per year worth of natural gas (about $2,419 per month.) Many if not most heated spaces in larger commercial, educational, governmental, military, and industrial settings would satisfy that threshold. *EPA Website Calculator available at*: http://www.epa.gov/climatechange/emissions/ind_calculator.html.

dominant greenhouse gas in the atmosphere is water vapor.") (available at http://www.epa.gov/climatechange/emissions/downloads06/07CR.pdf); Wikipedia, *Greenhouse gas*, at http://en.wikipedia.org/wiki/Greenhouse_gas (last visited Nov. 10, 2007) (stating that water vapor "accounts for the largest percentage of the greenhouse effect, between 36% and 66%").

Oxygen and water vapor could also be "subject to regulation" under Sierra Club's interpretation because the same Part 75 regulations that require monitoring and reporting of carbon dioxide also require monitoring and reporting of oxygen and water vapor emissions. Oxygen is used as a diluent released along with other gases and must be monitored, among other things, to help track carbon dioxide emissions. *See, e.g.*, 40 C.F.R. § 75.10(a)(3)(iii) ("The owner or operator shall install, certify, operate, and maintain . . . a flow monitoring system and a CO_2 continuous emission monitoring system that uses an *O_2 concentration monitor* to determine CO_2 emissions (according to the procedures in appendix F of this part) with *an automated data acquisition and handling system for measuring and recording O_2 concentration* (in percent), CO_2 concentration (in percent), volumetric gas flow (in scfh), and CO_2 mass emissions (in tons/hr) discharged to the atmosphere.") (emphasis added).

Water vapor, similarly, is released together with NO_X and must be monitored and recorded as a means of tracking NO_X emissions. *See, e.g.*, 40 C.F.R. § 75.19(c)(1)(iv)(H)(1) ("Owners or operators must include in the [NO_X] monitoring plan the acceptable range of the water-to-fuel or steam-to-fuel ratio, which will be used to indicate hourly, proper operation of the NO_X controls for each unit. The water-to-fuel or *steam-to-fuel ratio shall be monitored and recorded during each hour of unit operation.*") (emphasis added). Under Sierra Club's interpretation, these monitoring and reporting requirements would render oxygen and water

vapor "subject to regulation" under the Act, thus triggering PSD permitting and BACT requirements for both constituents. Sierra Club's strained interpretation of the Act would have no apparent limits, and would have to be litigated, probably in many venues, to avoid unwarranted and unintended results.

Finally, Sierra Club effectively asks the Board to overturn 30 years of regulatory practice and adopt a sweeping expansion of the PSD regulations without any notice to the public or opportunity to comment. It is not only EPA but the regulated community that benefits from notice and comment rulemaking, which is designed to ensure "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

Although EPA may have discretion to interpret the Clean Air Act through adjudication rather than notice and comment rulemaking, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), that discretion is not unlimited. A decision to proceed by adjudication is still subject to review and reversal under the Administrative Procedure Act if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 268 F.3d 1075, 1087-88 (D.C. Cir. 2001). It is also subject to the constitutional constraints of due process. *Id.* Overturning 30 years of EPA practice and adopting broad new PSD rules without any opportunity for notice or public comment might well run afoul of those provisions. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (agency may not avoid "[t]he rule-making provisions of th[e] Act . . . by the process of making rules in the course of adjudicatory proceedings."). And even if it does not, notice and comment rulemaking makes far more sense as a policy matter. It ensures not only that the regulated public will receive a fair opportunity to participate, but also "that the agency will have before it the facts and information

relevant to a particular administrative problem, as well as suggestions for alternative solutions." *American Hosp. Ass'n*, 834 F.2d at 1044. The Board should reject Sierra Club's attempt to make sweeping new regulatory changes through ad hoc litigation.

B. Carbon Dioxide Is Not Regulated "Under the Clean Air Act" Because Section 821 Is Not Part of the Act.

As noted above, a BACT analysis is appropriate only if carbon dioxide is a "pollutant subject to regulation *under this Act*." CAA Section 165(a)(4) (emphasis added); 42 U.S.C. § 7475(a)(4) ("pollutant subject to regulation *under this chapter*") (emphasis added). The phrase "under this Act" (or "under this chapter") unambiguously refers to the Clean Air Act, not to other legislative enactments that may deal with air pollution but are not part of the Clean Air Act. Section 821, however, has never been incorporated in the Clean Air Act.[7] Sierra Club ignores this fact, effectively replacing the phrase "subject to regulation under this Act" with "subject to regulation *by the Administrator*."

What Sierra Club erroneously calls "Section 821 of the Clean Air Act," Pet. 5., is actually section 821 of Public Law 101-549, also referred to as the 1990 Clean Air Act Amendments. The 1990 Clean Air Act Amendments contained many provisions amending the Clean Air Act, but not every provision within the 1990 legislation did so. Throughout the legislation, Congress was very clear on which of the law's provisions were intended to add to or amend the Clean Air Act. When it intended to do so, Congress stated precisely which sections of the Clean Air Act were being modified (or added) and how. *See, e.g.*, § 801, Pub. L. 101-549 ("Title III of the

[7] The Clean Air Act, as enacted by Congress, does not contain a section numbered "821." As eventually arranged and codified by the Office of Law Revision Counsel of the U.S. House of Representatives, the language of section 821 was never incorporated into the codification of any portion of the Clean Air Act itself. For ease of reference, the codifiers placed it *with* the Clean Air Act provisions, likely because of its relation to the subject matter involved, but included it only as an explanatory note following 42 U.S.C. § 7651k. By law, of course, while the U.S. Code may be used as "*prima facie* evidence" of the law in effect, the U.S. Statutes at Large, consisting of the publication, in chronological order, of the Public Laws passed by Congress and signed by the President, remains the ultimate authority. 1 U.S.C. § 112.

Clean Air Act is amended by adding the following new section after section 327: . . ."); § 802(a) ("Subparagraphs (A) and (B) of section 105(a)(1) of the Clean Air Act are amended to read as follows: . . .").

Section 821, by contrast, contains no expression of amendatory intent. It is included as a freestanding provision in Title VIII of the Public Law ("Miscellaneous Provisions"), which the House Committee on Energy and Commerce described as "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) That Did Not Amend the Clean Air Act." EPA Br. at 20-21. Because section 821 is not part of the Clean Air Act, EPA regulations implementing section 821 are not "regulation[s] under this Act." CAA § 165(a)(4). A BACT emissions limit for carbon dioxide, therefore, is not required. Indeed, until EPA legally promulgates regulations of general applicability that control carbon dioxide emissions, and does so pursuant to an express provision of the Clean Air Act, EPA lacks authority to impose any BACT emissions limits on carbon dioxide.

II. EPA Reasonably Considered Alternatives to the Proposed Project.

Sierra Club also contends that the permit should be remanded because EPA has taken "contrary positions" in another coal-fired power plant proceeding. Pet. 9. Specifically, Sierra Club asserts that before issuing the PSD permit, EPA Region VIII should have considered (1) the need for the project and (2) additional alternatives to the project (such as increased energy efficiency or carbon capture and sequestration) because Region IX recommended similar considerations for a draft environmental impact statement under the National Environmental Policy Act ("NEPA") in a Nevada project ("White Pine"). According to Sierra Club, it was "arbitrary and capricious" to recommend the consideration of these alternatives under NEPA for one project, but not consider the same alternatives in the PSD process for another. Pet. 10-11.

This argument fails for several reasons. First, this issue is not preserved for review because Sierra Club could have raised each of the alternatives now discussed in its Petition during the public comment period, but did not do so. Second, Sierra Club's argument ignores the fundamental principle that PSD permits are analyzed on a case-by-case basis, and considerations relevant to one permit are not necessarily relevant to another. Third, different results under NEPA and the PSD permitting process are entirely appropriate because the two statutes involve different legal standards for the evaluation of alternatives. Finally, Sierra Club fails to cite any evidence or authority demonstrating that EPA's actions are clearly erroneous or involve an important policy consideration requiring reversal by the Board. *See* 40 C.F.R. § 124.19(a). Consequently, review must be denied.

A. Sierra Club's Argument Is Waived.

The Board will review an issue on appeal only if the issue was either "raised during the comment period" or "not reasonably ascertainable" before the close of the public comment period. *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 708 (EAB 2002); 40 C.F.R. §§ 124.13 & 124.19(a). At all times, the petitioner "bears the burden of demonstrating that review is warranted," and must submit "credible documentation showing that" issues were properly preserved. *Avon*, 10 E.A.D. at 707.

There is no question that Petitioner failed to challenge the need for, or raise specific alternatives to, the Bonanza project during the public comment period. Although Petitioner submitted lengthy and wide-ranging comments on many aspects of the Bonanza project, it never mentioned the alternatives it now raises on appeal.[8] *See* Pet. Comments (attached as Exhibit 2 to Pet. for Review). EPA responded to every issue raised during the

[8] The only alternative Sierra Club did raise below was consideration of a coal gasification facility. EPA considered and responded to this alternative in its comments, and Sierra Club does not challenge EPA's analysis in this appeal. *See* EPA Response to Comments at pp. 19-20 (Aug. 30, 2007).

public comment period and properly contained in the administrative record, and the Board should reject Sierra Club's attempt to circumvent the public comment process. *See* EPA Response to Comments (Aug. 30, 2007); *see also Prairie State Generating Co., LLC,* 13 E.A.D. at 63 (recognizing PSD permitting process includes a time-gap for evaluation of evidence during which permit issuer is not required to consider new information received after close of public comment period.); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000) (no obligation for permitting authorities to consider comments received after close of public comment period); *In re St. Lawrence County Solid Waste Disposal Auth.*, PSD Appeal No. 90-9, at 3 n.3 (Adm'r July 27, 1990) (noting that close of public comment period is appropriate benchmark for closing administrative record to receipt of new information).

Furthermore, attempts by Sierra Club to claim that the issues of need and alternatives raised in the White Pine NEPA process were not "reasonably ascertainable" during the comment period for the Bonanza permit are easily dismissed. As EPA points out (EPA Br. at 24), Sierra Club raised similar issues in its comments to the Bureau of Land Management ("BLM") on another project *prior to the close of the public comment period* in this project. *See* Comments by Sierra Club and others on BLM's Atlantic Rim CBM Project Draft EIS, at pp. 5 & 10 (Feb. 21, 2006) (attached as Exhibit __). There is no reason why Sierra Club could not have raised the same issues here. Because the issue was both reasonably ascertainable and not raised below, review should be denied. *See In re BP Cherry Point*, 12 E.A.D. 209, 219-20 (EAB 2005) (observing that allowing petitioner to raise untimely issues "would undermine the efficiency, predictability, and finality of the permitting process," and potentially result in "an unnecessarily protracted permitting process, where each time a final permit is issued and a new issue is raised on review, the permit must be sent back to the permit issuer for further consideration"); *see also*

In re Sumas Energy 2 Generation Facility, PSD Appeal No. 02-10 & 02-11, slip op. at 10 (EAB, March 25, 2003) ("[A]llowing a petitioner to raise for the first time on appeal concerns that could have been brought to the attention of the permitting authority, would leave the PSD permit system open-ended, frustrating the objective of repose and introducing intolerable delay.").

B. PSD Permits Must Be Analyzed on a Case-by-Case Basis.

Even if Sierra Club's arguments were not waived, Sierra Club cannot demonstrate, as it must, either clear error on EPA's part or the existence of an important policy consideration requiring Board review. *See* 40 C.F.R. § 124.19(a). The Board has observed on numerous occasions that PSD permitting decisions "depend heavily on site-specific analysis, and this kind of case-by-case decisionmaking inevitably results in substantive differences from permit to permit." *In re BP Cherry Point*, 12 E.A.D. 209, 223 n. 37 (EAB 2005) (*citing In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 788-89 (Adm'r 1992) ("PSD permit determinations are made individually under the Act on a case-by-case basis")). The very definition of BACT refers to an emissions limitation that the regulator determines is achievable for a particular source "on a case-by-case basis." 40 C.F.R. § 52.21(b)(12). *See In re Cardinal FG Co.*, 12 E.A.D. 154, 161 (EAB 2005) (explaining that "BACT is a site-specific determination"). In addition, any alternatives considered in the PSD context must be economically viable for the source at issue. *See* CAA § 169(3); 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 52.21(b)(12) (BACT definition requires taking into consideration economic impacts and other costs).

Because PSD permits are determined on a case-by-case basis, the Board has repeatedly explained that "it is insufficient for a petitioner merely to observe that a permit does not include some condition that has been adopted in a permit for some other facility." *In re BP Cherry Point*, 12 E.A.D. at 223 n. 37; *see also In re Indeck-Elwood, LLC*, 13 E.A.D. ___, slip op. at 119-20 (EAB 2006) (same). Sierra Club, however, has done precisely that: it simply points to

comments on the White Pine environmental impact statement and argues that the same analysis should apply to the Bonanza project, without any analysis of the similarities or differences between the two projects.

Moreover, Sierra Club has offered no basis for concluding that economically viable alternatives for carbon dioxide control even exist for the Bonanza project, due to the project's small size, relatively low fuel quality, intended beneficial environmental impacts (disposal of landfilled waste coal washing byproduct) and its physical isolation from rail service, which would be necessary to arrange for delivery of any alternative fuels. Given the need for case-by-case analysis of PSD permits, Sierra Club's assertion that the Bonanza permit is somehow flawed because EPA did not consider non-economically viable alternatives that relate to an entirely different facility does not even begin to demonstrate "clear error."[9]

C. NEPA and the PSD Permitting Process Are Separate Regulatory Procedures with Different Legal Standards Governing the Consideration of Alternatives.

In addition to disregarding the case-by-case decisionmaking required in the PSD permitting process, Sierra Club ignores the fact that the process of issuing an environmental impact statement under NEPA, pursuant to which Region IX issued its comments on White Pine, is separate and distinct from the process of issuing a PSD permit under the Clean Air Act. The Board has long recognized that it lacks jurisdiction to consider NEPA issues in the context of CAA permit appeals, *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161-72 (EAB 1999), that there is no requirement than an environmental impact statement be prepared in connection with

[9] Sierra Club also erroneously contends that because EPA Region IX suggested consideration of carbon capture and sequestration for the White Pine project, carbon capture and sequestration necessarily constitutes an appropriate carbon dioxide control technology for the Deseret project. Sierra Club has not shown, as it must, that carbon capture and sequestration or other technologies are technically feasible and currently available (at a commercially viable cost) to control carbon dioxide emissions for this project without drastically changing the project's scope. *In re Hillman Power Co. LLC*, 10 E.A.D. 673, 691 (EAB 2002) (acknowledging EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 136 (EAB 1999) (same).

the PSD permitting process, *In re Tondu Energy Co.*, 9 E.A.D. 710 (2001), and that NEPA and the PSD permitting process have different standards and goals. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 162 (noting that there are other regulatory programs in place, aside from the PSD context, to address petitioner's concerns).

More importantly, the legal standards for considering alternatives under NEPA differ substantially from the standards governing the PSD permitting process. NEPA broadly requires that federal agencies "rigorously explore and objectively evaluate all reasonable alternatives" to a project. 40 C.F.R. § 1502.14. Under the PSD program, however, while the permit issuer is required to consider alternatives submitted in public comments, it is not required "to perform an independent analysis of alternatives." *In re Prairie State Generating Co.*, 13 E.A.D. __, slip op. at 39 (EAB 2006). Because the issues Sierra Club now raises regarding project need and specific project alternatives were not presented to EPA during the public comment period, the agency was not required to respond to these issues, nor was it required to conduct an independent assessment of potential alternatives to the Bonanza project. Given the separate and distinct nature of NEPA and the PSD program, as well as the different legal standards governing each one, Sierra Club has failed to demonstrate that EPA's consideration of alternatives in the Bonanza permit was clearly erroneous.

D. Sierra Club Presents No Evidence or Authority Demonstrating that EPA's Actions Were "Clearly Erroneous" or Involved an "Important Policy Consideration" that the Board Should Review.

Finally, the Board should deny review because Sierra Club cites no relevant statutory or regulatory authority, and submits no factual evidence, in support of its position that EPA's consideration of alternatives was inadequate.[10] This alone is a sufficient basis for denying

[10] The only precedent Sierra Club cites in its discussion of alternatives is *Kent County v. EPA*, 963 F.2d 391 (D.C. Cir. 1992). *Kent County*, however, does not support Sierra Club's argument. There, the court determined that it was

review. *See In re Newmont Nevada Energy Investment, LLC*, 12 E.A.D. 429, 487 (EAB 2005) (denying review where petitioner did not supply Board with legal authority to support remand); *In re Tondu Energy Co.*, 9 E.A.D. 710, 725 (EAB 2001) (petitioner failed to show clear error by simply asserting opinion that alternative technologies would be preferable, unsubstantiated by any data).

Sierra Club's mere assertion that, in commenting on the White Pine environmental impact statement, EPA "made specific findings that are directly relevant to the Bonanza project, and has erred here by failing to take account of its own findings in considering 'alternatives' to the Bonanza project," Pet. at 10, is insufficient to support remand. Sierra Club cites no relevant authority that would require such agency action and makes no effort to explain why EPA Region IX's findings in a different legal context, at a different facility, in a different state, with vastly differing technology and design objectives, would have been in any way appropriate. Indeed, it would have been unnecessary, impractical, and wasteful for Region VIII to attempt to reconcile its analysis for the Bonanza project with the evaluation of such a starkly different project. As a matter of sound policy, the Board should reject Sierra Club's invitation to require needless analysis of projects in different regions, the result of which would be to force Region VIII to evaluate, independently and simultaneously, not one proposed project, but every proposed project nationwide. In short, Sierra Club provides neither a legal nor factual basis for requiring EPA to consider the alternatives suggested in the White Pine environmental impact statement, let

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arbitrary and capricious for EPA not to have searched Region III's Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") files in the context of a potential CERCLA National Priorities List listing of a site located in the same Region. However, even assuming *Kent County* could support the proposition that Region VIII should have considered a *different* region's comments, those comments, as explained above, were made under different legal standards and in different factual circumstances. A different alternatives analysis, therefore, was entirely appropriate, and *Kent County* provides no support to the contrary.

alone for concluding that those alternatives would be appropriate for the Bonanza project. Pet. 9-11.

Given these omissions, Sierra Club has not shown, as it must, that EPA's actions in issuing the Bonanza permit constituted either clear error or involved a significant policy decision requiring Board review. *See* 40 C.F.R. § 124.19(a). The Board therefore has no basis on which to remand the permit, and review should be denied. *See In re Newmont Nevada Energy Investment, LLC*, 12 E.A.D. 429, 487 (EAB 2005); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 725 (EAB 2001) (alleging general error in regulator's BACT review without in any way addressing its content is insufficient to meet petitioners' burden of proof in seeking review of final permit).

CONCLUSION

For the foregoing reasons, the Petition for review should be denied.

Respectfully Submitted,

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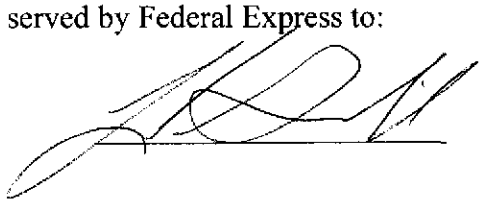
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2007, a true and correct copy of this Motion to Participate and accompanying Memorandum was served by Federal Express to:



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