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September 5, 2008

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

Dear Clerk of the Board:

Enclosed please find an original and six copies of Deseret Power Electric Cooperative's Supplemental Brief of Permittee in Response to the Board's June 16, 2008, Request for Supplemental Briefing. Please return a file-marked copy to the awaiting courier.

Please do not hesitate to contact me at (202) 282-5879 if you have any questions or concerns.

Sincerely,

Steffen Johnson

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

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

SUPPLEMENTAL BRIEF OF PERMITTEE DESERET POWER ELECTRIC COOPERATIVE IN RESPONSE TO THE BOARD'S JUNE 16, 2008 REQUEST FOR SUPPLEMENTAL BRIEFING

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SUPPLEMENTAL BRIEF OF
PERMITTEE DESERET POWER ELECTRIC COOPERATIVE

Permittee Deseret Power Electric Cooperative ("Deseret") respectfully submits this brief in response to the Board's June 16, 2008, Order requesting supplemental briefing.

Issue 1

The first issue on which the Board requested supplemental briefing is "whether the carbon dioxide monitoring requirements springing out of or resulting in whole or in part from section 821 of Public Law 101-549, including but not limited to the requirements of 40 C.F.R. § 75.10(a)(3), are enforceable under the Clean Air Act." June 16, 2008, Order 3.

On this issue, EPA Region VIII and the Office of Air and Radiation ("Region VIII/OAR") explain that "[t]he language of section 821 . . . makes the carbon dioxide monitoring and reporting regulations required by this provision enforceable using the same penalty and enforcement authority granted to EPA and citizens under section 113 and other provisions of the CAA." Supp. Br. 11. Region VIII/OAR explains that this conclusion follows from "one of two possible readings of section 821." *Id. First*, all of the enforcement provisions of the CAA are incorporated by reference into Section 821, which states that "[t]he provisions of section [412](e) of title [IV] of the Clean Air Act shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]." Pub. L. 101-549 § 821(a). Supp. Br. 11-19. *Second*, the reporting requirements are enforceable "by virtue of the expansion of the enforcement authority found in CAA 412(e) and 113 to cover requirements promulgated under Section 821 of the Public Law." Supp. Br. 24. Under either reading, however, EPA emphasizes that "enforcement of the CO2 monitoring requirements . . . of section 821 of the Public Law does not make carbon dioxide regulated 'under the

Act,' because such a result would be inconsistent with the clear Congressional intent to exclude the requirements of section 821 of Public Law 101-549 from the Clean Air Act."

Deseret agrees with Region VIII/OAR's position that regardless of how Section 821 is interpreted, there is no basis to the Sierra Club's position that carbon dioxide has somehow become a "pollutant subject to regulation under [the Act]." CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). As Region VIII/OAR recognizes, under the most straightforward reading of that provision (Supp. Br. 11-19), the enforcement provisions in the CAA were intended to serve as a stand-alone enforcement mechanism to ensure compliance with the Section 821 monitoring program. But even under Region VIII/OAR's alternative reading (Supp. Br. 19-20), Congress's intent to modify or enlarge the scope of potential matters that could be subject to enforcement under Section 412(e) does not reflect an intent to convert carbon dioxide into a "pollutant subject to regulation under [the Act]" for purposes of Section 165. As we have explained, the phrase "subject to regulation" requires actual control, as opposed to monitoring, of emissions. Deseret Response Br. 7-24. And in all events, the method chosen by Congress to effectuate any "expansion" of enforcement authority under Section 412(e) was carefully calculated to keep the subject matter of Section 821 (carbon dioxide emissions) separate and distinct from other pollutants addressed directly by the PSD provisions of the CAA. *See* Deseret Response Br. 25-30. For these reasons, the Board should reject the Sierra Club's proposed reading of the Act.

Issue 2

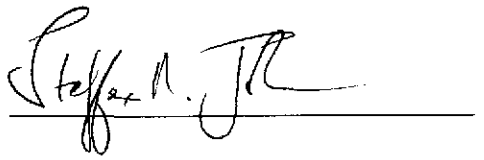
The second issue on which the Board requested supplemental briefing is "whether, under section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a), a facility with the potential to emit at least the requisite number of tons per year, as specified in section 169(1) of the Clean Air Act, 42 U.S.C. § 7479(1), of carbon dioxide is a major emitting facility requiring a PSD permit." June

15, 2008, Order 4. On this issue, the position of EPA Region VIII/OAR is that, under both EPA's "consistent interpretation" and the relevant case law, "PSD applies only to regulated air pollutants." Region VIII/OAR Supp. Br. 26, 27; *see id.* at 25-38.

Deseret agrees with this position. Even if a facility were deemed a "major emitting facility" because of its carbon dioxide emissions, PSD permitting requirements would still apply only to "each pollutant subject to regulation under the [Clean Air] Act." 42 U.S.C. § 7475(a)(4), CAA § 165(a)(4). Because carbon dioxide is not such a pollutant, a PSD permit on carbon dioxide is not required, regardless of whether an entity is deemed a "major emitting facility" because of its carbon dioxide emissions. *See* Deseret Response Br. 7-24.

Respectfully Submitted,

Dated: September 5, 2008



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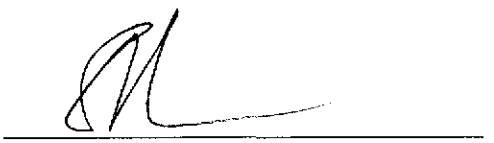
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2008, a true and correct copy of this Response Brief was served by U.S. Mail to:



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