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P-R-O-C-E-E-D-I-N-G-S

(1:06 p.m.)

MS. DURR: The Environmental Appeals Board of the United States is now in session for oral argument in re: Russell City Energy Center, LLC, permit number 15487; PSD Appeal numbers 10-01, through 10-05. The Honorable Judges Charles Sheehan, Edward Reich, Kathie Stein, Presiding.

Please turn off all cell phones and no recording devices allowed. Please be seated.

JUDGE REICH: All right. Good afternoon and for those folks joining us via video in California, good morning. We are here hearing oral argument this afternoon in the matter of Russell City Energy Center, LLC, five petitions for review of a PSD permit issued by the Bay Area Air Quality Management District, pursuant to a delegation of federal authority from US EPA Region IX.

Participating in this afternoon's

1 argument is the Bay Area Air Quality
2 Management district, which will be referred to
3 as "The District" for short, the permittee,
4 Russell City Energy Center, and the five
5 petitioners, California Pilots Association,
6 PSD Appeal number 10-01, CHABOT Las Positas
7 Community College District, PSD Appeal number
8 10-02, Citizens Against Pollution PSD Appeal
9 number 10-03, Mr. Robert Sarvey, PSD Appeal
10 number 10-04, and Californians for Renewable
11 Energy/Mr. Rob Simpson PSD Appeal number 10-
12 05.

13 Before proceeding, since a number
14 of parties are participating remotely, I want
15 to make sure everyone is on the line. So I
16 would like to have each party or counsel
17 indicate his or her presence, starting with
18 The District, then Russell City, then each of
19 the petitioners in the order in which they
20 will be arguing; that is, the California
21 Pilots Association, CHABOT Las Positas
22 Community College District, Citizens Against

1 Pollution, Mr. Robert Sarvey; and Californians
2 for Renewable Energy/Mr. Rob Simpson.

3 District?

4 MR. CROCKETT: This is Alexander
5 Crockett on behalf of the Bay Area Air Quality
6 Management District.

7 MR. POLONCARZ: This is Kevin
8 Poloncarz on behalf of Russell City Energy
9 Company and with me are Holly Pearson and
10 Rosemary Antonopoulos.

11 JUDGE REICH: Okay, thank you.
12 And then California?

13 MS. HARGLEROAD: Good morning,
14 Your Honor. This is Jewell Hargleroad for
15 CHABOT Las Positas Community College District
16 and I also have with us the Chancellor, Dr.
17 Joel Kinnamon of The District and President,
18 Dr. Celia Barberena, and also the Trustee,
19 Carlo Vechiarelli, Dr. Susan Sperling, the
20 Dean of Social Study or Sciences at CHABOT
21 College, Ms. Charlotte Lofft, the President of
22 the CHABOT Las Positas Faculty Association,

1 and Ms. Diane Zuliani, the Faculty Association
2 Grievance Officer of CHABOT College.

3 And we would like to thank also
4 Region IX for hosting this for us.

5 JUDGE REICH: Okay, is the
6 California Pilots Association there?

7 MR. COZAD: Yes. Good afternoon,
8 Your Honor. Ron Cozad, counsel for California
9 Pilots Association. With me is presenter Andy
10 Wilson, Director at Large of California Pilots
11 and Carol Ford, Vice President of Region V.

12 JUDGE REICH: Okay, Citizens
13 Against Pollution?

14 MS. KANG: Yes. This is Helen
15 Kang for Citizens against Pollution. I have
16 with me, Audrey LePell, the President of
17 Citizens Against Pollution and several other
18 members of the group.

19 JUDGE REICH: Okay, thank you.
20 Mr. Sarvey?

21 MR. SARVEY: Yes, Your Honor, this
22 is Robert Sarvey, representing himself. Thank

1 you very much.

2 JUDGE REICH: Okay and finally
3 Californians for Renewable Energy.

4 MR. BOYD: Hello. My name is Mike
5 Boyd and I am the President of the Board of
6 Directors of Californians for Renewable
7 Energy. And then I also have with us Mr. Rob
8 Simpson and Mr. Ernie Pocheco here. Ernie,
9 raise your hand and Rob, raise your hand so
10 they can see you.

11 JUDGE REICH: Okay, thank you. A
12 couple of procedural ground rules in the
13 beginning. As provided for in the Board's
14 June 9, 2010 scheduling order, we will proceed
15 as follows.

16 Each petitioner will be allocated
17 ten minutes for argument and may, if it
18 chooses, reserve up to two minutes of that
19 time for rebuttal. If you are reserving time,
20 please say so at the beginning of your remarks
21 or you may forfeit that opportunity.

22 And The District will proceed for

1 up to 35 minutes and Russell City for 15
2 minutes. That will be followed by rebuttal,
3 if any, by Petitioners in the same order in
4 which they argued.

5 Further, as addressed in the
6 Board's order on further briefing and oral
7 argument dated June 14, 2010, the briefs in
8 this case raise issues both as to whether
9 certain issues and arguments were raised below
10 and thus preserved for review, as well as
11 arguments that the reply briefs impermissibly
12 raise a number of issues not raised in the
13 petition.

14 The Board has not made any
15 determination as to these objections and thus
16 is allowing argument on any points raised in
17 the briefs. However, it should be understood
18 that should the Board subsequently determine
19 that any issue is not properly before it, it
20 will not consider that issue, notwithstanding
21 that it may have been discussed at this
22 argument. The Board assumes that all The

1 Districts and Russell City's prior objections
2 on these grounds apply equally to this oral
3 argument and, therefore, no objections at this
4 argument are necessary to preserve them.

5 I should also note that while the
6 Board has closed briefing on this matter, we
7 have now received three motions requesting
8 that the Board take official notice of various
9 documents. Therefore, I feel compelled to
10 remind the parties that the Board's decision
11 is largely based on the permit proceeding
12 below and that in accordance with 40 CFR
13 Section 124.18(c), the record closed on the
14 date the final permit was issued.

15 Therefore, while the Board will in
16 time address all of these motions, please keep
17 in mind that it is one thing to suggest that
18 a document was in fact considered by the
19 permit issuer and thus should be properly have
20 been included in the administrative record, it
21 is something quite different to ask the Board
22 to take official notice of something that was

1 not before the permit issuer or that in fact
2 may not have even been in existence at the
3 time the permit was issued.

4 And finally as those familiar with
5 oral arguments well know, the Board is likely
6 to ask numerous questions during the course of
7 this afternoon's argument. The purpose in
8 asking these questions is to fully probe the
9 issues before it and assure the Board's full
10 understanding of the positions of the various
11 parties. The questions themselves should not
12 in any way be interpreted as reflecting any
13 particular leaning of the Board or even any
14 particular judge at this time.

15 Now I would like to ask Mr. Wilson
16 representing the California Pilots Association
17 to reintroduce himself for the record and to
18 begin argument.

19 MR. WILSON: Thank you, Your
20 Honor. My name is Andy Wilson and I will be
21 representing today for California Pilots
22 Association. And for the record with me today

1 are Ms. Carol Ford, Vice President of Region
2 III and Mr. Ron Cozad, who is acting as our
3 counsel and is Vice President of Region V.

4 I will try not to repeat
5 information that is in our brief. Put simply,
6 we ask that you remand this matter to the Bay
7 Area Air Quality Management District with
8 instructions to conduct a diligent study in
9 conjunction with the FAA as to the effects of
10 the plumes exhaust turbulence and emission, on
11 light aircraft engines, pilots, occupants, and
12 to recognize the FAA is completing their
13 process to develop criteria addressing these
14 issues.

15 JUDGE REICH: Can I ask in the
16 response filed by The District, they reference
17 discussion in the Response to Comments talking
18 about two studies or analyses that were done,
19 even though they indicate that they don't
20 believe that the issues raised in your
21 petition are within the scope of the PSD
22 permit issuance.

1 One study, which they reference at
2 page 188 and 189 talks about a health
3 assessment using a flagpole receptor. They
4 calculated an acute hazard index of 0.52 based
5 on one hour continuous exposure and they
6 indicate any value below 1.0 means no adverse
7 health effects.

8 Did you evaluate that study?
9 Because I do not see it addressed in your
10 petition.

11 MR. WILSON: On the flagpole
12 addressing issue, they didn't come in close
13 proximity to the stack itself. Our argument
14 is we fly inside the stack. What they have
15 done is they have used distances further away
16 and given time for the plume to disperse and
17 mix.

18 JUDGE REICH: Was there anywhere
19 in the administrative record in Response to
20 Comments, in your petition or otherwise, an
21 analysis of why you felt that this study was
22 done adequate?

1 MR. WILSON: I would certainly, at
2 this point in time, defer to the FAA but they
3 are currently in the midst of their study.

4 JUDGE SHEEHAN: Well it seems
5 like, as Russell City points out, it is your
6 burden to identify some error or deficiency in
7 The District's response. And we would
8 appreciate it if you were a little more
9 specific about what you think the error or
10 deficiency is or we really, I don't see how we
11 can go further with this.

12 MR. WILSON: On the deficiency
13 being what?

14 JUDGE SHEEHAN: I am asking you.
15 What did The District fail to do? What was
16 its mistake, error, deficiency, or inadequacy?

17 MR. WILSON: The inadequacy is
18 that they used standard dispersion models.
19 And Cal Pilots does not feel that the model is
20 appropriate with general aviation inside the
21 cabin to the cockpit.

22 JUDGE REICH: Well let me ask on

1 page 227 of the Response to Comments, they
2 indicate that the California Energy Commission
3 examined the potential for aviation hazards,
4 including vertical plume velocities during the
5 licensing proceedings for the facility and
6 found the risk to be "extremely remote" and
7 within acceptable ranges.

8 Again, do you disagree that the
9 California Energy Commission did such an
10 analysis? Or if they did, is there anywhere
11 in the record or in your petition where you
12 address why that conclusion is not accurate?

13 MR. WILSON: I will again defer to
14 the FAA study that the FAA feels that it is
15 deficient, has not had time to respond. In my
16 brief, I have pointed out there is an ongoing
17 study and we will have to defer for their --

18 JUDGE REICH: Is the study
19 specific to Russell City or is it relevant to
20 aviation more generally?

21 MR. WILSON: It will be relative
22 to general aviation but they are referring to

1 the documentation based on the Russell City
2 Energy Center from both the CEC and the RCEC
3 calculations.

4 As a matter of fact, in the East
5 Shore hearing, evidentiary hearing, after the
6 RCEC plant was approved, the FAA stepped
7 forward and the CEC themselves began to
8 question the accuracy and the validity of the
9 plume calculations for both velocity and for
10 emission content.

11 This is part of what has triggered
12 further study by the FAA.

13 JUDGE SHEEHAN: But you refer to
14 it as an ongoing study. You are speaking the
15 future. What are we to do with something that
16 is not yet ripe that is not before us, that
17 wasn't part of the record that is somewhere
18 off in the next weeks or months or years.

19 MR. WILSON: Put simply, Your
20 Honor, we ask that you remand this matter to
21 the Bay Area Air Quality Management District
22 with instructions to conduct a diligent study

1 in conjunction with the FAA, as the effects of
2 the plume's exhaust turbulence and emission on
3 light aircraft engines, pilots and occupants,
4 and to recognize the FAA is completing their
5 process to develop criteria addressing these
6 issues.

7 JUDGE REICH: Can you be specific
8 as to what specific requirement of the PSD
9 program you find to have been violated by what
10 was done here?

11 MR. WILSON: All the parts because
12 the PSD prevents significant deterioration of
13 the environment.

14 JUDGE REICH: According to some
15 very specific sets of regulations. It is not
16 sort of a generalized provision. I mean, it
17 has very meticulous provisions that have to be
18 complied with and reviewed against. And I am
19 trying to get a sense of which of those
20 particular provisions you feel to have been
21 violated.

22 MR. WILSON: I think the listing

1 of the emissions themselves in an accumulated
2 set. And also, there are no standards on how
3 this or metrics how these exhaust gases would
4 affect a pilot and operating an aircraft in a
5 three-dimensional airspace.

6 You can talk about the flagpole
7 effect. You can talk about somebody living on
8 a hill. You can talk about the man painting
9 the flagpole. You can talk about the person
10 in the office building. But there are no
11 metrics within the PSD that address the effect
12 it will have on a pilot or the occupants
13 inside the pilot, or the engine operation
14 itself.

15 JUDGE REICH: Okay. I should note
16 for the benefit of people both here in
17 Washington and California, that we do not have
18 visual of the folks in California. We do have
19 the audio and to get visual, we would have to
20 drop everybody and restore it, which I am not
21 inclined to do.

22 So unfortunately, we will just

1 have to continue to proceed with audio only.
2 I don't know whether you are getting your
3 visuals at your end but we are not getting it
4 at our end. But we are going to continue with
5 audio.

6 But it would mean that if there
7 was something you were trying to show us,
8 obviously, we wouldn't have the capability of
9 seeing it.

10 Do you have anything else, Mr.
11 Wilson?

12 MR. WILSON: Yes, I do, Your
13 Honor.

14 JUDGE REICH: Okay, please
15 proceed.

16 MR. WILSON: First of all, I would
17 like to just describe briefly the environment
18 that a pilot experiences --

19 JUDGE REICH: Okay, you have got
20 about a minute and a half. So I am taking you
21 at your word that it is brief.

22 MR. WILSON: It is brief.

1 JUDGE REICH: Okay, go ahead.

2 MR. WILSON: Technically, the
3 airport is so compressed in the usage on the
4 left-hand side of the airport that the power
5 plant being 1.5 miles away from the runway, we
6 have an obstruction in front of the runway, an
7 invisible obstruction and that is the Oakland
8 Airport.

9 And when we make our left turn, we
10 end up flying inside the plume itself. And
11 California Pilot's Association feels this
12 court allow the Bay Area Control District and
13 the EPA to work with the FAA so that they can
14 continue to research this further.

15 JUDGE REICH: Okay.

16 MR. WILSON: Again, I would just
17 put it simply that we feel that this matter
18 has to be remanded back to the Bay Area Air
19 Quality Management District to be worked with
20 the FAA and the EPA. It is for safety
21 purposes. There is children around. There is
22 the college around, in close proximity. It is

1 just too dangerous to experiment.

2 Thank you, Your Honor. If you
3 have any further questions. This completes my
4 presentation.

5 JUDGE REICH: Okay, thank you, Mr.
6 Wilson. We appreciate your participation. We
7 are now going to turn to CHABOT Las Positas
8 Community College District. Ms. Hargleroad?
9 And please again, if you are going to reserve
10 time, let us know up front.

11 MS. HARGLEROAD: Yes, I would like
12 to reserve the maximum two minutes and we do
13 have your visual.

14 JUDGE REICH: Okay, thank you.

15 MS. HARGLEROAD: So we can see
16 you.

17 First, I would like to just point
18 out as a housekeeping matter, we disagree with
19 the objections of BAAQMD and RCEC. And if the
20 Board entertains any objections barring or
21 that would bear on any material arguments that
22 we would be allowed or that the parties would

1 be allowed the opportunity to brief that
2 issue, that the Board would inform us of that.

3 RCEC and BAAQMD's primary argument
4 opposing our petition, the College District,
5 is that once an area is designated as non-
6 attainment for a pollutant, here it is 24-hour
7 particulate matter 2.5, unless the stationery
8 source is major for that pollutant, 100 tons,
9 BAAQMD does not even have an obligation to
10 examine whether the project for that non-
11 attainment pollutant, would cause or
12 contribute to an exceedance of the NAAQS.

13 In essence, the argument is that
14 Appendix S trumps 42 USC subsection 7475. Not
15 so.

16 JUDGE REICH: Can I ask, as I
17 understand it, at the time at least of the
18 additional statement of basis, The District
19 foresaw the possibility that the area would be
20 reclassified as non-attainment for PM 2.5 and
21 did indicate that if that were the case and if
22 it was reclassified prior to the permit

1 issuance, then the permit would not address
2 the 24-hour PM 2.5 standard.

3 And as characterized in the
4 Response to Comments, they indicate nobody
5 voiced a legal objection to that theory at
6 that point. Was there an objection to the
7 statement that they would not be proceeding
8 because it would no longer be subject to PM
9 2.5?

10 MS. HARGLEROAD: Your Honor, I
11 would like to point out that basically there
12 was a lot of confusion and ambiguity
13 presented. Because at that point in time, The
14 District has been relying on the surrogate
15 test and had abandoned that and did a full
16 impact study. And this was the first time
17 that the full impact study was actually
18 disclosed and then they began a discussion
19 basically seeking an opinion stating well this
20 might be the case.

21 So under those circumstances, it
22 wasn't like well speak your peace and hold

1 forever. In fact, it was this is what we
2 think might be the case. And I think that if
3 you look at the language of the additional
4 statement of basis, it is sufficiently
5 ambiguous and uncertain whether or not it is
6 even inviting an objection.

7 JUDGE REICH: But if we flag the
8 issue, given what would seem to the be the
9 importance of the issue, if it flagged it as
10 an issue, it is hard for me understand why you
11 would not have said hey, wait a minute, if you
12 thought that was not accurate, why would have
13 needed more of an invitation than that to
14 provide comments if you thought that the
15 underlying legal theory was incorrect.

16 MS. HARGLEROAD: But we did. We
17 did do that in our comments to that additional
18 statement of basis by when we asked for those
19 runs. And we presented the evidence showing
20 that in fact there was a violation of the
21 Clean Air Act by the exceedance of the six
22 point micrograms per cubic meter.

1 JUDGE REICH: But did you, in
2 those comments, suggest that the
3 reclassification of the areas nonattainment
4 would not in fact mean that the PSD permit
5 would no longer cover?

6 MS. HARGLEROAD: We had always
7 gone under the theory and our argument has
8 been consistent throughout that this PSD
9 permit must examine all criteria pollutants,
10 including that which is nonattainment.

11 JUDGE REICH: The argument -- Let
12 me ask. The argument that you made in the
13 petition specific to 40 C.F.R. 51.165(b)(2),
14 did you make that argument in your comments?

15 MS. HARGLEROAD: Yes. In fact, we
16 raised that in our comments and we made that
17 point that once you exceed the NAAQS, then the
18 discussion is over.

19 JUDGE SHEEHAN: But did you say
20 that the PSD regime still would apply if the
21 area went non-attainment.

22 MS. HARGLEROAD: Yes. That has

1 always been our position.

2 JUDGE REICH: And so if we look at
3 those comments we are going to find that,
4 notwithstanding the fact that The District
5 said that there was no challenge to their
6 legal theory in the comments.

7 We will check the record on this.

8 MS. HARGLEROAD: The District also
9 made certain claims about the Caithness
10 records also.

11 JUDGE REICH: All right. Well, we
12 don't need to go down that track because we
13 are capable of looking at the record.

14 The argument that you made in your
15 reply brief talking about the construction
16 moratorium seemed to me not an argument made
17 in the petition. So wholly apart from the
18 question of whether that was raised below, why
19 should we not find that that is an untimely
20 argument, given that we specifically said that
21 you cannot raise new issues or new arguments
22 in the reply brief that were not raised in the

1 original petition.

2 MS. HARGLEROAD: Because we are
3 responding to their argument that we are not
4 providing sufficient authority. And our whole
5 argument has been must look at the Clean Air
6 Act as a whole. You cannot just isolate Part
7 D or Part C or Part A in isolation. You must
8 construe them together. And that is why in
9 fact if you look at Section 7475, it
10 specifically is directing and expects that a
11 major emitting facility on which construction
12 is commenced -- that no major emitting
13 facility may be constructed in any area to
14 which this part applies, unless subpart (3),
15 the owner or operator of such facility
16 demonstrates that emissions from construction
17 or operation of that facility will not cause
18 or contribute to air pollution in excess of
19 subpart B, the NAAQS in any air quality
20 control region.

21 So, there is two "anys" in this
22 statute and further The District didn't seem

1 to think that they wanted more. And so part
2 of our argument has been if you look at these
3 other C.F.R.s, they also are providing you
4 guidance and you have the building moratorium.
5 What we would also like to address is the
6 difference there also includes precursors.
7 And if you examine 40 C.F.R. 51.002, NOx is a
8 presumptive precursor of particulate matter
9 and, therefore, under this record, you have
10 over a hundred tons.

11 JUDGE REICH: Okay.

12 MS. HARGLEROAD: So basically our
13 reply is responding to their argument.

14 JUDGE REICH: Okay. And just to
15 make sure I understand the extent of the PM
16 2.5 24-hour issue, the way I read it, the
17 modeling issues that you discuss both sort of
18 in general and specifically as to the
19 roadways, both seem to relate specifically to
20 the PM 2.5 24-hour. Is that correct?

21 MS. HARGLEROAD: That is correct,
22 Your Honor.

1 JUDGE REICH: And the way The
2 District, at least, interprets your
3 environmental justice issue, they also see it
4 as an offshoot of your concern about the
5 effects of PM 2.5 24-hour. Is that an
6 accurate statement of your environmental
7 justice concern?

8 MS. HARGLEROAD: Well, I would say
9 it is somewhat limited because part of the
10 environmental justice argument also relies on
11 the fact that the run, which we obtained from
12 The District, essentially, inadvertently shows
13 that there is a violation and that there are
14 2,400 additional sensitive receptors which
15 have not been mapped out and not plotted --

16 JUDGE REICH: Okay.

17 MS. HARGLEROAD: -- and we do not
18 know where they are located.

19 JUDGE REICH: Okay. But that
20 tells me we are still talking PM 2.5 24-hour.

21 Okay, your time has expired. You
22 do have a reserve two minutes for rebuttal.

1 I am going to turn now to the Citizens Against
2 Pollution. Ms. Kang or is it Professor Kang?

3 MS. KANG: Ms. Kang is fine and I
4 will address three issues.

5 JUDGE REICH: Are you reserving
6 time?

7 MS. KANG: The Citizens Petition
8 -- Yes, I am reserving two minutes, Your
9 Honor.

10 JUDGE REICH: Okay, thank you.

11 MS. KANG: The Citizens' petition
12 raised three issues of importance in the Bay
13 Area, where there is a high reserve margin
14 with reliability and thus, it as the
15 California Energy Commission Staff noted with
16 concern in this case, the power plant is
17 expected to shut down and start up frequently.

18 The first error The District
19 committed is the failure to ascertain how many
20 times the power plant would startup and shut
21 down and to face fact on a credible operating
22 scenario. It is undisputed that the power

1 plant asks for no limits on the number of
2 startup and shut downs. And the permit, thus,
3 has no restrictions on the number of startup
4 and shut downs.

5 The plant can start, cold start,
6 twice from the two turbines at the facility,
7 without exceeding the daily and annual
8 emissions limits. The District concedes this.

9 At bottom, there is no credible
10 source of the assumption that there will be
11 three cold starts, 100 warm starts, and 250 to
12 300 hot starts per turbine at the facility.
13 The loading order doesn't tell you that and
14 the power purchase agreement doesn't tell you
15 that. The power purchase agreement, in fact,
16 disputes or contravenes or contradicts what
17 The District says about the number of
18 startups. The power purchase agreement on
19 which The District so heavily relies says the
20 facility would operate not at least 16 hours
21 a day as the District contends, but says up to
22 16 hours per day, up to five days per week,

1 and up to 50 weeks per year.

2 JUDGE REICH: Let me ask about
3 that. I agree that the language is, as you
4 cited, but I am trying to understand the logic
5 of the power purchase agreement and it talks
6 about those numbers on buyers' behalf. So
7 obviously it is in there because it is there
8 to satisfy the buyers' need.

9 What I am having a hard time
10 understanding would be the logic for the buyer
11 putting in what would essentially by your
12 interpretation be a maximum availability
13 rather than a minimum availability. I would
14 assume that what the purchaser would want
15 would be essentially some guarantee that this
16 source of power is going to be available for
17 some period of time. And I don't understand
18 why logically, even if the wording is as you
19 say, why logically it makes sense to interpret
20 this as saying basically you can be available
21 as much as you want, as long as it is not more
22 than this amount. It just doesn't seem to

1 make a lot of sense to me.

2 MS. KANG: It is true that that is
3 the buyer's requirement and it could set the
4 availability limit. But within that, that is
5 what The District relied on to set three cold
6 starts and there is nothing in that agreement,
7 if you look at the Response to Comments, The
8 District heavily relied on that in the loading
9 order. And there is no document in the record
10 that says that this facility will cold start
11 only three times.

12 In fact The District said in the
13 reply or in the response that the fact that
14 Palomar in San Diego started five times was
15 indicative of how these power plants would
16 operate. In fact, the Bay Area power plants
17 do not operate that way because of the high
18 grid reliability and the high reserve margin,
19 which at CHABOT's comments in February was
20 pointed out and nobody disputed that.

21 JUDGE REICH: Well, it doesn't
22 talk about the number of starts, I don't

1 think, but it does talk about them operating
2 in a six by sixteen mode. And if a cold start
3 is, I thought it was like 48 hours, I am
4 having a hard time understanding how you could
5 get that many cold starts in any given week
6 with a six by sixteen operating mode.

7 MS. KANG: Well, that is the
8 problem here, which is that the permit does
9 not have a limit on the number of starts and
10 shutdowns. And the NSR manual says if you
11 don't have a power plant or if you don't have
12 an applicant that is willing to take a limit,
13 then the permit considerations have to be that
14 the worst case operating scenario must be
15 considered. In the back here for startup and
16 shut down did not consider those scenarios.

17 As The District concedes, there
18 could be two cold starts per day. And that
19 was not the operating scenario that The
20 District considered in setting that.

21 JUDGE REICH: Okay. When we get
22 to The District, I want to find out if they

1 did concede that. Because as I read what the
2 District filed, I thought they were disputing
3 that and saying that the reason that you were
4 thinking there were two cold starts a day is
5 because it talked about shutting down late
6 evening and early morning and you were
7 interpreting that as two separate shut downs,
8 as opposed to one continuous shut down.

9 I don't see how that would be a
10 cold start but we will get into that.

11 MS. KANG: Well, I am glad you
12 brought that up, Your Honor, because there are
13 two turbines. And if you look at the daily
14 limits for carbon monoxide, which is the
15 limiting factor in this permit, there are
16 potentials for two cold starts from the two
17 turbines. And it is not just that the plant
18 would shut down in the morning or start up in
19 the morning and shut down at night. That is
20 not the two starts. The two starts are from
21 the two separate turbines.

22 JUDGE REICH: So it means one

1 start per turbine?

2 MS. KANG: Yes, Your Honor.

3 JUDGE REICH: Okay.

4 MS. KANG: And in the surreply at
5 page 15, The District concedes that that is
6 possible in the discussion of the auxiliary
7 boiler.

8 Now let me move on to the second
9 issue if the court has no questions on the
10 first issue. The District failed to support
11 its calculation, emissions calculation for the
12 auxiliary boiler cost effectiveness for this
13 reason. But not only that, it wasn't just the
14 emissions calculations that The District did
15 not support but The District failed to account
16 for CHABOT's comments about the amount of
17 emissions reductions that are possible from
18 the use of an auxiliary boiler. The Caithness
19 records that are at the Docket 2-09 show that
20 there are 66 percent reductions possible for
21 both NOx and CO from the auxiliary boiler.
22 And The District used the numbers 38 percent

1 for cold and 18 percent for warm and that is
2 a significant difference in addition to the
3 size of the boiler that the Caithness records
4 show, which is that it is 72 MMBTU for the
5 Mankato records and 49 MMBTU for the Caithness
6 records. So that is a 20 percent difference
7 in the size of the boiler that The District
8 did not consider. And the burden here is
9 important which is that our burden is to show
10 that The District did not support its cost
11 ineffective analysis. That is our burden.
12 And The District did not supports is cost
13 ineffective analysis with --

14 JUDGE REICH: Okay, I think you
15 are out of time. You can reserve any further
16 discussion for your rebuttal if you would
17 like.

18 MS. KANG: Your Honor, I think I
19 will use the two minutes because there is a
20 very important discussion about NOx and CO on
21 the cases that the District brought up that
22 are very distinguishable.

1 The District added an unnecessary
2 compliance margin to account for variabilities
3 that show up in the operations when the data
4 that The District relied on were actual
5 operational data and thus, should have already
6 accounted for the operational variabilities
7 that The District says that it was adding the
8 margin for.

9 And so this is very
10 distinguishable from the cases that the
11 District discusses, such as Newmont where the
12 technology was considered new and, therefore,
13 there was discretion that The District had to
14 add some or the permitting agency had to add
15 some margin. And in NOF, it was the average
16 emissions that was used, not the maximum
17 achieved as it is here.

18 If we used the average here, that
19 would be about 185 and you get from the 25
20 percent, you would get about 231 pounds per
21 cold NOx startup, not 480, which is what The
22 District did.

1 JUDGE REICH: Why, given prior
2 Board case law, would you use the average when
3 there are clearly Board cases that indicate
4 that it is acceptable to look at the maximum
5 because it is a never to exceed limit?

6 MS. KANG: I didn't catch that.
7 Here it was an achieved maximum. At Palomar,
8 the maximum is 375. At Delta, which is
9 supposedly exactly the same facility that RCEC
10 will have, the maximum was 281. We discussed
11 rates because that is what The District
12 discussed and they said that Mr. Sarvey's
13 discussion of limits was inappropriate because
14 he didn't raise it. He raised it in response
15 to The District arguments that we
16 inappropriately used the rates.

17 The rates that we used were used
18 because that is what The District used to set
19 the limit plus the margin.

20 JUDGE REICH: Okay, your time has
21 now expired and you have used your rebuttal
22 time. So there will be no rebuttal.

1 We are going to turn to Mr.
2 Sarvey.

3 MR. SARVEY: Thank you, Your
4 Honor. I would like to reserve two minutes
5 for rebuttal, please.

6 JUDGE REICH: Okay, thank you.

7 MR. SARVEY: The first issue I
8 would like to address is the project's
9 compliance with the new national one-hour NO2
10 standard.

11 On January 22, 2010, the EPA
12 Administrator signed a final rule containing
13 a new standard for NO2 based on a one-hour
14 averaging time.

15 On February 9, 2010, the final
16 rule was published in the Federal Register as
17 noted on page 16 of my appeal. The February
18 9th Federal Register notice clearly states on
19 page 6525 the first major new and modified
20 sources applying for NSR/PSD permits will
21 initially be required to demonstrate that
22 their proposed emissions increase of NOx will

1 not cause or contribute to a violation of
2 either the annual or one-hour NO2 standard.
3 And The District does not dispute this and
4 effectively recognizes this fact on page 35 of
5 its response to my appeal.

6 The District in Russell City
7 argued that the RCEC permit need not contain
8 a demonstration that the RCEC does not violate
9 the federal one-hour NO2 standard. The
10 District argues that since it issued the PSD
11 permit on February 2, 2010, the new NO2
12 standard is not applicable, since the Federal
13 Register notice was issued on February 9th and
14 the new standard becomes effective on April
15 12th.

16 As The District's public notice
17 for this permit states, pursuant to 40 C.F.R.
18 124.15(b), this PSD permit becomes effective
19 March 22, 2010, unless a petition for review
20 is filed with the EPA's environmental appeals
21 board by that date period pursuant to 40
22 C.F.R. Section 124.19.

1 Under 40 C.F.R. 124.19(f)(1), a
2 final permit that has been appealed is issued
3 by the administrator when the Environmental
4 Appeal Board issues notice to the parties that
5 the review has been denied or when the
6 Environmental Appeals Board issues a decision
7 on the merits of the appeal and the decision
8 does not include a remand of the proceedings
9 or upon completion of the remand proceedings -
10 -

11 JUDGE REICH: Mr. Sarvey, I gather
12 you are not disputing that the NO2 limit
13 becomes relevant for permitting purposes,
14 depending on when the permit is issued. And
15 what you are essentially saying is you are
16 disputing their characterization of when the
17 permit is issued. Is that right? Because if
18 that is the case, that is certainly something
19 the Board I think has the capability of
20 addressing without further argument.

21 I just want to make sure I
22 understand your argument correctly.

1 MR. SARVEY: Yes, that is my
2 argument.

3 JUDGE REICH: Okay, well we will
4 certainly take that issue under advisement.
5 Thank you.

6 MR. SARVEY: Okay. The next issue
7 I want to address is the NO2 limit for
8 startups and shut downs.

9 And as I addressed in my petition,
10 the Delta Energy System located in the Bay
11 Area Air Quality Management District has
12 demonstrated since 2004 that a 281 pound cold
13 start emission limit has been achieved in
14 practice for the same model of turbine that is
15 being used here at the RCEC.

16 The District in response to this
17 fact has defended its 480 pound limit for the
18 RCEC by stating that it assessed other data
19 from several other projects and they
20 demonstrated results of 103 pounds to 499
21 pounds.

22 The District argues that the EAB

1 has consistently upheld the use of a
2 reasonable compliance margin to assure that
3 the facility can meet its permit limit over
4 the operating life of the facility. And as I
5 have argued in my petition, the 40 percent
6 compliance margin is not reasonable, and is
7 unprecedented and unnecessary.

8 In my reply brief, I noted that
9 the Delta Energy System --

10 JUDGE REICH: Can you speak up a
11 little bit more? But before you do, let me
12 stop you and ask you a couple of questions.

13 I think there is some dispute
14 which we are obviously not resolve about what
15 may or may not have been raised below relative
16 to the Delta Energy Center. But there is some
17 discussion about trade offs between NOx
18 control and CO control as accounting for
19 differences between Delta and the limits being
20 proposed or adopted for Russell City.

21 Do you dispute that there is a
22 tradeoff there and one needs to look at the

1 two limits in relationship to each other to
2 have a clear picture of what the permit is
3 imposing?

4 MR. SARVEY: I don't think it is a
5 relevant issue at this point because The
6 District used the Delta Center warm start
7 permit limit of 125 pounds as a starting point
8 for setting the warm start NO2 limit for the
9 RCEC.

10 So I mean, they used the permit
11 limit on one basis to set the standard but in
12 another standard or another determination,
13 they ignored the limit.

14 JUDGE REICH: Okay.

15 MR. SARVEY: The don't even
16 consider the CO2/NOx tradeoff. So I see that
17 as being inconsistent on The District's part.

18 JUDGE REICH: Okay. On the
19 compliance margin, you can go ahead. Do you
20 agree that the Board has sanctioned a
21 compliance margin, although you may disagree
22 how one was determined in this case?

1 MR. SARVEY: The highest
2 compliance margin that I have seen has been 25
3 percent, Your Honor. They are asking for like
4 a 41 percent compliance margin.

5 JUDGE REICH: Forty-one percent
6 from what?

7 MR. SARVEY: Forty-one percent
8 from the Delta limit of 281 pounds per hour.

9 JUDGE REICH: Okay. So that
10 becomes a question of what limit you use as a
11 starting point.

12 MR. SARVEY: Yes, Your Honor.

13 JUDGE REICH: Okay.

14 MR. SARVEY: And you can look at
15 this another way. It could be a 250 percent
16 increase if you look at it from the average
17 emissions that Delta has emitted. So that is
18 all I want to say about that point.

19 JUDGE REICH: Okay.

20 MR. SARVEY: I would like to move
21 on if that is okay with you, sir.

22 JUDGE REICH: Yes, sir.

1 MR. SARVEY: The next issue is the
2 District elimination of the OpFlex technology
3 in step two of the BACT analysis. The
4 District eliminated the OpFlex technology in
5 step two of the BACT analysis, claiming that
6 turndown technology such as OpFlex are not
7 technically feasible at this time for the
8 control of startup emissions.

9 The 1990 NSR manual requires that
10 a demonstration of technical infeasibility
11 should be clearly documented and should show
12 based on physical, chemical, and engineering
13 principles that technical difficulties would
14 preclude the successful use of the control
15 option on the emissions unit under review.

16 The petitioner provided adequate
17 documentation that the OpFlex technology is a
18 feasible technology and has demonstrated great
19 success in reducing the startup emissions at
20 the Palomar facility in Escondido.

21 JUDGE SHEEHAN: How do you address
22 -- Pardon me. To the Palomar point, how do

1 you address The District's argument that it is
2 not quite comparable or useful here because
3 there was no manufacturer's guarantee you had
4 the ammonia injection at Palomar which is
5 different from this facility and you had
6 limited data.

7 It sounds like there is a wide gap
8 between what Palomar shows and what we need,
9 what you would like here.

10 MR. SARVEY: And I finish reading
11 where I am at, Your Honor, it will address all
12 of those points.

13 Petitioner provided adequate
14 documentation that the OpFlex technology is a
15 feasible technology and has demonstrated great
16 success. The OpFlex technology has been
17 offered commercially by GE since 2005, so it
18 is certainly a feasible technology and is
19 commercially available.

20 The California Energy Commission,
21 the lead permitting agency for this project
22 considers OpFlex technology as feasible and

1 available and requires it. In case this
2 particular project wants to start both
3 turbines at one time, the OpFlex or some other
4 fast art technology is required.

5 The District argued that it could
6 not determine from the Palomar data what
7 reductions were attributable to OpFlex or what
8 emission ejections were attributable to
9 earlier ammonia injection.

10 In response, I have provided a
11 breakdown to the emission reductions
12 attributable to OpFlex and those reductions
13 attributable to early ammonia injection as
14 determined by the San Diego AQMD.

15 This information is included in my
16 petition for review on page 10 and was
17 included in my February 6 comments on the
18 draft permit. The District then complained
19 that the data was too limited so I executed a
20 public records request and supplied The
21 District with one year of available data.
22 There are still several more years. The data

1 I provided was 2007. The District still could
2 have accessed 2008-2009 and still evaluated
3 that for this permit.

4 JUDGE REICH: Okay, Mr. Sarvey,
5 your time has expired. Thank you. You will
6 have two minutes for rebuttal.

7 And now to the CARE/Simpson
8 petition. I understand that you intend to
9 have more than one person speak. I caution
10 that you know, when the time runs out it runs
11 out, irrespective of whether everybody has had
12 a chance to speak.

13 So I don't know who is going first
14 but please introduce yourself for the record
15 and go ahead.

16 MR. BOYD: Hi. This is Mike Boyd,
17 President of CARE and I would like to reserve
18 two minutes for rebuttal, if we make it. And
19 then I am going to go for three, then Rob is
20 going to go for three, and then Ernie has got
21 two.

22 Essentially CARE's issues have to

1 do with the public participation process and
2 the public commenting process. The District
3 claims that the record shows that The District
4 not only complied with all requirements of
5 Part 124 but went over and above what is
6 required to ensure the public was fully
7 engaged in this proceeding.

8 The Board should, therefore,
9 dismiss CARE's claims based on evidence in the
10 record. The District claims that it complied
11 with all of the requirements of Part 124,
12 which we believe is false and is pursuant to
13 the Notice Requirements set forth by 40 C.F.R.
14 124(10)(d), contents, name, address, and
15 telephone number of the person for whom
16 interested persons may obtain further
17 information, including copies of the draft
18 permit or draft general permit, as the case
19 may be, statement of basis or fact sheet and
20 the application.

21 As stated in our comments on
22 February 4, 2009 to the District, a notice

1 that was included in the PSD permit on The
2 District's website failed to include a copy of
3 the application number 15487 that was
4 originally submitted to The District in 2001.

5 We did everything we could
6 possibly do, Your Honors, to get a copy of
7 that application, including Mr. Simpson
8 traveling to the District's office and we were
9 never provided a copy of that application.

10 Based on the fact that we didn't
11 have a copy of the application when we did our
12 comments, we asked extensive questions because
13 of that fact. And in the response that The
14 District provided to our comments, it wasn't
15 possible for us to tell what, if any, comments
16 they were responding to, since they didn't
17 provide any reference or cross-reference to
18 the commenter, who the commenter was, and that
19 kind of stuff. So we had no way of knowing if
20 they were responding to our comments and it
21 was left up to us to dig through their
22 responses to see if there was anything that we

1 even relevant.

2 And so we don't believe The
3 District did the response right. We don't
4 believe they did the notice right and we don't
5 believe they provided us a copy of the
6 original application, which is necessary for
7 us to meaningfully participate.

8 Okay and my few minutes are up.
9 Thank you.

10 MR. SIMPSON: Hello, this is Rob
11 Simpson. Well the first remand regarding this
12 plan could have been attributed to mere
13 incompetence or negligence on the part of the
14 Air District. This remand should recognize
15 that the intent here is an applicant to
16 circumvent the Clean Air Act by reconstructing
17 antiquated equipment in a sensitive, yet
18 highly impacted location. They manipulated
19 monitoring and modeling results to fabricate
20 a permit, a permit that the Applicant does not
21 intend to comply with and The District does
22 not intend to enforce. The public has been

1 misled in this process, undermining the
2 opportunity for the informed participation
3 contemplated by Congress.

4 Region IX disallowed media access
5 to this proceeding, claiming that they simply
6 could not accommodate any more people. We are
7 broadcasting from the 19th floor of what must
8 be a 300,000 square foot EPA facility. It is
9 simply not plausible if this facility cannot
10 accommodate the press. There are empty seats
11 in this room.

12 The people of this Region are
13 interested in this action and have a right to
14 know what goes on here. I request that we
15 continue this proceeding until the Board
16 determines whether interested members of the
17 media are rightfully excluded from the
18 proceeding.

19 The Air District took great
20 interest in attempting to prevent my
21 participation in this proceeding, in their
22 claim that my appeal was not timely pursuant

1 to East Coast time and their refusal to
2 provide access to an administrative record or
3 any relevant permitting documents to me during
4 the first comment period; The District's
5 contention that there is no reason why
6 petitioners should not be held to the same
7 strict procedural standards in appealing this
8 permit that they have demanded from The
9 District in issuing it, demonstrate the
10 absurdity of their position.

11 The petitioners are not paid
12 government regulators with delegated
13 responsibility under the Clean Air Act
14 attempting to permit an illegal facility that
15 threatens public health, the environment, and
16 the integrity of the Clean Air Act. The
17 petitioners are unpaid members of the public
18 seeking protection through the Environmental
19 Appeals Board for the egregious actions of the
20 air district in concert with the applicant.
21 Their desire to make money should not take
22 precedence over the compliance with the Clean

1 Air Act.

2 The District's failure to include
3 any representation of the project's potential
4 effect on air quality in any of its notices
5 should result in a remand. We have a right to
6 this information. It is what the national Air
7 Quality Standards were developed for.

8 The District's failure to correct
9 public notice deficiencies in subsequent
10 public notices should result in a remand. The
11 District gives itself credit for so-called
12 outreach, yet no person in this room and
13 likely very few of any commenters learned of
14 the permitting actions through The District's
15 outreach. It is Ernest Pocheco who deserves
16 credit for the outreach. I demonstrated that
17 The District's outreach failed to even inform
18 prior to participants, like the executive
19 director of women's environmental matters, a
20 prominent local air quality advocate.

21 The District and applicant have
22 not disputed that they intend to utilize used

1 equipment that likely earned emission
2 reduction credits in retirement for this
3 facility. They have merely disputed the
4 public's right to know. I demonstrated
5 adequate reason to support the public's right
6 to know this information and adequate basis
7 for the contention in my comments and
8 petition.

9 The District's record of never
10 issuing a PSD permit correctly, failing to
11 enforce permit conditions, and carte blanche
12 modifications of permits to increase emissions
13 demonstrates no likelihood of an enforceable
14 permit conditions which comply with the PSD
15 provisions of the Clean Air Act.

16 There is ample evidence to suggest
17 that if a facility is built and does not
18 contain existing permit conditions will be
19 ignored or changed to suit the facility,
20 especially if the developer is screaming we
21 need the electricity and maybe flips the power
22 off from other plants, like it did at the

1 start of this debacle.

2 MR. POCHECO: Good morning, Your
3 Honor, Ernest Pochecho of CARE. I would like
4 to address two issues very briefly but first
5 is the complete lack of any analysis by The
6 District of the zero liquid discharge all-
7 vapor emission system which will produce the
8 largest emission of this plant and will effect
9 the production, chemical evolution, transport,
10 and distribution, and deposition of the
11 criteria pollutants that are regulated within
12 the permit.

13 This all-vapor emission system
14 will emit over 12 billion 180 million pounds
15 a year of water vapor into the immediate
16 vicinity of the stacks, thereby affecting
17 production, chemical evolution, transport, and
18 distribution of the criteria pollutants. This
19 needs to be analyzed. To this date, they have
20 not.

21 The second issue is the EPA and
22 Fish and Wildlife Consultation, informal

1 consultation which was necessary to actually
2 place or is necessary for the EPA concurrence,
3 which is necessary to place the proposed
4 permit into the applicant's hands.

5 In informed the EPA and Fish and
6 Wildlife about the new FAA mandate that it is
7 going to if and only if this power plant is
8 constructed to reroute over 560 helicopters
9 and planes directly over our endangered
10 species preserve and the sensitive habitat in
11 which numerous listed species live.

12 I did a FOIA request to Fish and
13 Wildlife to confirm my suspicion that no
14 analysis was done, despite their contention
15 that all issues have been looked at and they
16 have seen no harm. The FOIA request
17 demonstrates that neither EPA, as far as I can
18 tell, where Fish and Wildlife even discussed
19 this issue.

20 So the issue of whether or not if
21 this power plant is built and 560 helicopters
22 and planes are routed directly over the native

1 species preserve, must be analyzed before EPA
2 can concur and actually put the permit in
3 hand.

4 Thank you.

5 JUDGE REICH: Thank you,
6 gentlemen. We have reserved two minutes for
7 rebuttal.

8 We are going to move now to the
9 Bay Area Air Quality Management District here
10 in Washington.

11 MR. CROCKETT: Good afternoon,
12 Your Honors. Good afternoon Ms. Ward. I
13 would like to begin before --

14 JUDGE REICH: Just reintroduce
15 yourself for the record, please.

16 MR. CROCKETT: Alexander Crockett
17 on behalf of the Bay Area Air Quality
18 Management District.

19 JUDGE REICH: Thank you, Mr.
20 Crockett.

21 MR. CROCKETT: Before I get to the
22 specific issues raised by petitioners, I would

1 like to give the Board a little background as
2 to what has happened over the past two years
3 since the permit was remanded in the original
4 proceeding here.

5 Over the past two years we have
6 taken the Board's mandate and its remand and
7 we needed to go back and provide additional
8 notice and comment really to heart. And we
9 have done a great deal of work in that
10 respect. We went back and we put together a
11 very comprehensive list of citizens who may be
12 interested in PSD permitting. We looked at
13 people who have been interested in this
14 facility. We looked at people who had asked
15 to be on a list about PSD permits. We looked
16 to people who had participated in other
17 permits before The District, not just PSD
18 permits but other major permits as well.

19 We put together a comprehensive
20 list that has approximately 1900 names on it.
21 We mailed out notice of this permit proceeding
22 after the remand to all the people on that

1 list. We provided two comment periods, both
2 of them over the minimum 30 days required by
3 law. We provided two public hearings in the
4 community at Hayward City Hall, people to come
5 and be able to express their comments orally.

6 And all of this public outreach
7 generated a great deal of very informed,
8 valuable, substitute public comment. And we
9 took all that comment to heart. We actually
10 improved the permit in a number of ways, based
11 on that public comment.

12 We now have a permit that has
13 improved permit conditions. It has improved
14 analyses on which it is based. And for the
15 first time, we have a permit that has a
16 substantive emissions limit on greenhouse gas
17 emissions. To our knowledge, this is the
18 first time ever in the history of the United
19 States that a permit has actually had
20 enforceable greenhouse gas emission limits in
21 it.

22 So we are proud of the work that

1 we have done here. We think it is a good
2 permit. And we urge the Board, for all the
3 reasons that we put forward, to deny these
4 petitions for review and let this permit go
5 forward.

6 With that background, let me start
7 and address the specific issues that have been
8 raised here. I would like to start with the
9 startup backed determination issues. There is
10 only two related issues here. One of them is
11 whether The District properly decided that it
12 was not going to require an auxiliary boiler
13 as an additional control technology to reduce
14 NO2 emissions and CO emissions. And then the
15 second issue would be the actual NO2 startup
16 emission limits that we came up with.

17 Let me start with the issue of
18 whether we properly decided not to require the
19 auxiliary boiler. There is a threshold issue
20 which I would like to address that citizens
21 against pollution raised, which is whether The
22 District is even required to do an analysis of

1 the costs that would be involved, required in
2 an auxiliary boiler here.

3 I mean, it was the cost
4 effectiveness that The District looked at that
5 was the reason why The District decided not to
6 require an auxiliary boiler.

7 CAP argues that The District was
8 required to jettison the cost effectiveness
9 analysis requirement in federal BAAQ
10 requirement 40 C.F.R. 52.21 and just go with
11 more stringent layer limits here, lowest
12 available emissions rate, even though it is
13 clear under EPA precedence that a delegated
14 agency acts standing in the shoes of the
15 federal EPA and is required to follow the
16 federal requirements in 40 C.F.R. 52.21.

17 JUDGE SHEEHAN: What do you make
18 of the delegation agreement that appear to
19 take costs off the table?

20 MR. CROCKETT: I don't read the
21 delegation agreement that way. I see that the
22 delegation agreement does make references to

1 PSD provisions of The District's regulation to
2 Rule 2 but the SPD provisions go to things
3 like conducting the air quality impact
4 analysis and so forth. And I don't see any
5 indication in the language of the delegation
6 agreement that authorizes or requires The
7 District to jettison the federal requirements
8 in 40 C.F.R. 52.21.

9 But notwithstanding the fact that
10 the language, I don't believe, can be read
11 that way, even if the language can be read
12 that way and even if it was the intention of
13 EPA and The District to somehow deviate from
14 the federal requirements, that is not legally
15 permissible because when requirements are
16 adopted in the Code of Federal Regulations,
17 EPA is bound to follow those regulations
18 unless and until it adopts a change after
19 noticing comment and that certainly wasn't
20 done here.

21 So to the extent that the staff at
22 EPA Region IX or the staff at The District had

1 some idea that they could throw out the cost
2 effectiveness element of the BAAQ requirement,
3 they certainly could not do that legally.

4 And we are a delegated agency
5 standing in the shoes of the EPA, which the
6 Board has held on numerous occasions we are,
7 we are bound to follow the same exact rules
8 the EPA would be bound to follow and one of
9 those is when you do a BAAQ analysis, you need
10 to take into account economic impacts and
11 other costs. That is part of the definition
12 there.

13 JUDGE STEIN: Counsel, other than
14 this particular case, is there any written
15 interpretation that Bay Area has made that
16 would show us that the interpretation that you
17 are arguing in this case has been consistent
18 over time or has this issue never really come
19 up before?

20 MR. CROCKETT: This issue has
21 never really come up before and I think the
22 reason why is that this is a fairly unique

1 proceeding in that we don't have a district
2 permit, a non-attainment NSR permit and a PSD
3 permit proceeding forward together in an
4 integrated proceeding.

5 Usually we have that with a major
6 facility if it is going to be major for PSD,
7 it will also be major for non-attainment NSR.

8 And so when you are plotting BAAQ,
9 you have to apply the layer level of BAAQ that
10 is in the District regulations as part of the
11 non-attainment NSR review and then you also
12 have this other BAAQ element that is out there
13 which is less stringent. But the issue never
14 comes up because the substantive requirement
15 has to be the more stringent one under non-
16 attainment NSR.

17 So I don't believe that this issue
18 has ever come up before. We are working now
19 with EPA Region IX on revisions to the
20 delegation agreement that will clarify this.
21 We have a draft that we have shared with EPA
22 and we will be negotiating that going forward.

1 But I believe that what we will be seeing in
2 the near future is a revised delegation
3 agreement that makes this distinction here.

4 JUDGE STEIN: What you will be
5 doing is a clarification of what you still
6 believe the applicable requirements to be.

7 MR. CROCKETT: Yes, it will be a
8 clarification in the delegation agreement that
9 for PSD purposes, the District is bound to
10 follow the federal requirements, which I
11 believe is the state of the law. I think
12 there is no dispute on that. So that will
13 clear up the confusion that has been caused by
14 the language in the delegation agreement --
15 Judge Sheehan.

16 So I think that it is very clear
17 that we were required to consider costs here.
18 We looked at the costs of requiring an
19 auxiliary boiler. We have looked at the
20 emission reductions that would be gained by
21 using an auxiliary boiler here for cold and
22 warm startups because that is where it is

1 effective, since it keeps the equipment warm,
2 so it doesn't have to be warmed up on startup.

3 We have looked to other similar
4 facilities that use auxiliary boilers and what
5 emissions reduction can be achieved there. We
6 looked at how that would work here at this
7 facility, in terms of startups at this
8 facility. And then we looked at the costs
9 that would be involved in implementing an
10 auxiliary boiler system and we found that the
11 cost of doing so would be \$83,000
12 approximately per ton of CO reduced. In the
13 NOx the numbers were even higher, I think
14 around a million dollars. The limiting factor
15 here was the carbon monoxide. So I am going
16 to focus my remarks primarily on the CO
17 calculation.

18 JUDGE REICH: What did you
19 consider to be an acceptable cost per ton of
20 emission reduction for NO2? Did you have a
21 baseline number you were comparing it to and
22 where did that number come from?

1 MR. CROCKETT: We have in our
2 districts, we have adopted a guideline for
3 doing cost effective analyses for NOx
4 basically, which we used here. And that is,
5 I believe it is \$25,000 per ton. I could be
6 mistaken. It is certainly far, far lower than
7 the million dollars that we were looking at
8 for the NOx reductions here.

9 So the answer to your question is
10 that we do have a guideline within The
11 District for NOx. We did not for CO and, as
12 I said, that was the bigger issue here. So we
13 did look around to see what other agencies
14 have been doing by way of adopting guidelines
15 and we looked around to see what other
16 agencies had done in specific permits when
17 they made a cost-effectiveness determination
18 for CO.

19 And as we have explained in our
20 papers and in the Response to Comments, we
21 found the range to be approximately several
22 hundred dollars to several thousand dollars

1 per ton of CO reduced. Obviously that is a
2 much lower number than for NOx but that is
3 because most areas around the country
4 including the Bay Area are attainment for CO,
5 whereas, they are non-attainment for ozone.
6 And so NOx is of much more concern. So you
7 can justify spending a lot more per ton of NOx
8 reduction than you can for CO.

9 JUDGE SHEEHAN: What about the
10 data that was proffered by CAP on the Siemens
11 Facility and their technology? They made a
12 strong case that that was not fairly
13 considered by you.

14 MR. CROCKETT: I assume that that
15 refers to the Caithness --

16 JUDGE SHEEHAN: Cost
17 effectiveness. Right? The Siemens' data?

18 MR. CROCKETT: Yes, we did look at
19 that data. The data that was submitted during
20 the comment period apparently inadvertently
21 included some of the incorrect data and so we
22 looked at that in the Response to Comments.

1 Subsequently, in the petition, the
2 correct data was submitted and so in our
3 response to the petition, we have looked at
4 that information. And even if you take that
5 information as somehow being more preferable
6 or trumping the information from the Mankato
7 facility that we looked at, still you come out
8 with a number that is nowhere near cost
9 effective.

10 We looked at data from the Mankato
11 facility in Minnesota. That was actual
12 operating data that was showing what an
13 auxiliary boiler system was achieving on the
14 ground. The Siemens' vendor data was simply
15 vendor estimates. I would submit that the
16 Mankato data has more force to it because it
17 comes from actual operating data.

18 Even if you were to take away the
19 Mankato data and say that the only evidence in
20 the record was the Siemens data, looking at
21 the numbers there, we have done the
22 calculations and we come out with

1 approximately \$15,000, even when you look at
2 the correct natural gas and natural gas
3 comparison of \$15,000 per ton.

4 We are still not quite clear where
5 the CHABOT Las Positas number of \$10,500 came
6 from. It has not been adequately explained in
7 their comments or in their petition. But it
8 really is a root issue because all of this is
9 an academic exercise because even the lowest
10 number that is out there, even the number that
11 CHABOT Las Positas has put forward of \$10,500
12 approximately, that is still well above what
13 any other agency has used or is using for a
14 cost-effectiveness threshold, which would be
15 somewhere below \$5,000 and maybe even to the
16 hundreds of dollars.

17 So it does not appear that there
18 really is any issue here, beyond just a sort
19 of academic exercise about whether it is
20 preferable to rely on the Mankato data or the
21 Siemens' estimates because ultimately the
22 issue is moot. Under any view of the facts

1 the auxiliary boiler is not going to come down
2 into the range of cost effectiveness here that
3 it would need to be for us to be able to
4 require an auxiliary boiler as the BACT
5 control technology.

6 So for all of these reasons we
7 submit that there is no way that any of these
8 petitions have shown an abuse of discretion on
9 this issue. Certainly, there is no abuse of
10 discretion in choosing to look at the Mankato
11 data instead of the Siemens' data. Even if we
12 were to look to at the Siemens' data, it does
13 not show that the auxiliary boiler becomes
14 cost effective.

15 Let me move on and address while
16 we are on this issue of how we did the cost
17 effectiveness calculation. Let me also look
18 at -- Let me address the issue now that CAP
19 has raised about whether we had an adequate
20 basis in terms of the operating scenario here.

21 We have been very clear throughout
22 that this is not going to be a peaker-type

1 facility with lots of startups and shut downs.
2 This is going to operate more as a base load
3 facility with a high capacity factor.

4 That was the original description
5 that we put out there. And then we received
6 a lot of comments asking for a much more
7 specific analysis of the startup scenario.
8 And this was important because the startup
9 scenario underpins the amount of emission
10 reductions that you will achieve from putting
11 in the auxiliary boiler. With more startups,
12 the more emission reductions you will achieve
13 with the auxiliary boiler.

14 So we went back and took a very
15 hard look at this issue. We looked at the
16 power purchase agreement, which we were asked
17 to do by some of the commenters. The power
18 purchase agreement said that the facility was
19 intended to operate in a six by sixteen
20 operating scenario or operating mode, which as
21 we have discussed already here today means six
22 days a week of operation, sixteen hours per

1 day.

2 When you look at that mode of that
3 profile of operation, it means that you are
4 going to have in a week you are going to have
5 five warm startups when the facility starts up
6 in the morning and the demand rises, and then
7 one warm startup because there is an idle day
8 during the week and after that idle day, you
9 have a warm startup.

10 So that gives you in a normal
11 week, five hot startups and one warm startup,
12 and then we assume that there may be several
13 periods --

14 JUDGE REICH: I assume -- there
15 are a number of times actually in your
16 response to the CAP petition where you talk
17 about six hot starts per week, but I gather
18 that's an error. It is actually five.

19 MR. CROCKETT: That is a
20 mathematical error.

21 JUDGE REICH: All right.

22 MR. CROCKETT: Anyway, but I think

1 that we all understand how the calculations
2 work based on this six by sixteen operating
3 scenario.

4 JUDGE SHEEHAN: What do you make
5 of the point that the reference to the, I
6 believe, May of '07 letter from the California
7 Energy Commission that there would be frequent
8 startups and shut downs.

9 MR. CROCKETT: Well frequent is a
10 relative term here. I mean, the facility is
11 intending to startup and shut down almost
12 every day, six days a week. I think that that
13 can be fairly described as a frequent startup.
14 I mean, that certainly is different than a
15 peaker plant, for example, which may only be
16 used during periods of peak demand in the
17 middle of the summer when there is heavy air
18 conditioning use.

19 A base load facility that is going
20 to startup every day like this one, obviously,
21 that is going to be more frequent. That
22 letter was also submitted in the context of

1 what the maximum daily emissions could be.

2 And it certainly is possible, as petitioners
3 have pointed out, that you could have, on a
4 given day, multiple startups because it is
5 true that we did not impose a limit on the
6 number of startups here, in order to allow
7 this plant to have the flexibility it will
8 need to operate.

9 But that does not mean that a
10 typical day will have multiple startups per
11 day and it does not mean that over the course
12 of the year, which is the time frame you look
13 at when you are doing a cost effectiveness
14 calculation that the typical startup profile
15 of six by sixteen, won't be the kind of thing
16 that you would see on an annual basis.

17 JUDGE SHEEHAN: And is that the
18 way you characterize your response to comment
19 when you say that it is intended to be base
20 load but there will be, I think the quote is
21 "dictated by market demand and circumstances"
22 which on its face could be taken to mean wild

1 fluctuations, more like a peaking facility
2 than base load.

3 MR. CROCKETT: Yes, that is what
4 we said in the Response to Comments. We also
5 responded to comments that said, well you
6 know, you say that is going to operate six by
7 sixteen but do you have any assurances that it
8 won't operate like a peaker, since there isn't
9 a limit on the number of startups. So we went
10 and looked at all the other assurances that we
11 could find and all the other indications that
12 were out there. And everything we could find
13 indicated that it wouldn't operate as a
14 peaker, that it would operate more like an
15 intermediate to base load facility as we
16 described it, more like the six by sixteen
17 operating scenario.

18 Some of the factors that we looked
19 at were the fact that the facility has a very
20 low heat rate. That means it is a highly
21 efficient facility. Those types of facilities
22 are dispatched preferentially when there is a

1 demand for power. For obvious reasons, that
2 a more efficient plant is going to be cheaper
3 to operate, use less natural gas, run those
4 plants more, and keep the peaker plants which
5 cost more to operate, keep those for when you
6 really need all your plants online at once.

7 PGNE has also noted that this
8 facility is going to have a very high demand
9 for natural gas, which is an indication that
10 it is going to be operating with a high
11 capacity factor. And then we also looked to
12 the fact that the PUC has determined that this
13 plant will be subject to California's
14 Emissions Performance Standard for electrical
15 generating facilities. Now that is an
16 emissions standard, greenhouse gas emission
17 standard that applies only to base load
18 facilities, those with a high capacity factor.

19 So, we looked at all these other
20 indications that would be out there beyond
21 just the fact that the power purchase
22 agreement says six by sixteen operation and

1 ever indication that we could find supported
2 the fact that this facility will operate in
3 this manner and certainly shows that there is
4 really no indication at all that the facility
5 is going to operate like a peaker with
6 frequent, frequent is a relative term here,
7 but with highly frequent startups and shut
8 downs.

9 And we put all this information
10 forward in the comments. We responded in the
11 comments specifically on the issue of the
12 auxiliary boiler and whether our emissions
13 profile that underlay our auxiliary boiler
14 cost-effectiveness profile was valid.

15 And then we also provided five
16 pages of Response to Comments a little bit
17 later on in the document where we specifically
18 took up this issue of maximum number of
19 startups, what is a realistic scenario of how
20 many startups this facility will have and
21 whether it will operate like a peaker or a
22 base load facility. And we also addressed the

1 question there of whether we should have a
2 maximum number of startups, a limited number
3 of startups. And we disagreed that there
4 should be any limit because this is a facility
5 that does need to operate as part of its
6 design requirements to be able to meet market
7 demand that is out there. It needs to be able
8 to come online when renewable and other types
9 of resources are not available and then it
10 needs to be able to be offline when those
11 other resources that don't cause greenhouse
12 gas emissions do come online.

13 So we submit that all of this
14 documentation that we looked at and we
15 discussed in Response to Comments and we have
16 been talking about here, clearly support The
17 District's determination that the most
18 credible operating scenario here is the six by
19 sixteen operating scenario, which leads to the
20 three cold startups per turbine, 50 warm
21 startups per turbine and 250 hot startups per
22 turbine operating profile that we used for the

1 cost effectiveness calculations.

2 We put that forward in the
3 Response to Comments and CAP challenged it in
4 our petition. We pointed out all the reasons
5 in our response why we had justified the six
6 by sixteen operating scenario. And then in
7 the reply for the first time, CAP tried to
8 shift gears and move to a different argument
9 that oh no, this is not about whether the six
10 by sixteen operating scenario is a credible
11 operating scenario supported by all the
12 documentation that we looked at but that the
13 cost effectiveness calculation needs to be
14 based on the maximum number of startups that
15 the facility could theoretically have under
16 its permit here. And they pointed to some
17 language in the NSR workshop manual. But when
18 you review the NSR workshop manual, it is
19 clear that you don't necessarily use the
20 maximum worst-case operating scenario full-
21 time throughout the year. It is clear that
22 what you need is a realistic operating

1 scenario. And it is clear that the concern
2 that the concern they expressed in the NSR
3 workshop manual, is that if you have a
4 facility that is not realistically going to
5 operate at its worst case emissions condition
6 throughout the year, that if you use worst
7 case to do your cost effectiveness
8 calculation, you are actually going to
9 overstate the amount of emissions. You are
10 going to overstate the emission reductions
11 that could be achieved and you are going to
12 get an unsupportable cost effectiveness
13 calculation number. An unrealistic cost
14 effectiveness calculation number.

15 So we disagree strongly that
16 anything in the NSR workshop manual says that
17 we would need to use the theoretical maximum
18 number. And in fact there is a very
19 instructive example in the NSR workshop manual
20 which talks about a coding operation that uses
21 a wide range of different codings that have a
22 wide range of EOC content in them. Obviously,

1 unless you have a limit that says you need to
2 use this coding at this time and this coding
3 at that time, which would be very detrimental
4 to the flexibility to the plant, it would not
5 make any sense to assume that they used all
6 the time the single highest EOC content coding
7 there because that would obviously lead to an
8 overestimation of the emissions and the
9 overestimation of the emission reduction
10 number that you put into your cost
11 effectiveness calculation. And it is the same
12 type of situation here. If you assume the
13 facility will have the maximum number of
14 startups allowed on the permit, you will get
15 a gross overestimation of the number of
16 startups and shut downs because that
17 assumption would be the facility to maximize
18 the number of startups simply starts up and as
19 soon as it gets up to its operating
20 temperature and operating speed and is ready
21 to sell power to the grid, it shuts down
22 immediately and stays shut down for two days.

1 So you are going to have another cold startup
2 and then it starts up again just to have some
3 startup operation, and then shuts down again
4 right away.

5 Theoretically, that is possible.
6 Theoretically under the permit, the facility
7 could operate that way but it certainly isn't
8 a realistic operating scenario and it
9 certainly isn't one that would be counseled,
10 that we should use under the NSR workshop
11 manual.

12 But even taking this sort of crazy
13 hypothetical way of operating a power plant,
14 we looked at what the numbers would be if we
15 did assume worst case and we found that, if I
16 can find my numbers here, we found that if you
17 did assume that the facility was operated
18 simply to be a startup facility and never sell
19 any power in normal steady state operations,
20 that under the annual limits in the permit,
21 the facility would be allowed to startup 262
22 times, 262 cold startups, which is the worst

1 case type of startup because it has the
2 largest emissions associated with it.

3 Two hundred and sixty-two cold
4 startups per year, we looked at what the cost
5 effectiveness would be for an auxiliary boiler
6 there and we looked at it under the two pieces
7 of information we had about what emission
8 reductions an auxiliary boiler could achieve.
9 The 31 percent reduction that we saw from the
10 data from Mankato, the facility in Minnesota
11 where we had actual data on what an auxiliary
12 boiler could achieve at an operating plant,
13 that was a 31 percent reduction

14 A 31 percent reduction over 262
15 cold startups comes out to be \$10,093 per ton
16 and these numbers are in our brief so you can
17 check them there.

18 JUDGE REICH: Are they also in the
19 record below, as opposed to just the briefs?

20 MR. CROCKETT: They are not
21 because the issue that you need to use the
22 maximum startup scenario here was not raised

1 in any of the comments. It was not until the
2 reply came out that this issue came up.

3 JUDGE REICH: Okay.

4 MR. CROCKETT: Which is the reason
5 why the whole issue should not be considered
6 by the Board and why the petition should be
7 rejected on this.

8 JUDGE REICH: Okay. Can I ask, I
9 think given the limited amount of time and
10 there is a lot to cover, I want to shift
11 ground a little bit.

12 In your response to CAP, you were
13 talking about kind of what the cold start NO2
14 limit should be, there is a sentence that
15 says, "Petitioner has not pointed to a single
16 facility with a cold start NO2 limit of less
17 than 480 pounds either in its comments or in
18 its petition and The District did not find any
19 in its BACT review either."

20 Is that an accurate, does not
21 Delta Energy have a number lower than 480? I
22 understand that you tried in the surreply to

1 explain why that wouldn't be transferrable
2 limit to Russell City but is that not in fact
3 lower than the 480?

4 MR. CROCKETT: It is in fact lower
5 than 480; 300 is lower than 480. When we were
6 putting together the emission limits here, we
7 were working against an emission with numbers
8 and I think it was, apparently, an oversight
9 that we did not find and explain this 300
10 pound emission limit from Delta. We were not
11 trying to hide the ball on Delta by any means
12 and certainly the Delta emissions data is
13 there in the record and in the documentation.

14 JUDGE REICH: So the discussion
15 that, for instance, I find in the surreply
16 brief about why one would not transfer the 300
17 pound limit from Delta to Russell City is not
18 in the discussion in the record below?

19 MR. CROCKETT: I think that is
20 correct, Your Honor. I would have to go back
21 and double check but I do not believe that we
22 addressed the Delta limit. I don't believe

1 that the Delta limit was something that really
2 was brought to us before --

3 JUDGE REICH: Okay.

4 MR. CROCKETT: -- and what we
5 looked at because we were looking at emissions
6 data there.

7 JUDGE REICH: Okay. To the best
8 of your knowledge, is that the only facility
9 that has a limit below 480?

10 MR. CROCKETT: I believe someone
11 mentioned the Palomar limit but I don't have
12 that number on the tip of my tongue. I am not
13 aware, when I walked in here today I was not
14 aware of other facilities with a lower limit.

15 JUDGE REICH: Okay. On the issue
16 of compliance margin and what I think is
17 fairly termed a 22 percent margin, using your
18 own way of calculating, what factors did you
19 rely on in determining that 22 percent was
20 reasonable? You, I know, talk a lot about
21 variability but was there anything other than
22 variability? Did you investigate the sources

1 of the variability to determine whether some
2 of the higher numbers might be based on
3 factors that would not be relevant for
4 purposes of Russell City? How much sort of
5 scrutiny into that variability did you go into
6 for purposes of establishing a compliance
7 margin?

8 MR. CROCKETT: When we looked at
9 the sources of variability such as the
10 temperature, the equipment maybe when it
11 starts to start up, limitations on what you
12 can do because of the need to ramp up to
13 accommodate the speed that the turbine can
14 ramp at and get it to the place where it needs
15 to be to be able to synchronize with the grid,
16 we also looked at sources of variability in
17 the steam cycle side of the equipment
18 limitations on what you can do in terms of
19 warming up the equipment so you safely do that
20 without harming the equipment on the steam
21 side.

22 Those are factors that apply

1 combined cycle power plants generally. We
2 looked at these facilities that all have these
3 same concerns, including Russell City and all
4 the comparable facilities that we looked at.
5 And we looked at data from these facilities
6 that show that variability. And we looked at
7 that and on the face of it, that sort of
8 seemed to us like we have a valid reason to
9 see variability here that we need to
10 accommodate for and the data in the record
11 that show startup emissions above 480 at some
12 plants, even a few provisions there. We had
13 some that were very low. We had, I think a
14 range of approximately five times between the
15 lowest and the highest. The lowest data
16 point, I think is around 100 for the best
17 startup. The highest emitting startup was
18 around 500. I believe it was 490, something
19 like that.

20 So we looked at the information
21 that we had before us, which included actual
22 emissions test data from a number of

1 facilities. Our engineering judgment,
2 understanding that this is we are talking
3 about staff here, they understand the way
4 power plants work and they understand that
5 there are these limitations in the way a power
6 plant operates when they start up. All of
7 that information seemed highly relevant and
8 transferrable to Russell City because it was
9 a similar type of facility.

10 When we look at different
11 facilities out there that are having startup
12 events that are all over the map and we
13 understand that there are technical reasons
14 why combined cycle facilities like this have
15 startup events that are all over the map, it
16 seemed reasonable that we should put in a
17 compliance margin that would allow for this
18 level of variability. There is no reason to
19 doubt that this level of variability was a
20 real phenomenon that you will see with
21 facilities starting up. You know, as I said
22 before, we had some data points that were

1 actually above where we put the limit.

2 So when people talk about the
3 compliance margin and they talk about one
4 specific facility, you need to keep in mind
5 that we were looking at a number of facilities
6 here and based on the variability we saw the
7 staff's technical judgment here, professional
8 engineering judgment that it would be
9 difficult to impose anything below 480 pounds
10 that would be consistently achievable
11 throughout the life of the facility, given the
12 high degree of variability that we see and the
13 reasons for it. And that is the basis on
14 which a BAAQ limit must be set so that it can
15 be achievable consistently throughout the life
16 of the facility.

17 JUDGE REICH: There was a
18 statement in your response to Mr. Sarvey that
19 troubled me a little bit and I would like to
20 understand what you are saying there.

21 Your response indicates that
22 petitioner "offers no basis for presuming this

1 facility will perform as well as the best
2 performing of the similar facilities." And I
3 would have thought that it really would have
4 been both your burden and approach to assume
5 that it would in fact comply with -- that it
6 would perform comparable to the best
7 performing similar facility, unless there was
8 something to suggest otherwise.

9 So are you shifting the burden to
10 the petitioner to make that demonstration or
11 is that not quite the approach you took or
12 what do I make of that statement?

13 MR. CROCKETT: Well first of all,
14 I would like to point out that there is a
15 reason to distinguish the 300 pound limit --

16 JUDGE REICH: Yes, I know. This
17 isn't specific to Delta but it talks about
18 similar facilities which is why I would have
19 thought that for similar facilities, you would
20 have started with the assumption that this
21 would perform the same way, unless there was
22 some reason to conclude otherwise.

1 MR. CROCKETT: All of the
2 facilities that we looked at are similar
3 facilities. For whatever reason about the way
4 the facilities have been built or operated,
5 you can end up with some that have higher or
6 lower bit of range. Certainly at Delta they
7 are optimizing their NOx emissions there at
8 the expense of CO.

9 But the point about Mr. Sarvey not
10 having brought up any technical information
11 really goes to the fact that he really did not
12 bring up these issues earlier because
13 everything is focused on emission limits,
14 which is part of the reason why we did not
15 respond in more detail on the specific limit
16 that is involved in Delta. And I was
17 referring to the point that a petitioner needs
18 to bring the issue forward so the agency can
19 consider it and then give the agency an
20 opportunity to respond and then come back with
21 a reason why the Agency's response was
22 erroneous here.

1 And really what Mr. Sarvey has
2 done here has brought this issue up in a way
3 that we haven't had a chance to come right up
4 front and give our reasons for Delta. So that
5 was what the sentence was referring to.

6 JUDGE REICH: So you are
7 suggesting you didn't really think you needed
8 to look at what limits were set for comparable
9 facilities, unless somebody asked you to look
10 at that? I mean, that is what it sounds like
11 and I am surprised to hear that.

12 MR. CROCKETT: That was not the
13 way we looked at this and we did look at the
14 emission limits. I mean, we started with a
15 480 pound limit from Metcalf. It appears that
16 in the record we did not focus on the 300
17 pound limit at Delta for whatever reason. We
18 looked at an awful lot of information.
19 Obviously, we didn't focus clearly on this
20 issue and we are looking more at whether we
21 could justify this based on the emissions data
22 that we were looking at, the actual emissions

1 data.

2 But that is really what the notice
3 and comment process is for is that when the
4 Agency has looked at a whole bunch of
5 information but maybe not looked at everything
6 squarely the way that they should have, a
7 common trick would be to come forward and
8 correct the agency's oversight to the extent
9 it may be an oversight and that is not what
10 Mr. Sarvey did here.

11 JUDGE REICH: The limits that were
12 set here would have been the limits
13 irrespective of whether they used current but
14 upgraded turbines or new turbines. Is that
15 correct?

16 MR. CROCKETT: That is right. The
17 BAAQ emission limit is not necessarily a
18 controlled technology per say. It is based on
19 a controlled technology demonstration.

20 JUDGE REICH: So the existence of
21 the turbines and the costs associated with
22 replacing or disposing of them played no part

1 in your analysis.

2 MR. CROCKETT: No. And that is
3 clear from the record.

4 JUDGE STEIN: I guess what I am
5 struggling with is in the effort not to set
6 the compliance margin too high so that you are
7 setting a limit that really can't, you know,
8 realistically be consistently achieved, what
9 measures are there to assure that you are not
10 in fact setting it too low?

11 You know, particularly in a
12 program like BACT where you are, as a general
13 proposition, trying to be looking at really
14 what is the best achievable for these kinds of
15 facilities. So is there anything else you
16 want to add in response to this question in
17 addition to what you have already shared with
18 Judge Reich?

19 MR. CROCKETT: About who we were
20 concerned about not setting the BAAQ limits
21 too low?

22 JUDGE STEIN: Uh-huh.

1 MR. CROCKETT: Well, it is a very
2 good point. I mean, we need to make sure that
3 the limits are achievable and when we see a
4 great deal of variability in the record, we
5 need to be very careful that we don't set a
6 limit that is too low, that would not be
7 achievable.

8 And we have had arguments from
9 some sides that we have set BAAQ limits that
10 are too low. In fact CHABOT Las Positas is
11 arguing that we should have set a nine pound
12 per hour BAAQ limit for particulate matter
13 emissions because they are saying that that is
14 realistically the number that needs to be
15 used. We disagree with that. We think that
16 7.5 is a good number. We actually had
17 comments that we should go below 7.5.

18 But so I think it is a good
19 observation that we need to, as a regulatory
20 agency, draw a balance here between people who
21 want to have a limit set as high as possible
22 and to give them as much compliance leeway and

1 to have people who want lower limits to ensure
2 the emissions are limited as much as possible.
3 And it is a difficult job for an agency to
4 understand where to draw that line as a
5 technical matter.

6 We believe that our staff have
7 exercised our professional judgment in a very
8 sound way and have done this in a way that was
9 defensible and consistent with all the
10 evidence that we looked at and so forth.

11 So we would submit that there is
12 no reason for this Board to grant review of
13 that technical determination.

14 JUDGE REICH: Just to make sure I
15 understand on a totally different issue. You
16 have some discussion relative to the issue of
17 dry cooling that suggests that had you done a
18 BACT analysis that included dry cooling, you
19 would have opted for wet cooling at step four,
20 rather than dry cooling. But it is my
21 understanding you did not in fact do a BACT
22 analysis that included dry cooling. Is that

1 correct?

2 MR. CROCKETT: Well, there are two
3 reasons why we decided not to require dry
4 cooling. One is that it appears that it would
5 be impermissibly redefining the source in
6 order to require the facility design to use a
7 wet cooling system for very good reasons to
8 require them to jettison that design and use
9 to use dry cooling instead.

10 But then we also did look at the
11 substance of the BACT analysis would be there.
12 And we looked at all of the adverse ancillary
13 environmental and energy impacts that would be
14 associated with dry cooling.

15 JUDGE REICH: And when you say you
16 looked at it, you looked at it while you were
17 considering what BACT for the cooling tower
18 would be?

19 MR. CROCKETT: Yes, we did. We
20 did it in Response to Comments and the comment
21 was raised about dry cooling and we looked at
22 that and potential technology that was out

1 there. And we found two reasons why we
2 disagreed that dry cooling should be required
3 as a BACT control technology. One was a legal
4 reason redefining the source doctrine and the
5 second was looking at all of the ancillary,
6 environmental, and energy impacts that will be
7 associated with, that would offset the
8 benefits of going to dry cooling in this
9 particular case.

10 JUDGE REICH: Okay, thank you.

11 MR. CROCKETT: Thank you, Your
12 Honors.

13 JUDGE REICH: Russell City.

14 MR. POLONCARZ: Your Honors, thank
15 you for allowing us to appear before you
16 today. We would also like to thank the Board
17 for rescheduling oral argument from next month
18 in recognition of the time constraints the
19 project is facing.

20 Next week will mark two years
21 since the Board issued the remand order as a
22 result of the first appeal filed by Mr.

1 Simpson. In response to the Board's first
2 remand order, the District has done a
3 significant amount of work to correct the
4 error it made when it failed to assure
5 adherence with Part 124's notice requirements.

6 As the District indicated, these
7 efforts amounted to more than just additional
8 process.

9 In response to public comments,
10 The District strengthened the permit and
11 analyses in many respects. It reduced
12 emissions limits for startup, shut down and
13 steady state operations. It also produced a
14 235 page responses to public comments document
15 that goes far beyond the minimum requirements
16 established by Part 124.

17 The District's development of the
18 permit also had to respond to significant
19 changes in the PSD program. For PM 2.5, EPA
20 issued a stay of the surrogate policy and
21 proposed to repeal it, which required the
22 District to conduct a cumulative impacts

1 analysis for compliance with PM 2.5. This
2 needed to be done, even though the Bay Area
3 had recently been re-designated non-attainment
4 for PM 2.5. That designation remains in
5 regulatory limbo, due to the change in
6 administration. It was signed but never
7 published in the Federal Register at the time
8 that the administration changed.

9 For greenhouse gases, we worked
10 with the District to propose a greenhouse gas
11 BACT analysis soon after the Board issued its
12 decision In Re Deseret and just days before
13 Administrator Johnson issued his December 18,
14 2008 memorandum on whether certain pollutants
15 were subject to regulation under the Clean Air
16 Act.

17 Although issuance of that memo
18 meant that greenhouse gases would not be
19 considered subject to regulations for the time
20 being, we nevertheless decided to proceed with
21 establishing what amounted to the first BACT
22 limitations on greenhouse gas emissions ever

1 included in a federal PSD permit.

2 In sum, since the time when the
3 Board remanded the original PSD permit, the
4 District has scrupulously adhered to public
5 participation requirements, responded to an
6 evolving regulatory landscape and produced a
7 permit that the District's executive officer
8 has described as "the most stringent the air
9 district has ever issued."

10 All these efforts aside, the
11 petitioners remained dissatisfied with the
12 District's decision. Their dissatisfaction
13 takes the form of on the one hand lengthy
14 arguments challenging The District's technical
15 analyses and on the other, inflammatory
16 accusations of wrongdoing on the part of The
17 District.

18 In all cases, however, petitioners
19 have failed to raise any issue that
20 demonstrates error or otherwise warrants
21 review. Nothing petitioners have said today
22 changes this fact. I would like to address a

1 number of points that were raised in these
2 proceedings.

3 First, there is absolutely no
4 basis for CHABOT's claim that The District
5 erred in facing its modeling analysis on the
6 federally enforceable permit limit of 7.5
7 pounds per hour, rather than the higher rate
8 that appeared in the initial draft permit.
9 Simply put, CHABOT has absolutely no support
10 in law, regulation, guidance, or in fact to
11 assert that the permitted emissions limit does
12 not constitute the worst case emissions for
13 modeling.

14 In Prairie State, the Board
15 dismissed arguments similar to CHABOT's here
16 that the permitting agency had used the wrong
17 emissions rate in its modeling analysis. The
18 Board dismissed those arguments because as the
19 district did here, the Agency used the
20 federally enforceable limit as required by
21 Appendix W.

22 Moreover, CHABOT provides no

1 credible evidence to dispute The District's
2 determination that 7.5 pounds per hour is in
3 fact achievable. The District had a solid
4 basis for setting back with a level existing
5 equipment had demonstrated it could achieve in
6 more than 95 percent of source tests.

7 The remaining five percent test
8 results could be attributed to anomalies in
9 the test methods which can be controlled
10 through the application of proper quality
11 assurance and quality control procedures.

12 In the late comments submitted by
13 other power plant developers saying vendors
14 will only guarantee a higher rate demonstrates
15 no error on The District's part. Both the NSR
16 manual and decisions of this Board made clear
17 that BACT is based not on a guarantee but on
18 multiple sources of information, including
19 manufacturer's data, engineering estimates,
20 and the experience of other sources.

21 In fact, when Calpine was first
22 willing to accept nine pounds per hour as a

1 BACT limit for similar facilities, vendors
2 were only willing to guarantee an emissions
3 rate that was as much as twice that amount but
4 the data indicated to Calpine, just as they do
5 here, that it could better.

6 Over time, as Calpine demonstrated
7 compliance with this limit, vendors were
8 willing to guarantee it as well. Ironically,
9 CHABOT had previously argued in favor of an
10 even lower limit. In comments it submitted to
11 The District, CHABOT argued BACT should be
12 based on a permit that imposes a six pound per
13 hour limit instead. For CHABOT to now say
14 that 7.5 pounds is too low, based on nothing
15 more than late filed comments from other power
16 plant developers would amount to a bait and
17 switch that should not be allowed on appeal.

18 Even if 7.5 pounds per hour were
19 lower than the level that would have otherwise
20 been found to BACT PM, there is absolutely
21 nothing wrong with imposing a lower limit at
22 the results of modeling analysis. That is the

1 way permitting agencies have written permits
2 since the beginning of the PSD program. Both
3 the NSR manual and EPA guidance issued as
4 recently as last month support this fact. The
5 NSR manual expressly acknowledges that lower
6 limits than would otherwise result from the
7 top down method may be necessary to avoid air
8 quality impacts. But "in all cases,
9 regardless of the rationale for the permit
10 requiring a more stringent emissions limit
11 than would have otherwise been chosen as a
12 result of the BACT selection process, the
13 emissions limit in the final permit and
14 corresponding control alternative represents
15 BACT.

16 In light of this, CHABOT's
17 suggestion of any wrongdoing on the part of
18 The District in setting a limit based on the
19 modeling analysis simply falls flat.

20 Moving on to CHABOT's arguments
21 concerning environmental justice, CHABOT does
22 little more than rehash its arguments about

1 defects in the PM 2.5 model. The District
2 gave due consideration to environmental
3 justice and found there would be no
4 significant adverse impacts on any community,
5 regardless of its makeup. Although CHABOT
6 focuses solely on the 24-hour PM 2.5 max, The
7 District also conducted a health risk
8 assessment and considered carcinogenic risk,
9 as well as acute and chronic non-cancer risks
10 and found them all to be less than
11 significant.

12 Moreover, the facilities emissions
13 of PM 2.5 were found to have a de minimis
14 impact on air quality. At all times and
15 locations where there were predicted
16 exceedances of the 24-hour standard, the
17 facility's contribution was always less than
18 significant. In Prairie State, the Board
19 specifically held that where a facility's
20 contribution model exceedances was less than
21 the sill, its impact was appropriately
22 considered de minimis or trivial. In claiming

1 that the project's impacts would not be de
2 minimis, CHABOT essentially argues any model
3 concentration above the sill in an
4 environmental justice community is grounds for
5 denying a PSD permit, even when the source has
6 been demonstrated not to cause or contribute
7 to a violation of the next.

8 First, aside from its bald
9 assertion that Russell City would have
10 significant impacts on the identified priority
11 environmental justice community, CHABOT has
12 presented no credible evidence that the
13 project's emissions will have greater than a
14 de minimis impact upon that community.

15 As we demonstrated in our
16 response, all of Russell City's significant
17 impacts for either the 24-hour or the annual
18 max fall outside of the boundaries of the
19 identified community.

20 Second, there is no basis in EPA
21 guidance or Board precedent for CHABOT's
22 suggestion that a model concentration in

1 excess of a sill in an environmental justice
2 community would constitute grounds for denying
3 a PSD permit. Rather, just as the petitioner
4 did in Prairie State, CHABOT has failed to
5 show "that there is a potential nontrivial
6 impact that would have a disproportionately
7 high and adverse effect on its environmental
8 justice population.

9 Accordingly, its claims that The
10 District failed to appropriately consider
11 environmental justice must fail.

12 Moving on to CAP's argument
13 concerning the daily limit, what CAP argued
14 was that the daily limit allowed for two cold
15 startups of an individual turbine per day.
16 What we heard today was a bit different.
17 That, as a matter of fact, is plainly false.
18 A cold startup only occurs after 48 hours when
19 a turbine has been shut down. And therefore,
20 by definition, if one cold start would have
21 occurred during the day, the next cold start
22 would be either warm or hot, depending on

1 whether eight or more hours had elapsed since
2 the shut down.

3 In fact, the daily emissions limit
4 was set upon the assumption that there could
5 be one cold start and one hot start per day
6 per turbine, upon the assumption that if,
7 during a cold start, which is a complex
8 process, the turbine should trip, they would
9 need to restart it again.

10 At bottom, CAP contends that to
11 rely upon the six by sixteen operating
12 scenario to eliminate either flex plant
13 technology or an auxiliary boiler is BACT, The
14 District should have imposed permit conditions
15 that limited the number of cold and warm
16 startups. However, CAP fails to identify any
17 error in The District's explanation that it
18 was not imposing limits on the number of
19 startup events because power plants need
20 flexibility to be dispatched to assure a
21 reliable grid.

22 CAP also does not refute The

1 District's conclusion that the number of
2 startups and shut downs are limited indirectly
3 by the annual limits.

4 CAP's central contention that the
5 NSR manual requires use of the worst case
6 emissions, rather than a reasonable scenario,
7 such as assumed by The District is immaterial.
8 As The District pointed out, one could assume
9 that as an absolute theoretical worst case,
10 the project would always only be operated in
11 a startup mode. That is, it would only ever
12 start up and then immediately shut back down.
13 Such a dispatch scenario is wholly
14 unrealistic, since a facility would not be
15 dispatched just to start up and shut back
16 down. Doing so would waste both PGNE's gas
17 supply and rate payer's dollars. However, as
18 pointed out by both the District and Russell
19 City in their surreplies, even under this
20 wholly unrealistic dispatch scenario, the
21 resulting reductions achieved through use of
22 an auxiliary boiler still would cost more than

1 required to meet BACT.

2 Further, to limit the number of
3 cold and warm startup events as CAP's logic
4 suggests, while still allowing the facility to
5 be dispatched for intermediate to base load
6 service, would essentially require imposition
7 of a condition mandating operation for at
8 least six days a week for at least 16 hours
9 per day, even when the power is not required
10 and the plant has not been dispatched by the
11 grid operator. Such a permit condition would
12 completely ignore the realities of how power
13 plants are dispatched to meet instantaneous
14 demand. And CAP can point to no guidance or
15 precedent that would require of imposition of
16 such a condition to satisfy the federal BACT
17 requirement.

18 On CAP's argument on the
19 delegation agreement, the delegation agreement
20 in no way incorporates the Air District's SIP
21 approved role, as CAP argues. Rather, it
22 merely provides that The District shall issue

1 PSD permits under this partial delegation in
2 accordance with the PSD requirements of Reg 2
3 Rule 2 and 52.21, which allows The District to
4 issue PSD permits along with permits
5 satisfying its own SIP approved rules in an
6 integrated fashion and is no different than
7 the terms of the delegation agreement at issue
8 in West Suburban Recycling.

9 CAP's argument would essentially
10 conflate issuance of a PSD permit under
11 delegation from EPA with issuance of a PSD
12 permit under a SIP approved permitting
13 program, which is exactly what the Board said
14 could not be done in West Suburban Recycling.

15 Further, CAP's contention that The
16 District impose an unprecedented compliance
17 margin is plainly false. The Board has upheld
18 compliance margins of 25 percent or more in
19 other cases. In Newmont, it upheld margins of
20 17 to 26 percent and in Kendall and in Kinnock
21 II, it upheld margins of 25 percent. Compared
22 to the maximum startup events observed at the

1 Palomar facility, the compliance margins for
2 Russell City are 9 to 22 percent for cold
3 starts and 21 percent for hot startup events.

4 In sum, the overwhelming weight of
5 Board precedent supports the appropriateness
6 of The District's methods in establishing BACT
7 and CAP has failed to meet its heavy burden in
8 challenging The District's technical
9 determinations in this regard.

10 Mr. Sarvey has similarly failed to
11 demonstrate any error in The District's
12 establishment of startup and shutdown limits.
13 His arguments suffer from the same error as
14 CAP in failing to recognize the Distinction
15 between observed emissions rates and
16 enforceable limits. Mr. Sarvey should be
17 barred from raising the Delta Energy Center's
18 300 pound per hour NOx limit during cold
19 startup events as he attempted in reply. No
20 one ever, during the course of these
21 proceedings raised this limit as an
22 appropriate basis for establishing BACT. Had

1 anyone raised this limit, The District could
2 have explained why, as indicated by an
3 analysis Russell City submitted very early on
4 in these proceedings and which is part of the
5 administrative record. The Delta was not an
6 appropriate BACT limit, since it came at a
7 considerable cost in terms of higher CO
8 emissions. However, the issue was never
9 raised and certainly cannot be raised now by
10 way of reply.

11 JUDGE REICH: Can I ask the same
12 question I asked of Mr. Crockett? Are you
13 aware of any other facility that has a lower
14 limit than the 480?

15 MR. POLONCARZ: I believe the
16 Caithness facility has a lower limit for when
17 it is using the auxiliary boiler but a higher
18 limit for when it is not. But most notably,
19 the Caithness permit does not require them to
20 use the auxiliary boiler during startup. It
21 merely provides that if they should use it at
22 their option, depending on whether they are

1 operating the auxiliary boiler, as these are
2 primarily operated for freeze protection, that
3 if they should use it, the limit is lower.
4 But if they decide not to use it because if it
5 were backed, they would have had to use it.
6 It is as simple as that. So I am not aware of
7 any other permit like that is lower.

8 JUDGE REICH: Okay, thank you.

9 MR. POLONCARZ: Regarding Mr.
10 Sarvey's cooling tower BACT analysis, The
11 District found that the facility was
12 specifically designed from the very beginning
13 to make use of recycled water from the City of
14 Hayward's adjacent wastewater treatment plant.
15 The District noted that the initial 2002
16 energy commission decision explicitly
17 identified the ability to use recycled water
18 is one of the primary objectives of the
19 project. Accordingly, The District concluded
20 that use of a wet cooling system taking
21 advantage of the City's Waste Water "is thus
22 clearly an integral design element of the

1 project that had clear environmental
2 benefits." Mr. Sarvey's bare assertion that
3 with dry cooling, "the source would still be
4 a combined cycle natural gas electrical-
5 generating facility amounts to an overly broad
6 characterization of the source that would run
7 contrary to Board precedent.

8 In this case, The District did
9 exactly as required by Board precedent. It
10 took a hard look at the facility's basic
11 design and concluded that a wet cooling system
12 was an inherent design element of the project.

13 In conclusion, we have heard from
14 petitioners on many different issues today but
15 none of these issues warrants review of any
16 permit condition or remanded the permit to The
17 District. In all instances, petitioners have
18 failed to meet their burden in challenging The
19 District's technical determinations and have
20 failed to demonstrate clear error in The
21 District's decision.

22 The PSD permit issued to Russell

1 City Energy Company is procedurally correct
2 and technically sound and well reasoned.
3 Accordingly, Russell City Energy Company
4 respectfully requests that the Board dismiss
5 all of petitioner's claims as expeditiously as
6 possible.

7 JUDGE REICH: Okay, thank you.

8 Okay, we had three petitioners who reserved
9 two minutes each. So we will go back to them
10 for rebuttal, the first one being CHABOT Las
11 Positas Community College District. Ms.
12 Hargleroad.

13 MS. HARGLEROAD: Thank you, Your
14 Honor. To put the BAAQMD's argument in
15 perspective that somehow CHABOT should have
16 been objecting, we refer the Board to pages 52
17 to 53 of the additional statement of basis.
18 We also refer the Board to our September 16,
19 2009 letter to BAAQMD. Some pages relevant
20 are pages eight to nine, citing and referring
21 to Volume 72 of the Federal Register. And we
22 can also provide other references, if the

1 Board wishes.

2 We also object to Mr. Crockett's
3 and Mr. Poloncarz's misconstruction of our
4 argument on the nine pounds emission rate.
5 This goes to The District's failure to
6 properly model the worst case scenario, which
7 is distinguishable from the requirements of
8 BACT. And we refer the Board to In Re
9 Northern Michigan, the Board's recent case
10 decided February 2010 at Volume 14.

11 Also we disagree or we object to
12 The District's prejudicial failure to address
13 the Caithness records upon which they now are
14 heavily relying on the cost effectiveness. We
15 did not agree to Calpine's, the Applicant's
16 estimated cost for the auxiliary boiler. We
17 simply took that number and stated if you
18 apply the Caithness records, which the
19 District had or had access to, that it is
20 about six times less or reduced than what The
21 District was estimating. And in fact, given
22 Mr. Crockett's discussion here at oral

1 argument, we would like to make an offer of
2 proof that the cost could be less, as low as
3 less than \$2,000 per ton or we remain ready
4 and willing to make that offer upon remand.

5 Also --

6 JUDGE REICH: Okay, I think we
7 have heard that argument, Ms. Hargleroad.
8 Thank you. We are going to turn to Mr.
9 Sarvey.

10 MS. HARGLEROAD: Thank you.

11 MR. SARVEY: I just wanted to
12 address a question that was asked to me
13 earlier that I didn't get an opportunity to
14 address. And one was that the OpFlex
15 technology did not provide a manufacturer's
16 guarantee. And as the Russell City attorney
17 so eloquently explained, a manufacturer's
18 guarantee is not necessary in the BACT
19 determination.

20 So the other issue was ammonia, or
21 excuse me, the early ammonia ejection at the
22 Palomar facility using the OpFlex technology.

1 That is going to be a similar process with
2 RCEC and Palomar. They are both going to use
3 some form of ammonia injection to control NOx.
4 So the facilities are very similar in that
5 respect.

6 One thing that distinguishes the
7 Delta project CO emissions is the fact that
8 the Delta project does not have a CO catalyst.
9 And in fact, the Russell City has a CO
10 catalyst and so do the other projects that The
11 District compared Russell City to. So the CO
12 catalyst is an important factor.

13 Earlier, it was mentioned that
14 Delta, they could have looked to other permit
15 limits besides Delta and they could have
16 looked at other emission rates, besides what
17 Delta had and the Metcalf project had a 335
18 pound maximum emissions rate, which was 30
19 percent compliance margin over the 480 that
20 The District ultimately set. The Palomar
21 facility had a 375 pound emission rate and
22 that was 22 percent more or 22 percent less

1 than the emission rate of 480 pounds that the
2 District ultimately adopted. And that is all
3 I have. Thank you.

4 JUDGE REICH: Okay. Petitioner
5 CARE.

6 MR. BOYD: CARE gives its two
7 minutes to Helen Kang.

8 MS. KANG: If the Board would
9 allow this --

10 JUDGE REICH: Excuse me. No, that
11 is not permissible. Either one of the people
12 who already spoke should speak on rebuttal or
13 waive your two minutes. I don't want a fourth
14 party participating at this stage.

15 MS. KANG: Your Honor, this is
16 Citizens Against Pollution. CARE is ceding
17 its time to Citizens Against Pollution, rather
18 than speaking on its own behalf.

19 JUDGE REICH: No, we are not doing
20 that. Each petitioner is a separate entity.
21 Unless I hear something otherwise, I am
22 assuming CARE has no rebuttal.

1 MR. SIMPSON: We have rebuttal, sir.

2 JUDGE REICH: All right then you
3 have got your two minutes. Go ahead.

4 MR. SIMPSON: Thank you. This is
5 Rob Simpson speaking.

6 The Court's effort to impose logic
7 on the potential minimum and maximum
8 availability of this facility doesn't examine
9 the regulatory process environment here that
10 allows a developer to profit from captive rate
11 fares regardless of its energy production and
12 environmental impact.

13 The developer makes more on a rate
14 through their PPA the less they operate. So
15 these frequent startups and shut downs are a
16 benefit to this developer and this six hundred
17 million dollar price tag is only supported by
18 that regulatory environment.

19 The very basis of all these
20 modeling scenarios should be based on
21 monitoring that never occurred in the City of
22 Hayward. From where I live, I can see

1 Oakland, Hayward, Fremont, and I can see the
2 diminished air quality traveling from Oakland
3 to Hayward. If the Oakland station was used,
4 which wasn't even built seven, ten years ago
5 when the Fremont Station was proposed for
6 monitoring for this facility, then there would
7 be an entirely different set of modeling for
8 this facility and that is what needs to
9 happen, is the closer more representative open
10 station should be utilized before all this
11 conversation of monitoring. Thank you.

12 JUDGE REICH: Thank you, Mr.
13 Simpson.

14 That concludes argument this
15 afternoon. I would like to thank all the
16 participants for participating and for their
17 level of information they provided to the
18 Board. I am sure it is going to be helpful to
19 the Board in its deliberations and this matter
20 stands adjourned.

21 (Whereupon, at 3:06 p.m., the
22 foregoing hearing was adjourned.)

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