

STATE OF WEST VIRGINIA

AIR QUALITY BOARD

* * * * *

TUCKER UNITED, WEST VIRGINIA*

HIGHLANDS CONSERVANCY, and * Appeal No.

SIERRA CLUB, * 25-02-AQB

Appellants *

vs. *

DIRECTOR, DIVISION OF AIR *

QUALITY, DEPARTMENT OF *

ENVIRONMENTAL PROTECTION, *

Appellee *

and *

FUNDAMENTAL DATA, LLC, *

Permittee/Intervenor *

* * * * *

BEFORE: J. MICHAEL KOON, Chair

Grant Bishop, Member

Robert C. Orndorff, Member

R. Thomas Hansen, Member

Leonard Knee, Member

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HEARING: Thursday, December 4, 2025

8:37 a.m.

LOCATION: WV Department of Environmental Protection

601 57th Street, Southeast

Charleston, WV 25304

WITNESSES: Jerry Williams, Joseph Kessler, Leah Blinn

Reporter: Madison Adkins

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A P P E A R A N C E S

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A P P E A R A N C E S (cont.)

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ALSO PRESENT:

KENNA M. DERAIMO
SCOTT WYLAND

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COURT REPORTER: Sir, you did want --- you
guys automatically get a copy of the transcript.

Correct?

ATTORNEY GRAY: I don't. Yeah, the ---
the Board does, yes.

COURT REPORTER: Okay.

Did you want a copy?

ATTORNEY GRAY: No, I --- no. You'll have
to ask Kenna how to do the, who gets what. I definitely
don't want a copy.

COURT REPORTER: Okay.

The transcripts are setup the same way
they were yesterday.

Correct?

MS. DERAIMO: They should be, yes, yes.

COURT REPORTER: For who gets a copy?

MS. DERAIMO: For who gets a copy, yes.

(WHEREUPON, AN OFF RECORD DISCUSSION WAS HELD DURING THE
PROCEEDING.)

CHAIR: All right.

1 So I'm Mike Koon. I'm Chairman of the Air
2 Quality Board, and we're here to continue our hearing on
3 Tucker United, West Virginia Highlands Conservancy, and
4 Sierra Club versus the Director, Division of Air Quality,
5 West Virginia Department of Environmental Protection,
6 Appeal Number 25-02-AQB.

7 What I'm going to do at this point is ask
8 the parties to introduce themselves, beginning with the
9 Air Quality Board members to my right.

10 MR. HANSEN: I'm Tom Hansen.

11 MR. BISHOP: I'm Grant Bishop.

12 MR. ORNDORFF: Bob Orndorff.

13 CHAIR: And Leonard.

14 MR. KNEE: Hi. This is Leonard Knee.

15 CHAIR: All right.

16 And our counsel, I don't think we
17 introduced you yesterday, but our counsel.

18 ATTORNEY GRAY: John Gray, Attorney
19 General's Office.

20 CHAIR: And then the Appellant.

21 ATTORNEY BECHER: My name is Mike Becher
22 from Appalachian Mountain Advocates on behalf of the
23 Appellants, Tucker County United, West Virginia Highlands
24 Conservancy, and Sierra Club.

1 ATTORNEY DRIVER: Scott Driver for
2 Appellee, West Virginia Department of Environmental
3 Protection.

4 ATTORNEY YAUSSY: And on behalf of the
5 Intervener, Fundamental Data. My name is Dave Yaussy
6 with the law firm of Spilman, Thomas and Battle.

7 CHAIR: And is Mr. Walls on today?

8 ATTORNEY YAUSSY: He won't be joining us
9 until 10:30 or so.

10 CHAIR: Okay. All right.

11 ATTORNEY YAUSSY: But --- but we will be
12 joined by Jim Walls, who's also with my law firm.

13 CHAIR: All right.

14 With that where we left off yesterday was
15 Mr. Becher was, he finished his expert witness. You had
16 one other witness to call?

17 ATTORNEY BECHER: Yes, and just for
18 logistical purposes, I --- I spoke to Mr. Driver this
19 morning. We --- we intend to call Mr. Williams for ---
20 for a few issues on our own. We had agreed that I will
21 ask my questions. Mr. Driver can do a combined Cross and
22 Direct. Mr. Yaussy could ask questions, and I can do a
23 Recross so that he's not coming and going. If that's
24 acceptable, if that would work with Mr. Yaussy.

1 ATTORNEY YAUSSY: I'll take ---.

2 MS. DERAIMO: I'll show you where the
3 shredder is if you need to.

4 CHAIR: All right.

5 So are we going to have ---?

6 ATTORNEY DRIVER: Mr. Chairman, before we
7 get started, this is Scott. I was --- I was going to ask
8 the Board to caution any remaining witnesses we've got
9 who are familiar with the --- with the unredacted permit
10 application to refrain from giving any information like
11 manufacturer's names, number of turbines, configuration,
12 anything like that. I think Mr. Williams at least was
13 not present when we gave those instructions yesterday. I
14 would just --- I would just like to make sure that he
15 understands not to bring up any of the information from
16 the unredacted application.

17 CHAIR: Okay.

18 Is he on the line now?

19 ATTORNEY DRIVER: I believe he is. Jerry,
20 are you on there?

21 MR. WILLIAMS: Yes, I am.

22 CHAIR: All right.

23 ATTORNEY DRIVER: Okay.

24 CHAIR: So you heard Mr. Driver's

1 admonition?

2 MR. WILLIAMS: I did, thank you.

3 CHAIR: All right.

4 And again, as we --- as we said yesterday
5 with the counsels, if we start to stray into that area,
6 any of the three of you, raise a red flag and we'll see
7 what we have to do. If we have to, you know, adjourn
8 people or move --- move people out when we do that.
9 Okay. All right.

10 So is --- is Scott taking the lead is how
11 we're going to do that?

12 ATTORNEY BECHER: I'm just going to take
13 the lead if that's fine.

14 CHAIR: You're going to take the lead?
15 Okay. All right.

16 Mr. Becher, then go right ahead.

17 ATTORNEY BECHER: Good morning, Mr.
18 Williams.

19 MR. WILLIAMS: Good morning. How are you?

20 CHAIR: Wait a minute. Again, need to
21 swear him in. I'm sorry.

22 ATTORNEY BECHER: Oh, I'm sorry. Yes.

23 COURT REPORTER: Hi. Can you please raise
24 your --- your right hand?

1 Q. Okay.

2 And you were in fact the engineer who wrote the
3 engineering evaluation?

4 A. That is correct.

5 Q. And you responded to, you wrote the response to
6 public comments?

7 A. That is correct.

8 Q. Okay.

9 And you reviewed the application in its
10 entirety?

11 A. I did.

12 Q. Okay.

13 And did that include review of the redacted
14 information?

15 A. Yes.

16 Q. Okay.

17 And you currently, let me ask this. Do you
18 have a copy of the certified record in front of you?

19 A. I could access it on the Internet. I have some
20 of the documents pulled up, you know, for reference, if
21 need be. I don't have, like, so possibly. If not, I can
22 find it.

23 Q. We'll --- we'll see where we --- we get.

24 A. Okay.

1 Q. Before we get there, obviously when you had.
2 When you had your --- your duties to review this permit,
3 you were an employee of the West Virginia Department of
4 Environmental Protection.

5 Correct?

6 A. That is correct.

7 Q. And are you currently employed by the West
8 Virginia Department of Environmental Protection?

9 A. No, I am not.

10 Q. Who's your current employer?

11 ATTORNEY DRIVER: And if I could jump ---
12 if I could jump in here. I'm sorry, Mr. Williams is no
13 longer employed by DEP. He has faced, and I have no
14 reason to think by anybody in the courtroom. He has
15 faced some harassment in the past related to this case.
16 I would ask that unless some kind of relevance could be
17 proved for his current employer that we just stick to
18 when he was employed with the DEP and his title there.

19 ATTORNEY BECHER: I believe it is relevant
20 because he had access to the non-redacted data. I
21 believe he now works for an entity that does work on
22 behalf of potential competitors on oil and gas, yeah.
23 Diesel and gas fired power plants.

24 ATTORNEY GRAY: What is --- what is the

1 relevance to the ongoing issue of whether this permit,
2 who he works for today? I don't see the relevance.

3 ATTORNEY BECHER: It --- it has a
4 relevance to the disclosure of confidential information.
5 He reviewed that information, he knows that information,
6 and he now works for.

7 ATTORNEY GRAY: I still don't see where
8 the relevance of breaking the protective order, let's say
9 per se, has to do with whether or not this permit was
10 properly issued.

11 ATTORNEY BECHER: It is not breaking the
12 protective order. It goes to the designation of the
13 confidential business information.

14 CHAIR: Okay, but the ---.

15 ATTORNEY DRIVER: And Mr. Gray, Mr.
16 Chairman, I think we can accomplish that same end simply
17 by asking him whether or not he has made that --- that
18 available to anyone else. And I think he can answer that
19 question. That should address whether or not any kind of
20 confidentiality requirement of the CBI maintenance or the
21 protective order has been handled.

22 ATTORNEY BECHER: May I ask if he has
23 signed any nondisclosure agreements with Fundamental Data
24 regarding the disclosure of confidential information?

1 THE WITNESS: What was the question?

2 BY ATTORNEY BECHER:

3 Q. Have you signed any nondisclosure agreements
4 with Fundamental Data regarding the disclosure of the
5 confidential business information in this case?

6 A. With Fundamental Data?

7 Q. Yes.

8 A. No.

9 CHAIR: How about with DNR?

10 ATTORNEY BECHER: I'm sorry?

11 CHAIR: How about with DNR?

12 BY ATTORNEY BECHER:

13 Q. Have you signed a nondisclosure agreement with
14 the Department of Environmental Protection regarding this
15 information?

16 A. No.

17 ATTORNEY BECHER: I'll move on.

18 BY ATTORNEY BECHER:

19 Q. I do want to ask you regarding the confidential
20 business information. I'm looking at what is marked in
21 the certified record as pages two through five. Excuse
22 me, two through four. And that is the cover page to the
23 application submittal.

24 Do you have that, that information?

1 A. If you give me a second, I will attempt to find
2 it.

3 Q. Thank you.

4 A. You said pages two through four?

5 Q. Correct.

6 A. So what I see is page two through four on the
7 certified record is a table of contents, a page that says
8 redacted permit application is page three, and page four
9 is the application submittal document? Oh, no. Okay.
10 I'm sorry. I was looking at page two of the PDF, not of
11 the numbers at the bottom. I apologize. So, okay. All
12 right. I have it.

13 Q. Okay.

14 And so were these pages the initial submittal
15 of the rationale for CBI designation, confidential
16 business information, that was submitted with this permit
17 application?

18 A. Yes.

19 Q. And can you point to anything within these
20 pages that reflects or --- or informs the agency of a
21 competitive business disadvantage for disclosing this
22 information?

23 ATTORNEY YAUSSY: Just a point of order.
24 If you're looking at unredacted data on your computer,

1 that's visible to folks behind you.

2 ATTORNEY BECHER: I'm not.

3 ATTORNEY YAUSSY: Okay, thank you.

4 CHAIR: Do you want to repeat your
5 question?

6 ATTORNEY BECHER: Yes.

7 BY ATTORNEY BECHER:

8 Q. Is there anything within these pages where
9 there's a justification or explanation of the competitive
10 disadvantage that Fundamental Data would suffer from the
11 disclosure of this information?

12 A. I mean, the document said that it's a trade
13 secret.

14 Q. Okay.

15 And is that the only explanation given?

16 A. That is what the document said. Yes.

17 Q. I would, and I apologize if you've got multiple
18 versions of the certified record in front of you, but I'd
19 --- I'd like to go to page 107 of the certified record.
20 Excuse me, I had that written down wrong.

21 A. I'm looking. Okay.

22 Q. All right.

23 On page 107, there is additional background
24 information on the data center.

1 Do you see that?

2 A. I do, yes.

3 Q. And would you agree that the DEP's position is
4 this application did not include a data center as a
5 source or as the data center was not definitively named
6 as an end user?

7 A. That is correct.

8 Q. And would you agree that a data center is
9 therefore not part of the application?

10 A. The application and the permit did not include
11 a data center. That's correct.

12 Q. Okay.

13 If I could have you turn to page 182 of the
14 record.

15 A. All right.

16 I'm going to have to open up a second sheet, so
17 just give me a second.

18 Q. Sure.

19 A. You said 182?

20 Q. Correct.

21 A. Is that the page 182?

22 Q. It's the page 182. It is the response from
23 Fundamental Data ---

24 A. Okay.

1 Q. --- on May 7th.

2 A. All right, okay.

3 I'm opening that document now.

4 Q. Let me know when you're there.

5 A. Okay.

6 I'm here.

7 Q. All right.

8 And would you agree this is Fundamental Data's
9 response to an initial expression of concern by the
10 Department that their redactions did not constitute
11 confidential business information?

12 A. That is the reply from Fundamental Data. That
13 is correct.

14 Q. Okay.

15 And in here we see justifications based on, I
16 believe, the United States facing growing pressure from
17 foreign adversaries in areas of artificial intelligence
18 and advanced computing.

19 Do you see that?

20 A. What page is that?

21 Q. That's 182.

22 A. Okay.

23 Hold on.

24 Q. The last full paragraph.

1 A. Could you repeat what you said, please?

2 Q. Yes. Would you agree with me that there's a
3 justification there for the confidential business
4 information based on artificial intelligence and advanced
5 computing?

6 A. Yes.

7 Q. Would you agree that if the DEP and the Board
8 were to take into account artificial intelligence and
9 advanced computing, that would be relevant only to the
10 end user of this permit as a data center?

11 A. I can't --- I could not agree. I mean, I can't
12 make that statement on behalf of Fundamental. No.

13 Q. Okay.

14 On behalf of the DEP, would you --- would you
15 say that these concerns go to the permitting of a
16 standard gas plant?

17 A. I'm not sure I understand it. I mean, the
18 permit was the, you know, the permit. It was --- it was
19 clear in the engineering evaluation that a data center
20 was not part of it. It was not --- there was no data
21 center equipment or anything of that nature in the
22 permit. So I can't make that statement that that would
23 be true.

24 Q. Okay

1 Fair enough. Can you point to anywhere in this
2 document again, this Fundamental Data response, where it
3 shows a competitive disadvantage to the business of
4 building a gas plant?

5 A. I mean, I think that would be a question better
6 answered by Fundamental Data. You know, I can't get into
7 their minds and know, you know, what --- what they're
8 thinking or what they're doing. I mean, you know, at the
9 top of page 183, it does say that the ability to maintain
10 the confidentiality of proprietary business information
11 is not only vital --- not only vital to our company,
12 meaning Fundamental's competitiveness, but it's also a
13 key factor considered by other investors evaluating
14 projects within the state.

15 Q. But you can't know how specifically would harm
16 their business without getting inside Fundamental Data's
17 head, can you?

18 A. You know.

19 ATTORNEY GRAY: I'm going to ---.

20 THE WITNESS: My role in this was to
21 review the, you know, the permit application for the
22 equipment that was part of the application.

23 ATTORNEY GRAY: The document speaks for
24 itself, and he is an engineer who is reviewing the

1 document. To the extent you're seeking legal type
2 opinions or speculation on his part as to what
3 Fundamental was thinking, I think it's going a bit far
4 afield because he's just an engineer and the document
5 does speak for itself.

6 BY ATTORNEY BECHER:

7 Q. Okay.

8 Let me --- let me ask you this. Are you aware
9 of any other support for the confidential business
10 information designations that were supplied besides the
11 cover to the application that we looked at and this
12 letter from Fundamental Data?

13 A. So it would have been the cover page, which we
14 already spoke about, and then the explanation within this
15 document which went to what we just spoke about, and then
16 at the bottom of page 183 and at the bottom of page 180.
17 Well, not the bottom, but the page 184 and page 185. So
18 that, that would have been the complete justification
19 that I would have reviewed. Yeah.

20 Q. Okay.

21 A. That is all.

22 ATTORNEY YAUSSY: Wait, you're --- just an
23 objection. You're referring to the letter. It wasn't
24 the letter. You're not referring to any conversations

1 that they had independent of the letter?

2 ATTORNEY BECHER: I'm referring to what's
3 in the record.

4 BY ATTORNEY BECHER:

5 Q. Is there anything that was submitted that was
6 part of the record besides that cover page and this
7 letter?

8 A. Not that I'm aware of.

9 Q. Thank you.

10 ATTORNEY BECHER: Nothing further.

11 CHAIR: Okay.

12 Mr. Driver, do you want to, I guess, Cross
13 on --- on the --- on that part of the questioning?

14 ATTORNEY DRIVER: I --- I can do that or I
15 can do everything at once. I think it might be, as long
16 as we can keep Mr. Williams on the stand and available, I
17 can do Cross now, let the Intervener do their Cross, and
18 then put on my Direct. Or however you all think would
19 be, would make the most sense. I would offer that I do
20 the Cross now. And while the witness is still on the
21 stand, he would be my first witness anyway. However you
22 all would like to handle it, honestly.

23 CHAIR: Well, go ahead and do your Cross
24 now. Let's do it that way.

1 ATTORNEY GRAY: Keep the record clean.

2 ATTORNEY DRIVER: Perfect, thank you.

3 ---

4 CROSS EXAMINATION

5 ---

6 BY ATTORNEY DRIVER:

7 Q. Mr. Williams, as to what Mr. Becher was asking
8 you, and I think --- I think from Mr. Gray's question,
9 everybody knows the answer. Are you able to analyze the
10 market conditions, et cetera, about competitive
11 advantages, disadvantages, and opine as to their material
12 or economic implications? In other words, if somebody
13 says under these market conditions, this would --- this
14 would have such and such competitive effect? Can you
15 opine as to that precisely?

16 A. No.

17 Q. Is that something that you're empowered to do?

18 A. No.

19 ATTORNEY DRIVER: Okay.

20 That's all I've got for Mr. Williams on
21 Cross.

22 CHAIR: Mr. Yaussy.

23 ---

24 CROSS EXAMINATION

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BY ATTORNEY YAUSSY:

Q. Mr. Williams, do you get other applications in which people ask for, to --- to redact data based on confidential business information?

A. Yes.

Q. Or did you, I should say, did you when you were employed by the DEP?

A. In the past when I --- it was at the DEP, yes.

Q. And when you got those requests, did you evaluate them in accordance with 45 CSR 31, the confidential business information trade secrets rule?

A. That is correct.

Q. Do you accept the representations that --- that people make at that point as to what is a trade secret?

A. That is correct.

Q. Do you have any, in --- if we look at page three of the certified record, we see that the reason --- the rationale for the confidentiality claim was the configuration of turbines is considered a trade secret.

Do you have any reason to disagree with that?

A. No.

Q. Do you have any reason to disagree with the fact that the manner of operation of a power plant and

1 how it is, how it's operated, the turbines that it uses,
2 that kind of information might be of competitive
3 advantage with other power plants?

4 A. Could you repeat your question, please?

5 Q. Do you have any reason to believe it's untrue
6 that the manner of operation of a power plant and how its
7 turbines are going to be used could be a competitive
8 advantage for a power plant? Do you have any reason to
9 disagree with that?

10 A. I agree that, yeah. I mean, what you're saying
11 like that they claim that it could be a competitive
12 advantage. I agree with that, yes.

13 Q. Do you have any reason to disagree --- would
14 you agree that there are ways of setting limits in
15 permits so that the redacted data that's claimed as
16 confidential isn't needed in order to make an enforceable
17 permit?

18 A. Yes.

19 ATTORNEY YAUSSY: I have nothing further.

20 ---

21 REDIRECT EXAMINATION

22 ---

23 BY ATTORNEY BECHER:

24 Q. And just to be clear, you had said you

1 typically accept representations that something is a
2 trade secret. Are those accepted just upon the labeling
3 of something as a trade secret without further
4 justification?

5 A. In this case, as you're aware, the --- the
6 Office of General Counsel or the DEP did send a request
7 to Fundamental to provide, you know, further information
8 on that topic.

9 Q. And the response they got ---?

10 A. So in --- so in those instances where the
11 information does come into question, you know, the
12 Division of Air Quality did reach out to the Office of
13 General Counsel to. I guess you could say, get legal
14 advice on that issue. And that was the letter.

15 ATTORNEY DRIVER: If I --- if I could
16 interact, or if I could interject right here. I don't
17 have a problem with Mr. Williams, you know, stating that
18 they --- that it went under legal review. I would just
19 like to get --- I would like to cut off anything that
20 goes into attorney client confidentiality or any exact
21 communications between Office of General Counsel and DAQ.

22 ATTORNEY BECHER: And I have not asked for
23 any of this information.

24 ATTORNEY GRAY: No, I think it's more.

1 ATTORNEY DRIVER: Right.

2 ATTORNEY BECHER: Right.

3 ATTORNEY GRAY: It's more making sure
4 people don't tread where they shouldn't tread.

5 CHAIR: Do you need to repeat your
6 question?

7 ATTORNEY BECHER: No, let me --- let me
8 move on. I think as long as what's in the record is
9 acceptable.

10 BY ATTORNEY BECHER:

11 Q. So based on consultation with legal counsel,
12 it's in the record. Legal counsel or general counsel
13 sent a letter to Fundamental Data.

14 Correct?

15 A. That is correct.

16 Q. And Fundamental Data responded with the letter
17 that we have already talked about.

18 Correct?

19 A. That is correct.

20 Q. Okay.

21 And so any justifications that are present in
22 the record would be present in that letter or the cover
23 page we talked about earlier?

24 A. That is correct.

1 Q. Can you show me in this letter where the
2 Fundamental Data explanation is about competitive markets
3 relevant to gas?

4 A. Could you? Let me, hold on. Let me go back to
5 that page. Sorry.

6 Q. Yeah, it's if that's helpful.

7 A. Okay.

8 Sure. So could you repeat your question while
9 I'm looking?

10 Q. Yeah. Can --- can you tell me where in this
11 document Fundamental Data is explaining business
12 disadvantages based on competitive markets in gas
13 generation?

14 A. Well, I do see at the top of page 183 it talks
15 about the ability to maintain confidentiality of
16 proprietary business information is vital to
17 competitiveness, but is also a key factor considered by
18 investors.

19 Q. Is there any further elaboration on why it's
20 vital to a company's competitiveness or is that just ---?

21 A. Yeah, if you can give me a second, I can review
22 further. Thank you. It alludes --- I mean, not alludes.
23 It states again on page 183 about protecting sensitive
24 proprietary data from the competitors. It references

1 rule 31 and trade secrets on page 183 and then also again
2 on page 184.

3 Q. And that's simply certain portions of the
4 regulations around the confidential business information.

5 Correct?

6 A. Page 183, that's correct. Page 184 talks about
7 the notes. Trade secrets include plans, patterns, and
8 processes such as. Identity number and configuration
9 that provide an advantage over competitors. The redacted
10 materials fall into two categories. Information covered
11 by bonding, confidentiality, and nondisclosure agreements
12 with third party vendors and proprietary data
13 constituting trade secrets under applicable law.

14 Q. Is there any --- Mr. Driver had asked you about
15 market effects. Is there any explanation about market
16 effects in there that you would have to evaluate?

17 A. Market effects evaluated during the review of
18 an air quality permit application, no. That does not
19 happen.

20 Q. Okay.

21 And it's not explained in this letter?

22 A. Not to my knowledge.

23 ATTORNEY BECHER: Nothing further.

24 CHAIR: Does the Board have anything?

1 ATTORNEY YAUSSY: Oh, I'd like to go back
2 if we could.

3 CHAIR: Okay.

4 Go ahead. We'll let you.

5 ---

6 RECROSS EXAMINATION

7 ---

8 BY ATTORNEY YAUSSY:

9 Q. Mr. Williams, you're familiar with the
10 definition of a trade secret in the confidential business
11 information rule?

12 A. Yes.

13 Q. Does it require you to make an involved
14 investigation of any kind of claim of trade secrets?

15 A. No.

16 Q. Are you allowed to rely on the representation
17 of the parties who request trade secrets protection as
18 long as they can describe what they're requesting and
19 why?

20 CHAIR: Mr. Yaussy, I'm going to stop you
21 for just a second. Apparently we lost Mr. Driver, so let
22 me see if we can get him back on before we. So he can
23 --- he can hear what's going on.

24 ---

1 (WHEREUPON, THERE WAS A PAUSE DURING THE PROCEEDING.)

2 ---

3 ATTORNEY BECHER: I --- I may suggestion

4 --- oh, is Mr. Driver back?

5 MS. DERAIMO: Yeah, he's on now.

6 ATTORNEY BECHER: Okay.

7 Great. I was going to say, I have Mr.
8 Driver's cell phone.

9 MS. DERAIMO: Yeah, no, that's why ---
10 that's how I know.

11 CHAIR: He's back now?

12 MS. DERAIMO: He's just joining with me.
13 Give me a minute. I want to make sure. Scott, can you
14 unmute for a minute, please?

15 ATTORNEY DRIVER: I can. I'm on, but it
16 keeps --- it keeps lurching out on me. Hopefully it will
17 not happen again. I switched browsers.

18 MS. DERAIMO: Okay.

19 I'm going to text you my work cell so that
20 I don't have to juggle between my two cell phones.

21 Okay?

22 ATTORNEY DRIVER: Okay, thank you.

23 MS. DERAIMO: Thanks, Scott.

24 CHAIR: Scott, where were you last with

1 us?

2 ATTORNEY DRIVER: We were going over, I
3 believe, the --- the correspondence from Fundamental Data
4 to --- to DEP. And the witness was being asked where in
5 there he saw anything about competitive advantage or
6 disadvantage from a gas facility. I believe that's where
7 we were at.

8 ATTORNEY GRAY: I believe that was the
9 last question.

10 ATTORNEY BECHER: That was, I believe, my
11 last question.

12 ATTORNEY GRAY: Last question. And then
13 did you hear his answer?

14 ATTORNEY DRIVER: I did not. My
15 apologies.

16 ATTORNEY GRAY: Give us one second.

17 ATTORNEY BECHER: Mr. Driver, would you be
18 willing to rely on the answer as it is in the record or
19 do you want me to repeat and get a new answer?

20 ATTORNEY GRAY: Well, we'll get.

21 ATTORNEY BECHER: Okay.

22 ATTORNEY DRIVER: If you wouldn't mind
23 repeating just so I know what the answer was now.

24 ATTORNEY GRAY: The court reporter will

1 read it back here in a second.

2 ATTORNEY DRIVER: Sounds good.

3 COURT REPORTER: What was --- what was the
4 question again?

5 ATTORNEY BECHER: I believe I'd asked
6 where in the letter the justification for a competitive
7 disadvantage for an operation of gas plant was listed.

8 COURT REPORTER: Looks like he said not to
9 my knowledge.

10 ATTORNEY BECHER: Okay.

11 CHAIR: Did you hear that, Scott?

12 ATTORNEY DRIVER: I did. That's
13 acceptable.

14 CHAIR: All right.

15 ATTORNEY GRAY: Okay.

16 And then I think Dave was getting ready to
17 go into it. And I'll just let you --- I don't think you
18 were very far.

19 ATTORNEY YAUSSY: I was not. Why don't I
20 just?

21 ATTORNEY GRAY: Yeah.

22 ATTORNEY YAUSSY: I could even make it
23 shorter.

24 ATTORNEY BECHER: Are you going to start

1 over, Dave, or are we going to go back to your original
2 question?

3 ATTORNEY YAUSSY: I'll start over again.

4 BY ATTORNEY YAUSSY:

5 Q. Mr. Williams?

6 A. Yes.

7 Q. You're still there? I'm looking at ---.

8 A. Yes.

9 Q. I'm looking at page three of the certified
10 record. That has the, is that --- is that the DEP's form
11 for claiming confidential business information?

12 A. I'll need to go to page three. Give me a
13 second, please. I cannot say with 100 percent certainty
14 that that's a DEP form, but it is a DEP, DAQ requirement
15 when submitting confidential business information.

16 Q. Is this of the type and amount of information
17 that you often get when people are claiming trade
18 secrets?

19 A. I can't say in all instances that that would be
20 the case. But generally speaking, yes.

21 Q. Once someone claims trade secrets, then the
22 question is whether they have protected those secrets.
23 They've --- they've kept them secret in other
24 circumstances as well.

1 Correct? Under the --- under the rule?

2 ATTORNEY BECHER: I'm going to object to
3 asking for a legal opinion here.

4 ATTORNEY YAUSSY: Fair enough.

5 BY ATTORNEY YAUSSY:

6 Q. Mr. Williams, are you aware of any situation in
7 which Fundamental might have revealed the same
8 information to anybody else?

9 A. No.

10 ATTORNEY YAUSSY: Nothing further.

11 CHAIR: Okay.

12 ATTORNEY DRIVER: And I have a --- I have
13 a brief Recross based on that line of questioning. If I
14 could go into it, Mr. Chairman.

15 CHAIR: Go ahead.

16 ---

17 RE CROSS EXAMINATION

18 ---

19 BY ATTORNEY DRIVER:

20 Q. Mr. Williams, is it your understanding from
21 your exposure to this case that at all times Fundamental
22 Data seemed very concerned with maintaining
23 confidentiality on all of this information?

24 A. Yes.

1 Q. In fact, they were? I'm trying to think of the
2 right word. Vehemently vocal about this, this being
3 maintained as confidential.

4 Correct? And they did they give the impression
5 that they had been attempting to maintain it as
6 confidential?

7 A. That is correct.

8 ATTORNEY DRIVER: That's all I've got on
9 Cross.

10 CHAIR: All right.

11 Now, anybody from the Board have any
12 questions at this point? Mr. Knee, do you have any
13 questions at this point? All right.

14 So now we're at the stage where Mr.
15 Driver, you may call, and as your witness, and we'll go
16 from there.

17 ATTORNEY BECHER: And --- and just
18 formally, at this case, I would say that Appellants' rest
19 their case.

20 CHAIR: Oh, all right.

21 I'm sorry. Thank you. Mr. Driver, are
22 you there?

23 ATTORNEY DRIVER: All right.

24 And at this point, if the Appellant has

1 rested their case in chief, I'd like to make a motion to
2 dismiss to any counts of --- on any counts of the appeal
3 that implicated modeling, because I do not think that
4 there was any evidence presented as to whether or not
5 modeling would have been mandatory or appropriate in this
6 case.

7 ATTORNEY BECHER: My response to that
8 would be the modeling provision specifically references
9 the purposes and policy of the act to be taken into
10 consideration. I think we have substantial evidence that
11 the purpose of policies of the act, which include the
12 promotion of economics of the state as well as the
13 facilitation and enjoyment of natural areas, is a
14 particular concern where this plant is located. And that
15 was not done and not taken into account.

16 CHAIR: All right.

17 ATTORNEY YAUSSY: If I could address it.
18 Modeling for minor sources is at the discretion of the
19 director. The director has made a determination,
20 modeling is not necessary in this case. There's been no
21 evidence provided presented that it should have been
22 opposed. I --- I think, we join in Mister --- Mr.
23 Driver's motion.

24 ATTORNEY BECHER: And --- and I would

1 respond briefly that this Board reviews these issues de
2 novo. It can make its own determination based on the
3 evidence that was presented here on whether or not that
4 would be appropriate.

5 CHAIR: All right.

6 We've heard the objection and the --- and
7 the motion. We are going to take it under advisement and
8 move on. Mr. Driver, you have the floor.

9 ATTORNEY DRIVER: Thank you, Mr. Chairman.

10 ---

11 DIRECT EXAMINATION

12 ---

13 BY ATTORNEY DRIVER:

14 Q. Jerry, I'm sorry. I'll go with Mr. Williams.
15 Is it abnormal to use manufacturer's data as a
16 significant factor in determining permit limits?

17 A. No.

18 Q. And when you are considering a permit, and I'm
19 not referring to just this permit, but in your experience
20 as permit reviewer, what does that data from the
21 manufacturer represent? In other words, in terms of mass
22 emissions levels, what does that data typically
23 represent?

24 A. The data would come from a manufacturer would,

1 you know, normally represent, you know, depending upon
2 what was included with the manufacturer's data like a ---
3 like a mass emission limit, like you stated, like a
4 pounds per hour limit or potentially some other type of
5 volumetric limit that could be used in that manner. And
6 that data is obviously done through testing from the
7 manufacturer themselves.

8 Q. And would you say that represents a worst case
9 mass emissions level, conservative mass emissions level?
10 How would you characterize, in other words, what exactly
11 that is supposed to represent in terms of okay, we can
12 expect this out of this particular piece of equipment?

13 A. Speaking about this permit application
14 specifically, since that's why we're here, that was
15 represented as worst case emission limit.

16 Q. And would you say that basing an annual
17 emissions limit on a worst case assumption of the hourly
18 emissions pounds per hour, whichever the measure happens
19 to be, would you say that that's inherently conservative
20 in nature?

21 A. I would.

22 Q. And based on that in your calculation
23 methodology, would a theoretical short-term exceedance
24 cause the annual emissions limits to be exceeded by the

1 actual emissions?

2 A. Not necessarily, no.

3 Q. And is using parametric monitoring like the
4 hours of operations, the startup and shutdown tracking,
5 do you consider that a reasonable and practical method of
6 continuous compliance demonstration?

7 A. Yes.

8 Q. And is initial stack testing a common method of
9 compliance demonstration for all manner of emissions
10 units and not just turbines?

11 A. That's correct.

12 Q. And moving on to the formaldehyde question. Is
13 it your understanding or your recollection that the
14 formaldehyde emissions were accounted for during the
15 startup and shutdown at the same rate as the steady state
16 emissions?

17 A. That is correct.

18 Q. Would they have been based on the hours of
19 operation tracking in the permit?

20 A. The hourly formaldehyde emissions would have
21 been based upon manufacturer's data.

22 Q. And just so I'm not --- not mischaracterizing
23 or going down a rabbit hole, it was your --- it's your
24 recollection that in this case it was based on the worst

1 case scenario.

2 Is that correct?

3 A. That is correct.

4 Q. And I'm trying to find the page. There's
5 language in the permit that --- that concerns 25 percent
6 at the peak load. Do you recall that while I'm looking
7 for it? And I apologize, I'm --- I'm scared to click on
8 anything at this point for fear it'll boot me for another
9 ten minutes. But I'm trying to find that in the
10 certified record. I'm going to go on mute for just a
11 moment while I find that. If I get kicked, I apologize.
12 Okay.

13 I am unable to find the page number at
14 this time. I was going to try to pull it off of the AQB
15 website.

16 ATTORNEY YAUSSY: Which is the page you're
17 looking at, Mr. Driver? What are you ---?

18 ATTORNEY DRIVER: Oh, I'm --- I'm trying
19 to look at a page and having no luck. Let me see if I
20 can pull it up locally. Okay.

21 I'm going to have to go off of memory
22 here.

23 BY ATTORNEY DRIVER:

24 Q. There's a testing requirement in the permit of

1 25 percent of the peak load. Do you recall anything
2 about that? And I know, I think you worked on this some
3 time ago.

4 ATTORNEY BECHER: Mr. Driver, if it's
5 helpful, I can point you to the testing requirements.
6 They're on page 503 of the certified record.

7 ATTORNEY YAUSSY: We're looking at Section
8 4.3.5.

9 ATTORNEY DRIVER: I'm sorry, what pages
10 was that? Page was that, Mr. Becher? Or if it's easier,
11 I can ask for a short recess.

12 ATTORNEY BECHER: 503.

13 BY ATTORNEY DRIVER:

14 Q. Jerry, do you have access to that page?

15 A. I actually have a copy of the permit. Pull it
16 up on my tablet here. So if you're asking about the
17 testing requirements?

18 Q. Yes.

19 A. So 432 and 433 are testing requirements that,
20 as they're referenced in that permit, that are directly
21 out of 40 CFR 60(4)(k), which is a new source performance
22 standard for stationary combustion turbines. And that is
23 the requirement to conduct the performance testing for
24 those units for those pollutants, NOx and SO2.

1 Q. And is that based on federal requirements,
2 state requirements, where you get that requirement?

3 A. That's a federal requirement. And as I
4 referenced, it's 60.4400 and 60.4415. And then also just
5 for basic knowledge, it also references 60.8, which is a
6 general provision in the new source restoration standards
7 for performance testing.

8 Q. So this was written by --- this was written by
9 EPA, completely independent of DEP or DAQ or our
10 legislature.

11 Correct?

12 A. That is an EPA rule. That's correct.

13 Q. In your understanding, having worked with these
14 permits, what is the --- what's the implication or, you
15 know, what would be the scientific reasoning behind
16 wanting that done?

17 A. The performance test?

18 Q. Yes.

19 A. The purpose of performance test would be to
20 prove compliance with the hourly emission limits, not
21 only the permit, but also as the limits exist, and the
22 associated new source performance standard, which in this
23 case would be Subpart KKKK.

24 Q. And why do you think that? Why do you think

1 that that particular level of testing requirement exists?
2 If you can answer that question.

3 A. Unfortunately, or fortunately, I mean, I wasn't
4 involved in, like, EPA rulemaking, so it would --- it
5 would just be, you know, a guess on my part to make that
6 statement.

7 Q. Okay.

8 ATTORNEY DRIVER: I will go ahead and pass
9 the witness at this time.

10 CHAIR: Okay.

11 Mr. Yaussy.

12 ATTORNEY YAUSSY: Thank you, Mr. Chairman.

13 ---

14 RE CROSS EXAMINATION

15 ---

16 BY ATTORNEY YAUSSY:

17 Q. Mr. Williams, you were asked about the use of
18 manufacturer's data to set the permit limits. Do you
19 recall that question?

20 A. Yes.

21 Q. Do you find the manufacturer's data to be
22 reliable for the most part?

23 A. Yes.

24 Q. Better than using general AP42 data in most

1 cases?

2 A. That is correct.

3 Q. And in this case, that was --- that was the
4 situation?

5 A. Correct.

6 Q. Mr. Williams, what incentive do manufacturers
7 have to get their data correct that they provide to ---
8 to purchasers, potential purchasers?

9 A. So, I mean, I'm just going to kind of just go
10 off on a summary here. Like, if you're looking at a
11 manufacturer, you know, you're taking manufacturer data.
12 So you have a turbine manufacturer and you manufacture
13 whatever it may be. I mean, obviously if they're selling
14 their equipment to someone and they say that the --- the
15 limit is one, right? And say the corresponding federal
16 or state standard may be 1.5. I mean, if they test, when
17 --- when they're required to test that as part of that
18 determination, it doesn't, you know, meet those
19 standards. And, you know, that's going to fall back
20 upon, you know, the manufacturer because obviously
21 they're selling equipment that doesn't meet federal or
22 state standards. And I can't help but think if you had
23 equipment that didn't meet the standards that anyone
24 would purchase it.

1 Q. So they have every incentive to get it right
2 and to be conservative.

3 Correct?

4 A. That is correct.

5 Q. Mr. Williams, in your experience, do you
6 believe this permit that you wrote was a reasonable and
7 enforceable synthetic minor permit?

8 A. I do, yes.

9 Q. Do you believe that based on the requirements
10 that you imposed in this permit, that you will be able
11 --- that the DAQ will be able to determine the actual
12 emissions from Fundamental?

13 A. Yes. I believe that, you know, as it was
14 explained in engineering evaluation and also the
15 corresponding conditions during the permit, that every
16 effort was made to ensure that it was a synthetic minor.

17 Q. And you believe the permit you wrote imposes
18 sufficient limits not only to make sure that it stays at
19 the synthetic minor, but that it can be demonstrated to
20 the DAQ?

21 A. Correct. With the, you know, the testing
22 requirements that are part of the permit, the parametric
23 monitoring that are part of the permit, and then, you
24 know, the, in addition to that, the predictive emission

1 monitoring requirements that are part of 4.2 and 4.4 as
2 part of the turbines that --- that they're, you know, are
3 reasonable conditions in there that will make that
4 statement true. Yes.

5 ATTORNEY YAUSSY: I've nothing further.

6 CHAIR: Mr. Becher.

7 ATTORNEY BECHER: Yes.

8 ---

9 CROSS EXAMINATION

10 ---

11 BY ATTORNEY BECHER:

12 Q. Let me ask, let's --- let's start back with the
13 testing requirements on page 503. Let me know when
14 you're there.

15 A. As the message is, before I go to the certified
16 record, is this 503? Is that part of the permit?
17 Because I have that document.

18 Q. Yeah, yeah. Sorry.

19 A. Okay.

20 Q. It's Section 4.3, the testing requirements in
21 the permit.

22 A. Okay.

23 I'm there.

24 Q. Okay.

1 And there was talk about 25 or 100 percent
2 load. Would you agree that this testing requirement
3 requires, as it's written here, plus --- testing under
4 conditions plus or minus 25 percent of 100 percent peak
5 load?

6 A. That is language directly out of the 4.3
7 performance standard. That is correct.

8 Q. Yes. And so this gives the operator the
9 discretion to perform this test at anywhere from 75 to
10 100 percent load?

11 A. As part of any type of performance testing, and
12 I'm not trying to avoid anything. I just want to kind of
13 just put the whole picture here. As far as any type of
14 performance testing, the other thing is, if we go back to
15 Section 3 point. Three point. 3.1 of the permit, it
16 talks about stack testing. As part of any type of
17 performance testing that is done, you know, the permittee
18 would have to submit a stack test protocol to the agency
19 prior to conducting any type of performance testing. So
20 that would have to be reviewed and agreed upon by the
21 agency before the stack testing could occur.

22 Q. But as the permit is written, it gives the
23 permittee discretion to do that plan anywhere from a 75
24 to 100 percent load?

1 A. Let me go back there real quick. That is
2 correct.

3 Q. Thank you. Now, I'd like to ask you about
4 formaldehyde. This is under, it's certified record page
5 497. It's Section 4.0 of the permit. I've got it
6 labeled at the top page 13 of 22 of the permit, the final
7 permit.

8 A. Okay.

9 Let me get there. Okay.

10 Q. And would you agree that when we're looking at
11 hourly limitations there, the hourly limitations for
12 formaldehyde are 1.26?

13 A. That's correct.

14 Q. If we go back into the certified record on page
15 58 of the certified record.

16 A. Okay.

17 Give me a second here, please. Okay.

18 Q. All right.

19 And if you look at the big table there, it's
20 labeled controlled steady state emissions.

21 Correct?

22 A. Correct.

23 Q. Okay.

24 And would you agree that under steady state,

1 the hourly emissions rate is predicted at the same 1.26?

2 A. That is correct.

3 Q. And would you agree there is no addition given
4 to that 1.26 if we look at the top table during startups
5 and shutdowns?

6 A. That is correct.

7 Q. You were asked some questions about setting
8 permit limits. Was part of the review of this permit to
9 determine whether it complied with the synthetic minor
10 limitations based on the pollutant loads limit?

11 A. Correct.

12 Q. Okay.

13 So in addition to setting permit limits, this
14 review entailed making sure that the plant itself would
15 stay below those major source thresholds?

16 A. The permit conditions, that was the purpose of
17 the permit conditions. To ensure that the facility, you
18 know, were below the thresholds. Correct.

19 Q. Yeah. And if I could have you turn to page 123
20 of the record.

21 A. Okay.

22 Q. Okay.

23 Under the section, the Title V Operating Permit
24 Program.

1 Do you see that?

2 A. Yes.

3 Q. Okay.

4 And there is an explanation of major source
5 thresholds there.

6 Do you see that?

7 A. Yes.

8 Q. Okay.

9 And would you agree those are the appropriate
10 thresholds under which this permit should have been
11 evaluated to determine whether it was a major or minor
12 source?

13 A. For a Title V major? Title V --- are we
14 talking about Title V major or PSD major? Because those
15 are two different things.

16 Q. Title V major.

17 A. Title V major. If it was ten tons per year of
18 a single HAP or 25 tons aggregate HAPs. Correct. That
19 would, or 100 tons of a regulated pollutant. Yes, it
20 would have been a Title V facility.

21 Q. Okay.

22 And HAPs is hazardous air pollutants?

23 A. I'm sorry, yes.

24 Q. And that ---?

1 A. Yes, that's correct. Hazardous air pollutants.

2 Q. That would include formaldehyde?

3 A. That is correct.

4 Q. I have a question on worst case scenario. So
5 we can refer to it if we need to, but generally is it
6 your understanding that this has hourly restriction ---
7 this permit contains conditions or hourly restrictions if
8 the plant is solely running on natural gas?

9 A. That is correct.

10 Q. And it has hourly limitations if it's solely
11 running on diesel?

12 A. Yes, for both of those if it was for a
13 consecutive 12-month period. That is correct. Yes.

14 Q. And if within a 12-month period it's running on
15 some part diesel, some part gas, we have to look at the
16 hourly emissions rates that were displayed in the permit
17 to determine the emissions at that point.

18 Correct?

19 A. That is correct.

20 Q. If I could, let's --- let's go back to page 58
21 of the permit.

22 A. Okay.

23 Fifty-eight (58) of the certified record?

24 Q. Excuse me. Yes, I misspoke. Fifty-eight (58)

1 in the certified record.

2 A. No worries. All right. Just give me a second,
3 please. Okay.

4 Q. All right.

5 And we have the hourly emissions rates. This
6 is for fired on natural gas listed here unredacted in the
7 one, two, three, fourth or fifth column over?

8 A. The hourly emission rate? Yes, I see that.

9 Q. Excuse me. This is --- this is in the redacted
10 portion, which --- which is the one you have access to?

11 A. Correct.

12 Q. Those are hourly emissions rates.

13 Correct?

14 A. That is correct.

15 Q. And this is, would you agree, all of the
16 turbines operating at full load?

17 A. That's correct.

18 Q. Okay.

19 Would you agree, other than the startup and
20 shutdowns here, there is any explanation of hourly
21 emissions if this is not operated at full load?

22 A. That's correct.

23 Q. Okay.

24 And we do not have, in fact, what is redacted

1 here is the hourly emissions rates for a single turbine?

2 A. That is correct.

3 Q. Okay.

4 And in fact the number of turbines is also
5 redacted from this page.

6 Correct?

7 A. That's correct.

8 Q. So let's throw out a hypothetical here. If
9 this plant, let's say it has 20 total turbines, I'm just
10 making that number up. It's not reflective of the actual
11 turbines. If it's running 15 of those turbines for six
12 hours, how would you know the emissions rate of those 16
13 turbines from this redacted data?

14 A. Okay.

15 Can I give maybe a couple things here, if I
16 may? Because I don't, I'm not really sure, like, you
17 know, where you're going with --- I mean, like what your
18 --- what your question.

19 Q. Yeah, I --- I can rephrase it if it would help.
20 Since we don't know the total number of turbines, we
21 can't scale down this full load calculation to determine
22 what an operation with less than the full load of
23 turbines would represent, can we?

24 A. That's correct. But I would like to point out

1 that in permit condition 4.3.5, that does require the
2 initial performance test for formaldehyde. It does state
3 that the compliance demonstration is on a per turbine
4 basis, not as an aggregate.

5 Q. Sure, but that's --- that's the testing
6 requirement. That's not a monitoring requirement?

7 A. So, yeah. You just had to give me a second to
8 go through this. I'm, you know. So I mean the permit
9 does require, you know, monitoring and operation type,
10 number of startup shutdown events, hours of operation in
11 each mode. And that's on, so I mean that's something
12 that they have to. That, you know, that they're required
13 to do daily.

14 Q. But if they're operating less than the full
15 number of turbines at the full load, there is no way,
16 based on the redacted information, to figure out how much
17 is actually being emitted?

18 A. Per turbine. That's correct.

19 Q. Okay.

20 And there are restrictions here on the total
21 number of hours that can be run under the natural gas
22 exclusive operations.

23 Correct?

24 A. That is correct.

1 Q. And there are restrictions on running fully at
2 diesel exclusively under total operations.

3 Correct?

4 A. That's correct.

5 Q. There's no restrictions on a mix of diesel and
6 --- and gas except for the hourly and annual load limits?

7 A. So not --- not, no. There's no hourly
8 limitation if there's a mix. That's correct.

9 Q. And again, you would agree that if we had a
10 subset of turbines that were operating, we couldn't
11 determine what that would be because we don't have this
12 information in front of you?

13 A. If there was a mix of fuels?

14 Q. If there was a mix of fuels, sure.

15 A. That's correct.

16 ATTORNEY BECHER: Thank you. Nothing
17 further.

18 CHAIR: Mr. Driver?

19 ATTORNEY DRIVER: I do not have any
20 Redirect at this time.

21 CHAIR: Mr. Yaussy, anything?

22 ATTORNEY YAUSSY: Yes.

23 ---

24 RE-CROSS EXAMINATION

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BY ATTORNEY YAUSSY:

Q. Mr. Williams, you were asked about the fact that the stack testing is done on a plus or minus 25 percent basis form --- from full load.

Do you recall those questions?

A. Yes.

Q. Do you believe that within that range you can get a representative emissions produced?

A. There would be information on, you know, what percent of full load it was and what the representative emissions were at that rate. Yes.

Q. So the fact that it could vary that much does not mean it wouldn't be a representative figure that would be provided by the stack test?

A. The federal standard allows that. That's correct.

Q. You referred to some of the other requirements, I think, did you --- you referred to Subpart 4(k)?

A. That's correct.

Q. That requires startup and shutdown emissions limitations for CO and NOx.

Correct? If you know, if you recall.

A. I can't answer that off the top of my head.

1 I'm not sure without looking at it.

2 Q. Let me ask you this. Are you aware of any
3 federal rule that requires startup and shutdown emissions
4 be set for formaldehyde for --- for turbines of this
5 nature?

6 A. No.

7 Q. Would you please differentiate Title V major
8 source for purposes of Title V as opposed to NSR?

9 A. Sure. For Title V, you would be a major source
10 if you had one individual hazardous air pollutant has ten
11 tons per year or a combination of hazardous air
12 pollutants at 25 tons per year. You could also be Title
13 V major if any of the regulated air pollutants were 100
14 tons per year, and that would include nitrogen oxide,
15 carbon monoxide, volatile organic compounds, carbon
16 dioxide, particulate matter.

17 And then for NSR major. For just, there's two
18 different ways you can become an NSR Major. If you're,
19 there EPA has a, it's called a listed source. So like
20 there's 28 types of facilities and if you're one of those
21 28 types of facilities, NSR major comes into play at 100
22 tons. If you're not one of those types of facilities,
23 then NSR major comes in at 250 tons. This type of
24 facility that we're speaking about is a listed source.

1 So NSR major would be 100 tons, but it would just be the
2 regulated air pollutants. Hazardous air pollutants are
3 not listed, regulated air pollutant for PSD. So it would
4 be if your nitrogen oxide, carbon monoxide, volatile
5 organic compounds, sulfate oxide, particulate matter were
6 above the 100 ton per year threshold, then it would be
7 PSD major.

8 Q. So when they talk about being a major source
9 because of formaldehyde emissions, that wouldn't make you
10 a major source for purposes of NSR?

11 A. That is correct.

12 Q. You wouldn't be a major source, to use our
13 terms here in the state, under 45 CSR 14?

14 A. That's correct. Not for --- not for hazardous
15 air pollutants. That's correct.

16 Q. Not for --- not for hazardous air pollutants.
17 And it is the NSR major source that 45 CSR 14 that
18 requires fact analysis modeling and that type of
19 additional permitting.

20 Correct?

21 A. That's correct.

22 Q. That isn't required for Titel V?

23 A. That's correct.

24 Q. You were asked about the hourly restrictions

1 that apply when running diesel as opposed to natural gas.

2 Do you recall those questions?

3 A. I do.

4 Q. And those aren't the only restrictions that
5 allow you to determine compliance with a permit.

6 Is that correct?

7 A. That's correct.

8 Q. You mentioned, for example, that there is stack
9 testing required for, well, there is stack testing
10 required for carbon monoxide, NOx, SO2, and formaldehyde.

11 Do you recall that?

12 A. That's correct.

13 Q. So in the course of up, those stack tests
14 provide you with the emissions on an hourly basis.

15 Correct?

16 A. That's correct.

17 Q. That's on the per turbine basis that has to be
18 determined.

19 Correct?

20 A. Yes, that's correct.

21 Q. So, and you're also required under record
22 keeping to keep track of the hours of operation for each
23 turbine.

24 Correct?

1 A. That is --- that is correct.

2 Q. So you can determine what the emissions are for
3 every hour by multiplying the hours of operation by the
4 known emissions from those turbines.

5 Correct?

6 A. Could you rephrase that question, please, or
7 repeat it? I'm sorry.

8 Q. Well, you can determine the amount of emissions
9 that are actually being emitted by this, by the plant
10 once it's constructed by multiplying the known emissions
11 per turbine by the number of hours each turbine is
12 operating?

13 A. The, well, actual --- I mean, the emission
14 limits that are in the permit, you know, were the worst
15 case scenarios. That would be the potential emissions.
16 So if you multiply that value by the number of hours,
17 that would be your potential annual emissions. As far as
18 actuals, you know, as you would do a stack test and the
19 stack test provided, you know, some type of different
20 value, whether it be, you know, lower, higher, whatever
21 it may be.

22 Then, but the permit --- the permit potential
23 is still the value that, the hourly value that's in the
24 permit. I don't know if I'm answering your question or

1 if I understand your question completely.

2 Q. We know we have to do stack testing for each of
3 the turbines.

4 Correct?

5 A. That's correct.

6 Q. And that will give us the emissions from that
7 turbine for those four pollutants that we talked about?

8 A. That's correct.

9 Q. Okay.

10 And you have to keep track of the number of
11 hours that they operate?

12 A. That's correct.

13 Q. You have to keep track of under what --- what
14 operational mode they're operating?

15 A. That is correct.

16 Q. So if you multiply the hours that a turbine's
17 operating by the emissions that we know from the stack
18 testing, that can give --- that will give us the
19 emissions for that turbine on a monthly basis, on an
20 annual basis, hours, times?

21 A. Right. That is correct. On that, that's
22 correct.

23 Q. There's further a requirement that we operate
24 those turbines and --- and the control devices pursuant

1 to manufacturer specifications.

2 Correct?

3 A. That's correct.

4 Q. And the manufacturer supply specifications when
5 they provide their estimates.

6 Correct?

7 A. That's correct.

8 Q. So we have to be operating it in accordance
9 with the specifications linked to the manufacturer's data
10 that you relied upon in writing this permit.

11 Correct?

12 A. That's correct.

13 Q. Mr. Williams, you --- you calculated the number
14 of hours that could be operated for both natural gas and
15 for diesel.

16 Do you recall doing that?

17 A. I did not calculate that. They're the
18 Fundamental's, you know, Fundamental Data on behalf of
19 the consultant did the calculations.

20 Q. They were provided to you.

21 Correct?

22 A. That is correct.

23 Q. For the purpose of identifying how much, how
24 many hours it could be run in order to stay within minor

1 source limits?

2 A. That's correct.

3 Q. That's your understanding?

4 A. Yes.

5 Q. And in fact, that was --- that was done because
6 it was your understanding that the intention was to
7 operate using natural gas for the site?

8 ATTORNEY BECHER: Objection. I don't
9 think there's anything in the record that talks about
10 whether ---.

11 ATTORNEY YAUSSY: I'm asking about what it
12 is.

13 ATTORNEY BECHER: Okay.

14 CHAIR: Go ahead. You may answer.

15 THE WITNESS: Could you repeat that,
16 please?

17 BY ATTORNEY YAUSSY:

18 Q. Was that --- because it was your understanding
19 that Fundamental intended to run the plant using only
20 natural gas?

21 A. That is correct. And that was also recognized
22 in the engineering evaluation.

23 Q. Mr. Williams, we talked about the calculating
24 actual emissions based upon hours of operation and

1 results of the stack test. Do you recall that we talked
2 about that just a bit ago?

3 A. That's correct.

4 Q. And the same analysis is done whether you're
5 running on natural gas or running on diesel? It's hours
6 of operation times emissions?

7 A. Correct.

8 ATTORNEY YAUSSY: Nothing further.

9 ATTORNEY BECHER: Maybe we're going to
10 have three questions.

11 CHAIR: All right.

12 ---

13 RECROSS EXAMINATION

14 ---

15 BY ATTORNEY BECHER:

16 Q. First Mr. Williams, would you turn to page 123
17 of the certified record?

18 A. Sure. Give me a second, please. Okay, I'm
19 here.

20 Q. And would you agree with me that under 40 CFR
21 70, the Title V operating program, permit program, it was
22 determined that Part 70 doesn't apply?

23 A. That is correct.

24 Q. And that was based upon the conclusion that the

1 HAPs as well as criteria pollutants would not exceed
2 those thresholds?

3 A. That is correct.

4 Q. There's been a lot of talk about the stack
5 testing and the results from that stack testing. Is
6 there any requirement that the results of the stack test
7 be made public?

8 A. There's nothing specific in the permit
9 application that requires that.

10 Q. Thank you. And there was a question, finally,
11 on the intent to operate this only on natural gas.

12 Do you recall that question?

13 A. Yes.

14 Q. Do you agree that this permit calls for 30
15 million gallons of diesel to be stored on site?

16 A. Yes.

17 ATTORNEY BECHER: Nothing further.

18 CHAIR: Mr. Driver, anything else you want
19 to add?

20 ATTORNEY DRIVER: No further Redirect, Mr.
21 Chairman.

22 CHAIR: Board, questions? Mr. Knee, do
23 you have any questions? Mr. Knee?

24 MR. KNEE: I don't --- I don't have any

1 questions.

2 CHAIR: All right.

3 I do have one or two here. When I look at
4 the thing, it looks like you, they're allowed to use the
5 gas for a maximum of, was that 61,328 hours a year?

6 Is that right? I'm looking at the bottom.

7 THE WITNESS: That's correct.

8 CHAIR: Okay.

9 And they're allowed to use diesel for a
10 maximum of 25,000 hours per year.

11 Is that correct?

12 THE WITNESS: That's correct.

13 CHAIR: Is there anything to preclude them
14 from using their 61,000 hours of natural gas and then
15 switching to the 25,000 hours of diesel?

16 THE WITNESS: So the hourly restrictions
17 for natural gas or diesel are exclusive to those fuels,
18 meaning that it would only --- those hourly limitations
19 would only apply if natural gas, like the 61,000 plus
20 hours, if it was 12 straight months of natural gas usage
21 only. And then the same thing would apply, like diesel
22 only if it was 25,000 hours in that 12-month period as
23 diesel.

24 If there was any mix of fuels at any point

1 in time during that 12-month period, those hourly
2 restrictions would not apply. And then the compliance
3 would be determined based upon the number of hours and
4 what type of operating mode and the types of fuel that
5 was utilized during that operating mode to determine
6 compliance with the annual emission limits.

7 CHAIR: All right.

8 So I'm trying to get my head around this a
9 little bit. So you're saying that if they were operating
10 for 61,000 plus and then they switched over to diesel for
11 those 25,000, that, and this is all within one year now,
12 one continuous year, that you're not going to use the
13 hours at that point? You're going to go back and look at
14 each individual turbine and what was done?

15 THE WITNESS: That's correct. If at any
16 point in time during the consecutive 12-month period that
17 multiple fuels were utilized, then the compliance would
18 not be determined by the hours of operations exclusively.
19 Compliance would then be determined based upon the type
20 of operation that the units were in, whether it be steady
21 state, whether it was startup and shutdown, what type of
22 fuel were used in the individual turbines, and the hours
23 that those fuels were used in those turbines. And that's
24 how compliance would be demonstrated.

1 CHAIR: Can you show me where it says that
2 in the permit?

3 THE WITNESS: If you --- if you give me a
4 second, I will. So from, in the monitoring section of
5 the permit in condition 4.2.1, because the permit
6 condition that we're speaking of is 4.1.5, it says that
7 they're --- documentation compliance with permit
8 conditions 4.1, 2, 3, 4, 5, 6, and 9. The permittee
9 shall monitor operations by steady state or startup
10 shutdown, number of startup shutdown events, and hours of
11 operation in each operating mode on a daily basis.

12 Then Section 4.4.1, it says to determine
13 compliance with permit condition 4.1.5, 8, and 9, the
14 permittee shall keep records of the operating hours of
15 each combustion turbine, the throughput of each type of
16 fuel, natural gas or diesel, and operation type, steady
17 state or startup and shut down on a daily basis. The
18 permittee shall multiply the hourly steady state
19 operation emissions to permit condition 4.1.3 by the
20 number of hours of steady state operations and adding the
21 appropriate startup and shutdown emissions from permit
22 condition 4.1.4. The permittee shall calculate the
23 emissions monthly and then on a 12-month running total if
24 the 12-month running total exceeds the sum of emissions

1 at any given time during the previous 12 consecutive
2 calendar months.

3 ATTORNEY DRIVER: Jerry, would you mind
4 slowing down just a little for --- so the court reporter
5 doesn't rip her hair out?

6 THE WITNESS: I'm sorry. You, okay. So
7 where do you want me to go back to? What's --- what?
8 Which --- do you need me to start over?

9 ATTORNEY BECHER: She's got ---.

10 ATTORNEY DRIVER: That's at the Board's
11 discretion.

12 ATTORNEY BECHER: Scott, she's got the
13 exhibit that was provided by Mr. Gray. So I'll let her
14 speak for herself, but.

15 THE WITNESS: Okay.

16 So --- so 4.1.5 is the condition that we
17 are. The question was about. No. Yeah, 4.1.5. So
18 there is an annual emission limit for the turbines. And
19 then if --- then parts B and C or if it's natural gas or
20 diesel operations exclusively over a consecutive 12-month
21 period. The question was, how do you comply with this
22 limit if it's not consecutive 12-month natural gas or
23 diesel?

24 And so the answer would be two places. In

1 4.2.1, that's where the monitoring requirements are for
2 that. And then in four point --- 4.1, those designate
3 what the recordkeeping requirements are to show
4 compliance with that.

5 Did that answer the question?

6 CHAIR: Partially. I'm still, I'm looking
7 at the, just the unredacted tables and I'm still having
8 trouble looking at the. I'm sorry. Looking at the,
9 yeah. Yeah, I'm looking at the redacted tables. I'm
10 sorry, and I'm still having difficulty with the idea that
11 with the number of hours we've got on the two different
12 turbines. I mean two different sources of fuel. How ---
13 how we're getting to a maximum yearly?

14 THE WITNESS: Sure. Yeah, so.

15 CHAIR: Let me put it this way. If I'm
16 going to run --- if I'm going to run 61,000 hours on one
17 and I'm going to run 25,000 hours on the other, I don't
18 understand how I can't just add the two emissions from
19 the two tables together to figure out my total is for the
20 year.

21 THE WITNESS: So the table and in
22 engineering evaluation on page. Well, I don't have the.
23 It's on page 12 of the engineering evaluation, which
24 isn't the certified record page, which I don't have that

1 open. But on page 12 of the engineering evaluation, it
2 has the same table that's in that permit requirement,
3 4.1.5, for the annual emissions. And there's --- it says
4 the following table represents the permitted emission
5 limits for the combustion turbines. This will represent
6 a worst-case scenario for each pollutant when combusting
7 either fuel at its potential hourly emission limitation.

8 So essentially what that table is, it's
9 because the --- because they're, the ability exists that
10 they can combust either fuel throughout the year. So
11 like, if they don't, to stay below the major source
12 thresholds, if they combusted --- if they operated 61,000
13 plus hours of natural gas, they would not be able to
14 operate any hours of diesel during that 12-month period
15 because that would be, they would be up against the
16 maximum limit. And then the opposite is true if it was
17 diesel.

18 So what that table, the emission table
19 represents is the worst case for either pollutant. And
20 so if you are combusting a mix of fuels during that 12-
21 month period, that's where the requirements of 4.2.1 and
22 4.4.1 come in to show compliance with those emission
23 values. Because if you would combust either fuel during
24 that 12-month period, then the hourly operational

1 restriction would not serve any purpose for compliance.

2 CHAIR: You talked about manufacturer
3 specifications and so forth. Do they give you a, they're
4 giving you a mean figure, I'm assuming when they --- they
5 give you their data. Do they give you a standard
6 deviation on that? Or a level of confidence?

7 THE WITNESS: According to the Fundamental
8 side that that was the worst case maximum emissions.

9 CHAIR: But no standard deviation, no
10 indication of level of confidence? In other words, when
11 you get a mean, you normally plus or minus something.
12 There's no plus or minus manufacturer's data?

13 THE WITNESS: Yeah, that it does not state
14 or, you know, to my recollection, the --- the
15 confidential version of that did not make a statement
16 about deviation. No. And that's just in my
17 recollection. At the same time, you have to understand
18 that I probably haven't looked at that in, you know, the
19 confidential version of that, you know, in six months,
20 four months, I don't know.

21 CHAIR: Understand.

22 ATTORNEY DRIVER: And this is --- this is
23 Scott. I don't think it's going to get into problematic
24 territory. I just want to make sure we don't go into any

1 specifics on the specs that are in the --- that are in
2 the unredacted version.

3 CHAIR: No, I was just asking a general
4 question as to whether they typically do that or not.

5 THE WITNESS: Yeah, I can't --- I can't
6 recall that that was the case.

7 CHAIR: Anything else anybody has for this
8 witness? Okay.

9 Mr. Williams, we appreciate your time
10 today. Thank you very much. You're now free to go. I
11 think what we're going to do is take a ten minute break,
12 and then we'll reconvene. Then we're to. Oh, Mr.
13 Driver, do you have another witness?

14 ATTORNEY DRIVER: I do. I'm going to have
15 Joe Kessler when we're done. And I anticipate that being
16 my last witness.

17 CHAIR: Okay.

18 Well, we'll bring him when we come back
19 then.

20 Okay?

21 ATTORNEY DRIVER: Sounds good.

22 CHAIR: Ten minutes.

23 ---

24 (WHEREUPON, A SHORT BREAK WAS TAKEN DURING THE

1 PROCEEDING.)

2 ---

3 CHAIR: All right.

4 We're back in session. Mr. Driver, you
5 have another witness, you say?

6 ATTORNEY BECHER: Mr. Driver, you're on
7 mute.

8 MS. DERAIMO: He's on mute. Scott, you're
9 on mute.

10 ATTORNEY DRIVER: My apologies. Sorry
11 about that.

12 MS. DERAIMO: No worries.

13 CHAIR: So you had another witness?

14 ATTORNEY DRIVER: We do. I'd like to call
15 Joseph Kessler.

16 COURT REPORTER: Please raise your right
17 hand.

18 ---

19 JOSEPH KESSLER,
20 CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
21 HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS
22 FOLLOWS:

23 ---

24 ATTORNEY DRIVER: Thank you.

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DIRECT EXAMINATION

BY ATTORNEY DRIVER:

Q. Mr. Kessler, would you mind stating --- stating your name and spelling your last name?

A. My name is Joseph Kessler, K-E-S-S-L-E-R.

Q. And where are you currently employed, Mr. Kessler?

A. With the Division of Air Quality.

Q. And is that with the Department of Environmental Protection?

A. That's correct.

Q. And what is your title?

A. I am the NSR program manager.

Q. And what are your duties as part of that job?

A. I manage a staff of engineers who review permit applications and other permitting actions across the whole state of West Virginia.

Q. And how long have you been in that position?

A. I've been in that position since October of 2024.

Q. And how long have you been employed with DEP?

A. I started with DEP in February of 1997.

1 Q. And have you worked with the Division of Air
2 Quality for that entire tenure?

3 A. I have, yes.

4 Q. And do you have experience with --- do you have
5 program experience with the issuance of air permits like
6 the one at issue today?

7 A. I do. In my previous nonmanagement career, I
8 was the reviewing engineer on over 450 permit
9 applications.

10 Q. Okay.

11 A. And over 600 permitting actions total.

12 Q. Okay.

13 And I just want to make it clear when we talk
14 about this specific permit, you are not the permit
15 reviewer on this.

16 Correct?

17 A. That's correct. That was Jerry Williams.

18 Q. Okay.

19 And so there may be technical details about
20 which you do not have full knowledge?

21 A. That's correct. Not as the permit writer, and
22 I also want to make sure to be a little bit careful.
23 Although I had access to the confidential information, I
24 don't have a --- a list in my head of exactly what was

1 claimed confidential. So I have to be extra careful not
2 to say something that. So if I pause sometimes, I've
3 just got to be a little bit careful not to say something
4 that --- that may have been claimed confidential.

5 Q. Okay.

6 And just as a --- as a measure, kind of
7 guardrails around that. And I'm sure that other counsel
8 will jump --- will jump in if we get outside the
9 guardrails. We don't want to talk about turbine
10 manufacturers. We don't want to talk about
11 configurations, we don't want to talk about numbers,
12 anything that could possibly be proprietary or
13 competitive advantage information.

14 Are we good on that?

15 A. Yep.

16 Q. I didn't --- I didn't hear you, Mr. Kessler.

17 A. Yes.

18 Q. Okay.

19 Thank you. Now, is using the parametric
20 monitoring, such as was used in this permit, is that
21 programmatically unusual?

22 A. Not at all. So if I can add a little context,
23 let's first ---.

24 Q. Feel free.

1 A. Yeah. Let's --- let's talk a little bit about
2 what we're talking about with parametric monitoring.
3 It's, obviously, it's using parameters to show compliance
4 other than direct emissions measurement. So in this
5 case, we've been talking a lot about hours of operation.
6 So that's the parameter that's being monitored. In many
7 other permits, you might use throughput. You know, how
8 much material is going through a piece of equipment. You
9 might use, how much coating is used in another potential
10 type of facility. Whatever parameter that --- that you
11 can relate to the emissions, that there's a depth, that
12 there's a direct causality between the parameter and the
13 emissions, that's reasonable. That is what we're talking
14 about with parametric monitoring.

15 So here, the hours of operation are the
16 parameter that's being used to show continuous compliance
17 in lieu of direct emissions measurement. So that's what
18 we're talking about, parametric monitoring. And it is
19 the backbone of air permitting. It really is. Many
20 types of sources you can't directly measure, like a
21 flare. There's no way to have direct measurement on ---
22 on an open combustion source like a flare. But almost
23 all emission units across permitting, air permits use
24 some sort of parametric monitoring as a compliance

1 demonstration. So really not as --- not only is it not
2 --- not rare, it is ubiquitous across air permitting.

3 Q. Sorry, does that include synthetic minor
4 permits?

5 A. It does, yes.

6 Q. Okay.

7 And I do not want to get into any speculation
8 or, you know, expert opinion here, but at a program
9 level, how would you characterize Dr. Sahu's
10 representation that synthetic minors should have CEMS for
11 all pollutants in all --- all units that the CEMS are
12 technically feasible? What would be the program
13 implications of that?

14 ATTORNEY BECHER: I'm going to object to
15 the extent this calls for opinion testimony in response
16 to an expert's opinion testimony. He's not qualified as
17 an expert. And I'd ask ---.

18 ATTORNEY DRIVER: And I would just respond
19 that we're not going into any speculation. We are going
20 into just a question based on Mr. Kessler's experience
21 with the program, not what program implications that has.

22 ATTORNEY BECHER: And I would object to
23 the extent it calls for any kind of opinion. I think
24 that was in the question, what do you think of?

1 CHAIR: Can you rephrase your question in
2 a way that doesn't require an Opinion?

3 ATTORNEY DRIVER: Yes.

4 CHAIR: An opinion on an opinion is what
5 you're asking right now.

6 ATTORNEY DRIVER: Okay.

7 Let --- let me rephrase.

8 ATTORNEY YAUSSY: If I --- If I could
9 support Mr. Driver in this. We heard a lot of opinion
10 testimony from people yesterday who were anything but
11 expert. I think Mr. Kessler being able to offer an
12 opinion about the program he works with is entirely
13 consistent.

14 CHAIR: We'll give it the weight it
15 deserves. Go ahead.

16 THE WITNESS: So yeah, I'll answer that
17 from my perspective as again, the program manager of NSR.
18 Requiring compelling all synthetic minors to install CEMS
19 across all emission units for technical --- that have a
20 technical feasible option of putting CEMS on would ---
21 would drastically change how we administer our program.
22 And I'm not going to speculate as to the cost on the
23 business community or the delays involved, but I will
24 just say that it would be vastly different than how we

1 run our program now.

2 BY ATTORNEY DRIVER:

3 Q. And again, just --- just from a program level,
4 how would that, I mean why would that affect the program?
5 And we don't want to talk about the technical
6 feasibilities of CEMS. But from a permitting
7 perspective, how would that affect the program?

8 A. My sense would that we would be, we would first
9 have to determine what metrics we would use to --- to
10 compel, require these CEMS in a non-statutory basis. So
11 we don't have a federal rule that says you got to put
12 CEMS on. We don't have a state regulation that says you
13 have to put CEMS on. So we are requiring it under the
14 authority of the director to put it on there, compelling
15 them to do that. So we're going to have to come up with
16 some metrics to determine when we do this so that we
17 don't get appealed consistently for being arbitrary and
18 capricious in enforcing this.

19 So what level do we say? Ninety-five (95)
20 tons? Ninety (90), 85? We would have to come up with a
21 reasonable justification for some percentage of what a
22 major source is to compel the use of these CEMS. And on
23 top of that, we've got two different major source levels.
24 250 tons a year for some sources, 100 tons a year for

1 others. So we're going to have to make a case that it's
2 percentage based and not mass based because we might be
3 saying 220 tons of a particular emission you don't have
4 to put on CEMS because it's less of a percentage than 80.
5 I'm not doing the math, but 90 tons for a 100 ton source.

6 So that's --- that's a question we're going to
7 have to figure out at a program level. And do we also
8 institute these CEMS requirements for Title V major
9 source? You know, do we consider that as important as
10 NSR major source? So it really goes down a rabbit hole
11 of a lot of program level justifications that we can
12 defend in front of the Board and defend to a --- to a
13 potential applicant as to why we're compelling them to
14 use the CEMS in a non-statutory basis.

15 So from a program level, that's one of the
16 problems that we would have. We would have to have all
17 that lined up so when we came here in front of the Board,
18 we would be able to have the justifications ready. And
19 just to talk a little bit about CEMS, they're not. You
20 know, they're not foolproof devices either.

21 ATTORNEY BECHER: I'm going to object to
22 the extent this is going into expert testimony about
23 equipment here.

24 ATTORNEY DRIVER: And, yeah.

1 BY ATTORNEY DRIVER:

2 Q. And --- and Joe, if we could --- let's just
3 steer away the.

4 A. Got you.

5 Q. Technical implications. Is using the --- is it
6 the policy of DEP to use parametric monitoring like hours
7 of operations, startup and shutdown tracking as a method
8 of continuous --- continuous compliance demonstration?
9 Is that something that is typically required or accepted?

10 A. Yes, that's correct on a --- on a number of
11 different permits. I mean like I said before, in almost
12 all permits, parametric monitoring is what is used,
13 including synthetic minors. That doesn't mean that ---
14 that there aren't statutory requirements for CEMS and
15 other types of measurements that can be used. But I do
16 want to emphasize that again, there's nothing abnormal or
17 out of the box by using parametric monitoring. Again, it
18 is what most air permits are based on.

19 Q. And under the regulatory framework that you
20 work with, is --- does EPA accept that? Is that
21 something that's out of line with EPA's requirements?

22 A. No. We --- we send all of our Rule 13 permits,
23 modification, and construction permits to EPA. And
24 again, as program manager for just a year, I don't want

1 to talk about 28 years' worth of experience running the
2 program. So I didn't see every permit that went through.
3 But from my own experience, I mean EPA will comment on,
4 has commented on, you know, a variety of different
5 issues. Maybe the efficacy of --- of a particular
6 parameter involved or, you know, it could be any ---
7 anything under the sun. But the acceptance of parametric
8 monitoring has never been questioned.

9 Q. Now, is initial stack testing a common method
10 of compliance demonstrations for all manners of emissions
11 units? Is that something that you see a lot?

12 A. Yes, it is. And it, as you did see within that
13 Jerry talked about within 4(k), you know, it's also
14 required in --- in federal rules as well. And it is,
15 again, a standard way of determining real world as built
16 compliance for a particular unit.

17 Q. And is it abnormal in your experience for ---
18 for a permit to use manufacturer's data as a significant
19 factor in determining limits?

20 A. No, as a matter of fact, and Jerry may have
21 touched on this. Manufacturer's data is preferred. So
22 we've got to understand that when we get a permit
23 application, because of the timelines involved with air
24 permitting, we're seeing a permit application long before

1 a company can even break ground. They have to get our
2 permit first before they can really even do any
3 significant, you know, they can't --- they can't start
4 erecting the emission units. That's why it's a pre-
5 construction permit. So we're getting, they come to us
6 early in the game.

7 So our options at that point, when we're trying
8 to figure out what the potential emissions are of a
9 facility in a particular unit, we have a couple of
10 options. We can use general emission factors for the
11 equipment. And that's, if you've --- if you've heard
12 AP42 is a database maintained by EPA that has emission
13 factors in it. Or we can, which we prefer to use,
14 manufacturer's data. And we do get that in all sorts of
15 forms. But generally, almost always it's preferable to
16 using just general emission factors. I mean, I think
17 that's self-evident, right? You're getting data from a
18 manufacturer that is claimed --- that is saying these are
19 the emissions at this particular site, at this particular
20 specific, and it may be something that is unrelated to
21 the site or the environmental conditions, or it may be
22 something that is related.

23 So we prefer that and it's common. And to
24 address something that --- that you asked earlier, these

1 are generally given as maximums, not means. So there
2 wouldn't be a standard deviation in most cases applied,
3 you're getting the maximum emissions for a particular set
4 of circumstances for a unit. And so again, would we love
5 to always have real world testing data before we issued
6 the permit? Sure, it'd be great. But how do you get
7 real world testing data before you --- before they're
8 allowed to build the unit? You can't. So you've got to
9 have information either from general emission factors or
10 from the manufacturer's data.

11 So we prefer manufacturer's data. We accept
12 AP42 data, and we've had this discussion in many other
13 response to comments about AP42 data. But we will also
14 accept AP42 data. But those are --- those are the
15 options we have. And then we try to back that up with
16 performance testing where it is. Where it's applicable
17 or where we think it's appropriate and where we feel like
18 it's needed on the back end. And I mean, and that's the
19 way our permitting works. And you know, if --- if that
20 changes, then someone has to come up with a better option
21 of giving real world data to us before something can be
22 built. And I don't think that's possible.

23 Q. And based on your experience with --- how many
24 permits did you say that you had worked on or had

1 experience with during your 28 years?

2 A. The current number, based on my ridiculous
3 spreadsheet, is 479.

4 Q. Based on your experience with those 479
5 permits, is there anything irregular about the way this
6 permit was issued or something that would cause EPA any
7 heartburn? Leaving aside any of the outside non-
8 permitting or non-litigation matters.

9 ATTORNEY BECHER: I'm going to object to
10 the extent that calls for opinion testimony and
11 speculation on what EPA would say.

12 CHAIR: We'll --- we'll allow it.

13 BY ATTORNEY DRIVER:

14 Q. Did --- did EPA have any issue?

15 A. I believe EPA made some comments and that Jerry
16 addressed them in the response to comments, so I don't
17 need to speculate. They --- their comments are in the
18 record and his response to those.

19 Q. And again, Mr. Kessler, we don't want to go
20 into the technical details, and I know you did not write
21 this permit, but do you have anything else you'd like to
22 add?

23 A. Well, I would like to say I thought Jerry did a
24 really good job and I want to --- I appreciate him for

1 coming on today.

2 Q. Okay. Okay.

3 Well, we got a ten from one judge there.

4 ATTORNEY DRIVER: So I'll go ahead and
5 pass the witness for now.

6 ATTORNEY BECHER: Is it me or Mr. Yaussy?

7 ATTORNEY YAUSSY: I have no questions.

8 ATTORNEY BECHER: That makes it easy.

9 ---

10 CROSS EXAMINATION

11 ---

12 BY ATTORNEY BECHER:

13 Q. All right.

14 Mr. Kessler, have you been in front of the
15 Board before?

16 A. Yes.

17 Q. Do you understand the role of the Air Quality
18 Board in the permitting process?

19 A. I think I do, yes.

20 Q. Okay.

21 Would you agree with me that it's the Air
22 Quality Board's role to review the facts and
23 circumstances of the specific permit at issue?

24 A. I would say based on my legal knowledge, which

1 is pretty slim, that that seems an accurate
2 representation. But since we have the Board here, I
3 would let them comment if that is their role.

4 Q. Do you know how many air permits did the DEP
5 processed last year?

6 A. I have it on a spreadsheet. Yes. I don't have
7 it in front of me.

8 Q. Okay.

9 Do you know how many --- was it in the
10 hundreds?

11 A. Yes, it was around 300, I think.

12 Q. Do you know how many of those permits the DEP
13 denied?

14 A. We denied none of those permits.

15 Q. Thank you.

16 ATTORNEY BECHER: Nothing further.

17 CHAIR: Mr. Driver, any Redirect?

18 ATTORNEY DRIVER: I do not have any
19 redirect, Mr. Chairman.

20 CHAIR: Board members, any questions?

21 MR. ORNDORFF: Yeah, I have a question.

22 Mr. Kessler, based on your 479 permits that you've been
23 involved in and how --- how many of those do, have you
24 used the manufacturer's warranties to approve a permit?

1 THE WITNESS: Well, it's hard to give an
2 exact, but I would say. Again, in this 479, I've got to
3 preface this by saying across all amount of different
4 types of sources, right? So in some sources you're going
5 to have, you're not going to have any need or for
6 manufacturer's data, like a conveyor belt at a prep plant
7 or something, so. So that's going to push the percentage
8 down. But of the subset where you have combustion
9 devices, boilers, engines, turbines, other types of
10 combustion units or units that would be appropriately to
11 have manufacturer's data, I would say a pretty good
12 percentage. I would say that 50 percent.

13 MR. ORNDORFF: Of those permits that use
14 the manufacturer's warranties, in your experience, once
15 you start stack testing, how many of those fail to meet
16 the manufacturer's warranty?

17 THE WITNESS: I would say, again, not
18 being part of compliance enforcement, I would say a very
19 small number.

20 MR. ORNDORFF: How many?

21 THE WITNESS: A very small number. Less
22 than a --- less than a percent.

23 CHAIR: Any other questions?

24 ATTORNEY DRIVER: I do have one follow up,

1 Mister --- Mr. Chairman.

2 ---

3 REDIRECT EXAMINATION

4 ---

5 BY ATTORNEY DRIVER:

6 Q. Mr. Kessler, is the manufacturer's data the
7 only factor that is generally considered in permit
8 issuance?

9 A. No, I mean, you know, when you're reviewing the
10 calculations of --- of a permit application, I mean,
11 you're looking at a variety of data as supplied by the,
12 you know, in the application, including the
13 manufacturer's data. So I would have to have a more
14 specific example to --- to really discuss much further
15 than that. But I mean, so I'm not quite sure how to
16 answer that. You're always looking at everything to a
17 reasonable degree. You know, to a reasonable degree, are
18 these calculations representative of the maximum, you
19 know, worst case emissions from --- from this unit that
20 we can base the potential to emit a facility on? That's
21 what we're looking at to a reasonable degree.

22 ATTORNEY DRIVER: Okay.

23 And I'll pass the witness again.

24 CHAIR: Okay.

1 I've got --- I want to follow up on --- on
2 the question a minute ago. I know you're not
3 enforcement, so maybe I'm putting you on the spot here.
4 Let's suppose you do the stack test. Well, let me back
5 up. Let's suppose that the manufacturer says that the
6 units are going to be, I'm going to make up numbers
7 totally, okay? Manufacturer says 40 pounds per hour on
8 this unit, okay? You do a stack test and it comes out to
9 be 42 pounds per unit. What do you do?

10 THE WITNESS: Again, speaking for
11 enforcement, but I do have obviously experience in, you
12 know, in hearing about these types of cases. So the
13 enforcement, first of all is they're going to try to get
14 an explanation from the source, what happened? Were the
15 testing conditions normal? Was there something abnormal
16 about the test that day? Was the probe put in the stack
17 the correct way? Was the oxygen readings correct, and so
18 on? And then, well, let me back up first. Before
19 testing ever happens, here's what --- here's the
20 procedure that happens. The --- the facility submits a
21 testing protocol that is reviewed by the DAQ, and it
22 outlines exactly how the test is going to be. What test
23 method are we using, what day, where are we putting the
24 probe in? You know, what equipment? So we review that

1 and approve it. And I know enforcement tries to get
2 somebody there to observe the test as well.

3 So it's not just, hey, we did a test on
4 February 1st. Here's the results. We've already looked
5 at how they're going to do the test and approved that.
6 So once we're in agreement how and the test methods that
7 are used, hopefully we've got somebody to be on site
8 during the test. So once we're at that point, if they
9 definitively fail the test, and we agree that they fail
10 the test, the enforcement section will most likely issue
11 them a notice of violation and require them to curtail
12 the use of that particular piece of equipment. It may be
13 a linear relationship between fuel usage and emissions.

14 So if they're at 100 percent heat input
15 and they're hitting 42 instead of 40, we might say, you
16 got to run that at 75 percent heat load, because we know
17 there's a linear relationship between fuel usage and ---
18 and heat load and emissions. So until you get this
19 figured out or change the permit, you've got to operate
20 this at a lower level.

21 And that's why we have a notice of
22 violation. A consent order is entered into with the
23 company to get them back into compliance. And there's
24 usually a fine involved, but that, again, is up to the

1 discretion of the enforcement section. But the whole
2 goal of that process is to get them back into compliance
3 and to stop them from operating in such a way outside the
4 permit. And oftentimes there are penalties involved.

5 CHAIR: Okay.

6 And the permit says that the firm
7 manufacturer --- not manufacturer, the plant has to keep
8 a copy of all --- I can't talk. All vendor guarantees?

9 THE WITNESS: That's correct.

10 CHAIR: Emphasis on the word guarantee?

11 THE WITNESS: That's right. Like we
12 talked about before, I --- I do think there is difficulty
13 in getting. And again, I don't want to roam in the realm
14 of speculation. So, again, I don't work for a turbine
15 manufacturer. But in my experience as a permit reviewer,
16 those guarantees can tend to come later in the game when
17 there's contractual obligations made with, between the
18 applicant and the --- and the company as I understand it.

19 When they start operating, they've got to
20 have that vendor guarantee on site, and so the inspectors
21 can see it. And that's the reason that language is in
22 the permit.

23 CHAIR: As a --- as a permit writer, are
24 you looking at guarantees, or are you looking at

1 estimates?

2 THE WITNESS: I mean, would we love to see
3 the contractual legal guarantee in the permit
4 application? Yeah, that would be best case. But it's
5 not practical, I don't think, in most --- in most cases.
6 So we will accept the manufacturer data that's not
7 written as a legal guarantee. Again, you know, going
8 back to what the options are we, you know, compelling a
9 source to enter a contractual obligation to get that
10 guarantee, in my opinion, is beyond the authority of the
11 DAQ.

12 CHAIR: And you have 100 --- as a permit
13 writer, which you've done before, you have 100 percent
14 confidence that --- that the figure they give you is ---
15 is close to being 100 percent?

16 THE WITNESS: Close to being 100 percent.
17 I don't have 100 percent confidence, I'm not in the
18 matrix, so. A reasonable confidence as a permit writer,
19 understanding the role that we have as permit writers in
20 the timelines. Do I have --- I mean, I just said
21 occasionally they do violate. So 100 percent confidence
22 is not there.

23 CHAIR: So there's a margin of error?

24 THE WITNESS: Absolutely. With the tools

1 we have to work with, I prefer manufacturer's data even
2 if it's not written as a contractual or legal guarantee.

3 CHAIR: Thank you. Anything else for this
4 witness?

5 ATTORNEY BECHER: Just a quick follow up.

6 ---

7 RE CROSS EXAMINATION

8 ---

9 BY ATTORNEY BECHER:

10 Q. So on --- on guarantees, would you agree with
11 me? There's no guarantees that are in the certified
12 record as we have?

13 A. There is no legal guarantee that I see in the
14 certified record.

15 Q. Okay.

16 And so we don't know what conditions a
17 guarantee might contain?

18 A. There's no legal guarantee in that certified
19 record.

20 Q. You --- you had spoken about penalties. Can
21 you give me an order of magnitude of a typical penalty?

22 A. I cannot. You would have to bring up someone
23 out of enforcement.

24 ATTORNEY BECHER: All right.

1 CHAIR: Okay.

2 Thank you, sir. You may step down.

3 ATTORNEY DRIVER: I've got a quick follow
4 up, Mr. Chairman.

5 CHAIR: Too late. Go ahead.

6 ATTORNEY DRIVER: Mr. Kessler, is it
7 common for a guarantee not to be entered into until a
8 purchase --- a purchase contract has already been signed
9 off on?

10 ATTORNEY BECHER: I'm going to object. I
11 think he already addressed that.

12 CHAIR: Yeah, he did --- he did address
13 that, Scott. We got that.

14 ATTORNEY DRIVER: Okay.

15 Well, I'm done with him.

16 CHAIR: Okay, thank you. All right.

17 Mr. Yaussy, you're up. Is Mr. Walls on?
18 I didn't check to see.

19 ATTORNEY YAUSSY: I have not seen him
20 check in yet. He is ---.

21 ATTORNEY WALLS: I just checked in. I'm
22 here.

23 ATTORNEY YAUSSY: Oh, there he is. Great.

24 CHAIR: So it's your ballgame? OKAY.

1 Consultants, Inc.

2 Q. Can you give me a brief recounting of your
3 education?

4 A. Absolutely. I have a Bachelor of Science
5 degree in chemical engineering with a minor in
6 environmental engineering from Penn State.

7 Q. Can you give me some idea of your work
8 experience?

9 A. Yes. I've been doing air quality consulting
10 since I graduated school for the past 24 years.

11 Q. And what is that? When you say you have been
12 involved in air permitting, what kinds of things have you
13 been doing?

14 A. Sure. I calculate air emissions for a variety
15 of industries of prepared minor, synthetic minor, Title
16 V, major new source review, prevention of significant
17 deterioration permits. I also assist my clients in
18 complying with those permits and complying with both state
19 --- state, federal, and local regulations by calculating
20 emissions, preparing air compliance reports, et cetera.

21 Q. What kind of work have you done with gas
22 turbines of the kind that we've been addressing?

23 A. Yes. I've --- I've permitted a number of gas
24 fired power plants as well as worked with gas fired

1 turbines in the oil and gas industry, especially over the
2 last five to ten years. Dozens of permits if we're
3 looking for numbers.

4 Q. Have you done back --- best available control?

5 A. Yes, certainly. When we're talking about major
6 source under new source review and prevention of
7 significant deterioration regulations, the federal
8 regulations, that requires a best available control
9 technology analysis, or BACT, as well as conducting air
10 dispersion modeling to demonstrate compliance with the
11 national ambient air quality standards as well as the PSD
12 increment thresholds.

13 Q. Have you worked with the major turbine
14 manufacturers?

15 A. Yes, I've worked with all of the major turbine
16 manufacturers.

17 Q. When I say work with, what ---?

18 A. Well, I would say the top three, which I think
19 has been referenced before, I, and Mitsubishi, and
20 Siemens as well as some other ones like solar.

21 Q. When you work with them, what kinds of --- how
22 are you engaged with them?

23 A. I would say, you know, we're partnering with
24 them to establish admission rates, to review regulations

1 to determine what emission rates they must comply with.

2 Q. You're familiar with the --- with the obtaining
3 of manufacturer data as opposed to manufacturer
4 guarantees?

5 A. Absolutely.

6 Q. Tell me a little bit about your position with
7 the CEC?

8 A. So I'm a vice president with CEC. I sit in our
9 Pittsburgh, Pennsylvania office, which is our
10 headquarters, actually technically Moon Township. I am
11 the corporate air practice lead. So CEC has 1,500
12 employees and over 30 offices across the country. We
13 were founded in Pittsburgh, so that is our headquarters.
14 And I am responsible for the air quality practice across
15 those 30 plus offices to ensure that the quality of our
16 work remains consistent across those offices as well as,
17 you know, managing those employees, making sure those
18 employees are, you know, get enough professional
19 development that they --- that they require.

20 Q. Have you been engaged with the Air Waste
21 Management Association?

22 A. Yes. Yes.

23 Q. Tell us what that is and what you do?

24 A. Sure. The Air and Waste Management Association

1 is a nonpartisan, nonprofit organization that was founded
2 in the early 1900s, I believe 1907. It's an
3 international organization with members across 65
4 countries. And I was elected president of that
5 association for 2025, so I'm currently serving as
6 president. I've previously been on the Board of
7 Directors of that association and will sit on the Board
8 of Directors next year as well as immediate --- immediate
9 past president.

10 The mission --- if I may?

11 Q. Sure.

12 A. It's a passion of mine. I've been a member of
13 that association for 20 years and the mission of that
14 association is to educate our members so that we can
15 make, you know, difficult environmental decisions, solve
16 environmental problems to benefit society. So it's a
17 little different than an industry group because we bring
18 all stakeholders to the table, academic industry as well
19 as regulators.

20 ATTORNEY YAUSSY: Mr. Chairman, at this
21 time I'd like to offer Ms. Blinn as an expert in air
22 pollution permitting, the permitting of natural gas
23 turbines, including emissions from combined cycle
24 turbines. Those --- that are at issue in this case.

1 CHAIR: Any objections?

2 ATTORNEY BECHER: If I may have just a few
3 questions on voir dire?

4 CHAIR: Questions? Sure.

5 ---

6 EXAMINATION ON QUALIFICATIONS

7 ---

8 BY ATTORNEY BECHER:

9 Q. Ms. Blinn, how long have you been employed by
10 CEC?

11 A. I've been employed by CEC for going on eight
12 years now.

13 Q. Okay.

14 Prior to your employment with, well at CEC,
15 have you worked with any non-industrial clients?

16 A. At CEC, have I worked with any non?

17 Q. Non-industrial clients?

18 A. Non-industrial clients? Yes. I've worked with
19 public sector clients as well.

20 Q. Who is that?

21 A. We're currently doing work with the Tennessee
22 Department of Environmental Conservation, and we've also
23 worked with other municipalities.

24 Q. And does that relate to air pollution?

1 A. Yes.

2 Q. I see that you --- you are an engineer in
3 training.

4 Is that correct?

5 A. Correct, yes.

6 Q. Okay.

7 That means you do not have an engineering
8 certification?

9 A. That's correct. I have yet to take the
10 professional engineer's test.

11 Q. And you had stated you have a Bachelor of
12 Science in chemical engineering.

13 Correct?

14 A. Correct.

15 Q. Do you have any graduate education?

16 A. I do not.

17 Q. And you're not holding yourself out to be an
18 expert in the mechanics or operations of power plant
19 beyond the extent of calculating emissions, are you?

20 A. Correct. Wait, I'm waiting for.

21 ATTORNEY YAUSSY: Well, I mean it's pretty
22 broad, it's air pollution permitting.

23 THE WITNESS: Yeah, it's.

24 ATTORNEY YAUSSY: Which would include the

1 entire plant.

2 THE WITNESS: It's, I mean, I do
3 understand the combustion of --- of fossil fuels in
4 combustion turbine.

5 BY ATTORNEY BECHER:

6 Q. Have you done any work on power plant design or
7 construction?

8 A. No.

9 Q. Have you done any work evaluating turbine
10 combustion?

11 A. Yes, in conjunction with my work with the
12 turbine manufacturers.

13 Q. And is that simply to establish what emissions
14 will --- will be emitted from those turbines?

15 A. Yes.

16 Q. Okay.

17 What percentage of your work would you say is
18 with gas plants?

19 A. Probably about 50 percent.

20 Q. Has that changed over the years?

21 A. It comes and goes, yes, it's changed. Like
22 other expert witnesses, you know, there was a lot more
23 coal combustion when I started working, but has
24 transferred to more natural gas combustion.

1 Q. And with that 50 percent is, what percentage of
2 that would be electric utilities or electric generation?

3 A. I would say about two thirds of that.

4 ATTORNEY BECHER: That's all.

5 CHAIR: Mr. Driver?

6 ATTORNEY DRIVER: I have no objections to
7 Ms. Blinn's qualifications.

8 CHAIR: Any objections?

9 ATTORNEY BECHER: No.

10 CHAIR: Okay. All right.

11 So she'll be so advised the witness as you
12 --- as you specified, Mr. Yaussy.

13 ATTORNEY YAUSSY: Thank you.

14 CHAIR: Please proceed.

15 ATTORNEY YAUSSY: My next question is
16 going to be how she calculated emissions for purposes of
17 the application, so I think we're going to have to. I
18 think we'll have to ask people who don't have a right to
19 be here to leave.

20 CHAIR: Okay. All right.

21 At this point, we're going to take a brief
22 recess. For those of you in the room, we'll have to
23 escort you out. I'll get somebody to escort them out.
24 And you can wait in the lobby, I suppose, and then we can

1 tell you when we're back in session. That's probably the
2 best way we can do that.

3 ATTORNEY BECHER: And --- and just to
4 clarify for the public, I think this is Mr. Yaussy's last
5 witness. I think we have agreed, but we haven't spoken
6 to Mr. Driver, that we would waive --- waive closings if
7 we have an opportunity to brief. I just want to be clear
8 about what might happen when we come back.

9 CHAIR: Okay.

10 So are you telling the public that there's
11 really nothing after this? Is that what you're trying to
12 say?

13 ATTORNEY BECHER: That --- that is my ---
14 my point.

15 CHAIR: Okay Scott?

16 ATTORNEY DRIVER: I have no issue
17 whatsoever with it.

18 CHAIR: Okay.

19 And you're --- you're agreeing that you'll
20 do briefs and not a closing?

21 ATTORNEY DRIVER: Unless something
22 absolutely unexpected happens where --- where a rebuttal
23 witness is needed, I don't anticipate having anything at
24 all after Mr. Yaussy and I'm perfectly willing to waive

1 closing and give briefs.

2 CHAIR: Okay.

3 We'll do that then. So that, we thank you
4 from the public for attending. Thank you for your
5 civility during the hearings.

6 MS. DERAIMO: So are we getting everybody
7 off of Zoom now?

8 CHAIR: Yes. Yes. People on Zoom except
9 for Mr. Driver and Mr. Knee will need to get off.

10 MS. DERAIMO: And Mr. Walls.

11 CHAIR: And Mr. Walls, I'm sorry. Mr.
12 Walls, you can stay on too. I forgot you were on there.

13 MR. WYLAND: Scott Wyland here. I'm with
14 the Fundamental Data team and I'd like to stay on,
15 please.

16 CHAIR: Mr. Yaussy, is that?

17 ATTORNEY YAUSSY: Yes, sir.

18 ATTORNEY DRIVER: No objections from here.

19 COURT REPORTER: What was his last name?

20 CHAIR: What?

21 COURT REPORTER: What --- what was his
22 last name, Scott?

23 CHAIR: I didn't catch it myself. The
24 person that just said they were on, can we get your name

1 again?

2 ATTORNEY YAUSSY: Scott Wyland.

3 CHAIR: Scott Wyland. Okay.

4 ATTORNEY YAUSSY: W-Y-L-A-N-D.

5 MR. WYLAND: Yes.

6 ---

7 (WHEREUPON, THERE WAS A PAUSE DURING THE PROCEEDING.)

8 ---

9 CHAIR: Okay, Mr. Yaussy

10 CONFIDENTIAL PORTION BEGINS

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CONFIDENTIAL PORTION ENDS

CHAIR: All right.

1 We are at the conclusion then. The
2 understanding is that we are not going to have closing
3 statements, correct? Okay.

4 So we'll move on to closing this. We're
5 going to allow you to produce --- allow all parties to
6 produce proposed findings of fact and conclusions of law
7 and a narrative that if you want to put a narrative in
8 there as well, but specifically the proposed findings and
9 conclusions of law. We understand that --- that
10 everybody is anxious to have this done within the 60 days
11 of the hearing.

12 ATTORNEY BECHER: Yes, sir.

13 CHAIR: So that means that we are going to
14 have to make sure that we've got tight deadlines here,
15 okay? So what we're going to do is they have to be, your
16 --- your documents have to be submitted within 30 days of
17 today. Now if that's not possible, you let me know. But
18 30 days of today. After that, there will be 14 days for
19 each party to respond to the other party, okay? And then
20 at that point, then the Board will move forward in terms
21 of preparing an order.

22 Again, that's a little tighter than we
23 normally do. Normally we have 30 days after the
24 transcript, but the transcript available to the Board

1 might not be for two to three weeks and that takes us
2 close to that 60 days. So that's why we're going to do
3 that.

4 ATTORNEY BECHER: January 3rd's the next
5 day.

6 CHAIR: That works? Works Mr. Driver?

7 ATTORNEY DRIVER: It does.

8 CHAIR: All right.

9 ATTORNEY GRAY: And if anybody runs into
10 procedural log jams, let everybody know. And if we need
11 to adjust the schedule, it can be adjusted.

12 ATTORNEY YAUSSY: We intend to meet it.
13 Thank you.

14 CHAIR: Now, the other ---.

15 ATTORNEY WALLS: Sorry, Mr. Chairman, I
16 didn't mean to interrupt you. This is Jim Walls. I was
17 just wondering --- wondering if the court reporter can
18 give us some estimate on when we might be --- think we're
19 going to receive the --- the transcript?

20 ATTORNEY GRAY: Let's --- let's do that
21 tomorrow or whatever.

22 ATTORNEY YAUSSY: Well, we talked with the
23 court reporter yesterday and she said she had 21 days,
24 but thought she could easily beat that. So we fell

1 confident.

2 COURT REPORTER: Yeah, it --- I would say
3 between 20 and 21. I mean, you can always expedite the
4 transcript if you want and then.

5 MS. DERAIMO: Our contract says 21 days.

6 ATTORNEY GRAY: That's our contract. You
7 all can expedite it if you so desire.

8 COURT REPORTER: Yeah.

9 ATTORNEY DRIVER: And I'd also, this is
10 Scott. I'd also like to make sure that we have that we
11 get copies of the redacted and the unredacted
12 transcripts.

13 ATTORNEY BECHER: I'll talk to you later,
14 but.

15 COURT REPORTER: Yeah.

16 ATTORNEY BECHER: I'd like to make sure we
17 get the expedited.

18 COURT REPORTER: Yeah, yeah.

19 ATTORNEY BECHER: For sure.

20 COURT REPORTER: Just give me a specific
21 date for the expedite, and then we can get it all sorted
22 out. Typically our expedite's about three days.

23 ATTORNEY BECHER: Okay.

24 COURT REPORTER: But we can work with you

1 and see what --- whatever you guys would want. But
2 typically it's about three business days.

3 CHAIR: And caution, of course, if in
4 preparing your --- your narratives and your findings of
5 fact and conclusions of law, we have the redacted versus
6 the unredacted material. So if you're doing anything
7 that's redacted, make sure that you follow the protective
8 order. Indicated --- indicate that it should be under
9 seal, and we'll have to deal with at that point.

10 ATTORNEY BECHER: And what I have done in
11 other cases with protective order information is file a
12 public version of it with that section of the facts or
13 conclusions or argument redacted, and then a sealed
14 version for the judicial or quasi-judicial board. Is
15 that the Board's preference?

16 CHAIR: That's --- that's probably the
17 best way to do it.

18 ATTORNEY GRAY: But make sure you share it
19 with the other ones. Make sure that none of the parties,
20 everybody, the parties are going to say, well, yeah, you
21 know.

22 ATTORNEY BECHER: Of course.

23 ATTORNEY GRAY: Just --- just let the
24 other party, for any objections.

1 ATTORNEY YAUSSY: Yeah, why don't --- why
2 don't we share? Well, I'm just trying to think what. I
3 don't want to get advanced.

4 ATTORNEY BECHER: We'll --- we'll talk,
5 we'll work it out.

6 ATTORNEY YAUSSY: We'll work it out.

7 ATTORNEY GRAY: Yeah. Just make sure you
8 guys are okay with what the public version looks like and
9 there's no thought that somebody towed a little bit too
10 close to the line.

11 ATTORNEY YAUSSY: I'm sure we can work it
12 out.

13 ATTORNEY BECHER: Okay.

14 CHAIR: All right.

15 Are there any other questions? All right.

16 At this stage then, we are concluded. The
17 transcript, of course, is available, you all know that.
18 So you can get it directly from the court reporter if you
19 need to. And of course, a copy will be available in the
20 Board office once we get it, but that's going to be after
21 you need it, so. So we are concluded at this stage.
22 Thank you all for your time, for your presentation in a
23 professional manner, and civility during the hearing. We
24 appreciate that as well. Thank you all, and we stand

1 adjourned.

2 ---

3 (WHEREUPON, AN OFF RECORD DISCUSSION WAS HELD DURING THE
4 PROCEEDING.)

5 ---

6 COURT REPORTER: Okay. All right.

7 So you said you wanted to modify your
8 transcript order from yesterday.

9 Correct?

10 ATTORNEY BECHER: Yeah.

11 COURT REPORTER: Okay.

12 If you just want to fill out this paper
13 again, just let me know. If you can also give a date as
14 to whenever you would want it.

15 ATTORNEY BECHER: Does the price change
16 based on how fast it's expedited?

17 COURT REPORTER: I honestly don't know the
18 answer to that question.

19 ATTORNEY BECHER: Okay.

20 COURT REPORTER: I --- the only thing that
21 I really do know is that it's typically, with a typical
22 expedite, it's about three business days.

23 ATTORNEY BECHER: Okay.

24 COURT REPORTER: From whenever you order

1 it. But you can always give a more specific date, and
2 then maybe we can work something out.

3 ATTORNEY BECHER: Yeah. Yeah. I'll give
4 --- I'll give you all a call tomorrow to see.

5 COURT REPORTER: Okay.

6 ATTORNEY BECHER: Because I don't need it
7 within three days, but yeah, I also don't know want to
8 wait 20 days, so.

9 COURT REPORTER: Yeah, yeah. You'll just
10 want to make sure that you call our Johnstown office in
11 Pennsylvania.

12 ATTORNEY BECHER: Okay.

13 COURT REPORTER: Do you have that number?

14 ATTORNEY BECHER: I'm sure I can find it.

15 COURT REPORTER: I can give you one of our
16 business cards that has that information on it.

17 ATTORNEY BECHER: Sure.

18 * * * * *

19 HEARING CONCLUDED AT 12:18 P.M.

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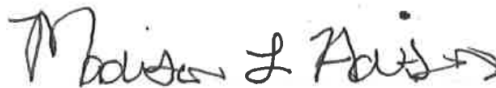
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CERTIFICATE

I hereby certify, as the stenographic reporter,
that the foregoing proceedings were taken
stenographically by me, and thereafter reduced to
typewriting by me or under my direction; and that this
transcript is a true and accurate record to the best of
my ability.

I certify that the attached transcript meets the
requirements set forth within article twenty-seven,
chapter forty-seven of the West Virginia Code.



Madison Adkins,

Court Reporter

1