

SOAH DOCKET NO. 582-13-1520
TCEQ DOCKET NO. 2012-2608-AIR

IN THE MATTER OF EL PASO ELECTRIC
COMPANY
APPLICATION FOR AIR QUALITY PERMIT
NOS. 102294/PSD-TX-1290



BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

APPLICANT EL PASO ELECTRIC COMPANY'S
RESPONSE TO EXCEPTIONS

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TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

Aligned Protestants must by their exceptions, and with record evidence,¹ establish that the Judge did not properly apply or interpret applicable law or agency rules, that a prior administrative decision on which the Judge relied is incorrect, or that the Judge made a technical error in a finding of fact.² Aligned Protestants chose instead to re-brief the case as presented to the Judge. El Paso Electric Company's response briefs may be found in the record, and so—following an abbreviated summary of the parties' positions on contested issues—this Response refutes only Aligned Protestants' objections to the Judge's specific findings and conclusions, confirming that each finding

¹ See TEX. GOV'T CODE § 2003.047(m) ("The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge.")

² See TEX. GOV'T CODE § 2001.058(e) ("A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative law judge, only if the agency determines (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions, (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed, or (3) that a technical error in a finding of fact should be changed") Courts interpreting this provision have held that before changing a finding of fact or conclusion of law, the Commission must explain "with particularity" its specific reason and legal basis for each change made and must articulate "a rational connection between an underlying agency policy and the altered finding of fact or conclusion of law." See *Sanchez v. Texas State Bd. of Medical Examiners*, 229 S.W.3d 498, 515-16 (Tex. App.—Austin 2007, no pet.)

is supported by substantial record evidence and each conclusion by proper application of governing legal authority.

I. OVERVIEW OF CONTESTED ISSUES

El Paso Electric Company seeks permission to install four GE LMS100 turbines,³ fueled by pipeline natural gas,⁴ equipped with the full suite of emission controls,⁵ operated in simple-cycle mode,⁶ to generate up to 400 MW of peak- and intermediate-load power for the Company's customers in west Texas and southeastern New Mexico.⁷ From an air emissions standpoint, this Montana Power Station would be far less consequential than one commercial airliner.⁸ But for its emissions of "greenhouse gases," which trigger PSD review under federal law, the project already would be well under construction by authority of the Commission-issued standard permit for turbines, requiring no case-by-case review at all.⁹ While Aligned Protestants may not wish to see the Montana Power Station built, it is not because of legitimate concerns about its air emissions.

³ El Paso Electric Ex. 1 (Ramirez pre filed) at 9.

⁴ *Id.* at 15.

⁵ *Id.* at 19-20.

⁶ *Id.* at 9

⁷ El Paso Electric Ex. 1 (Ramirez pre-filed) at 15.

⁸ These "aeroderivative" turbines are just like jet engines, *see* Tr. at 402 (Powers on re-direct), except (1) fueled by natural gas instead of JET-A, *see* El Paso Electric Ex. 4G (Application Section 7) at 1, (2) built with an "Intercooler" system to enhance air flow and efficiency, *see* El Paso Electric Ex. 1 (Ramirez pre-filed) at 12-13, and (3) equipped with state-of-the-art emission controls instead of exhausting straight to atmosphere. El Paso Electric Ex. 1 (Ramirez pre-filed) at 9, 19-20

⁹ Because the project is "major" for GHG, under EPA's "major for one major for all" policy, it triggers PSD review for any other pollutants emitted above the applicable significance threshold. El Paso Electric Ex. 100 (Greywall pre-filed) at 12-13

A. THE “BEST AVAILABLE CONTROL TECHNOLOGY” URGED BY ALIGNED PROTESTANTS IS NEITHER BEST NOR AVAILABLE, NOR EVEN CONTROL TECHNOLOGY.

Aligned Protestants’ primary “BACT” issue relates to the small cooling towers used in service of the LMS100 intercoolers.¹⁰ Even their expert, Bill Powers, did not question that the high-efficiency mist eliminators described in the application represent BACT for those cooling towers.¹¹ Instead, he argued that the Commission should compel El Paso Electric to use dry cooling (a large fin-fan array) on the air circulated to the LMS100 intercoolers, eliminating the trivial amount of PM associated with cooling tower drift.¹² But dry cooling not only would add substantial parasitic load,¹³ but fail to achieve the same temperature drops as evaporative cooling, with adverse effect on turbine efficiency.¹⁴ Substantial expert testimony established that dry cooling, as a consequence, would *increase* overall emissions not only of PM, but of all other pollutants,¹⁵ at much greater cost,¹⁶ with lower power output.¹⁷ Accordingly, even if it were appropriate for a permitting authority to re-direct

¹⁰ El Paso Electric Ex. 100 (Greywall pre filed) at 79 (“[T]he cooling towers here are just cooling a heat exchanger that’s cooling recirculated inlet combustion air in the inlet compressor end of the turbine. That’s the GE Intercooler system. This isn’t a large-scale cooling tower intended to remove residual heat in the massive flow of water used in a boiler-based steam driven turbine.”)

¹¹ Tr. at 372-73 (Powers on cross).

¹² Aligned Protestants Ex 27 (Powers pre-filed) at 23-24

¹³ El Paso Electric Ex. 100 (Greywall pre filed) at 77-78 (testifying that a dry cooling system, which requires a great many fan motors, would reduce the net power output available to the grid by about one percent)

¹⁴ El Paso Electric Ex. 100 (Greywall pre-filed) at 76-77 (indicating that a dry cooling system would cause the Montana Power Station to lose about 10 percent of its maximum rated capacity); Tr. at 106 (Ramirez on re-direct); El Paso Electric Ex 1 (Ramirez pre filed) at 12; Tr at 25 (Ramirez on cross). In fact, El Paso Electric’s Vice President of Power Generation testified that a 10 percent drop in maximum power output due to dry cooling would be an underestimate.

¹⁵ Based on the need to overcome power loss due to dry cooling, El Paso Electric would have to increase gas usage in the turbines, which would not only result in additional PM emissions from the turbines, but additional emissions of other pollutants emitted from the turbines, as well El Paso Electric Ex 100 (Greywall pre-filed) at 78

¹⁶ Tr at 107 (Ramirez on re-direct) (testifying that based on his knowledge of internal bids and equipment cost differentials, a dry-cooled Montana Power Station would cost \$18 million more than a wet-cooled version); El Paso Electric Ex 1 (Ramirez pre-filed) at 13

¹⁷ El Paso Electric Ex 1 (Ramirez pre filed) at 13, El Paso Electric Ex 100 (Greywall pre-filed) at 76 78

the applicant's selection of facilities in the exercise of its BACT review function,¹⁸ no rational permitting authority would direct an applicant to build a higher-emitting design at greater cost that fails to meet the business needs of its proponent.

Although their expert advocated "dry cooling," Aligned Protestants' post-hearing briefing (and now their exceptions) advocate instead for something they call "dry-hybrid." The record includes only one cryptic mention of the possible offer of such an option (in a 2004 GE sales brochure),¹⁹ but no further description of what it is, what it does, or even proof that it actually has ever been built anywhere in the world. Certainly no evidence supports the magical claims that Aligned Protestants make on its behalf.²⁰

B. THE METEOROLOGICAL DATA SET USED IN THE DISPERSION MODELING SATISFIED ALL REQUIREMENTS OF THE *GUIDELINE ON AIR QUALITY MODELS*.

Aligned Protestants' principal complaint about the dispersion modeling used in support of the application is that the modeling would have predicted higher concentrations had it been run with

¹⁸ It is not. El Paso Electric Ex 110 (TCEQ Sandy Creek Interim Order) at 2 (Commission answering in the negative the Judges' question of whether an applicant that proposes to construct a pulverized coal boiler-based power plant must include other electric generation technologies in its BACT analysis); El Paso Electric Ex. 100 (Greywall pre-filed) at 78-79 (testifying that it is not appropriate for a permitting authority to direct the use of a cooling technology and that he has never seen an air permitting agency direct the use of a power project cooling system)

¹⁹ El Paso Electric Ex 4U (Application Appendix C) at 8

²⁰ As the Judge noted in his proposal for decision,

Mr Powers never mentions a "dry-hybrid" intercooler in either his prefiled direct testimony or his oral testimony. He only discusses the dry versus the wet intercooler systems. Protestants' first mention that a dry-hybrid intercooler system is BACT for the LMS100 CTGs is in their initial post-hearing brief and is based solely on one short paragraph in a GE sales brochure which states. "In high ambient climates the performance of the air-to-air system can be enhanced with an evaporative cooling system integrated with a heat exchanger. This provides equivalent performance to the air to-water system." (EPE Ex 4U at 7-8) Thus, it is apparent that the dry-hybrid intercooler system, like the wet intercooler system, uses evaporative cooling, i.e., a cooling tower. Accordingly, Protestants' representations that there is "no water consumption in the Dry-Hybrid System" and that "the Dry-Hybrid system has the added benefit of eliminating particulate emissions from the cooling towers" are inaccurate and misleading (Protestants Brief at 6 and 7)

a different meteorological data set. But even the Aligned Protestants' expert, Steven Klafka, identified no respect in which the met set that El Paso Electric did use, and which the Executive Director approved for use, fell short of the governing *Guidelines on Air Quality Models*:

Q [BY MR. GROTEN]...This [Section 8.3.1 of the *Guideline on Air Quality Models*] is talking about the amount of data to have—

A Correct.

Q It's not about the age of the data?

A No.

Q And it's not about the preprocessing of the data. It's about the length of the record of the data. Isn't that correct?

A The amount of data.

Q And are you aware that EPA has concluded that five years of meteorological data is sufficient to capture worst case conditions?

A Yes.

Q ...You'll agree that Trinity used five years of preprocessed met data. Correct?

A Yes.

Q It was preapproved data compiled from information collected by the National Weather Service?

A Yes.

Q That meteorological data set was preprocessed with AERMET?

A Yes.

Q ... That the protocol that was negotiated between El Paso Electric and TCEQ called for using that preprocessed meteorological data set?

A Yes.

Q TCEQ had QA/QC'd that data set?

A Yes.

Q Was that the same data set that anyone seeking to build a project in El Paso would have been required to use at the time that El Paso Electric filed its application?

A Yes.

Q So just to confirm, is there any other [*Guidelines*] requirement that you think wasn't followed other than the one to gather enough meteorological data to ensure worst case meteorological conditions are adequately represented?

A Not that I'm aware of, no.²¹

Mr. Klafka ultimately could find nothing wrong with the data set used by El Paso Electric.²² And although Aligned Protestants might prefer a different met set, expert testimony established that their preferred data set (i) is no more representative than the one used by El Paso Electric,²³ (ii) was not pre-processed or made publicly available by TCEQ until months after El Paso Electric completed and TCEQ audited the modeling report,²⁴ and (iii) was not pre-processed in consideration of EPA recommendations,²⁵ and thereby interjects a "calm wind bias"²⁶ that EPA is working to address.²⁷

²¹ Tr at 261 62 (Klafka on cross).

²² Q [By Mr. Groten] Mr Klafka, did you identify anything that was objectively wrong in the meteorological data set that Trinity used in this case?

A [By Mr. Klafka] No.

Tr at 270 (Klafka on cross)

²³ Tr. at 298 (Klafka on cross) (reading into record provision in *Guidelines* requiring five consecutive years of met data be used when estimating concentrations with an air quality model); Tr at 214 (Greywall on re-direct) (testifying that it may be more representative to exclude the "calm" hours that Mr Klafka did not exclude when running his modeling).

²⁴ Executive Director Ex ED-23 (Cherry pre-filed) at 447 ("The updated meteorological data became available and was posted on the TCEQ website on December 20, 2012"), El Paso Electric Ex 105 (Modeling Report) (dated September 12, 2012), El Paso Electric Ex 111 (Modeling Audit) (dated October 2, 2012)

²⁵ Tr. at 216 (Greywall on re-direct) (relaying that EPA has issued a new version of AERMET that establishes a minimum wind speed threshold to address calm wind bias, and the meteorological data used by Mr Klafka was not processed with that threshold option activated)

²⁶ Tr at 214-15 (Greywall on re-direct), Executive Director Ex ED-23 (Cherry pre-filed) at 447.

²⁷ Tr at 215 16 (Greywall on re direct) (indicating that EPA has made suggestions for dealing with the bias); Executive Director Ex ED 23 (Cherry pre-filed) at 447

C. THE RECORD INCLUDES SUBSTANTIAL MONITORING DATA TO ESTABLISH BACKGROUND AIR QUALITY.

Aligned Protestants complain about the Executive Director's failure to consider background ambient monitoring data for PM_{2.5}, even though Texas law unequivocally provides an exemption from that general requirement where, as here, the predicted contributions from the permitted source are *de minimis*.²⁸ Aligned Protestants complain that the Executive Director failed to evaluate ambient background concentrations of PM_{2.5}, even though the Executive Director unquestionably did examine such data, regardless of a lack of obligation to do so.²⁹ Aligned Protestants complain that El Paso Electric's modeling report did not include any monitoring data, even though they recognize that the law did not require any monitoring data to be considered at the time El Paso Electric submitted its modeling report, or at the time TCEQ audited that report.³⁰ Aligned Protestants complain that the monitoring data was not available at an informal public meeting on the air permit,

²⁸ 30 TEX. ADMIN. CODE § 116.160(c)(2)(B) (incorporating by reference 40 C.F.R. § 52.21(m), which allows permit authorities to exempt an applicant from the need to even determine a background concentration when modeling results show that the proposed source's impacts would be less than significant monitoring concentrations). It was not until January 22, 2013—the day of the preliminary hearing in this case—that the D.C. Circuit vacated the federal rule establishing the PM_{2.5} significant monitoring concentration, and its mandate did not issue until March 19, 2013. *Sierra Club v. E.P.A.*, 705 F.3d 458 D.C. Cir. 2013). The *Sierra Club* opinion might have an immediate, prospective effect in delegated states administering federal law. But the opinion certainly has no direct effect in states with EPA-approved state implementation plans, like Texas, in which permits are issued under state law. Because Texas has an EPA-approved PSD program, unless and until the Commission revises its rules, those are the rules that govern the Judge's evaluation of El Paso Electric's application. Even now, TCEQ's "Policy and Guidance Memos for Modeling" website lists its October 14, 2011, "PM_{2.5} Implementation Guidance for Increment, SILs and SMC" guidance as "active." That guidance affirms that "[t]he Air Permits Division (APD) will continue to use existing procedures to determine if a PSD applicant must conduct preconstruction monitoring for PSD applications" and advises that "[i]t remains the applicant's responsibility for PSD applications to determine whether the project exceeds the SMC...."

²⁹ Executive Director Ex. ED 23 (Cherry pre-filed) at 460-61, El Paso Electric Ex. 108 (TCEQ Response to Comments) at 12-13 (reporting background concentrations obtained from an El Paso monitor, and concluding that the ADMT's "conservative analysis verif[ies] the applicant's conclusion that the proposed project is protective of the PM_{2.5} NAAQS and Increments")

³⁰ El Paso Electric submitted its application to TCEQ in April 2012, *see* El Paso Electric Ex. 1 (Ramirez pre-filed) at 21, and filed its Modeling Report with TCEQ in September 2012. *See* El Paso Electric Ex. 105 (Modeling Report) at 1. TCEQ finished its audit of El Paso Electric's modeling report on October 2, 2012. El Paso Electric Ex. 111 (Modeling Audit) at 1. In reliance on approved modeling showing PM_{2.5} impacts below the "significant monitoring concentration" established for PM_{2.5}, El Paso Electric did not specifically discuss data from any background PM_{2.5} monitor in that report. The vacatur of the SMC, which Aligned Protestants (incorrectly) claim to have the effect of requiring monitoring data to be included in all permit applications, did not occur until March 19, 2013.

even though they acknowledge having it before the public hearing, as the Clean Air Act requires.³¹ Aligned Protestants complain about ambient monitoring data, even though their expert didn't bother to review the reams of data made available to him from multiple monitors of multiple types from throughout El Paso County.³² Aligned Protestants complain about the sufficiency of the data, even though the two experts who did bother to review it found it sufficed as representative background preconstruction monitoring data.³³ Aligned Protestants' complaints about ambient monitoring data ring hollow.

D. TCEQ's Permitting Process Protects and Includes All People, Regardless of Race or Economic Condition.

Aligned Protestants' environmental justice claims have evolved over the course of these proceedings, but remain consistent in misstating the law and overstating the facts.

In order to identify some unmet duty, their post-hearing briefs urged the Judge to hold that Executive Order 12898 "applies to SOAH's hearing as the permit is a delegated federal permit,"³⁴ obligating TCEQ and El Paso Electric to identify affected populations and communities of concern

³¹ See 42 U.S.C. § 7475(e)(2) (ambient monitoring data to "be available at the time of the public hearing on the application for such permit"). El Paso Electric first transmitted ambient monitoring data—inclusive of summary pages and pages containing "continuous" hourly readings—compiled from three El Paso monitors to the Aligned Protestants on April 8, 2013, nearly two months prior to the merits hearing. See Applicant's Second Supplemental Rule 194 Disclosures (served on all parties on April 8, 2013). El Paso Electric later pre-filed the same data as its Exhibit 123. See El Paso Electric Ex. 123 (Continuous Monitoring Data) (filed on May 8, 2013). And at the merits hearing, El Paso Electric printed out the "continuous" hourly readings from the monitors and offered those as Exhibit 303, while representing that the same data was also available within Exhibit 123. Tr. at 287 (Klafka on cross). The Aligned Protestants' actually objected to the admission of Exhibit 303, but were overruled by the Judge. See Tr. at 294 (Klafka on cross).

³² Tr. at 283-87 (Klafka on cross) (upon being presented with printouts of the ambient monitoring data, admitting that he was not able to recall offhand whether he had ever looked at the data despite the data being included as a pre-filed exhibit)

³³ El Paso Electric Ex. 100 (Greywall pre filed) at 127-28 (explaining that he reviewed data from three El Paso monitors and acquired monitor data that met EPA's "completeness" standards); Tr. at 222-23 (Greywall on re-cross) (establishing that the monitor he used sufficed to establish a background concentration); Executive Director Ex. ED-23 (Cherry pre-filed) at 460-61 (testifying that EPA draft modeling guidance allows applicants to meet preconstruction monitoring requirements by use of data from existing, representative monitors, and that the monitor used by the ADMT to acquire background concentrations satisfies this requirement).

³⁴ Aligned Protestants' July 12 Brief at 46

and evaluate whether adverse environmental impacts would disproportionately affect minority and low-income populations within the communities of concern.³⁵ But TCEQ does not issue permits as a delegate for EPA: It is an agency of a sovereign state. No federal executive order can direct the affairs of a state.³⁶ Accordingly, the Judge rightly concluded that E.O. 12898 imposes no obligations on TCEQ.³⁷

Now, at the exceptions stage, Aligned Protestants retreat to an unsupported—and unsupportable—procedural due process claim based on Title VI of the Civil Rights Act and its interpretative guidance, both of which aim to ensure “meaningful outreach and public participation early and throughout the decision-making process . . . ,”³⁸ and to ensure that no person “be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin...”³⁹ Aligned Protestants’ rote complaint that TCEQ “denied their right to meaningfully participate ‘early and throughout the decision-making process’”⁴⁰ should not, cannot be taken seriously:

- Within 30 days after its filing, El Paso Electric published a notice of its application in the English-language *El Paso Times* and the Spanish-language *El Diario de El Paso*.⁴¹ The notice

³⁵ Aligned Protestants’ July 12 Brief at 46-47.

³⁶ And E.O. 12898 does not purport to do so. President Clinton explained that his order was designed to focus *federal* attention on environmental justice issues, and to promote nondiscrimination in *federal* programs. While President Clinton directed *federal* agencies to ensure that all programs receiving *federal* financial assistance do not use discriminatory practices, that directive imposes no requirements on state agencies like TCEQ. See Memorandum from President Clinton, EPA-175-N-94-001 (Mar 1994)

³⁷ As noted in his PFD, “[t]he ALJ is unaware of any Texas statute or rule that explicitly requires TCEQ, or an applicant for an air quality permit, to conduct an environmental justice review pursuant to Executive Order 12898, and Protestants have not cited any. Absent such authority the ALJ concludes that no environmental justice review was required.” PFD at 39

³⁸ Title VI Public Involvement Guidance, 71 Fed Reg 14,207, 14,209 (Mar 21, 2006)

³⁹ 40 C F R § 7.30

⁴⁰ Exceptions, at 19

⁴¹ El Paso Electric Ex 100 (Greywall pre filed) at 19

explained how the public could submit comments to TCEQ, request a public meeting or contested case hearing, or be included on future mailing lists.⁴²

- Soon after, El Paso Electric held a community meeting at a church near the proposed site, established a special project information contact number for public inquiries, and distributed fact sheets and other handouts in both English and Spanish.⁴³
- El Paso Electric also posted signs, including alternative language signs, in accordance with TCEQ rules and instructions.⁴⁴
- El Paso Electric published second notices in the *El Paso Times* and *El Diario de El Paso*.⁴⁵ The notices again explained how the public could submit comments to TCEQ, request a public meeting or contested case hearing, or be included on the mailing list.⁴⁶
- TCEQ mailed notice of a public meeting to State legislators, federal officials, county officials, and other individuals in the El Paso area.⁴⁷ And on December 13, 2012, both TCEQ staff and El Paso Electric officials presided over a public meeting, held at a middle school near the proposed site, concerning the application.⁴⁸ El Paso Electric even provided a Spanish-language translator.

⁴² Executive Director Ex. ED-B.

⁴³ El Paso Electric Ex. 1 (Ramirez pre-filed) at 23.

⁴⁴ El Paso Electric Ex. 1 (Ramirez pre-filed) at 22; El Paso Electric Ex. 7 (Public Notice Verification Form) at 4-5.

⁴⁵ El Paso Electric Ex. 100 (Greywall pre-filed) at 23-24.

⁴⁶ Executive Director Ex. ED-A.

⁴⁷ El Paso Electric Ex. 10 (Notice of Public Meeting)

⁴⁸ El Paso Electric Ex. 1 (Ramirez pre-filed) at 24, El Paso Electric Ex. 10 (Notice of Public Meeting) at 10.

- After members of the public submitted over 150 comments, 100 contested case hearing requests, and 5 public meeting requests, El Paso Electric asked TCEQ to directly refer consideration of its application to the State Office of Administrative Hearings for a contested case hearing. On December 19, 2012, the Commission mailed notice of the referral to an extensive mailing list.⁴⁹ And on December 21, 2012, El Paso Electric published notice of TCEQ's decision and the upcoming preliminary hearing in the *El Paso Times*.⁵⁰
- On January 22, 2013, the Judge convened the preliminary hearing, took jurisdiction, and admitted the parties to the case—all without objection from Aligned Protestants.
- TCEQ issued a comprehensive response to all public comments.⁵¹
- Aligned Protestants, through their legal counsel, fully participated in the contested case hearing and proffered expert testimony from two out-of-state expert witnesses.
- The modeling evidence confirmed protection of air quality standards established to protect the health of even the most sensitive populations.⁵²

⁴⁹ Executive Director Ex. ED-C.

⁵⁰ El Paso Electric Ex. 9 (Notice of Hearing).

⁵¹ El Paso Electric Ex. 108 (Response to Comments).

⁵² See, e.g., El Paso Electric Ex. 200 (Dydek pre filed) at 11, 37-39, see also El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26. The Environmental Appeals Board's decision in *In re Shell Gulf of Mexico*, 15 E.A.D. at 79-80 (Dec. 30, 2010) ("*Shell I*"), although not governing here, helpfully confirms that EPA also accepts that a showing of compliance with applicable ambient air quality standards—as made here—would suffice to establish the protection of all peoples. In *Shell II*, EPA's Environmental Appeals Board determined that it was the failure of the record to establish compliance with a particular revised NAAQS that caused the argument to fail. *Id.* By implication, if the record had established compliance with all NAAQS, as it does here, the demonstration also would have satisfied the requirements of E.O. 12898.

Neither in their briefs nor their exceptions do Aligned Protestants identify any record evidence of disproportionate effect on disadvantaged populations or any inability to have their concerns heard by TCEQ. In sum, every member of the general public was given every possible opportunity to be heard, and for their interests in a healthy environment to be protected. “Environmental justice” demands nothing more, or less.

II.
THE ADMINISTRATIVE RECORD FULLY SUPPORTS
THE JUDGE’S FINDINGS OF FACT

Aligned Protestants follow their “exceptions” with “Objections to the ALJ’s Findings of Fact and Conclusions of Law.” Given their burden to show with record evidence that the Judge did not properly apply or interpret applicable law or agency rules, or to identify a specific technical error in a finding of fact, this is the right idea: One would expect Aligned Protestants to direct the Commission to specific evidence in the record that contradicts the Judge’s findings. But the objections are eloquent in their silence: Not even one is followed by citation to where in the record one might find any contravening evidence; instead, they present only repetitions of the arguments rejected by the Judge. In fact, each of the challenged findings is very well supported, as explained below.

Finding 32: EPE’s Application fully addresses all of TCEQ’s requirements for an air permit Application.

The record includes the direct testimony of both Paul Greywall (a seasoned air permit consultant engaged by El Paso Electric to prepare the application) and Sean O’Brien (the Executive Director’s assigned permit engineer), both of whom testified that the Application fully meets all TCEQ requirements.⁵³ No more is needed to insulate this finding from exception (although there is much, much more).

⁵³ El Paso Electric Ex 100 (Greywall pre filed) at 18-19, 146-47 (testifying that El Paso Electric submitted a complete application and that El Paso Electric demonstrated that each facility will use BACT, that emissions are so controlled and

Finding 38: EPE performed atmospheric dispersion modeling to demonstrate that emissions from the Montana Power Station will be protective of public health and welfare.

Among much else, the record includes the modeling report prepared on behalf of El Paso Electric,⁵⁴ the expert testimony of both its preparer (Mr. Greywall) and its TCEQ reviewer (Justin Cherry), and the expert testimony of a credentialed toxicologist (Dr. Thomas Dydek) to establish the sufficiency of the modeling report to show that the Montana Power Station will meet all applicable ambient standards, increments, property line standards, and screening levels, which are the Commission's tools to ensure protection of public and welfare.⁵⁵

Finding 40: El Paso Electric's modeling assumed that the worst-case meteorological conditions for dispersion would occur simultaneously with the worst-case emissions scenarios.

Mr. Greywall testified that the ambient concentrations predicted by the modeling were conservatively high because (i) the modeling methods assume that the worst-case dispersion conditions occur simultaneously with the worst-case emissions scenario, (ii) the maximum potential emission rates used in the modeling are conservative, as actual emission rates will be less than the permitted emission rates, and (iii) the modeling assumes that all sources at the Montana Power Station are operating simultaneously.⁵⁶ Mr. Cherry agreed that the results provided a conservative representation of effects on air quality.⁵⁷ Both testified that the modeling was done in accordance

will not have unacceptable health or welfare effects, and that all facilities are designed, constructed, and operated in accordance with otherwise applicable air quality control requirements); Executive Director Ex. ED-1 (O'Brien pre-filed) at 24 (stating that his review of the application encompassed all of the applicable provisions required by federal and Texas rules and statutes and that he recommends the permit be issued).

⁵⁴ El Paso Electric Exs. 105 (Modeling Report) and 105A (Modeling Report Supplement).

⁵⁵ El Paso Electric Ex. 100 (Greywall pre-filed) at 139-40; El Paso Electric Ex. 200 (Dydek pre-filed) at 37-39; Executive Director Ex. ED 23 (Cherry pre-filed) at 463.

⁵⁶ El Paso Electric Ex. 100 (Greywall pre filed) at 120-21, 133 (“[W]e attempted to make conservative assumptions ... that would tend to overstate emissions”)

⁵⁷ Executive Director Ex. ED 23 (Cherry pre-filed) at 448 (“The model is designed to be a conservative representation of what the predicted impacts could be”)

with a TCEQ-approved⁵⁸ and EPA-accepted⁵⁹ modeling protocol based on running the five years of El Paso County-specific meteorological data pre-processed and posted by TCEQ,⁶⁰ a selection fully consistent with the *Guideline on Air Quality Models*, which governs El Paso Electric's and TCEQ's obligations.⁶¹

Finding 43: The modeling submitted by EPE yielded conservatively high predictions of ambient impacts.

As noted in response to Aligned Protestants' objection to Finding 40, this finding is fully supported by the expert testimony of two witnesses.⁶²

Findings 45 & 46: EPE and TCEQ conducted an analysis of secondary PM_{2.5} impacts to determine whether secondary formation of PM_{2.5} would influence direct PM_{2.5} impacts.

Secondary formation of PM_{2.5} from the Montana Power Station's SO₂ and NO_x emissions will not influence predicted PM_{2.5} impacts.

Mr. Greywall's un rebutted testimony established that the Montana Power Station's direct emissions of PM_{2.5}, combined with precursor emissions that might lead to secondarily-formed PM_{2.5} and conservatively determined background concentrations, would not exceed the NAAQS.⁶³ Mr. Greywall specifically testified that "secondary PM_{2.5} formation should not influence direct PM_{2.5} impacts, and thereby should not affect [the modeling] analysis."⁶⁴ TCEQ's Executive Director

⁵⁸ El Paso Electric Exs. 112-119 (correspondence between TCEQ and El Paso Electric regarding the modeling protocol); El Paso Electric Ex. 100 (Greywall pre-filed) at 100-05; Executive Director Ex. ED-23 (Cherry pre-filed) at 445-46 (stating that El Paso Electric submitted a protocol and later submitted a modeling report once the protocol was established); Tr at 474 (Cherry on cross) (testifying that El Paso Electric submitted a modeling protocol with 1987-1991 met data and that TCEQ allowed El Paso Electric to do that); El Paso Electric Ex. 111 (Air Quality Analysis Audit) at 1 (approving modeling done in accordance with modeling protocol)

⁵⁹ Tr at 213 (Greywall on re direct); El Paso Electric Ex. 100 (Greywall pre-filed) at 101-02; Tr. at 474 (Cherry on cross) (testifying that El Paso Electric submitted the modeling protocol to EPA for review, and EPA had no comments).

⁶⁰ El Paso Electric Ex 100 (Greywall pre-filed) at 113-14; Executive Director Ex ED-23 (Cherry pre-filed) at 447.

⁶¹ Tr at 261 62, 270 (Klafka on cross); Tr at 211-12 (Greywall on re direct)

⁶² El Paso Electric Ex 100 (Greywall pre-filed) at 133, Executive Director Ex. ED-23 (Cherry pre-filed) at 448.

⁶³ El Paso Electric Ex 100 (Greywall pre-filed) at 127 29

⁶⁴ *Id* at 129

undertook a similar analysis, concluding that “[t]he results of [its] conservative analysis verif[ies] the applicant’s conclusion that the proposed project is protective of the PM_{2.5} NAAQS and Increments.”⁶⁵

Finding 47: For all contaminants subject to review and for which National Ambient Air Quality Standards (NAAQS) and PSD Increments have been established, EPE used the pre-processed meteorological data for the El Paso area that was available on TCEQ’s website. For all non-PSD modeling, EPE used a single year of meteorological data to conduct its modeling. This selection was appropriate and fully satisfied the EPA Guideline on Air Quality Models.

Substantial expert testimony evidenced that El Paso Electric used the pre-processed meteorological data for the El Paso area that was available on TCEQ’s website,⁶⁶ all of which satisfied the EPA *Guideline on Air Quality Models*.⁶⁷

Finding 48:⁶⁸ *EPE’s modeling analysis demonstrates that the proposed project will not violate the NAAQS, cause an exceedance of the increment, cause an exceedance of ESLs, or have any adverse impacts on soils, vegetation, or Class I areas.*

This finding is supported by, among much else, the Executive Director’s “Preliminary Determination Summary,” which recommends permit issuance in part because “[t]he modeling analysis indicates that the proposed project will not violate the NAAQS, cause an exceedance of the increment, or have any adverse impacts on soils, vegetation, or Class I Areas . . . [and] the modeling predicted no exceedance of ESLs at all receptors for non-criteria contaminants evaluated.”⁶⁹

⁶⁵ El Paso Electric Ex. 108 (Response to Comments) at 11-13.

⁶⁶ El Paso Electric Ex. 100 (Greywall pre-filed) at 113-14, El Paso Electric Ex. 105 (Modeling Report) at 19.

⁶⁷ Tr at 211-12 (Greywall on re-direct)

⁶⁸ What Aligned Protestants label as Finding 48 appears to instead be Finding 140.

⁶⁹ El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26

Finding 50: *The maximum predicted concentrations of NO₂, PM₁₀, PM_{2.5}, CO, and SO₂ resulting from the Montana Power Station's emissions are less than PSD monitoring de minimis concentrations.*

Both expert testimony and El Paso Electric's modeling report establish that maximum predicted concentrations of NO₂, PM₁₀, CO, SO₂, and PM_{2.5} resulting from the Montana Power Station's emissions are less than applicable NAAQS Significant Impact Levels and PSD monitoring *de minimis* concentrations.⁷⁰

Finding 51: *Both the ED and EPE submitted to the record continuous and representative ambient PM_{2.5} monitoring data from El Paso monitors, providing at least a full year's worth of background PM_{2.5} concentration data. The ED analyzed data from a monitor used by EPA to establish the attainment status of the area, and EPE analyzed data from monitors with hourly readings posted on TCEQ's web site. Each monitor was appropriate for the purpose of establishing a background concentration in support of a PSD permit application.*

Although not required by governing law, both El Paso Electric and the Executive Director provided one year's worth of preconstruction monitoring data to all parties over a month before the hearing on the merits⁷¹ to establish that the Montana Power Station's impacts, even when added to background concentrations, would not exceed applicable standards.⁷² Mr. Greywall compiled and evaluated PM_{2.5} monitoring data obtained from monitors with hourly readings posted on TCEQ's website,⁷³ and the Executive Director's staff analyzed PM_{2.5} data from a monitor used by EPA to establish the attainment status of the area.⁷⁴ Testimony at the merits hearing established that each

⁷⁰ El Paso Electric Ex. 100 (Greywall pre filed) at 124; El Paso Electric Ex. 105 (Modeling Report) at 40.

⁷¹ See Applicant's Second Supplemental Rule 194 Disclosures (served on all parties on April 8, 2013); El Paso Electric Ex. 123 (Continuous Monitoring Data) (filed on May 8, 2013); El Paso Electric Ex. 108 (TCEQ Response to Comment) (issued on March 29, 2013) at 11-13. Assuming it were applicable, that is all that Section 165(e)(2) of the federal Clean Air Act requires. See 42 U.S.C. § 7475(e)(2) (ambient monitoring data to "be available at the time of the public hearing on the application for such permit").

⁷² Executive Director Ex. ED-23 (Cherry pre-filed) at 461, Tr. at 456-58 (Cherry on cross); El Paso Electric Ex. 100 (Greywall pre filed) at 127-29.

⁷³ El Paso Electric Ex. 100 (Greywall pre filed) at 127-28; Tr. at 222-24 (Greywall on cross).

⁷⁴ Tr. at 491-93 (Cherry on cross), El Paso Electric Ex. 108 (TCEQ Response to Comment) at 11-13.

monitor was appropriate for the purpose of establishing a background concentration in support of a PSD permit application.⁷⁵

Finding 52: The ED concluded that the Montana Power Station's impacts, when added to background concentrations, would not exceed any applicable standards. The difference between the PM_{2.5} NAAQS and the PM_{2.5} background concentration is greater than EPA's PM_{2.5} significant impact level, such that no further modeling analysis would be necessary, even under draft, non-binding EPA policies.

Using background concentrations acquired from an EPA AIRS monitor in El Paso, the Executive Director concluded that primary PM_{2.5} concentrations, when added to a representative background concentration, will not cause a NAAQS or increment exceedance.⁷⁶ And testimony from Mr. Greywall confirmed that because “the difference between the PM_{2.5} NAAQS and the monitored PM_{2.5} background concentrations in the [El Paso] area is greater than EPA's PM_{2.5} Significant Impact Level value,” EPA guidance requires no further modeling analysis.⁷⁷

FOF 53: Both the ED's and EPE's analysis of ambient PM_{2.5} monitoring data was presented to all parties in this case more than 31 days before the hearing on the merits and was available to the public prior to the hearing in this matter.

This is unquestionably true.⁷⁸

FOF 54: TCEQ's Air Dispersion Modeling Team performed an audit of the Modeling Report submitted by EPE and determined that the modeling performed was acceptable for all types of regulatory review and for all pollutants.

Mr. Cherry proffered the modeling audit with his testimony, which went unchallenged in any respect.⁷⁹ Absent any explanation or testimony concerning Aligned Protestants' new claim that

⁷⁵ Tr. at 456-58 (Cherry on cross); Executive Director Ex. ED-23 (Cherry pre-filed) at 461.

⁷⁶ El Paso Electric Ex. 108 (Response to Comments) at 12-13; Executive Director Ex. ED-23 (Cherry pre-filed) at 460-61.

⁷⁷ El Paso Electric Ex. 100 (Greywall pre-filed) at 127

⁷⁸ See Applicant's Second Supplemental Rule 194 Disclosures (served on all parties on April 8, 2013); El Paso Electric Ex. 108 (TCEQ Response to Comments) (issued on March 29, 2013)

⁷⁹ Tr. at 451 (Cherry on direct) (proffering pre filed exhibits, including the modeling audit marked as Executive Director Ex. ED-17)

“TCEQ’s audit of the modeling was inadequate,” any further response is both unnecessary and impossible.

Finding 55: EPE has adequately demonstrated in its Modeling Report that the NAAQS and PSD Increments will not be exceeded. EPE has adequately demonstrated that all applicable state air quality standards will be met.

Among much other evidence, the Executive Director’s Preliminary Determination Summary confirms that the modeling report demonstrated that the NAAQS and PSD Increments will not be exceeded and that all applicable state air quality standards will be met.⁸⁰

Finding 63: EPE’s modeling showed maximum concentrations at or beyond the property line will not exceed the NAAQS de minimis levels for NO₂, SO₂, PM₁₀, PM_{2.5}, or CO.

It is undisputed, even by Aligned Protestants’ modeling expert,⁸¹ that El Paso Electric’s modeling showed maximum concentrations at or beyond the property line will not exceed applicable NAAQS *de minimis* levels.⁸²

Finding 65: Emissions from the Montana Power Station will not cause or contribute to any exceedance of any NAAQS.

As noted above, the audited modeling report fully supports this finding.⁸³

Finding 70: Maximum predicted concentrations at all significant receptors within the radius of impact, including impacts from inventory sources, will be below the PSD increment for PM_{2.5} (24-hour).

Again, El Paso Electric’s TCEQ-approved modeling report demonstrates that maximum predicted concentrations at all significant receptors within the radius of impact, including impacts from inventory sources, were below the PSD Increment for PM_{2.5} (24-hour).⁸⁴

⁸⁰ El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26.

⁸¹ Tr. at 242 (Klafka on cross)

⁸² El Paso Electric Ex. 100 (Greywall pre-filed) at 124.

⁸³ El Paso Electric Ex. 100 (Greywall pre filed) at 28; El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26

⁸⁴ El Paso Electric Ex. 100 (Greywall pre filed) at 131

Finding 86: *Emissions from the Montana Power Station will not cause any adverse health or welfare effects.*

An expert in TCEQ’s practices, policies, and criteria for evaluating health and welfare effects from air emissions,⁸⁵ Dr. Dydek provided unrebutted testimony that emissions from the Montana Power Station will not cause any adverse health or welfare effects.⁸⁶

Finding 101: *In undertaking its BACT analysis, EPE considered information from the TCEQ’s BACT guidelines for simple cycle turbines, the RBLC database, vendors and engineering experts, and other permit applications and other states’ websites.*

Aligned Protestants do not dispute this finding, instead asserting that El Paso Electric “also discussed a dry intercooler configuration of the facility with GE.” Aligned Protestants’ “objection” is neither correct nor relevant to this finding. In fact, El Paso Electric’s BACT analysis did *not* address the dry cooling configuration, given that El Paso Electric is not seeking permission to build such a configuration.⁸⁷ As a result, its BACT analysis ensured that BACT would be applied to all of its proposed facilities, including the cooling towers. El Paso Electric offered testimony concerning the “dry intercooler configuration” only because the Aligned Protestants’ expert suggested it would be a lower-emitting alternative to achieve the same business objectives. The record evidence overwhelmingly refutes that suggestion.⁸⁸

⁸⁵ El Paso Electric Ex. 200 (Dydek pre-filed) at 7.

⁸⁶ El Paso Electric Ex. 200 (Dydek pre filed) at 37-39; El Paso Electric Ex. 202 (Health Effects Analysis) at 2-3.

⁸⁷ El Paso Electric Ex. 100 (Greywall pre filed) at 75-76

⁸⁸ See, e.g., El Paso Electric Ex. 100 (Greywall pre-filed) at 75-78; El Paso Electric Ex. 1 (Ramirez pre filed) at 12-13; Tr. at 25 (Ramirez on cross).

Findings 102 & 103: The simple cycle combustion turbines in the RBLC or otherwise identified in the record do not use control technologies in addition to or more effective than those that will be used by the Montana Power Station.

There are no new technical developments that are both technically practicable and economically reasonable that offer the potential for EPE to further reduce the Montana Power Station's emissions.

Aligned Protestants do not identify anything to contradict these findings, except to aver that the “dry-hybrid intercooler technology” could eliminate the need for PM emissions from the evaporative cooling towers that El Paso Electric proposes to build. Aligned Protestants offer no record citation to establish that even one, much less “several simple cycle turbines identified in the record are using this technology.” Not a single witness offered any testimony about a “dry-hybrid,” which exists in the record only as a theoretical offering in a nine-year-old GE sales brochure. It is impossible to conclude from this record that dry-hybrid even actually exists, much less that it is BACT.

Aligned Protestants’ objection was fully briefed and ultimately rejected by the Judge, perhaps because Aligned Protestants have offered no evidence that any power project developer has ever chosen to install a dry-hybrid system, and because the record evidences that a dry-hybrid system would cost at least an additional \$18 million more than the proposed configuration,⁸⁹ would cause *increased* emissions not only of particulate matter, but all other pollutants,⁹⁰ and would fail to achieve the power outputs required by El Paso Electric.⁹¹ These worst-of-all-world attributes of a dry-hybrid system no doubt account for its primary attribute: evanescence.

⁸⁹ Tr. at 107 (Ramirez on re-direct).

⁹⁰ El Paso Electric Ex. 1 (Ramirez pre filed) at 13, El Paso Electric Ex 100 (Greywall pre-filed) at 77-78; Tr. at 100-01 (Ramirez on cross)

⁹¹ Tr at 29 (Ramirez on cross) (testifying that El Paso Electric can’t afford the power loss associated with dry cooling and that the Company would “have to make it up somehow”)

Finding 104: EPE did not consider combined cycle technology or other industrial processes to generate electricity as part of its BACT analysis because that would constitute redefinition of EPE's proposed power plant design.

Testimony from Mr. Greywall confirmed that El Paso Electric did not consider combined cycle technology because it does not propose to build a combined cycle plant.⁹² The permit application also includes an alternatives analysis demonstrating that the combined cycle configuration would not achieve El Paso Electric's business objectives, notably due to its lower ramp rates, and would yield greater emissions (due to the need to maintain it on spinning reserve).⁹³

Finding 107: EPE will control NOx emissions from the combustion turbines during steady-state operations to 2.5 ppmvd corrected to 15% oxygen (on a three-hour rolling average basis) through the use of water injection, SCR technology, and staged air burners. This limit is lower than or equal to all prior BACT determinations for any comparable project, and the record includes no evidence to suggest that a lower limit can be achieved.

Undisputed in the record is evidence that El Paso Electric will use water injection, SCR technology, and staged air burners to control NOx emissions from its LMS100s to 2.5 ppmvd,⁹⁴ and that this limit is equal to or lower than all prior BACT determinations for any comparable simple-cycle turbine.⁹⁵ The record also establishes that permitting authorities recognize the differences in the thermodynamic performance of combined and simple cycle plants and set different expectations for BACT limits accordingly.⁹⁶

⁹² El Paso Electric Ex. 100 (Greywall pre filed) at 65.

⁹³ El Paso Electric Ex. 4S (Application Appendix A) at 4-5.

⁹⁴ El Paso Electric Ex. 100 (Greywall pre filed) at 67.

⁹⁵ El Paso Electric Ex. 4X (Application Appendix F) at 2 5; El Paso Electric Ex. 100 (Greywall pre-filed) at 67.

⁹⁶ Tr. at 402 03 (Powers on re-direct); Executive Director Ex. ED 8 (TCEQ Combustion Sources BACT Requirements) at 287.

Finding 108: EPE will control CO emissions from the combustion turbines during steady-state operations to 6.0 ppmvd corrected to 15% oxygen (on a three-hour rolling average basis) through the use of good combustion practices and an oxidation catalyst. This is consistent with prior BACT determinations for comparable projects, and the record includes no evidence to suggest that a lower limit can be cost-effectively achieved.

The record evidence establishes that El Paso Electric will control CO emissions from its LMS100s to 6.0 ppmvd through the use of good combustion practices and an oxidation catalyst,⁹⁷ and that this level of control is consistent with prior BACT determinations for comparable projects.⁹⁸ Aligned Protestants' assertion that simple cycle projects should be judged by combined cycle performance is addressed in the context of the identical objection to Finding 107.

Finding 110: EPE will meet a PM/PM₁₀/PM_{2.5} limit of 6.0 lbs/hr, as guaranteed by the vendor of the combustion turbines. This is lower than or equal to all prior BACT determinations for any comparable project, and the record includes no evidence to suggest that a lower limit can be achieved.

Expert witness testimony, including that of the witness called by Aligned Protestants, confirms that the PM emission limit for the turbines is equal to or lower than all prior BACT determinations for any comparable project.⁹⁹

Finding 111: EPE will control VOC emissions from the combustion turbines to 2 ppmvd at 15% O₂ through the use of an oxidation catalyst. This is lower than or equal to all prior BACT determinations for any comparable project, and the record includes no evidence to suggest that a lower limit can be achieved.

El Paso Electric will control VOC emissions from the Montana Power Station's LMS100s to 2 ppmvd through the use of an oxidation catalyst,¹⁰⁰ a level of control lower than or equal to all prior BACT determinations for any comparable project.¹⁰¹

⁹⁷ El Paso Electric Ex. 100 (Greywall pre-filed) at 67

⁹⁸ El Paso Electric Ex. 4X (Application Appendix F) at 6 7; Executive Director Ex. ED 8 (TCEQ Combustion Source BACT Requirements) at 287, Tr. at 369-70 (Powers on cross)

⁹⁹ El Paso Electric Ex. 100 (Greywall pre-filed) at 72 74; Aligned Protestants Ex. 27 (Powers pre-filed) at 21.

¹⁰⁰ El Paso Electric Ex. 100 (Greywall pre-filed) at 72

Finding 112: EPE will control NH₃ emissions to 5 ppmvd at 15% oxygen in order to meet the emission rate limits in the Draft Permit's MAERT, through careful control of NH₃ injection and operation of the SCR per the manufacturer's recommendations. This exceeds TCEQ's BACT level of 7-10 ppmvd for NH₃. The Draft Permit establishes 7 ppmvd at 15% oxygen as NH₃ BACT, which is within TCEQ's discretion.

This finding is supported by record evidence establishing that El Paso Electric will control NH₃ emissions to 5 ppmvd in order to meet the pound per hour emission limits in the Draft Permit, and that this exceeds TCEQ's associated BACT level.¹⁰² Although Aligned Protestants object that the Permit should specifically establish 5 ppmvd as NH₃ BACT, they do not challenge with evidence the testimony from Messrs. Greywall and O'Brien that it is within TCEQ's discretion to set the BACT limit as 7 ppmvd because a lower ammonia BACT limit does not require any greater control, but instead is just a monitoring requirement.¹⁰³

Finding 117: EPE reasonably calculated the PM₁₀ and PM_{2.5} mass fractions of total PM emissions from the evaporative cooling towers through the use of drift droplet diameter data presented in Joel Reisman and Gordon Frisbie's "Calculating Realistic PM₁₀ Emissions from Cooling Towers."

Mr. Greywall used the drift droplet diameter data in Reisman and Frisbie's published technical paper, *Calculating Realistic PM₁₀ Emissions from Cooling Towers*, to calculate PM₁₀ and PM_{2.5} mass fractions of total PM emissions from the Montana Power Station's cooling towers.¹⁰⁴ Aligned Protestants claim that "[t]he Frisbie calculations underestimate the PM generated by the proposed intercooler cooling towers," despite their expert witness admitting on cross-examination that he was not aware of any specific problems that occurred during Reisman and Frisbie's testing.¹⁰⁵ In fact,

¹⁰¹ Executive Director Ex. ED-8 (TCEQ Combustion Sources BACT Requirements) at 287; Executive Director Ex. ED-1 (O'Brien pre-filed) at 13.

¹⁰² El Paso Electric Ex. 100 (Greywall pre filed) at 72-73.

¹⁰³ El Paso Electric Ex. 100 (Greywall pre-filed) at 72-73; Tr. at 444-45 (O'Brien on cross).

¹⁰⁴ El Paso Electric Ex. 100 (Greywall pre-filed) at 42-43.

¹⁰⁵ Tr. at 389-90 (Powers on cross)

Reisman and Frisbie’s peer-reviewed techniques are frequently relied upon by TCEQ in issuing permits and have been upheld by the Commission and other permitting authorities in contested case hearings.¹⁰⁶

Finding 118: Because of hotter combustion air temperatures, a dry-cooled LMS100 would lose about 10 percent of its maximum-rated capacity in the peak summer months. In addition, a dry cooling system would impose a parasitic load of approximately 1% of net power output due to the power needed to drive the fan motors required in a dry cooling system.

Mr. Greywall testified to dry cooling’s deleterious effects on plant performance, exactly as found by the Judge.¹⁰⁷ Aligned Protestants do not contest that testimony, instead asserting that a *dry-hybrid* LMS100 configuration should have been considered by El Paso Electric because “[t]he limitations of a dry system can be offset by the water savings acquired by a dry-hybrid system which should have been considered in this application.” But because a dry-hybrid power plant (evidently consisting of both cooling towers and a dry cooling system) would exhibit the water usage of a wet-cooled plant for all the times that cooling towers in a “hybrid system” would be operated, which would be at least when ambient temperatures exceed 60° F,¹⁰⁸ Aligned Protestants’ objection is self-evidently meritless.¹⁰⁹

Finding 119: Dry cooling of the intercoolers used at the Montana Power Station would result in reduced summer peaking capacity, higher auxiliary power requirements (parasitic losses), higher overall emissions, and higher costs relative to the configuration for which EPE seeks a permit.

After consulting with the combustion turbine manufacturer, Mr. Greywall testified that dry cooling of the Montana Power Station’s combustion turbine intercoolers would result in lost

¹⁰⁶ El Paso Electric Ex. 100 (Greywall pre-filed) at 43; Tr. at 219-20 (Greywall on re-direct).

¹⁰⁷ El Paso Electric Ex. 100 (Greywall pre-filed) at 76-78

¹⁰⁸ See El Paso Electric’s Response to Closing Arguments at 9-10, n. 39; see also El Paso Electric Ex. 4U (Application Appendix C) at 8 (GE sales brochure stating that in high ambient climates, the performance of the air-to-air system can be enhanced with an evaporative cooling system integrated with a heat exchanger, and that water will be used during peak temperature periods)

¹⁰⁹ PFD p. 16, n. 49

capacity, increased parasitic load, higher overall emissions, and higher costs when compared to the wet-cooled configuration proposed by El Paso Electric.¹¹⁰

Finding 123: EPE established separate NO_x and CO BACT emission limits for steady-state operations and start-up/shutdown periods. The Draft Permit's emission limits for startups and shutdowns reflect prudent operation of the turbines and their associated emission control equipment.

This finding is directly supported by the testimony of Messrs. Greywall and O'Brien. Both testified that the Draft Permit allows no period of operation during which the combustion turbines are exempted from BACT-based limits.¹¹¹

Finding 124: The Draft Permit imposes conditions that meet or exceed BACT requirements for all proposed facilities and pollutants under all permitted operating conditions.

Messrs. Greywall's and O'Brien's testimony fully support this finding.¹¹² Aligned Protestants' running objection here—that "[t]he permit does not meet BACT" because BACT for PM is the dry-hybrid intercooler and because other emissions should be lowered to be consistent with the latest combined cycle plants—is elsewhere and at length addressed in post-hearing briefs and this Response.

Finding 133: But for the emergence of EPA-driven permitting requirements for greenhouse gases, the Montana Power Station project would not have triggered PSD review, and would have satisfied the requirements for a standard permit.

Aligned Protestants opine that "[t]his FOF shows a disrespect for the law and is irrelevant" and, therefore, "FOF 133 should be struck." It is easy to understand why the Aligned Protestants

¹¹⁰ El Paso Electric Ex. 100 (Greywall pre-filed) at 76-78.

¹¹¹ El Paso Electric Ex. 100 (Greywall pre-filed) at 40; Tr. at 423 (O'Brien on cross).

¹¹² El Paso Electric Ex. 100 (Greywall pre-filed) at 146; Executive Director Ex. ED-1 (O'Brien pre-filed) at 24; El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26

would wish to see this finding eliminated, as real-world context¹¹³ is detrimental to their cause. But Aligned Protestants do not explain how stating the law (and facts) shows disrespect for them.

Finding 135: EPE conducted an appropriate source impact analysis showing that the Montana Power Station's allowable emissions will not cause or contribute to air pollution in violation of any NAAQS or PSD increment.

The modeling report El Paso Electric introduced into the record demonstrates that the Montana Power Station's emissions will not cause or contribute to air pollution in violation of any NAAQS or PSD increment.¹¹⁴ The Executive Director reviewed the technical merits of that modeling and reached the same conclusion.¹¹⁵

Finding 139: EPE performed computerized air dispersion modeling to demonstrate the maximum air impacts expected to result from the Montana Power Station's emissions.

Because the computerized air dispersion modeling El Paso Electric introduced into the record to demonstrate the maximum air impacts expected to result from the Montana Power Station's emissions¹¹⁶ relied on weather data not preferred by the Aligned Protestants, they object to this finding on the grounds that it "inaccurately portrays EPE's modeling as accurate." The Judge considered and rejected that objection.

¹¹³ El Paso Electric Ex. 100 (Greywall pre-filed) at 12 (testifying to how the Montana Power Station would have been permitted but for EPA-driven permitting requirements for greenhouse gases).

¹¹⁴ El Paso Electric Ex. 100 (Greywall pre-filed) at 86; El Paso Electric Ex. 105 (Modeling Report) at 41-44.

¹¹⁵ El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26.

¹¹⁶ El Paso Electric Ex. 100 (Greywall pre-filed) at 105-06; El Paso Electric Exs. 105 (Modeling Report) and 105A (Modeling Report Supplement)

Finding 140: *EPE’s modeling analysis demonstrates that the proposed project will not violate the NAAQS, cause an exceedance of the increment, cause an exceedance of ESLs, or have any adverse impacts on soils, vegetation, or Class I areas.*

Aligned Protestants’ objection here—that “EPE’s flawed modeling means that there can be no conclusions regarding NAAQS compliance”—conflicts with expert testimony and the TCEQ’s Preliminary Determination Summary that support this finding.¹¹⁷

III. THE JUDGE’S CONCLUSIONS OF LAW CORRECTLY APPLY COMMISSION RULES AND PRECEDENT

Suffering in ways similar to their objections to the proposed findings, Aligned Protestants’ objections to the Judge’s conclusions are not followed by any mention of how those conclusions might conflict with applicable rules or Commission policy or precedent; instead, they repeat objections rejected by the Judge. In short, Aligned Protestants provide no basis for the Commission to change the Judge’s conclusions, which should be adopted in full.

Conclusion 4: *Proper notice of EPE’s Application was provided pursuant to Tex. Health & Safety Code §§ 382.0516, 382.0517, and 382.056; Tex. Gov’t Code §§ 2001.051 and 2001.052; and 30 Tex. Admin. Code (TAC) § 39.601, et seq.*

El Paso Electric complied with all notice requirements¹¹⁸ and, as reflected in the Judge’s proposed Finding 22, no party contested notice at the preliminary hearing, and so any objections to notice have been waived.¹¹⁹

Conclusion 5: *EPE properly submitted a complete application pursuant to Tex. Health & Safety Code §§ 382.0515 and 382.0518; and 30 TAC §§ 116.110, 116.111, 116.140, and 116.404.*

Testimony from El Paso Electric’s expert in Texas air permitting established that El Paso Electric submitted a complete application to TCEQ,¹²⁰ a conclusion confirmed by the Executive

¹¹⁷ El Paso Electric Ex 100 (Greywall pre-filed) at 86; El Paso Electric Ex 200 (Dydek pre-filed) at 37-39; El Paso Electric Ex 106 (Preliminary Determination Summary) at 26

¹¹⁸ See, e.g., El Paso Electric Exs 7-8 (Public Notice Verification Forms), 9 (Notice of Hearing), 10 (Notice of Public Meeting), 104 (Notice of Receipt and Intent to Obtain Air Permit), 106 (Notice of Application and Preliminary Decision), see also Executive Director Exs ED A, ED-B, and ED-C, see also Findings 28-34

¹¹⁹ PFD p 39

Director, who determined “the application is administratively complete” as a pre-requisite to his issuance of the Notice of Receipt of Application and Intent to Obtain Air Permit on April 26, 2012.¹²¹ The Judge agreed, making seven findings specific to the completeness of the application.¹²²

Conclusion 7: EPE met its burden of proof that the Application satisfies all applicable statutory and regulatory requirements.

El Paso Electric submitted an application to TCEQ complete with modeling conducted in accordance with a TCEQ-approved protocol¹²³ and a BACT review evaluated and approved by TCEQ.¹²⁴ And although not required to complete its application, El Paso Electric introduced preconstruction monitoring data into the record to prove that projected emissions from the Montana Power Station, combined as needed with background concentrations established by preconstruction monitoring data, do not violate any applicable air quality standard.¹²⁵

Conclusion 8: In accordance with 40 C.F.R. § 52.21(k), as incorporated into TCEQ’s rules at 30 TAC § 116.160(c)(2)(B), the Montana Power Station’s emissions will not cause or contribute to air pollution in violation of any NAAQS in any air quality control region, or any applicable maximum allowable increase over the baseline concentration in any area.

The modeling report submitted to TCEQ by El Paso Electric demonstrates the protectiveness of the Montana Power Station’s emissions. The Executive Director audited that modeling report, concluding that it was “acceptable for all review types and pollutants.”¹²⁶ And so

¹²⁰ El Paso Electric Ex. 100 (Greywall pre-filed) at 18-19, 146-47.

¹²¹ El Paso Electric Ex. 104 (Notice of Receipt of Application and Intent to Obtain Air Permit) at 6; Executive Director Ex. ED-1 (O’Brien pre-filed) at 24.

¹²² See Findings 28-34.

¹²³ El Paso Electric Ex. 100 (Greywall pre-filed) at 100-05; El Paso Electric Ex. 111 (Modeling Audit) at 1.

¹²⁴ El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26

¹²⁵ El Paso Electric Ex. 100 (Greywall pre-filed) at 127-29, El Paso Electric Ex. 123 (Monitoring Data); El Paso Electric Ex. 303 (Print-Outs of Monitoring Data)

¹²⁶ El Paso Electric Ex. 111 (Modeling Audit) at 1

the Judge made a number of findings regarding the protectiveness of the Montana Power Station's emissions,¹²⁷ the outgrowth of which is this conclusion.

Conclusion 36: An applicant that is proposing to construct a simple cycle natural gas-fired power plant with cooling towers is not required to include other electric generation technologies, such as combined cycle technology, in its BACT analysis.

This conclusion is fully consistent with Commission practice¹²⁸ and precedent.¹²⁹

Conclusion 38: In accordance with 30 TAC § 116.111(a)(2)(C) and applicable Commission and EPA policies, the Montana Power Station will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating emissions from the facilities of which it will be comprised.

El Paso Electric's BACT analysis ensured that BACT would be applied to all of its proposed facilities.¹³⁰ The Executive Director evaluated and agreed with the analysis.¹³¹ Aligned Protestants' terse assertion that "Dry Hybrid intercooler is BACT for PM" is wrong as a matter of fact and law.

Conclusion 44: Because the Montana Power Station is a "major source" of greenhouse gas emissions, it is disqualified from using the Commission's standard permit for simple cycle turbines. Under EPA's "major for one, major for all" policy, if a site is a major source for one pollutant, then any other pollutant emitted above so-called "significant emission rates" also must go through PSD review.

Aligned Protestants identify no error in this conclusion, complaining only that the Judge's explanation of why this project is subject to the Commission's permitting jurisdiction is irrelevant and shows disdain or disrespect for the law. To state this objection suffices to rebut it.

¹²⁷ See, e.g., Findings 38-86

¹²⁸ El Paso Electric Ex. 110 (TCEQ Sandy Creek Interim Order) at 2 (Commission answering in the negative the Judges' question of whether an applicant that proposes to construct a PCB power plant must include other electric generation technologies in its BACT analysis).

¹²⁹ *Blue Skies Alliance v. TCEQ*, 283 S.W.3d 525, 535 (Tex. App.—Amarillo 2009, no pet.) (“[T]he only control technologies that must be considered in a BACT analysis are those control technologies that can be incorporated into or added to the facility as proposed by the applicant. Thus, ascribing the common meaning to the words used in the BACT definition, we conclude that a BACT analysis must consider any control technology that may be applied to the proposed facility, but does not need to consider any control technology that would require such a redesign of the facility that it would constitute an alternative proposal.”).

¹³⁰ El Paso Electric Ex. 100 (Greywall pre filed) at 59, 61-62.

¹³¹ El Paso Electric Ex. 106 (Preliminary Determination Summary) at 26.

Conclusion 47: Neither the submittal of a modeling report or of monitoring data in support of any application is considered an amendment of that application, as that term is used in Texas Health & Safety Code § 382.0291(d).

El Paso Electric filed its permit application in April 2012.¹³² Consistent with Commission rules and practice, that application did not include an air quality assessment, and still was declared administratively complete a few weeks later.¹³³ It was not until September 2012 that El Paso Electric submitted to TCEQ an air quality assessment to show that the project described in the application as filed in April 2012 would not cause or contribute to an exceedance of any applicable NAAQS or exceed a PSD increment.¹³⁴ That assessment cannot in any sense of the word be described as an amendment of the application.

Similarly, introduction of preconstruction monitoring data into the administrative record no more amends the application than does any other evidence submitted to establish that the project as proposed meets the requirements for issuing it a permit. A permit holder must seek a permit amendment when the design of a project changes—causing a change in the method of control of emissions, a change in the character of emissions, or an increase in the emission rate of any air contaminant—such that the permit holder must vary from a representation or permit condition.¹³⁵ And at no point since the application’s submittal in April 2012 has El Paso Electric amended any aspect of the proposed project’s design.¹³⁶

Texas Health & Safety Code Section 382.0291(d)—which prohibits amendment of a permit application “after the 31st day before the date on which a public hearing on the application is

¹³² El Paso Electric Ex. 1 (Ramirez pre-filed) at 21

¹³³ El Paso Electric Ex. 104 (Notice of Receipt of Application and Intent to Obtain Air Permit) at 7; El Paso Electric Ex. 100 (Greywall pre-filed) at 19

¹³⁴ El Paso Electric Ex. 100 (Greywall pre-filed) at 22 & 86; *see also* El Paso Electric Ex. 105 (Modeling Report) at 41-44.

¹³⁵ *See* 30 TEX. ADMIN. CODE § 116.116(b)

¹³⁶ The only changes were to amend the estimated PM emissions from the cooling towers. El Paso Electric Ex. 100 (Greywall pre-filed) at 20-21, El Paso Electric Ex. 4Z (Revised Cooling Tower Emissions).

scheduled to begin”—cannot be and has never been construed as forbidding anything other than changing the project for which a permit is sought, such that amendment of the permit would be required under 30 TEX. ADMIN. CODE § 116.116. Consider the nonsensical consequence of the opposite view: If any testimony or other evidence to establish that the project as described in the application meets applicable requirements were an “amendment” of that application, then the applicant would be prohibited from making any offer at a contested case hearing, which necessarily is “after the 31st day” before the hearing.

Conclusion 48: Emissions from the Montana Power Station will not cause a violation of any NAAQS, an exceedance of any increment, an exceedance of ESLs, or have any adverse impacts on soils, vegetation, or Class I areas.

This conclusion flows naturally from the Judge’s finding, supported by record evidence,¹³⁷ that El Paso Electric’s modeling analysis demonstrates that the proposed project will not violate the NAAQS, cause an exceedance of the increment, cause an exceedance of ESLs, or have any adverse impacts on soils, vegetation, or Class I areas.¹³⁸

Conclusion 52: Based on these Findings of Fact and Conclusions of Law, EPE has made all demonstrations required under applicable statutes and regulations, including 30 TAC § 116.111 regarding air permit applications, to be issued an air quality permit with PSD review, with conditions as set out in the Draft Permit.

The Judge, having presided over a three-day contested case hearing and having considered all evidence in the administrative record, found that El Paso Electric’s modeling analysis demonstrates that the proposed Montana Power Station will not violate the NAAQS, cause an exceedance of any increment, cause an exceedance of ESLs, or have any adverse impacts on soils, vegetation, or Class I areas,¹³⁹ and found that with respect to all other contested issues, the

¹³⁷ El Paso Electric Ex. 100 (Greywall pre filed) at 86; El Paso Electric Ex. 200 (Dydek pre-filed) at 37-39; El Paso Electric Ex 106 (Preliminary Determination Summary) at 26

¹³⁸ Finding 140

¹³⁹ Finding 140

application and the remainder of the record contain factual information sufficient to satisfy all applicable statutory and regulatory requirements.¹⁴⁰ No other conclusion could result from these findings.

Conclusion 53: In accordance with Tex. Health & Safety Code § 382.0518(b)(2), emissions from the Montana Power Station will not contravene the intent of the TCAA and will be protective of the public's health and physical property, consistent with the long-standing interpretations of the Commission's rules, regulations, and guidance.

Texas Health & Safety Code § 382.0518(b)(2) requires the Commission to grant a permit if it finds that there is no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.¹⁴¹ The Judge having made a number of findings to this effect,¹⁴² this conclusion must follow.

Conclusion 54: In accordance with Tex. Health & Safety Code § 382.0518(b), the Application for Air Quality Permit Nos. 102294 and PSD-TX-1290 should be granted, under the terms expressed in the Draft Permit.

Texas Health & Safety Code § 382.0518(b) requires the Commission to grant a permit if it finds that the proposed facilities will use BACT and, as explained in response to Aligned Protestants' objection to Conclusion 53, if it finds that there is no indication that the emissions from the facilities comprising the Montana Power Station will contravene the intent of the Texas Clean Air Act and will be protective of the public's health and property. Both findings were made by the Judge¹⁴³ and so this conclusion naturally follows.

¹⁴⁰ Finding 158.

¹⁴¹ As explained in response to Aligned Protestants' objection to Conclusion 54, an applicant must also prove that the facility will use BACT.

¹⁴² See, e.g., Findings 86, 135, 140.

¹⁴³ See, e.g., Findings 54, 56, 86, 124, 140.

**IV.
SUGGESTED REVISION TO DRAFT PERMIT**

Although the Executive Director “agree[d] with the ALJ’s Proposal for Decision and Findings of Fact and Conclusions of Law,”¹⁴⁴ he filed exceptions at the Judge’s request¹⁴⁵ to “clarify the consistency” of Draft Permit Conditions 5D and 5E. El Paso Electric takes no exception to the ALJ’s request, but suggests as a slightly less wordy alternative that the permit conditions remain independent, as originally intended by the permit writer, with Permit Condition 5D modified as follows (changes underscored):

Condition 5D: No more than one of the four simple cycle turbines will undergo a startup and/or shutdown in any 30 minute period, except as permitted by Permit Condition 5E. Startups and shutdowns are limited to no more than 30 minutes per event.

Condition 5E: Infrequent simultaneous startups of multiple turbines within a 30 minute period will be limited to no more than 52 events per year.

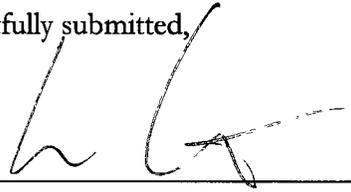
**V.
CONCLUSION**

The Aligned Protestants’ exceptions do not warrant any changes to the Judge’s PFD. El Paso Electric respectfully requests that the Commission adopt the Judge’s proposed Findings of Facts and Conclusions of Law and issue an order directing that El Paso Electric’s application for an air permit be granted under terms of the draft permit as recommended by the Executive Director with the slight revision to Condition 5.D. suggested above.

¹⁴⁴ Executive Director’s Exceptions to the Administrative Law Judge’s Proposal for Decision and Order, at 2 (agreeing with the Judge’s PFD and asking that one correction be made regarding attribution of testimony).

¹⁴⁵ PFD p 36

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Eric Groten', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand-delivery, facsimile, electronic mail, first class mail, and/or overnight mail on the **31st** day of October, 2013.

State Office of Administrative Hearings *(via e-filing)*
Attn: SOAH Docket Clerk
300 West 15th Street
Austin, Texas 78701
Fax: 512-322-2061

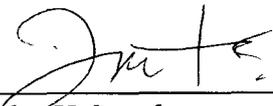
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