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STATE OF CALIFORNIA

Tax Appeals Hearing of:

OTA Case No. 18011846

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WEDNESDAY, MARCH 27, 2019

OFFICE OF TAX APPEALS  
400 R STREET  
SACRAMENTO, CALIFORNIA

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APPEARANCES

Panel Lead:

ANDREW KWEE, ADMINISTRATIVE LAW JUDGE  
STATE OF CALIFORNIA  
OFFICE OF TAX APPEALS  
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Panel Members:

JOHN JOHNSON, ADMINISTRATIVE LAW JUDGE  
TERESA STANLEY, ADMINISTRATIVE LAW JUDGE

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KEVIN HANKS, HEARING REPRESENTATIVE  
California Department of Tax and Fee  
Administration, Legal Division

Also Present:

CRISTINA RUBALCAVA, SUPERVISOR  
OFFICE OF TAX APPEALS  
FOUNDATION SUPPORT

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and retained by Administrative  
Law Judge.)

1 WEDNESDAY, MARCH 27, 2019 - 11:03 A.M.

2

3 ALJ KWEE: We are opening the record in the  
4 appeal of Praxair Inc., before the Office of Tax  
5 Appeals, OTA Case No. 18011846. Today's date is  
6 Wednesday, March 27, 2019, and the time is  
7 approximately 11:05 a.m. This hearing is being  
8 convened in Sacramento, California.

9 For the record, will the parties please state  
10 their name and whom they represent, starting with  
11 Praxair.

12 MS. ROBERTS: My name is Carley Roberts. I'm  
13 counsel for Praxair.

14 MR. MERTEN: My name is Robert Merten, also  
15 counsel for Praxair.

16 MR. NOBLE: Jarrett Noble with CDTFA.

17 MR. CLAREMON: Scott Claremon, CDTFA.

18 MR. HANKS: Kevin Hanks with CDTFA.

19 ALJ KWEE: Okay. Thank you. Today's hearing  
20 is being heard by a panel of three administrative law  
21 judges. My name is Andrew Kwee, and I'll be the lead  
22 Administrative Law Judge. Judge John Johnson to my  
23 right, and Judge Teresa Stanley to my left are the  
24 other members of this panel.

25 All three judges will meet after the hearing

1 and produce a written decision as equal participants.  
2 Although, the lead judge will conduct the hearing, any  
3 judge on this panel may ask questions or otherwise  
4 participate in order to ensure we have all the  
5 information needed to decide this appeal.

6 The documentary evidence marked for  
7 identification in this appeal includes Exhibits 1  
8 through 26 for Praxair; Exhibits A through J for  
9 CDTFA; Exhibit J1, which is the joint stipulation of  
10 facts, and also, the five stipulated facts which are  
11 summarized in OTA's minutes and orders, dated  
12 March 13, 2019.

13 Will the parties confirm for the record that  
14 this summary that I have provided is accurate and that  
15 they have no objections to admitting any of this  
16 evidence into the record with the caveat that CDTFA  
17 reserves the right to, during their 60 days of  
18 additional briefing, clarify any issues with the joint  
19 stipulation of facts.

20 MR. NOBLE: No objection.

21 MS. ROBERTS: No objection, your Honor.

22 ALJ KWEE: Okay. The above evidence and  
23 exhibits are admitted into the oral hearing record.

24 (Appellant's Exhibits 1-26  
25 admitted into evidence.)

1 (Department's Exhibits A-J1  
2 admitted into evidence.)

3 ALJ KWEE: So the only item in dispute in  
4 this appeal is the tax. There were two issues subject  
5 to this appeal: One is whether Appellant is liable  
6 for sales or use tax in connection with certain design  
7 and engineering charges; and two is whether Appellant  
8 established a basis for adjustment to the measure of  
9 disallowed claimed nontaxable sales.

10 If it is determined that tax applies to any  
11 of these charges at issue, Praxair does not dispute  
12 the audit methodology used to calculate the disputed  
13 measure. However, there is a dispute as to what  
14 portion of the design and engineering fees are  
15 allocable to nontaxable components.

16 In addition, at the pre-hearing conference, I  
17 placed the parties on notice that OTA is raising a new  
18 issue. That issue is assuming OTA finds that tax  
19 applies to the engineering and design piece. First,  
20 is the applicable tax for the 13 contracts is sales or  
21 use tax; and second, is Praxair liable for that tax.

22 I offer the parties an opportunity to present  
23 additional briefing in this matter. And at the  
24 conclusion of the hearing, we're going to follow up to  
25 determine whether additional briefing will be

1 necessary for this new issue.

2 Is there any objections or concerns with the  
3 issues as I have stated them?

4 MS. ROBERTS: No, your Honor.

5 MR. NOBLE: No, your Honor.

6 ALJ KWEE: Great. So then we're ready to  
7 proceed with Praxair's opening presentation.

8 MS. ROBERTS: Okay. Good morning. I want to  
9 make sure that everybody can hear me okay. We tried  
10 to get this mic live, but it's not live. But as long  
11 as everybody can hear me okay. Is my volume --

12 ALJ KWEE: That's good for us.

13 MS. ROBERTS: If I start to yell, just tell  
14 me to quiet down. You know, the facts in this case  
15 are fairly simple. I'm proceeding only on the first  
16 issue since we bifurcated the issues. So with regard  
17 to the first issue, the facts are fairly  
18 straightforward as well as the issue.

19 Praxair is one of the largest industrial gas  
20 suppliers in the world. It does things like this.  
21 These are onsite plants where it distributes its  
22 various gasses. This is Exhibit 3, Appellant's  
23 Exhibit 3, which is a picture of the Richmond plant  
24 pursuant to the Lurgi agreement.

25 And the other is going to be the air

1 separation plant, that is Exhibit 9 with regard to the  
2 plant that Praxair built for Occidental.

3 Both of these projects took place during the  
4 audit period. I think what is important here is when  
5 you take a look at these exhibits, you can see that  
6 everything that is here in the hydrogen plant is part  
7 of a design. It's part of -- it all makes up as a  
8 whole the plant. Same thing with the air separation  
9 unit.

10 Prior to the time of the existence of these  
11 contracts, there was nothing on these pieces of land.  
12 There were no -- there was nothing. In order to be  
13 able to build these types of plants, you have to have  
14 a number of things:

15 You need to have a designer. You need to  
16 have a designer that has a technical expertise to be  
17 able to build these types of plants to be able to say  
18 this is what the layout is. This is what the flow is  
19 going to be. This is how the many components of all  
20 of this are going to come together to be able to make  
21 the plant work.

22 You also have to have an engineer. The  
23 engineer needs to work with the architect, and the  
24 engineer has to create all the technical  
25 specifications that would be necessary for making the



1 plant work as a whole.

2 You would need to have procurement. Somebody  
3 has to have a job of going out and figuring out how to  
4 get the various pieces of equipment that will be used  
5 to construct the plant.

6 Then you need to have a construction  
7 contractor. Somebody actually has to take all of  
8 those designs and specifications, everything that came  
9 from the designer and the engineer, and they have to  
10 be able to take everything that's being procured and  
11 they need to construct the plant.

12 That is exactly what happened in this case  
13 with regard to both the Lurgi Richmond Project, as  
14 well as the Occidental Air Separation Project. The  
15 issue comes down to fabrication labor and whether some  
16 component of the design and engineering services were  
17 part of the sale of the tangible personal property.

18 The department contends that the portions of  
19 the contract that are stated separately specifically  
20 for the design and engineering services, that all of  
21 it goes into engineering the specific pieces of  
22 equipment.

23 Praxair's position is that the vast majority,  
24 90 to 95 percent for the hydrogen plant is for the  
25 design and engineering of the entire plant. Under the

1 contract, Lurgi was required to hand over a turnkey  
2 hydrogen plant.

3 With regard to the air separation unit, same  
4 thing. Praxair, there would be no more than around  
5 13 percent that would have been specific engineering  
6 for pieces of equipment. Otherwise, everything else  
7 that we have in the design and engineering fees would  
8 be for the construction and design and the engineering  
9 of the plant as a whole.

10 The assessment in this case, it's been an  
11 assessment in search of a legal theory. The audit  
12 started in January of 2010. Four years later,  
13 January 2014, the audit assessment was issued. The  
14 audit assessment determined not that these were  
15 construction contracts and not that the parties  
16 involved a construction contractor.

17 Instead, the department, who had full copies  
18 of the lengthy contract agreement with regard to the  
19 hydrogen plant, a 42-page document labeled Praxair  
20 Richmond Project Engineering and Construction Contract  
21 Fixed Price, 17-page contract, Air Separation Plant  
22 Sale Agreement.

23 They had these documents at audit, and yet  
24 there was a conclusion that these were not  
25 construction contractors. They did not apply the

1 requirements under Regulation 1521. They did not find  
2 that the parties who were conducting the design and  
3 engineering services were the consumers of the  
4 materials and equipment they were using, that they  
5 would have paid sales and use tax as the construction  
6 contractors.

7 Instead, the department applied a true object  
8 analysis. They looked at the tangible personal  
9 property. They looked at the engineering, all of  
10 which is separately stated in the contracts, and they  
11 said the true object is the tangible personal  
12 property. They subjected the entire amounts of the  
13 grievance to sales or use tax.

14 Three years later, we find ourselves at the  
15 appeals conference hearing. This is in January of  
16 2017. At the appeals conference, the conferee  
17 determined that this involved construction contracts,  
18 that the two contracts in dispute are, in fact,  
19 construction contracts, and that they do, in fact,  
20 have construction contractors.

21 The theory had to change. Now, no longer was  
22 the department relying on true object, they changed to  
23 the theory I described earlier, that some portion or  
24 all of the design and engineering fees would be  
25 fabrication labor for the very specific pieces of

1 equipment that were used to construct the entire  
2 plant.

3 In this case, the burden of proof, the  
4 threshold, it just got -- it has been here and then it  
5 got here and then it got here. It constantly gets  
6 higher.

7 It wasn't enough to have the construction  
8 contract at the audit level to determine that they  
9 were construction contracts. It wasn't enough at the  
10 appeals conference level that we had a declaration  
11 under penalty of perjury by one of Praxair's project  
12 business directors that was in charge of this entire  
13 project, particularly hydrogen plant and also involved  
14 in the Occidental project detailing everything with  
15 regard to the Lurgi project, and later, in two  
16 separate declarations detailing more on the Lurgi  
17 contract, as well as the Occidental contract. That  
18 wasn't enough.

19 In fact, the appeals conference conferee  
20 determined that our witness did not have enough  
21 credibility based in the first declaration. So now we  
22 had to produce the second declaration going through  
23 Mr. Schaub's long history with Praxair, his, at that  
24 time, 35 years with the company and everything in his  
25 distinguished career that more than established his

1 knowledge, particularly his personal knowledge with  
2 regard to these projects. That wasn't enough.

3 The decision and recommendation now had  
4 the -- sorry, one piece more.

5 At the appeals conference level, these  
6 photographs were also produced in addition to other,  
7 many other multiple photographs of the plants so that  
8 the department could see the magnitude and size of the  
9 plants.

10 So the department could see that all of this  
11 is not just tangible personal property, a bunch of  
12 equipment that's sitting there, each piece  
13 individually designed and engineered, and instead, is  
14 one big plant that had to be designed and engineered,  
15 that you would not have the majority of the design and  
16 engineering fees going to individual pieces of  
17 equipment. That was not enough at the appeals  
18 conference.

19 Now we appeal to the Office of Tax Appeals.  
20 Since the evidentiary bar came up another level,  
21 Praxair went out to an independent third party, had a  
22 study conducted with regard to exactly the issue now  
23 that's on appeal, which is how much from an industry  
24 perspective typically would be engineering for  
25 equipment in these types of projects.

1           That independent third party determined that  
2           the average would be around 6 percent. Mr. Schaub had  
3           testified and will testify again today, to my left  
4           back here, that it was only 5 to 10 percent in his  
5           estimate for the hydrogen plant, and 13 percent for  
6           the air separation plant. And even that wasn't  
7           enough.

8           This appeal and this record, these exhibits,  
9           the study, the department has had all of this since  
10          July of 2018. There were plenty of opportunities then  
11          to withdraw on these issues because the evidence is  
12          overwhelming that the fact that there's no fabrication  
13          labor for the entirety of the engineering fees, and  
14          that Praxair agrees some portion would be for -- some  
15          portion of those large figures of the design and  
16          engineering fees would be for fabrication labor, and  
17          they have established concisely what that would be.

18          Fast forward to today. We're going to have  
19          more testimony. We're going to hear from Praxair's  
20          director of indirect tax in her role as business --  
21          custodian of business records. We're going to hear  
22          from her with regard to the tax terms in the  
23          contracts.

24          We're going to hear from Mr. Schaub, who's  
25          here and can be cross-examined by the department if

1       there are any issues with regard to his credibility  
2       and what he has testified to. He is here for if the  
3       ALJs find if they want to ask questions of him and his  
4       testimony, both today and in his declarations that are  
5       in the record.

6               At the end of the day, the department has  
7       wanted to justify this assessment, the legal theories  
8       have evolved, the burden of proof on the taxpayer  
9       keeps going up. And Praxair contends as it always did  
10      nine years ago that these were construction contracts,  
11      and the majority of the design and engineering fees  
12      would have been nontaxable services. Thank you.

13             ALJ KWEE: Okay. Is CDTFA ready to proceed  
14      with their opening?

15             MR. NOBLE: Yes. CDTFA concurs with the  
16      Appeals Bureau's decision and recommendation  
17      statement. This is a construction contract issue, the  
18      fact that's been stipulated to. The issues throughout  
19      the appeal have been whether or not services included  
20      in retail sales of fixtures, machinery and equipment,  
21      what portion of those services were part of those  
22      sales and subject to tax.

23             The evidentiary burdens have never changed.  
24      This was not an issue with credibility with  
25      Mr. Schaub. This was not an issue with third party

1 independent studies. It was an issue with actual  
2 numbers related to these contracts showing whether  
3 certain costs went into the retail sales and fixtures.

4 The evidence, the facts and the law that are  
5 available to us will show that tax applies to services  
6 that are sold with fixtures. And without evidence  
7 establishing what amounts were not included in those  
8 sales, there's no basis to reduce the determination.  
9 That's it.

10 ALJ KWEE: Okay. Are we ready to proceed  
11 with the first witness?

12 MS. ROBERTS: Yes. Appellant would like to  
13 call Ms. Tamara Volmer to the stand.

14 ALJ KWEE: Okay. Please come forward.

15 Ms. Volmer, do you swear or affirm to tell  
16 the truth today?

17 THE WITNESS: Yes.

18 ALJ KWEE: Okay. Please be seated.

19 **TAMARA VOLMER**

20 called as a witness, being first duly sworn, testified  
21 as follows:

22 DIRECT EXAMINATION

23 BY MS. ROBERTS:

24 Q Good morning, Ms. Volmer.

25 Can you please state and spell your full name



1 for the record.

2 A Tamara Volmer. It's T-A-M-A-R-A, V, as in  
3 Victor, O-L-M-E-R.

4 Q Who is your current employer?

5 A Praxair, Inc.

6 Q Can you please share with me your current  
7 title and responsibilities with Praxair?

8 A So my business card title is Director of  
9 Indirect Tax. Formally, it's Director of Accounting  
10 and Assistant Treasurer.

11 Q And in those roles, what are your  
12 responsibilities within Praxair?

13 A So I'm responsible for everything related to  
14 sales and use tax, compliance, audit, tax planning,  
15 litigation, basically anything that has to do with  
16 sales and use tax. I am also responsible for property  
17 tax. Again, compliance, audit appeals.

18 I am responsible for, or am a consultant for  
19 the payroll group in terms of any kind of  
20 payroll-related issues. And as assistant treasurer, I  
21 sign documents on behalf of the company, generally  
22 POAs.

23 Q Just to give a sense, I'd like to go briefly  
24 over your educational background as well as your  
25 professional history.

1                   Can you please tell us when and where you  
2 graduated from college?

3           A       So I graduated from the University of South  
4 Dakota in 1990.

5           Q       Okay. Did you obtain a postgraduate degree?

6           A       I did. I also obtained my JD from the  
7 University of South Dakota.

8           Q       So you have a great deal of involvement  
9 through your responsibilities with regard to  
10 transaction taxes, including sales and use taxes.

11                   Of your responsibilities now, approximately  
12 how much time do you spend with sales and use tax  
13 issues?

14          A       It's generally around 50 percent of my time.

15          Q       When did you start professional working  
16 with --

17                   When did you start working professionally  
18 with sales and use tax issues?

19          A       It was a couple of years out of college -- or  
20 I'm sorry, law school. In 1995, I started with a  
21 company, DSC that was then purchased by Alcatel. I  
22 was their use tax accountant in charge of reviewing  
23 all of their purchases to ensure that the proper tax  
24 had been assessed.

25          Q       Okay. How about your positions after that

1 particular position, what else have you done between  
2 then and Praxair with regard to sales and use tax?

3 A So after leaving Alcatel, I worked for a  
4 public accounting firm, Ryan and Company in their  
5 dispute resolution group, handling sales and use tax  
6 appeals.

7 I was there for a couple of years, and then  
8 took a position with you URS as their head of tax. So  
9 I managed the outsourcing of income tax. In-house we  
10 handled all of the sales and use tax, property tax and  
11 payroll taxes.

12 After I left URS, I went to work with  
13 EchoStar, which later changed its name to Dish  
14 Network. There I was a senior manager responsible for  
15 all aspects of sales and use tax, again, compliance,  
16 audit, appeals, tax technology, litigation.

17 I left there after a couple of years and went  
18 to work for TYCO, setting up a shared service center  
19 in Richmond, Virginia. Again, there I was responsible  
20 for sales and property tax, as well as payroll and  
21 fixed assets.

22 I left there in 2007 and went back to Dish  
23 Network as director of indirect tax. While I was at  
24 Dish, I was responsible for compliance for 19  
25 operating companies. I also, again, was responsible

1       for audit, for tax planning, projects related to sales  
2       tax, tax technology and tax legislation.

3               In 2017, I took my current position with  
4       Praxair, again, as director of indirect tax, in charge  
5       of all aspects of sales tax as well as property tax.

6           Q       Okay. And I may have just missed that.

7                   When did you start in 2017?

8           A       June of 2017.

9           Q       June. So at what point after you joined  
10       Praxair did you become aware of this dispute?

11          A       I became aware of it almost immediately.

12          Q       Why so quickly?

13          A       So audits are always a big issue for sales  
14       tax. So I wanted to make sure I was up to speed on  
15       all of our open audits, particularly any that were  
16       currently in appeals or litigation.

17          Q       Okay. So at that particular point in time,  
18       do you recall where procedurally this case was, had  
19       the audit, itself, been completed?

20          A       The audit had been completed and the first  
21       appeal had been completed. We had not received the  
22       D&R yet.

23          Q       So you're there for some portion of the  
24       initial appeal and before the decision and  
25       recommendation comes out.

1                   And then how about for this appeal before the  
2                   Office of Tax Appeals, have you been involved in that  
3                   the entire time?

4                   A           Yes, I have.

5                   ALJ KWEE:   Excuse me, Counsel.   May I pause  
6                   you for one second.   We're having problems with our  
7                   mic not picking up her testimony for the online  
8                   transcript.   We're wondering if you can clarify that  
9                   we're live online?

10                  MS. RUBALCAVA:   Her mic is on --

11                  ALJ KWEE:   Could you rotate your mic and just  
12                  speak into the mic because we are actually recording  
13                  this by video also and we are not being able to pick  
14                  up your responses by her video.

15                  THE WITNESS:   Okay.

16                  ALJ KWEE:   I apologize.   Please proceed.

17                  MS. ROBERTS:   It's the little button there.

18                  THE WITNESS:   Is that better?

19                  MS. ROBERTS:   There you go.

20                  ALJ KWEE:   That's much better.   Thank you.

21                  BY MS. ROBERTS:

22                  Q           All right.   Okay.   Turning back to this  
23                  dispute, you said you had come up to speed shortly  
24                  after arriving at Praxair in June 2017; right?

25                  A           Correct.

1           Q       Okay. And that you were personally involved  
2 basically since that time through the time the D&R  
3 came as well as this appeal?

4           A       Correct.

5           Q       Ms. Volmer, what did you do to come up to  
6 speed on the sales and use tax issues in this case?

7           A       So I reviewed all of the audit work papers.  
8 I reviewed the documents that had been submitted on  
9 appeal. And I also worked with the sales tax manager  
10 who had handled the audit and had been responsible for  
11 the appeal up to that point.

12          Q       Okay. So given all of your responsibilities  
13 as director of indirect tax, as well as your review  
14 and participation of everything that's related to the  
15 underlying audit in this appeal, is it fair to say  
16 that in your role, that you're a custodian of  
17 Praxair's books and records regarding sales and use  
18 tax?

19          A       Yes.

20          Q       I'm going to shift gears a little bit.  
21 Can you tell us a little bit about Praxair  
22 generally, what it does?

23          A       So Praxair is an industrial gas company. We  
24 build large complex plants generally on a customer's  
25 site. And we generally have a pipe running between

1     our plants which is either on or adjacent to our  
2     customer's site and directly into our customer's  
3     manufacturing plant.

4           Q       Can you give us examples of typical gas  
5     distribution plants that Praxair builds onsite for its  
6     customers?

7           A       So we have a number of different types of  
8     plants. We do hydrogen plants similar to the one that  
9     we did for Chevron. We also will build CO 2 or  
10    nitrogen or oxygen plants that are used by chemical  
11    companies like BASF. Oxygen is typically used by  
12    large scale companies like U.S. Steel.

13                  We also have CO 2 plants that are used in the  
14    food and beverage industry for customers like Pepsi,  
15    Dr. Pepper and Tyson Foods.

16          Q       Okay. Why is it, Ms. Volmer, that Praxair  
17    prefers or uses, doing this onsite distribution method  
18    versus, for example, just bringing in truckloads of  
19    gasses of containers?

20          A       So a lot of these gasses don't travel long  
21    distance, so that's not practical. But the main  
22    reason is most of these customers are very large  
23    manufacturers and they need a high volume and a steady  
24    supply. So it's better to be right there on the  
25    customer site where there's a constant flow of gas

1 directly into their production facility.

2 Q Okay. And does Praxair, other than the  
3 distribution of gas and the selling of gas to your  
4 customer, does Praxair ordinarily sell at retail  
5 materials or equipment that would be used in the  
6 facilities of the customer?

7 A No, we do not.

8 Q So besides on-site distribution, does Praxair  
9 distribute gas in other ways?

10 A Yes. We have bulk and cylinder sales, but  
11 those are generally done by affiliates.

12 Q Okay. You should have a binder there in  
13 front of you, and as well as the ALJs and opposing  
14 Counsel. We prepared a full set of all of the  
15 Appellant's exhibits, that they're consecutively Bates  
16 stamped in the bottom right corner so that it's easier  
17 for us to refer to them.

18 Your Honors, would it be okay if instead of  
19 introducing each exhibit and having to go through  
20 moving them into the record or marking them, can I  
21 just refer to them by their exhibit numbers?

22 ALJ KWEE: Yes, you may. I've admitted all  
23 of the exhibits into the record already.

24 BY MS. ROBERTS:

25 Q If you could turn to Exhibit 3. Okay.



1                   Is what you're looking at for Exhibit 3 the  
2 same as the demonstrative that's up here?

3           A       Yes, it is.

4           Q       What is being depicted in this photograph  
5 here?

6           A       This is a large hydrogen plant.

7           Q       I recognize that you're not an engineer, but  
8 just in general, how does the hydrogen plant work?  
9 What does it do?

10          A       So a hydrogen plant takes natural gas and  
11 heats it up through a methane reformer in order to  
12 separate it into its components. One of those  
13 components is a hydrogen-rich stream of about  
14 95-percent purity.

15                   There's a second process that that hydrogen  
16 is then run through to increase the purity level. And  
17 that product is then sold to refineries like the one  
18 in this case, Chevron, for them to use in refining  
19 high sulfur crude oil.

20          Q       Okay. So in your role as director of  
21 indirect tax, what is your connection with these type  
22 of plants that Praxair builds?

23          A       So typically, when we are getting ready to  
24 build a new plant, particularly one of this size, we  
25 prepare a budgetary document which we refer to as an

1 FEL-2. It breaks down the plant into various  
2 components.

3 The operations people then will consult with  
4 me on which of these components they should add sales  
5 tax to. I will also work with our subcontractors as  
6 to what kind of documentation for exemptions that  
7 we'll supply, whether that's a manufacturing  
8 certificate, retail, et cetera.

9 I will also work with our customers in terms  
10 of what kind of taxes will pass through to them, if  
11 any. And then as issues come up on the -- in the  
12 contracts, you know, they'll consult with me on those.

13 Generally, I review all of the tax line which  
14 is associated with these tops of projects in the  
15 contract.

16 Q Okay. Turning back to Exhibit 3, how does  
17 this photograph relate to this appeal?

18 A So this photograph is the Richmond hydrogen  
19 plant, which is the main issue in this appeal. And  
20 the question is whether separately stated engineering  
21 and design services were for the design of the plant  
22 in its entirety or just for specific pieces of  
23 equipment.

24 Q If I can have you turn to Exhibit 2. Are you  
25 there?

1           A       Yes.

2           Q       Okay. Can you tell us what this document is?

3           A       So this is the engineering and construction  
4 contract for the Chevron plant in Richmond.

5           Q       Are you familiar with this contract?

6           A       I am.

7           Q       What is the contract for and who are the  
8 parties?

9           A       So the contract is for engineering  
10 procurement and construction. The parties to the  
11 contract are Praxair, Lurgi and ARB.

12          Q       If I could have you turn to page 2-4.

13                 If you look at the very top, the very first  
14 sentence on the page, do you see where it says, "The  
15 engineering and construction contract fixed price"?

16          A       Yes.

17          Q       What does fixed price mean?

18          A       It means that it's a lump sum contract, that  
19 everything is included in that price.

20          Q       Okay. What is the purpose behind a lump sum  
21 contract, particularly with regard to construction  
22 contractors?

23          A       So lump sum contracts are the preferred  
24 contract by Praxair. The benefit to them is that we  
25 negotiate everything out front. And then once the

1 contract is signed, there's no more negotiating with  
2 our subcontractors, so we know exactly what we're  
3 going to be getting. We don't have to analyze 1,000  
4 different invoices coming in from our contractors and  
5 subcontractors.

6 Q Just internally within the indirect tax  
7 department at Praxair, would you even be able to have  
8 the capacity to review all the thousands of invoices  
9 that would come in?

10 A No. We wouldn't have the -- we wouldn't have  
11 the personnel to examine them, and a lot of times, the  
12 subcontractors, how much they pay for materials is  
13 part of their competitive bid. So they don't want us  
14 to know what they paid and what the markup is.

15 Q Okay. I want to move back to the contract.  
16 What was the role of Praxair in this  
17 contract?

18 A So Praxair is the owner.

19 Q Okay. And what role did Lurgi and ARB take?

20 A So Lurgi was the prime contractor or the  
21 general contractor, and they were responsible for the  
22 procurement of all of the equipment, as well as  
23 designing the entire plant.

24 ARB was responsible for the actual  
25 construction of the plant.

1           Q       Okay. So it was Lurgi who actually did the  
2 design and engineered the hydrogen plant?

3           A       Yes.

4           Q       And they were the ones again as well who  
5 procured all of the equipment for the hydrogen plant?

6           A       Yes.

7           Q       Who was responsible for the supervision of  
8 ARB and the final work product?

9           A       Lurgi.

10          Q       If I could have you turn to page 2-7 of the  
11 contract. If I can direct your attention to Article  
12 4, the last section there on that page.

13                 Can you tell us contractually what happened  
14 with regard to the separation of how Lurgi and ARB  
15 were compensated?

16          A       So ARB's piece is specifically broken out for  
17 the builder, the construction of the plant. It's  
18 94,243,000. On the Lurgi piece, their contract price  
19 was 118,624,000, and that was further divided into the  
20 two components.

21                 They were paid 80,046,000 for the procurement  
22 of the plant equipment, and they were paid 38,578,000  
23 for designing and engineering the plant.

24          Q       What was the -- what's the purpose of  
25 breaking out those two components, the equipment and

1 the design and engineering?

2 A So we do that in most of our contracts. And  
3 the purpose behind it is, again, we negotiate up front  
4 as to which pieces we believe are going to be taxable.  
5 And that is an agreement between both us and the  
6 contractor.

7 So by splitting those two components, we make  
8 it very clear what should be taxable in the contract.  
9 And there's that agreement between us and our general  
10 contractor or subcontractor that they agree with that  
11 assessment.

12 Q All right. And again, just to clarify, when  
13 you're looking at the amounts, you're working  
14 typically with the other parties in the contract to  
15 determine what would be taxable and not taxable?

16 A Correct, because, you know, if we're going to  
17 issue them a manufacturing or retail certificate, they  
18 want to feel comfortable that they're accepting that  
19 in good faith. So it's a negotiation between the two  
20 tax departments generally.

21 Q Was California sales or use tax paid by  
22 Praxair on the Lurgi PSI equipment price?

23 A On the equipment price it was. It was a  
24 sales tax reimbursement.

25 Q Okay. And that was something that you

1       remitted -- that Praxair remitted to Lurgi?

2           A       Correct.

3           Q       Was California sales or use tax paid by  
4       Praxair on the Lurgi PSI engineering and design price?

5           A       No, it was not. That's nontaxable  
6       professional services, engineering services.

7           Q       Okay. And then how about ARB, was California  
8       sales or use tax paid by Praxair on approximately 94  
9       million?

10          A       No, it was not. As a contractor, ARB was  
11       responsible for paying sales tax on anything they used  
12       in performing their contract.

13          Q       Okay. I'm going to -- I'd like to explore  
14       some of the tax terms that are in the contract that  
15       would be applicable to the three different contract  
16       prices. If I could have you turn to page 2-8.

17                 Can you please read the first sentence of the  
18       paragraph that starts with "All applicable"?

19          A       "All applicable federal and state and local  
20       taxes due to import taxes, handling charges and other  
21       charges are included in the ARB price."

22          Q       Okay. And then on the next page, 2-9, I want  
23       you to look at the first full paragraph about  
24       two-thirds of way down.

25                 Can you please read the sentence that starts

1 with, "The ARB price includes"?

2 A "The ARB price includes all sales and other  
3 taxes, and as such, ARB shall not add sales tax or any  
4 other tax to the ARB price and shall pay any and all  
5 sales use [inaudible] and other taxes, related  
6 governmental charges imposed on or with respect to or  
7 measured by the income, revenue, profits, goods or  
8 services included in the ARB price."

9 Q That's perfect. Thank you. So within your  
10 role with Praxair in addition to your close to  
11 25 years of handling indirect taxes and your  
12 familiarity with construction contracts, why was the  
13 contract price for ARB inclusive of all state taxes  
14 including sales and use tax?

15 A Because in a construction contract, ARB was  
16 responsible for paying the sales tax on anything they  
17 used in performing that contract.

18 Q Okay. And that makes sense with the audit  
19 determination; correct?

20 A Correct.

21 Q Okay. There was no dispute that these  
22 contract services would be subject to sales or use  
23 tax?

24 A No. There is no assessment made with ARB.

25 Q Okay. So I wanted to ask you about the



1 comparable tax terms for the Lurgi price and the Lurgi  
2 design and engineering price. If I can have you just  
3 look back to page 2-8.

4 Looking at the same paragraph that you were  
5 looking at before, the last full paragraph on the  
6 page, do you see almost halfway through the paragraph  
7 the sentence that starts, "Owner shall be  
8 responsible"?

9 A Yes.

10 Q Can you please read the rest of that sentence  
11 and the sentence that follows?

12 A "Owner shall be responsible for sales tax,  
13 import taxes, use or other taxes imposed by the State  
14 of California local authorities within the State of  
15 California or taxes imposed by the United States on  
16 the Lurgi equipment price and shall reimburse Lurgi  
17 PSI for sales taxes, import taxes, use or other taxes  
18 imposed by the State of California, local authorities  
19 within the State of California or taxes imposed by the  
20 United States on the Lurgi engineering design price."

21 Q Okay. And then, again, on the next page,  
22 page 2-9, do you see the first full sentence and the  
23 sentence that follows at the top there of 2-9?

24 A Yes.

25 Q Can you please read those two sentences?

1           A       "The Lurgi PSI engineering and design price  
2       represents a lump sum turnkey price. Lurgi PSI is a  
3       consumer of all materials, supplies and equipment,  
4       purchases by PSI with respect to the Lurgi engineering  
5       and design price."

6           Q       Okay. So again, given your role and your  
7       experience, why is Praxair paying the sales and use  
8       tax on the equipment price but not on the design and  
9       engineering?

10          A       The equipment is the purchase of TPP and  
11       would be subject to sales tax. The engineering design  
12       services are nontaxable services.

13          Q       Based on -- switch gears again a little bit.  
14       I'm going to go back to the audit.

15                 Based on your familiarity of the audit files  
16       and your review of the records, do you have a sense of  
17       what position the department took at audit regarding  
18       the Lurgi design and engineering services in the  
19       contract?

20          A       So the auditor determined that this was not a  
21       construction contract, and instead, applied a true  
22       object test. And under the true object test, their  
23       determination was that this was a contract for TPP.  
24       That carried until after the first appeal when the  
25       conference officer determined that these were, in

1 fact, construction contracts. And at that time, the  
2 theory changed to that this was fabrication labor.

3 Q Okay. Do you know if the audit staff had a  
4 copy of the Lurgi contract that would have been for  
5 the performance of what's depicted in Exhibit 3?

6 A Yes. My understanding is they had the copy  
7 of the contract.

8 Q And they still determined it was not a  
9 construction contract?

10 A That was my understanding.

11 Q Okay. So then Praxair moves on to the  
12 appeals conference level, that changes?

13 A Correct.

14 Q Okay. And then we have the issue that we're  
15 dealing with here today in the appeal on the  
16 fabrication?

17 A Correct.

18 Q All right. I want to direct your attention  
19 to Exhibit 9. It's both in your binder as well as a  
20 demonstrative here that you can see.

21 A Uh-huh.

22 Q Do you recognize what's depicted in  
23 Exhibit 9?

24 A So this is a standard air separation unit or  
25 an ASU.

1           Q       So again, I realize you're not an engineer.  
2                   Generally, what does an air separation plant  
3 do?

4           A       So an air separation plant is used to  
5 separate atmospheric air into its basic components,  
6 oxygen, nitrogen and argon. And then one of those  
7 three gasses is typically sold to our on-site customer  
8 to be used either in their refining or manufacturing  
9 process.

10          Q       Okay. And how does the photograph in  
11 Exhibit 9 relate to this appeal?

12          A       So this is our air separation unit at  
13 Occidental. It's largely the same issue as Lurgi,  
14 whether or not the separately-stated engineering and  
15 design services were for the plant in its entirety or  
16 for specific pieces of equipment.

17          Q       Okay. Can I have you turn to Exhibit 5.  
18 Do you recognize this document?

19          A       Yes. This is our contract for the building  
20 of the Occidental plant.

21          Q       And you're familiar with the contract?

22          A       Yes.

23          Q       So what is the contract for and who are the  
24 parties?

25          A       This is a contract to -- a construction

1 contract to build the Occidental plant. And it's  
2 between Praxair and Occidental.

3 Q And who is the owner and who is the  
4 contractor?

5 A In this case, Occidental is the owner and  
6 Praxair is the contractor, similar to what Lurgi did  
7 in the Chevron plant.

8 Q Praxair provided the design and engineering?

9 A Correct.

10 Q Would Praxair have provided the actual  
11 construction labor services?

12 A No.

13 Q Okay. And why is that?

14 A They acted as the prime contractor, and a  
15 subcontractor did the actual construction.

16 Q And that's typical for Praxair, correct,  
17 they're not -- they don't do the actual construction  
18 services?

19 A Correct. We're not a construction company.

20 Q All right. And just so we're clear, I think  
21 we got there.

22 You've got Lurgi that's acting as a design  
23 and engineer of the hydrogen plant; correct?

24 A Correct.

25 Q And then Praxair is the designer and engineer

1       for the Occidental?

2           A       Correct.

3           Q       Are you familiar with the term EPC?

4           A       Yes.

5           Q       What does that mean?

6           A       It's a typical contract for us.  It's an  
7       engineering procurement and construction contract.

8           Q       And the contracts that you've been looking at  
9       for both Lurgi and Occidental, are they EPCs or EMCs?  
10       I don't know what the nomenclature is there.

11          A       So they're -- EPCs are sometimes what you  
12       refer to as EPCm.

13          Q       Sorry.  If I could have you in the Occidental  
14       contract, if you can turn to pages 5-2 and 5-3.

15          A       Okay.

16          Q       Do you see the Section 3.1, Scope of Work at  
17       the bottom of page 2?

18          A       Yes.

19          Q       Is this consistent with your testimony on  
20       Praxair's role as the contractor or the design -- I  
21       know they're listed as the contractor in the contract,  
22       but for the design and engineering?

23          A       Yes.

24          Q       If I could now have you look on the next  
25       page, Section 5.1.

1           A       Okay.

2           Q       How was Praxair to be compensated by  
3 Occidental?

4           A       So the composition is broken into two parts  
5 similar to, again, Lurgi's contract. There's one  
6 amount, 11,400,000 for the procurement of equipment;  
7 and then there is another for 8,073,500 for the  
8 engineering services.

9           Q       Okay. And again, given your role at Praxair  
10 and your experience, why was the contract price broken  
11 into these two pieces?

12          A       It just makes it simpler for everybody when  
13 we're trying to apply sales tax on these contracts.  
14 You know, there's an agreement between the parties as  
15 to what's going to be subject to the tax.

16          Q       Did Praxair collect and remit California  
17 sales tax on the equipment price?

18          A       Yes, we did.

19          Q       Did Praxair pay any tax on the engineering  
20 price?

21          A       We didn't pay any tax on the engineering  
22 price. We did pay tax on the consumables that we used  
23 in providing that.

24          Q       Correct. Okay. Got that. If I could have  
25 you, 5-3 -- and you just made that comment.

1                   And is it because where you see engineering,  
2                   it says sales tax included, is that your reference as  
3                   to what was being consumed?

4                   A        Yes.

5                   Q        The materials being consumed?

6                             If I could have you turn to page 5-5.

7                             Do you see there Section 6.2?

8                   A        Yes.

9                   Q        Is this consistent with your testimony of --  
10                   I'll let you look at that paragraph for one moment.

11                   A        Okay.

12                   Q        Is this consistent with your testimony for  
13                   why the contract price for the engineering was  
14                   inclusive of sales tax?

15                   A        Yes. You know, most subcontracts, everything  
16                   is included in that price. You don't add sales tax on  
17                   top of it. And as the service provider, we would pay  
18                   sales tax on any materials that we consumed while  
19                   performing service.

20                   Q        And then with regard to the audit, what  
21                   happened at audit and on appeal with regard to the  
22                   engineering, design and engineering query fees for the  
23                   Occidental contract, did the department treat it the  
24                   same as Lurgi?

25                   A        Yes, they did.



1 MS. ROBERTS: Okay. That's all my questions.

2 ALJ KWEE: Okay. Does CDTFA have any  
3 questions for this witness?

4 MR. NOBLE: Respectfully request just five  
5 minutes to confer.

6 ALJ KWEE: Okay. We'll go for a five-minute  
7 recess then.

8 MR. NOBLE: Thank you.

9 ALJ KWEE: We're back on the record. Does  
10 CDTFA wish to proceed?

11 CROSS-EXAMINATION

12 BY MR. NOBLE:

13 Q Yes. Ms. Volmer, is that correct?

14 A Yes.

15 Q Thank you. If you could turn your attention  
16 to Exhibit 2-9 again, Praxair's exhibit.

17 A Okay.

18 Q That large paragraph that's at that top of  
19 that page, like a third of way down, there's a  
20 sentence that starts, "Where DPSI shall pay any and  
21 all taxes," do you see the sentence I'm talking about?

22 A You said it's about halfway down?

23 MR. MERTEN: Sixth line.

24 BY MR. NOBLE:

25 Q Yes. Can you read that sentence, please.

1           A       "Lurgi PSI shall pay any and all taxes as set  
2       forth in 1, 2 and 3 above, and shall pay subject to  
3       reimbursement by owner any sales or use taxes due to  
4       the State of California with respect to the Lurgi  
5       engineering and design price."

6           Q       Did Lurgi or Praxair remit any taxes with  
7       respect to the Lurgi engineering and design price?

8           A       Again, they paid taxes on their consumable  
9       materials.

10          Q       So they didn't pay any sales or use tax to  
11       the State of California with respect to the Lurgi  
12       engineering and design, the bill price here?

13          A       The 38 million?

14          Q       Yeah.

15          A       Not on that total 38 million.

16               MR. NOBLE: Thank you.

17                       CROSS-EXAMINATION

18       BY MR. CLAREMON:

19          Q       I just had a couple follow-up questions.  
20                    You mentioned that budgetary document, the  
21       FDL 2?

22          A       Yes.

23          Q       Would one of those have been prepared for the  
24       Lurgi ARB contract?

25          A       I would assume so.

1           Q       Okay. And would one of those have been  
2 prepared for the Occidental contract?

3           A       Yes. I would -- again, I would assume so.

4           Q       And would those have been in the possession  
5 of Praxair, or at the time the audit was conducted in  
6 2010?

7           A       If they were prepared, they would have been.

8           Q       Okay. About how long is a document like that  
9 for a job of the size of the Lurgi contract -- or  
10 excuse me, yeah, the Lurgi contract?

11          A       You know, they can be fairly large because  
12 it's breaking out all of the different pieces of  
13 equipment. It's a budgetary document. It's not  
14 necessarily the final one. But they're generally  
15 fairly substantial.

16          Q       And it's breaking out the pieces of  
17 equipment, is it also breaking out the other  
18 components of the price?

19          A       Yes.

20                   MR. CLAREMON: Okay. Thank you.

21                   MR. NOBLE: We have no further questions.

22                   ALJ KWEE: Okay. I did have one question.

23                   And I believe you had mentioned that tax  
24 might have been paid on the consumables under both the  
25 Richmond and Occidental contracts, and I'm wondering

1 if there is any evidence in the record of, I guess,  
2 tax being reported to the state on the design and  
3 engineering fees to the extent that there were  
4 consumables or -- yeah.

5 THE WITNESS: So that would have been Lurgi's  
6 responsibility to pay any sales tax on their  
7 consumables. So it would have been Praxair remitting  
8 those.

9 ALJ KWEE: Oh. I thought with respect to the  
10 Occidental contract that you had mentioned --

11 THE WITNESS: Oh, sorry. Occidental, yes,  
12 that, we would have.

13 ALJ KWEE: Do we have any evidence of tax, or  
14 are you contending that there was, I guess that you  
15 might be entitled to a tax pay or tax already paid on  
16 a portion of this liability?

17 THE WITNESS: So to the extent that the  
18 materials that were used, those are generally taxable.  
19 If you're using consumables, we didn't pay tax on the  
20 actual services.

21 ALJ KWEE: Okay. Thank you.

22 REDIRECT EXAMINATION

23 BY MS. ROBERTS:

24 Q I guess I have one, just one follow-up  
25 question, Ms. Volmer. If I could have you turn to

1 Exhibit 8.

2 Can you tell me what these documents are?

3 A Exhibit 8 is the -- it's our California tax  
4 return for Praxair, Inc.

5 Q Okay. And looks like there might be two  
6 different time periods?

7 A Yes. One is October through December of  
8 2005, and the other is July through September of 2006.

9 Q Okay. And to the extent that Praxair would  
10 have been purchasing materials, any kind of, I don't  
11 know what would normally get -- I think a contractor  
12 would maybe go get nails, maybe get concrete, I don't  
13 know what you get.

14 But the tax that Praxair would have been  
15 paid, would it have been reported either in line 2 or  
16 probably more likely line 12?

17 A So, yeah. I mean, to the extent that we  
18 accrued use tax or charged sales tax, it would appear  
19 on the return. It's impossible to -- it's not a  
20 one-for-one lineup because there are other contracts,  
21 other customers in California. So this is going to be  
22 inclusive of all of the tax collected and/or  
23 self-assessed.

24 MS. ROBERTS: Thank you. I have no further  
25 questions.

1           ALJ KWEE:   Okay.   Thank you.   So at this  
2 point, it is noon, and I think you had indicated your  
3 second witness would be taking approximately two  
4 hours, but that also you wanted him to conclude by,  
5 was it 2:15?

6           MS. ROBERTS:   We were able to confer during  
7 the break and address the rental car situation.   So  
8 when we pulled that out of the equation, he would need  
9 to leave here no later than 2:45.

10          ALJ KWEE:   Okay.   So I guess I should ask, if  
11 the parties want to recess for lunch before the second  
12 witness testifies, or you're inclined to go through at  
13 this time?

14          MR. MERTEN:   Can we do the qualifications,  
15 the beginning section for him?

16          ALJ KWEE:   Okay.   So you want to start the  
17 witness?

18          MR. MERTEN:   Yes, please, your Honor.

19          ALJ KWEE:   Okay.

20          MR. MERTEN:   Praxair calls Herbert Schaub.

21          ALJ KWEE:   Okay.   Mr. Schaub, do you swear or  
22 affirm to tell the truth today?

23          THE WITNESS:   I do.

24          ALJ KWEE:   Okay.   Thank you.   Please be  
25 seated.

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**HERBERT SCHAUB**

called as a witness, being first duly sworn, testified  
as follows:

DIRECT EXAMINATION

BY MR. MERTEN:

Q A couple minutes. Good afternoon,  
Mr. Schaub.

A Good afternoon.

Q Can you please state and spell your full name  
for the record.

A Herbert Schaub, H-E-R-B-E-R-T, S-C-H-A-U-B.

Q Who is your current employer?

A Praxair.

Q How long have you worked for Praxair?

A Too long. 1982 I started, so it will be  
37 years in May.

Q Long time. Let's go over your background a  
little bit. Let's start with your post-high school  
education.

Where and when did you graduate college?

A So I went to the -- I'm a Western New York  
native. I went to the University of Buffalo and  
graduated in 1982 with a bachelor's degree in  
mechanical engineering.

Q Where did you go to work after graduating?

1           A       Started right at Praxair.  It's been my only  
2   real job.

3           Q       What was your initial role at the company?

4           A       So I started in the R&D department.  You  
5   know, we worked in a lot of specialty areas, types of  
6   projects, more sort of traditional projects for  
7   Praxair.  Actually, the company's name was Linde at  
8   the time, which is also, you know, now we've  
9   re-acquired that name.

10                   And, you know, really was involved in a  
11   number of sort of unique, sort of first-of-a-kind  
12   projects throughout the United States, and some  
13   aspects globally during my first 14 years in R&D.

14          Q       What's a first-of-a-kind project?

15          A       So it's got different meanings with different  
16   engineers.  It's generally something that, you know,  
17   sort of hasn't been done before.  Either something  
18   much larger than you may be have done before, much  
19   smaller.  Sometimes it's going to involve some new  
20   technology elements, potentially new suppliers and  
21   contractors that we haven't dealt with before.

22                   So any of those sorts of general things could  
23   sort of, one could term as sort of constituting a  
24   first-of-a-kind project.

25          Q       Could you give us a little flavor of that,



1 maybe some examples?

2 A So I worked on, you know, the one of the  
3 first interesting ones was actually for Vandenberg Air  
4 Force Base here in California. At that point in time  
5 in the early '80s, they were looking to do west coast  
6 shuttle launches, and I was involved in a  
7 high-pressure, a large capacity, high-pressure  
8 nitrogen pumping system that would provide  
9 high-pressure gasses to the air force for the plant  
10 shuttle launches. So that never materialized out  
11 here, but we did that project.

12 I also worked on a very interesting project  
13 for DuPont in New Jersey where we had a large scale  
14 carbon monoxide storage system and gassing supply  
15 system by pipeline to one of their chemical processing  
16 facilities in the area.

17 I also worked on an interesting, what they  
18 called at the time, it was in the mid-'80s, was what  
19 they call an oxygen fire flood, where it was for a  
20 company called Grenich [sic] Oil in Texas where we  
21 pressurized and produced very high-pressure oxygen.  
22 They injected that oxygen down a hole underground to,  
23 you know, reduce the viscosity of the oil in an aging  
24 oil field to get ancillary recovery from that  
25 facility. So those were some of the unique projects I

1 was involved in in the early parts of my career.

2 Q Thank you for that.

3 Could you let us know where your path of  
4 Praxair took you next?

5 A In, you know, in the late 1996, early 1997, I  
6 was afforded the opportunity to take -- sort of go out  
7 of my R&D role and take a position in our, sort of our  
8 general engineering project execution group. As the  
9 director of our, sort of what we call our product line  
10 development effort, I had some prior experience while  
11 in R&D developing a number of sort of first-of-a-kind  
12 standardized plants for smaller customers that had  
13 lower usages of oxygen and nitrogen.

14 So I was asked to take that role in the  
15 engineering group to try to take some of those design  
16 philosophies to our larger cryogenic plants so that we  
17 could have some more reusable design packages and  
18 improve our competitiveness of those systems for our  
19 customers.

20 Q Now you mentioned a couple terms there:

21 Standardized, could you tell us what that is?

22 A Yeah. You know, a standardized design would  
23 be anything that where we would get some sort of  
24 reusable or repeat engineering that we could reuse on  
25 a number of projects for different customers. You

1 know, it would include some of the, you know, some of  
2 the, what we call core plant or base plant design  
3 elements and equipment that, you know, for every  
4 project would be highly repeatable.

5 So, you know, for those for smaller-type  
6 systems where, you know, you can't afford to custom  
7 engineer for everything, we look to try to standardize  
8 where possible. And obviously, the larger systems  
9 require more customization to be adapted to a  
10 specific -- tailored to a specific customer's needs.

11 Q You also mentioned a cryogenic plant.

12 What is a cryogenic plant?

13 A So, you know, cryogenics is a term that is  
14 used for, I mean it really talks about extreme cold.  
15 Okay? So when we refer to cryogenics in the air  
16 separation business, that's about 300 degrees below  
17 zero. Okay?

18 So you know, at that point, air, okay, when  
19 it's at that temperature will start to -- it can  
20 distill out the components of air in a distillation  
21 column. Okay? You need to get it down that cold  
22 otherwise that process will not occur.

23 Q Are either of the plants at issue here today  
24 cryogenic plants?

25 A Yeah. The one on the left here for

1 Occidental is a very conventional, midsize cryogenic  
2 plant that Praxair designs and, you know, we still  
3 design plants like that today.

4 Q Mr. Schaub pointed at Exhibit 9.

5 A Okay. That one.

6 Q Okay. So what happened next, where did you  
7 go next with Praxair?

8 A So in the, you know, my role in the  
9 engineering group starting in 1997 sort of increased  
10 overtime. I, you know, around the year 2000, I also  
11 was assigned responsibility to manage all of our  
12 project work that we had going on in the U.S.

13 And then I, you know, continued that role  
14 until 2004 when after, you know, having spent the  
15 majority of my career sort of in technology,  
16 engineering and projects, you know, I wanted to get a  
17 little bit of a business exposure as well. So I took  
18 a new assignment at that point in time as what they  
19 call a project business director.

20 And you know, in that role, you sort of work  
21 with the engineering and project teams so, you know,  
22 really, you know, business management role. Okay?  
23 But because obviously I had an engineering and project  
24 background, that was why they wanted me for that  
25 position.

1           And you also worked, you know, with the  
2       business team to try to make sure that the engineering  
3       aspects of the larger project were managed in that  
4       properly with, you know, our business contracts with  
5       our end-use customers as well.

6           Q       You mentioned management there.

7                    About how many people were you managing at  
8       this time?

9           A       Well, when I left the engineering group, it  
10      was, you know, 85 to 100 people, you know, sort of  
11      varied over time depending on the workload that we had  
12      and the projects that we had going.

13          Q       Okay. And I think you left off at 2004,  
14      became a project business director, how long did that  
15      last?

16          A       So I did that for two years. And then I was  
17      working in, you know, in the areas of cryogenic plant  
18      projects that we had in the U.S. Actually, you know,  
19      the Exhibit 9, that was one of the projects I was  
20      involved with at the early stages.

21                   I also worked on, you know, some projects  
22      that we did for an expansion of our facility in Niagra  
23      Falls, New York. We built another facility in  
24      Loveland, Colorado. And I think there was another one  
25      in Canton, Ohio where we had built, you know, types of

1 systems like that over the course of that couple-year  
2 time span, you know, when I was doing that work for  
3 cryogenic plants.

4 Q And you said that was until about 2006?

5 A Right. So in March of 2006, I was asked to  
6 take over that similar role for the hydrogen project  
7 in Richmond for Chevron.

8 Q Is that Appellant's Exhibit 3 we're seeing  
9 here, the Richmond hydrogen plant?

10 A Yes. That, you know, was a few months before  
11 the construction was halted at the job site.

12 Q So you mentioned you took on that role in  
13 2006. Was that your exclusive role?

14 A Could you repeat that?

15 Q Was that your exclusive role?

16 A Yes. Yes. You know, so I was offered that  
17 position in March of 2006. Was a very large capital  
18 project, at the time was the biggest project Praxair  
19 had ever undertaken. So that was a full time -- my  
20 full-time job through sort of mid-2010 time frame.

21 Q So about four years?

22 A Uh-huh.

23 Q And then what happened in 2010?

24 A So in 2010, we had sort of, you know, sort of  
25 closed all of our activities at the site. So I had a

1 little bit more of my time available at that point.

2 So they took on a similar role, you know, for a couple  
3 of projects that we had ongoing in Texas and  
4 Louisiana. They were also for hydrogen plants for  
5 Valero Refining. I did that through the end of 2012.

6 Q Could you tell us from your perspective what  
7 an engineer -- sorry -- what a hydrogen plant does?

8 A So, you know, a hydrogen plant would, you  
9 know, take in natural gas. Okay? And that is heated  
10 up to a very high temperature. And then it is sort of  
11 supplied into what is called a steam methane reformer.  
12 And it's reacted with steam at a very high temperature  
13 of about 1600 degrees Fahrenheit.

14 And it's passed through a catalyst where it  
15 undergoes a reaction or it's what they call reformed.  
16 And it produces sort of a hydrogen-rich product,  
17 basically natural gas is carbon and hydrogen. So it  
18 separates those out. So it basically produces a  
19 hydrogen-rich stream and a byproduct CO 2 stream as  
20 well.

21 Q So what do Praxair's customers use hydrogen  
22 for?

23 A So hydrogen's primarily used in the refining  
24 industry. Okay? You know, in the early 2000s, many  
25 states in the government adopted cleaner burning fuels

1 regulations. So that required refineries to be able  
2 to reduce sort of, or eliminate more of the sulfur in  
3 the crude oils, okay, to get cleaner burning fuels.

4 Hydrogen basically enables that reaction  
5 within the refinery, so sulfur can be removed at  
6 higher concentrations and produce cleaner burning fuel  
7 for the refineries.

8 Q Could you tell us some typical  
9 characteristics of a hydrogen plant?

10 A Yeah. You have, you know, basically seeing  
11 sort of at the central part of that plant, the  
12 structure that's partially built there with the green  
13 elevated section, that's called a reformer box. You  
14 know, that's a very large fuel-directed piece of  
15 equipment. It's sort of like about a cube shape but  
16 it's anywhere from 80 to 100 feet on the side.

17 It's all refractory-lined insulation.  
18 There's a number of, or a large number of reformer  
19 tubes that go in from the top. There's a large number  
20 of natural gas burners in the top. That heats up and  
21 enables a reaction of the natural gas to produce the  
22 hydrogen in the CO 2.

23 Obviously, to make a system like that that  
24 operates at high temperature efficient, all the gasses  
25 have to be pre-heated and you have to recover all the



1 waste heat. So there's a large, what they call waste  
2 heat recovery system that sits up to the right of  
3 those green boxes. That's yet to be installed in that  
4 photograph. Okay?

5 Along with that, you know, there's a further  
6 sort of cleanup system that's shown in those  
7 tan-colored pieces of equipment just above the  
8 reformers. There's one for each of the plants that I  
9 listed.

10 I did mention that, you know, these plants  
11 were, at the time when the project was approved, these  
12 were the largest plants that Praxair had ever  
13 purchased before. And this was also the first time we  
14 had put two of them together at one time. And this  
15 project was also very highly integrated into the  
16 operating Chevron refinery. So it was a very large  
17 and complex project at the time of authorization.

18 That was one of the reasons why we went to  
19 Lurgi as sort of our main technology provider for the  
20 overall design of the facility.

21 Q Now, you mentioned quite a few pieces of  
22 equipment here.

23 Is it safe to say that to put something like  
24 this together, it requires a lot of components?

25 A Oh, yeah. I mean, that only shows, you know,

1     some of the major elements. You see all of the open  
2     foundations that are around that. I mean, you know,  
3     this facility has been since completely built out by  
4     Chevron. And you know, all those areas where you see  
5     just foundations and things like that, there's  
6     equipment that's sort of arranged all throughout that  
7     facility. Okay?

8             And every piece of equipment has, you know,  
9     pipes and control systems and wiring going back and  
10    forth between all the pieces of equipment. You know,  
11    it's a very highly customized and sophisticated  
12    overall facility.

13            Q     And you said that you were working as a  
14    project business director on hydrogen plants from 20'  
15    --

16            A     -- '06 to 2012.

17            Q     Okay.

18            A     With, exclusively with on the Chevron project  
19    until 2010, and then with some other projects until  
20    2012.

21            Q     And then in 2012, did your role change?

22            A     So in 2012, yes. I decided to take an  
23    opportunity, actually moved back into our classical  
24    engineering project group. You know, the business had  
25    grown quite a bit. There was, you know, a lot of new

1 projects globally. I took a job, reentered the  
2 engineering team as what we call as the executive  
3 director of product line development globally for  
4 Praxair.

5 And we were accountable to do all of our  
6 basic plant designs for a new cryogenic and as well as  
7 the non-cryogenic systems and CO 2 plants globally for  
8 Praxair.

9 Q Is that what you still do?

10 A Well, in 2015, sort of also merged back into  
11 in September of '15 the project execution  
12 responsibilities for all projects that we have going  
13 on in the United States. So now between the basic  
14 design engineering group, plus the project execution  
15 responsibilities for projects in the U.S., I have  
16 about 215 people reporting to me, and I still have  
17 that job now.

18 Q A lot of people. How many projects does your  
19 team work on?

20 A You know, it varies over time. You know,  
21 sometimes there's maybe on the low side, 40 or 50  
22 different projects. On the high side, it could be  
23 over 100. You know, the typical portfolio that we run  
24 on projects is anywhere for maybe on the low side  
25 \$500 million worth of different projects in the U.S.

1 to over 700, 800 million dollars.

2 We do small projects that are as low value as  
3 a couple hundred thousand dollars to big projects that  
4 are over \$100 million.

5 Q And that brings us up to today?

6 A You bet.

7 MR. MERTEN: Thank you. Very illustrious  
8 career. Thank you for being here today.

9 THE WITNESS: Thanks.

10 MS. ROBERTS: Your honor, it would be --  
11 whatever that you would like to do for a break for  
12 lunch, we certainly don't expect you to go through  
13 this lunch.

14 ALJ KWEE: Okay. How much time do you think  
15 would the parties want for our lunch?

16 MR. NOBLE: We can be as quick as whatever is  
17 convenient.

18 MS. ROBERTS: Maybe half hour.

19 ALJ KWEE: Okay. So how about we resume the  
20 hearing at 1:00.

21 MS. ROBERTS: Okay.

22 (Lunch recess taken.)

23 ALJ KWEE: Just remind the witness that  
24 you're still under oath. Okay. Thank you.

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DIRECT EXAMINATION

BY MS. ROBERTS:

Q Good afternoon, Mr. Schaub. It is afternoon.

A Good afternoon.

Q I want to start with a question to something that Ms. Volmer talked about earlier. She mentioned an FEL-2.

Are you familiar with what that is?

A Yes. FEL is a common industry term in the construction and project industry, it stands for front-end loading. It's how, you know, the processes companies use to define an estimated project before it started.

Q Okay.

A FEL-2 just refers to sort of a stage-gate process of that. So it kind of goes through a series of what those gate reviews as part of authorization. Praxair has adopted that process over the course of the years.

Q Okay. And would Praxair have prepared an FEL-2 for the Lurgi project?

A No. We did for the portion that we were accountable for, but for the portion that was part of the ENC contract, those estimates were prepared by Lurgi and ARB. That was sort of their fixed price to

1 us. Contractors don't share their estimates with us.  
2 Okay? They just sometimes give us summaries of  
3 things. So we, you know, we never had or would the  
4 parties disclose what their detail estimates were.

5 Q Okay. Thank you. All right. We're going to  
6 turn back to the Richmond hydrogen plant. You were  
7 testifying about that a little bit before we took our  
8 break.

9 Now, you said you were the project business  
10 director for this plant in 2006; right?

11 A Uh-huh.

12 Q Was that the start of the project?

13 A No. Well, you know, the proposal had gone,  
14 you know, sort of a lapse in 2005, okay, went through  
15 that phase. I came from the project when it was very  
16 close to being, you know, when Praxair thought it was  
17 actually sort of a go project, it was actually going  
18 to happen. I was not involved in sort of the  
19 proposal, sort of initial estimating phase and various  
20 proposals that were made to Chevron in 2005.

21 You know, by the end of 2005, you know, sort  
22 of things started to get more focussed with Praxair  
23 and Chevron. Both parties felt we were going to work  
24 towards the contract and that's why I came on board in  
25 March of '06.

1           Q       Okay. So did your involvement ever stop for  
2 the duration Praxair was involved with the project?

3           A       No. Goes on until today obviously. Some  
4 things you can never pass on.

5           Q       All right. So in your role related to the  
6 Richmond project, what was the scope of your role?

7           A       So, the primary objective of, you know,  
8 somebody who's the project business director is to,  
9 you know, first help make sure that we have a, you  
10 know, a proper business case, okay, that is worthwhile  
11 for us to make the investment in the facility.

12                    You know, we, you know, for the Richmond  
13 project, we're an owner/operator so we would look to  
14 operate this facility 15, 25, 35 years. Okay? So  
15 it's important that we, you know, understand all the  
16 design aspects, the costs of it. You know, ultimately  
17 the project business director is not just there to  
18 help sell it internally and win the job and then sort  
19 of step aside.

20                   One of the primary roles in support of the  
21 building and the designing of the plant of the project  
22 business director is to make sure we're making the  
23 right business decisions throughout the project,  
24 things that involve not only the contractors that we  
25 employ, but also our customer Chevron so that we

1 ensure that the economics that were used to support  
2 the approval of the project, we do our best to  
3 maintain those, you know, at the end of the project.

4 Q Okay. Is there anyone at Praxair that has  
5 more knowledge of the project from the whole thing,  
6 the operational, the engineering and the business  
7 perspective than you?

8 A No. I mean, I was the one who reported on  
9 this project every month to our CEO and our executive  
10 operating committee.

11 Q Okay. Can I have you turn to Exhibit 2 in  
12 the binder.

13 A Okay.

14 Q Can you tell us what this document is?

15 A This is the engineering and construction  
16 contract that Praxair signed with Lurgi and ARB.

17 Q Were you involved in the creation and  
18 execution of this contract?

19 A I was, yes.

20 Q What was your role relative to that process?

21 A You know, we, you know, basically to ensure  
22 that Praxair's objectives here for, you know,  
23 obtaining a fixed price for the facility from Lurgi as  
24 well from ARB was something that we could count on to  
25 make sure that the scope supplied between the parties



1 was, you know, it was clear, and that we had a good  
2 contract from a cost standpoint, from the schedule  
3 standpoint, from understanding the liabilities and  
4 guarantees that go on with the contract. So, you  
5 know, really all aspects of that.

6 Obviously, I worked with, you know, a number  
7 of folks on our legal team as well as specialists in a  
8 number of different areas.

9 Q Okay. I noticed that throughout the  
10 contract, the term "turnkey" is used.

11 What does it mean to build a turnkey plant?

12 A Well, a turnkey plant would be a fully  
13 constructed, checked-out operational plant, okay, not  
14 something that, you know, still hasn't been run, you  
15 know, part of the contract and actual, you know,  
16 performance operating guarantees in terms of  
17 efficiency from Lurgi.

18 So, you know, sort of simple analogy is you  
19 buy a new car from a dealership, you just want to be  
20 able to drive it away and park it in your garage and  
21 be sure it's going to start up every time you have it.  
22 And that really applies to our expectation of a  
23 facility, that we were going to, you know, get at the  
24 end of the project.

25 Q It's very helpful. Thank you.

1           In the contract, who was designated as the  
2 contractor?

3           A       So there's, you know, Lurgi and ARB were the  
4 contractors. Praxair was the owner of the -- as  
5 defined in the contract.

6           Q       Okay. And just briefly, what were the  
7 general roles for Lurgi and ARB?

8           A       So, you know, ARB had sort of a very strict,  
9 more well-defined in our role as the construction  
10 company. Okay? You know, they had that role.

11                  Lurgi was the, you know, sort of what we  
12 refer to as a technology provider, they do all the,  
13 you know, technology elements that go into the plant.  
14 They specified a procured majority of the major  
15 equipment as well as all minor equipment as well.  
16 They did all the design work on the facility, which  
17 is, you know, for a project like this is really an  
18 enormous amount of effort. You know, they were  
19 responsible for delivering all the equipment to the  
20 site. Okay?

21                  They also had responsibility for what we call  
22 construction management. Obviously to build a  
23 facility like this, you not only need to hire a good  
24 quality contractor, but to build a site like we did  
25 with ARB, Lurgi's responsibility was to make sure that

1 ARB installed the plant with the right quality  
2 controls that were specified in their drawings. Okay?

3 So all the quality assurance, all the cost  
4 monitoring, all the construction progress was Lurgi's  
5 responsibility to oversee ARB's actual physical work.

6 Q Okay. If I could -- there in the contract,  
7 if I could have you turn to page 2-4.

8 And at the very top, can you just confirm for  
9 me the date that this was entered into, the contract?  
10 Should be there in the second line.

11 A On the 6th day of October 2006.

12 Q Okay.

13 A That was part of your question?

14 Q No.

15 A Okay. I'm sorry.

16 Q I'm gathering myself over here.

17 A Okay. Sorry.

18 Q So given your intimate involvement with the  
19 project and as well as your knowledge of its complete  
20 history, can you share why the project was unique to  
21 Praxair?

22 I know you spoke to this a little bit  
23 earlier, but if we can go over why it was so unique to  
24 Praxair?

25 A It was what?

1           Q       Why was this project unique?

2           A       Oh, unique. Okay. So, you know, they had  
3 mentioned it briefly before, you know, at the time  
4 these two, each individual reformer box was larger  
5 than any of our systems that we've ever built before.

6                   We also had never done a project with two of  
7 them, so the scope was obviously multiplied by more  
8 than two because of the dual units as they recorded  
9 all the interconnections as well.

10                  There was also a number of other elements of  
11 this plant that were tied into refinery fuel gas  
12 reprocessing for Chevron to try to improve their  
13 recovery of fuel products. So that involved sort of a  
14 third smaller system that had to be integrated into  
15 the overall facilities as well.

16                  So it was, you know, this was not -- you  
17 know, we had done other projects that were more sort  
18 of what we refer to as sort of standalone, sort of  
19 maybe off to the side of a refinery's system.

20                  This one was, you know, if you look at a  
21 layout of the Chevron refinery, our facility is right  
22 in the middle of the refinery. It's very highly  
23 integrated into some of the other gas processing  
24 streams within the refinery. So it was very  
25 customized because of that. And because of just the

1 overall capacity of the system, it was much larger  
2 than we had done ever before.

3 MS. ROBERTS: Okay. Judge Kwee, would it be  
4 okay if I asked the witness to approach the Exhibit 3  
5 demonstrative?

6 ALJ KWEE: Yes. Go ahead.

7 BY MS. ROBERTS:

8 Q Okay. Mr. Schaub, if I could have you  
9 approach the demonstrative down here.

10 A Okay.

11 Q Okay. So we talked a lot about the different  
12 pieces of the plant.

13 Can you point out the various pieces and give  
14 us a sense of what the design here would have been for  
15 the project?

16 A Sure.

17 Q Okay.

18 A All right. So over here, you know, there's  
19 two of what we call the reformer boxes. Okay? We  
20 talked a little bit about these before. These are  
21 maybe 80 to 100 feet cross-section wise, and maybe the  
22 same overall height. You know, it's basically a high  
23 temperature furnace. It operates the whole -- inside  
24 of it is a refractory line and it operates at 1600  
25 degrees Farenheit. Okay?

1           So, you know, that system basically takes the  
2   natural gas, passes it through, I think there was  
3   about 380 reformer tubes inside of that that have a  
4   catalyst inside of them. And it converts that natural  
5   gas into a hydrogen rich and a CO 2-rich stream.

6   Okay?

7           Q       Mr. Schaub?

8           A       Yes.

9           Q       I'm going interrupt you for one minute. I'm  
10   going to have you stand right here.

11          A       Okay.

12          Q       And I'm going to make this closer to you.

13          A       Oh, okay. That will work better. Okay. So  
14   from the sort of the reformer assembly here, you could  
15   see here there's a number of foundations that still  
16   have yet to have equipment installed on them.

17                You know, there's a large heat exchanger  
18   system here, it's called the waste gate recovery  
19   system. It's about ten different heat exchangers that  
20   basically preheat the steam and natural gas. And they  
21   recover all the waste heat that comes off of the  
22   products from that come out of the reformer to become  
23   an efficient system.

24                So, you know, there's a lot of sort of custom  
25   engineered equipment out of here in terms of the feed

1 gas, reheat waste gas recovery. You know, there's a  
2 couple large fans, inlet and outlet fans here, big 3  
3 or 4 thousand horsepower fans that aren't really  
4 installed here, yet basically push the combustion air  
5 in and help pull the products of that out.

6 Over here is what's called the pressure swing  
7 absorption system. It's filled with a type of  
8 absorbant material that operates in a [inaudible]  
9 process across all those different systems to clean up  
10 the hydrogen gas to make it a pure product that  
11 Chevron needed.

12 You know, obviously you're dealing with  
13 hydrogen and natural gas. They're flammable  
14 materials. So here you see a foundation for a large  
15 flare stack. That flare stack is over 200 feet tall,  
16 and it's over 20 feet in diameter. It's yet to be  
17 installed there, but that would be the foundation that  
18 is for that.

19 There's also a bunch of compression equipment  
20 that is not yet installed here that is over here.  
21 These are just some of the pilings that stick up in  
22 the ground for that equipment. Over here, not shown  
23 in the picture, would actually be a large, a very  
24 large cooling tower system.

25 There was also a very long pipe rack that

1       went all the way from this end. You see the  
2       foundations for it here have yet to be assembled,  
3       extended all the way to this end. In the end, all of  
4       the piping systems on the plant, there's 80,000 feet  
5       of pipe on this plant, over 20 miles. And all of the  
6       electrical systems, not only the control systems but  
7       all the high voltage electrical for the motors and  
8       compressors ran along these pipe rack systems as well.

9           Q       Okay. Mr. Schaub, approximately  
10       acreage-wise, how much acreage are we looking at in  
11       the photo?

12          A       So the actual site extends, you know,  
13       probably a little farther, kind of out to maybe here  
14       on this paragraph. This whole area was referred to as  
15       of the Y inside Chevron because there was two roads  
16       that had a road extending on either side of this sort  
17       of a Y-shaped pattern right in the middle of the  
18       refinery, just about seven-and-a-half acres.

19          Q       In terms of overall man hours between what  
20       Lurgi was doing and ARB was doing in their respective  
21       roles, what are we talking about for man hours of this  
22       project?

23          A       For the, you know, the construction work, the  
24       actual craft, the welders, the cement finishers, those  
25       sorts of folks, plus the supervision that ARB had,



1       they estimated at the time of sort of when the work  
2       got terminated, that it would be about 900 to 950  
3       thousand hours of time in total for ARB.

4               Lurgi's time to do all of the engineering  
5       design associated with all of the different elements  
6       was estimated to be between 150 and 200 thousand man  
7       hours of time as well. So very large project for  
8       actually, for both companies for them to execute.

9               Q       Okay. I noticed in the top right-hand corner  
10      of the photo as well as to the left, there seem to be  
11      some construction trailers.

12              Do you recall what those were for?

13              A       Sure. Yeah. These were two construction  
14      trailers. Praxair had a few construction managers on  
15      the site as well. Plus, we needed some facilities  
16      when we would come there to, you know, to do our  
17      inspections and to meet. So these were sort of our  
18      construction trailers. What's shown over here is  
19      actually a construction trailer that ARB had.

20              The site here was very filled up with  
21      equipment. Okay? So obviously these things are only  
22      sort of at the sort of the periphery of the job site.  
23      You know, we had other, what we refer to as lay-down  
24      areas within the refinery that Chevron had given us,  
25      typical where all the equipment would be brought into.

1                   And we also had sort of our main set of  
2 construction trailers and main resources were over  
3 there. It was about half or, you know, five-eighths  
4 of a mile away within the refinery property.

5           Q       Okay. In terms of Lurgi and ARB, did one of  
6 them have more responsibility in the contract?

7           A       Well, yeah. I mean, Lurgi, you know, Lurgi  
8 had to supply all the equipment. They had to do all  
9 the design work. They also were accountable for, you  
10 know, the, you know, what we call the construction  
11 cost of the plant because they determined the  
12 quantities of materials that ARB's price was based on.  
13 Okay?

14                   So they defined to ARB, you know, this is how  
15 many yards of concrete we have to put in, this is how  
16 many feet of electrical wire of the different pipes  
17 need to be put in. So they had that responsibility as  
18 well as, you know, making sure as sort of Lurgi was  
19 sort of acting as sort of the owners and engineer to  
20 make sure, as I mentioned before, sort of the  
21 installation was in accordance with their  
22 specifications and the quality was there.

23                   Lurgi also had the responsibility for  
24 performance guarantees from the facility. So we had,  
25 you know, the operating cost is a major portion of the

1 cost to supply these products to Chevron. So, you  
2 know, since Lurgi was a technology provider, we wanted  
3 those guarantees as part of the contract as well.

4 Q Mr. Schaub, can you tell us why Praxair  
5 selected Lurgi to do the design and engineering work?

6 A So, you know, for a project of this scope in  
7 nature is really two reasons: First off, Praxair does  
8 not really own or does not have the technology  
9 available to design these systems ourselves. We do in  
10 the cryogenic systems that were like what we do for  
11 Occidental.

12 But for hydrogen plants, we don't -- we  
13 didn't at the time, and still today, we don't have the  
14 internal capability for that. We also don't have the  
15 resources available to us to do a project of this  
16 scope that Lurgi has. Lurgi is viewed in the industry  
17 as a premier technology supplier. They build these  
18 systems all over the world.

19 You know, Chevron was very -- liked the fact  
20 that we had partnered with Lurgi, you know, for the  
21 supply of this system. Praxair has got a good, long  
22 operating track record of plants. You know, Lurgi  
23 brought the design technology piece to it, and  
24 together, that was part of our winning offer to  
25 Chevron.

1           Q       Okay. So I want to focus specifically on the  
2 design services that Lurgi would have provided.  
3 They're a party to the contract. Praxair says, in  
4 general, this is what I want to build. This is why  
5 you've been hired.

6                   What does the design group do at that point?  
7 They've got kind of a blank piece of land to work with  
8 or what have you. What happens?

9           A       That's basically what it is. This was  
10 basically -- there was nothing on this piece of  
11 property. It was sort of an open area. Chevron had  
12 sort of reserved this for the hydrogen system, you  
13 know, earlier. So this was basically an open area in  
14 their facility.

15                   So, you know, it all starts with, you know,  
16 sort of the process engineering work on a facility  
17 like this. You know, there will be a team of chemical  
18 engineers that work together to figure out what is the  
19 most optimal process to supply because none of these  
20 systems are sort of standardized at this scope and  
21 scale. Okay?

22                   There's a lot of customization that goes, you  
23 know, not only into the size and type of systems, but  
24 also the overall control systems, the integration with  
25 the refinery feed gas streams. This facility didn't

1 not only process natural gas, but also some refinery  
2 fuel gas as well. So all of those, all of that aspect  
3 needs to be brought together in a sort of a flow sheet  
4 and initial design basis. Okay?

5 From there, it goes to, you know, what we  
6 call the equipment engineering folks, mechanical  
7 electrical engineers that specify sort of all the  
8 major equipment required here. Like this system here,  
9 this PSA system, they would specify that.

10 Once all that equipment is specified in  
11 order, okay, that all comes from a bunch of different  
12 third-party suppliers around the globe. Once those  
13 drawings are received back, then what we refer to as  
14 sort of a plant detail design people would get  
15 involved. And they would do sort of all of the detail  
16 design in this.

17 In this project, all these little things you  
18 see sticking up here, those are all the tops of  
19 piling. Okay? There's over 2,000 piles that were  
20 basically, you know, had to be hammered into the  
21 ground for this facility. Obviously, it's in the Bay  
22 Area, earthquake zone. So it was all that work that  
23 was done, all of the foundation design work.

24 There's all underground electrical utilities  
25 throughout this system, as well as, you know,

1 underground cooling water systems, you know, then all  
2 of the interconnecting, you know, over 100 different  
3 pieces of different major equipment here. Each one of  
4 those pieces of equipment has piping systems,  
5 electrical supply systems, control systems that all  
6 are sort of brought together into the facility.

7 So it just represents a very large, overall  
8 engineering effort to produce a set of drawings that a  
9 contractor like ARB could then use to install a  
10 facility.

11 Q Okay. Mr. Schaub, in theory, could Praxair  
12 or anyone, I guess, go in and disassemble all the  
13 equipment there to use it elsewhere?

14 A Sure. I mean, everything here came in by  
15 either, you know, conventional transport trucks or  
16 specialty transport vehicles. So this system can all  
17 be unbolted from the foundations and moved and taken  
18 somewhere else, sure.

19 Q Okay. And it wouldn't damage the foundation  
20 or anything that's there, you would just be moving it?

21 A Yeah. Basically all the foundation things,  
22 everything below ground would obviously stay. But  
23 everything that would show up above ground could be  
24 moved and reused.

25 Q Terrific. If I could have you sit back down,

1       that would be great. All right.

2               Can I have you turn to Exhibit 26.

3       A       Exhibit?

4       Q       26 in the binder.

5       A       26, okay. I'm sorry.

6       Q       That's okay.

7       A       I spent a lot of time building plants.

8       Sometimes my hearing's not the best.

9       Q       And I sometimes mumble, so I'll try and do  
10      better. All right.

11              Are you familiar with this document?

12      A       Yes.

13      Q       Okay. What is it?

14      A       This is what was referred to as the  
15      consortium agreement. It was put together between  
16      Lurgi and ARB.

17      Q       Okay. So Praxair was not a party to this  
18      agreement?

19      A       No.

20      Q       Okay. Very generally, what was the purpose  
21      of the consortium agreement?

22      A       You know, this was a document that, you know,  
23      that sort of they wanted to sort of clearly define the  
24      scope and responsibilities between the parties, okay,  
25      to execute the project for Praxair.

1           Q       Okay. Just so we can confirm, right there on  
2 the very first page of the contract at the top, can  
3 you confirm for me when the contract was entered into?

4           A       On the 6th day of October 2006.

5           Q       Same as the Lurgi contract?

6           A       Yes.

7           Q       And you were aware of this consortium  
8 agreement?

9           A       Yes. I don't believe we had a hand in  
10 drafting it but, you know, we knew that this was, you  
11 know, this was there.

12          Q       Okay. Normally, if you had two parties that  
13 had come together for a project like this where there  
14 wasn't this kind of connection with the owner that you  
15 guys were doing, would Praxair be privy to any kind of  
16 agreement between two contractors?

17          A       No. I mean, it's -- I mean, you know, we  
18 were concerned about what the overall cost and  
19 schedule was, okay, sort of, you know, how the  
20 parties, you know, were intending to work out, you  
21 know, some of the details of the deal.

22                 You know, we certainly would maybe want to  
23 understand some of that, but we wouldn't have dictated  
24 that we wanted those two companies to sort of work  
25 together to give us a final product. Okay? We



1 intentionally wanted to, you know, stay sort of  
2 outside of their sort of day-to-day things.

3 Q Okay. Can I have you -- you're looking at  
4 the consortium agreement, I believe the first 25 pages  
5 is the agreement itself, and then about eight pages or  
6 so of exhibits seem to follow.

7 Can you turn to page 26-27?

8 A Yeah.

9 Q Are you looking at a document that says  
10 Exhibit A, Split of Work?

11 A Yeah.

12 Q Can you tell us what this is?

13 A So I mean, this is a common document that  
14 parties use, whether it's a, sort of a two-party  
15 agreement or a three-party contract that just  
16 basically define who does what. Okay?

17 One of the key things at the start of the  
18 project is to make sure all the parties clearly  
19 understand with some level of detail what they're  
20 supposed to do and who has responsibility to complete  
21 that, and the responsibilities supply the, you know,  
22 the components. Okay.

23 So, you know, this has between Lurgi which is  
24 designated as the C; ARB, AR; obviously Praxair is PX.  
25 It sort of goes through sort of the key aspects of

1 equipment supply, as well as constructing the  
2 facility, sort of who has the responsibility to  
3 complete and perform those aspects of work.

4 Q I'm going to -- one question here about Lurgi  
5 in terms of their role.

6 Did they manufacture any of the equipment  
7 that went into the plant?

8 A No. I mean, Lurgi's not an engineering  
9 company, okay, you know, they don't manufacture  
10 equipment. They specify equipment that they buy from  
11 OEMs.

12 Q If I can have you return back to Exhibit 2,  
13 page 2-35.

14 A Okay.

15 Q You beat me. All right.

16 Do you see where it says Section 11, Title?

17 A Yes.

18 Q Can you read that and let me know when you're  
19 done?

20 A Okay.

21 Q Okay. Based on your understanding of this  
22 particular title provision, can you tell me when title  
23 would have passed from Lurgi to Praxair on the  
24 equipment?

25 A You know, as it states in Section 11, I mean,

1       when things are unloaded or delivered to the  
2       construction site, you know, that's when sort of the  
3       Lurgi's sort of supply would have been completed.

4           Q       Okay.  Who bore the risk of loss on what  
5       Lurgi procured and delivered to the job site?

6           A       You know, they did.

7           Q       All right.  I would like to shift gears to  
8       the contract pricing.  You heard Ms. Volmer, she  
9       testified earlier regarding the Lurgi contract fixed  
10      price lump sum structure.

11                  In your almost 40-year history with the  
12      company, would you say Praxair typically prefers to  
13      structure its construction contracts this way?

14          A       I think virtually everyone in the industry  
15      prefers to.  Praxair as well.

16          Q       Why is that?

17          A       Well, it provides the most amount of cost  
18      schedule and sort of performance of certainty for an  
19      owner like Praxair.

20          Q       Okay.  Can you tell me how payments were made  
21      by Praxair under the contract?

22          A       So, you know, for Lurgi, there was sort of a  
23      payment milestone schedule based on when they ordered  
24      major equipment, when various aspects of engineering  
25      were competed.  So there was sort of a schedule of

1 payments to be made, you know, as part of the Lurgi  
2 reimbursement for their cost.

3 You know, as they ordered major long-awaited  
4 equipment and they had to make prepayments to OEM  
5 suppliers, you know, we would obviously pay them, you  
6 know, in the month following that as well.

7 You know, for ARB, you know, we traditionally  
8 develop what we refer to as a schedule of values with  
9 the contractor that, you know, defines sort of what  
10 are the values of the various installation aspects  
11 that total up to the agreed-upon final price.

12 And as progress is made against those  
13 different aspects of the construction, you know, we  
14 pay on a monthly basis based on that to ARB.

15 Q Okay. With specific regard to the equipment,  
16 would Praxair have signed off on, you know --

17 Would they have signed off and accepted  
18 equipment before Lurgi delivered them to the job site?

19 A No. I mean, we would have made, you know, on  
20 major equipment, whatever progress payments had to be  
21 made along, much along the equipment of 12, 15 months  
22 to construct. So, you know, typically there would be  
23 progress payments along the way. Praxair would pay  
24 those as Lurgi incurred those costs. And then a  
25 portion was always -- a full portion was withheld

1       until the equipment was final delivered.

2           Q       Okay. Can I have you there in the binder  
3       turn to page 2-7?

4           A       Okay.

5           Q       You see Article 4, the contract price?

6           A       Yes.

7           Q       Okay. Can you tell us generally how the  
8       total contract price was broken down between what was  
9       paid to Lurgi and ARB?

10          A       Sure. So, you know, the total contract  
11       value, as it shows here, is 212,867,000. Though the  
12       ARB price for the construction was 94,243,000.  
13       Lurgi's price in total was 118,624,000. That was  
14       really broken into two elements: The first of which  
15       was the Lurgi equipment price, that was \$80,046,000;  
16       and then the engineering design price of \$38,578,000.

17          Q       Okay. I'm going to approach. I'm going to  
18       give you a sticky so you can put it on that page. And  
19       then if I could have you turn to back to page -- back  
20       to Exhibit 26, page 63.

21          A       You said 63?

22          Q       63. 26-63.

23          A       Okay.

24          Q       Okay. You see at the top where it says  
25       Exhibit C?

1           A       Yes.

2           Q       Can you please describe this single-page  
3 exhibit to the consortium agreement?

4           A       Can you repeat?

5           Q       Yeah. Sure. Can you describe this  
6 particular single-page exhibit to the consortium  
7 agreement?

8           A       So this was sort of a summary representation  
9 of, you know, what the costs were for sort of the  
10 Lurgi portion of the project, as well as the ARB  
11 portion of the project.

12          Q       Okay. And the demonstrative that was just  
13 put up, does this look like what you were looking at  
14 in your binder?

15          A       Looks exactly like that.

16          Q       Okay. What is the significance of some of  
17 the numbers here that you see on the price breakdown  
18 between Lurgi and ARB?

19          A       Well, it, you know, in terms of the most  
20 important thing to Praxair was the number near the  
21 bottom, the project over price was \$212,867,000.  
22 Okay? That was sort of our lump sum price for the  
23 facility. You know, it sort of outlines ARB portion  
24 of the price as sort of just one whole number.

25                   And then it outlines the portion of the Lurgi

1 cost in the very condensed manner related to equipment  
2 supply as well as a balance of the, you know,  
3 engineering and design price.

4 Q Okay. So back in Article 4 of the contract,  
5 does this number, the 212.867 million, does it ever  
6 change what you see in Exhibit C?

7 A No. That's a fixed price.

8 Q Okay. I'm going to hand you a calculator.

9 As Ms. Volmer testified earlier, and you as  
10 well, Praxair is not a construction contractor, but it  
11 does appear on this particular document that those two  
12 parties had approximately \$375,000 of the total  
13 construction going to Lurgi.

14 Do you see that?

15 A Yeah. Uh-huh.

16 Q Okay. Can I have you add that number to the  
17 93.868 million that you see for ARB and let me know  
18 what you come up with?

19 A Sure. That totals 94.243, which actually is  
20 the amount in the contract amount.

21 Q Okay. And then when you take out the 375,000  
22 out of what was allocated to Lurgi, what do you have?

23 A 118,624,000.

24 Q Is that also the amount that's in the Lurgi  
25 contract?

1           A       Yes.

2           Q       I can see from the top of this particular  
3 exhibit, it has a date in there, May 2, '06.

4                   What was sort of going on at this point  
5 between the parties, you know, prior to the agreement  
6 all being signed in October of 2006?

7           A       So you know, we had been sort of working with  
8 Lurgi and ARB near the tail end of 2005 and through  
9 the first order of 2006. And in conjunction with sort  
10 of negotiating the P&C [sic] contract that we talked  
11 about before, we were also negotiating Chevron  
12 contract.

13                   So as things were progressing with Chevron,  
14 there were things that were taking a little bit longer  
15 in time to complete with them. So we agreed to  
16 basically sort of try to fix -- even though the ENC  
17 [sic] contract was not done yet, we issued them  
18 something like an LOI that would sort of fix the  
19 responsibilities or start the clock on the duration of  
20 the project.

21                   We authorized them to get started with  
22 procuring long-needed equipment and the early  
23 engineering design work so that we could complete the  
24 facility when Chevron originally wanted it completed.  
25 So we sort of pre-authorized the overall work.



1           Q       Okay. Thank you for that explanation. I  
2       want to turn back to -- switch gears a little bit here  
3       and go back to Lurgi.

4                   At what point did Lurgi start having a  
5       presence at the construction, the job site in  
6       Richmond?

7           A       So, you know, through the end of 2007, they  
8       were, you know, basically, you know, doing their  
9       engineering design, ordering their equipment and so  
10      forth. You know, in order to start work at the job  
11      site, Chevron had to acquire an air permit. Okay?  
12      That was part of Chevron's responsibility. That was  
13      delayed, okay, fairly substantially. So, you know, we  
14      really couldn't start any construction activity until  
15      the air permit was received.

16                   You know, starting in probably around the end  
17      of the first quarter, early second quarter 2008,  
18      things were progressing more favorably with Chevron at  
19      the time so, you know, Lurgi established a presence,  
20      actually not on the Chevron property because we  
21      couldn't actually put any construction trailers there  
22      yet or anything because we had to wait for the air  
23      permit approval, but they rented an office in the City  
24      of Richmond so we could start some of their planning  
25      work for the building permits and so forth along with

1 ARB. ARB was local to the area so they would  
2 obviously work on those issues together.

3 So they had a few folks that started, you  
4 know, sort of to work out of the office in the City of  
5 Richmond. And then when Chevron got their air permits  
6 and we could actually start construction, then the  
7 construction trailers were installed at the job site  
8 and folks all moved over there.

9 Q Okay. So Lurgi had its own construction  
10 trailer at the job site?

11 A Yeah.

12 Q Starting what, September --

13 A Yeah, sometime in September. I don't recall  
14 the exact date when the air permit was approved. I  
15 think it was the middle of the month.

16 Q Okay. So in total as in terms of -- oh.

17 When did Lurgi stop having employees on the  
18 job site not using the construction --

19 A It was sort of around the end of 2009, it  
20 would have sort of carried over to, you know, January,  
21 February of 2010, sometime around the end of the year.

22 Q Okay. So if I followed you correctly, Lurgi  
23 rented office space in Richmond for, I don't know,  
24 roughly six months?

25 A Uh-huh.

1           Q       And then after that, maybe for around  
2       15 months it had a construction trailer at the job  
3       site?

4           A       Yes.   Yes.

5           Q       Okay.   And there were employees throughout  
6       this time from Lurgi that were obviously there?

7           A       Right.   Uh-huh.   Yeah.   They had a full-time  
8       staff there.

9           Q       In terms of if I could just direct your  
10      attention back to Exhibit 3, and I know that we talked  
11      about this earlier, but can you see Lurgi's  
12      construction trailer on that photograph of Exhibit 3?

13          A       You know, actually it's not shown on -- the  
14      Lurgi trailers are not shown on that photograph.   You  
15      know, near the top right, those are two Praxair  
16      trailers.   And over to the top left, that's an ARB  
17      construction trailer.   But bottom half or  
18      three-quarters of a mile away, we had four or  
19      five acres of construction lay-down area.   And there  
20      was a series of about, you know, eight or ten  
21      construction trailers there.

22                   Lurgi had one or two of the trailers there at  
23      that sort of remote lay-down area for the on-site  
24      personnel.   We didn't have enough room on the  
25      construction site itself for everybody's construction

1 trailers.

2 Q Okay. And you used that term "lay-down" a  
3 couple times. What does that mean?

4 A Yeah. So you know, for a facility like this,  
5 I mean, you know, eventually when this facility is  
6 complete, it's all filled up. There's no extra room  
7 anywhere. Okay? So as the major equipment comes in,  
8 you know, we like to sort of bring it right to the job  
9 site and install it directly on the foundations.

10 But there's a lot of smaller equipment and  
11 some assemblies, piping materials, structural steel  
12 for pipe racks, wiring, cable tray conduit, valves,  
13 instrumentation, literally tens of thousands of  
14 individual pieces and parts. Okay?

15 There's not enough room to store them on the  
16 job site itself. Okay? So they're all staged in a  
17 lay-down area and sort of organized and gone through,  
18 so they're only brought out to the construction site  
19 when they're ready to be installed. So, you know, we  
20 had a couple what we call construction lay-down areas  
21 that were areas reserved within the Chevron refinery  
22 that they allowed us to use for that.

23 That's where we had more space where we sort  
24 of set up our home base, okay, for the construction.  
25 These trailers out here actually weren't even

1 occupied. Most of the time it's just when we had sort  
2 of issues that arose sort of quickly at the job site.  
3 It was an area to address questions and not have to  
4 run back a half mile back to the lay-down area.

5 But the main facilities were -- all the  
6 meetings were actually held in the lay-down area.

7 Q Okay. I really appreciate that explanation.

8 Do you recall providing three declarations in  
9 this matter when it was at the different layer, level  
10 of administrative review?

11 A Uh-huh. Yeah.

12 Q Do you recall stating in two of those  
13 declarations that approximately 90 to 95 percent of  
14 the design and engineering services that Lurgi  
15 provided was for the hydrogen plant as a whole?

16 A Yes.

17 Q Did this include instructing and supervising  
18 ARB?

19 A Oh, yeah. Uh-huh.

20 Q What is your basis for that 90 to 95 percent  
21 estimate?

22 A So, you know, as stated before, I mean,  
23 Praxair doesn't design hydrogen plants like this  
24 directly, but we do have an extensive amount of  
25 project execution experience doing projects in the

1 U.S. You know, I've literally worked on hundreds and  
2 hundreds of projects over my career. And, you know, I  
3 have a large estimating team that I'm accountable for.  
4 Okay? All of my engineers put together individual  
5 estimates for projects where we do -- where we  
6 self-perform the engineering.

7 And that is typically the amount of time that  
8 the electrical and mechanical equipment engineers  
9 utilize to specify [inaudible] equipment for  
10 facilities. So that was my basis for that 90 or  
11 95 percent. We didn't have all those details with  
12 Lurgi because they gave us sort of a lump sum price.

13 They don't, you know, suppliers don't share  
14 those details with us. So that was my estimate based  
15 on my experience in Praxair.

16 Q Okay. So in terms of the design and  
17 engineering services, what would that remaining 5 to  
18 10 percent be for?

19 A That would be for the -- sort of the  
20 equipment engineers. I don't know if those include  
21 both mechanical engineers, electrical engineers to  
22 specify the equipment, okay, to evaluate bids from  
23 suppliers, to make those final equipment selections,  
24 and to make sure that that equipment is built in  
25 accordance with the specifications.

1           Q       Okay. And this is all the equipment you  
2 testified earlier, that it would have been  
3 manufactured by someone other than Lurgi?

4           A       Yes. Uh-huh.

5           Q       In the declarations, you gave an example of  
6 how this relationship would have worked relative to  
7 Lurgi providing some of the technical specifications.

8                   Can you go over that example again?

9           A       Sure. There was, you know, there's an  
10 element, I spoke to it earlier of the reformer tubes,  
11 those are one of the elements that's inside those high  
12 temperature furnaces. I think there's, you know,  
13 several hundred of them in each one of those boxes.  
14 And these are very, you know, sort not a conventional  
15 material.

16                   So what Lurgi would have done is they would  
17 have said, you know, this is how many we need, they  
18 got to be, you know, this length, okay, they got to  
19 have this size connection on the end, and they have to  
20 be good for this operating temperature. Okay?

21                   They would go to their sort of preferred  
22 equipment suppliers for that type of piece of  
23 equipment with what is commonly referred to in the  
24 industry as a specification. Okay? It really tells  
25 what you want. Okay? And from that, the supplier

1 would provide a bid on that to, you know, sort of  
2 build that for you and provide you that.

3 Q Okay. So the specifications that Lurgi would  
4 have been providing really is just a very small  
5 component of the overall design and engineering that  
6 it would take to bring together the plant?

7 A Yes. Just in layman's terms, it's the what.  
8 It is not the how. Okay? It's, you know, the what  
9 is, you know, the engineer will make it go to supplier  
10 A, B or C with that specification and solicit bids  
11 from those three people.

12 How they would do their individual  
13 engineering to build that piece of equipment, that  
14 could be different between those different suppliers.  
15 And then one selection would be made by that equipment  
16 engineer.

17 Q My last question, and switching gears again.

18 Does the fact pattern for the reformer tubes,  
19 does that hold true for all other equipment that  
20 needed specifications that Lurgi procured?

21 A Yes. I mean, that's a similar process for  
22 everything from a compressor to a motor to a cooling  
23 tower to a heat exchanger or any piece of equipment  
24 that's required for the facility.

25 Q Okay. Thank you. I'm going to turn the



1       questioning over to my co-counsel, Mr. Merten.

2                   Mr. Schaub, are you okay? Do you need a  
3       break?

4           A       Sure.

5                               DIRECT EXAMINATION

6       BY MR. MERTEN:

7           Q       Hello again, Mr. Schaub.

8           A       Good afternoon.

9           Q       Are you familiar with an organization called  
10       Independent Project Analysis, Incorporated?

11          A       I am.

12          Q       IPA?

13          A       Yeah.

14          Q       Could you share with us a little bit about  
15       what they do?

16          A       So, you know, IPA is a firm that, you know,  
17       they're a global firm. I think they're headquartered  
18       near Washington D.C., but I think they have some other  
19       offices around the world. They do sort of what's  
20       referred to as capital project benchmarking, okay,  
21       that's their sort of claim to fame. I think they've  
22       been around about 30 years or so.

23          Q       What does that mean?

24          A       So owners like ourselves would hire IPA to  
25       evaluate their projects that are completed and sort of

1       compare them to sort of like industry norms to, you  
2       know, provide feedback to sort of owner companies like  
3       ourselves.

4               Are we efficient in our processes? Are we  
5       cost-effective? Do our projects take too long to  
6       execute? You know, maybe what are some things that  
7       could be done to improve the performance of one of  
8       their clients.

9           Q       You mentioned owner companies.

10          A       Yeah.

11          Q       Is there a distinction there?

12          A       Yeah. As you know, I said that I know  
13       obviously Praxair is an owner company, so that's why I  
14       refer to that. I believe they also do that service  
15       for just other equipment sale companies as well. That  
16       was, you know, I'm just talking from my experience.

17          Q       What about construction companies?

18          A       I'm not aware that they really have any  
19       effort focused on construction industries. There are  
20       a number of other sort of organizational groups in the  
21       U.S. that are sort of groups of construction companies  
22       that have various organizational things, but I don't  
23       believe IPA does. I'm not aware of it at least.

24          Q       And you mentioned Praxair specifically in  
25       connection with IPA.

1           Have you worked with IPA?

2           A       I have. I worked for them in my sort of, you  
3 know, in the early 2000-type time frame, Praxair was  
4 looking to evaluate our project performance. You  
5 know, we basically hired IPA to do that. We worked  
6 with them for, I think, close to 15 years, okay, over  
7 that course of time to sort of regularly evaluate our  
8 project performance.

9           Q       So when you worked with IPA and they  
10 evaluated your performance and your methods and  
11 efficiency, et cetera, how did that process work?

12          A       You know, they would, typically they not only  
13 did this for our office in, you know, West New York,  
14 but they did this at several of our global offices.  
15 They would sort of dispatch a group of people.

16                They would, you know, conduct interviews with  
17 project teams for completed projects. They would  
18 collect a lot of cost and schedule information. You  
19 know, they would interview the personnel working on  
20 the projects in terms of what processes they used,  
21 what reviews were held, when they were held to  
22 basically collect information for their database.

23          Q       Did you find them to be valuable?

24          A       Yeah. I think they, you know, they  
25 definitely are insightful because for, you know, for

1 an engineer, especially somebody like myself, I've  
2 only worked for Praxair, that's all I know. Okay? So  
3 to get some external, sort of unbiased feedback how  
4 you compare to sort of other industry peer groups, I  
5 think is valuable. They did help us along the way to  
6 make some improvements through sort of our project  
7 execution work processes.

8 Q What have you -- what's been your overall  
9 impression of their work product?

10 A I think they're a top-shelf company. They  
11 have a pretty aggressive client list of major  
12 corporations. I don't think they have anybody who's  
13 even close to that in terms of their sort of  
14 credibility and their depth of their informational  
15 database.

16 Q Would you say that they have this reputation  
17 not just with you in Praxair, but with your partners?

18 A I think that's their sort of claim to fame,  
19 and that's why, you know, major companies as well as,  
20 you know, smaller companies look to them for their  
21 insight and, you know, hire them.

22 Q Do you have a sense of how long they held  
23 this high stature?

24 A I think they've been around 30 years.  
25 Certainly, my knowledge of them is close to 20 years.

1 You know, they came in really from the outset and they  
2 impressed us at the beginning, and they've certainly  
3 continued with that over the course of time.

4 Q What, in your opinion, would be their biggest  
5 contributor to their success and reputation?

6 A I think they, what their unique, at least in  
7 my knowledge of unique is, you know, first off,  
8 they're unbiased, okay, they're much a third party.  
9 They look at a broad cross-section of industry of sort  
10 of people doing capital projects, the data they  
11 collect, and the methods of statistical analysis to be  
12 able to draw good, comparative results from sort of  
13 like our own projects to their database of projects is  
14 very insightful.

15 Q Let's talk about their data a little bit.

16 So you mentioned they come and they do  
17 interviews and they take data.

18 What type of data are they taking, estimates,  
19 projections, taking actual data --

20 A No. They're going to look at some of your  
21 final costs. Okay? You know, obviously it's easy to  
22 look at your final costs versus your estimated costs.  
23 We typically don't need consultants to do that. We  
24 can do that ourselves. So they would go in and sort  
25 of assess a project after completion and sort of

1 interview the project team members as well, okay, in  
2 terms of, you know, sort of what happened and when and  
3 why things were, what were the results of those things  
4 from a, you know, from a cost and schedule standpoint.  
5 You know, how do changes affect the outcome of a  
6 project and so forth.

7 Q So when they take your data and compare it to  
8 other data, all the data that they're using for those  
9 purposes is actual data?

10 A Right.

11 Q Do you have a sense of the volume of data  
12 they have or the volume of clientele?

13 A My understanding over the sort of the span of  
14 their firm being in business, they got over 20,000  
15 projects in their database. So, you know, they have  
16 very good library, a regular muscle library.

17 Q In preparation for your testimony today, did  
18 you review a study guide paper for this appeal?

19 A Yes.

20 Q Can I have you look at Exhibit 23, please.

21 A Okay.

22 Q Is this the study you reviewed?

23 A Yes.

24 Q So for convenience sake, I'll just refer to  
25 this as the IPA study.

1           So given your illustrious career that we went  
2 over earlier in the engineering and project  
3 management, would you say you're familiar with and  
4 understand the content and terminology in that study?

5           A       Uh-huh. Yes.

6           Q       I'd like to direct you to page 23-4, titled  
7 Study Objective.

8           A       Okay.

9           Q       Could you tell me in your own words what the  
10 study objective for this was?

11          A       So this was really something that was aimed  
12 at trying to identify the amount of sort of the total  
13 engineering costs that was associated with sort of the  
14 equipment engineering and specification of equipment  
15 for a project.

16          Q       How does that relate to the issues that we've  
17 been talking about here today?

18          A       So, you know, this is sort of, you know, a  
19 central question here, you know, what I guess  
20 documented in the, you know, in the declarations, that  
21 our feeling was that 5 to 10 percent of the total  
22 amount of sort of engineering construction management  
23 cost was associated with certain specifications.

24                 That was sort of my personal perspective  
25 based on my experience. This objective was to get

1 sort of a separate third-party view of what that  
2 number was.

3 Q So while you were looking at 23-4, so the  
4 study objective is to determine the equipment  
5 engineering cost?

6 A Uh-huh.

7 Q When we're talking about that, are we talking  
8 about the equivalent of the 5 to 10 percent equipment  
9 specifications on the Lurgi contract?

10 A Yes. Uh-huh.

11 Q Can you please turn to page 23-7, titled  
12 Definition Total EPCm Contractor Cost?

13 A Sure.

14 Q Is that same page as the blowup that my  
15 colleague Ms. Roberts is putting up right here?

16 A Yes.

17 Q On this page, it looks like we have a  
18 breakdown of EPCm contractor cost. Is that a typical  
19 term in your industry?

20 A Yes, it is. Uh-huh.

21 Q Okay. Looks like we have some categories  
22 here of inclusions and exclusions and how IPA defined  
23 this term. So let's go ahead and go through this.

24 Start with No. 1, this is what we've already  
25 been talking about; right?



1           A       Correct.

2           Q       So equipment engineering cost, that equates  
3 to the 5 to 10 percent estimate --

4           A       Uh-huh.

5           Q       -- on the Lurgi contract?

6                   What about No. 2, can you help us understand  
7 what bulk materials engineering cost is?

8           A       So, you know, we have the photograph of the  
9 overall site at Richmond, so I talked about, you know,  
10 the foundation design and the piling and all the  
11 underground work associated with the supply utilities,  
12 that would all be work that's done by the civil  
13 engineers and the civil designers. That would be  
14 included in that.

15                   There's all the time and effort for the  
16 drawings for the control systems and all that sort of  
17 stuff that defines all of the electrical wiring needs.  
18 There's all of the electrical engineering and design  
19 time associated with where cable trays and conduit  
20 systems need to be installed throughout the facility.

21                   You know, there's a large amount of work, the  
22 design of the piping systems, because this is all sort  
23 of high pressure, high temperature types of materials,  
24 so they require a lot of detail engineering, not only  
25 from the sizing of the piping, but also the pressure

1 ratings, the flexibility analysis, all the things that  
2 define the materials, the construction that ARB would  
3 have to sort of install.

4 So all of those sort of detailed engineering  
5 works to produce all of the design drawings that a  
6 construction contractor would use to install the  
7 facility.

8 Q Thank you for that.

9 What about No. 3 here, project management  
10 cost?

11 A So, you know, project management cost would,  
12 you know, include obviously all the sort of the  
13 procurement and then sort of contract administration  
14 for equipment supply. Okay? You know, there's a lot  
15 of work in terms of scheduling and planning all the  
16 work to make sure it's done in a timely manner and  
17 sequenced the proper way. Okay?

18 You know, there's a lot of cost and schedule  
19 reporting, okay, that goes along with the project of  
20 this dollar magnitude. Okay? And then there's sort  
21 of the miscellaneous, project management, surfaces and  
22 expenses associated with, you know, documentation and  
23 IT systems and things like that. Okay?

24 Q Could you tell us about construction  
25 management cost, No. 4 here?

1           A       So construction management cost typically  
2       represents sort of the cost of the people sort of in  
3       the field, okay, supervising the construction  
4       activities, making sure progress is properly accounted  
5       for on the project. You know, that's an important  
6       part because that's how we pay our contractors.

7                       So there's also all of the planning that goes  
8       into scheduling the sequence of work activities and  
9       deliveries of equipment. And there's also sort of the  
10      very important part to make sure that the quality  
11      associated with the installation is in accordance with  
12      the design requirements.

13           Q       And then No. 5?

14           A       So that would typically represent sort of the  
15      commissioning, what's called the commissioning or  
16      commonly referred to sometimes as checkout and  
17      commissioning. It's really making sure that, you  
18      know, all the wires are connected properly. Okay?  
19      Everything has been tested from a safety standpoint.

20                    You know, anything associated with, you know,  
21      making sure equipment, you know, each sort of unit  
22      piece of equipment operates individually, properly  
23      before it's all collectively tried to be operated  
24      together.

25                    And then the start-up element obviously is

1 pretty self-explanatory, what's involved to sort of  
2 bring a facility of this complex nature, sort of  
3 online together. It's a very -- it's a sophisticated  
4 plan to operate. And obviously, the first time you  
5 operate it, it's even a little more -- needs a little  
6 more attention.

7 Q Okay. So we've gone through the five  
8 components here that are included in the EPCm  
9 contractor cost. And we already discussed how  
10 engineering cost equates to the 5 percent that we  
11 talked about with Lurgi.

12 A Uh-huh.

13 Q So would it be safe to say that 2, 3, 4 and 5  
14 together consist of the other 90 to 95 percent of the  
15 responsibilities Lurgi had in the design and  
16 engineering side?

17 A Yeah. It's mirrored to that, yes.

18 Q Okay. Let's take a look at the exclusions  
19 here, construction labor cost. Could you tell us  
20 about that?

21 A So the construction labor cost that would be  
22 sort of ARB's labor cost in this example, okay, and  
23 everything from, you know, sort of pipe fitters to  
24 cement finishers to electricians, you know, anything  
25 associated with that.

1           Q       And then the last inclusion here is equipment  
2           and bulk materials costs?

3           A       Those would be the costs that ARB had for  
4           supply of bulk materials that they were accountable  
5           for in the project.

6           Q       So in the inclusion section, we've got  
7           Lurgi's design and engineering responsibility, No. 1,  
8           specifically to equipment specifications?

9           A       Uh-huh.

10          Q       ARB is down here, construction labor cost.

11          A       Uh-huh.

12          Q       The procurement responsibilities that Lurgi  
13          had under the Lurgi contract would not have been  
14          included in EPCm contractor cost; right?

15          A       Could you say that again?

16          Q       The procurement of material and equipment,  
17          the 80 million part of the contract, of the Lurgi  
18          contract, that has nothing do would with this  
19          equation; right?

20          A       No. That's the work, too.

21          Q       Yeah. Right.

22          A       That's not in this assessment, in this pie.

23          Q       Right.

24          A       Okay.

25          Q       Now that we've gone through this, how would

1 we go about identifying the percentage industry  
2 average of equipment engineering cost of EPCm  
3 contractor cost?

4 A How did IPA do it here?

5 Q Yeah.

6 A Okay. You know, they took a look through the  
7 database. We described the nature and size of the  
8 project that we had. And, you know, they pulled some  
9 sample sets of data from projects where we had this  
10 level of detailed information, and they arrived at  
11 their conclusion for what their sort of industry  
12 average percentage was for Item No. 1.

13 Q And to determine the number here, we would  
14 take No. 1 and figure out the percentage out of 1  
15 through 5; right?

16 A Right. Yeah. It would be No. 1 divided by  
17 the total of 1 through 5, uh-huh.

18 Q Could you take a look at page 23-9 in the  
19 study?

20 A Uh-huh.

21 Q Is that what's reflected in the equation  
22 there?

23 A Yeah. Uh-huh.

24 Q All right. So we're at IPA's conclusion.  
25 The next two pages are pages 23-10 and 23-11. Could

1       you just look at those briefly?

2           A       Uh-huh.  Sure.

3           Q       Do these essentially identify the data pool  
4       that IPA used and the characteristics they applied to  
5       that data pool?

6           A       Yeah.  They sort of [inaudible] data set down  
7       to what shows here, 76, sort of industry-similar types  
8       of projects.

9           Q       Okay.  Let's look at IPA's conclusion.  Can I  
10      direct you to page 23-12.

11                  Do you see the bar chart there?

12          A       Uh-huh.

13          Q       So this provides an industry average  
14      equipment engineering cost percentage of 6 percent;  
15      right?

16          A       Uh-huh.

17          Q       Does that conclusion surprise you?

18          A       No.  I mean, that's, you know, consistent  
19      with what, you know, with the projects that we do this  
20      function, it's, you know, 5 to 10 percent.  So it's  
21      within the range of that.

22          Q       The low range?

23          A       Yes.  Yes.

24          Q       Right.  So before we shift away from the IPA  
25      study, let's do one more thing here.  Let's direct our

1 attention again to this 23-7, and I'm going to give us  
2 a second here.

3 Could I address you back to the consortium  
4 agreement, Exhibit C, page 26-3.

5 Your Honor, do you mind if the witness comes  
6 up to help with these diagrams?

7 ALJ KWEE: No. Please proceed.

8 BY MR. MERTEN:

9 Q Mr. Schaub, thank you.

10 A Where do you want me to stand?

11 Q Right there is great. So I want to see how  
12 the terminology we just went over in the IPA study  
13 matches up, if at all, to Exhibit C in the consortium  
14 agreement.

15 A Sure. So, you know, the totals of 1 through  
16 5 on the Exhibit 23 sort of match up to, you know, the  
17 two rows of Exhibit 26 right in here. Okay? The  
18 first row here is Lurgi engineering and project  
19 management.

20 Q And it matches up with what on the IPA?

21 A That matches up with numbers 1, 2 and 3  
22 there.

23 Q Okay.

24 A And then No. 4 and 5 here match up to the row  
25 here, Lurgi Construction and startup supervision. So



1       you see similar, you know, terms used in bulk.

2           Q       Okay. So on this Exhibit C, consortium  
3       agreement, 26-63, it looks like we have two components  
4       that match up to the EPCm.

5                    Could you take a close look at 26-63, and let  
6       me know if there's any other line items here that  
7       should be included in the EPCm?

8           A       Yeah. There's a lot of couple smaller  
9       amounts here, one less traveled cost, okay, you know,  
10      that would typically be what shows up in here in terms  
11      of some of the expenses and so forth and, you know,  
12      for a lot of -- for, you know, documentation, IT costs  
13      as sort of part of the overall engineering cost. So  
14      that would typically be, you know, somehow part of  
15      that total cost as well.

16          Q       Okay. So it would just be these four  
17      components?

18          A       Yeah. Right.

19          Q       I'm going to hand you a calculator.

20                    Would you mind helping me add up the  
21      estimated costs for these components? So we've got  
22      10.856 million for the Lurgi engineering project  
23      management.

24          A       Uh-huh.

25          Q       4.123 million for Lurgi construction and

1 startup supervision, 0.281 million for travel cost,  
2 and then 0.594 for documentation and IT.

3 A Right.

4 Q Could you tell me that total?

5 A 15,854,000.

6 Q Okay. Now, let's apply IPA's industry  
7 average. Did you take 6 percent of that?

8 A \$951,240.

9 MR. MERTEN: Thank you very much.

10 MS. ROBERTS: Your Honor, if we could confer  
11 with opposing Counsel for just a minute.

12 ALJ KWEE: Sure.

13 THE COURT REPORTER: Off the record?

14 ALJ KWEE: Yeah. We'll remain off the record  
15 until they're done.

16 (Off the record.)

17 BY MR. MERTEN:

18 Q All right. Let's shift gears now. We are  
19 finished with the hydrogen plant now. You're not  
20 though. So let's go ahead and go to Exhibit 9.

21 Can you tell me what's depicted in that  
22 photograph?

23 A This is a beautiful photo of the Praxair air  
24 separation plant.

25 Q Ah. Can you tell me what a Praxair air

1 separation plant does?

2 A So, you know, as we've sort of gone through  
3 before, an air separation plant basically separates  
4 air into the primary constituents of oxygen, nitrogen  
5 and argon. Okay? We, you know, we do that, we use  
6 the air compressor to compress the air. From that  
7 point, all of the trace impurities are removed from  
8 that air.

9 Then there's sort of the refrigeration system  
10 that cools a portion of that stream. It's then goes  
11 through a heat exchanger system where it's cooled to  
12 the cryogenic temperatures. Okay? And from that  
13 point, it enters what those sort of tall-ish  
14 structures there that are sort of, you can see that  
15 look like they're white that contains the distillation  
16 equipment. That actually separates the various  
17 constituents of the air out into their pure  
18 components.

19 Q In your experience, have you worked on a lot  
20 of air separation plants?

21 A A lot of them.

22 Q And do you have an estimate?

23 A Well-over 100.

24 Q Okay. You witnessed the testimony of  
25 Ms. Volmer a little earlier regarding this project.

1           Are you familiar with this particular project  
2           in the corresponding construction contract?

3           A       Yeah. I was involved in the early phases of  
4           this and the proposal estimating phases, yes.

5           Q       Could I direct you to Exhibit 5, please.

6           A       Okay.

7           Q       Could you tell me what this is?

8           A       This is a contract between, you know,  
9           Occidental of Elk Hills and Praxair for the supply of  
10          this facility in the photo.

11          Q       Can you tell us who was designated the  
12          contractor as opposed to the owner in this contract?

13          A       So the owner is Occidental, and Praxair is  
14          the contractor.

15          Q       So just to be clear because we were just  
16          talking for a long time about the other plant, Praxair  
17          got a switched role here; right?

18          A       Absolutely.

19          Q       In the terminology we were talking about with  
20          the Lurgi contract and the Richmond hydrogen plant and  
21          Lurgi's responsibilities, could you explain how that  
22          relates to Praxair's responsibilities here?

23          A       Uh-huh. Yeah. I mean, it's sort of, here we  
24          were, you know, sort of the engineer, the supplier of  
25          equipment, you know, we would hire, directly hire a

1 third-party construction camp director to install the  
2 facility, all that was sort of Praxair's  
3 responsibility as designated by the contractor here.

4 Q So plant making, materials?

5 A Uh-huh.

6 Q Pretty much everything it takes to build this  
7 guy?

8 A Right, I mean, if we looked at an aerial  
9 photograph, that would be a lot smaller than the  
10 overall Richmond facility, the overall, the foundation  
11 and equipment and piping and electrical systems and so  
12 forth.

13 Q So Praxair was ultimately responsible for  
14 everything that both Lurgi and ARB did with the  
15 project?

16 A Right, including the operating performance  
17 guarantees for the facility, that would be our  
18 responsibility here. In Richmond, it was -- that was  
19 part of Lurgi's responsibility.

20 Q So in your work on this, besides the flipped  
21 role of Praxair here and besides the different type of  
22 plant, was there anything else notably distinct  
23 between these two projects we're talking about?

24 A Yeah. I mean, this plant was actually, the  
25 major elements of this plant were relocated from

1 another facility that we had in Salt Lake City where  
2 the customer no longer needed the gasses. So the  
3 majority of the key main processing equipment was  
4 used.

5 Q Is there a significance to that distinction  
6 from a cost perspective?

7 A Yeah. I mean, it's, you know, contrary to  
8 what many people think. It actually takes more  
9 engineering to incorporate used components into a  
10 plant than new components. Okay? New components, you  
11 get exactly what you ask for. Okay? And used  
12 components, you have to basically take what's there  
13 and figure out how to put them together. Okay?

14 So there were some new elements of a plant  
15 that were no longer reusable, and that's from their  
16 usable life. So there are some new components that  
17 have to be sort of integrated into any typical  
18 relocation project as well.

19 Q Okay. When we're talking about components,  
20 are we talking about the equipment specifications --

21 A Yeah.

22 (Multiple voices.)

23 A Things like, you know, AR compressors,  
24 cooling towers, things like that.

25 Q You mentioned you personally helped prepare

1 the cost estimate information for Praxair to provide  
2 engineering services on this plant; right?

3 A Yes.

4 Q When was that?

5 A It was in the, you know, sort of the fall of  
6 2005.

7 Q Can you tell us a little bit about what that  
8 entailed?

9 A So, you know, this would have been working  
10 with the engineering team. I was sort of the project  
11 business director on this project along with a few  
12 other smaller projects like this at that time frame.

13 So in that role, sort of that would be  
14 comparable to, you know, work along with the  
15 engineering team to find the -- first off, the scope  
16 that needed to be included in the project, and then to  
17 provide, you know, sort of reviews of estimates and so  
18 forth.

19 Q Can I direct you to Exhibit 6, please.

20 A Yes.

21 Q When you get there, can you tell me what that  
22 is, if you know?

23 A That's a declaration that I signed.

24 Q Page No. 2, that's your signature you're  
25 referring to?

1           A       Yes. Uh-huh.

2           Q       Could you go to the exhibit, please.

3           A       Sure.

4           Q       So marked Exhibit A, page -- starts on page  
5 6-5.

6           A       Uh-huh.

7           Q       Would you tell us what we're looking at here?

8           A       This is an example of a cost estimate that --  
9 or this is the cost estimate that the Praxair  
10 engineering team prepared for this particular project.

11          Q       That you built on?

12          A       Yes.

13          Q       Does this appear to be a true and accurate  
14 copy of the estimate you worked on?

15          A       Uh-huh.

16          Q       Does this document indicate anywhere what  
17 Praxair's estimated total engineering cost was for the  
18 project?

19          A       You know, yes. There is, you know, sort of  
20 the way we, you know, we have a standard way we bring  
21 down these estimates into various sub-account  
22 structure. And, you know, the total cost is, you  
23 know, if you look over to the left, there's a column  
24 labeled WBS. That actually stands for work breakdown  
25 structure, common term.



1           If you look under Element 1.02, there's  
2           engineering across that row. You know, it adds up to  
3           about \$1.572 million.

4           Q       And could you help us find where you're  
5           finding that 1.572? Is that --

6           A       So that's sort of about midway through the  
7           first page.

8           Q       Could you tell us the title of the column?

9           A       Okay. There's a title column that's labeled  
10          Total Oxy Bakersfield FEL-3 Cost.

11          Q       Great. Thank you. Just little font.

12          A       Yeah. It's engineers and spreadsheets.

13          Q       Well, I'm going to get you on a calculator  
14          here soon.

15                 All right. So does this document also  
16          indicate Praxair's estimated equipment specification  
17          cost?

18          A       Yes. Down about maybe 15 rows or so there,  
19          there's sort of a detailed, more detailed breakdown of  
20          the individual engineering disciplines. And there's  
21          an area, there's a row titled 1.02.03, says Equipment  
22          Material Specification and totals \$200,000 -- 200.6  
23          thousand dollars.

24          Q       Could you please use the calculator you have  
25          there and tell us what the equipment and materials

1 specification percentage is of total engineering on  
2 this cost estimate?

3 A 12.76 percent.

4 Q Does that sound about right for this project?

5 A Yeah. It's a little bit above, you know,  
6 sort of our typical. And that's reflective of the  
7 fact that, you know, we have a combination of new  
8 equipment and used equipment. Doesn't surprise me at  
9 all.

10 MR. MERTEN: Thank you so much, Mr. Schaub.

11 ALJ KWEE: Are you completed questioning this  
12 witness?

13 MR. MERTEN: Yes, your Honor.

14 ALJ KWEE: So would CDTFA like an opportunity  
15 to question him?

16 MR. NOBLE: Yes, please.

17 ALJ KWEE: Proceed.

18 CROSS-EXAMINATION

19 BY MR. NOBLE:

20 Q Mr. Schaub, if we could stay on the FEL cost  
21 sheet for the Occidental. I just have one quick  
22 question about the -- it's the next darkened line  
23 above the equipment and materials specification. It's  
24 the cold box engineering and design.

25 A Uh-huh.

1           Q       I was just curious like what sort of  
2 engineering and design goes into the cold box, and why  
3 that wouldn't be considered part of the  
4 specifications?

5           A       Well, this was, you know, this is a large  
6 piece of equipment. It was installed at that existing  
7 site. It actually has to be taken apart and cut into  
8 various sections to be shipped. Okay? So there's all  
9 sorts of interior columns and heat exchangers inside  
10 those tall white structures, so supports have to be  
11 reinstalled.

12                   So to move -- this is a large plant to move.  
13 Okay? We typically move much smaller plants. I think  
14 at the time we did this, this was the largest plant we  
15 ever moved. So we had teams from the design  
16 engineering, our organization that does this work out  
17 at the job site for removal, okay, to supervise that  
18 because this is fairly unique work. It's not common  
19 in the industry.

20                   And then also, we typically have engineering  
21 from the design groups oversee the installation at a  
22 new location. So there really wasn't any sort of new  
23 design work associated with this cold box, we just  
24 sort of had to take it apart, figure out how to  
25 transport it, and reinstall it at the new location.

1           Q       And that would have been included in the  
2 engineering cost that was billed to Occidental?

3           A       Yeah. Yeah. That was, yeah, as it shows up,  
4 you know, here.

5                   MR. MERTEN: Thank you.

6                               CROSS-EXAMINATION

7 BY MR. CLAREMON:

8           Q       I just had a couple questions.

9                   So taking a look at Exhibit 2, I think,  
10 Exhibit 3, I'm sorry, the photo.

11                  So you identified the big box as the, I think  
12 you identified it as the reformer box; is that  
13 correct?

14          A       Yeah.

15          Q       And then you said that was in various  
16 components within in that as well?

17          A       Yeah. There's what we call the reformer  
18 tubes, okay, where the catalyst is inside there. And  
19 there's a lot of what they call high temperature burn  
20 elements, okay, that really provide the heat, okay, to  
21 make that reaction go.

22          Q       Okay. And then you described the reformer  
23 box essentially as a large furnace; is that correct?

24          A       Sure. Yeah. I mean, other people may call  
25 it something else. I like to be simple where I can.

1           Q       Now, when you're coming up, when you are  
2       estimating, or the 5 to 10 percent of what you  
3       consider to be the equipment engineering, are you  
4       considering the engineering that goes into each of  
5       those tubes, or are you considering the specification  
6       and engineering that's going into that entire reformer  
7       box?

8           A       That would be for the engineering that goes  
9       into the specification of the tubes. The burners  
10      would be another element that would be specified by  
11      the engineers.

12          Q       But then, but in terms of the specifications  
13      to complete that box, that furnace, you're considering  
14      that to be nontaxable general engineering?

15          A       I'm not a tech support.

16                   (Multiple voices.)

17          A       I don't know in terms of what you mean by  
18      that, nontaxable.

19          Q       You consider that to not be engineering of a  
20      piece of equipment?

21          A       I think the -- I'm not sure exactly what your  
22      question is, to be quite honest.

23          Q       Okay. I guess it's the question, my first  
24      question which was to clarify when you're considering  
25      the 5 to 10 percent, it's not including the

1 specifications of the reformer box and the engineering  
2 design of the reformer box as all the components come  
3 together?

4 A You mean the exterior structure of the box,  
5 is that what you're referring to?

6 Q The exterior structure and how the components  
7 all work together?

8 A No. It would include all the components that  
9 are purchased from sort of OEMs that go inside of it,  
10 you know, the reformer tubes, the burner assemblies,  
11 all of the sort of a refractory system, that is all  
12 supplied by Lurgi. That's all specified by their  
13 engineers, okay, to go inside that structure.

14 Q Okay. But then is there another level of all  
15 of those components that the engineering, of how  
16 they're all connected basically within the box?

17 A I'm not clear on exactly what your question  
18 is. Okay? I mean, that's what, you know, how many of  
19 those pieces of equipment need to get installed, okay,  
20 inside what the -- how the arrangements of spacing of  
21 all that, that's all what the engineers are  
22 specifying.

23 Q Okay. And then you mentioned the exterior,  
24 so that the specifications and engineering of the  
25 exterior of that box?

1           A       Uh-huh.

2           Q       You would consider that, that was included in  
3 your 5 to 10-percent estimate?

4           A       My 5 to 10 percent would have included the  
5 cost to sort of specify the sort of the OEM, the  
6 purchased equipment from third parties. I really  
7 don't know where the exterior of that, if that was  
8 something that Lurgi bought or whether Lurgi designed  
9 that.

10          Q       Okay. And then turning to Exhibit 26, I  
11 think that's the construction period. And then can  
12 you turn to page 26-49.

13                   Can you tell us what this exhibit is or what  
14 this document is?

15          A       You're referring to 26-49?

16          Q       Yeah. The document that starts on page  
17 26-49.

18          A       Yeah. That's a schedule.

19          Q       Okay. Is that the schedule of all the work  
20 that would have been done by ARB, Lurgi?

21          A       Well, I know that this first page covers --  
22 it's been a lot of years since I looked at this one.

23          Q       Take your time.

24          A       Yeah. This is the combined schedule for, you  
25 know, Lurgi and ARB's work.

1           Q       Okay. And so then on page 53, we have the  
2 procurement activities, and that would have been done  
3 by Lurgi?

4           A       Yeah. Uh-huh.

5           Q       And then going to page 57, we have the  
6 construction?

7           A       Yeah.

8           Q       And generally, the construction activities  
9 would have been primarily done by ARB?

10          A       Yeah. Uh-huh.

11          Q       If you go to the next page, 58, do you know  
12 what it's referring to when it's talking about the  
13 steel structure, generally what that would be  
14 referring to?

15          A       It was sort of just partially completed in  
16 that photo. There was a large pipe rack system that  
17 was about 40 feet tall that had multiple levels that  
18 ran throughout the structure of the facility, that  
19 basically all of the pipes that ran back and forth,  
20 the cable systems, power supply systems were run on  
21 that.

22          Q       And would those be pieces of equipment and  
23 tangible personal property that would have been  
24 procured by Lurgi?

25          A       That structure?



1           Q       The pipe rack system that you were just  
2           referring to?

3           A       I believe the materials were supplied by  
4           Lurgi. And I believe the assembly was done by ARB.  
5           But I'd have to -- I'd have to look at some other  
6           documents to be certain on that specific point.

7           Q       Which documents would those be?

8           A       That would probably be in that scope split of  
9           work.

10          Q       Okay.

11          A       One of the other prior documents there.

12          Q       And then similarly, if you look down to on  
13          page 59, the next page.

14          A       Uh-huh.

15          Q       There's a heading for plant and piping. It's  
16          right at the top. It's a little fuzzy.

17          A       Yeah.

18          Q       Do you know what that's generally referring  
19          to?

20          A       Yeah. I mean, that would be all the pipes  
21          that go within that structure.

22          Q       Okay. And those pipes were also part of the  
23          equipment, tangible personal property that was  
24          procured by Lurgi as well; correct?

25          A       That was -- I mean, that was on that Exhibit

1 C, that document that was labeled as bulk materials.  
2 Okay? So, you know, the piping, like the electrical  
3 wiring, and I believe the structural steel, the supply  
4 of those sort of bulk materials to the site was  
5 Lurgi's accountability.

6 Q Okay. But then the actual work and assembly  
7 was done by ARB?

8 A Yeah. And I believe the actual piping  
9 fabrication, I think, related to the piping. You  
10 know, Lurgi just, when they say bulk materials, those  
11 are not finished and cut to -- you know, they don't  
12 have all the fittings and elbows and all that sort of  
13 stuff. They're just like sort of like random sort of  
14 6, 8-foot length of pipe.

15 So just the bulk supply, sort of the raw  
16 construction materials was one Lurgi did for this  
17 project for those, the piping, high voltage electrical  
18 wiring, and I believe the structural steel that went  
19 associated with the pipe rack as well. All of the  
20 sort of fabrication to put all that stuff together was  
21 done by ARB.

22 Q Okay. And then one, just almost for  
23 education purposes, you said this is a turnkey plant,  
24 but then the scope of work seems to show a lot of  
25 materials or equipment that's provided by Praxair.

1                   So how does that work?

2           A        So there were some of the equipment where we  
3           thought we had some better purchasing leverage because  
4           we had purchased similar pieces of equipment for other  
5           plants. Okay? So we purchased that equipment  
6           directly. And we then just, you know, provided that  
7           information and Lurgi incorporated all that equipment  
8           into sort of the end result design of the facility.

9                   MR. CLAREMON: Okay. That's all the  
10          questions I have. Thank you.

11                  THE WITNESS: Okay.

12                                   EXAMINATION

13          BY ALJ KWEE:

14           Q        If you don't mind, I would like to ask you a  
15           couple questions just to make sure I understand your  
16           testimony today at basically a very high level. I  
17           guess I'll start with the hydrogen plant in Richmond.

18                   If I could summarize, is your testimony  
19           basically that the engineering and the design charge,  
20           the 38 million was basically to turn an empty plot of  
21           land into what you see in the photo?

22                   Is that basically your position today, I  
23           guess, how you would turn, the design for how you  
24           would turn that plot of land into what you would see  
25           in the photo?

1           A       If you could just ask your question again. I  
2       didn't follow a whole train of thought there.

3           Q       Oh. My question was basically for that 38  
4       million design and engineering charge, that was paid  
5       to Lurgi?

6           A       Yeah.

7           Q       Was that charge --

8                   Is your testimony basically that that charge  
9       was basically for the, how you're going to turn an  
10      empty plot of land into the hydrogen plant that you  
11      see in the photo there?

12          A       Well, I think a portion of that \$38 million  
13      that was sort of, you know, identified on that Exhibit  
14      C, was for the engineering work and the design work to  
15      turn that empty plot into that finished facility.

16          Q       That was the 5 to 10 percent that you were  
17      referring to?

18          A       No. I don't know if it makes sense to go  
19      back to Exhibit C there to maybe address his question.

20                 So I believe your question was, what was the  
21      engineering and design cost that Lurgi had  
22      responsibility for to turn that empty plot into that  
23      completed facility?

24          Q       Yes.

25          A       Right? So I would answer that question by

1 the sort of the elements that are bracketed together  
2 there in the center part of that diagram, that  
3 15,854,000 is the cost to do the engineering and  
4 design work associated with putting that facility on  
5 or for Lurgi.

6 Q Okay. So my understanding, this breakdown  
7 was based on the breakdown of duties set forth between  
8 the parties because I guess you're not Lurgi, so  
9 you're using industry averages to determine like what  
10 the percentage would be.

11 Is that what the basis for what the IPA study  
12 was?

13 A Yeah. I mean, I just used sort of my  
14 experience from building other plants like this to  
15 come up with that 5 to 10 percent determination, the  
16 total cost of that engineering. And, you know, the  
17 IPA study sort of independently came up with that  
18 6-percent industry average for that associated with  
19 equipment specifications, you know, and the supply of  
20 the equipment.

21 So, you know, we used that 6-percent IPA  
22 figure on the portion of that, of the costs that were  
23 associated with the engineering and design work.

24 Q Okay. And then when you turned over to the  
25 Oxy plant, or is that the Occidental plant?

1           A       Uh-huh.

2           Q       You used your own figures because you were --  
3 I guess, Praxair was the contractor?

4                   Is that a correct understanding?

5           A       Yeah. I mean, we're, you know, we have the  
6 technology to do those types of cryogenic projects.  
7 We have engineers on my staff that execute those  
8 projects, so we actually prepare all the detailed  
9 estimates. So that's what was shown in the exhibit  
10 here.

11                   ALJ KWEE: Okay. And I would just like to  
12 make sure I understand CDTFA's position.

13                   And CDTFA's position was that 100 percent of  
14 the engineering and design charge, that \$38 million  
15 charge was solely for, I guess, equipment and not  
16 allocable to any other portion, or am I understanding  
17 CDTFA's position on the \$38 million engineering and  
18 design charge?

19                   MR. CLAREMON: I think our position is that a  
20 portion of that charge includes taxable design of  
21 tangible personal property. And at least up to the  
22 point of this hearing, there hasn't been any evidence  
23 presented to us that we felt was compelling enough to  
24 break out what that portion was.

25                   We also reserve the right to, like you said,

1 determine what effect both Exhibit 26 and today's  
2 hearing has on that.

3 ALJ KWEE: Okay. So then if there's going to  
4 be additional briefing on CDTFA's position on the  
5 breakdown, I guess I won't ask more questions at this  
6 point on that matter.

7 But on the matter of the issue that I raised  
8 on whether this was a sales tax or use tax, I was  
9 going to ask some questions pertinent to sales tax.  
10 But before I did that, I just wanted to clarify if  
11 there actually was a dispute.

12 And I assume CDTFA's position is that this is  
13 a use tax; is that correct?

14 MR. NOBLE: That's correct. Our position is  
15 subject to use tax, yes.

16 ALJ KWEE: Okay. And I'll turn to the  
17 taxpayer.

18 Does the taxpayer have a position on whether  
19 or not this is a sales tax or a use tax?

20 MS. ROBERTS: Yes, your Honor. Our  
21 contention is that it is sales tax, and it is not  
22 Praxair's liability.

23 ALJ KWEE: Okay. I'm just going to ask, if  
24 you don't mind, a couple questions of the witness  
25 about that.

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EXAMINATION

BY ALJ KWEE:

Q So how did you come about contracting with Lurgi, did you have buyer, I guess, work experiences with them or is this a new --

A So this project was the first time we selected them to be our, sort of our equipment technology supplier. You know, we had worked with them on proposals and considered using them before, but we did not actually, you know, either win that business and go forward with, or they did not -- they were not the final supplier to be selected.

Q Okay. So do you have any other personal knowledge about their contracts in California or just was this your own experience?

A I do not believe they had -- I was not aware of any other California experience that they had. They may have but, you know, I don't really know.

Q Okay. And I believe you had testified that they procured the equipment and they delivered the equipment, basically what you see in that photo to the job site; is that correct?

A Yeah.

Q Do you know where that equipment came from or the materials came from? Is this sourced in



1 California --

2 A No. Best of my knowledge, nothing was  
3 manufactured, none of the equipment supply came from  
4 California. You know, a lot of the equipment came  
5 from Europe where he's a German company, so a lot of  
6 key technology components that came from Germany, from  
7 Italy, some other places around Europe.

8 There was a lot of pressure vessels that came  
9 from Korea. There was some equipment that was  
10 supplied from -- the compressor of German  
11 manufacturers are actually from New York State. Okay?

12 Q Okay.

13 A So came really from all around different  
14 parts of the world.

15 Q Okay. And I believe you had mentioned that  
16 Lurgi also had trailers and a rental office --

17 A Yes.

18 Q -- on site, and I guess in the city?

19 Did you, in addition to your testimony, was  
20 there any other evidence in the record that I didn't  
21 see regarding, I guess, their presence in the state or  
22 other work in the state?

23 A I, you know, I mean, I know they rented some  
24 office space. Okay? I know yesterday I was looking  
25 and there was a Google photo that actually showed

1       where their construction trailer still was, okay, but  
2       I don't know if any of that information is in the  
3       record officially. I know that.

4               ALJ KWEE: Okay.

5               MS. ROBERTS: Just want to note there, your  
6       Honor, Mr. Schaub has not reviewed the full record or  
7       all of the evidence that's been produced for this  
8       hearing.

9               ALJ KWEE: Okay. Thank you. I should find  
10      out if my co-panelists have any questions that they  
11      would like to ask. Okay.

12              Are there any other questions from either  
13      party for this witness?

14              MS. ROBERTS: Just ask one question on  
15      redirect in response to the department?

16              ALJ KWEE: Proceed.

17                               REDIRECT EXAMINATION

18      BY MS. ROBERTS:

19              Q       Mr. Schaub, opposing Counsel was asking you  
20      about the steam methane reformers. And you testified  
21      that there's all kinds of stuff that's inside the  
22      steam methane reformers. And one of those examples,  
23      you said, is the reformer tube which just happens to  
24      be one, but there would be some for specifications  
25      that went to the vendor.

1                   That would be some of that 5 to 10 percent?

2           A       Absolutely. Right.

3           Q       In terms of how all of this was installed by  
4   ARB, does that relate to the design and engineering  
5   that Lurgi did for the entire plant and how it was to  
6   be built?

7           A       Yeah. I mean, that's, you know, essentially  
8   you know, a large steel structure. So, you know, sort  
9   of, you know, sort of like a large erector set. Okay?  
10   So that was all what ARB did is put all that stuff  
11   together. And it came in sort of like, you know,  
12   pieces and parts and were bolted and welded together.

13          Q       Right. And I don't want to belabor the  
14   point, but ARB is the one who did all of the  
15   construction, the labor on site?

16          A       Yeah, they did. Yeah.

17                   MS. ROBERTS: Okay. Thank you.

18                   THE WITNESS: All right.

19                   ALJ KWEE: Okay. If there's no further  
20   questions for this witness, this witness can be  
21   excused. Okay.

22                   MS. ROBERTS: Your Honor, could we do a short  
23   recess?

24                   ALJ KWEE: Yes. Would ten minutes be good?

25                   MS. ROBERTS: That would be perfect.

1 ALJ KWEE: Let's go off the record then.

2 (Recess taken.)

3 ALJ KWEE: We're going to go back on the  
4 record then.

5 MS. ROBERTS: All right. The just to make  
6 sure I'm on the same page. The issue to be addressed  
7 right now is assuming for a moment that the  
8 engineering and service fees in dispute are taxable,  
9 whether or not the tax at issue would be sales tax or  
10 use tax, and then whether or not Praxair would be  
11 liable for the particular tax?

12 ALJ KWEE: Yes. That's correct.

13 MS. ROBERTS: It's Praxair's position that  
14 the Lurgi transactions are subject to California sales  
15 tax. This is based on two different arguments:

16 First, the department has already stipulated  
17 the sales tax applies and not the use tax to the  
18 transactions. Stipulated fact No. 34 reads, "Pursuant  
19 to the Lurgi contract and related change orders,  
20 Praxair paid to Lurgi \$83,352,084 for purchases of  
21 taxable tangible personal property related to the  
22 Lurgi equipment price and remitted to Lurgi \$7,166,091  
23 in sales tax reimbursement for such purposes."

24 If the department prevails on its legal  
25 hearing that some or all of the amounts paid by

1 Praxair to Lurgi for design and engineering services  
2 was for fabrication labor under Revenue Tax Code  
3 6006(b), 6010(b), then that amount is part of the sale  
4 price for the tangible personal property under Section  
5 6011. The department cannot have its cake and eat it,  
6 too.

7 If the equipment sales were subject to sales  
8 tax and the equipment sales price includes the  
9 fabrication labor, then only the sales tax can apply.

10 The second argument for why this would be  
11 sales tax and not use tax: So even if the department  
12 had not stipulated to the fact sales tax reimbursement  
13 is what applied to the sale of tangible personal  
14 property, California's two sales tax requirements are  
15 met for this being a sales tax.

16 Title to the equipment passed to Praxair in  
17 California at the job site. Lurgi participated in the  
18 equipment sales through its place of business in  
19 California.

20 In the form of evidence on the passage of  
21 title to Praxair California, we have Section 11, title  
22 to the Lurgi contract that states the title  
23 contractually passed when Lurgi delivered the  
24 equipment at the job site. We have Mr. Schaub who  
25 testified that there's no acceptance of the tangible

1 personal property that was procured by Lurgi until  
2 after delivery at the job site.

3 From Mr. Schaub, we know that the risk of  
4 loss on Lurgi, the risk of loss was on Lurgi until  
5 after delivery at the job site. And again, going back  
6 to Stipulated Fact No. 34, the department has already  
7 acknowledged title passes at a point of delivery in  
8 California by agreeing to the original tax, the  
9 \$7 million being sales tax reimbursement.

10 Evidence of Lurgi's place of business in  
11 California is supported by the rented office space in  
12 the City of Richmond for approximately six months from  
13 March to September 2008. Also, for the 15 months that  
14 it had a construction trailer at the job site starting  
15 in September 2008 through the end of 2009, and its  
16 continuous employee presence for that entire duration,  
17 roughly 21 months.

18 In addition to the foregoing, we know from  
19 the record in this case that Lurgi delivered millions  
20 of dollars of both goods and services into California  
21 as required under the Lurgi contract.

22 I believe the department will argue that a  
23 1994 un-precedential memorandum opinion by the Board  
24 of Equalization would support its position that Lurgi  
25 did not have a place of business in California. This

1 is a Long Beach terminal case.

2 Briefly, the Board of Equalization held  
3 establishment of a temporary construction site by a  
4 vendor for the purpose of installing property sold  
5 pursuant to a contract entered into prior to the  
6 establishment of the site does not create the required  
7 constitutional nexus for imposition of tax.

8 There is nothing in that decision that  
9 describes the amount of activity by the contractor,  
10 nothing about the duration of how long the project  
11 would take to be able to do the installation.

12 Further, the department has already  
13 stipulated that Lurgi is a construction contractor and  
14 that sales tax reimbursement was collected for its  
15 equipment sales to Praxair. Lurgi was required to  
16 have a sellers permit under Regulation 1521, little  
17 (b)(4). I'd like to read this subsection of 1521.

18 1521, subsection (b)(4): Permits.

19 Contractors engage solely in performing  
20 construction contracts which do not involve sale and  
21 installation of fixtures and who do not also engage in  
22 the business as a seller, or retailers are not  
23 required to hold sellers permits.

24 However, if a contractor is a seller or  
25 retailer because he or she makes sales of fixtures,

1 materials or machinery and equipment or other tangible  
2 personal property either in connection with or as a  
3 part of a construction contract or otherwise, he or  
4 she is required to hold a sellers permit.

5 In this case, it is clear, one, already  
6 that's been stipulated to in the stipulation of facts  
7 that Lurgi is a construction contractor. That should  
8 be enough for the requirement for them to have to hold  
9 the sellers permit. In addition to the fact that  
10 Lurgi was providing millions of dollars, \$80 million  
11 and change of machinery and equipment that it was  
12 selling to Praxair in the State of California.

13 In the decision and recommendation in this  
14 case, there is a footnote from the hearing officer  
15 that states Lurgi did not have a sellers permit and  
16 instead had a use tax permit. The fact that Lurgi  
17 held a use tax permit and not a sellers permit does  
18 not change the nature of tax.

19 The fact that Lurgi did not have the right  
20 permit cannot change its liability for the sales tax  
21 and the fact that it should have held a sellers permit  
22 under 1521(b)(4).

23 If we could have just a quick side bar, is  
24 that okay?

25 ALJ KWEE: Would you like to take a



1 five-minute recess?

2 MS. ROBERTS: Just like two minutes.

3 ALJ KWEE: Okay.

4 (Off the record.)

5 MS. ROBERTS: At this point in the argument,  
6 I would like the ALJ panel, request that it take  
7 notice of the information that is on the State  
8 controllers website for unclaimed property search  
9 results.

10 Judge Kwee, you were asking earlier about a  
11 specific address where Lurgi may have resided or has  
12 an address in California, and there are two unclaimed  
13 property entries for Lurgi Corporation that shows an  
14 address of 1 Davis Drive, Belmont, California, 94002.

15 ALJ KWEE: Okay. Does the CDTFA have any  
16 objections to taking official notice on the  
17 information on the Secretary of State's website?

18 MR. CLAREMON: We do object [inaudible] --  
19 (Clarification by Reporter.)

20 THE WITNESS: We're not sure that's subject  
21 to judicial notice, so we would need new evidence.

22 ALJ KWEE: Okay. How about we do this  
23 because we're going to be leaving the record open for  
24 at least 60 days for CDTFA to provide their responses  
25 on Exhibit 26. Between that time frame, the taxpayer

1 can have about 30 days to provide a printout of  
2 information for which they want us to take official  
3 notice, followed by 30 days for CDTFA to object or  
4 raise an objection if they desire and specify basis  
5 for their objection.

6 MS. ROBERTS: That works for Appellant, your  
7 Honor.

8 MR. CLAREMON: And that would just be to  
9 provide a printout of what they've just said right now  
10 and nothing more?

11 ALJ KWEE: That would be just to print out  
12 the Secretary of State's information that was stated  
13 by Counsel for Praxair.

14 MR. CLAREMON: Okay.

15 ALJ KWEE: Okay.

16 MS. ROBERTS: So continuing with the argument  
17 that Lurgi would have had a place of business in  
18 California, in addition to what will be noticed after  
19 the hearing potentially, the fact that it had an  
20 actual address here in the State of California.

21 But also, we contend that the fact that they  
22 had continuous presence for 21 months in the State of  
23 California was more than enough to create a permanent  
24 place of business either through the rented office  
25 space, the six months in the City of Richmond, or the

1 15 months that it had the construction trailer on the  
2 job site and then continuously had employees for that  
3 21-month period of time.

4 Unlike California use tax which has dual  
5 liability on purchasers and sellers, only the seller,  
6 and in this case, Lurgi, can be held liable for the  
7 sales tax, not Praxair. Thank you.

8 ALJ KWEE: Okay. Is CDTFA ready to make a  
9 brief statement on this issue?

10 MR. NOBLE: Yes. With respect to the  
11 stipulation that was an oversight, it's in  
12 contradiction to the appellant. It states that it was  
13 use tax. The erroneous stipulation renders a  
14 transaction subject to sales tax rather than use tax,  
15 the applicable law, but that was an oversight on our  
16 part when we were working on the draft stipulation  
17 with opposing Counsel.

18 With respect to the actual question at issue  
19 as to whether the sales or use tax applied to these  
20 transactions, as previously stated, there are two  
21 conditions to impose the sales tax in the state:

22 First of all, the sale has to occur; and  
23 second of all, you're going to need local  
24 participation in the sale or delivery of the property  
25 by a office, outlet or other place of business of the

1       retailer.

2               Here, before even reaching the question of  
3       whether or not title passed, which according to the  
4       documents, it appeared it likely did pass here in  
5       California. As stated before, the board's memorandum  
6       opinion in Long Beach container terminals  
7       incorporated, as well as sales and use tax annotation  
8       190.2510, both stand for the proposition that the  
9       establishment in California of a temporary job site  
10      solely for the purpose of performing construction  
11      contract does not constitute the required  
12      constitutional nexus to impose the sales tax.

13              The opinions in the annotation don't make any  
14      notes on the amount of contract value, nor how long it  
15      takes to finish the project. So the fact that 15  
16      months were spent in the construction site building,  
17      what they said, and everyone agrees is a very, very  
18      large hydrogen plant shouldn't render that job site as  
19      a place of business as a construction contractor and  
20      have control of the construction site. They didn't  
21      hold that out to be their place of business. This was  
22      Praxair's, this whole Praxair was constructing  
23      hydrogen plant.

24              Same thing with the office. We would need to  
25      know more information on the six months that it was

1       there. But to the extent that Lurgi was in Richmond  
2       renting an office space to ramp up the construction  
3       contract activities that they were hired to do, we  
4       don't believe that that would be enough nexus to  
5       create a place of business, and we also need evidence  
6       that that six-month office rental participated in  
7       either the sale or delivery of the goods at issue.

8               For all of those reasons, we contend that the  
9       establishment in the temporary job site in California  
10      where a construction contractor is making retail sales  
11      of fixtures, machinery and equipment is not enough to  
12      sustain the sales tax.

13             ALJ KWEE: Okay. And if I may, I just --  
14      could you briefly address the applicability of  
15      Regulation 1806, subsection (b) that says that the job  
16      site is regarded as a place of business, the  
17      construction contract or a subcontractor of the sale  
18      of fixtures furnished, as the [inaudible] fixtures  
19      furnished and sold by contractors or subcontractors,  
20      and if that creates an inconsistency with application  
21      of the law on taxes and state portion of the sales  
22      tax.

23             MR. NOBLE: Yes, Judge Kwee. Local sales and  
24      use tax was always intended to follow the state sales  
25      and use tax. It is the local sales tax that applies

1 and the state sales tax applies. And it's the local  
2 use tax that applies when the state use tax applies.  
3 If you look at Regulation 1803, subdivision (a), it  
4 provides in any case which state sales tax is  
5 inapplicable, state administrative local sales is also  
6 inapplicable.

7 The necessary analysis is first whether the  
8 state sales tax or the state use tax was applicable to  
9 the disputed transactions. If the former, then the  
10 applicable local tax would also be sales tax and the  
11 local allocation rules would apply.

12 If the latter, then the local tax would be  
13 use tax. Only if state tax applies do we reach the  
14 place of sale described in regulation 1806,  
15 subdivision (b). When the state sales tax does not  
16 apply, the place of sale rules are inapplicable.

17 The tail does not wag the dog. So we would  
18 first need to see whether or not the state tax was  
19 applicable before we ever reach the local allocation  
20 rules.

21 ALJ KWEE: Okay. Are there any other  
22 questions from this panel? Okay. I believe that  
23 we're ready to proceed with Issue 2.

24 Did the parties want to take a brief recess  
25 before starting, or are you ready to proceed?

1 MS. ROBERTS: Your Honor, is it possible to  
2 do -- to respond to just one of the department's  
3 points on the --

4 ALJ KWEE: Sure. Please proceed.

5 MS. ROBERTS: It's with regard to the  
6 Stipulated Fact No. 34. I just wanted to make clear  
7 that it was Appellant that made -- that originally  
8 drafted the stipulation of facts for the department's  
9 review. And upon getting back their revisions, they  
10 specifically changed Paragraph 34 to read "sales tax  
11 reimbursement."

12 ALJ KWEE: Okay. Thank you. So I believe at  
13 this point, it would be the opening presentation for  
14 the Issue 2.

15 MR. MERTEN: I'm going to keep this really  
16 brief because I'm going to go over this with  
17 Ms. Volmer. But just to transition, until now, we've  
18 been addressing issues that have to do with  
19 separately-stated engineering service to construction  
20 contracts.

21 Next, the parties are going to address three  
22 remaining issues on appeal that are completely the  
23 same from those issues. After audit and re-audit, the  
24 department disallowed claimed nontaxable sales to  
25 three of Praxair's customers. These were National

1 Beef Packing Company, LLC, or National Beef, I'll  
2 refer to them in short; Ralphs grocery store or  
3 Ralphs; and Solar Turbines, Inc., or Solar Turbines.

4 Appellant's direct or indirect tax, Tamara  
5 Volmer is going to return to the stand to briefly  
6 testify about those issues. She's going to go over  
7 descriptions of each of the sales at issue which  
8 consist of sales for resale, tax and debit sales of  
9 tangible personal property, as well as nontaxable  
10 services.

11 Ms. Volmer will also testify about the nature  
12 of the remaining dispute regarding these remaining  
13 sales at issue. She's going to go over Appellant's  
14 positions why these sales are not taxable, and also  
15 Appellant's actual support, why these sales are  
16 taxable. Thank you.

17 ALJ KWEE: CDTFA, are you ready to do your  
18 opening presentation on Issue 2?

19 MR. NOBLE: Yeah. The evidence in this case,  
20 the facts and the law available in this case will show  
21 there's insufficient evidence that Appellant has  
22 failed to establish the sales at issue are not subject  
23 to tax.

24 ALJ KWEE: Okay. So I believe we're ready to  
25 call the first and only witness.



1           MR. MERTEN: Yes. Appellant calls, again,  
2 Ms. Tamara Volmer.

3           ALJ KWEE: Ms. Volmer, I remind you that  
4 you're still under oath. I'm also wondering if the  
5 poster boards are still for this presentation?

6           MR. MERTEN: No.

7                           **TAMARA VOLMER**

8 called as a witness, still remaining under oath,  
9 testified as follows:

10                           REDIRECT EXAMINATION

11 BY MR. MERTEN:

12           Q       Good afternoon, Ms. Volmer.

13           A       Good afternoon.

14           Q       Could you please tell us about products and  
15 services Praxair offers for the food and beverage  
16 industry?

17           A       Sure. We actually have a number of products  
18 that deal in the food and beverage industry. We  
19 developed CO 2 plants, so if you think about your  
20 favorite soda, we provide the carbonation and the  
21 bubbles for that. So Dr. Pepper, Pepsi are a couple  
22 of our customers.

23                       We also have a line of food freezers that use  
24 CO 2, liquid oxygen or liquid nitrogen in order to  
25 quick-freeze food. We have a production in the

1 process called IQF, or individual quick freeze, that  
2 when you tumble food through the freezer, it puts a  
3 quick coating on the outside of your chicken so that  
4 it doesn't get all dried out. So like Tyson is one of  
5 our customers. They use one of our processes like  
6 that.

7 Q Thank you for that. Can I direct you to  
8 Exhibit 10.

9 When you get there, could you take a look and  
10 let us know if you know what that document is?

11 A So this is an invoice from Praxair to  
12 National Beef for carbon dioxide.

13 Q Can you tell us how these invoices are  
14 related to the current appeal?

15 A So National Beef purchases carbon dioxide  
16 from Praxair to be used in their manufacturing  
17 process. They use the CO 2 to create what they call  
18 snow that gets applied to the raw meat in the final  
19 stages of their manufacturing process right before  
20 they package it. It keeps, again, it freezes the meat  
21 quickly to prevent bacteria.

22 So the issue here was whether or not the CO 2  
23 becomes a part of the manufactured product and is  
24 there for a sale for resale.

25 We alternatively also looked at, there's a

1 specific exemption under the California code for CO 2  
2 used in food protection. I think the statute  
3 specifically says fruit and vegetables, but our  
4 argument is that it should be expanded to any food  
5 product.

6 Q What factual support, if any, does Praxair  
7 rely on for these positions?

8 A So we have an XYZ letter from National Beef.  
9 We also have an email from National Beef's controller  
10 explaining how they use our product in their  
11 manufacturing process.

12 Q Could I direct you to Exhibits 11 and 12.

13 A Uh-huh.

14 Q Are these the two documents you described for  
15 us? Can you maybe give us a brief summary?

16 A Sure. So the first is -- 11 is the XYZ  
17 document that they signed. And 13, again, is it's an  
18 email from Ron Heeke, who is the controller at  
19 National Beef explaining specifically that dry ice,  
20 frost and snow which is applied directly onto the raw  
21 beef products as they are packaged for resale.

22 Q Based on your current role for Praxair, do  
23 you have any reason to believe the CO 2 sales were not  
24 sales for resale or that they were not used in  
25 National Beef's meat packaging process?

1           A       No, I do not.

2           Q       Okay. Let's go on to the second issue  
3 regarding Ralphs.

4                    Could I direct you to Exhibit 13, please.

5           A       Sure.

6           Q       Can you tell us what this is?

7           A       So this is an invoice from Praxair to Ralphs  
8 groceries. This specific invoice is for liquid  
9 oxygen. So Ralph uses liquid oxygen in combination  
10 with CO 2, again, to freeze their raw meat product at  
11 the end of the manufacturing process.

12                   So again, the issue here is very similar to  
13 National Beef in that Praxair contends that the CO 2  
14 becomes a part of the product during manufacturing,  
15 and that also the CO 2 exemption for processing of  
16 food should apply.

17          Q       What factual support does Praxair have in  
18 connection with the Ralphs' transaction?

19          A       So Praxair had a valid resale certificate on  
20 file during the entire time of the audit. We also  
21 received an XYZ letter from the company.

22          Q       Let's take a look at Exhibits 14 and 15,  
23 please.

24          A       Okay.

25          Q       We'll start with 14. Could you tell me what

1       that is?

2           A       So this is the original resale certificate  
3       provided to Praxair by Ralphs grocery.

4           Q       And do you typically deal with resale  
5       certificates in your duties and responsibilities?

6           A       Unfortunately, yes.

7           Q       Does this resale certificate have all of the  
8       requisites that you tend to look for when you accept?

9           A       Yes. I mean, it has the most important  
10      components that California requires. It's got the  
11      company's registration number, it's specifically made  
12      out to Praxair. It describes what the property is,  
13      all that's being purchased, although a little  
14      generally, and it's dated. So it's a  
15      properly-completed form.

16          Q       You mentioned the description is a little  
17      general, can you tell me what the description is?

18          A       So the description is retail groceries and  
19      related items.

20          Q       Now, typically when you're dealing with  
21      customers, say Ralphs, would you be expected to  
22      receive different retail certificates on each itemized  
23      product you're providing?

24          A       This. I mean, you know, for companies like  
25      this that purchase a large volume of very diverse

1 goods, they tend to give a more general retail  
2 certificate. If you're dealing with a company that  
3 only buys one thing, then, you know, it's a little  
4 more specific.

5 But, you know, I'm sure this grocery store's  
6 probably buying hundreds of different items and they  
7 don't make out a different retail certificate for  
8 every item.

9 Q You said you deal with these frequently, and  
10 this general description is what you'd typically  
11 expect from a customer like this?

12 A Yes. It's generally what we get.

13 Q Based on your current role for Praxair, would  
14 you say Praxair accepted the resale certificate in  
15 good faith?

16 A Yes.

17 Q All right. Now, the last issue deals with  
18 Solar Turbines.

19 Could I direct you to Exhibit 17.

20 A Okay.

21 Q Can you tell me what that is?

22 A So this is an invoice from Praxair to Solar  
23 Turbines, and it's an invoice for an equipment upgrade  
24 to an H2 tube bank.

25 Q Can you tell us how this invoice is related

1 to the current appeal?

2 A So in the current appeal, the state is  
3 contending that this is taxable as an equipment  
4 purchase. Praxair would argue that the true object  
5 test should be applied here.

6 So basically just to give you a little  
7 context around an H2 tube bank, so if you think about  
8 a helium cylinder that you go to Party City and you  
9 rent for your child's birthday party to blow up the  
10 balloons, it sort of looks like that, but make it ten  
11 times bigger and set it on its side and then have a  
12 rack that goes along the side of the property. So  
13 that's what an H2 tube bank looks like.

14 Q In this transaction, how does a customer  
15 obtain --

16 Well, first of all, what are they getting  
17 from the tank?

18 A So they're getting a gas, I don't remember  
19 if -- I think this was nitrogen. But what the  
20 customer was looking for is they've been a long-term  
21 Praxair customer. And when the H2 tube banks were  
22 originally installed, the customer needed about 400  
23 PSI of gas load.

24 When they reached out to Praxair to come out  
25 and do this equipment upgrade, their processes had

1 changed and they needed a significantly faster gas  
2 load. So that required that we went out and  
3 reconfigured the pipes coming off of the H2 tube bank  
4 to allow the gas to flow faster.

5 So the intent here was the service behind  
6 modifying the piping on the H2 tube so it would allow  
7 the gas to flow faster.

8 Q So let me get this straight.

9 So there's a tank on Solar Turbine's  
10 property; right?

11 A Uh-huh.

12 Q You mentioned when it was installed, so the  
13 transaction wasn't for the tank, they already had the  
14 tank?

15 A Yes, they already had the tanks.

16 Q And then the transaction involved a new  
17 capability for the tank?

18 A Correct.

19 Q Praxair was transacted, but Solar Turbine's  
20 transaction with Praxair was to provide services to  
21 enable?

22 A Right. They wanted us to come out and  
23 increase the flow capacity from 400 PSI to I think it  
24 was around 26,000 PSI. It was a significant increase  
25 in the capacity of the flow.



1           Q       While you're still looking at Exhibit 17, is  
2       there anything on this invoice that indicates what  
3       Praxair [inaudible] Solar Turbines?

4           A       It's a service work order.

5           Q       And typically when Praxair deals with a  
6       service work order, what transaction does it involve?

7           A       It involves labor. If it was just a sale of  
8       equipment, it wouldn't be a service work order.

9           Q       How much is the transaction for?

10          A       45,000.

11          Q       Can I now direct you to Exhibit 19.

12                   Is this an internal email between Praxair  
13       representatives discussing the total costs to Praxair  
14       for the transaction?

15          A       Yes, it is.

16          Q       How much did it cost Praxair to complete this  
17       job?

18          A       Just under 55,000.

19          Q       So compared to the 45,000, so Praxair lost  
20       money on the job?

21          A       Yes, we did.

22          Q       Could you turn now to Exhibit 16.

23          A       Okay.

24          Q       Is this another internal email between  
25       Praxair representatives discussing this transaction?

1           A       Yes, it is.

2           Q       Can I direct your attention to the list of  
3 items on the middle of the page. They have equipment  
4 numbers, some descriptions like H2 module and track 2.  
5 So these sort of look like tangible personal property  
6 to me.

7                   Was Solar Turbines purchasing this equipment?

8           A       Not, they were not.

9           Q       How can you tell?

10          A       Well, a couple of things: One, these 2200  
11 12-pack two trailers would be about a half a million  
12 dollars. So we're not selling those for 45,000. And  
13 this is basically, you know, the site number here  
14 tells us that that's where the equipment is currently  
15 located.

16                   So what they're getting is they're showing  
17 what the equipment currently at the customer site was.  
18 And then, you know, there's talk about the system  
19 upgrade and making the change from the 400 PSI to the  
20 26,000 SDFH, which I'm not an engineer so I couldn't  
21 tell you what that means.

22          Q       But that's the capacity they were going for?

23          A       That's the capacity they needed, yes.

24          Q       To what extent, if any, was tangible personal  
25 property involved in this job?

1           A       So there were materials that were needed in  
2       order to redirect the piping. So these tubes sit in a  
3       large rack, and then there are pipes that come off the  
4       front of the rack that then feed over into the  
5       manufacturing plant. So they needed to increase --  
6       they needed to change the configuration of those pipes  
7       on the front in order to allow for that gas to flow  
8       faster.

9           Q       And is the situation with the tangible  
10      personal property that was involved and consumed, is  
11      that any different than any other Praxair transactions  
12      with other customers involving services?

13          A       No. I mean, you know, it all depends on what  
14      you are doing, but it's fairly unusual for you not to  
15      need some level of materials in order to perform a  
16      repair, an upgrade or whatever you're doing.

17          Q       And just to sum this up, could you reiterate  
18      how the transaction relates to this appeal, what  
19      Praxair's position is on this transaction?

20          A       So Praxair's position is that this should be  
21      looked at under a true object test. And what the  
22      customer wanted was a faster flow of gas. They didn't  
23      really care how we got them that faster flow of gas.

24          Q       Thank you.

25          A       Uh-huh.

1           MR. MERTEN: That's actually all the  
2 questions I have, but I did want to make a request,  
3 Judge Kwee, that because these issues are somewhat  
4 different, if when we get to the closing argument  
5 stage, maybe we can just go ahead and handle this  
6 section first, if opposing Counsel doesn't have an  
7 issue with that?

8           ALJ KWEE: Sure. Do you have any objection?

9           MR. NOBLE: So we would go with the resale  
10 closing argument and go all the way back to the  
11 beginning to the closing arguments for the  
12 construction contract?

13          ALJ KWEE: Is that what you're proposing?

14          MR. MERTEN: Yeah. While we're on topic.

15          MR. NOBLE: That's fine.

16          ALJ KWEE: Okay. That makes sense. Do you  
17 have any questions on cross for this witness?

18          MR. CLAREMON: Can we get two minutes?

19          ALJ KWEE: Sure. We'll go off record for two  
20 minutes.

21               (Off the record.)

22          MR. CLAREMON: We don't have any questions of  
23 the witness. Thank you.

24          ALJ KWEE: Okay. I think the penal might  
25 have a couple questions. And I did have a question

1 myself about Exhibit 14, which is the resale  
2 certificates issued by Ralphs.

3 And if you're on that page, my question was  
4 really, does Praxair sell anything other than liquid  
5 nitrogen, or was this resale certificate issued solely  
6 for purchasing liquid nitrogen or liquid oxygen, I  
7 believe?

8 THE WITNESS: This was solely for purchasing  
9 liquid oxygen.

10 ALJ KWEE: Okay. And I believe you had  
11 testified that Ralphs used the liquid oxygen when  
12 packing the meat; is that correct?

13 THE WITNESS: Yes.

14 ALJ KWEE: How do you know what Ralphs would  
15 do with the oxygen that it purchased?

16 THE WITNESS: So we had conversations with  
17 them during the audit, asking how they used the -- how  
18 they used the product.

19 ALJ KWEE: Okay. Does the panel have any  
20 other questions?

21 ALJ JOHNSON: I have one question. Thank  
22 you, Ms. Volmer, for being here today.

23 I know it's not a very large issue, but if we  
24 go to the Solar Turbines in Exhibit 19, that's where  
25 it listed that, the cost for the work that was

1 performed.

2 THE WITNESS: Yes.

3 ALJ JOHNSON: I was curious as to, it looks  
4 like more than half the cost is related to materials  
5 cost, about 28,000.

6 Do you have any idea what that material cost  
7 is that involved the transfer of TPP to the purchaser?

8 THE WITNESS: That ended up being  
9 significantly more than what was originally bid. So  
10 originally, the 45,000 was broken out in the proposal  
11 25,000 as services and 20,000 as materials.

12 In talking to our engineers, what they needed  
13 to do was there's a little something in the front of  
14 the tank that restricted it, so they had to take those  
15 out and then reposition the pipes and the direction  
16 they went. So I don't know off the top of my head  
17 that required that they put in new pipe or just move  
18 around the existing pipe.

19 ALJ JOHNSON: Thank you.

20 ALJ KWEE: Are there any other questions from  
21 this panel?

22 Would Counsel -- does either counsel have any  
23 other additional questions before this witness is  
24 excused?

25 MR. MERTEN: Just one.

1 ALJ KWEE: Please proceed.

2 BY MR. MERTEN:

3 Q Could I direct you to Exhibit 25?

4 A Okay.

5 Q In connection with this appeal, did Praxair  
6 submit invoices in connection with the materials  
7 purchased for the Solar Turbines transaction?

8 A Yes, we did. There were several invoices  
9 from McJunkin.

10 Q And could you flip through these pages.

11 For instance, if you look at the second page,  
12 the second and third page, 25-3 on the bottom there,  
13 is tax included?

14 A Yes. So on, it looks like on several --  
15 well, all of them except for the very first one, tax  
16 was paid for the McJunkin when the materials were  
17 purchased.

18 MR. MERTEN: Thank you.

19 ALJ KWEE: Just a quick clarification. These  
20 are Praxair's purchase invoices for the materials; is  
21 that correct?

22 THE WITNESS: Yes. These are invoices that  
23 were to Praxair. There's both -- sorry. Yes. These  
24 were Praxair's invoices from McJunkin for the repairs.

25 ALJ KWEE: Was this in relation to the Solar

1 Turbines?

2 THE WITNESS: Yes.

3 ALJ KWEE: Just a quick question for CDTFA.

4 Do you know if an allowance was made for  
5 sales tax that Praxair paid on their materials cost?

6 MR. NOBLE: There's no indication that the  
7 tax paid purchases, some sort of allowance was  
8 created. Typically, I believe what the department  
9 would like to see is that that tax was actually paid,  
10 so AR summary or bills paid.

11 ALJ KWEE: So just to clarify, CDTFA's  
12 position is that no evidence is warranted because they  
13 don't have evidence that the itemized amounts for  
14 county tax and state tax, that reimbursement was paid  
15 to the state?

16 MR. HANKS: Judge Kwee, this would be  
17 sufficient to identify that the tax paid with respect  
18 to this property. I think probably the difficulty the  
19 staff had was in identifying that this related to that  
20 contract. So that would have been my question as to  
21 whether or not this property actually related to the  
22 contract, the sales contract that was in question.

23 But certainly, we would offer tax paid  
24 purchase [inaudible] we had to give them credit for  
25 that.



1 (Clarification by Reporter.)

2 ALJ KWEE: So just to understand your  
3 position.

4 Are you saying that in this case, an  
5 allowance is not being made because you cannot trace  
6 this purchase invoice to a specific transaction, or  
7 are you recommending an allowance for this amount?

8 MR. NOBLE: We're going to recommend an  
9 allowance for the tax paid purchases they sold in the  
10 event that sales tax applies to the charge, yes.

11 ALJ KWEE: Okay. Is it possible that CDTFA  
12 could include the amount of the adjustment recommended  
13 in their post-hearing briefing with the same deadline  
14 of 60 days?

15 MR. HANKS: Yes.

16 MR. NOBLE: Yes.

17 ALJ KWEE: Okay. Thank you.

18 MR. MERTEN: Can I just make one more comment  
19 about exhibits that have already been entered?

20 ALJ KWEE: Yes.

21 MR. MERTEN: That might not be in connection  
22 with these questions. Exhibit -- and this also might  
23 help the CDTFA in coming up with -- Exhibit 18 is the  
24 service work order that ties to the invoices.

25 MR. NOBLE: Thank you.

1 (Multiple voices.)

2 MR. CLAREMON: Yeah.

3 MR. MERTEN: Thank you.

4 ALJ KWEE: Okay. I believe there's one more  
5 question from the panel.

6 ALJ STANLEY: I'm just wondering if the  
7 McJunkin invoices constitute the entire materials  
8 costs that are included in Exhibit 19, or if there are  
9 some missing?

10 So do the totals in Exhibit 25 match what's  
11 called materials cost in Exhibit 19? That's the  
12 question.

13 MR. MERTEN: Do you want me to answer?

14 ALJ STANLEY: Well, no, that would probably  
15 be for your witness.

16 THE WITNESS: Well, so there's the McJunkin  
17 invoices that we have attached here, just trying to  
18 add them up quick. The 2,500, 15, so it's about  
19 \$4,500 worth of invoices here. So this is not going  
20 to be the total amount.

21 ALJ STANLEY: Thank you.

22 ALJ KWEE: Okay. Are there any other  
23 questions for this witness? Okay. This witness is  
24 excused. You may step down.

25 So at this point, I believe the parties were

1 going to do a closing statement on, specifically on  
2 Issue 2. And then after that, move on to closing  
3 statements on Issue 1; is that correct?

4 MR. MERTEN: Judge Kwee, could we please  
5 request that we do the close things pretty quick,  
6 maybe a five-minute recess before we do the closing on  
7 the other issues?

8 ALJ KWEE: Okay. Why don't we make it a  
9 ten-minute recess. Some of us would like to stretch  
10 our feet and walk around.

11 MR. MERTEN: Great. Thank you.

12 ALJ KWEE: Please proceed.

13 MR. MERTEN: Starting with National Beef and  
14 Ralphs. Praxair sales of carbon dioxide with oxygen  
15 to National Beef and Ralphs are not subject to tax for  
16 two reasons: First, these transactions were sales for  
17 resale. Sales for resale are not subject to sales tax  
18 pursuant to California Revenue Tax Code 6007(a).

19 As Appellant's briefing supporting exhibits  
20 and testimony just now will demonstrate, both  
21 customers purchased gas from Praxair to create frost  
22 for packaging raw meat products being packaged for  
23 resale to others.

24 Pursuant to Cal Revenue Tax Code 6091 and  
25 6092, as well as regulation 1668, a seller's relieved

1 from sales tax liability if it takes a resale  
2 certificate in good faith.

3 As Ms. Volmer testified, Praxair had a valid  
4 timely resale certificate from Ralphs, which is  
5 Exhibit 14. Regulation 1668(b)(1)(c) provides that a  
6 resale certificate meets all the requisite -- well,  
7 has all the requirements if there's a signature of a  
8 purchaser, name and address of purchaser, number of  
9 sellers permit, statement that property described in  
10 the document, there's purchase for resale and  
11 specifies that it's proper form of a general  
12 description of the property purchased was provided as  
13 well as the date of execution. And Exhibit 14 has all  
14 these characteristics.

15 It was also provided in 2000 and on file with  
16 Praxair at the time of the sale. There's zero  
17 indication here that this resale certificate was taken  
18 in bad faith. Also, pursuant to Regulation 1668, so  
19 long as the seller shows proof the product sold was  
20 resold, whether by way of XYZ letter or otherwise, it  
21 is reviewed as liability.

22 As Ms. Volmer testified, Praxair had valid  
23 XYZ letters from both National Beef and Ralphs. These  
24 are Exhibits 11 and 15. Praxair had additional  
25 written confirmation from National Beef in Exhibit 12.

1           There's plenty of supporting evidence on  
2 multiple fronts to confirm these sales were for resale  
3 and, therefore, not subject to sales tax.

4           Second, on a separate basis, these sales are  
5 also tax exempt. As Ms. Volmer testified, CRTC 6359.8  
6 expressly exempts sales of carbon dioxide used with  
7 packing fruits and vegetables. And we maintain --  
8 Praxair maintains that this exemption should equally  
9 apply to carbon dioxide and liquid oxygen used  
10 together in packaging raw beef products.

11           Regulation 1630, little (b)(1), big B does  
12 the same. This regulation also exempts both ice and  
13 preservatives used to package food products including  
14 meat. The intent of these exemptions is to exempt for  
15 sales and use tax packaging when it serves the purpose  
16 of delivering fresh food. Both the email of  
17 Exhibit 12 and Ms. Volmer's testimony confirm that is  
18 exactly what these subject actions did for National  
19 Beef and Ralphs.

20           Moving on to the final transaction with Solar  
21 Turbines. This transaction concerned the nontaxable  
22 services Praxair provided to its customer. As the  
23 email in Exhibit 16 and Ms. Volmer's testimony today  
24 show, Solar Turbines already had a tube trailer on its  
25 property and contracted with Praxair to perform

1 services to adjust the piping supplying Solar Turbines  
2 with hydrogen from the trailer to allow for higher  
3 flow. The tube trailer was already on the premises of  
4 Solar Turbines.

5 These installation services are not numerated  
6 as taxable in California, and thus are not subject to  
7 tax. Praxair has submitted the email at Exhibit 19  
8 and the service work order itself as Exhibit 18, which  
9 both break out the cost on the job, including  
10 Praxair's own labor costs, its contracted labor costs  
11 for Irwin Industries, shipping and incidental  
12 materials that were purchased and consumed while  
13 performing the requested services.

14 Supporting invoices for Praxair's contracted  
15 labor with Irwin Industries are provided in  
16 Exhibit 24. And invoices for materials purchased are  
17 provided at Exhibit 25, those are McJunkin invoices we  
18 looked over, most of which invoices for materials  
19 already charged and collected any applicable sales  
20 tax.

21 Pursuant to the true object analysis on the  
22 Regulation 1501, the evidence shows the true object,  
23 this transaction was for services making the entire  
24 bundled transaction, including the transfer of  
25 materials incidental to performance to the service

1 nontaxable. The consumed materials for tangible  
2 personal property was not even a significant object of  
3 the transaction, and certainly not the true object.

4 Alternatively, even if one were to determine  
5 the transaction was mixed and not bundled pursuant to  
6 *Dell v. Superior Court, San Francisco*, at 159 Cal.  
7 App. 4th 911, the labor and shipping charges supported  
8 by the evidentiary breakouts are not subject to tax.  
9 Thank you very much.

10 ALJ KWEE: Is CDTFA ready to proceed with  
11 their closing?

12 MR. NOBLE: We are.

13 ALJ KWEE: Please go.

14 MR. NOBLE: With respect to the measure for  
15 disallowed claimed nontaxable sales, under the  
16 relevant law, sales taxes imposed on retail sales of  
17 tangible personal property in this state unless the  
18 sale is exempt or included from tax, a sale for  
19 resale is not a retail sale. It is presumed that all  
20 sales are retail and the seller has the burden to  
21 establish the contrary unless the seller accepts a  
22 timely and valid resale certificate in good faith.

23 The Regulation 1668, subdivision (b)(1)  
24 provides the essential elements that constitute the  
25 minimum requirements for a valid resale certificate.

1 As relevant here, the elements include an itemized  
2 list of the particular property or a general  
3 description of the property to be purchased for  
4 resale, any statement that the property described in  
5 the document is purchased for resale.

6 Regulation 1668 subdivision (c) states that  
7 if a purchaser insists that they are buying property  
8 of the kind not normally resold in their ordinary  
9 course of business, the seller should require a resale  
10 certificate containing the statement that the specific  
11 property is being purchased for resale.

12 If a seller does not take a valid and timely  
13 resale certificate, the seller may be relieved of the  
14 liability only if they can show the property was, in  
15 fact, resold by the purchaser prior to intervening  
16 use, that the property is currently being held for  
17 resale, or that the purchaser paid tax to CDTFA on its  
18 consumption of the property.

19 The CDTFA does allow the use of XYZ letters  
20 as a means to establish that the sale was, in fact,  
21 for resale, or the tax has been paid. However, under  
22 1668, the XYZ letter is not the equivalent of a timely  
23 and valid retail certificate, and CDTFA is not bound  
24 by the response.

25 With respect to Appellant's sales of carbon



1 dioxide to National Beef, there was no dispute that  
2 Appellant did not take a timely and valid retail  
3 certificate. Thus, it is presumed the sales are  
4 subject to tax, and the burden is on Appellant to  
5 establish the contrary.

6 While Appellant has provided XYZ letter  
7 responses, it is unclear from the available evidence  
8 that the property was, in fact, resold or consumed by  
9 National Beef. Specifically, there is insufficient  
10 evidence establishing that the carbon dioxide remained  
11 on the product for any appreciable amount of time.

12 Indeed, Petitioner's website indicates that  
13 the dry ice known as a carbon dioxide was formerly  
14 used to create and was used as a preparation for  
15 freezing of the product.

16 Further, it's discussed in the decision and  
17 recommendation, the dry ice, snow would return to a  
18 gas state relatively fast. Thus, there was no  
19 evidence the dry ice, snow or carbon dioxide would  
20 have remained on the beef for any appreciable amount  
21 of time, much less during shipping.

22 This further indicates that the carbon  
23 dioxide was not resold. Appellant did receive a  
24 resale certificate from Ralphs grocery store on a  
25 sales of liquid oxygen. But as indicated in Exhibit

1     A, page 71, the resale certificate describes the  
2     property of grocery store resale as groceries and  
3     related items.

4             Liquid oxygen does not fall into the general  
5     category of groceries and related items. As such, the  
6     retail certificate on its face does not contain a  
7     general description of the property that Ralphs  
8     purchased for resale.

9             More importantly, since a grocery store does  
10    not generally resell liquid oxygen in its regular  
11    course of business, pursuant to 1668, subdivision (c),  
12    Appellant was required to have obtained a specific  
13    statement on the resale certificate that Ralphs was  
14    purchasing liquid oxygen for resale.

15            Since the resale certificate Appellant took  
16    from Ralphs grocery store is invalid, it is presumed  
17    that Appellant's sale to Ralphs is subject to tax.  
18    Appellant has provided no actual evidence regarding  
19    how the liquid oxygen was used, much less resold as  
20    part of the -- and therefore, the XYZ letter response  
21    obtained from Ralphs is insufficient to rebut the  
22    presumption that it was sold at retail.

23            I note that during the testimony, the  
24    appellant noted that they spoke with members at Ralphs  
25    and that Ralphs confirmed they were reselling it.

1 According to Exhibit J, which is page 235, it's a  
2 report of audit discussions.

3 The department stated that they contacted  
4 Ralphs grocery store during the re-audit and that they  
5 spoke to the person who filled out the XYZ letter, and  
6 they stated it was filled out that way in mistake and  
7 they consumed the oxygen.

8 We further note that there was no specific  
9 exclusion or exemption from tax that would apply to  
10 these transactions. In fact, Regulation 1630  
11 subdivision (b)(1)(a) states the tax applies to sales  
12 to shippers of property used in conditioning goods to  
13 be shipped or to preserving and protecting the goods  
14 during transportation.

15 While subdivision (b)(1)(b)(1) does provide  
16 an exemption for the sale or use of the dry ice used  
17 in packing and shipping, again, there was no evidence  
18 that carbon dioxide sold to National Beef was actually  
19 used to create dry ice, snow that remained on the  
20 product during shipment, if it was used for shipment  
21 at all.

22 In addition, subdivision (b)(1)(b)(2) which  
23 was based on Revenue and Taxation Code Section 6359.8  
24 does not apply if it only exempts carbon dioxide used  
25 for packing and shipping fruits and vegetables. The

1 plain language in the statute is very clear, it is  
2 unambiguous, and there is no basis in the law to  
3 expand its reach.

4 With regard to Appellant's \$45,000 sale to  
5 Solar Turbines, the total amount of the sale price  
6 includes any services that are part of the sale  
7 excluding labor to install or applying the property  
8 sold. Under Regulation 1546, subdivision (b)(2), if  
9 the retail value of parts and materials furnished in  
10 connection with repair, reconditioning or is more than  
11 ten percent of the total charge, the person performing  
12 the repairs is the retailer, and tax applies to the  
13 fair retail selling price of the property.

14 The person performing the repairs must  
15 segregate on the invoices to his or her customers and  
16 in their records the fair retail selling price of the  
17 parts and materials from other labor. The Solar  
18 Turbines invoice indicates that Appellant made the  
19 sale to Solar Turbines for an equipment upgrade. The  
20 sale involved a transfer of tangible personal property  
21 in the form of the equipment.

22 Accordingly, it is presumed that the sale is  
23 subject to tax measured by Appellant's gross receipts,  
24 which include any services that are part of the sale,  
25 and the burden is on Appellant to establish the

1       contrary.

2               If the sale was for reconditioning the tube  
3       trailer, the value of the parts and materials as  
4       indicated in Exhibit F, page 183, was \$28,483, which  
5       is well over the 10 percent of the \$45,000 contract  
6       value. Pursuant to 1546 subdivision (b)(2), Appellant  
7       would be considered the retailer of the parts,  
8       including fabrication labor which would include  
9       fabrication in place, as well as any other services  
10      that required to complete the upgrade.

11              And since Appellant has failed to provide  
12      documentation establishing any portions of the \$45,000  
13      charge was for installation, no adjustments to the  
14      measure are warranted for this sale.

15              As for Appellant's assertion regarding  
16      Regulation 1501, we note that the increased gas flow  
17      that they were describing could not have occurred  
18      without the tangible personal property being applied.

19              That on its face means that the property was  
20      a significant component of the transaction and  
21      certainly was not incidental to the service of  
22      performing the upgrade unless the true object of the  
23      contract test does not apply in this circumstance, or  
24      to say that in a different way, the true object of the  
25      contract was not the services, per say, unless sales

1 tax applies to their sales.

2 That's all for this portion.

3 ALJ KWEE: Okay. So I believe we're going to  
4 go for a ten-minute recess. Before we do, can I find  
5 out approximately how long the parties intend to go  
6 for their closing presentations on Issue 1?

7 MS. ROBERTS: I don't think it will be any  
8 more than 15 minutes for Appellant.

9 ALJ KWEE okay. For CDTFA?

10 MR. NOBLE: Yeah, probably about ten minutes.

11 ALJ KWEE: That sounds good. We should be  
12 done before 5:00. We'll be back at 4:15.

13 (Recess taken.)

14 ALJ KWEE: Praxair may proceed with their  
15 closing arguments then.

16 MS. ROBERTS: For purposes of the Lurgi  
17 contract, the original amount in the dispute for  
18 looking at the taxable measure was \$38 million. And  
19 the reason it was \$38 million is because this is what  
20 was listed in the Lurgi contract, and Praxair had no  
21 other evidence to demonstrate what the price breakdown  
22 would be for this 38 million.

23 With the introduction of Exhibit C to the  
24 consortium agreement, which is Exhibit 26 in this  
25 appeal or in this proceeding, we now have

1 contemporaneous documentary evidence that makes clear  
2 that we aren't talking about the 38 million anymore.  
3 The greatest measure is only going to be is 15.8  
4 million. That is the amount that would be in dispute  
5 now only with regard to Lurgi. Meaning, now when we  
6 have to figure out what the engineering cost would be  
7 for specific equipment, whatever that percentage  
8 happens to be, we would be applying it against the  
9 15.8 million.

10 The department seems to press that Praxair  
11 doesn't have the actual pieces of paper or data that  
12 would support the 5 to 10 percent estimate by  
13 Mr. Schaub, and the 13 percent from Mr. Schaub on the  
14 Occidental and Lurgi contracts.

15 On Lurgi, Praxair can't produce what it  
16 doesn't have. They never had the cost data. Lurgi is  
17 the only entity that would have its cost data that it  
18 prepared as part of this project. At no point would  
19 Praxair be privy to that information.

20 In the absence of what it can't produce,  
21 Praxair has satisfied its burden to establish the 5 to  
22 10 percent estimate for equipment engineering on the  
23 Lurgi contract, and the 13 percent on the Occidental  
24 contract.

25 These estimates are supported by four

1 different areas of evidence: The first is  
2 Mr. Schaub's testimony. We heard testimony from the  
3 single person most knowledgeable on the Richmond  
4 hydrogen plant. This is undeniable. He was also  
5 personally involved in the cost estimate for the  
6 Occidental contract at the start of that contract.

7 In Mr. Schaub's tenure over 37 years with  
8 Praxair, he testified that he has and has been  
9 responsible for hundreds of projects comparable to the  
10 Richmond project from a cost perspective. This means  
11 that he and his team that estimate are responsible for  
12 understanding exactly how much design and engineering  
13 services would go into specific pieces of equipment.  
14 Based on this personal experience within the industry,  
15 this is how Mr. Schaub came up with the 5 to  
16 10 percent estimate for Lurgi and the 13 percent  
17 estimate for Occidental.

18 The IPA study that was commissioned by  
19 Praxair only further corroborates the two estimates  
20 that Mr. Schaub has provided. IPA is a fairly renown  
21 project benchmarking and best practices consulting  
22 firm. It does mass collection of real post-project  
23 completion capital data. It's not a bunch of  
24 estimated cost data, it's not from a bunch of proposed  
25 bidding. This is the real cost data after projects



1 are complete.

2 It is the purity and reliability of their  
3 data that makes their statistical reporting so  
4 accurate. IPA had no knowledge of Mr. Schaub's 5 to  
5 10-percent estimate or 13-percent estimate. These  
6 estimates have been his since his first declaration in  
7 January of 2017.

8 IPA was not commissioned to do the study  
9 until 2018. IPA was only given the project  
10 descriptions. It was then up to IPA to gather data  
11 from its global capital project database and determine  
12 what the percentage of cost engineering would be  
13 across their industry on average. That result, the 6  
14 percent is spot on with Mr. Schaub's estimates.

15 We also have the contracts. Both contracts  
16 separately state the design and engineering charges.  
17 They're separately stated for a reason. As Ms. Volmer  
18 testified, the reason this is done in the contract is  
19 so that you're able to see what is going to be the  
20 taxable portion of the contract subject to things like  
21 sales and use taxes and other local taxes and duties  
22 versus what is going to be the services component.

23 And in that services component, the only tax  
24 that you have applicable there is going to be the tax  
25 on any of the materials or things that the contractor

1 consumes while performing their activities, in this  
2 case, in the performance of their duties to do the  
3 design engineering.

4 So it would be Lurgi's design and engineering  
5 for the Lurgi contract, and it would be Praxair for  
6 the design and engineering of the Occidental contract.  
7 Anything it purchased to perform those duties of  
8 design and engineering, those are the portions that  
9 would have had tax. And they would have paid the tax  
10 when they purchased the materials. They would be a  
11 consumer of those materials. This is consistent with  
12 Regulation 1521. So the contracts themselves support  
13 that the majority of separately-stated amounts are for  
14 nontaxable services.

15 The last piece of evidence that we have that  
16 supports this estimate are the photographs themselves.  
17 They show the job sites and demonstrate the magnitude  
18 and complexity of the projects and why the majority of  
19 the design and engineering charges would be for the  
20 design of the plant and how its many components would  
21 fit together.

22 As Mr. Schaub testified, Praxair could go in  
23 and pull all of those pieces of equipment out of the  
24 hydrogen plant and be able to use them elsewhere. It  
25 would be out of money for all of the design and

1 engineering that it paid for for the design of that  
2 plant and for the design and engineering for pulling  
3 together all the many components of that project.

4 So with those four primary areas of evidence,  
5 Praxair contends that, at most, for the Lurgi contract  
6 it would have been 5 to 10 percent of the 15.8 million  
7 for the engineering equipment, and at most, 13 percent  
8 would have been for the engineering equipment cost in  
9 Occidental. Thank you.

10 ALJ KWEE: Thank you. And I'll turn to CDTFA  
11 for their clothing arguments. And at this point, I  
12 just briefly mention if you could slow down just a  
13 little bit when you're making your closing  
14 presentation. Thank you -- or closing argument.  
15 Thank you.

16 MR. NOBLE: Sure. Thank you. Under the  
17 sales and use tax law, sales tax applies to retail  
18 sales of tangible personal property in this state as  
19 previously discussed. When sales tax does not apply,  
20 use tax is imposed on a person actually storing,  
21 using, or otherwise, consuming property.

22 The tax is measured by the total sales price  
23 of the property including services that are part of  
24 the sale without any deduction for labor, service cost  
25 or other expense. However, charges for installing the

1 property are not subject to tax.

2 Furthermore, it is presumed that all gross  
3 receipts are subject to tax until the contrary is  
4 established. Under Regulation 1521, a construction  
5 contract means a contract to erect, construct, alter  
6 or repair any building or other improvement to real  
7 property, including any fixed works such as gas  
8 transmission and distribution systems, pipelines and  
9 other systems for the transmission of gas substances,  
10 as well as refineries in chemical plants.

11 Construction contractors are generally the  
12 retailers of fixtures, machinery and equipment. They  
13 furnish and install performance of construction  
14 contracts, hence, tax applies to a construction  
15 contract through sales of fixtures, machinery and  
16 equipment.

17 Regulation 1521, subsection (b) (2) (b)  
18 provides that, in general, if the contract states the  
19 sales price at which a fixture is sold, tax applies to  
20 that price. If not, the sales price is considered to  
21 be the cost price of the fixture to the contractor.

22 In determining what the cost price is, the  
23 contractor purchases the fixture in complete  
24 condition. The cost price is considered to be the  
25 sales price of the fixture to the contractor.

1       However, if the contractor is the manufacturer of the  
2       fixture, the cost price is considered to be the price  
3       at which similar fixtures and similar quantities ready  
4       for installation are sold by him or her to other  
5       contractors. If not sold and ready for installation,  
6       the cost price shall be deemed to be the amount stated  
7       in the price list, bid sheets or other records of the  
8       contractor.

9               Lastly, if the sale price of fixtures can't  
10       be established in these means, Regulation 1521  
11       provides a formula that takes an aggregate of various  
12       factors like the cost of materials, the direct labor,  
13       factory cost attributable to the fixture, a pro rata  
14       share of all overhead attributable to the manufacturer  
15       of the fixture and reasonable profit of the  
16       manufacturing operations.

17               This would include job site fabrication labor  
18       in its prorated share of overhead. Job site  
19       fabrication labor includes all assembly labor  
20       performed prior to attachment of a fixture or  
21       machinery and equipment to a structure of the real  
22       property.

23               Sales and machinery equipment are calculated  
24       in similar manner under 1521 subdivision (b)(2)(c).  
25       These provisions of Regulation 1521 must be applied to

1 be consistent with the statutory definition of what's  
2 included in gross receipts or sales price under  
3 Revenue and Taxation Code Section 6011 and 6012.

4 As such, if a construction contractor charges  
5 for services that are part of a sale like for the  
6 design and engineering of a fixture, it cannot avoid  
7 tax by excluding those charges in the stated sales  
8 price of the contract.

9 Rather, the stated sales price under  
10 subdivision (b) (2) (b) (2) (a) includes those charges  
11 that they are clearly stated, or if they are not  
12 clearly stated, then the price cannot be determined by  
13 the terms of the contract, and must be determined  
14 pursuant to the methods described under  
15 (b) (2) (b) (2) (b) .

16 Similarly, if a contractor purchases a  
17 fixture in a completed form but only after it provided  
18 the designs and specifications to the fabricator, then  
19 the sales price pursuant to (b) (2) (b) (2) (b) must  
20 include the cost of the design and specifications  
21 charged to the customer.

22 There is no dispute that Lurgi is the  
23 retailer of the fixtures, machinery and equipment  
24 furnished to Appellant, and the tax applies to the  
25 \$80,046,000 equipment charge. There is also no

1     dispute that the equipment charge did not include any  
2     of the charges or design, engineering and job site  
3     fabrication of the fixtures, machinery and equipment.  
4     Rather, according to Mr. Schaub's declaration, a  
5     portion of the \$38,578,000 charge for engineering  
6     design for Lurgi's design and engineering of the  
7     fixtures and other TPP.

8             We note that the contract was to construct a  
9     large hydrogen production plant, primarily consisting  
10    of two steam methane reformers. According to  
11    Mr. Schaub's declaration, steam methane reformers are  
12    essentially large steel structures that are welded  
13    together on site. The steam methane reformers are  
14    roughly the size of apartment buildings and act as  
15    high temperature furnaces used in the creation of  
16    hydrogen.

17            According to Mr. Schaub, the plant was also  
18    comprised of hundreds of other pieces of substantial  
19    equipment, all of which were customized to Lurgi's  
20    specifications under the contract. In other words,  
21    Lurgi engineered and designed large fixtures under the  
22    contract, and the property sold by Lurgi with  
23    component parts for the fixtures and the machines  
24    necessary for their operation.

25            While Appellant contends that only 5 to

1 10 percent of the service fees represent design of the  
2 actual fixtures, machinery and equipment, Appellant  
3 has failed to provide any documentation corroborating  
4 that amount, aside from the exhibit that was recently  
5 provided that we would be providing response to later  
6 on within the next 60 days. For all the  
7 above-mentioned reasons, no adjustments are warranted  
8 to the measure for the Lurgi contract.

9 With respect to the Occidental contract,  
10 there is no dispute that Appellant was a construction  
11 contractor and the retailer of all fixtures, machinery  
12 and equipment and sold to Occidental. And the tax  
13 applied to the 11,400,000 equipment charge.

14 There is also no dispute that the equipment  
15 charged did not include any of the charges for design,  
16 engineering and the job site fabrication of the  
17 fixtures, machinery and equipment performed by  
18 Appellant.

19 Rather, according to Mr. Schaub's  
20 declaration, a portion of the eight million dollar  
21 charge for engineering was for Appellant's design. As  
22 the retailer, Appellant's liable for tax measured by  
23 the sales price of the fixtures, machinery and  
24 equipment including all services that were part of the  
25 sales of the property. This means that all of



1 Appellant's charges to design and fabricate the  
2 fixtures, machinery and equipment that Occidental  
3 hadn't paid to the property are part of the sales  
4 price.

5 While Appellant contends that only 13 percent  
6 of the design and engineering fees pertain to actual  
7 design and fabrication of the property it sold, and  
8 that the remainder was for the installation of the  
9 property and site management, Appellant has only  
10 provided a declaration cost sheet and testimony that  
11 this percentage is correct.

12 Appellant has failed to provide any  
13 documentation such as bids or other evidence  
14 corroborating the assertion. Because it is presumed  
15 the gross receipts from a retailer, retail sales are  
16 subject to tax, and the available evidence indicates  
17 the design and engineering fees were part of  
18 Appellant's sales, absent evidence establishing what  
19 portions were not part of the sales of equipment,  
20 fixtures and machinery, no adjustments are warranted  
21 for the sales to Occidental.

22 Lastly, I wanted to bring up one last thing  
23 with respect to the previous discussion about whether  
24 sales or use tax applies to Lurgi ARB contract, and  
25 specifically Regulation 1521, subdivision (b)(4) and

1       its guidance on permits.

2               It's important to know the context of that  
3       subdivision, a subdivision that's making a distinction  
4       between construction contractors, and also make retail  
5       sales of fixtures, machinery and equipment, meaning  
6       that they need to obtain a sellers permit. They're  
7       doing that in this state versus construction  
8       contractors that only consume materials in the  
9       performance of construction contracts.

10              What the regulation is saying is that in that  
11       regard, you don't need a sellers permit because you're  
12       not making any retail sales. That is all. Thank you.

13              ALJ KWEE: Okay. Thank you. I believe we  
14       are ready to conclude this hearing. Does the panel  
15       have anything further to add before we conclude?  
16       Okay. This case is submitted on March 27, 2019. The  
17       record is going to be open for several matters:

18              One, a minimum of 60 days in order for CDTFA  
19       to clarify the amount of the concession, and that was  
20       in reference to the Exhibit 25 invoices; and, two, to  
21       provide additional briefing on its position after  
22       reviewing Exhibit 26, including any stipulations that  
23       might be impacted by the information contained in  
24       Exhibit 26.

25              After we hear CDTFA's response, OTA may

1 request additional briefing from Praxair depending on  
2 what CDTFA's response is. Is that okay?

3 MS. ROBERTS: Your Honor, we would, as I  
4 stated at the start, wanted to clarify now the  
5 opportunity as the 15 days to be able to respond. We,  
6 Appellant, will not have heard everything that  
7 Respondent will be provided. We will be hearing for  
8 the first time, and we would request that we have the  
9 opportunity to respond to that.

10 ALJ KWEE: Okay. Did you want -- are you  
11 asking for 15 days, or did you want an equal amount of  
12 time to respond?

13 MS. ROBERTS: We can do 30 days.

14 ALJ KWEE: Okay. So then it will be 90 days,  
15 60 for CDTFA, and an additional 30 for Praxair to  
16 respond after having received CDTFA's response.

17 And in addition, the record is also going to  
18 be held open during this period to allow Praxair to  
19 submit documentation on the Secretary of State's  
20 website printout regarding the fact for which Praxair  
21 is requesting that this panel take official notice  
22 following the -- and that's going to be allowed  
23 30 days to do that.

24 And following our receipt of that  
25 documentation, CDTFA will be given 30 days to provide

1 any objection to OTA taking an official notice of that  
2 fact, if they wish to object.

3 Have I summarized accurately all the items  
4 that are to be handled after this hearing?

5 MR. NOBLE: Yes, sir.

6 MS. ROBERTS: Yes, your Honor.

7 ALJ KWEE: Okay. Great. So I will issue a  
8 brief ruling in the next day or two summarizing what I  
9 just stated here and provide it to the parties. Other  
10 than that, this record, this hearing is now adjourned,  
11 and we will decide your case later after hearing all  
12 the briefing. And the stipulated matter should come  
13 out within 100 days after closing the record, which,  
14 as I noted, will not be for at least 90 days.

15 (Whereupon the proceedings were  
16 adjourned at 4:35 p.m.)

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REPORTER'S CERTIFICATE

I, Amy E. Perry, a Certified Shorthand Reporter in and for the State of California, duly appointed and commissioned to administer oaths, do hereby certify:

That I am a disinterested person herein; that the foregoing hearing was reported in shorthand by me, Amy E. Perry, a duly qualified Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewritten form by means of computer-aided transcription.

I further certify that I am not of counsel or attorney for any of the parties to said hearing or in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of April, 2019.

\_\_\_\_\_  
AMY E. PERRY  
Certified Shorthand Reporter  
License No. 11880