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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
RHINO READY MIX TRUCKING, INC.,) OTA NO. 18103871
)
) APPELLANT.)
)
)
_____)

Transcript of Proceedings, taken at
400 R Street, Sacramento, California, 95811,
commencing at 1:15 p.m. and concluding
at 2:19 p.m. on Wednesday, August 26, 2020,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA ALDRICH

Panel Members: ALJ TERESA STANLEY
ALJ KEITH LONG

For the Appellant: JAIME A. BARRAGAN

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION

KEVIN SMITH
STEPHEN SMITH
DAMIAN ARMITAGE

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-6 were received at pages 8 and 9.)
(Department's Exhibits A-E were received at page 8.)

OPENING STATEMENT

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1 Sacramento, California; Wednesday, August 26, 2020

2 1:15 p.m.

3

4 JUDGE ALDRICH: This is Judge Aldrich. We're
5 opening the record in the appeal of Rhino Ready Mix
6 Trucking, Inc., before the Office of Tax Appeals, Case
7 Number 18103871. This hearing is being convened
8 electronically on August 26, 2020, at approximately
9 1:15 p.m. The hearing is noticed for Sacramento,
10 California.

11 As a quick point of clarification, we are another
12 Office of Tax Appeals. We're a separate agency from the
13 California Department of Tax and Fee Administration, the
14 Franchise Tax Board, and the Board of Equalization.

15 Today's hearing is being heard by a panel of
16 three Administrative Law Judges. I'm the lead
17 Administrative Law Judge for the purposes of conducting
18 the hearing. I'm joined by judges Teresa Stanley and
19 Keith Long. While I'm the lead for purposes of conducting
20 the hearing, we three will deliberate and decide all
21 issues presented. Each of us will have an equal vote in
22 those deliberations.

23 As an aside, should you experience connectivity
24 issues, please try to reconnect as soon as possible.
25 Please state your appearance, starting with Appellant or

1 his representative; in other words, who you are and who
2 you're representing.

3 MR. BARRAGAN: My name is Jaime Barragan. I'm
4 representing Rhino Ready Mix Trucking, Inc.

5 JUDGE ALDRICH: Thank you.

6 And department.

7 MR. KEVIN SMITH: Hi. This is Kevin Smith. I'm
8 representing the California Department of Tax and Fee
9 Administration.

10 JUDGE ALDRICH: We can't hear you, Mr. Smith.

11 MR. STEVEN SMITH: This is Steven Smith. I'm
12 also with the California Department of Tax and Fee
13 Administration.

14 MR. ARMITAGE: This is Damian Armitage, and I'm
15 also with the California Department of Tax and Fee
16 Administration.

17 JUDGE ALDRICH: Thank you. This is
18 Judge Aldrich. The issue to be decided is whether
19 Appellant has established that it is entitled to receive
20 an additional amount of tax refund for the claim period of
21 April 30th, 2009, through September 30th, 2013, which will
22 encompass the following:

23 Whether the safe harbor percentage of 15 percent
24 established by California Code of Regulations, Title 18,
25 Section 1432, should be used to establishment the exempt

1 off-road use of diesel in bottom dump units and cement
2 powder units during the claim period; whether adjustment
3 are warranted to the percentage of exempt use of diesel
4 fuel in the operation of power take off equipment or PTO
5 in cement trucks during the claim period; whether
6 adjustments are warranted to the percentage of off-highway
7 use of fuel related to the operation of cement trucks in
8 the claim period.

9 Is this correct, Appellant's representative?

10 MR. BARRAGAN: Yes.

11 JUDGE ALDRICH: And, Department, is this correct.

12 MR. KEVIN SMITH: Yes, that's correct. This is
13 Kevin Smith.

14 JUDGE ALDRICH: Thank you.

15 Next, we will address the admission of exhibits
16 into the record. Pursuant to the August 6th, 2020,
17 minutes and orders, neither party objected to Appellant's
18 proposed Exhibits 1 through 5 and the Department's
19 proposed Exhibits A through E during the prehearing
20 conference on August 5th, 2020.

21 Is that accurate Appellant's representative?

22 MR. BARRAGAN: Actually, they added an Exhibit 6.

23 JUDGE ALDRICH: We'll get there. I'm just
24 talking about Exhibits 1 through 5 and Exhibits A through
25 E at the moment.

1 MR. BARRAGAN: And what's the status of
2 Exhibit 6?

3 JUDGE ALDRICH: So if you could just confirm
4 whether or not there were objections to Exhibits 1
5 through 5 and Exhibits A through E. We'll get to Exhibit
6 6 in a second.

7 MR. BARRAGAN: Very good. No objections.

8 JUDGE ALDRICH: Okay. And Department?

9 MR. KEVIN SMITH: This is Kevin Smith. We have
10 no objection.

11 JUDGE ALDRICH: Okay. Hearing no objections to
12 Exhibit 1 through 5 and Exhibits A through E, they're
13 admitted into the record.

14 (Appellant's Exhibits 1-5 were received
15 in evidence by the Administrative Law Judge.)

16 (Department's Exhibits A-E were received in
17 evidence by the Administrative Law Judge.)

18 That leaves proposed Exhibit, which appears to be
19 a copy of the Rule Making File for Regulation 1432. As I
20 noted in the prehearing orders, Department would have an
21 opportunity to object.

22 Do they so object?

23 MR. KEVIN SMITH: This is Kevin Smith. We don't
24 object.

25 JUDGE ALDRICH: Okay. So proposed Exhibit 6 is

1 admitted as well.

2 (Appellant's Exhibit 6 was received in
3 evidence by the Administrative Law Judge.)

4 Does that answer your question regarding that
5 issue, Mr. Barragan?

6 MR. BARRAGAN: Yes. It's Barragan.

7 JUDGE ALDRICH: Barragan. Excuse me.

8 MR. BARRAGAN: Thank you.

9 JUDGE ALDRICH: All right. In the minutes and
10 orders we indicated the time estimates for the hearing.
11 We plan for the hearing to proceed as follow:

12 Appellant's representative, you will present your
13 opening statement, which we estimated at 45 minutes. Then
14 the Department will present a combined presentation and
15 closing remarks for an estimated total of 20 minutes.
16 Appellant will then have approximately 10 minutes to close
17 or rebut.

18 Please note, the panel may ask questions of
19 either party. Both parties are expected to answer the
20 seven questions posed in our August 18th, 2020, prehearing
21 order concisely after they've concluded their
22 presentations.

23 Appellant's representative, are you ready to
24 begin your opening statement?

25 MR. BARRAGAN: Yes.

1 JUDGE ALDRICH: Please proceed.

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OPENING STATEMENT

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MR. BARRAGAN: This is Jaime Barragan. For the most part I'm going to read my opening and closing statements; a lot of stuff to commit that to memory. Here we go.

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I retired from the Board of Equalization in 2010 after 29 years of service. I worked in the Bakersfield branch office at headquarters Field Taxes Division, as well as in the Criminal Investigations Division. During my career I audited or investigated hundreds of entities ranging from mom-and-pop stores to multinational corporations.

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About exhibits, let's reference as Smith Exhibit Number included in Mr. Smith's prehearing statement. All exhibits referenced are in the prehearing statement I filed as the authorized representative for the Appellant. As discussed in Exhibit 4, I spent about a year and a half painstakingly working with staff to develop and design a test method to establish a power take off, PTO, exempt consumption rate for my client's cement mixers.

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As described in Exhibit 4, the approved test method involved documenting all phases of an actual delivery followed by a mimic delivery half loaded with

1 one-inch rock duplicating all the actual delivery
2 activities except for the use of PTO equipment. A mimic
3 delivery reflects the unit's average half the weight to
4 and from an actual delivery.

5 The difference in gallons, the fuel gallons
6 consumed between the actual and the mimic delivery would
7 then be considered fuel consumed during the operation of
8 the PTA equipment. The difference in gallons divided by
9 gallons consumed during the actual delivery determined the
10 PTO rate. Exhibit 1-D, columns H, K, and M.

11 Is that okay? Everybody can hear me well?

12 JUDGE ALDRICH: Yes.

13 MR. BARRAGAN: Good.

14 As recommended by staff, I conducted a pilot
15 test, Exhibit 4, that resulted in a 39.08 percent PTO
16 rate, Exhibit 1-D, column M. The test procedures,
17 protocols, documentation, and results were audited and
18 approved by staff. After I conducted three additional
19 tests, staff requested that I discontinue test pending a
20 field audit visit scheduled for June 3rd and 4th, 2014. I
21 assisted the staff in conducting six additional tests
22 during their visit.

23 In Exhibit 1-B-1b, page 8, staff member,
24 Ms. Figueroa states in part that, quote, "Above summary
25 represents 10 mimic fuel tests conducted by the taxpayer

1 capture a fuel consumption rate for fuel consumed by mixer
2 trucks in the use of power take-off equipment," unquote.

3 However, documentary evidence Smith Exhibit D,
4 pages 335 to 397, clearly establishes that staff was in
5 full control of the six of the ten mimic deliveries as
6 they directed the driver's activities as to off-highway
7 mimic distances traveled, mimic idling time, gather
8 documented field test data, and computed test results. My
9 sole role during staff testing was limited to coordinating
10 the test unit schedules with dispatch and observing
11 staff's activities at the cement plant. I was not present
12 nor involved in test activities that occur outside of the
13 plant's premises.

14 Although, all test conducted by staff had testing
15 error issues as they produce an average PTO rate of only
16 0.1448 percent, Exhibit 2-E, Column O. The most serious
17 errors occurred during the first two tests they were
18 conducting. They conducted resulting in range of
19 3.49 percent and 11.11 percent as discussed in Exhibits-F,
20 page 4, and 2-G, pages 2 to 3, respectively.

21 In computing a final recommended 23.79 PTO rate,
22 Exhibit 1-B-1b, page 8, staff removed the result of one
23 test conducted by representative that was not within the
24 agreed upon distance testing perimeters, Exhibit B, page
25 92. In a staff conducted test yielding a 3.49 rate,

1 Exhibit 2-F as outliers. As described in Exhibit 2 F,
2 page 4, staff now committed three testing errors that
3 overstated fuel consumed during the mimic delivery,
4 resulting in a maturely understated 3.49 percent PTO rate.

5 Of the three errors, the most serious one
6 occurred when the fuel consumed during the time the test
7 unit traveled to the trimming area, loaded water to the
8 mixing drum to clean it, traveled to the wash out area,
9 washed out the mixing drum, and traveled to the loading
10 area below the one-inch rock, while at times operating the
11 PTO equipment at high revolutions per minute.

12 Fuel consumed during this operation that I termed
13 the "Pre-Rock Load Loop," was included in the total fuel
14 consumed during the mimic delivery. This is supported by
15 staff's comment in Exhibit 2-F, page 17, quote, "The rock
16 was loaded after fueling after the mimic route. The truck
17 should have been fueled after loading," unquote.

18 It should also be noted that staff failed to
19 document Exhibit 2-F, page 17, the pre-rock load loop
20 activities in her formalized notes. However, I observed
21 and documented these activities, Exhibit 2-F, pages 14
22 through 15. Exhibit 2-G documents that the fuel consumed
23 during that second mimic delivery was also overstated due
24 to the inclusion of the fuel consumed during the same
25 pre-rock loop activities, Exhibit 2-D, pages 13, 14.

1 This resulted in a maturely understated 11.11
2 percent PTO rate. It should be noted that staff, again,
3 failed to document Exhibit 2 D, page 17, the pre-rock loop
4 activities, loading only that from 7:24 a.m. to 7:35 a.m.,
5 the unit, quote, "Added water to tanks, water tank,"
6 unquote.

7 However, I observed and documented the
8 activities, Exhibit 2-G, pages 13, 14. Noted in
9 Exhibit 2-G, page 17, staff advised me that the fuel
10 consumed during the pre-rock loop activity should be
11 isolated. After the fact, I concurred with the staff's
12 recommendation. However, the fact that the fuel consumed
13 during this mimic delivery is overstated remains. Thus,
14 this test causing known faulty test results must also be
15 excluded from the final computation that result in a 31.95
16 PTO rate for cement mixers, Exhibit 1-D.

17 I'm certain that if the issue had been in the
18 State's favor, staff, as I would have done, should have
19 found a way to adjust for the overstatement of fuel
20 consumed or declare the test results as invalid. It is a
21 fact that full-size SUV vehicles experience a much lower
22 miles per gallon rate than small economy vehicles,
23 Exhibit D, 79 to 80. Corroborate the test conducted by
24 staff overstated fuel consumed during mimic deliveries are
25 conducted and achieve miles per hour differential

1 analysis.

2 Exhibit 2-C shows that test producing only 3.49
3 percent and 11.11 percent rates have the lowest mpg
4 differential show 0.10 and 0.32, respectively.

5 Ms. Figueroa states in part in her pre-appeals conference
6 analysis, Smith Exhibit D, page 24, that quote, "Using an
7 analysis of mpg differentials is not an appropriate means
8 of determining which, if any, test should be excluded from
9 the weighted average PTO rate," unquote.

10 In support of her conclusion, she states, Smith
11 Exhibit D, page 24, quote, "The Department notes that the
12 mpg rate differentials between the delivery and mimic runs
13 will be line with whatever the PTO result is," unquote.

14 I'm not 100 percent certain what she meant by this
15 statement. However, since PTO equipment uses are limited
16 turning the mixing drum at low revolutions per minute
17 during the mimic deliveries, Exhibit 4, the fuel consumed
18 would be less for losing higher mpg rates.

19 Given this fact, the leading correlation is that
20 higher mpg differentials equal higher PTO rates,
21 Exhibit 2-C. In support of her conclusion, she also
22 states Smith Exhibit D, page 24, quote, "The Department
23 notes that claimant's business and delivery sites are
24 located mostly throughout business and rural areas, which
25 require lower speed limits and multiple traffic stops,

1 lights, railroad crossings. The nature of the claimant's
2 business has negative effects on its structural efficiency
3 measured by mpg rates," unquote.

4 This latter statement is true. However,
5 Ms. Figueroa fails to recognize that the driving
6 conditions present during the actual deliveries were to be
7 duplicated during the mimic delivery as require by the
8 approved test method, Exhibit 4. Thus, given everything
9 else equal, except for the 100 percent difference in
10 weight, it would be expected the achieved mpg rates during
11 mimic deliveries would be substantially higher, coupled
12 with higher achieved mpg differentials, Exhibit 2-C.

13 Again, low mpg differentials as achieved in the
14 two tests in question corroborate that fuel consumed
15 during the mimic runs was overstated primarily due to fuel
16 consumed during the pre-rock loop activities previously
17 discussed. Staff member Ms. Figueroa states that, quote,
18 "Staff notes that allow 23.79 rate Exhibit 1 B-1b, page 8,
19 is in line with the recently BOB -- BOE approved safe
20 harbor rate of 25 percent allowed for cement mixers,
21 effective April 1, 2016, off highway uses included in the
22 allowed safe harbor percentage," unquote.

23 As discussed in Exhibit 5, the BOE did not
24 provide documentary evidence supporting the off-highway
25 use allowance as included in a 25 percent as stated by

1 Ms. Figueroa. I should also note that my diligent review
2 of the Regulation 1432 Rule Making File, Exhibit 6, and as
3 noted by the document itself, Exhibit 6, page 13, disclose
4 that no empirical test data exist supporting the BOE's
5 proposed 25 rate for cement mixture; nor for the State of
6 Washington's 25 percent rate, Exhibit 6, page 217, used by
7 BOE as a comparative rate to establish the recommended
8 25 percent safe harbor rate for cement mixers.

9 In deciding to use a 25 percent State of
10 Washington rate, the BOE ignored the state's highest
11 rates -- other states' highest rates ranging from 30 to
12 39 percent, Exhibits 5, page 1 through 4, and 5-C, pages 6
13 to 8; as well as a scientific database study conducted by
14 the Internal Revenue Service resulting in 30.20 percent
15 PTO rate for cement mixers, Exhibit 5-A, page 32.

16 For all the reasons stated, Appellant request
17 that a second faulty test conduct by CDTFA staff,
18 Exhibit 2-G, resulting in an 11.11 percent PTO rate,
19 Exhibit 2-C, line 2, be removed from the final computation
20 resulting in an auto proposed 31.95 percent rate for
21 cement mixers, Exhibit 1 D. This rate is more in line
22 with those allowed by other states as noted, the 30.20
23 rate -- excuse me -- determined by the IRS study,
24 Exhibits 5-A and 5-A, page 32, as well as the Appellant's
25 nature of operations.

1 Okay. I'm going to move on to the off-highway
2 travel and highly exempt use for the cement units. In
3 computing a combined allowed 4.39 rate, Smith Schedule B,
4 page 12, staff used mimic miles in an estimated 3.30 miles
5 per gallon rate stating that quote, "The estimated 3.3 mpg
6 was the mpg used to convert off-highway miles to gallons
7 during the test week May 21, '12 t May 26, '12. This mpg
8 is lower than the on-road driving mpg, which accounts for
9 slow driving and idling associated with driving off-road,"
10 unquote.

11 However, that did not provide empirical test data
12 and/or documentation to support this contention nor in
13 on-road mpg rate. Noted in Exhibit 1 B-2a, quote --
14 complainant -- it should read claimant. "First with the
15 use of a 3.30 mpg rate as a good estimate for computing an
16 off-highway consumption rate, however, it was never
17 intended for it nor does it reflect a combined idling
18 off-highway efficiency rate as used by BOE personnel.
19 Vehicles consumed fuel either by moving or idling.
20 There's no such thing as a combined rate," unquote.

21 In contrast I use actual miles traveled during
22 full load deliveries I tested for in and off-highway miles
23 travel from the parking area to the fuel tank not
24 documented by staff, Exhibit 1-2a-1. The upper case is B
25 I referred to. Case one. An actual mpg rate of 4.41,

1 Exhibit 1-B-2a-2, to compute a separate 3.97 off-highway
2 travel consumption rate, Exhibit 1-B-2a.

3 I should note that the 4.41 mpg rate I used is a
4 conservative rate, since it's a rate reflecting all off
5 and on-highway travel. Either party conducted a test to
6 determine an off-highway mpg rate. I also used actual
7 idling time documented by staff, Exhibit 1-B-2b-6, in a .2
8 hourly idling consumption rate established by staff,
9 Exhibit 1-B-2a, to compute a separate 4.80 off-highway
10 idling consumption rate, Exhibit 1-B-2b.

11 A position of the best evidence rule requires it
12 separates for off-highway and idling for cement mixers
13 based on actual data be allowed in lieu of this task
14 computed, 4.93 percent combined rate. The latter rate is
15 based on less reliable mimic test data and a dubious
16 unsupported combined guess estimated off-highway 3.30 mpg
17 rate.

18 Okay. So that pretty much adds it up for cement
19 mixture. I'm going to move onto off-highway use and
20 idling PTO use for bottom dumps and cement powder trucks.
21 As explained in Smith Exhibit B, page 6, staff allowed
22 2.0 percent and 1.78 off-highway travel consumption rates
23 for cement powder and dump and bottom dump units
24 respectively.

25 Due to the extensive time and cost it took to

1 develop and implement a test method to establish and
2 exempt power take rate for cement mixers, Exhibit 4,
3 Appellant did not pursue developing tests to establish
4 off-highway idling rates for cement powder and bottom dump
5 units. These units qualify for a 50 percent safe harbor
6 rate under Regulation 1432 effective April 1, 2016, on
7 Smith Exhibit E.

8 In her prehearing staff analysis report, Smith
9 Exhibit D, page 25, staff member Ms. Figueroa states,
10 quote, "The Department recommended PTO rate of 23.79
11 percent is in line with the 22 percent PTO rate that the
12 Board of Equalization has allowed for mixing trucks based
13 on a percentage previously allowed on as a use fuel tax
14 Regulation 1316," unquote.

15 In footnote 8 on same page of the report she
16 states, quote, "BOE's allowed PTO rate of 22 percent was
17 offered when claimant initially filed its first claim,"
18 unquote. As discussed in Exhibit 5, that failed to
19 provide empirical test data supporting the 22 percent
20 established via annotation and incorporated into the use
21 fuel tax Regulation 1316, Exhibit 5-E. Effective
22 July 1st, 1995, Regulation 1316 was superseded by
23 Regulation 1432 under the diesel fuel tax law.

24 Thus, staff exercise administrative discretion to
25 justify the use of an unsupported 22 percent exempt PTO

1 rate for cement mixers during the period July 1, 1995 to
2 March 31, 2016, with no legal authority. Under the same
3 principle of administrative discretion exercised by staff,
4 the basic rights to bear an equal treatment afforded by
5 the Taxpayer's Bill of Rights and the CDTFA submission
6 statement, Appellant motions that it would be allowed to
7 retroactively use a 50 percent exempt rate to compute
8 exempt of gallons used by cement powder and bottom dump
9 units.

10 As you know the Appellant's operations were the
11 same pre and post April 1, 2016. Effective date of the
12 amendment to Regulation 1432 allowing for safe harbor
13 rates.

14 That concludes my opening statement, gentlemen.

15 JUDGE ALDRICH: Thank you. Could you please take
16 a moment to answer the seven questions that we raised.

17 MR. BARRAGAN: Sure.

18 JUDGE ALDRICH: Do you need me to read them, or
19 do you have them available to you?

20 MR. BARRAGAN: I have them. Okay. Number 1, you
21 asked what are there, if any, exist for the retroactive
22 application of Regulation 1432?

23 As noted in my opening statement, staff exercised
24 administrative discretion to justify the use of an
25 unsupported 22 percent exempt PTO rate for cement mixers

1 during the period, July 1, 1995 to March 31, 2016, with no
2 legal authority. Under the same principal of
3 administrative discretion exercised by staff and the basic
4 right to fair and equitable treatment as provided by the
5 Taxpayer Bill of Rights in the CDTFA's mission statement,
6 Appellant request that it be allowed to retroactive use a
7 15 percent exempt rate to compute exempt gallons by cement
8 powder and bottom dump units.

9 Number 2 -- do you want me to read the question
10 or just go straight to the answer?

11 JUDGE ALDRICH: You can go straight to the
12 answer.

13 MR. BARRAGAN: Okay. The answer is the PTO rates
14 resulting from the test I conducted are within or very
15 close to the PTO rates allowed by other agencies,
16 Exhibit 5. The staff conducted test, Smith Exhibit
17 Section 2-L5, resulting in the 17.99 percent -- reference
18 in the question -- involved intense use of the PTO
19 equipment.

20 Thus, a high PTO rate would be expected. Even
21 though it is the highest rate determined by the staff, the
22 17.99 percent is still below the lowest rate allowed by
23 other agencies of 20 percent, Exhibit 5. As indicated by
24 a low .96 mpg differential in the staff's noted, Smith
25 Exhibit 2-L5-86. Difficultly in mimicking the actual

1 delivery, the fuel consumed during the mimic run was most
2 likely grossly overstated.

3 Moving onto Number 3. This is a question for
4 CDTFA staff to answer. I used mileage data gathered
5 during the actual test deliveries to compute an
6 off-highway exempt use rate.

7 JUDGE ALDRICH: Okay.

8 MR. BARRAGAN: Answer to Number 4. This is,
9 again, a question for CDTFA staff to answer. I use gather
10 during actual test delivers.

11 Number 5, this is a question, again, for CDTFA
12 staff to answer. The determination was made as a
13 guesstimate with no verifiable documentation and/or data.

14 Number 6, this is a question for CDTFA staff to
15 answer. Determining an off-highway mpg rate was not part
16 of the approved test method procedures. As a conservative
17 estimate, I used the average mpg rate of 4.41 achieved
18 during actual deliveries, Exhibit 1-B-2a-2.

19 Number 7 and final question, I believe. Yes?

20 JUDGE ALDRICH: Yes.

21 MR. BARRAGAN: I used actual idling time
22 documented by staff, Exhibit 1-B-2b, 1-6, in an hourly
23 idling consumption rate established by staff using a
24 full -- a half-fuel test unit, Exhibit 1-B -- excuse me.
25 Exhibit 1-B-2c, to compute a separate 4.80 percent

1 off-highway idling consumption rate, Exhibit 1-B-2b. A
2 half fuel unit mimics the fact that the unit is full
3 during the actual delivery and empty during the return
4 trip to the plant.

5 I believe that's all the questions.

6 JUDGE ALDRICH: Yes. So now I'm going to refer
7 to my panel to see if they have any questions for you.

8 Judge Stanley, did you have any questions for
9 Appellant's representative?

10 JUDGE STANLEY: I do not at this time. This is
11 Judge Stanley speaking, and I do not have any questions at
12 this time.

13 JUDGE ALDRICH: Thank you.

14 And Judge Long, do you have any questions for
15 Appellant's representative at this time?

16 JUDGE LONG: I do. Looking at the audit work
17 papers, Exhibit B, page 14, there are -- all the mimic
18 test were performed just taxpayer without CDTFA present
19 are higher than the ones where CDTFA was present, the PTO
20 percentage. In fact, if you look at it, the CDTFA's
21 highest PTO percentage is 17 percent, and taxpayer's
22 lowest percentage when CDTFA was not present is
23 31 percent. It's a difference of about 13 percent.

24 Is there an explanation for why the mimic test
25 where CDTFA was not present are significantly higher than

1 when CDTFA was present?

2 MR. BARRAGAN: The -- I believe I answered that
3 already, but all I can tell you is the test conducted by
4 the staff are -- there's evidence indicating that the fuel
5 was overstated during the mimic runs, at least for two of
6 the test that were conducted that I'm asking you -- are to
7 be removed. And even the other test that they conducted,
8 if you read the details on how they were conducted, they
9 were instances where the staff deviated from the
10 protocols.

11 There were instances where the -- the mimic run
12 really wasn't mimicked. So all I can say to you is that,
13 although, I wasn't there, it appears that from actual
14 evidence and my mpg differential analysis, that the fuel
15 consumed during the mimic rate -- I mean, the mimic run
16 conducted by staff was overstated.

17 JUDGE LONG: Thank you. And then to follow up
18 and clarify, you are asking for the 11 percent test to be
19 removed. Can you point to where in the exhibits the CDTFA
20 auditor deviated on the remaining test?

21 MR. BARRAGAN: I would have to refer back to the
22 test that are in the -- the documents that are in
23 Mr. Smith's exhibits. I can go one by one. It would be a
24 very time-consuming process. I'm sure you have access to
25 those exhibits. So you can -- you can see and -- you can

1 read and see that there are some tests that indicate
2 deviations and also the -- an overstatement of fuel during
3 the mimic runs.

4 I only have 45 minutes, and they're gonna get
5 eaten up real fast. So if you want me to I could, but you
6 have access to that information.

7 JUDGE LONG: Okay. Thank you very much. I have
8 no further questions.

9 JUDGE ALDRICH: I believe Judge Stanley had a
10 follow-up question for you.

11 JUDGE STANLEY: Yes, thank you. This is
12 Judge Stanley speaking.

13 MR. BARRAGAN: Yes.

14 JUDGE STANLEY: Mr. Barragan, when you did your
15 test that were not observed by CDTFA, did you use the same
16 protocols that they did, such as having a half load of
17 rock for the test.

18 MR. BARRAGAN: Yes. Yes. Let me -- let me say
19 this. That by the very nature of the tests, the mimic
20 test are subject to testing error. We have two tests that
21 have documentary evidence that the fuel was overstated
22 during the pre-rock load loop. That's even the staff
23 admits to that. Now, during my tests, was there a
24 possibility for testing errors? I would have to admit
25 there was. To what extent, difficult to determine.

1 diesel fuel, and the trucks are fueled from a 6,000-gallon
2 tank located on Appellant's business site. Appellant
3 contends that he's entitled to a refund pursuant to
4 subdivision (a) (4) (a) of Revenue and Taxation Code
5 Section 60501. Because the tax paid diesel fuel was used
6 for purposes other than operation motor vehicles upon the
7 public highway of the state. Specifically, the tax-paid
8 diesel fuel was consumed in off-highway driving and idling
9 in the operation of power take off or PTO of equipment.

10 To evaluate fuel consumption rates, Appellant and
11 the Department conducted a series of 10 tests between
12 January 3rd, 2014, and June 5th, 2014. These tests were
13 designed to create or mimic Appellant's actual trucking
14 operations. Generally, a mimic test or a mimic run is
15 performed a day after an actual run. It's done by the
16 same driver and truck, at or around, the same time of day
17 in order to capture similar road conditions with the mimic
18 run avoiding nontaxable activities; such as running PTO
19 equipment or driving off-highway.

20 The difference between the fuel consumed during
21 the original test route and the fuel consumed during the
22 mimic run represents the fuel consumed by use of PTO
23 equipment or off-highway operations. The data generated
24 is used to determine the allowable percentage of diesel
25 fuel consumed during nontaxable use. To calculate the

1 applicable percentage of nontaxable use for PTO equipment,
2 the Department examined the data from 8 of the 10 mimic
3 tests.

4 The Department removed the PTO fuel consumption
5 tests results provided in north side site of Metro plant,
6 which was 93.62 percent, and the Horse Main Avenue, which
7 was 3.49 percent as unrepresentative outliers. The
8 Department then calculated the difference between gallons
9 consumed on the actual delivery run and the gallons
10 consumed on the mimic runs to determine the gallons
11 consumed operating PTO equipment.

12 By dividing the gallons consumed operating the
13 PTO equipment by the gallons consumed during the actual
14 run, the Department determined that PTO field consumption
15 rate of 21.39 percent. After factoring in Appellant's
16 distance segment percentages, the Department established a
17 weighted average fuel consumption rate of 23.79 percent
18 for cement mixers operating PTO equipment.

19 Using data gathered during the PTO field
20 consumption tests, the Department determined the number of
21 miles cement mixers traveled off-highway during the mimic
22 runs estimated an average of 3.3 miles per gallon were
23 consumed during off-highway driving and idling. By
24 dividing the number of combined off-highway miles by 3.3
25 miles per gallon, the Department determined 3.24 gallons

1 were consumed in off-highway operations, which led to a
2 fuel consumption rate of 4.42 percent.

3 After factoring Appellant's distance segment
4 percentages, the Department established a weighted average
5 fuel consumption rate of 4.39 percent for cement mixers
6 engaged in off-highway operations. To calculate the
7 allowable percentage for power trucks, the Department
8 relied on data provided by Appellant with his October 1st,
9 2013, test proposal to show that power trucks consumed a
10 total 380 gallons in tax-paid diesel fuel during the test
11 period, with total off-highway miles of 40.5 and an
12 average mile per gallon of 3.8.

13 Dividing total off-highway miles by 3.8 miles per
14 gallon results in total fuel consumption of 10.66 gallons
15 off-highway and in an off-highway fuel consumption rate
16 for power trucks 2.8 percent. To calculate the total
17 amount of the refund, the Department then multiplied the
18 allowable nontaxable fuel consumption for each vehicle
19 type by the total gallons allocated according to vehicle
20 type. This resulted in total PTO gallons of 133,247, and
21 total off-highway gallons of 37,007 for total allowable
22 gallons consumed and nontaxable use of 170,360.

23 The Department then multiplied the total gallons
24 allowed by the applicable quarterly diesel tax rate and
25 recalculated an allowable refund of \$24,063.56. As

1 relevant to this appeal, Revenue and Taxation Code
2 Subdivision 60501(a)(4)(a) and Regulation 1432 provide for
3 a refund of a tax to those who have paid it -- to those
4 who have paid it.

5 The diesel fuel was used for purposes other than
6 operating power vehicles upon the public highway of the
7 state. In June of 2016, the Board revised Regulation of
8 1432 to simplify the refund process for claim of
9 nontaxable use of diesel fuel; providing combined safe
10 harbor percentages, the operation of auxiliary permit,
11 which includes PTO equipment in off-highway use. But the
12 changes in the regulation only applied to transactions
13 occurring on and after April 1st, 2016.

14 Here Appellant and the Department agreed to use
15 the results from 10 PTO fuel consumption tests to
16 calculate nontaxable fuel consumption for each type of
17 vehicle. Both Appellant and the Department relied upon
18 the results from those tests to reach a respective fuel
19 consumption rate percentage. At issue here are the tests
20 used to calculate an allowable refund.

21 To determine the allowable percentage of PTO fuel
22 consumption, the Department reasonably relied on data
23 generated out 8 of 10 of the tests. And, again, we
24 excluded two of the tests as outliers. And these tests
25 were all designed by Appellant. The result of these 8

1 tests establish the basis for the Department's calculated
2 PTO fuel consumption percentage of 23.79 percent.

3 In addition, the Department relied on the data
4 derived from the 8 Appellant-designed PTO fuel consumption
5 test and compute an off-highway fuel consumption
6 percentage for cement mixers of 4.39 percent. When this
7 rate is combined with the fuel consumption rate for PTO
8 equipment of 23.79 percent and resulted in nontaxable fuel
9 consumption rate of cement mixers of 28.18 percent. This
10 number exceeds the current safe harbor percentage of 25
11 percent for cement mixers further supporting the accuracy
12 and reasonableness of the Department's speculation.

13 Regarding the consumption of tax-paid fuel by
14 power trucks in nontaxable operations, the Department
15 reasonably relied on data provided by Appellant to
16 determine an off-highway fuel consumption rate of power
17 trucks of 2.8 percent. Appellant provided no further
18 information that would allow the Department to change the
19 allowable percentages.

20 Moving on to the question that were posed, the
21 seven questions. The first is what authority, if any,
22 exist for the retroactive application of 1432. Again, no
23 authority exist for the retroactive application of 1432.
24 The expressed terms of the regulation state that it is
25 only applicable for periods on or after April 1st, 2016.

1 You then asked for an explanation between the
2 lowest amount, which I think is -- it said 17.99, but I
3 think it's a little bit lower than that. It's around 17
4 percent where there's nowhere the CDTFA employee was
5 present and then the 31.46 for where we were present. In
6 that one we, you know, we are unclear about what caused
7 the difference. However, we used both those test
8 percentages in driving a nontaxable fuel consumption rate.
9 So, again, we don't know what the reason is, but both
10 those numbers were used when we provide -- when we
11 determined our number.

12 You next asked in this computation of the
13 percentage of off-highway use for the cement trucks, why
14 was data from the mimic test used rather than data from
15 actual deliveries? The data from actual deliveries showed
16 an off-highway percentage of 1.77 percent. And this was
17 based on data from 297 trips. So it's likely that this is
18 a more accurate representation. However, the Department
19 decided to allow the use of a higher 4.39 percent amount
20 from the mimic runs in an effort to resolve this matter.

21 You then asked is there and objective reason why
22 the data from the mimic test is more reliable to show
23 off-highway use than data from actual deliveries? Again,
24 as I stated in the previous question, the data from the
25 mimic runs regarding off-highway use is likely less

1 reliable than data from the actual deliveries. Well, we
2 use data from the mimic runs any ways.

3 You asked how was it determined that 3.3 miles
4 per gallon was sufficiently low to incorporate idling?
5 Again, that 3.3 miles per gallon came from Mr. Barragan,
6 and the Department accepted the number. You next asked
7 what does CDTFA consider to be the average miles per
8 gallon for cement trucks when driving off-highway, not
9 idling. The Department did not make this calculation. We
10 don't separate out off-highway idling and driving use.

11 And then you asked how was these additional fuels
12 consumed during idling established? Again, we did not
13 make that calculation. There's not really any feasible
14 way for us to isolate the time spent on power take-off
15 equipment versus driving versus idling. Those are all
16 kind of -- it's difficult to embellish that. So we did
17 not mistake that calculation.

18 This concludes my presentation. Thank you.

19 JUDGE ALDRICH: Thank you, Department.

20 I'm going to refer to my fellow panelists.

21 Judge Long, do you have any questions for the Department?

22 JUDGE LONG: I have no questions. Thank you.

23 JUDGE ALDRICH: And Judge Stanley, do you have
24 any questions for the Department?

25 JUDGE STANLEY: This is Judge Stanley. I just

1 have one. Mr. Smith, I'm a little bit confused about how
2 you were combining off-highway miles versus off-highway
3 and including off-highway idling time in there because one
4 is a distance measure and one is going to be a time
5 measure. So how do you combine the two items together?
6 Can you explain?

7 MR. KEVIN SMITH: The off-highway use we just
8 determined how many miles of travel off-highway. We don't
9 try to separate out the idling from the driving. We
10 just -- you just use that number of miles that are driven
11 off-highway. I don't know if that makes sense.

12 JUDGE STANLEY: This is Judge Stanley. It
13 doesn't really make sense. I'll answer your question like
14 that back to me because it seems to me in the data it
15 showed that there was significant amount of idling time
16 for the cement mixers waiting to go to other job sites and
17 idling while they're at a job site but not pouring.

18 So they were -- it seems like it could be a
19 significant number if you measure it by time spent. If
20 you're not traveling a mile on this road but your sitting
21 at a job site for 15 minutes, you're still using gas. So
22 you're just saying that the CDTFA just used the -- I'm
23 sorry. I'm going to stop for a second.

24 Mr. Barragan, I think I'm getting feedback from
25 your speaker. Do you have a mute button?

1 MR. BARRAGAN: Oh, I'm sorry. How do I mute it?

2 JUDGE STANLEY: I think you can --

3 MR. BARRAGAN: Hit the little icon?

4 JUDGE STANLEY: Yes.

5 MR. BARRAGAN: Okay.

6 JUDGE STANLEY: Then remember to click it again
7 when you need to talk again.

8 Okay. So what you're saying, Mr. Smith, the
9 bottom line is that wasn't accounted for. It was just
10 based purely on the number of miles, not on how many
11 minutes the trucks were sitting around, right?

12 JUDGE ALDRICH: You're muted Mr. Smith.

13 MR. KEVIN SMITH: Oh, sorry. I could have
14 Mr. Armitage address this further, if that's okay with
15 you.

16 JUDGE ALDRICH: Yes. Mr. Armitage, please
17 unmute.

18 MR. ARMITAGE: Sorry about that. Damian Armitage
19 for the Department. So one of the ways that we accounted
20 for the idling was that the -- the mpg that we used was
21 sufficiently low to account for idling. Normally, you
22 wouldn't get that low of a miles per gallon without
23 idling.

24 And also in terms of the test, the drum is still
25 turning. So you can't turn the drum off to isolate the

1 idle time from the -- from PTO time or the time that the
2 PTO is turning, if that makes sense. So we didn't -- the
3 different activities were not isolated to enable us to
4 isolate the different percentages. Okay.

5 JUDGE STANLEY: This is Judge Stanley. I believe
6 I do understand your reasoning at this point. So I'm
7 not -- I don't have any other questions at this time.

8 JUDGE ALDRICH: Okay. Appellant's
9 representative, would you like to make a final statement
10 or a rebuttal to the Department? If you could unmute. I
11 can't hear you.

12 MR. BARRAGAN: Okay. There we go. May I ask
13 Mr. Smith one question? Hello?

14 JUDGE ALDRICH: Sorry. Mr. Smith, isn't
15 testifying. He's just providing argument.

16 MR. BARRAGAN: May I ask Mr. Armitage a question?

17 JUDGE ALDRICH: The Department isn't providing
18 any testimony. They're providing argument. So it would
19 be inappropriate to pose the question directly to the
20 Department.

21 MR. BARRAGAN: So the statements that were made
22 here by Mr. Armitage and Mr. Smith, they're going to be
23 accepted at face value without any counter argument?

24 JUDGE ALDRICH: So they are accepted as argument
25 as opposed to testimony, which is the evidence.

1 MR. BARRAGAN: Got it. So it's still going to be
2 vetted with facts?

3 JUDGE ALDRICH: Correct.

4 MR. BARRAGAN: Okay.

5 JUDGE ALDRICH: I believe it's in the record.

6 MR. BARRAGAN: Fair enough. Yes, I want to go
7 ahead and move onto my closing statement.

8 JUDGE ALDRICH: Okay. Please proceed when you're
9 ready.

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CLOSING STATEMENT

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MR. BARRAGAN: Okay. With respect to cement mixers, staff failed to remove a faulty test it conducted yielding an 11.11 percent PTO rate under the computation of an overall weighted PTO rate yielding a faulty and illogical low 23.79 rate. This rate is illogical when compared to PTO rates allowed by other states topping a 39 percent rate and a 30.20 percent rate established by a scientifically-based study conducted by Internal Revenue Service.

Removing this test from the computation will yield a 31.95 percent rate that is comparable to the rates allowed by other governmental agencies and consistent with the Appellant's nature of operations. As used, estimated travel and mpg data computed to combine off-highway travel

1 and idling exempt use rate of 4.39 for cement mixers.

2 Conversely, I use actual miles traveled as
3 documented by both parties during actual test deliveries
4 and an actual mpg rated to compute eight separate
5 off-highway travel rate of 3.98 percent. I also used
6 actual data collected and recorded by staff during the six
7 fuel tests they conducted in a 0.82 hourly idling
8 consumption rate determined by a test conducted by staff
9 to compute a separate 4.80 percent off-highway idling fuel
10 use rate.

11 Appellant hasn't met the preponderance of
12 evidence level of proof in supporting the user rates in
13 question. In contrast, the staff has failed to support
14 the combined 4.39 rate, the recommended with empirical
15 verifiable data, and/or logical reasoning. With respect
16 to bottom dump and cement power units, Appellant chose not
17 to conduct a study to develop a test method to determine
18 off-highway idling and PTO fuel consumption rates for
19 these units due to the excessive high cost and time
20 involved.

21 Instead of the inequitable 1.78 percent and
22 2.8 percent rates reflecting only off-highway travel used
23 for bottom dumps and cement power units respectively,
24 Appellant request that the combined safe harbor 15 percent
25 rate allowed by Regulation 1432, effective May 1st, 2016,

1 be retroactively applied. The nature of operations did
2 not change pre and post this regulatory change.

3 Honoring this request would be consistent with
4 the Appellant's right to be treated fairly and uniformly
5 under the Taxpayer Bill of Rights in CDTFA's mission
6 statement. In addition, this action if taken, is no
7 different than the BOE administratively using a 22 percent
8 PTO rate for cement mixers with no legal authority or
9 fact-based justification during the period July 1, 1995,
10 to March 31, 2006.

11 Motion to consolidate cases. As discussed in
12 Exhibit 3, Appellant has the second case, Number 1058613,
13 covering the period October 1, 2013 to March 31, 2016, on
14 which an appeals conference was held on May 22, 2019. The
15 minutes and orders of prehearing conference dated
16 August 5th, 2020, as a consolidation request was denied on
17 the basis that a decision and recommendation had not been
18 issued. I file motions that this panel deliberate this
19 issue, exercise its administrative discretion and grant
20 the motion for the following reasons:

21 Number one, ignoring Appellant's request for a
22 timely --

23 JUDGE ALDRICH: Excuse me. I'm going to
24 interject right now. So we already decided the issue of a
25 consolidation as indicated in that minutes and order. So

1 if you could move on to the rest of your rebuttal.

2 MR. BARRAGAN: The -- we -- is that the panel as
3 a whole? I thought you had made that decision.

4 JUDGE ALDRICH: I made that decision, but it
5 stands.

6 MR. BARRAGAN: You know, I don't -- this is my
7 first hearing. I don't know all the rules and regs, but
8 it sound to me that this is such an important issue that
9 the whole panel should deliberate.

10 JUDGE ALDRICH: Well, at the beginning of the
11 hearing we established what the issues were. You agreed
12 with the issues stated; the Department agreed with the
13 issues stated; and we're not going to debate whether or
14 not the consolidation is at issue. It was already
15 addressed.

16 MR. BARRAGAN: I'm not debating. I just want the
17 opportunity to submit my request and the reasons for my
18 request, and have the whole panel deliberate. That is --
19 that is the intent of the OTA, isn't it, to have the whole
20 panel as a panel intake the information, deliberate, and
21 decide. I mean, am I out of bounds here?

22 JUDGE ALDRICH: No. It's just outside the scope
23 that we agreed to in the issue statement.

24 MR. BARRAGAN: Well, you know, if you read
25 everything about what the OTA does, it doesn't say that

1 you as an individual have the right to independently of
2 the panel make decisions for the panel. I didn't see it
3 anywhere.

4 JUDGE ALDRICH: As I mentioned in those minutes
5 and orders, we don't have jurisdiction to hear the other
6 case.

7 MR. BARRAGAN: Well, I want to make my case for
8 a -- for a, you know, a deviation, an administrative
9 discretion deviation. I mean, it's not going to hurt for
10 me to read two or three more items, I don't think.

11 JUDGE ALDRICH: I'm going to give you a little
12 bit of leeway but keep it short, okay.

13 MR. BARRAGAN: I appreciate it.

14 This delay is the direct cost of the
15 consolidation request denial that states in part, quote,
16 "CDTFA objected to the consolidation since the case has
17 not finished the appeals process. The Appellant should
18 not be allowed to be unfairly the victim of CDTFA's
19 failure to inexplicably issue a timely decision and
20 recommendation.

21 The other three are short. The issues in
22 question are exactly the same in both cases. Number 3,
23 it's very unlikely that the Appeals Bureau will issue a
24 D&R inconsistent with the OTA's decision.

25 And lastly, Number 4, I think the most important

1 one is that the time and resources that will be spent by
2 both side to schedule an OTA hearing will be a total waste
3 of time and unnecessarily further the delay the
4 Appellant's access to funds it is eagerly entitled to.
5 Justice delayed is justice denied. Sorry for my
6 quirkiness, but that is the case.

7 I mean, this case has been going on for years.
8 This company has gone into bankruptcy. So, you know, this
9 delay, delay, delay it -- it just, you know, like I said,
10 it's just justice denied. I have a motion to enter
11 documents into the official record. Appellant hereby
12 motions that a copy of the opening statement, closing
13 statement, and Appellant's response to other matters,
14 along with related exhibits be entered into the official
15 hearing record; Appellant's response to the other matters,
16 document and contains responses to a list of questions
17 posed by Mr. Aldrich in his hearing orders dated,
18 August 18, 2020.

19 Lastly, throughout my 29-year career with the
20 Board of Equalization, I truly believe in and implemented
21 the Board of Equalization's mission statement to treat the
22 taxpayer in a fair, firm, and uniform matter. So far, the
23 Appellant has only experienced the firm part of the
24 mission at all levels of the administrative appeals
25 process. I am hopeful that this panel will do otherwise

1 in rendering a well-thought out fair and equitable
2 decision.

3 Thank you for your time.

4 JUDGE ALDRICH: Thank you. We have your evidence
5 and argument in the record. Is there anything else you
6 would like to tell us before I submit the case?

7 MR. BARRAGAN: There's so many things. Other
8 than it's very, very important, is that if I understood
9 Mr. Smith's argument, he compared a 28 percent that
10 they're allowing for off-highway and PTO rate for cement
11 mixers to the 25 percent that the harbor rate allows. As
12 I indicated and there's evidence, there is nothing that
13 supports that 25 percent, number one. There's nothing
14 that supports the idea that it's a combined rate of
15 off-highway use as well as PTO rate. So that comparison
16 is mute.

17 JUDGE ALDRICH: Okay.

18 MR. BARRAGAN: I think that's the one that really
19 caught my attention. There's a few more but, you know,
20 we're probably pressed for time.

21 JUDGE ALDRICH: One moment.

22 MR. BARRAGAN: Thank you. Did you want to say
23 anything? I'm done.

24 JUDGE ALDRICH: Okay. Thank you both for your
25 time, the Department and the Appellant and for being

1 flexible with the hearing format. We're ready to submit
2 the case. The record is now closed. The judges will meet
3 and decide the case based on the evidence and the
4 arguments presented today. We will aim to send both
5 parties our written decision no later than 100 days from
6 today.

7 The hearing calendar is now in recess. Thank
8 you.

9 (Proceedings adjourned at 2:19 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 30th day of September, 2020.

ERNALYN M. ALONZO
HEARING REPORTER