

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
THE APPLICATION OF YUCCA
GROWTH INFRASTRUCTURE
LLC FOR AN AIR QUALITY PERMIT,
NO. NSR 10883**

No. AQB 26-57 (P)

**MAXWELL’S LIMITED MOTION TO STRIKE OR DISREGARD
UNAUTHORIZED ADDITIONAL BRIEFING FROM
APPLICANT’S AUGUST 7, 2026 CONSOLIDATED RESPONSE**

Mr. Maxwell respectfully moves pursuant to 20.1.4.100(E)(2) and 20.1.4.200(D) NMAC to strike, or alternatively disregard, the portions of Applicant Yucca Growth Infrastructure, LLC’s August 7, 2026 Applicant’s Consolidated Response in Opposition to Nicholas Maxwell, NEE and CBD’s Requests for Discovery (“August 7 Response”) that constitute an additional response to discovery requests of New Energy Economy (“NEE”) and the Center for Biological Diversity and New Mexico Environmental Law Center (“CBD/NMELC”) after Applicant had already responded to those requests on July 31 and the moving parties thereafter filed papers in support of their requests.

This Motion is filed contemporaneously with Maxwell’s Reply in Support of his August 3, 2026 Motion for Expedited Prehearing Disclosure, Production of Identified Administrative-Record Materials, Targeted Admissions, and, in the Alternative, Limited Discovery (“Maxwell Motion” or “August 3 Motion”). Applicant expressly states that Sections II through IV of its August 7 Response address Maxwell, Section V addresses NEE, and Section VI addresses CBD. *Applicant Aug. 7 Resp.* at 2. Maxwell’s Reply therefore addresses the arguments properly directed to his Motion and does not attempt to answer the merits of Sections V and VI or other arguments directed only to another party’s discovery requests.

This Motion is narrow. Maxwell does not challenge Applicant's right to respond to his August 3 Motion. Nor does Maxwell seek to strike an otherwise proper argument merely because Applicant uses collective terminology or refers to the total workload allegedly created by multiple parties' requests. Some passages in the August 7 Response are mixed: they are part of Applicant's authorized first response to Maxwell but also speak collectively about NEE and CBD/NMELC, whose requests Applicant had already opposed on July 31. Those passages need not be literally excised if the Hearing Officer confines them to their proper function. Other portions are severable and expressly directed only to NEE or CBD/NMELC.

The distinction matters to Maxwell because Applicant consolidated materially different requests, repeatedly uses "Objectors," "Requests," and other collective formulations, incorporates its July 31 response, and concludes by asking that all "Requests" be denied for "all of the reasons cited here and in Applicant['s] prior Response." *Applicant Aug. 7 Resp.* at 19. Yet Applicant acknowledges that Maxwell's Exhibit A "disclaims most" of the broad subjects attributed to NEE and CBD/NMELC. *Id.* at 2. Without an order separating the filings, arguments concerning matters Maxwell did not request can become part of the stated basis for denying his narrower Motion, or Maxwell can be put in the position of answering in his own Reply material directed to other parties' materially different requests.

Maxwell seeks the relief necessary to preserve the Part 4 briefing sequence and to ensure that Applicant's consolidated filing is not used to import another party's discovery requests, factual premises, authorities, or alleged burdens into adjudication of Maxwell's separate Motion.

I. PART 4 DOES NOT PROVIDE AN ADDITIONAL RESPONSE AFTER THE MOVING PARTY'S REPLY.

Under 20.1.4.200(D)(4) NMAC, a non-moving party served with an opposed motion may file a response. Section 20.1.4.200(D)(5) then provides that "[t]he moving party may, but is not

required to, submit a reply to a non-moving party's response within ten (10) days after service of the response." Part 4 does not provide another response as of right after the moving party's reply.

Ordinary civil motion practice, which may guide the Hearing Officer under 20.1.4.100(A) NMAC, follows the same sequence. Rule 1-007.1(D), (F), and (H) NMRA provides for a response, reply, and completion of briefing. Federal practice in the District of New Mexico states expressly that "[t]he filing of a surreply requires leave of the Court." D.N.M.LR-Civ. 7.4(b). In *Rowley v. Morant*, No. 10CV1182 WJ/GBW, *Memorandum Opinion and Order* at 3 (D.N.M. June 27, 2014), the court treated a proposed supplemental response to allegedly new reply material as a request for leave to file a surreply; while that request was pending, a supplement filed on the party's own initiative without leave was struck.

Thus, genuinely new matter in a reply may support a request for leave to file a limited surreply; it does not itself create another briefing right. A motion or request for leave would itself permit the orderly consideration of whether additional briefing is warranted and, if so, its scope. Likewise, retroactive leave, treatment of an unauthorized filing as an implicit request for leave, or another procedural alternative permitting its consideration should not be granted without first affording the parties an opportunity to brief whether such relief is warranted and its proper scope. If additional merits briefing is ultimately permitted, it should remain confined to the particular motion practice and genuinely new matter for which leave is granted.

Applicant did not request leave before filing the challenged material.

II. APPLICANT'S AUGUST 7 RESPONSE EXPRESSLY TAKES A SECOND RESPONSIVE TURN ON THE OTHER DISCOVERY REQUESTS.

A. Applicant had already responded to NEE's and CBD/NMELC's discovery requests.

Applicant had already filed *Applicant Yucca Growth Infrastructure, LLC's Response to Requests for Hearing Officer to Order Discovery* on July 31, 2026. That filing expressly responded to NMELC/CBD's Request and NEE's First and Second Requests and asked the Hearing Officer not to order Applicant to answer them. *Applicant July 31 Resp.* at 1.

The moving parties thereafter filed papers supporting their discovery requests. Applicant's August 7 filing then expressly returns to those same matters while also responding for the first time to Maxwell's separate August 3 Motion.

B. Applicant's August 7 Response expressly separates Maxwell's Motion from its additional responses to NEE and CBD/NMELC.

Applicant itself identifies the compartments:

“Applicant addresses Mr. Maxwell's Requests in Sections II, III and IV below. Section V addresses NEE's Requests, and Section VI briefly addresses CBD's Requests.”

Applicant Aug. 7 Resp. at 2.

Section V, entitled “NEE's Requests do not Meet the Criteria for Limited Discovery,” presents additional legal and factual argument against NEE's requests concerning 20.2.72.208(G) NMAC, project approvals, pipeline availability, manufacturing and supply-chain information, burden, and asserted alternative sources of information. *Id.* at 12–17.

Section VI is still more explicit:

“On August 5, 2026, NMELC and CBD for the first time offered their rationale for 29 Interrogatories and 24 Requests for Production on Applicant. As such, Applicant briefly responds to NMELC and CBD.”

Id. at 17.

Applicant then supplies additional factual and legal argument concerning those requests, including assertions concerning water and wastewater, fuel-cell components, manufacturing

capacity, individual interrogatories and requests for production, and a separate SEC filing offered in support of Applicant's position. *Id.* at 17–19.

Applicant's contention that a moving party supplied rationale "for the first time" could have supported a request for leave to file a limited surreply. It did not authorize an additional responsive filing as of right. The same is true of any contention that NEE's paper raised new matter after Applicant's July 31 response. Applicant could have asked the Hearing Officer to permit a confined additional response; it did not do so before filing the challenged material.

C. A claim of new reply material requires identification of what was actually new.

In *Rowley*, the court considered a request for leave to file a surreply based on an assertion that the opposing reply contained new material. The court required the proponent to identify the particular new evidence or argument allegedly raised for the first time. Where the proposed surreply merely reargued the merits without identifying what was new, the court found no basis for the additional filing; where an assertedly new point had already been prominently raised in the earlier motion, the court likewise rejected the claim of novelty. *Rowley v. Morant*, No. 10CV1182 WJ/GBW, *Memorandum Opinion and Order* at 4–7 (D.N.M. June 27, 2014).

The relevant inquiry is therefore not simply whether a party wishes to answer a reply, but what specific material was newly raised and what additional response is necessary to address it.

This distinction is also consistent with the ordinary rule that a reply does not become "new material" merely because it responds to, develops, or points out defects in arguments already placed at issue. See *Green v. New Mexico*, 420 F.3d 1189, 1196–97 (10th Cir. 2005). A claim of genuinely new material requires identification sufficient for the adjudicator to distinguish a permissible reply from a new issue and to confine any surreply accordingly.

D. Applicant does not make that particularized showing as to either CBD/NMELC or NEE.

Applicant's treatment of CBD/NMELC makes only a generalized assertion of novelty. Section VI states that CBD/NMELC "for the first time offered their rationale for 29 Interrogatories and 24 Requests for Production," but does not identify with particularity which argument or evidence was newly raised, where it appeared in the August 5 filing, which particular requests previously lacked that rationale, or which portions of Applicant's ensuing response were necessary to answer the allegedly new matter. *Applicant Aug. 7 Resp.* at 17–19.

Instead, Section VI proceeds broadly through water and wastewater, public sources, fuel-cell components, manufacturing capacity, 20.2.72.208(G) NMAC, numerous individual discovery requests, technical testimony, and a separate SEC filing.

Applicant's treatment of NEE is less specific still. Section V refers to NEE's "Response in support" and answers NEE's arguments at length, including its emphasis on pipeline availability and the denial of a State Land authorization, but does not identify any particular evidence or legal argument as having been raised for the first time in that reply-stage filing. *Id.* At 12–17. Section V instead presents additional substantive opposition concerning 20.2.72.208(G) NMAC, major- and minor-source regulation, project-development timing, pipeline availability, manufacturing capacity, risk assessments, supply chains, other proceedings, alternative information sources, and burden.

E. The Hearing Officer need not determine independently whether unspecified new material existed.

Maxwell does not ask the Hearing Officer on this Motion to decide whether NEE's or CBD/NMELC's reply-stage filings in fact contained new material. The Hearing Officer likewise need not independently search the prior filings for unspecified new matter. *See Locke v. Grady Cnty.*, 437 F. App'x 626, 633–34 (10th Cir. 2011) (affirming denial of a surreply where the

proponent made little effort to identify which evidence and arguments were new), cited in *Rowley, Mem. Op. & Order* at 7.

The narrower procedural point is sufficient: Applicant neither sought prior leave nor supplied the particularized identification that would allow the Hearing Officer to determine whether additional briefing was justified and, if so, what its proper scope should be. If Applicant believes particular portions of those filings genuinely introduced new evidence or legal argument requiring an answer, that contention may be presented in a request for leave identifying the allegedly new material and the corresponding portion of the additional response. It does not establish an unrestricted additional briefing turn as of right.

Applicant could have asked the Hearing Officer to permit a confined additional response and made that showing before filing. It did not do so.

III. FROM THE TITLE THROUGH THE CONCLUSION, THE PORTIONS REQUIRING STRIKE, DISREGARD, OR LIMITING CONSTRUCTION ARE IDENTIFIED BELOW.

Maxwell does not ask the Hearing Officer to strike Applicant's August 7 Response wholesale. The response contains Applicant's authorized first opposition to Maxwell's August 3 Motion, and those Maxwell-directed arguments remain for decision. To avoid ambiguity created by the consolidated filing, Maxwell identifies below, in the order they appear from the title through the end of the substantive filing, every passage requiring either (1) strike or disregard because it is severable additional briefing directed only to NEE or CBD/NMELC, or (2) a limiting construction because it is a mixed collective passage that also forms part of Applicant's response to Maxwell.

A. Title, page 1.

The title is:

“APPLICANT’S CONSOLIDATED RESPONSE IN OPPOSITION TO NICHOLAS MAXWELL, NEE AND CBD’S REQUESTS FOR DISCOVERY.”

Applicant Aug. 7 Resp. at 1.

Maxwell does not request that the title itself be stricken. It is identified because it confirms that Applicant combined separate motion practices into one filing. The title should not be construed as merging the scope, factual premises, authorities, burdens, or decisional grounds applicable to the separate discovery requests.

B. Introduction, page 1 — opening collective paragraph.

The opening paragraph begins:

“Nicholas Maxwell, New Energy Economy (‘NEE’) and Center for Biological Diversity, Jose Saldaña Jr. and Vivian Fuller (‘CBD’ and collectively ‘Objectors’) served over one hundred and sixty discovery requests . . .”

and continues through:

“Significantly, none of the Objectors cite to any legal authority allowing discovery in this type of air permit proceeding, or any prior instance where discovery was allowed in a similar proceeding.”

Id. at 1.

This paragraph is mixed. It includes Applicant’s first response to Maxwell but simultaneously treats the separate requestors and approximately 160 requests as a collective unit. Maxwell does not request literal excision of the paragraph. He requests that, when applied to Maxwell, the paragraph be confined to Maxwell’s own Motion, Exhibit A, authorities, and requests, except that Applicant may preserve its separately stated contention that simultaneous requests by multiple parties contribute to aggregate workload. The approximately 160-request total must not be treated as the number or scope of requests served by Maxwell. To the extent the paragraph operates as a renewed merits response to NEE’s or CBD/NMELC’s previously briefed requests, it should be disregarded absent leave.

C. Introduction, page 2 — NEE/CBD-specific relevance passage.

Maxwell requests strike, or alternatively disregard, of the following three sentences in their entirety:

“The documents and information sought by Objectors are far outside this limitation. The Requests served by NEE and CBD seek information regarding topics such as Bloom’s fuel cell manufacturing process, supply chain, water needs, wastewater and separate pipeline proceedings before the New Mexico State Land Commission—none of which bear any connection to the statutory factors governing this proceeding. The Hearing Officer can deny those Requests on that basis alone.”

Id. at 2.

These sentences are severable and concern the requests of NEE and CBD/NMELC. The immediately following sentence expressly distinguishes Maxwell: “Mr. Maxwell’s Exhibit A disclaims most of those subjects, but his Requests are unreasonably burdensome in other ways.”

Id. Maxwell does not seek to strike that Maxwell-specific sentence.

D. Introduction, page 2 — Applicant’s own allocation of the sections.

The sentence stating:

“Applicant addresses Mr. Maxwell’s Requests in Sections II, III and IV below. Section V addresses NEE’s Requests, and Section VI briefly addresses CBD’s Requests.”

Id.

is not challenged. It is identified because it supplies Applicant’s own express basis for severing the motion practices and confirms that Sections V and VI are not Applicant’s response to Maxwell.

E. Introduction, pages 2–3 — collective Administrative Record, testimony, rebuttal, cross-examination, and burden passage.

The paragraph beginning:

“Generally, many of the relevant documents and information sought in the Requests will be provided in the administrative record . . .”

and continuing through:

“None of the Objectors have demonstrated why the incredibly burdensome discovery would not duplicate all of this relevant information (and the entire purpose of the hearing) and unreasonably burden NMED and Applicant.”

Id. at 2–3.

is mixed. Maxwell does not request its wholesale deletion because Applicant relies on the same general theory against Maxwell. As applied to Maxwell, however, “Requests,” “Objectors,” and “incredibly burdensome discovery” must refer only to Maxwell’s own requested relief and the burdens independently attributable to it, except for Applicant’s preserved aggregate-workload contention. The breadth, subject matter, factual premises, and asserted deficiencies of another party’s requests should not be attributed to Maxwell. To the extent this paragraph functions as an additional response to NEE or CBD/NMELC, it should be disregarded absent leave.

F. Introduction, page 3 — concluding collective paragraph.

The paragraph stating:

“Applicant maintains that, in accordance with the Air Act and Part 4 regulations, discovery is not permitted in this type of proceeding. But even if the Hearing Officer believes some limited discovery is appropriate, Objectors’ Requests are unreasonably burdensome and improper, and the Hearing Officer should decline to order Applicant to respond to them.”

Id. at 3.

is also mixed. Applicant may preserve against Maxwell its generally applicable no-authority argument and its contention that Maxwell’s requests are burdensome or improper. The paragraph should not, however, import another party’s scope or alleged burden into adjudication of Maxwell’s Motion, and it should not operate as an additional response to NEE’s or CBD/NMELC’s requests absent leave.

G. Section II, page 3 — incorporation of Applicant’s July 31 response.

Section II begins:

“Applicant incorporates by reference its Response to New Mexico Environmental Law Center (‘NMELC’), CBD, and NEE’s requests for Hearing Officer to Order Discovery filed July 31, 2026, and specifically arguments related to the lack of authority to order discovery in this air permit proceeding.”

Id.

Maxwell does not request strike of Applicant’s generally applicable authority argument. But the July 31 response addressed materially broader requests of NEE and CBD/NMELC. As against Maxwell, the incorporation should be confined to the generally applicable legal and procedural arguments that independently apply to Maxwell’s August 3 Motion. The July 31 response’s discussion of another party’s subject matter, factual premises, breadth, relevance, burden, proportionality, or individual requests should not be incorporated against Maxwell. Nor should this incorporation serve as a vehicle for an additional merits response to the earlier requestors.

The remainder of Section II is directed specifically to Maxwell, including Applicant’s arguments concerning Maxwell’s requests for admission, Sections 20.1.4.100(E)(2) and 20.1.4.300(A)(3) NMAC, and Applicant’s position concerning relief directed to NMED. Maxwell does not seek to strike those Maxwell-specific portions.

H. Section III, pages 5–6 — aggregate request count and footnote 2.

Section III states that Maxwell’s requests are directed to the same responding parties that “could be simultaneously answering over 100 separate Requests served by NEE, NMELC, and CBD.” *Id.* at 5. Footnote 2 then states:

“Collectively, the parties have issued 160 Requests on NMED and Applicant.”

and cites Wright & Miller concerning circumstances in which nominally separate parties may be treated as one party for numerical interrogatory limits. *Id.* at 5 n.2.

Maxwell does not request strike of this material. Applicant may present the number of other parties' requests as part of its contention concerning aggregate simultaneous workload. But the 100- or 160-request totals do not define Maxwell's own scope, breadth, subject matter, relevance, proportionality, or reasonableness, and should not be treated as requests served by Maxwell.

I. Section III, page 6 — collective reference to “Objectors.”

Applicant states:

“There is simply no reason why Objectors can't put on their own technical testimony or use cross-examination time at the hearing if the Hearing Officer deems the questioning relevant and material.”

Id. at 6.

As part of Section III, this sentence is within Applicant's identified response to Maxwell and may remain insofar as Applicant makes that argument independently against Maxwell. It should not be used to attribute another party's procedural position or discovery request to Maxwell and, to the extent it operates as an additional response to NEE or CBD/NMELC, it should be disregarded absent leave.

J. Section III, page 8 — collective statement concerning prior air-permit discovery.

Applicant states:

“None of the parties in this case, including Mr. Maxwell, have pointed to a permitting case where discovery was ordered – indicating that parties are typically able to prepare affirmative cases in air permitting cases without discovery.”

Id. at 8.

Maxwell does not seek strike of Applicant's argument as directed to him; Maxwell addresses that argument in his Reply. But the acts or omissions of another party should not be attributed to Maxwell or used as an independent ground against his Motion. To the extent

Applicant relies on this sentence against Maxwell, it must stand or fall on the record and authorities applicable to Maxwell himself. To the extent it functions as another response to NEE or CBD/NMELC, it should be disregarded absent leave.

K. Section IV heading and opening paragraph, page 9.

Section IV is entitled:

“IV. Objectors have no ‘due process’ right to discovery.”

It begins:

“Objectors have repeatedly relied on ‘due process’ concerns to support their argument that the Hearing Officer should order discovery. But the Due Process Clause does not require the Hearing Officer or the Secretary to provide Objectors and other participants with any right to discovery.”

Id. at 9.

Applicant identified Section IV as part of its response to Maxwell. Maxwell does not seek to prevent Applicant from arguing that constitutional due process does not independently require the relief Maxwell requests. But Maxwell’s August 3 Motion does not assert an unconditional or freestanding constitutional right to discovery. The heading and opening paragraph therefore should not be construed as establishing that Maxwell asserted such a right. Any constitutional argument considered against Maxwell should be confined to Maxwell’s actual Motion and procedural/fairness contentions. To the extent this passage responds anew to constitutional theories asserted only by NEE or CBD/NMELC, it should be disregarded absent leave.

L. Section IV, page 10 — collective protected-interest discussion.

Applicant states:

“Here, Objectors and other participants have no property or liberty interest that results in a constitutional right to discovery.”

Id. at 10.

The ensuing paragraph discusses neighbors and other interested participants generally. *Id.* Maxwell does not request strike of the generally applicable constitutional argument insofar as Applicant directs it to Maxwell. But the passage should not be treated as a second merits response to NEE or CBD/NMELC absent leave, and no distinct constitutional theory of another party should be attributed to Maxwell.

M. Section IV, pages 10–11 — collective access and prejudice passage.

Applicant states:

“This is not such a case. Objectors have had access to the Application since May 2026 and the Draft Permit, Statement of Basis, and Modeling Review Report since July 29, 2026.”

Id. at 10. The passage continues on page 11 by referring to what “They” will receive on August 24 and states:

“No Objector has identified any specific prejudice that would follow from denying these Requests—the showing the Court found determinative in both *Archuleta* and *Dente*.”

Id. at 11.

This passage is mixed. Applicant may argue against Maxwell that the existing schedule and available materials provide adequate process, and Maxwell may answer that contention in his Reply. But Maxwell’s showing of prejudice must be evaluated from Maxwell’s own Motion and record, not from whether another Objector did or did not identify prejudice. The collective formulation should not be used to merge the different requests or to supply an additional response to NEE or CBD/NMELC absent leave.

N. Section IV, page 11 — NEE-specific authorities paragraph.

Maxwell requests strike, or alternatively disregard, of the paragraph beginning:

“Objectors’ own authorities confirm the point. NEE relies on *Public Service Co. of New Mexico v. New Mexico Public Regulation Commission* . . .”

and ending:

“The process those cases describe is precisely the process this proceeding provides.”

Id. at 11.

The paragraph expressly identifies and answers authorities attributed to NEE: *Public Service Co. of New Mexico v. New Mexico Public Regulation Commission*, *Albuquerque Bernalillo County Water Utility Authority v. NMPRC*, *Jones v. New Mexico State Racing Commission*, *Atherton v. Gopin*, and *In re Pamela A.G.* *Id.* Those are not authorities Applicant identifies as having been cited by Maxwell. This paragraph is severable NEE-specific additional briefing and should not be attributed to Maxwell or considered as part of Applicant’s response to Maxwell’s Motion.

O. Section IV, pages 11–12 — collective Mathews analysis.

Applicant states:

“The factors Archuleta drew from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), would weigh decisively against allowing the Requests here.”

Id. at 11. It then characterizes “[t]he discovery sought” as “overbroad and in many instances irrelevant,” and on page 12 states that the proposed discovery would consume time “on collateral subjects.” *Id.* at 11–12.

Applicant may preserve a Mathews argument against Maxwell to the extent it independently applies to Maxwell’s own Motion. But, as applied to Maxwell, the factual premises of that analysis must be Maxwell’s actual requests and asserted prejudice. The breadth, irrelevance, collateral subject matter, or burden of NEE’s or CBD/NMELC’s requests should not be used as the factual premise for denying Maxwell’s materially narrower Motion. To the extent this passage operates as additional merits opposition to NEE or CBD/NMELC, it should be disregarded absent leave.

P. Section V, pages 12–17 — NEE.

Maxwell requests strike, or alternatively disregard, of Section V in its entirety, beginning with the heading:

“V. NEE’s Requests do not Meet the Criteria for Limited Discovery”

on page 12 and continuing through the sentence immediately preceding Section VI on page 17:

“That is not what the Air Act contemplates.”

Id. at 12–17.

The requested strike includes subsections V.A and V.B and all footnotes contained within or supporting Section V, including footnotes 7 through 12 to the extent they are part of or support the Section V argument.

Section V expressly addresses NEE’s requests and supplies additional argument after Applicant’s July 31 response, including arguments concerning 20.2.72.208(G) NMAC, major-versus minor-source regulation, project-development timing, other approvals, pipeline availability, manufacturing capacity, internal risk assessments, supply chains, separate proceedings, project milestones, other agency dockets, State Land Office materials, Bloom-related public information, and the asserted burden and relevance of NEE’s particular requests. *Id.* It is not Applicant’s response to Maxwell.

Q. Section VI, pages 17–19 — CBD/NMELC.

Maxwell requests strike, or alternatively disregard, of Section VI in its entirety, beginning with the heading:

“VI. NMELC and CBD’s Requests Do not Meet the Criteria for Limited Discovery”

on page 17 and continuing through the final sentence immediately preceding Section VII on page 19:

“Ultimately, as with Mr. Maxwell, NMELC and CBD never address why they cannot address purported deficiencies in the administrative record in their own technical testimony or rebuttal testimony (due 10 days after the record is anticipated) and cross examination of technical NMED and Applicant witnesses at the hearing.”

Id. at 17–19.

The requested strike includes footnote 13 and all factual and legal material offered in Section VI concerning water use, wastewater, fuel-cell components, public sources, manufacturing capacity, supply chains, particular CBD interrogatories and requests for production, fuel-cell performance and emissions testing, and the Bloom Energy Form 8-K. *Id.*

The phrase “[u]ltimately, as with Mr. Maxwell” in the final paragraph of Section VI does not convert Section VI into a Maxwell-directed response. Applicant expressly designated Section VI as its response to CBD, and the paragraph’s substantive subject is what “NMELC and CBD” allegedly failed to address. *Id.* at 2, 18–19. If Applicant wishes to make the same technical-testimony/rebuttal/cross-examination argument against Maxwell, it already does so in Sections II and III.

R. Section VII Conclusion, page 19 — collective “Objectors” characterization.

The first sentence of the Conclusion states:

“As NMED noted in its persuasive response to discovery requests that will duplicate its efforts on the administrative record, Objectors are attempting to transform this limited and narrowly focused air permit proceeding subject to strict statutory criteria and timelines into a full-blown civil trial with no limitation on scope and no corresponding deadline for completion.”

Id. at 19.

This sentence is mixed and collectively characterizes all requestors. Maxwell does not request literal excision if the Hearing Officer confines the sentence to its proper scope. As applied to Maxwell, the characterization may rest only on Maxwell’s own Motion and Exhibit A; the breadth, subject matter, or alleged lack of limitation in NEE’s or CBD/NMELC’s requests

should not be attributed to Maxwell. To the extent the sentence functions as another merits response to NEE or CBD/NMELC, it should be disregarded absent leave.

S. Section VII Conclusion, page 19 — incorporation of “all” reasons.

The final substantive sentence states:

“For all of the reasons cited here and in Applicants’ prior Response, Applicant respectfully asks the Hearing Officer to deny the Requests.”

Id.

This incorporation clause is the principal mechanism by which the otherwise separable additional briefing can spill into adjudication of Maxwell’s Motion. As to Maxwell, “all of the reasons cited here” should incorporate only those portions of the August 7 Response that independently and properly apply to Maxwell, and “Applicants’ prior Response” should incorporate only generally applicable legal or procedural arguments that independently apply to Maxwell. It should not incorporate against Maxwell:

- (1) the three NEE/CBD-specific sentences identified in Paragraph C above;
- (2) the NEE-specific authorities paragraph identified in Paragraph N;
- (3) Section V;
- (4) Section VI;
- (5) the particular requests, factual premises, legal theories, authorities, subject matter, breadth, or burden of NEE or CBD/NMELC; or
- (6) any collective passage identified above except to the extent the argument independently applies to Maxwell under the limiting construction requested here.

Likewise, the concluding incorporation should not be used to convert the unauthorized additional briefing into an authorized second response to NEE’s or CBD/NMELC’s requests.

T. Signature block and Certificate of Service, pages 19–20.

The signature block and page 20 Certificate of Service contain no additional merits argument. Maxwell requests no relief concerning them. They are identified only to make clear that the preceding list extends through the end of the August 7 filing and that no substantive passage after the Conclusion has been omitted from this identification.

IV. THE CONSOLIDATED FILING CREATES DIRECT PREJUDICE TO MAXWELL'S SEPARATE MOTION.

Applicant itself separates the matters: Sections II through IV address Maxwell; Section V addresses NEE; and Section VI addresses CBD/NMELC. It also acknowledges that Maxwell's Exhibit A "disclaims most" of the broad subjects attributed to the other requestors. *Applicant Aug. 7 Resp.* at 2. Nevertheless, Applicant repeatedly uses collective terminology and incorporates the entire filing and its July 31 response into a collective request for denial.

That structure creates prejudice to Maxwell independent of the briefing rights of NEE and CBD/NMELC. Arguments concerning pipeline development, manufacturing capacity, supply chains, water, wastewater, broad business information, State Land Office proceedings, and other subjects Maxwell did not request can become part of the stated basis for denying his materially narrower Motion. Maxwell would then have to choose between answering matters outside his Motion in his Reply or leaving unanswered material that Applicant has incorporated into its collective opposition.

The problem is not cured merely because some portions are captioned as separate sections. The Introduction, Section IV, and Conclusion contain collective statements; Section II incorporates the July 31 response; Section III uses other parties' request totals in its burden analysis; and the Conclusion purports to incorporate "all of the reasons cited here and in Applicants' prior Response." *Applicant Aug. 7 Resp.* at 19. That is why the requested order

should identify both the severable material to be struck or disregarded and the proper construction of mixed passages that remain as part of Applicant's response to Maxwell.

V. STRIKING OR DISREGARDING THE ADDITIONAL BRIEFING PRESERVES THE PART 4 SEQUENCE WITHOUT DISTURBING APPLICANT'S RESPONSE TO MAXWELL.

The requested relief leaves intact Applicant's authorized response to Maxwell. Sections II through IV remain available to Applicant to the extent their arguments independently concern Maxwell's Motion, Exhibit A, grounds for relief, or procedural position, subject to the limiting treatment identified in Section III above. Applicant remains free to argue against Maxwell that discovery is unauthorized, that Maxwell's own requests are burdensome, duplicative, cumulative, disproportionate, or reasonably obtainable elsewhere, that technical testimony and cross-examination are sufficient, and that constitutional due process does not independently require the requested relief.

The requested relief also preserves Applicant's aggregate-workload argument. Maxwell does not ask the Hearing Officer to disregard the existence or number of requests served by other parties if Applicant contends that simultaneous obligations bear on actual total workload. He asks only that those requests not be used to define Maxwell's own scope, relevance, proportionality, subject matter, or reasonableness.

What the requested relief removes or confines is the second merits response directed to requestors Applicant had already answered on July 31 and the resulting spillover into Maxwell's separate motion practice. If a responding party could file its response, receive the moving party's reply, and then file another substantive response without leave, the sequence established by Section 200(D)(4)–(5) would cease to provide an endpoint. It would also leave the moving party facing new merits argument after its authorized reply without a corresponding filing contemplated by the rule.

If the Hearing Officer concludes that specific new matter in a reply warranted an additional response, Maxwell alternatively requests that the Hearing Officer first permit briefing on whether leave should be granted, identify the genuinely new matter for which additional briefing is permitted, and confine any permitted additional response to that matter and to the particular motion practice in which it arose.

VI. INTERIM TREATMENT IS WARRANTED WHILE THIS MOTION IS BRIEFED.

Maxwell does not request that any non-moving party be deprived of its response opportunity to this Motion under 20.1.4.200(D)(4) NMAC. This Motion may proceed under the ordinary Part 4 briefing sequence unless the Hearing Officer orders otherwise.

Maxwell's underlying August 3 Motion, however, is already on an expedited briefing schedule and may be reviewed before this Motion to Strike is finally resolved. Final adjudication of the strike issue should not be required before the Hearing Officer can protect Maxwell from the identified spillover.

Accordingly, pending final disposition of this Motion, Maxwell requests that, for purposes of reviewing his August 3 Motion and contemporaneously filed Reply:

- (1) Sections II through IV be treated as Applicant's identified response to Maxwell only to the extent their arguments independently concern Maxwell under the limiting treatment specified in Section III of this Motion;
- (2) the three NEE/CBD-specific sentences in the Introduction, the NEE-specific authorities paragraph in Section IV, Sections V and VI, and the other-party-specific subject matter identified in Section III of this Motion not be relied upon as grounds for denying Maxwell's Motion; and

(3) the Conclusion’s incorporation of “all of the reasons cited here and in Applicants’ prior Response” be confined, as against Maxwell, to arguments properly applicable to Maxwell as specified in Section III of this Motion.

VII. CONCURRENCE.

Pursuant to 20.1.4.200(D)(3) NMAC, on August 7, 2026, Maxwell sought concurrence from the parties and counsel concerning the limited relief contemplated by this Motion.

Applicant opposes the Motion. NMED stated that it takes no position. NEE and Bruce Wetherbee indicated support for Maxwell’s contemplated motion. Mr. Saldaña and Ms. Fuller do not oppose. CBD and Christine Dobbin do not oppose. No concurrence response was received from the remaining parties before filing.

The Motion is therefore opposed.

VIII. CONCLUSION AND PRAYER FOR RELIEF.

Applicant was entitled to respond to Maxwell’s August 3 Motion, and Maxwell has contemporaneously filed his Reply to that response. Applicant had already responded, however, to NEE’s and CBD/NMELC’s discovery requests before using portions of the August 7 filing to respond to those matters again without prior leave. Because the filing combines those additional arguments with Applicant’s response to Maxwell and repeatedly uses collective terminology and incorporation, precise severance and limiting treatment are necessary.

WHEREFORE, Mr. Maxwell respectfully requests that the Hearing Officer:

1. strike, or alternatively disregard, the following severable additional briefing:
 - a. the three sentences in the Introduction on page 2 beginning “The documents and information sought by Objectors are far outside this limitation” and ending “The Hearing Officer can deny those Requests on that basis alone”;

- b. the paragraph in Section IV on page 11 beginning “Objectors’ own authorities confirm the point. NEE relies on” and ending “The process those cases describe is precisely the process this proceeding provides”;
 - c. Section V, pages 12–17, in its entirety, including its subsections and supporting footnotes as specified in Section III.P above; and
 - d. Section VI, pages 17–19, in its entirety, including footnote 13, as specified in Section III.Q above;
- 2. with respect to the mixed collective passages identified in Sections III.B, III.E–III.M, III.O, and III.R–III.S above, decline to use another party’s requests, factual premises, legal theories, authorities, subject matter, breadth, or alleged burden as grounds for adjudicating Maxwell’s separate Motion, while preserving Applicant’s arguments that independently apply to Maxwell and its aggregate-workload contention as specified above;
 - 3. construe Applicant’s Section II incorporation of its July 31 response, as against Maxwell, as limited to generally applicable legal and procedural arguments that independently apply to Maxwell, and not as incorporating the scope, subject matter, factual premises, relevance, burden, proportionality, or particular requests of NEE or CBD/NMELC against Maxwell;
 - 4. construe the final sentence of Applicant’s Conclusion—requesting denial “[f]or all of the reasons cited here and in Applicants’ prior Response”—as against Maxwell to incorporate only arguments independently and properly applicable to Maxwell and not the severable or other-party-specific material identified in Section III of this Motion;

5. alternatively, if literal excision from the docketed filing is unnecessary, enter an order disregarding the severable material and applying the limiting constructions stated above, which would provide equivalent relief;
6. if the Hearing Officer considers retroactive leave, treatment of the challenged material as an implicit request for leave, or another procedural alternative permitting its consideration, first afford the parties an opportunity to brief whether such relief should be granted and its proper scope; and, if additional merits briefing is ultimately permitted, confine it to the particular motion practice and genuinely new matter for which leave is granted, with any corresponding response opportunity afforded within that motion practice;
7. pending final disposition of this Motion, apply the interim treatment stated in Section VI above when reviewing Maxwell's August 3 Motion and contemporaneously filed Reply; and
8. grant such other procedural relief as is necessary for the fair and orderly disposition of the pending motions.

Respectfully submitted,

By -s- Nicholas Maxwell
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of my Limited Motion to Strike or Disregard Unauthorized Additional Briefing from Applicant's August 7, 2026 Consolidated Response was served by email to the Hearing Clerk and all parties of record on August 10, 2026, with a hard copy mailed upon request.

-s- *Nicholas Maxwell*
Mr. Nicholas R. Maxwell