

**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**

AQB 26-57

NO. 10883

**NEW ENERGY ECONOMY’S MOTION TO ORDER DISCOVERY
REQUIRED BY DUE PROCESS**

New Energy Economy (“NEE”) respectfully requests that Hearing Officer, Judge Browning, order Applicant Yucca Growth Infrastructure, LLC (“YGI”) and Bloom Energy, the company whose technology, emissions data, engineering assumptions, manufacturing capabilities, and technical representations form the basis of the proposed source, and the New Mexico Environment Department, to respond to discovery.

This Motion does not contend that every administrative proceeding carries an unrestricted constitutional right to discovery. It presents the narrower and controlling question: where the outcome of an adjudicatory proceeding turns upon highly technical and genuinely disputed facts substantially within the opposing party’s possession, and a party cannot meaningfully prepare its expert case, test those facts, or develop an evidentiary record without discovery, does due process permit the agency to prohibit discovery altogether? New Mexico law answers no.

**I. THE HEARING OFFICER HAS AUTHORITY TO ORDER DISCOVERY
NECESSARY TO ENSURE A FAIR HEARING.**

The governing regulations expressly contemplate procedural flexibility in proceedings of unusual complexity. The Hearing Officer may issue prehearing orders that are not inconsistent with the rules and may adopt “special procedures for managing proceedings involving difficult or complex issues and/or large numbers of parties.” 20.1.4.300(A)(3) NMAC. The Hearing

Officer also has the responsibility to conduct the hearing in a manner that assures that the relevant facts are fully elicited. See 20.1.4.100(E)(2) NMAC.

Project Jupiter presents precisely the circumstance for which that authority exists. This is not a routine permit involving a mature technology deployed at a familiar scale. YGI and Bloom Energy¹ seek authorization for an approximately 2.46-gigawatt methane-fueled solid-oxide-fuel-cell facility unprecedented in size. NEE's expert has identified material technical questions concerning the statistical validity of Applicants' emissions calculations, the representativeness of their source testing, degradation and fleet-wide variability, Bloom Energy's manufacturing capacity and critical-material supply, constrained supply chain, actual fuel-cell performance, the adequacy of the proposed monitoring regime, and the availability of the natural-gas infrastructure necessary to operate the proposed source.

The Hearing Officer need not invent a new procedure to address those issues. Formal, targeted discovery is the conventional and efficient mechanism for requiring the party possessing the relevant technical information to disclose it before the evidentiary hearing.

II. DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO DEVELOP AND TEST THE FACTS, NOT MERELY AN OPPORTUNITY TO APPEAR AT A HEARING.

Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment protect the right to procedural due process. In an administrative adjudication, the fundamental requirements are reasonable notice and an opportunity to be heard and to present a claim or

¹ Yucca Growth Infrastructure, LLC., "YGI Microgrid, Initial NSR Application," at 648 of 648, (hereafter, "YGI Application") 4/22/2026, signed by Marisa Blackshire, Vice President, Environment and Regulatory Law, Bloom Energy, San Jose, CA.

defense “at a meaningful time and in a meaningful manner.” *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regul. Comm’n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24.

That requirement is substantive, not ceremonial. An opportunity to attend a hearing is not meaningful if a party is denied the means reasonably necessary to investigate the opposing party’s technical claims before the hearing begins. Procedural due process is “flexible”. *State ex rel. Battershell v. City of Albuquerque* explains that, in administrative proceedings, due process “is flexible in nature” and requires the procedural protections “the particular situation demands.” 1989-NMCA-045, ¶ 17, 108 N.M. 658. Likewise, *Mills v. N.M. State Board of Psychologist Examiners* holds that procedural-due-process requirements “are not static” and that the hearing required must be determined case by case. 1997-NMSC-028, ¶ 19, 123 N.M. 421. And the New Mexico Supreme Court has long captured the constitutional core: due process is a flexible concept “whose essence is the right to be heard at a meaningful time and in a meaningful manner.” *N.M. Industrial Energy Consumers v. N.M. Public Service Commission*, 1986-NMSC-059, ¶ 18, 104 N.M. 565. *See also Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

That principle answers NMED’s contention that because the Legislature did not expressly enact a right to discovery, requiring procedures sufficient to satisfy due process would amount to judicial lawmaking. It would not. Due process is not discretionary, and ensuring governmental adherence to a constitutional command is a foundational exercise of judicial authority. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Constitutional due process does not disappear wherever a statute is silent about the procedural mechanics necessary to provide it. If statutory silence ended the inquiry, *Mathews*, *Battershell*, *Mills*, *Archuleta*, *Aragon*, and *N.M. Industrial Energy Consumers* would have little work to do. Their premise is the opposite: what

process the Constitution requires depends upon the circumstances of the governmental proceeding and is subject to judicial review.

Most importantly, the New Mexico Supreme Court has already rejected the proposition that the absence of an express administrative discovery right ends the inquiry. In *Archuleta v. Santa Fe Police Department ex rel. City of Santa Fe*, the Court acknowledged the general rule that there is no automatic constitutional entitlement to prehearing discovery in every administrative proceeding, but immediately held that the rule “is not dispositive.” 2005-NMSC-006, ¶ 31, 137 N.M. 161, 108 P.3d 1019. Quoting *Dente v. State Taxation & Revenue Department*, the Court recognized that “in some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare.” *Id.* (quoting *Dente*, 1997-NMCA-099, ¶ 8, 124 N.M. 93, 946 P.2d 1104). The governing inquiry is therefore the *Mathews* inquiry: what process is necessary in this particular proceeding to provide a meaningful opportunity to prepare and be heard? *Archuleta*, 2005-NMSC-006, ¶¶ 31–32.

Resolute Wind 1 LLC v. New Mexico Public Regulation Commission makes the distinction controlling here even clearer. 2022-NMSC-011, 506 P.3d 346. There, the Supreme Court held that due process was violated when the Commission’s procedure prevented a party from presenting evidence and “developing a record” concerning a disputed factual issue. *Id.* ¶¶ 24–25. NEE confronts technical questions that cannot reasonably be answered from the face of the permit application and cannot be meaningfully investigated without information controlled by Applicants. Cross-examination at the merits hearing is not a substitute. An expert cannot analyze data that have never been disclosed, statistically test an undisclosed dataset, evaluate undisclosed degradation or operating information, determine manufacturing capacity from

undisclosed production records, or assess the feasibility of an undisclosed alternative fuel-supply plan while simultaneously conducting cross-examination.

Indeed, *N.M. Industrial Energy Consumers* itself recognized that an express denial of the opportunity to conduct discovery may present a due-process violation; the Court rejected the challenge there because the complaining party had not actually been denied an opportunity to pursue discovery. 1986-NMSC-059, 104 N.M. at 568, 725 P.2d at 247. That distinction favors NEE here: NEE will propose, if allowed, specific discovery directed to identified disputed facts and seeks an order requiring answers.

III. THE *MATHEWS* FACTORS REQUIRE DISCOVERY IN THIS PARTICULAR PROCEEDING.

The *Mathews* balancing test confirms the result. Courts consider: (1) the interests affected by governmental action; (2) the risk of erroneous decision under the procedures used and the probable value of additional safeguards; and (3) the governmental interest and administrative burden associated with additional process. *Mathews*, 424 U.S. at 335; *Archuleta*, 2005-NMSC-006, ¶¶ 31–32.

First, the interests and consequences are extraordinary. The proposed permit would authorize an industrial source projected to annually emit approximately 8.8 million tons of greenhouse gas emissions (CO₂e),² 37 tons per year of nitrogen oxides,³ 124 tons per year of volatile organic compounds,⁴ 161 tons per year of carbon monoxide,⁵ and 75 tons per year of

² Administrative Record NSR 10833, Bates Stamp 001626, Table 102.A.

³ *Id.*, at 001625, Table 102.A.

⁴ *Id.*, at 001626, Table 102.A.

⁵ *Id.*

particulate matter.⁶ Nitrogen oxides and volatile organic compounds are ozone precursors; particulate matter and carbon monoxide carry additional health consequences. Those emissions would occur in Doña Ana County, where existing ozone conditions already make additional ozone-forming pollution particularly consequential.

The environmental interests extend beyond human health. The area surrounding the proposed facility contains habitat for numerous species identified by the New Mexico Department of Game and Fish, now officially the New Mexico Department of Wildlife, as Species of Greatest Conservation Need, including state-listed threatened species and other sensitive species, and the area has been identified as significant for rare plants. An erroneous permitting decision therefore cannot simply be treated as an accounting error capable of correction after construction.

Second, the risk of error without discovery is exceptionally high, while the probable value of discovery is exceptionally great. NEE's expert testimony will demonstrate why. For instance, the permit's CO emission factor rests upon only three test runs conducted on a single Bloom module⁷ and is then extrapolated to a proposed facility containing approximately 37,800 modules. **NEE's expert observes that if the test runs were reproduced in the field as they were recorded in the laboratory, the first run would be out of compliance with draft permit limit requirement,⁸ A-601.D.** The specific module that was tested was chosen by Bloom and prepared in Bloom's laboratory for the test, and not shown to have been randomly selected from

⁶ *Id.*

⁷ *Id.*, at 000321, Table 1.

⁸ *Id.* 0.016 CO, lb/MW-hr compared to p. 001628, **Table 106.A Allowable Emissions:** CO pph of 36.8, divided by 2,462 MW = 0.015 lb/MWh. Test run #1 produced a result that is higher than the allowable permit emissions.

production inventory, and the record does not establish that it is statistically representative of the tens of thousands of modules proposed for Project Jupiter.

These are not abstract criticisms. They identify factual questions that discovery can—and must—answer before the Hearing Officer can determine whether Applicants’ emissions estimates constitute reliable evidence at all. What EPA and NMED protocols govern the development, validation, and statistical extrapolation of source-specific emissions data from a tested unit to an entire source population? Were those protocols followed here? EPA’s own emission-factor methodology treats representativeness as fundamental: it considers the number of sources tested, variability within and among sources, the manner in which the tested sample was selected, whether that selection may introduce bias, and whether the resulting data are sufficiently representative of the population to which the emission factor will be applied. EPA further cautions that meaningful statistical confidence analysis depends upon the tested sources being representative of the relevant population and the measurements being representative of the tested source under typical operating conditions. See EPA, *Technical Procedures for Developing AP-42 Emission Factors and Preparing AP-42 Sections*, §§ 5.1–5.2. EPA’s current methodology likewise evaluates an emission factor according to its ability to estimate emissions across the relevant population, expressly distinguishing factors that are “highly,” “moderately,” or only “minimally” representative. See EPA, *Procedures for the Development of Emissions Factors from Stationary Sources* (Aug. 2024), <https://www.epa.gov/air-emissions-factors-and-quantification/procedures-development-emissions-factors-stationary>.

Those principles expose one of the central evidentiary problems here. Applicants seek to extrapolate measurements from three one-hour test runs from **one physical module** to an approximately **37,800-module facility**, yet the present record does not establish that the tested

module was randomly selected from production inventory, that it was statistically representative of the modules that will actually be installed, that module-to-module variability was measured at all, or that the testing captured aging, degradation, manufacturing variability, differing operating conditions, startup, shutdown, malfunction, maintenance, replacement, or recommissioning. Indeed, EPA explains that the quality of an emissions factor depends not simply upon whether an individual test was competently performed, but upon the *quantity, quality, variability, and representativeness of the underlying data*. EPA describes its strongest emission factors as derived from high-quality test data obtained from *many randomly chosen facilities*,⁹ while factors derived from a small number of potentially nonrepresentative sources receive substantially lower representativeness ratings. See EPA, *AP-42 Frequent Questions*, <https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-frequent-questions>.

EPA separately cautions that emissions factors representing averages of source populations are not recommended as source-specific permit limits or compliance determinations precisely because individual-source emissions may differ materially from the average. See EPA, *Basic Information of Air Emissions Factors and Quantification*, <https://www.epa.gov/air-emissions-factors-and-quantification/basic-information-air-emissions-factors-and-quantification>.

That raises questions the Hearing Officer cannot responsibly resolve by assumption:

- a) What underlying test data exist?
- b) What NMED protocols or guidance did the Department apply in accepting the extrapolation?
- c) How was the single tested module selected?
- d) Was it randomly selected?

⁹ Administrative Record NSR 10833, Bates Stamp 000311: Here, there were three runs of a fuel cell test at the Bloom Energy test facility located at 543 Bailey Road, Mountain View California.

- e) What evidence establishes that it is representative of the production population?
- f) What production-unit emissions data exist?
- g) What is the measured module-to-module variability?
- h) What degradation and end-of-life emissions data exist?
- i) What statistical methodology supports extrapolation from three test runs on the same module to approximately 37,800 modules?
- j) What confidence level did Applicants calculate before selecting the proposed emission factor?
- k) What empirical or statistical basis supports the 15-percent margin?
- l) Does that margin account for sampling uncertainty, fleet variability, manufacturing variation, degradation, and operating-life changes—or was 15 percent simply selected without statistical validation?
- m) What emissions occur during startup, shutdown, malfunction, and recommissioning?
- n) And what monitoring will detect fleet-wide deviation from the assumptions upon which the permit is based?

The final question is therefore not merely whether NEE disagrees with Applicants' emissions calculation. It is whether, given the extraordinarily limited underlying testing and the unprecedented magnitude of the extrapolation, the Hearing Officer can lawfully rely upon that calculation as substantial and technically reliable evidence without first permitting discovery into its statistical foundation. NEE's expert will testify that the three test runs on the same module themselves exhibit substantial variability and that requires a major-source threshold and a different application, and process. And even that calculation captures only the variability among the three measurements on the same module; it does **not** capture module-to-module variability across the approximately 37,800-module fleet, manufacturing differences, equipment aging, degradation, or differing operating conditions. On this record, refusing discovery would require the Hearing Officer to accept the reliability and representativeness of Applicants' extrapolation *before NEE has been permitted to obtain the very evidence necessary to determine whether that*

extrapolation satisfies EPA and NMED standards in the first place. Due process does not permit the evidentiary conclusion to precede the factual inquiry.

The same is true of fuel-cell performance. Real-world operating information of Bloom Energy solid oxide fuel cell technology raises questions concerning whether Bloom systems maintain the represented efficiency, output, and durability over time.¹⁰ Those questions directly affect emissions.¹¹ If the equipment produces less electricity per unit of fuel than assumed, more natural gas must be consumed to produce the same electrical output, potentially increasing emissions. Discovery into actual operating performance, degradation, fuel consumption, maintenance, replacement rates, and emissions over equipment life is therefore not collateral commercial inquiry. It tests whether the emissions assumptions upon which the requested permit depends correspond to actual operation.

The same is true of manufacturing feasibility. Project Jupiter requires equipment at a scale vastly beyond Bloom's demonstrated installations.¹² NEE therefore requests information regarding Bloom's existing manufacturing capacity, production commitments and backlog, Project Jupiter allocation, construction and delivery schedule, critical raw-material requirements, scandium requirements and sources, supply-chain limitations, and contingency plans. Those facts bear directly upon whether this source can actually be manufactured, delivered, constructed,

¹⁰ "Do Bloom's Fuel Cells Work as Claimed? Data Says No," Hunterbrook, July 30, 2026, Exhibit A.

¹¹ For instance, Applicants refer, at Administrative Record NSR 10833, Bates Stamp 000621, to "Depleted anode exhaust, which is approximately 95 percent carbon dioxide once dried is discharged to the atmosphere," yet this information provides little to no details about how the exhaust performs over a variety of operating conditions. These emissions will impact total fleet emissions.

¹² "Bloom's Big Lie," Hunterbrook, June 30, 2026, Exhibit B.

commissioned, and placed into operation within the period represented by Applicants.

20.2.72.208(G) NMAC.¹³ For instance, if some but not all Bloom Energy solid oxide fuel cells are manufactured and delivered, might this box New Mexico into a proverbial corner, when the operator can no longer complete the 2.46 GW goal with fuel cells and create a situation where gas turbines are the “only default.”

And the same is true of fuel supply. Project Jupiter is represented as requiring approximately 400 million cubic feet of natural gas per day. Yet the Commissioner of Public Lands denied rights-of-way and a business lease required for portions of the Green Chili Lateral and associated facilities identified to supply that gas. NEE therefore seeks discovery concerning alternative gas supplies, necessary permits and rights-of-way, construction timing, contingency plans, and Applicants’ factual basis for asserting that the facility can nevertheless be timely constructed and operated. Those matters go directly to the regulatory requirement governing whether the proposed source can be produced or completed in a timely fashion.¹⁴

Applicants possess the answers to these questions.

A hearing is not meaningful when one party possesses the underlying technical evidence and the opposing party is permitted to see only the conclusions drawn from it. Due process protects the opportunity to test the factual premises of private parties coordinated with governmental action, not merely the opportunity to comment upon those premises after Applicants have selected which information to disclose.

¹³ 20.2.72.208(G) NMAC states that the Department shall deny any application for a permit if it appears that the construction of the new source will not be completed within a reasonable time.

¹⁴ See, attached and incorporated Exhibit C – letter of July 14, 2026, from the New Mexico Commissioner of Public Lands.

Third, the burden of targeted discovery is modest. NEE does not seek years of civil litigation, unrestricted depositions, or discovery unrelated to the permit. It seeks answers and documents concerning identified technical questions going directly to emissions, compliance, monitoring, performance, manufacturing feasibility, construction timing, and fuel availability. Applicants necessarily possess or should possess much of this information because they rely upon these same subjects in asking the State to authorize the proposed source.

The balance is therefore lopsided. The burden is answering targeted discovery about an unprecedented industrial project for which Applicants seek governmental authorization. The countervailing risk is that the State makes a consequential permitting decision on technical assumptions that affected parties were never permitted to meaningfully investigate.

IV. THE COURT SHOULD ORDER TARGETED DISCOVERY NOW, BEFORE THE MERITS HEARING.

Resolute Wind teaches that the constitutional defect occurs when a procedure prevents a party from developing the record on a genuinely disputed factual issue. 2022-NMSC-011, ¶¶ 24–25. That defect cannot reliably be repaired after the merits hearing. A reviewing tribunal examines the record that was made below. Discovery denied before the hearing cannot retrospectively inform expert testimony already filed, produce analyses never performed, create cross-examination that never occurred, or place technical evidence into an administrative record after the evidentiary proceeding has closed.

The meaningful time for discovery is therefore *before the merits hearing and with sufficient time for the parties' experts to analyze the responses.*

This is particularly important because the issues presented here go to the very heart of the permit:

- a) **how much pollution Project Jupiter will actually emit;**

- b) **whether the emissions methodology is statistically defensible;**
- c) **whether the proposed monitoring system can detect noncompliance;**
- d) **whether tens of thousands of fuel-cell modules will perform over time as assumed;**
- e) **whether Bloom can manufacture and deliver the proposed source;**
- f) **whether the necessary critical materials are available; and**
- g) **whether the project has a lawful and feasible means of obtaining the enormous natural-gas supply required for operation.**

These are questions of evidence, not advocacy. They should be answered with data.

The Constitution does not require NMED to guarantee NEE every discovery device available under the Rules of Civil Procedure. It does require procedures adequate to the circumstances. *Archuleta*, 2005-NMSC-006, ¶¶ 31–32. And it prohibits a procedure that deprives a party of a meaningful opportunity to develop the evidence on disputed material facts. *Resolute Wind*, 2022-NMSC-011, ¶¶ 24–25.

Under the extraordinary circumstances presented here, targeted discovery is not procedural excess. It is the minimum process necessary to make the evidentiary hearing meaningful.

CONCLUSION

NEE respectfully requests that the Hearing Officer exercise the authority provided by 20.1.4.300(A)(3) NMAC and order YGI and Bloom Energy to respond fully to NEE’s forthcoming interrogatories and requests for production about these specific issues sufficiently in advance of the merits hearing to permit meaningful expert review and use of the information in expert testimony and at hearing.

The question is not whether administrative litigants possess an abstract right to discovery in every case. They do not. *Archuleta*, 2005-NMSC-006, ¶ 31. The question is whether *this*

proceeding can provide a meaningful opportunity to be heard when Applicants seek authorization for an unprecedented industrial source based upon disputed technical assumptions, Applicants possess the information necessary to test those assumptions, and their opponents are denied access to that information before the evidentiary hearing. That question is particularly consequential here because Applicants' projected emissions depend upon extrapolating extremely limited testing to an approximately 37,800-module facility.

EPA's treatment of uncertainty makes discovery even more essential here. EPA identifies the number of tests used to determine the emissions factor, the distribution of the resulting data, the selected decision level or percentile, and the number of similar emissions units as variables bearing directly upon uncertainty. *Id.* EPA's stated objective is to improve the accuracy of emissions factors through incorporation of direct emissions testing. *Id.* Thus, where Applicants seek to extrapolate three test runs on a single module to approximately 37,800 modules, the fundamental questions are not merely mathematical.

This uncertainty goes directly to whether the emissions estimates upon which the permit depends are sufficiently reliable to support a permit for *this particular source*. They also illustrate why cross-examination at the hearing is no substitute for discovery. An expert cannot meaningfully evaluate raw test data, determine statistical distributions and confidence intervals, assess sample representativeness, analyze degradation, or test fleet-wide extrapolations for the first time at counsel table. Nor can the Hearing Officer fairly determine whether Applicants' estimates are reliable if the information necessary to evaluate those estimates remains exclusively in Applicants' possession.

Due process does not require the Hearing Officer to prejudge whether Applicants' extrapolation is ultimately valid. It requires something more fundamental: a procedure capable of

finding out. Where the permit rests upon disputed technical assumptions, the evidence necessary to test those assumptions is controlled by Applicants, and EPA itself recognizes that limited testing and source-to-source variability bear directly upon the uncertainty inherent in emissions estimates, denying access to that evidence before the hearing risks converting the evidentiary hearing into a proceeding in which Applicants' assumptions can be asserted but never meaningfully tested. That is not the "meaningful opportunity to be heard" that due process requires. *TW Telecom of N.M., LLC v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24.

Under *Archuleta*, *TW Telecom*, *N.M. Industrial Energy Consumers*, and *Resolute Wind*, the answer is no. Due process requires enough procedure to make the hearing real. Here, that requires discovery.

NEE sought the position of the parties on this Motion and can state: Center for Biological Diversity, Wetherbee, Mr. Saldaña and Ms. Fuller, Youth United for Climate Crisis Action support the Motion; YGI and NMED oppose the Motion. No other party provided their position before the filing of this Motion.

WHEREFORE, New Energy Economy respectfully requests that the Hearing Officer grant this Motion and order YGI and Bloom Energy to provide complete responses to NEE's outstanding discovery requests on an expedited schedule that affords NEE and its experts a meaningful opportunity to analyze and use those responses before the merits hearing.

Respectfully submitted this 13th day of October, 2026,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2026, a copy of the foregoing was sent to the following parties or counsel of record via electronic mail:

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