

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF:

THE APPLICATION

OF YUCCA GROWTH INFRASTRUCTURE, LLC

AQB 26-57(P)

FOR AN AIR QUALITY PERMIT

NO. 10883

APPLICANT YGI'S RESPONSE IN OPPOSITION TO NEW ENERGY ECONOMY'S
EXPEDITED MOTION TO COMPEL NMED TESTIMONY ([Dkt. No. 116](#))

Applicant Yucca Growth Infrastructure, LLC ("YGI") responds in opposition to New Energy Economy's ("NEE") Expedited Motion to Compel the Appearance and Testimony of NMED Major Sources Manager Julia Kuhn, or an Equally Knowledgeable Technical Witness, at the October 26, 2026 Hearing, served October 20, 2026 (the "Motion to Compel").

INTRODUCTION

NEE asks the Hearing Officer to take live testimony on its *Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing* ([Dkt. No. 107](#)) (the "Motion to Dismiss"), something Part 4 does not allow.

Part 4 allows the Secretary to issue a final order on a party's pre-hearing motion to dismiss in only two scenarios: to dismiss for "a jurisdictional defect," or to "decide the merits of the Application or Petition on legal arguments presented in writing or oral argument." 20.1.4.600(B)(1) NMAC (emphasis added). NEE does not assert a jurisdictional defect, and the fact that it now asserts it needs factual testimony to support its motion to dismiss shows that its arguments reach beyond pure legal issues that could be resolved prior to the scheduled public hearing.

NEE moved to dismiss YGI's Application on the strength of two New Mexico Environment Department ("Department") emails. Six days before the hearing on that motion, NEE asks the Hearing Officer to order the Department to produce one of its technical employees so that NEE can question her for forty-five minutes about the Department's review, YGI's modeling, and re-notice. Technical testimony belongs at the public hearing, where an expert may testify only after being identified in a timely statement of intent, the applicant presents its case first, every party may cross-examine, the applicant may call rebuttal witnesses, and the public participates. That hearing is how this process answers the questions raised in public comment, including NEE's, and it is where NEE's current questions belong. Contrary to Part 4, NEE's request would bypass that hearing, putting one witness, chosen and examined by NEE, on the stand to answer questions YGI bears the burden to prove, with no testimony from YGI and no role for the public.

NEE cites no legal authority authorizing this unprecedented request. As shown below, Part 4 does not allow the testimony and nothing authorizes compelling it (Sections I–II); it would produce a one-sided record (Section III) on questions that are not proper subjects for testimony (Section IV); NEE suffers no prejudice by waiting for the public hearing (Section V); and if any testimony is taken, YGI must be able to cross-examine and call its own rebuttal witnesses (Section VI). The testimony NEE seeks belongs at the public hearing, set for the week of December 7, 2026.

BACKGROUND

1. NEE filed its Motion to Dismiss on October 14, 2026, relying on Department emails dated October 2 and October 9. Dkt. No. 107, Exs. A–B. The Hearing Officer set it for hearing on October 26. Dkt. No. 111.

2. On October 15, NEE asked the Department to make a technical witness available for that hearing, and on October 19 the Department declined. Motion to Compel at 2, 8. On October

20, NEE filed its Motion to Compel, seeking an order requiring the Department to produce Julia Kuhn, or another technical employee, for “up to forty-five minutes of direct examination” by NEE, and, if no witness is available on October 26, a “supplemental evidentiary proceeding” before any ruling on the Motion to Dismiss. *Id.* at 1, 9.

3. NEE would ask the witness whether YGI’s October submission is a “materially revised application,” how long the Department’s review will take, whether YGI’s modeling is “accurate, representative, and conservative,” whether the 1,600 MW cap “actually supports” lower emissions, and whether the Department “will . . . need to re-notice” the Application. *Id.* at 5–6. NEE describes these as “factual and technical questions.” *Id.* at 6. Its Motion attaches no declaration or other evidence, and apart from the two emails it cites nothing in the record for its description of YGI’s refinements.¹

4. YGI served its refined modeling and application components on every party on October 16, more than seven weeks before the public hearing set for the week of December 7, 2026. Dkt. No. 113.

5. YGI filed its Response to NEE’s Motion to Dismiss on October 19, 2026. Dkt. No. 107. YGI’s Response explains why NEE’s Motion is not authorized, and attaches a declaration from John Ke at Trinity Consultants explaining the materials submitted to the Department on October 14 and 16, 2026. *Id.* Exh. A. A copy of the letter submitted to the Department was attached to the declaration. *Id.* at Exh. A-1. The declaration notes that: “these types of refinements to the design of a project and air permit application and associated air dispersion modeling are typical in

¹ YGI addressed those characterizations in its Response to the Motion to Dismiss (“MTD Response”) and the sworn Declaration of John Ke (“Ke Decl.”). [Dkt. No. 114.] In brief, the refinements “do not alter the Microgrid proposal to install 2,462 MW of electricity generating capacity,” Ke Decl. ¶ 13; use the same modules, emission factors, and safety factors, *id.* ¶¶ 13, 16; respond to requests from the Bureau and from commenters, including NEE, *id.* ¶¶ 13(a), 15; MTD Response at 20 & n.10; and reduce requested emissions by about 35 percent, Ke Decl. ¶¶ 15–17.

air permit proceedings in New Mexico. ... the majority of applications Trinity reviewed from 2017-2024 involved changes to facility layout, equipment, and modeling during application review and before final permit issuance.” *Id.* at A-1 ¶ 14.

6. On October 20, the Hearing Officer set the Motion to Compel for 8:30 a.m. on October 26, ahead of the motions to dismiss, and directed the Department to have its witnesses available if the motion is granted.

ARGUMENT

I. PART 4 DOES NOT ALLOW TESTIMONY ON A MOTION TO DISMISS.

Part 4’s summary procedures permit a final order on a party’s motion under only two circumstances: (1) “to dismiss the Application or Petition for a jurisdictional defect,” or (2) “to decide the merits of the Application or Petition on legal arguments **presented in writing or oral argument.**” 20.1.4.600(B)(1)(a)–(b) NMAC (emphasis added). Nothing allows for an evidentiary hearing. October 26 is only the threshold step: the Hearing Officer determines whether “the relief requested is likely to be granted,” and any final order is the Secretary’s to issue. 20.1.4.600(B)(2), 20.1.4.100(E)(2)(c) NMAC; Notice of Substitution of Hearing Officer (Oct. 2, 2026) (Dkt. No. 99) (“all final and dispositive decisions” remain with the Deputy Secretary). A motion that cannot be decided purely on legal arguments (without testimony) turns on disputed facts, and Part 4 sends those cases involving issues of fact to a public hearing, where “the evidence submitted at the hearing” becomes the record on which the permit decision rests. 20.1.4.300(B)(1), 20.1.4.400 NMAC; 20.2.72.207(D) NMAC.

Part 4’s general motion rule points the same way. Motions are decided “by the Hearing Officer without a hearing” unless otherwise ordered, 20.1.4.200(D)(6) NMAC, and evidence on a motion comes in through “affidavits, certificates, or other evidence relied upon” filed with it,

20.1.4.200(D)(1) NMAC. NEE's Motion to Compel attaches no affidavit or declaration. NEE may not cure that omission with a live witness it selects and examines.

The New Mexico Supreme Court has applied this same principle in other administrative cases finding that contested administrative proceedings "are not susceptible to summary disposition" "in the face of disputed issues of material fact." *Resolute Wind I, LLC v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-011, ¶ 1. When the Public Regulation Commission resolved a disputed technical question on sworn submissions without a full hearing, the Court annulled that order as "at a minimum arbitrary, capricious, or an abuse of discretion." *Id.* ¶¶ 1, 24. In agency adjudications, issues of fact require a full evidentiary hearing on the record, not an abbreviated one (with one cherry-picked witness). YGI's Declaration of John Ke is offered for the same reason: to show that NEE's factual characterizations are disputed so that the Motion to Dismiss cannot be granted on legal argument, not to ask the Hearing Officer to resolve those disputes on October 26.

NEE even concedes in its Motion to Compel that disputed facts are what it wants to explore. It calls its subjects "factual and technical questions" that "cannot be meaningfully tested through correspondence alone." Motion to Compel at 5–6. That description places the testimony within Part 4's definition of "technical testimony": "scientific, engineering, economic or other specialized testimony." 20.1.4.7(A)(22) NMAC. Technical testimony requires a Statement of Intent filed "in no event later than fourteen (14) days prior to the hearing." 20.1.4.300(B)(1) NMAC. No statement has been filed, and as a result the rules bar that testimony from being presented on October 26 because they state that "[n]o person shall be allowed to testify as an expert unless identified as a technical witness in a timely filed Statement of Intent." 20.1.4.400(B)(1)(c) NMAC. This tribunal has already told NEE where such questions belong. It held NEE's first motion to dismiss "not ripe," because the disputed facts belong in "testimony presented under oath rather than . . . briefs,"

Sua Sponte Order at 2 (Aug. 9, 2026) (Dkt. No. 63), and it set the sequence: technical testimony first, and only after that, “[a] motion to dismiss could be filed,” Order Denying NEE’s Motion to Reconsider (Aug. 12, 2026) (Dkt. No. 77). NEE now asks the Hearing Officer to invert that sequence and, contrary to Part 4, to take that testimony anyway. 20.1.4.300(B)(1)(b), 20.1.4.400(B)(1)(c) NMAC. If the Motion to Dismiss cannot be decided on the papers and argument, it should be denied, not converted into an evidentiary proceeding contrary to 20.1.4.600(B)(1) NMAC.

II. NOTHING AUTHORIZES COMPELLED TESTIMONY AT A MOTION HEARING.

NEE cites no case holding that a party to an air permitting case under the Air Quality Control Act may compel another party to produce an employee for direct examination at a motion hearing. Nothing in the Air Quality Control Act, Part 72, nor Part 4 authorizes one party to compel another to produce its employee for examination at a motion hearing. New Mexico law confirms this point. Administrative hearing officers “can act only within the scope of [their] authority as prescribed by” the governing rules, because “administrative bodies have no common law or inherent powers.” *Bd. of Cnty. Comm’rs of Sierra Cnty. v. Harrison*, 1998-NMCA-106, ¶ 16, 125 N.M. 495 (citing *Pub. Serv. Co. of N.M. v. N.M. Env’t Improvement Bd.*, 1976-NMCA-039, ¶ 16, 89 N.M. 223); accord *Alto Coal. for Env’t Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶ 12; *Law v. N.M. Hum. Servs. Dep’t*, 2019-NMCA-066, ¶ 23, 451 P.3d 91 (“administrative agencies are bound by their own regulations” (quoting *Saenz v. N.M. Dep’t of Hum. Servs.*, 1982-NMCA-159, ¶ 22, 98 N.M. 805)). Applying that principle, the Court of Appeals affirmed a hearing officer’s refusal to compel pre-hearing interviews of agency employees, because “there is no provision in the law” for them. *ERICA, Inc. v. N.M. Regul. & Licensing Dep’t*, 2008-NMCA-065, ¶ 40, 144

N.M. 132. The hearing officer there noted that the governing statute authorized depositions, a procedure the party had not used. *Id.* Here, no statute or rule authorizes either.

This tribunal has resolved the closely related question of discovery the same way, in rulings on NEE's own requests. The prior Hearing Officer held that "[d]iscovery is not allowed in air quality permit proceedings," because the Legislature provided for discovery in Solid Waste Act permit cases and air enforcement cases, but not here. Order (Aug. 12, 2026) (Dkt. No. 72); *see* Order (Aug. 14, 2026) (Dkt. No. 79); NMSA 1978, §§ 74-9-29(A)(5), 74-2-12(H). He likewise denied pre-hearing disclosures as "unnecessary, duplicative or wasteful pre-hearing activities." Order (Aug. 11, 2026) (Dkt. No. 70) (citing 20.1.4.300(A)(3) NMAC). Those rulings reflect settled law. *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 31, 137 N.M. 161 ("no constitutional right to pre-trial discovery in administrative hearings"); *Dente v. State Tax'n & Revenue Dep't*, 1997-NMCA-099, ¶¶ 6, 8, 124 N.M. 93 (no right to pre-hearing depositions where the party could cross-examine the witness at the hearing). Compelled pre-hearing examination of a party's employee in advance of a public hearing is discovery by another name, and ordering it would be contrary to those rulings and to Part 4. NEE's own request confirms the point. NEE asks the Hearing Officer to direct the Department to "make reasonable arrangements for a brief advance conference concerning the limited subjects of examination." Motion to Compel at 9. An order compelling a party's employee to confer with an opposing party before testifying is the pre-hearing interview for which "there is no provision in the law." ERICA, 2008-NMCA-065, ¶ 40.

NEE has pressed for this relief before. After the denial of its July 27 and July 28, 2026 discovery requests, [Dkt. Nos. 33, 35], NEE took that ruling, among others, to the Supreme Court, which lifted its stay and denied the petition. Order, No. S-1-SC-41579 (N.M. Sept. 17, 2026). In

that proceeding, the Department told the Court that discovery “should never have been authorized.” NMED Resp. at 58, No. S-1-SC-41579 (Sept. 2, 2026). And on October 19, the Department declined NEE’s request to produce a witness for the October 26 hearing. Motion to Compel at 2, 8. NEE now asks a new Hearing Officer, six days before argument, to compel through a motion what it could not obtain through its discovery requests or from the Supreme Court. Nothing has changed but the label.

NEE relies instead on the Hearing Officer’s general duty to “conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay.” 20.1.4.100(E)(2) NMAC; *see* Motion to Compel at 4. That duty governs how the proceeding is run, and it is paired with avoiding delay. The enumerated powers confirm the point. The authority to “administer oaths and affirmations, examine witnesses and admit or exclude evidence,” 20.1.4.100(E)(2)(e) NMAC, applies to witnesses who properly appear at the hearing on the merits. It creates no power to compel them, let alone in a non-public hearing on a pre-hearing motion.

The general authority to “take all measures necessary” is tied to “the maintenance of order and . . . the efficient, fair and impartial adjudication of issues” under Part 4, and to powers “prescribed or delegated under the Act, the Regulations, or this Part.” 20.1.4.100(E)(2) NMAC. A catch-all cannot supply compulsory process that Part 4 confines to Solid Waste Act cases. Where Part 4 provides compulsory process, it does so only for Solid Waste Act cases: the Hearing Officer may “issue subpoenas, as authorized under the Solid Waste Act and” Section 200(E)(4), which falls under “Special Procedures for Hearings Under the Solid Waste Act.” 20.1.4.100(E)(2)(d), 20.1.4.200(E)(4) NMAC. NEE asks for a subpoena “as authorized by applicable law,” Motion to Compel at 8, but never identifies that law, and an agency subpoena requires, first, that “the inquiry . . . be within the authority of the agency.” *In re Investigation No. 2 of Governor’s Organized*

Crime Prevention Comm’n, 1978-NMSC-022, ¶ 4, 91 N.M. 516. And a procedure devised for this motion would be contrary to Part 4 because only the Secretary may “specify procedures in addition to or that vary from those provided in this Part,” and only if they do not “prejudice the rights of any party.” 20.1.4.100(E)(1) NMAC. NEE’s request that the Hearing Officer “preserve the opportunity for appropriate judicial relief,” Motion to Compel at 8, seeks nothing the Hearing Officer can grant. Review of the final order “shall be as provided by law.” 20.1.4.500(E) NMAC.

NEE’s remaining authorities lead to the same place. The Administrative Procedures Act does not apply to this proceeding, which is likely why NEE invokes it only “to the extent applicable.” Motion to Compel at 4. The APA governs only an agency “specifically placed by law under” it, NMSA 1978, § 12-8-2(A); *see* § 12-8-23, and a party cannot invoke it by pointing to the APA itself. *Dente*, 1997-NMCA-099, ¶¶ 11–12 (APA “applies only to those agencies made subject to its coverage by statute or regulation”; rejecting that “bootstrap argument”). NEE identifies no law placing air permit proceedings under the APA, and none exists. The Air Quality Control Act instead supplies its own permit procedures, NMSA 1978, § 74-2-7, which the Department carries out through Part 72 and Part 4. The permit rule NEE cites for the right to examine witnesses secures that right “at the hearing,” for “all interested persons.” 20.2.72.206(C) NMAC. Every provision NEE cites points to the public hearing.

III. THE TESTIMONY WOULD BYPASS PART 4’S HEARING PROCESS AND PRODUCE A ONE-SIDED RECORD.

Part 4 sets out a detailed process for technical testimony, and NEE’s request is contrary to every step of it. The process begins with disclosure: a party presenting technical testimony must file a statement of intent identifying each witness and summarizing the testimony “in no event later than fourteen (14) days prior to the hearing,” or it is precluded “from presenting technical testimony.” 20.1.4.300(B)(1), (B)(1)(b), 20.1.4.400(B)(1)(c) NMAC. Part 4 also bars technical

information from being “offered or introduced during the examination of witnesses unless the technical information is in the Hearing Record, and was filed on or before the deadline for a Statement of Intent.” 20.1.4.400(B)(2) NMAC. Part 4 has no comparable step for a motion hearing, so the testimony NEE seeks would be undisclosed expert testimony no party has had the chance to review or answer. Part 4 then assigns the burden and order of proof. YGI bears the burden of showing that the permit should issue, and that burden “does not shift”; a party challenging a condition must “present an affirmative case”; the applicant goes first, opponents follow, and rebuttal comes last. 20.1.4.400(A)(1)–(2) NMAC; 20.2.72.207(D) NMAC. As the Court of Appeals has explained in an air permit case, an opponent “cannot fulfill the burden of production simply by raising doubt” but “must go forward with adverse evidence,” and if both sides carry their burdens, “the case is ripe for the [agency] to resolve factual disputes,” considering “the evidence presented by both parties.” *Alto Coal*, 2025-NMCA-018, ¶ 24; *see id.* ¶¶ 18–19. That is why NEE’s premise, that “[o]nly NMED can explain what NMED has reviewed, what NMED has verified, and what NMED still needs to determine,” Motion to Compel at 6, is mistaken. The question at a Part 4 hearing is not what the Department has concluded, but whether the permit should issue on the evidence of every party.

NEE’s proposal is contrary to that structure. NEE would choose the witness, choose the subjects, and conduct the examination, on questions YGI bears the burden to prove, before YGI has presented any case, and with no provision for YGI’s witnesses. That is the procedure the Supreme Court rejected in *Resolute Wind*, where the process “gave the [opposing parties] the last and decisive word on the all-important factual issue,” “allowing no means” to counter them. 2022-NMSC-011, ¶¶ 22, 24. Forty-five minutes from one witness selected by the movant would not leave the facts “fully elicited,” 20.1.4.100(E)(2) NMAC; it would leave a partial record built on

one witness selected by NEE. *See TW Telecom of N.M., L.L.C. v. N.M. Pub. Regul. Comm’n*, 2011-NMSC-029, ¶¶ 20–22, 150 N.M. 12 (annulling order resting on findings from a proceeding in which the party was “denied the opportunity to present evidence and to examine and cross-examine witnesses”).

NEE’s proposal is also contrary to the rules’ protection of public participation. At the public hearing, “all interested persons shall be given a reasonable chance to submit data, views or arguments . . . and to examine witnesses testifying at the hearing,” 20.2.72.206(C) NMAC, and Part 4 is “liberally construed to facilitate participation by members of the public,” 20.1.4.100(B) NMAC. The members of the public who commented would have no part in testimony offered to dismiss the Application before their hearing begins. Construing nearly identical language in the Water Quality Act, NMSA 1978, § 74-6-5(G), the Court of Appeals recognized the “legislative intent to provide for robust public participation throughout the permitting process” and held that a process in which opponents could not “cross-examine witnesses, present [their] own experts and make a record for appeal is not a substitute for a public hearing.” *Cmtys. for Clean Water v. N.M. Water Quality Control Comm’n*, 2018-NMCA-024, ¶¶ 15, 30–31, 413 P.3d 877.

NEE does not need a motion hearing to test the Department’s views; it will have that opportunity at the public hearing, with disclosed testimony, cross-examination, YGI’s witnesses, and the public all present. The Department itself has identified the public hearing as the place to evaluate updates to a pending application, stating in a prior case that it “will offer testimony at the hearing on the updates” and that “[t]he Board will have the opportunity to make that determination at the hearing.” NMED Resp. to Mot. to Dismiss at 6, No. EIB 22-34 (Oct. 13, 2022). Deferring NEE’s questions until then is a matter of timing, not preclusion, the line *Resolute Wind* drew

between a “manageable” schedule and restrictions that are “absolute, not relative.” 2022-NMSC-011, ¶ 25.

IV. NEE’S QUESTIONS ARE NOT PROPER SUBJECTS FOR TESTIMONY.

Even apart from these procedural defects, NEE’s questions would not produce testimony the Hearing Officer could rely on. Each asks the witness for a legal conclusion, rests on a false premise, calls for a non-binding opinion, seeks a prediction, or goes to the merits, and each belongs at the public hearing.

First, NEE wants the witness to say whether YGI’s submission is a “materially revised application” and whether the Department “will . . . need to re-notice” the Application. Motion to Compel at 5–6. NEE, however, cites no provision of Part 72 that even makes a “material” revision a reason to treat a pending application as new, to re-notice it, or to dismiss it, and the Hearing Officer should “not read into a statute or ordinance language which is not there, particularly if it makes sense as written.” *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413 (quoting *Burroughs v. Board of County Comm’rs*, 88 N.M. at 306, 540 P.2d at 236). Part 72 requires public notice when an application is filed and after it is determined complete, 20.2.72.203(B), 20.2.72.206(A)(3) NMAC, and requires no new notice when a pending application is supplemented. Contrary to NEE’s premise, Part 72 requires the applicant “[p]rior to a final decision,” to “promptly supplement and correct information submitted in the application.” 20.2.72.203(E)(1) NMAC. It authorizes the Department to request more information “regardless of whether [the application] has been determined to be administratively complete.” 20.2.72.203(E)(1)–(2) NMAC. NEE relies on the same provision. Motion to Compel at 7. The Department’s October 9 communication is a request of that kind, and YGI’s October 14 submission is the response the rule requires.

Second, the premise of NEE’s re-notice question is wrong. NEE asserts that the Department re-noticed “the first two YGI applications.” Motion to Compel at 6. It did not. Those applications were filed by a different applicant, Acoma, LLC, for natural gas turbines that are no longer part of YGI’s Application, and they were withdrawn on April 27, 2026, the day YGI filed. [Permit No. 10732 and 10734] When YGI filed Application No. 10883, the Department gave the notice Part 72 requires for a new application. MTD Response at 4 (citing Administrative Record NSR 10833_001355–001359). That is the same course the Court of Appeals described with approval in the WIPP proceeding, where a request was withdrawn and refiled and “a new set of public notice and public proceedings” began. *Sw. Rsch. & Info. Ctr. v. Sec’y of N.M. Env’t Dep’t*, 2025-NMCA-007, ¶ 39, 570 P.3d 217. The measure of notice is whether the public can “meaningfully participate in the permitting process,” *id.* ¶¶ 36–37 (internal quotation marks and citation omitted), and the thirty-day review of the Department’s analysis and the public hearing ensure exactly that. 20.2.72.206(B)(2), (C) NMAC.

The Department’s practice confirms the point. It has repeatedly carried applications supplemented after public notice through hearing without re-noticing them. *E.g.*, Roper Constr., Inc., Permit No. 9295, No. AQB 21-57, NMED Ex. 1 at 2:1–2, 6:22, 7:12–13, 8:7–19 (Jan. 19, 2022) (Saikrishnan Test.) (App. A-43–46) (application publicly noticed July 28, 2021, followed by nine dated updates through January 13, 2022); DLK Black River Midstream, LLC, NSR 6567-M8, No. AQB 22-25, NMED Ex. 1 at 4:12–14, 7:17–19 (Aug. 29, 2022) (Kuhn Test.) (App. A-33–34) (legal notice published May 27, 2021; updated application received September 15, 2021), Final Order at 2 (Dec. 16, 2022) (App. A-40) (permit granted); Targa N. Delaware, LLC, NSR 7200-M4, No. AQB 23-58(P), Hearing Officer’s Report, FOF 30, 32 (Oct. 13, 2023) (legal notice published January 2023; application updated February 14, 2023). When community groups moved

to “re-publish the public notice” after a draft permit was revised, the Department kept the earlier draft posted and addressed “all revisions” “as direct testimony at the hearing,” and the Environmental Improvement Board sustained the permit. Associated Asphalt & Materials, LLC, Permit No. 8585, No. AQB 20-12, NMED Ex. 1 at 21:7–13 (Mar. 1, 2021) (Primm Test.); Final Order at 1, 4, No. EIB 21-48 (Aug. 26, 2022) (App. A-7–8). NEE identifies no matter in which the Department did otherwise.

Third, those same questions would elicit one employee’s opinion on matters the Department’s practice already answers, and that opinion would not bind the Department. New Mexico law gives “persuasive weight” to an agency’s long-standing construction of its rules, not to a position first articulated in litigation.” *High Ridge Hinkle*, 1998-NMSC-050, ¶¶ 7, 9. The Department’s long-standing practice is to process supplements on the pending application, MTD Response at 25–28 & App. A, and courts defer to such practice. *Augustin Plains Ranch, LLC v. D’Antonio*, 2023-NMCA-001, ¶¶ 29–32, 521 P.3d 1226 (deferring to policy allowing applications to be corrected; “[f]iling an updated application was not an attempt to circumvent the State Engineer’s procedures”). Treating YGI differently would require a rational explanation no one has offered. *Sais v. N.M. Dep’t of Corr.*, 2012-NMSC-009, ¶¶ 16–17, 22, 275 P.3d 104 (disparate treatment of similarly situated parties without “rational explanation” is arbitrary and capricious); *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1 (agency may not “change its position without good cause and prior notice to the affected parties” (quoting *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, ¶ 7, 115 N.M. 678)). The Department’s own sworn testimony treats updates as part of ordinary review, not a reason to start over: “[a] draft permit is a dynamic working document which may be updated throughout the review process.” DLK, No.

AQB 22-25, NMED Ex. 1 at 7:8, (App. A-34); *see DLK*, Final Order at 2 (Dec. 16, 2022) (App. A-40) (granting the permit on the updated application).²

Fourth, NEE asks the witness to predict how many working days the Department “reasonably require[s],” what work remains, and whether it can be finished before the hearing. Motion to Compel at 5. That question does not bear on the Motion to Dismiss. At most it goes to scheduling, and NEE’s only request on that subject is the alternative stay request in its Motion to Dismiss, which NEE must support with its own evidence. 20.1.4.200(D)(1) NMAC. NEE cannot use a compelled witness to build a record for relief it has not otherwise supported. In any event, a forecast of a review still under way is speculation, not testimony “rationally based on the witness’s perception.” Rule 11-701(A) NMRA. Any technical opinion would be expert testimony, and admitting it without a timely statement of intent would be contrary to 20.1.4.400(B)(1)(c) NMAC.

Finally, whether YGI’s modeling is “accurate, representative, and conservative” and whether the cap is enforceable when clusters operate at “varying loads,” Motion to Compel at 6, are the merits. YGI will address them at the public hearing through experts. *Ke Decl.* ¶¶ 13(c), 19–20. If a Department witness disagreed, the result would be competing expert testimony, which

² Any informal protocol that would bind applicants, such as a standard for when a supplement becomes a “new application” or requires re-notice, would be a rule that must be adopted through the State Rules Act’s notice-and-comment process. *See* NMSA 1978, § 14-4-2(F) (2017) (a “rule” includes any “standard” that “explicitly or implicitly implement[s] or interpret[s]” a legal mandate and “purport[s] . . . to affect persons not members or employees of the issuing agency”); NMSA 1978, § 14-4-5.2(A) (2017) (notice of proposed rulemaking in the New Mexico Register at least thirty days before a public rule hearing); § 14-4-5.3(A)–(B) (2017) (at least thirty-day comment period and a public rule hearing at which “members of the public shall be given a reasonable opportunity to submit data, views or arguments”); NMSA 1978, § 14-4-5(A) (2017) (“[N]o rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.”); *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*, 1979-NMSC-090, ¶¶ 41–42, 93 N.M. 546 (an agency standard “designed to have the force and effect of law” is a “rule,” and if not adopted under the State Rules Act it would have “no efficacy, validity or enforceability”); *see also id.* ¶¶ 11, 33 (striking a standard under which conduct would be judged “not by what he can read in print about the standards,” but by “information available to the director”). YGI has searched and has found no rule adopting any such protocol.

cannot be resolved on a motion to dismiss. *Resolute Wind*, 2022-NMSC-011, ¶ 1. That is what the public hearing is for.

V. WAITING FOR THE PUBLIC HEARING DOES NOT PREJUDICE NEE.

NEE's justification for all of this is prejudice. It says that a "fundamentally reconfigured facility" is being presented on the current schedule and that "[t]he prejudice is concrete." Motion to Compel at 7. But NEE identifies no testimony it cannot prepare, no witness it cannot call, and no deadline it cannot meet. "An assertion of prejudice is not a showing of prejudice." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562. Due process in an administrative proceeding "contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them." *Archuleta*, 2005-NMSC-006, ¶ 32 (internal quotation marks and citation omitted); *see Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 6, 100 N.M. 434, 436 (objection fails when "not supported by any factual showing of prejudice"). NEE has had the refined materials since October 16, more than seven weeks before the public hearing. Statements of intent are not yet due, and NEE retains full rights to file technical testimony and to cross-examine every witness, including the Department's. That is all due process requires. *Dente*, 1997-NMCA-099, ¶¶ 3, 8 (no violation where counsel "had ample opportunity to cross-examine the testifying officer at the hearing" and "alleged no specific prejudice"); *Victor v. N.M. Dep't of Health*, 2014-NMCA-012, ¶ 33, 316 P.3d 213 (no violation where, at the hearing, the party "reviewed and objected to the Department's exhibits, confronted and cross-examined the Department's witnesses, and provided testimony and oral argument on her own behalf").

NEE's remaining contentions confirm that its dispute is with the merits and the schedule. NEE says YGI cannot carry its burden "by continually replacing the technical foundation of its application," and that the Department cannot "substitute the applicant's assurances for the

Department’s own independent assessment.” Motion to Compel at 7. The burden is YGI’s, and YGI will carry it at the public hearing. 20.1.4.400(A)(1) NMAC; 20.2.72.207(D) NMAC. The Department will present its independent assessment the same way: through a timely Statement of Intent and sworn testimony that every party may cross-examine. 20.1.4.300(B)(1), 20.1.4.400(B)(2) NMAC. The supplements NEE describes are what Part 72 requires “[p]rior to a final decision.” 20.2.72.203(E)(1) NMAC. None of this is a reason to take testimony on a motion.

Many of the refinements, moreover, answer NEE’s own objections. During public comment, NEE objected that 2,275 separate stacks do not “provide a realistic mechanism to verify compliance,” NEE Comment, July 6, 2026 (Administrative Record NSR 10833_001831), and it raised the facility’s greenhouse gas emissions, *id.* at 001834–001837. YGI consolidated the stacks into 1,263 uniform clusters and adopted a cap that cuts greenhouse gas emissions by more than three million tons of CO₂e per year. *Ke Decl.* ¶¶ 13(a), 15(b). That is the public comment process working as intended. NEE remains free to challenge the refined design at the public hearing, but it cannot claim that changes made to answer its own objections have prejudiced its ability to do so. Its own framing, whether the revisions warrant “dismissal without prejudice rather than another continuance,” Motion to Compel at 6–7, confirms that what NEE is pressing is the schedule, not a need for evidence to decide the Motion to Dismiss. The current schedule already gives every party the full opportunity Part 4 requires.

VI. ANY TESTIMONY MUST INCLUDE CROSS-EXAMINATION AND THE OPPORTUNITY FOR YGI TO PRESENT REBUTTAL WITNESSES.

NEE’s fallback request for a “supplemental evidentiary proceeding” before any ruling on the Motion to Dismiss, Motion to Compel at 9, is contrary to Part 4 for the same reasons and should be denied; the public hearing is the evidentiary proceeding Part 4 provides. If the Hearing Officer nonetheless takes testimony on October 26, the record must not be one-sided. YGI requests that

any testimony (1) be taken under oath; (2) be confined to the content of the Department’s October 2 and October 9, 2026 communications; (3) exclude opinion on questions of law, including whether the Application must be re-noticed; (4) be subject to full cross-examination by YGI; and (5) be followed by YGI’s rebuttal witnesses. 20.1.4.400(A)(1)–(2) (B)(2) NMAC (“Nothing in this Section shall be construed to limit the right of a party to offer or introduce technical information for impeachment or rebuttal.”); 20.2.72.206(C), 20.2.72.207(D) NMAC; *Resolute Wind*, 2022-NMSC-011, ¶¶ 22, 24; *TW Telecom*, 2011-NMSC-029, ¶¶ 20–21.

CONCLUSION

Part 4 provides for a pre-hearing motion to dismiss to be decided on written submissions and oral argument and based on legal argument, and for technical testimony to be disclosed in statements of intent and then presented and tested at the public hearing, with every party and the public taking part. NEE’s Motion to Compel asks the Hearing Officer to proceed contrary to Part 4. The testimony NEE seeks belongs at the public hearing, and that is where it should be heard. YGI respectfully requests that the Hearing Officer deny NEE’s Motion to Compel, deny NEE’s alternative request for a supplemental evidentiary proceeding, and decide the Motion to Dismiss on the written submissions and oral argument. In the alternative, YGI requests that any testimony be taken subject to the conditions set out in Section VI, including YGI’s right to cross-examine the Department’s witnesses and to call its own rebuttal witnesses.

Respectfully submitted this 23rd day of October, 2026.

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CERTIFICATE OF SERVICE

I certify that on October 23, 2026, I served the foregoing on all parties and counsel of record on the service list for AQB 26-57(P) by electronic mail.

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