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Luis Lopez (OPF)
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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

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

AQB 26-57(P)

NEW MEXICO ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU'S
RESPONSE IN OPPOSITION TO NEW ENERGY ECONOMY'S MOTION TO
COMPEL NMED WITNESS FOR MOTION TO DISMISS HEARING [Dkt. No. 115]

The New Mexico Environment Department ("NMED" or the "Department") Air Quality Bureau ("Bureau"), pursuant to the New Mexico Environment Department's Permit Procedures at 20.1.4.200(D)(4) NMAC (responses) and 20.1.4.100(E)(2) NMAC (extensions of time and rescheduling), respectfully responds in opposition to *New Energy Economy's 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 and Request for Expedited Responses by October 22, 2026* (filed Oct. 20, 2026) [Dkt. No. 115] ("*NEE's Motion to Compel NMED Witness for Motion to Dismiss Hearing*") seeking to require the Bureau to respond in less than two business days and to compel the Bureau to provide a witness at the hearing just three business days later, on October 26, to testify to *NEE's Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing* (filed Oct. 14, 2026) [Dkt. No. 107] ("*NEE's October Motion to Dismiss*"), which has now been joined by Jose Saldaña Jr. and Vivian Fuller, and the Center for Biological Diversity through a "notice" with six pages of additional argument in support of NEE's requests for relief and to cure a now moot motion – in addition to requesting new relief for scheduling, *Jose Saldaña Jr. and Vivian Fuller and Center for Biological Diversity's Notice of Joinder in New Energy Economy's Motion to Dismiss Application Without Prejudice as*

Incomplete and Not Ready for Hearing (filed Oct. 22, 2026) [Dkt. No. 123] (“*Joinder to October Motion to Dismiss by Mr. Saldaña Jr. and Ms. Fuller and CBD*”). Demanding answers, as briefed by NEE, Mr. Saldaña Jr. and Ms. Fuller and CBD, is an abuse of process.

INTRODUCTION

NEE’s Motion to Compel NMED Witness for Motion to Dismiss Hearing and *NEE’s October Motion to Dismiss* make material misstatements of fact and law based on incorrect assumptions about the manner that the Bureau evaluates air permit applications and inappropriately assign to the Bureau their own purported conclusions. The only significance to the October 2 and 9 communications are that the Bureau is doing its job to evaluate the information submitted to support issuance of an air permit based on an application from Yucca Growth Infrastructure, LLC (“YGI”). YGI is entitled to make business decisions about moving forward within the air permitting process, which it has done by submitting a revised application and supporting information on October 14 and 16. The October 2 and 9 communications make no technical conclusions upon which final findings should be made at this point in the proceeding; NEE’s own characterization cannot transform statements into something that they are not, especially when the Bureau asserts that NEE is wrong.

NEE seeks to impermissibly cure the flaws in its *October Motion to Dismiss* by having a Bureau witness testify to later events not raised or contemplated in the *Motion*. There is no basis in law or practicality to force a Bureau witness to prematurely testify under oath to explain the air permitting process, provide status updates on the application and the work remaining, or guess at the time necessary to complete that work in a hearing on a dispositive motion that itself did not make a case for the relief requested and is now dependent upon testimony from Bureau technical staff. Forcing a hearing in these circumstances will not provide bases upon which the Hearing Officer can rely on to issue findings of fact, conclusions of law, and a recommended decision for

the Deputy Secretary.

The Bureau declines to voluntarily produce a witness(es) for the hearing on October 26. The Bureau declines to support this public hearing proceeding deteriorating into a process where intervenors can conduct and compel operational oversight into the air permitting process with civil trial expectations. The Bureau simply seeks an opportunity to conduct the permitting process as implemented by the Environmental Improvement Board at the behest of the New Mexico Legislature decades ago without being subjected to the non-agency parties' proposed means of controlling or terminating that process. Whether further Bureau review and public participation are necessary does not establish agreement about dismissal, abeyance, compulsory testimony, or the Hearing Officer's authority.

BACKGROUND

In the October 2 email to YGI, the Bureau questioned whether the original assumptions in the application and supporting modeling were defensible and conservative given some of the parameter changes in recent demonstrations from YGI; the letter did not announce a determination that YGI could not demonstrate compliance or withdraw the Bureau's administrative-completeness determination. The October 2 email is the same as numerous other inquiries in the Administrative Record from the Bureau to YGI. See e.g., Administrative Record NSR 10833_001976-002009; Administrative Record NSR 10833_002023-002078.

On October 5, the Bureau technical staff and legal counsel met with YGI's technical team and legal counsel to discuss in more detail the information submitted by YGI over the course of the preceding month and so the Bureau could understand YGI's plans for moving forward with its application given the interrelatedness of the physical and operational design (such as for the fuel cell servers) and the resulting emissions. The Bureau's October 9 email summarizes that meeting and identifies the information needed from YGI to move forward with the technical review.

On October 6, Judge Browning ordered the Bureau to file the Administrative Record by the Administrative Record. The Bureau complied and filed on October 9 the Administrative Record, as it had been compiled and indexed by Bureau staff that day. The documentation included the October 2 letter and October 9 email.

On October 14, NEE filed its *October Motion to Dismiss*.

Relevant background is set forth in *Motion for Correction of the Hearing Record* (filed Oct. 22, 2026) [Dkt. No. 124] regarding YGI's October 14 letter to the Bureau; confirmation of this information conveyed for the parties during the status conference on October 15; and October 16 submission¹ to the Bureau—and all parties—of a revised application, new information and dispersion modeling, including the Bureau's corresponding preliminary understandings. As stated in the Bureau's *Motion for Correction of the Hearing Record* [Dkt. No. 124]:

YGI's [October 16] submission will likely change the Bureau's materials for public review, including the Draft Permit, Statement of Basis, and Modeling Report from the materials on which public comment already occurred. As preliminarily understood by the Bureau, YGI's October 16 submission reflects a new attempt at reconciling its application and modeling data, with information that now supports a three-tier design (instead of two-tiers) with nearly identical sever and cluster configurations (where the original application was only exhaust points); a decrease in the number of stacks from 2,275 to 1,263; an increase in stack height from 30 feet to 45 feet; and changed stack parameters (*e.g.*, exhaust temperature, exit velocity, and flow rates) – all different than the original application – that inform the dispersion modeling and downwash analysis. Despite the recent submission assertion that the new “design yields dispersion modeling outputs that are consistent with the April modeling submission” such conclusion must be evaluated and confirmed by the Bureau and does not relieve YGI from the requirement to maintain an accurate application submission.

Id., at pp. 6-7. Nothing in the Bureau's communications or briefing seeks to deprive YGI of the permit review opportunities afforded by the Air Quality Control Act, Sections 74-2-1 to 74-2-17

¹ While YGI sent the information on the afternoon of Friday, October 16, the Bureau technical staff's preliminary review did not begin until Monday, October 19.

(“AQCA”) and 20.2.72 NMAC for YGI to meet its burden of demonstrating entitlement to a permit before the statutory deadline of November 23 absent YGI waiving the deadline. This requires that the Bureau be allowed to perform its job (without repeated unsubstantiated demands) under the controlling legal framework set forth in State and Federal law, which is to actually evaluate the application materials and modeling data, and then ensure that the public can then evaluate the Bureau’s analysis in the form of a draft permit with a statement of basis and modeling report.

ARGUMENT

In *Applicant YGI’s Response in Opposition to New Energy Economy’s Expedited Motion to Compel NMED Testimony (Dkt. No. 116)*, at pp. 2-9, 11 (filed Oct. 19, 2026) [Dkt. No. 114], relevant background and legal authority are presented relevant to the Hearing Officer concluding that compelling a Bureau witness to testify is contrary to law.² The Bureau offers additional argument below.

I. THE BUREAU HAS TIMELY FILED THIS RESPONSE.

This response is timely, regardless of the arguments presented by NEE in the *Motion to Compel NMED Witness for Motion to Dismiss Hearing*, which requested the Bureau respond in less than two business days. The time-period set forth in the procedural rule at 20.1.4.200(D)(4) NMAC states: “Any party upon whom an opposed motion is served shall have fifteen (15) days after service of the motion to file a response.” The *Second Amended Pre-Hearing Order*, states that for “[p]rehearing Motions (including all dispositive motions and motions to exclude evidence)” the “[r]esponses shall be filed [*sic*] by November 30, 2026.” *Id.*, at ¶ 6. No other order

² Arguments presented by YGI regarding public notice and NMED practice are not responsive to the *Motion to Compel NMED Witness for Motion to Dismiss Hearing* and prematurely place positions into the record about the legal appropriateness of a factual action not yet taken by the Bureau. The Hearing Officer should decline to consider these arguments. *Applicant YGI’s Response in Opposition to New Energy Economy’s Expedited Motion to Compel NMED Testimony (Dkt. No. 116)*, at pp. 12-14 [Dkt. No. 114]

from the Hearing Officer imposes a more specific response deadline on the Bureau. As identified by the Bureau in its *Motion for Correction of the Hearing Record* (filed Oct. 22, 2026) [Dkt. No. 124], repeated demands made by parties in motions practice seeking to bend the rules in their favor are deeply prejudicial to the Bureau, this proceeding, and will establish poor precedent for administrative law in New Mexico.

II. APPLICABLE LAW DOES NOT GRANT ANYONE AUTHORITY TO SUBPOENA AND/OR COMPEL THE BUREAU TO PRODUCE A WITNESS FOR EXAMINATION BY NON-AGENCY PARTIES.

The power granted in statute limits authority here. The Hearing Officer must carefully evaluate the request being made and the arguments in support, as it is an attempt to obtain an advanced ruling regarding the application of 20.1.4.200(E)(4) NMAC for discovery requests in *Motion to Order Discovery Required by Due Process* (filed Oct. 13, 2026) [Dkt. No. 106] and *CBD's Motion for Hearing Officer to Order Discovery* (filed Oct. 14, 2026) [Dkt. No. 108] set for hearing on October 29.

The Legislature delegated to the EIB the requirement to issue rules governing public hearings, which it did, and to the Secretary of Environment, who adopted further procedural rules to carry out the agency's duties. NMSA 1878, § 74-2-7(B)(5) (directive for public hearings); 20.2.72.207 NMAC (EIB's exercise of authority); 9-7A-6(D) (Environment Secretary's authority); 20.1.4 NMAC (NMED procedural rules for public hearings); see Bureau's Motion for Correction of the Hearing Record, pp. 10-11, 25- (filed Oct. 22, 2026) [Dkt. No. 124] (statutory construction law and arguments hereby incorporated by reference). Many of the requirements in 20.1.4 NMAC that generally apply to the administrative public hearing on the pending air quality permit stem not from the AQCA but from statutory requirements in other laws. For example, the AQCA does not provide for subpoena power in public hearings or appeals like other laws, such as the Solid Waste Act. See generally NMSA 1978, § 74-2-1 to -17; compare § 74-9-29(A)(5) (Solid Waste Act

requiring procedures for discovery); § 74-2-12(H) (subpoena power in the AQCA is limited to enforcement, compliance orders, and field citations). Thus, 20.1.4 NMAC has no provisions regarding subpoenas in any proceeding other than those under the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -43. See 20.1.4.200(E)(2) NMAC. NMED could not have, through regulation, enlarged a hearing officer's authority to require compelled appearances of a witness when the AQCA does not allow it. Thus, no reading of the law can support such authority existing.

NEE's principal citation to 20.1.4.200(E)(4) NMAC omits two limitations that control its request: 1) the provision only applies as "Special Procedures for Hearings Under the Solid Waste Act" and 2) the power is reliant upon an initial grant of that authority from the Environment Secretary. This proceeding concerns an air quality construction permit, not a Solid Waste Act permit. Additionally, even if the regulation did apply, the Environment Secretary has not given the Hearing Officer the power to issue subpoenas, and the Hearing Officer has no authority to force the Secretary to compel the relief requested.

When the Legislature gives broad grants of power to an agency, the power comes with the understanding "that the [agency] would develop an appropriate test to fit the regulatory climate." Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n, 1991-NMSC-083, ¶ 11, 112 N.M. 379 (internal citation omitted). "It is a settled principle of administrative law that the Legislature, when 'through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.'" Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, ¶ 34, 417 P.3d 369 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)). The Legislature did not provide for subpoenas as of right in air permit proceedings and did not prescribe any procedural requirements for the

public hearing. The New Mexico Supreme Court has “decline[d] to read the Legislature’s silence as embracing (implicitly or otherwise) any particular approach[.]” Gila Res. Info. Project, 2018-NMSC-025, ¶ 66. For both the AQCA direction to the EIB to adopt public hearing regulations and the EIB’s delegation to the Secretary, the broad grant of authorities carry with them discretion to adopt an appropriate public hearing process. See N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n, 2007-NMCA-010, ¶ 11, 141 N.M. 41 (upholding “presumptively valid” agency regulations against a facial challenge where the regulations were “reasonably consistent with the authorizing statutes”). The AQCA and governing regulations deliberately allocate evidentiary burdens without providing for subpoenas as a prerequisite to carrying those burdens and instead rely on public-notice materials, prefiled technical testimony, and procedural protections like oaths, cross-examination, objections, and rebuttal. See Alto Coal. for Env’t Pres. v. Roper Constr., Inc., 2025-NMCA-018, ¶ 24, 572 P.3d 268.

Here, the hearing process does not include subpoena power or the authority to compel testimony. Therefore, NEE cannot rely upon 20.1.4.200(E)(4) NMAC as an unrestricted grant of subpoena authority.

NEE’s reliance on the Administrative Procedures Act (“APA”) is similarly incomplete. The APA does not apply merely because the proceeding is administrative; it is an opt-in statute. See NMSA 1978, § 12-8-23 (the APA governs only the agencies specifically made subject to its coverage); § 12-8-2(A) (definition of agency). Agencies not subject to the APA do not have to comply. N.M. Att’y Gen. Op. No. 93-3 (Feb. 3, 1993) (citing Livingston v. Ewing, 1982-NMSC-110, 98 N.M. 685; Mayer v. Public Employees Retirement Bd., 1970-NMCA-005, 81 N.M. 64). NEE identifies no law or regulation making NMED’s present air permit proceeding subject to the

APA, nor did the Bureau's counsel identify any in research. Thus, there is no legal basis upon which the Hearing Officer can invoke the subpoena power under Section 12-8-15 of the APA.

NEE also conflates the opportunity to cross-examine witnesses with the power to compel their attendance prior to providing any previous testimony. Sections 20.2.72.206(C) NMAC and 20.1.4.400(B)(2) NMAC state the opportunity to cross-examine witnesses testifying at the hearing. However, neither provision expressly requires the Bureau to designate and prepare an employee for examination at an opposing party's request. The right to examine witnesses who testifies does not, by its terms, establish a right to require an opposing party to supply a witness.

Although 20.1.4.100(A) NMAC provides that the Rules of Civil Procedure do not apply and may be used only for guidance, the civil discovery and subpoena procedures cannot independently supply the authority missing from NEE's Motion because such application would extend or modify the Hearing Officer's and the Secretary's authority/jurisdiction not provided for in statute. Similarly, nor can a general pre-hearing order overcome the lack of statutory or regulatory authority. Lastly, NEE invokes "good cause" for expedited relief, but identifies no provision of the applicable law, making good cause a standard for compelling testimony in this proceeding.

The threshold issue is whether applicable law authorizes the requested compulsion; NEE cannot replace that inquiry with a showing under standards the governing law does not prescribe. Therefore, NEE has failed to demonstrate it is entitled to the relief requested as a matter of law.

III. NEE IS IMPROPERLY SEEKING TESTIMONY BEFORE FINAL REVIEW

In attempting to establish a basis for compelling testimony from a Bureau witness, NEE impermissibly supplements its *October Motion to Dismiss* by asserting additional arguments in support of the relief requested, not just arguments regarding testimony. This nonchalant approach to overlapping motions that amend arguments and relief to comport with real-time events should

not be tolerated. Further, this is an example of why premature filings of the Administrative Record confuse the issues, and why dispositive motion practice is not well-taken when the Bureau is following the process to work with an applicant on its request for a permit.

The air permitting process expressly contemplates supplementation after administrative completeness and before final decision. See 20.2.72.203(E)(1)-(2) NMAC. Moreover, YGI submitted additional information and modeling on October 16, after NEE filed its *October Motion to Dismiss*. The adequacy of the October 16 submission must be evaluated on its contents; it cannot be conclusively determined from correspondence that preceded it. The Bureau's correspondence documents its scrutiny of the information submitted by YGI. The correspondence does not establish that requesting further information automatically invalidates administrative completeness or requires dismissal.

The Bureau respectfully recognizes that the early filing and supplementation of the Administrative Record, undertaken pursuant to the Hearing Officer's direction, has made materials available while the Bureau's technical evaluation remains ongoing. That sequence may explain some of the uncertainty concerning the significance of particular communications and submissions. The compilation and filing of documents reflects the materials collected at that point; it does not signify that the Bureau has completed its analysis, verified the applicant's representations, or adopted a final technical position. Correspondence identifying questions, requesting clarification, or describing preliminary concerns documents the review process and should be considered in that context. The Bureau respectfully submits that the distinction between making the developing record available and completing the evaluation of that record is essential: the former enables public access, while the latter requires sufficient time to assess the information, reconcile the application with its supporting modeling, and develop a reasoned recommendation.

The Bureau's compliance with the Hearing Officer's direction should therefore not be understood as a representation that the materials filed constitute a completed technical evaluation or are ready to support definitive conclusions.

Turning to the specific information requests, NEE's first proposed examination topic is not responsive to the *October Motion to Dismiss* [Dkt. No. 107], which was filed before the October 14 letter existed: the Motion was filed at 3:27 p.m. and the letter was sent at 6:11 p.m. and received the next day at 8 a.m. This makes the matters raised for the prior application moot.

NEE's second proposed examination topic is similarly moot for the same reasons as NEE's first proposed examination topic. Additionally, NEE's second proposed examination topic asks for the time required to evaluate the October 16 submission (we are guessing because the *October Motion to Dismiss* [Dkt. No. 107] is not specific) requires guess-work and no witness can competently testify to that.

For NEE's third proposed examination topic, NEE failed to review the Administrative Record properly. See Administrative Record NSR 10833_011976 (the October 9 email from the Bureau to YGI stated: "The Air Quality Bureau understood from the meeting that YGI may not use its most current air dispersion modeling design with the three different cluster compositions (i.e., the 10/18/20 configuration) and will submit updated air dispersion modeling reflecting the permit application. As part of this forthcoming air dispersion modeling submission . . ."). This matter has already been addressed.

NEE's fourth proposed examination topic seeks conclusions from the Bureau that have not yet been developed because the complete technical review is not done, nor has the Bureau had an opportunity to determine what revisions are required for the Draft Permit, develop a corresponding revised Statement of Basis, and complete the Modeling Report for the new modeling.

Furthermore, these are expressly the type of questions that belong at the full evidentiary hearing through examination on a more complete Administrative Record. Contrary to NEE's assertion that "NEE does not ask the Hearing Officer to prejudge the merits[,]" [Dkt. No. 115] at p. 8, that is in fact exactly what NEE is requesting.

NEE's fifth proposed examination topic is speculative and based on a flawed understanding of the air permitting process, as well as seeking conclusions from the Bureau that have not yet been developed because the complete technical review is not done, nor has the Bureau had an opportunity to determine what revisions are required for the Draft Permit, develop a corresponding revised Statement of Basis, and complete the Modeling Report for the new modeling.

NEE's Motion to Compel NMED Witness for Motion to Dismiss Hearing itself demonstrates why *NEE's October Motion to Dismiss* is both moot and not ripe, depending on the perspective one takes. To the extent NEE seeks summary disposition under 20.1.4.600(B)(1) NMAC, NEE's insistence that live technical testimony is indispensable undermines the requested procedure. The movant for a motion to dismiss, or a motion converted into summary judgment, bears the burden of establishing the material facts supporting the request for relief. NEE bears the burden of presenting undisputed material facts to support its request for relief.

NEE cannot establish entitlement to summary disposition while also asserting that additional evidence must first be compelled to determine whether NEE's factual premises are correct. The operative application NEE seeks to adjudicate was amended on October 16. NEE cannot demand dispositive relief; get a hearing; and then seek factual support through compelled testimony about changed circumstances four days after the hearing is noticed, six days after filing the dispositive motion and three days after demanding the Bureau produce a witness. It begs the question that the evidentiary findings required to resolve the allegations (if permissibly expanded

to more recent circumstances) are the same as the findings following the evidentiary public hearing currently set for December 7. If resolution requires development of disputed technical facts, that supports addressing those issues through the properly established evidentiary process rather than granting dismissal on an incomplete technical record.

The request for compelled testimony also contradicts the assertions that discovery is required to move forward in this proceeding. See *Motion to Order Discovery Required by Due Process* (filed Oct. 13, 2026) [Dkt. No. 106]; *CBD's Motion for Hearing Officer to Order Discovery* (filed Oct. 14, 2026) [Dkt. No. 108]; October 15 Status Conference (oral orders for serving discovery by October 20 and suggesting a meet-and-confer with a deadline for objections by October 26); *Notice of Hearing on Motions for Discovery* (entered Oct. 16, 2026) [Dkt. No. 112]; *Joinder to October Motion to Dismiss by Mr. Saldaña Jr. and Ms. Fuller and CBD*, at p. 5 [Dkt. No. 123] (describing the need for discovery as a justification for further delay).

NEE cannot be prejudiced by not getting relief that the law does not afford them to obtain. NEE's own demands are causing greater prejudice to the Bureau, the integrity of the process, and applicants – both currently and in the future. NEE identifies no applicable authority requiring the Bureau to produce a witness for an adversarial examination in support of relief the Bureau disputes on both legal and factual grounds and considers premature. NEE's characterization of the Bureau's refusal as obstruction is unwarranted. Bureau technical staff are carrying out their responsibilities for the State of New Mexico, including evaluating the very materials NEE insists require further review, as required by law. The Bureau will comply with the Hearing Officer's scheduling orders to the extent it is capable to do so but declines to be faulted by the repeated undue delays caused by other parties to this proceeding that would be avoidable if the Bureau is simply allowed to do

its job.³

IV. THE HEARING OFFICER HAS AUTHORITY TO GRANT THE BUREAU APPROPRIATE RELIEF FROM THE REQUEST TO COMPEL PREMATURE TESTIMONY OUTSIDE THE PROTECTIONS OF 20.1.4 NMAC, AND TO ISSUE SANCTIONS TO PROHIBIT FURTHER HARASSING, INTIMIDATING, TIME-WASTING, AND REPETITIVE REQUESTS.

Section 20.1.4.400(B)(2) NMAC states: “The Hearing Officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time, or undue repetition.” The Bureau respectfully requests the Hearing Officer exercise this authority to prohibit non-agency parties from attempting to prematurely and inappropriately call Bureau witnesses to prove their own case. Such efforts are harassing and intimidating, result in the needless expenditure of time for being premature, and risk undue repetition when there is already a full evidentiary hearing set for December 7 that the same Bureau staff are attempting to prepare for that will address the issues non-agency parties raise.

New Mexico Rule of Civil Procedure 1-045(C)(3) addresses relief from a subpoena requiring testimony at a hearing. See 20.1.4.100(A) NMAC (“At the discretion of the Hearing Officer, the [New Mexico Rules of Civil Procedure] may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.”). Rule 1-045(C)(3) does not support compelling an appearance when there is “undue burden” and the court may “quash or modify” the request, including if it fails to allow time for

³ Notably, NEE again raises the prospect of judicial intervention if its requested relief is denied. See [Dkt. No. 115] at p. 8. NEE previously sought an emergency stay and a writ of mandamus from the New Mexico Supreme Court, resulting in a stay that interrupted this administrative proceeding for nearly a month. NEE’s stated intention to seek judicial relief supplies no independent basis to shorten the Bureau’s response time, compel testimony without applicable authority, or otherwise depart from the procedures governing this proceeding. See New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-049, ¶¶ 10, 14, 19, 149 N.M. 42 (preventing the agency from completing necessary factfinding denies the agency an opportunity to correct alleged errors during the proceeding).

compliance, and may even sanction the party or attorney responsible for the command. NMRA, 1-045(C)(3)(1), (3)(a). While the relief sought here is not labeled a “subpoena” it has the same effect of being a legally binding order requiring a person to appear and give testimony for a legal proceeding.

By email at 6:44 p.m. on October 20, the Hearing Officer set a hearing for the *Motion to Compel NMED Witness for Motion to Dismiss Hearing* on October 26, 2026, before the hearing on the *August Motion to Dismiss* [Dkt. No. 52] and *October Motion to Dismiss* [Dkt. No. 107] and ordered the Bureau to have its witness available in case he granted the *Motion to Compel NMED Witness for Motion to Dismiss Hearing*. An updated formal hearing notice for the docket was entered October 21, stating: “If the Hearing Officer grants the Motion to Compel, he has advised counsel for the New Mexico Environment Department to have its witnesses ready to testify on matters raised in the Motion to Compel.” *Amended Notice of Hearing on Motions to Dismiss* [Dkt. No. 117]. The Bureau understands this statement as a conditional recommendation concerning preparation, rather than a ruling granting *NEE’s Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115] or an independent directive compelling witness attendance. If the *Amended Notice of Hearing on Motions to Dismiss* [Dkt. No. 117] is expressly ordering the Bureau to prepare and produce a witness, such a ruling should be promptly clarified since it effectively grants the *NEE’s Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115] without any notice of the legal authority, witness requirements, and permitted subjects of examination.

Deciding *NEE’s Motion to Compel NMED Witness for Motion to Dismiss Hearing* immediately before compelling testimony makes meaningful procedural protection difficult. The Bureau must either undertake the disputed preparation before its objections are decided or risk

being ordered to present an unprepared Bureau employee immediately afterward. Compelling premature testimony forces the Bureau to contemplate if it must expedite its review, an enormous burden for government employees with less than two business days' notice (the *Amended Notice of Hearing on Motions to Dismiss* [Dkt. No. 117] was filed at 10:31 a.m. on October 21), to establish a point-in-time understanding of YGI's technical submissions, identifying what conclusions have actually been reached, and distinguishing completed analysis from ongoing work. Requiring witness readiness before resolving whether compulsory testimony is authorized imposes much of the burden of the disputed relief before the Bureau's objections have been adjudicated. Moreover, a ruling followed immediately by examination would afford no meaningful interval to address the ruling, prepare the witness within the authorized scope, or seek reconsideration and any available review. Therefore, the Bureau requests the Hearing Officer withdraw or stay the conditional readiness directive and decide the threshold question of authority before requiring witness designation, preparation, or attendance.

Thus, the Bureau requests a protective procedural order confirming that it is not required to designate or produce Ms. Kuhn or another Bureau technical staff for examination on October 26. If the Hearing Officer allows NEE and any other party to conduct a direct examination of a compelled Bureau witness, the inquiry must be defined in scope much more limited than NEE's five proposed examination topics, allow Bureau counsel a non-time constrained opportunity for redirect on testimony by a compelled Bureau witness, and – most importantly – vacate the hearing and provide the Bureau with adequate preparation time.

The Bureau maintains its objections to the requested compulsory testimony and requests that those objections be resolved before any obligation to designate or produce a witness is imposed. If the Hearing Officer grants the *NEE's Motion to Compel NMED Witness for Motion*

to Dismiss Hearing, the Bureau alternatively requests that testimony be scheduled separately, following an order identifying the legal authority and permissible scope of examination and allowing reasonable time for preparation, reconsideration, and any available review. The Bureau should not be required to undertake the disputed witness preparation merely to ensure that testimony can begin immediately upon an adverse ruling.

The Bureau hereby incorporates by reference its arguments in its *Motion for Correction of the Hearing Record* (filed Oct. 22, 2026) [Dkt. No. 124] that the hearing itself lacks public notice and the protections afforded by 20.1.4 NMAC for evidentiary hearings.

Lastly, sanctions are warranted. In their rush to simply make this permit opportunity go away, opposing parties are taking every opportunity to confuse the record and misapply the law to get what they want. This effectively diverts the Bureau's attention to disproving false and incorrect statements and protecting the process to the detriment of completing the same technical review for which answers are being demanded and preparing for hearing. These abusive tactics are prohibited by 20.1.4 NMAC and should not be tolerated. The Bureau respectfully asks the Hearing Officer to issue an order that sanctions such conduct by putting procedural protections in place to prevent the recurring harms associated with harassing, intimidating, time-wasting, and repetitive requests.

CONCLUSION

NEE has failed to demonstrate legal authority exists for the Hearing Officer to compel the Bureau to present a witness from its technical staff reviewing the YGI application and modeling for NEE to directly examination during the October 26 hearing. Even if such legal authority existed, NEE has failed to demonstrate a need for such testimony nor is there a basis to go to such length to allow NEE to cure the lack of supporting facts in its *October Motion to Dismiss*. Therefore, the Bureau respectfully requests the Hearing Officer:

A. Deny NEE's demand for compulsory attendance of a Bureau witness and confirm that the Bureau need not designate or produce an employee for the October 26 examination;

B. Alternatively, if testimony from a Bureau witness will be compelled:

- a. resolve the legal authority question;
- b. limit testimony to the witness's actual responsibilities and personal knowledge;
- c. prohibit questions inviting speculation;
- d. define the examination scope and require advance disclosure of the examination topics in detail and any documents counsel intends to use;
- e. provide reasonable preparation time for the Bureau witness(es);
- f. allow only examination by NEE's counsel and strictly enforce the 45-minute time limit; and
- g. allow Bureau counsel an unrestricted opportunity for redirect of the witness(es).

C. All other relief necessary.

Filed: October 24, 2026

Respectfully Submitted,

ROBLES, RAEL & ANAYA, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Response in Opposition to New Energy Economy's Motion to Compel NMED Witness for Motion to Dismiss Hearing* was electronically filed and sent via electronic mail on this 24th day of October 2026 to the following:

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Should the Hearing Clerk require a paper original, Robles, Rael, and Anaya, P.C. shall promptly provide the document upon request.

/s/Kelsea E. Sona
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