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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 DISMISS APPLICATION WITHOUT PREJUDICE AS INCOMPLETE
AND NOT READY FOR HEARING [Dkt. No. 107]

The New Mexico Environment Department ("NMED") Air Quality Bureau ("Bureau"), pursuant to the New Mexico Environment Department's Permit Procedures at 20.1.4.200(D)(4) NMAC, respectfully provides this response in opposition to *New Energy Economy'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*").

INTRODUCTION

The relief sought by New Energy Economy ("NEE") is simply not available under applicable law and the pace at which NEE is demanding the Bureau provide the parties with information is detrimental to the process. Although YGI retains the burden of demonstrating entitlement to an air quality permit. It is the Bureau that will bear the consequences of harmful precedent created under misapplication of the law if *NEE's October Motion to Dismiss* is granted. NEE's motion fails to establish a legal basis for dismissing the application at this point in the proceeding.

BACKGROUND

The Bureau has presented background in its prior recent filings and adds additional relevant background for the particular issue here. See *Bureau's Motion for Correction of the Hearing Record*, at pp. 4-10 (filed Oct. 23, 2026) [Dkt. No. 124]; *Bureau's Response in Opposition to New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* [Dkt. No. 52], at pp. 3-5 (filed Oct. 24, 2026) [Dkt. No. ____] (not yet docketed) (“*Bureau's Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*”); *Bureau's Response in Opposition to New Energy Economy's Motion to Dismiss YGI's Application as Not Ripe for Adjudication* [Dkt. No. 52] , at pp. 2-3 [Dkt. No. ____] (consecutively filed; not yet docketed) (“*Bureau's Response in Opposition to August Motion to Dismiss*”).

On October 14, YGI sent the Bureau a letter in response to the October 9 inquiry, which the Bureau received the morning of October 15.

On October 15, the parties participated in a status conference where preliminary oral argument on *NEE's October Motion to Dismiss* was offered by some parties, YGI's counsel shared the October 14 letter and its plans to submit the information described in the letter shortly thereafter. YGI sent the information on Friday, October 16, although, practically, the Bureau did not receive it to begin a preliminary review until Monday, October 19.

On October 16, a formal hearing notice was filed setting *NEE's October Motion to Dismiss* for hearing on October 26, along with *New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* (filed Aug. 4, 2026) [Dkt. No. 52], as amended by *Errata to New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* (filed Aug. 5, 2026) [Dkt. No. 57] (together “*NEE's August Motion to Dismiss*”). See *Notice of Hearing on Motions to Dismiss* [Dkt. No. 111].

On October 19, YGI filed *Applicant Yucca Growth Infrastructure, LLC's Response in Opposition to New Energy Economy's Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing (Dkt. No. 107)* (filed Oct. 19, 2026) [Dkt. No. 116] (“YGI’s Response in Opposition to October Motion to Dismiss”).

On October 20, NEE filed its *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* [Dkt. No. 115] (“*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.

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 *NEE’s 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 on October 21. *Amended Notice of Hearing on Motions to Dismiss* [Dkt. No. 117].

On October 22, the Jose Saldaña Jr. and Vivian Fuller, and the Center for Biological Diversity filed a “notice” joining *NEE’s October Motion to Dismiss* [Dkt. No. 107] with six pages of additional argument in support of NEE’s requests for relief. *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 NEE’s October Motion to Dismiss by CBD, Mr. Saldaña Jr. and Ms. Vivian Fuller*”).

Later, on October 22, the Bureau filed its *Motion for Correction of the Hearing Record* [Dkt. No. 124]. On Friday, October 23, at 8:35 p.m., YGI filed a response (not yet docketed).

On Friday, October 23, YGI filed *Applicant YGI's Response in Opposition to New Energy Economy's Expedited Motion to Compel NMED Testimony (Dkt. No. 116)* [Dkt. No. 126].

ARGUMENT

The requested relief confuses administrative completeness and denial, as well as fails to establish the factual basis for relief because NEE asserts it needs additional information to support its claim for dismissal. More specifically, NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller ask the Hearing Officer to terminate YGI's application, vacate the merits hearing, and direct the Bureau's technical evaluation of the recently submitted materials. Alternatively, NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller seek an indefinite stay until the application and administrative record satisfy conditions of their choosing. Neither the governing law nor the two emails attached to the *October Motion to Dismiss* establish a legal basis for nor entitlement to such relief. The argument presented by the Bureau herein, as well as the arguments presented by the Bureau in its consecutively filed *Response in Opposition to August Motion to Dismiss*, as are the arguments raised in the *Bureau's Motion for Correction of the Hearing Record* [Dkt. No. 124] and the *Bureau Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*, are relevant to evaluating *NEE's October Motion to Dismiss* [Dkt. No. 107], as well as *Joinder to NEE's October Motion to Dismiss by CBD, Mr. Saldaña Jr. and Ms. Vivian Fuller* [Dkt. No. 123].¹

As the Bureau has not been afforded a meaningful opportunity for technical review of the October 14 and 16 submissions from YGI, the Bureau cannot meaningfully address YGI's

¹ The Bureau has tried to provide citations to relevant discussion but the limited time to file this response means the citations are likely not all encompassing of previously presented relevant arguments in other filings.

assertions in *YGI's Response in Opposition to October Motion to Dismiss* [Dkt. No. 116] (115 pages) and the evidence attached to *Applicant Yucca Growth Infrastructure, LLC's Response in Opposition to: New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication, Filed August 4, 2026, as Corrected August 5, 2026 (Dkt. No. 52, Dkt. No. 57 (Errata))* (filed Oct. 19, 2026) [Dkt. No. 114] (234 pages). To the extent the Hearing Officer considers them at the October 26 hearing and/or to support findings of fact and conclusions of law, the Bureau requests a reasonable period of time to respond or comment on a draft recommendation to avoid extreme prejudice to the Bureau, particularly as YGI attributes characterizations/meaning, statements, and conclusions to the Bureau and NMED permitting history that may be disputed.² The general authority and argument in *YGI's Response in Opposition to October Motion to Dismiss*, at pp. 8-9 and 11-12 (§ II(A)(iii)) [Dkt. No. 116] are responsive.

Notably, in every example from prior hearings cited by YGI on pages 14-15 of [Dkt. No. 116] involved an applicant that did not enforce the statutory decision deadline.

I. PROCEDURAL REQUIREMENTS MUST BE ADDRESSED BEFORE PROCEEDING TO HEARING ON NEE'S OCTOBER MOTION TO DISMISS.

Dispositive relief cannot bypass applicable public notice and participation requirements, nor can the Hearing Officer issue a final order, as that authority rests with the Deputy Secretary. See Bureau's Motion for Correction of the Hearing Record, Argument § I, at pp. 10-21 [Dkt. No. 124] (particularly argument at pp. 12-17 and 20–21 & n.4). The Bureau must receive a meaningful opportunity to respond before the dispositive motion is heard. Id., Argument § II, at pp. 21-23.

² Arguments presented by YGI regarding NMED prior practice and corresponding treatment of YGI are not responsive to the *October Motion to Dismiss* and prematurely place defensive positions into the record about the legal appropriateness of a factual action not yet taken by the Bureau or NMED. See e.g., YGI's Response in Opposition to October Motion to Dismiss, at pp. 18-19, 21, 23-26 [Dkt. No. 116]. The Hearing Officer should decline to consider these arguments to avoid prejudice.

The statutory decision deadline, absent a waiver from YGI, constrains the availability of relief requested by NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller. *Id.*, Argument § III, at pp. 23-31. Furthermore, the approach to resolution here must not transform this proceeding into a civil trial, particularly when the fundamental basis here is to afford a process with defined rules to give the public a venue to convey its thoughts to the agency and test the applicant's supporting information followed by adjudication before the Environmental Improvement Board and Court of Appeals if dispute remains. *See Bureau's Response in Opposition to August Motion to Dismiss*, at pp. 6-7.

II. THE OCTOBER MOTION TO DISMISS SEEKS DISPOSITIVE RELIEF THAT IS FACT-DEPENDENT, RATHER THAN PRESENTING A PURELY LEGAL DEFECT UNDER THE ONLY SUMMARY PROCEDURE RECOGNIZED BY 20.1.4 NMAC.

The only recognized summary procedure in 20.1.4 NMAC is in 20.1.4.600(B) NMAC, which does not recognize dismissal when there is an existing necessity to build out the evidentiary record to substantiate the request for relief. *See Bureau's Response in Opposition to August Motion to Dismiss*, at pp. 7-9. The Summary Procedure applies to an "Application" or "Petition," while other provisions throughout the procedural rule separately identify a "Draft Permit" in the list. *Compare* 20.1.4.7(A)(4) NMAC (definition of application); *id.*, 7(A)(17) (definition of petition); *id.*, 7(A)(9) (definition of draft permit). However, the Hearing Officer need not resolve the full reach of that distinction here, although the Bureau questions its application. Even assuming Section 600(B) applies to the relief NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller request, the *October Motion to Dismiss* does not satisfy its terms.

First, 20.1.4.600(B)(1)(a) NMAC addresses dismissal for a jurisdictional defect. NEE identifies no defect depriving NMED of jurisdiction over YGI's air-permit application. Whether the evidence is adequate to support approval of a permit is a merits question, not a jurisdictional defect merely because NEE labels the application incomplete. Second, 20.1.4.600(B)(1)(b)

NMAC addresses deciding the merits on legal arguments. NEE's proposed findings concerning modeling reliability and present technical sufficiency require evidentiary evaluation – that is not a matter limited to a legal argument with established undisputed facts. NEE itself has asked for testimony from Bureau staff to support its *October Motion to Dismiss*, essentially admitting the motion cannot be granted without further record development. Lastly, 20.1.4.600(B) NMAC assigns final disposition to the Secretary of Environment after public notice and allowance for an expedited hearing. NEE's request for an order by the Hearing Officer dismissing the application cannot bypass the designated final decision maker, the Deputy Secretary or public notice requirements. Therefore, 20.1.4 NMAC does not provide the dispositive relief NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller and the Hearing Officer cannot grant *NEE's October Motion to Dismiss*.

III. EVEN IF THE PROCEDURAL PROCESS RECOGNIZED SUMMARY DISMISSAL OF AN APPLICATION, NEE HAS FAILED TO DEMONSTRATE IT IS ENTITLED TO SUCH RELIEF.

NEE's October Motion to Dismiss is both moot because the operative application it seeks to adjudicate was amended on October 16 and not ripe because the evidentiary findings required to resolve the allegations are the same as the findings following the evidentiary public hearing currently set for December 7. The Bureau raises the legal arguments addressing this in its *Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*. For *NEE's October Motion to Dismiss*, the requested dismissal depends on findings that the application presently lacks a reliable compliance demonstration, that subsequent information necessarily invalidates administrative completeness, and that a fair merits hearing cannot proceed. Those propositions do not follow as pure questions of law from the existence of the Bureau's emails nor substantiate a basis for premature dismissal. Answering those questions requires evaluation of the operative application, modeling inputs and results, subsequent submissions, and the opportunities available to address the evidence. See *Bureau Response to Motion to Compel NMED Witness for Motion to*

Dismiss Hearing, Background, at pp. 4-5; Argument § III, at pp. 10-13 (the October 14 and 16 submission changes the factual premise of *NEE's October Motion to Dismiss*, which must be evaluated on its own contents); *Motion for Correction of the Hearing Record*, Background, at pp. 5-7 [Dkt. No. 124] (same). NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller present questions that belong at the evidentiary public hearing; not a dispositive motion pre-hearing before a full evidentiary record is developed.

A. NEE Cannot Obtain Summary Disposition While Insisting That Additional Technical Evidence is Necessary to Establish Its Factual Premises.

NEE's demand for indispensable testimony and the record replete with discovery requests undermine the claim that *NEE's October Motion to Dismiss* has presently established the necessary grounds for disposition. See *Bureau Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*, Argument § III, at pp. 12-13 (addressing why the requested dismissal depends on disputed technical facts and unfinished review); *Motion for Correction of the Hearing Record*, Argument § I, at pp. 12-13 [Dkt. No. 124] (same)

B. The Hearing Officer Lacks Jurisdiction to Incorporate into the Hearing Process Evaluation and Oversight of the Bureau's Technical Review and Has No Authority to Mandate the Bureau Take Specific Action Under 20.2.72 NMAC.

The Hearing Officer's authority concerns the conduct of the public hearing, development and evaluation of the hearing record, and preparation of a final order recommendation. See e.g., 20.1.4.110(E)(2) (powers and duties); 20.1.4.300(A)(3) NMAC ("orders for conduct of proceedings"); 20.1.4.400(B)-(C) NMAC (evidence); 20.1.4.500(C) NMAC (Hearing Officer's report). The functions for the Hearing Officer under 20.1.4 NMAC focus on hearing management and assessing technical evidence bearing on permit entitlement. The functions do not confer general jurisdiction to supervise how the Bureau conducts its underlying evaluation of the application and supporting materials, dictate the Bureau's information requests, or require the

Bureau to establish a new deadline for obtaining information from YGI. The relevant substantive rule, 20.2.72.203(E)(2) NMAC, assigns the information-request process to the Department. NEE identifies no statute, regulation, or appointment provision delegating the supervisory power it asks the Hearing Officer to exercise, meaning NEE's fourth request for relief expressly seeking such an order against the Bureau is contrary to law. Thus, the Hearing Officer should decline the invitation to exercise that level of oversight. See NMSA 1978, § 74-2-9(C)(3) (appellate review sets aside "actions . . . otherwise not in accordance with law.").

C. The Air Permitting Process Allows Supplementation, Correction, and Additional Information Before Final Decision and After Administrative Completeness, But Applicants Making Late-Stage Changes Cannot Supersede the Bureau's Complete Technical Review.

Administrative completeness does not conclusively establish technical sufficiency. However, NEE's proposed consequence of dismissal is not recognized by law. Section 20.2.72.203(E)(1) NMAC imposes a continuing duty on the applicant to supplement and correct information before final decision, including relevant information later acquired or recognized as relevant. The substantial-change discussion in AQB Procedure 02-013.00, New Source Review Permit Applications—Ruling Administratively Incomplete, Requesting More Information, Denials, and Extensions (Mar. 11, 2002), Section 2.0, provides for Bureau Chief review of the appropriate response; it does not prescribe automatic dismissal. See *Bureau's Notice of Errata Regarding Exhibit A to Motion for Correction of the Hearing Record* (filed Oct. 23, 2026) [Dkt. No. 125] (attaching **Exhibit A**). The Bureau's continuing authority to request information is not an obligation to keep requesting information until an applicant succeeds. Nor does it guarantee YGI additional time to cure deficiencies absent YGI's own waiver. As discussed throughout the Bureau's *Motion for Correction of the Hearing Record* [Dkt. No. 124], applicants that create additional work associated with technical review of an application due to changes accommodate

the review required by withdrawing and resubmitting their applications or agreeing to extend the decision deadline when a public hearing is granted to further develop the record due to significant public interest.

The Bureau disputes NEE's characterization of the October 2 and 9 correspondence as agency "admissions" conclusively establishing an unreliable or incomplete application, as addressed in the *Bureau Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*, Introduction and Background, at pp. 2-4, and Argument § III, at pp. 10-11. Similarly, the Bureau disputes NEE's characterization that the October 2 and 9 correspondence invalidates prior agency decisions, as addressed in the Bureau's *Bureau Response to Motion to Compel NMED Witness for Motion to Dismiss Hearing*, Argument § III, at p. 10, and *Motion for Correction of the Hearing Record*, Background, at pp. 6-7 [Dkt. No. 124].

Also, as addressed in the *Bureau's Response in Opposition to New Energy Economy's Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115], at pp. 10-11, the Bureau filed early a supplementation to the Administrative Record, which resulted in production of records reflecting Bureau questions and YGI decisions that have since evolved. Reactionary dispositive motion practice based on the incomplete record is not appropriate because "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." *Id.*, at p. 10. Filing the Administrative Record does not signify that technical review is complete or that every preliminary concern is an adopted conclusion. Furthermore, receipt of materials offered to demonstrate compliance does not establish that the Bureau has verified their adequacy or that YGI has satisfied its burden.

IV. IF THE HEARING OFFICER CONSIDERS THE RELIEF REQUESTED, THE BUREAU REQUESTS AN OPPORTUNITY TO PRESENT ESSENTIAL RESPONSIVE EVIDENCE.

The Rules of Civil Procedure do not govern this proceeding and neither do the Rules nor 20.1.4 NMAC authorize fact-dependent summary disposition of the proceeding. Nevertheless, since civil summary-judgment principles are asserted by movants and may be used as guidance, the Bureau conditionally invokes Rule 1-056(F) NMRA and requests the opportunity to obtain and present essential responsive facts based on and after completion of its technical review. Resolving the disputed technical questions before the Bureau completes the necessary review would substitute assumptions for evidence and fail to recognize the distinction between denying an application because the applicant has not demonstrated compliance on the available record and prematurely dismissing the application based on assumptions about what unfinished technical review will establish. The Bureau makes this request expressly to avoid any suggestion that it consented to premature disposition. See Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 22, 122 N.M. 537 (objection preservation required for appeal based on premature dispositive relief); see NMRA, Rule 12-321. Furthermore, if NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller contend that additional discovery is necessary before favorable disposition of their dispositive requests, they cannot participate in oral argument or invite a ruling while reserving an appellate objection that the record required further development; that right will be waived. See Zavala v. El Paso Cnty. Hosp. Dist., 2007-NMCA-149, ¶ 9, 143 N.M. 36, 41, 172 P.3d 173 (“Plaintiffs cannot appear at a hearing, present their evidence, and then argue that they should have been permitted additional discovery simply because the district court ruled against them.”) (citing Ciup, 1996-NMSC-062). The moving/joiner parties must take a clear position: either the existing record allows disposition of the motions, or additional discovery is necessary and they seek deferral.

The Bureau requests denial of the *NEE’s October Motion to Dismiss* on the legal and

procedural grounds stated in this response. Alternatively, if adverse factual disposition is contemplated, the Bureau asserts that evidence from completing the technical review would be responsive. The Bureau requests an express ruling on that alternative relief before any adverse factual disposition. If the necessary evidentiary development cannot occur within the available process, the Bureau requests denial of NEE's fact-dependent *NEE's October Motion to Dismiss* rather than acceptance of its disputed factual premises.

CONCLUSION

The positions herein and requests for relief do not join the non-agency parties demand for an indefinite stay, concede authority exists to extend the statutory decision deadline, or relieve YGI of its burden to demonstrate entitlement to a permit by the statutory decision deadline absent a waiver within a period of time that enables the Bureau to conduct a meaningful technical review. The Bureau respectfully maintains that the Hearing Officer must:

- A. Resolve the procedural problems hindering notice, review and participation before going to hearing on and/or evaluating the *October Motion to Dismiss* [Dkt. No. 107];
- B. Deny the *October Motion to Dismiss* [Dkt. No. 107] for failing to establish a legal basis under which it is entitled to relief;
- C. Provide a reasonable period of time for the Bureau to meaningfully review and respond to the technical evidence submitted by YGI in [Dkt. No. 114] and [Dkt. No. 116] if it is considered in any manner by the Hearing Officer;
- D. If review is undertaken, deny the *October Motion to Dismiss* [Dkt. No. 107] for failing to establish undisputed material facts under which NEE, CBD, Mr. Saldaña Jr. and Ms. Fuller base the request for relief;
- E. Alternatively, if review is undertaken and a consideration is made to recommend

granting the *October Motion to Dismiss* [Dkt. No. 107], such a ruling must be deferred pending the Bureau's complete technical review.

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Respectfully Submitted,

ROBLES, RAEL & ANAYA, P.C.

By: /s/ Kelsea E. Sona
Kelsea E. Sona
500 Marquette Ave NW, Suite 700
Albuquerque, New Mexico 87102
(505) 242-2228
kelsea@roblesrael.com

-and-

**OFFICE OF GENERAL COUNSEL,
New Mexico Environment Department**

Zachary Ogaz, General Counsel
Brian Yardman-Frank
5401 Watson Dr. Se, Bldg. B
Albuquerque, NM 87106
(505) 470-8151
zachary.ogaz@env.nm.gov
brian.yardman-frank@env.nm.gov

Counsel for the Bureau

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 Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing [Dkt. No. 107]* was electronically filed and sent via electronic mail on this 25th day of October 2026 to the following:

Judge James O. Browning
james.oren.browning@gmail.com
Hearing Officer

Luis Lopez
Luis.lopez@env.nm.gov
Hearing Clerk

Jennifer L. Bradfute
David Kirmse
jennifer@bradfutelaw.com
david@bradfutelaw.com
- and -
Jennifer Bieber
Carlos Romo
Corey Lim
Jbiever@williamsweese.com
Cromo@williamsweese.com
clim@williamsweese.com
Counsel for Applicant Yucca Growth Infrastructure, LLC

Colin Cox
Sarah Baer
Gail Evans
ccox@biologicaldiversity.org
sbaer@biologicaldiversity.org
gevans@biologicaldiversity.org
Counsel for Center of Biological Diversity

Maslyn Locke
Eric Jantz
Kayla Jankowski
mlocke@nmelc.org
ejantz@nmelc.org
kjankowski@nmelc.org
Counsel for Vivian Fuller and Jose Saldana Jr.

Esperanza Chairez
Zephyr Jaramillo
Esperanza@yuccanm.org
info@yuccanm.org
Youth United for Climate Crisis Action

Mariel Nanasi
Christopher Dodd
mnanasi@newenergyeconomy.org
chris@fayerbergdodd.com
Counsel for New Energy Economy

Yiwei Chen
yiwei.chen@edd.nm.gov
Counsel for the New Mexico Economic Development Department

Isaiah Zemke
izemke@smwlu49.org
Counsel for Sheet Metal Workers Local Union No. 49

Courtenay Eichhorst
courtenaye@ualocal412.org
Counsel for New Mexico Building and Construction Trades Council

Nicholas R. Maxwell
inspector@sunshineaudit.com
Pro Se

Bruce Wetherbee
editor@thecandlepublishing.com
Pro Se

Joe Cardillo
joe@progressnownm.org
Pro Se

Christine Dobbin
Dobbin.cc@gmail.com

Pro Se

Darrell Deaguero
Darrel.deaguero@liuna16.org

Cc: mlor@liuna.org

Representative of LIUNA Local 16

Nathaniel Chakeres
Nathaniel.chakeres@ose.nm.gov
Counsel for New Mexico Office of the State Engineer

Andre Makarski
andre@ualocal412.org
United Association Local 412

Mark Trujillo
Stephanie Maez
markgtrujillo@ibew611.org
smaeznm@gmail.com
Authorized Representatives for IBEW Local Union 611

Robert Aubert
robert.aubert@dc36.org
cc: uriel.apodaca@dc36.org
Authorized Representatives for IUPAT District Council 36, Local 823

Rocky Bacchus
Consultant
6501 Tarascas Drive
El Paso, TX 79912
rockybacchus@gmail.com
Pro Se

Allison Johnson
Kalista Wilson
AJohnson@nmdoj.gov
KWilson@nmdoj.gov
New Mexico Department of Justice

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
Kelsea E. Sona