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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 10883

AQB 26-57 (P)

RESPONSE IN OPPOSITION TO JOINT MOTION TO VACATE DECEMBER 7, 2026 HEARING DATE

The New Mexico Building Construction & Trades Council ("NMBCTC"), Laborers' International Union of North America ("LIUNA") Local 16, Sheet Metal Workers Local Union No. 49, and United Association ("UA") Local 412 (collectively, the "Unions"), by and through undersigned counsel, file this Response in Opposition to Applicant Yucca Growth Infrastructure, LLC ("YGI") and the New Mexico Environment Department, Air Quality Bureau's ("Department") *Joint Motion to Vacate December 7, 2026 Hearing Date* (sometimes referred to as the "Motion") filed on November 3, 2026. The Unions object to vacating the currently scheduled December 7, 2026, Hearing ("Hearing") without resetting that Hearing to a date certain which does not cause unreasonable delay. An indefinite delay will result in extreme prejudice to the Unions members whose very livelihoods depend on the YGI microgrid project (the "Project"). In support of this Response, the Unions state as follows:

INTRODUCTION

This Motion seeks an indefinite delay of the Hearing without any reasonable explanation supporting such unorthodox relief. That is, the Motion fails to explain what exactly the Department needs to do to complete its technical review of YGI's application for an air quality construction permit or how long that technical review will take. Moreover, the Motion fails to acknowledge,

much less confront, the prejudice the Unions' members will suffer as a consequence of an indefinite delay. For the Unions' members, this is not simply a scheduling dispute. The relief requested in the Motion presents the very real risk of serious interruption of work that threatens the income that sustains the Union members' families, and the risk that prolonged delay will result in the complete elimination of these jobs.

The Hearing Officer should deny the relief requested in the Motion. The Department's asserted need to complete its technical review does not justify leaving this proceeding without a hearing date, particularly when the Motion identifies neither a concrete timetable for that review nor a means of limiting the resulting prejudice. Because the currently scheduled hearing date appears to no longer be feasible, the Unions respectfully request that the Hearing Officer enter an amended scheduling order setting a public hearing within a reasonable time, which will provide the Department sufficient time to issue notice and which will remove the prejudice that the Union's members now face.

RELEVANT BACKGROUND

In April 2026, YGI filed Application No. 10833 (the "Application") to build an energy microgrid under the Air Quality Control Act (the "Act"), NMSA 1978, Sections 74-2-1 *et seq*. AR NSR 10833_000001. The Department deemed the Application administratively complete on May 27, 2026. On July 1, 2026, the Department submitted its Request for Public Hearing Determination for Air Quality Permit Application, which the NMED Secretary James C. Kenney approved. [Doc. 1]. That same day, Secretary Kenney provided notice that an extension of time to process the Application was needed pursuant to 20.2.72.207(C)(1), (5) NMAC. AR NSR 10833_002092. Just sixteen days later, on July 17, 2026, the Department published the Notice of Hearing. *See* AR NSR 10833_002126-0021270.

On July 29, 2026, the Department published a draft permit and on August 12, 2026, submitted an Amended Notice of Hearing for a public hearing set to begin on September 14, 2026. AR NSR 10833_002092; AR NSR 10833_002105. The hearing noticed for September 14, 2026, did not occur due to an order from the New Mexico Supreme Court staying this proceeding. (*See* Doc. 94). The Supreme Court lifted its stay on September 17, 2026. (Doc. 97). Shortly thereafter, on October 16, 2026, Hearing Officer Hon. James O. Browning ("Hearing Officer") issued the Second Amended Scheduling Order. (Doc. 109). The Hearing Officer scheduled the public hearing in this matter to begin at 9:00 a.m. on Monday, December 7, 2026, and to continue as necessary. (*Id*.).

The Motion fails to adequately explain the basis for vacating a public hearing *that was originally noticed to occur nearly three months ago*, includes *no* alternative proposed hearing date, and *fails* to address the prejudice that will result from postponing the public hearing indefinitely. This scheduling issue has serious consequences far beyond the administrative calendar. The latest reporting reveals that the Project is responsible for the employment of over 1,800 union workers. *See* Kurt Johnson, The Las Cruces Bulletin, *Project Jupiter gives a sneak peak*, https://www.lascrucesbulletin.com/stories/project-jupiter-gives-a-sneak-peak,186308 (last accessed 11/04/26). These union workers are at imminent risk of irreparable harm if further procedural delays persist. The Unions' members are fully employed and rely on the Project as a source of economic well-being. Further delay will cause this source of work to be suspended and ultimately result in the complete loss of jobs. A delayed hearing therefore threatens not merely a later permit decision, but the continued availability of a critical source of work.

The Unions do not advocate for a permit by default, authorization for work that requires an unissued permit, or a decision that disregards air quality requirements. The Unions, on behalf

of their members, ask for a fair hearing on a definite and timely schedule as provided by the Hearing Officer and as required under the applicable regulations. Environmental review and the protection of union employment are not mutually exclusive: the Hearing Officer can preserve a meaningful process that fully elicits the facts while eliminating undue and unnecessary delay. Therefore, the Unions request that the Hearing Officer deny the Motion. The Unions request that the Hearing Officer reschedule the Hearing as soon as reasonably practicable and order the Department to promptly issue notice of that Hearing.

ARGUMENT

I. The Motion Does Not Address the Prejudice That the Unions' Members Will Suffer From an Indefinite Delay of the Hearing.

Pursuant to Part 20.1.4 NMAC, a continuance cannot be granted without consideration of the prejudice to parties and undue delay to the proceeding. 20.1.4.100(F)(2) NMAC; 20.1.4.200(C)(3) NMAC. Instead, a continuance can only be granted where good cause exists in light of the consideration of prejudice to other parties and undue delay. *Id*. Under these Regulations, the Motion fails.

The Motion ignores the adverse employment consequences a continuance will cause. The Unions respectively represent laborers, plumbers and pipefitters, and sheet metal workers. NMBCTC is an alliance of craft unions for skilled and productive construction labor, and the members of the NMBCTC's trade unions provide skilled trade work. LIUNA's members perform site preparation, excavation support, concrete work, trenching and utility installation, material handling, and general construction labor. UA's members work on piping systems, which includes plumbing and welding work. Sheet Metal Workers' members assist with ductwork, heating and ventilation, and metal fabrication. The Project has contributed to the creation of over 1,500 quality,

well-paying jobs for these union workers in the State of New Mexico, all of whom have benefited from the Project.

The Motion seeks to destroy these employment opportunities. The delay of the Project – caused by indefinitely delaying these proceedings – will cause interruptions of work and will likely result in the complete termination of employment, thereby depriving the affected union workers of the steady, critical income on which they and their families depend and threatening their ability to meet basic needs while the proceedings remain indefinitely suspended. Members may be forced to seek work elsewhere, disrupting their households and severing their connection to the Community.

This irreparable harm is compounded by current economic conditions, including persistent inflation and broader economic uncertainty, as rising living costs leave affected workers and their families less able to withstand interruptions to income or prolonged unemployment. The resulting prejudice, therefore, extends beyond lost wages to include the loss of stable employment and household security.

Any postponement should identify the specific tasks requiring additional time, explain why the existing schedule is insufficient, and demonstrate why a narrower adjustment would not suffice. A request for a continuance cannot be an open-ended deferral, and any necessary extension should be limited to the demonstrated need. The Motion, however, fails to address any of these issues; does not identify what the Department must do to complete its technical review, does not identify how long such review will take, does not propose a reasonable date by which the Department will be prepared for a public hearing, and, critically, it fails to address the prejudice to the Unions' members that will result from an undue delay.

II. There is No Basis to Further Delay the Public Hearing.

A. There Is No Requirement for the Department to Finalize its Position Before a Public Hearing.

The Motion is founded upon the flawed premise that the Hearing cannot occur until the Department completes its technical review of revisions to the Application and places its revised recommendation or revised draft permit into the Administrative Record. (*See* Doc. 150). Contrary to this position, however, the procedural rules governing this matter do not require the Department's final recommendation or a draft permit.

A public hearing for a construction permit is fundamentally an opportunity for all interested persons to present their views regarding a permit *application*. *See* 20.2.72.206. While a draft permit or the Department's recommendation *may* be the subject of a public hearing, neither is a precondition for a public hearing. The permit procedures under Part 20.1.4 reinforce this distinction. The initiation of a hearing is triggered by a "Hearing Determination by the Secretary," 20.1.4.200(A)(1) NMAC. In turn, Part 20.2.72.206(C) NMAC identifies the triggering condition for a public hearing. The Department must hold a public hearing if the Secretary determines there is "significant public interest"; it does not state that the Department must first complete its technical review or recommended disposition before a public hearing.

Additionally, the notice requirements for a public hearing explain that a notice must provide "***a brief description***" of the nature of the action "to be considered in the Draft Permit, ***application or*** petition . . . ." 20.1.4.200(C)(2)(a)(ii) NMAC (emphasis added). The use of the word "or" in this part is given its ordinary, disjunctive meaning. *See First Nat. Bank v. Bernalillo County Valuation Protest Bd.*, 1977-NMCA-005, ¶¶ 7-9, 90 N.M. 110 ("Ordinarily, the word "or"

as used in a statute is given a disjunctive meaning . . . ." (cited authority omitted).[1] This means that a hearing can be based on any of the alternatives provided, including an "application." And "a brief description" of the Application does not mean a description of the Department's position regarding that Application.

> Other requirements for a properly noticed hearing include the following:
>
> (i) the date, time and location of the hearing;
>
> (ii) a brief description of the nature and location of the action to be considered in the Draft Permit, Application or Petition, including the name and address of the Applicant or Petitioner;
>
> (iii) the name, address and telephone number of a person from whom further information, including a copy of the Draft Permit, Application or Petition, may be obtained;
>
> (iv) the requirements for an Entry of Appearance, a Statement of Intent to Present Technical Testimony, and a general written or oral statement;
>
> (v) a statement that Part 4 shall apply at the hearing; and
>
> (vi) any other requirement set forth in the Act or applicable regulation.

20.1.4.200(C)(2)(a) NMAC. None of these requirements for a notice of hearing require that the Department must submit a draft permit or its final recommendation prior to the hearing.

Consistent with these Regulations – and contrary to the Department's position – a hearing in this case was already noticed *before* the Department had issued a draft permit. Specifically, the Administrative Record establishes that the Department had caused to be published a notice of hearing on July 17, 2026, two weeks before it published the draft permit. *Compare* Affidavit of Publication of Public Hearing, dated 07/17/26, AR NSR 10833_002129 *with* Notice of Draft Permit, dated 07/31/226 AR NSR 10833_002089.

[1] *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481 (explaining that principles governing statutory construction apply equally to administrative regulations).

The mere fact that YGI submitted revisions to its application (Doc. 150 at 1) does not change this result and provides no basis to vacate the Hearing and indefinitely delay this matter. For example, in *In re Application of Roper Construction, Inc. for Air Quality Permit No. 9295*, No. AQB 21-57(P) (N.M. Env't Dep't) ("Roper") a revised draft permit incorporated substantive changes, including revised emissions estimates, and was filed just one week before the scheduled hearing, without a new thirty-day public review period. The Hearing Officer nevertheless found the notice requirements were satisfied, although the permit was ultimately denied on other grounds.

Thus, while YGI has revised its Application to include certain changes, these changes do not require a new review period that requires public input or mandate additional Department determinations before the hearing. The Regulations simply require public notice of the Hearing with all of the information required under Part 20.1.4.200(C)(2)(a) NMAC.

B. The Department has Provided Adequate Notice for the Public to Participate.

The Administrative Record demonstrates that the public has received notice of YGI's Application to provide a meaningful opportunity to participate. The initial Notice of Hearing was published in newspapers as early as July 17, 2026, and included a "Brief Description of the Permit Application", YGI's contact information, the location of the proposed source, the location where information regarding the application could be obtained, information regarding how members of the public can participate in the proceeding, and notice that Part 20.1.4 NMAC will apply at the public hearing. Affidavit of Publication of Public Hearing, dated 07/17/26, AR NSR 10833_002129-02131. The Department also published the preliminary draft permit and its Statement of Basis on July 29, 2026. AR NSR 10833_001609-001664. As a consequence, interested parties, including the Unions, have entered their appearance and have had the opportunity to participate and evaluate the status of the proceedings.

The Department has already provided sufficient notice of this matter, it has already issued a draft permit, and it has produced a statement of basis. The regulations specifically contemplate that additional facts may be developed at the public hearing and will become part of the Administrative Record. *See* 20.2.72.207(D) ("The administrative record shall consist of . . . the evidence submitted at the hearing."). That information simply becomes part of the record so that all interested parties to the proceeding can review the information, evaluate it with technical testimony, and provide comments. *See* 20.1.4.200(A)(2) NMAC ("The Administrative Record is available for public review at all times.").

III. The Department's Obligation to Notice a Hearing is Non-Discretionary.

The Regulations require that the Hearing Officer conduct a fair and impartial proceeding, which fully elicits the facts and avoids delay. 20.1.4.100(E)(2) NMAC. These regulations also authorize necessary procedural orders to expedite the proceeding. *Id*. Pursuant to that authority, the Hearing Officer has scheduled the hearing in this matter to begin on December 7, 2026, (Doc. 109), and the Hearing Officer has the authority to enter a procedural order requiring that the Department to issue notice of that Hearing. *See* 20.1.4.100(E)(2) NMAC.

In turn, the Department has the non-discretionary obligation to "promptly prepare and file" a notice of hearing setting forth the information described above. This notice must be issued no later than thirty (30) days before the scheduled hearing, accounting for the time it will take the Hearing Clerk to publish notice of the Hearing. *See* 20.1.4.200(C)(2)(b) NMAC. These rules favor a definite hearing date accompanied by sufficient notice. They do not support leaving the proceeding without a reliable path to resolution, when a lawful schedule exists, and they do not permit the Department to dictate when a hearing will occur.

The Department cannot unilaterally extend a hearing date any time new information is received and when it proclaims that additional time is needed to rethink its position. This is contrary to the Regulations, which were promulgated to "give an orderly structure to the proceedings." 20.1.4.6 NMAC. Moreover, the Regulations do not contemplate repeated extensions. The applicable provision of the Act unequivocally states that the deadline for the Department to process a permit application "may not exceed ninety days after the application is determined to be administratively complete . . . , unless the secretary or director grants *an extension* ***not to exceed ninety days*** for good cause, including the need to have public hearings[.]. NMSA 1978, § 74-2-7(B)(2)(a) (emphasis added).[2] A plain reading of this statute sets forth only two fixed periods for the Department to process permit applications: either (1) ninety days after the application is administratively complete or (2) within *a single* extension period that *does not* exceed ninety days. Had the Legislature intended to enlarge the exception by expressly providing for multiple extension periods, it could have done so, but it did not. *See Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512 ("Under the plain meaning rule, when a statute's language is clear and unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written.").

The Secretary has already issued a determination that additional time was necessary pursuant to Part 20.2.72.207(C) NMAC. On July 1, 2026, Secretary Kenney cited Parts 20.2.72.207(C)(1) (need for public hearing) and (5) (the permit application requires review of unusually complex technical and regulatory issues) as grounds for an additional extension not to

[2] Part 20.2.72.207(C) NMAC tracks the Act and provides "[t]he secretary may grant an extension, not to exceed ninety (90) days."

exceed ninety days. Given that YGI's Application was submitted in April 2026, the two ninety-day periods, excluding the New Mexico Supreme Court's stay, would have required the Department to finish processing the Application sometime in October. Now, the Department contends again that additional time is needed but cites no authority for this request, except the agreement of YGI to waive this deadline. That waiver, however, does not establish authority for the Department to exceed the extension limit prescribed by Section 74-2-7(B)(2)(a) of the Act. *C.f. First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 13, 345 P.3d 310 (holding that parties could not contract around the Oil and Gas Proceeds Payments Act as a matter of public policy).

The Hearing Officer set a scheduling order for the Hearing to begin on December 7, 2026, and the Department had the non-discretionary duty to notice that Hearing. Its apparent refusal to do so does not justify an indefinite delay of this proceeding, particularly when the relief requested ignores the prejudice to the other parties to this proceeding, including the thousands of union workers whose livelihoods depend upon their employment with the Project.

CONCLUSION

For the foregoing reasons, the Unions respectfully request that the Hearing Officer:

a. Deny the Joint Motion to Vacate the December 7, 2026 Hearing Date;

b. Enter an amended scheduling order setting a public hearing in this matter to begin by a date certain; and

c. Set a status conference no later than November 16, 2026, to receive an update from the Department regarding its technical review and the issuance of a notice of hearing.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2026, the foregoing was filed and served to all parties entitled to notice as listed below.

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