

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

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

No. AQB 26-57 (P)

**MAXWELL'S RESPONSE IN OPPOSITION TO NEW ENERGY ECONOMY'S
MOTION TO DISMISS AND OBJECTION TO THE AUGUST 5, 2026 ORDER**

Mr. Maxwell submits this response in opposition to New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication ("NEE Motion") and objects to the Hearing Officer's August 5, 2026 Order ("August 5 Order") to the extent the Order adopted NEE's alternative show-cause questions before opposing parties had an opportunity to address their form and to the extent those questions may permit new, unsupported, or unmarked factual material to be used as though it were part of the Application or the permit-review record underlying NMED's July 29 Draft Permit, Draft Statement of Basis, and Draft Modeling Review Report.

Mr. Maxwell does not object to factual development concerning fuel supply or construction timing. Those matters may be relevant to 20.2.72.208(G) NMAC. The objection concerns the manner in which the issue was presented and the evidentiary consequences of the Order. NEE did not establish the dispositive premises of its motion. Its alternative request instead invited Applicant and NMED to develop a present-tense affirmative account after the challenge was filed, without distinguishing the preexisting permit record from information first developed or acquired in response to the motion.

Because Applicant's and NMED's ordered responses are due August 11, Mr. Maxwell asks that this objection be considered before those responses are used to support any disposition of NEE's motion. The objection does not seek to stay the duty to respond. It preserves

objections to the form, scope, evidentiary use, and timing of the ordered responses and identifies procedural safeguards necessary to prevent prejudice to parties whose complete affirmative technical cases are due August 24.

CONCURRENCE NOT SOUGHT.

Concurrence was not sought. This filing is principally a response to NEE and an objection to an Order already entered; it is not presented as a motion for reconsideration or clarification. To the extent the Hearing Officer construes any requested procedural safeguard below as relief within 20.1.4.200(D) NMAC, concurrence was not sought because the August 5 Order was entered before the ordinary response period, the objection must be preserved before the August 11 responses are filed, and the requested safeguards concern the administration and evidentiary use of the Hearing Officer's existing Order rather than negotiated substantive relief.

I. POSITION ON NEE'S MOTION.

A. NEE did not establish that the Green Chili Lateral is the only legally or technically available fuel-delivery route.

NEE's dispositive theory depends on the proposition that the Green Chili Lateral is the only means by which the proposed source can receive natural gas. Yet NEE does not cite a page of Air Quality Permit Application No. 10883 identifying that pipeline as the exclusive delivery route. The Application's fuel table identifies the fuel generically as natural gas from a "Pipeline Quality Natural Gas / Purchased Commercial" source and states an hourly usage of 15.61 MMscf. Application, Table 2-J at 132. That establishes the fuel type and demand; it does not by itself establish that one particular offsite route is an indispensable component of the stationary source.

NEE's Exhibit A establishes that the Commissioner of Public Lands canceled and denied reconsideration of two requested rights-of-way and a business lease. The same letter describes

the requested state-trust-land rights-of-way as a small part of an approximately seventeen-mile proposed pipeline. *NEE Motion* Ex. A at 2. The letter does not establish that the affected segments cannot be rerouted, that a meter station cannot be relocated, that another interconnection is unavailable, or that another legally obtainable delivery arrangement does not exist.

The present record therefore establishes a material obstacle, but not the impossibility NEE asserts. The August 5 Order seeks facts necessary to evaluate that issue; it does not convert NEE's disputed premises into findings.

NEE also states at the outset that Application No. 10883 was "filed by" YGI and Bloom Energy Corporation. The Application materials do not establish Bloom as a co-applicant. The Compliance History Disclosure Form identifies the "Permittee/Applicant Company Name" as Yucca Growth Infrastructure, LLC, and the Section 22 certification likewise identifies the "Company Name" as Yucca Growth Infrastructure, LLC. The Application separately identifies Bloom as the plant operator and identifies Marisa Blackshire as the Responsible Official, with a Bloom Energy email address; Ms. Blackshire signed the Section 22 certification. Those facts may establish Bloom's operational or representative role, but they do not by themselves establish that Bloom filed the Application as a co-applicant. NEE supplies no citation, evidence, or legal basis showing that the certification signature converted Bloom into an applicant or that Ms. Blackshire signed on Bloom's own behalf rather than in the designated Responsible Official capacity for the Application submitted in YGI's name. NEE's plural "Applicants" characterization therefore should not be treated as an established fact.

B. Section 20.2.72.208(G) presents a merits question; it does not make the Application automatically unripe.

NEE initially cited 20.2.7.208(G) NMAC and corrected the citation by errata to 20.2.72.208(G) NMAC. The governing provision requires denial if "[i]t appears that the construction of the new source will not be completed within a reasonable time." 20.2.72.208(G) NMAC. The provision does not state that the air-permit proceeding becomes jurisdictionally unripe whenever a separate land or infrastructure authorization is denied or remains subject to further administrative proceedings.

Section 20.2.72.209 NMAC separately provides that issuance of an air permit does not relieve any person from compliance with other applicable law. The absence of a presently effective State Land Office authorization may be relevant evidence under Section 208(G), but it is not automatically a jurisdictional defect in the air-permit Application. NEE must establish the additional factual proposition that the identified denial makes completion of construction within a reasonable time unlikely.

NEE's Motion advances overlapping theories of administrative unripeness and substantive denial under 20.2.72.208(G) NMAC. Although the Motion also discusses a stay as a possible means of conserving administrative resources, its requested relief is dismissal of Application No. 10883 or, alternatively, expedited responses followed by a ruling on the dispositive Motion before technical testimony is due. The August 5 Order characterizes the Motion more broadly as one "to dismiss or continue" the Application. These potential dispositions are materially different. Part 4 defines a "final order" as the Secretary's dispositive order, reserves final orders to the Secretary, and provides a specific summary procedure under which the Secretary may issue a final order only after an expedited hearing on a motion to dismiss an application for a jurisdictional defect or to decide the merits on legal argument. 20.1.4.7(A)(10), 20.1.4.100(E)(2)(c), and 20.1.4.600(B) NMAC. The August 11 written responses may inform whether further expedited procedure is warranted, but they should not

themselves be treated as the complete merits process or final decisional record for dismissal or denial of the Application.

C. NEE's alternative request gave Applicant and NMED an opportunity to cure rather than testing the record already before the Department.

A focused dispositive challenge would have asked what fuel-delivery route appeared in the Application, what alternatives existed when the Application was under review, what information NMED relied upon before release of the Draft Permit, Draft Statement of Basis, and Draft Modeling Review Report, and what construction schedule supported the permit-review position reflected in those July 29 draft materials. NEE instead asked whether any alternative source or route exists now, whether one has been identified, engineered, or permitted, and whether the source can still be completed within a reasonable time.

Those present-tense questions permit Applicant to develop or announce a conceptual reroute, new commercial discussion, intended administrative contest, revised schedule, or other later-acquired alternative after seeing NEE's challenge. They likewise permit NMED to rely on new material to formulate a rationale that was not part of the permit review reflected in the July 29 draft permitting materials. The questions may produce useful information, but they are poorly structured as a basis for dispositive relief unless the responses identify when each asserted fact arose, the degree to which it is presently available rather than merely conceptual, and whether it was part of the Application or NMED's prior evaluation.

Youth United for Climate Crisis Action's August 5 response does not cure this defect. It repeats that the Green Chili Lateral is indispensable and that the record establishes impossibility, but it supplies no route analysis, engineering evidence, gas-supply record, construction schedule, or citation to the Application establishing exclusivity.

D. No dispositive inference should rest on an administrative-contest status that had not yet matured when the response order issued.

The Commissioner's July 14 letter states that an aggrieved person may file an administrative contest within thirty days. *NEE Motion* Ex. A at 4. The August 11 briefing deadline precedes the ordinary expiration of that stated period. No adverse inference should be drawn from the absence of a contest before the filing period expires, but Applicant should not be permitted to rely indefinitely on a vague possibility of future review after the actual filing status becomes ascertainable. Any party relying on a contest should identify the public filing or state accurately that none has been filed as of the response date.

II. OBJECTION TO THE AUGUST 5 ORDER.

A. The Order adopted NEE's alternative procedural request before opposing parties could object to the form of the questions.

Part 4 ordinarily allows fifteen days to respond to an opposed motion. 20.1.4.200(D)(4) NMAC. The Hearing Officer has broad authority to expedite proceedings, fully elicit the facts, rule on procedural requests, issue necessary orders, simplify issues, and adopt special procedures for complex matters. 20.1.4.100(E)(2); 20.1.4.300(A)(3) NMAC. Mr. Maxwell does not dispute that authority.

The August 5 Order was nevertheless entered one day after NEE filed its motion and before Mr. Maxwell or other opposing parties could address the form of NEE's requested show-cause procedure. The Order therefore granted NEE's alternative procedural request in material part before the ordinary response period had run. This objection preserves the issues that could not be presented before entry of that Order.

B. The ordered questions are open-ended and present-tense, and they do not distinguish the existing record from post-motion supplementation.

The Order asks whether "any legally obtainable alternative source" exists, whether an alternative route or delivery system "has been identified, engineered, or permitted," whether the

project "remains capable" of construction, and whether the source "can still" be completed in a reasonable time. Those formulations do not establish a temporal cutoff or require Applicant and NMED to distinguish information that existed before the motion from alternatives first developed after it.

The defect is consequential because later-acquired relevant information may properly be supplied during an ongoing permit review, but it should not be silently merged into the earlier Application or the permit-review record reflected in NMED's July 29 draft materials. A later-developed alternative may bear on the ultimate permit decision while simultaneously demonstrating that the premise or support did not exist when the Draft Permit, Draft Statement of Basis, and Draft Modeling Review Report were released. Those are different propositions and should remain distinguishable in the record.

C. Attorney briefing is not a substitute for evidence, and counsel's brief cannot silently amend the Application.

Filed briefs become part of the Record Proper, and the Record Proper is evidence under Part 4. 20.1.4.7(A)(19) and 20.1.4.400(B)(3) NMAC. That does not make unsupported attorney assertions conclusive proof of disputed technical, commercial, routing, capacity, permitting, or construction facts. The Hearing Officer must determine each matter in controversy by a preponderance of the evidence and may exclude or give little weight to material that is unreliable or of little probative value. 20.1.4.400(A)(3) and (B)(1) NMAC. Part 4 also distinguishes legal argument and statements of position from technical testimony. 20.1.4.7(A)(22) NMAC. Accordingly, a material factual assertion offered for dispositive use should identify the existing record supporting it or be supported by competent factual evidence rather than advocacy alone.

To the extent Applicant relies on new factual information as part of its permit case, the information should be identified as a supplement or correction to the Application under

20.2.72.203(E)(1) NMAC and submitted in the certified form required for Application information under 20.2.72.203(A)(12) NMAC. Applicant should not be permitted to revise the factual basis of Application No. 10883 through advocacy alone.

Post-Order public statements reinforce that distinction without supplying the missing factual proof. A Santa Fe New Mexican report states that Applicant's counsel said YGI's August 11 filing "will speak for itself as part of the public record," while NMED stated that it would address the issues through its formal response. Mr. Maxwell does not offer those press statements as evidence that the project is or is not constructible, or that any alternative route exists. They underscore instead that any material factual basis on which Applicant or NMED asks the Hearing Officer to act should be disclosed in the formal filing with its source, timing, and record support, rather than supplied by unsupported characterization. See Julia Gentin, "Advocacy group asks for Project Jupiter's air quality permit application to be tossed," Santa Fe New Mexican (Aug. 2026)¹.

D. The Order should not be construed to shift Applicant's nonshifting burden or allow NMED to supply Applicant's proof.

Applicant bears the burden of proving that the permit should be issued and not denied, and that burden does not shift. 20.1.4.400(A)(1) NMAC. The Order's inquiry into whether any alternative source or route exists should not be construed to require NEE, Mr. Maxwell, or another opponent to disprove every conceivable future arrangement. Applicant must identify and support the facts on which it relies. NMED may explain its review and proposed permit conditions, but later agency advocacy cannot substitute for Applicant's proof or erase the distinction between information Applicant supplied and information NMED first considered after the motion.

1 URL: https://www.santafenewmexican.com/news/local_news/advocacy-group-asks-for-project-jupiters-air-quality-permit-application-to-be-tossed/article_094a181c-2bdd-400f-bbf9-5118ff58d20f.html

E. Applicant and NMED should answer separately and identify the source and timing of material facts.

Applicant, NMED, Energy Transfer, Transwestern, ET Gathering and Processing, Bloom Energy, and other entities may possess different information and have different roles. Applicant should not speak for a separate State Land Office applicant without identifying the basis for doing so, and NMED should not simply adopt Applicant's representations without identifying its own record or review. Each responding party should identify whether a material statement rests on its own existing record, information received from an affiliate or third party, or an inference; when the information was first obtained; and when it was first disclosed to NMED.

F. The Order contains disputed or inaccurate premises that should not be treated as findings.

The Order refers to the denied interests as "essential fuel infrastructure." Whether the Green Chili Lateral is indispensable is the central disputed factual premise of NEE's motion and has not been adjudicated. The neutral description is the identified Green Chili Lateral rights-of-way and business lease. The Order also refers to "Applicants." YGI is the applicant identified in this Part 4 proceeding. Although the Application identifies Bloom as plant operator and a Bloom-affiliated Responsible Official signed the certification for the Application, the Application identifies YGI as the Permittee/Applicant and as the company named on the certification; NEE has not established Bloom as a co-applicant. The State Land Office applications, moreover, appear to involve separate Energy Transfer entities. The plural formulation therefore should not be treated as resolving which entity has applicant status or which entity possesses authority to pursue State Land Office review. Finally, the Order repeats the superseded citation to 20.2.7.208(G) NMAC; the applicable provision is 20.2.72.208(G) NMAC.

G. Simultaneous August 11 briefing deprives opposing parties of a meaningful opportunity to answer new facts first disclosed by Applicant or NMED.

All parties are required to file their positions on August 11, while Applicant and NMED may first disclose alternative routes, schedules, commercial arrangements, or other factual material in filings due that same day. An opposing party cannot meaningfully address material it has not yet seen. At minimum, no dispositive ruling should issue until parties have a short opportunity to respond to new matter first disclosed in Applicant's or NMED's ordered filings. And if dismissal or merits disposition is thereafter considered likely under 20.1.4.600(B) NMAC, the simultaneous briefing should be treated as preliminary to—not a substitute for—the Notice of Hearing, expedited hearing, and post-hearing procedures prescribed by that rule.

A short supplemental period should not waive technical-review, examination, rebuttal, or scheduling rights. Three business days may suffice to identify an immediate legal or procedural defect but may not permit full technical evaluation of a newly disclosed route, pipeline-capacity assertion, engineering analysis, emissions consequence, or construction schedule. Technical information is subject to the August 24 affirmative filing deadline and the evidentiary limitations of 20.1.4.400(B)(2) NMAC.

H. Confidentiality or privilege may protect material, but cannot support a dispositive factual finding hidden from opposing parties.

Applicant may assert privilege, confidentiality, or security sensitivity as to some gas-supply, engineering, route, or legal materials. Particularized protection may be appropriate, and privileges recognized in New Mexico courts apply in this proceeding. 20.1.4.400(B)(1)(b) NMAC. But a party should not obtain a dispositive factual finding on the basis of information whose substance and support are withheld from opposing parties. Nonconfidential portions should be disclosed, and any protected material on which reliance is sought should be handled through a procedure permitting meaningful review by authorized participants.

III. OBJECTIONS PRESERVED AND PROCEDURAL SAFEGUARDS REQUESTED.

Mr. Maxwell objects to the August 5 Order to the extent it may be construed or administered inconsistently with the foregoing principles. Without seeking to stay Applicant's or NMED's duty to respond, Mr. Maxwell requests that the Hearing Officer sustain the objection, or at minimum administer the Order and any later ruling on NEE's motion subject to the following safeguards:

1. Use 20.2.72.208(G) NMAC as the applicable citation and treat the phrase "essential fuel infrastructure" as NEE's disputed characterization rather than a finding of fact.
2. Require Applicant and NMED to respond separately and to identify the source of knowledge for each material factual assertion.
3. For each asserted alternative gas source, pipeline route, delivery system, administrative contest, or construction plan, require identification of when it was first identified; by whom; whether it existed before August 4, 2026; when it was first disclosed to NMED; where it appears in Application No. 10883 or an addendum; and the existing record supporting it.
4. Require the present status of each asserted alternative to be stated accurately, including whether it is conceptual, preliminarily engineered, fully engineered, subject to property access, commercially committed, applied for, or permitted. A conceptual possibility should not be described as an available alternative without the facts necessary to support that characterization.
5. Do not assign dispositive weight to unsupported attorney assertions of disputed technical, commercial, routing, capacity, permitting, or construction facts merely because the assertions appear in a filed brief. Require each material factual assertion relied upon for dispositive use to identify its existing record support or other competent factual basis.

6. Require responsive information first developed, acquired, or submitted after August 4, 2026 to be identified separately. If Applicant relies on it as part of its permit case, Applicant should state whether it supplements or corrects the Application and comply with applicable certification requirements.
7. Require NMED to distinguish information it possessed and relied upon before releasing the July 29 Draft Permit, Draft Statement of Basis, and Draft Modeling Review Report from information first received, considered, or relied upon after August 4, 2026.
8. Place new relevant information used by NMED in the Administrative Record and make it promptly available for public review, rather than allowing dispositive reliance on material not accessible to the parties.
9. Permit particularized objections and protection of privileged or legitimately confidential material, but require each responding party to state whether responsive information is being withheld and to answer to the extent responsive, nonprivileged facts are known.
10. Do not base a dispositive factual finding on material withheld in substance from opposing parties. If protected information is relied upon, employ a procedure permitting meaningful review to the extent legally permissible.
11. Do not construe the Order to shift Applicant's burden under 20.1.4.400(A)(1) NMAC or to require an opposing party to disprove every conceivable source, route, or future arrangement.
12. Require any party relying on a State Land Office administrative contest to identify the public filing and its status, while drawing no adverse inference from the absence of a filing before expiration of the period stated in the Commissioner's July 14 letter.
13. Allow any party three business days after service of Applicant's and NMED's ordered responses to submit a supplemental response limited to new facts, records, objections, or

Application supplements first disclosed in those filings. No ruling on dismissal or continuance should issue before that period expires.

14. Treat that short supplemental period as without prejudice to a party's right to request additional time, limited supplementation of direct technical testimony or exhibits, examination, rebuttal, or a targeted scheduling adjustment if material technical information is first disclosed too late for reasonable use by August 24.
15. Do not permit a material revision of the proposed source or permit record through the August 11 briefing process without the certification, agency review, public availability, and other procedural protections otherwise required by Parts 4 and 72.
16. Treat the August 11 papers as briefing that may inform whether summary relief is likely to be granted. If the Hearing Officer determines that dismissal or merits relief under 20.1.4.600(B) NMAC is likely to be granted, follow that rule's Notice of Hearing, expedited-hearing, post-hearing, and Secretary-final-order procedure rather than treating the August 11 papers alone as the complete merits process.
17. Do not rely on press statements or other extra-record advocacy as proof of constructibility, non-constructibility, an alternative route, or administrative-review status. Any such factual proposition should be established, if at all, through the formal Hearing Record with an identifiable evidentiary basis.

IV. EXPEDITED CONSIDERATION OF THE OBJECTION IS NECESSARY.

Applicant's and NMED's responses are due August 11. The prejudice identified here will arise when new information is first submitted and potentially used dispositively without temporal identification, record support, or an opportunity to answer it. Mr. Maxwell therefore requests consideration of this objection before any ruling on NEE's Motion and, at minimum, preservation of a three-business-day opportunity to address new matter first disclosed in the

ordered responses. The August 11 filings may properly assist the Hearing Officer in deciding interlocutory matters or whether further expedited procedure is warranted; they should not be treated as a substitute for the additional process required if final summary disposition of the Application is contemplated.

This objection does not seek to delay the September 14 hearing or excuse Applicant or NMED from answering the Hearing Officer's questions. It seeks to preserve the distinction between the case that was actually submitted and reviewed and any later supplementation, and to ensure that newly developed factual material is supported, identified, accessible, and subject to meaningful response before it is used dispositively.

V. CONCLUSION.

The NEE Motion should be denied insofar as it seeks dismissal on the present record. The State Land Office decision raises a potentially relevant question under 20.2.72.208(G) NMAC, but NEE has not established that the Green Chili Lateral is the sole legally or technically feasible fuel-delivery route or that construction of the proposed source cannot be completed within a reasonable time.

Mr. Maxwell objects to the August 5 Order to the extent its open-ended, present-tense questions may permit post-motion supplementation, unsupported attorney assertions, burden shifting, post hoc agency reasoning, or newly developed alternatives to be treated as though they were part of the preexisting Application and July 29 permit-review record. The ordered responses should be administered and evaluated subject to the objections and safeguards stated above. No dispositive ruling should issue before opposing parties have a meaningful opportunity to address material new matter first disclosed in those responses, and the August 11 papers should not substitute for the expedited-hearing procedure required by 20.1.4.600(B) NMAC if final summary disposition is considered likely.

RESERVATION OF OBJECTIONS.

By responding to the NEE Motion and objecting to the August 5 Order, Mr. Maxwell does not waive any objection to the admissibility, reliability, certification, evidentiary weight, timeliness, confidentiality treatment, or procedural use of information first submitted in response to that Order; any objection to a material amendment or supplement to the Application, Draft Permit, Statement of Basis, emissions analysis, modeling, or construction schedule; or any right to examination, rebuttal, additional technical review, supplementation, or an expedited hearing under 20.1.4.600(B) NMAC.

Respectfully submitted,

By -s- Nicholas Maxwell
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of my Response in Opposition to New Energy Economy's Motion to Dismiss and Objection to the August 5, 2026 Order was served by email to the Hearing Clerk and all parties of record on August 7, 2026, with a hard copy mailed upon request.

-s- *Nicholas Maxwell*
Mr. Nicholas R. Maxwell