

**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. 10883

AQB 26-57 (P)

**APPLICANT’S RESPONSE IN OPPOSITION TO THE JOINT EMERGENCY MOTION  
FOR A HEARING CONSISTENT WITH DUE PROCESS GUARANTEES,  
DISQUALIFICATION OF HEARING OFFICER, AND STAY, AND TO MAXWELL’S  
SUPPLEMENTAL MOTION FOR EXPEDITED DISCLOSURE CONCERNING THE  
ERG CONTRACTUAL RELATIONSHIP**

Yucca Growth Infrastructure, LLC (“YGI” or “Applicant”) responds in opposition to two filings. The first is the Joint Emergency Motion for a Hearing Consistent with Due Process Guarantees, to Disqualify the Hearing Officer, and to Stay (the “CBD Motion”), filed August 19, 2026 by the New Mexico Environmental Law Center on behalf of Jose Saldaña, Jr. and Vivian Fuller, and by the Center for Biological Diversity.<sup>1</sup> The second is Maxwell’s Response in Substantial Support of Joint Emergency Motion for Disqualification and Stay, and Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship, served August 21, 2026 (the “Maxwell Supplemental Motion”).

As described below, neither filing carries the Movants’ legal burden, and the requested relief should be denied. New Mexico law establishes that disqualification is not appropriate under the circumstances presented. The Hearing Officer’s actions raised in both filings were in accordance with the law and with scope of authority conferred to him by the governing regulations.

---

<sup>1</sup> Movants did not seek the position of the parties prior to filing this Motion, which serves as a separate basis for denial.

## INTRODUCTION AND SUMMARY

Movants' primary complaint is that the Hearing Officer ruled against them on a handful of procedural issues. But each of these rulings relied on and followed the plain statutes and rules that govern the Hearing. This cannot justify the disqualification of a Hearing Officer.

The rule Movants invoke allows for disqualification of a Hearing Officer on one ground: that the Hearing Officer "has a personal bias or prejudice concerning a party, the Application or Petition." 20.1.4.100.E(3)(a)(i) NMAC (emphasis added); *see* 20.1.4.100.E(3)(b)(i) NMAC (limiting the grounds for a disqualification motion to the cause listed at Subparagraph (a), Item (i)). The CBD Motion, however, does not allege personal bias.

Movants do not allege or provide any proof that the Hearing Officer knows any party, has any interest in the Application or the source, has any relationship to anyone in this docket, or has communicated with anyone about the merits of this proceeding outside the record. Instead, the CBD Motion alleges that the Hearing Officer issued procedural rulings Movants disliked, corrected prior rulings, and changed his mind after consideration of written submissions. A long line of case law clearly establishes that these are not grounds for disqualification.

A Hearing Officer's rulings — including rulings that are revisited and changed — have always been the ordinary work of presiding decisionmakers, and "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings" do not support disqualification. *Liteky v. United States*, 510 U.S. 540, 555 (1994).<sup>2</sup> New Mexico law

---

<sup>2</sup> Giving the amount of case law on this issue, including New Mexico case law, this motion is arguably frivolous in nature and appears to be a mere attempt to delay the proceeding a few days before direct testimony is due. For example, in *Hall v. State*, 172 Idaho 334, 367, 533 P.3d 243, 276 (2023), the Idaho Supreme Court held that "opinions formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a motion to disqualify judge due to bias or partiality unless they display a deep seated favoritism or antagonism that would make fair judgment impossible." Similarly, the Fifth Circuit in *Andrade v. Chojnacki*, 338 F.3d 448, 462 (5th Cir. 2003) established that "expression of opinions formed by judge on basis of facts or events occurring in course of current proceeding, or prior proceedings, do not constitute basis for bias or partiality disqualification motion unless they display deep-seated favoritism or antagonism that would make

is to the same effect: the decisionmaker is presumed honest and impartial, and disqualification requires “comments indicating that he or she has prejudged the case to be heard,” *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 45, and even a firmly held view about a question of law or policy “is not, without more, a disqualification.” *Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶¶ 24-32. The New Mexico Supreme Court, in *United Nuclear Corp. v. Gen. Atomic Co.*, 1980-NMSC-094, ¶¶ 414-426, held that in-court comments and rulings afford no basis for disqualification, and that the purpose of the extrajudicial source requirement concerns the origin of the judge’s bias rather than the place of its expression. As a result, it was improper for Movants to seek to disqualify the Hearing Officer based on the orders and rulings issued in this case.

Two further points dispose of the CBD Motion. First, each of the three “reversals” was a reasoned application of a governing rule or principle of law. Second, the record contradicts the premise that the Hearing Officer is biased. The Hearing Officer has ruled against YGI several times in this proceeding. The Hearing Officer rejected the August 17 hearing date advocated for by YGI and then rejected the August 24 hearing date YGI sought. He initially included the ability to seek discovery over YGI’s verbal objection. He directed YGI and the Department to brief issues

---

fair judgment impossible.” The Eighth Circuit further reinforced this principle stating that “facts learned by a judge in his judicial capacity cannot be basis for disqualification.” *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1329 (8th Cir. 1985). The Ninth Circuit, in *King v. U.S. Dist. Ct. for Cent. Dist. of California*, 16 F.3d 992 (9th Cir. 1994), held that recusal of a judge ordinarily is required only if bias or prejudice stems from an extrajudicial source, and not from the judge’s conduct or rulings during the course of judicial proceedings. The Nevada Supreme Court, in *Canarelli v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022), held as a matter of first impression that what a judge learns during the course of performing judicial duties generally does not warrant disqualification unless the judge forms an opinion that displays a deep-seated favoritism or antagonism that would make fair judgment impossible. The Louisiana Supreme Court, in *State v. Williams*, 601 So. 2d 1374 (La. 1992), held that a judge’s bias or prejudice is not of an extrajudicial nature warranting recusal where the alleged bias or prejudice stems from testimony or evidence presented in the proceedings at bar, and that a trial judge did not have to recuse himself where the perceived bias arose out of his participation as presiding judge in the trial of the defendant. In *Kniatt v. State*, 239 S.W.3d 910, 913 (Tex. App. 2007), the Texas Court of Appeals quoted *Liteky* at length, emphasizing that the bias must have come from an extrajudicial source and result in an opinion on the merits of the case other than what the judge learned from participating in the case.

framed by New Energy Economy. And, he declined to consider YGI's August 7 filing. A tribunal captured by the Applicant would not compile that record.

The Maxwell Supplemental Motion does not supply what the CBD Motion lacks. Mr. Maxwell expressly declines to allege personal bias, declines to allege a financial interest in the proceeding or the facility, declines to adopt the other movants' inferences about the Governor's calendar and the Memorandum of Understanding, and declines to read the Hearing Officer's July 27 statement as a determination on the merits. What he offers instead is a request that the tribunal order the Department to disclose how the Hearing Officer came to be engaged through Eastern Research Group ("ERG"), so that the qualification question can be decided on a fuller record. That is a request for discovery, and this proceeding does not permit discovery. It is also a request that inverts the burden. A party seeking disqualification must make a showing; the presumption of integrity does not dissolve because a movant can identify questions the public record does not answer.

The CBD Motion and the Maxwell Supplemental Motion should therefore be denied. Under 20.1.4.100.E(3)(b)(ii) NMAC, the Hearing Officer should file a recommended decision denying the motions within five days of service, and the Secretary or his Designee should enter an order denying it within five days thereafter. No stay is warranted, and none is available based on the arguments Movants assert. Nor should the August 24 deadlines be suspended or adjusted.

## **I. THE GOVERNING STANDARD IS PERSONAL BIAS, NOT ADVERSE RULINGS**

### **A. The rule limits disqualification to personal bias or prejudice.**

Section 20.1.4.100.E(3)(a) NMAC lists four disqualifying conditions: personal bias or prejudice concerning a party, the Application, or the Petition; a financial interest in the proceeding or the facility; a family relationship to a party; and service as an officer, director, or trustee of a

party. Subparagraph (b)(i) then strictly limits the application of the rule, permitting a party to “request the disqualification of the Hearing Officer” only “for cause listed in” Subparagraph (a), Item (i) — personal bias or prejudice.

The rule requires personal bias or prejudice and the rule is directed at the adjudicator’s personal relationship to the parties in the matter before him. Movants nowhere allege it, because they cannot: nothing in either motion suggests the Hearing Officer has ever met with a party, holds any interest in the source, or has any stake of any kind in the outcome.

**B. Adverse rulings are not evidence of personal bias.**

Every fact used to support the CBD Motion is a ruling in this docket. That category of evidence is insufficient (as a matter of law) to support disqualification. *Liteky*, 510 U.S. at 555 (“judicial rulings alone almost never constitute a valid basis for a bias or partiality motion”). The objective test Movants themselves invoke — whether “there is an indication of a possible temptation to an average person sitting as a judge to try the case with bias,” *Alb. Bernalillo Cnty. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 43 (quoting *Mountain States Tel. & Tel. Co. v. Corp. Comm’n*, 99 N.M. 1, 7 (1982)) — asks about temptation, that is, about a clear interest or relationship with a party that might pull the adjudicator off center. It does not attack or scrutinize a series of orders issued by the decisionmaker.

The law presumes that decisionmakers act with integrity and honesty. *Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (presumption of honesty and integrity; a challenger must show a risk of actual bias or prejudgment that is “intolerably high”); *United States v. Morgan*, 313 U.S. 409, 421 (1941) (officers “charged by Congress with adjudicatory functions are not assumed to be flabby creatures”; both they and judges “are assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own

circumstances”). And in *Phelps Dodge*, the New Mexico Court of Appeals declined to disqualify a commissioner who held a known environmental philosophy and had taken a position adverse to the petitioner in a prior proceeding, because the inquiry turns on “comments indicating that he or she has prejudged the case to be heard,” and there were none. 2006-NMCA-115, ¶¶ 44–45.

Movants’ own authorities each rejected the disqualification challenge before them, on records materially stronger than this one. *See Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972) (finding no bias in a case where a Commissioner made statements on the record prejudging her opinion of the outcome of the case); *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156 (10th Cir. 2020) (a case in which commissioners made three separate statements in a related rulemaking related to the merits of a party’s adjudication case pending before the same commission). Here, there are no allegations that come close to the facts in these cases. The Hearing Officer has not opined about the merits of the application. Instead, he has made procedural rulings, and in each case has explained which statute or rule justified or necessitated his holding.

## **II. EACH RULING MOVANTS CALL A “REVERSAL” APPLIED A GOVERNING RULE AND ESTABLISHED LAW**

### **A. The schedule.**

Section 20.1.4.100.E(2) NMAC imposes three duties on a Hearing Officer: to “conduct a fair and impartial proceeding,” to “assure that the facts are fully elicited,” and to “avoid delay.” Movants quote all three and then treat the third as though it were evidence of misconduct – it is not, since the Hearing Officer and Department must follow the law (not just the cherry-picked provisions that favor the Movants). Section 20.1.4.100.F(2) NMAC supplies the standard for adjusting deadlines: the Hearing Officer may extend time “for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceeding.” The July 29

Amended Scheduling Order recites that the Hearing Officer gave “additional consideration of the arguments of the parties, including the due process arguments” of Movants and New Energy Economy, and concluded that the interests of all parties – as well as statutory deadlines – were best served by a September 14 setting. YGI strongly argued for an earlier hearing setting, but did not receive it.

Section 20.2.72.207(B)(1) NMAC requires the Department to grant, conditionally grant, or deny a minor source air application within 90 days of the administrative completeness determination, and Subsection (C) permits a single extension “not to exceed ninety (90) days” for good cause — expressly including “the need to have public hearings.” The Hearing Officer is entitled — indeed obliged — to schedule a proceeding that can conclude inside the outer limit the Board’s own rule sets. The fact that the Hearing Officer did so while still rejecting the August 17 date the Department had noticed and YGI had supported, while granting Movants nearly a month more than YGI had requested, does not show capture by any party.

Mr. Maxwell’s account of this same history confirms the point. He acknowledges that the September reset was not “ultimately unexplained,” and he identifies the Hearing Officer’s August 3 Order as supplying the specific rationale: that without extending the November 23, 2026 decision deadline, an October 19 hearing would leave insufficient time for the parties and the Deputy Secretary to complete the post-hearing procedures prescribed by 20.1.4.500 NMAC. Maxwell Supp. Motion at 4. That was a finding by the Hearing Officer that the Department was going to comply with the statutory deadline.

## **B. Discovery**

Movants failed to cite to **any prior air permitting hearing** in which discovery was allowed, and counsel for YGI has not been able to find any precedent in NMED’s Docketed

Matters or Archived Docketed Matters that allowed discovery to occur. Section 20.1.4.200.E NMAC, which allows for limited discovery, is captioned “**Special Procedures for Hearings Under the Solid Waste Act.**” The discovery provision Movants relied upon, Subsection E(2), sits under that caption, alongside a public notice provision keyed to NMSA 1978, § 74-9-22 — a Solid Waste Act provision. These discovery rules, on their face, do not apply to air permit hearings. The August 12 Order said so, in straight-forward terms: the Hearing Officer’s “initial interpretation of discovery Rule 4 was incorrect and ... discovery is not allowed in air quality permit proceedings.”

Significantly, the Hearing Officer had not yet had the benefit of written briefs on the legality of discovery from any party before his August 12 Order. An adjudicator who reads a rule one way at a status conference, orders briefing, reviews the briefs from all parties, and applies the regulations as written has engaged in a reasoned decision-making process. The alternative Movants propose — that a Hearing Officer must adhere to an acknowledged legal error because a party relied on it — has no support in New Mexico law and would make every correction a disqualifying act. That reasoning does not comport with New Mexico law and must be rejected.

Mr. Maxwell presses the same reliance theory in a softer form. He concedes that the August 12 Order “contained a stated legal rationale” and that he does not rely on any claim that the Order was unexplained; his objection is to “the sequence.” Maxwell Supp. Motion at 5–6. But sequence is not a ground for disqualification. As the above-cited authorities clearly show, Movants must establish much more than a sequence of orders issued that, on-their-face, correctly apply the law.

Movants’ lead authority fails to support their case. In *Resolute Wind I LLC v. NMPRC*, 2022-NMSC-011, ¶ 25, the Court drew the line between an expedited but “ultimately manageable” schedule affording limited process, and a summary-judgment-like proceeding that involved the outright denial of “any and all opportunities to conduct discovery or otherwise develop the record

on a disputed factual issue.” In that case, the Public Regulation Commission failed to follow its own regulations and rules by engaging in an ad hoc summary fact-finding procedure that relied solely on affidavits.

That is not the case here. Discovery does not customarily occur in air permitting cases heard by the Secretary or his Designee. Parts 20.2.72 and 20.1.4 NMAC do not provide for discovery, and the Air Quality Control Act is completely silent regarding discovery. So, it would be arbitrary, and not in accord with the Department’s past practice and rules, to allow for discovery in this case. The only discovery provision that the parties could find is in Part 20.1.4 and appears under the heading “Special Procedures for Hearings Under the Solid Waste Act.” 20.1.4.200(E)(2) NMAC. This is not a solid waste permit proceeding. Here, Movants were never entitled to the process they claim to have been denied.

Unlike in *Resolute*, Movants have a meaningful opportunity to participate under NMED’s regulations. They may submit direct testimony, rebuttal testimony, and exhibits; cross-examine every witness; offer public comment; and file post-hearing briefs. Every disputed factual issue remains open to them on this record.

### **C. The August 10 Order.**

#### **1. Dispositive Motion Practice Cannot Circumvent the Department’s Public Hearing Requirements.**

Finally, the Hearing Officer was right to deny New Energy Economy’s dispositive motion. Rule 20.2.72.206(C) NMAC provides that the Department “shall hold” a public hearing when the Secretary determines there is significant public interest. The use of “shall” creates a mandatory obligation. Neither Part 72 nor 20.1.4 NMAC authorizes an intervenor to nullify that determination through a pre-hearing dismissal motion.

NMSA 1978, Section 74-2-7(I), similarly provides that where a permitting action substantially affects the public interest, a public hearing is held and the decisionmaker must consider the data, views, and arguments presented there. The New Mexico Court of Appeals has questioned the use of summary judgment once a public hearing has been ordered under the Air Quality Control Act, indicating that the Board is required to consider the public's views before deciding the merits of an air permit application. *Freed v. City of Albuquerque (In re Hearing on the Merits Regarding Air Quality Permit No. 3135)*, 2017-NMCA-011, ¶ 23, 388 P.3d 287. Although *Freed* involved a permit appeal before a local air board rather than an initial permitting hearing before the Department, the Court's reasoning remains instructive. The court recognized that the AQCA assigns independent value to public participation and rejected efforts to bypass the hearing process based on an assumption that the outcome was legally predetermined. *Freed*, ¶¶ 21, 23. Here, New Energy Economy likewise argued the outcome of the permitting hearing can be determined through dispositive motions and asked the Hearing Officer to terminate the proceeding before the hearing scheduled by the Department and before the evidentiary record contemplated by Part 72 could be developed. It was proper to deny this request.

Other states are in accord. In *Putnam County Aging Program, Inc. v. Panhandle Support Services, Inc.*, 252 W. Va. 206, 919 S.E.2d 454 (Ct. App. 2025), a hearing examiner's award of summary judgment was clear error where the governing rule provided that the agency "shall hold a public hearing" on timely request, and summary disposition was in any event premature because the opposing parties had not yet had the opportunity to present evidence. In *Duke University Health System, Inc. v. N.C. Department of Health & Human Services*, 295 N.C. App. 589, 906 S.E.2d 535 (2024), a statutory public hearing requirement could not be waived by the parties, because public

hearings are not private benefits to their participants but critical aspects of the agency review process existing for public and systemic benefit.

Here, the September 14 hearing is not a private entitlement of the Applicant, Movants, or of any other party. It exists to inform the decisionmaker — here the Deputy Secretary for NMED. A party cannot waive the hearing, and a party should not be permitted to extinguish it by a motion to dismiss.

## **2. New Energy Economy Failed to Show That Dispositive Relief Was Warranted**

New Energy Economy's motion asked the Hearing Officer to dismiss the Application, based on the unsupported arguments of counsel and to specifically order Applicant to answer certain questions in legal briefing prior to the due date for sworn testimony. Neither 20.2.72 NMAC nor 20.1.4 NMAC provides for dispositive motion practice, and the Rules of Civil Procedure for the District Courts do not apply to permit proceedings before the Department. Assuming *arguendo* that motions to dismiss do apply, which they do not, New Mexico's appellate courts have made dismissal difficult to obtain by design. A motion to dismiss tests the formal or legal sufficiency of the claim. *McCasland v. Prather*, 1978-NMCA-098, 92 N.M. 192, 585 P.2d 336; *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43. The tribunal must accept as true all facts pled, *Johnson v. Francke*, 1987-NMCA-029, 105 N.M. 564, 734 P.2d 804, and must resolve all doubts in favor of the sufficiency of the pleading, *Village of Logan v. E. N.M. Water Utility Authority*, 2015-NMCA-103, 357 P.3d 433; *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97. Dismissal is available only where the claimant "cannot be entitled to relief under any state of facts provable under the claim." *Salas v. Guadalupe Credit Union*, 2025-NMSC-006, 563 P.3d 873. The foundational formulation, drawn from *Conley v. Gibson* and never abandoned in

this State, is that a claim should not be dismissed unless it appears beyond doubt that the pleader can prove no set of facts entitling it to relief. *McCasland*, 1978-NMCA-098.

Here, the best analogue of a complaint in an air permit hearing is the Application — a 648-page, 22-section technical submission representing that the proposed source will meet the applicable emission standards and regulations, which the Department ruled administratively complete on May 27, 2026. Taking those representations as true, viewing them in the light most favorable to the Applicant, and resolving every doubt in favor of sufficiency, dismissal would require the conclusion that there is no state of facts provable under which Permit No. 10883 could issue. New Energy Economy did not even attempt to make that showing.

New Energy Economy instead attached and relied on a document wholly outside the Application. Under Rule 1-012(B) NMRA, where matters outside the pleading are presented and not excluded, the motion “shall be treated as one for summary judgment.” Summary judgment requires the movant to demonstrate the absence of any genuine issue of material fact, with all inferences drawn in favor of the non-movant; it is “a drastic remedy to be used with great caution,” viewed with disfavor in this State. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶¶ 8, 10, 148 N.M. 713. Neither New Energy Economy nor YUCCA, which filed in support on August 5, 2026, submitted an affidavit, a declaration, an engineering analysis, or a routing study; their assertions rested entirely on a discretionary agency letter and newspaper articles cited within it. And New Energy Economy failed to make any showing that these factual issues were not disputed and that the case was ready for a dispositive ruling. These errors were pointed out in the record by Mr. Maxwell, a pro se party, which the Hearing Officer obviously appeared to agree with on this point.

The August 10 Order directed that this contested factual question be developed through testimony at the September 14 hearing. That is not a favor to YGI; and YGI disputes any contention

that evidence related to a third party's right-of-way application actually has any relevance as to whether the actual source at issue here (i.e., the Fuel Cell Microgrid System) can properly be constructed in time. This order was and is clearly beneficial to Movants, was made without hearing any response or arguments from YGI, and preserves Movants' ability to cross-examine YGI's witnesses on an issue that YGI believes is irrelevant to the case.

### **III. THE RECORD OF RULINGS ADVERSE TO YGI REFUTES THE CLAIM OF FAVORITISM**

Movants describe a Hearing Officer who has moved "consistent[ly]" in YGI's favor. The docket shows otherwise:

- July 16, 2026 — The Hearing Officer rejected the August 17 hearing date the Department had noticed and set the hearing for October 19, more than two months later.
- July 15 and July 27, 2026 — Over YGI's objection, the Hearing Officer ruled that discovery would be permitted subject to his approval.
- July 27, 2026 — The Hearing Officer denied YGI's request to advance the hearing to August 17 or August 24, stated on the record that the source required "a pretty thorough examination before we commit to it," and eliminated November 23 as an absolute deadline.
- July 29, 2026 — The Hearing Officer set the hearing for September 14, four weeks later than the date YGI had initially requested.
- August 5, 2026 — The Hearing Officer directed YGI and the Department to respond to issues framed by New Energy Economy concerning YGI's ability to construct the source. YGI spent time and resources briefing out these arguments.
- August 12, 2026 — In the same Order Movants attack, the Hearing Officer stated that he did not consider YGI's August 7 Consolidated Response. And, he issued an order without hearing arguments from YGI indicating that the Hearing Officer will hear evidence related to right-of-way easements that is largely irrelevant to this proceeding.

A Hearing Officer who was, as Movants in the CBD Motion put it, "similarly committed to YGI's success" would not have compiled this record adverse to YGI. What the record shows is an adjudicator working through procedural questions under a statutory clock, ruling for and against

every party in turn, and correcting himself when he concluded he had gotten something incorrect under the applicable laws.

#### **IV. MOVANTS DEMONSTRATE NO PREJUDICE**

Disqualification of a presiding officer mid-proceeding is an extraordinary remedy. Movants must show more than a few procedural losses, or an expectation that they will likely lose on the merits; they must show that fair adjudication has become impossible. They fail to make this showing.

The Hearing Officer has repeatedly asked parties to support their bare accusations of prejudice. Movants have repeatedly failed to satisfy this showing. Instead, Movants and other Opponents have spent numerous hours on pre-hearing motion practice, filing Petitions with the Supreme Court, organizing protests, and other endeavors focused solely on delaying this proceeding.

New Mexico law is well-established; there is no constitutional right to pre-trial discovery in administrative hearings. *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 31, 137 N.M. 161, 172, 108 P.3d 1019, 1030. The Due Process Clause applies only where a protected liberty or property interest is at stake, *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 118 N.M. 470, 477 (1994); *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972), and participation in the adjudication of another party's permit application is not such an interest, even where state law affords a right to a hearing. *Moore v. City of Parkville*, 156 S.W.3d 384, 391 n.3 (Mo. App. 2005); *Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu*, 70 Haw. 361, 377 (1989); *In re Freshwater Wetlands Statewide Gen. Permits*, 185 N.J. 452, 468–70 (2006).

The narrow exception *Archuleta* drew from *Dente v. State Taxation & Revenue Department* requires a showing of specific prejudice, and none here has been made. 1997-NMCA-099, ¶ 8, 124

N.M. 93, 95, 946 P.2d 1104, 1106. Objectors have had the Application since May 2026 and the Draft Permit, Statement of Basis, and Modeling Review Report since July 29, 2026. Additionally, they have now had access to over 15,000 pages of materials in NMED’s IPRA Portal for several weeks.

Movants have filed an entry of appearance, attended every conference, filed a motion to reset the schedule, filed discovery requests, filed a reply in support of them, filed a motion to strike, filed a response in support of New Energy Economy’s motion, and filed these motions, and more — all within five weeks. The administrative record is due August 24 under the Department’s commitment on the record. Every party, including YGI, proceeds without discovery. Every party will have direct testimony, rebuttal testimony, cross-examination of every witness, and post-hearing briefing.

A stay would not fall on Movants and YGI alone. The Department’s authority to act on Application No. 10883 expires November 23, 2026, and that date already reflects the single 90-day extension 20.2.72.207(C) NMAC permits. Five labor organizations and the Economic Development Department are participants in this proceeding, and approximately 22,500 members of the public submitted written comments on the Application (over 8,000 of which wrote in support of the Application). An indefinite stay pending the appointment of a new hearing officer and the implementation of unspecified “fair procedures” would consume the time that remains and deny each of those participants the hearing 20.2.72.206(C) NMAC requires the Department to hold. As such, the motions should be denied.

**V. MR. MAXWELL DOES NOT SUPPLY WHAT THE MOTION LACKS**

**A. Mr. Maxwell disclaims every element the rule requires.**

The Maxwell Supplemental Motion is styled as substantial support for the CBD Motion. Read against the text of 20.1.4.100.E(3) NMAC, it is closer to the opposite. On point after point, Mr. Maxwell tells the tribunal what he is **not** alleging:

- He “**does not** contend that adverse rulings alone establish personal bias, nor does he ask the tribunal to infer subjective motive merely from disputed procedural decisions.” Maxwell Resp. at 1 (emphasis added).
- He “**does not** contend at the outset that the presently available ERG records establish actual bias, a disqualifying financial interest, or an improper contractual arrangement.” *Id.* at 2 (emphasis added).
- He **does not** agree that the Hearing Officer’s July 27 statement was “an express determination that Permit No. 10883 should issue,” and points out that the same passage shows the Hearing Officer insisting on thorough examination before “we commit to it.” *Id.* at 11 (emphasis added).
- He “**does not** equate” the Memorandum of Understanding’s development policy “with a commitment to approve Permit No. 10883,” because “[a] State policy favoring development and timely lawful processing is not itself a predetermined regulatory result.” *Id.* (emphasis added).
- On the Governor’s July 27 calendar entry, he states that the record **does not** establish any communication, any knowledge on the Hearing Officer’s part, or any causal connection, and he “therefore does not rely upon that chronology as proof of influence.” *Id.* (emphasis added).
- He **does not** adopt the CBD Motion “to the extent it can be read to say that the Hearing Officer simply transferred Applicant’s ultimate permitting burden to NEE,” because the August 12 Order confirmed the Applicant’s burden. *Id.* at 10 (emphasis added)
- He “**does not** contend that Mr. Rhoderick’s execution of the amendment establishes bias or impropriety.” *Id.* at 15 (emphasis added).
- He **does not** infer that the ERG representative identified in the July correspondence “selected Mr. Shepherd, directs him, evaluates him, or acted improperly.” *Id.* at 19 (emphasis added).
- He “**does not** presently contend that ERG is in fact supplying technical testimony, modeling, analysis, exhibits, permit support, or other substantive evidence to NMED in AQB 26-57(P).” *Id.* at 22 (emphasis added).
- He agrees that “[c]ompensation for professional Hearing Officer services **is not**, standing alone, unusual or evidence of bias.” *Id.* at 27 (emphasis added).
- He states that ERG’s commercial interest “**does not** establish that ERG has any financial stake in whether YGI receives Permit No. 10883,” and “alleges no such stake.” *Id.* at 28 (emphasis added).

- He **does not** contend that ERG’s commercial interest “can simply be attributed to Mr. Shepherd as a ‘financial interest in the proceeding or facility’ under 20.1.4.100(E)(3)(a)(ii) NMAC.” *Id.* at 28, 30 (emphasis added).
- He **does not** ask the tribunal “to rewrite” the text of Subparagraph (b)(i) “or to assume that Subparagraph (b)(i) expressly authorizes a party motion under every separate ground listed in Subparagraph (a).” *Id.* at 30 (emphasis added).

Taken together, these disclaimers concede the case. In order to prevail in a disqualification motion, the movant must show personal bias or prejudice concerning a party, the Application, or the Petition. 20.1.4.100.E(3)(a)(i), (b)(i) NMAC. Mr. Maxwell does not even allege facts that support this showing – let alone provide proof.

## **VI. THE ERG CONTRACTUAL RELATIONSHIP IS NOT A GROUND FOR DISQUALIFICATION**

### **A. The exhibits describe how the Department procures hearing officers; they say nothing about this Applicant, this Application, or this permit.**

Exhibits A through H to the Maxwell Supplemental Motion appear to be pieces of an alleged unauthenticated procurement file: a 2024 Request for Proposals, the resulting professional services contract, a September 12, 2025 amendment adding a Hearing Officer labor category, July 2026 correspondence about the Hearing Officer’s engagement, testimony given by ERG personnel in two unrelated Environmental Improvement Board rulemakings in 2021 and 2023, and a 2022 ERG press release. Nothing in any of them mentions YGI, the Fuel Cell Microgrid System, Permit No. 10883, or this docket.

The rule asks whether the Hearing Officer has “personal bias or prejudice concerning a party, the Application or Petition.” 20.1.4.100.E(3)(a)(i) NMAC. Documents describing the Department’s contracting practices with a vendor do not speak to those issues and are entirely irrelevant to this case.

### **B. An adjudicator engaged and compensated through the agency is the ordinary structure of administrative adjudication.**

Reduced to its essentials, Mr. Maxwell's theory appears to be that a hearing officer whose engagement and compensation depend on the agency that appears before him cannot be relied upon to be neutral without proof of additional safeguards. Settled law rejects that premise.

In *Schweiker v. McClure*, 456 U.S. 188 (1982), the hearing officers who decided Medicare Part B claims were chosen and paid by the private carriers that had already denied the very claims at issue, and their decisions were final and unappealable. The Court held that the arrangement satisfied due process. It began "from the presumption that the hearing officers ... are unbiased," explained that the presumption "can be rebutted by a showing of conflict of interest or some other specific reason for disqualification," and held that "the burden of establishing a disqualifying interest rests on the party making the assertion." *Id.* at 195–96. Because the challengers had made no such showing, the claim failed. *Id.* at 196–97. The same result follows here. *Marcello v. Bonds*, 349 U.S. 302, 311 (1955), is to the same effect for adjudicators who are employees of, and subject to supervision within, the very agency prosecuting the matter.

The cases in which a decisionmaker's financial position has required disqualification share a feature this record does not have: a direct interest in the outcome of the particular case. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Mr. Maxwell states plainly that no such interest exists here: ERG has no "financial stake in whether YGI receives Permit No. 10883," and he "alleges no such stake." Maxwell Supp. Motion at 28.

The theory also proves far too much. Section 20.1.4.100.E(2) NMAC authorizes the Secretary or his designees to appoint hearing officers, and the Department necessarily pays them, whether directly, through a professional services contract, or through some other instrument. If the fact of agency-derived compensation, coupled with unanswered questions about how the engagement is administered, were enough to require an inquiry into the adjudicator's neutrality,

then every hearing officer in every Department docket would be subject to the same demand on the same showing.

**C. *Nuclear Waste Partnership* does not advance the argument.**

Mr. Maxwell relies on *Nuclear Waste Partnership, LLC v. Nuclear Watch New Mexico*, 2022-NMCA-014, 505 P.3d 886, in which the appellants in that case argued that this same Hearing Officer should have been disqualified because of his hourly contract with NMED. As Mr. Maxwell candidly states, the Court “did not adjudicate whether that contractual arrangement required disqualification” and declined to reach the issue on preservation grounds. Maxwell Supp. Motion at 24. As a result, this is not a basis for disqualification and Mr. Maxwell fails to cite to any subsequent authorities in which disqualification occurred because the Hearing Officer was paid an hourly rate.

**VII. THE SUPPLEMENTAL MOTION FOR EXPEDITED DISCLOSURE SHOULD BE ALSO BE DENIED**

The premise of the Supplemental Motion is stated candidly: the available documents “establish a sequence of events and relationships while leaving material facts ... unanswered,” Maxwell Supp. Motion at 2, and therefore “[d]isclosure should therefore precede conclusion,” *id.* at 31. Elsewhere: “[t]here may be substantial safeguards addressing every category,” and disclosure “could substantially resolve the concern.” *Id.* at 29.

That reasoning reverses the allocation of proof in a motion for disqualification. The presumption is that the adjudicator is honest and impartial; the burden of establishing a disqualifying interest rests on the party asserting it. *Schweiker*, 456 U.S. at 195–96; *Withrow*, 421 U.S. at 47; *Morgan*, 313 U.S. at 421. The presumption is not a provisional placeholder that lapses whenever a movant can identify something the public record does not say. There is always something a record does not say. If unanswered questions were themselves grounds for compelled

disclosure, every presiding officer could be put to proof about the terms of his own engagement whenever a party asked, and the presumption would mean nothing. Simply put, Mr. Maxwell lacks sufficient proof that disqualification is warranted and he is attempting to use his supplemental motion as a fishing expedition to delay the hearing, and more specifically the impending August 24, 2026 deadline for parties to file notices of intent to present technical testimony. Nothing in the record (or well-established case law) supports this finding.

**C. The rule’s five-day sequence forecloses a disclose-then-decide procedure.**

Section 20.1.4.100.E(3)(b)(ii) NMAC requires the Hearing Officer to file a recommended decision on a disqualification motion within five days and the Secretary or his Designee to enter an order within five days after that. Mr. Maxwell computes those deadlines himself and acknowledges that the disclosure he seeks may not be obtainable within them. Maxwell Supp. Motion at 34–35. His fallback is that the recommended decision should “expressly identify the material contractual questions that remain unresolved,” after which the Secretary or his Designee may consider whether a further expedited procedure under Section 100(E)(1) is necessary. *Id.* at 35.

The rule provides for a decision on the motion, not for a supplemental investigation of the adjudicator. Its brevity reflects a deliberate choice: a challenge to the presiding officer’s qualification is resolved quickly, on what the moving party presents, so that the proceeding is not held hostage to the challenge. Asking the Hearing Officer to catalog unresolved questions about his own engagement — questions no party has substantiated — would convert a ten-day decisional sequence into an open-ended inquiry, and would do so in a docket with a November 23, 2026 statutory deadline that already reflects the single extension the rule permits. As such, Maxwell’s Supplemental Motion and the CBD Motion should both be denied.

## CONCLUSION

The CBD Motion and the Maxwell Supplemental Motion asks the Secretary or his Desingee to disqualify a Hearing Officer for the rulings he has made, without alleging that he has any personal bias, any interest, any relationship, or any contact with anyone about this case outside the record, or even showing that any of these rulings was legally incorrect. YGI respectfully requests that the Hearing Officer recommend, and the Secretary or his Designee order, that the CBD Motion and the Supplemental Motion be denied in all respects, that the August 24, 2026 deadlines remain in place, and that the September 14, 2026 hearing proceed as scheduled.

Respectfully submitted,

/s/ Jennifer L. Bradfute

Jennifer L. Bradfute

David Kirmse

Bradfute Sayer, P.C.

P.O. Box 90233

Albuquerque, NM 87199

(505) 264-8740

jennifer@bradfutelaw.com

david@bradfutelaw.com

Corey Lim, Associate

Jennifer Biever, Director

Carlos Romo, Director

Williams Weese Pepple & Ferguson

1801 California Street, Suite 3400

Denver, CO 80202

(303) 861-2828

clim@williamsweese.com

jbiever@williamsweese.com

cromo@williamsweese.com

*Counsel for Applicant*

*Yucca Growth Infrastructure, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2026 a copy of the foregoing filing was emailed to the persons listed below.

Max Shepherd  
max.shepherd@comcast.net  
*Hearing Officer*

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

Christopher Vigil  
Brian Yardman-Frank  
New Mexico Environment Department  
Office of General Counsel  
121 Tijeras Avenue NE, Suite 1000  
Albuquerque, NM 87102  
christopherJ.vigil@env.nm.gov  
brian.yardman-frank@env.nm.gov  
*Counsel for NMED*

Zachary E. Ogaz, General Counsel  
New Mexico Environment Department  
PO Box 5469, Santa Fe, NM 87502-5469  
Zachary.ogaz@env.nm.gov  
*Counsel for NMED*

Kelsea E. Sona  
Robles, Rael & Anaya, P.C.  
500 Marquette Ave NW, Ste. 700,  
Albuquerque, NM 87102  
kelsea@roblesrael.com  
*Counsel for NMED*

Bruce Wetherbee  
60 Concord, Massachusetts 01742  
editor@thecandlepublishing.com  
*Pro Se Intervenor*

Joe Cardillo  
344 4th Street SW, Albuquerque, NM 87102  
joe@progressnownm.org  
*Pro Se Intervenor*

Nicholas Maxwell

Nathaniel Chakeres, General Counsel  
P.O. Box 25102, Santa Fe, NM 87504-5012  
nathaniel.chakeres@ose.nm.gov  
*Counsel for New Mexico Office of the State Engineer*

Yiwei Chen  
P.O. Box 20003, Santa Fe, NM 87504-5003  
yiwei.chen@edd.nm.gov  
*Economic Development New Mexico*

Andre Makarski  
510 San Pedro, Albuquerque, NM 87108  
andre@ualocal412.org  
*United Association Local 412*

Maslyn Locke, Senior Staff Attorney  
Eric Jantz, Legal Director  
New Mexico Environmental Law Center  
mlocke@nmelc.org  
ejantz@nmelc.org  
*Counsel for Vivian Fuller and Jose Saldaña Jr.*

Mariel Nanasi  
Christopher Dodd  
422 Old Santa Fe Trail, Santa Fe, NM 87501  
MNanasi@NewEnergyEconomy.org  
chris@fayerbergdodd.com  
*Counsel for New Energy Economy*

Esperanza Chairez, YUCCA Policy  
Campaign Manager  
Zephyr Jaramillo  
esperanza@yuccanm.org  
info@yuccanm.org  
*Youth United for Climate Crisis Action*

Courtenay Eichhorst  
411 Arizona ST. Albuquerque, NM 87109  
courtenaye@ualocal412.org

P.O. Box 1064, Hobbs, New Mexico 88241  
inspector@sunshineaudit.com  
*Pro Se Intervenor*

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

Colin Cox  
Sarah Baer  
Gail Evans  
PO Box 31417, Santa Fe, NM 87594  
ccox@biologicaldiversity.org  
sbaer@biologicaldiversity.org  
gevans@biologicaldiversity.org  
*Counsel for Center for Biological Diversity*

Christine Dobbin  
1 Cielo Azul Anthony, NM 88021  
dobbin.cc@gmail.com  
*Pro Se Intervenor*

*New Mexico Building and Construction  
Trades Council*

Alfonso “Fonze” Martinez, Jr.,  
Business Manager/Financial Secretary  
alfonso@ibew611.org  
markgtrujillo@ibew611.org  
smaeznm@gmail.com  
*IBEW Local Union 611*

Darrell Deaguero, Business Manager  
1030 San Pedro Drive NE, Albuquerque, NM  
87110  
darrell.deaguero@liuna16.org  
mlor@liuna.org  
*LIUNA Local 16*

/s/ Jennifer L. Bradfute