

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of)
PROPOSED AMENDMENT)
TO 20.6.6 NMAC (Dairy Rule))

Nos. WQCC 12-09(R) and 13-08(R)

**ATTORNEY GENERAL’S REPLY TO DIGCE’S RESPONSE TO
ATTORNEY GENERAL’S MOTION TO DISQUALIFY HEARING OFFICER**

Preliminary Statement

The Dairy Industry Group for a Clean Environment (“DIGCE”) opposes the Attorney General’s Motion to Disqualify Hearing Officer on that ground that the motion is untimely. DIGCE’s opposition is not well taken. The Attorney General’s motion, filed one month prior to hearing, is timely.

Procedural and Factual Background

The Commission appointed the current Hearing Officer in this matter on September 9, 2014. WQCC Minutes, p. 3 (Sept. 9, 2014). At that time, the Hearing Officer was under contract with both the Commission and the New Mexico Environment Department (“NMED”) to provide hearing officer services to both agencies.¹ However, the Hearing Officer did not disclose to the parties his contract with NMED – one of the parties before him -- and the potential conflict of interest his contract with NMED creates.

The Attorney General entered his appearance on October 17, 2014. Entry of Appearance of Tannis L. Fox (Oct. 17, 2014). Almost immediately thereafter, on October 27, 2014, NMED moved to strike the Attorney General’s entry of appearance. Motion to Strike Entry of Appearance of Attorney General (Oct. 27, 2014). Over the timely objection of the Attorney

¹ See Environment Department Professional Services Contract 15-667-1800-003 (Aug. 8, 2014) [attached as Exhibit A to Attorney General’s Motion to Disqualify Hearing Officer].

General, the Hearing Officer struck the Attorney General from this rulemaking proceeding, less than two weeks before the hearing scheduled for December 10, 2014. Order on NMED's Motion to Exclude and Strike (Nov. 26, 2014). Once struck as a party, the Attorney General could not file any motions or other pleadings in this proceeding, including any motion to disqualify the Hearing Officer.

Promptly, on December 1, 2014, the Attorney General filed a Petition for Writ of Mandamus ("Petition") with the New Mexico Supreme Court challenging the Hearing Officer's exclusion of the Attorney General from this rulemaking. *See State of New Mexico ex rel. Gary King, Attorney General of the State of New Mexico v. N.M. Water Quality Control Comm'n*, No. 35,000. That same day, the Coalition filed a Verified Petition for Writ of Superintending Control with the Supreme Court challenging venue of this proceeding. The Court requested response to the two petitions by December 5, 2014, and set argument on both petitions for December 8, 2014. Order, No. 35,000 (N.M.S. Ct.) (Dec. 1, 2014).

On December 3, 2014, DIGCE filed a Motion to Vacate Emergency Hearing and to Set New Date for Responses with the Supreme Court requesting the Court to postpone argument on the Attorney General's Petition [attached as Ex. D]. DIGCE requested vacation of the December 8, 2014 hearing, that responses to the two petitions be due December 19, 2014, and that argument before the Court be held thereafter. DIGCE Motion to Vacate, ¶ 15.

That same day, DIGCE moved to continue this proceeding based on the proceedings in the Supreme Court. DIGCE Unopposed Motion for Continuance (Dec. 3, 2014). The Hearing Officer promptly granted the motion. Order Granting Continuance (Dec. 3, 2014).

Preliminary to the hearing before the Supreme Court, the Attorney General's Office on December 2, 2014 requested a copy of the contract between the Hearing Officer and the

Commission. Dec. 2, 2014 email from T. Fox, AGO, to M. Mascarenas, NMED [Ex. E]. On December 9, 2014, NMED forwarded a copy of the contract to the Attorney General's Office. Dec. 9, 2014 email from M. Mascarenas, NMED, to T. Fox, AGO [Ex. F].

The Supreme Court heard argument on the Attorney General's Petition on December 15, 2014, granted the Petition after argument, and issued an order that same day. *See* Order, No. 35,000 (N.M.S. Ct.) (Dec. 15, 2014) [attached as Exhibit C in Attorney General Notice of Errata (Mar. 9, 2015)].

Therefore, it was not until December 9, 2014 that the Attorney General had notice that the Hearing Officer in this proceeding also served as hearing officer for NMED and it was not until *December 15, 2015*, when the Supreme Court reinstated the Attorney General as a party to this proceeding, that the Attorney General was even permitted to file a motion to disqualify the Hearing Officer.

Argument

I. THE ATTORNEY GENERAL'S MOTION TO DISQUALIFY IS TIMELY

The Attorney General filed his Motion to Disqualify Hearing Officer on March 9, 2015, approximately one month before hearing, scheduled for April 6, 2015. This is more than enough time for all parties to file responses to the motion and for the Commission or Hearing Officer to decide the motion. The motion is timely.

Furthermore, there was no undue delay in filing the Motion to Disqualify. The Attorney General was only on notice about the Hearing Officer's conflict since December 9, 2014, and the very first date the Attorney General could have filed a motion to disqualify was December 16, 2014, after the Supreme Court reinstated the Attorney General as a party to this proceeding. Between December 16, 2014 and March 9, 2014, the Attorney General's Office did not delay.

By mid-December, the administration of Attorney General King was ending, and the new administration of Attorney General Balderas was transitioning in. Counsel for the Attorney General took a planned vacation from December 22, 2014 through January 5, 2015. Thereafter, counsel for the Attorney General diligently researched the disqualification issue, prepared a draft motion, and sought approval from Attorney General management, all during the transition of a new administration which had many complex and new issues to deal with, and during a 60 day legislative session, in which the administration which had many complex and fast breaking issues to deal with. The Attorney General's Office acted diligently in filing the Motion to Disqualify March 9, 2015, with sufficient time prior to hearing for the motion to be decided.

II. THERE IS NO PREJUDICE IF THE HEARING IS DELAYED

DIGCE complains that it will suffer prejudice if the hearing is delayed by granting the Motion to Disqualify because it "has been waiting on its Petitions in these matters since September, 2012 and August, 2013." DIGCE Response, p. 2. DIGCE's complaint is not based on the actual record. The fact is that delay of the two hearings is due entirely to repeated requests for continuance from DIGCE, and there is no delay due to the Attorney General's Office (who just entered its appearance in October 2014).

On January 2, 2013, DIGCE moved to continue the January 8, 2013 hearing on its first petition. Unopposed Motion to Continue Hearing, WQCC No. 12-09(R) (Jan. 2, 2013). The continuance was granted, and the hearing was continued until July 9, 2013. Order Granting Motion to Continue Hearing, WQCC No. 12-09(R) (Jan. 3, 2013); Notice of Publication, WQCC No. 12-09(R) (June 3, 2013).

On June 7, 2013, DIGCE filed a *second* motion to continue the hearing, this time based on lack of availability of witnesses. Unopposed Motion to Continue Hearing, WQCC No. 12-

09(R) (June 7, 2013). That motion was granted, and the hearing was reset for September 10, 2013. Order on Motion to Continue Hearing, WQCC No. 12-09(R) (July 5, 2013); Notice of Publication, WQCC No. 12-09(R) (July 11, 2013).

On August 5, 2013, DIGCE filed its Second Petition to Amend the Dairy Rule, 20.6.6 NMAC. Second Petition, WQCC No. 13-08(R) (Aug. 5, 2013). DIGCE requested consolidation of the two petitions and that one hearing be held, delaying the hearing again. *Id.* at 17. The petitions were consolidated, and hearing on the petitions was continued to “a later date not yet established.” Order Continuing Hearing, p. 1, WQCC No. 12-09(R) (Aug. 9, 2013).

Hearing on the two petitions was then set for March 2014, but DIGCE for the *third* time moved to continue the hearing, until September 2014. DIGCE’s Unopposed Motion to Continue Hearing (Jan. 31, 2014). The Commission granted the motion. Order Granting DIGCE’s Unopposed Motion to Continue Hearing (Feb. 5, 2014).

On September 30, 2014, the Commission published notice that the hearing would be held December 9, 2014. Notice of Publication (Sept. 30, 2014).

Thereafter, the Supreme Court proceedings, outlined above, occurred, and DIGCE requested its *fourth* continuance. DIGCE Unopposed Motion for Continuance (Dec. 3, 2014). The Commission rescheduled the hearing for April 5, 2015. *See* Draft Comm’n Agenda, p. 2 (Jan. 13, 2015).

The fact is that, while DIGCE filed its first petition September 5, 2012, it has continually sought and received continuances for hearing on its petitions. DIGCE can hardly now complain that the Attorney General’s Motion to Disqualify – timely filed – if granted, prejudices it by causing delay in a hearing DIGCE has postponed since its initial filing in September 2012.

III. DIGCE'S REQUEST FOR COSTS IS FRIVOLOUS

DIGCE requests that, in the event the Attorney General's Motion to Disqualify is granted, the Attorney General be ordered to pay all costs of new public notices required for a rescheduled hearing. DIGCE Response, p. 2. DIGCE's request is frivolous. The Commission has no statutory authority to impose costs – for whatever reason -- on a party in a rulemaking. *See* NMSA 1978, §§ 74-6-1 to -17. Without such statutory authority, the Commission cannot impose costs.

Furthermore, the Attorney General's Motion to Disqualify is timely, for the reasons set forth above, and therefore there is no just cause to sanction the Attorney General.

Finally, if the Motion to Disqualify is granted, it is meritorious, and therefore there would be no just cause to impose sanctions.

Conclusion

For the reasons set forth herein and in the Attorney General's Motion to Disqualify Hearing Officer, the Attorney General respectfully requests disqualification of the Hearing Officer.

Respectfully submitted,

HECTOR BALDERAS
NEW MEXICO ATTORNEY GENERAL



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Santa Fe, New Mexico 87504
T 505.827.6695 F 505.827.4444 tfox@nmag.gov

Counsel for Attorney General of New Mexico

Certificate of Service

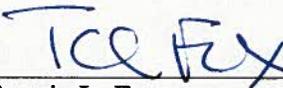
I certify that the following were served with the foregoing pleading by email on March 25, 2015:

Robert A. Stranahan, IV
Dalva Moellenberg
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Gallagher and Kennedy, P.A.
1233 Paseo de Peralta
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Jeffrey Kendall
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Santa Fe, New Mexico 87504-4147



Tannis L. Fox

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 35,001

RIO GRANDE CHAPTER OF THE SIERRA CLUB,

Petitioner,

v.

**HON. JENNIFER L. ATTREP,
First Judicial District Court Judge,**

Respondent,

and

**NEW MEXICO WATER QUALITY CONTROL COMMISSION,
DAIRY INDUSTRY FOR A CLEAN ENVIRONMENT,
and NEW MEXICO ENVIRONMENT DEPARTMENT,**

Real Parties in Interest.

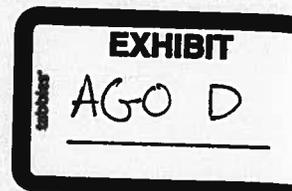
**DIGCE's MOTION TO VACATE EMERGENCY HEARING
AND TO SET NEW DATE FOR RESPONSES**

Pursuant to NMRAP 12-309, and for the reasons set forth below describing why there is no need for emergency action by the Court, the Dairy Industry Group for a Clean Environment, Inc. (hereinafter "DIGCE") moves that the Court vacate the December 5, 2014 deadline for a response and the December 8, 2014 hearing and set new dates for responses and a hearing on this matter.

1. On December 1, 2014, the Rio Grande Chapter of the Sierra Club ("Sierra Club") filed a Verified Emergency Petition for Writ of Superintending

SUPREME COURT OF NEW MEXICO
FILED

DEC - 8 2014



Control Of [sic] Other Appropriate Writ (“Emergency Petition”). Movant DIGCE was named as a Real Party in Interest in the Petition.

2. By Order issued on December 2, 2014, the Court ordered that a response to the petition be filed on or before December 5, 2014 at Noon and that oral argument be heard on Monday, December 8, 2014 at 1:30 p.m.

3. The underlying administrative proceeding is a hearing before the Water Quality Control Commission (“Commission”) on two Petitions filed by DIGCE for the Commission to consider proposed amendments to the New Mexico Administrative Code, 20.6.6 NMAC, known as the Dairy Rule.

4. The specific issue raised in the Emergency Petition is whether the Commission is authorized by law to hold the hearing in Roswell, the region of the state where most dairies affected by the Dairy Rule are located and the location chosen by the Commission, rather than in Santa Fe.

5. The Emergency Petition cites a hearing scheduled before the Commission on December 9, 2014 in Roswell, New Mexico as the reason for the requested emergency action by the Court. As discussed below, the circumstances have changed and the Commission will not hold its hearing on December 9.

6. On December 3, 2014, based on an unopposed motion filed by DIGCE, the Commission’s Hearing Officer ordered that the hearing be continued from the December 9 date to be rescheduled to a new date to be set by the

Commission. The Hearing Officer's Order continuing the hearing is attached hereto as Exhibit "A."

7. On December 3, 2014, DIGCE's counsel received an email notice from the Commission's Administrator indicating that the Commission will not hold its December 9, 2014 meeting . A copy of that email and a preceding email requesting information on the Commission's intent regarding its December meeting are attached hereto as Exhibit "B".

8. As a result of the Order continuing the hearing, a portion of the relief sought by the Sierra Club, that is, a cancellation of the December 9 hearing in Roswell, already has been accomplished. The issue of the Commission's authority to schedule the hearing in Roswell, however, remains, but there no longer is any need for emergency action.

9. According to the Commission's website and usual practice to hold its regular meetings on the second Tuesday of each month and the draft agenda for the cancelled December 9 meeting, the Commission's next meeting will be on January 13, 2015. Consequently, there is no need for the Court to act on this matter until sometime before that meeting.

10. The issue of the hearing location is very important to DIGCE and its members. DIGCE submits that, since there is no longer any need for emergency action, it would be reasonable for the Court to allow DIGCE and the other parties

who oppose the Emergency Petition additional time to respond to the 22 page Emergency Petition and for the Court to have additional time to review the pleadings before it acts.

11. On the same date as the Emergency Petition was filed, December 1, 2014, Attorney General Gary King also filed a Petition for Writ of Mandamus and Request for Expedited Consideration or, Alternatively, Request for Stay (No. 14/35000). That Petition seeks a writ ordering the Commission to allow the Attorney General to participate in the same rulemaking hearing, to expedite the consideration of the Petition or, in the alternative, to stay the rulemaking hearing pending the Court's consideration of the Petition. DIGCE was not named in that Petition, but will seek leave to file an amicus brief.

12. The Court in response to that Petition also required responses to be filed by Noon on December 5 and set a hearing at the same time on December 8 at 1:30 p.m.

13. For the same reasons as discussed above, because the Commission will not proceed with a hearing on December 9, there is no need for the Court to expedite its consideration of the Petition before December 9, and the Court should consider setting a new response date and hearing date for that matter as well.

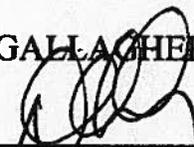
14. Allowing approximately three days for the parties to respond to both the 22 page Emergency Petition and the 19 page Attorney General's Petition poses a heavy burden on counsel and is not warranted given the change in circumstances.

15. Undersigned counsel requests that the date for responses be extended by two weeks to December 19, 2014, with a hearing to follow as determined by the Court.

16. Undersigned counsel contacted the other counsel of record for both the Emergency Petition in No. 35,001 as well as for the Petition in No. 35,000. Counsel for the Environment Department in this matter and No. 35,000 indicated they concur in this motion . The separate counsel for the Commission in both matters indicate that they do not oppose this motion. Counsel for the Petitioners Sierra Club in this matter and for the Attorney General in No. 35,000 indicated that they oppose this motion.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



Dalva L. Moellenberg, Esq.
Anthony (T.J.) J. Trujillo, Esq.
Robert A. Stranahan, IV, Esq.
1239 Paseo de Peralta
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Fax: (505) 983-8160

Certificate of Service:

I hereby certify that a true and accurate copy of the foregoing pleading was served on the following parties by counsel for the Dairy Group for a Clean Environment via e-mail or hand-delivery this December 3, 2014:

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JBlock@nmelc.org
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Counsel for the Water Quality Control Commission

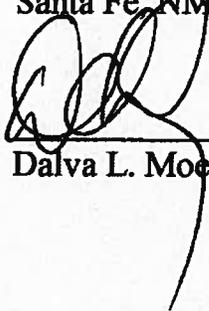
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Christopher.Atencio@state.nm.us
Counsel for the New Mexico Environment Department

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Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
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Santa Fe, NM 87504
tfox@nmag.gov
Counsel for the New Mexico Attorney General

VIA HAND-DELIVERY TO CLERK

Honorable Jennifer L. Attrep
First Judicial District Court
225 Montezuma Ave.
Santa Fe, NM 87501



Dalva L. Moellenberg, Esq.

**BEFORE THE WATER QUALITY CONTROL COMMISSION
FOR THE STATE OF NEW MEXICO**



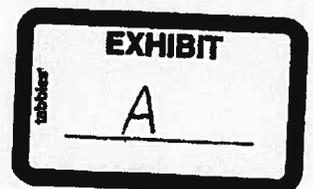
In the Matter of:
**PROPOSED AMENDMENT
TO 20.6.6 NMAC (Dairy Rule)**

**WQCC 12-09 (R) and
WQCC 13-08 (R)**

ORDER CONTINUING HEARING

Petitioner the Dairy Industry Group for a Clean Environment, Inc. filed an unopposed motion for continuance of the hearing on December 3, 2014. For the reasons stated in the motion, it is granted. It is hereby ORDERED that the hearing of this matter currently set for December 9, 2014 in Roswell, New Mexico is vacated and the Commission will set a new time and place for the hearing.

**Christopher T. Saucedo
Hearing Officer**



Moellenberg, Dalva L.

From: Castaneda, Pam, NMENV <Pam.Castaneda@state.nm.us>
Sent: Wednesday, December 03, 2014 3:22 PM
To: Stranahan, Bob A.; Moellenberg, Dalva L.; Trujillo, Anthony J.; Kendall, Jeff, NMENV; Atencio, Christopher, NMENV; Bonza, Kay, NMENV; Jonathan Block
Subject: WQCC 12-09-14 meeting

Good afternoon, there will not be a meeting for December.

Pam Castaneda

Administrator to Boards and Commissions

Environmental Improvement Board

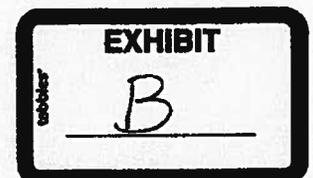
Water Quality Control Commission

1190 St. Francis Drive Room S2102/PO Box 5469

Santa Fe, NM 87502

(505) 827-2425

Email: pam.castaneda@state.nm.us



Moellenberg, Dalva L.

From: Jonathan Block <jblock@nmeic.org>
Sent: Wednesday, December 03, 2014 2:30 PM
To: Castaneda, Pam, NMENV; Stranahan, Bob A.; Moellenberg, Dalva L.; Trujillo, Anthony J.; Kendall, Jeff, NMENV; Atencio, Christopher, NMENV; Bonza, Kay, NMENV
Subject: Re: WQCC 12-09 (R) and 13-08 (R)

Hello, Pam
Thanks for getting this back so quickly. Do you know if the Commission will still hold the Dec. 9th regular meeting in Roswell or if it will be in Santa Fe?

Thanks.

Jon

On 12/3/2014 2:24 PM, Castaneda, Pam, NMENV wrote:

Good afternoon, attached is the Order Continuing Hearing signed by the Hearing Officer Christopher T. Saucedo.

Pam Castaneda
Administrator to Boards and Commissions
Environmental Improvement Board
Water Quality Control Commission
1190 St. Francis DriveRoom S2102/PO Box 5469
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--
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(505) 989-3769 (Fax)
www.nmelc.org



Fox, Tannis <tfox@nmag.gov>

IPRA request

Fox, Tannis <tfox@nmag.gov>

Tue, Dec 2, 2014 at 4:52 PM

To: Melissa NMENV Mascarenas <melissa.mascarenas@state.nm.us>

Hi Melissa. Attached is an IPRA request. I request that the document(s) be provided within the 3 day period under the Inspection of Public Records Act, NMSA 1978, § 14-2-8(D), that is, by **close of business December 5, 2014**, because these documents may be of use before the New Mexico Supreme Court on December 8, 2014.

Thank you.

—

Tannis L. Fox
Assistant Attorney General
Water, Environment and Utilities Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
T 505.827.6695
F 505.827.4098



Please consider the environment before printing this e-mail

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EXHIBIT

AGO E



**NEW MEXICO ENVIRONMENT DEPARTMENT
INSPECTION OF PUBLIC RECORD REQUEST FORM**

Please fill out the following information:

1. Date: December 2, 2014
2. Requestor's Name: Tannis Fox, Assistant Attorney General
3. Requestor's Address: PO Box 1508, Santa Fe, NM 87502
4. Phone No.: (505) 827-6695
5. Email: tfox@nmag.gov
6. Company Being Represented: Office of New Mexico Attorney General
7. Address: same as above

8. Document or File being requested to be reviewed or copied (please describe the records in sufficient detail to enable Department personnel to reasonably identify & locate the records:

The professional services contract(s) between NMED and SaucedoChavez PC, Christopher Saucedo and/or Morris Chavez

I request that the document(s) be provided within the 3 day period under the Inspection of Public Records Act, NMSA 1978, § 14-2-8(D), that is, by close of business December 5, 2014, because these documents may be of use before the New Mexico Supreme Court on December 8, 2014.

9. NMED Bureau where Document/File can be found (if known): Office of General Counsel

/s/ Tannis Fox
Signature

The cost for copying by NMED is as indicated on Attachment A. Please send this request to:
Melissa Y. Mascareñas



NEW MEXICO
ENVIRONMENT DEPARTMENT



Office of General Counsel

SUSANA MARTINEZ
Governor
JOHN A. SANCHEZ
Lieutenant Governor

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RYAN FLYNN
Cabinet Secretary
BUTCH TONGATE
Deputy Secretary

Jeffrey M. Kendall, General Counsel

VIA E-MAIL

December 9, 2014

Tannis Fox
tfox@nmag.gov

Dear Ms. Fox:

The New Mexico Environment Department ("NMED") recently completed fulfillment of your Inspection of Public Records Act ("IPRA"), NMSA 1978, § 14-2-12 (1993), request received by the NMED records custodian, Melissa Mascareñas, on December 3, 2014.

Please contact me at (505) 827-2855 if there is anything further we can assist you with.

Sincerely,

Melissa Y. Mascareñas
New Mexico Environment Department
Department Public Records Custodian

cc: Stacy Lopez, Chief, Administrative Services Division
Marlene Cordova, Financial Services Bureau
Ben Naranjo, Purchasing Services Bureau
Jeffrey M. Kendall, General Counsel
Billy Jimenez, Office of General Counsel

Melissa Y. Mascareñas

New Mexico Environment Department
Department Public Records Custodian

The New Mexico Environment Department ("NMED") recently completed fulfillment of your Inspection of Public Records Act ("IPRA"), NMSA 1978, § 14-2-12 (1993), request received by the NMED records custodian, Melissa Mascareñas, on December 3, 2014.

cc: Stacy Lopez, Chief, Administrative Services Division

Marlene Cordova, Financial Services Bureau

Ben Naranjo, Purchasing Services Bureau

Jeffrey M. Kendall, General Counsel

Billy Jimenez, Office of General Counsel

EXHIBIT
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