

Service by Email:

January 21, 2024

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Santa Fe, NM 87501

Re: Follow-Up Questions from the January 17 Meeting on the Conditional Use Permitting Process for Commercial Renewable Energy Projects

Dear Ms. Ellis-Green, Fire Marshal Blay and Mr. Prucino:

Thank you and all the other County representatives who participated in the January 17 meeting to inform and discuss with the public the permitting process for AES Corporation's Rancho Viejo solar project. I am sure you are aware, as public representatives, how important it is that the public is willing to accept and respect your decisions. To achieve that goal, the permitting process must be open and transparent. So, I appreciate the dialogue.

However, due to the shortness of time that was available for each participant to ask questions, I am writing to request that you answer several follow-up questions, and I would appreciate your responses.

1. The public's participation rights in a Conditional Use Permit hearing

At the January 17 meeting, in discussing the Conditional Use Permit hearing for the Rancho Viejo solar project, Ms. Ellis-Green described only the participation rights of the general public (whose participation the County limits to two minutes each), not the rights of people entitled to participate as formal parties.

Section V.B of the Rules of Order for the Board of County Commissioners (attached), which you identified as applying to the eventual hearing on AES's Application, establishes the order of proceeding in an administrative adjudicatory hearing. Section B provides for presentations by four classes of participants: Staff, Applicant, *Other Parties* and Public Input:

- Staff Presentation (Section B.2)
- Applicant's Presentation (Section B.4)
- Presentation of Other Parties (Section B.6)
- Public Input (Section B.8)

Section V.B distinguishes between (1) presentations of parties claiming an interest in the outcome of the administrative hearing and (2) public input, which appears to include any

“members of the public.” According to the Rules, "other parties" must "identify themselves" as a party to the proceedings and must state with specificity their interest in the outcome. These "other parties" are entitled to make a presentation during the hearing in support of or in opposition to the outcome and to call witnesses in support of the party's position. They have the right to cross examine the witnesses presented by Staff and the Applicant. Parties also have the right to appeal the decision of the Planning Commission to the Board of County Commissioners under the Sustainable Land Development Code (SLDC).¹

The rights of the public generally under Public Input are more limited. Members of the public have only the right to make their own statements, and the two-minute time and other limits described by Ms. Ellis-Green can be placed upon their participation (Section B.8).

The procedural rules for a Conditional Use hearing set forth in Section 4.7.2.1 of the SLDC are similar.

Follow-up questions:

a. Does the County dispute that certain members of the public will have the right to participate in any upcoming hearings as "Other Parties" under Section B.6? The exclusion of people's rights to participate as parties (and the limitation of those rights to public commenters) would violate the County's rules. It would also produce a fundamentally unfair hearing process -- one in which only the Applicant and the County's Staff have the right to present evidence.

b. Does the Growth Management Department have the authority to interpret and implement the Rules of Order in such hearings – or does that authority belong to the Hearing Officer?

c. Do parties in the proceedings have the right to conduct discovery?

d. Who has the authority (i.e., the Growth Management Department or the Hearing Officer) to schedule the dates for any prehearing conferences and hearings?

e. Does the County Staff (i.e., the Growth Management Department, the Fire Department and the County Attorney's Office) have any role in the deliberations of the Hearing Officer, the Planning Commission or in the appeals hearing conducted by the Board of Commissioners? If so, how will the County avoid the issues addressed in the Court of Appeals decision in *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd.*?² This case held that a hearing on proposed regulations was not fair or impartial because the same staff who presented testimony proposing regulations then provided staff support for the agency's deliberations on the regulations that staff proposed.

2. Additional public meeting hosted by AES

At the January 17 meeting, I and at least one other member of the public requested that the County require AES to hold an additional public meeting to explain and answer the public's questions about AES's further filings with the County, regardless of whether those filings are

¹ SLDC Section 4.5.4.

² 1981-NMCA-044, paras. 46-53, 97 N.M. 88, 637 P.2d 38.

characterized as a new application, a resubmitted application or a supplement to AES's original application.

AES's original application was filed on January 23, 2023, almost exactly one year ago. Since then, AES has indicated to the County and the public that it plans to make changes to the proposal it submitted in its January 2023 application. The consultant hired by the County to review the Environmental Impact Report in AES's Application issued a report with 14 pages of comments, criticisms and requests for further information to which AES needs to respond. The County Fire Department has identified additional information that should be included in further submittals. The County also intends to hire an additional consultant who is expected to require further information about the battery storage portion of AES's proposal. Responding to all of these requests will entail substantial changes and additions to the application, effectively making it a new application.

Follow-up questions:

a. Under these circumstances, does the County intend to treat AES's anticipated resubmittal as a new application? If not, why not?

b. Does the County believe that AES should be required to conduct an informational meeting with the public pursuant to Section 4.4 of the SLDC and, as discussed below, conduct an additional set of Studies, Reports and Assessments under Chapter 6 of the SLDC? If not, why not?

3. "Neutrality" versus Due Diligence

The County indicated that it intends to stay "neutral" in the pending District Court proceedings on whether information such as the percentage chance of a thermal runaway event, the likely gases generated during such an event and the explosive impacts of such an event qualify as "trade secrets" that should not be disclosed to the public. The County said at the initial September 2023 hearing on the issue that it lacked the expertise to evaluate AES's claims. In accordance with the County's September 26, 2023 adoption of a Resolution (Resolution 2023-093) which authorized the County to hire experts to assist the County with its review of permit applications for commercial renewable energy projects, the County could presumably hire an expert to evaluate and present evidence challenging or at least testing AES's trade secret claims. But County staff stated at the January 17 meeting that it will not do so; it will not take a position and will stay "neutral."

At a minimum, the County could ask the District Court to recognize the County's authority (under SLDC 6.3.1) to disclose trade secret information "where the preservation of any trade secret involves a significant threat to health and safety." The County could then further ask the District Court to recognize the County's authority and modify its injunctive relief to state that the District Court's orders do not limit the County's authority under the SLDC.

The County also stated at the Jan 17 meeting that it would not request any investigative reports or other information related to the second of the AES battery facility fires in Arizona -- the April 2022 fire in Chandler, Arizona. The fire hazard of the project proposed here is a key issue in the Conditional Use proceeding, but Fire Department officials have stated that the Department needs

to maintain a "neutral" position on AES's Application. At the January 17 meeting, Fire Marshal Blay also stated that the Fire Department is focused on the safety of AES's current technology, not the technologies in AES's Arizona facilities.

The issues that the County, including the Fire Department, should diligently research in its Conditional Use review include (1) the damages (i.e., personal injury and property damage) that were caused by the Arizona explosion and fires, (2) the extent to which the technologies used by AES in Arizona are similar to the technologies proposed here, (3) the extent to which any AES management practices may have contributed to the Arizona incidents, and (4) lessons AES may have learned from its investigations of the Arizona incidents and the extent to which those lessons have been incorporated into the technologies and management practices that AES proposes to avoid similar incidents here.

Follow-up Questions:

a. The County's duty is to protect the health and safety of the residents of the County, not to remain "neutral" or to protect AES's trade secrets. The "trade secret" issues are of serious public concern. What is the County's reason for refusing to take a position on these issues? Does the County not want the public to be aware of information that is central to the County's determination of whether the proposed project will be "detrimental to the health, safety and general welfare of the area" or "create a potential hazard for fire, panic, or other danger?"³ If not, why not?

b. Does the County agree that it has the authority under Section 6.3.1 of the SLDC to disclose trade secret information "where the preservation of any trade secret involves a significant threat to health and safety"? If the County agrees that it has that authority, should it not at least ask the District Court to recognize the County's authority and modify its injunctive relief to state that the District Court's orders do not limit the County's authority under the SLDC? If not, why not?

c. In the County's determination about whether AES's proposed project will be "detrimental to the health, safety and general welfare of the area" or "create a potential hazard for fire, panic, or other danger," does the County believe that AES's role in the Arizona explosion and fires is relevant and that due diligence requires the County's investigation of those incidents? If not, why not?

d. Does the County believe it should require AES to provide an account of the injuries and property damages that resulted from AES's explosion and fires in Arizona and the amounts of the damage claims received by AES and its insurer? If not, why not? This information should provide concrete examples of the fire risks and other risks associated with the proposed project.

e. If the County insists on maintaining absolute "neutrality" on these issues, does the County agree that this is a compelling reason that parties should have a right to intervene in the Conditional Use proceeding and have the right to conduct discovery to ensure that these central issues are addressed?

³ SLDC, Section 4.9.6.5.

4. The County Fire Department's September 26, 2023 "Approval with Conditions"

The same resolution (Resolution 2023-093) that authorized the County Staff to hire experts to review applications for commercial renewable energy projects also directed County Staff to create a website to provide information to the public about such projects. The current website recently added an item titled "Compliance with the Santa Fe County Fire Code." The link for the item pulls up a September 26, 2023 document titled:

Santa Fe County
Fire Department Fire Prevention Division
Development Plan Review

The document contains four optional boxes for the reviewer to check: "Approved," "Approved with Conditions," "Denied," and "Incomplete." The Fire Department reviewer checked "Approved with Conditions." The document states that the "Development plan review documents are approved" and then includes seven pages of references to portions of the International Fire Code, the International Wildland Urban-Interface Code and National Fire Protection Association Standard 855. Significantly, two of the conditions require that AES provide further information about the details of the project:

1. Location and layout diagram of the room or area in which the ESS is to be installed.
2. Details on the hourly fire-resistance ratings of assemblies enclosing the ESS.
3. The quantities and types of ESS to be installed.
4. Manufacturer's specifications, ratings and listings of each ESS.
5. Description of energy (battery) management systems and their operation.
6. Location and content of required signage.
7. Details on fire suppression, smoke or fire detection, thermal management, ventilation, exhaust and deflagration venting systems, if provided.
8. Support arrangement associated with the installation, including any required seismic restraint.
9. A commissioning plan complying with Section 1207.2.1.
10. A decommissioning plan complying with Section 1207.2.3.

A further condition is that AES provide a "failure modes and effects analysis (FMEA) or other approved hazard mitigation analysis."

At the January 17 meeting, I asked what specifically was approved and how this approval relates to the Conditional Use Permit application. Ms. Ellis-Green stated that there has not been an approval, but she did not address the fact that the County Fire Department's Development Plan review shows a checked box labeled "Approved with Conditions." Fire Marshal Blay also did not describe the effect of the "approval," but he indicated that the additional information the Fire Department requested would not be required for submission until AES applies to the Fire Department for a Construction Permit AFTER the Conditional Use Permit has been approved.

Furthermore, the conditions referencing NFPA 855 in the Fire Department's Development Plan Review relate to the 2020 edition of NFPA 855, which is the obsolete standard the County adopted on August 29, 2023. After the County was alerted to its adoption of the obsolete standard in November 2023, the County Commission corrected its mistake, but the Fire

Department has not changed the conditions in its September 26 approval. In the January 17 meeting, the Fire Marshal downplayed the significance of this issue, but the outdated 2020 edition of NFPA 855 (and the references to it adopted by the Fire Department) does not include the entirely new section (Annex G) that the NFPA added in 2023 "in response to international incidents of ESS fires."⁴

Annex G is an appendix titled "Guide for Suppression and Safety of Lithium-Ion Battery (LIB) Energy Storage Systems (ESS)." Annex G supplements the mandatory requirements of NFPA 855 with 41 pages of "information for designers, users, and enforcers planning, approving, or encountering installations of LIB-based ESS."⁵

This annex focuses on hazard identification and assessment, firefighting, fire protection, and fire and gas detection. It represents information on LIB properties and characteristics, guidance on implementing minimum safety requirements, maintenance and operation of fire protection systems, and other information that can be used to promote safety of LIB installations.⁶

Follow-up questions:

a. What is the "Approved with Conditions" determination under the SLDC or the County Fire Code that the Fire Department is making and how does it relate to the Conditional Use Permit process?

b. Why does the County not require the submission and evaluation of information (i.e., fire hazards and public safety) central to the Conditional Use Permit process BEFORE the County makes a decision on those issues? The SLDC requires that AES's Environmental Impact Report identify and mitigate the project's hazards⁷ and that "[f]ormulation of mitigation measures shall be identified at the first discretionary approval [i.e., the Conditional Use Permit process] and under no circumstances deferred until the ministerial development process."⁸ Does the County agree that any delay in requiring and evaluating AES's Hazard Mitigation Analysis would violate these SLDC requirements? If not, why not?

c. Does the County Fire Department plan to update its Development Plan Review document to address the updated 2023 version of the fire safety standards? If not, why not?

5. AES reimbursement of County costs

At the January 17 meeting, a member of the public asked whether the County could recover the costs it incurs in responding to fires or other emergencies created by incidents at the proposed project, and the County's attorney answered that he doubts that the County could penalize AES for such costs.

⁴ NFPA 855, Standard for the Installation of Stationary Energy Storage Systems, 2023 Edition, National Fire Protection Association, at 855-1.

⁵ Id., Annex G, Section G.1.1.

⁶ Id.

⁷ SLDC Sections 6.3.6, 6.3.10.

⁸ SLDC Section 6.3.10.2.

The SLDC provides for conditions the County can impose and mechanisms by which the County and the company can agree in advance that the County will be able to recover certain costs incurred by the County. These would not be a “penalty” paid by the company, but rather conditions of approval imposed on AES by the County, and/or arrangements entered into voluntarily by AES and the County.

AES's proposed emergency plan appears to consist simply of AES's provision of training for County Fire Department personnel on how the County should respond to incidents at AES's site. The SLDC authorizes the County to require AES to conduct studies (e.g., an Adequate Public Facilities and Services Assessment⁹ and a Fiscal Impact Assessment¹⁰) to quantify the costs the County is anticipated to incur for AES's project. The SLDC authorizes the County to establish conditions providing for recovery of the County's costs for facilities and services¹¹ and for a related payment and performance guaranty.¹² The SLDC also authorizes a voluntary development agreement between a developer and the County to carry out all requirements, conditions and mitigation measures.¹³

Follow-up questions:

- a. Does the County intend to exercise its authority to pursue AES's funding of the additional personnel, equipment and facility costs the County will incur to prepare its emergency response to any incidents at the proposed site? If not, why not?
- b. Does the County intend to implement any of the above authorities to be able to recover the substantial costs it will likely incur in responding to minor and major incidents at the proposed site? If not, why not?
- c. Has the County investigated AES's emergency response and cost recovery arrangements with other municipalities in which AES operates generation resources? If not, why not?

I look forward to your responses.

Respectfully,
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⁹ SLDC Section 6.1.2.2.

¹⁰ SLDC Section 6.1.2.5.

¹¹ SLDC Section 4.9.6.6.1a.

¹² SLDC Section 4.9.6.6.2.

¹³ SLDC Section 4.9.6.6.3.