STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
SILVER OAK DRILLING LLC
TO DENIAL OF HIGH WAGE JOB TAX CREDIT ISSUED UNDER LETTER ID NO. L0237026864

v. **D&O 19-01**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on September 13, 2018 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Timothy Van Valen, Esq. (Askew & Mazel) appeared representing Silver Oak Drilling, LLC (Taxpayer) and was accompanied by Mr. Stephen Bartlett and Mr. Ron Saavedra of Axiom CPAs & Business Advisors, LLC (Axiom), and Ms. Florence Livingston.

Ms. Tonya Noonan Herring, Esq., appeared representing the Taxation and Revenue Department of the State of New Mexico (Department) and was accompanied by Mr. Danny Pogan, Mr. Dan Armer, Ms. Elizabeth Florence, and Ms. Martha Rodriguez. The parties filed their closing arguments on November 2, 2018.

At the hearing, Taxpayer expressed its intention to address three specific issues: the meanings of (1) "eligible employer" and (2) "new job" under the high wage jobs tax credit act; and (3) the effect of a prior closing agreement. *See* Record of Hearing, Taxpayer's Opening Statement. Taxpayer's written closing argument raised a fourth issue regarding the method by which the Department counts the total number of employees in high-wage economic-based jobs for the purpose of determining whether a taxpayer has satisfied the increase in headcount

requirement.

The Hearing Officer finds that the Taxpayer's protest should be granted in part and denied in part. First, the Hearing Officer found Taxpayer to be an eligible employer under the high-wage jobs tax credit act. Second, the Hearing Officer found the Department's "replacement analysis" was not contrary to law and the Department was entitled to evaluate whether a high wage job was genuinely new, or not. Third, the Hearing Officer found that there was insufficient evidence or argument in reference to the effect of any prior closing agreement, such that the issue was waived, or in the alternative, rejected for lack of evidence. Fourth, the Department's method of identifying the total number of employees in high-wage economic-based jobs did not contradict the law.

The result is that Taxpayer is entitled to a high-wage jobs tax credit for twelve positions that were disallowed solely on the basis that Taxpayer was not an eligible employer. The remainder of Taxpayer's protest is denied.

Taxpayer Exhibits 3 through 9 and 11 through 14 and Department Exhibits E, H, and I were admitted into the evidentiary record without objection. Department Exhibit C was admitted over Taxpayer's objection. All exhibits are described in the Administrative Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

Summary of the Administrative File

1. On October 6, 2016, the Department denied Taxpayer's Application for High Wage Job Tax Credit ("Application") under Letter ID No. L0237026864. [*See* Administrative File, Attachment B to Taxpayer's Protest].

2. Taxpayer's Application sought a total high wage jobs tax credit in the amount of $1,144,314.98 for 148 eligible employees for the periods between January of 2010 through

December 2014. [*See* Administrative File; Taxpayer Exhibit 3].

3. On January 4, 2017, Taxpayer executed a protest of the denial of its Application. The protest was received in the Department's protest office on January 11, 2017. [*See* Administrative File, Formal Protest Letter; Taxpayer Exhibit 12].

4. On January 26, 2017, the Department acknowledged the Taxpayer's protest under Letter ID No. L1980090672. [*See* Administrative File, Letter ID No. L1980090672].

5. On March 6, 2017, the Department filed a Hearing Request in which it requested a scheduling hearing for the purpose of setting a date for a hearing on the merits of Taxpayer's protest and establishing associated prehearing deadlines. [*See* Administrative File].

6. On March 7, 2017, the Administrative Hearings Office entered a Notice of Telephonic Scheduling Conference that set a telephonic scheduling hearing for April 7, 2017. [*See* Administrative File].

7. On April 7, 2017, a telephonic scheduling hearing occurred in which the parties did not object that the scheduling hearing satisfied the hearing requirements of NMSA 1978, Section 7-1B-8 (A). [*See* Administrative File; Record of Hearing 4/7/2017].

8. On April 10, 2017, the Administrative Hearings Office entered a Scheduling Order and Notice of Administrative Hearing, which in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's protest for October 31, 2017. [*See* Administrative File; Record of Hearing 4/7/2017].

9. On August 15, 2017, the Department filed a Certificate of Service indicating that it had served the Department's First Set of Requests for Admission, First Set of Interrogatories, and First Set of Requests for Production of Documents. [*See* Administrative File].

10. On September 14, 2017, Taxpayer, by and through Mr. Bartlett, filed a Certificate

of Service indicating that Taxpayer served its responses to the Department's First Set of Requests for Admission, First Set of Interrogatories, and First Set of Requests for Production of Documents. [*See* Administrative File].

11. On October 20, 2017, Taxpayer filed a Motion for Continuance, Order Vacating All Deadlines and Request for Scheduling Conference. [*See* Administrative File].

12. On October 20, 2017, the Department filed Department's Response in Opposition to Taxpayer's Motion for Continuance, Order Vacating All Deadlines and Request for Scheduling Conference. [*See* Administrative File].

13. On October 24, 2017, Mr. Van Valen entered his appearance on behalf of Taxpayer. [*See* Administrative File].

14. On October 26, 2017, the Administrative Hearings Office entered an Order Converting Merits Hearing to Telephonic Scheduling Hearing. [*See* Administrative File].

15. On April 13, 2018, Taxpayer filed a Notice of Withdrawal and Substitution of Counsel in which Taxpayer provided notice of its intent to maintain Mr. Van Valen as its representative rather than the law firm with which he was previously associated at the time of his initial entry of appearance. [*See* Administrative File].

16. On May 18, 2018, the Department filed a Prehearing Statement. [*See* Administrative File].

17. On May 21, 2018, Taxpayer filed Silver Oak Drilling LLC's Prehearing Statement. [*See* Administrative File].

18. On June 8, 2018, the Administrative Hearings Office continued the hearing on the merits of Taxpayer's protest due to an unexpected illness which prevented the previously-assigned hearing officer from presiding over the matter as scheduled. The hearing was therefore continued

to September 13, 2018 and reassigned to the undersigned Hearing Officer. [*See* Administrative File].

19. On August 31, 2018, Taxpayer filed a Motion to Vacate the Formal Hearing and All Deadlines Pending Final Resolution of an Identical Issue [in] Another Protest. [*See* Administrative File].

20. On September 4, 2018, the Department filed Department's Response in Opposition to Taxpayer's Motion to Vacate the Formal Hearing and All Deadlines Pending Final Resolution [in] Another Protest. [*See* Administrative File].

21. On September 7, 2018, the parties filed a Prehearing Statement[1]. [*See* Administrative File].

22. On September 12, 2018, the Administrative Hearings Office entered an Order Denying Motion to Vacate Formal Hearing and All Deadlines Pending Final Resolution of an Identical Issue [in] Another Protest. [*See* Administrative File].

Evidence at the Hearing

23. Mr. Stephen Bartlett is employed by Axiom CPAs & Business Advisors (Axiom) where he acts as manager in Axiom's state and local tax department. [Direct Testimony of Mr. Bartlett].

24. Taxpayer retained Axiom to provide various services, including preparation and submission of its high wage jobs tax credit application. [Cross-Examination of Mr. Bartlett].

25. Mr. Bartlett has been involved in several high wage job tax credit applications for various Axiom customers. [Direct Testimony of Mr. Bartlett].

[1] Although the Prehearing Statement specifies that it is submitted jointly, the Hearing Officer observed that it is not signed by Mr. Van Valen on behalf of Taxpayer.

26. In reference to Taxpayer's protest, Mr. Bartlett prepared Taxpayer's high wage job tax credit application with assistance from Taxpayer. [Direct Testimony of Mr. Bartlett; Direct Testimony of Ms. Livingston; *See* Taxpayer Exhibit 3].

27. Mr. Bartlett's first step in preparing the application was to obtain employee information and payroll registers from Taxpayer, which he then relied upon to create Taxpayer's employee list. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibits 3 and 6].

28. Mr. Bartlett then utilized the employee list [Taxpayer Exhibit 6] to identify individual employees who he determined should also be included in Taxpayer's headcount analysis. Those employees were then incorporated into a spreadsheet called Employees in Headcount. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibits 3 and 5].

29. Mr. Bartlett then applied a formula to confirm that the headcount revealed an appropriate growth in jobs as required by the high wage jobs tax credit. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibit 3].

30. Having determined that an employee was eligible and that his analysis revealed an appropriate increase in headcount, Mr. Bartlett included the employee in RPD-41376. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibits 3 and 7].

31. The employment details of every employee listed on RPD-41376 are provided in a spreadsheet designated "Detail of Calculations." [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibits 3 and 4].

32. Other considerations Mr. Bartlett evaluated in preparation of Taxpayer application were whether claimed jobs satisfied minimum durations of occupancy and minimum wage thresholds. [Direct Testimony of Mr. Bartlett].

33. Mr. Bartlett also evaluated whether Taxpayer was an eligible employer by virtue of

the percentage of sales it made to out-of-state buyers. [Direct Testimony of Mr. Bartlett].

34. Taxpayer compiled and submitted sales information intended to substantiate their sales to out-of-state buyers, which it contended were sufficient to establish eligibility for a high wage jobs tax credit. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibit 13; Taxpayer Exhibit 14].

35. Sales data revealed that although Taxpayer provided services for a variety of customers during the periods at issue, Taxpayer's most-significant customers in 2014 were COG Operating LLC and RKI Exploration & Production, LLC. [Cross Examination of Mr. Bartlett].

36. Sales to COG Operating LLC and RKI Exploration & Production, LLC in the form of services performed within New Mexico represented more than 69 percent of its total sales, on which it also paid New Mexico gross receipts tax. [Direct Testimony of Ms. Rodriguez; Direct Testimony of Mr. Pogan; *See* Department Exhibit C].

37. COG Operating LLC and RKI Exploration & Production, LLC engage in business both within and outside of New Mexico. [Cross Examination of Mr. Bartlett].

38. COG Operating LLC and RKI Exploration & Production, LLC own oil and gas wells within New Mexico which are also the locations at which Taxpayer has performed services. [Direct Examination of Ms. Livingston].

39. Taxpayer reports and pays gross receipts tax on receipts derived from services performed in New Mexico for COG Operating LLC, RKI Exploration & Production, LLC, and other similarly situated customers. [Direct Testimony of Ms. Livingston].

40. Taxpayer provides services to COG Operating LLC and RKI Exploration & Production, LLC both within and outside of New Mexico. [Cross Examination of Mr. Bartlett; Direct Examination of Ms. Livingston].

41. Taxpayer does not report gross receipts nor pay New Mexico gross receipts tax on receipts derived from providing services in other states. [Direct Testimony of Ms. Livingston].

42. Taxpayer, with Mr. Bartlett's assistance, submitted its application which was assigned to Ms. Martha Rodriguez. [Direct Testimony of Mr. Bartlett].

43. Mr. Bartlett signed Taxpayer's tax credit application with Taxpayer's pre-authorization. [Cross-Examination of Mr. Bartlett].

44. Mr. Bartlett recalled that the review process was rather prolonged. The parties executed two 120-day extensions in addition to the Department's initial review period. [Direct Testimony of Mr. Bartlett].

45. The Department denied Taxpayer's Application on October 6, 2016 under Letter ID No. L0227026864. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibit 8].

46. Taxpayer's Application sought credit for a total of 148 positions. [Direct Testimony of Ms. Martha Rodriguez].

47. Out of 148 claimed positions, 133 were denied as replacements. [Direct Testimony of Ms. Martha Rodriguez; *See* Taxpayer Exhibit 11].

48. Ms. Rodriguez was unaware of any previous closing agreement in reference to any prior application between Taxpayer and the Department and did not deny any portion of Taxpayer's Application based on such agreement. [Direct Testimony of Ms. Rodriguez].

49. The Department's audit narrative did not address replacement positions as a basis for denying any portion of Taxpayer's Application. Instead, that issue was addressed by footnote in the audit work papers. [Direct Testimony of Mr. Bartlett; *See* Taxpayer Exhibit 8; Taxpayer Exhibit 11].

50. The Department has not promulgated any rules implementing the high wage jobs

tax credit. Although Mr. Bartlett is confident in his understanding of the Department evaluation methods, he has also observed inconsistencies in its methods. [Direct Testimony of Mr. Bartlett].

51. Florence Livingston is employed by Mack Energy Corporation (Mack). Mack and Taxpayer have common ownership. Ms. Livingston is employed as controller responsible for supervising and managing Taxpayer's accounting and financial matters, including its local tax matters. [Direct Testimony of Ms. Livingston].

52. Ms. Livingston assisted in preparing Taxpayer's Application. [Direct Examination of Ms. Livingston].

53. Taxpayer engages in the service of drilling oil and gas wells for third party customers. [Direct Examination of Ms. Livingston].

54. Taxpayer presently owns 13 drilling rigs which it employs in New Mexico. In 2010, Taxpayer had 11 drilling rigs. [Direct Testimony of Ms. Livingston].

55. Each drilling rig employs a 4 to 5-person crew depending on the size of the specific rig and the specifications of the site, including depth. Rigs operate 24 hours per day with crews rotating as required to maintain continuous production. [Direct Testimony of Ms. Livingston].

56. At a minimum, each rig is expected to employ one floorhand, motorman, tool pusher, and derrick. Larger rigs may employ additional positions if necessary. [Direct Testimony of Ms. Livingston].

57. Depending on the circumstances, a rig might employ two crews working two 12-hour shifts, or three crews working three 8-hour shifts. [Direct Testimony of Ms. Livingston].

58. If operating at optimal capacity, meaning all rigs are operating simultaneously and continuously, then Taxpayer could employ as many as 300 individuals in the field. [Direct Testimony of Ms. Livingston].

59. In circumstances where a rig might be out of use for any reason, the crews assigned to that rig could possibly be reassigned to other rigs, other tasks, or perhaps be terminated if their assigned rig is expected to be out of service for an extended period of time. [Direct Testimony of Ms. Livingston].

60. If under circumstances where a crew is terminated from employment because their assigned rig is out of service for a prolonged period of time, Taxpayer may choose to re-hire the crew when the rig is ready to resume operations. [Direct Testimony of Ms. Livingston].

61. Market conditions might also effect the number of Taxpayer's employees. For example, a decline in gas and oil prices might result in termination of employees. [Direct Testimony of Ms. Livingston].

62. In addition to market conditions, other factors could influence the number of employees, such as safety concerns or customer demands. [Direct Testimony of Ms. Livingston].

63. Taxpayer also maintains a machine shop where it employs machinists who are employed to repair or fabricate components for use in Taxpayer's operations. The machine shop primarily functions to support Taxpayer's rigs, but might also be employed to provide machining services to other parties. [Direct Testimony of Ms. Livingston].

64. Mr. Dan Armer is employed by the Department for more than 20 years where he specializes in corporate income tax and pass-through entities. [Direct Testimony of Mr. Armer].

65. Taxpayer is a limited liability company. Taxpayer's parent company is Chase Petroleum, LLC, of which Taxpayer is a solely owned subsidiary. [Direct Testimony of Mr. Armer].

66. Taxpayer and its parent company are separate and distinct legal entities with each having its own federal and state tax identification numbers. [Direct Testimony of Mr. Armer].

67. For corporate income tax purposes, entities are capable of being present in multiple states. [Direct Testimony of Mr. Armer].

68. For corporate income tax purposes, an entity's presence in a state is determined by physical presence. [Direct Testimony of Mr. Armer].

69. For corporate income tax purposes, physical presence might include property, location, or payroll. [Direct Testimony of Mr. Armer].

70. For purposes of apportioning income for corporate income taxes, attributing sales to other states is determined by identifying the location to which the goods were delivered or the services performed. [Direct Testimony of Mr. Armer].

71. For corporate income tax purpose, income derived from performing services in New Mexico is apportioned to New Mexico regardless of other locations where an entity might operate or be headquartered. [Direct Testimony of Mr. Armer].

72. Although having extensive experience in corporate income tax apportionment, Mr. Armer's experience in gross receipts taxes and the implementation of the high wage jobs tax credit is minimal. [Cross Examination of Mr. Armer].

73. Ms. Martha Rodriguez has been employed by the Department for more than 18 years. She is a managed audit tax audit supervisor. She was previously assigned to the business tax credit unit where she reviewed Taxpayer's Application. [Direct Testimony of Ms. Rodriguez].

74. Ms. Rodriguez reviewed all documents submitted by Taxpayer and ultimately denied the application. [Direct Testimony of Ms. Rodriguez].

75. The credit periods at issue were January 6, 2010 through December 15, 2014. [Direct Testimony of Ms. Rodriguez; *See* Taxpayer Exhibit 8].

76. Ms. Rodriguez performed independent research in order to gain a better

understanding of Taxpayer's business activities. [Direct Testimony of Ms. Rodriguez].

77. Ms. Rodriguez was required to determine whether Taxpayer was an eligible employer by evaluating whether it made more than 50 percent of its sales to out-of-state buyers. [Direct Testimony of Ms. Rodriguez].

78. To determine whether Taxpayer was eligible by virtue of making more than 50 percent of its sales to out-of-state buyers, she reviewed Taxpayer's sales report and concluded that Taxpayer failed to meet the 50-percent eligibility threshold. [Direct Testimony of Ms. Rodriguez; *See* Taxpayer Exhibit 11].

79. Taxpayer's Application was also denied for a variety of other reasons as illustrated in the Summary & Calculation of High-Wage Jobs Tax Credit. [Direct Testimony of Ms. Rodriguez; *See* Taxpayer Exhibit 11].

80. The Department regards services performed within New Mexico, to businesses also having a presence in New Mexico, as in-state sales for the purpose of the high wage jobs tax credit. Ms. Rodriguez has always perceived this as being the general rule in evaluating whether a service is sold to an out-of-state buyer for the purpose of the high wage jobs tax credit. [Direct Examination of Ms. Rodriguez].

81. The Department also concluded that 133 positions failed to qualify as new jobs because they were deemed to be replacement positions. Ms. Rodriquez prepared a worksheet specifying the positions that she identified as being replacements. [Direct Testimony of Ms. Rodriguez; *See* Taxpayer Exhibit 11].

82. All taxpayers have an opportunity to make inquiries and provide explanations for the purpose of permitting the Department to reconsider its conclusions prior to the denial of an application. [Cross Examination of Ms. Rodriguez].

83. Ms. Elizabeth Florence is a tax audit supervisor for the business tax credit unit. She assigns audits and supervises their work. [Direct Testimony of Ms. Florence].

84. Ms. Florence's work in reference to the current protest was limited to reviewing the audit resulting in the denial of Taxpayer's application. [Direct Testimony of Ms. Florence].

85. Discussion of a denial based on replacements is not always addressed in audit narratives, but relevant information will be provided in the Department's audit work papers. [Direct Testimony of Ms. Florence].

86. Although there are not any written instructions regarding the Department's replacement analysis, the analysis has been utilized regularly by business tax credit auditors. [Direct Testimony of Ms. Florence].

87. Mr. Danny Pogan has been with the Department for 24 years where he is currently an audit protest supervisor. [Direct Testimony of Mr. Pogan].

88. As part of his functions as a protest auditor, he will review the file, evaluate issues, and request additional information if necessary. [Direct Testimony of Mr. Pogan].

89. Taxpayer previously protested a prior high wage job tax credit application for periods February 2006 through April 2013. Some of the periods from the 2013 application overlap with the application presently in dispute. [Direct Testimony of Mr. Pogan].

90. Taxpayer and the Department compromised the 2013 application through a closing agreement. [Direct Testimony of Mr. Pogan].

DISCUSSION

Although Taxpayer's original protest presented a variety of issues for consideration, by the time Taxpayer appeared for the hearing, it had resolved to concentrate its efforts on three distinct topics: the meanings of (1) "eligible employer" and (2) "new job" under the high wage jobs tax

credit act; and (3) the effect of a prior closing agreement on the Department's evaluation and ultimate determination on Taxpayer's Application. *See* Record of Hearing, Taxpayer's Opening Statement.

However, with concern for the third issue, Taxpayer presented nominal evidence concerning the effect of a prior closing agreement, and did not address the issue at all in its closing argument. Consequently, the Hearing Officer perceives that particular issue, along with all of the other issues Taxpayer did not address, as abandoned, or alternatively DENIED for lack of evidence and argument.

With regard for issues addressed by evidence and argument, the parties agree that the law governing the protest is NMSA 1978, Section 7-9G-1 (2013)[2].

Burden of Proof.

Although the protest does not arise from an assessment, but from the denial of Taxpayer's Application, Taxpayer bears the burden of establishing entitlement to the credit central to its protest. The New Mexico Court of Appeals has found that tax credits are legislative grants of grace that must be narrowly interpreted and construed against a taxpayer. *See Team Specialty Prods. v. N.M. Taxation & Revenue Dep't*, 2005-NMCA-020, ¶9, 137 N.M. 50, 107 P.3d 4. Accordingly, Taxpayer carries the burden of proving that it is entitled to the claimed credit.

Even though, pursuant to *Team Specialty*, a credit must be narrowly interpreted and construed against a taxpayer, the credit must also be construed in a reasonable manner consistent

[2] On September 30, 2016, the 52nd Legislature of the State of New Mexico convened for the second special session of 2016. By October 6, 2016, Senate Bill 6, containing various amendments to the high wage jobs tax credit act had passed both chambers and was transmitted to the governor for final action. The governor signed SB 6 on October 19, 2016, and because it contained an emergency clause, it became effective immediately. The 2016 amendments are not applicable to the current protest.

with legislative language. *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶9, 107 N.M. 540, 760 P.2d 1306 (although construed narrowly against a taxpayer, deductions and exemptions—similar to credits—are still to be construed in a reasonable manner).

Definition of "Eligible Employer."

Having concluded its evaluation of the Taxpayer's Application, the Department determined that Taxpayer provided goods and services to customers having physical business locations in New Mexico, despite the fact that those customers were incorporated and headquartered in other states. Taxpayer's most-significant customers were COG Operating, LLC and RKI Exploration & Production, LLC, which both own oil and gas wells in New Mexico, but neither of which is based in New Mexico.

Sales to COG Operating, LLC and RKI Exploration & Production, LLC represented approximately 69 percent of its total sales, which if considered as sold to an in-state buyer, would render Taxpayer ineligible for the high wage jobs tax credit, even if every other sale was indisputably made to out-of-state buyers.

Accordingly, the Department asserted that Taxpayer is not an eligible employer because it failed to establish that it "made *more than fifty percent of its sales* of goods or services produced in New Mexico *to persons outside New Mexico* during the applicable qualifying period[.]" *See* NMSA 1978, Section 7-9G-1 (M) (3) (a) (2013). The essence of the Department's position seems to be that regardless of the location where a buyer is headquartered, or the source of money funding a purchase, if Taxpayer's services, or products thereof, are delivered in New Mexico, then the sale cannot be "to persons outside New Mexico." For that reason, the Department concluded that Taxpayer was not an eligible employer. The Hearing Officer does not agree.

Taxpayer's status as an "eligible employer" in this protest rests entirely on the construction

of the phrase "to persons outside New Mexico" as contained in Section 7-9G-1 (M) (3) (a).

It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, absurdity, or a conflict among statutory provisions. *See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401, 962 P.2d 1236. In *Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶12, 149 N.M. 455, 250 P.3d 881 (internal quotations and citations omitted), the New Mexico Court of Appeals stated:

> the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.

Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶27, 127 N.M. 120, 978 P.2d 327; *See also Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't*, 1994-NMCA-086, ¶8 & ¶14, 118 N.M. 72, 878 P.2d 1021. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473, 212 P.3d 361. Because this case also involves a tax credit, which is an act of legislative grace, the language of the credit statute must be narrowly construed. *See Team Specialty*, 2005-NMCA-020, ¶9

The Department claims that its position in this protest is consistent with its longstanding interpretation of the statutory definition of "eligible employer." However, the Department has admittedly never implemented its interpretation in any formal manner. With the exception of its application form, at no time from the initial inception of the high wage jobs tax credit nearly 15 years ago, through its most current amendments, has the Department ever promulgated rules, published any

guidance, or taken other steps to formalize its implementation of the act. Instead, its longstanding interpretation seems to exist only within the memories of those amassing its institutional knowledge.

This is problematic for several reasons. First, institutional knowledge is not readily accessible to the general public seeking uniform guidance. Second, institutional knowledge is not fixed and uniform. It can be inconsistent and subjective, and therefore disposed to an arbitrary and capricious implementation. In fact, the potential for the inconsistent application of the law is illustrated in the Department's closing argument in which it cites the Fiscal Impact Report (FIR) for the bill that ultimately amended the high wage jobs tax credit act during the Second Special Legislative Session of 2016. *See* 2016 (2nd S.S.), ch. 3, §6. The FIR stated in part that "[e]xtractive and retail industries are not typically considered to be economic-base companies, but many of these companies have received credits and refunds under this statute over the last several years." The Hearing Officer finds this statement meaningful because Taxpayer is within the category of extractive industries to which the FIR spoke, suggesting that other similarly-situated taxpayers have been approved for the credit. Therefore, a significant inconsistency in the application of the law arises when Taxpayer is treated inversely to others whose applications for high wage jobs tax credits have been approved under the same law.

Nevertheless, the Department goes on to argue that "[u]sing the location of corporate headquarters instead of the location of where the services are provided to define where a sale occurs and to calculate the out-of-state sales threshold will open the loophole the legislature closed" with its enactment of SB 6 in 2016. *See* New Mexico Taxation and Revenue Department's Written Closing Arguments, Page 12. However, if there was a loophole[3], then the legislative enactment intended to

[3] The Hearing Officer will not characterize any portion of the high wage jobs tax credit act as a "loophole". To do so improperly suggests that the Hearing Officer has a more enlightened comprehension of what the Legislature

close it was not effective until 2016, and neither party asserts that it should be given retroactive effect.

However, the most significant problem with the Department's position is that its purported, long-standing interpretation fails to align with the plain language of the statute. The Department argued that "Taxpayer *delivered* its products and *performed* drilling services on rigs or wells located in New Mexico to customers who also engaged in business in New Mexico." (Emphases Added). *See* New Mexico Taxation and Revenue Department's Written Closing Arguments, Page 5. Consequently, the Department asserted that because "Taxpayer did not provide more than fifty percent of its services to 'persons outside New Mexico,' it did not make more than fifty percent of its 'sales' to persons outside New Mexico." *Id.*

The first defect in the Department's logic is that the definition of "eligible employer" does not forbid services from being performed in New Mexico, or the product of those services from being delivered in New Mexico. In contrast, the act actually contemplates that scenario by referring to "sales of goods or services *produced in* New Mexico[.]" (Emphasis Added). Instead, the critical component, representing the second defect in the Department's logic, is that the Legislature assigned special significance to the *location* of the buyer, since the statute requires that services produced in New Mexico be sold "*to persons outside New Mexico*." Neither party disputes that one objective of the Legislature was to incentivize sales of goods or services that would generate income from out-of-state sources, consequently infusing new money into the State's economy. *See* New Mexico Taxation and Revenue Department's Written Closing Arguments, Page 11; Silver Oak Drilling LLC's Written Closing Argument, Page 3.

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intended than the Legislature itself, when it enacted the 2013 version of the law. The text of a statute is the primary indicator of legislative intent. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473, 212 P.3d 361.

For this reason, it is not unreasonable to consider the place from which a sale was authorized and funded in order to determine whether a sale is made "to persons outside New Mexico." In this matter, even if COG Operating, LLC and RKI Exploration & Production, LLC had some in-state presence, the fact that purchases were authorized and paid from its out-of-state headquarters is not inconsequential, considering the fact that when a sale was authorized and funded from out-of-state, it satisfied the agreed-upon objective of the Legislature to stimulate New Mexico's economy with out-of-state cash. Focusing on the location of the sale, or the place where a service was performed, or the location were a product of the service delivered, requires that one minimize and ignore one of the Legislature's fundamental interests, the location of the buyer and its money.[4] This, however, was not the application the Legislature intended when it specifically required "more than fifty percent of its sales of goods or services produced in New Mexico *to persons outside New Mexico* during the applicable qualifying period" in order to establish eligibility.

Nonetheless, the Department correctly asserts that "an administrative agency has the authority to reasonably interpret the statute which it is charged with enforcing." *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶39, 117 N.M. 346, 871 P.2d 1352. However, its reliance on *Helman* is misplaced for two reasons. First, it argues that "[t]he phrase 'outside New Mexico' defines where 50% sale (of goods and service produced in New Mexico) must be made." *See* New Mexico Taxation and Revenue Department's Written Closing Arguments, Page 8. This is incorrect. The statute does not dictate the place where the sale must be made. Instead, it centers on the location of the buyer. For

[4] The Department has previously argued that businesses applying for the high wage jobs tax credit are ineligible unless they are "New Mexico businesses." *In the Matter of Harris Corporation*, D&O No. 18-35 (non-precedential), it argued that a taxpayer headquartered in another state was *not* a New Mexico business even though it maintained property and employees in New Mexico and actively engaged in business in New Mexico. In contrast, the Department now seems to suggest that same criteria should be relied upon for finding that the buyer of a service or product *is a New Mexico business*, at least for the purpose of establishing the location of the buyer.

this reason, the Department's interpretation is not reasonable because it is indifferent and disregards the requirement that the sales of goods or services produced in New Mexico be "to persons outside New Mexico."

The second reason the Department's reliance on *Helman* is misplaced is because the statutory interpretation relevant to *Helman* was adopted as a rule having the force of law. *Id.* As previously explained, the Department in the present matter acknowledged that it has never enacted any rules in reference to the high wage jobs tax credit act, which are essential to assuring a fair and consistent implementation of the law. The issue in *Helman* required the court to consider a properly promulgated rule against the terms of a statute. In this protest, there is no promulgated rule or other formal implementation of the law.

Although rulemaking by the Department might have supported the Department's interpretation of the high wage jobs tax credit act, the Department's argument ultimately fails because it is contrary to the plain meaning of the law. If the Hearing Officer agreed with the Department's interpretation of the law, the absence of formal rules would not provide the Taxpayer with relief. *See Dir., Labor & Indus. Div., N.M. DOL v. Echostar Communs. Corp.*, 2006-NMCA-047, ¶14, 139 N.M. 493, 134 P.3d 780, *citing Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal.4th 557, 59 Cal.Rptr.2d 186, 927 P.2d 296 (1996) ("If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of the controlling law."). The point here is that the Hearing Officer finds that the Department's interpretation contradicts controlling law, not that the Department has failed to promulgate rules for its implementation.

Definition of "New Job."

The next issue presented by Taxpayer concerns what it characterizes as the definition of "new

job," or how the Department goes about evaluating whether a job is genuinely new, or perhaps a replacement.

Taxpayer's evidence and argument did not challenge any of the Department's particular determinations in reference to any specific jobs. Instead, it generally disputed the Department's method of evaluating whether a job was new or not, referred to by the Department as its "replacement analysis." This issue has been previously addressed on several occasions. *See In the Matter of the Protest of Par Five Energy Services, LLC,* D&O 18-10 (non-precedential) (*pending appeal in A-1-CA-37231*); *In the Matter of the Protest of MVT Services,* D&O 18-11 (non-precedential); *In the Matter of the Protest of Mosaic Potash Carlsbad Inc.*, D&O 18-13 (non-precedential) (*pending appeal in A-1-CA-37303*); *In the Matter of the Protest of Raytheon Company,* D&O 18-20 (non-precedential).

The issue presented in this protest is substantially similar, and is summarized as whether the Department acted within its statutory authority when it engaged in a "replacement analysis." That determination turns on a question of statutory construction to determine whether the statute permits or precludes disallowance of the credit based on such analysis.

The high wage jobs tax credit act provides that "[a] taxpayer who is an eligible employer may apply for, and the taxation and revenue department may allow, a tax credit *for each new high-wage economic-based job*. The credit provided in this section may be referred to as the 'high-wage jobs tax credit'." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis Added). The act states that "[t]he purpose of the high-wage jobs tax credit is to provide an incentive for urban and rural businesses to create and fill *new* high-wage jobs in New Mexico." (Emphasis Added). *See* NMSA 1978, Section 7-9G-1 (B) (2013).

Again referring to the cannons of statutory construction, the Hearing Officer is persuaded

that it is not beyond the authority of the Department to examine whether a claimed position is newly created or a "replacement."

A "new high-wage economic-based job" is defined in the statute as "a *new* job *created* in New Mexico by an eligible employer on or after July 1, 2004 and prior to July 1, 2020 that is occupied for at least forty-eight weeks of a qualifying period by an eligible employee who is paid wages" that meet the statutory criteria. *See* NMSA 1978, § 7-9G-1 (M) (5) (Emphases Added)

In evaluating what the Legislature intended by its use of the words "new" and "created," the Hearing Officer may refer to the dictionary as an instrument for defining the ordinary meaning of words. *See Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶¶18-20, 289 P.3d 1232.

In this case, "new" means "recently come into being". *See Black's Law Dictionary*, p. 1141 (9th ed. 2009). "Create" means "to bring into existence". *See Merriam-Webster, n.d. Web.* (2018) at http://www.merriam-webster.com/dictionary/create. It is therefore reasonable to conclude that by its use of the word "new," the Legislature intended that a new job be one that recently came into being and did not exist at an earlier time. Accordingly, the Legislature has plainly and clearly established what it considers to be a "new job."

The Legislature has also clearly stated that the purpose of the Act is to permit "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013) (Emphasis Added). Since permitting a credit for any other type of job would contradict the statute and the Legislature's intentions, it is reasonable to imply a grant of authority that empowers the Department to examine whether a high-wage job is genuinely "new" within the meaning of the statute. With regard for such an implication, "[i]t is, of course, a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also,

all powers that may fairly be implied therefrom." *See Wimberly v. N.M. State Police Bd.*, 1972-NMSC-034, ¶6, 83 N.M. 757, 758, 497 P.2d 968, 969.

The Legislature has also expressly authorized the Department, for the purpose of enforcing any statute administered under the provisions of the Tax Administration Act, to examine and require the production of pertinent records, books, information or evidence concerning the subject matter of its inquiry. *See* NMSA 1978, Section 7-1-4 (2005). In this case, the act clearly comes within the provisions of the Tax Administration Act. *See* NMSA 1978, 7-1-2 (A) (16).

Nevertheless, the process by which the Department evaluates whether a high-wage job is "new" has not been established in a rule. This raises the question of whether or not the analysis is a "rule" under NMSA 1978, Section 14-4-2. Once again, the meaning of a statute is derived from the plain meaning of the words selected by the Legislature.

The definition of "rule" is broad. *See State v. Ellis*, 1980-NMCA-187, ¶11, 95 N.M. 427, 622 P.2d 1047 *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981). Excluding specific exceptions not applicable to the matter at hand, a "rule" is defined as follows at NMSA 1978, Section 14-4-2 (C):

> "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency.

The Hearing Officer is not persuaded that the methods the Department employs for evaluating whether a job is "new" comes within the definition of "rule" under the State Rules Act. The evidence established that the analysis is merely a method of review which enables an auditor to identify jobs that may not be newly created, enabling the auditor to make further inquiry. This is an essential function of an auditor, given the definition of the word "audit" which is "to examine and verify, as an

account or accounts. In its broad sense 'audit' means to hear, examine, and determine a claim or claims by their allowance or disallowance or rejection in toto, or in part." *See State ex rel. Heglar v. Wheeler*, 146 Wash. 513, 514, 263 P. 946 (1928); *See also Black's Law Dictionary*, 150 (9th ed. 2009) ("Audit" is "[a] formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards.").

In contrast to a rule, the so-called "replacement analysis" does not implement or interpret law in a manner that affects one or more agencies or persons not members or employees of the issuing agency. It is merely a term used to describe the extrapolation and interpretation of data from a spreadsheet in aid of perceiving indicators of whether a high-wage job, for which a tax credit is claimed, is genuinely new or not.

The authority to make that determination is both express and implied because whether or not a high wage job is new is a threshold inquiry under the act, since the Legislature has only permitted "a tax credit *for each new high-wage economic-based job*." *See* NMSA 1978, Section 7-9G-1 (A) (2013).

The so-called "replacement analysis" does not determine whether a taxpayer will be disqualified from receiving the credit. It is merely the mechanism, for identifying jobs in which it may be appropriate for an auditor to make further inquiry. In situations where the evaluation identifies high-wage jobs that may not be new within the purpose of the act, the Department provides an opportunity for a taxpayer to provide further explanation and submit additional documentation. [Testimony of Ms. Rodriguez]. However, such additional explanation or information may not always resolve a question to the satisfaction of either party. Since Taxpayer bears the burden of establishing entitlement to the credit, an insufficient answer to any follow up inquiry may be sufficient to deny the claim. The fact that Taxpayer has not adequately addressed the Department's inquiries does not

invalidate the method through which the Department reviewed the Application, which in turn gave rise to those very same inquiries.

As addressed in the prior section, even if there were some facet of the Department's evaluation that came within the definition of "rule," the Department's application of the law in the absence of promulgated rules under the State Rules Act would not be void absent some contradiction of the controlling law. *See Echostar*, 2006-NMCA-047, ¶14. Under the facts of this protest, the Hearing Officer perceives no contradiction of the law from the Department's so-called replacement analysis.

In this protest, as in others addressing the very same issue, the Department has determined that verifying whether or not a high-wage job is new is essential for the purpose of determining whether a taxpayer is entitled to the receive a tax credit. The Department's perception of its duty to verify such information is reasonable and consistent with its grant of authority provided in the statute, which also provides that "an eligible employer shall apply to the taxation and revenue department *on forms and in the manner prescribed by the department*." *See* NMSA 1978, Section 7-9G-1 (J) (2013) (Emphasis Added).

An interpretation of the Act that restricts the Department's ability to thoroughly scrutinize the contents of an application is inconsistent with the plain meaning of the statute, and would require that the Act be construed in favor of Taxpayer contrary to the directive in *Team Specialty*.

Taxpayer asserted in its closing argument that "other than reliance on a presumption of correctness, the Hearing Officer has no basis for agreeing with the Department's position that employee A "replaced" Employee B[.]" *See Silver Oak Drilling LLC's Written Closing Argument*, Page 8. This statement suggests that the burden rests with the Department to prove that Taxpayer is not entitled to a credit, and because the Department has not satisfied that false burden, that Taxpayer must prevail. However, Taxpayer always bears the burden of proving entitlement to the credit. *See*

Team Specialty, 2005-NMCA-020, ¶9. In other words, Taxpayer might have been better positioned approaching the issues in this protest resolved to prove why it was right, instead of why the Department was wrong. Despite hundreds of pages of documents, the Hearing Officer is unable to conclude that Taxpayer is entitled to any portion of the tax credit denied based on the determination that a high-wage job was not new.

The Hearing Officer agrees that the Department properly disallowed 133 of 148 of the claimed qualifying positions because Taxpayer was not able to establish an entitlement to the credit for those positions. The Hearing Officer further notes that although 15 positions were determined to be new jobs, three of those 15 were denied for other reasons. Accordingly, Taxpayer should be entitled to credit for 12 claimed qualifying positions that were denied solely because the Department determined that Taxpayer was not an eligible employer[5]: A., J. for period 01/06/2013 – 01/05/14; B., A. for period 02/17/2013 – 02/16/2014; E., K. for period 01/02/2013 – 01/01/2014; G., R. for period 01/06/2010 – 01/05/2011; G., D. for period 10/17/2011 – 10/16/2012; H., R. for period 01/25/2013 – 01/24/2014; P., R. for period 05/16/2012 – 05/15/2013; T., M. for period 01/11/2013 – 01/10/2014; T., S. for period 03/08/2013 – 03/07/2014; V., J. for periods 01/15/2010 – 01/14/2011 and 01/15/2011 – 01/14/2012; V., L. for period 03/25/2013 – 03/24/2014.

Whether the Department's "Headcount" Calculation for 48-Week Periods is Incorrect.

As previously explained, at the onset of Taxpayer's presentation, counsel indicated that its evidence and argument would be narrowed to three discreet issues, listed above. Taxpayer's closing argument, however, raised an additional issue, which although previously included in its protest and prehearing statement, seemed abandoned at least until it filed is closing argument.

[5] The Hearing Officer will refer to the employees' initials only (last, first).

It claimed that pursuant to its headcount calculations, seven qualifying periods at issue showed an increase of at least one more employee with a high-wage economic-based job at the end of those qualifying periods as required by Section 7-9G-1 (E). The Department's calculations, however, concluded otherwise.

Taxpayer asserted that the Department "improperly included in the headcount employees that did not work the required 48 weeks and employees that earned less than the required $28,000 during the qualifying period." *See* Prehearing Statement, filed May 18, 2018, Page 6, Issue D[6]. The result, according to Taxpayer, was essentially to inflate the headcount at the beginning of a period, which reduced or even eliminated the increase in headcount that Taxpayer was required to show in order to qualify for the tax credit.

Taxpayer's only citation to legal authority in support of its argument is Section 7-9G-1 (E) which provides that "[a] new high-wage economic-based job shall not be eligible for a credit … unless the eligible employer's total number of employees with high-wage economic-based jobs on the last day of the qualifying period at the location at which the job is performed or based is at least one more than the number on the day prior to the date the new high-wage economic-based job was created."

The Department argued, in the Prehearing Statement, that its practice is to include "all high-wage employees who were paid on a W-2, and received wages, regardless of the actual amount of payment or number of weeks in the position." *See* Prehearing Statement, Filed September 7, 2018, Page 15.

[6] The Prehearing Statement filed on September 7, 2018 presents the identical issue at Page 9. However, the Hearing Officer relies on the Taxpayer's recitation as it was provided in the previous statement since the statement filed on September 7, 2018 did not contain Taxpayer's counsel's electronic signature.

The Hearing Officer cannot find based on the plain meaning of the statute that the Department's method of evaluating headcount was contrary to the law. The statute requires that the "*total* number of employees with *high-wage economic-based jobs*" be greater than "the number on the day prior to the date the *new high-wage economic-based job* was created." (Emphases Added). Accordingly, the baseline is determined by the "*total* number of employees with high-wage economic-based jobs." The word "total" means "having no exceptions or restrictions." *See* https://www.merriam-webster.com/thesaurus/total.

In contrast, Taxpayer's argument seems to assert that the statutory definition for "new high-wage economic-based job" should be applied to the general term, "high-wage economic-based job," therefore requiring that the baseline headcount be determined by the number of total *new* high-wage economic-based jobs, instead of all high-wage economic-based jobs. Had this been the Legislature's intention, then it would have utilized the adjective, "new," to describe the sorts of high-wage economic based jobs which it intended be utilized to establish a baseline headcount. However, it did not do so, instead referring to "total" exemplifying its intention that the Department not be restricted by the definition of "new high-wage economic-based jobs."

The Department's method of calculation, which established a baseline determined by the total number of high-wage economic-based jobs was reasonable and not contrary to the plain meaning of the statute. Construing the statute as suggested by Taxpayer would require that the Hearing Officer insert words into the statute that the Legislature did not include, as well as construe it in Taxpayer's favor contrary to *Team Specialty*, neither of which is permitted under the law.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the Department's denials of its Application for high wage jobs tax credit, and jurisdiction lies over the parties and the subject matter of this protest.

B. A scheduling hearing occurred on April 7, 2017 that satisfied the 90-day hearing requirement of NMSA 1978, Section 7-1B-8 (A).

C. The 2013 version of the High-Wage Job Tax Credit Act governs the issues at protest.

D. Taxpayer is an eligible employer under NMSA 1978, Section 7-9G-1 (M) (3) (a) because it made more than fifty percent of its sales of goods or services produced in New Mexico to persons outside New Mexico during the applicable qualifying periods.

E. Taxpayer did not establish that 133 claimed positions were new high-wage economic jobs because it failed to prove those jobs were newly created under NMSA 1978, Section 7-9G-1 (E).

F. Taxpayer did not establish that total number of employees with high-wage economic-based jobs on the last day of the qualifying period at the location at which the job was performed or based was at least one more than the number on the day prior to the date the new high-wage economic-based job was created for seven employees. *See* NMSA 1978, Section 7-9G-1 (E) (2013).

For the foregoing reasons, Taxpayer's protest **IS GRANTED IN PART** and **DENIED IN PART**.

Taxpayer's protest shall be GRANTED to the extent it is entitled to a high-wage economic-based jobs tax credit for the positions occupied by the following individuals during the applicable periods: A., J. for period 01/06/2013 – 01/05/14; B., A. for period 02/17/2013 – 02/16/2014; E., K. for period 01/02/2013 – 01/01/2014; G., R. for period 01/06/2010 – 01/05/2011; G., D. for period 10/17/2011 – 10/16/2012; H., R. for period 01/25/2013 – 01/24/2014; P., R. for period 05/16/2012 – 05/15/2013; T., M. for period 01/11/2013 – 01/10/2014; T., S. for period 03/08/2013 – 03/07/2014; V., J. for periods 01/15/2010 – 01/14/2011 and 01/15/2011 – 01/14/2012; V., L. for period 03/25/2013 – 03/24/2014.

Taxpayer's protest is otherwise DENIED.

DATED: January 8, 2019

Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

On January 8, 2019, a copy of the foregoing Decision and Order was submitted to the parties listed below in the following manner:

First Class Mail *Interagency Mail*

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