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8 BEFORE THE HEARING EXAMINER  
9 FOR THE CITY OF SEATTLE

10 In the Matter of the Appeal of

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12 MAGNOLIA COMMUNITY COUNCIL AND  
13 OTHERS; and FRIENDS OF THE LAST 6,000

14 From a decision issued by the Director, Seattle  
15 Department of Construction and Inspections  
16

Hearing Examiner File: MUP 21-016 (CU)  
and MUP 21-017 (ECA)

Department Reference: 3028072-LU

APPLICANT’S RESPONSE TO MCC  
MOTION FOR CONTINUANCE

17 The Hearing Examiner should deny the Motion for Continuance (“Motion”) filed by  
18 Appellant Magnolia Community Council (“MCC”), because MCC has not demonstrated  
19 “good cause” for rescheduling the five days of hearing that have been reserved since May for  
20 this appeal. MCC seeks to extend this appeal for more than 60 additional days to  
21 accommodate its discovery efforts, which it claims are necessary for its hearing preparation.  
22 But MCC does not indicate anywhere in the Motion that the 15 witnesses it already plans to  
23 call or the 29 exhibits it plans to introduce will be incapable of establishing a sufficient basis  
24 for its claims regarding the two single-family homes (the “Project”) at issue. Nor does the  
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28 APPLICANT’S RESPONSE TO MCC  
MOTION FOR CONTINUANCE - 1

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1 Motion identify any specific evidence that MCC expects to obtain through the subpoena  
2 process, much less explain how any such evidence could be considered material to the appeal.  
3 In addition, the Motion’s attempt to cast aspersions on Applicant Oceanstar, LLC  
4 (“Applicant”) is belied by written communications between the parties’ representatives that  
5 demonstrate the Applicant’s responsiveness and willingness to negotiate in good faith.  
6 MCC’s own delays, along with its refusal to narrow its absurdly overbroad document requests,  
7 has prevented resolution of discovery matters. The Examiner should not reward MCC’s delay  
8 tactics and should deny the Motion.  
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#### 10 **I. FACTUAL BACKGROUND**

11 The prehearing conference in this matter was held on May 18, 2021. On May 25, 2021,  
12 the Examiner issued a prehearing order establishing a June 24, 2021, briefing deadline for  
13 dispositive motions. Also on May 25, 2021, MCC representative Edward Coulson emailed  
14 representatives for the Applicant and for Appellant Friends of the Last 6,000 (“Friends”), stating  
15 that MCC “anticipates some basic document discovery, such as communications regarding the  
16 design, construction, and future use of the property, minutes or notes of meetings regarding the  
17 property, development agreements regarding the property, etc.” Declaration of Courtney Kaylor  
18 (“Kaylor Dec.”), Exhibit A at 2. The Applicant’s counsel, Courtney Kaylor, suggested that  
19 discovery await the Examiner’s ruling on the Motion to Dismiss, and Mr. Coulson agreed. *Id.* at  
20 1.  
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23 MCC filed its Ex Parte Motion for Subpoenas Duces Tecum (“Subpoena Motion”) on  
24 June 22, 2021. Although this was prior to the completion of briefing on the Motion to Dismiss,  
25 the Applicant conferred with MCC in good faith regarding its subpoenas. Immediately after  
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1 receiving the Subpoena Motion, Ms. Kaylor emailed Mr. Coulson regarding dates for potential  
2 depositions, indicating availability within the ranges Mr. Coulson had suggested. Kaylor Dec.,  
3 Exhibit B. Ms. Kaylor also initiated a phone call regarding discovery matters that took place on  
4 June 29, 2021, the day after the Examiner's ruling on the Motion to Dismiss. Kaylor Dec.,  
5 Exhibit C.  
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7 The Examiner issued the order on the Motion to Dismiss ("Dismissal Order") on June 28,  
8 2021. MCC characterizes the Dismissal Order as dismissing only one issue, its State  
9 Environmental Policy Act ("SEPA") issue. Motion, p. 2. This is inaccurate. It is true that the  
10 Dismissal Order dismissed all of MCC's SEPA claims. However, MCC fails to recognize that  
11 this includes its claim that the Project will be used for event use, a use that was not sought or  
12 approved. This issue was raised only in the context of MCC's SEPA claim. See MCC's Appeal  
13 of Analysis, Recommendation and Decision of the Director ("MCC Notice of Appeal"), pp. 3-4.  
14 The Examiner also ruled she lacks subject matter jurisdiction over MCC's claims of  
15 inconsistency with two covenants and a Memorandum of Agreement ("MOA"), determining that  
16 these agreements may be considered only for "context." In all, the majority of the claims stated  
17 in MCC's Notice of Appeal were dismissed.  
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20 Ms. Kaylor and Mr. Coulson discussed scheduling another phone conversation on July 1,  
21 2021. At page 3 of the Motion, MCC suggests that Ms. Kaylor arbitrarily "cancelled" this call.  
22 This is a misrepresentation. In reality, Ms. Kaylor sent Mr. Coulson an email on July 1, 2021,  
23 stating the reasons for the Applicant's objections to the language of the document requests in  
24 MCC's subpoenas, as well as continuing to discuss dates for depositions. Kaylor Dec., Exhibit  
25 D at 1-2. Because the email fully explained the Applicant's position, Ms. Kaylor also stated: "At  
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1 this point, I do not see a need to talk this afternoon. Let me know if there's anything we should  
2 discuss today." *Id.* Mr. Coulson responded by sending a revised motion that changed the dates  
3 for document production but not the language of the requests. *Id.* at 1. Just over an hour after  
4 sending the revised motion to the Applicant, Mr. Coulson filed it with the Examiner. Kaylor  
5 Dec., Exhibit E at 4. Accordingly, Ms. Kaylor requested and received the opportunity to file a  
6 response pursuant to Hearing Examiner Rule of Practice and Procedure ("HER") 2.16(b). *Id.* at  
7 3-4. Mr. Coulson objected to this request on the grounds that it would continue to compress the  
8 timeline for discovery, but he then requested and received the opportunity to file a reply,  
9 extending the briefing schedule by an additional five days. *Id.* at 1, 3.

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12 On July 7, 2021, while briefing on the Subpoena Motion was ongoing, Ms. Kaylor  
13 emailed Mr. Coulson to continue the discussion of document requests and indicate the  
14 Applicant's willingness to provide documents "that are related to the remaining issues in the case  
15 and not unduly burdensome for my client to produce." Kaylor Dec., Exhibit F. Ms. Kaylor  
16 requested "more specific information about what you are looking for and how it relates to the  
17 remaining live issues" in anticipation of this discussion. *Id.* Ms. Kaylor also discussed potential  
18 deposition dates for members of the Project's design team. *Id.* She specifically indicated that  
19 the Applicant's architects were "holding" three days during the date range Mr. Colson had  
20 requested for depositions. *Id.* Mr. Coulson responded the next day, stating in capital letters that  
21 he would prefer to "WAIT FOR THE HEARING EXAMINER TO GUIDE US" on the  
22 document requests rather than discussing their scope with Ms. Kaylor. Kaylor Dec., Exhibit G at  
23 1. Mr. Coulson also rejected Ms. Kaylor's suggestion to reserve deposition dates, stating: "I  
24 WANT TO HAVE RESPONSIVE DOCUMENTS PRIOR TO TAKING THESE  
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1 DEPOSITIONS, SO IT SEEMS A WASTE OF TIME AT THIS POINT TO HOLD DATES.”

2 *Id.* at 2. Ms. Kaylor addressed to Mr. Coulson’s points in an additional email on July 10, 2021,  
3 and Mr. Coulson responded the next day without offering any substantive response to the  
4 Applicant’s objections. Kaylor Dec., Exhibit H.  
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6 On July 16, MCC filed its Witness and Exhibit List, which includes 14 witnesses and 21  
7 exhibits.

8 On July 19, 2021, the Examiner issued an Order on Applicant’s Motion to Quash  
9 (“Subpoena Order”) that denied MCC’s subpoena requests as overbroad and unduly burdensome.  
10 In particular, the Examiner noted:

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12 Appeal issues relate to whether the Director erred in not imposing mitigation to address  
13 north side stair use and views. Single-family home disposition is not before the  
14 Examiner. Home design and use are relevant to the extent the approved design and use  
15 will impact stair usage or views. However, the question before the Examiner is not  
16 whether the Applicant could have or should have designed the project differently. The  
17 question is whether the Department erred in how it conditioned the project. Because it is  
18 the Department’s, rather than the Applicant’s decisions which are at issue, this narrows  
19 the issue. Deciding whether there was error requires understanding what was approved  
20 and whether the approved design creates impacts which, under the code, the Department  
21 erred in not mitigating. The discovery requested goes beyond the issues presented.

22 Home design is disclosed on the approved plan set. There is no allegation that there is  
23 any ambiguity in what was approved. However, a narrower request for documents  
24 addressing project impacts on views and stair use would be relevant.

25 As currently worded, the discovery questions encompass electronic and written  
26 correspondence from Global Seas’ eight employees dating back to before the 2017  
27 project pre-submittal conference. Global Seas holds weekly meetings at which  
28 handwritten minutes are taken. Minutes from 2017-2021 include 192 sets of handwritten  
minutes. The Applicant estimates that as now worded, hundreds or thousands of  
documents would likely result, and the request could not be completed in the two weeks  
the subpoena requests. This type of production would be unduly burdensome for the  
Applicant. A narrowed request tailored to the issues would presumably avoid undue  
burden.

Subpoena Order at 2.

1 On the evening of July 20, 2021, Mr. Coulson emailed revised subpoenas to Ms. Kaylor.  
2 Kaylor Dec., Exhibit I. Despite the Examiner's clear ruling that "single family home disposition  
3 is not before the Examiner," the subpoenas continued to request information relating to  
4 disposition of the Project. See Subpoena Order at 2. In addition, despite the Examiner's  
5 determination that seeking documents back to 2013 – six years before the Project application was  
6 submitted – would be unduly burdensome (Subpoena Order at 3), the subpoenas continued to  
7 request documents during that time frame. Specifically, the subpoenas included the following  
8 documents requests:  
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- 10 1. All Documents, including without limitation, communications or agreements among  
11 representatives of Oceanstar, LLC, Global Seas, LLC, Nina Fisheries, Inc., Robert  
12 Desautel, Walter Kuhr, Jr., Lil Kuhr and Kathy Shepard, regarding the use or potential  
13 disposition of the Buildings that relate to the Project's potential impact on the use of the  
14 north exterior stairs or the UJV view from 2013 to the present.
- 15 2. All Documents concerning communications or agreements among representatives of  
16 Oceanstar, LLC, Global Seas, LLC, Nina Fisheries, Inc. Robert Desautel, Walter Kuhr,  
17 Jr., Lil Kuhr and Kathy Shepard regarding the use of the Admiral's House that relate to  
18 the Project's potential impact on the use of the north exterior stairs or the UJV view from  
19 2013 to the present.
- 20 3. Minutes of all meetings that discuss or refer to the use or potential disposition of the  
21 Buildings that relate to the Project's potential impact on the use of the north exterior stairs  
22 or the UJV view from 2017 to the present.
- 23 4. All Documents that refer to or discuss the Project's relationship to the View Corridor and  
24 Landscape Maintenance Covenant, dated December 13, 2012, last recorded under King  
25 County Recorder No. 20130613001828.
- 26 5. All Documents that refer to or discuss the Project's relationship to the Historic  
27 Preservation Easement and Covenants, dated June 7, 2013, and recorded under King  
28 County Recorder No. 20130611002100.
6. All Documents that refer to or discuss the Project's relationship to a 2011 Memorandum  
of Agreement or any other agreement among the Federal Highway Administration, State  
Historic Preservation Office, Washington Department of Transportation, City of Seattle,  
and Pacific Northwest Communities, LLC.

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2 7. All Documents, including any written communications with the Landmarks Preservation  
3 Board ("Board") or others, that discuss or refer to the Project's possible impact on the  
4 Admiral's House status as a designated landmark or the impact of Oceanstar's  
5 construction practices, construction means, or construction means and methods to  
6 construct the Buildings on the Admiral's House and its designated landmark area on the  
7 Property.

8 *Id.*

9 On July 22, 2021, Ms. Kaylor emailed Mr. Coulson regarding the Applicant's objection  
10 to uncompensated depositions of expert witnesses, and Mr. Coulson again responded in capital  
11 letters. Kaylor Dec., Exhibit J. On July 27, 2021, Ms. Kaylor sent Mr. Coulson an email stating  
12 that the Applicant would agree to the scope of the subpoenas with certain changes, including  
13 limiting the time to the period after the Project application was submitted; clarifying that the  
14 subpoenas are directed to the managers and officers of the corporate entities in their official  
15 rather than personal capacities; and removing the issue of single-family home disposition per the  
16 Subpoena Order. Kaylor Dec., Exhibit K.

17 On July 29, 2021, MCC filed its Rebuttal Witness and Exhibit List, adding one additional  
18 witness and eight additional exhibits to those it had previously identified. Also on July 29, 2021,  
19 Mr. Coulson filed the Motion. On August 2, 2021, while preparing to file this Response, Ms.  
20 Kaylor suggested a further compromise to Mr. Coulson, offering to extend the timeframe for  
21 document production an additional two years back to the date that the pre-submittal conference  
22 for the Project was requested in 2017. Kaylor Dec., Exhibit L at 2. Ultimately the parties agreed  
23 to delete the reference to "disposition" of the Project and limit the time frame of the requests to  
24 dates after April 3, 2017. Kaylor Dec., Exhibit M. While the Applicant believes this time frame  
25 remains very broad – it encompasses documents a full four years before Project approval – it  
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1 agreed to this scope to facilitate compromise. The Applicant stated in its communications with  
2 Mr. Coulson that its agreement was for the purpose of compromise and that it did not waive “its  
3 position that none of the discovery is needed, or that discovery with an appropriate scope could  
4 have been requested at an earlier time.” *Id.* at p. 2.

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6 The Applicant agreed to produce documents on or before August 16, so that MCC can  
7 have them for the hearing. The Applicant will provide the documents on a “rolling” basis as it  
8 locates them in its records and anticipates most of the documents will be produced before August  
9 16. While MCC will likely complain about this time frame, it is entirely of MCC’s making. Its  
10 representative Mr. Coulson could easily have made a more appropriate request for documents  
11 related to the Project far earlier in this process. As the Applicant’s agreement to the current  
12 scope demonstrates, the Applicant would have readily agreed. MCC has been aware of the  
13 hearing schedule since it was originally set in May and has been aware of the limited scope of  
14 the issues in this case since the Examiner’s Dismissal Order issued on June 28. MCC’s steadfast  
15 refusal to agree to a reasonable scope of discovery until this late date does not provide good  
16 cause to continue the hearing.  
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## 19 II. ARGUMENT

20 “A scheduled hearing may be continued on the Examiner’s initiative, or on the motion of  
21 a party for good cause shown.” HER 2.20(a). “A party does not have an absolute right to a  
22 continuance . . . .” *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687,  
23 691 (1986) MCC has not shown good cause for continuing the hearing in this matter, and the  
24 Motion should be denied.  
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1 First, MCC has not shown that there is any need for the material it seeks. As the  
2 Examiner noted at page 4 of the Subpoena Order, the Project does not present “a particularly  
3 unwieldy matter based on party number or complexity.” The issues in MCC’s appeal – whether  
4 the permitted design and use of the Project will impact a City park and a designated landmark –  
5 are straightforward. MCC has at all times had access to the public portal containing site plans,  
6 plan sheets, technical reports, reviewer comments, and other documents on which the City based  
7 its approval of the Project. Kaylor Dec., Exhibit M. Based on these documents, as well as the  
8 exhibits introduced by the Applicant and other publicly accessible information, MCC has  
9 submitted witness and exhibit lists indicating its intention to call as many as 15 witnesses  
10 (including each of the individuals it has sought to depose) and introduce 29 exhibits in support of  
11 its claims. Nothing in the Motion asserts that this evidence will be insufficient to prove MCC’s  
12 case or suggests a reason why MCC would need to introduce even more material during the  
13 hearing.  
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16 Nor does MCC substantiate its claim that continuing the hearing is justified by reference  
17 to Superior Court Civil Rule 40(e), which provides that a continuance “on the ground of absence  
18 of evidence shall only be made upon affidavit showing the materiality of the evidence expected  
19 to be obtained.” Motion at 4. MCC has not made this showing because it has never identified  
20 any “evidence expected to be obtained” through this process. Nor can it do so for the first time  
21 on reply. *Lewis v Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991). It has not cited a  
22 single specific document that it believes exists in the Applicant’s files, nor has it pointed to a  
23 single fact or legal question that the ostensibly absent evidence could be expected to clarify.  
24 Much less has MCC explained how any such evidence would meet the standard of “materiality”  
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1 to the appeal. Indeed, the only time MCC has stated what it seeks through discovery was in its  
2 reply on its first motion for subpoenas. MCC Reply in Support of Ex Parte Motion for Issuance  
3 of Subpoenas Duces Tecum (Reply), pp. 5-8, 10. But the information it sought relates to matters  
4 that have been dismissed or are irrelevant. Specifically, MCC mentioned the issue of whether  
5 Landmark Board approval is necessary for the Project (dismissed) (Reply, p. 5), preliminary  
6 discussions not carried through to the final design (irrelevant) (Reply, p. 7), the alleged non-  
7 residential use of the Project (dismissed and irrelevant) (Reply, pp. 7-10) and the disposition of  
8 the Project (dismissed and irrelevant) (Reply, p. 8). MCC has provided no valid justification  
9 whatsoever for the discovery it seeks. Rather than providing such explanations, MCC simply  
10 asserts that it has sought discovery that “relates to important issues in this appeal” and is  
11 “relevant to the Director’s exercise of discretion.” Motion at 5-6. But a request for “relevant”  
12 evidence is not the same as an expectation of obtaining “material” evidence. *See, e.g., Fed.*  
13 *Home Loan Bank of Seattle v. Credit Suisse Sec. (USA), LLC*, 194 Wn.2d 253, 272, 449 P.3d  
14 1019, 1028 (2019) (“A material fact is one to which a reasonable [person] would attach  
15 importance in determining [their] choice of action in the transaction in question.”) (internal  
16 quotations and citation omitted); *State v. Boyd*, 29 Wn. App. 584, 588, 629 P.2d 930, 932-33  
17 (1981) (“[I]mplicit in the requirement of materiality is a “concern that the suppressed evidence  
18 might have affected the outcome of the trial.”). MCC cites no authority indicating that the  
19 possibility of receiving unspecified “relevant” evidence constitutes good cause for continuing a  
20 hearing, because none exists. Neither HER 2.20 nor CR 40(e) suggests that good cause for delay  
21 exists any time a litigant fails to receive discovery responses to its satisfaction.  
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Moreover, MCC's statement that "the Examiner has already ruled on the materiality of the evidence" sought by its subpoena requests is entirely false. *See* Motion at 5. In the Subpoena Order, the Examiner indicated that some of MCC's discovery requests, if narrowly tailored, "would be relevant" or "would presumably avoid undue burden." Subpoena Order at 2. This in no way indicates that the evidence requested is "material," and the Examiner has not stated anything of the kind. To the contrary, a continuance would be especially inappropriate because, as the Examiner has clarified, the question at issue "is not whether the Applicant could have or should have designed the project differently" but, instead, "whether the *approved design* creates impacts which, under the code, *the Department* erred in not mitigating." Subpoena Order at 2 (emphasis added). "Home design" – *i.e.* the subject of the appeal – "is disclosed on the approved plan set," and there is "no allegation that there is any ambiguity in what was approved." *Id.* MCC's document requests, which primarily seek information regarding the Applicant's internal discussions of the Project, are not focused on the Project's design and are therefore particularly unlikely to obtain material evidence.

Second, MCC's insistence that it has not received "adequate time to investigate and prepare for the hearing" is unconvincing. *See* Motion at 5. The hearing date has been set for well over two months. During the prehearing conference in mid-May, MCC did not request a discovery schedule, object to the briefing schedule for the Motion to Dismiss, or provide any indication that it planned to issue subpoenas going back years before Applicant submitted the permit application and covering thousands of potential documents. MCC now complains that the briefing schedule "[took] time away from MCC to conduct its discovery," Motion at 6, but the Motion to Dismiss did not prevent MCC from moving forward with discovery. Indeed, MCC

1 filed its first subpoena requests on June 22, 2021, before briefing was complete. MCC could  
2 have filed these earlier, but it chose not to.

3 In addition, after the Applicant objected to its overly burdensome requests, Mr. Coulson  
4 repeatedly rebuffed offers for further conversation, needlessly prolonging the process. *See*  
5 Kaylor Dec., Ex. G, H, J. In particular, Mr. Coulson turned down the offer to depose Applicant  
6 witnesses, stating that he preferred to do so after receiving responses to document requests.  
7 Kaylor Dec., Ex. G. In sum, MCC spent its time pursuing subpoenas that, as the Examiner has  
8 ruled, were impermissibly broad and well beyond the issues in the appeal. Subpoena Order at 1-  
9 2. MCC could have used this time to depose witnesses, craft narrower questions, or provide the  
10 clarification the Applicant repeatedly requested, but it chose not to do so. MCC's dissatisfaction  
11 with the results of its own choices does not justify delaying the hearing for everyone else. *See*  
12 *Odom v. Williams*, 74 Wn.2d 714, 717, 446 P.2d 335, 337 (1968) (continuance not merited when  
13 all parties were aware of trial requirements and when scheduling issues were primarily  
14 attributable to actions of party seeking continuance).

15 Highlighting the lack of substance behind its request, MCC primarily attempts to justify a  
16 continuance through disparaging references to the Applicant and its representatives. This is  
17 unavailing: the Applicant's good-faith approach to discovery and settlement is reflected  
18 throughout the email communications discussed above, which demonstrate Ms. Kaylor's  
19 continued attempts to initiate a substantive discussion regarding the parties' disagreements.  
20 Kaylor Dec., Ex. B, C, D, F, H, J, K, L. This approach is also reflected in the Applicant's  
21 successful discussions with Friends, the other appellant in this matter, regarding an agreement to  
22 allow Friends' arborist to access the Property. *See* Kaylor Dec. at 1-2. In addition, it is reflected  
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1 in the Applicant's recent agreement to produce documents in advance of the hearing in this  
2 matter in order to reach compromise of a discovery dispute, notwithstanding its repeated  
3 statements that it believes these documents are not necessary to MCC's case. Kaylor Dec., Ex.  
4 M. In particular, the Examiner should disregard the second full paragraph on page 6 of the  
5 Motion (beginning "The tremendous discrepancies . . ."), which cites no authority or evidence  
6 and consists entirely of the conclusory allegations of MCC's representative.  
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### 8 **III. CONCLUSION**

9 The Applicant respectfully requests that the Hearing Examiner deny MCC's request for a  
10 continuance and proceed with the hearing in this matter as scheduled.  
11

12 DATED this 4th day of August 2021.

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