

# NEW MEXICO RENEWABLE ENERGY TRANSMISSION AUTHORITY

## HEARING PROCEDURE

### 1.1 SCOPE:

This hearing procedure governs all adjudicatory proceedings of the New Mexico Renewable Transmission Authority (“RETA”), including any challenge brought before RETA under NMSA 1978, § 62-16A-4(C)(2), regarding whether a proposed project is an eligible facility.

### 1.2 EFFECTIVE DATE: November 29, 2023

### 1.3 DEFINITIONS:

These definitions apply unless there is a conflict between the definitions in the act, in which case the definition in the act shall govern.

- A. **“Act”** means the RETA act, Chapter 62, Article 16A NMSA 1978, and its subsequent amendments and successor provisions.
- B. **“Board”** means the RETA board or its successor agency under the act.
- C. **“Challenge”** means a written objection to RETA’s determination that a proposed project is an eligible facility submitted to RETA in accordance with NMSA 1978, 62-16A-4(C)(2).
- D. **“Challenger”** means any person with an interest that may be affected by a proposed project who has submitted a timely challenge.
- E. **“Days”** means consecutive days except as otherwise specifically provided.
- F. **“Document”** means any challenge, pleading, motion, response, memorandum, decision, order or other written material or tangible item that is submitted or brought to or before the board or hearing officer for consideration in a proceeding pursuant to this hearing procedure.
- G. **“Ex parte contact”** means oral or other communication with a board member or a hearing officer regarding the merits of an expected or pending challenge or related proceeding if:
  - 1. the communication is made by a person who is not a board member, RETA employee, a member of a board member’s advisory staff, RETA’s general counsel, or the hearing officer;
  - 2. the person communicating knows or has reason to know a challenge will be or has been submitted pursuant to NMSA 1978, § 62-16A-4(C)(2);

3. the communication is made without all other parties being present or receiving the same communication received by the board member or board hearing officer; and
  4. the communication is intended to affect, or reasonably may be expected to affect the board member's or the hearing officer's opinion regarding the merits of the expected or pending challenge or related proceeding.
- H. "Hearing officer"** means the person who is appointed or otherwise authorized by the board chair to conduct a proceeding pursuant to this hearing procedure.
- I. "Party"** means the challenger, the respondent, and any other person granted intervenor status by the hearing officer or board following a motion.
- J. "Person"** means a natural individual, partnership, corporation, association, other legal or fiduciary entity or a governmental entity.
- K. "Record proper" or "record"** means all documents submitted by or to the board or the hearing officer during the proceeding authorized by this hearing procedure, and includes:
1. all documents submitted for consideration by a party to the board or the hearing officer during the proceeding authorized by this hearing procedure;
  2. the verbatim record of the hearing (court reporter transcription) and all exhibits offered into evidence at the hearing, whether or not admitted;
  3. the recommended decision submitted to the board by the hearing officer; and
  4. minutes or a summary of minutes, or the decision or order resulting from a hearing or board meeting at which the board deliberated or acted on any procedural or substantive issue in a proceeding authorized by this hearing procedure.
- L. "Regulations"** means the rules promulgated by the board, as authorized by the act.
- M. "Respondent"** means the proponent of the proposed project that is the subject of the challenge.
- N. "RETA"** means the New Mexico Renewable Energy Transmission Authority.
- O. "RETA's general counsel"** means the attorney(s) authorized to give RETA legal advice under its current general legal services contract.
- P. "RETA staff"** means the employees of RETA.
- Q. "Service"** means delivering to a person that this hearing procedure requires to be served a copy of a document, exhibit or pleading by personally delivering it to that person, mailing it to that person, or, by sending it by facsimile or electronic transmission to that person. If a person is represented by an attorney, service shall be made on the attorney. Service by mail is complete

upon mailing the document unless service is made by mail to a party who must act within a prescribed period after being served, in which case three (3) days shall be added to prescribed period. Service by facsimile or electronic transmission is accomplished when the transmission of the document is completed.

#### **1.4 SEVERABILITY:**

This hearing procedure shall be liberally construed to carry out its purposes. If for any reason any section, subsection, sentence, phrase, clause or wording of this hearing procedure is held to be unconstitutional or otherwise invalid by any court the decision shall not affect the validity of remaining portions of this hearing procedure.

#### **1.5 GENERAL PROVISIONS:**

**A. Applicability of rules of civil procedure and rules of evidence:** In the absence of a specific provision in this hearing procedure governing an action, the board and the hearing officer may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance, except all rules of privilege and the attorney work-product doctrine shall apply to any proceeding brought under this hearing procedure. No provision of the rules of civil procedure shall be construed to extend or otherwise modify the authority and jurisdiction of the board.

#### **B. Board and hearing officer powers and duties-qualification, disqualification, recusal, withdrawal:**

1. **Board:** The board shall exercise all powers and duties authorized and required by the act, this hearing procedure, and any other board regulation if the powers and duties are not otherwise delegated by this hearing procedure to the board chair, a RETA staff member, or a hearing officer. The board may specify procedures in addition to, or that vary from the procedures provided in this hearing procedure in order to expedite the efficient resolution of the action or to avoid obvious injustice, if the procedures do not conflict with the act or the regulations, or prejudice the rights of any party.
2. **Hearing officer:** The board chair may appoint a hearing officer to perform the functions described in Section 1.5.B.2.b of this hearing procedure. From the date a proceeding is initiated pursuant to this hearing procedure, the board chair shall serve as hearing officer until another hearing officer is appointed. The appointment of a hearing officer shall not prevent any board member from attending or participating in any proceeding.
  - a. **Qualifications:** A hearing officer may be an independent contractor, board counsel or a member of the board, and shall not be:
    - i. an employee of RETA, unless employed by RETA as a hearing officer; or
    - ii. a person who is disqualified as a result of a condition described in Section 1.5.B.3 of this hearing procedure.

- b. **Functions:** The hearing officer shall exercise all powers and duties required by or delegated under this hearing procedure. The hearing officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay. The hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this hearing procedure, including, but not limited to:
  - i. conducting hearings pursuant to this hearing procedure;
  - ii. ruling upon motions and procedural requests that do not seek final resolution of the proceeding, and issuing all necessary orders;
  - iii. issuing subpoenas, as authorized by law, for the attendance and testimony of witnesses and the production of documentary evidence;
  - iv. administering oaths and affirmations, examining witnesses, and admitting or excluding evidence;
  - v. requiring parties to attend conferences for the settlement or simplification of issues, or the expedition of proceedings;
  - vi. imposing sanctions, subject to review and approval by the board, on parties who cause undue delay and fail to cooperate with the board; and
  - vii. submitting to the board all original documents received or generated by the hearing officer.
- c. **Notice of hearing officer assignment:** If a hearing officer other than a board member is assigned, RETA staff shall notify the parties of the name and address of the hearing officer. At the same time, RETA staff also shall forward to the hearing officer copies of all documents related to the challenge that have been submitted to date.

3. **Board member and hearing officer disqualification-recusal-withdrawal:**

- a. A board member or a hearing officer shall not perform any function authorized by this hearing procedure regarding any matter in which a board member or a hearing officer:
  - i. has a personal bias or prejudice concerning a party or the outcome of a proceeding;
  - ii. is related to a party within the third degree of relationship;
  - iii. is an officer, director or trustee of a party in the proceeding; or
  - iv. has a financial interest in the proceeding or facility that is the subject of the proceeding or has any other conflict of interest.

b. In making its decision regarding whether a board member or hearing officer should be disqualified or recuse himself or herself, the board and hearing officer may rely on applicable legal authority.

**c. Disqualification, recusal and withdrawal:**

- i. Any party, for a cause included in Section 1.5.B.3.a of this hearing procedure, may submit a motion requesting the disqualification of a board member at any time before the final order is entered, or requesting the disqualification of a hearing officer at any time prior to the completion of the evidentiary hearing.
- ii. If a motion is filed pursuant to Section 1.5.B.3 of this hearing procedure, and the motion asks that a board member be disqualified, then, within five (5) days after the hearing officer and the challenged board member receive the motion, the challenged board member may respond to the motion in writing. Within five (5) days after the hearing officer and the challenged board member receive the motion regarding the challenged board member, the hearing officer shall file a recommended decision. The board shall vote on the motion. However, the vote of the board shall not include the vote of the challenged board member. If the vote of the majority of a quorum of the board, not including the vote of the challenged board member, determines that the challenged board member is disqualified, the disqualified board member will not participate in the proceeding thereafter.
- iii. If a motion is filed pursuant to Section 1.5.B.3 of this hearing procedure, and the motion asks that a hearing officer be disqualified, then, within five (5) days after the hearing officer receives the motion, the hearing officer may respond to the motion in writing. The board shall vote on the motion. If the vote of the majority vote of a quorum of the board members determines that the challenged hearing officer is disqualified, the disqualified hearing officer will not participate in the proceeding thereafter, and the board chair may appoint a replacement hearing officer.
- iv. A board member may recuse himself or herself from a hearing, and a hearing officer may withdraw as hearing officer, by submitting written notice to the board or by making a statement on the record at a hearing or meeting of the board. In making a decision regarding whether to recuse or withdraw, a board member or a hearing officer may rely on applicable legal authority.

**C. Recording of hearings:** All hearings on the merits shall be recorded by a court reporter. The recording of the court reporter, will be the sole official recording of the hearing. Any person other than the board who requests a transcription of the hearing shall pay the court reporter. Payment for the transcription shall include payment for delivery of the original transcription to RETA staff. RETA staff shall make the transcription part of the record proper, which is a public record except as otherwise provided by law.

**D. Participation by conference, telephone or other similar device:** A member of the board may participate in the hearing or a meeting of the board by means of a conference telephone or other similar communications equipment when circumstances exist that makes it difficult for the board member to attend the hearing or meeting in person, provided that each member participating by conference telephone or other device can be identified when speaking, all participants are able to hear each other at the same time, and members of the public attending the meeting are able to hear any member of the board who speaks at the meeting. A request to be present and vote by telephone or other similar device must be made by the member to the board chair by the member. A board member who wishes to participate in a meeting in this manner must receive permission from the board chair sufficiently in advance of the meeting so RETA can arrange for an adequate telephone hookup. A board member's participation by such means shall constitute presence in person at the meeting.

**E. Ex parte contact:** At no time before a challenge is expected to be submitted and at no time between the submission of a challenge and the final decision of the board or withdrawal of the challenge shall any person other than the hearing officer, RETA staff, or RETA's general counsel have ex parte contact with a board member or the hearing officer regarding the merits of the expected or pending challenge or related proceeding.

**F. Computation and extension of time:**

1. **Computation of time:** In computing any period of time prescribed or allowed by this hearing procedure, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal State of New Mexico holiday, in which event, the time shall be extended until the end of the next day that is not a Saturday, Sunday, or legal State of New Mexico holiday. Whenever a party must act within a prescribed period after service upon that party, and service is by mail, three (3) days shall be added to the prescribed period. The three-day extension does not apply to a deadline established by the act. Whenever a party must act within a prescribed period after service upon that party, and service is by facsimile or electronic transmission, no days shall be added to the prescribed period.
2. **Extension of time:** Upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, the hearing officer or the board, as appropriate for the stage of the proceeding at the time, may grant an extension of time for filing any document. No extension shall be granted regarding a deadline established by the act or an applicable regulation.

**G. Documents; submission, service, form and examination:**

1. **Submission of documents:** All documents shall be submitted at least five (5) days before the hearing at which the hearing officer or the board will consider the matter. A certificate of service with the following heading or "caption," completed appropriately, shall accompany each submitted document.

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IN THE MATTER OF A CHALLENGE TO [Name of Project]

[Name of Challenger], Challenger.

2. **Service of documents:** Except as otherwise provided, all documents may be served personally, by express or first class mail, by facsimile, or by electronic mail.
3. **Form of documents:** Unless otherwise provided by order of the hearing officer or the board, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, and, where appropriate, the first page of every document shall contain the caption or heading required by Section 1.5.G.1 of this hearing procedure.
4. **Documents issued by board or hearing officer:** All documents issued by the board or hearing officer shall be submitted to RETA staff. RETA staff shall promptly serve copies of the documents upon all parties.
5. **Examination of documents filed; cost:** Subject to the provisions of law restricting the public disclosure of confidential or other exempt or protected information, any person may inspect and copy any document filed in any proceeding filed pursuant this hearing procedure. Inspection shall be allowed consistent with the requirements of the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12, and may be limited as provided by NMSA 1978, Section 62-16A-16. RETA staff shall make the appropriate documents available for inspection and copying. The cost of duplicating documents or tapes filed in any proceeding shall be borne by the person seeking the copies. If the requested documents are available in an electronic format, RETA staff will provide a copy by electronic transmission without charge, or the documents will be copied onto a CD, DVD, or other electronic media, if provided by the requester, without charge.

**H. Motions:**

1. **General:** All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, and state the relief sought. Each written motion shall be accompanied by an affidavit, certificate or other evidence relied upon, and shall be submitted and served as required by Sections 1.5.G.1 and 2 of this hearing procedure.
2. **Unopposed motions:** An unopposed motion shall state that the concurrence or agreement of all other parties was obtained. The party that filed the motion shall submit to the hearing officer for review a proposed order that has been approved by all parties.
3. **Opposed motions:** Any opposed motion shall state either that concurrence or agreement of all other parties was sought and denied, or why concurrence was not sought. A memorandum brief in support of an opposed motion may be submitted with the motion.

4. **Response to motions:** Any party upon whom an opposed motion is served shall have five (5) days after service of the motion to file a response. Any other party who fails to file a timely response shall be deemed to have waived any objection to the granting of the motion.
5. **Reply to response:** The moving party may submit, but is not required to submit a reply to any response within five (5) days after service of the response.
6. **Decision regarding motions:** All motions may be decided by the hearing officer, in the hearing officer's sole discretion, with or without a hearing. However, the hearing officer shall refer all motions that would effectively dispose of the challenge to the board for a decision. The hearing officer may refer any motion to the board for decision. A motion may be ruled upon before the expiration of the time for response. Any response regarding the motion received after the decision is made shall be treated as a request for reconsideration of the ruling.

## 1.6 PREHEARING PROCEDURES:

- A. **Initiation of hearing:** A hearing on the merits shall be initiated by the submission of a challenge.
- B. **Challenge requirements:** A challenge must be in writing and be received by RETA no later than thirty (30) days from the date of the last publication of the initial project notice provided by RETA pursuant to NMSA 1978, § 62-16A-4(C)(1). The challenge must state the challenger's name, address, telephone number, email address and other contact information and state the interest affected by the proposed project and the basis of the challenge.
- C. **Service on respondent:** RETA staff shall serve a copy of the challenge on the respondent no fewer than thirty (30) days prior to the hearing on the merits.
- D. **Response:** Within fifteen (15) days after receipt of the challenge, the respondent shall submit a response to the challenge.
- E. **Scheduling the hearing on the merits:**
  1. **Hearing date:** The hearing officer shall schedule the hearing on the merits to begin no sooner than thirty (30) days after receiving the challenge.
  2. **Scheduling order:** The hearing officer shall issue a scheduling order setting the date, time and location of the hearing. The scheduling order may include other procedural matters. The hearing officer may consult with the board chair regarding procedural matters. The hearing officer may, but is not required to, conduct an in-person or telephonic pre-hearing conference with the parties to set the hearing date or to discuss other procedural matters.
- F. **Public notice of hearing:**



1. **Publication:** Upon direction from the board chair or hearing officer, RETA staff or RETA's general counsel shall prepare a notice of hearing setting forth the date, time and location of the hearing, a brief description of the challenge and information on the requirements for submitting a public comment; and
  - a. no later than two weeks before the hearing date RETA staff or RETA's general counsel shall give notice of the hearing in the same newspapers and web page in which the initial notice pursuant to NMSA 1978, § 62-16A-4)(c)(1) was given; and
  - b. no later than thirty (30) days before the hearing date, serve a copy of the notice of hearing to each party.
2. **Certification:** After the notice of hearing has been distributed as required by Section 1.5.F of this hearing procedure, the RETA staff or RETA's general counsel shall submit into the record proper an affidavit certifying how and when notice was given and shall attach to the affidavit a copy of the notice of hearing and affidavits of publication.

**G. Statement of intent to present evidence:**

1. **Requirement to submit:** No later than seven (7) days before the hearing, any party who wishes to present evidence at the hearing shall submit to the hearing officer and serve on all parties a statement of intent to present evidence.
2. **The statement of intent to present evidence shall include:**
  - a. the name of the party filing the statement;
  - b. the name of each witness;
  - c. an estimate of the length of the direct testimony of each witness;
  - d. a summary or outline of the anticipated direct testimony of each witness;
  - e. a list of exhibits, if any, to be offered into evidence at the hearing on the merits; and
  - f. a copy of each exhibit to be offered into evidence at the hearing on the merits.

**H. Participation by the general public:** Any person may present a comment by submitting a written comment to RETA staff at least three (3) days in advance of the hearing. Comments will be part of the record proper, but will not be considered as evidence.

**I. Pre-hearing discovery:** Discovery shall be guided by the provisions of the New Mexico rules of civil procedure in effect at the time of the hearing. Formal discovery is not a right, and, therefore, is discouraged and shall only be allowed by order of the hearing officer if the following conditions exist.

1. **Grounds for discovery:** Formal discovery shall only be authorized if the hearing officer determines:
  - a. the type of discovery sought will not unreasonably delay the proceeding and is not unreasonably burdensome or unreasonably expensive; and
  - b. the information to be obtained is relevant and is not otherwise reasonably obtainable, or may be lost, or may become unavailable.
2. **Order for discovery:** Upon motion for discovery by a party and determination by the hearing officer that the motion should be granted, the hearing officer shall issue an order for the taking of discovery. The order shall include all terms and conditions imposed by the hearing officer.

## 1.7 HEARING PROCEDURES:

### A. Hearing on the merits:

1. **Location of the hearing on the merits:** Unless otherwise ordered by the board or hearing officer, the hearing on the merits normally shall be held in the New Mexico State Capitol, 411 S. Capitol St, Santa Fe, NM 87501, in Santa Fe, New Mexico, or in another adequate city of Santa Fe, county of Santa Fe, or other publicly-owned location.
2. **Postponement of hearing:** No request for postponement of a hearing shall be granted unless the hearing officer or the board determines either that all parties consent or that good cause has been proved.

### B. Conduct of hearing on the merits:

1. The hearing officer shall conduct the hearing on the merits in a manner that provides a reasonable opportunity for all parties to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition.
2. The hearing officer shall establish the order of testimony, except that the challenger shall present its case first. The hearing officer may allow brief opening and closing statements.

- C. Burden of persuasion:** In a hearing on the merits, the challenger has the burden of proof, the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence the facts relied upon by the challenger. Following the establishment of a prima facie case by the challenger, the respondent has the burden of going forward with any adverse evidence showing why the relief should not be granted.

#### **D. Evidence:**

1. **General:** The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is unduly repetitious, otherwise unreliable or of little probative value.
2. **Examination of witnesses:** Witnesses shall be examined orally, under oath or affirmation, and may be examined by the hearing officer and members of the board. At the hearing on the merits, the board members, hearing officer, and the parties shall have the right to cross-examine a witness. The hearing officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the direct testimony of the witness.
3. **Exhibits:** All exhibits offered in evidence shall be marked with a designation identifying the person offering the exhibit, and shall be individually numbered serially. Large charts and diagrams, models and other bulky exhibits are discouraged. Any party offering an exhibit shall provide at least an original and sufficient copies for the hearing officer, the board, the other parties and persons attending the hearing.
4. **Official notice:** The hearing officer may take official notice of any matter that may be judicially noticed in the New Mexico courts. In the hearing, parties shall be given adequate opportunity to show that such facts have been erroneously noticed.

#### **E. Objections and offers of proof:**

1. **Objection:** Any objection concerning the conduct of the hearing on the merits may be stated during the hearing, either orally or in writing. The party raising the objection must make a short statement of the grounds for the objection. The ruling by the hearing officer on any objection and the reasons given for the ruling shall be part of the record.
2. **Offer of proof:** Whenever the hearing officer excludes evidence from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded and what such evidence would have proven. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

### **1.8 POST-HEARING PROCEDURES:**

- A. Filing the transcript:** The hearing shall be transcribed verbatim by a court reporter. Any person, other than the board, who wants a copy of a transcript from the court reporter, shall pay the court reporter for the transcript copy.
- B. Proposed findings of fact and conclusions of law:** The hearing officer may allow the record to remain open for a reasonable period of time after the conclusion of the hearing on the merits in order to allow any party to submit proposed findings of fact and conclusions of law and a closing argument. At the conclusion of the evidentiary hearing held by the hearing officer, the

hearing officer shall state whether the parties may submit findings, conclusions and closing arguments and the deadlines for submission. All such submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon. After the conclusion of the evidentiary hearing before the hearing officer, no new evidence shall be presented unless specifically allowed by the hearing officer for good cause.

**C. Recommended decision:** If the board chair directs, the hearing officer shall issue a recommended decision within a period established by the board chair. The recommended decision shall contain the hearing officer's findings of fact, conclusions regarding all material issues of law or discretion, reasons for the recommended decision, and a proposed final order. Upon receipt of the hearing officer's recommended decision, RETA staff shall forward a copy to all parties and to the board. At the board's or the hearing officer's discretion, or any party may file comments regarding the hearing officer's recommended decision.

**D. Deliberation and decision:**

1. **Deliberation:** At a board meeting following the hearing, the board shall reach a final decision on each adjudicatory matter. The board may deliberate in closed session. However, any final action must occur in an open meeting.
2. **Final order of the board:** After the board has reached a decision regarding the challenge, the board shall direct a board member, the hearing officer, the RETA's general counsel or a party to prepare a final order. The final order shall contain findings of fact, conclusions of law, an order based on the findings and conclusions, and a statement regarding the availability of appeal, as authorized by NMSA 1978, § 39-3-1.1. If a recommended decision was prepared, the board may adopt, modify or set aside the recommended decision and state the board's reasons for adopting, modifying or setting aside the recommended decision. RETA staff shall promptly send copies of the final order to each party and to all other persons who have made written requests for notification of the action taken.

**E. Judicial review:** Judicial review of the final order shall be as provided by law. The filing of an appeal pursuant to NMSA 1978, § 39-3-1.1 does not stay the final order, unless otherwise ordered by the board or a court, as appropriate, depending on which entity has jurisdiction at the time the stay is requested.

**F. Preparation of record proper:** The preparation of the record proper for an appeal or for any other reason shall be the responsibility of RETA staff. The appellant shall make satisfactory arrangements with RETA staff including paying for copying, including transcript costs, before the RETA staff prepares the record proper.