

**TITLE 13 INSURANCE**  
**CHAPTER 21 PATIENT'S COMPENSATION FUND**  
**PART 5 SURCHARGE RATE HEARINGS**

**13.21.5.1 ISSUING AGENCY:** New Mexico Superintendent of Insurance.  
[13.21.5.1 NMAC – N, 01/01/2022]

**13.21.5.2 SCOPE:** Except as otherwise provided, the rules in this part govern every surcharge rate proceeding conducted pursuant to Subsection D and Subsection F of Section 41-5-25 NMSA 1978.  
[13.21.5.2 NMAC – N, 01/01/2022]

**13.21.5.3 STATUTORY AUTHORITY:** Section 41-5-25 NMSA 1978.  
[13.21.5.3 NMAC – N, 01/01/2022]

**13.21.5.4 DURATION:** Permanent.  
[13.21.5.4 NMAC – N, 01/01/2022]

**13.21.5.5 EFFECTIVE DATE:** January 1, 2022, unless a later date is cited at the end of a section.  
[13.21.5.5 NMAC – N, 01/01/2022]

**13.21.5.6 OBJECTIVE:** The purpose of this rule is to provide procedures to govern surcharge rate hearings required by the Medical Malpractice Act.  
[13.21.5.6 NMAC – N, 01/01/2022]

**13.21.5.7 DEFINITIONS:** This rule adopts the definitions found in Section 41-5-3 NMSA 1978, in Section 14-4-2 NMSA 1978, in Chapter 59A, Article 1 NMSA 1978, in 1.24.1.7 NMAC, in 13.21.1.7 NMAC, and in 3.21.4.7 NMAC.  
[13.21.5.7 NMAC – N, 01/01/2022]

**13.21.5.8 REVISION OF STANDING ORDERS:** The superintendent may issue or withdraw standing procedural orders addressing general practice issues and filing protocols for the handling of surcharge rate hearings. Such standing orders will be available for public inspection at OSI office facilities, on the *Patient's Compensation Fund* website, and in any applicable information provided with a notice of hearing. Parties appearing at surcharge rate hearings are expected to comply with standing orders.  
[13.21.5.8 NMAC – N, 01/01/2022]

**13.21.5.9 ADVISORY BOARD AS HEARING OFFICER:**

**A. General authority.** The advisory board is the hearing officer for surcharge rate hearings. The advisory board may conduct any hearing *en banc*, may designate any number of members less than its whole to conduct any hearing, or may designate a single member to conduct any hearing.

**B. Duties of the advisory board.** The advisory board shall conduct fair and impartial hearings, take all necessary action to avoid delay in the proceedings and maintain order. The advisory board shall have the powers necessary to carry out these duties, including the following:

- (1) to administer or have administered oaths and affirmations;
- (2) to cause depositions to be taken;
- (3) to require the production or inspection of documents and other items;
- (4) to require the answering of interrogatories and requests for admissions;
- (5) to rule upon offers of proof and receive evidence;
- (6) to regulate the course of the hearings and the conduct of the parties and their representatives therein;
- (7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;
- (8) to schedule, continue and reschedule hearings;
- (9) to consider and rule upon all procedural and other motions appropriate in the proceeding, including qualification of expert witnesses and admission of exhibits;
- (10) to require the filing of briefs on specific legal issues prior to or after the hearing;

- (11) to cause a complete record of a hearing to be made;
- (12) to make and issue decisions and procedural orders;
- (13) to issue subpoenas in the name of the superintendent;
- (14) to issue a recommendation to the superintendent regarding the final resolution of the

matter; and

(15) to appropriately sanction, up to exclusion, indecorous, obstinate, recalcitrant, obstreperous, unethical, unprofessional or other improper conduct that interferes with the conduct of a fair and orderly hearing or the development of a complete record.

**C. Independence of the advisory board.** In the performance of these functions, the advisory board shall not be responsible to or subject to the direction of any officer, employee or agent of OSI or the TPA. Pursuant to Subsection A of Section 41-5-25.1 NMSA 1978, OSI shall provide staff services to the advisory board to assist in the administration of the hearing.

**D. Ex parte communication.** In the performance of these functions, the advisory board is prohibited from engaging in any improper *ex parte* communications about the substantive issues with any party on any matter. An improper *ex parte* communication occurs when the advisory board, or any of its members, discusses or otherwise communicates regarding the substance of a case without the opposing party being present, except that it is not an improper *ex parte* communication for the advisory board to go on the record with only one party when the other party has failed to appear at a scheduled hearing.

**E. Recommended decision.** Upon conclusion of the surcharge rate hearing, the advisory board, or a quorum thereof, shall meet to determine the surcharge rates to recommend to the superintendent. The advisory board shall base its determination upon substantial evidence in the whole record. The advisory board shall provide a written recommended decision to the superintendent on or before October 21 of each year, which shall set forth the recommended surcharge rates and a summary of the evidence supporting those rates.

**F. Final order.** After a thorough review of the record and the recommendation prepared by the advisory board, the superintendent shall issue a final order. No party or member of OSI or TPA staff shall engage in any *ex parte* communication with the superintendent in an attempt to influence a final decision. The superintendent may seek counsel from OSI's office of legal counsel.

[13.21.5.9 NMAC – N, 01/01/2022]

#### **13.21.5.10 INITIATION OF THE SURCHARGE RATE HEARING:**

**A. Selection of actuary.** No later than March 1 of each year, the advisory board shall meet with the superintendent to consult on the selection of an independent actuary to perform the independent actuarial study of the fund. The actuarial study is to be completed by August 1 of the year in which the actuary is selected.

**B. Opening the docket.** No later than March 15 of each year, the superintendent shall open a docket in OSI's electronic docket system for that year's surcharge rate hearing. A docket number shall be assigned and referenced in all subsequent communications and filings concerning the surcharge rate hearing.

(1) The superintendent shall file an initial order setting the surcharge rate hearing between September 15 and September 30 of each year.

(2) The superintendent shall establish the caption for the docket, which caption shall be used thereafter for any matters pertaining to the hearing. The caption shall state the nature of the matter and shall include the docket number.

(3) Every written document that is submitted to the superintendent or advisory board or exchanged between the parties for consideration, including pleadings such as motions, responses and objections, all evidentiary documents and any other filings shall include the caption and shall be filed to the docket.

**C. Designation of advisory board as hearing officer.** The superintendent's initial order shall designate the advisory board as the hearing officer in the surcharge rate hearing.

**D. Intervenors.** Any person who claims an interest relating to the surcharge rate hearing, and is so situated that the hearing may impair or impede the person's ability to protect that interest, may apply to intervene in the proceeding.

(1) In determining whether to allow or deny intervention, the advisory board shall consider the nature of the claimed interest of the applicant, the potential impact of the advisory board's decision on the applicant's ability to protect that interest, the timeliness of the application, the potential disruption of the proceedings and prejudice to existing parties if intervention were allowed.

(2) Whether to allow intervention is at the sole discretion of the advisory board.

[13.21.5.10 NMAC – N, 01/01/2022]

**13.21.5.11 REPRESENTATION AT HEARING, FORMAL ENTRY OF APPEARANCE, SUBSTITUTION OF COUNSEL, AND WITHDRAWAL FROM REPRESENTATION:**

**A. Representation.** Unless otherwise expressly authorized by statute, only a person made a party or a bona fide majority owner if the party is a business entity, or that person's attorney may represent the person in the surcharge rate proceeding.

**B. Entry of appearance.** Any attorney wishing to represent a party must file a formal written entry of appearance in the docket of the proceeding. The entry of appearance must list the attorney's mailing address, phone and fax number (if any), and an email address (if any). Any attorney wishing to substitute in for a previous attorney must file a substitution of counsel containing the same information required in the initial entry of appearance.

**C. Withdrawal.** An attorney who intends to withdraw from representation of a party must do so in accordance with the rules of professional conduct.

(1) Withdrawing counsel must file in the docket a written request to withdraw from representation that indicates when counsel notified the party of the withdrawal, and of the date and time of the scheduled hearing.

(2) The advisory board may deny a request to withdraw from representation only when withdrawal would have a clear, materially adverse effect on the represented party's interests and impede the conduct of a full, fair, and efficient hearing.

[13.21.5.11 NMAC – N, 01/01/2022]

**13.21.5.12 ELECTRONIC DOCKET AND FILING OF DOCUMENTS:**

**A. Electronic docket.** Individuals or their counsel may access OSI's free electronic docket to view cases and filed pleadings. Registration of a free user account is required to file pleadings into a docket. Every written document that is submitted to a hearing officer or exchanged between parties for consideration, including pleadings, such as motions, responses and objections, all evidentiary documents and any other filings shall include the caption and shall be filed to the electronic docket

**B. Public access.** Unless the document contains information protected under Subsection D of Section 41-5-25 NMSA 1978, all documents filed in the docket for the surcharge rate proceeding shall be open for public inspection. Any protected information will be filed under seal or redacted in publicly available documents, in a manner ensuring the greatest possible public access to non-confidential information.

**C. Filing restrictions and service.**

(1) The OSI docket administrator will review all filings for compliance with these rules. Non-compliance with filings will be returned to submitter for correction.

(2) The OSI's electronic docket does allow for electron service. All parties of record shall be listed on the initial request for hearing and shall be selected for service with each additional filing.

(3) All filings shall include a certificate of service that documents the method of service used. A represented party shall only be served through counsel.

(4) In-person filing shall be accepted on business days between 8:00 am and 4:00 pm. In-person pleadings will be marked as filed on the business day that the OSI receives the pleading.

**D. Filing requirements.**

(1) All motions, except motions made on the record during the hearing or a continuance request made in a genuine unforeseen emergency circumstance (such as an unexpected accident, force majeure, or major medical emergency occurring in such close proximity to the date of the scheduled hearing that a written motion could not be completed), shall be in writing and shall state with particularity the grounds and the relief sought.

(2) Absent any order to the contrary, no pleading shall exceed 10 pages, excluding the caption and certificate of service, of double-spaced (except for block quotations), 12-point font. Only relevant excerpts of a motion exhibit shall be filed, with the pertinent portions highlighted, underlined, or otherwise emphasized. All exhibits and attachments shall identify the total number of pages, and consecutive page numbers (e.g., "Page 1 of 10"). Only single-sided documents will be accepted for filing or into a record at a hearing.

**E. Request for concurrence.** Before submission of any motion, request for relief or request for continuance, the requesting party should make reasonable efforts to consult with each other party about that party's position on the motion unless the nature of the pleading is such that it can be reasonably assumed the requested relief would be opposed. The moving party shall state the position of each other party in the pleading.

**F. Responses to filings.**

(1) Unless a different deadline has been established by the advisory board, each non-moving party shall have 10 calendar days to file a written response to a pleading.

(2) If a deadline for filing falls on a non-business day, the deadline falls on the next business day.

(3) The advisory board has the discretion to extend or shorten the response deadline.

(4) Failure to file a response in opposition may be presumed to be consent to the relief sought.

(5) The advisory board is not required to make a default ruling on any motion if the relief sought could be contrary to the facts or law on the issues.

**G.** In the event of a procedural defect or other error with the manner, method, or content of a submitted filing, the advisory board or records manager may communicate such error to the filing party and withhold filing of the pleading until the moving party remedies the procedural defect. Examples of a procedural defect include, but are not limited to, failure to certify service, failure to comply with the page limitations, failure to confer with other parties, failure to use the form or follow the specific filing method required by the Patient's Compensation Fund, submission of double-sided documents, failing to properly number pages, failure to use the correct caption of reference the assigned docket number, or failure to comply with an applicable standing order. [13.21.5.12 NMAC – N, 01/01/2022]

### **13.21.5.13 PREHEARING CONFERENCES, STATUS CONFERENCES, AND STATUS CHECKS:**

**A. Purpose of prehearing conferences.** The advisory board may direct representatives for all parties to meet together or with the advisory board present for a prehearing conference to consider any or all of the following:

(1) simplify, clarify, narrow or resolve the pending issues;

(2) stipulations and admissions of fact and of the contents and authenticity of documents;

(3) expedition in the discovery and presentation of evidence, including, but not limited to, restriction on the number of exhibits and expert, economic or technical witnesses;

(4) matters of which administrative notice will be taken; and

(5) such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and the identity of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.

**B. Conduct of prehearing conferences.**

(1) Prehearing conferences conducted by the advisory board may be electronically, but not stenographically, recorded. Should a party request that the recording be transcribed, that party shall pay any costs of transcription.

(2) The advisory board may issue a written order that recites the results of the conference. Such order shall include rulings upon matters considered at the conference, together with appropriate directions to the parties. The order shall control the subsequent course of the proceeding, unless superseded by a subsequent order.

**C. Status conferences.**

(1) The advisory board may require the parties to submit a written report of any conference ordered to be conducted between the parties updating the status of the proceeding in light of the conference.

(2) The advisory board may conduct a status conference upon the request of either party or on the advisory board's own initiative, at which time the advisory board may require the parties, attorneys, or authorized representatives, to provide information regarding the status of a proceeding.

[13.21.5.13 NMAC – N, 01/01/2022]

### **13.21.5.14 HEARING LOCATION, TIME AND PLACE, NOTICE OF HEARING:**

**A. Location.**

(1) In the absence of any statutory requirements to the contrary, all hearings conducted by the advisory board shall occur in Santa Fe, at the office of superintendent of insurance, unless the advisory board orders the parties to appear at another location in New Mexico.

(2) The parties may express a mutual preference for location of any hearing.

(3) In selecting a location other than Santa Fe, the advisory board shall consider and give weight to the location and wishes of the parties, witnesses, and access for members of the advisory board.

(4) If selecting a location other than Santa Fe would cause an unreasonable, undue burden to any party, that party may file a written objection to the selected location within 10 days of issuance of the notice of

hearing, articulating the reasons supporting the objection. The advisory board will promptly review the objection and, upon a showing of an unreasonable, undue burden, may move the hearing to another more reasonable location.

**B. Notice.** Except for the evidentiary hearing to establish surcharge rates set by the superintendent's initial order (unless the advisory board determines to change the date of that hearing), the advisory board will notify the parties to the hearing of the date, time and place scheduled for any hearing at least seven days before the that hearing. This notice will be directed to the party's attorney, or to the last known address of any unrepresented party. Notice will be provided in a manner calculated to provide actual notice.

[13.21.5.14 NMAC – N, 01/01/2022]

#### **13.21.5.15 TELEPHONIC, VIDEOCONFERENCE AND OTHER EQUIVALENT ELECTRONIC METHOD HEARINGS:**

**A.** If not otherwise prohibited by statute, rule, or court ruling, the advisory board may conduct any hearing in person or by telephone, videoconference, or other equivalent electronic method. The advisory board shall cause a stenographic or audio recording to be made of all proceedings involving the presentation of evidence, points, authorities or argument pertaining to the merits of the matter before the advisory board.

**B.** If the hearing is to be conducted by telephone, videoconference or other equivalent electronic method, the notice shall so inform the parties. Either party may file a written objection to conducting the hearing by telephone, videoconference, or other equivalent electronic method within 10 days of the notice of hearing. Failure to timely object to the conduct of a telephone, videoconference, or other equivalent electronic method hearing constitutes consent to the hearing proceeding in that manner and waiver of any other applicable statutory in-county hearing requirement.

**C.** Upon receipt of a timely objection, the advisory board shall consider the applicable legal requirements, the location of the parties and witnesses, the complexity of the particular matter, the availability of necessary electronic equipment for conduct of a full and fair hearing by telephone, videoconference, or other equivalent electronic method, and the basis of the objection in determining whether the hearing should occur at a specific location rather than via telephone, videoconference, or other equivalent electronic method.

**D.** Provided that the requesting party has not previously demanded an in-person hearing or otherwise objected to conducting the matter via telephone, videoconference, or other equivalent electronic methods, any party may request to appear directly or have a witness on their behalf appear via telephone, videoconference, or alternative electronic means by filing a request at least three business days before the scheduled hearing. The filing of a request to appear via telephone, videoconference, or other alternative electronic method shall be deemed as a total and complete waiver of any in-person, in-county hearing requirement and deemed as consent for all parties, all witnesses, and the advisory board to appear via telephone, videoconference, or other equivalent electronic methods.

**E.** All parties appearing via telephone, videoconference, or other electronic method shall provide the advisory board with a working email address or facsimile number for the exchange of all documentary evidence before or during the hearing.

**F.** Failure to follow the advisory board's instructions for participating in the hearing via telephone, videoconference, or other equivalent electronic method will be treated as a non-appearance at the hearing.

**G.** Any technical issues shall be promptly reported to the advisory board.

**H.** In the event that technical or other computer problems prevent a hearing by videoconference or other electronic method from occurring or otherwise interfere with maintaining or developing a complete record at the hearing, the parties agree and consent that the advisory board may continue the matter to a different time before expiration of the statutory deadline, may order the parties to appear for an in-person hearing, or may conduct the remaining portion of the hearing via telephone.

**I.** If the advisory board determines during the course of the hearing, either *sua sponte* or upon argument of a party, that an in-person hearing is necessary to adequately complete the record, address credibility issues, or is otherwise necessary to ensure a full or fair hearing process, the advisory board may recess a hearing occurring by telephone, videoconference, or other equivalent electronic method and reconvene the proceeding as an in-person hearing.

[13.21.5.15 NMAC – N, 01/01/2022]

#### **13.21.5.16 CONTINUANCES:**

**A.** At the request of a party, a witness, or upon the advisory board's own determination, a hearing may be continued for good cause. The advisory board shall consider only written continuance requests made at least three working days prior to the scheduled hearing absent extraordinary, unforeseen circumstances that the requesting party or witness could not have known earlier. An order to grant or deny the request may be issued prior to the

scheduled hearing or if there is insufficient time to issue an order prior to the scheduled hearing, the advisory board may grant or deny the request on the record at the hearing. No continuance request may be granted unless there is adequate time to provide notice to the parties, subpoena witnesses and conduct the rescheduled hearing before expiration of any statutory deadline.

**B.** Within the time limits set by statute, the superintendent or advisory board may *sua sponte* continue any matter as necessary to address OSI or TPA staffing needs, to ensure efficient and adequate use of state resources, and to manage the hearing docket. To this end, the advisory board may contact the parties to inquire about the status of a scheduled case.

**C.** No case shall be continued, even with a showing of good cause or an emergency circumstance, beyond any mandatory, applicable time limit on the case.

[13.21.5.16 NMAC – N, 01/01/2022]

**13.21.5.17 ATTIRE AT HEARING:** All attorneys and other authorized representatives must be attired in a dignified, professional manner at all times during the hearing. Witnesses shall dress in a respectful manner. No attire or dress so flamboyant, disheveled, inflammatory, obscene, offensive or revealing as to create a distraction to the orderly conduct of the hearing will be permitted.

[13.21.5.17 NMAC – N, 01/01/2022]

**13.21.5.18 BURDEN OF PROOF, PRESENTATION OF CASE, EVIDENCE:**

**A. Burden of proof.** Unless otherwise specified by statute, the burden of proof in a proceeding is the preponderance of evidence.

**B. Presentation order.** The party with the burden of proof in the case will ordinarily present their case first, followed by the opposing party, if any, unless the advisory board makes reasonable exceptions related to the availability of the witnesses and representatives or other scheduling concerns.

**C. Opening statements.** The advisory board may require or allow opening statements as the circumstances justify. Opening statements are not ordinarily evidence, but without objection, may be adopted as evidence by sworn oath of the party-witness who made the opening statement.

**D. Testimony under oath.** All testimony must be given under oath and will be subject to questioning of each other party. The advisory board may also ask questions of the witness as appropriate. At the advisory board's discretion, redirect and re-cross may be allowed.

**E. Closing arguments.** The parties may make closing arguments, either orally at the conclusion of the case or, upon order of the advisory board, in writing after conclusion of the hearing.

**F. Post-hearing briefs.** The advisory board may also order the parties to submit further briefing on any issue in the case, and to submit proposed findings of fact and conclusions of law. The advisory board will establish a timeline for submission of any post-hearing pleadings, including time for the parties to exchange briefs, as the advisory board finds necessary. No decision-writing deadline commences until the parties have submitted any ordered post-hearing briefing or submission.

**G. Rules of evidence.**

(1) Formal rules of evidence and civil procedure shall not apply in a proceeding unless otherwise expressly and specifically required by statute, regulation, or order of the advisory board.

(2) Relevant and material evidence shall be admissible. Irrelevant, immaterial, unreliable, or unduly repetitious evidence may be excluded.

(3) A party may offer exhibits, such as records of transactions.

(a) The party shall have the exhibits numbered by the stenographer prior to the hearing.

(b) The party shall provide copies of the evidence to the stenographer, all parties and to the advisory board.

(c) Exhibits must be introduced and explained by a witness, who must be prepared to answer questions from the parties and the advisory board.

(d) The advisory board shall be asked by the party offering an exhibit to accept the exhibit into evidence. The advisory board may be asked to consider all exhibits introduced by a witness at the conclusion of that witness's testimony or at the conclusion of that party's case.

(e) The stenographer shall retain copies of all exhibits that are admitted and shall make them a part of the record.

(4) The advisory board shall consider and give appropriate weight to all relevant and material evidence admitted in rendering a final decision on the merits of a matter.

**H. Hearsay evidence.** Hearsay evidence may be admitted in a proceeding.

**I. Taking notice.**

(1) The advisory board may take administrative notice of facts not subject to reasonable dispute that are generally known within the community, capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably disputed, or as provided by an applicable statute.

(2) The advisory board may take administrative notice at any stage in the proceeding, whether *sua sponte* or at the request of a party.

(3) A party may dispute the propriety of taking administrative notice, including the opportunity to refute a noticed fact.

**J. Objections.**

(1) A party objecting to evidence, qualifications of an expert, a line of questioning, or the response shall timely and briefly state the grounds for the objection.

(2) Rulings on objections may be addressed on the record at the time of the objection, reserved for ruling in a subsequent written order, or noted as a continuing, ongoing objection for which ruling is reserved to later in the proceeding.

**K. Audio or video evidence.** Any party wishing to submit a video or audio recording into the record must provide a complete tangible, playable copy that can be retained as part of the record.

**L. Size of exhibits.** In general, documentary evidence should be no larger than 8.5 inches by 11 inches unless expressly allowed by the advisory board. The advisory board may admit larger documentary exhibits presented at hearing, provided the proponent of such exhibits provides the advisory board with a copy of the exhibit reduced to 8.5 inches by 11 inches. After the hearing at which the exhibit was admitted, the reduced copy shall be substituted for the larger exhibit and made part of the record of the hearing. Arrangements to provide a reduced copy of a large exhibit shall be undertaken in advance of the hearing. Failure by the proponent to provide a reduced copy shall be deemed a withdrawal of the exhibit.

**M. Substitutions for objects.** In lieu of the introduction of tangible objects as exhibits, the advisory board may require the moving party to submit a photograph, video, or other appropriate substitute such as a verbal description of the pertinent characteristics of the object for the record.

[13.21.5.18 NMAC – N, 01/01/2022]

#### **13.21.5.19 WITNESSES, EXPERT WITNESSES, AND INVOCATION OF THE RULE:**

**A. Use of witnesses.** Any person having relevant, material knowledge related to one of the issues in a hearing may testify as a witness under oath in a proceeding. Upon affirming the oath, the witness may be questioned by any party and by the advisory board.

**B. Method of appearance.** Unless a more specific provision applies, witnesses are ordinarily expected to appear in the same manner or by the same method as the parties in a proceeding, absent express preapproval of the advisory board allowing an appearance by a different method. For example, if the hearing is scheduled to be conducted in person in a specific place, the witnesses are also ordinarily expected to appear in person at that same place; however, if the matter is set to occur by telephone or videoconference, then the witnesses may ordinarily appear by telephone or videoconference.

**C. Advisory board as a witness.** The current or previously assigned advisory board in a matter shall not be called and shall not be a witness in the proceeding.

**D. Use of expert witnesses.**

(1) If either party intends to call and treat a particular witness as an expert witness in the proceeding, the party must identify the purported expert to the other parties and to the advisory board at least seven days before the scheduled hearing, or with sufficient time before completion of the discovery deadline specified in a scheduling order to allow for deposition.

(2) The party shall include the scope of that expert's purported testimony relative to the proceeding, the expert's credentials, and a listing of any materials the expert reviewed as part of reaching his or her expert opinion.

(3) The opposing party may file a response in opposition before the hearing or challenge the designation of the witness as an expert during the course of the hearing.

**E. Use of exclusionary rule.** At the hearing, any party can invoke the exclusionary rule, excluding all witnesses other than the real party in interest, their representative, one main case agent, and any designated expert witness from the proceeding until the time of their testimony. If the rule has been invoked, the witnesses shall not discuss their testimony with each other until the conclusion of the proceeding. When the rule has been invoked, any witness who remains in the hearing after conclusion of their testimony may not be recalled as a witness in the

proceeding, except that any witness may observe the testimony of an expert witness and be recalled to provide any subsequent rebuttal testimony.

**F. OSI staff as experts.**

(1) The advisory board may request one or more members of OSI staff to be present at the hearing to assist the advisory board with any matters within the expertise of the staff person.

(2) The staff person may be called as a witness by the advisory board and examined by the parties and the advisory board.

(3) Any party may call the staff person as a witness.

(4) Each other party will have the opportunity to cross-examine a staff person who is called as a witness. In the discretion of the advisory board, the advisory board may permit re-direct or re-cross examination of the staff person.

(5) The advisory board shall not discuss the case with the staff person outside the hearing or off the record.

(6) Any staff person requested to be present by the advisory board shall not be subject to the exclusionary rule.

[13.21.5.19 NMAC – N, 01/01/2022]

**13.21.5.20 CLOSED OR PUBLIC HEARING, SEALED RECORDS, AND DELIBERATIVE NOTES OF ADVISORY BOARD:**

**A. Closed hearings.** Unless otherwise provided by law, ordered by the advisory board for good cause, or required to prevent disclosure of confidential information, all hearings and the record are open to the public. Any party to a proceeding may submit a written request to close the hearing and the record to the public, which shall be granted if authorized by statute, regulation, to preserve confidentiality or to protect a party from harassment or reprisal.

**B. Open hearings.** If the hearing is open to the public, members of the public and the media may attend the hearing so long as they do not interrupt, interfere with, or impede the orderly, fair, and efficient hearing process. With prior consent of the advisory board, media members may record the proceeding from a fixed location in the hearing room. The advisory board may direct any member of the public, including media members, to leave the proceeding if they engage in any conduct that interferes with the advisory board's ability to maintain order, develop the record, and provide a fair and efficient hearing process. The proceedings shall be made available telephonically to members of the public, including the media, upon prior request.

**C. Sealed records.** Upon request of any party, and upon a showing of good cause, the advisory board may seal a particular exhibit, document, or portions of a witness's testimony from public disclosure if such items contain statutorily-protected confidential information, privileged information, or otherwise contain private identification information of a party or third party that is immaterial to a substantive issue in the proceeding or if its materiality is substantially outweighed by the prejudice of public release of the information. Upon issuance of an order sealing such documents or exhibits, these records will remain under seal throughout the proceeding and shall be returned to the submitting party at the conclusion of the appeal period or the appeal. The opposing party shall be entitled to promptly review these documents in preparing for the hearing, and may rely on those documents during the hearing as necessary to ensure a fair hearing process; however, the opposing party shall not maintain its own copy of the sealed document after conclusion of the hearing nor reveal, discuss, or disclose the contents of these sealed documents to any other party outside of the hearing process.

**D. Notes of deliberation.** The advisory board's notes taken during the course of the hearing, notes generated during the decision-making process, and any draft orders or draft decisions are confidential as part of the deliberative process and are not subject to public disclosure.

[13.21.5.20 NMAC – N, 01/01/2022]

**13.21.5.21 SUBPOENAS:** Any request for issuance of subpoenas in matters subject to these rules shall be guided by Rule 45 of the rules of civil procedure for the district courts of New Mexico, except where provisions of that rule conflict with the powers of the superintendent. Any subpoena issued shall be in the name of the superintendent. The party requesting the subpoena shall prepare a proposed subpoena, submit the proposed subpoena to each other party and to the advisory board for approval, and shall timely and reasonably serve the subpoena on the person or entity subject to the subpoena. Unless good cause is shown for a shorter period, a subpoena shall provide at least 10 days-notice before compelled attendance at a hearing or deposition, and at least 10 days-notice before compelled production of materials. All returns or certificates of service on served subpoenas



shall be filed in the docket of the proceeding, copied to the opposing party, and shall be made part of the record of the proceeding.

[13.21.5.21 NMAC – N, 01/01/2022]

**13.21.5.22 LANGUAGE INTERPRETERS:** A party to a proceeding who needs language interpreter services for translation of one language into another is responsible for arranging such service for the hearing. While the person serving as an interpreter need not be a court-certified interpreter in order to provide interpretation at a hearing, any person serving as an interpreter in a matter before the superintendent must be approved by the advisory board and must affirm the interpreter's oath applicable in New Mexico courts. Upon reasonable notice by the party, any interpreter required to be provided under the Americans with Disabilities Act shall be provided for by the superintendent.

[13.21.5.22 NMAC – N, 01/01/2022]

**13.21.5.23 FAILURE TO APPEAR:**

**A. Entry of default order.** If a party fails to appear for a properly noticed hearing, either in person, through a permissible representative or telephonically with prior approval of the advisory board, the person waives the right to protest or challenge any action that is the subject of the hearing notice. The matter shall go on the record for the limited purpose of addressing notice and non-appearance, and the advisory board shall enter an appropriate order based on the waiver of the hearing by failing to appear.

**B. Evidence of notice.** In considering the non-appearance and whether the person received appropriate notice necessitating issuance of the order, the advisory board may consider the contents of the docket, information conveyed to or known by the advisory board, information related to mailing, including mail tracking, returned receipt information, and notes written on returned envelopes of the United States postal service or other mail tracking services, and arguments offered by any present party, all of which may be addressed on the record of the hearing or in any subsequent order.

**C. Written order required.** Oral rulings based on a party's failure to appear are not final until reduced to writing. The advisory board may issue a different written order as new information arises after the hearing regarding whether the notice of hearing was properly sent to the correct address or otherwise properly served.

[13.21.5.23 NMAC – N, 01/01/2022]

**13.21.5.24 RECONSIDERATION:**

**A. Time to file.** A party may file a motion for reconsideration within 15 days after the date of the final order. Any other party may file a response no more than 15 days after the motion for reconsideration was filed. Motions for reconsideration that are not filed within this deadline may be denied automatically. A timely filed motion for reconsideration should be decided based on the merits, whether or not a response is filed.

**B. Posture.** The prevailing party shall not file a motion for reconsideration. However, if a requested action is granted in part and denied in part, either party may file a motion for reconsideration.

**C. Basis for motion.** Motions for reconsideration shall not endeavor to present new evidence previously available, or discoverable through reasonable diligence, to the parties before the hearing. Motions for reconsideration shall not reargue the weight of evidence already ruled upon and shall not reiterate legal arguments already ruled upon. However, a motion for reconsideration may address gross factual or legal errors or omissions contained in the final decision and order.

[13.21.5.24 NMAC – N, 01/01/2022]

**13.21.5.25 APPEALS FOLLOWING HEARING:** Any person who is adversely affected by a final order or decision in a surcharge rate proceeding may appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978. Each order issued by the superintendent after a surcharge rate proceeding shall include information about the appeal process for the type of case at issue. Once the appeal is filed in the appropriate court, the appealing party shall promptly provide a court-endorsed copy of the appeal to the superintendent so that the OSI records manager can prepare and submit the proper record.

[13.21.5.25 NMAC – N, 01/01/2022]

**13.21.5.26 REQUESTING COPIES OF EXHIBITS, AUDIO, OR THE ADMINISTRATIVE RECORD:** Any party may access and copy any written document filed to the docket. Copies of an audio recording or written transcript of the proceeding shall be arranged through the stenographic service. The OSI may charge a

reasonable fee for copies made, consistent with OSI's fee schedule under the Inspection of Public Records Act. The superintendent may also require the requesting party to submit a computer storage device, such as a compact disc, dvd disc, blu-ray disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record.

[13.21.5.26 NMAC – N, 01/01/2022]

**History of 13.21.5 NMAC: [RESERVED]**