

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES
CHAPTER 8 RENEWABLE ENERGY
PART 3 EMINENT DOMAIN

17.8.3.1 ISSUING AGENCY: New Mexico Renewable Energy Transmission Authority (“Authority”).
[17.8.3.1 NMAC - N, 12/15/2011]

17.8.3.2 SCOPE: This rule applies to the authority’s exercise of the authority’s power of eminent domain for acquiring property or interests in property for projects the authority has determined are eligible facilities, as that term is defined in NMSA 1978, Section 62-16A-2, and for which the authority has determined to participate in the project, but in circumstances in which the authority is not acquiring the project. In exercising any authority provided for herein, the authority shall act in accordance with all applicable laws.
[17.8.3.2 NMAC - N, 12/15/2011]

17.8.3.3 STATUTORY AUTHORITY: NMSA, 1978, Sections 42A-1-1 *et seq.*, and 62-16A-1 *et seq.*
[17.8.3.3 NMAC - N, 12/15/2011]

17.8.3.4 DURATION: Permanent.
[17.8.3.4 NMAC - N, 12/15/2011]

17.8.3.5 EFFECTIVE DATE: December 15, 2011, unless a later date is cited at the end of a section.
[17.8.3.5 NMAC - N, 12/15/2011]

17.8.3.6 OBJECTIVE: The purpose of this rule is to specify the objective standards and procedures the authority will follow in considering applications for exercise of its power of eminent domain, the negotiation procedures required of persons submitting applications with landowners and those claiming an interest in property, the contents of applications, condemnation procedures, and related matters.
[17.8.3.6 NMAC - N, 12/15/2011]

17.8.3.7 DEFINITIONS: In addition to the definitions in NMSA 1978, Sections 62-16A-2, 42A-1-2, , as used in this rule:

A. “Agreement” means a project ownership and property agreement as described in this rule and includes the applicant and the authority’s understanding regarding the authority’s participation in the project, project ownership, project financing, project management, and any other matter required by the authority. The parameters of the authority’s exercise of its eminent domain powers shall be set forth in the agreement.

B. “Authority” means the renewable energy transmission authority.

C. “Applicant” means any person that submits an application to the authority pursuant to this rule and in the manner set forth herein. Applications will only be considered if the authority has already agreed to participate in the project.

D. “Eligible facilities” means facilities to be financed or acquired by the authority, in which, within one year after beginning the transmission or storage of any electricity, and thereafter, at least 30 percent of the electric energy, as estimated by the authority, originates from renewable energy sources.

E. “Eminent domain code” means the statutory provisions governing condemnation in New Mexico, NMSA 1978, Section 42A-1-1 *et seq.*, as modified from time to time.

F. “Person” includes a natural individual, partnership, corporation, association other legal or fiduciary entity and a governmental entity.

G. “Project” means, for the purposes of this rule, an undertaking by the authority to finance or plan, acquire, maintain and operate eligible facilities located in part or in whole within the state of New Mexico in which the authority has agreed to participate.

H. “Property” means real property under the laws of the New Mexico, and may include one or more individual parcels of land or a portion or portions thereof, any improvements thereon or connected therewith or any easement or other interest therein.

I. “Property owner(s)” means any person or entity having an ownership interest in the property.
[17.8.3.7 NMAC - N, 12/15/2011]

17.8.3.8 PROJECT OWNERSHIP AND PROPERTY AGREEMENT:

A. The applicant may apply to the authority for approval of an agreement and exercise of the authority's eminent domain powers for the purpose of property acquisition, condemnation, property management, property disposition, and related matters. The parameters of the authority's exercise of its eminent domain powers shall be set forth in the agreement.

B. Contents of application: The applicant must file with the authority an application, which shall contain:

- (1) a description of the project, including:
 - (a) identification of all applicants and other persons with a financial interest in the project;
 - (b) a description of the project and its purpose(s);
 - (c) a description of the proposed project route in New Mexico, including a map showing the route in New Mexico;
 - (d) a description of the property on the proposed project route that the applicant does not have an interest in; and
 - (e) a description of the scope of work for the project and the projected timeline for completion of the work;
- (2) a copy of the draft agreement(s) proposed for approval;
- (3) copies of memorandum of understanding (MOU) or prior agreements, if any, regarding the authority's support for or participation in the project;
- (4) a statement explaining why the property comprising the proposed route in New Mexico is necessary for the project;
- (5) copies of any reviews of the proposed project under the National Environmental Policy Act, 42 U.S.C. Section 4321 *et seq.* (NEPA), or other similar reviews;
- (6) evidence that the applicant has made reasonable and diligent efforts to acquire the property by negotiation, including by offering at least fair market value for the property;
- (7) a statement verifying, under oath, that the proposed exercise of eminent domain authority does not involve taking any utility-owned property;
- (8) a copy of a determination by the New Mexico public regulation commission that the proposed project will not materially diminish electric service reliability of the transmission system in New Mexico, if issued;
- (9) a form of draft publication of the notice in compliance with Subsection C of 17.8.3.8 NMAC;
- (10) any other information or exhibits the applicant wishes to submit in support of the application.

C. Any information contained in the application which the applicant believes is exempt from disclosure pursuant to the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978) or the New Mexico Renewable Energy Transmission Authority Act (Chapter 6, Article 16A NMSA 1978) must be clearly marked in the application and, if feasible, separated from the remainder of the application.

D. Notice and comment on application:

- (1) Notice.
 - (a) At the same time the application is submitted to the authority, the applicant shall provide a copy of the application to private property owner(s) of record of the properties that lie within the proposed project route in New Mexico, in the same manner as provided in Subsection B of 17.8.3.8 NMAC.
 - (b) The authority shall cause notice of the application to be published in a newspaper of general circulation available in every county in which the property within the proposed project route in New Mexico lies. The notice shall not include any information from the application that is exempt from disclosure pursuant to the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978) or the New Mexico Renewable Energy Transmission Authority Act (Chapter 6, Article 62A NMSA 1978). Upon request by the authority, the applicant shall publish notice in accordance with this rule.
 - (c) Such published notice shall appear at least three times a minimum of seven days apart, with the first occurrence published within 14 days after the date of the authority's approving the form of notice and at least 30 days prior to the date of the authority board meeting at which the application will be considered.
 - (d) The notice shall contain the following information:
 - (i) identification of the applicant(s);
 - (ii) a description of the project and its purpose;
 - (iii) a description of the proposed project route in New Mexico and a statement that a map is available at RETA's offices;
 - (iv) a statement that the applicant has applied to the authority for approval of the agreement and exercise of its eminent domain authority pursuant to this rule;

(v) the date, time and place of the authority meeting at which the authority may consider the application, if known, together with the further statement that interested persons should contact the authority for confirmation of the meeting date, time, and place;

(vi) a statement that any interested person may examine the application and related exhibits, except such information exempt from disclosure pursuant to the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978) or the New Mexico Renewable Energy Transmission Authority Act (Chapter 6, Article 62A NMSA 1978), submitted to the authority at the offices of the authority in Santa Fe, and indicating the address and telephone number of the authority;

(vii) a statement that property owners whose property lies within the proposed project route in New Mexico may submit written comments on the application to the authority on or before the date of the board of directors' meeting at which the authority will consider the application;

(viii) a statement that property owner(s) whose property lies within the proposed project route in New Mexico may appear at the time and place of the authority's board of directors' meeting at which the authority will consider the application, and may make written or oral comments on the application at the meeting;

(ix) a statement that any and all agency approvals required by law have been obtained and all reviews required by any other agency have been satisfactorily completed. Copies of all supporting documentation or review results shall be submitted along with the application.

(e) The applicant shall bear the cost of publication.

(f) If the authority requires the applicant to publish the notice in accordance with this rule, the applicant shall ensure that an affidavit of publication is provided to the authority promptly upon last publication of the notice.

(2) Comment. The authority shall provide opportunity for written and oral comments on the application by property owner(s) whose property lies within the proposed project route in New Mexico. The authority shall provide a comment period of at least 30 days following last publication of the notice pursuant to Paragraph (1) of Subsection D of 17.8.3.8 NMAC, but may provide a reasonable extension of the comment period, not to exceed sixty 60 additional days. Oral comments shall be received at the meeting of the authority wherein the issue is to be considered.

E. Findings and determination:

(1) For projects in which the authority already participates, the authority may approve the proposed agreement if the criteria below are satisfied in the sole discretion of the board of directors of the authority:

(a) The property comprising the route in New Mexico is necessary for the project. Consideration and selection of the proposed route through review under NEPA, or other governmental review, if undertaken, shall serve to satisfy this requirement.

(b) The proposed project route in New Mexico will not involve taking utility-owned property. Applicant's affidavit or letters or documentation from relevant New Mexico utilities shall serve to satisfy this requirement.

(c) The project will not materially diminish electric service reliability of the transmission system in New Mexico, as determined by the New Mexico public regulation commission. If the public regulation commission has not yet made this determination, the authority may approve the application subject to a New Mexico public regulation commission determination that the project will not materially diminish electric service reliability of the transmission system in New Mexico.

(d) The project and the proposed agreement, as may be modified by the authority, are in the public interest.

(e) The applicant has the financial capacity to complete the project.

(2) The authority shall make its determination on the application within 120 days of the applicant's submittal of its application, which may be extended if the comment period is extended.

(3) If the authority denies the application, the authority shall inform the applicant in writing within 15 days after the denial the reasons for the denial in the context of the criteria set forth herein, and shall provide opportunity to submit an amended application. The new application shall include additional information demonstrating the applicant has met the requirements for approval set forth herein. The amended application will go through the approval process contained in this section including the requirements for public notice and comment. [17.8.3.8 NMAC - N, 12/15/2011]

17.8.3.9 NEGOTIATION WITH PROPERTY OWNERS: Prior to the exercise of the authority's eminent domain powers, negotiations with private property owner(s) by the applicant must be by reasonable and diligent efforts to acquire property needed for the project, including by offering at least fair market value for the

property. At any time during applicant's negotiations with property owner(s) and upon the applicant's request, the authority may participate in such negotiations in order to facilitate the voluntary acquisition of property for a project, but the applicant shall remain responsible for conducting good faith negotiations.
[17.8.3.9 NMAC - N, 12/15/2011]

17.8.3.10 CONDEMNATION PROCEDURES:

A. Condemnation proceedings.

(1) Upon initiating condemnation procedures, the authority shall expeditiously and diligently follow the condemnation procedures set forth in the Eminent Domain Code found at NMSA 1978, Section 42A-1-1 *et seq.* as it may be modified from time to time.

(2) The applicant shall cooperate with the authority to assist the authority in carrying out the authority's procedures set forth herein and its obligations under the law in an expeditious and diligent manner.

B. Costs and expenses.

(1) The applicant shall be responsible for all costs and expenses incurred by the authority in the condemnation action, including all attorneys' fees. The applicant shall pay all such costs and expenses within 30 days after receipt of an invoice for such from the authority, subject to dispute provisions which shall be set forth in the agreement. If an applicant fails to timely pay all such costs and expenses, the authority may discontinue the condemnation action.

(2) Prior to the authority's initiation of condemnation proceedings under the Eminent Domain Code, the applicant shall obtain a surety or cash bond in an amount agreed to by the parties and as required by law.

(3) The authority shall diligently work to reasonably minimize damages, other costs, and litigation expenses for which the applicant is responsible. The authority shall consult with the applicant prior to incurring substantial costs or expenditures, whenever practicable. The authority shall not make any offer above fair market value without prior approval by the applicant.

[17.8.3.10 NMAC - N, 12/15/2011]

17.8.3.11 OTHER AGREEMENTS; DISPOSITION OF PROPERTY:

A. In addition to the agreement, the authority and the applicant may enter into any other contracts or agreements they deem necessary setting forth the roles and obligations of the parties in the condemnation proceeding, the disposition and use of the property once acquired by the authority, and any other matter. The authority may dispose of any or all of the property in accordance with New Mexico law if it determines that doing so fulfills a public purpose. The use of the property for the same purpose for which the property was condemned is deemed to fulfill a public purpose.

B. If the property cannot be used for the purpose for which it was condemned, and if practicable and permissible under existing laws, the authority shall offer the property owner an opportunity to purchase the property from the authority at fair market value.

[17.8.3.11 NMAC - N, 12/15/2011]

17.8.3.12 INDEMNIFICATION: The agreement shall provide that the applicant shall indemnify and hold harmless the authority against any and all liability arising pursuant to the authority's actions under this rule and the Eminent Domain Code.

[17.8.3.12 NMAC - N, 12/15/2011]

17.8.3.13 VARIANCES:

A. An applicant may request a variance from any of the requirements of this rule, provided such variance will not create a conflict with state law.

B. A petition for variance must be supported by an affidavit signed by an officer of the applicant or someone with authority to sign for the applicant.

C. The applicant shall send notice of any request for a variance to the property owner(s) who are affected by the variance or who possess an ownership interest in the property. The notice shall indicate the nature of the variance requested and state that the property owner(s) may submit written or oral comments on the request for a variance. The authority may, at its discretion, require an informal conference or formal evidentiary hearing prior to making its determination on a request for variance. In the event an informal conference or a formal evidentiary hearing is held, oral comment shall be accepted at that time.

D. A petition for variance shall:

(1) identify the section of this rule for which the variance is requested;

- (2) describe the situation that necessitates the variance;
- (3) describe the effect of complying with this rule on the applicant if the variance is not granted; and
- (4) describe the result the variance will have if granted.

[17.8.3.13 NMAC - N, 12/15/2011]

HISTORY OF 17.8.3 NMAC: [RESERVED]