

# CHAPTER 62

## ELECTRIC, GAS AND WATER UTILITIES

### ARTICLE 1

#### INCORPORATION AND POWERS OF UTILITIES

##### 62-1-1. [Incorporation.]

Corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity or steam for lighting, heating, power, manufacturing or other purposes may be organized under the general incorporation laws of this state.

**History:** Laws 1909, ch. 141, § 1; 1912, ch. 50, § 1; Code 1915, § 1021; C.S. 1929, § 32-401; 1941 Comp., § 72-101; 1953 Comp., § 68-1-1.

#### ANNOTATIONS

**Cross-references.** - As to requirement of certificate of public convenience and necessity before new utility construction or operation, see 62-9-1 NMSA 1978.

As to municipal utilities, see 3-23-1 to 3-23-10, 3-24-1 to 3-24-10, 3-25-1 to 3-25-6, 3-26-1 to 3-26-3, 3-27-1 to 3-27-9 and 3-28-1 to 3-28-20 NMSA 1978.

As to municipal franchises, see 3-42-1 and 3-42-2 NMSA 1978.

As to powers of counties, see 4-37-1 NMSA 1978.

As to disposition of unclaimed property, see 7-8-1 to 7-8-34 NMSA 1978.

As to Business Corporation Act, see 53-11-1 to 53-11-51, 53-12-1 to 53-12-5, 53-13-1 to 53-13-13, 53-14-1 to 53-14-7, 53-15-1 to 53-15-4, 53-16-1 to 53-16-24, 53-17-1 to 53-17-20 and 53-18-1 to 53-18-12 NMSA 1978.

As to certification of telephone and telegraph companies, see 63-9-1 to 63-9-19 NMSA 1978.

As to agricultural processing plants as public utilities, see 76-13-1 NMSA 1978.

**Provisions applicable to telephone and telegraph companies.** - Telephone and telegraph companies are subject to the provisions of this section, 62-1-2, 62-1-3 and 3-42-2 NMSA 1978. *Mountain States Tel. & Tel. Co. v. Town of Belen*, 56 N.M. 415, 244 P.2d 1112 (1952).

A telephone company which generates electricity for the conduct of its business comes within the purview of 62-1-1 to 62-1-3 NMSA 1978. *City of Roswell v. Mountain States Tel. & Tel. Co.*, 78 F.2d 379 (10th Cir. 1935).

Sections 62-1-1 to 62-1-3 NMSA 1978 are applicable to telephone utilities. 1963-64 Op. Att'y Gen. No. 63-66.

**Which have power of eminent domain.** - Corporation, engaged as a public utility in furnishing telephone service to the public, has the power of eminent domain. *State Hwy. Comm'n v. Ruidoso Tel. Co.*, 73 N.M. 487, 389 P.2d 606 (1963).

**Authorized foreign public utility may exercise eminent domain.** - Under 53-17-2 and 62-1-4 NMSA 1978 and this section, a foreign public utility authorized to do business in this state has the same right as a domestic public utility to exercise the power of eminent domain in this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979) See 62-1-1.1 NMSA 1978.

**Supervision of foreign public utilities.** - Foreign public utilities authorized to do business in this state are subject to the same supervision as utilities incorporated under the laws of this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979) See 62-1-1.1 NMSA 1978.

**Application of provisions to pipeline companies.** - See 1973 Op. Att'y Gen. No. 73-26; 1957-58 Op. Att'y Gen. No. 57-124.

**Sanitary projects association not public utility.** - A sanitary projects association (see Article 29 of Chapter 3 NMSA 1978) was not transformed into a public utility by selling water to a limited number of nonmember water haulers and was not subject to the Public Service Commission's regulatory jurisdiction. *El Vadito De Los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n*, N.M. , 858 P.2d 1263 (1993).

**Law reviews.** - For article, "The Regulation of Public Utilities," see 10 *Nat. Resources J.* 827 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18A *Am. Jur. 2d Corporations* § 150; 26 *Am. Jur. 2d Electricity, Gas and Steam* §§ 7, 19, 24, 25, 228, 232, 233; 64 *Am. Jur. 2d Public Utilities* §§ 1, 2, 4, 82; 74 *Am. Jur. 2d Telecommunications* §§ 4, 8.

Authority from public official as affecting responsibility of public service corporation infringing property rights, 1 *A.L.R.* 403.

Perpetual franchise, 2 *A.L.R.* 1105.

Bank which has acquired a public service plant bound to continue its operation, 8 *A.L.R.* 248.

Irrigation company as a public utility, 8 A.L.R. 268, 15 A.L.R. 1227.

What are "public utilities" within provisions relating to municipal purchase, construction or repair of public utility, 9 A.L.R. 1033, 35 A.L.R. 592.

Municipal corporations owning or operating a public utility as within public utility acts, 10 A.L.R. 1432, 18 A.L.R. 946.

Right of public utility company to discontinue its entire service, 11 A.L.R. 252.

Contract for service by public utility in consideration of conveyance of property as affected by public utility acts, 11 A.L.R. 460, 41 A.L.R. 257.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 A.L.R.4th 894.

Regaining of private status by a corporation after having become subject to the duties and obligations of a public utility, 34 A.L.R. 175.

Competition by grantor of nonexclusive franchise as violation of constitutional rights of franchise holder, 114 A.L.R. 192.

Right of public utility not having an exclusive franchise to protection against, or damages for, interference with its operations, property or plant by a competitor, 119 A.L.R. 432.

Conclusiveness of charter as regards character of corporation as a public utility corporation, 119 A.L.R. 1019.

Right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

Special requirements of consumer as giving rise to liability, based on implied contract, for failure to furnish particular amount of electricity, gas or water, 13 A.L.R.2d 1233.

18 C.J.S. Corporations § 25 et seq.; 29 C.J.S. Electricity § 10(1); 38 C.J.S. Gas § 7; 73B C.J.S. Public Utilities § 15; 82 C.J.S. Steam § 2; 86 C.J.S. Telegraphs, Telephones, Radio and Television § 9.

### **62-1-1.1. Foreign corporations; powers.**

Foreign corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity or steam for lighting, heating, power, manufacturing or other purposes, which are duly qualified to do business in this state and are public utilities under the New Mexico Public Utility Act, Section 62-3-1, et seq., 1978, Annotated, shall

have the same rights and privileges including the power of eminent domain as domestic corporations of like character.

**History:** 1978 Comp., § 62-1-1.1, enacted by Laws 1979, ch. 259, § 1.

## **62-1-2. [Acquisition of water rights; placing of equipment over roads, highways and waters.]**

Such corporations may acquire water rights for power plants or other purposes either by purchase, by appropriation under the laws of this state or of the United States or by acquiring rights of persons or corporations having made such appropriations or filed applications therefor, and are authorized to place their pipes, poles, wires, cables, conduits, towers, piers, abutments, stations and other necessary fixtures, appliances and structures, upon or across any of the public roads, streets, alleys, highways and waters in this state subject to the regulation of the county commissioners and local municipal authorities.

**History:** Laws 1909, ch. 141, § 2; Code 1915, § 1022; C.S. 1929, § 32-402; 1941 Comp., § 72-102; 1953 Comp., § 68-1-2.

### **ANNOTATIONS**

**Cross-references.** - As to regulation of use of state highways by public utilities, see 67-3-12C and 67-3-41 NMSA 1978.

As to appropriation of water rights, see 72-5-1 NMSA 1978 et seq.

**This section and 62-1-3 NMSA 1978 must be construed together.** City of Roswell v. Mountain States Tel. & Tel. Co., 78 F.2d 379 (10th Cir. 1935).

**Provisions applicable to telephone utilities.** - Sections 62-1-1 to 62-1-3 NMSA 1978 are applicable to telephone utilities. 1963-64 Op. Att'y Gen. No. 63-66.

**Law reviews.** - For article, "Water Requirements for Coal-fired Power Plants," see 24 Nat. Resources J. 137 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 25 Am. Jur. 2d Easements § 81; 26 Am. Jur. 2d Electricity, Gas and Steam § 18; 61 Am. Jur. 2d Pipelines § 27; 74 Am. Jur. 2d Telecommunications § 15.

Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 A.L.R.4th 602.

29 C.J.S. Electricity §§ 15, 16; 38 C.J.S. Gas § 11; 86 C.J.S. Telegraphs, Telephones, Radio, and Television §§ 22, 41, 42, 44.

### **62-1-3. Use of highways and streets; power of county commissioners.**

The boards of county commissioners of the several counties are authorized to permit corporations organized pursuant to Section 62-1-1 NMSA 1978, public utilities under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] and companies that provide public telecommunications service pursuant to the New Mexico Telecommunications Act [63-9A-1 to 63-9A-20 NMSA 1978] to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures; provided that such use shall not unnecessarily obstruct public travel and provided further that the boards of county commissioners and municipal authorities of incorporated cities and towns are authorized to grant franchises not exceeding twenty-five years' duration to corporations for such purposes within their respective jurisdictions. A board of commissioners is authorized to impose charges for reasonable actual expenses incurred in the granting of any franchise pursuant to this section.

**History:** Laws 1909, ch. 141, § 3; Code 1915, § 1023; C.S. 1929, § 32-403; 1941 Comp., § 72-103; Laws 1949, ch. 8, § 1; 1953 Comp., § 68-1-3; Laws 1987, ch. 155, § 1.

#### **ANNOTATIONS**

**Cross-references.** - As to regulation of use of state highways by public utilities, see 67-3-12C, 67-3-41 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, substituted "corporations organized pursuant to Section 62-1-1 NMSA 1978 . . . Telecommunications Act" for "such corporation" near the beginning of the first sentence, added the second sentence and made minor changes in language throughout the section.

**This section and 62-1-2 NMSA 1978 must be construed together.** City of Roswell v. Mountain States Tel. & Tel. Co., 78 F.2d 379 (10th Cir. 1935).

**Application of provisions to pipeline companies.** - See 1973 Op. Att'y Gen. No. 73-26; 1957-58 Op. Att'y Gen. No. 57-124.

**And telephone companies.** - Sections 62-1-1 to 62-1-3 NMSA 1978 are applicable to telephone utilities. 1963-64 Op. Att'y Gen. No. 63-66.

**Meaning of "franchise".** - The term "franchise" was used in generally accepted sense of grant of right to use highways, streets and alleys, rather than exercise of police power respecting their use. The consent of the state becomes effective when the franchise is obtained. City of Roswell v. Mountain States Tel. & Tel. Co., 78 F.2d 379 (10th Cir. 1935).

**Highway acquired by prescription may be used for normal communication methods.** - A public highway acquired and established by prescription, and which was recognized and maintained by the corporate authorities of a county as a public highway, was in no way less than a public highway acquired by dedication, by condemnation or by authority of any other law of New Mexico. In any case, what was ordinarily acquired was an easement, by which the state or its political subdivisions were authorized by law to use the lands, lying within the boundaries of the streets and highways, for all lawful purposes consistent with every reasonable method of travel, transportation and communication for which public streets and highways are normally used. Hall v. Lea County Elec. Coop., 78 N.M. 792, 438 P.2d 632 (1968).

**Electric power line is permissible use of highway.** - The construction and maintenance of an electric power or transmission line, within the boundaries of a public highway, were consistent with the permissible uses to be made of a public highway easement and do not constitute an additional burden or servitude. Hall v. Lea County Elec. Coop., 78 N.M. 792, 438 P.2d 632 (1968).

**County regulations must be reasonable and related to health and safety.** - The statutory grant of regulatory powers to county commissions contained in this section is very general, but such regulations would have to be reasonable and related to public health and safety - in other words, to the design, construction, operation and maintenance of the facility. 1973 Op. Att'y Gen. No. 73-26.

**County may not impose franchise tax.** - A county, in the process of granting a franchise to a public utility for operation in the county, may not exact from the utility a franchise tax. 1957-58 Op. Att'y Gen. No. 57-51.

**Nor fees or rental charges.** - There is no statutory authority for a county to impose fees or rental charges on a utility holding a certificate of public convenience and necessity from the public service commission for use of rights-of-way of county roads. 1973 Op. Att'y Gen. No. 73-26 (issued prior to 1987 amendment).

**Nor regulate use of state highway.** - County commissioners have no right to grant any easement to a public utility over a state highway, the right-of-way of which came under the control of the state highway commission after 1917. 1933-34 Op. Att'y Gen. 89; 1973 Op. Att'y Gen. No. 73-26.

**County franchise authorizes occupying streets of later village.** - Telephone companies are included in the language of 3-42-2 NMSA 1978, and a franchise granted by a county board before incorporation of a village is adequate authority for occupying streets of the village and doing business until such time as the village itself offers a fair and equitable franchise for a maximum number of years and until a reasonable time has passed in which it may be considered by the company involved. Village of Ruidoso v. Ruidoso Tel. Co., 52 N.M. 415, 200 P.2d 713 (1948).

**But town need accept only works actually constructed or started under county franchise.** - In order to compel a town, incorporated after the granting of a franchise by the county commissioners, to accept such franchise, it was necessary that the holder of the franchise had erected or constructed, or in good faith commenced, the erection or construction of the works. Village of Hobbs v. Mann, 39 N.M. 76, 39 P.2d 1025 (1935).

**And city need not recognize franchise without construction in annexed territory.** - A city is not bound by law to recognize the county franchise issued to a private company to operate in territories which have subsequently been annexed by the city, in which territories no construction of utility facilities has been commenced. 1964 Op. Att'y Gen. No. 64-129.

**Cost of moving lines need not be reimbursed.** - Southwestern public service company is not entitled under its franchise and under applicable statutes to be reimbursed for the cost of moving its transmission lines. 1955-56 Op. Att'y Gen. No. 6270.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 39 Am. Jur. 2d Highways, Streets and Bridges §§ 215, 217, 220 to 234, 255.

Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 A.L.R.4th 602.

#### **62-1-4. Eminent domain; surveys; entry on property; crossing right-of-way of another corporation.**

A. Corporations organized pursuant to Section 62-1-1 NMSA 1978 are authorized to enter upon any property belonging to the state or to persons, firms or corporations for the purpose of making surveys and from time to time to appropriate so much of such property, not exceeding a strip one hundred feet wide in any one place, as may be necessary for their purpose. The corporations have the right of access to such property to construct and place their lines, pipes, poles, cables, conduits, towers, stations, fixtures, appliances and other structures and to repair them. If a corporation cannot agree with the owners as to a right-of-way or the compensation for a right-of-way, the corporation may proceed to obtain the right-of-way in the manner provided by law for condemnation of such property. Where it is necessary to cross the right-of-way of another corporation, the crossing shall be effected either by mutual agreement or in the manner now provided by law for the crossing of one railroad by another railroad; provided that the construction of any electric transmission lines crossing the right-of-way of a railroad shall comply with the minimum standards of the national electric safety code. When it is necessary for a corporation to construct any transmission line and associated facilities for the transmission of electrical power requiring a width for right-of-way of greater than one hundred feet, unless that width is agreed to by the parties, the applicant for the right-of-way shall apply to the New Mexico public utility commission as

provided in Section 62-9-3.2 NMSA 1978 for a determination of the width necessary for the right-of-way for the transmission line.

B. For the purposes of this section, "corporation" means individuals, firms, partnerships, companies, municipalities, rural electric cooperatives organized under Laws 1937, Chapter 100 or the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], lessees, trustees or receivers appointed by any court.

**History:** Laws 1909, ch. 141, § 4; Code 1915, § 1024; C.S. 1929, § 32-404; 1941 Comp., § 72-104; 1953 Comp., § 68-1-4; Laws 1980, ch. 20, § 17; 1993, ch. 282, § 19.

## ANNOTATIONS

**Cross-references.** - As to eminent domain proceedings, see Chapter 42A, NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, in Subsection A, substituted "corporation" and "right-of-way" for references to "they" and "the same", substituted "New Mexico public utility commission" for "public service commission" and made stylistic changes throughout the subsection; and deleted "whatsoever" at the end of Subsection B.

**Compiler's note.** - Laws 1937, ch. 100, referred to in Subsection B, was repealed by Laws 1939, ch. 47, § 34.

**Eminent domain matter of public policy.** - The granting of the power of eminent domain, and the parameters thereto, is a matter of public policy for the legislature's determination. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979).

**Section authorizes entry by utility.** - This section authorizes utility to enter land to survey and to appropriate land for the erection of power lines. *Zobel v. Public Serv. Co.*, 75 N.M. 22, 399 P.2d 922 (1965).

**Regardless of validity of utilities easement.** - That electric power utility may have entered onto premises under an easement which landowners alleged was invalid would not make unlawful utility's entry onto premises pursuant to statute granting public utilities such right of entry. *Garver v. Public Serv. Co.*, 77 N.M. 262, 421 P.2d 788 (1966).

**And gives right to damages in inverse condemnation.** - This section gives the right to recover damages in inverse condemnation. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

**Authorized foreign public utility may exercise eminent domain.** - Under 53-17-2 and 62-1-1 NMSA 1978 and this section, a foreign public utility authorized to do



business in this state has the same right as a domestic public utility to exercise the power of eminent domain in this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979) See 62-1-1.1 NMSA 1978.

**Supervision of foreign public utilities.** - Foreign public utilities authorized to do business in this state are subject to the same supervision as utilities incorporated under the laws of this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979) See 62-1-1.1 NMSA 1978.

**Authorized condemner may be liable in trespass.** - An authorized condemner may be liable in trespass to a property owner for taking more land than is reasonably necessary or for causing excessive damage by the manner in which the taking occurs, but only when there is evidence of fraud, bad faith or gross abuse of discretion. *North v. Public Serv. Co.*, 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

**Damages for trespass when authorized condemner is liable** cover only that portion of the damage over and above what results from the taking itself. *North v. Public Serv. Co.*, 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

**Procedure for compensation for prior entry is exclusive.** - In those jurisdictions in which there may be a constitutional taking of property by virtue of an exercise of the power of eminent domain prior to the payment of compensation, such procedure is justified by reason of legislative provision for an adequate method of obtaining just compensation by the owner. Under such circumstances the statutory remedy is deemed exclusive, and the owner is prevented from asserting the ordinary common-law actions arising from interference with his title or possession. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

**And the landowner cannot assert a common-law action for damages.** *Zobel v. Public Serv. Co.*, 75 N.M. 22, 399 P.2d 922 (1965).

**But trespass lies where there is no right to condemn.** - Where parties are mistaken in their belief that they had the right to condemn, a trespass action would be proper. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

**When consequential damages permitted.** - Where a utility takes possession of property and grades roads outside the 100-foot easement allowed by 62-1-4 NMSA 1978, the condemnees are entitled to consequential damages if they can prove that the value of their property depreciated by reason of the entry and grading. *El Paso Elec. v. Real Estate Mart, Inc.*, 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

**Stipulation as to power of court to award damages held binding.** - Stipulation is binding on the parties and properly given effect on remand where it was agreed that if a gas utility seeking to enjoin erection of a dwelling over its main line was found not to have a prescriptive easement, evidence of damages for the line crossing defendant's

property would be considered by the court. *Southern Union Gas Co. v. Cantrell*, 57 N.M. 612, 261 P.2d 645 (1953).

**Condemnees may appeal although warrants have been issued to attorneys. -**

Where the clerk issued warrants to attorneys for condemnees for amounts of awards in eminent domain, but these warrants were not delivered to or endorsed by condemnees and funds that were deposited with clerk remained in hands of clerk, condemnees had not received benefit from judgment and were not barred from appealing judgment. *AT & T Co. v. Walker*, 77 N.M. 755, 427 P.2d 267 (1967).

**As to right to trial by jury, and waiver thereof,** see *El Paso Elec. v. Real Estate Mart, Inc.*, 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

**Law reviews. -** For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references. -** 26 Am. Jur. 2d Eminent Domain §§ 20, 30, 37, 112; 64 Am. Jur. 2d Public Utilities §§ 300, 312.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's power of eminent domain, 87 A.L.R.3d 1265.

Un sightliness of powerline or other wire, or related structure, as element or damages in easement condemnation proceeding, 97 A.L.R.3d 587.

Eminent domain: review of electric power company's location of transmission line for which condemnation is sought, 19 A.L.R.4th 1026.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Eminent Domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

Validity and construction of provision of Cable Communications Policy Act (47 USC § 541(a)(2)) allowing cable companies access to utility easements on private property, 113 A.L.R. Fed. 523.

29A C.J.S. Eminent Domain §§ 25, 207, 213, 219.

## **62-1-5. [General powers.]**

In addition to the powers conferred by the general incorporation laws of the state, any corporation for one or more of the purposes mentioned in Section 62-1-1 NMSA 1978 organized under the laws of New Mexico may construct, maintain, extend, own, purchase or lease any plant, line or lines whether wholly within or wholly or partly

without this state, and shall have the power to connect with or attach to the line or lines of other corporations or individuals, to join with other corporations or individuals in constructing, maintaining or operating such line or lines upon such terms as may be agreed upon, and to consolidate with other corporations organized for similar purposes under the laws of this state or of any other territory, state or country and to purchase, hold, own and vote the stock or securities of other corporations.

**History:** Laws 1909, ch. 141, § 5; Code 1915, § 1025; C.S. 1929, § 32-405; 1941 Comp., § 72-105; 1953 Comp., § 68-1-5.

## ANNOTATIONS

**A public utility may require a deposit** to assure payment of accumulating charges for service or for protection of utility-owned equipment such as meters. 1957-58 Op. Att'y Gen. No. 57-101.

A public service company may enforce a regulation requiring a customer to make a reasonable deposit or payment in advance. Such a regulation enables the company to assure itself of compensation for its service and to protect itself against unknown or irresponsible persons. 1957-58 Op. Att'y Gen. No. 57-101.

### **62-1-6. Foreign municipal corporation; ownership; supervision.**

A. Any municipal corporation located in another state and within twenty-five miles of the boundary of the state of New Mexico that has heretofore acquired or hereafter acquires property and facilities for the production, transmission and distribution of electricity, a part of which property and facilities is located in New Mexico, has full rights to own the property and facilities in New Mexico and to enjoy and use the property and facilities in all respects as might a private owner situated in New Mexico. The New Mexico public utility commission shall have general and exclusive power and jurisdiction to regulate and supervise the rates charged and service regulations made by such municipal corporations for electricity supplied by them to consumers in New Mexico in the manner provided for regulation and supervision of rates and service regulations for private corporations under the provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] to the same extent that it has now or hereafter may have jurisdiction over private utility corporations, and to do all things necessary and convenient in the exercise of that power and jurisdiction. The municipal corporation shall be subject to the laws of the state of New Mexico now existing or hereafter amended or enacted as to foreign corporations, shall designate a statutory agent resident in New Mexico upon whom process against the municipal corporation may be served and may sue and be sued in this state as a foreign corporation.

B. The state and its political subdivisions, notwithstanding any provisions contained in Chapter 62, Article 1 NMSA 1978, shall assess for taxation the property of any such foreign municipal corporation and shall levy taxes against its property and facilities in

New Mexico in the same manner and to the same extent as electric properties owned by private corporations are now or may hereafter be taxed in this state.

C. The provisions of this section shall not operate to prevent a municipal corporation located in another state and further than twenty-five miles from the boundary of the state of New Mexico from owning any interest in a jointly owned generating facility.

**History:** 1941 Comp., § 72-106, enacted by Laws 1943, ch. 100, § 1; 1953 Comp., § 68-1-6; Laws 1979, ch. 260, § 16; 1993, ch. 282, § 20.

## ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, in Subsection A, rewrote the first sentence, divided the former second sentence into the present second and third sentences, in the present second sentence, substituted "New Mexico public utility commission" for "New Mexico public service commission", "them" for "such municipal corporation" preceding "to consumers", and "the Public Utility Act" for "Chapter 84 of the Laws of 1941", and in the present third sentence, added "The" at the beginning and deleted "foreign" preceding "municipal" near the end of the sentence; and, in Subsection B, deleted "of New Mexico" following "state", substituted "Chapter 62, Article 1 NMSA 1978" for "this act", and made minor stylistic changes.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 374, 385; 71 Am. Jur. 2d State and Local Taxation §§ 438 to 442.

73B C.J.S. Public Utilities §§ 72, 129 to 138; 84 C.J.S. Taxation §§ 118, 184, 427, 444.

### 62-1-7. [Applicability.]

That nothing in this act [62-1-6, 62-1-7 NMSA 1978] shall be construed to grant permission to any municipal corporation located outside the state of New Mexico to own or operate distribution facilities in New Mexico for the purpose of selling electricity to consumers in New Mexico who reside more than two (2) miles from the boundary of the state of New Mexico.

**History:** 1941 Comp., § 72-107, enacted by Laws 1943, ch. 100, § 2; 1953 Comp., § 68-1-7.

## ARTICLE 2 INCORPORATION AND POWERS OF WATERWORKS

### 62-2-1. [Incorporation.]

Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipelines, for the purpose of supplying

water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of state, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with the state corporation commission.

**History:** Laws 1887, ch. 12, § 1; C.L. 1897, § 468; Code 1915, § 1026; C.S. 1929, § 32-406; 1941 Comp., § 72-201; 1953 Comp., § 68-2-1.

## ANNOTATIONS

**Cross-references.** - As to municipal water facilities, see 3-27-1 to 3-27-9 NMSA 1978.

As to municipal water or natural gas associations, see Chapter 3, Article 28 NMSA 1978.

As to use of waters and regulation of water by municipalities, see 3-53-1 to 3-53-5 NMSA 1978.

As to certification of water and wastewater plant operators, see 61-33-1 to 61-33-9 NMSA 1978.

As to community springs, tanks, reservoirs and ponds, see 72-10-1 to 72-10-10 NMSA 1978.

**Compiler's note.** - Prior to the 1915 Code, this section provided for filing of articles with the secretary of the territory.

**Diversion of water for domestic purposes is public purpose.** - The diversion and distribution of water for irrigation and other domestic purposes is a public purpose. *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900), *aff'd*, 188 U.S. 545, 23 S. Ct. 338, 47 L. Ed. 588 (1903).

**And legislature has impliedly declared condemnation for water conveyance is for public use.** - The legislature, in 72-1-5 NMSA 1978, has given to persons, firms, associations and corporations the right to condemn land right-of-way for the purpose of conveying water for beneficial uses. Since the power of eminent domain cannot be exercised without a "public use" being present, the legislature has impliedly declared such a "public use" to be present in such conveyance of water. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

**Company seeking to divert water need not own lands to be irrigated.** - It is not necessary that the company seeking to divert the water be the owner of the lands to be irrigated, or be employed by the owners, provided the water is used beneficially within a

reasonable time. *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900), *aff'd*, 188 U.S. 545, 23 S. Ct. 338, 47 L. Ed. 588 (1903).

**Application need not be made in name of all persons to be benefited.** - Sections 62-2-1 to 62-2-22 NMSA 1978 relating to the incorporation of waterworks companies and the powers which such companies may exercise, do not require that an application to appropriate public waters for a beneficial use must be made by or in the names of all persons who may ultimately use or be benefited by such use. *Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771 (1966).

**Applicant may acquire right-of-way through existing ditch.** - An applicant for the appropriation of waters for irrigation purposes may acquire by condemnation proceedings the right to use of the project, and a right-of-way through an existing ditch or canal of another appropriator, by enlargement. 1915-16 Op. Att'y Gen. 92.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 78 Am. Jur. 2d Waterworks and Water Companies § 1 et seq.

Public utility acts, applicability to municipal corporation operating water plant, 18 A.L.R. 946.

Liability of water distributor for damage caused by water escaping from main, 20 A.L.R.3d 1294.

Water distributor's liability for injury due to condition of service lines, meters, and the like, which serve individual consumer, 20 A.L.R.3d 1363.

94 C.J.S. Waters § 248.

## **62-2-2. [Contents of articles of incorporation.]**

Such articles shall set forth:

- A. the full names of the incorporators, and the corporate name of such company;
- B. the purpose or purposes for which such company is formed, and if the object be to construct reservoirs and canals, or ditches and pipelines for any of the purposes herein specified, the beginning point and terminus of the main line of such canals and ditches and pipelines, and the general course, direction and length thereof shall be stated;
- C. the amount of the capital stock and the number of shares as definitely as practicable;
- D. the term of existence of the company, which shall not exceed fifty years;
- E. the number of directors, and the names of those who shall manage the business of the company for the first year;

F. the name of the city or town and county in which the principal place of business of the company is to be located.

**History:** Laws 1887, ch. 12, § 2; C.L. 1897, § 469; Code 1915, § 1027; C.S. 1929, § 32-407; 1941 Comp., § 72-202; 1953 Comp., § 68-2-2.

### **62-2-3. [Filing copy with county clerk; certified copies; evidence.]**

A duly certified copy of such articles, executed by the state corporation commission shall be filed in the office of the county clerk of each county through or into which any such canal or ditch or pipeline may run, or such reservoir may be established, or in which any such company may desire to transact business, and duly certified copies of such articles shall be given by said commission, or said county clerks, on the payment of the fees allowed by law, which copies shall be received as evidence in any of the courts of this state.

**History:** Laws 1887, ch. 12, § 3; C.L. 1897, § 470; Code 1915, § 1028; C.S. 1929, § 32-408; 1941 Comp., § 72-203; 1953 Comp., § 68-2-3.

## **ANNOTATIONS**

**Cross-references.** - For fees of corporation commission, see 53-2-1 NMSA 1978.

**Compiler's note.** - Prior to the 1915 Code, "state corporation commission" read "secretary of the territory" and "county clerk" read "probate clerk."

### **62-2-4. [General powers.]**

When articles of incorporation shall have been executed, acknowledged and filed, as herein required, the persons therein named shall, with their associates and successors, be deemed a body politic and corporate, by the name stated in such articles, for and during the period named therein, and shall have power to sue and be sued, in any court; to adopt and use a common seal and alter the same at pleasure; to purchase, acquire, hold, sell, mortgage and convey such real and personal estate as such corporation may require to successfully carry on and transact the objects for which it was formed; to appoint such officers, agents and servants as the business of the corporation may require, and exact of them such security as may be thought proper, and remove them at will; except, no director shall be removed from office unless by a two-third [two-thirds] vote of the whole number of directors; and to adopt bylaws, not inconsistent with the laws of this state for the organization of the company, the management of its business and property, the regulation of its affairs, the transfer of its stock and for carrying on all kinds of business within the objects and purposes of the corporation.

**History:** Laws 1887, ch. 12, § 4; C.L. 1897, § 471; Code 1915, § 1029; C.S. 1929, § 32-409; 1941 Comp., § 72-204; 1953 Comp., § 68-2-4.

## ANNOTATIONS

**Cross-references.** - As to power to borrow money, mortgage property and issue bonds, see 62-2-15 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 94 C.J.S. Waters §§ 254 to 259.

### 62-2-5. [Additional powers.]

Corporations formed under this article for the purpose of furnishing and supplying water for any of the purposes mentioned in Section 62-2-1 NMSA 1978, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

A. to cause such examinations and surveys for their proposed reservoirs, canals, pipelines and ditches to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants, to enter upon the lands or water of any person, or of this state;

B. to take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation;

C. to construct their canals, pipelines or ditches upon or along any stream of water;

D. to take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in Section 62-2-1 NMSA 1978, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this article provided: and provided, further, that no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted;

E. to furnish water for the purposes mentioned in Section 62-2-1 NMSA 1978, at such rates as the bylaws may prescribe; but equal rates shall be conceded to each class of consumers;

F. to enter upon and condemn and appropriate any lands, timber, stone, gravel or other material that may be necessary for the uses and purposes of said companies.

**History:** Laws 1887, ch. 12, § 17; C.L. 1897, § 484; Code 1915, § 1042; C.S. 1929, § 32-422; 1941 Comp., § 72-205; 1953 Comp., § 68-2-5.

## ANNOTATIONS

**Cross-references.** - As to eminent domain proceedings, see 62-2-16 to 62-2-18 and Chapter 42A NMSA 1978.



As to need for certificate of convenience and necessity before construction or operation of utility, see 62-9-1 NMSA 1978.

As to excavation damage to underground utility lines and related facilities, see 62-14-1 to 62-14-8 NMSA 1978.

As to appropriation of water, see 72-5-1 to 72-5-39 NMSA 1978.

**Meaning of "this article".** - The 1915 Code compilers substituted the words "this article" for "this act." They presumably refer to Code 1915, ch. 23, art. 3, the effective provisions of which are compiled as 62-1-1 to 62-1-5 and 62-2-1 to 62-2-22 NMSA 1978, while the original reference to "this act" meant Laws 1887, ch. 12, the effective provisions of which are compiled as 62-2-1 to 62-2-19, 62-2-21 and 62-2-22 NMSA 1978.

**Irrigation companies may go upon private lands** to make a preliminary survey for right-of-way by eminent domain, to divert surplus water, unappropriated and subject to diversion, for this is a public purpose, and it is not necessary that the distributing company shall itself be a consumer, provided the water is used beneficially within a reasonable time. The burden of proving such facts is with the company. *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900), *aff'd*, 188 U.S. 545, 23 S. Ct. 338, 47 L. Ed. 588 (1903).

**Appropriator not limited to lands in original application.** - An appropriator may use water for lands in addition to those specified in original application. 1909-12 Op. Att'y Gen. 19.

**Strangers may not raise question of interference with other appropriators.** - The question whether the appropriation of water interferes with the rights of other appropriators cannot be raised by strangers not parties to the action. *Albuquerque Land & Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900), *aff'd*, 188 U.S. 545, 23 S. Ct. 338, 47 L. Ed. 588 (1903).

## **62-2-6. [Directors; qualifications; election.]**

The corporate powers of any corporation formed under this article shall be exercised by a board of not less than three directors who shall be stockholders of the company, and a majority of them citizens of the United States, and at least one-third of whom shall be residents of this state. Such directors shall be elected annually, after the expiration of the term of the directors named in the articles of incorporation, at such time and place, and upon such notice, and in such mode as the bylaws of the company may provide; but all such elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be declared elected. When a vacancy occurs in the office of director by death, resignation or otherwise, such vacancy shall be filled for the remainder of the year in such manner as the bylaws shall prescribe. Should

there be no election of directors, on the day fixed in the bylaws for such election, such election may be held at such other time as the bylaws may designate, and the directors in office may continue to act until their successors are elected.

**History:** Laws 1887, ch. 12, § 5; C.L. 1897, § 472; Code 1915, § 1030; C.S. 1929, § 32-410; 1941 Comp., § 72-206; 1953 Comp., § 68-2-6.

## ANNOTATIONS

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

### **62-2-7. [Quorum in directors' meeting.]**

A majority of the whole number of directors shall form a board for the transaction of business, and a decision of a majority of the directors assembled as a board shall be valid as a corporate act.

**History:** Laws 1887, ch. 12, § 6; C.L. 1897, § 473; Code 1915, § 1031; C.S. 1929, § 32-411; 1941 Comp., § 72-207; 1953 Comp., § 68-2-7.

### **62-2-8. [Meetings of directors.]**

The first meeting of the board of directors shall be held at such time and place as may be agreed upon by a majority of the persons named as such in the articles of incorporation, and all subsequent meetings shall be at such times and places as the bylaws may designate.

**History:** Laws 1887, ch. 12, § 7; C.L. 1897, § 474; Code 1915, § 1032; C.S. 1929, § 32-412; 1941 Comp., § 72-208; 1953 Comp., § 68-2-8.

### **62-2-9. [Transfer of shares.]**

The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the bylaws of the company; but no transfer shall be valid except between the parties thereto, until the same shall be so entered on the books of the company as to show the names of the parties by and to whom transferred, the number and designation of the shares and the date of transfer.

**History:** Laws 1887, ch. 12, § 8; C.L. 1897, § 475; Code 1915, § 1033; C.S. 1929, § 32-413; 1941 Comp., § 72-209; 1953 Comp., § 68-2-9.

## ANNOTATIONS

**Cross-references.** - As to investment securities provisions of Uniform Commercial Code, see 55-8-101 to 55-8-406 NMSA 1978.

## **62-2-10. [Subscriptions to stock; payment; notice of assessment; sale of stock.]**

The directors shall have power to call in and demand from the stockholders the sum by them subscribed, at such times and in such payments as they may deem proper; notice of such assessment shall be given to the stockholders personally, or shall be published once a week for at least four weeks, in some newspaper published at the place designated as the principal place of business of the corporation, or if none be published there, then by posting such notice for that period, in at least six of the most public places in the county in which said principal place of business of the corporation is located. If, after such notice has been given, any stockholder shall make default in the payment of the assessment upon the shares held by him, so many of such shares may be sold as will be necessary for the payment of the assessment on all shares held by him. The sale of said shares shall be made as prescribed in the bylaws of the company, but all such sales shall be made at public auction, to the highest bidder, after notice thereof shall have been given as in this section provided for notice to stockholders of assessments; and the person who will agree to pay the assessment due, together with the expense of advertising, and other costs of such sale, for the smallest number of whole shares, shall be deemed the highest bidder. A complete record shall be kept of all assessments and sales of stock.

**History:** Laws 1887, ch. 12, § 9; C.L. 1897, § 476; Code 1915, § 1034; C.S. 1929, § 32-414; 1941 Comp., § 72-210; 1953 Comp., § 68-2-10.

### **ANNOTATIONS**

**Cross-references.** - As to legal newspapers, see 14-11-2 NMSA 1978.

**Bylaw providing for notice by registered mail is insufficient.** - Provision in bylaw of a water company for notice of assessment by registered mail is insufficient notice under this section. 1917-18 Op. Att'y Gen. 22.

**This section does not contemplate any surplus** from sale, as the bid must be for the payment of the assessment and costs for the smallest number of shares. 1917-18 Op. Att'y Gen. 22.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 94 C.J.S. Waters §§ 234, 293.

## **62-2-11. [Increase or decrease of capital stock.]**

The capital stock of any such corporation may be increased or diminished at any meeting of the stockholders, but may only be done by a two-thirds vote of all the shares of stock, but in no case shall the capital stock be reduced below the outstanding indebtedness and liabilities of the corporation.

**History:** Laws 1887, ch. 12, § 12; C.L. 1897, § 479; Code 1915, § 1037; C.S. 1929, § 32-417; 1941 Comp., § 72-212; 1953 Comp., § 68-2-12.

## **62-2-12. [Commencement of business within one year.]**

If any corporation formed under this article shall not organize and commence the transaction of its business within one year from the time of filing its articles of incorporation, its corporate powers shall cease.

**History:** Laws 1887, ch. 12, § 13; C.L. 1897, § 480; Code 1915, § 1038; C.S. 1929, § 32-418; 1941 Comp., § 72-213; 1953 Comp., § 68-2-13.

### **ANNOTATIONS**

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

## **62-2-13. [Voluntary dissolution.]**

Any corporation formed under this article or formed under any general law of this state, the principal business of which has been the construction and maintenance of dams, reservoirs, ditches and canals, and the distribution of water there-through for public use, may be disincorporated by a two-thirds vote of all the stockholders, and when such vote shall have been taken, notice thereof shall be given as required, by which notice shall state when and at what place application will be made to the district court or the judge thereof to have such corporation judicially declared dissolved, and at such time and place or at such other time and place to which said matter may be adjourned by the court or judge, such court or judge may hear evidence touching the matter, and if satisfied that all debts and liabilities of such corporation have been paid or that the same can be paid, settled, satisfied or compromised by the sale of the tangible assets of such corporation, and that the requisite vote in favor of dissolution has been duly given, such court or judge shall enter an order declaring the corporation dissolved, and thereafter the directors or trustees of such corporation shall sell and dispose of the tangible property thereof or such portion of the same as may be necessary to liquidate the indebtedness of the company, and apply the proceeds realized from such sale to the payment, satisfaction or compromise of the indebtedness of such corporation, the balance remaining to be distributed to the stockholders thereof in accordance with Section 62-2-14 NMSA 1978.

**History:** Laws 1887, ch. 12, § 14; C.L. 1897, § 481; Laws 1905, ch. 92, § 1; Code 1915, § 1039; C.S. 1929, § 32-419; 1941 Comp., § 72-214; 1953 Comp., § 68-2-14.

### **ANNOTATIONS**

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 93 C.J.S. Waters §§ 68, 69, 159; 94 C.J.S. Waters §§ 330, 332.

### **62-2-14. [Powers of directors after dissolution.]**

Upon the dissolution of any corporation, the directors at the time of dissolution shall be directors and agents of the creditors and stockholders of the corporation dissolved, and shall have full power to sue for and recover the debts and property of the corporation, by the name of the directors of such corporation, collect and pay any outstanding debts, settle its affairs and divide amongst the stockholders the money and property remaining after the payment of all debts, liabilities and necessary expenses.

**History:** Laws 1887, ch. 12, § 15; C.L. 1897, § 482; Code 1915, § 1040; C.S. 1929, § 32-420; 1941 Comp., § 72-215; 1953 Comp., § 68-2-15.

### **62-2-15. [Borrowing money; bonds; mortgages.]**

Corporations formed under this article shall have power to borrow such sums of money as may be necessary for the construction, completion or operation of their reservoirs, canals and ditches, or pipelines, or the purchase of any lands, water rights or other property necessary, in order to carry out the objects for which they were incorporated; and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted for the purpose aforesaid.

**History:** Laws 1887, ch. 12, § 16; C.L. 1897, § 483; Code 1915, § 1041; C.S. 1929, § 32-421; Laws 1941, ch. 15, § 2; 1941 Comp., § 72-216; 1953 Comp., § 68-2-16.

## **ANNOTATIONS**

**Cross-references.** - As to general power to mortgage property, see 62-2-4 NMSA 1978.

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 58 Am. Jur. 2d Occupations, Trades and Professions §§ 70, 73, 91, 100, 123, 127.

93 C.J.S. Waters §§ 190, 218; 94 C.J.S. Waters §§ 259, 326.

### **62-2-16. Eminent domain.**

Corporations formed pursuant to Sections 62-2-1 through 62-2-22 NMSA 1978 have the power of eminent domain for the purpose of carrying out the provisions of Sections 62-2-1 through 62-2-22 NMSA 1978, and in the manner provided by the Eminent Domain Code [42A-1-1 to 42A-1-33 NMSA 1978].

**History:** 1978 Comp., § 62-2-16, enacted by Laws 1981, ch. 125, § 50.

## ANNOTATIONS

**Cross-references.** - As to eminent domain proceedings generally, see Chapter 42A NMSA 1978.

**Repeals and reenactments.** - Laws 1981, ch. 125, § 50, repeals former 62-2-16 NMSA 1978, relating to the power of eminent domain, and enacts the above section.

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

**Section grants power only to corporations organized under article.** - The powers of this section are limited to corporations incorporated under 62-2-1 through 62-2-22 NMSA 1978. 1967 Op. Att'y Gen. No. 67-50 (mutual domestic water or sewage works association has no power of eminent domain).

**Right to condemn implies conveying water is "public use".** - The legislature, in 72-1-5 NMSA 1978, has given to persons, firms, associations and corporations the right to condemn land right-of-way for the purpose of conveying water for beneficial uses. Since the power of eminent domain cannot be exercised without a "public use" being present, the legislature has impliedly declared such a "public use" to be present in such conveyance of water. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 26 Am. Jur. 2d Eminent Domain §§ 189 to 198.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

93 C.J.S. Waters § 88; 94 C.J.S. Waters §§ 228, 247, 255.

### **62-2-17. [Construction of works; eminent domain.]**

Such corporations shall be authorized to construct such branch, lateral or side canals, pipelines or ditches, as may be necessary to successfully accomplish the objects and purposes for which they shall be organized, and shall have the same rights and powers as to the taking and appropriating of land and other property, to be used therefor, as is given and conferred by the next preceding section [62-2-16 NMSA 1978], or other sections of this article.

**History:** Laws 1887, ch. 12, § 19; C.L. 1897, § 486; Code 1915, § 1044; C.S. 1929, § 32-424; 1941 Comp., § 72-218; 1953 Comp., § 68-2-18.

## ANNOTATIONS

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

**Section grants power only to corporations organized under article.** - The powers of this section are limited to corporations incorporated under 62-2-1 to 62-2-22 NMSA 1978. 1967 Op. Att'y Gen. No. 67-50 (mutual domestic water or sewage works association has no power of eminent domain).

**Right to condemn implies conveyance of water is "public use".** - The legislature, in 72-1-5 NMSA 1978, has given to persons, firms, associations and corporations, the right to condemn land right-of-way for the purpose of conveying water for beneficial uses. Since the power of eminent domain cannot be exercised without a "public use" being present, the legislature has impliedly declared such a "public use" to be present in such conveyance of water. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

## **62-2-18. Acquiring land of minors and incapacitated persons.**

Should it become necessary for any such corporation to acquire the title to any land or other property belonging to any minor or incapacitated person, or which may belong to the estate of any deceased person, the title to any such property may be obtained in such manner as may be provided by law for the conveyance, sale or disposal of the land or other property belonging to minors or incapacitated persons or the estates of deceased persons.

**History:** Laws 1887, ch. 12, § 20; C.L. 1897, § 487; Code 1915, § 1045; C.S. 1929, § 32-425; 1941 Comp., § 72-219; 1953 Comp., § 68-2-19; Laws 1975, ch. 257, § 8-124.

### **ANNOTATIONS**

**Cross-references.** - As to administration of decedent's estates, see 45-3-101 to 45-3-1302 NMSA 1978.

As to protection of lands of minors or incapacitated persons, see 45-5-401 to 45-5-432 NMSA 1978.

## **62-2-19. [Use of materials on state lands.]**

Corporations formed under this article for the purpose of furnishing or supplying water for any of the purposes mentioned in Section 62-2-1 NMSA 1978, shall have the right to use any timber, stone or other materials upon lands belonging to the state, and along the line of their canals or ditches, or in the vicinity of such reservoirs as may be necessary in the construction thereof.

**History:** Laws 1887, ch. 12, § 21; C.L. 1897, § 488; Code 1915, § 1046; C.S. 1929, § 32-426; 1941 Comp., § 72-220; 1953 Comp., § 68-2-20.

## ANNOTATIONS

**Compiler's note.** - Prior to the 1915 Code, this section contained the provision "shall have the right and privilege of constructing their reservoirs, canals, pipelines or ditches on or over any of the lands now belonging to this territory, or which may hereafter become the property of the territory."

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

### **62-2-20. [Corporations for serving cities and towns; rights and privileges.]**

All corporations which have been heretofore or may hereafter be formed under the laws of New Mexico for the purpose of supplying water for domestic, irrigating or manufacturing purposes, for cities or towns, with a population of three thousand persons or more, shall have all the powers and shall be entitled to all the rights and privileges so far as they may be necessary for the transaction of the business of any and all such corporations as are conferred on railroad companies.

**History:** Laws 1884, ch. 41, § 1; C.L. 1884, § 231; C.L. 1897, § 467; Code 1915, § 1047; C.S. 1929, § 32-427; 1941 Comp., § 72-221; 1953 Comp., § 68-2-21.

## ANNOTATIONS

**Cross-references.** - As to powers, rights and privileges of railroad companies, see N.M. Const., art. XI, §§ 10, 17; 63-2-1 to 63-2-18 NMSA 1978.

**Failure to use does not lose right to appropriated water.** - Failure to use water rightfully appropriated does not cause a loss of such property right. 1914 Op. Att'y Gen. 29.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Waterworks as public building, 19 A.L.R. 547.

Liability of water company to private owner for breach of its contract with municipality to supply pressure for fire purposes, 62 A.L.R. 1205.

Right to cut off water supply because of failure to pay sewer service charge, 26 A.L.R.2d 1359.

94 C.J.S. Waters § 254.

### **62-2-21. [Corporations for serving cities and towns; laying mains in streets; service.]**



Corporations formed under this article for the purpose of supplying water to any city, town or the inhabitants thereof for any purpose, may lay their mains or pipes in, along and upon any of the public streets or alleys of such city or town, subject to such regulations as may be provided by the corporate authorities of such city or town; and may furnish and supply such city or town or the inhabitants thereof, with water, upon such conditions and terms as may be fixed by such corporations, or as may be agreed to by the consumers and such corporations.

**History:** Laws 1887, ch. 12, § 24; C.L. 1897, § 491; Code 1915, § 1048; C.S. 1929, § 32-428; 1941 Comp., § 72-222; 1953 Comp., § 68-2-22.

## ANNOTATIONS

**Meaning of "this article".** - See same catchline in notes to 62-2-5 NMSA 1978.

**Franchise may be granted without referendum.** - A franchise to maintain and operate an existing water plant and to make betterments may be granted by ordinance by a city without a referendum. *Asplund v. City of Santa Fe*, 31 N.M. 291, 244 P. 1067 (1926).

**City is estopped to deny mutual agreements.** - A private waterworks company having agreed to furnish water to a city for 25 years, and the city having agreed not to operate waterworks in or near the town for the same time, and to rent hydrants, is estopped to deny that it operates under the contract. *Bankers' Trust Co. v. City of Raton*, 258 U.S. 328, 42 S. Ct. 340, 66 L. Ed. 642 (1922).

**But may require removal of system after franchise expires.** - A municipality cannot be enjoined from requiring the removal from the streets of the system of a waterworks company whose franchise has expired. *Bankers' Trust Co. v. City of Raton*, 258 U.S. 328, 42 S. Ct. 340, 66 L. Ed. 642 (1922).

## 62-2-22. [Irrigation companies; restrictions on use of water.]

That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any stream which by Section 73-2-9 NMSA 1978 has been declared a public acequia for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or companies shall interfere with the water rights of any individual or company, acquired prior to February 24, 1887.

**History:** Laws 1887, ch. 12, § 25; C.L. 1897, § 492; Code 1915, § 1049; C.S. 1929, § 32-429; 1941 Comp., § 72-223; 1953 Comp., § 68-2-23.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 45 Am. Jur. 2d Irrigation §§ 44 to 55.

Discrimination between property within and that outside municipality or other governmental district as to rates, 4 A.L.R.2d 595.

94 C.J.S. Waters §§ 314 to 368.

## **ARTICLE 3**

# **PUBLIC UTILITY ACT; PREAMBLE AND DEFINITIONS**

### **62-3-1. Declaration of policy.**

A. Public utilities, as defined in Section 62-3-3 New Mexico Statutes Annotated, 1978 Compilation, are affected with the public interest in that, among other things:

(1) a substantial portion of their business and activities involves the rendition of essential public services to a large number of the general public;

(2) their financing involves the investment of large sums of money, including capital obtained from many members of the general public; and

(3) the development and extension of their business directly affects the development, growth and expansion of the general welfare, business and industry of the state.

B. It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry.

**History:** 1953 Comp., § 68-3-1, enacted by Laws 1967, ch. 96, § 2.

### **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1967, ch. 96, § 2, repeals former 68-3-1, 1953 Comp., relating to declaration of policy, and enacts the above section.

**Goals of utility regulation have been established.** - The legislature has established certain goals which utility regulation and supervision are intended to achieve: reasonable and proper services should be made available to the public at fair, just and reasonable rates, and capital and investment should be encouraged and attracted for the plants and facilities which are to render that service. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Section lists some, but not all, points of public interest.** - A preamble is a declaration by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities within the statute to which it is prefixed; however, the points of public interest in this section are not the only ones contemplated by the legislature. *Griffith v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 113, 520 P.2d 269 (1974).

**Indians on reservation are not subject to regulation.** - Indians acquiring gas resources from sources wholly upon Indian reservations within the state of New Mexico are not public utilities subject to regulation by the public service commission of New Mexico. 1953-54 Op. Att'y Gen. No. 5690.

Indians operating a gas distribution system wholly on an Indian reservation regardless of the manner in which they acquire the gas on the reservation are not subject to the laws of the state of New Mexico in relation to regulation as public utilities. 1953-54 Op. Att'y Gen. No. 5690.

**And selling television signals does not require certificate.** - There does not exist any requirement that a business, consisting of sale of television transmission signals, obtain a certificate of convenience and necessity from either the public service commission of New Mexico or the corporation commission of New Mexico before commencing to do business. 1953-54 Op. Att'y Gen. No. 5942.

**But individual selling water to municipal utility is regulated utility.** - An individual operating a water service and selling at wholesale water to a municipally owned utility would be a public utility to the extent this operation effects the public interest and as such would be subject to the jurisdiction of the public service commission. 1953-54 Op. Att'y Gen. No. 5715.

**Supervision of foreign public utilities.** - Foreign public utilities authorized to do business in this state are subject to the same supervision as utilities incorporated under the laws of this state. *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 92 N.M. 581, 592 P.2d 181 (1979) See 62-1-1.1 NMSA 1978.

**Public service commission's powers only come from statute.** - The public service commission is an administrative body created by statute and must therefore find its authority and jurisdiction conferred upon it either expressly or by necessary implication from the same statutory authority. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**General jurisdiction does not cover water and sanitation districts.** - The legislature did not intend to place water and sanitation districts under the general jurisdiction of the public service commission. 1971 Op. Att'y Gen. No. 71-56.

**But it is given jurisdiction of water and sanitation district rates.** - Water and sanitation districts have not been declared to be subject to the jurisdiction of the public

service commission except in the limited area of approving the district board's rates, tolls and charges. 1971 Op. Att'y Gen. No. 71-56. See 73-21-16L NMSA 1978.

**It may not distinguish between forms of ownership in rate-making.** - The New Mexico legislature has made no distinction between public utilities operated as individuals, firms, partnerships, companies or corporations. Nowhere in the New Mexico Public Utility Act is the commission given authority, for the purpose of rate-making, to make a distinction between a public utility operated as a corporation from one operated as a sole proprietorship. *Moyston v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 146, 412 P.2d 840 (1966).

**Nor order that refund be passed on to consumers.** - Public service commission has no express or implied statutory authority to order the flow-through of refunds to electric company from power supplier to consumers. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Where refund was not trust fund for consumers.** - Where refund was ordered paid over to power company by the federal power commission without any restrictions, and there was nothing in the order indicating an intention on the part of the commission to create a "trust fund" for the benefit of the ultimate consumers, the refund did not constitute a trust fund belonging to company's customers. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Charitable contributions and lobbying expenditures not passable to consumers.** - A commission order which essentially prohibited utility companies from including charitable contributions and lobbying expenditures in their cost of service, and from thereby passing those expenses on to the ratepayers was a reasonable exercise of the commission's authority pursuant to Subsection B. *El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n*, 103 N.M. 300, 706 P.2d 511 (1985).

**Advertising costs passable to consumers.** - A commission order which allowed utility companies to include in their cost of service, and pass on to their ratepayers, expenditures for "informational" advertising (e.g., safety, billing practices, etc.), but not expenditures for "institutional" advertising (e.g., enhancement of corporate image), and which required that a utility show by "clear and convincing" evidence that an advertising expense is allowable was a reasonable exercise of the commission's authority pursuant to Subsection B, to insure that utility services are available "at fair, just and reasonable rates." *El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n*, 103 N.M. 300, 706 P.2d 511 (1985).

**Lowering gas rate to reimburse for overpayment is subject to bankruptcy stay provisions.** - Lowering of gas rate to reimburse customers for previous overpayments is not a rate setting function of the Public Service Commission and, as such, was subject to bankruptcy stay provisions. *In re Jal Gas Co.*, 44 Bankr. 91 (Bankr. D.N.M. 1984).

**Financial affairs of public utilities are strictly regulated.** - It is the public policy of the state to require strict regulation of the financial affairs of public utilities, to the end that they may be adequately financed and, among other things, render service at reasonable rates. *Hogue v. Superior Utils., Inc.*, 53 N.M. 452, 210 P.2d 938 (1949).

**Both ratepayers and investors must be justly treated.** - In the determining of a proper rate of return under the statute, enough actual dollars must be produced that both ratepayers and investors are justly and reasonably treated. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Commission is vested with considerable discretion** in determining whether a rate to be received and charged is just and reasonable. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**Commission not limited in factors to be considered in setting rates.** - Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the commission in ascertaining the rate base of a utility; nor does the spirit of the statute tie the commission down to the consideration of a single factor in establishing rates. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**Commission must consider income taxes in fixing rates.** - Rates which failed entirely to take federal and state income taxes to which unincorporated utility's operations had been subjected into account as operating expenses are unfair, unjust, unreasonable and discriminatory, and an amount equal to the tax the utility would pay, if incorporated, was a reasonable and realistic amount to be deducted from the utility's taxable income for rate-making purposes. *Moyston v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 146, 412 P.2d 840 (1966).

**Evidence must show rate fixed is reasonable and will achieve goals.** - District court's holding below that commission's order was unreasonable and unlawful because it did not simply turn the cost of capital percentage directly into a rate of return was upheld by supreme court because it found there was little or no evidence that the particular rate chosen by the commission would achieve the statutory goals and therefore was unreasonable. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**And its valuation methods must be supported by substantial evidence.** - Where gas company seeking rate increase proposed to trend the general plant account items by using a nationally recognized index, but the commission instead inserted its own method - to simply use the untrended original cost, although the witness who strongly supported this approach admitted that he did not know whether this would accurately establish the reproduction cost of the items, the court held the commission's order was unreasonable, being unsupported by substantial evidence. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**It may not remove entire construction item because interest was included.** - The district court erred in failing to hold unreasonable and unlawful the commission's removal of \$673,574 of construction work in progress from the company's rate base on the reasoning that it had included the interest on that amount, \$4904.62, when the object was to determine accurately the value of the company's property. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Utility cannot contract against its negligence in performing duties.** - A public service corporation, or a public utility such as an electric company, cannot contract against its negligence in the regular course of its business or in performing one of its duties of public service or where a public duty is owed or where public interest is involved. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Requiring exhaustion of administrative remedies is constitutional.** - The requirement of the Public Utility Act that a person first exhaust his administrative remedy before resorting to the courts does not violate N.M. Const., art. VI, § 13, granting general jurisdiction to the district courts except as elsewhere limited in such constitution. *Smith v. Southern Union Gas Co.*, 58 N.M. 197, 269 P.2d 745 (1954).

**Procedure may not be changed arbitrarily.** - Although the public service commission should be able to change its procedure, it should not arbitrarily or capriciously do so without good reasons. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Motion to bring record of previous case before court properly stricken.** - It was not error on the part of the district court to strike the commission's motion for an amended praecipe, where this motion would have had the effect of bringing the record of a previous case before the court, and the record of that case was not a part of the record in the instant case. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Law reviews.** - For article, "The Regulation of Public Utilities," see 10 *Nat. Resources J.* 827 (1970).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 *Nat. Resources J.* 411 (1979).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 *N.M.L. Rev.* 287 (1979).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 *Nat. Resources J.* 851 (1986).

For article, "State Regulation in a Deregulated Environment: A State-Level Regulator's Lament," see 27 Nat. Resources J. 799 (1988).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

For note, "Administrative Law - The Constitutional Limits of the Power to Regulate: *Duquesne Light Co. v. Barasch*," 20 N.M.L. Rev. 199 (1990).

For article, "Current Utility Regulatory Practice from a Historical Perspective," see 32 Nat. Resources J. 289 (1992).

## **62-3-2. Objects and purposes; liberal interpretation; repeal of inconsistent statutory provisions.**

A. The following are the objects and purposes of this act.

(1) Experience has proven that electric service by rural electric cooperatives must be furnished under the regulation of the commission in order to effectuate the purposes of both the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], as amended, and the Public Utility Act, as amended, and that without extending the coverage of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended, to rural electric cooperatives, the declared policy of the Public Utility Act, as amended, and the general welfare, business and industry of the state may be frustrated.

(2) It is the declared policy of the state that preservation of the public health, safety and welfare, the interest of consumers and the interest of investor-members require that the construction, development and extension of utility plants and facilities be without unnecessary duplication and economic waste. Experience has proven that this purpose cannot be accomplished without bringing the rural electric cooperatives and persons heretofore recognized as public utilities into parity of treatment with respect to the commission's independent jurisdiction and power to prevent unreasonable interference between proposed and existing plants, lines and systems.

(3) Experience has also proven that rural electric cooperatives are substantially different from investor-owned utilities, particularly relative to setting rates. Under the Rural Electric Cooperative Act, rural electric cooperatives are nonprofit membership corporations whose members have direct control over the cooperative's rates through an elected board of trustees. Generally, consumers of the cooperative's power are members. In contrast, consumers of power from investor-owned utilities have no control over the setting of rates by such utilities which are profit motivated. Experience has proven that the costs to rural electric cooperatives and the public at large in complete government regulation of their rates is greatly disproportionate to the need and benefits of complete rate regulation and interferes with the setting of fair, just and reasonable rates to all utilities. Experience has shown that a rational basis exists to provide procedures for setting rates of rural electric cooperatives different from and more limited than those for setting rates of investor-owned utilities. Without limiting government

regulation of rate setting by rural electric cooperatives as provided by Section 62-8-7 NMSA 1978, the declared policy of the Public Utility Act, the provision of reasonable and proper utility services at fair, just and reasonable rates, and the general welfare, business and industry of the state may be frustrated.

(4) It is the intent of the legislature in enacting this statute to bring up to date the laws pertaining to public utilities and rural electric cooperatives so that the rural electric cooperative which is a public utility is subject to reasonable burdens and entitled to reasonable benefits which apply to public utilities generally, to insure more reasonable public regulation and supervision of public utilities, to facilitate the prevention of unnecessary duplication and economic waste between utility systems and to establish a system which will more adequately provide for the development and extension of reasonable and proper utility services at fair, just and reasonable rates. The accomplishment of this intent is necessary and vital to the preservation of the public health, safety and welfare.

B. This act shall be liberally construed to carry out its purposes.

C. Nothing contained in any other act governing the creation and operation of rural electric cooperatives which are public utilities, including Laws 1937, Chapter 100 and the Rural Electric Cooperative Act, as amended, shall be construed to conflict with any duty to which such a utility may be subject or with any benefit to which such a utility may be entitled under the Public Utility Act, as now or hereafter amended. In the event any provision of such other act, including Laws 1937, Chapter 100 or the Rural Electric Cooperative Act, as now or hereafter amended, is held to be repugnant to any provision of the Public Utility Act, as now or hereafter amended, the latter shall be controlling and the former is repealed to the extent of the repugnancy.

**History:** 1953 Comp., § 68-3-1.1, enacted by Laws 1967, ch. 96, § 9; 1985, ch. 176, § 1.

## ANNOTATIONS

**Cross-references.** - As to Public Utility Act repealing repugnant provisions of Rural Electric Cooperative Act, see 62-15-32 NMSA 1978.

**The 1985 amendment** deleted "hereby declared to be" following "The following are" and "1967" following "purposes of this" in the introductory paragraph of Subsection A, deleted "public service" preceding "commission" near the beginning of Subsection A(1), substituted "this purpose" for "such purpose", "plants" for "plant" and "systems" for "system" in the second sentence of Subsection A(2), added present Subsection A(3), renumbered former Subsection A(3) as present Subsection A(4), substituting "which is a public utility is subject to reasonable burdens and entitled to reasonable benefits which apply to public utilities generally, to insure more reasonable public regulation" for "subject to all the burdens and entitled to all the benefits which apply to public utilities generally, to insure more rigid public regulation" in that subsection, deleted "1967"



following "This" at the beginning of Subsection B, divided the former provisions of Subsection C into two sentences, substituting "operation of rural electric cooperatives which are public utilities" for "operation of public utilities brought under the regulation of the commission by virtue of this 1967 act" and deleting "and" following "hereafter amended" in the first sentence and substituting "is held to be" for "shall be held to be" and deleting "shall be, and" following "former" and "hereby" following "former is" in the second sentence of Subsection C.

**Severability clauses.** - Laws 1967, ch. 96, § 11, provides for the severability of the act if any part or application thereof is held invalid.

Laws 1985, ch. 176, § 3 provides for the severability of the act if any part or application thereof is held invalid.

**Compiler's note.** - Laws 1937, ch. 100, referred to in Subsection C, was repealed by Laws 1939, ch. 47, § 34, which also provided that Laws 1937, ch. 100, was to continue in full force and effect as to nonprofit electric membership corporations formed thereunder. See notes to 62-15-32 NMSA 1978.

**Meaning of "this act".** - The term "this act", referred to in Subsections A and B, first appears in Laws 1985, ch. 176, which is codified at 62-3-2 and 62-8-7 NMSA 1978, but is probably intended to be a reference to the Public Utility Act.

**Cooperatives may not be made utilities but excepted from regulations upon others.** - See same catchline in notes to 62-3-3 NMSA 1978.

**It was the intent of the legislature that the Public Utility Act be liberally construed.** 1969 Op. Att'y Gen. No. 69-81.

**Formerly, rural electric cooperatives were not regulated by public utilities commission.** - See Socorro Elec. Coop. v. Public Serv. Co., 66 N.M. 343, 348 P.2d 88 (1959).

**Commission may not order that refund be passed on to consumers.** - Public service commission has no express or implied statutory authority to order the flow-through of refunds to electric company from power supplier to consumers. New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 81 N.M. 683, 472 P.2d 648 (1970).

**Where refund was not trust fund for consumers.** - Where refund was ordered paid over to power company by the federal power commission without any restrictions, and there was nothing in the order indicating an intention on the part of the commission to create a "trust fund" for the benefit of the ultimate consumers, the refund did not constitute a trust fund belonging to company's customers. New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 81 N.M. 683, 472 P.2d 648 (1970).

**Law reviews.** - For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

### **62-3-2.1. Objects and purposes; liberal interpretation.**

A. The following are declared to be the objects and purposes of this 1985 act. Experience has proven that the costs to ratepayers of small water utilities with annual revenues of less than five hundred thousand dollars (\$500,000) and the public at large in complete government regulation of their rates is greatly disproportionate to the need and benefits of complete rate regulation and interferes with setting of fair, just and reasonable rates to all utilities. A rational basis exists to provide procedures for setting rates of such small water utilities different from and more limited than those for setting rates of other utilities. Without limiting government regulation of rate setting by small water utilities as provided by Section 62-8-7.1 NMSA 1978, the declared policy of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended, the provision of reasonable and proper utility services at fair, just and reasonable rates, and the general welfare, business and industry of the state may be frustrated.

B. The following are hereby declared to be the objects and purposes of these 1987 amendments to the Public Utility Act. Because small sewer utilities are similar to small water utilities, the costs to ratepayers of small sewer utilities with annual revenues of less than five hundred thousand dollars (\$500,000) and the public at large in complete government regulation of their rates is greatly disproportionate to the need and benefits of complete rate regulation and interferes with setting of fair, just and reasonable rates to all utilities. A rational basis exists to provide procedures for setting rates of such small sewer utilities different from and more limited than those for setting rates of other utilities. Without limiting government regulation of rate setting by small sewer utilities as provided by Section 62-8-7.1 NMSA 1978, the declared policy of the Public Utility Act, the provision of reasonable and proper utility services at fair, just and reasonable rates, and the general welfare, business and industry of the state may be frustrated.

C. The following are declared to be the objects and purposes of this 1991 act. Experience has proven that the construction, development and extension of proper plants and facilities cannot be accomplished without unnecessary duplication and economic waste within areas certificated to water and sewer utilities without controls against duplicative intrusions into certificated areas by municipal utilities. A rational basis exists to prohibit intrusion of municipal water or sewer facilities or service into areas in which a public utility furnishes regulated services until that municipality elects to come within the terms of the Public Utility Act, in which event both systems will be brought into parity of treatment with respect to the commission's independent jurisdiction and power to prevent unreasonable interference between competing plants, lines and systems. Without such controls as provided by Section 62-9-1.1 NMSA 1978, the declared policy of the Public Utility Act, the provision of reasonable and proper utility services at fair, just and reasonable rates and the general welfare, business and industry of the state may be frustrated.

D. The provisions of the 1985 and 1987 acts and of this 1991 act [62-3-2.1 and 62-9-1.1 NMSA 1978] shall be liberally construed to carry out their purposes.

**History:** 1978 Comp., § 62-3-2.1, enacted by Laws 1985, ch. 221, § 1; 1987, ch. 52, § 1; 1991, ch. 143, § 1.

## ANNOTATIONS

**The 1987 amendment,** effective June 19, 1987, added Subsection B and made a minor word change near the beginning of Subsection A.

**The 1991 amendment,** effective April 3, 1991, substituted "62-8-7.1 NMSA 1978" for "62-8-7 NMSA 1978, as amended" near the end of Subsection A and added Subsections C and D.

**Compiler's note.** - "This 1985 act", referred to in the first sentence of Subsection A, and "the 1985 . . . acts," referred to in Subsection D, refer to Laws 1985, ch. 221, which is presently compiled as 62-3-2.1, 62-8-7, and 62-8-7.1 NMSA 1978.

The terms "these 1987 amendments," referred to in the first sentence in Subsection B, and "1987 act," referred to in Subsection D, apparently mean Laws 1987, ch. 52, which appears as 62-3-2.1, 62-3-3, 62-8-7.1 and 62-9-2.1 NMSA 1978.

### **62-3-3. Definitions, words and phrases.**

Unless otherwise specified, when used in the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended:

A. "affiliated interest" means a person who directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, a public utility. Control includes instances where a person is an officer, director, partner, trustee or person of similar status or function, or who owns directly or indirectly or has a beneficial interest in ten percent or more of any class of securities of a person;

B. "commission" means the New Mexico public service commission;

C. "commissioners" means any member of the commission;

D. "municipality" means any municipal corporation organized under the laws of the state and H class counties;

E. "person" means individuals, firms, partnerships, companies, rural electric cooperatives organized under Laws 1937, Chapter 100 or the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], as amended, corporations and lessees, trustees or receivers appointed by any court. It shall not mean any municipality as defined in this section unless the municipality has elected to come within the terms of

the Public Utility Act, as amended, as provided in Section 62-6-5 NMSA 1978. In the absence of such voluntary election by any municipality to come within the provisions of the Public Utility Act, as amended, the municipality shall be expressly excluded from the operation of that act and from the operation of all of its provisions, and no such municipality shall for any purpose be considered a public utility;

F. "securities" means stock, stock certificates, bonds, notes, debentures, mortgages or deeds of trust or other evidences of indebtedness issued, executed or assumed by any utility;

G. "public utility" or "utility" means every person not engaged solely in interstate business and, except as stated in Sections 62-3-4 and 62-3-4.1 NMSA 1978, that now does or hereafter may own, operate, lease or control:

(1) any plant, property or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat or power or other uses;

(2) any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas or mixed or liquefied petroleum gas, for light, heat or power or for other uses; but the term "public utility" or "utility" shall not include any plant, property or facility used for or in connection with the business of the manufacture, storage, distribution, sale or furnishing of liquefied petroleum gas in enclosed containers or tank truck for use by others than consumers who receive their supply through any pipeline system operating under municipal authority or franchise, and distributing to the public;

(3) any plant, property or facility for the supplying, storage, distribution or furnishing to or for the public of water for manufacturing, municipal, domestic or other uses; provided, however, nothing contained in this paragraph shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation;

(4) any plant, property or facility for the production, transmission, conveyance, delivery or furnishing to or for the public of steam for heat or power or other uses; or

(5) any plant, property or facility for the supplying and furnishing to or for the public of sanitary sewers for transmission and disposal of sewage produced by manufacturing, municipal, domestic or other uses;

H. "rate" means every rate, tariff, charge or other compensation for utility service rendered or to be rendered by any utility and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff or part of a schedule or tariff thereof;

I. "service" or "service regulation" means every rule, regulation, practice, act or requirement in any way relating to the service or facility of a utility;

J. "Class I transaction" means the sale, lease or provision of real property, water rights or other goods or services by an affiliated interest to any public utility with which it is affiliated or by a public utility to its affiliated interest;

K. "Class II transaction" means:

(1) the formation after the effective date of this 1982 act of a corporate subsidiary by a public utility or a public utility holding company by a public utility or its affiliated interest;

(2) the direct acquisition of the voting securities or other direct ownership interests of a person by a public utility if such acquisition would make the utility the owner of ten percent or more of the voting securities or other direct ownership interests of that person;

(3) the agreement by a public utility to purchase securities or other ownership interest of a person other than a nonprofit corporation, contribute additional equity to, acquire additional equity interest in or pay or guarantee any bonds, notes, debentures, deeds of trust or other evidence of indebtedness of any such person; provided, however, that a public utility may honor all agreements entered into by such utility prior to the effective date of this 1982 act; or

(4) the divestiture by a public utility of any affiliated interest which is a corporate subsidiary of the public utility;

L. "corporate subsidiary" means any person ten percent or more of whose voting securities or other ownership interests are directly owned by a public utility; and

M. "public utility holding company" means an affiliated interest which controls a public utility through the direct or indirect ownership of voting securities of such public utility.

**History:** 1953 Comp., § 68-3-2, enacted by Laws 1967, ch. 96, § 3; 1980, ch. 85, § 1; 1982, ch. 109, § 7; 1987, ch. 52, § 2; 1993, ch. 282, § 21; 1993, ch. 308, § 3; 1993, ch. 351, § 2.

## ANNOTATIONS

**Cross-references.** - As to Public Utility Act repealing repugnant provisions of Rural Electric Cooperative Act, see 62-3-2 C and 62-15-32 NMSA 1978.

**Repeals and reenactments.** - Laws 1967, ch. 96, § 3, repealed former 68-3-2, 1953 Comp., relating to definitions for the Public Utility Act, and enacted a new 62-3-3 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, in Subsection G, substituted "stated in Section 62-3-4 and 62-3-4.1 NMSA 1978" for "hereinafter stated" in the opening clause and added Paragraph (5) and made minor language changes throughout the section.

**The 1993 amendments.** - Laws 1993, ch. 282, § 1, effective June 18, 1993, substituting "New Mexico public utility commission" for "New Mexico public service commission" in Subsection B, and making minor stylistic changes in Paragraph (4) of Subsection K and Subsection M, was approved on April 7, 1993. Laws 1993, ch. 308, § 3, effective April 8, 1993, inserting "class B counties as defined in Section 4-36-8 NMSA 1978" in Subsection D, adding a proviso at the end of Paragraph (5) of Subsection G, and making stylistic changes in Subsection M, was approved on April 8, 1993. However, Laws 1993, ch. 351, § 2, effective June 18, 1993, rewriting Subsection A and making stylistic changes in Subsection M, was approved on April 8, 1993. The section is set out as amended by Laws 1993, ch. 351, § 2. See 12-1-8 NMSA 1978.

**Compiler's note.** - Laws 1937, Chapter 100, referred to in the first sentence in Subsection E, was repealed in 1939. See note under same catchline in 1984 replacement pamphlet.

**Effective date of this 1982 act.** - The phrase "effective date of this 1982 act", referred to in Subsections K(1) and K(3), means May 19, 1982, the effective date of Laws 1982, Chapter 109.

**United States and governmental agencies are not "persons".** - The legislature, under this section, did not see fit to include or even mention the United States or governmental agencies as "persons." *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 82 N.M. 405, 482 P.2d 913 (1971), overruled on another point, 87 N.M. 469, 535 P.2d 1320 (1975).

The words "person or corporation" do not in their ordinary signification mean a sovereign government. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 82 N.M. 405, 482 P.2d 913 (1971), overruled on another point, 87 N.M. 469, 535 P.2d 1320 (1975).

**Obligation of state agency.** - A state agency, like any other user of utility service, has the statutory obligation to pay the rates therefor, including any late charges, under schedules approved by the commission, since late charges fall within the definition of "rate" in this section. 1988 Op. Att'y Gen. No. 88-80.

**Readiness to serve public is principal characteristic of public utility.** - The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964).

In determining a public utility question, the test is whether or not a person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it. *Griffith v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 113, 520 P.2d 269 (1974).

The public or private character of the enterprise does not depend on the number of persons by whom it is used, but on whether or not it is open to the use and service of all members of the public who may require it, to the extent of its capacity. Griffith v. New Mexico Pub. Serv. Comm'n, 86 N.M. 113, 520 P.2d 269 (1974); Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P.2d 646 (1964).

**Or sufficient part to clothe operation with public interest.** - The phrase "to the public" means sufficient sales to the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination. Griffith v. New Mexico Pub. Serv. Comm'n, 86 N.M. 113, 520 P.2d 269 (1974).

**Extent of undertaking limits obligation to serve.** - One who undertakes to serve the public undertakes an obligation which is limited by the extent of his profession, and he cannot be compelled to serve beyond the limits of that profession. 1957-58 Op. Att'y Gen. No. 57-277 (gas utility not required to serve city constructing line to utility's line).

**Corporation not serving public is not public utility.** - Where corporation had not held nor was holding itself as ready, willing and able to provide natural gas service to or for the public or any segment thereof, it could not be considered a public utility. Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P.2d 646 (1964).

**But may subject itself to regulation by selling electricity for resale to public.** - When one utility sells electrical energy to another utility only, and not to the public, it is not subject to the provisions of this section, but notwithstanding the fact that by such operation it does not become a public utility, it subjects itself to regulation by the public service commission when sale of the electricity is for resale to the public, to the extent necessary to determine that the cost to the utility shall be reasonable. 1951-52 Op. Att'y Gen. No. 5618.

**Or by selling water to municipal utility.** - An individual operating a water service and selling at wholesale to a municipally owned utility would be a public utility to the extent his operation affects the public interest and as such is subject to the jurisdiction of the public service commission. 1953-54 Op. Att'y Gen. No. 5715.

**A water association in the control of the developer of a subdivision is a public utility,** as the character of the use is to serve all members of the public who buy lots from the developer, and the extent of the use is that an entire housing development is dependent upon the association for a prime necessity of life. Griffith v. New Mexico Pub. Serv. Comm'n, 86 N.M. 113, 520 P.2d 269 (1974).

**Formerly, cooperatives did not come within definition of "public utility".** - See Socorro Elec. Coop. v. Public Serv. Co., 66 N.M. 343, 348 P.2d 88 (1959).

**Public service commission was not required to delineate an electric cooperative's service area** where part of its system was in an area previously certificated to another

utility. *Lea County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 75 N.M. 191, 402 P.2d 377 (1965), cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Cooperatives may not be made utilities but excepted from regulations upon others.** - Laws 1961, ch. 89 (repealed), insofar as it attempted to place rural electric cooperatives under the Public Utility Act by including them within the definition of "public utility" constituted an arbitrary and unreasonable classification in violation of the equal protection clauses because cooperatives were included in the act though not required to render service to the general public and no provision was made for complete regulation of rates charged by them or securities issued by them, whereas other electric utilities had to render service to the public and their rates and financing were completely supervised and controlled. *Community Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 314, 414 P.2d 675, cert. denied, 385 U.S. 933, 87 S. Ct. 292, 17 L. Ed. 2d 213 (1966).

**No distinction made between utilities based on form of ownership.** - The New Mexico legislature has made no distinction between public utilities operated as individuals, firms, partnerships, companies or corporations. Nowhere in the New Mexico Public Utility Act is the commission given authority, for the purpose of rate-making, to make a distinction between a public utility operated as a corporation from one operated as a sole proprietorship. *Moyston v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 146, 412 P.2d 840 (1966).

**Unregulated municipalities must comply with liquefied petroleum gas statutes.** - Inasmuch as municipally operated and owned utilities are not subject to regulation by the public service commission (unless they so elect), a village is required to comply with provisions relating to liquefied petroleum gas. 1947-48 Op. Att'y Gen. No. 5156. See 70-5-1 NMSA 1978 et seq.

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 Nat. Resources J. 851 (1986).

For 1984-88 survey of New Mexico administrative law, 19 N.M.L. Rev. 575 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 1, 2, 82.

Irrigation company as a public utility, 8 A.L.R. 268, 15 A.L.R. 1227.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 A.L.R.4th 894.

Conclusiveness of charter, as regards character of corporation as a public utility corporation, 119 A.L.R. 1019.



73B C.J.S. Public Utilities §§ 2, 3, 15.

### **62-3-4. Limitations and exceptions.**

The term "public utility" or "utility" when used in the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended, shall not include:

A. any person not otherwise a public utility who furnishes the service or commodity only to himself, his employees or tenants, when such service or commodity is not resold to or used by others or who engages in the retail distribution of natural gas for vehicular fuel; or

B. a corporation engaged in the business of operating a railroad and that does not primarily engage in the business of selling the service or commodity but that only incidentally to its railroad business or occasionally furnishes the service or commodity to another under a separate limited or revocable agreement or sells to a utility or municipality for resale, or that sells the service or commodity to another railroad, the state or federal government or a governmental agency, or that sells or gives for a consideration under revocable agreements or permits quantities of water out of any surplus of water supply acquired and held by it primarily for railroad purposes; and such railroad corporation shall not be subject to any of the provisions of the Public Utility Act.

The business of any public utility other than of the character defined in Subsection G of Section 62-3-3 NMSA 1978 is not subject to provisions of the Public Utility Act, as amended. Nothing contained in that act shall be construed as giving to the commission any powers or jurisdiction over public utilities covered by Section 7 of Article 11 of the constitution of New Mexico.

**History:** 1953 Comp., § 68-3-3, enacted by Laws 1967, ch. 96, § 4; 1992, ch. 58, § 9.

### **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1967, ch. 96, § 4, repeals former 68-3-3, 1953 Comp., relating to limitations on and exceptions from definition of "public utility," and enacts the above section.

**The 1992 amendment,** effective May 20, 1992, added the subsection designations; added "or who engages in the retail distribution of natural gas for vehicular fuel" at the end of Subsection A; substituted "Subsection G of Section 62-3-3 NMSA 1978" for "Subdivision F of Section 68-3-2 New Mexico Statutes Annotated, 1953 Compilation hereof" in the first sentence of the second paragraph of Subsection B; and made minor stylistic changes throughout the section.

**Supplier of water to public is public utility.** - In order to preserve the public welfare, any person not engaged solely in interstate business, who operates a facility which supplies water to the public for domestic use, is a public utility unless he supplies water

only to himself, his tenants or his employees. Griffith v. New Mexico Pub. Serv. Comm'n, 86 N.M. 113, 520 P.2d 269 (1974) See notes to 62-3-3 NMSA 1978.

**But railroad furnishing water to town is not regulated by commission.** - Public service commission lacks jurisdiction in case in which a railroad which has been furnishing water service to an unincorporated town for years proposes to discontinue the same. 1947-48 Op. Att'y Gen. No. 5054.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 A.L.R.4th 894.

### **62-3-4.1. Certain persons not public utility.**

A. Notwithstanding anything in the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] to the contrary, no person not otherwise a public utility shall be deemed to be a public utility subject to the jurisdiction, control or regulation of the commission and the provisions of the Public Utility Act solely because such person owns or controls all or any part of any plant, property or facility described in Paragraph (1) of Subsection G of Section 62-3-3 NMSA 1978:

(1) which is leased or held for lease or sale to any public utility or other lessee; or

(2) the operation and use of which is vested by lease or other contract in a public utility or other lessee; or

(3) for a period of not more than ninety days after termination of any lease or contract described in Paragraph (1) or (2) of this subsection or after such person gains possession of such property following a breach of such lease or contract.

B. The commission may upon application by a public utility issue its order approving the terms of any lease or contract described in Paragraph (1) or (2) of Subsection A of this section for the purpose of qualifying any party thereto for an exemption by the United States securities and exchange commission from the federal Public Utility Holding Company Act of 1935, as amended (Chapter 2C of Title 15 of the United States Code).

C. A public utility leasing all or any part of any plant, property or facility described in Paragraph (1) of Subsection G of Section 62-3-3 NMSA 1978 which is subject to any lease or contract described in this section shall comply with Section 62-9-1 NMSA 1978 with respect to such plant, property or facility.

D. Nothing in this section shall alter or modify the authority of the commission to regulate the rates and services of a person that is a public utility subject to the provisions of the Public Utility Act.

**History:** 1978 Comp., § 62-3-4.1, enacted by Laws 1981, ch. 345, § 1.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 A.L.R.4th 894.

### **62-3-5. Collection of fees by public utilities.**

Any public utility that owns or operates a public water supply system upon whom a fee is imposed pursuant to Section 74-1-7 or 74-1-8 NMSA 1978 shall be entitled immediately to collect the fee from its ratepayers, without a request for a change in rates. The utility shall notify the New Mexico public utility commission in writing of the imposition of the fee and, if practicable, shall show the fee as a separate line item on its bill.

**History:** Laws 1989, ch. 223, § 5; 1993, ch. 282, § 22.

## ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, substituted "New Mexico public utility commission" for "New Mexico public service commission" in the second sentence.

## ARTICLE 4 JOINT HEARINGS AND ORDERS

### **62-4-1. Joint hearings and orders.**

The public utility commission, in the discharge of its duties under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] is authorized to make joint investigations, hold joint hearings within or without the state and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of such investigations or hearings, or in the making of such order, the commission may function under agreements or compacts between states to regulate interstate commerce. The commission, in the discharge of its duties under the Public Utility Act, is further authorized to negotiate and enter into agreements or compacts with agencies of other states, pursuant to any consent of congress, for cooperative efforts in certificating the construction, operation and maintenance of major utility facilities in accord with the purposes of the Public Utility Act and for the enforcement of the respective state laws regarding same.

**History:** 1953 Comp., § 68-8-2.1, enacted by Laws 1977, ch. 191, § 1; 1993, ch. 282, § 44.

## ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, substituted "public utility commission" for "public service commission" in the first sentence.

## **ARTICLE 5**

### **NEW MEXICO PUBLIC UTILITY COMMISSION**

#### **62-5-1. New Mexico public utility commission established.**

A commission to be known as the "New Mexico public utility commission", consisting of three commissioners who are competent persons and qualified electors of this state, is established.

**History:** Laws 1941, ch. 84, § 3; 1941 Comp., § 72-401; 1953 Comp., § 68-4-1; 1993, ch. 282, § 23.

#### **ANNOTATIONS**

**Cross-references.** - As to Public Utility Act not granting commission powers over utilities covered by N.M. Const., art. XI, § 7, see 62-3-4 NMSA 1978.

**The 1993 amendment**, effective June 18, 1993, substituted "public utility commission" for "public service commission" in the section catchline and in the body of the section, substituted "are" for "shall be", and deleted "hereby" preceding "established".

**Appropriations.** - Laws 1992, ch. 22, § 2, effective March 5, 1992, appropriates \$535,000 from the general fund to the New Mexico public service commission for expenditure in the eightieth and eighty-first fiscal years for the purpose of developing and implementing an information systems design and further provides that any unexpended or unencumbered balance remaining at the end of eighty-first fiscal year shall revert to the general fund.

Laws 1993, ch. 366, § 2M, effective June 18, 1993, appropriates \$325,000 from the computer systems enhancement fund to the public service commission for expenditure in the eighty-second fiscal year to develop an integrated office automation and case records management system.

Laws 1993, ch. 366, § 3GG, effective June 18, 1993, appropriates \$175,000 from the general fund to the public service commission for expenditure in the eighty-first and eighty-second fiscal years to provide litigation, and technical and financial consultation services associated with the El Paso electric company bankruptcy proceedings. Any unexpended or unencumbered balance remaining at the end of the eighty-second fiscal year shall revert to the general fund.

Laws 1993, ch. 366, § 5 provides for the severability of that act if any part or application thereof is held invalid.

**Law reviews.** - For article, "An Administrative Procedure Act for New Mexico," see 8 Nat. Resources J. 114 (1968).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 Nat. Resources J. 851 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 20, 33, 90, 223, 230 to 291.

73B C.J.S. Public Utilities §§ 61, 95.

## **62-5-2. New Mexico public utility commission administratively attached to energy, minerals and natural resources department.**

The commission is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the energy, minerals and natural resources department.

**History:** 1953 Comp., § 68-4-1.1, enacted by Laws 1977, ch. 255, § 121; 1993, ch. 282, § 24.

### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, rewrote the section catchline; deleted "public service" preceding "commission", and substituted "minerals and natural resources department" for "and minerals department."

## **62-5-3. New Mexico public utility commissioners; appointment; terms.**

A. The members of the commission are appointed by the governor with the advice and consent of the senate. If the senate is not in session when an appointment is made by the governor, the appointment is subject to the approval of the senate when next convened. Commissioners are appointed for staggered terms of six years that expire on January 15 of the appropriate year.

B. Vacancies or unexpired terms are filled in the same manner as original appointments, but the appointee shall serve only the unexpired term. The commissioner with the longest continuous service upon the commission is the chairman.

C. A commissioner who seeks nomination or election to any civil office in the state while he is a member of the commission vacates his office as commissioner, and the governor shall appoint a successor.

**History:** Laws 1941, ch. 84, § 4; 1941 Comp., § 72-402; Laws 1953, ch. 119, § 1; 1953 Comp., § 68-4-2; Laws 1959, ch. 348, § 1; 1965, ch. 289, § 2; 1970, ch. 42, § 1; 1971, ch. 234, § 7; 1993, ch. 282, § 25.

### ANNOTATIONS

**The 1993 amendment,** effective June 18, 1993, substituted "New Mexico public utility commissioners" for "New Mexico public service commissioners" in the section catchline, and inserted "the" preceding "longest" in the second sentence of Subsection B.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 63, 64.

### **62-5-4. Name of commission; oath of office; seal of office.**

The commission shall be known as the "New Mexico public utility commission" and shall have a seal with the words "New Mexico public utility commission" and with such emblem as the commission prescribes. The members of the commission are state officers, and, before entering upon the discharge of their duties, they shall take the oath of office prescribed for other state officers.

**History:** Laws 1941, ch. 84, § 5; 1941 Comp., § 72-403; 1953 Comp., § 68-4-3; 1993, ch. 282, § 26.

### ANNOTATIONS

**Cross-references.** - As to oath of office, see N.M. Const., art. XX, § 1.

**The 1993 amendment,** effective June 18, 1993, substituted "public utility commission" for "public service commission" in two places in the first sentence, and made stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 60 to 67.

### **62-5-5. Person ineligible to the office of commissioner.**

No person owning any securities in or interested in the business of any public utility, as defined in Chapter 62, Article 3 NMSA 1978, either directly or indirectly, is eligible to the office of commissioner.

**History:** Laws 1941, ch. 84, § 6; 1941 Comp., § 72-404; 1953 Comp., § 68-4-4; 1993, ch. 282, § 27.

#### **ANNOTATIONS**

**Cross-references.** - As to commissioner not performing professional service for nor making contract with public utility, see 62-6-3 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, deleted "the" preceding "commissioner" in the section catchline; inserted "in" following "securities", substituted "as defined in Chapter 62, Article 3 NMSA 1978" for "as hereinabove defined" and "is eligible" for "shall be eligible" and deleted "public service" preceding "commissioner".

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

#### **62-5-6. Removal of commissioners.**

The governor may remove any commissioner for incompetency, neglect of duty or malfeasance in office; and it shall be an additional cause for removal of any commissioner if he shall accept any gift, gratuity, emolument or employment from any firm, person, corporation, company or association, owning or operating any public utility, as hereinabove defined, in whole or in part in this state, during his continuance in office; before any commissioner is removed, he shall be given a copy of the charges against him and an opportunity of being publicly heard before the governor in person or by counsel in his own defense, upon not less than ten (10) days' notice.

**History:** Laws 1941, ch. 84, § 7; 1941 Comp., § 72-405; 1953 Comp., § 68-4-5.

#### **ANNOTATIONS**

**Cross-references.** - As to commissioner not performing professional service for nor making contract with public utility, see 62-6-3 NMSA 1978.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

#### **62-5-7. Members of commission; whole time given to work.**

Each member of the commission shall devote his whole time to his official business.

**History:** Laws 1941, ch. 84, § 8; 1941 Comp., § 72-406; 1953 Comp., § 68-4-6; Laws 1979, ch. 261, § 1.

## ANNOTATIONS

**Commissioner may not be otherwise employed but may engage in outside activities.** - This section means that one serving as a member of the public service commission (now public utility commission) may not be otherwise employed, nor can he receive compensation for employment other than that as a public service commissioner. However, it does not intend that in his free time and apart from his official duties he may not engage in outside activities. 1959-60 Op. Att'y Gen. No. 59-103.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 64.

### **62-5-8. Officers, agents and assistants.**

The commission may appoint and employ such officers, agents, assistants and other employees as may be necessary to carry out the provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] or to perform the duties and exercise the powers conferred by law upon the commission. In addition to the services of the attorney general as provided hereinafter, the New Mexico public utility commission shall have authority to employ competent attorneys to handle the legal matters of the commission and give advice and counsel in regard to any matter connected with the duties of the commission and in the discretion of the commission to represent the commission in any legal proceeding, including the enforcement of any and all laws and regulations concerned with the Public Utility Act and the commission shall be empowered and authorized to fix the compensation to be paid to the attorneys employed under the authority of this section; provided that said attorneys shall be compensated from the budget of the New Mexico public utility commission as appropriated by the legislature.

**History:** Laws 1941, ch. 84, § 10; 1941 Comp., § 72-408; Laws 1953, ch. 119, § 3; 1953 Comp., § 68-4-8; Laws 1965, ch. 289, § 3; 1993, ch. 282, § 45.

## ANNOTATIONS

**Cross-references.** - As to approval of governor of employment of officers, agents, assistants and other employees, and as to compensation and expenses of employees, see 62-5-10 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, substituted "New Mexico public utility commission" for "New Mexico public service commission" twice in the second sentence.

**Scope of authority.** - Commission staff had the capacity to conduct settlement negotiations to determine the rate treatment of a utility's ownership interest in a nuclear



generating station. Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 111 N.M. 636, 808 P.2d 606 (1991).

### **62-5-9. Counsel; duties.**

It shall be the duty of the attorney general to advise, to represent and to appear for the commission in all actions and proceedings involving any question under this act or under any order or act of the commission.

**History:** Laws 1941, ch. 84, § 11; 1941 Comp., § 72-409; 1953 Comp., § 68-4-9.

#### **ANNOTATIONS**

**Meaning of "this act".** - The words "this act" refer to Laws 1941, ch. 84, the presently effective portions of which are compiled as 62-5-1, 62-5-3 to 62-5-11, 62-6-1 to 62-6-7, 62-6-9 to 62-6-24, 62-8-1 to 62-8-7, 62-9-1, 62-9-4, 62-9-5, 62-10-1 to 62-10-16, 62-11-1 to 62-11-6, 62-12-1 to 62-12-7, 62-13-1, 62-13-3 and 62-13-4 NMSA 1978.

### **62-5-10. Compensation for officers, agents, assistants and other employees; expenses; disbursements.**

All such officers, agents, assistants and other employees as may be employed by the commission, with the approval of the governor, shall receive compensation to be fixed by the commission, subject to the approval of the governor, within the limits provided by regulation adopted by the state personnel director. The commission and its officers, agents, assistants and employees shall have reimbursed to them all actual and necessary traveling and other expenses and disbursements necessarily incurred by them or made by them in the discharge of their official duty. The commissioners may also incur necessary expenses for office furniture, stationery, printing and other incidental expenses. Any money paid out under the provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] shall be paid out of the state treasury on warrants drawn by the secretary of finance and administration on the state treasury.

**History:** Laws 1941, ch. 84, § 12; 1941 Comp., § 72-410; 1953 Comp., § 68-4-10; Laws 1965, ch. 289, § 4; 1977, ch. 247, § 179.

#### **ANNOTATIONS**

**Cross-references.** - As to compensation of attorneys, see 62-5-8 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 63.

### **62-5-11. Officers at capitol; session; meetings; when and where held; record of meetings.**

Such commissioners shall have an office at the capitol and shall meet on the first Monday of every month and shall remain in session until all business before them is disposed of; they shall hold other sessions at such times as may be proper or may be necessary for the proper discharge of their duties, or as the evidence of parties in the judgment of the commission may require; they shall keep a record of their proceedings, which shall be open at all times to the inspection of the public. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty or for the exercise of any power of the commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners shall be the act of the commission.

**History:** Laws 1941, ch. 84, § 13; 1941 Comp., § 72-411; 1953 Comp., § 68-4-11.

### **ANNOTATIONS**

**Cross-references.** - As to joint hearings, see 62-4-1 NMSA 1978.

As to public meetings of policy-making bodies, see 10-15-1 to 10-15-4 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 67.

## **ARTICLE 6 POWERS AND DUTIES OF COMMISSION**

### **62-6-1. Rules; adoption of.**

The commission may adopt and publish rules to govern its proceedings, and such rules, together with this act, shall regulate the mode and manner of all investigations and hearings before it, provided that all hearings shall be open to the public.

**History:** Laws 1941, ch. 84, § 14; 1941 Comp., § 72-501; 1953 Comp., § 68-5-1.

### **ANNOTATIONS**

**Cross-references.** - As to public meetings of policy-making bodies, see 10-15-1 to 10-15-4 NMSA 1978.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Commission's rules may govern business but not relieve from liability.** - The authority of the commission is sufficiently broad to empower it to establish rules and regulations for the government of the utility in the prosecution of its business, but such commission cannot relieve a utility from liability under the law of negligence by any rule

it may adopt. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**General, exclusive jurisdiction over rates.** - The legislature intended to confer general and exclusive jurisdiction to the commission to regulate every intrastate rate to be charged by public utilities for the services they render to the extent provided in this article, including jurisdiction over contract rates between public utilities and municipalities. 1951-52 Op. Att'y Gen. No. 5597.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 232.

Validity of statute requiring submission of claims for refund of overcharges to public service commission, 3 A.L.R. 203.

Federal control of public utilities, 4 A.L.R. 1680, 8 A.L.R. 969, 10 A.L.R. 956, 11 A.L.R. 1450, 14 A.L.R. 234, 19 A.L.R. 678, 52 A.L.R. 296.

Advertising through medium of public utilities as subject to public regulation, 47 A.L.R. 815.

Construction of regulations regarding time of payment for service, 97 A.L.R. 982.

73B C.J.S. Public Utilities §§ 65 to 67.

## **62-6-2. Reports to governor.**

On or before the first day of October of each year, the public utility commission, through the chairman thereof, shall make to the governor for transmission to the legislature, a report on its acts and doings for the year ending on the 30th day of June next preceding, setting forth such facts as will disclose the actual workings of the public utilities as hereinabove defined, of this state, and make such suggestions as to said commission may seem appropriate, and for the best interests of the state, including the protection of consumers and investors, and the encouragement and development of industry within the state.

**History:** Laws 1941, ch. 84, § 15; 1941 Comp., § 72-502; 1953 Comp., § 68-5-2; 1993, ch. 282, § 46.

## **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, substituted "public utility commission" for "public service commission".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 67.

### **62-6-3. Commissioners and employees shall not render service to public utilities.**

No commissioner or clerk or employee of the commission shall, during his continuance in office, personally or through any partner or agent render any professional service or make or perform any contracts for or with any corporation, firm, company, association or persons owning or operating any public utility, as defined in Chapter 62, Article 3 NMSA 1978, in this state, except contracts made by commissioners and employees as consumers of utility products or of facilities or equipment for the use of utility products.

**History:** Laws 1941, ch. 84, § 16; 1941 Comp., § 72-503; 1953 Comp., § 68-5-3; 1993, ch. 282, § 28.

## **ANNOTATIONS**

**Cross-references.** - As to person interested in public utility being ineligible to be commissioner, see 62-5-5 NMSA 1978.

As to removal of commissioner accepting gift, emolument or employment from public utility, see 62-5-6 NMSA 1978.

**The 1993 amendment**, effective June 18, 1993, deleted "public service" preceding "commissioner", substituted "as defined in Chapter 62, Article 3, NMSA 1978," for "as in this act defined" and "utility products" for "such products", and made minor stylistic changes throughout the section.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 64.

### **62-6-4. Supervision and regulation of utilities.**

A. The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], and to do all things necessary and convenient in the exercise of its power and jurisdiction. Nothing in this section, however, shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation either directly or through a

municipally owned corporation, or owned and operated by any H class county or by a class B county as defined in Section 4-36-8 NMSA 1978 either directly or through a corporation owned by or under contract with an H class county or by a class B county as defined in Section 4-36-8 NMSA 1978. No inspection or supervision fees shall be paid by such municipalities or municipally owned corporations or a class B county as defined in Section 4-36-8 NMSA 1978 or H class counties or such corporation owned by or under contract with a class B county as defined in Section 4-36-8 NMSA 1978 or an H class county with respect to operations conducted in a class B county as defined in Section 4-36-8 NMSA 1978 or in H class counties.

B. The sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of the gas, water or electricity at the place where the major distribution to the public begins is reasonable and that the methods of delivery of the gas, water or electricity are adequate; provided, however, that nothing in this subsection shall be construed to permit regulation by the commission of production or sale price at the wellhead of gas or petroleum, except regulation of abandonment pursuant to Section 62-7-8 NMSA 1978.

C. The sale, furnishing or delivery of coal, uranium or other fuels by any affiliated interest to a utility for the generation of electricity for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of the coal, uranium or other fuels at the point of sale is reasonable and that the methods of delivery of the electricity are adequate; provided, however, that nothing in this subsection shall be construed to permit regulation by the commission of production or sale price at the wellhead of gas or petroleum, except regulation of abandonment pursuant to Section 62-7-8 NMSA 1978. Nothing in this section shall be construed to permit regulation by the commission of production or sale price at the point of production of coal, uranium or other fuels.

**History:** Laws 1941, ch. 84, § 17; 1941 Comp., § 72-504; 1953 Comp., § 68-5-4; Laws 1963, ch. 55, § 1; 1977, ch. 73, § 1; 1980, ch. 85, § 2; 1993, ch. 308, § 4.

## ANNOTATIONS

**Cross-references.** - As to regulation of foreign municipal corporations distributing electricity in state, see 62-1-6 NMSA 1978.

As to option of municipal corporations and class H counties to be regulated, see 62-3-3 E and 62-6-5 NMSA 1978.

As to service regulations, see 62-6-19 NMSA 1978.

As to meter regulations, see 62-6-20 to 62-6-22 NMSA 1978.

As to safety regulations, see 62-6-24 NMSA 1978.

As to municipal utilities generally, see 3-23-1 to 3-23-10, 3-24-1 to 3-24-10, 3-25-1 to 3-25-6, 3-26-1 to 3-26-3, 3-27-1 to 3-27-9, and 3-28-1 to 3-28-20 NMSA 1978.

As to approval of water and sanitation district rates, see 73-21-16 L NMSA 1978.

**The 1993 amendment**, effective April 8, 1993, in Subsection A, substituted "reservations" for "reservation" in the first sentence, divided the former second sentence into the present second and third sentences, and inserted references to a class B county as defined in Section 4-36-8 NMSA 1978 in two places in the second sentence and in three places in the third sentence; and in Subsection B and the first sentence of Subsection C, made stylistic changes.

**Compiler's note.** - Section 62-7-8 NMSA 1978, referred to in Subsections B and C, was repealed by Laws 1984, ch. 123, § 13A.

**Commission's general jurisdiction includes safety regulations and inspections.** - The general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations includes the power to make safety regulations and enforce them through inspections. 1972 Op. Att'y Gen. No. 72-35.

**Express jurisdiction over rates is given to commission.** - This section vests in the commission express jurisdiction, among other things, to regulate and supervise every public utility as respects its rates. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**Including jurisdiction over increase in contract rate.** - Where the commission had entered an order authorizing a public utility to enter into a contract and to continue to charge the gas rate therein specified until further notice and on the ex parte petition of the utility subsequently entered an interlocutory order making a rate increase to be effective until the commission could hold a hearing to determine and set a new and proper rate, the commission was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction - a question of rates. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**General jurisdiction does not cover water and sanitation districts.** - The legislature did not intend to place water and sanitation districts under the general jurisdiction of the commission. 1971 Op. Att'y Gen. No. 71-56.

**Sanitary projects association not a public utility.** - A sanitary projects association (see Article 29 of Chapter 3 NMSA 1978) was not transformed into a public utility by selling water to a limited number of nonmember water haulers and was not subject to the Public Service Commission's regulatory jurisdiction. *El Vadito De Los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n*, N.M. , 858 P.2d 1263 (1993).

**But does cover water and sanitation district rates.** - Water and sanitation districts have not been declared to be subject to the jurisdiction of the commission except in the

limited area of approving the district board's rates, tolls and charges. 1971 Op. Att'y Gen. No. 71-56. See 73-21-16 L NMSA 1978.

**Commission is vested with considerable discretion** in determining whether a rate to be received and charged is just and reasonable. Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n, 94 N.M. 731, 616 P.2d 1116 (1980).

**But not exclusive jurisdiction over rate disputes.** - Neither N.M. Const., art. XI, § 7 nor the Telephone and Telegraph Company Certification Act grants the state corporation commission general power and exclusive jurisdiction over disputes involving rates charged by a telephone company. First Cent. Serv. Corp. v. Mountain Bell Tel., 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).

**Scope of authority.** - Commission staff had the capacity to conduct settlement negotiations to determine the rate treatment of a utility's ownership interest in a nuclear generating station. Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 111 N.M. 636, 808 P.2d 606 (1991).

**Complete remedy for testing rates provided.** - The Public Utility Act envelops the commission with an aura of broad power and jurisdiction to determine just and reasonable rates and sets up a complete remedy within the framework of the act for testing their propriety and reasonableness. Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n, 62 N.M. 1, 303 P.2d 908 (1956).

**Requiring exhaustion of administrative remedies is constitutional.** - The requirement of the Public Utility Act that a person first exhaust his administrative remedy before resorting to the courts does not violate N.M. Const., art. VI, § 13, granting general jurisdiction to the district courts except as elsewhere limited in such constitution. Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954).

**It is the commission's duty to protect not only the utility but also its patrons.** 1969 Op. Att'y Gen. No. 69-81.

**Rules and regulations have force of law.** - The rules and regulations of the commission duly adopted under this section and 62-6-24 NMSA 1978 have the force and effect of law which a utility must obey. 1969 Op. Att'y Gen. No. 69-81.

**Compliance with rules excuses discontinuance of service under hazardous conditions.** - Compliance with rules of the commission permitting a public utility to immediately discontinue service in the event of a condition determined by the utility to be hazardous would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce some evidence that the condition was actually hazardous if the criminal action was brought against it, and to prove the existence of the rule itself. 1969 Op. Att'y Gen. No. 69-81.

**All utilities not municipally owned are subject to commission's jurisdiction.** - The commission is given authority by virtue of this section to regulate and supervise every private utility in respect to its rates and service regulations. This same statute specifically withholds from the commission any jurisdiction to regulate or supervise the rates or service of any utility owned and operated by a municipal corporation either directly or through a municipally owned corporation unless said municipality shall exercise its option to come within the provisions of the Public Utility Act as provided in 62-6-5 NMSA 1978. 1957-58 Op. Att'y Gen. No. 57-101.

The commission is not empowered to regulate or supervise the service and rates set by municipally owned utilities either in or outside the corporate limits. 1943-44 Op. Att'y Gen. No. 4395.

**Commission's jurisdiction exempts utilities from liquefied petroleum gas statutes.** - A public utility is exempt from the provisions of the law applicable to liquefied petroleum gases (70-5-1 NMSA 1978 et seq.). The law places the general and exclusive power and jurisdiction to regulate and supervise every public utility in the commission. 1961-62 Op. Att'y Gen. No. 62-7.

**However, commission may delegate some of its authority over liquefied petroleum gas utilities.** - The commission is authorized by this section and by the common law to delegate its authority to inspect and test liquefied petroleum gas utilities to the liquefied petroleum gas commission. Only the public service commission can promulgate safety regulations, however, and it must make the final order regarding any violations of regulations. 1972 Op. Att'y Gen. No. 72-35.

**And unregulated village must comply with liquefied petroleum gas statutes.** - Inasmuch as municipally operated and owned utilities are not subject to regulation by the commission (unless there has been a local option election), a village is required to comply with provisions relating to liquefied petroleum gas. 1947-48 Op. Att'y Gen. No. 5156. See 70-5-1 NMSA 1978 et seq.

**Power of commission does not extend to acts of a utility not affecting its public duties;** its jurisdiction is limited to matters or controversies wherein the rights of a utility and the public are involved. Its duties begin and end with conservation of the public interest, and are not concerned with individual rights of private litigants, and, ordinarily, it has no power to adjudicate purely private matters between a utility and an individual, or between two utilities. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Construction and enforcement of private contracts are for courts, not commission.** - The commission, under the broad powers given it by the legislature, has the right to pass upon the question of whether or not a public utility may enter into a given contract, because of the effect such contract may have upon the power of the utility to carry out its purposes, but when a contract is once entered into, its construction and interpretation, and the rights growing out of the same, including the right to



terminate, are to be determined by the courts. Power to pass on validity of a private contract or to enforce its provision is entrusted exclusively to the courts. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Contract between utility and consortium of municipalities excluded.** - Commission acted within its jurisdiction in excluding from jurisdictional rates a contract between a utility and a consortium of municipalities for the purchase of electricity, where exclusion of the contract in no way affected the municipalities' contract; it only affected the utility's ability to recover the cost of the contract from New Mexico consumers. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 111 N.M. 622, 808 P.2d 592 (1991).

**Commission may disallow unreasonable gas prices in fixing rates.** - This section gives the commission some authority to review the prices of certain intrastate sales of natural gas to a utility. However, the nature of this grant of authority is the power only to determine whether the sale prices set by the parties are unreasonable (i.e., outside of a range of acceptable prices), in which case they should be disallowed for rate-making purposes, as expenses of the utility. This authority of the commission to determine the reasonableness of prices is limited to sales other than (i.e., after) the sale from the wellhead. 1977 Op. Att'y Gen. No. 77-1.

**If wellhead transactions are not involved.** - Subsection B makes it abundantly clear that the commission can disallow, for rate-making purposes, any portion of a price paid by a utility which the commission finds to be unreasonable unless wellhead transactions are involved. *Maestas v. New Mexico Pub. Serv. Comm'n*, 85 N.M. 571, 514 P.2d 847 (1973).

**Commission may not order that refund be passed on to consumers.** - Commission has no express or implied statutory authority to order the flow-through of refunds to electric company from power supplier to consumers. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Where refund is not trust fund for consumers.** - Where refund was ordered paid over to power company by the federal power commission without any restrictions, and there was nothing in the order indicating an intention on the part of the commission to create a "trust fund" for the benefit of the ultimate consumers, the refund did not constitute a trust fund belonging to company's customers. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Commission's duty under Subsection C.** - Commission is only required to find the ultimate fact, that being the reasonableness of the cost of fuel to a utility under Subsection C, and is not required to give reasons for its decision or to make a finding that is not an ultimate finding, such as the arms-length nature of transaction between utility and affiliate from which it purchased the fuel. *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 685 P.2d 957 (1984).

**Exemption from state antitrust law.** - Arrangements between utilities approved and regulated by commission acting under statutory authority are exempt from state antitrust law. *Gonzales v. Public Serv. Comm'n*, 102 N.M. 529, 697 P.2d 948 (1985).

**Supervision of transactions with affiliates and nonaffiliates distinguished.** - Normal burden to be met in making a prima facie case regarding costs incurred in transactions with nonaffiliates is a demonstration that the costs were, in fact, incurred; however, the normal burden regarding costs incurred in transactions with affiliates is heavier, requiring a showing of the reasonableness of the costs. *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 685 P.2d 957 (1984).

**Law reviews.** - For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 *Nat. Resources J.* 599 (1967).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 *Nat. Resources J.* 411 (1979).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 *N.M.L. Rev.* 287 (1979).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 *Nat. Resources J.* 851 (1986).

For article, "State Regulation in a Deregulated Environment: A State-Level Regulator's Lament," see 27 *Nat. Resources J.* 799 (1988).

For 1984-88 survey of New Mexico administrative law, 19 *N.M.L. Rev.* 575 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 *Am. Jur. 2d Public Utilities* §§ 9 to 15, 240.

Power of public service commission to increase franchise rates, 3 *A.L.R.* 730, 9 *A.L.R.* 1165, 28 *A.L.R.* 587, 29 *A.L.R.* 356.

State regulation of rates to consumers of gas or electricity transported across state lines for light or power purposes, 7 *A.L.R.* 1094.

Power of state to change contract rates, 9 *A.L.R.* 1423.

Patron's right to question reasonableness of public utility rate authorized by legislature, 12 *A.L.R.* 404.

Right of public service corporation to change rate while another rate is undetermined, 16 A.L.R. 1219.

Termination of federal control as restoring rates fixed by public service commission, 19 A.L.R. 684, 52 A.L.R. 296.

Valuations for rate making as affected by advance in price conditions due to war, 20 A.L.R. 555.

Right to fix new rate for public utility where court sets aside rate fixed by commission as confiscatory, 57 A.L.R. 146.

Power of state or municipality to fix minimum public utility rates, 68 A.L.R. 1002.

Power of state or public service commission to regulate rates of municipally owned or operated public utility, 76 A.L.R. 851, 127 A.L.R. 94.

Profit factor in determining rates for municipally owned or operated public utility, 90 A.L.R. 700.

Allowance for depletion or amortization in respect of natural resources in fixing rates, 91 A.L.R. 1413.

Prohibition as means of controlling action of commission as to rates, 115 A.L.R. 19, 159 A.L.R. 627.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates, 8 A.L.R.2d 839.

Right of customers of public utility with respect to fund representing a refund from another supplying utility upon a reduction of latter's rates, 18 A.L.R.2d 1343.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 A.L.R.4th 183.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 A.L.R.4th 894.

73B C.J.S. Public Utilities § 68.

### **62-6-4.1. Contract carriage.**

A. The intent and purpose of this section is to encourage lower costs of natural gas for New Mexico consumers by providing competition in natural gas markets through contract carriage. Lower fuel costs are an integral part of New Mexico's economic

development efforts because they preserve existing jobs, facilitate expansion of the state's businesses and provide incentives for new industry to locate in New Mexico.

B. The commission shall, by rule or order, authorize and require the nondiscriminatory and nonpreferential transportation of natural gas by any person subject to the jurisdiction of the commission for a seller or purchaser of natural gas to the extent of available capacity and subject to Subsections C and D of this section.

C. The commission may, in its discretion, impose such terms and conditions on the transportation of natural gas as may be necessary to safeguard deliverability and operational efficiency and to prevent undue hardship and anticompetitive conduct by a public utility.

D. The rates and charges for the transportation of natural gas under this section shall be just, reasonable, nondiscriminatory and subject to approval by the commission.

E. For purposes of this section, "transportation" means exchange, backhaul, displacement or any other means of transporting and includes gathering.

F. A public utility shall be prohibited from the marketing and brokering of natural gas for delivery within New Mexico under this section. This prohibition shall not exclude a public utility from transporting natural gas for an affiliated corporation. Any contract to transport natural gas for an affiliate shall be an arms-length agreement containing no terms that are unavailable to other-end users, gas brokers or marketers.

G. The commission, upon a finding that a public utility is in violation of this section, may impose upon the utility a civil penalty not to exceed an amount three times the damages established by the complainant in the commission proceeding and issue such orders, including but not limited to a cease and desist order, to assure the nondiscriminatory and nonpreferential transportation of natural gas.

**History:** 1978 Comp., § 62-6-4.1, enacted by Laws 1985, ch. 8, § 1; 1987, ch. 93, § 1; 1993, ch. 282, § 29.

## ANNOTATIONS

**The 1987 amendment,** effective June 22, 1987, inserted present Subsection A and relettered the former subsections; in Subsection B, inserted "and nonpreferential" following "and require the nondiscriminatory" and substituted "Subsections C and D" for "Subsections B and C"; in Subsection C, added "and anticompetitive conduct by a public utility" at the end; in Subsection D, inserted "nondiscriminatory" following "shall be just, reasonable"; and added Subsections F and G.

**The 1993 amendment,** effective June 18, 1993, made a stylistic change in Subsection F, and substituted "The commission" for "The public service commission" at the beginning of Subsection G.

**Law reviews.** - For article, "Regulatory Reform of the U.S. Natural Gas Industry: A Summing Up," see 27 Nat. Resources J. 841 (1988).

### **62-6-5. Local option.**

Notwithstanding any of the provisions in Section 62-6-4 NMSA 1978, any municipality desiring to avail itself of all the benefits of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] and of the regulatory services of the commission may elect to come within the provisions of that act and to have the utilities owned and operated by it, either directly or through a municipally owned corporation, regulated and supervised under the provisions of that act. When a municipality so elects, in the manner provided in this section, it shall be subject to all the provisions of the Public Utility Act. The election shall be held as follows:

A. at any time after the effective date of the Public Utility Act, the legal voters of any municipality may petition in writing the governing body of the municipality by filing a petition in the office of the municipal clerk to hold an election for the purpose of determining whether the municipality shall be subject to the provisions of that act. If the aggregate of the names signed to the petition equals or exceeds twenty-five percent of the number of legal votes cast in the municipality for governor at the last preceding general election, the governing body of the municipality shall call an election to be held within sixty days of the filing of the petition. Provided, however, that if a general municipal election is to be held for any other purpose within six months of the filing of the petition, the election provided for in this section shall be held at the same time as and through the election machinery used at that election;

B. the election shall be held in the same manner as and with the same registration books as for other municipal elections. The ballots to be submitted to the voters at the election shall present the following questions:

"For regulation of municipally owned utilities by the New Mexico public utility commission .....

"Against regulation of municipally owned utilities by the New Mexico public utility commission ....."

The votes at the election shall be counted, returned and canvassed as provided for in general municipal elections. If the majority of all the votes are in favor of regulation of municipally owned utilities, the governing body of the municipality shall declare, by order entered upon the records of the municipality, that it is subject to all the provisions of the Public Utility Act. If the majority of all the votes are against such regulation, the result of the election shall be declared and entered in the same manner; and

C. no elections for the same purpose shall be held within two years of each other.

**History:** Laws 1941, ch. 84, § 17A; 1941 Comp., § 72-505; 1953 Comp., § 68-5-5; 1993, ch. 282, § 30.

## ANNOTATIONS

**Cross-references.** - As to regulation of foreign municipal corporations distributing electricity in state, see 62-1-6 NMSA 1978.

As to municipal elections, see 3-8-1 to 3-8-80 and 3-9-1 to 3-9-14 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, in the introductory language, substituted "Section 62-6-4 NMSA 1978" for "Section 17 hereof" and "may elect" for "created by this Act, shall have the right to elect" in the first sentence, and divided the former first sentence into the present first and second sentences; in Subsection A, substituted "governing body of the municipality" for "Board of Trustees or municipal council" in the first sentence, and rewrote the second sentence; in Subsection B, deleted "may be available" following "books as" in the first sentence, deleted "to the voters" following "shall present" in the second sentence, deleted "of public utilities" following "regulation" in the second sentence in the last paragraph, and substituted "New Mexico public utility commission" for "New Mexico public service commission" in two places; and made stylistic changes throughout the section.

**Effective dates.** - Laws 1941, ch. 84, contains no effective date provision, but was enacted at a session which adjourned on April 14, 1941. See N.M. Const., art. IV, § 23.

**Municipality may constitutionally compete with previously franchised utility.** - The action of a municipal corporation in undertaking to compete with a privately operated public utility holding a franchise previously granted by the municipality itself in no way violates any constitutional right of the utility whether the right asserted be that based upon the constitutional provision invalidating laws which impair the obligation of a contract or those relating to the taking of property without due process of law, the injuring or destroying of property without just compensation or the denial of the equal protection of the laws. 1957-58 Op. Att'y Gen. No. 58-236.

**Section provides exception to exemption of municipalities from commission jurisdiction.** - The commission is given authority by virtue of 62-6-4 NMSA 1978 to regulate and supervise every private utility in respect to its rates and service regulations. This same statute specifically withholds from the commission any jurisdiction to regulate or supervise the rates or service of any utility owned and operated by a municipal corporation either directly or through a municipally owned corporation unless said municipality shall exercise its option to come within the provisions of the Public Utility Act as provided in this section. 1957-58 Op. Att'y Gen. No. 57-101.

## **62-6-6. Issuance, assumption or guarantee of securities.**

A. The power of a public utility to issue, assume or guarantee securities and to create liens on its property situated within this state is a special privilege subject to the supervision and control of the commission as set forth in the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978].

B. A public utility, when authorized by order of the commission and not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen months after the date thereof, for the following purposes only:

(1) making loans or grants from the proceeds of federal loans for economic development projects benefiting its service area;

(2) the acquisition of property;

(3) the construction, completion, extension or improvement of its facilities;

(4) the improvement or maintenance of its service;

(5) the discharge or lawful refunding of its obligations; or

(6) the reimbursement of money actually expended for purposes set forth in this subsection from income or from any other money in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five years next prior to the filing of an application with the commission for the required authorization.

C. Notwithstanding the provisions of Subsection B of this section, the commission may authorize issuance by a public utility of shares of stock of any class as a dividend on outstanding shares of stock of the public utility of any class and may authorize the issuance of the same or a different number of shares of stock of any class in exchange for outstanding shares of stock of any class of the public utility, and the public utility may issue the stock so authorized.

D. The commission shall not authorize a borrowing under the provisions of Paragraph 1 of Subsection B of this section unless the governing board has approved the borrowing by a two-thirds majority vote of the members present at a special meeting called for that purpose. The commission shall review the terms of the economic development loan or grant to ascertain the adequacy of any collateral, to have the right to inspect books and review the level of co-participation by the borrower or grantee.

**History:** Laws 1941, ch. 84, § 18; 1941 Comp., § 72-506; Laws 1947, ch. 5, § 1; 1953 Comp., § 68-5-6; 1991, ch. 110, § 1.

### **ANNOTATIONS**

**The 1991 amendment**, effective June 14, 1991, designated the formerly undesignated provisions as Subsections A to C; substituted "subject to the supervision and control of the commission as set forth in the Public Utility Act" for "hereby subjected to the supervision and control of the commission as hereinafter in this act set forth" at the end of Subsection A; in Subsection B, inserted Paragraph (1), inserted the paragraph designations "(2)" to "(6)," and inserted "set forth in this subsection" near the beginning of Paragraph (6); added "Notwithstanding the provisions of Subsection B of this section" at the beginning of Subsection C; added Subsection D; and made related changes and minor stylistic changes in Subsections B and C.

**Unauthorized notes and mortgages are void.** - Notes and mortgages issued without authority of the commission are void. *Hogue v. Superior Utils., Inc.*, 53 N.M. 452, 210 P.2d 938 (1949) See 62-6-11 NMSA 1978.

**Utility not liable for payment to protect unauthorized mortgage.** - Where plaintiff paid \$600 to protect a second mortgage on property of utility company which proved void because it was not authorized by the commission, he could not recover the sum from the utility. *Hogue v. Superior Utils., Inc.*, 53 N.M. 452, 210 P.2d 938 (1949).

**And may recover meter deposits applied on unauthorized note and mortgage.** - Utility company was properly granted judgment for meter deposits where they were applied by sellers of the capital stock on a note and mortgage of the company which were invalid because not authorized by the commission. *Hogue v. Superior Utils., Inc.*, 53 N.M. 452, 210 P.2d 938 (1949).

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 255 to 263.

Regulating issuance of securities by public utilities through public service commissions, 41 A.L.R. 889.

Conclusiveness of commission's decision or order as to issuance of securities, 41 A.L.R. 922.

Control over issue of securities to capitalize or fund bond discount, 72 A.L.R. 1232.

### **62-6-7. Application to commission; order of commission.**

Such public utility shall, by written petition filed with the commission and setting forth the pertinent facts involved, make application to the commission for an order authorizing the proposed issue, assumption or guarantee of securities, and the application of the proceeds therefrom to the purposes specified. The commission shall, after such hearing and upon such notice as the commission may prescribe, enter its written order



approving the petition and authorizing the proposed securities transactions, unless the commission shall find: that such transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act; or that the aggregate amount of the securities outstanding and proposed to be outstanding will exceed the fair value of the properties and business of the public utility.

**History:** Laws 1941, ch. 84, § 19; 1941 Comp., § 72-507; 1953 Comp., § 68-5-7.

## **ANNOTATIONS**

**Cross-references.** - As to investment securities, see 55-8-101 to 55-8-406 NMSA 1978.

As to security dealers, see 58-13B-3 to 58-13B-19 NMSA 1978.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

### **62-6-8. Exempted securities.**

A. A public utility may issue securities, other than stock or stock certificates, payable at periods of not more than eighteen months after the date of issuance of same, and secured or unsecured, without application to or order of the commission, but no such securities so issued shall in whole or in part be refunded by any issue of stocks, stock certificates or other securities having a maturity of more than eighteen months, except on application to and approval of the commission.

B. If a utility proposes to accomplish proposed financing by the issuance and delivery of notes, bonds or other evidences of indebtedness and of mortgages, deeds of trust or other security instruments therefor to the United States of America or any agency or instrumentality thereof, acting solely as the lender or with the participation of one or more other lenders, the application to the commission shall set forth the facts involved, the proposed application of the proceeds therefrom and any approval or expected approval thereof by the United States of America or its agency or instrumentality. No hearing by the commission shall be required for approval of the issuance and delivery of the evidences of indebtedness and security instruments to such lender or lenders and the commission shall approve the issuance and delivery thereof within the time provided in Section 62-6-9 NMSA 1978; provided that for good cause shown, the commission may order that a hearing shall be held with respect to the proposed financing. The order of approval of the commission may be conditioned on the approval of the issuance of the evidences of indebtedness or security by the United States of America or the agency or instrumentality thereof as may be appropriate.

**History:** 1953 Comp., § 68-5-8, enacted by Laws 1967, ch. 96, § 5; 1971, ch. 9, § 1.

## **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1967, ch. 96, § 5, repeals 68-5-8, 1953 Comp., relating to securities exempted from approval requirements, and enacts a new 68-5-8, 1953 Comp.

### **62-6-8.1. Additional jurisdiction.**

Notwithstanding any other provision of Sections 62-6-1 through 62-6-11 NMSA 1978, the commission shall have jurisdiction over and may regulate by general order or regulation, securities of a public utility incorporated under the laws of this state which would otherwise be exempt from regulation by the commission under Section 62-6-6 NMSA 1978 or Subsection A of Section 62-6-8 NMSA 1978, and which is subject to regulation under 16 USC 824.

**History:** 1978 Comp., § 62-6-8.1, enacted by Laws 1979, ch. 50, § 1.

### **62-6-9. Applications disposed of promptly.**

All applications for the issuance, assumption or guarantee of securities shall be placed at the head of the commission's docket and shall be disposed of promptly, and within thirty days after petition is filed with the commission unless it is necessary for good cause to continue same for a longer period. Whenever such application is continued beyond thirty days after the time it is filed, the commission shall enter an order making such continuance and stating fully the facts necessitating same.

**History:** Laws 1941, ch. 84, § 21; 1941 Comp., § 72-509; 1953 Comp., § 68-5-9.

### **62-6-10. No obligation on state.**

No provision of this act, nor any act or deed done or performed in connection therewith, shall be construed to obligate the state of New Mexico to pay or guarantee in any manner whatsoever any security authorized, issued, assumed or guaranteed under the provisions of this act.

**History:** Laws 1941, ch. 84, § 22; 1941 Comp., § 72-510; 1953 Comp., § 68-5-10.

## **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

### **62-6-11. Securities void unless approved.**

All securities issued, assumed or guaranteed without application to and approval of the commission, except the securities mentioned in Sections 62-6-8 and 62-6-8.1 NMSA 1978, shall be void.

**History:** Laws 1941, ch. 84, § 23; 1941 Comp., § 72-511; 1953 Comp., § 68-5-11; Laws 1979, ch. 50, § 2.

## **62-6-12. Acquisitions, consolidations, etc.; consent of commission.**

A. With the prior express authorization of the commission, but not otherwise:

(1) any two or more public utilities may consolidate or merge with each other so as to form a new concern;

(2) any person and a public utility or public utility holding company may consolidate or merge with each other so as to form a new concern;

(3) stock of a public utility or public utility holding company may be acquired by:

(a) any person who prior to the acquisition of any such stock or part thereof is a person subject to regulation or classified as a public utility or public utility holding company in any jurisdiction;

(b) any person who is or during the course of an acquisition covered by this section becomes subject to regulation or is classified as a public utility or public utility holding company in any jurisdiction based on reasons other than solely the acquisition described in this paragraph;

(c) any person associated, affiliated or acting in concert with any person subject to regulation or classified as a public utility or public utility holding company in any jurisdiction for the purposes of any acquisition subject to the provisions of this section;

(d) any person associated, affiliated or acting in concert with any person described in Subparagraphs [Subparagraph] (a), (b) or (c) of this paragraph; or

(e) any person who, during the course of an acquisition covered by this section, merges or consolidates with a person described in Subparagraphs [Subparagraph] (a), (b), (c) or (d) of this paragraph.

(4) any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof; provided, however, that this paragraph shall not be construed to require authorization for transactions in the ordinary course of business.

B. Any consolidation, merger, acquisition, transaction resulting in control or exercise of control, or other transaction in contravention of this section without prior authorization of the commission shall be void and of no effect.

C. Nothing in this section shall limit or expand the authority of the commission with respect to Class II transactions as provided in the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978].

**History:** Laws 1941, ch. 84, § 24; 1941 Comp., § 72-512; 1953 Comp., § 68-5-12; Laws 1983, ch. 250, § 1; 1989, ch. 33, § 1.

## ANNOTATIONS

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

**The 1983 amendment** added "and" at the end of Subsection B and added the language beginning with "or any substantial part thereof" at the end of Subsection C.

**The 1989 amendment**, effective June 16, 1989, designated the formerly undesignated introductory paragraph as Subsection A and inserted "prior" therein; deleted subsection designation "A" preceding Subsection A(1) and made a minor stylistic change in that subsection; added Subsection A(2); substituted present Subsection A(3) for former Subsection B, which read "any public utility may acquire the stock or any part thereof of any other public utility"; redesignated former Subsection C as present Subsection A(4) and made a minor stylistic change therein; and added present Subsections B and C.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 14, 72.

### **62-6-13. Application; approval of commission.**

Application shall be made by the interested public utility by written petition containing a concise statement of the proposed transaction, the reason therefor and such other information as may reasonably be required by the commission. Upon the filing of such application, the commission shall promptly investigate the same, with such hearing and upon such notice as the commission may prescribe, and unless the commission shall find that the proposed transaction is unlawful or is inconsistent with the public interest, it shall give its consent and approval in writing.

**History:** Laws 1941, ch. 84, § 25; 1941 Comp., § 72-513; 1953 Comp., § 68-5-13.

## ANNOTATIONS

**Only notice necessary is such as commission requires.** - The notice requirement under 62-10-5 NMSA 1978 has application only when a proceeding is initiated by a complaint; otherwise the only notice necessary is such as is required by the commission. 1947-48 Op. Att'y Gen. 5138.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 255 to 263.

Merger or consolidation without required permit as affecting validity of contracts, 30 A.L.R. 890, 42 A.L.R. 1226, 118 A.L.R. 646.

73B C.J.S. Public Utilities §§ 68, 72.

### **62-6-14. Valuation by the commission.**

A. When in the exercise of its powers and jurisdiction it is necessary for the commission to consider or ascertain the valuation of the properties or business of a public utility, or make any other determination involved in the fixing or setting of rates for a utility, the commission shall give due consideration to the history and development of the property and business of the particular public utility, to the original cost thereof, to the cost of reproduction as a going concern, to the revenues, investment and expenses of the utility in this state and otherwise subject to the commission's jurisdiction and to other elements of value and rate-making formulae and methods recognized by the laws of the land for rate-making purposes.

B. For the purpose of making such valuation or determinations, the members of the commission and its duly authorized agents and employees shall at all reasonable times have free access to the property, accounts, records and memoranda of the utility whose property and rights are being valued, and the utility shall aid and cooperate with the commission and its duly authorized agents and employees to the fullest degree for the purpose of facilitating the investigation.

C. In making any determination involving the rates or service of a utility, the commission may change its past practices or procedures, provided that substantial evidence on the record justifies such a change.

**History:** Laws 1941, ch. 84, § 26; 1941 Comp., § 72-514; 1953 Comp., § 68-5-14; Laws 1983, ch. 250, § 2.

### **ANNOTATIONS**

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

**The 1983 amendment** divided the formerly undivided language into Subsections A and B and, in Subsection A, substituted "is necessary" for "shall be necessary" and "or make any other determination involved in the fixing or setting of rates for a utility, the commission shall" for "it shall, in arriving at such valuation" and inserted "to the revenues, investment and expenses of the utility in this state and otherwise subject to the commission's jurisdiction" and "and rate-making formulae and methods." The 1983 amendment also inserted "or determinations" in Subsection B and added Subsection C.

**Commission not limited in method of valuating utility or setting rates.** - Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the commission in ascertaining the rate base of a utility; nor does the

spirit of the statute tie the commission down to the consideration of a single factor in establishing rates. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**If plant acquisition adjustment is included as legitimate plant cost**, it becomes a part of the rate base upon which a rate of return is to be computed. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**New Mexico is not "original cost" jurisdiction**, but a "fair value" jurisdiction. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**"Used and useful" concept is but one factor among many to be considered** by the commission in its rate base analysis. *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 725 P.2d 244 (1986).

**Utility may not capitalize capital investments previously treated as operating expenses.** - Where prior capital investments were charged to operating expenses and the rate apparently fixed on that basis, a utility cannot later capitalize such amounts in determining original cost for ratemaking purposes. *Moyston v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 146, 412 P.2d 840 (1966) (decided prior to addition of Subsection C).

**Commission may deduct deferred tax reserve from rate base.** - The court did not err in failing to hold unreasonable and unlawful the commission's deduction from rate base of the company's reserve for deferred taxes because the statute does not compel inclusion of value of the latter type in the rate base and because the laws of the land do lend support for the commission's action. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Law reviews.** - For article, "The Regulation of Public Utilities," see 10 *Nat. Resources J.* 827 (1970).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 *Am. Jur. 2d Public Utilities* §§ 138 to 172.

Valuations for rate making as affected by advance in price conditions due to war, 20 *A.L.R.* 555.

Propriety of considering capital structure of utility's parent company or subsidiary in setting utility's rate of return, 80 *A.L.R.4th* 280.

73B *C.J.S. Public Utilities* §§ 18 to 33.

## **62-6-15. Contract rate with the municipality and utilities; how established.**

Rates and service regulations may be established by contract between the municipality and the utility for a specified term not exceeding twenty-five years, but only by and with the approval of the commission to be expressed by its order. Whenever any such contract shall be made, it shall, before becoming effective, be submitted to the commission. Unless the commission shall find the provisions of any such contract inconsistent with the public interest, the interest of the consumers and the interest of investors, it shall approve the same, otherwise it shall disapprove the same, and, unless and until so approved, such contract shall be of no effect, but if it be approved, it shall be in all respects lawful. Any such new contract shall provide for a redetermination by the commission of the reasonableness of the rates at such intervals as the commission may prescribe not longer than five years and every order made by the commission approving any contract shall expressly state the intervals at which redetermination of rates shall be made. For the purpose of determining whether any such contract hereafter made is consistent with public interest, the commission shall hold such hearings, after notice, as may be necessary to its determination. This act is intended to make rates in existing franchises and contracts subject to the control of the commission only to the extent that the legislature may lawfully do so. The provisions of this section shall not apply to any contract between a municipality and a utility relating to electric power and energy sales between such entities if the electric power and energy which is the subject of such contract is generated by such municipality's generating facility or its interest in a jointly owned generating facility.

**History:** Laws 1941, ch. 84, § 27; 1941 Comp., § 72-515; 1953 Comp., § 68-5-15; Laws 1979, ch. 260, § 17.

### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Commission has jurisdiction over municipal contract rates.** - The legislature intended to confer general and exclusive jurisdiction on the commission to regulate every intrastate rate to be charged by public utilities for the services they render to the extent provided in this article, including jurisdiction over contract rates between public utilities and municipalities. 1951-52 Op. Att'y Gen. No. 5597.

**Contract on behalf of municipal inhabitants allowed.** - This section allows municipalities to contract with a public utility for proposed rates and service regulations for utility service to municipal inhabitants. Any rates or service regulations set forth in the contract do not take effect, however, until they have been approved by the commission, which retains plenary authority to approve, disapprove, or modify them. *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 521, 854 P.2d 348 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 13 Am. Jur. 2d Carriers § 105.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 A.L.R.4th 183.

### **62-6-16. Commission may prescribe uniform accounts.**

The commission may, when it deems it advisable to do so, upon notice and hearing, establish a uniform system of accounts for each utility, which system shall be uniform for all utilities of the same kind and class, and may make such regulations regarding the accounts of each utility for the purpose of ensuring uniform and correct books of account and record as in the judgment of the commission may be necessary to carry out any of the provisions of this act.

**History:** Laws 1941, ch. 84, § 28; 1941 Comp., § 72-516; 1953 Comp., § 68-5-16.

### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 68.

### **62-6-17. Office, books and records; sanction; penalty.**

A. Every utility furnishing service within the state shall maintain an office located in the state. The commission by order may require any utility or any officer or agent of any utility to produce within the state or provide access to, at such reasonable time and place as the commission may designate, any books, records, accounts or documents kept in any office or place within or without the state, or certified copies thereof, whenever the production thereof is reasonably required and pertinent to any matter under investigation before the commission.

B. Whenever the production of books, records, accounts or documents is reasonably required by the commission and pertinent to any matter under investigation before the commission, the commission may require the utility or any affiliated interest participating in a Class I or II transaction to produce or provide access to, at such reasonable time and place as the commission may designate, such books, records, accounts or documents.

C. Any person whose interest may be adversely affected by the production of any books, records, accounts or documents may petition the commission for a protective order for confidential or proprietary information. The commission shall determine the materiality and relevancy of the books, records, accounts or documents to any matter



before the commission and determine whether such books, records, accounts or documents contain confidential or proprietary information. If the commission determines such books, records, accounts or documents contain confidential or proprietary information that is material and relevant to the proceeding, it shall determine whether the public interest requires that such books, records, accounts or documents be produced in any hearing or investigation held under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] or that an abstract of or the extraction of specific information from such books, records, accounts or documents be produced for use in any such hearing or investigation. Any books, records, accounts or documents determined under this section to contain confidential or proprietary information are not subject to the Public Records Act [14-3-1 to 14-3-16 NMSA 1978].

D. For so long as such information determined by the commission to contain confidential or proprietary information retains its confidential or proprietary character, any person who intentionally discloses such confidential or proprietary information is guilty of a misdemeanor and upon conviction shall be fined not less than five hundred dollars (\$500) nor more than five thousand dollars (\$5,000).

**History:** Laws 1941, ch. 84, § 29; 1941 Comp., § 72-517; 1953 Comp., § 68-5-17; Laws 1980, ch. 85, § 3; 1982, ch. 109, § 8; 1993, ch. 351, § 3.

#### **ANNOTATIONS**

**The 1993 amendment,** effective June 18, 1993, rewrote this section to the extent that a detailed comparison would be impracticable.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 Nat. Resources J. 851 (1986).

#### **62-6-18. Utilities required to report to commission.**

Every utility[,], when and as required by the commission, shall file with the commission such annual report and such other information as the commission may reasonably require. The commission shall prepare and distribute to every utility blank forms for the reports required under this section.

**History:** Laws 1941, ch. 84, § 30; 1941 Comp., § 72-518; 1953 Comp., § 68-5-18.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 13 Am. Jur. 2d Carriers §§ 219, 220; 64 Am. Jur. 2d Public Utilities § 235.

73B C.J.S. Public Utilities §§ 66, 67, 75.

### **62-6-19. Standard of service.**

A. The commission may prescribe reasonable and adequate service regulations and standards of service rendered or to be rendered by any utility and may prescribe such regulations for the examination and testing of such service and for the measurement thereof.

B. In order to assure reasonable and proper utility service at fair, just and reasonable rates, the commission may investigate:

(1) Class I transactions to determine the reasonableness of the cost and contract conditions to the utility in any such transaction; and

(2) Class II transactions or the resulting effect of such Class II transactions on the financial performance of the public utility to determine whether such transactions or such performance have an adverse and material effect on such service and rates.

C. A public utility engaging in any Class I or Class II transaction shall have the burden to produce such evidence and information as is sufficient to demonstrate:

(1) that such Class I transaction has resulted in reasonable cost and contract conditions to the utility; and

(2) that such Class II transaction or the resulting effect of such Class II transaction on the financial performance of the public utility has not materially and adversely affected the utility's ability to provide reasonable and proper utility service at fair, just and reasonable rates.

If the commission finds that the utility has failed to meet its burden, the commission may issue orders consistent with the authority granted to the commission under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] to assure the provision of such service at such rates. Any such order that explicitly and directly requires the production of information shall be in accordance with Section 62-6-17 NMSA 1978.

D. The commission may issue such orders in connection with an evidentiary proceeding involving a public utility as it finds appropriate and necessary to assure that appropriate cost allocations are made and that no cross-subsidization occurs between the utility and an affiliated interest.

E. The commission shall, by November 30, 1982, promulgate rules and may amend such rules thereafter, to implement the provisions of Subsections B, C and D of this section, including the manner of conducting such investigations and making such determinations, and the specification of such reporting requirements as may be reasonably necessary and as are consistent with the provisions of this 1982 act.

F. For a period of thirteen months from the effective date of this subsection, no utility or affiliated interest shall engage in a new Class II transaction described in Paragraph (1) or (2) of Subsection K of Section 62-3-3 NMSA 1978, nor during that period shall any utility or affiliated interest controlled by a utility engage in any nonutility activity not carried on prior to that effective date except as is necessary to protect or dispose of an asset, unless such nonutility activity had been the subject of substantial negotiations and had been publicly announced prior to the effective date of this section.

F. For a period of fifteen months from the effective date of this subsection, no utility or affiliated interest shall engage in a Class II transaction described in Paragraph (1) or (2) of Subsection K of Section 62-3-3 NMSA 1978, nor during that period shall any utility or affiliated interest controlled by a utility engage in any nonutility activity not carried on prior to that effective date except as is necessary to protect or dispose of an asset.

**History:** Laws 1941, ch. 84, § 31; 1941 Comp., § 72-519; 1953 Comp., § 68-5-19; Laws 1982, ch. 109, § 9.

## ANNOTATIONS

**Cross-references.** - As to denial of service by utility being petty misdemeanor, see 30-13-2 NMSA 1978.

**Effective dates.** - Laws 1982, ch. 109, contains no effective date provision, but was enacted at the session which adjourned on February 18, 1982. See N.M. Const., art. IV, § 23.

**Compiler's note.** - The 1982 amendment added two Subsections F.

The term "the effective date of this subsection," referred to in each Subsection F, probably means the effective date of the 1982 act. See effective date notes above.

**Meaning of "this 1982 act."** - The term, "this 1982 act," referred to in Subsection E, means Laws 1982, ch. 109, which is compiled as 62-3-3, 62-6-17, 62-6-19, 62-8-7, 62-11-1 to 62-11-3, 62-11-5 and 62-11-6 NMSA 1978.

**Primary purpose of extending commission's jurisdiction to Class I transactions** was to protect against allocation of some of a regulated utility's profits to its unregulated affiliate. *Gas Co. v. New Mexico Pub. Serv. Comm'n*, 100 N.M. 740, 676 P.2d 817 (1984).

**Commission may impute gas processor's unreasonable revenues to affiliate utility.** - Where a company processed natural gas for its affiliate gas utility in a Class I transaction and had unreasonable revenues when compared to similar natural gas processors, the commission was authorized to impute some of those revenues to the affiliate gas utility for rate-making purposes. *Gas Co. v. New Mexico Pub. Serv. Comm'n*, 100 N.M. 740, 676 P.2d 817 (1984).

**Variations in rates not ipso facto discriminatory.** - Section 62-8-6 NMSA 1978 does not prohibit variations in rates, nor does it require "equal service." Rather, it prohibits "unreasonable differences" in rates of service between localities. Allowing municipalities to contract with utilities for service rates to their inhabitants does not, therefore, ipso facto, violate 62-8-6 NMSA 1978. *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 521, 854 P.2d 348 (1993).

**Company restructuring.** - This section allows the commission to disapprove a public utility holding company restructuring prior to its completion. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 106 N.M. 622, 747 P.2d 917 (1987).

The commission properly disapproved a public utility holding company restructuring prior to its completion. This restructuring would have changed the status of certain subsidiaries of the utility to a status which can be called "sisters" (a subsidiary of a holding company of which the utility also is a co-equal subsidiary), which are not, under 62-3-3A NMSA 1978, included within the definition of an "affiliated interest." Therefore, this holding company structure would have prevented the commission's access, under 62-6-17 NMSA 1978, to the books and records of the "sister" necessary to ensure the reasonableness of transactions between that "sister" and the utility. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 106 N.M. 622, 747 P.2d 917 (1987).

**Law reviews.** - For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 *Nat. Resources J.* 411 (1979).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 *N.M.L. Rev.* 287 (1979).

For 1984-88 survey of New Mexico administrative law, 19 *N.M.L. Rev.* 575 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 *Am. Jur. 2d Public Utilities* § 236.

Service of government as excuse for failure of carrier to discharge duty to individual, 8 *A.L.R.* 162.

Right of public utility company to discontinue its entire service, 11 *A.L.R.* 252.

Statutory requirement of adequate service and facilities by public utility as affecting liability for loss of private property through inadequate supply of water to extinguish fire, 27 *A.L.R.* 1279.

Public service commission's power to require extension of gas service into new territory, 31 *A.L.R.* 333.

Duty of public utility to duplicate service, 52 A.L.R. 1111.

Validity of contract which impairs or tends to impair the ability of a public service corporation to serve the public, 58 A.L.R. 804.

Constitutionality of statute or ordinance requiring public utility to supply fixtures or accessories or incidental service to customers free of charge or for fixed charge, 115 A.L.R. 1162.

Special requirements of consumer as giving rise to implied contract by public utility to furnish particular amount of electricity, gas or water, 13 A.L.R.2d 1233.

73B C.J.S. Public Utilities § 73.

### **62-6-20. Meter accuracy.**

The commission may prescribe reasonable rules, regulations and standards to secure the substantial accuracy of all meters and other devices for measurement of utility service or products which shall be complied with by the utility and consumer.

**History:** Laws 1941, ch. 84, § 32; 1941 Comp., § 72-520; 1953 Comp., § 68-5-20; Laws 1965, ch. 289, § 5.

### **62-6-21. Inspection of meters and other devices for measuring public utility service.**

The commission shall adopt rules, regulations and standards to secure the accuracy of all meters and other devices for measurement of utility service or products, and the commission may examine and test any and all such meters and other devices under such rules and regulations as it may prescribe. At all inspections and tests made on complaints of consumers, representatives of the utility complained of and of the complainant may be present.

**History:** Laws 1941, ch. 84, § 33; 1941 Comp., § 72-521; 1953 Comp., § 68-5-21; Laws 1965, ch. 289, § 6.

### **62-6-22. Meters and other measuring devices; testing; fees.**

Any consumer or user may have any meter or measuring device tested by the utility once without charge after a reasonable period to be fixed by the commission by rule, and at shorter intervals upon payment of reasonable fees fixed by the commission. The commission shall declare and establish reasonable fees to be paid for other examining and testing [of] such meters and other measuring devices on the request of the consumer. If the test is requested to be made within the period of presumed accuracy as fixed by the commission since the last such test of the same meter or other

measuring device, the fee to be paid by the consumer or user at the time of his request shall be refunded to the consumer or user if the meter or measuring device be found unreasonably defective or incorrect to the substantial disadvantage of the consumer or user. If the consumer's request is made at a time beyond the period of presumed accuracy fixed by the commission since the last such test of the same meter or measuring device, the utility shall make the test without charge to the consumer or user.

**History:** Laws 1941, ch. 84, § 34; 1941 Comp., § 72-522; 1953 Comp., § 68-5-22; Laws 1965, ch. 289, § 7.

### **62-6-23. Authority to enter premises.**

The commission and its officers and employees of the commission may during all reasonable hours, after reasonable notice to the utility, enter upon any premises occupied by any utility for the purpose of making examinations and tests and exercising any power provided for in this act, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections, and shall be given sufficient time before the making thereof to secure the presence of a representative of its selection.

**History:** Laws 1941, ch. 84, § 35; 1941 Comp., § 72-523; 1953 Comp., § 68-5-23.

### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 14, 75.

### **62-6-24. Safety rules and regulations.**

The commission shall have the right and is hereby empowered to adopt, promulgate and enforce such reasonable rules and regulations as may be required to protect users of gas or electricity from damage to their persons or property through the use of defective gas or electrical appliances or equipment, or improper installation thereof; and to require discontinuance by a consumer of the use of any defective appliance or equipment or the removal forthwith of any unsafe condition incident to the distribution of gas or electricity.

**History:** Laws 1941, ch. 84, § 36; 1941 Comp., § 72-524; 1953 Comp., § 68-5-24.

### **ANNOTATIONS**

**Commission's general jurisdiction includes safety regulations and inspections.** - The general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations includes the power to make safety regulations and enforce them through inspections. 1972 Op. Att'y Gen. No. 72-35.

**It may delegate its authority to inspect.** - The commission is authorized by 62-6-4 NMSA 1978 and by the common law to delegate its authority to inspect and test liquefied petroleum gas utilities to the liquefied petroleum gas commission. Only the public service commission can promulgate safety regulations, however, and it must make the final order regarding any violations of regulations. 1972 Op. Att'y Gen. No. 72-35.

**Rules and regulations have force of law.** - The rules and regulations of the commission duly adopted under 62-6-4 NMSA 1978 and this section have the force and effect of law which a utility must obey. 1969 Op. Att'y Gen. No. 69-81.

**It is the commission's duty to protect not only the utility but also its patrons.** 1969 Op. Att'y Gen. No. 69-81.

**Utility must refuse service to customer with defective wiring.** - A utility has a positive duty to refuse service to a customer whose wiring is known by the utility to be in a dangerous or defective condition. 1969 Op. Att'y Gen. No. 69-81.

**Compliance with rules excuses discontinuance of service under hazardous conditions.** - Compliance with rules of the commission permitting a public utility to immediately discontinue service in the event of a condition determined by the utility to be hazardous would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce some evidence that the condition was actually hazardous if the criminal action was brought against it, and to prove the existence of the rule itself. 1969 Op. Att'y Gen. No. 69-81.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Right of public service corporation to prescribe fixtures to be used in connection with its service, 37 A.L.R. 1367.

Duty of gas company as regards precautions to be taken upon or after discontinuing service to premises, 13 A.L.R.2d 1396.

Water distributor's liability for injury due to condition of service lines, meters and the like, which serve individual consumer, 20 A.L.R.3d 1363.

Liability in connection with fire or explosion incident to bulk storage, transportation, delivery, loading or unloading of petroleum products, 32 A.L.R.3d 1169.

## **62-6-25. Electrical power grids reports; transmission of electrical power; complaint procedures.**

A. The commission may require electric utilities and rural electric cooperatives to furnish the commission with available information material to the reliability of electrical power grids within the state.

B. To ensure efficient and reliable operation of New Mexico electrical power grids and upon complaint of an interested electric utility or rural electric cooperative, and after notice and hearing, the commission may, to the extent permitted by federal law and consistent with the standards prescribed by law for compulsory wheeling service ordered by the federal energy regulatory commission, require another electric utility to provide transmission services to the complainant, subject to arrangements for compensation therefor by agreement between the utilities or pursuant to a rate schedule filed with the federal energy regulatory commission.

**History:** 1978 Comp., § 62-6-25, enacted by Laws 1983, ch. 104, § 1.

### **ANNOTATIONS**

**Severability clauses.** - Laws 1983, ch. 104, § 2, provides for the severability of the act if any part or application thereof is held invalid.

## **62-6-26. Economic development rates for gas and electric utilities; authorization.**

A. The commission may approve or otherwise allow to become effective, as provided in Subsection B of this section, applications from utilities or persons subject to regulation pursuant to Subsection B of Section 62-6-4 NMSA 1978 or filings by cooperative utilities pursuant to Subsection F of Section 62-8-7 NMSA 1978, as appropriate, for special rates or tariffs in order to prevent the loss of customers, to encourage customers to expand present facilities and operations in New Mexico and to attract new customers where necessary or appropriate to promote economic development in New Mexico. Any such special rates or tariffs shall be designed so as to recover at least the incremental cost of providing service to such customers.

B. The commission may approve or otherwise allow to become effective applications from utilities or persons subject to regulation pursuant to Subsection B of Section 62-6-4 NMSA 1978 and filings by cooperative utilities pursuant to Subsection F of Section 62-8-7 NMSA 1978 for economic development rates and rates designed to retain load for gas and electric utility customers. For purposes of this section and Section 62-8-6 NMSA 1978, economic development rates and rates designed to retain load are rates set at a level lower than the corresponding service rate for which a customer would otherwise qualify.



C. Economic development rates shall be approved or otherwise allowed to become effective for an electric utility or persons subject to regulation pursuant to Subsection B of Section 62-6-4 NMSA 1978 or filings by cooperative utilities pursuant to Subsection F of Section 62-8-7 NMSA 1978 only when the utility or the substantially full requirements supplier of the utility has excess capacity. For purposes of this section, "excess capacity" means the amount of electric generating and purchased power capacity available to the utility or such supplier that is greater than the utility's or such supplier's peak load plus a fixed percentage reserve margin set by the commission.

**History:** Laws 1989, ch. 5, § 1; 1993, ch. 282, § 31.

### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, substituted "The commission" for "The New Mexico public service commission" at the beginning of Subsections A and B; and, in Subsection C, in the second sentence, deleted "and Section 62-8-6 NMSA 1978" preceding "excess capacity", substituted "the commission" for "the New Mexico public service commission", and made a stylistic change.

#### **62-6-26.1. Rates for clean fuels used as vehicular fuels; authorization.**

The commission may approve or otherwise allow to become effective applications from public utilities, subject to the commission's jurisdiction under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], for clean fuel rates, tariffs or other programs in order to encourage, develop or promote the development and use of natural gas and other clean fuels used as vehicular fuels. For the purposes of this section, clean fuel rates or tariffs are rates or tariffs set at a lower level than the corresponding service rate or tariff for which a customer would otherwise qualify.

**History:** 1978 Comp., § 62-6-26.1, enacted by Laws 1992, ch. 58, § 10; 1993, ch. 282, § 32.

### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, substituted "The commission" for "The New Mexico public service commission" at the beginning of the section.

**Effective dates.** - Laws 1992, ch. 58 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 20, 1992.

## **ARTICLE 7 NATURAL GAS PRICE PROTECTION**

**62-7-1 to 62-7-10. Repealed.**

## ANNOTATIONS

**Saving clauses.** - Laws 1984, ch. 123, § 13B, provides that nothing in that act shall limit the right of any person to seek relief or to pursue rights or limit the obligation of any governmental agency to act, if such right or obligation existed prior to repeal of the Natural Gas Pricing Act and provides that the repeal of 62-7-1 through 62-7-10 NMSA 1978 by Laws 1984, ch. 123, § 13A, shall not operate to limit any such right or obligation.

**Repeals.** - Laws 1984, ch. 123, § 13A, repeals 62-7-1 through 62-7-10 NMSA 1978, the Natural Gas Pricing Act, effective July 1, 1984. For former provisions of 62-7-1, 62-7-5 and 62-7-10 NMSA 1978, see 1978 original pamphlet. For former provisions of 62-7-2 to 62-7-4 and 62-7-6 to 62-7-9.1 NMSA 1978, see 1983 cumulative supplement.

### 62-7-11 to 62-7-23. Terminated.

## ANNOTATIONS

**Termination dates.** - Laws 1984, ch. 123, § 15, terminated 62-7-11 to 62-7-23 NMSA 1978, as enacted by Laws 1984, ch. 123, the Natural Gas Price Protection Act, effective June 30, 1985. For former provisions, see 1984 cumulative supplement.

## ARTICLE 8 DUTIES AND RESTRICTIONS IMPOSED UPON PUBLIC UTILITIES

### 62-8-1. Rates.

Every rate made, demanded or received by any public utility shall be just and reasonable.

**History:** Laws 1941, ch. 84, § 37; 1941 Comp., § 72-601; 1953 Comp., § 68-6-1.

## ANNOTATIONS

**Cross-references.** - As to commission jurisdiction over rates, see 62-6-4 NMSA 1978 and notes thereto.

As to commission jurisdiction over water and sanitation district rates, see 73-21-16 L NMSA 1978.

**Balancing of interests required.** - To set a just and reasonable rate, the commission must balance the investor's interest against the ratepayer's interest. *Behles v. New Mexico Pub. Serv. Comm'n*, 114 N.M. 154, 836 P.2d 73 (1992).

**Rate requests carried out under 62-8-7 NMSA 1978.** - Section 62-8-7 NMSA 1978 is the provision under which the overall purpose of this section is carried out for the given instance of a rate request. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Commission not limited in method of valuating utility or setting rates.** - Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the commission in ascertaining the rate base of a utility; nor does the spirit of the statute tie the commission down to the consideration of a single factor in establishing rates. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**As commission is vested with considerable discretion** in determining whether a rate to be received and charged is just and reasonable. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**Discretion to review rates efficiently.** - The statutory scheme vests broad discretion in the commission to review utility rates in an efficient and reasonable manner. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Assignment of issue to separate proceeding.** - The commission may assign an issue raised in a rate request hearing to a separate proceeding. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**If plant acquisition adjustment is included as legitimate plant cost,** it becomes a part of the rate base upon which a rate of return is to be computed. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**Ordering increase in contract rate is within commission's jurisdiction.** - Where the commission had entered an order authorizing a public utility to enter into a contract and to continue to charge the gas rate therein specified until further order and on the ex parte petition of the utility subsequently entered an interlocutory order making a rate increase to be effective until the commission could hold a hearing to determine and set a new and proper rate, the commission was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction - a question of rates. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**Burden of proof on utility.** - The legislature has granted the commission discretion to place the burden of proof on the utility in any rate proceeding. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 79 to 87.

Judicial relief from contract rates which have become inadequate, 6 A.L.R. 1659, 10 A.L.R. 1335.

Validity, construction and effect of provisions for the appropriation of excess income of public utility, 33 A.L.R. 488.

Variations of electric utility rates based on quantity used, 67 A.L.R. 821.

Right of public utility to make minimum monthly bill or fixed monthly service charge, 122 A.L.R. 193.

Discrimination between property within and that outside governmental districts as to public service or utility rates, 4 A.L.R.2d 595.

Special requirements of consumer as giving rise to liability, based on implied contract, for failure to furnish particular amount of electricity, gas or water, 13 A.L.R.2d 1233.

Variations of utility rates based on flat and meter rates, 40 A.L.R.2d 1331.

Amount paid by public utility to affiliate for goods or services as includible in utility's rate base and operating expenses in rate proceeding, 16 A.L.R.4th 454.

Public utilities: validity of preferential rates for elderly or low-income persons, 29 A.L.R.4th 615.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 A.L.R.4th 183.

73B C.J.S. Public Utilities §§ 15 to 59.

## **62-8-2. Service.**

Every public utility shall furnish adequate, efficient and reasonable service.

**History:** Laws 1941, ch. 84, § 38; 1941 Comp., § 72-602; 1953 Comp., § 68-6-2.

## **ANNOTATIONS**

**Cross-references.** - As to jurisdiction of commission over service by public utility, see 62-6-4 and 62-6-19 to 62-6-22 NMSA 1978.

As to denial of service by utility being petty misdemeanor, see 30-13-2 NMSA 1978.

**The term "reasonable" imports a standard of reasonable care** requiring the presence of fault as a prerequisite to liability. *Rossin v. Southern Union Gas Co.*, 472 F.2d 707 (10th Cir. 1973).

**Standard of care for power company.** - A power company engaged in distributing electric current over its wires to consumers is not an insurer of the safety of the consumer or anyone else, although the company must exercise a high degree of care to protect those likely to come in contact with its wires. The care required is that commensurate with the dangerous character of the business and consistent with its practical operation and extends not only to the erection, maintenance and operation of the company's plant and apparatus, but also to an inspection thereof and to the discovery of defects. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Duty to furnish service is imposed by law.** - The duty of a public utility to furnish adequate, efficient and reasonable service is imposed by law, separate and apart from any contractual obligation to its consumers and entirely apart from any pertinent matters filed with the commission. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

A public utility's obligation to provide adequate, efficient and reasonable service is statutory and not contractual and there is no obligation that provides for a utility to continue electrical service to a customer for an indefinite term at a set rate. *Gonzales v. Public Serv. Comm'n*, 102 N.M. 529, 697 P.2d 948 (1985).

**Commission cannot relieve utility of liability for negligence.** - The authority of the commission is sufficiently broad to empower it to establish rules and regulations for the government of the utility in the prosecution of its business, but such public service commission cannot relieve a utility from liability under the law of negligence by any rule it may adopt. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Nor can utility contract against its negligence.** - A public service corporation, or a public utility such as an electric company, cannot contract against its negligence in the regular course of its business or in performing one of its duties of public service or where a public duty is owed or where public interest is involved. *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 6, 16.

Right of public utility company to discontinue its entire service, 11 A.L.R. 252.

Liability of one maintaining high tension electric wires over private property of another for injuries thereby inflicted, 14 A.L.R. 1023, 56 A.L.R. 1021.

Right to string electrical wires across railroad right-of-way, 18 A.L.R. 619.

Validity of service charge for gas meter, 20 A.L.R. 225, 122 A.L.R. 194.

Implied obligation with respect to character or extent of service by gas company, 21 A.L.R. 671.

Electric light plant as nuisance, 23 A.L.R. 1410, 90 A.L.R. 1207.

Gas company's liability for injury or damage by escaping gas, 25 A.L.R. 262, 29 A.L.R. 1250, 47 A.L.R. 488, 90 A.L.R. 1082, 138 A.L.R. 870.

Injunction against anticipated or threatened nuisance from storage of gas, 26 A.L.R. 948, 32 A.L.R. 724, 55 A.L.R. 880.

Statutory requirement of adequate service and facilities by public utility as affecting liability for loss of private property through inadequate supply of water to extinguish fire, 27 A.L.R. 1279.

Right of company to prescribe fixtures to be used in connection with service, 37 A.L.R. 1368.

Duty of company to instruct patron as to economical manner of using service or give him equivalent concession, 38 A.L.R. 1065.

Duty of public utility to notify patron in advance of temporary suspension of service, 52 A.L.R. 1078.

Duty of public utility to duplicate service, 52 A.L.R. 1111.

Right of public utility corporation to refuse its service because of collateral matter not related to that service, 55 A.L.R. 771.

Cost involved as affecting duty to extend electrical service or supply individual applicant, 58 A.L.R. 537.

Mandamus to compel service by electric company, 83 A.L.R. 950.

Duty and liability in respect of sagging electrical wires maintained over highway, 84 A.L.R. 690.

Liability of utility company for delay in commencing service, 97 A.L.R. 838.

Construction of contract regarding time of payment for public utility service, 97 A.L.R. 982.

Damages for breach of duty to furnish electricity, 108 A.L.R. 1192.

Municipal corporation's power to sell meters to consumers as adjunct of services furnished, 108 A.L.R. 1459.

Right of utility on expiration of street franchise by limitation to discontinue service, 112 A.L.R. 631.

Constitutionality of statute or ordinance requiring public utility to supply fixtures or accessories or incidental service to customers free of charge or for fixed charge, 115 A.L.R. 1162.

Validity of contract for exemption of public service company from liability for own negligence, 175 A.L.R. 38.

Right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

Deposit required by public utility, 43 A.L.R.2d 1262.

Liability of electric light or power company to patron for interruption, failure or inadequacy of power, 4 A.L.R.3d 594.

Payment of charge as condition of further service, 19 A.L.R.3d 1227.

Water distributor's liability for injury due to condition of service lines, meters and the like which serve individual consumer, 20 A.L.R.3d 1363.

Racial or religious discrimination in furnishing of public utility services or facilities, 53 A.L.R.3d 1027.

Liability of one other than electric power or light company or its employee for interruption, failure, or inadequacy of electric power, 15 A.L.R.4th 1148.

Liability of electric utility to nonpatron for interruption or failure of power, 54 A.L.R.4th 667.

Debtor's protection under 11 USCS § 366 against utility service cutoff, 83 A.L.R. Fed. 207.

73B C.J.S. Public Utilities § 73.

### **62-8-3. Schedules.**

Under such rules and regulations as the commission may prescribe, every public utility subject to the jurisdiction of the commission, shall file with the commission, within such

time and in such form as the commission may designate, schedules showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The utility shall keep a copy of such schedules open to public inspection under such rules and regulations as the commission may prescribe.

**History:** Laws 1941, ch. 84, § 39; 1941 Comp., § 72-603; 1953 Comp., § 68-6-3.

### ANNOTATIONS

**Fee payable for each schedule, not each instrument.** - Fee provided for is payable for each rate schedule filed even though all schedules filed under rules of the commission may be included in one instrument. 1941-42 Op. Att'y Gen. No. 3939. See 62-13-2 NMSA 1978.

**Law reviews.** - For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 5, 29, 41, 59.

### 62-8-4. Schedules to show classifications.

Such schedules filed by every public utility shall set forth the classification of users and the rates to be charged as to each classification; and every utility shall have the right to make reasonable classifications of its users.

**History:** Laws 1941, ch. 84, § 40; 1941 Comp., § 72-604; 1953 Comp., § 68-6-4.

### ANNOTATIONS

**Refund to wholesale users held not discriminatory.** - There was no de facto discrimination where electric company gave refund to wholesale users and did not give it to small consumers who did not have contracts with the power company. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 117 to 125.

Public utilities: validity of preferential rates for elderly or low-income persons, 29 A.L.R.4th 615.

### 62-8-5. Adherence to schedules.

No public utility shall directly or indirectly, by any device whatsoever, or in anywise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the



schedules of such public utility applicable thereto then filed in the manner provided in this act, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.

**History:** Laws 1941, ch. 84, § 41; 1941 Comp., § 72-605; 1953 Comp., § 68-6-5.

### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 5, 56.

### **62-8-6. Discrimination.**

No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility shall establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service. Nothing shall prohibit, however, the commission from approving economic development rates and rates designed to retain load.

**History:** Laws 1941, ch. 84, § 42; 1941 Comp., § 72-606; 1953 Comp., § 68-6-6; Laws 1989, ch. 5, § 2; 1993, ch. 282, § 33.

### **ANNOTATIONS**

**Cross-references.** - As to denial of service by utility being petty misdemeanor, see 30-13-2 NMSA 1978.

**The 1989 amendment,** effective June 16, 1989, added the last sentence.

**The 1993 amendment,** effective June 18, 1993, substituted "the commission" for "the New Mexico public service commission" in the last sentence.

**Discrimination in rates or service is prohibited.** - This section prohibits any unreasonable preference or advantage to any corporation or person as to rates or service. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**Refund to wholesale users held not discriminatory.** - There was no de facto discrimination where electric company gave refund to wholesale users and did not give it to small consumers who did not have contracts with power company. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 472 P.2d 648 (1970).

**Ordering change in contract rate is within commission's jurisdiction.** - Where the commission had entered an order authorizing a public utility to enter into a contract and to continue to charge the gas rate therein specified until further order and on the ex parte petition of the utility subsequently entered an interlocutory order making a rate increase to be effective until the commission could hold a hearing to determine and set a new and proper rate, the commission was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction - a question of rates. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**Variation between rates of different utilities is not discrimination** within the meaning of this section. *Gonzales v. Public Serv. Comm'n*, 102 N.M. 529, 697 P.2d 948 (1985).

**Contract on behalf of municipal inhabitants allowed.** - This section does not prohibit variations in rates, nor does it require "equal service." Rather, it prohibits "unreasonable differences" in rates of service between localities. Allowing municipalities to contract with utilities for service rates to their inhabitants does not, therefore, ipso facto, violate this section. *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 521, 854 P.2d 348 (1993).

**Law reviews.** - For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 *Nat. Resources J.* 411 (1979).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 *Am. Jur. 2d Public Utilities* §§ 38 to 42, 110 to 116.

Franchise provisions for free or reduced rates of public service corporations as within constitutional or statutory provision prohibiting discrimination, 10 *A.L.R.* 504, 15 *A.L.R.* 1200.

Right to discriminate against a concern which desires service for resale, 12 *A.L.R.* 327, 112 *A.L.R.* 773.

Discrimination by public utility in respect of extension of credit, 12 *A.L.R.* 964.

Discrimination in operation of municipal utility, 50 *A.L.R.* 126.

Discrimination between property within and that outside governmental districts as to public service or utility rates, 4 *A.L.R.2d* 595.

Deposit required by public utility, 43 *A.L.R.2d* 1262.

Racial or religious discrimination in furnishing of public utility services or facilities, 53 A.L.R.3d 1027.

73B C.J.S. Public Utilities § 43.

### **62-8-7. Change in rates.**

A. At any hearing as provided in this section involving an increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility.

B. Unless the commission otherwise orders, no public utility shall make any change in any rate which has been duly established except after thirty-days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force and the time when the changed rates will go into effect. The utility shall also give notice of the proposed changes to other interested persons as the commission may direct. All proposed changes shall be shown by filing new schedules that shall be kept open to public inspection. The commission for good cause shown may allow changes in rates without requiring the thirty-days' notice, under conditions that it may prescribe.

C. Whenever there is filed with the commission by any public utility any schedule proposing new rates, the commission may, upon complaint or upon its own initiative, except as otherwise provided by law, upon reasonable notice, enter upon a hearing concerning the reasonableness of the proposed rates. Pending a hearing decision, the commission shall suspend the operation of the proposed rates before they become effective but not for a longer initial period than nine months beyond the time when the rates would otherwise go into effect, unless the commission finds that a longer time will be required, in which case the commission may extend the period for an additional three months; provided and notwithstanding any such order of suspension, the public utility may put the suspended rates into effect at the expiration of the initial suspension period by filing with the commission its undertaking, secured by its bond, to refund to entitled persons the amount, if any, finally determined to be excessive. The bond, in terms, amount and sureties, shall be subject to the commission's approval. There may be substituted for the bond other arrangements satisfactory to the commission for the protection of the parties interested; provided, further, that in any case involving a proposed change in rates, the commission may permit the utility to make effective without suspension any portion of the change which the commission may determine to be proper under the circumstances. If the public utility fails to make refund within thirty days after the final determination or within an additional period of time as may be allowed by the commission for good cause shown, any person entitled to the refund may sue therefor in any court of this state of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within one year after the final determination. Any number of persons entitled to the refund may join as plaintiffs and recover their several claims in a single action, in which action the court shall render a

judgment severally for each plaintiff as his interest may appear. During a period of suspension, the commission may, in its discretion, require that the public utility involved furnish to its patrons a certificate or other evidence of payments made by them under the rates that the public utility has put into operation in excess of the rates in effect immediately prior thereto.

D. If after a hearing the commission finds the proposed rates to be unjust, unreasonable or in any way in violation of law, the commission shall determine the just and reasonable rates to be charged or applied by the utility for the service in question and shall fix the rates by order to be served upon the utility; or the commission by its order shall direct the utility to file new rates respecting such service that are designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable. Those rates shall thereafter be observed until changed, as provided by the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978].

E. Except as otherwise provided by law, any increase in rates or charges for the utility commodity based upon cost factors other than taxes or cost of fuel, gas or purchased power, filed for after the effective date of this section shall be permitted only after notice and hearing as provided by this section. The commission shall enact rules and regulations governing the use of tax, fuel, gas or purchased power adjustment clauses by utilities that enable the commission to consider periodically at least the following:

(1) whether the existence of a particular adjustment clause is consistent with the purposes of the Public Utility Act, including serving the goal of providing reasonable and proper service at fair, just and reasonable rates to all customer classes;

(2) the specific adjustment mechanism to recover tax, gas, fuel or purchased power costs;

(3) which costs should be included in an adjustment clause, procedures to avoid the inclusion of costs in an adjustment clause that should not be included, and methods by which the propriety of costs that are included may be determined by the commission in a timely manner, including what informational filings are required to enable the commission to make such a determination; and

(4) the proper adjustment period to be employed. The commission may eliminate or condition a particular adjustment clause if it finds such elimination or condition is consistent with the purposes of the Public Utility Act, including serving the goal of providing reasonable and proper service at fair, just and reasonable rates to all customer classes; provided however that no such elimination or condition shall be ordered unless such elimination or condition will not place the affected utility at a competitive disadvantage. The commission rules and regulations shall also provide for variances and may provide for separate examination of a utility's adjustment clause based upon that utility's particular operating characteristics.

F. Whenever there is filed with the commission any schedule proposing any new rates by any rural electric cooperative organized under the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], as amended, the rates shall become effective as proposed by the rural electric cooperative without a hearing. However, the cooperative shall give written notice of the proposed rates to its affected patrons at least thirty days prior to the filing with the commission, and the commission shall suspend the rates and conduct a hearing concerning the reasonableness of any proposed rates filed by a rural electric cooperative pursuant to Subsections C and D of this section upon the filing with the commission of a protest setting forth grounds for review of the proposed rates signed by one or more members of the rural electric cooperative and if the commission determines there is just cause for reviewing the proposed rates on one or more of the grounds of the protest. The protest must be filed no later than twenty days after the filing with the commission of the schedule proposing the new rates. The hearing and review shall be limited to the issues set forth in the protest and for which the commission may find just cause for the review, which issues shall be contained in the notice of hearing. The provisions of this subsection shall not be construed to affect commission authority or procedure to regulate the sale, furnishing or delivery by wholesale suppliers of electricity to rural electric cooperatives under Section 62-6-4 NMSA 1978. In addition to the adjustments permitted by Subsection E of this section, the commission may authorize rate schedules of rural electric cooperatives to recover, without notice and hearing, changes in the cost of debt capital incurred pursuant to securities the issuance of which are approved by the commission. For the purposes of this subsection, a member of a rural electric cooperative is a member as defined by the Rural Electric Cooperative Act, as amended.

**History:** 1978 Comp., § 62-8-7, enacted by Laws 1991, ch. 251, § 1.

### ANNOTATIONS

**Repeals and reenactments.** - Laws 1991, ch. 251, § 1 repeals former 62-8-7 NMSA 1978, as amended by Laws 1985, ch. 221, § 2, relating to change in rates, and enacts the above section, effective April 4, 1991. For provisions of former section, see 1990 Cumulative Supplement.

**Compiler's notes.** - All of the following annotations are taken from cases decided under prior law.

**Rate requests carried out under this section.** - This section is the provision under which the overall purpose of 62-8-1 NMSA 1978 is carried out for the given instance of a rate request. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Commission is vested with considerable discretion** in determining whether a rate to be received and charged is just and reasonable. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 94 N.M. 731, 616 P.2d 1116 (1980).

**Discretion to review rates efficiently.** - The statutory scheme vests broad discretion in the commission to review utility rates in an efficient and reasonable manner. Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n, 108 N.M. 462, 774 P.2d 1050 (1989).

**Commission may change rates by unilateral action followed by hearing.** - This section contains express language conferring power on the commission, by unilateral action, to make a change in rates, providing hearing on what is a fair and reasonable rate follows in due season on proper notice and an opportunity is made for all interested parties to be heard. Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n, 62 N.M. 1, 303 P.2d 908 (1956).

**Including increase in contract rate.** - Where the commission had entered an order authorizing a public utility to enter into a contract and to continue to charge the gas rate therein specified until further order and on the ex parte petition of the utility subsequently entered an interlocutory order making a rate increase to be effective until the commission could hold a hearing to determine and set a new and proper rate, the commission was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction - a question of rates. Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n, 62 N.M. 1, 303 P.2d 908 (1956).

**Action on rate change not required within nine months.** - With respect to rate changes, this section does not make it mandatory for the commission to act within any specific time; it merely provides that if the commission fails to act within the nine-month suspension period, the utility may put the proposed rates into effect. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979).

**Commission may not order refund passed on to consumers.** - Commission has no express or implied statutory authority to order the flow-through of refunds to electric company from power supplier to consumers. New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 81 N.M. 683, 472 P.2d 648 (1970).

**Where refund is not trust fund for consumers.** - Where refund was ordered paid over to power company by the federal power commission without any restrictions, and there was nothing in the order indicating an intention on the part of the commission to create a "trust fund" for the benefit of the ultimate consumers, the refund did not constitute a trust fund belonging to company's customers. New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 81 N.M. 683, 472 P.2d 648 (1970).

**Commission's order held unsupported by substantial evidence.** - Where gas company seeking rate increase proposed to trend the general plant account items by using a nationally recognized index, but the commission instead inserted its own method - to simply use the untrended original cost, although the witness who strongly supported this approach admitted that he did not know whether this would accurately establish the reproduction cost of the items, the court held the commission's order was

unreasonable, being unsupported by substantial evidence. *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 84 N.M. 330, 503 P.2d 310 (1972).

**Assignment of issue to separate proceeding.** - The commission may assign an issue raised in a rate request hearing to a separate proceeding. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Burden of proof on utility.** - The legislature has granted the commission discretion to place the burden of proof on the utility in any rate proceeding. *Otero County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 774 P.2d 1050 (1989).

**Law reviews.** - For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 *Nat. Resources J.* 411 (1979).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 *N.M.L. Rev.* 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 *N.M.L. Rev.* 287 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 *N.M.L. Rev.* 1 (1981).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 *Nat. Resources J.* 851 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Change of rates by public utility while another rate is undetermined, 16 *A.L.R.* 1219.

Joinder or representation of several claimants in action to recover overcharge, 1 *A.L.R.2d* 160.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 *A.L.R.4th* 183.

73B *C.J.S. Public Utilities* § 17.

### **62-8-7.1. Hearing procedures for change of rates of small water and sewer utilities.**

A. Whenever there is filed with the commission any schedule proposing any new rate or rates pursuant to Section 62-8-7 NMSA 1978 by any public utility as defined in Paragraph (3) or (5) of Subsection G of Section 62-3-3 NMSA 1978 whose annual operating revenues averaged less than five hundred thousand dollars (\$500,000) over any consecutive three-year period, the rate or rates shall become effective as proposed by the utility without a hearing; provided that the utility shall be required to give written

notice of the proposed rates to the ratepayers receiving service from the utility at least sixty days prior to filing the proposed rate change with the commission and provided further that the commission shall enter upon a hearing concerning the reasonableness of any proposed rates filed by such a utility pursuant to Subsections C and D of Section 62-8-7 NMSA 1978 when any rate increase would have the effect of increasing the rate or rates fifty percent or more in any twelve-month period or upon the filing with the commission of a protest seeking review of the proposed rate or rates signed by ten percent or more of the ratepayers receiving service from such a utility. For purposes of this section, each person who receives a separate bill equals one ratepayer and each person who receives multiple bills equals one ratepayer. The petition shall be signed by the person in whose name service is carried. The petition shall be filed no later than twenty days after the filing with the commission of the schedule proposing the new rates. In all other respects, Section 62-8-7 NMSA 1978 shall apply to such water utilities. If a utility provides both water and sewer service, the annual operating revenues attributable to the provision of water service only shall determine whether the procedure specified in this section shall apply to any schedule proposing any new rate or rates for water service, and the annual operating revenues attributable to the provision of sewer service shall determine whether the procedures specified in this section shall apply to any schedule proposing any new rate or rates for sewer service.

**History:** 1978 Comp., § 62-8-7.1, enacted by Laws 1985, ch. 221, § 3; 1987, ch. 52, § 3.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, designated the existing language as Subsection A (there is no Subsection B), substituted "this section" for "this act" near the beginning of the second sentence, added the present last sentence and made minor language changes throughout the section.

### **62-8-8. Inspection and supervision fees.**

Each utility doing business in this state and subject to the control and jurisdiction of the commission with respect to its rates or service regulations shall pay annually to the state a fee for the inspection and supervision of such business in an amount equal to one-half of one percent of its gross receipts from business transacted in New Mexico for the preceding calendar year. In calendar year 1992, that sum shall be payable in equal quarterly installments on or before the last day of February, May, August and November, respectively. Thereafter, that sum shall be payable on or before the last day of February in each year. Inspection and supervision fees shall be paid by such utilities in addition to any and all property, franchise, license, intangible and other taxes, fees and charges now or hereafter provided by law. No similar inspection and supervision fee shall be measured by the amount of the gross receipts of such utility for the calendar year next preceding the date fixed in this section for the payment of the fee. In the case of utilities engaged in interstate business, the fees shall be measured by the gross receipts of those utilities from intrastate business only for that preceding calendar



year and not in any respect upon receipts derived wholly or in part from interstate business. No supervision or inspection fees shall be charged on the gross receipts from the sale of gas, water or electricity to a utility regulated by the commission for resale to the public.

**History:** 1953 Comp., § 68-6-8, enacted by Laws 1967, ch. 96, § 6; 1992, ch. 22, § 1.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1967, ch. 96, § 6, repeals 68-6-8, 1953 Comp., relating to inspection and supervision fees, and enacts the above section.

**The 1992 amendment,** effective March 5, 1992, substituted the present second and third sentences for the former second sentence, which read "Said sum shall be payable in equal quarterly installments on or before the last day of February, May, August and November in each year" and made stylistic changes.

**Legislative intent is that the fees collected go to the state,** not to any specific fund. Once deposited with the state, in the general fund, they may be appropriated by the legislature as it sees fit. Thus, the commission is only entitled for its operation to such money generated by the fees collected pursuant to this section as the legislature may appropriate. The commission may not expend the entire amount received. 1978 Op. Att'y Gen. No. 78-10.

**Fee calculated at beginning of year based on past year's receipts.** - Under this section the fee to be paid in any given year is calculated at the beginning of the year on the basis of gross receipts for the past year. It is only the payment of the fee which is permitted to be spread throughout the year. 1967 Op. Att'y Gen. No. 67-96.

**Where utility operates only for part of a year,** it is liable for the full annual fee. 1943-44 Op. Att'y Gen. No. 4266 (opinion rendered under former statute).

**Effect of disposing of major part of holdings.** - Where utility disposes of a major part of its holdings, the fees for the remaining holdings will be based upon gross receipts of such remaining holdings for the previous year. 1943-44 Op. Att'y Gen. No. 4266 (opinion rendered under former statute).

**First fees paid by rural electric cooperatives.** - See 1961-62 Op. Att'y Gen. No. 62-16 (opinion rendered under former statute).

### **62-8-9. Disposition of funds; interest and penalty on late payments.**

A. All fees and money collected under the provisions of the Public Utility Act, including fees provided for in Section 62-13-2 NMSA 1978 and including fees and charges for inspection and supervision, for stenographic services and for transcripts of evidence, shall be remitted by the commission to the state treasurer not later than the day

following receipt. Payments provided for in the Public Utility Act shall be obligatory upon all utilities subject to the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978].

B. When a fee is not paid on the date it is due, interest shall be paid to the state on the amount due. The interest on the amount due shall start to accrue on the day following the due date and will continue to accrue until the total amount due is paid. The rate of interest on a late fee payment shall be fifteen percent per year, computed at the rate of one and one-fourth percent per month.

C. In addition to any interest due on a late fee payment, a penalty shall be paid to the state for failure to pay the fee when it was due. The penalty imposed shall be two percent of the amount of the fee due.

D. The attorney general, in the name of the state, shall bring suit to collect fees, interest and penalties that remain unpaid.

**History:** 1953 Comp., § 68-6-9.1, enacted by Laws 1957, ch. 25, § 1; 1992, ch. 23, § 1.

#### **ANNOTATIONS**

**The 1992 amendment**, effective July 1, 1992, added the present catchline; added the Subsection A designation; in Subsection A, made a section reference substitution, inserted "inspection and supervision, for", deleted the former last sentence, relating to failure, neglect or refusal of a utility to pay on the date it is due, and made stylistic changes; and added Subsections B, C, and D.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 65.

#### **62-8-10. Utility service; seriously ill individuals.**

Utility service shall not be discontinued to any residence where a seriously ill person is residing, if the person responsible for the utility service charges does not have the financial resources to pay the charges and if a practitioner of the healing arts, as defined in Paragraph (2) of Subsection B of Section 59A-22-32 NMSA 1978, certifies that discontinuance of service might endanger that person's life and the certificate is delivered to a manager or officer of the utility providing the service at least two days prior to the due date of a billing for utility services. The commission shall provide by rule and regulation the procedure necessary to carry out this section.

**History:** 1953 Comp., § 68-6-10, enacted by Laws 1977, ch. 175, § 1; 1993, ch. 282, § 34.

#### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, in the first sentence, substituted "Section 59A-22-32 NMSA 1978" for "Section 58-18-19, NMSA, 1953" and made a stylistic change; and deleted "public service" preceding "commission" in the second sentence.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Liability of electric utility to nonpatron for interruption or failure of power, 54 A.L.R.4th 667.

Debtor's protection under 11 USCS § 366 against utility service cutoff, 83 A.L.R. Fed. 207.

## **ARTICLE 9 THE UTILITY FRANCHISE**

### **62-9-1. New construction.**

No public utility shall, after the effective date of this 1941 act, begin the construction or operation of any public utility plant or system or of any extension of any plant or system, without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation. This section shall not be construed to require any such public utility to secure a certificate for an extension within any municipality or district within which it lawfully commenced operations before the effective date of this 1941 act or for an extension within or to territory already served by it, necessary in the ordinary course of its business, or for an extension into territory contiguous to that already occupied by it and that is not receiving similar service from another utility. Notwithstanding any other provision of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended, or any privilege granted under that act, if any public utility or mutual domestic water consumer association in constructing or extending its line, plant or system unreasonably interferes or is about to unreasonably interfere with the service or system of any other public utility or mutual domestic water consumer association rendering the same type of service, the commission, on complaint of the public utility or mutual domestic water consumer association claiming to be injuriously affected, may, upon and pursuant to the applicable procedure provided in Chapter 62, Article 10 NMSA 1978, and after giving due regard to public convenience and necessity, including but not limited to reasonable service agreements between the utilities, make such order and prescribe such terms and conditions in harmony with the Public Utility Act as are just and reasonable so as to provide for the construction, development and extension, without unnecessary duplication and economic waste.

**History:** Laws 1941, ch. 84, § 46; 1941 Comp., § 72-701; 1953 Comp., § 68-7-1; Laws 1965, ch. 289, § 10; 1967, ch. 96, § 1; 1990, ch. 95, § 1.

### **ANNOTATIONS**

**The 1990 amendment**, effective May 16, 1990, inserted "or mutual domestic water consumer association" following "public utility" in three places, substituted "Chapter 62, Article 10 NMSA 1978" for "Sections 68-8-1 through 68-8-16 New Mexico Statutes Annotated, 1953 Compilation" in the third sentence and made numerous stylistic changes throughout the section.

**"Effective date of this 1941 act"**. - The phrase "effective date of this 1941 act", referred to in this section means July 13, 1941, the effective date of Laws 1941, ch. 84.

**Formerly, section did not apply to rural electric cooperatives.** - See Socorro Elec. Coop. v. Public Serv. Co., 66 N.M. 343, 348 P.2d 88 (1959); 1957-58 Op. Att'y Gen. No. 57-31. See present 62-3-3 E, G NMSA 1978, as to meaning of "public utility."

**And it does not apply to water and sanitation districts.** - Water and sanitation districts are not required by statute to obtain a certificate of convenience and necessity as are public utilities under the jurisdiction of the commission. 1971 Op. Att'y Gen. No. 71-56.

**Certificate is needed for construction, but not for extensions where lawfully operating.** - This section prohibits construction of any facilities for public utility service without first obtaining a certificate of convenience and necessity, and provides that the holder of a certificate need not get a permit for extensions within a district where it has lawfully commenced operations, or to territory being served by it and necessary in the ordinary course of its business. New Mexico Elec. Serv. Co. v. Lea County Elec. Coop., 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**New certificate not required for service to few transferred customers.** - It is not required that utility obtain a new certificate for the purpose of providing service to a few customers who are to be transferred to it from another utility. Gonzales v. Public Serv. Comm'n, 102 N.M. 529, 697 P.2d 948 (1985).

**The 1967 amendment to this statute did not annul appellant's certificate** of public convenience and necessity which was valid at the date of amendment. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 86 N.M. 255, 522 P.2d 802 (1974).

**Other provisions govern revocation of certificate.** - If the commission is assumed to have power to revoke a certificate, the authority as well as the procedure therefor is found in 62-10-1 to 62-10-16 NMSA 1978 rather than in 62-9-1 and 62-9-4 NMSA 1978, as contended by the commission. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 86 N.M. 255, 522 P.2d 802 (1974); New Mexico Elec. Serv. Co. v. Lea County Elec. Coop., 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Commission cannot deny right to continue under valid certificate.** - The commission cannot deny to service company its right to continue in the area covered by

its certificate if its certificate has been exercised as required by 62-9-4 NMSA 1978, or, in other words, if its certificate is valid in the area sought to be served by it, even though other public utilities have overlapping or conflicting certificates; furthermore, the commission cannot hold existing franchise rights null and void, nor can it make an order which would conflict with 62-9-2 B NMSA 1978, which states that when certificates granted utilities under that section overlap, certificates theretofore issued and exercised within the time required are valid under 62-9-4 NMSA 1978 and both utilities shall be permitted to continue service. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 255, 522 P.2d 802 (1974); *New Mexico Elec. Serv. Co. v. Lea County Elec. Coop.*, 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Even though commission could find certificate void under this section.** - A conclusion that the certificate of a public service company was null and void, if based upon proper findings, could probably be made in determining the issues in a hearing under this section as a necessary incident of the larger questions presented thereunder. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 255, 522 P.2d 802 (1974); *New Mexico Elec. Serv. Co. v. Lea County Elec. Coop.*, 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**If holder does not exercise certificate in time.** - A certificate of public convenience and necessity cannot be declared null and void in the absence of findings by the commission, based upon substantial evidence, that the certificate holder failed to exercise its right with diligence. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 255, 522 P.2d 802 (1974); *New Mexico Elec. Serv. Co. v. Lea County Elec. Coop.*, 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 36 Am. Jur. 2d Franchises §§ 6, 7; 64 Am. Jur. 2d Public Utilities §§ 237, 277.

Validity of contract between public utilities other than carriers, dividing territory and customers, 70 A.L.R.2d 1326.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 A.L.R.4th 183.

73B C.J.S. Public Utilities §§ 3, 66, 69, 99.

**62-9-1.1. Additional authority with respect to water and sewer utilities.**

A. Notwithstanding any other provision of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], or any provision of the Municipal Code [Chapter 3 NMSA 1978], or any privilege granted under either act, if any municipality that has not elected to come within the terms of the Public Utility Act, as provided in Section 62-6-5 NMSA 1978, constructs or extends or proposes to construct or extend its water or sewer line or system or water pumping station or reservoir into a geographical area described in a certificate of public convenience and necessity granted by the commission to a public utility rendering the same type of service, the commission, on complaint of the public utility claiming to be injuriously affected thereby, shall, after giving notice to the municipality and affording the municipality an opportunity for a hearing with respect to the issue of whether its water or sewer line, plant or system actually intrudes or will intrude into the area certificated to the public utility, determine whether such intrusion has occurred or will occur. If the commission determines such an intrusion has occurred or will occur, the municipality owning or operating the water or sewer utility shall cease and desist from making such construction or extension in the absence of written consent of the public utility involved and approval of the commission.

B. The authority and jurisdiction conferred by Subsection A of this section shall be in addition and cumulative to the independent authority of the commission to determine territorial disputes between public utilities and between mutual domestic water consumer associations and public utilities as provided in Section 62-9-1 NMSA 1978, which provisions shall govern the resolution of a territorial dispute between a municipality that has elected to come within the terms of the Public Utility Act, as provided in Section 62-6-5 NMSA 1978, and any other public utility rendering the same type of service. Provided, however, in the event that a certificate of public convenience and necessity granted to such a municipality overlaps, or conflicts with, a valid certificate previously issued by the commission and exercised within the term required under Section 62-9-4 NMSA 1978, the municipal utility shall be permitted to continue operation of its plant, line and system in existence upon the effective date of this 1991 act and the other public utility may continue service in the area covered by its certificate, subject to the other provisions of the Public Utility Act.

C. For purposes of this section, "municipality" means any municipality that has a population of more than two hundred thousand as determined in the most recent federal decennial census and is located in a class A county.

**History:** 1978 Comp., § 62-9-1.1, enacted by Laws 1991, ch. 143, § 2.

### **ANNOTATIONS**

**Emergency clauses.** - Laws 1991, ch. 143, § 3 makes the act effective immediately. Approved April 3, 1991.

## **62-9-2. Applications by utilities brought under the Public Utility Act.**

A. Within sixty days after the effective date of this 1967 act, each utility brought within the jurisdiction of the commission by virtue of this 1967 act shall file with the commission an application, in such form as may be prescribed by the commission, for a certificate of public convenience and necessity covering its present plant, lines and system. Upon proof of the existence and operation of the plant, lines and system upon the effective date of this 1967 act, the commission shall grant the certificate to the utility.

B. In the event the certificate granted a utility under Subsection A of this section overlaps or conflicts with a valid certificate heretofore issued by the commission and exercised within the time required under Section 62-9-4 NMSA 1978, both certificates shall be valid and both utilities shall be permitted to continue service subject to the other provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended.

**History:** 1953 Comp., § 68-7-1.1, enacted by Laws 1967, ch. 96, § 7; 1993, ch. 282, § 35.

## ANNOTATIONS

**Repeals and reenactments.** - Laws 1967, ch. 96, § 7, repeals 68-7-1.1, 1953 Comp., relating to applications by utilities covered by the Public Utility Act by virtue of Laws 1961, ch. 89, and enacted the above section.

**The 1993 amendment,** effective June 18, 1993, in Subsection A, deleted "public service" following "jurisdiction of" and made stylistic changes; and substituted "Section 62-9-4 NMSA 1978" for "Section 68-7-2 New Mexico Statutes Annotated, 1953 Compilation" in Subsection B.

**Emergency clauses.** - Laws 1967, ch. 96, § 13, makes the act effective immediately. Approved March 15, 1967.

**Meaning of "this 1967 act".** - The words "this 1967 act," appearing in Subsection A, refer to Laws 1967, ch. 96, compiled as 62-3-1 to 62-3-4, 62-6-8, 62-8-8, 62-9-1, 62-9-2 and 62-9-6 NMSA 1978.

**Certificate cannot be held void unless not exercised diligently.** - A certificate of public convenience and necessity cannot be declared null and void in the absence of findings by the commission, based upon substantial evidence, that the certificate holder failed to exercise its right with diligence. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 86 N.M. 255, 522 P.2d 802 (1974).

**Application covering existing facilities must be granted.** - Upon timely filing of an application for a certificate of public convenience and necessity to cover a cooperative's "present plant, lines and system" and upon proof that the same are in existence and operating, the certificate so applied for must be granted. *Lea County Elec. Coop. v. New*

Mexico Pub. Serv. Comm'n, 75 N.M. 191, 402 P.2d 377 (1965), cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966) (decided under former similar provision).

**Regardless of conflicting or overlapping certificates.** - The commission cannot deny to service company its right to continue in the area covered by its certificate if its certificate has been exercised as required by 62-9-4 NMSA 1978, or, in other words, if its certificate is valid in the area sought to be served by it, even though other public utilities have overlapping or conflicting certificates; furthermore, the commission cannot hold existing franchise rights null and void, nor can it make an order which would conflict with this section, which states that when certificates granted utilities under this section overlap, certificates theretofore issued and exercised within the time required are valid under 62-9-4 NMSA 1978 and both utilities shall be permitted to continue service. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 86 N.M. 255, 522 P.2d 802 (1974); New Mexico Elec. Serv. Co. v. Lea County Elec. Coop., 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**New certificate and conflicting or overlapping certificate are both valid.** - Subsection B provides that both the certificate so granted as well as any pre-existing certificate overlapping or conflicting with that granted to the cooperative shall be valid and the service under both shall continue. No suggestion of delineation of areas or territory served or to be served is contained in the plain language used by the legislature. Lea County Elec. Coop. v. New Mexico Pub. Serv. Comm'n, 75 N.M. 191, 402 P.2d 377 (1965), cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966) (decided under former similar provision).

### **62-9-2.1. Applications by sewer utilities brought under the Public Utility Act.**

Within six months after the effective date of these 1987 amendments to the Public Utility Act, each sewer utility brought within the jurisdiction of the commission by virtue of these 1987 amendments to the Public Utility Act shall file with the commission an application, in such form as may be prescribed by the commission, for a certificate of public convenience and necessity covering its present plant, lines and system. Upon proof of the existence and operation thereof upon the effective date of these 1987 amendments to the Public Utility Act, the commission shall grant to the utility such certificate. The commission shall enter upon a hearing to determine whether the rate or rates of such a sewer utility in effect on the effective date of these amendments to the Public Utility Act are just and reasonable pursuant to Subsection D of Section 62-8-7 NMSA 1978 upon the filing with the commission of protests signed by ten percent or more of the ratepayers receiving sewer service from such a sewer utility. For purposes of this section, each person who receives a separate bill equals one ratepayer and each person who receives multiple bills equals one ratepayer. The protest shall be signed by the person in whose name service is carried. The protests shall be filed no later than sixty days after the filing with the commission of an application by the sewer utility for a certificate of public convenience and necessity as prescribed by this section. Each sewer utility filing an application for a certificate of public convenience and necessity



under this section shall be required at the time of filing to give written notice to its ratepayers of the filing of its application and the ratepayers' rights to protest its rates under this section.

**History:** 1978 Comp., § 62-9-2.1, enacted by Laws 1987, ch. 52, § 4; 1993, ch. 282, § 36.

## ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, in the first sentence, inserted "1987" preceding "amendments" and substituted "the commission" for "the public service commission"; made a stylistic change in the second sentence; and substituted "The commission" for "The public service commission" at the beginning of the third sentence.

**"These 1987 amendments"**. - The terms "these amendments" and "these 1987 amendments," referred to throughout the first three sentences, apparently mean Laws 1987, ch. 52, which appears as 62-3-2.1, 62-3-3, 62-8-7.1 and 62-9-2.1 NMSA 1978.

### **62-9-3. Location control; limitations.**

A. The legislature finds that it is in the public interest to consider any adverse effect upon the environment and upon the quality of life of the people of the state which may occur due to plants, facilities and transmission lines needed to supply present and future electrical services. It is recognized that such plants, lines and facilities will be needed to meet growing demands for electrical services and cannot be built without in some way affecting the physical environment where these plants, facilities and transmission lines are located. The legislature therefore declares that it is the purpose of this section to provide for the supervision and control by the commission of the location within this state of new plants, facilities and transmission lines for the generation and transmission of electricity for sale to the public.

B. No person, including any municipality, shall begin the construction of any plant designed for, or capable of, operation at a capacity of three hundred thousand kilowatts or more for the generation of electricity for sale to the public within or without this state, whether or not owned or operated by a person which is a public utility subject to regulation by the commission, within this state, or of transmission line or lines in connection with such a plant, on a location within this state, unless the location has been approved by the commission. For the purposes of this section, "transmission line" means any electric transmission line and associated facilities designed for, or capable of, operations at a nominal voltage of two hundred thirty kilovolts or more, to be constructed in connection with and to transmit electricity from a new plant for which approval is required.

C. If a person is a public utility regulated by the commission, application for approval shall be submitted and disposition made in connection with the application for a

certificate of public convenience and necessity in accordance with the provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978].

D. If a person is not a public utility regulated by the commission, application for approval shall be made in writing setting forth the facts involved and filed with the commission. The commission shall, after a public hearing and upon notice as the commission may prescribe, act upon the application.

E. No approval shall be required for construction in progress on the effective date of this act or for additions to or modifications of an existing plant or transmission line.

F. The commission shall approve the application for the location of the generating plant unless the commission finds that the operations of the facilities for which approval is sought will not be in compliance with all applicable air and water pollution control standards and regulations existing. The commission shall not require compliance with performance standards other than those established by the agency of this state having jurisdiction over a particular pollution source.

G. The commission shall approve the application for the location of the transmission line or lines unless the commission finds that the location will unduly impair important environmental values.

H. No application shall be approved pursuant to this section which violates an existing state, county or municipal land use statutory or administrative regulation unless the commission shall find that such regulation is unreasonably restrictive and compliance therewith is not in the interest of the public convenience and necessity, in which event and to the extent found by the commission, such regulation shall be inapplicable and void as to the siting. When it becomes apparent to the commission that an issue exists with respect to whether such a regulation is unreasonably restrictive and compliance therewith is not in the interest of public convenience and necessity, it shall promptly serve notice of such fact by certified mail upon the agency, board or commission having jurisdiction for land use of the area affected and shall make such agency, board or commission a party to the proceedings upon its request and shall give it an opportunity to respond to such issue. The judgment of the commission shall be conclusive on all questions of siting, land use, aesthetics and any other state or local requirements affecting the siting.

I. Nothing in this section shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise any person, including a municipality, that is not otherwise a public utility regulated and supervised by the commission, with respect to its rates and service and with respect to its securities, nor shall any other provision of the Public Utility Act be applicable with respect to such a person, including a municipality.

**History:** 1953 Comp., § 68-7-1.2, enacted by Laws 1971, ch. 248, § 1.

## **ANNOTATIONS**

**Cross-references.** - As to public utilities subject to jurisdiction of commission, see 62-3-3E, G, 62-3-4, 62-6-4 and 62-6-5 NMSA 1978.

As to regulation of issuance of securities, see 62-6-7 and 62-6-8 NMSA 1978.

**Compiler's note.** - The phrase "the effective date of this act" refers to the effective date of Laws 1971, ch. 248, which contained no effective date provision, but was enacted at a session which adjourned on March 20, 1971. See N.M. Const., art. IV, § 23.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 237.

### **62-9-3.1. Limited regulation of certain jointly owned generation facilities.**

No municipality or H class county shall hereafter begin construction or operation of any jointly owned generating facility within this state without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation; provided, however, that the commission's regulation shall be limited to such determination unless the municipality or H class county has elected to come under the general supervision of the commission as provided by law.

**History:** 1978 Comp., § 62-9-3.1, enacted by Laws 1979, ch. 260, § 18.

#### **ANNOTATIONS**

**Severability clauses.** - Laws 1979, ch. 260, § 20, provides for the severability of the act if any part or application thereof is held invalid.

**Compiler's note.** - Laws 1979, ch. 260, § 19, provides that the act shall be liberally construed to carry out its purposes.

### **62-9-3.2. Application for determination of right-of-way width.**

A. Unless otherwise agreed to by the parties, no person shall begin the construction of any transmission line requiring a width for right-of-way of greater than one hundred feet without first obtaining from the commission a determination of the necessary right-of-way width to construct and maintain the transmission line. For the purposes of this subsection, "construction" does not include acquisition of rights-of-way, preparation of surveys or ordering of equipment.

B. For the purposes of this section, "transmission line" means any electric transmission line and associated facilities requiring a width for right-of-way of greater than one hundred feet.

C. If the person is regulated by the commission, application for the right-of-way width determination may be submitted and disposition made in connection with application for a certificate of public convenience and necessity in accordance with the provisions of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978]. Application may be submitted as provided in Subsection D of this section for persons not regulated by the commission.

D. If the person is not regulated by the commission or has already procured a certificate of public necessity and convenience, application for the right-of-way width determination shall be made in writing, setting forth the facts involved and filed with the commission.

E. The applicant shall cause notice of the time and place of hearing on the application for the right-of-way determination to be given to any owner of property proposed to be taken and, if applicable, to the person in actual occupancy of the property. Notice shall be given by mailing a copy by ordinary first class mail at least twenty days before the time set for hearing. Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

F. The commission shall, after public hearing, act upon the application.

**History:** 1978 Comp., § 62-9-3.2, as added by Laws 1980, ch. 20, § 18; 1993, ch. 282, § 37.

#### **ANNOTATIONS**

**The 1993 amendment,** effective June 18, 1993, deleted "public service" preceding "commission" in the first sentence of Subsection A; and made minor stylistic changes in Subsections A and E.

**Law reviews.** - For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

#### **62-9-4. Authority exercised.**

A certificate of convenience and necessity shall remain in full force and effect for the period designated by the commission unless such authority is modified or becomes void because the authority has not been exercised within such period.

**History:** 1978 Comp., § 62-9-4, as added by Laws 1980, ch. 20, § 19.

#### **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1980, ch. 20, § 19, repeals former 62-9-4 NMSA 1978, relating to the time in which a certificate of convenience may be acted on, and enacts the above section.

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

## **62-9-5. Abandonment of service.**

No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility; provided, however, that ordinary discontinuance of service or use of facilities for nonpayment of charges, nonuser or other reasons in the usual course of business shall not be considered as abandonment.

**History:** Laws 1941, ch. 84, § 48; 1941 Comp., § 72-703; 1953 Comp., § 68-7-3; Laws 1983, ch. 250, § 3.

### **ANNOTATIONS**

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

As to denial of service by public utility being petty misdemeanor, see 30-13-2 NMSA 1978.

**The 1983 amendment** deleted "regulated" at the end of the catchline and rewrote the text of the section to the extent that a detailed comparison is impracticable.

**Constitutionality of commission's actions.** - Exclusion of an electric utility's interest in a generating facility from its rate base, coupled with the commission's refusal to decertify the facility, did not violate the due process provisions or the takings clauses of the New Mexico and United States Constitutions. *Public Serv. Co. v. Public Serv. Comm'n*, 112 N.M. 379, 815 P.2d 1169 (1991).

**Construction of section.** - The first part of this section refers to "continuation of service", while the second part addresses "continuation of the service or use of the facility". Thus, the section is written in the disjunctive to provide not for alternative bases upon which decertification of facilities is authorized, but for distinct factual scenarios giving rise to abandonment. *Public Serv. Co. v. Public Serv. Comm'n*, 112 N.M. 379, 815 P.2d 1169 (1991).

**Certificate is no longer necessary for abandonment of service;** all that is required is the commission's permission and approval. *Gonzales v. Public Serv. Comm'n*, 102 N.M. 529, 697 P.2d 948 (1985).

**Burden of proof.** - Utility, as the movant for abandonment, bore the burden to establish the factual predicate upon which the commission could base its decision to grant or deny abandonment. *Public Serv. Co. v. Public Serv. Comm'n*, 112 N.M. 379, 815 P.2d 1169 (1991).

Utility's assertion that "exclusion from rates of the 26.10% interest in that unit . . . represents a loss in terms of capital costs alone of \$19.8 million a year" fell short of the required showing, where the utility failed to demonstrate with any degree of certainty the overall impact continued regulation had on its financial condition. *Public Serv. Co. v. Public Serv. Comm'n*, 112 N.M. 379, 815 P.2d 1169 (1991).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 328.

Discontinuance of entire service, 11 A.L.R. 252.

Discontinuance of one of several different kinds of service, 21 A.L.R. 578.

Right to cut off water supply from one tenant on nonpayment by another, 28 A.L.R. 489.

Duty of public utility to notify patron in advance of temporary suspension of service, 52 A.L.R. 1078.

Damages for wrongfully shutting off gas, 108 A.L.R. 1188.

Right of user of public utility discontinuing use, 112 A.L.R. 230.

Right of utility on expiration of street franchise by limitation to discontinue service, 112 A.L.R. 631.

Right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

Right to shut off one served by common service pipe for nonpayment by another, 19 A.L.R.3d 1227.

Right of public utility to discontinue or refuse service at one address because of refusal to pay for past service rendered at another, 73 A.L.R.3d 1292.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 A.L.R.4th 183.

73B C.J.S. Public Utilities §§ 69, 73.

## **62-9-6. Certificates; application; issuance.**

Before any certificate may be issued under Sections 62-9-1 through 62-9-6 New Mexico Statutes Annotated, 1978 Compilation, a certified copy of its articles of incorporation or charter, if the applicant be a corporation, shall be on file in the office of the commission. Every applicant for a certificate shall give such reasonable notice of its application as the commission may require and shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the consent and franchise from the municipality wherein construction and operation is proposed. The commission shall have power, after hearing, to issue said certificate, as prayed for, or to refuse to issue the same, or to issue it for the construction or operation of a portion only of the contemplated facility, line, plant or system, or extension thereof, or for the partial exercise only of said rights or privilege, and may attach to the exercise of the rights granted by said certificates such terms and conditions in harmony with the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as amended, as in its judgment the public convenience and necessity may require. Except as otherwise provided in Section 62-9-2 New Mexico Statutes Annotated, 1978 Compilation, in determining whether any certificate shall issue as prayed for, the commission shall give due regard to public convenience and necessity including, but not limited to, any reasonable service agreement between the applicant and another utility and unnecessary duplication and economic waste. Whenever a public utility is engaged or is about to engage in construction or operation without having secured a certificate of public convenience and necessity as required by the provisions of the Public Utility Act, as amended, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the public utility complained of to cease and desist from such construction or operation until the commission makes and files its decision on said complaint or until the further order of the commission. The commission may after hearing, after reasonable notice, make such order and prescribe such terms and conditions in harmony with the Public Utility Act, as amended, as are just and reasonable.

**History:** 1953 Comp., § 68-7-4, enacted by Laws 1967, ch. 96, § 8.

### **ANNOTATIONS**

**Repeals and reenactments.** - Laws 1967, ch. 96, § 8, repeals 68-7-4, 1953 Comp., relating to application for and issuance or denial of certificates, and enacts the above section.

## **62-9-7. Legislative declaration; voluntary service agreements.**

A. The legislature declares that the existing scheme of public utility regulation is adequate to exempt voluntary service agreements, as approved and regulated pursuant to the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], from the antitrust laws.

B. In exercising its authority pursuant to Chapter 62, Article 9 NMSA 1978, the commission may, after public hearing upon at least twenty days notice, approve voluntary service agreements between utilities providing similar service proposing the delineation between themselves of one or more service areas in which each shall be entitled to furnish service, if the commission first determines that the proposed delineation of service areas is consistent with the public convenience and necessity and otherwise conforms to the Public Utility Act.

C. Voluntary service agreements that the commission, after public notice and hearing, has previously approved are deemed to comply with Subsection A of this section and to have the same effect as if approved pursuant to Subsection B of this section.

D. Approval of a voluntary service agreement shall not affect the duties and restrictions imposed upon a public utility pursuant to Chapter 62, Article 8 NMSA 1978.

**History:** 1978 Comp., § 62-9-7, enacted by Laws 1991, ch. 121, § 1.

## **ARTICLE 10**

### **HEARINGS BEFORE THE COMMISSION**

#### **62-10-1. Complaints as to rates, etc.; hearing by commission.**

Upon a complaint made and filed by any municipality, or by any person or party affected, that any rate, service regulation, classification, practice or service in effect or proposed to be made effective is in any respect unfair, unreasonable, unjust or inadequate, the commission may proceed, if the commission finds probable cause for said complaint, and without such complaint, the commission, whenever it deems that the public interest or the interest of consumers and investors so requires, may proceed, to hold such hearing as it may deem necessary or appropriate; but no such hearing shall be had without notice, and no order affecting such rates, service regulations, classifications, practice or service complained of shall be entered by the commission without a hearing and notice thereof. Any utility may make complaint as to any matter within the provisions of this act affecting it.

**History:** Laws 1941, ch. 84, § 50; 1941 Comp., § 72-801; 1953 Comp., § 68-8-1.

#### **ANNOTATIONS**

**Cross-references.** - As to costs in proceedings before commission, see 62-13-3 NMSA 1978.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Article governs revocation of certificate of convenience and necessity.** - If the commission is assumed to have power to revoke a certificate of public convenience and



necessity, the authority as well as the procedure therefor would be found in this article rather than in 62-9-1 and 62-9-4 NMSA 1978 even though a conclusion that the certificate of the service company was null and void, if based upon proper findings, could probably be made in determining the issues in a hearing under 62-9-1 NMSA 1978 as a necessary incident of the larger questions presented thereunder. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 86 N.M. 255, 522 P.2d 802 (1974); New Mexico Elec. Serv. Co. v. Lea County Elec. Coop., 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 240, 264 to 275.

Prohibition as means of controlling action of rate-making official, 115 A.L.R. 19, 159 A.L.R. 627.

Representation of another before state public utilities or service commission as practice of law, 13 A.L.R.3d 812.

73B C.J.S. Public Utilities §§ 16, 77, 50, 51, 175.

## **62-10-2. Other hearings by commission.**

The commission may in addition to the hearings specifically provided by this act, conduct such other hearings as may be required in the administration of the powers and duties conferred upon it by this act, after notice as hereafter provided shall be given to the persons interested therein.

**History:** Laws 1941, ch. 84, § 51; 1941 Comp., § 72-802; 1953 Comp., § 68-8-2.

## **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

## **62-10-3. Complaint to be filed and become commission record.**

Whenever any complaint shall be made as herein provided, the same shall be filed and shall become a part of the permanent records of said commission; and whenever the commission without complaint shall determine that a hearing or investigation is necessary or appropriate, it shall make written specifications of the matters to be considered upon such hearing or investigation, and the same shall be filed and become a part of the permanent records of said commission.

**History:** Laws 1941, ch. 84, § 52; 1941 Comp., § 72-803; 1953 Comp., § 68-8-3.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 267.

### **62-10-4. Complaint and specifications, served on utility.**

Whenever the commission shall determine to hold a hearing or conduct an investigation upon a complaint made and filed as in this article provided, it shall fix a time and place for public hearings thereupon; and whenever the commission shall determine to conduct a hearing or investigation upon specifications filed by it, it shall fix a time for public hearings of the matter [matters] under investigation; and a copy of the complaint or a copy of the specifications filed by the commission as basis for said hearings shall be served upon the person or utility interested. All hearings shall be held at the offices of the commission in Santa Fe, or at such place in the state as the commission may designate.

**History:** Laws 1941, ch. 84, § 53; 1941 Comp., § 72-804; 1953 Comp., § 68-8-4.

## ANNOTATIONS

**Meaning of "this article".** - The words "this article" refer to Laws 1941, ch. 84, §§ 50 to 65, compiled as 62-10-1 to 62-10-16 NMSA 1978.

### **62-10-5. Hearings to be public and notice of hearing to be given.**

All hearings, and investigations, held or made by the commission, shall be public; and before proceeding to hold any such hearing or make any such investigation, the commission shall give the utility and the complainant at least twenty days' notice of the time and place when and where such matters will be considered and determined, and all parties shall be entitled to be heard, through themselves or their counsel, and shall have process to enforce the attendance of witnesses. At the hearing held pursuant to such notice, the commission may take such testimony as may be offered or as it may desire.

**History:** Laws 1941, ch. 84, § 54; 1941 Comp., § 72-805; 1953 Comp., § 68-8-5.

## ANNOTATIONS

**Notice requirement only applies to complaint proceedings.** - The notice requirement under this section has application only when a proceeding is initiated by a complaint; otherwise, the only notice necessary is such as is required by the commission. 1947-48 Op. Att'y Gen. No. 5138.

**Law reviews.** - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 80.

### **62-10-6. Separate hearings of several complaints.**

When complaint is made of more than one matter or thing, the commission may, when convenience so requires, order separate hearings thereon, and may thereupon hear and determine the several matters complained of separately and at such times as it may prescribe. In any hearing, proceeding or investigation conducted by the commission, any party may be heard in person or by attorney.

**History:** Laws 1941, ch. 84, § 55; 1941 Comp., § 72-806; 1953 Comp., § 68-8-6.

### **62-10-7. Hearings.**

At all public hearings, the chairman of the commission, if present, shall preside. In the absence of the chairman, one of the other commissioners shall preside. The commission may designate any commissioner to act as a hearing examiner at any hearing, or the commission may employ one or more full-time hearing examiners qualified to conduct such hearings or investigations as the commission may direct on matters within the jurisdiction of the commission. The hearing examiner is empowered to conduct any hearing or investigation which the commission is authorized to conduct, and to take testimony in respect to the subject or matter under investigation and report the testimony to the commission. In the conduct of an investigation or hearing, a hearing examiner shall have all the powers of a commissioner. The hearing examiner shall submit to the commission recommended findings of fact and conclusions of law in writing, and these shall become part of the case record. The final decision in all hearings and investigations remains the responsibility of the commission, and no decision of the commission shall become legally operative unless agreed to by the majority of the commission.

**History:** Laws 1941, ch. 84, § 56; 1941 Comp., § 72-807; 1953 Comp., § 68-8-7; Laws 1977, ch. 170, § 1; 1980, ch. 93, § 2; 1985, ch. 116, § 1.

## **ANNOTATIONS**

**The 1985 amendment** deleted the former fourth sentence which read "Such hearing examiners shall serve at the pleasure of the commission", inserted "and" following "authorized to conduct" and substituted "the testimony" for "such testimony" in the present fourth sentence, substituted "an investigation" for "such investigation" in the present fifth sentence, and substituted "conclusions of law in writing" for "conclusions of law in written form" in the next-to-last sentence.

**Purpose of act.** - Laws 1980, ch. 93, § 1, states that the purpose of the act is to authorize the commission to employ and use the services of full-time hearing examiners as a means of assisting it in the conduct of hearings and investigations relating to the

operation of public utilities in order to reduce the time between the filing of an application for a rate increase and the final decision of the commission.

**Law reviews.** - For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 Nat. Resources J. 851 (1986).

### **62-10-8. Process.**

The commission, and each commissioner, may issue subpoenas, subpoenas duces tecum and all necessary process in proceedings pending before it, and such processes shall extend to all parts of the state and may be served by any person authorized to serve process out of the district courts of New Mexico.

**History:** Laws 1941, ch. 84, § 57; 1941 Comp., § 72-808; 1953 Comp., § 68-8-8.

#### **ANNOTATIONS**

**Law reviews.** - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

### **62-10-9. Witnesses.**

The commission and each of the commissioners, for the purposes mentioned in this act, may administer oaths, examine witnesses at any hearing and certify official acts. In case of failure on the part of any person or persons to comply with any lawful order of the commission, or with any subpoena or subpoena duces tecum, or in the case of the refusal of any witness to testify concerning any matter on which he may be interrogated lawfully, any court of record of general jurisdiction or a judge thereof, may on application of the §1 commission or of a commissioner compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such a court or a refusal to testify therein.

**History:** Laws 1941, ch. 84, § 58; 1941 Comp., § 72-809; 1953 Comp., § 68-8-9.

#### **ANNOTATIONS**

**Cross-references.** - As to contempt proceedings, see 34-1-1 to 34-1-4 NMSA 1978.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 232.

73B C.J.S. Public Utilities §§ 80, 87.

### **62-10-10. Depositions.**

The commission or any commissioner or any party to the proceedings may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for taking depositions in civil actions, and any party as provided by law in civil actions may be required to answer written interrogatories propounded by the commission or any commissioner or any other party to the proceedings.

**History:** Laws 1941, ch. 84, § 59; 1941 Comp., § 72-810; 1953 Comp., § 68-8-10; Laws 1965, ch. 289, § 12.

#### **ANNOTATIONS**

**Cross-references.** - As to taking depositions, see Rules 1-026 and 1-032.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 80.

### **62-10-11. Certified copies; evidence.**

Copies of official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner or by the secretary under the official seal of the commission to be true copies of the original shall be evidence in like manner as the originals, in all matters before the commission and in the courts of this state.

**History:** Laws 1941, ch. 84, § 60; 1941 Comp., § 72-811; 1953 Comp., § 68-8-11.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 269.

73B C.J.S. Public Utilities §§ 82 to 85.

### **62-10-12. Recording orders.**

Every order, finding, authorization or certificate issued or approved by the commission under any provisions of this act shall be in writing and entered on the records of the commission. A certificate under the seal of the commission that any such order, finding, authorization or certificate has not been stayed, suspended or revoked shall be received as evidence in any proceedings as to the facts therein stated.

**History:** Laws 1941, ch. 84, § 61; 1941 Comp., § 72-812; 1953 Comp., § 68-8-12.

#### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 274.

73B C.J.S. Public Utilities §§ 89 to 92.

### **62-10-13. Fees.**

Witnesses who are summoned before the commission shall be paid the same fees and mileage as are paid to witnesses in the courts of record of general jurisdiction.

Witnesses whose depositions are taken pursuant to the provisions of this act, and the officer taking the same, shall be entitled to the same fees as are paid for like services in such courts.

**History:** Laws 1941, ch. 84, § 62; 1941 Comp., § 72-813; 1953 Comp., § 68-8-13.

## **ANNOTATIONS**

**Cross-references.** - As to fees and mileage as paid to witnesses in district courts, see 38-6-4 NMSA 1978.

As to fees for taking depositions, see 14-12-19B, 39-2-8 NMSA 1978.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality and construction of statute imposing upon public service corporation expense of investigation of its affairs, 101 A.L.R. 197.

73B C.J.S. Public Utilities § 80.

### **62-10-14. Decisions.**

After the conclusion of any hearing the commission shall make and file its findings and order. The findings of fact shall consist only of such ultimate facts as are necessary to determine the controverted questions presented by the proceeding. Such findings shall be separately stated and numbered, and each thereof shall state briefly and plainly an ultimate fact necessary to determine a controverted question; and there shall be such a finding of fact as to each of the controverted questions presented by the proceeding. The order of the commission shall be based upon said findings of fact, and a copy of the findings of fact and of the order, certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceeding or their attorneys. Said order shall take

effect and become operative thirty days after the service thereof, unless otherwise provided. If an order cannot in the judgment of the commission be complied with within thirty days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply therewith, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

**History:** Laws 1941, ch. 84, § 63; 1941 Comp., § 72-814; 1953 Comp., § 68-8-14.

## ANNOTATIONS

**Requiring exhaustion of administrative remedies is constitutional.** - The requirement of the Public Utility Act that a person first exhaust his administrative remedy before resorting to the courts does not violate N.M. Const., art. VI, § 13, granting general jurisdiction to the district courts except as elsewhere limited in such constitution. *Smith v. Southern Union Gas Co.*, 58 N.M. 197, 269 P.2d 745 (1954).

**This section requires only a finding of an ultimate fact,** and where that fact is found, the supreme court cannot interpret it to require any additional basis for the commission's order. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

This section requires that the commission find only ultimate facts and does not require it to give reasons for its decision. The ultimate fact is the logical result of the proofs reached by reasoning from the evident facts. It is a conclusion of fact. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

**Unnecessary but erroneous findings of fact are not grounds for reversal.** - Erroneous findings of fact, unnecessary to support the decision of a court, are not grounds for reversal. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

**Nor is failure to number findings.** - That the findings were unnumbered would not justify a reversal on the grounds that the requirements of this section were not followed. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

**Moving party has burden of proof.** - Although this section does not specifically place any burden of proof on the complainant, the courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

**Burden of proving rate discrimination not met.** - Where commission found that no unreasonable discrimination existed between rates charged to complainant's classification of service and to respondent's classifications of service, complainant failed

to sustain the burden of proving unlawful or unreasonable discrimination as to rates charged to various members of its own classification. *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 466 P.2d 557 (1970).

**Commission is not bound by opinions of experts** so long as the commission's ultimate decision is supported by substantial evidence. *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 547, 685 P.2d 957 (1984).

**Commission is only required to find ultimate fact:** it is not required to give reasons for its decision or to make a finding that is not an ultimate finding. *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 547, 685 P.2d 957 (1984).

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 273, 274.

Necessity of some evidence at hearing to support decision of commission, 123 A.L.R. 1349.

73B C.J.S. Public Utilities §§ 88 to 92.

## **62-10-15. Record of proceedings.**

A full and complete record of all proceedings before the commission on any hearing held, and all testimony therein, shall be taken down by a competent reporter appointed by the commission. A copy of such transcript shall be furnished on demand to any party to such hearing upon the payment of a reasonable charge for reproducing the testimony, to be fixed from time to time by rules adopted by the commission.

**History:** Laws 1941, ch. 84, § 64; 1941 Comp., § 72-815; 1953 Comp., § 68-8-15; Laws 1965, ch. 289, § 13.

## **ANNOTATIONS**

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

## **62-10-16. Rehearing.**

After an order or decision has been made by the commission, any party to the proceedings, may within thirty days after the entry of the order or decision apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters. The commission shall either grant or refuse an application for rehearing



within twenty days after the application therefor is filed in the office of the commission; and a failure by the commission to act upon such application within that period shall be deemed a refusal thereof. If the application be granted, the commission's order shall be deemed vacated, and the commission shall enter a new order after the rehearing shall have been concluded.

**History:** Laws 1941, ch. 84, § 65; 1941 Comp., § 72-816; 1953 Comp., § 68-8-16.

### ANNOTATIONS

**Motion for rehearing not acted upon is deemed refused.** - A timely motion for rehearing, filed in accordance with this section but not acted upon by the commission within 20 days, is deemed refused. *New Mexico Elec. Serv. Co. v. Lea County Elec. Coop.*, 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Right of public service corporation to judicial relief from contract rates which have become inadequate, 10 A.L.R. 1335.

73B C.J.S. Public Utilities § 96.

## ARTICLE 11 REVIEW OF COMMISSION ORDERS

### 62-11-1. Right of appeal.

Any party to any proceeding before the commission may file a notice of appeal in the supreme court asking for a review of the commission's final orders. If an application for rehearing has been filed, a notice of appeal must be filed within thirty days after the application for rehearing has been refused or deemed refused because of the commission's failure to act within the time specified in Section 62-10-16 NMSA 1978. If an application for rehearing has not been filed, a notice of appeal must be filed within thirty days after the entry of the commission's final order. Every notice of appeal shall name the commission as appellee and shall identify the order from which the appeal is taken. Any person whose rights may be directly affected by the appeal may appear and become a party, or the supreme court may, upon proper notice, order any person to be joined as a party.

**History:** Laws 1941, ch. 84, § 66; 1941 Comp., § 72-901; 1953 Comp., § 68-9-1; Laws 1965, ch. 289, § 14; 1982, ch. 109, § 11; 1993, ch. 282, § 38.

### ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, made minor stylistic changes in the first and second sentences, and deleted "New Mexico public service" preceding "commission" in the next-to-last sentence.

**Requiring exhaustion of remedies is constitutional.** - The requirement of the Public Utility Act that a person first exhaust his administrative remedy before resorting to the courts does not violate N.M. Const., art. VI, § 13, granting general jurisdiction to the district courts except as elsewhere limited in such constitution. *Smith v. Southern Union Gas Co.*, 58 N.M. 197, 269 P.2d 745 (1954).

**Section liberally applied in determining standing for review.** - The language "[a]ny party to any proceeding before the commission" is broad and requires liberal application in determining standing for review pursuant to this section. *Community Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 99 N.M. 493, 660 P.2d 583 (1983).

**Courts have jurisdiction to vacate unlawful administrative order.** - The statutory provisions for limited review of an order of a commission by the district court do not oust the courts of jurisdiction to annul and vacate a final administrative order as unlawful. *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964).

**But complete administrative remedy for testing rates is provided.** - The Public Utility Act envelops the commission with an aura of broad power and jurisdiction to determine just and reasonable rates and sets up a complete remedy within the framework of the act for testing their propriety and reasonableness. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**And action will be dismissed if remedies have not been exhausted.** - Where plaintiff brought action to enjoin commission from enforcing new gas rates and to recover amounts paid without waiting for final determination in pending statutory review proceeding, complaint was properly dismissed because plaintiff failed to exhaust administrative remedies. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**Standard of review for appeal** is whether there is substantial evidence in the record as a whole to support the agency's decision. *Gonzales v. Public Serv. Comm'n*, 102 N.M. 529, 697 P.2d 948 (1985).

**Review limited.** - On appeals from administrative bodies the questions to be answered by the court are questions of law and are restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence and, generally, whether the action of the administrative body was within the scope of its authority. *Maestas v. New Mexico Pub. Serv. Comm'n*, 85 N.M. 571, 514 P.2d 847 (1973); *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964).

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For comment, "Regulation of Electric Utilities and Affiliated Coal Companies - Determining Reasonable Expenses," see 26 Nat. Resources J. 851 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 276 to 291.

73B C.J.S. Public Utilities §§ 96, 101 to 138.

## **62-11-2. Notice to the commission.**

Upon the filing of a notice of appeal, the appellant shall cause a copy thereof to be served upon the commission and parties of record in the proceeding before the commission in the manner prescribed by the Rules of Appellate Procedure for Civil Cases. Within thirty days after service of the notice of appeal or such further time as the supreme court for good cause may specify, the commission shall certify to the supreme court the record of the testimony taken before the commission and all exhibits offered or received in evidence at the hearing before the commission, and all pleadings, findings, conclusions, orders and opinions, or certified copies thereof, made and entered in, or in connection with, the hearing before the commission; provided, however, that the parties and the commission may stipulate that a specified portion only of the testimony taken at the hearing before the commission shall be certified to the supreme court for review on appeal.

**History:** Laws 1941, ch. 84, § 67; 1941 Comp., § 72-902; 1953 Comp., § 68-9-2; Laws 1965, ch. 289, § 15; 1982, ch. 109, § 12.

## **ANNOTATIONS**

**Cross-references.** - As to service of process, see Rule 1-004.

**Law reviews.** - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 101 to 117.

## **62-11-3. Appeal on the record.**

The appeal shall be heard on the record made before the commission, and the supreme court shall not permit the introduction of new evidence addressed to any of the issues presented at the hearing before the commission.

**History:** Laws 1941, ch. 84, § 68; 1941 Comp., § 72-903; 1953 Comp., § 68-9-3; Laws 1965, ch. 289, § 16; 1982, ch. 109, § 13.

#### **ANNOTATIONS**

**Additional evidence cannot be introduced.** - See Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P.2d 646 (1964).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 126 to 138.

#### **62-11-4. Burden of showing that the order is unreasonable or unlawful.**

The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful.

**History:** Laws 1941, ch. 84, § 69; 1941 Comp., § 72-904; 1953 Comp., § 68-9-4; Laws 1965, ch. 289, § 17.

#### **ANNOTATIONS**

**Burden of proving construction was not commenced in time.** - The burden was on petitioners-landowners, as the moving parties before the commission, to demonstrate by substantial evidence, and thereby prove to the commission, that electrical cooperative failed to commence construction of a transmission line and related facilities within the time prescribed by 62-9-4 NMSA 1978. Lone Mt. Cattle Co. v. New Mexico Pub. Serv. Comm'n, 83 N.M. 465, 493 P.2d 950 (1972).

**When commission's construction of certificate and statutes is binding.** - The commission's construction of the certificate issued by it and the statutes governing its operation was binding on review, unless this construction was unreasonable or unlawful. Lone Mt. Cattle Co. v. New Mexico Pub. Serv. Comm'n, 83 N.M. 465, 493 P.2d 950 (1972).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 126 to 128.

#### **62-11-5. Decision on appeal.**

The supreme court shall have no power to modify the action or order appealed from, but shall either affirm or annul and vacate the same. The supreme court shall vacate and annul the order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful. Proceedings in the supreme court shall be

governed by the provisions of this act and by the Rules of Appellate Procedure for Civil Cases promulgated by the supreme court of New Mexico.

**History:** Laws 1941, ch. 84, § 70; 1941 Comp., § 72-905; 1953 Comp., § 68-9-5; Laws 1982, ch. 109, § 14.

## ANNOTATIONS

**Cross-references.** - As to Rules of Appellate Procedure, see Rule 12-101 et seq.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Entire order must be annulled if part is unlawful.** - Where the court finds part of the order of the commission to be unreasonable and unlawful, it must annul the entire order. The court has no power to modify the order of the commission. *Moyston v. New Mexico Pub. Serv. Comm'n*, 76 N.M. 146, 412 P.2d 840 (1966).

**And supreme court is limited to affirming or reversing lower court.** - Because of the form of this section (prior to the 1982 amendment), supreme court was limited in its disposition of cause to affirming or reversing the lower court, and the cause cannot be remanded to permit the commission to supply necessary findings. *New Mexico Elec. Serv. Co. v. Lea County Elec. Coop.*, 76 N.M. 434, 415 P.2d 556, cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Court is limited in its review** to determining whether the order of the commission was unreasonable and/or unlawful, whether it was supported by substantial evidence and, generally, whether the action of the commission was within the scope of its authority. *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964).

On appeals from administrative bodies the questions to be answered by the court are questions of law and are restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence and, generally, whether the action of the administrative body was within the scope of its authority. The district court may not substitute its judgment for that of the administrative body. *Maestas v. New Mexico Pub. Serv. Comm'n*, 85 N.M. 571, 514 P.2d 847 (1973); *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964); *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 92 N.M. 721, 594 P.2d 1177 (1979).

**But commission decision not upheld without substantial evidence.** - Although every inference is to be drawn in support of the commission's decision, a reviewing court may not uphold a commission's decision which is not supported by substantial evidence. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 92 N.M. 721, 594 P.2d 1177 (1979).

**Questions of fact are for commission, not court.** - Whether or not the construction had been commenced on a certain date is a question of fact to be determined by the commission. Lone Mt. Cattle Co. v. New Mexico Pub. Serv. Comm'n, 83 N.M. 465, 493 P.2d 950 (1972).

**When commission's construction of certificate and statute is binding.** - The commission's construction of the certificate issued by it and the statutes governing its operation was binding on review, unless this construction was unreasonable or unlawful. Lone Mt. Cattle Co. v. New Mexico Pub. Serv. Comm'n, 83 N.M. 465, 493 P.2d 950 (1972).

**Once commission's order is annulled and vacated,** a rate case is in the same posture it was in before the original decision was rendered: the commission may hold additional hearings and take additional testimony just as if the vacated order had never been entered; however, because the proposed rates may be put into effect after expiration of the initial nine-month period, the commission will have every reason to act expeditiously to enter new findings based on substantial evidence. Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979).

**Regulation held neither arbitrary nor capricious.** - The question of a potential for abuse in a regulation allowing company to adjust consumers' rates relative to change in the company's cost prior to the approval by the commission in that the company could negotiate contracts with its subsidiaries who supply 26% of its natural gas at favorable rates, and thereby accrue hidden profits, was a question of fact for the commission to decide, and as the commission's findings were supported by substantial evidence, this regulation was neither arbitrary nor capricious. Maestas v. New Mexico Pub. Serv. Comm'n, 85 N.M. 571, 514 P.2d 847 (1973).

**Commission's finding of fact held supported by substantial evidence.** - Considering petitioner's burden of proof, the nature and extent of the evidence adduced and the qualifications of the commission in knowing and understanding what is meant by "surveys" and "construction," in the sense in which these terms are used in the construction of power transmission lines and related facilities, the commission's finding of fact was supported by substantial evidence, and it is not the province of the court to substitute its judgment for that of the commission. Lone Mt. Cattle Co. v. New Mexico Pub. Serv. Comm'n, 83 N.M. 465, 493 P.2d 950 (1972).

**Commission's order held unsupported by substantial evidence.** - Where gas company seeking rate increase proposed to trend the general plant account items by using a nationally recognized index, but the commission instead inserted its own method - to simply use the untrended original cost, although the witness who strongly supported this approach admitted that he did not know whether this would accurately establish the reproduction cost of the items, the court held the commission's order was unreasonable, being unsupported by substantial evidence. Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n, 84 N.M. 330, 503 P.2d 310 (1972).

**Factors considered in rate hearing.** - See Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 92 N.M. 721, 594 P.2d 1177 (1979).

**Departure from prior practice without notice.** - A regulatory body cannot, without prior notice, abruptly depart from past practice on which the regulatee has relied and impose a retroactive refund requirement upon the regulatee. However, once notice was given, nothing prevented the commission from adopting a new regulatory practice and applying it prospectively; if the regulatee chose not to comply, it did so at its own peril. Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n, N.M. , 858 P.2d 54 (1993).

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities §§ 125 to 128.

## **62-11-6. Appeals; supreme court may stay or suspend commission's order.**

The pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission, but, during the pendency of such proceedings, the supreme court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order on such terms as it deems just and in accordance with the practice of courts exercising equity jurisdiction. If the supreme court stays or suspends the operation of an order of the commission, pending a review of the order, the court may require the party seeking the stay or suspension to secure the other parties against loss due to the delay in the enforcement of the order, in case the order on appeal is affirmed, in such amount and in such form as the supreme court shall direct.

**History:** Laws 1941, ch. 84, § 71; 1941 Comp., § 72-906; 1953 Comp., § 68-9-6; Laws 1982, ch. 109, § 15; 1983, ch. 250, § 4.

### **ANNOTATIONS**

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

**The 1983 amendment** inserted "stay or suspend commission's order" at the end of the catchline and substituted "If the supreme court stays or suspends the operation of an order of the commission, pending a review of the order, the court may require the party seeking the stay or suspension to secure" for "Any party shall have the right to secure from the supreme court an order suspending or staying the operation of an order of the commission, pending a review of such order, by securing" in the second sentence.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

## **62-11-7. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1982, ch. 109, § 16, repeals 62-11-7 NMSA 1978, relating to appeals to the supreme court. For present provisions, see 62-11-1 to 62-11-6 NMSA 1978.

Laws 1982, ch. 109, contains no effective date provision, but was enacted at the session which adjourned on February 18, 1982. See N.M. Const., art. IV, § 23.

## ARTICLE 12 ENFORCEMENT OF ORDERS AND DUTIES

### 62-12-1. Mandamus; injunction; utilities.

Whenever the commission shall be of the opinion that any person or utility is failing or omitting or about to fail or omit to do anything required of it by this act or by any order of the commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, contrary to or in violation of this act or of any order of the commission, it may direct the attorney general of New Mexico to commence an action or proceeding in the district court in and for the county of Santa Fe, or in the district court of the county in which the complaint or controversy arose, in the name of the state of New Mexico for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. The attorney general of New Mexico shall thereupon begin such action or proceeding by petition to such court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding thirty days after the service of the copy of the petition, within which the public utility or person complained of must plead, and in the meantime said public utility or person may for good cause shown be restrained. In case of default, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. An appeal may be taken as in other civil actions.

**History:** Laws 1941, ch. 84, § 73; 1941 Comp., § 72-1001; 1953 Comp., § 68-10-1.

## ANNOTATIONS

**Cross-references.** - As to mandamus, see 44-2-1 to 44-2-14 NMSA 1978.

As to injunctions, see Rules 1-065 and 1-066.

As to the Rules of Appellate Procedure, see Rule 12-101 et seq.



**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 52 Am. Jur. 2d Mandamus §§ 108 to 110; 64 Am. Jur. 2d Public Utilities §§ 30, 275, 277, 278.

Joinder or representation of several claimants in action to recover overcharge, 1 A.L.R.2d 160.

Adequacy, as regards right to injunction, of other remedy for review of order fixing utility rates, 8 A.L.R.2d 839.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

73B C.J.S. Public Utilities § 59.

## **62-12-2. Actions against commission.**

In case the commission or its members shall undertake to act in excess of its jurisdiction and authority conferred under this act, or without jurisdiction; or in case the said commission or its members shall undertake to exercise rights or privileges not conferred upon it by this act or by law; or in case the said commission or its members shall fail or refuse in the performance of any duties or obligations imposed upon it by the terms of this act, then the person interested or whose rights are affected may bring suit by mandamus, prohibition, injunction or other appropriate remedy against the said commission in its statutory name in this act provided, to compel performance of the duties and obligations imposed upon said commission by this act, or to restrain said commission and its members from the exercise of jurisdiction not by this act conferred. Consent of the state is hereby expressly given to the maintenance of such suits against said commission. Any such action shall be brought against said commission in the district court of Santa Fe county, New Mexico, or in the district court of the county in which the complaint or controversy arose. Any judgment or decree entered against the commission shall be binding upon the commission and each and every member thereof.

**History:** Laws 1941, ch. 84, § 74; 1941 Comp., § 72-1002; 1953 Comp., § 68-10-2.

## **ANNOTATIONS**

**Cross-references.** - As to prohibition, see N.M. Const., art. VI, § 13.

As to mandamus, see 44-2-1 to 44-2-14 NMSA 1978.

As to injunctions, see Rules 1-065 and 1-066.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Equity has inherent power to restrain acts beyond commission's jurisdiction.** -

The power to restrain the exercise by the commission of acts entirely beyond or in excess of its jurisdiction inheres in a court of equity, and a mere declaration of the power in this section adds no new strength to the power. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**But complete administrative remedy for testing rates is provided.** - The Public Utility Act envelops the commission with an aura of broad power and jurisdiction to determine just and reasonable rates and sets up a complete remedy within the framework of the act for testing their propriety and reasonableness. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

**And increasing contract rate is not in excess of commission's jurisdiction.** -

Where the commission had entered an order authorizing a public utility to enter into a contract and to continue to charge the gas rate therein specified until further order and on the ex parte petition of the utility subsequently entered an interlocutory order making a rate increase to be effective until the commission could hold a hearing to determine and set a new and proper rate, the commission was moving strictly in conformity with the act creating it to determine one of the major questions submitted to its jurisdiction - a question of rates. *Potash Co. of Am. v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956), (complaint for injunction and declaratory relief dismissed).

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 278.

Prohibition as means of controlling action of ratemaking officials, 115 A.L.R. 19, 159 A.L.R. 627.

73B C.J.S. Public Utilities §§ 66, 129-138.

### **62-12-3. Actions preferred.**

All actions and proceedings under this act, and all actions or proceedings to which the commission or the state of New Mexico may be a party, and in which any question arises under this act, or under or concerning any order or decision of the commission,

may be preferred over all other civil causes except election causes, irrespective of position on the calendar.

**History:** Laws 1941, ch. 84, § 75; 1941 Comp., § 72-1003; 1953 Comp., § 68-10-3.

### **ANNOTATIONS**

**Cross-references.** - As to assignment of cases for trial, see Rule 1-040.

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

### **62-12-4. Violation of orders.**

Any person or corporation which violates any provision of the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978] or which fails, omits or neglects to obey, observe or comply with any lawful order, or any part or provision thereof, of the commission is subject to a penalty of not less than one hundred dollars (\$100) nor more than one hundred thousand dollars (\$100,000) for each offense.

**History:** Laws 1941, ch. 84, § 76; 1941 Comp., § 72-1004; 1953 Comp., § 68-10-4; Laws 1983, ch. 250, § 5; 1993, ch. 220, § 2.

### **ANNOTATIONS**

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

**The 1983 amendment** substituted "ten thousand dollars (\$10,000)" for "one thousand dollars."

**The 1993 amendment**, effective June 18, 1993, substituted "the Public Utility Act" for "this act" near the beginning and "one hundred thousand dollars (\$100,000)" for "ten thousand dollars (\$10,000)" near the end of the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Imprisonment for overcharge by public utility, 40 A.L.R. 82.

### **62-12-5. Separate offenses.**

Every violation of the provisions of this act or of any lawful order of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.

**History:** Laws 1941, ch. 84, § 77; 1941 Comp., § 72-1005; 1953 Comp., § 68-10-5.

#### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

#### **62-12-6. Penalties cumulative.**

All penalties accruing under this act shall be cumulative, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any public utility or any officer, director, agent or employee thereof or any other corporation or person.

**History:** Laws 1941, ch. 84, § 78; 1941 Comp., § 72-1006; 1953 Comp., § 68-10-6.

#### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M.L. Rev. 184 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 59.

#### **62-12-7. Action to recover penalties.**

Actions to recover penalties under this act shall be brought in the name of the state of New Mexico in the district court of Santa Fe county.

**History:** Laws 1941, ch. 84, § 79; 1941 Comp., § 72-1007; 1953 Comp., § 68-10-7.

#### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

## **ARTICLE 13**

### **MISCELLANEOUS PROVISIONS RELATING TO PUBLIC UTILITIES**

#### **62-13-1. Short title.**

Articles 1 through 6 and 8 through 13 of Chapter 62 NMSA 1978 may be cited as the "Public Utility Act".

**History:** Laws 1941, ch. 84, § 80; 1941 Comp., § 72-1101; 1953 Comp., § 68-11-1; 1993, ch. 220, § 1; 1993, ch. 282, § 39; 1993, ch. 351, § 1.

## ANNOTATIONS

**1993 amendments** - Identical amendments to this section were enacted by Laws 1993, ch. 220, § 1, effective June 18, 1993, Laws 1993, ch. 282, § 39, effective June 18, 1993 and Laws 1993, ch. 351, § 1, effective July 1, 1993, which rewrote the section, which read: "This act shall be known, and cited and referred to, as the Public Utility Act". The section is set out as amended by Laws 1993, ch. 351, § 1. See 12-1-8 NMSA 1978.

**Law reviews.** - For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M.L. Rev. 287 (1979).

For note, "Preemption - Atomic Energy," see 24 Nat. Resources J. 761 (1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities § 13.

73B C.J.S. Public Utilities § 63.

### **62-13-2. Fees.**

The commission shall collect the following fees, which shall be remitted to the state treasurer not later than the day following receipt:

A. for filing any rate schedule, service rule or regulation or sample form, or amendment thereto, one dollar (\$1.00);

B. for filing each application, petition or complaint, twenty-five dollars (\$25.00);

C. for copies of papers, testimony and records, the reasonable cost of such copies as the commission may provide from time to time by rule; and

D. for certifying any copy of any paper, testimony or record, two dollars (\$2.00).

**History:** 1953 Comp., § 68-11-2.1, enacted by Laws 1957, ch. 25, § 2; 1965, ch. 289, § 19; 1993, ch. 282, § 40.

## ANNOTATIONS

**The 1993 amendment**, effective June 18, 1993, in the introductory language, deleted "New Mexico public service" preceding "commission" and made stylistic changes; added the subsection designations; and added "and" at the end of Subsection C.

**Fee payable for each schedule, not each instrument.** - The fee provided for is payable for each rate schedule filed even though all schedules filed under rules of the commission may be included in one instrument. 1941-42 Op. Att'y Gen. No. 3939 (opinion rendered under former statute).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality and construction of statute imposing upon public service corporation expense of investigation of its affairs, 101 A.L.R. 197.

73B C.J.S. Public Utilities § 65.

### **62-13-3. Costs.**

A. Except as otherwise provided by law, in all proceedings before the commission and in the courts, each party to the controversy shall bear his own costs and no costs shall be taxed against either party.

B. In any commission rate proceeding in which the utility seeks rates to recover adjusted test-year litigation expenses there shall be no presumption that the litigation expenses are prudent. Nothing in this section shall be construed to create or imply a presumption of prudence for any utility expenditures not addressed in this section.

C. As used in this section, "litigation expenses" means all attorneys' fees, consulting fees and other costs of litigation, including in-house expenditures.

**History:** Laws 1941, ch. 84, § 82; 1941 Comp., § 72-1103; 1953 Comp., § 68-11-3; Laws 1983, ch. 250, § 6; 1993, ch. 265, § 1.

### **ANNOTATIONS**

**Cross-references.** - For definition of "commission," see 62-3-3 NMSA 1978.

As to hearings before commission, see 62-10-1 to 62-10-16 NMSA 1978.

As to review of commission orders, see 62-11-1 to 62-11-6 NMSA 1978.

**The 1983 amendment** deleted "transfer of cause to another county" at the end of the catchline, deleted the former second sentence, relating to the transfer of a cause to another county, added "Except as otherwise provided by law" at the beginning of the section and deleted "on review" following "and in the courts."

**The 1993 amendment,** effective June 18, 1993, designated the existing provisions as Subsection A, and added Subsections B and C.

**Severability clauses.** - Laws 1983, ch. 250, § 7, provides for the severability of the act if any part or application thereof is held invalid.

#### **62-13-4. Interstate commerce not affected.**

Neither this act nor any provision thereof shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except insofar as the same may be permitted under the provisions of the constitution of the United States and the acts of congress.

**History:** Laws 1941, ch. 84, § 83; 1941 Comp., § 72-1104; 1953 Comp., § 68-11-4.

#### **ANNOTATIONS**

**Meaning of "this act".** - See 62-5-9 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 145.

#### **62-13-5. Mortgages and deeds of trust; execution by corporations distributing electric energy, natural gas and providing telephone and telegraph services.**

The provisions of Sections 62-13-5 through 62-13-7 NMSA 1978 shall apply to mortgages, deeds of trust and other security instruments hereafter executed by, and to secure the payment of bonds, notes or other obligations of:

- A. corporations engaged in this state in the generation, manufacture, transmission, distribution and sale of electric energy and power to the public;
- B. corporations engaged in this state in the transportation, distribution and sale through local distribution system or systems of natural gas to the public for domestic, commercial, industrial or any other use;
- C. corporations owning or operating in this state any gas pipeline or lines for the transportation and sale of natural gas to other pipeline companies or to local distributing systems, or to municipalities, or to industrial consumers for their own use; and
- D. corporations engaged in this state in providing telephone or telegraph service to the public.

**History:** 1953 Comp., § 68-11-6, enacted by Laws 1961, ch. 76, § 1; 1973, ch. 253, § 1.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 64 Am. Jur. 2d Public Utilities §§ 6 to 8, 256.

29 C.J.S. Electricity § 19; 38 C.J.S. Gas § 17; 73B C.J.S. Public Utilities §§ 8, 15, 72; 86 C.J.S. Telegraphs, Telephones, Radio and Television § 17.

### **62-13-6. [Mortgages and deeds of trust; notice of lien; after-acquired property.]**

Any mortgage, deed of trust or other security instrument hereafter executed by any corporation referred to in Section 1 [62-13-5 NMSA 1978] of this act, which by its terms subjects to the lien thereof property then owned, and any property to be acquired by the corporation subsequent to the execution by it of such mortgage, deed of trust or other security instrument, upon the deposit thereof for record, and the payment of the proper recordation and filing fees, in the proper recording office of any county in this state shall constitute notice of the lien of such mortgage as to the property situated in such county and specifically described in such mortgage, deed of trust or other security instrument and shall also constitute notice of the lien of such mortgage, deed of trust or other security instrument as to the property in such county acquired by the corporation subsequent to the execution and deposit for record as aforesaid. Every mortgage, deed of trust or other security instrument of the class to which the provisions of the act [62-13-5 to 62-13-7 NMSA 1978] are applicable shall have typed or printed on the title page, or the first page thereof, substantially the following: "This instrument contains after-acquired property provisions."

**History:** 1953 Comp., § 68-11-7, enacted by Laws 1961, ch. 76, § 2.

### **ANNOTATIONS**

**Cross-references.** - As to secured transactions under the Uniform Commercial Code, see 55-9-101 to 55-9-507 NMSA 1978.

### **62-13-7. [Prior mortgages and deeds of trust not impaired.]**

The provisions of the act [62-13-5 to 62-13-7 NMSA 1978] shall be applicable only to mortgages, deeds of trust and other security instruments that are executed after the effective date of this act by a corporation of the class referred to in Section 1 [62-13-5 NMSA 1978] of this act and which comply with the provisions of this act with respect to the filing thereof for record. No mortgage, deed of trust or other security instrument executed and filed for record prior to the effective date of this act, regardless of whether the same was executed by a corporation of the class referred to in Section 1 of this act, or otherwise, shall be impaired, invalidated or otherwise affected by any of the provisions of this act. The provisions of this act are cumulative of existing statutes, including statutes enacted by this twenty-fifth legislature, and nothing herein shall be so construed as to modify or affect existing statutes relating to the execution or recording or filing of mortgages, deeds of trust or other security instruments.

**History:** 1953 Comp., § 68-11-8, enacted by Laws 1961, ch. 76, § 3.



## ANNOTATIONS

**Effective dates.** - Laws 1961, ch. 76, contains no effective date provision, but was enacted at a session which adjourned on March 11, 1961. See N.M. Const., art. IV, § 23.

### **62-13-8. Filing with the secretary of state.**

Any mortgage, deed of trust, security agreement or similar security instrument, or instrument supplemental thereto, or amendatory or in satisfaction thereof, covering any real or personal property situate in more than one county in this state, which is made to secure the payment of bonds, notes or other obligations issued, or to be issued, by any public utility, rural electric cooperative, telephone company or railroads shall be executed and acknowledged in the same manner as are conveyances of real estate and shall be filed in the office of the secretary of state. The secretary of state shall endorse his certificate upon the filed instrument, specifying thereon the day and hour of the instrument's receipt, and the file number assigned to it, which shall be evidence of such facts. The secretary of state shall retain the instrument in his office, and filing the instrument in his office shall be notice to all the world of its existence and contents from the time of filing.

**History:** 1953 Comp., § 68-11-9, enacted by Laws 1965, ch. 112, § 1; 1973, ch. 253, § 2; 1979, ch. 78, § 1.

### **62-13-9. Refiling instruments with any county clerk.**

Any mortgage, deed of trust, security agreement or similar security instrument, or instrument supplementary thereto, or amendatory or in satisfaction thereof, covering any real or personal property situate in more than one county in this state, which was heretofore made to secure the payment of bonds, notes or obligations issued, or to be issued, by any public utility, rural electric cooperative, telephone company or railroads, and which was heretofore filed or recorded in the office of the county clerk of any county of this state, or a copy thereof was certified to by any county clerk of this state, may be refiled in the office of the secretary of state as provided in Section 62-13-8 NMSA 1978. Refiling shall thereafter, as to any real or personal property covered thereby and not previously released, be of the same effect as if the instrument had been originally filed in the office of the secretary of state in conformity with the provisions of Section 62-13-8 NMSA 1978. Nothing herein contained, however, shall require refiling of any instrument.

**History:** 1953 Comp., § 68-11-10, enacted by Laws 1965, ch. 112, § 2; 1973, ch. 253, § 3; 1979, ch. 78, § 2.

### **62-13-10. Fees.**

A uniform fee for filing, indexing and furnishing filing data for any instrument filed under the provisions of Sections 62-13-8 and 62-13-9 New Mexico Statutes Annotated, 1978

Compilation, shall be one dollar (\$1.00). Upon request of any person, the secretary of state shall furnish a copy of such instrument, and shall, upon request, certify the copy as being a true and correct copy of the instrument on file in his office. A uniform fee for each copy shall be seventy-five cents (\$.75) per page, and the uniform fee for each certification shall be fifty cents (\$.50). The secretary of state shall further certify as a true and correct copy of any instrument filed in his office pursuant to the provisions of Sections 62-13-8 and 62-13-9 New Mexico Statutes Annotated, 1978 Compilation, any typed, printed or photocopied instrument furnished to him by any person if he shall find the copy to be a true and correct copy. The uniform fee for each certification shall be fifty cents (\$.50).

**History:** 1953 Comp., § 68-11-11, enacted by Laws 1965, ch. 112, § 3.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73B C.J.S. Public Utilities § 65.

#### **62-13-11. Recording notice in office of county clerk.**

If any instrument filed with the secretary of state under the provisions of Sections 62-13-8 or 62-13-9, New Mexico Statutes Annotated, 1978 Compilation, covers any real property, a notice shall be recorded in each county where any part of such real property is situate setting forth the nature of such instrument, the date thereof, the names of the parties thereto and the date such instrument was filed with the secretary of state. The notice shall be signed and acknowledged in the same manner as other instruments relating to real estate and entitled to recording.

**History:** 1953 Comp., § 68-11-12, enacted by Laws 1965, ch. 112, § 4.

#### **62-13-12. Effect of filing with the secretary of state; duration of filing.**

The filing of an instrument with the secretary of state under the provisions of Sections 62-13-8 and 62-13-9 NMSA 1978 together with the recording of the notice under the provisions of Section 62-13-11 NMSA 1978 in the office of the county clerk in each county where any real property is situate shall for all intents and purposes be equivalent to recording the same instrument in the office of the county clerk in each county where any part of the real or personal property is situate, as contemplated by Sections 14-9-1 through 14-9-9 NMSA 1978, and equivalent to filing the instrument as contemplated by Sections 55-9-401 through 55-9-407 NMSA 1978, which filed instrument shall remain effective until a termination statement is filed.

**History:** 1953 Comp., § 68-11-13, enacted by Laws 1965, ch. 112, § 5; 1979, ch. 78, § 3; 1981, ch. 301, § 1; 1982, ch. 15, § 1.

### **62-13-12.1. Effect of instruments previously filed.**

All instruments on file with the secretary of state, the filing of which, pursuant to Section 62-13-12 NMSA 1978, is equivalent to filing as contemplated by Sections 55-9-401 through 55-9-407 NMSA 1978, which instruments were filed prior to, and in effect on, July 1, 1981, shall remain effective until a termination statement is filed, and the refiling thereof or the filing of a continuation statement with respect thereto shall not be required.

**History:** 1978 Comp., § 62-13-12.1, enacted by Laws 1981, ch. 301, § 2.

### **62-13-13. Deposits; interest.**

Interest, at a minimum rate of nine percent per annum, shall be paid on any deposit required of a consumer by any public utility, as defined in Section 62-3-3 NMSA 1978, or by any telephone company, as defined in Section 63-9-2 NMSA 1978 or by any waterworks organized under Article 2 of Chapter 62 NMSA 1978.

**History:** Laws 1979, ch. 292, § 1.

### **62-13-14. Prohibition against water utilities imposing additional standby charges on owners of structures containing automatic fire protection sprinkler systems.**

No water utility defined as a public utility under the provisions of Section 62-3-3 NMSA 1978 shall impose sprinkler standby charges on the owners of structures that contain automatic fire protection sprinkler systems. As used in this section, "sprinkler standby charges" means additional charges imposed by a water utility on owners of structures because the structures are equipped with automatic fire protection sprinkler systems.

**History:** Laws 1987, ch. 294, § 1.

## **ARTICLE 14 EXCAVATION DAMAGE TO PIPELINES AND UNDERGROUND UTILITY LINES**

### **62-14-1. Purpose and intent.**

The purpose of Chapter 62, Article 14 NMSA 1978 is to prevent injury to persons and damage to property from accidents resulting from damage to pipelines, underground utility lines, cable television lines and related facilities by excavating and blasting.

**History:** 1953 Comp., § 12-32-1, enacted by Laws 1973, ch. 252, § 1; 1987, ch. 156, § 1.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, substituted "Chapter 62, Article 14 NMSA 1978" for "this act" and "lines, cable television lines" for "line."

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 1 Am. Jur. 2d Adjoining Landowners § 33; 26 Am. Jur. 2d Electricity §§ 195, 222; 61 Am. Jur. 2d Pipelines §§ 15 to 18; 64 Am. Jur. 2d Public Utilities § 16.

### **62-14-2. Definitions.**

For purposes of Chapter 62, Article 14 NMSA 1978:

A. "blasting" means the use of an explosive to excavate;

B. "excavate" means the movement or removal of earth using mechanical excavating equipment or blasting and includes augering, backfilling, digging, ditching, drilling, grading, plowing in, pulling in, ripping, scraping, trenching and tunnelling;

C. "mechanical excavating equipment" means all equipment powered by any motor, engine or hydraulic or pneumatic device used for excavating and includes trenchers, bulldozers, back hoes, power shovels, scrapers, draglines, clam shells, augers, drills, cable and pipe plows or other plowing-in or pulling-in equipment;

D. "pipeline" means a pipeline or system of pipelines and appurtenances for the transportation or movement of any gas, mixture of gases or petroleum products suitable for domestic or industrial fuel;

E. "underground utility line" means an underground conduit or cable, including fiber optics, and related facilities for transportation and delivery of electricity, telephonic or telegraphic communications or water;

F. "cable television lines and related facilities" means the facilities of any cable television system or closed-circuit coaxial cable communications system or other similar transmission service used in connection with any cable television system or other similar closed-circuit coaxial cable communications system;

G. "underground facilities" means any tangible property described in Subsections D through F of this section which is underground;

H. "person" means any individual, partnership, corporation, joint venture, state, subdivision or instrumentality of the state, association or any legal representative thereof;

I. "means of location" means a mark such as a stake in earthen areas or a paint mark in paved areas which is conspicuous in nature which is designed to last at least five days if not disturbed; and

J. "reasonable advance notice" means two working days.

**History:** 1953 Comp., § 12-32-2, enacted by Laws 1973, ch. 252, § 2; 1987, ch. 156, § 2.

## **ANNOTATIONS**

**The 1987 amendment**, effective June 19, 1987, in the opening clause substituted "Chapter 62, Article 14 NMSA 1978" for "this act"; in Subsection E, inserted "or cable, including fiber optics, and" following "and underground conduit"; inserted present Subsections F and G; redesignated former Subsection F as present Subsection H; inserted present Subsections I and J; and made minor changes in language throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Pipelines § 2.

### **62-14-3. Excavation.**

Every person who prepares engineering plans for excavation or who engages in excavation shall:

A. make reasonable efforts to inform himself of the location of any underground facility in or near the area where the excavation is to be conducted, including a request to the owner or operator of the underground facility to locate the underground facility pursuant to Section 62-14-5 NMSA 1978;

B. plan the excavation to avoid or minimize interference or damage to underground facilities in or near the excavation area;

C. provide reasonable advance notice of the commencement, extent and duration of the excavation work to the owners of any existing underground facility in and near the excavation area in order to allow the owners to locate, and mark the location of the underground facility described in Section 62-14-5 NMSA 1978 prior to the commencement of work in the excavation area;

D. prior to initial exposure of the underground facility, maintain at least an estimated clearance of eighteen inches between existing underground facilities for which the owners or operators have previously identified the location, and the cutting edge or point of any mechanical excavating equipment utilized in the excavation;

E. provide such support for existing underground facilities in or near the excavation area as may be reasonably necessary to prevent damage to them;

F. backfill all excavations in a manner and with materials as may be necessary to prevent damage to and provide reliable support during and following backfilling activities for pre-existing underground facilities in or near the excavation area; and

G. notify as promptly as possible the owner of any underground facilities which may have been damaged or dislocated during the excavation work.

**History:** 1953 Comp., § 12-32-3, enacted by Laws 1973, ch. 252, § 3; 1987, ch. 156, § 3.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, in the opening clause substituted "prepares engineering plans for excavation or who engages" for "shall engage"; substituted "underground facility" for "pipeline or underground utility line" in Subsections A, B and E through G; in Subsection A inserted "including a request to the owner or operator of the underground facility to locate the underground facility pursuant to Section 62-14-5 NMSA 1978" at the end; in Subsection C substituted "any existing underground facility" for "pipelines or underground utility lines" near the middle and "location of the underground facility prescribed in Section 62-14-5 NMSA 1978 prior to the commencement of work" for "location of pipelines and underground utility lines" near the end; in Subsection D inserted at the beginning "prior to initial exposure of the underground facility" and substituted "existing underground facility for which the owners or operators have previously identified the location" for "any nonexposed pipeline or underground utility line"; and made minor changes in language and punctuation throughout the section.

### **62-14-4. Emergency excavation.**

Every person who engages in emergency excavation shall take all necessary and reasonable precaution to avoid or minimize interference with or damage to existing underground facilities in and near the construction area and shall notify as promptly as possible the owners of underground facilities located in and near the emergency excavation area. In the event of any damage to or dislocation of any underground facility caused by the emergency excavation work, the person responsible for the excavation shall immediately notify the owner of the underground facility.

**History:** 1953 Comp., § 12-32-4, enacted by Laws 1973, ch. 252, § 4; 1987, ch. 156, § 4.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, substituted "underground facility" for "pipelines and underground utility lines" the three places that phrase appears and made minor changes in language throughout the section.

## **62-14-5. Marking of facilities.**

A. Every person owning or operating an underground facility shall, upon the request of a person intending to commence an excavation and upon reasonable advance notice locate and mark on the surface the actual horizontal location within twelve inches by some means of location the underground facilities in or near the area of the excavation so as to enable the person engaged in excavation work to locate the facilities in advance of and during the excavation work.

B. If the owner or operator fails to correctly mark the underground facility after being given reasonable advance notice and such failure to correctly mark the facility results in additional costs to the person doing the excavating, then the owner or operator shall reimburse the person engaging in the excavation for the reasonable costs incurred.

**History:** 1953 Comp., § 12-32-5, enacted by Laws 1973, ch. 252, § 5; 1987, ch. 156, § 5.

### **ANNOTATIONS**

**The 1987 amendment**, effective June 19, 1987, designated the former provisions as set out in the main pamphlet as Subsection A; in Subsection A, substituted "an underground facility" for "pipeline or underground utility line" both places it appears and "locate and mark on the surface the original horizontal location within twelve inches by some" for "mark by some reasonable and customary" near the middle; added Subsection B; and made minor changes in language throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Pipelines § 49.

## **62-14-6. Liability for damage to underground facilities.**

A. If any underground facility is damaged by any person who failed to make reasonable efforts to inform himself as to its location as provided in Chapter 62, Article 14 NMSA 1978, that person shall reimburse the owner of the underground facility for the actual cost of the damage to the underground facility, including the cost of restoration of services. The person engaging in the excavation may also be liable to the owner or operator of the underground facility for the comparative negligence of the person engaging in the excavation which results in damage to the facility for an additional amount not to exceed three hundred thousand dollars (\$300,000) for each occurrence.

B. If any underground facility is damaged by any person who has made reasonable efforts to inform himself as to its location and such damaged underground facility was correctly located by the owner or operator of the underground facility as provided in Section 62-14-5 NMSA 1978, then that person causing the damage shall be liable to the owner or operator of the underground facility for only the actual cost of damage to the underground facility, including the cost of restoration of service.

C. If any underground facility is damaged by any person who has made reasonable efforts to inform himself as to its location and damage to the underground facility is caused by the failure of the owner or operator to correctly locate that underground facility as provided in Section 62-14-5 NMSA 1978, then the person engaging in the excavation shall have no liability for the damage to that facility.

D. It is not the intent of Chapter 62, Article 14 NMSA 1978 to impose civil liability to any person beyond that provided in this section.

**History:** 1953 Comp., § 12-32-6, enacted by Laws 1973, ch. 252, § 6; 1987, ch. 156, § 6.

### ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, designated the former first sentence as set out in the main pamphlet as Subsection A; in Subsection A, in the first sentence substituted "Chapter 62, Article 14 NMSA 1978, that" for "this act, then such" and "actual cost of the damage to the underground facility, including the cost of restoration of services" for "entire cost of the repair of such facility," added the second sentence and made minor changes in language throughout the subsection; added Subsections B and C; designated the former last sentence of the section as Subsection D and, in that subsection, substituted "Chapter 62, Article 14" for "this act."

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 26 Am. Jur. 2d Electricity § 222; 61 Am. Jur. 2d Pipelines §§ 35, 36.

### **62-14-7. Liability for negligence notwithstanding information obtained.**

The act of obtaining or making reasonable efforts to obtain information as required by Chapter 62, Article 14 NMSA 1978 shall not excuse any person making any excavation from doing so in a careful and prudent manner, nor shall it excuse such person from liability for any damage or injury resulting from his negligence as limited in Section 62-14-6 NMSA 1978.

**History:** 1953 Comp., § 12-32-7, enacted by Laws 1973, ch. 252, § 7; 1987, ch. 156, § 7.

### ANNOTATIONS

**Cross-references.** - As to negligent use of explosives being petty misdemeanor, see 30-7-6 NMSA 1978.

**The 1987 amendment**, effective June 19, 1987, substituted "Chapter 62, Article 14 NMSA 1978" for "this act" near the middle and added "as limited in Section 62-14-6 NMSA 1978" at the end.



**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Excavator's liability for injury or damage resulting from explosion or fire caused by damaging of gas mains and pipes, 53 A.L.R.2d 1083.

35 C.J.S. Explosives § 11; 65A C.J.S. Negligence §§ 243, 273.

## **62-14-8. Penalties.**

In addition to any other liability imposed by law, any person who willfully fails to comply with Chapter 62, Article 14 NMSA 1978 and whose failure proximately contributes to the damage of any pipeline or underground utility line shall be subject to a civil penalty not to exceed five hundred dollars (\$500) for each offense. All actions to recover the penalties provided for in this section shall be brought by either the attorney general or the appropriate district attorney upon complaint of the state corporation commission, the New Mexico public utility commission or the construction industries division of the regulation and licensing department. All such actions shall be brought in the district court in and for the county in which the cause, or some part thereof, arose or in which the person complained of has their principal place of business or residence. All penalties recovered in any such action shall be paid into the state general fund.

**History:** 1953 Comp., § 12-32-8, enacted by Laws 1973, ch. 252, § 8; 1993, ch. 282, § 41.

### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, made stylistic changes in the first sentence; in the second sentence, substituted "New Mexico public utility commission" for "public service commission" and "division of the regulation and licensing department" for "commission"; and substituted "their" for "its" in the next-to-last sentence.

## **ARTICLE 15 RURAL ELECTRIC COOPERATIVES**

### **62-15-1. Short title.**

This act [62-15-1 to 62-15-32 NMSA 1978] may be cited as the "Rural Electric Cooperative Act."

**History:** Laws 1939, ch. 47, § 1; 1941 Comp., § 48-401; 1953 Comp., § 45-4-1.

### **ANNOTATIONS**

**Cross-references.** - As to jurisdiction of public service commission over rural electric cooperatives, see 62-3-2, 62-3-3 and 62-15-32 NMSA 1978 and notes thereto.

**Cooperatives are subject to highway and street regulations.** - Rural electrification cooperatives are subject to the same regulations by the highway commission and the county or municipality for the use of rights-of-way as any other public utility, and would be subject to the penal features of 67-8-13 and 67-8-14 NMSA 1978. 1951-52 Op. Att'y Gen. No. 5624.

**Public service commission (now public utility commission) was not required to delineate an electric cooperative's service area** where part of its system was in an area previously certificated to another utility. *Lea County Elec. Coop. v. New Mexico Pub. Serv. Comm'n*, 75 N.M. 191, 402 P.2d 377 (1965), cert. denied, 385 U.S. 969, 87 S. Ct. 503, 17 L. Ed. 2d 433 (1966).

**Premature action.** - Action by cooperative seeking to enjoin municipality from acquiring electric distribution and transmission lines outside of corporate limits where the cooperative held a prior franchise was brought prematurely since it did not yet own plant or transmission lines and could not show basis for relief in equity. *Sierra Elec. Coop. v. Town of Hot Springs*, 51 N.M. 150, 180 P.2d 244 (1947).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 1, 4 to 9, 11 to 13, 49.

Duty of mutual association, nonprofit organization or cooperative to furnish utility services, 56 A.L.R.2d 413.

Validity and enforceability of bylaw amendment reducing benefits available to members, 61 A.L.R.3d 976.

Competency of juror as affected by his membership in cooperative association interested in the case, 69 A.L.R.3d 1296.

Liability of electric utility to nonpatron for interruption or failure of power, 54 A.L.R.4th 667.

3 C.J.S. Agriculture §§ 138 to 158; 43 C.J.S. Industrial Cooperative Societies §§ 1, 3.

## **62-15-2. Purpose; definition.**

Cooperative nonprofit membership corporations may be organized under the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] for the primary purpose of supplying electric power and energy and promoting and extending the use of electricity in rural areas. Corporations organized under that act and corporations which become subject to that act in the manner provided in that act are referred to in the Rural Electric Cooperative Act as "cooperatives".

**History:** Laws 1939, ch. 47, § 2; 1941 Comp., § 48-402; 1953 Comp., § 45-4-2; Laws 1987, ch. 36, § 1.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, in the first sentence substituted "primary purpose of supplying electric power and energy" for "purpose of supplying electric energy," and made minor changes in language and punctuation throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations § 4.

### **62-15-3. Powers.**

A cooperative shall have power to:

A. sue and be sued, complain and defend, in its corporate name;

B. have perpetual existence by its corporate name;

C. adopt a corporate seal and alter the same at pleasure, and to use the seal by causing it or a facsimile of it to be impressed or affixed or in any other manner reproduced; but failure to have or to affix a corporate seal does not affect the validity of any instrument or any action taken in pursuance of or in reliance on any instrument;

D. own, operate, lease or control plant, property and facilities for the generation, transmission or distribution, sale or furnishing of electricity for light, heat or power or other uses; and to generate, manufacture, purchase, acquire, accumulate and transmit electric energy; and to distribute, sell, supply and dispose of electric energy in rural areas to or for its members, governmental agencies and political subdivisions and the general public;

E. make loans to persons to whom electric energy is or will be supplied by the cooperative for the purpose of, and otherwise to assist such persons in, wiring their premises and installing electric and plumbing fixtures, appliances, apparatus and equipment of any kind and character; and in connection therewith to purchase, acquire, lease, sell, distribute, install and repair such electric and plumbing fixtures, appliances, apparatus and equipment; and to accept or otherwise acquire and to sell, assign, transfer, endorse, pledge, hypothecate and otherwise dispose of notes, bonds and other evidences of indebtedness and any type of security therefor; and to lend money for its corporate purposes, invest and reinvest its funds; and to take and hold real and personal property as security for the payment of funds so loaned or invested;

F. make loans to persons to whom electric energy is or will be supplied by the cooperative for the purpose of, and otherwise to assist such persons in, constructing, maintaining and operating electric refrigeration plants;

G. purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, exercise rights arising out of the ownership or possession thereof, use, employ, sell, assign, transfer, convey, mortgage, lend, pledge, hypothecate or otherwise dispose of and otherwise use and deal in and with shares, rights, memberships or other interests in, or notes, bonds, debentures, mortgages, passbooks, certificates of deposit or other obligations of, other domestic or foreign corporations, associations, partnerships, limited partnerships or individuals, or direct or indirect obligations or securities of individuals, associations, cooperatives, partnerships, corporations or of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;

H. construct, purchase, take, receive, lease as lessee or otherwise acquire, and to own, hold, improve, use, equip, maintain and operate, and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, property, buildings, structures, dams, plants and equipment and any kind and class of real or personal property which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

I. purchase or otherwise acquire, and to own, hold, use and exercise, and to sell, assign, transfer, convey, mortgage, pledge, hypothecate or otherwise dispose of or encumber franchises, rights, privileges, licenses, rights-of-way and easements;

J. make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the board of trustees shall determine and otherwise contract indebtedness, and to issue its notes, bonds and other evidences of indebtedness therefor, and to secure the payment of any thereof by mortgage, pledge, deed of trust, assignment, security agreement or any other hypothecation or encumbrance upon any or all of its then-owned or after-acquired real or personal property, assets, franchises, revenues or income;

K. construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation all roads, highways, streets, alleys and bridges, and upon, under and across all publicly owned property;

L. exercise the power of eminent domain in the manner provided by the Eminent Domain Code [42A-1-1 through 42A-1-33 NMSA 1978] for the exercise of that power by corporations constructing or operating electric transmission and distribution lines or systems;

M. conduct its business, carry on its operations, have offices and exercise the powers granted by the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] in any state, territory, district or possession of the United States or in any foreign country;

N. adopt, amend and repeal bylaws consistent with the Rural Electric Cooperative Act and the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978];

O. make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war to make donations in aid of war activities;

P. transact any lawful business in aid of governmental policy;

Q. subject to any limitations set forth in the articles of incorporation or bylaws, do such other and further acts and undertake such other and further activities and transactions for the mutual benefit of its members and patrons as may be done and undertaken by a corporation organized under the Business Corporation Act [53-11-1 through 53-18-12 NMSA 1978] for the same or any additional lawful purpose, including the indemnification of and the procurement of insurance for present and former trustees, officers, employees and agents of the cooperative as if trustees and members were directors and shareholders respectively;

R. pay pensions and establish pension plans, pension trusts, bonus plans, health insurance plans, savings plans and any other incentive plans or employee relation plans customarily used by broadly held corporations for its trustees, officers and employees, or for its employees alone;

S. cease its corporate activities and surrender its corporate franchise; and

T. do and perform all other acts and things and have and exercise all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized, to effectuate the powers set forth in this section and to accept all the burdens and exercise all the benefits which apply to public utilities under the laws of New Mexico.

**History:** Laws 1939, ch. 47, § 3; 1941 Comp., § 48-403; 1953 Comp., § 45-4-3; Laws 1967, ch. 102, § 2; 1971, ch. 8, § 1; 1981, ch. 125, § 51; 1987, ch. 36, § 2.

## ANNOTATIONS

**Cross-references.** - As to excavation damage to pipelines and underground utility lines, see 62-14-1 to 62-14-8 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, in Subsection P, substituted the present provisions for "in time of war transact any lawful business in aid of the United States in the prosecution of the war"; substituted the present provisions of Subsection Q for the provisions set out in the 1984 Replacement Pamphlet; and made minor changes in language and punctuation throughout the section.

**Scope of service.** - Prior to the 1967 amendment to Subsection D, a rural electric cooperative could only supply electric energy to its members, to governmental agencies

and political subdivisions and to other persons not in excess of 10% of the number of its members. Socorro Elec. Coop. v. Public Serv. Co., 66 N.M. 343, 348 P.2d 88 (1959).

**Powers of county commissioners over use of roads by utilities.** - See 1973 Op. Att'y Gen. No. 73-26.

**Premature action.** - Action by cooperative seeking to enjoin municipality from acquiring electric distribution and transmission lines outside of corporate limits where cooperative held prior franchise was brought prematurely since it did not yet own plant or transmission lines and could not show basis for equitable relief. Sierra Elec. Coop., Inc. v. Town of Hot Springs, 51 N.M. 150, 180 P.2d 244 (1947).

**Law reviews.** - For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 30 to 32.

43 C.J.S. Industrial Cooperative Societies §§ 5, 6.

#### **62-15-4. Name.**

The name of each cooperative shall include the words "electric" and "cooperative," and the abbreviation "Inc.," provided, however, such limitation shall not apply if, in an affidavit made by the president or vice president of a cooperative and filed with the state corporation commission, it shall appear that the cooperative desires to transact business in another state and is precluded therefrom by reason of its name. The name of a cooperative shall distinguish it from the name of any other corporation organized under the laws of, or authorized to transact business in, this state. The words "electric" and "cooperative" shall not both be used in the name of any corporation organized under the laws of, or authorized to transact business in, this state, except a cooperative or a corporation transacting business in this state pursuant to the provisions of this act [62-15-1 to 62-15-32 NMSA 1978].

**History:** Laws 1939, ch. 47, § 4; 1941 Comp., § 48-404; 1953 Comp., § 45-4-4.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 5 to 9.

43 C.J.S. Industrial Cooperative Societies § 4.

#### **62-15-5. Incorporators.**

Five or more natural persons, or two or more cooperatives, may organize a cooperative in the manner hereinafter provided.

**History:** Laws 1939, ch. 47, § 5; 1941 Comp., § 48-405; 1953 Comp., § 45-4-5.

### **62-15-6. Articles of incorporation.**

A. The articles of incorporation of a cooperative shall recite in the caption that they are executed pursuant to this act [62-15-1 to 62-15-32 NMSA 1978], shall be signed and acknowledged by each of the incorporators and shall state:

- (1) the name of the cooperative;
- (2) the address of its principal office;
- (3) the names and addresses of the incorporators;
- (4) the names and addresses of the persons who shall constitute its first board of trustees; and
- (5) any provisions not inconsistent with this act deemed necessary or advisable for the conduct of its business and affairs.

B. Such articles of incorporation shall be submitted to the state corporation commission for filing as provided in this act.

C. It shall not be necessary to set forth in the articles of incorporation of a cooperative the purpose for which it is organized or any of the corporate powers vested in a cooperative under this act.

**History:** Laws 1939, ch. 47, § 6; 1941 Comp., § 48-406; 1953 Comp., § 45-4-6.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations § 1.

43 C.J.S. Industrial Cooperative Societies § 3.

### **62-15-7. Bylaws.**

The original bylaws of a cooperative shall be adopted by its board of trustees. Thereafter bylaws shall be adopted, amended or repealed by the majority of the members present at any regular annual meeting or special meeting called for that purpose, a quorum being present. The bylaws shall set forth the rights and duties of members and trustees and may contain other provisions for the regulation and

management of the affairs of the cooperative not inconsistent with this act [62-15-1 to 62-15-32 NMSA 1978] or with its articles of incorporation.

**History:** Laws 1939, ch. 47, § 7; 1941 Comp., § 48-407; 1953 Comp., § 45-4-7; Laws 1957, ch. 97, § 1.

## ANNOTATIONS

**Bylaws may be amended by vote at district meetings.** - A rural electric cooperative may provide for the amendment of its bylaws by a vote taken at a series of meetings of voting districts rather than at a general meeting of all the members, but, in so doing, it cannot take away the power of the majority of members to adopt, amend or repeal the bylaws. 1961-62 Op. Att'y Gen. No. 61-62.

It is legal to provide for the amendment of bylaws by a majority vote of the members voting by districts, rather than at a general meeting of all the members. This interpretation does no violence to this section, since it mentions "regular annual meeting," and does not exclude a regular annual meeting or special meeting of a voting district. The interpretation is supported by the liberal construction required to be given these statutes under 62-15-32 NMSA 1978. 1961-62 Op. Att'y Gen. No. 61-62.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15, 21.

43 C.J.S. Industrial Cooperative Societies §§ 3 to 5, 7 to 11.

### **62-15-8. Members.**

A. No person who is not an incorporator shall become a member of a cooperative unless he agrees to use electric energy furnished by the cooperative when electric energy is available through its facilities. The bylaws of a cooperative may provide that any person, including an incorporator, shall cease to be a member of a cooperative if he fails or refuses to use electric energy made available by the cooperative or if the electric energy is not made available to that person by the cooperative within a specified time after he becomes a member of the cooperative. Membership in the cooperative shall not be transferable except as provided in the bylaws. The bylaws may prescribe additional qualifications and limitations in respect of membership.

B. An annual meeting of the members shall be held at such time as shall be provided in the bylaws or, if not contrary to the bylaws, by the board of trustees.

C. Special meetings of the members may be called by the board of trustees, by any three trustees, by petition signed by not less than ten percent of the members or by the president.



D. Annual and special meetings of members whether general or by voting districts established pursuant to the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], shall be held at such place as may be provided in the bylaws. In the absence of any such provision, all general meetings shall be held in the city or town in which the principal office of the cooperative is located and all meetings by voting districts shall be held at a location set by the board of trustees within the boundaries of each district.

E. Except as otherwise provided in the Rural Electric Cooperative Act, written or printed notice stating the time and place of each meeting of members and, in the case of a special meeting, the purpose for which the meeting is called shall be given to each member by the board of trustees or the secretary, or their legal representatives, either personally or by mail not less than ten or more than twenty-five days before the date of the meeting. Failure to receive notice deposited in the mail addressed to a member at the member's address shown on the cooperative's books and records shall not affect the validity of any business conducted at a meeting.

F. Five percent of all members present in person constitutes a quorum for the transaction of business at all meetings of the members, unless the bylaws prescribe the presence of a greater or lesser number of members for a quorum. If less than a quorum is present at any meeting, a majority of those present in person may adjourn the meeting from time to time without further notice. The failure to hold a meeting of members due to the absence of a quorum shall not affect the validity of any business conducted by the board of trustees.

G. Each member shall be entitled to one vote on each matter submitted to a vote at a meeting. Voting shall be in person; provided that if the bylaws provide for voting by proxy or by mail, the bylaws shall prescribe the conditions under which proxy or mail voting shall be exercised. No person shall vote as proxy for more than three members at any meeting of the members.

H. All actions required by the Rural Electric Cooperative Act to be adopted or approved by a simple majority or greater number of members voting on the action at an annual or special meeting may be acted upon by voting at a general meeting or, to the extent and in the manner that the board of trustees may authorize, by voting by the voting districts established pursuant to that act, so long as the requisite majority of members voting on the action is obtained regardless of whether such a majority is obtained in any particular voting district. Action by voting by the voting districts shall be valid if a quorum exists as a result of a series of voting district meetings regardless of whether a quorum is present in any particular voting district.

**History:** Laws 1939, ch. 47, § 8; 1941 Comp., § 48-408; 1953 Comp., § 45-4-8; Laws 1961, ch. 210, § 1; 1983, ch. 273, § 1.

## **ANNOTATIONS**

**The 1983 amendment** rewrote Subsection A, substituted "bylaws or, if not contrary to the bylaws, by the board of trustees" for "bylaw" in Subsection B, inserted "by petition signed" and substituted "percent" for "per centum (10%)" in Subsection C, deleted "and the meeting shall be held at the place as may be designated in the petition" at the end of Subsection C and, in Subsection D, inserted "and special" and the language beginning with "whether general" and ending with "Cooperative Act" in the first sentence, and "general" in the second sentence and added the language beginning with "and all meetings" at the end of the second sentence. The 1983 amendment also, in Subsection E, added the second sentence and rewrote the first sentence; in Subsection F, substituted "constitutes" for "shall constitute" and "or lesser number of" for "of the" in the first sentence, inserted "in person" in the second sentence and added the last sentence; in Subsection G, substituted "provided that" for "but" and "provide for voting by proxy or by mail, the bylaws shall prescribe" for "so provide, may also be by proxy or by mail; they shall also prescribe" in the second sentence, deleted "In any event" at the beginning of the third sentence; and added Subsection H.

**Statutes, articles of incorporation, bylaws, application and certificate are contract.** - Sections 62-15-1 to 62-15-32 NMSA 1978, together with the articles of incorporation and the bylaws of the cooperative, the application made by the plaintiff and the certificate of membership issued to him, constituted the contract between him and the cooperative. *King v. Farmers' Elec. Coop.*, 56 N.M. 552, 246 P.2d 1041 (1952).

**Member is bound by bylaws.** - A member, in view of provision in his application agreeing to comply with and to be bound by provisions of the charter and bylaws of the cooperative, will, when such bylaws are reasonable, and enacted under properly delegated authority, be bound thereby. *King v. Farmers' Elec. Coop.*, 56 N.M. 552, 246 P.2d 1041 (1952).

A member of the cooperative is not in position to challenge the validity of its bylaws, is presumed to know contents of its charter and bylaws and, having agreed, if accepted as a member, to abide by all its rules, regulations and bylaws, cannot be permitted to repudiate the same. *King v. Farmers' Elec. Coop.*, 56 N.M. 552, 246 P.2d 1041 (1952).

**Refusal of easement for line forfeits membership.** - Member's refusal to grant needed right-of-way easement for transmission line, ipso facto, worked a forfeiture of his membership and abrogation of the contract for supplying member with electric service. *King v. Farmers' Elec. Coop.*, 56 N.M. 552, 246 P.2d 1041 (1952).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 13 to 15, 21 to 23, 25, 26.

43 C.J.S. Industrial Cooperative Societies §§ 7, 11.

**62-15-9. Board of trustees; suits.**

A. The business and affairs of a cooperative shall be managed by a board of not less than five trustees, each of whom shall be a member of the cooperative or of another cooperative which shall be a member thereof. The bylaws shall prescribe the number of trustees, the terms of the trustees and the manner of their election by the members, their qualifications, other than those provided for in the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], the manner of holding meetings of the board of trustees and of the election of successors to trustees who resign, die or otherwise are incapable of acting. The bylaws may provide for the removal of trustees from office and for the election of their successors and for the classification of trustees by terms of office. Without approval of the members, trustees shall not receive any salaries for their services as trustees and, except in emergencies, shall not be employed by the cooperative in any capacity involving compensation. The bylaws may, however, provide that a fixed per diem fee and advancement, reimbursement or a per diem amount in lieu of reasonably incurred expenses may be allowed to each trustee for attendance at each meeting of the board of trustees and of a committee thereof and for the performance of other cooperative business when such has had prior approval of the board of trustees.

B. The trustees of a cooperative named in any articles of incorporation, consolidation, merger or conversion shall hold office until the next following annual meeting of the members or until their successors have been elected and qualified.

C. A majority of the board of trustees constitutes a quorum.

D. If a husband and wife hold joint membership in a cooperative, either one, but not both, may be elected a trustee.

E. If the bylaws so provide, the board of trustees, by resolution adopted by a majority of the full board of trustees, may designate from among its members an executive committee and one or more other committees, except no such committee shall have authority to take any action on behalf of the board of trustees to distribute patronage refunds or in any matter which, under the articles of incorporation, bylaws or the Rural Electric Cooperative Act, requires the approval of the cooperative's members. Neither the designation of any such committee, the delegation thereto of authority nor action by such committee pursuant to such authority shall alone constitute compliance by any trustee not a member of the committee in question with the trustee's responsibility to act in accordance with the standard of conduct prescribed by Subsection E of this section.

F. Unless otherwise provided in the bylaws, any action required by the Rural Electric Cooperative Act to be taken at a meeting of the board of trustees, or any action which may be taken at a meeting of the board of trustees or of a committee, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the trustees or all of the committee members, as the case may be. The consent shall have the same effect as a unanimous vote.

G. The board of trustees may exercise all of the powers of a cooperative except such as are conferred upon the members by the Rural Electric Cooperative Act or its articles of incorporation or bylaws.

H. No action shall be brought against a trustee as such or against the cooperative in its right unless the plaintiff was a member of record at the time of the transaction complained of and the complaint is verified and alleges with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the board of trustees and the reasons for the plaintiff's failure to obtain the action or for not making the effort. If the cooperative undertakes an investigation upon receipt of a demand by plaintiff for action, or following commencement of suit, the court may stay an action commenced as the circumstances reasonably require. If the court finds the action was brought without reasonable cause, it may require the plaintiff to pay defendants the reasonable expenses, including counsel fees, incurred by them in the defense of such action or to reimburse the cooperative for any indemnification provided a defendant pursuant to the Rural Electric Cooperative Act or the cooperative's bylaws.

**History:** Laws 1939, ch. 47, § 9; 1941 Comp., § 48-409; 1953 Comp., § 45-4-9; Laws 1957, ch. 200, § 1; 1987, ch. 36, § 3.

## ANNOTATIONS

**The 1987 amendment**, effective June 19, 1987, in Subsection A, in the third sentence added "and for the classification of trustees by terms of office" at the end and, in the fifth sentence, substituted "a fixed per diem fee and advancement, reimbursement or a per diem of amount in lieu of reasonably incurred expenses" for "a fixed fee and expenses of attendance, if any" and added the material at the end following "board of trustees"; added present Subsections E, F, and H; redesignated former Subsection E as present Subsection G; and made minor changes in language and punctuation throughout the section.

**Trustee may serve as director.** - A member of the board of trustees of a rural electric cooperative incorporated under New Mexico's Rural Electric Cooperative Act (62-15-1 to 62-15-32 NMSA 1978) may serve as the salaried director of the cooperative with approval of the members. 1971 Op. Att'y Gen. No. 71-111.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 19, 22.

43 C.J.S. Industrial Cooperative Societies §§ 6, 8.

### **62-15-9.1. Duties of trustees.**

A trustee shall perform his duties as a trustee, including his duties as a member of any committee of the board upon which the trustee may serve, in good faith, in a manner the trustee believes to be in or not opposed to the best interests of the cooperative and with

such care as an ordinarily prudent person would use under similar circumstances in a like position. In performing such duties, a trustee shall be entitled to rely on factual information, opinions, reports or statements including financial statements and other financial data in each case prepared or presented by:

A. one or more officers or employees of the cooperative whom the trustee reasonably believes to be reliable and competent in the matters presented;

B. counsel, public accountants or other persons as to matters which the trustee reasonably believes to be within such persons' professional or expert competence;

C. a committee of the board upon which the trustee does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws as to matters within its designated authority, which committee the trustee reasonably believes to merit confidence, but the trustee shall not be considered to be acting in good faith if the trustee has knowledge concerning the matter in question that would cause such reliance to be unwarranted; or

D. any bulletin or other directive of the rural electrification administration, or successor agency, material to the matter in question.

A person who so performs such duties shall have no liability to the cooperative or to its members by reason of being or having been a trustee of the cooperative.

**History:** 1978 Comp., § 62-15-9.1, enacted by Laws 1987, ch. 238, § 13.

### **ANNOTATIONS**

**Law reviews.** - For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

### **62-15-9.2. Limitation on liability and indemnification of officers and trustees.**

A. Cumulative to any other provision of the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] as now or hereafter enacted, the bylaws of a cooperative may provide that a trustee shall not be personally liable to the cooperative or to its members for monetary damages for breach of fiduciary duty as a trustee unless:

(1) the trustee has breached or failed to perform the duties of his office in compliance with Section 62-15-9.1 NMSA 1978; and

(2) the breach or failure to perform constitutes willful misconduct or recklessness; or in the case of a trustee of a cooperative actively engaged in the generation and transmission of electric power, negligence, willful misconduct or recklessness. Such a provision in the bylaws shall, however, only eliminate the liability of a trustee for action

taken as a trustee or any failure to take action as a trustee at meetings of the board of trustees or of a committee of the board of trustees, or by virtue of action of the trustees without a meeting as may be permitted by the Rural Electric Cooperative Act as now or hereafter enacted, on or after the date when such provision in the bylaws becomes effective.

B. Cumulative to any other power granted by the Rural Electric Cooperative Act as now or hereafter enacted, each cooperative shall have the power to indemnify any trustee or officer or former trustee or officer of the cooperative or any person serving or having served at the request of the cooperative as a director, trustee, officer, partner, trustee, employee or agent of any cooperative, corporation, nonprofit corporation, partnership, joint venture, trust, unincorporated association, other incorporated or unincorporated enterprise or employee benefit plan or trust against reasonable expenses, costs and attorneys' fees actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of holding or having held such an office or position. The indemnification may include any amounts paid to satisfy a judgment or to compromise or settle a claim. The trustee, officer or other person shall not be indemnified if he shall be adjudged to be liable on the basis that he breached or failed to perform the duties of his office or position and the breach or failure to perform constitutes willful misconduct or recklessness. Advance indemnification to such persons may be allowed for reasonable expenses to be incurred in connection with the defense of the action, suit or proceeding, provided that the trustee, officer or other person shall reimburse the cooperative if it is subsequently determined that he was not entitled to indemnification. Each cooperative may make any other indemnification as authorized by the articles of incorporation or bylaws or by resolution adopted by the members after notice.

**History:** 1978 Comp., § 62-15-9.2, enacted by Laws 1987, ch. 238, § 14.

### **62-15-10. Voting districts.**

Notwithstanding any other provision of this act [62-15-1 to 62-15-32 NMSA 1978], the bylaws may provide that the territory in which a cooperative supplies electric energy to its members shall be divided into two or more voting districts, and that, in respect of each such voting district:

- A. a designated number of trustees shall be elected by the members residing therein; or
- B. a designated number of delegates shall be elected by such members; or
- C. both such trustees and delegates shall be elected by such members.

In any such case the bylaws shall prescribe the manner in which such voting districts and the members thereof, and the delegates and trustees, if any, elected therefrom shall function, and the powers of the delegates, which may include the power to elect

trustees. No member at any voting district meeting and no delegate at any meeting shall vote by proxy or by mail.

**History:** Laws 1939, ch. 47, § 10; 1941 Comp., § 48-410; 1953 Comp., § 45-4-10.

### **ANNOTATIONS**

**Amendment vote by districts rather than at general meeting deemed legal.** - It is legal to provide for the amendment of bylaws by a majority vote of the members voting by districts, rather than at a general meeting of all the members. This interpretation does no violence to 62-15-7 NMSA 1978, since that section mentions "regular annual meeting" and "special meeting," and does not exclude a regular annual meeting or special meeting of a voting district. The interpretation is supported by the liberal construction required to be given these statutes under 62-15-32 NMSA 1978. 1961-62 Op. Att'y Gen. No. 61-62.

**But cannot take away power of majority.** - A rural electric cooperative may provide for the amendment of its bylaws by a vote taken at a series of meetings of voting districts rather than at a general meeting of all the members, but, in so doing, it cannot take away the power of the majority of members to adopt, amend or repeal the bylaws. 1961-62 Op. Att'y Gen. No. 61-62.

### **62-15-11. Officers.**

The officers of a cooperative shall consist of a president, vice president, secretary and treasurer, who shall be elected annually by and from the board of trustees. No person shall continue to hold any of the above offices after he shall have ceased to be a trustee. The offices of secretary and of treasurer may be held by the same person. The board of trustees may also elect or appoint such other officers, agents or employees as it shall deem necessary or advisable and shall prescribe the powers and duties thereof. Any officer may be removed from office and his successor elected in the manner prescribed in the bylaws.

**History:** Laws 1939, ch. 47, § 11; 1941 Comp., § 48-411; 1953 Comp., § 45-4-11.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 18, 19, 49.

43 C.J.S. Industrial Cooperative Societies §§ 6, 8.

### **62-15-12. Amendment of articles of incorporation.**

A. A cooperative may amend its articles of incorporation by complying with the following requirements:

(1) the proposed amendment shall be first approved by the board of trustees and shall then be submitted to a vote of the members at any annual or special meeting thereof, the notice of which shall set forth the proposed amendment. The proposed amendment, with such changes as the members shall choose to make therein, shall be deemed to be approved on the affirmative vote of not less than two-thirds of those members voting thereon at such meeting; and

(2) upon such approval by the members, articles of amendment shall be executed and acknowledged on behalf of the cooperative by its president or vice president and its corporate seal shall be affixed thereto and attested by its secretary. The articles of amendment shall recite in the caption that they are executed pursuant to this act [62-15-1 to 62-15-32 NMSA 1978] and shall state:

(a) the name of the cooperative;

(b) the address of its principal office;

(c) the date of the filing of its articles of incorporation in the office of the state corporation commission; and

(d) the amendment to its articles of incorporation.

The president or vice president executing such articles of amendment shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with. Such articles of amendment and affidavit shall be submitted to the state corporation commission for filing as provided in this act.

B. A cooperative may, without amending its articles of incorporation, upon authorization of its board of trustees, change the location of its principal office by filing a certificate of change of principal office, executed and acknowledged by its president or vice president under its seal attested by its secretary, in the office of the state corporation commission and also in the office of the county clerk in each county in this state, in which its articles of incorporation or any prior certificate of change of principal office of such cooperative has been filed. Such cooperative shall also, within thirty (30) days after the filing of such certificate of change of principal office in the office of the county clerk, file therein certified copies of its articles of incorporation and all amendments thereto, if the same are not already on file therein.

**History:** Laws 1939, ch. 47, § 12; 1941 Comp., § 48-412; 1953 Comp., § 45-4-12.

### **62-15-13. Consolidation.**

Any two or more cooperatives, each of which is hereinafter designated a "consolidating cooperative," may consolidate into a new cooperative, hereinafter designated the "new cooperative," by complying with the following requirements:



A. the proposition for the consolidation of the consolidating cooperatives into the new cooperative and proposed articles of consolidation to give effect thereto shall be first approved by the board of trustees of each consolidating cooperative. The proposed articles of consolidation shall recite in the caption that they are executed pursuant to the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] and shall state:

(1) the name of each consolidating cooperative, the address of its principal office and the date of the filing of its articles of incorporation in the office of the state corporation commission;

(2) the name of the new cooperative and the address of its principal office;

(3) the names and addresses of the persons who shall constitute the first board of trustees of the new cooperative;

(4) the terms and conditions of the consolidation and the mode of carrying the same into effect, including the manner and basis of converting memberships in each consolidating cooperative into memberships in the new cooperative and the issuance of certificates of membership in respect of such converted memberships; and

(5) any provisions not inconsistent with the Rural Electric Cooperative Act deemed necessary or advisable for the conduct of the business and affairs of the new cooperative;

B. the proposition for the consolidation of the consolidating cooperatives into the new cooperative and the proposed articles of consolidation approved by the board of trustees of each consolidating cooperative shall then be submitted to a vote of the members thereof at any annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed consolidation. The proposed consolidation and the proposed articles of consolidation shall be deemed to be approved upon the affirmative vote of a simple majority of those members of each consolidating cooperative voting thereon at such meeting; and

C. upon such approval by the members of the respective consolidating cooperatives, articles of consolidation in the form approved shall be executed and acknowledged on behalf of each consolidating cooperative by its president or vice president and its seal shall be affixed thereto and attested by its secretary. The president or vice president of each consolidating cooperative executing such articles of consolidation shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with by such cooperative. Such articles of consolidation and affidavits shall be submitted to the state corporation commission for filing as provided in Section 62-15-19 NMSA 1978.

**History:** Laws 1939, ch. 47, § 13; 1941 Comp., § 48-413; 1953 Comp., § 45-4-13; Laws 1979, ch. 64, § 1.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Industrial Cooperative Societies §§ 6, 13.

### **62-15-14. Merger.**

Any one or more cooperatives, each of which is hereinafter designated a "merging cooperative," may merge into another cooperative, hereinafter designated the "surviving cooperative," by complying with the following requirements:

A. the proposition for the merger of the merging cooperatives into the surviving cooperative and proposed articles of merger to give effect thereto shall be first approved by the board of trustees of each merging cooperative and by the board of trustees of the surviving cooperative. The proposed articles of merger shall recite in the caption that they are executed pursuant to the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] and shall state:

(1) the name of each merging cooperative, the address of its principal office and the date of the filing of its articles of incorporation in the office of the state corporation commission;

(2) the name of the surviving cooperative and the address of its principal office;

(3) a statement that the merging cooperatives elect to be merged into the surviving cooperative;

(4) the terms and conditions of the merger and the mode of carrying the same into effect, including the manner and basis of converting the memberships in the merging cooperative or cooperatives into memberships in the surviving cooperatives and the issuance of certificates of membership in respect of such converted memberships; and

(5) any provisions not inconsistent with the Rural Electric Cooperative Act deemed necessary or advisable for the conduct of the business and affairs of the surviving cooperative;

B. the proposition for the merger of the merging cooperatives into the surviving cooperative and the proposed articles of merger approved by the board of trustees of the respective cooperatives, parties to the proposed merger, shall then be submitted to a vote of the members of each such cooperative at any annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed merger. The proposed merger and the proposed articles of merger shall be deemed to be approved upon the affirmative vote of a simple majority of those members of each cooperative voting thereon at such meeting; and

C. upon such approval by the members of the respective cooperatives, parties to the proposed merger, articles of merger in the form approved shall be executed and acknowledged on behalf of each such cooperative by its president or vice president and its seal shall be affixed thereto and attested by its secretary. The president or vice president of each cooperative executing such articles of merger shall also make and annex thereto an affidavit stating that the provisions of this section were duly complied with by such cooperative. Such articles of merger and affidavits shall be submitted to the state corporation commission for filing as provided in Section 62-15-19 NMSA 1978.

**History:** Laws 1939, ch. 47, § 14; 1941 Comp., § 48-414; 1953 Comp., § 45-4-14; Laws 1979, ch. 64, § 2.

## ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Industrial Cooperative Societies §§ 3, 6, 13.

### **62-15-15. Effect of consolidation or merger.**

The effect of consolidation or merger shall be as follows:

A. the several cooperatives, parties to the consolidation or merger, shall be a single cooperative, which, in the case of a consolidation, shall be the new cooperative provided for in the articles of consolidation, and, in the case of a merger, shall be that cooperative designated in the articles of merger as the surviving cooperative, and the separate existence of all cooperatives, parties to the consolidation or merger, except the new or surviving cooperative, shall cease;

B. such new or surviving cooperative shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a cooperative organized under the provisions of this act [62-15-1 to 62-15-32 NMSA 1978], and shall possess all the rights, privileges, immunities and franchises, as well of a public as of a private nature, and all property, real and personal, applications for membership, all debts due on whatever account and all other choses in action of each of the consolidating or merging cooperatives, and furthermore all and every interest of, or belonging or due to, each of the cooperatives so consolidated or merged, shall be taken and deemed to be transferred to and vested in such new or surviving cooperative without further act or deed; and the title to any real estate, or any interest therein, under the laws of this state vested in any such cooperatives shall not revert to be in any way impaired by reason of such consolidation or merger;

C. such new or surviving cooperative shall thenceforth be responsible and liable for all of the liabilities and obligations of each of the cooperatives so consolidated or merged, and any claim existing, or action or proceeding pending, by or against any of such cooperatives may be prosecuted as if such consolidation or merger had not taken place, but such new or surviving cooperative may be substituted in its place;

D. neither the rights of creditors nor any liens upon the property of any of such cooperatives shall be impaired by such consolidation or merger; and

E. in the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new cooperative; and in the case of a merger, the articles of incorporation of the surviving cooperative shall be deemed to be amended to the extent, if any, that changes therein are provided for in the articles of merger.

**History:** Laws 1939, ch. 47, § 15; 1941 Comp., § 48-415; 1953 Comp., § 45-4-15.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Industrial Cooperative Societies § 2.

### **62-15-16. Conversion of existing corporations.**

Any corporation organized under the laws of this state for the purpose, among others, of supplying electric energy in rural areas may be converted into a cooperative and become subject to this act [62-15-1 to 62-15-32 NMSA 1978] with the same effect as if originally organized under this act by complying with the following requirements:

A. the proposition for the conversion of such a corporation into a cooperative and proposed articles of conversion to give effect thereto shall be first approved by the board of trustees or the board of directors, as the case may be, of such corporation. The proposed articles of conversion shall recite in the caption that they are executed pursuant to this act and shall state:

(1) the name of the corporation prior to its conversion into a cooperative;

(2) the address of the principal office of such corporation;

(3) the date of the filing of articles of incorporation of such corporation in the office of the state corporation commission;

(4) the statute or statutes under which such corporation was organized;

(5) the name assumed by such corporation in compliance with the provisions of this act;

(6) a statement that such corporation elects to become a cooperative, nonprofit, membership corporation subject to this act;

(7) the manner and basis of converting either memberships in or shares of stock of such corporation into membership in the converted corporation; and

(8) any provisions not inconsistent with this act deemed necessary or advisable for the conduct of the business and affairs of such corporation;

B. the proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion approved by the board of trustees or board of directors, as the case may be, of such corporation shall then be submitted to a vote of the members or stockholders, as the case may be, of such corporation at any duly held annual or special meeting thereof, the notice of which shall set forth full particulars concerning the proposed conversion. The proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion, with such amendments thereto as the members or stockholders of such corporation shall choose to make, shall be deemed to be approved upon the affirmative vote of not less than two-thirds of those members of such corporation voting thereon at such meeting, or, if such corporation is a stock corporation, upon the affirmative vote of the holders of not less than two-thirds of the capital stock of such corporation represented at such meeting;

C. upon such approval by the members or stockholders of such corporation, articles of conversion in the form approved by such members or stockholders shall be executed and acknowledged on behalf of such corporation by its president or vice president and its corporate seal shall be affixed thereto and attested by its secretary. The president or vice president executing such articles of conversion on behalf of such corporation shall also make and annex thereto an affidavit stating that the provisions of this section with respect to the approval of its trustees or directors and its members or stockholders, of the proposition for the conversion of such corporation into a cooperative and such articles of conversion were duly complied with. Such articles of conversion and affidavit shall be submitted to the state corporation commission for filing as provided in this act;

D. the term "articles of incorporation" as used in this act shall be deemed to include the articles of conversion of a converted corporation.

**History:** Laws 1939, ch. 47, § 16; 1941 Comp., § 48-416; 1953 Comp., § 45-4-16.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 5 to 9.

43 C.J.S. Industrial Cooperative Societies § 6.

### **62-15-17. Initiative by members.**

Notwithstanding any other provision of this act [62-15-1 to 62-15-32 NMSA 1978], any proposition embodied in a petition signed by not less than 10 per centum (10%) of all members of the cooperative, together with any document submitted with such petition to give effect to the proposition, shall be submitted to the members of a cooperative either at a special meeting of the members held within forty-five (45) days after the

presentation of such petition or, if the date of the next annual meeting of members falls within ninety (90) days after such presentation or if the petition so requests, at such annual meeting. The approval of the board of trustees shall not be required in respect of any proposition or document submitted to the members pursuant to this section and approved by them, but such proposition or document shall be subject to all other applicable provisions of this act. Any affidavit or affidavits required to be filed with any such document pursuant to applicable provisions of this act shall, in such case, be modified to show compliance with the provisions of this section.

**History:** Laws 1939, ch. 47, § 17; 1941 Comp., § 48-417; 1953 Comp., § 45-4-17.

## **62-15-18. Dissolution.**

A. A cooperative which has not commenced business may dissolve voluntarily by delivering to the state corporation commission articles of dissolution, executed and acknowledged on behalf of the cooperative by a majority of the incorporators, which state:

- (1) the name of the cooperative;
- (2) the address of its principal office;
- (3) the date of its incorporation;
- (4) that the cooperative has not commenced business;
- (5) that the amount, if any, actually paid in on account of membership fees, less any part of that money disbursed for necessary expenses, has been returned to those entitled to it and that all easements have been released to the grantors;
- (6) that no debt of the cooperative remains unpaid; and
- (7) that a majority of the incorporators elect that the cooperative be dissolved.

The articles of dissolution shall be submitted to the state corporation commission for filing as provided in the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978].

B. A cooperative which has commenced business may dissolve voluntarily and wind up its affairs in the following manner:

- (1) the board of trustees shall first recommend that the cooperative be dissolved voluntarily, and the proposition that the cooperative be dissolved shall be submitted to the members of the cooperative at any annual or special meeting, the notice of which shall set forth that proposition. The proposed voluntary dissolution shall be deemed to

be approved upon the affirmative vote of not less than two-thirds of all of the members of the cooperative;

(2) upon such approval, a certificate of election to dissolve, designated the "certificate" in this section, shall be executed and acknowledged on behalf of the cooperative by its president or vice president, and its corporate seal shall be affixed thereto and attested by its secretary. The certificate shall state:

(a) the name of the cooperative;

(b) the address of its principal office;

(c) the names and addresses of its trustees; and

(d) the total number of members of the cooperative and the number of members who voted for and against the voluntary dissolution of the cooperative.

The president or vice president executing the certificate shall make and annex to it an affidavit stating that the provisions of this subsection were duly complied with. The certificate and affidavit shall be submitted to the state corporation commission for filing as provided in the Rural Electric Cooperative Act;

(3) upon the filing of the certificate and affidavit with the state corporation commission, the cooperative shall cease to carry on its business except insofar as may be necessary for the winding up thereof, but its corporate existence shall continue until articles of dissolution have been filed by the state corporation commission;

(4) after the filing of the certificate and affidavit with the state corporation commission, the board of trustees shall immediately cause notice of the winding up of proceedings to be mailed to each known creditor and claimant and to be published once a week for two successive weeks in a newspaper of general circulation in the county in which the principal office of the cooperative is located;

(5) the board of trustees shall have full power to wind up and settle the affairs of the cooperative and shall proceed to collect the debts owing to the cooperative, convey and dispose of its property and assets, pay, satisfy and discharge its debts, obligations and liabilities and do all other things required to liquidate its business and affairs. After paying or adequately providing for the payment of all its debts, obligations and liabilities, the board of trustees shall distribute the remainder of its property and assets among its members in proportion to the aggregate patronage of each member during the seven years next preceding the date of filing of the certificate or, if the cooperative was not in existence for that period, during the period of its existence; and

(6) when all debts, liabilities and obligations of the cooperative have been paid and discharged or adequate provision has been made therefor and all of the remaining property and assets of the cooperative have been distributed to the members pursuant

to the provisions of this section, the board of trustees shall authorize the execution of articles of dissolution which shall thereupon be executed and acknowledged on behalf of the cooperative by its president or vice president, and its corporate seal shall be affixed thereto and attested by its secretary. The articles of dissolution shall recite in the caption that they are executed pursuant to the Rural Electric Cooperative Act and shall state:

- (a) the name of the cooperative;
- (b) the address of the principal office of the cooperative;
- (c) that the cooperative has delivered to the state corporation commission a certificate of election to dissolve and the date on which the certificate was filed by the state corporation commission in the records of its office;
- (d) that all debts, obligations and liabilities of the cooperative have been paid and discharged or that adequate provision has been made therefor;
- (e) that all the remaining property and assets of the cooperative have been distributed among the members in accordance with the provisions of this section; and
- (f) that there are no actions or suits pending against the cooperative.

The president or vice president executing the articles of dissolution shall make and annex thereto an affidavit stating that the provisions of this subsection were duly complied with. The articles of dissolution and affidavit, accompanied by proof of the publication required in this subsection, shall be submitted to the state corporation commission for filing as provided in the Rural Electric Cooperative Act.

**History:** Laws 1939, ch. 47, § 18; 1941 Comp., § 48-418; 1953 Comp., § 45-4-18; 1987, ch. 36, § 4.

## **ANNOTATIONS**

**Cross-references.** - For legal newspapers, see 14-11-2 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, in Subsection B, in the last sentence of Paragraph (1) substituted "all of the members of the cooperative" for "those voting thereon at such meeting," in Paragraph (3) substituted "state corporation commission" for "secretary of state," in Paragraph (5) inserted "the board of trustees" in the second sentence preceding "shall distribute the remainder of its property," and made minor changes in language and punctuation throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations § 22.



Distribution of funds by nonprofit corporation absent dissolution, 51 A.L.R.3d 1318.

43 C.J.S. Industrial Cooperative Societies §§ 2, 3.

### **62-15-19. Filing of articles.**

Articles of incorporation, amendment, consolidation, merger, conversion or dissolution, as the case may be, when executed and acknowledged and accompanied by such affidavits as may be required by applicable provisions of this act [62-15-1 to 62-15-32 NMSA 1978], shall be presented to the state corporation commission for filing in the records of that office. If the state corporation commission shall find that the articles presented conform to the requirements of this act, he [it] shall, upon the payment of the fees as in this act provided, file the articles so presented in the records of his [its] office and upon such filing the incorporation, amendment, consolidation, merger, conversion or dissolution provided for therein shall be in effect. The state corporation commission immediately upon the filing in his [its] office of any articles pursuant to this act shall transmit a certified copy thereof to the county clerk of the county in which the principal office of each cooperative or corporation affected by such incorporation, amendment, consolidation, merger, conversion or dissolution shall be located. The clerk of any county, upon receipt of any such certified copy, shall file and index the same in the records of his office, but the failure of the state corporation commission or of a clerk of a county to comply with the provisions of this section shall not invalidate such articles. The provisions of this section shall also apply to certificates of election to dissolve and affidavits of compliance executed pursuant to Subsection B(2) of Section 18 [62-15-18 NMSA 1978] of this act.

**History:** Laws 1939, ch. 47, § 19; 1941 Comp., § 48-419; 1953 Comp., § 45-4-19.

### **62-15-20. Refunds to members.**

Revenues of a cooperative for any fiscal year in excess of the amount thereof necessary:

- A. to defray expenses of the cooperative and of the operation and maintenance of its facilities during such fiscal year;
- B. to pay interest and principal obligation of the cooperative coming due in such fiscal year;
- C. to finance, or to provide a reserve for the financing of, the construction or acquisition by the cooperative of additional facilities to the extent determined by the board of trustees;
- D. to provide a reasonable reserve for working capital;

E. to provide a reserve for the payment of indebtedness of the cooperative maturing more than one (1) year after the date of the incurrence of such indebtedness in an amount not less than the total of the interest and principal payments in respect thereof required to be made during the next following fiscal year; and

F. to provide a fund for education in cooperation and for the dissemination of information concerning the effective use of electric energy and other services made available by the cooperative, shall, unless otherwise determined by a vote of the members, be distributed by the cooperative to its members as patronage refunds prorated in accordance with the patronage of the cooperative by the respective members paid for during such fiscal year. Nothing herein contained shall be construed to prohibit the payment by a cooperative of all or any part of its indebtedness prior to the date when the same shall become due.

**History:** Laws 1939, ch. 47, § 20; 1941 Comp., § 48-420; 1953 Comp., § 45-4-20.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 19, 22, 23.

### **62-15-21. Disposition of property.**

A cooperative may not sell, convey, lease, exchange, transfer or otherwise dispose of all or any substantial portion of its property unless such sale, conveyance, lease, exchange, transfer or other disposition is authorized at a duly held meeting of the members thereof by the affirmative vote of not less than two-thirds of all of the members of the cooperative, and unless the notice of such proposed sale, lease or other disposition shall have been contained in the notice of the meeting; provided, however, that notwithstanding anything herein contained, or any other provisions of law, the board of trustees of a cooperative, without authorization by the members thereof, shall have full power and authority to authorize the execution and delivery of a mortgage or mortgages or a deed or deeds of trust upon, or the pledging, assignment for security purposes or encumbering of, any or all of the property, assets, rights, privileges, licenses, franchises and permits of the cooperative, whether acquired or to be acquired, and wherever situated, as well as the revenues and income therefrom, all upon such terms and conditions as the board of trustees shall determine, to secure any indebtedness of the cooperative.

**History:** Laws 1939, ch. 47, § 21; 1941 Comp., § 48-421; 1953 Comp., § 45-4-21; Laws 1971, ch. 8, § 2.

### **ANNOTATIONS**

**Severability clauses.** - Laws 1971, ch. 8, § 3, provides for the severability of the act if any part or application thereof is held invalid.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Industrial Cooperative Societies § 8.

### **62-15-22. Nonliability of members for debts of cooperative.**

The private property of the members of a cooperative shall be exempt from execution for the debts of the cooperative and no member shall be liable or responsible for any debts of the cooperative.

**History:** Laws 1939, ch. 47, § 22; 1941 Comp., § 48-422; 1953 Comp., § 45-4-22.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations § 32.

### **62-15-23. Recordation of mortgages.**

Any mortgage, deed of trust or other instrument executed by a cooperative or foreign corporation transacting business in this state, pursuant to this act [62-15-1 to 62-15-32 NMSA 1978], which, by its terms, creates a lien upon real and personal property then owned or after-acquired, and which is recorded as a mortgage of real property in any county in which such property is located or is to be located, shall have the same force and effect as if the mortgage, deed of trust or other instrument were also recorded or filed in the proper office in such county as a mortgage of personal property. Recordation of any such mortgage, deed of trust or other instrument shall cause the lien thereof to attach to all after-acquired property of the mortgagor of the nature herein described as being mortgaged or pledged thereby immediately upon the acquisition thereof by the mortgagor, and such lien shall be superior to all claims of creditors of the mortgagor and purchasers of such property and to all other liens, except liens of prior record, affecting such property.

**History:** Laws 1939, ch. 47, § 23; 1941 Comp., § 48-423; 1953 Comp., § 45-4-23.

### **62-15-24. Waiver of notice.**

Whenever any notice is required to be given under the provisions of this act [62-15-1 to 62-15-32 NMSA 1978] or under the provisions of the articles of incorporation or bylaws of a cooperative, waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time fixed for the giving of such notice, shall be deemed equivalent to such notice. If a person or persons entitled to notice of a meeting shall attend such meeting, such attendance shall constitute a waiver of notice of the meeting, except in case the attendance is for the express purpose of objecting to the transaction of any business because the meeting shall not have been lawfully called or convened.

**History:** Laws 1939, ch. 47, § 24; 1941 Comp., § 48-424; 1953 Comp., § 45-4-24.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 33, 34.

### **62-15-25. Trustees, officers or members; notaries.**

No person who is authorized to take acknowledgments under the laws of this state shall be disqualified from taking acknowledgments of instruments executed in favor of a cooperative or to which it is a party, by reason of being an officer, director or member of such cooperative.

**History:** Laws 1939, ch. 47, § 25; 1941 Comp., § 48-425; 1953 Comp., § 45-4-25.

### **62-15-26. Foreign corporations.**

Any corporation organized on a nonprofit or a cooperative basis for the purpose of supplying electric energy in rural areas and owning and operating electric transmission or distribution lines in a state adjacent to this state shall be permitted to extend its lines into and to transact business in this state without complying with any statute of this state pertaining to the qualification of foreign corporations for the transaction of business in this state. Any such foreign corporation, as a prerequisite to the extension of its lines into and the transaction of business in this state, shall, by an instrument executed and acknowledged in its behalf by its president or vice president under its corporate seal attested by its secretary, designate the state corporation commission its agent to accept service of process in its behalf. In the event any process shall be served upon the state corporation commission, he [it] shall forthwith forward the same by registered mail to such corporation at the address thereof specified in such instrument. Any such corporation may sue and be sued in the courts of this state to the same extent that a cooperative may sue or be sued in such courts. Any such foreign corporation may secure its notes, bonds or other evidences of indebtedness by mortgage, pledge, deed of trust or other encumbrance upon any or all of its then owned or after-acquired real or personal property, assets or franchises, located or to be located in this state, and also upon the revenues and income.

**History:** Laws 1939, ch. 47, § 26; 1941 Comp., § 48-426; 1953 Comp., § 45-4-26.

### **62-15-27. Fees.**

The state corporation commission shall charge and collect for:

- A. filing articles of incorporation, five dollars [(\$5.00)];
- B. filing articles of amendment, three dollars [(\$3.00)];

C. filing articles of consolidation or merger, five dollars [(\$5.00)];

D. filing articles of conversion, five dollars [(\$5.00)];

E. filing certificate of election to dissolve, two dollars [(\$2.00)];

F. filing articles of dissolution, three dollars [(\$3.00)]; and

G. filing certificate of change of principal office, one dollar [(\$1.00)].

**History:** Laws 1939, ch. 47, § 27; 1941 Comp., § 48-427; 1953 Comp., § 45-4-27.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 18 Am. Jur. 2d Cooperative Associations §§ 34, 40, 44, 46.

### **62-15-28. Taxation.**

Cooperative and foreign corporations transacting business in this state pursuant to the provisions of the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978] shall pay annually, on or before July 1, to the state corporation commission a tax of ten dollars (\$10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state, which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act [Chapter 7, Article 9 NMSA 1978]; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961 and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract.

**History:** Laws 1939, ch. 47, § 28; 1941, ch. 195, § 1; 1941 Comp., § 48-428; 1953 Comp., § 45-4-28; Laws 1961, ch. 236, § 1; 1966, ch. 58, § 1; 1975, ch. 263, § 7; 1982, ch. 18, § 24.

### **ANNOTATIONS**

**Saving clauses.** - Laws 1982, ch. 18, § 26, provides that nothing in the act shall affect the collection of the tax imposed by Sections 7-11-1 to 7-11-12 NMSA 1978 for 1981 and prior years.

**Nonseverability clauses.** - Laws 1975, ch. 263, § 10, provides that the act is not intended to be severable, and that if any part thereof should be declared unconstitutional, the entire act should be declared void.

Laws 1975, ch. 263, § 9, was declared invalid under the supremacy clause of the United States constitution in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 99 S. Ct. 1629, 60 L. Ed. 2d 106 (1979).

**Sales by rural electric cooperative exempt from school tax.** - This statutory provision must be considered to exempt from the school tax the sale of electricity by a rural electric cooperative to its customers. Since the legal incidence of the emergency school tax is upon the vendor of the goods or services as a tax with respect to his privilege of doing business, it is clearly immaterial to the consideration of the first inquiry that the cooperative, the purchaser of the goods or services, may not itself be subject directly to the tax because of this statute. 1957-58 Op. Att'y Gen. No. 57-302.

**And from compensating tax for out-of-state purchases.** - Rural electric administration cooperatives are not liable for the payment of compensating tax on their out-of-state purchases of materials for use or consumption within the state. 1961-62 Op. Att'y Gen. No. 62-131.

**Law reviews.** - For article, "Taxation of Electricity Generation: The Economic Efficiency and Equity Bases for Regionalism Within the Federal System," see 20 Nat. Resources J. 877 (1980).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 34 Am. Jur. 2d Federal Taxation § 7045; 71 Am. Jur. 2d State and Local Taxation § 514.

16C C.J.S. Constitutional Law § 881; 43 C.J.S. Industrial Cooperative Societies § 5; 84 C.J.S. Taxation § 251.

## **62-15-29. Exemption from jurisdiction of the state corporation commission.**

Except as otherwise provided in this act [62-15-1 to 62-15-32 NMSA 1978], cooperatives shall be exempt in all respects from the jurisdiction and control of the state corporation commission of this state. Cooperatives shall not be subject to the provisions of Chapter 93, Session Laws of New Mexico, 1921, or any acts amendatory thereof or supplementary thereto.

**History:** Laws 1939, ch. 47, § 29; 1941 Comp., § 48-429; 1953 Comp., § 45-4-29.

### **ANNOTATIONS**

**Compiler's note.** - Laws 1941, ch. 84, § 6, repeals Laws 1921, ch. 93, referred to in this section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Industrial Cooperative Societies § 4.

## **62-15-30. Securities Act exemption.**

The provisions of the Securities Act, Chapter 44, Session Laws of New Mexico, 1921, shall not apply to the issuance of any note, bond or other evidence of indebtedness issued, executed and delivered by any cooperative to the United States of America or any agency or instrumentality thereof. The provisions of said Securities Act shall not apply to the issuance of membership certificates by any cooperative.

**History:** Laws 1939, ch. 47, § 30; 1941 Comp., § 48-430; 1953 Comp., § 45-4-30.

### **ANNOTATIONS**

**Securities Act.** - Laws 1955, ch. 131, § 20, repeals the Securities Act, Laws 1921, ch. 44, referred to in this section. For present Securities Act of New Mexico, see 58-13B-1 to 58-13B-57 NMSA 1978.

## **62-15-31. "Rural area," "person" and "member" defined.**

A. "Rural area" means any area not included within the boundaries of any municipality having a population in excess of five thousand persons; provided that a municipality having a population of more than five thousand persons shall not cease to be included within the term "rural area" if at the time of the commencement of the cooperative's or its predecessor's operation therein the population of the municipality was less than five thousand persons and the municipality has been and continues to be served by a cooperative; provided, however, that the population of any municipality shall not be included in any rural area if said municipality has a municipally owned plant or other operating noncooperative utility; and, provided further, that any cooperative shall not be permitted to operate in any municipality without first having obtained a franchise from the governing authorities.

B. "Person" includes any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof or any body politic.

C. "Member" means each incorporator of a cooperative and each person admitted to and retaining membership therein, and shall include a husband and wife admitted to a joint membership.

**History:** Laws 1939, ch. 47, § 31; 1941 Comp., § 48-431; Laws 1945, ch. 9, § 1; 1947, ch. 182, § 1; 1953 Comp., § 45-4-31; Laws 1967, ch. 102, § 3.

## **62-15-32. Construction of act; inconsistency.**

The Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], as amended, shall be construed liberally. The enumeration of any object, purpose, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes,

powers, manners, methods of things. Nothing contained in the Rural Electric Cooperative Act, as amended, shall be construed, however, to conflict with any duty to which a cooperative is subject or with any benefit to which a cooperative is entitled under the Public Utility Act [Articles 1 to 6 and 8 to 13 of Chapter 62 NMSA 1978], as now or hereafter amended, and in event any provision of the Rural Electric Cooperative Act, as now or hereafter amended, shall be held to be repugnant to any provision of the Public Utility Act, as now or hereafter amended, or to a cooperative's inclusion as a public utility thereunder, the latter shall be controlling and the former shall be held repealed to the extent of the repugnancy.

**History:** Laws 1939, ch. 47, § 32; 1941 Comp., § 48-432; 1953 Comp., § 45-4-32; Laws 1967, ch. 102, § 4.

## ANNOTATIONS

**Cross-references.** - As to Public Utility Act repealing repugnant provisions of Rural Electric Cooperative Act, see 62-3-2C NMSA 1978.

**Saving clauses.** - Laws 1967, ch. 102, § 5, provides that the act does not apply to litigation pending prior to its effective date.

**Severability clauses.** - Laws 1967, ch. 102, § 6, provides for the severability of the act if any part or application thereof is held invalid.

**Repealing and saving clauses.** - Laws 1939, ch. 47, § 34 repeals Laws 1937, ch. 100, and provides that the former act, relating to electric membership corporations, shall continue in effect and be applicable to corporations formed under its provisions. For provisions applicable to electric membership corporations, see Laws 1937, ch. 100. As to Public Utility Act repealing repugnant provisions of Laws 1937, ch. 100, see 62-3-2C NMSA 1978 and this section.

**Junior licensee not to interfere with existing system.** - Laws 1937, ch. 100, § 10 means that any system of the junior licensee shall be constructed in such manner as not to materially or unreasonably interfere with any existing system. *Hale v. Farmers Elec. Membership Corp.*, 44 N.M. 131, 99 P.2d 454 (1940) (decided under former law).

**But no liability if operating in skillful manner.** - Where it was not apparent that electric membership corporation had constructed and operated its power line in other than a skillful manner in accordance with the best and most modern methods, it was not liable for inductive interference with use of telephone lines erected and in use many years prior to installation of rural electric power system. *Hale v. Farmers Elec. Membership Corp.*, 44 N.M. 131, 99 P.2d 454 (1940) (decided under former law).

**62-15-33. Conversion of corporations organized under Laws 1937, Chapter 100, into cooperatives under the Rural Electric Cooperative Act, as amended.**



A corporation created under Laws 1937, Chapter 100 shall be converted into a cooperative authorized to do business and entitled to all privileges and immunities of a cooperative under the Rural Electric Cooperative Act [62-15-1 to 62-15-32 NMSA 1978], as amended, being Laws 1939, Chapter 47, as amended, upon the adoption of a resolution to such effect by its board of directors.

**History:** 1953 Comp., § 45-4-33, enacted by Laws 1967, ch. 102, § 1.

### **ANNOTATIONS**

**Compiler's note.** - Laws 1939, ch. 47, § 34, repeals Laws 1937, ch. 100.