

This rule was filed as NMPSC 450.

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES
CHAPTER 6 AFFILIATE TRANSACTIONS
PART 450 AFFILIATE TRANSACTIONS

17.6.450.1 ISSUING AGENCY: New Mexico Public Service Commission [New Mexico Public Regulation Commission].
[Recompiled 12/30/01]

17.6.450.2 SCOPE: NMPSC Rule 450 [17.6.450 NMAC] applies to all water, electric, gas, and rural electric cooperative utilities subject to the Commission's jurisdiction.
[Recompiled 12/30/01]

17.6.450.3 STATUTORY AUTHORITY: NMPSC Rule 450 [17.6.450 NMAC] is adopted under the authority vested in this Commission by the Public Utility Act, NMSA 1978, Section 62-3-1 et seq., and in particular by NMSA 1978, Section 62-6-19E.
[Recompiled 12/30/01]

17.6.450.4 DURATION:
[Recompiled 12/30/01]

17.6.450.5 EFFECTIVE DATE:
[Recompiled 12/30/01]

17.6.450.6 OBJECTIVE: The purpose of NMPSC Rule 450 [17.6.450 NMAC] is to set forth the Commission's policy and requirements concerning Class I and Class II transactions by public utilities under the Commission's jurisdiction. The intent of the Commission in promulgating NMPSC Rule 450 [17.6.450 NMAC] to assure reasonable and proper utility service at fair, just, and reasonable rates; to require reasonable access to the books and records of a utility and its affiliates so that such an assurance can be made; to assure that appropriate cost allocations are made; and to assure that no cross-subsidization occurs between the utility and an affiliated interest. It is not the Commission's purpose or intent to approve, disapprove, or regulate any specific nonutility business or venture conducted by any utility's affiliates.
[Recompiled 12/30/01]

17.6.450.7 DEFINITIONS: When used in NMPSC Rule 450 [17.6.450 NMAC] unless otherwise specified the following definitions will apply:

- A. "Affiliated Interest" or "Affiliate" is as defined by NMSA 1978, Section 62-3-3A.
- B. "Class I Transaction" is as defined by NMSA 1978, Section 62-3-3J.
- C. "Class II Transaction" is as defined by NMSA 1978, Section 62-3-3K.
- D. "Commission" means the New Mexico Public Service Commission. [New Mexico Public Regulation Commission]
- E. "Holding Company" or "Public Utility Holding Company" is as defined by NMSA 1978, Section 62-3-3M.
- F. "Corporate Subsidiary" is as defined by NMSA 1978, Section 62-3-3L.
- G. "Utility" or "Public Utility" is as defined by NMSA 1978, Section 62-3-3G.

[Recompiled 12/30/01]

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[Recompiled 12/30/01]

17.6.450.9 GENERAL PROVISIONS:

- A. Reason for Adoption: NMPSC Rule 450 [17.6.450 NMAC] is adopted in order to fulfill the requirements of NMSA 1978, Section 62-6-19E.
- B. Investigation: The Commission hereby undertakes an ongoing investigation into Class I transactions and Class II transactions and their resulting effects, and finds that the information required to be provided by NMPSC Rule 450 [17.6.450 NMAC] is reasonably required and is pertinent, material, and relevant to such investigation.

[Recompiled 12/30/01]

17.6.450.10 CLASS II TRANSACTIONS: APPROVAL OF GENERAL DIVERSIFICATION PLAN:

- A. No public utility may engage in a Class II transaction after November 30, 1982 [the effective date of former General Order No. 39] without first obtaining written approval of a general diversification plan from the Commission.
- B. The general diversification plan shall include:
 - (1) to the extent known the name, home office address, and chief executive officer of each affiliate, corporate subsidiary, holding company, or person which is the subject of the Class II transaction;
 - (2) a statement of the goals and effects upon the utility operation of the Class II transaction including an analysis of the benefits, risks, and any costs to the public utility which could arise, and including all tax effects on the utility both on a consolidated entity basis and on a stand-alone basis;
 - (3) the type of corporate structure to be used;
 - (4) the means of implementing the corporate structure to be used, including, but not limited to, amendments to corporate articles, any issuances, acquisitions, cancellations, exchanges, transfers, or conversions of securities, and the impact of such on the rights of creditors and security holders;
 - (5) the anticipated capital structure for the utility, its affiliates, and the consolidated entity (utility plus affiliates) for the next five (5) years;

(6) the contemplated annual and cumulative investment in each affiliated interest for the next five (5) years in dollars and as a percentage of projected net utility plant and an explanation of why this level of investment is reasonable and will not increase the risks of investment in the public utility;

(7) an explanation of how the affiliate(s) will be financed, by whom, and the type and amounts of capital or instruments of indebtedness;

(8) an explanation of how the utility's capital structure, cost of capital, and ability to attract capital at reasonable rates will be impacted;

(9) an explanation of how the utility can assure that adequate capital will still be available for the construction of necessary new utility plants and at no greater cost than if the utility did not engage in this Class II transaction;

(10) to the extent not answered in (9) above, an explanation of how ratepayers will be protected and insulated from any risks, costs, or other adverse and material effects attributable to Class II transactions or their resulting effects;

(11) if the utility intends to divest a corporate subsidiary, an explanation of the reasons for such divestiture, how it will be accomplished, how it will affect utility operations, financial viability, cost of capital, and adequacy of service during the next ten (10) years following divestiture, the anticipated proceeds to the utility, the extent, if any, that the utility intends for ratepayers to share in the proceeds or otherwise benefit from the divestiture, the amount of and reasons why any ratepayer funds have flowed directly or indirectly to the benefit of the corporate subsidiary; and

(12) to the extent not provided above, such information or representations that will allow the Commission to make the findings contained in NMPSC Rule 450.7(c) [Subsection C of 17.6.450 10.NMAC].

C. The Commission shall approve the general diversification plan if it contains the above information in detail acceptable to the Commission and if the Commission finds that such approval is in the public interest. Approval is in the public interest if the Commission finds that the level of investment appears reasonable and that it appears the utility's ability to provide reasonable and proper utility service at fair, just, and reasonable rates will not be adversely and materially affected by Class II transactions and their resulting effect, and if the utility represents and the Commission, based upon such representations, finds that:

(1) the books and records of the utility will be kept separate from those of nonregulated business and in accordance with the Uniform System of Accounts;

(2) the Commission and its staff will have access to the books, records, accounts, or documents of the affiliate, corporate subsidiary, or holding company pursuant to NMSA 1978, Sections 62-6-17 and 62-6-19;

(3) the supervision and regulation of the public utility pursuant to the Public Utility Act will not be obstructed, hindered, diminished, impaired, or unduly complicated;

(4) if a holding company is formed the utility will not pay excessive dividends to such holding company, and the holding company will not take any action which will have an adverse and material effect on the utility's ability to provide reasonable and proper service at fair, just, and reasonable rates;

(5) the public utility will not without prior approval of the Commission:

(a) loan its funds or securities or transfer similar assets to any affiliated interest, or

(b) purchase debt instruments of any affiliated interests or guarantee or assume liabilities of such affiliated interests;

(6) all applicable statutes, rules, or regulations, federal or state, have been or will be complied with;

(7) when required by the Commission the utility will have an allocation study (which will not be charged to ratepayers) performed by a consulting firm chosen by and under the direction of the Commission; and

(8) when required by the Commission the utility will have a management audit (which will not be charged to ratepayers) performed by a consulting firm chosen by and under the direction of the Commission to determine whether there are any adverse effects of Class II transactions upon the utility.

D. The Commission's approval of a general diversification plan and any findings or conclusions made in connection therewith shall in no way limit or preclude the Commission from subsequently investigating and reviewing Class I and Class II transactions or from taking such steps as it deems necessary to protect ratepayers and to assure that the utility's ability to provide reasonable and proper utility service at fair, just, and reasonable rates will not be adversely and materially affected.

E. The Commission may require the modification of a general diversification plan and may attach conditions to the approval thereof in order to make such plan consistent with the public interest or to avoid material and adverse effects on the utility's ability to provide reasonable and proper service at fair, just, and reasonable rates.

[Recompiled 12/30/01]

17.6.450.11 CLASS I TRANSACTIONS: NOTIFICATION OF CLASS I TRANSACTIONS:

A. A public utility which enters into any agreement or other arrangement or any amendment thereto under which a Class I transaction would occur shall give written notification to the Commission within five (5) days after the agreement, arrangement, or amendment thereto is entered into.

B. Such notification shall include:

- (1) the terms of the arrangement, agreement, or amendment;
- (2) a description of the goods, services, or other property interest to be provided to or by the utility;
- (3) a discussion (including any studies or other pertinent information) of whether the utility could or attempted to obtain the goods or services at a price lower than that obtainable under the Class I transaction;
- (4) if the utility is selling, leasing, or providing goods, services, or other property interests to an affiliate, a discussion (including any studies or other pertinent information) of whether the utility could or attempted to obtain a better price than under the Class I transaction; and
- (5) a statement of the purpose of the transaction explaining how it benefits the utility or its ratepayers or both.

C. Notification is not necessary for Class I transactions which consist only of the provision of normal water, electric, gas or sewer service by a utility to an affiliate under tariffs filed with the Commission.

[Recompiled 12/30/01]

17.6.450.12 PROCEDURES FOR APPLICATIONS FOR APPROVAL OF GENERAL DIVERSIFICATION PLANS: APPLICATIONS FOR APPROVAL OF GENERAL DIVERSIFICATION PLANS:

A. A utility seeking approval of its general diversification plan shall file an application with the Commission.

B. Concurrently with the filing of any application under NMPSC Rule 450 [17.6.450 NMAC] the utility will send notice of such filing to each intervenor in its preceding rate case and the Attorney General.

C. Upon the filing of any application under NMPSC Rule 450 [17.6.450 NMAC] the Commission shall determine whether good cause exists to hold a hearing in the matter. If the Commission determines that good cause exists, notice of the hearing shall be given to the utility and each intervenor in its preceding rate case, and notice shall also be published in a newspaper of general circulation in the county where the principal New Mexico office of the utility is located and such other counties as the Commission directs. Such notice shall be given at least twenty (20) days prior to the hearing.

D. If the Commission determines that good cause does not exist to hold a hearing, public notice shall be published as above at least twenty (20) days prior to consideration by the Commission at an open meeting. The applicant shall bear the cost of all publications.

E. Hearings and other procedures will be conducted in a manner consistent with the Commission's Rules of Practice and Procedure.

[Recompiled 12/30/01]

17.6.450.13 REPORTING:

A. Class II Transaction Reports:

(1) Any declaration, filing, petition, prospectus, application, offering memorandum, or registration statement pertaining to a Class II transaction which is filed with any court of competent jurisdiction, the United States Securities and Exchange Commission, or other federal or state administrative agency shall be filed simultaneously with the Commission.

(2) After approval of a utility's general diversification plan or after the filing of a diversification summary, the utility must provide to the Commission unless otherwise ordered by the Commission:

(a) concurrent notification of all new or expanded lines of business or ventures entered into by the utility or any affiliate and any change or transfer of rights, obligations, or assets between the utility and any affiliate; and

(b) a verified annual report covering the last calendar year to be filed as an addendum to the annual report required by NMPSC Rules 510, 610, or 720 [17.3.510 NMAC, 17.3.610 NMAC, or 17.12.720 NMAC] which shall include:

- (i) an explanation and description of all affiliates, their relationship to each other and the utility, the types of business in which they are involved, and a listing of their exact names and home office addresses;
- (ii) the total investment in each affiliate;
- (iii) the joint officers, directors, employees, and facilities and an explanation of their functions and how they are divided;
- (iv) all agreements or contracts required to implement and/or continue the Class II transaction(s) and any amendments thereto;
- (v) a summary and explanation of any transactions or agreements between the utility and its affiliates, corporate subsidiaries, and holding company;
- (vi) the allocation factors utilized, the dollar amounts involved, and an explanation of how the factors are computed, why that methodology is appropriate, and why the allocation is required;
- (vii) an explanation and justification of any changes to any part of the utility's general diversification plan or any representations made to the Commission in connection therewith;
- (viii) the immediate and projected long-term (up to five (5) years) impact of the Class II transaction(s) on the capital structure of the public utility;
- (ix) an identification and detailed complete explanation of the method by which any Class II transaction or any action related thereto that has a utility accounting impact is or will be accounted for by the utility;
- (x) the names of the officers and managers of the utility and its affiliates;
- (xi) the most recent balance sheet and income statement from each of the utility's affiliates, corporate subsidiaries, and holding company which have been provided to or are in the possession of the utility;
- (xii) the effect of the Class II transactions or any action related thereto on the financial performance of the utility and the utility's ability to provide reasonable and proper service at fair, just, and reasonable rates;
- (xiii) all costs and fees related to the Class II transaction(s) and any necessary corporate restructuring;
- (xiv) a year-by-year, annual five-year projection using pro forma financial statements showing the effects of the utility's decision to enter into Class II transactions compared with a decision not to enter into Class II transactions and showing the expected impact of the Class II transactions and their resulting effect on utility rates and/or other matters relating to the public interest;
- (xv) the end-of-year consolidated capital structure (utility plus affiliates);
- (xvi) an explanation of how the utility's capital structure, cost of capital, and ability to raise capital have been impacted by Class II transactions and their resulting effect;
- (xvii) the amount of dollars transferred between the utility and each affiliate during the annual period and the purpose of each transfer;
- (xviii) an explanation of how the utility's taxes and their calculation have been impacted, both on a stand-alone basis and consolidated basis, by Class II transactions and their resulting effect;
- (xix) a five-year, year-by-year projection of new utility capital requirements categorized and identified to the extent the utility is able and the projected sources and amounts of capital that will be used to meet these requirements; and
- (xx) an explanation of any impacts on new utility capital requirements from Class II transactions and their resulting effect.

(c) The Commission may, upon receipt of the annual report and a finding of good cause, commence an investigation into the diversification activities pursuant to the provisions of the Public Utility Act and the rules of this Commission.

B. Class I Transaction Reports: Each utility engaging in a Class I transaction during the preceding period shall, unless otherwise ordered by the Commission, provide a statement with its Annual Report covering the twelve months preceding the date its Annual Report is due to be filed showing all monies, securities, or other items of value paid or transferred by a utility to an affiliate or by an affiliate to a utility showing the dollar amount of each Class I transaction by account (using Uniform System of Accounts) and broken down by the type of good or service provided, the quantity, and the price paid or received.

[Recompiled 12/30/01]

17.6.450.14 RATE TREATMENT:

A. Allocations: There is no presumption that a utility's allocation method is reasonable. The burden of proof shall be on the utility in a rate case or other proceeding to justify its method of allocation of expenses, any factors used, and amounts allocated.

B. Class I Transactions: There is no presumption that a Class I transaction is reasonable. The utility has the burden of proof to show that all Class I transaction costs and contract conditions are reasonable.

C. Class II Transactions: The utility shall bear the burden of proof to show that its rates, costs including cost of capital, and service have not been materially and adversely affected by any Class II transaction or its resulting effect and that the utility has not subsidized its affiliates.

D. Confidentiality: Any person who so qualifies may petition the Commission for a protective order for confidential or proprietary information, as provided by NMSA 1978, Section 62-6-17(D).

E. Sanctions for Failure to Provide or Permit Discovery: If any person fails to obey an order to provide or permit discovery with regard to any matter related to Class I transactions or Class II transactions and their resulting effect, the Commission may impose sanctions pursuant to Rule 37 of the New Mexico Rules of Civil Procedure for the District Courts and/or penalties pursuant to NMSA 1978, Article 12, Chapter 62, and/or if the person is a utility the Commission may disapprove the utility's general diversification plan.

F. Remedies:

(1) Upon a finding that a utility has failed to carry its burden of proof regarding Class I and Class II transactions, or upon a finding that a Class II transaction or its resulting effect is adversely and materially affecting the utility's ability to provide reasonable and proper service at just and reasonable rates, or a finding that a cross-subsidization or improper allocation has occurred, the Commission may take such steps as it deems necessary to correct such situations and to compensate ratepayers for any resulting risks, costs, service reductions, or other adverse and material effects including, but not limited to, adjustments to the utility's cost of capital, capital structure, expenses, or revenues.

(2) Upon a Commission finding that a Class II transaction or the resulting effect thereof has materially and adversely affected the utility's ability to provide reasonable and proper utility service at fair, just, and reasonable rates and/or imposed other costs or risks on the ratepayer, the Commission may order the utility to develop and file a proposed plan of action which will eliminate the cause of, and compensate ratepayers for, such effect, costs, or risks and will provide appropriate monitoring procedures.

[Recompiled 12/30/01]

17.6.450.15 DIVESTITURE AND SPIN-OFF: COMMISSION APPROVAL REQUIRED: An affiliate or a holding company may not divest itself of or spin-off a public utility without the prior written approval of the Commission. The Commission shall investigate such divestiture or spin-off and shall give its approval only upon a showing that such divestiture or spin-off is in the public interest.

[Recompiled 12/30/01]

17.6.450.16 AFFILIATED INTERESTS EXISTING AS OF MAY 19, 1982: FILING OF DIVERSIFICATION SUMMARY:

A. Any utility which had any affiliates as of May 19, 1982 is required to have filed a diversification summary with the Commission by December 30, 1982 [thirty (30) days after the effective date of former General Order No. 39].

B. For the purpose of NMPSC Rule 450.19(c) [Subsection C of 17.6.450.16 NMAC], Class I transactions and Class II transactions shall include in addition to their definitions in NMPSC Rule 450.6 [17.6.450.7 NMAC] anything which was classified as a Class I transaction or Class II transaction as of November 30, 1982 [the effective date of former General Order No. 39].

C. The diversification summary shall include:

- (1) the exact name of each affiliate together with the home office address and name of chief executive officer;
- (2) the date on which each affiliate became affiliated with the public utility;
- (3) the method or methods by which the affiliated interest was accomplished and is maintained;
- (4) a chart or listings clearly presenting --
 - (a) the identities of and interrelationships among the public utility and all affiliates;
 - (b) the percentage and number of each class of voting securities of each affiliate which is owned directly or indirectly by another affiliate or by the public utility;

- (c) if control of any person is maintained other than by the ownership or control of voting securities, the basis of such control;
- (d) the type of business organization (e.g., corporation, partnership, trust, etc.); and
- (e) the state(s) or other jurisdiction(s) of domicile;
- (5) a description of all Class I and Class II transactions that were operative or outstanding on May 19, 1982 including, but not limited to, the following:
 - (a) their nature and purpose;
 - (b) the identity of all parties involved; and
 - (c) the nature and amounts of any payments or transfers of assets and all rights and obligations established between the parties;
- (6) a brief description of any litigation or administrative proceedings pending or concluded on or after May 19, 1982, in which any affiliate of a public utility is involved which may have a material effect upon the solvency or capital structure or the value of any asset of the affiliate or the public utility, including, but not limited to, foreclosure of property, calls upon guarantees, bankruptcy, receivership, or other corporate reorganizations;
- (7) the latest financial statements for each affiliate on an individual basis that have been provided to or are in the possession of the utility;
- (8) latest annual reports to shareholders of each affiliate which have been provided to or are in the possession of the utility;
- (9) an identification and detailed complete explanation of the method by which any Class II transaction or any action related thereto that has a utility accounting impact is or has been accounted for by the utility;
- (10) the allocation factors utilized, the dollar amounts involved during the utility's latest fiscal year, and an explanation of how the factors are computed, why that methodology is appropriate, and why allocation is required;
- (11) the joint officers, directors, employees, and facilities and an explanation of their functions and how they are divided;
- (12) the effect of the Class II transactions on the financial performance of the utility and the utility's ability to provide reasonable and proper service at fair, just, and reasonable rates;
- (13) a year-by-year annual five-year projection using pro forma financial statements showing the effects of Class II transactions compared with a decision not to continue such transactions and showing the expected effect of each decision on rates; and
- (14) an explanation of how ratepayers have been protected and insulated from any risks, costs, or other adverse effects attributable to Class II transactions or their resulting effect.

[Recompiled 12/30/01]

17.6.450.17 ADDITIONAL INVESTIGATIONS AND INFORMATION: The Commission may conduct additional investigations of any matters pertaining to Class I and Class II transactions where it deems appropriate and may require additional information to be filed.

[Recompiled 12/30/01]

17.6.450.18 ENFORCEMENT: Enforcement of NMPSC Rule 450 [17.6.450 NMAC], any provision thereof, or any order of the Commission pursuant to NMPSC Rule 450 [17.6.450 NMAC] may be accomplished through any sanction, method, or procedure expressed or implied in the Public Utility Act.

[Recompiled 12/30/01]

17.6.450.19 MISCELLANEOUS:

- A. Powers Not Limited: Nothing contained herein shall be construed to limit the Commission in its powers, duties, or authority under the Public Utility Act.
- B. Supplement to Other Rules: NMPSC Rule 450 [17.6.450 NMAC] does not supersede any other rule of the Commission but is to be construed as a supplement to such rules.
- C. Severability: If any part or application of NMPSC Rule 450 [17.6.450 NMAC] is held invalid, the remainder or its application shall not be affected.
- D. Variances: The Commission may in its discretion grant variances from any provisions herein or their application.

[Recompiled 12/30/01]

17.6.450.20 **[HISTORY:** Codified by NMPSC Case No. 2086, order dated June 30, 1988, Amended by NMPSC Case No. 2232, order dated December 19, 1988; Amended by NMPSC Case No. 2277, order dated December 29, 1989. Formerly NMPSC General Order 39, superseded for purposes of rule reorganization and codification.]
[Recompiled 12/30/01]

HISTORY OF 17.6.450 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the Commission of Public Records-State Records Center and Archives.

General Order 39, Rules Regarding Class I and Class II Utility Transactions Under Chapter 109 Laws of 1982, 12/9/82.
NMPSC Rule 450, Affiliate Transactions; 6/30/88.

History of Repealed Material: [RESERVED]