

## EXHIBIT A

### **18.60.5.1 ISSUING AGENCY:**

New Mexico Public Regulation Commission.

### **18.60.5.2 SCOPE:**

This rule applies to all one-call notification systems, excavators, and owners and operators of pipelines and other underground facilities in New Mexico with the exemption of those preempted by Federal Law.

### **18.60.5.3 STATUTORY AUTHORITY:**

Sections 8-8-4, 62-14-7.1, 62-14-10, 70-3-4, and 70-3-13 NMSA 1978.

### **18.60.5.4 DURATION:**

Permanent.

### **18.60.5.5 EFFECTIVE DATE:**

August 15, 2012, unless a later date is cited at the end of a section.

### **18.60.5.6 OBJECTIVE:**

The purpose of this rule is to implement Chapter 62, Article 14 NMSA 1978 by providing procedures for preventing ~~excavation~~ damage to underground utilities and for dealing with damage when it occurs during excavation activities.

### **18.60.5.7 DEFINITIONS:**

In addition to the definitions in Section 62-14-2 NMSA 1978, 18.60.2.7 NMAC and 18.60.4.7 NMAC, as used in this rule:

**A. access information** means a telephone number, a facsimile number, an email address, and, if available, a web site address;

**B. bid locate** means the marking of underground facilities at the request of a project owner for the purpose of providing information to persons bidding on a project;

**C. design locate** means the marking of underground facilities at the request of a project owner or project engineer for the purpose of providing information to persons designing a project;

**D. emergency locate** means the marking of underground facilities at the request of a person for an underground facility owner as soon as practical, ideally within 2 hours for the purpose of an emergency excavation;

**E. excavation locate** means the marking of underground facilities for the purpose of providing information at the request of an excavator planning to commence excavation for his the excavator's project~~for the purpose of providing information to an excavator working on a project;~~

**F. holiday** means the day New Mexico state government observes New Year's Day, Martin Luther King, Jr's, Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, President's Day, and Christmas Day;

~~**G. incorporated area** means any area within the limits of any incorporated city, town or village with a population of ten thousand or greater;~~

**HG. non-member UFO** means a private underground facility owned by a homeowner and operated and located on a residential property or not subject to the jurisdiction of the commission;

**I. project owner or project engineer** means the owner of a project involving excavation or the person designated by the owner to be in charge of the project involving excavation;

**J. road maintenance** means routine grading and resurfacing of the earth and gravel surface, but not the subbase, of a roadway for the purpose of maintaining the surface condition of the road and includes recovery of material from a borrow ditch but does not include road construction or reconstruction and

shall entail moving no more than four (4) inches of earth; road maintenance does not include street sweeping or road milling and resurfacing as long as the subsurface is not disturbed;

**KJ. underground facility operator (UFO)** means a person who operates an underground facility; ~~and~~

~~LK. working day~~ means a twenty-four (24) hour period excluding weekends and holidays; ~~and~~

**ML. mechanical vacuum excavation** is deemed an appropriate non-mechanical method of excavating safely around underground facilities provided that the equipment has been specifically designed and built for this purpose [and] is operated in accordance with practices that provide appropriate levels of worker and public safety and prevent damage to buried facilities.

#### **18.60.5.8 RESPONSIBILITIES OF ONE-CALL NOTIFICATION SYSTEMS:**

A one-call notification system shall:

A. provide toll-free access;

B. provide to the commission quarterly the name, contact person, and access information for each member of the one-call notification system;

C. notify the commission of the service area in which the one-call notification system operates;

D. have a written coordination agreement with other one-call notification systems operating in New Mexico;

E. keep a record of all locate requests, tickets, and clears for five (5) years and make such records available to the commission upon request;

F. provide monthly reports to the commission, no later than the 10<sup>th</sup> of each month, with the following information quarterly the:

(1) average wait time for answered calls for ~~each month in the quarter~~ the previous month;

(2) number of calls received for ~~each month in the quarter~~ the previous month;

(3) number of tickets generated for ~~each month in the quarter~~ the previous month;

(4) number of requests by type (regular, priority, emergency) for ~~each month in the quarter~~ the previous month;

G. report any changes in access information to the commission on or before the date the information will change;

H. establish a registry of non-member UFOs that voluntarily provide their contact and underground facility information for excavation purposes; ~~and~~

I. establish a positive response registry system; and

J. inform any person who calls with a complaint that he or she may file a complaint with the commission's pipeline safety bureau, and provide the commission's pipeline safety bureau access information, if the one-call system is unable to satisfactorily resolve the matter.

K. Processing Locate Requests.

(1) A one-call notification system may hold a locate request in suspension until it is complete. The one-call notification system shall contact an excavator within three (3) hours to request any missing information that prevents the one-call notification system or non-member UFO from processing the request.

(2) A one-call notification system shall process all complete locate requests within three (3) hours of receipt. A one-call notification system shall deem locate requests received on a weekend or holiday, or after 4:00 p.m. on a working day, to have been received at 7:00 a.m. on the next working day and shall deem locate requests received before 7:00 a.m. on a working day to have been received at 7:00 a.m. on that working day.

(3) Upon receipt of a complete ~~damage report, conference or~~ locate request, a one-call notification system shall issue a ticket with a unique number to the requesting ~~excavator person~~ as confirmation, and shall send a ticket to all members of the system that have underground facilities in the excavation area, or notify the members by telephone. A ticket shall become effective at the date and time a one-call notification system issues a ticket number; if the ticket is for a conference, the ticket shall be marked "wide area conference," "bid conference," or "design conference," as appropriate.

(4) Any person may contact the one-call notification system and request confirmation of damage reports, conferences, and locate requests.

#### **18.60.5.9 RESPONSIBILITIES OF UFOs:**

A. A UFO shall report any changes ~~in access~~to the information required by 18.60.5.8(B) to the commission one call notification system(s) on or before the date the information will change at least seven (7) days prior to the effective date.

B. A UFO shall retain records of locate requests, excavation notices and underground facility damage information for a period of five (5) years and make such records available to the commission upon request.

C. A UFO that utilizes contractors to perform locate and excavation activities or damage investigations on its behalf shall be responsible for compliance with ~~the law~~Chapter 62 Article 14 NMSA 1978 and these rules.

#### **18.60.5.10 LOCATE REQUESTS:**

An excavator shall make an excavation locate request for all projects involving excavation, including road maintenance, with the exception of subsurface potholing or vacuum excavation activities conducted solely for the purpose of physically exposing or locating underground facilities. However, this exception does not preclude compliance with 18.60.5.18 NMAC. Although not required under the Excavation Damage to Pipelines and Underground Utility Lines Law, Sections 62-14-1, et seq. NMSA 1978, or this rule, locate requests are encouraged for excavation projects involving purely non-mechanical means.

A. Submittal.

(1) An excavator shall submit an excavation locate request to each one-call notification system:

(a) by telephone or in person during normal business hours Monday to Friday, excluding holidays;

or

(b) by facsimile or electronically via online web portal with appropriate one call notification center twenty-four hours a day, seven days a week.

(2) An excavator shall also submit an excavation locate request to each non-member UFO.

B. Size of locate requests.

(1) An excavator shall determine the maximum area that ~~he the excavator~~ can reasonably expect to excavate within a ~~ten-fifteen (15) to~~ working day period and shall request an excavation locate for that area only. ~~In every incorporated area, or when an excavation site cannot be clearly and adequately identified on the locate ticket, t~~The excavator shall pre-mark the actual intended excavation route or site(s) for any incorporated city, town or village including extra territorial zone(s) in that area in accordance with American public works association (APWA) marking guidelines to communicate to facility owners where the actual excavation will take place for standard ~~ten-fifteen (10) to~~ working day ticket requests only. Outside these incorporated areas, excavators shall provide clear and accurate driving and marking instructions; and either GPS coordinates or pre-marks as described above which define the parameters of the proposed excavation. The pre-marked excavation shall encompass location(s) where excavation equipment that may penetrate the surface will be setup such as directional boring equipment. If the location markings have been removed or are no longer visible and there are no marking offsets, the person engaging in the excavation activity shall suspend excavation activities and reinitiate a locate request set forth in this section. Such relocate request shall be limited to the area yet to be excavated only.

(2) An excavator may request relocates for the same area only if justified by the circumstances and nature of the work; such justification shall be made part of the relocate request.

C. Minimum information required. When requesting an excavation locate or a locate conference, an excavator shall comply with the requirements of the one-call notification system or non-member UFO

operating in the intended excavation area and shall provide accurate and truthful information. A locate request shall be deemed incomplete if it does not contain, at a minimum:

- (1) the name and contact information of the excavator personnel directly involved with or conducting the excavation at the actual excavation site;
- (2) if available, an alternate name and contact information of the excavator;
- (3) a description and the purpose of the type of work to be done;
- (4) the name of the person for whom the work is being done;
- (5) whether or not the excavation site is pre-marked in white;
- (6) an accurate physical description of the location and size of the excavation site; reference to a plat of a subdivision shall not by itself be sufficient description;
- (7) driving instructions to a rural excavation site;
- (8) spotting instructions;
- (9) any appropriate remarks regarding access to or hazards at the site;-
- (10) if available, GPS coordinates which define the parameters or start and end points of the actual excavation.

#### **18.60.5.11 WIDE AREA LOCATE REQUESTS:**

An excavator who expects a project to take more than ~~ten-fifteen~~ (10) working days to complete shall either request separate locates which meet the requirements of Subsection B of 18.60.5.10 NMAC or follow the conference procedure set forth in this section.

A. If an excavator expects that an excavation will take more than ~~ten-fifteen~~ (15) working days to complete, the excavator shall contact the one-call notification system to request a wide area conference a minimum of two (2) working days prior to the wide area conference and provide the proposed date, time, and location for the conference. The one-call notification system shall process the request as provided in Subsection ~~D-K~~ of 18.60.5.8 NMAC.

B. A UFO shall contact an excavator who requests a wide area conference within two (2) working days of the issuance of the conference ticket and confirm proposed conference schedule. A UFO shall be physically represented at the a scheduled wide area conference. , and if necessary, If a UFO cannot attend the scheduled wide area conference, it shall make arrangements to reschedule the conference meet with the excavator who requested the wide area conference not to exceed five (5) working days of the issuance of the conference ticketscheduled wide area conference.

C. At the conference, the excavator shall develop a written work plan [that includes the minimum information required under Subsection C of 18.60.5.10 NMAC] in consensus with each UFO, which shall be signed by all parties. Updates or revisions to the work plan shall also be in writing and signed by all parties.

D. After the work plan has been signed by all parties, an excavator shall request a wide area excavation locate. The one-call notification system shall process the request as provided in Subsection ~~D~~ K of 18.60.5.8 NMAC. The excavation ticket shall reference the wide area conference ticket number and cite the work plan as the description of the work to be performed.

E. An excavator working pursuant to a wide area excavation locate ticket shall request reaffirmation of the wide area locate ticket every ~~ten-fifteen~~ (10) working days. For the purpose of reaffirmation, a working day begins on the date and time stamped on the ticket and ends ~~ten-fifteen~~ (10) working days from such date and time. The excavator and UFO(s) shall continue to comply with the approved work plan established per 18.60.5.11(C) NMAC.

#### **18.60.5.12 DESIGN AND BID LOCATE REQUESTS:**

A project owner or project engineer shall request information regarding the location of underground facilities for design projects or bids in accordance with either Subsection A or B of this section, but may not switch methods once having made an election.

##### **A. Physical locates.**

(1) A project owner or project engineer may request a design or bid locate from one-call notification systems and non-member UFOs ~~a design locate or a bid locate~~.

(2) The one-call notification system and non-member UFOs for the intended excavation area shall issue a ticket marked "bid locate" or "design locate" as appropriate.

(3) UFOs shall physically mark the location of underground facilities on the site within two (2) working days from the date of the ticket.

(4) Designers or bidders, as appropriate, shall capture data from the site within ten (10) working days from the end of the two day marking period.

(5) A project owner or project engineer shall not request relocates or time extensions.

#### **B. Conferences.**

(1) A project owner or project engineer may request a design or bid conference a minimum of two (2) working days prior to conference from the one-call notification system and non-member UFOs for the intended excavation area ~~and non-member UFOs a design conference or bid conference with UFOs~~ and provide the proposed date, time, and location for the conference.

(2) A UFO shall contact ~~an excavator~~the project owner or project engineer who requests a conference within two (2) working days of the issuance of the conference ticket and confirm the proposed conference schedule, and if necessary, make arrangements to reschedule the conference not to exceed five (5) working days from the proposed conference schedule on the conference ticket. A UFO shall be physically represented at the scheduled design or bid conference.

(3) The one-call notification system for the intended excavation area shall process the request as provided in Subsection ~~D-K~~ of ~~18.60.5.10~~18.60.5.8 NMAC.

(4) UFOs shall ~~contact the project owner within two (2) working days to~~ arrange to provide information to designers or bidders within a reasonable time following the conference.

(5) A project owner or project engineer and UFOs shall continue with utility coordination ~~ng~~ until the design is complete or bid for the project has been awarded and an excavator requests an excavation locate.

#### **18.60.5.13 MARKING EXCAVATION SITES:**

**A. Excavators.** As provided under Subsection B of 18.60.5.10 NMAC, excavators shall mark all proposed excavation sites in accordance with American public works association (APWA) standards to improve communication between the excavator and UFO. In assessing administrative penalties for violation of the Excavation Damage to Pipelines and Underground Utility Lines Law, NMSA 1978, Section 62-14-1 et seq. and this rule, the commission may consider whether and how well an excavator marked a proposed excavation site. Pre-marking a site in white indicates the actual excavation site (not limits of construction) and, therefore, will supersede marking instructions provided on locate requests and be used to determine alleged violations during staff investigations. When an excavator fails to pre-mark the actual excavation site, UFO's shall mark per the spotting instructions provided on the locate request and register a positive response indicating the site was not pre-marked.

#### **B. UFOs.**

(1) A UFO shall mark underground facilities for excavation purposes in accordance with the APWA standards.

(2) A UFO shall locate and mark its underground facilities within two (2) working days from the effective date of the ticket in accordance with Subsection A of 62-14-5 NMSA 1978.

(3) If a UFO determines it does not have underground facilities within the proposed limits of the excavation site, a UFO shall provide positive response to the one-call notification's positive response registry system and may write "clear" or "no underground facilities" and the UFO's name at the site in the appropriate color.

(4) The locate markings shall be valid for ~~ten-fifteen~~ (105) working days from the end of the two (2) day marking period. For the purpose of excavation, a working day begins on the work to begin date and time stamped on the ticket and ends ~~twelve-fifteen~~ (1215) working days from such date and time.

(5) A UFO shall provide appropriate positive response to the one-call notification's positive response registry system for all advance notifications, including wide area, design, bid, standard, and road maintenance locate requests or conferences.

(6) If a UFO fails to mark its underground facility in accordance with the requirements of applicable laws, the UFO may be liable to the excavator in accordance with Subsection C of [62-14-5 NMSA 1978](#).

#### **18.60.5.14 IDENTIFYING UNDERGROUND FACILITIES FOR ROAD MAINTENANCE:**

In response to an excavation locate request for road maintenance, a UFO shall ~~physically mark its underground facilities that are parallel to the road, as provided in Subsection A, and shall either~~ physically mark or locate by marker its underground facilities that are parallel or cross the road, as provided in Subsection ~~BA~~.

~~**A. Underground facilities parallel to road.** A UFO shall physically mark the location of all underground facilities located parallel to the road to be maintained if the UFO deems the facilities to be in conflict with the road maintenance activity. If the UFO deems the facilities not to be in conflict with the road maintenance activity, then the UFO may "clear" the ticket with the excavator using the procedure set forth in NMAC.~~

~~**BA.**~~ Underground facilities parallel or that cross the road.

(1) **Physical locate.** A UFO may physically mark the location of all underground facilities that are parallel or cross the road to be maintained if the UFO deems the facilities to be in conflict with the road maintenance activity. If the UFO deems the facilities not to be in conflict with the road maintenance activity, then the UFO may "clear" the ticket with the excavator using the procedure for positive response set forth in [18.60.5.13 NMAC](#).

(2) **Locate by permanent marker.** Alternatively, a UFO may use a system of permanent markers to indicate the location of underground facilities that are parallel or cross the road to be maintained. Such markers shall:

(a) only be used ~~to mark underground facilities that cross the road to be maintained and only~~ for the purposes of road maintenance;

(b) be durable enough to withstand normal weathering;

(c) be the same APWA color as is designated for marking the UFO's type of underground facility; and

(d) have a decal on the marker specifying the depth of the underground facility at the marker.

~~**CB. Maintenance of markers.**~~ A UFO shall be deemed to have failed to correctly locate or mark its underground facility that is parallel or crosses a road to be maintained unless it:

(1) ~~maintains a minimum eighteen (18) inches of coverage over the underground facility; ensures that the markers are in place;~~

(2) ~~maintains a minimum twenty four (24) inches of coverage over the underground facility that crosses the road; ensures that the permanent markers are in place;~~

(3) verifies the depth of its underground facilities at the permanent marker locationss at least annually; and

(4) ensures that the decal is visible and the information on it is readable.

#### **18.60.5.15 EXCAVATION PROCEDURES:**

**A. Pre-excavation.** Before excavating, an excavator shall determine whether all underground facilities have been marked.

(1) If all underground facilities have been marked or cleared through a positive response system and the two (2) working day marking period has expired, the excavator may begin excavating.

(2) If one or more underground facilities have not been marked and positive response has not been provided, an excavator shall, prior to commencing excavation, call the one-call notification system for verification that advance notice was transmitted to the UFO and to provide notice that the underground

facilities have not been located or cleared via a warning locate request. UFO's shall promptly respond to warning locate requests ideally within 2-hours.

**B. Excavation.**

(1) If, while excavating, an excavator observes evidence that an unmarked underground facility may exist, the excavator shall, before excavating in the immediate area of such evidence:

~~location of underground facilities that cross the road to be maintained. Such markers shall:~~

(a) make a reasonable effort to identify and contact the UFO and wait until the UFO marks or clears the immediate area of the evidence; the UFO shall mark or clear the area within two (2) hours of contact or as expeditiously as possible if the excavation site is in a rural area; ~~or location of underground facilities that cross the road to be maintained. Such markers shall:~~

(b) expose the underground facility by non-mechanical means or mechanical vacuum excavation methods.

(2) If excavation activity encroaches within eighteen (18) inches either side of a marking made by a UFO, an excavator shall, prior to excavating, expose the underground facility by non-mechanical means or mechanical vacuum excavation methods.

(3) If the exact subsurface location of the underground facility or utility cannot be determined by non-mechanical means or mechanical vacuum excavation methods as required in (1)(a) and (2) above, the excavator shall contact the UFO directly and the UFO shall work with the excavator, to locate and expose the actual subsurface location of the underground facility or utility. If the UFO must resort to performing excavation to locate the facility, the UFO shall perform such excavation within five working days of notice from the excavator. If requested, the local one call notification center shall provide the excavator with the contact telephone number of the UFO.

~~(34)~~ If excavation activity cannot proceed without obliterating all or some of the markings made by a UFO, an excavator shall provide temporary offset marks or stakes to retain the information regarding the location of each UFO's underground facilities.

~~(45)~~ The requirement to provide positive response for a facility does not apply to the homeowner of a residential property.

(6) The Commission encourages excavators to notify UFO when excavation activity will be within twenty five feet (25') of the actual utility marking provided or as agreed upon by a right of way encroachment agreement or permit for infrastructure identified by the UFO as critical (i.e., transmission and trunk line pipelines, fiber optic, power, 911, etc.).

**C. Temporary suspension of excavation activity.** If staff determines that an excavation activity is not in compliance with the requirements of this rule, and that continued noncompliance may result in injury to persons or damage to property, staff may suspend the excavation activity until the excavation activity is brought into compliance with the requirements of this rule and excavation conditions are safe.

**18.60.5.16 EMERGENCY EXCAVATION AND DAMAGE REPORTING PROCEDURE:**

This section applies whenever failure of or damage to underground facilities or public infrastructure requires emergency excavation as defined in NMSA 1978, Section 62-14-2(E) and excavation shall be promptly commenced, ideally within twenty four (24) hours.-

**A. Excavators.** An excavator who damages an underground facility while excavating shall exercise prudence and shall:

(1) stop excavating immediately;

(2) call 911 if appropriate and the operator of the damaged underground facility and 811 to report the damaged facility;

(3) secure the site and direct people and traffic a safe distance away from the site of the damage;

(4) not leave the scene until authorized by an emergency responder or the operator of the damaged underground facility; an excavator may leave the scene without such authorization only if the excavator has made reasonable, if unsuccessful, efforts to contact the affected UFOs and has safely secured the site;

(5) not resume work within an unsafe distance of the damage until authorized by the operator of the damaged underground facility.

**B. Operators of failed or damaged underground facilities.** The operator of a failed or damaged underground facility shall exercise prudence and shall:

(1) ~~promptly~~ immediately respond to a report of damage or failure to its underground facilities and travel to the site;

(2) prior to traveling to the site or upon arrival, call the one-call notification system for the excavation area to request an emergency locate;

(3) make the site safe and get the emergency situation under control;

(4) locate its own underground facilities as soon as practical, ideally within two (2) hours; ~~and~~

(5) begin remedial action to restore service as soon as practical, ideally within twenty four (24) hours; and

~~(5)~~ obtain a standard  ~~excavation~~ locate ticket for repair work beyond resolution of the emergency situation.

**C. Operators of failed or damaged public infrastructure.** The entity responsible for the failed or damaged public infrastructure shall:

(1) call the one-call notification system for the excavation area to request an emergency locate;

(2) obtain an excavation locate ticket for repair work beyond resolution of the emergency situation.

**D. One-call notification system.** A one-call notification system shall upon request:

(1) issue an emergency excavation notice which shall be valid until the emergency is resolved, or for forty-eight (48) hours, whichever is longer;

(2) issue a notice of a reported damage to each affected UFO.

#### **18.60.5.17 ABUSE OF THE LAW:**

A person shall be deemed to have willfully failed to comply with this rule or Chapter 62, Article 14 NMSA 1978 and shall be subject to the penalties in Section 62-14-8 NMSA 1978 if the person:

**A.** requests a locate for an area that cannot reasonably be excavated in ~~ten-fifteen~~ (105) working days;

**B.** provides misinformation or withholds information regarding the size of an excavation area;

**C.** requests locates that unduly burden a one-call notification system or UFO;

**D.** requests a locate for fraudulent reasons;

**E.** fails to process locate requests within the requisite timeframe;

**F.** fails to mark, or provide positive response for its underground facilities within the requisite timeframe;

**G.** fails to determine if all underground facilities have been marked or cleared;

**H.** commences excavation prior to the expiration of the two (2) day notice period;

**HI.** obliterates markings at an excavation site without providing temporary offset marks or stakes;

**IJ.** alters any record relating to excavation activity;

**JK.** fails to pre-mark the actual intended excavation route or site(s) as required;

**KL.** fails to report or file a report of damage within requisite time frame; or

**~~LM.~~** commits any other act that the commission determines violates Chapter 62, Article 14 NMSA 1978 or this rule.

#### **18.60.5.18 REPORTS OF THIRD PARTY DAMAGE:**

**A.** A UFO shall report to the director or pipeline safety bureau -any incident in which the owner or operator's underground facility is damaged by excavation activities. Such report, where practicable, shall be submitted using the commission's website at: <http://nmprc.state.nm.us/transportation/pipeline->

~~safety.html. www.nmpre.state.nm.us.~~ For purposes of this subsection, incident is to be taken in its general sense and is not to be restricted to the definition given in 49 CFR 191.3.

**B.** The report shall be filled out in its entirety and should include any and all information, such as pre dig and post damage photos, the UFO used to determine probable cause and supports or justifies its position.

**C.** The report shall be submitted within thirty (30) calendar days of occurrence. Any additional information provided after the thirty (30) day deadline may be considered on a case by case basis.

**D.** The UFO shall make available to the director or staff, within a reasonable time, such other information or documentation as the director or staff may require regarding any incident damage reportable under this section.

#### **18.60.5.19 ALTERNATIVE DISPUTE RESOLUTION:**

**A.** The commission encourages owners and operators of underground facilities and excavators to privately negotiate and settle disputes arising from excavation damage to underground facilities.

**B.** In the event the parties are unable to resolve such disputes privately, any owner or operator of underground facilities or any excavator may request mediation or arbitration from the commission.

**C.** Staff may participate in mediation or arbitration proceedings.

**D.** In mediation and arbitration proceedings, persons shall be represented in accordance with the requirements of [18.60.4.11](#) NMAC.

#### **18.60.5.20 MEDIATION OF EXCAVATION DAMAGE DISPUTES:**

**A. Designation of mediator.** If any of the parties request mediation, the commission shall designate a mediator. The mediator may be a permanent or temporary employee of the commission or another state agency or any other individual acceptable to the parties. If the parties request a mediator who is not an employee of the commission, the commission shall not approve the request unless the parties agree in writing to bear as their own the costs of obtaining the mediator's services. The mediator shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties at the time the mediator is assigned by the commission and all parties agree that the mediator may serve. The mediator shall not, subsequent to serving as a mediator in an excavation damage dispute, participate in any subsequent proceeding in the same cause as a hearing examiner, advisory staff, staff counsel or expert witness, or as an attorney, expert witness, or representative of any party to the proceeding.

**B. Duties of mediator.** The mediator shall notify the parties by telephone or mail of the time and place of the mediation conference, which will be held at commission offices unless otherwise directed by the mediator. The notice may direct the parties to send the mediator, but not other parties, their settlement positions and other necessary information that could facilitate the mediation conference, including the results of staff's investigation of the damage. In addition, the mediator may require counsel to have their clients present at the mediation conference or accessible by telephone. The mediation conference shall be held within twenty (20) days of the date of the notice unless good cause is shown for an extension. If the parties are able to reach a settlement of their dispute, in appropriate cases the mediator shall assist the parties in preparing a written agreement to reflect that resolution. If the parties are unable to reach a complete settlement of their dispute, the mediator shall advise the parties that they may request arbitration or file an action for civil liability for damages in district court.

**C. Inadmissibility of settlement offers.** Offers of settlement and statements in furtherance of settlement made in the course of mediation are privileged and, except by agreement among all parties, shall not be admissible as evidence in any formal hearing before the commission nor disclosed by the mediator voluntarily or through discovery or compulsory process.

#### **18.60.5.21 BINDING ARBITRATION OF EXCAVATION DAMAGE DISPUTES:**

**A. Request for arbitration.** Any party to a dispute arising from excavation damage to underground facilities may request binding arbitration of the dispute. The request shall be in writing to the commission and shall include a concise statement of the grounds for the dispute, the remedy sought, and an acknowledgment that the requesting party agrees to be bound by the decision of the arbitrator. The commission shall forward the request for arbitration to all other parties and require that they submit a written response within ten (10) days of receipt of the commission's letter forwarding the request.

(1) If the other parties agree to arbitration of the dispute, they shall include in their response to the commission a concise statement of their position with regard to the merits of the dispute and an acknowledgment that they agree to be bound by the decision of the arbitrator.

(2) If the other parties will not agree to arbitration, they shall so state in their response.

(3) If the other parties either fail to respond to a request for arbitration or do not agree to arbitration, the requesting party retains the right to proceed with an action for civil liability for damages in district court.

**B. Designation of arbitrator.** If all parties agree to arbitration, the commission shall designate an arbitrator. The arbitrator may be a permanent or temporary employee of the commission or another state agency or any other individual who is acceptable to the parties to the dispute. The designated arbitrator shall have no official, financial or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties at the time of the commission's designation and all parties agree that the arbitrator may serve. The parties shall be required to indicate their consent in writing to the designated arbitrator within ten (10) days of the date of the commission's letter of designation. If the parties request an arbitrator who is not an employee of the commission, the commission shall not approve the request unless the parties agree in writing to bear as their own the costs of obtaining the arbitrator's services. Any employee of the commission designated to arbitrate a dispute under these provisions shall not participate in any subsequent proceeding in the same cause regarding excavation damage to underground facilities as a hearing examiner, advisory staff, staff counsel, or expert witness or as an attorney, expert witness, or representative of any party to the proceeding.

**C. Duties of arbitrator.**

(1) The arbitrator shall render a decision in the arbitration proceeding within sixty (60) days of the date the parties approved the arbitrator, unless good cause exists to extend the time.

(2) The arbitrator shall fix a time and place for an arbitration and shall serve notice of arbitration on all parties at least ten (10) days in advance of the arbitration. The arbitrator may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence and shall have the power to administer oaths. The parties may offer such evidence and produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrator shall decide the relevancy and materiality of the evidence offered. The arbitrator shall give consideration to but shall not be bound by the New Mexico rules of evidence. No stenographic or electronic record will be made of the testimony at the hearing unless requested by a party, who shall bear the cost of the record.

(3) The arbitrator shall permit discovery only if it will not unduly complicate, burden, or impede the expeditious and informal nature of the proceeding.

(4) At the close of or soon after the hearing, the arbitrator will issue a brief written decision, which need not contain findings of fact and conclusions of law. The arbitrator's decision will be binding on the parties, but will not be deemed a decision of the commission and shall have no precedential effect.

**D. Inadmissibility of settlement offers.** Unless agreed to by all the parties, no statements, admissions, or offers of settlement made during the course of arbitration proceedings shall be admissible as evidence in any formal proceeding nor shall the arbitrator disclose the same voluntarily or through discovery or compulsory process. Nothing in this section, however, shall preclude the arbitrator from issuing a brief written decision describing his conclusions and the bases for them.

**18.60.5.22 WAIVER OR VARIANCE FROM RULE REQUIREMENTS:**

**A.** The commission may, in its discretion, waive or vary any requirement of this rule whenever the commission finds that such waiver or variance would be in the public interest.

**B.** An excavator, one-call notification system, or UFO that cannot meet one or more of the requirements of this rule may petition the commission for a waiver or variance. The petition shall be in writing and shall include:

(1) a list of those requirements which the excavator, one-call notification system, or UFO wishes to have waived or varied;

(2) an explanation and description of the specific conditions which prevent the requirement from being met; and,

(3) a statement of steps already taken and to be taken, with projected time limits for each step, in attempting to meet the requirements.

**C.** The commission may order a hearing on the merits of the petition.

**D.** An excavator, one-call notification system, or UFO shall be required to comply with requirements it has petitioned to have waived or varied until the commission has issued an order on the merits of the petition, unless the commission or its designee grants an interim waiver of or variance from one of more of the requirements that are the subject of the petition.