

**TITLE 18    TRANSPORTATION AND HIGHWAYS**  
**CHAPTER 60 PIPELINE CONSTRUCTION AND MAINTENANCE**  
**PART 5        PIPELINE SAFETY EXCAVATION DAMAGE PREVENTION**

**18.60.5.1        ISSUING AGENCY:** New Mexico Public Regulation Commission.  
[18.60.5.1 NMAC - N, 7-17-06]

**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 subject to the jurisdiction of the commission.  
[18.60.5.2 NMAC - N, 7-17-06]

**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.  
[18.60.5.3 NMAC - N, 7-17-06]

**18.60.5.4        DURATION:** Permanent.  
[18.60.5.4 NMAC - N, 7-17-06]

**18.60.5.5        EFFECTIVE DATE:** July 17, 2006, unless a later date is cited at the end of a section.  
[18.60.5.5 NMAC - N, 7-17-06]

**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 and for dealing with damage when it occurs.  
[18.60.5.6 NMAC - N, 7-17-06]

**18.60.5.7        DEFINITIONS:** In addition to the definitions in Section 62-14-2 NMSA 1978, as used in this rule:

- A.    access information** means a telephone number, a facsimile number, an email address, and, if available, a website 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 for the purpose of providing information to persons designing a project;
- D.    excavation locate** means the marking of underground facilities at the request of an excavator for the purpose of providing information to an excavator working on a project;
- E.    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;

**F.    incorporated area** means any area within the limits of any incorporated

city, town or village with a population of ten thousand or greater;

~~[F]G. non-member UFO means [a UFO that is not a member of a one-call system] a private underground facilities owned by a homeowner and operated and located on a residential property or not subject to the jurisdiction of the commission;~~

~~[G]H. project owner means the owner of a project involving excavation or the person designated by the owner to be in charge of the project involving excavation;~~

~~[H]I. 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;~~

~~[H]J. underground facility operator (UFO) means a person who operates an underground facility; and~~

~~[J]K. working day means a twenty-four (24) hour period excluding weekends and holidays.~~

[18.60.5.7 NMAC - N, 7-17-06; A, 8-15-12]

#### **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. report to the commission quarterly the:
  - (1) average wait time for answered calls for each month in the quarter;
  - (2) number of calls received for each month in the quarter;
  - (3) number of tickets generated for each month in the quarter;
  - (4) number of requests by type (regular, priority, emergency) for each month in the quarter;

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

~~[H]I. inform any person who calls with a complaint that he or she may file a complaint with the commission, and provide the commission's access information, if the one-call system is unable to satisfactorily resolve the matter.~~

[18.60.5.8 NMAC - N, 7-17-06; A, 05-15-12]

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

~~[A.]—[All UFOs.]~~

~~[(1)]~~ **A.** A UFO shall report any changes in access information to the commission on or before the date the information will change;

~~[(2)]~~ **B.** A UFO shall keep a record of all locate requests and make such records available to the commission upon request;

~~[(3)]~~ **C.** A UFO shall retain records of locate requests, ~~[and]~~ excavation notices and underground facility damage information for a period of five (5) years;

~~[(4)]~~ **D.** 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 and these rules.

~~[B.]~~ ~~[Non-member UFOs. A non-member UFO shall:]~~

~~[(1)]~~ ~~[continuously advise the general public and excavators known to work in the area where the non-member UFO's underground facilities exist of:]~~

~~[(a)]~~ ~~[the requirement to submit a request for a locate at least two (2) working days prior to commencing any excavation;]~~

~~[(b)]~~ ~~[the local or toll-free telephone number or other authorized contact method for submitting locate requests; and]~~

~~[(c)]~~ ~~[the local or toll-free telephone number for reporting damage or an emergency situation to the non-member UFO;]~~

~~[(2)]~~ ~~[at a minimum, provide telephone access at no cost to an excavator during normal business hours Monday to Friday, excluding holidays.]~~

[18.60.5.9 NMAC - N, 7-17-06; A, 8-15-12]

**18.60.5.10 LOCATE REQUESTS:** An excavator shall make an excavation locate request for all projects involving excavation, including road maintenance. Although not required under the Excavation Damage 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)~~ ~~[One-call notification systems.]~~ 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 twenty-four hours a day, seven days a week.

~~(2)~~ ~~[Non-member UFOs.]~~ 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 can reasonably expect to excavate within a ten (10) 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, the excavator shall pre-mark the actual intended excavation route or site(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 (10) working

day ticket requests 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;
- (2) if available, an alternate name and contact information of the

excavator;

- ~~[(2)]~~(3) a description and the purpose of the type of work to be done;
- ~~[(3)]~~(4) the name of the person for whom the work is being done;
- ~~[(4)]~~(5) whether or not the excavation site is pre-marked in white;
- ~~[(5)]~~(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;
- ~~[(6)]~~(7) driving instructions to a rural excavation site;
- ~~[(7)]~~(8) spotting instructions;
- ~~[(8)]~~(9) any appropriate remarks regarding access to or hazards at the site.

**D. Processing.**

(1) A one-call notification system ~~[or non-member UFO]~~ may hold a locate request in suspension until it is complete. The one-call notification system ~~[or non-member UFO]~~ 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 ~~[or non-member UFO]~~ shall process all complete locate requests within three (3) hours of receipt. A one-call notification system ~~[or non-member UFO]~~ shall deem locate requests received on a weekend or holiday, or after 4:00 pm on a working day, to have been received at 7:00 am on the next working day and shall deem locate requests received before 7:00 am on a working day to have been received at 7:00 am on that working day.

(3) Upon receipt of a complete locate request~~[-];~~, ~~[(a)]~~ ~~[A]~~ a one-call notification system shall issue a ticket with a unique number to the requesting excavator as confirmation~~[-];~~ ~~[a one-call notification system]~~ 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.

~~[(b)]—[a non-member UFO shall provide, by telephone, facsimile, or e-mail, confirmation of receipt and a unique confirmation number to the requesting excavator, followed by a written confirmation of receipt if the initial confirmation was made by telephone; the confirmation shall be the equivalent of a ticket and shall be effective at the date and time the non-member UFO initially contacts the excavator.]~~

[18.60.5.10 NMAC - N, 7-17-06; A, 07-16-12]

**18.60.5.11 WIDE AREA LOCATE REQUESTS:** An excavator who expects a project to take more than ten (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 (10) working days to complete, the excavator shall contact the one-call notification system [~~and non-member UFOs~~] to request a wide area conference. The one-call notification system [~~and non-member UFOs~~] shall process the request as provided in Subsection D of 18.60.5.10 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 to schedule a conference.

**C.** At the conference, the excavator shall develop a written work plan in concert 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 developed, an excavator shall request a wide area excavation locate. The one-call notification system [~~or non-member UFO~~] shall process the request as provided in Subsection D of 18.60.5.10 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 ticket every ten (10) working days for the duration of the ticket. For the purpose of reaffirmation, a working day begins on the date and time stamped on the ticket and ends ten (10) working days from such date and time. Unless the excavator states that the existing markings are sufficient for the time being, a UFO shall verify that existing markings are still visible, refresh them if needed, and continue to locate according to the work plan.

[18.60.5.11 NMAC - N, 7-17-06; A, 07-16-12]

**18.60.5.12 DESIGN AND BID LOCATE REQUESTS:** A project owner shall request information regarding the location of underground facilities 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 may request 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 shall not request relocates or time extensions.

**B. Conferences.**

- (1) A project owner may request from the one-call notification system for the intended excavation area and non-member UFOs a design conference or bid conference with UFOs.
- (2) The one-call notification system for the intended excavation area shall process the request as provided in Subsection D of 18.60.5.10 NMAC.
- (3) UFOs shall contact the project owner within two (2) working days to arrange to provide information to designers or bidders within a reasonable time.
- (4) A project owner and UFOs shall continue coordinating until the bid for the project has been awarded and an excavator requests an excavation locate.  
[18.60.5.12 NMAC - N, 7-17-06]

**18.60.5.13 MARKING EXCAVATION SITES:**

**A. Excavators.** ~~[The commission encourages excavators to mark all proposed excavation sites in accordance with American public works association (APWA) standards. In assessing administrative penalties for damage to underground facilities, the commission may consider whether and how well an excavator marked a proposed excavation site.]~~ 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 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.

**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.
- (3) If it does not have underground facilities at the excavation site, a UFO may write “clear” or “no underground facilities” and the UFO’s name at the site in the appropriate color. ~~Alternatively[-],~~ [(a)] a UFO that is a member of the one-call notification system for the intended excavation area or non-member UFO may contact the one-call notification system within two (2) working days to report it has no underground facilities in the proposed area of excavation.
  - ~~[(a)] — [a UFO that is a member of the one-call notification system for the intended excavation area may contact the one-call notification system within two (2) working days to report it has no underground facilities;]~~
  - ~~[(b)] — [a non member UFO may:]~~
  - ~~[(i)] — [if it receives a locate request by telephone, and can determine at the time of the call that it has no underground facilities in the intended excavation area, so inform the excavator at the time of the call;]~~
  - ~~[(ii)] — [contact the excavator directly by telephone, facsimile, or email, within two (2) working days to report it has no underground facilities;]~~
  - ~~[(iii)] — [in either case, both the non member UFO and the excavator shall document the notification.]~~

(4) The locate markings shall be valid for ten (10) working days from the end of the two (2) day marking period. For the purpose of excavation, a working day begins on the date and time stamped on the ticket and ends twelve (12) working days from such date and time.

(5) 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.

[18.60.5.13 NMAC - N, 7-17-06; A, 07-16-12]

#### **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 cross the road, as provided in Subsection B.

**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 18.60.5.13 NMAC.

**B. Underground facilities that cross the road.**

(1) **Physical locate.** A UFO may physically mark the location of all underground facilities that 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 marker.** Alternatively, a UFO may use a system of markers to indicate the location of underground facilities that 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.

**C. Maintenance of markers.** A UFO shall be deemed to have failed to correctly mark its underground facility that crosses a road to be maintained unless it:

(1) 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;

(3) verifies the depth of its underground facilities at the markers at least annually; and

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

[18.60.5.14 NMAC - N, 7-17-06]

**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 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, an excavator shall, prior to commencing excavation, call ~~[-:]~~ ~~[(a)]~~ the one-call notification system for the intended excavation area if the UFO is a member of the one-call notification system ~~[;-ø:]~~ to verify the area as "clear" or "no underground facilities" .  
~~\_\_\_\_\_ [(b)] \_\_\_\_\_ [any non-member UFOs operating in the intended excavation area.]~~

**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,

(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

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

(2) 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.

(3) The requirement to clear a facility does not apply to the homeowner of a residential property.

**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.

[18.60.5.15 NMAC - N, 7-17-06; A, 07-16-12]

**18.60.5.16 EMERGENCY EXCAVATION AND DAMAGE REPORTING**

**PROCEDURE:** This section applies whenever damage to underground facilities or public infrastructure threatens or causes interruption of utility services or use of the public infrastructure.

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

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

(2) while on the way to the site or at the site, call the one-call notification system for the excavation area to request an emergency locate [~~if damage occurs during normal business hours~~];

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

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

(1) call the one-call notification system for the excavation area to request an emergency locate [~~if damage occurs during normal business hours~~];

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

[18.60.5.16 NMAC - N, 7-17-06; A, 07-16-12]

**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 (10) 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 or clears within the requisite timeframe;

**F.** fails to mark, or call in a clear for, its underground facilities within the requisite timeframe;

- G. commences excavation prior to the expiration of the two (2) day notice period;
  - H. obliterates markings at an excavation site without providing temporary offset marks or stakes;
  - I. alters any record relating to excavation activity; or
  - J. commits any other act that the commission determines violates Chapter 62, Article 14 NMSA 1978 or this rule.
- [18.60.5.17 NMAC - N, 7-17-06]

**18.60.5.18 REPORTS OF THIRD PARTY DAMAGE:**

A. ~~[A UFO shall report to the director, in writing, any incident in which the owner or operator's underground facility is damaged, or a person is injured by a person not employed by the owner or operator. 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.]~~ A UFO shall report to the director any incident in which the owner or operator's underground facility is damaged. Such report, where practicable, shall be submitted using the commission's website at: [ww.nmprc.state.nm.us](http://ww.nmprc.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 ~~[include the identity of the alleged violator, if known, and all pertinent information required by the director.]~~ be filled out in its entirety.

C. The report shall be submitted by the 15th day of the month following the month of occurrence, or within thirty (30) days of occurrence, whichever is later.

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

[18.60.5.18 NMAC - Rp, 18.60.2.20 NMAC, 7-17-06; A, 07-16-12]

**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.

[18.60.5.19 NMAC - Rp, 18.60.2.23 NMAC, 7-17-06]

**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.

[18.60.5.20 NMAC - Rp, 18.60.2.24 NMAC, 7-17-06]

#### **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.

[18.60.5.21 NMAC - Rp, 18.60.2.25 NMAC, 7-17-06]

**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.

[18.60.5.22 NMAC - N, 7-17-06]

**HISTORY OF 18.60.5 NMAC:**