

Opinion No. 52-5618

December 5, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. L. W. Liebrand, Chairman New Mexico Public Service Commission Santa Fe, New Mexico

{*330} On November 18, 1952, you requested an opinion of this office, asking for a pronouncement as to whether a proposed operation of El Paso Natural Gas Company, near Kirtland, New Mexico, would make the latter a public utility within the meaning of the Public Utility Act of New Mexico (71-301, et seq.).

Basin Light and Power Company is a public utility, subject to the jurisdiction of the Public Service Commission of New Mexico. It appears that Basin Light and Power Company, of Farmington, New Mexico, faces a possible power shortage during the forthcoming winter if there is any breakdown in any of its generating facilities; that plans are under way for additional generating capacity and that this additional capacity is expected to be ready sometime early in 1953. It appears further that the development of the San Juan Basin has resulted in an almost unprecedented demand for electric energy. It appears further that El Paso Natural Gas Company, in connection with a natural gas processing plant at Kirtland, has its own electric generating facilities and also has excess power available and that it is willing to connect its plant facilities to the facilities of Basin Light and Power Company to make the excess generating capacity available to the Basin Light and Power Company in stand by status to supplement the Basin Light and Power System and to safeguard against power failures.

El Paso Natural Gas Company is not willing to do this however, if in so doing it would be considered as a public utility within the meaning of the Public Utility Act of New Mexico.

Your attention is directed to the fact that in selling any electrical energy to the Basin Light and Power Company, El Paso Natural Gas Company would be selling such energy to another utility and not to the public. Section 72-302 (f) NMSA defines a public utility as:

". . . any person and every person not engaged solely in interstate business, that now does or hereafter may own, operate, lease, or control any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity for light, heat, or power, or other uses."

This section of the statute must be read in connection with § 72-303 NMSA in which it is stated that the business of any public utility other than that of the character defined in § 72-302 NMSA(f), is not subject to the provisions of the Public Utility Act.

The connection of the El Paso Natural Gas Company facilities to the Basin Light and Power Company and the furnishing of electrical energy by El Paso to Basin Light and Power Company a public utility within the meaning of the Public Utility Act of New Mexico by virtue of these operations. This is not to be construed as any pronouncement that El Paso Natural Gas Company may not be a public utility in New Mexico by virtue of any of its operations but for the purpose of your request it is to be observed that its proposed operations alone will not make it such.

Your attention is invited to the fact, however, that notwithstanding that El Paso Natural Gas Company is not becoming a public utility by virtue of the proposed operation, the rates which Basin Light and Power Company may pay it for any power furnished are subject to the provisions of § 72-504 NMSA. By virtue {331} of that section the Commission has the right to regulate the sale of electricity by any person to a utility for re-sale to the public to the extent necessary to determine that the cost to the utility of such electricity, at the place where the major distribution to the public begins, shall be reasonable.

I trust this fully answers your inquiry.