

**STATE HWY. COMM'N V. SOUTHERN UNION GAS CO., 1959-NMSC-011, 65 N.M.  
217, 334 P.2d 1118 (S. Ct. 1959)**

**STATE HIGHWAY COMMISSION of New Mexico, and L. D. Wilson,  
Chief Highway Engineer, Plaintiffs-Appellants,  
vs.  
SOUTHERN UNION GAS COMPANY, a Delaware Corporation,  
Defendant-Appellee**

Nos. 6425, 6427

SUPREME COURT OF NEW MEXICO

1959-NMSC-011, 65 N.M. 217, 334 P.2d 1118

February 03, 1959

Rehearing Denied December 30, 1958; Motion for Leave to File Second Motion for  
Rehearing Denied February 3, 1959

Declaratory judgment actions. The District Court, Santa Fe County, David W. Carmody, D.J., rendered the judgment challenged on appeal. The Supreme Court, 332 P.2d 1007, 1017, reversed and remanded with directions. On motion for permission to file a second motion for rehearing, the Supreme Court, McGhee, J., held that since question as to constitutionality of statute had not been raised below and had not been raised in reviewing court until permission was sought to file second motion for rehearing, question would not be considered, especially in view of fact that statutory provision had been in existence for many years.

#### **COUNSEL**

Fred M. Standley, Atty. Gen., Robert F. Pyatt, Asst. Atty. Gen., John T. Watson, Robert E. Fox, Santa Fe, Charles C. Spann, Sp. Asst. Attys. Gen., for appellants.

Manuel A. Sanchez, Santa Fe, Noble & Noble, Las Vegas, Willis L. Lea, Jr., James R. Wetherbee, Dallas, Tex., for appellee.

#### **JUDGES**

McGhee, Justice. MCGHEE and COMPTON, JJ., and GALLEGOS, D.J., concurring.

**AUTHOR: MCGHEE**

#### **OPINION**

{\*217} {1} The appellee has filed a motion asking permission to file a second motion for rehearing in which it attacks the last sentence of Section 1 (A) of Chapter 237, Laws of 1957, 55-7-18, N.M.S.A.1953, 1957 Pocket Supp. on the ground that it is unconstitutional because there is no provision for a hearing before the State Highway Engineer, and then before a court in the event of dissatisfaction on the part of the utility with the decision of the engineer. The sentence reads:

"In all cases where the widening, improvement, reconstruction, or maintenance of the highway shall necessitate the relocation of pole lines, pipelines, conduit, wires, cables and other equipment and appliances of a utility (hereinafter called facilities') located over, under, upon, along or adjacent to such highway right-of-way, the owner thereof shall within thirty (30) days after receiving notice in writing from the state highway engineer of the necessity of such relocation proceed to make the relocation in conformity with the reasonable regulations of the state highway engineer."

{2} The constitutionality of this section was not raised below nor here until permission was sought to file the second motion for rehearing, and will not now be permitted, especially in view of the fact that this provision has been in our laws since the year 1939. See 55-7-18, N.M.S.A.1953. Also, to allow such filing would be contrary to our long established appellate procedure.

{3} It is ordered, McGHEE and COMPTON, JJ., and GALLEGOS, D.J., concurring, that the motion be and hereby is denied.