

ALERT

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SUBROGATION AND RECOVERY

News Concerning
Recent Subrogation and Recovery Issues



UPDATE: THE BIG CHILL OF 2011¹ EVALUATING SUBROGATION CLAIMS ARISING FROM THE FEBRUARY 2011 INTERRUPTION OF GAS SERVICE BY NEW MEXICO GAS COMPANY

Sarah Earle Killeen • 720.479.3893 • skilleen@cozen.com
Cheri L. MacArthur • 720.479.3939 • cmacarthur@cozen.com

I. INTRODUCTION AND BACKGROUND

Beginning February 2, 2011, approximately 28,707 customers of New Mexico Gas Company (NMGC) in communities across New Mexico lost gas service. According to the National Weather Service, temperatures remained below freezing for 80-90 hours straight from February 1 through February 4 in parts of New Mexico. These residential and commercial customers lost service when NMGC first curtailed and then cut gas service due to apparent low supply. Gas service was not restored until February 8, 2011, when state and local officials assisted NMGC employees in restoring gas and relighting appliances at each customer's residence. As a result of the gas service interruption, thousands of insurance claims have been filed for damages caused by frozen pipes due to lack of heat.

NMGC purchases the majority of the gas for its customers from the Permian and San Juan Basins and maintains more than 10,000 miles of gas distribution and 1,600 miles of transmission pipes. NMGC claims that this was a once-in-50-year storm, leading to rolling electrical blackouts in Texas and freezes on wellheads, lines, and gathering plants in the Permian and San Juan Basins, which then resulted in reduced gas deliveries to NMGC from the interstate pipelines.

NMGC claims that it was prepared for the storm and believed its system was fully capable of meeting the increased demand. Its Gas Supply and Transmission Operations team closely tracked the storm as it approached and bought additional gas for increased usage, including 62 percent more than its expected customer usage for February 3, 2011. Ultimately, NMGC did not receive the gas purchased, and to preserve its own systems, curtailed service to customers statewide. The highest concentration of customers was located in the northwestern part of the state. We have identified those communities within New Mexico that were subjected to the gas curtailments and can provide detailed information to assist in enabling an initial identification of losses that may have been caused by NMGC's service interruptions.

To ensure adequate gas supplies, NMGC is required to submit a periodic resource plan. NMGC's gas resource plan acknowledges that the load on the gas system is highest during the coldest weather, which also happens to be the time customers can least afford to be without service. NMGC's system is a winter peaking system, with approximately 75 percent of demand taking place between October and April, with about 75 percent of the overall load on the northwest system.

¹ This update is meant to serve as a supplement to the prior discussions authored by Stephen M. Halbeisen titled *The Big Chill of 2011: Evaluating Subrogation Claims Arising from the February 2011 Freeze that Crippled Texas, New Mexico and Arizona* and *The Big Chill of 2011 – Part II: Analysis of Claims Arising out of the Interruption of Gas Service to Customers in Texas, New Mexico and Arizona*.

II. NMGC'S DUTY TO PROVIDE ADEQUATE GAS IS NOT ABROGATED BY ITS TARIFF.

Under New Mexico law, NMGC had a duty to furnish adequate, efficient, and reasonable gas service. Its production and storage capacity of its plant, supplemented by the gas supply regularly available from other sources, must be sufficiently large to meet all reasonably expectable demands for firm service. NMGC furnishes gas to its customers in accordance with a comprehensive set of rates and rules (the Tariff).

It is the policy of NMGC to use reasonable diligence in its operations to render continuous service to all its customers (other than those served under rates expressly permitting interruptions or curtailments of service). If NMGC was unable to deliver gas in any of its systems, however, the delivery of gas service was to be allocated in accordance with a predetermined schedule, with residential customers being the last to have their gas service interrupted.

Our analysis leads us to believe that there may be a basis for asserting viable subrogation claims based on theories of negligence and breach of contract against NMGC arising out of the service interruptions of February 2011. Although NMGC's Tariff does contain provisions for limiting liability for service interruptions and curtailments, in this case it appears that NMGC abandoned the procedures for an orderly curtailment and simply shut down the system to preserve its own property. Additionally, NMGC's claim that it shut down the system due to an "emergency" is tenuous in that it appears that its lack of foresight and preparation is what caused the emergency. Finally, despite the provisions of the Tariff, legal authority exists that abrogates NMGC's ability to rely on the Tariff to the extent that it contradicts New Mexico statutory law requiring that it provide adequate service.

III. NMGC'S CLAIMS PROCESS WILL NOT SATISFY ALL CLAIMANTS.

Perhaps recognizing that it had some liability for the service interruptions, NMGC voluntarily created a \$1,000,000 fund for the purpose of satisfying customer's damages claims. NMGC has created a process whereby the customer may submit a claim with supporting documentation that will be reviewed by NMGC's internal claims department. The claims department will determine whether and to what extent NMGC may be responsible for interruption-related damages.

Although this procedure has been set up, there is no information as to whether claims are in fact being paid by NMGC through this process. There has been information published by NMGC that this fund is designed to pay hardship cases, where the customer was without any insurance coverage. In fact, customers are encouraged to first contact their insurer for reimbursement and to submit any denial of insurance with their claim to NMGC. In any event, the amount of the fund is not likely to satisfy all claims related to the service interruptions and NMGC has admitted that reimbursement may be handled on a prorated basis.

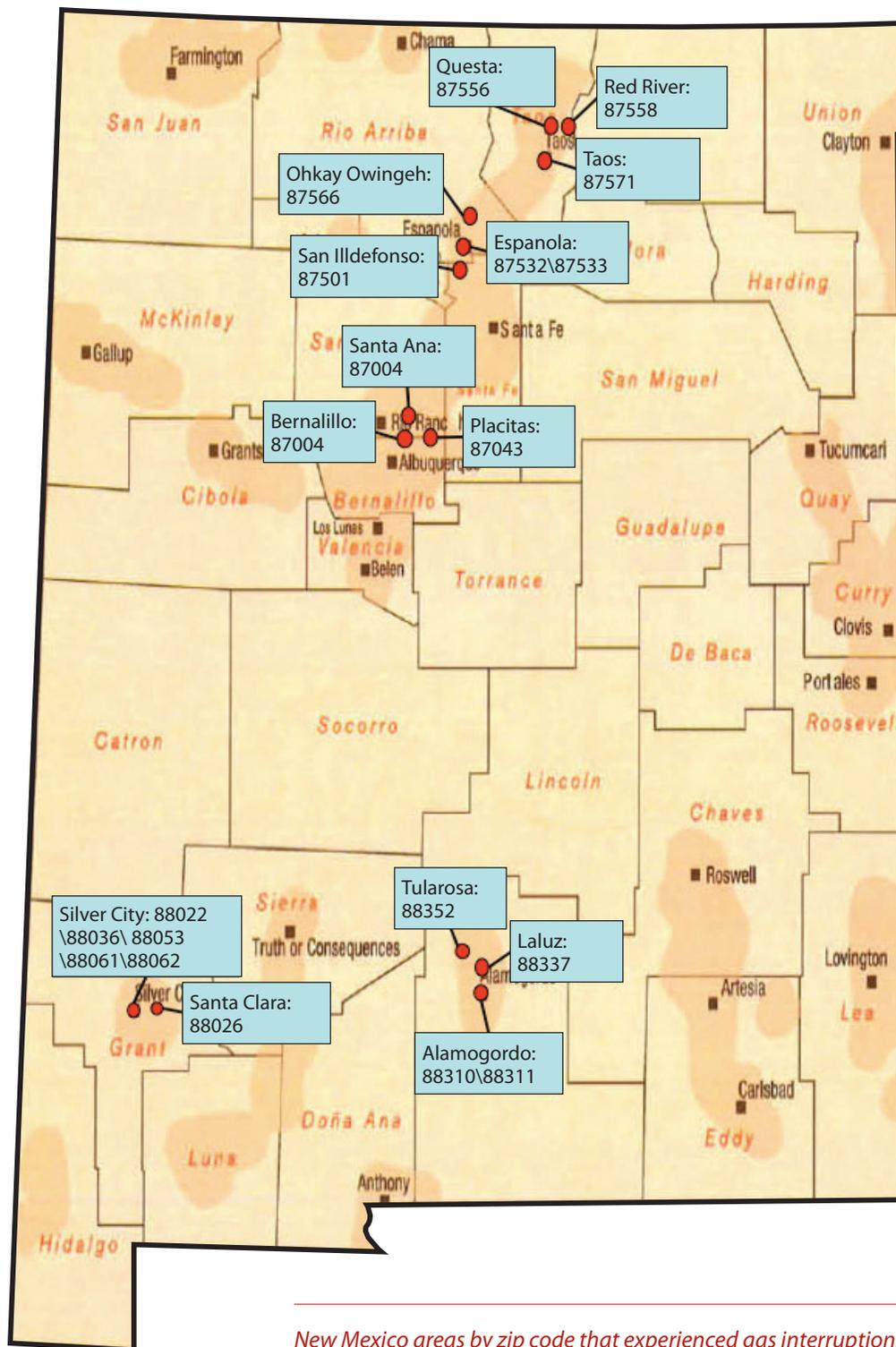
There is a concern that if NMGC does pay an insured's claim, NMGC will likely require the claimant to sign a release of liability, thereby frustrating insurance subrogation claims for unreimbursed portions of the claim.

IV. YOUR INSURED'S RELEASE OF CLAIMS IN FAVOR OF NMGC COULD BAR SUBROGATION CLAIMS

It is anticipated that NMGC, in exchange for any payments made directly to insureds, will require the insured sign a release. If NMGC has actual notice of an insurance subrogation claim, then New Mexico legal authority will not bar subrogation claims presented by an insurer of that insured. Under New Mexico law, it is important to preserve claims by placing NMGC on notice of subrogation claims to prevent those claims from being barred.

V. CONCLUSION

Cozen O'Connor remains prepared to assist you in the continued evaluation and pursuit of subrogation claims arising out of the February 2011 interruption of gas service to customers of NMGC.



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