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STATE-BY-STATE ANALYSIS
OF
PUBLIC UTILITY LAWS
AFFECTING GEOTHERMAL DIRECT HEAT APPLICATIONS

Supplementing EWLI April 23, 1979
"Overview of State Public Utility Regulation
Impact on Geothermal Direct Heat Applications"

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INTRODUCTION

This report supplements our April 23, 1979, "Overview of Public Utility Regulation Impact on Geothermal Direct Heat Applications." In that report, we discussed the historical rationale for, and some of the constitutional constraints upon, state public utility regulation. We examined the types of generic issues likely to arise in the application of state public utility laws to geothermal direct uses,¹ and discussed the potential significance of regulatory control over market entry and rate-setting. Specific state regulatory provisions were used to illustrate the issues discussed in the April report, but no effort was made there to analyze those provisions on a systematic, state-by-state basis.

This report supplies such an analysis for sixteen states known to have geothermal potential.² For each state covered, we have examined 1) the nature of the services defined as public utility functions; 2) the type and extent of "public use" required to subject suppliers of such services to regulation; 3) any special exemptions from public utility status or full regulatory control; 4) control of market entry through requirements for a certificate of public convenience and necessity before construction or operation of utility facilities; 5) the types of enterprise subject to rate regulation; 6) the existence of facility siting legislation applicable to public utilities; and 7) the general scope of regulation over utility securities issuances. We have focused upon state statutory provisions and, where available, judicial decisions interpreting them; in most cases, we have not examined individual utility commission decisions which have not been the subject of judicial review.

We are hopeful that the additional detail provided here will be useful not only to policy planners, but also as background for those contemplating direct use developments in the various states whose regulatory schemes are discussed. We have made every effort to provide comprehensive and

¹In accordance with our mandate from the Department of Energy, we have focused on direct heat uses, rather than electric applications of geothermal resources. Many regulatory issues are common to both types of use, and much of the discussion in our April report and in this one may be of use to those interested in geothermal electric generation as well.

²States surveyed include Arizona, California, Colorado, Hawaii, Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

accurate summaries of current state utility provisions. However, we must emphasize that these are summaries only; that state law and regulations in this area are in continuous evolution; and that state utility commission practice may not always reflect statutory or judicial interpretations advanced here. For these reasons, the discussion which follows is not intended and should not be regarded as legal advice applicable to particular transactions, and should not be relied upon for that purpose. Indeed, we will welcome any comments or information concerning changes in the regulatory schemes discussed, or concerning court or commission interpretations at variance with those suggested below.

Some of the implications of public utility status for potential geothermal developers are suggested in our April 23 report. One additional area not mentioned there deserves special mention in view of Congress' recent enactment of the National Energy Act. The Energy Tax Act of 1978, adopted as part of the NEA, authorizes an additional 10% business investment credit for investment in certain types of "alternative energy property."³ Such property includes "equipment used to produce, distribute or use energy derived from a geothermal deposit."⁴ However, geothermal equipment otherwise eligible for the credit is expressly made ineligible if it is "public utility property" - now defined to include property used predominantly in the trade or business of furnishing or selling electrical energy or water, or gas through a local distribution system, if the rates therefore have been established or approved by the United States, by a state or political subdivision thereof, or by a public utility commission or similar body.⁵

Under this Internal Revenue Code definition, then, the status of geothermal-related property as "public utility property" may depend upon the treatment accorded to a geothermal supplier under state utility law. Thus, any incentive which the additional 10% energy credit might potentially provide for geothermal development, will be eliminated by treatment of geothermal developers as public utilities under state law. To the extent that such an outcome is of concern to geothermal policy-makers, consideration might be given to limiting the Energy Tax Act's existing exclusion for public utility property.

³Act Secs. 301(a)(b); new IRC Secs. 46(a)(2), 48(1)(2).

⁴Act Sec. 301(b); new IRC Sec. 48(1)(3)(A)(viii).

⁵IRC Sec. 46(c)(3)(B).

ARIZONA

I. NATURE OF SERVICE

The Arizona Corporation Commission has jurisdiction over "public service corporations." [Ariz.Const.,Art.15,\$3; Ariz.Rev.Stat.\$40-202-A.] The state Constitution, Art. 15, \$2, defines such corporations to include

[a]ll corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.*

Neither the quoted provisions, nor judicial authority interpreting them, provide coherent guidelines for regulatory treatment of geothermal direct uses. Article 15, \$2 appears on its face to reach such uses, either as the furnishing of water for public purposes, or as the furnishing of steam for heating or cooling. However, in Williams v. Pipe Trades Industry Program of Arizona (1966) [100 Ariz.14,409 P.2d720] the Arizona Supreme Court concluded that "furnishing" connotes a transfer of possession; that "[t]here...is no contemplated transfer of possession" in supplying water for heating or cooling purposes as distinguished from consumptive uses; and that such activities accordingly fall outside the Constitutional definition of public service corporation functions, and are not entitled to the monopoly franchise afforded by a certificate of public convenience and necessity. Although the only issue actually before the court was the applicant's entitlement to certification, the court's reasoning would exclude suppliers of water for heating or cooling from all aspects of Commission jurisdiction, including rate regulation.

*Throughout this report, emphasis appearing in quotations from statutes or judicial decisions has been added for clarity, and does not appear in the originals from which the quotes are taken.

Its reasoning would equally exclude those furnishing steam for heating or cooling purposes, and in this respect cannot be reconciled with the express language of Art. 15, §2 quoted above. If and when the issue arises with respect to geothermal steam suppliers, it seems likely that the Constitutional language must prevail over the court's peculiar reasoning in Williams. If so, geothermal steam suppliers would be subject to the Commission's general jurisdiction, while geothermal hot water suppliers would not.

The likelihood of regulation is rendered even more uncertain by Arizona's treatment of "pipeline corporations." Article 15, §2, supra, defines public service corporations to include "common carriers." Article 15, §10 of the Constitution declares that common carriers include "...all...pipeline corporations...for the transportation of water, oil or other property for profit." However, Arizona statutes in turn define "pipe line" to mean "all property used in transmission for compensation of air, steam or fluid substances, except water, through pipe lines." [Ariz.Rev.Stat.§40-201.]

Under the Constitutional provision, operators of geothermal hot water pipelines would be common carriers subject to Commission jurisdiction; operators of geothermal steam pipelines might or might not be, depending upon whether steam is considered "other property." Under the statutory provision, pipelines are defined to exclude the transmission of water but to include the transmission of steam; but it is not clear how or even whether this definition fits into Arizona's regulatory scheme, since the only operational provision employing the term "pipeline" appears to be the conflicting language of Article 15, §10 of the Constitution. Thus, until and unless Arizona clarifies its Constitutional and statutory provisions in this area, it will be difficult to predict the treatment of geothermal direct uses.

II. PUBLIC USE LIMITATIONS

The Arizona Supreme Court has expressly rejected the position taken by some states that the public use requirement can be satisfied only where the nature of the service provided is such that all members

of the public have an enforceable right to demand it. [See, e.g., Trico Electric Cooperative, Inc. v. Corporation Commission (1959) 86Ariz.27,339P.2d1046.] Instead, the court has adopted the view that the requirement is satisfied by service to "a sizeable portion of the public" with "a commodity having a public interest," including water for domestic uses. [Arizona Corp. Comm. v. Nicholson (1972) 108Ariz.317,497P.2d815,817.]

Arizona courts have expressed an aversion to extending the Commission's power to businesses in which the public might be only "incidentally" interested. Thus, they have repeatedly held that suppliers furnishing utility-type services to others in connection with and incidental to their primary business are not subject to regulation as public service corporations. (See, e.g., Nicholson, supra, in which a trailer park operator supplying water from its own well to 250 tenants was held not subject to Commission jurisdiction.) On the other hand, the Supreme Court has indicated that where the furnishing of such services is essentially distinct from the supplier's main business, even though incidental to its production operations, the supplier may be subject to regulation. Id.

Assuming that the furnishing of water or steam for heating or cooling can be regarded as a type of activity subject to Commission jurisdiction in the first instance (see discussion above), then these authorities suggest, for example, that one who owns and leases land for residential, industrial, office park or shopping center uses could supply geothermal fluids to residential or business users located there without becoming subject to regulation, whereas one who operates a heating district as a primary business would fall within the Commission's jurisdiction.

III. EXCLUSIONS AND EXEMPTIONS

Municipally-owned utilities are exempt from regulation. [Ariz. Const.Art.15,§2.] We have found no other statutory exemptions. Arizona courts have interpreted its Constitutional definition of "public service corporation" to include cooperatives. [Application of Trico Electric Cooperative, Inc. (1962) 92Ariz.373,377P.2d309.]

IV. CERTIFICATION

Arizona Rev. Stat. §40-281 requires "water corporations," among others, to obtain a certificate of public convenience and necessity before constructing or extending service systems, except as to extensions within territories already served by the entity or within which its lawful operations have commenced, or into territories contiguous to its existing system and not already served by a similar public service corporation. Upon the complaint of an existing public service corporation claiming to be injured by construction or extension of another's system, the Commission may prescribe reasonable terms and conditions for the location of the systems affected. [Ariz.Rev.Stat. §40-281.]

These certification requirements have been held not to apply to persons furnishing steam or water for heating or cooling purposes (Williams, supra). However, as previously noted, steam suppliers (and possibly hot water suppliers, if they are deemed "pipeline corporations") may be subject to Commission jurisdiction in other respects.

V. RATE REGULATION

The Commission regulates rates for all public service corporations - presumably including those furnishing steam for heating or cooling purposes, but not those furnishing water for similar purposes under the Williams rationale. No provisions were found bearing specifically on the rate treatment of affiliates or exploration costs.

VI. FACILITY SITING

Arizona's energy facility siting law applies only to electric energy facilities. [Ariz.Rev.Stat. §40-360.]

VII. SECURITIES REGULATION

The Commission has power of prior approval over the issuance of stock and incurring of indebtedness by public service corporation, except as to the issuance of twelve-month notes for up to 7% of total capitalization by corporations with operating revenues over \$250,000. [Ariz.Rev.Stat. §40-302.]

CALIFORNIA

I. NATURE OF SERVICE

Among other entities, California's public utility statute covers water corporations, heat corporations and pipeline corporations. Cal. Pub. Util. Code §261(a):

"Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

The term "water corporation" is defined in Cal. Pub. Util. Code §§240, 241, broadly enough to include the use of geothermal water for heating purposes:

§240. "Water system"

"Water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal domestic, or other beneficial use.

§241. "Water corporation"

"Water corporation" includes every corporation or person owning, controlling, operating, or managing any water system for compensation within this State.

The term "heat corporation" likewise can be interpreted to apply to certain types of geothermal heat enterprises:

§223. "Heating plant"

"Heating plant" includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of heat for domestic, business, industrial, or public use.

§224. "Heat corporation"

"Heat corporation" includes every corporation or person owning, controlling, operating, or managing any heating plant for compensation within this State, except where heat is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others.

California's definition of "pipeline corporation" expressly excludes facilities used in connection with the transportation of water, but possibly could be interpreted to reach pipelines for the transportation of steam:

§227. "Pipe line"

"Pipe line" includes all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipe lines.

§228. "Pipe line corporation"

"Pipe line corporation" includes every corporation or person owning, controlling, operating, or managing any pipe line for compensation within this State.

We have found no authorities construing the phrase "fluid substances." Whether steam might be considered a "fluid substance" for regulatory purposes, and thus included under these pipeline provisions, or treated as water, and thus excluded, is difficult to predict. Since geothermal steam suppliers appear to be covered as heat corporations in any event, the prospect that they might also be classified as pipeline corporations is unlikely to affect their public utility status. However, a choice between these alternative classifications could affect the scope of regulation imposed. (See Sections III-V, below.)

II. PUBLIC USE LIMITATIONS

Under California's statute, persons or corporations providing heat, water or pipeline services are subject to Commission jurisdiction and regulation if they serve "the public or any portion thereof" for compensation, or if they serve another person, private corporation or

political subdivision which in turn does so, directly or indirectly [Cal. Pub.Util.Code§216(b) and (c).] The phrase "public or any portion thereof" is defined to mean "the public generally, or any limited portion of the public, including a person, private corporation, municipality or other political subdivision of the State." [Id., §207; see also In re Loyalty Warehouse Corp. (1968) 68PUC39.] Under these broad statutory provisions, taken alone, a provider of the designated services would be a public utility even though it might serve only one or a few customers, or another utility which in turn serves the public.

However, whether the provider, or any utility it serves, serves one customer or many, it will not be treated as a public utility unless it satisfies the additional judicially-imposed criterion of "dedication to a public use." California courts have indicated that "dedication" is normally evidenced by some act which the public reasonably interprets and relies upon as a willingness to provide service on equal terms to all who might apply, and which results in a legal duty on the part of the utility to provide such service. [See, e.g., California Water & Tel. Co. v. Public Util. Com. (1959) 51C.2d478, 494, 334P.2d887; Allen v. Railroad Com. (1918) 179Cal.68, 88-89, 175P.466.] Accordingly, where one provides a designated utility-type service only to selected customers pursuant to negotiated contracts, and denies the same service to others, it will not have dedicated its property or services to a public use, and will not be subject to regulation as a public utility. [See, e.g., Richfield Oil Corp. v. Public Util. Com. (1960) 54C.2d419, 354P.2d4]. The furnishing of surplus production of electricity or water to selected users under similar conditions, likewise has been held not to transform an otherwise private activity to a public use. [See, e.g., Story v. Richardson (1921) 186Cal.162, 198P.1057; Southern California Edison Co. v. Railroad Commission (1924) 194Cal.757, 230P.661.]

Although regulation in any particular case will depend heavily on the specific circumstances involved, these authorities suggest that a geothermal supplier could structure arrangements with industrial, commercial or even residential users based upon supply contracts negotiated with individual users, or with representatives of groups of users, without necessarily becoming a public utility subject to Commission jurisdiction.

III. EXCLUSIONS AND EXEMPTIONS

"Heat corporations" are defined to exclude situations where "heat is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others." [Cal.Pub.Util.Code§224, supra.]

The statutory definitions of "water corporations" and "pipeline corporations" do not contain similar exclusions. See §§241, 228, supra. However, California does exempt entities organized solely to deliver water to their stockholders or members, and which in fact deliver water to no one else (except certain political subdivisions or other mutual water companies). [Cal.Pub.Util.Code§2705.] The exemption is not lost by delivery of water to a shareholder or member which is itself a public utility for redelivery to the public, but is lost by delivery to persons who are not shareholders or members, with or without redelivery to the public at large. Yucaipa Water Co. v. Public Utilities Commission (1960) 54Cal.2d823, 9Cal.Rptr.239, 357P.2d295.

Nonprivately owned utilities, including municipal utilities and special districts, are not subject to regulation by the Commission. [See Cal.Const., Art.12, §3; Los Angeles Gas and Electric Corp. v. Dept. of Public Service of the City of Los Angeles (1921) 52CA27, 197R962; Los Angeles Metro. Trans. Auth. v. Public Util. Com. (1959) 52 C2.d 655, 343P.2d913; Water Users' & Taxpayers' Ass'n. v. Railroad Commission (1922) 188Cal.437, 205, p. 682.]*

IV. CERTIFICATION

Water corporations are required to obtain a certificate of public convenience and necessity before constructing or extending their service systems, subject to exceptions similar to those noted for Arizona. [Cal.Pub.Util.Code§1001.] Heat and pipeline corporations are not subject to this requirement, or entitled to the monopoly benefits which a certificate confers.

*California recently enacted statutes exempting from public utility status certain "private energy producers" producing electricity from nonconventional sources for limited direct distribution, and empowering the Commission to prohibit electric utilities from curtailing electric production by geothermal producers. See Cal.Pub.Util.Code§§82, 2802.

V. RATE REGULATION

California's rate-of-return statute allows the Commission to grant an additional 0.5% to 1.0% return on investments in geothermal and other renewable resources. [Cal.Pub.Util.Code§454(a)]. California has also allowed exploration costs to be passed on to ratepayers, at least in regard to gas exploration. [Re Southern Cal. Gas Co. (Cal. 1973) 100PUR3d401; see EWLI April 23, 1979, Overview, p. 20.] The Commission may also allow inclusion of a heat corporation's research and development expenses in setting rates. [Cal.Pub.Util.Code§740.] Although we have found no express statutory provision governing the treatment of affiliate transactions, the Commission's authority to regulate in this area seems well established. [See, e.g., Application of PT&T Co. (1968) 69Cal.P.U.C. 53; Key System Transit Lines & Railway Equipment & Realty Co., Ltd. (1953) 52Cal.P.U.C.589.]

VI. FACILITY SITING

California's facility siting law applies only to the siting of electric powerplants and related installations. [See Cal. Public Resources Code §§24110, 24119, 24120, 25500.] The statutes expressly exclude exploratory, development and production wells, resource transmission lines and other related facilities used in connection with a geothermal exploratory or field development project from treatment as "appurtenant facilities," otherwise included in the definition of "thermal powerplants" subject to site certification. [Id., §25120.] (Siting of geothermal powerplants is regulated by the State Energy Resources Conservation and Development Commission, or in some cases by counties, under a streamlined procedure relative to most powerplant siting in California; see Cal.Pub.Resources Code §§25440, et seq.)

VII. SECURITIES REGULATION

The Public Utilities Commission has prior approval power over the issuance of securities by public utilities. [Cal.Pub.Util.Code§816.]

COLORADO

I. NATURE OF SERVICE

Colorado expressly defines public utilities to include water and pipeline corporations, but not heat corporations [Colo.Rev. Stat.§40-1-103(1)]:

The term "public utility," when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the provisions of articles 1 to 7 of this title. Nothing in articles 1 to 7 of this title shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation or to exemptions provided for in the constitution of the state of Colorado relating to municipal utilities.

The terms "water corporation" and "pipeline corporation" are not defined by statute, and no judicial construction has been found.

II. PUBLIC USE LIMITATIONS

Read literally, the quoted statute appears to reach not only entities providing the types of service specifically mentioned, but also a residual class of "corporation[s] or person[s] declared by law to be affected with a public interest," without regard to the type of service provided. However, Colorado courts have implicitly interpreted the quoted language as a qualification on the specific entities mentioned, rather than as a distinct (though undefined) class of public utility utilities. [See, e.g., Public Utilities Com'n v.

Colorado Interstate Gas Co. (1960) 142Colo.361,351 P.2d241,248 (cf. dissent, at 351 P.2d251); Parrish v. Public Utilities Commission (1956) 134 Colo.192,301 P.2d343.]

In the Interstate Gas case, a majority of the Colorado Supreme Court agreed that an entity is "affected with a public interest" where it holds itself out to serve, to the extent of its capacity, all members of the public who may require the service, and where the nature of the service is such that all members of the public have an enforceable right to demand it. [Id. at 248-249.] In that case, Colorado Interstate Gas Company was held not to be a public utility under Colorado law as to sales made directly to industrial users, public institutions and governmental units pursuant to "negotiated" contracts. Applying the same test, in the Parrish case the court held that the private owner of a water distribution system who contracted with the City of Denver to furnish water to users, but who had no contract with any of the users and did not hold itself out to serve the public indiscriminately, was a contract carrier and not a public utility subject to Commission jurisdiction.

III. EXCLUSIONS AND EXEMPTIONS

Municipally-operated utilities are exempted from regulation, except as to service provided outside the municipal limits. [City and County of Denver v. Public Utilities Commission (1943) 181Colo.38, 507 P.2d871 (construing Colo.Rev.Stat.§40-1-103 and Colo.Const.Art.25).] Cooperatives, however, are regulated. [Colo.Rev.Stat.§40-1-103(2).]

An entity which supplies water principally for irrigation apparently could supply geothermal heat as an incident to its irrigation activity without becoming subject to regulation. [Colo.Rev.Stat. §40-1-103(1), supra.]

IV. CERTIFICATION

Subject to the exceptions noted for Arizona and California, Colo. Rev. Stat. §40-5-101 requires a certificate of any public utility company desiring to construct or extend a facility. The

Commission is empowered to avoid duplication of utility services by assigning specific territories and otherwise defining the terms and conditions of service.

V. RATE REGULATION

The Commission regulates rates for all public utilities, and can consider the reasonableness of affiliate transactions in rate cases. [Colo.Rev.Stat. §§40-3-101 to 111, 40-4-110,111.]

VI. FACILITY SITING

Colorado does not presently have a siting law as such, but a need determination is made during the certification process. [Colo.Rev.Stat. §40-5-101.]

VII. SECURITIES REGULATION

Authority over issuance of stocks and bonds is limited to those of gas and electric corporations. [Colo.Rev.Stat. §40-1-104.]

HAWAII

I. NATURE OF SERVICE

Hawaii includes the furnishing of heat, cold and water among public utility functions. Haw.Rev.Stat. §269-1:

"Public utility" means and includes every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use...for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas or oil,...provided that the term... (7) shall not include any person who controls, operates or manages plants or facilities for production, transmission or furnishing of power primarily or entirely from non-fossil fuel sources for its internal uses but who also provides, sells or transmits the portion of such power not used for such purposes directly to a public utility for transmission to the public.

II. PUBLIC USE LIMITATIONS

The meaning of the statutory phrase "directly or indirectly for public use" has received little attention by Hawaiian courts. In the only recent case found in this area, the Supreme Court of Hawaii merely observed that this language "appears quite broad" and that Hawaii's public policy "favors PUC jurisdiction over activities where the public welfare depends on proper conduct and regulation." [Public Util. Com'n., etc. v. Honolulu Rapid Transit Co., Ltd. (1975) 56 Haw.115, 530 P.2d742, 745.] In that case, the court held that a transportation company which claimed to have ceased doing public utility business, might nevertheless remain a public utility by reason of having leased portions of its equipment to a successor company engaged in serving the public. Although the case sheds little light on the scope of Hawaii's "public use" limitation, the issue appears to have less significance here than in other states because of the exemptions noted below.

III. EXCLUSIONS AND EXEMPTIONS

Hawaii expressly excludes geothermal steam producers from coverage as "public utilities." [Haw.Rev.Stat. §269-27.1(b), quoted below.] The statute is silent as to geothermal hot water producers, and as to geothermal suppliers beyond the production stage (whatever the character of the resource); such entities presumably could be treated as "heat" or "water" utilities under the quoted language of §269-1, above.

As appears from that statute, Hawaii also exempts from public utility status persons who produce power from non-fossil fuels primarily for their own uses, but who sell any excess power to a public utility for transmission to the public. The statute does not define the term "power," but it seems unlikely that it would be construed to include geothermal direct heat.

Hawaii also exempts utilities owned and operated by the state, or by any country or other political subdivision. [Haw.Rev.Stat. §269-31.]

IV. CERTIFICATION

Hawaii requires certificates of public convenience and necessity for all public utilities, except those franchised, chartered or otherwise recognized by the Commission prior to the 1978 enactment of Haw. Rev. Stat. §269-7.5.

V. RATE REGULATION

The Public Utilities Commission regulates rates for all public utilities. [Haw.Rev.Stat. §269-16.] The following special provision applies to public utility purchases of geothermal steam:

§269-27.1 Establishment of geothermal energy rates.

(a) The rate payable by a public utility to the producer of geothermal steam or electricity generated from geothermal steam shall be established by agreement between the public utility and the supplier, subject to approval by the public utilities commission; provided that, if the public utility and the supplier fail to reach an agreement for such rate, or if the agreed upon rate is disapproved by the commission, the public utilities commission shall establish a just and reasonable rate for the geothermal steam or electricity generated from geothermal steam supplied to the public utility by the producer.

(b) The producer of geothermal steam or electricity generated from geothermal steam shall be excluded from coverage of the term "public utility" as defined in section 261-1.

[L 1978, c132, §2.]

The Commission also has the power to apportion income, deductions, credits or allowances between entities controlled by the same interests. [Haw.Rev.Stat. §269-16(e).]

VI. FACILITY SITING

We have found no facility siting legislation for Hawaii.

VII. SECURITIES REGULATION

The Commission has prior approval over securities issued by public utilities, except for bonds payable up to one year from the date of issue. [Haw.Rev.Stat. §269-17.]

IDAHO

I. NATURE OF SERVICE

Idaho public utilities do not include heat corporations, but do include water and pipeline corporations. The code defines water corporations as follows:

61-124. Water system. - The term "water system" when used in this act includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment or measurement of water for power, irrigation, reclamation or manufacturing, or for municipal, domestic or other beneficial use for hire...

61-125. Water corporation. - The term "water corporation" when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees, appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state.

There is no question that geothermal hot water suppliers will be deemed "water corporations" within the meaning of these provisions; whether they will be regulated as public utilities will depend upon the "public use" characteristics of their activities, discussed below. [See Stoehr v. Natatorium Co. (1921) 34 Id. 217, 200P.132, and Public Utilities Commission v. Natatorium Co. (1922) 36 Id. 287, 211 P.533.]

Idaho courts have not had occasion to decide whether a different status should be accorded to geothermal steam suppliers. For purposes of utility regulation, there is no apparent reason to distinguish between hot water and steam suppliers, and the latter might reasonably be regarded as "water corporations" within the intent of the statute.

Alternatively, they might be treated as "pipeline corporations," defined to include those involved in the "transmission, storage, distribution or delivery of crude oil or other fluid substances except water through pipelines." [See Idaho Code §§61-114,61-115.] Whether steam could technically be considered a "fluid substance" is open to question, but might be decided either way in the absence of legislative guidance.

II. PUBLIC USE LIMITATIONS

Under the statute, entities providing the designated services are treated as public utilities if they serve the public or some portion thereof for compensation, or if they serve another entity which in turn does so. [Idaho Code §§61-125,61-129.]

In two early cases involving a geothermal hot water supplier known as the Natatorium Company (a predecessor of Boise's existing Warm Springs Water District), the Idaho Supreme Court defined the scope of its "public use" limitation. [See Stoehr v. Natatorium Co., supra.] The Natatorium Company, a bathing resort, originally had developed the geothermal source primarily for use in its own facilities, and not for sale to the general public. It later began selling surplus hot water to nearby residents for heating and domestic uses, and was supplying about 270 users at the time of the litigation. The Company did not solicit customers, but did accept applications from interested residents; on some occasions, it refused to supply persons desiring service.

On these facts, the Supreme Court held in both cases that the Company had not dedicated its services to a public use, and accordingly was not a public utility. In this connection, the Stoehr opinion reads as follows:

To hold that a water corporation is a public utility because it receives compensation for water owned by it and furnished to a limited number of the inhabitants of Boise within a limited area would be an unreasonable interpretation of the [utility] statutes...

If the service is dedicated to the public or some portion thereof, or to persons within a given area, then any member of the public or of the given class, or any person within the given area, may demand such service without discrimination, and the public or so much of it as has occasion to be served is entitled to the service of the utility as a matter of right and not of grace. [200 P.132,at133.]

In the Public Utilities Commission case, the main opinion emphasized that the Company reserved the right to furnish whom it pleased, and where it pleased; that all contracts between the Company and its users were private; and that each was on a year-to-year basis, with no obligation on the Company's part to furnish a continual flow of water.*

These cases confirm the general proposition, true in other states, that the number of users supplied may be less significant in determining public utility status than the nature of the contractual arrangements between the supplier and its customers, and the nature of the primary business engaged in by the supplier.

III. EXCLUSIONS AND EXEMPTIONS

Idaho exempts municipal corporations and mutual nonprofit or cooperative corporations, and water systems for irrigation of Carey Act Lands (a federal program for desert reclamation). [Idaho Code §61-104.]

IV. CERTIFICATION

Water corporations (but not pipeline corporations) generally must obtain a certificate of public convenience and necessity for construction or extension of their service systems, subject to the same exceptions noted above for Arizona. [Idaho Cost §61-526.]

*In an unusual departure from traditional public utility analysis on the "public use" issue, the court also distinguished between a public or state-owned water source, on the one hand, and a privately-owned source, on the other. The opinion suggests that distribution of the former would amount to "public use" in any case, whereas the distribution of "private waters" would amount to a "public use" only when an unequivocal intention to dedicate them for that purpose could be established. Whether such a distinction would be applied today is questionable.

V. RATE REGULATION

The Commission regulates rates for all public utilities. [Idaho Code §61-305 et seq.] No express statutory provisions govern the treatment of affiliated interests or of exploration expenses.

VI. FACILITY SITING

We have found no siting legislation for Idaho.

VII. SECURITIES REGULATION

The Commission has prior approval over securities issued by water corporations, except bonds maturing within twelve months. [Idaho Code §61-902.]

LOUISIANA

I. NATURE OF SERVICE

The Public Service Commission has "all necessary power and authority over any...heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities." [La.Rev.Stat.Ann.§45:1163.]

II. PUBLIC USE LIMITATIONS

Louisiana has little in its statutory or common law to indicate the nature of its public use limitation. The most recent case of any significance discusses state regulatory power with respect to common carriers; it states that a "common carrier" is one which "undertakes to carry for all people indifferently." [Higginbotham v. Public Belt Railroad Commission (La.App.1938) 181So.65.]

III. EXCLUSIONS AND EXEMPTIONS

Municipally-operated utilities are excluded from the Commission's jurisdiction (unless such jurisdiction is approved by local referendum). [La.Rev.Stat.Ann§45:1161.] Electric cooperatives, but not others, are also excluded. [La.Rev.Stat.Ann§12:301 et seq.]

IV. CERTIFICATION

Louisiana's certification requirement is limited to electric companies. [La.Rev.Stat.Ann§45:123.]

V. RATE REGULATION

The Commission regulates rates for all public utilities, and has broad power to investigate the reasonableness of expenses incurred by public utilities through contracts and agreements with other entities, whether affiliated or not. [La.Rev.Stat.Ann. §§45:1163,1176.] Recovery of exploration and drilling costs for gas utilities has sometimes been allowed through a surcharge to customers, which must be refunded within five years with 50% added (i.e., \$1.50 refunded for each \$1.00 obtained).

VI. FACILITY SITING

We have found no siting statute for Louisiana utilities.

VII. SECURITIES REGULATION

The Commission has prior approval over securities of any type issued by any public utility. [La.Rev.Stat.Ann. §§45-1161,45:1168.]

MONTANA *

I. NATURE OF SERVICE

Montana includes among public utility functions the furnishing of heat; water for business, manufacturing, or household use; and "power in any form or by any agency." [Mont.Rev.Codes Ann. §70-103.]

II. PUBLIC USE LIMITATIONS

To be subject to regulation as a public utility, the statute provides that the service must be delivered or furnished "for or to other persons . . ." Id. Despite the apparent breadth of this language, established constitutional doctrine requires that it be interpreted to apply to particular services only if they can be said to "affect the public interest" or be "dedicated to a public use."** The Montana Supreme Court has adopted the traditional public use test requiring that the supplier be willing to serve the entire public within its service area, as distinguished from particular individuals, or members or stockholders only. Lockwood Water Users Association v. Anderson (1975) __ Mont. __, 542 P.2d 1217. In that case, a nonprofit corporation supplying water only to its members (numbering about 600) and which had not held itself out to serve the public at large, was held not to be a public utility.

*We are advised that Montana has recently recodified its code law, in some cases amending existing provisions, and in others, merely renumbering them. With the exception of certain provisions of the new facility siting act, we have been unable to obtain texts of the new law as recodified. For this reason, code references cited here are to the former law and, except for the discussion of facility siting requirements, do not reflect these recent changes.

**See Earl Warren Legal Institute April 23, 1979, "Overview of State Public Utility Regulation Impact on Geothermal Direct Heat Applications," pp. 9-10.

III. EXCLUSIONS AND EXEMPTIONS

Although the language of its statute is unclear, it appears that Montana does not exempt municipal utilities from Commission regulation (see Id.; cf. Public Service Commission v. City of Helena 42M.527, 159 P.24). As noted above, nonprofit corporations serving only their own members have been judicially excluded from public utility status under the public use limitation.

IV. CERTIFICATION

We have found no certification requirement for Montana. The location of certain facilities is, however, regulated through the state's siting act, infra.

V. RATE REGULATION

The Public Service Commission regulates rates for heat, power, water and other services furnished by public utilities. [Mont.Rev. CodeAnn. §§70-105, 70-113, 70-119, 70-121.] Business other than utility business engaged in "directly or indirectly" by a utility requires separate accounting, and the Commission has authority over the books, accounts and records of any such nonutility business. [Mont.Rev.CodeAnn. §70-107.] We have found no statute governing the treatment of exploration expenses.

VI. FACILITY SITING

Montana has recently amended its facility siting act [Mont.Code Ann., as recodified, §75-20-101 et seq.] to define facilities subject to its provisions to include:

(d) any use of geothermal resources, including the use of underground space in existence or to be created, for the creation, use, or conversion of energy, designed for or capable of producing geothermally derived power equivalent to 25 million Btu per hour or more or any addition thereto having an estimated cost in excess of \$250,000,
[Mont.CodeAnn., as recodified, §75-20-104(7)(d).]

At this writing, we have not obtained the text of the operative provisions of the new facility siting act.

VII. SECURITIES REGULATION

The Commission has prior approval power over issuance of stocks and other securities by gas and electric companies, but the statute is silent with respect to other types of utilities. [Mont.Rev.Code Ann. §70-117.1.]

NEVADA

I. NATURE OF SERVICE

Nevada includes among public utility functions subject to Commission regulation the production, delivery or furnishing of heat, water for business, manufacturing, agricultural, or household use, and "power in any form or by any agency." [Nev.Rev.Stat.§704.020-2(b).]

In addition, counties are empowered to regulate persons (other than political subdivisions and certain nonprofit membership associations) furnishing water for compensation to persons within the county, if they are not otherwise regulated by the Commission. [Nev.Rev.Stat.§704.681.]

II. PUBLIC USE LIMITATIONS

The statute provides that the service must be delivered or furnished "for or to other persons . . ." to become subject to regulation as a public utility. [Id.] We have found no Nevada judicial opinions interpreting this language. However, a 1967 Opinion of the Nevada Attorney General expressed the view that a shopping center generating and selling electric power to its tenants was a public utility subject to certification and rate regulation within the literal meaning of the statute. Although the facts there involved some 60 tenants, the Opinion states that §704.020-2(b) requires that "a minimum of only two persons" be served, and that service to the "entire public" is not a prerequisite to Commission jurisdiction. [Nev. AGO 371, Jan. 13, 1967.] Neither the Commission nor the Courts are bound to follow such Opinions, and it seems doubtful the literal construction adopted by the Attorney General here could survive constitutional "public use" tests.

III. EXCLUSIONS AND EXEMPTIONS

Nevada provides several exclusions of potential significance for geothermal direct heat applications. Nev.Rev.Stat. §704.030 exempts the following entities from public utility status:

3. Corporations, cooperatives, nonprofit corporations or associations, companies, individuals, associations of individuals, their lessees, trustees or receivers appointed by any court whatsoever, engaged in the business of furnishing, for compensation, water or sewer services, or water and sewer services, to persons within this state if:

- (a) They serve 25 persons or less; or
- (b) Their gross sales for water or sewer services, or water and sewer services, amounted to \$11,000 or less during the immediately preceding 12 months; and
- (c) They do not own or control any other such business entity furnishing water or sewer service or water and sewer service within this state.

* * *

5. Corporations or persons not normally engaged in water production and sales and which sell or furnish water as an accommodation in an area where water is not available from a public utility, cooperative corporations and associations or political subdivisions engaged in the business of furnishing water, for compensation, to persons within the political subdivision. (Emphasis added.)

Like a number of other states, Nevada also provides that persons not otherwise engaged in business as public utilities and not furnishing heat, power, or water under a state or local franchise may, with Commission approval, sell any surplus beyond their own needs to others, including utilities, without becoming a public utility. [Nev.Rev.Stat. §§704.310 and 704.320.]

Cooperatives serving only their members are expressly declared to be public utilities. They are required to obtain certificates of public convenience and necessity and permission to modify or discontinue service, to pay certain annual assessments, and to submit various accounting reports to the Commission, but are otherwise exempt from Commission regulation. [Nev.Rev.Stat. §704.675.] Cooperatives serving their own members and the public are treated as public utilities subject to full Commission regulation; however, in specified cases certain established cooperatives

may enroll public utility customers as members in order to qualify for the limited Commission control specified for members-only co-operatives. [Id.,\$704.673.]

Municipalities constructing, leasing, operating or maintaining any public utility need not obtain certificates of public convenience and necessity [Nev.Rev.Stat.704.340], but we have found no authority exempting them from the Commission's general jurisdiction.

IV. CERTIFICATION

Except as indicated above, all public utilities must obtain a certificate of public convenience and necessity prior to construction or extension of facilities, subject to exemptions similar to those noted for Arizona and other states. [Nev.Rev.Stat.\$704.330.] The Commission has power to allocate territories in order to avoid or eliminate duplication of service. [Id.]

In addition, persons (other than local governments and those already granted certificates) who propose to supply water for new subdivisions or other land developments must furnish the Commission with a copy of any application made to local government entities; such entities cannot approve such applications until the Commission has approved the continuity and adequacy of the proposed water supply. [Nev.Rev.Stat.\$704.679.]

V. RATE REGULATION

The Commission regulates rates for all public utilities. [Nev. Rev.Stat.\$704.040.] We have found no statute applicable to treatment of affiliates or exploration costs.

VI. FACILITY SITING

Nevada has a facility siting act administered by the state environmental commission and applicable to all public utilities. [Nev.Rev. Stat.\$\$704.820-.900.] Construction permits based on an environmental review must be obtained for specified gas and electric plants and transmission lines, and for "water storage and transmission facilities." [Nev.Rev.Stat.\$704.860.] The Commission may not grant a permit unless

it finds, among other things, that the facility is needed, that it represents "minimum adverse environmental impact" and that it "will serve the public interest." [Nev.Rev.Stat.\$704.890.]

VII. SECURITIES REGULATION

The Commission has prior approval power over stock and bonds issued by public utilities, except for bonds payable up to one year and up to \$1,000,000, or 5% of the par value of the utility's then outstanding securities. [Nev.Rev.Stat.\$704.323.]

NEW MEXICO

I. NATURE OF SERVICE

New Mexico defines public utilities to include facilities for the supply, storage, distribution or furnishing of water for manufacturing, municipal, domestic or other uses, excluding irrigation; its statute also covers the production, transmission, conveyance, delivery or furnishing of steam for heat, power or other uses. [N.M.Stat.Ann. §68-3-2F(3),(4).]

II. PUBLIC USE LIMITATIONS

New Mexico's statute expressly declares that entities defined as public utilities in §68-3-2 are "affected with the public interest," and therefore subject to regulation [N.M.Stat.Ann. §68-3-1.] This declaration of policy is based upon explicit legislative findings that:

- 1) a substantial portion of their business and activities involves the rendition of essential public services to a large number of the general public;
- 2) their financing involves the investment of large sums of money, including capital obtained from many members of the general public; and
- 3) the development and extension of their business directly affects the development, growth and expansion of the general welfare, business and industry of the state. [Id.]

It seems doubtful that this declaration of policy could constitutionally be interpreted to apply to entities supplying designated utility services in cases where the facts actually presented do not support the legislative findings quoted (e.g., where service is not in fact rendered to "a large number of the public," or capital is not "obtained from many members of the general public"). However, this policy declaration applies only to public utilities as defined in §68-3-2. That section in turn imposes public utility status only where the service or commodity is furnished "to or for the public," necessitating the

same type of initial "public use" determination which would be required even in the absence of such a legislative declaration.

In Llano, Inc. v. Southern Union Gas Company (1964) 75N.M.7 399 P.2d 646, the New Mexico Supreme Court adopted the familiar position that furnishing "to or for the public" means holding oneself out, expressly or impliedly, as engaged in supplying the indefinite public, as distinguished from particular individuals. The court also observed that public utility status depends not on the number of persons served, but on whether the service is open to all members of the public who may require it. [399 P.2d 646, at p. 653.] Applying these criteria, the court held that a corporation which purchased natural gas from an oil company and constructed a pipeline to supply one existing industrial user and possibly several others in the future, was not supplying gas "to or for the public," and did not fall within any of the three categories set forth in the legislative policy declaration of §68-3-1.

More recently, the court reached a contrary result in Griffith v. New Mexico Public Service Commission (1974) 86N.M.113, 520 P.2d 269, where it construed the statute broadly to hold that a subdivider supplying about 50 lots with water from a nearby spring was engaged in service "to or for the public," and was a public utility subject to Commission regulation. Although paying lip service to the test applied in the Llano case, the court announced that "sales to sufficient of the public to clothe the operation with a public interest, as well as the specific language of the statute, will determine whether or not the operation of a water system is for the public use." [520 P.2d 269, at p. 272.] The court concluded that the legislative purpose to preserve the public health, safety and welfare embraced the regulation of "a water system which supplies water to lot owners of a subdivision." [Id.]

III. EXCLUSIONS AND EXEMPTIONS

Municipalities and certain counties are exempt from regulation unless they elect to submit to Commission jurisdiction. [N.M.Stat. Ann. §§68-3-2-D,F; 68-5-4; 68-5-5.] Rural electric cooperatives are expressly made subject to regulation. [N.M.Stat. Ann. §§68-3-1.1; 68-3-2-D,F.] The statutes are silent with respect to other types of cooperatives, but no reason appears why such entities would not be among the "companies"

included in the definition of "persons" which may be public utilities.

[See N.M.Stat.Ann. §68-3-2-D, F, and policy declaration of §68-3-1.1(2).]

Also exempted are persons who furnish utility services or commodities only to themselves, their employees, or tenants, without resale to others.

[N.M.Stat.Ann. §68-3-3.]

IV. CERTIFICATION

A certificate of public convenience and necessity must be obtained prior to the construction or operation of any public utility facility, except in cases similar to those noted for Arizona and other states.

[N.M.Stat.Ann. §68-7-1.] Upon the complaint of an existing public utility rendering the same type of service which claims to be injuriously affected by a proposed utility system, the Commission may make "just and reasonable" orders so as to avoid "unnecessary duplication and economic waste." [Id.]

V. RATE REGULATION

The Commission regulates rates for every public utility, except municipal utilities which have not elected to submit to Commission jurisdiction. [N.M.Stat.Ann. §68-5-4-A.] The Commission also has limited authority over the sale of gas, water, or electricity to a utility for resale to the public:

The sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such gas, water or electricity at the place where the major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate; Provided, however, that nothing herein contained shall be construed to permit regulation by the commission of production or sale price, at the well head, of gas or petroleum. [N.M.Stat.Ann. §68-5-4-B.]

We have found no statute governing treatment of affiliates or exploration expenses.

VI. FACILITY SITING

New Mexico's siting statute, authorizing Commission review and approval of environmental impacts, applies only to electric plants designed for or capable of producing at least 300,000 kilowatts for public use. [N.M.Stat.Ann. §68-7-1.2.]

VII. SECURITIES REGULATION

Public utility issuance of stock or securities payable more than 18 months after issuance is subject to Commission approval. [N.M.Stat. Ann. §68-5-6.]

NORTH DAKOTA

I. NATURE OF SERVICE

The Public Service Commission's general jurisdiction extends, among other things, to pipeline companies for the transportation of water; water companies for the storage and distribution of water for domestic or other beneficial uses; heating companies for the distribution of heat; and "all other public utilities engaged in business" anywhere in the state. [N.D.Cent.Code §49-02-01.] Geothermal direct uses might fall within any of the first three categories; the fourth category of "other public utilities" appears to add nothing to the types of service otherwise enumerated. [Cf. Id., §49-01-01-3.]

II. PUBLIC USE LIMITATIONS

We have found no express statutory requirement that the designated services be furnished "to the public," or equivalent language, in order to subject suppliers to regulation, nor have we found any judicial holding to this effect. Established constitutional doctrine would require that such a test be applied in practice, and it is likely that North Dakota would adopt one of the standard formulations applied in other states should the question arise.

III. EXCLUSIONS AND EXEMPTIONS

So far as relevant here, Commission jurisdiction over rates, contracts, services, adequacy of facilities and utility rules does not extend to 1) utilities operated by the state or by any city, county, town or other political subdivision, or 2) nonprofit utilities. All other utility provisions do apply to such entities, presumably including safety and certification requirements. [N.D.Cent.Code §49-02-01.1.]

IV. CERTIFICATION

North Dakota requires public utilities to obtain a certificate of public convenience and necessity for construction or operation of a

facility. [N.D.Cent.Code§49-03.1-01.] The grant of a certificate is not limited to instances where no similar service exists, but the Commission must consider the effect of the proposed service on other public utilities providing similar service in the same area. [N.D.Cent.Code§§49-03.1-03-04.] Other interested parties may complain to the Commission concerning construction or operation contemplated in violation of the certification requirement, and the Commission is empowered to enjoin such activities. [N.D.Cent.Code§49-03.1-08.]

V. RATE REGULATION

The Commission supervises the rates of all public utilities. [N.D.Cent.Code§49-02-03.] The Commission may require proof that no unreasonable profit is made in the sale of materials to or services supplied for any public utility by affiliates or other related entities. [Id., §49-02-02-6.] We have found no statute governing the treatment of exploration costs.

VI. FACILITY SITING

The siting statute would apply to geothermal facilities only to the extent that they might be designed for or capable of transporting water from or to an "energy conversion facility," defined to include certain plants for electric generation, gas and liquid hydrocarbon manufacture or refinement, and uranium enrichment. [N.D.Cent.Code §49-22-03.]

VII. SECURITIES REGULATION

Issuances of stock and debt securities maturing in more than one year must receive prior Commission approval. [N.D.Cent.Code§49-04-04.]

OREGON

I. NATURE OF SERVICE

Oregon defines public utility functions to include, among other things, the ownership, operation, management or control of all or a part of any plant or equipment for the production, transmission, delivery or furnishing of heat, water or power. [Or.Rev. Stat.§757.005(1)(a).] The terms heat, water, and power are not further defined.

II. PUBLIC USE LIMITATIONS

Individuals and entities engaged in the activities enumerated are public utilities if they perform the service or deliver the commodity "directly or indirectly to or for the public." The Oregon Supreme Court has held that this "public use" requirement is not met where a private irrigation company, formed principally to reclaim desert lands, furnishes water under some 1250 individual contracts with landowners within a 44,000 acre area, even where the public's right to obtain such a contract is conditioned only upon U.S. citizenship of the applicant and approval by the State Land Board. [See Central Oregon Irr. Co. v. Public Service Commission (1921) 101 Ore.442,196 P.832.]

III. EXCLUSIONS AND EXEMPTIONS

Or. Rev. Stat. §757.005(2) exempts the following, among others: municipally-owned or operated utilities; industries furnishing their excess production of heat, water, or power without profit to localities where no similar municipal or public utility service exists; certain nonprofit water systems; and any water utility serving less than 200 customers at a rate of \$10 per month or less, and with annual gross operating revenues under \$20,000.

IV. CERTIFICATION

Oregon has no statutory requirement for initial certification except through its facility siting law, infra. The Commission does have the power to order extensions of existing utility systems when required for the public convenience and necessity, conditional upon the grant of reasonable franchises to the affected utility. [Or.Rev.Stat.§757.050.]

V. RATE REGULATION

The Public Utilities Commission regulates the rates of every public utility. [Or.Rev.Stat.§575.020.] Affiliated interests of public utilities are defined. [Or.Rev.Stat.§575.015.] The Commission's control over the budgets and expenditures of public utilities reaches payments made to persons or corporations having an affiliated interest, and contracts with affiliates require Commission approval. [Or.Rev.Stat.§757.105(f).] We have found no statute governing exploration expenses.

VI. FACILITY SITING

Oregon requires site certification for energy facilities, including not only geothermal electric plants, but pipelines at least six inches in diameter and five miles long "used for the transportation of...a geothermal energy form..." [Or.Rev.Stat. §§469.300(10)(e)(a), 461.340.] The latter provision could include certain geothermal direct heat systems.

VII. SECURITIES REGULATION

Issuance of stocks and bonds by public utilities is subject to approval by the Commission, except as to bonds maturing not more than one year after issuance or renewal, and several other limited exceptions. [Or.Rev.Stat. §§757.400-.419.]

SOUTH DAKOTA

I. NATURE OF SERVICE

South Dakota's definition of "public utility" includes only electric and gas companies. [S.D. Compiled Laws Ann. §49-34A-1(12).]

II. PUBLIC USE LIMITATIONS

Service will be regulated if "to or for the public in whole or in part..." [Id.] We have found no South Dakota authorities interpreting this requirement.

III. EXCLUSIONS AND EXEMPTIONS

Publicly-owned utilities and rural electric cooperatives are exempt from regulation. [Id.]

IV. CERTIFICATION

Electric utilities have exclusive rights in "assigned service areas" based mainly on the position of electric lines as they existed on March 21, 1975. [S.D. Compiled Laws Ann. §§49-34A-42 to 44.]

V. RATE REGULATION

The Commission regulates rates for all public utilities. [S.D. Compiled Laws Ann. §49-34A-6.] Separate accounting for nonutility business is required, and "unreasonable" profits of affiliates in sales or services to public utility may be disallowed for rate-setting purposes. [S.D. Compiled Laws Ann. §49-34A-19.1, 19.2.] We have found no statute governing the treatment of exploration expenses.

VI. FACILITY SITING

South Dakota's siting statute applies only to electric facilities.
[S.D. Compiled Laws Ann.Ch.49-41B.]

VII. SECURITIES REGULATION

The incurring of debt, but not the issuance of stock, requires Commission approval, except as to debt maturing within one year or less. [S.D. Compiled Laws Ann. §§49-34A-29,30.]

TEXAS

I. NATURE OF SERVICE

Public utilities are defined in relevant part to include persons and entities owning or operating equipment or facilities for the transmission, storage, distribution, sale or furnishing of "potable" water. [Tex.Civ.Stat.Ann.Art.1446C§3(c)(4).] Like many state statutes, this one does not expressly cover "production" facilities. However, to the extent that such facilities might be separate from transmission or distribution facilities, they are likely to be covered by the "sale or furnishing" language of the statute if they produce potable water. Neither producers nor suppliers of non-potable water or steam are covered by the language of the statute.

II. PUBLIC USE LIMITATIONS

Those engaging in the activities described will be treated as public utilities if the service is provided "for compensation," "to the public or for resale to the public." [Id., §§3(c), 3(c)(4).] We have found no Texas authorities interpreting this requirement.

III. EXCLUSIONS AND EXEMPTIONS

Municipally-owned water utilities are exempt, as are entities which furnish utility services or commodities only to themselves, or to their tenants or employees. [Id., §3(c)(4).] "Corporations" are included in the state's public utility definition, and are defined broadly enough to include cooperatives. [Id., §§3(c),(m).]

IV. CERTIFICATION

Effective September 1, 1976, Texas required certification of public utilities as follows:

Sec. 49. For the purposes of this article only:
(a) "Retail public utility" means any person, corporation, municipality, political subdivision or agency, or cooperative corporation, now or hereafter operating, maintaining, or controlling in Texas facilities for providing retail utility service...

Sec. 50. Beginning one year after the effective date of this Act, unless otherwise specified:

(1) No public utility may in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.

(2) Except as otherwise provided in this article no retail public utility may furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another retail public utility on or after the effective date of this Act, without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located. [Id.]

Exceptions to the certification requirement similar to those noted for Arizona and other states are available to public utilities for interconnection of existing facilities to extend service to retail customers. [Id.,§51.]

V. RATE REGULATION

The Commission regulates rates for all public utilities. [Tex. Civ.Stat.Ann.Art.1446c§37.] The statute authorizes comprehensive Commission supervision of relations with affiliates. [Id.,§§3(i), 28,41(c)(1),67,68.] We have found no statute governing the treatment of exploration expenses.

VI. FACILITY SITING

We have found no utility siting procedure, except to the extent that certification involves a need determination.

VII. SECURITIES REGULATION

We have found no special provisions for regulation of utility securities.

UTAH

I. NATURE OF SERVICE

Utah's public utility definition covers both water and heat corporations, as follows:

The term "public utility" includes every...gas corporation, electrical corporation...water corporation...heat corporation [etc.] where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state of Utah for domestic, commercial or industrial use... [Utah Code Ann.§54-2-1(30).]

Section 54-2-1 further defines water and heat corporations as follows:

(15) The term "heating plant" includes all real estate, fixtures, machinery, appliances and personal property controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of artificial heat.

(16) The term "heat corporation" includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any heating plant for public service within this state.

(25) The term "water system" includes all reservoirs, tunnels, shafts, dams, dykes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, appointment, apportionment or measurement of water for power, fire protection, irrigation, reclamation or manufacturing, or for municipal, domestic or other beneficial use; provided, this shall not apply to private irrigation companies engaged in distributing water only to their stockholders.

(26) The term "water corporation" includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for public service within this state; provided, this shall not apply to private irrigation companies engaged in distributing water only to their stockholders; nor shall the term include towns, cities, counties, water conservancy districts, improvement districts or other governmental units created or organized under any general or special law of this state.

The statute does not define the term "artificial heat" used in subsection (15) above. Geothermal heat stored within the earth would be difficult to characterize as "artificial;" however, a court focussing on the method of delivery rather than the nature of the resource itself might conclude that a geothermal supplier is a "heat corporation" within the meaning of the statute.

II. PUBLIC USE LIMITATIONS

Water and heat corporations will be treated as public utilities "where the service is performed for or the commodity delivered to, the public generally," or for or to any public utility, subject to the exemptions noted below. [Utah Code Ann. §54-2-1(30); cf. §§54-2-1(16), (26).]

In a 1940 case, the Utah Supreme Court interpreted the phrase "to the public generally" to apply only to suppliers which hold themselves out to serve all who might apply within the service area -- an indefinite, unrestricted public. In that case, the court held that a non-profit electric company serving only its members did not meet this test, and was not a public utility. The court observed that:

[s]o long as a cooperative serves only its owner-members and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members or that a few or all the people in a given area are accorded membership, provided the arrangement is a bona fide cooperative or private service organization and is not a device prepared and operated to evade or circumvent the law. [Garkane Power Co. v. Public Service Commission (1940) 98 Utah 466, 100 P.2d571,573.]

Since Garkane, Utah's statute has been expressly amended to include gas and electric corporations which serve their own members, effectively overruling Garkane as to the "public" character of these types of utilities. [See Utah Code Ann. §54-2-1(30), quoted in part above; Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440F.2d36(10thCir.,1971); cf. Cottonwood Mall Shopping Center, Inc. v. Public Service Commission (1977) ___ Utah ___, 558 P.2d1331.] However, as to other types of utilities - including water and heat corporations - the statute has not been amended to reach membership cooperatives, and the Garkane test continues to be applied to determine public utility status. [See, e.g., Holmgren v. Utah-Idaho Sugar Co. (1978) ___ Utah ___, 582 P.2d856.]

III. EXCLUSIONS AND EXEMPTIONS

Private irrigation companies distributing water only to their stockholders are expressly exempted from public utility status. [Utah Code Ann. §54-2-1(25),(26), quoted above.]

The statute also specifically exempts gas and electrical corporations which distribute their commodity through private property alone, solely for their own use or that of their tenants, and not for resale. [Utah Code Ann. §54-2-1(18),(20); see also Cottonwood Mall Shopping Center, Inc. v. Public Service Commission, *supra*.] Water and heat corporations do not benefit from a similar statutory exemption, but such uses appear to be excluded in any event under the Garkane "public use" test discussed above.

Towns, cities, counties, special districts and other governmental units are exempt. [Utah Code Ann. §54-2-1(3),(26).]

Entities not otherwise engaged in business as public utilities which produce electric power, gas or water beyond the needs of their own business, may dispose of their surplus to public utilities without thereby becoming public utilities; all such transactions are, however, subject to Commission approval. [Utah Code Ann. §54-2-1(30).] The statute does not accord similar treatment for suppliers of surplus heat alone; if geothermal steam is considered "heat" rather than "water," users of high-temperature resources would not benefit from

this exemption. In any case, the exemption applies only where the surplus commodity is furnished to a public utility: whether the furnishing of surplus to nonutility users will result in utility status probably will depend upon the "public use" character of a particular transaction.

Entities not engaged in business exclusively as a public utility, and not otherwise exempt from regulation, will be regulated only to the extent of their public utility activities. [Id.]

IV. CERTIFICATION

Public utilities, including heat and water corporations, must obtain a certificate of public convenience and necessity before commencing construction or operation, subject to exceptions similar to those noted for Arizona and other states. [Utah Code Ann. §54-4-25.]

V. RATE REGULATION

The Commission regulates rates for all public utilities. [Utah Code Ann. §54-7-12.] We have found no statute governing the treatment of affiliate transactions or exploration costs.

VI. FACILITY SITING

We have found no utility siting statute for Utah.

VII. SECURITIES REGULATION

The Commission regulates securities issued by electric corporations, but not by other utilities. [Utah Code Ann. §54-4-31.]

WASHINGTON

I. NATURE OF SERVICE

Washington defines public service companies to include gas, electrical and water companies, among others. [Wash.Rev.Code Ann.§80.04.010.] The definition does not include heat companies. However, Commission jurisdiction over rates, services, facilities and practices extends to "all persons engaging...in the business of supplying any utility service or commodity to the public for compensation, and related activities[,] including, but not limited to" companies specifically defined as public service companies. [Id.,§80.01.040(3); emphasis added.]

The statute defines water companies as follows:

"Water system" includes all real estate, easements, fixtures, personal property, dams, dikes, head gates, weirs, canals, reservoirs, flumes or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement of water for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses for hire.

"Water company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, operating, or managing any water system for hire within this state: Provided, That it shall not include any water system serving less than sixty customers where the average annual gross revenue per customer does not exceed one hundred twenty dollars per year. [Wash.Rev.Code Ann.§80.04.010(1977); emphasis added.]

Whether "water" would include steam from high temperature geothermal sources is not apparent from the statute. Conceivably, steam could be treated as "gas" for regulatory purposes under Washington's definition, which reads as follows:

"Gas plant" includes all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of other type gas for light, heat or power.

"Gas company" includes every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state. [Id.]

II. PUBLIC USE LIMITATIONS

Washington has adopted the traditional test for "dedication to a public use" - i.e., whether the supplier holds itself out, expressly or impliedly, to supply its service for use either by the public in general or that portion of it which can be served by its facilities, or whether, on the contrary, it limits its service to particular users of its own selection.

In Inland Empire Rural Electrification Inc. v. Dept. of Public Service (1939) 199 Wash.527, 92 P.2d 258, the Washington Supreme Court applied this test to hold that a nonprofit electric corporation supplying power only to its members was not dedicated to the public use, and accordingly was not a public service corporation subject to regulation under Washington's statute. In reaching this result, the court acknowledged that, in charging its members the cost of its services, the company fell within the literal "for hire" language of the statute, but nevertheless concluded that its nonprofit operations were not within the intended reach of the public service corporation law. [See also Clark v. Olson (1934) 177Wash.237, 31 P.2d534, holding a supplier who furnished 19 other users with water at nominal cost from a tank and pipeline which he owned, not a public utility.]

On the other hand, a corporation providing water without charge to certain of its stockholders, but also serving for profit other customers located beyond its original service area, has been held to be a public utility, notwithstanding that its arrangements with outside customers were entirely the subject of private contracts. [State ex. rel. Addy v. Department of Public Works (1930) 158Wash.462, 291P.346.]

III. EXCLUSIONS AND EXEMPTIONS

As appears from the statute quoted above, Washington now expressly excludes from its "water company" definition water systems serving less than sixty customers, where the average annual gross revenue per customer does not exceed \$120.

The Commission's jurisdiction over municipally-owned utilities is sharply limited by Wash. Rev. Code. Ann. §80.04.500:

Nothing in this title shall authorize the commission to make or enforce any order affecting rates, tolls, rentals, contracts or charges or service rendered, or the adequacy or sufficiency of the facilities, equipment, instrumentalities or buildings, or the reasonableness of rules or regulations made, furnished, used, supplied or in force affecting any telephone line, gas plant, electrical plant or water system owned and operated by any city or town, or to make or enforce any order relating to the safety of any telephone line, electrical plant or water system owned and operated by any city or town, but all other provisions enumerated herein shall apply to public utilities owned by any city or town.

Thus, cities and towns are still subject to regulation in such matters as facility siting [Wash.Rev.Code Ann. §§80.50.010 to .902.]

IV. CERTIFICATION

Washington requires Commission certification only for gas companies. [Wash.Rev.Code Ann. §80.28.190.] Cities and counties are empowered to grant franchises for electric utilities, and to prescribe conditions for the construction and operation of transmission lines. [Id., §80.32.010.]

V. RATE REGULATION

As noted above, the Commission regulates the rates of all persons supplying "any utility service or commodity to the public for compensation, and related activities[,] including, but not limited to, electrical companies, gas companies, irrigation companies, ...and water companies." [Wash.Rev.Code Ann. §80.01.040.] The

Commission has express authority over dealings between affiliated companies and payments to affiliates. [Wash.Rev.Code Ann. §§80.16.010-.090.] We have found no statute governing the treatment of exploration expenses.

VI. FACILITY SITING

The Washington statute applies only to electric and gas facilities. [Wash.Rev.Code Ann. §§80.50.060,.020.]

VII. SECURITIES REGULATION

The Commission has prior approval of public utility issues of stocks and bonds maturing over one year from the date of issuance. [Wash.Rev.Code Ann. §§80.08.010-.040.]

WYOMING

I. NATURE OF SERVICE

Wyoming includes among public utility functions the supply, storage, distribution or furnishing of water for manufacturing, municipal, agriculture or domestic uses, and the production, transmission, conveyance, delivery or furnishing of steam or any other substance for heat or power. [Wyo.Stat. §37-1(v)(vi).]

II. PUBLIC USE LIMITATIONS

Public utilities are those providing service "to or for the public." [Id.] To determine whether this criterion is satisfied, the Wyoming Supreme Court has indicated that the following factors may be considered: 1) the interest of the public as a whole in the commodity supplied; 2) actual supply of the commodity to some "substantial portion" of the public; 3) the presence of monopoly characteristics as to the area served; 4) the scope of customer solicitation and acceptance of requests for service; 5) the ability to compete with existing utilities; and 6) the presence of eminent domain powers or special privileges to use public rights of way. [See Rural Electric Co. v. State Board of Equalization (1942) 57 Wyo. 451, 120 P.2d 741, 751-52; reh.den. 122 P.2d 189.]

The weight to be accorded to any particular factor presumably might vary with the circumstances of each case. In the case cited, the Wyoming Supreme Court found that all of the listed factors tended to establish the utility status of a rural electric cooperative, and so held; it rejected the claim that contractual service to members only insulated the supplier from public utility status.

In State Board of Equalization v. Stanolind Oil & Gas Co. (1939) 54 Wyo. 521, 94 P.2d 147, a company which bought natural gas, conveyed it through a pipeline and sold it to a refinery which consumed it, was held not to be furnishing gas "to and for the public" (as an earlier statute read).

More recently, in Phillips Petroleum Co. v. Public Service Comm'n. (1976) ___ Wyo. ___, 545 P.2d 1167, the court held that Phillips' sales of gas to a wholesaler, which then distributed the gas to retailers who ultimately sold it to the public, did not amount to sales "to or for the public," and did not subject Phillips to Commission jurisdiction.

III. EXCLUSIONS AND EXEMPTIONS

Exemptions from public utility status are set forth in Wyo. Stat. §37-1(f)(viii) in relevant part as follows:

(viii) None of the provisions of this chapter shall apply to . . . public utilities owned and operated by a municipality of the state of Wyoming, except as to that portion of such municipality owned and operated public utility, if any, as may extend services outside the corporate limits of such municipality . . .; nor to mutual water companies or associations having no capital stock and furnishing water service to members of such companies or associations only, and without charges other than assessments of members to reimburse such companies or associations for expenses incurred in their establishment or operation; nor to . . . the furnishing or distribution of water, nor to the production, deliver or furnishing of steam or any other substance, by a producer or other person, or for the use of tenants of such producer or other person and not for sale to others. Such exemptions shall not apply to metered or other direct sales of a utility commodity by such producer or other person to his tenants . . .

IV. CERTIFICATION

All public utilities must obtain a certificate of public convenience and necessity before construction or extension of facilities, subject to exceptions similar to those noted for Arizona and other states. [Wyo.Stat. §37-31.]

V. RATE REGULATION

The Public Service Commission regulates rates for all public utilities. [Wyo.Stat. §§37-20, 21.] We have found no statute governing the treatment of affiliate transactions or exploration expenses. However, we are advised that, in order to encourage the development of new resources, the Commission sometimes has allowed gas utilities to include exploration and drilling costs in their rate base, or to recover such costs as operating expenses in the year incurred. To date, the Commission has had no occasion to decide whether similar treatment might be extended to geothermal utilities. [Personal communication with Commission staff.]

VI. FACILITY SITING

Wyoming's siting statute covers energy facilities and industrial facilities costing at least \$50 million to construct. Energy facilities include only electric generation and various oil, gas and uranium facilities. [Wyo.Stat.§35-502.76.]

VII. SECURITIES REGULATION

The Commission regulates securities of gas and electric corporations only. [Wyo.Stat.§37-65.]

NATURE OF SERVICES COVERED

	<u>Water</u>	<u>Steam</u>	<u>Heat</u>	<u>Pipelines</u>
ARIZONA	Furnishing; for irrigation, fire protection or other public purposes (not including heating or cooling - see text, pp. 1-2).	Furnishing; for heating or cooling purposes		Status unclear - see text, p.2.
CALIFORNIA	Diversion, development, storage, supply distribution sale, furnishing, carriage, apportionment, measurement; for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial use.		Production, generation, transmission, delivery, or furnishing; for domestic, business, industrial or public use.	Transmission, storage, distribution or delivery of crude oil or other fluid substances, except water.
COLORADO	Supplying the public; for domestic, mechanical or public uses.			Supplying the public; for domestic, mechanical or public uses.
HAWAII	Production, conveyance, transmission, delivery or furnishing; uses not specified.		Production, conveyance, transmission, delivery or furnishing; uses not specified.	
IDAHO	Diversion, development, supply, distribution, sale, furnishing, carriage, apportionment or measurement; for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial use.			Transmission, storage, distribution or delivery of crude oil or other fluid substances, except water.
LOUISIANA	"Waterworks" covered; neither supply stage nor uses specified.		"Heat" covered; neither supply stage nor uses specified.	
MONTANA	Production, delivery or furnishing; for business, manufacturing or household use.		Production, delivery or furnishing; uses not specified.	
NEVADA	Production, delivery or furnishing; for business, manufacturing, agricultural or household use.		Production, delivery or furnishing; uses not specified.	
NEW MEXICO	Supply, storage, distribution or furnishing; for manufacturing, municipal, domestic or other uses, excluding irrigation.	Production, transmission, conveyance, delivery or furnishing; for heat or power or other uses.		
NORTH DAKOTA	Storage and distribution; for domestic or other beneficial uses.		Distribution	Transportation of water.
OREGON	Production, transmission, delivery or furnishing; uses not specified.		Production, transmission, delivery or furnishing; uses not specified.	
SOUTH DAKOTA	[Gas and electric utilities only.]			
TEXAS	Transmission, storage, distribution, sale or furnishing of potable water; uses not specified.			
UTAH	Diversion, development, storage, supply, distribution, sale, furnishing, carriage, appointment, apportionment or measurement; for power, fire protection, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial use.		Production, generation, transmission, delivery or furnishing of artificial heat; uses not specified.	
WASHINGTON	Supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement; for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses.	Commission jurisdiction extends to all persons engaging in the business of supplying "any utility service or commodity to the public for compensation, and related activities."		
WYOMING	Supply, storage, distribution or furnishing; for manufacturing, municipal, agriculture or domestic uses.	Production, transmission, conveyance, delivery or furnishing; for heat or power.		

EXEMPTIONS AND LIMITATIONS

(X = exemption; variations are described.)

	Municipal or Other Publicly-Owned Utilities	Cooperatives or Mutual Nonprofit Corporations	Small-Scale Utilities	Uses Solely by Producer, Tenants or Employees	Surplus or Incidental Sales	Other*
ARIZONA	X				X	Water for heating or cooling purposes (see text, pp. 1-2).
CALIFORNIA	X	Water cooperatives, serving members only.		Exempt as to heat corporations, but not as to water or pipeline corporations.	Possibly exempt as to surplus sales of water, electricity and other util. service.	Supply pursuant to certain negotiated contracts with users.
COLORADO	Exempt as to service within municipal boundaries.				Possibly exempt as to surplus or incidental sales from irrigation.	Supply pursuant to certain negotiated contracts with users.
HAWAII	X					Geothermal steam producers.
IDaho	X	X				Supply to selected users in limited areas pursuant to negotiated contracts.
LOUISIANA	Exempt unless elect regulation by referendum.	Electric corporations only.				
MONTANA		Nonprofit water corporations serving members only.				
NEVADA	Limited exemption for municipalities constructing, leasing, operating, or maintaining any public utility.	Persons and entities serving 25 persons or less, with less than \$11,000 annual gross sales, which do not own or control any other water-service business. Limited exemption for cooperatives serving members only.			Surplus heat, water, or power furnished by persons not otherwise public utilities or operating under local franchise.	Persons not normally engaged in water production and sales which furnish water as an accommodation where not otherwise available.
NEW MEXICO	Municipalities and counties exempt unless elect otherwise.			Exempt if not for resale.	Possibly exempt as to surplus or incidental sales from irrigation.	Possible exclusion for supply to strictly limited number of industrial users pursuant to certain negotiated contracts. Public utilities other than of the character defined in N.M.Stat. Ann. §68-3-2.
NORTH DAKOTA	Limited exemption.	Limited exemption.				
OREGON	Municipally-owned or -operated utilities.	Oregon nonprofit corporations, under specified conditions.	Water utilities serving less than 200 users at \$10/mo. or less, with less than \$20,000 annual gross operating revenues.		Surplus heat, water or power furnished without profit to localities where no similar service exists.	Possible exclusion for supply pursuant to negotiated contracts with users.
SOUTH DAKOTA						
TEXAS	Water utilities.			X		Suppliers of nonpotable water or steam not covered by utility definition.
UTAH	X	Statutory exemption for irrigation companies, & possible judicial exclusion for water & heat companies serving members only.		Gas & electric corporations if not for resale.	Surplus water supplied to a public utility by entities not otherwise public utilities.	
WASHINGTON	Limited exemption.	Possible judicial exclusion for nonprofit corporations serving members only.	Water systems serving less than 60 customers, with average annual gross revenues not more than \$120/customer.			
WYOMING	Exempt as to service within municipal boundaries.	Mutual water companies exempt under specified conditions.		Water & steam suppliers, if not for resale.		Supply to limited number of users pursuant to certain negotiated contracts.

*Exemptions or limitations noted in this column may provide a basis for exclusions in other listed categories where no specific exemption provision has been noted. Thus, for example, where suppliers with negotiated user contracts are exempted from public utility status in general, sales to tenants or employees or sales of surplus meeting this criterion, would also be exempt.