IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOONGATE WATER COMPANY, INC.,

Plaintiff-Appellant/Cross-Appellee,

vs.

No. 27,889

CITY OF LAS CRUCES,

Defendant-Appellee/Cross-Appellant.

On Appeal from the Third Judicial District Court
Doña Ana County, New Mexico
The Honorable Robert E. Robles, Presiding

CITY OF LAS CRUCES' ANSWER BRIEF

KELEHER & McLEOD, P.A.
Spencer Reid
Thomas C. Bird
Kurt Wihl
S. Charles Archuleta
Post Office Box AA
Albuquerque, New Mexico 87102

CITY OF LAS CRUCES
Marcia B. Driggers
200 N. Church Street
P.O. Box 20000
Las Cruces, New Mexico 88004

Attorneys for Defendant-Appellee/
Cross-Appellant

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STATEMENT OF COMPLIANCE WITH RULE 12-213(F)(3)

This Brief-in-Chief complies with the type-volume limitation imposed by Rule 12-213(F)(3). The word count feature of the word processing system (Microsoft Word, Version 2002) used to prepare the brief indicates a word count of Ten Thousand Seven Hundred Fifty Six [10,756], excluding the cover page, table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance.

I. INTRODUCTION

The City of Las Cruces (the "City") respectfully submits this Answer Brief to demonstrate that the District Court properly rejected the claims for damages presented by Moongate Water Company, Inc. ("Moongate") through its real estate appraiser, Dr. Vincent Barrett. The District Court correctly adopted the view of the City's utility property appraiser, Robert Pender, that Moongate's damages case was too speculative and that Moongate had failed to prove its damage claims. On the basis of Mr. Pender's opinions and other evidence confirming that Moongate had proven no compensable loss, the District Court declined to award Moongate damages.

II. SUMMARY OF PROCEEDINGS

A. Nature Of The Case.

Moongate appeals the District Court's determination that Moongate had failed to prove damages in its "takings" case against the City, based on the City's provision of water utility service in Dos Sueños, Los Enamorados, and Rincon Mesa, three annexed subdivisions ("Subdivisions") in the East Mesa area of Las Cruces.

B. Course Of Proceedings.

The District Court conducted a bench trial to determine the amount of damages, if any, sustained by Moongate. The District Court entered its findings of

fact and conclusions of law on May 9, 2007 and final judgment on June 12, 2007. *R.P.* at 3589-3612, 3631. The parties filed timely notices of appeal.

C. Summary Of Facts Relevant To Issues On Cross-Appeal.

The facts relevant to this appeal principally concern the speculative nature of Moongate's damage claims. Moongate characterized the property right taken in this case as the opportunity to provide water utility service within the Subdivisions pursuant to its Certificate of Convenience and Necessity ("CCN"). Dr. Barrett claimed that the value of this intangible right, and therefore Moongate's damages, should be determined by establishing a present market value for the "income stream" Moongate's service would generate in perpetuity. Moongate sought $2,535,000 as the present value of this "lost" income stream. Dr. Barrett acknowledged that his damage theory assumed that a potential buyer of the income stream would actually receive the benefit, in perpetuity, of Moongate building the necessary infrastructure, supplying the water, maintaining the system, billing and collecting payments from customers, and otherwise operating its utility system in the Subdivisions. The record in this case contradicts these assumptions, as the District Court correctly concluded.

Dr. Barrett also postulated a second category of damages based on Moongate's projected receipt of "Contributions in Aid of Construction" ("CIAC') from potential customers. His CIAC projections, however, assumed construction

Moongate acknowledged would never occur and conflicted with the rules governing the amount Moongate can charge for CIAC. The portion of Moongate's damage claim based on the present value of "lost" CIAC was $1,217,000. Moongate thus claimed over $3 million in total damages. The City presented evidence divided into six general categories to show that both components of Moongate's damages case were speculative and overreaching.

1. The City Assumed The Burden Of Planning And Financing The Expansion Of Utility Service.

First, the City demonstrated that the City, not Moongate, had undertaken the planning and financing required to provide actual water service in the Subdivision area. In comparison to the resources the City invested in making actual water service a reality, Moongate's efforts were insubstantial.

The City is a municipal corporation which operates both water and waste water utilities to serve urban residential subdivisions and customers in commercial, industrial, and multi-family residential structures. Vol. 15, 45 (Garcia). The City has planned for its growth. As part of that process, in 1995, the City developed a Master Plan that projected the extent and location of population growth and anticipated needs for infrastructure expansion and improvement to accommodate its anticipated growth. The Master Plan called for extensive and expensive expansion of the City's water and waste water utility systems. Vol. 14, 152-154, 157-160 (Garcia); Def. Ex. 14.

After twenty years of pursuing water rights necessary for its Master Plan, the City succeeded in obtaining the rights needed to support the City's expansion on the East Mesa. Vol. 14, 202 (Garcia). The City also developed additional wells, pumps, water storage tanks, water transmission pipes and other infrastructure improvements needed to provide service to the East Mesa. Vol. 14, 157-159 (Garcia).

Funding the improvements required the City to develop a Capital Improvement Plan and to issue municipal bonds to raise money for the construction of its projects in advance of the anticipated need. The City publicized the Capital Improvement Plan and invited the public to comment on the plan. Moongate did not protest, or comment upon, the City's plan to expend millions of dollars for water and waste water service expansion onto the East Mesa. Vol. 14, 160 (Garcia). The City borrowed and spent millions of dollars to drill wells, install pumps, build storage tank and build large water and waste water transmission lines to serve the growth of the City onto the East Mesa. Vol. 14, 157-160 (Garcia).

2. Moongate's Limited Opportunity.

Second, the City presented evidence showing that Moongate's lost "opportunity" was severely limited by the realties of land use regulation, fire flow requirements, Moongate's underdeveloped infrastructure, and its decision not to construct waste water facilities to provide waste water service. The District Court

set the dates of the three takings in this case as June 21, 2004 (Dos Suenos), December 20, 2004 (Los Enamorados), and March 28, 2005 (Rincon Mesa). *R.P.* at 3608. At the times that the Court determined that each of the three takings occurred, none of the properties had been subdivided. *R.P.* at 3591.

a. The Dos Sueños subdivision was built on a 140 acre tract of raw land. Plf. Ex. 1, p.3 (Garcia). Before the date of the taking, that land was zoned for residential use with a minimum lot size of one (1) acre. Plf. Ex. 1, p. 4. Notwithstanding the zoning, the land consisted of a single, unsubdivided tract upon which only one residence could be built. Plf. Ex. 1; Vol. 16, 114, 119 (O'Grady), Vol. 15, 41 (Garcia). Until the City approved a preliminary subdivision plat permitting dense residential development and agreed to provide water and waste water service to the property, the Dos Sueños subdivision could not be built. Vol. 14, 99-101 (Barrett); Vol. 16, 117 (O'Grady).

b. The Los Enamorados property contained about 39 acres. Vol. 13, 102 (Gariano); Plf. Ex. 4. Before the date of the taking, it was zoned for residential use with lots of ½ acre minimum size, Plf. Exs. 4, 5, 6, but it was not subdivided for this purpose and no development had occurred. Vol. III, 99 (Barrett). Moongate introduced no evidence of the number of lots within the property that became Los Enamorados prior to December 20, 2004, when the property was annexed, initially zoned, and master planned by the City. Accordingly, any determination of the

number of potential residential lots that could have been developed on the land that became Los Enamorados prior to December 20, 2004, would be speculation. At most, Moongate lost only a few potential residential water customers as a result of the City's annexation, zoning, and agreement to provide water and waste water utility service to what became Los Enamorados. Plf. Exs. 4, 5 and 6, p. 5; Vol. 15, 41-42 (Garcia); Vol. 16, 109 (O'Grady).

c. At the time that the City annexed, zoned, subdivided, and agreed to provide water and waste water service to the Rincon Mesa subdivision on March 28, 2005, (the date of the taking), the property was raw, undeveloped land consisting of about 52.8 acres. Plf. Exs. 7, 8 and 9; *R.P.* at 3462 (Pretrial Order, Stipulations, h). Prior to March 28, 2005, the land that became Rincon Mesa was zoned for residential lots with a minimum lot size of ½ acre, but was a single tract of land, that was not subdivided. Plf. Exs. 7, p. 6, 8 and 9, p.3; Vol. 15, 42 (Garcia).

Moongate had no infrastructure on any of the three tracts of land and no customers on any of the properties. Vol. 12, 69-72 (Gariano); Vol. 14, 17-18, 94 (Barrett). Also, there was no waste water service to any of the three properties, and Moongate could not provide this service. Vol. 16, 118 (O'Grady). Even if the properties had been subdivided and zoned, the land could not have been developed into lots smaller than ¾ acre, which is the minimum residential lot size for

properties with standard septic systems. Vol. 14, 212 (Garcia); Vol. 16, 118 (O'Grady). Waste water service was essential for achieving the density and use Moongate's damage claims projected. *R.P.* at 3592, 3595, 3596, 3601.

Further, Moongate had no ownership interest and no sovereign power in any of the lands that ultimately became the Subdivisions. Thus, Moongate could not cause the properties to be subdivided into more than the existing number of lots (one for Dos Sueños, one for Rincon Mesa, and an unsubstantiated, but small, number for Los Enamorados), and it could not cause the properties to be rezoned or replatted. Vol. 14, 215, 217 (Garcia); Vol. 16, 113-117 (O'Grady); Plf. Exs. 1-9 (showing existing plats and zoning). Significantly, no development of the Subdivisions occurred before the takings, using the services Moongate could provide.

In the ordinary course of an annexation, the City allows the developer to choose its water provider concurrent with annexation, zoning and preliminary approval of the subdivision plan or plat. In the Dos Sueños annexation, Moongate appeared at the City Council's March 15, 2004, meeting and questioned the City's right to provide water service. Vol. 14, 169-170 (Garcia). In response to Moongate, the City postponed a decision on utility service and preliminary subdivision approval to provide Moongate an opportunity to demonstrate its ability to serve Dos Sueños. Vol. 14, 170 (Garcia). It was undisputed that, absent

significant infrastructure improvements, Moongate could not serve or provide necessary fire flow to Dos Sueños. Vol. 12, 105-106, 128-29 (Gariano); Vol. 16, 117 (O'Grady).

Moongate made a presentation to the City and the Dos Sueños developer concerning the ways and means it might employ to provide water service. Vol. 12, 105, 108 (Gariano). The City concluded that Moongate's plan did not meet necessary fire flow requirements for the development. Vol. 12, 108-110 (Gariano). The developer reached the same conclusion and requested service from the City. Def. Ex. 36.

Moongate did not appear at the City Council's December 20, 2004, meeting when the City annexed and agreed to provide water and waste water utility service for the area which became Los Enamorados, or otherwise protest that action. Plf. Exs. 4, 5 and 6; *R.P.* at 3462 (Pretrial Order, Stipulations, h). Further, Moongate did not present to the City any plan for providing water or waste water utility service to the Los Enamorados Subdivision. Vol. 15, 69-70 (Garcia); Vol. 15, 98-99 (Reid).

The developer's original proposal for Los Enamorados included lots that were zoned for commercial development. Vol. 15, 122-124 (Philippou); Plf. Exs. 4, 5 and 6; Def. Ex. 39. Commercial development requires that the water service provider be able to provide a greater quantity of water for fire flow than the

quantity required for a residential development. The common standard used by the City is 2,500 gallons per minute for a minimum of two hours. Vol. 14, 190-191 (Garcia). Modeling performed by the City showed that, at best, Moongate could only achieve 650 gallons per minute fire flow for Los Enamorados. Def. Ex. 56. Even after system upgrades to serve other subdivisions, Moongate still did not have the ability to meet the 2,500 gallons per minute fire flow standard for the commercial properties in the planned Los Enamorados subdivision. Vol. 12, 118-119 (Gariano).

The opportunity taken by the City from Moongate was the opportunity to serve one residence in the area which became Dos Sueños; a small, but undetermined, number of households in the area which became Los Enamorados; and one household in the area which became Rincon Mesa. Vol. 16, 114 (O'Grady); Plf. Exs. 1, 4, 5, 6 and 7; Vol. 14, 97-103 (Barrett). Moongate's expert, Dr. Barrett, agreed that Moongate's alleged lost opportunity to serve was limited to the maximum number of houses that could have been built in the Subdivisions prior to the City's actions. Vol. 14, 94, 97-103 (Barrett).

3. The Deficiencies Of Line Extension No. 9.

Third, the City demonstrated that Moongate's claim for damages could not be reasonably anchored to Moongate's Proposed Line Extension No. 9. In July 2005, Moongate filed with the NMPRC its Advice Notice for a tentative plan to

build Line Extension No. 9. Vol. 12, 122 (Gariano); Def. Ex. 11. Line Extension No. 9 was filed with the NMPRC after all of the dates upon which the District Court ruled that the City had taken Moongate's opportunity to serve the land that became the Subdivisions. Plf. Exs. 6, 9 and 13; Def. Ex. 11 and 33.

The filing of Line Extension No. 9 was triggered by Moongate's commitment to serve a new and unrelated subdivision, Vista Chico, not by the Subdivisions at issue here. Vol. 12, 123-124 (Gariano). The design of Line Extension No. 9 was not affected by the City's takings. Vol. 12, 130 (Gariano).

Moongate's Line Extension No. 9 is a speculative plan to provide water service to a hypothetical 9,625 customers. Def. Ex. 11. Moongate's Vice President, Jeff Gariano, testified that development of the infrastructure called for in Line Extension No. 9 could take ten years, Vol. 12, 129 (Gariano), and that how the extension may actually be constructed depended on actual development. Vol. 12, 129 (Gariano).

The history of Line Extension No. 9 created further doubt concerning its viability. As part of the Advice Notice filed with the Commission, Moongate provided a computer model run prepared by Jeff Gariano, who is not an engineer, Vol. 12, 175 (Gariano), using a demonstration edition of a water system computer model called "KY Pipe". Vol. 13, 116 (Gariano). The model run printout states on its face that the program is not for professional use. *Id.* Moongate's model is a

demonstration product not intended for professional use and is therefore not reliable. Vol. 14, 205 (Garcia).

Matthew O'Grady and Jorge Garcia are both professional licensed engineers. They testified that the design of Line Extension No. 9 is incomplete and unreliable. It fails to include significant necessary transmission pipelines, tanks and wells, and is unworkable. Vol. 14, 193-201 (Garcia); Vol. 16, 121-122 (O'Grady). Also, Line Extension No. 9 does not address waste water service and fails to explain or depict the source of the water necessary to serve proposed water utility customers for whom it would be built. Computer modeling demonstrates that, even if Line Extension No. 9 were built, Moongate's system would not be able to provide peak day demand plus the necessary fire flow for the commercial development within Los Enamorados. Vol. 14, 201-202, 208-209 (Garcia); Def. Ex. 11. Information given as part of the Advice Notice does not demonstrate that Moongate could provide necessary fire flow to the Subdivisions at issue in this case. Vol. 14, 209 (Garcia); Def. Ex. 11. Whether, when, and how Line Extension No. 9 may be constructed was speculative. Vol. 15, 39-40 (Garcia); Vol. 1, 128-129 (Gariano).

4. Moongate's Claim For CIAC.

Fourth, the City demonstrated that Moongate's claim for damages based on an alleged loss of contributions in aid of construction ("CIAC") was untenable.

CIAC are actual contributions to a public utility made by a customer or developer for the public utility's construction of facilities specifically to serve those customers. Vol. 17, 9 (Pender). CIAC is not income to a utility and not part of an investment base upon which a utility is entitled to a return. Vol. 17, 25, 28, 35 (Pender).

Moongate's CIAC claim is based upon its Line Extension No. 9, filed with the NMPRC after the takings identified by the Court. Plf. Exs. 6, 9 and 13; Def. Ex. 11 and 33. Primary elements of Moongate's Line Extension No. 9 are its estimate of the total cost of building the line extension ($15,350,400), the total number of customers who could be served by building the line extension (9,625) and the calculated amount of CIAC for each such customer derived by dividing the estimated total cost by the number of potential customers ($1,595 per customer). Def. Ex. 11. For purposes of its damage claims with respect to CIAC, Moongate reduced this number to $1,435 per household. Plf. Exs. 34, 35 and 36.

Moongate claims it would have charged $1,435 to the developers and/or the estimated 943 households in the Subdivisions for a gross amount of $1,353,064 in CIAC. *Id.* In a conflict not addressed by Moongate, its damage witness, Dr. Barrett, assumed 951 households (rather than 943) for the CIAC claim, and thus a gross amount of $1,364,542. Plf. Ex. 39, p. 29.

Jeff Gariano testified that Moongate's actual cost of providing necessary infrastructure to provide basic water service to the Subdivisions would be approximately $406,800, collectively. Vol. 13, 119-121 (Gariano). Moongate further asserted that it could meet commercial fire flow for Los Enamorados for another $71,280, Vol. 13, 150 (Gariano), for a total cost to serve the Subdivisions of approximately $478,000. Nonetheless, Moongate claimed it was entitled to charge more than $1.3 million in CIAC.

Mr. Gariano testified that CIAC in excess of that required to serve the future Subdivisions will be held in an account and used to fund water and service to other potential future customers. Vol. 12, 122-123 (Gariano); Vol. 13, 78-79 (Gariano). This plan, and the amount Moongate proposed to charge as CIAC, violated Moongate's Rule of Service Number 19 issued by the NMPRC. That rule prohibits Moongate from charging any customer more in CIAC than the customer's proportionate cost of providing infrastructure, as a means of subsidizing service to other customers. Vol. 16, 177-182 (Dirmeier); Def. Ex. 144. Therefore, Moongate's proposed charges for CIAC to the Subdivisions are contrary to Rule 19. Vol. 16, 177-182 (Dirmeier); Def. Ex. 144.

Notwithstanding Moongate's claim for CIAC, it is undisputed that Moongate did not build any infrastructure pursuant to its proposed Line Extension No. 9 for the purpose of serving the Subdivisions annexed by the City before Line

Extension No. 9 was filed. Vol. 12, 180 (Gariano); Vol. 14, 37-38 (Barrett); Def. Ex. 11. Line Extension No. 9 has not been built, and will not be built, to serve the Subdivisions. Vol. 12, 130 (Gariano). Moongate has not incurred, and will not incur, any costs to serve the Subdivisions, and requires no CIAC to reimburse it for costs it has not incurred. Vol. 16, 185-186 (Dirmeier).

Dr. Barrett assumed that Moongate may charge the amount it claims in CIAC. He acknowledged that, if this assumption was incorrect, so was the amount claimed. Vol. 14, 61-62 (Barrett). Dr. Barrett was familiar with how CIAC is treated by the NMPRC. Vol. 14, 48 (Barrett). The City's expert, Michael Dirmeier, testified that the NMPRC will not permit Moongate to charge CIAC for improvements not constructed to serve an area not served by Moongate. Vol. 16, 177-182 (Dirmeier); Def. Ex. 144. CIAC is a cost to provide service, avoided when service is not provided. Here, Moongate did not incur any cost to provide service to the Subdivisions prior to the dates the Court determined that the City took Moongate's alleged opportunity to serve. Vol. 14, 17-18, 37 (Barrett); Vol. 16, 184-185 (Dirmeier).

5. Dr. Barrett's Other Indefensible Assumptions And Methodology.

Fifth, the City demonstrated that Moongate's claim for a lost hypothetical income stream rested on indefensible assumptions and methodology. Again, Dr. Barrett testified that Moongate's ongoing business suffered no damages by reason

of the takings. Vol. 13, 192-193 (Barrett). Mr. Gariano confirmed that Moongate had suffered no loss to its on-going business by reason of the takings determined by the Court, and acknowledged that its system and business continue to expand. Vol. 12, 157 (Gariano). Moongate still claimed takings damages, based on Dr. Barrett's opinions.

Dr. Barrett is a professional certified real estate appraiser, but he is not certified to appraise public utilities. Vol. 13, 175, Vol. 14, 58 (Barrett); Def. Ex. 115. His basic, mistaken assumption was that Moongate lost water sales to the Subdivisions, perpetually into the future. Vol. 14, 75, 80 (Barrett). He valued that loss by estimating the price a hypothetical buyer of the hypothetical income stream might pay for its present value. In doing so, he acknowledged that Moongate had no physical assets in the Subdivisions and that no physical asset of any kind was taken by the City from Moongate. Vol. 14, 17-18 (Barrett). His damage calculation therefore purported to appraise a stream of income generated without any Moongate assets or customers in the Subdivisons. Vol. 14, 19, 37 (Barrett).

Dr. Barrett did not perform a before-or-after appraisal. His justification for not doing so was that the loss of the opportunity to serve the Subdivisions was a complete taking unrelated to Moongate's on-going business. Vol. 13, 192-193 (Barrett). From an engineering and practical perspective, the lost opportunity to serve the Subdivisions was, at most, a partial taking. Any service by Moongate to

the Subdivisions would have to be an integral part of its total existing system, and could not be separated physically. Vol. 16, 111 (O'Grady). The wells from which water would be drawn, tanks in which water would be stored, transmission lines to deliver the water operation and maintenance of these systems would be the same and inseparable, had Moongate had the capacity to serve, and actually served, the Subdivisions. Vol. 16, 111-113 (O'Grady). Moongate did not have a separate CCN for the Subdivisions. Moongate could not serve the Subdivisions unless they were part of, and served by its current system. Vol. 16, 113 (O'Grady).

Dr. Barrett acknowledged that there are three common methodologies employed by appraisers to establish fair market value, which he identified as the price a willing informed buyer would need to pay to a willing informed seller for the asset appraised. They are: (1) replacement cost, (2) comparable sales, and (3) income based either on the discounted present value of the future income stream or on the capitalization of current earnings. Vol. 14, 5, 23-24 (Barrett). Dr. Barrett calculated the hypothetical income stream for the Subdivisions by assuming Moongate's current average monthly charges to its customers, $21.95, would be paid by 951 customers in the new Subdivisions, in perpetuity. Plf. Ex. 39, p. 25; Vol. 14, 19, 37, 63 (Barrett).

Dr. Barrett's assumption that Moongate lost the right to serve 951 customers was unsupported because zoning and platting prior to the takings did not permit

951 customers on the lands that became the Subdivisions. At the time of the takings of the Subdivisions, approximately three new connections would have been permissible. Vol. 16, 163, 199 (Dirmeier). Dr. Barrett also acknowledged that Moongate's opportunity to serve was limited to the maximum number of households that could have been built on the subject realty prior to the City's actions. Vol. 14, 94, 97-103 (Barrett).

Dr. Barrett disregarded the fact that Moongate is a regulated utility, and assumed that Moongate would be able to charge its current average rates to the Subdivisions, and that there would be no regulatory obstacles to it doing so. Vol. 14, 75-77, 79 (Barrett). The City was not permitted to cross examine with respect to this assumption. Vol. 14, 77-78 (Barrett). However, the City's regulatory expert testified that, when a utility's revenues increase with no new capital investment funded by the utility, the net result is a decrease in the rates the utility may charge all of its customers, both existing and new. Vol. 16, 167-173 (Dirmeier).

Dr. Barrett incorrectly assumed that Moongate would be able to charge future customers in the Subdivisions $21.95 per month for water service. On the contrary, such hypothetical new customers and all other existing Moongate customers would receive rate reductions to approximately $17.50 per connection

per month, which would yield no increase of income to Moongate. Vol. 16, 169-173 (Dirmeier).

Dr. Barrett's analysis of fair market value for the potentially lost income stream at $3.048 million, including CIAC, contains a glaring, fatal flaw. He assumed that the potential buyer of the income stream would actually receive the benefit of Moongate building the infrastructure to serve the subdivisions as part of its existing system, that Moongate would supply the water, maintain the system, bill and collect from the customers, and would actually generate the income stream to be paid over to the buyer. Vol. 14, 20-22; 38-42 (Barrett). Dr. Barrett suggested that one potential buyer might actually purchase the income stream he calculated. That hypothetical transaction, however, would require that Moongate actually build and maintain the infrastructure, serve, bill and collect from the customers, and supply the water to produce that income stream. Dr. Barrett offered no testimony regarding the fair market value of an opportunity to serve the areas in issue which did not include the means to do so. Vol. 14, 21-22, 38-44 (Barrett).

In practical terms, no person or entity could or would purchase the right and duty to serve the Subdivisions without the means necessary to do so, i.e. the wells (and thus the water), pumps, tanks, and other equipment. Vol. 16, 113-114 (O'Grady). Further, Dr. Barrett, while asserting he valued the loss of the opportunity to serve the Subdivisions on a stand-alone basis, actually based his

estimate of fair market value on the assumption that Moongate would serve the Subdivisions with its existing system and sources of water, and thus would have an income stream from that service, which it could sell. Vol. 14, 44, 46-47 (Barrett). Dr. Barrett did not value the potential loss of income on a stand-alone basis, but in fact, as part of and dependent upon Moongate's existing system. Vol. 14, 47-48 (Barrett).

There was no suggestion by either party that Moongate, in exchange for the $3.048 million, would actually build the system to serve the Subdivisions, supply the water to future residents, maintain the system, bill the customers, or collect the revenues, forever. There was consequently no basis for Dr. Barrett's conclusion that $3.048 million represents fair market value. Dr. Barrett acknowledged that, at the time of the taking, Moongate did not have any of this income, and effectively acknowledged that, but for the actions of the City in annexing, zoning, platting, and providing waste water utility service, the customers and, therefore, the income he projected for the Subdivisions could not be generated. Vol. 13, 182; Vol. 14, 93-94, 97-103 (Barrett).

The City's expert appraiser, Robert Pender, specializes in the valuation of utility property. Vol. 17, 5-7 (Pender). Mr. Pender is recognized as an accredited senior appraiser of public utility property by the American Society of Appraisers. Vol. 17, 7 (Pender). About 30 appraisers in the United States hold this

certification. Vol. 17, 7 (Pender). He has been in the business of valuing or appraising public utility property for 30 years, including his entire work history. Vol. 17, 7 (Pender).

Mr. Pender criticized Dr. Barrett's valuation opinion on many counts. He testified that Dr. Barrett's report is misleading, Vol. 17, 13-14 (Pender), and does not comply with professional standards. Vol. 17, 41-44 (Pender). Dr. Pender leveled other criticisms at Dr. Barrett's opinion:

a. Dr. Barrett purports to appraise a fee simple ownership in a marginal income stream. However, "fee simple" is a real estate concept. Further, an income stream is a product of tangible assets and a means to value that asset, but is not itself an asset subject to appraisal. Vol. 17, 13-14, 16-17 (Pender).

b. Dr. Barrett attempted to appraise the value of an income stream without identifying the asset that would produce the income. Vol. 15, 18 (Pender).

c. While Dr. Barrett purported to appraise the fair market value of an allegedly lost hypothetical net income stream on a stand-alone basis, as if it were a separate business unit, he assumed expenses to generate the income based upon Moongate's existing system. It is inappropriate to assume any potential buyer would pay a price predicated on Moongate's claimed expenses, as opposed to their own. Vol. 17, 20-21 (Pender).

d. Dr. Barrett stated that there might be one buyer in the universe for the claimed net income stream. Vol. 14, 21 (Barrett). Given such a limited market, he did not adequately discount the value of the hypothetical income. Vol. 17, 20-21 (Pender).

e. Dr. Barrett's analysis assumes that Moongate's current average rates would have applied to the Subdivisions, and that the incremental cost to Moongate of providing service would be only 17.5% of the new gross revenues. However, it was undisputed that this assumption is contrary to the way in which utilities establish their rates. Vol. 17, 24-27 (Pender). The rates utilities charge are based upon capital investment, excluding CIAC, plus a return on that investment, plus operating and maintenance expense. Vol. 17, 24-27 (Pender). When a utility makes no new investment to expand its service (because the expansion is funded by the customers via CIAC), but the number of customers, sales, and thus revenues all increase, ratemaking methodology dictates that rates go down for all customers on the utility system. Vol. 17, 30 (Pender).

f. Dr. Barrett failed to employ industry ratemaking methodology in calculating the claimed lost revenues. Vol. 17, 27-30 (Pender). As a result, Dr. Barrett overstates the rates which could be charged to customers in the Subdivisions.

g. Dr. Barrett's effort to treat the Subdivisions as wholly separate business units was inappropriate because, without water mains, meters, water rights, wells, tanks, pumps, pipes and all other components necessary to provide service, there is no source of revenue Vol. 17, 32-33 (Pender).

h. A potential buyer would not pay the $3.048 million claimed by Moongate for the right and obligation to serve the Subdivisions if the potential buyer must also make the investment to build the infrastructure necessary to serve the customers and generate revenue. Vol. 17, 34-35 (Pender). A prudent investor would reduce the amount claimed by Moongate by the cost to actually provide service, no part of which has been or will be advanced by Moongate, Vol. 17, 34-35 (Pender). Dr. Barrett did not address the cost of actually delivering service to the Subdivisions on a stand-alone/separate business unit basis. Vol. 17, 35 (Pender).

h. Appraisers traditionally employ three methodologies (1) cost, (2) comparable sales and (3) income. Vol. 17, 36 (Pender). These are methods used to value underlying assets. Given that Dr. Barrett identified no tangible assets serving these Subdivisions, the value derived for Moongate's claimed loss, on a cost basis, is zero. Vol. 17, 37-38 (Pender).

i. Dr. Barrett testified he found no similar sales of hypothetical income streams, and that there may be only one potential buyer in the universe who would

be interested in acquiring the future net income stream from future water customers in the Subdivisions. Regardless of the number of potential buyers, such a narrow or improbable market for this purported asset makes any valuation of that asset speculative at best. Vol. 14, 21 (Barrett); Vol. 17, 37-38 (Pender).

j. In the absence of the taking of tangible assets generating an income stream, it is inappropriate to attempt to place a fair market value on the income stream. Vol. 17, 38 (Pender). The most appropriate methodology for valuing the opportunity taken from Moongate was a before-and-after approach. Dr. Barrett failed to perform such an analysis. Vol. 17, 45-46 (Pender).

k. Dr. Barrett's appraisal does not represent, nor can it be construed to be, a reasonable valuation of the alleged damage to Moongate. Vol. 17, 47 (Pender). The District Court agreed, and therefore entered the findings which Moongate has failed to surmount in this appeal: the determinations that Dr. Barrett's appraisal was misleading, unprofessional, and unreasonable. *R.P.* at 3605 (No. 83), 3606 (No. 88), 3607 (No. 95).

6. Moongate's Inadequate Water Rights.

Sixth, the City presented evidence showing that Moongate lacked the water rights necessary to serve the Subdivisions and all the other subdivisions which it promised to serve. Moongate's damage claim was for the present value of an income stream in perpetuity. Vol. 14, 75, 80 (Barrett). The claim therefore

assumed the capacity to supply water to the Subdivisions and to meet all other demands for water on its existing and otherwise expanding system.

On the dates upon which the Court determined that the City took Moongate's opportunity to serve the land which became the Subdivisions in 2004 and 2005, Moongate operated primarily on two water permits: LRG-370 and LRG-371.

a. Under LRG-371, Moongate had the right to extract 736 acre feet per year. However, the place of use for this water is limited to several sections of land to the north and east of the Subdivision, and excludes all of the area encompassed by Line Extension No. 9. Vol. 16, 21-22, 26 (Turney); Def. Exs. 1f and 71. Moongate was aware of the limited place permitted for its use of LRG-371. Vol. 16, 26 (Turney). In recognition of this limitation, Moongate has applied to expand the area of use for LRG-371 to a much larger area. Vol. 16, 26-30 (Turney); Def. Ex. 88. However, that proposed expansion has not been granted. It is also the subject of numerous pending protests. Vol. 16, 31-32 (Turney); Def. Ex. 88.

b. Under LRG-370, Moongate has the right to 200 acre feet per year of water for use in all other areas in which it provided water service, including all of the area encompassed by Line Extension No. 9. Vol. 16, 7-8 (Turney). The undisputed testimony of Thomas Turney, former New Mexico State Engineer, demonstrated that, at the time of the taking of Moongate's opportunity to serve the

Subdivision, Moongate had no other lawful right to extract water to serve its customers residing outside the limited area of service permitted under LRG-371. Vol. 16, 14-18, 21 (Turney). Further, the total demand on its water supply at that time exceeded this 200 acre feet per year. Exh. 143; Vol. 16, 11, 36, 70 (Turney).

At the time of the City's taking of Moongate's opportunity to serve the land that became the Subdivisions, Louis Gariano, the president of Moongate, also had a right to extract up to 1,675 acre feet of water per year under LRG-370. *Id.* Jeff Gariano testified that there may have been a lease between his father and Moongate for Moongate to utilize Mr. Gariano's water rights. No document evidencing such a lease was introduced at trial. Further, no evidence that the State Engineer recognized or approved such a lease was introduced. Vol. 16, 8-9 (Turney). In the absence of publication of a public notice of the lease, followed by the State Engineer's approval, Moongate had no right to employ Mr. Gariano's water rights to meet its demand. Vol. 16, 11-13 (Turney). Further, there was evidence that the State Engineer's Office holds that Moongate's water rights under LRG-370 are limited to 200 acre feet per year. Vol. 16, 10-11 (Turney); Def. Ex. 143.

In October of 2006, long after the dates on which the Court determined there was a taking, Moongate did make efforts to acquire Mr. Gariano's rights under LRG-370. Def. Ex. 95. Mr. Turney testified, without dispute, that this effort was

defective, and that as of the date of trial, Moongate's lawful water supply to serve in all areas outside of the limited place of use of LRG-371, remained 200 acre feet per year. Vol. 16, 13-18, 21 (Turney). At 200 acre feet per year, Moongate did not have the capacity to serve the Subdivision.

Moongate has applied for many additional water rights from the Office of the State Engineer, but all such applications have been denied. Vol. 12, 133-134 (Gariano); Vol. 16, 96-99 (Turney); Plf. Ex. 53. Predictions about whether and when Moongate might have obtained any additional water rights were guesswork. Vol. 16, 56-57, 91 (Turney).

Moongate's current average customer usage of water is approximately 0.4 acre feet per year, Vol. 12, 134 (Gariano), though Mr. Turney expects that to rise by as much as 40% as its service area becomes more urbanized. Vol. 16, 37-38, 92 (Turney). At the end of 2004, Moongate had 3,719 customer connections. Def. Ex. 7. Moongate has added customers to its existing service area at the average rate of approximately 170 customers per year for the last 20 years. Def. Exs. 3-8, 81. This growth rate was confirmed by Jeff Gariano's testimony that Moongate had 4,060 customers at year-end 2006: exactly 341 new customers over two years. Moongate's historical rate of growth requires an additional 68 acre feet of water usage per year (170 new customers x 0.4 afpy). Vol. 12, 92, 195 (Gariano); Def.

Ex. 81. At an average of 0.4 acre feet per year for 4,060 customers, Moongate's water demand at year-end 2006 was 1,624 acre feet per year. Vol. 14, 89 (Barrett).

Jorge Garcia testified that the City expects Moongate to provide water service to the other subdivisions. Vol. 14, 172-176 (Garcia). Philip Philippou and Kenneth Thurston, the developers of these other subdivisions, testified that they expect Moongate to provide water service to these new subdivisions. Vol. 15, 132-138 (Philippou); Vol. 15, 151-153 (Thurston) Def. Exs. 65, 66, 67 and 141. Moongate has entered into signed contracts to provide water service to the Sierra Norte Heights, Sierra Norte II, and Monte Sombra, and Dos Lados subdivisions. Def. Exs. 66, 67, 68 and 114.

Dr. Barrett incorrectly assumed that Moongate lost an income stream in perpetuity because the loss of income stops as soon as Moongate uses its water rights for other customers. Vol. 16, 186, 202-203 (Dirmeier). Dr. Barrett acknowledged that the water Moongate is not selling to the Subdivisions may be sold elsewhere and, given his use of a fixed rate in calculating a damage claim, all sales are fungible; it does not matter to the calculation of the income stream where the water is sold. Vol. 14, 38-39, 86-88 (Barrett). Consequently, Moongate has fully mitigated any loss that it claims to have shown with reasonable certainty by committing its limited water rights to serve other customers in new subdivisions being built by Messrs. Philippou, Thurston, and others. Vol. 14, 172-176.

(Garcia); Vol. 15, 132-138 (Philippou); Vol. 15, 151-153 (Thurston); Vol. 16, 191-193 (Dirmeier); Vol. 12, 94-98, 131, Vol. 13, 13-14, 34, 36, 39-40, 52-53 (Gariano); Def. Exs. 65, 66, 67 and 114. All of the water that Moongate claims it might have sold to the Subdivisions thus has either already been sold or committed several times over to other developments. In other words, Moongate had no water available to supply to the Subdivisions at the time of the taking and thereafter. This is so even if the limitations on Moongate's rights under LRG-370 and LRG-371 are disregarded. Vol. 16, 92-96 (Turney).

Moongate cannot sell the same water supply twice. Vol. 14, 86-87 (Barrett). A damage claim based upon hypothetical water sales in perpetuity is not supported by the record. All lost potential water sales have been or are being mitigated.

III. ARGUMENT

A. A Substantial Evidence Standard Governs Review Of The District Court's Decision That Moongate Failed To Prove Damages.

Moongate contends that a *de novo* standard of review applies to the the District Court's conclusion that Moongate failed to prove damages. *See Moongate B-I-C*, at 10. Moongate ignores the fact that the trial consisted principally of conflicting expert opinions concerning Moongate's alleged lost opportunity to serve.

A substantial evidence standard governs review of the lower court's decisions about conflicting expert opinions and about valuations. *See, e.g.,*

Krattiger v. Krattiger, 81 N.M. 59, 60, 463 P.2d 35, 36 (1969) (value of liquor business fixed by lower court in divorce proceeding rested on, *inter alia*, expert appraisal and was therefore supported by substantial evidence); *Jurado v. Jurado*, 119 N.M. 522, 527, 892 P.2d 969, 974 (Ct. App. 1995) (holding that district court's choice of fair rate of return was supported by substantial evidence because it was within range presented by conflicting evidence); *Mattox v. Mattox*, 105 N.M. 479, 484, 734 P.2d 259, 264 (Ct. App. 1987) (holding that lower court's present valuation of pension plan was supported by substantial evidence, where it was within range of figures offered by opposing experts); *see also Sanchez v. Saylor*, 2000-NMCA-099, ¶¶ 14-16, 129 N.M. 742, 749 (reviewing lower court's valuation of partnership property using a substantial evidence standard). The opinion testimony of an expert witness can serve as substantial evidence supporting a judgment. *See, e.g., Sheraton Dev. Co., LLC v. Town of Chilili Land Grant*, 2003-NMCA-120, ¶¶ 32-33, 134 N.M. 444, 451; *City of Albuquerque v. Chapman*, 77 N.M. 86, 91, 419 P.2d 460, 464 (1966).

New Mexico's appellate courts recognize that it is the fact finder's role to weigh expert evidence and resolve conflicts in accord with the weight and credibility the fact finder attaches to the testimony. *See, e.g., State ex rel. Human Servs. Dep't v. Coleman*, 104 N.M. 500, 504, 723 P.2d 971, 975 (1986), *overruled on other grounds* by *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993); *State v.*

McGhee, 103 N.M. 100, 102-03, 703 P.2d 877, 879-80 (1985); *In re Ernesto M.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 567. The reviewing court defers to the fact finder's rulings in choosing between conflicting expert opinions. *Levario v. Ysidro Villareal Labor Agency*, 120 N.M. 734, 738, 906 P.2d 266, 270 (Ct. App. 1995). The appellate court does not reweigh contrary expert testimony. *Gonzales v. Sansoy*, 102 N.M. 136, 137, 692 P.2d 522, 523 (1984). Instead, all such conflicts should be resolved in favor of upholding the ruling below. *Id.*

New Mexico law affords wide discretion to courts and juries called upon to make decisions concerning valuation because valuation is a fact determination. For example, our appellate courts have repeatedly recognized that, in valuing corporate stock, courts have a great deal of discretion in reaching a factual determination of value. *E.g., Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972); *Smith v. First Alamogordo Bancorp, Inc.*, 114 N.M. 340, 344-345, 838 P.2d 494, 498-499 (Ct. App. 1992); *McCauley v. Tom McCauley & Son, Inc.*, 104 N.M. 523, 532, 724 P.2d 232, 241 (Ct. App. 1986). The considerable discretion accorded to the trial court in the valuation of intangibles has been recognized in many settings, including condemnation cases. *McCauley*, 104 N.M. at 532, 724 P.2d at 241 (citing *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983)), *see also City of Santa Fe v. Komis*, 114 N.M. 659, 662-63, 845 P.2d 753, 756-57 (1992) (stating that jury, in determining loss of value to land

in condemnation case, weighs testimony, including expert testimony, determines credibility of witnesses, reconciles inconsistent or contradictory statements, and determines where truth lies); *El Paso Elec. Co. v. Landers*, 82 N.M. 265, 266, 479 P.2d 769, 770 (1970) (stating, in affirming amount of condemnation verdict, that amounts awarded were between highest and lowest values testified to by witnesses and were therefore supported by substantial evidence; the appellate court will not weigh conflicting evidence of value and substitute its opinion for that of fact finder).

Moongate cannot avoid a substantial evidence standard simply by claiming that the District Court's "findings of fact were intertwined with the City's legal theories" about Moongate's rights. *B-I-C* at 10. At issue here are the reasons the District Court rejected Moongate's valuation of its intangible rights and concluded that Moongate failed to prove damages. Those reasons were factual, and therefore should be reviewed under a substantial evidence standard. *See, e.g., Board of Comm'rs of Doña Ana County v. Little,* 74 N.M. 605, 396 P.2d 591 (1964) (affirming under a substantial evidence standard District Court's decision in a condemnation case that no consequential damages had been proven); *Board of Comm'rs of Doña Ana County v. Gardner,* 57 N.M. 478, 260 P.2d 682 (1953) (affirming under a substantial evidence standard disallowance of consequential damages in a condemnation case).

B. Moongate Has Disregarded Rule 12-213(A) And Consequently Waived Its Challenges To The District Courts Findings.

The appellant must specifically address challenged findings and the substance of the evidence bearing upon them. Rules 12-213(A)(3) (4) NMRA; *In re Estate of Gardman*, 114 N.M. 793, 800, 845 P.2d 1247, 1254 (Ct. App. 1992). Failure to identify with particularity the findings that are not supported by substantial evidence and failure to recount the evidence supporting the challenged findings result in waiver of the substantial evidence challenge. *Id.*; *Trego v. Scott*, 1998-NMCA-080, ¶ 19, 125 N.M. 323, 328; *State ex rel. State Hwy. Comm'n v. Tanny*, 68 N.M 117, 123, 359 P.2d 350, 355 (1961) (applying a predecessor of Rule 12-213(A) in appeal of condemnation award). Also, unchallenged findings and conclusions are binding on appeal. *Cordova v. Broadbent,* 107 N.M. 215, 216, 755 P.2d 59, 60 (1988); *University of N.M. Police Officer's Ass'n v. University of N.M.*, 2004-NMCA-50, ¶ 2, 135 N.M. 655, 656.

Moongate ignores the substantial evidence supporting the District Court's conclusion that Moongate failed to prove damages with reasonable certainty. The only findings Moongate specifically challenges as lacking support in substantial evidence are the findings "to the effect" that Line Extension No. 9 "wouldn't work, couldn't be financed, and was speculative." *Moongate B-I-C* at 22. The District Court's conclusion that Moongate failed to prove any damages is overwhelmingly supported by substantial evidence and by findings Moongate has not challenged.

Moongate's challenges to the District Court's findings and conclusions as simply "erroneous," "irrelevant" or otherwise improper violates Rules 12-213A(3) and (4).

C. Substantial Evidence Supported The District Court's Decision To Reject Moongate's Damages Claim As Too Speculative.

In condemnation cases, speculation concerning damages is not substantial evidence. *See, e.g., Yates Petroleum Corp. v. Kennedy*, 108 N.M. 564, 569, 775 P.2d 1281, 1286 (1989) (rejecting as speculative testimony offered by landowner concerning amount of dust coverage); *City of Albuquerque v. PCA-Albuquerque No. 19*, 115 N.M. 739, 741-742, 858 P.2d 406, 408-409 (Ct. App. 1993) (rejecting as speculative testimony of appraiser). The court's objective in a condemnation case is to compensate for damages actually suffered, not to award damages which are speculative, conjectural, or remote. *Komis*, 114 N.M. at 662, 845 P.2d at 756. "Elements affecting value [in condemnation cases] that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value[.]" *Olson v. United States*, 292 U.S. 246, 257 (1934); *accord Detroit/Wayne County Stadium Auth. v. Drinkwater, Taylor & Merrill, Inc.*, 705 N.W.2d 549, 559-60 (Mich. Ct. App. 2005).

In New Mexico, a party seeking damages for lost profits must generally show such profits with reasonable certainty, accounting for the expenses incurred in earning the profit. *See, e.g., Camino Real Mobile Home Park P'ship v. Wolfe*, 119 N.M. 436, 447, 891 P.2d 1190 (1995); *Central Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶¶ 18-19, 121 N.M. 840, 847. A plaintiff claiming damages measured by lost profit therefore has the burden of providing an adequate evidentiary basis for determining damages, including proof of overhead or other costs or expenses, in addition to gross profit. *Central Sec. & Alarm Co.*, 1996-NMCA-060 at ¶ 21, 121 N.M. at 848.

Under Rules 11-703 and 11-705 NMRA, experts must satisfactorily explain the steps followed in reaching a conclusion, and without such an explanation and a supporting basis for it in the record, the opinion is not competent. *See State v. Foster*, 1999-NMSC-007, ¶ 43, 126 N.M. 646, 657; *In re Protest of Plaza del Sol Ltd. P'ship*, 104 N.M. 154, 160, 717 P.2d 1123, 1129 (Ct. App. 1986). In the context of condemnation cases, an expert's appraisal of fair market value not reasonably related to the actual facts of the case is incompetent. *See, e.g., In re Protest of Plaza del Sol Ltd. P'ship*, 104 N.M. at 160, 717 P.2d at 1129; *City of Albuquerque v. Chapman*, 76 N.M. 162, 168-69, 413 P.2d 204, 208 (1966); *City of Albuquerque v. PCA-Albuquerque No. 19,* 115 N.M. 739, 742, 858 P.2d 406, 409

(Ct. App. 1993); *Cibola Energy Corp. v. Roselli*, 105 N.M. 774, 776-77, 737 P.2d 555, 557-58 (Ct. App. 1987).

Moongate's case for damages failed all of these important tests. Moongate's efforts to overcome the fundamentally speculative nature of its damage claim with various legal arguments on appeal are unsuccessful. They unavoidably amount to arguments for reweighing the evidence, disregarding relevant New Mexico precedent, or overlooking the record demonstrating that Moongate's case for damages was unacceptably speculative.

1. The Record Confirms That Moongate Lacked The Capacity To Serve The Subdivisions At Issue.

Moongate argues on appeal that it had the ability to serve the taken properties. *Moongate B-I-C* at 16-24. Again, Moongate chose to ignore the abundant evidence showing that, as a matter of fact, Moongate could not demonstrate its ability to serve. A few of the most salient features of the record weighing against Moongate's characterization on appeal of its purported ability to serve are: (1) the striking contrasts between the planning, capitalization, and water rights development undertaken by the City in relation to its efforts to extend utility service to the East Mesa area, including the Subdivisions, and the lack of any comparable preparations undertaken by Moongate; (2) the absence of Moongate's infrastructure and Moongate customers on the three tracts in question; (3) Moongate's inability to demonstrate that it could provide the required fire flow

under the standards the City used for planning the Subdivisions; (4) the incompleteness and unreliability of Line Extension No. 9, particularly in relation to its failure to include necessary pipelines, tanks, and wells, and its failure to address the source of water for serving proposed customers; (5) the insufficiency of the water resources shown to be available to Moongate at the time of trial and uncertainty about whether and when Moongate would be able to procure additional water rights; (6) Moongate's disregard of Moongate's Rule 19, in assuming that it could charge customers more in CIAC than the customers' proportionate share of the cost of building infrastructure needed to provide service; and (7) Moongate's reliance on CIAC as a source of claimed revenues and profits, despite the fact that Moongate did not build, and will not build, infrastructure on the Subdivisions.

Moongate never contends that these are not issues of fact. Instead, Moongate argues that the case against its ability to serve "misconstrues the nature of what must be shown," that the City's arguments about the lack of evidence that Moongate had the ability to serve are "inconsistent with the realities of how water utility systems, by necessity, expand incrementally to meet growing demand," and that Moongate's ability to serve "must be judged on a macro scale." *Moongate B-I-C* at 16, 17, 18. Moongate rests these arguments on *Doña Ana Domestic Water Consumers Ass'n v. New Mexico Public Regulation Comm'n*, 2006-NMSC-032, 139 P.3d 166. ("*Doña Ana*"). *Id.* at 16-17.

The *Doña Ana* opinion, however, addressed the question of Moongate's ability to serve in a context unrelated to condemnation or speculative claims for damages. Dona Ana was a service territory dispute under NMSA 1978, § 62-9-1. The Association argued that Moongate could not show the Association's conduct "unreasonably interfere[d] with [Moongate] service or system" under § 62-9-1 because Moongate lacked the ability to serve in the area. The Supreme Court affirmed the Commission's use of a "half-mile" rule (a presumption that the utility holding a CCN is entitled to a right of exclusivity for areas within one half of a mile from its existing facilities) in deciding whether the interference requirement in § 62-9-1 had been met. *Id.* at ¶¶ 13-20, 139 P.3d at 170-72. Nothing in the Court's analysis of § 62-9-1, however, suggests that, in an inverse condemnation case, Moongate or any other public utility is somehow relieved of the burden of proving its lost profits damage claim with reasonable certainty. Nothing in the *Doña Ana* opinion indicates that the inquiry into whether Moongate lacked the capacity to serve is anything other than factual. Moongate essentially asks this Court to read *Dona Ana* as if it establishes a presumption of damages in takings cases brought by CCN holders.

Without a presumption of damages, Moongate's damages case succeeds or fails on the facts. In support of its argument that the District Court mistakenly viewed the evidence of Moongate's ability to serve without considering the matter

on a "macro scale," Moongate by necessity recounts the facts it believes demonstrate its ability to serve. *Moongate B-I-C* at 17-18. In doing so, Moongate explicitly invites a reweighing of the evidence on appeal, without presenting the facts which support the findings against it. Moongate repeats this error in arguing about the facts concerning the reliability of the computer modeling program it used, the fire flow standards the City used for planning purposes, and the pressure requirement specified in the City's master plan. *Id.* at 20-21.

Moongate's attempted defense of its claim for anticipated CIAC as damages also disregards the evidence showing that Moongate may not charge CIAC for nonexistent facilities or charge customers more in CIAC than the customers' proportionate share of the cost of the facility. *Id.* at 21-22. Moongate also may not sidestep the factual deficiencies in its CIAC position by suggesting that the District Court was not competent to judge the adequacy of Line Extension No. 9. On appeal, Moongate has not challenged the admission of the expert testimony the City provided to demonstrate that Line Extension No. 9 and its underpinnings were seriously deficient. Moongate's criticism of the District Court for considering the efforts the City devoted to planning and capitalizing actual service, on the grounds of relevance, also ignores the obvious pertinence of this evidence. *Id.* at 23. The District Court could properly consider the preparation and resources the City

invested as a means of confirming, by comparison, the untenability of Moongate's claim that it had the ability and resources needed to provide actual service.

2. The Record Confirms That The District Court Was Justified In Rejecting Dr. Barrett's Assumptions And Methodology.

Moongate also attempts to resurrect on appeal the discredited opinion of Dr. Barrett. *Moongate B-I-C* at 24-31. The District Court found Dr. Barrett's opinions to be misleading, unprofessional, and unreasonable. *R.P.* at 3605-3607. Moongate has not shown that these findings lack support in substantial evidence.

Moongate begins its defense of Dr. Barrett's appraisal with arguments concerning the sufficiency of Moongate's water rights, but again disregards all of the evidence supporting the conclusion that Moongate's water rights were inadequate. *Id.* at 24-25. Moongate insists that the evidence relating to its water rights "must be viewed within the policy framework which vests Moongate with its service rights." *Id.* at 25 (citing *Doña Ana*). Moongate again fails to acknowledge that the *Doña Ana* opinion does not address a damages claim for a utility's lost revenues in a condemnation suit or in any way relax the standards imposed by New Mexico law for recovery of such damages. The *Doña Ana* opinion does not exempt public utilities from the requirement that lost profit damages be demonstrated with reasonable certainty.

Also, Moongate may not avoid the standards imposed on parties seeking inverse condemnation damages by claming that questions about the long-term

sufficiency of Moongate's water rights or Moongate's ability to serve are questions within the jurisdiction of the PRC. *Id.* at 25. Moongate never filed a motion seeking an application of primary jurisdiction or exclusive jurisdiction principles. It has not appealed the admission of the abundant evidence showing the inadequacy of Moongate's water resources. The disputes about Moongate's water rights and its ability to serve were fact issues properly considered by the District Court at trial in deciding whether Dr. Barrett's opinions and Moongate's damages claim were too speculative. This Court should not retry the case against Moongate's ability to serve.

Moongate also revisits its positions concerning the CIAC portion of its damages claim in attempting to defend Dr. Barrett's opinions. *Moongate B-I-C* at 25-29. Again, Moongate fails to recount the testimony contrary to its CIAC position, while asking this Court to reweigh the evidence. Notably, Moongate has cited no authority for the recovery of CIAC as a component of takings damages for nonexistent facilities, intended to serve nonexistent customers. Unlike *Bd. of Educ. v. Thunder Mountain Water Co.*, 2007-NMSC-031, 141 N.M. 824, Moongate's situation does not involve condemnation of actual, existing utility facilities already paid for with CIAC. Moongate sought recovery for "lost" CIAC payments (in amounts it acknowledges are many times in excess of what it would have cost to provide service) in relation to assets it has not built, does not own, and

has not used to provide service. Moongate failed to defend Dr. Barrett's assumption that CIAC charges may exceed a customer's proportionate share of the cost of facilities built by a utility. Moongate also claims that it is somehow improper to consider "rate-based factors" in limiting Moongate's speculative, overreaching damage claim. Moongate's argument would permit it to present a takings case based on assumptions about the rates it will charge its customers for the next 100 years, but insulate those assumptions from challenges raising their inconsistency with regulatory reality. Moongate has not appealed the admission of expert testimony the City presented to support its challenges.

Moongate also attempts an appellate rehabilitation of Dr. Barrett's conclusions about the number of customer connections which should be used in determining Moongate's damages. *Moongate B-I-C* at 29-31. Moongate omits from this argument, however, any mention of Dr. Barrett's admission at trial that Moongate's lost opportunity to serve was limited by the maximum number of houses that could have been built in the Subdivisions at the time of the takings. Moongate is essentially arguing that, despite Dr. Barrett's testimony, it is entitled as a matter of law to base its damages calculation on the assumption that the maximum amount of development conceivably permissible at any point in the future would actually occur. Moongate's argument would also allow it to ignore the undisputed fact that, without the annexation, zoning, and replatting made

possible by the City, and without the City's provision of adequate fire flow and waste water service, the dense residential and commercial development Moongate's case rests upon would never occur. Moongate fails to cite any authority for this approach to damages, either in law or in the record in this case.

Moongate has also failed to demonstrate that Dr. Barrett could justifiably assume that the rate in effect at the time of the taking, or at the time of trial, would remain in effect for 100 years, or perpetuity. *Moongate B-I-C* at 31. Moongate cannot shield this assumption from factual scrutiny by arguing that ratemaking principles do not govern this action and that only the PRC can decide how it will regulate Moongate's rates. *Id.* The District Court correctly rejected as speculative and unreasonable the assumption that Moongate's rates will remain constant for the next century.

Moongate suggests that Dr. Barrett properly declined to use the "before and after" valuation method. *Moongate B-I-C* at 31-33. This suggestion ignores the facts. Moongate's condemnation claim was for the loss of an opportunity to serve under its CCN in the Subdivisions, which constituted only a small part of Moongate's total claimed service territory. If Moongate had been able to serve the Subdivisions, it would not have done so by creating a new, "stand-alone" water utility. It would have extended its existing system. These facts indicate that, to the extent a taking occurred in this case, it was if anything a partial taking. New

Mexico dictates use of the "before and after" approach "[i]n any case in which there is a partial taking of property ...." NMSA 1978, § 42A-1-26 (1981). The District Court properly concluded that Moongate's case presented a claim for a partial taking. *See also Bear Creek Water Ass'n, Inc. v. Town of Madison*, 416 So.2d 399, 401-402 (Miss. 1982) (recognizing that the proper measure of damages when a portion of a water utility's exclusive certificate of convenience and necessity is condemned is the difference between the fair market value of the business as a going concern immediately before the taking and the fair market value of the business after the taking).

Moongate argues that this case is not a partial taking because "each subdivision service area taken represents for all practical purposes a taking of the whole." *Moongate B-I-C* at 32. Moongate did not hold a separate CCN for each subdivision or even a separate CCN for the Subdivisions. It holds a CCN covering an area much larger than each or all of the Subdivisions. Also, Mr. Pender opined that the "before and after" method was the most apt in this case. The taking of the right under its CCN to serve the Subdivisions cannot be viewed as anything other than a partial taking, and therefore controlled by § 42A-1-26. The facts of this case made the "before and after" analysis the only factually sensible and legally permissible approach. *See Leigh v. Village of Los Lunas,* 2005-NMCA-025, ¶¶ 19-23, 137 N.M. 119, 126-127 (failure to present "before and after" evidence in a

partial taking case results in exclusion of the flawed damage testimony). Dr. Barrett's rejection of a "before and after" methodology presents only one in the long list of flaws in his opinion.

3. The Record Confirms That Moongate Failed To Demonstrate Any Entitlement To Damages, Even Assuming Moongate's Case Could Not Be Properly Characterized As A Claim For A Partial Taking.

Even if Dr. Barrett was correct in concluding that Moongate's case was not a partial taking, his opinion is nonetheless fatally speculative. In summary, the speculative elements in Moongate's damage case are:

a. Moongate's claims depended on it being able to establish that the Subdivisions would have been developed without action by the City. The evidence was uncontroverted that whether the Subdivisions would receive sewer service, or be replatted were wholly beyond Moongate's control.

b. Moongate's claims depended on it being able to establish that it had, or could obtain, water rights sufficient to serve the Subdivisions. The evidence at trial was uncontroverted that Moongate did not own sufficient water rights, and, in light of the State Engineer's Office denials of Moongate's applications for new water rights, the District Court could not make speculative assumptions about when, if ever, Moongate would obtain additional water rights. Moreover, the evidence showed that Moongate's commitments to use water rights to serve customers elsewhere consumed all of Moongate's existing water rights.

c. Moongate's claims depended on it establishing its ability to satisfy applicable fire flow requirements. The evidence established that no plan ever presented by Moongate would satisfy fire flow requirements for all three Subdivisions.

d. Moongate's claims depended on its establishing that it would actually construct the facilities contemplated by Line Extension No. 9, so as to justify its claimed CIAC charges. The evidence showed that completion of Line Extension No. 9 was speculative.

e. Moongate's claims depended on it being able to establish that it could charge to potential future customers in the Subdivisions the same rates for water service that Moongate charged to other customers and that such rates would remain unchanged in perpetuity. The evidence was uncontroverted that there could be no assurance that Moongate's rates would not change. Moreover, the evidence showed that Moongate could not charge those rates to potential new customers in the Subdivisions; on the contrary, if Moongate were to serve them with no new investment of its own capital, Moongate's rates would drop, and therefore produce no increase in net revenues; and

f. Moongate's claim for recovery of CIAC depended on it being able to establish that the amount it claimed it would charge for CIAC could indeed be charged. The evidence showed that Moongate could not charge any CIAC without

building the infrastructure to serve the Subdivisions. Moreover, the evidence showed that Moongate was not permitted to charge CIAC in excess of its costs, had it installed infrastructure to serve potential new customers in the Subdivisions.

g. Most importantly, Dr. Barrett impermissibly posited a buyer of a projected income stream who would pay a price that reflected the existence of facilities and services Moongate would not and could not provide.

These flaws remain embedded in Dr. Barrett's appraisal regardless of his failure to use the "before and after" method. They independently justify affirming the District Court's rejection of Dr. Barrett's appraisal.

IV. CONCLUSION

For the reasons stated above, the Court should affirm the District Court's conclusion that Moongate failed to prove damages with reasonable certainty.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By: 

Spencer Reid
Thomas C. Bird
Kurt Wihl
S. Charles Archuleta
Post Office Box AA
Albuquerque, New Mexico 87103
(505) 346-4646

– and –

CITY OF LAS CRUCES
Marcia B. Driggers
200 N. Church Street
P.O. Box 20000
Las Cruces, New Mexico 88004
(505) 541-2128

Attorneys for Defendant-Appellee/
Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were mailed on August 6, 2008, to the following individuals:

Kyle W. Gesswein, Esq.
P.O. Box 367
Las Cruces, NM 88004

William A. Walker, Jr., Esq.
650 E. Montana, Ste. G
Las Cruces, NM 88001

William H. Lazar, Esq.
P. O. Box 872
Tesuque, NM 87574

Thomas C. Bird
48656