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' BRIEF-IN-CHIEF ON CROSS APPEAL

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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 Five Thousand Eight Hundred Fifty One [5,851], 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 brief to demonstrate that the District Court erred as a matter of law in concluding that the rights of Moongate Water Company, Inc. ("Moongate") under its Certificate of Convenience and Necessity ("CCN") are exclusive as against the City, such that the City's actions in providing water service to subdivisions within the areas which Moongate claimed were covered by its CCN resulted in a "taking" of an intangible property interest.

II. SUMMARY OF PROCEEDINGS

A. Nature of the Case.

This cross-appeal arises from Moongate's inverse condemnation claims against the City, based on the City's provision of water service to three undeveloped tracts that were developed as the Dos Sueños, Los Enamorados, and Rincon Mesa subdivisions (collectively, the "Subdivisions"), located in the East Mesa area of Las Cruces. Moongate claimed that the Subdivisions are covered by its CCN and that it therefore had an exclusive right to serve the Subdivisions.

B. Course of Proceedings, Summary of Facts Relevant to Issues on Cross-Appeal.

Moongate filed its *First Amended Complaint for Declaratory Judgment, Injunctive Relief and Damages for Statutory Inverse Condemnation and for Uncompensated Taking* ("Complaint") containing three counts arising from

disputes between Moongate, a public utility regulated by the New Mexico Public Regulation Commission, (the "Commission" or "PRC"), and the City in relation to water utility service in the Subdivisions. *R.P.* at 390-407. The City annexed the Subdivisions, and committed to provide municipal water utility service within them. The City has fewer than 200,000 residents.

Count I of Moongate's Complaint sought an injunction and a declaratory judgment stating, *inter alia*, that Moongate is exclusively authorized to serve the Subdivisions and surrounding areas under its CCN. *R.P.* at 397-400. A CCN is a certificate issued to public utilities by the PRC under NMSA 1978, § 62-9-1 (2005), to authorize a public utility to begin the construction, extension or operation of any public utility plant or system.

Count II of the Complaint sought compensation for inverse condemnation of Moongate's allegedly exclusive right to serve the Subdivisions and other alleged property interests. *R.P.* at 400-401.

Count III sought compensation for a "regulatory taking" of Moongate's allegedly exclusive right to serve the Subdivisions and other alleged property rights. *R.P.* at 402-403.

The City moved for summary judgment on all three counts of the Complaint, *R.P.* at 1279-1332. Moongate then filed a cross-motion for summary judgment only on Counts II and III. *R.P.* at 1354-1547. The District Court denied the City's

motion, and granted Moongate's cross-motion on Counts II and III. *R.P.* at 2160-2163. The District Court entered summary judgment for Moongate, determining that Moongate's rights were exclusive as to the City, and holding the City would be liable for such damages as Moongate could prove. *Id.*

In conjunction with its summary judgment rulings, the District Court entered *Court's Findings of Fact and Conclusions of Law.* *R.P.* at 2136-2152. The District Court concluded that "[u]nless otherwise determined by the PRC, Moongate's Certificate of Convenience and Necessity (CCN) is a grant of an exclusive territory." *R.P.* at 2149, ¶ 39. The District Court further concluded that the City's provision of water service to the Subdivisions was an intrusion into the service area of Moongate, rendering the City liable to Moongate for damages resulting from inverse condemnation or regulatory taking. *R.P.* at 2151.

The District Court based its liability ruling on NMSA 1978, § 62-3-2.1(C) (1991), and *Fleming v. Town of Silver City*, 1999-NMCA-149, 128 N.M. 295. *R.P.* at 2144, 2145, 2150, 2151. The City unsuccessfully sought interlocutory appellate review of this determination. *R.P.* at 2777-2778.

In response to the District Court's conclusion that Moongate's CCN was a grant of an exclusive territory, "[u]nless otherwise determined by the PRC," the City later moved for summary judgment on Count I, not yet addressed by the District Court, to demonstrate that the PRC had otherwise determined that

Moongate's CCN does not grant an exclusive right to serve the Subdivisions. *R.P.* at 2375-2471. The City's *Motion for Summary Judgment on Count I of First Amended Complaint and its Memorandum Brief in Support* included copies, certified by the PRC records manager, of the PRC orders relevant to Moongate's CCN. *R.P.* at 2393- 2471. The City pointed out that, when Moongate first applied for a CCN, it sought designation of a specific, geographic service territory, but that Moongate later accepted a "plant, lines and system" CCN instead, with no grant of a specific service territory. *R.P.* at 2373-2374. The CCN originally granted to Moongate thus delineated no geographic service area for Moongate and gave it no exclusive right to serve. *R.P.* at 2380-2381. The City presented other PRC orders confirming that Moongate's original CCN did not confer a grant of exclusive territorial rights enforceable against the City and that the PRC had not granted such rights subsequently. *R.P.* at 2382-2391. In regard to the PRC's authority to grant CCNs generally, the City presented the Final Order issued in Moongate's Case No. 2754, which clarified that "[t]o the extent any prior order purports to grant a 'service territory,' we hereby interpret such order to grant only a certificate to construct or operate public utility plant." *R.P.* at 2384-2385, 2458.

The City thus submitted to the District Court the administrative record from the PRC to confirm that, contrary to Moongate's assertions, the PRC did not grant Moongate an exclusive right to serve in the area of the Subdivisions and

affirmatively clarified that it did not issue a CCN granting Moongate a "service territory."

Moongate moved to strike the City's Motion for Summary Judgment on Count I on the grounds that Moongate was withdrawing "ungranted" claims for relief under Count I, that such claims were therefore moot, and that the City's motion was untimely. *R.P.* at 2486-2495. The City opposed Moongate's motion to strike. *R.P.* at 2633-2644.

At the District Court hearing on Moongate's motion to strike, the City stressed that the PRC has the exclusive authority to confer CCN rights and that the District Court must therefore examine the administrative record to determine whether, in declaring Moongate's CCN rights to be exclusive, the Court was acting beyond its jurisdiction. *Tr. Sept. 11, 2006* at 15-16. If the PRC had not determined that Moongate's CCN rights are exclusive, the City argued, then the District Court would be exceeding its subject matter jurisdiction by conferring exclusive territorial rights over the Subdivisions because only the PRC could confer such rights. *Id.* at 16-18. The City also pointed out that Moongate's timeliness objection was not well taken because the issues posed by Count I called into question the Court's jurisdiction to confer exclusive territorial rights on Moongate, in contravention of the rulings of the PRC, and that subject matter jurisdiction may

be addressed at any time. *Id.* at 17-18. Nevertheless, the District Court granted the motion to strike. *R.P.* at 2746.

The City presented many of the same arguments concerning the administrative record when Moongate requested that the District Court "clarify" the status of Count I. *R.P.* at 2782-2797. The City later applied unsuccessfully to the New Mexico Supreme Court for a writ of prohibition or supervisory control based on what the City believed were extra-jurisdictional rulings.

The District Court conducted a bench trial beginning on January 18, 2007. Immediately before trial, the District Court entered an order clarifying and confirming its earlier ruling to the effect that it had determined that Moongate's CCN rights were enforceable as exclusive against the City. *R.P.* at 3440-3441 (finding and concluding that "a [CCN] from the [Commission] creates a regulated monopoly; the grant of [a CCN] is therefore a grant of exclusivity."). The bench trial solely concerned damages claimed by Moongate. In findings of fact and conclusions of law entered on May 9, 2007, the District Court concluded that Moongate failed to demonstrate that it had suffered any damages, but reaffirmed its conclusions that Moongate's CCN rights over the Subdivisions were a compensable property interest, which the City had taken. *R.P.* at 3612, ¶ 13. The District Court entered its final judgment on June 2, 2007. *R.P.* at 3631.

In this cross appeal, the City challenges as contrary to law, and lacking support in substantial evidence in the record, the District Court's findings and conclusions which expressly or implicitly determine that Moongate's CCN rights were exclusive in relation to the City, such that the City's provision of water utility service within the Subdivisions amounted to a taking. These include Findings of Fact No. 10, 19, 29, 97, and 103-105. *R.P.* at 3591, 3593, 3595, 3607, 3608. They also include Conclusion of Law No. 13. *R.P.* at 3631. The record contains no evidence demonstrating that Moongate's CCN rights are exclusive in relation to the City. The issue presented on cross appeal is a pure question of law.

III. ARGUMENT

A. New Mexico Statutes And Precedents Foreclosed The District Court's Erroneous Conclusion That Moongate's CCN Rights Are Exclusive As Against the City.

STATEMENT OF PRESERVATION: The City preserved the issues raised in this cross appeal by repeatedly seeking summary judgment, relief by extraordinary writ, and interlocutory review in relation to the treatment of Moongate's CCN rights as exclusive against the City, as recounted in the Course of Proceedings and Summary of Facts Relevant to Issues on Cross Appeal, above.

STANDARD OF REVIEW: A *de novo* standard controls review of District Court determinations of issues of subject matter jurisdiction and statutory construction. *See, e.g., Helen G. v. Mark J.H.,* 2006-NMCA-136, ¶ 11, 145 P.3d 98 ("The

interpretation of statutes is a question of law that we review *de novo*."), *rev'd on other grounds, Antonio R. v. Mark J.H.*, 2008-NMSC-602, 175 P.3d 914; *Gallegos v. Pueblo of Tesuque,* 2002-NMSC-12, ¶ 6, 132 N.M. 207 ("...the determination of whether jurisdiction exists is a question of law which an appellate court reviews *de novo*.").

The issue raised in this cross appeal presents the threshold question whether, under New Mexico law, and in light of the relevant administrative record, the District Court incorrectly concluded that Moongate's rights under its CCN were exclusive in relation to the City, such that the City became liable for a taking upon the decision to provide water utility service to the Subdivisions. Resolution of this issue in favor of the City will obviate the need to determine whether to affirm the District Court's decision that Moongate failed to demonstrate damages with reasonable certainty. The City therefore respectfully proposes that the Court consider the issue of whether Moongate's CCN rights were compensable property interests before considering the sufficiency of the evidence supporting the District Court's decision to award no damages to Moongate.

Moongate was not entitled to maintain a takings case because, under New Mexico statutes and precedent, Moongate's CCN rights were not exclusive as against a municipal utility and therefore not compensable property rights under the law of New Mexico or the United States. The City is entitled to compete with

Moongate for water utility customers without the constraint of having to compensate Moongate. These conclusions follow from several features of New Mexico law.

1. The Municipal Code Does Not Contemplate Condemnation Of CCN Rights For Unserved Territory.

First, the New Mexico Municipal Code expressly authorizes municipalities to extend municipal water utility service into annexed areas, with no suggestion that the service rights conferred by the Commission on regulated utility service providers constrain that right, where the CCN holder has no customers or facilities in the service area in dispute. *See* NMSA 1978, §§ 3-7-1(B) (1995) (stating that a municipality may annex new territory by any of the three methods authorized in the Municipal Code, "except where limitations of annexation are provided by law"); 3-7-2 (1993) (stating that "[a] municipal utility...may extend service to territory annexed by the municipality"); *R.P.* at 3592 (Finding of Fact No. 11: "Moongate had no infrastructure on any of the three tracts of land and no customers on any of the property."). Section 3-7-2 notably directs that the Commission shall resolve disputes about serving the annexed area when the municipality is served by a regulated utility and the annexed area is already served by another regulated provider. The legislature did not direct that the Commission address disputes relating to the extension of a municipal utility's services into

territory allegedly covered by a regulated provider's CCN, where no service is being provided.

Additionally, the Municipal Code grants municipalities the power to acquire and use water and water facilities for public use. *See generally* NMSA 1978, §§ 3-23-1 to -10; § 3-27-1 to -9. These statutes authorize the City to "acquire, maintain, contract for or condemn for use as a municipal utility privately owned water facilities used or to be used for the furnishing and supply of water to the municipality or its inhabitants," within and without the municipal boundary. § 3-27-2(A)(2) (1994). Our legislature contemplated municipal condemnation of the "privately owned water facilities" of utilities serving in annexed areas, but this language does not accommodate the conclusion that the legislature intended that municipalities would compensate regulated utility service providers for CCN rights if the annexed area contains no "privately owned water facilities," which the municipality intends to use as a municipal utility.

A municipal utility is not required to have a CCN issued by the Commission. CCN rights held by an existing regulated utility would therefore not fall within the scope of the phrase "facilities used or to be used" in § 3-27-2(A)(2). *See also Lynnwood Util. Co. v. City of Franklin*, 1990 Tenn. App. LEXIS 228 **8-9 (Tenn. Ct. App. Apr. 6, 1990) (concluding under Tennessee condemnation statute that CCN rights are not "facilities"). The Municipal Code thus supports the conclusion

that the legislature did not intend that a private utility's CCN rights for service areas containing no "facilities" would be compensable when a municipality annexes new territory and expands municipal utility service.

2. The New Mexico Public Utilities Act Weighs Heavily Against The District Court's Treatment Of Moongate's CCN Rights.

The limited jurisdiction of the Commission and the correspondingly limited scope of the New Mexico Public Utilities Act (the "NMPUA") weigh significantly against treating Moongate's CCN rights as exclusive in relation to the rights of the City to operate its municipal water utility. The relevant provisions of the NMPUA confirm that the Commission does not have jurisdiction over the utility operations of municipalities, other than Albuquerque, that do not elect to be regulated by the Commission. The New Mexico legislature explicitly excluded municipalities with fewer than 200,000 residents from the jurisdictional scope of the NMPUA. *See* NMSA 1978, §§ 62-6-4(A) (2003) (granting the Commission the "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations," but providing that "[n]othing in this section shall be deemed to confer upon the [C]omission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by a municipal corporation..."); 62-6-5 (1993) (allowing municipalities to "come within the provisions of the [NMPUA]" upon an election of the municipality to do so, as specified in subsection A).

Furthermore, the definitions language in section 62-3-3(E) decisively expresses the legislature's intent to make the NMPUA inapplicable to municipal utilities, unless the municipality elects regulation by the Commission. Our Supreme Court in *Public Serv. Co. of N.M. v. New Mexico Pub. Util. Comm'n,* 128 N.M. 309, 313, 992 P.2d 860, 864 (1999) reviewed the relevant language and stated:

> The legislature has phrased Section 62-3-3(E) in very plain language: "In the absence of [such] voluntary election by any municipality to come with the provisions of the [NMPUA], the municipality shall be expressly excluded from the operation of that act and...*all of its provisions,* and no such municipality shall *for any purpose* be considered a public utility."

(emphasis in original).

Similarly, in *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, the Supreme Court stated:

> The [NM]PUA definitional statute, Section 62-3-3(E), could not be more explicit: "[N]o such municipality shall *for any purpose* be considered a public utility."...The exclusion of municipalities is reemphasized by other statues in the [NM]PUA.
>
> The definitional statute sets the basic parameters for everything else in the [NM]PUA. Once something is defined out of a statute it cannot, without an unambiguous and specific provision be brought back in.

120 N.M. 579, 588-89, 904 P.2d 28, 37-38 (1995) (emphasis in original). The Commission thus has no jurisdiction over a municipal utility, and the provisions of

the NMPUA do not apply to a municipal utility, unless the municipal corporation opts to become regulated. *City of Sunland Park v. New Mexico Pub. Regulation Comm'n*, 2004-NMCA-024, ¶ 19, 135 N.M. 143, 149. The legislature intended that municipal utilities be regulated by the NMPRC only when the municipal utility serves a municipality with more than 200,000 residents or elects to be regulated. *Id.* The District Court incorrectly disregarded these express limitations on the Commission's powers and the reach of the NMPUA when it determined that the Commission may regulate municipalities, by granting exclusive rights to regulated utilities which then limit where a municipality may provide service.

Other language in the NMPUA does not override the clearly expressed intent to confine Commission authority over municipalities to those electing to be regulated or those with more than 200,000 residents. Moongate contended, incorrectly, that NMSA 1978, § 62-3-2.1(C) (1991), justifies the conclusion that competition between the City and Moongate entitles Moongate to takings compensation or a damage award. The District Court erred in agreeing with Moongate. Significantly, the language in § 62-3-2.1(C) is a preamble, and not an operative part of the statute. It does not enlarge or confer upon the NMPRC powers actually granted by substantive sections of the NMPUA. *See, e.g., Continental Oil Co. v. City of Santa Fe*, 25 N.M. 94, 98, 177 P. 742, 744 (1918); *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 684-

85, 472 P.2d 648, 649-650 (1970); *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Triple A Serv. Inc., v. Rice*, 545 N.E.2d 706, 709 (Ill. 1989).

In *Public Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n,* 1999-NMSC-40, ¶ 21, 128 N.M. 309, 314, our Supreme Court rejected an argument much like Moongate's reliance on § 63-3-2.1. The Court held that a policy statement concerning the promotion of efficient power grids in New Mexico could not overcome the express exclusion of municipalities from the scope of the NMPUA. *Id.* Also, Moongate itself acknowledged at an earlier phase of this litigation that § 62-3-2.1 does not apply to the City, in explaining why an exhaustion of administrative remedies was not required in connection with the issues raised in its Complaint. *R.P.* at 397, ¶ 35.

Furthermore, the language of § 62-3-2.1(C) itself limits the scope of the policy statement by referring to "such controls as provided by Section 62-9-1.1," which only concerns municipalities with populations larger than 200,000. The City's population does not satisfy this threshold. Only Albuquerque presently falls within sections 62-3-2.1(C) and 62-9-1.1.

Fleming v. Town of Silver City, 1999-NMCA-149, 128 N.M. 295, also does not support the District Court's determination of liability. The *Fleming* case did not involve "encroachment" by a municipal utility into an unserved portion of the

service area of a regulated utility. The language Moongate stressed in relying on *Fleming* ("A municipality may elect to have its utility operations regulated and supervised as a public utility under the PUA .... Otherwise, a municipal water system does not fall within the purview of the PUA except that regulation of the PUA extends to prohibit a municipality from operating within the service area of a regulated public utility until the municipality exercises its option to subject itself to regulation under the PUA[.]") at ¶ 6, 128 N.M. at 298, is dicta. It also conflicts with the controlling Supreme Court opinions in *Morningstar* and *Public Service Company of New Mexico*.

3. The District Court's Treatment Of Moongate's CCN Rights Ignores The City's Lack Of Notice Or An Opportunity To Be Heard.

Third, the District Court's error embodies a due process defect. In concluding that, unless the City appears before the NMPRC to challenge Moongate's claimed exclusive territorial rights, Moongate's CCN is exclusive as against the City and the provision of municipal water utility service in Moongate's CCN territory was a taking, the District Court effectively leveraged the Commission's jurisdiction beyond the limits imposed by the NMPUA, the New Mexico Constitution, and due process. *See, e.g., State ex rel. Battershell v. City of Albuquerque,* 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989) (recognizing that administrative proceedings involving substantial rights must adhere to

fundamental principles of justice and procedural due process). The general lack of NMPRC authority over municipal utilities means that a CCN issued by the NMPRC cannot limit or abridge the rights of an unregulated municipal utility. *See, e.g., Union Rural Elec. Assoc. v. Town of Frederick*, 670 P.2d 4, 8 (Colo. 1983). The jurisdictional limits imposed upon the NMPRC restrict the scope of the rights the NMPRC may grant to public utilities such as Moongate. *See id.* The District Court's treatment of CCN rights, conferred on Moongate with no notice of their effect on the City and no opportunity for the City to present its positions, is fundamentally unfair, and in violation of § 62-3-3(E). *See also Public Service Company of New Mexico,* 1999-NMSC-40, ¶ 20, 128 N.M. at 313 (noting that the legislature excluded municipalities from the NMPUA in very plain language, following *Morningstar*); *United Water New Mexico, Inc. v. New Mexico Pub. Util. Comm'n*, 121 N.M. 272, 277, 910 P.2d 906, 911 (1996) ("[T]he legislature ... [has] made it very clear that municipalities are excluded from the definition of public utilities under the [NMPUA].").

4. The District Court Improperly Disregarded The Burden Of Proof Upon A Claimant In A Takings Case.

Fourth, the District Court's adoption of Moongate's "takings" position, improperly inverted the burden of proof imposed by New Mexico law in condemnation cases. Moongate brought its case as a "takings" claim under the provisions for inverse condemnation in the New Mexico Eminent Domain Code.

In a condemnation action, the landowner (or, in this case, the purported owner of the exclusive right) has the burden of proving the right allegedly taken. *See Yates Petroleum Corp. v. Kennedy,* 108 N.M. 564, 567, 775 P.2d 1281, 1284 (1989). Moongate never proved its claimed "exclusive right" to serve the Subdivisions. Instead, it inaccurately contended that the City must disprove Moongate's exclusive right by going before the NMPRC and challenging Moongate's CCN, and the District Court agreed. *R.P.* at 2144-2148. This position conflicts with the common law of this state that places the burden of proving damages on the party seeking them. *See, e.g., Yates.*

The District Court's treatment of Moongate's CCN as exclusive in relation to the rights of the City to expand its municipal water utility system cannot be reconciled with important components of relevant New Mexico law. The Municipal Code does not contemplate the condemnation of CCN rights in relation to areas where a regulated utility service provider has no "privately owned water facilities." The NMPUA clearly expresses the intent to place municipal water utilities serving cities with fewer than 200,000 residents beyond the jurisdiction of the Commission and outside the reach of the NMPUA, unless the municipality elects to be regulated. Our Supreme Court and this Court have repeatedly confirmed that the NMPUA clearly expresses this intent. Treating Moongate's CCN rights as a barrier to the expansion of the City's municipal water system

presumes that the Commission, without notice to the City or allowing it an opportunity to object, limited the City's rights in relation to its water utility operations. Requiring the City to disprove the exclusivity of Moongate's CCN rights disregarded the law placing the burden of proving the nature of the claimant's alleged right upon the alleged condemnee. The District Court's conclusion that Moongate's CCN rights were exclusive as against the City should be reversed as contrary to New Mexico law.

B. The District Court Erred In Declining To Review The Relevant Administrative Record, Which Demonstrates That The Commission Has Never Purported To Grant Moongate CCN Rights Which Are Exclusive In Relation To The City.

The District Court's refusal to consider the administrative record underlying Moongate's CCN, further supports reversal. The extensive administrative record proffered by the City demonstrates that the Commission never purported to grant Moongate an exclusive territorial right enforceable against the City or any other municipality.

The rules concerning interpretation of grants of the right to provide service presume nonexclusivity. A grant of a right to serve is construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 33-34 (1906). In particular, exclusivity is disfavored and will only be recognized if it is explicit in the grant of the right to serve.

Pearsall v. Great Northern Ry. Co., 161 U.S. 646, 664 (1896); *Las Vegas Valley Water Dist. v. Michelas*, 360 P.2d 1041, 1045-1046 (Nev. 1961).

Moongate's request that the District Court determine that Moongate's service rights were exclusive as against the City, and the necessity of such a determination as a predicate for any determination of damages, obliged the District Court to examine the NMPRC administrative record to determine whether the NMPRC had granted Moongate an exclusive right to serve, enforceable against the City. *See, e.g., State v. Eychaner*, 41 N.M. 677, 678, 73 P.2d 805, 806 (1937). (stating that "[o]f course, when a question involving jurisdiction of the subject-matter arises, whether raised by the parties or sensed by the court, the first duty is to pause, consider, and determine the matter before approaching the merits."). The District Court's determination that Moongate had an exclusive right to serve, enforceable against the City, was contrary to the NMPRC administrative record, and therefore beyond the authority of the District Court.

The relevant administrative record showed that Moongate initially sought a geographical service area CCN, but abandoned that request after the Commission staff recommended issuance of a "plant, lines, and systems" CCN, instead of a CCN creating a service territory. *Id.* The Commission thus granted Moongate a plant, lines and system CCN. *Id.* at 2788. The Commission's subsequent rulings clarify that, contrary to Moongate's assertions, Moongate does not have an

exclusive right to serve the Subdivisions, or anywhere else where Moongate and the City might compete. *Id.* at 2788-2791. The City argued that the District Court was bound by the Commission's orders addressing the nature of Moongate's CCN rights. *Id.*

Separation of powers problems arise when a District Court purports to modify a Commission order granting a CCN. *Lone Mountain Cattle Co. v. New Mexico Pub. Serv. Comm'n*, 83 N.M. 465, 468-469, 493 P.2d 950, 953-954 (1972); *Transcontinental Bus Sys., Inc. v. State Corp. Comm'n*, 56 N.M. 158, 169, 241 P.2d 829, 836 (1952). It is not the province of a trial court to substitute its judgment for that of the Commission. *Id.*

Only the NMPRC may confer upon Moongate any exclusive right to serve. *See* N.M. Const. art. XI, § 2 (providing that the NMPRC "shall have responsibility for regulating public utilities ... in such manner as the legislature shall provide.") The legislature granted the NMPRC exclusive jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations, to insure that public utilities provide adequate service under just, reasonable, and nondiscriminatory rates. *See*, NMSA 1978, §§ 62-6-4(A) (2003), 62-8-1 (1941), 62-8-2 (1941), 62-8-6 (1993).

Correspondingly, the New Mexico Constitution excludes from the grant of authority to the district courts matters and causes "excepted" in the Constitution.

N.M. Const. art. VI, § 13. By making its own determination that Moongate had exclusive territorial service rights, where the NMPRC had not made such a determination, the District Court intruded upon the exclusive authority of an executive agency of the State of New Mexico, in violation of N.M. Const. art III, § 1, the separation of powers clause.

The outcome of *Doña Ana Mutual Domestic Water Consumers Ass'n v. New Mexico Pub. Regulation Comm'n*, 2006-NMSC-032, 139 P.3d 166 ("*Doña Ana*") does not change this conclusion. *Doña Ana* presented a service territory dispute between utility service providers under § 62-9-1, which granted the Commission jurisdiction to resolve such disputes. Section 62-9-1 confers no such jurisdiction on the NMPRC over service area disputes between regulated public utilities and a municipal utilities. Nor did the Court, or the Commission, in *Doña Ana* address the specific administrative record presented in this case, or whether Moongate's CCN limits the rights of the City. The administrative record and the applicable law therefore provide no basis for concluding that Moongate held exclusive CCN rights enforceable against the City at the time of the takings identified by the District Court.

Wholly apart from the incompatibility between New Mexico law and the District Court's treatment of Moongate's CCN rights, the administrative record specific to Moongate's CCN rights contradicts the characterization of Moongate's

CCN rights as exclusive in relation to the operation of the City's water utility. The District Court's authority in this case was limited to treating Moongate's CCN rights as no greater than the rights the Commission granted Moongate in the CCN process. The District Court declined to even consider the relevant administrative record, despite its clear jurisdictional significance. The District Court accordingly conducted more than five days of trial, based on the unconfirmed assumption that the Commission had granted Moongate exclusive CCN rights. The judgment in this case is therefore reversible on the ground that the Commission never granted Moongate the rights it claimed.

C. The District Court Erred In Concluding That A Taking Had Occurred.

Moongate did not have an exclusive right to serve, enforceable against the City. Relevant aspects of the Municipal Code, the NMPUA, the Eminent Domain Code, and due process all weigh against the premise the District Court acted upon in according Moongate's CCN rights exclusivity in this case. Furthermore, the actual administrative record the District Court did not examine confirms that the Commission never granted Moongate the CCN rights Moongate asserted in claiming a taking. If Moongate's CCN rights are exclusive at all, they are exclusive only in relation to other providers regulated by the Commission. In relation to the City, however, Moongate's CCN rights are non-exclusive.

A non-exclusive right to serve is not a compensable property interest for which takings damages are available when competition occurs. *See, e.g., Durham v. North Carolina*, 395 F.2d 58, 60 (4th Cir. 1968); *Williams v. Public Serv. Comm. of Utah*, 754 P.2d 41, 53-54 (Utah 1988); *Union Rural Elec. Ass'n v. Town of Frederick*, 670 P.2d 4, 8-9 (Colo. 1983); *Las Vegas Valley Water Dist. v. Michelas*, 360 P.2d 1041, 1047-48 (Nev. 1961).

In *Durham*, the Fourth Circuit Court of Appeals considered a takings claim by the holder of a non-exclusive water works and distribution franchise, brought in response to the entry of a county sanitary district into the area franchised to the plaintiff. 395 F.2d at 59-60. The court affirmed dismissal of the takings claim because "it has long been settled that the holder of a non-exclusive franchise has no monopoly and cannot complain of competition from a publicly created utility system." *Id.* at 60 (citations omitted). "Phrased another way, the creation by a State of a competing public utility does not amount to a 'taking' compensable under the fourteenth amendment." *Id.* (citing *Newburryport Water Co. v. City of Newburryport*, 193 U.S. 561, 577 (1904); *Helena Water Works Co. v. Helena*, 195 U.S. 383, 392 (1904)).

In *Williams*, the Supreme Court of Utah similarly concluded that a nonexclusive certificate of public convenience and necessity authorized one-way paging operations, but did not create a compensable property right. 754 P.2d at 54.

The *Williams* court followed *Michelas* and other authorities in concluding that a nonexclusive certificate cannot be the basis for a compensable taking. *Id.*

The *Town of Frederick* court considered whether a municipality's extension of electric service to new customers within an annexed area constituted a taking of a public utility's right to serve a certificated area. The court concluded that the jurisdiction of the Colorado Public Utilities Commission, which issued the CCN to the utility, did not extend to the regulation of municipal utilities operating within the municipality, and that the CCN issued to the utility only precluded similarly certificated public utilities within the Commission's jurisdiction from interfering with the plaintiff's right to provide service. 670 P.2d at 5. The *Town of Frederick* court reviewed the precedents limiting Commission jurisdiction over municipal utilities and concluded that the utility's property rights in its CCN must be comparably limited. *Id.* at 6-8.

> We agree with [the utility] that once an area has been certified by the PUC to one public utility, the Commission may not certificate another public utility to service that same area. To this extent, [the utility's] right to serve is a property right which may not be taken from it except by due process of law. The extent of the right, however, is not so great that municipally owned utilities, not within the jurisdiction of the PUC, are precluded from providing electric service to new customers within their municipal limits.

Id. at 8.

The *Michelas* opinion considered a takings claim against a municipal water district brought by a private water company, which held a CCN governing an area where the municipality decided to provide water. The court held that no taking had occurred because the rights of the municipal water district were not governed by the public utilities statutes requiring an application to the Nevada Public Service Commission, that the plaintiff's rights were not exclusive as against the municipal utility, and that the plaintiff had therefore suffered no loss caused by municipal competition. 360 P.2d at 1045-1047. The court relied on features of the Nevada statutes governing public utilities, which made clear that a municipal utility was not required to obtain a CCN as further support of its holding. *Id.* at 1047. Also, a long line of cases established that, when a municipality creates or extends its own utility facilities, no taking of the franchise or certificate rights of private utility service providers has occurred, unless the private provider held rights which were exclusive as against the municipality. *Id.* at 1045-1047. The Nevada Supreme Court reversed the district court's award of takings damages.

These authorities confirm that the non-exclusivity of Moongate's CCN rights forecloses a takings remedy. New Mexico law and the relevant administrative record demonstrate that the Commission could not and did not grant Moongate CCN rights which were exclusive in relation to the City. Consequently, no taking occurred in this case.

IV. CONCLUSION

For the reasons stated above, the Court should reverse the District Court's conclusions that Moongate's CCN rights are exclusive as against the City, such that the annexation of lands covered by Moongate's CCN, and the extension of municipal water utility service, constituted a "taking" under New Mexico law. The Court should remand this case to the District Court with instructions to enter judgment in favor of the City.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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