IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MOONGATE WATER COMPANY, INC.,

Plaintiff-Appellant/Cross-Appellee,

v. No. 27,889

CITY OF LAS CRUCES,

Defendant -Appellee/Cross-Appellant

Appeal from the Third Judicial District Court
Doña Ana County, New Mexico

Honorable Robert E. Robles, Judge

ANSWER BRIEF OF CROSS-APPELLEE MOONGATE WATER CO.

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SUMMARY OF PROCEEDINGS

The question presented in this cross-appeal is whether the actions of the City of Las Cruces in extending water service into areas contiguous to the plant, lines and system of Moongate Water Company were takings of Moongate's property for which the City must pay just compensation. The proceedings below are summarized in detail in the Appellant's Brief in Chief filed May 29, 2008. (Aplt. Br. in Chief at 1-5.) [1]

In brief review, the essential facts are that since the early 1980s Moongate has provided water service to an area outside the Las Cruces city limits referred to as "Section 15." (Aplt. Br. in Chief at 1-2.) The City had a policy of not providing water service to low-density areas. (*Id.*) Operating under a certificate of public convenience and necessity (CCN) from the Public Utility Commission [2] (R.P. 83-92), Moongate extended service to customers in Section 15 because of the City's refusal to do so. (*Id.*) Over the ensuing years Moongate has met the steadily increasing demand for water service throughout in Section 15. (*Id.*) Between 2004 and 2006 the City

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[1] The issue presented in this cross-appeal is a threshold issue to the issue briefed in the main appeal. *See* Aplt. Br. in Chief at 1, n. 1. Because the main appeal was briefed first, and is interrelated with the issue in the cross-appeal, the Appellant's brief in chief in the main appeal extensively discusses matters relevant to the cross-appeal. Rather than burden this brief with redundant material, the Appellant cites to those discussions where appropriate.

[2] The Public Utility Commission and its successor, the Public Regulation Commission, are both referred to herein as "the Commission."

annexed and decided to provide water service to three high-density subdivisions in Section 15 ("the Subdivisions") consisting of tracts which were touched by or located within a couple of hundred feet of Moongate's pipes. (Aplt. Br. in Chief at 2.) To protect its substantial investments in pioneering and expanding water service throughout Section 15, (R.P 192, 392, 466, 1358, 1407, 2140) Moongate brought this action asserting that its legal rights and obligations to provide service to the Subdivisions are compensable property rights under N.M. Const. art. 2, § 20 and the Just Compensation Clause of U.S. Const. amend. V. (R.P. 402-403, 1364.)

The district court ruled that Moongate has the exclusive right under its CCN to serve the Subdivisions, that such an exclusive right is a property right, and that the City's actions in extending service to the Subdivisions constituted takings of Moongate's property for which the City is required to pay just compensation. (R.P. 2148, 2150, 3440-3441; Tr. Vol. 11, p. 26-27.) On cross-appeal the City argues that Moongate's service rights contiguous to its plant, lines and system are non-exclusive as against the City, (Cross-Aplt. Br. in Chief, Points III(A) and (B)) and that as such they are not property. (*Id.*, Point III(C).) As to matters the City is mistaken.

Standard of review. This cross-appeal presents questions of whether, under the relevant statutes and constitutional provisions, Moongate has exclusive service rights in the Subdivisions, and whether the actions of the City in extending service to the

Subdivisions was a taking of Moongate's property for which it must pay just compensation. Moongate concurs with the City that these questions of law are to be reviewed by this Court *de novo*. (*See* Cross-Aplt. Br. in Chief at 7.)

ARGUMENT

I. UNDER ITS CERTIFICATE OF CONVENIENCE AND NECESSITY, MOONGATE IS PRESUMED TO HAVE THE EXCLUSIVE RIGHT TO SERVE THE AREAS CONTIGUOUS TO ITS PLANT, LINES AND SYSTEM.

In 1983 the Public Service Commission, in Case No. 1763, granted Moongate a CCN "covering its existing plant, lines and system." The Commission's order allowed Moongate

> to extend its service in accordance with the provisions of section 62-9-1 NMSA 1978, Second Revised General Order No. 10, Moongate's line extension policy as approved by the Commission, and all other laws, rules, and regulations that may be applicable to any such extension that are now in existence or may hereafter be promulgated.

(R.P. 90-91.) Section 62-9-1(A) (2005) NMSA 1978 provides that a regulated utility operating under an existing CCN is not required to secure a further certificate "for an extension into territory contiguous to that already occupied by it and that is not receiving similar service from another utility." Under Second Revised General Order No. 10, codified as Rule 17.5.440.10 NMAC (2001), a regulated utility is not required to report to the Commission an extension of service of less than one-half mile. (R.P.

2463-2464.)

In 2005 the Commission, in Case No. 03-247-UT, a territory dispute between Moongate and Doña Ana Mutual Domestic Water Consumers' Association, ruled that under New Mexico law Moongate has the legal right and duty to serve all territory contiguous to its distribution facilities and plant, including the areas within one-half mile of those facilities. (R.P. 540, 543.) The Supreme Court affirmed that ruling, recognizing that "the Commission appears to have adopted an interpretation presuming that all contiguous territory lies within a utility's 'service or system,' and to have adopted a definition of 'contiguous' that includes territory within one-half mile of a public utility's pipes or facilities." Doña Ana Mutual Domestic Water Consumers Ass'n v. New Mexico Public Regulation Com'n, 2006-NMSC-032, ¶ 14, 140 N.M. 6, 139 P.3d 166. The Court then approved this general presumption, explaining:

> It appears reasonable, given its planning and coordination function, that the PRC include not only a public utility's physical plant and current customers in a "service or system," but also any contiguous territory that is not receiving similar service from another utility. Section 62-9-1(A) states that a utility need not secure a certificate "for an extension into territory contiguous to that already occupied by it and that is not receiving similar service from another utility," and both Moongate and the PRC note that a utility has a duty to offer service to customers in its service area. *See* NMSA 1978, § 62-8-2 (1941); Morningstar, 120 N.M. at 590, 904 P.2d at 39 (public utilities accept the duty to offer service and submit to other regulations in exchange for protection from

> competition).[3] For planning purposes, the PRC may, therefore, include this contiguous territory in the "service or system" of the utility. The agency's definition of contiguous, which includes territory within one-half mile of a utility's pipes or facilities, appears neither arbitrary nor capricious because utilities have both a right and a duty to extend service to these areas.

Id. ¶ 18 (footnote added).

Public policy requires that regulated utilities develop and extend their plants and facilities in the public interest. NMSA 1978 § 62-3-1 (1967). As a matter of public policy territorial rights inhere in a CCN. In Doña Ana the Supreme Court approved, as a general matter, the presumption that under Section 62-9-1(A) all contiguous territory lies within a utility's system. The holding was not limited to the particular dispute involved in that case. Rather, the Court emphasized that "Section 62-9-1 is part of a comprehensive regulatory scheme granting the PRC the policy-making authority to plan and coordinate the activities of New Mexico public utilities, in a manner consistent with the Legislature's stated goals." *Id.* ¶ 16. The Court further stressed that

> [t]he PRC does not require utilities to seek approval of new construction within contiguous territory and regards this territory as a part of the utility's service or system. Contiguous territory is *generally* within one-half mile of the utility's existing facilities and lines.

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[3] Morningstar Water Users Ass'n v. New Mexico Public Utility Com'n, 120 N.M. 579, 904 P.2d 28 (1995).

Id. ¶ 26 (emphasis added). The Commission's presumption is reasonable given its statutory responsibility to ensure the setting of fair rates, to encourage investment by utilities and to prevent unnecessary duplication of facilities and economic waste. *Id.* at ¶ 16; *see* NMSA 1978 § 62-3-1(B) (1967). There is no dispute that the Subdivisions are "contiguous" to Moongate's existing distribution lines within the meaning of section 62-9-1(A). (R.P. 554, 1407, 2140.) In fact, the Subdivisions are surrounded by Moongate's lines. (Pl. Ex. 24, 25.) Moongate is thus presumed to have exclusive rights in the Subdivisions unless that presumption has been overcome in proceedings before the Commission.

The City does not acknowledge the presumption of exclusivity. Its arguments are premised, in considerable part, on the presumption's non-existence. (See, e.g. Cross-Aplt. Br. in Chief at 18-21.) Nevertheless, its arguments on cross-appeal may be understood to ultimately fall into two main themes: first, that the presumption is not supported by the administrative record, and second, that the presumption cannot be applied against a municipality which has not chosen to have its utility regulated by the Commission. Neither of these arguments has merit.

A. The administrative record fully supports the presumption that Moongate has the exclusive right to serve the Subdivisions.

In determining that the City's actions in providing water service to the

Subdivisions were takings of Moongate's property right, the district court, in effect, applied the presumption subsequently approved in Doña Ana that a public utility has the legal right and duty to provide service in areas contiguous to its facilities. The district court concluded that Moongate enjoys exclusive service rights in the Subdivisions "unless otherwise determined by the PRC." (R.P.2148.) [4]

After the district court entered this conclusion the City, represented by new counsel (R.P. 2153), filed a motion for summary judgment in which it argued that the Commission, in its order granting Moongate its CCN, and in several subsequent proceedings involving Moongate, had in fact "otherwise determined" that Moongate did not have exclusive rights. (R.P. 2377.) The City contended that the district court was without subject matter jurisdiction to contravene such purported determinations by the Commission. (Tr. Vol. 9 at 17.) The district court granted Moongate's motion to strike the City's motion, indicating that it was not inclined to reconsider the issue of Moongate's exclusive rights. (Tr. Vol. 9 at 25; R.P. 2746.)

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[4] The district court entered its findings and conclusions that the City's actions constituted takings on June 8, 2006. (R.P. 2136, 2148.) Doña Ana was decided by the Supreme Court on June 20, 2006. The district court's determination that Moongate has exclusive service rights in the Subdivisions which cannot be taken by the City without payment of just compensation, while not stated in terms of a presumption under Section 62-9-1(A), is identical in effect to the presumption approved in Doña Ana. *See*, Bustamante v. City of Las Cruces, 114 N.M. 179, 182, 836 P. 2d 98, 101 (Ct. App. 1992) (a district court's decision reaching the correct result for the wrong reason will be affirmed on appeal.)

On appeal the City argues that the district court, in granting Moongate's motion to strike, erred in failing to consider the effect of administrative record of the Commission upon the issue of Moongate's exclusive service rights. (Cross-Aplt. Br. in Chief at 18.) The City further argues that the administrative record "demonstrates that the Commission never purported to grant Moongate an exclusive territorial right enforceable against the City." (*Id.* at 18-22.) The administrative record does not support the City's argument. The presumption that Moongate's CCN gives it the exclusive right to serve the Subdivisions has never been challenged by or before the Commission. That being the case, the district court's granting of Moongate's motion to strike rather than ruling upon the merits of the City's motion, if it was error, could only have been harmless. Cumming v. Nielson's, Inc., 108 N.M. 198, 204, 769 P.2d 732, 738 (Ct. App. 1988) ("the complaining party on appeal must show the erroneous admission and exclusion of evidence was prejudicial in order to obtain a reversal.")

1. Moongate's "plant, lines and system" certificate gives it the presumptive right and duty to serve territory contiguous to its existing facilities.

The City argues that the Commission's designation of Moongate's CCN, in Case No. 1763 (R.P. 83-94), as a "plant, lines and system" certificate, rather than a grant of a specific geographic territory, negates Moongate's claims to territorial exclusivity in the Subdivisions. (Cross-Aplt. Br. in Chief at 19; *see* R.P. 2375-2391.)

The City argues for a literal interpretation of the words "plant, lines and system," while overlooking the rights and obligations included in a such a certificate. In Doña Ana the Court made clear that the presumption of exclusivity arises not by the Commission's specific designation of territory, but under Section 62-9-1(A). While Commission's order granting Moongate a CCN did not grant a specifically delineated territory, it did specifically recognize Moongate's right and duty under Section 62-9-1(A) to expand its service territory into contiguous areas. (R.P. 90-91.) Further, the Commission found that "[p]reventing Moongate from extending its system to meet new demand could result in stifling growth in the area or, at least, the creation of new entities to provide service Moongate would be capable of providing in the absence of Certificate restrictions." (R.P. 88.) Clearly, the Commission intended Moongate's "plant, lines and system" to include contiguous territory.

2. *The Commission's subsequent administrative actions have confirmed the presumption that Moongate has the right and duty to extend service into the Subdivisions.*

The City argued below that the Commission's 1997 order in Case No. 2686, granting Moongate the limited right to compete with certain other water providers, should be read in a way that is inconsistent with Moongate's presumed right to serve the Subdivisions to the exclusion of the City. (R.P. 2383-2384.) In that order in the Commission noted:

> while distribution level services by public utilities generally are afforded some protection from competition, the Public Utility Act does not afford absolute protection from competition. Rather the Act directs the Commission to afford such protection only as necessary to avoid unnecessary duplication and economic waste.

(R.P. 2426, emphasis in original.) The City takes this statement as a license to freely compete against Moongate in Moongate's certificated area. (*See* R.P. 2383, 2386-2387.) The City errs, however, in ignoring the nature of Moongate's CCN, which carries the presumption of exclusive service rights in contiguous territory. The City also overlooks how the presumption may be challenged. The Commission, in the exercise of its exclusive original jurisdiction, determines case by case whether the presumption controls, based upon the particular circumstances before it. § 62-9-1(A); Doña Ana, 2006-NMSC-032, ¶ 27. The order in Case No. 2686 reflects that following an adversary hearing before the Commission, based on specific circumstances, and with due consideration of the underlying policy against unnecessary duplication and economic waste, Moongate overcame the presumption that other utilities enjoyed exclusive rights contiguous to their facilities. That determination has no impact on the presumption the Moongate has exclusive service rights to the Subdivisions.

The City also urged that the Commission's order of May 4, 1998 in Case No. 2791, approving Moongate's application for a 12 mile extension of its lines to the Talavera area "on a non-exclusive basis" (R.P 2468), should be read to deny

Moongate's presumptive right to exclusively serve the Subdivisions. (R.P. 2384, 2790-2791; Cross-Aplt. Br. in Chief at 19-20.) That case dealt with Moongate's specific rights in an area unconnected with the Subdivisions, not with its rights in general. It has no bearing on Moongate's right to serve the Subdivisions.

Similarly, the City pointed to a Commission-approved stipulation between Moongate and another provider in Case No. 04-00089-UT. The stipulation designated certain areas as exclusive to each provider, and other areas in which they could compete, and recited that the agreement would not bind any non-parties. The City argued that the stipulation was tantamount to a recognition of the City's right to compete with Moongate. (R.P. 2387-2388, 2442, 2444-2446.) Like the other items in the administrative record upon which the City relies, the stipulation is irrelevant to Moongate's right to serve the Subdivisions. Under Section 62-9-1(A) Moongate has the presumptive right to serve exclusively in contiguous areas. The presumption may yield on a case-by-case basis in proceedings before the Commission. There have been no challenges before the Commission to Moongate's right to serve the Subdivisions. Moongate enjoys the benefit of the presumption of exclusivity in the Subdivisions as against all other providers, including the City.

II. THE PUBLIC UTILITY ACT PROHIBITS THE CITY FROM INTRUDING INTO SERVICE AREAS IN WHICH MOONGATE IS PRESUMED TO HAVE EXCLUSIVE SERVICE RIGHTS.

In its Brief in Chief filed May 29, 2008 Moongate described in detail the comprehensive statutory framework under which public utilities operate, and which governs the relationships between public utilities and utilities operated by municipalities. (Brief in Chief at 3-4, 10-15.) In outline, the essential features of that framework are as follows:

(1) The development and expansion of public utilities is a matter affecting the general interests of the state, and their regulation serves to make reasonable service available at fair rates, to encourage capital investment and to prevent unnecessary duplication and economic waste. § 62-3-1(B), *supra.*

(2) The Public Utility Act (PUA) "expresses a clear intent to displace competition with regulation in the area of utility service." City of Albuquerque v. New Mexico Pub. Serv. Com'n, 115 N.M. 521, 534, 854 P.2d 348, 362 (1993) (citation omitted).

(3) In exchange for extensive public regulation and assuming the duty to provide reliable, nondiscriminatory service over every aspect of its business, a public utility is granted, as a quid pro quo, protection from competition. Morningstar, *supra*;

State ex rel. Sandel v. New Mexico Public Utility Com'n, 1999-NMSC-019, ¶ 4, 127 N.M. 272, 275, 980 P.2d 55, 58. This includes "exclusive control of the industry in a particular area, as well as a fair opportunity to secure a reasonable rate of return on approved investments. . . ." *Id.*

(4) Utilities operated by municipalities are not regulated, nor are they subject to the jurisdiction of the Commission. NMSA 1978 § 62-6-4(A) (2003); City of Sunland Park v. New Mexico Public Regulation Com'n, 2004-NMCA-024, ¶ 19, 135 N.M. 143, 85 P.3d 267. However, a municipally operated utility may elect "to avail itself of all the benefits of the Public Utility Act and of the regulatory services of the commission" by electing " to come within the provisions of that act and to have" its utilities "regulated and supervised under the provisions of that act." NMSA 1978 § 62-6-5 (1993).

(5) The Legislature has declared as a matter of public policy, rationally based upon experience, that municipal water utilities should be prohibited from intruding "into areas in which a public utility furnishes regulated services until that municipality elects to come within the terms of the Public Utility Act . . . ." NMSA 1978 § 62-3-2.1(C) (1991). This prohibition is to insure that "both systems will be brought into parity of treatment with respect to the commission's independent jurisdiction and power to prevent unreasonable interference between competing

plants, lines and systems." *Id.*

(6) In a special provision applicable to only one city, the Commission is given limited jurisdiction to resolve disputes over service territory between regulated utilities and the City of Albuquerque. NMSA 1978 § 62-9-1.1 (1991).

Under this governing framework, Moongate's exclusive service right in the Subdivisions is presumed as against the City unless the City, having first chosen to avail itself of the benefits of regulation under Section 62-6-5, overcomes that presumption in proceedings before the Commission.

The City has not elected to have it's water utility regulated by the Commission. (R.P. 1283.) The City asserts that its unregulated status allows it to compete with Moongate and freely intrude into territory contiguous to Moongate's distribution lines. (Cross-Aplt. Br. in Chief at 11-15; R.P. 235-239, Tr. Vol. 5B, p. 23.) This assertion is irreconcilable with the PUA and its underlying policies. While the PUA does not afford absolute protection from competition as between providers subject to Commission regulation, it does provide protection from incursion by an unregulated municipality.

Within its sphere the City may provide water service without regard to the requirements which public policy imposes upon Moongate as a regulated utility. Unlike Moongate, the City is not required to offer adequate, efficient and reasonable

service at reasonable rates, *id.* §§ 62-8-1 (1941) and 62-8-2 (1941); or to serve low and high density areas alike by offering non-discriminatory service within classifications and as between areas and classes, *id.* § 62-8-6 (1993); nor is the City prohibited from abandoning any portion of its facilities without commission approval. *See id.* § 62-9-5 (2005); City of Albuquerque, *supra*, at 533, n. 12, 854 P.2d at 360 (a public utility has a "statutory duty . . . to continue its service until its duty is modified or terminated by the Commission.") However, utility regulation is favored as a matter of public policy. While the PUA does not require regulation of a non-intruding municipal utility, it nevertheless encourages the municipality to "avail itself of all the benefits of the Public Utility Act and of the regulatory services of the commission" by electing regulation. § 62-6-5, *supra.*

Special considerations arise when a municipal utility seeks to intrude into the service area of a regulated utility. Such an intrusion is a step beyond purely municipal concerns into an area "affected with the public interest" of the state as a whole. *Id.* § 62-3-1, *supra.* For this reason the Legislature has declared that a municipal utility shall not intrude into the service area of a regulated utility unless it elects to be regulated by the Commission. § 62-3-2.1(C). In addition, Albuquerque is automatically brought under the limited jurisdiction of the Commission to resolve a

public utility's complaints of intrusion. § 62-9-1.1. [5] The City contends it is outside the ambit of Section 62-3-2.1(C), arguing that the provision is not a substantive measure, but merely a preamble to Section 62-9-1.1. (Cross-Aplt. Br. in Chief at 13-14; R.P. 1811-1812.) An examination of the plain language of Section 62-3-2.1(C) and of its underlying policy shows the City's reading to be erroneous.

The principle objective of statutory construction "is to determine and give effect to the intent of the Legislature." U.S. Xpress, Inc. v. New Mexico Taxation and Revenue Dept., 2006-NMSC-017, ¶ 6, 139 N.M. 589, 136 P.3d 999. The plain language of the statute is "the primary indicator of the legislature's intent." *Id.* The plain language of Section 62-3-2.1(C) unmistakably offers the City a choice between opting to come under PRC regulation or abstaining from intrusion into Moongate's certificated service area. Section 62-3-2.1(C) provides:

> The following are declared to be the objects and purposes of this 1991 act. Experience has proven that the construction, development and extension of proper plants and facilities cannot be accomplished without unnecessary duplication and economic waste within areas certificated to water and sewer utilities without controls against duplicative intrusions into certificated areas by municipal utilities. A rational basis exists to prohibit intrusion of municipal water or sewer facilities or service into areas in which a public utility furnishes regulated services until that

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[5] At this time Albuquerque is the only city meeting the definition of "municipality" in Section 62-9-1.1 as a city with a population greater than 200,000 located in a class A county, which has not elected to be regulated pursuant to Section 62-6-5.

> municipality elects to come within the terms of the Public Utility Act, in which event both systems will be brought into parity of treatment with respect to the commission's independent jurisdiction and power to prevent unreasonable interference between competing plants, lines and systems. Without such controls as provided by Section 62- 9-1.1 NMSA 1978, the declared policy of the Public Utility Act, the provision of reasonable and proper utility services at fair, just and reasonable rates and the general welfare, business and industry of the state may be frustrated.

In enacting Section 62-3-2.1(C), the Legislature sought to avoid the adverse consequences of allowing unfettered municipal intrusion into the service areas of regulated utilities. It declared that controls against such intrusion are necessary to serve the basic policy of the PUA. In so declaring, the Legislature did not differentiate between large and small municipalities. The effect of an intrusion is the same regardless of the size of the municipality. The policy to encourage investment by utilities and prevent duplication and waste encompasses statewide concerns. § 62-3-1(B). To effect that policy, parity of treatment is required between a municipal utility and a public utility when the municipality seeks to intrude into a certificated area.

This is not a matter of implying a grant of authority in a statement of policy, as the City argues. (Cross-Aplt. Br. in Chief at 13.) C*ompare*, New Mexico Elec. Service Co. v. New Mexico Public Service Commission, 81 N.M. 683, 684-685, 472 P.2d 648, 649-650. Section 62-3-2.1(C) plainly refers to two distinct means of

effecting the policy against municipal intrusion. The first, applicable to all municipalities, is to "prohibit intrusion . . . until [a] municipality elects to come within the terms of the Public Utility Act." The second, as a special case pursuant to Section 62-9-1.1, is to place Albuquerque under limited PRC jurisdiction even in the absence of such an election. While the section may not be artfully drafted, it makes the distinction between the two means of effecting the policy quite clear. *See* Lucero v. Richardson & Richardson, Inc., 2002-NMCA-013, ¶ 19, 131 N.M. 522, 39 P.3d 739 (statutory distinction between recreational activities and competitive sports sufficiently clear, though not artfully drafted.)

Even if one perceives an ambiguity in the section, it must be construed according to its "obvious spirit or reason," State v. Nance, 77 N.M. 39, 46, 419 P.2d 242, 247 (1966), and its underlying purpose or object. State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). Moreover, "[a] statute will be construed to avoid an absurd result." City of Rio Rancho v. Logan, 2008-NMCA-011, ¶ 18, 143 N.M. 281, 175 P.3d 949. The Legislature has directed that Section 62-2-2.1(C) be "liberally construed" to carry out its purpose. *Id.* § 62-3-2.1(D) (1991). It is absurd to think that the Legislature intended to allow "the general welfare, business and industry of the state [to] be frustrated" by every municipality in the state except Albuquerque, or that it intended to specifically

prescribe a means of effecting a fundamental policy, but not enact it. To reach this untenable conclusion, the City focuses solely on the reference in Section 62-3-2.1(C) to Section 62-9-1.1, while ignoring the specific prohibition against intrusion by unregulated municipalities. This approach violates the principle that all parts of a statute should be construed together and viewed as "a harmonious whole." El Dorado Utilities, Inc. v. Eldorado Area Water and Sanitation Dist., 2005-NMCA-036, ¶ 18, 137 N.M. 217, 109 P.3d 305. Further, Section 62-3-2.1(C) must be read *in pari materia* with the comprehensive regulatory scheme of the PUA. *See* Martinez v. Sedillo, 2005-NMCA-029, ¶ 9, 137 N.M. 103, 107 P.3d 543 ("A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent") (citation and internal quote marks omitted). The City's narrow reading of Section 62-3-2.1(C), heedless of the legislative directive to construe it liberally to effect its purposes, defeats the Legislature's clear intent

The facts of this case highlight the unreasonableness of the City's reading of Section 62-3-2.1(C). Since 1984, after the City refused requests to provide water to customers in Section 15, Moongate has provided that service, and has met a tenfold increase in demand. (Tr. 1356-1357, 1406-1407, 2137-2138; Vol. 12, p. 58, 66-67; Pl. Ex. 29, p. 4.) In addition, anticipating the area's future growth, and in keeping

with its duty to extend service into contiguous territory, Moongate has invested substantially in excess capacity to serve the area containing the Subdivisions. (*Id.*; R.P. 1455-1475, 2139; Vol. 12, p. 92.) The availability of water service makes an area more attractive for additional development. (R.P. 555.) Hence, growth in Section 15 has been spurred in part by the water service made available by Moongate. Ultimately, the area became ripe for high density developments like the Subdivisions. Due to economies of scale, high density developments can be served at a lower unit cost than less densely settled areas. (Tr. Vol. 12, p. 137-138, 150-51.) The regulatory scheme of the PUA, which incorporates the presumption that a utility has exclusive service rights in its contiguous territory, is designed to encourage the achievement of such economies of scale. Public Service Co. of New Mexico v. New Mexico Public Service Com'n, 112 N.M. 379, 387, 815 P.2d 1169, 1177 (1991).

The City's policy is to not serve low density areas. (Def. Ex. 14, p. 34; R.P. 2139.) Moongate enjoys no such luxury. It must offer non-discriminatory service everywhere within its service area, § 62-8-6, as it has done in Section 15. The City believes that it may, at no cost, cherry pick the most lucrative service opportunities in an area made more attractive for development by Moongate's pioneering efforts and investments. The City's action is detrimental both to Moongate and its customers. As a result of the City's taking Moongate's right to serve the Subdivisions, Moongate

has lost contributions in aid of construction it would have received from the developers. (R.P. 2140-2141.) As the district court found, this will delay and increase the cost of service upgrades to Moongate's existing customers. (*Id.*) Further, without protection from intrusion by predatory municipalities, a utility would have no incentive to invest in providing service near a growing city, only to see its service area snatched up as soon as the city found it attractive. Residents of these areas would be unable to obtain water utility service. The City has no legitimate municipal interest in frustrating a public policy designed to make such service available.

A City's ordinances must be "not inconsistent with the laws of New Mexico." NMSA 1978 § 3-17-1 (1993).[6] Under New Mexico law, the Commission is assigned "the role of coordinating and planning expansion of water service in the state." Doña Ana, 2006-NMSC-032, ¶ 17. A home rule municipality may not usurp the Commission's authority to regulate, or use its refusal to avail itself of the regulatory services of the Commission to frustrate the policies of the PUA. *See* City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, ¶ 8, 134 N.M. 472, 79 P.3d 297 (discussing limitations upon municipal powers relating to utilities). Allowing the City to dispossess Moongate of its state-regulated service right

[6] The City determination to sell water in the Subdivisions was made by ordinance. (Pl. Ex. 1, p.2; Pl. Ex. 13; Pl. Ex. 4, p. 2; Pl. Ex. 6, p. 6; Pl. Ex. 7, p. 2; Pl. Ex. 9, p. 6.)

without payment of compensation would amount to such a usurpation. A municipality's home rule powers under article 10, § 6 of the New Mexico Constitution are expressly preempted by a "general law" of statewide concern. State ex rel. Haynes v. Bonem, 114 N.M. 627, 632, 845 P.2d 150, 155 (1992). The PUA, which contains the declaration that the development and expansion of public utilities "affects . . . the general welfare, business and industry of the state" § 62-3-1(A), is clearly a general law.

III. THE CITY MAY NOT INTRUDE INTO MOONGATE'S EXCLUSIVE SERVICE AREA UNLESS IT ACCEPTS REGULATION AND PREVAILS BEFORE THE COMMISSION OR ACQUIRES MOONGATE'S SERVICE RIGHTS BY EMINENT DOMAIN.

A. Moongate's service rights are its property.

Exclusive service rights such as Moongate is presumed to possess as to the Subdivisions are broadly recognized to be property. This principle is discussed extensively in the Appellant's brief in chief in the main appeal. (*See* Aplt. Br. in Chief at 34-37.) Our Supreme Court has recognized that a utility's interest in serving within its certificated area is a property right. *See* Morningstar *supra* at 588, 904 P. 2d at 37 (interest of water users' association in serving its members is unlike property right of public utility in serving its area). In examining the nature of Moongate's service rights it is also useful to consider the three factors identified by the United States

Supreme Court in determining whether a government regulation has resulted in a compensable taking: (1) the character of the governmental action; (2) the extent of interference with distinct investment-backed expectations; and (3) the economic impact on the claimant. Penn Central Transportation v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). Each of these factors weighs decisively for finding that the City's action was a compensable taking.

First, the City wanted to serve the Subdivisions because it was financially attractive to do so. This was shown by the City's analysis of the potential economic loss it would suffer from not serving one of the Subdivisions. (R.P. 1524; Pl. Ex. 51B, p. 193-95.) While just compensation is measured by the condemnee's loss, not the government's gain, *see* Brown v. Legal Foundation of Washington, 538 U.S. 216, 237, 123 S.Ct. 1406, 1420, 155 L.Ed.2d 376 (2003), the fact that the City was motivated by the opportunity for gain shows that the character of its action was a taking, not merely an exercise of its home rule powers.

Second, Moongate made substantial investments in serving Section 15 over a period of more than 20 years. Moongate reasonably expected that as population grew and housing densities increased contiguous to its facilities it could expand its service consistent with its legal right and duty. That investment-backed expectation was thwarted by the City's action.

Third, Moongate presented evidence that it lost more than three million dollars as a result of the City's actions. If Moongate's method of valuation, which the City disputes, is ultimately validated, the City's actions will have proved to have had a very serious and substantial economic impact.

B. The City's taking of Moongate's service rights without paying just compensation violated due process of law.

Ignoring both the presumption of exclusivity attached to Moongate's CCN and the prohibition of Section 62-3-2.1(C) against intrusion into certificated areas without submitting to regulation, the City has, without due process of law, deprived Moongate of its property right to serve the Subdivisions. (*See* R.P. 1395.) Due process is violated when one is deprived of a property right through a governmental failure to follow exclusive statutory procedures for the protection of the right. *See* Nesbit v. City of Albuquerque, 91 N.M. 455, 459, 575 P.2d 1340, 1344 (1977) (failure to give the notice required by zoning statute); State v. Raynolds, 22 N.M. 1, 158 P. 413, 417 (1916)(failure to follow exclusive statutory means for suspension from law practice).

A proceeding before the Commission is the exclusive means for challenging the statutory presumption that a utility's exclusive service area includes contiguous territory. Under Section 62-6-4, *supra*, the Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility . . . and to do all

things necessary and convenient in the exercise of its power and jurisdiction." Courts do not substitute their judgment for that of the Commission, which has special expertise in matters relating to utilities. Doña Ana, 2006-NMSC-032, ¶ 11.

> A detailed understanding of the operation of public utilities is required to determine intelligently whether a particular activity will interfere with the service or system of a public utility. As the agency responsible for the regulation of public utilities, or as its successor, the PRC has developed this expertise.

Id. ¶ 17.

Regulated providers may challenge the presumption of exclusivity by initiating proceedings before the Commission under Section 62-9-1(A). Municipalities may challenge the presumption if they have elected to come under regulation pursuant to Section 62-6-5. When the jurisdiction of the Commission is invoked it may,

> after giving due regard to public convenience and necessity, including reasonable service agreements between the utilities, make an order and prescribe just and reasonable terms and conditions in harmony with the Public Utility Act to provide for the construction, development and extension, without unnecessary duplication and economic waste.

§ 62-9-1(A). Due process requires that challenges to the presumption of Moongate's exclusive right to serve the Subdivisions be conducted before the Commission, which has exclusive jurisdiction to entertain such challenges.

C. The City's alternative to challenging Moongate's service rights before the Commission is to condemn those rights.

The City has chosen not to avail itself of the exclusive means by which the presumption of Moongate's right to serve may be challenged. Instead, it has attempted to use its unregulated status to take Moongate's property without due process of law and to frustrate the comprehensive regulatory scheme of the PUA. The City's action is illegitimate and cannot stand. However, the City does possess the inherent power to take private property for public use, limited only by the constitutional requirement of just compensation. City of Sunland Park v. Santa Teresa Services Co., 2003-NMCA-106, ¶ 43, 134 N.M. 243, 75 P.3d 843, *cert. denied,* 134 N.M. 179, 74 P.3d 1071 (2003). Due process and just compensation for governmental taking are closely related concepts. *See id.* ¶ 44; Stidham v. Peace Officer Standards And Training, 265 F.3d 1144, 1152 (10th Cir. 2001). A taking of property by the government must comply with minimum standards of due process. Gates v. N.M. Taxation & Revenue Dept., 2008 NMCA-023, ¶ 19, 143 N.M. 446, 176 P.3d 1178. According to these principles, if the City wants to provide service to the Subdivisions without the Commission's authorization, it must provide just compensation to Moongate for the taking of its exclusive rights.

The City asserts that Municipal Code provisions allowing it to extend water

service into annexed areas and granting it the right to acquire water "facilities" by condemnation relieve it from the requirement to pay just compensation for Moongate's service rights. (Cross-Aplt. Br. in Chief at 9-11.) It reasons that service rights are not "facilities" subject to condemnation by statute. However, this argument is based on the City's denial of the presumption that Moongate has the exclusive right to serve the Subdivisions. As we have seen, the presumption may only be overcome, if at all, before the Commission. The City's argument further overlooks that the requirement that property not be taken without just compensation is constitutionally based. It matters little whether the Legislature, in enacting the Municipal Code, did not specifically provide that cities could condemn service rights. The state and federal constitutions require just compensation for a taking.

The district court's conclusion that Moongate has exclusive service rights in the Subdivisions did not, as the City contends, exceed its jurisdiction (Cross-Aplt. Br. in Chief at 5), or substitute its judgment for that of the Commission. (*Id.* at 20.) Rather, the court's ruling was a recognition of the presumption approved by the Court in Doña Ana, and that only the Commission has the power to entertain a challenge to the presumption. Nor did the court's ruling unconstitutionally deny the City of notice that Moongate enjoys exclusive rights, as the City also asserts. (Cross-Aplt. Br. in Chief at at 15-16.) Rather, the court's ruling implicitly recognized that due process

requires a that one challenging the presumption do so in the only forum available for that purpose. Nor did the district court's conclusion that there was a taking disregard the burden of proof in condemnation cases. (*See id.* at 16-17.) While it is true that the property owner has the burden of proof on the measure of just compensation, Yates Petroleum Corp. v. Kennedy, 108 N.M. 564, 567, 775 P.2d 1281, 1284 (1989), the conclusion that Moongate's service rights are property flows from the presumption that they are exclusive as a matter of law.

CONCLUSION

Under its CCN, Moongate is presumed to have the exclusive right and duty to serve the Subdivisions. That presumption gives Moongate a property right, which includes the opportunity for a fair return on its investments. That presumption has never been overcome in proceedings before the Commission, which alone has jurisdiction to determine whether, in a specific case, the presumption should prevail. Consistent with that presumption, Section 62-3-2.(C) prohibits the City from intruding into Moongate's service territory unless it elects to avail itself of the regulatory services of the Commission and overcomes the presumption in proceedings before the Commission. The district court correctly ruled that the City, having refused the benefits of regulation, must pay Moongate just compensation for taking its property right to serve the Subdivisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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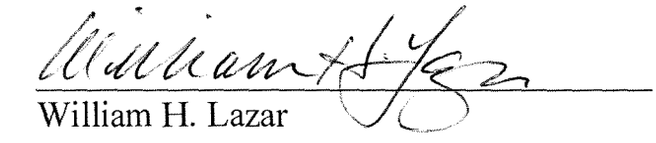

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