United Water New Mexico, Inc. v. New Mexico Public Utility Commission: Why Rules Governing the Condemnation and Municipalization of Water Utilities May Not Apply to Electric Utilities

Thomas Smidt III

Recommended Citation
Available at: https://digitalrepository.unm.edu/nrj/vol38/iss4/7
CASE NOTE

United Water New Mexico, Inc. v. New Mexico Public Utility Commission:¹
Why Rules Governing the Condemnation and Municipalization of Water Utilities May Not Apply to Electric Utilities

ABSTRACT

Despite substantial activity surrounding the municipalization of electric utilities as a means of obtaining lower electricity prices, when the New Mexico Supreme Court first confronted a case of the municipalization of a private utility by condemnation it dealt with a water and sewage utility. The court concluded that the New Mexico Public Utility Commission had no jurisdiction over Rio Rancho’s condemnation of its local water utility. That decision, though good for water utilities, which often serve as a means for communities to control growth, may have detrimental effects on some of New Mexico’s electricity consumers. Unlike water utilities, electric utilities are usually large and interconnected to numerous other communities. When one community leaves a system, the remaining communities will likely pay both financially and in terms of a decrease in service quality. Without oversight from the Public Utility Commission, those effects are not taken into consideration and balanced with other concerns when deciding when and how a community can leave a system. Las Cruces’ municipalization of El Paso Electric’s systems within its borders could require the remaining customers to pay higher rates, a concern that should be addressed by the Commission.

INTRODUCTION

In recent years, changes in the regulation of the electric industry and high electricity prices have prompted many cities in the United States to consider municipalization of the private utilities that provide them with electricity.² Although the trend may have started as early as the 1960s,³ it

¹ 910 P.2d 906 (N.M. 1996).
² See Suedeen G. Kelly, Municipalization of Electricity: The Allure of Lower Rates for Bright Lights in Big Cities, 37 NAT. RESOURCES J. 43 (1997). “Municipalization is the replacement of utility service provided by an investor-owned utility (IOU) with service provided by the
has picked up considerable steam since the beginning of this decade. As of 1997, an estimated 40 cities were seriously considering municipalization. Two New Mexico cities, Albuquerque and Las Cruces, have contemplated the option of acquiring their local electric systems from the investor-owner utilities (IOUs) that presently serve their respective areas. With all this activity, it is surprising that in New Mexico the first time that a municipality acquired a privately-owned public utility through condemnation was not until 1995. The same instance was also the first time that the New Mexico Supreme Court addressed the issue of municipalization of public service utilities. However, what is even more surprising is that when the New Mexico Supreme Court finally addressed the municipalization issue, it did so regarding a water utility instead of an electric utility.

In United Water New Mexico, Inc. v. New Mexico Public Utility Commission, the New Mexico Supreme Court addressed the issue of whether the New Mexico Public Utility Commission (PUC or Commission) had jurisdiction over the City of Rio Rancho’s (Rio Rancho or City) condemnation of a privately-owned public utility which provided water and sewage utilities to the municipality. The New Mexico legislature expressly provided municipalities with the power to condemn privately owned water and sewage utilities. However, it left the issue of what power the PUC had over such proceedings open to interpretation. In reaching its decision, the court rejected the PUC’s argument that the condemnation was substantially similar to a “sale” or “abandonment” of the facilities warranting PUC jurisdiction. Instead, the court focused on the difference between the voluntary nature of a sale or abandonment of a utility and the involuntary nature of a condemnation. Based on that

municipality itself.” Id. at 43. Municipalization can take a number of forms and can occur with any type of utility. Id. at 44-45.


7. See id.


9. Id.


distinction and the fact that the PUC does not have jurisdiction over municipal utilities,\textsuperscript{12} the court decided that the PUC does not have jurisdiction over the municipalization of a utility through condemnation. The court's decision followed the legislature's intent expressed through the statute permitting condemnation of water and sewage utilities\textsuperscript{13} and through an amendment that expressly withdrew the need for PUC approval for the issuance of bonds used to acquire a water or sewage utility.\textsuperscript{14} However, the court did not expressly limit its holding to water utilities; from its language, the decision apparently applies equally to electric utilities.

Although the court's decision most likely reached the correct result, its reach may be too broad. Unlike water and sewage systems which are generally small and localized, electric transmission and distribution systems are usually much larger and are interconnected to systems throughout the state and throughout the nation.\textsuperscript{15} There are numerous reasons why the court's decision in \textit{United Water} may not be extended to electric utilities.\textsuperscript{16} However, if it were so extended, it could have potentially adverse effects on the electric systems serving many parts of New Mexico. System problems that could result from municipalization of electric utilities can and should be addressed by the PUC. Therefore, the court should have required the legislature to clarify the role of the PUC in the condemnation proceeding. If the legislature then decided that the PUC should not have jurisdiction over condemnations of water and sewage utilities, it could have expressly clarified the Public Utility Act (PUA)\textsuperscript{17} to obtain that result. The New Mexico legislature made specific changes to other sections of the


\textsuperscript{13} §§ 3-26-1(A)(3) and 3-27-2(A)(2).


\textsuperscript{15} Of the more than 3,500 electric systems in the United States, the 200 largest provide approximately 90 percent of the generating capacity. The remaining systems generally serve as distributors. \textit{See} Michael J. Doane & Paul W. Macavoy, \textit{Transmission Access Pricing and "Non-bypassable" Competitive Transition Charges}, 37 NAT. RESOURCES J. 9, 12 (1997). In contrast, there are approximately 60,000 water systems in the United States. \textit{See} JANICE A. BEECHER & ANN P. LAUBACH, 1989 SURVEY ON STATE COMMISSION REGULATION OF WATER AND SEWER SYSTEMS 4, n.2 (National Regulatory Research Inst.) (1989).

\textsuperscript{16} For example, although the court did not so expressly state, it may limit the decision to cases involving water and sewage utilities. The New Mexico legislature may also intervene to limit the reach of the court's decision.

This article addresses the New Mexico Supreme Court's decision in United Water as it relates to both water utilities and electric utilities. Part I of the paper discusses the history of Rio Rancho's condemnation proceedings, including how the PUC became involved and how the court resolved the issues. Part II analyzes the court's interpretation of the relevant statutes. It begins by considering the legal distinction between a voluntary sale or abandonment versus an involuntary condemnation. Then it addresses the decision in the light of the apparent legislative intent in the area. Lastly, Part II describes the "public interest" and how it relates to the transfer of water and sewage utilities. The focus then turns to electric utilities in Part III and asks what impact the decision may have on the recent trend toward municipalization in the electric utility industry. It pays particular attention to the recent attempt by the city of Las Cruces to municipalize its electric system through condemnation of the El Paso Electric Company's facilities lying within Las Cruces. The paper concludes that while the decision may be the correct one from the standpoint of the municipalization of water and sewage utilities, the decision may have adverse effects in the electric industry if applied to that field.

PART I. CASE HISTORY

Located northwest of Albuquerque, New Mexico, and just across the mighty Rio Grande River, the city of Rio Rancho was, until recently, not much more than a small suburb of the rapidly growing Albuquerque area. However, in recent years Rio Rancho has become an industrial center and residence for companies such as Intel, the computer chip manufacturer. Lured by industrial revenue bonds and other financial

---

18. In 1994, the legislature provided municipalities with the power to condemn water and sewage utilities. See §§ 3-26-1(A)(3) and 3-27-2(A)(2). In addition, after RRUC initiated the condemnation, the legislature amended a statute removing PUC's jurisdiction over the issuance of bonds for the purpose of acquiring utility facilities. See § 3-23-3. The amended provision could only apply to one municipality other than Rio Rancho, which had a population of approximately 30,000 according to the 1990 census; i.e. Clovis. The amendment was, therefore, close to violating the New Mexico Constitution's prohibition against special legislation. N.M. CONST. art. IV, § 4. Interview with Lee Huffman, Comm'n Counsel, New Mexico Pub. Util. Comm'n, in Santa Fe, N.M. (Oct. 24, 1996).

19. The population of Albuquerque is growing at about twice the national average. However, the west side (including Rio Rancho) is growing twice as fast as the rest of the city. See Nancy Traver, Go West—Albuquerque, And Has It Ever, N.M. BUSINESS J., Nov. 1997, at 31.
incentives,\textsuperscript{20} Intel, Gateway 2000, Sumitomo Sitix Silicon, Fulcrum Direct, Intuit, Sun Healthcare and other large corporations have brought thousands of jobs to the Albuquerque and Rio Rancho area.\textsuperscript{21} Higher wages and increased opportunities in service-related fields created a flood of people into Rio Rancho and created a city out of what was until recently little more than a community.\textsuperscript{22} In 1994 Rio Rancho was the fastest growing small city in the United States.\textsuperscript{23}

In the arid southwestern landscape of the New Mexican desert, sudden increases in population growth can put tremendous pressure on an already strained water supply. In Rio Rancho’s case, the population growth was coupled with a dramatic increase in water use by the incoming industrial manufacturing sector.\textsuperscript{24} Perhaps because the growing community was putting additional stress on its already jealously hoarded water,\textsuperscript{25} Rio Rancho decided to take control of its water and sewage services. In 1994 the residents of Rio Rancho decided by an overwhelming majority\textsuperscript{26}

\begin{footnotesize}
\begin{enumerate}
\item See Don Clark, New Mexico Gets Huge Intel Plant, S.F. CHRON., Apr. 1, 1993, at C1. In 1995, Sandoval County approved an $8 billion industrial revenue bond for Intel Corp. to expand and revamp its Rio Rancho chip-making plant. It was the largest industrial revenue bond in U.S. history. See In Brief, THE DENVER POST, Sept. 23, 1995, at D1.
\item The population of Rio Rancho grew from 10,000 to 46,000 between 1981 and 1995. See Martin F. Nolan, An Intel Town Comes of Age On The Mesa, BOSTON GLOBE, Oct. 9, 1995, at 3. As of 1995, Rio Rancho was the sixth largest city in New Mexico. See id.
\item In the decade ending in 1990, the population of Rio Rancho grew at a rate of more than 239 percent, making it the fastest growing "small city" in the United States. See Leah Beth Ward, Atop A Mesa, A City Just Grows and Grows, N.Y. TIMES, June 27, 1993, at H1.
\item Intel uses more than 4 million gallons of water a day in its manufacturing process. See Paul Logan, Intel Uses 4.8 Million Gallons of Water Daily, ALBUQUERQUE J., Aug. 25, 1995, at Metro Plus 1. For a more complete history of Intel’s water use and water permit applications, see Susanne Hoffman-Dooley, Determining What is in the Public Welfare in Water Appropriations and Transfers: The Intel Example, 36 NAT. RESOURCES J. 103 (1996).
\item Albuquerque and the surrounding area were already depleting the local aquifer before Intel arrived. See Michael Hartranft, Aquifer Crisis May Hit By 2020, ALBUQUERQUE J., Jan. 31, 1995, at A1.
\item Eighty-four percent of the voters were in favor of acquiring the utility. See Brief of the City of Rio Rancho at 2, United Water N.M., Inc. v. New Mexico Pub. Util. Comm’n, 910 P.2d 906 (N.M. 1996) (Nos. 23151, 23264) [hereinafter City’s Brief].
\end{enumerate}
\end{footnotesize}
to acquire, by whatever legal means necessary, the local privately owned water and sewage utility, the Rio Rancho Utility Corporation (RRUC).

A. Condemnation Proceedings

After negotiations with RRUC failed to reach an agreeable sale price for the water and sewage systems and related assets (Systems), Rio Rancho initiated condemnation proceedings against the utility. On December 15, 1994, the City amended its complaint to include a request for the immediate possession of the Systems. After a three day hearing on the issue of the City’s right to immediate possession, at which RRUC vigorously contested the condemnation, the district court granted the City possession of the water and wastewater systems, effective June 30, 1995. The district court, in issuing its decision, explicitly declined to rule on questions raised by both RRUC and the City regarding the applicability of the PUA and the jurisdiction of PUC.

Based on the district court’s order, RRUC and the City reentered negotiations and agreed upon a “just compensation” price of $72.5 million (Stipulation). The district court approved the stipulated amount, and on June 30, 1995, the City took possession of the Systems. RRUC retained title, however, and the Stipulation was subject to certain conditions

---

27. See Padilla, supra note 7.
28. After the initial proceedings giving rise to this case, the utility changed its name to United Water N.M., Inc. For consistency, the courts have continued to refer to it as RRUC. See United Water, 910 P.2d at 907, n.1. This article will do the same.
30. See City’s Brief, supra note 26, at 2.
32. The term “immediate” in this context refers to the City’s right to possess and operate the Systems before the issue of just compensation has been resolved and before title has been transferred to the City.
34. See id. at 908.
37. See United Water, 910 P.2d at 908.
38. See id.
precedent. As part of the Stipulation, all proceedings with government agencies had to be resolved prior to the transfer of title, including a resolution of PUC's jurisdiction and approval of the matter. If the conditions precedent were not satisfied by October 30, 1995, the Stipulation would expire.

B. The Commission Proceedings

The PUC first entered the fray on January 27, 1995, when RRUC filed for a declaratory order with the Commission. According to the PUA, the Commission regulated RRUC, a privately-owned public utility. Therefore, RRUC required PUC approval before it could discontinue water and sewage services to Rio Rancho. RRUC filed the declaratory order seeking clarification of certain issues regarding Commission jurisdiction over the condemnation and any approvals RRUC would be required to obtain before lawfully complying with the court order granting Rio Rancho the right to immediate possession. The City opposed the RRUC petition for declaratory judgment and any action by the Commission on the matter of the condemnation. The City argued that its constitutional and statutory eminent domain power and the district court's comprehensive authority over condemnation superseded any power the Commission might derive through the PUA. The Commission denied Rio Rancho's motion to dismiss for two reasons.

40. See City's Brief, supra note 26, at 2.
41. See United Water, 910 P.2d at 908. The filing commenced NMPUC Case No. 2623. Id.
44. See City's Petition, supra note 31, at 7-8.
45. See id. at 8-9.
46. There is no explicit power of eminent domain given to municipalities in the New Mexico Constitution. The New Mexico legislature provided municipalities with the power of eminent domain in various statutes. Explicitly with regard to water and sewage facilities:

[A] municipality may within and without the municipality . . . acquire, maintain, contract for or condemn for use as a municipal utility privately owned sewer facilities used or to be used for the collection, treatment and disposal of sewage of the municipality or its inhabitants.


Municipalities, within and without the municipal boundary, may . . . 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.

47. See City's Petition, supra note 31, at 8-9.
First, the Commission decided that it had to determine whether its approval was required in order for Rio Rancho to use municipal bonds to acquire RRUC’s Systems. According to section 3-23-3 of the New Mexico statutes, Rio Rancho could not issue bonds to purchase RRUC’s Systems without PUC approval. Second, PUC determined that RRUC must seek its approval for the “proposed sale” and abandonment of RRUC’s water and sewer facilities.” According to PUC, the transfer of the Systems from RRUC constituted either an abandonment or sale of the Systems, thereby requiring PUC approval.

The Commission’s first reason for denying the City’s motion to dismiss soon became irrelevant. Rio Rancho had lobbied the New Mexico state legislature to amend section 3-23-3. On April 4, 1995, New Mexico Governor Gary Johnson signed into law Senate Bill 982; an emergency clause of the law amended section 3-23-3 by specifically exempting from its coverage any municipality attempting to condemn a water and sewage utility and having a population over 25,000 according to the 1990 federal decennial census.

---

48. On December 14, 1994, Rio Rancho’s Governing Body authorized the issuance of bonds not to exceed $80 million to be used for acquiring RRUC’s systems. See City’s Petition, supra note 31, at 6.

49. At that time, N.M. STAT. ANN. § 3-23-3 (Michie Repl. Pampl. 1995) read as follows:
   A. If the acquisition of a utility is to be financed from funds received from the issuance and sale of revenue bonds, the price of the acquisition of the utility shall be approved by the New Mexico public utility commission and the commission shall require: (1) a determination by appraisal or otherwise of the true value of the utility to be purchased; or (2) an engineer’s estimate of the cost of the utility to be constructed.
   B. No revenue bonds shall be issued for the acquisition of such a utility until the New Mexico public utility commission has approved the issue and its amount, date of issuance, maturity, rate of interest and general provisions.

   A. With the prior express authorization of the commission but not otherwise . . .
      (4) any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof; provided, however, that this paragraph shall not be construed to require authorization for transactions in the ordinary course of business.


53. N.M. STAT. ANN. § 3-23-3(C) (Michie Repl. Pampl. 1995):
   The provisions of Subsections A and B of this section shall not apply to the condemnation by a municipality having a population of twenty-five thousand or more persons according to the 1990 federal decennial census of either sewer facilities as authorized by Chapter 3, Article 26 NMSA 1978 or water facilities as authorized by Chapter 3, Article 27 NMSA 1978.
Rancho filed a special appearance and refused to submit the requested testimony.\textsuperscript{65}

Two days after the City entered its second special appearance, it filed a Petition for Writ of Mandamus with the New Mexico Supreme Court\textsuperscript{66} which the court denied without prejudice as premature, "holding that Rio Rancho could renew its petition after the PUC's hearing."\textsuperscript{67} The hearing examiner again issued an order requesting the City to submit testimony.\textsuperscript{68} The city complied two days later.\textsuperscript{69} The hearing examiner conducted a two-day hearing, and on October 23, 1995, issued a recommended decision.\textsuperscript{70} Based on the agreed upon price, the hearing examiner recommended that the PUC not grant the abandonment or sale of the Systems.\textsuperscript{71}

With an unfavorable recommended decision on its way to the Commission, denying abandonment and sale approval for RRUC's facilities,\textsuperscript{72} RRUC filed a motion with the New Mexico Supreme Court\textsuperscript{3} seeking a stay of the expiration of the Stipulation and a writ of mandamus requiring the PUC to find that it had no jurisdiction over the condemnation. The court granted RRUC's motion and consolidated it with the City's earlier petition.\textsuperscript{74} On November 7, 1995, the Commission issued its final order in the proceeding, denying abandonment and sale approval for RRUC. On November 8, 1995, the court's stay of the Stipulation ran out and with it the just compensation price agreed upon by RRUC and the City.

\textsuperscript{65} See id. It has been suggested that one of Rio Rancho's possible motivations for not entering the required testimony may have been the realization that the stipulated price was too high and it could have acquired the utility for substantially less. RRUC implicitly made such a claim:

\begin{quote}
[T]he lack of a timely NMPUC decision was caused in major part by the City's refusal to comply with NMPUC's scheduling orders requiring the City to submit testimony before the NMPUC...To now permit the City to benefit from the jurisdictional uncertainty over the condemnation would be unjust and inequitable.
\end{quote}


\textsuperscript{66} See United Water, 910 P.2d at 908.

\textsuperscript{67} Id.

\textsuperscript{68} See Final Order, supra note 36, at 3, Record at 1063, United Water, 910 P.2d 906.

\textsuperscript{69} See id.

\textsuperscript{70} Recommended Decision of Hearing Examiner at 5, Exhibit 1 to the Final Order, supra note 36, Record at 1079, 1083, United Water 910 P.2d 906.

\textsuperscript{71} See id. at 1114.

\textsuperscript{72} See id.


\textsuperscript{74} See id.
Based on the amendment of section 3-23-3 and the Stipulation it entered into with the City regarding the amount of just compensation, RRUC filed a motion to withdraw its earlier petition for declaratory order with the PUC. RRUC concluded that any uncertainties regarding the necessity to obtain PUC approvals had been resolved by the amendment, the district court’s decision, and the Stipulation with the City. The Commission granted the motion to withdraw as it pertained to section 3-23-3.

However, the Commission maintained that RRUC must still file applications for approval of its sale and abandonment of the Systems. On May 10, 1995, RRUC and the City signed an amended Stipulation that permitted RRUC to file for approval of abandonment in compliance with the Commission’s order. On the same date, RRUC filed a motion with the Commission seeking approval for the abandonment of its facilities. In accordance with the approval and New Mexico statute, the PUC issued an order reconstituting the proceedings related to the condemnation of RRUC’s facilities and appointed a hearing examiner to preside over the matter. The Commission ordered the hearing examiner to determine whether to approve the abandonment and sale of the water and wastewater facilities. PUC reserved final judgment on the issue of whether the Commission had jurisdiction until such time as an adequate record of all material issues was developed.

Upon a finding that the city of Rio Rancho was a necessary party to its proceeding, the hearing examiner issued an order requiring the City to file testimony by July 24, 1995. However, in a special appearance filed by Rio Rancho, the City objected to the Commission’s jurisdiction in the matter and did not file testimony. Subsequently, the hearing examiner again issued an order “denying” the City’s objection to jurisdiction and requiring the City to submit testimony by August 28, 1995. Again, Rio

54. See City’s Petition, supra note 31, at 12.
55. See id.
56. See id.
57. See id.
58. See id. at 13.
59. See id.
62. See Final Order, supra note 36, at 2, Record at 1062, United Water, 910 P.2d at 906.
63. See id.
64. See id.
The court held that such an arrangement would give the Commission veto power over the district court's determination of just compensation and would be "inconsistent with the traditional approach to eminent domain."\textsuperscript{93} According to the court's analysis, the condemnation process essentially consists of two parts. First, the court must determine if the municipality has the authority to take certain property by condemnation.\textsuperscript{94} If the court finds that the municipality is entitled to condemn the property, the owner then has a constitutional right to just compensation for that property.\textsuperscript{95} It is the function of the court to determine what amount of compensation is just.\textsuperscript{96} To allow the Commission to limit that compensation or to retain final approval authority over the amount of compensation would prohibit the municipality from exercising its right to condemn or prohibit the utility from receiving just compensation. Moreover, the court pointed out that the factors the Commission considers when evaluating whether the purchase price for a public utility is in the public interest, \textit{i.e.} rate-based factors, are unrelated to the standards the court uses to determine what constitutes just compensation.\textsuperscript{97} To allow the Commission to veto the district court's determination would frustrate the judicial process of determining just compensation.

D. The Aftermath

Because the stay issued by the supreme court expired on November 8, 1995, and was not renewed by the court, RRUC and Rio Rancho renegotiated the purchase price for the utility's systems after the court issued its decision. The final purchase price was $5 million less than the originally negotiated price. While the residents of Rio Rancho complained about the Commission's interference with their attempts to acquire the local water and sewage utility,\textsuperscript{98} they actually benefited in the end from the Commission's activities. As suggested by RRUC in one of its briefs to the court, the City, after realizing it paid too much for the utility, may have attempted to prolong the proceedings with the Commission in an attempt to allow the deal it had entered into with RRUC to expire.\textsuperscript{99} Although such

\textsuperscript{93} Id. \\
\textsuperscript{94} See id. \\
\textsuperscript{95} See N.M. CONST. art. II, § 20. \\
\textsuperscript{96} See United Water, 910 P.2d at 913. \\
\textsuperscript{97} See id. \\
\textsuperscript{98} One state legislator, Sen. Joe Carraro, R-Albuquerque, proposed giving Rio Rancho $351,153, Rio Rancho's cost to litigate the case. However, such a plan would in effect "punish state agencies for good-faith efforts to apply the law." See Don't Penalize PUC, ALBUQUERQUE J., Feb. 23, 1996, at A14. \\
\textsuperscript{99} See discussion, supra note 65.
claims cannot be substantiated, if that was indeed the case, then Rio Rancho may have exploited the judicial system.

PART II: ANALYSIS OF THE COURT'S DECISION

Despite the political intricacies of the United Water case, the issue to be decided by the New Mexico Supreme Court boiled down to statutory construction. The court was forced to determine whether the legislature intended the PUC to have authority in the condemnation of a privately owned water and sewage utility by a municipality. Because the statute was silent on the issue, the question was whether the broad powers conferred upon the Commission by the PUA should be interpreted to cover condemnation proceedings. Based on legislative action directly related to municipal condemnation of water and sewage utilities, the court most likely reached the correct result when it ruled that the PUC did not have jurisdiction in the matter. The decision, however, may have been incorrect in that it may extend beyond water and sewage utilities. While there are many reasons why the decision might not apply to electric utility condemnation, if it does so apply it could have detrimental effects on the electric industry.

A. Voluntary Versus Involuntary

In United Water the court's decision focused on the distinction between the involuntary nature of a condemnation versus the voluntary nature of a sale or abandonment of property. If this had been a sale or an abandonment of facilities by RRUC, then RRUC would have been a "voluntary" participant in the transaction. In that case, PUC would have had jurisdiction to determine whether the acquisition of the facilities by Rio Rancho was in the "public interest." However, merely because the negotiations between Rio Rancho and RRUC failed to produce an agreed upon sale price, PUC had no jurisdiction over the matter. The distinction seems to be a purely academic one that does not consider the true nature of utility regulation. It does not consider the intricate nature of the operations of many of these facilities, nor does it take into account the environmental aspects directly related to all utilities.

1. The California Case

The United Water decision is not without precedent, however. The court cited two cases to support its holding that the language of section 62-6-12(A)(4) of the New Mexico statutes, which requires PUC approval when a utility sells any of its facilities, refers only to voluntary transfers. In the

100. See United Water, 910 P.2d at 910.
Briefs were supplied to the supreme court and oral arguments were heard late in the year.75

C. The Court's Decision

On January 27, 1996, the court issued its decision holding that the PUC did not have jurisdiction over Rio Rancho's condemnation of RRUC's water and wastewater facilities.76 While acknowledging that the PUA confers broad powers on the Commission to regulate public utilities, it noted that municipal utilities are exempt from Commission control77 unless they vote to be regulated by it.78 Although the PUC acknowledged that it would have no jurisdiction over the Systems once RRUC transferred them to Rio Rancho, it argued that it continued to have control over RRUC and the Systems until the condemnation was complete. Therefore, according to its own interpretation, the PUC had jurisdiction over the proceeding and a statutory obligation to determine whether the transfer of the facilities would be in the "public interest" under section 62-6-12(A)(4) (sale) and section 62-9-5 (abandonment).79 The court disagreed. It looked at the plain language of the PUA and determined that, because there is no explicit reference to the PUC's jurisdiction over condemnation, the PUC did not have jurisdiction in the matter.80

In addition, the court addressed the issue of whether the statutory language implied that condemnation fell within the purview of the Commission's power under the PUA by virtue of the "abandonment" or "sale" clauses. Its decision hinged on the distinction between the "voluntary" nature of an abandonment or sale as opposed to the "involuntary" or compulsory nature of a condemnation.81 While a utility decides when it is necessary or desirable to abandon or sell part or all of its facilities, "the utility has absolutely no say over a municipality's decision to pursue a condemnation action against it."82 The Commission's argument that a condemnation is similar to a "forced sale" in which the "state stands

75. See id. Oral arguments were held on Dec. 13, 1995.
76. See id.
79. See United Water, 910 P.2d at 909.
80. See id. at 910.
81. See id.
82. Id.
toward the owner as buyer toward seller,83 was rejected by the court because the past cases which had so analogized condemnation proceedings had done so to highlight the property owner's right to the market value of the property.84 With regard to "abandonment," the court concluded that the facts of the case identified this as an involuntary action, noting that RRUC had vigorously contested the condemnation during the hearing before the district court.85

The court also looked at the legislative intent of the drafters of the PUA in concluding that the Commission's jurisdiction did not extend to municipal condemnation of public utilities. The PUC was originally designed to promote the development of utilities and utility service for the benefit of New Mexico so that its citizens may receive adequate services at reasonable rates.86 Municipalities were explicitly exempt from such regulation87 because the drafters believed that "municipalities were fully capable of protecting the interests of citizens served by a municipal utility both inside and outside the municipalities' borders without need for PUC oversight."88 The legislature reasoned that the power of the vote would give citizens the power to check the rates that the municipal utility implemented.

The second argument addressed by the court was whether the Commission had concurrent jurisdiction with the district court over a condemnation proceeding.89 The Commission argued that "the legislative grant of condemnation authority to municipalities can and should be harmonized with the grant of PUC authority over a sale or abandonment" by finding that the Commission and the district court have concurrent jurisdiction over the condemnation.90 According to the plan presented by the PUC, the district court would determine if the municipality has the right to condemn, and determine the amount of just compensation to the public utility.91 The Commission would then have authority to determine if the amount of compensation, as determined by the district court, was in the public interest and approve or deny the condemnation based on its determination.92 Such a process would protect the public welfare while harmonizing the jurisdiction of the Commission and the district court.

83. Id. (quoting Jackson v. State, 106 N.E. 758, 758 (N.Y. 1914)).
84. See id.
85. See id. at 911.
86. See N.M. STAT. ANN. § 62-3-1(B) (Michie Repl. Pampl. 1993).
88. United Water, 910 P.2d at 912.
89. See id. at 913.
90. Id.
91. See id.
92. See id.
first case, Public Utilities Commission v. City of Fresno, California's Court of Appeals addressed a statute that was substantially similar to the one addressed by the New Mexico Supreme Court in United Water. In 1967, section 851 of the California Public Utilities Code required approval from the California Public Utilities Commission (California PUC or California Commission) for sales of privately owned utility property dedicated to public use. However, while the "primary function of the [California] commission is to... exercise control over private companies engaged in public service," the statutes empowering the California PUC, by their silence on the matter, conferred upon the commission no jurisdiction to regulate municipalities. Moreover, sections 1240 and 1241 of the California Code of Civil Procedure expressly provided that a city could condemn a privately owned public utility. The statutes were silent, however, on the issue of whether commission approval was necessary for such a condemnation.

The facts in City of Fresno clearly indicate that the city of Fresno (Fresno) used its power of eminent domain simply to avoid having to obtain the California PUC's approval for the sale of water utilities to Fresno. In 1965 the Bowen Land Company, which then provided water to Fresno, agreed to sell its entire water system and related facilities to the City for $25,000. In accordance with the California Public Utilities Code section 851, the parties filed a joint application for approval of the purchase with the California PUC. When the California Commission refused to approve the sale unless certain conditions precedent were met, the city of Fresno instituted a condemnation action with the Superior Court. In its complaint for condemnation, Fresno alleged that the fair market value of the water system was $25,000. Bowen's answer admitted that the fair market value was as alleged in the complaint.

Despite Fresno's blatant attempt to avoid the required California Commission approval imposed by California statute, the court held that section 851 of the California PUC did not regulate a city's power of eminent

102. See id. at 82.
103. See id.
104. See id.
105. Id. at 84, nn. 2 & 3.
106. At the time the case was decided, section 851 of the California Public Utilities Code stated:

No public utility ... shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its ... line, plant, system or other property necessary or useful in the performance of its duties to the public ... without first having secured from the commission an order authorizing it to do so.

City of Fresno, 62 Cal. Rptr. at 82.
domain. It interpreted the focus of section 851 to be the regulation of the actions of public utilities in their dealings with property designated to the public use.\textsuperscript{107} Such regulation did not extend to a wholly separate power of a municipality expressly provided for by the California legislature.\textsuperscript{108}

According to the California appellate court, the unequivocal power of eminent domain provided to the municipality "is an attribute of sovereignty" and should not be limited by judicial interpretation of an equivocal statute.\textsuperscript{109}

Furthermore, the California court took into account that, similar to New Mexico law,\textsuperscript{110} under sections 1401 and 1402 of the California PUC, a municipality could voluntarily submit the determination of just compensation to the California Commission when seeking to acquire privately-owned public utility property through eminent domain.\textsuperscript{111} However, unlike the New Mexico law which allows municipalities to subject themselves to general PUC regulation if the voters so choose, sections 1401 and 1402 of the California PUC expressly provided that the California Commission could become involved in the condemnation of public utility property by a municipality only when the condemnor invites the commission to become involved in a condemnation, thereby severely limiting the commission’s involvement in municipal condemnation. New Mexico law, on the other hand, is completely silent on the issue of the PUC’s role in condemnation, not limiting the PUC’s involvement in condemnations of public utility property either implicitly or explicitly.

2. The Indiana Case

The New Mexico Supreme Court also relied on Decatur County Rural Electric Membership Corp. v. Public Service Co. of Indiana\textsuperscript{112} to support the holding that regulation of sales of utility assets under the PUA does not include an involuntary condemnation of utility property. Decatur County involved the condemnation of one utility’s assets by another utility. Over a ten-year period, the City of Greensburg annexed certain land to the city. The Public Service Company of Indiana (PSCI), which provided electric service to the City of Greensburg, sought to purchase facilities in the annexed area which were owned by the Decatur County Rural Electric Membership Corporation (REMC), the utility that provided electric service to the annexed area prior to annexation. When negotiations between the

\begin{itemize}
  \item \textsuperscript{107} See id. at 83.
  \item \textsuperscript{108} See id. at 82, n.2.
  \item \textsuperscript{109} See id. at 84.
  \item \textsuperscript{110} N.M. STAT. ANN. § 62-6-5 (Michie Repl. Pampl. 1993).
  \item \textsuperscript{111} See City of Fresno, 62 Cal. Rptr. at 85.
  \item \textsuperscript{112} 307 N.E.2d 96 (1974).
\end{itemize}
mean that, although both types of abandonment fall within the term "abandonment" by itself, the legislature wanted to clarify its language so that the type of dispute that arose in the United Water case would not present itself to the Ohio courts.

B. Legislative Intent

While these cases certainly do not prove one way or another whether the requirement for either sale or abandonment should be applied to condemnation, they do show that the distinction is not as clear cut as the New Mexico Supreme Court seems to make it. The applicability of the utility sale and abandonment statutes cannot be determined merely from their language. Moreover, any possible distinction based on the voluntary nature of a sale or an abandonment versus the involuntary nature of a condemnation was not likely considered by the New Mexico Legislature when it passed the Public Utilities Act. While the interpretation may make legal sense, any analysis of the decision should compare the result reached by the court with the probable intent of the legislature in passing the Act. Although New Mexico does not maintain legislative history, the legislators' intent on this issue can be gleaned from other actions related to the Rio Rancho water and sewage utility condemnation. The court did not ignore those actions and considered them in making its decision. Based on the language and the time of the provision granting municipalities the power to condemn water and sewage utilities and the last-minute amendment removing the necessity for PUC approval of certain bond issues, the legislature probably wanted municipalities to have the power to condemn these utilities without having to seek PUC approval.

In 1994, the same year that Rio Rancho passed a resolution to acquire the facilities of RRUC by any legal means, the legislature amended the sections of the New Mexico statutes related to water and sewage facilities to allow municipalities to "acquire, maintain, contract for or condemn" such utilities. These amendments were most likely the result of lobbying by Rio Rancho, which had in mind taking control of its water and sewage facilities. The language of the amendments, sections 3-26-1(A)(3) and 3-27-2(A)(2), clearly circumscribes the scope of its reach. The power to condemn private utilities is limited to water and sewage facilities, although the power is extended to facilities both within and without the

124. N.M. STAT. ANN. § 3-26-1(A)(3) (Michie Repl. Pampl. 1995) (a municipality may condemn sewer facilities) and § 3-27-2(A)(2) (Michie Repl. Pampl. 1995) (a municipality may condemn water facilities) were both passed in the beginning of 1994. Later that year, Rio Rancho began proceedings to acquire RRUC's water and sewer facilities.
municipality boundary. There is, therefore, no ambiguity as to a municipality’s power to condemn these types of facilities.

In addition, the legislature explicitly removed one of the grounds on which the PUC had asserted jurisdiction after the condemnation proceedings had already begun. After the negotiations between Rio Rancho and RRUC had failed to reach an agreement and condemnation proceedings against RRUC had been initiated, the New Mexico PUC asserted jurisdiction over the condemnation based on three different sections of the statutes. While the sections requiring PUC approval for the sale or abandonment of assets may have been of questionable relevance to the condemnation action, section 3-23-3 of the statutes gave the PUC explicit jurisdiction to approve or disapprove the use of revenue bonds to fund the purchase of a utility. Months after the condemnation proceedings had begun, however, the legislature explicitly removed that requirement from the Rio Rancho water and sewage condemnation case. The amendment applied only to the condemnation of water and sewage utilities by municipalities, and only to municipalities with a population of more than 25,000 according to the 1990 federal decennial census. Because those requirements could apply to only one city other than Rio Rancho, the legislature apparently intended to exclude from PUC jurisdiction the condemnation process taking place in Rio Rancho.

C. Public Interest

Although the United Water judgment most likely followed the intent of the New Mexico legislature, the net effect of the case is to remove the “public interest” consideration from the analysis. Both the sale and abandonment statutes for utilities require that the PUC take into consideration the “public interest” when deciding whether or not to approve the transfer of a utility’s property. The factors considered by a district court,

126. Interview with Lee Huffman, supra note 18.
127. Section 62-9-5 of the New Mexico statutes provides:
   No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility....
   For sales or other transfers under section 62-6-12 (sale), the Commission is required to approve the transfer unless the transaction is found to be “unlawful” or “inconsistent with the public interest.” N.M. STAT. ANN. § 62-6-13 (Michie Repl. Pampl. 1993) (emphasis added).
utilities failed to reach a sale price, PSCI initiated a condemnation action against REMC to acquire the facilities located in the annexed territory. PSCI relied on section 8-1-13-19 (section 18a) of the Indiana Code as the basis for initiating the condemnation. The statute specifically provided that a utility (Utility A) may condemn the property of another utility (Utility B) when the municipality served by Utility A annexes land served by Utility B. In opposition to the condemnation by PSCI, REMC argued that the condemnation, although explicitly permitted by the statute, must be approved by the Indiana Public Service Commission (Indiana Commission or PSC) according to section 8-1-2-84 (section 84) of the Indiana Code.

The Court rejected the application of section 84 to condemnation actions under section 18a for two reasons. First, the court noted that section 84 made "no mention of condemnation actions, but rather, deals only with voluntary sale or leases." Second, the court noted that section 18a made no reference to the requirements of section 84, and therefore, held that they should not be imported to section 18a absent explicit language that they should apply.

While the language of section 84 of the Indiana Code is similar to section 62-6-12(A)(4) of the New Mexico statutes governing the sale of...
public utility property, there are significant differences between *United Water* and *Decatur County*. First, whereas *United Water* dealt with the condemnation of an entire water and sewage utility by a municipality, *Decatur County* involved the condemnation of a part of one utility's facilities by another utility, both of whom were regulated by the Indiana PSC. Moreover, the condemnation was the result of the city of Greensburg extending its borders through annexation. More importantly, however, the condemnation power delegated to the utility in *Decatur County* was very specific in terms of the situations in which it applied, *i.e.*, only when a municipality has annexed territory that was previously served by a utility other than the utility serving the municipality. The specificity of the Indiana statute indicates that if the Indiana legislature had intended for the requirements of section 84 to apply, it would have done so expressly.

The power of eminent domain conferred upon municipalities by sections 3-26-1(A)(3) and 3-27-2(A)(2) of the New Mexico statutes, while specific in terms of what types of property may be acquired through eminent domain, is more general in terms of the instances in which the power may be exerted. Unlike the Indiana statute, no requirement as to the type of negotiations or the time period of those negotiations is made by the New Mexico statutes. Moreover, the New Mexico statutes combine the terms "acquire," "maintain," and "contract for" with the term "condemn" in their language. The Indiana statute expressly applies only to condemnations. As noted earlier, if Rio Rancho had elected to "acquire" or "contract for" RRUC's facilities in some way other than condemnation, the PUC would have had jurisdiction. Therefore, the legislature's failure to expressly provide that the approval requirements of either the sale (section 62-6-12(A)(4)) or abandonment (section 62-9-5) of utility property apply to condemnation of water and sewage utilities does not shed light as to whether the legislature intended the requirements to apply as they did in the Indiana case.

While the two cases that the New Mexico Supreme Court relied upon have similarities to the Rio Rancho water and sewage municipal condemnation, there are numerous other cases that analogize condemnation to an involuntary sale.116 Although these cases do not necessarily overcome the voluntary-involuntary distinction drawn by the court in *United Water*, they do indicate that there is some dispute as to whether or

---

when a condemnation falls within the meaning of the term "sale," as used in a statute such as section 62-6-12(A)(4) of the New Mexico statutes. The same dispute is present with the utility abandonment statute. When one applies the voluntary-involuntary distinction to the term "abandonment," the exercise appears academic. Moreover, while the distinction may hold water as a legal argument, it definitely leaks upon close scrutiny.

3. The Pennsylvania Case

To support its distinction between abandonment as voluntary on the one hand and condemnations as involuntary on the other, the court cited a 1954 case involving a gas utility. In *Emerald Coal and Coke Co. v. Equitable Gas Co.*, a court-ordered injunction threatened to force the defendant gas company to abandon its public utility facilities. The defendant challenged the court's jurisdiction in the matter, arguing that any court injunction that required it to abandon its system would have to be approved by the Pennsylvania Public Utility Commission (Pennsylvania PUC) according to Pennsylvania's public utility law. The court rejected the defendant's argument stating, "[a]bandonment necessarily implies the voluntary or intentional act of the party having the facility, right or power to relinquish it."118

4. The Ohio Case

In a more recent case, however, the Supreme Court of Ohio decided that the city of Clyde (Clyde) was required to get approval from the Public Utilities Commission of Ohio (PUCO) before it could force the Toledo Edison Company (Toledo) to abandon its lines through the enforcement of a city ordinance.119 In 1965 Clyde turned over its electric generation, transmission, and distribution system to Toledo and provided Toledo with a twenty-five year non-exclusive contract to provide electricity to the residents of Clyde. Twenty-three years later, with only two years left on the contract, the residents of Clyde decided to re-establish the municipal utility in the city by building a duplicate electric transmission system.120 When the franchise agreement expired in 1990, Clyde denied Toledo's application to renew the agreement. Over the next five years, the two utilities continued to jointly provide electric service to the inhabitants of Clyde.

In 1995 the peaceful co-existence of the two utilities ended when Clyde's city council passed an ordinance that required all future arrange-
ments for electricity within the city be made with the municipal utility.\footnote{121} While the ordinance did not require that established contracts be transferred to the municipal utility, it would eventually require all arrangements for electricity be transferred to Clyde's utility as they came up for renewal. Toledo argued that the ordinance would require it to abandon its electric distribution systems. According to Ohio law, any abandonment of utility property had to be approved by PUCO.\footnote{122} The Court held that, based on the statutes, Clyde was required to obtain PUCO approval before it could enforce the ordinance and that enforcement of the ordinance constituted an abandonment even though the abandonment was not voluntary.\footnote{123}

One point regarding the Ohio statute needs to be emphasized and may lend credence to the New Mexico Supreme Court's classification of abandonment as involuntary. Section 4905.20 of the Ohio Revised Code explicitly provides that approval must be obtained from PUCO before a utility "shall abandon" its property or "be required to abandon" any of its property (emphasis added). The language of the statute provides independently for both voluntary and involuntary abandonment, "required abandonment." Moreover, section 4905.21 of the Revised Code specifically requires a "political subdivision," which includes a municipality, to apply with PUCO anytime it wishes to abandon or have abandoned any part of an electric line. In both sections of the code, the powers and limitations of the municipality and the PUCO are more clearly defined than in the New Mexico statutes. The Ohio Code's explicit provision for both voluntary and involuntary abandonment might be interpreted to mean that the term "abandonment," by itself, refers only to voluntary actions. Otherwise the legislature would not have needed a separate involuntary abandonment clause in the statute. However, the language may also be interpreted to

\begin{itemize}
\item \footnote{121}{Section 3 of the ordinance read:}
\begin{quote}
On and after the effective date of the ordinance, all utility service arrangements for electric water or sewer utility service within the corporate limits of the City of Clyde, as the same may be altered from time to time through annexation or otherwise, shall be made with the City of Clyde's electric, water and sewage utilities.
\end{quote}
\end{itemize}

\begin{itemize}
\item \footnote{122}{Ohio Rev. Code Ann. § 4905.2 (Anderson 1991) states:}
\begin{quote}
No . . . public utility as defined in Section 4905.02 of the Revised Code furnishing service or facilities in this state, shall abandon or be required to abandon or withdraw any main . . . electric light line . . . or any portion thereof . . .
\end{quote}
\end{itemize}

\begin{itemize}
\item \footnote{123}{Ohio Rev. Code Ann. § 4905.21 (Anderson 1991) states:}
\begin{quote}
Any . . . political subdivision desiring to abandon, close, or have abandoned, withdrawn, or closed for traffic or service all or any part of any . . . [electric] line . . . shall make application to the public utilities commission in writing.
\end{quote}
\end{itemize}

\begin{itemize}
\item \footnote{124}{City of Clyde, 668 N.E.2d at 509.}
\end{itemize}
on the other hand, do not include the "public interest." The district court follows a two-step process: First, the court determines if the municipality has the right to condemn the property. This can include a requirement that the condemned property be for a public use. The public use requirement is not analogous to "public interest;" rather it is a constitutional requirement that the property not be transferred to use by a private individual. Second, the court determines the amount of "just compensation," usually based on the fair market value. As noted by the New Mexico Supreme Court, such a determination does not consider rate-based factors to reach its result. Therefore, the City of Rio Rancho has no duty to consider the "public interest" when it decides to condemn the RRUC. "Neither the District Court nor the City are [sic] charged with addressing these [public] interests in the course of a condemnation. The Court's interest is in assuring the due process rights of the condemnee. The City's interest is purely local." Since a municipality is not required to consider the public interest when deciding to condemn a utility, and because the municipal government is beholden only to the residents of the municipality, the only aspect of the public interest with which the municipality is likely to concern itself is the interest of the local community. In the case of Rio Rancho, however, even the interests of the city may have been compromised by local politics. In conducting its review of the stipulated agreement between Rio Rancho and RRUC, the PUC found that the agreed upon "just compensation" price was unusually high. Furthermore, the revenue bond structure created by the stipulated agreement was back-loaded, providing comparable rates to the city during the first ten to fourteen years of payments, but increasing dramatically thereafter. Despite the fact that both the decision to condemn the Systems and the revenue bond structure were approved by the residents of Rio Rancho through local elections, it is highly unlikely that

128. See United Water, 910 P.2d at 913.
129. In the case of California, the Code of Civil Procedure § 1241 required that if property is already devoted to a public use it must appear that the public use to which it is to be applied is a "more necessary public use." Under the same section of the Code, the California Legislature stated that when public utility property already devoted to the public use is to be condemned by a city, the city use is deemed "the more necessary public use" as a matter of law.
130. The requirement that the condemned property be put to a "public use" has been relaxed in recent years. See Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
133. "Although RRUC is now receiving $72.5 million for the plant, it paid only $44 million for the water and sewage utility... when (it] bought it in 1991." Id. at 10.
134. "Thus, these [sic] benefits slowly accrete over time because any benefits from them are effectively 'backloaded.'" Id. at 12.
the voters understood that the bond structure would cause their water rates to increase over time. Furthermore, by the time the bond issue went to the polls, RRUC no longer had any incentive to contest the City’s condemnation of its Systems.135

The PUC’s primary reason for denying the transfer of the Systems to the City was the proposed rate structure. Through its hearings and analysis, the hearing examiner for the Commission found that the rate structure would cause an increase in the rates to the Rio Rancho customers, both within and without the city limits. Despite the tax benefits, the lower financing rates, and the book depreciation of the Systems under control of the municipality, the residents will have to pay an increased $61.5 million in costs over what would be paid under RRUC’s control.136 The Commission, therefore, found that, based on the rate structure required to meet the bond payments, the “abandonment” by RRUC was not in the “public interest.”

The term “public interest” can take on a seemingly endless number of definitions and an endless number of factors can possibly be used to determine whether a certain action is in the “public interest.” Fortunately, the Commission has somewhat limited the definition. For a sale, in order for the Commission to deny approval of the sale, it must find that there was a net detriment to the public interest.137 With regard to the abandonment of public utility property, the standard is somewhat higher. In order for the Commission to approve an abandonment of public utility property, it must find that there will be a net benefit to the public.138 In making its determination, the Commission looks at four factors: (1) the extent of the carrier’s loss on the particular branch or portion of the service, and the relation of that loss to the carrier’s operation as a whole; (2) the use of the

135. By the time the Rio Rancho municipal government had sent the bond issue to the polls, RRUC had already lost possession of its Systems by virtue of the district court’s ruling that Rio Rancho had the right to immediate possession of those Systems. The high price contemplated by the agreement also discouraged RRUC from contesting the transfer. As such, RRUC had no incentive to raise a campaign against the transfer.
136. See Final Order, supra note 36, at 11.
137. The Commission in In re Southern Union Gas Co., 64 PUR 4th 17, 24 (NMPUC Case Nos. 1891, 1892 (1984)) defined the standard as:

The “not inconsistent with the public interest” standard is applicable to commission approvals of transfers of utility property and issuance of securities by utilities. This standard requires that we [the Commission] find that there is likely to be a net detriment to the public interest before we may withhold our approval of proposed transfers of utility property or issuance of securities by utilities under our jurisdiction. If the sale of the assets or issuance of securities is merely neutral, or equally balanced as to benefit and detriment to the public interest, we are compelled to approve such requests.
138. See Final Order, supra note 36, at 10.
service by the public and the prospects as to future use; (3) a balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of such service; and (4) the availability and the adequacy of service to be substituted. While these standards only slightly limit the term "public interest," they do provide the Commission some direction regarding the analysis to be done.

Although the potential rate and hook-up cost increases were the primary reason for the PUC's denial of the transfer of the System, there may be other "public interest" reasons besides the Commission Committee standards for PUC review of the transfer. In an arid climate like New Mexico, control of water resources in a central body may make better use of the scarce resource. An agency such as the PUC could regulate where water goes depending on where it is most needed, considering environmental and social consequences in addition to the standard economic factors. Such a system could balance the inequities in water rates presently experienced in various regions of the state. Moreover, control of the water rates could be the most efficient way to promote water conservation, an important issue in New Mexico.141 People tend to respond well to effects on their pocketbooks.

However, as has been demonstrated by a vast majority of regulated industries, increased regulation often causes more problems than it resolves. Government is notoriously inefficient in controlling and regulating industry. Moreover, despite any possible benefits of PUC control over all the various utilities across the state, the New Mexico legislature clearly did not intend that the PUC's power extend that far. The


140. Albuquerque water rates are significantly lower than rates in other parts of the state. See Water Is Liquid Gold; Rate Hike Reflects This, ALBUQUERQUE TRIB., Apr. 23, 1998, at C2.


142. During the past 25 years, the airline, telephone, trucking, and natural gas industries have all undergone tremendous deregulation. The electric industry is presently marked for deregulation on the federal level and has already undergone deregulation on the state level in many areas. The deregulation movement was sparked by the cost, inefficiency and ineffectiveness of regulation when compared with a free market system. See Michael T. Maloney, et al., On Stranded Cost Recovery in the Deregulation of the U.S. Electric Power Industry, 37 NAT. RESOURCES J. 59 (1997).
powers delegated to the Commission, although broad, are limited to certain areas of regulation.

The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the [PUA], and to do all things necessary and convenient in the exercise of its power and jurisdiction.\textsuperscript{143}

While the PUC has power over rates, the legislature never contemplated that the PUC would control all water allocation or sewage disposal. Moreover, there are benefits to be derived from giving municipalities control over their water supplies. In the Southwest, such power translates into control over the development within the municipality. All development is dependent upon what water sources are available and how much water is available. When municipalities have the ability to control water allocation, they also have some control over the type and rate of development. In the recent case of the Santa Fe water utility municipalization, the PUC praised local control over water systems:

For a community in the arid West, such as Santa Fe, a good water system furnishes a necessity of life that, metaphorically and otherwise, forms the lifeblood of the community's existence. Where, as here, a community seeks to own the water system that has served it for over 100 years, the gaining of that system is a milestone in the life of that community if only because the City will, for the first time, have sole responsibility for its water needs both now and in the future.\textsuperscript{144}

Furthermore, any detrimental effects of the municipal acquisition and control of the water system are likely to be borne primarily by the municipality itself. The PUC, in approving Santa Fe's acquisition of its water system from the Public Service Company of New Mexico (PNM), stated that while the city of Santa Fe was gaining control over its water, it also took with that the added risk of higher rates and losses to service quality.\textsuperscript{145} The size and extent of most water systems dictate that risks of increased rates and decreased service quality will be borne by the municipality and, in some circumstances, the neighboring communities dependent on the municipal water system. The effects will almost never


\textsuperscript{144} In re City of Santa Fe, N.M., New Mexico Pub. Util. Comm'n, Case No. 2588 at 4 (May 22, 1995), available at 1995 WL 389322.

\textsuperscript{145} See id.
extend much beyond the city limits because water systems are by nature small and localized.

Part III: THE EFFECT OF THE UNITED WATER DECISION ON ELECTRIC UTILITIES

The same cannot be said for electric utilities. Electric utility systems are typically larger and considerably more interconnected with state and national systems. Due to the nature of the "product," electricity cannot be stored or inventoried; unlike most other commodities, it must be produced at the same time customers demand it. Moreover, the cost of transporting electricity over long distances can be cost prohibitive except to balance out demand fluctuations during peak demand periods. Therefore, large utilities often design large power generating plants in their service territories in order to provide power to customers. Likewise, the numerous smaller electric utilities across the nation often build generation plants within or near their service territories. However, combined they generate only about 10 percent of the total power produced in this country. More often than not, the smaller electric utilities buy power at wholesale from the larger utilities or other power producers. Even those that do generate their own power often rely on larger generators to provide additional power during peak demand hours. The design and construction of generating plants is based on the total demand in the service area.

All the residents and businesses must be directly connected to the power generators by a system of wires in order to deliver power to those customers. Water utilities are similar in that all the customers must be connected to a water supply in order to receive water. With electricity, however, the interconnectedness of the utility is much more extensive. High voltage wires connect the generating plants to one another and to distribution centers that deliver the power to final customers. The interconnected nature of electric utilities distinguishes it from water utilities and also creates a certain interdependent nature for the communities served by a utility company. Changes in one part of the utility's system

146. Interview with Professor Suedeen Kelly, Univ. of N.M. School of Law, in Albuquerque, N.M. (Apr. 22, 1998).
148. See id. § 1, at 3.
149. See id.
150. See id. § 1, at 2.
151. See Doane & Macavoy, supra note 15, at 12.
152. See Report of Experts, supra note 147, § 1 at 2.
153. See id.
can have both physical and economic effects on the entire system. Therefore, one municipality leaving the system can adversely affect the remaining customers.

These differences in the nature of water and electric utilities could make United Water a bad precedent for the electric industry in New Mexico. Although the decision most likely reached the correct result for water and sewage utilities based on both the legislative intent on the issue and the nature of those utilities, if the decision is extended to electric utilities the PUC will not have the power to oversee the condemnation of electric utilities. Since neither the courts nor the condemning municipalities have an obligation to consider the "public interest" issues outside the locality, it is unlikely that anyone will take into account, and either balance or remedy, the potential detrimental effects such a condemnation could have on the remaining customers.

A. Will the United Water Decision Apply to Electric Utilities?

There are numerous reasons why the United Water decision might never be applied to an electric utility condemnation by a municipality. First, New Mexico courts may interpret the United Water case to apply only to water and sewage utilities even though there is nothing in the case that expressly limits the decision to those types of utilities. In United Water, the court considered numerous factors that do not apply equally to water and electric utilities. Moreover, some of the legislation relied on by the court applied only to water utilities. However, the actual holding of the case is an interpretation of the PUA which governs both electric and water and sewage utilities. The voluntary-involuntary distinction created and relied upon by the court to distinguish condemnations from sales and abandonments applies equally to electric and water utilities.

Second, the legislature may amend the PUA to expressly provide for PUC jurisdiction in electric utility condemnation actions by a municipality. Such an express statement by the legislature would likely be the best way to ensure that the "public interest" is considered in a transfer of electric facilities, thereby ensuring that other customers served by the utility are not injured by the condemnation. The legislature could also

154. Although the conclusion of the case in the last paragraph states "that Section 62-6-12(A)(4) (sale) and Section 62-9-5 (abandonment) do not give the PUC jurisdiction over municipal condemnations of regulated water and sewage utilities," United Water, 910 P.2d at 914, the reasoning of the case, which is based on the voluntary/involuntary distinction, is certainly not limited to water and sewage utilities.


156. See N.M. STAT. ANN. § 62-3-3 (Michie Repl. Pampl. 1993). The PUA also governs other forms of public utilities such as natural gas. See id.
direct the PUC to consider only certain factors in making its determination or otherwise limit the PUC's role in such a condemnation. Considering the legislature's recent interest in the electric industry,\(^{157}\) this may be the best way to limit the court's holding in *United Water*.

Finally, the express provision of the New Mexico statutes that provided municipalities with the power to condemn water and sewage utilities, by implication, might have limited the condemnation power to cover only those types of utilities. In other words, because the New Mexico legislature expressly conferred upon municipalities the power to condemn water and sewage utilities, it would have to do the same for electric utilities before municipalities would have the power to condemn them. United States District Court Judge Leslie Smith certified the question of whether municipalities have the power to condemn electric systems within their limits to the New Mexico Supreme Court.\(^ {158}\) However, the New Mexico legislature recently made the issue moot.\(^ {159}\) On April 11, 1997, New Mexico Governor Gary Johnson signed a bill that would permit a city to condemn an electric utility.\(^ {160}\) The bill is limited in its reach, however. The language is designed so that the law only applies to the Las Cruces condemnation of El Paso Electric Company's (EPE) systems that lie within the municipal limits, lending further support for the argument that municipalities need express authorization from the legislature to have the power to condemn the utilities which serve them.\(^ {161}\)

**B. The Las Cruces Municipalization Plan**

Until recently, the question as to whether the *United Water* decision would apply equally to water and electric utilities would probably not have drawn much consideration from the legislature or the electric industry. As noted earlier, Rio Rancho's acquisition of RRUC was the first time in New Mexico that a municipality had condemned a privately owned public utility. However, during the past decade the electric industry has experi-

---

157. The New Mexico legislature has had the issue of electric competition before it every year since 1993. Interview with Professor Suedeen Kelly, *supra* note 146.


enced a surge of municipalization activity. The increased activity is due in large part to recent changes in the body of law governing the regulation of electric utilities. In 1992, Congress passed the Energy Policy Act of 1992 (EPAct), making it possible for municipal utilities to acquire less expensive, wholesale electric power. In an attempt to take advantage of the low-cost power alternatives, 39 cities and towns across the United States have at least considered municipalizing their electric service. Although there are ways to municipalize other than through the use of eminent domain, at least one of those 39 cities has considered condemnation as an option.

In New Mexico alone, both Albuquerque and Las Cruces have explored the option of municipalizing their electric service. Although Albuquerque has put discussion of the issue on hold, Las Cruces has made significant steps toward establishing a working municipal electric system. Las Cruces began contemplating municipalization of its electric service as early as 1987. At that time, the EPE, the investor owned utility (IOU) that provides Las Cruces with power, was having serious financial difficulties that resulted in higher rates to its customers.

EPE's financial difficulties began in the late 1970s and 1980s. From World War II until the middle of the 1960s, the electric industry experienced large and consistent growth in demand. Based on that trend, EPE invested in the Palo Verde Nuclear Project in the 1970s as a means of keeping up with increasing demand. EPE also diversified its investments

162. See Doane & Spulber, supra note 4, at 335.
163. See Kelly, supra note 2, at 47.
165. See Doane & Spulber, supra note 4, at 335.
166. Cities can also build duplicate distribution facilities or can purchase the existing facilities from the investor owned utility (IOU) presently serving the area. See Doane & Spulber, supra note 4.
condemnation is in the public interest. Its analysis and its decision are purely economic in nature. Las Cruces implicitly made a “public interest” determination when it decided to acquire its electric utility system. However, that determination was based only on the interests of the Las Cruces community. It did not consider what impacts the condemnation might have on other EPE customers. However, there will be impacts and they should be addressed during the process.

Two major concerns that would not likely be considered by the courts are engineering feasibility and economic impacts of the condemnation. The interconnectedness of electric utility systems means that changes in one area can affect other areas. For example, if Las Cruces leaves the system and seeks to purchase power from a more distant, lower cost power generator, EPE would still have to “wheel”\(^\text{190}\) that power across its transmission lines in order for Las Cruces to receive the power. Such added power flows could mean that other areas of the system may not receive adequate power because the transmission lines are only capable of carrying a certain amount of power.\(^\text{191}\) Moreover, EPE might have to increase its existing system in order for it to meet the increased demand put on it by Las Cruces buying power from outside EPE’s system.

While these are real engineering concerns related to a condemnation, most of them have been mitigated by both legislation and technological advances. Much of the legislation related to electric utilities deals with requirements that IOUs meet the service requirements to the customers in their service areas before any other demands are met. In the case of Las Cruces, EPE’s system was designed and created to provide service to Las Cruces along with the other communities. The chances that the transmission demands on the system will change dramatically if Las

---

\(^{190}\) “Wheeling” has been defined as a process: that breaks down the exclusive rights that power companies have traditionally had in geographic areas. It involves moving electricity from a power plant owned by one company across high-voltage transmission lines owned by another. Wholesale wheeling involves moving electricity from one utility, or power producer, to another. Chaney, *A Powerful Change: Big Utilities Competition Could Give Consumers a Choice* ALBUQUERQUE J., Mar. 20, 1995, at Business Outlook 1. Wholesale wheeling has already been approved by EPAct, § 721, 16 U.S.C. § 824j. Retail wheeling plans have been proposed in many areas of the country but still have not been included in federal legislation. Cities like Las Cruces hope to take advantage of wholesale wheeling through municipalization by becoming eligible wholesalers of electricity under EPAct. See Kelly, *supra* note 2, at 46-51.

Cruces leaves the system are slight. Moreover, technological advances in the monitoring and control of transmission make IOUs much more capable of adapting their facilities to changes in the system.\textsuperscript{192}

A more difficult problem lies in the economic changes that will occur as a result of a community leaving the system. The most significant economic issue surrounding the deregulation of the electric industry is "stranded costs."\textsuperscript{193} Stranded costs are a result of the nature of electricity and regulation of the industry. IOUs design their generation facilities based on the projected demand from the entire service area.\textsuperscript{194} Because electricity cannot be stored, the IOU must plan generation that is large enough to meet the highest demand, the peak demand.\textsuperscript{195} The larger the demand, the greater the cost to develop adequate generation. The costs of building transmission, distribution and generation facilities are passed on to the customers in the form of rates paid for service. Once the investment in those facilities has been made, its amount is constant except for the costs to operate the generation plants. When customers leave the system, the IOU must still pay for the generation investment it made based on projected demand. The projected demand is based on all the customers, even those that later leave the system. Because the cost remains basically the same and there are fewer customers, the IOU must raise rates to the remaining customers in order to recoup its initial investment. Otherwise, the shareholders of the IOU must bear the burden of the investment, even though the IOU was required to make the investment in generation to meet the demand of its service territory.\textsuperscript{196}

The issue of stranded costs in the Las Cruces case has already been considered by the Federal Energy Regulatory Commission (FERC).\textsuperscript{197} As a municipal utility that will resell electricity to its customers, Las Cruces will qualify as a wholesale buyer of electricity. Thus, the transfer of the facilities will be governed by federal law and overseen by FERC. Under FERC's Order No. 888,\textsuperscript{198} a utility is entitled to recover stranded costs based on the

\begin{small}
\textsuperscript{192} See Christensen, supra note 191. Despite the advances, EPE has nonetheless determined that it will need "100 percent of its transmission capacity to provide reliable service to its retail customers." \textit{Cruces May Have to Build Own Plants}, ALBUQUERQUE J., Aug. 28, 1998, at E3.

\textsuperscript{193} For a more complete explanation of stranded costs, see Doane & Macavoy, \textit{supra} note 15.

\textsuperscript{194} See Christensen, \textit{supra} note 191.

\textsuperscript{195} See id.

\textsuperscript{196} See id.

\textsuperscript{197} FERC staff said that Las Cruces would owe EPE $29.4 million based on FERC's 10-year planning period policy. \textit{See Court Jolts El Paso Electric}, \textit{supra} note 178.

\end{small}
in hopes of taking advantage of the growing Southwest economy. The oil embargo in the 1970s resulted in a decrease in the demand for electricity, however, as Americans began employing conservation measures to decrease their dependence on foreign oil. Moreover, although EPE's other investments grew initially, the bottom eventually fell out of the Southwest's real estate market and the savings and loan industry collapsed. At about the same time, the Palo Verde Project became increasingly costly to operate. Extended shutdowns forced EPE to purchase expensive replacement power.

Bad investments and the Palo Verde Project eventually forced EPE to file for bankruptcy in 1992. Central and Southwest Power Company (CSW), a neighboring IOU, agreed to bail out EPE under a proposed $2.2 billion merger agreement set up in 1993. The merger agreement died, however, after Las Cruces residents voted two to one to oust EPE as the electric provider in favor of establishing a municipal utility.

EPE's financial difficulties resulted in higher than average rates for its customers. To escape those rates, Las Cruces decided to try to break from EPE. Although it contemplated leaving EPE's system in the 1980s,

172. Like other utilities in the Southwest, EPE was investing in the then booming southwestern real estate market. See Leah Beth Ward, A Reckoning for the Utility High Rollers, N.Y. Times, July 29, 1990, at C4. EPE and other IOUs began diversifying out of fear that regulators might force them to relinquish their profits. Paying out the profits as dividends would cause the size of the companies to shrink so investment seemed the only way to protect the profits. See id.

173. See id.

174. See id.


177. See Utility Kills Merger Deal, ALBUQUERQUE J., June 10, 1995, at A1. See also Denise Warkentin, Las Cruces Voters Approve Municipalization, ELECTRIC LIGHT AND POWER, Oct. 1994, at 1. Other factors also contributed to the failure of the merger deal including allegations that EPE was promoting a stand-alone reorganization plan. See New Doubts, supra note 176.

178. Residential electric rates for a majority of New Mexico utilities rank among the most expensive 20 percent nationwide. See Court Jolts El Paso Electric, ALBUQUERQUE J., Feb. 13, 1998, at C4. In addition, EPE charges 10.6 cents per kilowatt hour (kWh) compared to Public Service Company of New Mexico at 9.3 cents per kWh, Texas New Mexico Power Company at 8.4 cents per kWh, and Southwestern Public Service at 6.4 cents per kWh. See Michael G. Murphy, Las Cruces Utility Takeover Approved, ALBUQUERQUE J., Apr. 12, 1997, at C4.

179. EPE's high rates caused problems for the people living in Las Cruces in more than one way. Not only did its citizens have to pay the higher rates, those rates created a barrier to potential incoming industry for the area, an area plagued by high unemployment and low wages. See Michael G. Murphy, Las Cruces Power Struggle May End, ALBUQUERQUE J., Apr. 7,
Las Cruces could not find a way to do it until its 25 year franchise agreement with EPE expired in 1993. In 1996, EPE came out of bankruptcy protection. Las Cruces attempted to negotiate a sale price with EPE for the facilities lying within the city limits from 1990 until 1995, to no avail. In 1994, Las Cruces passed a referendum to acquire an electric utility system.

As of August 1998, the condemnation proceeding was in federal district court. In 1996 the district court certified to the New Mexico Supreme Court the issue of whether a municipality’s power of eminent domain extends to electric utility facilities. Arguments were heard in February of 1997. After the New Mexico legislature enacted amendments to the New Mexico PUA, however, the court determined that the issue was moot, quashed its earlier certification, and sent the case back to the district court. The condemnation issue is now before the United States District Court. However, the issue is no longer whether Las Cruces has the legal authority to condemn, but rather how much Las Cruces should pay for the facilities. EPE argues that Las Cruces should pay $170 million, while staff at the Federal Energy Regulatory Commission estimate Las Cruces owes $29.4 million.

C. Applying United Water to the Las Cruces Municipalization

Effects on Stranded Costs

Now that Las Cruces has the legal authority to condemn the electric facilities within its borders, the court’s task is to determine how much Las Cruces must pay for the facilities. As with Rio Rancho’s condemnation of RRUC’s facilities, the court does not consider whether the

181. See Robertson, supra note 169.
185. See Murphy, supra note 171, at A1.
187. See Las Cruces II, 954 P.2d at 79.
188. See Murphy, supra note 178.
utility's "reasonable expectation" of service to the customer or customers leaving the system. FERC's determination could be the end of the inquiry. However, some states have opted to address the issue of stranded costs separately. For example, California recently opened its electric system to retail wheeling. Since then, the California PUC has established guidelines for establishing a competitive transition charge to be paid by customers leaving the incumbent utility's system. In New Mexico there is no similar provision and the legislature has only begun to address the issue of competition in the electric industry.

Because EPE is already in bankruptcy, it is unlikely that it will be able to bear the additional costs if Las Cruces leaves the system. However, the PUC has the power to control EPE's rates and therefore could keep them at their present levels. Determining who would then pay the additional costs is difficult. Possibly, EPE would have to decrease its service quality to the remaining customers. The PUC also oversees quality of service, however, and has a duty to assure that quality is not impaired. By providing the PUC with jurisdiction over the condemnation proceedings, it could take these costs into consideration when determining whether or not to approve the transfer of the facilities and when assisting in the determination of how much should be paid.

On the other hand, the New Mexico legislature has already spoken to the issue of the Las Cruces condemnation proceedings. It expressly provided Las Cruces with the power to condemn the local electric facilities. The narrow reach of the law indicates that the legislature wanted to provide Las Cruces with this power in this situation. Even though the remaining EPE customers in New Mexico will likely bear an additional burden of EPE's poor investing, the legislative process is not one we like to question or criticize. However, the PUC does have expertise in the area of utility regulation and so should have some oversight of the process.

The issue of "stranded costs" has been at the heart of the retail wheeling debate for years. Questions of who will pay for the investments made by IOUs — the remaining customers, the leaving customers, or the investors — continues to be hashed out between IOUs and electric customers. The federal government has already provided for full, stranded cost recovery for the IOUs that it governs. Some states have already provided

199. For a more complete analysis of "stranded costs" and the pitfalls of the "reasonable expectation" standard, see Doane & Spulber, supra note 4.
200. See Doane & Macavoy, supra note 15, at 10-12 & n.4.
201. The New Mexico legislature has considered changing its electric policy every year since 1993. However, the bills that have been introduced have not been passed. Interview with Professor Suedeen Kelly, supra note 146.
203. See id.
that customers leaving the system must pay a certain fee to the IOU whose system they are leaving. By allowing a municipality like Las Cruces to leave EPE's system without considering the economic effects on other areas served by EPE, it almost guarantees rate increases or other problems for the remaining customers and the investors. The problem does not necessarily have to be resolved by the PUC; the legislature may address it specifically in electric utility law reform. However, until it does, the courts should, for policy reasons, provide the PUC with an opportunity to consider the effects a condemnation could have outside the city limits of the condemning municipality.

CONCLUSION

The United Water decision provides excellent support for the old adage, "what is sauce for the goose is not always sauce for the gander." Despite its dependence on a questionable distinction between voluntary and involuntary actions by a utility, the court most likely reached the result envisioned and anticipated by the legislature. Moreover, the decision was likely the best result considering the nature of water utilities. By allowing Rio Rancho to control its water, the court in effect gave Rio Rancho the power to control its development, both in terms of rate of growth and type of development. With that added power comes added risk which the City alone must bear.

However, like many decisions, the reach of United Water may extend beyond the water and sewage areas into areas where the result is not as appropriate. As in the case of water utility, control over a local electric utility and electric rates provides cities the power to control growth and the economy. Thus, cities are given the opportunity to control their own destinies. However, that ability comes at a greater price in the electric industry. When Las Cruces leaves EPE's electric system, the risks will not be borne by the city alone. The remaining EPE customers will be forced to bear a greater percentage of the cost of the Palo Verde plant and other failed investments. Those customers will most likely have to pay increased rates for the same service they are presently provided. The PUC was established to look out for the public's interest regarding public utilities in just this type of case. It was designed to assure quality public services at reasonable prices for all customers. The courts should, therefore, allow the Commission to fulfill its statutorily mandated duties by providing it with the jurisdiction to oversee Las Cruces' condemnation of EPE's systems.

THOMAS SMIDT III

204. See Doane & Macavoy, supra note 15, at 10-12 & n.4.