

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
2 SENATE BILL 458

3 **50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

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10 AN ACT

11 RELATING TO EMINENT DOMAIN; PROVIDING THAT "PUBLIC USE"
12 INCLUDES A SIGNIFICANT BENEFIT TO THE STATE AND ITS RESIDENTS
13 WHEN CERTAIN UTILITIES OR AUTHORITIES EXERCISE THE POWER OF
14 EMINENT DOMAIN.

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16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. Section 62-1-1.1 NMSA 1978 (being Laws 1979,
18 Chapter 259, Section 1) is amended to read:

19 "62-1-1.1. FOREIGN CORPORATIONS--POWERS.--Foreign
20 corporations for the generation, production, transmission,
21 distribution, sale or utilization of gas, electricity or steam
22 for lighting, heating, power, manufacturing or other purposes,
23 which are duly qualified to do business in this state and are
24 public utilities under the [New Mexico] Public Utility Act
25 [~~Section 62-3-1, et. seq., 1978, Annotated, shall~~], have the

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1 same rights and privileges, including the power of eminent
2 domain, as domestic corporations of like character; provided,
3 that when a corporation exercises the power of eminent domain
4 for acquiring property for a public use pursuant to this
5 section, "public use" shall include the requirement that the
6 primary beneficiaries of the use are the state and its
7 residents."

8 SECTION 2. Section 62-1-4 NMSA 1978 (being Laws 1909,
9 Chapter 141, Section 4, as amended) is amended to read:

10 "62-1-4. EMINENT DOMAIN--SURVEYS--ENTRY ON PROPERTY--
11 CROSSING RIGHT-OF-WAY OF ANOTHER CORPORATION.--

12 A. Corporations organized pursuant to Section
13 62-1-1 NMSA 1978 are authorized to enter upon any property
14 belonging to the state or to persons, firms or corporations for
15 the purpose of making surveys and from time to time to
16 appropriate so much of such property, not exceeding a strip one
17 hundred feet wide in any one place, as may be necessary for
18 their purpose. The corporations have the right of access to
19 such property to construct and place their lines, pipes, poles,
20 cables, conduits, towers, stations, fixtures, appliances and
21 other structures and to repair them. If a corporation cannot
22 agree with the owners as to a right of way or the compensation
23 for a right of way, the corporation may proceed to obtain the
24 right of way in the manner provided by law for condemnation of
25 such property; provided that, when a corporation, other than a

1 rural electric cooperative organized pursuant to the Rural
 2 Electric Cooperative Act, exercises the power of eminent domain
 3 for acquiring property for a public use pursuant to this
 4 section, "public use" shall include the requirement that the
 5 primary beneficiaries of the use are the state and its
 6 residents. Where it is necessary to cross the right of way of
 7 another corporation, the crossing shall be effected either by
 8 mutual agreement or in the manner now provided by law for the
 9 crossing of one railroad by another railroad; provided that the
 10 construction of any electric transmission lines crossing the
 11 right of way of a railroad shall comply with the minimum
 12 standards of the national electric safety code. When it is
 13 necessary for a corporation to construct any transmission line
 14 and associated facilities for the transmission of electrical
 15 power requiring a width for right of way of greater than one
 16 hundred feet, unless that width is agreed to by the parties,
 17 the applicant for the right of way shall apply to the [~~New~~
 18 ~~Mexico public utility~~] commission as provided in Section
 19 62-9-3.2 NMSA 1978 for a determination of the width necessary
 20 for the right of way for the transmission line.

21 B. For the purposes of this section, "corporation"
 22 means individuals, firms, partnerships, companies,
 23 municipalities, rural electric cooperatives organized under
 24 [~~Laws 1937, Chapter 100 or~~] the Rural Electric Cooperative Act,
 25 lessees, trustees or receivers appointed by any court."

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1 **SECTION 3.** Section 62-16A-4 NMSA 1978 (being Laws 2007,
2 Chapter 3, Section 4) is amended to read:

3 "62-16A-4. AUTHORITY--DUTIES AND POWERS.--

4 A. The authority shall:

5 (1) do any and all things necessary or proper
6 to accomplish the purposes of the New Mexico Renewable Energy
7 Transmission Authority Act;

8 (2) hire an executive director and such other
9 employees or other agents as it deems necessary for the
10 performance of its powers and duties, including consultants,
11 financial advisors and legal advisors, and prescribe the powers
12 and duties and fix the compensation of the employees and
13 agents. The executive director of the authority shall direct
14 the affairs and business of the authority, subject to the
15 policies, control and direction of the authority; and

16 (3) maintain such records and accounts of
17 revenues and expenditures as required by the state auditor.
18 The state auditor or the state auditor's designee shall conduct
19 an annual financial and legal compliance audit of the accounts
20 of the authority and file copies with the governor and the
21 legislature.

22 B. The authority may:

23 (1) make and execute agreements, contracts and
24 other instruments necessary or convenient in the exercise of
25 its powers and functions with any person or governmental

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1 agency;

2 (2) enter into contractual agreements with
 3 respect to one or more projects upon the terms and conditions
 4 the authority considers advisable;

5 (3) utilize the services of executive
 6 departments of the state upon mutually agreeable terms and
 7 conditions;

8 (4) enter into partnerships with public or
 9 private entities;

10 (5) identify and establish corridors for the
 11 transmission of electricity within the state;

12 (6) through participation in appropriate
 13 regional transmission forums, coordinate, investigate, plan,
 14 prioritize and negotiate with entities within and outside the
 15 state for the establishment of interstate transmission
 16 corridors;

17 (7) pursuant to Subsection C of this section,
 18 finance or plan, acquire, maintain and operate eligible
 19 facilities necessary or useful for the accomplishment of the
 20 purposes of the New Mexico Renewable Energy Transmission
 21 Authority Act;

22 (8) pursuant to the provisions of the Eminent
 23 Domain Code, exercise the power of eminent domain for acquiring
 24 property or rights of way for public use if needed for projects
 25 if such action does not involve taking utility property or does

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1 not materially diminish electric service reliability of the
2 transmission system in New Mexico, as determined by the public
3 regulation commission; provided, that when the authority
4 exercises the power of eminent domain for acquiring property
5 for a public use pursuant to this section, "public use" shall
6 include the requirement that the primary beneficiaries of the
7 use are the state and its residents;

8 (9) receive by gift, grant, donation or
9 otherwise, any sum of money, aid or assistance from the United
10 States, the state of New Mexico, any other state, any political
11 subdivision or any other public or private entity;

12 (10) for any project, provide information and
13 training to employees of the project regarding any unique
14 hazards that may be posed by the project, as well as training
15 in safety work practices and emergency procedures;

16 (11) issue bonds pursuant to the New Mexico
17 Renewable Energy Transmission Authority Act as necessary to
18 undertake a project;

19 (12) enter into contracts for the lease and
20 operation by the authority of eligible facilities owned by a
21 public utility or other private person;

22 (13) enter into contracts for leasing eligible
23 facilities owned by the authority; provided that any revenue
24 derived pursuant to the lease shall be deposited in the
25 renewable energy transmission bonding fund;

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1 (14) collect payments of reasonable rates,
2 fees, interest or other charges from persons using eligible
3 facilities to finance eligible facilities and for other
4 services rendered by the authority; provided that any revenue
5 derived from payments made to the authority shall be deposited
6 in the renewable energy transmission bonding fund;

7 (15) borrow money necessary to carry out the
8 purposes of the New Mexico Renewable Energy Transmission
9 Authority Act and mortgage and pledge any leases, loans or
10 contracts executed and delivered by the authority;

11 (16) sue and be sued; and

12 (17) adopt such reasonable administrative and
13 procedural rules as may be necessary or appropriate to carry
14 out its powers and duties.

15 C. Except as provided in this subsection, the
16 authority shall not enter into any project if public utilities
17 or other private persons are performing the acts, are
18 constructing or have constructed the facilities, or are
19 providing the services contemplated by the authority, and are
20 willing to provide funds for and own new infrastructure to meet
21 an identified need and market. Before entering into a project,
22 the following procedures shall be implemented:

23 (1) the authority shall provide to each public
24 utility and the public regulation commission and publish one
25 time in a newspaper of general circulation in New Mexico and

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1 one time in a newspaper in the area where the eligible
2 facilities are contemplated and on a publicly accessible web
3 page maintained by the authority, an initial notice describing
4 the project that the authority is contemplating, including a
5 detailed description of the existing or anticipated renewable
6 energy sources that justify the determination by the authority
7 that the project facilities are eligible facilities. The
8 description shall contain, at a minimum, the names of all
9 persons that already are or will develop the renewable energy
10 sources, all persons that will own the renewable energy sources
11 and the peak output capacity, source type, location and
12 anticipated connection date of the renewable energy sources;

13 (2) any person with an interest that may be
14 affected by the proposed project shall have thirty days from
15 the date of the last publication of the initial notice to
16 challenge, in writing, the determination by the authority that
17 the facilities are eligible facilities. If a challenge is
18 received by the authority within the thirty days, the authority
19 shall hold a public hearing no sooner than thirty days after
20 receiving the challenge and after a minimum of two weeks notice
21 in the same newspapers and web page in which the initial notice
22 was given. Following the public hearing, the authority shall
23 make a final determination of eligibility and give notice of
24 the determination pursuant to Section 39-3-1.1 NMSA 1978. Any
25 person or governmental entity participating in the hearing may

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1 appeal the final determination by filing a notice of appeal
 2 with the district court pursuant to Section 39-3-1.1 NMSA 1978;

3 (3) public utilities and other persons willing
 4 and able to provide money for, acquire, maintain and operate
 5 the eligible facilities described in the notice shall have the
 6 following time period to notify the authority of intention and
 7 ability to provide money for, acquire, maintain and operate the
 8 eligible facilities described in the notice:

9 (a) within ninety days of the date of
 10 the last publication of the initial notice if no challenge is
 11 received pursuant to Paragraph (2) of this subsection; or

12 (b) within ninety days of the date of
 13 the notice of determination if a challenge is received pursuant
 14 to Paragraph (2) of this subsection; and

15 (4) in the absence of notification by a public
 16 utility or other person pursuant to Paragraph (3) of this
 17 subsection, or if a person, having given notice of intention to
 18 provide money for, acquire, maintain and operate the eligible
 19 facilities contemplated by the authority, fails to make a good
 20 faith effort to commence the same within twelve months from the
 21 date of notification by the authority of its intention, the
 22 authority may proceed to finance or plan, acquire, maintain and
 23 operate the eligible facilities originally contemplated;
 24 provided that a person that, within the time required, has made
 25 necessary applications to acquire federal, state, local or

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1 private permits, certificates or other approvals necessary to
2 acquire the eligible facilities shall be deemed to have
3 commenced the same as long as the person diligently pursues the
4 permits, certificates or other approvals.

5 D. In soliciting and entering into contracts for
6 the transmission or storage of electricity, the authority and
7 any person leasing or operating eligible facilities financed or
8 acquired by the authority shall, if practical, give priority to
9 those contracts that will transmit or store electricity to be
10 sold and consumed in New Mexico.

11 E. The authority and any eligible facilities
12 acquired by the authority are not subject to the supervision,
13 regulation, control or jurisdiction of the public regulation
14 commission; provided that nothing in this subsection shall be
15 interpreted to allow a public utility to include the cost of
16 using eligible facilities in its rate base without the approval
17 of the public regulation commission.

18 F. In exercising its powers and duties, the
19 authority shall not own or control facilities unless:

20 (1) the facilities are leased to or held for
21 lease or sale to a public utility or such other person approved
22 by the public regulation commission;

23 (2) the operation, maintenance and use of the
24 facilities are vested by lease or other contract in a public
25 utility or such other person approved by the public regulation

1 commission;

2 (3) the facilities are owned or controlled for
 3 a period of not more than one hundred eighty days after
 4 termination of a lease or contract described in Paragraph (1)
 5 or (2) of this subsection or after the authority gains
 6 possession of the facilities following a breach of such a lease
 7 or contract or as a result of bankruptcy proceedings; or

8 (4) the facilities do not affect in-state
 9 retail rates or electric service reliability.

10 G. A public utility subject to regulation of the
 11 public regulation commission pursuant to the Public Utility Act
 12 may recover the capital cost of a project undertaken pursuant
 13 to the New Mexico Renewable Energy Transmission Authority Act
 14 from its retail customers only if the project has received a
 15 certificate of public convenience and necessity from the public
 16 regulation commission. A municipal utility exempt from
 17 regulation of the public regulation commission may recover such
 18 costs only if the project has been approved by the governing
 19 body of the municipality. Costs associated with a project
 20 undertaken pursuant to the New Mexico Renewable Energy
 21 Transmission Authority Act are not recoverable from retail
 22 utility customers except to the extent the costs are prudently
 23 incurred and the project is used and useful in serving those
 24 customers as determined by the public regulation commission."

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