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### **FISCAL IMPACT REPORT**

SPONSOR:	Griego	DATE TYPED:	02/11/00	HB	
SHORT TITLE:	Limit Public Electric Utility Eminent Domain			SB	196/aSJC
				ANALYST:	Valenzuela

### **APPROPRIATION**

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY00	FY01	FY00	FY01		
		Indeterminate			

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to

### **SOURCES OF INFORMATION**

LFC Files

Energy, Minerals and Natural Resources Department (EMNRD)

Office of the Attorney General (AG)

Public Regulation Commission (PRC)

## **SUMMARY**

### Synopsis of the Amendment

The Senate Judiciary Committee (SJC) amendment to Senate Bill 196 addresses concerns that the eminent domain authority being granted to public utility companies for condemnation of financial instruments was too broad and could in the future result in abuses. The amendment, consequently, limits the eminent domain authority to leases and other financial instruments related to these leases.

### Synopsis of Bill

Senate Bill 196 would provide public electric utilities with authority to condemn any covenant or other provisions of a wide range of financial instruments, such as contracts, mortgages or leases. The bill requires the Public Regulation Commission (PRC) to consider and make recommendation on these eminent domain requests within thirty days. The bill carries an emergency clause.

### Significant Issues

The bill restricts a public utility company's ability to use this remedy to a couple of situations: when condemnation is necessary to provide relief when separating generation from transmission facilities is cost prohibitive or when the action is necessary for the transition to retail electric competition. However, meeting these criteria should not be onerous. Consequently, it is unclear how this broad authority might be used in the future.

Enactment of the bill would be beneficial to public utilities who operate in New Mexico because it would allow them to renegotiate commercial agreements with electric generation facilities, in an effort to restructure its operations, as outlined in the Electric Utility Industry Restructuring Act. The most notable example for which this bill would be applicable is the Public Service Company of New Mexico (PNM) and the Palo Verde Generating Station, located in Arizona.

The Office of the Attorney General (AG), the Energy, Minerals and Natural Resources Department (EMNRD), and the Public Regulation Commission (PRC) have identified substantial legal issues with this bill. Foremost, according to the PRC and EMNRD analyses, the bill may be unconstitutional because the courts may see it as "an impermissible interference with the private right to contract". Article II, Section 19 of the New Mexico Constitution states "No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."

Regarding the eminent domain statute to which this bill would be applicable, the New Mexico Supreme Court determined that in an eminent domain proceeding instituted by a private corporation, a real and substantial relation to the public use must be demonstrated to the court prior to an affirmative determination of eminent domain authority [*Kennedy v. Yates Petroleum Corp.* 101 NM 268, 681 P.2d 53 (1984)]. Yet, this bill expands the eminent domain authority to financial instruments such as contracts and leases. Consequently, the bill could lead to increased litigation on this point.

## **FISCAL IMPLICATIONS**

Senate Bill 196 does not contain an appropriation. The level of activity that would result from enactment of this bill is unknown. Consequently, the fiscal impact is indeterminate.

## **ADMINISTRATIVE IMPLICATIONS**

The level of activity that would result from enactment of this bill is unknown. Consequently, the administrative impact is indeterminate.

## **POSSIBLE QUESTIONS**

- What remedies exist under current law for public utility companies to restructure its generation facilities from its transmission facilities?
- How would this bill apply to PNM's lease-holdings with the Palo Verde Generating Station, which is located in Arizona?

MFV/prr