STATE OF NEW MEXICO
COUNTY OF SOCORRO
SEVENTH JUDICIAL DISTRICT

THE SOCORRO ELECTRIC COOPERATIVE, INC.

Plaintiff/Petition,

vs. No. D-725-CV-2019-00234

CITY OF SOCORRO,

Defendant/Respondent.

MOTION TO DISMISS

COMES NOW the City of Socorro (the City), by and through its attorneys, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., and pursuant to Rule 1-012(B)(6) NMRA moves to dismiss Plaintiff Socorro Electric Cooperative, Inc. (SEC)'s Complaint. As grounds for this Motion, the City states:

I. INTRODUCTION

SEC's Complaint concerns the City's recent efforts to create a municipally-owned electric utility and the award of a contract to Guzman Energy (Guzman) in furtherance of those efforts. Unrelated to those efforts, SEC and the City entered into a franchise agreement in 1999, which agreement authorized SEC to occupy City rights-of-way for a five-year term. SEC alleges in its Complaint, that the City's efforts to create an electric utility amount to an anticipatory breach of the franchise agreement, and seeks declaratory and injunctive relief.

SEC's claims are founded on an incorrect legal conclusion. In particular, although SEC acknowledges that the 1999 franchise agreement expired, it contends that the agreement continues as an implied contract. Under New Mexico law, however, a franchise agreement only continues

as an implied contract if the parties continue to operate as though the agreement has not expired. Moreover, the implied agreement may be terminated on reasonable notice.

The allegations of Plaintiff's Complaint not only confirm that the City has not continued to operate as though the agreement remains in effect, but has also provided clear notice of termination of the agreement. SEC accordingly cannot prevail under the facts alleged in its Complaint, and the Court should dismiss Plaintiff's Complaint under Rule 1-012(B)(6).

II. STANDARD

Dismissal of a claim under Rule 1-012(B)(6) is proper when the claim asserted is "legally deficient." *Wills v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-105, 357 P.3d 453. The Court should grant the motion to dismiss if the non-moving party is "not entitled to recover under any theory of facts alleged in their complaint." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 257 P.3d 917 (internal quotation marks and citation omitted).

"In ruling on a motion to dismiss, all facts well-pleaded are accepted as true. Only the allegations of the complaint, however, are to be considered. Legal conclusions or inferences that may be drawn from the allegations are not admitted." *Romero v. United Life Ins. Co.*, 1986-NMCA-044, ¶8, 719 P.2d 819 (internal citations omitted).

III. SEC'S CLAIMS MUST BE DISMISSED BECAUSE THE FRANCHISE AGREEMENT HAS EXPIRED.

SEC relies on an expired franchise agreement with the City. The parties entered into the Agreement in 1999. Complaint, ¶ 8. The Agreement was for a five-year term, which could be extended for an additional five years. Complaint, Exhibit 1, Section 1. The Agreement has not been renewed. Complaint, ¶ 10.

In 2016, the City enacted an ordinance with the stated purpose of creating a municipally-owned electric utility. Complaint, ¶ 13. Under the ordinance, "the City is empowered to sell its products

and services to the residents, both public and private, of the City and others as may be permitted by law; to construct and operate generating plants, transmission, distribution, and other electric facilities; to set electric rates and service policies and regulations; to purchase real property and personal property; and to enter into contracts, leases, and agreements in furtherance of its powers and duties." *Id.* ¶ 14.

On March 13, 2018, the City notified SEC that after "January 1, 2020, SEC shall be considered in trespass on that right-of-way located within the City's industrial corridor on that right-of-way located within the City's Industrial corridor (S-Corridor ROW), generally described as that 800 acres of property located on the southwest side of the City, adjacent to the railroad and bisected by U.S. 60." Complaint, Exhibit 2. SEC noted in its Complaint that this "corridor is designated to be one of the certain customers and members of SEC to which the City intends to deliver electricity." *Id.* ¶ 24.

"On August 30, 2018, the City issued a request for proposals ("RFP") seeking competitive sealed bids for long term power supply, scheduling services and capital financing." *Id.* ¶ 17. And "[o]n July 8, 2019, the City Council awarded a contract, based on the RFP to Guzman Energy to construct the Long-Term Wholesale Power Supply, Scheduling Services & Project Capital Financing for starting an electric delivery system." *Id.* ¶ 18.

SEC alleges in its Complaint that these actions of the City amount to an anticipatory breach of the franchise agreement. *See* Complaint, Second Claim for Relief. It also seeks a declaration that the expired franchise agreement "will remain in effect until at least 2024, if the parties do not mutually agree to renegotiate or terminate the Agreement." Complaint, ¶ 33. Finally, SEC requests an injunction restraining the City "from declaring SEC to be considered in trespass on the right-of-way located within the City's industrial corridor and entering into a contract with Guzman

Energy or any other provider for building a Long-Term Wholesale Power Supply, [and] Scheduling Services & Project Capital Financing for starting an electric delivery system." *Id.* ¶ 47.

Central to each of these claims is Plaintiff's allegation that "[t]he [Franchise] Agreement continues in effect until at least 25 years from the date of execution if the Agreement is not renegotiated between the parties." *See* Complaint, ¶ 11. That allegation is a legal conclusion, which need not be accepted as true for purposes of this Motion to Dismiss. *See Romero v. United Life Ins. Co.*, 1986-NMCA-044, ¶8, 719 P.2d 819. Moreover, it is in direct conflict with applicable New Mexico law on the expiration and continuation of franchise agreements.

"Ordinarily, a public utility ceases to have any contractual relationship with a municipality upon the expiration of a franchise." *Moongate Water Co. v. City of Las Cruces*, 2009-NMCA-117, ¶ 11, 219 P.3d 517. If, however, "the parties to a franchise agreement continue to perform after the expiration of the franchise in the same manner they did when the franchise was formally in effect, then the public utility operates under an implied contract, cancelable upon reasonable notice, under the same terms and conditions as the franchise ordinance." *Id.* (internal quotation marks omitted). The policy underlying this limited implied-contractual extension of franchise agreements is protection of municipalities. *See Moongate*, 2009-NMCA-117, ¶ 11 ("The rationale behind this rule is that a public utility may not continue to reap the benefits of a franchise agreement after its expiration and be relieved of the burdens of the same agreement.") (internal quotation marks omitted).

The implied contract does not, contrary to the allegations of the Complaint, *see* Complaint ¶ 11, continue for a set period of time. While there is a New Mexico statute prohibiting franchise agreements for extending beyond twenty-five years, it says nothing about the continuation of

expired franchise agreements. *See* NMSA 1978 § 3-24-1(F). It certainly does not mandate that expired franchise agreements remain in effect for twenty-five years unless renegotiated between the parties. *See id.*

Application of settled New Mexico law to the allegations of Plaintiff's Complaint requires dismissal under Rule 1-012(B)(6). While the franchise was, through an implied contract, extended after its expiration in 2004, beginning in 2016, with the enactment of the City ordinance creating a municipally-owned electric utility, the City did not continue to perform in the same manner it had performed. *See* Complaint, ¶¶13-14. Then, on March 13, 2018 the City unequivocally reaffirmed the expiration of the agreement and indicated its intent to cancel the franchise agreement (and provided reasonable notice of cancellation) as it concerned SEC's occupation of the "Industrial corridor", when it informed SEC that effective January 1, 2020 SEC would be considered in trespass if it continued to occupy the right-of-way. *See id.* ¶ 24. The City effectively provided SEC with more than 9 months notice of the intended termination of the implied contract, the City then acted in accordance with its intent to create a municipally-owned electric utility by issuing an RFP, and awarding a contract to Guzman Energy. *Id.* ¶¶ 17-18.

Thus, even accepting the factual allegations of the Complaint as true, the Court cannot conclude that the franchise agreement remains in effect on the same terms and conditions as it did in 1999. SEC therefore cannot prevail on its claims, all of which depend on the underlying premise that the franchise agreement has not expired.[1] SEC's Complaint must be dismissed under Rule 1-012(B)(6).

[1] Although the franchise agreement has expired, SEC must continue to pay the City franchise fees during its continued occupation of City property and provision of electric service in Socorro. *See City of Las Cruces v. El Paso Elec. Co.*, 1997 WL 1089567 (D.N.M. 1997), *aff'd by City of Las Cruces v. El Paso Elec. Co.*, 166 F.3d 1220 (10th Cir. 1999) (finding for the City on its claim for unjust enrichment based on El Paso Electric's failure to pay franchise fees despite continuing to use the City's poles, lines, and property, and retaining the franchise-fee component of its rates).

IV. CONCLUSION

The allegations of the Complaint prohibit SEC from establishing that its franchise agreement with the City remains in effect. Since Plaintiff's claims all rest on the assumption that the franchise agreement has not expired, Plaintiff's Complaint is legally deficient, and must be dismissed under Rule 1-012(B)(6). *See Wills v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-105, 357 P.3d 453.

Respectfully submitted,

STELZNER, WINTER, WARBURTON
FLORES, SANCHEZ & DAWES, P.A.
302 Eighth Street NW, Suite 200
P. O. Box 528
Albuquerque, NM 87103
(505) 938-7770
Email: jflores@stelznerlaw.com
Email: jd@stelznerlaw.com

Electronically filed January, 2020

BY: */s/ Nann M. Winter*
NANN M. WINTER
JUAN L. FLORES
JAIME L. DAWES

Attorneys for the City of Socorro

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the foregoing electronically on the 21st day of January, 2020 through the Odyssey File and Serve system, which caused the following counsel and parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Lorna M. Wiggins:

Email: lwiggins@wwwlaw.us

/s/ Nann M. Winter
NANN M. WINTER