

Survey of State Municipalization Laws

On Behalf of the
American Public Power Association

by,

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Forward

This *Survey of State Municipalization Laws* examines and summarizes each of the 50 state's laws on the issues of whether municipalities have the legal authority to acquire, own and operate an electric utility, and, in the case where a municipality acquires the facilities of an incumbent utility, the laws that determine the price to be paid.

The laws regarding these two issues vary broadly across the states. For example, some states such as Alaska have passed laws explicitly providing for the quick condemnation of certain private property, while others such as Oklahoma have passed laws placing a moratorium on the condemnation of electric plant. Similarly, the determination of the price to be paid for electric plant varies widely according to state. Whereas some states let the courts determine "just compensation," other states let the local public utilities commission make such a determination. Some states have even legislated the calculation of "just compensation."

In reading the laws outlined in this *Survey*, one should keep in mind the following words of Franklin D. Roosevelt:

I therefore lay down the following principle: That where a community--a city or county or a district--is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service. That right has been recognized in a good many of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates. It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" gets beyond the point where a mere scolding does no good.

The "Portland Speech," September, 1932.

Alabama

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, cities and towns have the right to establish, purchase, maintain and operate electric utilities. Ala. Code § 11-50-1 (2011). Where a municipality proposes to engage in the business of operating an electric utility, and there is already in existence within the territory an electric utility, the municipality must notify the incumbent utility “of its willingness to acquire [the plant] on such terms and conditions as may be agreed upon.” *Id.* at § 37-4-60; see also *id.* at § 37-4-65 (limits on applicability of statute). “If the owner fails or refuses to advise such agency within 30 days after receipt of such notice of its purpose to sell such property, then the agency may proceed as provided by law to construct, condemn or otherwise acquire a plant or system within the designated territory.” *Id.* at § 37-4-61; see also *id.* at § 37-14-32 (assigning service territories and thereby placing limitations on municipalization).

How is the price of the facilities determined?

By agreement or, failing agreement as to price, by the Public Service Commission (PSC) upon request of either party. The PSC determines the fair value of the assets based on cost less depreciation, plus severance damages, but not taking into account future earnings, good will or certain real estate rights, and deducting or withholding the value of encumbrances, pending discharge thereof. *Id.* at § 37-4-62. “If the owner fails to notify the agency of his acceptance and make tender of a deed...or to comply with all other terms and conditions of the order or judgment, the agency may proceed as provided by law to construct or otherwise acquire a plant or system within the territory where the property of such owner or any part thereof is located.” *Id.* at § 37-4-64.

Alaska

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

As a general matter yes, though the authority to do so may be dependent on the municipal charter. While home rule municipalities in Alaska have all legislative power not prohibited by law or charter (Alaska Stat. § 29.04.010 (2012)), general law municipalities have legislative powers conferred by law (*id.* at § 29.04.020). See also e.g., *id.* at § 29.20.310 (outlining requirements for municipal utility boards). Municipalities have the authority to condemn property under eminent domain. *Id.* at §§

29.35.030 (granting municipalities eminent domain authority), 09.55.240 (public uses for which the right of eminent domain may be exercised includes electric power lines), 09.55.260 (property that may be taken includes certain rights-of-way and the structures and improvements thereon, and the land used in connection with them). Unlike a complaint seeking an order of possession, a municipality may acquire title immediately upon the filing of a “declaration of taking,” in what is known as a “quick-take” procedure where necessity and compensation are left for later determination. Alaska Stat. §§ 09.55.420 (authorizing a municipality to file a declaration of taking along with the complaint), 09.55.430 (contents of a declaration of taking), 09.55.440 (vesting of title upon the filing of a declaration of taking).

How is the price of the facilities determined?

Where a municipality files a declaration of taking, it must deposit with the court the amount of the estimated compensation stated in the declaration. Alaska Stat. § 09.55.440. Actual compensation is subsequently determined, with interest owing to the former property owner. *Id.* The court may appoint a master to determine just compensation, or just compensation may be determined by jury trial. *Id.* at § 09.55.300. The right to compensation or damages accrues as of the date of the summons, and the value of the property as of that date determines compensation. *Id.* at § 09.55.330. Courts have accepted multiple valuation methods in eminent domain proceedings to determine just compensation, including fair market value, replacement value, and reproduction value. See e.g., *City of Kenai v. Burnett*, 860 P.2d 1233, 1242 (Alaska 1993).

Arizona

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, municipal corporations have the right to engage in any business or enterprise that any other entity could engage in with a franchise from the municipal corporation. Ariz. Rev. Stat. § 9-511 (2012). This includes the ability to “construct, purchase, acquire, own or maintain within or without its corporate limits...electric and gas plants [and] electric lines for the transmission of electricity.” *Id.* at § 9-511(a). The decision to municipalize must be approved by a majority vote at a general or special election (*id.* at § 9-514) and, the municipal corporation must purchase and take over the property and plant of the public utility, if one existed, before it can construct, purchase, acquire or lease any other facility. *Id.* at §§ 9-515(a) & 9-516(a).

How is the price of the facilities determined?

“The fair valuation of the public utility shall be the equivalent of the compensation to be paid for the taking of private property for public use as provided by article 2, chapter 8 of title 12 [Ariz. Rev. Stat. §§ 12-1111 to -1130].” Ariz. Rev. Stat. § 9-515(c). The amount is determined by one of the following methods (*id.*):

- (1) By agreement between the municipal corporation and the public utility.
- (2) By arbitrators chosen in a manner agreed upon at the time by the municipal corporation and the public utility.
- (3) By a court of competent jurisdiction determining the compensation for the taking of private property for public use as provided by article 2, chapter 8 of title 12 (Ariz. Rev. Stat. §§ 12-1111 to -1130).

Arkansas

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Ark. Code § 14-200-106 (2012). Buyout of the existing utility must be approved by the municipal council or city commission after public hearing, and by a majority of voters in a general or special municipal election. *Id.* at § 14-200-107.

How is the price of the facilities determined?

As agreed by the parties, or, failing agreement, as determined by order of the Arkansas Public Service Commission after public hearing. *Id.* at § 14-200-108.

California

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Article 11, Section 9(a) of the California Constitution allows a municipal corporation to “establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.” Cal. Gov’t Code Sections 6500 *et seq.* (2012) and Cal. Pub. Util. Code Sections 1-22 *et seq.* (2012) contain the enabling legislation. Cal. Gov’t Code Section 54340 allows a local agency to “acquire any enterprise by gift, purchase or eminent domain.”

How is the price of the facilities determined?

As a matter of procedure, a municipal corporation must file a petition with the California Public Utilities Commission (CPUC) pursuant to Cal. Pub. Util. Code Section 1403. The petition must request the CPUC to fix the just compensation to be paid for the acquired property. *Id.* at § 1404. Cal. Pub. Util. Code Sections 1401-1421 set forth the procedure for determination of just compensation for the acquisition of utility properties. *See also id.* at § 1413 (authorizing the commencement of a eminent domain proceeding in court where the incumbent utility declines to accept the CPUC's compensation determination).

Colorado

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, within or without its territorial limits. Colo. Const. art. XX, Sections 1 and 6 (2012); Colo. Rev. Stat. § 31-15-707 (2012). The acquisition or erecting of a municipal utility must be approved in a special election. Colo. Rev. Stat. §§ 31-15-707(1)(a)(I), 31-15-302(1)(d). Where there is a franchise in place, the municipality may purchase or condemn the system only at ten or fifteen years after the granting of the franchise, or anytime after twenty years of the granting. *Id.* at § 31-15-707(1)(a)(IV).

How is the price of the facilities determined?

The municipality may either purchase the system or condemn the system at fair market value. Colo. Rev. Stat. § 31-15-707. The municipality is not required to purchase or condemn any part of the system that is obsolete or outworn its usefulness. *Id.*; *see also id.* at §§ 40-9.5-201 to 40-9.5-207.

Connecticut

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Conn. Gen. Stat. §§ 7-213, -224 (2012). Any utility then serving the area may, at its option, require the municipality to purchase its facilities at the time of municipalization. *Id.* at §§ 7-213, 7-228.

How is the price of the facilities determined?

The price to be paid for the plant is fair market value (taking into account specified factors, including actual earnings, the value of related facilities, any

encumbrances and paid-in capital). *Id.* at §§ 7-226, -227. If the parties fail to agree, terms of sale are determined by special commission of the relevant Superior Court. *Id.* at § 7-228.

Delaware

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Delaware does not have specific legislation that allows for the creation of a municipally owned electric system. Instead, in this Home Rule state, the right to municipalize resides at the local level, and must be reflected in the municipality's charter. Del. Code tit. 22, § 802 (2012); *see e.g., Wilmington by Water Dep't v. Lord*, 340 A.2d 182 (Del. 1975); *see also* Del. Code tit. 22, §§ 811-815 (addressing how a municipality goes about changing its charter).

How is the price of the facilities determined?

The price of any acquired facilities is determined through the application of Delaware's eminent domain regulations. Del. Code tit. 29, §§ 9501-9506.

Florida

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Fla. Const. art. VIII, Section 2 (2012); *Saunders v. City of Jacksonville*, 25 So. 648, 650 (Fla. 1946) ("There is no doubt that the furnishing of electric current is a municipal purpose."); *see also* Fla. Stat. §§ 163.01(15) (2012) (authorizing, under certain conditions, municipalities to participate jointly in electric projects); 180.19 (use of municipal plant by other municipalities and by individuals outside the corporate limits); 361.10 *et seq.* (Joint Power Act).

How is the price of the facilities determined?

When acquiring using the powers of eminent domain, the jury determines the "just compensation" owed, which is the reproduction cost of the property, less depreciation, together with going concern value. Fla. Stat. § 73.0715. Where less than the entire property is acquired through eminent domain, just compensation also includes any damages to the remainder. *Id.*; *see also* Fla. Stat. §§ 166.411 (authorizing municipalities to exercise the power of eminent domain), 73.013 (restrictions on eminent

domain authority); *Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1180 (Fla. Dist. Ct. App. 2001) (“When the PSC has been asked to approve the sale of electric company assets and/or transfers of customers from one electric utility to another and the resulting new rates, the PSC has allowed replacement cost less depreciation for physical assets, going concern values, (determined by the PSC to be an amount recoverable by the public utility for a prudent investment), and other items which are normally included in valuations of electric utility assets. These other items might include stranded costs or required capital expenditures made during the time needed for PSC and FERC approval.” (citations omitted)).

Georgia

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Any municipality not providing electric service on March 29 1973, may, by referendum, establish a municipal electric system and exercise the power of eminent domain over any existing utility. Ga. Code § 46-3-8(h) (2011).

How is the price of the facilities determined?

Existing utilities are authorized to negotiate terms of sale. Ga. Code § 46-3-8(h). Statutory condemnation procedures also apply. *Id.*

Hawaii

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

No specific provisions exist in the Hawaii Constitution or statutes.

How is the price of the facilities determined?

No specific provisions exist in the Hawaii Constitution or statutes.

Idaho

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Any municipality may exercise the right of eminent domain under Title, 7, Chapter 7 of the Idaho Code of Civil Procedure. Idaho Code § 7-720 (2012). Section 7-701(11) of the Idaho Code authorizes the right of eminent domain to be exercised for purposes of electric generation, transmission and distribution. See *also* Idaho Const. art. 1, § 14 (2012). Section 7-703 of the Idaho Code authorizes a municipality to take private property such as real property belonging to any person, as well as rights of way, structures and improvements thereon and lands held or used in connection therewith.

How is the price of the facilities determined?

Price is determined by the court, jury or referee, pursuant to Idaho Code Section 7-711. When determining value, the minimum amount for damages is the greater of the assessed value for property tax purposes (unless the property has been altered substantially), or the municipality's highest prelitigation appraisal. *Id.* at § 7-711(1). Damages to the remainder or business damages may be awarded. *Id.* at § 7-711(2).

Illinois

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. 65 Ill. Comp. Stat. 5/11-117-1 (2012) (providing, among other things, a general right for municipalities to acquire, construct, own and operate municipal utilities). In addition, any municipality may incorporate in any grant to an investor-owned utility a reservation of such municipality's right to take over the utility's facilities on the terms specified in the grant. *Id.* at 5/11-117-6.

How is the price of the facilities determined?

By agreement or condemnation. 65 Ill. Comp. Stat. 5/11-117-7.

Indiana

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, a "municipality may own, lease, acquire, or construct a utility within the corporate boundaries of the municipality, and within a radius of six (6) miles from those boundaries or any place within the county in which the municipality is located, under this chapter without the consent of any agency other than the municipal legislative body." Ind. Code § 8-1.5-2-3(b). However, as of March 1, 1980, municipalities no longer have

the authority to condemn the electric utility property of a rural electric corporation or a public utility “for the use of the property in providing electric utility service.” *Id.* at § 8-1-2-95.1.

How is the price of the facilities determined?

Because municipalities no longer have the authority to condemn the electric utility property of rural electric corporations or public utilities for the use of property in providing electric utility service (see Ind. Code § 8-1-2-95.1), the municipality and the owner must agree to a purchase price.

Iowa

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, any municipal corporation, after being authorized by a vote of its citizens, may file a petition with the Iowa Utilities Board requesting a certificate of authority to provide electric service. Iowa Code § 476.23(1) (2012). If a municipalization petition is subsequently filed, the Board is to issue a certificate authorizing the municipality to provide service to the city if there are no objections. *Id.* When an objection is filed, the Board, after hearing, is to grant a petition for municipalization (upon such terms, conditions, and restrictions as may be justified), if the Board determines that service to the customer by the city is in the public interest, including consideration of any unnecessary duplication of facilities. *Id.*; see also Iowa Utilities Board Docket No. SPU-06-5 *et al.*, *City of Everly v. Interstate Power & Light Co.*, Final Decision and Order (July 11, 2008). Iowa Code Section 476.26 governs the incorporation, consolidation or annexation of any facilities or service territories of an electric utility within the boundaries of a city.

How is the price of the facilities determined?

A municipality that acquires an existing electric utility must pay the reasonable price for the facilities. Iowa Code § 476.23(1). When determining reasonable price, the Iowa Utilities Board must give due consideration to the cost of the facilities being acquired, any necessary generating capacity and transmission capacity dedicated to the customer, depreciation, loss of revenue, and the cost of facilities necessary to reintegrate the system of the utility after detaching the portions sold. *Id.*

Kansas

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, “any city operating waterworks, fuel, power, or lighting plant may sell and dispose of water, fuel, power or light to any person within or without” of that city. Kan. Stat. § 12-808 (2012). A city served by an electric utility whose franchise has expired or will expire before the completion of the proceedings contemplated by Kan. Stat. Section 12-811 may acquire control of and operate the incumbent electric utility. *Id.* at § 12-811 (also discussing procedures for acquisition). A municipality must obtain a certificate of public convenience from the corporation commission, but the commission is prohibited from regulating or reviewing rates charged for service or the operation of electric or gas utility plants “within the corporate limits or outside but within three (3) miles of the corporate limits of any city.” *Id.* at § 66-131.

How is the price of the facilities determined?

The governing body of municipality must pass a resolution that it desires to acquire the system of a former provider. Kan. Stat. § 12-811. The resolution is then filed with the district court of the county in which the municipality is located. *Id.* The court will then enter an order granting the application and providing for the appointment of three commissioners: one to be selected by the municipality, one to be selected by the company or corporation owning the plant to be acquired, and one expert engineer, to be selected by the court. *Id.* The three commissioners will then “appraise and ascertain the fair cash value of said plant and the appurtenance thereunto belonging or in any way appertaining to same.” *Id.* Once a value is reached, the court will enter an order, and its decision shall be considered a final order, which can be appealed to the Kansas Supreme Court. *Id.*

Kentucky

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, municipalities of all classes in Kentucky have the “full power and authority to establish, acquire, own and operate electric plants.” Ky. Rev. Stat. § 96.560 (3) (2012); *see also id.* at §§ 96.550 to 96.901 (detailing the statutory requirements for the ownership and operation of municipal utilities).^{1/} Before any municipality can establish

^{1/} Ky. Rev. Stat. Sections 96.550 to 96.900 are intended to be the exclusive law with respect to municipalities acquiring electric plants after June 1, 1942. Ky. Rev. Stat. § 96.560(2). Any municipality that owned an electric plant prior to that date may elect to operate under these provisions, but is not compelled to do so. *Id.* at 96.560(1). Municipalities that operated electric plants prior to June 1, 1942 and do not wish to operate under Ky Rev. Stat.

or acquire an electric plant, it must first pass a resolution on the issue, and if the municipality desires to construct an electric plant, it must obtain a detailed construction plan from a licensed engineer. *Id.* at § 96.640(2). The decision to “purchase, construct or acquire, or to institute condemnation proceedings for acquiring an electric plant” must be approved by a majority of voters at a regular election. *Id.* at §§ 96.640(2) to 96.640(6).

How is the price of the facilities determined?

Price is determined by agreement or condemnation. A municipality is required to negotiate with the incumbent utility, but if a price cannot be agreed upon, a board of appraisers will be selected as described in Ky. Rev. Stat. Section 69.580(1). If either party refuses to accept the price established by the board of appraisers, the municipality may exercise its powers of eminent domain. *Id.* at § 69.580(2); *see also id.* at § 69.590 (limitations on the eminent domain power). If proceeding by condemnation, the municipality must follow the procedures of the Eminent Domain Act of Kentucky (*id.* at §§ 416.540 to 416.680) “except that, in lieu of determining the award to the owners in the manner prescribed in [Ky. Rev. Stat. §] 416.580(1) the commissioners shall ascertain and determine the value of the property taken; the value of real estate, tangible personal property, intangible personal property and franchises...and they shall also award damages, if any, resulting to the remainder of the electric plant or system of the owner.” *Id.* at § 96.600.

Louisiana

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, however, where a price cannot be agreed upon with the owner, the municipality must determine the expropriation to be necessary for the public interest. La. Rev. Stat. § 19:102 (2012). Such a determination is not conclusive as to whether the purpose of the taking is necessary, which if contested, is determined independently by the court. *Id.* A municipality must take all electric plant owned by a single owner within its jurisdiction; it may not take only a portion of the plant owned by a single owner within its jurisdiction. *Id.* Procedures for filing a petition for expropriation are outlined in La. Rev. Stat. Section 19:103.

Sections 96.550 to 96.900 continue to operate under the preexisting laws. *See id.* at §§ 96.040 (cities of the first class), 96.160 (cities of the second class), 96.170 (cities of the third class), 96.190 (cities of the fourth class), 96.210 (cities of the fifth class), 96.220 (cities of the sixth class).

How is the price of the facilities determined?

Compensation is determined by the jury, when there is a jury demand. La. Rev. Stat. §§ 19:105, 19:109. The owner of the property must be compensated “to the full extent of his loss.” *Id.* at 19:110(B). When determining fair market value, the courts have accepted assessments based on the “income approach,” but will also consider the cost approach and market approach to determining fair market value. See *generally, Lafayette City-Parish Consol. Gov’t v. Entergy Gulf States, Inc.*, 975 So. 2d 177 (La. Ct. App. 2008).

Maine

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Municipalities may form single- or multi-member power districts providing electric utility services. Me. Rev. Stat. tit. 35-A, § 3903 *et seq.* (2011). Power districts have the right of eminent domain with respect to transmission and distribution facilities. *Id.* at § 3911.

How is the price of the facilities determined?

When acquiring a plant under a municipality’s Me. Rev. Stat. tit. 35-A Section 3911 eminent domain authority, the municipality must get approval of the Public Utilities Commission. Me. Rev. Stat. tit. 35-A, § 3136 (also setting limits on eminent domain authority). Price is not specified.

Maryland

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Maryland does not have specific legislation that allows the creation of a municipally owned electric system. Instead, in this Home Rule state, the right to municipalize resides at the local level, and must be reflected in the municipal’s charter. Section 3 of Article XI-E of the Maryland Constitution gives municipalities the power and authority to amend their charters, and Md. Code Art. 23A, Sections 11-18 (2012) detail how to amend a charter. A municipality must get approval from the Maryland Public Service Commission (PSC) to “build, maintain, or operate a plant for supplying gas or electric for other than municipal purposes.” Md. Code Pub. Util. Cos. § 7-210(b)(1).

Similarly, a municipality can only serve an area it has recently annexed with the approval of the PSC. *Id.* at § 7-210(d).

How is the price of the facilities determined?

The price of any acquired facilities would be determined through the application of Maryland's eminent domain regulations. Md. Code Real Prop. §§ 12-101 to -112. If the PSC has approved a municipality's request to serve an area it has annexed, the municipality may acquire facilities in the annexed area through the application of eminent domain. Md. Code Pub. Util. Cos. § 7-210(e).

Massachusetts

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Mass. Gen. Laws ch. 164, §§ 34 (2012) (authority to operate electric plant), 35 (city voting requirements), 36 (town voting requirements), 41 (enlargement of plant), 42 (purchase of existing plant). Additionally, where a municipality "purchases a gas or electric lighting plant having mains, poles, wires or other distributing apparatus in an adjoining town where there is no private gas or electric lighting company, it may also purchase such mains, poles, wires or other distributing apparatus therein." *Id.* at § 45; see also *id.* at §§ 46, 47 (governing the supply of electricity to adjoining towns).

How is the price of the facilities determined?

Where the municipality and the incumbent utility are unable to agree to a purchase price of the plant, pricing is determined pursuant to Mass. Gen. Laws ch. 164, Section 43. The Department of Public Utilities (DPU) is required to determine "what price should be paid, having in view the cost of the property less a reasonable allowance for depreciation and obsolescence, and any other element which may enter into a determination of a fair value of the property so purchased, but such value shall be estimated without enhancement on account of future earning capacity or good will, or of exclusive privileges derived from rights in the public ways." *Id.* at § 43. The method for determining fair value is within the Department's discretion (*Stow Mun. Elec. Dep't v. Dep't of Pub. Utils.*, 688 N.E.2d 1337, 1344-45 (Mass. 1997)), and the Massachusetts Supreme Judicial Court has upheld the Department's use of a 50-50 weighted valuation of original cost less depreciation and reproduction cost new less depreciation (*id.*). The incumbent utility may accept the DPU's determination or reject it. Mass. Gen. Laws ch. 164, § 43. If the incumbent utility rejects the DPU's determination, "the town may proceed to construct or otherwise acquire a municipal plant without further attempt to

acquire the plant of such owner or any part thereof,” subject to appropriate authorization. *Id.*

Michigan

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Mich. Const. art. VII, § 24 (2012); Mich. Comp. Laws § 117.4f(a) (2012). Acquisition of existing utilities must be approved by 3/5 of electors. Mich. Const. Art. VII, § 25; Mich. Comp. Laws § 117.4f(a).

How is the price of the facilities determined?

Price may be determined through agreement or condemnation. Mich. Comp. Laws § 117.4f(a). In the case of condemnation by cities with more than 25,000, “just compensation” is determined by jury in county circuit court. Mich. Comp. Laws §§ 213.111 *et seq.*

Minnesota

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. In cases where a municipality did not operate, prior to the time of the purchase, the type of utility service delivered by the utility property being purchased, Minn. Stat. Sections 216B.45 and 216B.46 apply. Minn. Stat. § 216B.465 (2012). Under such circumstances, any public utility operating under a license, right or franchise in a municipality is deemed to consent to the municipality’s purchase of its property within the municipality, for just compensation. *Id.* at § 216B.45. The acquisition of public utility property must follow certain procedural requirements. *See id.* at § 216B.46 (requiring resolution of the governing body, public hearing and notice requirements).

In cases where a municipality operates, prior to the purchase of public utility property, a municipal utility providing the type of utility service delivered by the utility property being purchased, voter ratification is not required and Minn. Stat. Section 216B.44 applies. *Id.* at § 216B.465; *see also id.* at § 216B.44 (authorizing municipal annexation and extension of service territory).

How is the price of the facilities determined?

Where the municipality seeks to acquire the property of a public utility and the municipality has not previously provided the type of utility service delivered by the utility property being acquired, the municipality and incumbent utility may agree on a price. Minn. Stat. §§ 216B.45, 216B.465. If the municipality and incumbent utility cannot agree on compensation, the Minnesota Public Utilities Commission will issue an order determining just compensation. *Id.* § 216B.45. In making the determination, the Commission “shall consider the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities and other appropriate factors.” *Id.*

Where a municipal utility seeks to expand its service territory by annexation or extension of its territory within its existing corporate limits, and the municipality and incumbent utility are unable to agree to a purchase price, the Commission determines compensation. *Id.* at § 216B.44(b). When “making that determination the commission shall consider the original cost of the property, less depreciation, loss of revenue to the utility formerly serving the area, expenses resulting from integration of facilities, and other appropriate factors.” *Id.*

A municipality may also avail itself of eminent domain procedures, in which case damages “must include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors.” *Id.* at § 216B.47.

Mississippi

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, municipalities may “acquire, improve, operate and maintain” an electric plant within or without the municipality’s corporate limits. Miss. Code § 77-5-405 (2012). Generally, municipalities are “authorized and empowered to condemn any land, easements or rights of way either on, under or above the ground, for any and all purposes necessary in connection with the construction, operation and maintenance of an electric plant or improvements thereto.” *Id.* at § 77-5-441. However, prior to any municipality exercising its power of eminent domain pursuant to Miss. Code Section 77-3-17 (discussing a municipality’s eminent domain rights where the incumbent utility has a certificate of public convenience and necessity), the Mississippi Public Service Commission must make a determination cancelling the certificate of public convenience and necessity granted to the incumbent utility, as provided in Miss. Code Section 77-3-21 (discussing hearings on the adequacy of service provided by the incumbent utility). Miss. Code §§ 77-3-13(6) & -13(7); *see also City of Starkville v. 4-County Elec. Power*

Ass'n, 909 So. 2d 1094, PP 28-39 (Miss. 2005); *Cities of Oxford v. N.E. Miss. Elec. Power Ass'n*, 704 So. 2d 59 (Miss. 1997).

How is the price of the facilities determined?

Compensation for the property taken “is the difference between the fair market value of the business as a going concern immediately before the damage and the fair market value of any assets remaining after the business closed and ceased to operate as a public utility. In determining the before value of the utility business so damaged, every element of the plant or system which was reasonably required for the operation thereof and which entered into and remained a part thereof should be taken into account. This means that the appraiser should consider the certificate of public convenience and necessity as an element of value, for without it the entire physical plant would be worthless. The value of the utility as a going concern is obtained by taking a comprehensive view of each and all of the elements of property, tangible and intangible, and considering them as inseparable parts of the business entity.” *Jackson v. Creston Hills, Inc.*, 172 So. 2d 215, 221-222 (Miss. 1965) (internal citations omitted); see also *Dedeaux Util. Co. v. City of Gulfport*, 63 So. 3d 514 (Miss. 2011).

Missouri

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. The city council of any city, town or village may erect, purchase, acquire, maintain and operate gas and power plants, electric light plants, ice plants or any other kind of plant or device for lighting purposes. Mo. Rev. Stat. § 91.010 (2012).

How is the price of the facilities determined?

Price is not specified. Condemnation of property of a public utility or rural electric cooperative is prohibited (subject to limited exceptions) if such property will be used for the same purpose after condemnation. Mo. Rev. Stat. § 71.525.

Montana

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

A municipality may operate a utility within and outside of its boundaries. Mont. Code § 69-7-201 (2012); see also *id.* at § 69-7-201 (detailing the required rules for

operation of a municipal utility). However, municipal utilities and local government entities cannot use the eminent domain laws to acquire existing telephone or electric energy lines and appurtenant facilities owned by a public utility or cooperative for the purpose of transmitting or distributing electricity. Mont. Code. § 70-30-102(37).

How is the price of the facilities determined?

Montana law does not allow a municipality to use eminent domain to obtain a public utility's facilities. Mont. Code. § 70-30-102(37). The municipal utility and owner must therefore agree to a purchase price.

Nebraska

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Any city or village may construct, purchase, acquire, maintain, extend or enlarge an electric light and power plant, distribution system and transmission lines, and real and personal property needed or useful in connection therewith. Neb. Rev. Stat. § 18-412 (2012); *see also id.* at § 70-1012 (discussing approval by the Nebraska Power Review Board (NPRB)).

How is the price of the facilities determined?

By agreement, or by decision of the NPRB. The NPRB determines the amount of cash consideration based, without limitation, on: (a) current reproduction cost, less straight-line depreciation at 3% a year, not to exceed 70%; plus (b) seller's system reintegration costs; plus (c) 2 ½ times seller's annual revenue from regular customers and 5 times net annual revenue from large customers (consuming more than 300 kW per year). However, no transfer shall be made if it would impair the obligations of a power supplier to holders of its bonds or mortgages. Neb. Rev. Stat. § 70-1010.

Nevada

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. The city council may establish any public utility after fulfilling notice and consultation requirements prescribed by law. Nev. Rev. Stat. § 266.290 (2012). In addition, any county is authorized to purchase, acquire, construct and operate electrical

power plants and power lines upon receipt of a petition signed by at least two thirds of taxpayers. *Id.* at § 710.160.

How is the price of the facilities determined?

Pursuant to generally applicable eminent domain law. Nev. Rev. Stat. §§ 710.180, 37.009 *et seq.*

New Hampshire

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, a municipality may “establish, expand, take, purchase, lease or otherwise acquire and maintain and operate...one or more suitable plants for the manufacture and distribution of electricity.” N.H. Rev. Stat. § 38:2 (2012). The specifics of the required vote to establish a utility vary depending whether it is a city (*id.* at § 38:3), a town or village district (*id.* at § 38:4), or an unincorporated town or unorganized place (*id.* at § 38:5) establishing the municipality.

How is the price of the facilities determined?

Once a vote is taken, the municipality must contact the incumbent utility, inform it of the vote, and request the opportunity to purchase the utility’s facilities. N.H. Rev. Stat. § 38:6. Upon receiving notice, the utility has 60 days to respond and begin negotiations with the municipality on a price for the facilities. *Id.* at § 38:7. If the utility fails to respond in 60 days, it forfeits its right to have the municipality purchase the plant, and the municipality may then proceed to acquire the facilities via condemnation. *Id.* If the municipality and the utility cannot agree on a price, or how much property is to be purchased, the parties may petition the Public Utilities Commission to determine these questions. *Id.* at §§ 38:9, 38:10. In fixing compensation, the Commission determines the amount of damages “caused by the severance of the plant and property proposed to be purchased from the other plant and property of the owner” and the amount shall “be limited to the value of such plant and property and the cost of direct and remedial requirements, such as new through-connections in transmission lines, and shall exclude consequential damages such as stranded investments in generation, storage, or supply arrangements.” *Id.*

New Jersey

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, within or without the corporate limits of the municipality. N.J. Stat. § 40:62-12 (2012). Prior to doing so, the municipality must get approval for such an action by a majority of legal voters. N.J. Stat. § 40:62-15. Voters may also submit a signed petition requesting a referendum vote on the acquisition or construction of a light, heat or power plant. *Id.* Municipalities may construct, maintain and operate additions and extensions to the plant and distribution system pursuant to N.J. Stat. Section 40:62-22. *See also id.* at § 48:3-88 (applicability of the Electric Discount and Energy Competition Act to municipal utilities).

How is the price of the facilities determined?

A municipality may proceed by condemnation under N.J. Stat. Section 40:62-12. Compensation under eminent domain law is determined pursuant to N.J. Stat. Sections 20:3-29 (compensation), -29.1 (loss of income) and -31 (interest).

New Mexico

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, subject to the territorial limitations of N.M. Stat. Section 3-24-1 (2012). *See generally*, N.M. Stat. §§ 3-24-1 to -24-118. Those municipalities that own electric distribution systems on July 1, 1979 are granted additional powers by the Municipal Electric Generation Act (*id.* at §§ 3-24-11 to -24-118). The Public Utility Act (*id.* at §§ 62-1-1 to -6-28, 62-8-1 to -13-15), and specifically its acquisition procedures (*id.* at § 62-6-12), may apply where a municipality has elected to come within the terms of the Act (*see id.* at §§ 62-3-3(E), -3-3(G)).

How is the price of the facilities determined?

Where the municipality acquires facilities pursuant to condemnation (N.M. Stat. § 3-24-5), procedures for acquisition and compensation are determined by the Eminent Domain Code (*id.* at §§ 42A-1-1 to -1-33). *See also id.* at § 42A-3-1 (listing purposes for which property may be condemned). Just compensation is determined pursuant to Section 42A-1-24 of the Eminent Domain Code (N.M. Stat. § 42A-1-24). Where there is a partial taking of the property, damages to the remainder are awarded, which is the difference between the fair market value of the entire property immediately before the taking, and the fair market value of the property remaining immediately after the taking.

Id. at § 42A-1-26. The municipality may seek immediate possession of the property proposed to be taken. *Id.* at § 42A-1-22.

New York

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Any municipality may “construct, lease, purchase, own, acquire, use and/or operate any public utility service within or without its territorial limits, for the purpose of furnishing to itself or for compensation to its inhabitants, any service similar to that furnished by any public utility company.” N.Y. Gen. Mun. Law § 360(2) (2012). Any decision to construct or otherwise acquire a utility requires the approval by referendum of the residents through an election or special election. *Id.* at § 360(5).

How is the price of the facilities determined?

The price is determined either by an agreement to purchase, or by condemnation. N.Y. Gen. Mun. Law § 360(6). If proceeding by condemnation, the municipality must do so “in the manner provided by law for condemnation by such municipal corporation of private property for a public use.” *Id.*

North Carolina

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, cities are authorized to acquire an electric system to furnish services to the city and its citizens. N.C. Gen. Stat. §§ 160A-311(1), -312(a) (2012). A city may do the same outside its corporate limits “within reasonable limitations.” *Id.* at § 160A-312(a). The governing body of a municipality may use the powers of eminent domain to acquire by purchase, gift or condemnation any property for purposes of establishing, extending, enlarging or improving an electric system. *Id.* at § 40A-3(b); *see also Town of Midland v. Morris*, 704 S.E.2d 329, 336-37 (N.C. Ct. App. 2011). Approval of the board of commissioners may be required prior to condemnation of real property outside the county. N.C. Gen. Stat. § 153A-15.

How is the price of the facilities determined?

A commissioner, judge or jury determines the issue of compensation. N.C. Gen. Stat. § 40A-52. When proceeding by condemnation, the compensation must reflect the

value of the property immediately prior to the filing of the petition or complaint to condemn. *Id.* at § 40A-63; see also *id.* at § 40A-66. Where the entirety of the property is taken, the measure of compensation is fair market value. *Id.* at § 40A-64(a). However, if “less than the entire tract” (see *id.* at § 40A-67) is condemned, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken. *Id.* at § 40A-64(b). Interest is awarded pursuant to N.C. Gen. Stat. Section 40A-53.

North Dakota

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. “The governing body of a municipality shall have the power ... [t]o purchase, acquire by eminent domain in accordance with [relevant eminent domain law], erect, lease, rent, manage, and maintain electric light and power plants, gasworks, steam heating plants and appurtenances for distribution, and to regulate and fix the rates to its patrons and to jointly, with other municipalities, acquire by eminent domain, erect, construct, lease, rent, manage, and maintain any artificial or natural gas transmission or distribution lines or plants. N.D. Cent. Code § 40-05-01(66) (2011); see also *id.* at § 40-33-01 (“Any municipality may purchase, erect, construct, operate, maintain, enlarge, improve and extend, or lease from any person, or sell or lease to any person: [(1) a]ny electric light and power plant, site, buildings and equipment thereof; (2) a]ny electric distribution system and equipment thereof; and (3) a]ny electric transmission line and equipment thereof [...]”).

How is the price of the facilities determined?

Pursuant to generally applicable eminent domain law. N.D. Cent. Code §§ 40-05-01(66); see also *id.* at § 32-15-01 *et seq.* (eminent domain laws).

Ohio

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, “any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants.” Ohio Const. art. XVIII, § 4. A

municipality proceeding to acquire, construct, own, lease or operate a public utility must act by ordinance. *Id.* at § 5.

How is the price of the facilities determined?

A municipality may acquire a public utility “by condemnation or otherwise.” Ohio Const. art. XVIII, § 4; see *also* Ohio Rev. Code §§ 163.01 to 163.63 (2012) (eminent domain law and procedure).

Oklahoma

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Municipalities have the general right to acquire, own, and maintain within or without its corporate limits real estate for municipal purposes including public utility purposes. Okla. Stat. tit. 11, § 22-104(2) (2012). Generally, a municipality has the right to exercise the power of eminent domain for any such municipal purpose, within or without its corporate limits. *Id.* at §§ 22-104(3), -105. However, Oklahoma temporarily placed a moratorium on all municipal condemnation proceedings where a municipality is attempting to condemn the facilities of electric public utilities or rural electric cooperatives for the purpose of utilizing such facilities for the delivery of electric power and energy. *Id.* at § 21-222. The moratorium is in effect until the Oklahoma legislature enacts electric restructuring enabling legislation and implements consumer choice of retail electric energy suppliers. *Id.*; see *also* Okla. Stat. tit. 27, § 7(B) (“The power of eminent domain shall not be used for the siting or building of wind turbines on private property.”).

How is the price of the facilities determined?

As stated above, municipalities may not currently use their powers of eminent domain to condemn electric public utilities or rural electric cooperatives. Okla. Stat. tit. 11, § 21-222 (2012). This moratorium does not prohibit a municipality from agreeing to purchase the plant of another electric public utility or rural electric cooperative. When municipalities’ authority to condemn is restored, price would be determined pursuant to Okla. Stat. tit. 27, § 16 (just compensation defined). See *also id.* at § 7.10 (relocating and rerouting of public utility lines).

Oregon

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. “When the power to do so is conferred by or contained in its charter or act of incorporation, any city may build, own, operate and maintain [...] electric light and power plants [...] In exercising such powers, any city may bring actions for the condemnation or taking of private property for public use in the same manner as private corporations are now authorized or permitted by law to do.” Or. Rev. Stat § 225.020 (2009);^{2/} see also *id.* at § 223.005 (“Any incorporated city may [...] condemn for its use private property for the purpose of erecting and maintaining electric lines thereon [...] and for the purpose of constructing electrical systems for municipal uses.”).

How is the price of the facilities determined?

Price is determined pursuant to generally applicable eminent domain law (see Or. Rev. Stat. §§ 223.005, 225.020, as discussed immediately above), except with respect to the takeover of hydroelectric projects, where specific requirements apply: acquirer (State or municipality, as the case may be) must pay just compensation, including severance damages and assume existing contracts of seller. *Id.* at § 543.610. Failing agreement on the price, compensation is determined in a proceeding in equity in the circuit court of the county in which most of the project is based. *Id.* The acquirer can also use condemnation proceedings. *Id.*

Pennsylvania

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, but the ability varies based on the classification of the municipality. Cities of the first class benefit from home rule, and the right to municipalize resides at the local level and must be reflected in the municipality’s charter. 53 Pa. Stat. § 13101 (2012). Cities of the second class and third class have the “exclusive right to supply” themselves with electric power, and may “make, erect, and maintain” the facilities

^{2/} Oregon Constitution, Art. XI, Section 12, and its implementing legislation, Or. Rev. Stat. Sections 261.005 *et seq.*, also authorize the creation of People’s Utility Districts (PUDs), consisting of “territory, contiguous or otherwise, within one or more counties [or] an incorporated municipality, or municipalities, with or without unincorporated territory, for the purpose of supplying water for domestic and municipal purposes; for the development of water power and/or electric energy; and for the distribution, disposal and sale of water, water power and electric energy.” Or. Const., art. XI, § 12. However, “nothing in the [PUD implementing legislation] modifies in any manner any charter provisions of any city, or prohibits any city from acquiring and operating its own plant.” Or. Rev. Stat. § 261.035. Since this survey focuses on municipalization, PUDs are not discussed in detail herein.

necessary to do so. *Id.* at §§ 23153 (cities of the second class), 38575 (cities of the third class). Boroughs have the right to operate generating facilities to manufacture electricity. *Id.* at §§ 47471-47479. Townships of the first and second class also may manufacture electricity, but must do so through a hydroelectric generating facility. *Id.* at §§ 57751 (township of the first class), 67801 (township of the second class).

How is the price of the facilities determined?

The pricing of facilities also varies according to the classification of the municipality. The price for a city of the first class is not specified. Cities of the second and third class may acquire facilities through the implementation of their eminent domain statutes, 53 Pa. Stat. §§ 24101 (cities of the second class), 37801-37850 (cities of the third class). Boroughs may only acquire facilities if the borough and the owner of the facility can agree on a price. *Id.* at § 47474. Townships of the first and second class can only acquire hydroelectric generating facilities by paying an agreed purchase price. *Id.* at §§ 57754 (township of the first class), 67804 (township of the second class).

Rhode Island

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

While Rhode Island is a home rule state (R.I. Const. art. XIII, § 1 (2012)), the General Assembly has expressed its intent to entirely preempt town and city regulatory activity in the field of public-utilities regulation. *Town of East Greenwich v. Narragansett Electric Co.*, 651 A.2d 725, 729 (R.I. 1994); see also R.I. Gen. Laws § 39-1-1 (2012). Consequently, a municipality must have legislative authority to regulate its own municipal electric utility. See e.g., R.I. Gen. Laws § 45-58-8 (powers of the Pascoag Utility District, a quasi-municipal utility).

How is the price of the facilities determined?

Because a municipal electric utility must be granted the authority to condemn electric utility property under eminent domain law by the General Assembly (see above), any such authorizing statute would govern the determination of the price of the facilities. *Cf.*, R.I. Gen. Laws § 39-1-31 (eminent domain authority of public utility companies).

South Carolina

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Any incorporated municipality may, upon majority vote of residents, acquire by initial construction or purchase, and may operate electric plants and other utilities. S.C. Const. art. VIII, § 16 (2011); see *also* S.C. Code §§ 5-31-610 (2011) (reiterating the right of any city or town to, among other things, construct, purchase, operate and maintain electric light works), 5-31-620 (requiring an election before such powers are exercised). Any city or town may purchase local property of existing electric utility for just compensation. *Id.* at § 58-27-1320.

How is the price of the facilities determined?

Failing agreement, municipality must pay just compensation (including severance damages, if any), as determined by Public Service Commission pursuant to statutory procedures, including public hearing. S.C. Code § 58-27-1340. Purchase price must be approved by a majority of municipal voters. *Id.* at § 58-27-1350.

South Dakota

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. “Every municipality shall have the power to construct, operate, and maintain any system or part thereof to provide light, heat and power.” S.D. Codified Laws § 9-39-1 (2012). A municipality may supply itself, “or any specified portion of the municipality or adjacent territory within ten miles of its corporate limits.” S.D. Codified Laws § 9-40-1.

How is the price of the facilities determined?

If a municipality finds it necessary, it may appropriate or damage private property, either within or without the corporate limits of the municipality. S.D. Codified Laws § 9-27-1 (granting condemnation authority and discussing voting requirements). Municipalities can borrow money and issue negotiable bonds, without pledging or using the credit of the municipality for the purpose of financing the erection or acquisition of a utility. S.D. Codified Laws § 9-40-5.

Tennessee

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes, within or without the municipalities’ corporate limits. Tenn. Code §§ 7-34-104 (2012) (authorization pursuant to revenue bond law), 7-52-103 (authorization under

the Municipal Electric Plant Law of 1935), 7-52-105 (eminent domain authority); see *also id.* at §§ 6-51-111 (municipal annexations), 6-51-112 (municipal annexations and electric cooperatives). Municipalities may exercise eminent domain authority to acquire facilities, equipment and service areas of non-consumer owned electric systems even where such facilities and equipment were previously dedicated to utility use. *Id.* at § 65-34-106; see *also id.* at § 65-34-107 (powers and limitations of municipalities).

How is the price of the facilities determined?

When proceeding under eminent domain, Tenn. Code Sections 29-16-101 *et seq.* controls the proceedings and compensation. Tenn. Code § 7-52-105. The value of damages is determined pursuant to Tenn. Code Section 29-16-114 (detailing elements of damages). Damages are determined by a jury (*id.* at § 29-16-113), the results of which are presented in a report, which may be accepted by the court or set aside if either party objects to the report and good cause is shown (*id.* at §§ 29-16-115 to -117).

Texas

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. See Tex. Loc. Gov't Code §§ 552.001 (2012) (granting general power for municipalities to purchase, construct or operate a utility system), 552.002 (authorizing home-rule municipalities to buy, own, construct, maintain and operate electric lighting plants and other public utilities). When the governing body of a municipality considers it necessary, it may exercise the right of eminent domain to acquire public or private property for an electric or gas power system, among other uses. *Id.* at § 552.001. A home-rule municipality may also use eminent domain for such purposes and is explicitly authorized to condemn the property of existing utilities. *Id.* at § 552.002. A home-rule municipality may adopt, in its charter, rules for the acquisition or operation of a public utility. *Id.*; see *also* Tex. Util. Code §§ 37.051 (discussing when a utility is required to obtain a certificate of public convenience and necessity), 37.059 (discussing revocation or amendment of certificates of public convenience and necessity).

How is the price of the facilities determined?

In accordance with generally applicable eminent domain law (Chapter 21 of the Texas Property Code). Tex. Loc. Gov't Code § 552.002.

Utah

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. A municipality may “construct, maintain and operate” electric light works, and may “sell and deliver the surplus product or service capacity...not required by the city or the city’s inhabitants, to others beyond the limits of the city.” Utah Code § 10-8-14 (2012).

How is the price of the facilities determined?

If a municipality and the incumbent utility cannot agree on a purchase price, a municipality may utilize Utah’s eminent domain laws to condemn and acquire the plant. Utah Code § 10-8-2(b)(iii); *see generally id.* at §§ 78B-6-501 to -522 (eminent domain laws). Price is determined by the court, jury or referee pursuant to Utah Code Section 78B-6-511. The court, jury, or referee shall determine the value of the property and all improvements. *Id.* at § 78B-6-511(1). If the facility being acquired is part of a larger piece of property, the court, jury or referee shall determine the amount of damages “which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought” by the municipality. *Id.* at § 78B-6-511(2).

Vermont

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

A municipality may construct, purchase or lease plant for the manufacture, distribution, purchase and sale of electricity for the use of the municipality pursuant to Vt. Stat. tit. 30, Section 2902 (2012). A municipality may exercise its eminent domain authority to take private plant after first following the procedures outlined in Vt. Stat. tit. 30, Section 2910 (identifying preliminary procedures). *See also id.* at §§ 2903 (city voter authorization), 2904 (town or village voter authorization), 2907 (identifying plant that may be taken). Additional condemnation authority is found in Vt. Stat. tit. 30, Section 2914 (Chapter 3 of Title 30 condemnation procedures apply where a municipal utility seeks further takings it might deem necessary for its utility functions, beyond that of the private utility plant and property within its boundaries). *In re Town of Springfield*, 469 A.2d 375, 380 (Vt. 1983) (discussing Section 2914 condemnation authority). Authority to operate a utility outside the territorial limits of the municipality is provided in Vt. Stat. tit. 30, Sections 2912, 2913, 2922.

How is the price of the facilities determined?

When proceeding under Vt. Stat. tit. 30, Section 2910, Vt. Stat. tit. 30, Section 2909 authorizes the Public Service Board, after proper notice and hearing, to decide the amount of just compensation. Specifically, the Board may fix the price to be paid for the plant and property, and determine the amount of damages, if any, caused by the severance of the plant and property proposed to be purchased. *Id.* However, where a municipality is exercising its Vt. Stat. tit. 30, Section 2914 condemnation authority, compensation is determined by Vt. Stat. tit. 30, Sections 101 *et seq.*

Virginia

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Va. Code § 15.2-2109(A) (2012). A locality may take over facilities of existing utility only if authorized by a majority of voters in a referendum. *Id.* at § 15.2-2109(B). However, no such vote is needed if the existing utility consents to the acquisition, if the acquiring municipality provided electric service as of January 1, 1994, or with respect to the use of energy generated from landfill gas in the City of Lynchburg or Fairfax County. *Id.* Municipal takeovers are subject to State Corporation Commission (SCC) approval on the basis of public necessity or essential public convenience. *Id.* at § 25.1-102(A).

How is the price of the facilities determined?

General condemnation law (Va. Code Ann. § 25.1-300 *et seq.*) applies. For purposes of condemnation, the SCC establishes “for use in any condemnation proceeding whether any payment for stranded investment is appropriate and, if so, the amount of such payment and any conditions thereof.” *Id.* at § 25.1-102(B).

Washington

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. A city or town may “construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants...with gas, electricity and other means of power.” Wash. Rev. Code § 35.92.050 (2012). When the governing body of a city or town decides to purchase, acquire or construct a utility, “it shall provide therefor by ordinance,

which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be, and the ordinance shall be submitted for ratification or rejection by majority vote of the voters of the city or town at a general or special election.” *Id.* at § 35.92.070. A city or town’s right to acquire facilities from a public utility district is limited: “the right of condemnation shall not apply to a city or a town located within a public utility district that owns the electric distribution properties sought to be condemned.” *Id.* at § 35.92.054.

How is the price of the facilities determined?

Where a city or town has condemnation authority (see Wash. Rev. Code § 35.92.054 for limitations on condemnation authority), price is determined pursuant to Wash. Rev. Code Sections 8.04.005 to -8.28.070 (eminent domain laws and procedures).

West Virginia

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

A municipality may acquire, construct, establish or extend a municipal electric power system. W. Va. Code §§ 8-12-5(32), 8-19-1, 8-19-3 (2012). However, the state has placed numerous limits on the authorities of municipalities. For instance, a municipality may not serve or supply electric power facilities or services within the corporate limits of any other municipality without the consent of that municipality. *Id.* at § 8-19-1. A municipality must get a certificate of public convenience and necessity from the Public Service Commission in order to compete with an existing electric power system beyond its corporate limits. *Id.* at § 8-19-3; *see also id.* at § 8-12-5(32). While a municipality has eminent domain authority, as provided for in W. Va. Code §§ 54-1-1 *et seq.*, with respect to electric power systems generally, it may not use its eminent domain authority over a “*privately* owned electric power system,” or any part thereof, “for purposes of acquiring, constructing, establishing or extending an electric power system.” *Id.* at § 8-19-3 (emphasis supplied).

How is the price of the facilities determined?

Where condemnation is permitted by statute (see W. Va. Code § 8-19-3), just compensation is determined pursuant to W. Va. Code §§ 54-1-1 *et seq.* Condemnation commissioners initially determine just compensation, and any damage to the residue if less than a fee interest in the property is taken, in a report. *Id.* at § 54-2-9; *see also id.* at § 54-2-9a. Either party may file exceptions to the report and demand that the

question of compensation and any damages to be paid be ascertained by a jury. *Id.* at § 54-2-10. If no exception with respect to the report is filed, the report of the condemnation commissioners must be confirmed by the court. *Id.*; *see also id.* at § 54-2-11 (setting aside the report if good cause shown or if defective or erroneous).

Wisconsin

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Wis. Stat. § 197.01(1) (2012). Any municipality may purchase any public utility or part thereof, provided it receives the approval of a majority of voters, a favorable jury verdict as to the necessity of the taking, and the approval of the Wisconsin Public Service Commission (WIPSC) after a public hearing. *Id.* at § 197.02-05. Condemnation proceedings may be discontinued within 90 days after WIPSC approval, by vote of residents or by resolution of municipal governing body pursuant to specified procedures. *Id.* at § 197.04; *see also id.* at § 66.0803(1) (requiring, under certain circumstances, referendum approval prior to the construction or purchase of electric plant).

How is the price of the facilities determined?

Just compensation is determined by the WIPSC after public hearing, subject to court review. Wis. Stat. § 197.05-09.

Wyoming

Is there a right for a municipality to establish or acquire an electric system to serve customers or the residents and businesses within the municipal corporate limits?

Yes. Any incorporated city or town has the right to “acquire by condemnation, purchase or gift any real estate or other property, public or private, whether within or outside the corporate limits of the city or town, for rights-of-way, sites, buildings or other purposes connected with or necessary to carry on the business of municipal ownership or operation of any public utility service, or to secure outside connections for any public utility service.” Wyo. Stat. § 1-26-807 (2012). Acquisition of a utility or its facilities must be authorized at an election. *Id.* at § 1-26-808.

How is the price of the facilities determined?

The condemning party must negotiate in good faith and attempt to acquire the property via purchase. Wyo. Stat. § 1-26-509; see *also id.* at § 1-26-511 (purchase efforts waived or excused). Where negotiations fail, compensation is awarded pursuant to Wyo. Stat. Sections 1-26-701 to -714. In determining the value of the property being acquired, "consideration shall be given to the total amount paid for the franchise for the entire term of the franchise and deductions made proportioned on the unexpired term of the franchise." Wyo. Stat. § 1-26-809.