

## Memorandum 98-40

### **Eminent Domain Law: Condemnation by Privately Owned Public Utility**

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#### BACKGROUND

In Spring 1997, the Law Revision Commission conducted several public meetings on the subject of needed revisions of the Public Utilities Code that result from the restructuring of the electrical, gas, transportation, and telecommunications industries. This was done pursuant to a statutory mandate that the California Public Utilities Commission (CPUC) consult with the Law Revision Commission on this matter.

During the course of the consultation, CPUC indicated to the Law Revision Commission that deregulation in the local telecommunications industry has resulted in a large number of authorized service providers; it has also resulted in an increase in the use, and abuse, of eminent domain authority by service providers. CPUC suggested that this is a significant problem the Law Revision Commission might look into.

In Fall 1997, the Law Revision Commission decided to review problem areas in the Eminent Domain Law. The Eminent Domain Law was enacted in 1975 on recommendation of the Law Revision Commission and has not been reviewed since. The Commission decided to include the matter of condemnation by privately owned public utilities among the problem areas to be investigated.

#### CONDEMNATION AUTHORITY OF PRIVATE PERSONS

##### **Right to Take**

As a general rule, the authority to take property for public use by eminent domain is limited to public entities. See, e.g., Gov't Code §§ 15853 (state), 37350.5 (cities), 25350.5 (counties). However, some private entities are authorized by statute to exercise eminent domain authority for public use. These include:

- (1) Privately owned public utilities. Pub. Util. Code §§ 610-624.

(2) Certain “quasi-public” entities, including nonprofit educational institutions of collegiate grade (Educ. Code § 94500), nonprofit hospitals (Health & Saf. Code § 127050), limited dividend housing corporations (Health & Saf. Code § 34874), land chest corporations (Health & Saf. Code § 35167), cemetery authorities (Health & Saf. Code § 8501), and mutual water companies (Pub. Util. Code § 2729).

(3) Private persons, in cases of great necessity, for the limited purposes of acquiring an appurtenant easement for utility service (Civ. Code § 1001) or a temporary right of entry on adjacent property to repair or reconstruct land or improvements (Civ. Code § 1002).

### **Consent of Local Entity Required**

A quasi-public entity’s, or private person’s, right to acquire property by eminent domain is not unfettered. Consent of the local public entity in whose jurisdiction the property is located is required. See Code Civ. Proc. §§ 1245.310-1245.390 (resolution consenting to eminent domain proceeding by quasi-public entity); see also Code Civ. Proc. § 1245.325 (private person acquiring appurtenant easement deemed to be quasi-public entity for purposes of article).

Before the local public entity may authorize the acquisition, it must make the following findings:

- (1) The public interest and necessity require the propose project.
- (2) The proposed project is planned or located in the manner that will be most compatible with the greatest good and least private injury.
- (3) The property to be taken is necessary for the proposed project.
- (4) The hardship to the quasi-public entity if the taking is not permitted outweighs the hardship to the owners of the property.

### **Consent of State Administrator Required**

In addition to the required consent of the local public entity, eminent domain acquisitions by certain quasi-public entities may not be made unless the state administrator having jurisdiction over the quasi-public entity authorizes it. Specifically:

- A nonprofit hospital may not exercise the power of eminent domain unless the Director of the Office of Statewide Health Planning and Development, after a public hearing, adopts a

certificate of necessity for the acquisition. Health & Saf. Code § 127050.

- A limited dividend housing corporation may not exercise the power of eminent domain unless the Commission of Housing and Community Development adopts a resolution of necessity for the acquisition. Health & Saf. Code § 34875.

- A land chest corporation may not acquire property by eminent domain or otherwise unless the Commissioner of Corporations has approved the project. Health & Saf. Code § 35167.

### **Condemnation by Privately Owned Public Utilities**

The consent of the local public entity is not required for condemnation by a privately owned public utility. Nor is CPUC consent required. (Note, however, that CPUC has general regulatory authority over public utilities, and a public utility must obtain a certificate of public convenience and necessity from CPUC before it may begin construction or extension of its line, plant, or system. Pub. Util. Code §§ 701, 1001.)

## **PROBLEMS IN PUBLIC UTILITY CONDEMNATION**

### **Regulated Public Utilities**

Until now, the Law Revision Commission has not been aware of any particular problems with condemnation authority or its exercise by privately owned public utilities. When the Eminent Domain Law was enacted in 1975, the existing condemnation authority of privately owned public utilities was continued without change. The Law Revision Commission's report to the Governor and Legislature provided for addition of provisions to the Public Utilities Code "to preserve and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their **regulated** activities." *The Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1001, 1018 (1975) (emphasis added).

### **Deregulation**

We have now entered an era of competition and an anticipated end to monopoly regulation of privately owned public utilities. The current status of deregulation is chronicled in the Law Revision Commission's report on its consultation with CPUC. See *Public Utility Deregulation*, 27 Cal. L. Revision Comm'n Reports 439 (1997). The Law Revision Commission's report finds that, while a number of the utility industries have been opened to competition, there is

significant disagreement over the extent and timing appropriate for deregulation within these industries.

In the four industries reviewed by the Law Revision Commission — electrical, gas, transportation, and telecommunications — the nature of the competition and prospects for deregulation differ significantly. In the electrical and gas industries, for example, generation of electricity and gas is open to competition, but transmission and distribution will continue to be handled by regulated franchise monopolies. On the other hand, competition in the telecommunications industry may occur on many fronts, and may involve transmission and delivery by alternate means (cable or wireless), as well as shared lines and switches.

The opening of utilities industries to competition certainly presents the opportunity for vastly expanded use of eminent domain authority. Instead of one company acquiring property for its system, many companies may be acquiring property for their systems. Under current law, all that is necessary for a company to exercise eminent domain authority is that the company qualify as a public utility, i.e., receive a certificate of public convenience and necessity from CPUC. In the telecommunications industry alone, over 80 local carriers have now received authority to compete to provide local telephone service in California.

Competition may also drive a company to seek the greatest competitive advantage in the cost and location of its facilities. In a monopoly environment, a company may negotiate with a property owner to acquire property in the most favorable location for the company. This may require the company to pay a premium for the property, or to select a less favorable location. But in a competitive environment, paying a premium or selecting a less favorable location may not be an option. The company may be compelled to use eminent domain authority to maintain a competitive advantage.

### **Reported Problems**

To date, the only problems as a consequence of deregulation that have reported to the Law Revision Commission have been in the telecommunications industry. This may be attributable to several factors — (1) deregulation in that industry is further along than in other industries, (2) competition in that industry is more intense than in other industries, and (3) unlike other industries, the telecommunications industry is open to competition in the transmission and distribution area.

The Public Utilities Code authorizes a telephone service provider to condemn any property necessary for the construction and maintenance of its system, wireless or otherwise. See Pub. Util. Code §§ 216 (“public utility” defined), 233 (“telephone line” defined), 234 (“telephone corporation” defined), 610 (application to public utilities), 616 (eminent domain authority of telephone corporation). This would include any of the 80-plus companies that are now authorized to compete in the local market in California.

Instances of abuse reported by CPUC relate to condemnation of easements on downtown buildings for placement of a company’s microwave or relay equipment. CPUC has received complaints from property owners where this has occurred when negotiations between the property owners and the companies seeking use of their property have broken down. (Note that in such a situation, a company need not actually use eminent domain authority — the threat of its exercise may pressure a reluctant property owner to accept the offered compensation.)

### **Other Potential Problems**

No problems have yet been reported to us concerning privately owned public utility acquisitions of easements in public streets for transmission lines, but this may be only a matter of time. When the 80 plus local telephone service providers one after another start to tear up the city streets to lay their coaxial, fiber optic, or other special cable, complaints will be heard.

The general rule is that property devoted to public use may only be taken for a more necessary public use, and a public entity’s use of property is more necessary than a private person’s use. Code Civ. Proc. § 1240.650. However, the general rule does not preclude use of a public right of way by a telephone service provider, which may construct its line along and upon any public road or highway. Pub. Util. Code § 7901. Municipalities may exercise reasonable control as to the time, place, and manner of access by the telephone service provider, but may not preclude use by the service provider. Pub. Util. Code § 7901.1; *Pacific Tel. & Tel. v. City and County of San Francisco*, 197 Cal. App. 2d 133, 17 Cal. Rptr. 687 (1961).

### **OPTIONS**

The authority of privately owned public utilities to exercise eminent domain power has developed in the context of a regulated monopoly system. The

regulated system encompassed inherent restraints on exercise of eminent domain power. These included (1) limitations on the number of entities seeking to exercise the power; (2) the ability to pay a premium for property, or use an alternate but less efficient location, recouped through the monopoly rate system; and (3) the restraining effect of CPUC regulation of all the utility's activities.

The opening of public utility industries to competition, and the accompanying deregulation, raises the question of the continued basis for unrestrained eminent domain authority of privately owned public utilities.

The concept of the public utility as a controlled monopoly in a paternalistic system (or maternalistic in the case of Ma Bell) operated in the public interest is undergoing erosion. In a deregulated environment, a public utility is viewed and treated as an ordinary competitive business. Should the law continue to provide the business with special rights not available in other industries that may equally affect the public interest?

In a competitive environment, each service provider will strive for every possible economic advantage. It may be anticipated that eminent domain authority, or its threat, will be exercised by the service providers if it will give them a competitive advantage. Problems are now surfacing in the telecommunications industry.

What are the options?

### **Do Nothing**

An argument can be made that it is premature to consider addressing this issue. We have been informed of problems by CPUC, but we have no sense of their current magnitude or extent. We have requested further details from PUC staff, but have received none to date.

On the other hand, one means the Law Revision Commission uses to collect information is circulation of a tentative recommendation. This may elicit further information, not only from property owners, but from privately owned public utilities as well.

### **Eliminate Eminent Domain Authority**

The staff does not believe elimination of eminent domain authority of privately owned public utilities is an option. Public utility services are critical to the public, and a means must be provided, whether restricted or unrestricted, to ensure that the necessary property is available for public use.

## **Regulation by Local Public Entities**

Public utilities are the only private condemners that may exercise the power of eminent domain without authorization of the local public entity — city or county — within whose jurisdiction the property is located. Other private condemners — private persons and quasi-public entities — must first obtain a resolution of necessity from the local public entity. Code Civ. Proc. § 1245.330.

Is there any reason not to impose the same restriction on privately owned public utilities? An argument can be made that the other private and quasi-public entities are seeking property for a local project, hence local control is appropriate. But utility service is a matter of statewide concern, and a locality ought not to be in a position to frustrate the utility service by precluding otherwise appropriate condemnation. And in fact, experience demonstrates ongoing friction between privately owned public utilities and local public entities.

## **Regulation by CPUC**

Existing law imposes, in addition to local public entity control, state agency control over acquisition practices of certain quasi-public condemners. The analogue for condemnation by privately owned public utilities would be control by CPUC.

To what extent does CPUC have existing authority to control acquisition practices of privately owned public utilities? There is no specific statutory authority relating to eminent domain, but CPUC has general authority to “supervise and regulate every public utility in the state and may do all things, **whether specifically designated in this part or in addition thereto**, which are necessary and convenient in the exercise of such power and jurisdiction.” Pub. Util. Code § 701 (emphasis added).

It is arguable that CPUC has sufficient authority under this provision to control exercise of eminent domain power by privately owned public utilities. However, it is unlikely that CPUC would seek to exercise this authority without specific statutory authorization, particularly in the current political climate of deregulation. See, e.g., AB 1973 (Campbell) (CPUC to report annually in consultation with Law Revision Commission on statutes that might impede competition and deregulation of telecommunications).

The staff can see two feasible options in terms of CPUC control of condemnation by privately owned public utilities — (1) simply make a resolution

of CPUC a prerequisite to use of eminent domain by a privately owned public utility, or (2) authorize CPUC to adopt regulations controlling use of eminent domain by a privately owned public utility. Of these two options, the staff believes CPUC adoption of regulations is preferable. CPUC is in a position to monitor activities of the utilities, and to hear complaints about abuses. It could narrowly tailor any regulations to the types of abuses, or the particular industry in which they occur, if that appears appropriate.

### **Restrict only Telephone Service Providers**

To date, the only report of problems we have heard is in the telecommunications industry. If the Law Revision Commission recommends any limitations on exercise of eminent domain authority by privately owned public utilities, it might be limited to the telecommunications industry. (If the Law Revision Commission's recommendation is simply to make clear CPUC authority to regulate eminent domain, this limitation is unnecessary. CPUC can tailor its regulations as appropriate.)

### CONCLUSION

**The staff recommends that the Law Revision Commission prepare a tentative recommendation that would authorize CPUC to adopt regulations controlling exercise of eminent domain authority by a privately owned public utility. This is consistent with the general authority of CPUC to supervise and regulate public utilities, but will eliminate any question about CPUC's authority to act in this area. It will enable CPUC to monitor experience with and complaints about condemnation in a deregulated environment, and to act in a way appropriately tailored to the problems that develop.**

Respectfully submitted,

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