Study EmH-451 November 20, 1998

Memorandum 98-77

**Condemnation by Privately Owned Public Utility:
Comments on Tentative Recommendation**

BACKGROUND

Beginning in September the Commission circulated for comment, with a mid-November deadline, its tentative recommendation on condemnation by privately owned public utilities. The thrust of the tentative recommendation is to make clear the discretionary authority of the Public Utilities Commission to control the exercise of condemnation power by a privately owned public utility.

We have received comments on the tentative recommendation from the following persons:

GENERAL REACTION

Commentary on the tentative recommendation was mixed.

Unqualified Support

The proposal was supported without qualification by the Public Utilities Commission. Exhibit pp. 1-2.

Qualified Support

The need for legislation in this area was endorsed by the City and County of San Francisco (Exhibit pp. 5-9) and by the Building Owners and Managers

Association (Exhibit pp. 10-23). However, both entities believe that the tentative recommendation is inadequate and that express statutory standards are necessary to control condemnation by privately owned public utilities.

Opposition

Privately owned public utility companies did not endorse the proposal. Pacific Bell believes there is no demonstrated need for Public Utilities Commission oversight. Exhibit pp. 3-4. Union Pacific Railroad Company and California Short Line Railroad Association point out that Public Utilities Commission oversight of the transportation industry is inappropriate due to federal preemption. Exhibit pp. 24-25, 26. The California Western Railroad would not like to see increased PUC bureaucracy in this area, stating that further regulation is unnecessary and will simply add to the private and public cost of doing business. Exhibit p. 27-28. Southern California Edison believes such a statutory provision is unnecessary. Exhibit p. 29-30.

NEED FOR FURTHER INFORMATION

A common theme running through many of the comments, pro and con, was the need to take more time to develop further information and alternative approaches.

Pacific Bell states that the Commission should not recommend revising the eminent domain laws until it has thoroughly reviewed both sides of this issue. They refer us to extant materials containing a discussion of the problems telecommunications providers face in establishing the facilities to provide necessary service. Exhibit p. 4.

The City and County of San Francisco urges the Commission to delay acting on the tentative recommendation to give other California cities and counties and opportunity to comment and provide examples of abuse of eminent domain power by private utilities. Exhibit pp. 5-6.

The Building Owners and Managers Association suggests that before making a final recommendation the Commission should seek further input from interested parties, including both telecommunications carriers and private property owners and managers, concerning the implications of the suggestions BOMA makes. Exhibit p. 16.

The Union Pacific Railroad Company and California Short Line Railroad Association ask that the effect of the proposed changes on railroads be carefully

reviewed and evaluated before the Commission recommends changes that could constrain their exercise of condemnation rights. Exhibit pp. 24, 26.

The staff has no problem with taking any additional time on this recommendation that appears productive. The problems in practice are only now emerging, and there is no immediate crisis or need to rush legislation through. Until now, factual inputs to the Commission have been limited. To the extent the participants are committed to getting more information to the Commission, that can only help. We will be in a better position to make a fully informed final recommendation to the Legislature. **The staff recommends that the Commission proceed with deliberation on this project**, allowing participants the time they need to produce information that will be helpful, no matter how we proceed on the recommendation.

IS THERE A PROBLEM THAT NEEDS TO BE ADDRESSED?

The basis for the tentative recommendation is that problems in the exercise of eminent domain authority by privately owned public utilities are beginning to develop as a result of deregulation. These problems were first brought to our attention by the Public Utilities Commission.

Pacific Bell takes the position, however, that the need to act by legislation in this area has not been demonstrated. The California Western Railroad believes that we have not cited any cases of private utility condemnation abuse. Southern California Edison notes that at a recent Public Utilities Commission conference, PUC division heads indicated that none of them were aware of any attempted exercise of eminent domain by a competitor that has given them any problem.

These utility companies are correct in the sense that to date we have heard of only isolated incidences of abuse of eminent domain authority. But we continue to learn of more examples of problems in practice. The letters of both the City and County of San Francisco and the Building Owners and Managers Association cite examples of ongoing conflicts between private utilities and property owners. They promise us additional information. **We would supplement our report** with this information and any additional information developed by the participants in the course of this study.

Need for Clarification

The key element of the tentative recommendation is to make clear the authority of the Public Utilities Commission to control exercise of condemnation power by privately owned public utilities. By leaving the matter to the PUC, any necessary regulation can be crafted in a manner appropriate to the particular industry and type of problem that has developed.

The Public Utilities Commission supports this approach, noting that PUC would then have clear authority to deal with any problems that arise "and will not have to concern itself with the risk of extended litigation challenging its authority to regulate such abuses." Exhibit p. 1.

Pacific Bell argues that this clarification is unnecessary. "The CPUC has not hesitated to exercise its regulatory authority in the past in similar situations, however, under Public Utilities Code § 701. Section 701 gives the CPUC plenary powers to regulate public utilities." Exhibit p. 3. Southern California Edison makes the same point — "Existing statutes and case law already have adequate safeguards, and grant the Public Utilities Commission sufficient authority to regulate privately-owned public utilities." Exhibit p. 30.

The staff agrees with the analysis of these utility companies that under existing law the Public Utilities Commission has adequate authority to control exercise of condemnation power by privately owned public utilities if it chooses to exercise it. However, this authority is clouded by new developments in deregulation, and **we believe that a statutory reaffirmation is desirable**, absent a showing that a statutory reaffirmation would create problems.

Interrelation with Other Law

One potential problem with statutory confirmation of Public Utility Commission authority is demonstrated by the letter of the City and County of San Francisco. They apparently read the statutory proposal as rejecting standard public use and necessity constraints on exercise of eminent domain authority in favor of PUC control. "This remedy would merely move the disputes from one venue, the courts, to another venue, a state administrative agency, without addressing abuses of eminent domain power." Exhibit p. 7.

This was not our intent. The intent is to leave the existing judicial system constraints on exercise of eminent domain power in place. These constraints are

spelled out in the tentative recommendation. The authority of the Public Utilities Commission to regulate exercise by privately-owned public utilities would supplement, rather than replace, the existing limitations.

Thus, for example, the PUC might prohibit a telephone service provider from condemning property for its business unless it demonstrates that the property so acquired would be shared with competitors desiring to provide service in the same vicinity. But that would not end the matter. The service provider, having satisfied PUC about its concerns, would still need to satisfy standard public use and necessity requirements in court.

The staff thinks this needs to be made more clear in the recommendation:

> **Pub. Util. Code § 610 (amended). General provisions**
>
> Section 1. Section 610 of the Public Utilities Code is amended to read:
>
> 610. (a) This article applies only to a corporation or person that is a public utility.
>
> (b) The commission may regulate exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate. **The authority provided in this subdivision supplements, and does not replace, any other constitutional or statutory limitation on exercise of the power of eminent domain, including but not limited to the provisions of Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.**
>
> **Comment.** Subdivision (b) is added to Section 610 to make explicit the Public Utilities Commission's authority to regulate exercise of condemnation power by privately owned public utilities. This provision is an elaboration of existing plenary authority of the Public Utilities Commission, found in such provisions as Sections 701, 702, 761, and 1001, to regulate operations of privately owned public utilities. The amendment is intended to eliminate any argument that the specific grants of condemnation power in this article are exempt from regulation by the Public Utilities Commission.
>
> Nothing in subdivision (b) requires the Public Utilities Commission to regulate exercise of condemnation power by a privately owned public utility, or gives a property owner the right to object to such exercise before the Public Utilities Commission. The provision merely makes clear the authority of the Public Utilities Commission to act in any way it determines is appropriate, in the circumstances. Examples of actions that may be appropriate in the circumstances may include, for example, (1) establishment of standards that must be satisfied by a privately owned public utility

before it may take property by eminent domain, and (2) adoption of a requirement that a privately owned public utility obtain permission from the Public Utilities **Commission** before exercising condemnation power.

Nothing in subdivision (b) is intended to diminish public use and necessity requirements imposed on every condemnor, including a privately owned public utility. Subdivision (b) allows the Public Utilities Commission to impose additional requirements and restrictions on exercise of condemnation authority by a privately owned public utility, to the extent they appear appropriate in the circumstances.

Would Greater PUC Involvement be Counterproductive?

The California Western Railroad is concerned about the prospect of increased PUC regulatory activity in this area. The company cites two examples of the regulatory quagmire they have experienced at PUC during the past year. "The CPUC does not have sufficient staffing to undertake this additional work, and their existing staffing is not capable of performing adequate analysis in a timely fashion." Exhibit p. 28.

The staff can think of no more appropriate body than the PUC to act in this area. We do not know whether this view of the PUC is widely held by those who have had dealings with it. But if it is true that PUC is understaffed and its regulatory involvement would only cause problems, that is an argument for investigating more seriously some of the alternate approaches discussed below.

Does PUC Control Improperly Imply the Existence of Eminent Domain Authority?

The Building Owners and Managers Association has a more fundamental problem with the proposal to clarify Public Utilities Commission control of condemnation by privately owned public utilities. The association argues that statutory condemnation authority of the utilities is predicated on government regulation of monopoly providers and predates deregulation and competition among numerous competitors, all of whom could be potential condemnors. The Legislature's grant of eminent domain authority to privately owned public utilities should not be construed to extend beyond the circumstances existing at the time the grant was made. "We submit therefore that such condemnation power does not presently exist. This conclusion is particularly compelled when it is recognized that privately owned public utilities can claim the right to condemn

private property interests absent any resolution, approval, findings, public hearing or other oversight." Exhibit p. 15.

A statute making clear PUC regulatory authority, under this analysis, improperly implies the extension of private condemnation authority to deregulated public utility companies.

The Commission has considered this argument previously and rejected it. While changed circumstances may create problems or call into question the continued basis for a statute, they do not change the meaning of the statute. Changed circumstances may, however, be cause for reconsideration and revision of the statute; that is what we are about, in this instance. **The staff believes it would be unwise for the Commission to proceed on the assumption that a specific statutory grant of eminent domain authority to privately owned public utilities in a particular industry is rendered inoperable by deregulation and competition in that industry.**

Nonetheless, we believe the point is well-taken that existing eminent domain authority of privately owned public utilities is predicated on a regulatory model that is no longer relevant in some circumstances. This point is also made effectively by the City and County of San Francisco (Exhibit p. 6):

> Under the traditional regulatory compact, to ensure universal service, regulated utilities had an obligation to provide service to all customers in a particular geographic territory. Eminent domain powers were granted to telephone companies to enable them to meet this "universal service obligation" imposed as a "regulated function." With the advent of competition, only a handful of telephone companies now have this obligation to serve. Competitive local exchange carriers ("CLEC's") and wireless providers have no obligation to serve all the customers in a particular geographic territory. Rather, they are left free to serve the customers of their choice. Absent this "universal service obligation," imposed as a "regulated function," the Legislature could not have contemplated that all telephone companies still receive the benefits of eminent domain powers.

OTHER SUGGESTED APPROACHES

The premise of the tentative recommendation is that the Public Utilities Commission is in the best position and is the most appropriate governmental authority to monitor problems with public utility condemnation as the problems develop. PUC is able, by exercise of its regulatory authority, to respond, where

necessary, with appropriate constraints. This is a "soft touch" approach, given the fact that we are still in largely uncharted waters.

Two of our commentators, however — the City and County of San Francisco and the Building Managers and Owners Association — maintain that the problems are real and pervasive and will only get worse, and that express statutory constraints on condemnation by privately owned public utilities are now necessary. Deregulation and competition in the utility industries demand a different statutory scheme for condemnation authority. To some extent, their concern with vesting oversight responsibility in the PUC may be predicated on an abiding concern that the agency is a captive of the regulated industries.

They suggest a variety of statutory approaches, analyzed below.

Limit Condemnation Authority by Statute

The Building Owners and Managers Association argues that the right of privately owned public utilities to condemn should be statutorily limited. Specifically, they would:

• Make clear that the right of condemnation is not vested in privately owned public utilities in deregulated industries.

• Make clear that no condemnation right exists beyond the Minimum Point of Entry into any building. (The MPOE is the physical location in a building where carrier ownership of the telephone line terminates and the owner's responsibilities for maintenance, repair, and liability commence. The MPOE typically is located within the building itself.)

• Deny unlimited extension of the condemnation right to all privately owned public utilities, particularly in the telecommunications industry.

• Limit the condemnation right to service providers of last resort. (I.e., such carriers as would be required to provide the requested service by PUC if not otherwise available to the requesting party.)

The staff is skeptical of any proposal to statutorily eliminate public utility condemnation power. Eminent domain authority has been a mainstay of the utility industry because of the need to establish a delivery infrastructure. While there may be some abuses under deregulation, the staff does not believe a case has been made that the power is no longer needed. As the railroads put it, "The ability to employ the power of eminent domain to condemn property is critically important to our industry and the effect of the proposed legislative changes on railroads should be carefully reviewed and evaluated before your Commission

adopts recommendations that could constrain our exercise of condemnation rights." Exhibit pp. 24, 26.

Impose Higher Standards for Exercise of Condemnation Authority

The City and County of San Francisco argues that the statutory standards for exercise of eminent domain power by a privately owned public utility are too liberal. By statute, any purpose for which the power of eminent domain is authorized is a public use. And the statutory requirement of public necessity has been construed to mean "reasonably necessary for the accomplishment of the end in view under the particular circumstances." They suggest that the concepts of public use and necessity be redefined for privately owned public utilities to curb their abuse of eminent domain power to coerce favorable contract terms. Exhibit. 8.

The staff agrees that the courts have construed the public use and necessity requirements quite liberally. And we think the change in the nature of the public utility industries from regulated monopolies to ordinary competitive businesses calls for some reassessment as to the propriety of eminent domain as a business tool. **But the staff continues to believe that the preferable approach is to more narrowly address known problems with appropriate limitations than to try to reconfigure the basic underpinnings of the system.**

Require Consideration of Specific Factors as Prerequisite to Exercise of Condemnation Authority

The Building Owners and Managers Association suggests specific additional factors that should be considered before a telecommunications carrier is allowed to condemn an easement in a building. Exhibit p. 21. These factors are:

(1) The number and type of carriers already servicing the building.

(2) The available remaining space in the building to accommodate additional telecommunications infrastructure.

(3) The portion of the building that the carrier desires to access, and how intrusive the proposed acquisition is on the building's layout and design.

(4) The financial and operational capabilities of the carrier, to ensure that the facilities will be competently installed and completed in a timely manner.

(5) The cost of implementing or facilitating the demanded access into the building.

The staff thinks these sorts of factors are more appropriate for administrative regulation than for statute. They are exactly the type the Commission had in mind when it concluded that the law should make clear the authority of the Public Utilities Commission to regulate condemnation by privately owned public utilities. BOMA acknowledges that these factors "could be promulgated either by statute or regulation as already suggested by this Commission with respect to potential oversight by the CPUC." Exhibit p. 21.

Impose Higher Burdens for Condemnation of Public Property

The City and County of San Francisco suggests that a higher showing be required for the condemnation of public property. They do not provide any specifics. Presumably they would require a heightened burden of proof on public use and necessity, such as proof by clear and convincing evidence.

This has some attraction for the staff, if we decide to depart from the proposed scheme of Public Utilities Commission control. It is consistent with existing eminent domain concepts protecting property already appropriated to public use from condemnation except for a more necessary public use. It would recognize, at least in the deregulated industries, that the propriety of a forced taking by one of potentially numerous condemnors must be clearly demonstrated.

A broader question is whether public property deserves unique treatment in this respect. Similar principles would appear to apply to privately owned property as well.

Impose Public Hearing and Resolution of Necessity Requirements

The Building Owners and Managers Association argues that there should be a public hearing, and a resolution of public use and necessity adopted by an independent body or officer, before a privately owned public utility may condemn. This would be analogous to the requirement imposed on other non-public entity condemnors. Code Civ. Proc. § 1245.340. It would invoke appropriate and neutral consideration and weighing of public needs and private interests.

BOMA suggests a number of options for appropriate neutral decisionmakers. These include:

(1) The governing board of the local public entity within whose jurisdiction the property to be taken lies. BOMA argues that the danger of hometown

protectionism is not significant enough to override the public benefits of governmental oversight. "BOMA reiterates that public utility condemnations are the only condemnation actions California that are allowed to proceed without the express authorization of a public agency governing board, by a 'super-majority' vote, and the adoption of express findings concerning public use, public necessity, and so forth." Exhibit p. 19.

(2) The Public Utilities Commission (or a committee or officer), or a new state board or officer. BOMA notes that while PUC may be a logical assignment, BOMA is concerned that PUC may be more sensitive to the needs of utility providers than the needs of property owners, at least in the telecommunications area.

(3) BOMA emphasizes that the public hearing and resolution of necessity prerequisite should not supplant the opportunity for judicial review of the existence of public use and necessity for a particular condemnation. "Property owners must retain their rights to challenge in court the adequacy and legal sufficiency of any findings made in the context of public utility condemnations, particularly since serious doubts may and do exist as to whether the required findings such as public use or public necessity can be made in particular situations." Exhibit p. 20.

If we were to require a public hearing and determination of necessity by a public entity, the staff thinks the Public Utilities Commission is the logical body to be designated for this task. **But the staff does not think a case has been made that this should be routinely required for every public utility condemnation.** Again, we like the tentative recommendation's delegation of authority to the PUC. It can decide if circumstances warrant such a procedure.

Impose Reasonable Conditions on Access to Buildings

The Building Owners and Managers Association argues that conditions should be imposed on condemnations for access to buildings. The types of conditions that should be considered include:

(1) Insurance and indemnity requirements on the condemnor.

(2) Health and safety, legal compliance, and security and construction considerations that might arise from the proposed installation.

(3) Compliance with the standard telecommunications construction access rules and regulations for buildings.

(4) Bonding requirements to insure proper installation and removal of facilities.

(5) Access fees.

(6) Exclusion of non-complying carriers.

BOMA notes that the parameters of appropriate conditions should be established either by statute or regulation.

Again, the staff believes this is more appropriately the province of regulation than statute, and that the Public Utilities Commission is the appropriate regulatory body. The question here is whether the recommendation should require, rather than authorize, PUC to regulate in this area.

Establish Standards of Compensation

The Building Owners and Managers Association notes that compensation issues in telecommunications access to buildings are unique and not recognized in traditional compensation doctrine. "Experience to date has indicated that the compensation issue has been particularly problematic in these cases, with carriers offering extremely low values and then threatening condemnation." Exhibit p. 23.

BOMA may well be right that valuation in their circumstances presents unique issues that require special treatment. **The staff would address this issue as a separate matter.**

RAILROAD CORPORATIONS

Public Utilities Code Section 611 authorizes a railroad corporation to condemn any property necessary for the construction and maintenance of its railroad.

Federal Preemption

Union Pacific Railroad Company objects for a number of reasons to the proposal to subject condemnation power under Section 611 to regulation by the Public Utilities Commission. The company points out that, unlike the telecommunications industry, the number of competitors is actually declining in the railroad industry. Moreover, due to federal preemption, the Public Utilities Commission no longer has a role in economic regulation of railroads; it is therefore inappropriate for PUC to be involved in regulation of railroad

corporations' use of condemnation power. Exhibit pp. 24-25. These concerns are echoed by the California Short Line Railroad Association. Exhibit p. 26.

The staff believes they make a good point. But what are the alternatives to Public Utilities Commission control? Condemnation authority was given to railroads at a time when they were subject to full PUC regulation. The Law Revision Commission's Comment to Section 611 states that "Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad." Under the new federal regime, deregulation is the order of the day. Is it the policy of the state to allow what is essentially a competitive business the right to condemn without any oversight? **Perhaps in the railroad industry PUC regulation should be replaced by other standards or prerequisites for condemnation**, as suggested by the City and County of San Francisco and BOMA.

PUC Regulation

The situation of the California Western Railroad is somewhat different from other railroads. As the Commission discovered in preparing its report on public utility deregulation, there are currently four small railroads in California which are completely intrastate, with no interstate connection. The California Western Railroad (the "Skunk" line) is one of the four. These railroads remain subject to Public Utilities Commission regulation, notwithstanding general federal preemption in the railroad industry.

As to these PUC-regulated railroads, there do not appear to have been any substantial changes in the nature of regulation in the industry. Given those circumstances, there does not appear to be any need to create new or special rules. Although California Western Railroad is "extremely concerned about the prospect of the California Public Utilities Commission gaining increased regulatory authority in this area" (Exhibit p. 27), **the staff believes that the proposed legislation merely clarifies existing law**.

ELECTRICAL CORPORATIONS

Southern California Edison notes that, whatever may be happening in other industries as a result of deregulation, in the electrical industry competition is developing among independent power producers and other entities that are not regulated by the Public Utilities Commission and do not have eminent domain power. Exhibit pp. 29-30.

The staff agrees that the types of problems we have seen in the telecommunications industry have not surfaced in the electrical industry. And we agree with the analysis that this is because competition in the electrical industry is at the production rather than the delivery end. However, we are also aware that there is some discussion of granting to the electrical Independent System Operator either eminent domain authority or the right to confer that authority on others. See Exhibit pp. 1-2.

In any event, the tentative recommendation neither imposes restrictions on eminent domain exercise by electrical corporations nor grants to the PUC any new authority to impose restrictions that it does not already have. Again, **we believe it merely clarifies existing law**.

CONCLUSION

There is substantial interest in this topic on all sides, but we are nowhere near a consensus that we have reached a proper balance with our present approach. The staff does not see a need for precipitous action here, and would give the parties the time they need to fully present their cases.

Meanwhile, it is possible that an entity such as the Building Owners and Managers Association or the Independent System Operator may introduce legislation directed to public utility condemnation authority. If so, this will give us a chance to get insight into the Legislature's attitude towards some of these issues.

It is true that most of the problems we have seen are in the telecommunications industry. As deregulation proceeds in the other industries, some of the same problems may or may not show up. One possible approach is to take the issue one industry at a time, and develop legislative solutions geared to the specifics of that industry. Of course, part of the concept of the tentative recommendation is to delegate this matter to the Public Utilities Commission so that it can prescribe appropriate restrictions, if necessary, geared to the particular industry.

To some extent the problems in the telecommunications industry involve the unique situation of many service providers trying to condemn space within office buildings for their lines and equipment. The existing eminent domain law, and compensation principles, may be ill-suited to handle this situation. It may be

necessary to reevaluate whether eminent domain is the appropriate device to deal with this situation at all.

It should be noted, though, that telecommunications problems are not limited to building access issues. As the City and County of San Francisco points out, numerous competitors seeking to compel use of public property and public rights of way to run their lines and place their equipment presents fairly traditional eminent domain issues. The problems are intensified by the number of competitors involved.

The staff's bottom line is that we still like the proposal to clarify the Public Utilities Commission's regulatory authority in this area. We don't see how it can hurt, and it can help. Whether that is sufficient is not yet clear. The staff would explore some of the other options raised in this memorandum. The regulatory proposal could be submitted to the Legislature immediately while further studies are ongoing, or could be held for submission until the other studies are complete. Discussion at the Commission meeting should be helpful to the Commission in deciding how to proceed.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

November 13, 1998

VIA FAX AND MAIL

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation: Condemnation by Privately Owned Public Utility

Dear Mr. Sterling:

At its meeting on November 5, 1998 the California Public Utilities Commission (CPUC) voted unanimously to support the Tentative Recommendation of the Law Revision Commission (LRC) on Condemnation by Privately Owned Public Utility. The Tentative Recommendation will ensure that if there are abuses in the use of eminent domain by CPUC-regulated utilities, then the CPUC will have clear authority to deal with them, and will not have to concern itself with the risk of extended litigation challenging its authority to regulate such abuses. The CPUC appreciates that the Tentative Recommendation does not mandate any exercise of this authority, but grants the CPUC discretion to determine if there is a problem, and what steps should be taken to deal with any problems that may arise.

We would also like to take this opportunity to inform the Law Revision Commission of several potential developments in the area of electric deregulation that might have some impact on eminent domain law. These matters are just in the discussion stage at this time, and the CPUC has not taken any formal position on them. With the creation of an Independent System Operator (ISO), public oversight related to planning and construction of the statewide electric transmission grid is divided between the CPUC (with responsibilities for certification of investor-owned electrical facilities), the CEC (with broad siting jurisdiction for electrical powerplants and limited siting jurisdiction for transmission lines), and the ISO. It is quite possible that the Legislature will be taking a further look at the responsibilities of these entities in the 1999-2000 session. The ISO has floated the idea that perhaps it should be given eminent domain power, or authorized to

confer that power on others. Furthermore, the ISO has raised the question of whether current law concerning "public benefit" and "necessity" is appropriate for "economically driven" transmission projects. These are not issues that need to be addressed by the Law Revision Commission at this time, but may be of interest to the LRC depending on further developments.

In conclusion, we thank you for this opportunity to express the CPUC's support for the LRC's Tentative Recommendation on Condemnation by Privately Owned Public Utility. We believe that it is appropriate to move forward with that recommendation at this time.

Very truly yours,

Peter Arth, Jr.
General Counsel

PAJ/JTP:ngs

cc: Beth Emery
General Counsel
ISO

Kent Kauss
OGA

Attorneys

J. Scott Paisley
(619) 237-2696

David J. Benner
(619) 237-3039

Lori L. Ortenstone
(619) 237-3329
(619) 238-2318 (Fax)

Karen K. Haubrich
(619) 237-2177

Hearing Representatives

Beth A. Eakin
(619) 237-7714

G. Michael Kilpatrick
(619) 237-2863

Paralegal

Jean L. Bailey
(619) 237 2465

Legal Department
101 W. Broadway, Suite 1300
San Diego, California 92101
Fax: (619) 238-9915

PACIFIC TELESIS Group

Via Facsimile

November 13, 1998

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94808-4789

Re: Tentative Recommendation on Condemnation by Privately Owned Public Utilities

Dear Mr. Sterling:

The following are Pacific Bell's comments with regard to the California Law Revision Commission's tentative recommendation on condemnation by privately owned public utilities. The Commission recommends amending Public Utilities Code § 610 by giving the California Public Utilities Commission explicit authority to regulate the exercise of condemnation power by privately owned public utilities. As we indicated at the public meeting held on September 24, Pacific Bell does not believe that the Commission should go forward with this recommendation at this time.

First, the tentative recommendation is based on the assumption that deregulation in the local telecommunications industry has resulted in an increase in the use, and alleged abuse, of eminent domain authority by telecommunications service providers. The investigation conducted by the Commission' staff, however, did not support this assumption. The staff did not find that there was a significant increase in the use of eminent domain by telecommunications providers in California. Therefore, there is no real need to change the law at this time.

In addition, the Commission's proposal indicates that the recommended change would give the CPUC clear authority to act if new CPUC regulation becomes necessary in the future. The CPUC has not hesitated to exercise its regulatory authority in the past in similar situations, however, under Public Utilities Code §701. Section 701 gives the CPUC plenary powers to regulate public utilities. For example, the CPUC has already exercised its authority in this area with regard to electric utilities under General Order 131-D which controls the planning and construction of electrical facilities. The CPUC has also addressed eminent domain issues in its recent decision on access to rights of way by telecommunications providers. (Local Competition Proceeding, R.95-04-043; I.95-04-044, issued October 22, 1998.) Therefore, if the need arises it is clear that the

Finally, the Commission should not recommend revising the eminent domain laws until the Commission has thoroughly reviewed both sides of this issue. Some property owners view the increased number of telecommunications providers as an opportunity for increased revenues, setting up barriers to access to their property in the form of high fees or unreasonable requirements. This situation has escalated, in a few cases, to the point where a telecommunication provider felt that it had no alternative but to obtain access through condemnation of a building owner's property. The ROW Decision cited above contains an extensive discussion of the problems some providers are facing.

Thank you for this opportunity to comment on the Commission's proposal. If you would like any additional information to help you in this process, please let me know.

Sincerely,

Lori L. Ortenstone
Senior Counsel

mlr

cc: Randall E. Cape
Martha A. Johnson

CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
City Attorney

OFFICE OF THE CITY ATTORNEY

JAYNE C. LEE
Deputy City Attorney
DIRECT DIAL: (415) 554-3954
E-MAIL ADDRESS: JAYNE_LEE@CI.SF.CA.US

NOVEMBER 13, 1998

Via Facsimile and U.S. Mail

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation on Condemnation by Privately-Owned Public Utility

Dear Members of the California Law Revision Commission:

The City and County of San Francisco ("City") has only recently been informed of the California Law Revision Commission's ("Commission") proceedings on condemnation by privately-owned public utilities. The issue of condemnation by privately-owned public utilities is of great importance to this City and other cities and counties. The City is currently contacting the League of California Cities and the California Supervisors Association to inform them of these proceedings. The City urges the Commission to delay acting on its Tentative Recommendation to give other California cities and counties an opportunity to comment on this issue.

The City's Interest In The Proceeding:

The City has an immediate interest in this proceeding. Like many other cities in California, the City owns fee title to many of its streets and highways. The City also owns fee title to public property, such as the San Francisco International Airport and the San Francisco Port. In its capacity as a property owner, the City is responsible for maintaining a multi-billion dollar asset on behalf of its taxpayers. Every year, cities in California spend billions of dollars to maintain, repair and repave streets and other property. Cities therefore have a significant interest in proposed legislation that increases the costs of maintaining their property or the intensity of its use by privately-owned utilities. Ultimately, any increase in cost will have to be borne by their taxpayers.

Like the examples cited by the Commission, the City has encountered privately-owned public utilities who have threatened to file eminent domain actions during contract negotiations. For example, a cellular telephone provider occupied several sites in the City under month-to-month use permits. The cellular telephone provider and the City entered into negotiations for a renewed permit. When the parties disagreed on the terms of the permit, the cellular telephone provider threatened to file an eminent domain proceeding to condemn a permanent easement on City property. The threat of an eminent domain action was used by a cellular carrier as a bargaining tool to attempt to coerce the City to accept certain contract terms. This is not the only example of privately-owned public utilities exercising eminent domain power for their own economic advantage. The City believes that its experience is not unique. The City asks the

Commission to delay acting on its Tentative Recommendation to give the cities and counties of California an opportunity to provide further examples of such abuse of eminent domain power.

The Legislature Could Not Have Intended The Unbridled Use Of Eminent Domain Power:

It is clear that the Legislature never contemplated the deregulation of utilities and the rise of over one hundred competitive local exchange carriers when it enacted Public Utilities Code section 616, the eminent domain statute. As the Commission has recognized, the "inherent restraints on the exercise of condemnation power" have been eroded, "creat[ing] the possibility of greatly expanded exercise not contemplated at the time the authority was granted." California Law Revision Commission Tentative Recommendation at 10 (September 1998) ("Tentative Recommendation").

The structure and the legislative history of the eminent domain statutes are inconsistent with the rampant exercise of eminent domain by deregulated privately-owned public utilities. Former C.C.P. section 1238, enacted in 1905, first authorized eminent domain actions by telephone service providers. In 1975, the Legislature enacted a thoroughly revised and recodified eminent domain law. See C.C.P. § 1230.010 et seq. Formerly, condemnation authority was delegated to any person to acquire property for public use. The bill repealed, with certain exceptions, provisions for condemnation by private persons. A.B. 278. The bill continued the right of some private persons, such as privately-owned public utilities, to exercise eminent domain power "necessary to carry out their *regulated functions*." Legislative Summary Digest, A.B. 278 (1975) (emphasis added). The Legislature intended "[p]rivate communications companies may continue to condemn only if they are public utilities. Telephone and telegraph companies are public utilities that are *regulated* by the Public Utilities Commission." Law Revision Commission Comment to C.C.P. § 1238, Subd. 7 (emphasis added).

In 1975, when the California Legislature contemplated the recodification of the eminent domain law, there was only one telephone company providing service in each community. Under the traditional regulatory compact, to ensure universal service, regulated utilities had an obligation to provide service to all customers in a particular geographic territory. Eminent domain powers were granted to telephone companies to enable them to meet this "universal service obligation" imposed as a "regulated function." With the advent of competition, only a handful of telephone companies now have this obligation to serve. Competitive local exchange carriers ("CLECs") and wireless providers have no obligation to serve all the customers in a particular geographic territory. Rather, they are left free to serve the customers of their choice. Absent this "universal service obligation," imposed as a "regulated function," the Legislature could not have contemplated that all telephone companies still receive the benefits of eminent domain powers.

Further, a number of telephone companies are now largely unregulated. In 1993, federal law preempted states from regulating the market entry and rates of cellular providers, effectively

ending meaningful regulation at the state level. 47 U.S.C. 332c(3).[1] Federal preemption of state authority to regulate cellular market entry and rates should be construed to preempt state law *benefits* provided to cellular carriers under the rubric of regulation. The statutory scheme adopted in 1975 contemplated that in return for full regulation, especially rate regulation and an obligation to serve, telephone service providers received eminent domain power. No longer burdened by the California Public Utilities Commission's ("CPUC") rate-regulation and obligation to serve, the Legislature could not have contemplated that telephone companies would still continue to receive the benefits of eminent domain power.

The City's Position on the Tentative Recommendation:

The City agrees with the Commission's conclusion that constraints should be imposed on the "unfettered exercise of eminent domain power" by privately-owned public utilities. Nevertheless, the City has grave concerns about the Commission's Tentative Recommendation that the CPUC assert authority over the exercise of condemnation authority by a privately-owned public utility. The Commission's Tentative Recommendation is fundamentally flawed for two reasons. *First*, the Commission recognizes that there is serious abuse of eminent domain power by telephone service providers. However, the Commission addresses this abuse by proposing to grant the CPUC regulatory authority over the exercise of condemnation power. This remedy would merely move the disputes from one venue, the courts, to another venue, a state administrative agency, without addressing abuses of eminent domain power.

Second, the Commission's Tentative Recommendation proposes to grant the CPUC plenary authority over the exercise of eminent domain powers by public utilities. However, the Tentative Recommendation sets no guidelines or parameters upon the CPUC's exercise of jurisdiction. "The commission may regulate exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate." Tentative Recommendation at 13. This vague language would create immediate confusion about the scope of jurisdiction granted to the CPUC. For over one hundred years, superior courts have determined whether a party could commence and prosecute eminent domain proceedings. See C.C.P. § 1250.010. The Commission's Tentative Recommendation creates a profound break in a fundamental, settled area of law. If allowed to stand, the Commission's Tentative Recommendation would allow the CPUC jurisdiction over eminent domain disputes between privately-owned utilities and local governments over access to public property -- jurisdiction that the CPUC has never been allowed to exercise before.

[1] Under certain market conditions, the Communications Act authorizes state utility commission to petition the FCC for authority to continue regulating cellular rates. The California PUC submitted such petition but was rejected. In the Matter of the CPUC, FCC 95-195, 10 FCC Rcd. 7486; FCC 95-345, 11 FCC Rcd. 796.

Redefining The Terms "Public Necessity" and "Public Use":

The City urges the Commission to address the specific reasons for the rampant abuse of eminent domain power. The City believes that liberal definitions of "public necessity" and "public use" in eminent domain statutes contribute to the abuse of eminent domain power by privately-owned utilities. See C.C.P. § 1240.030. California courts have interpreted the statutory language "public necessity" liberally in favor of the condemnor. City of Hawthorne v. Peebles (1959) 166 Cal.App.2d 758, 761; Shell California Pipeline Co. v. Compton (1995) 35 Cal.App.4th 116, 1125. "The necessity specified by statute . . . does not mean an imperative or indispensable or absolute necessity but only that the taking provided for be *reasonably necessary* for the accomplishment of the end in view under the particular circumstances." City of Hawthorne, supra, 166 Cal.App.2d at 761 (emphasis added). The City believes that redefining the statutory definition of "public necessity" for privately-owned utilities would help curb their ability to abuse eminent domain power to coerce favorable contract terms. In the alternative, the City urges the Commission to adopt statutory language requiring a higher showing of "public necessity" for the condemnation of public property.

Similarly, the City believes that the liberal definition of "public use" contributes to the abuse of eminent domain power. Where a statute provides that a particular use is one for which the power of eminent domain may be exercised, this statutory language is deemed to be a legislative declaration that the prescribed use is a public use. C.C.P. § 1240.010. Since section 616 provides that "the construction and maintenance of telephone lines" is a use for which the power of eminent domain may be exercised, telephone service providers have claimed that this statutory language is deemed to be a legislative declaration that this use is a "public use." The City believes that redefining the statutory definition of "public use" for privately-owned public utilities would help to curb abuse. Again, in the alternative, City urges the Commission to adopt statutory language requiring a higher showing of "public use" for the condemnation of public property.

Conclusion:

The City thanks the Commission for this opportunity to comment on the Tentative Recommendation. The City urges the Commission to delay acting on its Tentative Recommendation to give other California cities and counties an opportunity to comment on this issue. Like other Commission examples, the City has been threatened with the filing of an eminent domain action during contract negotiations. It is clear that the Legislature never contemplated over one hundred CLECs attempting to gain access to public property by using

eminent domain power as a legal weapon to gain economic advantages. The City urges the Commission to address this problem. However, the City believes that the Commission's proposal that the CPUC assert authority over the exercise of condemnation authority by a privately-owned public utility would not curb this abuse. The City also believes that the vague grant of jurisdiction to the CPUC without any limiting guidelines would unsettle an entire body of administrative law. The City therefore urges the Commission to reconsider its Tentative Recommendation.

Please do not hesitate to contact us if we can be of any further assistance.

Very Truly Yours,

LOUISE H. RENNE
City Attorney

Traci Bone
Deputy City Attorney

Jayne C. Lee
Deputy City Attorney

WENDEL
ROSEN
BLACK
&DEAN
LLP
Attorneys at Law

1111 Broadway, 24th Floor
Oakland, CA 94607-4036

Post Office Box 2047
Oakland, CA 94604-2047

Telephone: (510) 834-6600
Fax: (510) 834-1928
info@wendel.com

November 13, 1998

TO: **CALIFORNIA LAW REVISION COMMISSION**

FROM: **LES A. HAUSRATH** LAH

RE: **TENTATIVE RECOMMENDATION: CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITIES**

I. INTRODUCTION

This response to the California Law Revision Commission's Tentative Recommendation concerning Condemnation by Privately Owned Public Utilities is submitted on behalf of the Building Owners and Managers Association of California and the Building Owners and Managers Association International ("BOMA"). BOMA is a trade organization which represents the owners and managers of thousands of commercial buildings throughout the State of California and the rest of the country. In this capacity, BOMA is particularly cognizant of and sensitive to the operational impacts of, and the problems inherent in, the acquisition through condemnation of private property interests by privately owned public utilities, particularly recent condemnations by telecommunications providers.

BOMA agrees with the Tentative Recommendation of the Law Revision Commission ("Commission") to the extent that it identifies a number of problematic issues that arise from extending the power of condemnation to perhaps hundreds of new companies in this era of utility deregulation. In this regard, BOMA submits, as a threshold matter, that the power of condemnation does not currently exist for and should not be extended to, all privately owned public utilities in California. Thus, we believe that an entirely different legislative revision is necessary to resolve the issues arising from such condemnations.

However, to the extent that such a condemnation right is recognized, BOMA submits further that the Commission should recommend a more specific and comprehensive legislative response. The extent of the Commission's recommendation is that the California Public Utilities

Commission ("CPUC") may exercise some jurisdiction over condemnation by privately owned public utilities, if the CPUC deems such action appropriate. This is not sufficient to address real and existing concerns. BOMA believes that if such utilities are granted the power of eminent domain, the approach suggested by the Commission in the Tentative Recommendation does not go nearly far enough to provide sufficient protections for affected private property owners similar to protections afforded other property owners under existing law. BOMA does provide the outline of a suggested legislative approach in the latter portion of these comments, in the event that this Commission ultimately recommends retention of the condemnation power for all privately owned public utilities in California.

II. BACKGROUND: GRANTING UNLIMITED CONDEMNATION RIGHTS TO ALL PRIVATELY OWNED PUBLIC UTILITIES IS BOTH UNPRECEDENTED AND PROBLEMATIC IN THE ERA OF DEREGULATION.

Prior to making substantive comments, we believe it is important to provide a framework as to why BOMA both questions the existence of a condemnation right by privately owned public utilities and maintains that if such right exists, a stronger and more specific legislative response is appropriate in response to the proliferation of condemnation actions by such utilities. BOMA's comments are focused primarily on condemnations by telecommunications providers, as this is the type of action that has surfaced most consistently since deregulation. However, the comments made here would be applicable to other types of condemnations by privately owned public utilities as well.

A. Additional Regulation Of The Condemnation Activities Of Privately Owned Public Utilities Is Both Necessary and Appropriate Following Deregulation.

There are several reasons that additional scrutiny and regulation of the condemnation activities of privately owned public utilities are both necessary and appropriate. First, condemnation by such utilities is, in itself, unique in California. It is the only type of condemnation that requires neither the approval of a governing body or officer of the State or of a local public entity. Privately owned public utilities can simply initiate eminent domain proceedings whenever they feel the need. Second, in this era of deregulation, the condemning power (to the extent that such power exists) now potentially lies in the hands of perhaps hundreds of privately owned public utilities, many of whom could be competing to acquire and access the same space in commercial buildings. No parallel exists for public agency or quasi-public entity condemnations. Third, the nature of the interests sought to be condemned in the telecommunications context is very unusual, in that it is typically not a fee interest or easement, but rather, the right to enter into privately owned buildings and install and maintain telecommunications facilities within shared equipment rooms, and even beyond into the risers and between the floors.

The combination of these factors renders unfettered condemnation power by virtually unlimited numbers of privately owned telecommunications carriers both unacceptable and unworkable for public and private property owners. In the previous monopolistic regime, these were not significant issues. Dominant telecommunications carriers had no need to force their

way into privately owned buildings through condemnation, as they would have been invited in, usually during construction, because buildings were not marketable without telecommunications service from the only available provider. Multiple demands for the same limited space would simply never arise because there was only one carrier. Thus, the power that privately owned public utilities had to condemn was historically not utilized for the purposes that are now of concern to BOMA and its members. A typical eminent domain action by a public utility would have involved, for example, acquisition of private property interests to install exterior telephone or electric line.

Further, in the deregulated market, much of the justification for this extreme condemnation right has disappeared. Formerly, a single provider had the duty to provide service to all, but competitive carriers under deregulation do not. They can pick and choose those buildings they wish to service and locate in, and then try to force their way in.

According to this Commission, several hundred telecommunications providers are currently operating in California under Certificates of Public Convenience and Necessity ("CPCNs") issued by the CPUC. Clearly, if each of these providers retain unlimited and unregulated ability to condemn whatever and wherever they want, the adverse impacts upon property owners and managers in California will be substantial.

1. Public Utility Condemnations Are Unique Procedurally In California.

As noted, the situation involving condemnation by privately owned public utilities is unique in California, in that no authorization is required from outside the utility itself, including any public agency or officer. Compare this situation with condemnations by the State, special districts, school districts and cities and counties in California: in all cases the authorization of a public board or governing body and the adoption of a resolution of necessity are required prior to the initiation of condemnation proceedings in court. These procedures involve public hearings, and the making of findings concerning public use and necessity. Code Civ. Proc. §§1240.040, 1245.220, 1245.230, 1245.235. In the case of quasi-public entities, which include entities such as not-for-profit colleges and hospitals, limited dividend housing corporations and land chest corporations, condemnation is only authorized if the local public entity consents and adopts a resolution at a public hearing. Code Civ. Proc. §§1245.330-350. In some cases, certain other public boards or officers must also concur (for example, the Commissioner of Corporations in the case of land chest corporations). H.&S. Code §3516.7. In very limited situations, private parties can condemn adjacent property in order to complete necessary repairs or install utilities, but only if very onerous requirements are met and the local public entity governing body adopts a resolution. Code Civ.Proc.§§1245.325,1245.326.

Contrast this to the procedure available to privately owned public utilities. They can simply condemn whenever and however they choose, with no public hearing, no adoption of a resolution of necessity, and no findings. The staff report concerning the Tentative Recommendation suggests (at p.8) this may be a disadvantage to the public utilities, in that, if challenged, they have the burden of proof to demonstrate in a court of law that the elements of public use and necessity have been satisfied. Public entities, on the other hand, can establish

these elements through adoption of the resolution by the governing body. BOMA submits, however, that this reasoning is flawed: the adoption of the resolution involves a public hearing at which the property owner has the opportunity to appear and comment and/or object, the findings contained in Code Civ. Proc. § 1245.230 must be made, and a "super-majority" of the public entity's legislators must approve the condemnation. Code Civ. Proc. §1245.240. Further, court challenge to the findings is still possible, even in the case of public entity and quasi-public entity eminent domain actions, although it is more limited in the case of public entity condemnations. Code Civ. Proc. §§1250.360, 1250.370.

In contrast, under an expansive interpretation of the public utility condemnation statutes, any representative of a public utility (including a new local telecommunications carrier), can unilaterally decide that the carrier requires a private property interest, and authorize initiation of condemnation proceedings. Current law places absolutely no special statutory or regulatory guidelines or restrictions on the circumstances of such condemnation actions, thereby shifting to the courts all determinations of public use and necessity and other findings in the context of condemnations by such carriers. But courts are, and may continue to be, ill-equipped to make such determinations in these situations, given the dearth of authority and the unusual situation involving telecommunications carrier acquisitions of closet, riser and wall space in private buildings.

2. Hundreds of New Telecommunications Carriers Can Now Claim The Power To Condemn Throughout The State, If The Public Utility Statutes Are Liberally Construed.

The second troubling issue identified above relates to the large number of entities in the telecommunications industry now claiming to be public utilities under Pub. Util. Code §§216 and 234. According to this Commission's staff report, hundreds of companies have been issued CPCNs to compete as local telecommunications service providers in California. Under an expansive view of the codes (which is expressly disputed by BOMA), all such carriers could (and presumably do) claim the power of condemnation. This was clearly never contemplated decades ago when the power of condemnation was given to privately owned public utilities, nor was it contemplated in 1975 when this Commission recommended the overhaul that resulted in the current eminent domain code.

However, the fact that hundreds of telecommunications carriers might simultaneously have the power of eminent domain in California is not, in and of itself, the problem. Obviously, there are thousands of public entities in California which have eminent domain power, including cities, counties, special district, and school districts. However, these entities do not compete with one another in the commercial world, and rarely would several of them be interested in acquiring the same property interest from the same owner, as is potentially the case here. And even in that circumstance, the eminent domain code contains provisions relating to "more necessary public use," which establish priorities and procedures for competing public claims to the same property. Code Civ. Proc. §1240.610, *et seq.*

In the telecommunications industry, the situation is very different, as it very likely that multiple carriers would demand space and access in the same commercial buildings to install their facilities. Yet that space is physically limited. Equally important, access by multiple parties to a building's sensitive telecommunications infrastructure presents serious security, safety, liability and management concerns, which increase exponentially with the number of providers. How is a property owner to respond to multiple demands for access into buildings with limited capacity, and with these other concerns? Further, as recognized in the Tentative Recommendation report, even the threat of condemnation - obviously inherent in any underlying power of condemnation - is a powerful tool in the hands of a carrier seeking access into a particular building. Litigation is costly, and many property owners may not have the wherewithal to fight an attempt at forced access, knowing that the carrier can go to court. This power thus gives the carriers a substantial advantage in the marketplace, as absent the right of eminent domain, access into a particular building would be negotiated on an "arms-length" basis. The ability to access privately owned buildings in this manner by multiple carriers was surely never contemplated when the power to condemn was originally granted to public utilities.

3. The Nature of the Property Interests To Be Acquired By Telecommunications Providers Is Also Very Unusual.

Third, the nature of the interest to be acquired by telecommunications providers is very unusual in the condemnation context. This raises unique physical, procedural, substantive, and valuation issues. As noted above, carriers want entry into private buildings themselves, with access into the equipment closets and the right to install lines in the risers and into actual tenant spaces. Equipment closets have limited capacity, and so do building risers, floors and walls. Such intrusion was never contemplated when the power of condemnation was originally granted to public utilities, and BOMA submits that it is certainly not justified today.

Further, defining the interest to be acquired is conceptually and actually difficult, as is determining and controlling the extent of the required physical intrusion into the building. For example, in one recent court filing, the condemnor (a local exchange carrier) provided only small scale diagrams of proposed easements, and failed to identify or describe any of the access easements that would necessarily be required for it to install, maintain and service its proposed facilities. (*Brooks Fiber Communications of Fresno, Inc. v. Gunner & Andros Investments* (Fresno County Sup. Ct. No. 595893-0).) It was also impossible to ascertain from the attached descriptions what precise interests the carrier was attempting to condemn.

Are interests such as these easements, licenses, or some other property interest? In addition, very technical terminology is involved in attempting to ascertain if the property interest that the carrier wants to condemn is actually needed, or whether the requested use satisfies the statutory public use and necessity requirements.

The issue of valuation of the interests, whatever their classification, is yet another of the many complexities inherent in this entire scenario. BOMA members have reported that very nominal offers are being made by carriers, offers which are dramatically lower than the true market value of such interests if negotiated in the marketplace. For example, in the case just

cited, the carrier contended that the property to be acquired had a total value of only $2200, based upon an appraisal that failed to acknowledge that the highest and best use of the property to be acquired was for installation of a fiber optic telecommunications infrastructure. The appraisal also failed to address the very intrusive required access rights over the other portions of the owner's property, or the ongoing burden and costs to the owner as a result of this access. While property owners can object to the value proposed - even if they do not object to the entry into their building - this will require hiring an attorney and fighting an eminent domain lawsuit. Since there are no established standards for determination of such valuation issues, however, the outcome is highly uncertain.

III. PRIVATELY OWNED PUBLIC UTILITIES DO NOT AND SHOULD NOT HAVE UNLIMITED CONDEMNATION RIGHTS IN CALIFORNIA.

It is in the framework just described that BOMA is responding to the recommendation of the Law Revision Commission. As stated at the outset, BOMA maintains that the recommendation does not go nearly far enough in suggesting a legislative response to the potential proliferation of condemnation actions by privately held public utilities. The staff report correctly identifies the issues and problems inherent in allowing condemnation by privately owned public utilities, but the recommendation falls far short of effectively addressing the very real and complex issues that such condemnations (and the corresponding threats of condemnation) have generated, and will continue to generate, in California.

In this regard, BOMA submits as a threshold matter that all of the hundreds of telecommunications providers currently operating under CPCNs from the CPUC do not possess the unlimited power of condemnation in California. BOMA recognizes that Pub. Util. Code §§216, 234 and 616 can be read to say that they do. However, the granting of unfettered condemnation power to hundreds of competing telecommunications (and in the future, electric and other utility) providers could not possibly have been contemplated by the Legislature when this power was first granted to public utilities. Further, there is no legal authority in California at any level that has interpreted these statutes in such a broad fashion. Accordingly, it certainly cannot be stated that the Legislature ever intended to extend this power to hundreds of privately owned public utilities in the era of deregulation. We submit therefore that such condemnation power does not presently exist. This conclusion is particularly compelled when it is recognized that privately owned public utilities can claim the right to condemn private property interests absent any resolution, approval, findings, public hearing or other oversight.

In addition, this power should not be further extended to all the privately owned public utilities which have surfaced and continue to surface in the wake of deregulation. The condemnation power of public utilities has always been procedurally unprecedented in California. Absent an express statement by the Legislature that it intends the power of eminent domain to be available to all the new carriers and other companies forming in the post-monopolistic era, this Commission should neither sanction nor condone an interpretation of the applicable existing statutes that would allow such an expansion of the condemnation power.

Moreover, we submit that in any event no right of condemnation exists in the telecommunications context beyond the Minimum Point of Entry ("MPOE"). The MPOE is the physical location in a building where carrier ownership of the telephone line terminates, and the owner's responsibilities for maintenance, repair and liability commence. The MPOE typically is located within the building itself. Even if BOMA accepted the argument that acquisition of building space by condemnation to this point is authorized or justified, forced access into private buildings beyond the MPOE (for example, into floors and walls and actual tenant spaces) should never be allowed, and could not possibly have been contemplated in the monopolistic regime.

In its Decision 93-08-022, the CPUC determined that building owners have unlimited liability for failure of telephone wiring beyond the MPOE, regardless of who installed the line. *Re Accounting for Station Connections and Related Rate-Making Effects and the Economic Consequences of Customer-Owned Premise Wiring* (1993) 50 CPUC 2D 483. It is worth noting that carriers' liability for wire under their ownership, on the other hand, is limited to $10,000. This potential for the creation of new liabilities for building owners, (i.e., liability for lines installed by third parties), provides further support for the notion that condemnation beyond the MPOE is not and should not be authorized.

Based upon the above analysis and considerations, we therefore request that this Commission fully and thoughtfully analyze the following range of options in making any further recommendations concerning a legislative response to condemnation by telecommunications providers: (i) clarifying that the right of condemnation is not currently vested in all privately owned public utilities in the era of deregulation; (ii) clarifying that in any event no condemnation right exists beyond the Minimum Pont of Entry into any building; (iii) denying the unlimited extension of the condemnation right to all privately owned public utilities, particularly in the telecommunications industry; and/or (iv) limiting the condemnation right to service providers of last resort, i.e., such carriers as would be required to provide the requested service by the CPUC if not otherwise available to the requesting party.

The Commission may wish to seek further input from interested parties, including telecommunications carriers and private property owners and managers, concerning the implications of these various options and the policy issues inherent therein, prior to making a final recommendation. As made clear above, there are clearly competing interests which must be balanced in making this analysis.

IV. ANY CONDEMNATION POWER THAT IS EXTENDED TO PRIVATELY OWNED PUBLIC UTILITIES IN THE TELECOMMUNICATIONS CONTEXT SHOULD BE STRICTLY REGULATED AND CONTROLLED.

BOMA recognizes that the Commission may not agree with its conclusion concerning the underlying right of condemnation by privately owned public utilities. Without waiving or diminishing any argument concerning the existence of the underlying right of condemnation, BOMA is nevertheless suggesting a legislative response, in the event that such right is found to exist. At a minimum, BOMA therefore urges that any power of condemnation which is found to presently exist or which is extended to privately owned public utilities be strictly regulated and

controlled. Such regulation and control is clearly required to afford at least some measure of protection to the private property owners who have been, and will continue to be, adversely affected by condemnations undertaken and threatened by telecommunications providers.

BOMA submits the following alternatives for a legislative response, if this Commission elects to recommend recognition of the condemnation right for privately owned public utilities:

A. A Public Hearing And Adoption Of A Resolution Of Necessity Should Be Required.

If the power of condemnation is to be vested in all privately owned public utilities, including perhaps hundreds of newly formed telecommunications providers, a procedure should be established whereby an independent body or officer, following a duly noticed public hearing, authorizes condemnation in a given instance, after making certain findings. These findings should include the four elements included in Code Civ. Proc. §1245.340, which are the findings that must be made by the appropriate legislative body in the case of authorized quasi-public entity eminent domain actions.[1] This would be the closest parallel to the condemnations by

---

[1] Code Civ. Proc. §1245.340 applies to quasi-public entity condemnation actions. It provides:

> The resolution required by the Article shall contain all of the following:
>
> (a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the quasi-public entity to acquire the property by eminent domain;
>
> (b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification;
>
> (c) A declaration that the legislative body has found and determined each of the following:
>
> (1) The public interest and necessity require the proposed 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 described in the resolution is necessary for the proposed project.

public utilities. The fourth finding is particularly critical in this context: "The hardship to the quasi-public entity if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of such property." Such a finding is clearly necessary to protect the rights of private property owners in the face of potential multiple demands for forced access by deregulated providers, to ensure that a condemnation action is not allowed to proceed in the face of demonstrable undue hardship to the property owner.

Additional findings would include both public use (Code Civ. Proc. § 1240.010) and public interest and necessity (Code Civ. Proc. §1240.030), along with the other requirements of §§1240.030, 1245.230 and 1245.340. In this regard, property owners submit that whether condemnations by privately owned public utilities constitute a public use in a given instance, or whether public interest and necessity can be demonstrated in a particular case, are both open to substantial question in the deregulated telecommunications arena. In this regard, BOMA members have indicated that many, if not most, commercial buildings in California are already served by multiple carriers. In such a situation, a demand for access by yet another carrier - motivated solely by profit - may well not constitute either a significant public use or actual public necessity, even under the two pipeline cases referenced in the Tentative Recommendation report, sufficient to justify condemnation. Furthermore, the addition of another carrier imposes significant costs and burdens on the property owner. These private burdens must be balanced against any public benefit in a meaningful way. In this regard, see Code Civ. Proc. §1245.340(c)(4), which requires a balancing of interests.

In sum, there is simply no rationale or justification to exempt public utilities, particularly hundreds of newly created telecommunications providers, from the requirements that some body or officer hold a hearing, and make appropriate findings, prior to authorizing the filing of a condemnation action in a court of law.

1. The Local Governing Body Could Hold The Hearing And Make The Findings.

Several possibilities exist for the appropriate mechanism to provide the public hearing and make the required findings. One would be to follow the procedure required for condemnation by quasi-public entities. This requires a public hearing and a resolution of necessity by the governing body of the local jurisdiction in which the property sought to be acquired is located. Code Civ. Proc. §1245.310, et. seq. This possibility was rejected by the Commission in its Tentative Recommendation, on the grounds of perceived friction between public utilities and cities and counties, and because regulation of the provision of public utility services is considered a statewide concern.

---

(4) The hardship to the quasi-public entity if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of such property.

However, requiring telecommunications providers to seek the consent of the applicable local entity governing board would not bring into play either of these perceived concerns. The types of condemnation actions that are problematic to private property owners and thus require some public oversight create no demonstrable public utility/public entity conflict, as they typically involve individual commercial buildings. Further, while such actions might involve issues of general statewide concern, so do all of the other categories of quasi-public entity condemnations defined in Code Civ. Proc. § 1245.320. All of these agencies must obtain the consent of the local public entity. Therefore, we do not see consent by the local public entity as problematic.

Thus, BOMA submits that the Commission should reconsider its recommendation concerning possible public entity governing body oversight of privately owned public utility condemnations. In this regard, BOMA reiterates that public utility condemnations are the only condemnation actions in California that are allowed to proceed without the express authorization of a public agency governing board, by a "super-majority" vote, and the adoption of express findings concerning public use, public necessity, and so forth. In addition, several of the quasi-public agency eminent domain actions require, in addition, the approval of another, separate public official or board prior to proceeding with the action. See, e.g., Cal. H. & S. Code §1260 re non-profit hospitals. In fact, this statute may provide a workable model here, as it requires a hearing before the Director of Statewide Health Planning and Development, the making of findings, and a certification by the Director, before a nonprofit hospital can proceed in court to acquire private property by eminent domain. No matter what procedure is followed, however, some sort of public hearing and the making of appropriate findings is essential.

2. The California Public Utilities Commission Could Also Hold The Hearing And Make The Findings.

Another procedural possibility would be a public hearing before, and findings made by, the California Public Utilities Commission, or some subcommittee, committee, hearing officer or other body or individual delegated this function by the CPUC. This might be in addition to, or possibly instead of, approval by the local public entity governing body: some quasi-public entity condemnations require only approval by the local governing body, while others require additional approval from a State Commission or officer.

There does exist some logic in having the CPUC (or a delegated committee or officer thereof) hold the required hearing and make the necessary findings, as the CPUC is presumably the State agency with the most knowledge concerning the activities of the utilities that it regulates. Further, the CPUC currently has some limited oversight in the area of condemnation activities by public utilities. In this regard, see, e.g., Pub. Util. Code §1401, *et seq*. The CPUC also has the authority to make appropriate rules, and to generally regulate affected industries. Pub. Util. Code §701.

However, BOMA is concerned that the CPUC is not necessarily the appropriate forum to hold public hearings and make threshold determinations concerning the right of privately owned public utilities to acquire private property by eminent domain, particularly in the

telecommunications context. The CPUC has historically not been sensitive to, or fully cognizant of, private property ownership interests or concerns, particularly where those interests potentially clash with those of its regulated industries. Telecommunications providers constantly appear before, and have ready access to, the CPUC and its staff. The same is not true for individual property owners.

A new state board or officer could be created to handle requests for the exercise of condemnation power by privately owned public utilities. This would alleviate concerns about the ability of the CPUC to fairly address the competing interests inherent in such requests.

Therefore, alternative forums should be explored by this Commission before making any final recommendation to grant the CPUC the power to authorize individual condemnation actions by privately owned public utilities. Moreover, if the CPUC is granted this power, at a minimum procedures and guidelines should be adopted to help ensure that private property interests are properly addressed. Such guidelines are, in fact, contemplated in this Commission's proposed comment to the suggested revision to Pub. Util. C. §610.

3. The Ability To Challenge In Court The Findings Made In Connection With the Adoption Of Any Resolution Must Be Retained.

It should be noted here that if a mechanism is created to hold a public hearing, adopt a resolution, and make necessary findings as a prerequisite to public utility condemnation lawsuits, the statutory protections afforded the property owner in Code Civ. Proc. §§1250.360 and 1250.370 must be retained. These statutes allow the owner to challenge in court that the stated purpose for a condemnation is not a public use (Section 1250.360(b)), and in the case of quasi-public entity actions, that the public interest and necessity do not require the proposed acquisition (Section 1250.370(b)) and that the public good/private injury must be balanced in any proposed project (Section 1250.370(c)). Notwithstanding any hearing that might occur, or any resolution adopted, in the case of privately owned public utility condemnations, the resolution adopted should not be conclusive on the matters described in the cited sections so as to prevent court challenge, just as it is now not conclusive in the case of quasi-public entity condemnations. Property owners must retain their rights to challenge in court the adequacy and legal sufficiency of any findings made in the context of public utility condemnations, particularly since serious doubts may and do exist as to whether the required findings such as public use or public necessity can be made in particular situations.

B. Several Additional Factors Should Be Considered At The Time The Required Findings Are Made To Authorize A Condemnation Action By A Telecommunications Provider.

BOMA submits that a number of additional factors should be considered in making the necessary findings, prior to authorizing the filing of any eminent domain action by a privately owned utility in the telecommunications context. These factors should include, among others:

1. The number and type of carriers already servicing the building in question. This relates directly to any finding of public necessity, as BOMA submits it would be difficult to make a finding of public necessity to install telecommunications infrastructure in a building already well served by multiple carriers;

2. The available remaining space in the building to accommodate additional telecommunications infrastructure. The physical space that will accommodate such facilities is limited in any building, and at some point there simply will not be space available to accommodate additional carriers;

3. The portion of the building that the carrier desires to access, i.e., what access is being demanded, and how intrusive is the proposed acquisition in terms of the building's physical layout and design?

4. The financial and operational capabilities of the carrier, i.e., does the carrier have a demonstrated "track record" in telecommunications installations and the financial strength, sufficient to ensure that proposed facilities installed will be competently installed and completed in a timely manner? and

5. The cost of implementing or facilitating the demanded access into the building, including the administrative and actual (out-of-pocket) costs to the building owner.

Such factors would be appropriately considered in the context of any public hearing, adoption of a resolution, and the making of findings in connection with proposed acquisitions by telecommunications providers. The property owner may be required to demonstrate certain of these elements, while the carrier demanding access may need to establish others. Further, the factors suggested, and any others adopted, could be promulgated either by statute or regulation as already suggested by this Commission with respect to potential oversight by the CPUC.

C. Any Authorization For Access To A Privately Owned Building Should Also Be Accompanied By The Imposition of Reasonable Conditions.

If access to private property by privately owned public utilities is authorized by way of condemnation, it is essential that reasonable conditions also be placed on such access, once again recognizing the very unique factual context of such condemnations. Such a procedure could be comparable to, for example, conditions that are typically imposed at the time an order for immediate possession is granted, or when permission is sought to conduct testing on property prior to the initiation of condemnation proceedings (see, e.g., Code Civ. Proc. §1245.010, et seq.. BOMA submits that he following types of conditions should be considered:

1. Imposition of insurance and indemnity requirements on the carrier;

2. Imposition of appropriate conditions which address health and safety, legal compliance, and security and construction considerations that might arise from the proposed installation;

3. Compliance with the standard telecommunications construction access rules and regulations for the buildings;

4. Possible bonding requirements, to ensure that any facilities are properly installed, and then removed from the building at the end of any applicable term or use;

5. The right of the property owner to charge appropriate fees for access, which fees might vary depending upon the type of access being demanded and under what circumstances; and

6. The ability of the property owner to prevent access to a carrier that has not complied with the applicable conditions.

Any such conditions would, of course, need to reasonable, but individual conditions could only be determined on a case-by-case basis, in particular situations. But in order to protect its own interest and those of its tenants, a building owner must have the right to regulate access to and installations in the building. Just as with work by any other tenant or user, the owner must be sure that health and safety requirements are met, and that work is performed in a lawful and workmanlike manner, that all contractors are qualified, that other occupants and users of the building are not negatively impacted, that required permits have been obtained, that the owner has received and approved plans for the proposed work areas, that the work will be done in accordance with the approved plans, and that appropriate insurance and bonds are in place. In addition, in the context of access to the building's telecommunications systems, the building owner must preserve the security, and prevent disruption of other telecommunications services to building occupants. The conditions of any telecommunication access would need to address all such issues.

In terms of the procedure for imposition of such conditions, BOMA submits that they might be imposed either by the decision-maker that is making the threshold determination whether a condemnation is justified in a given instance, or by a court at the time that possession is actually sought. In either case, the parameters of appropriate conditions should be set forth either statutorily or by way of regulation, so that all parties are clear as to the circumstances whereby privately owned public utilities may be allowed to condemn access into private buildings.[2]

---

[2] A useful analogy may be drawn to the conditions that may be required by shopping center owners in providing public access for free speech purposes, which recognize the need and right of property owners to properly control and condition such conduct.

D. Consideration Should Also Be Given To Establishing Appropriate Standards Or Guidelines For Determination Of Compensation To The Property Owner.

As discussed above, compensation issues also arise that are unique to this type of condemnation. Thought should therefore be given as to how and where such issues should be appropriately addressed. For example, it could be in the eminent domain or public utility codes, or by way of separate regulations or guidelines. Determination of compensation to property owners in condemnation actions involving access to privately owned buildings for installation of telecommunications infrastructure must address issues such as insurance, security, liability and administrative cost. Further, it should be made clear that the fair market value for any such taking is for a telecommunications use, not simply a nominal value based upon an arbitrary square footage basis. Experience to date has indicated that the compensation issue has been particularly problematic in these cases, with carriers offering extremely low values and then threatening condemnation. Accordingly, a statutory or regulatory standard is appropriate.

V. CONCLUSION

The issues involved in potential condemnations of private property interests by privately owned public utilities are complex and multi-faceted. They reach private property interests as well as public concerns. Accordingly, BOMA requests this Commission to carefully and thoughtfully proceed before making its final recommendation with respect to condemnation by privately owned public utilities.

As argued in this memorandum, BOMA maintains that all such utilities, and particularly all of the newly emerging telecommunications providers throughout the state, do not and should not have the power of eminent domain. To recognize such a right jeopardizes and impairs the rights of private property owners, particularly because condemnation by public utilities is presently unregulated and unsupervised in California.

But if such a right is recognized in one fashion or another, BOMA asserts that at a minimum, such right must be strictly controlled and regulated, and such control and regulation should be mandatory, not discretionary. Basic procedures such as a hearing, the adoption of a resolution, and the making of findings should be required, before the appropriate body or officer. Appropriate standards or guidelines should also be developed.

Accordingly, BOMA submits that if this Commission continues to recommend that the condemnation power be extended to all privately owned public utilities, an appropriate statutory and regulatory scheme be recommended which will balance the rights of the utility providers with private property rights.

We appreciate very much the opportunity to submit these comments to the Commission on behalf of BOMA, and look forward to further dialogue and the opportunity for input on this issue.

UNION PACIFIC RAILROAD COMPANY

49 Stevenson Street 15th Floor San Francisco, CA 94105
(415) 541-7011 Facsimile (415) 541-7017

Carol A. Harris
General Commerce Counsel

Room 1533
Law Department

VIA FAX 650-494-1827

November 15, 1998

Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Subject: Condemnation by Privately Owned Public Utility

Dear Mr. Sterling:

Thank you for telecopying the tentative recommendation of your Commission to my office on Friday. I have circulated the material to involved departments, and although they have not had an opportunity to provide input into these comments, there are several points that I would like to raise for your Commission's consideration.

First, we question whether the impact of the proposed amendment to Public Utilities Code Section 610 on railroads was even considered by your Commission because there is no mention of railroads in the text of the tentative recommendation. The ability to employ the power of eminent domain to condemn property is critically important to our industry and the effect of the proposed legislative changes on railroads should be carefully reviewed and evaluated before your Commission adopts recommendations that could constrain our exercise of condemnation rights.

Second, railroads are readily distinguishable from the two other categories of privately owned public utilities that were specifically considered and discussed in the tentative recommendation -- pipeline corporations and telephone service providers. There has been burgeoning growth in those industries with the associated expansion of physical networks and facilities as new competitors have entered those fields as a result of state economic deregulation. However, in the case of railroads, as both your Commission[1] and the California Public Utilities

---

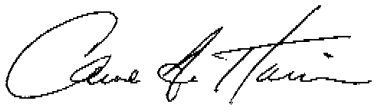
[1] California Law Revision Report, "Public Utility Deregulation", June 1997, at p. 446, 467-468.

Commission[2] have recently acknowledged, the dominant feature is federal preemption rather that state deregulation. Additionally, as a result of recent federally approved consolidations, there are fewer Class 1 railroads serving California today than there were just five years ago, and the focus tends to be on streamlining existing route structures to improve the efficiency of competitive single line rail service to make the railroads more competitive with trucks.[3]

Third, as a result of the ICC Termination Act of 1995, Public Law No. 104-88, which resulted in the complete federal preemption of state economic regulation of railroads, it would hardly be appropriate for the California Public Utilities Commission to impose constraints on the exercise of condemnation powers by railroad corporations. While we recognize that the proposed amendment to P. U. Code Section 610 is permissive, rather than mandatory, we are nevertheless concerned that it could lead to an attempt on the part of the California Public Utilities Commission to assert regulatory control over federally preempted railroad transportation and facilities.

We appreciate the opportunity to provide these comments and we will be prepared to expand upon them at a later date if that would be helpful to your Commission. I would like to be apprised of any future hearings, conferences, or workshops on this subject.

Very truly yours,



Carol A. Harris
General Commerce Counsel

cc: Mr. Wayne Horiuchi, UPRR
Mr. Kent W. Kauss, CPUC
Mr. Ken Koss, CPUC

---

[2] California Public Utilities Commission, "Report to the Legislature on Revisions of the Public Utilities Code Resulting from Restructuring of Regulated Industries, November, 1997, at p. 5.

[3] For example, Union Pacific's capital improvement plans, which were reflected in our merger application to the Surface Transportation Board and are encompassed within its decision approving the transaction, are designed to achieve the efficiency benefits of the merger with Southern Pacific and to implement competitive conditions imposed by the Surface Transportation Board. They involve some incidental property acquisitions through condemnation.

CALIFORNIA SHORT LINE RAILROAD ASSOCIATION

1127 11th Street • Suite 242 • Sacramento, California 95814
Ph.: (916) 447-6006 • Fax: (916) 441-6504

November 17, 1998

VIA FACSIMILE & U. S. MAIL
(650-494-1827)

Mr. Nathaniel Sterling
Executive Director
California Law Revision
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Subject: Condemnation by Privately Owned Public Utility

Dear Mr. Sterling:

Thank you for considering the following comments on the tentative Commission recommendation titled "Condemnation by Privately Owned Public Utility."

The Commission states that recent developments such as deregulation of the telecommuni-cations industry, competition between pipeline carriers and the potential for similar situations in the restructured electric industry may justify some clarification of California Public Utility Commission jurisdiction over eminent domain activities by privately owned public utilities. To accomplish this, the Commission recommends that new language be added to the Public Utility Code emphasizing that the CPUC "may regulate exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate."

By this addition the Commission intends only to clarify what it believes to be existing law. The proposed revision would ensure the CPUC has the express authority it needs to act in the best interests of the public should it choose to do so. The Commission suggests that "in the current political climate of deregulation, it is likely that the CPUC will not be willing to act absent express authority."

The Commission does not specifically address the condemnation rights of railroads in the recommendation. In fact, unlike the other privately owned public utilities cited in the report, railroads are not restructuring and expanding in such a way as to justify any additional regulation by the CPUC. On the contrary, the trend in railroad regulation has been toward federal preemption and industry consolidation. Nevertheless, the proposed revision could be interpreted to allow or encourage the CPUC to assert unwarranted and unnecessary authority over the exercise of condemnation rights of the railroads.

We agree with the comments submitted by Union Pacific: "The ability to employ the power of eminent domain to condemn property is critically important to our industry and the effect of the proposed legislative changes on railroads should be carefully reviewed and evaluated before your Commission adopts recommendations that could constrain our exercise of condemnation rights."

Thank you again for the opportunity to comment.

Sincerely,
CALIFORNIA SHORT LINE RAILROAD ASSOCIATION

Kennan H. Beard, Jr.
President / Director

TOTAL P.01

California Western Railroad
Foot of Laurel Street, P.O. Box 907, Fort Bragg, CA 95437
Tel: (707) 964-6371 Fax: (707) 964-6754

November 16, 1998

Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Dear Mr. Sterling:

We have reviewed the recommendations by the California Law Revision Commission relative to condemnation by privately owned public utilities.

We are extremely concerned about the prospect of the California Public Utilities Commission gaining increased regulatory authority in this area.

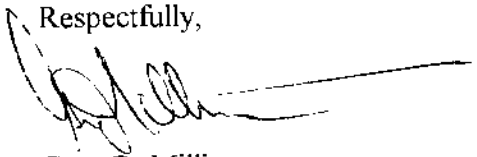
This past year, California Western Railroad experienced two encounters with the CPUC, both of which were unpleasant and costly. In July, 1997 we applied for authority to reduce our passenger operation during the winter months from seven to three days per week. The CPUC staff elected to conduct full evidentiary hearings on our application, even though there was only one formal customer compliant. This enabled the CPUC staff to become involved in the process. Staff analysis of railroad financial information was poor, and CPUC counsel was allowed to introduce volumes of extraneous and misleading information into the record to oppose our application. We finally withdrew our application after nine months of "processing".

Our second experience was equally frustrating. In April 1998, we submitted an application for authority to issue common stock. Initially, the CPUC staff was at a loss to how to deal with the application. We were given conflicting advise on processing and timing. The CPUC role in this matter is to simply verify that the proposed uses of funds are consistent with the Public Utilities Code; the CPUC makes no determination with respect to the fairness of the transaction or underlying stock issues. This process took four months to complete, and could have gone on for more than a year had a single protest been filed. Approval was received from the Securities and Exchange Commission and the Department of Corporations in four states in less time than it took the CPUC to complete an "administrative review" of the stock offering.

We would hate to see the issue of condemnation by a private utility become bogged down in the same quagmire of "processing" which we have experienced in recent years. The CPUC does not have sufficient staffing to undertake this additional work, and their existing staffing is not capable of performing adequate analysis in a timely fashion.

The recommendation document by the California Law Revision Commission notes that condemnation rarely occurs. This is also true in the public agency sector in which I worked for 25 years. However, the acquisition of property "under threat of condemnation" is more commonly used as it has certain tax advantages for the property seller. I am concerned about how expanding the bureaucratic review into this area will affect property negotiations and the ability to act in a timely manner when a condemnation issue does arise. The California Law Revision Commission does not cite any cases of private utility condemnation abuse. It seems to me that further regulation is unnecessary and will simply add to the private and public cost of doing business.

Respectfully,



Gary D. Milliman
President

cc: File

GDM/blb

SOUTHERN CALIFORNIA EDISON
An EDISON INTERNATIONAL Company

Julie A. Miller
Attorney

November 19, 1998

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Public Utility Eminent Domain Law

Dear Mr. Sterling:

Thank you for the opportunity to comment on the Law Revision Commission's tentative recommendation on condemnation by privately-owned public utilities. The report argues that legislation is needed because deregulation foreshadows an increase in the number of privately owned utilities engaged in aggressive competition with minimal oversight. The tentative conclusion is to make clear the authority of the CPUC to regulate the exercise of eminent domain by privately-owned public utilities. Such a statutory provision is unnecessary.

The eminent domain law already has significant safeguards built into it to protect landowners from a public utility that might try to abuse its power. In fact, those in attendance at the CPUC's November 5, 1998 conference are aware that, in response to questioning by Commissioner Neeper, the division heads at the CPUC indicated that none of them were aware of any attempted exercise of eminent domain by a competitor that has given them any problem.

Furthermore, at the November 5 conference, the Commission staff acknowledged the fact that it clearly has jurisdiction in a particular instance to say whether a utility may or may not build a particular facility. Specifically, Public Utilities Code section 701 gives the CPUC plenary power to regulate public utilities. A public utility abusing its power could be easily brought to task at the Commission. With regard to electric utilities, Commission General Order 131-D allows the Commission to control the planning and construction of electric facilities. General Order 131-D provides for notification of affected property owners and a forum for them to be heard on the issues prior to condemnation.

Finally, Edison agrees with the Law Revision Commission's consultant, Professor Kanner, that the Law Revision Commission may be harpooning the wrong whale. The Law Revision draft report is premised on the assumption that deregulation foreshadows an increase in the number of privately owned public utilities. To the contrary, for the electric industry, deregulation foreshadows an increase in the number of

P.O. Box 800 2244 Walnut Grove Ave. Rosemead, California 91770 (626) 302-4017 Fax (626) 302-2050

independent power producers and other entities that are not regulated by the CPUC and who do not have the power of eminent domain. For the telephone industry, Professor Kanner suggests that the issues raised by competing telephone companies trying to gain access to facilities inside buildings by exercising their power of eminent domain appears to be a landlord tenant issue that may ultimately need to be addressed through Federal legislation. In any event, Edison believes it is premature to try to address these types of issues in this forum.

In summary, there is no need for the Law Revision Commission to draft new statutes to control public utilities' use of eminent domain. Existing statutes and case law already have adequate safeguards, and grant the Public Utilities Commission sufficient authority to regulate privately-owned public utilities.

Very truly yours,

Julie A. Miller

Julie A. Miller

JAM:scp:LW983210.158