

## Memorandum 99-65

### **Condemnation by Privately Owned Public Utility (Status of 1999 Legislation)**

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At the June 1999 meeting the Commission decided to defer circulation of a tentative recommendation on condemnation by a privately owned public utility pending the outcome of legislative action on the matter during the 1999 legislative session, at which time the need for further Commission action could be assessed. The two bills we have been tracking are SB 177 (Peace & Burton) and AB 651 (Wright); an additional relevant bill is SB 678 (Polanco).

Attached to this memorandum is the latest staff draft of a telecommunications access procedure, implementing Commission decisions made the last time the Commission considered this matter in June 1999. The circumstances of this draft are discussed below.

#### STATUS OF 1999 LEGISLATION

#### **SB 177 (Peace & Burton) — Limitation on Public Utility Condemnation**

##### **Authority**

SB 177 (Peace & Burton) would prohibit condemnation by public utilities for competitive purposes, unless the Public Utilities Commission makes a finding, after a local public hearing, that the condemnation would serve the public interest. The bill would also preclude telecommunications condemnation of San Francisco airport property (responding to the GTE Wireless case).

The bill has passed the Legislature and gone to the Governor for action.

#### **AB 651 (Wright) — Administrative Procedure for Access to Buildings**

AB 651 (Wright) is comparable to the draft being developed by the Commission, in that it presents a Connecticut-style solution to telecommunications access problems that have been identified. The bill provides a significantly greater amount of detail on a number of issues than does the Commission's draft.

This is a two-year bill. It has passed the Assembly and is awaiting action in the Senate. We are informed that the bill has stalled over issues involving

compensation to the building owner for the telecommunication provider's occupancy of space in the building. Assembly Member Wright's office has suggested that in light of this development, it may be appropriate for the Commission to reactivate its work on this matter.

### **SB 678 (Polanco) — Telecommunications Access to State Property**

SB 678 deals with telecommunications access to state property. It sets up an interagency committee on state-owned property for the purposes of evaluating use of that property for telecommunications services by private parties. The bill has passed the Legislature and gone to the Governor for action.

In this connection, the latest edition of the *Public Law Journal* (published by the State Bar Public Law Section) includes an article by Paul Valle-Riestra, Assistant City Attorney for the City of Walnut Creek, "Telecommunications Companies: An Unlimited Right to Occupy Public Property?" The article discusses federal and state laws affecting franchise rights of telecommunications companies, focusing on local public entities. The article concludes:

In the face of an ambiguous, outdated federal and state regulatory scheme, public agencies should strongly consider adopting their own ordinances or regulations concerning use of public rights-of-way by telecommunications companies. While the scope of local jurisdiction remains largely undefined, agencies will be in a much stronger position in court if they can refer to concrete regulations rather than relying on ad hoc decisions. A telecommunications ordinance should cover telephone, cable, OVS, wireless and other telecommunications facilities (defined broadly to include telecommunications devices that haven't been invented yet), location of lines, street cut mitigation measures, surplus conduit requirements, placement of cabinets, pedestals and antenna within the public rights-of-way, franchise requirements where not preempted by federal or state law, and fees.

Perhaps most importantly, public agency attorneys should not be intimidated by the seemingly superior knowledge of this area of the law by telecommunications company lawyers. Armed with the knowledge provided by this article, public agency attorneys should stake a broad jurisdictional claim to their right to regulate the time, place and manner in which all telecommunications companies may use the public rights-of-way.

Valle-Riestra, *Telecommunications Companies: An Unlimited Right to Occupy Public Property?* 22 *Public Law Journal* 10, 12 (No. 3, Summer 1999)

The Law Revision Commission staff has likewise concluded that, notwithstanding the statewide franchise granted telecommunications companies by statute, local public entities have the right to regulate the time, place, and manner in which a telecommunications company may use the public right of way. Pub. Util. Code § 7901.1.

#### ASSESSMENT OF NEED FOR FURTHER COMMISSION ACTION

The staff believes that enactment of SB 177 (Peace & Burton) would make further Commission study of the issue of public utility condemnation unnecessary. The measure imposes Public Utilities Commission oversight consistent with but more specific than the Law Revision Commission's original tentative recommendation on this matter promulgated a year ago.

Meanwhile, the Law Revision Commission has shifted its focus from public utility condemnation to an administrative approach for telecommunications access. That approach is derived from Connecticut law and would eliminate eminent domain authority for that purpose. Whether this concept should still be pursued, if SB 177 is signed into law, is an issue. Presumably the limitation on condemnation authority imposed by SB 177 would encourage open market access transactions between telecommunications companies and property owners. (The bill prohibits an exclusive access agreement between a landlord and a public utility that would limit the right of any other public utility to provide service to a tenant.)

A measure along the lines of AB 651 (Wright) would help facilitate telecommunications access agreements. The need for it would be somewhat diminished by enactment of SB 177. Assembly Member Wright's office suggests that, although SB 651 is currently stalled over the question of compensation, it may be appropriate for the Law Revision Commission to reactivate its work on this project — the Commission's process could help resolve some of the outstanding issues.

#### STATUS OF TELECOMMUNICATIONS ACCESS PROJECT

At the time the Commission suspended work in June on the telecommunications access project, the Commission had reviewed a staff draft and made policy decisions, but had not approved a tentative recommendation to circulate for comment.

Policy decisions made at the June meeting included:

**Obligation to Provide Service**

The authority of the Public Utilities Commission to regulate the obligation to provide service should be made clear. Any obligation to provide service should be on request of a user of the service (tenant), as opposed to a building owner.

**Removal of Wiring**

The approach of AB 651 (Wright) was adopted to provide for removal of a telecommunications installation to the extent it is obsolete and hinders a new installation.

**PUC Approval of Compensation Agreement**

The statute should not require the Public Utilities Commission to approve a compensation agreement entered into between a telephone corporation and a building owner.

**Elimination of Eminent Domain Authority**

Condemnation authority for purposes for which the administrative access procedure is available should be eliminated. The specific language set out in the staff draft needs to be fine-tuned on this point.

**Technical and Minor Substantive Revisions**

The technical and minor substantive issues raised by the draft would be subject to further review when and if the Commission circulates a tentative recommendation on this matter for comment.

**Judicial Review**

The question was raised to what extent Public Utilities Commission decisions under the proposed statute would be judicially reviewable, and whether there should be any time limits for the PUC to act under the statute. The Law Revision Commission decided that implementing regulations under the statute should be adopted within 18 months, using a notice and comment type of procedure. The Commission decided to further address judicial review issues before any tentative recommendation is circulated for comment.

Attached to this memorandum is a revised version of the staff draft that incorporates these decisions.

Respectfully submitted,

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Executive Secretary

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Exhibit

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**TELECOMMUNICATIONS ACCESS TO BUILDINGS**

**Pub. Util. Code § 616 (amended). Telephone corporation**

SECTION 1. Section 616 of the Public Utilities Code is amended to read:

616. A (a) Except as provided in subdivision (b), a telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

(b) A telephone corporation may not condemn property for the purpose of the installation or provision of service to an occupied building to the extent access for that purpose may be obtained pursuant to Article 2 (commencing with Section 7910) of Chapter 3 of Division 4.

**Comment.** Section 616 is amended in recognition of the supervening provisions of Sections 7910-7917 (access to occupied building by telephone corporation). Condemnation authority is eliminated only for those purposes for which the access procedure is available; condemnation authority is preserved for other purposes.

**Pub. Util. Code § 7901 (added). Article heading**

SEC 2. An article heading is added immediately preceding Section 7901 of Chapter 3 of Division 4 of the Public Utilities Code, to read:

Article 1. General Provisions

**Comment.** An article heading is added for Public Utilities Code Sections 7901-7907 to facilitate addition of a new article on access to an occupied building by a telephone corporation. See Sections 7910-7916.

**Pub. Util. Code §§ 7910-7917 (added). Access to occupied building by telephone corporation**

SEC. 3. Article 2 (commencing with Section 7910) is added to Chapter 3 of Division 4 of the Public Utilities Code, to read:

Article 2. Access to Occupied Building by Telephone Corporation

**§ 7910. "Occupied building" defined**

7910. As used in this article, "occupied building" means a building or part of a building that is rented, leased, hired out, arranged or designed to be occupied, or is occupied as the residence of three or more persons or families living independently of each other, as the place of business of three or more persons conducting

business independently of each other, or by any combination of such persons and families totaling three or more, and includes a trailer park, mobile manufactured home park, nursing home, hospital, and condominium association.

**Comment.** Section 7910 is drawn from Connecticut General Statutes Section 16-2471(a)(1). For other definitions relevant to this article, see Sections 20 (commission), 205 (person), 234 (telephone corporation).

**§ 7911. Limitations on owner of occupied building**

7911. No owner of an occupied building shall demand or accept payment in any form, except as provided in Section 7915, in exchange for permitting a telephone corporation on or within the owner's property or premises, or discriminate in rental charges or the provision of service between tenants who receive service and those who do not, or those who receive service from different providers, provided the owner shall not be required to bear any cost for the installation or provision of service.

**Comment.** Section 7911 is drawn from Connecticut General Statutes Section 16-2471(b).

**§ 7912. Installation of wiring and ancillary facilities**

7912. (a) An owner of an occupied building shall permit installation of telecommunications wiring and ancillary facilities to provide service by a telephone corporation in the building provided:

(1) The telephone corporation has an agreement with a tenant of the building requesting service from the telephone corporation. The agreement is subject to inspection by the owner.

(2) The entire cost of the installation is assumed by the telephone corporation, including but not limited to building supervisory and related overhead costs associated with the installation.

(3) The telephone corporation indemnifies and holds harmless the owner for any damages caused by the installation, including any loss of existing service to a tenant that results from installation activities. On request of the owner, the telephone corporation shall provide a bond, recorded with the county clerk, in favor of the owner to ensure that the installation work is properly completed.

(4) The telephone corporation complies with written rules of operation of the building and with all rules and regulations of the commission pertaining to the installation. The commission shall adopt regulations that set forth terms that may be included, and terms that shall not be included, in a contract entered into by the owner and the telephone corporation concerning the installation. Regulations for terms that may be included should cover, without limitation, esthetics and architectural compatibility of the installation, security and safety considerations, terms and conditions relating to treatment of hazardous materials (including asbestos) affected by the installation, building safety systems (such as fire sprinklers in telecommunications utility closets), and necessary permits that must be obtained by the telephone corporation. No telephone corporation shall present

to an owner for review or for signature a contract that contains a term prohibited by regulations adopted pursuant to this paragraph.

(5) The owner may require the installation work when the owner is present and may approve or deny the location at which wiring enters the building.

(b) Before completion of construction of an occupied building, an owner of a building in the process of construction shall permit prewiring to provide services in the building provided that all wiring other than that to be directly connected to the equipment of a customer is concealed within the walls of the building and the telephone corporation complies with all provisions of subdivision (a) and of Section 7915.

**Comment.** Section 7912 is drawn from Connecticut General Statutes Section 16-2471(c)-(d). For additional regulatory requirements that must be satisfied to obtain access to a building under this article, see Section 7914.

The types of conditions that should be authorized by regulation under subdivision (a)(4) in an access contract include such matters as:

- (1) Insurance and indemnity requirements for the telecommunications carrier.
- (2) Health and safety, legal compliance, and security and construction considerations that might arise from the proposed installation.
- (3) Compliance with standard telecommunications construction access rules and regulations for buildings.
- (4) Bonding requirements to insure proper installation of facilities.
- (5) Exclusion of non-complying carriers.

*Cf.* Conn. Reg. § 16-247c-6.

#### **§ 7912.5. Removal of wiring and ancillary facilities**

7912.5. If the telecommunications utility closet or other telecommunications service area contains obsolete unused telecommunications equipment, on the request of another telecommunications service provider or on a order of the commission, the owner of the equipment shall remove or replace, at its own expense, the equipment to ensure the provision of upgraded and advanced telecommunications services to occupants of the occupied building. If the owner of the obsolete unused equipment is out of business, the telecommunications provider that seeks to install equipment shall either remove the obsolete unused equipment or pay another entity to remove the obsolete unused equipment, to the extent necessary to install the equipment of the telecommunications provider.

**Comment.** Section 7912.5 has no analogue in Connecticut law.

#### **§ 7913. Limitations on telephone corporation**

7913. No telephone corporation may enter into an agreement with the owner or lessee of, or person controlling or managing, an occupied building served by the provider, or commit or permit an act, that would have the effect, directly or indirectly, of diminishing or interfering with existing rights of a tenant or other occupant of the building to use or avail itself of the services of other telephone corporations.

**Comment.** Section 7913 is drawn from Connecticut General Statutes Section 16-2471(e).

**§ 7913.5. Service on request of building owner**

7913.5. A telephone corporation shall provide service to an occupied building on request of an occupant of the occupied building, to the extent authorized by regulations adopted by the commission.

**Comment.** For adoption of implementing regulations under Section 7913.5, see Section 7914(a).

**§ 7914. Regulation by Public Utilities Commission of right to access**

7914. (a) The commission shall adopt regulations that prescribe the circumstances in which a telephone corporation is permitted access to or required to provide service to an occupied building pursuant to this article. The regulations shall take into account the following, among other considerations:

(1) The number and type of telecommunications service providers already serving the building, and the extent to which joint use of existing facilities is feasible.

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

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

(4) The financial and operational capabilities of the telephone corporation, to ensure that the facilities will be competently installed and completed in a timely manner, and the qualifications and credentials of the installation contractor (including proper licensing, qualifications, and bonding for the work), including a procedure for resolution of any objections by the owner to access by a particular telephone corporation on the basis of prior unsatisfactory experience with that telephone corporation.

(5) The relative hardships to the owner of the building of permitting access and to the telephone corporation of denying access or of requiring service.

(b) The commission shall adopt regulations that prescribe a dispute resolution mechanism if the telephone corporation and the owner of an occupied building are unable to agree on the terms of access sought by the telephone corporation.

**Comment.** Section 7914 has no analogue in Connecticut law. It is intended to limit the potential for multiple separate access proceedings by competitive telecommunications service providers, and ensure that the demanded access or demanded service is otherwise necessary, and to address the possibility of a disagreement between the telephone corporation and property owner over whether the access sought by the telephone corporation or the service demanded by the owner is required under this article. It is also intended to authorize a procedure to disqualify a telephone corporation that has an unsatisfactory prior history with installations in other buildings or that has failed to comply with building rules or Public Utilities Commission rules and regulations.

**§ 7915. Compensation**

7915. (a) The commission shall adopt regulations requiring a telephone corporation, on application by the owner of an occupied building, to reasonably compensate the owner for any occupancy of property associated with the

installation of wiring and ancillary facilities for the provision of service. The regulations may include, without limitation:

(1) A procedure under which an owner may petition the commission for an award of additional compensation.

(2) Authorization for an owner and telephone corporation to negotiate a settlement agreement regarding the amount of compensation.

(3) Establishment of criteria for determining any additional compensation that may be due, including but not limited to costs of maintenance, engineering, supervision, security, and other ongoing building costs directly related to the installation.

(4) Establishment of a schedule of compensation under specified circumstances.

(5) Establishment of fees for an application under this section.

(b) Nothing in this section precludes a telephone corporation and owner from installing equipment or facilities in an occupied building before the commission's determination of reasonable compensation.

(c) Any determination by the commission under this section regarding the amount of compensation to which an owner is entitled is subject to judicial review.

**Comment.** Section 7915 is drawn from Connecticut General Statutes Section 16-2471(f)-(h). *Cf.* Conn. Reg. § 16-247d-1 *et seq.*

#### **§ 7916. Civil penalty**

7916. (a) Any person that the commission determines, after notice and opportunity for a hearing, has failed to comply with a provision of this article shall pay to the state a civil penalty of not more than one thousand dollars for each day following the issuance of a final order by the commission that the person fails to comply with the provision.

(b) Any determination by the commission under this section regarding a persons failure to comply with a provision of this article is subject to judicial review.

**Comment.** Section 7916 is drawn from Connecticut General Statutes Section 16-2471(i) and broadened to apply to all parties, including a telephone corporation.

#### **§ 7917. Operative date**

7917. (a) This article is operative on January 1, 2001.

(b) The commission shall adopt implementing regulations pursuant to this article on or before June 30, 2002. The commission shall take regulatory actions under this article pursuant to a procedure that provides for public notice and comment.

(c) Nothing in this article invalidates or affects an agreement between a telephone corporation and an owner of an occupied building made before the operative date of this article or the operative date of implementing regulations adopted pursuant to this article.

**Comment.** Section 7917 grandfathers in existing agreements.