

Memorandum 98-43**Condemnation by Privately Owned Public Utility**

At its June 1998 meeting the Commission reviewed the law governing exercise of eminent authority by privately owned public utilities, and heard arguments pro and con concerning whether there may be a need for some sort of limitation, particularly in the context of deregulation in the telecommunications industry.

The Commission requested the staff to provide further information concerning the incidence eminent domain, or its threat, by privately-owned public utilities. The Commission also requested the staff to review the statutory, regulatory, and other mechanisms that may already exist to control use of eminent domain by public utilities.

INCIDENCE OF EMINENT DOMAIN (OR ITS THREAT)

The Commission has received input from PUC staff as well as from the Building Owners & Managers Association of California (BOMA) to the effect that exercise of eminent domain, or the threat of eminent domain to coerce an agreement, has increased inappropriately as a consequence of deregulation, particularly but not exclusively in the telecommunications industry. The Commission has received input from incumbent providers in the telecommunications and electrical industries that they rarely if ever exercise their eminent domain authority.

The Commission requested the staff to see what information might be available on this matter. The staff is pursuing this request on several fronts, but any information gathered will not be available until near the time of the Commission's July meeting. We will supplement this memorandum with any statistical or other information we have collected at the time of that meeting.

Meanwhile, published appellate cases provide some insight into public utility eminent domain practices.

Pipeline Corporations

There is at least one industry in which privately owned public utilities actively use their eminent domain authority, as evidenced by the reported cases. A “pipeline corporation” is a public utility that transmits, stores, distributes, or delivers crude oil or other fluids (except water) through pipelines. Pub. Util. Code §§ 227, 228. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline. Pub. Util. Code § 615. No PUC certificate of public convenience and necessity is required. Cf. Pub. Util. Code § 1001.

Recent instances of condemnation by pipeline corporations are illuminated by appellate court decisions.

In *Unocal California Pipeline Co. v. Conway*, 23 Cal. App. 4th 331, 28 Cal. Rptr. 2d 429 (1994), the pipeline corporation (Unocap) sought to condemn a subsurface easement across the property owner’s ranch for the purpose of running an 8-inch pipeline to carry crude oil from Unocap’s offshore platforms to a shipping point. The property owner objected to the condemnation on the theory that Unocap is not a public utility — a public utility cannot have itself as its only customer. The court upheld the right to take, holding that dedication of its property to public use is all that is required to make a pipeline corporation a public utility.

In *Shell California Pipeline Co. v. City of Compton*, 35 Cal. App. 4th 1120, 41 Cal. Rptr. 2d 753 (1995), Shell Oil Corporation had been operating two subsurface pipelines below city streets to run oil products from a refinery to a bulk storage and distribution plant. When negotiations to renew franchise agreements with the city failed, Shell transferred the pipelines to its subsidiary pipeline company (SCPC), a public utility. SCPC immediately filed a condemnation suit against the city to acquire the subsurface pipeline easements. The city objected that (1) the California franchise statutes preclude condemnation of a subsurface pipeline easement on city property and (2) there was no public use or necessity for the acquisition. The court held that the franchise statutes do not supersede the eminent domain statutes, and that public use and necessity had been adequately demonstrated (i.e., the L.A. basin motoring public’s need for cheap gas).

Other Privately Owned Public Utilities

As far as published appellate decisions go, there do not appear to be any in the ‘90s involving privately owned public utilities other than pipelines. Appellate

decisions from the '80s reveal usage of eminent domain authority by both electrical and gas companies. See, e.g., *San Diego Gas & Electric Co. v. Daley*, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (1988) (acquisition of 200 foot wide power line easement); *Pacific Gas & Electric Co. v. Zuckerman*, 189 Cal. App. 3d 1113, 234 Cal. Rptr. 630 (1987) (acquisition of right to inject, store, and withdraw gas from beneath 427 acres of adjacent property).

STATUTORY, REGULATORY, AND OTHER MECHANISMS CONTROLLING EMINENT DOMAIN

What are the statutory, regulatory, and other mechanisms that may already exist to control use of eminent domain by public utilities?

Public Use

The principle protection for private property owners against forcible taking of their property is constitutional. Private property may be taken only for a public use. U.S. Const., amends. V, XIV; Cal. Const. art. I, § 19. This principle is reinforced by statute:

Code Civ. Proc. § 1240.010. Public use limitation

1240.010. The power of eminent domain may be exercised to acquire property only for a public use. Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.

The concept of public use, as interpreted by the courts, is quite broad. The courts have consistently held that acquisition of property for a public utility system is for an acquisition for a public use.

Statutory Delegation of Condemnation Authority

Code of Civil Procedure Section 1240.020 provides that, "The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use." Express statutes authorize privately owned public utilities to condemn for utility purposes. Pub. Util. Code §§ 610-624.

BOMA argues that the statutory grant of authority to telecommunications companies in Public Utilities Code Section 616 predates deregulation in the

telecommunications industry and should not be construed as a broad grant of condemnation authority to newly-authorized local service providers. In a submittal to the Public Utilities Commission it questions “what authority supports the assumption that the Legislature intended the sweeping powers of eminent domain it delegated to monopolistic telephone companies in 1975 to subsequently be equally applicable to a virtually unlimited number of CLC’s operating in an open and competitive telecommunications marketplace.”

Public Utilities Code Section 616 provides that, “A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.” This grant of authority is quite broad, when read in conjunction with Sections 234 (“telephone corporation” defined) and 233 (“telephone line” defined).

Public Necessity

Under California’s eminent domain law, it is not sufficient that property acquired by eminent domain be devoted to a public use. There must also be a public necessity for the acquisition.

Code Civ. Proc. § 1240.030. Public necessity required

1240.030. The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

- (a) The public interest and necessity require the project.
- (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the project.

If the property owner challenges the public necessity for the acquisition, the burden of proof to establish the necessity is on the condemnor. Whereas a public entity may adopt a resolution of necessity that is conclusive on the issue, this option is not available to a privately owned public utility.

Public Utilities Commission

The Public Utilities Commission has broad regulatory authority over privately owned public utilities.

Pub. Util. Code §701. PUC authority over public utilities

701. The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Pursuant to this general authority, PUC has taken steps to control the planning and construction of certain high voltage electric generation, transmission/power/distribution line facilities, and substations in California. The rules are set out in General Order No. 131-D, which provides for notice to property owners and the opportunity for a hearing by PUC before approval of the project.

While there is no express authority in the Public Utilities Code for PUC to control use of eminent domain by privately-owned public utilities, the Law Revision Commission staff believes that Section 701 provides authority, should PUC choose to exercise it.

However, an argument can be made that the broad authority provided in Section 701 is not sufficient to allow PUC regulation of eminent domain in light of the express and unlimited statutory grants of authority to privately owned public utilities in Sections 610-624. Cf Cal. Const. art. XII, §§ 3 (privately owned public utilities subject to control by Legislature), 5 (power of Legislature to delegate to PUC), 6 (power of PUC to establish rules for public utilities).

It is likely that PUC will be unwilling to assert control over exercise of eminent authority by privately owned public utilities absent express authority.

Respectfully submitted,

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Executive Secretary