

Memorandum 98-68

**Eminent Domain Law: Condemnation by Privately Owned Public Utility
(Draft of Tentative Recommendation)**

Attached is a draft recommendation to make clear the authority of the Public Utilities Commission to control exercise of condemnation power by privately owned public utilities. The Commission adopted this approach at its July meeting.

One concern was that the authority given the Public Utilities Commission should not create an automatic right of appeal in a property owner. We believe the draft does this adequately:

Pub. Util. Code § 610 (amended). General provisions

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.

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, (2) adoption of a requirement that a privately owned public utility obtain permission

from the Public Utilities before exercising condemnation power, or
(3) provision for a property owner to appeal a proposed taking to
the Public Utilities Commission.

If the draft appears satisfactory, we will circulate the tentative
recommendation for comment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Condemnation by Privately Owned Public Utility

September 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN November 15, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The power of privately owned public utilities to condemn property predates deregulation of the utilities. Deregulation foreshadows an increase in the number of privately owned utilities, engaged in aggressive competition with minimal governmental oversight. This situation was not contemplated at the time privately owned public utilities were granted eminent domain power.

The Law Revision Commission recommends that the law make clear the authority of the Public Utilities Commission to regulate exercise of eminent domain authority by privately owned public utilities to the extent the Public Utilities Commission determines is appropriate in light of the circumstances.

The proposed law is consistent with the general authority of the Public Utilities Commission to supervise and regulate public utilities, but will eliminate any question about Commission's authority to act in this area. It will enable the Commission to monitor experience with and complaints about condemnation in a deregulated environment, and to act in a way appropriately tailored to the problems that develop.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

CONTENTS

SUMMARY OF TENTATIVE RECOMMENDATION	2
CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY	5
BACKGROUND	5
INCIDENCE OF CONDEMNATION EXERCISE BY PRIVATELY OWNED PUBLIC UTILITIES	5
General Considerations	5
Pipeline Corporations	6
Telephone Service Providers	7
CONSTRAINTS ON CONDEMNATION EXERCISE BY PRIVATELY OWNED PUBLIC UTILITIES	7
Public Use	7
Statutory Delegation of Condemnation Authority	8
Public Necessity	8
Consent of Public Entity	8
Control by Public Utilities Commission	9
RECOMMENDATION	10
PROPOSED LEGISLATION	13
Pub. Util. Code § 610 (amended). General provisions	13

CONDEMNATION BY PRIVATELY OWNED PUBLIC UTILITY

BACKGROUND

Privately owned public utilities are authorized by statute to exercise the power of eminent domain.¹ This authority dates from an era when the numbers of privately owned public utilities were limited, and their operations were superintended by the Public Utilities Commission in a regime of monopoly regulation.

Circumstances have changed. Deregulation has occurred in a number of public utility industries, with a corresponding increase in the number of competitors and decrease in Public Utilities Commission oversight.² For example, by mid-1998, hundreds of competitors had been issued certificates of public convenience and necessity by the Public Utilities Commission to compete as local telecommunications service providers.

Deregulation has been accompanied by complaints of inappropriate exercise or threatened exercise of condemnation power by competitors.³ While the number of complaints to date are limited, the Law Revision Commission believes that some constraint on unfettered exercise of eminent domain power by a privately owned public utility may be appropriate.

INCIDENCE OF CONDEMNATION EXERCISE BY PRIVATELY OWNED PUBLIC UTILITIES

General Considerations

Historically, the incidence of exercise of condemnation power by privately owned public utilities has been low. Superior court records indicate that privately owned public utility filings constitute less than one percent of all eminent domain filings; essentially all the rest are public entity filings.⁴

Based on examination of superior court filings and statistics,⁵ reports from practitioners, and published appellate reports, the Law Revision Commission concludes there does not appear to be an immediate significant increase in privately owned public utility filings resulting from public utility deregulation.

1. Pub. Util. Code §§ 610-624. See, *The Eminent Domain Law*, 13 Cal. L. Revision Comm'n Reports 1001, 1017-1018 (1975).

2. See, e.g., *Public Utility Deregulation*, 27 Cal. L. Revision Comm'n Reports 439 (1997).

3. See, e.g., *Eminent Domain Law: Condemnation by Privately Owned Public Utility*, Cal. L. Revision Comm'n Staff Memorandum 98-40 (May 19, 1998).

4. Filings by private persons other than privately owned public utilities are rare.

5. Based on examination of superior court records for recent years in Alameda, Contra Costa, San Diego, San Francisco, and Santa Clara counties.

It can be argued that the number of filings is not indicative of the full impact of condemnation power, since the mere threat of its exercise by a privately owned public utility may have a coercive effect on a property owner, resulting in a settlement without the filing of an eminent domain proceeding.⁶ This aspect of the condemnation power of privately owned public utilities is not possible to quantify.

Pipeline Corporations

The economics of exercise of eminent domain power by privately owned public utilities are illustrated by recent published appellate court decisions involving pipeline corporations. A “pipeline corporation” is a public utility that transmits, stores, distributes, or delivers crude oil or other fluids (except water) through pipelines.⁷ A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.⁸ No Public Utilities Commission certificate of public convenience and necessity is required.⁹

In *Shell California Pipeline Co. v. City of Compton*,¹⁰ 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, a public utility, which then filed a condemnation suit against the city to acquire the subsurface pipeline easements.

In *Unocal California Pipeline Co. v. Conway*,¹¹ the pipeline corporation 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 Unocal’s offshore platforms to a shipping point.

These are not isolated instances of pipeline corporations exercising eminent domain authority for their economic advantage. Practitioner experience¹² and superior court filings¹³ show the same pattern.

6. It can be argued that settlements are more likely in a regulated monopoly regime, since a public utility seeking to acquire property for its system could afford to take a liberal negotiating posture — it could recoup its costs through rate setting procedures before the Public Utilities Commission. With deregulation and competition, privately owned public utilities are subject to economic pressures that may make settlement more difficult. Eminent domain power becomes an economic device in a competitive industry.

7. Pub. Util. Code §§ 227, 228.

8. Pub. Util. Code § 615.

9. Cf. Pub. Util. Code § 1001.

10. 35 Cal. App. 4th 1120, 41 Cal. Rptr. 2d 753 (1995).

11. 23 Cal. App. 4th 331, 28 Cal. Rptr. 2d 429 (1994).

12. A survey of eminent domain defense lawyers conducted for the Commission concerning increases in public utility condemnation identified the pipeline easement condemnations that flared up a few years ago.

13. Examination of recent superior court filings in Alameda County reveal, for example, an eminent domain proceeding filed by Chevron Pipe Line Company as plaintiff.

Telephone Service Providers

Existing law authorizes a telephone service provider to condemn any property necessary for the construction and maintenance of its system, wireless or otherwise.¹⁴ It is in this area that the Law Revision Commission has received complaints of exercise of eminent domain power.

The facts in *TCG San Francisco v. Britphil & Co.* are not untypical.¹⁵ In that case the telephone service provider, operating under a certificate of public convenience and necessity issued by the Public Utilities Commission, had been running fiber optic cable in a commercial building pursuant to an interim license agreement, for the purpose of providing high speed digital phone line service to a tenant in the building. The telephone service provider and the building owner entered negotiations for a long-term license agreement. When negotiations broke down, the building owner terminated the interim license. The telephone service provider thereupon filed an eminent domain proceeding to condemn a permanent easement to enable it to continue to install and maintain fiber optic cable in the building, and sought an order for immediate possession. The case was settled.

Problems of this type may be more common in the telecommunications industry than in other public utility sectors for a number of reasons: (1) deregulation in that industry is further along than in other industries; (2) competition in that industry is more intense than in other industries; and (3) unlike other industries, the telecommunications industry is open to competition in the transmission and distribution area, which involves physical facilities.

CONSTRAINTS ON CONDEMNATION EXERCISE BY PRIVATELY OWNED PUBLIC UTILITIES

Exercise of condemnation power by a privately owned public utility is not without constraints. A number of statutory, regulatory, and other mechanisms already exist to control use of eminent domain authority.

Public Use

Private property may be taken only for a public use.¹⁶ The courts have consistently held that acquisition of property for a public utility system is for a public use.¹⁷

14. See Pub. Util. Code §§ 216 (“public utility” defined), 233 (“telephone line” defined), 234 (“telephone corporation” defined), 610 (application to public utilities), 616 (eminent domain authority of telephone corporation).

15. *San Francisco County Superior Court*, Case No. 987679. See also *TCG San Diego v. Equitable Life* (San Diego County Superior Court 10/1/97); *TCG San Diego v. HG Fenton Material* (San Diego County Superior Court 12/4/96).

16. U.S. Const., amends. V, XIV; Cal. Const. art. I, § 19; Code Civ. Proc. § 1240.010.

17. Even an acquisition for the benefit of one customer may be for a public use if the utility has dedicated its facilities to public use and submitted to the jurisdiction of the Public Utilities Commission. *Unocal California Pipeline Co. v. Conway*, 23 Cal. App. 4th 331, 28 Cal. Rptr. 2d 429 (1994).

Statutory Delegation of Condemnation Authority

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 the property for that use.¹⁸ Statutes authorize private persons to condemn in a number of circumstances.¹⁹ Privately owned public utilities may condemn for utility purposes.²⁰

An argument can be made that because the statutory grants of authority to privately owned public utilities predate deregulation they should not be construed as a broad grant of condemnation power to newly-authorized competitors. There is no appellate decision on this point.

Public Necessity

An authorized condemnor may not take property for public use absent public necessity for the acquisition.²¹ The condemnor must establish all of the following:

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

Whereas a public entity may adopt a resolution of necessity that is conclusive on the issue, that option is not available to a privately owned public utility, which bears the burden of proof on the issue. The courts have been liberal in finding public necessity for private public utility acquisitions.²²

Consent of Public Entity

Before certain private condemnors may acquire property by eminent domain, they must obtain consent of the local public entity in whose jurisdiction the

18. Code Civ. Proc. § 1240.020.

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

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

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

20. Pub. Util. Code §§ 610-624.

21. Code Civ. Proc. § 1240.030.

22. See, e.g., *Shell California Pipeline Co. v. City of Compton*, 35 Cal. App. 4th 1120, 1126, 41 Cal. Rptr. 2d 753, 759 (1995), in which the court found public necessity for pipeline easements that "would allow Shell to provide lower priced gasoline to the public and to transport oil products by subsurface pipeline rather than tanker trucks."

property is located is required.²³ The local public entity must, in addition to making standard public necessity findings, also determine that the hardship to the private condemnor if the taking is denied would outweigh the hardship to the owners of the property if the taking is allowed.²⁴

Acquisitions by certain quasi-public entities may not be made unless the state administrator having jurisdiction over the quasi-public entity authorizes it.²⁵

These requirements do not apply to condemnation by a privately owned public utility.

Control by Public Utilities Commission

The Public Utilities Commission has broad regulatory authority over privately owned public utilities.²⁶ The Law Revision Commission believes this authority is sufficient to enable the Public Utilities Commission to curb any abuse of condemnation power by a privately owned public utility, should the Public Utilities Commission choose to exercise it.

However, an argument can be made that the general grant of regulatory authority is not sufficient to allow Public Utilities Commission regulation of condemnation exercise in light of the express later-enacted unlimited statutory grants of authority to privately owned public utilities.²⁷

To date, the Public Utilities Commission has attempted to assert control over exercise of condemnation power by privately owned public utilities only to a

23. See Code Civ. Proc. §§ 1245.310-1245.390 (resolution consenting to eminent domain proceeding by quasi-public entity); see also Code Civ. Proc. § 1245.325 (private person acquiring appurtenant easement deemed to be quasi-public entity for purposes of article).

24. Code Civ. Proc. § 1245.340(c)(4).

25. Specifically:

- A nonprofit hospital may not exercise the power of eminent domain unless the Director of the Office of Statewide Health Planning and Development, after a public hearing, adopts a certificate of necessity for the acquisition. Health & Saf. Code § 127050.
- A limited dividend housing corporation may not exercise the power of eminent domain unless the Commission of Housing and Community Development adopts a resolution of necessity for the acquisition. Health & Saf. Code § 34875.
- A land chest corporation may not acquire property by eminent domain or otherwise unless the Commissioner of Corporations has approved the project. Health & Saf. Code § 35167.

26. Pub. Util. Code § 701:

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.

A public utility must obtain a certificate of public convenience and necessity from the Public Utilities Commission before it may begin construction or extension of its line, plant, or system. Pub. Util. Code § 1001.

27. Pub. Util. Code §§ 610-624. Cf Cal. Const. art. XII, §§ 3 (privately owned public utilities subject to control by Legislature), 5 (power of Legislature to delegate to Public Utilities Commission), 6 (power of Public Utilities Commission to establish rules for public utilities).

limited extent.²⁸ In the current political climate of deregulation, it is likely that the Public Utilities Commission will not be willing to act absent express authority.

RECOMMENDATION

When the Eminent Domain Law was enacted in 1975, the existing condemnation authority of privately owned public utilities was continued without change. The intent was “to preserve and clarify the authority of public utilities to exercise the power of eminent domain to acquire property necessary to carry out their *regulated* activities.”²⁹

The opening of utilities industries to competition and the anticipated end to monopoly regulation of privately owned public utilities erodes inherent restraints on exercise of condemnation power³⁰ and creates the possibility of greatly expanded exercise not contemplated at the time the authority was granted. Competition is likely to drive utility companies to seek the greatest economic advantage in the cost and location of their facilities. Early experience suggests that condemnation will become an important competitive tool in the deregulated environment.

This concern is not limited to private property owners. Experience in the pipeline corporation cases³¹ portends future problems with easements in public streets for transmission lines.³²

The Law Revision Commission believes the law should make clear that the Public Utilities Commission may assert appropriate regulatory authority over exercise of condemnation power by a privately owned public utility.³³ This is

28. For example, the Public Utilities Commission 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 the Commission before approval of the project.

29. *The Eminent Domain Law*, 13 Cal. L. Revision Comm’n Reports 1001, 1018 (1975) (emphasis added).

30. These included (1) limitations on the number of entities seeking to exercise the power; (2) the ability to pay a premium for property, or use an alternate but less efficient location, recouped through the monopoly rate system; and (3) the restraining effect of the Public Utilities Commission’s regulation of all the utility’s activities.

31. See, e.g., *Shell California Pipeline Co. v. City of Compton*, 35 Cal. App. 4th 1120, 41 Cal. Rptr. 2d 753 (1995).

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

33. The Commission considered and rejected suggestions that (1) privately owned public utilities be denied condemnation power and (2) condemnation by a privately owned public utility be subject to approval by the local public entity in whose jurisdiction the property is located. Public utility services are critical to the public, and a means should be provided, whether restricted or unrestricted, to ensure that the

consistent both with the Public Utilities Commission's general regulatory authority and with existing statutes that provide state agency control over acquisition practices of other quasi-public condemnors.

Nothing in this recommendation would require the Public Utilities Commission to exercise this regulatory authority. In fact, empirical data does not indicate overuse of eminent domain authority at present. But the law should be clear so that the Public Utilities Commission may act without question as to its authority if the need arises.

The recommended legislation provides discretion to the Public Utilities Commission, which is in a position to monitor activities of privately owned public utilities and to hear complaints about abuses. Any regulations might be narrowly tailored to the types of abuses prevalent, or to the particular industry in which they occur, if that appears appropriate.

necessary property is available for public use. Utility service is a matter of statewide concern, and a locality ought not to be in a position to frustrate the utility service by precluding otherwise appropriate condemnation. Experience demonstrates ongoing friction between privately owned public utilities and local public entities.

1 PROPOSED LEGISLATION

2 **Pub. Util. Code § 610 (amended). General provisions**

3 Section 1. Section 610 of the Public Utilities Code is amended to read:

4 610. (a) This article applies only to a corporation or person that is a public
5 utility.

6 (b) The commission may regulate exercise of the authority provided in this
7 article to the extent and in the manner that it determines is appropriate.

8 **Comment.** Subdivision (b) is added to Section 610 to make explicit the Public Utilities
9 Commission's authority to regulate exercise of condemnation power by privately owned public
10 utilities. This provision is an elaboration of existing plenary authority of the Public Utilities
11 Commission, found in such provisions as Sections 701, 702, 761, and 1001, to regulate operations
12 of privately owned public utilities. The amendment is intended to eliminate any argument that the
13 specific grants of condemnation power in this article are exempt from regulation by the Public
14 Utilities Commission.

15 Nothing in subdivision (b) requires the Public Utilities Commission to regulate exercise of
16 condemnation power by a privately owned public utility, or gives a property owner the right to
17 object to such exercise before the Public Utilities Commission. The provision merely makes clear
18 the authority of the Public Utilities Commission to act in any way it determines is appropriate, in
19 the circumstances. Examples of actions that may be appropriate in the circumstances may include,
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21 utility before it may take property by eminent domain, (2) adoption of a requirement that a
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24 Public Utilities Commission.
