Study EmH-451 October 13, 1999

First Supplement to Memorandum 99-65

Condemnation by Privately Owned Public Utility: PUC Comments

Attached as an Exhibit is a letter from Joel Perlstein on behalf of the Public Utilities Commission and its Legal Division. The letter makes three points:

1. The PUC supports further Law Revision Commission work on the "Connecticut" administrative approach to telecommunications access to buildings. Because it balances the interests of landlords and telephone corporations, this type of approach provides a better tool than eminent domain to resolve these conflicts.

2. With respect to judicial review of PUC decisions under such an administrative approach, existing general statutes governing judicial review of PUC decisions should suffice. There is no need to further complicate an already complex scheme with special rules for judicial review of telecommunications access provisions.

3. The current Commission draft would grandfather in existing access agreements between utility companies and building owners. This may be at odds with provisions of SB 177 and the PUC's Rights of Way Decision prohibiting discriminatory agreements. The grandfathering provision should either be eliminated or revised to take account of the anti-discrimination laws.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA
GRAY DAVIS, *Governor*

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

October 13, 1999

VIA FACSIMILE AND FIRST CLASS MAIL

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

Re: Memorandum 99-64 Condemnation by Privately Owned Public Utility (Status of 1999 Legislation)

Dear Mr. Sterling:

I am writing on behalf of the California Public Utilities Commission (PUC) to support further Law Revision Commission (LRC) action on its telecommunications access project. While SB 177 was being considered by the Legislature, the PUC twice voted to support the bill if it was amended, inter alia, to incorporate the "Connecticut" approach providing telephone companies with a statutory right of access to occupied buildings. As you are aware, this approach was not incorporated into SB 177. Accordingly, the Commission continues to believe that additional legislation adapting the Connecticut approach for use in California would be desirable.

As I explained in a prior memo to the PUC, the Connecticut approach gives competing telecommunications carriers a statutory right of access to occupied buildings so long as they comply with certain conditions designed to protect the interests of landlords. Because it specifically balances the interests of landlords and telephone corporations, such an approach provides a better tool (than eminent domain under existing law) for ensuring that tenants will be able to choose freely among competing telecommunications services.

Because the Law Revision Commission process could help resolve some of the outstanding issues over how to adapt the Connecticut approach for use in California, we recommend that the LRC resume its work on this project.

Although the PUC as a body has not taken a position on how the Connecticut approach should be adapted for use in California, the PUC's Legal Division does wish to make the following comments on the current LRC Staff Draft and accompanying memo. First, with regard to judicial review (Memo 99-64 at p.4), the Legal Division recommends that this statute not provide

a procedure for judicial review that would be different from what would otherwise apply under existing law. Existing statutes, recently amended by the Legislature, provide a comprehensive and complex scheme for judicial review of Commission decisions. We see no reason to make judicial review of Commission decisions even more complex by providing for any special treatment of decisions rendered pursuant to the proposed statute.

Second, Legal Division has concerns with language in the current staff draft that is intended to grandfather existing agreements between telephone corporations and owners of occupied buildings. The current Staff Draft provides, in section 7917(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 [January 1, 2001] or the operative date of implementing regulations adopted pursuant to this article.
>
> **Comment.** Section 7917 grandfathers in existing agreements.

This grandfathering in of agreements entered into before January 1, 2001 seems inconsistent with the provisions of SB 177, which has added section 626 to the Public Utilities Code to provide:

> On or after January 1, 2000, a public utility may not enter into any exclusive access agreement with the owner or lessor of, or a person controlling or managing, a property or premises served by the public utility, or commit or permit any other act, that would limit the right of any other public utility to provide service to a tenant or other occupant of the property or premises. (Emphasis added.)

This grandfathering provision also seems inconsistent with the PUC's Rights of Way Decision D.98-10-058 (applications for rehearing pending), in which the PUC stated:

> If, after a hearing, we find that a carrier's [telephone corporation's] agreement or arrangement with a private building owner is unfairly discriminatory with respect to other carriers, we shall direct that within 60 days, the agreement be renegotiated. Failing that, at the end of 60 days, a fine shall be imposed ranging from $500 to $20,000 per day based on the number of lines served in the building until the agreement is renegotiated to remove the discrimination. (Conclusion of Law No. 74.)

The PUC's Legal Division recommends that proposed Public Utilities Code section 7917(c) and the accompanying comment be eliminated or revised to reflect the provisions of D.98-10-058 and SB 177.

Very truly yours,

Joel T. Perlstein
P.U. Counsel IV, Legal Division

JTP:mfd