

ORIGINAL

Decision No. ~~75325~~

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application }
of the CITY OF VISALIA, for a }
railroad crossing over the }
SOUTHERN PACIFIC COMPANY'S rail- }
road in Section 29, Township 18 }
south, Range 25 east, M.D.B. & M. }

Application No. 48658
(Filed July 26, 1966)

N. O. Bradley, City Attorney, for applicant.
Harold S. Lentz and L. W. Telford, for
Southern Pacific Company, protestant.
M. E. Getchel, for the Commission staff.

O P I N I O N

This matter is on rehearing. It is an application by the City of Visalia seeking authority to open a crossing at grade over the tracks of Southern Pacific Company at Bridge Street in Visalia. The Commission previously entered Decision No. 72364 in this matter on May 2, 1967. A petition for rehearing was filed. The Commission granted a rehearing in Decision No. 72756 entered on July 11, 1967. The rehearing was held before Examiner Jarvis at Visalia on March 26 and 27, 1968. The matter was submitted subject to the filing of briefs and proposed findings of fact and conclusions of law, which have been received.

Before considering the merits of the matter we first deal with one preliminary point. Decision No. 72364 did not list as a party to the proceeding Pacific Motor Trucking Company (hereinafter referred to as PMT). In the amendment to the petition for rehearing it is contended that the Commission has "failed and refused to acknowledge that said trucking company (PMT) is a party to the proceeding." A party to a Commission proceeding is one who has

appeared in the proceeding or one over whom jurisdiction has been obtained by proper notice or service of process. We are not here concerned with an attempt by anyone to obtain jurisdiction over PMT but with an attempt by PMT to voluntarily appear as a party of record. "An 'appearance' is generally defined as the formal proceeding by which a party to an action submits himself to the jurisdiction of the court. It includes the act of either a plaintiff or a defendant in coming into court." (5 Cal. Jur. 2d p. 3.) The ways in which an appearance can be made in Commission proceedings are set forth in Rules 53 and 54. Among the effects of an appearance making someone a party to a Commission proceeding are to subject the person making the appearance to the Commission's Code of Ethics (Rule 1), entitle the party to participate in the proceeding, make motions and produce evidence (Rules 53-57), entitle the party to copies of exhibits, unless otherwise provided (Rule 71), entitle a party to petition for a proposed report, and, if the petition is granted file exceptions and replies to the proposed report (Rules 78-81), entitle the party to service upon him of decisions or orders in the proceeding (Rule 82), entitle the party to petition for rehearing (Public Utility Code §1731, Rule 85) and entitle the party to petition for judicial review (Public Utility Code §1756).

The Commission does not condone the practice of a third person attempting to make an appearance for a party whom he does not represent and who is not physically present at the hearing. Such a procedure, if permitted, defeats the requirements of Rule 1; frustrates the disclosure provisions of Rule 53; and burdens the other parties and the Commission in arranging for future hearing dates and providing copies of documents, notices, etc. It causes procedural problems.

On the first day of hearing counsel for Southern Pacific stated:

"MR. LENTZ: Mr. Examiner, I am appearing only for Southern Pacific Company as protestant; but also for Southern Pacific's common carrier called Pacific Motor Trucking Company, and appearing for both parties is Mr. L. W. Telford."

The Reporter's transcript incorrectly indicates a joint appearance by Messrs. Lentz and Telford for both Southern Pacific and PMT. There is no indication that Mr. Telford was physically present at the hearing and the record clearly indicates that he took no direct part in the original hearing or the rehearing. Decision No. 72364 indicates that Lentz and Telford appeared for Southern Pacific. This was correct. Lentz, who represented Southern Pacific and was physically present could indicate that another attorney was also representing his client. However, Lentz specifically disclaimed that he was representing PMT. There is no basis for his entering an appearance for someone else to represent PMT. The petition for rehearing was in the names of Lentz and Telford, as attorneys, for Southern Pacific and PMT, and signed by Lentz. The amendment to the petition for rehearing is in both names, as attorneys, for Southern Pacific and PMT, and signed by Telford. As indicated, Telford took no direct part in the rehearing. At the commencement of the rehearing the Presiding Examiner indicated:

"Let the record show that the appearances that previously appeared at the original hearing are here present: Mr. Bradley, the City Attorney, representing the applicant; and Mr. Lentz, one of the appearances representing the Southern Pacific Company, protestant.

"Mr. Getchel is appearing for the Commission staff.

"If there are any other appearances that I am not aware of, please notify me at the next recess and we will make appropriate provision."

At the conclusion of the rehearing the Presiding Examiner ordered that "the matter is submitted subject to the filing of briefs, if the parties desire, and subject to mandatory filing of fact and conclusions of law..." Proposed findings of fact and conclusions of law were filed by Visalia, the Commission staff, and Lentz, as attorney, for Southern Pacific. No proposed findings and conclusions were filed in behalf of PMT. The Commission is of the opinion and finds that PMT did not enter a proper appearance in this proceeding and is not a party hereto. However, even if it be assumed, for the sake of discussion only, that PMT did enter a proper appearance and was a party to the proceeding, that appearance should be struck because of its failure to file proposed findings and conclusions, as required. PMT should not be permitted to have the status of a party without the obligations of one. It should not be allowed to be in a position where it can sit back and await the decision herein and, if it does not like the findings and conclusions, petition, as a party, for rehearing or judicial review when it has not placed its contentions before the Commission in advance of this decision.

By the foregoing we only hold that PMT is not a party to this proceeding and that the contention that it should be accorded that status is erroneous. We do not mean to imply that any evidence dealing with PMT, adduced by the parties, which may be relevant to any issue herein has not been fully considered.

We now consider the merits of the application. It raises three material issues: (1) Should a grade crossing at Bridge Street and the Southern Pacific tracks be authorized? (2) If a crossing is authorized, what protection or other conditions should be required in connection therewith? and (3) If a crossing is authorized, what amount of money should be required to be advanced pursuant to Public Utilities Code Section 1202.1?

Visalia is the county seat of Tulare County and has a population of approximately 25,000 people. It is traversed by two railroads, the Southern Pacific and Santa Fe. Southern Pacific goes through the city in an east-west direction along the northern edge of the commercial area. Santa Fe's Visalia branch goes through the city in a north-south direction in the eastern part of the commercial area. Both railroads run in streets for part of the distance through the city. Santa Fe runs on Santa Fe Avenue and Southern Pacific's tracks are on Oak Street.

Bridge Street is the next parallel north-south street to the west of Santa Fe Avenue followed by Garden and Church Streets. The next two streets to the west are Court and Locust Streets. They are paired one-way streets forming part of State Highway 63. The next parallel main street to the east of Santa Fe Avenue is Burke Street, which does not go through to the northern edge of the settled area in Visalia. Shortly before this application was filed the State Department of Public Works converted State Highway 198 into a freeway. This was done by constructing a depressed roadway, below ground level, across Visalia from east to west. Nine bridges were constructed over the freeway. As a result, the number of direct north-south streets in Visalia was reduced from 26 to 9. Bridge Street crosses over the freeway. The freeway crossovers nearest to Bridge Street are Court and Locust Streets pairing to the west, and Burke Street to the east.

Bridge Street was formerly a through street which crossed the Southern Pacific tracks at grade. It was closed in 1915 when the Commission ordered the construction of new passenger and freight depots in Visalia. (Visalia Board of Trade v. Southern Pacific Company, 5 C.R.C. 888.) In 1915, in order to provide for the

construction of the depots and closing of Bridge Street, Visalia vacated a portion of Bridge Street 66 feet in width and 156.75 feet in length. The area vacated runs from the center of Oak Street to an alley which parallels Oak Street and Center Street, the next street south of Oak. The alley connects with Garden Street to the west and Santa Fe Avenue to the east. In order to open the requested crossing it will be necessary for Visalia to acquire the area previously vacated, which is now owned by Southern Pacific, by agreement or condemnation. The indications at the hearings herein are that if Visalia is to acquire the area a condemnation proceeding will be necessary. However, neither the question of condemnation nor the question of just compensation is directly before the Commission in this proceeding.

There are presently four tracks over which the proposed crossing would pass if no alterations are made: a branch line track, two industry tracks and a public team track. Three of the tracks run on Oak Street. The team track is in the area which was vacated in 1915 and presently owned by Southern Pacific and is approximately 80 feet south of the other tracks. There is also located in the vacated area a portion of the Southern Pacific freight depot. Traffic to the freight depot presently crosses the team track. If Bridge Street is opened, even with alterations, it will still be necessary to leave in place and operation three of the tracks: the branch line track, team track and one industry track. One industry track, which serves the Southern Pacific depot, could be removed.

Bridge Street is part of the select street system in Visalia. As part of the select street system it is eligible for the expenditure of State collected gas tax funds which revert to Visalia. However, if the crossing is not opened, Visalia will not

lose any gas tax monies. Visalia takes the position and introduced evidence that its estimated population by 1980 will be between 60,000 to 70,000 persons and that by 1980 all the select streets will need to be developed to accommodate the projected population. It introduced evidence that its present areas of growth are (1) an area bounded by Center, Acequia, Court and Liberty Streets which is in the vicinity of the requested crossing; (2) an area near Ben Maddox Way and Houston Avenue, which is to the northeast of the requested crossing; (3) an area near Tulare and Santa Fe Avenues, which is to the south of the requested crossing; (4) an area near West Street and Santa Fe and Caldwell Avenues, which is south of the crossing and (5) an area between the St. John's River and State Highway 216, which is northeast of the crossing. The record shows that the Visalia Unified School District has indicated that its next high school will be built in the area between the St. John's River and State Highway 216. Visalia introduced evidence to show that as a result of the recent development there has been generated more traffic traversing the city diagonally from southwest to northeast; that opening the crossing would help meet the needs of this traffic; that opening the crossing will help relieve traffic on Center Street and that opening the crossing will help increase traffic use of Garden Street and Santa Fe Avenue.

Southern Pacific and the Commission staff attack some of the evidence adduced by Visalia. Much ado is made over the fact that Visalia's estimates of future traffic at the crossing were not based on "origin and destination studies." Findings to this effect are proposed by Southern Pacific and the staff. Visalia was entitled to present its case in a manner of its own choosing. There is no special magic connected with origin and destination studies which makes them the only mode of proof to show projected traffic.

Visalia presented an exhibit with traffic counts of 46 street intersections or railroad crossings in the area here involved. It also presented exhibits which graphically portrayed the traffic counts. The director of planning of Visalia gave his opinion as to the meaning of the traffic counts with respect to the proposed crossing and he was subjected to extensive cross-examination on this point. The Visalia city engineer also gave opinions about traffic with respect to the proposed crossing based on his "general knowledge of this city, and having made the same type of general judgments on previous crossings we opened ... and we were about correct." The opinions of the city engineer and director of planning, together with the traffic data in the record, supply an ample basis for considering the prospective traffic over the crossing. If Southern Pacific or the staff believed that an origin and destination study was critical to their positions herein, they were at liberty to conduct such a study and offer it in evidence.

Southern Pacific also contends that Visalia has not sufficiently investigated or considered the possibility of opening a crossing at Burke Street instead of the proposed Bridge Street crossing. Burke Street is the second parallel street to the east of Bridge Street.

The Visalia city engineer testified that he did not develop statistics on a Burke Street crossing because he did not consider it an alternative to one at Bridge Street. The planning director testified that Bridge Street was closer than Burke Street to the central business area and would better serve the needs of north-south traffic. The record indicates that at the present time Burke Street is not a through north-south street. It is included in the select street system but there are no present plans to extend

it to make it a through street. In the circumstances we find that it was not necessary for Visalia to make a detailed investigation of the possible alternative opening of a crossing at Burke Street for this proceeding.

Southern Pacific and the staff contend that authorization to open the crossing should not be given. They argue that it is against Commission policy to permit the opening of crossings at grade, unless absolutely necessary; that opening the crossing would unduly interfere with the operations of Southern Pacific and that opening the crossing is economically unjustified.

The evidence indicates that Visalia is served by one freight train a day, six days per week. There occasionally pass over the crossing detoured trains or special livestock trains. The Commission is of the opinion that these occasional, infrequent movements have no significant bearing on the issues presented herein. During seven months of the year the daily freight train arrives in Visalia about 4:00 p.m. During the other five months it arrives between noon and 2:00 p.m. After the train arrives it is presently switched and rearranged at the location of the proposed crossing. The duration of the switching operation ranges from 10 minutes to more than one hour. The regular freight train is in Visalia, although not necessarily in the vicinity of the proposed crossing, from one to three hours per day. Sometimes the time is increased because the train crew goes to lunch. There is presently no other place in Visalia where similar switching can take place. If the crossing is opened and Bridge Street is not continuously closed during switching operations the time necessary to complete switching will increase. Southern Pacific introduced evidence which, if completely accepted, would indicate that if the crossing were not closed during switching operations Southern Pacific would incur

additional costs of approximately \$13,038 per year. However, the record indicates that Southern Pacific owns property along its trackage to the east of the crossing upon which a 20-car runaround track could be constructed. If such a runaround track were constructed the general switching movements in Visalia could be moved away from the Bridge Street area. The cost of constructing such a runaround track would be approximately \$25,200. Even if a runaround track is constructed there will still be some daily train movements over the proposed crossing. The estimated cost of constructing the proposed crossing is \$10,140.

Southern Pacific and the staff also contend that the crossing should not be opened because Garden Street and Santa Fe Avenue, the first westerly and easterly streets parallel to Bridge Street, are presently not carrying their full capacity of traffic. Visalia presented evidence that opening the crossing would change traffic patterns and result in a significant increase in traffic on Garden Street and Santa Fe Avenue, thereby relieving congestion on other streets. By looking to the traffic situation of Visalia as a whole and what the city seeks to accomplish by the crossing here involved, the Commission finds that the existence of the presently opened grade crossings at Garden Street and Santa Fe Avenue, while a factor to be considered, does not compel or induce it to deny the application on that basis.

Southern Pacific contends that one reason why the proposed crossing is economically unjustified is because it will cause PMT to relocate its trucking terminal in Visalia. The record indicates that if the crossing is opened, it will be necessary for Southern Pacific to remove approximately 23 feet of its station building and loading dock. This portion of the building and loading dock is

used by PMT in its Visalia operations. PMT is a highway common carrier. Although it is a wholly owned subsidiary of Southern Pacific its trucking operations are not railroad operations with respect to the proposed crossing. The fact that this particular highway common carrier is owned by a railroad corporation does not make it a railroad corporation. PMT's status in this proceeding is no different than any third party tenant or lessee to whom Southern Pacific may have let space in its depot. (Mill Valley, 47 C.R.C. 176, 178.) Of course, the effect of opening the proposed crossing on any third party is relevant to the question of economic justification.

If the crossing is opened and part of the depot removed, PMT could continue to use the depot for a short time, but if its business increased it would need to find other quarters. If it relocated it would seek another on-rail situs. There is evidence that the cost of constructing a similar building in a lower rated fire area would be approximately \$14,000. This figure is, however, misleading. PMT does not own the building. It is a tenant or lessee. Its damages, in the event of a condemnation proceeding, relate to the value and or severance value of what is taken, namely, a leasehold or tenancy interest. It is Southern Pacific's building which would be partially taken. Even if it be assumed for the purposes of discussion that replacement cost may be looked to, the lessee is not entitled to the replacement cost of the building. There is conflicting evidence in this record, which need not be resolved, about the damage to Southern Pacific if a portion of its depot is condemned. There is evidence that the remaining portion of the depot can be used for depot purposes and rented for private storage. In any event, if the condemnation of a portion of the depot results in the termination of a lease by PMT, this may be an

element in determining the value of what has been taken. (Evidence Code §817.) The question of the value of what may be taken by way of condemnation if the crossing is opened is one for the Superior Court (City of Oakland v. Schenck, 197 Cal. 456) or this Commission in a just compensation proceeding (Public Utilities Code §§ 1401 et seq.). We do not intrude upon that jurisdiction herein. We assume that if condemnation occurs the award will be in accordance with law and that Southern Pacific, PMT or any other third party will receive the compensation to which it is entitled.

If we consider, as one factor, the economic justification or impact of the proposed crossing it is because of the general consideration entrusted to the Commission in determining the public need, since grade crossings are matters of statewide concern.

(City of San Bernardino v. Railroad Commission, 190 Cal. 562.) The primary reason the regulation of grade crossings is a matter of statewide concern is that "As such railroads serve the people of the entire state as means of communication and transportation, it is apparent that it would not be to the interest of the state to leave them subject to the exclusive and unlimited control of every city through which they may pass, with respect to the construction, maintenance, and operation of the lines lying within such city..."

(Civic Center Assn. v. Railroad Commission, (175 Cal. 441, 451.)

Another reason of great importance is safety. An additional factor of lesser significance to be considered is the impact of the opening or closing of a grade crossing on private individuals affected thereby. (Redwood City, 56 Cal. P.U.C. 153, 155; Decision

No. 63958 in Application No. 43779, unreported, 60 Cal. P.U.C. 31.)

With the foregoing principles in mind we consider whether the crossing should be opened.

We are here dealing with a community which has, over the years, developed with railroad tracks running in and across some of its streets. In some places, such as the crossing here under consideration, the tracks run through developed areas. As long as this situation continues, and no change seems likely for the foreseeable future, it is necessary for Visalia and Southern Pacific to adapt to each other's changes which may be brought about by normal or unforeseen development, changes in technology, etc. In the present situation we are dealing with a crossing in a community which has many grade crossings, whose inhabitants are accustomed to them and where railroad operations are conducted with recognition thereof. If the crossing is opened no precedent would be created for this area nor would any new, unusual or different situation be presented for railroad crews or members of the public. The record indicates that Visalia has present need for the crossing. That need today is not as great as it will be in the future, but the Commission is not required to wait until the need reaches crisis proportions before acting. (Re Colonial Improvement Company, 29 C.R.C. 196.) If Southern Pacific's switching operations could not be moved, the present opening of the crossing, without temporary closures of Bridge Street during the switching operations, would have more of a deleterious effect on Southern Pacific than benefit to Visalia. In those circumstances the Commission would be disposed to delay opening the crossing until absolutely necessary. (City of Commerce, 60 Cal. P.U.C. 714.) However, there presently exists an alternative where, if the crossing is opened, a new runaround track can be constructed. If the crossing is not opened at this time but at sometime in the future the site for the replacement runaround track may no longer be available. Thus, if the

crossing is opened now there will be little or no impact on Southern Pacific's general switching operations because they can be moved to another place. To the extent this relocation results in compensable damage, Southern Pacific will be compensated in a condemnation proceeding. Opening the crossing now will permit Visalia to engage in appropriate long range planning and implementation of its select streets system. Likewise, PMT presently has available other locations in Visalia from which it can continue to conduct its business. Since there presently is a need for the crossing and the need will increase in the future, the Commission is of the opinion and finds that the crossing should be opened now when alternative sites are available to relocate Southern Pacific's switching operations and PMT's operations.

Having determined that the crossing should be opened we turn to the question of what protection should be required therefor. Decision No. 72364 ordered that:

"Protection shall be by two Standard No. 1-A crossing signs (General Order No. 75-B) and by two advance warning signs and by two devices not operated by track circuits which will close the crossing during switching operations across it."

The amendment to the petition for rehearing contends that this portion of the order "is not supported by either findings or evidence submitted to the Commission." It argues that:

"A reading of the record in this case will quickly show that nowhere in the record did any witness testify that a manually operated crossing protective device would adequately protect the public at the proposed new crossing. The fact is that at no time during the proceeding was such a device even mentioned by any party. Moreover, if rehearing is granted, it will be shown that the type of device proposed by the Commission is completely impracticable, totally unsatisfactory and substantially more expensive than estimated by the Commission. By ordering the installation of such an archaic form of crossing protection, without any evidence concerning the suitability of

such protection or the cost thereof, the Commission has acted arbitrarily and unreasonably and has denied the parties before it the most rudimentary due process of law guaranteed to the parties by the Constitution of the United States in the fourteenth amendment and by the constitution of the State of California in Article I, sections 13 and 14."

We reject the contention that the Commission is limited in the exercise of its expertise and statutory authority by the solutions proposed by litigants. (Market Street R. Co. v. Railroad Com. of Cal., 324 U.S. 548, 560-61.) We are of the opinion that this portion of Decision No. 72364 was consonant with our jurisdiction and supported by the record. However, at the rehearing additional evidence was presented with respect to the protection necessary for the crossing, if it is opened. We therefore consider the question anew in the light of all the facts presently before us. Much of the evidence dealing with protection for the crossing relates to a situation where the crossing is opened and general switching is continued in the area. The protection ordered in Decision No. 72364 was based upon the assumption that switching would continue over the crossing. On this point and based on this assumption Southern Pacific produced evidence to the effect that because of restrictions in labor agreements neither train crews nor station personnel can be required to manually place barriers to close the crossing during switching operations. Furthermore, testimony by the Visalia Director of Public Works makes it appear that it is unlikely that the City Council would authorize physical closing of Bridge Street on each side of the crossing during switching operations. However, based on the record as supplemented by the rehearing the Commission is of the opinion that if the crossing is opened the switching operations should be moved to another area, which is currently available. The authority hereinafter granted will be conditioned on this

premise pursuant to Sections 1201 and 1202 of the Public Utilities Code. Thus, the crossing protection about which we are here concerned deals with the one daily train movement and additional spotting of cars over the three sets of tracks heretofore described. Among the reasons Visalia seeks to open the crossing are to develop its select street system and to encourage local traffic on Bridge Street so surrounding streets will develop additional through traffic. With this in mind, the Commission is of the opinion and finds that the crossing protection required should comprehend the fulfillment of Visalia's objectives: a heavily traveled street conforming to the specifications of the select street system. As indicated, the street will cross three or four tracks at the crossing. The crossing is in a commercial area and obstructed. The Commission finds that the crossing should be protected by No. 8 Flashing Lights and automatic gates. The estimated cost of such installation is \$20,950.

We next turn to the question of what amount Visalia should be ordered to advance to Southern Pacific as reasonably necessary to enable Southern Pacific to complete the work necessary to open the crossing. (Public Utilities Code §1202.1.) There may be, of course, a difference between this amount and that which Southern Pacific might be entitled to in a condemnation proceeding. The record indicates that the total estimated cost to Southern Pacific of constructing the crossing (including grading, replacing ties, relaying tracks and installing planking) would be \$10,140. This amount of money is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing. We have heretofore found that the protection necessary for the crossing will be No. 8 Flashing Lights and automatic gates. The estimated cost of

such protection is \$20,950. This amount of money is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing. The record discloses that in order to open the crossing and extend the street thereover it is necessary to remove 23 feet of Southern Pacific's Visalia depot. The estimated cost of cutting back the building to clear the area for the street to go through is \$1,600. This amount is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing. There is conflicting evidence about whether or not the remainder of the depot can continue to be used; if it can still be used, whether or not Southern Pacific will choose to use it and the damage, if any, Southern Pacific may suffer. We need not resolve this conflicting evidence because such determination is within the issues of a condemnation proceeding. All that is necessary for the crossing is the removal of part of the depot at a cost of \$1,600. We also need not determine whether or not the cost of providing a substitute switching track (runaround track) is a cost required by Section 1202.1. This cost is an element in computing damage in a condemnation proceeding. (Code Civ. Proc. §1248a; City of Long Beach v. Pacific Elec. Ry. Co., 44 Cal. 2d 599; People v. Hayward Bldg. Materials Co., 213 Cal App. 2d 457.) Insofar as possible the Commission seeks herein not to intrude in the condemnation proceeding. The ensuing order will coordinate the crossing opening with a condemnation proceeding. If Visalia obtains a final condemnation order it will include an amount for such damage. Also, if Visalia secures an order for immediate possession (Cal. Constit., Art. I, §14; Code Civ. Proc. §§1243.4, 1243.5) it must put up a security deposit which would include this element of damages. It would be redundant to require the payment of money for the same thing in two different proceedings. Southern Pacific will be protected on this item by having Visalia

pay the money after judgment or by withdrawing the amount involved from the security deposit. (Code Civ. Proc. §1243.7.) As indicated, while the possible removal of PMT's operations from the depot was considered in determining the necessity for opening the crossing, any damages resulting therefrom are not costs related to the amount of money reasonably necessary to complete the work as contemplated by Section 1202.1. If there be such damage, and it is legally cognizable, it must be recovered in the condemnation action. (See Town of Los Gatos v. Sund, 234 Cal. App. 2d 24.) In the light of the previous discussion the Commission finds that Visalia should advance the sum of \$32,690 pursuant to Section 1202.1 of the Public Utilities Code as the amount of money reasonably necessary to enable Southern Pacific to complete the crossing.

One further point requires discussion. Southern Pacific contends, in the amendment to the petition for rehearing, that:

"It cannot be questioned that the Commission's order requiring demolition of a portion of Southern Pacific Company's freight station constitutes a condemnation of Southern Pacific's building and of Pacific Motor Trucking Company's leasehold interest. Such condemnation will require relocation of a major trucking terminal and agency. This condemnation order has been entered despite the express stipulation that no condemnation order was sought in this proceeding. Under such circumstances, it is clear that the Commission has not regularly pursued its statutory authority and that its order confiscates petitioners' property and deprives petitioners of their property without due process of law or just compensation contrary to the provisions of the fourteenth amendment to the Constitution of the United States and sections 13 and 14 of article I of the constitution of the State of California."

The contention contains factual assertions not necessarily compelled by the record. For example a PMT employee who testified on behalf of Southern Pacific indicated that if the present depot is altered, it might still be used by PMT for a period of time:

"Q. Could you get along for a period of time?

A. We probably could get along for a short time.

Q. In other words, you would use it for a while but it is not satisfactory, and if business increases you would be out?

A. Absolutely."

It is not necessary to pass upon this point to determine the legal question raised. We mention this to indicate that the Commission does not necessarily accept the alleged facts stated by Southern Pacific in dealing with the contention. Public Utilities Code Section 1202 provides in part that "the Commission has the exclusive power:... (b) to alter, relocate, or abolish by physical closing any such [grade] crossing heretofore or hereafter established." Sections 761, 762, 763 and 768 of the Public Utilities Code provide as follows:

"§761. Whenever the commission, after a hearing finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

"§762. Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities,

the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.

"§763. Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

.....

"§768. The commission may, after a hearing, by general or special orders, rules, or otherwise, require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings

or junctions and block or other systems of signaling, establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand. Provided, however, that the commission shall not regulate the safety of operation of passenger stage corporations, highway common carriers, and petroleum irregular route carriers."

When the Commission acts under these sections a required expenditure of money or use of property may not result in condemnation or legally compensable damage. In some instances "Such expenses must be regarded as incidental to the police power of the state." (City of Oakland v. Schenck, supra, at p.462; Atchison, Topeka & S. F. R. Co. v. Public Util. Com., 346 U. S. 346.) We note that the depot here in question which now needs to be altered was erected pursuant to an order of this Commission under the predecessor Public Utilities Act provisions now contained in the aforementioned code sections. (Visalia Board of Trade v. Southern Pacific Company, supra.) Furthermore, even if a Commission order resulted in a situation where a party was entitled to legally compensable damages, this would not defeat the Commission's jurisdiction to make such an order. The injured party would still have recourse in an appropriate action (e.g., action for damages, inverse condemnation, etc.). (Cf., Northwestern Pacific R. R. Co. v. Superior Court, 126 Cal. App. 575.)

The Commission is of the opinion, however, that the portion of Decision No. 72364 requiring unconditionally the removal of part of the depot was inappropriate, not for the reasons advanced by Southern Pacific, but because of the particular facts of this case. The only present reason for removal of part of the depot is to permit the extension of Bridge Street over the crossing. As indicated, in order to extend Bridge Street to and over the crossing it is necessary for Visalia to condemn the right of way which it

does not now possess. This is an application proceeding. Even though the Commission grants the authority requested herein, Visalia is under no obligation to proceed with the crossing. The order herein is permissive, not mandatory. If Visalia does not condemn the right of way, Southern Pacific will be put to needless expense for which there would be no justification. Therefore, the ensuing order will be made dependent upon the issuance of an order of immediate possession or final judgment of condemnation. In either event Southern Pacific will be protected against needless expense or interference with its operations.

No other points require discussion. The Commission makes the following findings and conclusions:

Findings of Fact

1. Portions of Decision No. 72364 are unwarranted and should be changed. Decision No. 72364 should be modified and changed as hereinafter provided.
2. PMT did not enter a proper appearance in this proceeding and is not a proper party hereto.
3. If it be assumed, for the sake of discussion only, that PMT entered a proper appearance in this proceeding and was a party herein, said appearance should be struck from the record because PMT failed to file proposed findings of fact and conclusions of law as directed by the Presiding Examiner.
4. Visalia is the county seat of Tulare County and has a population of approximately 25,000 people. It is traversed by two railroads, the Southern Pacific and Santa Fe. Southern Pacific's Visalia Branch goes through the city in an east-west direction along the northern edge of the commercial area. Santa Fe's Visalia Branch goes through the city in a north-south direction in the eastern part

of the commercial area. Both railroads run in streets for part of the distance through the city. Santa Fe runs on Santa Fe Avenue and Southern Pacific's tracks are on Oak Street.

5. Bridge Street is the next parallel north-south street to the west of Santa Fe Avenue followed by Garden and Church Streets. The next two streets to the west are Court and Locust Streets. They are paired one-way streets forming part of State Highway 63. The next parallel main street to the east of Santa Fe Avenue is Burke Street, which does not go through to the northern edge of the settled area in Visalia. Shortly before this application was filed the State Department of Public Works converted State Highway 198 into a freeway. This was done by constructing a depressed roadway, below ground level, across Visalia from east to west. Nine bridges were constructed over the freeway. As a result, the number of direct north-south streets in Visalia was reduced from 26 to 9. Bridge Street crosses over the freeway. The freeway crossovers nearest to Bridge Street are Court and Locust Streets pairing to the west, and Burke Street to the east.

6. Bridge Street was formerly a through street which crossed the Southern Pacific tracks at grade. It was closed in 1915 when the Commission ordered the construction of new passenger and freight depots in Visalia. In 1915, in order to provide for the construction of the depots and closing of Bridge Street, Visalia vacated a portion of Bridge Street 66 feet in width and 156.75 feet in length. The area vacated runs from the center of Oak Street to an alley which parallels Oak Street and Center Street, the next street south of Oak. The alley connects with Garden Street to the west and Santa Fe Avenue to the east. In order to open the requested crossing it will be necessary for Visalia to acquire the area previously vacated, which is now owned by Southern Pacific, by agreement or condemnation.

7. There are presently four tracks over which the proposed crossing would pass if no alterations are made: a branch line track, two industry tracks and a public team track. Three of the tracks run on Oak Street. The team track is in the area which was vacated in 1915 and presently owned by Southern Pacific and is approximately 80 feet south of the other tracks. There is also located in the vacated area a portion of the Southern Pacific freight depot. Traffic to the freight depot presently crosses the team track. If Bridge Street is opened, even with alterations, it will still be necessary to leave in place and operation three of the tracks: the branch line track, team track and one industry track. One industry track, which serves the Southern Pacific depot, could be removed.

8. Bridge Street is part of the select street system in Visalia. As part of the select street system it is eligible for the expenditure of State collected gas tax funds which revert to Visalia. However, if the crossing is not opened, Visalia will not lose any gas tax monies.

9. Visalia's estimated population by 1980 will be between 60,000 to 70,000 persons. It will be necessary to develop all the select streets by 1980 to accommodate the projected population.

10. Visalia's present areas of growth are (1) an area bounded by Center, Acequia, Court and Liberty Streets which is in the vicinity of the requested crossing; (2) an area near Ben Maddox Way and Houston Avenue, which is to the northeast of the requested crossing; (3) an area near Tulare and Santa Fe Avenues, which is to the south of the requested crossing; (4) an area near West Street and Santa Fe and Caldwell Avenues, which is south of the crossing and (5) an area between the St. John's River and State Highway 216, which is northeast of the crossing. The Visalia Unified School

District has indicated that its next high school will be built in the area between the St. John's River and State Highway 216.

11. As a result of the recent development in Visalia there has been generated more traffic traversing the city diagonally from southwest to northeast. Opening the proposed crossing would help meet the needs of this traffic. Opening the crossing will help relieve traffic congestion on Center Street. Opening the crossing will help increase traffic use of Garden Street and Santa Fe Avenue.

12. At the present time Burke Street is not a through north-south street. It is included in the select street system but there are no present plans to extend it to make it a through street. It was not necessary for Visalia to make a detailed investigation of the possible alternative opening of a crossing at Burke Street for this proceeding.

13. The evidence indicates that Visalia is served by one freight train a day, six days per week. There occasionally pass over the crossing detoured trains or special livestock trains. These occasional, infrequent movements have no significant bearing on the issues presented herein. During seven months of the year the daily freight train arrives in Visalia about 4:00 p.m. During the other five months it arrives between noon and 2:00 p.m. After the train arrives it is presently switched and rearranged at the location of the proposed crossing. The duration of the switching operation ranges from 10 minutes to more than one hour. The regular freight train is in Visalia, although not necessarily in the vicinity of the proposed crossing, from one to three hours per day. Sometimes the time is increased because the train crew goes to lunch. There is presently no other place in Visalia where similar switching can take place.

14. If the proposed crossing is opened and Bridge Street was not closed during switching operations, Southern Pacific would incur additional operating costs.

15. Southern Pacific owns property along its trackage to the east of the crossing upon which a 20-car runaround track could be constructed. If such a runaround track were constructed the general switching movements in Visalia could be moved away from the Bridge Street area. The cost of constructing such a runaround track would be approximately \$25,200. If a runaround track is constructed there will still be some daily train movements over the proposed crossing.

16. The estimated cost of constructing the proposed crossing is \$10,140.

17. In the light of the traffic situation of Visalia as a whole, the existence of the presently opened grade crossings at Garden Street and Santa Fe Avenue does not require denial of this application.

18. If the crossing is opened it will be necessary for Southern Pacific to remove approximately 23 feet of its station building and loading dock. This portion of the building and loading dock is used by PMT in its Visalia operations. PMT is a highway common carrier. Although it is a wholly owned subsidiary of Southern Pacific, its trucking operations are not railroad operations with respect to the proposed crossing. The fact that this particular highway common carrier is owned by a railroad corporation does not make it a railroad corporation. PMT's status in this proceeding is no different than any third party tenant or lessee to whom Southern Pacific may have let space in its depot.

19. If the crossing is opened and part of the depot removed, PMT could continue to use the depot for a short time, but if its

business increased it would need to find other quarters. If it relocated it would seek another on-rail situs. There is evidence that the cost of someone constructing a similar building in a lower rated fire area would be approximately \$14,000.

20. There is evidence that the remaining portion of the depot can be used for depot purposes and rented for private storage.

21. Visalia has, over the years, developed with railroad tracks running in and across some of its streets. In some places, such as the crossing here under consideration, the tracks run through developed areas. The proposed crossing is in a community which has many grade crossings, whose inhabitants are accustomed to them, and where railroad operations are conducted with recognition thereof. If the proposed crossing is opened no new, unusual or different situation would be presented for railroad crews or members of the public.

22. Visalia has present need for the crossing which need will increase in the future.

23. If the crossing is opened, a new runaround track can be constructed to accommodate Southern Pacific's switching operations. If the crossing is not opened at this time but at some time in the future the site for the replacement runaround track may no longer be available. If the crossing is opened now there will be little or no impact on Southern Pacific's general switching operations because they can be moved to another place.

24. Opening the crossing now will permit Visalia to engage in appropriate long range planning and implementation of its select streets system.

25. PMT presently has available other locations in Visalia from which it can continue to conduct its business.

26. Because of restrictions in labor agreements Southern Pacific cannot require train crews or station personnel to manually place barriers to close the crossing during switching operations.

27. If the crossing is opened, it is unlikely that the Visalia City Council would authorize the physical closing of Bridge Street on each side of the crossing during switching operations.

28. Public convenience and necessity require that the proposed crossing be opened and that Southern Pacific be ordered to relocate its switching operations to another situs.

29. Because Bridge Street is part of the Visalia select street system, because the proposed crossing is obstructed and located in a commercial area and because traffic on Bridge Street will increase as Visalia continues to grow, the crossing, when opened, should be protected by No. 8 Flashing Lights and automatic gates. The estimated cost of installing said protection is \$20,950.

30. The total estimated cost to Southern Pacific of constructing the crossing (including grading, replacing ties, relaying tracks and installing planking) would be \$10,140. This amount of money is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing.

31. The estimated cost of No. 8 Flashing Lights and automatic gates is \$20,950. This amount of money is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing.

32. In order to open the crossing and extend the street thereover, it is necessary to remove 23 feet of Southern Pacific's Visalia depot. The estimated cost of cutting back the building to clear the area for the street to go through is \$1,600. This amount is reasonably necessary for Southern Pacific to complete the work necessary to open the crossing. There is conflicting evidence

about whether or not the remainder of the depot can continue to be used. It is not necessary to determine this issue herein.

33. Opening the crossing is dependent upon Visalia securing an appropriate right of way in a condemnation proceeding. Certain elements of damages in the condemnation proceeding may include amounts which might also be included in the amounts reasonably necessary for Southern Pacific to complete the work necessary to open the crossing. It would be redundant to require payment of money for the same thing in two different proceedings. An order which is contingent upon a final order of condemnation or an order of immediate possession will provide Southern Pacific with all the money reasonably necessary to do the work to open the crossing.

34. Even if opening the crossing causes PMT to remove its operations from the Southern Pacific depot, any damages resulting therefrom are not costs related to the amount of money reasonably necessary for Southern Pacific to complete the work necessary to open the crossing as contemplated by Section 1202.1 of the Public Utilities Code.

35. Visalia should advance the sum of \$32,690 pursuant to Section 1202.1 of the Public Utilities Code as the amount of money reasonably necessary to enable Southern Pacific to complete the crossing.

36. Since the order herein will be permissive and not mandatory; and since the only present reason for removal of part of the depot is to permit the extension of Bridge Street over the crossing; and since Visalia is not required to proceed with the opening of the crossing, the ensuing order should provide that the removal of part of the depot be dependent upon the issuance of an order of immediate possession or a final order of condemnation.

37. The location and engineering plans proposed by Visalia are suitable for the crossing.

38. Since the crossing is presently closed, no plans are necessary for rerouting vehicular traffic.

39. Southern Pacific has the ability and personnel to construct the crossing and install the crossing protection herein provided.

40. Visalia has the ability and personnel to perform all street work in connection with the crossing including paving within and between the tracks.

41. Visalia should pay all of the costs of constructing the crossing, pay for the cost of installing and maintaining the automatic crossing protection and be responsible for maintaining the crossing, except for that portion of the area delineated by lines two feet outside the rails.

Conclusions of Law

1. Visalia should be authorized to open a crossing over the Southern Pacific tracks at grade at Bridge Street in Visalia.

2. The crossing should be protected with No. 8 Flashing Lights and automatic gates.

3. Southern Pacific should be ordered to construct the crossing.

4. Southern Pacific should be ordered to commence construction of the crossing:

a. After Visalia has, in an appropriate condemnation proceeding, secured an order of immediate possession or a final order of condemnation.

b. After Visalia has deposited with it the sum of \$32,690.

5. After Visalia has, in an appropriate condemnation proceeding, secured an order of immediate possession or a final order of

condemnation and after Visalia has complied with Ordering Paragraph 4.b hereof, Southern Pacific should be ordered to remove a portion of its Visalia depot sufficient to clear Bridge Street.

6. Southern Pacific should be ordered to prepare the tracks for paving, place all planking in the crossing, perform necessary work on its depot and install the crossing protection herein provided.

7. Visalia should be ordered to perform all street work including paving as necessary.

8. Visalia should be ordered to pay all the costs of constructing the crossing, pay the cost of installing and maintaining the automatic protection and be responsible for maintaining the crossing, except for that portion of the area delineated by lines two feet outside the rails.

9. After the crossing is opened, Southern Pacific should be ordered to refrain and desist from conducting general switching operations in the vicinity of the crossing.

O R D E R

IT IS ORDERED that:

1. The City of Visalia is hereby authorized to construct Bridge Street at grade across four tracks of Southern Pacific Company to be identified as Crossing No. BAC 253.15.

2. The width of the aforesaid crossing shall be not less than 48 feet and the grades of approach shall not be greater than two percent. Construction shall be equal to or superior to Standard No. 2 of General Order No. 72.

3. The crossing shall be protected with two No. 8 Flashing Light Signals equipped with automatic gate arms.

4. Southern Pacific Company shall remove a portion of its Visalia depot sufficient to clear Bridge Street and commence work as soon as possible after:

- a. The City of Visalia has, in an appropriate condemnation proceeding, secured an order of immediate possession or a final order of condemnation, and
- b. The City of Visalia has deposited with Southern Pacific Company the sum of \$32,690 to apply to the cost of work done by Southern Pacific Company.

5. Southern Pacific Company shall prepare its tracks to receive the roadway conforming them to the city's established street grades.

6. Southern Pacific Company shall be responsible for construction between lines two feet outside the rails on each track and the installation of the crossing protection herein ordered. The City of Visalia shall be responsible for all other crossing construction. The parties are authorized to vary this division of responsibility by agreement.

7. The City of Visalia shall pay all the costs of constructing the crossing and the automatic protection. The cost of maintaining the automatic protection shall be borne by the City of Visalia pursuant to Section 1202.2 of the Public Utilities Code. Visalia shall be responsible for maintaining the crossing except for that portion delineated by lines two feet outside the rails which portion shall be maintained by Southern Pacific Company.

8. Within thirty days after the completion and opening of the crossing the City of Visalia shall so advise the Commission in writing.

9. After the crossing has been opened Southern Pacific Company shall refrain and desist from conducting general switching

operations in the vicinity of the crossing. Nothing in this paragraph is designed to prohibit switching which is necessary for the movement of railroad cars for shippers or receivers of freight who are directly served by the tracks at the crossing.

10. The authority granted by this decision shall, if not utilized, expire two years after the effective date hereof.

The effective date of this order shall be twenty-five days after the date hereof.

Dated at Los Angeles, California, this 18th day of FEBRUARY, 1969.

William S. Squire, Jr.
President
August
John P. Monsey
William
Commissioners

Commissioner Thomas Moran, being necessarily absent, did not participate in the disposition of this proceeding.