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Decision 89-04-082 April 26, 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of the City of Fontana)	
for the determination of just)	
compensation for acquisition of)	Application 86-06-022
the Fontana Division of the San)	(Filed June 6, 1986)
Gabriel Valley Water Company.)	
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Dale E. Bacigalupi and Andre G. De Bortnowski,
Attorneys at Law, for the City of Fontana,
applicant.
Hufstedler, Miller, Kaus & Beardsley, by
Burton J. Gindler and Donna R. Harvey, and
Michael L. Whitehead, Attorneys at Law, for
San Gabriel Valley Water Company,
respondents.

OPINION ON SAN GABRIEL VALLEY WATER COMPANY'S SECOND
MOTION TO DISMISS CITY OF FONTANA'S PETITION

Comments on the Proposed Decision
of the Administrative Law Judge

As provided by Public Utilities (PU) Code § 311, the Proposed Decision of Administrative Law Judge (ALJ) John B. Weiss on San Gabriel Valley Water Company's (San Gabriel) second motion to dismiss the City of Fontana's petition was served on both of the parties to this proceeding. Both the City and San Gabriel submitted comments. San Gabriel submitted reply comment.

In its comments the City asserts that the Proposed Decision reflects a serious misunderstanding of the law of eminent domain, ignores or misinterprets evidence, and relies upon evidence that should not have been considered.

However, the City's attempt in its comments to recast the character, thrust, and intent of representations it made to this Commission in response to San Gabriel's first motion to dismiss fails. Despite City's effort to characterize its June 6, 1986

petition to this Commission as initiation of an action in eminent domain, and its efforts to sustain that strained characterization by footnote 1 of its comments, the plain inescapable fact remains that the filing of a petition under Chapter 8 of the PU Code does not commence or initiate an eminent domain proceeding. The plain wording of PU Code § 1403 makes that clear:

"Any political subdivision may, at any time, file with the commission either a petition of the first class, setting forth the intention of the political subdivision to acquire under eminent domain proceedings, or otherwise..., or a petition of the second class, setting forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition to acquire under eminent domain proceedings, or otherwise..." (Emphasis added.)

Clearly, what is contemplated with reference to the foregoing underlined part of PU Code § 1403 is an additional act, one of acquisition by condemnation under the Eminent Domain Law.

Eminent domain refers to legal procedure where the people or government take private property for public use. To take the lands, property, and rights of a public utility, a political subdivision must commence an action in a court of competent jurisdiction. Only by this procedure can such a taking be instituted. This Commission has no jurisdiction to condemn in these instances. The Legislature, however, has given the Commission a specific grant of jurisdiction over issues of just compensation where such issues are involved in particular acquisitions of public utility property, whether by condemnation or by purchase. But our procedures under Chapter 8 are merely peripheral to the act of acquisition. They deal with an alternate way under the Eminent Domain Law to determine the just compensation for a condemnation taking, or with determination of just compensation in an "otherwise" acquisition, as for example, a

purchase by the political subdivision of lands, property, and rights of a public utility. But no taking is authorized by a just compensation issue determination by the Commission. As the Law Revision Comment to Code of Civil Procedure § 1235.165 makes clear, where the term "proceeding" is used with reference to condemnations, it refers to proceedings under the Eminent Domain Law and not to eminent domain matters before the Public Utilities Commission.

The City's assertion that evidence was ignored or misinterpreted must also fail. The evidence is abundantly clear. Instead of a frank admission or acknowledgment to the Commission, when challenged in November 1986 by San Gabriel as to its intentions, that the City's sole intention at that point was only to petition the Commission "for the purpose of establishing the fair market value of the water system in making an offer to buy the water system," and that the Council "had not yet made a determination to vote on whether or not to acquire the property by filing a condemnation suit in superior court (see Councilman Kragness' April 28, 1988 declaration - Exh. 6-D to Whitehead's Declaration), City embarked upon a deliberate and persistent process of misleading the Commission to the effect that City had a present intention to condemn if necessary. As part and parcel of this planned deception City resorted to retrospective creation of purported Executive Session Minutes, duly certified as true, but containing known false and misleading statements artfully crafted to further cloud issues, and then relied upon this false document in various oral and written arguments to the Commission.

In its comments City further asks how, in light of the various documents created in relation to the Certificates of Participation, "is it possible that the Proposed Decision concludes that the City's 'only possible intent' was to obtain a basis for making an offer to buy?" The answer comes both from Councilman Kragness' declaration (supra), and from Mayor Simon's April 27,

And with reference to the latter, the financial documentary evidence, the distinction made by the ALJ between "may" condemn and "will" condemn is appropriately reflective of the weight he and we accord this evidence.

We adopt the Proposed Decision of the ALJ without change.

Statement of Facts

The Fontana Water Company (Division), a division of the San Gabriel Water Company (San Gabriel) provides public utility water service primarily to approximately 21,711 customers in the City of Fontana and adjacent unincorporated areas, but also incidentally to approximately 581 customers in the Cities of Rialto, Rancho Cucamonga and Ontario.

For some years the City has been interested in establishing its own water department to provide water to its residents and to meet anticipated demand within redevelopment project areas. As early as October 1985 discussions were held between City officials and representatives of Division concerning possible city acquisition of the water system owned by Division. The City Council was aware that several methods were available to make an acquisition. Avowedly, its preferred method would be a negotiated purchase and sale, although as an alternative the City Council was aware that it could proceed in a condemnation proceeding in Superior Court. Concentrating upon a possible

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purchase by the political subdivision of lands, property, and rights of a public utility. But no taking is authorized by a just compensation issue determination by the Commission. As the Law Revision Comment to Code of Civil Procedure § 1235.165 makes clear, where the term "proceeding" is used with reference to condemnations, it refers to proceedings under the Eminent Domain Law and not to eminent domain matters before the Public Utilities Commission.

The City's assertion that evidence was ignored or misinterpreted must also fail. The evidence is abundantly clear. Instead of a frank admission or acknowledgment to the Commission, when challenged in November 1986 by San Gabriel as to its intentions, that the City's sole intention at that point was only to petition the Commission "for the purpose of establishing the fair market value of the water system in making an offer to buy the water system," and that the Council "had not yet made a determination to vote on whether or not to acquire the property by filing a condemnation suit in superior court (see Councilman Kragness' April 28, 1988 declaration - Exh. 6-D to Whitehead's Declaration), City embarked upon a deliberate and persistent process of misleading the Commission to the effect that City had a present intention to condemn if necessary. As part and parcel of this planned deception City resorted to retrospective creation of purported Executive Session Minutes, duly certified as true, but containing known false and misleading statements artfully crafted to further cloud issues, and then relied upon this false document in various oral and written arguments to the Commission.

In its comments City further asks how, in light of the various documents created in relation to the Certificates of Participation, "is it possible that the Proposed Decision concludes that the City's 'only possible intent' was to obtain a basis for making an offer to buy?" The answer comes both from Councilman Kragness' declaration (supra), and from Mayor Simon's April 27,

1988 declaration (Exh. 6-B to Whitehead's Declaration) wherein he stated: "It is not and never was my understanding that the issuance of the certificates of participation obligated the City to acquire the Fontana Water Company or its assets by filing a condemnation suit in Superior Court. I also understand that the purpose of the PUC valuation proceeding is to establish a value for the water system for the purpose of making an offer to purchase."

Finally, City's contention that the Commission should not use the City Councilmen's declarations lacks merit. County of Los Angeles v. Superior Court (1975) 13 C 3d 721, 726-728, precludes judicial probing into the subjective motivations of legislators, including local legislators. But the ALJ and we considered the declarations, not to inquire into individual subjective mental processes, but to determine just what action the Council did or did not take. And they clearly show that the City Council never voted or decided to file a condemnation action.

San Gabriel's comments support the ALJ's Proposed Decision and urges the Commission to promptly adopt the Proposed Decision as written. San Gabriel concurs with the ALJ's conclusion that the City has engaged in a continuous series of intentional misrepresentations amounting to a fraud on the Commission, and further urges that dismissal will vindicate the integrity of the Commission's procedures and effectuate important public policy objectives.

In San Gabriel's reply to City's comments it stresses that City continues to misrepresent the effect of both the discredited February 4, 1986 minutes, and the financing documentary evidence, before the Commission. In view of the evidence that City Council had never authorized eminent domain proceedings in Superior Court, we agree with San Gabriel that City's characterization of the former in its comments as an "unfortunate error" attributable to "neglect, stupidity or oversight" is but another example of City's efforts to conceal or cloud its fraud upon the Commission.

And with reference to the latter, the financial documentary evidence, the distinction made by the ALJ between "may" condemn and "will" condemn is appropriately reflective of the weight he and we accord this evidence.

We adopt the Proposed Decision of the ALJ without change.

Statement of Facts

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For some years the City has been interested in establishing its own water department to provide water to its residents and to meet anticipated demand within redevelopment project areas. As early as October 1985 discussions were held between City officials and representatives of Division concerning possible city acquisition of the water system owned by Division. The City Council was aware that several methods were available to make an acquisition. Avowedly, its preferred method would be a negotiated purchase and sale, although as an alternative the City Council was aware that it could proceed in a condemnation proceeding in Superior Court. Concentrating upon a possible

purchase arrangement, the City Council contemplated using the Fontana Non-Profit Development Corporation (Corporation)¹ as the vehicle of acquisition.²

A certified true copy of the City Council Minutes of the regular council meeting of February 4, 1986 indicates that City's Redevelopment Attorney Sabo reported on discussion in the Council's Executive Session in regards to the acquisition, and that the Council directed staff to proceed with negotiations toward acquisition of the water system. Also discussed in the executive session were tax exempt bond financing, proposed negotiations and valuation of the water system. At the same regular session, the Council passed two resolutions that later had significance to the issues presently to be considered.³

1 The Fontana Non-Profit Development Corporation was represented as being a creature of the City adopted a number of years previously to be used for various types of tax-exempt financing of projects. Assertedly, the Corporation's Board of Directors is comprised of the City Council members, and that in fact they are one and the same, and agents for each other.

2 The Corporation would purchase the Division property from San Gabriel; then in turn resell it on an installment plan to the City. The City and the Corporation would enter a trust agreement with a bank as trustee, issuing \$40 million of certificates of participation which would be sold to an underwriter for re-offer to the public. The City would pledge the water receipts as installment payments.

3 Passed at the February 4, 1986 Regular Council Meeting:

Resolution No. 86-15: establishing a source of revenue to be derived by the city from ownership or operation of Division.

Resolution No. 86-17: approving a purchase of Division, and approving the form of an Installment Sale Agreement, Purchase and Sale Agreement, Trust Agreement, Official Statement and Purchase Agreement, and authorizing execution thereof.

When negotiations with San Gabriel thereafter hung up on valuation issues, the City Council, according to a certified true copy of the minutes of its regular meeting of April 15, 1986, passed a motion directing its City Manager and its City Attorney to file a petition with this Commission to determine the value of the water system.⁴ (Two years later, in April of 1988, sworn declarations of four of five of these City Councilmen stated that the City Council at no time voted or decided to file any condemnation action to acquire the water system; that the sole purpose of the 1986 petition to the Public Utilities (P.U.) Commission was to obtain a valuation basis to make an offer to San Gabriel to purchase the water system.)

On June 6, 1986, the City filed Application (A.) 86-02-022 asking that this Commission fix the amount of just compensation the City should pay for the water system. The petition was signed by City Manager Ratelle, City Attorney Rager, and Special Counsel Sabo. It was verified by City Manager Ratelle. Paragraph No. 4 gives rise to the problem present in this phase of the proceeding. It reads:

"4. Petitioner intends to acquire under eminent domain proceedings all property, franchises and rights (the "property") of the Fontana Division of the San Gabriel Valley Water Company, including the water rights, if any, which are appurtenant to, dedicated for public use or otherwise available for public use within the service area of the Fontana Division of the San Gabriel Valley Water Company and the stock owned by the San Gabriel Valley Water Company

4 Also passed at the April 15, 1986 Regular Council Meeting:

Resolution No. 86-77: approving the issuance of its 1986 Certificates of Participation for the water system project, and approving the final form of an Installment Sale Agreement, Trust Agreement, Official Statement and Purchase Agreement, and authoring their execution.

or any division, subsidiary or holding company thereof in the Fontana Union Water Company. The City has previously taken certain preliminary actions with respect to the acquisition of the Property by an exercise of the power of eminent domain or otherwise including, without limitations, the adoption of the resolutions of the City Council of the City attached as Exhibit "A" hereto and incorporated herein by this reference."⁵ (Emphasis added.)

On September 17, 1986, the Commission issued its Statutory Order to Show Cause (P.U. Code § 1405) setting a Prehearing Conference (PHC) for November 3, 1986. San Gabriel moved for dismissal of the application on a number of grounds including the contention that the City had not by its application alleged a sufficiently "unequivocal expression of intent" to acquire the utility property as would satisfy the Commission requirements of City of Fresno (1981) 6 CPUC 2d 408. Administrative Law Judge (ALJ) Turkish ordered briefs and a January 23, 1987 hearing on the dismissal motion.

The brief Fontana filed on January 16, 1987 in response to the ALJ's order contained a section purporting to reply to San Gabriel's lack of intent contentions, and included two exhibits in support of its arguments. San Gabriel argues that Exhibit B, is the "loaded gun" of this proceeding, a deliberate and calculated attempt to mislead the Commission, although such was not apparent to outsiders at the time of submission of City's brief with its exhibits in 1987.

Exhibit B was represented to the Commission as being a certified true copy of what purported to be the minutes of the

⁵ Exhibit A attached to and incorporated into the application consisted of copies of Resolutions Nos. 86-15, 86-17, and 86-77 (see footnotes 3 and 4).

executive session of the City Council the evening of February 4, 1986. Signed by City Attorney Rager and subscribed by Mayor Simon as being minutes approved by the City Council, it also bore the certification of the City Clerk.

Exhibit B indicated that City Manager Ratelle at the February 4, 1986 Executive Session had advised the Council that its staff had completed the preliminary work in preparation for "eminent domain" proceedings to acquire the water system, that financing had been arranged, and that it was proposed to acquire the property by condemnation. Exhibit B proceeded further to indicate that at that same February 4, 1986 Executive Session, a motion had been made, seconded, and passed with all five Council members voting affirmatively, that the City "commence eminent domain proceedings by filing a petition for just compensation before the Public Utilities Commission...."

At the January 23, 1987 hearing on the motion to dismiss, the City's associated outside council, Bacigalupi, argued to ALJ Turkish that Exhibit B, the February 4, 1984 executive session minutes, taken with the other materials in the application itself, was sufficiently "unequivocal" as to what the City Council had ordered done before filing the application, to conclusively show that Fontana had evidenced its intent to condemn if a voluntary sale failed.

Following other rulings, etc. not material to the present issue, on June 10, 1987, ALJ Weiss⁶ issued a proposed interim decision denying San Gabriel's motion to dismiss. Among other matters, that proposed decision concluded that the City's application, by indicating an intention to acquire by "purchase,

⁶ On April 14, 1987, as the consequence of the sudden serious illness of ALJ Turkish, the matter was reassigned to ALJ John B. Weiss.

condemnation, or otherwise," sufficed to comply with the requirements of P.U. Code § 1403. On July 29, 1987 by Decision (D.) 87-07-082, the Commission adopted the ALJ's proposed decision. Rehearing requested by San Gabriel was denied on March 23, 1988 (with minor language clarifications not of consequence here).

Meanwhile San Gabriel pondered possible judicial remedies. A San Gabriel executive had discovered certain discrepancies between the Exhibit B executive session minutes of February 4, 1986, and the official minutes of the February 4, 1986 regular session of the City Council. For example, one showed Councilman Boyles absent the evening of February 4, 1986; the other showed him present and voting.

On January 29, 1988, San Gabriel filed in Superior Court for a writ of mandate seeking to force the City to withdraw its application to the P.U.C.⁷ Extensive discovery followed. The evidence uncovered led San Gabriel to conclude that the City had deliberately perpetrated fraud upon the Commission. Accordingly, on August 8, 1988, San Gabriel filed this, its second motion to dismiss before the Commission. The present motion is based upon different grounds and upon newly discovered evidence. The City opposes this second motion to dismiss.

In essence, by this Second Motion to dismiss San Gabriel asserts that having to respond at the close of 1986 to San Gabriel's first dismissal motion, and very cognizant of the essentially bare bones nature of City's condemnation assertions contained in paragraph 4 of City's application, the City's representatives feared that the Commission might grant dismissal based upon San Gabriel's contention (drawn from City of Fresno,

⁷ On May 23, 1988, the Honorable Ben T. Kayashima, Judge of the Superior Court, finding that P.U. Code §§ 1756-1759 gave exclusive jurisdiction to the State Supreme Court, denied a writ of mandate.

supra) that in order for Commission jurisdiction to attach under P.U. Code § 1403, a first class petition must set forth the unequivocal intention of a public subdivision to acquire under eminent domain proceedings. San Gabriel states that Fontana was fearful that the Commission might indeed dismiss the City's application for an insufficiency of evidence showing intent to condemn. Accordingly, San Gabriel asserts, Fontana decided it would have to create some supportive evidence to bolster the record and show that there was indeed City Council eminent domain intent and acts before the City filed its application in June, 1986.

On October 7, 1988, ALJ Weiss heard oral argument on San Gabriel's second motion to dismiss. Upon filing of briefs on October 28, 1988, the motion to dismiss was submitted for decision.

The evidence introduced to support the second motion to dismiss shows the following: Despite the fact that it had not been City practice to prepare formal minutes of the executive or closed sessions of the City Council (indeed City Attorney Rager, deposed on April 13, 1988, stated that he could not recall any previous instance) the City's legal group - with at least the later acquiescence of Mayor Simon, decided to retroactively prepare a closed session minute for the evening of February 4, 1986, which minute would support the City's application statement on intent to condemn.⁸ Accordingly, Rager, using his recollection of that executive session 11 months earlier, drew up various drafts. These

⁸ When asked during discovery in the writ proceeding for the motivation behind this most unusual and exceptional procedure, Rager stated:

"Dale Bacigalupi, during the proceeding before the Public Utilities Commission, asked me to prepare some because they had a motion to dismiss and he needed evidence that the Council had made -- had taken the action." (Deposition: 4/31/88.)

initial drafts reflected closely the context of Redevelopment Attorney Sabo's report on the executive session discussion of the water system acquisition summarized in the official minutes of the February 4, 1986 regular session of the City Council,⁹ except for the addition of references to a motion being made, seconded, and carried by all five Council members to proceed to acquire the water system by "condemnation"; this motion purportedly being made following City Manager Ratelle's purported advice to the Council that staff had completed its preliminary work in preparation for "eminent domain proceedings."¹⁰ Alterations to these drafts were

9 The Certified True Copy of the Minutes of the City Council Regular Meeting on February 4, 1986 state:

"Mayor Simon called an Executive Session at 7:31 p.m. to discuss potential litigation. The meeting reconvened at 7:56 p.m. Redevelopment Attorney Sabo stated discussion in the Executive Session was in regards to acquisition of the Fontana Water Company by the City of Fontana, and that Council directed staff to proceed with the negotiations to acquire the system on behalf of the City. He stated they also discussed, with regard to the proposed tax exempt bond financing where the City could acquire the system, as well as proposed negotiations and evaluation of the system. Before the resolutions regarding this time were adopted, the City Clerk asked, with approval Attorney Sabo that the Consent Calendar be approved first to help expedite the numbers of the resolutions."

10 In a sworn declaration dated April 28, 1988 Sabo stated: "I do not recall any formal or informal authorization as of February 4, 1986, on behalf of the City Council acting as City Council or acting on behalf of the Board of Directors of the Corporation to file or to initiate either a condemnation action or proceedings before the Public Utilities Commission of the State of California."

(Footnote continues on next page)

made by the City's associated council Bacigalupi, after which the result was typed, signed by Rager, subscribed by Mayor Simon with the legend "The foregoing minutes were approved by Council," and were included in a Council agenda packet distributed in advance of the January 6, 1987 regular City Council meeting. Interestingly, of all the agenda packet items, this document was the only one pre-signed and pre-subscribed with the Council approval legend. At the January 6, 1987 regular meeting of the City Council, in the absence of Mayor Simon, the newly devised "minutes" of the February 4, 1986 executive session were retroactively approved by the City Council. And as stated before, these "minutes" were attached as Exhibit B to Fontana's January 16, 1987 brief in opposition to San Gabriel's motion to dismiss.

Today, further clouding the validity of Exhibit B, San Gabriel charges that the copy of the minutes represented as Exhibit B is not the same in content as that adopted by the City Council on January 6, 1987; that the Exhibit B document had several additions made from the document in the Council's Agenda packet. But, San Gabriel notes, the official minutes of the January 6, 1987 regular Council meeting give no indication or reference to any

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And in his deposition of April 22, 1988 in the Writ Proceeding, in response to the question "Did Mr. Ratelle propose on February 4, 1986 that the City Council make a decision to condemn this property?", Sabo stated: "Not to my recollection."

discussion or amendment being made to the Agenda packet item before it,¹¹ indicating only that the minutes of a February 4, 1986 executive session were approved.

In the oral argument before ALJ Weiss on October 7, 1988, Bacigalupi by way of explanation, stated:

"...The council packets, as is frequent with all cities that I'm acquainted with and also in Fontana, are prepared at least one week before the council meeting.

"It's the rule rather than the exception for many of the items in the council packets to be amended or changed before they get acted upon by the council, including the minutes.

"In fact, in my experience with city councils, and I attend them weekly, city council people always amend minutes, and so the minutes submitted to the city council as part of the council packets, generally speaking, are not what is approved, and that is exactly why, your Honor, only the Q-6 minutes (the Exhibit B version) which were presented to this Commission bear the certified stamp of the City Clerk, while the Q-4 (the agenda packet version) does not."

¹¹ The certified true copy of the January 6, 1987 minutes of the regular session of the City Council, as to this matter merely state:

"Motion made by Councilman Day, seconded by Councilman Koehler, to approve minutes of February 4, 1986 Executive Session. Motion carried by the following vote:

AYES: Mayor Pro Tem Boyles, Councilmen Day, Koehler, Kragness

NOES: None

ABSENT: Mayor Simon"

And attached to the City's Memorandum of Points and Authorities for the Superior Court writ of mandate proceeding is the April 28, 1988 declaration of City Attorney Rager. In his declaration, Rager stated:

"I had prepared a minute of the executive session for February 4, 1986 which was put in the agenda packet for the January 6, 1987 City Council session. That minute was subsequently corrected to include the fact that the City Council had voted to authorize the petition with the Public Utilities Commission. It is my recollection this corrected minute was adopted by the City Council in open session on January 6, 1987, and was ultimately submitted to the Public Utilities Commission as part of the City's response to a motion to dismiss. When this minute was submitted to the Public Utilities Commission, I believed it to be accurate."

Mr. Rager's deposition taken April 13, 1988 in the writ proceeding further states in response to a question whether Attorney Bacigalupi altered Rager's draft that:

"He had me put in the wording concerning a proceeding before the Public Utilities Commission rather than the wording I had put in."

A copy of the minute version submitted to the Commission as Exhibit B is attached to this decision as Appendix A. The wording that is underlined is the wording added to the agenda packet version.

Unexplained is why, at the time in January 1987 when City filed its opposition to San Gabriel's first dismissal motion, and argued its case before ALJ Turkish, City's Attorney Bacigalupi gave the Commission no word about the unusual circumstances attending Exhibit B and its adoption 11 months after the event?

The next development was on May 17, 1988 when City's Attorney Bacigalupi advised ALJ Weiss that during the extensive review, numerous depositions, and production of documents

necessitated in the Superior Court writ proceeding, an inaccuracy had been brought to light relating to the date when the events described in the Exhibit B minutes of the closed session of the City Council had actually occurred. It was stated that City Attorney Rager had discovered that the affirmative action approving a P.U.C. application taken by the City Council had occurred during the regular session of the City Council on April 15, 1986, not during the executive session on February 4, 1986 as previously asserted by City.¹²

Subsequently, on August 8, 1988, when San Gabriel filed its second motion to dismiss, the complete story began to unfold for the first time. San Gabriel included in its motion a voluminous declaration of Michael L. Whitehead which in turn attached copies of exhibits obtained in the Superior Court writ proceeding, which had been concluded. And this led the City on

12 Bacigalupi, at the instruction of Rager, attached to his communication certified copies of the February 4, 1986 open session Council meeting, of the April 15, 1986 Corporation open session and of the April 15, 1986 open session Council meeting, as well as a certified copy of the January 6, 1987 open session Council meeting. These purportedly accurately depict the events that were intended to be portrayed by the February 4, 1986 executive session minute (Exhibit B to City's January 16, 1987 response to San Gabriel's first motion to dismiss).

Unfortunately for City's purpose 11 months after the fact in preparing these closed session minutes to prove previous staff and Council intent to commence eminent domain proceedings, when the February 4, 1986 closed session minutes finally were associated with the Council's April 15, 1986 Corporation and Open Session minutes, they failed of their purpose. The April minutes reflect that Council members considered and authorized only the filing of a proceeding before the Commission to determine the value of the water system, not any commencement of eminent domain proceedings as stated in the Certified True Copy of the now rather discredited executive session minutes.

September 1, 1988 to respond with additional copies of declarations, etc. from the Superior Court proceeding.

It developed that in an April 28, 1988 declaration appended to City's Memorandum of Points and Authorities in the writ proceeding, Rager stated that because of the reaction raised out of the preparation of the February 4, 1986 executive session minute, he subsequently had attempted to collaterally verify the accuracy of the minute. He was able to obtain unofficial videotape recordings of both the February 4, 1986 and April 15, 1986 regular City Council meetings, as well as the April 15, 1986 City Corporation meeting. Reviewing these, Rager ascertained that he had confused various events; that it had been at the April 15, 1986 regular City Council meeting, and not at any February 4, 1986 executive closed session that the City Council had voted to file a petition with the Public Utilities Commission. In his declaration, he states that he had asked Bacigalupi to send the Commission copies of these respective meeting minutes which he states accurately portray the events. (Bacigalupi did this in his May 17, 1988 letter.)

And in these subsequently obtained August 8, 1988 and September 1, 1988 filings, the ALJ learned from an April 28, 1988 declaration appended to the City's Memorandum of Points and Authorities in the Superior Court writ proceedings, that Bacigalupi had stated that until March 1988 he had been unaware of the existence of any City Council minutes other than the one reflecting the purported February 4, 1986 closed session minute (the one he helped create). He stated further that had he been aware of the existence of other Council minutes, he would have filed them with the Commission as part of the City's January 1987 brief opposing the first dismissal action.

Finally, the appendix to the City's April 29, 1988 Memorandum of Points and Authorities in the Superior Court writ

proceeding also contained the declarations of four members of the City Council, Mayor Simon and Councilmen Boyles, Kragness and Koehler.¹³ These sworn declarations, taken late in April 1988, make it very clear that the City Council never had voted or decided to file a condemnation proceeding. The Council voted only to file a just compensation petition with the Commission, and its sole reason for doing so, as these declarations make clear, was to obtain a basis for making an offer to San Gabriel to purchase the water system. The potential for proceeding with a condemnation suit was reserved for possible future consideration. (The existence and content of these sworn declarations of the Councilmen was first revealed to the Commission in the declaration of San Gabriel's Michael L. Whitehead filed August 8, 1988 concurrently with and in support of San Gabriel's Second Motion to Dismiss. The first time the City disclosed to the Commission, the existence or content of these declarations was when the City on September 1, 1988 filed its response and opposition to the second motion to dismiss.)

Discussion

The irony of this proceeding is that, as we stated earlier in D.87-07-082, all that City was required to do to initiate a just compensation proceeding before the Commission under P.U. Code § 1403 was to have filed a petition which unequivocally indicated the intention of that political subdivision to acquire the property, either by eminent domain or by other means such as by purchase.

As is presently abundantly clear, the Fontana City Council in its actions leading up to the filing of the City's petition in June, 1986 had evidenced only a present intention as of

¹³ No declaration was taken from Councilman Day who was ill at the time.

that date to acquire the water property by purchase. Nothing more. We now know that the Council authorization which permitted the City's staff to file the City's petition to the Commission was made at the April 15, 1986 regular City Council meeting.¹⁴ As both City Attorney Rager and City Special Counsel Sabo subsequently stated in April 28, 1988 declarations, both were unaware of any City Council authorization for the City's staff to instigate condemnation proceedings.¹⁵ Nonetheless, the petition to the

14 The Certified True Copy of the Minutes of the City Council Regular meeting on April 15, 1986 state:

"Motion made by Mayor Simon, seconded by Councilman Kragness, to direct the City Manager and the City Attorney to file a petition with the California Public Utilities Commission for initiation of a proceeding to determine the value of the acquisition of the Fontana Water Company. Motion carried by the following vote:

AYES: Mayor Simon, Councilmen Boyles, Day, Koehler, Kragness

NOES: None

ABSENT: None"

15 Paragraph 7 of City Attorney Rager's April 28, 1988 sworn declaration in the writ proceeding states in this regard:

"I am unaware of any decision or vote of the City Council to acquire the Water System of the Fontana Water Company by filing a condemnation suit in the Superior Court."

Paragraph 24 of City Special Counsel Sabo's April 28, 1988 sworn declaration in the writ proceeding states:

"24. At the regular meeting of the City Council on April 15, 1986, specific authorization was given by the City Council pursuant to a motion adopted by the

(Footnote continues on next page)

Commission of June 6, 1986 signed for the City by both Rager and Sabo, as well as by City Manager Ratelle, stated that "Petitioner intends to acquire under eminent domain proceedings..." This was the wording that precipitated the first San Gabriel motion to dismiss, since beyond these words there was little of substance to flesh out indication of unequivocal intent to condemn.

On balance, it is understandable that leading up to preparing and filing the City's June 6, 1986 petition, these city representatives may not have been well versed with valuation and/or condemnation procedures,¹⁶ even though it is also reasonable to expect that the City's attorneys, before drafting and signing that petition would at least have reviewed the appropriate statutes. Ratelle was not an attorney and possibly relied upon the two attorneys in adding his signature for the City.

Nonetheless, once the significance of what they had signed became apparent in November 1986 (when San Gabriel moved for dismissal, citing City of Fresno, supra), the situation could easily have been rectified to reflect the true state of affairs -

(Footnote continued from previous page)

City Council to commence valuation proceedings in the form of the filing of a Petition for Just Compensation before the PUC. To the best of my knowledge, no authorization was granted by any members of the City Council or representatives of the City during said City Council meeting to commence any eminent domain or condemnation proceedings for the purposes of acquiring the Fontana Water Company without the consent of the Fontana Water Company."

16 Indeed, in his April 28, 1988 declaration in the Superior Court proceeding, Rager conceded that he had not been familiar with Public Utilities Commission proceedings and had virtually no experience in the field of eminent domain. Sabo's principal area of legal practice was in municipal bonds and related financing.

that City wanted to make the acquisition by purchase and that the drafter-signees of the petition had erred. A simple amendment to the petition could have been filed.

But the City's representatives chose not to take that approach. Confronted with San Gabriel's many faceted motion to dismiss, including San Gabriel's reliance upon City of Fresno, supra, in arguing that the City's bare bones statement of condemnation intent "fails to place in the record any facts supporting the alleged intent on the part of petitioner to acquire property by eminent domain," they chose instead to continue asserting intent to condemn.

By this time the City realized it needed specialized legal assistance and had associated Mr. Bacigalupi, an attorney well experienced in Commission practice including just compensation, as well as in the conduct of eminent domain proceedings in Superior Court. Bacigalupi conferred with Rager. The City's petition had expressly alleged that the City intended to acquire the water system by "eminent domain proceedings," and Bacigalupi recognized that to support and sustain that statement of intent under challenge by San Gabriel's motion, additional supportive evidence would be needed - some tangible evidence that the City Council had indeed determined it would proceed by eminent domain. The record shows that Bacigalupi in December 1986 asked Rager whether the City Council had formally authorized the filing of a petition with the Commission, and was told that it had not voted to initiate eminent domain procedures, but had voted to authorize a petition to the Commission to initiate just compensation proceedings; that this latter authorization - to the best of Rager's recollection - was during a council executive session on February 4, 1986, although no minutes had ever been prepared of that executive session.

It was then decided to create minutes of that executive session to be used to support City's defense against San Gabriel's

motion. Rager proceeded to draft successive versions based upon his recollection, with Bacigalupi assisting by making successive alterations to Rager's drafts. But while both Rager and Bacigalupi were well aware that the City Council at no time had voted to condemn or proceed with eminent domain proceedings, beginning with the first draft, reference was included of a motion made by the Mayor, seconded, and passed which set forth that the City "proceed to condemn," later altered to "commence eminent domain proceedings."¹⁷ Similarly, included was a paragraph on a City Manager's presentation which was expanded to represent that Ratelle had advised the City Council that "staff had completed its preliminary work in preparation for eminent domain proceedings," and "proposed to acquire by condemnation."¹⁸

These drafts, as we later finally learned, culminated in an City Council agenda packet item, presigned by both Attorney Rager and Mayor Simon, which 11 months retroactively was adopted by the City Council on January 6, 1987 as the purported minutes of a February 4, 1986 executive session of that Council. The document as adopted still included the false statements that the Council had been advised that staff had completed preliminary work in preparation for eminent domain proceedings and had proposed condemnation, as well as the reference to the passed motion to commence eminent domain proceedings. And the document was adopted even though later the Mayor and three of the councilmen

17 Special Counsel Sabo, when later deposed, was asked if such a motion had been made, stated: "I don't recall such a motion," and "I would have to say that I don't think there was any motion made along those lines." (April 28, 1988 deposition.)

18 Again, Sabo who had been present both on February 4, 1986 and April 15, 1986, when asked whether Ratelle during the Council meetings had proposed that the City Council make a decision to condemn, answered "Not to my recollection." (April 28, 1988 deposition.)

categorically denied that the Council "at any time" had authorized or even intended to initiate eminent domain proceedings. This was the document filed as Exhibit B to City's January 16, 1987 response to San Gabriel's motion to dismiss.

This document was incorporated in the City's January 16, 1987 response specifically to support the statement in the City's petition that the City intended to acquire under eminent domain proceedings, the statement of intention under attack by San Gabriel. This incorporation was made despite the fact that City's attorneys knew when they did so that the petition statement was not true; that the City Council had not voted to commence eminent domain proceedings, and that the City Manager had not reported that staff proposed to acquire by condemnation. This action can be nothing less than a planned and deliberate effort to mislead the Commission by an artifice or false statements of fact in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

And the calculated deception did not end there. At the January 23, 1987 hearing before ALJ Turkish, Bacigalupi persisted in the strange attempt to mislead, stating:

"I frankly fail to see the fault that Mr. Ross finds with the resolution adopted in executive session, which is Exhibit B, which once again is a rather unequivocal, I submit, statement by the Council to the City Attorney and the staff to come here and do this. I fail to see any equivocation in what the city has done."

and further:

"And I would ask that you take the time to read the history set forth in the no arbitrage certificate and the tax memorandum. The history in these is interesting and, I think,

contradicts quite conclusively arguments made by Mr. Ross that we have no intent to condemn.¹⁹ (Emphasis added.)

And later, in the April 2, 1987 City response to San Gabriel's appeal from the Commission ruling denying San Gabriel's first motion to dismiss, Bacigalupi still persisted, arguing:

"In stark contrast, however [to the City of Fresno situation], in this case the City Council in the City of Fontana has voted, not once but several times, to commence the acquisition proceedings, to pursue diligently the proceedings before the Public Utilities Commission and thereafter the Superior Court, and has appropriated \$40 million to accomplish these objectives. Frankly, we are at a loss to imagine what more the Company would have us do." (Emphasis added.)

Even after the City on April 29, 1988 filed its Memorandum of Points and Authorities in opposition to San Gabriel's petition for writ of mandate in Superior Court, the City still failed to come forward to the Commission with a straightforward revelation of matters as they really were. That memorandum conceded to the Court that the City Council voted, not on February 4, 1986 in executive session, but on April 15, 1986 in open session to file with the Commission, not "an eminent domain proceeding" as set forth in these Exhibit B "official minutes," but

19 Mr. Bacigaulupi was referring to certain of the financing documentation prepared by City's staff for use in any sale and delivery. Several of these made reference to a possible exercise of eminent domain powers in the event a negotiated sale could not be achieved. But as one of these documents states: "As an alternative, the City may seek to acquire the water system through a condemnation proceeding." In view of the fact that the City Council most emphatically had not decided or voted any condemnation action, these statements may be "interesting," but they scarcely "contradict quite conclusively" arguments that the City had no intent to condemn.

rather merely a petition for the Commission to determine just compensation. It further conceded that the "the City has not decided or voted yet to take the Water Company's assets without the Company's consent by the power of eminent domain,"²⁰.

Instead, on May 17, 1988, by letter to ALJ Weiss, Bacigalupi stated that Rager had "recently notified him" that the February 4, 1986 executive session minutes (Exhibit B) "is inaccurate in some respects"; that the Council action had really occurred on April 15, 1986. But nothing was mentioned of the fact that the City Council had never decided or voted to initiate eminent domain procedures. While copies of minutes of the February 4, 1986 regular Council session, the April 15, 1986 Redevelopment Agency Executive session, the April 15, 1986 Non-Profit Development Corporation regular session, the April 15, 1986 regular Council session, and the January 6, 1987 regular Council session were attached to his letter, no mention was made of the fact contained in City's April 29, 1988 Memorandum of Points and Authorities in the Superior Court proceeding that "the February 4, 1986 executive session minute is mistaken in one other major regard," i.e., that "the City has not decided or voted yet to take the Water Company's assets without the Company's assets without the Company's consent by the power of eminent domain." Nor did the City then furnish the Commission with other documents from its Memorandum of Points and Authorities in the writ proceeding. It was only after San Gabriel filed its second motion to dismiss accompanied by the Whitehead declaration that the full extent of the attempted fraud could be pieced together; only then did the City by its September 1, 1988 response include the damaging material in its Memorandum of Points and Authorities.

20 The Memorandum of Points and Authorities included declaration of the Mayor and three City Councilmen to that point.

This Commission's Rules of Practice and Procedure provide for a Code of Ethics. Rule 1 provides:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

In this matter the City's representatives initially misrepresented an intention to acquire under eminent domain when they knew the City had no such intention, and then created misrepresentations and made arguments to support the initial misrepresentations. A misrepresentation is a falsehood or untruth with the intent and purpose of deceit; it may consist as well in the concealment of what is true as in the assertion of what is false. If a party conceals a fact material to the case, knowing that the other party acts on the presumption that no such fact exists, it is fraud. Fraud is simply the gain of an advantage to another's detriment by deceitful or unfair means. It connotes concealment, falsification, misrepresentation or the like.

While there are distinctions occurring in the course of a proceeding between extrinsic fraud which consists of preventing a fair presentation of views, and intrinsic fraud which relates to fair determination of issues, practical application of the distinctions is difficult, and this Commission will not become involved in rules, distinctions, and categories so as to become impotent to deal with this fraud in a forthright manner.

Under the provisions of the Business and Professions Code, Section 6068(d), a lawyer has a duty to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge by artifice or false statement of fact or law. And any

presentment to a court of a statement of fact known to be false presumes an intent to receive a determination based upon it.

In the judicial courtroom, the filing of an affidavit containing statements known to be false, or with disregard as to their truth or falsity is contemptuous, as is any other attempt to deceive the Court (Vaughn v. Municipal Court (1967) 252 CA 2d 348, 357-358).

Just as a judge in a Court of record has a duty to protect the integrity of the judicial process, so too do an ALJ and this Commission have a commensurate duty to protect the integrity of the administrative law process, and to enforce the effective control of Commission proceedings in order to insure the orderly administration of justice.

The City's representatives have breached the Commission's Code of Ethics in numerous respects. Rule 5 of our Rules of Practice and Procedure require that all applications be verified. The City's petition was verified under penalty of perjury by the City Manager. It was also signed by the City Attorney and the City's Special Counsel. Paragraph 4 of the petition was known not to be true. It cannot be supported by the false February 4, 1986 executive session minutes, which were also falsely verified when "certified" as a "true copy" by the City Clerk. City Councilmen have sworn under oath that there was no intention to condemn. Nonetheless the Council adopted these minutes, false on their face, 11 months after the fact, and the Mayor signed them. City's associated counsel, well versed in eminent domain and public utility proceedings, when associated later in 1986, immediately ascertained that the Council had not voted to condemn. Nonetheless, he participated in the preparation of and submission to the Commission of the false February 4, 1986 executive session minutes, and thereafter artfully argued them and continued to mislead the Commission.

What is the appropriate remedy? The Commission has jurisdiction to punish for contempt, and has the same power and authority in this regard as courts of record. But this power should be exercised solely when necessary. The wide participation by city officials and representatives, civil and legal, in this unfortunate proceeding would necessitate extensive further proceedings, with benefit really to no one. The City's petition, as San Gabriel points out, founders in its own illegality. We believe the best resolution would be for the Commission simply to refuse to consider the City's petition further. To permit the City to amend the just compensation petition would encourage, not deter, such illegal conduct in Commission proceedings. By dismissal of this proceeding the Commission effectuates the purpose and policy of our Rules of Practice and Procedure, and does not cause any injury to the City or to San Gabriel.

While we do not choose to mete out punishment for contempt here, we will refer this matter to the State Bar for appropriate proceedings.

Findings of Fact

1. Division is a water system unit of San Gabriel, a public water utility within the jurisdiction of this Commission.

2. City has been interested in acquiring Division to establish and operate its own municipal water department.

3. The City Council of Fontana, while aware of its eminent domain powers which could be used to acquire the water system, has never decided or voted to use those powers to acquire Division, instead intending no more than acquisition of the system by a negotiated purchase.

4. City Council's staff, in anticipation of a potential by purchase acquisition, prepared preliminary enabling documentation for funding such an acquisition, which documentation was approved in form and authorized by the Council in various sessions of the Council during the first quarter of 1986.

5. Negotiations with San Gabriel having stalled on valuation issues, the City Council in its regular session on April 15, 1986 passed a motion authorizing its staff to file a petition with this Commission to have the Commission determine the just compensation for an acquisition of the system by purchase.

6. On June 6, 1986, the City's staff filed a petition with this Commission, stating the City's intent "to acquire under eminent domain proceedings." The petition, verified by the City Manager, was also signed by the City Attorney and the City's special counsel, all of whom were aware the City had no such present intention to condemn.

7. On September 17, 1986, the Commission issued its statutory Order to Show Cause.

8. At the November 3, 1986 prehearing conference on the Show Cause Order, San Gabriel made its first motion to dismiss based on numerous grounds, including a contention that the City's petition did not allege the "unequivocal expression of intent" required under City of Fresno (1981) 6 CPUC 2d 408.

9. Meanwhile, the City had associated Attorney Bacigalupi, experienced in municipal government, eminent domain and just compensation matters.

10. Bacigalupi immediately ascertained from the City Attorney that the City Council had not voted to initiate eminent domain proceedings, but rather had voted to file with the Commission to initiate just compensation proceedings to obtain a valuation to be used in negotiations with San Gabriel.

11. Instead of conceding error or mistake in the City's filed petition with regard to the stated intent "to acquire under eminent domain proceedings," and amending its petition to the Commission, the City's representatives engaged in deceptions and misrepresentations to sustain the petition as filed.

12. To counter San Gabriel's lack of intent argument, the City's representatives, prompted and guided by Bacigalupi, prepared

successive drafts of minutes of a purported City Council unrecorded executive (or closed) session ascribed as having occurred on February 4, 1986, 11 months earlier.

13. Through the various successive drafts and the Council Agenda Packet to the final "official" product, reference was incorporated of a Council motion, seconded and passed after staff recommendation, that the City proceed to condemnation, although the participants knew this not to be true.

14. Presigned by the City Attorney and the Mayor, this misleading purported February 4, 1986 "minute" was formally adopted by the City Council in regular session on January 6, 1987 and certified by the City Clerk.

15. This misleading false "official" February 4, 1986 minute then was incorporated as Exhibit B to the City's formal January 16, 1987 response to San Gabriel's second motion to dismiss, and filed with the Commission specifically to support the statement in the City's petition that the City intended "to acquire under eminent domain proceedings."

16. In oral argument before the Commission on January 23, 1987, Bacigalupi argued that the Exhibit B minute, taken with other material in the City's application, was sufficiently unequivocal to conclusively contradict San Gabriel's arguments that the City had no intent to condemn.

17. Subsequently, on April 2, 1987, in responding to San Gabriel's appeal from D.87-07-08 which denied San Gabriel's first motion to dismiss, Bacigalupi again persisted in this misleading by arguing that the City Council had voted, not once but several times to commence acquisition proceedings before the Commission "and thereafter the Superior Court."

18. Still later, on May 17, 1988 Bacigalupi advised the ALJ that he had been notified by the City Attorney that Exhibit B was "inaccurate in some respects," notably when the purported City Council action had occurred, but Bacigalupi continued the deception

by failing to inform the ALJ that he knew that the Exhibit was also inaccurate in one other major regard, i.e., that "the City had not decided or voted yet to take the water company's assets without the company's consent by the power of eminent domain."

19. Only after San Gabriel, as a result of discovery efforts in a collateral Superior Court writ action, obtained depositions of the City Council members and other City representatives as well as other documents which served to completely discredit Exhibit B, and on August 8, 1988 filed the present, or second motion to dismiss, did all the facts become known. It was only thereafter, in City's September 1, 1988 response to that motion, that City furnished the Commission with relevant documentation which unveiled the continued deception.

Conclusions of Law

1. The representatives and attorneys of the City of Fontana filed a petition containing a known misrepresentation to the Commission on June 6, 1986 seeking a determination of just compensation with regard to the San Gabriel Fontana Division water system.

2. When challenged by San Gabriel, rather than concede the misrepresentation, known by them to be false, and amend their petition, the City's representatives, attorneys, and associated counsel determined to persist in the misrepresentation by artifice, false statements, and artful but misleading argument.

3. City's motive for indulging in this course of misrepresentation was to avoid possible application of City of Fresno to their petition.

4. But for San Gabriel's suspicion and persistence, the deception would have been successful.

5. The representatives and attorneys of the City, including City's associated counsel, have knowingly, deliberately, and repeatedly misled or sought to mislead the Commission in this

proceeding in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

6. The appropriate remedy should be that San Gabriel's second motion to dismiss should be granted.

7. This matter should be referred to the State Bar of California for appropriate proceedings.

O R D E R

IT IS ORDERED that:

1. The second motion by San Gabriel Valley Water Company to dismiss the City of Fontana's petition for determination of just compensation for acquisition of the utility's Fontana Division is granted, and the petition is dismissed.

2. This matter of professional conduct is referred to the State Bar of California for appropriate proceedings.

This order becomes effective 30 days from today.

Dated April 26, 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Patricia M. Eckert
present but not participating.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

Victor Woizner
Victor Woizner, Executive Director

MINUTES OF THE
CITY COUNCIL OF THE CITY OF FONTANA
REGULAR MEETING
EXECUTIVE SESSION
FEBRUARY 4, 1986

A regular meeting of the City Council of the City of Fontana was held on Tuesday February 4, 1986 in the City Hall Council Chambers, 8353 Sierra Avenue, Fontana, California. Mayor Simon called the meeting to order at 7:30pm. Following the Pledge of Allegiance to the Flag of the United States of America and the invocation, an executive session was called by Mayor Simon. The meeting was adjourned to the executive conference room to discuss litigation to commence acquisition of the Fontana division of the San Gabriel Valley Water Company.

Present: Mayor Simon, Councilmen Boyles, Kragness, Koehler, Day
Absent: None

Also present: City Attorney John M. Rager and City Manager Ratelle

City Manager Ratelle advised the Council that staff had completed it's preliminary work in preparation for eminent domain proceedings to acquire the Fontana division of the San Gabriel Valley Water Company. Financing to pay just compensation had been arranged and it was proposed that the City of Fontana acquire the property by condemnation.

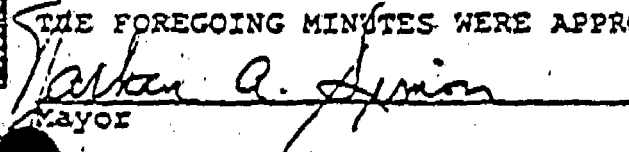
A discussion was held by the Mayor and Councilmen concerning the City's need to acquire the water company.

Motion made by Mayor Simon seconded by Councilman Day to commence eminent domain proceedings by filing a petition for just compensation before the Public Utilities Commission pursuant to just compensation procedure of the Public Utilities Code, for the acquisition of Fontana division of the San Gabriel Valley Water Company to provide water service to the inhabitants of the division based on the findings that the public's interest and necessities require the project, that the acquisition will be the most compatible with the greatest public good and the least private injury and the property sought to be acquired is necessary for the project. Motion carried by following vote:

AYES: Mayor Simon, Councilmen Boyles, Day, Kragness, Koehler
NOES: None.


John M. Rager, City Secretary

THE FOREGOING MINUTES WERE APPROVED BY COUNCIL:


Mayor


-CERTIFIED TRUE COPY-

City Clerk, City of Fontana

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of the City of Fontana
for the determination of just
compensation for acquisition of
the Fontana Division of the San
Gabriel Valley Water Company.

)
)
) Application 86-06-022
) (Filed June 6, 1986)
)

Dale E. Bacigalupi and Andre G. De Bortnowski,
Attorneys at Law, for the City of Fontana,
applicant.

Hufstedler, Miller, Carlson & Beardsley, by
Burton J. Gindler and Donna R. Harvey, and
Michael L. Whitehead, Attorneys at Law, for
San Gabriel Valley Water Company,
respondents.

OPINION ON SAN GABRIEL VALLEY WATER COMPANY'S SECOND
MOTION TO DISMISS CITY OF FONTANA'S PETITION

Statement of Facts

The Fontana Water Company (Division), a division of the San Gabriel Water Company (San Gabriel) provides public utility water service primarily to approximately 21,711 customers in the City of Fontana and adjacent unincorporated areas, but also incidentally to approximately 581 customers in the Cities of Rialto, Rancho Cucamonga and Ontario.

For some years the City has been interested in establishing its own water department to provide water to its residents and to meet anticipated demand within redevelopment project areas. As early as October 1985 discussions were held between City officials and representatives of Division concerning possible city acquisition of the water system owned by Division. The City Council was aware that several methods were available to make an acquisition. Avowedly, its preferred method would be a negotiated purchase and sale, although as an alternative the City

petition to this Commission as initiation of an action in eminent domain, and its efforts to sustain that strained characterization by footnote 1 of its comments, the plain inescapable fact remains that the filing of a petition under Chapter 8 of the PU Code does not commence or initiate an eminent domain proceeding. The plain wording of PU Code § 1403 makes that clear:

"Any political subdivision may, at any time, file with the commission either a petition of the first class, setting forth the intention of the political subdivision to acquire under eminent domain proceedings, or otherwise..., or a petition of the second class, setting forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition to acquire under eminent domain proceedings, or otherwise..." (Emphasis added.)

Clearly, what is contemplated with reference to the foregoing underlined part of PU Code § 1403 is an additional act, one of acquisition by condemnation under the Eminent Domain Law.

Eminent domain refers to legal procedure where the people or government take private property for public use. To take the lands, property, and rights of a public utility, a political subdivision must commence an action in a court of competent jurisdiction. Only by this procedure can such a taking be instituted. This Commission has no jurisdiction to condemn in these instances. The Legislature, however, has given the Commission a specific grant of jurisdiction over issues of just compensation where such issues are involved in particular acquisitions of public utility property, whether by condemnation or by purchase. But our procedures under Chapter 8 are merely peripheral to the act of acquisition. They deal with an alternate way under the Eminent Domain Law to determine the just compensation for a condemnation taking, or with determination of just compensation in an "otherwise" acquisition, as for example, a

purchase by the political subdivision of lands, property, and rights of a public utility. But no taking is authorized by a just compensation issue determination by the Commission. As the Law Revision Comment to Code of Civil Procedure § 1235.165 makes clear, where the term "proceeding" is used with reference to condemnations, it refers to proceedings under the Eminent Domain Law and not to eminent domain matters before the Public Utilities Commission.

The City's assertion that evidence was ignored or misinterpreted must also fail. The evidence is abundantly clear. Instead of a frank admission or acknowledgment to the Commission, when challenged in November 1986 by San Gabriel as to its intentions, that the City's sole intention at that point was only to petition the Commission "for the purpose of establishing the fair market value of the water system in making an offer to buy the water system," and that the Council "had not yet made a determination to vote on whether or not to acquire the property by filing a condemnation suit in superior court (see Councilman Kragness' April 28, 1988 declaration - Exh. 6-D to Whitehead's Declaration), City embarked upon a deliberate and persistent process of misleading the Commission to the effect that City had a present intention to condemn if necessary. As part and parcel of this planned deception City resorted to retrospective creation of purported Executive Session Minutes, duly certified as true, but containing known false and misleading statements artfully crafted to further cloud issues, and then relied upon this false document in various oral and written arguments to the Commission.

In its comments City further asks how, in light of the various documents created in relation to the Certificates of Participation, "is it possible that the Proposed Decision concludes that the City's 'only possible intent' was to obtain a basis for making an offer to buy?" The answer comes both from Councilman Kragness' declaration (supra), and from Mayor Simon's April 27,

1988 declaration (Exh. 6-B to Whitehead's Declaration) wherein he stated: "It is not and never was my understanding that the issuance of the certificates of participation obligated the City to acquire the Fontana Water Company or its assets by filing a condemnation suit in Superior Court. I also understand that the purpose of the PUC valuation proceeding is to establish a value for the water system for the purpose of making an offer to purchase."

Finally, City's contention that the Commission should not use the City Councilmen's declarations lacks merit. County of Los Angeles v. Superior Court (1975) 13 C 3d 721, 726-728, precludes judicial probing into the subjective motivations of legislators, including local legislators. But the ALJ and we considered the declarations, not to inquire into individual subjective mental processes, but to determine just what action the Council did or did not take. And they clearly show that the City Council never voted or decided to file a condemnation action.

San Gabriel's comments support the ALJ's Proposed Decision and urges the Commission to promptly adopt the Proposed Decision as written. San Gabriel concurs with the ALJ's conclusion that the City has engaged in a continuous series of intentional misrepresentations amounting to a fraud on the Commission, and further urges that dismissal will vindicate the integrity of the Commission's procedures and effectuate important public policy objectives.

In San Gabriel's reply to City's comments it stresses that City continues to misrepresent the effect of both the discredited February 4, 1986 minutes, and the financing documentary evidence, before the Commission. In view of the evidence that City Council had never authorized eminent domain proceedings in Superior Court, we agree with San Gabriel that City's characterization of the former in its comments as an "unfortunate error" attributable to "neglect, stupidity or oversight" is but another example of City's efforts to conceal or cloud its fraud upon the Commission.

And with reference to the latter, the financial documentary evidence, the distinction made by the ALJ between "may" condemn and "will" condemn is appropriately reflective of the weight he and we accord this evidence.

We adopt the Proposed Decision of the ALJ without change.

Statement of Facts

The Fontana Water Company (Division), a division of the San Gabriel Water Company (San Gabriel) provides public utility water service primarily to approximately 21,711 customers in the City of Fontana and adjacent unincorporated areas, but also incidentally to approximately 581 customers in the Cities of Rialto, Rancho Cucamonga and Ontario.

For some years the City has been interested in establishing its own water department to provide water to its residents and to meet anticipated demand within redevelopment project areas. As early as October 1985 discussions were held between City officials and representatives of Division concerning possible city acquisition of the water system owned by Division. The City Council was aware that several methods were available to make an acquisition. Avowedly, its preferred method would be a negotiated purchase and sale, although as an alternative the City

Council was aware that it could proceed in a condemnation proceeding in Superior Court. Concentrating upon a possible purchase arrangement, the City Council contemplated using the Fontana Non-Profit Development Corporation (Corporation)¹ as the vehicle of acquisition.²

A certified true copy of the City Council Minutes of the regular council meeting of February 4, 1986 indicates that City's Redevelopment Attorney Sabo reported on discussion in the Council's Executive Session in regards to the acquisition, and that the Council directed staff to proceed with negotiations toward acquisition of the water system. Also discussed in the executive session were tax exempt bond financing, proposed negotiations and valuation of the water system. At the same regular session, the Council passed two resolutions that later had significance to the issues presently to be considered.³

1 The Fontana Non-Profit Development Corporation was represented as being a creature of the City adopted a number of years previously to be used for various types of tax-exempt financing of projects. Assertedly, the Corporation's Board of Directors is comprised of the City Council members, and that in fact they are one and the same, and agents for each other.

2 The Corporation would purchase the Division property from San Gabriel; then in turn resell it on an installment plan to the City. The City and the Corporation would enter a trust agreement with a bank as trustee, issuing \$40 million of certificates of participation which would be sold to an underwriter for re-offer to the public. The City would pledge the water receipts as installment payments.

3 Passed at the February 4, 1986 Regular Council Meeting:

Resolution No. 86-15: establishing a source of revenue to be derived by the city from ownership or operation of Division.

(Footnote continues on next page)

When negotiations with San Gabriel thereafter hung up on valuation issues, the City Council, according to a certified true copy of the minutes of its regular meeting of April 15, 1986, passed a motion directing its City Manager and its City Attorney to file a petition with this Commission to determine the value of the water system.⁴ (Two years later, in April of 1988, sworn declarations of four of five of these City Councilmen stated that the City Council at no time voted or decided to file any condemnation action to acquire the water system; that the sole purpose of the 1986 petition to the Public Utilities (P.U.) Commission was to obtain a valuation basis to make an offer to San Gabriel to purchase the water system.)

On June 6, 1986, the City filed Application (A.) 86-02-022 asking that this Commission fix the amount of just compensation the City should pay for the water system. The petition was signed by City Manager Ratelle, City Attorney Rager, and Special Counsel Sabo. It was verified by City Manager Ratelle. Paragraph No. 4 gives rise to the problem present in this phase of the proceeding. It reads:

(Footnote continued from previous page)

Resolution No. 86-77: approving a purchase of Division, and approving the form of an Installment Sale Agreement, Purchase and Sale Agreement, Trust Agreement, Official Statement and Purchase Agreement, and authorizing execution thereof.

4 Also passed at the April 15, 1986 Regular Council Meeting:

Resolution No. 86-77: approving the issuance of its 1986 Certificates of Participation for the water system project, and approving the final form of an Installment Sale Agreement, Trust Agreement, Official Statement and Purchase Agreement, and authorizing their execution.

"4. Petitioner intends to acquire under eminent domain proceedings all property, franchises and rights (the "property") of the Fontana Division of the San Gabriel Valley Water Company, including the water rights, if any, which are appurtenant to, dedicated for public use or otherwise available for public use within the service area of the Fontana Division of the San Gabriel Valley Water Company and the stock owned by the San Gabriel Valley Water Company or any division, subsidiary or holding company thereof in the Fontana Union Water Company. The City has previously taken certain preliminary actions with respect to the acquisition of the Property by an exercise of the power of eminent domain or otherwise including, without limitations, the adoption of the resolutions of the City Council of the City attached as Exhibit "A" hereto and incorporated herein by this reference." (Emphasis added.)

On September 17, 1986, the Commission issued its Statutory Order to Show Cause (P.U. Code § 1405) setting a Prehearing Conference (PHC) for November 3, 1986. San Gabriel moved for dismissal of the application on a number of grounds including the contention that the City had not by its application alleged a sufficiently "unequivocal expression of intent" to acquire the utility property as would satisfy the Commission requirements of City of Fresno (1981) 6 CPUC 2d 408. Administrative Law Judge (ALJ) Turkish ordered briefs and a January 23, 1987 hearing on the dismissal motion.

The brief Fontana filed on January 16, 1987 in response to the ALJ's order contained a section purporting to reply to San Gabriel's lack of intent contentions, and included two exhibits in support of its arguments. San Gabriel argues that Exhibit B, is

5 Exhibit A attached to and incorporated into the application consisted of copies of Resolutions Nos. 86-15, 86-17, and 86-77 (see footnotes 3 and 4).

the "loaded gun" of this proceeding, a deliberate and calculated attempt to mislead the Commission, although such was not apparent to outsiders at the time of submission of City's brief with its exhibits in 1987.

Exhibit B was represented to the Commission as being a certified true copy of what purported to be the minutes of the executive session of the City Council the evening of February 4, 1986. Signed by City Attorney Rager and subscribed by Mayor Simon as being minutes approved by the City Council, it also bore the certification of the City Clerk.

Exhibit B indicated that City Manager Ratelle at the February 4, 1986 Executive Session had advised the Council that its staff had completed the preliminary work in preparation for "eminent domain" proceedings to acquire the water system, that financing had been arranged, and that it was proposed to acquire the property by condemnation. Exhibit B proceeded further to indicate that at that same February 4, 1986 Executive Session, a motion had been made, seconded, and passed with all five Council members voting affirmatively, that the City "commence eminent domain proceedings by filing a petition for just compensation before the Public Utilities Commission...."

At the January 23, 1987 hearing on the motion to dismiss, the City's associated outside council, Bacigalupi, argued to ALJ Turkish that Exhibit B, the February 4, 1984 executive session minutes, taken with the other materials in the application itself, was sufficiently "unequivocal" as to what the City Council had ordered done before filing the application, to conclusively show that Fontana had evidenced its intent to condemn if a voluntary sale failed.

Following other rulings, etc. not material to the present issue, on June 10, 1987, ALJ Weiss⁶ issued a proposed interim decision denying San Gabriel's motion to dismiss. Among other matters, that proposed decision concluded that the City's application, by indicating an intention to acquire by "purchase, condemnation, or otherwise," sufficed to comply with the requirements of P.U. Code § 1403. On July 29, 1987 by Decision (D.) 87-07-082, the Commission adopted the ALJ's proposed decision. Rehearing requested by San Gabriel was denied on March 23, 1988 (with minor language clarifications not of consequence here).

Meanwhile San Gabriel pondered possible judicial remedies. A San Gabriel executive had discovered certain discrepancies between the Exhibit B executive session minutes of February 4, 1986, and the official minutes of the February 4, 1986 regular session of the City Council. For example, one showed Councilman Boyles absent the evening of February 4, 1986; the other showed him present and voting.

On January 29, 1988, San Gabriel filed in Superior Court for a writ of mandate seeking to force the City to withdraw its application to the P.U.C.⁷ Extensive discovery followed. The evidence uncovered led San Gabriel to conclude that the City had deliberately perpetrated fraud upon the Commission. Accordingly, on August 8, 1988, San Gabriel filed this, its second motion to dismiss before the Commission. The present motion is based upon different grounds and upon newly discovered evidence. The City opposes this second motion to dismiss.

6 On April 14, 1987, as the consequence of the sudden serious illness of ALJ Turkish, the matter was reassigned to ALJ John B. Weiss.

7 On May 23, 1988, the Honorable Ben T. Kayashima, Judge of the Superior Court, finding that P.U. Code §§ 1756-1759 gave exclusive jurisdiction to the State Supreme Court, denied a writ of mandate.

In essence, by this Second Motion to dismiss San Gabriel asserts that having to respond at the close of 1986 to San Gabriel's first dismissal motion, and very cognizant of the essentially bare bones nature of City's condemnation assertions contained in paragraph 4 of City's application, the City's representatives feared that the Commission might grant dismissal based upon San Gabriel's contention (drawn from City of Fresno, supra) that in order for Commission jurisdiction to attach under P.U. Code § 1403, a first class petition must set forth the unequivocal intention of a public subdivision to acquire under eminent domain proceedings. San Gabriel states that Fontana was fearful that the Commission might indeed dismiss the City's application for an insufficiency of evidence showing intent to condemn. Accordingly, San Gabriel asserts, Fontana decided it would have to create some supportive evidence to bolster the record and show that there was indeed City Council eminent domain intent and acts before the City filed its application in June, 1986.

On October 7, 1988, ALJ Weiss heard oral argument on San Gabriel's second motion to dismiss. Upon filing of briefs on October 28, 1988, the motion to dismiss was submitted for decision.

The evidence introduced to support the second motion to dismiss shows the following: Despite the fact that it had not been City practice to prepare formal minutes of the executive or closed sessions of the City Council (indeed City Attorney Rager, deposed on April 13, 1988, stated that he could not recall any previous instance) the City's legal group - with at least the later acquiescence of Mayor Simon, decided to retroactively prepare a closed session minute for the evening of February 4, 1986, which minute would support the City's application statement on intent to

condemn.⁸ Accordingly, Rager, using his recollection of that executive session 11 months earlier, drew up various drafts. These initial drafts reflected closely the context of Redevelopment Attorney Sabo's report on the executive session discussion of the water system acquisition summarized in the official minutes of the February 4, 1986 regular session of the City Council,⁹ except for the addition of references to a motion being made, seconded, and carried by all five Council members to proceed to acquire the water system by "condemnation"; this motion purportedly being made following City Manager Ratelle's purported advice to the Council that staff had completed its preliminary work in preparation for

8 When asked during discovery in the writ proceeding for the motivation behind this most unusual and exceptional procedure, Rager stated:

"Dale Bacigalupi, during the proceeding before the Public Utilities Commission, asked me to prepare some because they had a motion to dismiss and he needed evidence that the Council had made -- had taken the action." (Deposition: 4/31/88.)

9 The Certified True Copy of the Minutes of the City Council Regular Meeting on February 4, 1986 state:

"Mayor Simon called an Executive Session at 7:31 p.m. to discuss potential litigation. The meeting reconvened at 7:56 p.m. Redevelopment Attorney Sabo stated discussion in the Executive Session was in regards to acquisition of the Fontana Water Company by the City of Fontana, and that Council directed staff to proceed with the negotiations to acquire the system on behalf of the City. He stated they also discussed, with regard to the proposed tax exempt bond financing where the City could acquire the system, as well as proposed negotiations and evaluation of the system. Before the resolutions regarding this time were adopted, the City Clerk asked, with approval Attorney Sabo that the Consent Calendar be approved first to help expedite the numbers of the resolutions."

"eminent domain proceedings."¹⁰ Alterations to these drafts were made by the City's associated council Bacigalupi, after which the result was typed, signed by Rager, subscribed by Mayor Simon with the legend "The foregoing minutes were approved by Council," and were included in a Council agenda packet distributed in advance of the January 6, 1987 regular City Council meeting. Interestingly, of all the agenda packet items, this document was the only one pre-signed and pre-subscribed with the Council approval legend. At the January 6, 1987 regular meeting of the City Council, in the absence of Mayor Simon, the newly devised "minutes" of the February 4, 1986 executive session were retroactively approved by the City Council. And as stated before, these "minutes" were attached as Exhibit B to Fontana's January 16, 1987 brief in opposition to San Gabriel's motion to dismiss.

Today, further clouding the validity of Exhibit B, San Gabriel charges that the copy of the minutes represented as Exhibit B is not the same in content as that adopted by the City Council on January 6, 1987; that the Exhibit B document had several additions made from the document in the Council's Agenda packet. But, San Gabriel notes, the official minutes of the January 6, 1987 regular Council meeting give no indication or reference to any discussion or amendment being made to the Agenda packet item before

10 In a sworn declaration dated April 28, 1988 Sabo stated: "I do not recall any formal or informal authorization as of February 4, 1986, on behalf of the City Council acting as City Council or acting on behalf of the Board of Directors of the Corporation to file or to initiate either a condemnation action or proceedings before the Public Utilities Commission of the State of California."

And in his deposition of April 22, 1988 in the Writ Proceeding, in response to the question "Did Mr. Ratelle propose on February 4, 1986 that the City Council make a decision to condemn this property?", Sabo stated: "Not to my recollection."

it,¹¹ indicating only that the minutes of a February 4, 1986 executive session were approved.

In the oral argument before ALJ Weiss on October 7, 1988, Bacigalupi by way of explanation, stated:

"...The council packets, as is frequent with all cities that I'm acquainted with and also in Fontana, are prepared at least one week before the council meeting.

"It's the rule rather than the exception for many of the items in the council packets to be amended or changed before they get acted upon by the council, including the minutes.

"In fact, in my experience with city councils, and I attend them weekly, city council people always amend minutes, and so the minutes submitted to the city council as part of the council packets, generally speaking, are not what is approved, and that is exactly why, your Honor; only the Q-6 minutes (the Exhibit B version) which were presented to this Commission bear the certified stamp of the City Clerk, while the Q-4 (the agenda packet version) does not."

And attached to the City's Memorandum of Points and Authorities for the Superior Court writ of mandate proceeding is the April 28, 1988

¹¹ The certified true copy of the January 6, 1987 minutes of the regular session of the City Council, as to this matter merely state:

"Motion made by Councilman Day, seconded by Councilman Koehler, to approve minutes of February 4, 1986 Executive Session. Motion carried by the following vote:

AYES: Mayor Pro Tem Boyles, Councilmen Day, Koehler, Kragness

NOES: None

ABSENT: Mayor Simon"

declaration of City Attorney Rager. In his declaration, Rager stated:

"I had prepared a minute of the executive session for February 4, 1986 which was put in the agenda packet for the January 6, 1987 City Council session. That minute was subsequently corrected to include the fact that the City Council had voted to authorize the petition with the Public Utilities Commission. It is my recollection this corrected minute was adopted by the City Council in open session on January 6, 1987, and was ultimately submitted to the Public Utilities Commission as part of the City's response to a motion to dismiss. When this minute was submitted to the Public Utilities Commission, I believed it to be accurate."

Mr. Rager's deposition taken April 13, 1988 in the writ proceeding further states in response to a question whether Attorney Bacigalupi altered Rager's draft that:

"He had me put in the wording concerning a proceeding before the Public Utilities Commission rather than the wording I had put in."

A copy of the minute version submitted to the Commission as Exhibit B is attached to this decision as Appendix A. The wording that is underlined is the wording added to the agenda packet version.

Unexplained is why, at the time in January 1987 when City filed its opposition to San Gabriel's first dismissal motion, and argued its case before ALJ Turkish, City's Attorney Bacigalupi gave the Commission no word about the unusual circumstances attending Exhibit B and its adoption 11 months after the event?

The next development was on May 17, 1988 when City's Attorney Bacigalupi advised ALJ Weiss that during the extensive review, numerous depositions, and production of documents necessitated in the Superior Court writ proceeding, an inaccuracy had been brought to light relating to the date when the events

described in the Exhibit B minutes of the closed session of the City Council had actually occurred. It was stated that City Attorney Rager had discovered that the affirmative action approving a P.U.C. application taken by the City Council had occurred during the regular session of the City Council on April 15, 1986, not during the executive session on February 4, 1986 as previously asserted by City.¹²

Subsequently, on August 8, 1988, when San Gabriel filed its second motion to dismiss, the complete story began to unfold for the first time. San Gabriel included in its motion a voluminous declaration of Michael L. Whitehead which in turn attached copies of exhibits obtained in the Superior Court writ proceeding, which had been concluded. And this led the City on September 1, 1988 to respond with additional copies of declarations, etc. from the Superior Court proceeding.

¹² Bacigalupi, at the instruction of Rager, attached to his communication certified copies of the February 4, 1986 open session Council meeting, of the April 15, 1986 Corporation open session and of the April 15, 1986 open session Council meeting, as well as a certified copy of the January 6, 1987 open session Council meeting. These purportedly accurately depict the events that were intended to be portrayed by the February 4, 1986 executive session minute (Exhibit B to City's January 16, 1987 response to San Gabriel's first motion to dismiss).

Unfortunately for City's purpose 11 months after the fact in preparing these closed session minutes to prove previous staff and Council intent to commence eminent domain proceedings, when the February 4, 1986 closed session minutes finally were associated with the Council's April 15, 1986 Corporation and Open Session minutes, they failed of their purpose. The April minutes reflect that Council members considered and authorized only the filing of a proceeding before the Commission to determine the value of the water system, not any commencement of eminent domain proceedings as stated in the Certified True Copy of the now rather discredited executive session minutes.

It developed that in an April 28, 1988 declaration appended to City's Memorandum of Points and Authorities in the writ proceeding, Rager stated that because of the reaction raised out of the preparation of the February 4, 1986 executive session minute, he subsequently had attempted to collaterally verify the accuracy of the minute. He was able to obtain unofficial videotape recordings of both the February 4, 1986 and April 15, 1986 regular City Council meetings, as well as the April 15, 1986 City Corporation meeting. Reviewing these, Rager ascertained that he had confused various events; that it had been at the April 15, 1986 regular City Council meeting, and not at any February 4, 1986 executive closed session that the City Council had voted to file a petition with the Public Utilities Commission. In his declaration, he states that he had asked Bacigalupi to send the Commission copies of these respective meeting minutes which he states accurately portray the events. (Bacigalupi did this in his May 17, 1988 letter.)

And in these subsequently obtained August 8, 1988 and September 1, 1988 filings, the ALJ learned from an April 28, 1988 declaration appended to the City's Memorandum of Points and Authorities in the Superior Court writ proceedings, that Bacigalupi had stated that until March 1988 he had been unaware of the existence of any City Council minutes other than the one reflecting the purported February 4, 1986 closed session minute (the one he helped create). He stated further that had he been aware of the existence of other Council minutes, he would have filed them with the Commission as part of the City's January 1987 brief opposing the first dismissal action.

Finally, the appendix to the City's April 29, 1988 Memorandum of Points and Authorities in the Superior Court writ proceeding also contained the declarations of four members of the City Council, Mayor Simon and Councilmen Boyles, Kragness and

Koehler.¹³ These sworn declarations, taken late in April 1988, make it very clear that the City Council never had voted or decided to file a condemnation proceeding. The Council voted only to file a just compensation petition with the Commission, and its sole reason for doing so, as these declarations make clear, was to obtain a basis for making an offer to San Gabriel to purchase the water system. The potential for proceeding with a condemnation suit was reserved for possible future consideration. (The existence and content of these sworn declarations of the Councilmen was first revealed to the Commission in the declaration of San Gabriel's Michael L. Whitehead filed August 8, 1988 concurrently with and in support of San Gabriel's Second Motion to Dismiss. The first time the City disclosed to the Commission, the existence or content of these declarations was when the City on September 1, 1988 filed its response and opposition to the second motion to dismiss.)

Discussion

The irony of this proceeding is that, as we stated earlier in D.87-07-082, all that City was required to do to initiate a just compensation proceeding before the Commission under P.U. Code § 1403 was to have filed a petition which unequivocally indicated the intention of that political subdivision to acquire the property, either by eminent domain or by other means such as by purchase.

As is presently abundantly clear, the Fontana City Council in its actions leading up to the filing of the City's petition in June, 1986 had evidenced only a present intention as of that date to acquire the water property by purchase. Nothing more. We now know that the Council authorization which permitted the

¹³ No declaration was taken from Councilman Day who was ill at the time.

City's staff to file the City's petition to the Commission was made at the April 15, 1986 regular City Council meeting.¹⁴ As both City Attorney Rager and City Special Counsel Sabo subsequently stated in April 28, 1988 declarations, both were unaware of any City Council authorization for the City's staff to instigate

14 The Certified True Copy of the Minutes of the City Council Regular meeting on April 15, 1986 state:

"Motion made by Mayor Simon, seconded by Councilman Kragness, to direct the City Manager and the City Attorney to file a petition with the California Public Utilities Commission for initiation of a proceeding to determine the value of the acquisition of the Fontana Water Company. Motion carried by the following vote:

AYES: Mayor Simon, Councilmen Boyles, Day, Koehler, Kragness

NOES: None

ABSENT: None"

condemnation proceedings.¹⁵ Nonetheless, the petition to the Commission of June 6, 1986 signed for the City by both Rager and Sabo, as well as by City Manager Ratelle, stated that "Petitioner intends to acquire under eminent domain proceedings..." This was the wording that precipitated the first San Gabriel motion to dismiss, since beyond these words there was little of substance to flesh out indication of unequivocal intent to condemn.

On balance, it is understandable that leading up to preparing and filing the City's June 6, 1986 petition, these city representatives may not have been well versed with valuation and/or

15 Paragraph 7 of City Attorney Rager's April 28, 1988 sworn declaration in the writ proceeding states in this regard:

"I am unaware of any decision or vote of the City Council to acquire the Water System of the Fontana Water Company by filing a condemnation suit in the Superior Court."

Paragraph 24 of City Special Counsel Sabo's April 28, 1988 sworn declaration in the writ proceeding states:

"24. At the regular meeting of the City Council on April 15, 1986, specific authorization was given by the City Council pursuant to a motion adopted by the City Council to commence valuation proceedings in the form of the filing of a Petition for Just Compensation before the PUC. To the best of my knowledge, no authorization was granted by any members of the City Council or representatives of the City during said City Council meeting to commence any eminent domain or condemnation proceedings for the purposes of acquiring the Fontana Water Company without the consent of the Fontana Water Company."

condemnation procedures,¹⁶ even though it is also reasonable to expect that the City's attorneys, before drafting and signing that petition would at least have reviewed the appropriate statutes. Ratelle was not an attorney and possibly relied upon the two attorneys in adding his signature for the City.

Nonetheless, once the significance of what they had signed became apparent in November 1986 (when San Gabriel moved for dismissal, citing City of Fresno, supra), the situation could easily have been rectified to reflect the true state of affairs - that City wanted to make the acquisition by purchase and that the drafter-signees of the petition had erred. A simple amendment to the petition could have been filed.

But the City's representatives chose not to take that approach. Confronted with San Gabriel's many faceted motion to dismiss, including San Gabriel's reliance upon City of Fresno, supra, in arguing that the City's bare bones statement of condemnation intent "fails to place in the record any facts supporting the alleged intent on the part of petitioner to acquire property by eminent domain," they chose instead to continue asserting intent to condemn.

By this time the City realized it needed specialized legal assistance and had associated Mr. Bacigalupi, an attorney well experienced in Commission practice including just compensation, as well as in the conduct of eminent domain proceedings in Superior Court. Bacigalupi conferred with Rager. The City's petition had expressly alleged that the City intended to acquire the water system by "eminent domain proceedings," and

¹⁶ Indeed, in his April 28, 1988 declaration in the Superior Court proceeding, Rager conceded that he had not been familiar with Public Utilities Commission proceedings and had virtually no experience in the field of eminent domain. Sabo's principal area of legal practice was in municipal bonds and related financing.

Bacigalupi recognized that to support and sustain that statement of intent under challenge by San Gabriel's motion, additional supportive evidence would be needed - some tangible evidence that the City Council had indeed determined it would proceed by eminent domain. The record shows that Bacigalupi in December 1986 asked Rager whether the City Council had formally authorized the filing of a petition with the Commission, and was told that it had not voted to initiate eminent domain procedures, but had voted to authorize a petition to the Commission to initiate just compensation proceedings; that this latter authorization - to the best of Rager's recollection - was during a council executive session on February 4, 1986, although no minutes had ever been prepared of that executive session.

It was then decided to create minutes of that executive session to be used to support City's defense against San Gabriel's motion. Rager proceeded to draft successive versions based upon his recollection, with Bacigalupi assisting by making successive alterations to Rager's drafts. But while both Rager and Bacigalupi were well aware that the City Council at no time had voted to condemn or proceed with eminent domain proceedings, beginning with the first draft, reference was included of a motion made by the Mayor, seconded, and passed which set forth that the City "proceed to condemn," later altered to "commence eminent domain proceedings."¹⁷ Similarly, included was a paragraph on a City Manager's presentation which was expanded to represent that Ratelle

17 Special Counsel Sabo, when later deposed, was asked if such a motion had been made, stated: "I don't recall such a motion," and "I would have to say that I don't think there was any motion made along those lines." (April 28, 1988 deposition.)

had advised the City Council that "staff had completed its preliminary work in preparation for eminent domain proceedings," and "proposed to acquire by condemnation."¹⁸

These drafts, as we later finally learned, culminated in an City Council agenda packet item, presigned by both Attorney Rager and Mayor Simon, which 11 months retroactively was adopted by the City Council on January 6, 1987 as the purported minutes of a February 4, 1986 executive session of that Council. The document as adopted still included the false statements that the Council had been advised that staff had completed preliminary work in preparation for eminent domain proceedings and had proposed condemnation, as well as the reference to the passed motion to commence eminent domain proceedings. And the document was adopted even though later the Mayor and three of the councilmen categorically denied that the Council "at any time" had authorized or even intended to initiate eminent domain proceedings. This was the document filed as Exhibit B to City's January 16, 1987 response to San Gabriel's motion to dismiss.

This document was incorporated in the City's January 16, 1987 response specifically to support the statement in the City's petition that the City intended to acquire under eminent domain proceedings, the statement of intention under attack by San Gabriel. This incorporation was made despite the fact that City's attorneys knew when they did so that the petition statement was not true; that the City Council had not voted to commence eminent domain proceedings, and that the City Manager had not reported that staff proposed to acquire by condemnation. This action can be

18 Again, Sabo who had been present both on February 4, 1986 and April 15, 1986, when asked whether Ratelle during the Council meetings had proposed that the City Council make a decision to condemn, answered "Not to my recollection." (April 28, 1988 deposition.)

nothing less than a planned and deliberate effort to mislead the Commission by an artifice or false statements of fact in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

And the calculated deception did not end there. At the January 23, 1987 hearing before ALJ Turkish, Bacigalupi persisted in the strange attempt to mislead, stating:

"I frankly fail to see the fault that Mr. Ross finds with the resolution adopted in executive session, which is Exhibit B, which once again is a rather unequivocal, I submit, statement by the Council to the City Attorney and the staff to come here and do this. I fail to see any equivocation in what the city has done."

and further:

"And I would ask that you take the time to read the history set forth in the no arbitrage certificate and the tax memorandum. The history in these is interesting and, I think, contradicts quite conclusively arguments made by Mr. Ross that we have no intent to condemn." (Emphasis added.)

And later, in the April 2, 1987 City response to San Gabriel's appeal from the Commission ruling denying San Gabriel's first motion to dismiss, Bacigalupi still persisted, arguing:

"In stark contrast, however [to the City of Fresno situation], in this case the City Council in the City of Fontana has voted, not

19 Mr. Bacigalupi was referring to certain of the financing documentation prepared by City's staff for use in any sale and delivery. Several of these made reference to a possible exercise of eminent domain powers in the event a negotiated sale could not be achieved. But as one of these documents states: "As an alternative, the City may seek to acquire the water system through a condemnation proceeding." In view of the fact that the City Council most emphatically had not decided or voted any condemnation action, these statements may be "interesting," but they scarcely "contradict quite conclusively" arguments that the City had no intent to condemn.

once but several times, to commence the acquisition proceedings, to pursue diligently the proceedings before the Public Utilities Commission and thereafter the Superior Court, and has appropriated \$40 million to accomplish these objectives. Frankly, we are at a loss to imagine what more the Company would have us do." (Emphasis added.)

Even after the City on April 29, 1988 filed its Memorandum of Points and Authorities in opposition to San Gabriel's petition for writ of mandate in Superior Court, the City still failed to come forward to the Commission with a straightforward revelation of matters as they really were. That memorandum conceded to the Court that the City Council voted, not on February 4, 1986 in executive session, but on April 15, 1986 in open session to file with the Commission, not "an eminent domain proceeding" as set forth in these Exhibit B "official minutes," but rather merely a petition for the Commission to determine just compensation. It further conceded that the "the City has not decided or voted yet to take the Water Company's assets without the Company's consent by the power of eminent domain,"²⁰.

Instead, on May 17, 1988, by letter to ALJ Weiss, Bacigalupi stated that Rager had "recently notified him" that the February 4, 1986 executive session minutes (Exhibit B) "is inaccurate in some respects"; that the Council action had really occurred on April 15, 1986. But nothing was mentioned of the fact that the City Council had never decided or voted to initiate eminent domain procedures. While copies of minutes of the February 4, 1986 regular Council session, the April 15, 1986 Redevelopment Agency Executive session, the April 15, 1986 Non-Profit Development Corporation regular session, the April 15, 1986

²⁰ The Memorandum of Points and Authorities included declaration of the Mayor and three City Councilmen to that point.

regular Council session, and the January 6, 1987 regular Council session were attached to his letter, no mention was made of the fact contained in City's April 29, 1988 Memorandum of Points and Authorities in the Superior Court proceeding that "the February 4, 1986 executive session minute is mistaken in one other major regard," i.e., that "the City has not decided or voted yet to take the Water Company's assets without the Company's assets without the Company's consent by the power of eminent domain." Nor did the City then furnish the Commission with other documents from its Memorandum of Points and Authorities in the writ proceeding. It was only after San Gabriel filed its second motion to dismiss accompanied by the Whitehead declaration that the full extent of the attempted fraud could be pieced together; only then did the City by its September 1, 1988 response include the damaging material in its Memorandum of Points and Authorities.

This Commission's Rules of Practice and Procedure provide for a Code of Ethics. Rule 1 provides:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

In this matter the City's representatives initially misrepresented an intention to acquire under eminent domain when they knew the City had no such intention, and then created misrepresentations and made arguments to support the initial misrepresentations. A misrepresentation is a falsehood or untruth with the intent and purpose of deceit; it may consist as well in the concealment of what is true as in the assertion of what is false. If a party conceals a fact material to the case, knowing that the other party acts on the presumption that no such fact

exists, it is fraud. Fraud is simply the gain of an advantage to another's detriment by deceitful or unfair means. It connotes concealment, falsification, misrepresentation or the like.

While there are distinctions occurring in the course of a proceeding between extrinsic fraud which consists of preventing a fair presentation of views, and intrinsic fraud which relates to fair determination of issues, practical application of the distinctions is difficult, and this Commission will not become involved in rules, distinctions, and categories so as to become impotent to deal with this fraud in a forthright manner.

Under the provisions of the Business and Professions Code, Section 6068(d), a lawyer has a duty to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge by artifice or false statement of fact or law. And any presentment to a court of a statement of fact known to be false presumes an intent to receive a determination based upon it.

In the judicial courtroom, the filing of an affidavit containing statements known to be false, or with disregard as to their truth or falsity is contemptuous, as is any other attempt to deceive the Court (Vaughn v. Municipal Court (1967) 252 CA 2d 348, 357-358).

Just as a judge in a Court of record has a duty to protect the integrity of the judicial process, so too do an ALJ and this Commission have a commensurate duty to protect the integrity of the administrative law process, and to enforce the effective control of Commission proceedings in order to insure the orderly administration of justice.

The City's representatives have breached the Commission's Code of Ethics in numerous respects. Rule 5 of our Rules of Practice and Procedure require that all applications be verified. The City's petition was verified under penalty of perjury by the City Manager. It was also signed by the City Attorney and the

City's Special Counsel. Paragraph 4 of the petition was known not to be true. It cannot be supported by the false February 4, 1986 executive session minutes, which were also falsely verified when "certified" as a "true copy" by the City Clerk. City Councilmen have sworn under oath that there was no intention to condemn. Nonetheless the Council adopted these minutes, false on their face, 11 months after the fact, and the Mayor signed them. City's associated counsel, well versed in eminent domain and public utility proceedings, when associated later in 1986, immediately ascertained that the Council had not voted to condemn. Nonetheless, he participated in the preparation of and submission to the Commission of the false February 4, 1986 executive session minutes, and thereafter artfully argued them and continued to mislead the Commission.

What is the appropriate remedy? The Commission has jurisdiction to punish for contempt, and has the same power and authority in this regard as courts of record. But this power should be exercised solely when necessary. The wide participation by city officials and representatives, civil and legal, in this unfortunate proceeding would necessitate extensive further proceedings, with benefit really to no one. The City's petition, as San Gabriel points out, founders in its own illegality. We believe the best resolution would be for the Commission simply to refuse to consider the City's petition further. To permit the City to amend or file a new just compensation petition would encourage, not deter, such illegal conduct in Commission proceedings. By dismissal with prejudice the Commission effectuates the purpose and policy of our Rules of Practice and Procedure, and does not cause any injury to the City or to San Gabriel.

While we do not choose to mete out punishment for contempt here, we will refer this matter to the State Bar for appropriate proceedings.

Findings of Fact

City's Special Counsel. Paragraph 4 of the petition was known not to be true. It cannot be supported by the false February 4, 1986 executive session minutes, which were also falsely verified when "certified" as a "true copy" by the City Clerk. City Councilmen have sworn under oath that there was no intention to condemn. Nonetheless the Council adopted these minutes, false on their face, 11 months after the fact, and the Mayor signed them. City's associated counsel, well versed in eminent domain and public utility proceedings, when associated later in 1986, immediately ascertained that the Council had not voted to condemn. Nonetheless, he participated in the preparation of and submission to the Commission of the false February 4, 1986 executive session minutes, and thereafter artfully argued them and continued to mislead the Commission.

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Findings of Fact

1. Division is a water system unit of San Gabriel, a public water utility within the jurisdiction of this Commission.

City's Special Counsel. Paragraph 4 of the petition was known not to be true. It cannot be supported by the false February 4, 1986 executive session minutes, which were also falsely verified when "certified" as a "true copy" by the City Clerk. City Councilmen have sworn under oath that there was no intention to condemn. Nonetheless the Council adopted these minutes, false on their face, 11 months after the fact, and the Mayor signed them. City's associated counsel, well versed in eminent domain and public utility proceedings, when associated later in 1986, immediately ascertained that the Council had not voted to condemn. Nonetheless, he participated in the preparation of and submission to the Commission of the false February 4, 1986 executive session minutes, and thereafter artfully argued them and continued to mislead the Commission.

What is the appropriate remedy? The Commission has jurisdiction to punish for contempt, and has the same power and authority in this regard as courts of record. But this power should be exercised solely when necessary. The wide participation by city officials and representatives, civil and legal, in this unfortunate proceeding would necessitate extensive further proceedings, with benefit really to no one. The City's petition, as San Gabriel points out, founders in its own illegality. We believe the best resolution would be for the Commission simply to refuse to consider the City's petition further. To permit the City to amend the just compensation petition would encourage, not deter, such illegal conduct in Commission proceedings. By dismissal of this proceeding the Commission effectuates the purpose and policy of our Rules of Practice and Procedure, and does not cause any injury to the City or to San Gabriel.

While we do not choose to mete out punishment for contempt here, we will refer this matter to the State Bar for appropriate proceedings.

Findings of Fact

1. Division is a water system unit of San Gabriel, a public water utility within the jurisdiction of this Commission.

2. City has been interested in acquiring Division to establish and operate its own municipal water department.

3. The City Council of Fontana, while aware of its eminent domain powers which could be used to acquire the water system, has never decided or voted to use those powers to acquire Division, instead intending no more than acquisition of the system by a negotiated purchase.

4. City Council's staff, in anticipation of a potential by purchase acquisition, prepared preliminary enabling documentation for funding such an acquisition, which documentation was approved in form and authorized by the Council in various sessions of the Council during the first quarter of 1986.

5. Negotiations with San Gabriel having stalled on valuation issues, the City Council in its regular session on April 15, 1986 passed a motion authorizing its staff to file a petition with this Commission to have the Commission determine the just compensation for an acquisition of the system by purchase.

6. On June 6, 1986, the City's staff filed a petition with this Commission, stating the City's intent "to acquire under eminent domain proceedings." The petition, verified by the City Manager, was also signed by the City Attorney and the City's special counsel, all of whom were aware the City had no such present intention to condemn.

7. On September 17, 1986, the Commission issued its statutory Order to Show Cause.

8. At the November 3, 1986 prehearing conference on the Show Cause Order, San Gabriel made its first motion to dismiss based on numerous grounds, including a contention that the City's petition did not allege the "unequivocal expression of intent" required under City of Fresno (1981) 6 CPUC 2d 408.

9. Meanwhile, the City had associated Attorney Bacigalupi, experienced in municipal government, eminent domain and just compensation matters.

10. Bacigalupi immediately ascertained from the City Attorney that the City Council had not voted to initiate eminent domain proceedings, but rather had voted to file with the Commission to initiate just compensation proceedings to obtain a valuation to be used in negotiations with San Gabriel.

11. Instead of conceding error or mistake in the City's filed petition with regard to the stated intent "to acquire under eminent domain proceedings," and amending its petition to the Commission, the City's representatives engaged in deceptions and misrepresentations to sustain the petition as filed.

12. To counter San Gabriel's lack of intent argument, the City's representatives, prompted and guided by Bacigalupi, prepared successive drafts of minutes of a purported City Council unrecorded executive (or closed) session ascribed as having occurred on February 4, 1986, 11 months earlier.

13. Through the various successive drafts and the Council Agenda Packet to the final "official" product, reference was incorporated of a Council motion, seconded and passed after staff recommendation, that the City proceed to condemnation, although the participants knew this not to be true.

14. Presigned by the City Attorney and the Mayor, this misleading purported February 4, 1986 "minute" was formally adopted by the City Council in regular session on January 6, 1987 and certified by the City Clerk.

15. This misleading false "official" February 4, 1986 minute then was incorporated as Exhibit B to the City's formal January 16, 1987 response to San Gabriel's second motion to dismiss, and filed with the Commission specifically to support the statement in the City's petition that the City intended "to acquire under eminent domain proceedings."

16. In oral argument before the Commission on January 23, 1987, Bacigalupi argued that the Exhibit B minute, taken with other material in the City's application, was sufficiently unequivocal to

conclusively contradict San Gabriel's arguments that the City had no intent to condemn.

17. Subsequently, on April 2, 1987, in responding to San Gabriel's appeal from D.87-07-08 which denied San Gabriel's first motion to dismiss, Bacigalupi again persisted in this misleading by arguing that the City Council had voted, not once but several times to commence acquisition proceedings before the Commission "and thereafter the Superior Court."

18. Still later, on May 17, 1988 Bacigalupi advised the ALJ that he had been notified by the City Attorney that Exhibit B was "inaccurate in some respects," notably when the purported City Council action had occurred, but Bacigalupi continued the deception by failing to inform the ALJ that he knew that the Exhibit was also inaccurate in one other major regard, i.e., that "the City had not decided or voted yet to take the water company's assets without the company's consent by the power of eminent domain."

19. Only after San Gabriel, as a result of discovery efforts in a collateral Superior Court writ action, obtained depositions of the City Council members and other City representatives as well as other documents which served to completely discredit Exhibit B, and on August 8, 1988 filed the present, or second motion to dismiss, did all the facts become known. It was only thereafter, in City's September 1, 1988 response to that motion, that City furnished the Commission with relevant documentation which unveiled the continued deception.

Conclusions of Law

1. The representatives and attorneys of the City of Fontana filed a petition containing a known misrepresentation to the Commission on June 6, 1986 seeking a determination of just compensation with regard to the San Gabriel Fontana Division water system.

2. When challenged by San Gabriel, rather than concede the misrepresentation, known by them to be false, and amend their

petition, the City's representatives, attorneys, and associated counsel determined to persist in the misrepresentation by artifice, false statements, and artful but misleading argument.

3. City's motive for indulging in this course of misrepresentation was to avoid possible application of City of Fresno to their petition.

4. But for San Gabriel's suspicion and persistence, the deception would have been successful.

5. The representatives and attorneys of the City, including City's associated counsel, have knowingly, deliberately, and repeatedly misled or sought to mislead the Commission in this proceeding in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

6. The appropriate remedy should be that San Gabriel's second motion to dismiss should be granted with prejudice.

ORDER

IT IS ORDERED that the Second motion by San Gabriel Valley Water Company to dismiss the City of Fontana's petition for determination of just compensation for acquisition of the utility's Fontana Division is granted, and the petition is dismissed with prejudice.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.

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6. The appropriate remedy should be that San Gabriel's second motion to dismiss should be granted with prejudice.

7. This matter should be referred to the State Bar of California for appropriate proceedings.

ORDER

IT IS ORDERED that:

1. The second motion by San Gabriel Valley Water Company to dismiss the City of Fontana's petition for determination of just compensation for acquisition of the utility's Fontana Division is granted, and the petition is dismissed with prejudice.

2. This matter of professional conduct is referred to the State Bar of California for appropriate proceedings.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.

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6. The appropriate remedy should be that San Gabriel's second motion to dismiss should be granted.

7. This matter should be referred to the State Bar of California for appropriate proceedings.

O R D E R

IT IS ORDERED that:

1. The second motion by San Gabriel Valley Water Company to dismiss the City of Fontana's petition for determination of just compensation for acquisition of the utility's Fontana Division is granted, and the petition is dismissed.

2. This matter of professional conduct is referred to the State Bar of California for appropriate proceedings.

This order becomes effective 30 days from today.

Dated APR 26 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Patricia M. Eckert
present but not participating.