

Decision 89 06 056

JUN 21 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of the City of Vallejo for )  
issuance of an order to show cause )  
and for a determination of just )  
compensation in eminent domain )  
proceedings. )

Application 88-07-021  
(Filed July 18, 1988)

Skaiff & Anderson, by Dwight C. Donovan and  
Andrew J. Skaiff, Attorneys at Law, for the  
City of Vallejo, petitioner.  
Douglas E. Stephenson, Attorney at Law, for  
Southern Pacific Transportation Company,  
respondent.

OPINION

The City of Vallejo (Vallejo) requests an order fixing  
the just compensation it shall pay to the Southern Pacific  
Transportation Company (SPT) for the lands, property, and rights  
described as follows:

"A 10-foot wide easement for the placement,  
reconstruction, maintenance, repair, renewal,  
and operation of a water main located within  
the right of way and parallel to the tracks of  
the Southern Pacific Railroad Company (sic) for  
a distance of approximately 1.463 miles and a  
width of 10 feet between Engineer Station  
114+00 and Engineer Station 191+26, near the  
station of Flosden, Solano County, California,  
in the location shown by red line on the map  
attached hereto as Exhibit 'A' and incorporated  
herein by reference, along with the perpetual  
right of ingress and egress thereto."  
(Petition, p. 3.)

The above described property is situated in Vallejo, County of  
Solano, and is within Vallejo's corporate limits.

Vallejo's petition invokes the Commission's authority  
under Public Utilities (PU) Code §§ 1401-1421 to fix the just

compensation which shall be paid by the petitioner, under the law, for the taking of the described lands, properties, and rights owned by SPT. In Decision (D.) 88-08-039, dated August 24, 1988, the Commission issued, pursuant to PU Code § 1405, its order directing SPT to appear and show cause why the Commission should not proceed to hear Vallejo's petition and to fix the just compensation to be paid for the above described properties. D.88-08-039 was duly served upon SPT and Vallejo; and on September 19, 1988, a prehearing conference was held before Administrative Law Judge (ALJ) Baer to consider the procedures to be followed in hearing the petition of Vallejo. During the prehearing conference the parties agreed: to exchange prepared testimony, reports, and exhibits on November 21, 1988; to take depositions between that date and December 9, 1988; and to hold hearings on December 15 and 16, 1988. The schedule was observed by both parties; and hearings were held on December 15 and 16 and the matter submitted, subject to filing of concurrent briefs on February 8, 1989.

Stipulation

On October 13, 1988, the parties jointly filed a stipulation, signed by their respective attorneys, which states:

- "1. The City of Vallejo has run an underground water line across Southern Pacific's property since approximately May, 1940, paying an annual fee to Southern Pacific for the right to operate its water line below that property. A dispute between the parties arose concerning Southern Pacific's right to raise the fee described above, on or about May, 1985. The City of Vallejo, as a result of that dispute, chose to exercise its right to pursue eminent domain proceeding against Southern Pacific which led to the filing of the petition in this action on July 18, 1988. No fees have been paid to Southern Pacific by the City of Vallejo for the use of said land from May 22, 1985 to the present.
- "2. In its petition, the City of Vallejo seeks a determination of just compensation for a

10-foot wide easement for the operation of the water main, which compensation would be paid in connection with the condemnation of the easement. The petition does not seek a determination of Southern Pacific's entitlement to compensation for the City of Vallejo's use of the easement from May, 1985 to the date of condemnation. At the prehearing conference, the administrative law judge indicated his willingness to hear evidence and rule on that issue in order to have all issues determined in one forum.

- "3. The parties hereby stipulate to allow all issues to be adjudicated in this proceeding, and to be bound by the Commission's adjudication thereof. The parties will present their evidence to Administrative Law Judge Baer, and will present legal argument on the evidence, either orally or by way of written briefs. The issues to be decided, in addition to the determination of just compensation, are as follows:

"A. Does Southern Pacific have any legal entitlement to charge an annual fee to the City of Vallejo from May, 1985 through the date of condemnation in excess of the fee which was being assessed on that date?

"B. Assuming that Southern Pacific is entitled to assess a fee for the City of Vallejo's use of the property from 1985 through the date of condemnation, what is the proper value of the fee to be assessed?

- "4. Both parties further stipulate that they would not contest the issue of the Commission's authority to hear and determine the issues raised in the petition and in this stipulation. Both parties agree to be bound by the Commission's determination of the issues described herein. The expressed purpose of this stipulation is to promote economy of justice and to have all matters currently

before the parties addressed in one forum at one time.

- "5. Consistent with the purpose outlined in the preceding paragraph, the parties hereto agree that they will take all steps necessary to transfer an easement to the property immediately upon the Commission's issuance of its order determining just compensation in this action. They further stipulate that they will take all steps necessary to transfer any funds deemed owing to Southern Pacific by the City of Vallejo pertaining to the City's use of the property from 1985 through the date of condemnation. In connection with this paragraph, the parties specifically agree that they will comply with the first three sentences of Section 1412 of the California Public Utilities Code."

Pursuant to the stipulation of the parties, the ALJ received evidence and heard argument concerning the issues covered

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1 Section 1412 provides in part:

"Within 20 days after the Commission has made and filed its finding, the owner of the lands, property, and rights may file with the legislative or other governing body of the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the Commission. Upon the filing of the stipulation, the political subdivision shall proceed with all due diligence to provide the necessary funds under the law governing the providing of such funds, for paying the just compensation fixed by the Commission. Whenever the just compensation has been tendered by the political subdivision, a deed of grant, bargain, and sale conveying the owner's right, title, and interest in and to the lands, property, and rights to the political subdivision shall be executed and delivered by the owner, and the other claimants who have any right, title, or interest in the property shall execute appropriate instruments conveying or releasing to the political subdivision their respective rights, titles, and interests therein."

by the stipulation. This opinion will dispose of those issues as well as the just compensation issues.

Historical Background

On May 22, 1940, SPT's predecessor, Southern Pacific Company (SP), entered into a standard license agreement with Vallejo covering Vallejo's proposed construction of a water main along SP's Vallejo branch railroad right-of-way. In that era, SP was, first and foremost, a railroad. Although SP owned vast land holdings at the time, it made little effort to earn income from them. Moreover, SP frequently sought to maintain favor with local governments by providing them with lease/license agreements for pipelines, streets and roads, etc., for nominal annual rentals. Such was the case with the 1940 agreement between SP and Vallejo, which provided Vallejo with a 1.46-mile (7,726 feet) pipeline right-of-way for a mere \$100 per year.

In the late 1960's, SP's management began to realize that it must begin to focus on developing and capitalizing on SP's land resources. In 1968, Southern Pacific Company, the parent holding company, was restructured into SPT, the transportation subsidiary, Southern Pacific Land Company, which managed its own and SPT's land assets, Southern Pacific Pipeline Company, and several other narrowly focused subsidiaries. In the early to mid-1970's, one of the objectives of SP Land Company was to review the many thousands of existing long-term lease and license agreements and begin bringing them up to market rental rates. This initial review resulted - in 1975 - in the City's license agreement being increased from \$100 per annum, where it had remained since 1940, to \$400 per annum.

In the late 1970's, with inflation approaching double digits, SP Land Company began inserting cost-of-living increases in all of its real estate leases and licenses. As a result, in 1979, a Consumer Price Index (CPI) was inserted in the 1940 agreement. Thus, by 1984, the last year that the City paid any rental for the

subject property, the rent had increased from \$400 to \$585 per annum.

In 1984, following the merger of Southern Pacific Company and Santa Fe Industries and the formation of Santa Fe Pacific Realty (SFPR), one of the first statewide tasks of SFPR's management was to bring all existing lease and license agreements up to market rates, i.e., rentals based on present market values of the real estate assets. For pipeline leases, this was accomplished by having regional SFPR lease managers estimate the value of comparable real estate in the surrounding community, following which they would multiply this value by a number of other factors: (1) length of right-of-way; (2) width of right-of-way; (3) percent impairment of fee value; and (4) reasonable rate of return on value of assets.

Using this approach, in 1984, SPT developed what it considered to be a conservative (in favor of the City of Vallejo) annual rental of \$9,735 for the subject property. On August 28, 1984, SPT wrote to the City advising that, based on its review of the 1940 agreement in relation to market real estate values, the then-current rental was woefully low. SPT requested that, commencing May 22, 1985, the rent be increased to \$9,735 annually. Following several years of discussions and negotiations, the parties reached an impasse. Vallejo initiated this legal proceeding to resolve that impasse.

Property to be Taken

The easement that Vallejo seeks to have valued by the Commission lies within a part of the right-of-way of SP connecting Napa and the Napa Valley on the north and Vallejo and the Mare Island Naval Reserve on the south and southwest. This railroad right-of-way is itself a small part of an operating railway and utility system, extending in all directions and connecting services throughout the routes of SPT's lines.

As indicated above, Vallejo has used a portion of this railroad right-of-way for its water pipelines since the early 1940's. The part of the SP railroad right-of-way occupied by the pipeline is about 7,725 feet or 1.463 miles long and lies between Tuolumne Street on the north and Texas Street on the south. The north 3,126± feet of the pipeline lie along the west side of the railroad right-of-way, while the south 4,600± feet of the pipeline lie along the east side of the railroad right-of-way. In the section with which we are concerned SP's right-of-way varies in width from 50 to 100 feet.

In its application Vallejo seeks a 10-foot wide by 7,725±-foot long permanent easement or right-of-way for the placement of its 20-inch diameter water main, manholes, valves, and other facilities incidental to its operation. Thus, the total area sought to be valued in this proceeding is 10 x 7,725 feet or 77,250 square feet or 1.7734 acres.

#### Motion to Amend Application

At the beginning of the first day of hearing, December 15, 1988, Vallejo submitted to the ALJ a motion under PU Code § 1410<sup>2</sup> to amend the application by reducing the width of the easement to be valued from 10 feet to 6 feet wide. In support of its motion the City alleged that, since the filing of the petition, it had determined that it may effectively maintain its water main within a 6-foot wide easement. It further alleged that

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#### 2 Section 1410 states:

"The Commission may, at any time subsequent to the filing of the petition, and prior to making and filing its finding as to just compensation, authorize the amendment of the petition by altering or modifying the description of the lands, property, and rights, or by adding to or deducting from the lands, property, and rights, and in each other respect including jurisdictional allegations."

at deposition neither expert witness would alter his valuation procedure in connection with a 6-foot wide easement, other than to diminish his initial valuation figure by a 40% factor. Finally, the City alleged that its engineer has determined that a 6-foot wide easement will suffice for the limited purposes which the City intends to make of this easement.

Argument on this motion was deferred until after the taking of evidence, when, at the end of the second day of hearing, December 16, the ALJ denied the motion.

The City renewed its motion to amend the application in its brief filed February 8, 1989. The facts cited by the City in its brief in support of its motion are not matters of record. Rather, they consist of counsel's recollection of the events that transpired during negotiations between SPT and the City over settlement of the dispute.

In its brief, SPT opposes the motion of Vallejo to amend its petition. SPT argues that its appraisal report, which has already cost \$12,500 plus \$250 per hour for the appraiser's time in court, was premised on the City's 10-foot easement. SPT asserts that to change the width at the last minute would require a new appraisal of severance damages. SPT's appraiser testified that this was the case. (Tr. 2:168-70, 181-84.) A new appraisal of severance damages would cost an additional sum, which SPT is unwilling to absorb. In addition, SPT argues that both parties agreed to use the Commission's processes to resolve the entire dispute quickly. It further contends that Vallejo should not be permitted on the morning of the hearing to amend its petition and thereby force a delay of at least several months to permit SPT to reanalyze the severance damage issue and sponsor testimony relating thereto.

We confirm the ALJ's ruling denying the motion to amend. We find SPT's argument persuasive. We also note that the City's own engineer testified that to repair the pipeline would require a



trench as wide as 5 to 6 feet in order to give the employees room to work around the pipeline. (Tr. 1:27.) We believe that, where the City contemplates trenching within its easement up to the 6-foot wide easement boundary it proposes, a 6-foot easement is undersized for the pipeline now installed in SPT's property. We also note that SPT's appraiser cited an example of a 30-inch diameter high pressure gas transmission line lying within a 10-foot wide easement in his testimony. (Exhibit 8, pp. 16 and 17.) Although Vallejo's water pipeline is slightly smaller than the gas pipeline, we believe the relationship between the size of the transmission line and the width of the easement is more appropriate at 10 feet than at 6 feet.

Evidence of SPT's Appraiser

SPT's appraiser John C. Donohue, M.A.I.,<sup>3</sup> testified that he first divided SPT's transportation corridor into five segments, depending upon the adjoining land use characteristics. He numbered the five segments 1 through 5 beginning at the south end of the subject railroad right-of-way. The five segments are described as follows:

1. Segment 1 is 3,347 feet long, lying along the east side of the transportation corridor. It abuts low density residential uses for the most part and a smaller section abuts the Vallejo Senior High School grounds.
2. Segment 2 is 1,253 feet long, lying along the east side of the transportation corridor where the corridor adjoins the grounds of Kaiser Medical Center. It is

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3 See Appendix A.

thus identified with medical or alternative institutional uses.

3. Segment 3 is 950 feet long, lying along the west side of the transportation corridor between Sereno Drive and El Campo Gardens, a residential subdivision. This segment is identified with highway commercial uses abutting Broadway, a main north-south artery in Vallejo.
4. Segment 4 is 960 feet long, lying along the west side of the transportation corridor. It is identified with low density residential uses such as El Campo Gardens, which is adjacent to the segment.
5. Segment 5 is 1,215 feet long, lying along the west side of the transportation corridor. It is identified with the highway and community level commercial uses abutting Broadway.

In summary, SPT's appraiser used low density single-family residential land value indicators to derive fair market values for Segments 1 and 4. He used commercial land value indicators to value Segments 2, 3, and 5.

Donohue's study of the real estate market in Vallejo showed that recent residential land value indicators throughout Vallejo's older built-up neighborhoods were relatively few in number. He therefore created a collage of residential land market data across zones and densities, solicited "what if" information from local realtors, and compared percentage relationships between land and total property in order to have adequate residential land value information. In addition to other information investigated and applied in his appraisal, he also relied on residential land value indicators from nine real property transactions. He summarized them in a table containing location, sales date, land area in square feet, and purchase price expressed as a total and as a price per square foot. The price data range from \$2.47 per square foot to \$6.86 per square foot. (The average of these data

is \$4.36 per square foot, and the median is \$4.31 per square foot.) Donohue felt that these data support low density single-family residential land values for this district in the range of \$4 to \$5 per square foot. He assigned a value of \$4.50 per square foot to Segment 1 and a value of \$4.25 per square foot to Segment 4.

Donohue did a similar study of commercial land value indicators in Vallejo's older and newer developing business and highway districts. He relied upon 15 items which he summarized in a table similar to the one described above. The prices before adjustment ranged widely between \$3.62 per square foot and \$10.95 per square foot. (The average of the 15 commercial land value indicators is \$6.69 per square foot; and the median is \$5.16 per square foot.) After considering adjustments, the appraiser believed that the information and data in his possession supported commercial land values for this district in the range of \$6 to \$8 per square foot. He applied a value of \$6 per square foot to Segment 2, a value of \$7.50 per square foot to Segment 3, and a value of \$6.50 per square foot to Segment 5.

In reaching his total valuation the appraiser next found the square footage of each segment by multiplying the length of the segment times the width of the easement (10 feet). He then multiplied the square footage of each segment times the value he arrived at above for each segment. This operation is demonstrated in the table following this page, which shows that the total square footage is 77,250 and the unadjusted value of the fee is \$416,820.

Since the City is seeking only the exclusive use of the subsurface rights in the easement corridor, the appraiser valued the easement portion of the fee at 50% of the fee value. The unadjusted value of the easement is thus one-half of \$416,820, or \$208,410. To this unadjusted value of the easement the appraiser added one-third for the assembly or synergy value. This concept will be explained later. His total for the easement after adding one-third is \$277,880, which he rounded to \$278,000.

Table 1

<u>Value Segment</u>	<u>Square Feet</u>	<u>Value/Sq.Ft. Applied</u>	<u>Unadjusted Value of Fee</u>
1	33,470	\$4.50	\$ 75,308
2	12,530	6.00	37,590
3	9,500	7.50	71,250
4	9,600	4.25	40,800
5	12,150	6.50	78,975
Totals	77,250 sq.ft.		416,820
Less:	50% for Easement		<u>-208,410</u>
Unadjusted Value of Easement			208,410
Plus: Assembly of Synergy Value at 1/3			<u>69,470</u>
			277,880
Rounding			\$278,000

It should be noted that in considering the 15 commercial and the 9 residential land value indicators Donohue did not use averages or any particular mathematical formula in arriving at the values he assigned. He looked at each land value indicator in light of the particular facts and information in his possession regarding the transaction and the property and gave each transaction more or less weight in arriving at his appraisal of each segment.

#### Evidence of City of Vallejo's Appraiser

The City called Hal Bolla as its expert appraisal witness. He first determined the amount of square footage occupied by the entire railroad right-of-way traversed by the water main. The length he found to be 7,580 feet. However, since the railroad right-of-way varies in width along that portion from 50 to 100 feet, he next divided the right-of-way into segments of varying widths. His method for reaching the total of 505,500 square feet is demonstrated in attached Table 2.

Table 2

<u>Segment</u>	<u>Length (Feet)</u>		<u>Width (Feet)</u>		<u>Square Feet</u>
1	550	x	100	=	55,000
2	2,470	x	75	=	185,250
3	450	x	70	=	31,500
4	450	x	65	=	29,280
5	2,150	x	60	=	129,000
6	<u>1,510</u>	x	50	=	<u>75,500</u>
Totals	7,580				505,530
Rounded Total					505,500
Value of Fee (505,500 x \$3.50)					\$1,769,250
Square Footage of Easement 10 x 7,580					75,800
Value of Easement (75,800 x \$3.50 x 20%)					\$53,060

Bolla next found the square footage of the easement by multiplying the width of the easement (10 feet) by the total length of 7,580 feet. The total square footage of the easement is 75,800 square feet. Bolla then chose a unit valuation of \$3.50 per square foot to apply to the square footage of the railroad right-of-way as a whole and the portion thereof represented by the easement. He used comparable sales data from Vallejo in reaching his unit valuation. Those data are found in Exhibit 16, which is Bolla's revised Exhibit B from his prepared testimony. The comparable sales data in revised Exhibit B consist of two residential land transactions and four commercial/industrial transactions. The residential sales show prices per square foot of \$2.70 and \$2.80. The commercial/industrial sales show prices per square foot ranging from \$1.10 to \$4.39.

Bolla multiplied his adopted unit value of \$3.50 times the total square footage of the entire railroad right-of-way to reach a fee value of \$1,769,250. He next calculated the value of the interest to be taken by Vallejo by multiplying the square footage of the easement (75,800 square feet) by the unit value (\$3.50 per square foot) to arrive at a fee value of \$265,300. Only

the subsurface rights in the easement area were to be taken by the City. He gave as his expert opinion that the value of the subsurface rights was no more than 20% of the fee value. Twenty percent of \$265,300 is \$53,060, which constitutes his opinion of the value of the easement to be taken by Vallejo.

Issues to be Decided

The following issues have been distilled from the foregoing testimony as those contested areas that need to be decided before a decision can be reached as to the fair market value of the easement sought by the City:

1. What rules of law should be applied in valuing the proposed easement?
2. What is the highest and best use of SPT's right-of-way?
3. What is the interest in real property that the City seeks to condemn?
4. Should the easement be valued as a whole or segment by segment?
5. What per square foot value or values should be applied to the portion of the SPT right-of-way to be occupied by the City?
6. What percentage of the fee value of the City's proposed 10-foot corridor should be applied to reach the fair market value of the easement?
7. What assembly or synergy value, if any, should be applied to reach fair market value?

Issue 1 - Rules of Law to be Applied

The California Constitution provides for the taking of private property for public use upon payment of just compensation to the owner. (California Constitution, Article 1, Section 14.) The measure of compensation is the fair market value of the

property taken. (Code of Civil Procedure, Section 1263.310.) The Code of Civil Procedure also defines fair market value as:

"The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

"The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable." (Code of Civil Procedure, Section 1263.320.)

The parties differ on the method of valuation that must be applied to cases involving the valuation of easements. The City insists that Redevelopment Agency of City of Concord v. Tobriner (1984) 153 Cal. App. 3d 367, 372, is binding on the Commission. The City cites from that case the following statement:

"The well-established legal standard for evaluating an easement requires an analysis of the decrease in value of the dominant estate (or dominant tenement) resulting from the taking of the easement. The measurement of this decrease must be derived from an appraisal of the value of the dominant estate before and after the taking. This approach has been utilized in every reported eminent domain case in the United States involving the condemnation of easements appurtenant, and is the law in California."

The City asserts that the above cited law determines the manner in which the instant case must be analyzed.

We do not believe that the case cited is binding on us. It did not involve the taking of a longitudinal easement within the right-of-way of a railroad. Rather, the case involved the taking

of tenant-owned, undivided easements for parking in a parking lot of a shopping center. We believe that the legal principle quoted above from Redevelopment is appropriate for valuing an interest in a parking lot; however, we do not believe that it necessarily applies to the valuation of property for which there is no relevant market, such as a railroad right-of-way or an interest therein. We conclude that the diminution of value approach from Redevelopment is an appropriate method of valuation, but it is not binding on us nor is it the only method of valuation that may be considered by us in reaching a finding of just compensation.

The railroad cites Department of Transportation v Southern Pacific Transportation Company (1978) 84 Cal 3d 315 in support of its use of a replacement cost approach in valuing the property to be taken. We believe that this is an appropriate, just, and equitable method of valuing the interest to be taken in this case. However, the method is not binding on us any more than the diminution of value method is binding. We will consider the evidence of each party and give it the weight to which we feel it is entitled.

We do note, however, that each expert witness, despite the method he testified he used, applied generally the same steps in reaching his ultimate value. Using comparable sales (City) or land value indicators (SPT) the expert witnesses estimated the value of the fee on a price per square foot basis. Each witness then multiplied his price or prices per square foot times the square footage or footages of the easement corridor. Next, the witnesses multiplied their totals times a percentage: 20% for City and 50% for SPT. These calculations produced the fair market value of the easement. SPT went one step further by adding a synergy or assembly value. Whatever names may be given to the methods employed by the appraisers, the operations were very similar and the results consistent except in magnitude.



Issue 2 - Highest and Best Use

SPT's witnesses testified consistently that the highest and best use of the railroad right-of-way involved was as a transportation corridor or joint use transit way corridor. The City's evidence on this point was equivocal, vacillating between transportation corridor or railroad right-of-way as the highest and best use.

In the decade of the 1980s SPT realized that these transportation corridors are substantial revenue producers. Accordingly, the company began to market their corridors for use as bus ways, light rail, fiberoptics, petroleum product pipeline, water line, sewer line, telegraph-telephone line, electric powered transmission and utility corridors. Today, SPT has about 50,000 lease or license agreements relating to its properties including about 7,000 longitudinal uses like the City's.

With regard to the corridor in question, SPT introduced evidence that the corridor in question is subject to the following present or immediately prospective uses:

1. Rail use with one train per day serving the Navy at Mare Island and substantial freight shipments to General Mills facility;
2. The subject water line;
3. A sanitary sewer line of unknown dimensions running 500 to 600 feet along side the City's water main, and concerning which SPT had no information;
4. A proposed Vallejo Sanitation and Flood Control easement, 30 feet wide and 3,600 feet long for a 108-inch diameter sewer line; and
5. A proposed 1,400-foot long easement for Vallejo Sanitation and Flood Control District, to accommodate a 48-inch or 54-inch sewer pipe.

The City's appraiser testified that: the condemnee shall be paid for the highest and best use of the property, which in this case is its use as a railroad right-of-way. (Exhibit 15, p. 7.) He further testified that railroad property is property of limited market value and that where the railroad property is actively used by the railroad, there are virtually no prospective purchasers in the market for property within the railroad right-of-way. In discussing his comparable sales data he adjusted his data downward to reflect the unimproved character of railroad right-of-way property. That is, his comparable sales data reflected lots with services such as water, sewer, and utilities provided to them, whereas railroad property is not provided with such services. He noted that some residential lots in his comparable sales data possess views, which feature the railroad right-of-way property does not possess. Other factors which he thought depressed the value of the railroad right-of-way property was that it was narrow and in places 6 to 12 feet below the level of the adjoining property. Also, if viewed as a separate parcel, it is of an odd lot shape. Again, in some places the railroad property has direct street access while in other places it does not. These factors he took into consideration in arriving at the unit value he selected.

We believe that the highest and best use of this property is as a transportation corridor. The section of the railroad right-of-way with which we are immediately concerned is now occupied by two joint users: the railroad and Vallejo by its water main. Other prospective users are now negotiating with the railroad for rights to occupy other portions of this railroad right-of-way. In addition, the very nature of the railroad right-of-way makes it adaptable to a variety of public and quasi-public uses. It is virtually flat, it is virtually straight, there is limited access to the right-of-way from the streets intersecting it, and it is adaptable to a variety of joint uses both subsurface, surface, and hypersurface. Transportation corridors are also rare.

As development proceeds in areas north, east, and west of the main north-south arteries in Vallejo (Interstate 80 and Highway 29) they will become more and more congested and other north-south longitudinal properties will come in into consideration as possible means of alleviating transportation problems in those directions.

We believe that Vallejo has taken a much too narrow view of the highest and best use of this property; and, accordingly, we conclude that its highest and best use is as a transportation corridor for a multitude of utility and transportation uses.

Issue 3 - Interest in real property to be taken

We have earlier established that the easement sought by Vallejo is 10 feet wide. (We denied above Vallejo's motion to amend the description of the easement to reduce its width from 10 to 6 feet.) In general terms the easement lies along the west side of SPT's right-of-way for a portion of its length, then it crosses over to the east side of the right-of-way where it continues until it exits the right-of-way altogether. The easement is about 7,725 feet long or 1.463 miles in length. Thus, it occupies about 77,250 square feet of right-of-way. There are no facts in the record that give the precise location of the water main within the railroad right-of-way. However, since the water main is installed, the midpoint of the main is the midpoint of the easement sought to be valued; and the exterior boundaries of the easement are located 5 feet to either side of the midpoint.

Vallejo City engineer testified that the City desires to have an exclusive easement in the subsurface area above-described. That is, the City wants to obtain the right to veto any use of the subsurface region between the outside edges of its 10-foot easement. City engineer further testified that the City wanted the right to exclude others from using the subsurface area within its 10-foot easement. There is some testimony that suggests that the City intended to acquire an exclusive easement that gave it the right to preclude what was built "over," that is, on the surface,

of the easement property. The City would then have the right to allow certain kinds of uses of the surface above its water main and within the easement boundaries, and to exclude other uses that it felt were not compatible with its water main easement. However, during cross-examination the City engineer conceded that the City was seeking only an exclusive easement as to the subsurface rights within the easement boundaries. As to the surface rights, it would not have the ability to exclude others. Rather, it would be a cohabitant with SPT of the surface rights; however, those rights are merely incidental. They are incidental to the rights acquired in the subsurface area. They are rights of perpetual ingress and egress, to reconstruct, maintain, repair, renew, and otherwise operate its water facilities.

We conclude that the City of Vallejo seeks an exclusive easement as to the subsurface region of the described corridor and incidental and nonexclusive rights in the surface area of the easement corridor.

Issue 4 - Should the easement be valued  
as a whole or segment by segment?

SPT's appraiser valued the easement area in five segments, whereas the City's appraiser valued the easement area as a whole. As part of his exhibit SPT's appraiser included a value segments map. This map clearly shows that the segments he used lie in distinctly different zones. Segment 1 lies for the most part adjacent to a residential area zoned by the City as Medium-density Residential, except for a small portion that is adjacent to the grounds of the Vallejo Senior High School. Segment 2 lies adjacent to the Kaiser Foundation Hospital which is zoned by the City as Medical. Segment 3 lies adjacent to an area zoned by the City as Intensive Use. Segment 4 lies adjacent to an area zoned by the City as Low-density Residential and Segment 5 lies adjacent to an area zoned by the City for the most part Intensive Use with a very

small part zoned Linear Commercial. SPT's appraiser gave each of these segments a different value.

Although his appraisal was based upon an earlier appraisal commissioned by the City of Vallejo, which appraisal used four value segments, the City's expert witness did not adopt that method. Rather, he assigned a single value per square foot to the entire length of the easement, irrespective of the uses of adjoining property.

We believe that the segment method adopted by the witness for SPT and by the City's earlier appraiser is the most appropriate and reasonable method to use in the circumstances with which we are faced. The evidence shows that the corridor passes through distinctly different neighborhoods where the uses of the property differ between segments. We would expect that the fair market value of these different properties would vary from neighborhood to neighborhood.

**Issue 5 - What per square foot value or values should be applied to the portion of the SPT right-of-way to be occupied by the City's easement?**

SPT's expert witness valued the property to be taken in five segments, ranging from \$4.25 per square foot for Segment 4 to \$7.50 per square foot for Segment 3. Vallejo's expert appraiser applied a single value of \$3.50 per square foot to the property to be taken. We have already decided that it is reasonable to value the property to be taken in segments as SPT's appraiser has specified them. Accordingly, our task in this section of the discussion is to determine what weight should be given to Vallejo's valuation evidence and whether it should have any influence on the values given by SPT's appraiser to the various segments he identified. Accordingly, we will first discuss the evidence offered by Vallejo on the issue of per square foot value.

Vallejo called as its expert witness Hal Bolla, who has had many years of experience in appraising properties of all kinds

in Northern California. He is not, however, an MAI<sup>4</sup> appraiser. Vallejo has many times employed Conger & Fisk, MAI appraisers located in Vallejo. In fact, in connection with this underlying dispute Vallejo actually hired Fisk to evaluate the easement. Fisk did in fact submit an appraisal showing his opinion of value at \$118,000. At the request of Vallejo Fisk later updated his appraisal to show his opinion of value at \$130,000. When the underlying dispute regarding the annual license fee for the use of the railroad right-of-way could not be resolved and the City filed this application for a determination of just compensation, Vallejo did not retain Fisk as its expert appraiser witness. Rather, it employed Bolla, whose testimony shows his opinion of value at \$53,060.

Bolla described his role in this appraisal as that of a review appraiser. He looked at Fisk's sales and market data and at his report, and he also looked at Donahue's sales and report. Based on his analysis of those reports he concluded that both appraisers were wrong in using as comparable sales, for example, those along Tennessee Street, the most commercial street in town, where prices are in the area of \$10 to \$12 per square foot.

From the comparable sales data in the Fisk reports, Bolla extracted four residential sales and four commercial/industrial sales that he initially employed in reaching his opinion of value. Those sales appear in Exhibit B to his prepared testimony (Exhibit 15). During his direct testimony, however, Bolla amended his Exhibit B, containing comparable sales data, and this amended sheet became Exhibit 16. It now shows two residential sales and four commercial/industrial sales. Furthermore, during cross-examination it became clear that Bolla did not rely upon residential land sales at all. His opinion was based on the assumption that, if it was

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4 See Appendix A.

necessary to replace the 10-foot strip of property now occupied by Vallejo's water pipeline, it could be done most expeditiously and inexpensively by purchasing a 10-foot strip of property along the eastern side of the railroad right-of-way, which property in his opinion was predominantly commercial/industrial in nature. Accordingly, he relied exclusively upon his commercial/industrial sales data to reach his opinion of value. Further cross-examination showed that he did not give sale number one at \$1.10 per square foot any weight in reaching his opinion. Although he stated that he used sales 2, 3, and 4 in reaching his conclusion on value, in actuality he gave no weight to sale 3, the highest priced sale among the commercial/industrial sales on revised Exhibit B (Exhibit 16). The two sales he did employ, 2 and 4 at \$3.30 and \$3.66 per square foot, respectively, average \$3.48 per square foot. Clearly, he gave no weight to sale 3 at \$4.39 per square foot. If he had given equal weight to sale 3, his value opinion would have been \$3.78 per square foot. In summary, Bolla used two sales of commercial/industrial property upon which he based his opinion of value.

Bolla's testimony differs in one other significant respect from Donahue's testimony. Bolla selected only sales of unimproved properties to include within his Exhibit 16. Using a comparable sales approach Bolla noted that the portion of the right-of-way to be taken by the City of Vallejo was unimproved. Accordingly, he sought comparable sales from only unimproved properties. In contrast, Donahue, using the replacement theory of valuation, sought land value indicators from sales transactions involving both improved and unimproved property. Donahue reasoned that if the railroad needed to replace the property occupied by the City's water main it would need to secure that replacement strip from improved properties adjacent to its right-of-way. Accordingly, Donahue's 9 residential and 15 commercial land value indicators include improved properties. However, Donahue took some

pains to inquire into the circumstances of each sale to determine whether land or improvements were the primary consideration, particularly of the purchaser. In discussing each of the sales he selected he testified that the information he obtained from buyers, sellers, and agents showed that the underlying land was the primary consideration in the sales he included.

We note that, in valuing the residential segments, Donahue selected values of \$4.25 and \$4.50 per square foot, values that bracket the mean (\$4.36) and median (\$4.31) of his data. We also note that 3 of the residential land value indicators are listing prices rather than purchase prices, and one is not a completed sale but was in escrow at the end of November 1988. Listed property in our experience does not tend to be marketed at the listing price, but rather at a price below the offering price. If we adjust the 3 listing prices by 10% that would tend to pull down the average of the data slightly. Also, we desire to give some effect to Bolla's valuation testimony. Accordingly, in the residential segments we will make a slight adjustments to the segment values found by Donahue. We will find a value for residential Segment 1 of \$4.30 and a value for residential Segment 4 of \$4.10.

For his commercial segments Donahue used 15 land value indicators derived from purchase prices of commercial properties in Vallejo. We note that the difference between the highest price (\$10.95) and median price (\$5.16) is \$5.79, while the difference between the median price (\$5.16) and the lowest price (\$3.62) is \$1.54. These calculations suggest to us that the higher priced land value indicators are unduly influencing the average price of \$6.69. We believe that, in valuing the commercial segments of the right-of-way, Donahue's data should be adjusted by eliminating the three top prices in the commercial land value indicators table. These transactions are: #4, a superior site on Tennessee Street and Interstate 80, at \$10.46; #11, also a superior site on



Tennessee Street, at \$10.77; and #13, good commercial frontage on Sonoma Boulevard. After we remove these sales from Donahue's data the resulting 12 sales show an average price of \$5.68 or 15% less than the average price of the 15 sales. We will apply a 15% reduction to the three commercial land values reached by Donahue for Segments 2, 3, and 5. This adjustment will produce findings of value: for Segment 2 of \$5.10 per square foot; for Segment 3 of \$6.37; and for Segment 5 of \$5.52.

Issue 6 - Percentage of fee value to be applied

Donahue testified for SPT that the taking proposed by Vallejo would involve 50% of the use of the easement corridor. He accordingly used 50% to reach his ultimate finding of value for the easement to be taken by the City. Bolla testified that he believed that a 20% portion of the easement corridor was being taken by Vallejo. He applied that factor in reaching his ultimate finding of fair market value.

Bolla criticized Donahue's 50% factor as been "a little excessive" and as "slightly too high." This testimony suggests that Bolla does not take serious issue with Donahue's 50% factor. Moreover, Bolla testified that he used 50% or more in his own appraisals for condemning agencies, stating at one point that a land owner "could get as high as 75% if [the subsurface easement] impaired the use and enjoyment of [the surface property]." (Transcript at 254; see also transcript at 283.)

Donahue's testimony cited several instances of valuations involving easements where from 50 to 100% of the fee value was paid by the public agency for an easement. Bolla also admitted that public agencies are currently paying higher percentages for pipeline easements than was customary in the past.

We note that the City is seeking to take exclusive rights to the subsurface area of its 10-foot corridor. It will have the right to exclude all other users including the railroad from using that subsurface area. The presence of the pipeline in the

subsurface area will also affect the railroad's use of the surface of the corridor, although this impairment is not a significant factor in the valuation, according to the testimony of Donahue.

We conclude that the overwhelming weight of evidence supports the 50% factor in valuing the easement for just compensation purposes.

Issue 7 - Assembly or Synergy Value

SPT cites no statutory or case authority for its application of an assembly or synergy value to augment the value reached by Donahue's method. Indeed, the railroad admitted that no California case has applied an assembly or synergy value in like circumstances. The railroad cites only an Oregon case in support of this augmenting factor. Bolla testified that it was improper to use an assembly or synergy factor because it required the trier of fact to look at the valuation from the point of view of the value of the property to the condemning agency.

We are inclined to agree with Vallejo's position on this issue. It is not traditional to augment the value of property because the public agency would be saved the time, delay, and cost of assembling various parcels of property into a corridor in order to install a pipeline. We are looking at this valuation problem from the point of view of the value lost to the railroad and not from the point of view of the value gained by the City. Accordingly, we will deny any augmentation for assembly or synergy value.

Valuation Date Adjustment

SPT's expert witness used November 15, 1988, as his valuation date. PU Code § 1411 requires, however, that: "the just compensation shall be fixed by the Commission as of the day on which the petition was filed with the Commission." Vallejo's petition was filed July 18, 1988, four months before the valuation date selected by SPT's appraiser. The annual inflation rate in Vallejo is about 10%, or 0.83% per month. In the four months

between July 18 and November 15, 1988 real property in the City of Vallejo would have inflated by approximately 3.32%. We will therefore adjust our fair market value by 3.32% in order to reach an appropriate fair market value for the earlier date, July 18, 1988.<sup>5</sup>

Summary of Adopted Values

The following table shows the fair market value of the interest of each value segment identified by SPT's appraiser. These five values are totalled; and that total is adjusted to bring the fair market value back to July 18, 1988. The adjusted total is then divided by 2 to bring the fair market value of the fee down to the fair market value of the easement on July 18, 1988. The fair market value of the easement on July 18, 1988, and thus the just compensation that the City of Vallejo should pay to SPT for the taking of the easement in its right-of-way, is \$181,185.

Table 3

Summary of Adopted Values

<u>Value Segment</u>	<u>Square Feet</u>	<u>Fair Market Value Per Square Foot</u>	<u>Fair Market Value of Fee, 11/15/88</u>
1. (Res.)	33,470	\$4.30	\$143,921
2. (Comm.)	12,530	5.10	63,903
3. (Comm.)	9,500	6.375	60,562
4. (Res.)	9,600	4.10	39,360
5. (Comm.)	12,150	5.52	<u>67,068</u>
Subtotal			\$374,814
Times 96.68% (valuation date adjustment)			362,370
Times 50% (fair market value of easement)			<u>\$181,185</u>

<sup>5</sup> Our method is simple and assumes no compounding. We subtract 3.32% from 100% to obtain 96.68%. We multiply 96.68% times the fair market value of the fee. We divide the result by 2 to reach the fair market value of the easement.

Issues to be Decided Pursuant  
to the Stipulation

In the stipulation submitted to the ALJ SPT and Vallejo set forth the following issues that they ask the Commission to decide in the interest of expediency and cost reduction.

1. "Does Southern Pacific have any legal entitlement to charge an annual fee to the City of Vallejo from May, 1985 through the date of the condemnation in excess of the fee which was being assessed on that date?
2. "Assuming that Southern Pacific is entitled to assess a fee for the City of Vallejo's use of the property from 1985 through the date of the condemnation, what is the proper value of the fee to be assessed?"

On the first issue the City's position is that from a strictly legal perspective, it is not liable to SPT for its past occupancy of the real property, since SPT has not established that it has been damaged by the City's use of the property. The City's theory is that after the license agreement was terminated around the beginning of June 1985 the City technically became a trespasser on SPT's property. The City contends that when the license is terminated the licensee is unlawfully occupying the lands of another and is subject to an eviction action or an action for damages occasioned by the unlawful occupation. According to the City, an action for eviction will not lie unless a notice to quit the premises is served and an unlawful detainer action is commenced pursuant to Code of Civil Procedure §§ 1161, et seq. The City argues that SPT elected to forego the unlawful detainer action and is therefore limited in its legal remedies to those associated with the law of trespass. The City asserts that in a trespass action the damages are determined by calculating the difference in property value before and after the trespass. Damages may also be based on the cost of making repairs, in the loss of use of the property, lost profits or prospective profits, increased operating

expenses, and other damages reasonably incident to the occupation of the property. However, a wrong without a showing of damage does not constitute a cause of action for damages. The City contends that the record does not show any evidence of injury to the property of SPT upon which damages could be based. Accordingly, the City believes that no damages for its occupation since 1985 are required by law. It is willing however to be bound by the contractual provisions in effect at the time of termination of the license agreement, paying an annual license fee in the amounts set forth at the last time the parties agreed-upon such a fee. That amount was \$585 per year, subject to an annual cost of living index.

SPT's argument for any rental is set forth in its brief at page 16. It states:

"The basic argument for any rental is constitutional in nature. Vallejo has had the use of SPT's corridor for almost four years without paying therefore. The question is not, as the City's witnesses have implied, whether the pipeline has damaged SPT or interfered with its rail operations. The questions are, has the City used SPT's property (which is admitted), and, if so, what is the rental value of the properties so used? This is essentially an inverse condemnation claim for reasonable rental, for the period May 22, 1985, until the City acquires its permanent easement."

We are in accord with SPT's position that the City is obligated to compensate SPT for its use of the property. Where the licensee holding over after termination of the license agreement is a public entity with the power of eminent domain, the only practical alternative for the property owner is a suit for inverse condemnation. If the public agency is determined to occupy the property then it may do so, either by filing a complaint in eminent domain and petitioning for immediate possession and paying the fair market value of the interest taken, or it may occupy the property and await the initiative of the property owner in an inverse condemnation action, in which case it would pay damages for the

interest seized. We also agree with SPT's constitutional argument, which is, implicitly, that no person may be deprived of his property without just compensation.

Accordingly, we conclude that the SPT has a legal entitlement to charge an annual fee to the City of Vallejo from May 1985 until the date of the condemnation. Furthermore, that fee is not limited by the amount that the parties last agreed to. In determining what that reasonable value should be we will be guided by the rules applied by the California courts in unlawful detainer actions.

In Lehr v Crosby (1981) 123 Cal App 3d Supp. 1, 8, the court held that "...the lessor is entitled to damages for the unlawful detainer predicated upon the fair rental value of the property."

In Glouberman v Coffey (1956) 138 Cal App 2d Supp. 906, 907, the court held: "if a tenant unlawfully detains possession after the termination of a lease, the landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of such unlawful detainer. He is not entitled to recover rent for the premises because the leasehold interest has ended."

In Harris v Bissell (1921) 54 Cal App 307, 312-313 the court held that "the amount agreed upon between the parties as rent is evidence of the rental value of the property. But, since the action is not upon contract, but for recovery of possession and, incidentally, for damages occasioned by the unlawful detainer, such rental value may be greater or less than that provided for in the lease."

Finally, in Haig v Hogan (1947) 82 Cal App 2d 876, 877-878, the court held that the rental value of \$1,000 per month was properly awarded despite a federal rent control ceiling of \$300 per month.

We conclude that the fee for the City's use of the property after May 1985 need not be limited by the last agreed-upon fee and that other values, both lesser or greater, may be applied depending upon the evidence.

We next address the question of the proper value of the annual fee to be assessed to Vallejo for its occupation of the easement after May 1985. Relying on its legal position, the City of Vallejo did not sponsor any evidence of the reasonable rental value of the easement for the period after May 1985. SPT, on the other hand, sponsored testimony through its witness Phipps. In his prepared testimony, Exhibit 14, Phipps offered two methods for calculating reasonable rental value.

"SPT's attorney in this matter has requested me to develop a reasonable number to cover the City's past due rent for the 3-1/2 years that they have been using SPT's right-of-way. I have developed two separate values using slightly different approaches. This commission could use either methodology, or could develop its own rental number by varying the component factors that go into the formula.

"Rental Alternate I

"This alternative assumes the use of SPT's requested rental of \$9,735 for the base year (May 22, 1985, through May 21, 1986), increasing it each year for inflation based on the CPI index. Under this approach which is very conservative, the annual rental would be:

<u>Year</u>	<u>CPI</u>	<u>Rental</u>	<u>Cumulative</u>
85-86	NA	\$ 9,735	\$ 9,735
86-87	2.3%	9,959	19,694
87-88	2.8%	10,238	29,932
88-89	3.7%	5,309*	35,241

\* Rental for six months only, from May 22, through November 21, 1988.

"Alternate I is conservative (i.e., favors the City) for several reasons. First, it is based on an average per square foot value (\$2.00) that appears to have been below market rate in 1984, let alone today. If SPT had used a more realistic \$4.00 per square foot average in 1984, the rental figures would have been doubled what is shown in the foregoing table. Second, SPT assumed the City needed only a 7-foot wide pipeline corridor, whereas the City, by its petition in this case, has said that its pilot line corridor is to be 10 feet wide. If SPT's rental request in 1984 had assumed a 10-foot rather than a 7-foot corridor, the annual rental beginning the 1985 would have been \$13,907 (all other things remaining equal) rather than \$9,735.

"Nevertheless, as a practical matter, if the City of Vallejo, in 1984, had accepted SPT's request for the \$9,735 rental, it is unlikely that in the interim, SPT would have again raised the rental (except for CPI increases) based on a new awareness of rising real estate values in the Vallejo area. Thus, I believe that the City would have had to pay rent of only \$35,241 for the 3-1/2 years between May 22, 1985 and November 21, 1988 if it had accepted SPT's below market rate offer at the outset.

"Rental Alternate II

"This alternative assumes that SPT's real estate increased in value from May 22, 1985, to the present in a gradual and uniform manner. It also assumes a 10-foot wide pipeline corridor and that the present real estate value of \$7.20 per sq. ft. (average) testified to by Mr. Donahue is the current market value. Finally, it conservatively assumes - as does Mr. Donahue's recent appraisal - that the pipeline's presence would absorb only 50% of the property's fee value, rather than 75%, which was assumed in SPT's 1984 rental request. Following are the components of Alternate II.



a) Average land value (per square foot)

<u>'85-'86</u>	<u>'86-'87</u>	<u>'87-'88</u>	<u>'88-'89</u>
\$2.00	\$3.75	\$5.50	\$7.20

b) Average land value x rental area

<u>'85-'86</u>	<u>'86-'87</u>	<u>'87-'88</u>	<u>'88-'89</u>
\$154,520	\$289,725	\$424,930	\$556,272

c) Property value x 50 percent

<u>'85-'86</u>	<u>'86-'87</u>	<u>'87-'88</u>	<u>'88-'89</u>
\$77,260	\$144,863	\$212,465	\$278,136

d) 12 percent return on fifty percent  
of full asset value

<u>Year</u>	<u>Rental</u>	<u>Cumulative Rental</u>
'85-'86	\$ 9,271	\$ 9,271
'86-'87	17,384	26,655
'87-'88	24,496	52,151
'88-'89	16,688*	68,839

\* Assumes 12 percent return on asset base for only 6 months -- from May 22 through November 21, 1988.

"The foregoing discussion demonstrates that whether the rental City owes SPT is calculated using the methodology of Alternate I (yielding a cumulative total of \$35,241), Alternate II (producing a cumulative total of \$68,839), or another approach somewhere in between, the amount of past due rent that SPT is owed is quite substantial." (Exhibit 14, 5-8.)

Comments under PU Code § 311

The ALJ's proposed opinion was mailed to the parties April 18, 1989, pursuant to PU Code § 311 and Article 19 of the Rules of Practice and Procedure. The City of Vallejo filed its comments on May 5, 1989. Its pleading consists of 15 pages of comments, a 4-page declaration of Dwight C. Donovan, 5 pages of exhibits to the declaration, and 2 pages of proposed findings of fact and conclusions of law.

On May 24, 1989, SPT submitted its motion for an extension of time to file its response to the City's comments. SPT attached to its motion the 8-page declaration of Douglas E. Stephenson with 4 pages of documentary exhibits: (1) in support of its request for extension of time, and (2) in opposition to the declaration of Donovan.<sup>6</sup>

By ruling of May 25, 1989, the ALJ extended SPT's time to file its reply comments until May 26, 1989. SPT filed its reply comments on May 26, 1989. In its 5-page pleading SPT incorporated by reference pages 4-6 of the Stephenson declaration.

By motion dated May 31, 1989, City seeks an order striking the Stephenson declaration. City states in its motion that it "has no objection to SP's filing of late comments."

Before considering the City's comments and SPT's reply comments we will first address the City's motion to strike. We note that the City was the first to offer through counsel extra-record facts. (See Tr. 1:7-8 for counsel's argument, including facts occurring during settlement negotiations.) Counsel for City then cited his own statement as factual support for City's position that the Commission should reverse the ALJ's ruling denying the City's motion to amend the description of the property to be taken.

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<sup>6</sup> Due to technical deficiencies the motion was not filed until June 2, 1989.

(City's brief of February 8, 1989, p. 35.) City next attached to its comments, dated and filed May 5, 1989, a 4-page declaration of its counsel plus 5 pages of documentary exhibits. In response to Donovan's declaration SPT submitted Stephenson's declaration as part of its motion to extend time to file reply comments. SPT then incorporated a part of the Stephenson declaration in its reply comments by reference.

We do not invite, nor do we welcome, attempts to augment the evidentiary record through comments or reply comments.

Rule 77.3 provides specifically that:

"Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. . . .

"New factual information, untested by cross-examination, shall not be included in comments and shall not be relied on as the basis for assertions made in post publication comments." (Emphasis added.)

In addition, "comments shall be limited to 15 pages", except that a subject index, a table of authorities, and proposed findings of fact and conclusions of law may be added. (Rule 77.3.) City used up its 15-page limit and then attached a declaration and documentary exhibits. SPT used up its 5-page limit for reply comments (Rule 77.5) and then incorporated a part of the Stephenson declaration by reference.

We will grant City's motion to strike, limiting our order to part "B" of the Stephenson declaration - the part that responds to the Donovan declaration - and appended exhibits. Part "A" pertains to SPT's motion for extension of time and is not objectionable.

Since both parties violated our rules, we will also - on our own motion - strike Appendix A to the comments of the City filed May 5, 1989, including the 4-page Donovan declaration and 3 pages of appended exhibits. For reasons that appear below we will

not strike Exhibit A-2 to the Donovan declaration, which is SPT's letter of December 3, 1986, terminating the 1940 license agreement.

In concluding this discussion of City's motion to strike, we observe that the time to offer evidence is during evidentiary hearings. The sworn testimony of witnesses, stipulated facts, and documentary evidence received as exhibits during hearings or as late exhibits (Rule 74) are the foundations upon which we base our findings of fact. Unsworn statements of counsel during argument or on brief and declarations of counsel offered after submission may not be considered as evidence in reaching our findings of fact, if the "substantial rights of the parties [are to be] preserved." (Rule 64.)

City challenges the ALJ's finding that the reasonable rental for the subject property is \$62,066 over a four-year period. (Finding of Fact 8.) City now submits that rent of only \$2,569 is due, arguing that unlawful detainer principles should not have been applied before the time the license agreement between SPT and the City was terminated. We will review in detail City's position on the question that is set forth in City's and SPT's stipulation: what is the proper value of the fee to be assessed for the City's use of the property since May, 1985?

City and SPT jointly sponsored a stipulation of facts (Exhibit 5) containing an account of license fee payments since the inception of the license agreement. The stipulation shows that from 1940 through 1974 City paid \$100 per year. Beginning in 1975 City paid \$400 per year pursuant to SPT's unilateral demand letter of January 22, 1975. (Exhibit 5, "B".) Payments from 1981 through 1984 were \$509, \$546, \$564, and \$585, respectively. By letter of August 28, 1984, SPT demanded \$9,735 per year effective May 22, 1985. (Exhibit 5, "C".) An SPT invoice, dated October 10, 1985, shows \$9,735 owing under the license agreement. (Exhibit 5, "D".) The computer generated document contains the warning: "Failure to make payment or contact above representative could result in

termination of your lease." An SPT bill dated May 19, 1986, shows \$9,735 owing for the 1985-86 fiscal year and \$10,027 (a 3% increase based on the Consumer Price Index (CPI)) owing for the 1986-87 fiscal year. (Exhibit 5, "E".)

There is no evidence that the City has ever agreed to pay \$9,735, \$10,027, or any other sum for the period since May, 1985. City last paid to SPT for its occupancy of the right-of-way an annual fee of \$585. The payment was made May 11, 1984, and covered the fiscal year ending May 21, 1985.

The stipulation of facts also contains a copy of the 1940 license agreement. (Exhibit 5, "A".) Paragraph 5 of that agreement provides in part:

"In the event City...shall fail to keep, observe or perform any covenant on the City's part herein contained, after thirty (30) days' notice thereof in writing given said City by said Southern Companies, all rights herein given shall forthwith cease and determine.

"Notwithstanding anything to the contrary herein contained, it is expressly understood and agreed that either party hereto may terminate this agreement by giving six (6) months' notice in writing to that effect to the other party."

This is the City's evidence on the above-stated issue. No witness testified for the City on the issue of the proper or reasonable value of the annual fee for the period since May, 1985. Nor did the City sponsor a witness to rebut SPT's prepared testimony on this issue, circulated well in advance of hearing.<sup>7</sup> Rather, the City elected to state its case on brief.

In its brief City sought an order determining that SPT "may not recover more than the amount contractually agreed upon by

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<sup>7</sup> Prepared testimony was exchanged on November 21, 1988; and City took the deposition of Larry H. Phipps on December 8, 1988.

the parties for the City's use of Southern Pacific's property from May 1985 to the present." (City Brief, pp. 1, 40-41.)

Specifically, the position of City is:

"From a strictly legal perspective, the City is not liable to Southern Pacific for its past occupancy of the real property.

"In the interest of fairness, the City has expressed a willingness to be bound by the contractual provisions in effect at the time of termination, paying an annual license fee in the amounts set forth at the last time the parties agreed upon such a fee. Southern Pacific has flatly rejected such offers. The City's legal position remains that it is not liable to SP for payment of any amount in this instance." (City Brief, pp. 34-35; emphasis is the City's.)

In addition, City states in the section of its brief entitled "FACTUAL BACKGROUND", as follows:

"By letter dated December 3, 1986, SP provided written notice of its intent to terminate the license agreement, effective 6 months from the date of that letter. On or about June 3, 1987, the license agreement was terminated."

City does not cite us to any evidence of such a letter in the record. It was not a part of Exhibit 5, the stipulation of facts. It first appears as an attachment to the Donovan declaration, which was in turn an attachment to City's comments. In its comments City cites SPT's December 3, 1986, letter in support of its theory of the amount of annual fees due after May, 1985. City states that:

"Under an appropriate analysis, this Commission should issue an order finding...[t]hat SP is entitled to receive rent from May 1985 to the present in the sum of \$2569;..." (City Comments, p. 1.)

City's rationale for the new position taken in its comments is that the parties entered into a written license

agreement, effective until terminated by either party upon 6 months' written notice. That agreement was not terminated until June 3, 1986, when SPT's termination letter of December 3, 1986 became effective by its own terms. Since  $4 \times \$585 = \$2,340$ , City apparently escalates the 1984-85 annual fee of \$585 by a CPI in order to reach a total of \$2,569 for the four-year period ending May 21, 1989. City did not disclose its calculations or the CPI it used to reach the total of \$2,569. By applying City's theory and by using the CPI increases in evidence, we derive a total of \$2,509.75, as follows:

Year	%			Fee
85-86	1.03	x	585.00	= \$ 602.55
86-87	1.023	x	602.55	= 616.41
87-88	1.028	x	616.41	= 633.67
88-89	1.037	x	633.67	= <u>657.12</u>
TOTAL				\$2,509.75

We are left with a spectrum of possible values for the proper or reasonable annual fees due, as follows:

- A. Zero. City's original position.
- B. \$2,509.75. City's final position - last fee paid, \$585, escalated by CPI for 4 years - with our adjustments.
- C. \$2,569. City's final position - last fee paid, \$585, escalated by CPI for 4 years.
- D. \$21,078. This figure gives the City two years of annual fees at the escalated rate ( $\$602.55 + \$616.41 = \$1,218.96$ ) until termination of the agreement. It then uses SPT's Rental Alternative I with the ALJ's inputs to derive the last two years. ( $\$9,749 + \$10,110 = \$19,859$ . See Appendix B.)  $\$1,218.96 + \$19,859 = \$21,078$ , rounded.
- E. \$38,612. SPT's Rental Alternative I with the ALJ's inputs. (See Appendix B.)

F. \$62,066. SPT's Rental Alternative II with the ALJ's inputs from the proposed opinion.

We will adopt Option D, which shows that \$21,078 is owing to SPT from City for reasonable rental over the 4-year period ending May 21, 1989. In adopting Option D we give greater weight than did the ALJ to SPT's invitation to us to use either Rental Alternative I or II. Option D uses Rental Alternative I; the ALJ used Rental Alternative II.

In adopting Option D we also treat as evidence the December 3, 1986 letter to City in which SPT gave formal notice under paragraph 5 of the 1940 agreement that it was terminating the agreement effective in 6 months. That letter was not received into evidence at the hearing; and the ALJ could not have considered it in preparing his proposed opinion. Neither party saw fit to disclose the letter during hearings, perhaps due to mutual oversight. However, it was alluded to in City's brief and attached to the City's comments. SPT has expressed no objection, either in its motion for extension of time or in its reply comments, to our consideration of the letter. We doubt that any cogent objection could be stated by SPT, since it sent the letter.

By treating the 1986 letter as evidence we are able to consider the 1940 agreement as in force until terminated on or about June 3, 1987. Thus, we are able to give City the benefit of the old fee through May 21, 1987. However, we believe it would be improper to allow the terminated agreement to control the rental for the 3rd and 4th year. City has repudiated the 1940 agreement by failing to pay any amount for its occupation of the SPT right-of-way since May, 1984; and SPT has formally terminated the agreement in accordance with paragraph 5. As of June 3, 1987 City no longer had any colorable contractual right to occupy SPT's right-of-way under the 1940 agreement. Thus, City's evidence that it last paid \$585 for its privileges is merely one piece of



evidence to be considered in determining the reasonable or proper fee for the 3rd and 4th years of its occupation.

We believe that SPT's Rental Alternative I, as adjusted, more nearly approximates reasonable rental value than does City's theory, based on the last annual fee paid, escalated by a CPI. In drawing this conclusion we compare the two proposed rentals with the fair market value of the property to be taken. In this opinion we adopt a fair market value of \$181,185, as of July 18, 1988. In this section we show that for the fiscal year 1988-89 City's theory produces annual rental of \$657.16, whereas SPT's Rental Alternative I produces \$10,110. The fair market value of the easement is 276 times the City's proposed annual rental, whereas it is only 18 times SPT's Rental Alternative I. Stated another way, if the City's proposed fee were an installment payment without interest, it would pay for the property in 276 years. In our view SPT's Rental Alternative I, as adjusted, is clearly the more reasonable proxy for rental value. Accordingly, we will use SPT's method to determine the annual fees for the fiscal years 1987-88 and 1988-89.

For the daily rental rate for the period after May 21, 1989, we will use \$10,110, divided by 365 days, or \$27.70 per day.

City's comments also attack the ALJ's denial of City's motion to amend its application to reduce the size of the easement from 10 to 6 feet wide. We confirm the ALJ's decision on this issue. We note that there is evidence in the record that supports a 10-foot easement, other than that cited by the ALJ. The testimony of John H. Duane, City Engineer and Director of Public Works, contains statements that support a 10-foot wide easement. Under direct examination by counsel for City, Duane testified:

"Q Would the placement of outdoor advertising signs adjacent or close to the water main be compatible with the City's use of the easement?

"A Since there is a Cyclone fence as close as five to six feet to our main, I would say that that would be an acceptable use also.

"If it were put directly over the main such that we had to dig the post out, that might create a problem.

"Q So the post itself could not go directly over the main; is that correct?

"A That's correct.

"Q But it could be located off to the side and where the billboard may be over the main but the post itself would not be; is that correct?

"A That's correct." (Tr. 1:20-21.)

On cross-examination Duane also testified to facts that support a 10-foot wide easement. In his testimony concerning the appropriate width of a trench for effecting repairs to the water main, Duane testified that the trench would need to be 5 to 6 feet wide in order to give the employees more room to work in than if they were merely installing or removing a main. Counsel for SPT continued his examination, as follows:

"Q The trench itself would be five to six feet wide?

"A Yes."

\* \* \*

"Q And the people and the machinery that would be involved in this kind of a repair effort would be confined to the six-foot easement that you're asking for now or would...they be spread out over a wider territory?

"A They would...occupy a wider territory."  
(Tr. 1:27-28.)

In further cross-examination counsel for SPT returned to the issue of poles near the water main. He asked Duane:

"Q ...from an engineering standpoint you would object to a pole line being put above this --

"A Directly over the water main.

"Q ...you...would object to that over -- directly over your --

"A Directly over the water main, yes.

"Q And for the same reason, that it would make it difficult for you to access your pipeline for repair purposes.

"A Not for the same reason. The reason I would object to it is that if it is directly over and our water main breaks, whatever your pole line is is going to fall over, and it creates a hazard to someone.

"If you could offset your pole line four or five feet such that a break of our water main did not adversely effect your pole and pose a threat to someone else, we would not have an objection." (Tr. 1:33-34.)

Duane expressed the same concern for the support structures of billboards as he did for pole lines. (Tr. 1:50-51.) Finally, Duane expressed his preference that other pipelines not be within 5 feet of the City's water main, as follows:

"Q ...In your deposition last week you indicated that you did not want another pipeline within five feet of your pipeline; is that still your testimony?

"A Preference, that would be the preference." (Tr. 1:47-48.)

The position of the City, first advocated at the commencement of evidentiary hearings, is that it seeks a six-foot easement. The engineering testimony of the City's own witness shows that a ten-foot easement is needed to assure proper

clearances. In fact, in order to accommodate a 20-inch water main with five feet of clearance on each side, an easement of nearly 12 feet would be necessary. We believe that the record clearly supports the ALJ's ruling on the City's motion. For the reasons stated in the ALJ's proposed opinion, as amended, as well as in the above discussion, we find that a ten-foot easement is the appropriate width for the 20-inch water main in this case.

City argues that in using Donohue's evidence of sales of improved properties to establish the fair market value of the easement the ALJ relied upon inadmissible evidence. City cites two cases in support of its argument, but neither is on point. We are not valuing unimproved commercial or residential property. Rather, we are valuing a transportation corridor. The expert appraisers who testified in this case offered us no evidence of the sale prices of comparable transportation corridor properties from which we could deduce the fair market value of this corridor. We infer from these omissions by the learned expert witnesses that there are no comparable sales of transportation corridor properties that could be used to establish the value of this corridor. We further infer that there is no relevant market for transportation corridors. They are not frequently bought and sold on the open market like bushels of wheat, single-family residences, or farm land. When we must value a property for which there is no relevant market, we may use "any method of valuation that is just and equitable." (CCP § 1263.320, paragraph 2.) Donohue used the sale prices of improved properties but only after confirming in each case that the property was purchased for the underlying land, and not for the improvement. The ALJ found that Donohue's method was just and equitable. We agree.

Finally, City contends that 50% is not the proper percentage of fee value to be applied. City's comments merely reargue this issue. There is ample evidence in the record to support the 50% factor adopted by the ALJ.

Conclusions of Law

1. We have the discretion under PU Code § 1410 to grant or deny a motion to amend a petition for just compensation.

2. The ALJ properly denied the motion of Vallejo to amend its petition under § 1410.

3. The fair market value of property taken for which there is no relevant market may be determined by any method of valuation that is just and equitable.

4. The methods of valuation employed by the appraisers for SPT and Vallejo are just and equitable.

5. The easement corridor should be valued segment by segment, as the 5 segments are described by SPT's witness.

6. No synergy or assembly value should be used to augment the just compensation finding.

7. The valuation date required by law is July 18, 1988.

8. Vallejo has a legal obligation to pay a fee for its occupation of the SPT right-of-way since May 22, 1985.

9. The 1940 agreement was in force until June 3, 1986.

10. The escalated fee under the 1940 agreement should govern reasonable rental for the fiscal years 1985-86 and 1986-87; for the fiscal years 1987-88 and 1988-89 SPT's Rental Alternative I with the ALJ's inputs (see Appendix B) should govern the rental charges.

Findings of Fact

1. The highest and best use of the property to be taken is as a transportation corridor for a multitude of utility and transportation uses.

2. Vallejo seeks to obtain from SPT an exclusive easement as to the subsurface region of the easement corridor and incidental and nonexclusive rights in the surface area of the easement corridor.

3. The part of SPT's right-of-way that is occupied by Vallejo's water main passes through neighborhoods that are distinguished by different zones, different kinds of improvements,

and different uses. The fair market value of properties adjacent to SPT's right-of-way varies from neighborhood to neighborhood, depending on the zoning, the improvements, and the uses to which the properties are put.

4. A 10-foot wide easement will assure that proper clearances are maintained between the City's 20-inch water main and structures built adjacent thereto.

5. The fair market values per square foot of the 5 segments are: Segment 1, \$4.30; Segment 2, \$5.10; Segment 3, \$6.37; Segment 4, \$4.10; and Segment 5, \$5.52.

6. The easement to be taken by Vallejo impairs the value of SPT's property within the easement corridor by 50%.

7. The evidence of SPT's appraiser was premised upon a November 15, 1988, valuation date. A 3.32% decrease in the fair market value of the property as of November 15, 1988, will bring the fair market value back to July 18, 1988.

8. The reasonable rental for the subject property is \$21,078 for the period May 22, 1985, through May 21, 1989. The reasonable rental rate after May 21, 1989, is \$27.70 per day.

### FINDING OF JUST COMPENSATION

The just compensation which the City of Vallejo shall pay to Southern Pacific Transportation Company for the taking of an easement in the right-of-way of the railroad, as described above, is the sum of \$181,185.00.

ORDER

IT IS ORDERED that:

1. The motion of the City of Vallejo to strike the Stephenson declaration is granted, except for Part "A" of the declaration.

2. Appendix A to the comments of the City of Vallejo is stricken, except for Exhibit A-2 to the Donovan declaration.

The finding of just compensation and the order are effective today.

Dated **JUN 21 1989**, at San Francisco, California.

I abstain.

/s/ PATRICIA M. ECKERT  
Commissioner

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

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

*Charles*  
Vice President, Executive Director  
*Bo*

APPENDIX A  
Page 1

(On redirect examination by Douglas E. Stephenson, attorney for SPT, John C. Donohue, M.A.I., explains the significance of the M.A.I. designation.)

REDIRECT EXAMINATION

BY MR. STEPHENSON:

Q Mr. Donahue, in your report and in connection with your appraisal, it has come out that you are an MAI. Could you explain for the record what an MAI is.

A MAI stands for Member of the American Institute of Real Estate Appraisers. I'm a senior member, so designated in 1979.

The MAI represents only about 2-1/2 percent of the entire appraisal community throughout the United States and internationally. It is a designation that is on loan to its members, not a lifetime guarantee.

The institute is responsible for most of the education, the textbooks, the periodicals and the efforts to enhance appraisal techniques and knowledge.

To become a member it takes five years of full-time appraisal experience in a variety of categories.

There are approximately eight courses that have to be completed and a passing grade on each one of the eight and an exam.

At the end of that there's a comprehensive exam much like the bar exam, only it's one day long. And there's an oral exam.

There is also the requirement for two demonstration reports to demonstrate the applicant's skill.

During this period of time the applicant for membership is a candidate and is also expected to be active in the local chapter affairs.



APPENDIX A  
Page 2

Finally, it's necessary to pass the critique of your colleagues and show that you're a person of responsible nature or ethical and do not have any bad stuff in your background.

Q How long have you been an MAI appraiser?

A Since 1979 when I retained my membership.

Furthermore, the institute does require its senior members to take recertification credits. And we are required to do 60 units each three years to be recertified or currently certified. So there is an ongoing education requirement.

I am currently certified until the year 1989.

(Tr. 2:177-178.)

(END OF APPENDIX A)

APPENDIX B

SPT's Rental Alternative I Using the ALJ's Inputs

<u>Year</u>	<u>CPI</u>	<u>Rental</u>	<u>Cumulative</u>
1985-86	NA	\$ 9,270	\$ 9,270
1986-87	2.3%	9,483	18,753
1987-88	2.8%	9,749	28,502
1988-89	3.7%	10,110	38,612

ALJ's Inputs

1. The length of the right-of-way is 7,725 feet; the width is 10 feet; and the rental area is 77,250 square feet.
2. The impairment of the fee is 50%.
3. The value of the fee is that suggested by SPT in its 1984 offer, or \$2.00 per square foot.
4. The rate of return is that suggested by SPT in its 1984 offer, or 12%.

Derivation of 85-86 Rental Using SPT's Alternative I Method

- \* 77,250 square feet x \$2.00/sq. ft. = \$154,500
- \* \$154,500 x 50% = \$77,250
- \* \$77,250 x 0.12 = \$9,270 per year rental

(END OF APPENDIX B)

trench as wide as 5 to 6 feet in order to give the employees room to work around the pipeline. (Tr. 1:27.) We believe that, where the City contemplates trenching within its easement up to the 6-foot wide easement boundary it proposes, a 6-foot easement is undersized for the pipeline now installed in SPT's property. A 10-foot wide easement should allow the City's trenching equipment to move north and south along the easement proper without substantially trespassing on the surrounding property of SPT. We also note that SPT's appraiser cited an example of a 30-inch diameter high pressure gas transmission line lying within a 10-foot wide easement in his testimony. (Exhibit 8, pp. 16 and 17.) Although Vallejo's water pipeline is slightly smaller than the gas pipeline, we believe the relationship between the size of the transmission line and the width of the easement is more appropriate at 10 feet than at 6 feet.

Evidence of SPT's Appraiser

SPT's appraiser John C. Donohue, M.A.I.,<sup>3</sup> testified that he first divided SPT's transportation corridor into five segments, depending upon the adjoining land use characteristics. He numbered the five segments 1 through 5 beginning at the south end of the subject railroad right-of-way. The five segments are described as follows:

1. Segment 1 is 3,347 feet long, lying along the east side of the transportation corridor. It abuts low density residential uses for the most part and a smaller section abuts the Vallejo Senior High School grounds.
2. Segment 2 is 1,253 feet long, lying along the east side of the transportation corridor where the corridor adjoins the grounds of Kaiser Medical Center. It is

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3 See Appendix.

in Northern California. He is not, however, an MAI<sup>4</sup> appraiser. Vallejo has many times employed Conger & Fisk, MAI appraisers located in Vallejo. In fact, in connection with this underlying dispute Vallejo actually hired Fisk to evaluate the easement. Fisk did in fact submit an appraisal showing his opinion of value at \$118,000. At the request of Vallejo Fisk later updated his appraisal to show his opinion of value at \$130,000. When the underlying dispute regarding the annual license fee for the use of the railroad right-of-way could not be resolved and the City filed this application for a determination of just compensation, Vallejo did not retain Fisk as its expert appraiser witness. Rather, it employed Bolla, whose testimony shows his opinion of value at \$53,060.

Bolla described his role in this appraisal as that of a review appraiser. He looked at Fisk's sales and market data and at his report, and he also looked at Donahue's sales and report. Based on his analysis of those reports he concluded that both appraisers were wrong in using as comparable sales, for example, those along Tennessee Street, the most commercial street in town, where prices are in the area of \$10 to \$12 per-square foot.

From the comparable sales data in the Fisk reports, Bolla extracted four residential sales and four commercial/industrial sales that he initially employed in reaching his opinion of value. Those sales appear in Exhibit B to his prepared testimony (Exhibit 15). During his direct testimony, however, Bolla amended his Exhibit B, containing comparable sales data, and this amended sheet became Exhibit 16. It now shows two residential sales and four commercial/industrial sales. Furthermore, during cross-examination it became clear that Bolla did not rely upon residential land sales at all. His opinion was based on the assumption that, if it was

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4 See Appendix.

expenses, and other damages reasonably incident to the occupation of the property. However, a wrong without a showing of damage does not constitute a cause of action for damages. The City contends that the record does not show any evidence of injury to the property of SPT upon which damages could be based. Accordingly, the City believes that no damages for its occupation since 1985 are required by law. It is willing however to be bound by the contractual provisions in effect at the time of termination of the license agreement, paying an annual license fee in the amounts set forth at the last time the parties agreed-upon such a fee. That amount was \$585 per year, subject to an annual cost of living index.

SPT's argument for any rental is set forth in its brief at page 16. It states:

"The basic argument for any rental is constitutional in nature. Vallejo has had the use of SPT's corridor for almost four years without paying therefore. The question is not, as the City's witnesses have implied, whether the pipeline has damaged SPT or interfere with its rail operations. The questions are, has the City used SPT's property (which is admitted), and, if so, what is the rental value of the properties so used? This is essentially an inverse condemnation claim for reasonable rental, for the period May 22, 1985, until the City acquires its permanent easement."

We are in accord with the railroad's position. Where the licensee holding over after termination of the license agreement is a public entity with the power of eminent domain, the only practical alternative for the property owner is a suit for inverse condemnation. If the public agency is determined to occupy the property then it may do so, either by filing a complaint in eminent domain and petitioning for immediate possession and paying the fair market value of the interest taken, or it may occupy the property and await the initiative of the property owner in a inverse condemnation action, in which case it would pay damages for the

Discussion of Rental Value Evidence

Beyond conceding that it is willing to pay the amount to which it last agreed as a rental fee for the occupation of the pipeline corridor, Vallejo did not sponsor any evidence on reasonable rental value. SPT, on the other hand, suggests two alternate ways of computing a rental value, and invites us to use either method or to vary the components of the methods suggested.

In selecting the method to apply we should, to be consistent, tie the rental value to the fair market value we found above. The fair market value of the fee on July 18, 1988, is \$362,370 or \$4.69 per square foot. We will use the later figure as an input into Alternate II, so that our fair market value will be tied to the calculation of rental value. The following table shows how we employ Alternate II. In the table we will use the following factors:

1. We will adopt 7,725 feet as the length of the right-of-way and 10 feet as the width. The rental area is 77,250 square feet.
2. We will adopt 50% as the percent of the impairment of the fee value.
3. We will use the 12% rate of return figure suggested by SPT.

Table 4

a. Average land value (per square foot)

<u>1985-86</u>	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>
\$2.00*	\$2.90**	\$3.80**	\$4.69

b. Average land value x rental area  
(77,250 square feet)

<u>1985-86</u>	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>
\$154,500	\$224,025	\$293,550	\$362,370

c. Property value x 50%

<u>1985-86</u>	<u>1986-87</u>	<u>1987-88</u>	<u>1988-89</u>
\$77,250	\$112,012	\$146,775	\$181,185

d. 12% return on 50% of full asset value

<u>Year</u>	<u>Rental</u>	<u>Cumulative Rental</u>
1985-86	\$ 9,270	\$ 9,270
1986-87	13,441	22,711
1987-88	17,613	40,324
1988-89	21,742	62,066

\* Fee value assumed by SPT in its 1985 offer.

\*\* Value derived by interpolation.

Using Alternate II, we calculate the rental due to SPT from the City to be \$62,066 from May 22, 1985, through May 21, 1989. After that date the daily rental rate, based on the latest annual rate, will be \$59.57 until transfer or judgment in an eminent domain proceeding.

Conclusions of Law

1. We have the discretion under PU Code § 1410 to grant or deny a motion to amend a petition for just compensation.

2. The ALJ properly denied the motion of Vallejo to amend its petition under § 1410.

3. The fair market value of property taken for which there is no relevant market may be determined by any method of valuation that is just and equitable.

4. The methods of valuation employed by the appraisers for SPT and Vallejo are just and equitable.

5. The easement corridor should be valued segment by segment, as the 5 segments are described by SPT's witness.

6. No synergy or assembly value should be used to augment the just compensation finding.

7. The valuation date required by law is July 18, 1988.

8. Vallejo has a legal obligation to pay a fee for its occupation of the SPT right-of-way since May 22, 1985.

9. The reasonable rental value of the SPT right-of-way should be related to our finding of just compensation.

10. SPT's Alternate II uses as an input the current fair market value of the subject property and is thus the appropriate method for determining the reasonable rental that Vallejo should pay for its occupation of SPT's right-of-way since May 22, 1985.

Findings of Fact

1. The highest and best use of the property to be taken is as a transportation corridor for a multitude of utility and transportation uses.

2. Vallejo seeks to obtain from SPT an exclusive easement as to the subsurface region of the easement corridor and incidental and nonexclusive rights in the surface area of the easement corridor.

3. The part of SPT's right-of-way that is occupied by Vallejo's water main passes through neighborhoods that are distinguished by different zones, different kinds of improvements, and different uses. The fair market value of properties adjacent to SPT's right-of-way varies from neighborhood to neighborhood, depending on the zoning, the improvements, and the uses to which the properties are put.



4. The fair market values per square foot of the 5 segments are: Segment 1, \$4.30; Segment 2, \$5.10; Segment 3, \$6.37; Segment 4, \$4.10; and Segment 5, \$5.52.

5. The easement to be taken by Vallejo impairs the value of SPT's property within the easement corridor by 50%.

6. The evidence of SPT's appraiser was premised upon a November 15, 1988, valuation date. A 3.32% decrease in the fair market value of the property as of November 15, 1988, will bring the fair market value back to July 18, 1988.

7. The reasonable rental for the subject property is \$62,066 for the period May 22, 1985, through May 21, 1989. The reasonable rental rate after May 21, 1989, is \$59.57 per day.

#### FINDING OF JUST COMPENSATION

The just compensation which the City of Vallejo shall pay to Southern Pacific Transportation Company for the taking of an easement in the right-of-way of the railroad, as described above, is the sum of \$181,185.00.

This finding is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

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APPENDIX  
Page 1

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REDIRECT EXAMINATION

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APPENDIX  
Page 2

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(Tr. 2:177-178.)

(END OF APPENDIX)