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Decision

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of the City of Fresno for the determination of just compensation for acquisition of the Calumet Water Company.

Application 82-05-64  
(Filed May 27, 1982)

Petition of the City of Fresno for the determination of just compensation for acquisition of the Northeast Gardens Water Company.

Application 82-05-65  
(Filed May 27, 1982)

Petition of the City of Fresno for the determination of just compensation for acquisition of the Kavanagh Vista Water Company.

Application 82-05-66  
(Filed May 27, 1982)

Charles William Brewer and Dale E. Bacigalupi,  
Attorneys at Law, for City of Fresno, Petitioner.  
Michael F. Willoughby, Attorney at Law, for  
Northeast Gardens Water Company, Kavanagh Vista  
Water Company, and Calumet Water Company,  
respondents.

ORDER ON MOTION AND PRELIMINARY RULINGS

Applications (A.) 82-05-64, 82-05-65, and 82-05-66 were filed by the City of Fresno (Fresno) for the purpose of having a determination of the just compensation for the respondent water companies. The Commission issued its orders to show cause in these applications on July 7, 1982. A prehearing conference was held on July 21, 1982, at which time the Presiding Administrative Law Judge (ALJ) gave the respondents leave to file motions to dismiss. The respondents filed these motions on August 11, 1982. Thereafter, another prehearing conference and further hearings were held on August 30, November 16, 23, and December 21, 1982, to consider the motions and questions relating to calendaring these matters.

Merits of the Motions to Dismiss

Before addressing the specific points raised by respondents, we set forth the ALJ's rulings which correctly disposed of the motions.

"ALJ JARVIS: . . .

"I have considered all the motions and the various preliminary issues so that I am familiar with it.

"Under the Commission's Rules of Procedure as they are currently followed, a motion to dismiss requires a formal Commission order for the final disposition, so even though I will indicate some tentative things after hearing argument today, there will necessarily be some sort of formal order coming out of today's proceedings.

"It seems to me that there are three issues raised by the motion to dismiss aside from the question of timeliness.

"The first issue has to do with the attempt to raise the constitutionality of the just compensation or valuation proceedings on the question of the absence of jury trial.

"There is a subsidiary issue to that, and that is the question of abating the proceedings in [sic] connection with the Washington Light & Power case which is in the federal courts.

"There is a constitutional provision that was enacted by the electorate a few years ago which says that a state agency cannot hold unconstitutional a state statute unless there is a decision of an appellate court which so holds.

"The fact of the matter is that there is a constitutional provision in California, and appellate authority which holds that there is no deprivation of due process with respect to the jury trial issue.

"I think the case is cited by the City of Fresno in its response, and there is also a section of the California Constitution that provides for valuation proceedings.

"Therefore, as a matter of state decisional law and state constitutional law, it would seem to me that that point has been resolved and is well settled.

"As to the attack in the federal court, I have been advised, and I can probably bring it down during the recess, that United States District Court has begun partial summary judgment in favor of the Commission in the Washington Light & Power case, and the constitutional point was raised in that case." (PEC RT 21-23.)

"ALJ JARVIS: Well, then, I will rule. . . .

"The motion to dismiss preliminarily is denied, subject to ratification by the full Commission.

"I will rule that the motion to abate is denied for the reasons that I specified before.

"I think the constitutional issues have been decided adversely and the parallel United States District Court action has been resolved adversely to the proponent of the constitutional provisions, and I do not see any reason to abate on those grounds.

"As far as abating on the parallel Superior Court actions, in view of what has transpired here, I am prepared to make rulings this morning to prevent harrassment in view of what counsel for the City of Fresno has said, and therefore, I feel that there won't be any harrassment of the respondent in this case.

"The ruling will be, and we will set -- I will go off the record in a moment to discuss calendaring and discovery in this case -- but the ruling will be in accordance with the representation of City Attorney: that there will be no duplication of discovery, and that if there is duplication of discovery, I am prepared to then consider the question of abatement and make rulings in this proceeding.

"It is my understanding that the only discovery will be in this proceeding, and we will provide for that.

"The other issue that has not been discussed or ruled upon is the question of joinder. And at the present posture of the record, I think there is no factual basis to abate the proceeding on the issue of joinder.

"I think the question of severance damages to parties that may not be parties to the record can either be an affirmative defense or the basis for a petition to intervene, or if the City seeks to add other respondents in this proceeding, I will permit the joinder on an intervention basis or on a pleading basis or an amendment to the applications for just compensation, provided there is some factual showing that is part of the record." (PEC RT 53-54.)

1. Constitutionality of Commission Jurisdiction

The respondents first contend that the statutory scheme authorizing the Commission to fix just compensation is unconstitutional because it deprives them of the right to trial by jury on this issue. There is no merit in this contention.

Section 5 of Article XII of the California Constitution provides that:

"The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

The California Supreme Court has held that this provision, which provides for valuation of utility property by the Commission without a jury, does not violate any California or federal constitutional rights. (Pacific Telephone & Telegraph Co. v Eshelman (1913) 166 C 640, 658; Marin Water & Power Co. v Railroad Commission (1916) 171 C 706, 708-711; S. E. Chase Lumber Co. v Railroad Commission (1913) 212 C 691, 700-707; East Bay Municipal Utility Dist. v Railroad Commission (1972) 194 C 603, 614-19.)

As a collateral matter, respondents argue that these proceedings should be abated because the constitutional question is being litigated in Washington Water & Light Co. v East Yolo Community Services District et al., a proceeding in the United States District Court, Northern District of California. The Commission was named as a defendant in that proceeding.

The Commission takes official notice that the District Court has entered a partial summary judgment in the Washington Water & Light case which declined to interfere with the Commission's just compensation jurisdiction. (N. D. Cal. C-80-3454 MHP, Memorandum Decision and Order filed June 2, 1981, Order, filed September 16, 1981.) In view of the District Court's action, the settled State of California law and the provisions of Section 3.5 of Article III of the California Constitution we find and conclude that abatement would not be appropriate.

## 2. Requisite Intent

Respondents next contend that the proceedings should be dismissed because Fresno lacks the requisite intent to condemn the respondents' utilities.

The record indicates that on May 19, 1982 the Fresno City Council adopted resolutions determining that public interest and necessity require the acquisition of the respondent water companies. Examination of the resolutions indicates that they meet the requirements to sustain the exercise of Commission jurisdiction under Public Utilities (PU) Code § 1403.

Respondents presented a copy of the Fresno City Council minutes for the meeting of May 19, 1982, at which the resolutions were adopted. During the course of deliberations the City attorney advised the Council that it had "the option to back out at any time." Whatever discussion may have occurred before the City Council, the resolutions are in full force and effect. Fresno is pursuing these actions. If Fresno does not acquire the respondents through eminent domain, or otherwise, they may seek to recover expenses under PU Code § 1414. Dismissal is not warranted on this point.

### 3. Joinder

Respondents also contend that the proceedings should be dismissed because indispensable parties are not joined.

The ALJ in his preliminary ruling pointed out there is no factual basis in the record showing the absence of indispensable parties. Furthermore, his ruling adequately and fairly disposed of the issue.

"I think the question of severance damages to parties that may not be parties to the record can either be an affirmative defense or the basis for a petition to intervene, or if the City seeks to add other respondents in this proceeding, I will permit the joinder on an intervention basis or on a pleading basis or an amendment to the applications for just compensation, provided there is some factual showing that is part of the record." (PEC R2-54.)

Dismissal is not warranted on this point.

### 4. Parallel Actions

Respondents finally contend that the proceedings should be dismissed or abated because of parallel actions in the Superior Court.

On April 9, 1980, Francis E. Ferraro, who is one of the respondents in each of these proceedings, filed an inverse condemnation action against Fresno in the Superior Court. In May, 1982, Fresno filed an action for eminent domain in the Superior Court with respect to the three respondents here involved.

The just compensation provisions of the PU Code contemplate coordinated actions in the Superior Court. (PU Code §§ 1413, 1416-1419.) Fresno commenced the eminent domain actions in the Superior Court but will rely on the Commission's determination of just compensation in those actions. The inverse condemnation action is not coextensive with the just compensation matters. Dismissal is not warranted. Nor is abatement. The ALJ made appropriate rulings to preclude duplication of discovery in the Commission proceedings and those in the Superior Court.

Hearing Dates

Fresno took the position that its expert appraiser would complete his appraisal within 6-8 months and it would be ready to go to trial at that time. The respondents asserted that their expert appraiser needed 18-24 months to complete his appraisal and sought to have the hearing calendared after that period of time. Both sides agree that the hearing will take 3-4 weeks.

Because of the disparate times the parties requested for calendaring the Presiding ALJ held a hearing to determine the issue. The respondents presented their expert appraiser who testified about the time he believed he needed to prepare for hearing.

The Presiding ALJ determined, after reviewing the published just compensation cases from 1930 to date, that the average time from filing to hearing was 378 days. With this in mind, after considering the testimony of respondents' expert appraiser and other matters of record, the Presiding ALJ ordered these matters calendared for October 11-14, 17-21, 24-28, and October 31 - November 4, 1983. The ruling was reasonable and we affirm it.

The Presiding ALJ also made pretrial discovery rulings which were correct and are affirmed.

The Commission makes the following findings and conclusions.

Findings of Fact

1. The Commission has jurisdiction in these matters.
2. Nothing in the record requires abatement of these matters.
3. The rulings of the Presiding ALJ were reasonable and correct.

Conclusions of Law

1. The motions to dismiss should be denied.
2. The rulings of the Presiding ALJ should be affirmed.

IT IS ORDERED that:

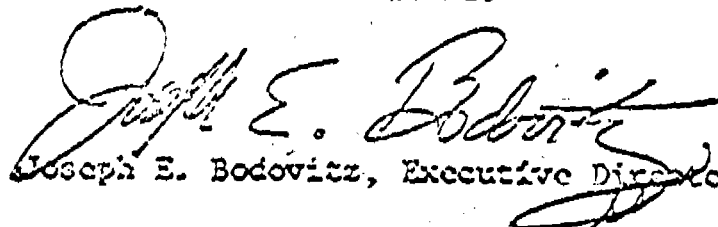
1. The motions of respondents to dismiss in Cases 82-05-64, 82-05-65, and 82-05-66 are denied.
2. All of the rulings made by the Presiding ALJ at the prehearing conference and hearing for the purpose of calendaring are affirmed.

This order is effective today.

Dated JUL 20 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
President  
VICTOR CALVO  
PRISCILLA C. GREN  
DONALD VIAL  
WILLIAM T. BAGLEY  
Commissioners

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

  
Joseph E. Bodovitz, Executive Director



~~X~~ Merits of the Motions to Dismiss

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