Decision No. 91967 JUL 2 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of the East Yolo Community Services District requesting the Public Utilities Commission to fix just compensation for the acquisition of the public utility property of Washington Water & Light Company within said District.

ORIGINAL

Application No. 57906
(Filed March 2, 1978)

O P I N I O N

On December 10, 1979, Washington Water & Light Company (Washington)[1/] filed a verified petition pursuant to Public Utilities Code Section 1414[2/] requesting that, inter alia, this Commission make and file an order declaring that our finding of just compensation in this proceeding shall no longer be of any force or effect. For the reasons stated herein, we deny the relief requested in Washington's petition.

A. Procedural Background

The East Yolo Community Services District (East Yolo) is a duly-created utility service district serving certain areas in Yolo County. East Yolo commenced this proceeding by filing Application No. 57906 on March 2, 1978, pursuant to Chapter 8 of Division One, Part One of the Public Utilities Code (Section 1401, et seq.), with the intention of condemning certain of

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1/ Washington is a wholly-owned subsidiary of Citizens Utilities Company of California, which in turn is owned by Citizens Utilities Company, a Delaware corporation headquartered in Stamford, Connecticut. We will use "Washington" to refer to all three corporate entities, which jointly filed the petition now under consideration.

2/ All references to code sections hereinafter made, unless otherwise noted, are to the Public Utilities Code.

Washington's utility property. This was a petition "of the second class" within the terms of Section 1403 of Chapter 8. Chapter 8 empowers this Commission to fix just compensation for property owned by regulated utilities and subject to condemnation by public agencies. That chapter also provides for the procedures to be observed in cases such as this.

On June 5, 1979, we issued Decision No. 90360 in which just compensation for Washington's utility property was fixed at $3,000,000. Washington filed a timely petition for rehearing of that decision. Rehearing was denied on August 28, 1979, by Decision No. 90767. Washington next petitioned for a writ of review from the California Supreme Court; however, the Court declined to grant the writ (S.F. No. 24073, writ of review denied, December 6, 1979).

On December 10, 1979, Washington filed the instant "Petition For Determination That Finding Of Just Compensation Shall No Longer Be Of Any Force Or Effect And For Determination Of Reasonable Expenditures." East Yolo filed its answer to that pleading on January 9, 1980. Oral argument was heard on January 28, 1980, before Administrative Law Judge Robert T. Baer.

B. Position of Washington

Washington alleges in its petition that on or about September 4, 1979, East Yolo submitted to its voters ballot proposition "Measure A" which would authorize East Yolo to: (a) issue up to $17.5 million in revenue bonds to effect the condemnation; and, (b) convert the water source of Washington's system from well sources to a river source. The voters approved Measure A. Washington next alleges that on or about September 11, 1979, the results of the election were officially certified by county election officials and officials of East Yolo. The answer of East Yolo admits all of the above allegations.

On these facts, Washington argues that East Yolo was required by Section 1413 to file within 60 days of the September 4 election, i.e., by no later than November 3, 1979, an action in a court of competent jurisdiction pursuant to the state eminent domain law.[3/] East Yolo commenced such an action on December 14, 1979, 41 days late under the terms of Section 1413. Washington concludes that, given only these facts, Sections 1414 and 1415 require as a matter of law that we declare our findings expressed in Decisions Nos. 90360 and 90767 to be without any force or effect and that we grant Washington recompense for the costs incurred in its participation in Application No. 57906. We disagree.

C. Discussion

In addressing Washington's petition our task is primarily one of statutory construction. The first issue we face is whether, in the case of a political subdivision having failed to comply with the 60-day requirement of Section 1413 for commencement of an eminent domain action, we possess any discretion as to the findings and determinations which we may be called upon to make pursuant to Sections 1414 and 1415. If we find that we do have such discretion, we must than decide whether the statutory standards and equitable considerations favor our granting the relief sought by Washington.

1. Does the Commission have any discretion as to the statutory findings and determinations called for in this case?

We must read the provisions of Chapter 8 upon which Washington relies together to properly discern their intent and operation. Our first task, then, is to review these sections of Chapter 8.

3/ See Code of Civil Procedure (CCP) Section 1230.010, et seq.

In a "friendly" condemnation, the condemnee utility would under Section 1412 file a written stipulation agreeing to accept the valuation set by the Commission. In the event that the condemnee elected not to file such a stipulation (and Washington here served notice that it had so elected by filing its petition for rehearing on June 22, 1979) the timetables set forth in Section 1413 become applicable. That section provides in part:

> "In the case of a petition of the second class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall initiate proceedings for the purpose of submitting to its voters a proposition to acquire under eminent domain proceedings the lands, property, and rights."

In the instant case, East Yolo's Board of Directors initiated proceedings in a timely fashion to place Measure A before the voters, by approving on June 28, 1979, its Resolution No. 79-11, which called for an all-mailed ballot election on September 4, 1979.

The election accomplished, East Yolo's next duty was to file an action as required by Section 1413:

> "...In the case of a petition of the second class, if the voters of the political subdivision, as provided by the law governing the political subdivision, vote in favor of any proposition to acquire under eminent domain proceedings, or otherwise, such lands, property, and rights, the political subdivision shall, within 60 days thereafter, commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings..."

Thus, East Yolo was to file its eminent domain action on or before November 3, 1979. It did not do so and Washington filed the instant "Petition for Determination" on December 10, 1979. Apparently alarmed by Washington's action, East Yolo on December 14 filed the

complaint (which it should strictly have filed by November 3) in the Yolo County Superior Court.

As a result of the above chain of events, Washington invokes and relies upon Section 1415. That section provides in pertinent part:

> "If the commission determines that the political subdivision,...in the case of a petition of the second class,...has failed, after its voters have voted in favor of the acquisition of the lands, property or rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the commission shall make and file its order declaring that [its finding of just compensation] shall no longer be of any force or effect..." (Emphasis added.)

This case turns on the meaning which we ascribe to the word "shall" underscored in the above citation. It is our opinion that, notwithstanding the use of the word "shall", in Section 1415, we have the discretion to refuse to vacate our earlier finding of just compensation.

We first note that neither East Yolo's characterization of Section 1414 as a forfeiture statute nor Washington's literal interpretation of Section 1414 as a statute of limitation has been of particular help to us: Section 1414 is a statute requiring that the condemnor, here East Yolo, diligently prosecute its rights in a timely manner. In this regard, it is similar to statutes such as Section 583(b) of the CCP.[4/] As is clear from the numerous

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4/ That section provides:

> "(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended." (Footnote continued)

cases decided thereunder, a tribunal undertakes more than merely a mechanical, ministerial act in applying the seemingly mandatory provisions of such a "diligence" statute. Despite the use of the phrase "shall dismiss" in Section 583(b), these cases have established substantial judicial discretion not to dismiss for failure to meet the statutory deadline under a variety of circumstances. We hold that when we are called upon to invoke the sanctions of Sections 1414 and 1415, we possess substantially the same discretion as the superior court wields in applying or refusing to apply Section 583(b).

In cases such as this, 60 days may well be a "reasonable period" in which to file a complaint for condemnation, as Washington asserts in its memorandum of points and authorities, but this does not appear to be the only period which might be reasonable. For instance; Section 1420 provides:

> "...Should a writ of review be obtained from the Supreme Court of the State of California, the time within which the political subdivision shall file an action in a court of competent jurisdiction or submit the proposition to its voters shall be extended to not more than 60 days beyond the final decision of the Supreme Court upon that writ."

Thus, had the Supreme Court in this case granted rather than denied Washington's petition for writ of review, East Yolo would-have been "saved" from Section 1415 without regard to any change of circumstances or prejudice to Washington which might have accrued in the interim. Section 1420, drafted in a day of uncrowded

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4/ (Continued)

See also, Section 473 (paragraph 3) of the Code of Civil Procedure where the court is permitted to "...relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect..."

appellate dockets, certainly cannot be read to require Supreme Court disposition of petitions for writs of review relevant to Commission proceedings brought under Chapter 8 in less than 60 days.

In relieving tardy litigants from default judgments, the courts have permitted such parties to plead "excusable neglect" as specified in CCP Section 473, i.e., that neglect which might have been the act of a reasonably prudent person under similar circumstances. Gilio v. Campbell, 114 Cal. App. 2d Supp. 853, 857-858 (1952). Given Section 1420's potential for delay, it was not necessarily imprudent for a condemnor agency such as East Yolo to have awaited the Court's action on a petition for writ of review before commencing its action in superior court. This is not to say that Sections 1413 through 1415 are irrelevant to proceedings in which a condemnee seeks judicial review. We hold only that, in view of Section 1420, the pendency of a petition for writ of review, particularly one involving as many novel and complex issues as Washington's did here, can in a proper case excuse a failure to observe the 60-day filing requirement of Sections 1413 through 1415 where no compelling reason to do otherwise is presented to the Commission. As discussed hereinbelow, no such reason appears in the record before us.5/

2. Should this Commission exercise its discretion to grant the relief sought by Washington?

5/ We here note and reject Washington's argument that "shall", being defined as mandatory by Section 14, is in and of itself the final word barring the exercise of any discretion by this Commission in this matter. Section 5 clearly states that Section 14 is controlling "[u]nless the provision or the context otherwise requires..." We find this to be a circumstance within that exception.

Section 1414 describes the Commission's responsibility once a condemnee utility files a petition alleging that a condemnor has failed any of the Section 1413 time requirements. Section 1414 provides as follows:

> "The commission shall thereupon cause written notice, with a copy of the owners' petition attached thereto, to be served upon the political subdivision, to appear before the commission at a time and place specified in the notice, to show cause why an order should not be made by the commission (a) finding that the political subdivision has failed to pursue diligently its rights, (b) determining that the finding as to just compensation shall no longer be of any force or effect, and (c) determining the reasonable expenditures necessarily incurred by the owner which, in the opinion of the commission, should be assessed against the political subdivision. The time specified in the notice shall be not less than 10 days subsequent to the date of service." (Emphasis added.)

It is apparent from the above underscored language that the question of whether "...the political subdivision has failed to pursue diligently its rights..." is the dispositive issue and consequently our paramount concern. Given the fact that this matter was pending in the Supreme Court, that East Yolo's delay in filing an action in superior court was brief, and that no prejudice to Washington appears to have occured or to have been intended, this Commission cannot find that, by filing its action in Superior Court on December 14 rather than November 3, East Yolo has failed to proceed in this matter on a diligent basis.

It is a matter of record that the phase of this proceeding leading up to Decisions Nos. 90360 and 90767 was actively contested and litigated. Washington filed its petition for rehearing on June 22, 1979. That petition was supported by three briefs

submitted by various members of the utility industry.[6] The gist of the arguments presented by these submissions was that Decision No. 90360 took a novel and inappropriate approach to the fixing of just compensation and that this approach could jeopardize utility holdings by encouraging future condemnations. We rejected this contention on August 28 in Decision No. 90767.

When Washington turned to the California Supreme Court on September 27, 1979, its petition for writ of review and request for stay was strongly worded. Five amici curiae[7] appeared on behalf Washington, reiterating the industry position that our decisions constituted a departure from constitutionally and judicially established principles of just compensation. The Supreme Court, however, denied a writ of review on December 6, 1979.

It was reasonable that East Yolo, concerned with the attention drawn by and the opposition brought to bear against Decisions Nos. 90360 and 90767, waited for the Supreme Court to act on Washington's petition before filing its action in eminent domain in superior court. East Yolo promptly moved to file its complaint in superior court eight days following the high court's action.

We decline East Yolo's invitation to construe our earlier decisions as not "final" until the Supreme Court acted on December 6. Such a construction totally ignores the express language found in Section 1416 to the contrary. Our decision here is based upon the discretion which is allowed to us by the statutes at issue and is not made under any compulsion of law as East Yolo has argued.

6/ California Water Association, on July 11; Pacific Gas and Electric Company, on July 26; and National Association of Water Companies, on August 9.

7/ Briefs were submitted by the California Water Service Company, on October 11; San Jose Water Works, on October 11; California Water Association, on October 15; National Association of Water Companies, on October 15; and Port Sacramento Land Company, on November 14.

We are thoroughly satisfied that the circumstances of this case support our decision to deny Washington's petition. The issue of the condemnor's diligence has been raised in numerous analogous proceedings brought under California's general eminent domain law (CCP Section 1230.010, et seq.). Condemnors of private property who seek to bring their actions in Superior Court pursuant to the eminent domain law must comply with a general prohibition against "unreasonable delays." See Klopping v. City of Whittier, 8 Cal.3d 39 (1972).

Under CCP Section 1245.260(a), the condemnor agency is required to file its superior court action within six months of making its resolution approving the taking of property through eminent domain proceedings. At least one court has criticized an approach whereunder any delays in excess of the six-month period would be held to be per se unreasonable. See People v. Peninsula Enterprises, Inc., 91 Cal. App. 3d 332, 356 (1979). That court observed that "...the evidence disclosing that there were ongoing negotiations between the parties for the sale of the subject property during most of the period preceding the condemnation suit..." would be sufficient to find that the condemnor had not unreasonably delayed the filing of its complaint. We see no more compelling need to impose a "per se" rule in the present circumstances than did the court in Peninsula Enterprises.

In Decision No. 90767, we said at pages 1 and 2:

> "...In the context of the facts of this case, which must necessarily provide the primary framework for determining just compensation, the reproduction cost new less depreciation (RCNLD) method and the valuations it produced were not as persuasive to us as the valuations based on both the capitalized earnings and market data approaches. Washington had ample opportunity to present its own testimony on these two methods, but chose to rely entirely on RCNLD."

This language was intended as a criticism of Washington's failure to address important issues in these proceedings. Convinced that RCNLD should be the only method we might consider and would produce the valuation most favorable to it, Washington ignored the methods of valuation used by East Yolo's experts. Washington surprisingly elects to continue its perfunctory participation in this subsequent stage of the proceeding. Washington has never alleged, argued, or brought forth the slightest evidence to show either: (1) that it has suffered any prejudice as a direct or indirect result of the 41-day lapse between the dates on which East Yolo should, by the strict terms of Section 1413, have filed and eventually did file its complaint; or (2) that any other acts of East Yolo's coupled with the 41-day lapse should indicate to us that East Yolo's interest in completing this condemnation on a substantively timely basis has waned.

On the record before us, we cannot perceive any material effect which East Yolo's hesitation to file its complaint would have had or will have on the superior court proceeding. Had East Yolo filed its complaint on or before the November 3 date, the superior court would have been justified in delaying that proceeding during the pendency of Supreme Court consideration of Washington's petition for writ of review, i.e., until December 6, 1979, in which case the superior court action would now have been essentially where it now does stand, in the pleading stages of suit. Thus, Washington has suffered no prejudice due to delay, and granting the relief requested in Washington's petition would serve no practical purpose. On the contrary, numerous policy considerations, several of which are proffered by Washington, militate against granting Washington's request.

East Yolo has already served notice that it fully intends to proceed with this condemnation both by having filed its complaint in the Yolo County Superior Court and by its vigorous opposition to the instant petition. If we were to determine that our finding of just compensation should no longer have any force or effect, it is apparent that the issue of just compensation would merely be relitigated, either before the superior court or before this Commission. While we do not consider it a compelling consideration. we do note that relitigation of the just compensation issue before the Commission could result in considerable administrative expense and burdens upon the resources of this Commission and the parties, with little or no benefit to anyone. Nothing in the record remotely suggests that if confronted by the just compensation question a second time, a result different from Decision No. 90360 should obtain.

To the extent that Washington's petition would uselessly prolong the eminent domain proceeding, it is contrary to the intent of the very statutes upon which it is based. Such a nonsensical result is to be avoided and we do so by denying Washington's request for relief.

In order to facilitate efficient processing and timely conclusion of condemnation proceedings, which we have construed as the intent of Sections 1413, 1414, and 1415, we should not without good reason issue orders defeating those ends. Rather, we should seek the expeditious resolution of any uncertainties arising from the condemnation process. As noted by Washington, such uncertainties may induce utility employees, fearful for their job security, to leave their positions, and may disrupt resource and investment planning by the utility. To prevent such needless mischief, which even Washington urges should be of utmost priority, we will deny petitions filed under Sectin 1414 unless the petitioner can demonstrate that the actions of the condemnor result in substantial detriment to the utility. Washington has failed to meet that burden,

paying mere lip service to the goals it would have this Commission defend.

Washington argues that a further purpose of the 60-day requirement in Section 1413 is to protect the voters by ensuring that its representatives, here East Yolo's Board of Directors, act promptly to carry out their directives. We agree, but again we find no necessary implication that the 60-day limit must be all determinative even in the absence of any showing of actual detriment to the voters' interests. The record indicates no such detriment, but rather that the will of the voters could be defeated if we were now to grant Washington's petition. It is curious that Washington would here purport to defend the rights of third parties with certain knowledge that the relief sought in defense of those rights would be inimical to them.

Due to our disposition of the above issues, there is no need to determine which of Washington's expenses incurred as a result of its participation in Application No. 57906 are reasonable. Under Section 1415, an entitlement to reimbursement for reasonable expenses is subject to the condition precedent that the Commission find the condemnor to have failed to diligently pursue its rights. Since we find East Yolo to have pursued its right diligently, the condition precedent fails and the entitlement does not arise.

Findings of Fact

1. On June 28, 1979, East Yolo initiated proceedings to submit to its voters Measure A, a proposition to acquire under eminent domain proceedings Washington's utility property.

2. By means of an all-mailed ballot election conducted September 4, 1979, the results of which were certified on September 11, 1979, East Yolo's voters approved Measure A.

3. On December 6, 1979, the California Supreme Court denied the petition for writ of review of this Commission's Decisions Nos. 90360 and 90767, which petition had been filed by Washington on June 2, 1979.

4. On December 14, 1979, East Yolo filed a complaint in Yolo County Superior Court to take Washington's utility property under eminent domain proceedings.

5. Although such complaint was filed more than 60 days after the election regarding Measure A, that filing constituted a diligent pursuit of the rights of East Yolo in condemnation.

6. No prejudice to Washington appears to have occured or to have been intended as a result of East Yolo's delay in filing eminent domain proceedings.

Conclusions of Law

1. In making findings and determinations pursuant to Public Utilities Code Sections 1414 and 1415, the Commission has the discretion to consider the diligence with which a political subdivision has pursued the required steps involved in the condemnation process.

2. East Yolo's filing of its complaint in Yolo County Superior Court on December 14, 1979, met the standards of diligence intended by Sections 1413, 1414, and 1415 of the Public Utilities Code.

3. The request of Washington for an order that the Commission's finding of just compensation made and filed in Decision No. 90360 and affirmed in Decision No. 90767 is of no force or effect should be denied.

4. The request of Washington for a determination of its reasonable expenditures incurred as a result of this proceeding should be denied.

O R D E R

IT IS ORDERED that the request of Washington Water & Light Co., Citizens Utilities Company of California, and Citizens Utilities Company for an order declaring that the Commission's finding of just compensation made and filed in Decision No. 90360 and affirmed in Decision No. 90767 is of no force or effect is hereby denied.

IT IS FURTHER ORDERED that the request of Washington Water & Light Co., et al., for a determination of its reasonable expenditures incurred as a result of this proceeding, Application No. 57906, is hereby denied.

The effective date of this order is the date hereof.

Dated JUL 2 1980, at San Francisco, California.

John E. Bryson
President

I will file a written dissent
Vernon L. Sturgeon

Richard D. Gravelle

Edward J. Bishop

Commissioners

A. 57906

DISSENT OF COMMISSIONER VERNON L. STURGEON

I respectfully dissent:

The majority decision apparently is based on a finding that, although East Yolo admittedly did not comply with the time limitations plainly spelled out in Section 1413 et. seq., it nevertheless diligently pursued its condemnation action pursuant to Section 1415 because the delay was relatively short and no injury was shown to the utility caused by the delay.

This interpretation completely ignores the plain language of Section 1415 that states that if the Commission finds that the eminent domain complaint has not been filed within the statutory sixty (60) day period it shall order that its previous finding of just compensation is no longer of any force and effect. In my opinion, the Commission lacks the authority or discretion to ignore the clear intent of the Legislature.

The Administrative Law Judge assigned to this proceeding reached the same conclusion. I will therefore adopt his opinion, attached hereto in its entirety, as my dissent.

/s/ Vernon L. Sturgeon

VERNON L. STURGEON
Commissioner

ALJ/hh

ATTACHMENT

Decision No. _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of the East Yolo Community Services District requesting the Public Utilities Commission to fix just compensation for the acquisition of the public utility property of Washington Water & Light Company within said District.	Application No. 57906 (Petition for Determination Filed December 10, 1979)

Frederick G. Girard, Attorney at Law, for East Yolo Community Services District, applicant.
Heller, Ehrman, White & McAuliffe, by Weyman L. Lundquist and Paul H. Rochmes, Attorneys at Law, for Washington Water and Light Company; and Jack H. Grossman, Attorney at Law (New York), for Citizens Utilities Company; respondents.

O P I N I O N

In response to the petition of East Yolo Community Services District (East Yolo) the Commission fixed the just compensation for the acquisition of the public utility properties of Washington Water and Light Company (Washington) at $3 million. (Decision No. 90360, dated June 5, 1979.) Washington's application for rehearing of Decision No. 90360 was denied on August 28, 1979, by Decision No. 90767.

In a September 4, 1979 election the voters of the District approved a proposition to acquire, under eminent domain proceedings, the lands, property, and rights of Washington. The results of the election were officially certified by Yolo County election officials and by the Board of Directors of East Yolo on or about September 11, 1979.

Washington filed with the California Supreme Court a petition for a writ of review and request for a stay of Decisions Nos. 90360 and 90767 on September 27, 1979, which was denied on December 6, 1979.

On December 10, 1979, Washington filed its petition pursuant to Public Utilities Code[1] Section 1414, for a determination that the finding of just compensation shall no longer be of any force or effect and for a determination of Washington's reasonable expenditures.[2]

Acting in accordance with the provisions of Section 1414,[3] the Commission immediately caused notice of hearing on Washington's petition to be served upon the parties.

1/ All references hereafter to section numbers are to the Public Utilities Code unless otherwise indicated.

2/ Section 1414 provides in part:

> "...if the political subdivision, in a petition of the second class, fails to proceed diligently to submit the proposition to its voters or fails, if its voters have voted in favor of the acquisition of the lands, property, and rights, to file such action [eminent domain proceedings] in a court of competent jurisdiction within 60 days thereafter, the owner of such lands, property, and rights may file with the commission a verified petition in writing setting forth that fact. . . ."

3/ Section 1414 provides in part:

> "The commission shall thereupon cause written notice, with a copy of the owners' petition attached thereto, to be served upon the political subdivision, to appear before the commission at a time and place specified in the notice, to show cause why an order should not be made by the commission (a) finding that the political subdivision has failed to pursue diligently its rights, (b) determining that the finding as to just compensation shall no longer be of any force or effect, and (c) determining the reasonable expenditures necessarily incurred by the owner which, in the opinion of the commission, should be assessed against the political subdivision. . . ."

On January 9, 1980, East Yolo filed its answer to Washington's petition with accompanying points and authorities and on January 25, 1980, filed supplemental points and authorities.

Hearing on Washington's petition was convened on January 28, 1980,[4] before Administrative Law Judge Robert T. Baer. Four exhibits were received, oral argument was presented, and the proceeding was submitted subject to the filing of concurrent closing briefs due February 13, 1980. The briefs are in hand and the proceeding is ready for decision.

The Applicable Statutory Provisions

In addition to those parts of Section 1414 quoted above, parts of Sections 1413 and 1415 also bear on the issues raised. Section 1413 provides in part:

> "In the case of a petition of the second class, if the voters of the political subdivision, as provided by the law governing the political subdivision, vote in favor of any proposition to acquire under eminent domain proceedings, or otherwise, such lands, property, and rights, the political subdivision shall, within 60 days thereafter, commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings.."

Section 1415 provides in part:

> "If the commission determines that the political subdivision...in case of petition of the second class, has failed to proceed diligently to submit the proposition to its voters or has failed, after its voters have voted in favor of the acquisition of the lands, property or rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the commission shall make and file its order declaring that such finding shall no longer be of any force or effect..."[5]

4/ On January 28, 1980, Washington filed points and authorities in support of its petition.

5/ Section 14 provides that: "'Shall' is mandatory and 'may' is permissive."

Washington's Petition

The petition of Washington filed December 10, 1979, merely recites the facts as related above, and, invoking the seemingly mandatory provisions of Sections 1413 through 1415, requests the Commission to declare that its finding of just compensation (in Decision No. 90360, dated June 5, 1979) shall no longer be of any force or effect and to make its finding as to the reasonable expenditures necessarily incurred by Washington in this proceeding, which should be assessed against East Yolo.[6/]

For ease of reference the following chronology of significant events is included:

Date	Event
June 5, 1979	D.90360 issued
June 22, 1979	WW&L Petition Rehearing
June 25, 1979	Effective date of D.90360 .
August 28, 1979	D.90767 issued (Mod., deny Rhrg.)
September 4, 1979	Election
	60-day filing period begins
September 27, 1979	WW&L Petition for Writ of Review
October 22, 1979	East Yolo Answer to petition
November 3, 1979	End of 60-day filing period
November 6, 1979	WW&L Reply to Answers of East Yolo and Commission
December 6, 1979	Petition for Writ Denied
December 10, 1979	Petition of WW&L - § 1414
December 14, 1979	Complaint filed in Yolo County Superior Court

6/ At the hearing the taking of evidence on the issue of reasonable expenditures was deferred pending a Commission decision on the issue of law.

Discussion

In its various answering pleadings[7/] East Yolo raises a number of legal arguments, attempting to persuade the Commission that it should overlook the explicit statutory language of Sections 1413 through 1415. It first argues that the Commission's finding of just compensation cannot be considered "made and filed", by the terms of Section 1414 until the California Supreme Court has denied the petition for writ of review. The issue of when the Commission's finding was "made and filed" is not strictly material to this proceeding, which involves a petition of the second class. In petitions of the first class the 60-day period for filing an action in the Superior Court commences when the Commission has "made and filed" its finding of just compensation. But in petitions of the second class, when the voters have voted in favor of a proposition to acquire the lands, property, and rights of a public utility, the 60-day filing period commences on the day of the election. (Section 1414.)

Since the phrase "made and filed" does not appear in the clauses dealing with petitions of the second class, when an election has been held in a timely manner, East Yolo's argument appears to be:

Assuming that the phrase "made and filed" may be read "final", and,

Assuming that the statute should be interpreted consistently with respect to petitions of the first class and petitions of the second class,

Therefore, the various filing periods required by the statutes to be observed by the political subdivision should be consistently tolled while the Commission and the Court are considering applications for rehearing and petitions for writ of review, respectively.

7/ Answer, filed January 9, 1980; Supplemental Points and Authorities, filed January 25, 1980; and Closing Brief, filed February 13, 1980.

Regrettably, the statute is explicit that the Commission's decision, or finding of just compensation, is made and filed, not when review has been exhausted and the finding is final from the point of view of the courts, but when the decision is signed. We conclude that the date of making and filing the finding of just compensation is the date of issuance of the Commission's opinion or decision containing such finding. In the instant case that date was and is June 5, 1979. We are compelled to that conclusion by the language of Section 1420, which provides in part:

> "The provisions of this part with reference to rehearing and review shall be applicable to the findings of the commission made and filed under the provisions of this chapter. Petitions for rehearing shall be filed within 20 days from the date of making and filing the finding as to which a rehearing is desired..." (Emphasis added.)

It is manifest that the phrase "made and filed" cannot be given the meaning or interpretation sought by East Yolo without rendering the statutory scheme meaningless. If the time periods are either tolled or do not begin to run until after a Commission decision is final, that interpretation would place the filing of a petition for rehearing after court review.

East Yolo argues that requiring the filing of a complaint in the Superior Court within 60 days after the election is not sensible because the plaintiff is unable to allege the existence of final Commission finding of just compensation, when a petition for writ of review is pending during the entire period. Thus, it contends that its filing in the Superior Court on December 14, 1979, was proper and timely, since it was after the date (December 6) when the Supreme Court denied review. This argument also falls short of the mark. By virtue of Rule No. 24(a) of the California Rules of Court a decision of the Supreme Court becomes final 30 days after

filing. In the instant case the court's decision denying Washington's petition for writ of review was filed December 6, 1979, and did not become final until January 5, 1980. Moreover, East Yolo's filing in the Superior Court was within the 15 days allowed an aggrieved party to file a petition for rehearing of the court's decision, an act which East Yolo admits Washington was contemplating, but which did not occur.

Certainly, in the face of the uncontroverted fact that the court's decision was not final on December 14, East Yolo cannot seriously argue that it must be able to allege a final Commission finding before it can file in the Superior Court.

East Yolo next argues that if the Commission enforces the literal terms of the statute the results would be a forfeiture, which the law does not favor. The cases cited by East Yolo involve principally forfeitures of private property to the government. In the instant case the facts are reversed, for the government agency argues that a literal interpretation of the statute would result in a forfeiture of rights acquired by the government agency under the same statute against an owner of private property. It is not surprising that the legislature in establishing a procedure for the taking of private property by a government agency should protect the property owner by requiring the agency to diligently pursue its rights under the statute. In the instant case, the procedure established defines diligence in terms of specific time periods which the government agency is required to observe when it engages in an eminent domain action. The results which flow from the failure of the government agency to observe the requirements of the law are unlike the circumstances ordinarily surrounding forfeiture cases.

To buttress its forfeiture argument, East Yolo points to "ambiguities" in the statutory scheme. It argues that ambiguous statutory provisions resulting in a forfeiture should not be enforced

so as to produce a forfeiture. The supposed ambiguities involve the statute's failure to address the question whether the time periods run while applications for rehearing or petitions for writ of review are pending.

The statute does, however, specifically address the situation where a petition for writ of review is granted. Section 1420 provides in part:

> ". . . Should a writ of review be obtained from the Supreme Court of the State of California, the time within which the political subdivision shall file an action in a court of competent jurisdiction or submit the proposition to its voters shall be extended to not more than 60 days beyond the final decision of the Supreme Court upon that writ."

East Yolo contends that the statute is ambiguous because it does not deal with the effect of the mere filing of petitions for rehearing or writ of review. East Yolo would have us clarify this alleged ambiguity by concluding that such filings toll or extend the running of the various time periods.

We do not agree, however, that the statute is ambiguous. It allows for an extension of time only when a writ is granted. That is the only circumstance which results in such an extension. Although East Yolo believes an extension of time is appropriate under other circumstances, such as when a petition for writ of review is first filed, the Commission may not grant such extensions by implication absent some expression of legislative intent.[8/]

8/ If a political subdivision need not take any decisive action until a decision of the Supreme Court is final, as much as 320 days could elapse from the date the finding is made and filed until a Supreme Court decision denying writ of review is final. As much as 5 months can, and does, elapse before the court acts to deny writs of review after a matter is fully briefed. In view of the many instances of specific and short time periods provided in this statutory scheme, we do not believe that an interpretation which would allow such potentially lengthy delays was intended by the Legislature.

East Yolo also argues that the Commission need not consider the term "shall" as it is used in the statutory scheme, as mandatory. It cites the general rule that:

> "...the word 'shall' when found in a statute is not to be mandatory, unless the intent of the legislature that it shall be so construed is unequivocally evidenced." (Coke v City of Los Angeles (1913) 164 C 705, 709.)

Even accepting the quoted language to be the general rule, we wonder how the Legislature could say that shall is mandatory with less equivocation than it did in Section 14:

> "'Shall' is mandatory..."

Washington's argument aptly counters East Yolo's forfeiture contention, as follows:

> "The District asserts that Sections 1413-1415 are in the nature of penalty or forfeiture provisions (District's Memorandum, pp. 17-22). Though the District presents an extensive discussion of the interpretation of forfeiture statutes, it fails to advance any arguments to support its bald assertion that Sections 1413-1415 are forfeiture provisions. The cases discussed by the District all involved a party which lost property it already owned because it had violated a statute (e.g., People v. One 1937 Lincoln etc. Sedan, 26 Cal. 2d 730, 160 P.2d 769 (1945), discussed in District's Memorandum, p. 17, lines 22-28, p. 18, lines 1-9). In the instant case, the District does not own the property at issue, and hence will not forfeit any property because of its violation of Sections 1413-1415. The District's position would lead to the absurd result that all statutes of limitation would be treated as forfeiture provisions." (Washington's Memorandum, filed January 28, 1980, p. 13, fn. 13.)

Washington has aided in the analysis of the issues by correctly characterizing the time periods required by the statute to be observed by East Yolo as statutes of limitation, rather than forfeiture statutes. In this characterization the Commission concurs.

Since we have concluded that the statute does not involve a forfeiture, it is unnecessary to respond to East Yolo's argument that Washington has waived the forfeitures by filing a petition for writ of review.

East Yolo's substantial compliance argument is based upon its assumption that the earliest the Commission's finding of just compensation may be deemed made and filed is on August 28, 1979, the date Washington's application for rehearing was denied. We have earlier concluded that our finding of just compensation was made and filed on June 5, 1979, and thus, East Yolo's substantial compliance argument is not meritorious.

East Yolo in its supplemental points and authorities filed January 25, 1980, invokes the implied exceptions doctrine developed by the courts under Code of Civil Procedure Section 583(b).[9/] In certain circumstances, where it would be impossible, futile, or impractical to bring a case to trial within 5 years, the courts have allowed the 5-year period to be tolled or extended by implying exceptions to the mandatory language of the statute.

There is, of course, no precedent for applying the implied exceptions doctrine to the just compensation provisions of the Public Utilities Code. Moreover, the two statutory schemes are not even analogous. When the provisions of the Code of Civil Procedure

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9/ "Any action...shall be dismissed...unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended."

Section 583(b) are applied, the plaintiff's cause of action is completely extinguished, whereas when Section 1415 is enforced against a political subdivision, it must merely restart the procedure, either before the Commission or the Superior Court.[10/] Finally, even if the doctrine were appropriate to just compensation proceedings, the requirements for its application have not been fulfilled in this case, for it was neither impossible, futile, nor impractical for East Yolo to have filed its complaint in Superior Court within 60 days after the election.

East Yolo argues that it was required to allege, but could not have alleged in its complaint the existence of a final Commission finding of just compensation prior to December 6, 1979, when Washington's petition for writ of review was denied. We have earlier concluded that the Commission's finding was not even final, in the sense that East Yolo uses the term "final", on December 6, 1979, according to the Rules of Court. But a more fundamental fallacy in East Yolo's argument is its contention that an allegation of such finality is necessary to protect a complaint from a demurrer. This argument will not hold up under scrutiny. First, it is a perfect defense to a demurrer that the statute requires the filing before the Supreme Court's decision becomes final. Second, Section 1416

10/ The pendency of a petition for writ of review would not deprive a Superior Court of jurisdiction, since its powers are not dependent upon the existence of a Commission finding no longer subject to direct attack. The just compensation procedure of the Public Utilities Code "...shall be alternative and cumulative and not exclusive, and the political subdivision shall continue to have the right to pursue any other procedure providing for the acquisition under eminent domain proceedings of the lands, property, and rights of any public utility. . . ." (Section 1421)

provides that the Commission's finding of just compensation "shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State." Therefore, from the point of view of the Superior Court the Commission's finding is final on the date it is made and filed. Even from the Commission's point of view the finding is final no later than August 28, 1979, the date when Washington's petition for rehearing was denied and well before a complaint was required to be filed. Third, even under the worst conceivable scenario a demurrer could only be granted with leave to amend in order to allow East Yolo to allege the Supreme Court's decision and the expiration of the time required to make it final.

We conclude that the filing of East Yolo's complaint in the Superior Court within 60 days after the election was neither impossible, impractical, nor futile. The implied exceptions doctrine is not applicable to the just compensation provisions of the Public Utilities Code. Even if it were applicable, the requirements of the doctrine have not been satisfied.[11/]

By ruling of the Administrative Law Judge the issue of reasonable expenditures by Washington was reserved for further hearing. Section 1415 provides that in the circumstances of this case, the Commission shall "make its finding as to the reasonable expenditures necessarily incurred by the owner in the proceeding before the Commission, which should be assessed against the political subdivision." We believe that this statutory provision, together with the related language of Section 1414, might reasonably be interpreted to allow us considerable discretion in determining what proportion of "reasonable expenditures" by Washington "should be assessed" against East Yolo. Should further hearings be requested on this issue, we will expect the parties to address the question of whether our finding as to the assessment of costs should be

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11/ It is noteworthy that in SMUD v PG&E (1946) 72 CA 2d 638, 642-643 the condemnor did in fact proceed exactly as East Yolo here asserts it could not. It filed its complaint in the Superior Court 5 weeks before the Supreme Court acted upon the petition for writ of review.

influenced by considerations such as whether East Yolo's failure to file a timely action was the result of intentional delay or merely a technical oversight.

Findings of Fact

1. On September 4, 1979, the voters of East Yolo voted in favor of a proposition to acquire under eminent domain proceedings the lands, property, and rights of Washington.

2. On December 14, 1979, East Yolo filed the complaint required by Section 1413 which commenced an action to take such lands, property, and rights.

3. The filing of such complaint was not within the 60-day period allowed by Section 1413 for the filing of such complaints.

4. No evidence was introduced by East Yolo to explain its failure to file the complaint within the required 60-day period.

5. The unsworn statements of counsel, suggesting that such failure was purposeful, are not evidence and are not entitled to any weight.12/

6. East Yolo has failed to pursue diligently its rights.

Conclusions of Law

1. Section 1413 requires a political subdivision to file its eminent domain action within 60 days after the voters have approved a proposition to acquire the public utility's land, property, and rights.

2. Section 1413 requires the timely filing of such an action, irrespective of the pendency of a petition for writ of review with respect to the Commission's finding of just compensation.

12/ "These unnecessary consumptions of trial court time were avoided by District's purposeful decision to wait until this Commission's order fixing just compensation became final. . . ." (Supplemental Points and Authorities, filed January 25, 1980, p. 11. See also pp. 10 and 18.)

3. Only when a writ of review has been obtained (which is not the case here) does the statute, specifically Section 1420, allow for the extension of the filing period.

4. The issue of the finality of the Commission's finding of just compensation (in the sense that all possibility of direct attack by writ of review or, conceivably, by writ of certiorari of the United States Supreme Court, has been exhausted) is irrelevant to this proceeding.

5. If the concept of finality is relevant at all, then the Commission's finding of just compensation was sufficiently final after the Commission denied rehearing for East Yolo to allege a final Commission finding in a timely filed complaint in eminent domain.

6. The phrase "made and filed", as it pertains to findings of just compensation in proceedings under Sections 1401 et seq. of the Public Utilities Code, means the date the Commission's opinion containing its just compensation finding is signed.

7. In this proceeding the date on which the Commission's finding was made and filed is June 5, 1979.

8. None of the Sections of Chapter 8 (Determination of Just Compensation for Acquisition of Utility Property) is a forfeiture statute, nor does the application or enforcement of such sections result in a forfeiture as to East Yolo.

9. The doctrine of implied exceptions has no application to these proceedings.

10. Even if the doctrine of implied exceptions were applicable to these proceedings, it was neither impossible, futile, nor impractical for East Yolo to file its complaint in a timely manner.

11. The Commission's finding as to just compensation should no longer be of any force or effect.

12. The issue of reasonable expenditures by Washington having been reserved for further hearings, such hearings should be set upon the request of either party.

13. The Commission is compelled by the provisions of Section 1415 to issue the following order.

O R D E R

IT IS ORDERED that the Commission's finding of just compensation made and filed in Decision No. 90360 and confirmed in Decision No. 90767 is no longer of any force or effect.

This proceeding shall remain open for the purpose of a supplemental order determining the reasonable expenditures necessarily incurred by Washington Water and Light Company which, in the opinion of the Commission, should be assessed against East Yolo Community Services District.

The effective date of this order shall be thirty days after the date hereof.

Dated _____, at San Francisco, California.