

93304 JUL 22 1981

ORIGINAL

Decision _____

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 Bakman Water Company.)

Application 59775
(Filed June 30, 1980)

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

Application 59776
(Filed June 30, 1980)

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

Application 59777
(Filed June 30, 1980)

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

Application 59778
(Filed June 30, 1980)

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

Application 59779
(Filed June 30, 1980)

Douglas C. Holland, Attorney at Law, for the City
of Fresno, applicant.

William G. Fleckles, Attorney at Law, for Bakman
Water Company, respondent.

Warren A. Palmer, Attorney at Law, for Calumet
Water Company, Kavanaugh Vista Water Company,
and Northeast Gardens Water Company,
respondents, and for Easton Estates, Water
Utility Supply Company, and Madera Ranchos
Water Company, necessary parties.

Truman F. Campbell, Attorney at Law, for Mary Lou
Devlin, Hans Warkentin, Joseph F. Maslowski,
Martha A. Dawson, Donna M. Eggers, and
Roberta Webster, interested parties.

ORDER ON MOTIONS TO DISMISS

On June 30, 1980, the City of Fresno filed petitions under **Public Utilities (PU) Code Sections 1401 et seq.** requesting the Commission in the above proceedings to fix the just compensation to be paid by the City of Fresno for the lands, property, and rights of the Bakman Water Company, the Calumet Water Company, the Kavanaugh Vista Water Company, the Norman Water Company, the Northeast Gardens Water Company, and the Park Van Ness Mutual Water Company.

Under PU Code Section 1405, the Commission by Decision (D.) 92187 dated September 3, 1980, issued an Order to Show Cause why the Commission should not proceed to hear the petitions and to fix the just compensation to be paid for such lands, property, and rights, all of which are located within the City of Fresno.

Public hearing on the Order to Show Cause was held before Administrative Law Judge Daly on November 18, 1980, in San Francisco at which time and place oral argument was heard upon the motions to dismiss. The motions were taken under submission upon the receipt of Memorandum of Points and Authorities, which, following two extensions of time, were filed on March 19, 1981. The City of Fresno filed its response on April 20, 1981.

On December 16, 1980, **at the request of the City** of Fresno, the Commission dismissed Application (A.) 59780 relating to the Park Van Ness Mutual Water Company. At the time of hearing on the Order to Show Cause no appearance was **made** on behalf of the Norman Water Company.

The Motions to Dismiss were filed as follows:

1. On October 27, 1980, by Truman F. Campbell on behalf of Mary Lou Devlin, Hans Warkentin, Joseph F. Maslowski, Martha A. Dawson, Donna M. Eggers, and Roberta Webster, as customers of Bakman Water Company.

Original

2

A.59775 et al. ALJ/km/nb * *

2. On March 27, 1981, by Warren A. Palmer on behalf of Francis H. Ferraro, Calumet Water Company, Kavanaugh Vista Water Company, and Northeast Gardens Water Company.
3. On March 27, 1981, by William G. Fleckles on behalf of Bakman Water Company.

The motions were based upon the following grounds:

1. The City of Fresno has never adopted a resolution declaring its intent to acquire the properties under eminent domain proceedings.
2. The projects have not been environmentally assessed.
3. Easton Estates, Madera Ranchos Water Company, and Water Utility Supply Company are necessary and indispensable parties in A.59776, 59777, and 59779 and have not been joined in the proceedings.

Prior to a discussion on the merits of the motions, it would be helpful to briefly describe the eminent domain procedure and the Commission's part.

If a political subdivision decides to acquire a public utility water system which serves its citizens, it may proceed in one of two ways. It may proceed by general eminent domain under the provisions of the Code of Civil Procedure (Part 3, Title 7, Section 1237) in which case the just compensation is fixed by a jury or by the court if a jury is waived. As an alternative procedure, it may petition the Commission under PU Code Sections 1401 et seq. and request the Commission to fix the just compensation.

The Commission's action may be likened to that of a referee appointed under authority of law to take evidence and submit to the court a finding of fact. (East Bay Municipal Utility District v Railroad Commission (1924) 194 C 603.) The finding of the Commission on the compensation is final and the court's primary function is to determine only whether the political subdivision has the right and power to take the property.

In the event a political subdivision decides to proceed before the Commission, it may file either: (1) a petition of the first class or (2) a petition of the second class (PU Code Section 1403).

A petition of the first class must set forth the intention of the public subdivision to acquire the property under eminent domain proceedings, whereas a petition of the second class must set forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition to acquire the property under eminent domain proceedings.

Although all of the applications allege an intention on the part of the City of Fresno to acquire the properties of the various water companies under eminent domain, nothing in the petitions or attachments support such expressions of intent.

The allegations were based upon an extract of the Minutes of the Fresno City Council for February 26, 1980, as certified by the City Clerk and reads as follows:

"IT IS RESOLVED that the Council hereby re-affirms the grant of authority to staff to proceed with the appraisal of water companies in the City of Fresno's sphere of influence for future acquisition; staff is authorized to petition the PUC for the purpose of 'fixing the just compensation' for

the acquisition of the seven water companies; and staff is directed to report back to Council at the conclusion of the PUC proceedings with recommendations on any water company purchase by the City of Fresno."

The City of Fresno's resolution is far from an unequivocal expression of intent to acquire the respective water systems under eminent domain proceedings, or otherwise. **It appears to indicate an** intent to engage more-or-less in a preliminary stage of inquiry and investigation, when information and recommendations are weighed and considered prior to the making of any decision or commitment. Clearly this is not sufficient to invoke the Commission's jurisdiction as petitions of the first class.

The City of Fresno correctly points out that the Commission may, at any time after the filing of the petition and prior to **making and filing its findings on just compensation, authorize** the amendment of a petition. (PU Code Section 1410.) To do so, however, would work an undue hardship on the owners of these small water systems, because the time that values are determined for condemnation purposes is the date upon which the petition is filed with the Commission. (Sacramento Municipal Util. Dist. v Pacific Gas and Electric Co. 72 CA 2d 638; PU Code Section 1411.) In this period of double digit inflation it is needless to say that, from the time that these petitions were filed with the Commission to the time that appropriate amendments can be filed, the properties involved will have experienced material changes in value. There is no reason why the utility owners should be penalized by the delay resulting from the filing of amendments.

Although the Commission may, upon petition filed within 30 days after the court awards judgment in favor of a complainant, increase or decrease the just compensation because of acts or occurrences subsequent to the date of the filing of the original

petition (PU Code Sections 1416 and 1417) until that point in the procedure has been reached the just compensation would be fixed as of the date on which the petition had been filed with this Commission.

Environmental Assessment

All of the petitions allege that the environmental assessments of the proposed acquisition of the water systems had resulted in the filing of negative declarations in compliance with the California Environmental Quality Act and that copies of the negative declarations were attached to each petition.

On March 19, 1981, the Superior Court in and for the County of Fresno issued a peremptory writ of mandate commanding the Planning Commission of the City of Fresno to reject the negative declarations. The Court concluded that:

"In order to properly assess **its possible** effects upon the environment, the project proposed by the City, viz., municipal acquisition of six privately owned public utility water companies, should not be implemented prior to adoption by the City of an Environmental Impact Report on the project; only the process of formulating and adopting such a report will enable the general public to provide public input into the project."

It is reasonable to conclude that the environmental assessments to be made in compliance with the Court's order will further delay these proceedings. Again, because of the effect that the filing date has upon the finding of value, we believe that it would be extremely unfair to the utility owners to allow the defects of premature filings to be cured by subsequent amendments while at the same time freezing the evaluation date to the date that the original petitions were filed with the Commission.

Necessary and
Indispensable Parties

Calumet Water Company and Kavanaugh Vista Water Company are unincorporated water utilities that are owned by Francis H. Ferraro. Northeast Gardens Water Company is a fictitious name for PPD Corporation, all the stock of which is owned by Ferraro. Ferraro also does business as Easton Estates, a water utility; Madera Ranchos Water Company, a water utility; and Water Utility Supply Company, a company that furnishes services that are common to the water operations conducted by Ferraro in Fresno and Madera Counties. Palmer, attorney for Ferraro, argues that these three enterprises are necessary and indispensable parties in A.59776, 59777, and 59779, because the taking of these systems would "gut" the remaining water operations of Ferraro. ✓

In a similar vein, the City of Fresno objected to the motion filed by the customers of Bakman Water Company for lack of standing.

A proceeding in eminent domain, including Commission action to fix just compensation, is an action in rem in which everyone who can possibly be affected by the decision has a right to appear and assert his rights. (Natomas Water Co. 69 CPUC 749.) In the event new petitions are filed, there is nothing to prevent these companies or customers from appearing and participating in future proceedings to the extent that their interests may be established.

Awaiting Federal Action

Included in the motion filed by Fleckles was a request that the Commission defer action on the petitions until disposition of a proceeding filed by Washington Water and Light Company in the Federal Court in San Francisco, wherein the constitutionality of the PU Code sections relating to just compensation is questioned. There is neither authority nor reason at this time to pass on this request.

Findings of Fact

1. The instant petitions fail to qualify as petitions of either the first or second class as set forth in PU Code Section 1403.

2. Because property value in just compensation proceedings is determined as of the date the original petition is filed, it would be more equitable for the owners of these small water companies if the instant petitions were dismissed and new petitions were filed with filing dates that would ^{reflect} ~~reflect~~ ^{current} ~~current~~ ^{value} ~~value~~ ^{for valuation purposes.} ~~value~~ RW

3. In the event that new petitions are filed, all parties may appear and participate in the resulting proceedings to the extent that their interests may be established.

Conclusion of Law

The applications should be dismissed without prejudice.

IT IS ORDERED that A.59775, 59776, 59777, 59778, and 59779 are dismissed without prejudice.

This order becomes effective 30 days from today.

Dated JUL 22 1981, at San Francisco, California.

John E. Bryson
President

Michael J. [unclear]

[unclear]

Victor [unclear]

Prasada C. Grew
Commissioners