What Price a Franchise?

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A Los Angeles County Superior Court trial judge has ruled in two cases that an oil pipeline company may exercise the power of eminent domain to acquire subsurface rights in public streets, without entering into a franchise agreement with the municipalities that controlled the streets.

The California public utility pipeline corporation, represented by the Los Angeles law firm of Sullivan, Workman & Dee, had operated pipelines passing through two South Bay cities for many years. The franchise agreements with these two cities expired periodically. Anticipating expiration, the company attempted to negotiate renewals of the franchises in advance. However, the cities refused to renew unless the company agreed to pay a franchise fee in excess of the fee authorized under California's Franchise Laws.

After lengthy negotiations, the company opted to condemn non-exclusive subsurface easements under the streets of the two cities for its existing pipeline. The cities argued that the company's exclusive remedy was to obtain a franchise under California's Franchise Laws, either through negotiations with the cities or through court order if the cities improperly refused to negotiate.

The company contended that, as a public utility, it had the power of eminent domain and could condemn rights of way under public streets for its pipelines without entering into a franchise agreement with the cities and without paying periodic franchise fees. In this case, the franchise fee for only one year exceeded the estimated fair market value of the perpetual subsurface easement sought by the company.

After a lengthy legal issues trial, the judge ruled in favor of the company.

The company contended that, as stated by the California Supreme Court in *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 65, California's Eminent Domain Law is a "comprehensive" statutory scheme intended to cover "all aspects of condemnation law and procedure." It argued that the power of eminent domain includes the right to condemn public property for a particular use if that use will not unreasonably interfere with the existing public use. This right is given to "any person" authorized to acquire property through eminent domain. It is not limited to public entities. Code of Civil Procedure § 1240.510. This right includes the right to condemn subsurface rights for "public utility facilities and franchises." Code of Civil Procedure § 1240.110(a).

In 1975, the California Legislature passed Public Utilities Code § 615 expressly granting the power of eminent domain to various public utilities (including pipeline corporations). The Law Review Commission Comment to § 615 confirms that the section "authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation." No exception is made for public streets or other public property.

California's Eminent Domain Law also recognizes that property may be acquired without condemnation and leaves the decision on whether to condemn to the condemnor. Code of Civil Procedure § 1230.030. Therefore,

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the Eminent Domain Law recognizes that, for example, a public utility could acquire an interest beneath streets in ways other than through condemnation. A public utility could acquire such an interest by way of franchise under the Franchise Laws. However, a public utility also could use its power of eminent domain to acquire such an interest. The method used is left to the discretion of the condemnor.

The company also contended that California's Eminent Domain Law governs all acquisitions by eminent domain except where a statute has specific provisions to the contrary. Since the Franchise Laws relied on by the cities contained no such specific provisions, the company concluded that the Eminent Domain Law governed, and that it had the right to condemn subsurface rights beneath the public streets of the two cities for its pipelines.

The company argued that it made "common sense" to permit the exercise of the power of eminent domain in this situation. Franchises can expire. Local governments can refuse to renew them. As in this case, local governments can attempt to condition renewal only upon payment of excessive fees. Streets can be abandoned by local governments, rendering the question of obtaining a franchise moot. Therefore, the Franchise Laws were totally inadequate to cover all possible situations and must be read together with the Eminent Domain Law.

Finally, the company contended that it merely sought to exercise the condemnation power to prevent abuse and exorbitant exactions sought to be imposed by the cities. The franchise fees sought by the cities exceeded the fair market value of the required easement. The cities were simply looking for additional sources of revenue during a time when they could not practically raise other taxes any further. The company argued that its right to condemn a right of way easement for its pipelines was not subject to the cities' need for additional sources of revenue.

The trial judge agreed with the company's position. The cases are now on appeal. They have potentially much broader ramifications because many utilities have rights of way that eventually cross public streets of one sort or another. The cost of condemnation may be much less than the cost of obtaining franchises from each city along the pipeline route.