

PROPOSED DECISION

Agenda ID #13547 (Rev. 1)
Adjudicatory
1/15/2015 Item 6

Decision PROPOSED DECISION OF ALJ MASON (Mailed 12/8/2014)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mark Fletcher,

Complainant,

vs.

Union Pacific Railroad Company,

Defendant.

Case 13-08-011
(Filed August 5, 2013)

Mark Fletcher, for self, for Mark Fletcher, complainant.
Melissa S. Greenidge and David M. Pickett, Attorneys at
Law, for Union Pacific Railroad Company, defendant.

DECISION GRANTING MOTION TO DISMISS

Summary

In today’s decision, we grant Defendant’s motion to dismiss the complaint on the ground that Complainant lacks standing to obtain the relief requested. We also recognize the California Public Utilities Commission’s (Commission) authority to ensure public crossings are safe, and thereby order the Commission’s Safety and Enforcement Division to meet with Defendant and Complainant to determine if the crossing that Complainant uses can be improved to facilitate better ease of access.

This proceeding is closed.

1. Background

1.1. The Complaint

On August 5, 2013, Mark Fletcher (Complainant) filed a complaint with the California Public Utilities Commission (Commission) against Union Pacific Railroad (UPRR). The complaint requested an order that the UPRR should: (1) provide an alternate access to Complainant's property from the public crossing at Phillips Road, later renamed Creekside Ranch Road in Templeton (Creekside crossing), north of Complainant's property; and (2) close the existing private crossing on 2nd Street (2nd Street crossing) in Templeton.

Complainant is in possession of real property along the railroad tracks of UPRR, without legal, direct access to the Creekside crossing via a frontage road, as several properties stand between Complainant's property and Creekside Ranch Road. Complainant and other property owners currently use a UPRR right-of-way, including a private crossing to access their property over 2nd Street. Complainant asserts that the crossing is unsafe and previously brought up the issue of the existing unsafe crossing to the County of San Luis Obispo, UPRR, and the Commission Railroad Crossing Engineering Section. Complainant contends that a Commission Utilities Engineer stated that the crossing is unsafe and that it should be closed, it cannot be altered or reconstructed in a way to make it safe, and using the crossing at Phillips Road is the best alternative. The e-mail between Complainant and the Commission Utilities Engineer only involves a discussion of Complainant's options, including asking neighbors to provide Complainant access from Creekside Ranch Road.

1.2. UPRR's Answer and Motion to Dismiss

UPRR, in its answer to the complaint, filed on September 18, 2013, raises 10 affirmative defenses, including failure to state facts sufficient to state a cause

of action. This affirmative defense was rooted in an argument that California Pub. Util. Code § 7537 only entitles Complainant access over land that he owns.

UPRR filed a motion to dismiss complaint on November 20, 2013. UPRR contends that the complaint must be dismissed because Complainant lacks standing under Pub. Util. Code §§ 7537 and 1202, and that the Commission lacks subject matter jurisdiction.

2. Standards for Ruling on Motion to Dismiss

While UPRR has set forth the reasons for its motion, it has not set forth the operative standards that the Commission employs to determine if a motion to dismiss should be granted. As such, and *sua sponte*, the Commission notes that over the years, it has developed two similar standards for ruling on a motion to dismiss, and we address and apply each standard in this decision.

2.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc. (Raw Bandwidth)*, the Commission stated that a Motion to Dismiss “requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice.”¹ A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any material fact, and that based on the undisputed facts, the moving party is entitled

¹ (2003) Decision (D.) 03-05-023 (*Scoping Memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters* at 3, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, Decision (D.) 94-04-082, 54 CPUC2d 244, 249).

to judgment as a matter of law.² While there is no express Commission rule for summary judgment motions, the Commission looks to § 437(c) for the standards on which to decide a motion for summary judgment.³ Section 437(c) provides:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

A further beneficial purpose of such a motion is “that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.”⁴ As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication.⁵

² California Code of Civil Procedure, § 437(c); Weil & Brown, *Civil Procedure Before Trial*, 10:26-27.

³ See *Westcom*, *supra*, 54 CPUC2d, 249-250.

⁴ *Id.*

⁵ See D.07-07-040 [granting Chevron judgment against Equilon “as a matter of law”]; D.07-01-004 [granting Cox Telecom judgment against Global NAPs of California]; and D.02-04-051 [granting summary adjudication of a claim by County Sanitation District against SCE]).

2.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint's Well-Pleaded Allegations are Accepted as True?

In *Re Western Gas Resources-California, Inc.*, D.99-11-023, we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth*:

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.⁶

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, D.12-03-037, wherein the Commission added:

By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that complainant will be able to prove everything alleged in its complaint.

In determining if the complainant's allegations are "well pleaded," we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule:

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any

⁶ See e.g., *MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal. PUC 166.

public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

As demonstrated by past precedent, the Commission will dismiss a complaint that fails to meet this two-pronged standard.⁷

3. Discussion

3.1. Complainant Lacks Standing Under Pub. Util. Code § 7537 to Require UPRR to Grant Him Access to Creekside Ranch Road because Complainant does not Own the Property Adjacent to the Creekside Public Crossing.

Pub. Util. Code § 7537 states:

The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right of way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner.

Pub. Util. Code § 7537 applies to persons who own “lands along or through which any railroad is constructed or maintained.” The purpose of Pub. Util. Code § 7537 is to provide such owners with “ingress and egress from such lands, or in order to connect such lands with other adjacent lands of the owner.” Ownership of “such lands” is essential to standing.

In *Buehler v. BNSF* (Burlington Northern & Santa Fe Railway Company) (D.02-07-050), the complainants brought an action with the Commission under

⁷ See *Monkarsh v. Southern California Gas Company*, (2009) D.09-11-017; *Pacific Continental Textiles, Inc. v. Southern California Edison Company*, (2006) D.06-06-011; *Watkins v. MCI_Metro Access Transmission Services*, (2005) D.05-03-007; *Rodriquez v. Pacific Gas and Electric Company*, (2004) D.04-03-010; *AC Farms Sheerwood v. So. Cal Edison*, (2002) D.02-11-003; and *Crain v. Southern California Gas Company*, (2000) D.00-07-045.

Pub. Util. Code § 7537 when BNSF closed a private crossing. The land on both sides of the track at the crossing was privately owned, but not by complainants. BNSF moved to dismiss the complaint arguing the complainants lacked standing because they did not own the property that was adjacent to the crossing.⁸

The Commission agreed with BNSF that the complainants lacked standing because they did not own the property adjacent to the crossing. The Commission held:

[C]omplainants are not owners of lands adjacent to that crossing. Private property does adjoin the BNSF right-of-way, but complainants do not own that property. Thus, complainants lack standing under Section 7537 to request that the Commission formally adjudicate the crossing as private for purposes of their “ingress to or egress from” lands through which the “railroad is constructed or maintained.”⁹

The instant case is analogous *Buehler*. Complainant requests the Commission order access to his land via the Creekside crossing. However, he lacks standing under Pub. Util. Code § 7537 because he does not have property adjacent to the crossing. Separately, Complainant does not have standing because Creekside crossing does not currently provide ingress or egress for Complainant.

While we find *Buehler* to be controlling, we must address the distinction that in *Buehler*, the Commission found the crossing to be “private,” while here the moving party and Complainant both concede that Creekside crossing is “public.”¹⁰ Pub. Util. Code § 7537 specifically applies to property owners’ rights

⁸ D.02-07-050 at Parties’ Contentions Section.

⁹ D.02-07-050 at Discussion Section 2.a.

¹⁰ UPRR Motion to Dismiss at Summary Section.

to a *private* railroad crossing if they have no other means of access to land. In this case, Complainant would not have standing under the statute because the Creekside crossing is public and not private.

Furthermore, if the crossing were private, Complainant would still not have standing under Pub. Util. Code § 7537 because his property is neither adjacent to the crossing, nor does the Creekside crossing provide “ingress to or egress from” his property. Complainant’s property is several properties over from the crossing, so it would not be considered adjacent to the crossing. Further, the Creekside crossing, in its current state would not provide “ingress to or egress from” Complainant’s property because Complainant would have to traverse privately owned property over which he does not currently have easements nor any other right to pass. Therefore, Complainant lacks standing even if the Creekside crossing was private.

Because Complainant lacks standing under Pub. Util. Code § 7537, there logically can be no triable issue of material fact. Therefore, under the first “motion for summary judgment” standard for motions to dismiss, the complaint praying for Creekside Ranch Road access must be dismissed for failing to put forth a triable issue of material fact.

The complaint for Creekside Ranch Road access must also be dismissed under the second “well-pleaded allegation” standard for motions to dismiss. Complainant does not declare whether Creekside crossing is public or private, but even if he did, it would not change the outcome for the reasons set forth above. Further, Complainant’s complaint indicates both that his property is not adjacent to the Creekside crossing, and that private property exists between the Creekside crossing and his property. Assuming all the facts of the complaint to be true, Complainant would not be entitled to prevail on the complaint as a

matter of law because he lacks standing. Therefore, under the second “well-pleaded allegation” standard for motions to dismiss, the complaint praying for Creekside Ranch Road access must be dismissed for failing to prevail as a matter of law even where the offered evidence is presumed to be true.

3.2. Complainant May Not Rely on Pub. Util. Code § 1202 to Gain Access to the Creekside Ranch Road Public Road because Rule 3.7 of the Commission Rules of Practice and Procedure (Rules) Requires that a § 1202 Request Must be Made by a Municipal, Count, State, or other Governmental Authority, rather than by a Private Citizen.

While the Commission has power to provide access from rail crossings, that power is tempered by Commission rules which require that applications for such access must be made by a governmental authority. Specifically, Pub. Util. Code § 1202(a) provides that:

The Commission has the exclusive power:

(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street.

In order to apply this “exclusive power” for construction, Rule 3.7 provides that “Applications to construct a public road, highway, or street across a railroad *must* be made by the municipal, county, state, or other governmental authority which proposes the construction.” Rule 3.8, states that “An application to alter or relocate an existing railroad crossing shall comply with Rule 3.7....” Read together, Rule 3.7 applies to both new crossings and to crossing alterations.

Here, Complainant cannot rely on Pub. Util. Code § 1202 to invoke Commission authority over the Creekside crossing for two reasons. First, Complainant is a private individual and not a “governmental authority” as required by Rule 3.7. Second, even if the Complainant could invoke the Commission’s authority, the Commission does not have the authority to require access over several property owner’s lands as would be necessary for Complainant to use the Creekside crossing.¹¹

3.3. UPRR’s Claim that the Commission does not have Jurisdiction is only Partially Correct and Partially Incorrect.

3.3.1. The Commission does not have Authority to Require Access over Property not Owned by the Complainant.

The Commission does not have authority to require access over private property. The California Constitution “confers broad authority on the [Commission] to regulate utilities.”¹² Included in this purview is the Commission’s “exclusive railroad crossing jurisdiction.”¹³ The power to adjudicate property rights rests with the superior courts, not with the Commission.¹⁴

Here, Complainant expressly requests a Commission order granting him access “paralleling the railroad tracks” so that he may connect to his private

¹¹ See discussion *infra*.

¹² *Hartwell Corp. v. Superior Court*, 27 Cal.4th 256, 265 (2002); Cal. Const., art. 12, §§ 1-6.

¹³ See *Santa Clara Valley Transp. Auth. v. Pub. Util. Comm’n of the State of Ca.*, 124 Cal.App.4th 346, 357 (2004); Cal. Pub. Util. Code § 1202.

¹⁴ See *Breidert v. So. Pac. Co.*, 61 Cal.2d 659, 662 (1964) citing *S.H. Chase Lumber Co. v. R.R. Comm’n*, 212 Cal. 691, 706 (1931).

property.¹⁵ Complainant acknowledges that a public crossing already exists at Creekside Ranch Road.¹⁶ As a member of the public, Complainant does not require an order from the Commission allowing him to use a public roadway or a public crossing. Rather, Complainant seeks a roadway license or easement over private property. As this involves property rights, the Commission lacks authority to grant such relief and the complaint should be dismissed.

Further, the Commission lacks authority over non-utilities. The Commission has jurisdiction over “[p]rivate corporations and persons that own, operate, control, or manage a line...for the transportation of people or property...and common carriers....”¹⁷ On the face of the complaint, there is no reasonable basis to conclude that the property over which Complainant seeks parallel access is owned by persons subject to the Commission’s jurisdiction.

Finally, the Commission, as an administrative body does not have authority over non-parties in a dispute.¹⁸ Complainant seeks an order from the Commission granting him access across privately owned land, but he has not named these property owners as defendants or served them with his complaint.

Because the Commission lacks authority, there are no triable issues of material fact before the Commission. Therefore, under the first “motion for summary judgment” standard for motions to dismiss, the complaint praying for Creekside Ranch Road access must be dismissed for failing to put forth a triable issue of material fact.

¹⁵ Complaint at G.4.

¹⁶ *Id.*

¹⁷ Cal. Const., art. 12, § 3.

¹⁸ *Ziller Electronics Lab v. Superior Court*, 206 Cal.App.3d 1222, 1228 (1988); *Dill v. Berquist Construction Co.*, 24 Cal.App.4th 1426, 1439 (1994).

The complaint for Creekside Ranch Road access must also be dismissed under the second “well-pleaded allegation” standard for motions to dismiss. Even assuming all of Complainant’s evidence to be true, the Commission could not rule on the matter because it lacks authority. Therefore, under the second “well-pleaded allegation” standard for motions to dismiss, the complaint praying for Creekside Ranch Road access must be dismissed for failing to prevail as a matter of law even where the offered evidence is presumed to be true.

3.3.2. The Commission does have Jurisdiction to Ensure that Crossings are Safe.

The Commission has jurisdiction to ensure that public and private crossings are safe, and is not preempted by federal law as to its rail crossing authority. While the Commission may not have authority over a non-party’s property in this dispute, the Commission does have jurisdiction to ensure that crossings are safe. Pub. Util. Code § 1202 provides the Commission with exclusive power “To determine and prescribe the manner...of installation, operation, maintenance, use, and protection of each crossing...” This authority extends to all public crossings. Further, Pub. Util. Code § 7537 requires railroad companies to ensure crossing safety, but also grants the authority for the Commission to intervene regarding the place, manner and condition of private crossings and how they are “constructed and maintained.” The language from Pub. Util. Code § 7537 indicates that the Commission can ensure safety through maintenance when railroad companies have failed to have done so.

The Commission retains this authority despite parallel federal rules. UPRR indicates that the Interstate Commerce Commission Termination Act preempts Commission authority and vests sole authority in the Surface Transportation Board over rail property and services. Article III, § 3.5 of the California

Constitution prevents an administrative agency from refusing to implement a statute on federal preemption grounds, unless an appellate court has first determined that such implementation is prohibited by federal law or regulations.¹⁹ No appellate determination has found that Commission resolution of rail crossing disputes (per Pub. Util. Code § 7537) is prohibited by federal law. Therefore, the Commission is not preempted by federal law from ensuring that crossings are safe.

4. The Commission Orders Safety and Enforcement Division's Crossing Engineering Section to Meet with UPRR and Complainant to Determine if the Crossing Complainant Uses can be Improved.

As stated above, the Commission has jurisdiction to ensure that crossings are safe. In light of this authority, this decision orders the Commission's Safety and Enforcement Division to meet with UPRR and Complainant to determine if the 2nd Street crossing can be improved. Complainant contends that a Commission crossing engineer stated that the 2nd Street was unsafe and should be closed. A closer look at the e-mail communication reveals that the engineer never made such statements, but rather laid out options for Complainant, including reaching out to neighbors to connect the frontage road. The Commission directs Safety and Enforcement Division to meet with UPRR and Complainant within 60 days from the effective date of this decision to consider possible improvements to the 2nd Street crossing.

¹⁹ See e.g., *Burlington Northern and Santa Fe Railway Company et al. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887-888.

5. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3. Complainant filed comments on December 18, 2014. UPRR filed reply comments and a motion to strike complainant's comments on December 23, 2014. Nothing in Complainant's comments causes us to alter the substance of our decision.

6. Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Robert Mason is the assigned ALJ in this proceeding.

Findings of Fact

1. On August 5, 2013, Mark Fletcher filed a complaint with the Commission against UPRR.
2. The complaint requested an order that the UPRR should: (1) provide an alternate access to Complainant's property from the public crossing at Phillips Road., later renamed Creekside Ranch Road (Creekside crossing), in Templeton, north of Complainant's property, and (2) close the existing private crossing on 2nd Street in Templeton.
3. Complainant is in possession of real property along the railroad tracks of UPRR, without legal, direct access to the Creekside crossing via a frontage road, as several properties stand between Complainant's property and Creekside Ranch Road.
4. Complainant and other property owners currently use a UPRR right-of-way, including a private crossing to access their property over the 2nd Street Crossing.

5. Complainant found the crossing to be unsafe and previously brought up the safety issue of the existing crossing to the County of San Luis Obispo, UPRR, and the Commission's Railroad Crossing Engineering Section.

Conclusions of Law

1. Complainant does not have standing under the Pub. Util. Code § 7537, because the Creekside crossing is public and not private.

2. Even if the Creekside crossing were private, Complainant would still not have standing under Pub. Util. Code § 7537 because his property is neither adjacent to the crossing, nor does the Creekside crossing provide "ingress to or egress from" his property.

3. It is reasonable to grant a motion to dismiss because Complainant lacks standing under Pub. Util. Code § 7537, and there are no triable issues of material fact.

4. It is reasonable to grant a motion to dismiss because assuming all the facts of the complaint to be true, Complainant would not be entitled to prevail on the complaint as a matter of law because he lacks standing.

5. Complainant cannot rely on Pub. Util. Code § 1202 to invoke Commission authority over the Creekside crossing because Complainant is a private individual and not a governmental authority. Even if the Complainant could invoke the Commission's authority, the Commission does not have jurisdiction to require access over other property owners' lands that would be necessary for Complainant to use the Creekside crossing.

6. The Commission lacks authority to require access for Complainant because this would require adjudicating issues concerning non-party, non-utility private property.

7. It is reasonable to dismiss the complaint because, even assuming all Complainant's evidence to be true, the Commission lacks jurisdiction to rule on the matter.

8. The Commission has authority to ensure that the crossing at 2nd Street is safe, pursuant to Pub. Util. Code § 7537, and this authority is not preempted under federal statute because no appellate courts have ruled as such.

O R D E R

IT IS ORDERED that:

1. Union Pacific Railroad Company's motion to dismiss is granted to the extent set out in these ordering paragraphs and is otherwise denied.

2. The California Public Utility Commission's Safety and Enforcement Division's Crossing Engineering Section shall meet with Union Pacific Railroad Company and Mark Fletcher within 90 days of the effective date of this decision to determine if the railroad crossing at 2nd Street crossing can be improved.

3. Case 13-08-011 is closed.

This order is effective today.

Dated _____, at San Francisco, California.