

Decision 00-11-038 November 21, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Cox California Telcom, L.L.C. dba Cox  
Communications (U-5684-C),

Complainant,

vs.

Crow Winthrop Development Limited  
Partnership,

Defendant.

(EDM)  
Case 00-05-022  
(Filed May 10, 2000)

**OPINION DISMISSING COMPLAINT**

## TABLE OF CONTENTS

Title	Page
OPINION DISMISSING COMPLAINT .....	1
I. Summary .....	2
II. Background .....	2
A. Public Utilities Code § 625 .....	2
B. Procedural Background .....	4
C. Other Administrative and Court Actions .....	7
1. Jamboree Superior Court Action .....	7
a. Relationship Between Crow Development and Jamboree .....	7
b. Allegations in Jamboree Superior Court Action .....	8
2. Cox Superior Court Action .....	9
3. C.00-05-023 (Related Commission Complaint) .....	10
III. Discussion .....	12
A. Overview .....	12
B. Necessity is a vital determination in a § 625 action .....	13
C. Whether or not Cox has existing access rights to the easements in question is critical to determining necessity .....	14
D. Cox's entitlement to access the easements is currently being litigated in the Superior Court .....	14
E. Logic and efficiency support a dismissal of this case without prejudice ...	16
F. Dismissal of this case without prejudice is consistent with a proper understanding of the primary jurisdiction doctrine .....	19
IV. Comments on Draft Decision .....	21
Findings of Fact .....	22
Conclusions of Law .....	24
ORDER .....	24

## **O P I N I O N**

### **I. Summary**

Cox California Telcom, L.L.C. dba Cox Communications (Cox) brings this complaint against Crow Winthrop Development Limited Partnership (Crow Development) pursuant to Pub. Util. Code § 625. Cox requests the Commission find in the public interest the proposed condemnation of certain easements Cox believes are necessary for it to provide competitive telephone utility service. We determine that the complaint is premature and should be dismissed without prejudice.

### **II. Background**

#### **A. Public Utilities Code § 625<sup>1</sup>**

Because § 625 has been recently enacted, this is the first case brought before the Commission where a public utility invokes this statute in order to condemn utility easements to offer a competitive service. Pub. Util. Code § 625(a)(1)(A) provides, in relevant part, that “a public utility that offers competitive services may not condemn any property for the purpose of competing with another entity in the offering of those competitive services, unless the commission finds that such an action would serve the public interest, pursuant to a petition or complaint filed by the public utility...” Where such a complaint is filed, the Commission will conduct an adjudication hearing in accordance with § 1701 et seq., “including an opportunity for the public to

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<sup>1</sup> Unless otherwise stated, all statutory references are to the Pub. Util. Code. SB 177 (Peace) enacted the relevant portions of Pub. Util. Code § 625 which we discuss. On October 7, 1999, the Governor signed SB 177 (Ch. 99-774) into law. It became effective on January 1, 2000.

participate.” Section 625(e) further states that a public utility that does not comply with this section may not exercise the power of eminent domain (i.e., it may not condemn property).

According to § 625 (b)(2)<sup>2</sup>, the Commission may make a finding that the proposed condemnation is in the public interest if the public utility is able to show all of the following with regard to the proposed condemnation:

1. the public interest and necessity require the proposed project;
2. the property to be condemned is necessary for the proposed project;
3. the public benefit of acquiring the property by eminent domain outweighs the hardship to the owners of the property;
4. the proposed project is located in a manner most compatible with the greatest public good and least private injury.

In Decision (D.) 00-05-048, a decision conditionally granting Lodi Gas Storage authority to build and operate a gas storage facility, we stated that the Commission has discretion over whether or not to permit a complainant to exercise the power of eminent domain, even if complainant makes the requisite showing under § 625.

“Also, we note that the language of § 625 gives the Commission the discretion to permit a complainant to exercise the power of eminent domain if it meets its burden of proof as to certain issues. Section 625 (b) states that the “commission may make a finding pursuant to subdivision (a) if, in the determination of the commission, either of the following conditions are met...” (Emphasis added.) We interpret § 625 to mean what it says, namely, that the Commission has the discretion whether or not to permit a complainant to exercise the power of eminent

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<sup>2</sup> Section 625 also addresses proposed condemnations necessary to provide service as a provider of last resort to an unserved area. This case does not concern such a provider.

domain. Furthermore, the Commission is not required to authorize the use of eminent domain where the complainant makes one of the alternate showings.” (D.00-05-048 at p. 62.)

Section 625 (a)(2)(A) provides that the Commission shall conduct the hearing in the local jurisdiction that would be affected by the proposed condemnation. The statute requires that the hearing commence within 45 days after the complaint is filed, unless the respondent establishes that an extension of not more than 30 days is necessary for discovery or other hearing preparation.

### **B. Procedural Background**

On May 19, 2000, Cox filed the above-captioned complaint. An exact description of the property interest Cox seeks to acquire was not clearly set forth in the complaint. However, at various places in the complaint, Cox referred to the property interest as “easements,” “easements across a parcel that includes buildings located at 3333-3355 Michelson Drive, Irvine, County of Orange, California,” and “easements within existing utility easements across the property owned by defendant.” (See Form Complaint, pp. 4 and 5;<sup>3</sup> see also the discussion below, where Cox’s description of what it seeks to condemn is discussed in more detail.)

On May 25, 2000, Assigned Commissioner Duque and Chief Administrative Law Judge (ALJ) Carew issued a ruling on, among other things,

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<sup>3</sup> Cox’s complaint consisted of the Commission’s Form Complaint entitled “Complaint for Authorization to Condemn Property for the Purpose of Offering Competitive Utility Services (SB 177)”, to which it also attached its own verified supplemental complaint.

the issues to be considered,<sup>4</sup> and the designation of ALJ Econome as the presiding officer.

On June 6, the ALJ issued a ruling directing complainant, and permitting others, to address additional issues in the written testimony to be served prior to the hearing. The issues are as follows:

1. Describe the location of the easements sought to be condemned, including a map (plat) showing both the easements sought to be condemned, the dimensions of the easements (i.e., length, depth, etc.), and other existing easements, buildings on the land, etc.
2. Provide a legal description of the property sought to be condemned (a metes and bounds description).
3. Set forth the total capacity of the existing easement, the capacity currently being used, and the capacity sought to be condemned.
4. Identify all persons who own or have legal access to the property sought to be condemned. Include title report or other means by which the Commission can determine persons affected by proposed condemnation.

On June 19, defendant Crow Development requested an extension of time for the hearing and submission of written testimony. A June 21 ALJ ruling stated that the prehearing conference would be held on July 3 as previously scheduled, and the hearing would also commence to, among other things, take public comment and hear oral argument on some outstanding motions. The ruling further stated that at the hearing, or thereafter, the Commission could

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<sup>4</sup> The May 25 ruling referred to the four criteria set forth in § 625 (b)(2), and also invited testimony on the current legal status of complainant's property interest or entitlement to access in the property sought to be condemned.

determine the dates for continued evidentiary hearings, if appropriate, as well as appropriate dates for serving written direct and reply testimony.<sup>5</sup>

On June 20, 2000, Crow Development filed a motion to stay this proceeding, which motion Cox opposes.

On July 3, 2000, within 45 days after the complaint was filed, the ALJ commenced a hearing pursuant to Pub. Util. Code § 625 (a)(2)(A). At that hearing, the ALJ addressed procedural matters and heard public comment from one individual, Henry Oh, who represents Jamboree L.L.C. (Jamboree), the owner of the office located on the facility parcel which is described more fully below. Oh expressed his client's support for Cox's complaint because Jamboree is involved in a longstanding legal dispute with Crow Development involving, among other things, Jamboree's tenants' access to competitive telecommunications services.

Counsel for Cox also stated that the State of California Department of Transportation (Caltrans) had authorized her to make a brief public comment on its behalf, and requested that the Commission take official notice of Caltrans' concerns as set forth in the Hecker declaration filed with this Commission in a related case, Case (C.) 00-05-023.<sup>6</sup> At the hearing, the ALJ outlined additional questions to be briefed in light of the fact that both parties are simultaneously litigating multiple complex issues in multiple fora regarding the same

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<sup>5</sup> The parties were also involved in discovery disputes. Cox filed a motion to compel discovery so that it can access Crow Development's property in order to conduct a survey, etc., of the easements sought to be condemned to prepare testimony in response to the ALJ's prior ruling.

<sup>6</sup> The ALJ clarified that Caltrans' request was for the Commission to consider the Hecker declaration as unsworn public comment rather than sworn testimony.

underlying dispute. The ALJ voiced concern that the potential for inconsistent results existed if these cases were litigated concurrently. At the end of the first day of hearing on July 3, the ALJ stated that the hearing may be continued to a time and date further ordered by the Commission. Because this decision finds that further hearings are not necessary, the July 3 hearing concludes the hearing record.

The parties served opening comments on the supplemental briefing requested by the ALJ on July 17, and reply comments by August 1, 2000.<sup>7</sup> This draft decision is timely issued in this case pursuant to § 625 (a)(3)(A) which requires a decision within 45 days of the conclusion of the hearing, unless further briefing is ordered, in which event this period may be extended for an additional 30 days. Because the briefing took an additional 29 days, the last day for the ALJ to issue the draft decision is September 15, 2000.

## **C. Other Administrative and Court Actions**

### **1. Jamboree Superior Court Action**

#### **a. Relationship Between Crow Development and Jamboree**

In March 1999, Jamboree commenced a state court action against, *inter alia*, Crow Development.<sup>8</sup> According to a First Amended Complaint filed in that action on January 18, 2000,<sup>9</sup> in 1985, two partnerships, Crow Winthrop

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<sup>7</sup> Reply comments were initially due on July 28, and Cox filed timely reply comments. The parties stipulated and the ALJ agreed that Crow Development could tender its reply comments on August 1.

<sup>8</sup> This case is consolidated with multiple other proceedings.

<sup>9</sup> Crow Development requests the Commission take official notice of the First Amended Complaint, which request is granted insofar as we take notice that such a complaint is

*Footnote continued on next page*



Operating Partnership (Winthrop Operating) and Crow Development, each acquired separate portions of land and office space located at Park Place.

Winthrop Operating acquired Park Place's then-existing office buildings, called Fluor World Corporation Headquarters Facility, and underlying land (the facility parcel.) Crow Development owned and still owns a majority of the 90 acres of land which surrounds the facility parcel (development parcel).

Also in 1985, Crow Development and Winthrop Operating entered into an agreement entitled "Construction, Operation and Reciprocal Easement Agreement" dated July 26, 1985 (Reciprocal Easement Agreement).

In April 1996, Winthrop Operating defaulted on its loan. As a result of Winthrop Operating's plan of reorganization confirmed by a bankruptcy court, a newly created company, Jamboree, became the new owner of the facility parcel.

**b. Allegations in Jamboree Superior Court Action**

Jamboree's First Amended Complaint alleges seven causes of action against Crow Development.<sup>10</sup> Among other things, Jamboree complains of Crow Development's interference with Jamboree's utility easements. Jamboree alleges, in relevant part, that Crow Development is interfering with

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filed and that the complaint contains certain allegations. We do not take as established facts the allegations set forth in the complaint.

<sup>10</sup> Jamboree's First Amended Complaint alleges the following seven causes of action: breach of contract (Reciprocal Easement and Management Agreements); specific performance of the Reciprocal Easement Agreement; breach of contract of a settlement agreement; declaratory relief; private nuisance; tortious interference with contract; and tortious interference with prospective business advantage. Cox is not a party to this action.

Jamboree's ability to access its easements as provided in the Reciprocal Easement Agreement, and such interference prevents providers such as CoxCom, Inc. dba Cox Communications of Orange County (CoxCom) and Cox from providing cable and telephone service to the facility parcel. Jamboree seeks a declaration that it be allowed full and complete access to its utility easements, which in turn would give CoxCom and Cox certain access to the easements. Crow Development's motion for official notice attaches copies of the voluminous discovery (many deposition transcripts, etc.) that has occurred in this case.

## **2. Cox Superior Court Action**

On May 17, 2000, Cox and CoxCom filed a complaint against Crow Development in Orange County Superior Court for declaratory and injunctive relief. Cox and CoxCom seek a declaration, in relevant part, that (a) CoxCom has both express and implied, affirmative and proscriptive, easements (through the Reciprocal Easement Agreement and otherwise) across Crow Development's property to install and maintain its cable system, over which cable television, high-speed internet access and telephone services are provided to Park Place customers, and (b) Cox and CoxCom are entitled to the continued use of these easements without interference from Crow Development. Cox and CoxCom also seek to enjoin Crow Development from denying CoxCom access to its cable distribution system on Crow Development's property and from interfering with CoxCom's operation and maintenance of this cable system.

Crow Development has filed a cross-complaint against Cox and CoxCom in the Cox Superior Court Action for trespass, ejectment, injunctive relief, declaratory relief, and restitution for violations of California Business and Professions Code § 17200. The Cox Superior Court Action has been transferred to the same judge as the Jamboree Superior Court Action.

The Superior Court has ruled on Cox and CoxCom's motion for preliminary injunction, granting it only to the extent that CoxCom may continue to maintain and repair the cable facilities pending a decision on the merits of the case. The court declined to grant a broader preliminary injunction, in part, because plaintiffs failed to show that they will prevail on the merits as to any claimed easement rights by virtue of Jamboree's rights or public utility rights. The court also indicated it would consider granting a motion for a limited stay of the Cox Superior Court Action because of the pending action between Crow Development and Jamboree. The court has not rendered a final decision on the merits of the Cox Superior Court Case, nor has Cox or CoxCom dismissed this case or any of the asserted claims in light of the Superior Court's ruling on the preliminary injunction.

### **3. C.00-05-023 (Related Commission Complaint)**

On the same day that Cox filed the instant case, Cox, CoxCom, and Caltrans also filed a complaint against Crow Development and Pacific Bell (Pacific) at this Commission. The complaint, of which we take official notice, alleges that Crow Development has denied Cox and CoxCom access to the existing facilities and easements on Crow Development's property because Crow Development and Jamboree are engaged in a dispute over further construction and use of Park Place. Complainants also allege that Jamboree has requested that Crow Development grant Cox an easement (to the extent one does not already exist) to allow Cox to provide local exchange service to the tenants located on the facility parcel.

Cox, CoxCom, and Caltrans allege that Crow Development manages and controls telephone lines for compensation, and consequently that Crow Development is operating as a public utility without Commission authorization,

and is also discriminating against Cox because Crow Development is denying easement access to Cox, while permitting Pacific access to the utility easements to offer telephone service. Complainants also allege that Pacific has violated both D.98-10-058, the Commission's Rights-of-Way Decision, in that Pacific has an arrangement with Crow Development that has the effect of restricting Cox's access to the property, and § 626, because Pacific has an affirmative duty to prevent property owners from limiting other carriers' access to their properties.

Complainants have filed a motion for temporary restraining order and preliminary injunction together with C.00-05-023. They request the Commission to require Crow Development to cease (1) operating as a public utility without Commission authorization, and (2) denying Cox access to existing utility easements at Park Place. Complainants allege that they have suffered harm in that Crow Development is interfering both with Cox and CoxCom's ability to provide cable and telephone service, and with Caltrans fully deploying its transportation management system located on the facility parcel.

Crow Development and Pacific move to dismiss C.00-05-023. Crow Development principally argues that the Commission lacks jurisdiction over Crow Development because it is not a public utility. Pacific also believes it does not have an easement over Crow Development's property and is only present on the property by license. The disposition of these matters and the necessity for and schedule of further proceedings in C.00-05-023 will be addressed separately in that proceeding.

### **III. Discussion**

#### **A. Overview**

In order for the Commission to make a finding under § 625 that this condemnation is in the public interest, it must find, among other things, that the

property to be condemned is necessary for the proposed public utility project. If Cox owns or is otherwise entitled to access the easements in question, then it is not necessary for Cox to condemn them. Cox is currently litigating easement entitlement issues in the Superior Court. We therefore dismiss this action without prejudice to Cox refiling the complaint. The appropriateness of such refiling will depend on the outcome of the Superior Court litigation over Cox's entitlement to access the utility easement.

Logic and efficiency support this result, because it makes sense to permit the Superior Court, a court of general jurisdiction, to address the property issues which are currently before it, rather than having multiple fora adjudicate the same issues concurrently. Finally, the primary jurisdiction doctrine supports this result because the easement issues, which concern contract and real property law, do not require the Commission's specialized public utility expertise, such as ratemaking, but rather legal issues that courts routinely resolve. The result we adopt promotes uniformity of decisions and judicial economy, policies that underlie primary jurisdiction doctrine.

#### **B. Necessity is a vital determination in a § 625 action**

Before Cox can file a condemnation action in the Superior Court seeking to condemn property for a competitive purpose, it must obtain a finding from the Commission pursuant to § 625 that the condemnation is in the public interest. In order for the Commission to make such a finding, it must find, among other things, that the property to be condemned is necessary for the proposed project. (Section 625 (b)(2)(B).) To the extent the necessity determination depends on the Commission's regulatory expertise regarding technical and economic conditions in the telecommunications industry, the Commission is the right forum for this determination.

**C. Whether or not Cox has existing access rights to the easements in question is critical to determining necessity**

If Cox owns or is otherwise entitled to access the easements in question for purposes of providing utility service to the facility parcel, then it would not be necessary to condemn this property for the proposed project.

“[T]he power of eminent domain [the power to condemn] may only be exercised if the property interest to be acquired is ‘necessary’ for a public use. (Code Civ. Proc., § 1240.110, subd. (a).)” (*City of San Francisco v. Mayer* (4<sup>th</sup> Dist., Div. 2, 1998) 67 Cal.App.4<sup>th</sup> 1350, 1354-1355; 79 CR2d 704, 707.)

In other words, for reasons unrelated to considerations within the Commission’s regulatory expertise, the proposed condemnation may not be necessary.

**D. Cox’s entitlement to access the easements is currently being litigated in the Superior Court**

The question of Cox’s access rights is currently being litigated in other fora. In the Cox Superior Court Action, Cox and CoxCom seek a declaration that CoxCom has an easement across Crow Development’s property to install and maintain its cable system, over which cable television, high-speed internet access, and telephone services are provided to Park Place customers on the facility parcel. Cox and CoxCom also allege they are entitled to continued use of these easements without interference from Crow Development. In the Jamboree Superior Court Action, Jamboree contends that CoxCom and Cox are

entitled to access the utility easements by virtue of Jamboree's claimed easement rights.<sup>11</sup>

The Superior Court may determine whether Cox owns or is otherwise entitled to access the easements in dispute, and this finding may be determinative in this action on the issue of necessity. Therefore, this action is premature and should be dismissed without prejudice to Cox refiling this case after the Superior Court renders a final decision concerning Cox's entitlement to access the utility easements. In other words, the Superior Court first should resolve as a matter of law whether Cox owns or otherwise is entitled to utility easements over Crow Development's property.

We choose to dismiss, as opposed to stay this proceeding, because § 1701.2 (d) states that adjudication cases shall be resolved within 12 months of initiation unless the Commission makes findings why the deadline cannot be met and issues an order extending that deadline. Section 625 also has short deadlines within which to commence a hearing. It is more consistent with these statutes to dismiss the proceeding without prejudice, because it is unclear at this point how long the proceeding would have to be stayed, or whether the parties might resolve their differences while the other proceedings are being adjudicated. Finally, depending the outcome of the Superior Court litigation, Cox may get the access it desires without this Commission's further involvement.

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<sup>11</sup> In C.00-05-023, Cox and CoxCom also claim that they are entitled to access the existing utility easements to provide service to the facility parcel under various legal theories.



**E. Logic and efficiency support a dismissal of this case without prejudice**

As stated in *Camp Meeker Water System v. Public Utilities Com.* (1990) 51 Cal.3d 845, 861 (citations omitted, emphasis added), “[t]he commission expressly recognizes that its functions do not include determining the validity of contracts, whether claims may be asserted under a contract, or interests in or title to property, those being questions for the courts. It claims only the power to construe, for purposes of exercising its regulatory authority and ratemaking authority, the existing rights of a regulated utility.”

It would not promote judicial economy for the Commission to make complex title and access determinations as part of exercising its regulatory authority when the Superior Court is currently adjudicating these same underlying title and access issues. For example, it might not be necessary to litigate this case if the Superior Court ultimately rules in CoxCom or Cox’s favor on the easement entitlement issue. Moreover, if these two proceedings are litigated concurrently, the potential exists for the two fora to reach inconsistent results.

Cox makes five arguments in support of its position that the Commission should not dismiss this complaint. First, Cox argues that its legal claims in various fora are different and do not present the possibility of inconsistent results. Cox explains that it is pleading its claims against Crow Development in the alternative in an effort to ensure that its claims for relief against Crow Development are heard.

When a party pleads inconsistent theories it typically does so in the same case before the same forum. In such circumstances, the trier of fact has the discretion to conduct the case as procedurally appropriate, and, in the interest of judicial economy or to promote an orderly adjudication of the case, may or may

not hear all issues concurrently. For instance, at this Commission, we may conduct proceedings in phases, or hear consecutive rounds of testimony. However, in this case, the matters are filed in different fora. It is an inefficient use of the parties' time and resources for the Commission to make complex title and access determinations as part of exercising its regulatory authority under § 625, while the Superior Court is currently adjudicating the title and access issues, and where the potential for inconsistent results between the two fora exists. Our dismissal here does not prevent Cox from refiling this case once the Superior Court determines the relevant title and access issues, if in fact it is necessary for Cox to do so.

Second, Cox argues that this action should go forward now, because the legally separate entity CoxCom, not Cox, claims an easement right in the Cox Superior Court Action. However, this distinction is blurred in the multiple pending actions. Both Cox and CoxCom are parties in the Cox Superior Court Action. In the instant complaint at the Commission, Cox states it has an agreement with CoxCom whereby Cox leases capacity in and on CoxCom's facilities to provide local exchange telephone service. If the Superior Court finds that CoxCom has an easement on Crow Development's property, we find that, as a practical matter, Cox in turn will obtain access to the easements.

Third, Cox believes that the doctrine of collateral estoppel will promote judicial economy if this case goes forward now. Collateral estoppel may preclude litigation of an issue, conclusively determined, as against the parties in a subsequent lawsuit on a different cause of action. (*Vandenburg v. Superior Court* (1999) 21 Cal.4<sup>th</sup> 815.) We disagree with Cox, and believe that having multiple fora concurrently determining easement access issues could lead to inconsistent

results which would require even more time on the part of the Commission and the parties to address.

Fourth, Cox argues that the Commission will still have to decide whether Cox's condemnation of easements on Crow Development's property is necessary for public use regardless of the outcome of the Cox Superior Court Action, because the easements at issue in the condemnation action are more expansive than the easements at issue in either the Cox or Jamboree Superior Court Actions. We disagree.

Although Cox's complaint describes the easements it seeks to condemn somewhat differently in different paragraphs, the descriptions address the existing utility easements to serve the facility parcel, and not (as it claims for the first time at the hearing and in a supplemental pleading) broad easement rights which may be necessary to provide service to future tenants in establishments being developed on Crow Development's property.<sup>12</sup> Logic and efficiency support this Commission hearing the § 625 case, if necessary, after the Superior Court determines the precise scope of Cox's existing easement access rights.

Fifth and finally, Cox argues that this action should go forward now because the Superior Court was not persuaded by its claimed easement rights when it ruled on Cox and CoxCom's motion for preliminary injunction in the Cox Superior Court Action. However, the Superior Court has not yet rendered a final decision on the merits in that case. Moreover, Cox and CoxCom have not dismissed this case, or their easement claims, from the Cox Superior Court Action in light of the Superior Court's ruling on the preliminary injunction. For

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<sup>12</sup> Cox also used the narrow definition in its complaint when asserting that the proposed condemnation would have little or no environmental effect on the property.

the above reasons, we hold that it is appropriate to dismiss this case without prejudice.

**F. Dismissal of this case without prejudice is consistent with a proper understanding of the primary jurisdiction doctrine**

Cox believes that the doctrine of primary jurisdiction mandates a different result from that which we reach today. Cox claims that § 625 confers exclusive original jurisdiction over Cox's complaint seeking condemnation authority, and that as a result, this Commission has the primary jurisdiction to decide this complaint now and pursuant to § 625 must do so.

The doctrine of primary jurisdiction is a judicially created doctrine whereby the court stays a judicial proceeding pending prior resort to the administrative process. It is sometimes confused with the exhaustion of administrative remedies doctrine, which is a closely related concept.

“Both [the primary jurisdiction and exhaustion of administrative remedies doctrines] are essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: Each determines whether an action may be brought in court or whether an agency proceeding, or further agency proceeding, is necessary.”

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“ ‘Primary jurisdiction’ ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4<sup>th</sup> 377, 390, emphasis omitted.)

Courts generally invoke the doctrine of primary jurisdiction so that an administrative agency can deal with a specialized matter or provide its expert

and specialized knowledge on an issue. (*Farmers Ins. Exchange*, 2 Cal.4<sup>th</sup> at 388.) “[T]he threshold question...is whether the Legislature established a scheme that precludes a court from exercising discretion. ...” (*Id.* at 394.)

In *Farmers Ins. Exchange*, the court stayed judicial proceedings until the Insurance Commission could resolve whether Farmers violated sections of the Insurance Code relating to the Good Driver Discount Policy, where the statutes and administrative regulations set forth a “pervasive and self-contained system of administrative procedure” to deal with the questions presented. (*Farmers Ins. Exchange*, 2 Cal.4<sup>th</sup> at 396.) Courts have invoked the primary jurisdiction doctrine to resolve questions involving specialized agency expertise such as ratemaking, but decline to invoke this doctrine to resolve common law issues such as alleged employment discrimination, even when related statutory violations are first cognizable by the administrative agency. (*Farmers Ins. Exchange*, 2 Cal.4<sup>th</sup> at 395-396, citing cases.)

Dismissal without prejudice of this condemnation action is consistent with the primary jurisdiction doctrine. The Superior Court is currently addressing issues concerning CoxCom and Cox’s entitlement to access the easements in question. These are not issues involving the Commission’s specialized expertise, but rather contract and real property issues that courts routinely resolve. A ruling in Cox’s favor on the easement question may moot this condemnation action, and certainly has bearing on the issue of necessity to condemn the easements which is before the Commission in the instant case. Nothing in the primary jurisdiction doctrine precludes us from determining that the instant action is premature, and from hearing Cox’s § 625 complaint (if necessary) after the Superior Court has resolved the easement entitlement issues.

In fact, the result we adopt promotes uniformity of decisions and judicial economy, policies that underlie the primary jurisdiction doctrine.

#### **IV. Comments on Draft Decision**

The draft decision of ALJ Econome in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and in Rule 77.7(b).

Both Cox and Crow Development filed comments to the draft decision. We affirm the draft decision but make several changes. We delete section IV and expand Section V to address the parties' comments, changes to the draft decision, and Cox' motion discussed below. In addition, we make changes to improve the discussion and correct typographical errors.

Cox filed 54 pages of comments to the draft decision, which are 39 more pages than permitted by Rules 77.7(b) and 77.3. Cox accompanied its comments with a motion seeking permission to exceed Rule 77.3's page limitation, primarily because this is the first case before the Commission to interpret § 625, thus presenting many procedural and substantive issues of first impression for Commission resolution. Crow Development opposed this motion, primarily arguing that Cox's comments are outside of the scope permitted by Rule 77.3.

Rule 77.3 provides that comments shall focus on factual, legal or technical errors in the draft decision and in citing such errors shall make specific references to the record. Comments which merely reargue positions taken in briefs will be accorded no weight and are not to be filed.

Cox has not stated good cause to exceed Rule 77.3's page limit by such a substantial amount. However, given that this is the first case interpreting § 625, we grant Cox' motion to file its comments as qualified. To the extent the comments raise for the first time additional factual material not raised below,

these facts should be disregarded and are not made part of the record. To the extent the comments reargue positions taken in briefs, or raise for the first time arguments which should have been raised in the briefs, they will be accorded no weight.

In the future, parties seeking to file comments exceeding the Commission's page limitation should make a motion to do so (together with a request for expeditious treatment) in sufficient time so that the principal hearing officer or presiding officer can act on the motion prior to the date when the comments are due. Failure to do so may result in comments in excess of the page limitation being stricken from the record.

### **Findings of Fact**

1. The Commission has discretion over whether or not to permit a complainant to exercise the power of eminent domain to offer a competitive service, even if complainant makes the requisite showing under § 625.

2. A timely hearing in this matter was commenced pursuant to § 625 (a)(2)(A).

3. Because this decision finds that further hearings are not necessary, the hearing concluded on July 3.

4. Crow Development and Cox, as well as other parties, are involved in multiple cases in multiple fora which essentially seek to resolve the same underlying problem.

5. In the Jamboree Superior Court Action, Jamboree seeks a declaration that it be allowed full and complete access to its utility easements, which in turn would give CoxCom and Cox certain access to the easements.

6. In the Cox Superior Court Action, Cox and CoxCom seek a declaration that CoxCom has an easement across Crow Development's property to install and

maintain its cable system, over which cable television, high-speed internet access, and telephone services are provided to Park Place customers on the facility parcel. Cox and CoxCom also allege that they are entitled to continued use of these easements without interference from Crow Development.

7. In C.00-05-023, Cox and CoxCom also claim that they are entitled to access the existing utility easements to provide service to the facility parcel under various legal theories.

8. Both Pub. Util. Code §§ 625 and 1701.2 have short deadlines for processing a proceeding. It is more consistent with these statutes to dismiss the proceeding without prejudice than to stay the proceeding, because it is unclear at this point how long the proceeding would have to be stayed, or whether the parties might resolve their differences while the other proceedings are being adjudicated.

9. Whether or not Cox has existing access rights to the easements in question is critical to determining necessity.

10. It would not promote judicial economy for the Commission to make complex title and access determinations as part of exercising its regulatory authority when the Superior Court is currently adjudicating these same underlying title and access issues. Moreover, if these proceedings are litigated concurrently, the potential exists for the two fora to reach inconsistent results.

11. When a party pleads inconsistent theories it typically does so in the same case before the same forum. In such circumstances, the trier of fact has the discretion to conduct the case as procedurally appropriate.

12. If the Superior Court finds that CoxCom has an easement on Crow Development's property, Cox in turn will obtain access to the easements by virtue of an agreement with CoxCom.



13. Cox's complaint describes the easements it seeks to condemn somewhat differently in different paragraphs. All of these descriptions, however, address the existing utility easements to serve the facility parcel, and not broad easement rights which may be necessary to provide service to future tenants in establishments being developed on Crow Development's property.

14. In this case, the Superior Court is currently addressing issues concerning CoxCom's and Cox's entitlement to access the easements in question. These are not issues involving the Commission's specialized agency expertise, such as ratemaking, or a legislative scheme, but rather contract and real property issues that courts routinely resolve.

### **Conclusions of Law**

1. Before Cox can file a condemnation action in the Superior Court seeking to condemn property for a competitive purpose, it must obtain a finding from the Commission pursuant to § 625 that the condemnation is in the public interest. In order for the Commission to make such a finding, it must find, among other things, that the property to be condemned is necessary for the proposed project.

2. If the Superior Court determines that Cox owns or is otherwise entitled to access the easements in dispute, this finding may be determinative in this action on the issue of necessity.

3. This complaint is premature and should be dismissed without prejudice.

4. Cox's motion seeking permission for its comments to the draft decision to exceed Rule 77.3's page limitation is granted as qualified. To the extent the comments raise for the first time additional factual material not raised below, these facts are disregarded and are not made part of the record. To the extent the comments reargue positions taken in briefs, or raise for the first time arguments which should have been raised in the briefs, they will be accorded no weight.

5. To provide to timely guidance to the parties, and in light of the multiple cases now in progress, this order should be effective immediately.

**O R D E R**

**IT IS ORDERED** that this complaint be dismissed without prejudice.

This order is effective today.

Dated November 21, 2000, at San Francisco, California.

LORETTA M. LYNCH  
President

HENRY M. DUQUE  
JOSIAH L. NEEPER  
RICHARD A. BILAS  
CARL W. WOOD  
Commissioners