

Substantial Justice in Eminent Domain Proceedings: The New Date of Valuation for Privately-Owned, Public Utility Companies

By: Michael C. McCabe, Jr.



In 2011, amid much fanfare, Mississippi voters overwhelmingly approved an initiative to amend the Mississippi Constitution to prohibit state and local government from taking private property by eminent domain and then conveying it to private interests in the name of public interest economic development for a period of ten years after the acquisition. Earlier that same year, the Mississippi Supreme Court quietly rendered its own reformation of Mississippi eminent domain law when it handed down its decision in *Dedeaux Util. Co., Inc. v. City of Gulfport*,¹ in which it held that Section 11-27-19 of the Mississippi Code, which sets the date of valuation of property subject to eminent domain as the date of filing of the complaint, is unconstitutional as applied to privately-owned, public utility companies. This article discusses the *Dedeaux* opinion and how the Court reached its conclusion.

I. Background

Dedeaux Utility Company, Inc. (“Dedeaux”), was the holder of Certificates of Public Convenience and Necessity for certain water and sewer services in Harrison County, Mississippi, and had operated as a local utility company since 1971. In the early 1990s, the City of Gulfport, Mississippi (“Gulfport”), annexed the area served by Dedeaux and, on December 3, 1996, filed a complaint of eminent domain against Dedeaux, Cause Number 96-01102, in the Special Court of Eminent Domain, Harrison County, Mississippi, First Judicial District. In addition to condemning those assets which existed on the date of filing, the Complaint also sought to condemn any later additions, extensions and/or supplements.

Gulfport did not take possession of the utility until December 20, 2004 (shortly after the entry of a final judgment in the first trial), a full eight years after filing its eminent domain complaint. During that eight year period of time, Dedeaux continued to operate the utility system and, it argued, accumulated assets as Contributions in Aid of Construction² (“CIAC”), all in accordance with its duty under Section 77-3-21 of the Mississippi Code to provide reasonably adequate service to its certificated area. According to Dedeaux, its tangible asset base continued to grow from December 3, 1996, through the date that Gulfport took possession of the utility system on December 20, 2004.

The parties appealed the final judgment entered following the first trial, and upon review, the Supreme Court of Mississippi reversed the judgment and remanded the case for a new trial.³ Approximately two years later, the case was tried for a second time. On October 7, 2008, the eminent domain court entered a final judgment, fixing the compensation and damages owed to Dedeaux. The judgment did not award Dedeaux compensation for Gulfport’s taking of the additions that Dedeaux claimed it had accumulated in the eight years between the date Gulfport filed its eminent domain complaint and the date Gulfport took possession of the utility company. The parties appealed the judgment entered following the second trial.

On appeal, the Mississippi Supreme Court held, among many other things, that Section 11-27-19 of the Mississippi Code was unconstitutional as applied to privately-owned, public utility companies and that, “in these specific cases, the applicable date for purposes of determining due compensation is the actual date the property is transferred (here, December 20, 2004).”⁴

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II. The Date of Valuation vs. the Duty to Provide Reasonably Adequate Service

Section 14 of the Mississippi Constitution states that “[n]o person shall be deprived of life, liberty, or property except by due process of law.” Section 17 of the Mississippi Constitution states that “[p]rivate property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof.” The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use, “without just compensation.” The Mississippi Legislature has mandated that “[e]vidence of fair market value shall be established as of the date of the filing of the complaint.”⁵

However, Section 77-3-21 of the Mississippi Code imposes upon public utilities the responsibility to provide reasonably adequate service to the citizenry within its certificated area. Dedeaux argued that this required it to accept and maintain improvements to its water and sewer system when such work was necessary. Thus, in order to comply with Section 77-3-21, Dedeaux argued that it added assets to its system between the date of filing of the Gulfport’s eminent domain complaint on December 3, 1996, and the date that the City actually took over possession and operation of the Dedeaux assets on December 20, 2004.

The statutes cannot be reconciled in fairness to public utility companies. In establishing the property valuation date as the date of filing of the eminent domain complaint, Section 11-27-19 fails to account for a delay of the date of physical taking following the filing of an eminent domain complaint. More importantly, it fails to account for the assets that a utility system must acquire and maintain as a matter of state law during the pendency of the eminent domain proceeding under Section 77-3-21.

In ordinary eminent domain cases, the date of the valuation of property is the date of the filing of the condemner’s complaint, without regard to any increased value of the property after that date.⁶ This is generally based upon the need for designation of some definitive time for the purpose of evaluating the property.⁷ However, the taking of public utility property is different than condemnation of a private home or business, because, in the case of a public utility, there is a statutory obligation imposed upon utility owners to continue the provision of reasonably adequate service to its customers.⁸

III. Substantial Justice in Eminent Domain Proceedings

At its most basic level, the Court’s resolution of this conflict is premised upon the recognition that “[f]air-market value ‘is not an absolute standard nor an exclusive method of valuation. . . .’”⁹ Rather, “[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law.”¹⁰ Thus, “[c]ourts have had to adopt working rules in order to do substantial justice in eminent domain proceedings.”¹¹

Based upon this flexibility inherent in eminent domain proceedings, the Court explored how best to reconcile Dedeaux’s right to just compensation with the conflict posed by Sections 11-27-19 and 77-3-21 of the Mississippi Code.

A. The Approach Adopted by Other Jurisdictions

The distinction between the condemnation of private property and public utility property had been long recognized in other states. In *Passaic Consol. Water Co. v. McCutcheon*,¹² the high court of New Jersey recognized that an eminent domain act that did not compensate a public utility company for its compulsory improvements made after the date of filing of the eminent domain complaint deprived the company of its constitutional right that private property shall not be taken for public use without just compensation.

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In *Passaic*, several municipalities sought to acquire the waterworks of the Passaic Consolidated Water Company (the “water company”). A commission was appointed to negotiate a price with the water company, and after negotiations failed, the commission initiated condemnation proceedings to acquire the water company through eminent domain. The eminent domain petition was filed on April 24, 1928. New Jersey’s Eminent Domain Act at that time was in all pertinent respects the same as Section 11-27-19 of the Mississippi Code in that it fixed the date of valuation of condemned property as the date of filing of the eminent domain complaint.¹³ The Court immediately recognized the dilemma faced by a public utility company that is subject to condemnation:

In the ordinary case of condemnation, no injustice by this provision of the statute is done to the owner, as he is under no obligation to extend, improve, or add to his property. In the present case the situation is different. The water company is a public utility. It is subject to regulation by the Board of Public Utility Commissioners. It must render adequate service. It cannot lawfully refuse to make repairs, improvements, additions, and extensions which are required for such service. It serves a population of 425,000. This number is increasing. To adequately serve its present patrons and new customers will require the expenditure of a considerable sum between the date of filing the petition and the completion of the condemnation. The condemnation proceedings will take a very considerable period of time. This is evidenced by the fact that the court gave until May 1, 1929, for the filing of the commissioners’ report. The property is varied. It consists of pumping and filtration stations, reservoirs, mains, pipes, meters, fire hydrants, etc. It is located in four counties. During the two years preceding the commencement of these proceedings, \$710,000 had been expended for main extensions and other property. For such similar expenditures during the condemnation proceedings the statute affords no method of compensation.¹⁴

The water company, like *Dedaux*, contended that it was “entitled to the constitutional provision that private property shall not be taken for public use without just compensation, and that the General Eminent Domain Act of 1900 . . . does not afford just compensation.”¹⁵ The commission argued that the eminent domain statute was sufficient for this purpose. In ruling that the eminent domain statute was not sufficient, the Court noted that the condemnation proceedings would likely last longer than two years and that in the meantime the water company would be compelled by orders of the commission to make improvements in order to render adequate service to the public that it served.¹⁶ The Court held that

[f]ailure to provide a method by which the owner can be reimbursed for the extension and betterments it is obliged to make during the pendency of the [eminent domain] proceedings is a serious matter, and deprives the water company of just compensation for its property if the statute cannot be so construed as to include such payments.¹⁷

In *Ariz. Corp. Comm’n v. Tucson Gas, Elec. Light & Power Co.*,¹⁸ the Supreme Court of Arizona recognized that Arizona’s eminent domain statute was insufficient for the assessment of just compensation due a public utility company that has made compulsory improvements after the date of filing of an eminent domain complaint. *Ariz. Corp. Comm’n* was an appeal from the judgment of a lower court vacating and annulling orders of the Arizona Corporation Commission (the “Commission”) requiring the public utility company to make capital improvements necessary to serve the public. Arizona’s eminent domain statute at that time fixed the date of valuation of condemned property as the date of summons.¹⁹ The lower court had vacated the Commission’s orders on the basis that they deprived the public utility company of its property without just compensation in that they compelled the

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public utility company to make improvements under a legislative condemnation plan that would never afford compensation for such improvements.²⁰ Instead of weighing the validity of the Commission's orders, the Arizona Supreme Court resolved to address the root of the problem: "[T]he legal conflict we are here called upon to determine would never have arisen were it not for the condemnation proceedings instituted by the City of Tucson. . . . We believe . . . that a determination of the constitutional question is essential to the deciding of this case."²¹

The Court analyzed the principles underlying the general rules of eminent domain, noting that "[t]he right of the owner to use and enjoy the property until it is actually taken is undoubted."²² However, the Court explained:

[A] point of time must be fixed upon with reference to which the damages shall be assessed and to which the title shall be assessed and to which the title shall relate But, wherever that point of time is fixed, up to that point of time the owner may put improvements upon his property and recover their value, but after that point of time improvements will be made at the risk of being taken without compensation. . . . This rule, however, may not afford 'just compensation' to a public utility the property of which is the subject of condemnation. . . . [D]efendant, as a public utility, may be under the necessity of making improvements to and extensions of its physical properties, the cost of which cannot properly be absorbed as expense of maintenance and operation. For any such betterments and improvements as may be reasonably necessary and prudently made between the date of the awards and the orders of appropriation, the defendant is entitled to compensation; and the judgments should so provide.²³

In concluding that the Arizona eminent domain statute was unconstitutional when applied to public utility properties, the Court ruled that:

The constitutional provision [requiring just compensation] must take precedence over the statutory provisions of Section 27-916, supra. The statutory provision is unconstitutional when applied to the taking of public utility properties. It occurs to us that the eminent domain statute of the State of Arizona was created for no other purpose than the condemnation of real estate and its appurtenances. We conclude that the condemnation statute, as a whole, is wholly inadequate, inappropriate, inapplicable, and insufficient as a means of assessing the compensation to be paid to a public utility for its physical properties and additions thereto made under compulsion of law.²⁴

New Jersey and Arizona are but two in a number of states that have ruled that public utility properties must be valued so as to provide compensation for the addition of assets after the date of filing of an eminent domain complaint.²⁵ The Court in *Dedeaux II* found many of these authorities to be helpful and persuasive.²⁶

B. Gulfport's Argument Against a New Date of Valuation

In response to these authorities, Gulfport argued that the Mississippi Public Service Commission already affords a supplemental source of just compensation for the taking of assets donated to a public utility after the date of filing of the eminent domain complaint in that Section 77-3-201, et seq., of the Mississippi Code establishes a procedure by which a public utility may challenge the economic feasibility of making capital expenditures to expand its services after an eminent domain action has been filed.²⁷ The Court in *Dedeaux II* rejected this argument without comment; however, its weaknesses are readily apparent.

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Section 77-3-201, et seq., is a part of Mississippi's statutory scheme dealing with the regulation of public utilities; it has nothing to do with eminent domain or just compensation, those matters being controlled by Section 11-27-1, et seq. As a result, *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc. v. Miss. Pub. Serv. Comm'n*²⁸ – cited by Gulfport in support of its position – has no application. *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc.* dealt with the constitutionality of Section 77-3-205—not Section 11-27-19. In fact, *Hinds-Rankin Metro. Water & Sewer Ass'n, Inc.*, was not a condemnation case at all. The public utility in the case was never at risk of losing title to the facilities it was required to construct; rather, it had argued that the forced construction of facilities for the extension of service was, in and of itself, an unconstitutional taking.²⁹ Dedeaux never took that position.

Moreover, the statutory scheme cited by Gulfport does not relieve a public utility company from its obligation to provide reasonably adequate service to its certificated area. First, the statutory scheme cited by Gulfport provides a remedy to property owners who desire service from a public utility and not a remedy to the public utility itself.³⁰ Second, a public utility has no choice but to accept title to the contributed property and maintain and operate such facilities—it is “obliged” to do so even after the institution of eminent domain proceedings.³¹

Gulfport also argued that the procedure set forth in Section 77-3-201, et seq., was apparently not available to the public utilities in the cases from other jurisdictions, on which the Court ultimately relied. But similar arguments were made in those cases. For instance, in *Passaic Consol. Water Co. v. McCutcheon*³² the condemning authority argued that it had the power to contract for the acquisition of facilities constructed after the initiation of eminent domain proceedings and, thus, there was no need to alter the date of valuation for public utility assets acquired after the date of filing of the eminent domain complaint. This alternate “procedure” for just compensation was both considered and rejected by the *Passaic* Court:

This is tantamount to saying that, notwithstanding that the act fails to provide a method for just compensation, the proceeding may be sustained if the commission offers to purchase or condemn the property which it cannot take in the initial condemnation proceedings. The fallacy of this reasoning is that a condemnation proceeding cannot be had under an invalid act. The owner is not required to submit its property to such jeopardy. Whether or not to proceed to acquire the additional property cannot be optional with the condemning party. It must be a remedy to which the party can resort of his own motion or compel the movement of the municipality by mandamus. It is also a doubtful question whether the language of section 1 of the 1923 act is broad enough to give the commission the power which it is claimed it does. An owner should not be obliged to have his property subjected to condemnation under statutes which are of doubtful meaning. Corrective legislation can be obtained which will insure the proper execution of the constitutional mandate respecting the acquisition of private property.³³

The same reasoning has to be extended to Gulfport's proposition, which is tantamount to saying that, notwithstanding that Section 11-27-19 fails to provide a method for just compensation, the proceeding may be sustained if property owners invoke the protection of Section 77-3-203(b). Even then, public utilities would still be obliged to accept title to the new facilities, maintain them, and operate them without the hope of ever receiving just compensation.

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C. The Dedeaux II Holding

The practical issue faced by the Court in *Dedeaux II* was the eight year delay between the date that Gulfport filed its eminent domain complaint and the date that Gulfport finally assumed ownership of the system. During that period of time, Section 77-3-21 required Dedeaux to render “reasonably adequate service” to Dedeaux’s certificated area. In the event that Dedeaux did not render “reasonably adequate service” to its certificated area, then the Public Service Commission could revoke and cancel Dedeaux’s certificate.³⁴

Recognizing this conflict between Sections 11-27-19 and 77-3-21 and the flexibility inherent in determining just compensation, the Court adopted the approach of the other states that have faced this issue: “[I]n the interest of doing ‘substantial justice’ in the eminent-domain proceeding so as to provide Dedeaux with its constitutional right to just compensation, this Court finds that the ‘ordinary rules of valuation must . . . change’”³⁵ Because the eminent domain court held otherwise, the Court concluded that it erred and remanded the case with the following instruction to the eminent domain court:

The jury may consider not only the value of the property at the time the petition was filed but also the worth of all extensions, additions, and improvement of the property which were necessarily and in good faith subsequently made or commenced by Dedeaux in accordance with its operating authority. These figures should be “subject to setoffs arising out of [Dedeaux’s] continued use of the property during that time[,]” including revenues earned.³⁶

IV. Conclusion

The holding in *Dedeaux II* regarding the date of valuation for privately-owned, public utilities represents a reasonable compromise of the interests of all parties to eminent domain proceedings relating to a regulated industry. On the one hand, the courts, the condemning authorities and the condemnees are entitled to the designation of some definitive time for the purpose of evaluating the property. On the other hand, the public utility is entitled to just compensation, but it has a statutory duty to render reasonably adequate service to its certificated area even after the eminent domain complaint has been filed. While the date of the filing of the eminent domain proceedings seems reasonable and logical in most other situations, it fails to account for a public utility’s statutory duty to render reasonably adequate service. In the end, the statutory date of valuation must yield to the public utility’s constitutional right to just compensation.

While Mississippi eminent domain law continues to evolve, both in the courts and at the polls, attorneys representing condemning authorities and condemnees in public utilities litigation should be particularly aware of the new date of valuation announced in *Dedeaux II*.

¹63 So. 3d 514 (Miss. 2011) (“*Dedeaux I*”). This opinion was the result of the parties’ appeal of the final judgment entered after the second trial. Another opinion, *Dedeaux Util. Co., Inc. v. City of Gulfport*, 938 So. 2d 838 (Miss. 2006) (“*Dedeaux I*”), addressed the parties’ appeal following the first trial. A detailed recitation of the procedural history of this litigation is unnecessary for purposes of this article. However, to date, the litigation stemming from Gulfport’s efforts to acquire Dedeaux has comprised two lawsuits, two trials and three appeals. The case will likely be tried a third time before all is said and done.

²“Contributions in Aid of Construction” are tangible and intangible assets that are contributed to a public utility company by land developers, and “[t]hese assets include pipelines installed by and paid for by the developers under their projects” as well as “easements, rights-of-way, wells, lift stations and tank sites.” *Dedeaux I*, 938 So. 2d at 840. Once the contributed assets are connected to the utility system, the title to those assets is transferred to the public utility company. *Id.* According to De-

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deaux's expert, James Elliott, "in fast-growing service areas, CIAC provides a 'very significant sourc[e] of value added.'" *Dedeaux II*, 63 So. 3d at 519. Mississippi eminent domain law requires that CIAC be included in the valuation of a public utility company. *See Dedeaux I*, 938 So. 2d at 842-43 (excluding opinion of expert witness who failed to include CIAC in valuation of *Dedeaux* during the first trial).

³*See generally Dedeaux I*, 938 So. 2d at 838.

⁴*Dedeaux II*, 63 So. 3d at 537.

⁵MISS. CODE ANN. § 11-27-19.

⁶*See Paulk v. City of Tupelo*, 204 So. 2d 153, 154 (Miss. 1967); *Pearl River Valley Water Supply Dist. v. Wright*, 203 So. 2d 296, 297 (Miss. 1967).

⁷*Wright*, 203 So. 2d at 297.

⁸*See* MISS. CODE ANN. § 77-3-21.

⁹*Dedeaux II*, 63 So. 3d at 535 (quoting *United States v. Fuller*, 409 U.S. 488, 490 (1973)).

¹⁰*Id.* (citations omitted).

¹¹*Id.* at 535-36 (alteration in original) (citations omitted).

¹²144 A. 571, 573 (N.J. 1929).

¹³*Id.* at 571.

¹⁴*Id.* at 572.

¹⁵*Id.*

¹⁶*Passaic*, 144 A. at 573.

¹⁷*Id.*; *see also New Jersey Water Serv. Co. v. Borough of Butler*, 148 A. 616 (N.J. 1930) (reaffirming *Passaic*).

¹⁸189 P.2d 907, 911 (Ariz. 1948).

¹⁹*Id.* at 908.

²⁰*Id.* at 910.

²¹*Id.*

²²*Id.* at 909.

²³*Ariz. Corp. Comm'n*, 189 P.2d at 909-10 (quoting *Pub. Util. Dist. No. 1 of Douglas County v. Wash. Water Power Co.*, 147 P.2d 923, 928 (Wash. 1944) and JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 742 & § 962 (3rd ed. 1997).

²⁴*Id.* at 911.

²⁵*See Citizens Utils. Co. of Cal. v. Super. Ct. of Santa Cruz County*, 382 P.2d 356, 361 (Cal. 1963):

Since the taking of property in eminent domain without the payment of just compensation is prohibited by our Constitution, it would be unconstitutional to take a utility's property valued as of the date of the summons and without compensating it for involuntary and compulsory improvements installed by it after such date that result in an increase of value of the system.

See also Ill. Cities Water Co. v. City of Mt. Vernon, 144 N.E.2d 729, 732 (Ill. 1957):

We believe the present situation is exceptional and that the value of all waterworks property, including that necessarily added subsequent to the date the condemnation petition is filed, may be determined in an eminent domain proceeding. . . . Nothing short of such an amount conforms to the constitutional requirement of just compensation.

See also Iowa Elec. Light & Power Co. v. City of Fairmont, 67 N.W.2d 41, 47 (Minn. 1954) ("The gas company should be properly compensated for any such betterments, extensions, or improvements it was required to make after the award was made but before relinquishing possession of the property, subject to setoffs arising out of its continued use of the property during that time."); *Pub. Util. Dist. No. 1 of Douglas County v. Wash. Water Power Co.*, 147 P.2d 923, 928 (Wash. 1944):

[D]efendant, as a public utility, may be under the necessity of making improvements to and extensions of its physical properties, the cost of which cannot properly be absorbed as expense of maintenance and operation. For any such betterments and improvements as may be reasonably necessary and prudently made between the date of the awards and the orders of appropriation, the defendant is entitled to compensation

²⁶*See Dedeaux II*, 63 So. 3d at 536-37.

²⁷*See* Brief of Appellee at 5-6, *Dedeaux Util. Co., Inc. v. City of Gulfport*, No. 2010-CA-00290 (Miss. Aug. 31, 2010).

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²⁸263 So. 2d 546 (Miss. 1972)

²⁹*Id.* at 552-53.

³⁰See MISS. CODE ANN. § 77-3-203.

³¹See MISS. CODE ANN. § 77-3-203(b) (“[U]pon . . . conveyance or assignment of such facilities and easements to the utility, the holder of the certificate for the area and service affected shall be obliged promptly to connect the same to its systems and provide such service.”); see also § 77-3-29 (confirming that the Public Service Commission may “require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area . . .”).

³²144 A. 571, 573 (N.J. 1929).

³³*Id.* (citations omitted).

³⁴See MISS. CODE ANN. § 77-3-21; see also *Capital Elec. Power Ass'n v. City of Canton*, 274 So. 2d 665, 668 (Miss. 1973):
[A]n award of a certificate of public convenience and necessity by the Public Service Commission to an electric utility is an exclusive permit to furnish electricity to the persons using electricity in the area designated and certificated to the utility so long as the utility holding the certificate is capable and willing to provide electric energy to the persons within the area.

³⁵*Dedeaux II*, 63 So. 3d at 537 (quoting *Ill. Cities Water Co. v. City of Mount Vernon*, 144 N.E.2d 731, 732 (Ill. 1957)).

³⁶*Id.* (alterations in original) (quoting *Iowa Elec. Light & Power Co. v. City of Fairmont*, 67 N.W.2d 41, 47 (Minn. 1954)).

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Recap of 2011 Annual CLE Program - “Focus on the Jury”

The Litigation Section of the Mississippi Bar hosted its 2011 CLE program on June 17, 2011. Last year’s program was entitled “Focus on the Jury.” This 6 CLE credit hour seminar explored new issues of jurors using social media during trials, revealed secrets of effective jury selection, looked inside a jury’s deliberations and examined ways of bringing jury instructions into plain English. Speakers included John Corlew, author of *The Mississippi Jury: Law & Practice*; Paulette Robi- nette from JurySync, a jury consultant; Lydia Quarles, Stennis Center for Public Service; and Carol Murphey, The Mississippi Model Jury Instruction Commission. The attendees not only reviewed current trends in opinions concerning jury deliberations but participated in ongoing efforts by the Mississippi Bar, the Stennis Institute and the Mississippi Judicial College to make jury service more effective for the public and litigators.

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