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September 20, 1999

Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Cornyn:

The purpose of this letter is to request an opinion from your office regarding the following on behalf of Tarrant Regional Water District, A Water Control and Improvement District and a conservation and reclamation district and political subdivision of the State of Texas, created by authority of Art. 16, Sec. 59 of the Texas Constitution.

Tarrant Regional Water District ("the Water District") has acquired pipeline easements extending from Tarrant County southeast to Cedar Creek Reservoir in Henderson County and Richland-Chambers Reservoir in Freestone and Navarro Counties, Texas. These pipeline easements were acquired for the purpose of installing water pipelines and the additional appurtenances necessary to transport water from the Water District's East Texas reservoirs of Cedar Creek and Richland-Chambers to the urban areas of Tarrant County.

The easement agreements expressly allow the installation of all necessary electric and

communication lines for the purpose of operating and maintaining the water pipelines. We have enclosed for your review representative samples of the subject easements. They specifically provide for (1) " . . . all necessary electric and communication lines . . . for the purpose of operating and maintaining the said pipeline"; (2) " . . . one water transportation pipeline, with all equipment and appurtenances incidental thereto . . ."; and (3) ". . . one water transportation pipeline and appurtenant facilities, including all necessary electric and communication lines . . . as may be necessary for the purposes of operating such pipeline."

The Water District plans to install in these existing pipeline easements a fiber optics cable for the purpose of operating its pipelines with a Supervisory Control and Data Acquisition (SCADA) System, designed by the Water District because it is deemed to be necessary for pipeline operation. The technology of fiber optics will provide excess capacity in the cable for years before the Water District will need all of the cable's capacity. The question has been asked whether or not it would be legal for the Water District to lease all or part of the excess capacity of the bandwidth provided by the fiber optics cable to telecommunication carriers for fiber optic telecommunications between cities until such time as all of the capacity is needed by the Water District. Please assume that the use of part of the capacity of the fiber optics cable by the telecommunication carrier will not cause the cable to be any larger or cause any more detriment to the landowner's land than if the use of the fiber optics cable was limited to the SCADA operation of the water pipeline, which the Water District has determined to be necessary.

We request an opinion from your office on the following issues:

1.. Does the language of the subject pipeline easements submitted herewith authorize the Water District as a matter of law to install a fiber optics cable for the purpose of operating its pipelines with a SCADA system?

2.. Is the test for answering the above a factual inquiry as to whether or not the fiber optics cable use of the pipeline easement was "reasonably within contemplation during the acquisition of the right-of-way" or "whether the grantor could have reasonably contemplated such uses as within the easement at the time he granted it"? *See Milam County v. Akers*, 181 S.W.2d 719 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.); Attorney General Opinion DM-420 (1996); *City of Sweetwater v. McEntyre*, 232 S.W.2d 434 (Tex. Civ. App.—Eastland 1950, writ ref'd n.r.e.). *See also* the *Hise* and *Salvaty* cases cited in connection with issue number 4 below.

3.. Are the contemplated additional uses of the fiber optics cable by leasing the excess capacity to a telecommunication carrier a "private use" prohibited by Texas law?

In *Weyel v. Lower Colorado River Authority*, 121 S.W.2d 1032 (Tex. Civ. App.—Austin 1938, writ ref'd n.r.e.), LCRA condemned a strip of land with the intent of selling the easement rights to the Texas Power & Light Company (TPL) and rebuilding TPL's electric lines on the

condemned strip. The court upheld this condemnation as "necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred [to LCRA under the Act]," even though this exercise of LCRA's condemnation power would benefit a private third party. The court reasoned: "the erection, by condemnation if necessary, of the new line, in order to destroy or remove the old one, which presented an insurmountable obstacle to the creation of [Lake Buchanan], was in itself a public use for the benefit of the LCRA within the meaning of the law creating it. *And it consequently becomes immaterial whether the LCRA thereafter operated this high line itself, or leased or sold it to the TP&L for that purpose, either of which it was authorized under the law to do.*" 121 S.W.2d at 1034. (Emphasis added.)

But compare *Lyon v. McDonald*, 14 S.W. 261 (Tex. 1890), which involved a condemnation for a "depot and station grounds for railroad purposes." The railroad company allowed Mr. Lyon to use part of the premises for the purpose of unloading and storing lumber shipped to Lyon over its railroad. The permission given was for the accommodation of both parties, and no rent was charged. "The meaning of this is that the railway company permitted Lyon to use its grounds as a lumber yard for his private business as a lumber dealer, the company being benefited thereby only in having its cars more conveniently unloaded of lumber hauled there for him. It was an exclusive license to him alone, and not to the public generally, that he should carry on his trade of lumber dealer on the grounds condemned for depot purposes. The company would certainly have had the right to permit the public to so use the grounds in unloading its cars, and in receiving freight; but the permission

here was to a particular person to so receive his freight bought and sold in his business, to store the same on the grounds, to erect sheds for the protection of his property, and to use the premises as a place of business. Such uses were inconsistent with the purposes for which the land was condemned, as much so as if it had been used as an ordinary warehouse or grocery store." 14. S.W. at 262.

". . . 'the right of the commonwealth to take private property without the owner's consent exists in her sovereign right of eminent domain, and can never be exercised but for a public purpose. . . .' The right of eminent domain does not extend beyond 'the reasonable necessities of the corporation in the discharge of its duties to the public.' . . . If it acquires the right of easement for public purposes and its own necessities, by proceedings of condemnation, and changes the use to private purposes, such change will amount to 'an abandonment' and the owner will have his remedy. . . . 'The land was used as a lumber yard, and the value of such use would be the correct inquiry on the subject of damages, there being no injury to the realty.'" 14 S.W. 263.

And also see *Acme Cement Plaster Company v. American Cement Plaster Company*, ., 167 S.W. 183 (Tex. Civ. App.—Amarillo 1914, no writ hist.). In this suit for an injunction to prevent telephone poles from being placed on private property, an issue arose as to whether or not the plaintiff had to negative the consent of the county and the railway company which owned a road and a railroad right-of-way to the placing of such poles on the public property. The court held that it was not necessary to negative the consent of the county or the railroad company because they did not

have the power to allow the use of public property for private purposes.

"Land cannot be taken for private purposes in any case, and can be taken for public use only upon compensation being made therefore."

167 S.W. at 184-185.

"Is the erection of a telephone line on the right-of-way of the railway company and on the public roads a taking of the land from the owner of the fee? Our Supreme Court has answered this question:

'. . . the location of a railroad, like that of defendant, upon land in which the public have only the easement of the highway and another has the fee is the taking of that part of the land occupied by the track, at the very least, and hence a taking of the property of the owner of the fee. No one disputes that this is the legal effect of such an appropriation of land not burdened with such an easement, for, by the Constitution and use of the railroad, the land is actually occupied, and necessarily, to a greater or less extent, the owner is excluded from that complete and exclusive use and control to which his ownership

> entitles him. . . . The fee in the land is not as valuable to him as if it were not burdened with the street, but nevertheless it is property which cannot be taken without compensation first made or secured. If the easement of the street should come to an end, the fee would remain burdened only by the easement of the railroad right-of-way, and this lays bare the fact that the private property in the street is diminished to the extent of such right-of-way.'

". . . It follows therefore, when appellees, for their own personal benefit, entered upon the right-of-way and the roadway and sought to erect thereon their telephone lines, they took and attempted to appropriate the property of appellant to their own use. This the law does not sanction.

"The county and the railway company could use the easement for the purposes for which it was granted them—that is, for public use—but could not farm it out to private individuals for their private ends or use. It was not therefore necessary for appellant to negative the consent of the company or the railroad company." (Emphasis added)

167 S.W. at 185.

The Water District feels that these latter two cases are distinguishable by the fact that the Water District pipeline easements specifically authorize installation of "all necessary communication lines."

4.. Even if the lease of the excess fiber optics cable capacity to a telecommunication carrier is "a private use," is the additional use still permitted under the "apportionment of easements doctrine"?

Although Texas case law does not specifically address the issue, numerous out-of-state cases addressing apportionment of easements support the proposition that installation of an additional cable line in a pre-existing utility easement does not materially increase the burden on the owner of the servient estate and must be allowed without additional consent from, or payment to, the fee owner. *Hise v. Barc Electric Coop.*, 492 S.E.2d 154, 156 (Va. 1997); *Salvaty v. Falcon Cable Television*; 165 Cal.App.3d 798, 212 Cal. Rptr. 31, 34-35 (1985); *Hoffman v. Capitol Cablevision System, Inc.*, 52 A.D.2d 313, 383 N.Y.S.2d 674, 677 (1976); *Jolliff v. Hardin Cable Television Co.*, 26 Ohio St.2d 103, 269 N.E.2d 588, 591 (1971).

In fact, at least one court has specifically addressed a situation where a public utility entity wishes to install fiber optic cable and contract with third parties for the use of reserve capacity in that cable. In *Cousins v. Alabama Power Co.*, 597 So.2d 583 (Ala. 1992), the Supreme Court of

Alabama considered whether the Alabama Power Company ("APCo") had the right to apportion certain rights-of-way taken by condemnation. More specifically, APCo wanted to share with AT&T the fiber optic lines installed on property within its electrical transmission easements. The Court noted that "[t]he question before us is whether the trial court erred in holding that APCo has the right, as a matter of law in this case, to share its easement with AT&T without obtaining the permission of, or compensating the owner of, the servient estate." *Id.* at 686. The Court affirmed the trial court's ruling allowing sharing of the easement with AT&T and offered the following analysis:

> The question of apportionment of easements by utility companies has been raised most recently around the country in cases involving cable television. Many courts have found that utility companies are authorized to share or apportion their easement rights with a third party, without obtaining the permission of, or compensating the owner of, the servient estate. [citations omitted] . . . An apportionment such as the one contemplated by APCo in this case has been held not to constitute an additional servitude. *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 212 Cal.Rptr. 31 (1985). The trial judge did not err in holding that APCo has a right, as a matter of law, to apportion the lines to AT&T.

Id. at 687.

In the *Hise* case, the Supreme Court of Virginia considered "whether the power company [which had an easement for the construction and operation of its electric power line] can permit a telephone company and a cable television company to attach their lines to the power company's poles without the consent of the owners of the servient estate." 492 S.E.2d at 156.

The court stated:

> "Nothing in the description of the Hises' rights permits them to share the electric company's poles or lines. . . . In our opinion, none of the Hises' retained rights deprive the power company of its 'sole privilege of making the uses authorized by [the eminent domain proceeding].' Accordingly, we conclude that the power company acquired an exclusive easement in gross in the eminent domain proceeding.
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> * * *
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> "In determining the apportionability of the easement acquired in the eminent domain proceeding, we note that 'the fact that [the servient tenant] is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable." Restatement

of Properties § 493 cmt.c.

492 S.E.2d at 158.

". . . as pointed out by the utility companies, the power company's express power to 'improve' and to make 'additions to or extensions of its facilities' as acquired in the eminent domain proceedings sufficiently supports the trial court's inference of the apportionability in this case. Accordingly, we hold that the power company could permit the television and cable companies to attach their lines to the new poles.

492 S.E.2d at 159.

The subject easements granted to the Water District contain language such as: ". . . an easement and right to survey, construct, operate, maintain, inspect, alter, replace, move and remove one or more pipelines . . . [and] the right to install all necessary electric and communication lines."

In the *Salvaty* case, the California Court of Appeals had to consider "whether a telephone company and cable television company had to secure a private property owner's consent before a cable television [line] was installed on a telephone pole situated on the telephone company's

easement on the [subject] property. We find that no such consent was required as the cable equipment was within the scope of the easement which the telephone company apportioned to the cable company." 212 Cal. Rptr. at 32.

"Appellants argue strenuously that cable television equipment was not within the scope of the easement here, which provides only for 'a pole line for the stringing of telephone and electric light and power wires thereon. . . .'

* * *

"'Our courts have been receptive to the contention that changed economic and technological conditions require re-evaluation of restrictions placed upon the use of real property.' As the court analyzed the problem, the real issue was whether the use of a particular case was consistent with the primary object of the grant."

* * *

"In the case at bench, the addition of cable television equipment on surplus space on the telephone pole was within the scope of the easement. Although the cable television industry did not exist at the time the easement was granted, it is part

> of the natural evolution of communications technology. Installation of the equipment was consistent with the primary goal of the easement, to provide for wire transmission of power and communication. We fail to see how the addition of cable equipment to a pre-existing utility pole materially increased the burden on appellants' property."

212 Cal. Rptr. at 34-35.

The *Hoffman* case was cited with approval in the *Salvaty* case. In *Hoffman* the court also had to consider whether a cable television company was allowed to place its cables on existing utility poles. The court stated:

> "Plaintiffs claim, of course, that the additional use of the easement by Defendant will be to the damage of their property. Even if we were to assume an additional burden, this would not be sufficient to defeat an apportionment of exclusive easements, as were created herein:
>
> > Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability increases the

> value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable. This inference is very strong in cases where an increase in use is in fact advantageous to the possessor of the servient tenement (5 Restatement of the Law, Property, § 493, subd. [c]).

383 N.Y.Supp.2d 676-677.

* * *

"We agree with the Special Term that the licenses granted to Defendant impose no burden on Plaintiffs greater than that contemplated by the original easements. This is an additional reason for allowing the apportionment herein sought."

383 N.Y.S.2d at 677.

In the *Jolliff* case, the court stated:

> "The easements involved here were granted for 'transmitting electric or other

power, including telegraph and telephone wires.' It is apparent that the attachment of a television coaxial cable, which is comprised of bound wires for transmitting high frequency electrical impulses, is a use similar to that granted in the easements to Ohio Power. In fact, such use constitutes no more of a burden than would the installation of telegraph and telephone wires. That burden was clearly contemplated at the time of the grants, as evidenced by the specific reference to telegraph and telephone wires therein."

269 N.E.2d at 591.

* * *

"'There is no additional burden imposed by the grantee. Nothing granted to the plaintiff enables it to do anything which the original grantee could not have done. The latter could have hung a toll cable of its own from the cross arms upon its poles. It could have put up guy wires or poles needed for the support of the poles carrying the cable, and such apparatus as was necessary to enable its wires so hung to transmit telephone and telegraph messages. The plaintiff has done no more . . .'

> "That reasoning with which we agree, is equally applicable here, where Hardin Cable, in attaching its television cable to Ohio Power's poles, is doing no more than Ohio Power or a telegraph or telephone lessee could have done under the terms of the original grants. We therefore conclude that the attachment of the television cable involved herein does not impose an additional burden on plaintiffs' lands."

269 N.E.2d at 591.

Therefore, it appears to the Water District that any transfer of reserve line capacity to third parties by the Water District in this case is permitted under the doctrine of apportionment of easements.

5.. Is such fiber optics cable sharing also authorized by the powers expressly delegated to the Water District by the Texas Legislature or those powers which exist by implication? *See Bullock v. Greer*, 353 S.W.2d 929 (Tex. Civ. App.--Eastland 1962, writ ref'd n.r.e.) (Water District had power to condemn land for raising highway in order to construct a reservoir despite having no express right to condemn highways because District was authorized to do whatever was reasonably necessary and convenient to accomplish the purposes of its creation) and *see Tri-City Fresh Water Supply District No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 946 (Tex. 1940) (a District created

under Article 16, Sec. 59 of the Texas Constitution may exercise expressly delegated powers or those which exist by implication); as to the powers of water control and improvement districts, see Texas Water Code Sec. 51.121 (which allows a water control and improvement district to provide for "the control, storage, preservation and distribution of its water . . . for irrigation power and all other useful purposes" and allows this to "be accomplished by any practical means"; Sec. 49.211 of the Water Code (which gives the Water District the "functions, powers, authority, rights and duties that will permit accomplishment of the purposes for which it was created or purposes authorized by the Constitution, this Code or any other law." The District also "is authorized by Sec. 49.211 to purchase, construct, acquire, own, operate, maintain, repair, improve or extend . . . any and all land, works, improvements, facilities, plants, equipment and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this Code or any other law"); Sec. 49.213 of the Water Code (the Water District "may contract with a person or any public or private entity for the joint construction, financing, ownership and operation of any works, improvements, facilities, plants, equipment and appliances necessary to accomplish any purpose or function permitted by a district . . ." The District "may enter into contracts with any person or any public or private entity in the performance of any purpose or function permitted by a district." Sec. 49.227 of the Water Code (the District "may act jointly with any other person or entity, private or public . . . in the performance of any of the powers and duties permitted by this Code or any other laws.") (Emphasis supplied)

6.. Is the additional use of the fiber optics cable by a telecommunication carrier, assuming that it causes no more damage to the land already burdened with a pipeline easement than if the cable were limited to the Water District's authorized SCADA use, "an additional burden" which entitles the landowner to additional compensation, or an "incidental use" for which the landowner receives no additional compensation?

A substantially similar case to these factual circumstances occurred in *Mellon v. Southern Pacific Transport Co.*, 750 F.Supp. 226 W.D. (Tex. 1990), where the court addressed the following facts:

> Southern Pacific had a railroad right-of-way across the landowner's property.
>
> Southern Pacific granted MCI an easement to install a fiber optic cable 36-inches to 40-inches below the ground on the railroad right-of-way, permitting MCI to use a portion of the cable for MCI's telecommunication system, provided that MCI gave supporting telecommunications capacity to Southern Pacific. *Id.*, 750 F.Supp. at 229.
>
> After the landowner challenged Southern Pacific's right to grant MCI this easement, the *Mellon* court granted summary judgment for Southern Pacific and MCI because:

Southern Pacific had the right to contract with MCI for installation of the fiber optic cable beneath the railroad's right-of-way even if the cable was to be utilized in part for commercial non-railroad uses.

The fiber optic cable was an "incidental use" that was not inconsistent with the purposes for which Southern Pacific's right-of-way was granted.

The landowner was not entitled to any compensation, because the landowner had not retained any interests in the railroad's easement for which it should receive rents. *Id.* at 230-231.

Also see *Joyce v. Texas Power & Light Co.*, 298 S.W. 627 (Tex. Civ. App.—El Paso 1927, no writ), where the condemnation by a power company for an electric transmission lines easement allowed a secondary use of telephone wires for the power company's sole private use.

As in the *Mellon* case, the Water District's "incidental use" of the fiber optic communications line by leasing excess capacity to third parties does not change the public purpose of the Water District's pipeline easements.

To the same general effect are the *Cousins*, *Salvaty*, *Hoffman* and *Jolliff* cases cited above in connection with issue number 4.

But compare Clutter v. Davis, 62 S.W. 1107 (Tex. Civ. App. 1901, writ ref'd), where the court held that the digging of wells in a public road for the purpose of furnishing water to persons and animals passing over the road was not "a right incidental to such road's use and created an additional easement entitling the owner of the fee to compensation."

The Water District submits that *Clutter v. Davis* is clearly distinguishable because the digging of the wells clearly (i) causes more damage to the land as opposed to the leasing of space in an existing fiber optics cable and (2) is entirely unrelated to the purpose of the original road easement.

7.. Is this an illegal "recoupment"? The "recoupment theory" refers to a means by which the government can finance a public project by taking more property rights than necessary for the project itself to later resell or lease to third parties to generate income for the government with which it might pay project costs. *See Annot.*, 6 A.L.R.3d 297, 311 (1966) and 2A NICHOLS ON EMINENT DOMAIN § 7.06[7][d] (1933). The recoupment theory has not been adopted in Texas. *See Atwood v. Willacy Co. Nav. Dist.*, 271 S.W.2d 137 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

The Water District submits that the "recoupment theory," even if it existed under Texas law, is not applicable to the questions posed because the pipeline easements were acquired long ago and

expressly authorize the installation of electric and communication lines and the landowner was compensated for these uses at the time of the taking or negotiation of the original pipeline easements. Further, if the "recoupment theory" might otherwise apply, Nichols has noted that it does not apply if the excess was not acquired *with the preconceived idea of reselling it for profit.* 2A NICHOLS ON EMINENT DOMAIN § 7.06[7][d] (1993).

We respectfully await your reply and opinion.

Yours truly,

TIM CURRY