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J.E. "BUSTER" BROWN  
STATE SENATOR

June 4, 2002

RQ-0563-JC

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

FILE # ML-42663-02  
I.D. # 42663

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OFFICE OF THE ATTORNEY GENERAL  
EXECUTIVE ADMINISTRATION

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RE: Request for Attorney General opinion regarding whether the Texas Department of Transportation's establishment of controlled access lines at the outer right-of-way boundary of a controlled access highway precludes (1) an electric utility from exercising its statutory right to construct, maintain, and operate lines under TEX. UTIL. CODE § 181.042, and (2) a gas utility from exercising its statutory right to lay and maintain gas facilities under TEX. UTIL. CODE § 181.022.

Dear Attorney General Cornyn:

Reliant Energy, Incorporated ("Reliant") proposes to extend its existing electric and gas facilities in the right-of-way along State Highway 288 ("SH288"), as shown on Exhibit A, to serve a rapidly-developing community south of Houston. Reliant's utility facilities have existed for years along certain sections of the SH288 right-of-way without any adverse impact on traffic, safety, or repair of the highway. Based on a "controlled access highway" designation, however, the Texas Department of Transportation ("TxDOT") now prohibits Reliant from extending its existing electric and gas facilities along SH288.

Texas statutory law affords electric and gas utilities the express and broad right to construct and maintain their facilities along public highways such as SH288. TEX. UTIL. CODE § 181.022 ("A gas utility has the right to lay and maintain a gas facility through, under, along, across, or over a public highway, a public road, a public street or alley, or public water.") and § 181.042 ("An electric utility has the right to construct, maintain, and operate lines over, under, across, on, or along a state highway, a county road, a municipal street or alley, or other public property in a municipality."). A utility proposing to exercise that right by placing its facilities in a public highway right-of-way must first give notice of the proposal to TxDOT's Texas Transportation Commission, not to obtain approval to use the right-of-way generally, but so that TxDOT "may designate the location along the right-of-way" where the electric or gas facility may be located. TEX. UTIL. CODE § 181.024(b) and § 181.044(b). TxDOT's authority to designate the location of the facility is limited by the fact that it has no authority to simply designate that the facility be located somewhere other than in the public highway right-of-way.

In 1963, Attorney General Waggoner Carr issued Opinion No. C-139, which addressed the utilities' statutory right to locate facilities in public highway right-of-ways as well as TxDOT's discretion to "designate the place on the highway right of way where the [facilities] may be placed." Attorney General Carr's opinion was that TxDOT's discretion to designate the place for the location of the facilities, along with the right to require the utility to relocate the facilities "to permit the widening or changing of traffic lanes," "is the only authority granted to the Highway Commission under the Act." The opinion concluded that TxDOT had no authority to altogether refuse to permit a utility to place facilities along public highway right-of-ways. The question presented herein is similar in subject matter to that presented to Attorney General Carr, but arises now in the context of TxDOT's Utility Accommodation Policy ("UAP"), a regulation which did not exist at the time of the Carr opinion, with respect to "controlled access highway" designations.

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The Texas Transportation Code allows TxDOT to designate certain highways as controlled access highways. TEX. TRANSP. CODE § 203.031 ("The commission... may... designate a state highway of the designated state highway system as a controlled access highway."). In 1976, TxDOT implemented the UAP, which restricts longitudinal utility facilities within "control of access lines" along such TxDOT-designated controlled access highways. 43 T.A.C. §§ 21.31-56. Control of access lines generally effect a restriction on access to the high-speed main lanes of traffic and are typically located between the main lanes and the feeder roads, as shown on Exhibit B. The remaining right-of-way may then be used by the utilities to locate their facilities pursuant to their statutory right of access.

Along SH288, the TxDOT-drawn control of access lines are impermissibly broad, as shown on Exhibit C, extending to the very borders of the 500-foot-wide right-of-way instead of maintaining the usual space between the lines and the edge of the right-of-way. It is because of this coincidence of the control of access lines and the edge of the SH288 right-of-way that TxDOT refuses Reliant's proposal to locate facilities along that highway. The manner in which TxDOT has drawn the control of access lines along SH288 effectively precludes all utilities from locating facilities along that portion of the public highway.

Although the UAP itself expressly states that it does not alter a utility's existing statutory right to locate facilities in public highway right-of-ways, 43 T.A.C. § 21.36(a) ("Under existing state laws, various utility firms and agencies have a right to install their lines along and/or across highway right-of-way.") and § 21.34 (The UAP "do[es] not alter current authority"), as implemented, it in fact violates Texas utilities' pre-existing statutory right to provide electric and gas service using the public highways. When TxDOT draws control of access lines to coincide with the boundary of the public highway right-of-way, the UAP prohibits utility facilities altogether in that location. The only alternative for the utility in such a situation is to satisfy the elements required to qualify for an exception to the UAP prohibition, 43 T.A.C. § 21.37©)(1)-(4), which is a burden on utilities not contemplated by the applicable statutory provisions ensuring access to public highways.

Based on the foregoing, I respectfully submit the following questions for your opinion:

1. Does TxDOT's establishment of controlled access lines at the outer right-of-way boundary of a controlled access highway preclude an electric utility from exercising its statutory right to construct, maintain, and operate lines under TEX. UTIL. CODE § 181.042 (Vernon 1998)?
2. Does TxDOT's establishment of controlled access lines at the outer right-of-way boundary of a controlled access highway preclude a gas utility from exercising its statutory right to lay and maintain gas facilities under TEX. UTIL. CODE § 181.022 (Vernon 1998)?

Reliant seeks to serve its prospective customers in the south Houston area with the same standard service available in its current utility system by utilizing the right-of-way along SH288. Despite the clear statutory mandate to the contrary, however, TxDOT continues to altogether refuse Reliant's proposal to locate utility facilities along that public highway. Recently, Governor Rick Perry outlined his plan for transportation and transmission corridors for Texas, with the thought of having highway, utilities, and water conduits being orderly arranged through a corridor of right-of-way. The current interpretation and application of policies at TxDOT appears to run counter to the governor's proposal.

Thank you for your prompt consideration of this request. Please do not hesitate to contact me if you should require any additional information.

Sincerely,



JEB:jlb