



THE ATTORNEY GENERAL
OF TEXAS

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November 17, 1969

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Dr. George J. Beto, Director
Department of Corrections
Huntsville, Texas 77340

Opinion No. M- 508

Re: Whether the Texas Board of Corrections must collect from public utilities a fair consideration for placing public utility lines on or across existing public roadways traversing State land under the control of the Department of Corrections, and related question.

Dear Dr. Beto:

In your request for opinion of this office, you present the following questions:

- 1) Is the Texas Board of Corrections obligated to collect and must public utilities pay a fair and adequate consideration for placing public utility lines in, on, along, over or across existing public roadways which traverse State-owned land which is under the custody and control of the Texas Department of Corrections?
- 2) May the Texas Board of Corrections, in the grant of a public roadway easement, limit the use of such easement to roadway purposes only and reserve the exclusive right to grant public utility easements in, on, along, over or across such roadway easement?

Section 1 of Article 6203d, Vernon's Civil Statutes, authorizes the Texas Board of Corrections, with consent of the Governor and Attorney General, to:

". . . grant permanent and temporary right-of-way easements for public highways, roads and streets, and ditches, and for electric lines and pipelines consisting of wires, pipes, poles and other necessary equipment for the transmission or conveyance

of, or distribution of, water, electricity, gas, oil or other similar substances or commodities, . . . along, across and over any and all lands now owned by the State of Texas as a part of the Penitentiary System, . . ."

Section 2 of the same Article provides that ". . . such grants and leases shall be executed only upon a fair and adequate consideration. . . ."

However, public utilities - including telephone, telegraph, water, gas and electric corporations - are given express legislative authority by virtue of such Articles as 1416, 1433, 1436a and 1436b, Vernon's Civil Statutes, to lay their lines along, over and across public streets and highways within the State.

The Court in Jones v. Carter, 101 S.W. 514 (Tex.Civ.App. 1907, error ref.) stated at page 516:

". . . Light, sewers, gas, and waterworks are among the common necessities of modern cities, and it is a matter of common knowledge that such plants cannot be constructed and operated without running the lines and mains along or across the streets. They are some of the common uses to which streets are necessarily devoted."

It has been recognized further that it is in the public interest to receive utility services; therefore, public utilities are authorized to use the streets and highways. State v. City of Austin (State v. City of Dallas), 160 Tex. 348, 331 S.W.2d 737 (1960).

The Legislature acting for the State has primary and plenary power to control public roads and streets. Recognizing this proposition, the Court in State v. City of Dallas (State v. City of Austin), 319 S.W.2d 767 (Tex.Civ.App. 1959, aff. 331 S.W.2d 737) said at page 773:

"There can be no question but that the Legislature can lawfully permit cities and private corporations to place facilities in streets and highways to provide essential utility service for the public, . . ."

The Legislature has seen fit to grant direct statutory authorization to public utilities to use public roads and

highways. Some such authority is found in Articles 1416, 1433, 1436a and 1436b, Vernon's Civil Statutes. It would therefore appear that Article 6203d, Vernon's Civil Statutes, would be rendered inapplicable to the question presented, since no additional grant of an easement would be necessary in order to entitle public utilities to take advantage of the right-of-way of existing public roadways. Accordingly, the Texas Board of Corrections would not be obligated to collect, nor public utilities required to pay, for placing lines in, on, along or across existing public roadways traversing State land under the custody and control of the Texas Department of Corrections.

Question 2 relates to the power of the Texas Board of Corrections to grant an easement for roadway purposes, while reserving the exclusive right to grant public utility easements along and across the roadway easement.

It has been held that the erection of telephone poles and wires along a public street or highway does not impose an additional servitude upon the highway so as to require the public utility to condemn the land of the street for that purpose. Roaring Springs Town-Site Co. v. Paducah Telephone Co., 164 S.W. 50 (Tex.Civ.App. 1914, aff. 212 S.W. 147). It has further been held that the statute so authorizing is constitutional, though no additional compensation is provided. Huffaker v. Lea County Electric Co-operative, 344 S.W.2d 915, 918 (Tex. Civ.App. 1961, error ref. n.r.e.); accord, Continental Pipe Line Co. v. Gandy, 162 S.W.2d 755, 757 (Tex.Civ.App. 1941, error ref. w.o.m.)

In Roaring Springs Town-Site Co. v. Paducah, 109 Tex. 452, 212 S.W. 147 (1919), an attempt had been made to dedicate streets and alleys in a townsite for public use, while reserving exclusive right to grant, for valuable consideration, the right to use the streets and alleys to construct telephone, telegraph, electric wires and poles, and gas, water and sewer mains. The Court held that under the public policy of the State, a public utility corporation had the authority to construct and maintain its poles and lines along the streets and alleys dedicated for public use. The Court stated at page 148:

". . . the attempt to reserve . . . a right inconsistent with such authority cannot be upheld. For the general rule that the dedicator may impose such restrictions as he may see fit on making a dedication of his property is subject to the thoroughly established limitation that the restriction be not repugnant to the dedication or against public policy. . . ."

The Legislature, by virtue of Articles 1416, et seq., has authorized public utilities to place their lines in, over, along and across public streets and roads within the State. Such authorization is not restricted to roads and highways to which the State or County owns the fee. Continental Pipe Line Co. v. Gandy, 162 S.W.2d 755, 757 (Tex.Civ.App. 1941, error ref. w.o.m.).

Therefore, by applying the same reasoning advanced in the Roaring Springs Town-Site Co. case, the attempt to reserve exclusive right to grant a public utility easement over a roadway easement would be inconsistent with the direct legislative grant of authority to public utility companies to lay their lines over, along and across any public road, street or highway within the State.

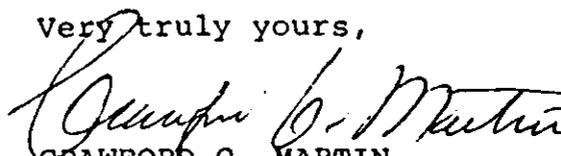
Accordingly, question 2 is answered in the negative. The Texas Board of Corrections is neither authorized nor entitled to limit the use of a public roadway easement to roadway purposes only, while reserving the exclusive right to grant public utility easements in, on, along, over or across such roadway easement.

S U M M A R Y

Public utilities, by virtue of the direct legislative grant of Articles 1416, 1433, 1436a, 1436b, and other similar Statutes, are authorized to place their facilities within the right-of-way along public roads, streets and highways in this State. Therefore, the Texas Board of Corrections is not obligated to collect nor must public utilities pay for placing their lines in, on, along, over or across existing public roadways which traverse State-owned land under the custody and control of the Texas Department of Corrections.

Accordingly, the Texas Board of Corrections is without power to reserve, in the grant of an easement for public roadway purposes, the exclusive right to grant public utility easements over such public roadway easement.

Very truly yours,


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