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AND PUBLIC TRANSPORTATION

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JULY 1, 1991

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RO-124

CONTACT:

Honorable Daniel C. Morales  
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Supreme Court Building  
Austin, Texas 78711

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Opinion Committee

Dear General Morales:

I am writing to solicit your opinion on a matter of concern to the State Department of Highways and Public Transportation (SDHPT). Below, we have set out our concern and some relevant authorities.

**Questions Presented:** May the State Department of Highways and Public Transportation require a public utility to indemnify the State and the Department prior to allowing the utility to use Department right of way to lay utility lines or pipes or perform other utility related work on the right of way?

Concern

As a routine matter, various public utilities in the state utilize SDHPT right-of-way (ROW) to lay their utility lines or pipes. Prior to such work being commenced, SDHPT requires the utility in question to execute a "Notice of Proposed Installation Utility on Controlled Access Highway" (copy enclosed). As you can see there is no indemnity provision in favor of SDHPT in this document. We are contemplating the insertion of such an indemnification clause to read substantially as follows:

Our Firm shall indemnify and save harmless the STATE and the State Department of Highways and Public Transportation, its employees, agents and officers, from all claims and liability due to activities as described herein, of our firm, our agents, contractors, officials or employees, and which result from an error, omission, or negligent act of

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our firm, our agents, contractors, officials, or employees. Our Firm shall also save harmless the STATE and the SDHPT in litigation or otherwise resisting said claim or liabilities which might be imposed on the STATE and SDHPT as the result of such activities by our firm, our agents, contractors, officials or employees.

Before revising our agreements with public utilities, we would go through appropriate rulemaking so as to specifically allow for indemnification in this area. Thus, we would amend and supplement those rules already in place which deal with public utilities' use of ROW. See 43 TAC Sec. 21.31 et seq.

#### Authorities

Public utilities in this state generally have the right to utilize highway ROW to lay their lines and pipelines. For example, See Tex.Rev.Civ.Stat.Ann., arts. 1416, 1528C, 1433, and 1434a. It is anticipated that some public utilities will point to these statutes, and others which are similar, as authority for the proposition that SDHPT absolutely cannot require indemnification while the utility is performing work on the SDHPT ROW. We believe this would be a misreading of the law. Our position is that, while public utilities do have the right to use SDHPT ROW to lay their lines and pipes, SDHPT has the right to impose reasonable conditions on the public utilities during the time of their work project on SDHPT ROW inasmuch as the highway use of the ROW is the dominant use. In other words, the use of the ROW for highway purposes should take precedence, and, therefore, the SDHPT should be able to require indemnification from public utilities wishing to use SDHPT ROW for other than highway purposes.

In City of San Antonio v. Bexar Metropolitan Water District 309 S.W.2d 491 (Civ. App. San Antonio, 1958, writ ref.) it was stated at p. 492:

"The main purposes of roads and streets are for travel and transportation, and while public utilities may use such road and streets for the laying of their telegraph, telephone and water lines, and for other purposes, such uses are subservient to the main uses and purposes of such roads and streets."

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In this regard see also State v. City of Austin 331 S.W.2d 737 (Tex., 1960) at p. 741 where our Supreme Court said:

As pointed out in the Bexar Metropolitan Water District case, the main purposes of roads and streets are for travel and transportation. While public utilities may use the same for laying their lines, such use is subject to reasonable regulations by either the state, the county or the city, as the case may be.

Also, the Court in County of Harris v. Tennessee Products Pipe Line Co. 332 S.W.2d 777 (Hous. App., 1960, no writ), said at p. 779:

Appellees do not deny that appellant has general jurisdiction over the county roads within Harris County, nor that the Commissioners Court of the County may make and enforce all reasonable and necessary rules for the working and repairing of public roads, nor that public utility and common carrier use of such roads are subservient to the main use and purposes of such roads for travel.

See, also Travis-Williamson Water Control District v. State 359 S.W.2d 528 (Austin App., 1962, rev on other grounds 374 S.W.2d 214) quoting from State v. City of Austin, supra at p. 532 and Pittman v. City of Amarillo 598 S.W.2d 941 (Amarillo App., 1980, ref. n.r.e.) at p. 944 where the Court said:

The landowner's exercise of his fee title rights cannot interfere with or restrict the public use of the street, See Hill Farm, Inc. V. Hill County, supra, at 323; Hale County v. Davis, 572 S.W.2d 63, 65 (Tex.Civ.App.-Amarillo 1978, writ ref'd. n.r.e.). Any use by others that interferes with the exercise of the superior easement rights must yield (emphasis added). See, Travis Williamson Water Control District v. State, 359 S.W.2d 528, 532 (Tex.Civ.App.-Austin, 1962, writ ref'd n.r.e.); City of San Antonio v. Bexar Metropolitan W. Dist., 309 S.W.2d 491, 492 (Tex.Civ.App.-San Antonio 1958, writ ref'd).

General Dan Morales

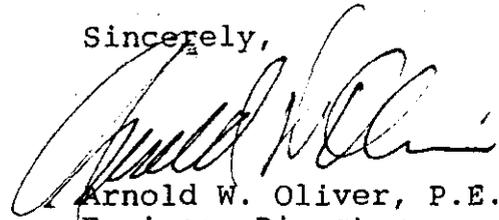
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CONCLUSION

SDHPT feels that the Department would be within its rights and would be acting according to legal precedent in requiring public utility companies to agree to an indemnification clause in favor of SDHPT and the State of Texas prior to allowing the utilities to use ROW for the laying of utility lines or pipes across said ROW. We solicit your opinion on this matter.

Sincerely,



Arnold W. Oliver, P.E.  
Engineer-Director