

NO. 06-0933

IN THE SUPREME COURT OF TEXAS

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC TEXAS,

Petitioner,

v.

HARRIS COUNTY TOLL ROAD AUTHORITY
AND HARRIS COUNTY,

Respondent.

On Appeal from the
Court of Appeals for the First District
of Texas at Houston, Texas

**BRIEF OF AMICUS CURIAE
GTE SOUTHWEST INCORPORATED
D/B/A VERIZON SOUTHWEST
IN SUPPORT OF PETITIONER**

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The First Court of Appeals' decision in this case creates serious and unnecessary uncertainty in an area of critical importance to the State. Because the decision involves important constitutional questions arising under state and federal law and because it involves one or more errors of law important to the jurisprudence of the State, Amicus urges the Court to grant the Petition filed by Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC") and to reverse the judgment of the court of appeals, as set forth more fully below.

INTEREST OF THE AMICUS

GTE Southwest Incorporated d/b/a Verizon Southwest ("Verizon") has invested billions of dollars in the State's telecommunications infrastructure. The vast majority of this investment represents physical facilities laid in and along the State's rights of ways under terms set forth in an 1874 Texas statute.

Like SBC, Verizon has functioned historically as a so-called "incumbent" carrier and as the "provider of last resort" in most of the areas where it provides regulated telecommunication services in Texas. Like SBC, Verizon has been continuously developing, upgrading, and expanding the network that has facilitated the State's growth and expansion for more than 100 years.

Verizon and SBC to this day are largely responsible for ensuring the State's "universal service" commitments are satisfied, meaning that the State's telecommunications infrastructure is available at reasonable cost to nearly all points in the State. Federal law requires that these historic facilities be made available to competing local service providers at rates that recognize Verizon's ownership. State law

has likewise operated on the understanding, settled in decisions of the Fifth Circuit and other courts for the past century, that these facilities laid by the original distance communications providers like SBC and Verizon (and their predecessors) represent a hugely valuable, constitutionally-protected interest in land.¹ As a result, this land interest has been included in Verizon’s annual property tax rendition and has been an important component of the State’s financial planning, including school financing.

These interests have also been the subject of decades of litigation and carefully crafted legislative compromises intended to balance the company’s rights to be present with Texas cities’ rights to recoup their cost of local supervision of the physical facilities.

The decision of the First Court of Appeals affects all of these interests in at least two distinct ways.

First, by erroneously holding that SBC has “no constitutionally protected property interest” in its facilities as they lay in the public right of way, the decision injects significant and unnecessary uncertainty into a formerly settled area of law of critical importance to both the telephone companies and the State itself. This aspect of the decision is squarely in conflict with decisions of the United States Supreme Court, other Texas Courts of Appeals, and the Fifth Circuit.

Second, the court of appeals erred with respect to its narrower holding—that telecommunications providers should be required to pay to relocate facilities in order to

¹ Before the 1960s, a substantial number of telephone service providers operated solely within the confines of Texas cities. A purely local telephone company had no right under Article 1416. *Alpine Tel. Corp. v. McCall*, 143 Tex. 335, 184 S.W.2d 830 (1945). Because these companies did not rely on the original statutory grant involved in this matter and thus have different rights, SBC and Verizon will be referred to as original distance communication providers.

facilitate the construction of a tollroad. Because Texas law did not impose such a condition on the original statutory offer—or at any point thereafter—a retroactive imposition of this nature would amount to a taking and/or an unconstitutional impairment of the obligation of contract.

ARGUMENT

The advanced state of telecommunications in Texas was not developed easily or at public expense. Rather, it was constructed over a century or more at great private cost as a result of an open offer made by the Texas Legislature to any company willing to develop the infrastructure. The 1874 statute that made that offer, and similar statutes in countless other states passed in the same era, have been construed, once acted upon, to vest in responding companies a constitutionally protected property right, subject only to the reservations and conditions stated in the original legislation.

As set forth in Verizon’s Brief in Support of the Petition, and as repeated below for the Court’s convenience, *infra* section I below, the resulting property right, in the nature of an easement, is protected against takings under the Fifth Amendment of the U.S. Constitution, and the right to maintain and extend facilities in accordance with the original offer is protected under the Contracts Clause. Additionally, because the Texas Constitution provides protections at least as substantial as those of its federal counterpart, the Court may wish to follow its policy of “[b]asing decisions on the state constitution whenever possible” and thereby “avoid unnecessary federal review.” *Davenport v. Garcia*, 834 S.W.2d 4, 16-18 (Tex. 1992); *see infra* Section III.

The premise of the holding below—that SBC and other historic providers of telecommunications service have no protected interest in the existing right of way—is in conflict with holdings in this State and elsewhere and wrongly implies that the billions of dollars permanently invested in the construction of a network embedded in the rights of way can be confiscated without cause or just compensation. Because telecommunications providers like SBC and Verizon, unlike other utilities, clearly do have a vested, taxable and constitutionally protected property right in the streets, alleys and rights of way as a result of their acceptance of the State’s offer to develop infrastructure, review from this Court is essential.

I. THE COURT OF APPEALS ERRED IN FINDING THAT SBC HAD NO PROPERTY RIGHT.

In the period following the Civil War, nearly every western state recognized that development of transportation and communications would be vital to development and economic progress. Unlike the industrialized northeast, most of the remaining states lacked both the well-developed economy and the population necessary to fuel expansion.² Hopeful of spurring growth and development, these states almost uniformly conveyed to railroads and telegraph (and later telephone) companies the “absolute”³ right to occupy the public rights of way and, further, to condemn private property where needed. Texas was no different.

² At the time Texas passed the Legislation at issue in this case, Texas had a population of less than one million people and not a single railroad line traversed its length. TEXAS ALMANAC 41 (1998 ed.).

³ *E.g., Mellon v. Southern Pac. Transp. Co.*, 750 F. Supp. 226, 231 (W.D. Tex. 1990).

In 1874, the Texas Legislature enacted a law broadly authorizing any company intending to “construct[] or maintain[] magnetic telegraph lines” to “set their poles . . . wires and other fixtures upon and across any of the public roads, streets and waters of this State in a manner as not to incommode the public in the use of such roads, streets and waters.” TEX. REV. CIV. STAT. art. 1416 (1874) (recodified at TEX. UTIL. CODE § 181.082). Recognizing the importance of an integrated, comprehensive telecommunications network to the development of the State, this Court quickly held the law to apply to telephone,⁴ as well as to telegraph, companies. *San Antonio & A.P. Ry. v. Southwestern Tel. & Tel. Co.*, 93 Tex. 313, 321-22, 55 S.W. 117, 119 (1900).

A. A Statutory Offer To Use The Rights Of Way To Develop A Distance Communications Network Creates A “Property Right” In The Form Of An Easement Once It Has Been Accepted.

Generations after the initial development of a comprehensive telecommunications network and the initial private investment that made that network possible, governments and the public often came to view the infrastructure as a public inheritance. Thus, in states across the country, local efforts to withdraw or substantially modify the grant to telecommunications providers began at the turn of the century and continued throughout. These efforts have uniformly failed, because, contrary to the holding below, the companies that developed the existing infrastructure have vested, constitutionally protected contract and property rights in the rights of way.

⁴ As noted above, the statutory grant has been held not to apply to purely local telecommunications providers.

1. The Court Of Appeals Decision Rejecting A Property Right Conflicts With Decisions Of The U.S. Supreme Court.

The Fifth and Fourteenth Amendments to the U.S. Constitution collectively protect private property from deprivation or taking without just compensation. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980) (finding Fifth Amendment's Takings Clause applicable to the states through the Fourteenth Amendment). Viewed through the lens of the federal Constitution, there can be no doubt that telecommunications carriers, like SBC and Verizon, acquire a vested interest in real property where they construct their facilities within them in response to the State's historic offer. Likewise, there can be no doubt that a local government action in physically ejecting the company from the right-of-way would constitute a *per se* taking requiring compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves straightforward application of *per se* rules."); *accord Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2006) ("physical possession is, categorically, a taking for which compensation is constitutionally mandated"). While the court of appeals decision in this case avoids the issue by declaring that SBC had no property right in its existing facilities, that conclusion is contrary to more than a century of unbroken caselaw to the contrary.

The first United States Supreme Court decision concerning whether a state's original statutory offer could ripen into a vested property right came shortly before World War I. *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649 (1912). There, the

State of Kentucky had chartered the Ohio Valley Telephone Company in 1886 and empowered it to lay lines along the rights of way in the City of Louisville, with the approval of its City Council. The City in fact gave its consent later in the same year, adding several very specific conditions, including, for example, a requirement that the company provide the City's fire and police departments with free services. The company then developed a network at substantial expense.

In 1908, "a difference arose between the City and the company," and "the city claim[ed] that the company's methods were dictatorial and oppressive, that it rendered poor service at high rates, and was guilty of discrimination among its patrons." *Id.* at 652. The City Council passed an ordinance repealing all existing rights, and authorized a new franchise, which was to be sold to the highest bidder.

The Supreme Court found nothing in the original legislation or the municipal acceptance to signal any reserved right to withdraw the right to use the rights of way. Quite to the contrary, the "municipality could not by an ordinance impair that contract *nor revoke the rights conferred.*" *Id.* at 659 (emphasis added). "Such a street franchise has been called by various names, an incorporeal hereditament, an interest in land, an easement, a right of way, *but, howsoever designated, it is property.*" *Id.* at 661 (emphasis added). And, "being property, it was taxable, alienable, and transferable." *Id.*

The Court went on:

In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires, and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances . . . could be revoked at will,

would operate to nullify the charter itself, and thus defeat the state’s purpose to secure a telephone system for public use. ***For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will***

Id. at 663-64 (emphasis added).

As the Iowa Supreme Court would later put it: “courts are confined to a definition of the rights under the original grants, save as they may be modified under the reserved power of the state.” *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323, 332 (Iowa 1917) (emphasis added).

The *City of Louisville* decision “is still good law.” *Lexington-Fayette Urban County Gov’t v. Bellsouth Tel.*, 14 Fed. App’x 636 (6th Cir. 2001). Indeed, the Supreme Court itself has continually applied this rule and reconfirmed that many—though not all—utilities enjoy a property right in the rights of way, contrary to the First Court of Appeals’ decision in this matter. *E.g.*, *Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U.S. 84, 90 (1913) (“The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right.”); *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913) (rejecting claim that grant did not “vest[] a property right capable of passing to an assignee”).

For example, in 1914, the Supreme Court confronted an effort by the City of Los Angeles to withdraw the previously conferred right to lay gas lines. *Russell v. Sebastian*, 233 U.S. 195 (1914). While the lower court had at least acknowledged the existence of a

property right, it nonetheless upheld a local regulation prohibiting the expansion of the existing gas lines without paying a further fee.

Looking forward to the expansion of the facilities, and accepting that public grants are to be strictly construed, the *Russell* Court nonetheless concluded that “there is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required” *Id.* at 206. While the state “could have imposed whatever conditions it sought fit to impose,” none could be implied after the fact. *Id.* at 207. The “offer was made” and when the “service was entered upon and the . . . corporation had changed its position beyond recall.” *Id.* at 208.

The First Court of Appeals, acknowledging none of these cases, simply declared “[t]hat the legislature has authorized SBC to make use of a public right-of-way does not mean SBC has somehow acquired a vested property right.” *Harris County Toll Road Authority v. Southwestern Bell Tel., L.P.*, No. 01-05-00668-CV, 2006 WL 2641204, at *15 (Tex. App.—Houston [1st] 2006, pet. pending) (“HCTRA”). The court relied primarily on cases dealing with electric utilities, which as noted below and in the decisions of this Court and others, hold materially different rights.

2. The Court Of Appeals Decision Is Also Squarely In Conflict With Decisions In This State And Others.

Efforts to withdraw or modify the easements originally granted to telecommunications companies and others did not come to an end with *City of Louisville* and its Supreme Court progeny. In particular, the more specific question of whether any property right obtains in favor of a telecommunications provider who has acted in

response to a statutory offer to develop the infrastructure is a recurring one and almost invariably given the same answer. Where, as in Texas, the statute makes an open offer, a subsequent effort to revoke it or to add material conditions affects a property interest.

Texas decisions recognizing, directly or by necessary implication, that the *telephone* companies enjoy a vested property right abound. In *Incorporated Town of Hempstead v. Gulf States Util.*, 146 Tex. 250, 206 S.W.2d 227 (Tex. 1947), the court of appeals had found a vested property right in favor of *electric* companies based on the historic legislation concerning their right to access the State’s rights of way, Article 1435a. The company in that case had not secured a separate local franchise and thus relied entirely on Article 1435a.⁵ This Court reversed, based in large part on the difference in the original statutory authorizations: “It must be regarded as significant that long distance telephone . . . , which do have the right to erect their poles and wires along and upon public ways, were given that right by the legislature in clear language.” *Id.* at 230; *see also Texas Power & Light v. City of Garland*, 431 S.W.2d 511, 516 (Tex. 1968) (describing telephone company’s “vested right to use the streets”).⁶

Texas courts have also addressed the question with respect to the assessment of property taxes. Once again, this Court and others have held that a grant authorizing use

⁵ Of course, where the electric company did secure specific, local consent, the right to maintain the facilities clearly was specifically recognized as a “vested or valuable property right.” *City of Baird v. West Tex. Util.*, 174 S.W.2d 649, 654 (Tex. Civ. App.—Eastland 1943, writ ref’d) (citing *Cumberland Tele. and Boise Hot & Cold Water*).

⁶ Some years earlier the Court addressed the validity of a charge imposed by cities based on the local presence of electric lines. The court of appeals found both a vested and constitutionally protected property right and that the cities lacked authority to impose a charge. *Houston Lighting & Power v. Fleming*, 128 S.W.2d 487, 490-92 (Tex. Civ. App.—Galveston 1939). This Court reversed, finding authority to impose the fee without reaching or addressing the question whether any property right was affected. *Houston Lighting & Power v. Fleming*, 135 Tex. 463, 138 S.W.2d 520 (Tex. 1940).

of a right of way, once accepted by investment and construction, vests a property right in the company. For example, this Court, quoting from *City of Louisville* and its progeny, found it “well settled” that the right of a railroad to lay lines in the public streets constitutes “property” for purposes of taxation. *Texas P. Ry. Co. v. City of El Paso*, 126 Tex. 86, 85 S.W.2d 245, 249 (1935). The Galveston Court of Appeals specifically held that a telegraph company’s use of the rights of way under Article 1416 constitutes “real property” subject to taxation. *Western Union Tel. Co. v. City of Houston*, 192 S.W. 577, 579 (Tex. App.—Galveston 1917, writ dismissed w.o.j.).

The Fifth Circuit, also applying Texas law and the *City of Louisville* decision, came to the same conclusion with respect to SBC’s telephone system in the City of Fort Worth. *City of Fort Worth v. Southwestern Bell*, 30 F.2d 972 (5th Cir. 1936). To this day, the revenues generated from these rulings are considered critical by local authorities. *E.g., Fort Worth I.S.D. v. City of Fort Worth*, 22 S.W.3d 831 (Tex. 2000) (upholding school district’s claim to portion of local fees). Put simply, the right to be present in the right of way cannot constitute “property” for purposes of taxation but cease being “property” for purposes of protection from confiscation.

The First Court of Appeals’ decision is also at odds with decisions of courts in other states. For example, the Iowa Supreme Court has addressed the issue twice in the past century. First, in 1917, the Court set aside an attempted local charge on the privilege of putting poles in the right of way, in the face of an earlier Iowa statute conferring that right in 1882. *City of Des Moines*, 162 N.W. at 323. Citing *Cumberland Telephone* and

its progeny, the Iowa Supreme Court found the company's presence to be protected by the federal Constitution, noting:

In the early history of every city and state in this age of scientific development and discovery new and important devices intended for the use and benefit of the people are eagerly sought after and generally encouraged ***The people of both the state and its instrumentalities are anxious to secure the advantage of these improvements, and so they . . . grant them most favorable franchises in order [to] keep up with the times Ofttimes, too, this has been necessary in order to induce the investment of capital. This has happened with reference to railroads, telephones, and telegraphs, waterworks, and various other utilities*** At this stage the Legislature was appealed to, and no one thought at that time of charging for the use of poles or wires upon either public highways or streets. The main thing was to secure them and to get capital wherewith to procure them

Id. at 332 (emphasis added).

The issue arose again in 1999. There, the City relied heavily on “cases [involving] distinctly different statutory schemes governing utilities other than telephone systems.” *City of Hawarden v. US West Commc’n*, 590 N.W.2d 504, 508 (Iowa 1999). Noting the uniquely broad historic grant to telephone service providers, the Court once again rejected an attempt to modify the terms that preceded the development. *Id.* at 509.

In 1956, the State of Mississippi enacted legislation attempting to require the historic incumbent telephone provider, Southern Bell, to pay a fee to municipalities despite an earlier, unencumbered grant of access to the state's rights of way. Once again, noting the vested nature of the right, the Mississippi Supreme Court recognized the company's vested contract and property rights and held the statute to be unconstitutional. *Southern Bell Tel. & Tel. v. City of Meridian*, 131 So.2d 666, 675 (Miss. 1961). As the

Court itself noted: “[t]his is one of those rare cases where the overwhelming weight of authority on a constitutional issue supports a particular result.” *Id.* at 702.

Again, despite its sweeping and erroneous conclusion to the contrary, the First Court of Appeals’ decision does not cite or discuss any of these many cases holding that a telephone company has a property interest in the rights of way.

B. Texas Did Not Provide Notice That Facilities Would Forever Be Subject to Relocation At The Provider’s Expense.

As the First Court of Appeals acknowledged, a utility cannot be required to relocate facilities where it holds a vested property interest. *CenterPoint Energy Houston Elec. v. Harris County Toll Road Auth.*, 436 F.3d 541, 543 n.3 (5th Cir. 2006). As noted above, the Supreme Court and several state courts of last resort have concluded that the grant to historic providers of distance telecommunications confers a vested property right, subject only to the reservations noted in the original offer. *Russell v. Sebastian*, 233 U.S. 195 (1914). “Courts are confined to a definition of the rights under the original grants, save as they may be modified under the reserved power of the state.” *City of Des Moines*, 162 N.W. at 332; *Southern Bell Tel. & Tel. v. City of Meridian*, 131 So.2d 666, 675 (Miss. 1961).

Notably, the Texas statute inviting development of telecommunications contained *no* reservation requiring that telephone company’s facilities might forever be relocated at the company’s expense. Rather, it authorized the companies to “construct[] or maintain[] magnetic telegraph lines” and to “set their poles . . . wires and other fixtures upon and across any of the public roads, streets and waters of this State in a manner as not to

incommode the public in the use of such roads, streets and waters.” TEX. REV. CIV. STAT. art. 1416. The statute never authorized the state to compel relocation at all. Only specific authorization to compel relocation of telecommunication facilities concerned municipalities and lines located within their limits, which held the exclusive power to franchise and regulate local telephone service until the 1970s. *See* Tex. Util. Code § 52.002. And while that statute uniquely conferred to cities the power to effect the taking, it did not purport to relieve them of the obligation to compensate for the cost of relocation. Tex. Util. Code § 181.089.

The Iowa statute at issue in the *City of Des Moines* provides a vivid contrast. The Iowa statute, passed in 1873, the year prior to Texas’s, likewise provided “any person or company may construct a telegraph or telephone line along the public highways of this state, or across the rivers or lands belonging to the state.” 162 N.W. at 324. And, like Texas, Iowa required that the lines, when initially placed, “must not be constructed as to incommode the public in the use of any highway or the navigation of any stream.” However, *unlike* Texas, the Iowa statute also imposed a further condition on all facilities: “Provided, that when any highway along which said line has been constructed shall be changed, said person or company shall . . . remove said line to said highway as established.” *Id.*

But the Texas telephony statute is not only different from those used in other states prior to its enactment, it is also far different from other *Texas* statutes dealing with other utilities. For example, the statutory authorization to lay gas and electric lines in Texas’ rights of way, TEX. REV. CIV. STAT. arts. 1435a and 1436b, included the following

language absent from Article 1416: “The public agency having jurisdiction or control of a highway . . . may require such person, firm, or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures”

Unsurprisingly, this Court and others have emphasized the obvious distinctions between the treatment of telephone and other utility services. *Incorporated Town of Hempstead*, 146 Tex. 250, 206 S.W.2d at 230; *see also City of Hawarden*, 590 N.W.2d at 508 (noting differing treatment of phone companies with respect to use of rights of way); *City of Cambridge v. Public Util. Comm’n*, 111 N.E.2d 1, 6 (Ohio 1953).

The reason for the differing offer to telephone and telegraph companies was obvious from the outset: “These companies are not primarily of local concern, affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted.” *City of Texarkana v. Southwestern Tel. & Tel. Co.*, 106 S.W. 915, 917 (Tex. Civ. App.—Texarkana 1907); *see also Diginet v. Western Union, ATS, Inc.*, 958 F.2d 1388, 1400 (7th Cir. 1992) (observing that telephone system by its nature must be free from local inference).

II. THE COURT OF APPEALS RESORT TO A CONTRARY COMMON LAW RULE FAILS IN VIEW OF CONTROLLING STATUTORY AND CONSTITUTIONAL PROVISIONS

Relying on a United States Supreme Court case applying Virginia law, the court of appeals began its takings analysis with the “long-established common law principle” that utilities forced to relocate from a public right-of-way must do so at their own expense.

HCTRA, 2006 WL 2641204 at *14 (citing *Norfolk Redev. & Hous. Auth v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 34 (1983)). The court’s reliance on *Norfolk* and the common-law rule is grossly misplaced. To begin with, the facilities in *Norfolk* had been placed under a franchise agreement that provided “the City could require C&P to move its facilities at any time, with all expenses of the move *to be borne by C&P.*” 464 U.S. at 33, n.3 (emphasis added).

Moreover, as *Norfolk* itself acknowledges and the Fifth Circuit recently recognized, this common-law rule, like any common law, “controls only where there is no conflicting or controlling statutory law.” *CenterPoint Energy*, 436 F.3d 544. Obviously some states, have effectively “altered the common law in order to reimburse utilities for the costs of relocation.” *Norfolk*, 464 U.S. at 40. Insofar as *telecommunications providers* are concerned, Texas has altered the common-law rule in at least two ways.

First, as detailed above, Texas has specifically and uniquely assured telecommunications provider’s continuing access to the right of way by statute, and the right to continued occupation is assured by the federal Constitution in the absence of notice of reservation in the original offer of a power to require relocation at the company’s expense.

Ostensibly, other utilities, such as water providers, were not regarded as so essential to the interests of the state as a whole that their use of the right of way could be considered “subservient to the main uses and purposes of such roads and streets;” as a result of this supposed “subservient” status these utilities were given the statutory right to

be present only so long as current road uses permitted. *City of San Antonio v. Bexar Metro. Water Dist.*, 309 S.W.2d 491, 492-93 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); *see, e.g.*, Texas Local Gov't Code § 402.105 (requiring “water corporations” to relocate water lines at “corporation’s . . . own expense”); Tex. Water Code §§ 49.220, 49.223 (authorizing use of right of way but requiring expenses associated with relocation to be paid “at corporation’s sole expense”).

That was never the State’s understanding of the telecommunications infrastructure. Rather, “[q]uite a responsible array of authorities [holds] the erection of a telephone or telegraph line [as] consistent with . . . the use of the streets by vehicles or any other accustomed mode of conveyance” [T]his method of transmission is an economical substitute for actual travel, reducing time, minimizing energy, and lessening . . . cost”; it **“is not an additional burden upon the property, but is wholly consistent with one of the principal purposes for which the street was dedicated.”** *Roaring Springs Townsite Co. v. Paducah Tele. Co.*, 164 SW 50, 56 (Tex. Civ. App.—Amarillo 1914) (emphasis added), *aff’d*, 109 Tex. 452, 212 S.W.2d 142 (1919) (invalidating attempt to reserve telecommunications use of right or way from original dedication as contrary to overarching state policy promoting communications).

Thus, the First Court’s resort to authorities like *Bexar Metropolitan Water District*, dealing with utilities having very different statutory authorization, or authorities like

State v. City of Austin,⁷ merely presuming application of a common-law rule to all utilities as a general matter, do little to advance the issue.

In a material respect, the First Court correctly identified the controlling principle – that the general common-law rule requiring relocation at the utility’s expense “is altered when the utility required to relocate holds a pre-existing ownership interest, such as an easement, in the property from which the . . . facilities were relocated,” *HCTRA* at * 14 – but misapplied it to the unique circumstances attending a telecommunications company in Texas. That is, the court simply erred in failing to recognize that telecommunications companies have in fact acquired a taxable, constitutionally property interest “in the nature of an easement.” *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649, 661 (1912); *City of Fort Worth v. Southwestern Bell*, 30 F.2d 972 (5th Cir. 1936).

Second, as SBC explains at length in its brief, Texas has specifically required counties to reimburse the costs associated with the relocation of facilities under Chapter 251 of the Transportation Code and waived their immunity to suit for those purposes as to all eligible utilities. SBC Br. at 14-17, *City of Austin*, 331 S.W.2d at 746

⁷160 Tex. 348, 331 S.W.2d 737 (1960). As the First Court of Appeals aptly described, this Court in *City of Austin*:

focused on the constitutionality of using public funds to reimburse a private utility’s relocation expenses, and emphasized that a legislative act directing a particular payment must be obeyed unless it violates the provisions of the Texas Constitution prohibiting donations for a private purpose. According to the [C]ourt, a payment to a utility company is not prohibited so long as “the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious.”

HCTRA at *7.

The Court’s rejection of the challenge to the statute’s constitutionally required that the state reimburse the cost of relocation of all utilities and thus made it unnecessary for the Court to parse among the interests held by each of the affected utilities. Its citation to the rule described in *Bexar Metropolitan Water District* is therefore *dicta* as to all utilities. *Ex Parte Coffee*, 328 S.W.2d 283 (Tex. 1959) (discussion unnecessary to holding is *dicta*).

(upholding statutory requirement to reimburse utilities); *CenterPoint Energy*, 436 F.3d at 542 (requiring HCTRA to reimburse utilities under Chapter 251 of the Transportation Code). A plain reading of the statute not only recognizes this, but puts the liability where it belongs: with the local political subdivision and not the state.

By contrast, a reading of these statutes as first inviting telecommunications providers to develop infrastructure throughout the state's rights of ways (with no reservation or notice of the prospect of compelled, uncompensated relocation), then, subsequently, empowering local governmental entities to compel removal and relocation and precluding recovery of costs by virtue of unwaived immunity would presumably make the State a proper party in any federal takings claim. The federal Constitution, like the Texas Constitution, creates a direct just compensation remedy free from considerations of sovereign immunity. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (finding that, notwithstanding "principles of sovereign immunity," the Constitution "dictates" a damages remedy); *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) ("The Constitution itself . . . is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.").

III. THE TEXAS CONSTITUTION PROVIDES AT LEAST THE SAME AND LIKELY GREATER PROTECTION AGAINST INTERFERENCE WITH VESTED PROPERTY AND CONTRACT RIGHTS

As detailed above, federal law unquestionably recognizes the right of historic distance telecommunications carriers to maintain their facilities in the rights-of-way as "property." *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *City*

of Fort Worth v. Southwestern Bell, 30 F.2d 972 (5th Cir. 1936). Likewise, the federal Contracts Clause prohibits the retroactive, material alteration of the terms of the State’s offer. *Russell v. Sebastian*, 233 U.S. 195, 206-08 (1914); *City of Hawarden v. US West Commc’n*, 590 N.W.2d 504, 508 (Iowa 1999). But Harris County’s efforts to compel SBC to relocate its facilities without compensation do not trigger only federal constitutional prohibitions. The Texas Constitution contains its own prohibitions against the taking of private property and the impairment of contracts, Tex. Const. art. I, §§ 16, 17, and this Court has long stated a preference for reliance on the State Constitution wherever possible as a means of “avoid[ing] unnecessary federal review.” *Davenport*, 834 S.W.2d at 17 & *id.* at 15 (finding Texas Constitution to prohibit gag order in civil pre-trial proceedings).

A. This Court’s Davenport Decision Calls for Consideration of State Constitutional Issues at the Outset

While the states may “not deny . . . the minimum level of protection mandated by the federal Constitution,” there is “certainly no prohibition against a state providing additional protections to its citizens.” *Davenport v. Garcia*, 834 S.W.2d 4, 15 (Tex. 1992); *see also City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982). In its *Davenport* decision, the Court stressed that state courts should begin any constitutional analysis by looking first to their own Constitution to determine whether its reach and application are merely coterminous with the federal Constitution or whether the state Constitution, in fact, provides a greater measure of protection. “When a state court interprets its [own] constitution . . . merely as a restatement of the federal Constitution, it

both insults the dignity of the state charter and denies its citizens the fullest protection of its rights.” *Id.* at 12.⁷

This Court’s “traditional method of constitutional interpretation” centers on the “intent of the people who adopted it.” *Davenport*, 834 S.W.2d at 19 (quoting *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)). In determining that intent, the Court looks “to the history of the times out of which it grew, . . . the evils intended to be remedied and the good to be accomplished.” *Edgewood Indep. School Dist.*, 777 S.W.2d at 394. While the evidence of historical intention is often best reflected in the text, the Court has also been mindful that the Texas Constitution was intended “to function as an organic document to govern society and institutions as they evolve through time.” *Id.* An examination of the text and the progression of Texas over time confirms an intent to proscribe governmental interference with property and contract at least as great, and likely far greater, than that reflected in the federal Constitution.

B. The Texas Constitution Reflects A Profound Rejection of Governmental Interference With Property and Contract Rights

The peculiar antagonism of Texans to governmental interference with their property is well understood as both a historical and enduring fact. Indeed, the Revolution against Mexico was inspired, in large part, by a new Mexican policy revoking land rights

⁷ Notably, *Davenport* looked beyond the narrow free speech questions involved in that case, citing authorities addressing, among other things, the protection of private property against takings and the prohibition on impairment of contract. Specifically, the Court cited to a Utah takings case that had “look[ed] to federal law only after finding no inverse condemnation under the state constitution.” *Id.* at n.23 (citing *Farmers New Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990)). The Court also cited its own earlier decision in *Traveler’s Ins Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d 1007, 1010 (1934), for the proposition that the State’s own contracts clause “cannot be subject to the same rule of interpretation” as its federal counterpart.

that had been previously conferred on legal immigrants by the former Spanish government.⁸ When Texans later ratified the post-reconstruction Constitution of 1876 many of its citizens had been adults at the time of the Revolution in 1835-36. It is hard to imagine that the same people who stitched the “Come and Take it” flag, would have subsequently accepted rights in property that merely defaulted to the existing federal standards.

The text of the Texas Constitution hardly supports the notion that it defaults to federal standards or to inconsistent views of the meaning of the word property.

First, while Article I, section 16 prohibits “any law impairing the obligation of contract” using language no different than the U.S. Constitution, Article I, section 17, speaks in terms far broader than its federal equivalent. It provides that “No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money” Nothing in the federal Constitution reflects such a profound mistrust of governmental taking of property as to require payment of just compensation in advance as a mandatory pre-condition of a valid taking.

In recent years this Court has openly acknowledged that the Texas Constitution contains a different, potentially broader prohibition against uncompensated takings, and has repeatedly reserved the question in view of the parties’ failure to press the issue.

⁸ See Goliad Declaration of Independence, Dec. 20, 1835 (“Our lands, peaceably and lawfully acquired, are solemnly pronounced the proper subject of indiscriminate forfeiture, and our estates of confiscation.”)

Sheffield Develop. Co. v. City of Glenn Heights, 140 S.W.3d 660, 669 (Tex. 2006)

(observing that as “the court of appeals noted, it could be argued that the differences in the wording of the two provisions are significant, but neither [party] makes this argument”); *City of Austin v. Travis County Landfill Co., LLC*, 73 S.W.3d 234, 239 (Tex. 2002) (“assuming without deciding” identical prohibitions against “taking by overflight”).

Given that the Federal Contracts and Takings Clauses both predate the Texas Constitution and provide an absolute minimum level of protection to Texas’ citizens, there can be no doubt that Texas’ own Constitution protects SBC and Verizon to at least the extent detailed in Section I above. Indeed, given the broadly-worded text of the Texas Takings Clause and the well documented historical reticence of Texas citizens to tolerate government efforts to expropriate or redistribute private property, the Court might use this opportunity to confirm the breadth of the State’s prohibition or, at a minimum, restate its earlier reservation of the question.

Second, the Texas Constitution, read as a whole, cannot both authorize a tax on a thing on account of its being “property” and also deny it protection from takings because it is not “property.” As noted above, this Court and others have long held that a telecommunications provider’s right to be present in the rights of way is “property” subject to *ad valorem* taxation under the Texas Constitution’s authorization for such taxes. Any reading of Article I, section 17 would obviously have to take this into account, as “[d]ifferent sections, amendments, or provisions of a Constitution which relate to the same subject-matter should be construed together and considered in the light of each other.” *Collingsworth County v. Allred*, 120 Tex. 473, 479, 40 S.W.2d 13, 15 (Tex.

1931); *see also Duncan v. Gabler*, 215 S.W.2d 155, 159 (Tex. 1948) (“An important and established rule for construing the Constitution is that all of its provisions affecting the same thing must be construed together”).

It simply cannot be that SBC’s interests in the rights of way of Harris County can be said to be “property” for purposes of determining their amenability to *ad valorem* taxation, and yet cease to be “property” for purposes of the Takings Clause.

CONCLUSION

Texas offered telephone companies like SBC and Verizon a right to lay their facilities in the rights of way. That offer was long ago accepted and vested a property right, notwithstanding the decision below to the contrary. As the original statute did not impose any requirement that the facilities be moved at cost and at the perpetual discretion of local officials, adding such a requirement raises serious constitutional questions. Plainly, a decision from this Court is essential to resolve the conflict created below and to resolve this important and recurring constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served upon all counsel of record by certified mail, return receipt requested on this the 24th day of August, 2007. *See* TEX. R. APP. P. 9.5.

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