ORAL ARGUMENT – -02/20/02
01-0291
MARCUS CABLE V. KROHN

KLINE: This case presents an opportunity to bring an aspect of Texas utility easement law in line with the restatement and the law in other states.

This is a case about utility poles and the wires on them. Having said that, I want to take just a minute to talk about what this case is not about. It's not about whether you can force a property owner to have a utility pole and wires on his property. It's undisputed here that in 1939, Hill County purchased the right to place poles and wires on the Krohn's property. The poles and wires have been on that property for more than 60 years.

Secondly, this isn't a case about whether a cable company can force its way on to a utility pole. Again, it's undisputed that Hill county owned the poles that Marcus's wires are attached to, and that Hill county voluntarily agreed to share space on those poles with Marcus.

ENOCH: If I'm a property owner and I own the fee simple and I gave an easement across my property to a utility company, do I retain any sort of property interest in that land that underlies that easement?

KLINE: You retain an interest in the use of the land underlying the easement only to the extent that it doesn't interfere with the easement that you've granted. And in this case the easement that was granted was to plant poles and hang wires. In construing the scope of that...

ENOCH: So if I give an easement for utility poles and wires, the utility company decides they are going to sell out of that business and somebody else decides you know I'll buy that easement from it because it will give me access to some other property. Could the person who owns the easement sell that easement to somebody else and not be implicating the property interest of the owner underlying that easement?

KLINE: I'm not sure I totally understand your question. But in this case, the easement was granted to Hill county, it's successors or its assigns.

ENOCH: If Hill county decided they no longer needed it for electricity, but they've got a term of years for the easement, could they just sell their easement to somebody else who would use it for a road, or just for hunting, etc.?

KLINE: This easement first of all is for an indefinite term. And in construing what the easement rights are, in other words, what Hill county owns and what it can assign, we believe that there are 4 factors that have to be considered in that analysis. The first is, that uses of easements can change over time to benefit the easement holder, and to take advantage of technological

developments.

HANKINSON: What are the limits on that change?

KLINE: The limits are 3. First of all, you look to see whether the change has increased the burden on the servient property. And in this case numerous courts that we've cited in our brief have held as a matter of law that adding a wire...

O'NEILL: Well let me ask you about that because that raises two concerns. First of all, what does that mean, an increase on the burden or further burden on the serving estate? I mean what if 3 more cars a year have to come to service the cable. How can we say that that's not some burden? What level does the burden have to rise to?

KLINE: You look at the original grant first of all. And this grant has no restrictions on the _____ of Hill county to bring repair people onto the property. In fact, the easement specifically provides that they can place, construct, operate, repair, maintain, relocate and replace.

O'NEILL: Right. An electricity line.

KLINE: And their successor or assigns.

O'NEILL: But still an electricity line. Where do we draw the line if we let now an internet provider and the cable TV people come in and suddenly there are 4 or 5 service trucks and repair people out there. Doesn't that in some way burden the subservient estate more?

KLINE: Well the restatement deals with this directly. And what it says is, if the change in use of the dominant estate, the easement, or the enterprise benefitted by the easement brings no change in the physical use of the easement. In other words, if you're using it the same way to hang wires on poles...

O'NEILL: You're saying then it doesn't matter if 50 people more have to come service it?

KLINE: There may be a point at which someone may be able to show this is an additional burden on my property. We're not even close to that window here.

O'NEILL: This was a traditional summary judgment motion right?

KLINE: Yes.

O'NEILL: It wasn't a no evidence summary judgment motion.

KLINE: That's true.

O'NEILL: So you have to disprove that as a matter of law correct?

KLINE: Yes. And the only evidence in the record was that Marcus's wires are on Hill county's poles within the easement.

O'NEILL: But there's also controverting affidavit testimony that some of those wires hang low and impede the height of an entrance to the property?

KLINE: What the evidence said is not that Marcus's wires were below the wires that Hill county could hang. This easement allows Hill county to put numerous wires on those poles. And actually the height of wires is governed by a national code that's adopted by state statute. And we cite that in our brief. There is no evidence that Marcus is doing anything that Hill county couldn't do.

O'NEILL: But let's say that the wires that are hanging there now that have arguably been there since 1939 are at a certain height. And even if the electric utility has the right to hang them lower, they've been at this height the entire time. And it sounds like what you're saying is if someone comes in and strings them down here with the cable, as long as it's within that legal right or limit it's okay.

KLINE: Right. What I'm saying is that as long as it's within the scope of the original easement. As long as it's something Hill county has the right to do, they have the right to assign it to someone else according to this easement.

O'NEILL: But how can we find on this record as a matter of law that you have affirmatively negated that aspect of the case?

KLINE: Because the undisputed evidence is that our wire is within the Hill county easement physically. And there is no evidence that we have done anything that Hill county couldn't do. In other words, we're saying we're doing the same thing. The evidence is that Marcus is doing the same thing that Hill county has the right to do under the easement.

OWEN: Does this easement give the right to string telephone wires? Would you have to have an additional easement to do that?

KLINE: That issue is not presented here. Again, I think it would depend on the 4 factors that...

OWEN: That's important for me to know what you're answer is. Does this easement - would this allow the holder of the easement to go out there and hang telephone wires on these poles?

KLINE: When you're looking at the scope of the easement and trying to construe the scope of the easement you look at 4 factors. In this case all 4 factors support the TC's decision with

respect to markets. And I believe they would support telephone wires...

OWEN: Do you have any case from any jurisdiction that says, when the easement says this is for electrical power transmission that, that also would allow you to hang telephone wires on the same poles?

KLINE: Yes. The SC of Virginia in the Hise case, which is cited in our brief, concerned an easement for the transmission and distribution of electricity. And it was construed to allow telephone and cable.

O'NEILL: Wasn't there broader language there?

KLINE: The language that the court looked at was that the electric company could like construct, improve. It was not dissimilar to repair, replace, relocate. It didn't say telephone, and it didn't say cable. What it was talking about was electricity and it was granted just to a power company. The power company had used it to have telephone and cable, and the lines had been there for some time without objection, then the objection came in. And the objection was this isn't within the scope of the easement.

O'NEILL: Again though it was broader - the grant.

KLINE: Well it was different language. And frankly if you look at the dozen or so cases that we cite in our brief, if you look at everyone of them there is different language in every case. Some of them are to a power company. Some of them are to power and telephones. Some of them are for electricity. Some of them are electricity and messages. The thing is despite all those variances everyone of those comes out the same way. When you want to add a wire to a pole...

ENOCH: If I understand your position as to the questions, this is strictly an interpretation of the easement. Do you agree that but for the easement that grants the power to the electric utility to allow utility poles to be used for cable, you would not have the authority to do so absent the permission of the landowner?

KLINE: With respect to the common law question, that's true. The common law question depends on the scope of the easement. The easement owner, the owner of those poles, has entered a voluntary commercial transaction to share that spece.

HANKINSON: Is it your view that this is first a question of common law and that the statutory language that you rely upon is an alternative position, that the starting point is the common law because we're dealing with real property interests?

KLINE: Yes.

HANKINSON: Would you go back to the list.

KLINE: You asked me what were the limits. In the limits, as set forth in the restatement and is distilled from these other cases are: first you look to the burden on the servient estate; second, you can't unreasonably damage or interfere with the enjoyment of the servient estate. Those I think are two closely related things, but they are used differently. And the third is, if you have specifically negating language, specifically contrary language in the easement, that might be a limitation. But in this case we don't even get close to any of those.

HANKINSON: That's three. What's the fourth one? You said four I thought.

KLINE: No. Those are the 3 limits. The four factors that we believe this court ought to look at to resolve this case are first, the restatement 410, which is that commercial easements are generally construed to allow for changes in use over time. This is a classic example. This easement was granted in 1939. It was for an unlimited period of time. It was granted to Hill county and its successors or assigns. The second factor is the burden question. And again, Marcus is sharing the space on this pole. It doesn't change the physical use of this easement. And it's exactly like the burden analysis in the dozen or so cases that we've cited in our brief.

HECHT: Is the easement typical or does the language even in Texas during this time period vary?

KLINE: I don't know that I can answer that. The third factor is that the restatement makes exclusive easements in Gross(?) presumptively divisible. That's terminology in Gross, the easement is not connected to a particular piece of property.

OWEN: What is there in the evidence about the nature of cable transmissions? What are they and how similar or dissimilar are they to electrical utility markets?

KLINE: There is no evidence in the record. I don't think there's evidence in the record as to the nature of a cable transmission. But several courts that we've cited in our brief have identified cable as a similar use to the transmission and distribution of electricity because it is the transmission of electric impulses. And we cite 2 or 3 cases that address that.

The grantor did not retain any rights to be on those poles. Those poles are the property of Hill county. There is nothing in the easement that indicates an intent to reserve the ability to be on those poles to the grantor.

Also, as the restatement says, these kinds of utility easements, and in particular line and pole easements, are generally presumed to be exclusive just because of their nature.

JEFFERSON: Even if the language doesn't say it there's nothing in the language itself that says exclusive right?

KLINE: The restatement tilts the balance in favor of exclusivity if there is nothing in the easement. And the fourth factor is, that the restatement says you should interpret commercial easements to further public policy. And here we have a clear enunciation of public policy from the US congress, from the Texas legislature, from the US SC. There is a explicit public policy to further the development and growth of cable, and in particular to do so in an efficient and environmentally friendly way.

HECHT: Has it happened that electric companies will not let cable companies hang their wires?

KLINE: These pole attachment agreements as the SC pointed out in the Florida power case have been very common throughout the country and throughout the state. I can't say there aren't cases like that, but this is a common arrangement.

O'NEILL: Do you agree with the general statement contained in one of the amicus briefs that says, the restatement and all the cases across the country stand generally for the proposition that technological advancement can expand the means of accomplishing the uses that are articulated in the easement?

KLINE: No, I don't agree with that. Because the restatement specifically talks about changes in use. And I think when you look at the means cases, the problem in those cases is usually that there is a physical change in use. An example. You have an easement for a horse cart path that was granted in 1900, and 100 years later you want to use it for motorized vehicles. That's a big change in the physical use. So yeah they may get around that problem by saying, well it's just a change in the means. But here we don't even have a change in the use.

O'NEILL: Doesn't that sort of beg the question? I mean they have also argued that it is a change in the use, that electricity is simply electricity but once you start stringing communication wires, such as telephone and cable, internet that's a different use.

KLINE: I think this is a case about poles and wires. And over the past week I've looked at every pole I have passed, and I challenge you to see one that doesn't have 5, 6, 7 wires.

ENOCH: The questions is, when they start stringing all those wires up there, do they just ask the electric company or do they go ask the city council in Austin for permission to also string wires on those poles?

KLINE: A lot of those are private easements. And court and after court after court has said, this is not a change in use. This is not an additional burden...

O'NEILL: Under broader grant language.

KLINE: Well in each of those cases...

O'NEILL: Are any of them limited to electricity?

KLINE: The Hise case is only electricity.

O'NEILL: So there's only one?

KLINE: Centel was electricity and purposes for which it could be used, or something like that.

O'NEILL: So there's only one case then that only contains electricity within the grant?

KLINE: No. Centel and Hise both dealt with electricity, but the language was different. But what I want to say is, even in the cases where there was telephone, the argument was telephone is not cable. And this is not within the scope of the easement. And the problem with saying if it doesn't say cable it can't be cable is that that means if it's a horse cart path it's not a car. Or if it's telephone it's not internet. We did not foresee in 1939 the convergence that an electricity company would be able to provide internet access.

O'NEILL: Well you've also got the Mississippi case. And I understand you say that that's not correct, but it goes the other way.

KLINE: The Mississippi case is arguably the only one. In fact, I think it's wrongly decided. But second, as best I can tell it wasn't about wires on poles. If you read the end of that opinion it deals with underground fiber optic cable. From reading the opinion it appears what they were talking about was digging ditches across an easement. And I think that's a change in the physical use. And that's why I don't count that as a pole and wire case. But arguably the reasoning there such as it is is not consistent with the restatement and these other cases.

OWEN: There seems to be some tension in some of the federal takings cases and in some of the state cases on what's an additional burden and what's not. As I recall some of the federal cases say that even hanging one cable wire on a telephone pole or a building, even though it's a minor burden, it is a burden. It is a taking per se. And that seems to say that it does burden the landowner's rights and property and so therefore it is a taking. Yet, the common law cases in the context of easements seem to say, well no it's not a burden. How do you reconcile that?

KLINE: Here's the difference. The federal cases you are talking about are referring to a taking of the easement owner's interests. The pole owner. Not the underlying landowner. The common law cases that we cite are generally cases where the challenger...

O'NEILL: I think they are all consistent.

OWEN: One was a building in New York. So even to hang a little cable thing on the side of the building were taking per se.

KLINE: You're thinking of Loretto(?). Loretto(?) there was no easement.

OWEN: I understand the difference. I understand we're talking about two separate things in terms of easements verses imminent domain basically. In the takings cases they seem to say even though it's not much of a burden at all, it is some burden and, therefore, constitutes a taking as a matter of law. Now how do you square that rationale that it's some burden verses this is not an additional burden for easement purposes?

KLINE: The US SC has done it for me. Because in the Florida power case that we cite, they distinguish that very case Loretto(?) by saying Loretto(?) didn't involve an easement, and there's a difference between a commercial licensee of an easement. And I think they said something like an interloper with a government authority or something like that. This isn't a case where the gov't is coming in and taking something that the landowner owns. This is a case where the landowner has given up a property right to the easement holder, and the easement holder has voluntarily shared it with a third party.

OWEN: But if your saying one of the factors is is an additional burden. I'm just getting the simple rationale that yes it is some burden. That's all I am trying to get at.

KLINE: I don't see that tension in the cases. Because in the federal cases you're talking about they were talking about the easement owner's property interest not the landowner's property interest.

OWEN: Some of them did deal with the landowners.

ENOCH: From the discussion there appears to be an agreement that the original property owner who gives up the easement does retain some property rights in the use of that easement. Because there would be no reason to have a discussion about a new burden. So if you're not going to use the easement the way it was anticipated the easement to be used, then there has to be a showing of no additional burden. Correct?

KLINE: I want to take issue with the first thing that you said, which is that the property holder retains a right in the easement. The easement is a right to use the property. The servient owner, the underlying landowner retains an interest in the land subject to that easement. And so the analysis is whether the use that's at issue, Marcus's wire on the poles, is something more than the property owner gave away to the easement.

ENOCH: So this contemplates some sort of property interest. We don't know quite what it is, but whatever it is the easement can't be used in such a way that it creates a different burden to the landowner than was anticipated when the easement was granted I guess.

KLINE: The language that is typically used is whether the challenged use is substantially compatible with the original use, not inconsistent with the original use.

ENOCH: Whatever language they used it's demonstrating that there is some sort of interest there. Let's go to the summary judgment. If I'm arguing that I'm entitled to use this easement for the cable, with the case law being what it is would it be a burden for the movant to establish as a matter of law no additional burden?

KLINE: Yes unless it's a no evidence motion.

ENOCH: And if it's not clearly evident that the requirements of cable service are identical to the requirements of electrical service, I mean you don't have to have any extra switching stations, you don't have to have any extra transformers, if it's not clearly evident from that, would the summary judgment record here have to have some evidence by Marcus cable that there would not be any additional repair trucks, there would not be any additional infrastructure.

KLINE: No. First of all it doesn't have to be identical. And second, the scope of this easement is quite broad in terms of - Hill county has the right to do all these things and under the restatement and common law principles, the right to do anything reasonably necessary to enjoy that easement. So there's no question that Hill county can come onto that property with repair trucks. But they can out source their repair work to a local Waxahachie firm and those people can come on to repair, that they can hang the wires, that they can relocate the wires, that they can replace them.

JEFFERSON: Could Hill county prevent the landowner from contracting separately to put cables on those poles?

KLINE: On those poles yes. Hill county owns those poles and they own the right to exclude on those poles. But I want to get back to your summary judgment question because here there are so many courts that have held...

ENOCH: Maybe I wasn't clear. I'm assuming Hill county because of its easement has the right to drive repair trucks on there and mount cement blocks for their switching stations or whatever they need to do. But if it is not clearly evident that cable uses the identical facilities isn't that part of the summary burden of Marcus to establish that it won't put any other cement blocks on the easement, or any other repair trucks, or any other uses to that that is different than what the electric utility does. Wouldn't it be their burden in summary judgment to establish that?

KLINE: I'm not arguing that Marcus has the burden when it brings a summary judgment motion to show the factors that I talked about. I differ a little bit with your characterization of what it is they have to show. They have a burden, but I believe in this case the court could find as a matter of law that adding a cable to a utility pole under this kind of an easement is not an additional burden. And numerous courts have done just that.

* * * * * * * * * *

RESPONDENT

BIGHAM: There's an old saying that it's easier to ask for forgiveness than it is to ask for permission. Well I believe in the cable company's case maybe it's cheaper. This is at the heart of this case. This is a simple case of whether or not Marcus Cable had permission to be on the Krohn's property.

HANKINSON: Do you agree that restatement 410 should apply in this case?

BIGHAM: In a general sense I do, and I think the cable company kind of glosses over the general premise that...

HANKINSON: So if you agree then what we should be doing is analyzing this easement under the four factors that are indicated in that particular provision of the restatement?

BIGHAM: I don't agree with that. I agree that the language used in the easement is controlling. That's your threshold issue. If the easement provides for a use...

HANKINSON: But in order to analyze the language in the easement, should we look to §410 of the restatement?

BIGHAM: I don't think so. I think the...

HANKINSON: What should we look to instead?

BIGHAM: I think this court decided just a few years ago in the DeWitt case in easements, that the thing we look at is what's in the grant. Within the contract what rights does it give the easement holder? And if it doesn't give him the right to do what's proposed, then you're done. But the threshold issue in this case is really has there even been an assignment in the first place. And I would argue to you this pole attaching agreement was only that. It's an agreement with the cable company and the electric company to allow them to attach the poles, but not to get across the land to be on the poles. There is no easement.

HANKINSON: I don't understand that. Explain how that interpretation fits with looking at the language of the easement, which is what you would have us do?

BIGHAM: We never get to the easement. Unless there is an assignment from the easement, you never get to the easement. Looking at the pole attachment agreement, page 41 of the record, page 2 of the pole attachment agreement, art. 3 states that each party must obtain their own easements and rights of way. Nowhere within the pole attachment agreement is there ever an assignment or a partial assignment, ie an apportionment. You just never get there in the first place. Unless there is an assignment, you don't need to really analyze whether or not it permits or it doesn't permit.

HANKINSON: If there's no assignment and no license given to the cable company, what is

the consideration for the pole attachment agreement?

BIGHAM: Well I think it's a two-step analysis. The cable company has to get permission to be on the poles. They realize that the electric company if they see their lines out there, they are going to notice it. And so they go get an all encompassing agreement to be on their poles wherever they run. But the second part of that analysis is, you have to go to the landowner to have permission to have a right of way.

HANKINSON: You just said we didn't need to get to that second question, because the pole attachment agreement does not assign any right to be on the poles. So if that's the case...

BIGHAM: No. I'm sorry. It assigns right to be on the pole, but it doesn't assign the right to be on the easement.

HECHT: Well how do you get to the pole if you can't get on the easement?

BIGHAM: Well that's the problem. You can't.

HECHT: Well it's silly to say that they got an agreement here that lets them hang a wire if only they could fly up there and attach it.

BIGHAM: That's exactly our point. They have to have both. They have to have the right to be on the pole, and they also have to have the right to get to the poles wherever they may be. Now I would argue like if the poles are in a roadway right of way owned by the state or the county or whatever, maybe all they need is a pole attachment agreement. But in a case where you've got a pole that's sitting in a private easement...

HECHT: Why is that? They still have to get on the property.

BIGHAM: That's right.

HECHT: So I don't understand why it would be any different if it were a public easement.

BIGHAM: I think that the legislature has given the cable company the right to get on public property, ie, §181.102 of the Utility code. But they haven't given them the right and they don't have the right to be on a private easement without a contract.

HECHT: Assuming that we think they do, then what will we do with this easement?

BIGHAM: And I think there are several assumptions you have to make in order to get from being a trespasser to being a person with a right to be on the property. The first assumption is there is an assignment. The second assumption is that the contract provides for the use within the

easement. The easement language, the granting in the easement in this case is that the electric company has the right to an electric transmission line or distribution line or system. The granting language isn't the right to have poles and wires as they say. The granting language is they have the right to put up an electric transmission or distribution line or system, not a water pipe line, gas pipe line, not a telephone line, not a cable television line. They have the right to put up an electric transmission line.

HANKINSON: So your view is that Texas law requires that we interpret the easement strictly and limit it to electric transmission and that you would not have us follow the restatement change of use doctrine?

BIGHAM: I would agree that is true, that the controlling language is the language within a contract.

HANKINSON: And what case law do we have in Texas to support the position that an easement must be strictly limited to the exact language in the easement as opposed to applying the change of use doctrine under the restatement?

BIGHAM: I think the DeWitt case changed the proposition that the easement is going to be interpreted in light of what the granting clause provides...

HANKINSON: Well I understand that. But that's the same argument that Ms. Kline would make. She would say that the granting language would accommodate change of use so long as the requirement under the restatement were met. What I understand you're asking us to do is to strictly interpret that easement to confine it to the exact language of the grant, that being electric transmission line as it was put in the easement in 1939, and that that's the end of the inquiry. And my question to you is, has that question ever been answered under Texas law so that there is precedent that we are bound by to stay with your position as opposed to considering what Ms. Kline would have us do?

BIGHAM: No. I think the question has been answered in various ways that a _____ should be given meaning from the four corners of the contract, and whatever the intent of the parties should be the intent given by the court.

HANKINSON: Do you have any cases in the context of real property law in Texas involving the interpretative easements that would have held exactly that? I'm just trying to understand from an analytical standpoint what our starting point is.

BIGHAM: I don't there's a case per se exactly between a electric company and a cable company with the same factual situation. But I think certainly there is cases that stand for the proposition that easements should be interpreted according to the language of the easement. And I think the difference in this use issue, I think it's the difference between the means verses the use. If the electric company has a new and different way of providing electricity, then maybe that's what

may change over time. But the fact that it's a wholly different use altogether, I don't think we can change that.

OWEN: That's what I want to explore with you. How different is it? How different is a cable transmission from the electricity that's transmitted through those lines?

BIGHAM: I think Ms. Barron stated it very well in her amicus brief going through the utility code and the various definitions of utility _____ electricity. And I think the utility code even distinguishes between the two and the business of electrical distribution is not in the business of cable...

OWEN: I understand what the difference between the businesses. But what's the physical difference between what's transmitted through those lines?

BIGHAM: I think if you grab the cable line and the grab the electrical line you would find out pretty quick. They are two different things. I think if you took a cable line and tried to plug it into the light fixture or to any appliance it's not going to operate. They are two different things.

OWEN: What are cable transmissions made up of?

BIGHAM: I don't know all the technical side of that. There are some kind of light pulses that send HBO and Cinemax into our homes. But I think from any common sense viewpoint looking at the cable transmissions and electrical transmissions they are two different things.

OWEN: Is there an electrical component to it or not? I know what the difference is. But from a technical standpoint, is there an electrical component to it?

BIGHAM: For one, there is no evidence in the record that cable is electrical transmission. They present no evidence, and I think they open up a whole other regulatory pandora's box if they want to suggest they are in the business of electrical transmission. They are currently unregulated by the PUC, but as soon as they say they are in the business of electrical distribution, they may become regulated. So I don't know how to answer that any differently.

HECHT: I'm still groping for how we are going to read this easement like Judge Hankinson. This says you can put in an electrical transmission or distribution line or system. So you wouldn't object if they came out there and built a high tension, high voltage transmission system across your property, and change everything, great big steel poles, a lot of danger, all kinds of electric flux, that would be within this easement?

BIGHAM: I haven't briefed it that way, but I think that certainly goes beyond the scope of the intent of the parties in 1939.

HECHT: Well that's what I thought you said a little while ago. And it certainly does.

And so is that your position that we have to read this easement the same way Mr. Curtis was thinking in 1939?

BIGHAM: I think so. We should...

HECHT: Is there law to that effect do you think, and that we can't consider? I mean I doubt that he - I don't know what's out there today, but I doubt that he considered that even the kind of electric transmission we have today would be available.

BIGHAM: That may be. I think the best example I can give of that is if I have a 10 acre tract somewhere, there's nothing on it, no easements or anything, and the electric company approaches me about running a line across it. They have to go from point A to point B, and I'm right in the middle. And they want to put their electrical distribution line across there. We come to a bargain and agree on a price, and I tell then I want this just to be for an electrical distribution line. I don't want any telephone lines. I don't want any cable lines. I don't want anything else out there: no roadways, no water pipelines, whatever. I would be well within my rights to contract and agree to that type of an easement...

HECHT: I understand that. But electric transmission goes all the way from a single or maybe two wires that are carrying household voltage across the property to a high tension transmission system that's carrying it across the country. Which did you mean?

BIGHAM: I think that could be I suppose a thing that you would have to interpret as to what the intent of the parties was as well. Was the original intent just for this lower voltage type distribution system, or the other. That's a whole different issue I think, but certainly they didn't intend for any other types of systems.

O'NEILL: Well the critical issue would be if the high tension voltage system increased the burden to the servient state wouldn't it?

BIGHAM: I think that could be the issue there. And I think the Orange County case really speaks to the issue of burden...

O'NEILL: And the reason I asked that question is it appears that what you're saying is it has to be contemplated by the original use. And as long as that doesn't - to meet Justice Hecht's example, as long as that doesn't increase the burden to the servient state. So if you want to put in a nuclear power station, that would increase the burden to the servient state.

BIGHAM: I think the burden issue is an issue you get several hurdles down the track. I think the initial issue is, is there a grant in the first place, an assignment, is there the use, is there this apportionment, and then you get to whether or not there's a burden. And I think the Orange County case speaks to it exactly. We've got a fairly broad easement which allows for additional petroleum pipelines. It allowed for additional apportionment of that easement. And then they went

through analysis. Well at some point you do have to look at whether or not the easement is overly burdened. In our case we never get there. We never get to burden.

HANKINSON: Certainly the dominant estate can increase the burden to the servient estate provided it is within the grant that was made in the easement. In other words, if I am granted an easement, and what I choose to do at the beginning only burdens the estate to a certain amount, but I increase the use within my rights, I may increase the burden on the servient estate, but as long as I'm within the easement that was granted to me, that's not going to be a problem is it.

BIGHAM: I don't necessarily agree with that. Whatever the burden is it is established through the use within the easement.

HANKINSON: I understand. But if choose to only use part of my rights under the easement initially, and 10 years later I decide to do something else that is within my rights under the easement that may result in an increase in the burden to the servient estate, I don't have to go get additional permission from you because I'm within the legal rights that I got when I was granted the easement in the first place.

BIGHAM: Like in Orange County, you know you may just have one pipeline there. If it provides for the ability to have additional pipelines, that may be true, but if it's limited you don't.

HANKINSON: I understand. That's the whole point. If the original grant would allow me to put in several pipelines, and I only put one in to begin with, if I come back 10 years later and put a second one in, there may be some increase in burden, but it's within my rights and therefore I'm allowed to do it without getting any additional grant permit. Similarly, under Justice Hecht's example, if I start out with a single pipe or pole that's carrying household electricity or whatever, and I go to a higher voltage system, if it's within the grant that was originally made to me, I don't have to have an additional easement from you and I'm within my rights.

BIGHAM: I would agree with that. It's controlled by the grant. If the language in the grant provides it, then you can increase your burden up to the point where it's not unreasonable.

HANKINSON: And that's what I understand to be the position of your opponents in this case. And I understand that you agree that you think the change in use should not be allowed under the terms of the original grant of the easement. But their position is, is that if we interpret the easement the way they would have us do it, that adding the cable line is within the original grant, and therefore, because the holder of the dominant estate could do it, they can let their licensee do it and there's no increase in burden..

BIGHAM: I think that's the essence of it. The holder of the original easement can't do it. They can't do cable transmission line. They can do electric.

HANKINSON: I understand. And that's the fundamental issue, is how to interpret the

easement on whether they can do it or not. But if they can do it, do you agree that there is no increase in burden on the servient estate because - assume with me. I know you don't concede it. But assume with me that the change in use doctrine applies to this particular easement, so that it would be within the rights of the holder of the easement to hang a cable line on there. If that's the case is there an increase in burden?

BIGHAM: If you've passed the assignment first hurdle you've passed the use hurdle and we say it's even apportionable. And I think that would be relevant there whether or not it's apportionable.

HANKINSON: I understand you don't concede any of those things. But assume those things with me. And I won't hold you to a concession on them. And is there an increase in burden?

BIGHAM: There is an increase in the burden.

HANKINSON: And what is that?

BIGHAM: There is testimony from Ms. Krohn, in fact the lines are lower. It creates an additional height burden.

HANKINSON: Assume those lines were hung by Hill County.

BIGHAM: If Hill county had done it likewise they would be in violation of the easement.

HANKINSON: Why?

BIGHAM: Because it's not granted for one. If it were granted though you would get the burden analysis...

HANKINSON: You're assuming with me that it's granted, that you can hang a cable line. What restriction is there in the easement with respect to the height and what they can do with respect to the cable? I don't see a restriction like that.

BIGHAM: I don't suppose there is a precise height restriction within there.

HANKINSON: So if Hill county had hung that cable line or hung it as an additional electric transmission line, is there an increase in burden or is it within the original grant?

BIGHAM: That begs the question of whether or not it's within the original grant.

HANKINSON: I'm trying to jump to the last piece of this. I understand that you disagree with the cable company's position on the other steps in the analysis. But just assume with me. Could Hill county have hung that line at that height within its rights making the assumptions that I have asked

you to make?

BIGHAM: I think at that point then you would have to analyze the additional burden to the estate. And whether or not the line is lower, I don't think I'm understanding the question. But I think that's the last leg of this analysis is the burden analysis.

HANKINSON: And I want you to jump to it. And you've already agreed with me that if hanging that line is within the grant of the easement, then it's not an additional burden on the estate.

BIGHAM: No, I don't agree with that. I agree with the Beaumont CA in Orange County that at some point you've got to look at what the additional burden is. I think that's a question of fact.

HANKINSON: But you don't get to additional burden if in fact as the holder of the dominant estate, I am exercising my rights within the grant.

BIGHAM: I think you do. If you're already exercising and you decide to add or do something differently within the context of the grant...

HANKINSON: That's it. That's my question.

BIGHAM: ...at that point that's where the burden analysis comes in, and only at that point does it come in.

HANKINSON: Why would the burden analysis come into play if in fact it's within my rights under the easement?

BIGHAM: As in Orange county, at some point you've got too many pipelines in there. And at some point there's a question of fact as to whether or not it's over burden on the servient estate, and that's the question of fact.

HANKINSON: I thought that that would go back to the language in the grant.

BIGHAM: The language in the grant defines the various uses you can have. That's the threshold issue, whether or not what they want to do is provided for in any way. And I would suggest to you that it's not, so you never get to the burden analysis. But as soon as the type of thing you're doing is the same thing that is allowed in the easement, then you analyze whether or not there's been an unreasonable burden to the estate.

HANKINSON: What law do you have for that?

BIGHAM: I think the Orange county case stands for that.

HANKINSON: But Orange county involved the question of whether or not laying that pipeline was outside the grant.

BIGHAM: That too. But they discussed the issues at some point of how many pipelines can you put in there. At some point you're going to overwhelm the estate and it's going to be too much. And that's I believe the question of fact.

OWEN: Aren't there some cases in Texas that deal with - when you had an easement for an oil and gas pipeline, it was a low pressure gas line for example, and then later the company wanted to come back and put in a high pressure line. Isn't there some law out there on whether the easement will let you do that?

BIGHAM: There may very well be. I think it gets back to your intended use within the easement. And if that's a change in the intended use in the easement, then that's certainly not permitted. And I think that's the essence of this case, is this what the parties in 1939 intended for this easement to encompass. And all it intended was for an electric transmission line. Nothing more. Nothing less.

O'NEILL: It seems like the premise of that argument is electricity does not equal telecommunications.

BIGHAM: I would agree with that.

O'NEILL: Why? If I look at a wire and it's the same size, same everything, and I can't tell whether it's electricity or telecommunications that's being transmitted over there, is that just a distinction without a difference?

BIGHAM: I suppose you could say the same thing about a water pipeline and gas pipeline. They may look the same to the naked eye, but they're not the same creature.

O'NEILL: Why aren't they the same creatures is what I'm trying to get at. The same question that judge Owen had. If you are powering telecommunications through pumping electricity through those lines, why are they different?

BIGHAM: Because they're not in the business of distributing electricity, and that's what this easement was for was for the purpose of distributing electricity. Not for the purpose of distributing some other communication device or telephone or cable television. So that's not what was granted. I think all the cases cited by counsel in his cable cases out of state all dealt with broader language easements. They all dealt with either some kind of communications device or this one Hise case she referred you to. It dealt with a _____ line that had been there for over 16 years. So they are all distinguishable and there is no case that holds an electric transmission easement is the same. It provides for the use provided for in a cable television easement.

* * * * * * * * * *

REBUTTAL

O'NEILL: Ms. Kline. If this cable wire is allowed out there, couldn't 10 different cable companies come out there and reach agreements and hang 10 different cable lines?

KLINE: That issue obviously isn't presented here, and there may be facts and circumstances that would relate to it but it would be analyzed the same way.

HECHT: We have two amicus briefs and they all say this is a big deal. This is a big case. The amicus brief on your side says resolution of this issue will significantly affect the future cable and telecommunication industries in Texas. And the other brief says if we do what you're asking us to do, we're going to end free property in the State of Texas. Assume that we're looking at a broader picture here, and that this case may have some of those ramifications if not all of them. How do you respond to Judge O'Neill's question?

KLINE: I think the reason those cases is important is it's whether Texas easement interpretation law is going to favor progress, like the restatement does...

HECHT: But she says how much?

KLINE: As a practical matter, that can't come up because the pole is only so big and the national code and the state statute regulates how much space has to be between those wires, and how high the wires have to be. So as a practical and realistic matter, that just isn't going to happen.

O'NEILL: So you're saying as many wires as could be hung on there within the law is going to be okay, whether that's 10, 15, 20?

KLINE: It's not going to be 10, 15 or 20. But I think the...

O'NEILL: And all those trucks can come in and service them.

KLINE: The original easement contemplated that there would be more people than Hill county on this property, because it talks about successors and assigns. The original easement contemplated that there would be more than one wire on that pole.

RODRIGUEZ: But the original easement also contemplated the least possible interference to farm operations, so why isn't there a fact issue there?

KLINE: Because that issue has never been raised. There has never been an allegation or any evidence or anything that these lines interfere with farm operations. The Krones don't have farm operations.

OWEN: Let's say you start out with a utility line, gas line or an electrical line just for the house that's out there, and later they want to turn it into a large transmission line. What's the law in Texas on that?

KLINE: There's one case, Lower Colorado River Authority, Justice Phillips wrote it on the CA in Austin. And it talks about changing out. It was a utility easement for poles, and it talked about whether the wooden poles could be replaced by steel poles and whether the voltage could be increased from such and such a power to such and such a power. And it held it could looking at the grant of the easement. I don't remember what the specific language of that easement is. But I know that there are a number of cases like that where an easement for the distribution of electricity is construed to allow for increasing voltage demands and changing out poles.

OWEN: If you only look at the grant itself, the language of the grant to decide what you can do, when does the burden issue ever come into play? It seems to me either you can or you can't under the grant language.

KLINE: Under the restatement the way it comes up is that it's intertwined with the interpretation of what the scope of the easement is. Because if you have easement language that - for example, we know in 1939 they wouldn't have written down cable, because they didn't know about cable. So when you're looking at whether something different than the easement language is within the scope one factor...

OWEN: I'm talking about - set aside the cable. Just in terms of an electrical line. If you've got an easement for an electrical line do you ever look at the burden? As long as it's an electrical line do you ever look burden?

KLINE: I have to think about that. I can't give you a ready answer.

HECHT: But surely there's a difference between a little old co-op operation that's just trying to get household current to people and somebody that's shipping electricity across the state.

KLINE: As a practical matter the extremes that we could come up with hypothetically don't come up realistically.

OWEN: When the nuclear plant was built in Matagorda county why wouldn't they use the co-op's lines to put those huge transmission lines across...

KLINE: I don't know the answer to that. I want to answer one of your other questions and Justice O'Neill's question about the relationship between cable and electricity. And the way the Ohio SC dealt with this in the Centel case, and this was a declaratory judgment case they say it is apparent that companies broadcasting television signals through coaxial or cable utilize electric power or electric energy. We hold that the transmission of television signals through coaxial cable by a cable television company constitutes a use similar to the transmission of electric energy through

a power line by an electric company.

OWEN: But the easement in that case said in other means that electricity might ever be used for is somewhat broader.

KLINE: It did. But the issue that they were holding on was whether cable is similar use to electric transmission and distribution.

O'NEILL: If we start with the language of the grant, and we hold that cable is a different use not contemplated in that language, do we reach the statutory question?

KLINE: Yes.

O'NEILL: So you would say the legislature intended to change original grant language?

KLINE: Our position is that the legislature intended to approve the kind of voluntary commercial transaction that we have here where a utility easement owner shared space on existing poles...

O'NEILL: Even if it's against the original grant language if we were to find that this is a different use?

KLINE: Yes.