

1948 when John Walson of Mahanoy City, Pennsylvania, used a twin-lead wire to transmit an electric signal from a remote antenna to his store to demonstrate to his customers how reception could be improved and thereby increase his sales of the newfangled television sets.² The Curtises no doubt intended that by granting the Co-op an easement, wires strung on poles erected on their property would be used to transmit electric current to power lights and appliances. They probably did not envision that one such appliance in the Sardis area would be a television set. And they could not possibly have imagined that televisions powered by the electric current carried by lines over their easement would have better reception if supplied with an electric signal transmitted over another look-alike line hung on the same poles, even if the Curtises had been as precocious as Philo Farnsworth himself.

So if the question is, what were the Curtises thinking in 1939 when they gave the Co-op an easement for “an electric transmission and distribution line or system”, the answer is easy: they were thinking about electric power, not an electric cable television signal, even though both are electric. But that’s not the question because, as the Court correctly holds, the scope of an easement is measured by the parties’ intent as expressed in the words used,³ broadened by changes in the manner, frequency, and intensity of the intended use that are due to technological advances and do not unreasonably burden the servient estate.⁴ An easement need not accommodate unintended uses merely because they present no

² See S. Res. 445, 100th Cong. (1988).

³ *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100-103 (Tex. 1999). See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 (1998).

⁴ See RESTATEMENT, *supra* note 3, at § 4.10 & cmt. a.

additional burden, nor can an easement be enlarged merely because additional uses would benefit the public. But a use that is within the language of an easement as it has come to be understood with changes in technology is not prohibited simply because it was not part of the parties' original thinking. So the question in this case is whether a cable carrying an electric television signal to various users is "an electric transmission and distribution line or system" as we have come to understand more of what those words entail.

Now if one were to stick just to the words, the answer would clearly be yes. A television cable is a "line". A television signal is "electric", assuming, as the Court does, that the cable is not fiber optic (although even if the cable were fiber optic, the signal would still start out electric at the transmitter and end up electric at the receiver).⁵ Sending the signal is "an electric transmission". Transmitting it among a number of users is "an electric distribution". Thus, a television cable is "an electric transmission and distribution line". Looking at a pole carrying lines transmitting electric power and a line transmitting television signals, a person unfamiliar with differences in the physics of the transmissions could not tell which was which.

But the Court answers the question no. Here is its analysis:

- (1) "The terms 'electric transmission' and 'electric distribution' are commonly and ordinarily associated with power companies conveying electricity to the public."⁶

⁵ Cf. KENNETH T. DESCHLER, CABLE TELEVISION TECHNOLOGY 24 (1987) (explaining that for a signal broadcast by air, "[i]n effect, electrical energy from the transmitter is converted into electromagnetic energy by the antenna and radiated into space. On the reception end, electromagnetic energy is converted into electrical energy by the antenna and fed into the receiver.").

⁶ *Ante* at ____.

- (2) “Texas cases decided around the time the cooperative’s easement was granted strongly suggest that this was the commonly understood meaning of those terms.”⁷
- (3) “While cable television may utilize electrical impulses to transmit communications, as Marcus Cable claims, television is not a more technologically advanced method of delivering electricity.”⁸
- (4) Although easements for electric transmission have been held to include cable television signal transmission in all seven cases that have considered the matter in other jurisdictions,⁹ the language of the easements in all those cases was broader.¹⁰

While each of these elements in the Court’s reasoning is irrefutable, they prove nothing. The fact (1) that the words “electric transmission and distribution” are often used in reference to electric power does not mean that they therefore cannot be used in reference to any other electric transmission, like a cable television signal. In fact, the words have a broader reference. For example, a statute regulating telecommunications refers to “any type of system in which electric . . . signals are used to transmit information, including a system transmitting information by . . . wire or cable”¹¹ — in other words, an electric transmission system for information by line or cable. Of course, (2) the words could not have referred to a cable television signal in 1939, but only because no such thing existed, not because of the

⁷ *Ante* at ____.

⁸ *Ante* at ____ (footnote omitted).

⁹ *Centel Cable Television Co. v. Cook*, 567 N.E.2d 1010, 1014-1015 (Ohio 1991); *Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588, 591 (Ohio 1971); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31, 34-36 (Cal. Ct. App. 1985); *Witteman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584 (Cal. Ct. App. 1986), *review dismissed*, 240 Cal. Rptr. 449 (Cal. 1987); *Henley v. Cont’l Cablevision, Inc.*, 692 S.W.2d 825, 829 (Mo. Ct. App. 1985); *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 677-678 (N.Y. App. Div. 1976); *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 108-109 (4th Cir. 1994) (applying West Virginia law).

¹⁰ *Ante* at ____.

¹¹ TEX. OCC. CODE § 1701.405(a)(1)(B).

caselaw of the era. Our understanding of what “electric” means has changed immensely over time. Before Michael Faraday, Benjamin Franklin, and others discovered electric currents, “electric” referred to the static, magnetic condition of certain materials, like amber rubbed with a cloth.¹² Indeed, the word “electric” derives from the Latin, *electrum*, meaning “amber”. The meaning of “electric”, as we have come to understand better the phenomenon to which it refers, can no more be confined to electric current than it could to static electricity or cloth-rubbed amber. Caselaw reflecting the understanding of “electric” in 1939 does not dictate all that the word means.

As the Court says (3), television is certainly not a more technologically advanced method of delivering electric current, but that simplistic observation begs the issue. Are the technological changes relevant to understanding the scope of the easement those in “electric transmission and distribution” of whatever nature, or only those in the transmission and distribution of electric *current*? The answer is the former, if we are to be faithful to the language of the easement. Is transmission of a cable television signal a more technologically advanced “electric transmission”? Clearly, yes.

The Court is correct (4) that in six of the seven cases from other jurisdictions that have considered whether an easement for electric transmission can be shared by cable television, the easements expressly permitted telephone lines.¹³ Because the telephone is used for communication, the Court reasons, the

¹² See generally *Ask the Globe*, THE BOSTON GLOBE, August 3, 1989, at 28 (explaining that, in 1600, Dr. William Gilbert coined the phrase ‘electrica’ in a book about amber); 10 ENCYCLOPEDIA AMERICANA 134 (Int'l ed. 1976).

¹³ *Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588, 590 (Ohio 1971) (involving an easement “to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires”); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31, 32 (Cal. Ct. App. 1985) (involving easement “for the construction, operation, repair and maintenance thereon and thereover of a pole line for the stringing of telephone and electric light and power wires thereon”); *Witteman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584, 586 (Cal.

easements in those cases were broader and could include — the Court will not say could *properly* include — cable television. Since the easement in the present case does not expressly allow for telephone lines, the Court concludes that it does not permit any use for purposes of communication. But electric power is used for communication in the very important sense that neither a television nor a telephone will operate without it. Indeed, a television without a cable signal still has limited reception, while a television without electric power is nothing but a big doorstop, whether it is hooked up to cable or not. It is just not true that an easement for telephone wires contemplates the use of communication devices and an easement for electric current does not. It makes no sense to say, as the Court does, that because an easement for electric lines can be used to supply power to a television receiver, the easement excludes an electric line used to supply a signal to that receiver. It is not surprising, then, that the courts in the six cases do not draw this distinction; that is, none says that if an easement referred only to electric transmission and not telephone transmission, cable television transmission over the easement would be prohibited.

In fact, Marcus Cable asserts that no case in the country has ever barred cable television from an easement for electric transmissions, and neither the Krohns nor the Court has found one. Today’s decision stands alone in the nation athwart the path to providing cable television and related services to rural areas.

Ct. App. 1986), *review dismissed*, 240 Cal. Rptr. 449 (Cal. 1987) (involving an easement for “constructing, adding to, maintaining, removing and repairing . . . pole lines . . . for the transmission of electrical energy and for telephone lines”); *Henley v. Cont’l Cablevision, Inc.*, 692 S.W.2d 825, 827 (Mo. Ct. App. 1985) (involving an easement to “construct, reconstruct, repair, operate and maintain its lines for telephone and electric light purposes”); *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 676-677-678 (N.Y. App. Div. 1976) (involving an easement “to construct, maintain, operate, repair and replace lines, consisting of poles, conduits, guys, guy stubs, crossarms, wires and appurtenances for the distribution of electricity and messages”); *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994) (applying West Virginia law) (involving an easement for “the installation, erection, maintenance, repair and operation of electric transmission and distribution pole lines, and electric service lines, with telephone wires thereon”).

It directly conflicts with one of the seven cases that did not involve an easement that referred to telephone transmissions. There, the Supreme Court of Ohio held that an easement “for a line for the transmission and/or distribution of electric energy thereover, for any and all purposes for which electric energy is now, or may hereafter be used” allowed for a cable television line.¹⁴ But the easement in that case only provided expressly what the law implies in the easement before us: that “electric transmission and distribution” includes all purposes for which electric transmissions are now or may hereafter be used, uses made possible only by subsequent technological developments. The legal effect of the language in both easements should be the same.

I would hold that the easement in the present case can be shared with a cable television provider if the servient estate is not additionally burdened. The Krohns argue that there would be an additional burden for three reasons. First, the Krohns suggest that “the placement of the cable line decreases the clearance which we have through one of our entrances”. Assuming that this is so, as we must in reviewing a summary judgment, there is no evidence that a cable line is or could be lower than lines already on the poles. The height of lines on electric poles is governed by statute.¹⁵ If the clearance at an entrance is decreased, it is only because the decrease is permitted by law regardless of whether the easement is used for cable television or other electric transmission. Second, the Krohns argue that if the Co-op lets one cable television provider share the easement, federal law requires that it let all such providers do so on a nondiscriminatory basis, and if more providers are allowed to hang their wires on the poles, the burden to

¹⁴ *Centel Cable Television Co. v. Cook*, 567 N.E.2d 1010, 1015 (Ohio 1991).

¹⁵ TEX. UTIL. CODE § 181.045.

the servient estate will be increased as workers and equipment enter the property to construct and maintain the lines. Obviously, the Krohns' concern is somewhat iffy, but even if it were to begin to materialize, their easement would not be required to accommodate uses that presented an additional burden, and thus the number of users would be limited. Finally, the Krohns argue that to allow a cable television line on the Co-op's poles clouds their title. But the Krohns do not explain how their title is more affected by Marcus Cable's use of the easement than by the Co-op's use. Thus, I would conclude that the Krohns have failed to show that Marcus Cable's use of the easement poses any greater burden to their estate.

Two amici curiae in support of the Krohns' position¹⁶ urgently warn that to allow Marcus Cable to share the Co-op's easement will profoundly impact the property rights of all Texas landowners. Other amici concur in less dramatic terms.¹⁷ The threat they perceive is inconsistent with experience. The Texas Cable and Telecommunications Association, as amicus curiae for Marcus Cable, advises that cable television providers already share electric poles on easements covering thousands of miles in Texas. The Association states, and the United States Supreme Court confirms,¹⁸ that this has been going on for decades all over the country. Although every case to consider the issue until today has allowed cable television lines to be hung on electric power and telephone poles, private land ownership has survived.

¹⁶ Independent Cattlemen's Association of Texas and Texas Forestry Association.

¹⁷ The Texas Land & Mineral Owners Association, The Texas and Southwestern Cattle Raisers Association, Temple-Inland Forest Products Corporation, International Paper Company, and Texas Farm Bureau.

¹⁸ *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("Cable television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; . . . [u]tility company poles provide . . . virtually the only practical physical medium for the installation of television cables. Over the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems.")

The Association, on the other hand, warns that this case “will significantly affect the future of the cable and telecommunications industries in Texas,” especially in rural areas. The gravity of this threat cannot be evaluated without knowing how many of the thousands of other easements that are being used are like the one in this case, and whether the Court would construe other language differently. One can reasonably expect, however, that there will be ample litigation over the matter, thereby increasing the costs of providing telecommunications services without affording any benefit.

I would hold that the Krohns’ easement to the Co-op for electric transmission and distribution lines can be apportioned or divided with Marcus Cable, based on the development of cable television since the easement was granted in 1939. Accordingly, I respectfully dissent.

Nathan L. Hecht
Justice

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