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Supreme Court of Texas.
Southwestern Bell Telephone, L.P. d/b/a SBC Texas, Apellant,
v.
Harris County Toll Road Authority and Harris County, Appellees.
No. 06-0933.

January 15, 2008

Appearances:
Mike A. Hatchell, Locke Liddell & Sapp, LLP, Austin, Texas, for petitioner.
Bruce Powers, Assistant County Attorney, Houston, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 06- 0933, *Southwestern Bell Telephone versus Harris County Toll Road Authority*.

COURT MARSHAL: May it please the Court. Mr. Hatchell will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. This is a suit by Southwestern Bell to recover utility location costs that were incurred when Harris County forced Southwestern Bell to relocate its utilities when Harris County and Harris County Toll Road Authority wanted to build the West-- Westpark toll road. Southwestern Bell's theories of liability were two. First is that sections of the Transportation Code permitted it to recover its relocation costs. And the second is, barring that, or perhaps even parallel to that, the constitution and the takings clause, particularly *Ketwood* classified the interest taken as property. And therefore, we would have a takings claim. As to the first of those theories, the Court of Appeals held that we did not show that the State was immune from suit. And as to the second of those, the Court held that Southwestern Bell did not have a vested property

interest in the utility facilities that were taken. And we will address both this morning. I do think, however, in order to give the Court an analytical framework in the time that I have this morning, the best place to start is really to look at the interest that Southwestern Bell has in its facilities because our two theories of recovery in one sense, are sort of joined at the hip. There is an overlap in which the nature of that interest is very important to both theories of recovery. And so let us look at that interest very carefully because there is, quite frankly, a confusing panoply of cases and statutes and patchwork statutes here and there that, that can lead one into a state of confusion. Justice Norville's Serbonian bog. And I would hope to try to give some illumination to that this morning.

JUSTICE O'NEILL: Well, let me-- does the nature of the interest affect the waiver question?

MR. HATCHELL: Probably not, but I-- well, yes and no, your Honor, because there are two aspects of the waiver question. One would be waiver as to, well, liability, and waiver as to immunity from suit. Probably does not affect the latter. But there is a certain aspect of the nature of their interest that-- and, and, and I don't think your Honor is going to have any problem with the waiver of immunity from liability. The beginning point in the analysis begins with the statute under which we have the right to locate. And it's very, very important to understand the nature of the ownership of highways in Texas. The State owns the highways. It is true that counties and municipalities have control over highways, oftentimes through police power and oftentimes through delegation from statutes. But the, but the State itself is the one that ultimately owns the highways, and any lesser governmental entity is simply acting as a trustee. Southwestern Bell gets its right to locate by direct statute from the State. And I think that distinguished it in many respects. We've given the Court a handout which we hope will phrase the nature of the interest in a very logical form for you. So the beginning portion is Section 181.082 of the Texas Utilities Code, which says that a telephone or-- telephone or telegraph corporation may install a facility of the corporation acting along or across a public road or interest in a manner that does not inconvenience the public in the use of that road. It's important to notice there are no qualifications on that grant. Our qualification -

JUSTICE O'NEILL: Well, there is a, a significant one, and that is the inconvenience of the public.

MR. HATCHELL: No. Well, yes and no. That qualification is an assertion of basic police power in the original location of the facilities. If you will notice, the very last phrase talks about in the use of the road. The prior version of the statute said in the use of such road. I think what your Honor will find is, once we comply with the minimal police, police power requirements of either the municipality or the county and we accept the invitation to locate our facilities there, the interest but ripens into a vested property interest. And that [inaudible]

JUSTICE O'NEILL: Well, I mean, it beg the question. Because if, if it's subject to the not inconveniencing the public, isn't the fact that, that they have to build a roadway, a tollway and expand to Westpark, doesn't that mean that if they don't make that expansion, the public's inconvenienced?

MR. HATCHELL: I don't think that's-- no, I don't think that's the proper construction. The inconvenience to the public again I say is, for example, we could not locate our poles in the middle of an intersection in the original location. That would certainly be an

inconvenience to the public.

JUSTICE O'NEILL: Well, I mean, what's your authority that, requiring expansion or, or let's say, not allowing expansion, would inconvenience the public? I mean, I understand how you're reading it, but what's your authority for that -

MR. HATCHELL: Well, our, our -

JUSTICE O'NEILL: - that it should be so narrowly read?

MR. HATCHELL: Our, our, our authority for that is if you'll follow along on, on the outline, in the very next paragraph on nature of interest, the privilege of using the streets for railway purposes is to franchise the important part. The actual occupation of the streets for railroad purposes by a virtue of ordinance is an easement. But even more pertinent, in the *CenterPoint* case, the result of the telephone company investing its money by placing its fixtures in a public right of way subject to the initial control under the police power, has the highest authority been held to be the vesting of a property right to be protected as such under constitutional guarantees. Granted, we must locate in accordance with the guidelines exercised through the police power when we initially installed. But once our right becomes vested, in many, many cases from this Court, from the United States Supreme Court, from the Federal authority saying that State government cannot backtrack on that offer and that acceptance.

CHIEF JUSTICE JEFFERSON: Is it true that common law facility implies Southwestern Bell who, well, was required to relocate its utilities had to do so at its own expense?

MR. HATCHELL: Your Honor, it is true that there are cases that will identify what is called a general common law rule. I would suggest to your Honor that the common law rule is actually the minority rule. The exceptions to that rule will have basically swallowed the common rule to the point that it's of very little importance. Those exceptions being two. One, if there is a statute which defines the nature of the right that dispenses with the common law rule. And if you'll notice in a footnote in the *CenterPoint* opinion, if you're dealing with a vested property interest, that also displaces the common law rule.

CHIEF JUSTICE JEFFERSON: Well, in looking at the statute then, it seems to me your, your position would be unlocked if the legislature will provide it as it does in the Transportation Code, that the authority shall pay the cost of installation of the facility in a new location. But this statute that we're talking about here, 251.102, doesn't have that same provision. So if we are to construe a statute derogation of the common law, you know, that says it's your expense, why would we read this provision expansively to, in fact, incorporate the Transportation Code's rule?

MR. HATCHELL: Well, and I think it all goes back to the nature of, of the grant from the State. The State, being the owner of the facilities in this case, has given us a vested property interest. So that when you look down to Section 251.102, that becomes very, very important. It says, "A county shall include the cost of relocating or adjusting an eligible utilities facility in the expense of right of way acquisition."

JUSTICE HECHT: If that statute said the opposite. If it said that the utility had to pay relay location expense, would you still have a vested interest to that?

MR. HATCHELL: We, we would not, your Honor, for this reason. Assuming that that statute was the initial invitation, and I'm not certain that it is, but I want to try to answer your question in the context of the way I understand. If the initial invitation by statute

has a condition attached to it whereby you must pay utility costs, and there are many of those in Texas, then, no. We would not have the right. We would have located with the condition that we would always be subject to an ouster as a result of removal of the [inaudible].

JUSTICE HECHT: So your argument that this is a protected property interest of some sort depends on how it was-- what conditions accompanied its creation and so on.

MR. HATCHELL: You, you've made the point obviously much better than I have in the entire opening of my argument because the, the point being because our right comes directly from the State in 181.082 without conditions. Numerous cases have established that that is a vested property interest contrasted to other utilities which take and locate under statutes which, from the very beginning, state that they are-- they must pay utility relocation costs or in some other manner have a condition attached.

CHIEF JUSTICE JEFFERSON: And if that's so then your remedy here, your, your ability to sue is based on the statute's provision that-- on, on which statute provision? Let me ask you that way.

MR. HATCHELL: Well, -

CHIEF JUSTICE JEFFERSON: Where does the right to sue come from?

MR. HATCHELL: - Well, of course, the, the right to sue, we think, begins with the, the code provisions which give us the right to sue the county for a debt. We think that section 251.102, if you will look at the words cost, include the cost of relocating creates a debt. The rationale being that, in the-- in a, in a statute like ours when the State has given us an unconditional right and the county wishes to acquire the property, it acquires the property subject to our right. So the word cost in section 251.102, we think, creates debt that allows us to sue.

CHIEF JUSTICE JEFFERSON: And yet in the, in the *City of Sunset Valley* case, legislature said compensation, adequate compensation shall be made. And we held that immunity was not waived even on-- in that circumstance because it didn't, the statute didn't expressly provide a cause of action, and how this-- how does this [inaudible].

MR. HATCHELL: Yes, of course. [inaudible] and, and it's a very, very excellent point, your Honor. But in *City of Sunset Valley*, what was happening there was they were trying to seek the cause of a substitute road. And I don't recall. It's, and, and it's very, very important in these cases to look at the origin of the title. And frankly I don't remember precisely what, what the government's, I mean, what, what the-- I believe in that case it was the city's right. I can't remember its origin as to whether it was unconditional. But what I would think would be then in *City on Sunset Valley*, since the State owns the streets to begin with, that they did not have the vested property interest that is necessary in this case. And also they were not seeking an ouster. In a sense, I guess, they were seeking an ouster. But what they were really seeking was the cost of building a substitute road. And I think clearly that, that the decision in that case was, was absolutely correct. The other thing, thing, your Honor, that I would point out about 251.102, which is a sense that you get when you finally read all the cases together, are in the words "in the expense of right of way location." It seems to me that that phrase, in particular, makes 251.102 the functional equivalent of an-- of, of a takings claim. And for that your reason, your Honor -

JUSTICE WAINWRIGHT: Before you go there, let, let me-- after *Took*, the *Took* case, if at 251.102 sets clear and unequivocal waiver of immunity -

MR. HATCHELL: I think that after *Took*, that the statutes are a waiver of immunity under the factors that this Court has identified. Clearly, we don't have express language. There, there's just no question that we don't have that.

JUSTICE WAINWRIGHT: Which puts you on the upside of the hill from the beginning.

MR. HATCHELL: Absolutely. We're fighting uphill.

JUSTICE WAINWRIGHT: Then, well take us up that hill.

MR. HATCHELL: But let me-- your Honor, I have three seconds. And I, I can answer your question in what-- with permission from the Court. I can give you five factors that I think will establish why we believe there is a waiver of immunity in this case. First, factor number one, we think 251.102 clearly imposes an obligation to pay when Harris County or HCTRA hops to take the property, knowing that we have an unconditional right to be there. So we get liability, the suit, out of the way. The second factor which goes to suit immunity is, as I said earlier, we believe 251.102 is the functional equivalent of property and tantamount to an inverse condemnation claim which-- and as the Court knows, inverse condemnation is free from the claim of governmental immunity. And so we really think when the Court gets a bird's eye view of all of these statutes, the reason there is no express waiver is because the legislature has also assumed that these are either takings claims or the functional equivalent of takings claims. And factor number three, which actually has subparts in this, that last factor. The brief that was filed in *State versus City of Austin* has a marvelous historical perspective. And I brought it and will leave it with the Court, that identifies over 40 statutes in which the State of Texas has provided for the recovery of utility relocation cost. We believe that that establishes a basic public policy of the State. We believe that it's a very, very important concept that in 251.102 and the whole panoply of cases -

CHIEF JUSTICE JEFFERSON: Mr. Hatchell, you may want to wrap up.

MR. HATCHELL: I'm going to. And this, this is just-- but probably the most important point I'll make, the legislature wanted to get money to the utilities so it's not to burden taxpayers with the cost of building highways. Our construction of 251.102 is a perfect example of proper allocation of those costs. The cost of building a highway is put upon the people who build the highways and the users. If we get over to utility relocation cost, the cost is put, "We don't have to pass on the cost of building highways to our right payers." Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Hatchell. Are there further questions? The Court is now ready to hear argument from the respondent.

COURT MARSHAL: May it please the Court. Mr. Powers will present the argument for the respondents.

ORAL ARGUMENT OF BRUCE POWERS ON BEHALF OF THE RESPONDENT

MR. POWERS: May it please the Court. The first topic I want to discuss with you this morning is the proper construction of section 251.102, the Transportation Code. I think, in order to determine what the proper construction is, we have to look at the predecessor statutes on which it-- this current statute was built. The first statute was article 6674 index three. That statute was passed in 1963, apparently

in response to a Fifth Circuit opinion concerning a case involving Hardin County. Hardin County had agreed with the utility that it would, actually the pipeline, I believe, they agreed that they would pay anything they were legally obligated to pay with respect to relocation costs. The Fifth Circuit determined that because Texas statutes precluded that County from paying for anything in connection with the construction of State highways after the creation of the Texas Highway Department, that it could not be legally obligated to pay the relocation cost because they weren't a part of the cost of acquisition of right of way. And so the statute was passed by the legislature to declare expressly that relocation costs were a part of the acquisition costs for right of way. Subsequent to that time, in 1983, the legislature passed article 6702-1 which included section 4.303. This, this statute was a County Road and Bridge Act. That Section 4.303 said that the county should include the cost of relocation of utilities in the cost of acquisition of right of way.

JUSTICE BRISTER: And you didn't [inaudible] do, and you didn't do that. Did you do that?

MR. POWERS: In this particular instance?

JUSTICE BRISTER: Yes.

MR. POWERS: No, sir.

JUSTICE MEDINA: Why doesn't SBC have a vested property interest here? And it certainly seems like they do.

MR. POWERS: Well, they go into possession of the property pursuant to 181.082 of the Utilities Code. That provision says that they may lay their lines in the public right of way so long as doing so does not inconvenience the public in the use of the road.

JUSTICE MEDINA: So they, they risk their investment subject to the growth of a particular county?

MR. POWERS: Well, they, they undertake the risk. They, you know, utilities know that if they placed their lines in the public right of way free of charge, that they may be called upon at some point in time to move that line so as to not inconvenience the public in the use of the road. If it's necessary to change the-- a traffic line or improve the roadbed in order to accommodate changes that must be made.

JUSTICE O'NEILL: And what does inconvenience of the public mean? Do you agree with Mr. Hatchell's definition of what inconveniences the public?

MR. POWERS: No, I do not, because what he's saying is that if they, if it doesn't inconvenience the public when you first place the line in a specific location, that's the end of the inquiry. And I submit that the proper construction of the wording in the statute is that you always have to consider whether or not it's going to inconvenience the public if the line must remain in that specific location.

JUSTICE HECHT: It seems that you were going to say that you'd use some word other than install.

MR. POWERS: Well, ...

JUSTICE HECHT: Telephone corporation may install in a way that is not inconvenient. But the fact that it becomes inconvenient 50 years later doesn't seem-- you would think install so that it would never be inconvenient? Or if it ever became inconvenient, you'd have to pay for it or something other than just that?

MR. POWERS: Well, there's no doubt about the fact that sometimes statutes are not worded in the best possible way as they could be. But I submit to you that historically, that it has been recognized always throughout the United States frankly, not just in Texas, that utilities

are required to move their, their lines if they-- if it's necessary to carry out the primary purpose of the road which is -

JUSTICE BRISTER: But, but that's a public policy choice. And Mr. Hatchell's last argument was they-- legislature's changed that. They've said you should pay for it.

MR. POWERS: Well, but they haven't waived immunity from, from suit at all.

JUSTICE BRISTER: And now, well let-- let's talk about that. So it's okay for the, the legislature to say-- let's, let's assume it's even clearer than it is, and says, "On Westpark Tollway, we demand, we say Harris County taxpayers must pay for the relocation of the telephone lines." But they don't create a cause of action. Then we just should ignore-- we shouldn't imply from that-- from their-- they're saying specifically in the case, "You should pay for it." We can't imply cause of action from that. We should just say, well, sorry, because you didn't say no suit. In fact, they don't pay for it.

MR. POWERS: Well, the legislature has made it very clear that waivers of immunity are not to be simply implied unless there is -

JUSTICE BRISTER: Right. But when they say, in my hypothetical statute, when Westpark Tollway, for moving the phone lines, we say Harris County own it, must pay for it in the cost of building Westpark Tollway. But they don't say anything about the suit. That's not an implied waiver.

MR. POWERS: I don't believe so. But that's not the statute we have in this case, your Honor. This one doesn't -

JUSTICE BRISTER: It would make no sense. How else would it be done? If that was their will, then Harris County should pay for the suit. Different case, hypothetical case. If that was their will, then Harris County should pay for it. Harris County say's no. What other options are there than a civil suit?

MR. POWERS: Well, if the legislature doesn't grant the authority to sue, whether or not it created an obligation doesn't make a difference. It, it must-- in other words, you, you have to look at the situation here about what the potential liability is for counties. You know, that's one of the factors the Court always looks at. Is there-- if we're trying to find an implied waiver of immunity, is there some limitation placed by the statute following the potential liability of the government?

JUSTICE O'NEILL: There is-- Speaking about limitation, does it matter that they already own the right of way rather than this being a cost in its acquisition?

MR. POWERS: Does it matter that, that the government own-

JUSTICE O'NEILL: That, that, that the county already owned the right of way rather than this being a cost of its acquisition. Because the statute says the county shall include the cost in the expense of right of way acquisition. And my understanding was your position was we already had it.

MR. POWERS: That's right. The State of Texas owned that right of way as it owns all the roads in Texas. And the, and the county was simply authorized by statute to make use of, of State property when it constructs a project of this nature. That's a part of the Transportation Code.

JUSTICE O'NEILL: Are you troubled at all by the *CenterPoint* decision from the Fifth Circuit? It would appear that they've allowed reimbursement to *CenterPoint* on the same project. If we were to hold differently, then does that result trouble you a little bit that the result depends upon whether you're in Federal Court or State Court?

MR. POWERS: Not in the slightest, your Honor, because the, the Fifth Circuit got it wrong. And this-- I'm sure that this Court is going to get it right about what is the proper construction of 251.102.

JUSTICE O'NEILL: But right or wrong-- one of us will be right or wrong. I mean, if, if you have differing decisions, isn't it somewhat troubling that one utility gets reimbursed and another one doesn't?

MR. POWERS: Well, then the law will be established, because this is the Court that establishes what the Texas law is, not the Fifth Circuit. The Fifth Circuit made its best guess about what this Court would hold. And I submit that it got it wrong. It got it wrong because it did not-- it, it, it based its decision upon the *City of Austin* analysis that this Court used.

JUSTICE HECHT: And but just-- so we don't leave Justice Brister's point. One other aspect to that. I know, I know, we had an argument about eligible utility facility and, and how that was construed. But if you're wrong about that, if the circuit and the Court of Appeals are correct about that, you're still not going to pay.

MR. POWERS: That's right.

JUSTICE HECHT: That's a little troubling that even though there's no cause of action, the government would just snub its lawful responsibilities because there's nothing the citizen can do about it.

MR. POWERS: Well, I don't think that the purpose of the statute was to free it of its debt on the part of the, of the, of the government. It was to, to establish that if the, if the utility actually isn't eligible utility, as that term has always been understood in Texas, then it's appropriate for the government to make a reimbursement. Now, that -

JUSTICE HECHT: But, but you say you won't, even if it is an eligible utility facility.

MR. POWERS: Well, now, certainly, the government is going to honor its, its obligations.

JUSTICE HECHT: Well, that's what I was asking about.

MR. POWERS: Okay. Well, I misunderstood, your Honor. I mean -

JUSTICE HECHT: No, because you couldn't be sued and therefore, you aren't going to do it.

MR. POWERS: If, if the government actually had an obligation to do this, then the government will honor its obligations, I would think.

CHIEF JUSTICE JEFFERSON: Does it actually have an obligation under the Transportation Code 366, that the Authority shall pay the cost of the installation of the facility in a new location?

MR. POWERS: No, I don't think it does. Not in this instance. Because here is the thing. There is no eligible utility involved in this situation. SBC -

CHIEF JUSTICE JEFFERSON: Well, under the circumstance where that provision would apply, 366. And the Authority shall pay the cost of installation. Does that waive immunity or does it not?

MR. POWERS: 366?

JUSTICE: Of, of the Transportation Code, 366.171(b), mentioned in the, in the-- I thought your brief, but certainly in *Southwestern Bell's*.

MR. POWERS: Well, 366.171 -

CHIEF JUSTICE JEFFERSON: I'm not, I'm not -

MR. POWERS: A completely different statute.

CHIEF JUSTICE JEFFERSON: I, I know. I'm not trying to apply it to, to your client, to Harris County, in this case. I'm saying, as a matter of waiver of immunity, if you have a statute that says that the authority shall pay the cost of relocation, is that a waiver of

immunity from suit?

MR. POWERS: I don't believe so your Honor, because you, you still have to determine the, the usual factors such as, is there a limitation on the exposure of the government?

JUSTICE HECHT: If Southwestern Bell here had refused to relocate, "So we're not going to do it till you hand us a check," then what would have happened?

MR. POWERS: Well, I suppose that there would have been litigation over whether they were obligated to move or not.

JUSTICE HECHT: You'd have to sue.

MR. POWERS: I suppose we would have had to sue. And the problem with, with having done-- doing that, of course, would be that we would-- may waive immunity for suit in the process.

JUSTICE HECHT: So it would be who's the utility to be apt ?

MR. POWERS: Well, that wouldn't, in the matter. That would take out one defense, the, the immunity from suit. It would not create a property, a vested property interest in them. And it would not pray a legal obligation to pay as the statute is worded. One-- getting back to the, the, the *CenterPoint* case and what's wrong with that decision. The Fifth Circuit utilized this Court's criteria for constitutionality of the legislature authorizing reimbursement to a private party when the, when the State exercises its police power. There was no eligibility to-- for reimbursement was undisputed in *City of Austin*. That wasn't-- you know, eligibility was not the issue. And yet that's the criteria that this, that this-- the Fifth Circuit determined was how you determine what is an eligible utility suit. And that cannot be right. And the other aspect of it that needs to be kept in mind is there was no assertion of immunity from suit in the *CenterPoint* case. The county -

JUSTICE BRISTER: Which doesn't, which doesn't matter because it can't be waived.

MR. POWERS: The county -

JUSTICE BRISTER: Court, Court has to take it up even if the parties don't raise it.

MR. POWERS: Well, but the problem is, under Federal law, if the county removes the suit from State Court to Federal Court, it waives its immunity from suit. That's established Federal, Federal law. And so we could not-- we were not in a position to assert immunity from suit in the Fifth Circuit or in the, in the Federal litigation.

JUSTICE BRISTER: Except you didn't have to remove it.

JUSTICE BRISTER: Correct.

MR. POWERS: Sorry?

JUSTICE BRISTER: Except you didn't have to remove it.

MR. POWERS: Well, that's true. We didn't have to remove it. But it was removed. And when it was removed -

JUSTICE BRISTER: Now, you wish it has.

MR. POWERS: Well, I think that's correct, your Honor. It would have been a lot better not to have removed that case.

JUSTICE BRISTER: [inaudible] the, the right of way is provided free to the utilities but taxed.

MR. POWERS: Yes, sir. That's correct.

JUSTICE BRISTER: So why is that not a property interest? You can't tax somebody if they don't have-- on something they don't have a property interest in.

MR. POWERS: Well, there's not any requirement in the Tax Code that, that, that the interest that they have, whatever-- of whatever nature it may be, there's no requirement that it be a vested property right. But only vested property rights can support a takings claim.

JUSTICE BRISTER: But what, so what interest are you taxed? What do you tax?

MR. POWERS: Well, I think it's being taxed in different ways around the State, frankly, probably.

JUSTICE BRISTER: What do you tax?

MR. POWERS: Well, the record doesn't reflect it one way or the other. I believe what they're taxing is the, the value of the lines installed on the ground. But I can't make a specific representation to the Court on it because the record doesn't reflect it.

JUSTICE BRISTER: Value, value of the lines to a user or the value of the cables and conduits?

MR. POWERS: Well, I think it's the market value of the lines in place. They take into account perhaps what did it cost to put them in there and, and, you know, what benefit can you gain from it. Because -

JUSTICE BRISTER: [inaudible] that's owned by Verizon. If that's owned by SBC, you'll make money off of that. That's a property right.

MR. POWERS: Right. But that doesn't make it a vested property right because if it were vested, then it would inconvenience the public. That's the difference.

JUSTICE HECHT: There's, there's statement in your brief at 14 to 15 where you say, thus a utility is eligible to receive reimbursement only when the project in question is, one, eligible for Federal participation; or two, the utility has a compensable property interest in the land put in-- append in the one and the two. Is it either or? Is, is that what you mean? Or do you mean that it must be eligible for Federal participation no matter what?

MR. POWERS: Oh, no. I don't mean that at all. I mean, Federal participation is just an aspect of how there could be an eligible utility because-- you know, that's what he had in the *City of Austin* case back in, in the-- in 1960, that the-- there was a-- the project was eligible for Federal funding. And so in that class of cases, then you have an eligible utility. The other aspect, of course, is did the utility have a private easement before the government came along to acquire the right of way?

JUSTICE HECHT: So you -

MR. POWERS: If you acquire their property, then there's a-- they're eligible.

JUSTICE HECHT: So when Mr. Hatchell says in-- today that there're some relationship here between the nature of the property interest and the statute, this sort of identifies part of that relationship, but that you would say utility is eligible if there was a compensable property interest in the land.

MR. POWERS: That's right. But it must, it must predate the government's acquisition of the right of way. And that's-- you know, here's another point I want to get to before my, my time runs out. Many of the cases that are relied upon by SBC in support of their position that they have a vested right in this right of way are cases that involve franchise agreements. Those are completely different than what we have here in this case. They're totally distinguishable. Franchise law is based in contract. The parties, the government and the utility enter into an agreement for the placement of the lines. The utility gives valuable consideration to place those lines there. It creates-- once they go into possession and place their lines there, they create vested rights. That's not what we have in this case. So the, the *Owensboro* case, the *City of Louisville* case, the *City of El Paso* case, all those cases are franchise cases. And they're completely distinguished from what we have here.

JUSTICE BRISTER: What, what would have happened if the, the county had, had, had told the utility, "No, you can't locate your lines in this right of way." Wouldn't then the phone company in this case or in your detail, you, you require that the purchase of the easement or some other way of, of locating their lines somewhere there?

MR. POWERS: But the county told a utility that they could not place their line in the public right of way in the face of the statute that gives them the right to do so.

JUSTICE GREEN: It says may.

MR. POWERS: Well, but I mean, it's been interpreted to mean that they-- that you must allow them to be there. And if you don't, then you'd be subject to suit for an injunction to, to force you, to allow that to, to occur.

JUSTICE GREEN: It seems to me that this sort of thing's been going on around the State for years. I mean, people, utilities or county said he's relocating a utilities on the streets, or reconstruction and so forth. Why is this case different from those in some way? Or why is this service [inaudible] Is it something new about this situation that makes it come out [inaudible]?

MR. POWERS: Well, I think, historically that utilities have always paid their own relocation cost because it's-- law has been clearly established that they must do so. I think probably what's happened here is that, in recent times, the utilities are not permitted to pass on the, the cost of, of changing those lines to their right payers. And they're-- it's going to the bottom line and they're looking for somebody else to pay for it. That's my supposition as to what's happening here. But I mean, historically, the, the utilities have always paid their own relocation cost. And that's been true throughout the United States.

JUSTICE GREEN: There's counties involved in this, as was in the *Centerpoint* case. What about other counties and cities? We don't see free litigation involving those. I wonder why that is.

MR. POWERS: Well, I'm, I'm not aware of any litigation yet. But I, I think what's happening is the utilities are beginning to take the position that the government must pay the relocation cost. And they're basing it on this.

JUSTICE BRISTER: [inaudible] at the regional tollway statute, they win.

MR. POWERS: Well, the tollways-- in the regional tollway statute, there is, you know, actually a provision for granting the reimbursement. And-- but the-- there's a point that -

JUSTICE BRISTER: So they win -.

MR. POWERS: Well, but -

JUSTICE BRISTER: - because under the regional tollway, you would lose.

MR. POWERS: No, because here's the reason. I'm about to run out of time, but I'll answer your question [inaudible]. You have to look at that, that tollway statute. It says that the, the payment must come from the revenue of the operation of the tollway. It does not create an obligation to the credit-- against the credit of the State of Texas or against the county that created the tollway. And so that it does not create liability on the part of the county. It's a red herring to say that the turnpike statute is like this. It's different. But it's-- it also is limited such that the only obligation is the obligation to pay out of the revenues from the operation, not the county's credit.

CHIEF JUSTICE JEFFERSON: Any further questions?

JUSTICE BRISTER: If I could have this one.

MR. POWERS: Yes, sir.

JUSTICE BRISTER: First, the whole idea of a tollway is that the users will pay for it. And your position is the user should not pay for this cost.

MR. POWERS: Well, the county shouldn't pay for it because the county hasn't been obligated by the -

JUSTICE BRISTER: If the county doesn't pay for it, the tollway users aren't either.

MR. POWERS: Well, what's going to happen is, is that ultimately that the utility which legislature has determined is the party to pay, will pay.

JUSTICE BRISTER: I'll take that as a no, correct?

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Powers.

MR. POWERS: Thank you.

JUSTICE WILLETT: Did you cover all five of your points earlier?

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: We didn't get to the takings clause, your Honor, which I can do. But I would like very much to get to the four points. The interesting dilemma that is posed by opposing Counsel's excellent argument is stark and striking. They say when we want to tax you and get money from you, we will call your interest a vested property interest. But when you want to get money from us, what is it? It's a puff of smoke. It's a franchise, a special privilege, a license. They just simply can't have it both ways. So there are four points that I would like to address in rebuttal. One is that utilities always know when they locate their facilities in a right of way, that they're subject to paying utility relocation cost. That's just absolutely untrue. The, the handout that we have given you contains direct quotations from cases which, which simply refute that. One of which being, if the right to maintain the company's poles, wires and conduits on the streets of Fort Worth is property for purposes of protection, is property for purposes of taxation. And when we have the right, unconditional right to locate, subject to simply-- to minimal police power, we don't know that we're going to be taxed on relocation cost, when the cases tell us that when we accept that invitation and sink our poles, we have, we have a vested property interest. And the government can't take it away from us. The second point that I would like to address is the question of the inconvenience limitation which Justice O'Neill has, has very appropriately raised. Justice O'Neill, that's best addressed in the *City of Fort Worth* case by-- out of the Fifth Circuit. And he made this very cogent observation: "The reservation of the-- by, by the statute of a supervision through the municipality as to the placing and alteration of the figures does not negative its operation when acted on as a grant or dedication." So I think that harmonizes the relationship between our interest and the [inaudible] interest police power. The next point that I want to make has to do with the statement that all of our cases have to do with franchises. In looking at the cases, I would caution the Court to be very careful at the Court's uses of various phrases . There are a number of ways in which courts have called our interest. One being a contractual franchise, which is exactly the type of the interest that I'm talking

about. We accept a contract. I mean, we accept your offer to locate. It initially starts out as a franchise, But once we accept it, it becomes a contract of franchise and a contract of right. And the cases are, in our judgment, very, very clear that in our particular situation, when we have an unconditional right to locate, we accept that, we sink our poles because they are-- the beginning of all of this litigation was to encourage the expansion of telephone and telegraph service within Texas. And that's why they were willing to give us the property interest that we did. And Mr. Justice Willett, that leads me to our takings claim. I think that if the Court doesn't buy into our argument under the statute, which we had emphasized because we believe the Court doesn't-- well, would prefer not to write on the Constitution if it has a statutory escape, we still say that, that the answer is exactly as we have just given you.

JUSTICE: And -

MR. HATCHELL: And do we have a vested property right that is a compensable property right? And, and we believe that we have given you cases that say that we do again.

JUSTICE O'NEILL: Well, the Court of, the Court of Appeals' analysis, I think, was fairly interesting because they seem to say a vested property right has to be an interest in the real estate itself -

MR. HATCHELL: Mm hmm.

JUSTICE O'NEILL: - rather than, they, they made the point, it can't be a mere expectancy that a particular law will continue.

MR. HATCHELL: Well, the cases have said that our-- in fact, I believe, this case [inaudible] I believe this case in the *City of Austin* described it as an easement. And the United States Supreme Court has described it as an easement. But whatever the nature -

JUSTICE O'NEILL: But you're not claiming it's an, an easement in the sense that we typically use that as an ownership interest in property.

MR. HATCHELL: Oh, absolutely.

JUSTICE O'NEILL: I mean you can't-- you couldn't transfer that interest. You couldn't sell that -

MR. HATCHELL: I think it-- oh, yes. As a matter of fact, also, the, the two United States Supreme Court cases that are cited in our brief say this is not only a, a property interest. But it is, when it becomes vested, is alienable. I mean, how are, for example, utility companies who merge with one another, going to be able to transfer these interests, one to other if, if they're not alienable, right?

JUSTICE O'NEILL: Well, but that doesn't relate to whether-- I mean, whoever you transfer it to is going to get whatever right you've had. That sort of begs the questions [inaudible] .

MR. HATCHELL: But, but if the cases are correct in saying that once we establish the locations, the government cannot take it away from us. I'm not sure that it makes a whole lot of difference. Well, [inaudible], because if we can't be proud of that, it is certainly proper. That is, subject to, in my judgment, not only the statute, but the takings claim. And your Honor, my clock is not working. I may just [inaudible].

CHIEF JUSTICE JEFFERSON: Yes. Are there-- are there any plaintiff questions? Thank you, Mr. Hatchell. The cause is submitted, and the Court will take a brief recess.

COURT MARSHAL: All rise.

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