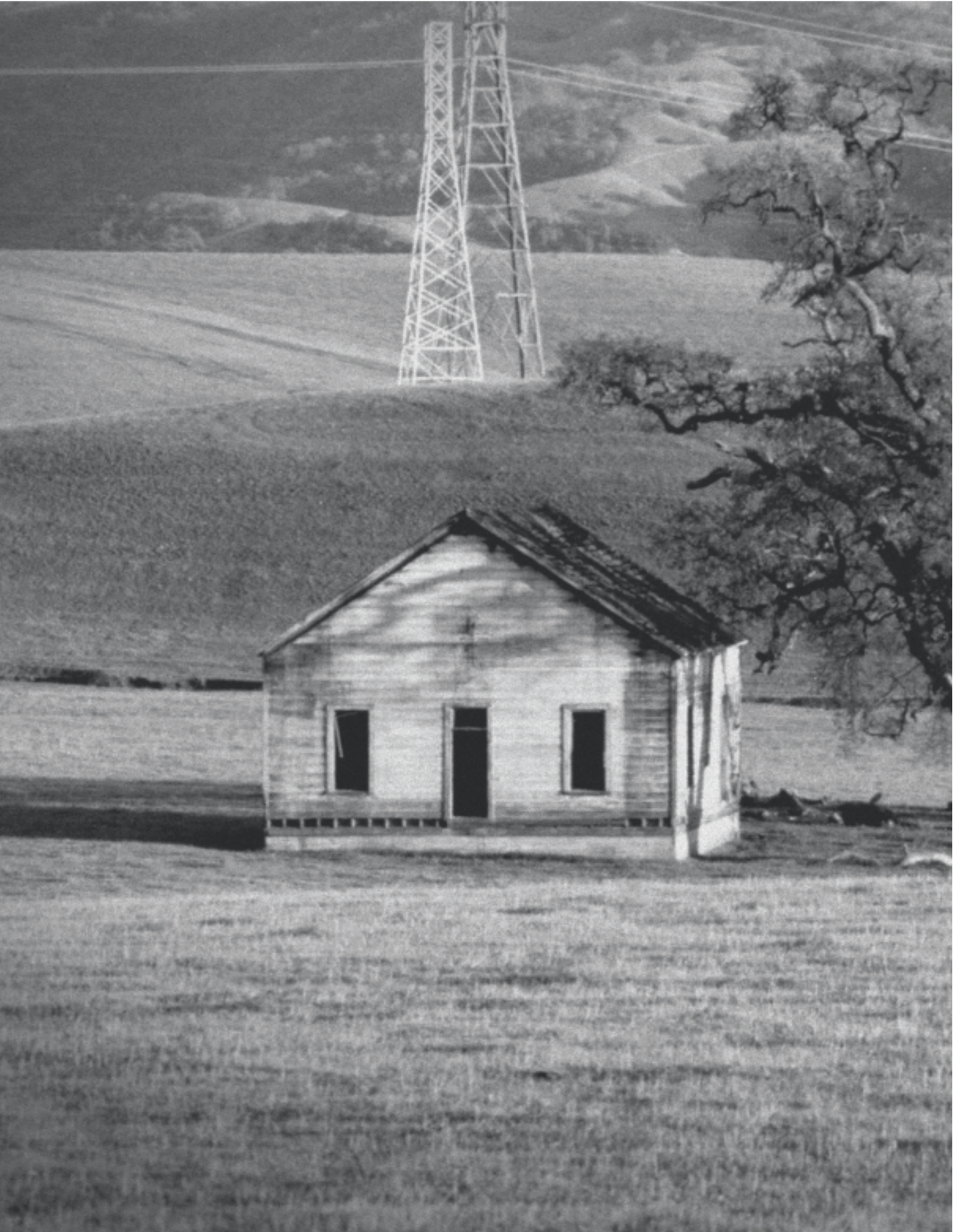


UTILITIES AND WIRELESS CARRIERS Ring The Bell

BY STEPHEN J. HUMES, ESQ.

There are some towering new opportunities lurking in long-forgotten utility infrastructures: At a time when wireless telecommunications carriers face mounting local opposition to zoning proposals for new towers and public utilities seek new revenue streams that optimize existing utility infrastructures, carriers and utilities have found creative ways to serve the public interest with new uses for transmission towers in historic rights of way.

Welcome to the age of antenna power mounts.

With the rapid deployment of nationwide tower networks and antennas to support wireless telecommunications systems, wireless carriers and owners of electric transmission infrastructure have become business partners in the race to site facilities on existing structures wherever possible.

For wireless carriers, such as T-Mobile, AT&T Wireless or Sprint PCS, power-mount installations of antennas on existing electric transmission tower facilities – often in desirable locations and elevations as rights of way span hilltops and approach interstate highways – is a sensible and often-expeditious alternative to constructing a new wireless tower facility on raw land sites where zoning considerations or environmental sensitivities complicate projects.

For electric transmission owners, whether public utilities or independent transmission companies, inducing wireless carriers to negotiate master leases and individual site leases for tower site collocation arrangements provides a winning strategy that can lead to long-term leases with absentee tenants offering steady, carefree, and annually escalating cash flow on mature assets.

> do the underlying property owners have any say at all in whether wireless antennas and ground equipment get installed within the right of way easement area?

For owners of the underlying property whose "predecessors in title" long ago conveyed an interest in property to utilities to support now-historic development of electric transmission rights of way, the new uses within utility easement areas may come as a surprise.

An interesting question, therefore, is do the underlying property owners – whose previous owners may have long ago granted utilities a right of way across, over and under their properties to erect tower structures and related facilities (such as light, heat and power and telephone purposes) – have any say at all in whether wireless antennas and ground equipment get installed within the right of way easement area?

Sometimes these property owners operate large industrial parks or vast farmland acreage. Sometimes these property owners live in residential subdivisions, for example, with electric transmission line rights of way meandering through the neighborhoods. Should these property owners

have a right to a share of the rents wireless carriers are paying to the utilities to deploy towers and antenna facilities? From the carrier and utility perspective, if the underlying easement permits the proposed use, why should the underlying property owner have a say at all? Further, from the carriers' perspective, paying rent to a ground owner for access to a utility easement that otherwise permits access anyway amounts to paying double when they should only have to pay the utility for access to the tower and easement area.

The competing interests between underlying property owners and wireless carriers, and electric transmission tower operators, have been clashing with results that, depending on the wording of the historic utility easements that supported the original right of way development, can leave utilities and wireless telecommunications carriers ringing the bell.

At the same time, disappointed property owners are turning to litigation, often using contingency fee arrangements and attorneys unfamiliar with the law of interpreting these kinds of easements. The litigation often ends in the carriers' and utilities' favor, but the litigation costs cannot be ignored even for a favorable outcome.

In that 1987 easement grant, the property owner granted an easement to the local electric company that provided:

… the right and easement to erect, construct and maintain a line or lines for the transmission of electric energy thereover for any and all purposes for which electric energy is now, or may hereafter be used, and a telegraph and telephone line or lines, and cable television service … with all necessary poles …

From the carrier and utility perspective, if the underlying easement permits the proposed use, why should the underlying property owner have a say at all?

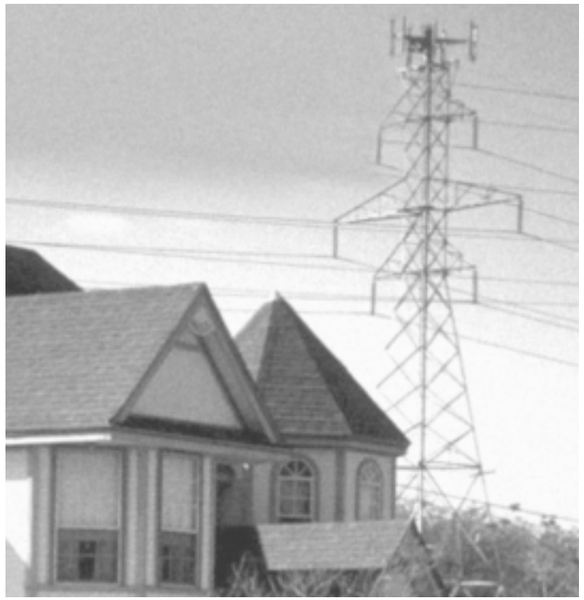
For example, a Superior Court in Cape May County, New Jersey, ruled in 2002 that an easement granted by a property owner, a municipal sewer authority, in 1987 to a utility, for "telephone line or lines," should be interpreted to include transmission of telephone services by "noncable" or wireless means. *Cape May County Municipal Utilities Authority v. Omnipoint*, Docket No. CPM-C-64-01 (decided July 12, 2002; oral opinion from bench).

The electric utility thereafter constructed a 60-foot wooden pole for electric transmission service adjacent to the sewer authority's pump station on the property. In 1997, the electric utility entered into a license agreement with Omnipoint, an affiliate of T-Mobile, to replace the wood pole with a 90-foot steel monopole with a wireless antenna platform and other associated equipment. The sewer authority eventually challenged the wireless antenna installation, alleging that its

easement rights were inappropriately burdened or expanded by the wireless carrier.

The court reviewed several decisions by New Jersey courts that discussed the rights of easement holders and landowners. In construing these cases, the court found that the easement allowed for transmission of telephone service by noncable or wireless means. With this ruling, which the plaintiff property owner did not and can no longer appeal, the New Jersey court followed a number of other states that have found historic utility easements sufficiently broad to allow advanced telecommunications uses.

Similar cases have cluttered the courts in Connecticut. In the last three years alone, at least four similar lawsuits have been filed in Connecticut.

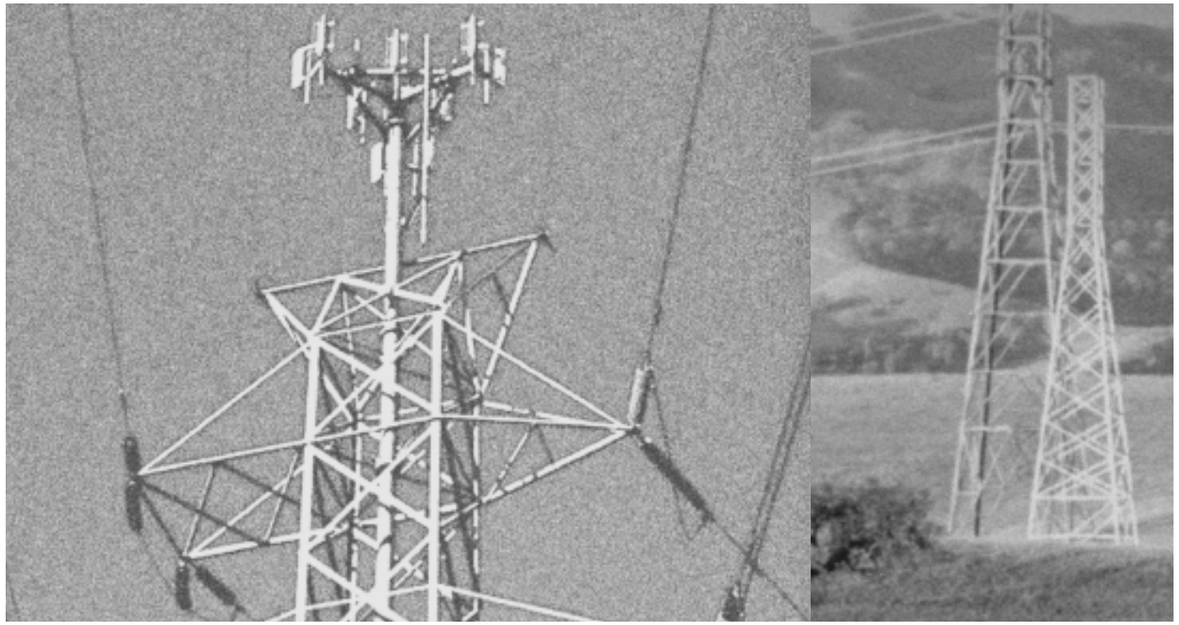


In one Connecticut case, a residential property owner purchased a house with an electric transmission tower in the back yard. The tower had been standing on the property for nearly 75 years. Of importance, before the buyer purchased the house, a wireless carrier obtained permission from the electric utility to install a monopole tower facility inside the footprint of the lattice "Fort Worth" style electric transmission tower so that the monopole extended roughly 30 feet above the 75-foot-high electric tower. This monopole made room for three carrier platforms above the electric transmission lines and the equipment compound and access area was accomplished within the historic utility easement. After the buyer moved in, he tried to stop the construction of another wireless carrier's facilities on the monopole by suing, alleging trespass.

The easement in question, which dated back to the 1920s, gave the electric utility the right to enter upon said land and erect, inspect, operate, replace, repair and patrol, and permanently maintain on said right of way, pole and towers, with necessary conductors, wires, cross arms, guy wires and other usual fixtures and appurtenances used or adapted for the transmission of electric current for light, heat, power or any other purpose, and "used or adapted for telephone purposes."

Plaintiff property owners often latch onto the fact that wireless telecommunications did not exist in the 1920s so, the argument goes, such easement language could not have been intended to cover the wireless antennas and cabinets that have been proliferating in recent years to support modern wireless communications.

The challenge for underlying property owners is that Connecticut, like most states, recognizes that easements should be interpreted to allow for a modernized form of a particular use, provided the underlying use was contemplated in the original easement grant. In these easement cases, therefore, if the easement confirms that a telephone use was contemplated, the courts should interpret the easement to allow for the modern wireless telephone use. In cases we have been involved with, we have argued that wireless antennas are less obtrusive and burdensome



to underlying property owners because no wires are needed between towers.

So far, the courts in Connecticut have rejected the property owner's claims, noting that easements should be interpreted to allow for the modernized use.

There is another legal doctrine that often governs how courts interpret these historic utility easements. The question for the reviewing court is, did the grantor intend the conveyance to be exclusive at the time the easement was conveyed? In other words, when the property owner gave the utility an easement to support right of way development, did the property owner also intend to separately operate a utility on its property, or did the property owner intend to let the utility company exclusively develop such electric utility facilities on the property?

The legal analysis is that if I, the grantor, give the easement rights to utility A to erect facilities for the purposes of light, heat, power and telephone purposes, what difference does it make to me, if utility A erects facilities for light, heat and power but lets company B put allowed facilities, such as for telephone purposes, on utility A's facilities?

Typically, such utility easements were clearly exclusive, allowing the granting property owner the reserved right to engage in passive activities like farming, recreation or access, provided the grantor did not interfere with the rights granted. A typical easement would relate this language as follows: "Reserving to myself and to my heirs and assigns, the right to cultivate the ground between said poles and towers and beneath said wires, provided that such use shall not interfere with or obstruct the rights herein granted."

If the reviewing court finds that an easement grants an exclusive right to erect utility facilities to an electric utility and, therefore, that the granting property owner did not intend to also develop portions of the property for the same reason, then the easement will be interpreted to be assignable, such that the utility is free to allow other parties to engage in the uses allowed by the original easement grant.

While judicial decisions that interpret historic utility easements to allow for wireless telecommunications use may disappoint underlying property owners, there are some important policy reasons that support such conclusions from a federal and state utility policy perspective.

The Federal Communications Commission, for example, has interpreted the Pole Attachment Act as requiring electric utilities to allow wireless carriers to attach their antennas on utility poles for reasonable compensation.

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And, from the state level, many states discourage the unnecessary proliferation of wireless tower facilities when it is possible to install antennas on existing structures such as rooftops, billboards, water tanks or electric transmission towers. So by allowing carriers to mount antennas on existing electric transmission towers, utility regulators and the public are avoiding the construction of unnecessary new wireless tower facilities nearby.

Given the legal and public policy considerations that support allowing wireless communications installations on electric transmission infrastructure, carriers and utilities may want to read the fine print of the underlying easements. And if the facts and the law of the jurisdiction support such a conclusion, proceed to allowing cell site development on such towers without the need for costly additional leases from underlying property owners. ❖