

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of: ELECTRONIC INVESTIGATION INTO)
THE IMPACT OF MADISON COUNTY FISCAL) CASE NO.
COURT’S USE OF MADISON COUNTY) 2021-00422
UTILITIES DISTRICT’S SYSTEM FOR ITS FIBER)
OPTIC CABLE INSTALLATION PROJECT)

**JOINT BRIEF IN SUPPORT OF
PROPOSED USE OF MADISON COUNTY UTILITIES DISTRICT’S
SYSTEM FOR FIBER OPTIC CABLE INSTALLATION**

Come now the Madison County Utilities District, by counsel, and the Madison County Fiscal Court, by and through the Madison County Attorney, and in support of Madison County’s proposed use of the Madison County Utilities District’s system for its fiber optic cable installation project as it relates to existing easements, hereby states as follows:

STATEMENT OF FACTS

This matter arises from Madison County’s (the “County”) proposed use of water lines utilized by the Kirksville Water Association and Madison County Utilities District (the “Water Districts”). The Water Districts have obtained Right-of-Way Easements (“Easements”) from the landowners through whose land the Water Districts have run water lines. The Easements read as follows:

Grantors hereby grant, bargain, sell, transfer, and convey unto Grantee, its successors and assigns, a perpetual easement with right to erect, construct, install and lay, and thereafter to use, operate, inspect, repair, maintain, replace and remove a water line, and appurtenances in connection therewith, over, across and through the land of the Grantor . . .

The Water Districts and the County now propose running fiber optic line through the existing water line to facilitate communication in connection with emergency operations.

ANALYSIS

Generally, an easement cannot be enlarged or extended so as to increase the burden upon or to interfere with the servient estate. McBrayer v. Davis, Ky., 307 S.W.2d 14 (Ky. 1957); Plunkett v. Weddington, Ky., 318 S.W.2d 885 (Ky. 1958). However, the contemplated use of the existing water lines does not require any expansion of the existing easements whatsoever. The explicit language of the Easements provides the right to “use” and “operate” a water line. The proposed installation of fiber optic cable through the interior of the water lines is not a new use of the subject property, but merely a derivative right of the water line being shared with the County. In this instance, it is not that the property owner is being asked to convey any right beyond what has already been conveyed, but that the recipient of those existing rights, the Water District, is sharing the rights which have already been conferred upon it by the landowner.

The plain language of the Easements conveys to the Water Districts the right to “install and lay, and thereafter to use, operate, inspect repair, maintain, replace and remove a water line, and all **appurtenances in connection therewith...**” (emphasis added). An Appurtenance is a thing associated with another, more important thing—appurtenances are accessories to the primary object or activity. In this instance, the inclusion of the “all appurtenances” language conferred upon the Water Districts additional rights to engage in activities associated with the installation, use, operation, repair, maintenance and replacement of a water line beyond those activities specifically listed therein. The Easement must be interpreted to encompass more than the handful of listed activities/rights, otherwise, the “appurtenances” language would be rendered superfluous. The proposed fiber optic cable is appurtenant to the use of the water lines in this instance.

The Water Districts and the County jointly assert that that the language of the Easements allows the Water Districts to permit County to share in, by grant of partial assignment, the rights

conferred by the Easements, which state “The grant and other provisions of this easement shall constitute a covenant running with the land for the benefit of the Grantee, its successors **and assigns.**” (emphasis added). As such, the Water Districts may grant a partial assignment to the County for the use of the water lines to accommodate fiber optic cable, so long as it does not increase the burden on the landowner under McBrayer, *supra*, and so long as it is a reasonable deviation from the original grant under Cincinnati, N.O. & T.P. Ry. Co. v. Barker, 247 S.W.2d 943 (Ky. 1951). Generally, the dominant estate may be divided or partitioned, and the owner of each part may claim the right to enjoy the easement appurtenant thereto, if no additional burden is placed on the servient estate. Martin v. Music, 254 S.W.2d 701, *supra*. That is the case here. In this case, testimony has established that fiber optic line may actually be helpful in improving and updating the water services provided in these Water Districts, creating not a burden, but a benefit.

Even if one were to view the proposed installation of fiber optic cable as a new or additional use of the easement, Kentucky law provides that reasonable deviation may be permitted the grantee when there has been a normal development of the use of the dominant estate. Cincinnati O. & T. P. R. Co. v. Barker, 247 S.W.2d 943 (Ky. 1951). The Kentucky Supreme Court has cited to the Restatement, Property Servitudes, Section 484:

In ascertaining, in the case of an easement appurtenant created by conveyance, whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement.

Cameron v. Barton, 272 S.W.2d 40, 41 (Ky. 1954), citing Restatement, Property Servitudes, Section 484. The above is especially true where the owners of the servient estates benefit from the expanding use. Cincinnati, N.O. & T.P. Ry. Co. v. Barker, *supra*, at 946. In this

case, testimony has established that fiber optic line may actually be helpful in improving and updating the water services provided in these Water Districts, creating not a burden, but a benefit.

As discussed in the Restatement provision above, the parties to the easements in the instant case likely did not contemplate the development of technology which would allow the transmission of information through these water lines. The development of that technology is a normal development over time, which is now capable of incorporation into the existing structures which are the subject of these easements. This is very new technology which has been very recently developed, and so could not have been explicitly included in the original easements. That being said, it is not a use inconsistent with the scope of the Easements. The use of the water lines does not increase the burden on the servient estate holders in any way. Further, the holders of the servient estates at issue will actually benefit from the increased capacity and effectiveness of emergency responders in the county in which their property lies, as supported by testimony provided in this proceeding.

Respectfully submitted,

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