

Payments to Public Utilities for Relocation of Facilities in Highway Rights-of-Way

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Larry W. Thomas, TRB Counsel for Legal Research, principal investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. This paper deals with the legal aspects of relocation of utility facilities. It includes legal authority relative thereto.

This paper will be included in a three-volume text entitled, "Selected Studies in Highway Law." The Transportation Research Board published Volumes 1 and 2 in 1976 and Volume 3 in 1978. Together with the first supplement, published in 1979, they include 45 papers and more than 2,000 pages. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of \$90.00 per set.

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RESEARCH FINDINGS

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INTRODUCTION

The subject of relocation of public utilities located in highway rights-of-way has been an important topic for many years. This paper is concerned, first, with the extent to which either the State or the utility must pay the cost of relocation when the utility is required to move its facilities because of highway construction or improvements. Discussed second is the reimbursement of States for payments to utilities pursuant to Title 23, Section 123 of the U.S. Code.

Thus, two basic situations are presented. The first one is purely a matter between the utility and the State, county, or city, or an agency of one of those levels of government. In this situation, if utility facilities are relocated, the utility may claim that the government requiring the relocation must pay the expenses of the move. As will be discussed, unless there is some specific statutory authority for such payments, the utility normally has to pay its own cost, absent other circumstances. This broad category of cases generally is governed by common law.

The second situation is a creature of statute and is more concerned with the reimbursement of States by the Federal Highway Administration (FHWA) where the States are paying the cost of utility relocation from the highway right-of-way as part of the highway construction project.

With these two basic situations in mind, one may note that the general rule (in the absence of statute) is that the utilities must bear their own costs. The Federal Aid Highway Act of 1956,¹ however, in authorizing reimbursement of States for utility relocation cost incurred on federal-aid or Interstate Highway projects has encouraged numerous States to enact laws permitting payment of relocation cost to utilities.²

The term "utilities" as used in this paper means a business or service that is engaged in regularly providing the public with a commodity that it requires, such as electricity, gas, water, transportation, telephone, or telegraph service.³ The federal regulations for 23 U.S.C., § 123 define the term in this manner:

Utility shall mean and include all privately, publicly, or cooperatively owned lines, facilities, and systems for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude

products, water, steam, waste, storm water not connected with highway drainage, and other similar commodities, including publicly owned fire and police signal systems and street lighting systems, which directly or indirectly serve the public or any part thereof. The term "utility" shall also mean the utility company, inclusive of any wholly owned or controlled subsidiary.⁴

In the federal regulation, no distinction is drawn on the basis of the type of ownership of the utility. Although a few State statutes may distinguish between public and private utilities, the type of ownership does not appear to have a significant impact on the legal issues concerned with payment of relocation cost. Unless otherwise noted, the term "utility" means all utilities, whether privately, publicly, or cooperatively owned.

As noted, the term "reimbursement" is somewhat misleading in that its application is more precise in the discussion of reimbursement of States by FHWA.⁵ Where the State, pursuant to 23 U.S.C. § 123, pays the cost of relocation of public utilities, the States are reimbursed *pro-rata* for their expense in the same proportion as the percentage of Federal funds participating in the project.

Where the term "relocation" is used in this paper, it means that the utility, located in the highway proper or in the highway right-of-way, has had to adjust, move, or relocate its facilities in order for the highway agency to proceed with the highway project. For example, the utility may have to remove and reinstall its facilities on a new right-of-way; it may have to move or rearrange its existing facilities; or it may have to change the type of facilities.⁶ In this paper the term "relocation" and the cases involving relocation of utilities all refer to changes incident to highway construction or improvements.

The authority under which utilities are permitted to be located in or to occupy highway rights-of-way is discussed in other studies. Several years ago it was determined that in all States there is statutory authority that permits the use and occupancy of public highways and streets by utilities,⁷ and many of the statutes attach terms and conditions to the utilities' privilege. In addition, the courts hold that the States may regulate the utilities located in highway rights-of-way pursuant to the police power,⁸ and, by virtue of that power, reasonably require the utilities to relocate their facilities.

In passing, it may be noted that each State may have policies on the accommodation of utilities in highway rights-of-way. The reason is that utilities often serve the same points as highways and inevitably "follow and cross highways and seek to be accommodated within highway rights-of-way."⁹ Because of this dual interest, many States have developed policies concerning installation of utility structures, scenic enhancement, permits or fees, and utility accommodation and coordination. The coordination of utility relocation is an important function of the highway agency.¹⁰

An important facet of utility relocation is the question of who should or must pay the cost of relocating the utility facilities that have been

constructed in the highway right-of-way. One view is that relocation costs are often too high for the utility alone to bear. It is argued that, because relocation cost eventually is passed on to the utility user, a more equitable method is to spread the cost among the highway users by having the public agency pay the utility's cost.

Since the enactment of the Federal and State laws pertaining to payment of relocation cost, the policy question of who should pay has been answered in many States. Reimbursement of relocation cost of utilities is sanctioned for Interstate Highway projects in fifteen States. In six States, such payments are authorized on all federal-aid highway projects. Seven States pay utility relocation cost on certain types of State highways. No statutory authority, however, exists for paying such cost in eleven States.¹¹

COMPENSATION FOR TAKING OR DAMAGING OF UTILITY EASEMENT OR PROPERTY

Majority View

As seen, utility facilities may be located properly in the highway right-of-way pursuant to statute or written instrument, such as a license, franchise, or permit. The nature of the utility's interest is important in determining whether the utility must be paid for relocating its facilities from its present position along the right-of-way.

The utility may be located on land that it has acquired in fee simple from the owner; it may be situated on privately owned land over which it has purchased or condemned an easement for its facilities; or it may be on private property with permission from the landowner.¹² The highway authority's right-of-way may be adjacent to the utility under one of the foregoing conditions, or the highway authority may have acquired or condemned property to which the utility may have some prior right that has not been extinguished by purchase or condemnation.

If a utility is located entirely on its own private right-of-way or easement, the courts have held uniformly that, before the highway agency can compel the relocation of facilities, the utility's property interest must be purchased or condemned. Clearly, the State cannot require relocation of utility facilities on private property as an exercise of its police power in regulating the safety or convenience of the highway.¹³

The utility's property interest may be created or reserved expressly by deed, thereby requiring the highway authority to purchase or condemn the utility's property. This situation is illustrated by the case of *Commonwealth, Department of Transportation v. Louisville Gas & Electric Co.*,¹⁴ in which utility lines along a highway had to be removed and relocated because of a highway-widening project.

The original road was built in 1837 by a turnpike authority on land that it had purchased outright. In 1889 the authority, since renamed, granted rights-of-way for gas mains and telephone lines. In 1901, the turnpike authority conveyed its interest in the road to the County, the conveyance specifically preserving the utility rights-of-way. In 1961, the Commonwealth and the utility company agreed to a relo-

cation of the lines and expressly recognized the existence of the private easement. The Commonwealth failed to abide by its agreement to pay all cost of relocation, and legal proceedings followed.

In this case, the utility had a "private easement to lay and maintain gas and telephone lines in and along the right-of-way" and the Commonwealth's title came from the same source; the deed "specifically recognized the existence and superiority of the easement."¹⁵ The Court held that the State could not require the relocation of the facilities as an exercise of its "police power" but must purchase or condemn the utility easement:

The glove of precedent which fits the hand in this case is *Commonwealth v. Means & Russell Iron Co.*, 299 Ky. 465, 185 S.W.2d 960 (1945). There the relocation of three thousand feet of a water line was necessitated by the widening of a public road, along which the company held a private easement. *The rule is now as it was then, when the government requires the relocation of a perpetual easement for the public convenience its owner is entitled to compensation in the form of damages, which may be determined by the actual cost of relocation.*¹⁶ (emphasis supplied)

It is not always necessary that the utility have a recorded instrument in order to have an easement. It has been held that the taking of a prescriptive easement is compensable when the highway authority requires utility facilities to be relocated. For example, in *State of Arizona ex rel. Herman v. Electrical District No. 2 of Pinal County*,¹⁷ the County in 1913 had not complied with all of the technical requirements in declaring a public road until after the electrical district lines were in place. Thereafter, the State took the road into the State highway system. It was held that, where the district's right to maintain its lines arose from its prior presence in the highway, the State had to pay the relocation cost.¹⁸

Minority View

The foregoing cases illustrate the majority view that the utility must be compensated for a taking of its easement or private property. It cannot be required to relocate its facilities that are located on its own property because of the State's police power. However, there are cases that award compensation for the taking of a utility's "property," although the utility's interest did not rise to the level of a fee or an easement. These cases have involved the situation where the utility was compelled to remove its facilities to a new location outside the highway right-of-way. It was held that this complete abrogation of the privilege to be located in the right-of-way constituted a taking. These decisions, however, appear to represent a distinct, minority view.

In *In re Gillen Place, Borough of Brooklyn, Etc.*,¹⁹ the Court upheld an award to the utility companies for the cost of relocating their facilities. When the City instituted an action to close the street and acquire the fee title, the utilities sought to recover the cost of relocation, because they no longer had any right or privilege to have their facilities in that location. The Court held that the common law rule that utilities must relocate at their own expense did not apply, but the precise basis for the ruling is not clear.

On the one hand, it appears that the Court thought that compensation was required because the utilities' franchises were in the nature of an easement. It appears that the opinion is stating a rule of law that in New York such franchises are a "perpetual and indefeasible interest" in the land. Also, the Court relied on a city code provision pertaining to street closings that defined real property to include all such surface structures and every "right, interest, privilege, easement, and franchise relating to the same."

On the other hand, it appears that the Court held that, although a franchisee's position within the right-of-way is subject to regulation, including the requirement of relocation, there is a compensable taking of "property" if the utility is required to remove its facilities permanently from the right-of-way.

The Court distinguished other cases denying compensation for relocation on the basis that, in those instances, the utilities did not lose their right to be located in the right-of-way:

In each such case the utility was required to relocate, but its rights in the particular street remained in being, the relocation therein being merely to accommodate some street improvement. When a street is closed, however, all rights therein are extinguished; "when regulation becomes destruction, it ceases to be regulation."²⁰

A dissent in the *Gillen* case cited numerous cases from other jurisdictions that had held on similar facts that the utilities were not entitled to compensation. Moreover, the dissent noted that there was no physical property belonging to the utilities that was taken and that the code provision relied on by the Court was purely for the purpose of assuring complete title. The provisions, it said, did not create any interest in land where none existed.

Another case that addresses the same issue of payment of cost where the utility is required to remove its facilities completely from the right-of-way is *Postal Telegraph Cable Co. v. Pennsylvania Public Utility Comm'n.*²¹ The company was ordered to remove the poles and wires at its own expense from the public right-of-way because of the proximity to an airport.

Although the Court upheld the order for removal, it did not agree on the question of cost:

The Commission imposed the cost upon appellant. It reached this result, as it said, in reliance upon our decision in *Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 139 Pa. Super. 529, 12 A.2d 479. In that case the relocation of the telephone company facilities ordered at the sole cost of the company was a re-location within the limits of the street in which they had been laid. This is not authority for imposing upon a utility the cost of complete removal of the facilities from a public highway to land privately owned.²²

The Court held that the abrogation of the company's right to have its poles and wires in the highway was not a valid exercise of the police power but constituted a taking of the company's property.²³

The distinction between relocation and removal drawn in the *Gillen and Postal-Telegraph Cable Co.* cases appears to be a distinct, minority view that has been either largely rejected or severely limited even in their own jurisdictions.²⁴ Except for minor exceptions, the courts uniformly have held that a location in a street, pursuant to a statute, ordinance, franchise, license, or permit, is not a property right, but a mere privilege that is subject to reasonable regulation.²⁵

Damages

Few decisions have elaborated on the question of what constitutes "just compensation" in these instances but it appears that in addition to the value of any real estate taken, the measure of damages is the cost of relocating the facilities.²⁶

In sum, the courts have held consistently that where the utility's facilities are located on private property, the highway agency may not compel them to be relocated without paying just compensation. Normally, there is no compensable interest taken if all that the utility has is a location that is assured it by statute or written agreement. As noted, however, a few courts have awarded compensation for a complete abrogation of the privilege.²⁷

RELOCATION WITHOUT PAYMENT PURSUANT TO THE POLICE POWER WHERE THE UTILITY HAS NO PROPERTY INTEREST

State's Authority to Require Relocation of Utilities

In most instances involving relocation of utilities, the facilities will not be situated on private property but, instead, will be located in the highway right-of-way, usually by permission of a statute, franchise, license, or permit.

The authority of the State to regulate reasonably its streets and highways, as well as utilities located therein, is well established.²⁸ Included within the scope of this authority is the right to require the utility to relocate its facilities when required by highway construction or improvements. The utilities, where they are located in highways or highway rights-of-way by virtue of a statute or franchise, acquire no vested right to any specific location in the right-of-way.²⁹

The authority of a State over its public roads is such that it may permit highways to be used not

... only for the passage of persons, freight, and vehicles, but also for the transmission of information and property. Permission for a utility to place its facilities on a State Highway has been sustained although attacked as an unconstitutional grant of public money to a private corporation. The nature of the interest which a utility acquires when permitted to use a highway in this way has troubled courts, and no generally accepted definition has been advanced. It seems clear, however, that the utility obtains no right to any specific location in the highway, since whatever interest it does have is subordinate to the requirements of public order, health and welfare and, in particular, to the rights of

the traveling public. It is generally held that a utility placing its facilities upon a public right of way must move its equipment at its own expense when a reasonable exercise of the police power requires such relocation. The fact that the utility has a franchise permitting its equipment on the streets does not alter its obligation, since the police power, as an essential element of sovereignty, cannot be alienated, and thus, is an implied term in every agreement to which the State or a political subdivision is a party.³⁰

The extent of the police power reserved to the governing body is illustrated by the case of *Central Main Power Company v. Waterville Urban Renewal Authority*,³¹ which held that the power company could be required to bear the additional costs incurred for relocating and installing its facilities underground rather than overhead.

Because of an urban renewal project, the power company had been asked to remove all overhead poles and wires in a designated area and to place its replacement facilities underground. By an agreement, the Authority promised to pay to the company the additional cost that would be necessitated by the underground system, with this condition: "provided that under the Constitution, common law, and statutes of the State of Maine the company could not be legally compelled to install such cables and wire underground at its own expense."

The Court, holding that the Authority was imbued with the police power of the State, found no statutory authority either permitting or requiring the payment of relocation cost, whether above or below the ground.

The Authority was held to be acting reasonably when it required the facility to be located underground. The utility thus had to bear the extra cost incurred:

In such matters of urban renewal and rehabilitation the defendant Authority was acting on behalf of the State within the scope of its corporate functions and, in requesting underground installations of public utility facilities in the urban renewal area, provided the urban renewal plan received approval of the municipal officers through proper governmental resolution, it was exercising the police power of the State which it obviously possessed.³²

In conclusion, we cannot say that the plaintiff has maintained its burden of proof that the Authority and municipal officers of the City of Waterville, in requesting that the utility go underground with its electric facilities in the urban renewal area, was guilty of arbitrary or unreasonable conduct, or that its exercise of the police power of the State in that instance was not primarily purposed upon the promotion of the public health, safety, morals or general welfare of the residents of the City.³³

Limitations do exist on the State's requiring relocation of facilities pursuant to the doctrine of the police power. Certainly, one limitation is that the State must be acting reasonably.³⁴

In addition to being reasonable, the action of the public authority that is requiring relocation must be "governmental in nature"; that is, it must be for a governmental purpose. Generally, the decision to relocate

utility facilities in order to accommodate highway construction is in furtherance of a recognizable, traditional, governmental function. However, as in *Central Maine Power Company v. Waterville Urban Renewal Authority*, *supra*, it may be that only one aspect of the project involves highway construction.

For example, in *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*,³⁵ an urban redevelopment project had necessitated the relocation of electric distribution facilities in one block of a public thoroughfare that had been vacated by a city ordinance. In part, the company claimed that it was entitled to relocation cost from the city or the authority, because the street closing was to enable the Authority to permit the use of the property for a privately owned and operated hotel, a proprietary function.

The Court noted that the general rule was that the utility did not have to pay its own relocation cost if the relocation is necessitated by a municipality's exercise of a proprietary, rather than a governmental, function or purpose.³⁶ However, it proceeded to apply what might be called a "primary purpose" test in ruling that the utility had to bear its own cost. It held that this relocation was compelled by an urban renewal project, the primary purpose of which was to renew a blighted area of the city. For that reason, the city's actions were primarily governmental in nature.

In a Maryland case, *City of Baltimore v. Baltimore Gas & Elect. Co.*,³⁷ the company was partially successful in recovering relocation expenses where the City required relocation in order to build a city market (proprietary in nature). The company did not recover expenses incurred for that part of the street that was vacated for a housing project.

Another limitation on the government's right to compel relocation is that it may not discriminate unfairly among utilities, and any distinction between utilities involving relocation cost or reimbursement must have a reasonable, rational basis.³⁸

Finally, it appears to be a general rule that, unless a statute authorizes payment of relocation cost, a State, county, or municipal agency may not enter into a contract that purports to bind the agency to paying such cost.³⁹

No Liability for Relocation Cost in the Absence of Statute

In the absence of statute, the courts have uniformly held that, if utility facilities are required to be relocated because of highway construction or improvements, the utility, and not the State or highway agency, must bear the cost incurred in relocating.⁴⁰

This common law rule was upheld and applied by the Supreme Court of Virginia in *Hampton Roads Sanitation District Commission v. City of Chesapeake*.⁴¹ In that case the City sought a ruling that the district was obligated to pay the cost of relocating a sewer main situated in a city street because of street improvements undertaken by the city.

The district contended that the enabling act, passed by the State legislature authorizing it to construct its lines along and under streets and

highways, did not state that it had the additional duty to bear the cost of relocating its facilities when required by street improvements. However, the district's argument was rejected, the Court holding that the district must bear the cost of relocation:

In the absence of a statute or an agreement to the contrary, Virginia, like most jurisdictions, adheres to the common-law rule that a public utility is required to relocate and/or adjust at its own expense its facilities located in public streets and highways when such relocation and/or adjustment is necessary to facilitate street and highway improvements. *PEPCO v. Highway Commissioner*, *supra*, 211 Va. at 748, 44-45, 87 S.E. 2d 756, 762 (1955). See *New Orleans Gas Light Co. v. Drainage Comm. of New Orleans*, 197 U.S., 453, 459, 460-61, 25 S.Ct. 471, 49 L.Ed. 831 (1905); *State Highway Dept. v. Roberts*, 42 Del. Ch. 486, 493, 215 A.2d 250, 254 (1965). See also opinions of the Attorney General of Virginia, 1964-65 at 129 and 1975-76 at 78. The rationale of the above rule is that since a utility acquires its rights to make special or exceptional use of a public street or highway only by permissive grant of the state or a municipality, the utility's use is necessarily subordinate to the general public's principal and primary use of the street and highway. *State Highway Dept. v. Parker W. & S. Subdist.*, 247 S.C. 137, 143, 146 S.E. 2d 160, 163 (1966).⁴²

The district had only a "permissive right" to lay its pipes in the affected street, and its use of the streets "was subservient to the reasonable exercise of the paramount right of the city and the state to improve Indian River Road."⁴³

Similarly, in *Delaware River Port Authority v. Pennsylvania Public Utilities Commission*,⁴⁴ the Court reversed an order of the Pennsylvania Public Utility Commission that had required the Delaware River Port Authority to pay the entire cost of relocating certain facilities owned by the Philadelphia Electric Company.

The Court held that the Public Utility Commission had no authority to allocate the expense of relocating facilities of a nontransportation utility. The "general rule has always been that the Commonwealth or its agency cannot be required to bear the costs of relocating facilities of any public utility."⁴⁵ The only exception was the one created by a Pennsylvania statute that expressly permitted relocation payments for a transportation public utility in connection with a highway-rail crossing.⁴⁶

One reason for the common law rule is that, because utilities occupy the highways free of cost, they should not be entitled to compensation when they are required to relocate their facilities in order to accommodate highway improvements.⁴⁷ Another reason is that the courts believe that, when utilities are permitted to install structures in a road or right-of-way, the utilities have an implied obligation to relocate their property at their own expense when a governmental use of the streets renders the relocation necessary.⁴⁸

Effect of Franchises or Other Agreements

The fact that the utility has been permitted by virtue of a franchise or an agreement to occupy a highway right-of-way does not create any

property right that must be compensated when the utility is required to relocate.⁴⁹

Although the utility may have a franchise, license, or permit, the general rule is that it must relocate its facilities in public streets at its own expense when changes are required by public necessity.⁵⁰

The legal effect of the utility's franchise is discussed in *Artesian Water Co. v. State, Dept. of Highways and Transp.*,⁵¹ in which the company sought reimbursement for relocating its water facility because of a highway reconstruction project.

One of Artesian's contentions⁵² was that it had a vested property or contract right in the location of its water distribution facilities along the highway, and it was, therefore, entitled to compensation for relocation expenses under the law of eminent domain.⁵³ The Court rejected Artesian's contention that it had a compensable interest in its location by virtue of State statute or its franchise.

The Court feels, however, that Artesian overstates the significance of 26 Del. C. § 1301 with respect to the nature of the franchise herein granted. Section 1301 merely gives Artesian a general but qualified right to locate its facilities beneath the public roads in order to effectuate its purpose in transporting water to a segment of the general public. Section 1301 does not, in and of itself, however, grant anything specific to Artesian; it does not categorize the nature of Artesian's right to locate its facilities in the public way, for example, in terms of a license, a franchise or an easement. Instead, the nature of the right, as well as any conditions to be placed on its exercise, are to be determined by the appropriate local unit or agency having control over the public roads and whose consent is deemed a condition precedent to the exercise of the right. Accordingly, the Court finds that Section 1301 is not an independent grant to Artesian of a franchise that is necessarily of a proprietary nature. Artesian's interest in the subject location of its facilities must instead be determined by the nature and incidents of the particular franchise herein granted.

As generally stated, a franchise is a special privilege conferred by the State on an individual or corporation to do that which a citizen cannot do by common right. Unlike a mere license, a franchise is neither personal nor revocable at the mere will of the grantor, absent a reservation of such right in the original grant. Unlike an easement, however, a franchise ordinarily does not create an interest in land, even though the use of the franchise requires the occupancy of land. Therefore, Artesian's labeling of the grant as a franchise does not necessarily repose in it any real property rights.

Although there is some authority to the contrary, the prevailing view in most jurisdictions is that a franchise conferred by the State on a public utility to locate its facilities in the public way creates no compensable property interest in the subject location. In refusing a utility's request for relocation cost compensation, these authorities and others uniformly concede that when some legitimate public need requires that a utility's franchise can no longer continue undisturbed, the disturbance, removal, or relocation of facilities or structures originally constructed under authority of such a franchise is neither a "taking" in the constitutional sense nor a damaging of property.

Moreover, one who accepts a franchise from a governmental body to construct water lines under or along a public street, road or highway,

impliedly consents, as a condition for the franchise, to bear all costs in relocating its facilities when made necessary to facilitate highway improvements. This condition is implied in the grant, itself, and its rationale rests on the indisputable notion that the permissive right of a utility to lay its pipes in the public way is subordinate to the paramount right of the general public to improve its streets, roads and highways. Consequently, the requirement that a utility remove or relocate its facilities from a highway construction site does not impair a utility's contractual rights under a franchise. Here, Artesian's franchise merely permits it to use, not own, the land where its water line and facilities are presently located. All such land is presently and exclusively owned by the State. Although Artesian previously owned a private easement through a portion of this area, the State's subsequent purchase of that easement extinguished Artesian's interest in the real property. Unlike a situation where a corporation acquires a location in private land by purchase, Artesian acquired its location in a public road by permission of the State. As such, Artesian acquired no vested real property interest in the location and, consequently, it is not entitled to compensation under the law of eminent domain for any losses or expenses it may sustain in the removal and relocation of facilities therein located.⁵⁴

Thus, the prevailing view is that a utility, whether privately or publicly owned, occupying a public street or right-of-way pursuant to a statute, franchise, license, or permit, must relocate its facilities at its own expense when required to do so in order to accommodate street or highway construction.⁵⁵ Moreover, if the utility's location is authorized by a permit or charter, the rule has been held to be the same.⁵⁶

Effect of Municipal Ownership

It has been held that, in the absence of State practice or statute, municipally owned utilities must bear the cost to relocate their facilities in the right-of-way when they are required to do so by State highway construction. There are several reasons advanced for this position.

First, the State has jurisdiction over the highways even though the "fee" title to the street or highway may be vested in the municipality.⁵⁷ In a few instances, however, the municipal utility has been reimbursed or compensated on the basis that it holds title to its streets.⁵⁸ In the sense that it has title, the municipality's position is similar to that of the utility that has a privately owned easement over which its facilities are located.⁵⁹ In some States, it may be an accepted practice for the State to pay the municipality its relocation cost.⁶⁰

The second reason, in the absence of State practice or statute, that no compensation is required to be paid to a municipally owned utility is that it is considered by the courts to be exercising a "proprietary" function when it goes into the utility business. When performing a proprietary service—one normally conducted for a fee or charge for the benefit of the community—the municipality is considered to have the rights and obligations of a private corporation.⁶¹ In undertaking utility operations, the municipality is acting in its proprietary capacity; thus, it must relocate its facilities at its own expense just as any other utility company similarly engaged.⁶²

The decisions are not in agreement on which municipal utility operations constitute a proprietary function. The sale of water may be a "proprietary" activity, yet the construction of the waterway system is a "governmental" function.⁶³ In contrast, it has been held that construction and operation of a waterway system are not "governmental" in nature.⁶⁴

Thus, it appears that, in the absence of State statute or practice, municipally owned utilities must bear the cost of relocating their facilities. There is a contrary view that the State must pay the cost either because the municipality holds title to the street or because the construction of a utility system is a governmental, as distinguished from a proprietary, function.

Effect of Location on Toll Road

If the utility is located in or along a toll road, the toll road is a "public highway" for the purpose of determining that the utility must pay the cost of relocation.⁶⁵

However, some enabling acts creating toll road authorities may provide that the toll road authority must or may pay the cost of relocation of utility facilities.⁶⁶ In the absence of that provision, the utility may be required to relocate its lines, pipes, or other facilities at its own expense.⁶⁷

REIMBURSEMENT OF STATES FOR RELOCATION PAYMENTS MADE TO UTILITIES: 23 U.S.C. § 123

As seen, the general rule is that a state or highway agency is not required, in the absence of statute, to pay a utility its cost to relocate its facilities located in the highway or highway right-of-way when necessitated by highway construction or improvements.

In 1956, the Congress authorized the Federal Highway Administration to reimburse the States for utility relocation cost in the same proportion that Federal funds were authorized for the project. Section 123 of Title 23 provides as follows:

(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate system, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.

(b) The term "utility," for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.

(c) The term "cost of relocation," for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.⁶⁸

Constitutionality of Reimbursement Statutes

Because of Section 123, numerous States passed statutes authorizing payment to utilities for their right-of-way relocation cost on certain highways, usually Interstate, and other federal-aid projects. During the period immediately following the enactment of the State statutes, there were several constitutional issues presented. Because the constitutional questions appear to be well-settled now, they are briefly summarized as follows.⁶⁹

One contention was that the State reimbursement provision was an unlawful diversion of highway funds in violation of State "anti-diversion" constitutional provisions or statutes.⁷⁰ Such provisions may restrict the use of certain revenues, such as gasoline taxes or road use taxes, exclusively to the "construction, reconstruction, and maintenance of state highways." In *Opinion of the Justices*,⁷¹ the Court ruled that the New Hampshire statute authorizing payment of the cost of relocation of utility facilities necessitated by the construction of the Interstate Highway System was constitutional. In doing so, it held that the relocation of utility facilities was an integral part of highway improvements.

Another contention was that these relocation payments were not for a "public purpose," and, therefore, contravened some State constitutional provisions. In *Minneapolis Gas Company v. Zimmerman*,⁷² the Court, rejecting such an argument, held that an expenditure of funds to effect relocation is properly a governmental function exercised for a public purpose of primary benefit to the entire community. The Court stated that the utility derived "no benefit—not even an incidental one," because the statute protected it only from suffering a loss.⁷³ There were, however, a few jurisdictions in which the courts ruled that payment of utility relocation cost was not for a "public purpose."⁷⁴

A third constitutional argument was that these statutes amounted to an extension of the State's credit for a nongovernmental purpose or constituted a gift to a private corporation in violation of the State constitution. Most courts rejected this argument,⁷⁵ with some exceptions.⁷⁶

Fourth, some opponents argued that the laws were enacted to serve a distinct class or group, and, therefore, were in violation of State constitutional provisions prohibiting "special legislation." However, on this issue the courts generally agreed that utility reimbursement statutes did not constitute special legislation.⁷⁷

Fifth, it was argued that the statutes abrogated preexisting agreements or contracts that expressly provided that the utilities would pay such relocation costs. The courts reasoned, however, that, because the parties to such an agreement could mutually extinguish the prior obligation, or because the State simply could release the utilities of their obligation, there was no impairment of a contract in the constitutional sense.⁷⁸

Although the constitutionality of the laws generally was upheld, some provisions have been struck down on the basis that there was an unfair or unreasonable classification of utilities for purposes of payment. However, the few cases that have discussed this issue are not entirely clear on what is permissible in the authorization statutes.

The decisions appear to support the proposition that it is the legislature's prerogative to create reasonable classifications and to decide which type of projects for which to authorize payments. It does not appear that the legislature must authorize payments to all utilities on all highways, of whatever kind. There may be a problem, if the legislature decides to treat some utilities differently from others that are located on the same type of highway, but this question seldom has been litigated.

The reasonableness of a statutory classification was upheld in *State v. Gaines*.⁷⁹ The statute provided that payment was authorized to *any* public utility required to be relocated on a federal-aid Interstate Highway project. Secondly, payment was authorized to municipally owned utility facilities, as well as water or sanitary districts or authorities, from State road funds on *any* Federal-aid project.⁸⁰ The effect of the classification was that all public utilities were placed in one category for purposes of Interstate projects. However, municipal and certain other utilities were in another category for any federal-aid project, thereby according potentially significantly greater benefits to the latter group.

The Court's decision was that this was not special legislation "merely because it does not operate alike upon all public utilities."⁸¹ The opinion noted that in "regulation" of this type a court must not substitute its judgment for the legislature; that the legislative classification cannot be set aside unless it is "devoid of reason, arbitrary, or unreasonable"; and that the classification is binding "if any state of facts can be reasonably conceived to support the classification."⁸² It must be noted that the opinion does not state any facts to support the reasonableness of the classification, the Court stating only that it did not find the classification to be unreasonable. The Court cited numerous decisions holding that reasonable classifications may be created, so long as all "persons" within that class are treated equally.

A similar classification question had arisen earlier in the case of *State v. Lavender*.⁸³ The statute provided that all utilities were to be compensated for relocations on Interstate Highways and that, in addition, the state would pay for municipally owned relocations on the primary system. The municipalities argued that the provision was constitutional, but the Court held that

... as to the claimed differences between public and private utilities
... we are of the opinion that the operation of water and sewer systems is a proprietary function of a municipality, not a governmental function, and therefore must stand on the same footing as privately owned utility facilities.⁸⁴

Thus, the provision of the statute that provided for payment to the municipally owned utilities on the primary system was ruled unconstitutional: "it is special legislation applying arbitrarily to municipally

owned utilities and not based on any substantial distinction between all utilities as a class.”⁸⁵

In another decision on this question, the unequal treatment of utilities within a given class is somewhat easier to conceptualize.

In *Potomac Electric Power Co. v. Fugate*,⁸⁶ utility lines had been installed in public streets and highways in a Virginia county. The Supreme Court of Virginia⁸⁷ had held that the permits were mere licenses, revocable at will, that created no interest in land; therefore, the utilities had no right to compensation. The highway department contended that the utilities located in counties on Interstate projects could be relocated without payment of relocation cost.

Virginia, however, had a statute providing for compensation for utilities having identical facilities under identical permits when they were located in cities and towns. The effect was that on the same Interstate project a utility company would be paid relocation cost if the facilities were on the Interstate route proceeding through a city or town, but not through a county.

The Court, observing that the county in question was just as urban in character as a city or town, held that there was no rational basis for such a legislative classification. It noted:

Perhaps the state could deny reimbursement to all utilities which installed their lines under similar permits, but when it determines to pay some of them and not others its choice of which to pay must conform to the fourteenth amendment.⁸⁸

In sum, it appears that the State may treat different classes of “persons” in different ways, but it may not “legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the statute.”⁸⁹

Thus, the State was required to reimburse the companies for the relocation of their lines in counties on the same basis as for lines in cities and towns.

Eligibility for Reimbursement

As seen, on Federal-aid primary or secondary systems or the Interstate System, the States may be reimbursed for the cost of relocating utility facilities as part of the highway construction project in the same proportion as the amount of Federal funds spent on the project.⁹⁰ Moreover, reimbursement may be made for relocating utility facilities regardless of whether they are publicly, privately, or cooperatively owned.⁹¹

Reimbursement Where Utility Has a Property Right

The federal regulations pertaining to reimbursement eligibility provide for three categories of federal funding. Federal funds may participate where the utility comes within the purview of “one or more” of these categories.⁹² It should be noted, however, that the State must have actually made payments to the utility for relocation cost.⁹³

First, there is reimbursement on a *pro rata* basis if the utility has the right to occupy the site. The regulations specifically authorize reimbursement

[w]here the utility has the right of occupancy in its existing location by reason of holding the fee, an easement or other real property interest, the damaging or taking of which is compensable in eminent domain.⁹⁴

Reimbursement under this first situation is permitted *only* if the utility has such a real property interest. Clearly, there may be reimbursement if the utility holds the “fee” (a term that is equivalent to “fee simple” or “fee simple absolute,” the largest estate in terms of ownership) or an “easement” (a right to use the land of another for a special purpose). Both of these are compensable in eminent domain.

One may note this language in the regulation: “or other real property interest, the damaging or taking of which is compensable in eminent domain.” This provision would appear to allow an expansive interpretation of this section, for example, if there were a State case holding that other types of interests, such as a license or permit, were compensable in eminent domain. However, as seen from the discussion in the previous two sections of this paper, the courts are virtually unanimous that franchises, permits, or other forms of contractual agreements, whereby utilities are permitted to occupy highway rights-of-way, do not constitute compensable property interests in eminent domain.

On occasion, it has been difficult for the utility to show ownership of a compensable interest in the land. For example, the utility may occupy property for many years without a recorded deed or easement. States are divided on whether mere occupancy is sufficient and may ripen into an easement.⁹⁵ Local law must be checked on this point to determine whether the utility can acquire a property right by adverse possession or prescription.

In one case where the utility placed its poles on private land without paying the landowners, it was held that the highway department was liable, nevertheless, for the cost of relocation.⁹⁶ Moreover, if a utility has a leasehold interest, that property right is a compensable interest.⁹⁷ On the other hand, it has been held that compensation is not required where the utility’s lease is terminable on 60 days notice, and the lease is, in fact, terminated.⁹⁸

The regulations, however, contemplate a recorded instrument documenting the utility’s interest: “the State shall obtain and have on record suitable evidence of the utility’s title to a compensable real property interest.”⁹⁹ The regulations provide, in the absence of such documentation, that the State’s legal counsel may make an “affirmative finding” of the utility’s compensable interest.¹⁰⁰

Reimbursement Where Payment Is Made Pursuant to Suitable State Law

The second situation in which the State may be reimbursed for utility relocation costs is:

Where the utility occupies either publicly or privately owned land or public right-of-way, and the State's payment of the costs of relocation is made *pursuant to State law, and does not violate a legal contract* between the utility and the State, provided an affirmative finding has been made by FHWA that such a law forms a suitable basis for Federal-aid fund participation under the provisions of 23 U.S.C. 123.¹⁰¹ (emphasis supplied)

There are several key words and phrases in this section: the first is "pursuant to state law." Interestingly, the regulation appears to go a step further than the statute itself, which requires only that State payment to a utility not violate the law of the State. Moreover, the regulation requires that there must be an "affirmative finding" by FHWA that the State law forms a "suitable basis" for Federal reimbursement. It appears that the statute would only require one to prove the negative—that the State's payment to the utility does not violate State law. In that instance, an Attorney General opinion or a State Supreme Court decision seemingly would suffice. The regulation, on the other hand, appears to contemplate that a State statutory provision has been enacted that authorizes payments to utilities.¹⁰²

As seen, the regulation provides in § 645.103(c) that Federal funding is not allowed where State law prohibits payments to utilities by the States. Again, the wording of the regulation differs somewhat from Section 123.

The condition that the State's payment must "not violate a legal contract between the utility and the state" is identical to the statutory language of Section 123(a). This condition may be meaningless in light of those decisions holding that, if a contract exists between the State and utility requiring the latter to pay relocation cost, the agreement may be mutually extinguished or the State may release the utility of any obligation.¹⁰³ No further interpretation of this condition is known.

It was because of the foregoing conditions that many States, after the passage of Section 123, enacted statutes in order to obtain reimbursement. In most States prior to 1956, there was either no authority permitting such payments, or there were court rulings that utilities, unless located on their own property or easements, had to bear the cost of relocating their facilities.

The relationship of Section 123 and State law cannot be emphasized too much, because States may not be, and are not, compelled to pay utility relocation cost merely because Section 123 authorizes Federal reimbursement of States. For example, in *South Carolina State Highway Department v. Parker Water and Sewer Subdistrict*,¹⁰⁴ the question was whether the subdistrict had to pay its own cost of relocating water and sewer lines because of the construction of a State road. South Carolina did not have a statute authorizing payment; however, there was federal funding of 50 percent of the project. The Court held that the utility had to bear its own relocation cost: "The fact, however, that Federal funds may be available to aid in the reimbursement of defendant for the cost of relocating its lines has no effect upon the determination of the liability of the State for such costs."¹⁰⁵ Moreover, it was

immaterial that the subdistrict was a political subdivision of the State.¹⁰⁶ Thus, as noted by another court, Section 123 funds are available only when a utility's cost is compensable under State law.¹⁰⁷

In spite of the language of Section 123 and the regulations, an important case to note is *State of Arizona Highway Dept. v. United States*.¹⁰⁸ In that case the Court of Claims held that the United States was bound to reimburse the State of Arizona in spite of the fact that the State was not obligated under its law to pay the relocation costs of a gas company. The State had sought to recover the sum of \$81,361.18 for the expense it had incurred in the removal and relocation of utility facilities owned by El Paso Natural Gas Co. (El Paso) for the construction of an Interstate Highway.¹⁰⁹

Since 1950 El Paso had had a special use permit for a pipeline through the Kaibab National Forest. This permit, terminable at the discretion of the U.S. Forest Service, expressly required the company to remove its structures within a reasonable time after termination of the permit. In 1966, the State of Arizona obtained a special use permit from the U.S. Forest Service for the same area to construct a portion of an Interstate Highway.

In 1968, the State reached an agreement with the utility whereby the State agreed to reimburse the utility for cost incurred in relocating the El Paso facilities. This agreement was made with the knowledge of a division engineer of the Federal Highway Administration and approved by agents of two federal agencies, first in May 1968 and again in October 1969. On the latter occasion, a Federal-Aid Project Agreement for construction of the highway included funds to cover the cost of relocating the facilities.

The United States subsequently refused to reimburse the State of Arizona for the relocation cost. The United States argued, first, that the gas company's license for its facilities was terminable at will; second, that the taking of such a license is not compensable;¹¹⁰ and third, that the State of Arizona was not legally obligated to pay El Paso.¹¹¹

The Court of Claims held that the United States had to pay the costs of relocation, not under 23 U.S.C. § 123, the utility reimbursement law, but under 23 U.S.C. § 106(a). The latter provision states in part that the Secretary's approval of a project is deemed a contractual obligation of the Federal Government for the payment of its proportional contribution. The Court held "that the Government has a contractual obligation to pay Arizona its proportionate share of El Paso's relocation costs under 23 U.S.C. § 106 since the Government's authorized employees approved an agreement so providing."¹¹²

Reimbursement Where Utility Is Owned by State Agency or Political Subdivision

There is a third category for reimbursement, and it is

[w]here the utility[,] which occupies publicly owned lands or public right-of-way[,] is owned by an agency or political subdivision of a state, and said agency or political subdivision is not required by law or agree-

ment to relocate its facilities at its own expense, provided the State has furnished a statement to FHWA establishing and/or citing its legal authority or obligation to make such payments, and an affirmative finding has been made by FHWA that such a statement forms a suitable basis for Federal-aid participation under the provisions of 23 U.S.C. 123. (commas supplied)¹¹³

Thus, subparagraph 3 is concerned with reimbursement for utilities owned by a State agency or political subdivision of the State that are located on publicly owned lands or right-of-way. The State, however, must demonstrate to FHWA's satisfaction that it has some legal authority or obligation to pay relocation cost in order to qualify for reimbursement.

Query whether a problem may arise if a State were to provide authority to cover only the subparagraph (a)(3) situation. For example, the highway project could cross through a county and a city, each having its own utility facilities located in the right-of-way. The result could be that payment would be authorized only for county-owned facilities (a political subdivision of the State) but not for the city-owned (presumably an independent or corporate entity). In two cases, the Courts have invalidated statutes that sought to treat, for example, municipally owned facilities differently from other utilities, or that permitted reimbursement where the facilities were located in cities and towns but not in counties.¹¹⁴

Effect of State Policy on Reimbursement Statutes

One article has noted that, in addition to the state reimbursement statutes, there are departmental policies and regulations and Attorney General opinions concerning the legality or availability of utility relocation payments.¹¹⁵ Of course, some courts have ruled that in the absence of a specific statute, States cannot lawfully pay utility relocation costs. One court has held that the department's practices may be relevant in interpreting a reimbursement statute.

The relationship of statute and policy is considered briefly, without an ultimate conclusion at this time, by the U.S. Court of Appeals for the Fourth Circuit, in *Potomac Electric Power Company v. Fugate*.¹¹⁶ The controversy has a lengthy procedural history over whether Virginia must reimburse utilities for relocation cost incurred because of Interstate Highway construction. A previous District Court decision had ruled that the State must reimburse the utilities for relocating their facilities, which happened to be situated in a county, "on the same basis as reimbursement for relocation of similar facilities in cities and towns."¹¹⁷ The State refused to pay any sums for any facilities that were relocated on Federal lands and on railway rights-of-way on the ground that there was no authority to pay such relocation cost whether located in counties or in cities and towns.

In a 1972 Federal court ruling, the State was ordered to pay the cost of such relocation, the Court stating that the Highway Commission had stipulated to certain expected testimony of a right-of-way engineer. The

stipulation was that the State had a policy of reimbursing all displaced city and town facilities, including those on Federal lands and railway rights-of-way.

In the 1978 Fourth Circuit opinion, the question was whether "the Commonwealth would, and could, compensate for the relocation of such facilities on federal lands or railroad rights-of-way which were located in cities and towns."¹¹⁸ The Court noted that the Virginia statute did not expressly allow such payment but was limited to paying the costs for facilities "in, on, under, over and along existing streets."

The Court suggested strongly that it was doubtful, even if such a policy existed as stipulated, that it would cause the State to pay relocation cost if such payment was in violation of the statute. Moreover, the Court stated that it was doubtful that the stipulation would estop the Commonwealth from asserting the illegality of the payments.

The Court ruled that the case should be remanded to the District Court for the taking of further evidence concerning the Commission's practices in reimbursing utilities, because the practice "may be relevant to, but not necessarily conclusive in, the interpretation of § 33.1-55."¹¹⁹ Of course, the Court on remand would have to determine that the practice, if it permitted such reimbursement, did not contradict the State statute.¹²⁰

Reimbursable Expenses in Relocation of Utilities

The regulations, as of 1979, issued pursuant to Section 123, set forth in detail the technical requirements for obtaining reimbursement of the cost of relocating utility facilities. Of course, the reader will want to refer directly to the current regulations for answers to specific questions concerning reimbursable expenses, because this section is intended to be merely a brief overview of that material.

Initially, there was some question as to whether a "relocation" meant only a relocation involving the movement of facilities within the right-of-way, or included a relocation to a new site outside the right-of-way.¹²¹ The federal regulations now provide, however, that expenses are reimbursable for relocations within and without the highway. By "relocation" the regulations mean

... the adjustment of utility facilities required by the highway project, such as removing and reinstalling the facility, *including necessary rights-of-way, on new location*, moving or rearranging existing facilities or changing the type of facility, including any necessary safety and protective measures. It shall also mean constructing a replacement facility functionally equal to the existing facility, where necessary for continuous operation of the utility service, the project economy, or sequence of highway construction. (emphasis supplied)¹²²

Most State statutes concerning utility relocation payments include a provision specifying relocation or removal. However, there are some statutes in which there is a reference only to relocation. Where the State law provides, or has been interpreted to provide, that a "relocation"

means only those adjustments within the right-of-way, it is possible that reimbursement would not be authorized under Section 123. The reason is that the regulations also state that "where state law or regulation provides more restrictive payment standards, the state standards shall govern such reimbursement."¹²³

There is scant case law interpreting the term "relocation." Nevertheless, it appears that Section 123, the Federal regulations, and the majority of the State statutes contemplate that payment may be made for removal to a new location.¹²⁴

Another issue that is infrequently presented is the one of abandonment or retirement of utility facilities caused by the highway construction because the service provided is no longer needed. It has been held that if the utility has only a franchise or similar interest and the statute, if any, does not provide for payment for facilities retired from service, the utility has no right to compensation.¹²⁵

No cases have been located that consider the matter of reimbursable expenses under Section 123, and one must refer to the Federal regulations and State law. Section 123 provides that the "cost of relocation includes the entire amount paid by the utility that is properly attributable to the relocation after deductions, first, for any increase in value of the new facility and, second, any salvage value derived from the old facility."¹²⁶

The language "the entire amount paid by or on behalf of the utility properly attributable to the relocation" means "the cost of adjusting or rearranging the existing facility, or providing a replacement facility functionally equal to the facility, or portion thereof, being replaced, including the cost of any additions, improvements, removals, or replacement right-of-way necessitated by, or in accommodation of, the highway project."¹²⁷

From this gross amount one must deduct "any increase in value of the new facility";¹²⁵ thus, any "betterments" to the facility must be deducted. Although no cases have been found that discuss the deduction for any "betterment" to the relocated facilities, it is understood that a longstanding issue concerns this very term. It is defined in the regulations as follows:

"Betterments" shall mean and include any upgrading to the facility being relocated made solely for the benefit of and at the election of the utility, not attributable to the highway construction.¹²⁹

If there is a dispute over whether the relocated utility facilities have been upgraded, the deductible cost for such an expense appears to be a matter of negotiation prior to the undertaking of the relocation. The reason is that the regulations require that the State and the utility must enter into a written agreement (with some exceptions) that must be approved by FHWA in order for the State to obtain Federal reimbursement.¹³⁰

Briefly, the utility and the State must agree in writing on their separate responsibilities in financing and accomplishing the relocation work, either on the basis of a master agreement or an individual agreement for

each project.¹³¹ The regulations, in addition to prescribing the matters to be covered in the agreement,¹³² provide that the agreement "shall be supported by plans, specifications where required, and estimates ("PS&E") of the work agreed upon,"¹³³ and "FHWA shall indicate approval of the written agreement by endorsement thereon."¹³⁴

The "betterments" issue, as well as other matters, may be considered at this PS&E stage, because the estimate in support of the agreement must set forth the items of work to be performed, and these must be

. . . broken down as to estimated cost of labor, construction overhead, materials and supplies, handling charges, transportation and equipment, rights-of-way, preliminary engineering, including an itemization of appropriate credits for salvage, betterments, and expired service life, all in sufficient detail to provide a reasonable basis for analysis.¹³⁵

The second deduction is for any salvage value that is derived from the old facility.¹³⁶ The regulations define "salvage value" as "the amount received for utility property removed, if sold; or if retained for reuse, the amount at which the material recovered is charged to the utility's accounts."¹³⁷

The regulations are too extensive to be summarized in detail with respect to computing reimbursable expenses, but they generally authorize reimbursement for labor,¹³⁸ materials and supplies,¹³⁹ cost of replacement right-of-way,¹⁴⁰ engineering and engineering services,¹⁴¹ certain overhead charges,¹⁴² removal costs,¹⁴³ and certain equipment and transportation expenses.¹⁴⁴ In addition, there are other items, as well as definitions and limitations, that must be considered.

ATTEMPTS TO OBTAIN REIMBURSEMENT UNDER OTHER STATUTES

23 U.S.C. Section 106(a)

In at least one case, because of the particular circumstances involved, a State has obtained reimbursement in the Court of Claims under the Tucker Act of utility relocation cost where there was neither a private easement nor specific statutory authority. As seen in *State of Arizona v. United States*, *supra*,¹⁴⁵ the United States had to pay the State because of the operation of 23 U.S.C. § 106(a), not because of 23 U.S.C. § 123.

The Uniform Relocation and Real Property Acquisition Policies Act of 1970

In another case, statutes other than Section 123 were cited by the utility in an effort to obtain payment for relocating its facilities. In *Artesian Water Co. v. State, Dept. of Hwys and Transp.*,¹⁴⁶ the claimant sought to have the Court extend the interpretation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970¹⁴⁷ and the Delaware Relocation Assistance Act of 1970.¹⁴⁸ Artesian contended that the State was obligated by Federal law to pay public utility relocation cost, regardless of the size of the Federal share payable to the State and that the interrelationship of recent Federal and

Delaware relocation assistance statutes created a statutory right to compensation that changed the common law rule that utilities had to relocate at their own expense. Moreover, the Company argued that Delaware's reimbursement statute¹⁴⁹ was modified by the Federal and Delaware relocation assistance statutes.¹⁵⁰

These statutes, of course, provide in part that any State, as a condition to receiving Federal aid, must submit assurances to, in this instance, the Secretary of Transportation, that "fair and reasonable relocation payments and assistance" will be provided to persons displaced by a federal-aid project.¹⁵¹ Delaware enacted its Uniform Relocation Assistance Act in order to assure maximum federal participation and to create a uniform statutory procedure for providing relocation payments and assistance to persons displaced by *any* federal-aid project.¹⁵²

The Court held, however, that these Acts "do not create an absolute right in a utility to be reimbursed for the cost of relocating its facilities in order to facilitate federally assisted highway improvements."¹⁵³ The utility was not a displaced "person" within the meaning of the relocation statutes. Moreover, the Court noted that Artesian's interpretation of the Relocation Assistance Laws to include utilities would render Section 123 "nugatory," which deals specifically and unequivocally with reimbursement of States for utility relocation cost. The Court also rejected Artesian's argument that the relocation assistance statutes either expressly or impliedly repealed Section 123.¹⁵⁴

SUMMARY AND CONCLUSIONS

If utilities that are located in or along State highways or rights-of-ways must be relocated, the interest, if any, held by the utility must be analyzed in order to determine whether the State or the utility must bear the cost. Occasionally, utility facilities are located on property that the utility has acquired, such as an easement or right-of-way. In that instance, the rule universally is that the State must pay relocation cost if, during highway construction or improvement, it requires that the utility relocate its facilities. The reason is that the agency's action constitutes a taking or damaging of private property for public use. In this

situation, the courts have rejected any argument that the State may compel removal or relocation without paying damages on the basis that a relocation is mere regulation pursuant to an exercise of the police power.

Rather than having an easement or fee interest, the utility is more likely to locate its facilities in accordance with the terms of a franchise, permit, license, or other agreement. In these instances, unless there is statutory authority for paying relocation cost, the general rule is that the utility must bear its own cost when required to relocate or remove its facilities in order to accommodate highway improvements. Although utilities have made several arguments in an attempt to overcome this common law rule, it appears that only an act of the legislature can shift the burden of paying relocation cost from the utility to the transportation or highway agency.

In many States, statutes have been enacted that authorize the highway agency to pay relocation cost on certain types of highways, usually Interstate and other federal-aid primary and secondary highway projects. Most of these State statutes were enacted in order to take advantage of 23 U.S.C. § 123, which authorizes FHWA to reimburse States on a *pro rata* basis for utility relocation cost as part of the highway construction contract. The State reimbursement statutes were necessary because Section 123 does not permit reimbursement if such payments violate State law. Moreover, the regulations provide that reimbursement is made only where there is a State law that provides a "suitable" basis for reimbursement. Very few decisions have been reported that concern the application or interpretation of Section 123 or the regulations issued pursuant thereto.

In some instances where State law does not sanction utility relocation payments, utilities have sought to obtain reimbursement under other statutes. Because of the unusual facts in one case, a State obtained reimbursement under 23 U.S. § 106; however, in another case a company failed to obtain payment for relocation cost from the State by relying on the Federal and State Uniform Relocation Assistance and Real Property Acquisition Policies Acts.

APPENDIX A

STATUTORY AUTHORITY RELATING TO REIMBURSEMENT OF PUBLIC UTILITY RELOCATION EXPENSE ^{2/}

	Interstate All	Interstate Urban Only	All Federal Aid Highways	Controlled Access Highways	State Highways	No Statutory Authority Located
ALABAMA Code of Ala. § 23-1-5	X					
ALASKA Alaska Stat. § 19.25.020			X			
ARIZONA						X
ARKANSAS						X
CALIFORNIA Deering's Calif. Code Street & Hwys § 700 et					X	
COLORADO Colo. Rev. Stat. § 43-1-225			X			
CONNECTICUT Conn.Gen.Stat. § 13a-126					X	
DELAWARE Del. Code Ann. Title 17 § 32; § 143			X			
FLORIDA Fla. Stat. Ann. § 338.19	X					
GEORGIA Geo. Code. Ann. 95A-1001					X	
HAWAII Ha. Rev. Stat. § 264-32					X	
IDAHO						X
ILLINOIS Ill. Ann. Stat. Title 121- § 3-107	X					
INDIANA Ind. Stat. Ann. 8-1-9-3	X					
IOWA Iowa Code Ann. § 306A.10	X					

^{2/} This table of statutory references is included for the reader's convenience in locating the desired state statute. The table is illustrative only and reference must be made to the statute for important exceptions, limitations, or requirements. For example, although the table indicates that some authority exists for reimbursement for utilities located on state highways, the provision may apply only to facilities owned by municipalities or public service companies, or may include privately owned utilities. The provision may be limited to state freeways or parkways, include all limited access highways, or all state highways. In some instances a reimbursement provision clearly includes all federal aid highways and state highways. In sum, the reader is cautioned to consult the statute and any amendments.

	Interstate All	Interstate Urban Only	All Federal Aid Highways	Controlled Access Highways	State Highways	No Statutory Authority Located
KANSAS						X
KENTUCKY Ky. Rev. Stat. 179.265, 175A.080, 177.035					X	
LOUISIANA La. Rev. Stat. § 48-381(c)		X				
MAINE Ma. Rev. Stat. Ann. 23 § 255	X					
MARYLAND Md. Ann. Code Art. 89B § 76 (b)	X					
MASSACHUSETTS Mass. Ann. L. Ch. 81, § 7C					X	
MICHIGAN						X
MINNESOTA Minn. Stat. § 161.46	X					
MISSISSIPPI						X
MISSOURI Mo. R. S. § 227.240					X	
MONTANA 32-2414 et seq			X			
NEBRASKA Rev. Stat. Neb. § 39-1304.02	X					
NEVADA Nev. Rev. Stat. 408.950			X			
NEW HAMPSHIRE N.H. Rev. Stat. Ann. §§ 229.6					X	
NEW JERSEY N.J. Stat. Ann. 27:7A-7				X		
NEW MEXICO N.M. Stat. 55-7-24					X	
NEW YORK Con. L. N.Y. Ann. § 10-24(6)					X	
NORTH CAROLINA						X
NORTH DAKOTA N.D. Century Code 24-01-41	X					
OHIO						X
OKLAHOMA Okla. Stat. 69 § 12.06	X					

	Interstate All	Interstate Urban Only	All Federal Aid Highways	Controlled Access Highways	State Highways	No. Statutory Authority Located
OREGON Oregon Rev. Stat. Ch. 366.321					X	
PENNSYLVANIA Purdon's Penn. Stat. Ann. § 36-670-412.1					X	
RHODE ISLAND R.I. Gen. L. 24-8.1-1			X			
SOUTH CAROLINA		X				X
SOUTH DAKOTA						X
TENNESSEE Tenn. Code Ann. 54-563	X					
TEXAS Tex. Code Ann. Art. 6674 w-4	X					
UTAH Utah Code 27-12-11			X			
VERMONT Vt. Stat. Ann. Title 19-1861(f)				X		
VIRGINIA Code of Va. § 33.1-54; 55; 56		X				
WASHINGTON Rev. C. Wash. 47.44.030	X					
WEST VIRGINIA West. Va. Code Ch. 17-4-17 b	X					
WISCONSIN Wis. Stat. Ann. § 59.965 g-h					X	
WYOMING						X

APPENDIX B
SELECTED FORMS IN USE

CE-6-A
Rev. 7-1-75
Sheet 2

No. _____

VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION
RICHMOND, VIRGINIA

For use only in connection
with signed AGREEMENTS

PERMIT

Route No. _____

District _____ County _____

PERMISSION is hereby given, in accordance with Special Agreement between the Applicant and the State Highway and Transportation Commission (See type of agreement and date at bottom of this sheet), to perform the work as described herein:

APPLICANT:
(Complete name and mailing address) _____

Nature of Work: _____

between _____ and _____

as shown on the accompanying plan or sketch and described on the reverse side of this sheet. Said work to be completed in a manner satisfactory to the Department of Highways and Transportation within _____ days from date of this permit.

Receipt is hereby acknowledged of check (money order, coupon) for \$ _____, Inspection Fee. The guarantee of the faithful performance of the work herein referred to is covered by bond with (Give name and address of Bonding Company and amount of bond)

Dated at Richmond, Virginia

THE STATE HIGHWAY AND TRANSPORTATION
COMMISSION OF VIRGINIA

Commissioner

Time Limit Expires

By _____

Permit Engineer

Application must be returned through office of _____ Resident Engineer at _____, Virginia, and he must be notified when work is completed so that inspection and report can be made.

APPLICATION is hereby made for permit as indicated above and shown on the accompanying plan or sketch and described on the reverse side of this sheet. Said work will be done under and in accordance with the rules and regulations of the State Highway and Transportation Commission of Virginia, so far as said rules are applicable thereto, and the agreement between the parties hereinbefore referred to. Applicants to whom Permits are issued shall at all times indemnify and save harmless the Commission, members of the Commission, the Commonwealth, and all Commonwealth employees, agents, and officers, from responsibility, damage, or liability arising from the exercise of the privileges granted in such Permit.

Dated at _____

By _____

(Applicant must sign all copies)

Checked and OK'd by _____

(date)
OFFICE COPY - PERMANENT RECORD FOR CENTRAL OFFICE
A charge of \$10.00 minimum is made if permit is cancelled. Permit lapses when time limit expires and will be cancelled unless extension of time has been requested.

1. Comprehensive Agreement, Section _____ dated _____
2. UT-2 Agreement, Section _____ dated _____
3. Letter of Authorization _____ dated _____
District or Resident Engr.

PLAN OR SKETCH

NO TREES OR SHRUBS TO BE CUT OR TRIMMED EXCEPT UPON APPROVAL OR UNDER SUPERVISION OF THE ENVIRONMENTAL QUALITY DIVISION

Inspection	\$ _____
Guarantee	\$ _____
Total	\$ _____

FULL DESCRIPTION AND DETAILS OF WORK

(Consult "Land Use Permit Manual" for instructions and give details of fees below)

All signing pertaining to traffic control must be as designated by the Resident Engineer

NOTE: Permit will not be issued unless accompanied by the proper inspection and guarantee fees. If bond is filed in lieu of check to cover guarantee, name and address of Bonding Company and amount of bond must be given.

CE-6
Rev. 7-1-75
Sheet 1

FORM CE-6

No. _____

VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION
RICHMOND, VIRGINIA

PERMIT
(ORIGINAL)

Route No. _____

District _____ County _____

PERMISSION is hereby given
(Complete name and
mailing address) _____

insofar as the State Highway and Transportation Commission has the right and power to grant the same to perform
action as described herein: _____

between _____ and _____

as shown on the accompanying plan or sketch and described on the reverse side of this sheet. Said work to be
completed in a manner satisfactory to the Department of Highways and Transportation within _____ days
from date of this permit, and if not so completed, the Department of Highways and Transportation may, in its
discretion, complete the work at the expense of the applicant. The State Highway and Transportation Commission
reserves full municipal control over the subject matter of this permit.

Receipt is acknowledged of check (money order, coupon) in the amount of \$ _____ (Inspection \$ _____
Guarantee \$ _____) which covers fees for inspection and to guarantee the faithful performance of the work
herein referred to. When guarantee is covered by bond, give the name and address of the Bonding Company and
amount of bond:

Dated at _____, Virginia

THE STATE HIGHWAY AND TRANSPORTATION
COMMISSION OF VIRGINIA

By _____
Commissioner—District Engineer—Resident Engineer

Time Limit Expires:

By _____
Permit Engineer

Application must be returned through office of _____ Resident Engineer at
_____ Virginia, and he must be notified when work is completed so that inspec-
tion and report can be made.

APPLICATION is hereby made for permit as indicated above and shown on the accompanying plan or sketch and
described on the reverse side of this sheet. Said work will be done under and in accordance with the rules and
regulations of the State Highway and Transportation Commission of Virginia, so far as said rules are applicable
thereto. Applicant agrees to maintain work in manner approved upon its completion. Applicant also hereby agrees
and is bound and held responsible to the owner for any and all damages to any other installations already in place
as a result of work covered by this permit. Applicants to whom Permits are issued shall at all times indemnify and
save harmless the Commission, members of the Commission, the Commonwealth, and all Commonwealth employees,
agents, and officers, from responsibility, damage, or liability arising from the exercise of the privileges granted in
such Permit.

Dated at _____

By _____

(Applicant must sign all copies)

NOTE: THIS PERMIT MUST BE KEPT ON THE WORK and shown when requested.

The minimum inspection fee charge will be made if permit is cancelled. Permit lapses when time limit expires and
will be cancelled unless extension of time has been requested—NO EXTENSION OF TIME WILL BE GRANTED
UNLESS WORK IS ACTUALLY UNDER WAY.

PLAN OR SKETCH

NO TREES OR SHRUBS TO BE CUT OR TRIMMED UNLESS AN APPROVED TREE TRIMMING PERMIT IS ATTACHED.

Inspection	\$ _____
Guarantee	\$ _____
Total	\$ _____

FULL DESCRIPTION AND DETAILS OF WORK

(Consult "Land Use Permit Manual" for instructions and give details of fees below)

All signing pertaining to traffic control must be as designated by the Resident Engineer

NOTE: Permit will not be issued unless accompanied by the proper inspection and guarantee fees. If bond is filed in lieu of check to cover guarantee, name and address of Bonding Company and amount of bond must be given.

L-4174U (6-73)
CC-0830-2200-0370



COUNTY	
CITY-BORO.-TWP.	
L. R. - SEC.	
FED. PROJ. NO.	
CL. NO.	
CLAIMANT(S)	

**RIGHT OF ENTRY
(UTILITY)**

THIS INDENTURE, made
by

heirs, executors, administrators, successors and/or assigns, hereinafter, whether
singular or plural, called the OWNER,

its successors and assigns, hereinafter called the UTILITY, and
the Commonwealth of Pennsylvania, Department of Transportation, hereinafter called the COMMONWEALTH.

WITNESSETH:

WHEREAS the COMMONWEALTH
a plan in the Recorder of Deeds Office of the aforesaid County indicating its intention to construct the
the above - designated highway, which highway will be located on or in the vicinity of certain property of
the OWNER; and

WHEREAS the construction of the said highway will require the relocation of certain facilities of
the UTILITY on, under and/or over the OWNER'S said property ; and

WHEREAS the amount of just compensation due the OWNER for the right of way required for the
said utility relocation has not yet been agreed upon; and

WHEREAS, in order to avoid delay in construction of the aforesaid highway, it is necessary for the
UTILITY, through its agents, employees and/or contractors, to enter upon the OWNER'S property prior to
acquisition of the said right of way for the purpose of constructing new facilities and/or relocating existing
facilities; and

WHEREAS the OWNER is desirous of cooperating with the UTILITY and the COMMONWEALTH
in expediting the construction of the aforesaid highway,

NOW THEREFORE, intending to be legally bound hereby, the parties hereto agree as follows:

1. The OWNER grants to the UTILITY, its employees, agents and/or contractors the right to enter
upon that portion of the OWNER'S property required for the construction of new facilities and/or the re-
location of existing facilities in connection with the proposed highway construction, as shown on the plan of

L-4174-U (6-73)

the proposed relocation attached hereto and made a part hereof; the OWNER further agrees that the UTILITY shall have the right of such ingress and egress as may be reasonably necessary to effect the said relocation of its facilities.

2. The UTILITY agrees to proceed with promptness in the said construction and/or relocation, and the UTILITY and the COMMONWEALTH agree to acquire without undue delay, either by purchase or condemnation, the right of way required for said facility relocation. This instrument shall in no way be construed as affecting the owner's right to receive just compensation for the right of way required from the said property for the said utility relocation, whether such right of way be eventually purchased or condemned by the UTILITY or by the COMMONWEALTH.

IN WITNESS WHEREOF the Parties hereto have executed or caused to be executed these presents, intending to be legally bound thereby.

INDIVIDUAL OR PARTNERSHIP

Witness _____ (SEAL)
Witness _____ (SEAL)
Witness _____ (SEAL)
Witness _____ (SEAL)

CORP., ASSOC., CLUB, ETC.

I attest to the signature of the officer who has executed this agreement and certify that execution hereof has been duly authorized by the

Bd. of Dirs., Majority Vote of Assoc., etc.

Corporation, Association, Club, etc.

Secretary
(SEAL)

By _____
President

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

The UTILITY

By _____
TITLE

By _____
District Right of Way Administrator

L-3107 (8-72)
CC-0830-2200-0250



COUNTY	
CITY-BORO.-TWP.	
L. R. - SEC.	
FED. PROJ. NO.	
CL. NO.	
CLAIMANT	

DEED

(Commonwealth to Utility)

THIS INDENTURE, made by the Department of Transportation, Commonwealth of Pennsylvania, hereinafter called the GRANTOR, and

hereinafter called the GRANTEE,

WHEREAS, Agreement Number entered into between the parties hereto on

provided for the removal of certain facilities of the GRANTEE located along the above highway improvement and for the conveying of a substitute right of way on another and favorable location to the GRANTEE by the GRANTOR, in accordance with Sec. 412 of the Act of June 1, 1945, P. L. 1242; and

WHEREAS the parties hereto have agreed that the right of way hereinafter described is in full compliance with the said agreement and act of the legislature,

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That the GRANTOR, for and in consideration of One (\$1.00) Dollar and other good and valuable consideration to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant and convey to the GRANTEE, it successors and assigns,

as shown on the plot plan attached hereto and made a part hereof;

L-3107 (8-72)
CC-0830-2200-0250

Being

IN WITNESS WHEREOF the GRANTOR has caused this indenture to be executed on the
day and year first above written.

(SEAL)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

ATTEST:

Deputy Secretary of Transportation

APPROVED AS TO FORM AND MANNER OF EXECUTION

Deputy Attorney General

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF DAUPHIN : SS

On _____, before me, the undersigned officer, personally
appeared _____, Deputy Secretary of Transportation, and, by virtue and
in pursuance of the authority conferred upon him, acknowledged the said Indenture to be the act and deed
of the Commonwealth of Pennsylvania, Department of Transportation.

WITNESS my hand and official Seal the day and year aforesaid.

Notary Public
My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF _____ : SS:

Recorded in the Office for Recording
of Deeds in and for the aforesaid County in
Deedbook _____, Page _____

Witness my hand and seal of Office on

I certify that, upon recording, the within
instrument should be mailed to:

Agent

Recorder of Deeds

L-4230A (6-73)
CC-0830-2200-0340



COUNTY	
CITY-BORO-TWP.	
L.R. - SEC.	
FED. PROJ. NO.	
CL. NO.	
CLAIMANT	

AGREEMENT OF SALE
(Acquisition for Utility)

THIS AGREEMENT, made _____, by _____,

owner(s) of property affected by the construction or improvement of the above-mentioned Legislative Route, heirs, executors, administrators, successors and/or assigns, hereinafter, whether singular or plural, called the SELLER, and the Commonwealth of Pennsylvania, Department of Transportation, its successors and assigns, hereinafter called the COMMONWEALTH,

WITNESSETH:

WHEREAS the COMMONWEALTH on _____, filed a plan in the Recorder of Deeds Office of the aforesaid County indicating its authorization to condemn an easement for highway purposes from the aforesaid property; and

WHEREAS it is necessary for the COMMONWEALTH to occupy a part of the right of way of _____

hereinafter called the COMPANY, for the aforesaid highway construction or improvement; and

WHEREAS it has become necessary for the COMMONWEALTH to acquire from the SELLER'S property a substitute right of way for the COMPANY, under and in accordance with the provisions of Section 412 of the Act of June 1, 1945, P. L. 1242, as amended, 36 PS 670 - 412; and

WHEREAS the parties hereto have agreed that, in lieu of condemnation, the SELLER will convey to the COMMONWEALTH, the premises

- as described in Exhibit "A"
- designated as required right of way on the plot plan

NOW, THEREFORE, in consideration of the sum of _____

(\$ _____) Dollars and other good and valuable consideration, the SELLER hereby agrees to sell and convey to the COMMONWEALTH and the COMMONWEALTH agrees to purchase the property described as above and as shown on the plot plan attached hereto and made a part hereof.

Being _____

Together with the improvements, hereditaments and appurtenances to the said easement, except those which may be agreed below to be retained by the SELLER, free and clear of all liens, easements, restrictions, delinquent taxes and assessments, leases and encumbrances of any kind, existing or inchoate, with proper release of dower and curtesy and waiver of homestead rights, if any.

All expenses of examination of the title and of preparation and recording of the deed of easement shall be paid by the COMMONWEALTH. Payments of the purchase price shall be made within ninety (90) days of transfer of title to the COMMONWEALTH.

L-4230A (6-72)
CC-0830-2200-0340

The deed shall be executed and delivered on or before however, from and after the execution of this instrument the COMMONWEALTH, its agents and contractors, shall have the right to enter upon the land covered by the easement to be conveyed for the purpose of making studies, tests, soundings and appraisals.

The SELLER does further remise, release, quitclaim and forever discharge the COMMONWEALTH or any agency or political subdivision thereof or its or their employees or representatives of and from all suits, damages, claims and demands which the SELLER might otherwise have been entitled to assert under the provisions of the State Highway Law, Act of 1945, P.L. 1242, as amended (36 P. S. 670-101), or the Eminent Domain Code, Act of June 22, 1964, P. L. 84, as amended, (26 P. S. 1-101), et. seq. for or on account of any injury to or destruction of the aforesaid property of the SELLER through or by reason of the aforesaid utility relocation, except damages, if any, under Section 610 (Limited Reimbursement of Appraisal, Attorney and Engineering Fees) and Section 610.1 (Payment on Account of Increased Mortgage Costs) of the Eminent Domain Code; provided, however, that, if relocation of a residence or business or farm operation is involved, this release shall likewise not apply to damages, if any, under Section 601-A(a) (Moving Expenses) and/or Section 603-A (Replacement Housing) of the Eminent Domain Code.

The SELLER does further indemnify the COMMONWEALTH against any claim made by any lessee of the aforesaid property who has not entered into a Settlement Agreement with the COMMONWEALTH.

IN WITNESS WHEREOF The Parties have executed or caused to be executed these presents, intending to be legally bound thereby.

INDIVIDUAL OR PARTNERSHIP

Witness _____ (SEA)
Witness _____ (SEA)
Witness _____ (SEA)
Witness _____ (SEA)

CORP., ASSOC., CLUB, ETC.

I attest to the signature of the officer who has executed this agreement and certify that execution hereof has been duly authorized by the

CORPORATION, ASSOCIATION, CLUB, ETC.

BD., OF DIRS., MAJORITY VOTE OF ASSOC., ETC.

Secretary BY _____
President
(SEAL)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

BY _____
District Right of Way Administrator

RW-4230 (2-73)
CC-0830-4700-1650



COUNTY	
CITY-BORO-TWP.	
L.R.-SEC.	
FED. PROJ. NO.	
CL. NO.	
CLAIMANT	

DEED OF EASEMENT
(Acquisition for Utility)

THIS INDENTURE, made
by

owner(s) of property affected by the construction or improvement of the above - mentioned Legislative Route, his/its/their heirs, executors, administrators, successors and/or assigns, hereinafter, whether singular or plural, called the GRANTOR, and the Commonwealth of Pennsylvania, Department of Transportation, and its assigns, hereinafter called the COMMONWEALTH,

WITNESSETH:

WHEREAS the COMMONWEALTH on _____ a plan in the Recorder of Deeds Office of the aforesaid County indicating its authorization to condemn an easement for highway purposes from the aforesaid property; and

WHEREAS it is necessary for the COMMONWEALTH to occupy a part of the right of way of

hereinafter called the Company, for the aforesaid highway construction or improvement; and

WHEREAS it has become necessary for the COMMONWEALTH to acquire from the GRANTOR'S PROPERTY a substitute right of way for the COMPANY, under and in accordance with the provisions of Section 412 of the Act of June 1, 1945, P.L. 1242, as amended, 36 PS 670 - 412; and

WHEREAS the parties hereto have agreed that, in lieu of condemnation, the GRANTOR will convey to the COMMONWEALTH the aforesaid substitute right of way

NOW, THEREFORE, in consideration of the sum of One (\$1.00) Dollar and other good and valuable consideration, the GRANTOR hereby grants and conveys to the COMMONWEALTH

as shown on the plot plan attached hereto and made a part hereof, being a part of the same premises

RW-4230 (2-73)

The GRANTOR does further remise, release, quitclaim and forever discharge the COMMONWEALTH or any agency or political subdivision thereof or its or their employees or representatives of and from all suits, damages, claims and demands which the GRANTOR might otherwise have been entitled to assert under the provisions of the State Highway Law, Act of June 1, 1945, P.L. 1242, as amended (36 P. S. 670-101 et seq.), or the Eminent Domain Code, Act of June 22, 1964, P. L. 84, as amended (26 P. S. 1-101 et seq.), for or on account of any injury to or destruction of the aforesaid property of the GRANTOR through or by reason of the aforesaid utility relocation, except damages, if any, under Section 610 (Limited Reimbursement of Appraisal, Attorney and Engineering Fees) and Section 610.1 (Payment on Account of Increased Mortgage Costs) of the Eminent Domain Code; provided, however, that, if relocation of a residence or business or farm operation is involved, this release shall likewise not apply to damages, if any, under Section 601-A(a) (Moving Expenses) and/or Sections 602-A and/or 603-A (Replacement Housing) of the Eminent Domain Code.

IN WITNESS WHEREOF, the GRANTOR has executed or caused to be executed these presents, intending to be legally bound thereby.

INDIVIDUAL OR PARTNERSHIP

Witness _____ (SEAL)
Witness _____ (SEAL)
Witness _____ (SEAL)
Witness _____ (SEAL)

CORP., ASSOC., CLUB, ETC.

I attest to the signature of the officer who has executed this deed and certify that execution hereof has been duly authorized, by the

BD. OF DIRS., MAJORITY VOTE OF ASSOC., ETC. CORPORATION, ASSOCIATION, CLUB, ETC.
Secretary President
(SEAL)

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF : ss:

On , before me, the undersigned officer, personally appeared

known to me (or satisfactorily proven) to be the person(s) whose name(s) subscribed to the within instrument, and acknowledged that executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

(SEAL) Notary Public My Commission Expires:

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF : ss:

On , before me, the undersigned officer, personally appeared , who acknowledged himself to be the of

a corporation, and that he as such officer, being authorized to do so, executed the foregoing instrument on behalf of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

(SEAL) Notary Public My Commission Expires:

¹ 70 Stat. 374, now codified in 23 U.S.C. § 123; See discussion in text at note 68, *infra*.

² See table in Appendix A. Eight states already had such legislation at the time of the enactment of the federal act (California, Connecticut, Hawaii, Missouri, New York, New Jersey, Pennsylvania, and Vermont). See "Relocation of Public Utilities, 1956-1966," *Special Report 91*, Transportation Research Board, Washington, D.C. (1969) p. 2.

³ *Gulf States Utilities Co. v. State*, 46 S.W.2d 1018, 1021 (Tex. Civ. App. 1932).

⁴ 23 C.F.R. § 645.102(a).

⁵ See discussion in text on "Reimbursement of States for Relocation Payments Made to Utilities: 23 U.S.C. § 123," at notes 68 to 144, *infra*.

⁶ See 23 C.F.R. § 645.102(j).

⁷ "Relocation of Public Utilities Due to Highway Improvement, *Special Report 21*, Transportation Research Board, Washington, D.C. (1955) p. 43.

⁸ "Policies for Accommodation of Utilities on Highway Rights-of-Ways, *NCHRP Report 34*, Transportation Research Board, Washington, D.C. (1976) p. 1.

⁹ *Id.* Many states have used the American Association of State Highway and Transportation Officials' (AASHTO) *Guide for Accommodating Utilities on Highway Rights-of-Way*. The Guide is directed toward the accommodation of utilities on highway rights-of-way in rural areas and provides minimal guidance for urban areas or highways with narrow rights-of-way. In addition, there is an FHWA policy on accommodation of utilities contained in the Federal-Aid Highway Program Manual.

¹⁰ See "Coordinating Utility Relocations as a Function of State Highway Agencies," *Transportation Research Board Record 631*, Transportation Research Board, Washington, D.C. (1977) pp. 56-61; *Accommodation of Utility Plant Within the Rights of Way of Urban Streets and Highways, State of the Art*, Federal Highway Administration, Washington, D.C. (1974).

¹¹ See table in Appendix A. Because of the variation in the many state statutes, the reader is cautioned to refer to the full text of a particular statute for specific conditions, circumstances, exceptions, or requirements.

¹² See *Special Report 21*, p. 14, at note 7, *supra*.

¹³ See, e.g., *Arkansas La. Gas Co. v. La. Dept. of Hwys.*, 104 So.2d 204 (La. App. 1958); *Sinclair Pipe Line Co. v. State*, 322 S.W.2d 58 (Civ. App. Tex. 1959); *Magnolia Pipe Line Co. v. City of Tyler*, 348 S.W.2d 537 (Civ. App. Tex. 1961). One case holding to the contrary is one involving change of grade, *Anderson v. Stuarts*

Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955) where the utility was required to bear the cost of relocation.

¹⁴ 526 S.W.2d 820 (Ky. 1975).

¹⁵ *Id.* at 821-822.

¹⁶ *Id.* at 822. See *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1936) (case originated in Kansas); *Los Angeles County v. Wright*, 236 P.2d 892 (Cal. App. 1951) (easement possessed by pipeline was real property and company entitled to recover damages in the amount of the cost of removal). See also *Tenn. Gas Transmission Co. v. State*, 32 A.D.2d 71, 299 N.Y.S.2d 578, 582 (1969), where the Court held: "Claimant's right to construct and maintain its gas transmission line was not, however, premised upon a mere franchise or license, rather it was founded upon a valuable property interest, a permanent easement duly acquired at the cost of over one million dollars from two municipal corporations authorized by law to so encumber their property."

In State, By Com'r of Transp. v. Sun Oil Co., 160 N.J. 513, 390 A.2d 661, 672 (1978), the Court noted: "In connection with utility relocation, one must first determine what is the property of the utility and what easements does the utility have. The State has the power to order a public utility which has facilities in a *public easement* to relocate them and do all necessary work not to disrupt service, either at the utility's expense or at [the] State's expense where the legislature has not provided."

In Louisiana, utility companies frequently acquire what is known as a "servitude," which is somewhat similar to a common law easement. *Arkansas-Louisiana Gas Company v. Louisiana Dept. of Highways*, 104 So.2d 204 (La. App. 1958).

¹⁷ 106 Ariz. 242, 474 P.2d 833 (1970).

¹⁸ 474 P.2d at 835.

¹⁹ 304 N.Y. 215, 106 N.E.2d 897 (1952).

²⁰ *Id.*

²¹ 154 Pa. Super. 340, 35 A.2d 535 (1944).

²² 35 A.2d at 539.

²³ *Id.* at 540. It may be noted that the opinion does not state whether the company had an easement or a franchise to occupy the street. Although the Court refers to the company's "easement" at page 540, it appears that the company did not have an "easement" in the sense discussed *supra* in the text at notes 12 to 18.

²⁴ See *New York Telephone Company v. City of Binghamton*, 18 N.Y.S.2d 152, 272 N.Y.S.2d 359, 361 (1966); and *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 168 Pa. Super. 360, 78 A.2d 46, 53 (1951). See also, *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, 393 Pa. 639, 145 A.2d 172 (1958) (noting that there had to

be specific statutory authority in order to pay relocation cost).

²⁵ See discussion in text on "Effect of Franchises or Other Agreements," at notes 49 to 56, *infra*.

²⁶ See, e.g., Commonwealth Department of Transportation v. Louisville Gas & Electric Co., 526 S.W.2d 820 (Ky. 1975); Arkansas-Louisiana Gas Company v. Louisiana Department of Highways, 104 So.2d 204 (La. App. 1958); *In re Gillen Place*, 195 N.Y. Misc. 685, 90 N.Y.S.2d 641, *aff'd* 304 N.Y. 215, 106 N.E.2d 897 (1952); Postal Telegraph Cable Co. v. Pennsylvania Public Utility Commission, 154 Pa. Super. 340, 35 A.2d 535 (1944); and Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W.2d 29 (Mo. 1977). There is no right, however, to compensation for loss of revenue. See *Fix v. City of Tacoma*, 17 P.2d 599 (Wash. 1933); Southern Counties Gas Co. of Calif. v. U.S., 157 F. Supp. 934 (U.S. Ct. Cl. 1958).

²⁷ See discussion in text on "Minority View," at notes 19 to 25, *supra*.

²⁸ See, e.g., New Orleans Public Service, Inc. v. New Orleans, 281 U.S. 682 (1930); Southern Bell Tel. & Tel. Co. v. State, 75 So.2d 796 (Fla. 1954); Oil City v. Postal Telegraph Co., 68 Pa. Super. 77 (1917); Dequesne Light Co. v. Pittsburgh, 251 Pa. 577, 97 A. 85 (1916); Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912). The public authority cannot arbitrarily order their removal or relocation. See 39 Am.Jur. 2d, *Highways, Streets, and Bridges*, § 278, at 666.

²⁹ See, e.g., New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905); Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777 (1952); Merced Falls Gas & Electric Co. v. Turner, 2 Cal. App. 720, 84 P. 239 (1906); Ganz v. Ohio Postal Telegraph Cable Co., 140 F. 692 (6th Cir. 1905).

³⁰ Comment, 35 N.Y.U.L. Rev. 302, 304-305 (1960).

³¹ 281 A.2d 233 (Maine 1971). See also, Southern Bell Telephone & Telegraph Co. v. Housing Authority, 38 N.C. App. 172, 247 S.E.2d 663 (1978) (authority not required to pay relocation cost when it closed public street).

³² 281 A.2d at 240.

³³ *Id.* at 244. Evidence was introduced as further proof of reasonableness that the company had placed its facilities underground in areas adjacent to the urban renewal area.

³⁴ *Des Moines City Ry. v. Des Moines*, 90 Iowa 770, 58 N.W. 906 (1894); *City of Hannibal v. K. Tel. Co.*, 31 Mo. App. 23 (1881).

³⁵ 555 S.W.2d 29 (Mo. 1977).

³⁶ See, e.g., *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121 (1919); *City of Cincinnati v. Cincinnati and Suburban Telep. Co.*, 123 Ohio St. 174, 174 N.E. 586 (1930).

³⁷ 232 Md. 123, 192 A.2d 87 (1963).

³⁸ *Southern Bell Tel. & Tel. Co. v. City of Nashville*, 35 Tenn. App. 207, 243 S.W.2d 617 (1951). See also discussion in text on "Constitutionality of Reimbursement Statutes," at notes 69 to 89, *infra*.

³⁹ *City of Wichita v. Kansas Gas and Electric Co.*, 240 Kan. 546, 464 P.2d 196 (1970); *State Highway Comm'n v. Clackamas Water District*, 247 Or. 216, 428 P.2d 395, 397 (1967). There are, however, cases that hold to the contrary; for example, *New Rochelle Water Co. v. City of New Rochelle*, 18 A.D.2d 922, 238 N.Y.S.2d 169 (1963), held that if public convenience or necessity so requires, the utility and municipal corporation may agree by contract that the municipality will pay the relocation cost.

⁴⁰ *New Orleans Gas Light Co. v. Drainage Comm. of New Orleans*, 197 U.S. 453 (1905); *Stillwater Water Co. v. Stillwater*, 50 Minn. 498, 52 N.W. 893 (1892); *Erie Railroad Co. v. Board of Public Commissioners*, 254 U.S. 394 (1921); *New Jersey Bell Tel. Co. v. Delaware River Joint Comm.*, 125 N.J. L. 235, 15 A.2d 221 (1940); *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565 (1930); *New York City Tunnel Authority v. Consolidated Edison Co. of N.Y.*, 295 N.Y. 467, 68 N.E.2d 445 (1946); *Western Gas Co. of Washington v. City of Bremerton*, 21 Wash. 2d 907, 153 P.2d 846 (1944); *State ex rel. City of Benwood v. Benwood & McMechen Water Co.*, 94 W.Va. 724, 120 S.E. 918 (1923); *Belfast Water Co. v. City of Belfast*, 92 Me. 52, 42 A. 235 (1898); *State, By Com'r of Transp. v. Sun Oil Co.*, 160 N.J. Super 390 A.2d 661 (1978).

⁴¹ 240 S.E.2d 819 (Va. 1978).

⁴² *Id.*

⁴³ *Id.* at 822. The district also contended that the evidence at trial showed that administrative officials had interpreted the enabling act to mean that the cost of relocation would be borne by the city; however, the evidence was insufficient to establish that the district's interpretation had been generally followed. *Id.* at 823. Another case that addresses the issue of departmental interpretation of a statute is *Potomac Electric Power Company v. Fugate*, 574 F.2d 1163 (4th Cir. 1978), at notes 115 to 120, *infra*.

⁴⁴ 393 Pa. 639, 145 A.2d 172 (1958).

⁴⁵ 145 A.2d at 176.

⁴⁶ *Id.* See also, Port of N.Y. Authority v. Hackensack Water Co., 41 N.J. 90, 195 A.2d 1 (1963), and Port of N.Y. Auth. v. Consolidated Edison Co., 205 N.Y.S.2d 781 (N.Y. 1960), both holding that the utilities had to pay the relocation cost where there was no provision in the enabling act requiring the Authority to pay relocation cost. In the following cases involving grade changes or crossings, the courts held that there was no right of the affected utility to compensation: Hammond, W. & E. C. Ry. Co. v. Zeigler, 198 Ind. 456, 152 N.E. 806 (1906); Union, Light, Heat & Power Co. v. Louisville & N.R. Co., 257 Ky. 761, 79 S.W.2d 199 (1935); Natick Gaslight Co. v. Natick, 175 Mass. 246, 56 N.E. 292 (1900) (no difference in result because utilities rendered useless by grade change); Tilton v. State, 259 A.D. 507, 20 N.Y.S.2d 76, *aff'd* 285 N.Y. 601, 33 N.E.2d 540 (1941); Western N.Y. Water Co. v. Brandt, 259 A.D. 11, 18 N.Y.S.2d 128, *appeal dismissed*, 283 N.Y. 686, 28 N.E.2d 408 (1940) (relocation cost was not "incidental improvements" within the meaning of the grade crossing elimination statute); Scranton Gas & Water Co. v. City of Scranton, 214 Pa. 586, 64 A. 84 (1906); Philadelphia Electric Co. v. Comm., 311 Pa. 542, 166 A. 892 (1933).

⁴⁷ 145 A.2d at 175.

⁴⁸ State Highway Comm'n v. Clackamas Water Dist., 247 Or. 216, 428 P.2d 395 (1967).

⁴⁹ Delaware River Port Authority v. Penn. Public Utility Comm., 393 Pa. 639, 145 A.2d 172, 175 (1958). See also, Western Union Tel. Co. v. Tarrant County, 450 S.W.2d 763, 766 (Tex. Civ. App. 1970), where the Court held that "the long duration of the plaintiff's free use of the city streets [43 years] does not ripen into a vested compensable right in the street."

⁵⁰ 12 McQuillin, *Municipal Corporations*, § 34.74a, at 183. See also, Bristol Tenn. Housing Auth. v. Bristol Gas Corp., 407 S.W.2d 681 (Tenn. 1966) (franchisee had to relocate lines at own expense where housing authority sponsored a slum clearance project that caused the closing of an alley in which lines were located). See State of Washington v. Public Utility Dist. No. 1 of Clark County, 349 P.2d 426 (Wash. 1960); Washington Natural Gas Co. v. City of Seattle, 373 P.2d 133 (Wash. 1962); Paradise Valley Water Co. v. Hart, 96 Ariz. 361, 395 P.2d 716 (1964); United States v. Certain Land in City of Portsmouth, 247 F. Supp. 932 (D.N.H. 1965); Southern Indiana Gas and Electric Co. v. Cornelison, 378 N.E.2d 845 (1978) (permit subject to reasonable regulation).

⁵¹ 330 A.2d 432 (Del. Super. 1974), *aff'd in part, mod. in part*, 330 A.2d 441 (Del. 1974).

⁵² The primary argument advanced by Artesian was that reimbursement was required because of the effect of the federal and state Relocation Assistance Acts. See discussion in text on Artesian Water Co. v. State, Dept. of Highways and Transp., at notes 146 to 154, *infra*.

⁵³ 330 A.2d at 435. It may be noted that the state was estopped to deny the existence of the franchise where it had participated and acquiesced in the company's earlier relocation of its facilities. *Id.* at 440.

⁵⁴ 330 A.2d at 440-441.

⁵⁵ See also, East Bay Municipal Util. Dist. v. County of Contra Costa, 200 Cal. App. 2d 477, 19 Cal. Rptr. 506 (1962) (holding that it made no difference that the State had granted the franchise and that relocation was required by the County); Dept. of Highways v. Southwestern Elect. Power Co., 243 La. 564, 145 So. 2d 312 (1962); City of Detroit v. Michigan Bell Tel. Co., 374 Mich. 543, 132 N.W.2d 660 (1965); General Tel. Co. v. U.S., 216 F. Supp. 388 (S.D. Calif. 1963); Sanitary District No. 1 of Pina County v. State, 399 P.2d 179 (Ariz. 1965); Green v. Noble, 182 N.E.2d 569 (Oh. 1961) (permit); City of San Antonio v. Bexar Metropolitan W. Dist., 309 S.W.2d 491 (Tex. Civ. App. 1958). It has been held that, where a utility has a franchise and a specific location is later approved by the city governing body, the approval does not convert the privilege into a property right.

One argument advanced—and rejected—is that, because the utility, in addition to providing water service for its customers, is required by law to furnish water for fire protection, the nonrevenue-producing function is contractual consideration for its use of the streets. In *Commonwealth, Dept. of Highways v. Louisville Water Co.*, 479 S.W.2d 626 (Ky. 1972), the company argued that water mains that were required to be relocated because of highway construction were not provided in order to supply paying customers but were required by the statutory duty to supply water for fire protection. The Court was not persuaded: "If the Company's use of the streets were a simple contract right obtained in exchange for an identifiable quid pro quo, the argument might be solid. But there are other privileges enjoyed by the company under its charter, the first and foremost of which is its exclusive franchise to do business." *Id.* at 629.

⁵⁶ County of Santa Barbara v. United States, 269 F. Supp. 855, 858 (C.D. Calif. 1967).

⁵⁷ South Carolina St. Hwy Dept. v. Parker W. & S. Subdistrict, 146 S.E.2d 160, 163 (1966); Dietrich v. City of Deer Lodge, 218 P.2d 708 (Mont. 1950).

⁵⁸ *Special Report 91*, pp. 45-46, note 2, *supra*.

⁵⁹ See discussion in text on "Majority View," at notes 12 to 18, *supra*.

⁶⁰ See discussion on PEPSCO v. Fugate, at notes 86 to 89 and 116 to 120, *infra*.

⁶¹ 56 Am.Jur.2d, *Municipal Corporations*, § 199, at 255.

⁶² See *State v. Town of Grants*, 66 N.M. 355, 348 P.2d 274 (N. Mex. 1960); *East Bay Municipal Utility District v. County of Contra Costa*, 200 Cal. App. 2d 477, 19 Cal. Rptr., 506 (1962); *Jackson County Pub. Wat. Supp. Dist. v. State Highway Comm'n*, 365 S.W.2d 553 (Mo. 1963).

⁶³ *Jamaica Water Supply Co. v. City of New York*, 280 App. Div. 834, 114 N.Y.S. 2d 79 (1952).

⁶⁴ *City of Chadron v. State*, 214 N.W. 297, 299 (Neb. 1927) (municipality not entitled to relocation cost but was entitled to damages for pipe destroyed by the actual grading of the road).

⁶⁵ *Ward v. Southern Bell Telephone and Telegraph Co.*, 436 S.W.2d 794, 796 (Ky. 1968).

⁶⁶ See *Special Report 91*, p. 27, note 2, *supra*.

⁶⁷ See, e.g., *First Nat. Bank of Boston v. Maine Turnpike Authority*, 136 A.2d 699 (1957); *Port of N.Y. Authority v. Hackensack Water Co.*, 195 A.2d 1 (N.J. 1963); *Port of N.Y. Authority v. Consolidated Edison Co.*, 205 N.Y.S.2d 781 (N.Y. 1960); *Delaware River Port Authority v. Pa. Public Utility Comm'n*, 393 Pa. 639, 145 A.2d 172 (1958). See, *contra*, *Baltimore Gas & Electric Co. v. State Roads Comm'n*, 134 A.2d 312 (Md. 1957), where the Court construed a provision requiring restoration, repair, or compensation for property destroyed or damaged in the construction of the Baltimore Harbor Tunnel to entitle the utility to costs for removal of its facilities. This case appears to be an exception to the widely recognized rule that the state or one of its agencies may not make payment to utilities without some specific statutory authority that allows them to do so. See, *Brunswick and Topsham Water Dist. v. W. H. Hinman Co.*, 136 A.2d 722 (Me. 1957) (noting that without express authority from the legislature the state cannot pay relocation cost to a utility).

⁶⁸ 23 U.S.C. § 123; Public Law No. 85-767; 70 Stat. 374 (August 27, 1958).

⁶⁹ *In Anno*, 75 A.L.R.2d 419, the authorities are collected pertaining to the "Constitutionality of State Legislation to Reimburse Public Utilities for Cost of Relocating Their Facilities Because of Highway Construction, Conditioned Upon Federal Reimbursement of the State under the Terms of the Federal-Aid Highway Act (23 U.S.C. § 123)."

⁷⁰ See 23 U.S.C. § 126 for the federal anti-diversion statute.

⁷¹ 152 Me. 449, 132 A.2d 440 (1957); *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958); *Opinion of the Justices*, 101 N.H. 527, 132 A.2d 613 (1957); *Northwestern Bell Tel. v. Wentz*, 103 N.W.2d 245 (N.D. 1960); *Jones v. Burns*, 357 P.2d 22 (Mont. 1960); *Pack v. Southern Bell Tel. and Tel. Co.*, 387 S.W.2d 789 (Tenn. 1965); *State v. Gainer*, 143 S.E.2d 351 (W.Va. 1965); *Edge v. Brice*, 113 N.W.2d 755 (Iowa 1962); *State Highway Department v. Delaware Power & Light Co.*, 165 A.2d 27 (Del. 1961).

⁷² 91 N.W.2d 642 (Minn. 1958).

⁷³ *Id.* at 652. See also, *State v. City of Dallas*, 319 S.W.2d 767 (Tex. Civ. App. 1958); *Pack v. Southern Bell Telephone & Telegraph Co.*, 387 S.W.2d 789 (Tenn. 1965); and *State Highway Department v. Delaware Power & Light Co.*, 167 A.2d 27 (Del. 1961).

⁷⁴ *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *Washington State Highway Comm'n v. Pacific Northwestern Bell Telephone Co.*, 367 P.2d 605 (Wash. 1961).

⁷⁵ *State v. Dallas*, 319 S.W.2d 767 (Tex. Civ. App. 1958); *Minneapolis Gas Co. v. Zimmerman*, 91 N.W.2d 642 (Minn. 1958); *Northwestern Bell Tel. v. Wentz*, 103 N.W.2d 245 (N.D. 1960); *Jones v. Burns*, 357 P.2d 22 (Mont. 1960); *State v. Gainer*, 143 S.E.2d 351 (W.Va. 1965); *State v. City of Austin*.

⁷⁶ *Mulkey v. Quillan*, 100 S.E.2d 268 (Ga. 1957); *State ex rel Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *Washington State Highway Comm'n v. Pacific Northwestern Bell Telephone Co.*, 367 P.2d 605 Wash. 1961).

⁷⁷ *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958); *Northwestern Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960); *Pack v. Southern Bell Tel. & Telegraph Co.*, 387 S.W.2d 789, 796 (Tenn. 1965); *State v. City of Austin*, 331 S.W.2d 737 (Tex. Civ. App. 1960); and *State v. Gainer*, 143 S.E.2d 351 (W.Va. 1965).

⁷⁸ *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958); *Jones v. Burns*, 357 P.2d 22 (Mont. 1958); *State Road Comm'n of Utah v. Utah Power and Light Co.*, 10 Utah 2d 333, 353 P.2d 171 (1960); *State ex. rel. Albuquerque v. Laverder*, 69 N.M. 220, 365 P.2d 652 (1961).

⁷⁹ 143 S.E.2d 351 (W.Va. 1965).

⁸⁰ *Id.* at 362.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 365 P.2d 652 (N.M. 1961).

⁸⁴ *Id.* at 654.

⁸⁵ *Id.* at 663.

⁸⁶ 341 F. Supp. 887 (E.D. Va. 1972), *aff'd* 409 U.S. 943 (1972). The case has a lengthy procedural history. *See also*, Potomac Electric Power Company v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971). *In Potomac Electric Power Company v. Fugate*, 574 F.2d 1163 (4th Cir. 1977), the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings in order to interpret the applicability of § 33.1-55, Virginia Code. *See discussion in text on PEPCO v. Fugate*, at notes 115 to 120, *infra*.

⁸⁷ PEPCO v. Fugate, 221 Va. 745, 180 S.E.2d 657 (1971).

⁸⁸ 341 F. Supp. at 889.

⁸⁹ *Id.*

⁹⁰ 23 U.S.C. § 123(a). In some states the Department may reimburse utilities where relocated on state roads or highways. *See table in Appendix A.*

⁹¹ 23 U.S.C. § 123(b).

⁹² 23 C.F.R. § 645.103(a).

⁹³ *Id.*

⁹⁴ 23 C.F.R. § 645.103(a)(1).

⁹⁵ *Special Report No. 91*, p. 32, note 2, *supra*.

⁹⁶ State Highway Comm'n v. Ruidoso Telephone Co., 73 N.M. 487, 389 P.2d 606 (1964).

⁹⁷ Green v. Noble, 182 N.E.2d 569 (Ohio 1961) (county-owned water line leased to a water service company and located in county right-of-way).

⁹⁸ Richfield Oil Corp. v. U.S., 178 F. Supp. 799 (1959).

⁹⁹ 23 C.F.R. § 645.103(d).

¹⁰⁰ *Id.*

¹⁰¹ 23 C.F.R. § 645.103(a)(2).

¹⁰² *See* 23 C.F.R. § 645.103(b) providing that the state is to furnish FHWA with copies of any new relocation statute or amendments to existing statutes.

¹⁰³ *See* note 78, *supra*, and cases cited therein.

¹⁰⁴ 146 S.E.2d 160 (S.C. 1966).

¹⁰⁵ *Id.* at 162.

¹⁰⁶ *Id.* at 163.

¹⁰⁷ Artesian Water Co. v. State, Dept. of Hwys & Transp., 330 A.2d 432 (Del. 1974).

¹⁰⁸ 494 F.2d 1285 (U.S. Ct. Cl. 1974).

¹⁰⁹ The case was brought under the Tucker Act, 28 U.S.C. § 1491.

¹¹⁰ *See discussion in text on "Effect of Franchises or Other Agreements,"* at notes 49 to 56, *supra*.

¹¹¹ Arizona has no reimbursement statute. *See table in Appendix A.*

¹¹² 494 F.2d at 1288.

¹¹³ 23 C.F.R. § 645.103(a)(3).

¹¹⁴ *See discussion in text at notes 79 to 89.*

¹¹⁵ *Special Report 91*, p. 43, note 2, *supra*.

¹¹⁶ 574 F.2d 1163 (4th Cir. 1978). *See PEPCO v. Fugate*, 275 F. Supp. 566 (E.D. Va. 1967); 341 F. Supp. 887 (E.D. Va.

1972), *aff'd* 409 U.S. 943 (1972); *See also*, PEPCO v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971).

¹¹⁷ 574 F.2d at 1165. *See discussion in text on illegality of discriminating between utilities located in cities and towns, on the one hand, and, on the other, those located in counties, at notes 86 to 89, supra.*

¹¹⁸ *Id.* at 1165.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1166-1167.

¹²¹ *Special Report 91*, p. 6, note 2, *supra*.

¹²² 23 C.F.R. § 645.102(j).

¹²³ In other words, FHWA is entitled to the benefit of the narrower state law, and, in any event, FHWA is going to reimburse states, *pro rata*, only for those payments that the states actually make.

¹²⁴ 23 C.F.R. § 645.101(j). As to the question of compensation of utilities where they are required to remove facilities to a location permanently outside the right-of-way, *see discussion in text on "Minority View,"* at notes 19 to 25, *supra*.

¹²⁵ New Rochelle Water Co. v. State, 10 N.Y.2d 287, 177 N.E.2d 771 (1961).

¹²⁶ 23 U.S.C. § 123(c).

¹²⁷ 23 C.F.R. § 645.109(a)(1). *See also* § 645.102(o) that defines "the cost of any improvements necessitated by or in accommodation to the highway construction" to mean "the cost of providing improvements in the relocated or adjusted facility that are needed to protect or accommodate the highway and its safe operation."

¹²⁸ 23 C.F.R. § 645.109(a).

¹²⁹ 23 C.F.R. § 645.102(n).

¹³⁰ 23 C.F.R. § 645.107(p).

¹³¹ 23 C.F.R. § 645.107(a).

¹³² 23 C.F.R. § 645.107(a)(1-5).

¹³³ 23 C.F.R. § 645.107(b).

¹³⁴ 23 C.F.R. § 645.107(c).

¹³⁵ If the state and utility are unable to come to terms, the state may submit its proposal to FHWA with a full report of the circumstances. *See* 23 C.F.R. § 645.107(q).

¹³⁶ 23 C.F.R. § 645.109(a)(3).

¹³⁷ 23 C.F.R. § 645.102(f).

¹³⁸ 23 C.F.R. § 645.110.

¹³⁹ 23 C.F.R. § 645.111.

¹⁴⁰ 23 C.F.R. § 645.104.

¹⁴¹ 23 C.F.R. § 645.105.

¹⁴² 23 C.F.R. § 645.110(b); *See also*, definition of "overhead costs" in § 645.102(m).

¹⁴³ 23 C.F.R. § 645.111(f).

¹⁴⁴ 23 C.F.R. § 645.112; § 645.113.

¹⁴⁵ *See discussion of this case in text, at notes 108 to 112, supra.*

¹⁴⁶ 330 A.2d 432 (Del. Super. 1974), *aff'd in part, and mod. in part*, 330 A.2d 441 (Del. 1974). *See discussion of this case in text, at notes 51 to 54, supra. See also*, Consumers Power Company v. Costle, Civ. No. 78-72481 (E.D.Mich., *dismissed* Mar. 30, 1979); National Fuel Gas Distribution Corp. v. Niagara Frontier Transportation

Authority, Civ. No. 78-843 (W.D.N.Y.);
Public Service Co. of Okla. v. Harris, Civ.
No. 79-C-37 (N.D. Okla., filed Jan., 1979),
all involving questions under the Act simi-
lar to those asserted in Artesian Water Co.
v. State, *supra*.
¹⁴⁷ 42 U.S.C. A. § 4601 *et seq.*; 23 U.S.C.
A § 101 *et seq.*

¹⁴⁸ 29 Del. C. § 9101 *et seq.*
¹⁴⁹ 17 Del. C. § 132(b).
¹⁵⁰ 330 A.2d at 437.
¹⁵¹ *Id.*
¹⁵² *Id.*
¹⁵³ *Id.*
¹⁵⁴ *Id.* at 438-439.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, and those responsible for land acquisition and use. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain and land use.

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