Liability for Cost of Relocating Utilities Due to Highway Improvements

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• I am going to direct my remarks primarily to the matter of relocating utilities, and my interest goes beyond the question of whether there should be reimbursement, and deals with the more specific question of what costs should be reimbursed. There are a number of cases on the constitutional validity of authorization to reimburse, but practically nothing on the question of how to do it. There are very few that even discuss or define the term "costs" of relocation.

I would like to start with a brief outline of Florida law. This is not because it is the only good one, but because we run the gamut on payment of relocation costs for utilities. We have no reimbursement whatever for public utilities located within existing primary, secondary, county, park, or lesser State-owned rights-of-way. We have full reimbursement for relocation of utilities on Interstate System highway right-of-way, except to the extent the Interstate System intersects existing right-of-way for one of the road systems just mentioned. We also have two expressway authorities. One of these has a law requiring reimbursement for relocation of utilities. The exceptions to that run a full column and a half on on 8½- by 11-in. page, prescribing the conditions that qualify a utility for reimbursement. The other expressway authority makes no provision whatever for reimbursement on their expressway. Therefore, we run into some interesting situations in Florida on this matter.

As an opening question I would like to ask how they got on the right-of-way in the first place. Where are they? Certain public utilities—water, gas, electric power—condemn various forms of interests in land to locate their facilities. This may be fee title because they think they need everything, including the right to dig into the ground. Others condemn only an easement; others take a lease. It is important to note this interest because when you build a highway the latitude of this interest may determine the latitude that you have in negotiating with the utility.

By far the largest amount of public utilities are located by permit on our State-owned rights-of-way. This includes both dollars and miles. The telephone, telegraph, electric power transmission lines almost all follow the highways since the highway system connects all our major cities. The occupancy of the right-of-way is by statute at the pleasure of the public agency owning the right-of-way with the exception of telephone and telegraph companies who have a statutory right to occupy space along the public highways as long as they do not interfere with traffic. There are several sections in the highway code that spell out what the utility has to undergo to get a permit, when they can go in, when they must take their facilities down, and the provision I referred to earlier that when they take it down they are not entitled to any reimbursement for these costs. The Federal Interstate System and our expressways are both exceptions to this general statutory rule.

Where a utility is on private property (that is, where the utility owns some form of interest in the land which it traverses), it is normally subject to condemnation. Conceivably this will present some situations where there will be a conflict of pub-

lic interest, but in Florida these have not yet been encountered very much. Many of our cities are in the power business, and are also very anxious to have highways. I think there is going to be some problem in this area. A city is likely to say, "We have just put in our new water line, and we are not going to take it out." When this occurs we are going to have to find out whose eminent domain authority is superior.

It is normally advisable in Florida, and I should think in most other States, to seek to negotiate these matters. There are several reasons for this. In Florida we would not be required to pay for the moving costs of a public utility as such, even where it is on private property. This is because such cases involve something less than a fee interest in the land, and we pay moving costs only to owners. We find, however, that we frequently pay these costs anyway because it comes in the back door and our dollar amount reflects it although it is called something else. We have found, however, that we have an important lever for negotiation in our power to permit the relocation of the utility. Consider the case of any highway in the open part of central Florida. It must cross a great number of privately-owned utilities. It is a great advantage to be able to say to the utility that if they will pull up their poles for about six weeks and then move them back in a location that conforms to the new highway we will let them come back for free. We can usually work out a fairly reasonable settlement on this basis. On the other hand, if they want to be bullheaded about it, we can always say that they are not complying with the statute and they can just go find themselves a new right-of-way somewhere else.

Consider also the damages that wily public utility lawyers will be able to slip in on you by way of "disruption of service." Any of you who have ever negotiated one of these reimbursements have, I am sure, heard that term. The familiar argument is that when we cut a utility line in central Florida, we black out the whole of southern Florida for months and months. Of course, this does not actually happen, but by the time they get done with us it sounds like we have multitudes of wives and children suffering great privations. This is another reason for attempting to negotiate these matters at an early stage, and attempting to work with the power companies as soon as you find out the highway will do something to their facilities.

On the technique of negotiation, this should probably begin with a discussion of some of the factual matters that are going to be the issues in the negotiation. Consider, for a moment, what constitutes the "cost of relocation." It is likely to run the gamut. In its simplest form it is the cost of the men, trucks and equipment required to pull a pole up out of the ground and move it over 20 ft to one side. In its broadest form it includes such things as administrative overhead, cost of disruption of service, the effect on the entire operation of the utility company throughout the immediate area, and other very interesting concepts that utility lawyers will come up with. You will also run into a great many accounting terms. The Milwaukee ordinance contains some terms that appear to mean one thing for tax purposes and entirely another thing for negotiation purposes. For example, the "unused life" of the facilities. What is this? Is this depreciated life expectancy? I doubt that this is what you will be paying for when you get to the final agreement.

Returning to the case where the utility is on public property, we have a very interesting provision in Florida law which I would commend to all of you who may be faced with payment of utility relocation costs. It provides that the State will pay for costs of relocation "and that in the case of a dispute as to the value or amount of the cost of relocation the decision of the chairman of the State Road Department shall be final." This removes many barriers to negotiation. It also means that you make

them the plaintiff in any lawsuit that may arise from failure to agree in negotiations.

I want to also mention one situation that can arise under our statute which is extremely difficult to deal with. In Dade County the terminus of the Sunshine State Parkway is in an interchange which we call the Golden Blaze Interchange. We are now in the process of reconstructing this interchange to serve as a connection of two Interstate routes, about four county roads, and a dozen city streets. You can imagine the complications we have figuring out under our four separate acts which utilities get reimbursed and which do not.

In the absence of a statutory provision such as we have in Florida, there is a very serious matter in my mind as to whether the condemnor can pay relocation costs. If your State is like ours you have to show some authority in a condemnation suit before you can condemn. Where do you put this relocation cost? Where would an auditor put it, if there was no statute covering the subject? This is a serious matter that is not solved by the Federal law which authorizes Federal-aid reimbursement. The application of the proper State law must be worked out before the Federal law will apply.

I suggest that all of the questions relating the constitutionality of statutes that provide for reimbursement may not yet have been settled. There are a number of cases on this that look both ways. Is it a gift of State funds, or is it a valid expense for a valid highway use? I have had a further query, too. How can we reconcile payment of utility relocation costs with the principle that the State may regulate the use of its right-of-way under the police power? Does the utility get a free ride both ways when the condemnor pays for relocation within an existing right-of-way? The question in Florida simply comes down to this: When we were discussing in our legislature the question of whether to reimburse across the board or whether to reimburse only for Federal-aid highways or whether to reimburse for any roads, we asked who should pay the costs of easements necessary for power transmission lines. Should it be the traveling public or the power consumer? We reached a rather interesting conclusion in that our law seems to let each one pay a little bit.

Those who do not have legislation on this matter should consider the practical and political considerations that arise in seeking it. It is quite possible that the first thing you will face is a possible lawsuit over the authority granted in a statute. Good lawyers representing taxpayers' groups or a public agency can make a very persuasive argument that this sort of law is unconstitutional. In such a lawsuit you would, of course, be aided by the utility lobby. I do not know whether they are good bedfellows or not, but they are very happy to support this type of legislation. If you do seek such a statute, make sure you control the language that goes into it, otherwise you are going to be in the same shape that Milwaukee County is now. There the utilities wrote the statute, and in some respects it now might be easier for Milwaukee County to buy the whole utility than to reimburse for relocation of the poles that are the subject of the present negotiation.

What are the practical problems in negotiating with utilities? Here is the heart of the matter. When you sit down at the table with the utility lawyers, whom should you have with you, and what should you be prepared to do? Consider first the simple case where the utility wants reimbursement only for the material and labor that goes into moving the poles involved in crossing the road. This is not likely to be a difficult problem because the amounts involved are not great. Neither the State nor the utility is likely to want to argue much about these little costs.

If there is more at stake, and you have a statute like that of Milwaukee County which provides for reimbursement of the costs of relocating utilities including a list of specific cate-

gories, you may have a more vexing situation.

Here you may be glad to have a negotiating lever in the form of the power to say whether the utility may relocate on the public right-of-way. This is perhaps the single most important unarticulated premise at the conference table. Nobody ever mentions it; nobody ever needs to because they know it is there.

I strongly recommend, also, a proviso in the State law that someone in the highway authority or someone who is sympathetic with the public interest be in a position to resolve differences, or at least appoint the arbitration panel.

And the last and most important thing: this is one area in which I have never tried to go it alone. We work in a field that is becoming more and more complicated every day; we work with engineers who have many many years of experience and rely on them. I recommend that the State highway counsel get himself a utility engineer; find out what the utility people are talking about, and what they are going to be doing after the relocation. Little things such as whether there was a better way or a cheaper way than the one the utility actually used may be very useful to know. Also, have a good accountant present. There are a great many accounting angles to this matter. The immediate impact of the tax picture is always considered. What does this relocation do to the utility in terms of taxes? Are they picking up money from tax deductions as well as reimbursements? Or, are they really being hurt both ways? These are things that an accountant can point out for you. Finally, be prepared as an attorney. Only after you have talked to your experts should you go to the negotiating table. And do not be surprised if, when you walk in with your three-man team, you find that there are three men on the other side of the table, too.

Going for a moment over to the relocation of property owners and tenants. In Florida we do not pay moving costs to anyone except the fee owner of land. In view of the Federal legislation adopted this year I think it is time we start considering the problem. If it becomes a requirement that we provide adequate relocation facilities for people that are dislocated from their homes this is going to be a moving cost, and many State statutes may have to be amended in order to comply with the Federal-aid standards.

DISCUSSION

J. Billett.—In Ohio we currently have a case that involves the authority of the Director of Highways to order relocation of a pipeline located on the right-of-way of a State highway, and also, in another instance, of a pipeline located on a county road where an expressway will cross both a county road and a State road. Ownership of the pipelines is one issue since one of the pipelines is owned privately, and the other is jointly owned, with the county holding legal title, and the private utility company having all the rights of operation and maintenance. The whole controversey is centered in these issues.

Banister.—There is a new Louisiana decision that may help on that point. It is a *Department of Highways v. Southwestern Electric Power Co.*, 145 So.2d 312 (1962).

Lindas.—In our State the difficulty has been not so much with the private utilities but with the public nonprofit utilities that want their moving costs. Our legislature has not authorized payment of costs of these utilities, and there are numerous water districts, irrigation districts, sewer districts, drainage districts, and so on that want to be included.

M. Cook.—We have problems in Oklahoma relating to pipelines. At the oil fields we have a gathering system that runs into a refiner, and the Interstate System will cross this sys-

tem. The line has been in the ground about 30 years and has a life expectancy of about 10 years so long as it stays in the ground. If you take it out of the ground it is a salvage. This has an effect on the Federal-aid reimbursement. The Bureau of Public Roads says it will pay 90 percent of the reimbursement for the relocation, but the utility company says that they want a new line. I think they are entitled to it, because the life expectancy of the oil field is about 10 more years, so they normally would not have to put in a new line, since the old one would have lasted the life of the oil field. Why should they put in a line that would last for 40 years when they can only use it for 10 more?