

Utility Relocation and Reimbursement

Basic Common-law Rule:

- Utilities that locate their facilities within highway rights-of-way “take the risk of their location” and can be required, at their own expense, to relocate or adjust their facilities to accommodate highway repairs or reconstruction [See 19 V.S.A. Section 1606(a)].
- When utilities are located outside existing highway rights-of-way, in areas that either are owned in fee by the utility or where the utility holds a non-terminable easement, then the utility, like any other property owner, is entitled to payment of just compensation [See 19 V.S.A. Section 1605(b) (2)]. Because of the special nature of utility property, the measure of just compensation usually is the cost of “functional replacement” of the affected utility facilities which is a distinct advantage to the utility when the highway project triggers the need to replace an aging utility facility with a new facility meeting current regulations, codes, etc.
- The above-referenced payment of just compensation would apply to both the “owner” and “tenant.” The issue is not specifically ownership of the actual utility poles, pipes and wires, but whether the utility has the right of occupancy in its existing location “because it holds the fee, an easement, or other real property interest, the damage or taking of which is compensable in eminent domain. Therefore, if the “tenant” utilities have some kind of indeterminate right to attach to the poles owned by the utility that holds the easement, than they too are entitled to compensation.

Vermont Modifications to Common-law Rule:

- 19 V.S.A. Section 1605(b) (3): Relocation of municipal utilities located within a municipal highway right-of-way is eligible for reimbursement as part of the cost of the highway project.
- 19 V.S.A. Section 1606(a): Except as provided in Section 1605, normal relocation by highway maintenance operations of highway construction projects is not eligible for reimbursement. “Normal relocation” means constructing a replacement facility, in kind, that is both functionally equivalent to the existing facility and necessary for the continuous operation of the utility facility, highway project economy or sequence of highway construction or maintenance (19 V.S.A. Section 1602). Therefore, VTrans generally does not pay for utility betterments.
- 19 V.S.A. Section 1606(b): Under certain circumstances, the extra cost of undergrounding existing aerial utilities in connection with highway reconstruction is partially eligible for reimbursement as part of the cost of the highway project—see **Undergrounding** section on the following page.
- 19 V.S.A. Section 1703(d): When existing utility facilities, located within the boundaries of a proposed new limited-access facility, must be relocated or removed, the cost and expenses of the relocation or removal will be reimbursable as part of the cost of the new limited-access facility. Thereafter, subsequent adjustments required as part of a highway project would not be eligible for reimbursement.
- 19 V.S.A. Sections 1(12) and 501(1) authorize VTrans to condemn additional areas needed for utility relocations. However, the State statutes are phrased as enabling legislation – in other words, it enables but does *not* compel VTrans to acquire additional areas needed for utility

relocations. Prior to this enabling legislation, it was VTrans' practice to accommodate relocation of utilities within the highway right-of-way if it was practical to do so. However, if it wasn't, then the utilities (which have eminent domain powers through the Public Service Board) were on their own to negotiate for (or, if necessary, condemn) new easements outside of the highway right-of-way. Ultimately, VTrans still has the option of telling a utility that it can't be accommodated within the highway right-of-way and they must acquire their own rights outside the highway right-of-way.

- All conveyances to the State for land and rights acquired for highway projects are recorded in the town land records and, like conveyances in general, give information as to the source of the grantor's title (*i.e.*, date and type of deed, name of grantor and grantee, book and page recorded in the land records). This recording information for the conveyances to the State will be noted on the final right-of-way plans for the highway project. It would not be feasible for VTrans to directly transfer the special-purpose easements to the utilities since the rationale for their acquisition by the State is that they are part of the highway under 19 V.S.A. Section 1(12). Moreover, because the easements are being acquired as part of a federal-aid highway project, their subsequent conveyance to a non-governmental entity likely would trigger Federal Highway Administration regulations which require an appraisal and payment of fair market value before property acquired as part of a federal-aid highway project can be conveyed to a private entity. If it is proposed on the Right-of-Way plans for the installation of anchor guys and braces to exceed the limits of the utility easement corridor, a permanent "Install and Maintain" right is taken, which will be appurtenant to the utility easement. This Right is also understood to include clearing and trimming as necessary and replacement of the guys or braces at the same location as defined on the plans.

Federal-aid Highway Projects:

- 23 U.S.C. Section 123: Federal-aid highway funds can participate in the cost of relocating utility facilities "necessitated" by construction of a federal-aid highway project if the payment is authorized by state law and does not violate a legal contract between the utility and the State; "cost of relocation" does not include betterments.
- 23 C.F.R. Section 645.107(a) (2): For utility relocation expenses to be eligible for federal participation, the state transportation agency must certify to FHWA that payment is made pursuant to a state law authorizing such payment.

Undergrounding

- Many communities have asked questions concerning how various aerial utilities can be required to be placed underground during a VTrans transportation improvement project. VTrans acquires its authority to pay for utility undergrounding costs through 19 V.S.A. Section 1603.
- The first requirement that must always be met is that the utility requires relocation to satisfy the needs of the project (*i.e.*, the existing utility must be physically moved to allow the project to be constructed).
- Adjustment of the utility facilities may be eligible for reimbursement when the required design and installation of utility facilities exceed normal relocation requirements as a result of the transportation improvement projects need to address environmental considerations, non-discriminating local ordinances, safety considerations or other requirements found to be applicable by VTrans.

- The Secretary of Transportation makes a determination that options other than placing utilities underground have been considered prior to finding adjustment eligible for reimbursement. This could mean that an alternate aerial route could accomplish the same result and could be considered for reimbursement.
- When an adjustment has been found to be reimbursable, the differential cost (over and above normal relocation cost) shall be apportioned on a 50/50 basis between VTrans and the municipality. VTrans may waive the requirement for municipal participation for projects that are located on the State highway system. For projects on the town highway system the municipality must fund 50% of the differential costs.

Miscellaneous:

- Under IRS standards, when a non-utility party asks a utility to install certain infrastructure, and the non-utility party pays for the actual cost of installing that infrastructure (as is the incremental cost by which underground infrastructure exceeds overhead replacement), the IRS insists that the outside payment to the utility be treated as taxable “income” to the utility. Therefore, the utility has to pay taxes on this supposed “income.” This means that if the amount paid to the utility for the required infrastructure isn’t increased so as to also include the tax that the utility has to pay to the IRS, then the utility is actually receiving less than the actual incremental cost for the work.

Note: This oddball situation applies to investor-owned utilities, because they pay income tax. Such “gross-up” cost never applies to municipally-owned utilities, as they are not subject to income tax. It is also likely that it never applies to co-operative utilities such as Washington Electric or Vermont Electric Co-op; but these quasi-public entities should be researched further.

Example - Williston STP M 5500 (7) S Project:

- Because this segment of US Route 2 is State highway, not a town highway, the existing 19 V.S.A. Section 1605(b) (3) (authorizing payment for relocation of affected municipal utilities located within municipal highways) does not apply.
- Since Industrial Avenue is a Town highway (Town Highway 2), relocation of the portion of the water line within the Industrial Avenue right-of-way would qualify for reimbursement under the highway project. See 19 V.S.A. Section 1605(b) (3).

Example – Burlington (Riverside Avenue) MEGC M 5000 (15) Project:

- Because Burlington Electric (BED) is a municipal utility and Riverside Avenue (Town Highway 4 or 10) is a Town highway, Section 1605 (b) (3) clearly makes BED eligible for reimbursement of the costs of a conventional (i.e., aerial) relocation of the affected utility facilities. [Not to be hypertechnical, but per 19 V.S.A. Section 309(a), reimbursement would not be 100%. Instead, it would follow the project’s general federal/State/municipal funding ratio—probably through a 90/10/10 split.]
- The effect of 19 V.S.A. Section 1605(b) is to preserve BEDs eligibility to the amount reimbursement provided for in Section 1605, but limiting to 50% its eligibility for reimbursement of the additional cost of underground relocation as compared to a conventional (i.e., aerial) relocation.

To give an arithmetic example:

- (1) The total cost of underground relocation is \$100,000, as compared to \$50,000 for a conventional (i.e., aerial) relocation.
- (2) Because a conventional relocation would have cost BED \$50,000, BED is eligible for reimbursement of \$45,000 (i.e., 90% of the \$50,000), with the local share being \$5,000 (i.e., 10% of the \$50,000).
- (3) Federal/State sharing of the remaining \$50,000 is limited to \$25,000 (i.e., 50% of the additional \$50,000).
- (4) In summary, BED would be reimbursed for \$70,000 of the \$100,000 relocation cost.