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## The Relocation of Utilities for State Highway Construction (2012)

Ron Darden

*Municipal Technical Advisory Service, Ron.Darden@tennessee.edu*

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**June 26, 2012**

## **THE RELOCATION OF UTILITIES FOR STATE HIGHWAY CONSTRUCTION**

**Ron Darden, Municipal Management Consultant**

### **INTRODUCTION**

Most Tennessee cities have utilities located in a state highway right-of-way. When the relocation of such utilities is required for state highway improvements, cities may be required to pay for the relocation. The relocation may be very expensive for a city, and such expenses are often not anticipated and budgeted.

Under the provisions of T.C.A. § 54-5-804, cities may request that the Commissioner of the Tennessee Department of Transportation include the cost of relocating utilities on state rights-of-ways as part of construction cost. If federal highway funds are being used to fund the project, such cost may be approved by the commissioner.

### **NOTIFICATION TO THE CITY**

T.C.A. § 54-5-803 provides that the department of transportation notify the city with utilities occupying the rights-of-way of proposed construction of highway improvements by certified mail, return receipt requested, addressed to the designated representative of the city.

Within 60 days following the receipt of notice from the department, the owner informs the department, in care of the person sending the notice at the address listed in the notice, whether or not it is the owner of the utility facilities and if so, the type of utility service, description and general location of each facility.

For each owner who receives a notice and does not respond to the department within 60 days as to whether or not the owner has utility facilities at the highway location described in the notice, the department provides a second notice by certified mail, return receipt requested.

Within 10 days following the receipt of the second notice from the department, any owner notified informs the department, in care of the person sending the second notice at the address listed in the notice, whether or not it is the owner of the utility facilities and if so, the type of utility service, description and general location of each facility.

The failure of an owner to comply with this section creates a presumption that it is not an owner, and the department and its contractor may then undertake construction without liability to the owner for damages to the owner's utility facilities, and in addition, the owner is liable to the department's contractor for damages resulting from the failure.

### **RELOCATION OF UTILITIES BY THE DEPARTMENT**

The department's contractor is liable for any damages negligently inflicted to the city's utilities. If the city fails to comply with required provisions, the contractor, with consent of the department,

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may undertake construction without liability to the city for damages to the city's utilities, and the city is liable to the contractor for damages resulting from the failure.

### **DRAWINGS, PLANS FOR RELOCATION AND SCHEDULE FOR RELOCATION**

Once the owner of the utility is notified and the owner has responded as requested, the department provides the city with two sets of complete project plans by certified mail or hand delivery. The city has 120 calendar days following the receipt of the plans to mark on the plans the approximate location of utilities, any proposed new utilities within the right-of-way, and prepare a plan and a schedule of calendar days to accomplish the proposed new location for utilities. The marked plans and schedule for relocation must be returned to the department in care of the person whose name and address are listed on the project plans.

The commissioner may approve the plans and schedule for relocation, or he/she may direct the city to relocate utilities in accordance with an approved plan and schedule. The utility bears the cost of all utility inspections. The department will communicate approval or direction to the city via certified mail.

### **RELOCATION UNDER RESERVATION OF RIGHTS**

In the event the department and the city fail to agree on a reasonable plan and schedule, the city may proceed with the schedule under a reservation

of rights notice to the department. The notice should be filed within 10 days of the issuance of a notice to proceed by the department. The notice should contain the city's objections to the relocation schedule and should state the reasons for the objections.

### **COMPENSATION FOR ADDITIONAL RELOCATION OR ADJUSTMENTS**

After the city has completed the relocation and the department requires any additional relocation or adjustment, the department reimburses the city for the cost incurred. The department gives its contractor and the city notice of any change in highway construction that would require additional relocation or adjustment, and the city designates an agreed reasonable time to accomplish the work. In addition, the department reimburses the city for costs of all materials that have been purchased and cannot be used as a result of the change.

### **CONSTRUCTION PROGRESS REPORTS**

During the construction phase of the project, the city furnishes the department with monthly progress reports regarding the status of the relocation of the utility, until its relocation is completed. If the city regularly reports progress during the course of pre-construction meetings held by the contractor and the department, the progress report requirement is met. The contents of the reports reflect in the minutes of the meeting, and the minutes constitute the monthly progress report, whether or not the meetings are held on a monthly basis. The department's resident engineer acts as liaison between the owner and the department's contractor.

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**CIVIL PENALTIES FOR NON-COMPLIANCE**

If the city fails to complete the relocation of utilities within the approved schedule of calendar days, the commissioner has the authority to assess and collect from the city a civil penalty of \$500 for each calendar day after the scheduled completion date that the city fails to complete the required relocation. If the city has less than 3,000 customers, the city is subject to a civil penalty of \$250 per calendar day when the city fails to complete the relocation of utilities within the approved schedule of calendar days.

**APPEAL PROVISIONS**

The department gives the city written notice of the intent to assess a civil penalty and the opportunity to appear before the commissioner or his/her designee to show cause why the penalty should not be assessed. Upon findings that a civil penalty should be assessed, the commissioner or his/her designee issues an appropriate order to the city. If the penalty is not paid within 90 days after entry of the order, the matter is turned over to the attorney general and

reporter for collection, and the city is liable for all expenses associated with the enforcement action, including court costs and attorney fees.

**RECOMMENDATIONS**

MTAS recommends that cities pay particular attention to proposed construction notices issued by the Tennessee Department of Transportation that may involve utility relocations. Such notices should be reviewed with the city's utility engineer and the city's attorney should review the provisions of T.C.A. §§ 54-5-853–854 to ensure that the city fully complies with the notices of the department of transportation. Public works and utility directors and supervisors should become familiar with the regulations governing the relocation of utilities on a state right-of-way. The city should request that the commissioner include the relocation of utilities as a project cost to the state when federal highway dollars are being used to fund highway improvements.

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