



The Rules of Us: Kentucky and Federal Law involving Utilities

2019 Partnering Conference

SESSION OBJECTIVES



- ▶ Learn why utilities occupy transportation right of way
- ▶ Learn State guidance on relocating utilities impacted by transportation projects
- ▶ Learn Federal guidance on relocating utilities impacted by transportation projects

WHY ARE UTILITIES IN ROW?



It is in the public interest for utility facilities to jointly use the right of way of public roads.

Joint use avoids the additional cost of acquiring separate right of way for the exclusive accommodation of utilities.

416.140 Companies transmitting or selling electricity, gas, or gasoline may acquire rights for lines and appliances along roads and streams.

- (1) Subject to the provisions of subsections (2) and (3) of this section, any person authorized under the laws of this state to conduct the business of producing or supplying water, electricity, gas or gasoline for purposes of light, heat, domestic use or power, or who is engaged in the business of the transmission or sale of water, electricity, gas or gasoline for such purposes, the aforesaid businesses being for a public purpose, may construct and maintain transmission or distribution lines, including placing and maintenance of pipes, poles, wires, crossarms and all other equipment incident thereto, for use in the transmission and sale of such water, electricity, gas or gasoline under, on, along or over any right-of-way used as a state highway, county road, public way or dedicated road outside the limits of a city, and over, under or across any of the waters of this state outside the limits of a city, and may construct and maintain along any right-of-way used for purposes of such state highway or county road all erections and appliances that are necessary to transform, convert and apply such water, electricity, gas or gasoline to the public purposes of lighting, heat, domestic use or power and to distribute and deliver it to the consumers.
- (2) The fixtures of the company shall not interfere with, obstruct or endanger the travel on and along the highway or road, nor obstruct the navigation of the waters, and the location of all transmission lines and other appliances shall be subject to the reasonable direction and regulation of the authorities having control of the highways, roads and waters through and over which the lines are constructed or proposed to be constructed.
- (3) Before any persons named in subsection (1) of this section shall proceed to place his wires, poles or other appliances on or over any part of the right-of-way of a state highway, he shall first obtain from the Department of Highways a permit so to do. Any poles, wires or other obstructions, heretofore or hereafter placed along, under, on or over any state highway that are found by the Department of Highways to be unreasonably interfering in any way with the convenient, safe and continuous use and maintenance of such highway shall, upon thirty (30) days' notice to the person or his chief agent, by the Department of Highways, be removed or relocated by such person at his own expense, except as otherwise provided in KRS 177.035. Whenever an order of the Department of Highways requires such removal or change in the location of any telephone, telegraph, electric light or other poles, signboards, fences, gasoline tanks and pumps, gas, water, sewerage, oil or other pipelines, or other similar construction or obstructions from the right-of-way of a state highway, and the owner thereof fails to remove or change the same at his own expense, except as otherwise provided in KRS 177.035, to conform to the order within the time stated in the notice, the Department of Highways shall proceed to cause the obstruction to be removed; the expense thereby incurred shall be paid out of any money available therefor, and shall be charged against the owner and levied and collected and paid into the State Treasury as provided by law.

History: Amended 1974 Ky. Acts ch. 74, Art. IV, sec. 20(1). -- Amended 1972 Ky. Acts ch. 195, sec. 17. -- Amended 1966 Ky. Acts ch. 213, sec. 1. -- Recodified 1942



It's in the law...
KRS 416.140

LET'S BREAK IT DOWN...



What utilities have rights to access...

- Water, electricity, gas or gasoline
- For a public purpose

Where can they go...

On, along or over any right-of-way

Provided they...

- Not interfere with, obstruct or endanger travel
- Follow direction and regulation
- Obtain a permit

If they are in the way...

- If interfering
- Thirty (30) days' notice
- Remove or relocate at his own expense, except as in KRS 177.035
- If fails to remove or change
- KYTC can remove and charge the owner

KRS 416.140

LESSER KNOWN STATE LAWS

- ▶ **KRS 177.106** requires a person or business to obtain a permit from the Department of Highways for encroachments under, on, or over any part of the right of way of a state highway.
- ▶ **KRS 177.110–177.210** provides the Cabinet the right to eliminate any grade crossing or change any existing overhead or underpass structure where any public road crosses railroad tracks.
- ▶ **KRS 277.065** provides how the costs of eliminating hazards of railroad highway crossings shall be allocated between the railroad and the governmental unit involved.
- ▶ **KRS 277.190** requires bells and whistles on locomotive engines and regulates their use.
- ▶ **KRS 367.4901–4917** requires underground utilities to be notified and located in advance of excavations, and defines the terms by which underground utilities are located for design, construction, and emergency projects.



Kentucky Statutes

STATE LAWS



The Kentucky Revised Statutes (KRS) cited are the primary state laws governing the Transportation Cabinet's (Cabinet) utility relocations and coordination:

- ▶ KRS 177.035
- ▶ KRS 179.265
- ▶ KRS 416.140 (ALREADY DISCUSSED)

Kentucky Statutes

177.035 Cost of relocation of publicly and privately owned utility equipment and appliances to be borne by department – Conditions.

- (1) If the department determines that it is necessary for any fireplugs, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances, belonging to any municipality or a municipally owned utility, or any water district established pursuant to KRS Chapter 74, any water association established pursuant to KRS Chapter 273, any local school district, or any sanitation district established pursuant to KRS Chapter 220, to be removed or relocated on, along, over, or under a highway, in order to construct, reconstruct, relocate, or improve any highway, the municipality, municipally owned utility, water district, local school district, or the sanitation district shall relocate or remove them in accordance with the order of the department. The costs and expenses of relocation or removal required by this section, including the costs of installing facilities in a new location, and the cost of any lands, or any rights or interest in lands, and any other rights, acquired to accomplish the relocation or removal, shall be ascertained and paid by the department as a part of the cost of improving or constructing highways.
- (2) The term "utility" as used in subsections (3) to (5) of this section shall mean any utility not referenced in subsection (1) of this section, and the term shall mean any utility as defined in KRS 278.010.
- (3) If a utility has facilities located within the public right-of-way pursuant to KRS 416.140, the department may reimburse the utility the cost to relocate the utility's facilities to a location either within or without the public right-of-way if the relocation is required due to a highway construction project, subject to the following conditions:
 - (a) The utility shall be required to submit to the department for the department's approval a plan for relocating the utility's facilities. The plan shall include:
 1. A proposal for the relocation, including plans and a cost estimate developed in accordance with department guidelines; and
 2. A reasonable schedule of calendar days for completing the relocation that has been agreed to by the department. If, due to circumstances beyond the utility's control, the utility or the department cannot meet the specified completion date included in the plan, the department may grant an extension to the utility for a time period agreed upon by both parties; and
 - (b) The utility shall be required to have either:
 1. Entered into a written agreement with the department to include the relocation of the facilities as part of the department's construction contract. The utility may, with the approval of the department, perform a portion of the relocation work under this subparagraph with contractors or employees of the utility; or
 2. Entered into a written agreement with the department for the utility to remove all of its facilities that conflict with the highway construction project, as determined by the department, prior to letting the construction contract. The utility may perform a portion or



KRS 177.035

LET'S BREAK IT DOWN...

Applicable to:

- municipality
- municipally owned utility
- water district
- water association
- local school district
- sanitation district

KYTC work:

- Construct
- Reconstruct
- Relocate
- Improve any highway

Utility is to:

- Relocate or
- Remove



KRS 177.035

LET'S BREAK IT DOWN...



KYTC is responsible for:

- Staying on schedule with KYTC Project (*Utility supplied schedule doesn't apply if KYTC project is delayed*)
- Costs and expenses of relocation or removal
- Including:
 - Installing facilities
 - Land

Utility requirements:

- Relocation plan
- Cost estimate
- Provide Schedule of calendar days
- Enter into a written agreement
- Maintain schedule
- Seek reimbursement within twelve (12) months from completion

KRS 177.035

179.265 Cost of relocating utility facilities paid by public.

The cost of relocating any utility facilities originally constructed on other than public right of way required to be moved in the reconstruction or improvement of a public road shall be borne by the Department of Highways in the case of a road on the state system of highways, or by the public agency having jurisdiction over that public road and sponsoring the reconstruction or improvement.

History: Created 1986 Ky. Acts ch. 108, sec. 4.



LET'S BREAK IT DOWN...

KYTC is responsible for:

- Costs and expenses of relocation or removal
- * Public agency with jurisdiction over road*

Utility requirements:

- Impacted facility is NOT on public right of way
- *See KRS 177.035*
- *Relocation plan*
- *Cost estimate*
- *Provide Schedule of calendar days*
- *Enter into a written agreement*
- *Maintain schedule*
- *Seek reimbursement within twelve (12) months from completion*

KRS 179.265

CALCULATING COST SHARE

Companies compensable in accordance with KRS 179.265 are compensated only for those utility facilities originally constructed on *other than* public right of way that are to be relocated.

If part of the impacted facilities are outside public right of way and part are inside public right of way, a participation percentage is calculated for the agreement to cover the reimbursable costs.

Acceptable methods of calculating participation percentage

1. Overhead only (Pole Count)
2. Combination of Overhead & Underground (Pair Feet)
3. Combination of Overhead and Underground (Cost)
4. Underground Weighted Percentage



CALCULATING COST SHARE

Method 1: Overhead only (Pole Count)

The number of poles affected by construction that were originally constructed on Private R/W divided by the total number of poles affected by construction yield the percentage of participation for the agreement.

$$\% \text{ of Participation} = \frac{\text{Poles on Private R/W}}{\text{Total Poles Affected}}$$

Example:

The utility company has to remove or rearrange attachments to a total of 10 poles, and 6 of those poles were originally constructed on other than public right of way. The percentage of participation will be calculated as follows:

$$\% \text{ of Participation} = 6/10 = 60\%$$



CALCULATING COST SHARE



Method 2: Combination of Overhead and Underground (Pair Feet)

In a situation where there is existing affected cable both overhead and underground, it may all be broken down into pair feet, fiber feet, or linear feet (if all cable is of like size) and a percentage may be calculated based on this.

% of Participation =
Pair Feet Private
Total Pair Feet Affected

Example:

If there are a total of 1,000,000 pair feet of existing cable affected and 250,000 pair feet of cable are on private right of way, the percentage of participation is calculated as follows:

% of Participation =
 $250,000 / 1,000,000$
= 25%

CALCULATING COST SHARE



Method 3: Combination of Overhead and Underground (Cost)

In a situation having a contiguous run where a company's facilities are on poles and another contiguous area where the facilities are underground:

1. Calculate each area based on pole count and underground cable (reduced to pair feet, fiber feet, or linear feet [if all cable is of like size])
2. Calculate a cost for each type of existing plant to be relocated
3. Apply the respective percentage of participation to each type of existing plant
4. Calculate a cost for private and a total cost for each
5. Add the costs to relocate the facilities existing on private of both types
6. Calculate a total cost of relocation of existing facilities and a percentage based on:

% of Participation =
Cost to Relocate Private / Total Cost to Relocate

Example:

If the allowable costs of relocation are \$200,000 (\$120,000 for overhead facilities and \$80,000 for underground facilities) and there are 200 feet of underground facilities on public and 800 feet on private facilities and 6 poles on public and 4 poles on private right of way, the percentage of participation is calculated as follows:

% Participation =
 $((800/1000) \$80,000 + (4/10) \$120,000) / \$200,000$
 $= (\$64,000 + \$48,000) / \$200,000 = 56\%$

CALCULATING COST SHARE



Method 4: Underground Weighted Percentage

Three methods are approved to calculate underground facilities:

- 1 – A separate estimate may be prepared for each different size of line, each prorated by private vs. public.
- 2 – An estimate may be prepared to reflect size of line and length of line (such as in–ft) and prorated by public vs. private.
- 3 – A straight percentage is used based on public vs. private (if all lines are the same size).

Example:

If there are 1000 feet of 4–inch line (500 feet on private and 500 feet on public), 1000 feet of 6–inch line (600 feet on private and 400 feet on public), and 1000 feet of 8–inch line (800 feet on private and 200 feet on public right of way); the participation percentage is calculated as follows:

% Participation =

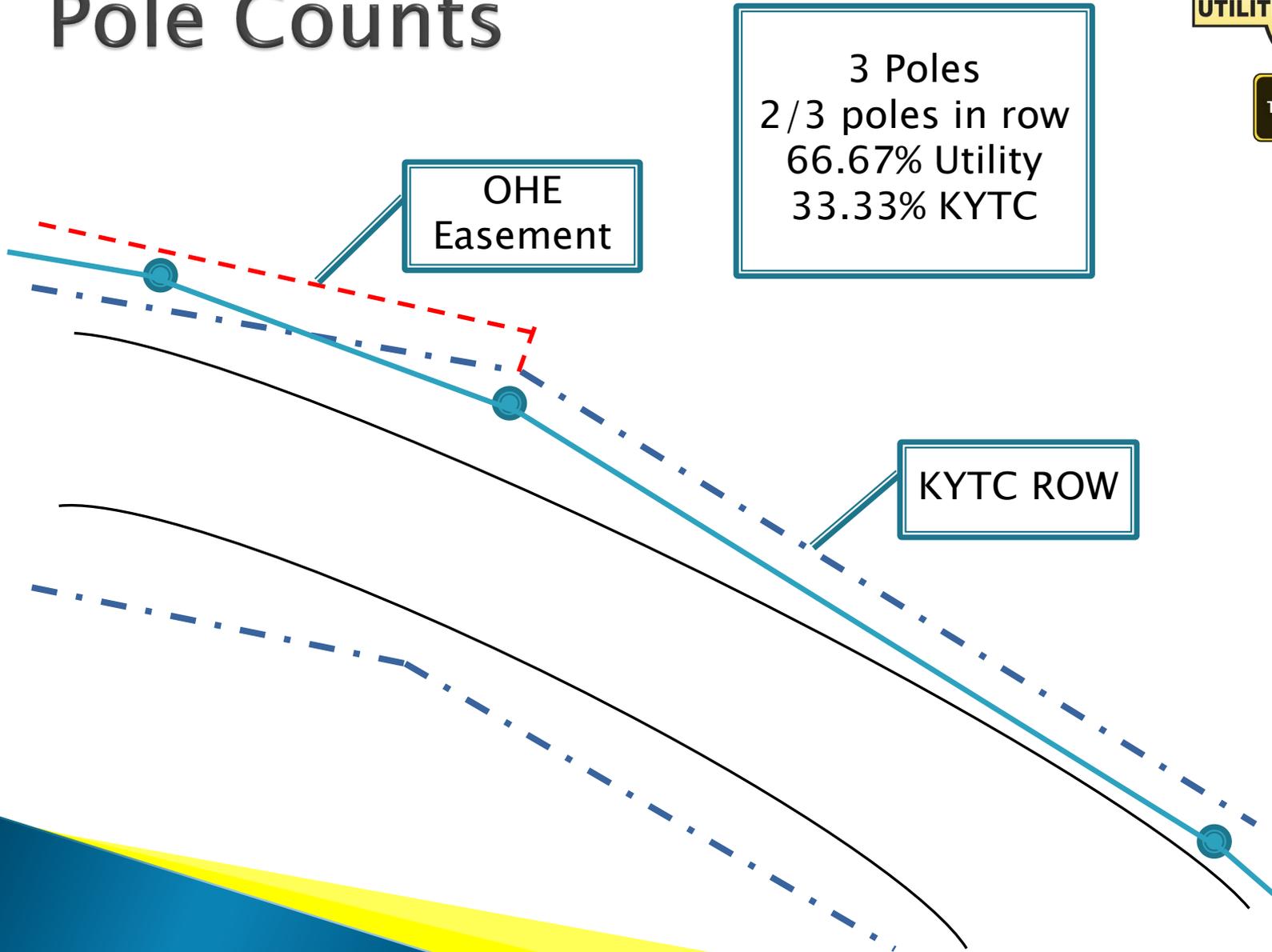
$$((500 \text{ ft})(4 \text{ in}) + (600 \text{ ft})(6 \text{ in}) + (800 \text{ ft})(8 \text{ in})) / ((1000 \text{ ft})(4 \text{ in}) + (1000 \text{ ft})(6 \text{ in}) + (1000 \text{ ft})(8 \text{ in}))$$

$$= 12,000 \text{ in–ft} / 18,000 \text{ in–ft} = 66.67\%$$

CALCULATING COST SHARE: Pole Counts



Utilities & Rail Manual



FEDERAL CONSIDERATIONS



Federal-Aid Highway Program in 1916,

- ▶ Utility relocation became eligible for federal-aid funds to the extent the state was obligated to pay for such work.
- ▶ During the early years, the use of federal-aid funds for utility relocations was quite limited

Interstate Program in the 1950s,

- ▶ Utility relocation reimbursement became a much more common practice

History

FEDERAL LAW



Title 23 of the United States Code (23 U.S.C.)
Code of Federal Regulations (23 CFR)

**Codify the use of federal highway funding and federal highway right of way.*

Two sections of 23 U.S.C. deal with utilities:

- ▶ 23 U.S.C. 109(l) addresses the accommodation of utilities on the right of way of federal-aid highways.
- ▶ 23 U.S.C. 123 addresses reimbursement for the relocation of utility facilities necessitated by the construction of a project on any federal aid highway.

United States Code

FEDERAL REGULATION



- ▶ 23 CFR 645, Subpart A - Addresses issues related to utility relocations, adjustments, and compensation.
- ▶ 23 CFR 645, Subpart B - Addresses the general accommodation of utilities.

Code of Federal
Regulation

[Title 23](#) → [Chapter I](#) → [Subchapter G](#) → [Part 645](#) → [Subpart A](#)

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Title 23: Highways
[PART 645—UTILITIES](#)

Subpart A—Utility Relocations, Adjustments, and Reimbursement

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23 CFR 645 Sub A

LET'S BREAK IT DOWN...

§645.103 Applicability.

Applies to reimbursement for costs incurred under DOT and utility agreement

Applies to utilities accommodated as set forth in 23 CFR part 645, subpart B

Applies to reimbursable utilities under State law (or State regulation)

§645.105 Definitions.

Authorization—for Federal-aid projects authorization to the STD by the FHWA, or for direct Federal projects authorization to the utility by the FHWA, to proceed with any phase of a project. The date of authorization establishes the date of eligibility for Federal funds to participate in the costs incurred on that phase of work.

Betterment—any upgrading of the facility being relocated that is not attributable to the highway construction and is made solely for the benefit of and at the election of the utility.

Cost of relocation—the entire amount paid by or on behalf of the utility properly attributable to the relocation after deducting from that amount any increase in value of the new facility, and any salvage derived from the old facility.



23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.105 Definitions.

Relocation—the adjustment of utility facilities required by the highway project. It includes removing and reinstalling the facility, including necessary temporary facilities, acquiring necessary right-of-way on the new location, moving, rearranging or changing the type of existing facilities and taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of highway construction.

Utility—a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public. The term utility shall also mean the utility company inclusive of any wholly owned or controlled subsidiary.

23 CFR 645 Sub A

LET'S BREAK IT DOWN...

§§645.107 Eligibility.

Federal funds are eligible for use provided...

- Utility has **property right or statutory right**:
 - (1) Utility has the right of occupancy: fee, easement, or property interest
 - (2) Existing facility is reimbursable according to state law
- A **new utility facility proposed** in right-of-way of a planned highway project for an additional cost incurred by the utility to accommodate the impending highway project
- **Preliminary engineering**, the acquisition of **replacement right-of-way** for utilities, and the physical **construction work** associated with utility relocations.
- Provided the costs are **incurred after the Project Authorization**
- **Safety features** to reduce the roadside hazards

Federal funds may NOT be used if...

- Utility relocations done **solely for the benefit or convenience** of a utility, its contractor, or a highway contractor.



23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.109 Preliminary engineering.

Preliminary engineering may be done by:

- (1) DOT
 - (2) Utility
 - (3) DOT provided engineering consultant or,
 - (4) Utility provided engineering consultant
- Engineering costs should not be based on a percentage of the cost of relocation
 - The utility and its consultant must have agreement in writing for services
 - A utility may use an existing written continuing contract

23 CFR 645 Sub A

LET'S BREAK IT DOWN...

§645.111 Right-of-way

Federal fund can be used for replacement row if...

- (1) The utility has a right of occupancy: fee, an easement, or real property interest
- (2) There is no charge to the project for that portion of the utility's existing right of way
- (3) The utility shall determine and make a written valuation of the replacement right-of-way that it acquires in order to justify amounts paid for such right of way
- (4) Acquisition of replacement right-of-way by the DOT for a utility shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act
- (5) When the utility has a right-of-occupancy but does not need to be relocated, it is treated as a right-of-way transaction



23 CFR 645 Sub A

LET'S BREAK IT DOWN...

§645.113 Agreements and authorizations.

Utility companies and the DOT must enter into agreements that define:

- Responsibilities for financing
- Responsibility for accomplishing the relocation work
- Incorporate regulation by reference
- Designate method to perform the work (by contract or force account)
- Method to estimate costs: actual direct and indirect costs preferred
- Relocation plans
- Specifications when required
- Itemized cost estimates of the work (including credits)
- Cost share to be borne by each party.

** Lump sums allowed if work is clearly defined and cost is accurately estimated*

Change orders are only acceptable for:

- Changes in the scope of work
- Extra work or
- Major changes in the planned work

** Must have a modification of the agreement, a written change, or extra work order approved by the DOT and the FHWA.*



23 CFR 645 Sub A

LET'S BREAK IT DOWN...

§645.113 Agreements and authorizations.

Utility relocations can only proceed after:

- The work is included in the Statewide transportation improvement program
- All environmental reviews and permitting are in place
- All utility documents are received and accepted: plans, estimates, utility agreements, and schedule

** An exception to environmental requirements in §645.113(g)(2) is if the work is to accommodate a new facility as defined in §645.107(i)*

If the DOT cannot get an agreement with the utility...

- Report circumstances to the FHWA
- Conditional authorizations for the relocation work to proceed may be given using state funds



23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.115 Construction

Utility relocation construction work may be done by:

- (1) Low bid contract awarded by the DOT or utility
 - (2) Inclusion as part of the DOT road contract
 - (3) Existing continuing contract
 - (4) Contract for low-cost incidental work
 - (5) Utility company forces and equipment
- Costs for labor, materials, equipment, and other services furnished by the utility shall be billed by the utility directly to the DOT.
 - The special provisions of contracts let by the utility or the DOT shall be explicit
 - The costs of force account work shall be reported separately from the costs of other force account and contract items on the highway project.

23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.117 Cost development and reimbursement

Conditions defining reimbursement eligibility...

- The lower expense of rehabilitating or replacing existing utility facilities
- The utility is not required to change its standards for materials used in permanent changes to its facilities.
- Total cost of removal is reimbursable when the facility cannot be abandoned in place

23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.117 Cost development and reimbursement

Eligible costs:

- Salaries
- Wages
- Expenses
- Contracts
- Labor surcharges
- Overhead and indirect construction costs
- Material and supply costs
- Inspection and testing
- Deduction of all offered discounts, rebates, and allowances
- Recovered materials recovered shall be credited
- Handling and loading materials and supplies
- Equipment costs
- Transportation and Subsidence costs

23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.117 Cost development and reimbursement

Eligible costs:

- *Salaries and wages*, at actual or average rates, and related expenses paid by the utility to individuals for the time worked on the project
- *Salaries and expenses* paid to individuals who are normally part of the overhead organization of the utility may be reimbursed for the time worked directly on the project
- *Contracts* paid to engineers, architects and others for services directly related to projects
- *Labor surcharges* including worker compensation insurance, public liability, property damage insurance, and such fringe benefits as the utility has established for the benefit of its employees
- *Overhead and indirect construction costs* not charged directly to work order or construction accounts may be allocated to the relocation provided the allocation is made on an equitable basis.
- *Material and supply costs* should be furnished from company stock except that they may be obtained from other sources near the project site when available at a lower cost. When not available from company stock, they may be purchased either under competitive bids or existing continuing contracts

23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.117 Cost development and reimbursement.

Eligible costs:

- *Materials and supplies* furnished from company stock shall be billed at the current stock prices and not furnished from company stock shall be billed at actual costs
- *Inspection and testing*
- *Deduction* of all offered discounts, rebates, and allowances should be included
- *Recovered materials* recovered shall be credited to the project at prices charged to the job, less a consideration for loss in service life at 10 percent.
- Total cost of removal is reimbursable when the facility cannot be abandoned in place
- *Handling and loading* materials and supplies
- *Equipment costs* The average or actual costs of operation, minor maintenance, and depreciation of utility-owned equipment may be reimbursed.
- *Transportation costs* The utility's cost of necessary employee transportation and subsistence directly attributable to the project is reimbursable.

23 CFR 645 Sub A

LET'S BREAK IT DOWN...



§645.117 Cost development and reimbursement.

Costs not eligible for Federal reimbursement...

- Advertising
- Sales promotion
- Interest on borrowings
- Issuance of stock
- Bad debts
- Uncollectible accounts
- Contributions
- Donations
- Entertainment
- Fines
- Penalties
- Lobbying
- Research programs

23 CFR 645 Sub A

LET'S BREAK IT DOWN...

When Credits are required...

- Required for the cost of any betterments
- Salvage value of the materials removed
- Depreciation of a utility facility being replaced:
 - Building
 - Pumping station
 - Filtration plant
 - Power plant
 - Substation
 - Other operational unit
- Depreciation is the ratio between the actual length of service and total life expectancy applied to the original cost.

** Depreciation is not required for a segment of the utility's service, distribution, or transmission lines.*



23 CFR 645 Sub A

LET'S BREAK IT DOWN...



When Betterment Credit is not required...

- Required by the highway project
- Replacement are equivalent standard
- Replacement is no longer manufactured
- Required by law
- Required by current design practices

** Credits shall not exceed the total costs of adjustment*

23 CFR 645 Sub A

LET'S BREAK IT DOWN...

Reimbursing for Utility Relocation Work...

- Progress billings for costs incurred
- Stockpiled materials are reimbursable
- Final billing
 - One year post completion of the utility work
 - All costs incurred or agreed-to lump-sum
- Post one year, previous payments to the utility are final
 - May be paid if the DOT agrees
- All records are subject to audit for a period of 3 years from final payment



23 CFR 645 Sub A

RECOMMENDED GUIDANCES

- ▶ Kentucky Statute
- ▶ Federal Regulation
- ▶ United States Code
- ▶ FHWA Program Guide: Utility Relocation and Accommodation on Federal-Aid Highway Projects
- ▶ Transportation Cabinet Permits Guidance Manual

