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A Guide on Utility Accommodation in ROW & Utility Easements

*Dean M. Loy, Division Director
Division of Right of Way and Utilities*

*Jennifer McCleve, Branch Manager
Utilities and Rail Branch*



Drafted for:



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1 Introduction

1.1 Purpose

Rights-of-way and easements are both examples of property rights, and can allow others the use a property. This guide defines how utility relocations are accommodated into right of way and easements in compliance with statute and regulation.

1.2 Overview

What is an Easement?

An easement is the right to use the real property of another for a specific purpose; such as, drainage, utility facilities, construction, or maintenance. An easement is a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. They are typically granted by will, by deed or by a contract.

An easement is created by the legal document which is expressed either by grant or deed. Easement are created by one of three ways: Easement by Express, Easement by Implication, or Easement by Prescription.

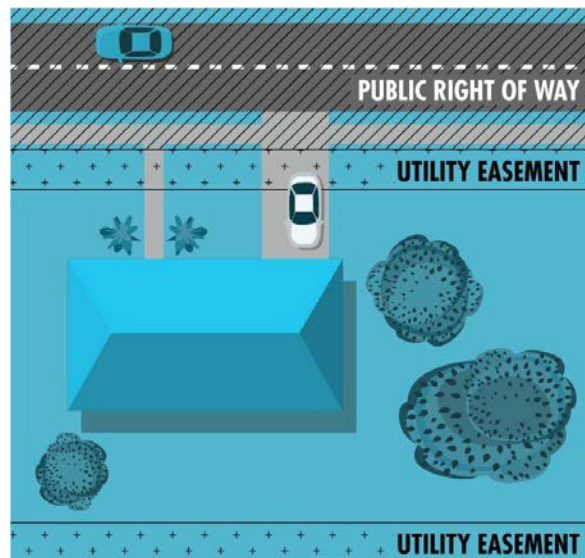
- Express – Agreed by landowners granting or reserving an easement (Generally by Deed)
- Implication – Are created only when two parcels of land were at one time treated as a single tract or owned by a common owner. Best example Appurtenant Easement
- Prescription – The use of an easement in a certain way for a certain number of years. Kentucky the time period is 15 years and falls under Adverse possession and must be proven.

Easements fall into two categories, affirmative and negative. An affirmative easement is the most common and allows its holder to do something on another individual's land, such as cross over it. Negative easements prevent something from occurring on a person's land. For example, a negative easement on your land could prevent you from building a structure.

What is Right of Way?

A right-of-way (ROW) allows others to travel through a property. It provides access to anyone who may need to travel through the property. It is broader than an easement because it does not apply to one specific person or entity. The most common form of right of way easement is a road.

KYTC Right of way in its truest sense is the land that a highway occupies. It consists of the land owned by the operating agency or land that the operating agency has a right to use for roadway purposes. The rights required to support a roadway must include sufficient interest to provide for both the construction and continued maintenance of the facility.



What state statutes address utility placement in easement or right of way?

No Kentucky Revised Statute (KRS) directly addresses utility accommodation in state ROW. However, KRS 177.035 and KRS 179.265 addresses the viability of reimbursement of relocations based upon occupancy and utility company.

Utility Easements				
			Reimbursable?	
Utility Type	Ex Facilities on:	Relocating To:	Now?	Future?
Private	ROW	ROW	NO	NO
	ROW	Easement	NO	YES
	Other than ROW	ROW	YES	NO
Public	Other than ROW	Easement	YES	YES
	ROW	ROW	YES	YES
	ROW	Easement	YES	YES
	Other than ROW	ROW	YES	YES
	Other than ROW	Easement	YES	YES

What Federal regulations address utility placement in easement or right of way?

Code of Federal Regulation addresses these matters to some degree as cited in 23 CFR 645.111 Subpart A.

1.3 Research

The securing of necessary right of way and easement is a critical aspect of effective project development. In fact, these acquisitions often can be the critical path to project delivery. Therefore, a thorough understanding of the means, mechanisms and standards is valuable. The following steps were taken to documents these matters:

- State statute review
- Federal regulation review
- Kentucky Transportation Cabinet (KYTC) policy manual review
- Consultation of KYTC legal and permits staff
- Consultation of FHWA Kentucky Division Office
- Survey of nine (9) other state Departments of Transportation
- Consultation of other state subject matter experts via regional summits held in 2018

2 Right Of Way (ROW)

2.1 ROW Purpose

KYTC Right of way (ROW) in its truest sense is the land that a highway occupies. It consists of the land owned by the operating agency or land that the operating agency has a right to use for roadway purposes. Acquired ROW allows others to travel through a property. It provides access to anyone who may need to travel through the property.

For the purpose of this document, we are referring to the KYTC acquisition of ROW for an upcoming road project. The project is expected to impact one to many utility companies that may occupy the existing ROW and/or are placed on 'other than public ROW. 'Other than public ROW' is reasonably defined as placement on a private easement and/or fee simple property ownership.

2.2 State & Federal Guidance

There are several sources of data on the subject of utility incorporation into public ROW. This guide considered both state statute, federal regulation and guidance language provided by the American Association of State Highway Transportation Officials (AASHTO). Excerpts from the findings are included herein.

AASHTO guideline

- ▶ ***When a State intends to permit utilities to use and occupy public highway right-of-way, such potential use should be a consideration in determining the extent and adequacy of the right-of-way needed for the project.*** Failure to recognize the impact of such use, as well as other uses on private property located adjacent to the public highway right-of-way, may affect the safe and efficient operations of the highway and may result in the acquisition of right-of-way which is inadequate to meet the needs of the highway and the traveling public. For example, little would be gained by acquiring restricted right-of-way and denying its use to certain utilities if these utilities could locate their facilities on

private property adjacent to the restricted right-of-way with substantially the same impact on the highway and its users.

- ▶ Therefore, the issue of adequate accommodation of utilities is a legitimate consideration in the development of highway projects. This is particularly true of land service facilities where the highway user and utility consumer tend to be one and the same.
- ▶ The concept of considering potential utility uses in the determination of right-of-way needs has been incorporated in § 645.209(a). A corresponding issue then becomes the use of Federal-aid highway funds for the acquisition costs of the needed right-of-way.
- ▶ Utility use of highway right-of-way is not considered to be a use for a highway purpose. Therefore, Federal-aid highway funds are theoretically not eligible to participate in right-of-way acquired solely for the purpose of accommodating utility facilities in excess of that normally acquired in accordance with standard criteria and procedures. Even so, ***when a State or locality routinely dedicates or permits a portion of the road and street right-of-way for use by utilities in accordance with established standard criteria pursuant to State law, ordinance, or administrative practice, such right-of-way may be considered eligible for Federal-aid reimbursement as an integral part of the project right-of-way.***

23 CFR 645.111 Subpart A

(a) Federal participation may be approved for the cost of replacement right of way provided:

(1) The utility has the right of occupancy in its existing location...fee, an easement, or other real property interest.

(2) There will be no charge to the project for that portion of the utility's existing right of way being transferred to the TD for highway purposes

(b) 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

(c) Acquisition of replacement right of way by the TD on behalf of a utility or acquisition of non-operating real property from a utility shall be in accordance with Uniform Relocation Assistance and real Property Acquisition Policies Act

(d) When the utility has the right of occupancy in its existing location because it holds the fee, an easement, or another real property interest and it is not necessary by reason of the highway construction to adjust or replace the facilities located thereon, the taking of and damage to the utility's real property, including the disposal or removal of such facilities may be considered a right of way transaction

23 CFR 1.23

- ▶ Defines FHWA's authority for allowing utility use and occupancy of the right-of-way of Federal-aid and direct Federal highway projects.
- ▶ The State must acquire right-of-way that is adequate not only for the construction of the highway facility but also for its operation and maintenance.
- ▶ Certain non-highway uses of the right-of-way are permitted which are found to be in the public interest provided such uses do not impair the highway or interfere with the free and safe flow of traffic thereon. Such a public interest finding has been made for utilities.
- ▶ ***There must be adequate space available to locate the utility facilities in a manner that does not interfere with the safe and efficient operations of the highway.***

David Whitworth, Federal Highway Administration - Kentucky Division

- ▶ FHWA would participate in the purchase of ROW for the purpose of accommodating the utilities in accordance with 23 CFR Section 645.111(a)(1) when-
 - ▶ the acquisition is made in the interest of the project economy, or
 - ▶ it is necessary to meet the requirements of the highway project.
- ▶ ***Since the KYTC routinely permits a portion of the road (whenever possible) for use by utilities in accordance with established criteria pursuant to law, such right of way may be considered eligible for Federal-aid reimbursement as an integral part of the project right-of-way.***
- ▶ Be sure the project team making the decision to acquire this right of way appropriately documents the reasons why it is necessary and why it is in the interest of the project economy.

- ▶ Making the utility find its own way around the project would delay their movement...have an effect on the project economy as materials, labor, and ROW costs will go up in that time.
- ▶ It may not be feasible in all cases and so as stated before, it must be looked at and documented carefully.
- ▶ A Public Interest Finding is NOT necessary since no regulations are being broken in allowing this participation.

2.3 Kentucky Perspective

Based upon the guidance available, including Kentucky statutes, AASHTO guidance and Federal regulation, the proposed ROW footprint should consider all existing features of the site, including the existing utilities and their final placement. Therefore, it is critical that the project team identify the impacted utilities and approximate relocation needs prior to development of the proposed ROW limits.

The ROW boundaries can and should consider existing permitted utilities when:

- ***It is in the interest of the project economy, or***
- ***If it is necessary to meet the requirements of the highway project.***

The project team must document the decision (Why it is in the interest of the project economy).

3 Easements in ROW

3.1 Easement Purpose

An easement is the right to use the real property of another for a specific purpose; such as, drainage, utility facilities, construction, or maintenance. An easement is a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. They are typically granted by will, by deed or by a contract.

An easement is created by the legal document which is expressed either by grant or deed.

For the purpose of this document section, we are referring to KYTC agreeing to establish an easement within the bounds of public ROW for an upcoming road project. The project is expected to impact one to many utility companies that may occupy the existing ROW and/or are placed on 'other than public ROW. 'Other than public ROW' is reasonably defined as placement on a private easement and/or fee simple property ownership.

3.2 Kentucky Case Study

Texas Gas requested exclusive easement rights in public right of way
Requested placement in road right of way with a 30 foot wide
exclusivity.

Exclusivity would violate the provisions of KRS 416.140 which provides that "any" listed utility may install facilities on right of way. Exclusivity would contravene this statute...

OLS memorandum response

MEMORANDUM

TO: Jennifer McCleve
FROM: Will Fogle, Attorney Office of Legal Services
DATE: November 1, 2017
SUBJECT: Utility Easement Rights

You have asked for a legal opinion on a request of a utility company to be granted exclusive utility easement rights on public right of way. As an initial matter, this concept is not advisable from a practical matter since it would limit and restrict the future use of the affected property. Moreover, in my opinion, such a grant would be inconsistent with provisions of KRS 416.140, which provides that “...any person authorized under the laws of this state to conduct the business of supplying water, electricity, [etc]...may construct and maintain transmission or distribution lines...” KRS 416.140(1). Thus, the grant of an exclusive utility easement to one utility at the exclusion of all others would be in contraindication of this statute. Thus, I would strongly advise that this request be denied.

3.3 Kentucky Perspective

Based upon the guidance available, including Kentucky statutes, and Office of Legal Service advice, the grant of an exclusive utility easement in public ROW to one utility at the exclusion of all others would be in contraindication with Kentucky statute.

While KYTC can dedicate easement in public ROW, KYTC should not grant an exclusive utility easement in public ROW to one utility at the exclusion of others

4 Replacement Utility Easements

4.1 Replacement Easement Purpose

An easement is the right to use the real property of another for a specific purpose; such as, drainage, utility facilities, construction, or maintenance. An easement is a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. They are typically granted by will, by deed or by a contract.

An easement is created by the legal document which is expressed either by grant or deed.

For the purpose of this document section, we are referring to KYTC acquiring or reimbursing for the acquisition of an easement for a specific utility company. The project is expected to impact this utility company that may occupy the existing ROW and/or are placed on 'other than public ROW. 'Other than public ROW' is reasonably defined as placement on a private easement and/or fee simple property ownership.

4.2 State & Federal Guidance

23 CFR 645.111 Subp A

(a) Federal participation may be approved for the ***cost of replacement right of way provided:***

(1) ***The utility has the right of occupancy in its existing location...fee, an easement, or other real property interest.***

(2) There will be no charge to the project for that portion of the utility's existing right of way being transferred to the TD for highway purposes

(b) 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

(c) Acquisition of replacement right of way by the TD on behalf of a utility or acquisition of non-operating real property from a utility shall be in accordance with Uniform Relocation Assistance and real Property Acquisition Policies Act

(d) When the utility has the right of occupancy in its existing location because it holds the fee, an easement, or another real property interest and it is not necessary by reason of the highway construction to adjust or replace the facilities located thereon, the taking of and damage to the utility's real property, including the disposal or removal of such facilities may be considered a right of way transaction

23 CFR 645.111 Subp A

Federal funds may be used for replacement easement for utilities

Either a state or a utility may purchase replacement easement for utility relocations:

- If a state acquires replacement easement, the requirements of the Uniform Act applies.
- If the utility acquires replacement easement, the Uniform Act does not apply.

4.3 Other DOT Perspectives

DOT	Does your DOT purchase utility specific easements on State behalf of utility companies?		Does your DOT retain the easement and permit access to it as opposed to easement transferring to the company occupying it?		Does your DOT acquire this easement to replace existing easement only	
	Yes	No	Yes	No	Yes	No
Pennsylvania	Yes			No	Yes	
Oregon	Yes Rarely			No	Yes	
Virginia	Yes		Yes		Yes	
Florida	Yes			No	Yes	
West Virginia		No		No	Yes generally	
Tennessee		No		N/A		N/A
Delaware		No		N/A		No
Alabama		No		No		No
Utah	Yes			No		No

Maryland	Yes occasionally			No		Yes
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State	Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation?			Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? It's not considered a betterment.	
DOT	Yes	No		Yes	No
Pennsylvania		No		Yes	
Oregon		No		Yes	
Virginia		No		Yes	
Florida		No			
West Virginia		No			No
Tennessee		N/A			N/A
Delaware		No			N/A
Alabama		No		Yes	
Utah	Yes			Yes	
Maryland		Not unless there was a hwy need & esmt would remain with the state			No

Detailed responses:

ALABAMA ROBERT LEE

- ▶ We don't buy easements for utilities, but we reimburse utilities for buying their own replacement easements. There doesn't seem to be much difference between providing a utility corridor and setting liberal ROW limits with utility accommodation in mind. We could probably accommodate utilities on our ROW that were previously on their own easement, but they would not want that. The main reason that a utility wants to be on their own easement is to control what happens on the easement. Otherwise, if the DOT is not careful, a utility will be permitted on top of an existing utility. A fiber optic line could be permitted atop a water or sewer

line. When the water or sewer utility comes to perform maintenance on their line, they will likely cut the f.o. line, because it should not have been put atop the water or sewer line. An easement also allows the utility to modify or expand their facilities without the need for permit, etc.

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? No. The Utility purchases replacement easement & DOT reimburses.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? Utility retains ownership.
- ▶ Does your DOT acquire this easement to replace existing easement only? No. Utility acquires, but we reimburse them.
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? No.
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? Yes.

DELAWARE ERIC CIMO

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? No. We always purchase on behalf of the State. Though there have been a couple of instances where we purchased an area to accommodate utility relocation then stripped off a portion of the easement giving it back to the utility. Those were specific areas to address transmission utility facilities and we were granted permission to do this on specific projects under Delaware Law due to circumstances surrounding the situation. This is not something we typically do.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? In the cases where we stripped a portion off for the utility company, we transferred that portion fully to the company occupying it.
- ▶ Does your DOT acquire this easement to replace existing easement only? We did in the case(s) mentioned above. However, we do not typically do this. Typically, we require the company to relocate into

our fee simple ROW or our State owned PE. If they want to remain on private easement, they are responsible to obtain that on their own.

- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? We would have to acquire it as a state owned PE and it would be open for other companies to use and for DeIDOT to use.
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? Not in the case I described. For us it is no different than a new utility installation within fee simple ROW.

FLORIDA THOMAS BANE

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? *FDOT would only purchase an easement when we condemn existing utilities as FDOT expands the R/W. Otherwise, FDOT would have the utility subordinate the easement to FDOT.*
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? *Our permits do not affect easements. The permit gives permission to do work within FDOT R/W. So, even if they have an easement they must get a permit to come into the R/W and work.*
- ▶ Does your DOT acquire this easement to replace existing easement only? *Yes.*
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? *No.*
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? *Purchasing an easement would only be through condemnation where we have to make the utility whole. So when we settle condemnation, the utility is considered whole – not better or worse.*

MARYLAND NELSON SMITH

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? We have acquired property for utility purposes.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? Not unless we are replacing a property that we are taking from the utility for the highway.
- ▶ Does your DOT acquire this easement to replace existing easement only? Yes
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? Maybe. If we had a highway need, but the property would remain with the state.
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? No.

TENNESSEE JOE SHAW

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies?
- ▶ TN court instruction is such that under eminent domain, the state can acquire ROW for highway purposes, and utility use is not considered highway purpose. Opinion of the AG office that was rendered many years ago and has not been reassessed recently.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? Not Applicable
- ▶ Does your DOT acquire this easement to replace existing easement only? Not Applicable
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? Not Applicable
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? Not Applicable

- ▶ Note: Under Local Public Agency projects, the local agency often acquires additional ROW for utility relocations adjacent to the Project ROW, using local funds not project funds, as a prescribed action of the local agency to acquire easements for the location of local agency utilities.
- ▶ This acquisition is often offered to utilities as a joint use to facilitate utility relocation for the LPA project. Owned and administered by the Local Public Agency which acquired it.

OREGON HEATHER HOWE

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? On very rare occasions, but it is usually because we are exchanging/swapping easements.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? Transfers to the company occupying it.
- ▶ Does your DOT acquire this easement to replace existing easement only? Yes
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? No
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? Yes

PENNSYLVANIA LARRY DITTY

- ▶ Pennsylvania only reimburses a utility if they have a property right. If they are located by permit they are considered non-reimbursable.
- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? Yes, PennDOT purchases utility specific easements when we overtake a utility's private r/w and they have a compensable real property interest. The utilities can also purchase their own easements and we will reimburse them for it if they have a compensable real property interest.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? The

easement transfer to the company occupying it. If we overtake their r/w, they have a compensable real property interest and they remain in the highway r/w, we will reserve their easement rights.

- ▶ Does your DOT acquire this easement to replace existing easement only? Yes
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? No
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? It's not considered a betterment. If they don't have a property right, they will have to purchase their own easement (if required).

UTAH ALANA SPENDLOVE

- ▶ Check out our utility right of way matrix that I've attached to this email. Hopefully it helps you understand our process when it comes to utility easements. We have regulations (Utah Admin Rule R930-8-7. Replacement of Property Rights) that gives us the authority to purchase replacement easements on behalf of utility owners. To date, we have not purchased a joint use easement as no utility has requested them; only public utility easements.
- ▶ Public Utility Easements are typically connected to subdivision plats. UDOT can replace these PUEs and can then turn over the ownership of the easement back to the city/subdivision. These easements are only for public utilities.
- ▶ If we were to do a joint use easement I believe it would be in the name of one utility company with the provision that others (such as gas and electrical) could also occupy that space.

Utility Relocation Right-of-Way Matrix					
Company Right-of-Way		R/W Product Acquired by UDOT	Betterment	Future Reimbursement	
Prior to Relocation	After Relocation				
Prior Rights	P.U.E. or Easement	UDOT R/W	Utility Agreement 100% future reimbursement	No	100%
		P.U.E.	P.U.E.	No	100%
		Company Easement	Easement with same prior rights using Company template	No	100%
	Prescriptive property rights or Facilities on UDOT R/W predate the road	UDOT R/W	Utility Agreement 100% future reimbursement	No	100%
		P.U.E.	P.U.E.	No	100%
		Company Easement	Easement with same prior rights using Company template	No	100%
	Fee Title Parallel to highway	Fee Title Property outside of UDOT R/W	UDOT acquires and conveys fee title property to Company.	No	100%
	Fee Title Crossing proposed highway	UDOT R/W	Utility Agreement 100% future reimbursement	No	100%
	No Prior Rights	UDOT R/W or Facilities on others' private property with no prescriptive right or adverse possession	UDOT R/W	UDOT Permit	No
P.U.E. (No room in within UDOT R/W for relocated facilities)			UDOT acquires P.U.E. Utility Agreement 50% future reimbursement	No	50%
Company Easement			Easement using Company template	Yes	100%

VIRGINIA MATT REYNOLDS

- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? Yes only as a replacement of an existing easement
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? VDOT retains. *Pursuant to an explicit state law.
- ▶ Does your DOT acquire this easement to replace existing easement only? Yes
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? Not as a policy.
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? It would be if done

WEST VIRGINIA ANTHONY CAROVILLANO

- ▶ General Utility Easements (acquisition of a utility easement that can be used by multiple companies, perhaps called 'Joint Use'?)
- ▶ Does your DOT purchase joint use easements? Recent Legislation has given the DOT authority to purchase Utility Corridors for joint use. I'm currently working on the implementation of this legislation so I don't have any results to share.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) If we purchase/establish a Utility Corridor then all utilities, current and future, will be required to locate in the corridor. We will charge the companies a lease to occupy the corridor but any future moves will be the DOT's financial responsibility
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? We will retain ownership of the corridor
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? Yes
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? We haven't thought that far out but I'm looking at building an interactive map/database to help us track our leases and permits
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? No, it hasn't been in the past
- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)
- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? No but we will reimburse a public utility (Public Service District & Municipalities) for acquisition costs
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? The easement will stay with the company
- ▶ Does your DOT acquire this easement to replace existing easement only? Generally but there have been times in which a public utility has elected to move out of our R/W into an acquired easement
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to

relocation? We would reimburse a public utility but we would not acquire for them

- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? No, it hasn't been in the past

4.4 Kentucky Perspective

Utility Specific Easements (Kentucky)

- ▶ Are we acquiring and transferring them to the utility?
 - ▶ We do sometimes acquire easement for a utility but not transferring them to our knowledge. These transfers would need to go through the Division of Right of Way and Utilities and be signed by the Governor.
- ▶ If not, should we be?
 - ▶ Yes
- ▶ Is this a betterment if the utility occupied no easement prior to relocation?
 - ▶ Defer to OLS and other DOT assessments but it appears to be a betterment.
- ▶ If so, can Federal funds be used to acquire it?
 - ▶ Not when it is betterment.

Utility Easements				
			Reimbursable?	
Utility Type	Ex Facilities on:	Relocating To:	Now?	Future?
Private	ROW	ROW	NO	NO
	ROW	Easement	NO	YES*
	Other than ROW	ROW	YES	NO
	Other than ROW	Easement	YES	YES
Public	ROW	ROW	YES	YES
	ROW	Easement	YES	YES
	Other than ROW	ROW	YES	YES
	Other than ROW	Easement	YES	YES

*Cannot improve their property right position. That is betterment and not eligible for Federal reimbursement.

Based upon the guidance available, including Kentucky statutes, and surveyed state DOTs, the DOT acquisition a utility easement is typically restricted to replacement easements only. These easements are to be transferred to the utility owner.

Utility specific easements:

- Can be acquired only to replace an existing easement.
- Must be specific to a utility company.
- KYTC must transfer the easement to the utility if KYTC acquires it.

5 Joint Utility Easements

5.1 Joint Utility Easement Purpose

An easement is the right to use the real property of another for a specific purpose; such as, drainage, utility facilities, construction, or maintenance. An easement is a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. They are typically granted by will, by deed or by a contract.

An easement is created by the legal document which is expressed either by grant or deed.

For the purpose of this document section, we are referring to KYTC acquiring or reimbursing for the acquisition of an easement for multiple utility companies to use. The project is expected to impact these utility companies that may occupy the existing ROW and/or are placed on 'other than public ROW. 'Other than public ROW' is reasonably defined as placement on a private easement and/or fee simple property ownership.

5.2 State & Federal Guidance

See section 4.2 State & Federal Guidance' as there are no specific and additional guidance on joint use utility easements.

5.3 Other DOT Perspectives

State	Does your DOT purchase joint use easements?		Does your DOT regulate (permit) access to them? (If so, is it written authority?)		Does your DOT retain the easement and permit access to it as opposed to easement transferring to one of the companies occupying it?	
	Yes	No	Yes	No	Yes	No
Pennsylvania		No		No		No
Oregon		No		No		No
Virginia	Yes		Yes		Yes	
Florida		No		No		No
West Virginia	New legislation allows		Yes uts lease access		Yes	
Tennessee		No		No		N/A
Delaware	Yes		Yes regulate not permit		Yes	
Alabama		No		N/A		N/A
Utah		No		N/A		N/A
Maryland	Yes occasionlly		Yes		Yes	

State	Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation?		If so, how do you track whom is reimbursable and whom is not if impacted in the future?	Is this a betterment if the utility occupied no easement (had no property right) prior to relocation?		
	Yes	No		Yes	No	
DOT	Yes	No	Text	N/A	Yes	No
Pennsylvania		No		N/A		N/A
Oregon		No		N/A		N/A
Virginia	Yes		VDOT requires a copy of recorded easements to demonstrate reimbursable. Joint Use easement use is not reimbursable unless it overlaps an easement in the company's name.			No
Florida		No		N/A		N/A
West Virginia	Yes		DOT considering a tracking database to help			No
Tennessee		N/A		N/A		N/A
Delaware	Yes		The utility provides evidence of property right.			No
Alabama		N/A		N/A		N/A
Utah		N/A		N/A		N/A
Maryland	Yes		Prior rights is tracked through Office of Real Estate			No

Detailed responses:

ALABAMA ROBERT LEE

- ▶ Does your DOT purchase joint use easements? No.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) N/A
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? N/A

- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? N/A
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? N/A
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? N/A

DELAWARE ERIC CIMO

- ▶ Does your DOT purchase joint use easements? We will purchase either fee simple ROW and have the utilities come into it or we will acquire permanent easements (PE) in the State's name. These PE's work just like fee simple ROW and the utilities are able to install within them...I might be able to get you our sample/form easement language that sets the stage for allowing utilities.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) Yes, we regulate the area. We coordinate and oversee the installations if happening as a result of a capital project but we do not require permits. Permits are only required for installations that occur outside of our capital project limits and that are not a direct result of an impact of the capital project design/construction.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? We typically retain the easement and permit access/use. However, we have had a few cases where we purchased an area to accommodate utility relocation then stripped off a portion of the easement giving it back to the utility.
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? Yes, a utility can occupy a DeIDOT PE or fee simple ROW when they had no easement prior to relocation.
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? The company has to provide us with easement documents or other prior rights documentation

showing they had a compensable interest prior to our project. We prepare and execute various agreements depending on the situation to assist in documenting the path forward and tracking how future impacts will be handled.

- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? Not for us. The betterment really comes in if they are running brand new or upgrading their facilities. Many times, companies are in our fee simple ROW before our project. Through the real estate negotiations, it is determined that is it easier to obtain a PE as opposed to fee simple ROW so that is how our designers and real estate team moves forward. Though this is not ideal, we end up placing relocated utilities into these PE's without there being betterment to the facilities. We tend to use PE's purchased through our projects no differently than fee simple ROW.

FLORIDA THOMAS BANE

- ▶ Does your DOT purchase joint use easements? FDOT would only purchase an easement when we condemn existing utilities as FDOT expands the R/W. Otherwise, FDOT would have the utility subordinate the easement to FDOT. Or, just permit the utility within the R/W.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) Our permits do not affect easements. The permit gives permission to do work within FDOT R/W. So, even if they have an easement they must get a permit to come into the R/W and work.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? FDOT does not hold easements in the FDOT R/W. FDOT holds fee title to all R/W except over federal lands such as national parks or military bases. If a utility has an easement within the R/W, they retain the easement but subordinate certain right to FDOT.
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? FDOT's

permit does not convey any property rights to the utility. Nor does FDOT grant easements to utilities.

- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? FDOT does not have to track them. FDOT reimburses all utilities located on the Federal Interstate System regardless of property rights. Off the Federal Interstate System we only reimburse if they have a an easement or when the utility has a subordination agreement that says they are reimbursable. It's up the utility to demonstrate this.
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? Purchasing an easement would only be through condemnation where we have to make the utility whole. So when we settle condemnation, the utility is considered whole – not better or worse.

MARYLAND NELSON SMITH

- ▶ General Utility Easements (acquisition of a utility easement that can be used by multiple companies, perhaps called 'Joint Use'?)
- ▶ Does your DOT purchase joint use easements? We have on a case by case basis.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) Yes
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? The state retains the underlying property interest. Transfers are only if we are replacing an easement/property right.
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? Yes
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? We have a prior rights process through our Office of Real Estate
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? No

OREGON HEATHER HOWE

- ▶ Oregon only reimburses a utility if they have a property right. If they are located by permit they are considered non-reimbursable.
- ▶ General Utility Easements (acquisition of a utility easement that can be used by multiple companies, perhaps called 'Joint Use'?)
- ▶ Does your DOT purchase joint use easements? NO
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) NO
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? NO
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? NO
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future?
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation?

PENNSYLVANIA LARRY DITTY

- ▶ Pennsylvania only reimburses a utility if they have a property right. If they are located by permit they are considered non-reimbursable.
- ▶ General Utility Easements (acquisition of a utility easement that can be used by multiple companies, perhaps called 'Joint Use'?)
- ▶ Does your DOT purchase joint use easements? No
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?)

- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it?
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation?
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future?
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation?

TENNESSEE JOE SHAW

- ▶ General Utility Easements (acquisition of a utility easement that can be used by multiple companies, perhaps called 'Joint Use'?)
- ▶ Does your DOT purchase joint use easements?
TN court instruction is such that under eminent domain, the state can acquire ROW for highway purposes, and utility use is not considered highway purpose. Opinion of the AG office that was rendered many years ago and has not been reassessed recently.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?)
TnDOT regulates State ROW. There is no designation of "utility strip/easement" in state ROW.
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it?
Not Applicable
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation?
Not Applicable
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future?
Not Applicable

- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation?
Not Applicable
- ▶ Note: Under Local Public Agency projects, the local agency often acquires additional ROW for utility relocations adjacent to the Project ROW, using local funds not project funds, as a prescribed action of the local agency to acquire easements for the location of local agency utilities.
- ▶ This acquisition is often offered to utilities as a joint use to facilitate utility relocation for the LPA project. Owned and administered by the Local Public Agency which acquired it.

UTAH ALANA SPENDLOVE

- ▶ To date, we have not purchased a joint use easement as no utility has requested them; only public utility easements.
- ▶ Public Utility Easements are typically connected to subdivision plats. UDOT can replace these PUEs and can then turn over the ownership of the easement back to the city/subdivision. These easements are only for public utilities. I'm not an expert on ROW but if we were to do a joint use easement I believe it would be in the name of one utility company with the provision that others (such as gas and electrical) could also occupy that space.

VIRGINIA MATT REYNOLDS

- ▶ We do purchase "Joint Use VDOT Utility Easements" to permit utilities into that do not have an existing land right (easement) but have to be relocated for the project outside of existing/proposed right of way to be clear for construction activities. These also can overlap company named easements we purchase only when replacing and existing recorded easements.
- ▶ This has been going well and have not experienced any significant issues and the practice has been accepted by the utility owners.
- ▶ Does your DOT purchase joint use easements? Yes
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) Yes through our Land Use Permitting System
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying

it? VDOT retains unless it is overlapping with an easement in a company's name that is being replaced for the project/parcel

- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? Yes
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? If the easement is in VDOT's name they do not have a future reimbursable right unless they overlap with an easement in the utilities name or acquire the right later from the landowner. VDOT requires a copy of a recorded easement to demonstrate a reimbursable right.
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? No, since the easement land right is retained by VDOT

WEST VIRGINIA ANTHONY CAROVILLANO

- ▶ Does your DOT purchase joint use easements? Recent Legislation has given the DOT authority to purchase Utility Corridors for joint use. I'm currently working on the implementation of this legislation so I don't have any results to share.
- ▶ Does your DOT regulate (permit) access to them? (If so, is it written authority?) If we purchase/establish a Utility Corridor then all utilities, current and future, will be required to locate in the corridor. We will charge the companies a lease to occupy the corridor but any future moves will be the DOT's financial responsibility
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to one of the companies occupying it? We will retain ownership of the corridor
- ▶ Does your DOT permit a utility to occupy it when they had no easement (had no property right) prior to relocation? Yes
- ▶ If so, how do you track whom is reimbursable and whom is not if impacted in the future? We haven't thought that far out but I'm looking at building an interactive map/database to help us track our leases and permits
- ▶ Is this a betterment if the utility occupied no easement (had no property right) prior to relocation? No, it hasn't been in the past
- ▶ Utility Specific Easements (acquisition of a utility easement that can be used for a specific company relocation)

- ▶ Does your DOT purchase utility specific easements on behalf of utility companies? No but we will reimburse a public utility (Public Service District & Municipalities) for acquisition costs
- ▶ Does your DOT retain the easement and permit access to it or does the easement transfer to the company occupying it? The easement will stay with the company
- ▶ Does your DOT acquire this easement to replace existing easement only? Generally but there have been times in which a public utility has elected to move out of our R/W into an acquired easement
- ▶ Would your DOT be able to acquire a utility specific easement if the company had no easement (had no property right) prior to relocation? We would reimburse a public utility but we would not acquire for them
- ▶ Is this considered a betterment if the utility occupied no easement (had no property right) prior to relocation? No, it hasn't been in the past

5.4 Kentucky Perspective

- ▶ Does KYTC have authority to regulate (permit) access to them? (Written authority?)
 - ▶ No we do not.
 - ▶ We should limit access with the easement description
 - ▶ Transfer to the utility owner
- ▶ Does KYTC wish to own and permit access to them?
 - ▶ No we have no interest in maintaining these easements.
- ▶ Is this a betterment if the utility occupied no easement prior to relocation?
 - ▶ Defer to OLS and other DOT assessments
- ▶ If so, can Federal funds be used to acquire it?
 - ▶ N/A

Utility Easements				
			Reimbursable?	
Utility Type	Ex Facilities on:	Relocating To:	Now?	Future?
Private	ROW	ROW	NO	NO
	ROW	Easement	NO	YES*
	Other than ROW	ROW	YES	NO
	Other than ROW	Easement	YES	YES
Public	ROW	ROW	YES	YES
	ROW	Easement	YES	YES
	Other than ROW	ROW	YES	YES
	Other than ROW	Easement	YES	YES

*Cannot improve their property right position. That is betterment and not eligible for Federal reimbursement.

Based upon the guidance available, including Kentucky statutes, and surveyed state DOTs, the DOT acquisition of a joint utility easement is uncommon and for those states whom use them, they have policy, law and a regulating body to execute them. Most states do not use and/or acquire joint use easements.

Those that do have law, policy and a regulation and permit process.

Since KYTC has none of these, specific conditions are needed:

Joint Use Utility easements:

- ▶ **Use for specific groups of utility companies**
- ▶ **Those companies have replacement easement rights**
- ▶ **The easement should be described for those facility types.**
- ▶ **The easement should be conveyed to owner utility(ies).**