Agreements for Utility Rearrangements in **Passenger Rail Projects**

Utility[1] rearrangements, their attendant betterments and administration of relationships with utilities collectively are a significant portion of the cost to develop urban passenger rail projects.[2] Usually, the question of who pays for required rearrangements is answered by statute.[3] For this article's purposes we will assume that generally the transit agency pays a significant share of necessary rearrangement costs.[4]

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THIS ARTICLE FIRST DISCUSSES KEY DEFINITIONS CONCERNING utility rearrangements, and then highlights issues to be considered when developing an agency's rearrangements policies and agreements.

DEFINITIONS

Rearrangement. The alteration, removal, relocation, replacement and/or reconstruction of a conflicting facility, which must be rearranged to build or operate the project.

Facility. This is simply the real and personal property that may be the subject of rearrangement, and can be anything from manholes to telephone poles to cable wire pipelines, etc.

Replacement Facility. This is the facility constructed or provided as a consequence of the rearrangement.

Substitute Facility. This is often a theoretical concept used to be the baseline measure for what is the appropriate replacement facility, against which any requested betterments or upgrades are measured.

Temporary Facility. A replacement facility may be constructed for temporary use; to ensure continuing service while construction of the transit project occurs, or while the conflicting facility is taken out of service and before the full completion of the rearrangement.

Conflicts. There is no need to rearrange the facility unless somehow its existing location and usage will conflict with the construction or operation of the transit project. Who makes that determination is often at issue.

Betterments. A replacement facility or portion thereof requested by a utility that will increase the service level or capacity over that of the conflicting facility being replaced.

Since over time standards change and generally require greater quality, a replacement facility often provides better service and capacity than the existing replaced one. However, utilities contend that is *not* a betterment because it simply meets the current utility standards.

Often, it will be agreed that if the project environmental mitigation requires measures that lead to an increased service level, that is not an increase requested by the utility but is a project responsibility and therefore not a betterment.

Betterments can be an expensive issue as utilities often seize on the opportunity of a funded transit project to achieve whole scale improvements in utility lines or other facilities, which perhaps were not otherwise affordable by the utility. In the circumstance where there are many utility interactions, a detailed betterment policy may be worth preparing, to guide the negotiations over betterments and the construction interfaces.

Utility Standards. Those are the written, customary and usual utility standards. Again the transit agency wants to make sure the utility does not seek, at the agency's expense, some gold-plated replacement facilities. Often, the definition refers to the standard for facilities that the utility would itself pay for, hopefully that would lead to a more reasonable and less costly set of standards.

Costs. If the transit agency will pay for the cost of rearrangement work, it wants to make sure that only necessary and related costs are included, and wants to avoid excessive overhead charges, etc., by the utility owner or its contractors. Sometimes reference is made to the accounting and costs procedures of the federal and state government, since those government levels may be the funders and they will impose their audit standards. Examples of this might be OMB Circular A-87 and implementing Department of Health and Human Services Publication ASMB C-10.

Work Authorization or Work Order. This is a document pursuant to a rearrangement agreement that typically authorizes work to be done at the expense

of the agency, and by the utility, its contractors, or the authority and its contractors.

ISSUES

Who does what? Who designs the rearrangements? Does the agency have available staff to do so?[5] Are there unique elements to the facility being replaced that makes it more appropriate for the utility owners to design it? Who has the final word as to the appropriateness of the design?

The review timetable for rearrangement design plans is important. Utilities may argue that they do not have sufficient staff to meet a rigorous timetable for review that the authority's construction schedule might impose. They may ask for assistance, including hiring temporary personnel at agency cost, to accomplish such reviews in a timely manner.

Often, particularly with respect to decades old utilities, such as old municipal water lines and gas lines, the utility owner is best able to identify the location of its facilities. The agency is in a position of dearly needing their timely cooperation, and so the price to be paid in terms of paying for borderline rearrangements or providing payment of extra utility staff time, may be worth it.

Who performs the rearrangements? Utilites can be quite particular in requiring that only their forces or approved contractors do the work. Particularly with respect to electrical connections, or connections involving computer networks and the like, the utility will want to be involved in the rearrangement work. If the transit agency allows the utility or its contractor to do the work, then it must be assured that the work is timely done to meet the agency's construction timetable.

Who obtains permits? There may be certain types of permits that only the utility owner can obtain in its name, though the agency staff or its consultants can help prepare applications, etc. Similarly there may be permits that only the agency can obtain if the rearranged facility would be within its right of way.

What happens if hazardous materials are found in the "vacated" utility location, or in the area that the rearrangement is disturbing? In the absence of clear statutory or contractual language the responsibility for those costs can be the source of disagreement. Suppose an oil pipeline must be relocated, and it turns out there have been slow leaks over the years contaminating the surrounding soil, but theretofore no environmental agency enforcement action regarding the leaks. The pipeline company will argue it is the agency's project that triggers the need for remediation, and that left undisturbed there had been no immediate need for any cleanup. The transit agency would argue that costs related to an oil discharge in violation of environmental laws is not a "reasonable" rearrangement cost that it should bear.

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Where will the newly rearranged facilities be located? A typical pattern is to relocate previously located public right of way facilities, again in public right of ways, and those that were in private right of ways. When utilities are relocated and the agency purchases the new right of way location, then in exchange it should receive the vacated right of way that the utility owned. A prudent construction program would allow for an early assessment of any right of way and property requirements to accommodate rearrangements, so they can be timely purchased or condemned. Nevertheless, maybe that utility company has relationships with property owners, or has unique statutory power, which makes it the more convenient party to acquire the replacement right of way.

There may be a need for interim or *temporary* grant of rights. For example, the agency seeks from the utility sufficient property rights to allow it to proceed with construction of the project in the vicinity of the affected rearrangement, notwithstanding that the agency has yet to provide the replacement facility.

If the rearranged facility will be within the right of way of the agency's project, the utility may request an easement or a separate joint use agreement to allow the use its continuing presence and operation therein.

There will be a need for coordination of the replacement facilities with both the long-term new facilities planned by the utility, and the current and future transit operational needs. For example, the transit agency should consider possible extensions, double-tracking, etc., in contemplating where to place rearranged facilities.

How will rearrangement work be authorized and paid for? Work Authorizations or Work Orders may be issued to authorize such work, and form the basis of payments by the agency to the utility. Utilities often ask for advance payments if the work is extensive; the agency prefers monthly billings for actual costs incurred.

The agency might be entitled to *credits* for salvage. Certain material may be salvageable, and reused by the utility or be incorporated into the project or sold. The agency should seek credit for any salvaged material that the utility removes.

The agency might be entitled to *credits* for accumulated depreciation – meaning the extended service life that the rearrangement is providing. The value of remaining service life can be based upon service life estimates in California Public Utilities Commission filings of the affected utility, or other accounting mechanisms.

Miscellaneous Issues. Mutual *indemnities* may be appropriate where both parties perform some work related to the designed and rearrangement of the facilities. *See* Civil Code §2778 for general indemnity rules, and Government Code §895 et seq., for indemnity agreements between public entities.

Insurance may also be sought to protect the parties with respect to work done by contractors on rearrangements. Where the agency has an owner controlled insurance program broadly covering the work done on the transit project, which risk protection might be extended to the

rearrangement work and to the utility.

Rearrangement agreements may include an operational component, imposing upon the utility an obligation to maintain and operate its facilities in a way that does not interfere with the *operations* (planned and continuing), of the transit agency.

Often a method of trying to resolve disputes is set up to avoid litigation as the only recourse. This can be some sort of *dispute resolution* board with binding authority, or use of a third party mediator to force negotiations before a lawsuit is filed.

Each party may want mutual *rights to inspect* rearrangement work, during construction and final inspection. The parties have to then decide who can direct any corrective work.

CONCLUSION

Though the language of applicable laws, franchises and leases may obligate the transit agency to bear much of the costs of utility rearrangements, the agency can still achieve significant cost savings by crafting agreements that carefully define the scope of reasonably necessary rearrangement costs, and prevent utility betterment costs from being shifted to the agency construction budget.

FOOTNOTES

1. This term may broadly include facilities of pipeline companies, municipal utilities, privately-owned public utilities, cable and telecommunications companies.
2. For instance, the Pasadena Blue Line Construction Authority, building the so-called Gold Line light rail from downtown Los Angeles to Pasadena, has an estimated construction cost for its work of $457,000,000. That includes some $11.4 million in utility rearrangement costs and third party betterments of over $10 million. The Santa Clara Valley Transportation Authority has under construction 3 light rail extensions of over $900,000,000 in construction costs, utility rearrangement costs are nearly 4% of that budget.
3. Agencies should be alert to situations where the utility facility is located pursuant to a lease or franchise which may have more favorable terms as to who pays rearrangement costs. In some cases those provisions may take precedence over the statute, or at least give negotiation leverage to the agency for cost-splitting.
4. A leading study on this topic is a California Law Revision Commission report by Prof. Arno Van Alstyne. Over 70 statutes were examined, the vast majority of which placed some degree of financial responsibility on the agency causing the rearrangement. Study Relating to Sovereign Immunity, California Law Revision Commission Report, vol. 5, Feb. 1963.
5. In instances of design/build, often a design/build contractor will have more of an interface and role in the rearrangement work on behalf of or instead of the agency.