

June 1958

Public Utility Relocation Costs Relative to Federal-Aid Highway Act of 1956

J. C. W. Jr.
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

J. C. W. Jr., *Public Utility Relocation Costs Relative to Federal-Aid Highway Act of 1956*, 60 W. Va. L. Rev. (1958).

Available at: <https://researchrepository.wvu.edu/wvlr/vol60/iss4/8>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

PUBLIC UTILITY RELOCATION COSTS RELATIVE
TO FEDERAL-AID HIGHWAY ACT OF 1956

Recently the justices of the Supreme Court of New Hampshire were asked by the senate of that state to give an opinion as to the constitutionality of a bill introduced in the state legislature relating to the federal-aid highway act of 1956.¹ The bill provided for payment of the cost, on a matching basis, of relocating public utility facilities resulting from highway construction or improvements. The court, after recognizing the common law rule that the obligation to remove or relocate utility facilities within public highways is placed on the owner of such utilities, was of the opinion that the legislature could validly declare that the cost of such relocation is a part of highway costs.² This case represents only the second opinion to be handed down by state courts of last resort on this question.³

The problem involved is one that has been of minor significance through the years, but the doors to its real prominence are just being opened. With passage of the federal-aid highway act of 1956, and the accompanying national demand for a better system of highways, the question of costs relative to relocating public utilities has, by necessity, been enlarged to become an important focal point in all tentative plans for highway construction.

Highways, though designated primarily for the use of the traveling public, may be used for any improved methods for the transmission of persons, property, intelligence, or for other means to promote sanitation, public health or welfare.⁴ This is a generally accepted principle of common law.⁵ Public utilities designated to serve these public purposes may also make use of the highways for location of their facilities, and equipment.⁶

The state legislature exercises sovereign and plenary control over all public highways within its jurisdiction. This control is generally delegated to a state highway department or to local governmental units. It is within the province of these divisions to

¹ 70 STAT. 374 (1956), 23 U.S.C. §§ 151-175 (Supp. IV, 1957).

² Opinion of the Justices, 132 A.2d 613 (N.H. 1957).

³ The other decision is: Opinion of the Justices, 132 A.2d 440 (Me. 1957).

⁴ Herold v. Hughes, 90 S.E.2d 451, 456 (W. Va. 1955); Watson v. Fairmont and Suburban Ry., 49 W. Va. 528, 540, 39 S.E. 193, 198 (1901); Hobbs v. Long Distance Tel. & Tel., 147 Ala. 393, 396, 41 So. 1003 (1906).

⁵ House Committee on Public Works, *Public Utility Relocation Incident to Highway Improvement*, H.R. Doc. No. 127, 84th Cong., 1st Sess. 57 n.1 (1955).

⁶ W. VA. CODE c. 17, art. 16, § 6 (Michie 1955); Herold v. Hughes, 90 S.E.2d 451 (W. Va. 1955); Thacker v. Ashland Oil & Refining Co., 127 W. Va. 520, 41 S.E.2d 111 (1946).

grant permission to the utilities to use highway rights-of-way and to establish the limitation and conditions of such use in conformity with the statutory provisions or general common law principles.⁷

Every government has the inherent power to make reasonable rules and regulations for the health, safety, general welfare, and convenience of its people. This is identified as a police power and is an implicit term of every grant by any governmental unit. The grant of permission to the utilities to use highway rights-of-way, being a grant from such a governmental unit, is, therefore, subject to this police power. The improvement of existing highways is considered to be within the powers of the appropriate highway authorities and a proper subject for the invocation of this police power.⁸

Courts have uniformly held that utilities can be required, by the state acting through its legislature or other governmental unit, to move their facilities in order to improve highways. This is regarded as a reasonable exercise of police regulations, and, as a result, the utility is not entitled to any compensation or reimbursement for the costs of the required move, in the absence of a clear, express statutory mandate shifting the burden of such costs from the utility to the state.⁹ Adherence to the regulation is required regardless of the type of improvement planned and regardless of the nature or source of the utility's permission to locate its facilities within the public right-of-way.¹⁰ The exceptions to this general principle are unreasonable discrimination against one utility, and the situation in which a utility's relocation has been designed for the benefit of another utility or for the benefit of a municipality acting in its proprietary capacity.¹¹

Where the utility is located entirely on its own right-of-way and proposed highway improvements require the utility to remove or relocate its facilities, the utility is treated as a private landowner

⁷ 2 POND, PUBLIC UTILITIES §§ 488, 490 (4th ed. 1932).

⁸ *State v. Benwood & McMechen Water Co.*, 94 W. Va. 724, 120 S.E. 918 (1924); *County Court v. White*, 79 W. Va. 475, 91 S.E. 350 (1917).

⁹ W. VA. CODE c. 17, art. 16, §§ 2, 3 (Michie 1955).

¹⁰ *Public Water Supply Dist. No. 2 v. State Highway Comm'n*, 244 S.W.2d 4 (Mo. 1951); *State v. Marin Municipal Water Dist.*, 17 Cal. 2d 699, 111 P.2d 651 (1941); *New Orleans Gas Light Co. v. Drainage Comm'r*, 197 U.S. 453 (1905).

¹¹ *Southern Bell Tel. Co. v. Nashville*, 35 Tenn. App. 207, 243 S.W.2d 617 (1951); *Los Angeles County v. Wright*, 107 Cal. 2d 235, 236 P.2d 892 (1951); *Carver v. State*, 11 Ga. App. 22, 74 S.E. 556 (1912); See also, 2 POND, PUBLIC UTILITIES § 492.

so that its property must be acquired by purchase or condemnation.¹²

Having laid a general foundation as to the relative rights and responsibilities of utilities, we must now determine why the problem of relocation costs has gained such significance.

The federal-aid-highway act of 1956 was enacted to amend and supplement the federal-aid road act of 1916.¹³ Its basic purpose is to improve highways in order to accommodate the ever increasing needs and demands for automotive travel. Since public utilities have traditionally established their facilities within highway rights-of-way, and since under the common law it has been the responsibility of the utilities to bear the costs of relocation, it is only logical that, as improvement and modernization have gone forward, the resources of the utilities have been subjected to greater and greater burdens. For this reason, the Congress of the United States incorporated in the federal-aid highway act of 1956 a provision concerning relocation of utility facilities.¹⁴ That provision reads as follows:

“Sec. 162 Relocation of Utility Facilities

(a) Availability of Federal Funds For Reimbursement to States.—Subject to the conditions contained in this section, whenever a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extension thereof within urban areas, federal funds may be used to reimburse the state for such cost in the same proportion as Federal funds are expended on the project; *Provided*, That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

(b) Utility Defined.—For the purposes of this section, the term “utility” shall include publicly, privately, and cooperatively owned utilities.

(c) Cost of Relocation Defined.—For the purposes of this section, the term “cost of relocation” shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.”

¹² W. VA. CODE c. 17, art. 4, § 5 (Michie 1955).

¹³ 39 STAT. 355 (1916), as amended, 23 U.S.C. §§ 1-26 (1952).

¹⁴ 70 STAT. 374 (1956), 23 U.S.C. § 162 (Supp. IV, 1957).

With a view toward reaping the benefits of this provision the legislatures of three states have proposed bills to shift the burden of utility relocation costs from the utility to the state.¹⁵

West Virginia is generally in conformity with the other jurisdictions on the question of costs relative to utility relocation in highway improvements. By statute it is provided that it shall be the duty of the utility owners to remove their facilities when they constitute an obstruction to the use of state or county district roads by the traveling public.¹⁶ The state's position on this matter is probably best defined by case law. The court has said that utilities have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right-of-way for the purpose of a roadway necessarily implies the right to widen and improve the traveled portion of the road whenever it becomes necessary for the better accommodation of the public.¹⁷ Our courts have also held that there is no question of a governmental unit's right to require a utility to remove its facilities, although originally located under the direction and supervision of a municipal or other governmental authority, if warranted by the facts.¹⁸ The use of the words "if warranted by the facts" would indicate that, in West Virginia as in other jurisdictions,¹⁹ the power to demand relocation may not be arbitrarily used to unreasonably require removal or relocation where the benefit derived would not justify the cost and inconvenience of the change in location or removal of equipment.

As previously pointed out, a bill to shift the burden of utility relocation costs to the state was introduced into both houses of the West Virginia legislature in February, 1957.²⁰ The bill enjoyed nonpartisan support but died in the legislative committees to which referred. In substance the proposed bill provided that whenever the state road commissioner should determine that a public utility facility should be removed to accommodate a federal-aid highway project, the owner of such utility would remove or relocate such

¹⁵ New Hampshire, Maine, and West Virginia have proposed such bills.

¹⁶ W. VA. CODE c. 17, art. 16, § 2 (Michie 1955).

¹⁷ *County Court v. White*, 79 W. Va. 475, 91 S.E. 350 (1917).

¹⁸ *State v. Benwood & McMechen Water Co.*, 94 W. Va. 724, 120 S.E. 918 (1924).

¹⁹ See note 18 *supra*.

²⁰ H.B. 444, 53d Leg., Reg. Sess. § 17-b; S.B. 325, 53d Leg., Reg. Sess. § 17-b (1957).

facility upon order of the state road commissioner, and that the cost of removing and relocating such facility would be paid out of the state road fund.

A statute similar to that proposed in the West Virginia legislature was declared constitutional by the New Hampshire court.²¹ The major question propounded there was whether reimbursement for costs of relocating utility facilities could be authorized out of revenues specified in the constitution as "use of certain revenues restricted to highways."²² The court was of the opinion that the public easement includes all reasonable modes of travel and transportation which are not incompatible with the proper use of the highway by others, and that the relocation of utility facilities is an integral part of highway improvements. The New Hampshire court had previously allowed an off-street parking lot to be built and maintained out of highway funds²³ and thus it required only a little more extension of purpose to allow this use for public utility relocation.

This view has not been wholly shared by the Maine court.²⁴ When a similar question was presented to that court, it was the opinion that the proposed act was constitutional *except* as to any payment by the state constitution for construction or reconstruction of highways. The court did not feel that relocation of utility facilities necessitated by a change of highways is a "construction" or "reconstruction" of highways within the meaning of the constitution. The variance between this and the New Hampshire court is probably best explained by the fact that the Maine court has not in the past seen fit to enlarge the purposes for which its highway funds could be used and it did not wish to change precedent here.

If the question of the constitutionality of such a bill should ever arise in West Virginia, it is at least possible that the West Virginia court would follow the New Hampshire view. In the past the purposes for which state road funds could be expended have been viewed fairly liberally. A case decided in 1948 held that the word "streets" did not include sidewalks under the statute²⁵ which gives the state road commissioner the right to designate and take over "streets and bridges" in municipalities.²⁶ The statute relates

²¹ Opinion of the Justices, 132 A.2d 613 (N.H. 1957).

²² N.H. CONSR., Part II, art. 6-a.

²³ Opinion of the Justices, 94 N.H. 501, 504, 51 A.2d 836, 839 (1947).

²⁴ Opinion of the Justices, 132 A.2d 440 (Me. 1957).

²⁵ W. VA. CODE c. 17, art. 4, § 26 (Michie 1955).

²⁶ Smith v. Bluefield, 132 W. Va. 38, 40, 55 S.E.2d 392, 393 (1948).

to the taking for purposes of establishing highways or temporary detours. A later case, however, pointed out that the state road commissioner, in performance of statutory duties imposed upon him, is not required to construct and pay for sidewalks along state roads within municipalities, *but may* in the exercise of discretion construct and pay for such improvements.²⁷ In light of these two cases it is apparent that the purposes for which state road funds may be expended are not all specifically set out. The state road commissioner is left with some discretion, thus justifying the reasonable assumption that the court might further extend this state road fund usage for other purposes which benefit the public, including the relocation of public utilities.

Another possible basis for this observation stems from the statutory provision for taking by eminent domain.²⁸ The statute gives the state road commissioner, as the administrator of a public corporation, the right to prosecute a proceeding to acquire by right of eminent domain land reasonably necessary for the location and construction of a public road, or to straighten, widen or otherwise improve such road. Another statute states that the terms "road", or "public road", or "highway", shall be deemed to include the right-of-way, roadbed, and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts.²⁹ Yet, one case has allowed the taking by right of eminent domain for the stated purposes of beautification, ease in maintenance, and to protect the road bank from erosion.³⁰ None of these purposes is expressly included in the statutory provision, but the court pointed out that these public agencies are clothed with a wide discretion in determining the purposes for which the right may be invoked and the amount of property necessary for such purposes. If extension could be made in such closely supervised areas as eminent domain, it is reasonable that it could be made to broaden the use to which state road funds could be put.

Regardless of the ultimate determination as to who should bear the burden of utility relocation, the final resting place of the burden will be upon the people. If shifted to the state, the burden will be in the form of taxes. If allowed to remain with the utilities, the burden will be in the form of utility rates. Therefore, the

²⁷ *Sturm v. St. Albans*, 137 W. Va. 911, 924, 78 S.E.2d 462, 469 (1953).

²⁸ W. VA. CODE c. 17, art. 4, § 5 (Michie 1955).

²⁹ *Id.* c. 17, art. 1, § 3.

³⁰ *West Virginia v. Horner*, 121 W. Va. 75, 81, 1 S.E.2d 486, 489 (1939).

question becomes one of public benefit: which determination will give the people the most for their money?

It would be erroneous to assume that the project outlined in the federal-aid highway act of 1956 could be accomplished without an increase in taxes on the one hand or utility rates on the other. The federal government, burdened as it now is by defense, foreign aid and domestic expenditures, could not be expected to stretch its present tax dollars to accomplish this project. The utilities, even prior to enactment of the highway act of 1956, were concerned over the greater burdens being placed upon their resources as a result of relocation costs. Therefore, for purposes of discussion, we will assume a proportionate increase in taxes or utility rates depending upon the final determination.³¹

As a result of a study made by the Secretary of Commerce by direction of the Congress of the United States, it was determined that, for the survey year of 1953, utility relocation costs amounted to 3.2 cents on each dollar of total highway costs involving utility relocations.³² While this data was compiled some five years ago and while costs have risen since that time, it is reasonable to assume that the rise in costs has been a proportionate one. The only reason for bringing this figure to light is to point up that, over the duration of the proposed projects, a substantial amount of money will be involved. The important point is the determination of the channel through which these amounts will be paid by the public.

Let us first consider the possibility that a statutory provision has been enacted shifting the burden of the relocation costs to the state. In speaking of the state, it is well to remember that the state will be aided by the federal provision. We have assumed a tax increase to cover these costs. The problem does not arise during the duration of these outlays for utility relocation. It is the purpose for which these funds will be used after they are no longer needed for their original purpose that is important. More specifically, it is the interim period between the termination of the outlays for relocation purposes and the subsequent tax decrease that must be considered. Basically, if the funds are in the hands of the government,

³¹ The proportionate increase spoken of is in terms of dollar increase, not percentage increase.

³² House Committee on Public Works, *Public Utility Relocation Incident to Highway Improvement*, H.R. Doc. No. 127, 84th Cong., 1st Sess. 3 (1955); the survey pointed out that for the year 1953, \$1.1 billion was spent for highway construction involving utility relocation while utility relocation costs involving utilities located within highway rights-of-way were \$29.1 million.

the question is easily answered. They must be channelled to the use which, in the opinion of the legislators, benefits the greatest number of people.

On the other hand, viewing the problem from the situation as it now stands, no satisfactory answer appears. The utilities are in business to make money for their stockholders. Therefore, if utility rates are increased to cover relocation costs due to federal-aid highway construction projects and later the use for which the funds thereby acquired expire, it may well be that these funds will be used either to give a greater return on invested capital or to improve or replace existing plant and equipment. It is true that a decrease in utility rates may be effected, but still it is the interim period which again causes concern.

As a result of the comparison just made, it becomes relatively clear that the people as a whole will better benefit if the burden of relocation costs is shifted to the state. The problem involved is not one that can be answered by considering tomorrow's or next year's out-of-pocket outlays. Any forecast as to when the usefulness of these funds will expire is at most observation because the needs and demands of the traveling public are the dictating forces. This does not mean that the considerations made in this note are not important. All of us, whether our expenditures be made for food or taxes, are interested in obtaining the most for our money.

J. C. W., Jr.