



Vorys, Sater, Seymour and Pease LLP  
Legal Counsel

## MEMORANDUM

**TO:** Jonathon McGee  
Ohio Cable Telecommunications Association

**FROM:** Michael C. Griffaton

**CC:** Fred Mills

**DATE:** June 3, 2011

**RE:** Reimbursement Procedures for Relocated Cable Operators

---

### **I. Statutory Basis for Reimbursing Cable Operators for Utility Relocations**

Previously, the State was required to reimburse a utility (meaning publicly, privately, and cooperatively owned utilities subject to the authority of the Public Utilities Commission of Ohio) for the cost of relocating any of its facilities because of highway construction. R.C. § 5501.51. As a result of Amended Substitute House Bill 114 of the 129<sup>th</sup> General Assembly (commonly referred to as the Ohio Department of Transportation (ODOT) Budget Bill), the State now is also required to reimburse cable operators<sup>1</sup>, electric cooperatives, and municipal electric utilities for the cost of relocating their facilities because of highway construction. The “cost of relocation” includes the actual cost paid by a cable operator directly attributable to relocation after deducting any increase in the value of the new facility and any salvage value derived from the old facility.

Similarly, Am. Sub. H.B. 114 now requires a port authority that takes or disturbs property or facilities of a cable operator that are necessary and convenient to the cable operator's operations to restore, relocate, duplicate, or, upon the cable operator's election, pay compensation for the property or facilities. The new facilities or location must be of at least comparable utilitarian value and effectiveness, and relocation must not impair the cable operator's ability to compete in the original area of operation. The relocated property or facilities also must be available for use by, and its title transferred to, the cable operator before the port authority can take title to the appropriated property. R.C. § 4582.31.

The reimbursement provisions for cable operators in Am. Sub. H.B. 114 become effective on June 29, 2011. There is no indication in the law that the reimbursement provisions

---

<sup>1</sup> Am. Sub. H.B. 114 adopts the definition of “cable operator” in the Cable Communications Policy Act of 1984, 47 U.S.C. § 522, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151. This Memorandum uses the term “cable operator” throughout; the provisions apply equally to any publicly, privately, or cooperatively owned utility.

# V

## Legal Counsel

Jonathon McGee

June 3, 2011

Page 2

are retroactive and apply to completed projects or projects that are in progress as of June 29, 2011. Therefore, the reimbursement provisions likely apply only to relocation projects that are started on and after June 29, 2011.

On April 15, 2011, we spoke with Ray Lorello, Utility Program Manager in the Division of Real Estate at ODOT (ph. 614-466-2279), who explained that the reimbursement procedures are contained within ODOT's on-line *Procedure for Utility Relocation, Adjustments and Reimbursement Manual* (12/1/2006) and an on-line form (an Excel spreadsheet) that cable operators complete and submit to the local District Utility Office where the project is being completed.

## II. The Reimbursement Process for Highway Projects

It is important to note when a project actually begins for reimbursement purposes. ODOT's *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8206.10(L) (12/1/2006), provides that "utility relocation work which is performed prior to review and approval of the plan and estimate is ineligible for State and/or Federal reimbursement." Moreover, as described below (see **Section II.B.**), Section 8207.02 of the ODOT Manual allows for partial billing and reimbursement of expenses – which allows the utility "to capture initial costs incurred during the preliminary engineering, right of way, and materials necessary for the relocation of those facilities." From these, it appears that the project would begin when the plans and estimate are first submitted to ODOT for review and approval. A cable operator should confirm this fact when it first submits its plans and estimates to approval.

There is a two-step process that a cable operator must follow in order to be reimbursed by the State for relocation costs. First, the cable operator must establish its eligibility for reimbursement. Second, the cable operator must substantiate the costs of reimbursement. Cable operators should contact their District ODOT office as early as possible in the process to discuss reimbursement procedures.

### A. Cable Operator Reimbursement Eligibility

Under guidelines established by the Ohio Department of Transportation (ODOT) pursuant to R.C. § 5501.51, cable operators are eligible for reimbursement when the existing facilities are affected by the project and located on property where the cable operator has a compensable property right in one or more of the following:

- On property owned by the cable operator or utility;
- On private right of way with a valid easement;
- On private right of way with valid prescriptive rights (affidavit required);

# V

## Legal Counsel

Jonathon McGee

June 3, 2011

Page 3

- On public road right of way with a valid easement which predates the rights held by the State. This means that the easement itself existed before the right of way became public. A cable operator could “piggy-back” on that easement as described below either before or after the right of way became public.

Reimbursement eligibility must be substantiated by the State having on file a copy of the pertinent document (i.e., an easement or affidavit) or by verifying the applicable recording data (i.e., by deed book, volume and page) which supports the reimbursement claim. If none of the above criteria is met, the cable operator is not eligible for reimbursement. ODOT *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8204 (12/1/2006).

To establish an easement, a cable operator must submit evidence that verifies the existence of a proper easement. A cable operator, itself, does not typically have a easement. Rather, pursuant to R.C. § 4905.71, the cable operator, “upon reasonable terms and conditions and the payment of reasonable charges,” attaches its cable to a utility pole or other location where the utility has the easement. The cable operator signs an agreement with the utility that allows the cable operator to attach its cable. In essence, the cable operator “piggy-backs” on the utility’s easement. Accordingly, the cable operator can provide a copy of the utility’s easement where the cable is located and a copy of the agreement between the cable operator and utility allowing the cable operator to attach its cable at the site within that easement. If the utility’s easement is proper, and if the agreement between the cable operator and utility is proper, then the cable operator should be able to establish a right to reimbursement.

### **B. Procedure for Requesting Reimbursement**

Except when a cable operator is seeking reimbursement for partial costs of relocation, in order to make a proper reimbursement request, the cable operator must submit a complete and final bill of the relocation work covering all incurred costs that has been prepared on ODOT’s online, standard Summary of Billing form RE 75-2. In addition to the RE 75-2 form, the cable operator must submit documentation supporting each item listed. For example, contractor payments must be substantiated by invoices from the contractor and a copy of the canceled check or payment record from the cable operator. Proof of payment for recorded purchases of rights-of-way must be supported by proof of payment that lists the name of the grantor, the amount paid, the volume, page and County of Record; if not recorded, proof of payment is shown by a copy of the canceled check or payment record. If the above criteria is met, the cable operator is eligible for reimbursement. ODOT *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8207.01 (12/1/2006). The final bill must be submitted within one year (365 calendar days) upon completion of the highway construction project. If the cable operator fails to submit costs within one year following the completion of the highway project, then the actual cost paid to the cable operator to date by ODOT will be considered as final payment. ODOT has the discretion to grant a limited extension of time in which to submit a

# V

## Legal Counsel

Jonathon McGee

June 3, 2011

Page 4

final bill. ODOT will review the cable operator's submission, verify the cable operator's eligibility for reimbursement (i.e., assure that it has an ownership interest in the property), verify the mathematical accuracy of the billing, and assure that all supporting documentation is properly attached. The procedures for a cable operator's submission and ODOT's verification process are described in detail in ODOT's *Manual*.

ODOT also allows a cable operator to request partial reimbursement to lessen the relocation cost impact. This allows the cable operator to be reimbursed for initial costs incurred during the preliminary engineering, right of way, and materials necessary for the relocation of those facilities. The cable operator must submit the same information, on the RE-75-2 form, and substantiating documentation as above. As the cable operator incurs additional costs in the relocation, the cable operator may submit additional partial billings in the same manner to cover those costs. ODOT *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8207.02 (12/1/2006).

### **III. Reimbursement Process for Local Public Agency (LPA) Projects**

There are two types of Local Public Agency (or LPA) projects – those administered by ODOT (ODOT-let) and those administered by the Local Public Agency, in other words, the local city, county, or village (LPA-let).

#### **A. ODOT-let Projects**

All cable operator adjustments or relocations on ODOT-let LPA projects that ODOT administers for a city, county, or village must conform to the policies and procedures set forth in the ODOT *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8208.01 (12/1/2006). The cost of these projects is the joint responsibility of the LPA and the Federal Highway Administration; not ODOT. However, because it administers the project, ODOT is responsible for assuring compliance with these policies and procedures.

The local ODOT District Utilities Office works closely with the LPA to assure that cable operator relocation functions are properly addressed. ODOT is directly responsible for review of all cable operator relocation submissions to assure conformance with the requirements of the ODOT *Manual* and provide necessary coordination with the Federal Highway Administration.

Unless paid directly by the LPA, cable operator billings will be processed in accordance with Section 8207 of the ODOT *Manual* as described above. Upon notification by ODOT as to the acceptability of the cable operator relocation submission, the LPA is responsible for issuing the approval to the cable operator. Also, the District must notify the LPA of its obligation to deposit funds with the State for payment of all cable operator relocation costs not eligible for

# V

## Legal Counsel

Jonathon McGee

June 3, 2011

Page 5

Federal participation. Finally, the LPA must be advised that it is responsible for all costs associated with construction delays caused by the cable operator.

### **B. Local-Let Projects**

Local Public Agency, or LPA, highway projects that are administered by the city, county or village are referred to as Local-let LPA projects. These projects do not follow the traditional project development process where ODOT is responsible for project administration. Instead, the project agreement between ODOT and the LPA must clearly define the responsibilities of each party, including the handling of the cable operator relocation functions. In this regard, the District Utilities Office provides guidance to the LPA regarding necessary cable operator relocation activities.

All cable operator adjustments or relocations on Local-let projects must conform to the policies and procedures set forth in the ODOT *Manual*. As with ODOT-let projects, ODOT is responsible for assuring that compliance with these policies and procedures occurs. Similarly, the local ODOT District works closely with the LPA to assure that cable operator relocation functions are properly addressed. ODOT *Procedure for Utility Relocation, Adjustments and Reimbursement Manual*, Sec. 8208.02 (12/1/2006).

Similar to what ODOT does when it administers projects, the LPA must determine whether the cable operator has a compensable property right (see Section II.A., above), review and approve the cable operator's relocation plans and estimates, and verify compensable property rights and contractor information. The cable operator that is eligible for reimbursement should prepare the following data and submit it to the LPA as promptly as possible: a plan, including cross section and/or profile of the existing and proposed facilities within the affected area; and a detailed estimate of the cost to cover all work to be performed.

All invoices should be broken down to show actual costs for all appropriate and approved expenditures. The LPA must review partial and final utility force account billings for conformance to the approved plan and estimate and verify that funding is in place. At that time, the LPA checks for betterments or ineligible work, reviews support documentation and proofs of payment, and if the cable operator's bill is acceptable, issues payment to the cable operator. If there are Federal funds involved, the LPA reviews the bills and forwards them to the ODOT District for approval before the LPA can make payment. The LPA then applies to ODOT for the Federal share.

Additional detail on the LPA-let reimbursement process is contained in the Office of Local Projects, *Manual of Procedures-Locally Administered Transportation Projects* (available at ODOT's website:

<http://www.dot.state.oh.us/Divisions/TransSysDev/ProgramMgt/Projects/Pages/ManualofProcedures.aspx>

# V

## Legal Counsel

Jonathon McGee

June 3, 2011

Page 6

### **IV. The Reimbursement Process for Port Authorities**

Unlike the standardized ODOT procedures, there are apparently no standard reimbursement procedures used by port authorities. Although port authorities are created by statute (R.C. Chapter 4582.), each port authority operates independently. A cable operator should work with the port authority to determine what information and supporting documentation the port authority needs for the reimbursement request. The most conservative course would be for a cable operator to prepare the same sort of information described above that it would submit to ODOT.