

TESTIMONY ON BEHALF OF
NUCA PA
SENATE TRANSPORTATION
COMMITTEE



2/2/2016

DELAY IN DELIVERY OF STATE
ROAD AND BRIDGE PROJECTS

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THE DELAY IN DELIVERY OF STATE ROAD AND BRIDGE PROJECTS

TUESDAY, FEBRUARY 2, 2016

We are pleased to offer this testimony to the Senate Transportation Committee on behalf of NUCA of Pennsylvania, a trade association primarily representing contractors, subcontractors, and suppliers performing work on utility and highway construction projects in Pennsylvania. Our contractor members frequently perform work within the public right-of-way, and may work for a variety of public and private owners, including performing projects for PennDOT, the PA Turnpike Commission, municipalities, municipal authorities, or for utility firms themselves. A typical project for one of our contractor members might include the replacement of a sanitary sewer system for a municipal authority located within the public right-of-way, which may involve the need to relocate other lines within the same trench or relocation of the aerial lines within the Project limits. Many such projects also involve pavement restoration work. Many of our members also perform paving and bridge construction on PennDOT highway construction projects and/or may work directly for a utility company as their private contractor that performs the utility relocation work on such projects. Thus, our members are sensitive to the issues faced by all sides on this issue.

Offering testimony on behalf of NUCA today will be two of our members. First, James Kutz, a construction and procurement attorney with the Harrisburg law firm of McNeese Wallace & Nurick LLC, an associate member of NUCA, will address the Committee regarding how delays in the relocation of a utility's facilities located within the public right-of-way impacts state road, bridge, and utility construction projects on which our members

work, and his testimony will also include a discussion of potential solutions to help minimize such delays, and to reduce the costs of such delays to the taxpayers when they do occur. NUCA will also offer testimony from Bruce Hottle, President of Eagle Concrete Products, Inc., a long time NUCA contractor member from Somerset, Pennsylvania, which supplies products and performs work on many public projects. Mr. Hottle will offer testimony on the impacts of project delays to not only NUCA's member firms, but on the employees of our member firms as well. While we are aware that others testifying today may address delays which may occur prior to construction, our focus will be on delays to transportation projects after the Notice to Proceed is issued. Also, while many issues can delay construction projects, our testimony will focus on the issue of utility related delays to highway and bridge projects. These delays usually arise out of two things: (1) mismarked or undisclosed utility lines, or (2) delays by utility firms in relocating facilities that must be moved to allow construction to proceed.

As this Committee considers testimony today regarding any possible legislative action to address the issue of delays in the delivery of highway and bridge projects, our industry would like to offer input on three primary concerns: (1) taking steps to prevent as many utility relocation delays as possible, and to minimize the impact of the relocation delays that do occur; (2) taking steps to ensure that contractors are fully compensated in the event delays to projects occur through no fault of their own; and (3) continue to take all steps to ensure the safety and well being of our employees, including not allowing concerns over delayed construction projects to impact the safety of our employees, and to minimize the job shutdowns and possible layoffs necessary when projects are suspended due to lengthy delays in relocating utility structures or other project delays.

Factors Which Contribute to Utility Delays on Highway and Bridge Projects

Before discussing the problem of delays in the delivery of road and bridge projects, it is important to note that the vast majority of such projects finish on time. It is also important to keep in mind that when thousands of contracts involving billions of dollars of construction are entered into each year, not every job will go as planned. This is a problem that will never be completely solved, but it is certainly helpful to discuss potential legislative solutions to minimize the problem.

We would also note that this is not a new problem. For example, we are aware of studies done by various government entities, including a study by the United States General Accounting Office (GAO) regarding the impact of utility relocations on highway and bridge projects completed in the late 1990's. That study addresses many of the same issues that this Committee is currently confronting (i.e. that utility delays affect the completion of highway and bridge projects, and that states have mechanisms in place to pay contractors in the event of such delays). Interestingly, with respect to "mitigation methods" used to reduce the utility delay issue, the GAO report studied the various methods that states used to attempt to encourage or compel utility companies to relocate utilities for federal highway and bridge projects in a timely manner. The study found that forty-one states attempted to resolve the utility relocation problem through early planning and coordination, that seven states utilized monetary penalties for the untimely location of utilities, and that three states used monetary incentives to pay utilities for finishing in a timely manner.

We are also aware of prior attempts made by both PennDOT and the Public Utility Commission to alert utility companies as to their duties to relocate facilities. Attached hereto as Exhibit A are two letters from 2002, one from The Secretary of Transportation, and one from the Secretary of the PUC, which highlights the difficulty that both public owners and contractors incur in the event utility facilities are not timely relocated during

construction projects. Clearly, this is an issue that has impacted highway projects for some time.

To attempt to solve the problem of utility relocation delays and their impact on public highway and bridge projects, it is critical to fully understand the magnitude of the issue this Committee is attempting to solve. The overriding problem is that virtually every highway, bridge, and utility relocation project in Pennsylvania, which total billions of dollars of construction each year, necessarily requires the relocation, (either temporarily or permanently), of existing utilities located within or immediately adjacent to a public right-of-way. The very nature of relocating utilities is complex, time consuming, and expensive, and most projects will involve the coordination of multiple parties who are not a party to the contract. Other complicating factors include:

- 1) Given the age of some of the utility infrastructure located underground, the exact location of existing underground facilities is often unclear, thus making design and construction of highway and bridge projects that much harder;
- 2) Whether the utility facilities are underground or overhead, the utility relocation process is often "linear" in nature, meaning that one utility company often must complete its work before another firm can begin, thus necessarily extending the project time;
- 3) Construction projects are delayed by a number of factors, including weather, unforeseen site conditions, slow production, delays in submittal reviews, and a number of other factors which are unrelated to utility relocation, and those project delays will impact the scheduling of the crews necessary to move the utility lines;
- 4) The crews required to relocate utilities are specialized, and may not necessarily be readily available when the contractor on a particular highway or bridge project is ready for the crew to perform the needed work. These specialized crews may

- be unavailable for a number of reasons, including, for example, emergency situations that the utility crews might be addressing, a decision by the utility firm to prioritize customer work over highway relocation work, the availability of man power during certain times of the year, or for a number of other reasons;
- 5) When working for a public owner, contractors have no privity of contract with the utility companies responsible for relocating the utility lines, and thus there is a limit to the leverage that contractors have in attempting to coordinate the work of multiple utilities who must move their facilities for the highway project to proceed;
 - 6) As this construction proceeds, and contractors find that existing utilities were either mismarked or not disclosed on the plans, there is often a need to redesign the utility infrastructure work during the project, and thus work on the project may be halted while redesign occurs;
 - 7) Many underground utility facilities are aging, and while a traffic pattern is in place and the trenches are open, etc., it is often prudent to spend the time and money to replace those facilities at the same time as a road or bridge project. That often minimizes the impact to the public but may have the appearance of making the job last longer;
 - 8) The relocation of multiple utilities within a tight project site requires significant coordination of many parties. Contractors are not always perfect in coordinating such efforts, which may result in delays. Additionally, not every public owner has the resources or technical capabilities that PennDOT or the Turnpike Commission may have, and thus local jobs may be more prone to such delays; and

- 9) When multiple utilities must be moved, a delay by one will impact the schedule of another, and thus crews which were scheduled for one project may be moved to another job, and may not be available right away when the project is ready.

Another issue which can result in delayed delivery of highway and bridge projects due to utility delays is that for many reasons, jobs may be put out to bid without fully investigating or understanding how the existing utilities and the relocation of those utilities will impact construction. For example, a job may be put out to bid before all utility coordination takes place in order to maximize available funding, because of emergency situations which necessitate a quick bid process, because of public or political pressure to break ground on a certain project by a certain time, or because there is a need to construct one project in advance of a second project.

Another issue that contributes to utility delays is that road construction contracts requiring utility relocation sometimes utilize unrealistic schedules for contract completion or the completion of the utility work itself. If multiple utilities are required to move their facilities within the same area on a tight construction site, contractors are better able to manage their work forces if a realistic timeframe is built into the job for each utility to mobilize, complete their work, and then demobilize so the next utility can follow behind with its work. Unrealistic schedules make it more difficult for contractors to coordinate the work of multiple parties. Please note, however, that utilizing more realistic schedules may ultimately not result in "quicker projects," but those jobs with more realistic schedules would be more cost effective because it would allow contractors to plan their crews more efficiently, provide better bids, and minimize layoffs. Finally, while we recognize the difficulty that design professionals face in relocating and identifying existing utilities on the drawings, we are aware of instances where a more detailed investigation before the project was put out for

bid, either by the owner or one of its consultants, would have resulted in more thorough plans and fewer delays during construction.

Cost Impacts of Utility Delays to Contractors

As this Committee considers the issue of how utility delays impact construction projects, it is critical to understand the full cost impact on utility contractors and their employees of project delays, particularly when a full or partial shutdown is required. When delays of any sort occur on a construction project, there is a significant cost to the contractor. Some examples of the types of costs that contractors incur on a daily basis in the event of a project delay are such things as: (1) extended field overhead; (2) idle labor and equipment; (3) equipment demobilizations and remobilizations; (4) extended costs for maintenance and protection of traffic items; (5) construction inefficiency costs for having to work around an area of the project on which work cannot be performed; (6) pushing work into unfavorable weather; (7) delaying work into another year resulting in escalation expenses; (8) added bonding and insurance costs; and (9) extended or unabsorbed home office overhead. These costs are borne not only by prime contractors, but by subcontractors and suppliers as well.

Once an extensive delay occurs, it is also virtually impossible for a contractor to be made whole. This is particularly true depending on how the contract attempts to assign the risk of delays for various items, including the relocation of utilities. The problem is exacerbated when the delay is of an uncertain duration, particularly in situations where repeated promises are made and the contractor must have work forces on standby so that it can resume work as soon as the utility delay is over. This situation invariably results in disputes, as the public owner is frustrated by the delays of a third party, and as the contractor must wait patiently (while incurring costs) to proceed with completing a project

which was impacted through delays which are no fault of its own. This results in a dispute over how to compensate the contractor for the delay. It also involves extensive administrative costs for recordkeeping and scheduling. The contractor is often forced to front the costs and hope it can get paid for some or most of its costs, and public owners frequently object to paying for all claimed costs. Thus, while there are risk shifting clauses which theoretically protect contractors for utility delays, as a practical matter, getting paid for all costs is extremely difficult.

Finally, we also recognize that contractors are not the only entities harmed by utility relocation delays, as the public owners themselves also have inspection costs and other delay related costs in the event the project is delayed by a third party. We also recognize that there is often an inconvenience to the traveling public and to affected business owners when projects extend beyond their anticipated completion date. Reducing the impact of utility delays will help reduce all of these costs.

Safeguards Already in Place

Before discussing possible solutions to the utility delay problem to consider, we must also first recognize what is already in place to mitigate the impact of the problem. First, Pennsylvania already has in place the Underground Utility Line Protection Act, known as the Pennsylvania One Call Law, 73 P.S. §§ 176-186, which places the responsibility on all parties, including the facility owner, the project owner, the designer, and the contractor, to locate existing facilities in the right-of-way which may be impacted by construction, and to take the necessary steps to ensure that such lines are not hit during construction. We believe that some modifications to the One Call Act may help mitigate the impact of the delays which have given rise to this hearing.

Second, there are many steps that are taken by multiple parties during the design stage of any highway bridge or utility infrastructure project to help minimize the impact of utility delays. PennDOT itself devotes a significant portion of its Design Manual to addressing utility issues in the project plans. Part Five of PennDOT's Design Manual ("DM") deals exclusively with utility relocation. For every project that is designed for PennDOT, or on which DM Part 5 is applicable, there are extensive steps that are required of design professionals, both during preliminary design and final design, to not only identify existing utilities, but to provide engineering for how they are to be relocated during construction. As DM Part 5 indicates, every PennDOT project requires "utility clearances, usually in the form of the preparation of a utility clearance form D-419, which is not to be completed until all acceptable written arrangements are received from utility companies located on the highway project." Such utility clearance certification must be issued prior to project advertisement. These are just a few of the safeguards within PennDOT's Design Manual that attempt to make sure that utility relocation does not impact highway projects.

One other interesting portion of PennDOT's Design Manual identifies the concept of "subsurface utility engineering" ("SUE") as part of the identification process for existing utilities. SUE is defined as "an engineering process that utilizes new and existing technologies to accurately identify, characterize, and map underground utilities early in development of a project or in certain cases during construction." DM Part 5 then notes that there are many different methods of gathering data regarding underground utilities, which require varying levels of efforts. The Design Manual sets forth four "quality levels" of obtaining underground utility data, which include Quality Level D (review of existing records and verbal recollection), Quality Level C (surveying and plotting visible above-ground features), Quality Level B (subsurface geophysical technology to identify the existence and horizontal position of subsurface utilities), and Quality Level A (non destructive excavation

methods to determine precise horizontal positions of sub surface utilities). As the Design Manual notes, the accuracy and reliability of underground information increases from quality level D to quality level A, but the cost of obtaining utility data also increase from quality level D to quality level A. Thus, not all SUE measures are used on every project. Rather, Section 6.3 of DM Part 5 directs how and why to use SUE, and provides a method to determine a "utility impact rating" to determine what level of Quality utility investigation is going to take place prior to advertising the Project for bids. Section 6.2(b)(1) lists nine categories of costs that can be reduced or eliminated through the use of SUE, including utility relocation costs, utility damage costs, emergency restoration costs, traffic delay costs, business impact costs, user service costs, environmental impact costs, information gathering and verification costs, and legal-litigation costs. Notwithstanding all of the possible methods of performing pre-bid determinations of the existence of utilities, the use of the most reliable methods of obtaining utility data is sporadic, primarily due to either the prohibitive of costs involved in such investigation, or due to circumstances which render several methods non-practical. While even the use of the highest Quality level of SUE will not solve the issue of timely relocation of utilities, the increased use of such methods could at least reduce the number of delays due to unforeseen utilities.

Similarly, even on projects which may not rely on PennDOT's design manual, design professionals frequently develop well thought out plans with sequences for utility construction which identify the utility work that can occur prior to the highway or bridge project, and what work can be done concurrently with the project. Additionally, there are many discussions between public owners, designers, and utility companies during the design stage before specifications are placed into a construction contract that identify, for example, the utility facilities that are to be moved and the estimated time that it will take to relocate the facility.

The extensive work in the design phase of a public project often results in construction specifications which dictate how utility relocation work is going to be performed. For example, in their contracts, PennDOT lists all utility companies or local authorities that may be affected by the placement, replacement, relocation, adjustment or reconstruction of utility facilities during construction, and separates them into six categories.

These categories include:

- (1) Prior – to be completed before Notice to Proceed;
- (2) Restrictive – to be completed by utilities before operating without restriction;
- (3) Concurrent – utility work which is simultaneous with, but not restricting construction operations;
- (4) Coordinated – utility work which must be phased with specific construction operations;
- (5) Not Affected – facilities in the construction area which are not anticipated to be affected by the project work; and
- (6) Incorporated – utility relocation work to be incorporated into the prime highway construction contract.

In addition to separating all of the utility structures on a highway project in these six categories, PennDOT also asks utility firms to identify all conditions affecting the utility's ability to perform a certain type of relocation work (such as certain days of the week, times of the year, etc.) and also asks all utilities to provide an estimated time which it will take to complete the work in question. Contact information for each utility and municipality/ municipal authority is also included. These contract provisions provide an example of safeguards that are already in place to minimize utility delays on state highway and bridge projects, and demonstrate the level of effort that all stakeholders on this issue undertake to assure projects run smoothly.

Third, on most public projects, significant steps are taken after project award and prior to construction proceeding to minimize the impact of the utility delays. Utility companies are asked to attend coordination meetings held between the contractor and the public owner to make sure that the utility relocation process is handled as seamlessly as possible. Utility firms spend considerable resources to attempt to minimize delays. Thus, while utility delays can delay road and bridge projects, significant efforts are expended to make sure that does not occur.

Finally, many public contracts already contain significant protections to attempt to make sure contractors should be paid for the impacted utility delays. For example, PennDOT's Form 408 Specifications contain two separate provisions which address this issue. Those provisions are attached as Exhibits B and C hereto. One provision is found at Section 110.02 of the Form 408 Specifications, and that section indicates that contractor will be paid in the event of differing site conditions, which include conditions which are encountered in the field which were different than what was represented in the drawings. An undisclosed and/or mismarked utility line would be examples of a differing site condition. With respect to delays in utility relocation, PennDOT's Form 408 Specifications include a section (Section 105.06) which specifically contemplates that a contractor will be paid its costs incurred in the event that a delay by a utility company in relocating its facilities delays the critical path of the project. The purpose of these provisions is to place the risk of such losses on the party which is most able to control the risk. By placing such clauses in contracts, public owners bear the benefit of contractors not putting contingencies in their bids for such situations, only to have those unforeseen contingencies not occur. While there may be disputes about the amount of compensation a contractor should be paid in the event of a utility delay, liability for such costs should not be in dispute. Thus, there are many safeguards already in place to both attempt to limit utility delays which may impact

highway and bridge projects, and which provide mechanisms to compensate contractors for such delays.

Impact on Employees of Utility Contractors

As this Committee considers the impact of utility delays, one other factor we would like to stress is that any time a construction project is significantly delayed, whether it be for utility delays or some other reason, and particularly if there is a project shutdown, there is an adverse impact on the employees of our member firms as well. By its very nature, certain aspects of highway and bridge construction is seasonal because it is weather sensitive. As such, it is not unusual for layoffs to occur during winter months. However, that fact makes it even more troubling when projects are shut down in good construction weather for extended periods of time due to utility delays, as contractors may not have other projects to which to move its crews. That can result not only in layoffs, but in potentially a loss of employees if work is not available.

As a final note, we want to emphasize that while the timely completion of highway projects is obviously a paramount concern, that we do not sacrifice speed for safety. The One Call Law was put into effect largely to protect the employees of contractors and utility firms such that catastrophes do not occur. Thus, as we discuss various ways of increasing the speed of delivery of highway and bridge projects, we want to make sure that safety is not compromised.

Potential Solutions for Utility Delays on Highway and Bridge Projects

As this Committee considers what, if any, legislative action is appropriate to mitigate the impacts of delays on road and bridge projects, we believe it is important to note that not every contract dispute or delay can be solved through legislation, and regardless of any action the General Assembly make take on this issue, delays to public projects will still

occur, and disputes on those projects will still arise. All parties to public contracts, and all third parties involved in any way with a highway construction project, including utilities, other government agencies, etc., can seek to improve their administrative and contracting processes to mitigate delays to these projects. For example, paying more attention to issues such as more realistic scheduling, better coordination, and better contract communication can help mitigate delays to highway projects. Additionally, just by holding hearings such as the one today, hopefully we can create a heightened awareness of the impacts of utility related delays not only to contractors, but also to the government agency letting the contract and to business owners located within or near a work zone.

We are also mindful that whatever legislative solutions are considered will likely create additional contractual and financial risks to one or more of the stakeholders in this issue. The cost of those risks will undoubtedly have to be passed on to ratepayers, taxpayers, or customers. Thus, while we are offering several potential legislative solutions for your consideration, we are presenting them from the perspective of utility contractors who work on highway projects and their employees, and we are presenting those possible solutions which we believe will have the greatest impact on minimizing the problem of utility related delays in the delivery of highway and bridge projects.

We respectfully submit that there are four areas for possible legislative action that this Committee should consider. As requested, these four suggestions are set forth in bullet point form at the end of this testimony. The first two suggested steps focus on developing new statutory requirements that create financial penalties or potential liability on those with the greatest ability to minimize utility delays on highway projects if there are "at fault" delays which impact projects. Such potential liability is likely the most effective way to stop delays from occurring in the first instance. The third suggestion, which is an alternative or to be used in conjunction with the first two suggestions, is that the General Assembly could create

financial incentives for the utility firms to move more quickly. The final suggested change is to mandate certain provisions be added to every public contract, including "risk allocation" language in all public contracts that recognizes that delays on projects will happen, but assures that contractors and their employees are protected from financial harm when utility delays occur.

First, we believe this Committee should consider recommending changes to expand the scope of the Pennsylvania One Call Act to place additional responsibilities on the Project Owner, the Facility Owner, and the Design Professional, to reduce or eliminate delays in relocating utility facilities located within the public right-of-way. As you are aware, the current focus of the PA One Call Law is to protect the public health and safety of all those on or near construction projects by preventing excavation or demolition work from damaging underground lines during construction. The One Call Law places the onus of preventing such damage and accidents on all parties, including the owner, facility owner, designer, and excavator. Under the law, all four entities must take the necessary steps to locate all utility lines that may be impacted by a project, and to make sure that those lines are not damaged. The law also establishes a One Call System through which notice of any utility work is to be provided and through which the marking of all facilities by the affected utilities is to occur in advance of construction. However, the One Call Law could go much further.

For example, Section 6.1 of the One Call Law identifies the responsibility of the Project Owner, and one of the stated duties of the Project Owner is to "utilize sufficient quality levels of subsurface utility engineering or other similar techniques whenever practicable to properly determine the existence and positions of underground facilities when designing known complex projects having an estimated cost of Four Hundred Thousand Dollars (\$400,000.00) or more." This section also prohibits Project Owners from releasing

to bid or construction any project until after final design is completed, and to furnish pertinent data obtained through subsurface utility engineering to the One Call System. These Owner responsibilities could easily be expanded to create a statutory duty to also take sufficient steps to allow for the timely and satisfactory relocation of utility facilities located within the right-of-way in which the project is being constructed. These duties could include, for example, the duty to allow sufficient time for such relocation to occur, to develop reasonable construction schedules for utility relocation, to contact utilities directly to obtain proposed schedules for relocation, etc. While much of this is already occurring, creating a statutory duty to do so may highlight the importance of these actions, particularly to those public owners which do not have large statewide construction programs.

The duties of both the Utility Facility Owners and the Design Professionals in the One Call Act could also be expanded to address potential utility relocation delays as well. Section 4 of the One Call Act addresses the responsibilities of a Designer, and while this Section requires designers to make a "reasonable effort" to prepare construction drawings to avoid damage and to minimize interference with the facility owner's facilities, it also indicates that a designer shall be deemed to have met the obligations under the Act if it merely calls the One Call System and can demonstrate proof of that communication. This Section also indicates that a Designer who complies with the terms of the Act, and which is not otherwise negligent shall not be subject to liability or incur any obligation to Facility Owners, operators, owners, or other persons who sustain injury as a result of the excavation or demolition planning work of the designer. Respectfully, this Section should be reevaluated in light of the concerns regarding both utility relocation delays and unforeseen utilities that this Committee is addressing. A public owner and its design professional should certainly be in position to know what is located beneath the right-of-way that the public owner controls. Historical information can be reviewed, field investigations

can be conducted, and prior construction contracts within the same work zone can be evaluated to determine what utility conflicts exist. Mandating these steps by statute could help create better utility information in plans. Requiring a more thorough pre-bid study would likely mitigate at least some of the utility delay issues which impact highway projects.

Similarly, like public Owners, Designers who have a role in developing project scheduling specifications, sequencing, etc. should also be charged with the duty to allow a reasonable time for utility relocation to take place during construction, and to perform a constructability review as it relates to utility relocation. Such steps will obviously create an additional layer of risk for design professionals, and will add a layer of cost to conduct additional design reviews that will increase the cost of public projects. However, such steps could certainly help minimize the delays on highway and bridge projects once the Notice to Proceed is issued,

Finally, the responsibilities of the Facility Owners, as that term is defined in the One Call Law, should also be reevaluated, as the utilities themselves are in the best position to be aware of the location of their existing facilities, and are also obviously in the best position to timely perform the location of their facilities as it relates to highway and bridge projects. Once again, the One Call Law focuses on the marking of utility lines prudently so that they are not hit during construction. The One Call Law could be amended to mandate that utility companies not only provide a reasonable schedule for relocating their facilities within the public right-of-way, but could also include financial penalties or liability if the promised dates are not reasonably met. These penalties could be in the form of liquidated damages or liability for any delay costs paid to the contractor. Obviously, such financial penalties would create an additional burden on utility companies to, for example, hire more crews. The costs of those crews may well be passed on to ratepayers. However, such financial penalties placed on the entity which is best able to control when the relocation work is

performed is likely the best way to solve the problem this Committee is currently considering.

Second, in addition to considering expanding the scope of the One Call Law, or possibly passing separate legislation which expands the responsibilities of Owners, Designers, and Facility Owners related to utilities, this Committee could also consider specifically allowing claims for negligent representation for economic losses by contractors and owners against both design professionals and utilities. As this Committee may be aware, in 2009 the Pennsylvania Supreme Court issued an opinion in the case of Excavation Technologies, Inc. v. Columbia Gas Company of Pennsylvania, 604 Pa. 50, 985 A.2d 840 (2009). In that case, the contractor had requested a utility firm to mark the locations of gas line around the worksite pursuant to the Pennsylvania One Call Act. The utility firm in question did not properly mark some of the lines and failed to mark others, and as a result the contractor struck several gas lines, which, while not resulting in any physical injury or property damage, did result in an economic loss due to project delays. The contractor opted to file a direct claim against the utility itself under the legal theory of negligent misrepresentation, which is found in Section 552 of the Restatement of Torts.

In ruling against the contractor, the Pennsylvania Supreme Court found that an excavation contractor could not directly sue a utility company for those economic losses, even when the utility company clearly mismarked the utility lines. One of the issues that was discussed by the Supreme Court in Excavation Technologies was the applicability of a fairly recently adopted theory of liability in the 2005 Pennsylvania Supreme Court decision in Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270 (2005), in which the Supreme Court allowed a negligent misrepresentation claim against a design professional by the contractor for economic losses. However, in the Excavation Technologies case, the Court refused to extend the negligent misrepresentation doctrine to

allow a direct claim by contractors against utility firms. As part of its rationale, the Court noted (we believe mistakenly) that "excavators, not utility companies, retain the duty to identify the precise location of facilities." The Court also found that public policy weighed against imposing liability for the contractor's economic losses, because permitting recovery would shift the burden of loss from the excavators, who the Court opined are in the best position to use prudent techniques on job sites to prevent facility breaches, to the utility companies. The Court was concerned that if utility companies were exposed to liability for an excavator's economic losses, such costs would inevitably be passed onto the consumer. In closing, the Court specifically noted that "if this is to be done, the legislature will face those specifically. Until that day, we decline to afford heightened protection to the private interest of entities who are fully capable of protecting themselves, at the public's expense." Respectfully, when it comes to both the location of utility lines and the timeliness of relocating such lines, utility firms are in a much better position than contractors to protect against the risk of loss.

In the Excavation Technologies decision, the Supreme Court essentially invited the General Assembly to at least consider whether utility companies should be exposed to liability for their actions related to the identification of utility lines, recognizing that those costs may eventually be passed on to ratepayers. This Committee should strongly consider legislation which not only allows such direct claims in the event lines are mismarked or misidentified, but should also consider allowing direct claims against utility firms in the event of a delay by a utility company relocating lines causes economic losses to a contractor. This strong financial disincentive will have a chilling effect on utility delays, as the utility firms would be required to expend sufficient resources to timely perform their work on highway and bridge projects, or face financial consequences.

Third, as an alternative to the financial disincentives created by the first two suggestions, or to be used in combination with those measures, the General Assembly could consider either having the public owner pay to have utilities relocated, or request public owners to pay financial incentives for utilities which complete their relocation work within the agreed to timeframe. Such financial incentives would recognize that the utility firms themselves are often placed in the difficult position of trying to prioritize not only their own construction-maintenance work for their private customers, (which may include emergency repairs), but may also be coordinating work on dozens of public projects at any one time. Our member firms which work directly for the utility companies are particularly sensitive to these issues, as they may be asked to move from project to project based on how the public owners may prioritize the affected utility work. Including financial incentives for timely completion of utility work would also help offset not only the costs of the relocation work itself, but also any potential penalties that are considered. From the perspective of utility contractors, we are not looking to unfairly penalize either the public owner or the utility firms, as both entities clearly must manage extraordinarily complex large construction programs. However, if we truly want to reduce the number of road and bridge projects which are delayed by delays in utility relocation, rather than just allowing delays to occur and attempting to make sure that contractors are compensated for these delays, the best way to mitigate the delays is to create either a financial disincentive or incentive for the timely relocation to occur.

The fourth and final legislative change that we urge this Committee to consider is to require that certain provisions be included in every public contract. For example, we urge that it be made mandatory that all public agencies letting construction contracts include in their contracts provisions similar to those contained in PennDOT's Form 408 Specifications relating to both differing site conditions and utility delays. Many public agencies already

have a differing site conditions clause in their contract, but some still do not. Those local government contracts which incorporate PennDOT's Form 408 Specifications in their entirety will obviously include the utility delay specifications, but not all local government contracts contain these provisions. By unifying these protections on public projects through a legislative change, this Committee can provide at least some level of protection to contractors and their employees in the event of utility delays.

Thank you for your consideration of this testimony. We appreciate the Committee's attention to a very important public contracting matter.

RECOMMENDED SOLUTIONS

- Consider revisions to the Pennsylvania One Call Act which increase the responsibilities of Project Owners, Facility Owners, and Design Professionals, to not only locate utility facilities within a project, but to take all steps necessary for timely relocation of those facilities during construction, and to provide financial penalties or direct causes of action against those entities in the event of delays;
- Create a statutory claim for negligent misrepresentation against either design professionals or utility companies in the event of misrepresentations about the location of facilities are contained in the contract documents or if schedules are not met. Such potential liability would not only protect utility contractors and their employees, but would also create a financial disincentive which will help minimize utility delays;
- As an alternative to the first two suggestions above, or to be used in combination with one or both suggestions, the General Assembly could also consider creating financial incentives to be paid by the public owner, for timely completion of utility relocation work.
- Mandate the inclusion in any public contract certain risk allocation provisions that ensure that contractors are compensated in the event of differing site conditions, such as mismarked or undisclosed utilities, and in the event utility firms delay relocating their facilities which are similar to the provisions that already exist in PennDOT contracts.

EXHIBIT A

May 30, 2002

Re: Relocation of Utility
Facilities within Highway
Right-of-Way

To All Concerned:

The Pennsylvania Department of Transportation has been experiencing delays in the completion of the construction of transportation improvement projects because utility companies are failing to relocate their facilities located within Department Right-of-Way in a timely manner. The Pennsylvania Public Utility Commission has recognized the issue and has put all affected jurisdictional utilities on notice of the Commission's expectations of utility cooperation in such manners. The Commission issued a Secretarial Letter on April 17, 2002 addressing this issue.

These failures of the utilities to relocate their facilities in a timely manner are forcing the Department to pay unnecessary construction delay damages to our contractors. Expending public funds for delay damages resulting from utility related delays correspondingly reduces the overall amount of infrastructure improvements that the Department can complete.

Title 67, Chapter 459 of the Pennsylvania Code, 64 Pa. Code Chapter 459.7(17), requires utilities to relocate their facilities at the request of the Department for highway alteration projects. When these facilities are not relocated in a timely manner, and such failure results in construction delays and claims, the Department may be forced to take appropriate legal action to recover the costs of construction delay claims from the responsible utility company.

Relocation of Utility
Facilities within Highway
Right-of-Way

May 30, 2002
Page 2

The Department is respectfully requesting your cooperation in relocating utility facilities in a timely manner so that any future construction delays are avoided. The Department understands that requiring relocation from the public right-of-way may not always be convenient or a priority for the affected utilities. However, in return for the privilege of free occupancy of public right-of-way, a utility has a corresponding duty to relocate its facilities at its own cost when the Department must alter the highway system.

The Department has been and will continue to be obliged to provide ample notification to the utility companies of our pending work program.

We thank you for your compliance.

Sincerely,



Bradley L. Mallory
Secretary of Transportation



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

2002.0057

April 17, 2002

All Gas and Electric Jurisdictional Utilities and
Facilities based Local Exchange and Inter-exchange Carriers

**RE: Relocation of Utility Facilities within Highway Rights-of-Way
Docket Number M-00021608**

To All Concerned:

It has come to the Commission's attention that the Pennsylvania Department of Transportation (PENNDOT) has had difficulty obtaining cooperation in the repositioning of utility facilities situated within highway rights-of-way. It is the purpose of this letter to put all affected jurisdictional utilities on notice of the Commission's expectations for utility cooperation in such matters.

The timely relocation of utility facilities in highway rights-of-way is essential in keeping the cost and duration of highway improvement to a minimum. Rights-of-way in state highways are granted purely at the discretion of PENNDOT under the State Highway Law (Section 670-411 of the State Highway Law, Act of June 1, 1945, P.L. 1242, 36 P.S. §670-411) and there should be every expectation that some facilities will need to be relocated from time to time. The fact that this activity may be inconvenient at times does not excuse a utility from rendering the highest level of cooperation.

We look forward to your cooperation in this matter. The Commission shall remain in regular contact with PENNDOT on this issue. If you have any questions in regard to this subject please contact the Office of the Executive Director at (717) 787-5131.

Very truly yours,

James J. McNulty
Secretary

cc: Veronica A. Smith, Executive Director
Gina D'Alfonso, Assistant-Counsel-in-Charge
Shane Rooney, Assistant Counsel

EXHIBIT B

If necessary, the District Executive will determine and order, in writing, any modifications or changes in the Plans, Standard Drawings, or Specifications to update, adjust, accept, or complete the work contemplated by the contract as specified in Section 104.02. Wherever reference specifications or publications are specified, comply with the issue or edition (including interim AASHTO specifications and ASTM tentative designations) in effect on the date bids are opened, unless the date or year of the reference specification or publication is indicated or specified. If there is a conflict between a cited title and a cited section number, the title will take precedence over the section number.

105.05 RESPONSIBILITY OF CONTRACTOR—

(a) **General.** Keep direct control of the contract and see that the work is properly supervised and is performed satisfactorily and efficiently. Supervise the work personally or appoint a competent superintendent or representative to be on the project at all times. Give this superintendent or representative the authority to receive orders and directions; to execute orders and directions without delay; and to make arrangements for all necessary material, equipment, and labor.

Keep on the project, at all times, a copy of the plans, a copy of the specifications, and a copy of the contract, and a copy of all subcontracts.

The Department is not responsible for the Contractor's satisfactory completion of the contract work as a consequence of the presence of Department representatives or inspectors and their inspection.

Notify the Assistant District Executive for Construction in the District having responsibility for the project 3 days before the actual start of work. Keep the Assistant District Executive for Construction informed as to any changes in the scheduled date for starting work.

(b) **Work By Others.** For work to be done without the supervision of the Department, investigate the work and anticipate its execution and completion. The Department will not be liable for failure to anticipate the time of performance and completion of such work, except in those cases where, upon timely request, the Department has agreed to cooperate.

(c) **Gratuities and Penalties.** Do not give or offer, or allow agents, employees, or representatives to give or offer, either directly or indirectly, money, property, entertainment, or other valuable things, to any employee or representative of the Department for any reason, purpose, or cause, or as an inducement, bribe, or reward for doing or omitting to do any act, or for showing any favor or disfavor in relation to any matter relating to the contract. Any such action will constitute a violation of the contract. Upon satisfactory proof to the Secretary of such violation, the Department may terminate performance of the work and take steps to complete the project, as specified in Section 108.08.

105.06 UTILITY INFRASTRUCTURE AND UTILITY ADJUSTMENTS -

(a) **Utility Infrastructure and Utility Adjustments Interfering with Contract Operations.** Before submitting a bid for the project, examine the project site and any waste or borrow sites designated in the proposal to determine the location of all Utility Infrastructure and the need for any Utility Adjustments. The Department has indicated in the contract documents such Utility Infrastructure and Utility Adjustments as have been brought to its attention. The Department is not responsible for waste and borrow areas not designated in the contract documents. Accept the responsibility and risk relating to the conditions to be encountered regarding Utility Infrastructure and Utility Adjustments that are indicated in the contract documents or that can be ascertained from a careful pre-bid examination of the project site for any waste or borrow sites designated in the proposal.

Upon execution of the contract, inform all public service companies, individuals, and others owning or controlling any facilities or structures within the limits of the project, which may have to be relocated, adjusted, or reconstructed, of the plan of construction operations. Give due notice to the responsible party in sufficient time for that party to organize and perform such work in conjunction with or in advance of construction operations.

Cooperate with the Utility Infrastructure owners and the owners of all waste and borrow areas not on the project site. Make arrangements for Utility Adjustments necessary to perform the work as indicated in the contract documents. Arrange and perform contract work in and around such Utility Infrastructure in accordance with recognized and accepted engineering and construction practices and in a manner that assists the Utility Infrastructure owners in their required Utility Adjustments.

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Refer to the provisions of Act 287-1974, which specifies project responsibilities in regard to public health and safety during excavation and demolition operations in areas of underground utilities.

(b) **Delays in the Performance of Work.** No additional compensation will be paid because of an impact to the contract work from Utility Infrastructure and Utility Adjustments unless the Contractor establishes, to the satisfaction of the District Executive and the Chief Engineer, that the impact was unforeseen and unforeseeable by a reasonable contractor; that losses could not have been avoided by the judicious handling of forces, equipment and plants, or by reasonable revisions to the schedule of operations; and that the impact has resulted in a documented increase in the cost of performing the contract work, in which case only delay damages will be paid as specified in Section 111.

The following are conditions precedent to the right, if any, of the Contractor to an adjustment in compensation:

- Attend a coordination meeting(s) that will be scheduled and conducted by the Department before beginning construction. The meeting(s) will include all Utility Infrastructure owners. At this meeting(s), be prepared to discuss: the project schedule; all project milestones and required completion dates and all activities related to Utility Infrastructure and Utility Adjustments and; how the project schedule differs from the utility relocation schedule prepared by the Department during project design. Incorporate appropriate information from this meeting(s) into the project schedule as specified in Section 108.03(b) or the Scheduling Special Provision, if applicable. The Department will provide a record of the meeting(s).
- Furnish all schedule updates specified in Section 108.03(b) or the Scheduling Special Provision, if applicable, to all affected Utility Infrastructure owners.
- Comply with the requirements specified in Section 111.

(c) **Utility Adjustments by Others.** When required, owners or lessees are to bring railway tracks to the established line and grade. Utility Adjustments are to be performed by the owners of the Utility Infrastructure, unless otherwise indicated. Check the line and grade before base or pavement is placed adjacent to or around such Utility Infrastructure.

(d) **Damage to Utility Infrastructure.** Compensate the owner for all cost of repairing, replacing, or resetting any Utility Infrastructure damaged or disturbed by contract construction as specified in Section 107.12.

Coordinate with the railroad company to provide accepted measures for protection of railroad tracks and ballast from debris, silt, or other foreign matter.

Provide required means of protection, maintenance, cleaning, repair, and replacement of ballast. This work will be subject to the approval of the Railroad's Chief Engineer or authorized representative.

105.07 COOPERATION BETWEEN CONTRACTORS—The Department reserves the right to contract for and perform other work on or near the work covered by the contract.

If separate contracts are awarded within the limits of, or adjacent to, any one project, conduct the work to avoid interfering with or hindering the progress or completion of the work being performed by other contractors. As directed, cooperate with contractors working on the same project. Satisfactorily join work with and in proper sequence with the work of others.

Assume all liability in connection with the contract. Protect and save harmless the Department from all damages or claims that may arise because of inconvenience, delay, or loss experienced because of the presence and operations of other contractors working within or outside the same project limits.

105.08 CONSTRUCTION SURVEYING—

(a) **Projects that Do Not Include a Construction Surveying Pay Item.** If the project plans and specifications do not indicate a separate pay item for Construction Surveying, control stakes will be furnished and placed, offset from the proposed roadway base line, and a grade sheet will be furnished showing the horizontal and vertical measurements from the stakes to the base line and grade of the roadway as planned, including adjusted

EXHIBIT C

SECTION 110—PAYMENT

110.01 GENERAL—Payment for items of work performed under this contract will be made at the contract price per unit of measure, as specified in Section 109.01 for the item complete in place, or portions thereof. Unless otherwise specified, the contract unit price will cover all costs for materials, labor, and equipment:

- specified, described, or identified in each section of the specifications (including the special provisions and plans);
- identified in each section of the specifications (including the special provisions and plans) as "as required" or "as directed;" or
- allowed under the specifications (including the special provisions and plans) and for which payment is not expressly provided.

In addition to the above, the contract price includes all other costs incurred in performing work on the project (e.g., home office overhead) and all profit. The contract price is accepted as payment in full for all risk, loss, damage, or expense of every kind arising out of the nature of the work or the performance as specified in Section 107.20.

Work specified as "incidental" in the Measurement and Payment section of the specification for a contract item is to be considered as an additional obligation to the other work required for the item(s). This incidental work is not payable directly, but is to be considered included in the contract price for the item(s) of work specified.

Removal and replacement of defective work, as specified in Section 105.12, will not be paid by the Department.

No payment will be made for work in excess of that indicated, shown, or specified, unless otherwise accepted in writing by the Secretary.

Removal of material found in excavation areas and accepted for use, as specified in Section 106.04, will be paid for at the contract unit price for the class of excavation in which it is found. Payment will also be made for the contract bid item in which the excavated material is used.

Work, material, or labor specified for an item will not be measured or paid for again under any other indicated pay items.

110.02 DIFFERING SITE CONDITIONS, SUSPENSIONS OF WORK, AND SIGNIFICANT CHANGES IN THE CHARACTER OF WORK—

(a) General. If differing site conditions, changes in quantities, or alterations of the construction drawings will significantly increase or decrease the cost of performing the work directly affected, perform such work only when authorized in writing, as specified in Section 110.03(a). Payment for such work will be made as specified in Section 110.03.

(b) Differing Site Conditions. During the progress of the work, if subsurface or latent physical conditions, differing materially from those indicated, are encountered at the site, or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work, are encountered at the site, the party discovering such conditions is responsible for promptly notifying the other party, in writing, of the specific differing conditions, before the site is disturbed and before the affected work is performed.

Upon written notification, the Representative will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made as specified in Section 110.02(a). The Representative will notify the Contractor of the determination whether or not an adjustment of the contract is warranted.

No contract adjustment that results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

No contract adjustment will be allowed under this section for any effects caused on unchanged work.

(c) Suspensions of Work Ordered by the Representative. If the performance of all or any portion of the work is suspended or delayed by the Representative in writing, as specified in Section 107.16(c), for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the Contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, submit to the Representative, in writing, a request for adjustment within 7 calendar days of receipt of the notice to resume work. Set forth the reasons, and support for such adjustment, in the request.

Upon receipt, the Representative will evaluate the Contractor's request. If the Representative agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the Contractor, its suppliers, or subcontractors, and not caused by weather, the Representative will make an adjustment, excluding profit, as specified in Section 110.03 and Section 108.06, as applicable. The Representative will notify the Contractor of the determination whether or not an adjustment of the contract is warranted.

No contract adjustment will be allowed unless the Contractor has submitted the request for adjustment within the time prescribed.

No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded as specified in Section 107.16(c).

(d) Required Changes in the Scope of Work. The Department reserves the right to make, in writing, at any time, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations in the work will neither invalidate the contract or release the surety, and the Contractor agrees to perform the work as changed or altered.

If alterations in the work or changes in quantities do not significantly change the character of the work to be performed under the contract, the work will be paid for at the original contract unit price.

If alterations in the work or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding loss of anticipated profits, will be made as specified in Section 110.03. The basis for the adjustment will be agreed upon before the performance of the work. If a basis cannot be agreed upon, the work will be paid for as extra work as specified in Section 110.03.

The term "significant change in character" applies only to the following circumstances:

- If the work as altered differs materially in kind or nature from that involved or included in the original proposed construction, or
- If an item of work is increased to in excess of 125% or decreased to below 75% of the original contract quantity. Any allowance for an increase in quantity applies only to that portion in excess of 125% of the original contract item quantity or, in case of a decrease below 75%, to the actual quantity of work performed.

When a contract item experiences a significant change in character as a result of a decrease to below 75% of the original contract quantity, the actual quantity of work performed may be paid at an adjusted price, as agreed upon with the Contractor and as approved; however, total compensation will not exceed the contract item's original value. Item value is defined as the original contract quantity multiplied by the contract unit price.

(e) Adjustment of Lump Sum Items. The original contract price for a lump sum item, where quantities and unit prices for component items are designated on a component item schedule submitted as specified in Section 103.01(a), will be adjusted only if differing site conditions, as specified in Section 110.02(b), or changes directed by the Representative will significantly increase or decrease the cost of performing the work. If the Representative determines that conditions materially differ and cause an increase or decrease in the cost or time for performance of the work, or if increases or decreases in quantities are required due to a change directed by the Representative, adjusted payment will be made as specified in Section 110.03.

110.03 ADDITIONAL WORK, EXTRA

(a) General. Work specified in Section 110.03 is additional work, as defined in Section 110.03(a), limited to the work authorized in writing to be performed at the Contractor's risk.

A work order identifying the work to be performed during the performance of the work. To be authorized, this section will be in the form of a letter from the District Executive, in writing to the Contractor, issued within a reasonable length of time.

If the work is to be paid as additional work, the work order must specify the following:

If the work is to be paid as extra work, the work order must specify the following:

- is such that a reasonable person would expect to be included in the original contract.
- is such that force account records can be maintained.

The District Executive's writing will authorize the work to be performed. To be authorized, this section will be in the form of a letter from the District Executive, in writing to the Contractor, issued within a reasonable length of time. Pending approval of the District Executive, the work will be paid only at the Contractor's risk.

If the work is to be paid as extra work, the work order must specify the following:

- the Contractor and District Executive agree on the unit price for the work.
- the work is such that force account records can be maintained.

The District Executive's writing will authorize the work to be performed. To be authorized, this section will be in the form of a letter from the District Executive, in writing to the Contractor, issued within a reasonable length of time.

If the District Executive and Contractor agree on the unit price for the work, the work will be paid on a force account basis. Payment for additional work, extra work, and every other expense incurred by the Contractor, including compensation of any kind arising out of the work, will be paid by the Contractor.

Payment for additional work, extra work, and every other expense incurred by the Contractor, including compensation of any kind arising out of the work, will be paid by the Contractor.

(b) Additional Work. This includes work of the type already included in the original contract.

- work of the type already included in the original contract.
- work for which there is no unit price in the original contract.

Perform all such work only when authorized in writing by the District Executive, in writing to the Contractor, issued within a reasonable length of time.

All additional work will be paid for at the Contractor's risk, as specified in the original contract.

(c) Extra Work. This includes work of the type already included in the original contract.