PENNSYLVANIA SENATE AND HOUSE VETERANS AFFAIRS & EMERGENCY PREPAREDNESS COMMITTEES

JOINT PUBLIC HEARING TO REVIEW EMERGENCY PREPAREDNESS AND RESPONSE MEASURES FOR NATURAL GAS/PETROLEUM PIPELINE INFRASTRUCTURE ACROSS PENNSYLVANIA

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ON BEHALF OF THE
KEYSTONE STATE RAILROAD ASSOCIATION
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PROPOSED STATUTORY AMENDMENT FOR "QUICK TAKE" CONDEMNATION PROCEDURAL ISSUE

Background:

Section 1511(g)(2) of the Business Corporation Law ("BCL"), as codified at 15 Pa.C.S. §1511(g)(2), contains an alternative to the otherwise exclusive condemnation procedures found in the Pennsylvania Eminent Domain Code. The alternative procedure pertains to the condemnation by public utility corporations having the power of eminent domain of rights-of-way and easements "for occupations by electric, underground telephone or telegraph, gas, oil, or petroleum products lines used directly or indirectly in furnishing service to the public." Id. Section 1511(g)(2) sets forth a procedure for specified public utilities to exercise what is commonly referred to as a "quick-take" condemnation, which permits the condemnor to obtain a possessory interest prior to the litigation of the condemnee's defenses upon court approval of the filing of a condemnation bond.

Public utility companies have recently used quick-take proceedings in a number of states to acquire easements for the construction of utility pipelines underneath active railroad rights-of-way. Some of the public utility companies have used quick-take procedures to circumvent

railroad industry practices which were implemented to protect public safety and railroad operational concerns. There is no effective means in quick-take condemnation proceedings by which the rail industry can challenge the taking prior to the construction of the pipeline. Thus, courts lack authority in quick take condemnation proceedings to ensure that subsurface utility lines are constructed in a safe manner which does not interfere with active railroad operations and is consistent with standard railroad industry safety standards. The proposed amendment to Section 1511(g)(2) discussed herein will protect public safety and railroad operational concerns; and level the playing field between the natural gas, oil and rail industries.

Public Safety Concerns:

Some public utility companies have used quick-take condemnation procedures to circumvent railroad industry practices which were implemented to protect public safety, frequently pursuant to federal safety standards and regulations. For example, in a case involving a subsurface sewer line, the Utilities Board of the City of Sylacauga, Alabama ("Utilities Board") instituted quick-take condemnation proceedings in state court. The Eastern Alabama Railway, LLC ("EARY"), a Class III railroad, sought relief from the Surface Transportation Board ("STB") because the Utilities Board "acted without the consent of EARY, without notification to EARY, without complying with rail or utility standards accepted and common in the industry, without complying with EARY's operational and engineering standards, without complying with federal regulations (*e.g.* 49 C.F.R. §214 et seq. ("Railroad Workplace Safety Rules")), or without agreement with EARY. Eastern Alabama Railway LLC Opening Statement.[1] EARY set forth nine specific instances of Utility Board actions that endangered public safety including incidents

[1] Dated February 8, 2012, Eastern Alabama Railway LLC -- Petition for Declaratory Order, STB Finance Docket No. 35583, available at: http://www.stb.dot.gov/filings/all.nsf/WEBUNID/96B95561B73F9A228525799E007B4523?OpenDocument.

where: (a) contractors fouled EARY's track to mark the rail without EARY's knowledge or consent, (b) contractors strung a line over EARY's track without EARY's knowledge or consent that was later struck by a maintenance-of-way contractor, and (c) a subgrade water pipe burst and EARY was forced to cease operations until the Utilities Board was able to locate a water cut-off valve which had been covered in violation of engineering standards. See Opening Statement pp. 6-9.

The R.J. Corman Railroad Group submitted comments during the EARY proceedings to notify the STB that it had experienced similar public safety concerns:

> R.J. Corman has several pending or threatened situations where a utility or agency has condemned a broadly-stated easement for a utility crossing, and then balked at any restrictive language that routinely accompanies a license agreement for entry on a railroad right-of-way. Those conditions, for example, include advance notice of the utilities' intent to enter railroad property, a requirement that utilities either use only existing crossings when moving equipment across the rail line or construct a temporary crossing for that purpose. The absence of the latter requirement can be particularly dangerous, as heavy equipment moved over track without proper lateral support can leave the track out of gauge and subject to derailments.

Comments of R.J. Corman Railroad Group.[2]

There have been several instances in Pennsylvania where natural gas companies have used the quick-take procedure under Section 1511(g) of the BCL to likewise circumvent legitimate public safety concerns. In Carbon County, a gas company took steps at one point to begin boring beneath an active railroad right-of-way of the Reading Blue Mountain & Northern Railroad in blatant disregard of the railroad's requirement to arrange and provide for flagmen and safety inspectors. In Bradford County, a gas company bore a hole for a natural gas pipeline

[2] Dated February 21, 2012, as submitted to the STB in Eastern Alabama Railway LLC -- Petition for Declaratory Order, STB Finance Docket No. 35583, available at http://www.stb.dot.gov/filings/all.nsf/WEBUNID/29C27132C766BDE4852579AB0073D54C?OpenDocument.

beneath an active railroad right-of-way of Norfolk Southern without notification to or knowledge of the railroad.

The federal courts have recognized the inherent danger presented by the unchecked use of condemnation proceedings. In condemnation proceedings instituted by a natural gas utility, Texas Eastern Transmission, LP, to construct a 30-inch natural gas pipeline underneath the active railroad right-of-way of Consolidated Rail Corporation ("Conrail") in New Jersey and New York, the United States District Court for the District of New Jersey found that the natural gas utility could not use its federal condemnation power as an excuse to ignore valid safety concerns, and required the utility to comply with the railroad's standard safety specifications and regulations. See Texas Eastern Transmission, LP v. 0.02 Acres of Land, Civil Action No. 12-03671-SRC-MAS (D.C.N.J. June 28, 2012) (Order for Preliminary Injunction).

In light of the unsafe circumstances which have arisen in the cases outlined above, it is imperative that the legislature amend Section 1511(g)(2) of the BCL to ensure that public utilities cannot use quick-take condemnation proceedings to circumvent public safety concerns.

Operational Concerns:

Some public utility companies have avoided entering into agreements with railroads defining the terms of coexistence between active rail lines and subsurface utility pipelines; instead using quick-take procedures to impose their own terms.

Railroads have traditionally required public utilities and municipal entities seeking subsurface easements to sign standard license agreements which contain terms essential for the protection of railroad operations, including requirements to: (1) construct the pipeline to meet the minimum standards of the American Railway Engineering and Maintenance-of-Way Association ("AREMA"), (2) comply with federal regulatory standards for safety, (3) indemnify railroads

from any losses or damages sustained by the railroad on account of the construction of the pipeline and related facilities, and (4) give the railroad the right to require the utility to relocate the subsurface easement at its cost where necessary to permit and accommodate changes of grade or alignment and improvements in or additions to railroad facilities. Regarding the bearing of costs, it is to be noted that these pipeline occupations generally provide no benefit to the railroads, only risk.

There have been a number of recent instances where public utilities have refused to sign such license agreements. One example involved the Paducah & Louisville Railway, Inc. ("P&L") which advised the STB that a water utility was attempting to install a pipeline without signing P&L's standard license agreement:

> P&L and others have experienced problems with uncooperative public entities that have rejected legitimate railroad property interests and safety and operational concerns. … P&L is having a similar experience with Louisville Water Company ("LWC") … LWC is a public utility who is seeking to install a water line under P&L's rail line at a location where P&L holds the underlying land in fee but over which there is a rail crossing … LWC has indicated that it is not required to obtain P&L's consent, and in fact does not need any form of permission to install its line, and that it is not obligated to enter into any form of license or other agreement with P&L. LWC goes as far to claim that it needs no eminent domain authority or any other authority to undertake the proposed project. In short, LWC intends to install the water line with or without P&L's permission or any form of state, local or regulatory authority. This raises serious questions over whether LWC … has shown disregard for railroad property interests, rail safety, and concerns that the water line installation not unreasonably interfere with rail operations.

Comments of Paducah & Louisville Railway, Inc.[3] Other examples include the aforementioned cases involving the Reading Blue Mountain & Northern Railroad and Norfolk Southern. In the Norfolk Southern case, the natural gas utility not only refused to sign the standard license

[3] Dated February 15, 2012, as submitted to the STB in Eastern Alabama Railway LLC -- Petition for Declaratory Order, STB Finance Docket No. 35583, available at http://www.stb.dot.gov/filings/all.nsf/WEBUNID/64D4B6F93BD843B9852579A5007863A4?OpenDocument.

agreement, it also filed a broadly drafted easement description which would have interfered with Norfolk Southern's surface rights by preventing Norfolk Southern from constructing structures within the easement area and from crossing the easement area with equipment.

The use of Section 1511(g)(2) proceedings to avoid compliance with the standard license agreements described herein is contrary to law and detrimental to the public's interest in maintaining safe operations in the railroad industry.

Standard and Quick-Take Condemnation Procedures:

The primary difference between the quick-take procedures set forth in Section 1511(g) of the BCL and the standard condemnation procedures set forth in the Eminent Domain Code is that the right to possess the condemned property passes in a quick-take proceeding prior to the determination of any challenges that the condemnee may raise to the power of the condemnor to appropriate the property to be condemned or the procedures used to condemn.

In a standard condemnation proceeding instituted pursuant to the Eminent Domain Code, condemnation is effected by the filing of a declaration of taking with the required security. 26 Pa.C.S. §302(a)(1). Within 30 days after the filing of the declaration of taking, the condemnor must give written notice of the filing to the condemnee. 26 Pa. C.S. § 305(a). The condemnee may file preliminary objections to the declaration of taking within 30 days after being served with the notice of condemnation. 26 Pa.C.S. §306(a)(1). Preliminary objections are the exclusive method of challenging, among other things, the power or right of the condemnor to appropriate the condemned property and the procedures used by the condemnor to effectuate the taking. 26 Pa.C.S. §306(a)(3).

The condemnor, after the expiration of the time for filing preliminary objections by the condemnee to the declaration of taking, is entitled to possession or right of entry upon payment

of or a written offer to pay to the condemnee the amount of just compensation as estimated by the condemnor. 26 Pa. C.S. §307(a)(1)(i). If a condemnee or any other person then refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule to show cause why a writ of possession should not issue. 26 Pa. C.S. §307(a)(1)(iii). The court, unless preliminary objections warranting delay are pending, may issue a writ of possession conditioned upon payment to the condemnee or into court of the estimated just compensation and on any other terms as the court may direct. 26 Pa. C.S. §307(a)(1)(iv).

In a quick-take condemnation proceeding instituted pursuant to Section 1511(g)(2) of the BCL, in the event the public utility cannot agree with the condemnee on the amount of damages sustained, the public utility may make a verified application to the appropriate court for an order directing the filing of a bond to the Commonwealth, in an amount and with security to be approved by the court, for the use of the person or persons who may be found to be entitled to the damages sustained. See Section 1511(g)(2)(i). Upon entry by the court of an order approving the bond and directing that it be filed, the title that the corporation acquires in the right-of-way or easement described in the resolution of condemnation passes to the corporation and the corporation is entitled to possession. See Section 1511(g)(2)(iii).

As set forth above, in a standard condemnation proceeding instituted pursuant to the Eminent Domain Code, a railroad may file preliminary objections if the utility refuses to sign a standard license agreement addressing the railroad's safety and operational concerns. This allows the Court to address public safety and operational concerns prior to the construction of the pipeline beneath the active railroad right-of-way. For instance, a railroad could raise preliminary objections that a condemnation as proposed would unreasonably interfere with railroad

operations and thus be preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 et seq. ("ICCTA"), unless the condemnor was required to comply with the railroad's safety and operational concerns. This would go to the power or right of the condemnor to appropriate the condemned property under 26 Pa.C.S. § 306(a)(3).

Preliminary objections are not available to challenge the scope of the quick-take condemnation proceedings instituted pursuant to Section 1511(g)(2). See the Amended Committee Comment to Section 1511(g). Thus, railroads have no method to raise challenges to quick-take condemnation proceedings, and courts have no authority to ensure that subsurface utility easements are constructed in a safe manner in such a proceeding.

Instead, the railroad would be forced to bring a separate action in equity to challenge the validity or scope of the condemnation. See Amended Committee Comment to 15 Pa.C.S. § 1511(g). However, a court decision in a separate suit might not be made until after the utility has obtained possession of the easement and caused damages by not following standard safety and operational procedures. Instead, as the Comment to Section 306 of the Eminent Domain Code notes, "it is better to have these matters [which can be raised by preliminary objections] raised in the condemnation proceeding rather than in a separate suit." 1964 Comment to 26 Pa.C.S. § 306.

Proposed Amendatory Language:

§ 1511. Additional powers of certain public utility corporation, 15 Pa.C.S. § 1511.

(g) Procedure.—

(1) The act of June 22, 1964 (Sp.Sess., P.L. 84, No. 6) known as the Eminent Domain Code, shall be applicable to proceedings for the condemnation and taking of property conducted pursuant to this section.

(2) Notwithstanding paragraph (1), a corporation having the power of eminent domain that condemns for occupation by electric, underground telephone or telegraph, gas, oil or petroleum products lines used directly or indirectly in furnishing service to the public an interest (other than a fee) for right-of-way purposes or an easement for such purposes may elect to

proceed as follows in lieu of the procedures specified in sections 402, 403, 405 and 406 of the Eminent Domain Code.

(i) If the corporation and any interested party cannot agree on the amount of damages sustained, or if any interested party is an unincorporated association, or is absent, unknown, not of full age or otherwise incompetent or unavailable to contract with the corporation, or in the case of disputed, doubtful or defective title, the corporation may make a verified application to the appropriate court for an order directing the filing of a bond to the Commonwealth, in an amount and with security to be approved by the court, for the use of the person or persons who may be found to be entitled to the damages sustained. The application shall be accompanied by the bond and a certified copy of the resolution of condemnation. The resolution shall describe the nature and extent of the taking.

(ii) When this paragraph (2) is utilized to condemn a right-of-way or easement for underground occupations beneath operating railroad property, the corporation shall be obligated (a) to construct the underground line to meet the minimum standards of the American Railway Engineering and Maintenance-of-Way Association specifications then in place; (b) to construct the underground line to meet federal regulatory standards for safety and railroad operational standards; (c) to indemnify the railroad owner and operator for any costs or damages arising out of the construction or presence of the underground occupation, including the exacerbation of any condition of the railroad property; and (d) to bear the costs associated with any subsequent relocation of the underground line necessitated by railroad operations. The potential costs of such indemnification or relocation shall not be considered in the amount of any award of just compensation.

~~(ii)~~(iii) If the address of such interested party is known to the corporation, written notice of the filing of the application under subparagraph (i) shall be sent to such party by mail, or otherwise, at least ten days prior to the consideration thereof by the court. Otherwise the corporation shall officially publish such notice in the county or counties where the property is situated twice a week for two weeks prior to consideration by the court and shall give such supplemental or alternative notice as the court may direct.

~~(iii)~~(iv) Upon entry by the court of an order approving the bond and directing that it be filed, the title that the corporation acquires in the right-of-way or easement described in the resolution of condemnation shall pass to the corporation and the corporation shall be entitled to possession.

~~(iv)~~(v) The papers filed by the corporation with the court under this paragraph shall constitute the declaration of taking for the purposes of sections 404, 408 and 409 and Articles V through VIII of the Eminent Domain Code.

Reasons for the amendment:

There is a long history of cooperation between the rail and other public utility industries regarding the intersection of active railroad rights-of-way and subsurface utility lines. More recently, however, with the explosion of new gas pipelines in particular arising out of the Marcellus Shale boom, some utility companies have refused to enter standard license agreements and instituted condemnation proceedings under Section 1511 (g)(2) instead. The use of quick-take condemnation proceedings to avoid legitimate safety and operational concerns is detrimental to public safety and contrary to law. The proposed legislative amendment to Section 1511(g)(2) would prevent the abuse of the privilege to use the quick-take procedure.

Without the amendment, there will be less certainty and more delays in the delivery of state and federally funded projects. Utilities can and have refused to relocate their lines or demanded that the involved railroad pay up front to do so before doing any work.

Even where the PUC is involved and the involved railroad has an agreement, private or municipal utilities can hold the project hostage by refusing to cooperate without the railroad agreeing to pay for its relocation costs upfront. Unless the railroad agrees to do so at its initial cost and expense, then try to recoup the costs later, a hearing and decision by the PUC would be required before the project can proceed. Conrail saw this with the Philadelphia-owned utilities in past years and with the city of Harrisburg in a case that went to the Pennsylvania Supreme Court. See Consolidated Rail Corporation v. City of Harrisburg, 577 Pa. 71, 842 A.2d 369 (2004). Norfolk Southern also recently faced this with a gas company, NRG, at its Federal Street project in Pittsburgh.

First, the proposed amendment will protect public safety. Ordinarily, a railroad will not permit a third party to perform work over, through, or under an active railroad right-of-way unless the third party agrees to comply with industry engineering standards and federal safety regulations. As demonstrated above, public utility companies have used quick take condemnation procedures to avoid entering into such agreements. The proposed amendment will ensure that public utility companies comply with these requirements and that subsurface utility occupations are constructed in a safe manner.

Second, the proposed amendment will protect railroad operational concerns. Public utilities, including natural gas companies, may not use state condemnation procedures, like the quick-take procedure under Section 1511(g) of the BCL, to condemn property necessary for rail transportation in a way that will unreasonably interfere with railroad operations. Courts have held that ICCTA can preempt the use of state eminent domain law to condemn railroad property.[4] Although the STB has found that routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc. may not be preempted, this is only true so long as they would not impede rail operations or pose undue safety risks.[5]

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[4] See Union Pacific Railroad Company v. Chicago Transit Authority, 647 F.3d 675 (7th Cir. 2011); Wisconsin Central Ltd. v. City of Marshfield, 160 F.Supp.2d 1009 (W.D. Wis. 2000); Buffalo Southern R.R., Inc. v. Village of Croton-On-Hudson, 434 F.Supp.2d 241 (S.D.N.Y. 2006); Dakota, Minnesota & Eastern R.R. v. South Dakota, 236 F.Supp.2d 989 (D.S.D. 2002); Fort Bend County v. Burlington N. and Santa Fe R.R. Co., 237 S.W.3d 355, 358 (Tex.App.-Houston [14th Dist.] 2007). Pursuant to 49 U.S.C. § 10501(b), the Surface Transportation Board ("STB") has "exclusive" jurisdiction over: (1) transportation by rail carriers … and (2) the construction, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located, entirely within one state …" The STB has recognized that "using state eminent domain law to condemn railroad property or facilities that are necessary for railroad transportation" constitutes a form of regulation that Section 10501(b) will not permit. City of Lincoln-Petition for Declaratory Order, Fed. Carr. Cas. (CCH) ¶ 37154, 2004 WL 1802302 at *2 (S.T.B. Aug. 11, 2004) petition for review denied by City of Lincoln v. Surface Transp. Bd., 414 F. 3d 858 (8th Cir. 2005). This preemption is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations. Norfolk S. Ry. Co. & the Alabama Great S. R.R. Co. Petition for Declaratory Order, STB FINANCE 35196, 2010 WL 691256 at *2 (S.T.B. Feb. 26, 2010) (collecting cases).

[5] Maumuee & Western Railroad Corporation and RMW Ventures, LLC-Petition for Declaratory Order, 2004 WL

The proposed amendment will ensure that the construction and operation of subsurface utility lines will not unreasonably interfere with railroad operations. Underground lines will be installed in compliance with industry engineering and safety standards. Public utility companies will bear the costs of construction and be responsible to indemnify the railroad for damages caused by the operation of the utility line or the exacerbation of preexisting conditions. Finally, if the railroad is required to relocate or change the grade of the rail line, public utility companies will be required to relocate the utility line and bear the costs of relocation.

The amendment regarding the relocation of lines is consistent with Pennsylvania's common law. Railroads maintain a unique status under Pennsylvania law. A railroad line, although privately owned, "as soon as acquired is impressed with a public use; it constitutes a public highway." Conwell v. Philadelphia & R. Ry. Co., 241 Pa. 172, 174 (1913), quoting, Delaware, Lackawanna & Western Railroad Co. v. Tobyhanna Co., 228 Pa. 487, 492 (1910). Various legal incidents attach to this public trust, including that a party cannot adversely possess against an active a rail line. Id.

The common law rule applicable to the location of non-transportation public utilities in highway rights-of-way is that such utilities "obtain no property rights in the highway and can be ordered by a competent state or municipal agency to relocate their facilities at their cost." Delaware River Port Authority v. Pa. Public Utility Comm'n, 393 Pa. 639, 645, 145 A.2d 172, 175 (1958). The basis for this rule is that "since these utilities occupy the highways free of cost, they should not be entitled to compensation if they are forced to relocate their facilities because of highway improvements." Id., 393 Pa. at 646, 145 A.2d at 175. This common law rule does not apply to public rail-highway crossings, however, which are under the exclusive jurisdiction

395835, *1-2 (S.T.B. March 2, 2004).

of the PUC, which has authority to allocate relocation costs upon a "just and reasonable" basis. PECO Energy Co. v. Pa. Public Utility Comm'n, 568 Pa. 39, 791 A.2d 1155 (2002).

Public utilities may assert that the common law rule applicable to the location of non-transportation utilities in highway rights-of-way is not applicable here because the public utility company will acquire title to the easement or right-of-way for its pipeline in a quick-take proceeding (See 15 Pa.C.S. § 1511(g)(2)(iii)) and the utility's occupation under the rail line is not without cost, as the company must pay just compensation to the railroad. Even if this common law rule is not applicable, it does not follow that the utility would not be required to move its easement to accommodate changes necessitated by railroad operations. In the absence of a contract which provides otherwise, an easement may be relocated under Pennsylvania law where the resulting easement is as safe as the original location, the relocation results in a relatively minor change and the reasons for moving the easement are substantial. Soderberg v. Weisel, 455 Pa. Super. 158, 164, 687 A.2d 839, 842 (1997).

While a railroad most likely could force the owner of a pipeline easement acquired through condemnation to relocate its line if later necessary for railroad operational purposes, the time to litigate those matters without the proposed statutory amendment could delay state and federally funded transportation projects. Under standard easement principles, the cost of relocation could be allocated to the railroad, which is fundamentally unfair in these situations. Lukens v UGI Corp., 461 Pa. 465, 336 A.2d 880 (1975); Minard Run Oil Co. v. Pennzoil, 419 Pa. 334, 214 A.2d 234 (1965); Soderberg, 455 Pa.Super. at 170-171, 687 A.2d at 845-846. So a gas company or other fixed utility could hold the project hostage unless the railroad agrees to pay its relocation costs.

The third and final reason for the proposed amendment is fundamental fairness. Railroads have traditionally obtained protection for their present and future operations and liability indemnification for pipeline occupations under their tracks through standard agreements. A number of public utilities, particularly natural gas companies, have recently sought to avoid those protections by resorting to the quick take condemnation procedures under 15 Pa.C.S. § 1511(g). The costs and risks of these occupations should not be shifted from the public utility to the railroad, which is another public utility under Pennsylvania law.

The railroad's proposal is in the public interest and comports with principles of equity. In order to take advantage of the streamlined procedures under the quick take provisions of § 1511(g), public utilities exercising that option would be required to provide the basic liability and operational protections that the railroads have traditionally obtained by agreement.

What is proposed in the amended statutory language is to make the utility company obligated to indemnify the railroad owner and operator for any damages that may be caused directly or indirectly by the underground occupation or costs associated with any subsequent relocation of the underground line necessitated by railroad operations. It would provide that the potential costs of such indemnification shall not be considered in the amount of any subsequent award of just compensation to the railroad.

While this amendment might lead to lower awards of just compensation, in those cases where a railroad otherwise might be successful in arguing that these potential risks should be figured into the award, it would provide certainty in those circumstances of most concern to railroads and the public. This course would also provide more certainty for utility companies, which would be relieved of the possibility of paying for these potential risks as part of the just compensation award and would only have to pay if the underground line does cause damage or

needs to be relocated. The language that such companies will pay for relocation only when "necessitated by railroad operations" provides a level of legal protection for utility companies, in addition to the practical matter that railroads do not relocate their tracks without good reason.

Thank you.