

2009 SENATE JUDICIARY

SB 2443

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB2443

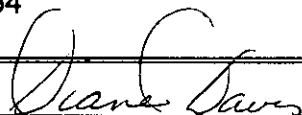
Senate Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 3/30/09

Recorder Job Number: 11554

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Relating to facility relocation cost recovery due to implementation of the American Recovery and Reinvestment Act of 2009.

Ilona A. Jeffcoat-Sacco – See written testimony. Requests a do pass.

Senator Nething – Asks if it would be possible to sunset this bill for a 2 year period. As he understands it there is a 3 year time period to use the stimulus.

Jeffcoat-Sacco – Replies they would have no problem with a sunset clause.

Senator Randy Christman - Introduces the bill – Says that Jeffcoat-Sacco covered everything. He said it is a matter of legalities if in fact we are able to do this and still qualify for the Federal monies. It seems to be the right thing to do.

Senator Olafson – Clarifies what we are doing with this bill.

Senator Christman – Says on a normal construction season the utilities know and prepare to pay for relocation. Some of these projects are going to come on quickly now and the year is budgeted for. Because this is a unique situation he believes we need to try cover those costs with the stimulus money.

Bob Graveland – Utility Shareholders of ND – In support of and encourage do pass.

Senator Nething – Asks him if we are talking about relocation or installation of new.

Graveland – Responds, we are talking about is moves that are being dictated because the highway department is making a change with stimulus money.

Kathy Aas – Xcel Energy – Urges do pass.

Dennis Boyd – MDU Resources Group – Agrees and urges a do pass.

Senator Nething – States we really don't know the magnitude of this yet.

Boyd – Replies, no, the utilities don't know what will be involved.

Opposition

Ron Henke – ND DOT – See written testimony.

Senator Nething – Asks him about the major savings he quoted, aren't we talking about moving.

Henke - Said when they were originally allowed to be place on the highway right of way, they didn't have to go out and purchase easements or right of way to locate those utilities off the highway. That is what we're talking about with savings.

Senator Nething – Responds, people own the land. We're going to have utilities that effect everybody involved.

Henke – Says, we were just looking at those savings up front.

Senator Nething – Asks about those savings, other than the land you go that the tax payers have paid for.

Henke – Replies, they look at the utility comes through to place the utility by allowing them on state right of way, the fee charged is very minable for that permit fee, otherwise the utility will have to go get easements or buy right away from private land owners to place that utility off of highway right of way. This is where their savings might be.

Senator Olafson – Asks if he has any information whether the federal stimulus money can be used to cover the cost of relocation. It seems to him if you have a project which requires relocation that the federal money ought to pay for that relocation. Is that prohibited under law?

Henke – Responds, the Federal US Code indicates that Federal funds should not be used to reimburse the state under this section, section 123 of USC 23. He says they have been told that part of the stimulus money you have to still follow all federal laws. He says what they told them is that they would not participate if those contracts (permits) indicate that the utility is aware that they have to relocate at their cost if for highway purposes.

Senator Olafson – Asks if it is correct that the laws of the state prevail in determining where the money comes to pay for the relocation. Depending on how the contracts are written in the state. If we change the rules in which we operate can't we use the federal money to pay for it.

Henke – Replies, they have discussed this, and in the permit it says they will relocate at their cost. Federal Highway has told them that basically they are circumventing the original contract, the utility company was well aware that any relocation was at their cost when they chose to put it on highway right of way. So he has been told they cannot use federal funds to relocate that.

Senator Olafson – States, what you're saying is that even if we make this change in law the federal funds can't be used anyway so we would be forced to use state funds.

Henke – Says yes, that is the way we understand it.

Senator Nething - Asks about the argument that the tax payers are already paying for the stimulus package and now they have to pay double if they happen to subscribe to a service provided by the utility.

Henke – He says their federal partners have not indicated any willingness to bypass the federal law, that has not come up in their discussions. They have been told they have to follow federal laws.

Senator Olafson – Asks if the argument can be made that since we are getting the federal money the state is receiving the benefit in that regards so it is a justifiable expense for the state to pay those utility relocations costs.

Henke – Says, as far as state funds, we can use state funds if that is what legislative intent is, we just can't use federal funds.

Terry Traynor – Association of Counties - He says counties have agreements like the state with the utilities. Rule of thumb is if the utility was there first, then the county assumes responsibility to move the utilities. If the road was there first then the utility is obligated to move. He said this bill has been addressed this session in HB1353 passed by the House and Senate and signed by the governor. That established the ground rules for moving utilities. He thinks this current bill will cause a lot of contention. He says only half of the counties will even have stimulus projects. He sees this as creating contention in the counties that will have projects. Agreements have been put in place over the years and hopes this doesn't make things more difficult.

Senator Nething – Asks, if we don't pass this bill aren't we contrary to the stimulus package. You're causing the rate payer to have to spend more money through your resistance and we're supposed to be trying to stimulate the economy.

Traynor – Responds, he sees projects going ahead. He says there are going to be costs for moving a utility and is not taken lightly by the counties. There will be costs someone will have to bear, either stimulus money, local money or the utility rate payer. It is going to increase somebody's costs in the long run.

Senator Nething – Asked him to tell Mr. Johnson we are going to continue this hearing so he can bring his testimony.

Keith Magnuson – ND League of Cities – Says this bill does set a precedent for existing contracts and ordinances. He says any projects under stimulus are just being accelerated, they would have been done anyway.

John Olson – Ottertail Power Company – In support of this bill. He thinks this is a good bill in terms of getting utility relocation and funds to pay for that. He says this will be passed on to the consumer if this bill doesn't pass.

Senator Nething adjourns the hearing, will continue the hearing so Mr. Johnson from Association of Counties can testify.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB2443

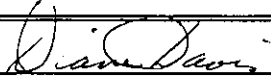
Senate Judiciary Committee

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Hearing Date: 4/6/09

Recorder Job Number: 11739 forward to 3:11

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Continued hearing on 2443

Senator Nething - Explains the intent of the bill and passes out a proposed amendment.

The amendment will put on a sunset clause for two years.

Senator Fiebiger – Asks how it is determined who pays for the relocation, state or political subdivision.

Senator Olafson – Asks how we are doing it currently, state or political subdivision.

Senator Nething – Calls on John Olson to answer a question they have.

John Olson – Representing Otter Tail Power – Speculates how it probably would be paid.

Senator Lyson – Moves the amendment .0101.

Senator Olafson – Seconds

Discussion

Senator Schneider – Asks for the meaning of the last sentence of the bill.

Senator Nething – Replies if it is a new project it would apply but not on projects that have already been contracted for. He asks John Olson to explain how it would go.

John Olson – Said it varies from county to county. This would supersede only on stimulus money.

Senator Schneider – Asks if there is a lot of relocation going to be done.

Senator Fiebiger – States that the DOT opposes the bill and says it will change contracts.

Senator Lyson moves for a do pass as amended.

Senator Olafson seconds

Vote – 6-0 – do pass as amended

Senator Nething will carry

FISCAL NOTE
Requested by Legislative Council
03/26/2009

Bill/Resolution No.: SB 2443

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. Bill and fiscal impact summary: *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill would result in government entities covering the cost of any utility relocations resulting from projects funded through the American Recovery and Reinvestment Act of 2009 (ARRA).

B. Fiscal impact sections: *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

It is not possible to estimate the fiscal impact of this bill at this time because we do not know all of the projects that will be undertaken using ARRA funds. However, the following points should be noted as they demonstrate the likely fiscal impacts:

* Utility relocations within highway right of way are normally not funded by the government entity. Since these utility facilities are on government owned property, the utility relocation costs are normally the responsibility of the utility. This bill would result in these costs becoming the added responsibility of the government entity on ARRA projects; often times these costs can be very substantial.

* Utility relocations outside of highway right of way are normally paid for by the government entity. Since the government entity normally bears these costs, these costs should not be considered as additional costs resulting from this bill.

In summary, as a result of this bill, government entities may realize substantial additional costs for relocation of utility facilities on highway right of way on ARRA projects. These costs are normally not eligible for federal funding; therefore the costs would be borne by city, county, and state funds.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	Shannon Sauer	Agency:	NDDOT
Phone Number:	328-4375	Date Prepared:	03/27/2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2443

Page 1, line 3, after "2009" insert "; and to provide an expiration date"

Page 1, line 12, after "subdivision" insert ", to the extent possible from funds provided by the Act,"

Page 1, after line 13, insert:

"SECTION 2. EXPIRATION DATE. This Act is effective through July 31, 2011,
and after that date is ineffective."

Renumber accordingly

Date: 4/6/09
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES 38 2443
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

☐ Check here for Conference Committee

*Amendment
.0101*

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☐ Amended

Motion Made By Sen Lyson Seconded By Sen Olafson

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething – Chairman			Sen. Tom Fiebiger		
Sen. Curtis Olafson – V. Chair.			Sen. Carolyn Nelson		
Sen. Stanley W. Lyson			Sen. Mac Schneider		

Total (Yes) 10 (N) 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal all yes

38 2443

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate JUDICIARY

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

☒ **Do Pass**

☐ **Do Not Pass**

☒ **Amended**

Motion Made By

Seconded By

[illegible]

Total (Yes) 6 (N) 0

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2443: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2443 was placed on the Sixth order on the calendar.

Page 1, line 3, after "2009" insert "; and to provide an expiration date"

Page 1, line 12, after "subdivision" insert ", to the extent possible from funds provided by the Act,"

Page 1, after line 13, insert:

"SECTION 2. EXPIRATION DATE. This Act is effective through July 31, 2011, and after that date is ineffective."

Renumber accordingly

2009 HOUSE POLITICAL SUBDIVISIONS

SB 2443

2009 HOUSE STANDING COMMITTEE MINUTES

Bill No. SB 2443

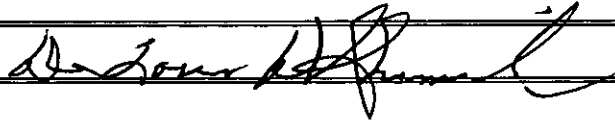
House Political Subdivisions Committee

☐ Check here for Conference Committee

Hearing Date: April 13, 2009

Recorder Job Number: 11838

Committee Clerk Signature



Minutes:

Chairman Wrangham: opened the hearing on SB 2443.

Senator Christmann: I introduced this bill after visiting with utility people and the public affairs commission. A normal road project when utility has the gas lines or whatever it might be on the highway right of way; these projects are usually worked on for several years. Public input is gathered on a project and the utility companies are able to plan for the money for some time. Now because of the stimulus package they want it to move along quickly. We want to allow these projects to be worked in with this additional money.

Rep. Kilichowski: Where would this money come from? Would it be out of the DOT project that \$70 million?

Senator Christmann: this would be projects that are paid for from the federal stimulus money so in this case it would be the money that goes to the DOT and to the counties or whichever for these projects.

Rep. Kilichowski: Would that be the place where all stimulus money?

Senator Christmann: Yes

Rep. Zaiser: With this stimulus money; isn't this the money suppose to go directly to projects that provide public benefit? Is this appropriate?

Senator Christmann: I think absolutely appropriate. Utilities do things at their expense in order to get a project done. This money is here and available to help people and create jobs and economic stimulus and used in that way. This is to provide services.

Rep. Zaiser: Maybe stimulus money might be more appropriate for roads versus utilities. When you talked about jobs; how many new jobs; long term jobs, would be created by this money?

Senator Christmann: I don't know about how many jobs.

Rep. Zaiser: does this provide public benefit on a long term basis?

Senator Christmann: If there is a road crossing or bridge crossing that utilities have to be moved, I think the best way we can serve the people there is to try to help along with the stimulus money is to get that project done and do no harm. It doesn't hurt the company and the cooperative and it doesn't increase the rates they will have to pay for the next year. I think this will very much serve the people.

Illona Jeffcoat-Sacco: (See testimony #1). This is my personnel opinion for a long time and not the position of the commission, but the legislative direction on policy we are talking about a state agency and political subdivisions and the legislative decision about what those entities ought to do should speak to those entities. Those entities could agree with the utilities to break the provisions that might be considered contrary in their purpose and policy on a single purpose basis. I think we should think as setting policy that this narrow situation, using those funds does not constitute a violation as opposed to doing an entire contract.

Rep. Jerry Kelsh: I do not understanding the last paragraph of your testimony. You say that we can do this and that the legislature has the right o interpret the provisions of the permit. I assume you are talking about subsequent permits? Does the Legislature ever get involved in approving bids on an individual basis?

Ilona Sacco: That is just a continuation of the answer I was trying to give you earlier. What we are saying is as a matter of policy the Legislature is saying any provision in today's permits for the future that would prohibit the use of stimulus funds should be revised. I recognize that that may appear to some to be changing the obligation of the contract where we are thinking of it slightly different. We are thinking of it as basing a policy on the content of the purpose of the franchise. Currently the utility is delegated to the Highway Department through their agreements to utilities. There is executive and legislative authority and we have dealt with it for years. The legislature can designate a certain way to use their authority that you have. I would think there is a certain way that DOT has to implement the authority they have with franchises.

Rep. Conrad: when you do a federal road project you can do an area project so what is the cost of that? On our federal roads we can get them buried. We are talking about going beyond what might be associated with that road.

Ilona Sacco: this bill is only talking about forced relocation. We have the road and it happens to have a utility underneath it, a cable or electric. It has to be moved because of the stimulus money. Because it is going to be a highway project that wasn't planned this year so it is forced relocation or forced revision of the utility plan in that project. If you are going to buried facilities I am not sure how costly that would be to cover that project. I think if it is not forced it would not be covered under this.

Rep. Conrad: this money for roads is coming different?

Ilona Sacco: You should direct these questions to DOT.

Rep. Klemin: Getting back to this contract issue. What would be the original intent of the provisional clause to enter a political subdivision franchise agreement to relocation between

the utility and the subdivision or the State of ND on the right of way? Is that the original intent?

If it is not just stimulus kind of money that goes into the program?

Ilona Sacco: We are having trouble with that. They go direct to DOT, but what I have been told if utilities are guests on highway or subdivision property then they pay the relocation cost and if the highway has the right of way; then DOT would pay the relocation cost. So I think the original intent would be to go back to whether utility was being moved at the request of DOT before or the guest of DOT.

Rep. Klemin: Maybe it wasn't their intent to cover the same situation?

Ilona Sacco: With the stimulus package so I agree with that.

Rep. Kretschmar: under the bill it says that the payment is to be made to the extent possible for funds provided by the act; which I assume if the federal act. If there aren't enough funds from the act payments are the state and political subdivisions liable to the utilities for those costs?

Ilona Sacco: I am not sure, but I think the answer would lie in how we structure the project. I don't have any idea how much money is coming for DOT and what project they picked to do with it. If it would simply be incorporating that additional cost in that total package in determining what we would do with it, we would share the costs. There was never any intent to require state governments to pay these costs. Solely to pay this from stimulus money.

Rep. Zaiser: Are these start up jobs one time jobs and will they be sustained and the second question I have is in terms of public works project planning how can this get into a viable structure and how does this balance out with other state infrastructure projects in terms of priority?

Ilona Sacco: I do not know the answer to the questions. There are other people here that can answer that.

Bob Graveline, USND: I am in support of this bill. Urge a do pass.

Rep. Koppelman: the fiscal note stipulates the costs sometimes being very substantial. Can you give us a sense of the project or a range of the costs?

Bob Graveline: It depends on the project. Is it an existing project or a gas pipeline? There is not a simple answer to that question.

Rep. Zaiser: Are there any projects that are identified where this would apply?

Bob Graveline: It depends on the project and if the roads are going to be resurfaced etc?

Rep. Kilichowski: Would this create jobs or would your employees handle the huge relocation costs?

Bob Graveline: It would depend again on the specific project. DOT would identify the projects that they intent to build or rebuild from stimulus dollars.

John Olson, Ottertail Power Company: The Administration and Congress has decided that ND should get \$150 million of stimulus money. I know a lot of that money is going to go into highway projects and there are various rules to how that money is spent on those highway projects. I don't think it can be for maintenance or anything like that. I can't believe we can spend this stimulus money and the Administration and Congress has asked us to do to stimulate our economy while penalizing for encouraging spending for the people. Who is going to pay for this; the political subdivisions of the state of ND or is there a rate case. After we have incurred this money the rate payer shouldn't have to pay for this. Under this stimulus package and this provides that it can only be available for the next biennium. So it is very restrictive. Now an interesting question by Rep. Kretschmar and what is going to be made from those stimulus funds to the extent possible under the Act. But if you don't have it in there and you don't tell the cities and political subdivisions to structure their projects and financing their projects they will have to spend all their township money on the project and nothing for

the force relocation. That is the way it is presented to you. I would hope that you would take that into consideration and give it a do pass.

Rep. Kretschmar: On line 12 what would you think to the extent possible?

John Olson: I can agree with that. If the city and political subdivision would provide for that reimbursement to the rate payers and utilities but if you take language out; then what you are left with is the sole discursion of the political subdivision or state and then all of the money went to relocation side on the project itself and not providing any money for reimbursement. Now if that language operates as it was intended to operate; hopefully that the utilities would be reimbursed I am fine with it. I think if you did that language that required the relocation costs to come out of the project money without any conditions then I think that would work.

Rep. Conrad: Inaudible...

John Olson: I think that is true. They are not. Rep. Klemin is concerned about the contracts. The franchise agreement might provide that any of those utilities might pick up those costs. So we are trying to say in this instance with the stimulus package the forced relocation of projects would be part of the stimulus package.

Rep. Conrad: right now if you have construction projects the state pays and determines which projects, right?

John Olson: I think the state legislates a lot of times for relocation. I am going to refer to XL pipeline situation in Fargo. I think the application for relocation of that pipeline as long as it was on federal contract and the costs were paid for by the federal government, but on state property XL would pay for those costs.

Rep. Jerry Kelsh: The project is going to costs \$1 millions; the money goes to the DOT.

They award the contract goes to the political body and it is going to cost \$200 thousand to

move the lien so it is going to be requested before so the project of \$1.2 million instead of the project gets paid relocation?

John Olson: It depends on who is paying for the relocation costs. If it is for \$1 million total costs on that project then I am hoping that the \$200 thousand comes out of that \$1 million and being \$800,000 for the project. It would force the utility to pay for the relocation for the rate payers in that case and with the \$200,000 on top of the \$1 million. That is why we have to determine.

Rep. Jerry Kelsh: If they want to do this; then the money that would be there from the stimulus project, not the \$1 million; and then who pays for the \$200,000?

John Olson: I agree with you fully and we have fiscal direction to do that.

Rep. Zaiser: Is there an assumption we are going to have these public works projects?

John Olson: I don't know if they are going to have forced relocation? We are going to have the kind of projects they want incorporating those anticipated costs for the relocation so if the bill is too high for the relocation, if they want under the stimulus in recovery. Another situation is they can force the utilities to pay those additional costs. Under the stimulus where all this money is suppose to be coming into the state; we don't think there should be any harm done to us?

Tony Clark, NDPSC: This is a big issue with the utility companies and it will be a lot of money going into construction projects and it is far above what utilities normally budget for and therefore regulate for. One of the things from the regulatory prospective that I would hope that passage of this bill could alleviate is a concern that I have. Typically we try to keep the rates the same for customers across the region. If we run into situations where certain political subdivisions have taken stimulus money and choose to spend it in such a way that; let's stay Fargo decided they won't pay utility relocation costs when we have these projects, but in

Grand Forks they say we are going to enforce all across the utilities with our stimulus money want utilities pay and we will spend it all on projects themselves. I think we have to have it all done the same. This would help standardize this across the state. The language the Rep. Kretschmar was asking about, to the extent possible, I would favor an amendment.

Dennis Boyd: MDU Resources Group: We support this bill and ask for your concurrence. The rate payers, not the utility companies, will bear these expenses.

Kathy Aas, Ecel Energy: We are in support of this bill.

Harlan Fjelstson: Rural Electric Cooperative: In support of this bill.

Opposition:

Ron Henke: NDDOT: (See testimony #2).

Rep. Klemin: I am confused on the testimony here. You said that the reinvestment act does allow funds to be used for facility relocation, but we are not going to allow that because of these other pre existing federal law. It sounds like there is a conflict between these two parts of the federal law here. Is that right?

Ron Henke: What I was trying to say in that testimony. The funds can be used to relocate a facility provided that is not a contract where they need to pay for those relocation costs. So we do projects where we affect the utilities and there is no missing permit so it doesn't violate a contract. We use federal funds to pay to relocate that utility. So the American Recovery and Reinvestment Act are just federal funds. We could those to pay for the relocation utility provided we don't have that other permit in place then.

Rep. Jerry Kelsh: If that utility company has a contract with the state and it is in there that contract that they are responsible, if they are on private property and in this project then they would have to support the move or whatever relocation of wildlife, then they would be paid, is that correct interpolation of what you said?

Ron Henke: That is correct. That is the way it is currently. If there is a prior right of way and we need to relocate that right of way as part of that project we pay to relocate that utility.

Rep. Conrad: It sounds to me like a big change in policy in ND if we would go along with this. Sounds like what we need to do to minimize what we pay to utilities and to maximize federal dollars for highway construction with utilities to increase their rates?

Ron Henke: Utility relocation costs are always there. If they were there by permit then by having them there they have not had to purchase other right of way off state regulation so when we have them sign the permit we identify in there that there is that gap and we may need to expand, change or add turning lanes or whatever and at that time they we be aware that they need to relocate it is going to be their cost.

Rep. Zaiser: Had DOT developed a plan or priority list what would be the most important road projects. Is that correct?

Ron Henke: We have made available to the legislative body a list of projects that have been identified as potential stimulus projects.

Rep. Zaiser: Then in developing that plan do you consider those projects that would probably have the least amount of impact on utilities? Perhaps they would be less on job generation perhaps, I could be proven wrong or is that not a consideration?

Ron Henke: Projects with bigger impacts there is less chance of those projects being moved forward unless you already have them being worked on. To get those right of ways etc there is not enough time to do all those pieces. There are some projects that we have proposed; a project on Highway 83 that was planned so that is one that is being proposed. There are utility impacts. Some utilities that are there by permit we got them to pay to relocate. They are the ones that were because of the safety of right of way we are paying to relocate those. Our normal process that we currently follow.

Rep. Zaiser: the priority list thought the utility relocation was a minor issue in developing the priority list?

Ron Henke: I would say you are correct. I don't know all the bodies that have been identified nor all the details that the cities or counties would do their job so they would be better to answer those. So far the projects that have come forward don't seem that big.

Rep. Klemin: Getting back to using state funds on this. The way it bill reads is that these costs must be paid to utilities from funds provided by the Act so if the bill says it has to come out those federal monies I am not quite sure where we get to the point where state funds have to be paid?

Ron Henke: Our concern there is the contract. It also says it doesn't violate the contract so if it doesn't violate the contract does that make our contract null and void is the question we have. Now funds can be used. Federal Highway told us today that no those contracts were in place before the stimulus dollars were available so those contracts are the ones we are going to work on. That is the knowledge both parties have.

Rep. Klemin: are there any contracts that don't have these kinds of provisions in them?

Ron Henke: On the state side I can say our current utility permits have them in them. I don't know what the counties or the cities have in them.

Rep. Klemin: It sounds like the real concern is that if the federal law allowed the money to be used to pay these relocation expenses then we wouldn't have a problem with them.

Ron Henke: That is correct. It is more on our contract part.

Rep. Klemin: In looking at this bill then it says it must be paid to the extent possible from funds provided by the Act. If we were to amend this to say if allowed by federal law, then it becomes a national issue. Would you have a concern if this was changed to make it clear this is out of federal funds?

Ron Henke: No we wouldn't. We are more concerned about the violation of our contract. If we can use federal funds I don't think we would have a big concern.

Rep. Jerry Kelsh: When you get FEMA dollars and the utility poles were on property that had to be moved state paid for that, correct?

Ron Henke: I would have to check, I believe that is right.

Rep. Koppelman: If the intent is to say that, if the stimulus dollars generate a lot more activity and new projects that weren't planned, therefore, those costs were not built into the rates currently charged by utilities; however, the costs built into the rates currently charged by utilities represented by the projects currently under contract, would be account for. Is that right?

Tony Clark: Yes you are correct. When utilities commission that utility rate structure toward the base rate that all customers have to pay include the operating and maintenance extension for utilities. Included in that are certain budget based lines from year to year have learned to expect with regard to these type of utility relocation expenses. They know from year to year basically what their ongoing costs associated with any of these relocations would be. My concern is that we would have this huge injection of money all at once that is going to create all kinds of utility relocations and it was something that wasn't considered and rate increases and utilities could only charge what has been approved by the commission. At some point utilities will come to the commission and ask it be added onto consumer bills in one way or another.

Rep. Koppelman: So the concern is not so much that the cost that have to be served by these dollars in presently planned projects, even if stimulus dollars are used to fund those, but rather if the number of projects or scope of projects expands as a result of the stimulus that those extra costs be covered so rate payers are not faced with rate increase down the road.

Tony Clark: The ongoing costs that utility company has from year to year would probably remain the same.

Terry Traynor, Ass't Director, ND Association of Counties: (See testimony #3).

Rep. Klemin: So if we take out the coma on line 12 and take out to the extent possible, and then we add in after subdivision, if allowed by federal law, would you have a problem with this?

Terry Traynor: I think that would help this.

Keith Magnusson: ND League of Cities: (See testimony #4).

Neutral: None

Hearing closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill No. SB 2443

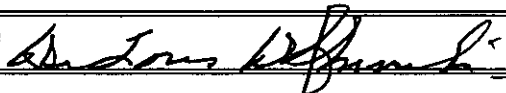
House Political Subdivisions Committee

☐ Check here for Conference Committee

Hearing Date: April 16, 2009

Recorder Job Number: 11903

Committee Clerk Signature



Minutes:

Chairman Wrangham reopened the hearing on SB 2443.

Rep. Klemin: (handed out a proposed amendment #1.) What this amendment is trying to do is allow these utilities to be paid out of the stimulus fund if federal law permits it to be done.

Went over the proposed amendment. The intent is that the federal law allows this and they can use the funds for relocation and that payment doesn't violate the legal contracts.

Motion Made By Rep. Klemin to move the amendment: Seconded By Rep. Hatlestad:

Discussion:

Rep. Kilichowski: On line 13 and the payment does not constitute a violation of a legal contract; is there any reason that needs to be in there?

Rep. Klemin: the reason it is in there to start with is there was concern about whether these franchises and regular contracts would have a provision in there that could declare the utility company to take the location of the utility facilities. We can't pass a law that would impair those obligations that are under contract. So what we are saying here is the payment from those federal funds doesn't violate those contracts.

Rep. Koppelman: I think I can support Rep. Klemin's amendment. I think what we are trying to do here is to say that this stimulus money triggers new work that wasn't expected and

therefore isn't accounted for in the cost structure of their rates; so some of those dollars should also be used for relocation costs. What seems to be interesting is that we have those existing contracts; and there is a question of whether or not stimulus dollars can be used for them. If it can then it shouldn't affect rates. If those dollars generate more business and more projects, then the relocation costs that haven't been obligated for and planned for should be covered. I support that. I am not sure this amendment accomplishes that or not.

Rep. Zaiser: What this does is reverses something we did earlier in the session where we worked hard with utilities and DOT to work out relocation excess. What this does is it goes back and sets a precedence I am not sure how that is going to be. One of the objectives of the stimulus package is to create new jobs. My understanding is that most utility crews already have been selected and in place so there would be no additional people hired. I understand that there was no communication between DOT and the utilities before this bill was drafted?

Rep. Kilichowski: getting back to that last sentence; if we are going to deal with the act I don't see why that sentence should be in there at all.

Rep. Klemin: That is in there because we are trying to define what the violation of contract is versus the constitutional provision on impairing that obligation. So we thought to define that paramount. So that is why it is in there. I just got some additional information from John Olson about federal funds can be used to reimburse the state as long as the state has either a law or legal opinion of reimbursement for utility relocation.

Chairman Wrangham: I think there may be more words to this but I think the legislative intent is pretty clear in the bill.

Rep. Jerry Kelsh: Which contract are you talking about; are you talking about the contract to do the work or a contract that the utilities have where their lines are at in the state?

Rep. Klemin: I think what they are talking about the latest agreement that allows the utility to place this pipeline in the road right of way and those contracts have a provision that basically says if they need to do some work on the road that utility company has to move those utilities at the utility companies expense so that is the contract we are talking about.

Rep. Koppelman: One unintended consequence here might be that we are setting a new precedent for something we may not want to do in the course of doing business going forward. I do intend to support this amendment but I am thinking we may want to have an amendment clarify that that is not what we intend to do. If state taxes have provisions in law allowing for this kind of reimbursement then these dollars can be used for that. I am not sure we want to have that in our law as a precedent going forward for all time.

Rep. Klemin: I don't think that this covers all situations. This is only for the American Recovery and Reinvestment Act of 2009.

Rep. Koppelman: some have registered a concern this may start a precedent going forward. We could easily clarify that is not our intent.

Rep. Zaiser: I went over to DOT and got the proposed project list for the year for utility relocation projects and there were only three listed. I think we are setting a precedent for one, two or three projects which may or may not be chosen. I don't think we want to get into this sort of a situation.

Chairman Wrangham: I understand your concerns about the whole bill. Let's act on the amendment first. Then we will discuss the whole bill.

Voice vote carried.

Chairman Wrangham: Now we have the amendment bill before us.

Rep. Klemin: The concerns about setting precedent and all of that are taken care of I think in Section 2 of this bill since it has an expiration date.

Rep. Jerry Kelsh: We had opposition on this bill. Can we ask if they want to comment on that?

Grant Levi, ND DOT: I have just taken the opportunity to review the proposed amendment to the bill. We do still have some concerns and I will tell you what they are. Just listening to the conversation around the committee The federal government does allow these paid for relocation of utilities however they do not allow you to make it occur in a specific incident.

What I mean by that is; if the State of ND were to decide that all the utility relocation could be funded by government; by state, county, and cities and it is not automatic then they would view it as that is the law of the state and they would respect that. In this instance in our conversations with them what they are indicating is if you attempt to do it with just the American Recovery and Reinvestment Act funds it is unplanned funding. You are trying to change the program. As a result they have made very clear to us that federal dollars would not be allowed and we could not do this. So I think it is a philosophical issue if that you have to in all honesty we would do what we could do. The feds have told us they would not budge and they would need to be paid with local funds. That is why we are so concerned about what is here. We would be using state or local funds for these relocation costs for utilities.

Rep. Klemin: That is the way it is right now; couldn't that be subject to change?

Grant Levi: We are told no. I tried to check if federal funds could be used for utility relocation. Because of the way the stimulus package was put together and the provision about this fund, we can't come in and use these funds where we usually use state funds. If this amendment passes it would make it clearer that it would have to be used for utilities and that is the intent.

Rep. Klemin: Where does it say that we would pay for utility relocation? It doesn't say it would obligate the state or political subdivisions.

Grant Levi: that is true. My concern was the conversation the committee had and that it would obligate the states or political subdivisions.

Rep. Klemin: I don't know how many projects there are national wide, but it just seems like you can't do this in a vacuum so you can't do it anywhere and you can't do it in ND with this program except with the stimulus money is perhaps a moving target with the department's budgets. We have to see how it fits.

Rep. Jerry Kelsh: We you contacted in the drafting of this bill and did you voice your concern in the Senate hearing?

Grant Levi: We did have a contact by the GV on this bill and we did express our views in the Senate transportation hearing.

Rep. Jerry Kelsh: Do you think this bill with the amendment if the feds do not change their stand the federal dollars could not be used for the utility companies to move their service that this bill would almost be mute by the state or not?

Grant Levi: Based on what we know today and based on the rules set up by the federal government we would go back to the relationship we had with utility companies and if we had an agreement with them and we were the first ones there the utility company would have to pay.

Do Pass As Amended Motion Made By Rep. Koppelman: Seconded by Rep. Kretschmar.

Vote: 10 Yes 1 No 2 Absent Carrier: Rep. Kilichowski:

Hearing closed.

VR
4/16/09

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2443

Page 1, line 8, after "of" insert "state"

Page 1, line 12, remove ", to the extent possible" and after the second underscored comma
insert "if allowed by federal law,"

Page 1, line 13, replace ", and the" with ". The"

Renumber accordingly

Date: 4/16
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2443

HOUSE POLITICAL SUBS COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number 10202

Action Taken ☐ DP ☐ DNP ☐ DP AS AMEND ☒ DNP AS AMEND

Motion Made By Rep. Klemin Seconded By Rep. Hatlestad

Representatives	Yes	No	Representatives	Yes	No
Ch. Wrangham			Rep. Conrad		
Vice Chair Rep. Headland			Rep. Kelsch		
Rep. Hatlestad			Rep. Kilichowski		
Rep. N. Johnson			Rep. Mock		
Rep. Klemin			Rep. Zaiser		
Rep. Koppelman					
Rep. Kretschmar					
Rep. Pietsch					

Total (Yes) _____ No _____

Absent _____

Floor Carrier: _____

If the vote is on an amendment, briefly indicate intent:

*Vote
cannot*

Date: 4-16-09
Roll Call Vote #: 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2443

HOUSE POLITICAL SUBS COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ DP ☐ DNP ☒ DP AS AMEND ☐ DNP AS AMEND

Motion Made By _____ Seconded By _____

Representatives	Yes	No	Representatives	Yes	No
Ch. Wrangham	✓		Rep. Conrad	○	
Vice Chair Rep. Headland	○		Rep. Kelsh	✓	
Rep. Hatlestad	✓		Rep. Kilichowski	✓	
Rep. N. Johnson	✓		Rep. Mock	✓	
Rep. Klemin	✓		Rep. Zaiser		✓
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Pietsch	✓				

Total (Yes) 10 No 1

Absent 2

Floor Carrier: Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2443, as engrossed: Political Subdivisions Committee (Rep. Wrangham, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (10 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). Engrossed SB 2443
was placed on the Sixth order on the calendar.

Page 1, line 8, after "of" insert "state"

Page 1, line 12, remove ", to the extent possible" and after the second underscored comma
insert "if allowed by federal law,"

Page 1, line 13, replace ", and the" with ". The"

Renumber accordingly

2009 TESTIMONY

SB 2443

Attachment 1
SB 2443

Senate Bill 2443

Presented by: Illona A. Jeffcoat-Sacco
General Counsel
Public Service Commission

Before: Senate Judiciary Committee
The Honorable Dave Nething, Chairman

Date: March 30, 2009

TESTIMONY

Mr. Chairman and committee members, I am Illona A. Jeffcoat-Sacco, General Counsel for the Public Service Commission. The Commission asked me to appear today in support of Senate Bill 2443.

It is our understanding that under existing federal and state law, federal stimulus funds intended for state infrastructure projects can be used to pay the costs of relocating utility plant so long as a contract is not violated by doing so. Similar provisions are contained in 2009 House Bill 1353 for political subdivision projects. It is also our understanding that state right of way permits and political subdivision franchises might be considered contracts and under some of permits and franchises, utilities must pay their own relocation costs caused by highway and road projects if requested to do so.

These utility relocation costs, in the normal course of business, are incorporated into rates and consequently paid by ratepayers. However, the stimulus package is expected to cause relocation expenses outside the normal course of business, and far above any amount currently budgeted and recovered

in rates. Eventually, the cost impacts on utilities of stimulus projects will be incorporated into rates and ratepayers will be burdened with paying those costs.

Ratepayers, as taxpayers, are already paying for the stimulus package. It is only fair that ratepayers not be asked to shoulder the additional burden of paying the utility relocation costs caused by implementing the stimulus package. Otherwise, North Dakota ratepayers will be paying these costs twice. That would be analogous to using stimulus funds for a highway or bridge project and then charging drivers a toll to use that highway or bridge.

While we recognize the arguments that the bill allows for reimbursement of relocation costs which might not otherwise be required under some governmental permits or franchises, we believe the Legislature has the right to interpret or waive the provisions of its permits. We respectfully request a Do Pass recommendation on Senate Bill 2443.

This concludes my testimony. I will be happy to answer any questions you may have.

SENATE JUDICIARY COMMITTEE

March 30, 2009

9:00 a.m. – Fort Lincoln Room

**North Dakota Department of Transportation
Ron Henke, P.E., Office of Project Development Director**

SB 2443

Good morning, Mr. Chairman and members of the committee, I'm Ron Henke, Office of Project Development Director for the North Dakota Department of Transportation (NDDOT). I'm here to oppose SB 2443.

Based on a conversation in February with the Public Service Commission's attorney, it is our understanding that the intent of this bill is to require the state or the political subdivision to pay the utility relocation cost, even if there is an existing contract in place that requires the utility to pay the relocation cost.

It is in the public interest for utility facilities to be accommodated on highway right-of-way when such use and occupancy do not adversely affect highway safety, construction, maintenance, or operations. It is the policy of the State of North Dakota to permit installation and maintenance of certain utility facilities on highway right-of-way under the jurisdiction of the NDDOT, subject to the following conditions:

- Such use and occupancy of the right-of-way does not interfere with the free and safe flow of traffic.
- Such occupancy does not interfere with existing, planned, or future use of the right of way for highway purposes.
- Such occupancy of the right-of-way does not impair the existing highway or its scenic appearance.
- Installation and maintenance of utility facilities on the right-of-way are performed in accordance with state laws, federal regulations, and guidance:

Because of these guidelines, the Department requires the utility to obtain a permit when installing utilities in NDDOT highway right-of-way. One of the conditions in the permit is that the utility pays for their own relocation costs if they need to move because of a highway improvement project. As a result of these agreements, the Federal Highway Administration has indicated that they will not participate in utility costs if we have an agreement in place that requires the utility company to pay for their own relocation. They will make utility reimbursement a non-participating item which would require us to use state funds to pay for the utility relocation.

The Department completes many construction projects on a yearly basis and some of these projects impact utilities. The Department acknowledges there are challenges with coordinating the relocation of utilities, but I can assure you the Department does not take the relocation of utilities lightly. As a result, we have established procedures with utility companies with the goal of obtaining their input early in the project development process, and to eliminate or minimize

the impact to the utilities. We do what we can to try to coordinate the relocation, eliminate any unnecessary relocation, and reduce the amount of relocations.

We recognize that the increased costs they must pay are eventually passed on to their customers. However, we believe that there also are major savings because of the original location on the NDDOT highway right-of-way. So those savings should have been passed on to the customers.

Therefore, the Department does not agree with the proposed legislation as it will change the conditions of the contracts we have in place regarding projects funded under the American Recovery and Reinvestment Act. Consequently, we will have to use state funds to pay for utility relocations.

Mr. Chairman, this concludes my testimony and I would be happy to answer any questions that the committee may have. Thank you

Attachment 1

SB 2443

4/6/09

**Testimony To The
SENATE JUDICIARY COMMITTEE
Prepared March 30, 2009 by
Mark A. Johnson, CAE – Executive Director
North Dakota Association of Counties**

REGARDING SENATE BILL No. 2443

Chairman Nething and members of the Committee, the North Dakota Association of Counties opposes Senate Bill 2443.

The NDDOT testimony very clearly explained the concerns of local road authorities as well as the State. County government has a long history in North Dakota of working cooperatively with the utilities that share our public right-of-way. There are numerous formal and informal agreements in place with the multitude of electric, telecommunications, pipeline, rural water, cable TV and other utilities. These agreements have proven to provide equitable treatment that does not inappropriately shift costs between utility rate-payers and property taxpayers.

Like the State, local governments make every effort to minimize the cost to utilities in the relatively rare instances that county road projects require a utility move. We understand that ultimately these costs are borne by the citizens, one way or the other.

County officials believe SB2443 proposes to inject State regulatory control into an area that has traditionally been negotiated very successfully at the local level. We recognize that, as proposed, this control would be rather limited; however, we believe it creates a precedent that need not be set.

Please give SB2443 a Do Not Pass recommendation.

SECTIONS OF U.S. CODE RELATED TO SB 2443

23 U.S.C. § 109

(1)(1) In determining whether any right-of-way on any Federal-aid highway should be used for accommodating any utility facility, the Secretary shall--

(A) first ascertain the effect such use will have on highway and traffic safety, since in no case shall any use be authorized or otherwise permitted, under this or any other provision of law, which would adversely affect safety;

(B) evaluate the direct and indirect environmental and economic effects of any loss of productive agricultural land or any impairment of the productivity of any agricultural land which would result from the disapproval of the use of such right-of-way for the accommodation of such utility facility; and

(C) consider such environmental and economic effects together with any interference with or impairment of the use of the highway in such right-of-way which would result from the use of such right-of-way for the accommodation of such utility facility.

(2) For the purpose of this subsection--

(A) the term "utility facility" means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public; and

(B) the term "right-of-way" means any real property, or interest therein, acquired, dedicated, or reserved for the construction, operation, and maintenance of a highway.

23 U.S.C. § 123

(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on any Federal-aid system, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.

(b) The term "utility", for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.

(c) The term "cost of relocation", for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

All -

The economic stimulus bill will ultimately contain billions of dollars for infrastructure enhancement/development, largely oriented to highways. It is anticipated that this construction may necessitate a great deal of distribution pipe relocation. There is currently a federal law governing the repayment of such moves, which states that: "When a state shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on any Federal-aid system, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds **shall not** be used to reimburse the State under this section **when the payment to the utility violates the law of the state or violates a legal contract between the utility and the State**. You can review the entire law by clicking on the following link: <http://vlex.com/vid/19205119>

Background:

Since the initiation of the Federal-aid highway program in 1916, utility relocation work has been eligible for Federal-aid participation as a construction cost item to the extent the State was obligated to pay for such work. During the early years, the use of Federal-aid funds for utility relocations was quite limited; however, with the advent of the Interstate Program in the 1950s, it became a much more common practice for the States to use their highway funds to reimburse utilities for relocation costs.

Laws and Regulations: Utility facilities, unlike most other fixed objects that may be present within the highway environment, are not owned nor are their operations directly controlled by State or local highway agencies. Because of this, highway authorities have developed policies and practices which govern when and how utilities may use public highway right-of-way, and under what conditions public funds may be used to relocate utility facilities to accommodate highway construction. Federal laws and FHWA regulations contained in title 23 of the United States Code and the Code of Federal Regulations, respectively, have been developed to reflect this situation.

Two sections of Federal highway law in title 23 of the United States Code (cited 23 U.S.C.) deal specifically with utilities:

23 U.S.C. 109(l) deals with the accommodation of utilities on the right-of-way of Federal-aid highways.

23 U.S.C. 123 deals with reimbursement for the relocation of utility facilities necessitated by the construction of a project on any Federal-aid highway.

Present FHWA regulations, policies, and practices dealing with utility relocation and accommodation matters have evolved from basic principles established decades ago, with many of the policies remaining unchanged. Present utility regulations in part 645 of title 23 of the Code of Federal Regulations (cited 23 CFR 645) and non-regulatory supplements are contained in chapter I, subchapter G, part 645 of the Federal-Aid Policy Guide (FAPG).

Subpart A of part 645 deals with utility relocations, adjustments, and reimbursement.

Subpart B of part 645 deals with the accommodation of utilities.

Program Guide: Utility Adjustments and Accommodation on Federal-Aid Highway Projects, Sixth Edition January 2003, FHWA-IF-03-014. This publication expands the Federal utility regulations contained in 23 CFR 645 and provides non-regulatory guidance for using Federal-aid highway funds for the relocation and adjustment of utility facilities, and for accommodating utility facilities on highway right-of-way.

Ultimately, utility relocation reimbursement is a state issue. Federal funds can be used to reimburse a state, so long as the state has either a law or legal agreement governing such reimbursement. Please check with your state legislative office(s) to determine exactly what the policy is for the state(s) in which your company operates. It may be that your company will want to pursue state legislation. The other option would be to try and get Congress to mandate the states to pay for the relocation (federal preemption) - something, heretofore, Congress has been unwilling to do.

#1

Engrossed Senate Bill 2443

Presented by: Illona A. Jeffcoat-Sacco
General Counsel
Public Service Commission

Before: House Political Subdivisions Committee
The Honorable Dwight Wrangham, Chairman

Date: 13 April 2009

TESTIMONY

Mr. Chairman and committee members, I am Illona A. Jeffcoat-Sacco, General Counsel for the Public Service Commission. The Commission asked me to appear today in support of Engrossed Senate Bill 2443.

It is our understanding that under existing federal and state law, federal stimulus funds intended for state infrastructure projects can be used to pay the costs of relocating utility plant so long as a contract is not violated by doing so. Similar provisions are contained in 2009 House Bill 1353 for political subdivision projects. It is also our understanding that state right of way permits and political subdivision franchises might be considered contracts and, under some permits and franchises, utilities must pay their own relocation costs caused by highway and road projects if requested to do so.

These utility relocation costs, in the normal course of business, are incorporated into rates and consequently paid by ratepayers. However, the stimulus package is expected to cause relocation expenses outside the normal course of business, and far above any amount currently budgeted and recovered

in rates. Eventually, the cost impacts on utilities of stimulus projects will be incorporated into rates and ratepayers will be burdened with paying those costs.

Ratepayers, as taxpayers, are already paying for the stimulus package. It is only fair that ratepayers not be asked to shoulder the additional burden of paying the utility relocation costs caused by implementing the stimulus package. Otherwise, North Dakota ratepayers will be paying these costs twice. That would be analogous to using stimulus funds for a highway or bridge project and then charging drivers a toll to use that highway or bridge.

While we recognize the arguments that the bill allows for reimbursement of relocation costs which might not otherwise be required under some governmental permits or franchises, we believe the Legislature has the right to interpret or waive the provisions of its permits. We respectfully request a Do Pass recommendation on Engrossed Senate Bill 2443.

This concludes my testimony. I will be happy to answer any questions you may have.

2

HOUSE POLITICAL SUBDIVISION COMMITTEE

April 13, 2009

2:15 p.m. – Prairie Room

North Dakota Department of Transportation

Ron Henke, P.E., Office of Project Development Director

Engrossed SB 2443

Good morning, Mr. Chairman and members of the committee, I'm Ron Henke, Office of Project Development Director for the North Dakota Department of Transportation (NDDOT). I'm here to oppose Engrossed SB 2443.

The Department understands that the American Recovery and Reinvestment Act, does allow funds from the Act to be used for utility facility removal, relocation, or installation, but the Act also requires that all other Federal rules and regulations be followed.

When utilities want to install a facility on the state highway right-of-way, the utility is required to obtain a permit (i.e. contract) from the Department. One of the conditions in this permit is that the utility agrees to pay for their own relocation costs if they need to move because of a highway improvement project. Title 23, United States Code, Section 123, Relocation of utility facilities states: "Federal funds shall not be used to reimburse the State under this section when payment to the utility violates the law of the State or violates a legal contract between the utility and the State." Because of these permits and this section of the United States Code, the Federal Highway Administration has said that they will not participate in utility facility removal, relocation, or installation costs. They will make utility reimbursement a non-participating item which would require us to use state funds to pay for the utility removal, relocation or installation costs.

Therefore, the Department does not agree with the proposed legislation. We feel that the intent of the bill is unclear. It appears the bill may change the conditions of the utility permits we already have in place. Consequently, we will have to use state funds to pay for utility removal, relocation or installation costs.

Mr. Chairman, this concludes my testimony and I would be happy to answer any questions that the committee may have. Thank you.

**Testimony To The
SENATE JUDICIARY COMMITTEE
Prepared April 13, 2009 by
Terry Traynor, Assistant Director
North Dakota Association of Counties**

REGARDING ENGROSSED SENATE BILL No. 2443

Chairman Wrangham and members of the Committee, the North Dakota Association of Counties opposes Senate Bill 2443.

The NDDOT testimony very clearly explained the concerns of local road authorities as well as the State. County government has a long history in North Dakota of working cooperatively with the utilities that share our public right-of-way. There are numerous formal and informal agreements in place with the multitude of electric, telecommunications, pipeline, rural water, cable TV and other utilities. These agreements have proven to provide equitable treatment that does not inappropriately shift costs between utility rate-payers and property taxpayers.

Like the State, local governments make every effort to minimize the cost to utilities in the relatively rare instances that county road projects require a utility move. We understand that ultimately these costs are borne by the citizens, one way or the other. Due to the federal restrictions outlined by NDDOT, for local projects this bill appears to suggest that property taxes will be the solution.

SB2443 proposes to inject State regulatory control into an area that has traditionally been negotiated very successfully at the local level. County officials recognize that, as amended, this control would be rather limited; however, they believe it creates a precedent that need not be set.

Please give SB2443 a Do Not Pass recommendation.

#4

Senate Bill 2443

House Political Subdivisions Committee

April 13, 2009

Good Morning Mr. Chairman. My name is Keith Magnusson and I am representing the North Dakota League of Cities in opposition to Senate Bill 2443.

SB 2443 abrogates existing contracts and agreements. This sets a terrible precedent.

Utilities are affected on many city projects and normally there are prior agreements, contracts, or ordinances that determine responsibility for costs. Usually, everything is worked out in advance. Communication and good working relationships make this possible – we do not need legislation. This need be no different when projects are funded by “stimulus” money under the American Recovery and Reinvestment Act of 2009.

A number of North Dakota cities will be receiving stimulus funds and would be adversely affected by this bill. If some think that they are not affected, I would advise them to go back and take a close look, especially at the future.

Projects done with the help of stimulus funding are not “make-work” projects; they are just being accelerated. They would be done anyway, merely at a later time when funding was available for that priority. Then they would be paid by utility ratepayers, taxpayers, gas tax payers, etc., whichever is the case. Stimulus projects are not an added burden on utilities or their ratepayers, only moving up these costs because of available funding and hopefully cheaper costs by earlier completion. This is no different than added funding coming from other sources, which often happens.

What do we do in the future? Do we abrogate contracts or agreements for the next stimulus bill? What do we do if there is extra funding because of Congressional earmarks (Memorial Bridge, Jamestown bypass, etc.)? Bonding to accelerate projects (Highway 2)? Voters increasing taxes for roads? See how easy it could be to do away with existing agreements! We need to encourage communication and agreement (HB 1353 does that), not put existing contracts in doubt.

While SB 2443 looks good on its face, it is not good legislation.