

ATTORNEY'S PRELIMINARY REPORT OF  
COMPENSABILITY

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**PRELIMINARY  
ATTORNEY'S INVESTIGATION  
AND  
REPORT OF COMPENSABLE INTEREST**

**MISSISSIPPI RIVER - GULF OUTLET  
NEW LOCK AND CONNECTING CHANNELS  
ORLEANS PARISH, LOUISIANA**

This preliminary investigation and report is made pursuant to draft Chapter 12, ER 405-1-12, dated August 24, 1992. The format for this document is modeled after guidance set forth in DIVR 1110-2-2 (See also DIVR 1110-2-1, 1 September 1985) and EFAR Q-73-203 and Q-73-204.

We stress that this document is preliminary. It is based on information provided by the facility owners. In accordance with guidance from CERE-AP in April 1995 at the Pittsburgh conference, this information has not been confirmed by formal title searches. Any and all findings are, therefore, contingent on confirmation in a final attorney's opinion of compensability.

**BACKGROUND ABOUT THE CANAL AND LOCK**

The Inner Harbor Navigational Canal, also known as the Industrial Canal, and the lock were built by the Port of New Orleans to provide navigation between the Mississippi River and Lake Pontchartrain and to provide areas for industrial development. The canal and lock were formally opened in 1923.

Later, during World War II, the Gulf Intracoastal Waterway was rerouted through this canal. It was at that time, in 1944, that the United States began leasing the lock and 2.1 miles of the canal and assumed operation and maintenance responsibilities.

In 1986 the Board of Commissioners of the Port of New Orleans and the United States executed an agreement whereby the United States received fee simple ownership of the lock and a perpetual channel right of way over the channel within the previously leased land.

## FACILITIES THAT MAY BE AFFECTED BY PROJECT

Based on information provided by the Relocations Section of the Engineering Division (CELMN-ED-SR), the following facilities<sup>1</sup> may be affected by the subject Project:

- I. New Orleans Public Belt Railroad:
  - a. Galvez Marginal Tracks - to be removed (R-3)
  - b. Galvez No. 3 - to be removed (R-4)
- II. Bell South Telecommunications, Inc.:
  - a. Cable crossing through lock utility gallery (T-4)
  - b. Submarine crossing near N. Claiborne Ave. (T-6)
  - c. Submarine crossing near N. Robertson St. (T-7)
- III. Cox Cable T.V. of Orleans Parish:
  - a. Cable crossing through lock utility gallery (T-3)
- IV. New Orleans Public Service, Inc.:
  - a. Electric service crossing (four 24 KV feeders in 14 conduits) through lock utility gallery (E-2)
  - b. Abandoned submarine cable north of lock (E-4)
  - c. Abandoned submarine cable near Florida Ave. siphon (E-14)
  - d. Abandoned cable north of Florida Ave. bridge (T-10)
  - e. Two 24 KV feeders in 2 conduits near Florida Ave. (E-13)
  - f. 16" natural gas pipelines near N. Robertson St. (G-3)
  - g. 16" natural gas pipeline near N. Robertson St. (G-4)
  - h. 16" gas line near Marais St. - no longer in use (G-1)
  - i. 16" gas line near Marais St. - no longer in use (G-2)
- V. Sewerage and Water Board of New Orleans:
  - a. Electric submarine cable crossing at Florida Ave. (E-10)
  - b. Electric submarine cable crossing at Florida Ave. (E-11)
  - c. Electric submarine cable crossing at Florida Ave. (E-12)
  - d. Cable crossing at Claiborne Ave. - no longer in use (E-3)
  - e. 20" water main pipeline through lock utility gallery (W-2)
  - f. 20" water main pipeline through lock utility gallery (W-3)
  - g. 48" water main pipeline south of Florida Ave. siphon (W-6)
  - h. 30" sewer main pipeline through lock utility gallery (S-2)
  - i. 30" sewer main pipeline through lock utility gallery (S-3)
  - j. 66" sewer main pipeline south of Florida Ave. siphon (S-7)
  - k. 54" sewer main pipeline south of Florida Ave. siphon (S-8)
  - l. Sewer lift station and 8" forced sewer main pipeline located at Surekote Rd. - to be removed (S-11)

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<sup>1</sup>In the interest of consistency, our references to the facilities, i.e., the items in parentheses, correspond to the references set forth in the Facility Relocations section of the Feasibility Report.

I.  
COMPENSABLE INTEREST OF  
NEW ORLEANS PUBLIC BELT RAILROAD

New Orleans Public Belt Railroad (PBRR) is controlled, operated, and managed by the City of New Orleans through the Public Belt Railroad Commission pursuant to La. R.S. 33:4530. PBRR serves railroads entering New Orleans and wharves and industries for handling freight inside and outside Louisiana. PBRR is a common carrier and engaged in interstate commerce. Higginbotham v. Public Belt Railroad Commission, 188 So. 395 (La. 1939).

The statutory authorization for PBRR is found within Chapter 10 of Title 33 of Louisiana Revised Statutes, which chapter pertains to public utilities of municipalities and parishes. La. R.S. 33:4161 et seq. It is our opinion that PBRR meets the statutory definition of "revenue producing public utility" as set forth in La. R.S. 33:4161 since PBRR regularly supplies the public with a commodity or service.

PBRR operates its tracks along the Inner Harbor Navigational Canal (IHNC) pursuant to a 1918 lease agreement whereby the Board of Commissioners of the Port of New Orleans leases to the City of New Orleans, for the use, benefit and advantage of the Public Belt Railroad of the City of New Orleans. This lease agreement predates the construction of the IHNC. (The canal was not formally opened until 1923.)

The proposed new lock will affect two of PBRR's railroad tracks. The Feasibility Report states that these two tracks must be removed. These two tracks service the Galvez Street Wharf, which wharf will be demolished in order to accommodate the project. We are not aware of plans to replace the wharf. The railroad tracks, likewise, need not be replaced.

Pursuant to guidance set forth in Appendix Q, if a facility to be abandoned interferes with the construction, maintenance, or operation of the project and so must be removed, compensation may be made, whether or not the owner has a valid real property interest, under the provisions of section 2 of the Flood Control Act of 1938. (See Q-73-209.3; see also paragraph 17-30(b) in April 1995 version of draft Chapter 17 of Real Estate Handbook.) The regulation specifies that compensation will be limited to that portion of the facility that lies within the project boundaries and will be based on (1) the original cost of the facility, (2) less depreciation based on original cost, (3) plus removal cost, (4) less salvage value.

It is our understanding that the wharf and PBRR's two tracks must be removed due to the change in configuration of the original channel. Specifically, the land underlying the wharf

and tracks will be carved out in order to accommodate the channel geometry for the new project. It is our opinion that PBRR is, therefore, entitled to the compensation set forth above because the project itself requires the removal of the tracks.

II.  
COMPENSABLE INTEREST OF  
BELL SOUTH TELECOMMUNICATIONS, INC.

Bell South Telecommunications, Inc. (Bell) is a Georgia corporation qualified to do business in the State of Louisiana. Bell provides communication services and is considered to be a public utility by virtue of La R.S. 45:781. It is regulated by Louisiana Public Service Commission in accordance with La. Const. Art.4, sec.21.

Several of Bell's facilities will be affected by the proposed project. Bell has provided whatever information it had regarding the time and manner by which Bell, or its predecessor in interest, secured the necessary interests to place the facilities within the project area.

Bell has provided correspondence which indicates that the facilities that pass through the utility gallery were installed some time after May, 1925, through the permission from the Board of Commissioners of the Port of New Orleans. Other correspondence indicates that the conduit and submarine cable placements in the vicinity of North Derbigny Street/North Claiborne Avenue were installed in 1976 through permission from the Department of the Army and the Port of New Orleans. For the submarine telephone line crossing at North Robertson Street, Bell could not locate permits, but it surmises that permission was originally granted between 1947 and 1949.

The information supplied by Bell is incomplete. In the absence of complete information, we can rely on the Doctrine of Unopposed Use, since Bell has the power of expropriation, pursuant to La R.S. 19:2(7). As such, Bell may acquire a right in real or immovable property by virtue of the Doctrine of Unopposed Use, which is codified in La R.S. 19:14.

Bell's facilities are located in existing right-of-way through the permission or acquiescence of the Port of New Orleans and the Department of the Army. It is our opinion that Bell does not have any compensable interest in the relocation of these facilities. Rather, Bell must bear the relocation costs.

**III.  
COMPENSABLE INTEREST OF  
COX CABLE OF NEW ORLEANS, INC.**

Cox Cable of New Orleans, Inc. (Cox) is a Delaware corporation licensed to do business in Louisiana. Cox provides cable television service. This corporation is considered to be a public utility by virtue of La. R.S. 45:781. As such, it has the power of expropriation in accordance with La. R.S. 19:2(6).

Cox owns a transmission cable which passes through the existing lock's utility gallery. According to information supplied by Cox, the transmission cable was installed in 1982 in accordance with a lease agreement between Cox's predecessor in interest and the Port of New Orleans for use of the conduit system under the lock. Cox later obtained an outgrant from the Corps of Engineers to install television transmission cables within the lock. That outgrant is scheduled to expire in 1998.

As stated above, Cox's facility is located within the existing lock through permission granted by both the Port of New Orleans and the United States. Its rights are therefore subordinate to the existing lock and channel right of way.

It is our opinion that Cox does not have a compensable interest. Cox must bear all costs associated with the relocation of its facility.

**IV.  
COMPENSABLE INTEREST OF  
NEW ORLEANS PUBLIC SERVICE, INC.**

New Orleans Public Service, Inc. (NOPSI) is a privately owned Louisiana corporation which provides electric and gas service to its customers in New Orleans. Although it is not a Government-owned utility, it is deemed to be a public utility that is vested with the power of expropriation pursuant to La. R.S. 19:2(7).

As listed above, NOPSI owns a number of gas and electric lines in the vicinity of IHNC. It is our understanding that some of NOPSI's facilities are no longer in use and/or abandoned, i.e., Items E-4, E-14, T-10, G-1 and G-2. For the remaining lines, however, NOPSI must provide ongoing service. They should therefore be treated as relocations.

According to information supplied by NOPSI, all but one of its facilities were installed through permission from the Board of Commissioners of the Port of New Orleans. We note that NOPSI obtained additional permission from the U.S. Coast Guard for the approach gas main to the crossing.

NOPSI has stated that its electric service crossing through the lock utility gallery (E-2) at Marais Street was installed in 1920, but NOPSI has not provided information to support this statement. The IHNC Canal and Lock were formally opened in 1923, so it is possible that the lines were installed in the early 1920s. Because the lines pass through the lock utility gallery, we presume they could only have been installed through the permission or acquiescence of the Board of Commissioners for the Port of New Orleans.

The information supplied by NOPSI is incomplete. We can, nonetheless, rely on the Doctrine of Unopposed Use, since NOPSI has the power of expropriation, pursuant to La R.S. 19:2(7). As such, NOPSI may acquire a right in real or immovable property by virtue of the Doctrine of Unopposed Use, which is codified in La R.S. 19:14.

It is our opinion that all of NOPSI's rights are subordinate to the existing lock and channel right of way. As such, NOPSI does not have compensable interest in the relocation of any of its facility. NOPSI must bear the relocation costs.

V.  
COMPENSABLE INTEREST OF  
NEW ORLEANS SEWERAGE AND WATER BOARD

New Orleans Sewerage and Water Board (S&WB) is a political subdivision of the State pursuant to authority granted in La. R.S. 33:4071. S&WB is charged with operating the public water, sewerage and drainage system in New Orleans. S&WB has the power of eminent domain. La. R.S. 33:4078.

As listed above, S&WB owns a number of gas and electric facilities in the vicinity of IHNC. One facility (E-3) is no longer in use, and one facility (S-11) will be removed because the businesses that it services will be moved. S&WB must provide ongoing service through the other facilities, which will, therefore, require relocation.

According to information supplied by S&WB, most of its facilities were installed in the 1960s and 1970s through permission from the Board of Commissioners of the Port of New Orleans. As for the water mains and the sewer mains (W-2, W-3, S-2, and S-3) that pass through the utility lock gallery, S&WB presumes that no permits exist because these facilities were installed prior to the construction of the lock. Nonetheless, these facilities could only have been installed through some sort of permission or acquiescence of the Board of Commissioners for the Port of New Orleans.

The information provided by S&WB about the installation of

its facilities is incomplete. We can, nonetheless, rely on the Doctrine of Unopposed Use, since S&WB has the power of expropriation, pursuant to La R.S. 33:4078. As such, S&WB may acquire a right in real or immovable property by virtue of the Doctrine of Unopposed Use, which is codified in La R.S. 19:14.

It is our preliminary opinion that all of S&WB's rights are subordinate to the existing lock and channel right of way. As such, S&WB does not have compensable interest in the relocation of any of its facilities.

The Government may wish to exercise its discretionary authority under Section 111 of 72 Stat. 303, as amended, to pay for the relocation of S&WB's facilities. 33 U.S.C. 633. The Chief of Engineers may protect, alter, reconstruct, relocate or replace any structure or facility owned by a subdivision of the State, provided such structure or facility is utilized in the performance of a Government function. The discussion about section 111 that is set forth in Appendix Q includes in its definition of "structure or facility" public owned utilities and water supply facilities.

It is our opinion, therefore, that although S&WB does not have compensable interest in its relocations, the Chief of Engineers could, in his discretion, opt to bear the costs associated with the relocation of S&WB's facilities.

## VI. AUTHORITY AND OBLIGATION

The Mississippi River-Gulf Outlet was authorized by the Rivers and Harbors Act on 29 March 1956, Public Law No. 84-455, in accordance with the Report of the Chief of Engineers contained in House Document No. 245, 82nd Congress. This Act provided that the existing lock would be replaced or an additional lock connected in the vicinity of Meraux, Louisiana, when economically justified by obsolescence of the existing industrial canal lock or by increased traffic.

Section 844 of the Water Resources Development Act of 1986, P.L. 99-662, modified the project to provide that the replacement or expansion of the existing lock and connecting channels would be in the area of the existing lock or at the Violet site. The costs of such modification shall be allocated between general cargo navigation and inland navigation, based on use patterns determined by the Secretary of the Army. Of the costs allocated to inland navigation, one-half of the Federal costs shall be paid from the Inland Waterways Trust Fund and one-half of the Federal costs shall be paid from the General Fund of the Treasury. With respect to the costs allocated to general cargo navigation, cost sharing provided in Section 101 of WRDA 86 shall apply.

VII.  
SUMMARY

We have reviewed information about those facilities that may be relocated. These facilities are located within existing Government right of way, and we surmise that these facilities were installed through the permission or acquiescence of the Port of New Orleans and/or the Corps of Engineers.

It is our opinion that New Orleans Public Belt Railroad is the only facility owner that has a compensable interest. Even so, PBRR's compensation is limited to the formula set forth in Appendix Q for the removal of its tracks. The other facility owners do not have compensable interests in the relocation of the facilities.

New Orleans Sewerage and Water Board does not have a compensable interest, but the Chief of Engineers does have the discretionary authority to pay for the relocation of its facilities under section 111.

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