

Right of Way's \$42,000 Penny

By Lisa Rogovin Payne, Esq.

WHEN DOES 1¢ EQUAL \$42,000?

Before you decide not to solve this riddle, let me tell you that I have actually seen this \$42,000 penny. It was neither in the "Ripley's Believe It Or Not!" gallery nor was it showcased in a rare coin collection.

Dull with age, the "penny" looked rather uncommon to the untrained eye. It was hidden in the fine print of a right of way document, which was buried in a pile of papers on an employee's desk.

A large telecommunications provider retained Chelepis & Associates, a specialized lease auditing and management firm in Overland Park, Kan., to abstract its right of way portfolio and automate recurring payments in a database system. A project team, consisting of real estate professionals and attorneys (including myself) was assembled. The task involved "scrubbing" the client's existing database, confirming the accuracy of the information specified, and abstracting that information into a workable framework suitable for an automated payment processing system.

Even without knowing the extent of any gaps or holes, it became readily apparent that the retrieval and review of all documentation relating to a particular conduit rental contract (easement, permit, grant, license, agreement or otherwise) would be central to the success of the project. The team met with each of the key employees to discuss any extraneous, unbound papers s/he might have with potential impact on the assignment. Several employees preferred to have their own filing system; they kept stacks of documents on their individual desks or drawers, rather than in binders or in technologically secure storage venues. Over time, the recall or significance of these papers faded and the client's personnel considered the documents inconsequential or irrelevant to a particular vendor or file. Fortunately, in the course of our due diligence, our project team decided to review the "unimportant" documents anyhow.

ENTER THE \$42,000 PENNY

A piece of paper, a letter, stated that the rate for a conduit rental payment by the client had been decreased from 48 cents to 47 cents per foot. A mere penny difference, right? The employee may have thought so, but the error is obvious. That "penny" was a 1-cent change for each of the 4,200,000 feet covered by the right of way contract and translated to a \$42,000 penny.¹

Hopefully, the value of a \$42,000 penny has not gone unnoticed by you, as a right of way professional. There are many lessons to be learned from the original riddle.

Lesson 1: Make sure you have all your documents in a database.

It is critical that all written documents pertaining to a particular agreement or vendor are centrally stored and accessible. This includes any agreements, contracts, memoranda, letters, correspondence, handwritten or typed notes, facsimile transmissions, emails, rate or tariffs. Any written statement of whatever kind or nature should be referenced in the database and physically scanned into the system. All written material should also be transferred into the database as soon as possible; there is a substantial risk in delaying the input of information into the database while it is being "handled." It is preferable to deal with the document at the same time that it is inputted into the database.

Lesson 2: Make sure that you properly review the documents in the database.

The documents in the database should be reviewed carefully. The terms and conditions of any written agreements should be summarized accurately and completely. At a minimum, all financial, monetary or payment-related

provisions should be detailed. Determine what additional provisions to include in the abstract as well. It is common to include other, non-payment categories in an abstract, such as the term or time period of the agreement, legal descriptions, and engineering and design specifications, as well as the provisions regarding notice, insurance, indemnification and transferability. The summary should contain user-friendly language for your company's users. Avoid legalese in your abstracts; unless your users are attorneys, paralegals or other trained legal personnel. Avoid industry "terms of art" unless your only users are right of way professionals, fully familiar with the language used.

Lesson 3: Make sure that the accuracy of the database has not been affected by external circumstances.

External circumstances may impact and compromise the documents within your database. Typical external circumstances include the passage of new laws, rates or tariffs, and the usage and calculation of price escalators. Although these factors operate beyond your company's control, they often affect the integrity of your database. It is possible for an external circumstance to negate the need to pay on an agreement in total or in part. To monitor these changes, a system needs to be in place and needs to be organized before a right of way payment is tendered.

Lesson 4: Make sure that the accuracy of the database is maintained.

The database must be updated and maintained to reflect the information learned from your initial review of the documents in the database, and from your continual monitoring of external factors impacting the documents. New data must be entered and original data must be modified to make the database meaningful.

Lesson 5: Make sure that invoices agree with your accurate database.

Each and every payment should be made in accordance with an agreement. Each and every invoice for payment should be in line with the terms and conditions of the underlying agreement and any additional modifying factors or circumstances subsequent to the date of the agreement. All of this information should be referenced in the database. Any discrepancies should be resolved in favor of the agreement and its valid modifiers; the invoice itself should not control.

CONCLUSION

As seen with the \$42,000 penny example, the very common and easy practice of housing information on an individual employee's desk (while it is being "handled") may lead to avoidable costs for your company. A more efficient and accurate framework and process is necessary when right of way payments are tendered.

All documents relating to an agreement and its terms should be entered into a central database. That database should be abstracted and then "scrubbed" for accuracy and verification of terms. Agreements should be monitored for modifiers and the database maintained to reflect any changes. After these steps are taken, the payment of an invoice is processed, and personnel confirms the propriety of payment.

¹ Some poetic license has been taken here. Actually, the footage on the right of way conduit rental payment was 4,194,581 feet, amounting to a difference in payment of \$20,972.90 payable semi-annually.

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