

Annual Payments For Easements?

By Otis F. Koske, SR/WA

The consumer movement in our country has had its definite effects on the way we live and on the manner in which businesses can operate and exist. Utilities have not been spared and because the life style of the majority of the public is affected to a certain degree by the services and products the utilities provide, they have been a special target for such movements. When vacant lands were plentiful and relatively cheap, property owners were not overly concerned when utility right-of-way agents approached them for easements or fee purchases of parts of their lands for the construction of transmission or other lines across their properties.

In recent years, however, there has been a reluctance on the part of many property owners to quickly acquiesce to such utility occupations, especially in the agricultural sector. Opposition in some cases has been highly organized as portrayed, (even though not very factually) by the movie "Ohms" seen by many of you on television last year. There have been an increasing number of complaints that such utility lines have adversely affected property uses and accusations have been made that the utilities have not adequately paid for the rights they enjoy. There are some who feel that even though a utility made payment at the time of utility line construction, the present owners and operators of such property are adversely affected without having received benefit of compensation that went to a former property owner. Some people have said it would be more equitable for the utilities to make annual payments for the rights they enjoy in lieu of one-time lump sum payments. It has been suggested that if utilities make annual payments to railroads for license fees, why can't the same method be employed on other private property.

During the last several years there have been discussions and comments in various parts of the United States and Canada concerning the merits of annual payments for easements with proposed legislation having been considered or attempted in

some places to make such payments mandatory. The state of Iowa is a case in point in which several attempts have been made over the last several years to adopt legislation. This proposed legislation has failed in each session. There are a few states and/or provinces, however, that have passed laws requiring annual payments, one of them being the state of Wisconsin.

In 1974 captions of certain newspaper articles in Wisconsin read like this: "McKenna Proposes Yearly Rental for Power Companies' Corridors," "Asks Rent For Towers Annually." About that time, or prior thereto, the State Department of Transportation was buying right-of-way for a new interstate highway through a relatively good agricultural part of the state and there was considerable organized resistance to the route chosen. Some years before that Wisconsin Electric Power Company had used its rights of eminent domain to enable the construction of a transmission line across a certain rural transitional property which was so vigorously opposed that several court cases resulted. Certain property owners involved in those and similar situations were instrumental through their legislators in exerting considerable pressure on the State government.

Both highway and utility condemnations are under the same chapter of the Wisconsin statutes, and the governor of the State at that time appointed a blue ribbon committee to study and make recommendations for changes in the condemnation law of the state which supposedly was to better protect the property owner, especially in agricultural areas. The makeup of this blue ribbon committee was such that most members leaned toward the consumer and property owner viewpoint. The only utility representation on the committee was an attorney from one local electric cooperative, and when matters before the committee were put to a vote the results were usually two votes opposed, the vote of that attorney and one more, and all the rest for a change in the statutes beneficial to the property

owner and adverse to the utilities and other condemning agencies. Included among many committee recommendations at the time was a provision to put a 15-year life on an easement for a transmission line and that all costs for appraisals and attorneys' fees should be borne by the condemnor.

The recommendations of the governor's committee resulted in the introduction in the State legislature of proposed changes to the condemnation law which involved, among other changes, annual payments. Such changes were in the form of two amendments which passed and became effective in 1978. These amendments increased benefits for persons affected by public acquisition and ensured citizen access to basic information. A requirement was included that the State Department of Local Affairs and Development, in cooperation with the Attorney General, prepare a pamphlet to be given to property owners or their representatives by a condemnor prior to initiation of negotiations for the acquisition of property or rights therein. It is entitled "The Rights of Landowners Under Wisconsin Eminent Domain Law." Included in the amendments were the following important changes in the method of compensation:

- In the case of a taking of an easement in lands zoned or used for agricultural purposes, for the purpose of constructing or operating a high voltage transmission line, (which is defined as more than 100 KV) or any petroleum or fuel pipeline, the owner was given a right to select annual payments, rather than a lump sum, as compensation. The annual payment is defined as the amount representing just compensation for the taking for one year.
- That succeeding annual payments after the first year shall be determined by multiplying the amount of the first annual payment by the quotient of the State assessment under s. 70.575¹ for

the year in question divided by the State assessment for the year in which the first annual payment for that easement was made, if the quotient exceeds one. As you can see, such annual payments could continually accelerate but never come down.

The effect of that new annual payments law in Wisconsin was somewhat reduced by the fact that only lands zoned or used for agricultural purposes were involved and that if the use or zoning of such lands changed after the beginning of such annual payment arrangement, the right to receive such annual payments will cease and a single payment equal to the difference between the lump sum representing just compensation and the total annual payments previously received by the condemnee shall be made by the condemnor. A welcome provision of the statute, however, is that a condemnee who selects the annual payment method of compensation, or any successor in interest, may at any time, waive in writing his or her right, or the right of his or her successors in interest, to receive such payments.

What the law did not say, however, and such absence of instructions has caused confusion, is a method of computing such annual payment. Should the payment be the lump sum value of an easement divided by the number of years a line is expected to remain on the property? Should it be based on an amount equal to the interest rate which could be obtained on the lump sum award? Should it be a sum divided by a given number of years? Should the annual payment be made in perpetuity? In addition to the accelerated payment prescribed by the statute, what interest should be added, if any, to the annual payment? Several meetings have been held by representatives of utilities in

Wisconsin to discuss proposed methods of calculating such payments, but to date no agreement has been reached as to the best method to be used or one which will commonly be used in the state. With interest rates having gone up as fast as they have recently, this problem becomes still more complex.

It is felt by some that some members of the governor's committee were not thinking of merely dividing a fair and reasonable lump sum payment by a given number of years to arrive at such annual payment, but were in fact thinking of some higher payment each year. Some owners who occupy agricultural lands today over which easements were negotiated many years ago would like to get payments for the present occupation of the utility line based upon today's values, and it was thought that annual payments would accomplish that. That possibility, however, could be nullified by a property owner, who upon selling his land, would reserve unto himself the right to continue receiving such annual payments or prior to sale, to make a lump sum settlement with the condemnor. In such cases, the successors in interest to the property, being the present property owners, would not benefit anyway.

Wisconsin Public Service Corporation, an electric utility in Wisconsin, had experience with one transmission line affecting four parcels of land to which the law applied. The utility offered 1/65 of the lump sum payment as its first year's payment but none of the property owners on that line opted for the annual payment. Northern States Power Company, another utility in the state, has had limited experience with such annual payments and has calculated them by using 3 percent of the lump sum payment for the first year's payment and letting the acceleration feature of the law apply to succeeding annual payments. The 3 percent initial payment was arrived at by a formula utilizing the acceleration factor under the law plus an interest element. Out of approximately 25 property owners only one selected the annual payment method.

There are only a few states and/or provinces in which utilities have had some experience with annual payments. Wisconsin, North Dakota and Minnesota in the United States and Alberta in Canada have legal requirements for such payments. There has been talk about the sub-

ject in other areas but no final development or implementation of laws mandating such action. In Minnesota there is a provision for annual payments up to a 10-year period with an additional payment being made to the county in the form of a tax, with a tax credit arrangement to property owners over whose lands transmission lines have been built recently.

In North Dakota the law does not confine annual payments to agricultural property but considers all property. The law requires that any easement for an electric transmission facility acquired contractually by a utility after July 1, 1979, shall give the landowner the option of receiving a single sum payment for the easement or receiving payment in annual installments of equal amount including interest on the outstanding balance to be paid by the utility at a rate equal to the average rate paid during that year by the Bank of North Dakota on a certificate of deposit in an amount equal to the outstanding balance. This option, however, applies only to easements providing for compensation of more than \$5,000 with anything less being on a lump sum, one-time basis. The law requires that utility right-of-way agents inform the property owner of his option to choose annual installments.

Even though annual payments became mandatory by law on July 1, 1979, Montana-Dakota Utilities Co. began offering annual payments to property owners as long as 10 years ago. At that time they offered annual payments to a small group of landowners. These payments were on a flat rate basis which was not difficult to administer. Upon follow-up with landowners in that case, even though the payments were small in accordance with today's standards, the property owners were apparently quite pleased with the arrangement. Recently the utility has negotiated an agreement with a landowner group in North Dakota which provides for an escalation annually based on percentage changes in land values as compiled by the State University applied to base land values and then multiplied by the mortgage loan rate in effect with the Federal Land Bank of St. Paul on July 1.

The surface rights act in the Province of Alberta provides that the surface rights board may require annual payments to be made for easements, this requirement being in effect since January 1, 1977. Inasmuch as a landowner who wants annual

¹70.575 State assessment, time. The department, not later than August 15 in each year, shall total the assessments of counties made by the department of revenue under s. 70.57, and the total shall be known as the state assessment and shall be the full market value of all general property of the state liable to state, county and local taxes in the present year. The department shall enter upon its records such state assessment. History: 1977 c. 29 ss. 763, 1647 (17); 1977 c. 300 ss. 6, 8.

payments could go through condemnation (expropriation) Alberta Power Ltd. decided to offer it to property owners at the outset.

Although there is no legal requirement under the expropriation act or otherwise in the Province of Ontario, Ontario Hydro has, for the past five years, been offering owners of agricultural land their option of annual or lump sum payments for easements for electric transmission lines. Such annual payment is determined by applying the prime bank interest rate as of January 1 of the year involved, plus 1 percent, to the lump sum value of the easement. That lump sum easement value is reappraised at the end of each five-year period. As of June, 1980 Ontario Hydro had about 40 owners receiving annual payments and its experience has been that only 3 percent of the total number of agricultural land-owners negotiated with are selecting the annual payment method of compensation.

In considering annual payments the following are some of the pros and cons as I see them:

Pros

- Eliminates large outlay of cash which may be good when interest rates are high.
- Depending on your company or agency position expensing rental payments vs. capitalizing easement lump sum payments may be desirable.
- No ad valorem taxes on investment in easement rights.
- Income tax advantages due to expensing of annual rentals.
- Payments may be related to the cost of money.

Cons

- There is a question whether transmission line investment will qualify for bonding purposes.
- Very difficult and time consuming to administer. (Could be an administrative nightmare.)
- To arrive at an agreed annual rental will be difficult. Even to choose payment for the first year in Wisconsin will be risky and speculative. If considering a 50-year period, and considering the first year's payment at \$10, if the rate of increase in the

state assessment under s. 70.575 remains constant as it was between the years 1978 and 1979, the annual payment in the 50th year will be \$31,141. If the first year's payment is \$20, the payment in the 50th year will double to \$62,282 and the utility would have by that time made a total payment of \$411,000.

- A cry of discrimination may result from some subsequent purchaser getting rental and some not.
- In condemnation, commissioners and jurors may go wild and award an extremely high annual payment.
- There could be a serious problem as to who is entitled to the annual payment in the event of death of an owner. Heirs may be scattered throughout the world.

I personally am not happy about annual payments, but like other aspects of utility right-of-way activities, because we employ one method now, doesn't mean we shouldn't change. The ways of yesterday may not be the best today. We must be ready to bend and adjust to the times.



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