

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

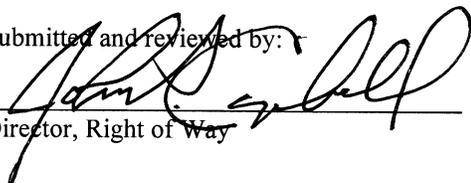
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §21.38 relating to construction and maintenance to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §21.38 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

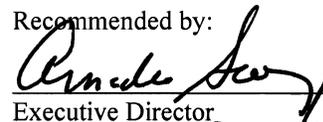
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Right of Way

Recommended by:



Executive Director

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §21.38, Construction and Maintenance, concerning
4 utility accommodation.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 Current provisions in §21.37, Design, and §21.38, Construction
8 and Maintenance provide that a utility company is responsible
9 for the installation, adjustment or relocation, maintenance, and
10 repair of its utility facilities placed in state highway right
11 of way. These provisions have been read by some individuals as
12 a prohibition against the department including in its highway
13 construction contract the work related to adjusting or
14 relocating a utility facility as required by a highway
15 improvement project. That was not the intent of the rules and
16 the department historically permitted the inclusion of utility
17 work in construction contracts in order to avoid delays on some
18 highway construction projects. Amendments to §21.38 clarify the
19 utility company's ultimate responsibility for the construction
20 and maintenance of its utility facilities, but expressly
21 authorize the department and utility company to agree to have
22 the department include required adjustment or relocation work in
23 the department's highway construction contract. The amendments
24 also provide the procedure to be followed for such an agreement.
25 The procedure allows the department's contractor to do the

1 adjustment or relocation utility work and provides for payment
2 by the utility company of its prorata share of that cost. The
3 amendments provide for a streamlined, efficient process that
4 allows for the potential of expedited work and reduced costs,
5 especially when small adjustments or relocations are combined
6 into the larger construction contract. In addition, the new
7 procedure may reduce the burden on small utility companies by
8 reducing a company's use of in-house resources or the necessity
9 of procuring independent outside contractors.

10

11 Amendments to §21.38(a) add a new paragraph (1) to expressly
12 describe the utility company's responsibility for the
13 construction and maintenance of its utility facility including
14 the initial installation, adjustment or relocation caused by a
15 highway improvement project, and any replacement, expansion, or
16 repair that the utility determines is needed. This
17 responsibility has always been implicit in the language of
18 §21.38, but the additional language makes it clear. Likewise,
19 new paragraph (1) expressly clarifies that the construction and
20 maintenance work by the utility company must conform to its
21 design plans prepared and approved under §21.37, and that the
22 construction and maintenance work must be accomplished in a
23 manner and to a standard acceptable to the department. These
24 provisions describe in express language the responsibilities and
25 standards that have historically been applied to utility

1 facility construction and maintenance under §21.38.

2

3 Amendments to §21.38(a)(3), (4), and (6) add or modify words to
4 clarify the current meaning of those provisions. These are
5 grammatical rather than substantive changes.

6

7 Amendments to §21.38(b)(1) delete a requirement that the utility
8 company return the right of way to its original condition after
9 a utility installation is complete. The provision is replaced
10 with a new standard that requires the utility company to restore
11 the right of way to substantially the same condition as existed
12 before the construction or maintenance. Since the phrase
13 "original condition" is susceptible to multiple interpretations,
14 the new restoration standard adds clarity and protects the
15 utility company from an uncertain and potentially onerous
16 burden.

17

18 Amendments to §21.38(b)(2), (3), and (6) add or modify words to
19 clarify the current meaning of those provisions. These are
20 grammatical rather than substantive changes.

21

22 Amendments to §21.38(c)(3) add or modify words to clarify the
23 current meaning of that provision. These are grammatical rather
24 than substantive changes.

25

1 Amendments to §21.38(d)(2) delete the word "installed" and
2 replace it with the words "constructed or maintained." This
3 change makes the provision consistent with the various types of
4 utility construction work that can occur, whether initial
5 installation, adjustment or relocation caused by a highway
6 improvement project, or any replacement, expansion, or repair
7 that the utility determines is needed. The amendments also add
8 the words "or in the manner" to expressly clarify that the
9 utility facility must be in conformity with the approved plans
10 both as to the location as well as materials and other design
11 requirements of Subchapter C.

12
13 The amendments add new §21.38(e) to expressly authorize the
14 department and utility company to agree that the department
15 include required utility work in the department's highway
16 construction contract. Subsection (1) limits this authority to
17 circumstances in which the utility facility needs to be adjusted
18 or relocated due to a highway improvement project. It does not
19 apply to initial installation or any replacement, expansion, or
20 repair that the utility determines is needed. Both the utility
21 company and the department must voluntarily agree. The
22 department may approve the agreement only if the district
23 engineer determines that including the adjustment or relocation
24 of the utility facility in the highway construction contract is
25 necessary to meet the construction sequencing of the state

1 highway improvement project or will expedite completion of the
2 project, the department's contractor is capable of having the
3 utility work performed in conformity with all applicable local,
4 state, and federal regulations for the installation of the
5 particular utility facility, and the adjustment or relocation
6 does not involve an unreasonably high risk of danger to the
7 traveling public, highway, or construction workers due to the
8 presence of hazardous material, high pressure gas, or other
9 potentially dangerous utility products. The adjustment or
10 relocation must also not involve an unreasonably high risk of
11 prolonged interruption of delivery of a utility product that is
12 essential to public health and safety. It is critical to both
13 the utility company and department that only experienced well-
14 trained persons engage in the construction of complicated or
15 high risk utility facilities.

16
17 Section 21.38(e)(2) requires the utility to approve the plans,
18 specifications, and cost estimate prior to the adjustment or
19 relocation being included in the construction contract. This
20 provision allows the utility company oversight authority in
21 order to ensure that the plans satisfy its needs and comply with
22 all regulatory requirements. The new paragraph also confirms
23 that the utility company is ultimately responsible for the
24 design and construction plans. It cannot pass responsibility
25 for compliance with applicable regulatory and environmental

1 requirements to the department.

2

3 Section 21.38(e)(3) requires the utility company to pay its
4 prorata share of the cost of construction work related to the
5 adjustment or relocation of its utility facility. This
6 paragraph incorporates the cost sharing/reimbursement provisions
7 of Transportation Code, §203.092. If the department is
8 otherwise responsible under §203.092 for the utility company's
9 cost in a standard situation when the utility company does the
10 actual construction work, the same cost responsibility will
11 apply when the work is done by the department's contractor under
12 this subsection (e).

13

14 Section 21.38(e)(4) specifies certain provisions that must be
15 included in the agreement between the department and the utility
16 company. The agreement must provide for the estimated cost of
17 construction work related to the adjustment or relocation of the
18 utility facility including the cost of any betterments, the
19 utility company's prorata share of the cost based on statutory
20 eligibility for department cost participation, payment to the
21 department of the utility company's share of costs at least 45
22 days prior to opening the highway construction bids, and a
23 description of any construction work that the utility company
24 will perform. These requirements allow both parties to be aware
25 of and agree to work and cost responsibilities before the

1 project begins. Advance payment by the utility company prevents
2 the State from being contractually obligated to pay its highway
3 contractor for the utility work without a reliable method to
4 later collect the amounts due from the utility company.

5
6 Section 21.38(e)(4) also specifies other provisions that must be
7 included in the agreement between the department and the utility
8 company. The agreement must provide for concurrent construction
9 inspection and final acceptance by the utility company when the
10 project is complete. These provisions ensure that the utility
11 company has the opportunity to inspect during construction to
12 determine contractor compliance and that the utility company
13 takes full responsibility of the completed facility at the
14 conclusion of the work. The agreement must also provide that
15 the utility company physically connect the installed facility to
16 its existing facilities to make the installed facility
17 operational, and perform all applicable testing. It is critical
18 that the department not assume responsibility for either the
19 risk inherent in dealing with potentially dangerous utility
20 products or any disruption of utility service.

21
22 Section 21.38(e)(5) defines the word "betterment" for purposes
23 of this subsection to mean an upgrading of the utility facility
24 being adjusted that is not attributable to the highway
25 construction and is made solely for the benefit of the utility.

1 It is based on the federal definition found in 23 CFR §645.105.

2

3 Section 21.38(e)(6) clarifies that responsibility for continued
4 utility service remains with the utility company both during the
5 design and construction of an adjustment or relocation as well
6 as after final completion of construction, and that the
7 department is not responsible for providing services to the end
8 users of the utility company during those phases of the
9 construction project.

10

11 Section 21.38(e)(7) provides that the utility is responsible for
12 any ongoing maintenance after completion of the construction
13 work. The department's involvement in the construction of the
14 utility adjustment or relocation does not include any future
15 maintenance responsibilities.

16

17 Section 21.38(e)(8) provides the circumstances under which the
18 department will reimburse the utility company for eligible
19 expenses the company incurs in approving and inspecting the
20 construction work. This reimbursement obligation is only
21 applicable to the extent the adjustment or relocation is
22 otherwise reimbursable under Transportation Code, §203.092.

23

24 Section 21.38(e)(9) provides that all other provisions of 43 TAC
25 Chapter 21, Subchapter C that apply to design and construction,

1 and Subchapter B that apply to estimates and state
2 reimbursement, continue to apply to adjustments or relocations
3 when the department is doing the construction work under this
4 subsection (e). This language is included in order to clarify
5 that the same standards and requirements apply to an adjustment
6 or relocation of a utility facility regardless of which entity
7 is responsible for the actual construction.

8

9 FISCAL NOTE

10 James Bass, Chief Financial Officer, has determined that for
11 each of the first five years the amendments as proposed are in
12 effect, there will be no fiscal implications for state or local
13 governments as a result of enforcing or administering the
14 amendments.

15

16 John Campbell, Director, Right of Way Division, has certified
17 that there will be no significant impact on local economies or
18 overall employment as a result of enforcing or administering the
19 amendments.

20

21 PUBLIC BENEFIT AND COST

22 Mr. Campbell has also determined that for each year of the first
23 five years in which the sections are in effect, the public
24 benefit anticipated as a result of enforcing or administering
25 the amendments will be the expedited delivery of state highway

1 improvement projects and the potential for reduced costs. There
2 are no anticipated economic costs for persons required to comply
3 with the sections as proposed. There will be no adverse
4 economic effect on small businesses.

5

6 SUBMITTAL OF COMMENTS

7 Written comments on the proposed amendments to §21.38 may be
8 submitted to John Campbell, Director, Right of Way Division,
9 Texas Department of Transportation, 125 East 11th Street,
10 Austin, Texas 78701-2483. The deadline for receipt of comments
11 is 5:00 p.m. on September 12, 2011.

12

13 STATUTORY AUTHORITY

14 The amendments are proposed under Transportation Code, §201.101,
15 which provides the Texas Transportation Commission with the
16 authority to establish rules for the conduct of the work of the
17 department, and more specifically, Transportation Code,
18 §203.095, which provides the commission with authority to adopt
19 rules to implement Transportation Code, Chapter 203, Subchapter
20 E, governing the relocation of utility facilities.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, Chapter 203, Subchapters A and E.

SUBCHAPTER C. UTILITY ACCOMMODATION

§21.38. Construction and Maintenance.

(a) General.

(1) A utility is responsible for the construction and maintenance of its utility facility, including installation, adjustment or relocation, replacement, expansion, and repair. Construction and maintenance must conform to the requirements of §21.37 of this subchapter (relating to Design) and shall be accomplished in a manner and to a standard acceptable to the department.

(2) [~~1~~] The provisions of this section apply to all utility types, unless otherwise specified in §21.40 and §21.41 of this subchapter (relating to Underground Utilities and Overhead Electric and Communication Lines respectively).

(3) [~~2~~] Utilities with facilities on the right of way shall be responsible and accountable to preserve [~~maintain~~] and protect the safety of the traveling public and the public's investment in the highway facility.

(4) [~~3~~] When an existing approved utility facility requires construction or maintenance, the utility shall notify the district 48 hours before the start of any work. In an emergency situation, the utility shall notify the district as soon as possible.

1 (5) [~~(4)~~] The utility shall not cut into the pavement or
2 concrete riprap without written permission from the department.

3 (6) [~~(5)~~] Utilities shall reimburse the department for
4 the cost of measures taken by the department in the interest of
5 public safety, restoration, clean-up, and repairs to the highway
6 and right of way made necessary by the utility's failure to
7 comply with the provisions of this subchapter.

8 (b) Vegetation and site clean-up.

9 (1) When utility construction or maintenance
10 [~~installation~~] is complete, the utility shall restore [~~return~~]
11 the right of way to substantially the same condition that
12 existed before the construction or maintenance, [~~a condition at~~
13 ~~a minimum, equal to its original condition,~~] including reseeding
14 or resodding to prevent erosion. After the area is brought to
15 grade, the entire disturbed area shall be covered in accordance
16 with the department's Standard Specifications for Construction
17 and Maintenance of Highways Streets & Bridges.

18 (2) To preserve and protect trees, bushes, and other
19 aesthetic features on the right of way, the department may
20 specify the extent and methods of tree, bush, shrubbery, or any
21 other aesthetic feature's removal, trimming, or replacement, in
22 conjunction with paragraph (1) of this subsection. The district
23 engineer shall use due consideration in establishing the value

1 of trees and other aesthetic features in the proximity of a
2 proposed utility facility [~~line~~] and any special district
3 requirements justified by the value of the trees and other
4 aesthetic features.

5 (3) If settlement or erosion occurs due to the actions of
6 the utility, the utility shall, at its expense, reshape, reseed,
7 or resod the area as directed by the department. Reseeding,
8 resodding, or repair under this section shall be completed
9 within a reasonable period of time that is acceptable to the
10 department.

11 (4) Pruning of trees shall comply with the department's
12 Roadside Vegetation Management Manual. When unapproved pruning
13 or cutting occurs, the utility shall be responsible for the
14 replacement of trees or for damages to existing trees and
15 bushes.

16 (5) Highways adjacent to utility construction sites shall
17 be kept free from debris, construction material, and mud. At
18 the end of every construction day, construction equipment and
19 materials shall be removed from the horizontal clearance, placed
20 as far from the pavement edge as possible, and properly
21 protected.

22 (6) The utility shall reimburse the department for all
23 costs incurred to repair damage to the right of way that results

1 from the actions of the utility. These costs may include
2 restoration of and repairs to the pavement structure, drainage
3 structures, [roads, drives,] terrain, landscaping, or fences.

4 (c) Traffic control.

5 (1) The utility shall be responsible for the safety of,
6 and shall minimize disruption to, the traveling public with
7 proper traffic control.

8 (2) Appropriate measures shall be taken in the interests
9 of safety, traffic convenience, and access to adjacent property
10 that meet the requirements of the department's Compliant Work
11 Zone Traffic Control Device List. The utility shall place
12 appropriate signs, markings, and barricades before beginning
13 work and shall maintain them to warn motorists and pedestrians
14 properly. All traffic control devices shall conform to the
15 TMUTCD and the National Cooperative Highway Research Project
16 Report 350.

17 (3) All utility pits opened within the horizontal
18 clearance must, in compliance with National Cooperative Highway
19 Research Project Report 350, [shall] be properly protected[~~, in~~
20 ~~compliance with National Cooperative Highway Research Project~~
21 ~~Report 350,]~~ with concrete traffic barriers, metal beam guard
22 fencing, appropriate end treatments, or other appropriate
23 warning devices.

1 (d) Work restrictions.

2 (1) The department reserves the right to halt
3 construction or maintenance during hazardous situations, such as
4 inclement weather, peak traffic hours, special events, or
5 holidays, or for non-compliance with a use and occupancy
6 agreement. Requests for emergency maintenance shall be directed
7 to the appropriate district office.

8 (2) If the department determines that the facility was
9 not constructed or maintained [~~installed~~] in the location or in
10 the manner shown on the approved construction plans, the
11 department may require the utility to take appropriate
12 corrective action as determined by the department.

13 (e) Utility work included in a highway construction
14 contract.

15 (1) If a state highway improvement project requires the
16 adjustment or relocation of a utility facility, the utility by
17 agreement with the department may authorize the department to
18 include the adjustment or relocation of the utility facility in
19 the highway construction contract. The district engineer may
20 enter into an agreement under this subsection only if the
21 district engineer determines that:

22 (A) including the adjustment or relocation of the
23 utility facility in the construction contract is necessary to

1 meet the construction sequencing of the state highway
2 improvement project or will expedite the project;

3 (B) the adjustment or relocation of the utility
4 facility by the department's contractor can be accomplished in
5 conformity with all applicable local, state, and federal
6 regulations for the installation of the particular utility
7 facility; and

8 (C) the adjustment or relocation of the utility
9 facility by the department's contractor will not involve an
10 unreasonably high risk of:

11 (i) danger to the traveling public, highway, or
12 construction workers due to the presence of hazardous materials,
13 high pressure gas or liquid petroleum lines, or other
14 potentially dangerous utility products; or

15 (ii) prolonged interruption of the delivery of a
16 utility product that is essential to public health and safety.

17 (2) The utility must approve the plans, specifications,
18 and cost estimate for the adjustment or relocation of the
19 utility facility before it may be included in the construction
20 contract. The utility is responsible for ensuring that the
21 design and construction of the utility facility meet all
22 regulatory and environmental compliance requirements.

23 (3) If the adjustment or relocation of the utility

1 facility included in the construction contract is not 100
2 percent reimbursable by the department under the requirements of
3 Transportation Code, §203.092, the utility is responsible for
4 advancing or otherwise paying to the department the utility's
5 prorata share under state law of the funds necessary for
6 construction work related to the adjustment or relocation.

7 (4) An agreement under this subsection must provide:

8 (A) the estimated cost of the construction work related
9 to the adjustment or relocation, including the cost of any
10 betterment, to be performed by the department's contractor, and
11 the utility's prorata share of the cost based on eligibility for
12 department cost participation under Transportation Code,
13 §203.092;

14 (B) for payment to the department of the utility's
15 prorata share, if any, of the estimated cost under paragraph
16 (4)(A) of this subsection at least 45 days before the date set
17 for the receipt and opening of bids for the highway construction
18 contract;

19 (C) a description of the construction work related to
20 the adjustment or relocation, including any betterment, that is
21 to be performed by the utility at no cost to the department;

22 (D) for concurrent construction inspection by the
23 utility during construction;

1 (E) that the utility is responsible for physically
2 connecting the installed utility facility to its existing
3 utility facilities to make the installed facility operational
4 and for performing any tests required to assure compliance with
5 all applicable safety standards and regulations;

6 (F) for final acceptance by the utility of the
7 adjustment or relocation after the construction work is
8 completed; and

9 (G) any other provisions that the district engineer
10 considers to be necessary or desirable.

11 (5) When used in this subsection, "betterment" means any
12 upgrading of the utility facility being adjusted or relocated
13 that is not attributable to the highway construction project nor
14 required in order to comply with any other law, code, or
15 ordinance, and is made solely for the benefit and at the
16 election of the utility.

17 (6) During the adjustment or relocation of a utility
18 facility under an agreement under this subsection, the utility
19 remains liable under any certificate of service. The department
20 is not responsible for any issue related to the design or
21 construction of the adjustment or relocation of the utility
22 facility after final acceptance by the utility of the utility
23 facility.

1 (7) After completion of the construction work under an
2 agreement under this subsection, the utility is responsible for
3 any ongoing maintenance of the utility facility in compliance
4 with this section.

5 (8) If the adjustment or relocation of the utility
6 facility is reimbursable by the department under the
7 requirements of Transportation Code, §203.092, the department
8 will reimburse the utility for eligible expenses incurred in
9 approving and inspecting the construction work.

10 (9) All provisions of this subchapter and 43 TAC Chapter
11 21, Subchapter B that apply to the design, estimates, and scope
12 of an adjustment or relocation apply to a project carried out
13 under an agreement entered into under this subsection.