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Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Use of Appropriated Funds to Pay for the Relocation of Utilities

File: B-300538

Date: March 24, 2003

DIGEST

1. Unless otherwise addressed by statute, regulation, or governing agreement, appropriated funds may be used to pay for the costs of relocating utility facilities when utility facilities are located on federal lands in order to serve the federal government and are not present as part of the utility company's general operating network pursuant to a right-of-way requested by the company. 10 Comp. Gen. 331 (1931), 51 Comp. Gen. 167 (1971) and similar cases distinguished.

2. The amount specified by Pepco as a "gross-up" fee represents the cost of Pepco's additional income taxes and is not a direct tax upon the AOC. The legal incidence of any additional state or local income taxes falls upon Pepco as "vendor" and not upon the federal government. Thus, to the extent Pepco is permitted by the D.C. Public Service Commission to recover such costs through the assessment of a "gross-up" fee, appropriated funds are available to pay such a fee.

DECISION

The Architect of the Capitol (AOC) requested our opinion on the availability of appropriated funds to pay utilities for the relocation of their facilities on the Capitol grounds and to pay a "gross-up" fee assessed on the costs of relocation. As a general proposition and consistent with our prior decisions, unless otherwise specified by statute, regulation, or governing agreement, utilities must bear the costs of relocating their facilities from a federal right-of-way whenever requested to do so by the federal government. However, when the federal government seeks to relocate utility facilities that are and will continue to be on federal lands in order to serve federal customers, appropriated funds may be used to pay for the cost of the relocation of utility facilities necessary to accommodate changing federal needs unless a statute, regulation, or governing agreement provides otherwise. In addition, appropriated funds are available to pay the "gross-up" fee assessed by the Potomac Electric Power Company (Pepco) because the "gross-up" fee represents the cost of additional

income taxes to Pepco that Pepco is attempting to recover through a regulatory approved charge and is not a direct tax upon the federal government.

Background

The AOC advised in his letter of January 27, 2003, that he has been requested to expend and has expended significant appropriated funds for the relocation of facilities of Pepco and the D.C. Water and Sewer Authority in connection with the construction of the new Capitol Visitor Center and the West Refrigeration Plant at the Capitol Power Plant. The AOC's specific inquiry concerns a pending request by the AOC that Pepco relocate its facilities in connection with an AOC contractor's work on the West Refrigeration Plant. Pepco demanded payment in advance of performing the work and requested that the AOC pay approximately $144,000 for the relocation of Pepco facilities. This figure represents approximately $104,000 for the cost of the actual work and $40,000 for a "gross-up" fee assessed by Pepco. The AOC did not provide a specific example of utility relocation work associated with the CVC.

Through follow-up conversations with an AOC official,[1] we learned that the work on the West Refrigeration Plant involves the construction of an underground tunnel connecting to the Capitol Power Plant. The AOC has requested that Pepco relocate Pepco's high-voltage feeders that bring power into the Capitol Power Plant in order to accommodate the location of the underground tunnel. Pepco's high-voltage feeders only serve the Capitol Power Plant, which in turn only serves the buildings and facilities that are on Capitol grounds. These high-voltage feeders do not provide power to any other customer.[2]

The AOC objected to Pepco's request for payment on the basis of two Comptroller General opinions, 10 Comp. Gen. 331 (1931) and 51 Comp. Gen. 167 (1971). These decisions held that absent specific statutory authority, appropriations made to the AOC for certain Capitol construction projects were not available for utility relocation costs as utilities must bear the cost of relocating their facilities pursuant to the terms of the right-of-way or franchise granted to public utility companies in the District of Columbia.

In its response to the AOC's denial of its request for payment for utility relocation costs associated with the West Refrigeration Plant project, Pepco asserts that the

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[1] Telephone conversation with Michael Keegan, AOC, Director of Utilities and Power on February 11, 2003.

[2] Telephone conversations with Michael Keegan, AOC, Director of Utilities and Power on February 11, 2003, and Jack Sullivan, Attorney, Pepco Office of General Counsel on February 12, 2003.

authority absent when our decisions were issued now exists.[3] Pepco points to the Federal Acquisition Regulation (FAR) and the terms of the General Services Administration (GSA)-Pepco Areawide Public Utility Contract[4] as the authority for the AOC to bear such costs. The GSA-Pepco Areawide Contract specifically provides that ordering agencies shall pay for the costs of the relocation of Pepco's facilities required or requested by the ordering agency.[5]

The AOC now seeks our opinion on whether appropriated funds are available for the costs of relocation of the utility facilities as described, including the "gross-up" fee assessed by Pepco.

Analysis

Pepco's Position

We turn first to disposing of Pepco's assertion that the FAR and the GSA-Pepco Areawide Contract provide authority for the AOC to pay for utility relocation costs associated with the West Refrigeration Plant project. GSA is directed to contract for utility services on behalf of executive agencies for periods not exceeding ten years and fulfills its requirement through the use of areawide agreements. 40 U.S.C. § 501(b). The FAR directs any "federal agency" having a requirement for utility services within an area covered by an areawide contract to acquire services under that areawide contract subject to certain exceptions not applicable here. 48 C.F.R. § 41.204(c)(1). Under the terms of the GSA-Pepco Areawide Contract, agencies requesting the relocation of Pepco utility facilities are required to pay for the costs of the relocation.

The AOC correctly points out, however, that the AOC is not subject to the FAR. The AOC and activities under the AOC's direction are specifically excluded from the definition of the term "federal agency." 40 U.S.C. § 102(5) and 48 C.F.R. § 2.101(b). And, while the AOC is authorized to use GSA areawide contracts if he so chooses, the AOC provides that he did not do so here. See 40 U.S.C. § 113(d) (authorizing the AOC to use certain services provided by GSA). Accordingly, contrary to Pepco's assertion, neither the FAR nor the GSA-Pepco Areawide Contract provides the requisite authority absent when we issued the cited decisions. We are unaware of

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[3] See letter of January 14, 2003, from William J. Sim, President of Pepco, to Mr. Alan M. Hantman, the Architect of the Capitol.

[4] Areawide Public Utility Contract for Electric, Electric Transmission, and Energy Management Services Contract No. GS-00P-00-BSD-0138 between the United States of America and Potomac Electric Power Company for the District of Columbia and the Adjoining Areas of Maryland.

[5] Id. at 5.

any specific statutory authority addressing the AOC's ability to pay for utility relocation costs. For example, the Congress authorized the reimbursement of such costs in the case of the construction of the Metrorail system.[6] Therefore, we now examine the applicability of our prior decisions relied on by the AOC in the situation before us.

Applicability of our Prior Decisions

The two decisions cited by the AOC held that absent specific statutory authority, appropriations made to the AOC for the construction of underground duct lines from the Capitol Power Plant to new public buildings and for the construction of the Library of Congress James Madison Memorial Building were not available for utility relocation costs.

> Rights of way or franchises granted … to public utility corporations, in public streets, etc., to operate their business are usually coupled with reservations that the public utility company will, upon demand of the granting authority, vacate the streets, etc., or relocate or divert its conduits, lines, etc., to meet the needs of the granting authority as they arise. It is understood that the franchises of public utility companies in the District of Columbia are granted on such a basis and that when the need of the Federal Government or the District of Columbia government so require in connection with the construction of public buildings, etc., such public utility companies are under obligation to remove, divert, or relocate their lines, conduits, etc., without cost to the Federal Government or the District of Columbia.

51 Comp. Gen. 167 (1971) (quoting 10 Comp. Gen. 331 (1931)). These decisions rely on the terms of the right-of-way or franchise granted to public utility companies in the District of Columbia. They also reflect the common law principle that utilities are required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Company of Virginia, 464 U.S. 30, 35 (1983).

In another line of decisions, we similarly held that in the absence of specific statutory authority, appropriations for the construction of roads and trails could not be used for the purpose of paying the cost of removing and relocating public utility lines on public property when they interfered with the paramount right of the United States to use the lands. See 44 Comp. Gen. 59 (1964), 20 Comp. Gen. 379 (1941) and 19 Comp. Gen. 608 (1939) (citing A-44362 (December 1, 1932), A-38299 (September 8, 1931) and A-36464 (July 22, 1931)). In these cases, which concerned federal lands

[6] Pub. L. No. 89-774, § 68, 80 Stat. 1347 (1966).

outside the District of Columbia, it is clear that the facilities or items on federal lands were part of a broader infrastructure to serve more than the federal government.

The two decisions cited by the AOC do not specify that the utility facilities at issue crossed Capitol grounds at the request of the utility company as part of an overall infrastructure to serve the utility's customers, including but not limited to the federal government. However, from the decisions' use of the term "right-of-way"[7] and references to the franchise granted to public utility corporations in the District of Columbia, we infer that the utility company had requested access to the federal lands in question in order to locate facilities that were part of its overall infrastructure to service its customers. When a utility company requests access to federal lands through a right-of-way, and the federal government grants the utility company such access, if the federal government subsequently requires the utility to relocate its facilities, our decisions have held consistently that in the absence of specific statutory authority, regulation, or other governing agreement the utility must bear all costs of relocation.

In some situations, however, a utility company may locate facilities on federal lands solely to serve the federal government's utility needs and not pursuant to the company's request for a right-of-way in order to locate facilities that will serve as part of the company's general operating network. When a utility company locates facilities on federal lands in order to serve federal needs, the federal government can be viewed as acting, not in its capacity of the sovereign granting the utility company's request for access, but rather as a customer of the utility company. And, when the federal government subsequently asks the utility company to relocate facilities that are located on and will continue to be located on federal lands in order to better serve the federal government, the federal government similarly is acting more as a continuing customer of the utility company than as the sovereign exercising its right of control over federal lands. In the absence of a statute, regulation, right-of-way, or other agreement governing the payment of utility relocation costs, we believe there is a distinction between the federal government's role as the sovereign granting access to the utility company to federal lands and the federal government's role as a consumer of utility services. We view utility relocation costs, when the utility facilities are present to serve the federal government alone and not as part of the utility company's general operating network, as a necessary expense of the project requiring the relocation of the utility facilities. Therefore, we do not object to the use of appropriations to pay the costs of utility relocations requested by the government for the benefit of the government in its role as customer.

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[7] A right-of-way is defined as "the right belonging to a party to pass over the land of another." 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 7 (2002).

Neither the materials provided to us nor our later conversations with the AOC or Pepco indicate conclusively which situation is before us. We were not furnished a copy of a right-of-way or franchise agreement governing the presence of the Pepco facilities on the Capitol grounds that are the subject of this decision. In response to our inquiries, neither the AOC nor Pepco was able to provide or was aware of any current franchise, right-of-way, easement, or other agreement governing the facilities at issue. In conversations with staff of the District of Columbia's Recorder of Deeds, however, we were advised that there may be rights-of-way or easements on file with that office that pertain to the Capitol grounds.

In order for the AOC to apply the principles articulated by this decision to the utility facilities in question here and to similar circumstances that may arise in the future, the AOC may need information concerning the existence of any applicable rights-of-way, easements, or other agreements. Accordingly, we recommend that the AOC take appropriate action to ensure that it has timely information on what rights-of-way, easements, or other agreements, whether on file with the Recorder of Deeds or in the AOC's records, apply to utility facilities that are being relocated.[8] An assessment of the terms and conditions of any rights-of-way, easements, or other agreements currently in force will assist the AOC in determining the availability of appropriations for utility relocation costs for the West Refrigeration Plant and other projects.

"Gross-Up" Fee

The AOC also requested that we determine whether appropriations are available to pay for a "gross-up" fee assessed by Pepco on the utility relocation costs associated with the West Refrigeration Plant project. The AOC stated that Pepco advised the AOC that it would charge approximately $144,000 for the relocation of the Pepco facilities as a "contribution in aid of construction." Of that amount, approximately $40,000 represented the amount of a "gross-up." In questioning whether it may pay the "gross-up" Pepco charges, the AOC characterizes it as a tax, implicating the issue of whether the federal government may pay taxes assessed by state and local governments.

[8] Some executive branch agencies have promulgated regulations concerning the processing of applications for rights-of-way and indicating specific agency personnel with whom such applications should be filed. See e.g., 36 C.F.R. § 14.21 (directing that applications to the National Park Service for a right-of-way shall be filed with the superintendent) and 43 C.F.R. § 2802.2-1 (directing that generally applications to the Bureau of Land Management for a right-of-way grant shall be filed with either the Area Manager, the District Manager, or the State Director having jurisdiction over the affected public lands).

Section 118(a) of the Internal Revenue Code provides, as a general rule, that a corporation's gross income does not include any contributions to the capital of the corporation. 26 U.S.C. § 118(a). Contributions to capital include contributions made by persons other than shareholders. 26 C.F.R. § 1.118-1. Section 118(b) provides, however, that contributions to the capital of a corporation do not include contributions in aid of construction or any other contribution as a customer or potential customer. 26 U.S.C. § 118(b). Prior to 1986, contributions in aid of construction given to regulated public utilities were excluded from income for purposes of section 118(a). However, section 824(a) of the Tax Reform Act of 1986 amended section 118 specifically to require regulated public utilities to include in income the value of any contribution in aid of construction made to encourage the provision of service by the utility to a customer. This change to the Internal Revenue Code directly affects the amount of federal income tax paid by Pepco but also has implications for Pepco's state and local income taxes to the extent state and local governments rely on federal adjusted gross income to calculate taxable income. In fact, Pepco refers to federal, state and local tax in its response to the AOC's questions.[9]

Pepco's "General Terms and Conditions for Furnishing Electric Service in the District of Columbia," as approved by the D.C. Public Service Commission, provides that "Contributions and fees shall be grossed up for the estimated taxes to be levied on the contribution or fee…" Par. 10e. The taxes referenced are federal, state, and local income taxes assessed upon Pepco due to the treatment of the costs of additional service connection installations and alterations as a contribution in aid of construction that must be included in Pepco's gross income.

The imposition of federal taxes upon federal entities does not raise constitutional concerns. As a matter of constitutional law, however, the United States and its instrumentalities are immune from direct taxation by state and local governments.[10] Direct taxation occurs when the legal incidence of the tax falls directly on the United States as the buyer of goods,[11] or as the consumer of services,[12] or as the owner of property.[13] Such taxes are known as "vendee" taxes and may not be paid unless expressly authorized by the Congress. 64 Comp. Gen. 655, 656-7 (1985). When,

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[9] See letter of January 3, 2003, from David C. Pirtle, High Voltage Representative, Customer Design – DC, Pepco, to Mr. Michael Keegan, AOC, Director of Utilities and Power.

[10] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[11] Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).

[12] 53 Comp. Gen. 410 (1973).

[13] United States v. County of Allegheny, 322 U.S. 174 (1944).

however, the legal incidence of the tax falls directly on a business as a "vendor" of goods and services, it is the contract or other agreement between the vendor and the government that determines what the government must pay for the goods or services supplied, even if part of the contract price is attributable to taxes paid by the vendor. Id. at 657. Similarly, when a tax is assessed upon a utility company as a vendor of services and the tax is passed along to customers in an approved tariff, the federal government may pay such costs. See 45 Comp. Gen. 192 (1965), 32 Comp. Gen. 577 (1953), B-144504 (June 30, 1970) and B-144504 (June 9, 1967).

The amount specified by Pepco as the "gross-up" fee represents the cost of Pepco's additional income taxes and is not a direct tax upon the AOC. The legal incidence of any additional state or local income taxes falls upon Pepco as "vendor" and not upon the federal government. Thus, to the extent Pepco is permitted by the D.C. Public Service Commission to recover such costs through the assessment of a "gross-up" fee, appropriated funds are available to pay such a fee.

Conclusion

Consistent with common law principles and a number of our decisions that rely on these principles, when utility facilities that are part of the utility company's general operating network are on federal lands pursuant to a right-of-way granted by the federal government to the utility company, the utility company must bear the costs of relocating facilities unless specific statutory authority, regulation, or other governing agreement provides otherwise. These principles and prior cases do not necessarily extend to all circumstances where utility facilities are on federal lands to serve federal customers. In the absence of a statute, regulation, right-of-way, or other governing agreement, when the federal government is acting as a customer of the utility company, appropriated funds are available to pay for the costs of utility relocations requested by the federal government. In order for the AOC to apply the principles articulated by this decision to the utility facilities in question here and to similar circumstances that may arise in the future, the AOC may need information concerning the existence of any applicable rights-of-way, easements, or other agreements. Accordingly, we recommend that the AOC take appropriate action to ensure that it has timely information on what rights-of-way, easements, or other agreements, whether on file with the Recorder of Deeds or in the AOC's records, apply to utility facilities that are being relocated. In addition, appropriations may be used to pay the "gross-up" fee assessed by Pepco, as it does not represent a direct tax upon the federal government.

/signed/

Anthony H. Gamboa
General Counsel