



UTILITY PROJECTS

A Right of Way Case Study

Authored by:

Ernest Grunewald
ESKOM
South Africa

Utility Project Case Study

Reducing right of way acquisition from its current "Risk #1" ranking for utilities

Economic and population growth requires additional public infrastructure. However, delays in utility project delivery are being experienced because rights of way are not being acquired within the scheduled completion dates. Applying existing legislation and advising government with the drafting of new legislation will dethrone rights of way acquisition as the number one risk in utilities.

Constructive and Collaborative Planning

Beginning in the mid 1980s, South African utilities implemented environmental management by doing in-house environmental impact assessments (EIA). This was a successful practice because interested and affected parties, which included landowners, local government and other stakeholders, were consulted in parallel to studies being conducted by fauna and flora specialists. As the principal affected party, the landowner was given the most weight when the final decision was made as to where to place the proposed route.

In 1992, a new route was required from the North West Province to Gaborone, the capital city of our neighboring country Botswana. Public meetings were held along the proposed route, and all affected landowners were invited to attend. The meetings started with heated refusal, but quickly changed into a constructive planning session once they were explained their role in the process. In addition to explaining that the line was necessary and in the public's interest, the team stressed that they would take the landowner's needs and issues into account. As such, it would be in their best interest to have a consultative session and give their input and suggestions for the best routing alternatives. The end result was an acceptable route with 100% acquisition, all within the time allocated and without any delays.

Environmental Impact

In 1989, the government enacted the Environment Conservation Act No. 73. Five years later, government regulation implemented the 1989 Act, which made it compulsory for all activities that would have an impact on the environment to undergo an EIA. The government revised the environmental laws by enacting the National Environmental Management Act No. 107 of 1998 (NEMA), after which more regulations followed to implement the Act. The latest regulations came through in November 2010.

These acts and regulations were twofold:

- 1) Everyone has the right to an environment that is not harmful to their health or wellbeing. Everyone has the right to have their environment protected for the benefit of present and future generations.
- 2) The law requires EIA's and public participation to be done by independent Environmental Assessment Practitioners (EAP's) so that an environmental impact report (EIR) with a recommended route can be submitted to the government and promote certainty with regard to decision making.

EIA's are a prerequisite for government approval of all activities with potentially adverse environmental impacts. The government has set the norms and standards for EIA's through application of the principles in legislation. The purpose of making EIA's compulsory is to give decision-makers at all levels adequate information on possible adverse environmental effects caused by the activity. This will enable them to make decisions about possible alternatives to mitigate impacts or to adopt the 'no go' option. The EIA process must provide for the participation of interested and affected parties in the planning, assessment and implementation of activities. The government would have preferred to appoint independent EAP's to conduct EIA's however due to budgetary constraints the cost of the EAP has been borne by the utility. This in itself has now created a wrong impression with interested and affected parties, as well as in the utilities.

The Right Roles

I have attended project meetings where the delegates include utility project staff, as well as the independent EAP who is conducting the EIA. The utility is interacting with the EAP as a utility staff member and not as the government's assessor independent of the utility. This interaction may be the first reason for project delays, because the utility is taking charge of the EIA and creating the impression that they will decide on the least impactful environmental alternative. At other public meetings, I have seen interested and affected parties voice their issues and concerns to the utility, which in turn triggers the utility to reply and justify why certain issues—other than landowner issues—are more important. However, this is incorrect, as the EAP serves as the independent assessor and is the one who must facilitate and assess all issues and concerns. If landowner issues are found to be less important than other assessed issues, it is for the EAP to inform the interested and affected parties.

At the EIA for the proposed Kusile Lulamisa 400kV power line, a public meeting was held at the Olievenhoutbosch Township Community Hall. The discussions were moving in the direction where the utility was serving as the EIA conductor, and issues and concerns were being raised and argued. This provided a good opportunity to experiment with the proper legislated method of EIA's.

I requested that my colleagues from the utility move away from the table that was in front of the hall. They were then seated with the IAP's, leaving the EAP at the main table with their assistants. After asking for the floor to share information with the IAP's, I explained that legislation requires EIA's to be conducted by the independent EAP (pointing to the EAP at the front of the hall), and that after the EIA, the EAP must submit an EIR to the government with a recommended route. The government will then study the EIR and make a decision on the final route.

I also informed the IAP's that we, as the utility, are one of the IAP's because we are affected both technically and financially. Therefore, we are attending this public meeting to give the EAP our concerns as an IAP, and that they as co-IAP's must also give the EAP their issues and concerns as far as land use, social, environmental and other issues are concerned. If we as IAP's constructively give all issues and concerns to the EAP, the EAP will then be able to assess these in conjunction with other issues they find. This means that when they recommend the final route to the government and the government approves the final route, we as IAP's will be confident that all our concerns were taken into account.

From this point forward, the mood of the public meeting changed, and all IAP's (including my utility colleagues) constructively participated to ensure that the EAP gained as much information as necessary to assess all issues and concerns raised. The EIA was completed and the government has approved the route as recommended by the EAP in their EIR. No appeals were received from interested and affected parties.

Negotiations were started to acquire rights for the Kusile Lulamisa 400kV power line. Even though there were no appeals on the route decision from the government, certain landowners have shown resistance to agree to grant us the rights required. The chance of delaying the project and keeping "rights of way as risk #1" was again taking its course, causing immense frustration by the utility and the public in general.

At a workshop organized by IRWA Chapter 83 (SARWA), various utilities gave presentations on their methods used in acquiring land and rights. In summary, all the presentations were similar except one. All utilities had to negotiate with landowners to acquire the rights, and until they could prove that the landowner was unreasonable, only then could they apply for expropriation. The only one that was different was the water utility. The water utility is regulated and must comply with the National water Act No.36 of 1998.

An important section of this Act states:

Expropriation of property Section 64.

- 1) The Minister, or a water management institution authorized by the Minister in writing, may expropriate any property for any purpose contemplated in this Act if that purpose is a public purpose or is in the public interest.
- 2) Subject to this Act, the Expropriation Act, 1975 (Act No, 63 of 1975) applies to all expropriations in terms of this Act.
- 3) Where the Minister expropriates any property under this Act, any reference to "Minister" in the Expropriation Act, 1975, must be construed as being a reference to the Minister.
- 4) Where any water management institution expropriates property under this Act, any reference to "Minister" and "State" in the Expropriation Act, 1975 must be regarded as being a reference to that water management institution.

On more intensive investigations and consultations, the Minister of Water Affairs authorized the water management utility to expropriate.

The procedure to acquire land and rights for water services is briefly outlined as follows:

- EIA conducted by an independent EAP
- Water utility participates in the EIA as an IAP to address technical and financial constraints
- The EAP ensures that all IAP's who will be directly affected by the proposed alternatives routes are invited as participative IAP's
- The EAP submits the EIR after assessing all issues and concerns raised by the IAP's
- Government makes a decision on the final route
- IAP's are informed of Government's decision

There are no negotiations to debate whether or not the route must be on the land.

Land and rights negotiators visit landowners to negotiate the amount of compensation to be paid, landowner conditions and rehabilitation plans on their land, and to plan for how the landowner wants to be treated during construction and maintenance. Expropriation notices are delivered with notice of intended start date of construction.

Organized commercial agriculture is represented by three unions/associations, one of which is the Agricultural association in South Africa (AgriSA). In 2010, I attended an AgriSA forum and during my presentation on future utility development, I posed the scenario of acquisition for rights by notice of expropriation. The first reaction was a definite NOT SUPPORTED. I then explained that according to our Constitution all persons have the following related rights:

- The right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations;
- No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

It is therefore irrelevant for a utility to ask a landowner if the route must or must not pass over their property. It is also irrelevant for the landowner to refuse such a route if the route position has been decided on by the government after they have adjudicated the EIR as submitted by the independent EAP, and on condition that the EIA has complied with the Constitutional rights of landowners and other IAP's.

AgriSA concurred that, if the constitutional rights of landowners are exercised during the EIA where their environmental and property issues and concerns are assessed, and if they are kept involved in the EIA process to track the assessments of their issues and concerns and those of others, they will then accept the decision of a final route from the government.

In March 2012, Chapter 83 (SARWA), IRWA International President Randy Williams, SR/WA and IRWA Executive Vice President Mark Rieck met with members of the Presidential Infrastructure Co-ordination Commission. The discussions were to strategize on a process to ensure that the infrastructure projects as requested by the President are not delayed because of the Utilities #1 Risk – Land and Rights. The commission members were pleased to learn that a solution for Risk #1 is available if Section 64 of the National water Act No.36 of 1998 could be applied to all utilities that deliver infrastructure according to the Presidential plan.

In May 2012, Chapter 83 (SARWA) met with the government to assist in drafting legislation that will be used for the execution of infrastructure projects. It has been suggested that the proposed legislation include clauses that deal directly with EIA's and land and rights. The content of these clauses should cover the process of ensuring the Constitutional rights of landowners and the expropriation notice methodology.

Conclusion

The acquisition of land and rights has been the #1 Risk in utilities because it can delay crucial infrastructure projects needed for public use. However, after consultation with other utilities, a methodology that complies with public Constitutional rights has been identified, and it is now being shared with the government. If this methodology is introduced for use with all public infrastructure utilities, then landowners, the general public and the utilities will all benefit.

In the future, there is potential for landowners and utilities to join as IAP's during the EIA. After the government's decision on the final route, landowners and utilities can negotiate compensation, rehabilitation and determine how the landowner wants to be treated. At that point, Risk #1 will no longer be the acquisition of land and rights.