

## **REGULATING UTILITIES IN TOWN ROAD RIGHTS-OF-WAY**

*This document is meant to serve as an optional add-on to the basic road administration ordinance contained in Document Number: TP8000.*

Prior to 1997, the law said relatively little about the authority of local governments to regulate the placement of utilities in public road rights-of-way. However, that all began to change when the scope of local government authority to regulate telephone lines became the subject of litigation.<sup>1</sup>

Briefly, the case involved an ordinance the city passed in 1990 granting a franchise to US West that, among other things, required the company to either encase its fiber-optic lines in a concrete duct or agree to limit to \$2,000 the liability of anyone who happens to cut a fiber optic line.<sup>2</sup> When the city first attempted to enforce this requirement in 1995 U.S. West went to court in an attempt to prohibit the enforcement of the ordinance and claiming the city acted beyond its authority. The court ruled in favor US West, finding cities do not have the authority to franchise telephone companies and that since the duct and liability limitation requirements stemmed from the city's franchise ordinance, these requirements were not valid.<sup>3</sup> As part of its decision the court found the legislature transferred authority over telephone companies to the Minnesota Public Utilities Commission in 1915.

Given the impact of this decision on utility companies and local governments concerned with protection their rights-of-way, the issue was brought to the attention of the legislature during its next session. After a great deal of debate and effort on both sides of the issue, the legislature adopted Minn. Stat. §§ 237.162 and 237.163. These statutes set out the basic division between the authority of local governments to regulate their rights-of-way and the ability of utility companies to use rights-of-way to place their facilities. As part of the legislation the Public Utilities Commission was directed to convene a task force to help develop rules on the issue within the general guidelines provided by the legislature.

After many months of meetings between the groups representing counties, cities, towns, and the utility companies, the Public Utilities Commission adopted Minnesota Rule Chapter 7819. These rules further define the respective rights and obligations of the parties. The practical effect of the legislation and rules was to make it much more complicated for local governments to regulate the placement of utilities in their rights-of-way. That is why this sample ordinance, even though it reflects a very minimal regulatory approach, is longer than many town officers may think is necessary. While some of the provisions can arguably be eliminated, many are necessary under the rules and must remain.

The goal in developing this sample was to allow towns to take advantage of some of the benefits of choosing to regulate the placement of utilities while minimizing the amount of time the Board would need to devote to administer the regulations. This approach also benefits utility companies by

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<sup>1</sup> *US West Communications, Inc. v. City of Redwood Falls*, 558 N.W.2d 512 (Minn. App. 1997).

<sup>2</sup> *Id.*, at 514.

<sup>3</sup> *Id.*, at 515-16.

reducing the regulatory compliance requirements in most cases. A town with more developed administrative capabilities that wishes to take a more regulatory approach to this issue can work with its attorney to take advantage of the additional authority provided by the statute and rules.

One of the benefits of having participated in the task force on behalf of towns was to secure some protections for those towns that choose not to regulate their rights-of-way under these rules. Under the rules,<sup>4</sup> even if a town chooses not to adopt an ordinance under these rules a utility company is still required to do the following before excavating in, or obstructing, a town road right-of-way:

- Restore the right-of-way to the same condition that existed before the excavation.<sup>5</sup>
- Restoration must involve compacting the materials placed in the excavation of the subgrade and aggregate base, plus pavement replacement, in kind. If required by the town, the utility company must perform all restoration work in accordance with the town's specifications and drawings.<sup>6</sup>
- The restoration standards set out in the rules can be used.<sup>7</sup>
- The utility company is required, except in emergencies, to notify the town before initiating an excavation, an obstruction lasting more than two hours, or of an obstruction of more than one lane of traffic. The notice must include: the name, address, and telephone number of the utility company and any contractors involved in the excavation; the anticipated start and completion dates; the typical depth of the lines; and the general location of the work. A town may waive all or any portion of this notice requirement.<sup>8</sup>
- Telecommunications facilities must be installed according to the requirements set out in the rules.<sup>9</sup>
- Gas and electric facilities must be installed according to the requirements set out in the rules.<sup>10</sup>

Towns need to seriously consider the advantages and disadvantages of getting involved with regulating utilities over what they are entitled to receive without impose regulations. Some towns simply do not see this as much of a concern for them. Others see this as an important issue, but one that is sufficiently addressed directly with the local utility companies without having to impose regulations. Unfortunately, there are other towns that have encountered problems over this issue and believe they have little choice but to adopt regulations.

As with all the samples provided by the Association, they can and should be modified to fit the particular town's needs and must be reviewed by the town's attorney before it is adopted. This is particularly true in this case given the significant level of detail and limits imposed by state statute and rule over this issue.

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<sup>4</sup> Minn. R. 7819.0050.

<sup>5</sup> Minn. R. 7819.1100, subp. 1.

<sup>6</sup> Minn. R. 7819.1100, subp. 2.

<sup>7</sup> Minn. R. 7819.9900 to 7819.9950.

<sup>8</sup> Minn. R. 7819.1200.

<sup>9</sup> Minn. R. 7819.5000.

<sup>10</sup> *Id.*

## Section 1. \_\_\_\_. Utility Excavations and Obstructions.

1. **Elect to Manage.** The Board hereby elects, pursuant to Minnesota Statutes, section 237.163, subdivision 2, to manage Rights-of-Way under its jurisdiction under Minnesota Statutes, sections 237.162 and 237.163, and all other applicable laws, for the purposes of Minnesota Rules chapter 7819.
2. **Definitions.** In addition to the definitions set out in this ordinance, the following terms shall have the meaning given here for the purposes of this section.
  - a. **Applicant.** A Person who submits a Permit Request for an Excavation Permit or an Obstruction Permit in accordance with this section.
  - b. **Excavate.** “Excavate” means to dig into, trench, or in any way remove, physically disturb, or penetrate a part of the Right-of-Way.
  - c. **Excavation Permit.** “Excavation Permit” means a permit issued to an Applicant to Excavate within a Right-of-Way.
  - d. **Facility.** “Facility” or “Facilities” mean any tangible asset in the Right-of-Way required to provide utility service.
  - e. **Obstruct.** “Obstruct” means to hinder the free and open passage of any portion of a Right-of-Way for more than two hours or on more than one lane of traffic.
  - f. **Obstruction Permit.** “Obstruction Permit” means a permit issued to an Applicant to Obstruct a Right-of-Way.
  - g. **Permit Request.** “Permit Request” means a request to obtain an Excavation Permit or Obstruction Permit made on the Board approved application form or, if none, in a writing containing all of the information required by this section.
  - h. **Permittee.** “Permittee” means a Person to whom the Board has issued an Excavation Permit or Obstruction Permit under this section.
3. **Permit Required.** Except in emergencies, no Person may Excavate or Obstruct a Right-of-Way without first obtaining a permit from the Board. An Excavation Permit is required to Excavate any portion of a Right-of-Way for the purpose of placing, repairing, or removing Facilities. An Obstruction Permit is required to Obstruct a Right-of-Way. To obtain a permit, a Person must provide the town clerk, or designee, a written Permit Request for the proposed Excavation or Obstruction as provided in this section. If a proposed Excavation project includes an Obstruction at the same site, an Applicant need not submit a separate Permit Request for an Obstruction Permit if the request for the Excavation Permit includes a description of the proposed Obstruction.
4. **Permit Requests.** Requests for an Obstruction or Excavation Permit must be made on the application form adopted by the Board. If the Board has not adopted an application form, Permit Requests must be in writing and contain at least the following information:

- Name, address, phone number, and fax number of the Applicant;
  - Name, address, phone number, and e-mail address of a local representative that will serve as the designated contact person on behalf of the Applicant;
  - Name, address, phone number, and fax number of any sub-contractors that will be performing any part of the Excavation or Obstruction;
  - A written description of the work to be performed in the Right-of-Way at each location including whether the work will involve Excavation and/or the Obstruction of a Right-of-Way;
  - A scaled drawing showing the specific location of the work to be performed and the location and approximate depth of any Facilities installed within a Right-of-Way;
  - Whether the Applicant intends to restore the Right-of-Way or elect to pay a degradation fee in lieu of restoration;
  - The start and completion dates for the work at each location; and
  - Certificate of insurance.
- a. **Incomplete Requests.** If a Permit Request received by the Board is incomplete, the Board will notify the Applicant within 15 days of the information that is needed in order to complete the request. Incomplete Permit Requests are invalid and shall be deemed rejected unless all the required information is submitted to the Board within 30 days of the date the Board notified the Applicant its Permit Request was incomplete.
  - b. **Permit Request Fee.** All Permit Requests must be accompanied by a Permit Request fee. The purpose of this fee is to compensate the Board for its costs associated with reviewing the Permit Request. A Permit Request is not complete and will not be considered unless it is accompanied by the required fee.
5. **Indemnification.** By making a Permit Request an Applicant agrees to, and all Excavation and Obstruction Permits are issued on the condition that a Permittee, defend and indemnify the Town in accordance with the provisions of Minnesota Rule 7819.1250.
  6. **Written Permit.** If the Board notifies an Applicant of the need to obtain a written permit, the Applicant may not undertake the proposed Excavation or Obstruction until the Board issues the Applicant a written permit. The Board will require a written permit if, in its sole discretion, it determines the potential impact on the public or Right-of-Way requires additional review or safeguards. When considering Permit Requests requiring a written permit, the Board may condition the issuance of a written permit on the Applicant: providing the Board with additional information; providing a completion certificate as authorized in Minnesota Rule 7819.1300; providing the Town a construction performance bond with a term of at least 24 months as authorized by Minnesota Rule 7819.3000 before the Excavation occurs; require the restoration of the Right-of-Way be performed in accordance with Board established

specifications and drawings; and complying with such other reasonable requirements as the Board determines are necessary to protect the public health, safety, and welfare or the Right-of-Way and its current uses.

- a. **Written Permit Fee.** When a written permit is required, the Applicant is required, in addition to paying the Permit Request fee, to reimburse the Board for the actual costs it incurs related to issuing the permit including, but not limited to, costs of reviewing the request, conducting inspections, hiring professionals, and other costs actually incurred that exceed the Permit Request fee and directly relate to the Applicant's request. The Board shall provide the Applicant a written statement of costs incurred. Payment in full of the written permit fee is due upon receipt of the statement and must be received by the Board no later than 30 days from issuance of the statement. In the alternative, the Board and the Applicant may agree to an advanced payment of the written permit fee. Failure to pay the written permit fee within the required period shall result in the immediate suspension of the permit and may result in the revocation of the permit as provided herein.
7. **Limitations.** Permitted Excavations or Obstructions are limited to the area and time periods described in the Permit Request or written permit. A Permittee must seek a new permit if it wishes to Excavate or Obstruct outside of the originally permitted work area or timeframe.
  8. **Delay Penalty.** A Permittee that does not complete its Obstruction, Excavation, or restoration of the Right-of-Way at a particular location within 10 days of the completion date shall pay the Town a delay penalty for each day of delay. If a Permittee is able to establish to the Board that one or more days of the delay was caused by circumstances beyond its control, the delay penalty shall not apply to those days of the delay.
  9. **Telecommunication Facilities.** Telecommunication facilities to be installed in a Right-of-Way shall be installed according to the requirements set out in Minnesota Rule 7819.5000 in addition to all other applicable federal, state, and local requirements.
  10. **Gas and Electric Facilities.** Gas and electric facilities to be installed in a Right-of-Way shall be installed according to the requirements set out in Minnesota Rule 7819.5100 in addition to all other applicable federal, state, and local requirements.
  11. **Restoration Required.** A Permittee must restore the Right-of-Way to at least the same condition that existed before the Excavation. If there is a dispute as to the level of restoration required, the Permittee shall restore the Right-of-Way according to the applicable standards established in plates 1 to 13 set out in Minnesota Rule 7819.9900 to 7819.9950. If a Permittee elects in its Permit Request to pay a degradation fee in lieu of restoring the Right-of-Way, the fee will be in an amount the Board determines necessary for the Town to have the Right-of-Way restored according to the applicable standards established in plates 1 to 13. A Permittee electing to pay a degradation fee remains responsible for replacing and compacting the sub-grade and aggregate base material in the Excavation.
    - a. **Correct Defects.** Upon notice by the Board, a Permittee shall correct any defects in the work it performs to restore a Right-of-Way. The work to correct the defects shall be completed with 7 days of the notice. If the Permittee is not able to complete the

corrective work within 7 days because of circumstances beyond its control, the Permittee shall complete the work as soon as is possible.

- b. **Failure to Restore.** If a Permittee fails to restore the Right-of-Way within 5 calendar days after the completion of an Excavation, or fails to correct defects in an earlier restoration as provided herein, the Board has the option of restoring the Right-of-Way according to the standards established in plates 1 to 13 set out in Minnesota Rule 7819.9900 to 7819.9950. The Town shall provide a statement of its actual costs for restoring, or correcting defects to, the Right-of-Way to the Permittee. Payment in full of the statement is due upon receipt and must be received by the Board no later than 30 days from the date of the statement. If the Permittee fails to pay the billed amount, the Town may exercise its rights under the construction performance bond.
12. **Permit Denial.** The Board may deny a Permit Request if the Applicant has failed to pay any fees, penalties, or other amounts due as the result of previous Excavations or Obstructions unless the failure to pay is based on a good faith dispute over the amount owed. If the amount owed the Town is in dispute, an Applicant can become eligible to submit an additional Permit Request by placing the full amount the Town claims is still owed in escrow until the dispute is resolved. The Board may also deny a Permit Request for failure to meet the requirements of this section or if it determines the denial is necessary to protect the public health, safety, and welfare.
13. **Warning Signs.** A Permittee shall supply, place, and maintain warning signs as needed to warn the public of its Excavation or Obstruction. A Permittee shall comply with the standards established by the Minnesota Department of Transportation in determining the need for signage, the type of signs, and their location.
14. **Site Inspection.** A Permittee shall make its work-site available at all reasonable times to Town representatives to conduct inspections of the site during the work and at its completion.
15. **Permit Revocation.** The Board may issue an order revoking a permit if a Permittee fails to comply with the requirements of this section, its permit, or is conducting the work in such a way as to pose an unreasonable risk to the public. An order revoking a permit is effective five days from the date of issuance if the Permittee does not come into full compliance and otherwise corrects the items stated in revocation order. The Board shall have the authority to order the immediate cessation of work if it determines any portion of the work poses a serious threat to life, health, safety, or well-being of the public. If the Board revokes a permit, it shall provide for the restoration of the Right-of-Way and the Permittee shall pay all costs the Town incurs associated with the restoration to the standards established in plates 1 to 13 set out in Minnesota Rule 7819.9900 to 7819.9950.
16. **Emergencies.** An Excavation or Obstruction Permit is not required in order for a Person to respond to emergencies related to their Facilities. However, within two business days after the occurrence of the emergency the Person shall apply for the necessary permits, pay the fees associated with those permits, and comply with the requirements to obtain those permits and of this section.

17. **Relocation of Facilities.** An approved applicant is required, at its own expense, to promptly permanently remove and relocate its Facilities in the Right-of-Way when it is necessary to prevent interference in connection with: the Town's present or future use of the Right-of-Way for a public project; the public health, safety, and welfare; or the safety and convenience of travel over the Right-of-Way. An approved applicant shall also pay for the relocation of its Facilities upon the vacation of the Right-of-Way as provided for in Minnesota Rule 7819.3200, subp. 2.
18. **Right-of-Way Vacation.** If the Board vacates all or a portion of a Right-of-Way containing Facilities and the vacation does not require the relocation of those Facilities, the Board shall, except when it would not be in the public interest, reserve to and for itself and all those having Facilities in the vacated Right-of-Way, the right to install, maintain, and operate facilities in the vacated Right-of-Way and to enter upon the Right-of-Way at any time to reconstruct, inspect, maintain, or repair the Facilities.
19. **Abandoned Facilities.** A Person is required to remove any of its abandoned Facilities in conjunction with other Right-of-Way repair, Excavation, or construction unless expressly waived by the Board in a specific situation upon the request of the Person. "Abandoned Facility" has the meaning provided in Minnesota Rule 7819.0100, subp. 2.
20. **Fees and Penalties.** All fees and penalties provided for in this section shall be established from time to time by Board resolution in compliance with Minnesota Rule 7819.1000 and made available to the public upon request. Unless indicated otherwise in a franchise, the fees and penalties provided for here are in addition to any franchise fees a Permittee may be required to pay. All fees, penalties, and other charges imposed under this section are non-refundable.
21. **Notices.** For the purposes of the Board providing notice under this section, the Board shall be deemed to have satisfied its notice obligation if it provides the required period of notice by mail, fax, or e-mail to the Applicant's designated local representative.

**RESOLUTION  
SETTING RIGHT-OF-WAY  
EXCAVATION & OBSTRUCTION PERMIT FEES**

**WHEREAS**, the Town Board of \_\_\_\_\_ Township, \_\_\_\_\_ County, Minnesota is authorized by law, including but not limited to Minnesota Statutes Sections 237.162; 237.163; and Minnesota Rule Chapter 7819, to regulate excavations and obstructions of its rights-of-way by certain right-of-way users;

**WHEREAS**, the Town Board did on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ adopt ordinance number \_\_\_\_\_ to regulate a variety of activities in the right-of-way including, but not limited to, excavations and obstructions associated with placing, repairing, or removing utility facilities;

**WHEREAS**, the ordinance set out that certain fees, costs, and penalties apply to those seeking permission to excavate or obstruct a town road right-of-way, the amount of which are to be set out in a Town Board resolution;

**NOW, THEREFORE, BE IT RESOLVED**, that the Town Board does hereby establish the following fees, costs, and penalties related to Excavation Permits and Obstruction Permits issued pursuant to Ordinance number \_\_\_\_\_:

Permit Request Fee: \$ \_\_\_\_\_

Board Member Fee: \$ \_\_\_\_\_

Special Board Meeting Fee: \$ \_\_\_\_\_

Professional Fees:

Delay Penalty \$ \_\_\_\_\_

Degradation Fee \$ \_\_\_\_\_

**BE IT FINALLY RESOLVED**, that the Town Board may amend this fee schedule by resolution and such amendment shall go into effect 30 days after the resolution is passed.

Approved by the Town Board of the Town of \_\_\_\_\_, Minnesota this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Attest:

\_\_\_\_\_  
Chair

\_\_\_\_\_  
Clerk