

# The Highs and Lows of Regulating Utilities in Town Rights-of-Way



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# History of Utilities in Rights-of-Way

- Historical authority for utilities operating in public rights-of-way
- The use of utilities expanded over time with advancements in technology – small cell wireless

# History of Utilities in Rights-of-Way

- *U.S. West Commc'ns, Inc. v. City of Redwood Falls* – Low point of municipal authority to manage its public rights-of-way
- Prompted a legislative response – Minnesota right-of-way law at Minnesota Statutes, §§ 237.162 and 237.163

# Minnesota Right-of-Way Law

- Under the law, towns have the authority to determine whether or not they will manage or regulate the use of their rights-of-way by utilities.
- The law also puts in place certain protections for all towns, including those towns that do not manage or regulate utilities in their rights-of-way.

# Management of Rights-of-Way

- For towns that elect to adopt a right-of-way ordinance, the statutes and rules promulgated by the Minnesota Public Utilities Commission outline a number of areas that a town can regulate.

# Management of Rights-of-Way

## 1. Permitting and Permit Fees

A town can establish a permit process and reasonable permit fees for excavation in or obstruction of a right-of-way.

The amount of the fees should cover expenses incurred by the town in managing the right of way, and they should be allocated among all of the users of the right-of-way.

# Management of Rights-of-Way

## 2. Indemnification

A town can require the utility to indemnify the town against liability claim as a condition of issuing a permit.

Indemnification does not apply to claims that the town committed a negligent act or was otherwise wrongful.

# Management of Rights-of-Way

## 3. Completion Certificate

A town can require a certificate of completion, which would include a completion date for the work, the name of the installer and designer, and a certification that the work was completed according to the town's requirements.



# Management of Rights-of-Way

## 4. Construction Performance Bond

At the time of an application for an excavation permit, a town can require a construction performance bond if the utility elects to restore the right-of-way after excavation.

A utility can pay a “degradation” fee in lieu of restoration.

# Management of Rights-of-Way

## 5. Relocation

A town can require a utility to remove and relocate facilities, at the utility's expense, when necessary to prevent interference with (a) a present or future use of the right-of-way, (b) public health and safety, and (c) the safety and convenience of travel over the right-of-way.

If a right-of-way is vacated in favor of a non-governmental entity, the utility cannot be required to remove or relocate facilities until reasonable costs are paid to the utility.

# Management of Rights-of-Way

## 6. Vacation of a Right-of-Way

If a town vacates a right-of-way but the utilities do not have to be relocated, the town must reserve the right to install, maintain and operate the utility's facilities on behalf of the town and the utility.

The town is not required to reserve the right to install, maintain and operate if it is against the public interest.

# Management of Rights-of-Way

## 6. Vacation of a Right-of-Way (cont.)

If the utilities must be relocated after the vacation of a right-of-way, payment of relocation fees is determined as follows:

- If vacation is initiated by the utility, the utility pays the relocation costs.
- If vacation is initiated by the town for a public project, the utility must also pay the relocation costs unless there is a separate agreement.

# Management of Rights-of-Way

## 6. Vacation of a Right-of-Way (cont.)

- If vacation is initiated for the benefit of a person other than the utility, the benefited person must pay the relocation costs.

# Management of Rights-of-Way

## 7. Abandonment of the Utilities

A town can require notice from a utility in the event it abandons its facilities in a right-of-way.

A town can also require the utility to remove the facilities if removal is required for other repair, excavation or construction in the right-of-way.

# General Protections for Towns

## 1. Restoration

Unless an ordinance provides otherwise, a utility must restore a right-of-way to the same condition that it existed prior to the excavation.

A utility is responsible for the work performed on behalf of the utility, whether it is completed by the utility's employees, agents or subcontractors.

# General Protections for Towns

## 2. Guidelines for Installation of telecommunication, gas and electric facilities

The rules set forth detailed specifications with regard to the installation of telecommunication facilities.

Electric facilities must comply with the National Electrical Safety Code. Gas facilities must comply with federal regulations.



# General Protections for Towns

## 3. Notice Prior to Excavation

Unless an emergency exists, a utility must notify a town, in writing, prior to (a) initiating excavation a the right-of-way, (b) beginning work that will obstruct the right-of-way for more than two hours, or (c) beginning work that will obstruct more than one lane of traffic.



# Miscellaneous Right-of-Way Issues

Towns have a general authority to supervise the drainage of public roads, but property owners have established rights to certain accesses to public right-of-ways.

# Miscellaneous Right-of-Way Issues

## 1. Drainage

- Drain connections – After obtaining a permit, property owners can make connections to a drain or ditch in a right-of-way. The town can establish rules and regulations with regard to drain connections.
- Drains across new roads – If a property owner needs to install drain tile across a new road for agricultural purposes prior to construction, the expense for the material and labor must come from the town's road funds as long as sufficient notice is given to the town.

# Miscellaneous Right-of-Way Issues

- Drains across roads after construction – A property owner can install drain trial across a road provided that there will be no diversion away from the natural drainageway immediately downstream from the road. The property owner is responsible for the costs, and the road must be left in as good condition as prior to the installation.

# Miscellaneous Right-of-Way Issues

## 2. Flexible Manure Lines

- With the approval of electors at an annual meeting, a town can establish a permitting process for the placement of flexible manure lines in the town's rights-of-way.
- However, even if the town does not adopt an ordinance, property owners can still place flexible manure lines in a right-of-way if there has been no notice from the town of road maintenance that would be obstructed by the lines.

# Miscellaneous Right-of-Way Issues

- Minnesota Statutes, §160.27 also sets forth a number of guidelines with regard to flexible manure lines, regardless of the existence of an ordinance, including:
  - One business day notice prior to placement, written or electronic
  - The line cannot be left in the right-of-way for more than 21 days.

# Miscellaneous Right-of-Way Issues

- Start and end point and path of intended placement
- Intended start and end date of placement
- Placed in the backslope of the right-of-way if possible
- No pumping equipment in the right-of-way
- Contact information
- Placement cannot interfere with another owner's access to their property, the safe use of the right-of-way, or maintenance activities in the right-of-way

# Miscellaneous Right-of-Way Issues

- No notice is necessary in case of an emergency, but a property owner must make a good faith effort to provide notice.
- The town can remove the line if it is placed longer than allowed
- The property owner must restore the right-of-way to preplacement condition after a spill or leak
- The town may restrict the number of lines in the same right-of-way at the same time by ordinance.



# Miscellaneous Right-of-Way Issues

## 3. Approaches/Culverts

- With regard to an existing road, a property owner can install an approach, upon receipt of a permit, at their own expense. The property owner must also pay the costs of installing a culvert, unless the town adopts a policy stating otherwise.
- With regard to new roads, a town must install approaches if they are necessary and practicable to provide reasonable access to the road.

# Miscellaneous Right-of-Way Issues

- Property owners who already have one access can request additional accesses to the road, at their own expense, that would facilitate the efficient use of the property for a particular purpose.

# Small Cell Wireless

## 1. What is small cell wireless?



# Small Cell Wireless

2. Minnesota's 2017 amendments of the right-of-way law with regard to small cell wireless.
  - Very little restriction on wireless providers
  - No moratoria allowed
  - Assumption of permission in the right-of-way
  - A town can require special or condition use permits if located in single-family residential or historic district
  - Limited ability to deny a permit
  - A town can recover reasonable permit fees and rent for placement on public structures

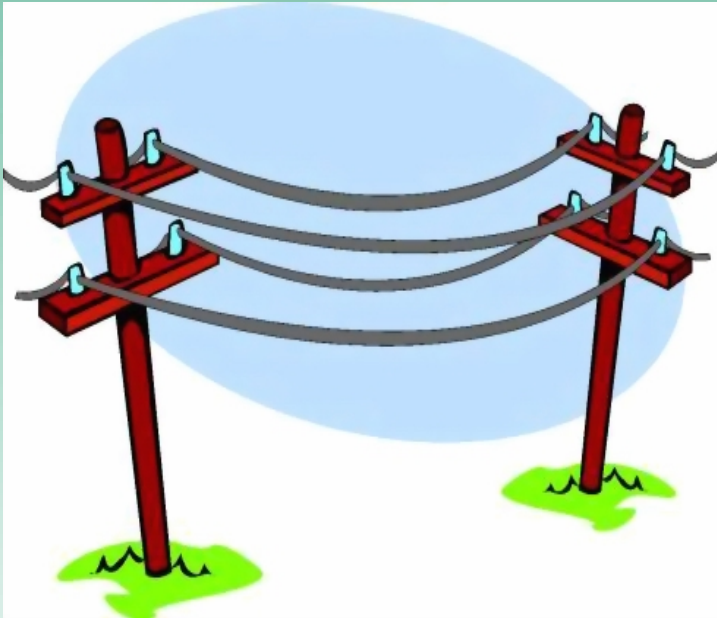
# Small Cell Wireless

## 3. Federal Regulation

- Conflict with Minnesota Statutes
- Recommend that a town have small cell wireless changes in place for their right-of-way ordinances

# Thank you!

## Questions?



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