

**MISSOURI MUNICIPAL ATTORNEYS ASSOCIATION**

**CITY LAW 101**

**RIGHTS-OF-WAY  
ISSUES**

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## RIGHTS-OF-WAY ISSUES

### I. SOURCES OF MUNICIPAL RIGHT-OF-WAY AUTHORITY.

#### A. Utility authority to use ROW; municipal consent required:

**§393.010 RSMo.** Any corporation . . . organized . . . for the purpose of supplying any town, city or village with gas, electricity or water shall have the power to lay conductors for conveying gas, electricity or water through the streets, alleys and squares of any city, town or village *with the consent of the municipal authorities thereof under such reasonable regulations* as such authorities may prescribe . . . in such manner as not to incommode the public in the use of such roads, streets and waters.

**§392.080 RSMo.** Companies . . . for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along, across or under any of the public roads, streets and waters of this state, *in such manner as not to incommode the public* in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires, poles, and other fixtures in any city, *they shall first obtain consent from said city* through the municipal authorities thereof . . . .

#### B. Public ROW Act - §§67.1830 - 1848 RSMo. (SB 369 2001).

**§67.1832.1 RSMo.** pursuant to this section, a political subdivision *shall grant its consent* to a public utility right-of-way user authorized to do business pursuant to the laws of this state . . . to construct, maintain and operate...below or above ground in the public right-of-way . . . .

**After SB369:** *See In the Matter of the Application of St. Louis County Water Co.*, Case No. WA-2001-288, n.23, 2002 WL 535128 (Mo.PSC January 27, 2002)(*"The consent of the municipality is an 'absolute prerequisite,' citing State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 53 S.W.2d 394, 399 (Mo. banc 1932)).

#### C. Charter Cities: Section 82.190 RSMo. expressly states that a charter city shall "*have exclusive control* over its public highways, streets, avenues, alleys and public places...any law of this state to the contrary notwithstanding." Section 82.230 RSMo. expressly authorizes charter cities to "provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city."

### II. RECENT/RELEVANT CASES.

#### A. RELOCATION OF FRANCHISE FACILITIES

*Union Electric v. Land Clearance Red. Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977)(stated the common law requirement that a utility must "relocate its facilities in public streets when changes are required by public necessity [and must do so] at its own expense" when the municipality is exercising a governmental function rather than a proprietary function; when the "primary purpose" for requiring relocation was an urban renewal project the municipality was performing a governmental function despite the fact that the relocation benefited a private interest).

*Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287, 290 (Mo. App. E.D. 1989)("Common law general rule regarding utility facilities within public rights-of-way states that licensees within public rights-of-way must relocate facilities at their own costs when necessary to accommodate rights-of-way improvements" *if done for purely governmental purpose.*)

*City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226 (Mo. banc 2007) (relocation to accommodate improvements completed by private entities following a legislative declaration of public interest is sufficient to meet the “public necessity” requirement triggering the common law rule that utility companies must move facilities if such move is required by public necessity; continued operation as if a franchise agreement remains in effect following such agreement’s expiration creates an implied contract under the terms of the prior agreement that can only be canceled upon reasonable notice).

*St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137 (Mo. banc 2011) (a utility’s installation of facilities in a designated “utility easement” dedicated to the utility in plat creates a private interest in that easement for which the utility must be compensated if that easement is taken; the utility is not responsible for the costs of regulating its equipment in a private easement; this case is a strong caution to review plat language carefully).

*Riverside-Quindaro Bend Levee Dist., Platte County, Missouri v. Missouri*, 117 S.W.3d 140, 150 (Mo. App. W.D. 2003) (“Because Water Company's occupancy interests in the Highway 9 and the [City of] Riverside rights-of-way are licenses, it is not entitled to compensation" for relocation resulting from condemnation to complete non-traffic related public project).

## B. STATUTORY CONSTITUTIONALITY

*Planned Industrial Expansion Authority of the City of St. Louis v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772 (Mo. banc 1981)(statute amendment to 392.080 unconstitutionally granted utility vested right in rights-of-ways; Authority had right to vacate and force relocation of telephone utility in rights-of-way).

*XO Missouri, Inc. & Southwestern Bell Telephone Co. v. City of Maryland Heights*, 362 F.3d 1023 (8<sup>th</sup> Cir. 2004)(upholds specific constitutional challenges against SB369 by City, but does "not reach" SBC's vested franchise claim, reasonableness or not of City's fees under federal law, or the district court's "alternative holdings").

## III. SUMMARY OF PUBLIC ROW LAW (§§ 67.1830 *et seq.* RSMo.)

### A. SCOPE OF THE ACT.

§ 67.1832 RSMo. – Political Subdivision "*shall grant its consent*" to a "*public utility right-of-way user*" to do business to construct and maintain virtually any type of facility "*for the transmission of any service or commodity installed below or above ground in the public right-of-way.*" "Public Utility right-of-way user" includes cable television, telecommunications, pipeline, electric, water, sewer, gas companies under PSC jurisdiction, and other entities that provide a "public utility" type of service to the "general public."

### B. POLITICAL SUBDIVISION EXPRESS AUTHORITY.

A political subdivision may "**manage**" its ROW (§67.1832.2) including:

- **recover "management costs"** including a "fee" to recover such costs (.1840)
  - actual substantiated costs
  - allocated among all users of ROW including the political subdivision
  - with above ground users bearing no costs of "regulating" below ground users
  - "Management Costs" – are the actual costs incurred by the City, but does not include (1) rent, (2) degradation of ROW, (3) litigation or other legal fees, and (4) costs of enforcement appeals (.1830(5)).

- **require a permit** for excavations subject to conditions, including completion date (.1834.1 & .1836.2(4))
- **require an application form** (.1836.1(1) & .2(3))
- **require notice** for "anticipated" projects (joint trenching notice?) (.1830(6)(b))
- **restore the ROW** or pay "actual restoration costs" at City option - §67.1834
- **require removal of abandoned facilities** *if* it "significantly impairs" ROW use
- **deny a permit if** applicant:
  - (1) fails to provide requested information
  - (2) fails to "return" ROW to "previous condition"
  - (3) alternative to the permit is offered by City that costs no more than 10% more
  - (4) if necessary for public safety
  - (5) *environmentally sensitive area or historic district*. §67.1836
- **revoke permit and impose penalty** until material violation is cured
- **existing franchises, permits and agreements in effect on May 1, 2001 remain enforceable**. §67.1846
- **establish regulations for:**
  - wireless structures and equipment. §67.1830(6)
  - standards to reduce degradation
  - restoration conditions and standards (.1834)
- **require a performance bond** (except for companies over \$25mm in assets)
- **zoning, safety, other ordinances** applying to users are not preempted (.1844)(subject to PSC rules and laws)
- **licensing of contractors permitted** (.1844.2)
- **grandfathered political subdivisions** may charge linear foot or antenna fee if: credit of gross receipts **or** business license taxes paid,
- **franchise, gross receipts, and other taxes (utility taxes) are not prohibited** (.1846)

**C. POLITICAL SUBDIVISION PROHIBITIONS AND DUTIES.**

**Political Subdivision *may not*:**

- **take longer than 31 days to process a permit application** (.1836.3)
- **require a Telecommunications Company to obtain a franchise** (.1842); *except* nothing prohibits the "renewing" or "entering" into of a "new or existing franchise with a public utility ROW user (.1846).
- **require a public utility ROW user to pay a fee (.1842.1(4)) except:**
  - **management costs (.1840)**
  - **linear foot or antenna charges by "grandfathered cities" (.1846)**
  - **degradation fees established prior to May 1, 2001**
- **require a performance bond for a user with \$25mm in assets** (.1830)
- **require in-kind services** as condition of consent or in lieu of fees (.1842.3) (other than in cable franchises).
- **contractors shall have the same obligations as if done by the Utility users** (.1844.2)

**Political Subdivision *shall*:**

- **specify time for filing appeal** (.1838)
- **hear appeals by written decision with written findings**
- **manage the ROW in a "competitively neutral and nondiscriminatory and uniform manner"** (.1830(6))

**D. PUBLIC UTILITY ROW USER RIGHTS/DUTIES.**

- **right to Governing Body review of any ROW grievance**
- **right to binding arbitration of a denial of an appeal**

- ½ cost of one arbitrator(s) to be paid by City
- customer bills may state costs paid to the City (.1840)
- proceed with emergency work without a permit (.1832.2(3))
- **user shall guarantee the restoration for 4 years** (.1834)
- shall pay restoration costs within 30 days of invoice by city (.1834)

**E. FRANCHISE/AGREEMENTS.**

**1. Are franchises and agreements prohibited generally? NO.**

Franchises and contracts for use of the ROW are permissible, as before Public Utility ROW Law, if entered into voluntarily and granted on a non-discriminatory basis. §67.1846 RSMo.

**2. May franchises or agreements be required?**

**a. Non-telecommunication Companies** - Nothing in Public Utility ROW Law precludes requiring non-telecommunication companies from requiring franchises or contracts for use of the ROW.

**b. Telecommunication Companies** – Cities may not "require a telecommunications company to obtain a franchise." Because the Public Utility ROW Law separately prohibits an exclusive "contract or other agreement" for access to the ROW, only franchises, and not mere agreements are expressly prohibited. While a City is prohibited from requiring a telecom company to obtain a regulatory franchise, such as a cable franchise, which may regulate rates, service, and conduct of the business, the Act does not expressly prohibit ROW use agreements that are more akin to leases or license agreements.

**c. Video Service companies** – Sections 67.2675-67.2714 RSMo. (2007) abolished local franchises for video services and cable service providers; as with telecommunication companies, however, nothing in the act prohibits non-franchise agreements and the act expressly requires compliance with the City's ROW ordinances (§67.2707 RSMo.).

**3. Is Compensation for Use of ROW prohibited in all ROW Agreements? NO.**

**a. Cities with grandfathered linear foot fees** – Section 67.1846 RSMo expressly allows “grandfathered political subdivisions” (cities with ordinance prior to May 1, 2001) to charge a “fair and reasonable linear foot fee.” **If your City has a linear foot fee that was adopted prior to May 1, 2001, take care when amending ordinances that the fee is not repealed.**

**b. Agreements with Non-Public Utility ROW Users** – The Protections of Public ROW Law should only extend to “Public Utility Rights of Way Users” as defined in §67.1830 RSMo. If the City has retained appropriate authority in its ordinances to charge compensation (linear-foot charge) where allowed by law, then City should be able to exercise right to demand compensation for use of the rights-of-way from entities who are not “public utility rights-of-way user[s].”

Examples of such companies might be:

- (1) Companies unregulated by the PSC (non-certificated) who install conduit or “dark fiber” (unused fiber optic cable installed in ROW) that is meant to be leased to other telecommunications companies or wholesale end-users or
- (2) Companies that provide telecommunication services on private basis to select end-users, i.e.: services are not being provided to the general public.

“Public utility rights of way user” (through incorporation of the statutory definition of “public utility”) has a very broad definition including any entity using facilities to provide “public utility type of service to members of the general public.” The issue of who may be rightfully excluded from the definition of “Public utility rights of way user” and be subjected to linear foot charges has not yet been litigated.

**4. Basic Franchise/ROW Agreement Terms**

- a. Length
- b. Indemnification of City
- c. Insurance/Bonding (see limitations above)
- d. Relocation
- e. No waiver of Sovereign Immunity/No damages actions
- f. Payment of City costs and applicable taxes
- g. Other (subject to reasonable ROW management)

**IV. SELECTED FEDERAL LAW - NO BARRIERS TO ENTRY (47 U.S.C. §253)**

Section 253 prohibits state and local government from enacting any law or requirement "that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Prohibition does not apply to "authority of state or local governments to manage the public rights-of-way or to require fair and reasonable compensation . . . for use of public rights-of-way on a nondiscriminatory basis" 47 U.S.C. §253(c).

*Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir. 2007). Section 253 interpreted as to ROW compensation requirements:

1. Section 253 states that “[n]othing in this section affects the authority of a state or local government to . . . require fair and reasonable compensation . . . for use of public rights-of-way.” Court held that this exception is a “safe harbor” that looks to reasonableness of compensation only if the applicable law has already been shown to violate the prohibition on prohibiting telecommunication service.
2. Section 253(a) requires showing of "actual or effective prohibition, rather than the mere possibility of prohibition." Under this standard, a plaintiff "need not show a complete or insurmountable prohibition," but it must show "an existing material interference with the ability to compete in a fair and balanced market." A plaintiff must establish either an outright prohibition or an effective prohibition of telecommunications services.

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