RIGHTS AND LIMITATIONS IN MANAGING THE RIGHTS-OF-WAY

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OVERVIEW OF TODAY'S TOPIC

The Issues:
- What infrastructure are we discussing?
- Who are the users of this infrastructure?
- Why are new users, and uses, proliferating the ROW?
- What is the city's authority over the ROW?

The Goals:
- Why should I develop ROW Management regulations?
- What should my community's goals for ROW Management be?
- How do I develop effective ROW Management controls?
- What tools help with effective ROW Management?

Small Wireless Facilities Special Rules/Limitations

WHAT ARE THE RIGHTS-OF-WAY (“ROW”)?

Per Missouri statute, the ROW is comprised of the underground or above public ways and line in tidal waters and the title to tidal waters and the underground or above ownership thereof. § 67.1300(8) RSMo.
WHAT PROPERTY IS NOT INCLUDED IN THE ROW?

- Easements obtained by utilities or private easements in platted subdivisions or tracts
- Railroad ROW and ground utilized or acquired for railroad facilities
- Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, ... or electronic or electrical current or impulses utilized by a multiplicity owned or operated utility ...

Statutorily:
- City Stormwater and Sewer Systems
- City-owned property—City Hall, City Parks, etc.
- Likely bridges or other similar infrastructure

What else is left out?

WHO ARE THE USERS?

Generally, Missouri law provides for a broad definition of what a “Public Utility” is per 67.1830(9) RSMo.:

- PSC-certified entities;
- Any entities that “provide a public utility type of service for members of the general public.”

WHY ARE THERE SO MANY NEW USERS—AND USES?

The main new use is fiber/backhaul for data/internet transmission.

Why?
- Increased demand for bandwidth
- Capabilities of existing/emerging technologies
- Demand for more connectivity/network redundancy
- 5G facilities and “Small Wireless”
- “Internet of Things”
- “Smart Cities”
WHY DEVELOP ROW MANAGEMENT REGULATIONS?

Sets ground rules for each entity’s usage of ROW
Cost on public of conflicting uses – consumption of limited resource
Streamlining new developments (or facilities relocation for projects like street widenings) and provision of new/upgraded services quickly
Lessen risk of interference and destruction of facilities (City & 3rd Party)

GENERAL CITY AUTHORITY

- § 67.1844.1 – Preserves applicable “zoning” in ROW
  Note, Small Wireless has special rules when zoning applies – see § 67.5112.3
- § 67.1846 – Linear Foot Fee Authority (limited by recent law)
- § 67.1844.6 – Agreements or permits for new users
- § 67.1844.3 – Utilities may use ROW “with the consent of the municipal authorities thereof under such reasonable regulations”
- § 67.1844.1 – Telephone companies “shall not incommode the public…”
- § 67.1844.4 – City shall “grant its consent”
- § 67.1844.5 – Establish permitting requirements for towers and other structures or equipment for wireless communications facilities consistent with Uniform Wireless Communication Infrastructure Deployment Act (“2014 Law”) and Small Wireless Act (“2018 Law”)

BUILDING CODE AUTHORITY

- Building Code authority retained §§ 67.5107/67.1844.1
- Wind loading, engineering study, etc.
- Abandonment Bonds?
NEED FOR MUNICIPAL CONTROL

GOALS IN ROW MANAGEMENT

Protection:
- Establish bonding, insurance, and indemnification requirements
- Determining which entities are in ROW, including subcontractors

Stewardship:
- Clear permitting and mapping requirements for facilities
- Aesthetics
- Reimbursement (and compensation, where/when applicable)

Continuity:
- Require the ROW User to demonstrate which laws may or may not apply to them
- Give clear guideposts in the process to city and ROW Users
- Ease of replication for approvals protects against claims of discriminatory or favorable treatment
HOw to develop effective ROW management controls?

Not one-size-fits all

What issues often come up in your community?

• Severed lines or unclear facilities ownership?
• Utilities slow to relocate and delaying capital improvements?
• Failure of entities to restore ROW after ROW work?
• Consistently having to use public works to fix excavation issues?

Bedrock Principles of any effective ROW Management system should be requirements for:

• Insurance
• Indemnification
• Relocation
• Restoration

Developing ROW Management — Statutory & Case Authority:

Insurance
City may require construction performance bonds or insurance coverage or demonstration of self-insurance at the option of the political subdivision or if the public utility right-of-way user has twenty-five million dollars in net assets and does not have a history of permitting noncompliance in the political subdivision as defined by the political subdivision, then the public utility right-of-way user shall not be required to provide such bonds or insurance. See 67.1830 (6)(a)
DEVELOPING ROW MANAGEMENT — STATUTORY & CASE AUTHORITY:

**Indemnification**

- Indemnification authority is premised on a city’s authority under § 67.1830(6), in “managing the public right-of-way” to reasonably exercise its police powers “to impose rights, duties and obligations on all users of the rights-of-way...reflecting the distinct engineering, construction, operation, maintenance and public work and safety requirements...”

**Relocation**

- Union Electric v. Land Clearance Red. Authority of the City of St. Louis, 555 S.W.2d 29 (Mo. 1977) (a utility must “locate its facilities in public streets when changes are required by public necessity...at its own expense” when the municipality is exercising a governmental function rather than a proprietary function).
- City of Bridgeton v. Missouri-American Water Co., 379 S.W.2d 226 (Mo. banc 2007) (relocation to accommodate improvements completed by private entities following a legislative declaration of public necessity is sufficient to meet the “public necessity” requirement).
- Model language could provide:
  - “Shall promptly remove, relocate, or adjust any Facilities located in the ROW as directed by the city when public necessity requires by public necessity, or public convenience and security require it, or such other findings in the public interest that may require relocation, adjustment, or removal at the cost of the entity.”

**Restoration:**

- 67.1834. Restoration of a public right-of-way after excavation, standards and conditions, completion dates, etc. — 1. A public utility right-of-way may, after the excavation of a public right-of-way, be restored in accordance with standards and conditions, including the pavement and its foundation, in accordance with the standards and conditions of the political subdivision, unless the political subdivision, or its agents, chooses to perform its own street restoration, in which case the public utility right-of-way user shall be responsible for reimbursing the political subdivision. Restoration costs shall be completed within thirty days of the date specified in the right-of-way permit, unless the permittee obtains a waiver, extension or an amended right-of-way permit. Every right-of-way user to whom a right-of-way permit has been granted shall guarantee for a period of four years the restoration of the right-of-way in the area where such right-of-way user conducted excavation and performed the restoration.
TOOLS FOR EFFECTIVE ROW MANAGEMENT - OVERVIEW

ROW Management
ROW Use Agreement, Franchise, and License
ROW Use Agreement Application and/or Registration
Model ROW Permit

ROW ORDINANCE

ROW Ordinance should be the 1st step

- Needs to be drafted broad enough to cover any potential ROW User and use with generally applicable rules
- Should include an automatic or self-preemption
- Outline the prior "bedrock" principles
- If zoning is considered, may also make it part of ROW Ordinance package

*Note: limited on zoning for Small Wireless**

Important that a ROW Ordinance sets the underlying requirements for subsequent ROW tools.

ROW USE AGREEMENT AND FRANCHISE

Gives an opportunity to file a contract claim for breach
Allows cities to establish how the general ordinances will operate
Allows flexibility between different types of uses, but also provides a back for all ROW users to access the ROW on generally the same terms
Should be required as a condition precedent to issuance of ROW permits
ISSUES RELATING TO ROW USE AGREEMENTS AND FRANCHISES

Franchises are exclusive agreements to utilize city ROW and provide service within city.
Can no longer require Franchise (regulation of service, etc.) for telecommunications (wireless or otherwise).

But can (sometimes*) require ROW agreement if non-exclusive.
* Exception: no “agreement” or “permit” for “general access” if already legally in ROW or for only Small Wireless Facilities.
ROW Use Agreements still required from fiber/backhaul provider that links up with/services Small Wireless Facilities.
No specific shot-clock.

ROW LICENSE

Typically used for incidental or temporary uses in ROW in lieu of ROW Agreement.
Should be drafted to provide city official flexibility to impose terms that protect city, but not over-burdensome in comparison to ROW Agreement.
Be clear in putting this option together that larger-scale ROW uses cannot fall under the ROW license.

ROW APPLICATION AND/OR REGISTRATION

Application – requires the potential ROW User to declare up front their business.
- Ensure using right document for right use.
- Ensure user declares whether they are public utility and what rules/limitations apply.

Registration – requires potential ROW User to identify themselves.
- Helpful to get application-like information in instances where ROW User can argue it is preempted from getting an agreement.
ROW PERMITS

When are ROW Permits required?

• For excavations within ROW, but also for instances of maintenance work on utility poles or interference with traffic
• Note, certain instances work on SWFs may be exempted

Key items for effective permitting documents:

• Should integrate Ordinance and Agreement requirements
• If entity performing excavation for ROW User, confirm you get a letter of authorization proving agency relationship
• If traffic interrupted—get proof of traffic control plans and protections relating to excavation
• Require proof of insurance
• Require as-builts

PERMIT ISSUES — AUTHORITY TO DENY

Section 67.1836 RSMo. May deny application for a ROW permit if:

1. Fails to provide requested information
2. Fails to “retain” ROW to “previous condition”
3. Alternative to the permit is offered by City that costs no more than 10%
4. If necessary for public safety
5. Environmentally sensitive area or historic district

PERMIT ISSUES — AUTHORITY TO REVOKE — 67.1836.2 RSMO.

May, after reasonable notice and opportunity to cure, revoke ROW permit if:

1. A material violation of a provision of the right-of-way permit;
2. An evasion or attempt to evade any material provision of the right-of-way permit, or the presentation or attempt to perpetrate any fraud or deceit upon the political subdivision or its citizens;
3. A material misrepresentation of fact in the right-of-way permit application;
4. A failure to complete work by the date specified in the right-of-way permit, unless a permit extension is obtained or unless the failure to complete the work is due to reasons beyond the permittee’s control; and
5. A failure to correct, within the time specified by the political subdivision, work that does not conform to applicable national safety codes, industry construction standards, or local safety codes that are more stringent than national safety codes, upon inspection and notification by the political subdivision of the faulty condition.
EXCEPTION TO PERMIT REQUIREMENTS

Section 67.1832.2(3) RSMo.
Allows a ROW User to work in the ROW on emergency basis w/out permit
Emergencies should be outlined within your ROW Ordinance to clarify what is an emergency and what information and permit fee need to be submitted

PERMIT FEES

Section 67.1840 RSMo.
- City may recover its ROW Management costs via permitting fees:
  - Based on the actual, substantiated costs reasonably incurred by city in managing ROW
  - Shall reflect the proportionate costs imposed on the [city] by each of the various types of use

COMPENSATION FOR ROW USE?

Certain political subdivisions may charge a “linear foot fee” for use of the ROW, as long as a credit is applied for applicable gross receipts and business license taxes

“A ‘grandfathered political subdivision’ is any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way users including ordinances which were specific to particular public right-of-way users.” § 67.1846
EXCEPTIONS TO LINEAR FOOT FEES

67.1846.2 RSMo. exempts from the payment of linear foot fees “small local exchange telecommunications company as of December 31, 2019, as defined in section 386.020; provided that the small local exchange telecommunications company is providing internet access to customers within the rural areas of the state.”

HB 271 (2021) – Changes authority to charge “telecommunications company[es]” linear foot fees to a 5% gross telecommunications revenue fee

- Is an entity that only provides data or internet a “telecommunications company”?
- If so, are these services subject to gross receipts taxation?
- Does the 5% fee stack with any applicable telecom tax?

SMALL WIRELESS SPECIAL RULES/LIMITATIONS

So, almost all the rules you’ve learned so far regarding ROW management and general applicability you can essentially toss out when it comes to analyzing Small Wireless Facilities (“SWFs.”)
HISTORY OF PRO-TELECOM LEGISLATION AND RESULTS

Missouri Legislature’s Decade+ Protecting/Subsidizing Telecom Industry:
- **1997**: § 392.410 prohibits cities from providing telecom services.
- **2001**: § 67.1830 requires cities to “consent” to utility use of ROW.
- **2004**: Wireless telephone taxes reduced – later struck down.
- **2007**: § 67.2675 cable industry local franchises eliminated.
- • Missouri network requirement is eased for new homes.
- • Copayment itemized.
- • Eased local consumer service protection.
- **2010**: § 67.5630: Nondeductible gross receipts; buried class utility mounted on poles and internal.
- **2012**: § 67.625 et seq. shortened gross receipts back-tax liability/capped penalties and interest.
- **2013/2014**: § 67.2350: Further reduce, refinance, municipal authority.
- **2021**: HB 271 Omnibus Bill – more limits on local government.

For more specifics on the history and results of Pro-Telecom Legislation, please see our previous presentations on this topic at www.municipalfirm.com

FCC 2021 Report, Missouri has:
- **21%** of Rural Missourians do not have access to Fixed 25/3 Mbps speeds (although only **4.7%** of Rural Missourians do not have access to Mobile LTE at 25/3 Mbps speeds).
- At least 6 Missouri counties have less than 10% of population with 25/3 Mbps fixed Broadband speeds.

Generally, 2021 FCC Report indicates that by end of 2019, total estimated number of Americans without at least 25/3 Mbps was at 14.5 million (a decrease of 20% from end of 2018).

**But note, BroadbandNow estimates via its studies that the number of Americans without 25/3 Mbps is 42 million.**

FCC 2018 Report Missouri had:
- **3rd largest population (1.006 mil) with NO high speed access**
- **3rd largest rural population (~917,000) with NO high speed access**
- **16.5%** of Missourians with NO high speed access
- **50.6%** of MO rural population has NO high speed access

Based on FCC 2016 Report:
- **15 Missouri counties = 0% high speed access**
- **53 Missouri counties = ≥50% with NO high speed access**


HOW SMALL ARE SWFS?

(1) each antenna of no more than 6 cubic feet, and
(2) all other equipment associated with the wireless
facility, whether ground or pole mounted, is
conclusively no more than twenty-eight cubic feet in
volume . . .** for a total of 34 cubic feet
• No single piece of equipment on the pole can
exceed 9 cubic feet;
• No single piece of ground-mounted equipment can
exceed 13 cubic feet, HOWEVER**
**NOTE: An "electric meter, concealment elements,
telecom demarcation box, grounding equipment,
power transfer switch, cut-off switch, and vertical
cable runs and related conduit" for the connection of
power and other services are not included in the
calculation of the equipment volume

UNIFORM SMALL WIRELESS FACILITY
DEPLOYMENT ACT (§§ 67.5110 –
67.5121.)

• Eliminates authority to require ROW Agreements for
SW antennas;
• Further preempts certain zoning authority over ROW
• Allows installation of Utility Poles within ROW if
complying with specific requirements
• Creates additional "shot-clocks" for city action –
deemed approved remedy
• Places limitations on insurance, indemnification, and
performance bonding requirements

THE ACT CAPS
APPLICATION FEES AND
ATTACHMENT RATES

Application Fees (§ 67.5116.3 RSMo.):
• Collocation of SWF: $100/pole;
• Collocation with Modification/New Pole: $500/pole.

Annual Attachment (to City Utility Poles) (§ 67.5116.4 RSMo.):
• $150/pole/year.

Rate unclear if City has municipal utility –
but FCC Rule 18-133 deemed $270
deemed reasonable for SWF (FCC 18-
35-9).

Applicants have the right to replace or
modify poles (§ 67.5112.9 RSMo.).
WHAT CAN WE STILL ENFORCE?

SWF law allows cities to still enforce:
- Spacing requirements on ground equipment and new utility poles (§ 67.5113.3(9)(f) RSMo.), if waiver procedure
- Aesthetic requirements for decorative poles (§ 67.5113.3(9)(h))
- Undergrounding requirements in effect prior to 1/1/18 or subsequently enacted for “new developments,” if such undergrounding requirement has a waiver procedure (§ 67.5113.3(9)(i))
- Permits for excavations and antenna collocations
- City authority for fiber backhaul
- Zoning authority in specific circumstances (single-family residential or historic zoned by August 28, 2018)
- Compliance with other safety codes, such as electric or fire codes
- Requirement in 2014 laws for owner consent

IF ZONING PREEMPTED, THEN CAN ONLY DENY FOR:

(a) Materially interfere with the safe operation of traffic control equipment or authority-owned communications equipment;
(b) Materially interfere with sight lines or clear zones for transportation, pedestrians, or nonmotorized vehicles;
(c) Materially interfere with compliance with the Americans with Disabilities Act, 42 U.S.C. Sections 12101 to 12213, or similar federal or state standards regarding pedestrian access or movement;
(d) Materially obstruct or hinder the usual travel or public safety on the right-of-way;
(e) Materially obstruct the legal use of the right-of-way by an authority, utility, or other third party;
(f) Fail to comply with reasonable and nondiscriminatory spacing requirements of general application adopted by ordinance or regulations promulgated by the state highways and transportation commission that concern the location of ground-mounted equipment and new utility poles. Such spacing requirements shall not prevent a wireless provider from serving any location and shall include a waiver, zoning, or other process that addresses wireless provider requests for exception or variance and does not prohibit granting of such exceptions or variances;
(g) Fail to comply with applicable codes, including nationally recognized engineering standards for utility poles or wireless support structures;
(h) Fail to comply with the reasonably objective and documented aesthetics of a decorative pole and the applicant does not agree to pay to match the applicable decorative elements; or
(i) Fail to comply with reasonable and nondiscriminatory undergrounding requirements contained in local ordinances as of January 1, 2018, or subsequently enacted for new developments, that require all utility facilities in the area to be placed underground and prohibit the installation of new or the modification of existing utility poles in a right-of-way unless prior approval is granted. This provision shall not prevent a wireless provider from serving any location and shall include a waiver, zoning, or other process of addressing requests to install such utility poles and does not prohibit the replacement or modification of existing utility poles consistent with this section or the provision of wireless services.
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