

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 369

91ST GENERAL ASSEMBLY

Reported from the Committee on Commerce and Environment, March 15, 2001, with recommendation that the Senate Committee Substitute do pass.

TERRY L. SPIELER, Secretary.

1518S.04C

AN ACT

To amend chapter 67, RSMo, by adding thereto ten new sections relating to utility access to public rights-of-way, with an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 67, RSMo, is amended by adding thereto ten new sections, to be known as sections 67.1830, 67.1832, 67.1834, 67.1836, 67.1838, 67.1840, 67.1842, 67.1844, 67.1845 and 67.1846, to read as follows:

67.1830. As used in sections 67.1830 to 67.1846, the following terms shall mean:

(1) "Abandoned equipment or facilities", any equipment materials, apparatuses, devices or facilities that are:

(a) Declared abandoned by the owner of such equipment or facilities;

(b) No longer in active use, physically disconnected from a portion of the operating facility or any other facility that is in use or in service, and no longer capable of being used for the same or similar purpose for which the equipment, apparatuses or facilities were installed; or

(c) No longer in active use and the owner of such equipment or facilities fails to respond within thirty days to a written notice sent by a political subdivision;

(2) "Degradation", the actual or deemed reduction in the useful life of the public right-of-way resulting from an event other than the restoration of the public right-of-way to the condition that existed prior to any excavation;

(3) "Emergency", includes but is not limited to the following:

(a) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that prevents or significantly jeopardizes the ability of a

public utility to provide service to customers;

(b) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that results or could result in danger to the public or a material delay or hindrance to the provision of service to the public if the outage, cut, rupture, leak or any other such failure of public utility facilities is not immediately repaired, controlled, stabilized or rectified; or

(c) Any occurrence involving a public utility facility that a reasonable person could conclude under the circumstances that immediate and undelayed action by the public utility is necessary and warranted;

(4) "Excavation", any act by which earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground is cut into, dug, uncovered, removed, or otherwise displaced, by means of any tools, equipment or explosives, except that the following shall not be deemed excavation:

(a) Any *de minimis* displacement or movement of ground caused by pedestrian or vehicular traffic;

(b) The occasional replacement of utility poles and related equipment at the existing general location that does not involve either a street or sidewalk cut; or

(c) Any other activity which does not disturb or displace surface conditions of the earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground;

(5) "Management costs" or "rights-of-way management costs", the actual costs a political subdivision reasonably incurs in managing its public rights-of-way, including such costs, if incurred, as those associated with the following:

(a) Issuing, processing and verifying right-of-way permit applications;

(b) Inspecting job sites and restoration projects;

(c) Protecting or moving right-of-way user construction equipment after reasonable notification to the right-of-way user during public right-of-way work;

(d) Determining the adequacy of right-of-way restoration;

(e) Restoring work inadequately performed after providing notice and the opportunity to correct the work; and

(f) Revoking right-of-way permits.

Right-of-way management costs shall be the same for all entities doing similar work. Management costs or rights-of-way management costs shall not include payment by a public utility right-of-way user for the use of the public right-of-way, degradation of the public right-of-way or any costs as outlined in paragraphs (a) to (f) of this subdivision which are incurred by the political subdivision as a result of use by users other than public utilities, the fees and cost of litigation relating to the interpretation

of this section or section 67.1832, or litigation, interpretation or development of any ordinance enacted pursuant to this section or section 67.1832, or the political subdivision's fees and costs related to appeals taken pursuant to section 67.1838;

(6) "Managing the public right-of-way", the actions a political subdivision takes, through reasonable exercise of its police powers, to impose rights, duties and obligations on all users of the right-of-way, including the political subdivision, in a reasonable, competitively neutral and nondiscriminatory and uniform manner, reflecting the distinct engineering, construction, operation, maintenance and public work and safety requirements applicable to the various users of the public right-of-way, provided that such rights, duties and obligations shall not conflict with any federal law or regulation. In managing the public right-of-way, a political subdivision may:

(a) Require construction performance bonds or insurance coverage or demonstration of self-insurance at the right-of-way user's option;

(b) Establish coordination and timing requirements that do not impose a barrier to entry;

(c) Require public utility right-of-way users to submit, for right-of-way projects commenced after August 28, 2001, requiring excavation within the public right-of-way, whether initiated by a political subdivision or any public utility right-of-way user, project data in the form maintained by the user and in a reasonable time after receipt of the request based on the amount of data requested;

(d) Establish right-of-way permitting requirements for street excavation;

(e) Establish removal requirements for abandoned equipment or facilities, if the existence of such facilities prevents or significantly impairs right-of-way use, repair, excavation or construction; and

(f) Establish siting requirements for towers;

(7) "Political subdivision", a city, town, village, county of the first classification or county of the second classification;

(8) "Public right-of-way", the area on, below or above a public roadway, highway, street or alleyway in which the political subdivision has an ownership interest, but not including:

(a) The airwaves above a public right-of-way with regard to cellular or other nonwire telecommunications or broadcast service; or

(b) Easements obtained by utilities or private easements in platted subdivisions or tracts;

(9) "Public utility", every cable television service provider, every pipeline corporation, gas corporation, electrical corporation, rural electric cooperative, telecommunications company, water corporation, heating or refrigerating corporation

or sewer corporation under the jurisdiction of the public service commission; every municipally owned or operated utility pursuant to chapter 91, RSMo, or pursuant to a charter form of government or cooperatively owned or operated utility pursuant to chapter 394, RSMo; every street light maintenance district; every privately owned utility; and every other entity, regardless of its form of organization or governance, whether for profit or not, which in providing a public utility type of service for members of the general public, utilizes pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses, in the collection, exchange or dissemination of its product or services through the public rights-of-way;

(10) "Public utility right-of-way user", a public utility owning or controlling a facility in the public right-of-way; and

(11) "Right-of-way permit", a permit issued by a political subdivision authorizing the performance of excavation work in a public right-of-way.

67.1832. 1. In addition to any other grants for the use of public thoroughfares, and 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 or by license of the Federal Energy Regulatory Commission, United States Department of Transportation, or the Federal Communications Commission to construct, maintain and operate all equipment, facilities, devices, materials, apparatuses, or media including but not limited to, conduits, ducts, lines, pipes, wires, hoses, cables, culverts, tubes, poles, towers, manholes, transformers, regulator stations, underground vaults, receivers, transmitters, satellite dishes, micro cells, Pico cells, repeaters, or amplifiers useable for the transmission or distribution of any service or commodity installed below or above ground in the public right-of-way; provided that, no political subdivision shall require any conditions that are inconsistent with the rules and regulations of the Federal Energy Regulatory Commission, United States Department of Transportation, Federal Communications Commission or the Missouri public service commission.

2. Pursuant to this section, a political subdivision may manage its public rights-of-way and may recover its rights-of-way management costs as set forth in sections 67.1830 to 67.1846. The authority granted in this section may be authorized at the option of the political subdivision, and the exercise of this authority is not mandated pursuant to this section. A political subdivision may, by ordinance:

(1) Require a public utility right-of-way user seeking to excavate within a public right-of-way, except in emergencies, to obtain a right-of-way permit and to impose permit conditions consistent with the political subdivision's management of the right-of-way; and

(2) Require public utility right-of-way users, except in emergencies, to provide required notice to the political subdivision by submitting plans for anticipated construction projects that require excavation within the public right-of-way.

67.1834. 1. A public utility right-of-way user, after an excavation of a public right-of-way, shall provide for restoration of the right-of-way and surrounding areas, including the pavement and its foundation, to the equivalent condition that existed before the excavation. Restoration of the public right-of-way shall be completed within the dates specified in the right-of-way permit, unless the permittee obtains a waiver, extension or a new or amended right-of-way permit.

2. If a public utility right-of-way user fails to restore the public right-of-way within the date specified in the right-of-way permit, or has not acquired a waiver or extension to such permit, a political subdivision is authorized to perform its own restoration required as a result of the excavation, and require the public utility right-of-way user to reimburse the political subdivision for the actual costs of such restoration.

67.1836. 1. A political subdivision may deny an application for a right-of-way permit if:

(1) The public utility right-of-way user fails to provide all the necessary information requested by the political subdivision for managing the public right-of-way;

(2) The public utility right-of-way user has failed to return the public right-of-way to its previous condition under previous permits;

(3) The political subdivision has provided the public utility right-of-way user with substantial evidence indicating that a reasonable, competitively neutral and nondiscriminatory alternative method exists for performing the work identified in the permit application that will result in neither additional installation expense to the right-of-way user nor a declination of service quality; or

(4) The political subdivision determines that the denial is necessary to protect the public health and safety, provided that the authority of the political subdivision does not extend to those items under the jurisdiction of the public service commission, such denial shall not interfere with a public utility's right of eminent domain, and such denials shall only be imposed on a competitively neutral and nondiscriminatory basis.

2. A political subdivision may, after reasonable notice and an opportunity to cure, revoke a right-of-way permit granted to a public utility right-of-way user, with or without fee refund, in the event of a substantial breach of the terms and material conditions of the permit. A substantial breach by a permittee includes but is not limited to:

(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 perpetration 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 or industry construction standards, upon inspection and notification by the political subdivision of the faulty condition.

3. Any political subdivision that requires public utility right-of-way users to obtain a right-of-way permit, except in an emergency, prior to performing excavation work within a public right-of-way shall establish definitive permit processing schedules identifying the maximum number of days, not to exceed fifteen days, for processing an application for a permit issued by the political subdivision. In order to avoid excessive processing and accounting costs to either the political subdivision or the public utility right-of-way user, the political subdivision may establish procedures for bulk processing of permits and periodic payment of permit fees. If the political subdivision fails to approve or deny a permit within the time specified by the permit processing schedule, the permit shall be deemed approved by default, unless denied pursuant to subsection 1 of this section.

67.1838. 1. A public utility right-of-way user that has been denied a right-of-way permit, has had its right-of-way permit revoked, believes that the fees imposed on the public right-of-way user by the political subdivision do not conform to the requirements of section 67.1840 or asserts any other issues related to the use of the public right-of-way, shall have, upon written request, such denials, revocations, fee impositions, or other disputes reviewed by the governing body of the political subdivision. The governing body of the political subdivision shall specify, in its permit processing schedules, the maximum number of days prior to its next regularly scheduled meeting by which the review request shall be filed in order to be reviewed by the governing body of the political subdivision at its next regularly scheduled meeting. A decision by the governing body affirming the denial, revocation, fee imposition or dispute resolution shall be in writing and supported by written findings establishing the reasonableness of the decision.

2. Upon affirmation by the governing body of the denial, revocation, fee imposition or dispute resolution, the public utility right-of-way user shall, in addition

to all other remedies, have the right to have the matter resolved by binding arbitration. Binding arbitration shall be before an arbitrator agreed to by both the political subdivision and the public utility right-of-way user. The costs and fees of a single arbitrator shall be borne equally by the political subdivision and the public utility right-of-way user.

3. If the parties cannot agree on an arbitrator, the matter shall be resolved by a three-person arbitration panel consisting of one arbitrator selected by the political subdivision, one arbitrator selected by the public utility right-of-way user, and one person selected by the other two arbitrators. In the event that a three-person arbitrator panel is necessary, each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the third arbitrator and of the arbitration.

4. Each party to the arbitration shall pay its own costs, disbursements and attorney fees.

67.1840. 1. A political subdivision may recover its right-of-way management costs by imposing a fee for permits issued by the political subdivision. A political subdivision shall not recover from a public utility right-of-way user costs caused by another entity's activity or inactivity in the public right-of-way.

2. Right-of-way permit fees imposed by a political subdivision on public utility right-of-way users shall be:

(1) Based on the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right-of-way;

(2) Based on an allocation among all users of the public right-of-way, including the political subdivision itself, which shall reflect the proportionate costs imposed on the political subdivision by each of the various types of uses of the public rights-of-way;

(3) Imposed on a competitively neutral and nondiscriminatory basis; and

(4) Imposed in a manner so that above ground uses of the public right-of-way do not bear costs incurred by the political subdivision to regulate underground uses of the public right-of-way.

3. The public utility right-of-way user shall have the right to equitably allocate, and may separately state in the customer's bill, any or all right-of-way permit fees imposed by a political subdivision to:

(1) Customers of the public utility right-of-way user residing in the political subdivision; or

(2) Any specific customer or customers requesting or requiring the public utility right-of-way user to perform work for which the acquisition of a right-of-way permit is necessary.

4. The rights, duties and obligations regarding the use of the public right-of-way imposed pursuant to sections 67.1830 to 67.1846 shall be uniformly applied to all users of the public right-of-way, including the political subdivision.

67.1842. 1. In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall:

- (1) Unlawfully discriminate among public utility right-of-way users;**
- (2) Grant a preference to any public utility right-of-way user;**
- (3) Create or erect any unreasonable requirement for entry to the public right-of-way by public utility right-of-way users;**
- (4) Require a public utility right-of-way user to obtain a franchise unless such franchise is required by state or federal law or pay for the use of the public right-of-way, except as provided in sections 67.1830 to 67.1846; or**
- (5) Enter into a contract or any other agreement for providing for the exclusive use, control, ownership or maintenance of any public right-of-way.**

2. A public utility right-of-way user shall not be required to apply for or obtain right-of-way permits for projects commenced prior to August 28, 2001, requiring excavation within the public right-of-way, for which the user has obtained the required consent of the political subdivision, or that are otherwise lawfully occupying or performing work within the public right-of-way. The public utility right-of-way user may be required to obtain right-of-way permits prior to any excavation work performed within the public right-of-way after August 28, 2001.

3. Data and documents exchanged between a political subdivision and a public utility right-of-way user are subject to chapter 610, RSMo.

4. A political subdivision shall not collect a fee imposed pursuant to section 67.1840 through the provision of in-kind services by a public utility right-of-way user other than from a cable television service provider as permitted by 47 U.S.C. et seq., nor shall a political subdivision require the provision of in-kind services as a condition of consent to use the political subdivision's public right-of-way.

67.1844. 1. The performance of excavation work in the public right-of-way shall be in accordance with the applicable health, safety and construction codes.

2. Any contractor or subcontractor used for the performance of excavation work in the public right-of-way shall be properly licensed pursuant to the laws of the state and all applicable local ordinances, and each contractor or subcontractor shall have the same obligations with respect to its work as a public utility right-of-way user would have pursuant to sections 67.1830 to 67.1846 and applicable laws if the work were performed by the public utility. The public utility right-of-way user shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent

with its permits and applicable law, fully responsible for all acts or omissions of contractors or subcontractors, and responsible for promptly correcting acts or omissions by any contractor or subcontractor.

67.1845. No political subdivision shall grant any new franchise for cable television service that overlaps the area served by an existing franchise for cable television service, unless the overlapping franchise is granted on terms and conditions no more or less favorable or burdensome than the terms and conditions of the existing franchise.

67.1846. Nothing in sections 67.1830 to 67.1846 relieves the political subdivision of any obligations under an existing franchise. Nothing in sections 67.1830 to 67.1846 shall be deemed to relieve a public utility right-of-way user of the provisions of an existing franchise, license or other agreement or permit. Nothing in sections 67.1830 to 67.1846 shall prohibit a political subdivision or public utility right-of-way user from renewing or entering into a new or existing franchise, as long as all other public utility right-of-way users have use of the public right-of-way on a nondiscriminatory basis.

Section B. Because immediate action is necessary to allow utility access to public rights-of-way, sections 67.1830, 67.1832, 67.1834, 67.1836, 67.1838, 67.1840, 67.1842, 67.1844, 67.1845 and 67.1846 of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and sections 67.1830, 67.1832, 67.1834, 67.1836, 67.1838, 67.1840, 67.1842, 67.1844, 67.1845 and 67.1846 of this act shall be in full force and effect upon its passage and approval.