

SECOND REGULAR SESSION
[P E R F E C T E D]
SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 653

97TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR LAGER.

Offered February 4, 2014.

Senate Substitute adopted February 4, 2014.

Taken up for Perfection February 4, 2014. Bill declared Perfected and Ordered Printed, as amended.

TERRY L. SPIELER, Secretary.

5011S.05P

AN ACT

To repeal sections 67.1830 and 67.5104, RSMo, and to enact in lieu thereof two new sections relating to municipal utility poles.

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

Section A. Sections 67.1830 and 67.5104, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 67.1830 and 67.5104, to read as follows: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 the cutting, excavation or restoration of the public right-of-way;

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

- 16 (3) "Emergency", includes but is not limited to the following:
- 17 (a) An unexpected or unplanned outage, cut, rupture, leak or any other
18 failure of a public utility facility that prevents or significantly jeopardizes the
19 ability of a public utility to provide service to customers;
- 20 (b) An unexpected or unplanned outage, cut, rupture, leak or any other
21 failure of a public utility facility that results or could result in danger to the
22 public or a material delay or hindrance to the provision of service to the public
23 if the outage, cut, rupture, leak or any other such failure of public utility facilities
24 is not immediately repaired, controlled, stabilized or rectified; or
- 25 (c) Any occurrence involving a public utility facility that a reasonable
26 person could conclude under the circumstances that immediate and undelayed
27 action by the public utility is necessary and warranted;
- 28 (4) "Excavation", any act by which earth, asphalt, concrete, sand, gravel,
29 rock or any other material in or on the ground is cut into, dug, uncovered,
30 removed, or otherwise displaced, by means of any tools, equipment or explosives,
31 except that the following shall not be deemed excavation:
- 32 (a) Any de minimis displacement or movement of ground caused by
33 pedestrian or vehicular traffic;
- 34 (b) The replacement of utility poles and related equipment at the existing
35 general location that does not involve either a street or sidewalk cut; or
- 36 (c) Any other activity which does not disturb or displace surface conditions
37 of the earth, asphalt, concrete, sand, gravel, rock or any other material in or on
38 the ground;
- 39 (5) "Management costs" or "rights-of-way management costs", the actual
40 costs a political subdivision reasonably incurs in managing its public
41 rights-of-way, including such costs, if incurred, as those associated with the
42 following:
- 43 (a) Issuing, processing and verifying right-of-way permit applications;
- 44 (b) Inspecting job sites and restoration projects;
- 45 (c) Protecting or moving public utility right-of-way user construction
46 equipment after reasonable notification to the public utility right-of-way user
47 during public right-of-way work;
- 48 (d) Determining the adequacy of public right-of-way restoration;
- 49 (e) Restoring work inadequately performed after providing notice and the
50 opportunity to correct the work; and
- 51 (f) Revoking right-of-way permits.

52 Right-of-way management costs shall be the same for all entities doing similar
53 work. Management costs or rights-of-way management costs shall not include
54 payment by a public utility right-of-way user for the use or rent of the public
55 right-of-way, degradation of the public right-of-way or any costs as outlined in
56 paragraphs (a) to [(h)] **(f)** of this subdivision which are incurred by the political
57 subdivision as a result of use by users other than public utilities, the attorneys'
58 fees and cost of litigation relating to the interpretation of this section or section
59 67.1832, or litigation, interpretation or development of any ordinance enacted
60 pursuant to this section or section 67.1832, or attorneys' fees and costs in
61 connection with issuing, processing, or verifying right-of-way [permit] **permits**
62 or other applications or agreements, or the political subdivision's fees and costs
63 related to appeals taken pursuant to section 67.1838. In granting or renewing a
64 franchise for a cable television system, a political subdivision may impose a
65 franchise fee and other terms and conditions permitted by federal law;

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

75 (a) Require construction performance bonds or insurance coverage or
76 demonstration of self-insurance at the option of the political subdivision or if the
77 public utility right-of-way user has twenty-five million dollars in net assets and
78 does not have a history of permitting noncompliance within the political
79 subdivision as defined by the political subdivision, then the public utility
80 right-of-way user shall not be required to provide such bonds or insurance;

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

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

88 requested;

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

90 (e) Establish removal requirements for abandoned equipment or facilities,

91 if the existence of such facilities prevents or significantly impairs right-of-way

92 use, repair, excavation or construction;

93 (f) Establish permitting requirements for towers and other structures or

94 equipment for wireless communications facilities in the public right-of-way,

95 notwithstanding the provisions of section 67.1832;

96 (g) Establish standards for street restoration in order to lessen the impact

97 of degradation to the public right-of-way; and

98 (h) Impose permit conditions to protect public safety;

99 (7) "Political subdivision", a city, town, village, county of the first

100 classification or county of the second classification;

101 (8) "Public right-of-way", the area on, below or above a public roadway,

102 highway, street or alleyway in which the political subdivision has an ownership

103 interest, but not including:

104 (a) The airwaves above a public right-of-way with regard to cellular or

105 other nonwire telecommunications or broadcast service;

106 (b) Easements obtained by utilities or private easements in platted

107 subdivisions or tracts;

108 (c) Railroad rights-of-way and ground utilized or acquired for railroad

109 facilities; or

110 (d) **Poles**, pipes, cables, conduits, wires, optical cables, or other means of

111 transmission, collection or exchange of communications, information, substances,

112 data, or electronic or electrical current or impulses utilized by a municipally

113 owned or operated utility pursuant to chapter 91 or pursuant to a charter form

114 of government;

115 (9) "Public utility", every cable television service provider, every pipeline

116 corporation, gas corporation, electrical corporation, rural electric cooperative,

117 telecommunications company, water corporation, heating or refrigerating

118 corporation or sewer corporation under the jurisdiction of the public service

119 commission; every municipally owned or operated utility pursuant to chapter 91

120 or pursuant to a charter form of government or cooperatively owned or operated

121 utility pursuant to chapter 394; every street light maintenance district; every

122 privately owned utility; and every other entity, regardless of its form of

123 organization or governance, whether for profit or not, which in providing a public

124 utility type of service for members of the general public, utilizes pipes, cables,
125 conduits, wires, optical cables, or other means of transmission, collection or
126 exchange of communications, information, substances, data, or electronic or
127 electrical current or impulses, in the collection, exchange or dissemination of its
128 product or services through the public rights-of-way;

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

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

67.5104. 1. As used in this section, "pole attachment" means an
2 attachment by **an attaching entity, including** a video service provider, a
3 telecommunications **provider** or other communications-related service provider
4 to a pole owned **or controlled** by a municipal utility **or municipality**, but not
5 a wireless antenna attachment or an attachment by a wireless communications
6 provider to a pole. **A municipal utility or municipality may only deny an**
7 **attaching entity access to the utility's poles on a nondiscriminatory**
8 **basis only if there is insufficient capacity or for reasons of safety and**
9 **reliability and if the attaching entity will not resolve the**
10 **issue. Nothing in this section shall be construed to prohibit a**
11 **municipal utility or municipality from requiring an attaching entity to**
12 **enter into a pole attachment agreement consistent with this section.**

13 2. Notwithstanding sections 67.1830 to 67.1846, any pole attachment fees,
14 terms, and conditions, including those related to the granting or denial of access,
15 demanded by a municipal utility pole owner or controlling authority of a
16 municipality shall be nondiscriminatory, just, and reasonable and shall not be
17 subject to any required franchise authority or government entity permitting,
18 except as provided in this section. A pole attachment rental fee shall be
19 calculated on an annual, per-pole basis. Such rental fee shall be considered
20 nondiscriminatory, just, and reasonable if it is agreed upon by the parties or, in
21 the absence of such an agreement, based on cost but in no such case shall such
22 fee so calculated be greater than the fee which would apply if it were calculated
23 in accordance with the cable service rate formula referenced in 47 U.S.C. Sec.
24 224(d) as applied by the Federal Communications Commission[, except as
25 permitted by subsection 3 of this section.]

26 3. Either party may seek review of any fee, term, or condition by means
27 of binding arbitration conducted by a single arbitrator mutually agreeable to the

28 parties or, in the absence of such an agreement, by means of binding arbitration
29 conducted by the American Arbitration Association. An arbitrator's award
30 regarding fees shall be confined to ensuring that the municipal utility pole owner
31 recovers its direct costs and a reasonable share of the fully allocated costs
32 attributable to the pole attachment, and that the fee may exceed the fee resulting
33 from the application of the cable service rate formula referenced in this section
34 only if based on an express written finding stated in the award that such award
35 is based on competent and substantial evidence that the revenues produced under
36 the cable service rate formula and other payments made by the service provider
37 do not sufficiently recover the direct costs and a reasonable share of the fully
38 allocated costs attributable to the pole attachment]. In addition, a municipal pole
39 owner may be authorized to exceed the rate of return cost components of the
40 Federal Communications Commission formula referenced in this section if
41 necessary to comply with Article X of the Missouri Constitution. [Pending the
42 arbitrator's rendering of such an award, the last existent rental fee applicable to
43 the pole attachment shall remain in place and binding upon both parties] **In the**
44 event of a dispute between the parties, either party may bring an
45 action for review in any court of competent jurisdiction. The court
46 shall rule on any such petition for review in an expedited manner by
47 moving the petition to the head of the docket consistent with
48 subsection 2 of this section. Nothing shall deny any party the right to
49 a hearing before the court.

50 [4.] 3. Where no [prior] contract exists between an attaching entity and
51 the municipal utility pole owner **or controlling authority of a municipality**,
52 and a dispute between a municipal utility pole owner **or controlling authority**
53 **of a municipality** and an attaching entity [exclusively] concerns the per-pole
54 fee, then the attaching entity may proceed with its attachments during the
55 pendency of the [arbitration under the agreed-upon terms and conditions]
56 **dispute at a rental rate of no more than as set forth in subsection 2 of**
57 **this section. The attaching entity shall comply with applicable and**
58 **reasonable engineering and safety standards and shall hold the**
59 **municipal pole owner or controlling authority of the municipality**
60 **harmless for any liabilities or damages incurred that are caused by the**
61 **attaching entity.**

62 [5.] 4. The provisions of this section shall not supersede existing pole
63 attachment agreements established prior to [August 28, 2013] **the effective**

64 date of this act.

65 [6.] 5. Nothing in this section shall be construed as conferring any
66 jurisdiction or authority to the public service commission, **or any state agency**,
67 to regulate either the fees, terms, or conditions for pole attachments, or for any
68 state agency to assert any jurisdiction over [pole attachments] **attachments to**
69 **poles** regulated by 47 U.S.C. Sec. 224.

70 6. A municipal utility or municipality may, after reasonable
71 notice and an opportunity to cure, revoke a pole attachment permit
72 granted to an attaching entity and require removal of the attachment,
73 with or without fee refund, and impose a penalty as established by the
74 municipal utility or municipality for breach of the pole attachment
75 agreement or permit until the breach is cured, but only in the even of
76 a substantial breach of the terms and material conditions of the pole
77 attachment agreement or permit. A substantial breach by an attaching
78 entity shall be limited to:

79 (1) A material violation of a provision of the pole attachment
80 agreement or permit;

81 (2) An evasion or attempt to evade any material provision of a
82 pole attachment agreement or permit, or the perpetration or attempt
83 to perpetrate any fraud or deceit upon the municipal utility or
84 municipality;

85 (3) A material misrepresentation of fact in the pole attachment
86 agreement or permit application;

87 (4) A failure to complete work by the date specified in the pole
88 attachment agreement or permit, unless an extension is obtained or
89 unless the failure to complete the work is due to reasons beyond the
90 attaching entity's control; or

91 (5) A failure to correct, within the time specified by the
92 municipal utility or municipality, work that does not conform to
93 applicable national safety codes, industry construction standards, or
94 local safety codes that are not more stringent than national safety
95 codes, upon inspection and notification by the municipal utility or
96 municipality of the faulty condition.