

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

In the Matter of Rulemaking Regarding Municipal Rights-of-Way
Issues

1-AC-188

ORDER ADOPTING FINAL RULES

The Commission adopts an order to create chapter PSC 130, relating to municipal regulation of municipal rights-of-way (ROW).

Analysis Prepared by the Public Service Commission of Wisconsin

Statutory authority: ss. 196.02(3) and 227.11(2), Stats.

Statutes interpreted: ss. 196.499(14) and 196.58(4), Stats.

Need for rules

Upon complaint, the Commission has authority to determine the reasonableness of an ordinance, contract or resolution promulgated by a city, village, or town (municipality) that regulates the location of utility facilities in municipal ROW. With the growth in telecommunications service providers requesting use of ROW, municipalities have been developing new policies for dealing with utility requests and utilities have faced a variety of requirements for using ROW. This rule creates several criteria the Commission will apply when considering a complaint involving utility access to and use of ROW within a municipality.

Description of rules

The rule defines “utility” to include public utilities such as electric and natural gas utilities and telecommunications providers. A “municipal regulation” is defined to be an ordinance or resolution adopted by a municipality that relates to ROW, or a contract between a municipality and a utility that relates to ROW. Significant rule provisions include the following:

1. Under the rules, unless there is an adequate health, safety, or public welfare justification, it is unreasonable for a municipality to discriminate between utilities seeking access to municipal ROW or to deny a utility access to ROW.

2. The rules recognize that a municipal regulation may require a utility to pay the actual cost of functions undertaken by a municipality to manage utility access to ROW, and identifies specific costs that may be collected through a pre-excavation permit fee.

3. The rules specify that it is unreasonable for a municipal regulation to require special construction conditions to be followed at the utility’s expense unless there is an adequate health, safety, or public welfare justification. Aesthetics alone is not a reasonable basis for requiring underground construction. Special construction conditions would be reasonable if the municipality or a third party agrees to pay the difference in construction costs between the standard and special construction conditions.

4. Under the rule, it is unreasonable for a municipal regulation to require a utility to restore a ROW to a condition that is better than the pre-excavation condition.

5. The rules specify that it is reasonable for a municipal regulation to require a utility to provide adequate bonding and insurance before authorizing a utility access to a ROW if the municipality has reasonable grounds to question the utility’s financial responsibility or

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compliance ability. The rules also identify advance workplan notification requirements and mapping requirements.

REGULATORY FLEXIBILITY ANALYSIS

The rules would apply to complaints regarding municipal rights-of-way ordinances. Current law authorizes the Commission to investigate such complaints and to determine if an ordinance is reasonable. The Commission anticipates complaints would primarily come from utilities, which would include some small businesses, as defined in s. 227.114(1), Stats. (There are approximately 76 small telecommunications utilities in Wisconsin.) The proposed rule does not create any new obligations or responsibilities for complainants, including small businesses. Therefore, the proposed rule does not have an effect on small businesses.

TEXT OF RULE

SECTION 1 Chapter PSC 130 is created to read:

Wisconsin Administrative Code

Chapter PSC 130

Municipal Regulation of Municipal Rights-of-Way

PSC 130.01 Definitions.

PSC 130.02 Scope.

PSC 130.03 Special design and construction conditions.

PSC 130.04 Discrimination.

PSC 130.05 Management function costs.

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PSC 130.06 Bonds and insurance.

PSC 130.07 Restoration.

PSC 130.08 Compliance with existing law.

PSC 130.09 Permanent relocation of utility facilities.

PSC 130.10 Advanced excavation workplans.

PSC 130.11 Facilities mapping.

PSC 130.12 Abandonment.

PSC 130.13 Municipal regulation challenges.

PSC 130.01 Definitions. In this chapter:

(1) “Actual cost” means identifiable costs that are reasonably incurred by a municipality, but does not include a contribution of surplus income to general revenues.

(2) “Municipal regulation” includes any ordinance or resolution adopted by the governing body of a municipality relating to utility use of municipal rights-of-way or any contract entered into by a municipality and a utility relating to utility use of municipal rights-of-way.

(3) “Municipal right-of-way” means a right-of-way owned or controlled by a municipality.

(4) “Municipality” means a city, village, or town.

(5) “Transmission and distribution facilities” includes any utility pipe, pipeline, wire, cable, duct, conduit, fiber optics or radio signal transmission equipment, and associated utility plant and equipment, whether underground or above ground, in a municipal right-of-way.

(6) “Utility” means a public utility, as defined in s. 196.01(5), Stats., and includes a telecommunications carrier, as defined in s. 196.01(8m), Stats.

PSC 130.02 Scope. This chapter applies to complaints involving utility access to and use of municipal rights-of-way within a municipality under ss. 196.499(14) and 196.58(4), Stats.

PSC 130.03 Special design and construction conditions. (1) Except as provided in sub. (2), a municipal regulation that requires a utility to install, at the utility’s expense, transmission or distribution facilities which are not consistent with the utility’s practice for design or construction of utility facilities is unreasonable unless there is an adequate health, safety, or public welfare justification for the requirement. Aesthetics alone is not an adequate basis to justify a requirement to install facilities underground.

(2) Subsection (1) does not apply if all of the following conditions are met:

- (a) The municipality or a third party agrees to reimburse the utility for the difference in cost between the standard design or construction techniques of the utility and any special design or construction requirement sought by the municipality.
- (b) The special design or construction requirement is consistent with safe and reliable utility construction practices.

PSC 130.04 Discrimination. Unless there is an adequate health, safety, or public welfare justification, it is unreasonable for a municipality to deny a utility access to a municipal right-of-way or to discriminate between utilities seeking access to municipal rights-of-way.

PSC 130.05 Management function costs. (1) A municipal regulation is unreasonable if it requires a utility to pay more than the actual cost of functions undertaken by the municipality to manage utility access to and use of municipal rights-of-way. These management functions include all of the following:

- (a) Registering utilities, including the gathering and recording of information necessary to conduct business with a utility.
- (b) Except as provided in sub. (2), issuing, processing, and verifying excavation or other utility permit applications, including supplemental applications.
- (c) Inspecting utility job sites and restoration projects.
- (d) Maintaining, supporting, protecting, or moving utility equipment during work in municipal rights-of-way.
- (e) Undertaking restoration work inadequately performed by a utility after providing notice and the opportunity to correct the work.
- (f) Revoking utility permits.
- (g) Maintenance of databases.
- (h) Scheduling and coordinating highway, street, and right-of-way work relevant to a utility permit.

(2) A municipal regulation is unreasonable if it requires a utility to be responsible for fees under s. 182.0175(1m)(bm), Stats., that may be assessed to a municipality as a member of the one-call system under s. 182.0175, Stats.

(3) It is reasonable for a municipal regulation to provide for the recovery of costs incurred under sub. (1)(a), (b), (c), and (g) through a pre-excavation permit fee.

(4) It is reasonable for a municipal regulation to provide for the recovery of costs incurred under sub. (1)(d), (e), and (f) only from the utility that is responsible for causing the municipality to incur the costs.

PSC 130.06 Bonds and insurance. A municipal regulation may impose reasonable bonding and insurance requirements on a utility seeking a permit to use a municipal right-of-way, provided the municipality has reasonable grounds to question the financial responsibility or compliance ability of the utility.

PSC 130.07 Restoration. A municipal regulation is unreasonable if it requires a utility to restore a municipal right-of-way to a condition that improves upon the pre-excavation condition.

PSC 130.08 Compliance with existing law. A municipal regulation is unreasonable if it is not in substantial compliance with state statutes, including ss. 66.0831 and 80.32(4), Stats.

PSC 130.09 Permanent relocation of utility facilities. (1) A municipal regulation that requires a utility to permanently relocate transmission or distribution facilities in a municipal

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right-of-way at the expense of the utility is unreasonable unless there is an adequate health, safety, or public welfare justification for the requirement.

(2) A municipal regulation that requires a utility to permanently relocate transmission or distribution facilities in a municipal right-of-way at the expense of the utility substantially for the benefit of a person other than the municipality is unreasonable.

PSC 130.10 Advanced excavation work plans. A municipal regulation that requires a utility to submit to a municipality its future construction or excavation work plans is reasonable in order for the municipality to coordinate work within a municipal right-of-way. It is unreasonable for a municipality to deny a permit for a utility excavation not identified on a work plan if the excavation is needed by the utility to restore service to an existing customer or to provide service to a new customer.

PSC 130.11 Facilities mapping. For purposes of acquiring a permit, a municipal regulation is unreasonable if it requires a utility to submit a map indicating the location of utility facilities, other than utility right-of-way construction plans and field sketches in the format maintained by the utility, for facilities that are the subject of the permit.

PSC 130.12 Abandonment. A municipal regulation is not unreasonable if it requires a utility to notify the municipality of the utility's intent to abandon transmission or distribution facilities and requires the utility to provide a map, at the utility's expense, depicting the location of any facility within that municipality that the utility intends to abandon.

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PSC 130.13 Municipal regulation challenges. A municipal regulation is unreasonable if it requires that, as a condition of obtaining a permit, the utility agree that the municipal regulation is valid and not subject to challenge.

SECTION 2 INITIAL APPLICABILITY This rule first applies to complaints active or filed on the effective date of the rule.

SECTION 3 EFFECTIVE DATE This rule takes effect as provided in s. 227.22(2)(intro.), Stats.

(end of the rule text)

Order

THE COMMISSION ORDERS:

These rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Dated at Madison, Wisconsin, _____

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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