

AUG 06 2001



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-077

AN ORDER to create chapter PSC 130, relating to municipal regulation of utility rights-of-way.

Submitted by **PUBLIC SERVICE COMMISSION**

07-02-01 RECEIVED BY LEGISLATIVE COUNCIL.

07-27-01 REPORT SENT TO AGENCY.

RS:MCP;jal;tlu

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



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CLEARINGHOUSE RULE 01-077

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. Definitions are useful when a term is used a number of times in a rule. "Actual cost," in s. PSC 130.01 (1), is only used in s. PSC 130.05 (1) (intro.). The rule would be more understandable if the substantive content of the "actual cost" definition appeared in s. PSC 130.05. Furthermore, some thought should be given to the clarity of the definition. What is meant by "surplus income" and "general revenues"?

b. The definition of "municipality" in s. PSC 130.01 (2) differs from the definition in s. 196.01 (4), Stats. Is this difference appropriate? Also, is this definition too narrow? Should ch. PSC 130 also apply to regulations adopted by utility districts, town sanitary districts, metropolitan sewerage districts or other similar special purpose districts?

c. The definition of "ordinance" in s. PSC 130.01 (3) raises several issues. First, it should be considered whether a definition is necessary. The rule is not particularly long, and repeating each of the three words would not add an inappropriate amount of text. Note that the statute [see s. 196.499 (14)] uses the phrase "contract, ordinance or resolution." If the PSC wishes to use a collective noun, it is not appropriate to define "ordinance" to include resolutions and contracts. It would be more appropriate to use another term such as "municipal regulation," and define that term to mean an ordinance, resolution or contract. The definition restricts this term so that it applies only to "municipal rights-of-way." It should be determined, throughout the rule, whether each instance in which "ordinance" is used means only a municipal

right-of-way, or also a utility right-of-way. The phrase "contract entered into" could be clarified. Who might be parties to such a contract?

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The analysis prepared by the Public Service Commission (PSC) and the text of the rule are not clear on the scope of this rule. For example, the first sentence of the analysis states that the rule applies to municipal rights-of-way. The second sentence then refers to a right-of-way, but does not specify that it must be a right-of-way owned by a municipality. The title of the rule refers to utility rights-of-way and a number of provisions in the rule appear to apply to any right-of-way, including those owned by a utility. Does the PSC intend that "municipal right-of-way" means a right-of-way owned by a municipality, or that is merely located within a municipality? This point should be clarified, and each provision of the rule should be reviewed to determine whether references to "right-of-way" should be changed to "municipal right-of-way."

b. "Rights-of-way" is used throughout the rule. For example, see s. PSC 130.02. Is it always clear what is meant by this term, or would some definition be appropriate?

c. "Undergrounding," as used in s. PSC 130.03, appears to be jargon associated with utility regulation. The use of jargon in statutes and rules is almost always inappropriate. The regulatory effect of this provision should be stated clearly.

d. The title of s. PSC 130.03 refers to "special construction conditions." The rule, in s. PSC 130.03 (2) (b) 1., refers to "special design or construction requirements." Can these terms be harmonized?

e. The first sentence of s. PSC 130.03 (2) (a) is not restricted to requirements related to underground installation of transmission and distribution facilities. However, the second sentence, regarding aesthetics, is limited to requirements to install facilities underground. Is this appropriate? In sub. (2) (b) 1., it appears that the word "or" is unnecessary and should be deleted.

f. Section PSC 130.05 refers to "registering" utilities. It is not clear what this means.

g. Section PSC 130.06 does not refer to "ordinances" or to "transmission and distribution facilities." The definitions of these two terms are restricted to municipal rights-of-way. Therefore, it appears that s. PSC 130.06 would also apply to utility-owned rights-of-way. Is this correct? Also, this provision allows a municipal judgment based on the "financial responsibility" or "compliance ability" of a utility. The rule does not indicate what potential action of or requirement imposed on the utility requires financial responsibility or compliance ability.

h. Section PSC 130.07 refers to "pre-excavation condition." It would appear that some uses of a municipal right-of-way would not require excavation, but may nevertheless require

some restoration. Is that the intent of the rule? Also, this provision refers to restoration, but does not indicate what is meant by that.

i. Section PSC 130.08 imposes a requirement for substantial compliance with state statutes. There may be requirements under state statutes, such as procedural requirements for enacting ordinances and publishing them, that have no relationship to utility construction in municipal rights-of-way. Is it the PSC's intent to create in this rule a vehicle for challenging all aspects of municipal compliance with state statutes in the process of enacting ordinances?

j. The term "facilities mapping" is used in s. PSC 130.11, but the rule does not indicate what is meant by that term. Is this an understood term of art?

DATE MAILED

JUN 26 2001

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

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

1-AC-188

NOTICE OF HEARING

Hearing Date:	Friday, July 27, 2001 – 9:00 a.m.
Hearing Location:	Public Service Commission, 610 North Whitney Way, Madison, WI

Comments Due: Friday, July 20, 2001 – Noon	Address Comments To: Lynda L. Dorr Secretary to the Commission Public Service Commission P.O. Box 7854 Madison, WI 53707-7854 FAX (608) 266-3957
FAX Due: Thursday, July 19, 2001 – Noon	

The Commission proposes an order to create ch. PSC 130, Wis. Admn. Code, relating to municipal rights-of-way issues before the Commission.

NOTICE IS GIVEN that pursuant to s. 227.16(2)(b), Stats., a hearing will be held on **Friday, July 27, 2001, at 9:00 a.m.** in the Amnicon Falls Hearing Room at the Public Service Commission Building, 610 North Whitney Way, Madison, Wisconsin, to consider the creation of right-of-way rules.

This building is accessible to people in wheelchairs through the Whitney Way first floor (lobby) entrance. Parking for people with disabilities is available on the south side of the building. Any person with a disability who needs additional accommodations should contact the docket coordinator listed below.

WRITTEN COMMENTS

Any person may submit written comments on these proposed rules. The hearing record will be open for written comments from the public, effective immediately, and until **Friday,**

Docket 1-AC-188

July 20, 2001, at noon (Thursday, July 19, 2001, at noon, if filed by fax). All written comments must include a reference on the filing to docket 1-AC-188. **File by one mode only.**

If filing by mail, courier, or hand delivery: Address as shown in the box on page 1. Industry parties should submit **an original and 15 copies**. Members of the general public need **only file an original**.

If filing by fax: Send fax comments to (608) 266-3957. Fax filing cover sheet **MUST** state "**Official Filing**," the docket number (1-AC-188), and the number of pages (limited to 20 pages for fax comments).

**ANALYSIS PREPARED BY THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Statutory authority: ss. 196.02(3) and 227.11(2), Stats.
Statute interpreted: ss. 196.499(14) and 196.58(4), Stats.

*memo to file
9/13/02*

Upon complaint, the Commission has authority to determine the reasonableness of an ordinance, contract or resolution (ordinance) promulgated by a municipality that regulates the location of utility facilities in municipal rights-of-way (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. These include the following:

Under the rules, the Commission will consider an ordinance to be unreasonable if it unduly discriminates between utilities seeking access to municipal ROW or if it denies a utility access to ROW without good cause.

The rules recognize that a municipality 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.

The rules specify that it is unreasonable for a municipality to require a utility to install underground a 100 kilovolt or greater electric transmission line at the utility's expense, but such a requirement would be reasonable if the municipality or a third party agrees to pay the difference in construction costs between overhead and underground installation.

Similarly, it is unreasonable for a municipality to require special construction conditions to be followed at the utility's expense unless there is an adequate health or safety 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.

Under the rules it is unreasonable for a municipality to require a utility to restore a ROW to a condition that is better than the pre-excavation condition.

The rules specify that it is reasonable for a municipality to require a utility to provide adequate bonding and insurance if the municipality has reasonable grounds to question the utility's financial responsibility or compliance ability. The rules also identify advance workplan notification requirements and mapping requirements.

A Statement of Scope on this rule was approved by the Commission on June 2, 1999, and was published in the Wisconsin Administrative Register on June 30, 1999.

TEXT OF PROPOSED RULE

SECTION 1 Chapter PSC 130 is created to read:

**Wisconsin Administrative Code
Chapter PSC 130**

Municipal Regulation of Utility Rights-of-Way

- PSC 130.01 Definitions.
- PSC 130.02 Scope.
- PSC 130.03 Undergrounding and special construction conditions.
- PSC 130.04 Discrimination.
- PSC 130.05 Management function costs.
- 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 Ordinance 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) "Municipality" means a city, village, or town.
- (3) "Ordinance" includes any ordinance or resolution adopted by the governing body of a municipality relating to municipal rights-of-way or any contract entered into by a municipality relating to municipal rights-of-way.

original is in 130.05

Contract
with utility
only defines an ordinance as a contract - one totally different

not same
std sup contract and res

*necessary
has this just modify pgs?*

(4) "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.

(5) "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.

is not defined - is it clear what is a ROW?

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

PSC 130.03 Undergrounding and special construction conditions. (1)(a) Except as provided in par. (b), an ordinance that requires a utility to install underground a 100 kilovolt or greater transmission line at the expense of the utility is unreasonable.

(b) Paragraph (a) does not apply if the municipality or a third party agrees to reimburse the utility for the difference in cost between above ground and underground construction.

(2)(a) Except as provided in par. (b), an ordinance 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 an undergrounding requirement.

(b) Paragraph (a) does not apply if all of the following conditions are met:

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

*is this only
work -
ground?
design?*

PSC 130.04 Discrimination. (1) It is unreasonable for a municipality to unduly discriminate between utilities seeking access to municipal rights-of-way.

(2) If space availability is limited, a municipality may permit a utility with an obligation to serve to receive access to a particular right-of-way before a utility that is not bound by an obligation to serve.

(3) It is unreasonable for a municipality to deny a utility any access to municipal rights-of-way without good cause.

PSC 130.05 Management function costs. (1) A municipality may require a utility to pay the actual cost of functions undertaken by the municipality to manage utility access to and use of rights-of-way. These management functions include all of the following:

municipal?

- (a) Registering utilities.
- (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 before, during, and after construction.
- (d) Maintaining, supporting, protecting, or moving user equipment during work in the streets, highways, and other public places.
- (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.

+ municipal ROW?

(2) A municipality shall be responsible for its costs incurred as a member of the one-call system under s. 182.0175, Stats.

(3) It is reasonable for a municipality to recover costs incurred under sub. (1) (a), (b), and (c) through a pre-excavation permit fee.

(4) A municipality may recover costs incurred under sub. (1) (d), (e), and (f) only from the utility that is responsible for causing the municipality to incur the costs.

why not (h)?

incl its own

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

PSC 130.07 Restoration. An ordinance is unreasonable if it requires a utility to restore a right-of-way to a condition that improves upon the pre-excavation condition. At the utility's option, a utility may undertake the restoration or pay the municipality a fee to cover the actual cost of restoration.

municipal

what is restoration?

what if an excavator?

revised from procedure?

PSC 130.08 Compliance with existing law. An ordinance 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) An ordinance that requires a utility to permanently relocate transmission or distribution facilities in a 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) An ordinance that requires a utility to permanently relocate transmission or distribution facilities in a 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 workplans. An ordinance that requires a utility to submit to a municipality its future construction or excavation workplans is reasonable in order for the municipality to coordinate work within a right-of-way. It is unreasonable for a municipality to deny a permit for a utility excavation not identified on a workplan if the excavation is needed by the utility to restore service to an existing customer, to provide service to a new customer, or for other good cause.

PSC 130.11 Facilities mapping. For purposes of acquiring a permit, a municipality may not require a utility to submit facilities mapping, 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. An ordinance 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. The format of the map shall be mutually agreed upon by the municipality and the utility.

PSC 130.13 Ordinance challenges. An ordinance is unreasonable if it requires that, as a condition of obtaining a permit, the utility agree that the ordinance 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)

INITIAL REGULATORY FLEXIBILITY ANALYSIS

The proposed rules would apply to complaints regarding municipal rights-of-way ordinances. Current law authorizes the Commission to investigate such complaints and to

Docket 1-AC-188

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.

FISCAL ESTIMATE

This rule has no fiscal impact. A completed Fiscal Estimate form is included as Attachment A.

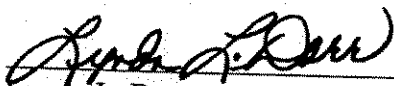
CONTACT PERSON

Questions from the media may be directed to Jeffrey L. Butson, Public Affairs Director at (608) 267-0912. Other questions regarding this matter should be directed to docket coordinator Scot Cullen at (608) 267-9229. Hearing or speech-impaired individuals may also use the Commission's TTY number, (608) 267-1479.

The Commission does not discriminate on the basis of disability in the provision of programs, services, or employment. Any person with a disability who needs accommodations to participate in this proceeding or who needs to obtain this document in a different format should contact the docket coordinator listed above.

Dated at Madison, Wisconsin, June 26, 2001

By the Commission:


Lynda L. Dorr
Secretary to the Commission

LLD:JL:clb:g:\notice\pending\1-AC-188 Hearing.doc

Attachment

FISCAL ESTIMATE

DOA-2048 N(R10/96)

- ORIGINAL
- UPDATED
- CORRECTED
- SUPPLEMENTAL

Subject
Revise Chapter PSC 130 on Municipal Regulation of Utility Rights-of-Way

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation
- Decrease Existing Appropriation
- Create New Appropriation
- Increase Existing Revenues
- Decrease Existing Revenues

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 - Permissive
 - Mandatory
- 2. Decrease Costs
 - Permissive
 - Mandatory

- 3. Increase Revenues
 - Permissive
 - Mandatory
- 4. Decrease Revenues
 - Permissive
 - Mandatory

5. Types of Local Governmental Units Affected:
- Towns
 - Villages
 - Cities
 - Counties
 - Others _____
 - School Districts
 - WTCS Districts

Fund Sources Affected

- GPR
- FED
- PRO
- PRS
- SEG
- SEG-S

Affected Ch. 20 Appropriations

20.155(l)(g)

Assumptions Used in Arriving at Fiscal Estimate

This rule revision is intended to strengthen and clarify the relationships between a "utility" and a municipal utility when access to, and use of, rights-of-way in a municipality is necessary. As drafted, the rule would not require additional costs for either the PSC or a municipality.

Long-Range Fiscal Implications

None

Agency/Prepared by: (Name & Phone No.)

PSC/Gordon Grant 267-9086

Authorized Signature/Telephone No.

Gordon Grant

Date

05/18/01