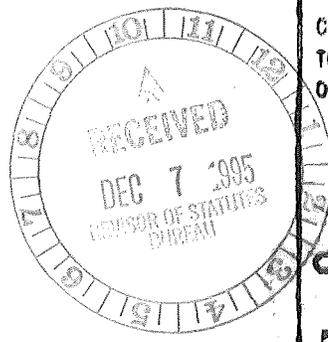


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Lynnda S. Davis
Secretary to the Commission
Public Service Commission of Wisconsin

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of the Municipal Electric Utilities of Wisconsin to Initiate a Rulemaking Proceeding to Adopt Regulations Under s. 196.04(4), Wis. Stats., Prescribing Lawful Conditions and Compensation for the Placement of Utility Facilities in Public and Private Crossings

1-AC-153

ORDER OF THE PUBLIC SERVICE COMMISSION
ADOPTING RULES

To create ch. PSC 132, Wis. Adm. Code, relating to compensation and conditions for the placement of utility facilities within railroad right-of-way.

ANALYSIS PREPARED BY THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

On May 18, 1994, the Municipal Electric Utilities of Wisconsin (MEUW) submitted a petition requesting the Public Service Commission (Commission) to adopt rules regarding the compensation and conditions to be met when utilities place their facilities in railroad right-of-way.

The petition makes reference to the Commission's 1989 proceeding entitled, Application of Wisconsin Southern Gas Company, Inc. for an Order Permitting Extension of its Lines Under Railroad Rights of Way Pursuant to s. 196.04(4), Wis. Stats., aff'd., Wisconsin Southern Gas Co. v. Wisconsin Central, Ltd., 170 Wis. 2d 558, 490 N.W.2d 27

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(Ct. App. 1992). In that proceeding the Commission determined the compensation to be paid and conditions to be met by Wisconsin Southern Gas Company for the construction of three pipelines under the railroad's track. The MEUW petition indicates that, in the years since the Wisconsin Southern decision, disagreements over utility/railroad crossings have continued to be a problem. The petition asserts that railroads have insisted on compensation and conditions exceeding those set forth in the Wisconsin Southern Gas decision. Commission staff has also been informed of these types of disputes involving utilities which are not MEUW members.

In order to prevent the continuation of such disputes, the Commission has determined to adopt rules governing the compensation to be paid and conditions to be met by utilities which place their facilities within railroad right-of-way. The rules proposed are based on principles of the Wisconsin Southern Gas decision, with certain modifications.

After submission to the Legislature, the Assembly Environment and Utilities Committee held a hearing on the proposed rules on July 11, 1995. Following that hearing, the committee voted to request that the Commission modify the proposed rules. The requested modifications were identified in a letter dated July 25, 1995 from Representative Marc Duff, the committee chair, to Chairman Cheryl Parrino. The Commission agreed to make modifications. In a letter dated October 4, 1995, the Commission sent copies of a proposed revised rules to interested parties, requesting written comments and informing the parties of the opportunity to meet with staff to discuss the rules. The proposed final rules include the modifications requested by the Assembly Committee on Environment and Utilities and incorporate changes suggested by parties who submitted comments.

In summary, the rules accomplish the following:

1. Generally identify the compensation to be paid and conditions to be met by a public utility seeking to place facilities within a railroad right-of-way, absent an agreement by the parties.
2. Define basic terms used in the rule, such as "facilities," "public utility," "railroad" and "within."
3. Unless otherwise agreed to by the parties, or unless the railroad can show special circumstances, set compensation to be paid by a utility placing facilities within a railroad right-of-way at \$500, whether the facilities are on public or private property. This compensation is a one-time payment.
4. State that the one-time payment compensates a railroad for direct expenses incurred as a result of the facilities construction, including inspection, administration, flagging, marking, and other direct expenses and, in the case of a private crossing, also compensates the railroad for the placement of the facilities in the right-of-way.
5. Precludes a railroad from requiring a gas utility to encase underground steel gas facilities. However, gas public utilities are required to meet all state and federal safety regulations, including any concerning casing.
6. Unless otherwise agreed, require each of the parties to insure themselves and to indemnify the other for damage resulting from their own negligence relating to the presence of public utility facilities within the railroad right-of-way.
7. Unless otherwise agreed, require railroads and utilities to notify each other before performing planned or emergency construction work on their own

facilities or property and forbid each from working on the facilities or property of the other. Each must also establish a notification mechanism. A 21-day notification period is established to inform the other of an intent to construct and a three working day notification period is required before actually beginning construction.

8. Unless otherwise agreed, require a railroad or public utility to compensate the other for emergency and other expenses incurred as a result of their facilities or actions within the right-of-way.
9. Unless otherwise agreed, require a public utility to relocate facilities located within a right-of-way, generally at its own expense, if the relocation is reasonably necessary for railroad operations.
10. Require a public utility to provide a railroad with a physical description of its new facilities within the railroad right-of-way, and require both the railroad and utility to inform the other of modifications to property or facilities.
11. Permit a public utility to remove facilities located within a railroad right-of-way. The Commission may order the facilities to be removed.
12. Unless otherwise agreed, permit a public utility to install facilities within a railroad right-of-way during resolution of any dispute regarding compensation or conditions of crossing. If a public utility locates facilities during a dispute and the Commission determines that those facilities were unreasonably located or constructed in an unsafe manner, the Commission may order the utility to remove or modify the facilities at the utility's expense.

PROPOSED RULES AND STATUTORY AUTHORITY

Pursuant to authority vested in the Public Service Commission by ss. 196.04(4) and 227.11(2)(a) and (c), Stats., the Public Service Commission proposes to create the following rules:

SECTION 1: Ch. PSC 132 entitled COMPENSATION AND CONDITIONS FOR PUBLIC UTILITY FACILITIES WITHIN RAILROAD RIGHT-OF-WAY is created to read:

PSC 132.01 Purpose. (1) The purpose of this chapter is to set forth the compensation to be paid and conditions to be met by a public utility for the construction of new facilities or the maintenance of existing facilities within a railroad right-of-way in cases where the utility and railroad cannot agree.

(2) These rules shall be applicable to all future facilities and, except as provided in s. PSC 132.03(1), shall be applicable to all existing facilities if agreements concerning existing facilities do not exist, expire, or are terminated.

(3) These rules shall be applicable to public utility facilities constructed within railroad right-of-way, whether on public or private property.

PSC 132.02 Definitions. In this chapter:

(1) "Commission" means the public service commission.

(2) "Facilities" means cables, conduits, wires, pipes and structures used by a public utility to transmit utility service.

(3) "Public utility" has the meaning given in s. 196.01(5), Stats., and includes a "telecommunications provider," as defined in s. 196.01(8p), Stats.

(4) "Railroad" has the meaning given in s. 195.02, Stats.

(5) "Within" means across, intersecting, on, over, perpendicular to, or under.

NOTE: The definition of the term "within" does not include facilities "along" or "parallel to" railroad right-of-way.

PSC 132.03 Compensation. (1)(a) Unless otherwise agreed to by the parties and subject to sub. (2), a public utility which locates its facilities within the right-of-way of a railroad shall compensate the railroad \$500 for each crossing. The payment shall be a one-time payment, in lieu of any license fees, to reimburse the railroad for expenses incurred by the railroad as a result of the construction of the facilities and, in the case of a private crossing, to compensate the railroad for the locating of the facilities within the right-of-way.

(b) Unless otherwise agreed to by the parties, the one-time payment under par. (a) does not apply to public utility facilities located within a railroad right-of-way on the effective date of this paragraph....[revisor inserts date].

(2) (a) In this subsection:

1. "Direct expenses" does not include a contribution to profit but may include any of the following:

- a. The cost of inspecting the crossing site before, during or after construction.
- b. Administrative costs, such as the costs of entering the new crossing on the railroad's books, maps and property records.
- c. The cost of flagging during construction.
- d. Any other costs incurred due to actual construction.

2. "Special circumstances" means unique characteristics of a parcel of property which enhance its value above that of a typical parcel of railroad right-of-way. "Special

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circumstances" may include the parcel's relationship to other property, the existence of unique topography or natural resources or other unusual characteristics.

(b) A railroad may petition the commission for compensation greater than the amount under sub. (1) if the railroad and the public utility cannot agree on compensation and the railroad incurs extraordinary direct expenses as a result of the construction of the facilities or believes that special circumstances exist. If a petition is filed, the commission shall determine whether extraordinary direct expenses are incurred or whether special circumstances exist and the amount of compensation to be paid to the railroad.

(3) If grade crossing markings or signs are damaged during construction, the party responsible for the damage shall pay the replacement costs, unless otherwise agreed to by the parties.

PSC 132.04 Casing. A railroad may not require a gas public utility to encase any steel pipeline facilities installed within the railroad's right-of-way. A gas public utility shall determine whether and how its facilities should be cased and shall comply with all applicable state and federal pipeline safety rules and regulations.

PSC 132.05 Insurance. Unless otherwise agreed to by the parties:

(1) A railroad and a public utility shall each determine for itself the amount and scope of insurance it shall carry to cover risks associated with the property of the railroad or the facilities of the utility within a railroad right-of-way.

(2) A railroad and a public utility shall indemnify the other for damages resulting from its own negligence related to the presence of utility facilities within the railroad right-of-way.

PSC 132.06 Notification of construction; emergencies; repair and maintenance.

(1) Unless otherwise agreed to by the parties, a railroad or public utility shall, at its own expense, notify the other of emergencies, planned repair and construction or similar operations within a railroad right-of-way if the operation may affect the other. Except for emergencies, initial notification of intent to construct shall be made not less than 21 days before construction and notification of actual construction shall be made not less than three working days before construction begins.

(2) Unless otherwise agreed to by the parties, a railroad or public utility shall establish, at its own expense, a mechanism for receiving notification of emergencies 24 hours per day, 7 days per week. For every public utility facility located within a railroad right-of-way, each shall inform the other of an emergency telephone number, the name of a person responsible for processing the notification and any other information necessary for dealing with an emergency situation.

(3) Unless otherwise agreed to by the parties, a railroad or public utility shall each repair and maintain its own property or facilities located within a railroad right-of-way and may not perform regular or emergency maintenance or repair of the other's property or facilities.

(4) Unless otherwise agreed to by the parties, a public utility shall relocate its facilities within a railroad right-of-way if the relocation is reasonably necessary for railroad operations. The relocation expenses shall be paid by the utility unless the facilities to be relocated serve only the railroad.

(5) In meeting notification and response responsibilities under this section, a railroad or public utility shall comply with ss. 66.047 and 182.0175, Stats., applicable federal law, and orders and rules of the commission.

PSC 132.07 Emergencies, reimbursement. Unless otherwise agreed to by the parties:

(1) A railroad or public utility shall reimburse the other for expenses reasonably incurred which result from emergencies caused by the property or facilities of each that is located within the railroad right-of-way.

(2) A railroad or public utility shall reimburse the other for reasonable miscellaneous expenses incurred by one party at the other's request.

PSC 132.08 Physical description of facilities. (1) Upon placement of new facilities, a public utility shall, at its own expense, provide a railroad with a physical description of those new facilities located within the railroad's right of way. The description shall include the installed location and depth of any underground facilities.

(2) A public utility or railroad shall provide the other with a physical description of any alterations or additions to its property or facilities located within the railroad right-of-way in the area of the utility's facilities.

PSC 132.09 Removal of Facilities. Public utility facilities may remain in a railroad right-of-way unless the commission approves abandonment of the facilities and orders the abandoned facilities to be removed.

PSC 132.10 Disputes. (1) Unless otherwise agreed to by the parties:

(a) A railroad may not refuse to permit a public utility to construct facilities within a right-of-way solely because of a dispute between the parties concerning compensation for or conditions to the right of placing the facilities within the railroad right-of-way.

(b) Subject to sub. (2), a public utility may proceed with construction while the dispute is resolved under s. PSC 132.03(2), s. 196.04(4), Stats., or another method mutually selected by the parties.

(2) If a public utility constructs facilities within a railroad right-of-way while a dispute is pending and, after notice and hearing, the commission determines that the facilities are located in an unreasonable location or constructed in an unsafe manner, the commission may order the public utility to remove or modify the facilities at the utility's expense.

(end)

No additional fiscal burden will be imposed on the state or on small businesses as a result of these proposed rules.

Hearing was held on these proposed rules on September 30, 1994. The proposed rules were forwarded to the legislature for review pursuant to s. 227.19, Stats. The Assembly Environment and Utilities Committee recommended modifications to the proposed rule, the Commission agreed to make modifications and the revised rules are being returned to the legislature under s. 227.19 (4) (b) 2., Stats. They will take effect as final rules on the

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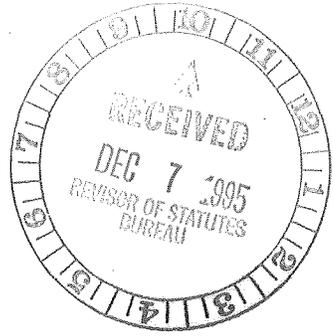
first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22(2), Stats.

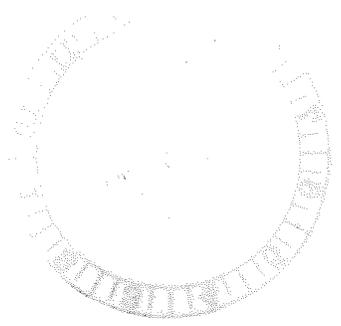
Dated at Madison, Wisconsin November 9, 1995

By the Commission.

Lynda L. Dorr
Lynda L. Dorr
Secretary to the Commission

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Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Scott A. Neitzel, Commissioner
Daniel J. Eastman, Commissioner

Jacqueline K. Reynolds, Executive Assistant
Lynda L. Dorr, Secretary to the Commission
Steven M. Schur, Chief Counsel

December 6, 1995

Mr. Gary L. Poulson, Deputy Revisor
Revisor of Statutes Bureau
131 West Wilson St., Room 800
Madison, WI 53703-3233

Re: Petition of the Municipal Electric
Utilities of Wisconsin to Initiate A
Rulemaking Proceeding to Adopt Regulations
Under s. 196.04(4), Wis. Stats., Prescribing
Lawful Conditions and Compensation for the
Placement of Utility Facilities in Public
and Private Crossings

1-AC-153

Dear Mr. Poulson:

Enclosed please find certified copies of the Order of the Public Service Commission Adopting Rules in the above-mentioned docket.

Sincerely,

John Lorence
Staff Counsel

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Encl.

cc: File

