Minnesota Office of Energy Security

FACT SHEET

Rights-of-Way and Easements for Energy Facility Construction and Operation

This fact sheet has been developed by Minnesota Department of Commerce, Office of Energy Security Energy Facility Permitting staff. It is intended for informational purposes only, as a result of and in response to questions and comments made at siting and routing public meetings throughout Minnesota. This document does not constitute legal advice, nor should it be relied on as such. Landowners are encouraged to independently verify any statements made herein.

The Minnesota Department of Commerce, Office of Energy Security (OES) provides this fact sheet for landowners who may be affected by construction of energy facilities in the State of Minnesota. Its purpose is to explain the process by which utilities obtain rights-of-way for new energy facilities (i.e., transmission lines and pipelines) and to inform landowners of their rights in negotiating right-of-way agreements.

Public Utilities Commission and Permits for Energy Facilities

The State of Minnesota has established a state policy of locating energy facilities in an orderly manner compatible with environmental preservation, sustainable development, and efficient use of resources. The Minnesota Public Utilities Commission (PUC) has authority to issue permits for certain energy facilities in the state, including power plants, transmission lines, wind farms, and pipelines. When it issues such permits, the PUC must choose sites and routes that minimize adverse human and environmental impacts while ensuring energy system reliability and sufficient energy supplies.

The land required for a specific energy facility may impact multiple landowners. In order to ensure that the particular land and rights-of-way required for an energy facility can be obtained for a project, Minnesota law gives utilities the power of eminent domain. Because the general public interest is enhanced by the addition of necessary energy facilities, the power of eminent domain allows utilities to obtain property rights even if landowners are unwilling to negotiate right-of-way agreements. Thus, Minnesota law gives utilities the power to acquire or "take" property interests (generally easements) by condemnation for constructing energy facilities.

Route Permits: Route permits issued by the PUC for transmission lines and pipelines specify a route width and a right-of-way (ROW) width. The route width is typically larger than the ROW width – providing flexibility in ROW placement within the route to address human and environmental concerns that arise after the permit has been issued. For example, the permitted ROW might be 150 ft. wide for a transmission line, but the permitted route might be 1000 ft. wide. The route is larger than the ROW to provide flexibility in locating and constructing the energy facility. But the route is also specific – it identifies where the energy facility must be placed, i.e. within the route. Thus, the route provides flexibility and predictability; it specifies where the energy facility must go and facilitates best placement of the facility within the route.

Site permits: The PUC typically issues site permits for electric power plants and wind farms. A PUC site permit will specify the site of the energy facility, with limited flexibility for locating and constructing the project. Eminent domain authority is not common for power plant sites, and is not available for wind farms.

Rights-of-way

The right-of-way (ROW) is the physical land area within a route that is needed to construct and operate the energy facility. A utility is interested in having rights to this land area sufficient to meet these uses. These rights may be obtained through one of two means: (1) purchase of an easement for the ROW, or (2) purchase of the land outright (fee simple ownership). An outright land purchase is less common because utilities seek only enough land interests to build and safely operate the facility, and fee simple ownership may not be necessary to accomplish this goal.

A ROW agreement is a private agreement between a landowner and a utility. The PUC does not involve itself with negotiations between landowners and utilities and has no authority over this process. However, the PUC does enforce the permits which it issues, including permit conditions related to design, construction, maintenance, and restoration within the ROW.

Easements

The most common form of right-of-way (ROW) agreement is an easement, which is a legal interest in real property that transfers a partial property right to the holder of the easement (e.g., from a landowner to a utility). The easement agreement specifies restrictions on both the utility's and the landowner's use of the land and specifies the rights of the utility to enter and use the land. It is binding upon the utility, the landowner, and any future owners of the land unless and until the easement is discharged. The easement will be recorded in the county in which it is located in the same manner as other real estate transactions.

Easement agreements allow only what is described by the terms of the easement – e.g., to "build and maintain a 20 inch oil pipeline" or "build and maintain a 115 kilovolt (kV) transmission line." Easements last for as long as the utility uses and maintains the energy facility in the ROW. If the utility abandons or removes the facility, the property interest transferred by the easement may return to the landowner (Minn. Stat. §117.225).

Easements typically describe allowable uses and restricted uses by the landowner. In general, the primary land use restrictions for transmission line ROWs include tall trees and buildings; for pipeline ROWs they include buildings, trees, shrubs, and brush.

ROW maintenance typically includes removing trees and other vegetation as needed within the ROW, and may include application of herbicides. Landowners with requirements for management of their land, e.g., organic certification prohibiting the use of certain pesticides, can discuss these requirements during their easement negotiations with the utility or its agent. Utilities typically notify landowners before beginning maintenance activities in the ROW; notification requirements may be part of the easement agreement. Some general conditions addressing the needs of landowners may be included in the permit issued by the PUC. In addition, the permitting process includes preparation of an Agricultural Impact Mitigation Plan (AIMP) by the Minnesota Department of Agriculture. The AIMP may include provisions dealing with organic farming as well as traditional agricultural uses.

In some instances, utilities require additional space during construction of an energy facility. This additional space is called "temporary work space" and is included in the ROW agreement, but is not part of the permanent easement. As the name implies, this work space is temporary and is typically used to place construction materials or provide operating room for machinery, e.g., room to maneuver and operate a pipeline drill. Unlike an easement, the property interest in the temporary work space reverts back to the landowner upon completion of the described work. A description of temporary work space, its uses, and duration should be part of ROW negotiations.

Negotiating

Almost all parts of the ROW agreement are negotiable, whether it is the purchase of an easement or fee simple ownership. Landowners can negotiate terms in the ROW agreement that will avoid or reduce negative impacts to their property. They can negotiate compensation for the ROW. Utilities, in turn, have an obligation to negotiate terms that meet the needs of their proposed facility. A satisfactory ROW agreement is likely best achieved if the landowner and the utility have reasonable expectations and negotiate in good faith.

Utilities have a statutory incentive to negotiate in good faith – if their last written offer to a landowner is significantly different from the final judgment of an eminent domain proceeding, the landowner can get attorney fees and other reasonable costs reimbursed (Minn. Stat. §117.031).

Typically a utility real estate agent contacts a landowner to purchase an easement for a specific parcel or strip of land that is to be used for a ROW. The utility may offer a standard easement agreement and an amount of money it is willing to pay for the easement. The offer will reflect the utility's assessment of the ROW's impact on the fair market value of the property. Typically a landowner does not sign an easement agreement without first reading it, asking questions, and negotiating terms. A landowner may wish to obtain an independent appraisal of his or her land value, speak to other landowners about possible ROW agreements and conditions, or hire an attorney or other person to negotiate on the landowner's behalf.

Easement and purchase agreements are legal documents and should, to the extent possible, include detailed and precise language. In general, it is a good idea to include in the easement agreement details about the ROW, its uses, and parties' rights and responsibilities. Blanket easements, i.e., easements that do not identify the exact location of the ROW, were common at one time in Minnesota. More contemporary easements identify and define the land area of the ROW.

If a landowner feels confused or overwhelmed during negotiations, he or she may wish to consult an attorney or "take a timeout" from negotiating until they get a better understanding of the process. Generally, time spent negotiating is time well spent – eminent domain proceedings can be time consuming and expensive.

Ultimately, each ROW agreement is unique – reflecting the values and interests of the landowner and the utility. These interests typically are not mutually exclusive and a satisfactory ROW agreement can most often be reached through negotiation.

Determining Value

A common point of negotiation in ROW agreements is the amount of money that a landowner should receive for the ROW, be it an easement or fee simple purchase. By law, landowners are due just compensation for their property. Landowners often have questions regarding what values should be included in this compensation and how these values are calculated.

To begin with, the value of the land itself – the physical length and width of the ROW – should be included. It is possible to estimate the fair market value of this land with established appraisal methods. Fair market value is the amount a willing buyer would pay a willing seller, taking into consideration the highest and best use to which the property can be put. Fair market value is typically estimated in one of four ways: (1) comparing the property to similar properties that have been sold recently, (2) estimating the future income producing capability of the property, (3) estimating the cost to replace an existing structure on the property, and (4) estimating the value of planned development on the property. These methods are not conclusive but can be used to support or defend a particular value.

If the utility is purchasing an easement, it is not purchasing all of the land rights associated with the ROW. Thus, the utility may propose paying a percentage of the fair market value of the property. This percentage is a point of negotiation between the landowner and utility.

Landowners can include damages as part of their compensation – e.g., crop damage or drain tile damage due to construction or maintenance of the energy facility. Landowners can negotiate how this value is calculated. Landowners can also be compensated for loss of a going concern (Minn. Stat. §117.186).

Another value that landowners may desire to include is any change in the value of their property that is not in the ROW, but is adjacent to it. It may be difficult to determine if a ROW and associated energy facility will affect the value of adjoining property, and if so, to what extent. Numerous studies have been conducted on this issue with varying results. Some general trends have been revealed by these studies. First, when negative impacts on property values occur due to establishment of a ROW, they tend to be in the range of a 1 to 10 percent reduction in value. Conversely, in some cases, the impacts can be positive. Second, negative impacts are most often attributed to the unattractiveness of the energy facility, fear of potential health effects, noise (during operation and maintenance, depending on the type of facility), and safety concerns. Third, the presence of the ROW and energy facility is not the primary determinant of property value. Neighborhood characteristics, lot size, schools, land characteristics, and improvements are all better predictors of property value. Fourth, the impact on property value from a ROW decreases the further away the property is from the ROW. Thus, impacts are usually greater for smaller properties than for larger properties.

Studies notwithstanding, every landowner has a unique relationship with his or her property and thus valuing impacts to property adjacent to a ROW can be challenging. If a landowner determines that he or she cannot continue living on property with an energy facility ROW easement, the landowner can, with some limitations, require that the utility purchase the landowner's entire property in fee simple (Minn. Stat. §216E.12).

A value that generally is not included in ROW agreements is the value of the energy moving through the energy facility (e.g., transmission line, pipeline). In contrast, landowners with agreements to allow wind turbines to be placed on their property can receive payments that reflect the wind energy generated on their property. In these cases, the wind farm developer is purchasing a property right that includes a known energy source, the wind. ROW agreements for transmission lines and pipelines do not anticipate drawing or creating energy from the ROW; thus, there is no energy value to speak of and no energy value appears in the ROW agreement.

Eminent Domain

"Eminent domain" is the power to take privately owned property, particularly land, and convert it to public use, subject to reasonable compensation for the taking. Despite good faith negotiations, it's possible that a landowner and utility will not reach agreement on the terms of a ROW agreement. Under these circumstances, once it obtains the necessary PUC permits, the utility has the right to use eminent domain power to initiate condemnation proceedings. However, until the utility receives the necessary permits, it may not initiate such a proceeding.

Minnesota Statutes Chapter 117 (Minn. Stat. §117, titled "Eminent Domain") describes the procedures to be followed for condemnation proceedings in Minnesota. The intent of Chapter 117 is to determine, through a fair process, what payment is due the landowner for the use of his or her land. Chapter 117 provides protections for landowners. The utility must negotiate in good faith with the landowner, and provide the landowner with a copy of an appraisal of the property before beginning a condemnation proceeding (Minn. Stat. §117.036). The landowner can obtain an appraisal and may be reimbursed, within statutory limits, for the reasonable costs of this appraisal (Minn. Stat. §117.036).

The utility begins a condemnation proceeding by filing a petition with the appropriate District Court. Landowners must receive notice of the petition (Minn. Stat. §117.055). A landowner may object to the granting of the petition and may appeal the issuance of a petition. If the petition is granted, the property interest (i.e., easement or fee simple ownership) is transferred to the utility, and the issue of compensation is taken up. The Court must appoint three impartial commissioners for the condemnation proceeding to ascertain the amount of compensation due to the landowner for the taking of the property (Minn. Stat. §117.075). The commissioners have broad powers to hear and consider "allegations and proofs of all persons interested" (Minn. Stat. §117.085). The commissioners' decision is considered final; however, landowners may appeal the decision and may request a jury trial.

A landowner who chooses not to negotiate a ROW on his or her property and instead requires the utility to use eminent domain power by initiating a condemnation process, would likely benefit from legal counsel. Condemnation proceedings can be time consuming and expensive; however, some landowners may feel this time and expense is necessary and worthwhile.

References and Resources

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