

FACT SHEET

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

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The Minnesota Department of Commerce 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 electric utilities and pipeline companies (Utility or Utilities) obtain rights-of-way for new energy facilities (e.g., transmission lines and pipelines) and to inform landowners of their rights in negotiating easement 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 (Commission) 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 Commission 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 certain instances, permits issued by the Commission give utilities the power to acquire or "take" property interests (generally easements) by condemnation for constructing energy facilities. 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 easement agreements.

Route Permits: The Commission issues route permits for pipelines and high-voltage transmission lines. Route permits specify a route and a right-of-way. The route is typically wider than the right-of-way – providing flexibility in right-of-way placement within the route to address engineering, human and environmental concerns that arise after the permit has been issued. The route is larger than the right-of-way to provide flexibility in locating and constructing the energy facility; but the route permit is also specific – it identifies an anticipated right-of-way placement within the route. Thus, the route permit provides flexibility and predictability; it specifies where the energy facility must go and facilitates the best placement of the facility within the route.

Site permits: The Commission typically issues site permits for electric power plants and wind farms. A Commission 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 and Easements

The right-of-way is the physical land area within a route that is needed to construct and operate an energy facility. The type of structure being built determines the size of the right-of-way; for example, the typical right-of-way for a 345 kilovolt (kV) transmission line is 150 feet wide. A utility may obtain a right-of-way through one of two means: (1) purchase of an easement for the right-of-way or (2) purchase of the land outright (fee simple ownership).

An outright land purchase is less common because utilities usually seek only enough land interests to build and safely operate the facility, and fee simple ownership may not be necessary to accomplish this goal.

An easement is a private agreement between a landowner and a utility. The Commission does not involve itself with negotiations between landowners and utilities and has no

authority over this process. However, the Commission does enforce the permits which it issues, including permit conditions related to design, construction, maintenance and restoration within the right-of-way.

An easement is the most common form of right-of-way agreement. This written agreement establishes a legal interest in real property that transfers a partial property right from a landowner to a utility. An 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. An easement is 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 kV transmission line." Easements last for as long as the utility uses and maintains the energy facility in the right-of-way. 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 rights-of-way include tall trees and buildings; for pipeline rights-of-way they include buildings, trees, shrubs and brush.

Negotiating

All parts of the easement agreement are negotiable, whether it is the purchase of an easement or purchase of the land in fee simple ownership. Landowners can negotiate terms in the easement agreement that will avoid or reduce negative impacts to their property. They can also negotiate compensation. Utilities, in turn, have an obligation to negotiate terms that meet the needs of their proposed facility. A satisfactory easement 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 before taking legal action 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 negotiate an easement for a specific parcel or strip of

Right-of-way maintenance typically includes removing trees and other vegetation as needed within the right-of-way 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 right-of-way; 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 Commission. In some cases, 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 right-of-way" and is included in the easement agreement, but is not part of the permanent easement. As the name implies, this additional 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 a permanent easement, the property interest in the temporary right-of-way reverts back to the landowner upon completion of the described work. A description of a temporary right-of-way, its uses and duration should be part of right-of-way negotiations.

land that is to be used for an energy facility right-of-way. The utility may offer a standard easement agreement and an amount of money it is willing to pay for the easement. The offer should reflect the utility's assessment of the fair market value of the easement.

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 easement 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 right-of-way, its uses and parties' rights and responsibilities. Blanket easements, i.e., easements that do not identify the exact

location of the right-of-way, were common at one time in Minnesota. More contemporary easements identify and provide the legal description of the land area of the right-of-way.

Ultimately, each easement agreement is unique, reflecting

the values and interests of the landowner and the utility. These interests typically are not mutually exclusive, and a satisfactory easement agreement can most often be reached through negotiation, avoiding the time and expense of eminent domain proceedings.

Determining Value

A common point of negotiation in easement agreements is the amount of money that a landowner should receive, either for 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.

The value of the land in the right-of-way is the first consideration. Traditionally, this value is based on the current property market and the type of land the energy facility will cross. It is possible to estimate the fair market value 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 rights associated with the right-of-way. 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.

Compensation to landowners can also include damages, e.g., crop loss or drain tile damage due to construction or maintenance of the energy facility or "loss of a going concern" (Minn. Stat. §117.186). Landowners can negotiate how these values are calculated.

Another value that landowners may desire to negotiate is any change in the value of their property that is not in the right-of-way, but is adjacent to it. It may be difficult to determine if a right-of-way 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 right-of-way, 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 and potential noise and safety concerns. Third, the presence of an energy facility right-of-way 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 of an energy facility on property value decreases the further away the property is from the right-of-way. Thus, impacts are usually greater for smaller properties than for larger properties.

Studies notwithstanding, every landowner has an individual relationship with his or her property, and thus valuing impacts to property hosting a right-of-way can be challenging. If a landowner determines before signing an easement that he or she does not wish to live on property with a right-of-way for a high voltage transmission line of 200 kV or larger, that landowner can choose to require the utility to purchase the landowner's entire property in fee simple (Minn. Stat. §216E.12).

Easement agreements for rights-of-way do not generally include compensation for the value of the energy moving through the energy facility (e.g., transmission line or pipeline). Landowners with agreements to host wind turbines, for example, receive payments that reflect the value of wind energy actually generated on their property. However, easement agreements for transmission lines and pipelines do not anticipate drawing or creating energy from the right-of-way; thus, there is no energy value, and none would be reflected in an easement 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 an easement agreement. Under these circumstances, once it obtains the necessary Commission permits, the utility has the right to use eminent domain to initiate condemnation proceedings. However, until the utility receives the necessary permits, it may not initiate such a proceeding.

Minnesota Statutes Chapter 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 make a good faith attempt to negotiate an easement. Before commencing an eminent domain proceeding, the utility must provide the landowner with a copy of an appraisal of the property, while the landowner can also 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. The landowner must receive notice of the petition (Minn. Stat. §117.055). At the hearing, this landowner may object to the granting of the petition and may appeal the issuance of a petition. If the petition is granted by the Court, the title to the land is transferred to the utility, and the issue of compensation is taken up. The Court must appoint three impartial commissioners to ascertain the amount of compensation due to the landowner for the taking of the land (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, the landowner or the utility may appeal the decision and may request a jury trial.

Condemnation proceedings can be time consuming and expensive; however, some landowners may feel this time and expense is necessary and worthwhile. In any case, whether a landowner chooses to negotiate an easement agreement for his or her property, or instead requires the utility to use eminent domain power by initiating a condemnation process, he or she would likely benefit from legal counsel.

References and Resources

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