

Right-of-Way and Easements for Electric Facility Construction



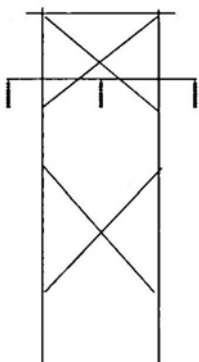
Introduction

The Public Service Commission of Wisconsin (PSC) offers this overview to landowners who must negotiate easement contracts with utilities for new electric transmission lines or sales of land for substations. It explains the utility easement process to help the negotiations have a balanced foundation for reaching agreement. The procedures of eminent domain (condemnation) are addressed, but a more complete discussion is contained in the Wisconsin government publication, *“The Rights of Landowners under Wisconsin’s Eminent Domain Law.”* Because easement agreements are private contracts, the PSC does not participate in the negotiations between utilities and landowners.

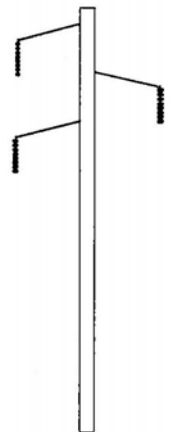
This overview will explain what a transmission “right-of-way” is and how a utility normally goes about obtaining it. It will explain the relationship between initial contract negotiations and the eminent domain process. Finally, it will discuss some concerns about landowner rights and utility easement contracts. If negotiations between a utility and a landowner for an easement fail and the condemnation process begins, the landowner should rely on the *“Rights of Landowners”* state publication.

Electric Transmission Line Right-of-Way

An electric transmission line right-of-way (ROW) is a strip of land that an electric utility uses to construct, maintain, or repair a large power line. The easement for the ROW allows the utility to keep the line clear of vegetation, buildings, and other structures that could interfere with line operation. If they are needed, the utility also obtains easements for access roads to get to the power line ROW.



A transmission line ROW is wider than a ROW for a smaller “distribution” line that serves homes and businesses directly. Transmission lines may operate at several hundred thousand volts and can serve several hundred thousand customers. Distribution lines operate at several thousand volts and can serve a few thousand customers. (Service connection to a home operates at a few hundred volts.)



A transmission line is usually centered in the ROW. The structures (usually poles and cross arms) keep the wires away from the ground, other objects, and each other. Structure height, type, span length (distance between structures), and ROW width are interrelated. If landowners wish to have fewer transmission structures installed on their land, they might ask if a longer span length is possible. To increase the span length, the utility might need to increase the structure height. If the span length and height are greatly increased, a wider ROW is sometimes needed. Attachment of the distribution wires (distribution underbuild) to the structures can limit the transmission span length to maintain safe clearances below the distribution line.

How a Utility Obtains a ROW

A utility obtains a ROW for an electric transmission line through the purchase of an easement (purchasing rights to the land) or fee title ownership (purchasing the land). The most common arrangement is an easement. 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 the power line.

An easement contract between the utility and the landowner is a legal restriction on land use that allows the utility to build and protect the power line and allows the landowner to retain general ownership and control of the land. The landowner sells the easement to the utility for a negotiated amount of money, generally paid in one lump sum. The contract specifies restrictions on both the utility's and the landowner's use of the land and specifies the rights of the utility. It is binding upon the utility, the landowner, and any future owners of the land until the contract is dissolved.

Sometimes, a new line needs to be installed in place of an older line that is in poor condition. If the existing ROW is not appropriate for the new line, a new ROW can be obtained through a new easement. New transmission easement agreements specify the type, height limits, and number of new structures; the line voltage; and the ROW width. If the ROW and structures are appropriate but the old easement can be improved in other ways, the utility might offer to renegotiate the easement contract. For example, some older easement contracts have wording that is difficult to interpret or a legal description that refers to an entire 40-acre parcel for the ROW when only a 60-foot-wide strip is needed. The utility may ask to renegotiate a contract when rebuilding an old line in order to clarify its relationship with the affected landowner.

Another arrangement for obtaining new power line ROWs is for the utility to purchase fee simple ownership. In this arrangement, a landowner sells the strip of land to the utility outright. The utility owns the ROW in "fee simple." The landowner gives up ownership of the land along with all the rights and responsibilities that ownership entails. This is a common arrangement for new substations, but it is used only occasionally for power line ROWs.

Transmission substations vary in size because of the different numbers of lines and different size lines and transformers in each one. A simple distribution substation may take less than one acre. Other types of substations may take up to six acres or more. Some land outside the substation fence may be needed for a road. If landscaping or earth berms are used to screen the substation, more land may be necessary. If more land is purchased than is needed for the substation, the utility may sell it, rent it out for farming or other local uses, or retain it for potential substation expansions.

How a Utility Obtains Easements

A utility acquires easements by negotiating with landowners on whose land the power line will be placed. Easement negotiations begin at different times, depending on the type of project and the type of certification the utility must receive from the PSC. For most large projects, an applicant must receive a Certificate of Public Convenience and Necessity (CPCN) from the Commission for a transmission project that is either:

- 345 kilovolts (kV) or greater
- Less than 345 kV but greater than or equal to 100 kV, over one mile in length, and needing new ROW.

A utility does not usually seek easement contracts for CPCN projects until it receives the CPCN. In CPCN cases, the project structures and routes are not certain until the PSC makes its decisions after a public hearing. For lower voltage lines where a simpler Certificate of Authority (CA) and not a CPCN is needed, there may be only one proposed route and structure type. In CA cases, the utility may be certain enough about its project to begin easement negotiations before the CA has been issued.

Although the negotiation for an easement is a private transaction between the utility and the landowner, a formal process protects the rights of the landowner during the negotiation. A utility agent presents the easement contract to the landowner along with an estimate of the value of the property interest it wants to buy. The landowner has the right to have his or her own appraisal made by a qualified appraiser. The reasonable cost of this appraisal must be reimbursed by the utility if 1) it is submitted to the utility within 60 days after receipt of the utility's appraisal and 2) it meets the standards of the law in Wis. Stat. § 32.09.

The exact easement agreement between a utility and an individual differs from case to case. The landowner should not sign an easement agreement without first examining it, asking questions, and negotiating. Under Wis. Admin. Code. § PSC 113.0509, the landowner can have a minimum period of five days to examine the materials. Also, there is nothing barring one landowner along a proposed transmission route from discussing easement concerns with other landowners before signing. In the case of high-voltage transmission lines, Wis. Admin. Code § PSC 113.0509(2) says that the easement contract must have certain descriptive details about the line.

For a proposed project, the landowner may also examine the project application that the utility submitted to the PSC. For projects that require a CPCN, the PSC distributes copies of the application to the city, village, town, and county clerks in the project area and also provides a copy to the main public library in each county in the project area. Interested persons can also request copies directly from the utility or review it on the PSC web site (<http://psc.wi.gov>).

Landowners' Rights and Waiving Those Rights

Wisconsin law lists some rights of landowners whose properties will be affected by a transmission line that is 100 kV or larger and over one mile in length. Table 1 lists these rights. The landowner may agree to waive or give up, one or more of these rights but does not have to do so. In the easement contract, marked or crossed-out items in the list are "waived" or no longer applicable if the landowner signs the contract.

Table 1 Landowners' Rights

Landowners who have signed easement agreements with the utility have the specific rights listed in the Wisconsin Statutes. These rights are applicable for high voltage power lines that are 100 kV or larger, longer than one mile, and built after 1976. If landowners have questions or problems related to these rights, they should contact the PSC at (608) 266-5481 or (888) 816-3831.

Under Wisconsin law (Wis. Stat. § 182.017(7)(c) to (h)), the rights are expressed as utility requirements:

(c) In constructing and maintaining high-voltage transmission lines on the property covered by the easement the utility shall:

1. If excavation is necessary, ensure that the top soil is stripped, piled and replaced upon completion of the operation.
2. Restore to its original condition any slope, terrace, or waterway which is disturbed by the construction or maintenance.
3. Insofar as is practicable and when the landowner requests, schedule any construction work in an area used for agricultural production at times when the ground is frozen in order to prevent or reduce soil compaction.
4. Clear all debris and remove all stones and rocks resulting from construction activity upon completion of construction.
5. Satisfactorily repair to its original condition any fence damaged as a result of construction or maintenance operations. If cutting a fence is necessary, a temporary gate shall be installed. Any such gate shall be left in place at the landowner's request.
6. Repair any drainage tile line within the easement damaged by such construction or maintenance.
7. Pay for any crop damage caused by such construction or maintenance.
8. Supply and install any necessary grounding of a landowner's fences, machinery or buildings.

(d) The utility shall control weeds and brush around the transmission line facilities. No herbicidal chemicals may be used for weed and brush control without the express written consent of the landowner. If weed and brush control is undertaken by the landowner under an agreement with the utility, the landowner shall receive from the utility a reasonable amount for such services.

(e) The landowner shall be afforded a reasonable time prior to commencement of construction to harvest any trees located within the easement boundaries, and if the landowner fails to do so, the landowner shall nevertheless retain title to all trees cut by the utility.

(f) The landowner shall not be responsible for any injury to persons or property caused by the design, construction or upkeep of the high-voltage transmission lines or towers.

(g) The utility shall employ all reasonable measures to ensure that the landowner's television and radio reception is not adversely affected by the high-voltage transmission lines.

(h) The utility may not use any lands beyond the boundaries of the easement for any purpose, including ingress to and egress from the right-of-way, without the written consent of the landowner.

As contracts, easements should be written in legally precise language. The landowner's rights listed in Table 1 are generally included as part of the contract by being attached as an "Exhibit." A term of the contract will state that those rights that are listed, marked, or crossed out in the exhibit would be "waived," i.e., not included in the contract. Table 2 gives an example of contract language that one might see for waiving landowner rights. (The "Grantor" is the landowner and the "Grantee" is the utility.)

The waiver of these rights, as well as any other part of the contract not required by law, is negotiable.

Table 2 Examples of Easement Contract Text for Waiving Landowner Rights

<p>In the Contract:</p> <p>"The parties hereto do hereby agree to the terms and conditions set forth in Exhibit(s) _____, attached hereto and incorporated therein."</p>
<p>At the top of the Exhibit:</p> <p>"As part of the foregoing High Voltage Electric Line Easement, Grantor(s) do hereby specifically waive certain of the following rights as designated at the bottom hereof . . ."</p>
<p>At the Bottom of the Exhibit:</p> <p>"The Grantor(s) do hereby waive the rights provided in the following paragraphs of this Exhibit A . . ." [with spaces following for listed rights to be waived]</p>

PSC Involvement in Easement Negotiations

The easement contract is a private agreement between the landowner and the utility. The PSC, therefore, does not become involved in easement negotiations unless it is asked to respond to complaints about unfair utility practices.

Agricultural Land as a Special Case

Agricultural land presents a special case. A negotiation tool that is sometimes available to farm operators or farmland owners is the Agricultural Impact Statement (AIS) prepared for certain power line projects by the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP). Any power line or substation that involves taking an interest in over five acres from any single farm operation requires an AIS before easement or purchase contract negotiations can begin. (A "farm operation" is defined by law as an activity conducted primarily for the production of commodities for sale or home use in such quantity that the commodities contribute materially to the support of the farm operator.)

Even if the taking is less than five acres, the DATCP may decide to prepare an AIS, if it believes the acquisition will have a significant effect on farm operations. The completed AIS will be sent to affected farmland owners and farm operators. By law, the DATCP must also distribute copies to certain local municipal offices and libraries in the potentially affected area. The utility is not allowed to negotiate with the property owner or to begin condemnation for at least 30 days after publication of the AIS. (For more on condemnation, see discussion below.)

According to Wisconsin law (Wis. Stat. § 32.09(6r)), if the line is at least 100 kV and more than one mile long, the utility's offer for land zoned or used for agricultural purposes must be in two forms: a lump sum payment and an annual payment. The agricultural landowner chooses one style of payment to accept. If annual payments are chosen, payments will be received only as long as the land remains in agricultural use.

When Negotiations Break Down - the Utility's Right of Eminent Domain

Despite earnest negotiations, it is possible the landowner and the utility will not reach agreement on the terms and conditions of the easement contract. Under these circumstances, the utility has the right to take the easement or property through court action. It may "condemn" the land, if needed, using its statutory right of eminent domain.

Utilities have been granted the right of eminent domain because it is in the public interest to provide safe and reliable electric service at a fair price. For major transmission lines, however, a utility may not condemn property before the utility receives a CPCN from the PSC. A public hearing in the project area is required for these types of projects.

In a condemnation action, the local condemnation commission determines the fair price to be paid, based on testimony provided by the utility and the landowner's witnesses. Landowners have rights in this process under the Wisconsin Eminent Domain Law (Wis. Stat. ch. 32). These rights are described in a state-produced brochure the utility must provide to landowners. It can also be accessed on the Internet as, "*The Rights of Landowners under Wisconsin Eminent Domain Law.*" If the utility begins the condemnation process, it is important for the landowner to have the information this brochure provides.

The Importance of Negotiation

A landowner does not have to sign the standard easement form as the utility agent initially presents it. Landowners have the right to negotiate for terms in the easement contract that will avoid or reduce the line's impact on their lands. The utility, in turn, has an obligation to negotiate. The utility will make an initial offer of money to be paid for the easement, but this amount is also negotiable. To complete a satisfactory easement negotiation, however, both the landowner and the utility must have reasonable expectations and be reasonable in negotiations.

If the landowner feels threatened about condemnation during the easement negotiations with the utility, the best action is to continue to negotiate. Some landowners find that hiring a lawyer is helpful if negotiations are not progressing. Utilities generally do not prefer condemnation. Condemnation procedures are expensive and time consuming, not only for the landowner but also for the utility.

The Condemnation Process

The condemnation process begins with the utility offering the landowner an official "jurisdictional offer," by personal delivery service or certified mail. The jurisdictional offer is an official written notice by the utility to the landowner that: 1) describes the proposed public use of the land; 2) describes what property is to be taken and the date when it will be taken; and 3) states the amount of compensation the landowner is to be paid. The landowner, by law, has 20 days from the receipt of this offer to accept it or reject it.

If the landowner accepts the offer, the offered payment is made by the utility and the condemnation process terminates. If the landowner rejects the offer or does not respond within 20 days, the utility may petition the court to have the county condemnation commission determine the appropriate level of compensation for the ROW. The condemnation process continues until the easement or property is obtained and the landowner is compensated. The process is outlined in the *“Rights of Landowners”* state publication previously mentioned.

ROW Restrictions

Utility Use

After acquiring an easement from the landowner, the utility owns the right to do only what the easement contract allows. If the utility buys the ROW in fee simple, it is limited only by the regulations, such as local zoning restrictions, that would apply to any landowner.

Property Owner Use

Modern easements specify a landowner’s allowable uses. In general, property uses that do not interfere with the power line are acceptable. These uses could include dairy farming, crop farming, fruit farming, grazing, gardening, hunting, biking, hiking, snowmobiling, and parking.

Modern easements specify the type and location of buildings or woody plants allowed within the ROW. The State Electrical Code sets the minimum distance between power lines and buildings (such as storage sheds). It prohibits new power lines from being built over residential dwellings and prohibits new houses from being built under power lines. The easement can specify the types of trees and other woody species that would be allowable or prohibited.

If the power line is installed underground, the ROW can sometimes be narrower than for an overhead line of the same voltage. However, buildings, shrubs, and trees would be prohibited throughout the ROW.

Public Use

Landowners retain the right to limit public access on their lands. Fences are allowed across the ROW. Fences constructed in ROWs of transmission lines that are 100 kV or larger, longer than one mile, and built after 1976 are specifically protected in Wis. Stat. § 182.017(7)(c) which states that the utility must satisfactorily repair to its original condition any fence that is damaged as a result of construction or maintenance operations. If the fence has no gate and the utility needs access to a ROW, the utility will cut the fence and a temporary gate will be installed. Any such gate may be left in place at the landowner’s request. Utilities that damage fences located in ROWs not mentioned in Wis. Stat. § 182.017(7) (see Table 1) are required to meet the conditions specified in the easement contract.

ROW Maintenance

After a power line is installed, the utility maintains the ROW as needed for the type, size, and voltage of the line. For an overhead line, trees and shrubs that remain short as they mature might be allowed to grow in the ROW. All woody vegetation is removed over underground lines. Herbicides may be used to remove trees and other woody vegetation unless prohibited in the easement agreement. If no herbicides or

chemicals are used, the utility relies on cutting and other mechanical means of control. If the utility agrees, landowners may do this cutting and be reimbursed by the utility.

Under Wis. Admin. Code § PSC 113.0510, the utility must make a reasonable attempt at contacting landowners a minimum of 24 hours before beginning maintenance activities in the ROW (emergency repairs are exempted from this notification requirement). The ROW is inspected from the air at least once a year and inspected by walking the corridor every two years. Property owners with concerns or questions about ROW management on their land should contact the regional office of the operating utility.

ROW Abandonment

If the utility removes a power line, it might offer the landowners the opportunity to cancel their easement agreements. The utilities usually charge landowners a fee to release the utility's easement rights. For example, a utility might charge landowners the administrative costs or the current market value of the easement to clear the easement from the property deed.

How Long Easements Last

The utility will retain its ROW rights and obligations forever unless it removes the line, abandons the ROW, and releases the easement rights. The easement becomes part of the property deed and is thereafter transferred with the property. Except in certain farmland situations, the easement compensation is a one-time payment by the utility to be allowed to maintain the ROW and protect the line in perpetuity. The utility, the landowner that signed the easement agreement, and all future owners of that property must abide by the terms of the easement contract.

The Public Service Commission of Wisconsin is an independent state agency that oversees more than 1,100 Wisconsin public utilities that provide natural gas, electricity, heat, steam, water and telecommunication services.



Public Service Commission of Wisconsin

P.O. Box 7854
Madison, WI 53707-7854

Telephone: 608-266-5481

Toll free: 888-816-3831

Consumer affairs: 608-266-2001 / 800-225-7729

TTY: 608-267-1479 / 800-251-8345

Fax: 608-266-3957

Website: <http://psc.wi.gov>

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