

CHAPTER 123—S.F.No. 442

An act relating to utilities; modifying provisions relating to municipal utilities, cooperative electric cooperatives, and natural gas pipelines; regulating use of public rights-of-way by telecommunications carriers; creating task force; requiring rulemaking; amending Minnesota Statutes 1996, sections 237.04; 237.16, subdivision 1; and 237.74, subdivision 5; proposing coding for new law in Minnesota Statutes, chapters 237; and 238; repealing Minnesota Statutes 1996, section 237.163, subdivision 5.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1996, section 237.04, is amended to read:

237.04 WIRES CROSSING OR PARALLELING UTILITY LINES; RULES.

(a) The department shall determine and promulgate reasonable rules covering the maintenance and operation, also the nature, location, and character of the construction to be used, where telephone, telegraph, electric light, power, or other electric wires of any kind, or any natural gas pipelines, cross, or more or less parallel the lines of any railroad, interurban railway, or any other public utility similar public service corporation; and, to this end, shall formulate and from time to time, issue general rules covering each class of construction, maintenance, and operation of such electric wire or natural gas pipeline crossing, or paralleling, under the various conditions existing; and the department, upon the complaint of any person, railroad, interurban railway, municipal utility, cooperative electric association, or other public utility claiming to be injuriously affected or subjected to hazard by any such crossing or paralleling lines constructed or about to be constructed, shall, after a hearing, make such order and prescribe such terms and conditions for the construction, maintenance, and operation of the lines in question as may be just and reasonable.

(b) The department may, upon request of any municipal utility, electric cooperative association, or public utility, determine the just and reasonable charge which a railroad, or owner of an abandoned railroad right-of-way, can prescribe for a new or existing crossing of a railroad right-of-way by an electric or gas line, based on the diminution in value caused by the crossing of the right-of-way by the electric or gas line. This section shall not be construed to eliminate the right of a public utility, municipal utility, or electric cooperative association to have any of the foregoing issues determined pursuant to an eminent domain proceeding commenced under chapter 117. Unless the railroad, or owner of an abandoned railroad right-of-way, asserts in writing that the proposed crossing is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, a crossing can be constructed following filing of the requested action with the department, pending review of the requested action by the department.

The department shall assess the cost of reviewing the requested action, and of determining a just and reasonable charge, equally among the parties.

Sec. 2. Minnesota Statutes 1996, section 237.16, subdivision 1, is amended to read:

Subdivision 1. **NEW SERVICE, CERTIFICATE OF AUTHORITY.** (a) For the purpose of bringing about fair and reasonable competition for local exchange telephone services, the commission has the exclusive authority, subject to the authority of a local government unit under sections 237.162 and 237.163, to:

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(1) authorize any person to construct telephone lines or exchanges or to otherwise furnish local service to subscribers in any municipality of this state, and to prescribe the terms and conditions upon which construction or service delivery may be carried on; and

(2) establish terms and conditions for the entry of telephone service providers so as to protect consumers from monopolistic practices and preserve the state's commitment to universal service.

(b) No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

(c) The commission shall make a determination on an application for a certificate within 120 days of the filing of the application.

(d) ~~The governing body of any municipality or town shall have the same powers of regulation which it now possesses with reference to the location of poles, wires, and other equipment or facilities on, below, or above the streets, alleys, or other public grounds so as to prevent any interference with the safe and convenient use of streets, alleys, and other public grounds by the public.~~

(e) ~~A telephone company or telecommunications carrier shall provide for repair or restoration of streets, alleys, and other public areas to their original condition if necessitated by the installation or operation of telephone or telecommunications carrier facilities.~~

Sec. 3. ~~[237.162] PUBLIC RIGHTS-OF-WAY; DEFINITIONS.~~

Subdivision 1. GENERALLY. The terms used in sections 237.162 and 237.163 have the meanings given to them in this section.

Subd. 2. LOCAL GOVERNMENT UNIT. "Local government unit" means a county, home rule charter or statutory city, or town.

Subd. 3. PUBLIC RIGHT-OF-WAY. "Public right-of-way" means the area on, below, or above a public roadway, highway, street, cartway, bicycle lane, and public sidewalk in which the local government unit has an interest, including other dedicated rights-of-way for travel purposes and utility easements of local government units.

A public right-of-way does not include the airwaves above a public right-of-way with regard to cellular or other nonwire telecommunications or broadcast service.

Subd. 4. TELECOMMUNICATIONS RIGHT-OF-WAY USER. "Telecommunications right-of-way user" means a person owning or controlling a facility in the public right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or is intended to be used for transporting telecommunications or other voice or data information. A cable communication system defined and regulated under chapter 238, and telecommunications activities related to providing natural gas or electric energy services whether provided by a public utility as defined in section 216B.02, a municipality, a municipal gas or power agency organized under chapter 453 or 453A, or a coopera-

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tive electric association organized under chapter 308A, are not telecommunications right-of-way users for the purposes of this section and section 237.163.

Subd. 5. EXCAVATE. "Excavate" means to dig into or in any way remove, physically disturb, or penetrate a part of a public right-of-way.

Subd. 6. OBSTRUCT. "Obstruct" means to place a tangible object in a public right-of-way so as to hinder free and open passage over that or any part of the right-of-way.

Subd. 7. RIGHT-OF-WAY PERMIT. "Right-of-way permit" means a permit to perform work in a public right-of-way, whether to excavate or obstruct the right-of-way.

Subd. 8. MANAGE THE PUBLIC RIGHT-OF-WAY. "Manage the public right-of-way" means the authority of a local government unit to do any or all of the following:

- (1) require registration;
- (2) require construction performance bonds and insurance coverage;
- (3) establish installation and construction standards;
- (4) establish and define location and relocation requirements for equipment and facilities;
- (5) establish coordination and timing requirements;
- (6) require telecommunications right-of-way users to submit, for right-of-way projects commenced after the effective date of this section, whether initiated by a local government unit or any telecommunications right-of-way user, project data reasonably necessary to allow the local government unit to develop a right-of-way mapping system, such as a geographical information mapping system;
- (7) require telecommunication right-of-way users to submit, upon request of a local government unit, existing data on the location of the user's facilities occupying the public right-of-way within the local government unit. The data may be submitted in the form maintained by the user and in a reasonable time after receipt of the request based on the amount of data requested;
- (8) establish right-of-way permitting requirements for street excavation and obstruction;
- (9) establish removal requirements for abandoned equipment or facilities, if required in conjunction with other right-of-way repair, excavation, or construction; and
- (10) impose reasonable penalties for unreasonable delays in construction.

Subd. 9. MANAGEMENT COSTS OR RIGHTS-OF-WAY MANAGEMENT COSTS. "Management costs" or "rights-of-way management costs" means the actual costs a local government unit incurs in managing its public rights-of-way, and includes such costs, if incurred, as those associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user equipment during public

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right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits. Management costs do not include payment by a telecommunications right-of-way user for the use of the public right-of-way, the fees and cost of litigation relating to the interpretation of this section or section 237.163 or any ordinance enacted under those sections, or the local unit of government's fees and costs related to appeals taken pursuant to section 4, subdivision 5.

Sec. 4. [237.163] USE AND REGULATION OF PUBLIC RIGHTS-OF-WAY.

Subdivision 1. LEGISLATIVE FINDING. The legislature finds, and establishes the principle that, it is in the state's interest that the use and regulation of public rights-of-way be carried on in a fair, efficient, competitively neutral, and substantially uniform manner, while recognizing such regulation must reflect the distinct engineering, construction, operation, maintenance and public and worker safety requirements, and standards applicable to various users of public rights-of-way. Because of the potential for installation by telecommunication companies of multiple and competing facilities within the public rights-of-way, the legislature finds it is necessary to enact the provisions of sections 237.162 and 237.163 to specifically authorize local government units to regulate the use of public rights-of-way by telecommunications right-of-way users.

Subd. 2. GENERALLY. (a) Subject to this section, a telecommunications right-of-way user authorized to do business under the laws of this state or by license of the Federal Communications Commission may construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, above, and under any public right-of-way.

(b) Subject to this section, a local government unit has the authority to manage its public rights-of-way and to recover its rights-of-way management costs. The authority defined in this section may be exercised at the option of the local government unit. The exercise of this authority is not mandated under this section. A local government unit may, by ordinance:

(1) require a telecommunications right-of-way user seeking to excavate or obstruct a public right-of-way for the purpose of providing telecommunications services to obtain a right-of-way permit to do so and to impose permit conditions consistent with the local government unit's management of the right-of-way;

(2) require a telecommunications right-of-way user using, occupying, or seeking to use or occupy a public right-of-way for the purpose of providing telecommunications services to register with the local government unit by providing the local government unit with the following information:

(i) the applicant's name, gopher state one-call registration number under section 216D.03, address, and telephone and facsimile numbers;

(ii) the name, address, and telephone and facsimile numbers of the applicant's local representative;

(iii) proof of adequate insurance; and

(iv) other information deemed reasonably necessary by the local government unit for the efficient administration of the public right-of-way; and

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(3) require telecommunications right-of-way users to submit to the local government unit plans for construction and major maintenance that provide reasonable notice to the local government unit of projects that the telecommunications right-of-way user expects to undertake that may require excavation and obstruction of public rights-of-way.

(c) A local government unit may also require a telecommunications right-of-way user that is registered with the local government unit pursuant to paragraph (b), clause (2), to periodically update the information in its registration application.

Subd. 3. RESTORATION. (a) A telecommunications right-of-way user, after an excavation of a public right-of-way, shall provide for restoration of the right-of-way and surrounding areas, including the pavement and its foundation, in the same condition that existed before the excavation. Local government units that choose to perform their own surface restoration required as a result of the excavation may require telecommunications right-of-way users to reimburse the reasonable costs of that surface restoration. Restoration of the public right-of-way must be completed within the dates specified in the right-of-way permit, unless the permittee obtains a waiver or a new or amended right-of-way permit.

(b) If a telecommunications right-of-way user elects not to restore the public right-of-way, a local government unit may impose a degradation fee in lieu of restoration to recover costs associated with a decrease in the useful life of the public right-of-way caused by the excavation of the right-of-way by a telecommunications right-of-way user.

(c) A telecommunications right-of-way user that disturbs uncultivated sod in the excavation or obstruction of a public right-of-way shall plant grasses that are native to Minnesota and, wherever practicable, that are of the local eco-type, as part of the restoration required under this subdivision, unless the owner of the real property over which the public right-of-way traverses objects. In restoring the right-of-way, the telecommunications right-of-way user shall consult with the department of natural resources regarding the species of native grasses that conform to the requirements of this paragraph.

Subd. 4. PERMIT DENIAL OR REVOCATION. (a) A local government unit may deny any application for a right-of-way permit if the telecommunications right-of-way user does not comply with a provision of this section.

(b) A local government unit may deny an application for a right-of-way permit if the local government unit determines that the denial is necessary to protect the health, safety, and welfare or when necessary to protect the public right-of-way and its current use.

(c) A local government unit may revoke a right-of-way permit granted to a telecommunications right-of-way user, with or without fee refund, in the event of a substantial breach of the terms and conditions of statute, ordinance, rule, or regulation or any material condition of the permit. A substantial breach by a permittee includes, but is not limited to, the following:

(1) a material violation of a provision of the right-of-way permit;

(2) an evasion or attempt to evade any material provision of the right-of-way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the local government unit or its citizens;

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(3) a material misrepresentation of fact in the right-of-way permit application;

(4) a failure to complete work in a timely manner, unless a permit extension is obtained or unless the failure to complete work is due to reasons beyond the permittee's control; and

(5) a failure to correct, in a timely manner, work that does not conform to applicable standards, conditions, or codes, upon inspection and notification by the local government unit of the faulty condition.

(d) Subject to this subdivision, a local government unit may not deny an application for a right-of-way permit for failure to include a project in a plan submitted to the local government unit under subdivision 2, paragraph (b), clause (3), when the telecommunications right-of-way user has used commercially reasonable efforts to anticipate and plan for the project.

(e) In no event may a local government unit unreasonably withhold approval of an application for a right-of-way permit, or unreasonably revoke a permit.

Subd. 5. APPEAL. (a) A telecommunications right-of-way user that: (1) has been denied registration; (2) has been denied a right-of-way permit; (3) has had its right-of-way permit revoked; or (4) believes that the fees imposed on the user by the local government unit do not conform to the requirements of subdivision 6, may have the denial, revocation, or fee imposition reviewed, upon written request, by the governing body of the local government unit. The governing body of the local government unit shall act on a timely written request at its next regularly scheduled meeting. A decision by the governing body affirming the denial, revocation, or fee imposition must be in writing and supported by written findings establishing the reasonableness of the decision.

(b) Upon affirmation by the governing body of the denial, revocation, or fee imposition, the telecommunications right-of-way user shall have the right to have the matter resolved by binding arbitration. Binding arbitration must be before an arbitrator agreed to by both the local government unit and the telecommunications right-of-way user. If the parties cannot agree on an arbitrator, the matter must be resolved by a three-person arbitration panel made up of one arbitrator selected by the local government unit, one arbitrator selected by the telecommunications right-of-way user and one person selected by the other two arbitrators. The costs and fees of a single arbitrator shall be borne equally by the local government unit and the telecommunications right-of-way user.

In the event there is a third arbitrator, each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the third arbitrator and of the arbitration.

Each party to the arbitration shall pay its own costs, disbursements, and attorney fees.

Subd. 6. FEES. (a) A local government unit may recover its right-of-way management costs by imposing a fee for registration, a fee for each right-of-way permit, or, when appropriate, a fee applicable to a particular telecommunications right-of-way user when that user causes the local government unit to incur costs as a result of actions or inactions of that user. A local government unit may not recover from a telecommunications right-of-way user costs caused by another entity's activity in the right-of-way.

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(b) Fees, or other right-of-way obligations, imposed by a local government unit on telecommunications right-of-way users under this section must be:

(1) based on the actual costs incurred by the local government unit in managing the public right-of-way;

(2) based on an allocation among all users of the public right-of-way, including the local government unit itself, which shall reflect the proportionate costs imposed on the local government unit by each of the various types of uses of the public rights-of-way;

(3) imposed on a competitively neutral basis; and

(4) imposed in a manner so that above-ground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way.

(c) The rights, duties, and obligations regarding the use of the public right-of-way imposed under this section must be applied to all users of the public right-of-way, including the local government unit while recognizing regulation must reflect the distinct engineering, construction, operation, maintenance and public and worker safety requirements, and standards applicable to various users of the public rights-of-way. For users subject to the franchising authority of a local government unit, to the extent those rights, duties, and obligations are addressed in the terms of an applicable franchise agreement, the terms of the franchise shall prevail over any conflicting provision in an ordinance.

Subd. 7. ADDITIONAL RIGHTS-OF-WAY PROVISIONS. (a) In managing the public rights-of-way and in imposing fees under this section, no local government unit may:

(1) unlawfully discriminate among telecommunications right-of-way users;

(2) grant a preference to any telecommunications right-of-way user;

(3) create or erect any unreasonable requirement for entry to the public rights-of-way by telecommunications right-of-way users; or

(4) require a telecommunications right-of-way user to obtain a franchise or pay for the use of the right-of-way.

(b) A telecommunications right-of-way user need not apply for or obtain right-of-way permits for facilities that are located in public rights-of-way on the effective date of this section for which the user has obtained the required consent of the local government unit, or that are otherwise lawfully occupying the public right-of-way. However, the telecommunications right-of-way user may be required to register and to obtain a right-of-way permit for an excavation or obstruction of existing facilities within the public right-of-way after the effective date of this section.

(c) Data and documents exchanged between a local government unit and a telecommunications right-of-way user are subject to the terms of chapter 13. A local government unit not complying with this paragraph is subject to the penalties set forth in section 13.08.

(d) A local government unit may not collect a fee imposed under this section through the provision of in-kind services by a telecommunications right-of-way user, nor may a

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local government unit require the provision of in-kind services as a condition of consent to use the local government unit's public right-of-way.

Subd. 8. UNIFORM STATEWIDE STANDARDS. (a) To ensure the safe and convenient use of public rights-of-way in the state, the public utilities commission shall develop and adopt by March 1, 1998, statewide construction standards for the purposes of achieving substantial statewide uniformity in construction standards where appropriate, providing competitive neutrality among telecommunications right-of-way users, and permitting efficient use of technology. The standards shall govern:

(1) the terms and conditions of right-of-way construction, excavation, maintenance, and repair; and

(2) the terms and conditions under which telecommunications facilities and equipment are placed in the public right-of-way.

(b) The public utilities commission is authorized to review, upon complaint by an aggrieved telecommunications right-of-way user, a decision or regulation by a local government unit that is alleged to violate a statewide standard.

(c) A local unit of government may not adopt an ordinance or other regulation that conflicts with a standard adopted by the commission for the purposes described in paragraph (a).

Sec. 5. Minnesota Statutes 1996, section 237.74, subdivision 5, is amended to read:

Subd. 5. EXTENSION OF FACILITIES. A telecommunications carrier may extend its facilities into or through a statutory or home rule charter city or town of this state for furnishing its services, subject to the regulation of the governing body of the city or town relative to the location of poles and wires and the preservation of the safe and convenient use of streets and alleys by the public provisions of sections 237.162 and 237.163. Nothing in this subdivision shall be construed to allow or prohibit facilities bypass of the local exchange telephone company, nor shall it be construed to prohibit the commission from issuing orders concerning facilities bypass of the local exchange telephone company.

Sec. 6. **[237.79] TELEPHONE COMPANY PROVIDING CABLE SERVICE.**

A telephone company that provides cable television services shall, with respect to provisioning of those services in Minnesota, be subject to the same franchise requirements, procedures, and fees, and public, educational, and government access requirements as a cable communication company under chapter 238.

Sec. 7. **[237.81] SCOPE.**

To the extent they regulate telecommunications right-of-way users, sections 1 to 5 supersede sections 222.37, 300.03, and 300.04, and any ordinance, regulation, or rule to the contrary.

Sec. 8. **[238.086] FRANCHISE HOLDER EXEMPTION.**

If there is a conflict in language between the franchise of a person holding a franchise agreement with a local unit of government and an ordinance regulating use of public rights-of-way, the terms of the franchise shall prevail.

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Sec. 9. ADVISORY TASK FORCE; UNIFORM STATEWIDE STANDARDS.

The public utilities commission shall convene a task force consisting of engineering and other experts representing, in equal proportions: (1) local government units; and (2) affected utilities and other users of the public rights-of-way, to establish recommendations to the commission regarding the uniform statewide standards required under section 4, subdivision 8. In addition to those general standards, the advisory task force shall provide recommendations to the commission regarding: the calculation of degradation costs; the establishment of right-of-way mapping systems; the establishment of high-density corridors within certain rights-of-way; the indemnification of local government units by right-of-way users and other liability conditions; and the recommended terms of a model ordinance or ordinances regulating use of public rights-of-way under the jurisdiction of local government units. The model ordinance or ordinances is advisory, and is not binding on local government units. The advisory task force shall complete its work and provide its recommendations to the commission by November 1, 1997. The public utilities commission shall incorporate the recommendations of the advisory task force in the rules developed and adopted by the commission under section 4, subdivision 8.

Sec. 10. HIGH-DENSITY CORRIDORS; LIMITATION.

A local unit of government may not establish a high-density corridor within its right-of-way for right-of-way users by ordinance or otherwise until the public utilities commission adopts uniform statewide standards under Minnesota Statutes, section 237.163, subdivision 8.

Sec. 11. REPEALER.

Section 4, subdivision 5, is repealed, effective June 30, 1999.

Sec. 12. EFFECTIVE DATE.

Section 1 is effective August 1, 1998.

Sections 2 to 10 are effective the day following final enactment, except that:

(1) section 4, subdivision 3, paragraph (b), is effective upon the earlier of March 1, 1998, or the adoption by the public utilities commission of the rules required under section 4, subdivision 8; and

(2) section 3, subdivision 8, clause (3), is effective upon the earlier of March 1, 1998, or the adoption of the rules required under section 4, subdivision 8, but local government units may exercise the authority that existed before November 1, 1996, with regard to the powers described in that clause, until those rules are adopted.

Presented to the governor May 8, 1997

Signed by the governor May 9, 1997, 8:00 a.m.

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