

Questions and Comments Response to Amending Chapter 24 of City of Columbia Code of Ordinances Related to the Public Rights-Of-Way

Question/Comment 1. We are already subject to a statute which places us firmly within the control of the Missouri Public Service Commission (MPSC). A copy of that statute is attached (attachment 1). The City's proposed Ordinance would be duplicative, and in some cases inconsistent, with the MPSC obligations that we already follow. The guidelines set by the ROW Management Ordinance are based off of current State of Missouri Statutes.

Answer 1. The City of Columbia is authorized under its charter to regulate the ROW, ensure its infrastructure is not damaged, and ensure the health, safety, and welfare of the citizens/visitors of the City of Columbia.

Question/Comment 2. We currently have a franchise agreement with the City which covers our use of the Public Right-of-Way. A copy of that Franchise is attached.

Answer 2. The agreement attached was for a time period of twenty (20) years and expired in 2008.

Question/Comment 3. We would like to see the application process online when this is implemented.

Answer 3. The City of Columbia is currently in process of making this happen for a variety of City of Columbia permits. The current plan is to do so within the next year.

Question/Comment 4. We would like a clarification on 24-169 that it is only for health and safety.

Answer 4. Public Health and Safety as determined by the City of Columbia.

Question/Comment 5. Sec. 24-160 Policy and Definitions
Public Utility and ROW-user definitions do not include the City of Columbia.

This violates Section 67.1840.4 RSMo, which requires the rights, duties and obligations regarding the use of the public right-of-way be uniformly applied to all users of the public right-of-way, including the political subdivision. This also violates Section 67.1842.1(1) RSMo. And 67.1842.1(2) RSMo. Which prohibits unlawful discrimination among public utility ROW-users or granting any preference to ROW-users.

These requirements cannot simply be sidestepped by excluding the City from the definition of public utility or ROW-user.

There is no reason not to use the statutory definition - it applies either way and it just injects confusion to exclude the City from the ordinance definition.

Answer 5. Missouri Chapter 394 governs Rural Electric Cooperative and included Political Subdivision under the definition of person. Missouri Statute 394.020 (2). Which in turn is included in the definition of public utility. 67.1830 (9).

Sec. 24-160.17 states “the City shall nevertheless comply with all such requirements applicable to ROW-Users to the extent such compliance is otherwise required by applicable state or federal law.”

Question/Comment 6. Section 24-161 Authorization to Use Rights of Way Required

All ROW users within the statutory provisions are exempt from obtaining a franchise or other agreement, so it is unclear why these provisions are even in the ordinance - but they should expressly only apply to those who do not fit the definition of ROW user.

Answer 6. 67.2681 Except with respect to the construction of a video service network, a certificate or franchise issued to a telecommunications company to construct and operate telecommunications facilities to provide telecommunications service in the public rights-of-way shall not constitute a video service authorization for purposes of sections 67.2675 to 67.2714. Also refer to Section 24-161.3 of the proposed Rights-of-Way Ordinance.

Question/Comment 7. Section 24-161.A(4) – Use Permit – This needs to be changed so that use permits or use agreements executed prior to the enactment of this Article “shall” constitute authorization rather than “may”. The authorization of prior agreements needs to be certain.

Answer 7. No intent at this time to make changes to prior agreements.

Question/Comment 8. Section 24-162 ROW Work Permits

Section 24-162.B Facilities Maintenance Permit; Bulk or Individual Permits

We are a video service provider, competitive local exchange carrier, and broadband provider that is overbuilding Columbia with a fiber-optic network to provide those bundled services. As an over-builder, our network is still evolving unlike its competitors which are typically the incumbent providers with ubiquitous networks. Our network continuously evolves based upon customer demand and the expansions to the network are often not finalized until shortly before the process starts. Our construction timelines could be greatly inhibited by a lengthy permitting process.

Depending upon the level of information required for a build to qualify for the Bulk Facilities Maintenance Permit, it is not clear whether typical our construction projects would fall under the Bulk Facilities Maintenance Permit or the standard ROW Work Permit. If a ROW- user will have to specify exactly where the construction will take place during the Bulk Facilities Maintenance Permit process, we are likely to not have that level of information in advance. That means the project will fall under the standard ROW Work Permit process. In this case, we cannot wait up to 31 days to obtain a permit and remain competitive with ROW-users who already have network facilities in place and can avoid the permitting process.

We would request that the Bulk Facilities Maintenance Permits require information limited to:

- General area of work to be performed
- Potential type of construction to be performed
- Timeframe requested in the Bulk Facilities Maintenance Permit

Specifics of the work to be performed would still be provided in advance as stated in the ordinance. Additionally, the ordinance should direct that permits will be processed as expeditiously as possible and that after 31 days they are deemed approved as stated in the statutes

Answer 8. Facilities Maintenance means construction, alteration, maintenance, installation, storage, or location of Facilities installed below, on or above ground in the public Rights-of-Way, other than Excavation, that also:

- a. Causes or threatens to cause any obstruction or interference to any vehicular or pedestrian traffic or traffic lane in the Rights-of-Way,
- b. Involves temporary or permanent storage of materials or equipment on Rights-of-Way,
- c. causes or reasonably may cause damage or alteration to any public improvement or vegetation within the Rights-of-Way, or
- d. Involves removal, replacement or alteration to any safety feature or requirement within the Rights-of-Way, including but not limited to removal of manhole covers, altering lighting, traffic signage or signals, placement or removal of traffic barricades, etc.
- e. Facilities Maintenance shall not include routine or other maintenance on poles, boxes, or other facilities that does not result in or qualify under one or more of the conditions described in subparagraphs (a) through (e) herein.

Typically a ROW Work Permit will be processed in 1 to 6 days. A simple permit without any closures will take a day or less. Any closure 7 days or less will follow the standard closure process that is currently in use. All closures must follow Chapter 24 Division 2 of the City of Columbia Ordinances. Therefore any closure over 7 days may have a longer process time due to the requirements contained therein.

The requirements for submission of the Bulk Facilities Maintenance Permit are still being discussed. The requirements would possibly follow the requirements of the closure process where possible.

Question/Comment 9. We believe the proposed per linear foot fee of \$0.16 per linear foot is unlawful.

There has been no demonstration that the linear foot user fee is fair or reasonable.

There has been no demonstration that the fee is based upon the actual, substantiated costs incurred in managing the ROW.

By excluding the City of Columbia from definition of Public Utility or ROW-user, the City of Columbia is not accepting a share of the cost of managing the ROW in violation of Section 67.1840.2(2) RSMo.

The linear per foot fee is pre-empted by Section 67.2689.1 RSMo. Which limits the fee a franchise entity may collect from a video service provider to not more than five percent of the gross revenues from each video service provider providing video service in the geographic area of such franchise entity. Section 67.2689.2 RSMo. Prohibits any political subdivision from demanding any additional fees, taxes, etc. or demanding the use of any other calculation. Under the proposed ordinance, a video service provider is included in the definition of Public Utility

Answer 9. Missouri Statute 67.1846.1 **Exceptions to applicability of right-of-way-laws** states that “any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user, including ordinances which were specific to particular public right-of-way users. Any existing ordinance or new ordinance passed by a grandfathered political subdivision providing for payment of the greater of a linear foot fee or a gross receipts fee shall be enforceable only with respect to the linear foot fee.”

This particular statute would allow the City of Columbia to enact linear foot fees due to having a linear foot fee ordinance prior to May 1, 2001. With that being said, after internal discussions we have decided to remove this particular section.

Question/Comment 10. Section 24 – 164 Permit Conditions

Section 24-164.G – This should be changed so that the standard is “unreasonably interfere”. There will always be some interference with other users of the ROW even if it is just by taking up space in the ROW.

Answer 10. After internal discussions it was decided not to add “unreasonably.”

Question/Comment 11. Registrations should not expire - this should be a one-time cost.

Answer 11. The proposed ordinance states registration will take place every 5 years. We want to keep that in place.

Question/Comment 12. The Missouri Statutes bar recovery of attorney's fees referring to 24-171(E).

Answer 12. Agreed 67.1830(5) (f) bars attorney's fee. This will be removed.

Question/Comment 13. I have a question for you regarding the proposed ordinance, specifically paragraph 15 on page three of the copy you provided. In the exemption list, I was just wondering if there should be added valves and fire hydrants. I don't know if the City of Columbia utilizes their right-of-way for these uses but I was thinking they probably do and you might want to add these items to the list.

Answer 13. Generally the City of Columbia would want the utility in the utility easement. There are cases where this does not happen. We will add valves, fire hydrants, and etc. to this section.

Question/Comment 14. Aren't ordinance sections 24-161.E.2 and 24-163.A, requiring us to pay for the use of the public ROW a violation of RSMO 67.1842.1(4) and RSMO 67.1830(5)(f)?

Answer 14. 24-161 E.2 states that "no costs, if any, shall be included if such inclusion is prohibited by law as to that applicant."

Missouri Statute 67.1830 & 67.1840 control the fee based on costs for municipality's management of the public right-of-way and proportionally divided between the users of the right-of-way. Also see answer to questions 9 and 19.

Question/Comment 15. Isn't the referenced ROW agreement for "general use" per section 24-161.A.1 & 2 and the permit required by section 24-161.A.4 a violation of RSMO 67.1842.1(6)?

Answer 15. 67.1842.2 States that "[t]he public utility right-of-way user may be required to obtain right-of-way permits prior to any excavation work performed within the public right-of-way after August 28, 2001."

24-161 A. 3 is an option for "[a]ny ROW-User expressly exempt by law from being required to execute a franchise or ROW agreement."

Question/Comment 16. Wouldn't section 24-161.E.2 (last sentence) be prohibited by RSMO 67.1830(5)(f)?

Answer 16. 24-161. E. 2 allows the City to charge reasonable compensation for use of the public Rights-of-Way where such a fee is not contrary to applicable law.

Under 67.1830 (5) "Management costs" or "rights-of-way management costs", the actual costs a political subdivision reasonably incurs in managing its public rights-of-way, including such costs, if incurred, as those associated with the following:

- (a) Issuing, processing and verifying right-of-way permit applications;
- (b) Inspecting job sites and restoration projects;
- (c) Protecting or moving public utility right-of-way user construction equipment after reasonable notification to the public utility right-of-way user during public right-of-way work;
- (d) Determining the adequacy of public right-of-way restoration;
- (e) Restoring work inadequately performed after providing notice and the opportunity to correct the work; and
- (f) Revoking right-of-way permits.

The \$500 application fee would be used to assist with managing the cost of any of the above referenced items.

Question/Comment 17. Under what statutory authority is the City of Columbia allowed to inspect "all documents, records or other information that pertains to the facilities within the public way"? Seems to be unduly overbroad and could allow city to demand information beyond the #, type and location of facilities within ROW.

Answer 17. See 67.1830 (6) (c) and (h).

Question/Comment 18. Isn't the requirement of us entering into an agreement or obtain permit for "general access" a violation of RSMO 67.1842.1(6); RSMO 394.080(10) and the Territorial Agreement?

Answer 18. 24-161 A.2. Applies to ROW-Users not covered in A.1,3, or 4

Under 67.1842.2 A public utility right-of-way user shall not be required to apply for or obtain right-of-way permits for projects commenced prior to August 28, 2001, requiring excavation within the public right-of-way, for which the user has obtained the required consent of the political subdivision, or that are otherwise lawfully occupying or performing work within the

public right-of-way. The public utility right-of-way user may be required to obtain right-of-way permits prior to any excavation work performed within the public right-of-way after August 28, 2001.

Under 394.080.1(10) a cooperative shall have power:

To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect of the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations constructing or operating electric transmission and distribution lines or systems;

Question/Comment 19. What is the state statute/legal authority for the monthly user fee?

Answer 19. Missouri Statute 67.1846.1 **Exceptions to applicability of right-of-way-laws** states that “any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user, including ordinances which were specific to particular public right-of-way users. Any existing ordinance or new ordinance passed by a grandfathered political subdivision providing for payment of the greater of a linear foot fee or a gross receipts fee shall be enforceable only with respect to the linear foot fee.”

This particular statute would allow the City of Columbia to enact linear foot fees due to having a linear foot fee ordinance prior to May 1, 2001. With that being said, after internal discussions we have decided to remove this particular section.

Question/Comment 20. What is the state statute/legal authority for the authority to control tree trimming per section 24-164.O? Isn't this overstepping the authority of the MO PSC in regard to adoption of safety standards for us, namely the NESC?

Answer 20. We do not believe so. See Chapter 24, article V of City of Columbia ordinances

Question/Comment 21. Isn't section 24-164.O regarding tree trimming limiting and in conflict with the statutory rights of us as set forth in RSMO 537.340.2?

Answer 21. 537.340 Is only applicable if trees and other vegetation pose a hazard to the continued safe and reliable operation of electric transmission.