

Right-of-Ways and Easements for Electric Facility Construction



Introduction

The Public Service Commission of Wisconsin (PSCW) 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 so that the negotiations might have a balanced foundation for reaching agreement.

The Commission understands that there are concerns among landowners about the eminent domain process (condemnation.) The procedures of eminent domain are addressed in this overview, but a more complete discussion is contained in a publication from the Wisconsin State Energy Office¹ entitled, [*“The Rights of Landowners under Wisconsin’s Eminent Domain Law.”*](#) Because easement agreements are private contracts, the PSCW does not participate in the negotiations between utilities and landowners. The processes for negotiation and condemnation are covered by the laws in Chapter 32 of the Wisconsin Statutes. Several appropriate citations from Chapter 32 are identified in this overview.

This overview explains what a transmission “right-of-way” is and how a utility normally obtains the rights-of-way it needs to build and protect its facilities. It also explains the relationship between initial contract negotiations and the eminent domain process. Finally, it discusses some concerns about landowner rights and utility easement contracts. If easement negotiations for an easement between a utility and a landowner fail and the condemnation process begins, the landowner should review the *“Rights of Landowners”* state publication.

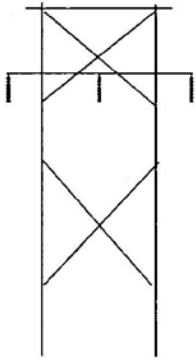


Electric Transmission Line Right-of-Way

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 ROW clear of vegetation, buildings, and other structures that could interfere with line

¹ The Wisconsin State Energy Office is part of the Department of Administration. The eminent domain publication is currently located on the state website under Relocation Assistance Program, <http://www.stateenergyoffice.wi.gov/>

operation. If the utility needs access roads to get to the power line ROW, it also obtains easements for those access roads.



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. A 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 limits 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).

Easements

The most common arrangement for a utility to obtain land rights 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, and negotiations begin.

An easement contract between the utility and the landowner is a legal restriction on land use that allows the utility to build, maintain, and protect the power line and allows the landowner to retain general ownership and control of the land. In addition, the landowner retains the obligation to pay taxes on the parcel. 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 must be obtained through a new easement. Newer transmission easement agreements must specify the:

- type, height limits, and number of new structures;
- line voltage;
- ROW width.

If the existing ROW and structures are still 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 on existing ROW in order to clarify its relationship with the affected landowner.

Fee Simple Purchases

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.” In this situation, 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.

Substation Lands

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 require less than one acre. Other types of substations may require up to six acres or more. Some land outside the substation fence may be needed for an access road. If landscaping or earthen 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 the excess land, 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 lands 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 PSCW. 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 100 kV, over one mile in length, and needing new ROW.

According to Wis. Stat. § 32.03(5), a utility may not acquire an easement for transmission projects requiring a CPCN until it receives the CPCN from the Commission. The Commission determines the transmission line route and structure designs that should be used after reviewing the record of the public hearing. However, Wisconsin’s eminent domain law (Wis. Stat. § 32.03(5)(c)) does allow a utility to negotiate before a CPCN is issued if the utility advises the landowner that it doesn’t have authority to acquire the property by condemnation until the CPCN actually is issued.

For lower voltage lines where a Certificate of Authority (CA) is required, there may be only one proposed route and structure type. For these types of proposed construction cases, the utility may be certain enough about its project to begin easement negotiations before the CA has been granted by the Commission.

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 precise easement agreement between a utility and an individual differs from case to case and depends on many factors. 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) states that the easement contract must have certain descriptive details about the line.

For a newly proposed project, the landowner may also examine the project application that the utility submitted to the PSCW for review. For projects that require a CPCN, the PSCW ensures that copies of the application are available to the cities, villages, towns, and county clerks in the project area and also 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 PSCW Electronic Regulatory Filing (ERF) web site (<http://psc.wi.gov>). All documents for proposed construction cases can be accessed on the website by using a project application's unique PSCW docket number (http://psc.wi.gov/apps40/ERF_public/info/howto.aspx). More information about using the PSCW's ERF system can be found on the website or by contacting the PSCW Gas & Energy Division at (608) 266-5481.

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 be asked 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. The contract should not be signed unless the landowner absolutely agrees to waive the items as indicated.

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.)

Waiving these rights, as well as any other part of the contract not required by law, are negotiable.

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 PSCW 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.

Table 2 Examples of Easement Contract Language that Waive Certain 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>

PSCW Involvement in Easement Negotiations

The easement contract is a private agreement between the landowner and the utility. The PSCW, therefore, cannot 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 may be 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 preparation of 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, 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 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 which type 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 that 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 PSCW. 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 by searching for, "[The Rights of Landowners under Wisconsin Eminent Domain Law](http://www.stateenergyoffice.wi.gov/docview.asp?docid=22817&locid=160)" (<http://www.stateenergyoffice.wi.gov/docview.asp?docid=22817&locid=160>). This publication is currently offered by the Wisconsin State Energy Office. If the utility begins the condemnation process, it is important for the landowner to review the information outlined in this publication.

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 land. 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

If other potential solutions cannot be reached, the utility might begin 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 can include dairy farming, crop farming, grazing, gardening, hunting, biking, hiking, snowmobiling, and parking, among other things.

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.

Vegetation management in the ROW is overseen by the North American Electric Reliability Corporation (NERC). NERC has been certified by the Federal Energy Regulatory Commission (FERC) as the reliability organization for the North American electric transmission system, oversees reliability of the transmission system’s lines, and has established a national reliability standard for ROW vegetation management on the transmission system. Each transmission owner must have a line clearance plan filed with the NERC with minimum standards related to clearances from the line. Landowner use of the ROW must conform to these standards as well. More details on vegetation management are provided in the section of this overview entitled “ROW Maintenance,” which follows.

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

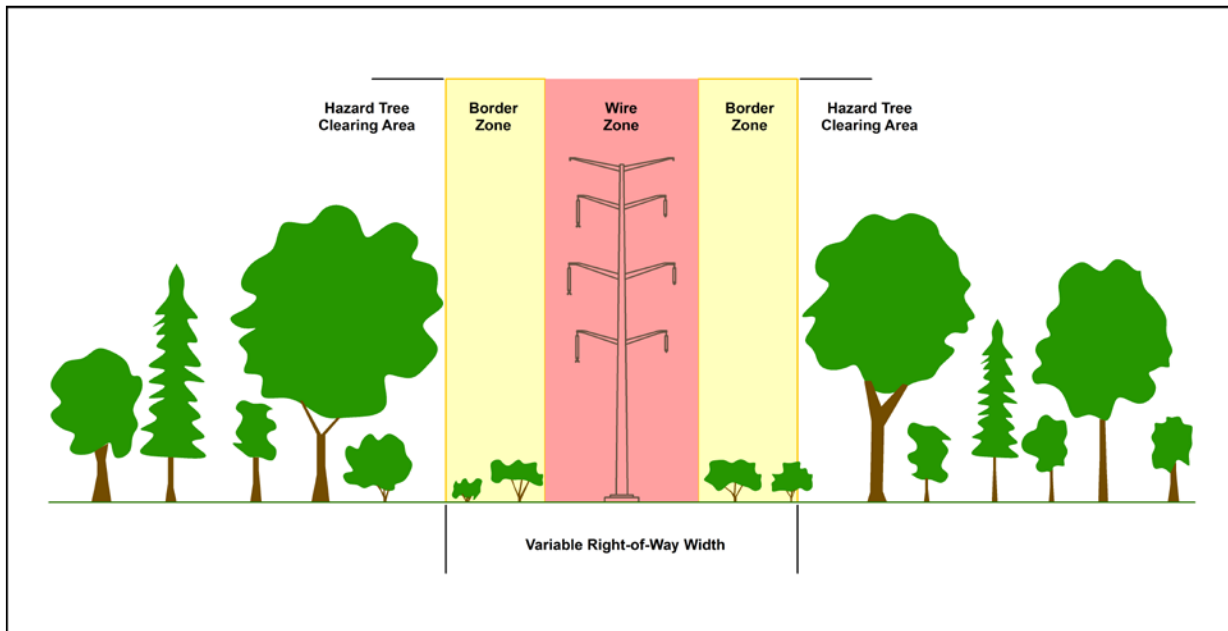
ROW Maintenance

After a power line is installed, the utility maintains the ROW as needed for the type, size, and voltage of the line. With the new NERC standards, the major transmission owners in Wisconsin employ an approach using a “wire zone” and a “border zone.” Figure 1 illustrates the different vegetative zones in a ROW. The wire zone is directly under the transmission line’s conductors and is kept in low-growing forbs and grasses to make it easier for line maintenance and repair. All woody vegetation in this zone is usually removed. The border zone is from the wire zone to the edge of the ROW as defined by the easement contract.

The utility may allow short-growing woody species, but it is important to note that anything located in an

easement can be at risk for removal if not specified in the easement contract or there is a change to the operation or maintenance requirement of the electrical facilities.

Figure 1 Typical ROW Vegetative Management Zones



Also, outside of the ROW, the transmission owner may conduct additional tree trimming or removal. Under state law, Wis. Admin. Code § 113.0512, transmission owners are required to trim or remove trees that could pose a threat to the transmission line even if those trees are located outside the border zone and ROW. These “hazard” trees are trees that pose an unacceptable risk of failing and contacting the line before the next ROW maintenance cycle. If identified, these hazard trees must be topped, pruned, or felled so that they no longer pose a hazard.

All woody vegetation is removed over underground lines.

The wire/border zone concept may not be totally appropriate for all ROW conditions. For an overhead line, trees and shrubs that remain short as they mature might be allowed to grow in the ROW but not under the line. There might be buffer zones necessary where low-growing woody plants are allowed to remain at streams and river crossings.

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 ground patrol periodically, generally every three to four years. Property owners with concerns or questions about ROW management on their land should contact the operating utility. 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.

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 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.

Length of Easements Terms

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.



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