SECOND REGULAR SESSION

HOUSE COMMITTEE SUBSTITUTE FOR

SENATE SUBSTITUTE FOR

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# SENATE BILL NO. 653

## 97TH GENERAL ASSEMBLY

5011H.10C D. ADAM CRUMBLISS, Chief Clerk

## AN ACT

To repeal sections 67.1830 and 67.5104, RSMo, and to enact in lieu thereof two new sections relating to municipal utility poles.

*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Sections 67.1830 and 67.5104, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 67.1830 and 67.5104, to read as follows:

67.1830. As used in sections 67.1830 to 67.1846, the following terms shall mean:

(1) "Abandoned equipment or facilities", any equipment materials, apparatuses, devices or facilities that are:

(a) Declared abandoned by the owner of such equipment or facilities;

(b) No longer in active use, physically disconnected from a portion of the operating facility or any other facility that is in use or in service, and no longer capable of being used for the same or similar purpose for which the equipment, apparatuses or facilities were installed; or

(c) No longer in active use and the owner of such equipment or facilities fails to respond within thirty days to a written notice sent by a political subdivision;

(2) "Degradation", the actual or deemed reduction in the useful life of the public right-of-way resulting from the cutting, excavation or restoration of the public right-of-way;

(3) "Emergency", includes but is not limited to the following:

(a) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that prevents or significantly jeopardizes the ability of a public utility to provide service to customers;

EXPLANATION — Matter enclosed in bold-faced brackets **[**thus**]** in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

(b) An unexpected or unplanned outage, cut, rupture, leak or any other failure of a public utility facility that results or could result in danger to the public or a material delay or hindrance to the provision of service to the public if the outage, cut, rupture, leak or any other such failure of public utility facilities is not immediately repaired, controlled, stabilized or rectified; or

(c) Any occurrence involving a public utility facility that a reasonable person could conclude under the circumstances that immediate and undelayed action by the public utility is necessary and warranted;

(4) "Excavation", any act by which earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground is cut into, dug, uncovered, removed, or otherwise displaced, by means of any tools, equipment or explosives, except that the following shall not be deemed excavation:

(a) Any de minimis displacement or movement of ground caused by pedestrian or vehicular traffic;

(b) The replacement of utility poles and related equipment at the existing general location that does not involve either a street or sidewalk cut; or

(c) Any other activity which does not disturb or displace surface conditions of the earth, asphalt, concrete, sand, gravel, rock or any other material in or on the ground;

(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.

Right-of-way management costs shall be the same for all entities doing similar work. Management costs or rights-of-way management costs shall not include payment by a public utility right-of-way user for the use or rent of the public right-of-way, degradation of the public right-of-way or any costs as outlined in paragraphs (a) to **[**(h)**]** **(f)** of this subdivision which are incurred by the political subdivision as a result of use by users other than public utilities, the attorneys' fees and cost of litigation relating to the interpretation of this section or section 67.1832, or litigation, interpretation or development of any ordinance enacted pursuant to this section or section 67.1832, or attorneys' fees and costs in connection with issuing, processing,

or verifying right-of-way **[**permit**]** **permits** or other applications or agreements, or the political subdivision's fees and costs related to appeals taken pursuant to section 67.1838. In granting or renewing a franchise for a cable television system, a political subdivision may impose a franchise fee and other terms and conditions permitted by federal law;

(6) "Managing the public right-of-way", the actions a political subdivision takes, through reasonable exercise of its police powers, to impose rights, duties and obligations on all users of the right-of-way, including the political subdivision, in a reasonable, competitively neutral and nondiscriminatory and uniform manner, reflecting the distinct engineering, construction, operation, maintenance and public work and safety requirements applicable to the various users of the public right-of-way, provided that such rights, duties and obligations shall not conflict with any federal law or regulation. In managing the public right-of-way, a political subdivision may:

(a) Require construction performance bonds or insurance coverage or demonstration of self-insurance at the option of the political subdivision or if the public utility right-of-way user has twenty-five million dollars in net assets and does not have a history of permitting noncompliance within the political subdivision as defined by the political subdivision, then the public utility right-of-way user shall not be required to provide such bonds or insurance;

(b) Establish coordination and timing requirements that do not impose a barrier to entry;

(c) Require public utility right-of-way users to submit, for right-of-way projects commenced after August 28, 2001, requiring excavation within the public right-of-way, whether initiated by a political subdivision or any public utility right-of-way user, project data in the form maintained by the user and in a reasonable time after receipt of the request based on the amount of data requested;

(d) Establish right-of-way permitting requirements for street excavation;

(e) Establish removal requirements for abandoned equipment or facilities, if the existence of such facilities prevents or significantly impairs right-of-way use, repair, excavation or construction;

(f) Establish permitting requirements for towers and other structures or equipment for wireless communications facilities in the public right-of-way, notwithstanding the provisions of section 67.1832;

(g) Establish standards for street restoration in order to lessen the impact of degradation to the public right-of-way; and

(h) Impose permit conditions to protect public safety;

(7) "Political subdivision", a city, town, village, county of the first classification or county of the second classification;

(8) "Public right-of-way", the area on, below or above a public roadway, highway, street or alleyway in which the political subdivision has an ownership interest, but not including:

(a) The airwaves above a public right-of-way with regard to cellular or other nonwire telecommunications or broadcast service;

(b) Easements obtained by utilities or private easements in platted subdivisions or tracts;

(c) Railroad rights-of-way and ground utilized or acquired for railroad facilities; or

(d) **Poles,** pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses utilized by a municipally owned or operated utility pursuant to chapter 91 or pursuant to a charter form of government;

(9) "Public utility", every cable television service provider, every pipeline corporation, gas corporation, electrical corporation, rural electric cooperative, telecommunications company, water corporation, heating or refrigerating corporation or sewer corporation under the jurisdiction of the public service commission; every municipally owned or operated utility pursuant to chapter 91 or pursuant to a charter form of government or cooperatively owned or operated utility pursuant to chapter 394; every street light maintenance district; every privately owned utility; and every other entity, regardless of its form of organization or governance, whether for profit or not, which in providing a public utility type of service for members of the general public, utilizes pipes, cables, conduits, wires, optical cables, or other means of transmission, collection or exchange of communications, information, substances, data, or electronic or electrical current or impulses, in the collection, exchange or dissemination of its product or services through the public rights-of-way;

(10) "Public utility right-of-way user", a public utility owning or controlling a facility in the public right-of-way; and

(11) "Right-of-way permit", a permit issued by a political subdivision authorizing the performance of excavation work in a public right-of-way.

67.5104. 1. As used in this section, "pole attachment" means an attachment by **an attaching entity, including** a video service provider, a telecommunications **provider** or other communications-related service provider to a pole owned **or controlled** by a municipal utility **or municipality**, but not a wireless antenna attachment or an attachment by a wireless communications provider to a pole**. A municipal utility or municipality may only deny an attaching entity access to the utility's poles on a nondiscriminatory basis if there is insufficient capacity or for reasons of safety and reliability and if the attaching entity will not resolve the issue. If a municipal utility or municipality does not find any capacity, safety, or reliability issues, such municipal utility or municipality shall issue the attaching entity a permit to attach to the municipal utility's or municipality's poles. Nothing in this**

**section shall be construed to prohibit a municipal utility or municipality from requiring an attaching entity to enter into a pole attachment agreement consistent with this section**.

2. Notwithstanding sections 67.1830 to 67.1846, any pole attachment fees, terms, and conditions, including those related to the granting or denial of access, demanded by a municipal utility pole owner or controlling authority of a municipality shall be nondiscriminatory, just, and reasonable and shall not be subject to any required franchise authority or government entity permitting, except as provided in this section. A pole attachment rental fee shall be calculated on an annual, per-pole basis. Such rental fee shall be considered nondiscriminatory, just, and reasonable if it is agreed upon by the parties or, in the absence of such an agreement, based on cost but in no such case shall such fee so calculated be greater than the fee which would apply if it were calculated in accordance with the cable service rate formula referenced in 47 U.S.C. Sec. 224(d) as applied by the Federal Communications Commission**[**, except as permitted by subsection 3 of this section.

3. Either party may seek review of any fee, term, or condition by means of binding arbitration conducted by a single arbitrator mutually agreeable to the parties or, in the absence of such an agreement, by means of binding arbitration conducted by the American Arbitration Association. An arbitrator's award regarding fees shall be confined to ensuring that the municipal utility pole owner recovers its direct costs and a reasonable share of the fully allocated costs attributable to the pole attachment, and that the fee may exceed the fee resulting from the application of the cable service rate formula referenced in this section only if based on an express written finding stated in the award that such award is based on competent and substantial evidence that the revenues produced under the cable service rate formula and other payments made by the service provider do not sufficiently recover the direct costs and a reasonable share of the fully allocated costs attributable to the pole attachment**]**. In addition, a municipal pole owner may be authorized to exceed the rate of return cost components of the Federal Communications Commission formula referenced in this section if necessary to comply with Article X of the Missouri Constitution. **[**Pending the arbitrator's rendering of such an award, the last existent rental fee applicable to the pole attachment shall remain in place and binding upon both parties**] In the event of a dispute between the parties, either party may bring an action for review in any court of competent jurisdiction. The court shall rule on any such petition for review in an expedited manner by moving the petition to the head of the docket consistent with subsection 2 of this section. Nothing shall deny any party the right to a hearing before the court**.

**[**4.**]** **3.** Where no **[**prior contract**]** **pole attachment agreement** exists between an attaching entity and the municipal utility pole owner **or controlling authority of a municipality**, and a dispute between a municipal utility pole owner **or controlling authority**

**of a municipality** and an attaching entity exclusively concerns the per-pole fee **or any requirement or issue not directly related to pole attachments consistent with this section or both**, then the attaching entity may proceed with its attachments during the pendency of the **[**arbitration**]** **dispute** under the agreed-upon terms and conditions **at a rental rate of no more than as set forth in subsection 2 of this section. The attaching entity shall comply with applicable and reasonable engineering, safety and reliability standards and shall hold the municipal pole owner or controlling authority of the municipality harmless for any liabilities or damages incurred that are caused by the attaching entity**.

**[**5.**]** **4.** The provisions of this section shall not supersede existing pole attachment agreements established prior to August 28, **[**2013**]** **2014**.

**[**6.**]** **5.** Nothing in this section shall be construed as conferring any jurisdiction or authority to the public service commission **or any state agency** to regulate either the fees, terms, or conditions for pole attachments, or for any state agency to assert any jurisdiction over **[**pole attachments**]** **attachments to poles** regulated by 47 U.S.C. Sec. 224.

**6. A municipal utility or municipality may, after reasonable written notice and an opportunity to cure, as provided in the applicable pole attachment agreement between a municipal utility or municipality and an attaching entity, revoke a pole attachment permit granted to an attaching entity and require removal of the attachment with or without fee refund for breach of the pole attachment agreement or permit until the breach is cured, but only in the event of a substantial breach of material terms and conditions of the pole attachment agreement or permit. A substantial breach by an attaching entity shall be limited to:**

**(1) A material violation of a material provision of the applicable pole attachment agreement or permit;**

**(2) An evasion or attempt to evade any material provision of the applicable pole attachment agreement or permit;**

**(3) A material misrepresentation of fact in the applicable pole attachment agreement or permit application;**

**(4) A failure to complete work by the date and in accordance with the terms specified in the applicable pole attachment agreement or permit, unless an extension is obtained or unless the failure to complete the work is due to reasons beyond the attaching entity's control; or**

**(5) A failure to correct, within the time and in accordance with the terms specified by the municipal utility or municipality in the applicable pole attachment agreement or permit, work by the attaching entity that does not conform to applicable national safety codes, industry construction standards, or local safety codes that are not more stringent**

**than national safety codes, upon inspection and notification by the municipal utility or municipality of the faulty condition. If the time for correction is not specified in the applicable pole attachment agreement or permit, the time for correction shall be reasonable under the particular circumstances, and in no event less than thirty days.**

**7. Unless otherwise provided for in an applicable pole attachment agreement, in the event of an imminent threat to public health, life, or safety, a municipal utility or municipality shall, upon notice to the attaching entity, request the attaching entity rearrange, relocate, or remove a pole attachment from a pole or absent action from the attaching entity, have the authority to rearrange, relocate, or remove a pole attachment consistent with industry practices. The attaching entity shall be notified as soon as practicable upon the cessation of the threat to public health, life, or safety, or upon restoration of the attachment by the municipal utility or municipality.**

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