

RIGHTS AND LIMITATIONS IN MANAGING THE RIGHTS-OF-WAY

MML ANNUAL CONFERENCE | SEPTEMBER 27, 2021

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OVERVIEW OF TODAY'S TOPIC

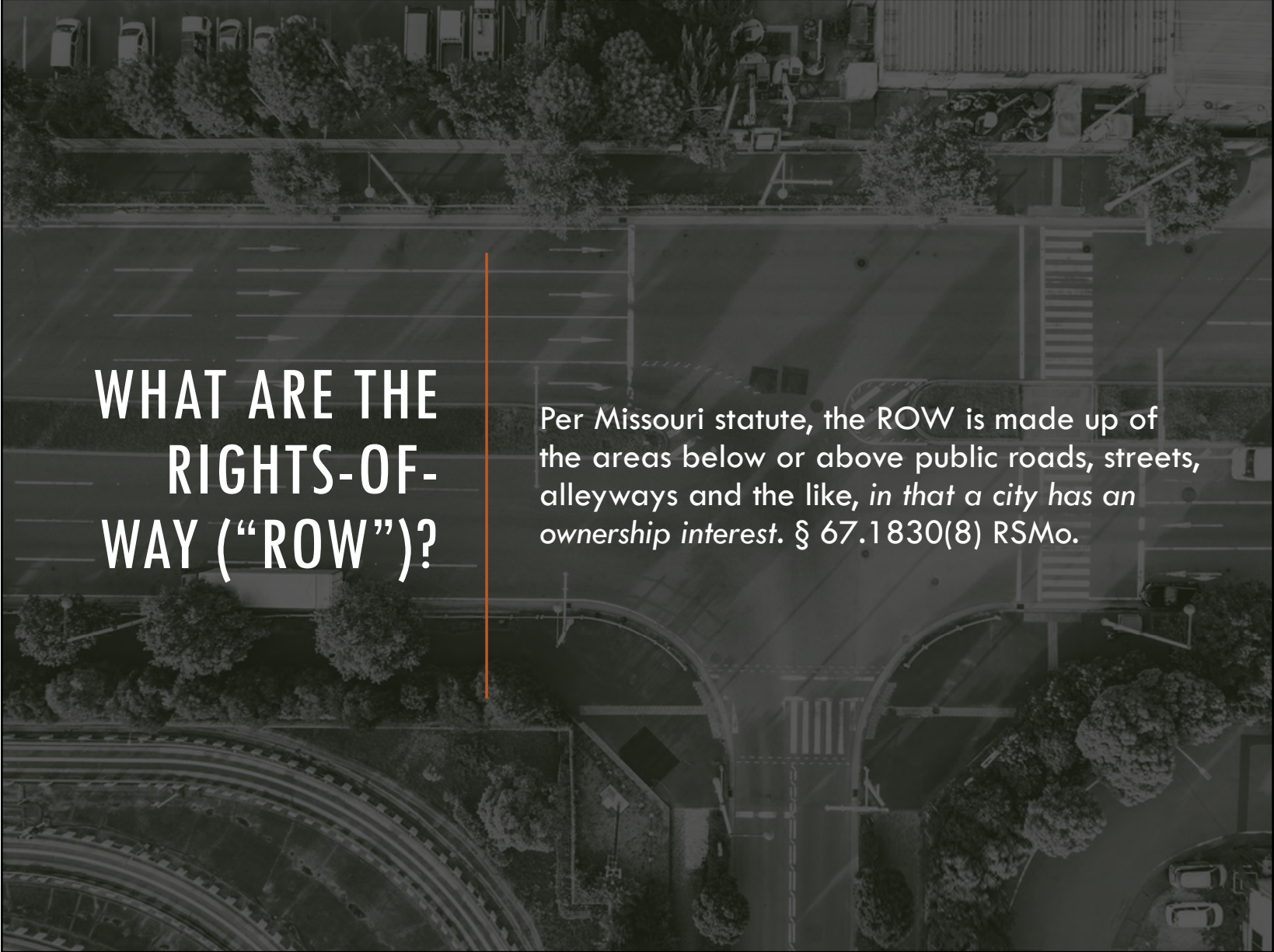
The Issues:

- What infrastructure are we discussing?
- Who are the users of this infrastructure?
- Why are new users, and uses, proliferating the ROW?
- What is the city's authority over the ROW?

The Goals:

- Why should I develop ROW Management regulations?
- What should my community's goals in ROW Management be?
- How do I develop effective ROW Management controls?
- What tools help with effective ROW Management?

Small Wireless Facilities Special
Rules/Limitations



WHAT ARE THE RIGHTS-OF- WAY (“ROW”)?

Per Missouri statute, the ROW is made up of the areas below or above public roads, streets, alleyways and the like, *in that a city has an ownership interest.* § 67.1830(8) RSMo.

WHAT PROPERTY IS NOT INCLUDED IN THE ROW?

Statutorily:

- Easements obtained by utilities or private easements in platted subdivisions or tracts
- Railroad ROW and ground utilized or acquired for railroad facilities
- Poles, pipes, cables, conduits, wires, optical cables, or other means of transmission, . . . or electronic or electrical current or impulses utilized by a municipally owned or operated utility . . .

What else is left out?

- City Stormwater and Sewer Systems
- City-owned property—City Hall, City Parks, etc.
- Likely bridges or other similar infrastructure



WHO ARE THE USERS?

Generally, Missouri law provides for a broad definition of what a “Public Utility” is per 67.1830(9) RSMo.:

- ***PSC-certified entities;***
and
- Any entities that “provide a ***public utility type of service for members of the general public***”

WHY ARE THERE SO MANY NEW USERS—AND USES?

The main new use is *fiber/backhaul*
for *data/internet transmission*.

Why?

- Increased demand for bandwidth
- Capabilities of Existing/Emerging Technologies
- Demand for more connectivity/network redundancy
- 5G Facilities and “Small Wireless”
- “Internet of Things”
- “Smart Cities”



WHY DEVELOP ROW MANAGEMENT REGULATIONS?

Sets ground rules for each
entity's usage of ROW

Cost on public of conflicting
uses – consumption of limited
resource

Streamlining new
developments (or facilities
relocation for projects like
street widenings) and
provision of new/upgraded
services quickly

Lessen risk of interference
and destruction of facilities
(City & 3rd Party)

GENERAL CITY AUTHORITY

- § [67.1844.1](#) – Preserves applicable “zoning” in ROW
- **Note**, Small Wireless has special rules when zoning applies – see § [67.5112.3](#)
- § [67.1846](#) – Linear Foot Fee Authority (limited by recent laws)
- § [67.1842\(5-6\)](#) – Agreements or permits for new users
- § [393.010](#) – Utilities may use ROW “***with the consent of the municipal authorities thereof under such reasonable regulations***”
- § [392.080](#) – Telephone companies “shall first obtain consent from said city” and shall “***not to incommode the public...***”
- § [67.1832.1](#) – City shall “grant its consent”
- § [67.1830\(6\)\(f\)](#) – Establish permitting requirements for towers and other structures or equipment for wireless communications facilities **consistent with Uniform Wireless Communications Infrastructure Deployment Act (“2014 Law”) and Small Wireless Act (“2018 Law”)**

BUILDING CODE AUTHORITY



Building Code
authority retained
§§ 67.5113.3(9)(g)/
67.5100/67.1844.1



Wind loading,
engineering study, etc.



Abandonment Bonds?



NEED FOR MUNICIPAL
CONTROL

GOALS IN ROW MANAGEMENT

Protection:

- Establish bonding, insurance, and indemnification requirements
- Determining which entities are in ROW, including subcontractors

Stewardship:

- Clear permitting and mapping requirements for facilities
- Aesthetics
- Reimbursement (and compensation, where/when applicable)

GOALS IN ROW MANAGEMENT

Continuity:

- Require the ROW User to demonstrate which laws may or may not apply to them
- Give clear guideposts in the process to city and ROW Users
- Ease of replication for approvals protects against claims of discriminatory or favorable treatment

HOW TO DEVELOP EFFECTIVE ROW MANAGEMENT CONTROLS?

Not one-size-fits all

What issues often come up
in your community?

- Severed lines or unclear facilities ownership?
- Utilities slow to relocate and delaying capital improvements?
- Failure of entities to restore ROW after ROW work?
- Consistently having to use public works to fix excavation issues?

HOW TO DEVELOP EFFECTIVE ROW MANAGEMENT CONTROLS?

Bedrock Principles of any effective ROW
Management system should be requirements
for:

- Insurance
- Indemnification
- Relocation
- Restoration

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DEVELOPING ROW MANAGEMENT — STATUTORY & CASE AUTHORITY:

Insurance

City may “[r]equire 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 in 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[.]” See 67.1830 (6)(a)

DEVELOPING ROW MANAGEMENT — STATUTORY & CASE AUTHORITY:

Indemnification

- Indemnification authority is premised on a city's authority under § 67.1830(6), in “managing the public right-of-way” to reasonably exercise its police powers “to impose rights, duties and obligations on all users of the rights-of-way ... reflecting the distinct engineering, construction, operation, maintained and public work and safety requirements ...”

DEVELOPING ROW MANAGEMENT — STATUTORY & CASE AUTHORITY:

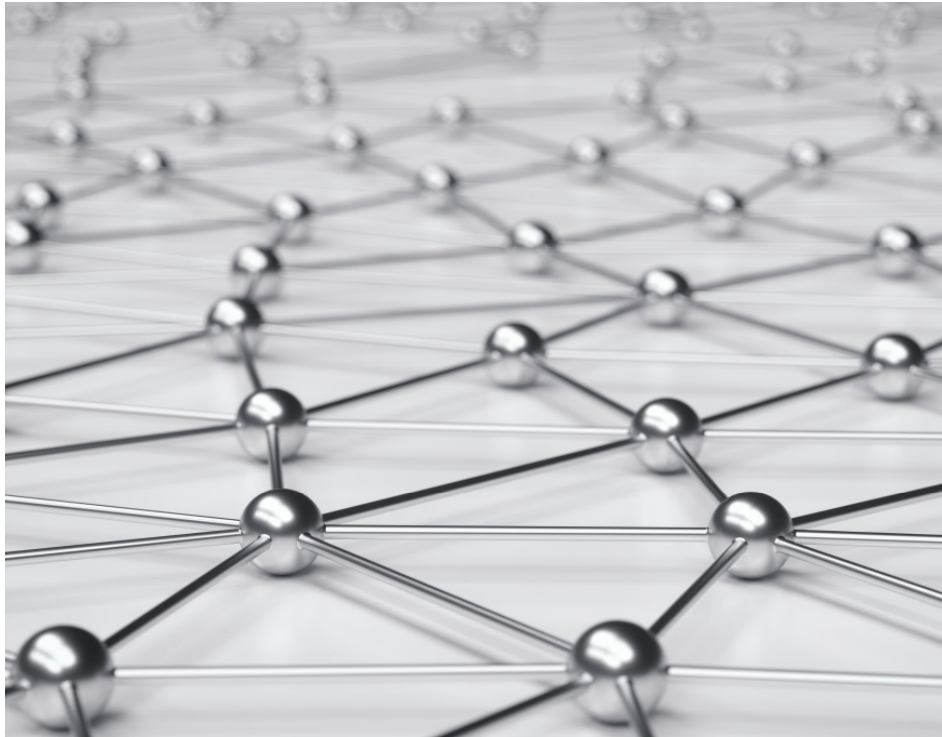
Relocation

- ***Union Electric v. Land Clearance Red. Authority of the City of St. Louis***, 555 S.W.2d 29 (Mo. 1977) (a utility must "relocate its facilities in public streets when changes are required by public necessity [and must do so] at its own expense" when the municipality is exercising a governmental function rather than a proprietary function).
- ***City of Bridgeton v. Missouri-American Water Co.***, 219 S.W.3d 226 (Mo. banc 2007) (relocation to accommodate improvements completed by private entities following a legislative declaration of public interest is sufficient to meet the "public necessity" requirement).
- Model language could provide:
 - "Shall promptly remove, relocate, or adjust any Facilities located in the ROW as directed by the city when such is required by public necessity, or public convenience and security require it, or such other findings in the public interest that may require relocation, adjustment, or removal at the cost of the entity."

DEVELOPING ROW MANAGEMENT — STATUTORY & CASE AUTHORITY:

Restoration:

- **67.1834. Restoration of a public right-of-way after excavation, standards and conditions, completion dates. — 1.** A public utility 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 accordance with the standards and conditions of the political subdivision, unless the political subdivision, at its option, chooses to perform its own street restoration, in which case the public utility right-of-way user shall be responsible for reimbursing the political subdivision its reasonable actual restoration costs within thirty days of invoice. Restoration of the public right-of-way shall be completed within the dates specified in the right-of-way permit, unless the permittee obtains a waiver, extension or a new or amended right-of-way permit. *Every right-of-way user to whom a right-of-way permit has been granted shall guarantee for a period of four years the restoration of the right-of-way in the area where such right-of-way user conducted excavation and performed the restoration.*



TOOLS FOR EFFECTIVE ROW MANAGEMENT - OVERVIEW

ROW Management

ROW Use Agreement,
Franchise, and License

ROW Use Agreement
Application and/or
Registration

Model ROW Permit

ROW ORDINANCE

ROW Ordinance should be the 1st step

Important that a ROW Ordinance sets the underlying requirements that the other tools will implement

- Needs to be drafted broad enough to cover any potential ROW User and use with generally applicable rules
- Should include an automatic or self-preemption
- Outline the prior “bedrock” principles
- If zoning is considered, may also make it part of ROW Ordinance package
 - ****but note, limited on zoning for Small Wireless****

ROW USE AGREEMENT AND FRANCHISE

Gives an opportunity to file a contract claim for breach

Allows cities to establish how the general ordinances will operate

Allows flexibility between different types of uses, but also provides a basis for all ROW Users to access the ROW on generally the same terms

Should be required as a condition precedent to issuance of ROW permits!

ISSUES RELATING TO ROW USE AGREEMENTS AND FRANCHISES

Franchises are exclusive agreements to utilize city ROW and provide service within city

Can no longer require Franchise (regulation of service, etc.) for telecommunications (wireless or otherwise)

But can (sometimes*) require ROW agreement if non-exclusive

- *Exception: no “agreement” or “permit” for “general access” if already legally in ROW OR for only Small Wireless Facilities

ROW Use Agreements still required from fiber/backhaul provider that links up with/services Small Wireless Facilities

No specific shot-clock

ROW LICENSE

Typically used for *incidental* or *temporary uses* in ROW in lieu of ROW Agreement

Should be drafted to provide city official flexibility to impose terms that protect city, but not over-burdensome in comparison to ROW Agreement

Be clear in putting this option together that larger-scale ROW uses cannot fall under the ROW License!

ROW APPLICATION AND/OR REGISTRATION

Application – requires the potential ROW User to declare up front their business

- Ensure using right document for right use
- Ensure user declares whether they are public utility and what rules/limitations apply

Registration – requires potential ROW User to identify themselves

- Helpful to get application-like information in instances where ROW User can argue it is preempted from getting an agreement

ROW PERMITS

When are ROW Permits required?

- For excavations within ROW, but also for instances of maintenance work on utility poles or interference with traffic
 - Note, certain instances work on SWFs may be exempted

Key items for effective permitting documents:

- Should integrate Ordinance and Agreement requirements
- If entity performing excavation for ROW User, confirm you get a letter of authorization proving agency relationship
- If traffic interrupted—get proof of traffic control plans and protections relating to excavation
- Require proof of insurance
- Require as-builts

PERMIT ISSUES — AUTHORITY TO DENY

Section 67.1836 RSMo.: May deny application for a ROW permit if:

- (1) fails to provide requested information
- (2) fails to "return" ROW to "previous condition"
- (3) alternative to the permit is offered by City that costs no more than 10%
- (4) if necessary for public safety
- (5) *environmentally sensitive area or historic district*

PERMIT ISSUES — AUTHORITY TO REVOKE — 67.1836.2 RSMO.

May, **after reasonable notice and opportunity to cure, revoke** ROW permit and/or impose an established penalty until the substantial breach is cured

A substantial breach includes but is not limited to:

- “(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 political subdivision or its citizens;
- (3) A **material misrepresentation of fact** in the right-of-way permit application;
- (4) A **failure to complete work by the date specified in the right-of-way permit**, unless a permit extension is obtained or unless the failure to complete the work is due to reasons beyond the permittee's control; and
- (5) A **failure to correct, within the time specified by the political subdivision, work that does not conform to applicable national safety codes, industry construction standards, or local safety codes** that are no more stringent than national safety codes, upon inspection and notification by the political subdivision of the faulty condition.”

EXCEPTION TO PERMIT REQUIREMENTS

Section 67.1832.2(3) RSMo.

- Allows a ROW User to work in the ROW on emergency basis w/out permit
- Emergencies should be outlined within your ROW Ordinance to clarify **what** is an emergency and **when** information and permit fee need to be submitted

PERMIT FEES

Section 67.1840 RSMo.:

- City may recover its ROW Management costs via permitting fees:
 - Based on the **actual, substantiated costs reasonably incurred by city in managing ROW**
 - “Shall reflect the **proportionate costs imposed on the [city] by each of the various types of uses**”

COMPENSATION FOR ROW USE?

Certain political subdivisions may charge a “linear foot fee” for use of the ROW, so long as a credit is applied for applicable gross receipts and business license taxes

“A ‘grandfathered political subdivision’ is 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.” § 67.1846



EXCEPTIONS TO LINEAR FOOT FEES

67.1846.2 RSMo. exempts from the payment of linear foot fees “**small local exchange telecommunications company as of December 31, 2019**, as defined in section 386.020; provided that the small local exchange telecommunications company is **providing internet access to customers within the rural areas of the state.**”

HB 271 (2021) – Changes authority to charge “telecommunications compan[ies]” linear foot fees **to a 5% gross telecommunications revenue fee**

- Is an entity that only provides data or internet a “telecommunications company”?
- If so, are those services subject to gross receipts taxation?
- Does the 5% fee stack with any applicable telecom taxes?



SMALL WIRELESS SPECIAL RULES/LIMITATIONS

THE SPECIAL EXCEPTIONS

So, almost all the rules you've learned so far regarding ROW management and general applicability ***you can essentially toss out when it comes to analyzing Small Wireless Facilities ("SWFs")***



HISTORY OF PRO- TELECOM LEGISLATION AND RESULTS

Missouri Legislature's Decade+ Protecting/Subsidizing
Telecom industry:

- **1997** – § [392.410](#) prohibits cities from providing telecom services
- **2001** – § [67.1830](#) requires cities to “consent” to utility use of ROW;
- **2004** – Wireless telephone taxes reduced – later struck down
- **2007** – § [67.2675](#) cable industry local franchises eliminated:
 - Eliminated local requirement to extend lines to homes
 - Capped city fees
 - Eliminated local consumer service protection
- **2012** – §§ [71.625 et seq.](#) shortened gross receipts back-tax liability/capped penalties and interest
- **2013/2014** – §§ [67.5090 et seq.](#) further reduce/eliminate municipal authority
- **2018** – HB 1991 “Small Wireless” Bill, §§ [67.5110-67.5121](#)
- **2021** – HB 271 Omnibus Bill – more limits on local government in ROW usage

For more specifics on the history and results of Pro-Telecom Legislation, *please see our previous presentations on this topic* at: www.municipalfirm.com

HISTORY OF PRO- TELECOM LEGISLATION AND RESULTS

FCC 2021 Report, Missouri has:

- 21% of Rural Missourians do not have access to Fixed 25/3 Mbps speeds (although only 14.1% of Rural Missourians do not have access to Mobile LTE at 10/3 Mbps speeds)
- At least 5 Missouri counties have less than 25% of population with 25/3 Mbps fixed speeds.

Generally, 2021 FCC Report indicates that by end of 2019, total estimated number of Americans without at least 25/3 Mbps was at 14.5 million (a decrease of 20% from end of 2018).

- But note, BroadbandNow estimates via its studies that the number of Americans w/out 25/3 Mbps to be 42 million.
- Missouri (FCC estimated 93.10%; BroadbandNow estimated 82.75% at 25/3 Mbps wired; 100/25 Mbps Wired down to 52.1% [and only 22.7% categorized as “affordable” -- \$60/mo. or less, non-promotional])

FCC 2018 Report Missouri had:

- 3rd largest population (1.006 mil) with **NO** high speed access
- 3rd largest rural population (~917,000) with **NO** high speed access
- 16.5% of Missourians with **NO** high speed access
- 50.6% of MO rural population has **NO** high speed access

Based on FCC 2016 Report:

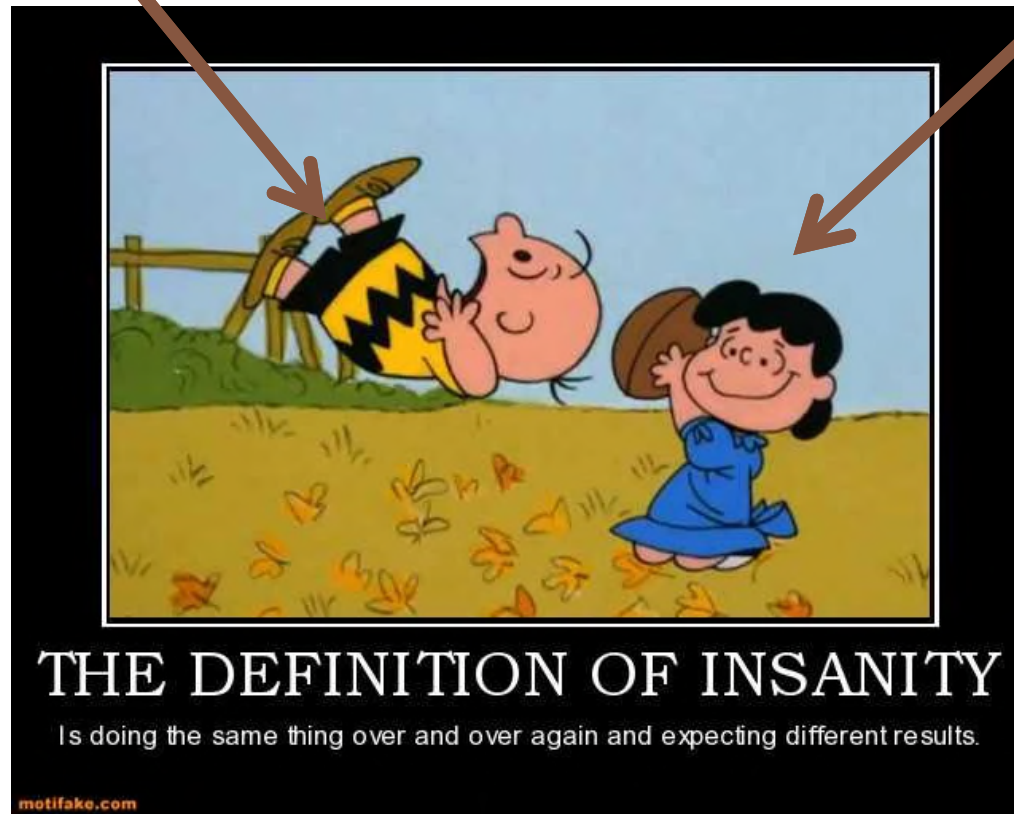
- 15 Missouri counties = 0% high speed access
- 53 Missouri counties = ≥ 50% with **NO** high speed access

Missouri ranking getting worse (2012 v. 2015 v. 2018 Report)

- <http://www.fcc.gov/document/fcc-finds-us-broadband-deployment-not-keeping-pace-0> (2015)
- <http://news.heartland.org/sites/default/files/missouri20broadband20report20and20fcs20actions20on20broadband.pdf> (2012)

Missouri Legislature

Telecom



HOW SMALL ARE SWFS?

(1) each antenna of no more than 6 cubic feet, and
(2) “all other equipment associated with the wireless facility, whether ground or pole mounted, is cumulatively no more than twenty-eight cubic feet in volume . . .”** for a total of 34 cubic feet

- No single piece of equipment on the pole can exceed 9 cubic feet;
- No single piece of ground-mound equipment can exceed 15 cubic feet, HOWEVER**

**NOTE: An “electric meter, concealment elements, telecom demarcation box, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs and related conduit” for the connection of power and other services are not included in the calculation of the equipment volume



UNIFORM SMALL WIRELESS FACILITY DEPLOYMENT ACT (§§ 67.5110 – 67.5121.)

- Eliminates authority to require ROW Agreements for SW **antennas**;
- Further preempts certain zoning authority over ROW
- Allows installation of Utility Poles within ROW if complying with specific requirements
- Creates additional “shot-clocks” for city action – deemed approved remedy
- Places limitations on **insurance, indemnification, and performance bonding requirements**

THE ACT CAPS APPLICATION FEES AND ATTACHMENT RATES

Application Fees (§ 67.5116.3 RSMo.):

- Collocation of SWF: **\$100/pole;**
- Collocation with Modification/New Pole: **\$500/pole**

Annual Attachment (to City Utility Poles) (§ 67.5116.4 RSMo.): **\$150/pole/year**

- Rate unclear if City has municipal utility – but FCC Rule 18-133 deemed \$270 deemed reasonable for SWF (FCC 18-133, ¶ 79)

Applicants have the right to replace or modify poles (§ 67.5112.3 RSMo.)

WHAT CAN WE STILL ENFORCE?

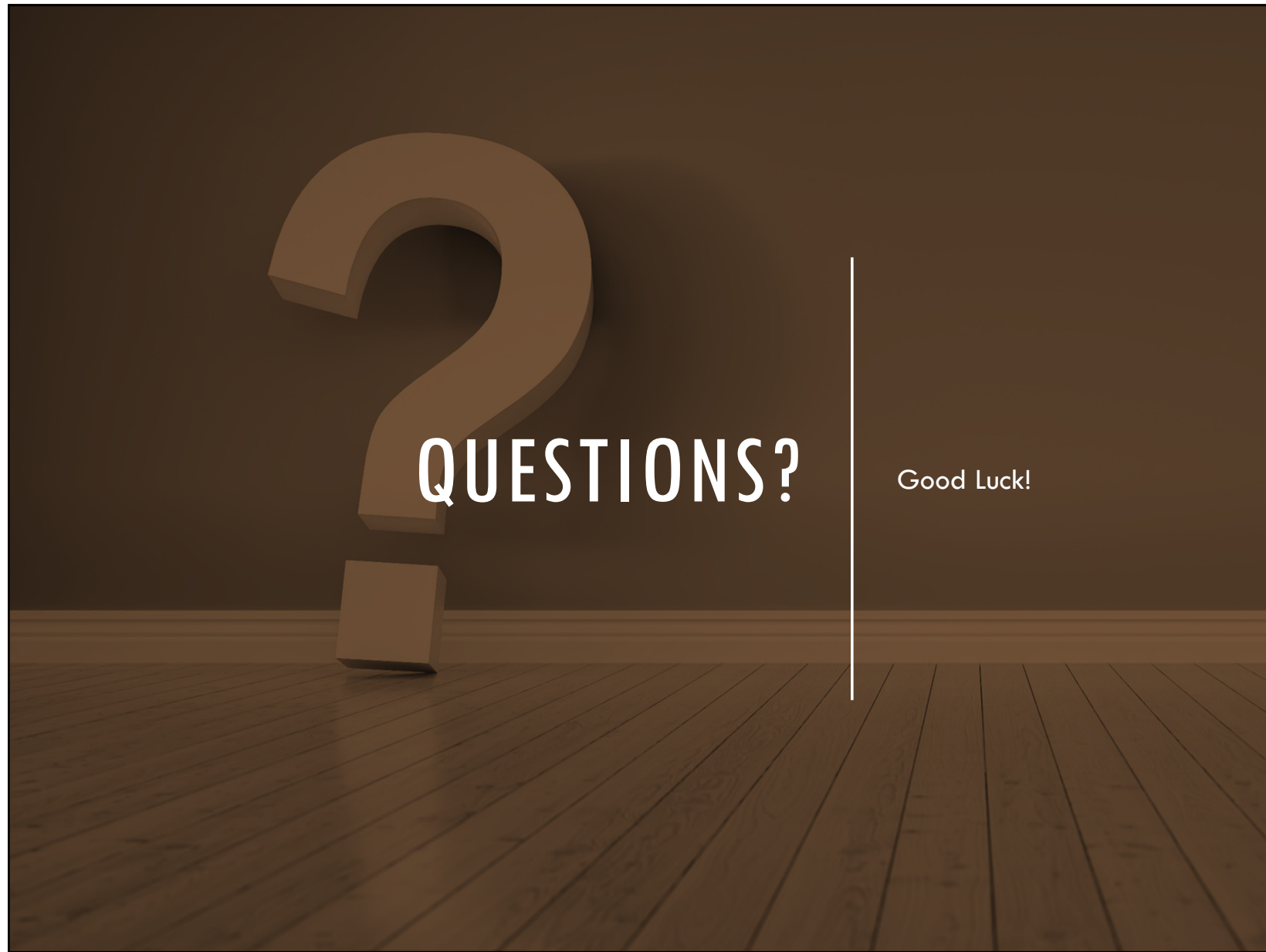
SWF law allows cities to still enforce:

- **Spacing requirements** on ground equipment & new utility poles (§ [67.5113.3\(9\)\(f\) RSMo.](#)), if waiver procedure
- **Aesthetic requirements** for decorative poles (§ [67.5113.3\(9\)\(h\)](#))
- **Undergrounding requirements** in effect prior to 1/1/18 or subsequently enacted for “new developments”, if such undergrounding requirement has a waiver procedure (§ [67.5113.3\(9\)\(i\)](#))
- **Permits for excavations and antenna collocations**
- City **authority for fiber backhaul**
- Zoning authority in specific circumstances (single-family residential or historic zoned **by August 28, 2018**)
- Compliance with Building Code
- Compliance with other safety codes, such as electric or fire codes
- Requirement in 2014 laws for owner consent

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IF ZONING PREEMPTED, THEN CAN ONLY DENY FOR:

- “(a) Materially **interfere with the safe operation of traffic control equipment** or authority-owned communications equipment;
- (b) Materially **interfere with sight lines or clear zones for transportation, pedestrians, or nonmotorized vehicles**;
- (c) Materially **interfere with compliance with the Americans with Disabilities Act, 42 U.S.C. Sections 12101 to 12213, or similar federal or state standards regarding pedestrian access or movement**;
- (d) Materially **obstruct or hinder the usual travel or public safety on the right-of-way**;
- (e) Materially **obstruct the legal use of the right-of-way** by an authority, utility, or other third party;
- (f) **Fail to comply with reasonable and nondiscriminatory spacing requirements** of general application adopted by ordinance or regulations promulgated by the state highways and transportation commission that concern the location of ground-mounted equipment and new utility poles. **Such spacing requirements shall not prevent a wireless provider from serving any location and shall include a waiver, zoning, or other process that addresses wireless provider requests for exception or variance and does not prohibit granting of such exceptions or variances**;
- (g) **Fail to comply with applicable codes, including nationally recognized engineering standards for utility poles or wireless support structures**;
- (h) **Fail to comply with the reasonably objective and documented aesthetics of a decorative pole** and the applicant does not agree to pay to match the applicable decorative elements; or
- (i) **Fail to comply with reasonable and nondiscriminatory undergrounding requirements contained in local ordinances as of January 1, 2018, or subsequently enacted for new developments**, that require all utility facilities in the area to be placed underground and prohibit the installation of new or the modification of existing utility poles in a right-of-way without prior approval, **provided that such requirements include a waiver or other process of addressing requests to install such utility poles and do not prohibit the replacement or modification of existing utility poles consistent with this section or the provision of wireless services;**”
67.5113.3(9)



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