

Jim Wees

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General

ASSISTANT ATTORNEYS
GENERAL

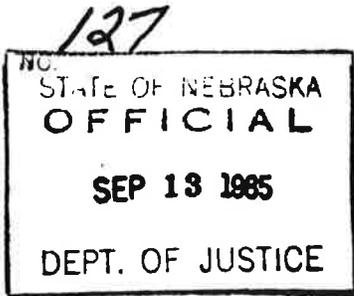
A. EUGENE CRUMP
Deputy Attorney General

State Highway Building
P.O. Box 94759
Lincoln, Nebraska 68509-4759
Telephone (402) 479-4611

GARY R. WELCH
JOHN P. REGAN
DALE L. BABCOCK, JR.
ROBERT G. AVEY
JOHN E. BROWN
WILLIAM J. ORSTER

WARREN D. LICHTY, JR.
Assistant Attorney General
Chief Counsel
Department of Roads

September 9, 1985



SUBJECT: Franchises in public right-of-way and utilities paying for relocation of lines in public right-of-way.

REQUESTED BY: Louis E. Lamberty, Director-State Engineer, Nebraska Department of Roads, P.O. Box 94759, Lincoln, NE, 68509.

OPINION BY: Robert M. Spire, Attorney General; Gary R. Welch, Assistant Attorney General.

QUESTION: Does the franchise given by a city to a utility company to occupy public right-of-way give the utility an interest in land which would require reimbursement for costs, where a utility relocation is required?

CONCLUSION: No.

The question above is satisfied by an examination of Neb.Rev.Stat. §39-1404 (Reissue 1984) which holds:

No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley, or public grounds, shall ever

arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

(Emphasis supplied.)

The language is clear on its face that no franchise can be given by a city to a utility company or any other person in public right-of-way. This applies to ground of any kind in the public domain and such prohibition applies to the above-ground, as well as to the area and region below the ground. Therefore, any document that a utility company or any other person has claiming to occupy public right-of-way by franchise is, in effect, the granting of a permit. That permit would require the utility or person to move whatever facility is in occupation of the public right-of-way at the expense of the person receiving the permit.

Even if one could argue a valid franchise exists, the cases are clear that no vested right to any specific location in the right-of-way is acquired. New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453; Peoples Gas Light & Coke Co. v. City of Chicago, 413 Ill. 457, 109 N.E.2d 777 (1952); City of Chadron v. State of Nebraska, 115 Neb. 650 (1927); Vap v. City of McCook, 178 Neb. 854, 136 N.W.2d 220 (1965).

The fact that the utility has been permitted, by virtue of a franchise or agreement, to occupy a highway right-of-way does not create a property right that must be compensated when the utility is required to relocate. Although the utility may have a franchise, license, or permit, the general rule is that it must relocate its facilities in public streets at its own expense when changes are required by public necessity.

Delaware River Port Authority v. Penn. Public Utility Comm'n., 393 Pa. 639, 145 A.2d 172, 175 (1958); Bristol Tenn. Housing Auth. v. Bristol Gas Corp., 407 S.W.2d 681 (Tenn. 1966); East Bay Muni. Util. Dist. v. County of Contra Costa, 200 Cal. App.2d 477, 19 Cal. Rptr. 506 (1962).

The case of City of Chadron v. State, 115 Neb. 650 (1927) holds:

A city of the second class obtaining its water supply from outside the city limits, having its pipes beneath the

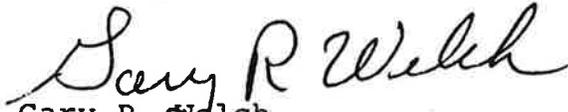
county roads by permission of the county authorities, holds such right subject to the use of the roads for the public welfare and travel; and whenever such use reasonably demands it, those in charge of said roads may change the grade of the water pipe lines belonging to the city, it is the duty of the city to make such change at its own expense.

Unless there is statutory authority for paying relocation costs, the rule is that the utility must bear its own costs when required to relocate or remove its facilities to accomodate a highway improvement. In this case there is no statutory authority allowing payment.

Therefore, the utilities in existing right-of-way must be moved at the expense of the utility company, and not at the expense of the public agency.

Very truly yours,

ROBERT M. SPIRE
Attorney General


Gary R. Welch
Assistant Attorney General

GRW/ta

Approved:



Robert M. Spire
Attorney General