

**State Highway Commission—Authority in Requiring the Removal of Telephone Lines Conflicting With a Proposed Highway—Cost of Removal.**

The State Highway Commission has authority to order the removal of telephone pole lines when such removal becomes necessary because of interference with proposed highway construction. The cost of making such removal must be borne by the telephone company.

Geo. W. Lanstrum, Esq.,  
State Highway Commissioner,  
Helena, Montana.

My dear Mr. Lanstrum:

You have requested an opinion from this office on the following questions:

1. As to the authority of the Commission in the matter of requiring the moving of telephone or other transmission or pole lines which may be in conflict with proposed highway or bridge locations?
2. Whether the cost of removing poles or lines should be borne by your Department or by the agency owning or controlling the pole or transmission line?

Subdivision 4 of Section 2894 of the Revised Codes of 1907, defining the powers of Boards of County Commissioners, provides they shall have power to lay out, maintain, control, and manage public highways, ferries, and bridges, within the county.

Section 13 of Chapter 10 of the Extraordinary Session Laws of 1921 provides:

"It shall be lawful for Boards of County Commissioners to transfer and convey to the State of Montana rights of way over and along county roads for State road purposes, and it is hereby made their duty to make such transfer or conveyance upon receiving notice from the State Highway Commission that a State road has been established \* \* \*."

Section 15 of Chapter 10 provides in part:

"The State Highway Commission shall have the power and authority to acquire by purchase or otherwise necessary rights of way for State highways and to lay out, alter, construct, improve and maintain highways in the State of Montana, \* \* \*"

Section 10 of Chapter 10 provides as follows:

"The State Highway Commission shall have authority to organize and operate a division of maintenance and control, and by co-operation with the Board of County Commissioners in the several counties of the State, if necessary, to maintain state highways constructed by the State and such additional mileage as the Commission may deem necessary."

It is, therefore, apparent that the Legislature intended to give to the State Highway Commission such powers and duties as were necessary in carrying out the purposes of the Commission, which are to lay out, alter, construct and improve highways.

Section 4400 of the Revised Codes of 1907 provides:

"A telegraph, telephone, electric light or electric power line, corporation, or a person owning or operating such, is hereby authorized to install its respective plants and appliances necessary for service, and to supply and distribute electricity for lighting, heating, power and other purposes and to that end, to construct such telegraph, telephone, electric light, or electric power line or power lines, from point to point, along and upon any of the public roads, streets and highways in the state of Montana, by the erection of necessary fixtures, including posts, piers and abutments necessary for the wires. But the same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets or highways and nothing herein shall be so construed as to restrict the powers of city or town councils."

By the provisions of this section, it was the intention of the Legislature to give to telephone, telegraph and transmission lines a license or leave to construct along or upon a public highway its transmission lines.

State ex rel. Telephone Co. v Mayor, 30 Mont. 338;

State ex rel. Crumb v. Helena, 34 Mont. 67.

The public highway is 60 feet in width, and although roads seldom occupy more than 12 to 20 feet of this right of way, yet it was not the intention of this provision to give to the transmission lines a vested interest or easement in any portion of the highway, but simply to allow the use of that unused portion until such time as it might become necessary or convenient to use the portion occupied by the line for highway purposes.

Howard v. Flathead etc. Telephone Co., 49 Mont. 197, 202;

State ex rel. Telephone Co. v. Mayor, *supra*.

"In every instance where land is set apart for a road or street, it becomes subject to the control of the highway officers, and they may devote every part of it to the public use for travel. The way is primarily devoted to that use, and to that use all other rights may be subordinated whenever the highway officers, acting fairly and within the limits of a reasonable discretion, determine that the public necessity demands that the owner of the fee be entirely excluded from enjoying any private rights in the road or street that will in any wise interfere with the free and convenient use of it by the public."

Elliott on Roads and Streets (3rd Ed.), Sec. 588.

The rule adopted by the courts is that a telegraph or telephone or power company, occupying part of the right of way of a public highway with its line, is required to change, at its own expense, the location of poles or line, where the public convenience or safety requires it because of changing conditions or necessitated public improvements, the companies acquiring no vested rights to any particular portion of the highway; but that an arbitrary or unreasonable change will not be enforced by the courts. And in *County Court of Wyoming County v. White*, 91 S. E. 350, it was held that this rule applies where a general improvement of the highways was undertaken, the court using the following language:

"Respondents seek to justify their refusal to remove their poles and lines on the ground that they do not interfere with public travel on the highway, and that, even if they do interfere with the work of permanently improving the highway, it is nevertheless the duty either of the county court or the contractors to remove and reset the poles and restring the wire in a careful manner. \* \* \*

"One question presented is: Upon whom rests the legal duty to remove the telephone poles and wire? Relator is a municipal corporation, a governmental agency, intrusted with the duty of locating, building, and maintaining the public highways of the county. Respondents, owners of the telephone lines, are engaged in the public service, and are occupying a portion of the public right of way with their lines, by virtue of a franchise granted, pursuant to legislative authority, by the county court to their predecessors in title. The right of the public in the highway for the purpose of travel in the ordinary modes is a primary and fundamental right, and is not limited to that portion only of the right of way heretofore traveled. Respondents have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right of way for the purpose of a roadway necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public. This principle was not controverted in the argument. But it was contended that the poles did not interfere with travel in the roadway, and that, being in the way only of the work of improving the highway, it was therefore the duty either of the county court or of their contractors to remove them in a careful manner, at their own expense. This is certainly not the law."

See, also:

- Butte v. Mont. Ind. Tel. Co., 50 Mont. 575;
- Mongahela City v. Elec. Light Co., 2 Pa. Co. Ct. 520;
- Ganz v. Postal Tel. Co., 140 Fed. 692;
- Amer. Tel. & Tel. Co. v. Harbor Creek, 23 Pa. Superior Ct. 437;
- Amer. Tel. v. Tel. Co., v. Mill Creek, 46 Atl. 140;
- Mich. Tel. Co. v. Charlotte, 93 Fed. 11;
- Merced Falls Co. v. Turner, 84 Pac. 239.

The conclusion from the foregoing is that the Commission has authority to order the removal of pole lines, abutments and other equipment used by the various telephone, telegraph or transmission lines to new locations when such removal becomes necessary because of interferences with highway construction, and that when such order is made in a proper case it is the duty of the company to make the change at its own expense.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.