

Section 18 Right of Way By-Law¹

I. Preamble

In partial fulfillment of the obligation to see to the prudential management of the Town's affairs and assets and in light of the continuing technological revolution in telecommunications, the recent passage of the Telecommunications Act of 1996 and the de-regulation of the electric and natural gas industries in the Commonwealth, the Town hereby establishes a comprehensive and fair system of regulation for all entities which desire to use the Town's Rights-of-Way.

II. Introduction

The purpose and intent of this By-Law is to:

Provide the Town with accurate and current information concerning all facilities located in the Town's Rights-of-Way together with current information concerning entities owning or controlling the Facilities, and

- a. Permit and manage reasonable access to the public Rights-of-Way on a competitively neutral basis, and
- b. Manage Grants of Location in Public Ways, and
- c. Conserve the limited physical capacity of the Rights-of-Way held in public trust by the Town, and
- d. Assure that the Town is appropriately compensated when its Rights-of-Ways are utilized by non-governmental entities, and
- e. Assure that the Town's current and on-going costs of granting and regulating private access to and use of the public Right-of-Way are fully paid by the persons seeking such access and causing such costs, and
- f. Assure that the Town can continue to fairly and responsibly protect the public health, safety and welfare.

This by-law is adopted in accordance with the authority granted, inter alia, by Amendment Article 89 to Article II of the Massachusetts Constitution, M.G.L. Chapter 43B section 13, M.G.L. Chapter 40 sections 4, 21 and 22F, and Chapter 85.

III. Definitions

Applicant: Any person or entity, including without limitation implied, Public Utility, Telecommunications Carrier, Local Exchange Carrier or municipal department which owns or exercises general responsibility and control over any Facility.

Application: The written application on a form prescribed by the Awarding Authority with any required documentation and the Application Fee by which an Applicant or Co-Locator requests a Right-of-Way Permit.

¹ ATM 5/8/00 Article #15.

Application Fee: Such fee as may from time to time be established pursuant to chapter 40, Section 22F of the General Laws shall accompany each application for a Right-Of-Way Permit.¹

Attachment: Any device, apparatus, appliance, equipment, wire or cable or other thing including any Telecommunication Facility installed or proposed to be installed on or in any Existing Facility whether by Applicant or Co-Locator or proposed to be installed on any New Facility by Applicant or Co-Locator.

Awarding Authority: The Board of Selectmen of the Town of Foxborough which has authority to exercise the powers granted by this By-Law.

Co-Locator: Any person or entity other than Applicant who desires to use an Existing or New Facility.

Contractor: All officers or employees of Applicant or Co-Locator who perform or any person or entity engaged by or on behalf of Applicant or Co-Locator to perform construction, repair or maintenance work on Overhead or Underground Facilities owned by Applicant and permitted by the Awarding Authority which are located in the Right-of-Way. The Contractor for purposes of this By-Law and for all questions of liability in connection with any construction, repair or maintenance work on Overhead or Underground Facilities owned by Applicant which are located in the Right-of-Way shall be conclusively deemed an agent of Applicant or Co-Locator for whom Applicant or Co-Locator is fully responsible.

Default: The failure of the Permit Holder (including all Contractors or other agents of Permit Holder) (i) to pay when due any License Rental, (ii) to perform fully any covenant of the License or otherwise fail to comply with any provision of the License Agreement, the Right-of-Way Permit or the By-Law following ten days prior written notice to Licensee from Town (iii) to keep its Certificate of Insurance in full force and effect, or (iv) to provide the service that is outlined in its Application (except for interruptions in service due to Emergency Repair Work) for a period of six consecutive months.

DTE: The Massachusetts Department of Telecommunications and Energy created by Chapter 25 M.G.L.

Effective Date: The date upon which this By-Law becomes effective.

Emergency Repair Work: Right-of-Way Work which must be commenced immediately to correct a hazardous condition in which the safety of the public is in imminent danger, such as a threat to life or health of the public or where immediate correction is required to maintain or restore essential Public Utility service.

Excess Capacity: The volume or capacity in any Existing Facility that is not being used or is not proposed to be used as part of a concrete plan for the future at the time that an Application is made for a Right-of-Way Permit by an Applicant or Co-Locator.

Existing Facility: An Overhead or Underground Facility which is in existence on the date of the Application for a Right-of-Way Permit.

Facility: Any Overhead or Underground Facility or Attachment thereto including without limitation any utility or other pipe, duct, line, pole, wire, cable, transmission line, conduit, pedestal, wave guide, dish, antenna, electronic or other thing located or proposed to be located in, on, above, along, under or across a Right-of-Way.

FCC: Federal Communications Commission.

Grandfathered Facility: An Overhead or Underground Facility in existence on the Effective Date.

Grant of Location: Permission granted by the Awarding Authority of the Town to a Public Utility, in order to conduct its Regulated Activities, to locate poles, piers, abutments or conduits or attachments thereto or railway routes on, in, above, along, under or across a Public Way in accordance with the procedures set out in M.G.L. Chapter 166 section 22, Chapter 161 section 70, Chapter 162 section 8 and with this By-Law.

¹ STM December 15, 2008, Article #13, deleted definition, inserted new definition.

Grant of Location Applicant: An Applicant or Co-Locator which is a Public Utility conducting a business described in section 21 of Chapter 166 of the Massachusetts General Laws.

Highway Superintendent: That individual, appointed or elected in accordance with Chapter 41, sections 1, 66 or 69E of the M.G.L.

Inspector of Wires: That individual appointed by the Town to fulfill the responsibilities set out in M.G.L. Chapter 166 section 32.

License Agreement: An Agreement between the Town and an Applicant owner of a Facility setting forth detailed contractual terms and obligations of the owner of a Facility and entered into incident to the grant of a Right-of-Way Permit.

Licensed Contractor: A Contractor who holds a current and valid Public Works Construction License issued by the Awarding Authority.

Local Exchange Carrier: Every person or entity that directly or indirectly owns, controls, operates and manages plant, equipment or property within the Town used or to be used for the purpose of offering telephone service and which is licensed by the FCC and certified by the DTE under C. 159 M.G.L. as a local exchange carrier.

Measurable Interference: Interference as defined by FCC Regulations (47 C.F.R.) which affects the Telecommunications Services provided by a Permit Holder.

Modification: A material physical change to an Existing Facility such that its use or capacity is materially altered.

New Facility: An Overhead or Underground Facility or an Attachment that has not yet been constructed but that is proposed and described in an Application for a Right-of-Way Permit.

Normal Working Hours: 7:30am to 3:30pm Monday through Friday excluding holidays.

Occupied Area: The area in square feet to be occupied by an Overhead Facility (including space adjacent to the Facility and rendered practically unusable by others whether because of physical limitations or potential Measurable Interference or otherwise) all as reasonably determined by the Awarding Authority. In the case of Pole lines, for the purposes of computing square feet, the width dimension generally shall be determined with reference to the maximum distance that protuberances such as crossarms, guy wires, etc. extend perpendicularly from the center-line of the Poles. Also included in the license for a Pole and at no additional rental, is the right to penetrate the surface of the Right-of-Way to the depth reasonably necessary to support the Pole.

Occupied Volume: The volume measured in cubic feet occupied by an Underground Facility (including space adjacent to the Facility rendered practically unusable by others whether because of physical limitations or potential Measurable Interference or otherwise) all as reasonably determined by the Awarding Authority.

Overhead Facility: Any tower, Telecommunication Facility and Pole including Poles and Overhead Wires and Associated Overhead Structures including Attachments located or proposed to be located above the surface of the Right-of-Way including the underground supports and foundations for such facilities.

Overhead License Rental Payment: The annual dollar amount to be paid by an Applicant to the Town for using the Right-of-Way for an Overhead Facility.

Overhead License Rental Rate: Shall have the meaning subscribed to it and shall be computed annually as set out in Section VIII A of this By-Law.

Permit Holder: An Applicant or Co-Locator to whom a Right-of-Way Permit has been granted.

Permit Term: The period commencing on the date of filing of an Application and ending upon the earlier to occur of: (i) the expiration of the useful life of the Facility as reasonably determined by the Awarding Authority or (ii) thirty years from the date of Application.

Planning Board: The Planning Board of the Town of Foxborough.

Pole or Poles and Overhead Wires and Associated Overhead Structures: poles, towers, supports, wires, conductors, guys, stubs, platforms, crossarms, braces, transformers, insulators, cut-outs, switches, communication circuits, appliances attachments, and appurtenances located above ground, upon, along or across any Public Way or private ways of the Town and used or useful in the transmission of intelligence by electricity or otherwise, or for the transmission of television signals, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating or power, or for the construction or operation of a street railway or an electric railroad; provided, that said phrase shall not mean or include any of the following: poles, towers, overhead wires and associated overhead structures used exclusively in the transmission but not the distribution of electricity; poles used exclusively for police and fire alarm boxes or any similar municipal equipment installed under the supervision and to the satisfaction of the engineer of the municipality; wires (exclusive of supporting structures) crossing any portion of any underground utility district from which overhead wires have been prohibited, or connecting to buildings on the perimeter of such portion, when such wires originate in an area from which poles and overhead wires and associated overhead structures are not prohibited; overhead wires attached to the exterior surface of a building by means of a bracket or other fixture and extending from one location on the same building or to an adjacent building without crossing any public Right-of-Way; radio antennae, their associate equipment and supporting structures used by a utility for furnishing communication services; and service terminals including transformers in pedestals above ground used to distribute electric or communication service in underground systems.

Pole Attachment: An Attachment which is a wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power or for the transmission of Telecommunications Services and any related device, apparatus, appliance or equipment installed upon any Pole or in any telegraph duct or conduit owned or controlled in whole or in part by one or more Public Utility.

Public Utility: A gas and electric company subject to M.G.L. Chapter 164, telephone and telegraph company subject to M.G.L. Chapter 166, cable TV company subject to M.G.L. Chapter 166A, water and aqueduct company subject to M.G.L. Chapter 165, or street railway subject to M.G.L. Chapter 161 or electric railroad subject to M.G.L. Chapter 162.

Public Utility Use: The use of a Facility by a Public Utility during the Permit Term in conducting its Regulated Activities but not including any non-Public Utility use by such Public Utility or any use by a non-regulated affiliate of a Public Utility or any other use by any other person or entity.

Public Way: Any road (including such appurtenances as berms, curbs, drains, sewers, water mains, sidewalks and paved and unpaved shoulders within the paper lay-out) to which the public has access and that the Town is responsible for maintaining.

Public Works Construction License: A license required of all Contractors who are not officers or employees of a Public Utility or of a municipal department who wish to perform Street Opening Work in the Public Ways of the Town.

Regulated Activities (of Public Utilities): The transmission of natural gas and electricity by a gas or electric Company subject to M.G.L. Chapter 164, the transmission of voice or telegraph messages by a telephone and telegraph company subject to M.G.L. Chapter 166, the transmission of video broadcasts by television or cable television (including other activities deemed incidental thereto by federal law) subject to M.G.L. Chapter 166A, the provision of street railway services subject to M.G.L. Chapter 161 or transportation by electric railroad subject to M.G.L. Chapter 162.

Right-of-Way: The surface and space on, along, above and below any real property which is a Public Way or other way in which the Town has an interest in law or equity, whether held in fee or other estate or interest, or as trustee

for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, park, skyway, or skyway bridge.

Right-of-Way Permit: A permit granted by the Awarding Authority to an Applicant for permission to construct, to repair and maintain, and to use Overhead and Underground Facilities that it owns and which are located or to be located in the Right-of-Way. Also a Permit granted by the Awarding Authority to a Co-Locator for an Attachment to a New or Existing Facility.

Right-of-Way Work: Any construction, repair or maintenance of utility or other pipes, ducts, lines, poles, wires, cables, conduits, pedestals, antennas, dishes, electronics or other thing located in, on, above, under or across a Right-of-Way.

Street Opening Work: Any cutting, excavating, compacting, construction, repair or other disturbance in or under a Public Way together with restoration of the Public Way in accordance with the Town's Street Opening By-Law following such disturbance but excluding the location or relocation of utility poles for which a Grant of Location has been obtained pursuant to M.G.L. Chapter 166 section 22.

Telecommunications: The transmission between or among points specified by the user of information of the user's choosing without change in the form or content of the information as sent and received.

Telecommunications Carrier: Every person or entity that directly or indirectly owns, controls, operates or manages plant, equipment or property within the Town used or to be used for the purpose of offering Telecommunications Service and which is licensed by the FCC and certified by the DTE under C. 159 M.G.L. as a Telecommunications common carrier.

Telecommunications Facility: A Facility other than customer premises equipment used by a Telecommunications Carrier to provide Telecommunications Service and includes software integral to such equipment (including upgrades), cables, wires, lines, wave guides, electronics, dishes and antennas.

Telecommunications Service: The offering of Telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the Telecommunications Facilities used.

The Telecommunications Act of 1996: Public Law 104-104- Feb. 8, 1996. 110 Stat. 57.

Town: The Town of Foxborough.

Transmission Line: Lines and associated structures used for the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.

Underground Facility: Any pipe, duct, line and conduit and Telecommunications Facility or other thing including Attachments located or proposed to be located under the surface of the ground but excluding the underground foundations or supports for Overhead Facilities.

Underground License Rental Payment: The annual dollar amount to be paid by an Applicant for use of the Right-of-Way for an Underground Facility.

Underground License Rental Rate: Shall have the meaning subscribed to it and shall be computed annually as set out in Paragraph VIII B of this By-Law.

Usable Space: The total usable capacity of any Overhead or Underground Facility located in the Right-of-Way as reasonably determined by the Awarding Authority.

IV. Necessity of a Permit

No work in, on, under, along, above or across a Right-of-Way or use of a Right-of-Way shall commence until the Applicant and any Co-Locator each shall have applied for and obtained from the Awarding Authority a Right-of-

Way Permit. Applicants with Grandfathered Facilities and any Co-Locator with Grandfathered Facilities located in the Right-of-Way shall be deemed to have applied for and been granted a valid Right-of-Way Permit for the Permit Term for such Facilities and to be subject to all of the provisions of the License Agreement substantially in the form attached hereto as Exhibit A.

An Applicant or Co-Locator which wishes to continue to use a Grandfathered Facility after the expiration of the Permit Term each must file an Application and treat such Facility as a New Facility. From and after the Effective Date, Applicant or Co-Locator must also obtain a Right-of-Way Permit for any modification of or new Attachment to a Grandfathered Facility.

Any Applicant or Co-Locator who is using a Grandfathered Facility for any purpose other than a Public Utility Use must notify the Town of such use of each such facility within 120 days after the Effective Date. Any Applicant or Co-Locator which after the Effective Date wishes to make a use of its Grandfathered Facility which is not a Public Utility Use must, prior to commencing such use, apply for and obtain a Right-of-Way Permit for such non-Public Utility Use.

Traffic lights, fire hydrants, mail boxes and intrusions in the Right-of-Way that are accessory uses to the primary use of the property such as awnings, balconies, over-hanging signs and sidewalk cafes are exempted from this By-Law.

Prior to the Town accepting a private way as a Public Way, such Applicant with a Facility located in, on, under or across the private way and each Co-Locator using such Facility including a Co-Locator Public Utility shall apply for and obtain a Right-of-Way Permit from the Awarding Authority.

A Public Utility that is petitioning for a Grant of Location in accordance with Ch. 166 section 22, Ch. 161 section 70, or Ch. 162 section 8 of the M.G.L. as part of its Application for a Right-of-Way Permit shall so indicate on the Application. A Right-of-Way Permit granted to a Public Utility for a Facility to the extent of Public Utility Use shall constitute a Grant of Location as well.

No Right-of-Way Permit shall be granted unless Applicant demonstrates to the reasonable satisfaction of the Awarding Authority that sufficient Existing Capacity remains in Existing Facilities to accommodate an Attachment or that Applicant will construct New Facilities in accordance with the requirements of this By-Law. Except for Transmission Lines, in the event that all of the Usable Space of Existing Overhead Facilities has been used up, the Town may in its reasonable discretion require that the Applicant construct New Underground Facilities.

All construction work contemplated by this By-Law shall be done in a good and workmanlike manner using best engineering and construction practices and shall be done in accordance with (i) all applicable laws and regulations, (ii) all of the provisions of this By-Law, (iii) any conditions contained in the Right-of-Way Permit, and (iv) such reasonable supplemental instructions not inconsistent with the foregoing as the Awarding Authority or its authorized representative may from time to time issue. Work that involves Street Opening Work must comply with the Town's Street Opening By-Law.

No person or entity may perform any work in or under a Right-of-Way unless it is a Permit Holder and (i) is a municipal department, Public Utility, Telecommunications Carrier or Local Exchange Carrier or their respective officers or employees or (ii) has engaged a Licensed Contractor and such holder performs all such Right-of-Way Work as agent of Permit-Holder.

V. Requirements of Application

A. Information Required of All Applicants and Co-Locators

Applicants or Co-Locators seeking a Right-of-Way Permit shall file on forms designated by the Awarding Authority a completed and signed Application at the office of the Awarding Authority which shall include the following information:

1. The identity and legal status of the Applicant or Co-Locator including any parent or affiliated corporation.
2. The address and telephone number of the corporation and the name of the officer, agent or employee responsible for the accuracy of the Application.
3. If a Public Utility (or municipal department), the federal identification number of the entity. All others must in addition specify their FCC license number and submit evidence of certification by the DTE.
4. A general description of Applicant's Existing Overhead or Underground Facilities within the Town that it is using to provide service and the service that it is currently providing.
5. A detailed description of the service that Applicant or Co-Locator intends to offer or provide to persons, firms, businesses or institutions within the Town and whether the use of the Facility to provide the service will constitute a Public Utility Use.
6. A detailed description of the Underground or Overhead Facilities Applicant or Co-Locator intends to use or construct, their useful life and full dimensions of the proposed Facility including but not limited to the following: height of Poles, number of wires and their diameter, height of wires above the Right-of-Way, voltage of electric transmission lines, diameter of mains and conduits.
7. Maps or plans showing the exact location of the Existing or proposed New Facility in the Right-of-Way using engineering metes and bounds, street names and intersecting street names. Show a north arrow.
8. A statement as to whether New Facilities will be built or Existing Facilities will be used and who is the Applicant with respect to such Facility.
9. In the case of a Co-Locator seeking a Permit for an Attachment to a Facility the Applicant of which is exempt in whole or part from the obligation to make Annual License Rental Payment for the Facility as provided herein, such application shall be made jointly by Applicant and Co-Locator. Each must sign the application and Applicant must acknowledge in a writing in form and substance satisfactory to the Town, its obligation to pay the amount, if any, of Annual License Rental Payment due the Town in respect of such Attachment.
10. The names of Co-Locators who share or will share the Facility. Applicants must provide evidence that Co-Locators have received their own Right-of-Way Permit and identify all pending Co-Locator Applications.
11. Evidence that Applicant or Co-Locator has obtained all other governmental approvals and permits needed to use Existing Facilities and to offer or provide services.

B. Petitions for Grants of Location

Applicants or Co-Locators that are Public Utilities and that are seeking a Grant of Location as part of the Right-of-Way Permit shall also provide the following information as part of the application:

1. A statement as to the demonstrated need to construct the New Facility or make an Attachment to an Existing Facility.
2. A list of abutters' names and addresses.
3. The kind, size and tested strength of supporting or service wires for Poles.
4. The maximum voltage that will be transmitted over wires and the maximum cubic feet of gas that will be transported through mains.
5. The size and pressure of gas mains and what the main is made of.
6. A list of all posts, Poles or other supports of wires included in the Grant of Location.
7. The number of cross arms in use with each Pole and the number of wires that are already attached thereto and the number of wires that are proposed.
8. The location of conduits and manholes in relation to the Existing Underground Facilities and proposed New Underground Facilities.

C. Applications for New Facilities must Submit Additional Information.

