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Jay Holmquist
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Re: Construction of Transmission and/or Distribution Lines

Dear Jay:

You have asked that I set out and attempt to reconcile all of the statutory requirements applicable to Public Power Districts ("PPDs") and Cooperatives for the construction of transmission and/or distribution lines. There are two types of Cooperatives in Nebraska, Electric Cooperative Corporations ("ECCs") organized pursuant to *Neb. Rev. Stat.* §§ 70-701 to 70-738 (Reissue 1996) and Electric Membership Association ("EMAs") organized pursuant to the Nebraska NonProfit Corporation Act, *Neb. Rev. Stat.* §§ 21-1901 to 21-19,177. There is a myriad of statutory and regulatory requirements applicable to the construction of transmission and/or distribution lines, which I have set out below. I will attempt to reconcile the ones that appear to be contradictory or overlapping.

1. Eminent Domain.

(a) PPDs have the authority to acquire private property for the purpose of constructing transmission and distribution lines. *Neb. Rev. Stat.* § 70-670 (Reissue 1996) provides:

"In addition to any other rights and powers hereinabove conferred upon any district . . . each such district shall have and exercise the power of eminent domain to acquire . . . any and all property . . . for operation, in the . . . transmission, or distribution of electrical energy"

(b) ECCs have the authority to exercise the power of eminent domain for transmission line purposes. *Neb. Rev. Stat.* § 70-704 (Reissue 1996) provides:

“(10) to have and exercise the power of eminent domain for the purposes expressed in section 70-703 (rural electrification). . . and to have the powers and be subject to the restrictions of electric light and power corporations and districts as regards the use and occupation of public highways and the manner or method of construction and physical operation of plants, systems, and transmission lines.”

(c) EMAs also have the authority of eminent domain for transmission lines. *Neb. Rev. Stat. § 70-301* (Reissue 1996) applies to EMAs and provides:

“Any public power district, *corporation*, or municipality that is now or may hereafter be engaged in the generation or transmission, or both, of electric energy for sale to the public for light and power purposes . . . may acquire right-of-way over and upon lands . . . for the construction of poles lines or underground lines necessary for the conduct of such business and for the placing of all poles and constructions for the necessary adjuncts thereto, in the same manner as railroad corporations may acquire right-of-way for construction of railroads.” (*Neb. Rev. Stat. § 74-308* give railroads the power of eminent domain to be exercised in the manner set forth in *Neb. Rev. Stat. §§ 76-704 to 76-724.*)
(Emphasis added.)

2. Electric Light and Power Corporations statutes applicable to PPDs and ECCs.

(a) *Neb. Rev. Stat. § 70-667* (Reissue 1996) applies to PPDs and provides:

“All power plants and systems . . . constructed . . . are hereby declared to be works of internal improvement. All laws applicable to works of internal improvement and provisions applicable to electric light and power corporations . . . for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of . . . transmission lines . . . shall be applicable, as nearly as may be, to all districts organized under or subject to Charter 70, article 6. . . The right to exercise the power of eminent domain is conferred . . .”

(b) *Neb. Rev. Stat. § 70-704(10)* (Reissue 1996) applies to ECCs and provides:

“. . . and to have the powers and be subject to the restrictions of electric light and power corporations and districts as regards the use and occupation of public highways and the manner or method of construction and physical operation of plants, systems, and transmission lines.”

3. PPDs, ECCs and EMAs may construct electric light and power plants, lines and systems.

(a) *Neb. Rev. Stat. § 70-626* (Reissue 1996) applies to PPDs and provides:

“Subject to the limitations of the petition for its creation and all amendments thereto, a district may . . . construct . . . electric light and power plants, lines, and systems . . .”

(b) *Neb. Rev. Stat. § 70-704(10)* (Reissue 1996) applies to ECCs and provides:

“ . . . to have the powers and be subject to the restrictions of electric light and power corporations and districts as regards the use and occupation of public highways and the manner or method of construction and physical operation of plants, systems, and transmission lines.”

(c) *Neb. Rev. Stat.* § 70-301 (Reissue 1996) applies to EMAs and provides:

“Any public power district, *corporation*, or municipality that is now or may hereafter be engaged in the generation or transmission, or both, of electric energy for sale to the public for light and power purposes . . . may acquire right-of-way over and upon lands . . . for the construction of poles lines or underground lines necessary for the conduct of such business and for the placing of all poles and constructions for the necessary adjuncts thereto, in the same manner as railroad corporations may acquire right-of-way for construction of railroads.” (*Neb. Rev. Stat.* § 74-308 give railroads the power of eminent domain to be exercised in the manner set forth in *Neb. Rev. Stat.* §§ 76-704 to 76-724).

(Emphasis added.)

4. PPDs and ECCs may construct transmission lines outside its boundaries within the State. *Neb. Rev. Stat.* § 70-501 (Reissue 1996) applies to both PPDs and ECCs and provides:

“Any city, village, or public electric light and power district within the state, which may own or operate, or hereafter acquire or establish, any electric light and power plant, distribution system and transmission lines may . . . extend the same beyond its boundaries, and for that purpose is hereby authorized and empowered to construct . . . and to maintain, improve, extend and operate electric light and power plants, distribution systems and transmission lines, outside the boundaries of such city, village, or public electric light and power district, for such distance and over such territory within this state as may be deemed expedient. . . .”

5. Public Notice of location of poles or underground transmission lines. *Neb. Rev. Stat.* § 70-301 (Reissue 1996) applies to PPDs, ECCs and EMAs and provides:

“Any [PPD], corporation [which includes an ECC or EMA]. . . engaged in the generation or transmission , or both, of electric energy for sale to the public for light and power purposes or the production or distribution or both . . . may acquire right-of-way . . . for construction of poles or underground lines necessary for the conduct of such business and for the placing of all poles and constructions for the necessary adjuncts thereto . . . Such district, corporation. . . shall give public notice of the proposed location of such poles or underground lines with a voltage capacity of thirty-four thousand five hundred volts or more which involves the acquisition of rights or interests in more than ten separately owned tracts by causing to be published a map showing the proposed line route in a legal newspaper of general circulation within the county where such line is to be constructed at least thirty days before negotiating . . . to acquire easements or property for such purposes and shall consider all objections which may be filed for such location. After securing approval from the Public Service Commission and having complied with sections 86-301 to 86-331, such public power district . . . shall have the right to condemn a right-of-way

over and across railroad right-of-way and depot grounds for the purpose of crossing the same. . .” (Emphasis added.)

6. Approval of Power Review Board for construction of transmission lines under certain conditions. *Neb. Rev. Stat.* § 70-1012 applies to any suppliers which by definition, *Neb. Rev. Stat.* § 70-1002, includes PPDs, ECCs and EMAs and provides

“Before any electric generation facilities or any transmission lines or related facilities carrying more than seven hundred volts are constructed or acquired by any *supplier* an application, filed with the (Power Review) Board and containing such information as the board shall prescribe, shall be approved by the board, except that such approval shall not be required (1) for the construction or acquisition of a transmission line extension or related facilities within a supplier’s own service area or for the construction or acquisition of a line not exceeding one-half mile outside its own service area when all owners of electric lines located within one-half mile of the extension consent thereto in writing and such consents are filed with the board, (2) for any generation facility when the board finds that: (a) such facility is being constructed or acquired to replace a generating plant owned by an individual municipality or registered group of municipalities with a capacity not greater than that of the plant being replaced, (b) such facility will generate less than twenty-five thousand kilowatts of electric energy at rated capacity, and (c) the applicant will not use the plant or transmission capacity to supply wholesale power to customers outside the applicant’s existing retail service area or chartered territory, or (3) for acquisition of transmission lines or related facilities, within the state, carrying one hundred fifteen thousand volts or less, if the current owner of the transmission lines or related facilities notifies the board of the lines or facilities involved in the transaction and the parties to the transaction.” (Emphasis added.)

7. Construction may be enjoined if Power Review Board Statutes are violated. *Neb. Rev. Stat.* § 70-1015 provides:

“If any supplier shall commence the construction or finalize or attempt to finalize the acquisition of any generation facilities, any transmission lines, or any related facilities, or any customers are served in violation of the provisions of Chapter 70, article 10, such construction, acquisition, or service of such customers shall be enjoined in an action brought in the name of the State of Nebraska, until such supplier has complied with the provisions of Chapter 70, article 10.”

8. Sufficient clearance between lines for safety. *Neb. Rev. Stat.* § 75-709 provides:

“All lines constructed for the transmission of electric current, including telephone and telegraph lines, on the public highways or in other places in this state, . . .shall provide sufficient clearance between such lines and existing properly constructed transmission, telephone, and telegraph lines so that they do not interfere with the reasonable safety, operation, and efficiency of existing lines.”

9. Public Service Commission approval of construction under certain conditions. *Neb. Rev. Stat.* § 75-710 provides:

“If the voltage of any electric line described in § 75-709 will exceed fifteen thousand volts and such line will be within one-quarter mile of any existing electrical or communication line of any other person or signal line of any railroad or if the voltage of such electric line will exceed seven hundred volts and such line will be within five hundred feet of the electrical or communication line of any other person or signal line of any railroad, application to construct the line shall be made to the (Public Service) Commission, except that no application shall be required for any line which will not exceed fifteen thousand volts, which will not exceed six hundred sixty feet in length, and which will be more than seventy-five feet from any existing electrical or communication line of any other person or signal line of any railroad.”

10. **Rules and regulations of Public Service Commission.** *Neb. Rev. Stat. § 75-703* provides:

“The Commission shall adopt and promulgate rules and regulations prescribing the manner in which the wires specified in section 72-702 will cross railroad tracks in the state at public highway crossings.”

A check with the Public Service Commission disclosed that the Commission has no rules or regulations applicable to this section other than to follow the National Electrical Safety Code as its official rules.

11. **Construction near airports.** *Neb. Rev. Stat. § 75-713* provides:

“Any public utility, public power district, or other governmental subdivision ... before engaging in the construction or alteration of any overhead wire, cable, or pipeline, the height of which is greater than five feet above the elevation of an airport which has been approved and licensed by the Department of Aeronautics, for each five hundred feet of the distance that such construction is or will be situated from the nearest boundary of such airport, shall file with the (Public Service) Commission an original application for permission to enter upon and complete such construction or alteration and shall also file a copy thereof with the Department of Aeronautics. No application need be made when the construction or alteration is within the corporate limits of a city or village and is adjacent to other structures of a permanent character which are of equal or greater height than the construction or alteration proposed.”

12. **Land devoted to agricultural purposes.** *Neb. Rev. Stat. § 76-710.03* provides:

“Whenever a condemner seeks to acquire lands or interest therein through eminent domain proceedings to construct power transmission lines through or over land devoted to agricultural purposes, such condemner shall be required to select a route along or following sections or one-half section lines unless such route cannot be followed without excessive and unreasonable costs to the condemner.”

13. **Right of way across public highways.** *Neb. Rev. Stat. § 86-305* provides:

“All persons, associations, and corporations engaged in the generating or transmitting of electric current for sale, use or purchase in the state for power or other purposes, are hereby granted the right-of-way for all necessary poles and wires along, within, and across any of the public highways of this state. Such persons, associations, or corporations shall be liable for all damages to private property by reason of the use of the public highways for such purpose.”

14. Intersections between railroads and highways. *Neb. Rev. Stat.* § 86-306 provides

“All such wires shall be placed at least eighteen feet above all road crossings, and all such poles and wires shall be so placed as not to interfere with the public use of any of such highways, and whenever practicable the poles shall be set upon the line of such highways. Where such persons, associations, or corporations seek to carry one or more of such wires over and across the railroad track or tracks, telegraph wires, or right-of-way of any railroad company in this state, where the same intersects and crosses streets, highways, alleys, and other public thoroughfares, or elsewhere, such persons, associations, or corporations shall first endeavor to agree by a contract as to the manner and kind of crossing to be constructed, which in no case shall be less than twenty-seven feet above the top of the rails of any railroad tracks, and the compensation, if any, to be awarded as damages. If no agreement can be had with any such railroad company as to the manner and kind of crossing, or compensation to be awarded, then such persons, associations, or corporations may proceed to have the same ascertained and determined in sections 76-704 to 76-724.”

15. Uniform procedure for acquiring private property for public use. *Neb. Rev.*

Stat.

(a) § 25-2501 applies to PPDs, ECCs and EMAs and provides:

“ It is the intent and purpose of sections 25-2501 to 25-2506 to establish a uniform procedure to be used in acquiring private property for a public purpose by the State of Nebraska and its political subdivisions and by all privately owned public utility corporations and common carriers which have been granted the power of eminent domain. Such sections shall not apply to:...(2) Public utilities and cities of all classes and villages when acquiring property for a proposed project involving the acquisition of rights or interests in ten or fewer separately owned tracts or when the acquisition is within the corporate limits of any city or village;....”

(b) **Terms, defined.** *Neb. Rev. Stat.* § 25-2502 provides:

“As used in sections 25-2501 to 25-2506 and 70-301, unless the context otherwise requires:...(2) Property shall include any right or interest in real property, including but not limited to easements, but shall *not include easements for public utilities located adjacent to and within ten feet of a public road right-of-way*;(Emphasis added).”

(c) *Neb. Rev. Stat.* § 25-2503 provides:

“Any agency [includes PPDs, ECCs and EMAs, (*Neb. Rev. Stat.* § 25-2502(1))] which proposes to acquire private property for a public purpose shall give notice of such proposed acquisition at least forty-five days before beginning negotiations for such acquisition. . . .”

(d) *Neb. Rev. Stat.* § 25-2504 provides:

“After giving notice pursuant to section 25-2503, the agency shall hold a public hearing on the proposed project and acquisition at least thirty days before beginning negotiations. . . .”

I. RECONCILIATION OF STATUTES

A. Acquisition of Private Lands for Public Purpose.

Neb. Rev. Stat. §§ 70-301 and 25-2501 describe procedures for acquiring land for a public purpose and the form the notice to landowners should take, but only when certain conditions are met.

The uniform procedures and notice to landowners described in Sections 25-2501 through 2506 *only apply* when [PPDs, ECCs and EMAs] seek to acquire *ten or more* separately owned tracts of land that are not being acquired as easements for public utilities located adjacent to and within 10 feet of a public road right-of-way. Section 70-301 also requires that “ten or more tracts” be at stake. However, the main difference between the statutes is the imposition of the additional requirement in § 70-301 that for § 70-301 to pertain, a PPD, ECC or EMA must be seeking to locate poles or build an underground system with a voltage capacity of 34,500 volts or more.

The two statutes however, are not mutually exclusive and there may be certain instances where both statutes apply. For example, if a PPD, ECC or EMA was constructing a transmission line with a capacity of 34,500 volts or more and ten or more separate tracts were being acquired that did not involve easements adjacent to and within 10 feet of a public road right-of-way, then both statutes need to be complied with.

In addition, if “land devoted to agricultural purposes” has been acquired through the operation of §§ 25-2501 and 70-301, PPDs, ECCs and EMAs must ultimately construct their transmission lines along a route which follows section or one-half section lines, unless such a route cannot be followed without excessive or unreasonable cost to the condemner. *See*, § 76-710.03.

B. Overlapping Requirements when acquiring private land for public purposes

The right to exercise the power of eminent domain is conferred upon PPDs, ECCs and EMAs as is the right to acquire right-of-way for construction of poles or underground lines. These rights are specified in §§ 70-301, 70-501, 70-670, 76-710.03, 86-305, and 25-2501. Each statute imposes additional requirements in exercising the right, for instance, that when condemning agricultural property, the route for power lines must be along section or half-section lines (§ 76-710.03), or that notice must be given if the voltage will be 34,500 or more volts and if

it involves more than ten parcels of separately owned tracts (§ 70-301). But the right to exercise the power of eminent domain or to condemn property is the overarching principle in these similar statutes.

C. Notice Requirements Prior to Starting Construction Projects

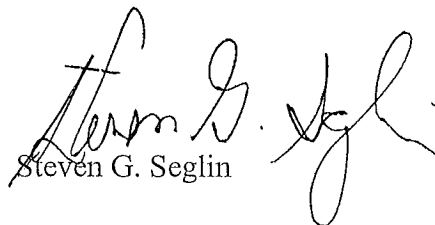
Before a transmission or distribution line can be constructed, "notice" to some board, commission or other entity may be required. Sometimes notice is not required, depending on the number of parcels involved in the project, or the voltage capacity of the lines. The notice requirements are as follows:

- (1) If § 70-301 is applicable, PPDs, ECCs and EMAs are required to give *notice to newspaper of general circulation* in the county 30 days before negotiations begin.
- (2) If § 25-2501 *et seq.* is applicable, § 25-2503 requires PPDs, ECCs and EMAs to give *notice to landowners* at least 45 days before beginning negotiations for right-of-way acquisition.
- (3) If § 25-2501 *et seq.* is applicable, § 25-2504 requires PPDs, ECCs and EMAs to *hold a public hearing* on the proposed project and acquisition at least 30 days before beginning negotiations for right-of-way acquisition.
- (4) If § 70-1012 is applicable, PPDs, ECCs and EMAs are required to give *notice to Power Review Board* and file an application for approval to construct a transmission or distribution line.
- (5) § 75-710 requires PPDs, ECCs and EMAs to give *notice to Public Service Commission* if project exceeds 15,000 volts and is to be within ¼ mile of any existing electrical or communication line of any other person or any railroad; or, if the voltage will exceed seven hundred volts and the line will be within five hundred feet of the electrical or communication line of any other person or any railroad.
- (6) § 75-713 requires PPDs, ECCs and EMAs to give *notice to Public Service Commission* seeking permission to enter upon airport property if constructing or altering overhead power lines within 500 feet of the boundary of an airport (copy to Department of Aeronautics).

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin