



MYTH OF THE DEFINED WIDTH

By balancing the converging issues, companies can exert greater control over their easements

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When it comes to acquiring an easement, defining the width of the right of way seems to get little attention. This often leads to confusion within an organization, especially for those who are tasked with maintaining a right of way that is not dimensionally uniform. In spite of the best intentions of a land department or contractor to obtain consistency, it's not unusual for issues to arise both during acquisition and after construction.

This article is intended to discuss the reasons why rights of way often lack uniform definition and how companies can take a

more active role in establishing and protecting their rights of way. It is not intended to cover situations where the width is prescribed due to the nature of the right of way such as with roadways, or when the separation between structures is regulated by statute as with natural gas pipelines. When state and federal regulations set minimum distances between facilities, these requirements will override the preferences of both the landowner and the utility regarding the size of the right of way. There are, however, abundant opportunities for companies to exert greater control over the widths of their rights of way.

Converging Issues

While working for one of the largest pipeline operators in the United States in the late 1970s, I noticed that there didn't appear to be any rhyme or reason or consistency in the width of the rights of way from one pipeline system to another. In fact, there was a width variance even when the rights were acquired at the same time for the same underground facility. Some surface rights of way were 25, 50, or even 75 feet in width, while others were limited to the width of the underground asset itself. And the situation is hardly unique to just one company.

The reality is there are many converging issues that impact the width of the right of way. These factors result in rights of way that are either non-uniform or more narrow than originally planned by the company. Contributing factors include the escalating costs of obtaining land rights, the lack of exclusive easements, changes in the relative rights of the landowners and easement holders, and the impact of congestion in obtaining new rights of way and maintaining existing ones. In order to deal with these contingencies, the width of the right of way is often treated as just another variable in the form of the easement grant that is subject to negotiation during acquisition. This has moved the right of way width from a basic, fundamental requirement in the agreement (like the right to construct, operate and maintain) to a term in the grant that may be no different than any other condition that is subject to negotiation between the land agent and the landowner (such as the right to assign).

Even when rights of way are uniform, the width may become compromised when companies try to accommodate the needs of others who are constructing their facilities in close proximity to existing lines. Permitting longitudinal encroachments can have the effect of reducing the width of existing rights of way unless the encroachments are handled in a consistent manner and in a way that reflects the long-term interests of the company to preserve the integrity of its right of way system.

These developments put into question whether the acquiring company can realistically expect to obtain a continuous strip of equal width right of way or even maintain the integrity of one that is already in place. The reality is that in most cases, the acquiring company of surface rights for underground facilities does not have total control over the width of their land rights. Still, they can do a better job with advance planning being more proactive in managing their land rights. Until this occurs, companies will be left with a right to way system that is inconsistent and difficult to administer and protect.

Factors that Impact Width

One of the earliest decisions that an acquisition team leader makes is to determine the standard width of the permanent right of way to be acquired. This decision is usually made without consideration of the specific needs of the project or the conditions in the field and this is an area where the company has the power to affect change. The width decision needs to be supported by a rigorous review of all of the factors that can impact it, as well as an understanding of the

overarching corporate policies and the practical ramifications of this decision on future right of way maintenance.

During the acquisition process, there is a tendency for companies to agree to reduce the size of the permanent right of way for a number of reasons. Some of these are:

- To achieve a corresponding reduction in market value of the rights being taken (thereby lowering the overall amount of the consideration due to the landowner);
- Reducing its obligation to provide compensatory mitigation;
- The last landowner to sign often requires a size reduction as a condition for the agreement;
- Agencies may demand that companies reduce the project's footprint as a condition for the approval of a permit; or
- The acquiring company encounters unforeseen congestion, especially when dealing with reroutes, and obtaining the standard width is no longer practicable.



For safety and maintenance purposes, it is imperative for an operating company to establish a minimum separation policy that is consistent and applied across all operating units.



In cases where the right of way is not being properly maintained, the width may be reduced.

In some cases, legislative actions may cause companies to accept narrower rights of way even after the company has obtained a right of way that conforms to the standard width. For example, when the right of way is undefined or exceeds a certain width, one's right of way may be reduced statutorily. In cases where the entire right of way is not being properly maintained, the width may be reduced through prescription.

Because of the trend toward narrower rights of way, it is important that the right of way grant contain a broad prohibition against unreasonable encroachments within the permanent right of way and contains the broadest array of land rights to maintain the facility. This might include the rights to "repair, renew, remove, substitute and change the size of" the asset. It is also vital that the grant bestows the right to use any adjoining lands owned by a landowner for any and all purposes convenient to the exercise of the rights being granted.

Conversely, there are other factors that may lead to companies trying to obtain wider rights of way than would normally be the case. For example, the safety specialists on the project team may recommend wider rights of way to protect the asset from third parties due to the nature or character of the product being transported. Governmental agencies are also known to require greater separation between structures in the siting of new projects. They may impose setback and other restrictions that have led companies to

obtain broader rights of way to prevent future construction near their utility than what would otherwise be required for the project.

Defending the Width

While other stakeholders can influence the width decision, public safety should always be the driver. The opportunity to provide input into the decision regarding the extent of the right of way needs to be widely communicated within the leadership structure of the project team. A rigorous internal vetting process can help in the defense of the width if it is later challenged by resistant landowners or by an opposing attorney should a court action result.

The operative standard is whether or not one can testify, under oath, that any reduction in the agreed upon standard right of way width could affect the safety and integrity of the facility. This analysis should be supported by objective technical and engineering data. It should also be based on the particular substance being transported through the asset, and the specific conditions in the field, such as soil conditions and stability. This analysis may result in a proposed right of way strip that is narrower or broader than originally planned, but one that has been stress-tested internally so that it can survive a future challenge.

By ensuring adequate up-front planning, companies can minimize any potential efforts to reduce the width. Soliciting input from

the various project team members and key internal (and, possibly, external) stakeholders in the earliest stages of the project will help establish the most desirable and appropriate size. This dialogue includes the project director, safety personnel, operating staff, legal, land, engineering, inspectors, environmental and public affairs. These discussions should include input from the operations group to ensure that there will be sufficient room to effectively maintain the right of way following construction.

For those responsible for maintaining existing rights of way, two things are important. First, the responsible personnel need to have a full understanding of the relative rights of the company and the landowner and have the authority to defend their existing land rights. This requires the operating personnel to coordinate with the land staff to determine the dimensions of the right of way, as well as the permissible uses in the applicable grant. Secondly, it is imperative that the operating company establish a minimum separation policy that is consistent and applied across all of the operating units. This ensures that all maintenance foremen are using the same standards. One caveat is that this determination be made with some knowledge of the way that the company has dealt with encroachments in the past. It would be problematic for a company to assert that it cannot construct closer than ten feet to another facility when they have done so in the past, unless of course, the company has adopted new policies and guidelines regarding encroachments.

Balancing the Needs

Companies will be more successful in obtaining rights of way that are uniform in both content and dimensionally if they have fully established what they need—as opposed to what they want—in the preliminary planning stages of a project. For example, the environmental team can usually provide data regarding what can realistically be permitted by the applicable agencies. Since these agencies have likely dealt with other companies that sought more

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than they needed for construction and operational purposes, the applicant should be prepared to defend the dimensions of the proposed right of way. If this decision had originally been made following a comprehensive and rigorous internal vetting process, the proponent will have already established a compelling case for the proposed width.

If a company has done its due diligence to confirm the exact size of the right of way for the subject facility as outlined, it is well positioned to defend its land rights. But if a company overreached and acquired a larger strip than it needed, protecting it will be more difficult following construction. This is because encroachments that do not unreasonably interfere with the facility are generally allowable under the grant. If the width is defensible and the grant prevents all permanent installations within the right of way, it is easier to maintain when the underlying rights are protected through, among other things, informed operating personnel and a robust surveillance program.

Even when companies obtain a consistent and uniform right of way that meets their requirements to operate in a responsible and safe manner, there are a number of post-construction issues that could affect the strip. Most situations involve accommodating the legitimate needs of landowners or other operating companies to share the right of way. One of the challenges is handling requests from another company to encroach on one's right of way to install another facility, usually because there is insufficient room to construct the new structure without overlapping the existing easement. Since most easements are not exclusive, this accommodation is a common industry practice. However, if handled incorrectly, the existing right of way may suffer from a reduction in width, which could potentially impair the company's ability to maintain its right of way in a consistent manner. As with new construction, the standard should be based on a company's ability to testify whether or not the



other company's proposal to construct near an existing facility could create an unreasonable safety hazard.

In cases where a proposed encroachment is within the right of way and permissible, the company proposing it should be asked to sign an encroachment agreement that recognizes the prior rights of the other company. The encroachment agreement should only allow for the subject encroachment and not amend or partially release the underlying right of way grant to reduce the overall width in order to accommodate the encroachment. If on the other hand, the proposed encroachment is in violation of a company's policies, it is essential that management be supportive of all efforts to prevent the encroachment, including the use of legal action to prevent it.

Final Thoughts

Early in my career, I accepted what I considered to be a no-brainer modification of an easement in order to close a deal. Since I had the authority to delete certain rights from the base form, such as additional line rights, I assumed that I also could delete one of the rights in the granting clause from the agreement. There were still a litany of other rights in the grant, and I believed the company was sufficiently protected. My first manager, Roger Ryman, SR/WA, thought otherwise. He counseled me as to why certain rights that may appear to be similar or even redundant, such as the rights to substitute or replace, may not be covered in the remaining rights like the rights to operate, maintain, replace

and change the size of the proposed installation. I was advised that this could restrict the company's ability to fully use the asset in the future. That was when I learned that the standard width in the grant should be considered a core right and not something that is subject to negotiation since, in an ideal world, it is established as part of a holistic exercise that incorporated both the short-term and long-term interests of the company.

As companies spend more time planning what is needed and becoming more disciplined in both the acquisition and administration of a their right of way portfolio, they can influence and exercise greater control. It starts with soliciting input from all the interested stakeholders, developing a consistent, well-defined policy that incorporates that input and communicating that policy to everyone involved in the project. It ends with ensuring those charged with maintaining and administering the existing right of way are well versed in their company's policies. They must also be fully aware of each party's respective land rights as outlined in the easement and given the authority and tools to effectively preserve those rights. ✪



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