

Is Your Outside Plant on a Powder Keg?

by Jerry Moran

There is a transition occurring within the telephone companies of this country regarding their approach to right-of-way acquisition. It is moving from the professional right-of-way agent who acquires the easement rights to the outside plant engineer who is already working at capacity. This individual is now saddled with the additional responsibility of acquiring easements. This applies to the very large as well as the very small companies. Not all companies are involved; however, a very large percentage of them are. This article is not meant as an indictment against any company, nor any engineer, but focuses primarily on a situation that needs attention.

Scenario

An easement is taken on a 5-acre single family residence parcel at the edge of "Anytown, USA" for a hut site to be filled with 21st-century communications technology. Two years later, the grantors of the easement default on their loan and the "Blackheart Bank of Anytown" forecloses. The bank decides that the property is under-utilized and decides to build a 50-unit condominium project on the site. The contractor wants to know who owns that "garden shed" on the property and wants it removed. The telephone company engineer informs the contractor that the telephone company has an easement. The bank asks the engineer if the bank ever subordinated its rights to the telephone company easement. If the answer is no, then the telephone company must remove its facility at its expense. Do your engineers and right-of-way agents take subordinations? Or:

A splicing chamber is placed on private property with the owner's

permission; unfortunately, nothing was ever signed. A new owner buys the property and sometime later discovers a splicer working at the site. The owner starts asking questions and doesn't like the answers. Your engineer gets a call and is unable to defend your company's right to be on the property. Your legal department is then asked to help. They will give you the bad news. They can't defend your rights either. You will be forced to relocate and possibly pay damages.

Property owners are getting smarter. They are asking sophisticated questions. What will happen when you start re-cabling America with fiber and electronics for the next century? Will you attach your cable to a pole line or put it in a conduit system that has a shaky private property right in the first place? Will the owners let you continue past sins? Will you stick your head in the sand and do nothing? Who will the jury side with if your company ends up in court and is charged with trespassing? These are tough questions.

You have invested a fortune in your outside plant. If it is on private property, how is that investment protected? Hopefully with a properly described, executed and recorded easement.

Some managers feel that all the engineer has to do is knock on a door and have the owner nod agreement, and the easement acquisition is complete. If only it was that easy.

I will address the various issues I see as very real and expensive to the telephone companies in this country:

If you are placing huts, CEV's or large cabinets, wouldn't you prefer the safety of private property? If you do, and the proper easement is taken, you do not have to be concerned about a municipality asking you to relocate at

your expense. Your plant has the right to remain where it is in perpetuity.

What is lost by eliminating the right-of-way professional?

- Experience in handling trespass issues (knowing how to defend and sometimes even run a bluff to protect plant location).
- Knowing how to check and verify ownership.
- Experienced negotiators.
- Knowledge in real property law.
- Awareness of environmental issues.
- Handling of access problems to easements.
- Trained individuals in all aspects of acquisition and maintenance of easements.
- Dealing with property that is in probate, or owned by a minor or an incompetent person.
- The representation that your company needs at zoning and planning boards.

The problems with requiring engineers to acquire right of way are:

- They are already doing a good job that requires a great deal of time and knowledge.
- They might take the path of least resistance (verbal right of way), which is indefensible in court.
- They often take a written easement that amounts to a blanket easement, which can create problems for the owner, the title insurance industry and your company in the long run.

Potential problems with using contractors to do easement acquisition: (some are great if properly selected)

- Some are not properly trained and experienced.
- Some supervisors do not have the knowledge to know if a quality job is being performed.

- Sometimes they don't have the same "ownership" that an employee may have.

Complaints from the field (agents/engineers):

- Upper level management doesn't know the repercussions of scaling back the right-of-way function.
- Legal department support is poor, slow or non-existent.
- Management doesn't realize the expertise required nor how long it takes to deal with property owners, governmental agencies, Indian lands, wetlands, railroads, environmental issues and the like.
- Performance measurements don't work universally. One easement may take an hour; the next may take weeks. A trespass complaint might take days of research in order to defend your rights and avoid relocating your plant.
- There is an unwillingness on the part of the company to pay fair market value for an easement.

Potential causes and their penalties:

Causes

- No easement or a verbal taken.
- Taking a license or an easement with a relocation clause.
- Claiming a "prescriptive" easement when you know you are in trespass.
- Not getting lenders to "subordinate" their rights to yours when placing huts, CEV's or large cabinets on private property.

- Not paying fair market value for hut, CEV's or large cabinet sites.

Penalties

- Relocation of plant at your expense, risk of lawsuit and punitive damages.
- Same as above, except you can prove you are not in trespass, but will still have to relocate at your expense.
- Slim chance of having your legal department defend prescriptive claim. Too easy to defeat.
- If easement grantor defaults on loan, you can be left with no easement and forced to relocate at your expense.
- Potential for being sued for taking advantage of property owner by not paying fair compensation.

If budgetary restrictions apply (and when don't they?), have at least one fully trained right-of-way agent in each engineering work group. Have the engineers at least trained in the basics of right of way. Then the agent can acquire easements for the "big stuff" and the engineers can acquire rights for poles, cables, anchors, pedestals and the like. This way the engineers have someone they can turn to if they get into trouble.

If you can afford it, have a centralized right-of-way group that can function as a unit as it relates to right-of-way problems, and keep your company out of court.

Encourage membership in the International Right of Way Association among your acquisition people. It

promotes professionalism through education and experience, and provides valuable contacts with other utilities, cities, counties, state and federal agencies.

Assure that your company has a record-keeping system that allows access to all of your easement documents. Access through legal descriptions, jobs, grids and grantor name(s).

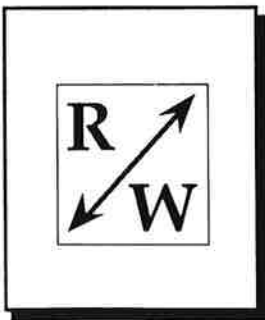
Every manager/supervisor should attend an overview of the right-of-way job so they can appreciate and support the work that needs to be done. Too often, they view the job as one that requires no skill or knowledge.

Provide an hour or two of training to your craft people that outlines your rights, privileges and obligations when entering private property.

Insist that contractors who install your facilities pay attention to putting the plant within the boundaries of the easement. They often do not, and relocation is required, which is a costly fix for a problem that should not have happened in the first place.

Above all, *do something about this keg with the burning fuse!* There is no substitute for proper training. □

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