

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2016-019

TO: Mayor Engen, Dale Bickell, John Wilson, Kevin Slovarp, Mike Haynes, Donna Gaukler, Eric Andersen, Doug Harby, Jane Plummer, Mickey Morin, Jolene Ellerton, Chris Boza, David Selvage, Don Verue, Marty Rehbein

CC: Attorney Department

FROM: Jim Nugent, City Attorney

DATE September 1, 2016

RE: Public Utility Statutory Right to Use Public Rights of Way for Utility Lines and Facilities

FACTS:

Recently there have been several instances of inquiry from city staff concerning public utility usage of public rights of way.

ISSUE(S):

Pursuant to Montana state law, do public utilities have any rights to use of public rights of way for public utility lines and facilities?

CONCLUSION(S):

Yes. Pursuant to section 69-4-101 MCA the Montana State Legislature has provided that public utilities have the right to install and maintain their lines and facilities along and upon the public roads, streets and highways in the State of Montana.

LEGAL DISCUSSION:

Title 69, chapter 4 MCA is entitled UTILITY LINES AND FACILITIES. Section 69-4-101 of part 1 of title 69, chapter 4, MCA provides:

69-4-101. Use of public right-of-way for utility lines and facilities. A telegraph, telephone, electric light, or electric power line corporation or public body or any other 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 lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires. The same shall be so constructed as not to incommodate 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. *(emphasis added)*

Montana's state highway regulation laws define the terms such as "highway", "Highway, road and street", "public highways" and "right-of-way" related to roads, streets and highways as meaning:

60-1-103(18) "Highway" includes rights-of-way or other interests in land, embankments, retaining walls, culverts, sluices, drainage structures, bridges, railroad-highway crossings, tunnels, signs, guardrails, and protective structures.

60-1-103(19) "Highway", "road", and "street", whether the terms appear together or separately or are preceded by the adjective "public", are general terms denoting a public way for purposes of vehicular travel and include the entire area within the right-of-way.

60-1-103(22) "Public highways" means all streets, roads, highways, bridges, and related structures:

- (a) built and maintained with appropriated funds of the United States or the state or any political subdivision of the state;
- (b) dedicated to public use;
- (c) acquired by eminent domain, as provided in Title 70, chapter 30, and chapter 4 of this title; or
- (d) acquired by adverse use by the public, with jurisdiction having been assumed by the state or any political subdivision of the state.

60-1-103(23) "Right-of-way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes.

61-1-101(27) "Highway" or "public highway" means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel.

61-1-101(77) "Street" means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel.

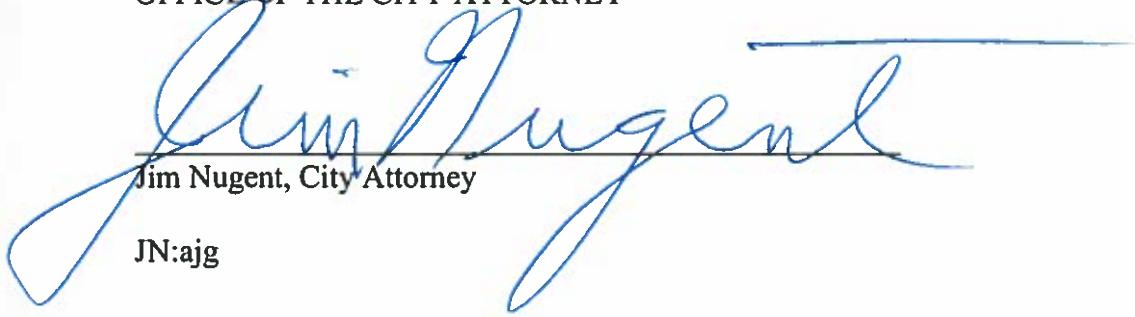
61-8-102(2)(i) that part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway; or

Courts recognize that a public utility has a right to maintain its buried telephone cable located in the right-of-way of a highway. See *U.S. v. Mtn. States Tel. & Tel. co.* 434 F. Supp. 625 (District of Montana 1977).

CONCLUSION(S):

Yes. Pursuant to section 69-4-101 MCA the Montana State Legislature has provided that public utilities have right to install and maintain their lines and facilities along and upon the public roads, streets and highways in the State of Montana.

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