

# Negotiating Transmission Line Easements

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Recently, the Kansas Corporation Commission has approved several new massive electric transmission lines (two phases) that will run from Spearville to the Nebraska border. Other lines are in the planning and development stages. They will travel south from Spearville to Coldwater and then on East to Wichita.

The lack of transmission lines have been a fundamental issue in Kansas and are becoming more and more of an issue elsewhere. These projects should improve the state's power grid system that is somewhat antiquated. It will also ease a bottleneck that has become a major obstacle to the development of wind rich Kansas plains and other areas suitable for wind generation.

Kansas is already one of the largest producers of wind power, with over 1,000 megawatts installed. However, this growth has all but stalled in recent years partly due to lack of capacity to move electricity to major markets.

With the encouragement of state officials, new transmission lines will be sprouting up across Kansas. Many landowners will be approached by an agent for the developer seeking an easement across their land. In order to run these electricity lines on your property, the power company will want the landowner to sign an agreement. During this process, the power company will need to acquire what is known as a "Transmission Line Easement". In layman's terms, you will be asked to allow the power company to take some of your rights in order to use your property under certain conditions. Consequently, landowners need to arm themselves with knowledge and understand the legal ramifications of entering into these agreements.

The developer seeks to obtain a Transmission Line Easement to acquire the property rights necessary to construct electrical distribution system such as electrical lines, substations, switching facilities, and operation and maintenance structures. The property rights to be taken are normally spelled out within the easement instrument.

Once a legal easement has been established, utility companies move forward with construction. Construction involves clearing of trees and other obstructions from the 150' (up to 250') wide easement, erecting towers that are at least 70' to 125' tall, and using cranes and whatever other special equipment is necessary to complete and maintain the project.

A number of issues should be addressed prior to signing any type of agreement. The Transmission Line Easement, like any easement agreement, is a legally binding agreement that needs to be carefully reviewed and understood before executing the same. This type of agreement will have a long-term effect on you, your land and future generations. It is important that you not agree to or sign any agreement until you have had an opportunity to discuss it with your attorney.

If you are approached by an agent of the transmission line company wanting you to execute such an agreement, take your time, and consider all the aspects of it. These agreements usually are in perpetuity. This means the easement will last forever.

The following is a checklist provided as a guide when reviewing Transmission Line Easements. The document represents the types of issues landowners may wish to consider as they enter into an agreement. Every contractual agreement between a landowner and a developer has unique possibilities that differ across regions and operations and must be negotiated with the help of legal counsel.

## **AGRICULTURE**

Landowners typically retain existing surface or sub-surface rights when entering a transmission line agreement, including rights granted by existing mineral leases, special use leases, temporary use permits, and easements. However, landowners and developers must consider the compatibility of transmission line development with existing uses of agricultural land.

## **LANDOWNER CHECKLIST**

### **General Purpose of Transmission Line Easement**

- Allow surveying and testing to be done for the purpose of determining the feasibility of building a transmission line (structure) on your property
- Allow construction, operation and maintenance of transmission lines

### **Scope of agreement** - amount of property covered

- How much of my land will be tied up?
- What land rights am I giving up?
- What activities can I continue on this land?
- What restrictions may be placed on my land – farming, hunting?

**Easement** – An easement is an interest in land in the possession of another that entitles the holder of the interest to a limited use or enjoyment of the land.

- Easements are either exclusive or nonexclusive
  - Exclusive easement - the easement rights are held solely by the holder
  - Nonexclusive easement - others could have the right to use the land concurrently
- The rights granted are permanent in this type of agreement
- Payment for these easements can be either in a lump sum or through periodic payments, but most of the payments consist of a lump sum

### **Transmission Line Easement Provisions**

#### **1. Area leased**

- Limit to only the land or space that is necessary to serve its purpose
- The legal description should be clearly described and checked for its accuracy
- Typically, developer is seeking between 150' – 250' width for the right-of-way
- Access from public roads to and from the land where the line and other physical structures are located
- Consider
  - desired setbacks from farming operations
  - desired setbacks from residences and property lines
  - location of general exclusion areas for development and for access

- questions of privacy, access, general disruption, and safety
- how to mitigate privacy, access, safety and general disruption issues
- controlled access points
- smoking ban
- access exclusion areas
- no living quarters for personnel

## 2. Term of Agreement

- Usually most agreements are for a number of years, but these agreements are in perpetuity or forever
- Landowners should understand that you will not be given a choice - the agreement is perpetual
  - Because the easement is perpetual, there are typically no renegotiations once the agreement is signed
  - This means that you have only one chance to reduce unnecessary terms of the easement agreement while maximizing easement compensation

## 3. Compensation for the Easement

- Amount of compensation
  - Generally, transmission line easement compensation involves a one-time payment
  - However, in private transmission lines it is not uncommon for the developer to offer a lump sum or yearly rent
- Compensation for a distribution easement depends on several factors
  - The general location
  - Type of land involved
  - The width and length of the easement
  - Value of the land
  - Damages to the property caused by installation, maintenance and/or operation of the structures and lines
  - Usually you are paid 80% to 90% of the fair market value (FMV) of the land, especially if it is a public line. This amount will rise significantly if it is a private line due to the lack of eminent domain power
  - The differences in compensation are similar to differences in property value – there are many conditions that would increase or decrease compensation, such as whether it is irrigated, dry land, grassland or wasteland
  - Also you may request additional compensation for interference with normal farming activities or the aesthetic appearance of the property (this may prove difficult, but should be discussed)
  - Landowners may need to factor in possible increases in insurance premiums, especially if the agreement requires the landowner to indemnify for potential damages in the future
- Consider the advantages and disadvantages of payment structures
  - Lump sum
    - Consider potential tax consequences
  - Compare the lump sum payments using a standard financial annuity formula to find the annual payment equivalent that is sometimes offered by private transmission line companies

- Become familiar with typical compensation rates for other transmission line access for the private sector or offered by other companies building public lines in this state or in other states
- Economic arrangements
  - Compensation for any loss of viable agricultural operations
  - Compensation for property damage
  - Non-conventional compensation

#### **4. Rights that Developer will Want**

- Right to conduct certain activities on the land prior to construction
  - Surveying
  - Taking soil samples
  - Environmental and/or wildlife studies
- Right to construct and install transmission lines and structures
  - Foundations, concrete pads and footings
  - Guy wires, support fixtures, anchors and fences
  - Electrical transformation, electric distribution and transmission towers (poles – wood/steel structures) and lines above ground or underground
  - Substations or switching facilities
  - Buildings needed for maintenance or storage
  - Private roads providing access from public roads to facilities or structures

#### **5. Rights Reserved for the Landowner**

- Landowner should concentrate on reserving any rights that are unique to his/her agricultural or other operations on the land
- Landowner may want to include a “catch all” provision
  - Rights with respect to the use of the land not given explicitly to developer are retained
  - If you are unable to use this phrase, specific provision can be incorporated into the agreement
    - Right to conduct farming or agricultural activities on the land or other activities involving the land such as mineral, oil, gas, or other natural resources
    - Right to use land to harvest crops, graze and/or hunt

#### **6. Minimum Duties and Obligations of Developer**

- Reclamation of premises
  - Long-term weed control?
  - Standards for reclamation?
  - Seed mix specifications?
  - Procedure for topsoil stockpiling, storage, and future use?
  - Party that will conduct reclamation?
  - Disruption of major rock outcropping or trees?
- Consider operation compatibility
  - Potential livestock displacement
    - Alternative grazing locations
    - Install cattle guards or gates where developer enters or leaves premise

- Who must maintain
  - How maintained
- Brace fences before cutting
- Notification the construction completed
- Reseed cleared areas with original or native grass after construction completed
  - Alternative - pay landowner the cost of reseeding and allow him/her the opportunity to replant grass seed
- Compensation for costs incurred from displacement and loss of native grassland cover
- Gates and locks
  - Location
  - Personnel with access
- Temporary protective fencing
  - Location
  - Maintenance
- Fences and cattle guards
  - Location
  - Maintenance
  - Immediate repair of fences if damaged
- Remove and pile rocks exceeding a certain diameter
- Chip and spread trees and brush that are removed
- Where the developer can enter and leave premises
- Use of chemicals to control weeds and brush
- Consider the viability of terrain
  - Gentle grade
  - Smooth terrain
  - Accessible for heavy machinery
- Consider transmission capacity issues
  - Provide survey and transmission plan to landowner
- Consider potential environment and wildlife concerns
  - Sensitive wildlife habitat
  - Species of concern or of potential concern
  - Invasive species control
    - Annual weed abatement program
- Consider potential archeological/historic concerns
  - Identify archeological sites, especially places listed on the National Register of Historic Places
  - Outline a procedure for dealing with archeological sites if they are uncovered
- Waterlines
  - Immediate repair of water lines if damaged
  - Responsibility to haul water until waterline is repaired
- Access stipulations
  - Maintenance and repair of access roads
    - Location
    - Direction
    - Snow removal

- Keep lands free from liens such as mechanic's liens
- Option of contesting the validity of liens
  - No cost to Landowner
  - May post a bond or escrow to cover the cost of removing lien
- Comply with all federal, state and local law and regulations
- Obtain and comply with all permits
- Ensure proper usage, storage, disposal and release of hazardous substances on the premises
  - Developer may be allowed to use hazardous substances in its normal business operations provided such use is not harmful to landlord and in compliance with all applicable laws
  - Developer should indemnify landowner for any losses from the use or handling of such substance

#### **7. Minimum Duties and Obligations of Landowner**

- Allow developer the quiet use and enjoyment of the land without interference
- Landowner will not engage in any activity that would hinder the developer
- Landowner will have to ensure the proper usage, storage, disposal and release of hazardous substances on the premises
  - Landowner should carve out an exception for the use hazardous substances in its normal business operations (agriculture use)
  - Landowner will have to indemnify developer if he or she mishandles the hazardous substances
- Landowner will have to cooperate with developer in obtaining any necessary subordination agreements or approvals from existing lien holders

#### **8. Taxes and Utilities**

- All tax (personal or real estate) increase due to improvements associated with the project, as well as all sales and use taxes should be the sole liability and responsibility of the Developer
  - This also includes, but not limited to the installation of the transmission line, structures, substations, switching facilities and/or maintenance buildings
- Developer should be responsible for all water, electric, telecommunications, and other utility services used for the transmission line

#### **9. Assignment Rights**

- Developer normally wants to be able to assign all or portion of their/its easement rights to another without consent from the Landowner. Includes:
  - Right to grant to a utility company the right to construct, operate and maintain the transmission line, interconnection and switching facilities on the premise
  - Right to sell or otherwise transfer the easement to another party
  - Right to grant subleases or sub-easements
- The assignment usually allows the original developer to be released from further obligations
  - Usually the party receiving the assignment agrees to assume all responsibilities
  - Landowner should understand the broad grant they are giving to developer and should exercise caution
- Landowner should request that developer provide prior written notice of any assignments. Including:
  - Name, address and phone number of assignee

- Liability assumed by assignee

## 10. Indemnification and Hold Harmless

- Most of these provisions describe who protects who
  - Developer should be 100% responsible for all costs associated with transmission line activities/operations, both pre and post completion of the project
- Usually provide for indemnification for damages arising out of:
  - Any operations or activity of the indemnifying party on the premise
  - Any intentional act or omission on the part of the indemnifying party
  - Any breach of the agreement
  - Be aware of language that forces the landowner to indemnify the developer for activities of any tenants or guest
  - Developer should indemnify and hold harmless landowner for damages sustained as a result of any claim made by a neighbor or other party arising out of the activities of developer. Including, but not limited to:
    - Nuisance, trespass and medical claims
    - Other damages
  - Safety risks (ex. electromagnetic field effects): human, livestock and structures
  - Risk of storm damage
  - Loss of TV, radio, telephone, cell phone and GPS use
- Finally, most easements contain a provision that includes paying the reasonable attorneys' fees for the party being indemnified.
  - Note – this may work very well if you are the party that has been damaged, however this can also work against you. Here is a quick example:
    - If your farm tenant were to fall asleep while driving a tractor and hits one of the transmission line structures and cuts off the electrical power
    - What would it cost to restore power and fix the tower/structure?
    - Who would pay for the damages?
    - What would litigation cost and could you be responsible for the developer's attorney fees if you lost?
  - We recommend that you speak to your insurance agent about exposure to future liabilities and the possibility of insuring that you are covered in this type of an event

## 11. Insurance

- The easement should require that developer maintain appropriate liability insurance covering all of its activities on the premises and name Landowner as an additional insured
  - The policy should require sufficient liability limits to protect landowner
    - This amount should be at least 1 million dollars and up
    - The amount of insurance should also adjust over the course of time (inflation)
    - Developer should provide a certificate of insurance annually
    - The policy should provide that it cannot be cancelled without at least 30 days written notice to landowner
  - Developer should reimburse for any increases in premium by landowner for additional coverage of transmission line, structures, buildings or operations
    - Landowner should factor in yearly premium increases over the life of the agreement

- Landowner should be careful about agreeing to language in the easement that allows developer to “self insure”

## **12. Eminent Domain**

- If a landowner ultimately declines the developer’s offer for the easement, they may have the right of eminent domain (condemnation) to take the easement
- The power to condemn rest with developers who are public utilities and as well as some private companies (ex. transmission line development)
  - The developer can take the portion of the property from the landowner for just compensation
  - These matters are usually filed in the local District Court
  - These proceedings usually happen very quickly. It is always prudent to consult with an attorney prior to this type of hearing
  - After the court finds that the developer is qualified to use eminent domain, it will appoint three appraisers and assign them the task of determining the FMV of the taking by the developer
  - The court will then consider the loss in value assessed by the appraisers to the premise and determine just compensation

## **13. Default and Termination**

- Events that normally cause a default on the part of the developer and allow for the termination of the easement
  - Failure to make the required payment(s)
  - Failure to pay for damages
  - Usually the agreements require a written notification of lack of payment or damages incurred by the landowner
  - If developer has a perpetual easement, it will be able to continue indefinitely unless it voluntarily discontinues the easement
  - The easement should provide that upon termination, developer must remove all towers, substations, switching facilities, equipment, machinery and any other structures on the premise
    - A time frame should be set for the developer to remove all materials and structures from the land in a timely fashion
    - Any concrete pads should be removed to a depth below ground of three feet
    - All debris removed from site
    - Payment for any property damages, tile damage, crop loss, seeding, fencing and/or soil compaction
    - All easements released after decommissioning
  - If termination should occur, developer should provide and execute a recordable document evidencing the termination of the easement

## **14. Miscellaneous**

- Change in land use options
  - Consider the potential loss of some of those uses
  - Hunting
  - Other recreational uses



- Determine location of Transmission Line, substations, switching facilities and other structures to residence, viewscape, livestock facilities and important wildlife areas
  - Consider the disruption to farming operation
  - Consider negotiating mitigation strategies
  - Consider and prepare for aesthetic changes to viewsheds and landscapes
- Farm Tenants
  - Make sure that you inform any farm tenants of the easement
    - The easement is an agreement between the landowner and developer and not the farm tenant. The tenant has a separate agreement with the landowner which may be adversely affected by the easement (ex. lost acreage to farm, work around towers/structures and inability to conduct aerial spraying)
    - Landowner and farm tenant may need to modify their agreement regarding the new easement
- Farm Service Agency (USDA) implications
  - Before signing an easement, landowners need to consult the local FSA office to be sure or at least aware of any problems that transmission line may cause if construction occurs over land in contract with the Federal Government (ex. CRP)
  - Therefore, landowner should seek USDA approval if participant in USDA programs, so payments are not lost or financial penalties are not triggered
- The manner in which notices are to be given to each party should be specified
- The easement should only be interpreted under the laws of the state in which the property is located
- Recording of Memoranda of the easement
  - An easement is usually filed with the county Register of Deeds
  - However, sometimes an easement may not be recorded, but a Memorandum that memorializes the terms so the existence of the easement will be filed in an abstract format. This prevents the financial terms from being disclosed.