

OFFICIAL OPINION NO. 69-1, Telephone line franchise

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

January 3, 1969

Gerald M. Baldwin
State's Attorney, Custer County
Custer, South Dakota 57730

OFFICIAL OPINION NO. 69-1

Telephone line franchise

Dear Mr. Baldwin:

In response to your request for my opinion, I am assuming that the township involved is an organized township and that it has, located within its limits, an incorporated town and that a power company serving the unincorporated town and township has been awarded a franchise to use the streets and alleys and highways of the township for the placement of poles and lines for the distribution of electricity within said township, and that it is the desire of a telephone company to use the pole line of the power company to string its wires for the purpose of rendering telephone service to the inhabitants. It appears obvious that the telephone company and power company may, by agreement, make use of the pole line already built and established.

Your questions are submitted in the following order:

"1. Without having its own franchise, is a telephone company further permitted to place lines within an incorporated township on power poles which have been located in said township under a franchise to the power company allowing 'the placement of poles and lines for the distribution of electricity within said township'?"

"2. If the answer to Question No. 1 is yes, is said telephone company further permitted to ditch public streets and place underground telephone lines in said township?"

"3. If the answer to either Question 1 or 2 is no, is the telephone company subject to criminal prosecution under Chapter 13.4503, subsection 5 of the 1960 Supplement to the South Dakota Code of 1939?

"4. If the answer to either Question 1 or 2 is no, is the telephone company liable to damages to the said township under the provisions of Sec. 58.0508 of the 1939 Code?"

The right of way over public lands, streets, alleys and highways is granted to a telephone or telegraph company by the express provision of Section 52.1313 of the South Dakota Code which reads as follows:

"52.1313 **Right of way over public lands, streets, alleys, and highways.** There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys, and highways in this state subject to the control of the proper authorities as to what grounds, streets, alleys, or highways such line shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this chapter may be acquired in the same manner and by like proceedings as provided for the railroad corporations."

The township supervisors are authorized and have power to grant franchises under the provisions of Section 58.0201(g) of the South Dakota Code in the following language:

"To grant franchises and rights to persons, associations, or corporations, for the sale of electric current, the erection of lamp posts, electric towers, light or power lines, or other apparatus;"

The township having awarded to the electric light and power company a franchise limited to the distribution of power and light does not lessen or limit the power of the township to grant its consent as to what grounds, streets, alleys or highways such telephone lines shall occupy within the township as stated in Section 52.1313.

The answer, therefore, to Question No. 1 is NO and the answer to your Question No.2 is also NO.

In answer to your Question No.3, it is my opinion that anyone acting in behalf of the telephone company, or the telephone company itself, in directing that the work be done in

digging for underground cable installation without the consent of the township board would be amendable to Section 13.4503(5) of SDC 1960 Supp. which reads as follows:

"**Digging**, taking, or carrying away from any land in any city or town, laid down on the map or plan of said city or town as a street or avenue, or otherwise established or recognized as a street or avenue, without the license of the mayor and common council or other governing body of such city or town, or owner of the fee thereof, any earth, soil, or stone, under such circumstances as would render the trespass a larceny if the thing so **severed** or carried away were personal property." (Emphasis added.)

In answer to your Question No.4 to the extent that damages can be established because of the excavations made for the purpose of installing underground cable lines by the telephone company, such damages may be recovered by the township board in behalf of the township against the telephone company assuming that the work is done without prior consent to the governing authorities.

Respectfully submitted,

Gordon Mydland
Attorney General