

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its	)	RULE AND REGULATION NO. 176
own motion, seeking to amend Title 291,	)	
Chapter 5, Telecommunications Rules and	)	ORDER ISSUING CERTIFICATE OF
Regulations, to adopt rules in	)	ADOPTION FOR THIRD SET OF
accordance with Nebraska Legislative	)	PROPOSED RULES
Bill 181 [2010].	)	
	)	Entered: July 26, 2011

BY THE COMMISSION:

O P I N I O N   A N D   F I N D I N G S

On August 31, 2010, the Nebraska Public Service Commission (Commission), on its own motion, opened the above-captioned proceeding to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to adopt rules in accordance with Nebraska Legislative Bill 181 passed in 2010 by the Nebraska Legislature regarding telecommunication lines, wires, or cables crossing railroad right-of-ways.

The proposed rules implement provisions of Legislative Bill 181 [2010]. Under the provisions of LB 181, the Commission is given the authority to review disputed terms of crossing agreements between telecommunication carriers and railroad carriers when the telecommunications carrier is seeking to place a line, wire, or cable across a railroad carrier right-of-way. The Commission released a first set of proposed rules and requested comments from interested parties. Comments were timely received from BNSF Railway Company (BNSF), the Nebraska Telecommunications Association (NTA), and Union Pacific Railroad Company (UP).

Based upon the comments received, revisions to the proposed rules were made and a Second Set of Proposed Rules and Regulations were released on November 22, 2010, for comment with a hearing scheduled for January 10, 2011.

Comments and pre-filed written testimony on the Second Set of Proposed Rules and Regulations in the above-captioned docket were timely received from the NTA and UP.

Due to inclement weather, the hearing on the Second Set of Proposed rules scheduled for January 10, 2011, was continued to a date to be determined later.

Subsequently, in early January, Legislative Bill 47 was introduced in the Nebraska Legislature that proposed to clarify the definition of railroad carrier in LB 181, now codified in *Neb. Rev. Stat. § 86-164* (2010 Cum. Supp.). On February 22, 2011, LB 47 was enacted by the Nebraska Legislature with an emergency clause.

Due to Legislative action, the Commission made further revisions to the proposed rules consistent with the language added by the Legislature in LB 47. Therefore, a Third Set of Proposed Rules and Regulations were released for comment on March 8, 2010. Interested parties were given until April 28, 2011, to file written testimony or comments. Comments and pre-filed written testimony on the Third Set of Proposed Rules and Regulations in the above-captioned docket were timely received from the NTA.

A hearing was held on the proposed rules on May 10, 2011, in the Commission Hearing Room, 1200 N Street, Suite 300, Lincoln, Nebraska. Notice of the hearing was published in the Daily Record and the Lincoln Journal Star. The two witnesses pre-filing testimony on behalf of NTA also presented oral testimony at the hearing. No other parties appeared at the hearing.

The proposed rules, attached hereto as Appendix reflect the rules regarding telecommunication lines, wires, or cables crossing railroad right-of-ways. Minor changes were made based on testimony and comments received at hearing. The wording in section 013.02H was modified to clarify the Commission's intention that the list of standards included in the rule is not exclusive. Other guidelines, manuals, and industry standards could be offered by a party to the proceeding for the Commission's consideration if deemed pertinent. One commenter had proposed expanding the list to include other publications. However, the Commission finds clarifying the list is not exclusive and allowing other pertinent information to be offered by the parties is sufficient. The change is not substantive.

The remaining suggested changes in the written comments and testimony at the hearing would require a statutory change as the language in the rule directly reflects the statutory language. Those changes were therefore rejected by the Commission.

Based upon the written comments filed and comments received at hearing, another hearing regarding this matter is not necessary and the Commission adopts the revisions proposed. The Commission finds that the third set of rules proposed in Appendix should be adopted.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a certificate of adoption for the proposed rules set forth in Appendix be, and is hereby, issued.

MADE AND ENTERED at Lincoln, Nebraska, this 26<sup>th</sup> day of July, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

AppendixAmendments to Nebraska Administrative Code,  
Title 291, Chapter 5, Telecommunications Rules and Regulations

Insert the following new section.

013 TELECOMMUNICATION LINES, WIRES, OR CABLES CROSSING RAILROAD RIGHT-OF-WAYS:

013.01 Definitions: For purposes of this section, the definitions in Section 001.01 shall apply except that as used in this section and unless the context otherwise requires:

013.01A Railroad carrier has the same meaning as in Neb. Rev. Stat. Section 75-402.

013.01B Railroad has the same meaning as in Neb. Rev. Stat. Section 75-402.

013.01C Telecommunications carrier means a telecommunications common carrier or a telecommunications contract carrier.

013.01D Public highway has the same meaning as in Neb. Rev. Stat. Section 60-624.

013.02 Crossing Agreements; Failure To Reach Agreement; Petition for Hearing: Any telecommunications carrier that intends to place a line, wire, or cable across a railroad right-of-way shall request permission for such placement from the railroad carrier.

013.02A Applications for Crossing: The request shall be in the form of a completed crossing application, and shall include engineering specifications.

013.02B Binding Agreement: Upon receipt of such application, the railroad carrier and the telecommunications carrier may enter into a binding wire-crossing agreement including terms pursuant to Section 013.04.

013.02C Petition for Hearing: If the railroad carrier and the telecommunications carrier are unable to negotiate a binding wire-crossing agreement within sixty (60) days after receipt of the completed crossing application pursuant to subsection 013.02A by the railroad carrier, either party may submit a petition to the commission for a hearing on the disputed terms and conditions of the wire-crossing agreement.

013.02D Petition Requirements: A party that files a petition for hearing under Section 003.02C shall include all relevant documentation concerning the disputed terms and conditions and the position of the petitioning party with respect to those issues.

013.02E Notice of Petition: A party that submits a petition for hearing under Section 013.02C shall serve a copy of the petition and any other documentation on the other party or parties not later than the day on which the Commission receives the petition for hearing.

013.02F Opportunity to Respond: The non-petitioning party under Section 013.02C shall respond to the petition and provide any relevant documentation concerning the unresolved issues and the position of the non-petitioning party with respect to those issues within twenty (20) days after service of the petition.

013.02G Action by the Commission:

013.02G1 Hearing: Unless otherwise agreed to by all parties, the Commission shall, after providing proper notice, hold and complete a hearing on the disputed wire-crossing agreement within sixty (60) days after receipt of a petition for hearing.

013.02H Commission Consideration: In rendering its decision, the Commission shall consider whether the terms and conditions at issue are unreasonable or against the public interest, taking into account safety, engineering, and access requirements of established rail industry standards, including but not limited to those prescribed and outlined in the following:

013.02H1 Federal Railroad Administration Rules and Regulations;

013.02H2 Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines - the National Electrical Safety Code; and

013.02H3 American Society for Testing and Materials (ASTM) Specifications.

013.02H4 The standards for installation of communication lines across a railroad right-of-way contained in this section apply to crossings that do not involve special circumstances such that additional or more stringent engineering standards may be warranted. The determination of such additional or more stringent standards will be determined on a case-by-case basis, according to the procedure in subsection 013.04D, depending on the facts and circumstances associated with the particular crossing.

013.02H5 References given to any manual, publication, or specification are intended to be the most current edition. If a conflict occurs between any publication and this section, the most restrictive specification will be used.

013.02H6 The Commission may require the parties to provide such information as may be necessary for the Commission to reach a decision on the unresolved issues.

013.02I Commission Order: The Commission shall have thirty (30) days from the date of hearing to issue an order resolving each issue set forth in the petition and the response with written findings and opinions.

013.03 Submission of Agreement to the Commission: Upon issuance of an order by the Commission on the petition submitted pursuant to Section 013.02C, the parties will have fifteen (15) days in which to file a conforming wire crossing agreement with the Commission. The Commission shall have fifteen (15) days from the date of filing the conforming agreement to approve or reject the agreement or the agreement will be deemed approved.

013.03A Non-conforming Agreement: The Commission may reject a wire crossing agreement submitted by the parties pursuant to Section 013.03 if it finds that the wire crossing agreement does not conform to the order issued by the Commission. If the Commission enters such a finding, the parties shall revise the agreement to comply with the Commission's order and shall file the revised agreement with the Commission within ten (10) days. If the Commission does not approve or reject the revised agreement within fifteen (15) days after the date of filing, the agreement shall be deemed approved.

013.04 Wire Crossing Agreement Terms:

013.04A Standard Crossing Fee: Except as provided in Section 013.04D, or as otherwise agreed to by all parties, if a telecommunications carrier places a line, wire, or cable across a railroad right-of-way pursuant to Section 013, it shall pay the railroad carrier, owner, manager, agent, or representative of the railroad carrier a one-time standard crossing fee of one thousand two hundred fifty dollars (\$1,250.00) for each applicable crossing.

013.04A1 One-Time Fee: The one-time crossing fee, with or without special circumstances as provided in Section 013.04D, shall be for the life of the line, wire, or cable placed across the railroad right-of-way.

013.04B Flagging Expenses: In addition to the standard crossing fee as provided in Section 013.04A, the telecommunications carrier shall reimburse the railroad carrier for any actual flagging expenses associated with the placement of the line, wire, or cable.

013.04C Other Fees Prohibited: The standard crossing fee as provided in Section 013.04A shall be in lieu of any license fee or any other fees or charges to reimburse the railroad carrier for any direct expense incurred as a result of the placement of the line, wire, or cable. Fees prohibited include, but are not limited to, application fees and processing fees.

013.04D Special Circumstances: If a railroad carrier or telecommunications carrier believes a special circumstance exists for the placement of a line, wire, or cable across a railroad right-of-way, the railroad carrier or telecommunications carrier may petition the Commission for additional requirements or modification of the standard crossing fee in its initial petition to the Commission pursuant to Section 013.02C. The Commission shall determine if a special circumstance exists that necessitates additional requirements for such placement or a modification of the standard crossing fee.

013.04E Indemnification Clauses:

013.04E1 Any provision, clause, covenant, or agreement contained within the wire-crossing agreement, collateral to the agreement, or affecting such agreement between a rail-road carrier and a telecommunications carrier that purports to indemnify, defend, or hold harmless the railroad carrier from any liability for loss or damage resulting from the negligence or willful and wanton misconduct of the railroad carrier, its agents, employees, or independent contractors who are directly responsible to the railroad carrier are prohibited.

013.04E2 Any provision, clause, covenant, or agreement contained within the wire-crossing agreement, collateral to the agreement, or affecting such agreement between a rail-road carrier and a telecommunications carrier that purports to indemnify, defend, or hold harmless the telecommunications carrier from any liability for loss or damage resulting from the negligence or willful and wanton misconduct of the telecommunications carrier, its agents, employees, or independent contractors who are directly responsible to the telecommunications carrier are prohibited.

013.04E3 Nothing in this section shall affect a provision, clause, covenant, or agreement in which the telecommunications carrier indemnifies, defends, or holds harmless a railroad carrier against liability for loss or damage to the extent that the loss or damage results from the negligence or willful and wanton misconduct of the telecommunications carrier or its agents, employees, or independent contractors who are directly responsible to the telecommunications carrier.

5b013.04F Assignment or Transfer: The telecommunications carrier may assign or otherwise transfer any rights to cross railroad right-of-way to any financially responsible entity controlled by, controlling, or under common control with the telecommunications carrier or any entity into or with which the telecommunications carrier is merged or consolidated or which acquires ownership control of all or substantially all of the facilities of the telecommunications carrier.

013.04F1 Notice: Notice of the assignment or transfer shall be given to the railroad within thirty (30) days. No other transfer or assignment may take place without the written permission of the railroad, which permission shall not be unreasonably withheld.

013.04G Relocation of Telecommunications Facilities: The railroad may require the telecommunications carrier, at the telecommunications carrier's expense, to relocate facilities on railroad right-of-way whenever such relocation is necessary to accommodate railroad operations. The decision whether relocation of telecommunications facilities is required shall be made solely by the railroad. The railroad in making the decision to relocate telecommunications facilities in the railroad right-of-way shall not act arbitrarily or unreasonably.

013.04G1 The telecommunications carrier shall not pay a standard crossing fee for relocation of facilities.

013.04G2 In the event relocation of telecommunications facilities is required, the relocation shall be to a location mutually agreed upon by the railroad and the telecommunications carrier, within the railroad right-of-way. The relocation shall be completed within a reasonable period of time.

013.04G3 Upon the request of the telecommunications carrier, the railroad shall provide a statement or other supporting documentation indicating the operational reasons for requiring relocation of telecommunications facilities. The railroad shall provide the statement and/or documentation requested within fifteen (15) days of receiving the request.

013.04H Applicable Law: Terms and conditions contained within any wire crossing agreement for the crossing of railroad right-of-way by a telecommunications line, wire or cable within the state of Nebraska shall be governed by applicable Nebraska law.

013.05 APPEALS: A party seeking to obtain reversal, modification, or vacation of an order entered by the Commission pursuant to this Section may appeal such order in accordance with the state's Administrative Procedure Act.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

RULE AND REGULATION NO. 176

Page 2

A hearing was held on the proposed rules on May 10, 2011, in the Commission Hearing Room, 1200 N Street, Suite 300, Lincoln, Nebraska. Notice of the hearing was published in the Daily Record and the Lincoln Journal Star. The two witnesses pre-filing testimony on behalf of NTA also presented oral testimony at the hearing. No other parties appeared at the hearing.

The proposed rules, attached hereto as Appendix reflect the rules regarding telecommunication lines, wires, or cables crossing railroad right-of-ways. Minor changes were made based on testimony and comments received at hearing. The wording in section 013.02H was modified to clarify the Commission's intention that the list of standards included in the rule is not exclusive. Other guidelines, manuals, and industry standards could be offered by a party to the proceeding for the Commission's consideration if deemed pertinent. One commenter had proposed expanding the list to include other publications. However, the Commission finds clarifying the list is not exclusive and allowing other pertinent information to be offered by the parties is sufficient. The change is not substantive.

The remaining suggested changes in the written comments and testimony at the hearing would require a statutory change as the language in the rule directly reflects the statutory language. Those changes were therefore rejected by the Commission.

Based upon the written comments filed and comments received at hearing, another hearing regarding this matter is not necessary and the Commission adopts the revisions proposed. The Commission finds that the third set of rules proposed in Appendix should be adopted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a certificate of adoption for the proposed rules set forth in Appendix be, and is hereby, issued.

MADE AND ENTERED at Lincoln, Nebraska, this 26<sup>th</sup> day of July, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Dee Johnson*  
*Dave Boyle*  
*Gerald L. Uy*

//s//Frank E. Landis  
//s//Tim Schram

*Tim Schram*  
Chairman

ATTEST:

*Shirley J. [Signature]*  
Executive Director