

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on)	RULE AND REGULATION NO. 176
its own motion, seeking to amend)	
Title 291, Chapter 5, Telecommuni-)	ORDER ISSUING A SECOND
cations Rules and Regulations, to)	CERTIFICATE OF ADOPTION
adopt rules in accordance with)	FOR THE FOURTH SET OF
Nebraska Legislative Bill 181)	PROPOSED RULES
[2010].)	
)	Entered: November 8, 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 and Regulations 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. A Third Set of Proposed Rules and Regulations were released for comment on March 8, 2011. 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 Third Set of Proposed Rules and Regulations 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.

Minor changes were made based on testimony and comments received at hearing. The Commission entered a Certificate of Adoption for the Third Set of Proposed Rules and Regulations on July 26, 2011. The rules were forwarded to the Nebraska Attorney General's office for review.

On November 3, 2011, the Attorney General sent the Third Set of Proposed Rules and Regulations back to the Commission for modification based upon its review. The proposed rules, attached hereto as an Appendix, reflect the changes directed by the Attorney General's office. The following revisions were made at the direction of the Attorney General's Office.

Section 013.01D was removed as the word defined was removed from the rule in later drafts and the definition was inadvertently allowed to remain.

Section 013.02H incorporated certain federal regulations, standards, manuals, and publications for the Commission's consideration, advocated by the industry members in comments and testimony to include more specificity to the statutory direction for the Commission to consider the safety, engineering, and access requirements in making a determination on disputed terms of an agreement. The rules provided the Commission would consider the most recent versions of any regulations, codes, publications and manuals. The Attorney General informed the Commission it could not adopt the most recent versions of regulations, codes, manuals, and publications, but must specifically reference a dated version. As including dates would require multiple rule changes every time a new edition of any referenced publication was released, the Commission has removed the specific references to any publications in sections 013.02H1 - 013.02H5 and will only include language that directly mirrors the statute. The Commission will rely on the parties of any contested agreement to offer the pertinent regulations, manual, and/or code provisions for any disputed terms at hearing.

Lastly, at the direction of the Attorney General, the Commission has removed section 013.04F, regarding assignments and transfers, section 013.04G regarding the relocation of telecommunications facilities, and section 013.04H requiring the terms and conditions of any crossing agreement in Nebraska be governed by applicable Nebraska law. Based upon a conversation with the Attorney General's office, these changes are not substantive, and therefore another hearing on the proposed rules is not necessary and the Commission adopts the revisions proposed. The Commission finds that the Fourth Set of Proposed Rules and Regulations contained in the Appendix should be adopted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a Second Certificate of Adoption be issued in the above-captioned rulemaking proceeding and the Fourth Set of Proposed Rules and Regulations set forth in Appendix, revised as directed, be, and are hereby, approved.

MADE AND ENTERED at Lincoln, Nebraska, this 8th day of November, 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.

013.02 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 the railroad carrier as such requirements are prescribed by the Federal Railroad Administration and established rail industry standards.

013.02H1 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 railroad 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.

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.

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MADE AND ENTERED at Lincoln, Nebraska, this 8th day of November, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Ed Jensen

Karen Boyle

Gerald Z. Up

//s// Frank Landis

//s// Tim Schram

Tim Schram
Chairman

ATTEST:

Phil J. 18
Executive Director