

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to adopt rules in accordance with Nebraska Legislative Bill 181 [2010].)	Rule and Regulation No. 176 Comments to Proposed Amendments to Rules and Regulations
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BNSF Railway Company, a common carrier operating a rail line within the State of Nebraska (“BNSF”), hereby offers the following comments with regard to those certain amendments to Title 291, Chapter 5, Telecommunications Rules and Regulations, proposed by the Nebraska Public Service Commission (the “Commission”) in Proposed Rule and Regulation No. 176 and its Order Opening Docket and Seeking Comment dated August 31, 2010:

I. The Proposed Amendments to the Rules and Regulations do not adequately define what minimum safety, engineering and access requirements shall be considered by the Commission.

Of paramount concern with regards to the Proposed Amendments to the Rules and Regulations (“Amendments”) is that they do not define in necessary detail what minimum safety, engineering and access requirements will be considered by the Commission if the telecommunications carrier (“telecom carrier”) and the railroad cannot reach an agreement for a wire crossing and a hearing is held before the Commission. Instead, the Amendments in Section 013.02G2 simply carry forward the language found in Neb. Rev. Stat. § 86-164(2)(a) (West 2010) that the Commission will consider whether any terms and conditions of the proposed private crossing agreement are unreasonable and 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 (“FRA”) and established rail industry standards. Many railroad carriers’ own safety, engineering and access

requirements exceed or further complement those of the FRA and it is difficult to have any certainty if those internal requirements fall within the definition of “established rail industry standards” so as to be given consideration by the Commission. Accordingly, BNSF asks that the Commission consider defining what minimum safety, engineering and access requirements will be considered by the Commission in rendering its decision if a private agreement cannot be reached between the railroad and the telecom carrier.

At the outset, while the term “public interest” as used in the Amendments and § 86-164(2)(a) is not defined within the Nebraska Telecommunications Regulation Act, it is generally understood that “[t]he determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the [Commission].” *Application of E & B Rigging & Transfer Inc.*, 191 Neb. 714, 722, 217 N.W.2d 813, 818 (1974) (quoting *Ace Gas, Inc. v. Peake Inc.*, 184 Neb. 448, 453, 168 N.W.2d 373, 377 (1969)). Typically the public interest is furthered when health, safety and welfare of the public are protected. *See e.g.* Neb. Rev. Stat. § 86-421 (West 2010) (providing that 911 emergency telephone systems further the public interest and protect the health, safety and welfare of the people of Nebraska). To that end, if certain internal standards have been adopted by the railroad carrier to further provide for the safety and protection of its employees, agents and other third parties, those standards would appear not to violate the public interest unless unreasonable.

For example, prior to L.B. 181 upon the receipt of a rail crossing application, BNSF’s engineering partner, Bartlett & West, would review the telecom carrier’s plans required to be submitted with the application to ensure that they complied with the FRA regulations and

BNSF's own utility accommodation policy ("UAP").¹ BNSF's UAP sets forth the minimum design and construction requirements any telecom carrier must satisfy prior to securing the wire crossing. This includes ensuring that the crossing complies with the most current National Safety Electric Code, the American Railway Engineering and Maintenance of Way Association Specifications ("AREMA") and other listed specifications. The UAP also sets forth the minimum depth requirements of any underground line crossing, procedures for obtaining core samples prior to crossing approval, requirements that the utility placed in the crossing must be encased, and procedures for the maintenance and preservation of the crossing. It is arguable that the applicable minimum requirements of the UAP are already encompassed into "established rail industry standards", but since the Amendments are silent as to minimum requirements a lack of certainty is present.

Other states that have adopted similar legislation on utility crossings over, on or under railroad right-of-ways have typically defined by statute or in their regulations the minimum engineering, design and safety specifications required of the applicant for the line crossing. For example, the Iowa statute required that the rules developed by the Iowa Utilities Board prescribing the terms and conditions for a utility crossing should at a minimum define certain engineering standards for utility facilities crossing railroad rights-of-way along with any other terms and conditions necessary for the safe and reasonable use of the right-of-way by the utility. Iowa Code Ann. § 476.27(2)(a)(7) & (9) (2010). Accordingly, the Iowa Utilities Board adopted minimum engineering standards for crossings that did not involve special circumstances where more stringent standards would be required. Iowa Admin. Code r. 199-42.6 (2010). These minimum standards are not unreasonable and align with BNSF's UAP.

¹ BNSF's UAP can be found online at <http://www.bnsf.com/communities/faqs/pdf/utility.pdf>

A similar approach was adopted by the state of Texas where the Texas Department of Transportation created regulations that required utility installations on, over, or under a railroad right-of-way to conform with minimum requirements, including the Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines – National Electric Safety Code, American Society for Testing and Materials (ASTM) Specifications, and other applicable federal and state laws. 43 Tex Admin. Code § 21.906 (2010). The Texas regulations also established that all installations should be made of durable materials in accordance with applicable materials specifications and set forth instances where core samples and geotechnical studies are required for underground utility installations. *Id.*; 43 Texas Admin. Code § 21.910 (2010). In fact, Part 3(C) of BNSF’s UAP largely mirrors the regulations found in § 21.910.

Another potential problem is that the telecom carrier may not submit to the railroad all the proper specifications necessary in its application for the railroad to make a determination of the adequacy of the proposed crossing since it is unknown what minimum level of safety, engineering and access requirements will be considered by the Commission. Instead the telecom carrier may choose to wait sixty (60) days and then appeal to the Commission contending that an agreement could not be reached because the railroad required information that the telecom carrier, in its opinion, did not find reasonable to provide. In that event, an unnecessary appeal is made to the Commission, consuming additional resources of the Commission and all parties involved, which could have been avoided if minimum safety and engineering requirements had been set forth in the Amendments as both parties would have known in advance those requirements considered by the Commission in rendering its decision.

For these reasons, BNSF asks that the Commission consider defining the minimum safety, engineering and access requirements that will be considered by the Commission when determining the merits of a proposed crossing such as both Iowa and Texas have done. Defining these requirements is not unreasonable and consistent with the public interest as these definitions will help ensure that at least minimum standards and precautions have been met which will protect the safety of the public and deter unnecessary involvement of the Commission. BNSF would be more than willing to work with the Commission in this regard to provide input upon what minimum safety, engineering and access requirements should be identified in the final set of amendments to the rules and regulations.

II. The requirement that the non-petitioning party respond to a petition within a ten (10) day period after service is an inadequate amount of time to properly review the petition, compile data and draft a thorough response.

Section 013.02F of the Amendments requires that the non-petitioning party 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 ten (10) days after service of the petition upon it. This proposed time frame is not practical for large national railroad carriers such as BNSF. For instance, by the time service of the petition is made upon BNSF's registered agent in Nebraska and routed through the corporate channels to the appropriate person within BNSF, much of the ten (10) day time period has already passed. Moreover, this limited time frame potentially prejudices the non-petitioning party's procedural due process rights as it has a minimal amount of time to review the petition, compile data to support its position and then draft an appropriate response to the Commission regarding the non-resolved issues between the telecom carrier and the railroad.

BNSF urges the Commission to adopt in its final set of amendments to the rules and regulations a thirty (30) day time period for the non-petitioning party to respond as that time period has been consistently used in Nebraska civil actions and other matters. *See* Neb. Ct. R. Pldg. § 6-112(a) (answer in civil action required within thirty (30) days of service of summons); 231 NAC 10-003 (responsive pleading to a complaint before Nebraska State Board of Architects shall be filed within thirty (30) days of service); 350 NAC 90-005.06 (thirty (30) days after service to file a responsive pleading to petition a contested case before the Tax Commission); Neb. Rev. Stat. § 84-912.01 (state agency must respond to a petition for declaratory order within thirty (30) days after receipt). Having thirty (30) days to respond to a petition will ensure that national carriers will have enough time to process the petition, accumulate the appropriate amount of supporting data, and formulate a thorough response.

Conclusion

The Amendments could be improved by further defining what minimum safety, engineering and access requirements will be taken under consideration by the Commission in the event there is a hearing on a disputed wire crossing agreement. Many of the safety, engineering and access requirements of the railroads exceed or further complement those prescribed by the FRA, and BNSF urges the Commission to consider adopting definitions so as to identify the minimum requirements that will be considered by the Commission such as Iowa and Texas have done under similar legislation to L.B. 181.

BNSF would also ask that the Commission consider extending the response time for the non-petitioning party in proceedings brought before the Commission on a disputed wire crossing agreement from ten (10) days to thirty (30) days. This extension of time will ensure

