

railroad as well as established rail industry standards. The NTA would submit that the rule could be limited to read as follows:

In rendering its decision, the Commission shall consider whether the terms and conditions at issue are unreasonable or against the public interest. 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.

Alternatively, if the Commission is to take into account the requirements of the railroad and established rail industry standards, it should likewise “take into account Nebraska rural consumers’ access to quality and efficient telecommunications services (since most crossings occur in rural areas) as well as telecommunications standards and industry practices.” Without identifying the rights of telecommunications consumers and carriers, the rule does not currently reflect the balance which the Commission should require to make its decision.

Proposed Rule 013.04A, Standard Crossing Fee. Except as provided in Section 013.04D, or as otherwise agreed to by the parties, if a telecommunications carrier places a line, wire, or cable across the railroad right of way pursuant to Section 013, it shall pay the railroad a one-time standard crossing fee of One Thousand Two Hundred Fifty Dollars (\$1,250.00) for each applicable crossing.

Comment. The rule, as drafted, is quite clear that a one-time fee is all that the railroad can charge telecommunications carriers as the standard crossing fee. If the fee is a one-time fee, rail carriers should not be able to place a limitation on the term of the agreement. Several NTA members have been confronted with contract proposals which provide that the agreement expires in 20 years. Presumably at that time, either a new owner, or if the property is under the same ownership, some new agreement would need to be negotiated which, in all likelihood, will call for another crossing fee. Even if the property is sold to a new owner, the one-time fee should eliminate any future obligations to make payments for that same crossing. Further, NTA members currently negotiating with railroads in Nebraska have been given an agreement which allows the railroad to cancel the agreement on 30 days’ notice. In essence, the agreement becomes a simple

month-to-month license. The one-time crossing fee concept included in LB 181 certainly did not contemplate that after a telecommunications carrier has paid the crossing fee that any crossing agreement could be terminated on 30 days' notice by the railroad. Additionally, such a position is not only contrary to this proposed rule, but is also contrary to LB 181. The railroad should not be able to limit the duration nor should it have the unilateral right to cancel the crossing agreement on a 30 day notice.

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

Comment. The NTA recognizes the statute requires telecommunications carriers crossing the railroad right of way to pay for flagging expenses. However, it should be incumbent upon the railroad to provide detail for flagging expenses and any such expenses charged by the railroad must be reasonable. One option would be for the railroad to provide a schedule of flagging expenses to the Commission to be published by the Commission and thereby put all telecommunications carriers on notice as to each railroad's flagging charges before they are incurred.

Proposed Rule 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.

Comment. The rule, as drafted, refers to "any direct expense incurred" by the railroad. Some railroads impose application fees (in addition to the crossing fee) to cover administrative expenses. Rule 013.04C should be modified so as to prohibit applications fees assessed by the railroad in addition to the one-time crossing fee. NTA members have received draft contracts which state the railroad will not impose a processing fee if the agreement is executed within 60 days from application date. If the agreement cannot be executed within 60 days, then a \$600.00 processing fee is assessed by the railroad. The railroad in that circumstance is in a position to unilaterally make the process of

obtaining an executed contract exceed the 60 day time line in order to assess the processing fee. Any such processing or administrative fee above and beyond those identified by the statute as the one-time crossing fee should not be allowed.

Other Considerations

Indemnification. Commission Rules 013.05A, 013.05B and 013.05C all address the issue of indemnification as between the telecommunications carrier and the railroad. The law is clear that neither the telecommunications carrier or the rail carrier are to be held harmless and indemnified for their own negligence or willful misconduct. However, at least one rail carrier is proposing it be indemnified based on the existence of the license to cross right of way agreement. Such a provision is totally contrary to the intent of LB 181 and should not be tolerated.

Rerouting or Movement of Line. Currently NTA members have been provided draft agreements by railroads which allow the railroad to demand that the line, wire or cable be moved or rerouted once it has been previously installed. The NTA recognizes that from time to time changes in use of land make such a rerouting or movement necessary. However, any such obligation on the part of the telecommunications carrier to reroute or move its line should (1) require that reasonable notice be given in order for construction plans to be made for rerouting, and (2) that rerouting should be allowed to the point nearest where the line, wire or cable currently resides so long as the rerouting still meets the railroad's safety and regulatory requirements.

Restoration of Property. The contracts being circulated by at least one Nebraska railroad require that if the line, wire or cable needs to be relocated or abandoned, the property must be returned to the same condition as it was in, on the date the agreement was executed. There are a variety of reasons which make such a requirement impossible. The telecommunications carriers should only be required to restore the property to the state it was in prior to the removal or relocation of the line, wire or cable. For example, assume a single track existed when the line, wire or cable was originally installed. Further assume the railroad at some future date double tracked the property. Also assume

the double tracking did not require a relocation or abandonment of the buried line, wire or cable. Under these circumstances, it would be impossible for the telecommunications carrier to return the property to the condition it was before the double tracking was installed. However, the telecommunications carrier certainly could return the property to the same condition it was in at the time of relocation or abandonment.

Time Line. Currently, one of the obstacles to efficiency in the entire process of crossing railroad right of ways revolves around the time line required to obtain final agreements. The NTA recognizes that certain statutory time lines were established in LB 181. However, if one looks at the process as contemplated, it could take as long as 190 days.

60 days if no voluntary agreement is reached.

60 days for Commission to set hearing after receipt of application.

30 days for the Commission to rule following hearing.

15 days for the parties to file a conforming agreement after Commission order.

10 days for the parties to resubmit a previously filed but rejected agreement.

15 days for the Commission to approve the final conforming agreement.

190 days

Application of Nebraska Law. Contracts currently being circulated by some railroads are requiring the laws of another state to govern the terms of the contract. The NTA recognizes that the agreements being negotiated by railroads are licenses and not property rights. However, it is unclear what contract statutes or common law from another jurisdiction might impact the crossing agreements. The NTA would therefore urge that the Commission develop a rule that requires that all Nebraska crossing agreements should be governed by Nebraska law.

CONCLUSION

The NTA applauds the Commission's efforts to put rules in place regarding the crossing of railroad right of ways by telecommunications lines, wires or cables. The NTA appreciates the opportunity to submit comments in Rule & Regulation No. 176 and looks forward to further participation in the Commission's rule making process. Should

the Commission or staff have any further questions, please feel free to contact the undersigned.

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Respectfully submitted,

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